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

BRIEF OF APPELLANT

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STATEMENT OF THE CASE

In February 2011, Appellant 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. R. p. 17-22. The Complaint alleged that the Magistrate's Court had no jurisdiction to collect these fees because the enabling legislation, SC Code Ann. 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. R. p. 17. Appellant 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. R. p. 18-19. The Complaint further alleged that Appellant 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. R. p. 18-19. Some of the judgments against him were for collection fees imposed against vacant land which was not subject to any fee and others were for property that he did not own but only paid the taxes on behalf of relatives. R. p. 20. The Complaint also sought to set aside the Sheriff's execution and sale of real property known as TMS 498 because it was based upon an invalid judgment and TMS 498 was vacant

land on which no fee could be imposed. R. p, 20. The Complaint also sought unspecified damages for violation of Appellant's right to equal protection under 42 USC Section 1983 due to the manner in which the fees were collected . R. p. 21-22. The named Defendants were Respondent Mase and Company, LLC, the current owner of 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. R. p. 24-25. Prior to service of an Answer, on March 23, 2011, Appellant filed an Amended Complaint which asserted that there were equitable grounds upon which to invalidate the user fee judgments and sale of his property. R. p. 31, Para. 28.

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. R. p. 35-36. On March 31, 2011, Respondents Charleston County and Charleston County Sheriff filed an Answer to the Amended Complaint with various defenses including Sovereign Immunity. R. p. 41. 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. R. p. 51-52. Appellant filed an Answer to the Counterclaim and the County Respondents filed an Answer to the Crossclaims. R. p. 54-55, 57-58.

In October 2011, Appellant filed a Second Amended Complaint to incorporate further allegations that resulted from discovery. R. p. 59-66. Respondent Charleston County Revenue Collections Department was added as a party Defendant as the entity responsible for

collection of the fees. R. p. 62. 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. R. p. 64. 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, execution and sale and against the Sheriff's Department on the basis that it had been negligent in retaining Respondent Harry Long as an employee. R. p. 64-65. All Respondents filed Answers and Respondent Mase and Company; LLC realleged the same Counterclaim against Appellant and Crossclaims against the County Respondents.[1] R. p. 67-84.

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. R. p. 85-90. County Respondents opposed the motion on the basis that the District Court could determine the alleged constitutional violations by assuming the validity of the state court judgments. R. p. 96. The District Court held that the federal court did not have jurisdiction over the validity of the Magistrate Court judgments and that they were " inextricably intertwined" with the civil rights claim and remanded the case sua sponte to the Circuit Court for further proceedings. R. p. 7-8.

In February 2012, the County Respondents filed a Motion for Summary Judgment and a Motion to dismiss the Second Amended Complaint as to Respondent Long. R. p. 101-102. In their Memorandum of Law filed in July, County Respondents asserted that the user fee was validly applied to Appellant, that the General Welfare Law, S.C. Code Ann. Section

[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.

4-49-30 authorized the enforcement of solid waste collection fees in Magistrate's Court, and that Respondent County Revenue Collections Department was immune from suit under the Tort Claims Act immunity for enforcement of laws. R. p. 166-172. 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, R. p. 173-174; and that Respondent Long was immune under the Tort Claim Act exemption for government employees. R. p. 175. 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. R. p. 175-176. With respect to the claim of negligent retention, County Respondents asserted that there was no evidence of causation and that Respondent Long had not acted with malice. R. p. 176-177.

Appellant opposed County Respondents Motions for summary Judgment on the basis that the plain language of the Magistrate's Court Act, S.C. Code Ann. 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 and that the County Respondents were not subject to immunity. R. p. 213-216, 225-226. Appellant further alleged that there were disputed issues of fact and that discovery was incomplete. R. p. 235-238. Appellant also filed a 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. R. p. 148-151.

While these Motions were 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. R. p. 103-107. Respondent Mase and Company, LLC consented to the amendment, R. p. 104, but the County Respondents opposed it on the basis that Appellant did not have standing to assert the inadequacy. R. p. 422-424. 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. R. p. 108-110.

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. R. p. 111-121. 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 et seq. to process a claim to collect a fee. R. p. 117-120.

In August, County Respondents filed Supplemental Memoranda 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. R. p. 454-458. 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). R. p. 460-461.County Respondents also

asserted that there was no nexus between the alleged negligent retention and the injury sustained. R. p. 461-462.

Appellant filed Further and Supplemental Opposition to the County Respondents Summary Judgment Motion based upon the receipt of additional discovery material. R. p. 426-453,492-501. 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. R. p. 494-496. Appellant further asserted that the claims for civil rights and negligence were supported by the additional facts. R. p. 431-437.

On November 7, 2012, the Court heard oral argument on all of the pending motions. 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. " R. p. 598, 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."

R. p. 604, line 25 to 605, line 11. The Court granted County Respondents' Motion to Dismiss Respondent Long, R. p. 602, line 23-25, and Appellant's Motion to file an Amendment to Second Amended Complaint to add a Sixth Count. R. p. 607, line 3-5. The Court entered a Form 4 Order containing its decision. R. p. 9. County Respondents filed a motion for reconsideration of the denial of summary judgment

and for the first time asserted that the Court had no jurisdiction to hear the other counts. R. p. 510-511. Appellant filed a motion to alter or amend the Order dismissing the Complaint as to Respondent Harry Long based upon his lack of immunity. R. p. 537-543. The Court heard oral argument on both motions on March 13, 2013. R. p. 611-627. The Court later entered an Order dated June 17, 2013 granting Reconsideration of its Decision and dismissing all of Appellant's claims. R. p. 11-15. The Court found that Appellant had not appealed the Magistrates Court judgments and was barred from collaterally attacking them in Circuit Court. R. p. 12. Further the Court held that all of the causes of action necessarily flowed from the judgments and the Court had no jurisdiction over them. R. p. 13. 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. R. p. 13-14. With respect to Appellant's claims of an equal protection violation, 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. R. p.14-15

Appellant subsequently filed a motion to alter /amend that Order. R. p. 556-572. That Motion was denied by Order dated October 6, 2014. R. p. 16. The Order contains no findings or reasons. Id. Appellant served a Notice of Appeal on November 17, 2014.

FACTS RELEVANT 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. R. p. 396, Para 3; R. p. 59 Para. 1. 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 Section 10-51 does not contain any provision for the county to collect a user fee in the Magistrate's Court.

Thereafter, Charleston County included an "annual disposal user fee" in the annual tax bill sent out by the Charleston County Auditor. R. p. 123; R. p. 396, Para.4. When Appellant received tax bills from the County for TMS 138 which included a user fee as part of the taxes owed, he 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. Ms. Peggy Ellington, the employee usually there would note on it that the "user fee had been removed". R. p. 396, Para, 4; R. p. 124-125. 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. R. p. 396, Para. 4.

Respondent County Revenue Collections Department designated George Boniface as its representative to testify about the collection of user fees. R. p. 272, page 14, line 13-23. 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. R. p. 276, page 25, line 12 to 17. 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. R. p. 127. A default judgment was entered in the amount of the user fee plus costs totaling the sum of $144.00. R. p. 129. Respondent commenced additional actions against Appellant for nonpayment of user fees imposed against TMS 138 in subsequent years and obtained six default judgments. R. p. 130-135. Respondent also obtained a default judgment against Appellant for nonpayment of user fees on real property designated as TMS 024. R. p. 135. 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 to avoid a tax sale. R. p. 398, Para 10. 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. Appellant never acquired title to TMS 024. Id.

Since 2007, Respondent Harry Long was assigned to the Judgment Section of the Sheriff's Department . His duties were to collect user fee and other civil judgments . R. p. 304, page 147, line 6 to13. He never received any formal training in the procedures relating to this. R. p. 301, page 110, line 5-10. In February 2009, Respondent Long received six user fee judgments against Appellant. In March 2009, Respondent Long did a record search and found several motor vehicles titled in Appellant's name but disregarded them. 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. R. p. 302, page128, line 2 to 16; R. p. 392-394. He based his decision on "life experience"- not any training he received. R. p. 303, page 135, line 25 to page 136 line 3. He did not go to Appellant's house to determine what personal property was there. R. p. 285, page 33, line 25 to 35 line 10. Respondent Long admitted that it was no more work to

levy and sell personal property than to do this for real estate. R. p. 303. page136, line 1-3. Respondent Long also found real property in Appellant's name. R. p. 293, page 68, line 10 to page 70, line 9.

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. R. p. 286, page 38, line 3 to 5. He believed what this person said that he was going to go down fighting the whole Sheriff's department. R. p. 287, page 43 line 7-13. Long filed an incident report that became a permanent record against Appellant. R. p. 287, page 41, line 19 to page 42, line 6, page 43, line 19 to page 44, line 12; R. p. 381. He also "flagged" Appellant's property with the Communications Department so that any other Sheriff's Department employee calling in to that location would be warned of a potential threat. R. p. 287, page 44 line 13 to R. p. 288, page 45, line 9; R. p. 378.

On July 23 Respondent Long decided to proceed against real property designated as TMS 498 owned by Appellant, not the property where he lived (TMS 138) because of the Homestead Exemption requiring a higher starting bid. R. p. 291, page 57, line 13 to page 58, line 11; page 59, line 17-20, page 60 lines 7 to 9. Respondent Long decided to levy on TMS 498 because the appraised value in the county tax system was $23,900. R. p. 297, page 81, line3 to 22. To be sure that this sale could go forward, Respondent Long even went to the office of the Master in Equity in August 2009 to confirm that a pending suit involving TMS 498 had been dismissed. R. p. 292, page 61, line 25 to page 63, line 24.

On August 26th, Respondent Long went to Appellant's home to serve the writ of execution. R. p. 295, page 74, line 12 to18. Appellant did not act belligerently or aggressively toward him and nothing out of the ordinary happened. R. p. 296, page 77, line 1 to 11.

Respondent Long conducted the sale of TMS 498 and the property was sold for $600, being the highest bid. R. p. 298, page 94, line 8 to page 95, line 7. The minimum bid was $490.62 representing the cost of advertising. R. p. 298, page 96, line 8 to 12. 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. R. p. 298, page 96, line 13 to 23. 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. R. p. 359-366. After deducting the costs of sale, the remaining amount was not sufficient to satisfy the $144.00 judgment. R. p. 298, page 96, line 24 to page 97, line 1. In the hundreds of executions of user fee judgments in which Respondent Long was involved over 4 ½ years, he sold real property only two other times. R. p. 302, page 125, lines 3-6; R. p. 348, Answers to Interrogatories No. 17.

Appellant was never served with the summons and complaint and did not appear at the hearing on the Complaint. R. p. 395, Para. 2, R. p. 396, Para. 4. Appellant never received notice of entry of the judgment. R. p. 396, 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. Id. If he had known of the user fee suit in Magistrate's Court he would have appeared and contested it. R. p. 397, Para. 7. Appellant contends he received no notice of any of the other complaints and had a valid defense, including waiver of the fee and the lack of any services or benefit as required by the statute. R. p. 397, Para. 9.

Appellant denies speaking to Respondent Long in April 2009 or making any threats against him or the Department. R. p. 396, 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. R. p. 397, 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 498 Appellant did not understand why the County would 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 value was determined to be $70,000.R. p. 397, Para. 8; R. p. 306-308.

According to Sheriff's Department records, Respondent Long had been disciplined on numerous occasions. R. p. 310-323. In 1998, he received a Letter of Reprimand for failing to transport a black male suspect he arrested to a court hearing causing the suspect to be issued 3 contempt citations. R. p. 322. In the Letter of Reprimand, Respondent Long's conduct was described a "irresponsible" and "unprofessional". R. p. 322-323. In 1999, he received a Letter of Suspension for an unauthorized absence from duty to walk his dog, R. p. 320; and another Letter of Reprimand for his unsafe operation of a motor vehicle causing an accident for which he was found to be responsible. R. p. 318. In 2003, he received a Letter of

Reprimand because he conducted a warrantless search without probable cause. R. p. 315-317.This Letter of Reprimand also referenced five (5) separate instances of violations of Department policy or decorum for which no disciplinary action was taken. These included 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. R. p. 316. In 2003, he received a Letter of Instruction for failing to timely serve an arrest warrant on a "highly sought after suspect' wanted for multiple burglaries allowing the suspect to escape. R. p. 442. In 2004 he received a Letter of Suspension for violating a standing policy by not obtaining a search warrant resulting in a loss of thousands of dollars and other evidence in a shooting. R. p. 441-443. After he denied advising his partner to ignore the policy, she filed a complaint against him for a lack of truthfulness and asked for a new partner. R. p. 441. Later that year Respondent Long was also issued a Written Reprimand for this incident that resulted in a Letter of Probationary Status due to failure to meet Professional Responsibility Standards. R. p. 310-311.

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. . . " R. p. 383, Section III, B (3). Respondent County Sheriff's Department had no documents discussing its retention of Respondent Long in light of his history of disciplinary violations. R. p. 368-369, 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 had jurisdiction to hear a collateral attack upon the validity of a Magistrate Court judgment; and 2) the Circuit Court had 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).

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 Respondents. 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 attack 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). County Respondents have not pointed to any limitation of the jurisdiction of the Circuit Court to hear an action under R. 60(b), SCRCP to vacate a lower court judgment. 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 (1978).

In Bunkum v. Manor Properties, 321 S.C. 95, 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 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 an R 60(b), SCRCP independent action and are not barred by failing to appeal or file a post trial motion.

The Circuit Court ruled that because Appellant had not appealed or filed any motions in the Magistrate's Court, the Circuit Court had no jurisdiction. County Respondents 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 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.

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

County Respondents asserted for the first time in their Motion for Reconsideration that the Circuit Court had no jurisdiction to hear Appellant's other claims since they all arose from the Magistrate Court judgments. R. p. 510-511.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 and sell 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). None of these claims are within the jurisdiction of the Magistrate Court. See S. C. Code Ann. Section 22-3-10.

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. Even if the Circuit Court did not have jurisdiction over validity of the user fee judgments, it had jurisdiction to hear and decide the other claims and dismissal leaves the Appellant without any remedy.

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

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).

The legislative purpose of Charleston County Ordinance Section 10-51 is to regulate solid waste disposal and to levy fees against persons for whom services are provided. See S. C. Code Ann. Section 44-55-1210. 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". Therefore, the burden of proof is upon the County Respondents to show a rational basis for imposing the user fee upon Appellant consistent with its purpose.

County Respondents argued that the user fee was for the general collection and disposal of solid waste and not dependent on whether Appellant derived any personal benefit.

However, 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. 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 Charleston County Ordinance Section 10-69 (2). "[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). Therefore, Respondent County Revenue Collections Department failed to demonstrate any rational basis to impose the solid waste disposal fee to Appellant.

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). Skyscraper Corp. involved an equal protection claim by the owner of a commercial building not a residential property. The Supreme Court held that "[s]ince 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." 323 SC at 417, 475 S.E.2d at 766. See Brown v. County of Horry, 308 S.C. 180, 417 S.E.2d 565 (1992) (vehicle tax sustained a user fee since owners are those who use the roads). Therefore, Skyscraper Corp. and Brown support Appellant's contention that the imposition of the user fee must be related to the receipt of specific benefit by the person being charged.

Therefore, County Respondents were not entitled to summary judgment as a matter of law. Appellant established that he is not similarly situated to other residential property owners

because he does not receive any solid waste disposal services or use any county facilities for solid waste collection or recycling. County Respondents did not establish any rational basis to impose the fee upon Appellant based upon its purpose. The Circuit Court erred in relying upon 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 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).

Appellant made out a prima facie showing of an equal protection violation. 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."

The undisputed facts support a reasonable inference of arbitrary treatment in enforcement of the statute by Respondent Long. The amount to be collected was minimal and the statute required that the Deputy first levy upon personalty. Appellant owned several 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 ignored the motor vehicles that he uncovered in his DMV search even though he admitted that one or more of them might be worth pursuing. Instead Respondent Long levied upon real estate valued at $24,000 far in excess of the amount needed to satisfy the judgment but sold it for an amount that was not sufficient to satisfy the judgment. The cost to levy on personalty property was the same for real property. In over the course of 4 ½ years and hundreds of user fee judgments, Respondent Long only sold real estate three times. 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 in the execution and sale of TMS 498.

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 applies only to the Fifth Count.

In summary, the Circuit Court erred by dismissing the Fourth Count for civil rights violations as a matter of law. Appellant received no benefit and the County Respondents did not provide any rational basis to justify the disparate treatment. There was a reasonable inference that Respondent Long was arbitrary in the execution on the judgment. 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 Respondent County Sheriff's Department for negligence in retaining Respondent Long as an employee and Respondent Long for malice in enforcing the user fee judgment against real property instead of personal property. The Circuit Court said that the Respondents actions were immune under S.C. Code Ann. Sect.15-78-60(3) (4), (5), (11) and (23). Order at 3-4. Appellant contends that the Circuit Court erred in applying the Tort Claims Act 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 never asserted that any immunity applies to Appellant's claim for negligent retention in support of summary judgment. 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 this 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, 578 S.E.2d 16 (Ct. App. 2002).

Respondent Long frequently passed the Sergeant's exam with a high score but was passed over for sergeant by 20-30 other officers. R. p. 283, page 13, line 15 to page 15, line 25. Respondent Sheriff's Department admitted there were no documents explaining why it decided not to promote Deputy Long to Sergeant. R. p. 368, Notice to Produce No. 4, R. p. 369, County Response. Respondent Long was subject to numerous disciplinary actions since joining the Department including two (2) suspensions and three (3) letters of reprimand. These actions all involved serious breaches of Department policy and included failing to transport a black male suspect he arrested to a court hearing resulting in the suspect being issued 3 contempt citations; an unauthorized absence and neglect of duty (to walk his dog); a motor vehicle accident for which he was found to be responsible; conducting warrantless search without probable cause; failure to timely serve an arrest warrant allowing the suspect

to escape; violating standing policy by not obtaining a search warrant resulting in loss of thousands of dollars and other evidence of a crime resulting in Probationary Status due to failure to meet Professional Responsibility Standards. Respondent Long was cited for five separate instances of violations of Department policy or decorum for which no disciplinary action was taken, including 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. His own partner accused him of lying and refused to work with him. Respondent County Sheriff's Department admitted that it had no documents concerning the any decision to retain Respondent Long. R. p. 368 No. 5 and R. p. 369, No. 5.

Respondent County Sheriff's Department had a policy of progressive punishment. It's Policy and Procedures Manual provides that employees are subject to termination for the " accumulation of violations. . . " or "consistent performance failure[s] " or " lying, cheating , stealing unethical conduct etc." R. p. 384, B (4); R. p. 388, I (2).There is no evidence that Department followed its own policy of progressive punishment. The disciplinary actions cover a six (6) year period. Each of the disciplinary reports refers to the incident in question and do not consider any earlier misconduct. R. p. 310-323. Respondent Sheriff's Department never took a comprehensive look at Respondent Long's history of disciplinary violations. Each of his offenses was considered in isolation, without regard to the cumulative effect.

Sergeant Wilson, one of Long's superiors who evaluated him in 2005 did not know the circumstances of his prior failure to obey an order or talk to the other officer about it. R. p. 330; R. p. 374, page 34, line 13 to page 35 line 14. 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 4.

In summary, the Record amply demonstrates that Respondent Long was prone to violate Departmental procedure of all types and had a history of unprofessional conduct. There is no evidence that Respondent Sheriff's Department exercised any discretion in retaining Respondent Long. Respondent Sheriff's Department violated its own policies by failing to take progressive action in the face of repeated serious violations. Therefore, County Respondents failed to establish a defense of discretionary immunity to overcome Appellant's prima facie case of negligent retention.

As its main defense, Respondent County Sheriff's Department asserted that there was no proximate cause. Appellant contended that proximate cause was a jury issue citing Doe v. ATC, Inc.,367 S.C. 199, 624 S.E.2d 447(Ct. App. 2005). In Doe, 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."367 S.C.at 206(citationsomitted). 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."); 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.").

Respondent County Sheriff's Department knew that Respondent Long had a history of violating procedure and had a temper. He had been disciplined for these actions many times. Appellant asserts and the facts support that this same pattern of behavior s is what led to a valuable piece of Appellant's real estate being sold for $600. Therefore, the issue of whether Respondent County Sheriff's Department negligence in retaining Respondent Long was the proximate cause of Appellant's damages was a question of fact for the jury.

In summary, there is no evidence that Respondent County Sheriff's Department made a conscious decision to retain Respondent Long in spite of his numerous violations of Department procedure so there is no basis for a claim of immunity. Respondent Long's violation of procedure was the cause in fact of Appellant's injury and proximate cause was for the jury to decide. Accordingly, this Court should reverse dismissal of the Fifth Count as to Respondent County Sheriff's Department for negligent retention.

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 (S.C. 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). 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 personal property and then on real property. It is simply not a matter of his discretion as to which type of property he levies on first.

Appellant contends that there was more than a scintilla of evidence to support an inference of malice. Respondent Long stated that Appellant threatened him and in response he filed an incident report and "flagged" his property. The reasonable inference is that he believed the threat was real. Respondent Long ignored personal property which he admitted was worth pursuing to enforce a $144.00 judgment against real estate which he believed was worth $24,000 but which he sold for $600. Respondent Long had gone after real estate only twice in enforcing hundreds of Magistrate Court (user fee) judgments. A reasonable inference is that Respondent Long intended to punish Appellant for his threat by using his authority to deprive Appellant of valuable property to satisfy a small judgment. See McBride v. School Dist. of Greenville County, 389 S.C. 546, 698 S.E.2d 845 (Ct. App. 2010) (defendant acted with ill will toward the plaintiff, or acted recklessly or wantonly, i.e., with conscious indifference of the plaintiff's rights); Swicegood v. Lott, 379 S.C. 346, 665 S.E.2d 211 (Ct. App. 2008) (defendant actuated by ill will in what he did, with the design to causelessly and wantonly injure the plaintiff). The facts support a scintilla of evidence of malice sufficient to

defeat summary judgment. See Hill v York County Sheriff's Department, 313 S.C. 303,308, 437 S.E.2d 179,182 (Ct. App. 1993) cert. den (1994)

Therefore, County Respondents were not entitled to summary judgment as matter of law on the Fifth Count tort claim. There was more than a scintilla of evidence to support both the issue of negligent retention and the existence of malice; and there were disputed issues of fact. See Point VI.

IV. THE CIRCUIT COURT ERRED IN DISMISSING THE SIXTH COUNT

Appellant asserts that the Circuit Court erred in dismissing the Sixth Count for the following reasons. County Respondents opposed the Appellant's motion to add the Sixth Count on the basis that he did not have standing. The Circuit Court granted the Amendment. County Respondents never filed a motion to dismiss it afterwards on other grounds. Their Motion for Reconsideration was filed before the Sixth Count was filed and the Motion never mentioned the Amendment. The Circuit Court's Order of Dismissal does not provide any reason for its dismissal. The Circuit Court previously held that Appellant had standing and no Respondent asserted any other basis to dismiss the Amendment.

The facts are not in dispute that Respondent Long sold TMS 498 for $600 and that the last appraised value of TMS 498 was $70,000. Appellant established a prima facie case that the price was inadequate and shocks the conscience justifying equitable relief. Therefore, the Sixth Count should not have been dismissed.

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 their summary judgment motion. 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 Respondent 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 a judgment, Respondent Long is charged with knowledge of this law. Respondent Long neither levied on personal property, even though he acknowledged it was available nor 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.

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 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. 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). 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).

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 Affidavit provided a factual basis to overcome any alleged lack of a genuine issue of material fact. These facts are relevant and 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 made out a prima facie case that Respondent County Sheriff's Department was negligent in retaining Respondent Long. 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. Respondent Longs' disciplinary actions were all taken without regard to the prior violations. There is no evidence that Respondent County Sheriff's Department applied its own policy of progressive punishment. Respondent County Sheriff's Department Policy and Procedure Manual permits termination for an accumulation of violations. 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.

Appellant contends that the evidence supports a reasonable inference that Respondent County Sheriff's Department violated its own policy and was negligent in retaining Respondent Long. "[T]he master may subject himself to liability . . . by retaining in his employment servants who, to his knowledge, are in the habit of misconducting themselves in a manner dangerous to others." Doe v. ATC, Inc., 367 S.C. 199, 206, 624 S.E.2d 447 (Ct. App. 2005). 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). Accordingly, the Circuit Court erred in dismissing the Fifth Count because there was a reasonable inference of negligence which was a disputed issue of fact.

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

Respondent Long claimed that Appellant threatened him and the entire Sheriff's Department but Appellant denied this. Respondent Long claimed to have made several attempts to contact Simmons to resolve the judgment including sending him letter but Appellant denies receiving the letters or speaking to him before he came to Appellant's house in August 2009 to serve the writ of execution. Appellant was the record owner of various items of personal property such as several autos registered to his name, a boat, and several

pieces of heavy equipment, all of which were in plain view of Respondent Long when he came to Appellant's house in August 2009. Respondent Long didn't remember seeing any personal property during his visit.

Respondent 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. Respondent Long sold TMS 498 for $600 to satisfy a $144.00 judgment which is still unsatisfied. The reasonable inference is that Respondent Long had ill will toward Appellant related to the alleged threats. In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn therefrom 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). "When 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). 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. The Court should give 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).

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 declaratory relief 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 S.C. Code Ann. 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.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 Supreme 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 fees other than in the manner provided therein.

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 Respondent Revenue Collections Department 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 fines 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 laws.

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 also alleges that such a suit is to recover damages for injury to the person of Charleston County. This is an 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 did not provide a single case citation to support its theory. Failure to pay a user fee does not cause any injury to the person or property of Charleston County. 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.

Finally, 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 establishes 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 for enforcement of 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

November 12, 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.

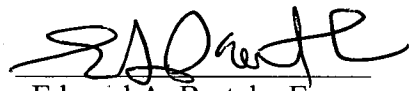
ROOSEVELT SIMMONS..... Appellant

Vs.

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

CERTIFICATE OF COMPLIANCE

I hereby certify that Appellant's final Brief and Reply Brief comply with Rule 211(b), SCACR.



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March 28, 2016
Charleston, SC