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

REPLY BRIEF OF APPELLANT

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REPLY TO STATEMENT OF THE CASE

County Respondents assert that at the initial Motion Hearing on summary judgment, Appellant argued that the basis for his allegation that Respondent Long acted with malice was a phone call. County Respondents' Brief at page 5. However, Appellant's Counsel also said that "Deputy Long took it upon himself to disregard . . . the property of Mr. Simmons. . . ." R. p. 600, line 16-23, and that the claims against Respondent Long included an equal protection violation. R. p. 602, line 18-23.

County Respondents assert that Appellant did not seek reconsideration of the denial of his Motion for Partial Summary judgment as to the Magistrate Court's lack of subject matter jurisdiction. County Respondents Brief at page 5. However, that was not a final order and Appellant preserved this issue by including it in his Motion to Alter and Amend the judgment dismissing the Second Amended Complaint. R. p. 558.

Finally, County Respondents contend that during the hearing on their Motion for Reconsideration, Appellant's counsel asserted that his claim for equitable relief was limited to a lack of notice of the sale. County Respondents' Brief at page 6. However, Appellant's Counsel said that it "would be inequitable under all the circumstances to enforce those judgments in the way in which it was enforced here. . . .", R. p. 621, line 25 to R. p. 622, line 3, and that there was evidence of malicious intent by respondent long. R. p. 625, line 23 to R. p. 626, line 5.

REPLY TO STATEMENT OF FACTS

County Respondents' assertion that the Application for Review Form did not contain any language that it was a waiver, County Respondents' Brief at 10, is incorrect. Peggy Ellington, an employee of the Auditor signed the forms Appellant received with the hand written inscription "User fee removed". R. p. 195.

REPLY ARGUMENT

I. THE CIRCUIT COURT HAS JURISDICTION UNDER R 60(b),SCRCP TO CONSIDER A CHALLENGE TO THE MAGISTRATE COURT'S JURISDICTION BASED UPON EQUITABLE CIRCUMSTANCES

County Respondents mischaracterize the case law applicable to R. 60(b), SCRCP and rely upon other cases which do not deal specifically with the issue of a collateral attack upon a judgment based upon a lack of subject matter jurisdiction as part of an equitable analysis. These are discussed below, See Section A. County Respondents also argue that Appellant is not entitled to any equity, an issue which they did not raise below. See Section B. Finally, County Respondents' argument that the Magistrate Court Rules bar this action is without merit. See Section C.

A. Rule 60(b) has been interpreted to permit an independent action based upon equitable circumstances.

County Respondents assert that T v. T, 378 S.C. 127, 662 S.E.2d 413 (Ct. App. 2008) does not deal with whether R 60(b), SCRCP permitted an independent action to vacate a prior judgment based upon equitable circumstances, only with holding a hearing. County Respondents' Brief at page 14. However, a reasonable reading of the case supports Appellant's position that T v. T allows the Circuit Court under R 60(b) to consider equitable circumstances as the basis for vacating an earlier judgment. This Court reversed the lower court's dismissal of the independent action and remanded for reconsideration of the paternity issue which the father had previously conceded in an earlier divorce action. Id at page 414. Therefore, R 60(b), SCRCP does provide a basis for an independent action to vacate an earlier judgment based upon equitable circumstances.[1]

County Respondents mistakenly reference the provisions of an earlier section of R. 60(b), SCRCP which pertains solely to motions to vacate a judgment based upon the enumerated grounds. County Respondents Brief at pages 15-17. Those provisions contain time restrictions for the filing of the motion based upon the nature of the defect which is being asserted. County Respondents contend that the case law applicable to those time limits should be applied to bar this action, Id. at page 16, citing McDaniel v. U.S. Fidelity and Guar. Co., 324 S.C. 639, 478 S.E.2d 868 (Ct. App. 1996). However, the facts are different. In Mc Daniel, the Court of Appeals held that " The special referee's decision that McDaniel's motion was untimely after nearly four years is not an abuse of discretion, especially since McDaniel participated in the settlement, received substantial benefits from it, and utilized [a statute he

[1] No issue of res judicata was raised below. Moreover, "a judgment must be "valid" in order to preclude a second action concerning the same transaction, and this validity requirement is already built into the doctrine of res judicata." S.C. Pub. Interest Found. v. Greenville Cnty., 401 S.C. 377,392, 737 S.E.2d 502, 510 (Ct. App. 2013)

now seeks to rely upon] as the basis for a cause of action in his [original] 1989 complaint." 478 S.E.2d at 871. The case simply holds that it was not an abuse of discretion to bar the motion after 4 years as untimely based upon all of the circumstances. Here the Circuit Court did not rule on the timeliness of Appellant's Complaint to vacate the user fee judgments but refused to consider the claims based upon its lack of jurisdiction.

Appellant contends that the timeliness of the Complaint is one aspect of the equitable analysis to be considered in granting equitable relief. In T v. T, supra, the action to vacate the final divorce judgment concerning paternity was made seven (7) years after the divorce was granted. 662 S.E.2d at 415. Appellant recognizes that in any such analysis a standard of "reasonableness" should be applied, but that is entirely fact dependent. See Below.

B. An equitable analysis is required based upon all the facts.

County Respondents urge this Court to conduct its own analysis of the few facts that the County presented and conclude that Appellant is not entitled to equitable relief. County Respondents' Brief at page 16. County Respondents did not raise this issue before the Circuit Court and it did not make any ruling on that issue and they should be barred from raising it here. Brashier v. South Carolina Dept. of Transp., 327 S.C. 179, 186 fn. 7, 490 S.E.2d 8(1997)(additional ground for sustaining dismissal not raised below will not be considered) . Notwithstanding his objection, Appellant will address the issue.

The relevant facts in the Record include the following : Appellant doesn't receive any county services for trash removal because trash removal companies don't come back to his house because it is too far off Kitford Road. He doesn't take any solid waste to the landfill. Each year when he received a tax bill from the country which included a user fee, he went to the County Auditor and spoke to Ms. Peggy Ellington, one of the employees to object to the

user fees being part of his taxes because he didn't receive any services. She gave him a form which he signed and she initialed indicating the user fee was being removed. He also spoke to the Auditor, Ms. Peggy Moseley about his problem with the user fee. Neither Ms. Ellington nor Ms. Moseley ever told him that he had to pay the user fee or else he could lose his property. Each year after the county removed the user fees from his tax bill he paid the taxes in full for TMS 138. He never received a separate user fee bill. As a result, he thought that the county had no claim for user fees. R. p. 396, Para. 3-5.

Appellant contended that he 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. He has had problems with not receiving mail for many years. Since he never received notice of the complaint in 2000, he never went to the Magistrate's Court to object to the user fee. He did not receive written notice that a judgment had been entered against him on that complaint.

Appellant contended that he owned several motor vehicles including a Ford truck, a Toyota sedan and a "classic" 1955 Desoto sedan which were in very good condition; that these vehicles are all owned free and clear and are registered to him. He also owned a boat and trailer, a Kubota tractor and an Allis Chalmers tractor and dump truck. The motor vehicles, the boat and trailer and all the heavy equipment were parked in plain sight when Deputy Long arrived at his house in August 2009 but he didn't seem to have any interest in them. When he told Appellant that he had to pay the judgment, Appellant told him the user fee had been removed. When Respondent Long gave him a notice of sale for TMS 282-00-00-498, another parcel he owns, he did not understand why the County would try sell property on which the taxes were paid that was not subject to the user fee since it was vacant. If he had

understood, he would have placed the taxes and user fee into an escrow account until the dispute could be resolved. R. p. 397, Para. 7. In 2006 Appellant had TMS 498 appraised because of a dispute involving Berkeley Electric and the fair market was then $70,000. R. p. 397, Para. 7; R. p. 306-308. Yet, Deputy Long sold TMS 498 for $600.00. R. p. 397, Para. 8. Appellant filed this action after he discovered that TMS 498 had been sold in 2010 for the user fee on TMS 138. R. p. 396, Para. 5 to R. p. 397, Para. 9.

Appellant contends that he has made a prima facie showing to satisfy the criteria of an equitable analysis relied upon in Nat'l Sur. Co. v. State Bank of Humboldt, 120 F. 593 (8th Cir.1903): 1) a judgment which ought not, in equity and good conscience, to be enforced; 2) a good defense to the alleged cause of action on which the judgment is founded; 3) fraud, accident, or mistake which prevented the defendant in the judgment from obtaining the benefit of his defense; 4) the absence of fault or negligence on the part of the defendant; and 5) the absence of any adequate remedy at law. The Record here establishes that the jurisdiction of the Magistrate's Court is in question; Appellant has a good defense to the action, he never received any service; he had a good faith belief that the County Auditor had waived the user fee based upon his personal discussions with the Auditor and was never told to the contrary; all of his taxes were paid on TMS 135 and TMS 498; Appellant responded once he found that TMS 498 had been sold; the sale produced $600. of a $70,000. parcel which was grossly inadequate s to shock the conscience; finally, Appellant has no other adequate remedy at law to regain title to TMS 498 other than to have the judgment and sale vacated. Therefore, Appellant contends that the Circuit Court should have exercised its equitable jurisdiction to hear the case due to the presence of facts justifying relief from the user fee judgments.

C. The Magistrate Court Rules do not bar an action under R 60(b) to challenge the lack of jurisdiction and associated claims

County Respondents raise the defense that the Magistrate Court Rules bar this action. County Respondents' Brief at pages 19. The provisions cited by County Respondents pertain to the filing of post trial motions for relief from a judgment. These Rules do not specifically preclude a remedy under R 60(b), SCRCP and County Respondents have not cited any case which so holds. Moreover, where the basis of the challenge is the lack of subject matter jurisdiction not the lack of notice of the hearing and entry of judgment, the time limit applicable to attacks upon a lack of jurisdiction is a reasonable time not 30 days as provided in R. 19, SCRMC. Further, the Magistrate Court has no jurisdiction over the Fourth and Fifth Counts alleging civil rights and tort claims against the County Respondents and the Sixth Count that the sale was void due to inadequacy of the sale price since those claims exceeded its jurisdictional limit. S.C. Code Ann. Section 22-3-10(2) & (12). The Magistrate Court could not provide Appellant with a complete remedy and accordingly, this action was appropriately brought in Circuit Court.

County Respondents also contend that the Magistrate Court has concurrent jurisdiction with the Circuit Court over actions to injury to the person and thus it could hear an action for unpaid user fees. County Respondents' Brief at page 23. Appellant has addressed this issue below. See Point VII.

Finally, County Respondents cite Love v. Dorman, 91 S.C. 384, 74 S.E. 829 (1912) for the proposition that Magistrate Court judgment becomes a Circuit Court judgment once the transcript is filed and not subject to collateral attack only an appeal. County Respondents' Brief at page 23. The County Respondents argument however, supports Appellant's position because by the filing of the Magistrate Court judgment, it became a Circuit Court judgment.

Love v Dorman predated the adoption of the South Carolina rules of Civil Procedure in 1985 and would not apply to preclude an independent action to vacate a Circuit Court judgment because R 60(b), SCRCP specifically permits it. See McLain v. Ingram, 314 S.C. 359 , 444 S.E.2d 512 (1994)("The adoption of the SCRCP in 1985 heralded a new era in South Carolina's civil practice, modernizing and streamlining our system."). Therefore, County Respondents' position that the Magistrate Court judgment is a Circuit Court judgment supports Appellant's position.

In summary, there are no reported cases which preclude the Circuit Court from hearing an action brought under R 60(b), SCRCP to collaterally attack a Magistrate Court judgment based upon a lack of jurisdiction under equitable circumstances . Appellant contends that for all of the foregoing reason, the Circuit Court should not have granted summary judgment for lack of subject matter jurisdiction.

II. THE CIRCUIT COURT'S JURISDICTION IS NOT AFFECTED BY DISMISSAL OF CLAIMS NOT RELATING TO VALIDITY OF JUDGMENTS

County Respondents assert that the Fourth Count should be dismissed based upon the decision of the District Court that the validity of the state court judgments and the civil rights claim (Fourth Count) are "inextricably intertwined". County Respondents' Brief at pages 24-25. Because this issue has been first asserted in response to this appeal, this Court should not consider it. Brashier v. South Carolina Dept. of Transp., 327 S.C. 179, 186 fn. 7, 490 S.E.2d 8 (1997) (additional ground for sustaining dismissal not raised below will not be considered). Notwithstanding this objection, Appellant will address it here.

The Circuit Court is not governed by any " inextricably intertwined" limitation on its jurisdiction. County Respondents have not cited any case which recognizes this as a rule of

subject matter jurisdiction governing the Circuit Court. Furthermore, County Respondents' contention that " the District Court essentially held that if the Appellant could not prove his first three counts, his fourth count must fail. " County Respondents' Brief at page 24, is not supported by a fair reading of the District Court's Decision or of Appellant's Motion to Dismiss and is simply wrong. The Fourth Count (Section 1983 claim) and Fifth Count (Tort Act Claim) do not depend on whether the judgments were invalid since the alleged wrongdoing occurred post judgment. See R. p. 64-65. Appellant moved to dismiss all of the counts or in the alternative to dismiss the counts challenging the user fee judgments (First, Second and Third) and to stay the remaining civil rights and tort claim counts because there was a potential for inconsistent results if the Court only dismissed the first three counts which would be remanded to state court and continued with the Section 1983 and tort claims. R. p. 85-87; R. p. 90, 99.

The District Court was prohibited from deciding the validity of the Magistrate Court judgments because only the United States Supreme Court can review the judgment of a state court; thus the District Court could not hear the first three counts. See Rooker v Fidelity Trust Company, 263 U.S. 413 44 S. Ct. 1249, 68 L. Ed. 362 (1923); District of Columbia Court of Appeals v. Feldman, 460 U.S. 462,103 S. Ct. 1303, 75 L.Ed.2d 206 (1983). R. p. 88-89.

The District Court chose not to stay the Fourth Count over which it could have jurisdiction without regard to the validity of the judgment and remanded the matter to the Circuit Court to determine all of the issues before it. The District Court's Decision to decline to exercise jurisdiction over the Fourth Count was a matter if its discretion. It does not bind the Circuit Court to the same conclusion regarding its own jurisdiction which is governed by the South Carolina Constitution. The Fourth , Fifth Count and Sixth Counts can be heard by

the Circuit Court because they do not depend on whether the judgments were valid. See Points III, IV & V. The Fourth, Fifth and Sixth Counts are beyond the jurisdictional limits of the Magistrate's Court. County Respondents also assert that there is an "arising from" exception to the Circuit Court jurisdiction similar to that which they contend the District Court invoked. County Respondents' Brief at page 29-30. County Respondents do not cite any authority. Therefore, this argument should also be rejected.

In summary, the Circuit Court should have decided the civil rights, tort claims and grossly inadequate price claims because they do not depend on the validity or invalidity of the user fee claims. There is no " arising from" exception to the Circuit Court's jurisdiction and the Decision of the Circuit Court to dismiss the Fourth, Fifth and Sixth Counts was not supported by any recognized limit to its own jurisdiction.

III. APPELLANT MADE OUT A PRIMA FACIE CASE OF AN EQUAL PROTECTION VIOLATION

County Respondents' arguments on the merits of the Fourth Count have no legal or factual support. County Respondents did not establish a rational basis to apply the fee to Appellant and the fee was arbitrarily collected. See Section A & B below.

A. The user fee was arbitrarily imposed upon Appellant

County Respondents failed to establish a rational basis for treating Appellant the same as other persons who use the disposal services for which the fee was imposed. See Harbit v. City of Charleston, 382 S.C. 383, 675 S.E.2d 776 (Ct. App. 2009). If the purpose of the fee is to pay for garbage disposal, why should Appellant pay it if he disposes of his own garbage without creating a nuisance on his own property? The Supreme Court rulings in Skyscraper Corp. v Newberry County, 323 SC 412, 475 S.E.2d 764 (1996) and Brown v. County of Horry, 308 S.C. 180, 417 S.E.2d 565 (1992), the language of the Charleston County

Ordinance at issue and the County 's own designated representative all agree that a user fee is to be imposed against persons receiving some special benefit or service. Appellant's Brief at pages 26-27. County Respondents have not presented any controlling authority to the contrary. See County Respondents' Brief at pages 27-29. Charleston County Ordinance 10-51 et seq. does not require Appellant to 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). County Respondent admits that Charleston County Ordinance Section 10-66 states that the user fees are for the receipt and disposal of waste. County Respondents' Brief at page 27.Therefore the County Respondents cannot escape the necessary conclusion that the obligation to pay the user fee is based upon the receipt of a benefit or service.

County Respondents claim that Appellant should pay a user fee because he receives the benefit of clean air and water from the disposal of solid waste. County Respondents' Brief at page 28. County Respondents have not provided any legal authority for their argument that a user fee can be charged for clean air and water based upon garbage disposal. County Respondents' clean air argument conflicts with the very definition and purpose of a user fee, i.e. that the fee relates to the purpose for which the government provides the service. Further County Respondents refuse to acknowledge that a fundamental aspect of a user fee is that its use is voluntary. See City of Gainesville v. State, 863 So.2d 138 (Fla. 2003): "[U]ser fees . . . are paid by choice, in that the party paying the fee has the option of not utilizing the governmental service and thereby avoiding the charge."

County Respondents misstate Appellant's position that the user fee has been applied uniformly. County Respondents' Brief at page 27.Appellant acknowledged that all residential property was charged the same flat fee but asserted that it was arbitrarily imposed because he

did not receive any services. Appellant's Brief at page 33. Finally, County Respondents assert that Appellant made contradictory statements about using a private hauler. County Respondents' Brief at page 28. However, the Complaint in which Appellant said he used a hauler was amended and that was deleted. Also Appellant provided an Affidavit and was deposed and in both instances he stated he did not use such a service. See Point IB above. Appellant's alleged inconsistent statements at best involve an issue of credibility which is a matter for the finder of fact to evaluate.

In summary, County Respondents have failed to establish a rational basis for the imposition of a user fee to Appellant. The law is clear that a user fee is imposed on someone who uses a service. Appellant neither used nor received any services. The Circuit Court should not have dismissed the Fourth Count based upon the established definition and application of a user fee.

B. The collection of the fee was arbitrarily conducted

County Respondents argue that there is no genuine issue of material fact as to arbitrary action by the Respondent County Sheriff. County Respondent's Brief at 29-31. However, the facts do not support their contention as to lack of evidence of arbitrary action. See Appellant's Brief at 28-29. County Respondents assert that Appellant denied making the phone call and therefore can't rely upon the call to support a claim of malice. County Respondents' Brief at page 30. However, Respondent Long testified that he believed that Appellant called him and his state of mind is at issue due to the claim that he acted out of malice. Therefore, there is question of fact as to whether this caused him to carry a grudge and act on it. County Respondents assert that Appellant did not document any other assets that he claimed to have owned, County Respondents' Brief at 30. An evidential issue which was not raised below

cannot be considered. Brashier v. South Carolina Dept. of Transp., 327 S.C. 179,186 fn. 7, 490 S.E.2d 8,12 (1997). However, the Record is clear that Respondent Long had already identified motor vehicles that he could have levied upon. Appellant's statements about farm machinery and other equipment being in plain sight were not contradicted by Respondent Long. The reasonable inference is that Respondent Long was aware of these assets but chose to ignore them also. County Respondents' assert that state law allowed Respondent Long to sell real estate or personalty, County Respondents' Brief at page 31. It is undisputed that state law required Respondent Long to levy on personalty first and not use his "judgment". It is undisputed that he didn't even try to levy upon it and ignored other asserts in plain sight. This is all evidential of a malicious intent toward Appellant. It is undisputed that Respondent Long only levied on real estate in three (3) cases out of thousands of user fee judgments. This raises an inference that it was unusual for him to have to do so. It is undisputed that Respondent Long knew that TMS 498 was assessed for almost $24,000 while searching for assets. This raises the inference that he knew this was far in excess of what the judgment required him to execute on and that he was motivated by malice.

This Court is required to review the evidence most favorable to the non moving party including all reasonable inferences. Willis v. Wu, 362 S.C. 146, 607 S.E.2d 63 (2004). " [W]hen only one reasonable inference, not just one inference, but one reasonable inference, can be deduced from the evidence, it becomes a question of law for the court." Hart v. Doe, 261 S.C. 116,120, 198 S.E.2d 526,528 (1973) . Appellant contends that these facts support a reasonable inference that Respondent Long was arbitrary in applying the law to Appellant based upon malice, ill will or ulterior motive. In summary, Appellant made a prima facie case of a civil rights violation against Appellant in the arbitrary and unjustified application of user

fee to him and the arbitrary manner in which the judgment was collected. The Circuit Court should not have summarily dismissed the Fourth Count.

IV. THERE WERE SUFFICIENT FACTS UPON WHICH TO DENY DISMISSAL OF THE FIFTH COUNT TORT CLAIM

The Circuit Court below never considered the negligent retention claim in dismissing the Fifth Count as to the Respondent County Sheriff but relied entirely upon County Respondents' claims of immunity as to the conduct of Deputy Long in enforcing the judgment. R. p. 13-14. Appellant asserted that County Respondents never raised any Tort Act immunity to Appellant's claim of negligent retention of Respondent Long. Appellant's Brief at 32. County Respondents do not rebut this assertion by reference to the Record on Appeal so it is conclusive against them but raise it for the first time on appeal. County Respondents' Brief at page 34. Because it was not raised and argued below, this Court should reject this argument. Brashier v. S.C. Dept. of Transp., 327 S.C. 179, 186 fn. 7, 490 S.E.2d 8, 12(1997).

Moreover, County Respondents rely upon a provision of the Tort Claim Act S.C. Code Ann. Section 15-78-60(4) which applies to the enforcement of law. The burden of establishing a limitation upon liability or an exception to the waiver of immunity is upon the governmental entity asserting it as an affirmative defense. Strange v. South Carolina Dept. of Highways and Public Transp., 314 S.C. 427, 445 S.E.2d 439 (1994). County Respondents do not cite to any case that supports their contention that employee discipline is akin to enforcing any law. Obviously it is not and is a discretionary function for which County Respondents have the burden of proof to show that they exercised their discretion. Appellant's Brief at 31. Respondent Sheriff 's Department could not document why Respondent Long was retained in light of his history of infractions. Obviously they did not exercise any discretion since they

cannot cite to any in the Record. County Respondents claim that Appellant did not raise any issue about the County Sheriff's failure to adhere to its own disciplinary procedures in opposition to summary judgment. County Respondents' Brief at page 34. However, the issue was clearly presented below. R. p. 432-433,436-438.

County Respondents assert that there were insufficient facts to support negligent retention or malice by Respondent Long. County Respondents' Brief at 31-35, 39-41. County Respondents do not deny that there was substantial evidence in the Respondent County Sheriff employment files of violation of procedure by Deputy Long. Id at 32-33. Respondent County Sheriff Department's records indicate that over a 5 year period (1999-2004) Respondent Long repeatedly violated department procedures. Several of Respondent Long's infractions directly involved third persons including a suspect in jail who was held in contempt because Deputy Long did not pick him up and take him to a hearing; and fellow officers when they barred him from an interrogation. County Respondents contended that while Deputy Long worked in the judgment section there were no disciplinary infractions so that the County Sheriff's Department did not have sufficient notice that he was a risk to third persons. County Respondents Brief at page 32-33. "It is not necessary for a plaintiff to demonstrate the defendant should have foreseen the particular event which occurred but merely that the defendant should have foreseen [its]negligence would probably cause injury to someone." Parks v. Characters Night Club, 345 S.C. 484, 491 548 S.E.2d 605 (Ct. App. 2001) (citing Greenville Memorial Auditorium v. Martin, 301 S.C. 242, 245, 391 S.E.2d 546,548 (1989)). Moreover the fact that Deputy Long was in a different section and had conducted himself appropriately during this time does not negate his earlier history of which the Sheriff's Department had actual notice. It is one fact in the overall analysis to

determine foreseeability. See Doe v. ATC, Inc., 367 S.C. 199, 624 S.E.2d 447 (2005). Respondent County Sheriff's Department violated its own procedure by failing to impose progressive discipline for Respondent Long's multiple infractions. Therefore not only did Respondent County Sheriff's Department have notice of his behavior, but it failed to take action in accordance with its own procedures that should ultimately have lead to termination.

County Respondents contend that Appellant cannot prove any "nexus" between the prior disciplinary infractions and the harm caused such that the Fifth Count should have been dismissed. Id. As previously established, the issue of proximate causation was normally to be determined by the jury. Appellant's Brief at 33. Appellant asserts based upon the number and nature of prior acts of wrongdoing by Respondent Long and similarity between the prior acts and the ultimate harm caused, the issue of foreseeability should have been determined by the fact finder, and not as a matter of law. Doe v. ATC, Inc., 367 S.C. 199, 624 S.E.2d 447 450-451(2005).

County Respondents rely upon Kase v. Ebert, 392 S.C. 57, 707 S.E.2d 456 (Ct. App. 2011) to support summary dismissal of the Fifth Count. In Kase, this Court acknowledged that the issue of "foreseeability is usually an issue of fact "but departed from that principle because it determined that reasonable minds could not differ as to the issue. 392 S.C. at 63, 707 S.E.2d at 459. The basis for its conclusion was that the assault conviction upon which plaintiff based his claim that the employer had knowledge of the employee's dangerous propensities was 20 years old, there was no other evidence of violent acts and plaintiff's own expert agreed that a single act was not sufficient notice. Id. Here there are multiple incidents of failure to follow procedure which affected third parties which are within a few years of the incident in question and Kase does not control the issue as a matter of law.

In summary, there is a disputed issue of fact as to whether County Respondents had sufficient notice of Respondent Long's propensity to violate procedure causing injury to third persons to terminate Respondent Long prior to the incident involving Appellant. The issue of malice is discussed below. See Point VI.

V. THE SIXTH COUNT WAS IMPROPERLY DISMISSED BASED UPON THE RECORD BEFORE THE CIRCUIT COURT

County Respondents assert that they are immune from the Sixth Count under provisions of the Tort Claim Act and the "arising under exception". County Respondents' Brief at page 36. County Respondents never asserted any Tort Claim Act or "arising under" defenses as to the Sixth Count since it was not part of their Summary Judgment motion. Accordingly, Appellant objects to these arguments regarding the Sixth Count and asks that they be disregarded. Brashier v. South Carolina Dept. of Transp., 327 S.C. 179, 490 S.E.2d 8 (1997). Moreover, the Tort Claims Act provides immunity against claims for money damages only. S.C. Code Ann. Section 15-78-30(b) & (f). The Sixth Count seeks to invalidate the Sheriff's sale on equitable grounds because of the grossly inadequate price, not to recover damages.

Respondent Mase asserts for the first time on appeal that summary judgment was properly granted as to the Sixth Count based on a lack of disputed issues of fact and that judgment should be entered as a matter of law and for equitable reasons. Respondent Mase & Company Brief at 11-14. Respondent Mase never filed any brief in support of summary judgment and these arguments should be disregarded. Brashier v. South Carolina Dept. of Transp., 327 S.C. 179, 490 S.E.2d 8 (1997). Moreover Respondent Mase's argument that "absent some showing of inequitable conduct by the one conducting the sale or the purchaser,

a sale . . . should not be set aside regardless of price", Respondent Mase Brief at page 12,is not a correct statement of the law. In Poole v. Jefferson Standard Life Ins. Co., 174 S.C. 150, 177 S.E. 24 (1934), the Supreme Court stated: " inadequacy of price, unless so gross as to shock the conscience of the court **or** accompanied by circumstances from which fraud may be clearly inferred, will not justify the overthrow of a judicial sale."(emphasis added) See Spillers v. Clay, 233 S.C. 99,104 103 S.E.2d 759, 761 (1958). In summary, the Sixth Count asserts a correct theory of law; and the Record contains evidence that TMS 498 was valued at substantially more than the judgment to establish a dispute of fact. Respondent Mase has not provided any legal citation to support its claim for equitable relief.

VI. THERE ARE DISPUTED ISSUES OF FACT REGARDING CLAIMS AGAINST DEPUTY LONG

Appellant demonstrated that there were disputed issues of fact regarding the claims against Respondent Long for arbitrary conduct and malice. Appellant's Brief at 35,38,41-44. These included his conduct in levying on real estate when personalty was available and his sale of that real estate for a price insufficient to satisfy the lien. Appellant argued that the statute was clear and that Respondent Long was motivated by Appellant's alleged threatening phone call to ignore these procedures. County Respondents assert that there were no disputed issues of fact about Deputy Long because he was exercising his judgment or that the pertinent statute was vague. County Respondents' Brief at pages 34-35. "[W]hen only one reasonable inference, not just one inference, but one reasonable inference, can be deduced from the evidence, it becomes a question of law for the court." Hart v. Doe, 261 S.C. 116,120 198 S.E.2d 526,528 (1973). Appellant contends that the evidence supports more than one reasonable inference such that summary judgment should have been denied.

After the alleged threatening phone call, Respondent Long filed an incident report and flagged Appellant's property indicating that he took the threat seriously. R. p. 378-381. It is reasonable to conclude that Respondent Long considered Appellant uncooperative given the number of letters and phone calls that allegedly went unanswered. These circumstances give rise to a reasonable inference that Respondent Long had an improper motive in levying upon real property worth far in excess of the user fee judgment something which he rarely did (three times out of thousands). See Pridgen v. Ward, 391 S.C. 238, 705 S.E.2d 58 (Ct. App.2011)(inference of malice sufficient to deny motion for directed verdict). See McBride v. School Dist. of Greenville County, 389 S.C. 546, 698 S.E.2d 845 (Ct. App. 2010)(Common law malice means defendant acted with conscious indifference to plaintiff's rights).

VII. THE CIRCUIT COURT SHOULD HAVE GRANTED SUMMARY JUDGMENT AS TO THE LACK OF JURISDICTION BY THE MAGISTRATE COURT

County Respondents argue that the user fee is not a tax and therefore cannot be collected like a tax. County Respondents' Brief at page 38. They argue that Charleston County Ordinance Section 10-56 which provides for the collection of " annual disposal user fee established by the county council in the same manner as taxes are collected" is limited to the mailing out of bills. Id. Their argument is not supported by any case or other guide to statutory interpretation. Skyscraper Corp. v Newberry County, 323 SC 412, 475 S.E.2d 764 (1996) does not discuss how the fee can be collected and is not dispositive of the issue.

County Respondents mischaracterize Appellant's as asserting that no collection efforts can be brought for user fees. County Respondents' Brief at page 39. Appellant is merely urging this Court to apply the statute and ordinance as written. The Legislature delegated the function of solid waste collection to the Counties under S.C. Code Ann. Section

44-55-1210. See Savage v. Waste Management, Inc., 623 F. Supp. 1505 (D. S.C. 1985)(solid waste collection is delegated by the state to the counties). Ordinance Section 10-65 provides how the user fee is to be collected like taxes through foreclosure and Ordinance Section 10-60 & 70 provides for fines and penalties to be imposed. There is no inconsistency in having the County collect user fees in the same manner as taxes. This creates a uniformity such that the public who are required to pay such fees can know what to expect. The enabling statute left it up to the counties to establish the procedures for collection user fees and County Respondents ask this Court to ignore them.

County Respondents overstate the significance of the Court of Appeals' decision in Rock Hill Body Co. v. Rainey, 294 S.C. 426 , 365 S.E.2d 228, (Ct. App. 1987). In Rainey, the issue involved S.C. Code Ann. Section 29-15-10 which authorizes the Magistrate to sell property subject to a mechanics lien. The Court of Appeals interpreted that statute to allow the Magistrate Court to determine the amount of the lien to see if it exceeded his jurisdiction over the sale. Rainey is limited to its facts and does not appear ever to have been cited as authority for the broader proposition which the County Respondents urge upon this Court.

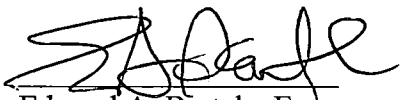
County Respondents assert that suits to collect user fees are of the general type determined by the Magistrate's Court Act to which it has been given jurisdiction . County Respondents' Brief at page 40-41. However, the only type of cases for which the Magistrate's Court has jurisdiction as it applies here is for actions for fines or penalties. S.C. Code Section Ann. 22-3-10(3). The County Respondents simply refuse to abide by their own ordinance and argue for an unreasonable interpretation to justify their actions in obtaining several judgments that are now being attacked.

County Respondents' final theory of jurisdiction is that the user fee suits are for damages to the "person" of the County under S.C. Code Ann. Section 22-3-10(2) which provides jurisdiction "in actions for damages for injury to rights pertaining to the person or personal or real property". County Respondents' Brief at page 41. County Respondents do not provide any citation to support their conclusion that user fee suits are included as an injury to the person. "A statute as a whole must receive practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers. In interpreting a statute, the language of the statute must be read in a sense that harmonizes with its subject matter and accords with its general purpose." Town of Mt. Pleasant v. Roberts, 393 S.C. 332, 342, 713 S.E.2d 278, 283 (2011). There is no injury to the rights or property of Charleston County as those terms are normally understood such as in auto or other negligence cases. S.C. Code Ann. Section 44-55-1210 authorizes the imposition of user fees and requires the user fee to be collected like property taxes and authorizes enforcement proceedings for fines and penalties. That is how the rights of the County are vindicated, not by the actions which they filed in Magistrate's Court. In summary, the specific provision of the Magistrate's Court Act do not create jurisdiction over suits to collect user fees. Therefore, the Circuit Court improperly denied the Appellant's motion for partial summary judgment as to the invalidity of the Magistrate Court's jurisdiction.

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 partial summary judgment thereon for the reasons set forth herein.



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Roosevelt Simmons

September 23, 2015

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.

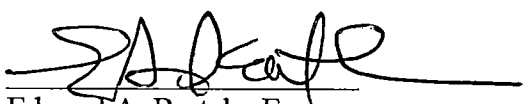
ROOSEVELT SIMMONS..... Appellant

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 Appellant's Reply Brief (revised) 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.

October23, 2015