

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM CHARLESTON COUNTY MAR 30 2016
CASE No. 2011- CP-10-1084
Circuit Court Judge R. Markley Dennis, SC Court of Appeals

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

RECORD ON APPEAL - VOLUME II

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CERTIFICATION

Counsel for Appellant hereby certifies that the Record on Appeal contains all material designated by any party and no other material.

June 8, 2015

Edward A. Bertele

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

ROOSEVELT SIMMONS,

Plaintiff,

v.

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

Defendants,

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO.: 2012-CP-10-1084

**DEFENDANTS J. AL CANNON, JR.,
CHARLESTON COUNTY SHERIFF'S
OFFICE, CHARLESTON COUNTY,
CHARLESTON COUNTY REVENUE
COLLECTIONS DEPARTMENT, and
HARRY LONG'S MEMORANDUM IN
OPPOSITION TO PLAINTIFF'S
MOTION FOR PARTIAL
SUMMARY JUDGMENT**

Defendants, J. AL CANNON, JR., CHARLESTON COUNTY SHERIFF'S OFFICE, CHARLESTON COUNTY, CHARLESTON COUNTY REVENUE COLLECTIONS DEPARTMENT, and HARRY LONG ("Defendants") file this Memorandum in Opposition to Plaintiff's Motion for Partial Summary Judgment. Plaintiff's main contention in his motion is that the Magistrates' Court lacked subject matter jurisdiction over a suit to collect user fees and therefore, any judgment from the court and any subsequent sheriff's sale based on the judgment are void. In addition to the below arguments, Defendants incorporate by reference their Memorandum in Support of Defendants' Motion for Summary Judgment previously filed with this Court.

ARGUMENT

- I. **The Circuit Court does not have subject matter jurisdiction to overturn a Magistrates Court judgment that is more than ten years old.**

~~Plaintiff can cite no case law nor precedent that directly supports his contention that a Circuit~~

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Court can overturn the subject matter jurisdiction of a Magistrates Court more than ten years after a ~~judgment has been rendered~~. Plaintiff cites several cases that hold that "issues related 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." Bunkum v. Manor Properties, 321 S.C. 95, 100, 467 S.E.2d 758, 761 (Ct.App.1996). However, all of the cases cited by Plaintiff in support of this contention dealt with direct appeals of matters to the appellate courts or have facts that are not applicable to the present case. Id. (Direct appeal from denial of temporary restraining order); State v. Funderbuck, 259 S.C. 256, 191 S.E.2d 520 (1972) (Direct appeal from criminal conviction); Amisub of SC, Inc. V. Passmore, 316 S.C. 112, 447 S.E.2d 207 (1994) (Direct appeal from Family Court order); State v. Richburg, 304 S.C. 162, 403 S.E.2d 315 (1991) (Direct appeal from criminal conviction); Toomer v. Toomer, 244 S.C. 399, 137 S.E.2d 406 (1964) (Direct appeal from ruling of South Carolina Wildlife Resources Commission); Lake v. Reeder Construction, 330 S.C. 242, 498 S.E.2d 650 (Ct.App.1998); Ross v. Richland County, 270 S.C. 100, 240 S.E.2d 649 (1978) (Direct appeal from a county court order transferring venue to Circuit Court); State v. Castleman, 219 S.C. 136, 64 S.E.2d 250 (1951) (Direct appeal of criminal conviction); State v. Adams, 73 S.C. 435 (1906) (Direct appeal of Order granting Motion for New Trial); Rock Hill Body Co. V. Rainey, 294 S.C. 426, 365 S.E.2d 228 (Ct.App.1987) (Direct appeal of Magistrate's Order to sell property); Johnson v. State, 319 S.C. 62, 459 S.E.2d 840 (1995) (Conviction overturned on appeal of denial of post-conviction relief); Eichor v. Eichor, 290 S.C. 484, 351 S.E.2d 353 (Ct.App.1986) (Direct appeal of family court order); Brown v. Greenwood School Dist. 50 Bd. Of Trustees, 344 S.C. 522, 544 S.E.2d 642 (Ct.App.2001) (Direct appeal of denial of jury trial); Eldridge v. City of Greenwood, 331 S.C. 398, 503 S.E.2d 191 (Ct.App.1998) (Direct appeal from Circuit Court judgment).

Plaintiff claims that the above cited case law supports the proposition that "the law is clear

that the lack of subject matter jurisdiction can be a basis for vacating an earlier judgment.” (Plaintiff’s Motion for Partial Summary Judgment at p. 10). In a sense, Plaintiff is correct. Subject matter jurisdiction can be raised by the parties or the courts at the pleading stage, trial stage, or during any appeal, which is what the above cited cases stand for. However, Plaintiff wants this Court to go against precedent and find that Plaintiff can raise the issue of subject matter jurisdiction of a Magistrates Court at any time whatsoever, even ten or twenty years after a judgment has been rendered. One of the cases cited by Plaintiff contradicts this and instead shows the proper way to contest subject matter jurisdiction of a Magistrate Court is through a direct appeal of the judgment.

In Rock Hill Body, the Plaintiff, a body shop, asked the Magistrates Court to sell a truck owned by one of the defendants in order to satisfy a garagemen’s lien. Rock Hill Body, 294 S.C. at 427. The Magistrate Judge ordered the sale of the truck and the owner directly appealed to the Circuit Court, which upheld the judgment, and then to the Court of Appeals. Id. The Court of Appeals ultimately held that the Magistrates Court lacked subject matter jurisdiction based solely on the fact that the lien in question was over the jurisdictional limit. Id. at 429-430.

In our current case, Plaintiff is not making a direct appeal of the 2000 Magistrates Court judgment, and in fact, he never directly appealed the Magistrates Court judgment. Instead, Plaintiff is in effect appealing a 2000 judgment more than 10 years after the judgment was entered by filing the subject lawsuit. This is improper and this court does not have subject matter jurisdiction to hear the case. This contention is, in fact, supported by cases cited by Plaintiff in his Partial Summary Judgment Motion.

In State v. Gorie, 256 S.C. 539, 183 S.E.2d 334 (1971), the defendant was convicted of manslaughter by a jury. Id. at 540. Defendant did not make any post-trial motions and did not appeal the verdict. Id. Instead, defense counsel filed post-trial motions more than 14 months after

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the trial ended. Id. at 541. The trial judge denied the motion, and defendant appealed. Id. The South Carolina Supreme Court held that, due to the untimely motion, the trial judge lacked subject matter jurisdiction to hear the motion. Id.

In Ness v. Eckerd Corp., 350 S.C. 399, 566 S.E.2d 193 (Ct.App.2002), an entry of default was entered against defendant, and the trial judge denied defendant's motion to set aside the entry. Id. at 401-402. However, more than one month after denying defendant's motion, the trial judge discovered a potential conflict, recused himself from the case, and vacated his prior ruling pursuant to Rule 59(e). Id. at 402-403. On appeal, the Court of Appeals held that the trial judge could not vacate his own order more than ten days after it was issued. Id. Based on this, the trial judge "lacked jurisdiction to vacate the original order." Id.

Based on Gorie and Ness, this court does not have subject matter jurisdiction to hear this case. In Gorie, the Supreme Court held that a trial judge did not have jurisdiction to hear post-trial motions in a case he presided over due to the defendants untimely post-trial motions. In Ness, the Court of Appeals held that a trial judge lacked subject matter jurisdiction to vacate his own order due to the untimeliness of his attempt to do so. In our current case, Plaintiff is asking the Circuit Court (an entirely different court) to overrule a decision made by a Magistrates Court, not a month after the judgment, not fourteen months after the judgment, but more than ten years after the judgment. This is improper pursuant to South Carolina precedent, and therefore, this court does not have subject matter jurisdiction to overturn a ten year old Magistrate Court judgment.

II. The Circuit Court does not have jurisdiction to overturn any judgments against Plaintiff from the Charleston County Magistrates Court because Plaintiff has never filed any post-trial motions nor has he filed an appeal of the Magistrates Court judgments against him.

Plaintiff cannot collaterally attack Magistrates Court judgments in Circuit Court because

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Plaintiff failed to file any post-trial motions or appeals after notice of the judgments. Plaintiff is asking the Circuit Court to overturn multiple judgments from the Charleston County Magistrates Court. Plaintiff seeks to do this not through an appeal of the Magistrates Court judgments, but rather through a collateral lawsuit filed more than ten years after some of the judgments were rendered. This is improper under South Carolina statute, court rules and case law.

South Carolina Code Ann. § 22-3-1000 provides the time for post-trial motions and appeals from civil and criminal judgments in Magistrates Courts.

No motion for a new trial may be heard unless made within five days from the rendering of the judgment. The right of appeal from the judgment exists for thirty days after the rendering of the judgment.

The South Carolina Magistrates Court Rules conform to the statute. Magistrates Court Rule 19 states that:

The motion for a new trial shall be made in writing and filed with the court no later than five (5) days after notice of the judgment. The court shall notify all opposing parties that the motion has been filed and shall provide those parties a copy of the motion in a manner provided for in Rule 8.

Rule 19(b), SCRMC. Rule 18 of the SCRMC governs appeals from Magistrates Courts:

All appeals of judgments rendered by the magistrates court shall be to the circuit court of the county where the judgment was rendered. Within thirty (30) days after delivery of written notice of judgment to the parties or their attorneys, a party wishing to appeal shall serve on the respondent and file a notice of appeal containing a statement of the grounds for appeal with the magistrate rendering the judgment and with the Circuit Court of the County where the judgment was rendered.

Rule 18(a), SCRMC.

In Town of Hilton Head Island v. Godwin, 370 S.C. 221, 634 S.E.2d 59 (Ct.App.2006), the South Carolina Court of Appeals addressed the necessity to file timely post-trial motions once notice

of a judgment is received. In this case, Godwin was issued a ticket for criminal domestic violence ("CDV") in July 1995. Id. at 222. Godwin failed to appear for a trial on the CDV charges that was set for August 8, 1995, and in his absence, he was convicted and the court ordered him to pay a fine of \$304. Id. On September 29, 1995, Godwin was arrested for three outstanding warrants, one being the CDV charge. Id. Either Godwin or someone on his behalf paid the \$304 fine on September 29, 1995, in order to have Godwin released from jail. Id.

Approximately eight years later, on August 11, 2003, Godwin applied for a gun permit; however, he was denied the permit due to the CDV conviction. Id. at 223. Instead of filing any motions with the Municipal Court or an appeal with the Circuit Court, Godwin waited seven months to send a letter to the Municipal Court, which was "treated as a motion to set aside the conviction and/or a motion for a new trial." Id. The municipal court denied the motion and Godwin appealed to the Circuit Court. Id. Godwin argued to the Circuit Court that due to clerical errors or mistakes made by the Municipal Court, he did not receive notice until August 11, 2003. The Circuit Court ordered a new trial. Id.

The Court of Appeals vacated the Circuit Court judgment and held that the Circuit Court lacked jurisdiction to hear Godwin's motion. Id. at 224. The basis for this holding was that Godwin did not file a timely post-trial motion or appeal once he received notice of the conviction. Id. The Court held that "[a] party who fails to timely appeal or take any other timely action necessary to correct an error is procedurally barred from contesting the validity of the conviction." Id. Importantly, the court held that while there was evidence to support the fact that Godwin had received notice of the conviction in 1995 when he paid the \$304 fine, there was certainty that he had notice of the conviction on August 11, 2003. Id. at 225. Because Godwin waited 7 months to take any action on the conviction, the Circuit Court was without jurisdiction to overturn Godwin's

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conviction. Id.

In Godwin, the Court of Appeals relied on Brewer v. South Carolina Highway Department, 261 S.C.52, 198 S.E.2d 256 (1973). In that case, Brewer filed a motion to enjoin the South Carolina Highway Department ("SCHD") from suspending his driver's license and reinstating his driving privileges. Id. at 55. The underlying facts of the case are that Brewer was arrested for driving under the influence, and neither he nor his attorney received notice of the trial set before a magistrate judge on September 25, 1972. Id. at 54-55. Brewer was convicted in his absence and did not receive notice of the conviction until October 18, 1972. Id. Brewer's attorney filed a motion for a new trial the following day, October 19, 1972. Id.

The SCHD took the position that the motion was not timely as it was not filed within five days of the conviction. Id. at 55. However, the Court held that Brewer timely filed his motion as he filed it one day after he had notice of the conviction. Id. at 55-56. The Court also held that the "time to appeal from a judgment in a magistrate's court or move for a new trial therein does not begin until he has notice of the judgment against him." Id. at 56. The Brewer Court cited the case of O'Rourke v. Atlantic Paint Co. 74 S.E. 930, 932 (1912), which held that "the only remedy of a party against whom a judgment is rendered is either to appeal, or make a motion for a new trial, and appeal in case such motion is refused."

In our current case, Plaintiff has never filed any motions or appeals of the Magistrates Court judgments once he had notice of the same. Therefore, he is procedurally barred from challenging those judgments. Plaintiff is challenging Magistrates Court judgments from the years 2000-2009. He claims that the Magistrates Court lacked jurisdiction to hear cases involving non-payment of user fees and therefore, the Magistrates Court judgments are without affect. As the Supreme Court held

in O'Rourke, Plaintiff's proper remedy for challenging a judgement in Magistrate Court is to make a motion for a new trial or to appeal. Id. If a party does not make a timely motion or appeal, once he has received notice of the Magistrate Court judgment, he is procedurally barred from challenging that judgment. Town of Hilton Head Island, 370 S.C. at 224; Brewer, 261 S.C.56.

Plaintiff has neither timely appealed nor filed a motion for a new trial regarding any of the judgments he is now challenging. Plaintiff claims that he was never served with any of the Magistrates Court lawsuits nor any of the judgments against him. While Defendants strongly dispute this allegation, for purposes of this summary judgment motion and taking facts in a light most favorable to the non-moving party, Plaintiff was certainly on notice of these judgments when he filed the current lawsuit contesting the judgments. This lawsuit was originally filed on February 11, 2011. When Plaintiff became aware of these judgments, he should have filed a motion for a new trial or an appeal of the judgments as required by South Carolina statute and the South Carolina Magistrates Court rules. Instead, he filed a civil lawsuit against defendants seeking monetary damages and declaratory relief among other elements of relief. Because Plaintiff did not timely file a motion for a new trial nor an appeal of the judgments, this court in our current lawsuit is without jurisdiction to overturn those judgments. Town of Hilton Head Island, 370 S.C. at 225.

III. Pursuant to the South Carolina Code of Laws, Magistrates' Courts have subject matter jurisdiction to hear cases involving user fees imposed by county ordinances.

If this Court finds that it does have jurisdiction to hear Plaintiff's claims, Defendants submit that the Charleston County Magistrates' Court had subject matter jurisdiction to enter judgments against Plaintiff for non-payment of User Fees. This is outlined in our South Carolina Code of Laws:

SECTION 4-9-30. Designation of powers under each alternative form of government except board of commissioners form.

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Under each of the alternate forms of government listed in Section 4-9-20, except the board of commissioners form provided for in Article 11, each county government within the authority granted by the Constitution and subject to the general law of this State shall have the following enumerated powers which shall be exercised by the respective governing bodies thereof: ...

(14) to enact ordinances for the implementation and enforcement of the powers granted in this section and provide penalties for violations thereof not to exceed the penalty jurisdiction of magistrates' courts. **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.** County officials are further empowered to seek and obtain compliance with ordinances and regulations issued pursuant thereto through injunctive relief in courts of competent jurisdiction. ~~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.~~

S.C. Code § 4-9-30 (emphasis added). One of the enumerated powers granted to county government is the assessment of "uniform service charges" for "sanitation, including solid waste collection and disposal." S.C. Code § 4-9-30(5)(a). This is precisely what is covered in the Ordinance that mandates a User Fee. Therefore, based on S.C. Code § 4-9-30, non-payment of a User Fee (i.e. violation of the Ordinance) may be heard in "magistrates' courts of the county." This statute provides subject matter jurisdiction in Magistrates Courts, which means that the judgments entered against Plaintiff were valid and enforceable.

Plaintiff claims that S.C. Code Ann. § 22-3-10 does not specifically give jurisdiction over user fee judgments to the Magistrates Court are without merit. Plaintiff cites only one case that discusses the application of this code section. See Rock Hill Body, 294 S.C. 426, 365 S.E.2d 228 (Ct.App.1987). In that case, a Magistrate Judge ordered the sale of a truck to satisfy a lien pursuant to S.C. Code Ann. §29-15-10. At the time this case was decided, the jurisdictional amount in

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Magistrates Court was limited to \$1000 pursuant to S.C. Code Ann. § 22-3-10. The Court of Appeals held that since the amount of the lien was over the jurisdictional limit, the Magistrates Court lacked subject matter jurisdiction.

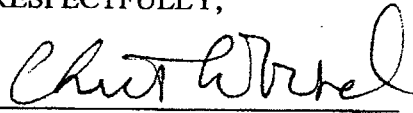
Importantly, though, is the Court of Appeals' analysis of the two statutes together. The court held that "[a] construction of Sections 29-15-10 and 22-3-10 leads to the conclusion that a magistrate has jurisdiction to determine a dispute as to the amount of the lien under Section 29-15-10 only if the amount involved does not exceed one thousand dollars." Id. at 429. The court does not cite to a specific section of S.C. Code § 22-3-10, but rather refers to it generally. In fact, no specific section in S.C. Code § 22-3-10 covers liens in Magistrates Courts. Regardless, the Court based its holding on the general monetary jurisdiction limit combined with S.C. Code § 29-15-10. Id.

In our current case, a construction of S.C. Code § 4-9-30 and S.C. Code § 22-3-10 together leads to the conclusion that the Magistrates Court had jurisdiction over judgments related to User Fees. S.C. Code § 4-9-30 provides that a violation of an ordinance can be heard and disposed of in Magistrates Courts. Non-payment of a User Fee is a violation of the Ordinance that established the User Fee. At the time all of the judgments were rendered against Plaintiff in Magistrates Court, the judgments were within the jurisdictional limit of Magistrates Court pursuant to S.C. Code § 22-3-10. Therefore, based on the Court of Appeals holding in Rock Hill Body, a construction of the two code sections together leads to the conclusion that the Magistrates Court had jurisdiction to hear cases involving non-payment of User Fees, so long as the amount in question was within the jurisdictional limit of the Magistrates Court. Id. at 429. Because all of the judgments in question were under the jurisdictional limit, the Magistrates Court had subject matter jurisdiction to hear them.

CONCLUSION

For all the reasons stated herein along with all the reasons set forth in Defendants' Memorandum and Supplemental Memorandum in Support of Defendants' Motion for Summary Judgment, Defendants respectfully request that this Honorable Court deny Plaintiff's Motion for Partial Summary Judgment.

RESPECTFULLY,



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Revenue Collections Department, and Harry
Long

August 14, 2012

Charleston, South Carolina

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STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

ROOSEVELT SIMMONS,

Plaintiff,

v.

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

Defendants,

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO.: 2012-CP-10-1084

2011-

DEFENDANTS J. AL CANNON, JR.,
CHARLESTON COUNTY SHERIFF'S
OFFICE, CHARLESTON COUNTY,
CHARLESTON COUNTY REVENUE
COLLECTIONS DEPARTMENT, and
HARRY LONG'S MEMORANDUM IN
OPPOSITION TO PLAINTIFF'S
MOTION TO AMEND SECOND
AMENDED COMPLAINT

FILED
2012 AUG 14 PM 12:50
JULIE J. ARISTON
CLERK OF COURT
BY

Defendants, J. AL CANNON, JR., CHARLESTON COUNTY SHERIFF'S OFFICE, CHARLESTON COUNTY, CHARLESTON COUNTY REVENUE COLLECTIONS DEPARTMENT, and HARRY LONG ("Defendants") file this Memorandum in Opposition to Plaintiff's Motion to Amend Second Amended Complaint. Plaintiff seeks to add a cause of action regarding "Inadequacy of Sale Price," and Defendants oppose this motion on the basis that Plaintiff lacks standing to bring this cause of action.

RELEVANT STATEMENT OF FACTS¹

Plaintiff owned property on Johns Island that was subject to the County mandated Solid Waste Recycling and Disposal User Fee ("User Fee"). For many years, Plaintiff refused to pay the User Fee based on the mistaken belief that, if he did not get trash pick-up, he did not have to pay the

¹ For a more complete Statement of Facts, Defendants would incorporate their Memorandum in Support of Defendants' Motion for Summary Judgment previously filed with this Court.

User Fee. Deposition Roosevelt Simmons, 55:11 - 56:13 (October 10, 2011). Due to non-payment and pursuant to South Carolina Statute and Charleston County Ordinance, the Charleston County Business License User Fee Department ("User Fee Department") instituted its first of several actions against Plaintiff in 2000 in the Charleston County Magistrate Court. The Summons and Complaint were served on Plaintiff. (See Exhibit A and B). Plaintiff did not respond to the Complaint, was not present at the hearing, and a judgment was entered against him.

In our current case, the judgment from 2000 was sent to the Sheriff's Office in 2009 for levy and execution. Deposition Harry Long, 22:12 - 23:23 (September 22, 2011). Plaintiff was sent multiple letters concerning the judgment and was personally served with the Notice of the Sheriff's Sale; however, Plaintiff did not attend the sale and the property was sold to the highest bidder for \$600. Plaintiff now seeks to assert a cause of action for Inadequacy of Sale Price claiming that the fair market value of the property is \$70,000.

ARGUMENT

I. Plaintiff lacks standing to bring this cause of action as he was not a real party in interest.

In order to assert a claim against a defendant and to have standing, a plaintiff must be a real party in interest. Bardoon Properties, NV v. Eidolon Corp., 326 S.C. 166, 485 S.E.2d 371, (1997).

The South Carolina Supreme Court has explained:

A party has standing if the party has a personal stake in the subject matter of a lawsuit and is a real party in interest. A real party in interest ... is one who has a real, actual, material or substantial interest in the subject matter of the action, as distinguished from one who has only a nominal, formal, or technical interest in, or connection with, the action.

Government Employee's Ins. Co., Ex parte, 373 S.C. 132, 138, 644 S.E.2d 699, 702 (2007) (citations and internal quotations omitted). With regard to why a plaintiff must be a real party in interest, the

South Carolina Supreme Court held:

The purpose of a real party in interest provision is to assure that a defendant is required only to defend an action brought by a proper party and that such an action need be defended only once. The right of a plaintiff to maintain a suit, while frequently treated as going to the question of jurisdiction, goes, in reality, to the right of the plaintiff to relief rather than to the jurisdiction of the court to afford it.

Bardoon Properties, 326 S.C. at 169. (citations omitted).

In order for Plaintiff to maintain a cause of action for Inadequacy of Sale Price, Plaintiff must be a real party in interest. Several South Carolina cases have dealt with this cause of action and in each case, the person or entity bringing the cause of action had a right to relief and was a real party in interest. A review of those cases indicates that Plaintiff, in our current case, is not a real party in interest.

Eastern Savings Bank, FSB. v. Sanders, 373 S.C. 349, 644 S.E.2d 802 (2007) involved a bank moving to set aside property that was foreclosed upon and sold at a judicial sale. The basis for the motion was that the bank had made a mistake in the bidding process and the property was sold at a much lower price than expected. Id. at 352-353. The bank wanted the sale set aside and the foreclosed property resold, but the court found the price adequate and did not set aside the sale. Id. at 360.

Both Poole v. Jefferson Standard Life Ins. Co., 174 S.C. 150, 177 S.E. 24 (1934) and Investors Savings Bank v. Phelps, 303 S.C. 15, 397 S.E.2d 780 (Ct.App.1990) involved cases where mortgage companies sought to set aside sales of foreclosed properties. Paslay v. Byars, 230 S.C.55, 94 S.E.2d 57 (1956) did not involve a mortgage company attempting to sell foreclosed property, but rather involved a partition of property. The property was sold at a judicial sale, but one interested

buyer was unable to attend the sale due to mechanical problems with his car. Id. at 57-58. The interested buyer, not the owner of the property, sought to set aside the sale.

In all four of these cases, the party seeking to set aside the sale was a real party in interest, and importantly, none of them were the owners of the property being sold. In examining who is a real party in interest, the South Carolina Supreme Court has explained that it is not a question of jurisdiction, but rather whether the Plaintiff has a right to relief. Bardoon Properties, 326 S.C. at 169. The mortgage companies in the above cases sought to set aside the inadequate sales in an effort to have the foreclosed properties resold and recoup more of their investment. In the Palsay case, the party seeking to set aside the sale was a person who intended to bid on the property, but could not do so due to mechanical difficulty with his automobile. He would have benefitted from the resale of the property as he would have been able to bid at the second sale.

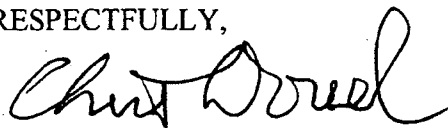
In our current case, Plaintiff, as the owner of the property, is not a real party in interest. The real party in interest to assert a claim for inadequacy of price would be the User Fee Department. Here, Plaintiff has no right to relief. If this court were to set aside the sale, the property would not be returned to Plaintiff, but rather the property will simply be resold to the highest bidder. In essence, Plaintiff does not have the right to force the parties to the previous sale to resell the property.

Further, Plaintiff gives no reason as to why he chose not to attend the first Sheriff's Sale and also gives no reason as to why he did not timely object to the sale of the property. Rather, two years after the sale of the property and after two years of another individual paying all applicable taxes and fees for the property, Plaintiff asks the Court to sit as a court of equity and adjudge the sale price to be inadequate. Defendants submit that Plaintiff has waived this right.

CONCLUSION

Defendants submit that Plaintiff's Motion to Amend should be denied as he is not the real party in interest and therefore lacks standing. In the alternative, Plaintiff has waived his right to claim that the sale was inadequate due to not timely objecting to the sale of the property.

RESPECTFULLY,



CHRISTOPHER T. DORSEY

Senn Legal, LLC

P.O. Box 12279

Charleston, SC 29422

(843) 556-4045

Attorneys for Defendants J. Al Cannon, Jr.,
Charleston County Sheriff's Office,
Charleston County, Charleston County
Revenue Collections Department, and Harry
Long

August 14, 2012

Charleston, South Carolina

2425

IN THE COURT OF COMMON PLEAS
IN THE NINTH JUDICIAL CIRCUIT
CASE NO. 2011CP10-1084

FILED
2012 AUG 15 PM 12:47
JULIE J. ARMSTRONG
CLERK OF COURT

Plaintiff herewith submits further opposition to the county defendants' motion to dismiss the First, Second and Third Counts of the Second Amended Complaint as set forth below. The county defendants 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." Plaintiff has previously argued that as a matter of statutory interpretation, this statute does not provide an independent basis for jurisdiction by the Magistrate's Court. However even if the cited provision can be interpreted as a source of jurisdiction, this is qualified by the following provision at the end of the cited paragraph:

1

R426

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

As plaintiff previously demonstrated, 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). In other words, according to the very section upon which the county defendants 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 county defendants' argument over the meaning of Section 4-9-30(14) is fatally flawed.

Furthermore, 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.

The interpretation that plaintiff urges here was followed by the Supreme Court in Terpin v. Darlington County Council, 286 S.C. 112,114, 332 S.E.2d 771, 773 (S.C. 1985) .

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

The county defendants' argument is also invalid because there is no Charleston County ordinance carrying out the alleged grant of jurisdiction on user fee enforcement suits in Magistrate's Court. The county's argument is based upon a faulty premise: that the general enabling statute Section 4-9-30(14) may confer jurisdiction without any action by the county. That statute plainly deals with enabling counties to enact ordinances ; it cannot create jurisdiction without any county action.

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 for the Court to interpret the ordinance on which the county relies to collect its user fees as overriding the specific provision of the ordinance actually enacted.

In summary, Section 4-9-30(14) does not allow any county to adopt an ordinance which contradicts a general law. As demonstrated above both the Magistrate's Court Law S.C. Code Ann. Section 22-3-10 and the Law governing Solid Waste Collection and Disposal by Counties S. C. Code Ann. Section 44-55-1210 et seq. specifically deal with fine and penalties. Neither of them allows an action to collect any user fee, only to enforce a fine or penalty. The provisions of Section 4-9-30(14) deals with violations of ordinances not suits to collect fees . The obvious intention of this statute is that fines and penalties were to be enforced in Magistrate's Court. That is the intent behind the use of the word "violation". That is the language in Ordinance Section 10-70: "violation. " By interpreting Section 4-9-30(14) as pertaining to suits for fines and penalties, the Court can harmonize the provisions with these other general law. However, the country 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 ". Charleston County did not sue Roosevelt Simmons 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. This Court should not expand its authority about what the Legislature has expressly granted.

CONCLUSION

For the additional reasons set forth above, plaintiff respectfully requests that the Court deny the county defendants' motions for summary judgment as to the First, Second and Third Counts.

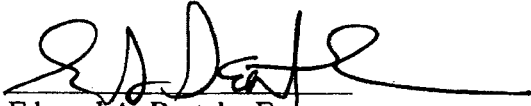
Respectfully submitted,

Edward A. Bertele, Esq.
1812 Pierce Street
Charleston, SC 29492
(843) 471-2082
Attorney for plaintiff, Roosevelt Simmons
By: 

Dated: August 14, 2012
Charleston, SC

CERTIFICATION OF SERVICE

I hereby certify that a true copy of the within opposition to county defendants motion for summary judgment and Appendix was personally served upon the defendants' attorneys, Christopher Dorsel, Esq. and Wendy Keefer, Esq. by regular mail postage prepaid at her last known mailing address.


Edward A. Bertele, Esq.

August 14, 2012

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
IN THE NINTH JUDICIAL CIRCUIT
CASE NO. 2011CP10-1084

ROOSEVELT SIMMONS)
Plaintiff)
Vs.)
MASE and COMPANY, LLC,)
J. AL CANNON, JR.,)
CHARLESTON COUNTY)
SHERIFF'S DEPARTMENT,)
CHARLESTON COUNTY,)
CHARLESTON COUNTY)
REVENUE COLLECTIONS)
DEPARTMENT and)
HARRY LONG)
Defendants)

**PLAINTIFF'S SUPPLEMENTAL OPPOSITION
TO MOTIONS OF DEFENDANTS COUNTY
OF CHARLESTON, SHERIFF'S DEPARTMENT
AND HARRY LONG FOR SUMMARY JUDGMENT**

Plaintiff herewith supplements his opposition to county defendants' motions for summary judgment based upon the following circumstances. Plaintiff previously served his opposition to the county defendants' summary judgment motion which was scheduled to be heard on August 6th. The hearing was adjourned to August 17th at the county's request. In the interim, defendant Sheriff's Department served additional documents in partial response to plaintiff's pending motion to compel discovery. These documents include: the full text of the Sheriff's Department Policy and Procedure Manual; the unredacted portion of the personnel file of defendant Harry Long which the Sheriff's Department claimed was unavailable; and a booking report for a criminal defendant that defendant Harry Long was disciplined for not transporting to court. The relevance of these documents to the pending motions is discussed below. However, the county defendants did not fully comply with the relief requested in the

motion to compel. Therefore, plaintiff supplements his opposition to the county defendants' summary judgment motion based upon the additional disclosure of relevant information and because the outstanding discovery requests were not all answered. These are more fully discussed below.

SUPPLEMENTAL FACTS RELEVANT TO THESE MOTIONS

At the time plaintiff served his opposition to the county defendants' summary judgment motion, plaintiff had an outstanding discovery request for a portion of defendant Harry Long's personnel file concerning his suspension in 2004, which had been redacted. The Sheriff's Department previously claimed that the unredacted file was not available, contrary to its own policies that require such reports to be a part of the permanent file. However, in response to plaintiff's motion to compel discovery, the Sheriff's Department produced the unredacted portion of his file. The unredacted portion reveals the details that led to Deputy Long's suspension in April 2004, as follows. At that time, Deputy Long was a senior detective in the Criminal Investigative Division. His partner, Detective Marana asked him what type of search to execute after a home invasion shooting. Deputy Long ignored the "well known standing practice" to secure a search warrant and "took a shortcut" and advised his partner to conduct a consent search. As a result, thousands of dollars and other items were not seized and lost as evidence in the relating shooting. Sheriff's Department Document Bates No. 2034-2035, Exhibit A. This disciplinary report also refers to an incident two months earlier in which defendant Long's failure to serve an arrest warrant on time led to the "getaway of a highly sought after subject wanted for multiple burglaries". Id. at Bates No. 2035. However, defendant Long's personnel file does not contain the separate disciplinary action taken against him (A Letter of Instruction) as required by the Sheriff's Department Policy and Procedure Manual, 3-08

Disciplinary Procedures, Section III L. County Document Bates No. 1300. This second omission of pertinent information about prior disciplinary infractions by Deputy Long has necessitated a further discovery request including the entire file from the Office of Professional Standards concerning Deputy Long. See Exhibit B.

Plaintiff had also requested an arrest record for a person named Karlton Hillyard whom Deputy Long had arrested but the Sheriff's Department claimed this was a public record and would not produce it. In response to plaintiff's motion to compel, the Sheriff's Department produced a copy of a booking report (not an arrest report) which was only partially legible. The booking report indicates that the suspect was an 18 year old black male. The suspect was booked for lack of a driver's license and proof of insurance and driving with an expired license plate. The circumstances surrounding the arrest are not legible, including the reason why the suspect was taken into custody for simple motor vehicle violations without some other criminal activity being present such as possession of a stolen vehicle or a DUI. As established in Deputy Long's personnel file, he was reprimanded for failing to transport the suspect to court on the motor vehicle violations, resulting in the court issuing three contempt citations against the suspect.

Finally, the county defendants have not produced other files requested in discovery involving Deputy Long's sale of real estate or responded to the request for information concerning the redaction of Deputy Long's file. These documents are the subject of plaintiff's pending motion to compel discovery.

In summary, the Sheriff's Department produced documents that contained information relevant to the pending motions but which are missing information. Plaintiff has requested the Sheriff's Department to address these but no response has been given. Plaintiff contends that the information recently provided further supports his opposition to summary judgment for the

reasons set forth below. In addition, the county defendants have not responded to other discovery requests for files handled by Deputy Long involving the levy upon real estate for a user fee judgment and the reasons for the redaction in Deputy Long's file. Therefore, plaintiff continues his opposition to summary judgment because discovery is incomplete.

ARGUMENT

I. SUMMARY JUDGMENT SHOULD BE DENIED BECAUSE THE MATERIAL ISSUES OF FACT ARE IN DISPUTE

Plaintiff contends that the additional documents provided by the county defendants support his contention that there are material issues of fact in dispute regarding the Fourth and Fifth Counts. The Fourth Count alleges that the County violated plaintiff's right to equal protection when Deputy Long's improperly levied on real property due to malice and ill will toward the plaintiff. Plaintiff sought discovery of incidents involving Deputy Long where racial animus may have occurred but the county has not fully responded. The information recently provided indicates that Deputy Long delivered an 18 year old black male into custody for minor motor vehicle violations. The documentation of the arrest has not been provided. That information is relevant to the issue of whether Deputy Long acted out of racial animus based upon what occurred during the routine traffic stop. The Letter of Reprimand issued to Deputy Long does not contain any explanation by Deputy Long of why he "forgot" to take Hillyard to court. As a result, plaintiff has requested all the documents maintained by the Sheriff's Department Office of Professional Standards concerning Deputy Long. See Exhibit B. The county defendants have not responded to other discovery requests concerning files handled by Deputy Long while he was enforcing civil judgments. These also may indicate evidence of a racial animus. Therefore, the relevant material facts as to Deputy Long's motivation and racial

or other animus are in dispute. At this stage without complete disclosure, the Court must consider that the inferences support the plaintiff's contention of animus and deny summary judgment.

The Fifth Count alleges that the Sheriff's Department wrongfully retained Deputy Long who acted out of malice and ill will toward Simmons in enforcing a judgment against him. Plaintiff sought discovery involving the suspension of Deputy Long in 2004 that was redacted from his personnel file. The Sheriff's Department finally produced the unredacted version, which revealed another disciplinary infraction which was not previously disclosed. For this reason as well, plaintiff requested all the documents maintained by the Sheriff's Department Office of Professional Standards concerning Deputy Long. See Exhibit B.

As previously set forth in plaintiff's opposition, Deputy Long's history of disciplinary infractions creates a prima facie case of wrongful retention as alleged in the Fifth Count and which requires that the matter be submitted to the jury under a "reasonableness" standard. See Doe v. ATC, Inc., 367 S.C. 199, 624 S.E.2d 447 (Ct. App. 2005). Simmons contends that all of the prior disciplinary infractions are evidential that Long had a problem with following procedure; and that the Sheriff's Department had notice of his propensities to ignore policy when it was convenient for him to do so. Deputy Long's file discloses that he failed to follow up on the status of a black male he had put in custody; left his post to go home to walk his dog; ignored standard policy by ordering a consent search; failed to serve a search warrant on time allowing a suspect to escape; made a warrantless search without probable cause; yelled at supervisors after being removed from an interview of a suspect; failed to respond to a call; failed to document a crime victim interview; and made an unauthorized appearance at a search. All of the disciplinary violations are breaches of department procedure. Simmons contends that Deputy Long violated

the South Carolina Code by improperly levying on his real property when there was adequate personal property in plain view. Long admitted during his deposition that some of Simmons personal property should have been investigated further but he didn't do so. Under the standard of "reasonableness", Simmons contends that there is a question of fact as to whether the Sheriff's Department wrongfully retained Deputy Long.

Plaintiff further contends that the Sheriff's Department Policy and Procedure Manual, 3-08, Disciplinary Procedures establishes a relevant standard for determining whether Deputy Long was wrongfully retained and that the Sheriff's Department violated its own procedures. The Sheriff's Department Policy and Procedure Manual, 3-08, Section III, B(3) 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"

The disciplinary actions taken in response to Long's infractions violate the Sheriff's Department Procedure of gradually increasing actions for subsequent misconduct. The following chronological list of infractions demonstrates this contradiction:

1998: Letter of Reprimand for failure to transport suspect he arrested to court hearing causing suspect to be issued 3 contempt citations

1999: Letter of Suspension (3 days) for unauthorized absence from duty (to walk dog)

1999: Letter of Reprimand for unsafe operation of county vehicle causing accident

2003: Letter of Reprimand for conducting warrantless search without probable cause

which also references five (5) separate instances of violations of Department policy or decorum for which no disciplinary action was taken.

2004: Letter of Instruction for failure to timely serve an arrest warrant allowing suspect to

escape.

2004: Letter of Suspension (1 day) for violating standing policy on obtaining search warrants in home invasion shooting incidents resulting in loss of money and other evidence.

In each instance where disciplinary action was taken, Deputy Long violated fundamental responsibilities of an employee of the Sheriff's Department.

The disciplinary action taken against him is clearly not "progressive". The 2004 Letter of Suspension was less severe than the 1999 Letter of Suspension even though it was for a more severe infraction. These incidents establish a clear pattern of behavior by an employee that cannot conform to departmental policies. Each incident was punished in isolation from all of the others. There is no reference in any of the disciplinary reports (apart from the 2003 Letter of Reprimand) that the earlier infractions were taken into account. There is nothing in Disciplinary Procedures 3-08 which allows the superior to ignore earlier disciplinary violations. Beginning in February 2012, the Sheriff's Department changed its policies so ~~that written reprimands more~~ than 12 months old would **not** be considered when **applying progressive discipline**. County Document Production Bates No. 1295. However, all of the disciplinary actions taken against Deputy Long occurred before the new policy went into effect. Therefore, the evidence supports Simmons contention that the Sheriff's Department wrongfully retained defendant Long under its then existing standards.

In summary, whether the wrongful retention is determined based upon a "reasonableness" standard or under the Sheriff's Department own Procedure, this issue represents a question of material fact to be submitted to the jury.

Finally, as previously set forth in plaintiff's opposition, the county defendants failed to present any evidence to support the application of the discretionary function immunity under the

Tort Claims Act as it relates to retaining Deputy Long. See Wooten ex rel. Wooten v. South Carolina Dep't of Transp., 333 S.C. 464, 511 S.E.2d 355 (1999). The disciplinary reports including the latest disclosure of previously redacted material does not establish that the Sheriff's Department exercised any discretion by not imposing progressive discipline on Deputy Long or why it decided to retain him as an employee in 2004 given his history of disciplinary infractions. Therefore, summary judgment must be denied because the county defendants have failed to establish the application of any tort immunity for their actions under the Fifth Count and because the facts support a prima facie case of negligence by the Sheriff's Department.

II. COUNTY DEFENDANTS HAVE REFUSED TO TO PROVIDE COMPLETE DISCOVERY

Plaintiff contends that the lack of complete discovery of other pertinent files should prevent this Court from granting summary judgment until the county has provided full discovery. The materials requested include the full records of other files handles by Deputy Long involving the sale of real estate for user fees, as occurred to Simmons; the entire file from the Office of Professional Standards concerning Deputy Long; the missing Letter of Instruction; and the documents indicating the reasons for the redaction from the personnel file earlier. All of these are relevant to the pending motion and the county has not opposed these requests. As discussed above, the information is relevant to the issue of racial animus in other case handles by Deputy Long and to a complete history of his disciplinary infractions, about which the Sheriff's Department has not been forthcoming. It misrepresented that the unredacted portion of his personnel file were unavailable and refused to produce other material for an invalid reason.

Plaintiff urges that this Court should consider the behavior of these county defendants in obstructing discovery as a sufficient reason to deny their motion by itself.

CONCLUSION

For the additional reasons set forth above, plaintiff respectfully requests that the Court deny the county defendants' motions for summary judgment.

Respectfully submitted,

Edward A. Bertele, Esq.
1812 Pierce Street
Charleston, SC 29492
(843) 471-2082
Attorney for plaintiff, Roosevelt Simmons`
By: _____

Dated: August 14, 2012
Charleston, SC

CERTIFICATION OF SERVICE

I hereby certify that a true copy of the within opposition to county defendants motion for summary judgment and Appendix was personally served upon the defendants' attorneys, Christopher Dorsel, Esq. and Wendy Keefer, Esq. by regular mail postage prepaid at her last known mailing address.

Edward A. Bertele, Esq.

August 14, 2012

APPENDIX

SIMMONS V MASE & COMPANY 2011CP10-1084

EXHIBITS TO PLAINTIFF'S SUPPLEMENT TO OPPOSITION
TO SUMMARY JUDGMENT

- A. Harry Long Personnel File (unredacted portion) (Under seal)
- B. Letter dated August 13, 2012 to Chris Dorsel, Esq.

CONFIDENTIAL MATERIAL

J. Al Cannon, Jr., Esq.
Sheriff, Charleston County



3505 Pinehaven Drive
Charleston Heights, SC 29405-7789

MEMORANDUM:

COPY

TO: Detective H. Long

THRU: Lieutenant T. Huey, Captain ^{T.H.} *Jack* Kephart, Major G. Van Horn *Bry*

FROM: Sgt. J.L. Scarborough *J.L.*

DATE: April 13, 2004

SUBJ: Letter of Suspension

On March 18, 2004, a complaint was made by Detective Marana in reference to you giving her bad direction during the course of a "Home Invasion" that occurred in the McClellanville area of Charleston County. The complaint was based on the fact that Detective Marana asked for advice from you, a senior detective, in reference to the residence in question being a drug house and should a consent search or search warrant be executed. Detective Marana stated that she explained "in detail" the circumstances and you advised her to do a consent search instead of a search warrant. As a result of the consent search, several thousand dollars, a computer and other evidence were not seized due to the consent only being for latent fingerprints and photographs. When being asked about this by Detective Marana the following morning, you denied giving such bad advice. At that point Detective Marana filed a complaint in reference to your truthfulness and requested for a change of partners.

On March 18, 2004, you and Detective Marana were issued internal Administration Investigation Sheets along with "Truthfulness" advisements. You both signed the documents and gave written statements to what you remember happening.

When Lieutenant Huey and myself spoke to you, you stated to us that you may have given Detective Marana the advice to do a consent search but you could not recall because you were at the East Cooper Hospital and there was a lot of back ground noise. During the meeting several other personnel issues in reference to your conduct were addressed by the Lieutenant and myself and the final outcome was that you stated you felt it was time for a change due to being in C.I.D. for five years now. At that point you stated that you were putting in for a position in Therapeutic transport.

0755-2034

TEL: (843) 554-4700



CONFIDENTIAL

FAX: (843) 554-9744

2441

CONFIDENTIAL MATERIAL

Letter of Suspension
Detective H. Long
April 13th 2004
Page 2

Having reviewed your actions, I find you have violated Charleston County Sheriffs Office policy and procedure, 1-09 Agency Rules and Regulations III - 10, Unsatisfactory Performance, which states, "failure to conform to work standards established for the employee's rank, grade, or position; failure to take appropriate action on the occasion of a crime...." and "repeated poor evaluations or a written record of infractions of rules, regulations, directives, or orders of the agency.

Due to the facts of this investigation, I find you did not listen to the facts presented on the night in question. Clearly, you should have made every effort to review the facts presented to you by Detective Marana before you gave her bad advice. This was a very serious call-out where a victim had been shot. You did not treat the situation appropriately when advising Detective Marana to conduct a consent search. It has always been a well-known standing practice for members of the Detective Office to secure search warrants for major incidents. A Home Invasion/Shooting certainly qualifies as a major incident. Instead, you took a shortcut by opting for the consent search. In addition, you failed to keep the on-call supervisor, Sergeant Phillips, notified of the situation.

Furthermore, on June 12, 2003, you received a written reprimand for "Unsatisfactory Performance" for the way you conducted a multi-jurisdictional arrest /search warrant. Additionally, on February 4, 2004, you received a Letter of Instruction for being 25 minutes late to an arrest warrant service which directly resulted in the getaway of a highly sought after subject wanted for multiple burglaries in the Hollywood area.

After carefully reviewing the facts and circumstances, and in keeping with the policy of progressive discipline, I find it in the best interest of the Criminal Investigations Division and the Sheriff's Office that you are suspended from duty, without pay, for a period of one (1) day. This Letter of Suspension will be permanently documented in your personnel file and in the Office of Professional Standards.

During this period of suspension, you will relinquish your service weapon, Sheriff's Office cruiser, badge and law enforcement identification. Additionally, you will have no authority to represent the Sheriff's Office or conduct Sheriff's Office business. During this suspension you should seriously reconsider your decision that day and strive to make better decisions in the future.

CONFIDENTIAL MATERIAL

Letter of Suspension
Detective H. Long
April 13th 2004
Page 3

Since a Letter of Suspension is a component of the agency's disciplinary process and is permanently documented in the employee's personnel file, in accordance with Procedure 3-07, Grievance Procedures, you have five working days to appeal this action to me if you should desire.

Acknowledgment of Receipt

I acknowledge receipt and understanding of this Letter of Suspension this 19th day of April, 2004

Recipient:

Hong Long

Witness:

Sgt. J. A. [Signature]

**EDWARD A. BERTELE, ESQ.
ATTORNEY AT LAW
1812 PIERCE STREET
CHARLESTON, SC 29492
Email: ebertele@msn.com**

Member: SC, NJ & NY bars

Ph: (843) 471-2082
Fax: (843) 471-2082

August 13, 2012

VIA TELEFAX

Christopher T. Dorsel, Esq.
Senn Law Firm, LLC
PO Box 12279
Charleston, SC 29422

Re: Simmons v. Mase and Co, LLC. et al
2011-CP10-1084

Dear Chris:

I received the unredacted portion of Deputy Long's personnel file on Friday. In addition to the details of the incident on March 18, 2004, it refers to an incident on February 4, 2004. This incident is not detailed in any contemporaneous record of discipline which you have produced as required by Policy and Procedure Manual, 3-08 Disciplinary Procedures, Section L. Please provide the document containing the details of this disciplinary incident. This is the second case of an omission of a required record. To insure that I have the entire history of disciplinary infractions by Deputy Long, I also request that the entire file on Deputy Long maintained by the Sheriff's Department Office of Professional Standards consisting of all reports and supporting documentation, see Disciplinary Procedure 3-08 Section L, be provided.

Finally, in light of previous conflicting explanations regarding the unavailability of documents, I again request that you produce all documents pertaining to the redaction indicating when and by whom it was authorized and performed in violation of department policy and identify who carried it out on April 19, 2004. Thank you for your previous cooperation.

Cordially,

Edward A. Bertele, Esq.

CC: Wendy Keefer, Esq.

IN THE COURT OF COMMON PLEAS
IN THE NINTH JUDICIAL CIRCUIT
CASE NO. 2011CP10-1084

**PLAINTIFF'S OPPOSITION TO
SUPPLEMENTAL MEMORANDUM OF
DEFENDANTS COUNTY OF CHARLESTON,
SHERIFF'S DEPARTMENT AND HARRY LONG
FOR SUMMARY JUDGMENT AND REQUEST
FOR LEAVE TO FURTHER RESPOND**

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2445

This case was originally filed in Circuit Court, and then removed by the county defendants to the United States District Court for South Carolina. Plaintiff subsequently moved to dismiss the case due to lack of subject matter jurisdiction and Judge Richard Gergel, U.S.D.C. ordered that the case be remanded to Circuit Court in February 2012. After the case was remanded, the parties agreed to a scheduling order that provided for discovery to be concluded by July 1 and dispositive motions to be filed by July 15th. Shortly after the Consent Order was filed, the County defendants served 2 Notices of Motion for summary judgment without setting forth the basis for the motions with particularity as required by R. 7(b) (1)SCRCP. The motions were scheduled for May 1st. When the county defendants failed to provide a basis for either of the motions, plaintiff objected but county defendants' counsel refused to produce any substantive moving papers prior to the hearing date. County defendants counsel subsequently agreed to adjourn the motions and they were rescheduled for August 6th. In the interim, plaintiff served a motion for partial summary judgment as to the First, Second and Third Counts of the Second Amended Complaint all of which relate to the lack of subject matter jurisdiction by the Magistrate's Court over suits to collect user fees. When the county defendants failed to provide discovery by the end date, plaintiff also filed a motion to compel discovery. That motion is also pending before this Court.

On July 26th, the county defendants served a 16 page Memorandum in support of their 2 summary judgment motions. The Memorandum sought dismissal of the First, Second and Third Counts on the basis that the Magistrate's Court did have subject matter jurisdiction over suits to collect user fees under the language of the statute enabling counties to adopt public welfare ordinances, S.C. Code Ann. Section 4-9-30(14). (Memorandum at pages 4-9). That was the only basis put forth to support dismissal of those counts. The Memorandum sought dismissal of the

Fifth Count for wrongful retention of defendant Harry Long on the basis that the Sheriff's Department was immune from suit under various exceptions under the Tort Claims Act relating to defendant Long's conduct of his duties (Memorandum at pages 11-13); that there was no evidence of negligence in retaining defendant Long and that the Sheriff's Department was immune from suit under the "public duty" rule. (Memorandum at pages 14-15). Plaintiff filed his opposition on August 2nd, pointing out that the county defendant had not addressed any other basis to seek dismissal in the first three counts relating to the Magistrate's Court jurisdiction or the Fifth Count relating to wrongful retention and should be barred from raising other issues prior to the hearing. The hearing was again adjourned due to the county defendants counsel's concern about a pending trial conflicting with the hearing and rescheduled for August 17th.

On August 14th, counsel for the county defendants served a 10 page Supplemental Memorandum in support of the summary judgment motions. The first six pages contain argument that this Court lacks jurisdiction because plaintiff failed to appeal the Magistrate's Court judgment and is procedurally barred and that the various user fee judgments have become the "law of the case". Plaintiff contends that these theories are inapplicable to a subsequent declaratory judgment action brought to vacate a judgment under R 60(b). See below. The Supplemental Memorandum also contains new arguments to support dismissal of the Fifth Count (wrongful retention) omitted from its initial Memorandum. In particular, the county defendants assert that the plaintiff's damages were not "proximately caused" by the retention of Long. Supplemental memorandum at pages 6-9. The case cited by the county defendants does not support their argument. See below. Plaintiff's counsel objected to the consideration of this document and asked counsel for the county to consent to his filing a post hearing response but he refused.

The county defendants' counsel continues to violate R 7(b) (1) SCRCrP by filing a Supplemental Memorandum to a Memorandum filed on July 26th. The rule requires that any motion state the basis for relief with 'particularity'. Counsel for the county defendants acknowledged that his "Notices of motions" filed in April did not comply and thereafter served a Memorandum with a statement of facts and legal argument within the 10 day requirement of the Rule. Plaintiff's counsel served a responsive Opposition to all of the points raised. Now counsel for the county defendants is again violating the rule by serving a document which raised new matter and does not comply with the 10 day requirement.

Plaintiff respectfully request that the Court consider this Opposition and grant him additional time within which to further respond to this document. As set forth in the Affidavit of Edward A. Bertele, counsel need additional time to further respond due to the nature of the new matter raised. Plaintiff believes that there are meritorious responses to the arguments which the county defendants have raised for the first time in their Supplemental. Memorandum. Their new arguments as to the lack of Magistrate's Court jurisdiction are that the plaintiff failed to appeal the earlier Magistrate's Court judgments and is barred by the law of the case principle from bringing this case. As to the first argument, they rely upon Town of Hilton Head Island v. Godwin, 370 S.C. 221, 634 S.E.2d 59 (Ct. App. 2006) but this case dealt with Rule 29(a), SCRCr. P which governs post trial motions from a conviction in Magistrate's Court. The Court of Appeals found that the appeal to the Circuit Court was barred by this rule. This case is not an appeal but an independent action pursuant to R 60(b). Godwin is entirely distinguishable for this and other reasons. As to the application of the "law of the case" principle, they rely substantially on Judy v. Martin, 381 S.C. 455, 674 S.E.2d 151 (S.C. 2009). However, as the Supreme Court described the doctrine, that rule does not apply here: "Under the law-of-the-case doctrine, a

party is precluded from relitigating, after an appeal, matters that were either not raised on appeal, but should have been, or raised on appeal, but expressly rejected by the appellate court.” There was no appeal from the Magistrate’s Court judgments because plaintiff never appeared or had notice of them, a fact to which the county does not dispute. The issue of subject matter jurisdiction is complex. Plaintiff should have the opportunity to present this Court with a proper statement of principles applicable to the facts and not have to respond to a last minute citations to cases which don’t apply.

With respect to the new argument for dismissal of the wrongful retention claim (Fifth Count), the county defendants argue that there was no proximate cause between their retention of defendant Long and his conduct toward plaintiff. They rely upon Kase v. Ebert, 392 S.C. 57, 707 S.E.2d 456, 459 (Ct. App. 2011). In that case the Court of Appeals affirmed dismissal of the wrongful retention claim because there was “no evidence that Ebert’s ~~single~~ assault conviction, which took place more than twenty years before he was hired by DMX, was reason for DMX to foresee that employing Ebert would create an undue risk of harm to the public or that DMX’s decision to hire him in view of this conviction fell below any acceptable hiring standard.” (emphasis added). In this case, as outlined in plaintiff’s Supplemental Memorandum, there are six disciplinary infractions (one of which was not produced in discovery) that the Sheriff’s Department had notice of and which indicate defendant Long’s propensity to violate procedure over a period of six years. Under the Department’s policy of progressive discipline, his superiors should have taken note of all of these. If they had they would dismissed him before he came in contact with the plaintiff, a few years later. The issue of proximate while a matter of law is fact sensitive and plaintiff should be allowed to develop all of the facts applicable to this new argument.

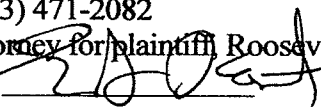
In summary, county defendants have violated R 7(b) (1) by serving a Supplemental Memorandum. Their intent is clear - to gain advantage by presenting arguments that should have been raised when they filed their original memorandum and which require a response. Plaintiff would be prejudiced if he is not allowed a further response.

CONCLUSION

For the additional reasons set forth above, plaintiff respectfully requests that the Court grant plaintiff leave to file a post hearing further response to the Supplemental Memorandum dated August 14th.

Respectfully submitted,

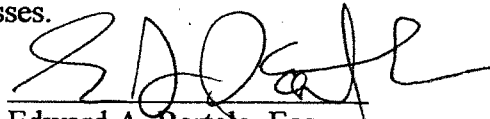
Edward A. Bertele, Esq.
1812 Pierce Street
Charleston, SC 29492
(843) 471-2082

Attorney for plaintiff Roosevelt Simmons
By: 

Dated: August 16, 2012
Charleston, SC

CERTIFICATION OF SERVICE

I hereby certify that a true copy of the within Opposition to county defendants Supplemental Memorandum dated August 14th in support of summary judgment was served upon the defendants' attorneys, Christopher Dorsel, Esq. and Wendy Keefer, Esq. by regular mail postage prepaid at their last known mailing addresses.


Edward A. Bertele, Esq.

August 16, 2012

IN THE COURT OF COMMON PLEAS
IN THE NINTH JUDICIAL CIRCUIT
CASE NO. 2011CP10-1084

**AFFIDAVIT OF
EDWARD A. BERTELE**

1. I am the attorney for plaintiff in this action, a member of the bar of this state and have personal knowledge of the facts herein.
2. I submit this affidavit in support of plaintiff's request for leave to file a post hearing opposition to the county defendants' Supplemental Memorandum dated August 14th in support of summary judgment.
3. The reason for this request is the county defendants counsel's failure to abide by R 7(b) (1), SCRCP in connection with two pending motions for summary judgment. The Notices of these motions were originally filed in April with nothing contained in them but the request for relief. The motions were scheduled for May 1. Prior to the date for serving opposition, I objected because they did not contain any reason for the relief as required by R 7(b) (1). Counsel for the county defendants responded that they didn't have to contain any reasons but that he would

submit a memorandum at the hearing. I objected to this also and requested an adjournment.

Counsel initially refused to consent but a few days before the return date, he agreed to an adjournment. The motions were later scheduled for August 6th together with motions for partial summary judgment and to compel discovery which I filed in the interim.

4. On July 26th, counsel for the county defendants filed his Memorandum in support of summary judgment. I served my opposition in which I addressed the issues raised by the county defendants as to each of the counts of the Second Amended Complaint. I also noted that the county defendants had failed to address certain issues in their motion and that I would oppose any attempt by them to add new arguments prior to the hearing.

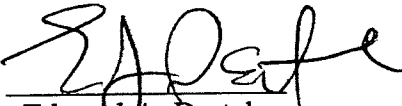
5. A few days before the hearing, counsel for the county defendants asked to adjourn the hearing because he was concerned that a pending trial might interfere and in order to address the pending discovery issues. We agreed to adjourn the motions and with the help of the Motions Coordinator, they were rescheduled to August 17th.

6. On August 9th, counsel for county defendants served discovery responses that supported plaintiff's position as to the wrongful retention. I prepared a Supplemental Opposition and served it on the 14th. However, that same day, counsel for the county defendants served a Supplemental Memorandum containing new arguments in support of dismissal of the First, Second, Third and Fifth Counts. On August 15th, I faxed a letter of objection and requested that he consent to plaintiff filing a post hearing response. He refused to agree. He also served additional discovery responses but I am not able to review these with sufficient time to incorporate them into an opposition to summary judgment.

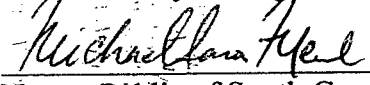
7. Plaintiff would be prejudiced by allowing the county defendants to raise new issues without having an adequate time to respond. In their Supplemental Memorandum, the county defendants

have asserted that this Court itself does not have jurisdiction and devoted five pages of their Supplemental Memorandum to this issue. I believe that their arguments are invalid under existing case law but require further time to prepare an adequate response. Similarly, the county defendants devoted 4 pages of their Supplemental Memorandum to asserting that they are not liable for wrongful retention of defendant Long because of a lack of proximate cause. Previously, they asserted that there were no facts to support the wrongful retention claim. Since they have raised a legal issue for the first time, I wish to address this by reference to existing case law and need time to prepare these arguments.

8. Because the county defendants have repeatedly violated R 7(b) (1), the Court should not penalize the plaintiff. Their repeated late filing of substantive motion papers is an effort to prevent plaintiff from having time to respond and should not be permitted. The county defendants have not acted in good faith given the plaintiff's previous objections. In addition, the county defendants have prolonged discovery by failing to respond to valid requests, not making objections or making spurious objections and then providing some of the documents but not in a timely manner so as to allow me to use them in opposing their motions. These actions are described in plaintiff's motion to compel discovery which is incorporated by reference. The foregoing demonstrates a pattern of abuse of the Rules and requires sanctions as requested in plaintiff's motion to compel. It also justifies this Court in granting plaintiff leave to file a post hearing opposition to the county defendants' latest filing.


Edward A. Bertele

Sworn and subscribed before me
This 16th day of August 2012


Notary Public of South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

ROOSEVELT SIMMONS,

Plaintiff,

v.

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

Defendants,

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO.: 2012-CP-10-1084

**AMENDED SUPPLEMENTAL
MEMORANDUM IN SUPPORT OF
DEFENDANTS J. AL CANNON, JR.,
CHARLESTON COUNTY SHERIFF'S
OFFICE, CHARLESTON COUNTY,
CHARLESTON COUNTY REVENUE
COLLECTIONS DEPARTMENT, and
HARRY LONG'S MOTION FOR
SUMMARY JUDGMENT
(FILED UNDER SEAL)**

Defendants, J. AL CANNON, JR., CHARLESTON COUNTY SHERIFF'S OFFICE,
CHARLESTON COUNTY, CHARLESTON COUNTY REVENUE COLLECTIONS
DEPARTMENT, and HARRY LONG ("Defendants") file this Supplemental Memorandum in
Support of their Motion for Summary Judgment.

ARGUMENT

- I. **The Circuit Court does not have jurisdiction to overturn judgments against Plaintiff from the Charleston County Magistrates Court because Plaintiff has never filed any post-trial motions nor has he filed an appeal of the Magistrates Court judgments against him.**

Plaintiff cannot collaterally attack Magistrates Court judgments in Circuit Court because Plaintiff failed to file any post-trial motions or appeals after notice of the judgments. Plaintiff is asking the Circuit Court to overturn multiple judgments from the Charleston County Magistrates Court. Plaintiff seeks to do this not through an appeal of the Magistrates Court judgments, but rather through a collateral lawsuit filed more than ten years after some of the judgments were rendered.

This is improper under South Carolina statute, court rules and case law.

South Carolina Code Ann. § 22-3-1000 provides the time for post-trial motions and appeals from civil and criminal judgments in Magistrates Courts.

No motion for a new trial may be heard unless made within five days from the rendering of the judgment. The right of appeal from the judgment exists for thirty days after the rendering of the judgment.

The South Carolina Magistrates Court Rules conform to the statute. Magistrates Court Rule 19 states that:

The motion for a new trial shall be made in writing and filed with the court no later than five (5) days after notice of the judgment. The court shall notify all opposing parties that the motion has been filed and shall provide those parties a copy of the motion in a manner provided for in Rule 8.

Rule 19(b), SCRMC. Rule 18 of the SCRMC governs appeals from Magistrates Courts:

All appeals of judgments rendered by the magistrates court shall be to the circuit court of the county where the judgment was rendered. Within thirty (30) days after delivery of written notice of judgment to the parties or their attorneys, a party wishing to appeal shall serve on the respondent and file a notice of appeal containing a statement of the grounds for appeal with the magistrate rendering the judgment and with the Circuit Court of the County where the judgment was rendered.

Rule 18(a), SCRMC.

In Town of Hilton Head Island v. Godwin, 370 S.C. 221, 634 S.E.2d 59 (Ct.App.2006), the South Carolina Court of Appeals addressed the necessity to file timely post-trial motions once notice of a judgment is received. In this case, Godwin was issued a ticket for criminal domestic violence ("CDV") in July 1995. Id. at 222. Godwin failed to appear for a trial on the CDV charges that was set for August 8, 1995, and in his absence, he was convicted and the court ordered him to pay a fine of \$304. Id. On September 29, 1995, Godwin was arrested for three outstanding warrants, one being

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the CDV charge. Id. Either Godwin or someone on his behalf paid the \$304 fine on September 29, 1995, in order to have Godwin released from jail. Id.

Approximately eight years later, on August 11, 2003, Godwin applied for a gun permit; however, he was denied the permit due to the CDV conviction. Id. at 223. Instead of filing any motions with the Municipal Court or an appeal with the Circuit Court, Godwin waited seven months to send a letter to the Municipal Court, which was "treated as a motion to set aside the conviction and/or a motion for a new trial." Id. The municipal court denied the motion and Godwin appealed to the Circuit Court. Id. Godwin argued to the Circuit Court that due to clerical errors or mistakes made by the Municipal Court, he did not receive notice until August 11, 2003. The Circuit Court ordered a new trial. Id.

The Court of Appeals vacated the Circuit Court judgment and held that the Circuit Court lacked jurisdiction to hear Godwin's motion. Id. at 224. The basis for this holding was that Godwin did not file a timely post-trial motion or appeal once he received notice of the conviction. Id. The Court held that "[a] party who fails to timely appeal or take any other timely action necessary to correct an error is procedurally barred from contesting the validity of the conviction." Id. Importantly, the court held that while there was evidence to support the fact that Godwin had received notice of the conviction in 1995 when he paid the \$304 fine, there was certainty that he had notice of the conviction on August 11, 2003. Id. at 225. Because Godwin waited 7 months to take any action on the conviction, the Circuit Court was without jurisdiction to overturn Godwin's conviction. Id.

In Godwin, the Court of Appeals relied on Brewer v. South Carolina Highway Department, 261 S.C.52, 198 S.E.2d 256 (1973). In that case, Brewer filed a motion to enjoin the South Carolina

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Highway Department ("SCHD") from suspending his driver's license and reinstating his driving privileges. Id. at 55. The underlying facts of the case are that Brewer was arrested for driving under the influence, and neither he nor his attorney received notice of the trial set before a magistrate judge on September 25, 1972. Id. at 54-55. Brewer was convicted in his absence and did not receive notice of the conviction until October 18, 1972. Id. Brewer's attorney filed a motion for a new trial the following day, October 19, 1972. Id.

The SCHD took the position that the motion was not timely as it was not filed within five days of the conviction. Id. at 55. However, the Court held that Brewer timely filed his motion as he filed it one day after he had notice of the conviction. Id. at 55-56. The Court also held that the "time to appeal from a judgment in a magistrate's court or move for a new trial therein does not begin until he has notice of the judgment against him." Id. at 56. The Brewer Court cited the case of O'Rourke v. Atlantic Paint Co. 74 S.E. 930, 932 (1912), which held that "the only remedy of a party against whom a judgment is rendered is either to appeal, or make a motion for a new trial, and appeal in case such motion is refused."

In our current case, Plaintiff has never filed any motions or appeals of the Magistrates Court judgments once he had notice of the same. Therefore, he is procedurally barred from challenging those judgments. Plaintiff is challenging Magistrates Court judgments from the years 2000-2009. He claims that the Magistrates Court lacked jurisdiction to hear cases involving non-payment of user fees and therefore, the Magistrates Court judgments are without affect. As the Supreme Court held in O'Rourke, Plaintiff's proper remedy for challenging a judgement in Magistrate Court is to make a motion for a new trial or to appeal. Id. If a party does not make a timely motion or appeal, once he has received notice of the Magistrate Court judgment, he is procedurally barred from challenging that judgment. Town of Hilton Head Island, 370 S.C. at 224; Brewer, 261 S.C.56.

Plaintiff has neither timely appealed nor filed a motion for a new trial regarding any of the judgments he is now challenging. Plaintiff claims that he was never served with any of the Magistrates Court lawsuits nor any of the judgments against him. While Defendants strongly dispute this allegation, for purposes of this summary judgment motion and taking facts in a light most favorable to the non-moving party, Plaintiff was certainly on notice of these judgments when he filed the current lawsuit contesting the judgments. This lawsuit was originally filed on February 11, 2011. When Plaintiff became aware of these judgments, he should have filed a motion for a new trial or an appeal of the judgments as required by South Carolina statute and the South Carolina Magistrates Court rules. Instead, he filed a civil lawsuit against defendants seeking monetary damages and declaratory relief among other elements of relief. Because Plaintiff did not timely file a motion for a new trial nor an appeal of the judgments, this court in our current lawsuit is without jurisdiction to overturn those judgments. Town of Hilton Head Island, 370 S.C. at 225.

II. Because Plaintiff did not appeal the prior orders and judgments of the Magistrates Court, those orders have become the law of the case.

An unappealed order of a court becomes the law of the case. See Judy v. Martin, 381 S.C. 455, 674 S.E.2d 151 (2009). In Judy, Martin filed a suit against Judy in 2000 seeking \$2500 in damages and Judy counter-claimed for \$6500 (which exceeded the jurisdictional limit of \$5000 at that time). Id. at 456-457. The trial was set for September 28, 2000, but Judy claimed that the magistrate told him that the Magistrates Court did not have jurisdiction over his counter-claim and that the case would be transferred to Circuit Court. Id. at 457. Based on this representation, Judy did not appear at trial and a judgment was issued against him for \$2,555. Id. Judy appealed the Magistrates Court's judgment to the Circuit Court and the Circuit Court affirmed the judgment. Judy "did not seek reconsideration from the circuit court or file an appeal." Id.

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In 2004, Martin sought to levy on property owned by Judy in order to satisfy the judgment. Id. Judy filed a declaratory judgment action with the Master in Equity asking the master to hold that the Magistrates Court lacked subject matter jurisdiction in the 2000 case. Id. The master ruled that Judy was not entitled to relief because he failed to remove the case to the circuit court, failed to ask the circuit court to reconsider their decision, failed to appeal the circuit court ruling, and "abandoned his defense of lack of subject matter jurisdiction until nearly four years later." Id.

The South Carolina Supreme Court held that Judy could not seek relief from "a prior unappealed order." Id. at 458. Because Judy had not appealed the prior order, the order became the law of the case. Id. See also Bakala v. Bakala, 352 S.C. 612, 576 S.E.2d 156 (2003) (holding that unappealed order became law of case and another family court judge could not overrule the prior unappealed order).

In our current case, suit was filed in the Charleston County Magistrates Court against Plaintiff for unpaid user fees. Orders were issued by the Magistrates Court awarding judgment against Plaintiff and a Transcript of Judgment was filed with the court. Plaintiff failed to timely appeal the issue of subject matter jurisdiction and therefore, it has become the law of the case. See Judy supra. Plaintiff now has filed this lawsuit seeking, among other things, a declaratory judgment that the Magistrates Court lacked jurisdiction over non-payment of user fees. However, relying on the Supreme Court's decision in Judy, this court may not entertain a declaratory judgment action seeking to overturn an unappealed order. Id. Therefore, Plaintiff's First, Second, Third, and Fourth causes of action should be dismissed. ✓

III. The Magistrates Court has jurisdiction pursuant to South Carolina statute to hear and determine cases involving unpaid user fees.

S.C. Code Ann. § 22-3-10 provides jurisdiction for recovery of unpaid user fees. S.C. Code

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Ann. § 22-3-10 (2) states that "Magistrates have concurrent civil jurisdiction in the following cases: ... (2) in actions for damages for injury to rights pertaining to the person or personal or real property, if the damages claimed do not exceed seven thousand five hundred dollars." South Carolina statute and Charleston County ordinance give the County the right to collect user fees from county residents. If a resident refuses to pay the user fees, than the rights of Charleston County have been injured, and the County may seek redress in Magistrates Court pursuant to S.C. Code Ann. § 22-3-10(2). Therefore, any claims and judgments against Plaintiff for unpaid user fees were within the subject matter jurisdiction of the Magistrates Courts.

Additionally, Plaintiff asserts that S.C. Code Ann. § 22-3-10 provides the exclusive jurisdiction of Magistrates Courts; however, Plaintiff's assertion is contradicted by S.C. Code Ann. § 22-3-20, which is titled "Civil actions in which magistrate has no jurisdiction." When reading these two code sections together, the only limitation the legislature placed on Magistrates jurisdiction is outlined in S.C. Code Ann. § 22-3-20. Therefore, any argument that jurisdiction in Magistrates Courts are limited to the specified areas in S.C. Code Ann. § 22-3-10 is incorrect.

Plaintiff's assertion that jurisdiction in Magistrates Courts are limited to the particular sections outlined in S.C. Code Ann. § 22-3-10 is contradicted by Rock Hill Body, 294 S.C. 426, 365 S.E.2d 228 (Ct.App.1987). In that case, a Magistrate Judge ordered the sale of a truck to satisfy a lien pursuant to S.C. Code Ann. §29-15-10. At the time this case was decided, the jurisdictional amount in Magistrates Court was limited to \$1000 pursuant to S.C. Code Ann. § 22-3-10. The Court of Appeals held that since the amount of the lien was over the jurisdictional limit, the Magistrates Court lacked subject matter jurisdiction.

Importantly, though, is the Court of Appeals' analysis of the two statutes together. The court held that "[a] construction of Sections 29-15-10 and 22-3-10 leads to the conclusion that a magistrate

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has jurisdiction to determine a dispute as to the amount of the lien under Section 29-15-10 only if the amount involved does not exceed one thousand dollars.” Id. at 429. The court does not cite to a specific section of S.C. Code § 22-3-10, but rather refers to it generally. In fact, no specific section in S.C. Code § 22-3-10 covers liens in Magistrates Courts. Regardless, the Court based it’s holding on the general monetary jurisdiction limit combined with S.C. Code § 29-15-10. Id.

In our current case, a construction of S.C. Code § 4-9-30 and S.C. Code § 22-3-10 together leads to the conclusion that the Magistrates Court had jurisdiction over judgments related to User Fees. S.C. Code § 4-9-30 provides that a violation of an ordinance can be heard and disposed of in Magistrates Courts. Non-payment of a User Fee is a violation of the Ordinance that established the User Fee. At the time all of the judgments were rendered against Plaintiff in Magistrates Court, the judgments were within the jurisdictional limit of Magistrates Court pursuant to S.C. Code § 22-3-10. Therefore, based on the Court of Appeals holding in Rock Hill Body, a construction of the two code sections together leads to the conclusion that the Magistrates Court had jurisdiction to hear cases involving non-payment of User Fees, so long as the amount in question was within the jurisdictional limit of the Magistrates Court. Id. at 429. Because all of the judgments in question were under the jurisdictional limit, the Magistrates Court had subject matter jurisdiction to hear them.

IV. Plaintiff cannot prove facts necessary to succeed on a claim for negligent retention against the Charleston County Sheriff’s Office.

Plaintiff cannot succeed on a negligent retention theory because he cannot prove a sufficient nexus between any of Deputy Long’s prior disciplinary issues and the harm he claims in this case. See Doe v. ATC, Inc., 367 S.C. 199, 624 S.E.2d 447 (Ct.App.2005). Plaintiff makes only one reference to this allegation in his Second Amended Complaint at paragraph 35: “Defendant Sheriff’s Department was negligent in retaining defendant Long as an employee prior to the time he undertook

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work on the Simmons judgment." Importantly, Plaintiff makes no allegations regarding negligent hiring.

Negligent retention claims involve two elements: "knowledge of the employer and foreseeability of harm to third parties." Id. at 206; citing Di Cosala v. Kay, 91 N.J. 159, 450 A.2d 508, 516 (1982). The ATC court explained that

These elements, from a factual perspective, are not necessarily mutually exclusive, as a fact bearing on one element may also impact resolution of the other element. From a practical standpoint, these elements 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.

Id. at 206.

Plaintiff cannot prove facts necessary to prove that the Sheriff's Office was negligent in retaining Deputy Long. Plaintiff bases his allegations of negligent retention on several unrelated disciplinary infractions Deputy Long received several years before he began working in the judgment division of the Sheriff's Office. Below are the infractions and the dates of the infractions:

- 1998 - failed to transport prisoner
- 1999 - left post to let his dog out
- 1999 - motor vehicle accident
- 2002 - unauthorized attendance in connection with a search warrant and failure to document crime victim interview
- 2003 - Warrantless search, yelling at supervisor, failure to respond to a call
- 2004 - Gave bad advice concerning search warrant vs. search by consent

Plaintiff must prove a "nexus or similarity between the prior acts and the ultimate harm caused." Id. The ultimate harm Plaintiff alleges is that "Defendant 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." Second Amended Complaint, ¶ 36. None of the prior disciplinary infractions have a nexus or similarity to the alleged ultimate harm to Plaintiff.

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Further, Plaintiff cannot prove that the Sheriff's Office had knowledge sufficient to be held liable for negligent retention. Deputy Long began working in the Judgment Division in 2007. For the two years prior, there is no evidence of disciplinary infractions. During his employment with the Judgment Division, Deputy Long received no disciplinary infractions and his evaluations show that he was exceeding expectations in his job duties. See Exhibit A.

In Kase v. Ebert, 392 S.C. 57, 707 S.E.2d 456 (SC.App.2011), summary judgment was granted in favor of the employer on Kase's claims of negligent hiring and negligent retention. The Court of Appeals affirmed the trial courts grant of summary judgment despite multiple instances of disciplinary infractions against the employee. In Kase, a truck driver, Ebert, ("Employee") who was employed by DMX Transportation, Inc. ("Employer") got into a physical altercation with a motorist after an automobile accident. Id. at 60. Kase filed a civil lawsuit against the Employee and the Employer alleging, among other things, negligent hiring and negligent retention. The evidence showed that the Employee had been convicted of assault prior to being hiring. Additionally, the record showed the following disciplinary infractions against Employee:

Ebert's employment at DMX continued despite numerous professional and personal difficulties, including (1) suspension of his commercial driver's license because of too many serious traffic violations within a short time, (2) a written reprimand from DMX concerning numerous accidents and complaints from customers and supervisors about his performance, (3) a second reprimand from DMX admonishing Ebert for hostile disrespect of his supervisors, (4) marital difficulties that were further compounded by DMX's withholding of his wages to pay child support, (5) a recent citation in Wisconsin for speeding and inattentive driving, and (6) a bizarre written complaint that he wrote against the officer who ticketed him in Wisconsin.

Id. at 60. Employee pled guilty to assaulting Kase after the accident, but even with that guilty plea, Employee was not fired. Id.

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The Court of Appeals affirmed the trial court's grant of summary judgment finding that Kase had not proven the facts necessary to prove a claim of negligent retention. The Court of Appeals held that even though the prior assault conviction was essentially identical to the assault after the subject accident, there was no reason for Employer to foresee the type of harm caused here. Id. at 62. Importantly, neither the trial court nor the Court of Appeals placed any weight on the long list of disciplinary infractions Employee had.

In our current case, Plaintiff cannot point to any prior conduct with a sufficient nexus to the alleged harm he received. Plaintiff claims that Deputy Long acted with ill will and as support for this, he has cited Long's prior disciplinary infractions. However, none of these disciplinary infractions lead to a question of fact concerning whether the Sheriff's Office should have foreseen the alleged wrongful actions of Long. Id. In Kase, the ultimate harm was an assault on a third party. The Employee had a documented record of complaints from customers, hostility toward superiors, and even had a conviction for assault, which was the ultimate harm caused. Even with all of this, the Court of Appeals affirmed the trial court's decision that there was no factual issue concerning negligent hiring or negligent retention. Id.

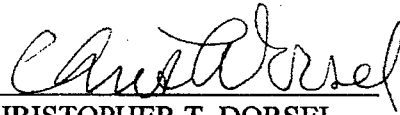
Based on the decisions in ATC and Kase, Defendants assert that Plaintiff cannot state a factual issue concerning negligent retention, and therefore, summary judgment should be granted in favor of the Charleston County Sheriff's Office on this issue.

CONCLUSION

For all the reasons stated herein along with all the reasons set forth in Defendants' Memorandum in Support of Summary Judgment, Defendants respectfully request that this Honorable Court grant their Motion for Summary Judgment and dismiss Plaintiff's complaint with prejudice.

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RESPECTFULLY,



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(843) 556-4045

Attorneys for Defendants J. Al Cannon, Jr.,
Charleston County Sheriff's Office,
Charleston County, Charleston County
Revenue Collections Department, and Harry
Long

August 31, 2012
Charleston, South Carolina

R465

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

ROOSEVELT SIMMONS,

Plaintiff,

v.

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

Defendants,

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO.: 2012-CP-10-1084

**DEFENDANTS J. AL CANNON, JR.,
CHARLESTON COUNTY SHERIFF'S
OFFICE, CHARLESTON COUNTY,
CHARLESTON COUNTY REVENUE
COLLECTIONS DEPARTMENT, and
HARRY LONG'S AMENDED
MEMORANDUM IN OPPOSITION TO
PLAINTIFF'S MOTION FOR PARTIAL
SUMMARY JUDGMENT**

Defendants, J. AL CANNON, JR., CHARLESTON COUNTY SHERIFF'S OFFICE, CHARLESTON COUNTY, CHARLESTON COUNTY REVENUE COLLECTIONS DEPARTMENT, and HARRY LONG ("Defendants") file this Amended Memorandum in Opposition to Plaintiff's Motion for Partial Summary Judgment. Plaintiff's main contention in his motion is that the Magistrates' Court lacked subject matter jurisdiction over a suit to collect user fees and therefore, any judgment from the court and any subsequent sheriff's sale based on the judgment are void. In addition to the below arguments, Defendants incorporate by reference their Memorandum in Support of Defendants' Motion for Summary Judgment previously filed with this Court.

ARGUMENT

- I. **The Circuit Court does not have subject matter jurisdiction to overturn a Magistrates Court judgment that is more than ten years old.**

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Plaintiff can cite no case law nor precedent that directly supports his contention that a Circuit Court can overturn the subject matter jurisdiction of a Magistrates Court more than ten years after a judgment has been rendered. Plaintiff cites several cases that hold that "issues related 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." Bunkum v. Manor Properties, 321 S.C. 95, 100, 467 S.E.2d 758, 761 (Ct.App.1996). However, all of the cases cited by Plaintiff in support of this contention dealt with direct appeals of matters to the appellate courts or have facts that are not applicable to the present case. Id. (Direct appeal from denial of temporary restraining order); State v. Funderbuck, 259 S.C. 256, 191 S.E.2d 520 (1972) (Direct appeal from criminal conviction); Amisub of SC, Inc. V. Passmore, 316 S.C. 112, 447 S.E.2d 207 (1994) (Direct appeal from Family Court order); State v. Richburg, 304 S.C. 162, 403 S.E.2d 315 (1991) (Direct appeal from criminal conviction); Toomer v. Toomer, 244 S.C. 399, 137 S.E.2d 406 (1964) (Direct appeal from ruling of South Carolina Wildlife Resources Commission); Lake v. Reeder Construction, 330 S.C. 242, 498 S.E.2d 650 (Ct.App.1998); Ross v. Richland County, 270 S.C. 100, 240 S.E.2d 649 (1978) (Direct appeal from a county court order transferring venue to Circuit Court); State v. Castleman, 219 S.C. 136, 64 S.E.2d 250 (1951) (Direct appeal of criminal conviction); State v. Adams, 73 S.C. 435 (1906) (Direct appeal of Order granting Motion for New Trial); Rock Hill Body Co. V. Rainey, 294 S.C. 426, 365 S.E.2d 228 (Ct.App.1987) (Direct appeal of Magistrate's Order to sell property); Johnson v. State, 319 S.C. 62, 459 S.E.2d 840 (1995) (Conviction overturned on appeal of denial of post-conviction relief); Eichor v. Eichor, 290 S.C. 484, 351 S.E.2d 353 (Ct.App.1986) (Direct appeal of family court order); Brown v. Greenwood School Dist. 50 Bd. Of Trustees, 344 S.C. 522, 544 S.E.2d 642 (Ct.App.2001) (Direct appeal of denial of jury trial); Eldridge v. City of Greenwood, 331 S.C. 398, 503 S.E.2d 191 (Ct.App.1998) (Direct appeal from Circuit Court judgment).

Plaintiff claims that the above cited case law supports the proposition that "the law is clear that the lack of subject matter jurisdiction can be a basis for vacating an earlier judgment." (Plaintiff's Motion for Partial Summary Judgment at p. 10). In a sense, Plaintiff is correct. Subject matter jurisdiction can be raised by the parties or the courts at the pleading stage, trial stage, or during an appeal, which is what the above cited cases stand for. However, Plaintiff wants this Court to go against precedent and find that Plaintiff can raise the issue of subject matter jurisdiction of a Magistrates Court at any time whatsoever, even ten or twenty years after a judgment has been rendered. One of the cases cited by Plaintiff contradicts this and instead shows the proper way to contest subject matter jurisdiction of a Magistrate Court is through a direct appeal of the judgment.

In Rock Hill Body, the Plaintiff, a body shop, asked the Magistrates Court to sell a truck owned by one of the defendants in order to satisfy a garagemen's lien. Rock Hill Body, 294 S.C. at 427. The Magistrate Judge ordered the sale of the truck and the owner directly appealed to the Circuit Court, which upheld the judgment, and then to the Court of Appeals. Id. The Court of Appeals ultimately held that the Magistrates Court lacked subject matter jurisdiction based solely on the fact that the lien in question was over the jurisdictional limit. Id. at 429-430.

In our current case, Plaintiff is not making a direct appeal of the 2000 Magistrates Court judgment, and in fact, he never directly appealed the Magistrates Court judgment. Instead, Plaintiff is in effect appealing a 2000 judgment more than 10 years after the judgment was entered by filing the subject lawsuit. This is improper and this court does not have subject matter jurisdiction to hear the case. This contention is, in fact, supported by cases cited by Plaintiff in his Partial Summary Judgment Motion.

In State v. Gorie, 256 S.C. 539, 183 S.E.2d 334 (1971), the defendant was convicted of manslaughter by a jury. Id. at 540. Defendant did not make any post-trial motions and did not

appeal the verdict. Id. Instead, defense counsel filed post-trial motions more than 14 months after the trial ended. Id. at 541. The trial judge denied the motion, and defendant appealed. Id. The South Carolina Supreme Court held that, due to the untimely motion, the trial judge lacked subject matter jurisdiction to hear the motion. Id.

In Ness v. Eckerd Corp., 350 S.C. 399, 566 S.E.2d 193 (Ct.App.2002), an entry of default was entered against defendant, and the trial judge denied defendant's motion to set aside the entry. Id. at 401-402. However, more than one month after denying defendant's motion, the trial judge discovered a potential conflict, recused himself from the case, and vacated his prior ruling pursuant to Rule 59(e). Id. at 402-403. On appeal, the Court of Appeals held that the trial judge could not vacate his own order more than ten days after it was issued. Id. Based on this, the trial judge "lacked jurisdiction to vacate the original order." Id.

Based on Gorie and Ness, this court does not have subject matter jurisdiction to hear this case. In Gorie, the Supreme Court held that a trial judge did not have jurisdiction to hear post-trial motions in a case he presided over due to the defendants untimely post-trial motions. In Ness, the Court of Appeals held that a trial judge lacked subject matter jurisdiction to vacate his own order due to the untimeliness of his attempt to do so. In our current case, Plaintiff is asking the Circuit Court (an entirely different court) to overrule a decision made by a Magistrates Court, not a month after the judgment, not fourteen months after the judgment, but more than ten years after the judgment. This is improper pursuant to South Carolina precedent, and therefore, this court does not have subject matter jurisdiction to overturn a ten year old Magistrate Court judgment.

- II. The Circuit Court does not have jurisdiction to overturn any judgments against Plaintiff from the Charleston County Magistrates Court because Plaintiff has never filed any post-trial motions nor has he filed an appeal of the Magistrates Court judgments against him.**

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Plaintiff cannot collaterally attack Magistrates Court judgments in Circuit Court because Plaintiff failed to file any post-trial motions or appeals after notice of the judgments. Plaintiff is asking the Circuit Court to overturn multiple judgments from the Charleston County Magistrates Court. Plaintiff seeks to do this not through an appeal of the Magistrates Court judgments, but rather through a collateral lawsuit filed more than ten years after some of the judgments were rendered. This is improper under South Carolina statute, court rules and case law.

South Carolina Code Ann. § 22-3-1000 provides the time for post-trial motions and appeals from civil and criminal judgments in Magistrates Courts.

No motion for a new trial may be heard unless made within five days from the rendering of the judgment. The right of appeal from the judgment exists for thirty days after the rendering of the judgment.

The South Carolina Magistrates Court Rules conform to the statute. Magistrates Court Rule 19 states that:

The motion for a new trial shall be made in writing and filed with the court no later than five (5) days after notice of the judgment. The court shall notify all opposing parties that the motion has been filed and shall provide those parties a copy of the motion in a manner provided for in Rule 8.

Rule 19(b), SCRMC. Rule 18 of the SCRMC governs appeals from Magistrates Courts:

All appeals of judgments rendered by the magistrates court shall be to the circuit court of the county where the judgment was rendered. Within thirty (30) days after delivery of written notice of judgment to the parties or their attorneys, a party wishing to appeal shall serve on the respondent and file a notice of appeal containing a statement of the grounds for appeal with the magistrate rendering the judgment and with the Circuit Court of the County where the judgment was rendered.

Rule 18(a), SCRMC.

In Town of Hilton Head Island v. Godwin, 370 S.C. 221, 634 S.E.2d 59 (Ct.App.2006), the

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South Carolina Court of Appeals addressed the necessity to file timely post-trial motions once notice of a judgment is received. In this case, Godwin was issued a ticket for criminal domestic violence ("CDV") in July 1995. Id. at 222. Godwin failed to appear for a trial on the CDV charges that was set for August 8, 1995, and in his absence, he was convicted and the court ordered him to pay a fine of \$304. Id. On September 29, 1995, Godwin was arrested for three outstanding warrants, one being the CDV charge. Id. Either Godwin or someone on his behalf paid the \$304 fine on September 29, 1995, in order to have Godwin released from jail. Id.

Approximately eight years later, on August 11, 2003, Godwin applied for a gun permit; however, he was denied the permit due to the CDV conviction. Id. at 223. Instead of filing any motions with the Municipal Court or an appeal with the Circuit Court, Godwin waited seven months to send a letter to the Municipal Court, which was "treated as a motion to set aside the conviction and/or a motion for a new trial." Id. The municipal court denied the motion and Godwin appealed to the Circuit Court. Id. Godwin argued to the Circuit Court that due to clerical errors or mistakes made by the Municipal Court, he did not receive notice until August 11, 2003. The Circuit Court ordered a new trial. Id.

The Court of Appeals vacated the Circuit Court judgment and held that the Circuit Court lacked jurisdiction to hear Godwin's motion. Id. at 224. The basis for this holding was that Godwin did not file a timely post-trial motion nor appeal once he received notice of the conviction. Id. The Court held that "[a] party who fails to timely appeal or take any other timely action necessary to correct an error is procedurally barred from contesting the validity of the conviction." Id. Importantly, the court held that while there was evidence to support the fact that Godwin had received notice of the conviction in 1995 when he paid the \$304 fine, there was certainty that he had notice of the conviction on August 11, 2003. Id. at 225. Because Godwin waited 7 months to take

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any action on the conviction, the Circuit Court was without jurisdiction to overturn Godwin's conviction. Id.

In Godwin, the Court of Appeals relied on Brewer v. South Carolina Highway Department, 261 S.C.52, 198 S.E.2d 256 (1973). In that case, Brewer filed a motion to enjoin the South Carolina Highway Department ("SCHD") from suspending his driver's license and reinstating his driving privileges. Id. at 55. The underlying facts of the case are that Brewer was arrested for driving under the influence, and neither he nor his attorney received notice of the trial set before a magistrate judge on September 25, 1972. Id. at 54-55. Brewer was convicted in his absence and did not receive notice of the conviction until October 18, 1972. Id. Brewer's attorney filed a motion for a new trial the following day, October 19, 1972. Id.

The SCHD took the position that the motion was not timely as it was not filed within five days of the conviction. Id. at 55. However, the Court held that Brewer timely filed his motion as he filed it one day after he had notice of the conviction. Id. at 55-56. The Court also held that the "time to appeal from a judgment in a magistrate's court or move for a new trial therein does not begin until he has notice of the judgment against him." Id. at 56. The Brewer Court cited the case of O'Rourke v. Atlantic Paint Co. 74 S.E. 930, 932 (1912), which held that "the only remedy of a party against whom a judgment is rendered is either to appeal, or make a motion for a new trial, and appeal in case such motion is refused."

In our current case, Plaintiff has never filed any motions or appeals of the Magistrates Court judgments once he had notice of the same. Therefore, he is procedurally barred from challenging those judgments. Plaintiff is challenging Magistrates Court judgments from the years 2000-2009. He claims that the Magistrates Court lacked jurisdiction to hear cases involving non-payment of user

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fees and therefore, the Magistrates Court judgments are without affect. As the Supreme Court held in O'Rourke, Plaintiff's proper remedy for challenging a judgement in Magistrate Court is to make a motion for a new trial or to appeal. Id. If a party does not make a timely motion or appeal, once he has received notice of the Magistrate Court judgment, he is procedurally barred from challenging that judgment. Town of Hilton Head Island, 370 S.C. at 224; Brewer, 261 S.C.56.

Plaintiff has neither timely appealed nor filed a motion for a new trial regarding any of the judgments he is now challenging. Plaintiff claims that he was never served with any of the Magistrates Court lawsuits nor any of the judgments against him. While Defendants strongly dispute this allegation, for purposes of this summary judgment motion and taking facts in a light most favorable to the non-moving party, Plaintiff was certainly on notice of these judgments when he filed the current lawsuit contesting the judgments. This lawsuit was originally filed on February 11, 2011. When Plaintiff became aware of these judgments, he should have filed a motion for a new trial or an appeal of the judgments as required by South Carolina statute and the South Carolina Magistrates Court rules. Instead, he filed a civil lawsuit against defendants seeking monetary damages and declaratory relief among other elements of relief. Because Plaintiff did not timely file a motion for a new trial nor an appeal of the judgments, this court in our current lawsuit is without jurisdiction to overturn those judgments. Town of Hilton Head Island, 370 S.C. at 225.

III. Pursuant to the South Carolina Code of Laws, Magistrates' Courts have subject matter jurisdiction to hear cases involving user fees imposed by county ordinances.

If this Court finds that it does have jurisdiction to hear Plaintiff's claims, Defendants submit that the Charleston County Magistrates Court had subject matter jurisdiction to enter judgments against Plaintiff for non-payment of User Fees. This is outlined in our South Carolina Code of Laws:

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SECTION 4-9-30. Designation of powers under each alternative form of government except board of commissioners form.

Under each of the alternate forms of government listed in Section 4-9-20, except the board of commissioners form provided for in Article 11, each county government within the authority granted by the Constitution and subject to the general law of this State shall have the following enumerated powers which shall be exercised by the respective governing bodies thereof: ...

(14) to enact ordinances for the implementation and enforcement of the powers granted in this section and provide penalties for violations thereof not to exceed the penalty jurisdiction of magistrates' courts. **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.** County officials are further empowered to seek and obtain compliance with ordinances and regulations issued pursuant thereto through injunctive relief in courts of competent jurisdiction. 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;

S.C. Code § 4-9-30 (emphasis added). One of the enumerated powers granted to county government is the assessment of "uniform service charges" for "sanitation, including solid waste collection and disposal." S.C. Code § 4-9-30(5)(a). This is precisely what is covered in the Ordinance that mandates a User Fee. Therefore, based on S.C. Code § 4-9-30, non-payment of a User Fee (i.e. violation of the Ordinance) may be heard in "magistrates' courts of the county." This statute provides subject matter jurisdiction in Magistrates Courts, which means that the judgments entered against Plaintiff were valid and enforceable.

Further, S.C. Code Ann. § 22-3-10 provides jurisdiction for recovery of unpaid user fees. S.C. Code Ann. § 22-3-10 (2) states that "Magistrates have concurrent civil jurisdiction in the following cases: ... (2) in actions for damages for injury to rights pertaining to the person or personal or real property, if the damages claimed do not exceed seven thousand five hundred dollars." South

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Carolina statute and Charleston County ordinance give the County the right to collect user fees from county residents. If a resident refuses to pay the user fees, then the rights of Charleston County have been injured, and the County may seek redress in Magistrates Court pursuant to S.C. Code Ann. § 22-3-10(2). Therefore, any claims and judgments against Plaintiff for unpaid user fees were within the subject matter jurisdiction of the Magistrates Courts.

Plaintiff asserts that S.C. Code Ann. § 22-3-10 provides the exclusive jurisdiction of Magistrates Courts. Plaintiff's assertion is contradicted by S.C. Code Ann. § 22-3-20, which is titled "Civil actions in which magistrate has no jurisdiction." When reading these two code sections together, the only limitation the legislature placed on Magistrates jurisdiction is outlined in S.C. Code Ann. § 22-3-20. Therefore, any argument that jurisdiction in Magistrates Courts are limited to the specified areas in S.C. Code Ann. § 22-3-10 is incorrect.

Plaintiff's assertion that S.C. Code Ann. § 22-3-10 does not specifically give jurisdiction over user fee judgments to the Magistrates Court is also contradicted by the only case Plaintiff cites in support of his position. See Rock Hill Body, 294 S.C. 426, 365 S.E.2d 228 (Ct.App.1987). In that case, a Magistrate Judge ordered the sale of a truck to satisfy a lien pursuant to S.C. Code Ann. §29-15-10. At the time this case was decided, the jurisdictional amount in Magistrates Court was limited to \$1000 pursuant to S.C. Code Ann. § 22-3-10. The Court of Appeals held that since the amount of the lien was over the jurisdictional limit, the Magistrates Court lacked subject matter jurisdiction.

Importantly, though, is the Court of Appeals' analysis of the two statutes together. The court held that "[a] construction of Sections 29-15-10 and 22-3-10 leads to the conclusion that a magistrate has jurisdiction to determine a dispute as to the amount of the lien under Section 29-15-10 only if the amount involved does not exceed one thousand dollars." Id. at 429. The court does not cite to a specific section of S.C. Code § 22-3-10, but rather refers to it generally. In fact, no specific section

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in S.C. Code § 22-3-10 covers liens in Magistrates Courts. Regardless, the Court based it's holding on the general monetary jurisdiction limit combined with S.C. Code § 29-15-10. Id.

In our current case, a construction of S.C. Code § 4-9-30 and S.C. Code § 22-3-10 together leads to the conclusion that the Magistrates Court had jurisdiction over judgments related to User Fees. S.C. Code § 4-9-30 provides that a violation of an ordinance can be heard and disposed of in Magistrates Courts. Non-payment of a User Fee is a violation of the Ordinance that established the User Fee. At the time all of the judgments were rendered against Plaintiff in Magistrates Court, the judgments were within the jurisdictional limit of Magistrates Court pursuant to S.C. Code § 22-3-10. Therefore, based on the Court of Appeals holding in Rock Hill Body, a construction of the two code sections together leads to the conclusion that the Magistrates Court had jurisdiction to hear cases involving non-payment of User Fees, so long as the amount in question was within the jurisdictional limit of the Magistrates Court. Id. at 429. Because all of the judgments in question were under the jurisdictional limit, the Magistrates Court had subject matter jurisdiction to hear them.

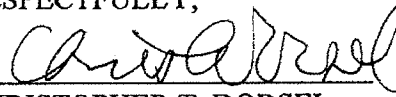
CONCLUSION

For all the reasons stated herein along with all the reasons set forth in Defendants' Memorandum and Amended Supplemental Memorandum in Support of Defendants' Motion for Summary Judgment, Defendants respectfully request that this Honorable Court deny Plaintiff's Motion for Partial Summary Judgment.

(Signature on following page)

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RESPECTFULLY,



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Charleston County, Charleston County
Revenue Collections Department, and Harry
Long

August 31, 2012
Charleston, South Carolina

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STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
IN THE NINTH JUDICIAL CIRCUIT
CASE NO. 2011-CP10-1084

ROOSEVELT SIMMONS)
Plaintiff)
Vs.)
MASE and COMPANY, LLC,)
J. AL CANNON, JR.,)
CHARLESTON COUNTY)
SHERIFF'S DEPARTMENT,)
CHARLESTON COUNTY,)
CHARLESTON COUNTY)
REVENUE COLLECTIONS)
DEPARTMENT and)
HARRY LONG)
Defendants)

FILED
2012 SEP -5 PM 1:20
JULIE J. ARMSTRONG
CLERK OF COURT
BY 

PLAINTIFF'S AMENDED MOTION FOR
PARTIAL SUMMARY JUDGMENT

PLEASE TAKE NOTICE that on the tenth day following service of the within NOTICE of MOTION or as soon thereafter as counsel may be heard, plaintiff Roosevelt Simmons, by his attorney, Edward A. Bertele, Esq. shall move before the Court of Common Pleas for the Ninth Judicial Circuit at the Charleston County Courthouse, 100 Broad Street, Charleston, SC 29401 for an Order pursuant to South Carolina Rules of Civil Procedure 56 for partial summary judgment as to the First, Second and Third Counts of the Second Amended Complaint. Plaintiff relies upon the pleadings filed heretofore, the discovery on file, the Affidavit of Roosevelt Simmons and the reasons set forth herein.

FACTS RELEVANT TO THIS MOTION

At all relevant times Simmons 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. See Second Amended Complaint (SAC) at para. 1. S.C. Code Section 44-55-1210 authorizes a county to provide and regulate solid waste

collection and disposal and to levy user fees only against persons for whom services are provided. On or about 1987, defendant Charleston County (the County) adopted Ordinance Section 10-56 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 10-56 by its terms was intended to conform to S.C. Code Section 44-55-1210. Thereafter, pursuant to Ordinance Section 10-56, Charleston County imposed an "annual disposal user fee" on property owners in Charleston County including real property owned by Simmons. The user fee was included in the annual tax bill sent out by the Charleston County Auditor. See Exhibit A. Simmons contends that each year after the user fee was included on his tax bill for TMS 138, he went to the Auditor's office to object to these fees being included with his taxes and requested that the fee be removed. The Auditor's office said that it would be removed and gave Simmons a form indicating that it had been. See Exhibit B-1. Simmons then paid his taxes less the user fee. Simmons was not informed by the employees of the Auditor's Office that the user fee was still owed.

In May 2000, George Boniface, manager of legal processing for the Charleston County Business License/User Fee Department(now known as the Revenue Collections Department) filed a complaint in the Magistrate's Court for Charleston County. The complaint alleged that Simmons was the owner of TMS 138, that Simmons had failed to pay the amount of the user fee imposed against this property in the amount of \$89.00 for the year 2000. See Exhibit C- 1,2, 3 Boniface was not an attorney and the county had not adopted a resolution authorizing the filing of any complaints by employees of the Business License/User Fee department to collect user fees. Simmons asserts that he was never served with the summons and complaint. See Affidavit of Roosevelt Simmons. It is not disputed that Simmons did not appear at the hearing on the

complaint. A judgment, 2000-JG-10-1817, was entered on the complaint in the amount of the user fee plus costs totaling the sum of \$144.00. See Exhibit D. Simmons never received notice of entry of the judgment. See Affidavit of Roosevelt Simmons. The Business License/User Fee Department filed other complaints against Simmons in Magistrate's Court to collect the annual user fee for subsequent years and default judgments were entered on them.

In February 2009, the Business License/User Fee Department sent six judgments for annual user fees to the Charleston County Sheriff's Department for enforcement including the following: 2000-JG-10-1817; 2002-JG-10-0021; 2002-JG-10-923; 2003-JG-10-170; 2004-JG - 10-444; 2006-JG-10-931. See Exhibit E 1,2,3,4,5. These were processed by Deputy Harry Long. Deputy Long who did a public records search for assets in the name of Roosevelt Simmons. At that time, Simmons held title to several parcels of real property in addition to TMS 138, including TMS 282-00-00-135 (TMS 135), 283-00-00-498 (TMS 498) and 283-00-00-145 (TMS 145) also located on Johns Island, all of which are undeveloped and vacant land. See exhibit I -1,2,3. Simmons also owned several motor vehicles, and various pieces of heavy construction equipment and a boat. See Exhibit J-1,2,3. Deputy Long prepared a levy against Simmons interest in TMS 498 on the 2000 judgment (2000-JG-10-1817) and ignored Simmons ownership of numerous vehicles. When Deputy Long served the levy on Simmons at his home, the vehicles and other personalty were in plain sight.

Deputy Long conducted a sale of TMS 498 in November 2009. According to the Sheriff's Department record of the sale, the property was sold to the highest bidder, defendant Mase & Company, LLC for \$600. The sale proceeds were not sufficient to satisfy the amount of the judgment and costs of sale and the judgment remains unsatisfied. See Exhibit H On or about February 2010, defendant J. Al Cannon, Jr., Sheriff of Charleston County (the Sheriff) executed

a deed purporting to transfer title to TMS 498 to defendant Mase & Company, LLC. See Exhibit G-1,2,3. The Sheriff's Department did not attempt to levy against Simmons property on any other judgments and they were returned to the Business License/User Fee Department.

The First Count of the Second Amended Complaint alleges that the 2000 judgment in against Simmons is void since the Magistrates Court had no jurisdiction or authority to proceed against plaintiff Roosevelt Simmons for nonpayment of a user fee of \$89.00 imposed upon TMS 138 and that the Sheriff's deed is also void because the judgment upon it is based is void. Id.

Para. 10. The First Count also alleges that defendant Sheriff had no authority to levy and execute on TMS 498 for payment of user fees on TMS 138; that the method to enforce a user fee is governed by SC Code Section 12-49-10 and laws applicable to real property taxes and that such sale is also subject to a statutory right of redemption pursuant to South Carolina Statutes Section 12-51-90. 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"

The Second Count of the Second Amended Complaint alleges that defendant County does not provide any trash removal services to TMS 135, 138, 498 or 499; that Simmons was not required to pay a user fee under Ordinance Section 10-56 because the County did not remove any trash from TMS 135, 138, 498 or 499; and that all user fees imposed by the County against TMS 135, 138, 498 or 499 are illegal because Simmons as owner derived no benefit from this charge as required by SC Code Section 44-55-1210. Simmons asserts that defendant Revenue Collections Department (then known as the Business License/User Fee Department) wrongfully

commenced actions against Simmons for nonpayment of user fees imposed against TMS 138 and obtained several default judgments. The following are judgments of record against Simmons for nonpayment of user fees: 2002-JG-10-0021; 2002-JG-10-923; 2003-JG-10-170; 2004-JG -10-444; 2006-JG-10-931; 2009 -JG-10-391; 2010- JG -10-3099. See Exhibits E-1,2,3,4,5 and F -1,2. Simmons asserts that all of these judgments entered against Simmons for nonpayment of user fees are void since the Magistrates Court had no jurisdiction or authority to proceed against Simmons for nonpayment of a user fee. Finally, the Second Amended Complaint asserts that all judgments entered against Simmons for nonpayment of user fees are the result of mistake, inadvertence and neglect and should be vacated because it would be unjust and inequitable for said judgments to have prospective effect against any real or personal property of Simmons. SAC at para. 18.

The Third Count of the Second Amended Complaint alleges that the County issued tax bills against certain real property known and designated as TMS 311-00-00-024 (TMS 024) which included user fees; that according to the records of the Charleston County Tax Assessor, TMS 024 was owned by the estate of Sam Balaam. Simmons asserts that he was one of the heirs of Samuel Balaam and in order to preserve his family's interest, Simmons had his name added to the Auditor's records to receive the tax bill. See Exhibit I-4. Simmons regularly and timely paid the taxes assessed on TMS 024 and made written application to the Charleston County Auditor for waiver of the user fees. See Exhibit B-2 Notwithstanding his voluntary payment of real estate taxes, Simmons asserts he had no legal obligation to pay user fees imposed against TMS 024 . Simmons asserts that notwithstanding the waiver of the user fees by the Auditor, the Revenue Collections Department commenced various law suits against Simmons in the Magistrate's Court of Charleston County for collection of the user fee imposed on TMS 024 . A

portion of judgment 2009-JG-10-391 entered against Simmons includes users fees imposed against TMS 024. See Exhibit K. Simmons contends that the Magistrate's Court had no jurisdiction or authority to proceed against him for nonpayment of a user fee and that all judgments or portions thereof entered against Roosevelt Simmons for nonpayment of user fees imposed upon TMS 024 are void.

Simmons asserts that he is entitled to partial summary judgment as matter of law as to the First, Second and Third Counts of the Second Amended Complaint. These counts allege that the judgments obtained by defendant Revenue Collections Department Business (formerly known as License/User Fee Department) for nonpayment of user fees entered against Simmons by the Magistrate's Court are void and the resulting sale of TMS 498 based upon one of them is also void. The applicable law supports Simmons contention.

LEGAL ARGUMENT

Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Bayle v. South Carolina Dep't of Transp., 344 S.C. 115, 119, 542 S.E.2d 736, 738 (Ct. App. 2001), cert. denied; Young v. South Carolina Dep't of Corrections, 333 S.C. 714, 511 S.E.2d 413 (Ct. App. 1999); see also Bruce v. Durney, 341 S.C. 563, 534 S.E.2d 720 (Ct. App. 2000) (a motion for summary judgment shall be granted if pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show there is no genuine issue as to any material fact and moving party is entitled to judgment as a matter of law). Under SC Rule 56(c), 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 at 545. (1991). Once the moving party

carries its initial burden, the "opposing party must, under Rule 56(e), 'do more than simply show that there is some metaphysical doubt as to the material facts' but 'must come forward with specific facts showing that there is a genuine issue for trial.'" Id. (quoting Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986)) (emphasis in original). The party opposing summary judgment cannot simply rest on mere allegations or denials contained in the pleadings. Id.; George v. Empire Fire & Marine Ins. Co., 344 S.C. 582, 545 S.E.2d 500 (2001).

A. The Magistrate's Court lacked subject matter jurisdiction 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 Magistrate's Court of Charleston County for unpaid user fees. The Magistrate's Court has limited jurisdiction which does not include a claim for 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 had no jurisdiction to hear and decide the case.

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 authorization given to collect the user fee by suit in Magistrate’s Court. Since the governing ordinance requires that the user fee be collected like “ad valorem taxes” the method to enforce a user fee is governed by SC Code Section 12-49-10 and laws applicable to real property taxes and that such sale is also subject to a statutory right of redemption pursuant to South Carolina Statutes Section 12-51-90.

The user fee is a variety of a tax. As the South Carolina Supreme Court stated in Powell v. Chapman, 260 S.C. 516, 197 S.E.2d 287 (1973): “ The essential characteristics of a tax are that it is not a voluntary payment or donation, but an **enforced contribution**, enacted pursuant to legislative authority, in the exercise of the taxing power, the contribution being of a proportional character, payable in money, and imposed, levied, and collected for the purpose of raising revenue, to be used for public or governmental purposes.” (emphasis added) See 84 C.J.S. Taxation s 1, at page 32. Therefore, under the statute providing subject matter jurisdiction to the Magistrate’s Court or the Ordinance creating the user fees, the Magistrate’s Court had no jurisdiction over the suits brought by the Business License/User fee Department.

B. A judgment of a court without subject matter jurisdiction is subject to collateral attack

Simmons filed this action under R 60(b), SCRCPP to vacate an earlier judgment by default which was entered against him based upon a lack of subject matter jurisdiction. It is not disputed that this judgment was entered on the basis of a default and that Simmons did not appear to contest the claim. Simmons denies receiving notice of this complaint or of the entry of the judgment. Simmons contends that he was only aware of the judgment when a deputy Sheriff came to his home to execute on the judgment in August 2009. Simmons filed this action after he discovered that TMS 498 had been sold in 2010.

The entry of final judgment in the Magistrate's Court action does not bar this action under the principle of res judicata. Rule 60(b), SCRPC states that in addition to motions post judgment to vacate a judgment, the court may also "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 reversed a judgment dismissing an independent action to set aside a prior paternity judgment where paternity was not contested. In discussing the circumstances where R 60(b) is applicable, the Court of Appeals said: "In essence, the rule merely reflects many of the considerations attendant to an equitable analysis." 378 S.C. at 136. 662 S.E.2d at 417. See National Surety Co. of N.Y. v. State Bank of Humboldt, 120 Fed. 593 (8th Cir. 1903). Therefore, Rule 60 (b) provides that equitable relief in the form of vacating an earlier judgment may be granted in a subsequent action based upon an equitable analysis.

In Bunkum v. Manor Properties, 321 S.C. 95,100, 467 S.E.2d 758 (Ct. App. 1996), plaintiff commenced an action pursuant to Rule 60(b), SCRPC, seeking to have a "Supplemental Order of Judgment of [sic] Costs" entered by the Charleston County Master In Equity declared void because the master exceeded the scope of his authority. The Court of Appeals noted that the plaintiff failed to appear before the master at the hearing on the motion, and failed to directly appeal the master's order. However, the court held that "issues relating to subject matter jurisdiction may be raised at any time, cannot be waived even by consent, and should be taken notice of by this court on our own motion." The Court of Appeals concluded that the master lacked jurisdiction to issue the Order and reversed. See Johnson v. State, 319 S.C. 62, 459 S.E.2d 840 (1995); State v. Richburg, 304 S.C. 162, 403 S.E.2d 315 (1991); State v. Gorie, 256 S.C. 539, 183 S.E.2d 334 (1971); Eichor v. Eichor, 290 S.C. 484, 351 S.E.2d 353 (Ct.App.1986). Bunkum has been relied upon subsequently in Ness v. Eckerd Corp., 350 S.C. 399, 566 S.E.2d

193, 195 (Ct. App. 2002); Brown v. Greenwood School Dist. 50 Bd. of Trustees, 344 S.C. 522, 544 S.E.2d 642, 643 (Ct. App. 2001) and Eldridge v. City of Greenwood, 331 S.C. 398, 408 503 S.E.2d 191, 196 (Ct. App. 1998).

Plaintiff has found no comparable precedent in which an appellate court refuses to allow the plaintiff to seek to vacate an earlier default judgment based upon a lack of subject matter jurisdiction and asserts that the Bunkum case controls this situation. Therefore, plaintiff contends that the law is clear that an independent action can be brought to vacate an earlier judgment for lack of subject matter jurisdiction

C. A judgment of a court without subject matter jurisdiction is void

The South Carolina Supreme Court has consistently adhered to the rule that the acts of a court without jurisdiction are without effect. Toomer v. Toomer, 244 S.C. 399, 137 S.E.2d 406 (1964) As stated in Ex parte Hart, 186 S.C. 125, 133, 195 S.E. 253, 256 (1938): "It is a universal principle as old as the law, that the proceedings of a Court without jurisdiction are a nullity, and its judgment without effect, either on the person or property." Ross v. Richland County, 270 S.C. 100, 240 S.E.2d 649, 651 (S.C. 1978)

It is elementary that lack of jurisdiction of the cause or subject matter can be raised at any time, including for the first time on appeal. State v. Castleman, 219 S.C. 136, 64 S.E.2d 250 (1951); State v. Adams, 73 S.C. 435, 53 S.E. 538 (1906). It is immaterial that the defendant failed to appeal from the earlier ruling or the intermediate ruling even if it be assumed that he had the right to do so. State v. Funderburk, 259 S.C. 256, 191 S.E.2d 520,523 (1972); Town of Hilton Head Island v. Godwin, 370 S.C. 221, 634 S.E.2d 59 (Ct. App. 2006); Amisub of S.C., Inc. v. Passmore, 316 S.C. 112, 114, 447 S.E.2d 207, 208 (1994). The lack of subject matter jurisdiction can be raised at any time, can be raised for the first time on appeal, and can be raised

sua sponte by the court. See, e.g., Lake v. Reeder Constr. Co., 330 S.C. 242, 248, 498 S.E.2d 650, 653 (Ct.App.1998).

In Rock Hill Body Co. v. Rainey, 294 S.C. 426, 430, 365 S.E.2d 228 (Ct. App. 1987), the court ruled that the jurisdiction of the Magistrate's Court was limited under South Carolina Code Section 22-3-10. The Court found that S.C. Code Ann Section 29-15-10 authorized the magistrate to sell property subject to a mechanics lien but not to do so if the amount of the lien exceeded the statutory limit of its jurisdiction (then \$1000.00). Since the matter in dispute exceeded this, the issue should have been transferred to the Circuit Court. Because the magistrate's Court failed to do so, the Court of Appeal vacated the lower court judgment. Rock Hill Body Co. v. Rainey stands for the proposition that the Magistrate's Court is of limited jurisdiction and extends only to what the legislature specifically authorized.

Since R 60(b) authorizes an independent action as well as a motion, Simmons contends that this action is just as appropriate a means to vacate an earlier judgment based upon a lack of subject matter jurisdiction as a motion in the Magistrate's Court. Furthermore, Simmons has asserted other claims for civil rights violations and tort against the County and Sheriff's Department over which the Magistrate's Court has no jurisdiction. Therefore, this action is clearly within the scope of the relief provided by R 60(b) to vacate an earlier judgment which is void for lack of subject matter jurisdiction.

D. The material facts are not in dispute

The judgments which Simmons seeks to vacate were obtained for the amount of the user fees imposed on TMS 138 for various years. They were not fines or penalties. The County has not presented any evidence to the contrary. The material facts are not in dispute and Simmons is

entitled to partial summary judgment as to the First, Second and third Counts of the Second Amended Complaint as a matter of law.

E. The equities favor the plaintiff

Finally, Simmons contends that the balance of the equities justify the relief requested. Simmons has asserted that he did not receive notice of either the complaint or of the judgment entered against him which resulted in the sale of TMS 498 and the county has not presented evidence to the contrary. Simmons has asserted that he believed that the waivers he received from the Tax Collector's Office relieved him from the obligation to pay for user fee. Simmons has asserted that he did not receive any solid waste removal services. The county has not presented any evidence to the contrary. Simmons contends that he was not responsible for payment of such fees under the language of the ordinance authorizing their collection. In summary, all of the equities favor the granting of the relief sought- declaration that the user fee judgments are void.

F. The Sheriff's sale and Deed pursuant to a void judgment are void

Because the underlying judgment is void, the Sheriff's sale and deed based upon the execution on that pursuant are also void. S.C. Code Ann Section 15-39-610 provides for sale of property following execution upon a judgment which remains unpaid for 5 days. The sale relies upon the validity of the execution which relies upon the validity of the judgment. Therefore, the Sheriff sale and deed which was based upon the invalid judgment should be also be vacated .

CONCLUSION

Partial summary judgment should be granted as to the First, Second and third Counts of the Second Amended Complaint vacating all judgments entered against Simmons for the payment of a user fee in the Magistrate's Court. Plaintiff has established that he is entitled to

judgment as matter of law that the Magistrate's Court judgments are void and respectfully requests that the court grant his motion.

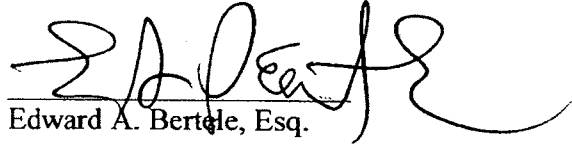
Respectfully submitted,

Edward A. Bertele, Esq.
1812 Pierce Street
Charleston, SC 29492
(843) 471-2082
Attorney for plaintiff, Roosevelt Simmons
By: 

Dated: August 31, 2012
Charleston, SC

CERTIFICATION OF SERVICE

I hereby certify that a true copy of the within Amended Motion for Partial Summary judgment on the Second Amended Complaint was served upon the defendants' attorneys, Christopher Dorsel, Esq. and Wendy Keefer, Esq. by regular mail postage prepaid at their last known mailing address.


Edward A. Bertele, Esq.

August 31, 2012

SIMMONS V MASE & COMPANY, LLC ET AL. 2011-CP10-1084

APPENDIX TO PLAINTIFF'S AMENDED PARTIAL SUMMARY JUDGMENT MOTION

- A. Charleston County 1995 tax bill for TMS 282-00-00-138
- B. Solid Waste Annual Disposal User Fee Application for Review
- C. Summons and Complaint filed by Charleston County Business License/User Fee Department in Case No. 2000SC-86-2578
- D. Judgment 2000-JG-10-1817 entered in Case No. 2000SC-86-2578
- E. Judgment 2002-JG-10-0021; Judgment 2002-JG-10-923; Judgment 2003-JG-10-170; Judgment 2004-JG -10-444; Judgment 2006-JG-10-931
- F. Judgment 2009 -JG-10-391; Judgment 2010- JG -10-3099
- G. Sheriff's deed to Mase & Company, LLC
- H. Partial Satisfaction of Judgment 2000-JG-10-1817
- I. Charleston County Tax System real property inquiry
- J. Charleston County Tax System Motor Vehicle inquiry
- K. Charleston County Notice of past due user fees

2491

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
IN THE NINTH JUDICIAL CIRCUIT
CASE NO. 2011CP10-1084

ROOSEVELT SIMMONS)
Plaintiff)
Vs.)
MASE and COMPANY, LLC,)
J. AL CANNON, JR.,)
CHARLESTON COUNTY)
SHERIFF'S DEPARTMENT,)
CHARLESTON COUNTY,)
CHARLESTON COUNTY)
REVENUE COLLECTIONS)
DEPARTMENT and)
HARRY LONG)
Defendants)

FILED
2012 SEP 10 PM 1:18
JULIE J. ARMSTRONG
CLERK OF COURT
BY 

**PLAINTIFF'S OPPOSITION TO
AMENDED SUPPLEMENTAL MEMORANDUM
OF DEFENDANTS COUNTY OF CHARLESTON,
SHERIFF'S DEPARTMENT AND HARRY LONG
FOR SUMMARY JUDGMENT**

Plaintiff herewith submits his opposition to the county defendants' Amended Supplemental Memorandum dated August 31, 2012 in support of their motions for summary judgment. This opposition is intended to address issues not previously raised by the defendants in their initial memorandum in support of summary judgment dated July 26th which was scheduled to be heard on August 6th (adjourned from June 1st.) In their original Memorandum, the county defendants sought dismissal of the First, Second and Third Counts on the basis that the Magistrate's Court did have subject matter jurisdiction over suits to collect user fees under the language of the statute enabling counties to adopt public welfare ordinances, S.C. Code Ann. Section 4-9-30(14). (Memorandum at pages 4-9). That was the only basis put forth to support dismissal of those counts. The Memorandum sought dismissal of the Fifth Count for wrongful retention of defendant Harry Long on the basis that the Sheriff's Department was immune from

suit under various exceptions under the Tort Claims Act relating to defendant Long's conduct of his duties (Memorandum at pages 11-13); that there was no evidence of negligence in retaining defendant Long and that the Sheriff's Department was immune from suit under the "public duty" rule. (Memorandum at pages 14-15). Plaintiff filed his opposition on August 2nd, pointing out that the county defendant had not addressed any other basis to seek dismissal in the first three counts relating to the Magistrate's Court jurisdiction or the Fifth Count relating to wrongful retention and should be barred from raising other issues prior to the hearing. The hearing was again adjourned due to the county defendants counsel's concern about a pending trial conflicting with the hearing and rescheduled for August 17th.

On August 14th, the county defendants served a 10 page Supplemental Memorandum in support of the summary judgment motions. The first six pages contain argument that this Court lacks jurisdiction because plaintiff failed to appeal the Magistrate's Court judgment and is procedurally barred and that the various user fee judgments have become the "law of the case". Plaintiff contends that these theories are inapplicable to a subsequent declaratory judgment action brought to vacate a judgment under R 60(b). See below. The Supplemental Memorandum contained new arguments to support dismissal of the Fifth Count (wrongful retention) omitted from its initial Memorandum. In particular, the county defendants assert that the plaintiff's damages were not "proximately caused" by the retention of Long. Supplemental Memorandum at pages 6-9. The case cited by the county defendants does not support their argument. See below. In their Amended Supplemental Memorandum, dated August 31st, the county defendants assert an additional argument for Magistrate's Court jurisdiction: that a suit to collect user fees is a suit to recover "damages to the person of Charleston County". Plaintiff herein addresses the additional arguments contained in the Supplemental and Amended Supplemental Memoranda.

I. CIRCUIT COURT HAS JURISDICTION OVER ACTIONS TO VACATE A JUDGMENT

The county defendants argument that this court does not have jurisdiction to hear a collateral attack to an invalid judgment of a lower court is incorrect. Simmons filed this action under R 60(b), SCRCF 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 defendants. Rule 60(b), SCRCF states that in addition to motions post judgment to vacate a judgment, the court may also "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 reversed a judgment dismissing an independent action to set aside a prior paternity judgment where paternity was not contested. In discussing the circumstances where R 60(b) is applicable, the Court of Appeals said: "In essence, the rule merely reflects many of the considerations attendant to an equitable analysis." 378 S.C. at 136. 662 S.E.2d at 417. See National Surety Co. of N.Y. v. State Bank of Humboldt, 120 Fed. 593 (8th Cir. 1903). Therefore, Rule 60 (b) provides that relief in the form of vacating an earlier judgment may be granted in a subsequent action based upon an equitable analysis.

In Bunkum v. Manor Properties, 321 S.C. 95,100, 467 S.E.2d 758 (Ct. App. 1996), plaintiff commenced an action pursuant to Rule 60(b), SCRCF, seeking to have a "Supplemental Order of Judgment of [sic] Costs" entered by the Charleston County Master In Equity declared void because the master exceeded the scope of his authority. The Court of Appeals noted that the plaintiff failed to appear before the master at the hearing on the motion, and failed to directly appeal the master's order. However, the court held that "issues relating to subject matter jurisdiction may be raised at any time, cannot be waived even by consent, and should be taken notice of by this court on our own motion." The Court of Appeals concluded that the master

lacked jurisdiction to issue the Order and reversed. See Johnson v. State, 319 S.C. 62, 459 S.E.2d 840 (1995); State v. Richburg, 304 S.C. 162, 403 S.E.2d 315 (1991); State v. Gorie, 256 S.C. 539, 183 S.E.2d 334 (1971); Eichor v. Eichor, 290 S.C. 484, 351 S.E.2d 353 (Ct.App.1986). Bunkum has been relied upon subsequently in Ness v. Eckerd Corp., 350 S.C. 399, 566 S.E.2d 193, 195 (Ct. App. 2002); Brown v. Greenwood School Dist. 50 Bd. of Trustees, 344 S.C. 522, 544 S.E.2d 642, 643 (Ct. App. 2001) and Eldridge v. City of Greenwood, 331 S.C. 398, 408 503 S.E.2d 191, 196 (Ct. App. 1998). Therefore Bunkum and cases relying upon it establish that subject matter jurisdiction can be attacked collaterally by a R 60(b) independent action without being barred by the failure to appeal or file a post trial motion.

Simmons contends that this same principle is even more applicable here. 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. Simmons filed this action after he discovered that TMS 498 had been sold in 2010 for the user fee on TMS 138. Therefore, Simmons' failure to file any post trial motions to the Magistrate's Court or to appeal does not bar this action because R 60(b) permits a collateral attack under appropriate circumstances.

Simmons contends that this court has jurisdiction for another reason. The Circuit Court is a court of general jurisdiction. The Magistrate's Court is a court of limited jurisdiction and has concurrent jurisdiction with Circuit Court in limited cases. See S.C. Code Ann. Sect. 22-3-10. R 60(b) does not specifically limit the power of the Circuit Court from vacating a judgment of a lower court. Since the rule does not contain such a restriction, this Court should not impose such a limitation on itself because to do so would unduly restrict its authority as a court of general

jurisdiction. Simmons is seeking relief which is entirely within the power of this Court to grant: a declaratory judgment that the user fee judgments are invalid along with the Sheriff's deed. Simmons has asserted other claims for civil rights violations and tort against the County and Sheriff's Department over which the Magistrate's Court has no jurisdiction. If Simmons had filed an appeal from the July 2000 user fee judgment, it would have been heard in this court. See S.C. Code Ann. Section. § 14-5-340. See R 18, S.C. R. Magistrate's Court. Instead Simmons utilized the remedy of R 60(b) by bringing an independent action. Therefore, this court has the power to entertain an independent action under R 60(b) which does not contain any limit on the court's power to review a lower court's decision under appropriate circumstances.

Finally, R 60(b) does not establish any time limit for independent actions to vacate a judgment. Thus, the county defendants' arguments that the applicable time periods for filing post trial motions or appeal have run are not pertinent. Amended Supplemental Memo at page 5. The cases on which the defendants rely, 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) all deal with the direct appeals from lower court decisions. Since this case is not an appeal but an independent action pursuant to R 60(b), Godwin and the cases it relied upon are entirely distinguishable for this and other reasons.

In summary, the argument that this court is without jurisdiction is incorrect. R 60(b) permits this very type of action under appropriate circumstances, which are present here. Simmons 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. The limitations on filing a post trial motion or appeal are not applicable to a R 60(b) independent action for the reason that the

circumstances justify the court's intervention. See T v T, supra; Bunkum v. Manor Properties, supra.

II. THE LAW OF THE CASE IS NOT APPLICABLE

The county defendants further argue that the Magistrate's Court jurisdiction cannot be collaterally attacked because it has become the "law of the case". Amended Supplemental Memorandum at page 5. They rely substantially on Judy v. Martin, 381 S.C. 455, 674 S.E.2d 151 (S.C. 2009). However, the Supreme Court described the doctrine in that case as follows: "Under the law-of-the-case doctrine, a party is precluded from relitigating, after an **appeal**, matters that were either not raised on appeal, but should have been, or raised on appeal, but expressly rejected by the appellate court." (emphasis added). As stated by the Supreme Court , the law of the case doctrine is not applicable here. Furthermore, the county defendants recitation of the facts support this contention: the party attacking the Magistrate's Court jurisdiction in an earlier action filed an appeal to the Circuit Court who affirmed . In this case, there was no appeal from the Magistrate's Court judgments because plaintiff never appeared or had notice of them, a fact to which the county does not dispute. Therefore, the principle underlying the decision in Judy as well as the facts clearly support Simmons contention that the "law of the case' principle does not bar this action.

III. S.C. CODE ANN. SECTION 22-3-10 DOES NOT PERMIT USER FEE SUITS

As to the merits of the issue that the Magistrate's Court lacks subject matter jurisdiction over a suit to collect a user fee, the county contends that such a suit is to recover damages for injury to the person of Charleston County. Amended Supplemental memo at page 7. This is a completely farfetched and unjustified interpretation of the Magistrate's Court jurisdiction under Section 22-3-10(2) which applies to personal injury or property damage claims within the

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

Furthermore, the user fee ordinance itself indicates the means by which it is to be enforced. As set forth in plaintiff's Further Opposition to defendants' motions for summary judgment (filed August 14 and incorporated by reference) , 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.

Finally, the count claims that by reading SC Code Ann. Sections 29-15-10 and 22-3-10 together , this court should find that there is subject matter jurisdiction. The county cites Rock Hill Body Co. v. Rainey, 294 S.C. 426, 430, 365 S.E.2d 228 (Ct. App. 1987) however, Rock hill involved the application of the statute giving the Magistrate's Court jurisdiction over enforcement of statutory liens, S.C. Code Ann Section 29-15-10, not the enabling statute

authorizing county government to adopt general welfare ordinance. Therefore Rock Hill is not pertinent.

Plaintiff has previously argued that the statute authorizing jurisdiction to magistrate's Court is to be narrowly construed. Rock Hill does support that position because the Court of Appeals interpreted the magistrate's authority to conduct a sale of property subject to a mechanics lien (over which it did have jurisdiction) to be limited to property within the jurisdictional amount of that court. Therefore, Rock Hill stands for the proposition that statutes will be read together so as to be in harmony. The county defendants' interpretation however does the opposite. The county wants the court to ignore the plain language of Section 22-3-10 and add language which does not exist in S.C. Code Ann. Section 29-15-10. There is no principle of statutory construction or logic to support the county's position and this court should reject it.

In summary , the plain language of Section 22-3-10 limits the jurisdiction of the Magistrate's Court and a suit to recover a user fee is not clearly within its limits.

IV. PROXIMATE CAUSE IS A JURY QUESTION

In their new argument for dismissal of the wrongful retention claim (Fifth Count), the county defendants argue that there was no proximate cause between their retention of defendant Long and his conduct toward plaintiff. They rely upon Kase v. Ebert, 392 S.C. 57, 707 S.E.2d 456, 459 (Ct. App. 2011). In that case the Court of Appeals affirmed dismissal of the wrongful retention claim because there was "no evidence that Ebert's **single** assault conviction, which took place more than twenty years before he was hired by DMX, was reason for DMX to foresee that employing Ebert would create an undue risk of harm to the public or that DMX's decision to hire him in view of this conviction fell below any acceptable hiring standard." (Emphasis added). In this case, as outlined in plaintiff's Supplemental Memorandum, there are six disciplinary

infractions (one of which was not produced in discovery) that the Sheriff's Department had notice of and which indicate defendant Long's propensity to violate procedure over a period of six years. Under the Department's policy of progressive discipline, his superiors should have taken note of all of these. If they had they would dismissed him before he came in contact with the plaintiff, a few years later.

As the Court of Appeals discussed in Mellen v. Lane, 377 S.C. 261 , 659 S.E.2d 236, 245 (Ct. App. 2008): "Proximate cause requires proof of both causation in fact and legal cause. Causation in fact is proved by establishing the plaintiff's injury would not have occurred "but for" the defendant's action. Legal cause is proved by establishing foreseeability. [L]egal cause is ordinarily a question of fact for the jury."(citations omitted) See Small v. Pioneer Mach., Inc., 329 S.C. 448, 463, 494 S.E.2d 835, 842 (Ct.App.1997)Small, 329 S.C. at 464, 494 S.E.2d at 843 ("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."). Simmons contends that Deputy long was racial motivated to levy upon his real property instead of personal property and had a history of ignoring the Departments regulations. But for Deputy's long' retention there would not have been the unlawful levy and execution of his real estate.

As established by Mellen, the issue of proximate cause is a question for the jury. This court should deny summary judgment because whether Simmons damages are proximately caused by the county retention of Long is jury question.

CONCLUSION

For the additional reasons set forth above, plaintiff respectfully requests that the Court deny the county defendants motion for summary judgment

Respectfully submitted,

Edward A. Bertele, Esq.
1812 Pierce Street
Charleston, SC 29492
(843) 471-2082
Attorney for plaintiff, Roosevelt Simmons
By: _____

Dated: September 6, 2012
Charleston, SC

CERTIFICATION OF SERVICE

I hereby certify that a true copy of the within Opposition to county defendants Amended Supplemental Memorandum dated August 31st in support of summary judgment was served upon the defendants' attorneys, Christopher Dorsel, Esq. and Wendy Keefer, Esq. by regular mail postage prepaid at their last known mailing addresses.

Edward A. Bertele, Esq.

September 6, 2012

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
IN THE NINTH JUDICIAL CIRCUIT
CASE NO. 2011CP10-1084

ROOSEVELT SIMMONS)
Plaintiff)
Vs.)
MASE and COMPANY, LLC,)
J. AL CANNON, JR.,)
CHARLESTON COUNTY)
SHERIFF'S DEPARTMENT,)
CHARLESTON COUNTY,)
CHARLESTON COUNTY)
REVENUE COLLECTIONS)
DEPARTMENT and)
HARRY LONG)
Defendants)

FILED
2012 NOV -7 AM 9:10
JULIE J. ARMSTRONG
CLERK OF COURT
BY

**PLAINTIFF'S REPLY TO
AMENDED MEMORANDUM OF DEFENDANTS
CHARLESTON COUNTY SHERIFF'S DEPARTMENT
CHARLESTON COUNTY, CHARLESTON COUNTY
REVENUE COLLECTIONS DEPARTMENT and
HARRY LONG IN OPPOSITION TO PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT**

REPLY ARGUMENT

I. THE CIRCUIT COURT HAS SUBJECT MATTER JURISDICTION

Defendants contend that the Circuit Court does not have subject matter jurisdiction to consider whether an earlier Magistrate's Court judgment was void for lack of jurisdiction. Defendants Amended Memo at pages 1-4. Defendants contend that the plaintiff's remedy was solely to appeal the Magistrate Court's judgment to the Circuit Court and he failed to do so. Id. at pages 4-8. However, defendants ignore the provisions of R 60(b), SCRCP which provides the basis for an independent action to vacate a judgment. R 60 contains the procedure for filing motions for relief from judgments including judgments which are "void" but also states:

“This rule shall not limit the power of a court to entertain an independent action to relieve a party from a judgment”. Plaintiff contends that R 60(b) provides an alternate remedy to collaterally attack the Magistrates Court judgment for lack of subject matter jurisdiction.

The defendants are misstating the law when they contend that this Court should not act against “precedent”. Id at page 3. There is no case which specifically holds that the Circuit Court cannot hear a challenge to a Magistrate Court decision in an independent action. Defendants rely upon numerous decisions which are factually different. Id at pages 2-7. These decisions such as Town of Hilton v Godwin, 370 SC 221, 634 S.E.2d 59 (Ct. App. 2006) deal with the Circuit Court’s appellate jurisdiction, which is not at issue here.

The issue of appellate jurisdiction is different from the matter of general jurisdiction. Whether or not plaintiff satisfied the requirements for perfecting an appeal from the Magistrate’s Court decision in 2000 does not determine this court’s general jurisdiction. “[O]ur 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, 723 S.E.2d 211, 218 (Ct. App. 2011) As the Supreme Court noted in Skinner v. Westinghouse Elec. Corp., 668 S.E.2d 795, 380 S.C. 91 (S.C. 2008) “ Subject matter jurisdiction is ‘ the power to hear and determine cases of the general class to which the proceedings in question belong.’” (Citations omitted). In Great Games, Inc. v. South Carolina Department of Revenue, 339 S.C. 79, 83 n. 5, 529 S.E.2d 6, 8 n. 5 (2000), the Court observed that “ [t]he 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.” See also State v. Brown, 358 S.C. 382, 387, 596 S.E.2d 39, 41 (2004).

An independent action to vacate a judgment is specifically permitted under R 60 (b) and many cases have interpreted it as such. See e.g., T v T, 378 S.C.127, 662 S.E.2d 413 (Ct. App. 2008); Bunkum v. Manor Properties, 321 S.C. 95,100, 467 S.E.2d 758 (Ct. App. 1996). “In essence, the rule merely reflects many of the considerations attendant to an equitable analysis.” T v. T, 378 S.C. at 136, 662 S.E.2d at 417. Simmons contends that he has established the basis for relief under the Rule. 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. Simmons filed this action after he discovered that TMS 498 had been sold in 2010 for the user fee on TMS 138. The defendants do not deny any of these allegations. Therefore, Simmons’ failure to file any post trial motions to the Magistrate’s Court or to appeal does not bar this action because this court has general jurisdiction under R 60(b) under appropriate circumstances to entertain an independent action to collaterally attack the Magistrate Court’s decision.

A case which is procedurally similar also supports the plaintiff’s interpretation of the scope of R 60(b). In Judy v Martin, 381 SC 455, 674 S.E. 2d 151 (SC 2009), the Supreme Court decided an appeal from a Master in Equity’s decision upholding a Magistrate Court decision challenged in an independent action. Id at page 152. The Supreme Court affirmed based upon the law of the case i.e. that the appellant had already appealed the Magistrate’ decision to the Circuit Court which upheld it, consequently he was barred from relitigating it again in the independent action. Id at page 153. The Supreme Court did not reject the jurisdiction of the Circuit Court to hear the case initially. Although not precedent, the decision in the Judy case suggests that an independent action represents an alternative remedy absent an earlier appeal.

Here, the plaintiff is not barred by the law of the case since he was never aware of the decision, never filed an appeal and thus is not barred from relitigating it. There is no procedural bar to this action and this Court should decide the issue on the merits.

In summary, this Court has general jurisdiction to determine the validity of the various Magistrate Court decisions entered against plaintiff in 2000 and thereafter and of the Sheriff's levy and sale of TMS 498 resulting from the 2000 judgment. Defendants concede that the plaintiff had no notice of the suit to collect the user fee in 2000 or of the judgment entered thereon. Defendants Amended Memo at page 8. Defendants do not contest any of the other bases for relief under R 60(b) i.e. that the material facts are not in dispute, that the equities favor the plaintiff and that the Sheriff's deed is void if the judgment is void. See Plaintiff's Amended Motion for Partial Summary Judgment at pages 11-12. Therefore, plaintiff urges this Court to decide the issue of the Magistrates Court jurisdiction on the merits.

II. THERE IS NO STATUTORY AUTHORITY TO COLLECT USER FEES IN MAGISTRATES COURT

The defendants cannot identify a single statutory or ordinance provision which specifically authorizes the Magistrates Court to have jurisdiction over a suit to collect a user fee. Magistrate Courts are courts of limited jurisdiction. See S.C. Ann. Code Section 22-3-10 & 20. Defendants have unconvincingly pointed to certain provisions of general welfare statute S.C. Code Ann. Sect 4-9-30. As plaintiff has previously demonstrated in his prior Opposition to defendants summary judgment motion which is incorporated by reference, this provision is not self executing and requires by its very terms that the County enact an ordinance. Charleston County enacted 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”.

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. It does not provide for any suit in Magistrate’s Court to collect the fee, thus the defendants argument fails. If the County did not adopt an ordinance in conformity with the county’s own interpretation of this provision, the defendants cannot rely upon the statute without an ordinance to support their position.

Defendants allege that because the general welfare ordinance provides that violations of user fee ordinances shall be heard in courts created by the general law including the magistrates’ courts, that this provision creates magistrates court jurisdiction. Defendants Amended Memo at page 9. However, the defendants must still point to a specific provision of some other ordinance or statute which provides jurisdiction to the Magistrates Court since they are not courts of general jurisdiction and the general welfare statute is not self executing. Plaintiff also contends that the use of the term “violation” does not apply to the collection of a user fee. Plaintiff asserts that this term was intended to apply to criminal activities or to the enforcement of an ordinance by imposition of a penalty. As stated above, 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”. However, the 2000 complaint filed by the county was not for a penalty but for the amount of the user fee. S. C. Code Ann. Section 22-3-10(3) provides that actions for penalties (less than \$7500.) may be brought in Magistrates Court. Therefore, the defendants’ arguments are again refuted by the language of the ordinance which they are relying upon to impose a user fee and by the language of the complaint they filed.

The defendants' argue that S.C. Code Ann. Sect 4-9-30 should be read in conjunction with Section 22-3-10 based upon the holding in Rock Hill Body Co. v. Rainey, 294 S.C. 426, 430, 365 S.E.2d 228 (Ct. App. 1987). Rock Hill involved the application of the statute giving the Magistrate's Court jurisdiction over enforcement of statutory liens, S.C. Code Ann Section 29-15-10, not the enabling statute authorizing county government to adopt general welfare ordinance. There, the court was concerned with an ambiguity in the procedure for enforcing liens of a certain amount and determined that the monetary limit of the Magistrates Court jurisdiction contained in Section 22-3-10 (\$7500.00) would apply. Plaintiff contends that Rock Hill supports his position since the monetary limit under Section 22-3-10 was found to govern, not the general authority of Section 29-15-10 to enforce liens. Therefore Rock Hill does not permit an interpretation of Section 4-9-30 which expands the jurisdiction of the Magistrate Court to include suits to collect user fees.

Defendants urge an interpretation of Section 4-9-30 which would create jurisdiction (without any enabling ordinance) in Magistrates Court over a suit to collect a user fee although there is no specific language in that statute which mentions collection of fees and although the Magistrates Court Act only allows suits over penalties. The Court should not accept an interpretation of the general welfare statute which contradicts the provisions of the S.C. Code Ann Sect 22-3-10. As plaintiff has already established, a general principle of statutory construction is that a general statute will not be read to contradict a specific one. Section 22-3-10 does not create jurisdiction over a user fee suit, only an action for a penalty. Defendants' interpretation is violation of the general principle of statutory construction and distorts the plain meaning of the words in the statute.

Finally, defendants contend that SC Code Ann. Sect 22-3-10 which allows suit for damages to real or personal property in Magistrates Court allows user fee suits because the County has been damaged. This is a bizarre interpretation of the language of the statute provision relating to "damages to real or personal property" and the Court should reject it summarily.

In summary, plaintiff contends that there is no reasonable interpretation of the Magistrates Court jurisdiction statute, Section 22-3-10 or the ordinance which allows the County to collect user fee that grants the Magistrates Court jurisdiction over the collection of user fees. The General Welfare Statute, Section 4-9-30 does not provide an independent source of jurisdiction absent an ordinance. That statute should not be read to create jurisdiction in the Magistrates Court (the subject of another statute) when is intended to authorize the enactment of general welfare ordinances by counties. Any other interpretation would stretch the meaning of the General Welfare Statute beyond the reasonable intention of the Legislature.

CONCLUSION

For the additional reasons set forth above, plaintiff respectfully requests that the Court grant plaintiff's motion for summary judgment.

Respectfully submitted,

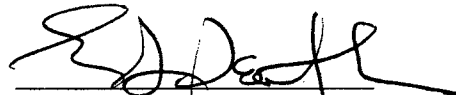
Edward A. Bertele, Esq.
1812 Pierce Street
Charleston, SC 29492
(843) 471-2082

Attorney for plaintiff, Roosevelt Simmons
By: 

Dated: November 6, 2012
Charleston, SC

CERTIFICATION OF SERVICE

I hereby certify that a true copy of the within Reply to Amended Memorandum in Opposition to plaintiff's motion for summary judgment was served upon the defendants' attorneys, Christopher Dorsel, Esq. and Wendy Keefer, Esq. by regular mail postage prepaid at their last known mailing addresses.


Edward A. Bertele, Esq.

November 6, 2012

FILED
2012 NOV -7 AM 9:10
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

R509

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

ROOSEVELT SIMMONS,

Plaintiff,

v.

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

Defendants,

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO.: ~~2012~~-CP-10-1084
2011

MOTION TO RECONSIDER

2012 NOV 29 AM 11:48
JULIE J. ARMSTRONG
CLERK OF COURT

FILED

Now comes the Defendants J. AL CANNON, JR., CHARLESTON COUNTY SHERIFF'S OFFICE, CHARLESTON COUNTY, CHARLESTON COUNTY REVENUE COLLECTIONS DEPARTMENT, and HARRY LONG ("Defendants") through their undersigned counsel respectfully moving this Court to reconsider its ruling on Defendants' Motion for Summary Judgment. Defendant's Motion was heard before the Honorable R. Markley Dennis, Jr., on November 7, 2012, and present at the hearing were Counsel for Plaintiff, Counsel for Defendants, and Counsel for Defendant Mase and Company, LLC.

At the hearing, the Court determined that there were issues of fact, which prevented the grant of Summary Judgment in favor of Defendants on any of Plaintiff's causes of action. However, the main argument asserted by counsel for Defendants in support of their Motion for Summary Judgment was regarding jurisdiction: 1) that the Court of Common Pleas did not have subject matter jurisdiction to hear any of Plaintiff's causes of action as they all arise from Magistrates Court judgments that were neither appealed nor the subject of a post-trial motion; and 2) that if the Court

of Common Pleas does have subject matter jurisdiction to hear these matters, the Magistrates Court in the underlying cases had subject matter jurisdiction to hear cases and issue judgments related to unpaid user fees. (Please see Defendants' Memorandum in Support of Summary Judgment and Amended Supplemental Memorandum in Support of Summary Judgment for a more complete discussion of these matters).

"The question of subject matter jurisdiction is a question of law for the court." Hammer v. Hammer, 399 S.C. 100, 104-105, 730 S.E.2d 874, 876 (Ct.App.2012), citing Capital City Ins. Co. v. BP Staff, Inc., 382 S.C. 92, 99, 674 S.E.2d 524, 528 (Ct.App.2009). As a preliminary matter, Defendants have argued in their Motion for Summary Judgment that Plaintiff cannot collaterally attack in the Court of Common Pleas a Magistrates Court order or judgment that was never appealed nor was the subject of a post-trial motion. Because there was no timely appeal or timely post-trial motion, the Court of Common Pleas has no subject matter jurisdiction over these claims. Therefore, as a matter of law, Plaintiff's entire lawsuit should be dismissed as all claims arise from the Magistrates Court judgments.

Further, Plaintiff's first three causes of action relate entirely to the subject matter jurisdiction of the Magistrates Court (See Plaintiff's Amended Motion for Partial Summary Judgment, filed Sept. 5, 2012). These three causes of action ask the Court to find that any Magistrates Court judgments against Plaintiff are void because the Magistrates Court lacked subject matter jurisdiction. As such, ~~these three causes of action do~~ not involve questions of fact, but rather matters of law that are appropriate for summary judgment.

Defendants reassert their arguments at hearing and all memorandums in support of their motions and in opposition to Plaintiff's motions by reference and respectfully request that this Court

reconsider its ruling and grant Defendants' Motion for Summary Judgment.

Respectfully Submitted,



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Chris@Sennlegal.com

Attorneys for Defendants J. Al Cannon, Jr., Charleston
County Sheriff's Office, Charleston County, Charleston County
Revenue Collections Department, and Harry Long

November 28, 2012
Charleston, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
IN THE NINTH JUDICIAL CIRCUIT
CASE NO. 2011-CP10-1084

ROOSEVELT SIMMONS)
Plaintiff)
Vs.)
MASE and COMPANY, LLC,)
J. AL CANNON, JR.,)
CHARLESTON COUNTY)
SHERIFF'S DEPARTMENT,)
CHARLESTON COUNTY,)
CHARLESTON COUNTY)
REVENUE COLLECTIONS)
DEPARTMENT and)
HARRY LONG)
Defendants)

FILED
2012 NOV 30 AM 11:58
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

**AMENDMENT TO
SECOND AMENDED COMPLAINT**

SIXTH COUNT
(Inadequacy of Sale price)

38. Plaintiff repeats and realleges each and every allegation of Paragraphs 1-37 of the Second Amended Complaint as if more fully set forth herein.
39. On or about November 4, 2009, Harry Long in his capacity as Deputy Sheriff of defendant Charleston County Sheriff's Department conducted a judicial sale of real property known as TMS 283-00-00-498 then owned by plaintiff.
40. The sale was purportedly to satisfy a judgment in Case No. 2000-JG -10-1817 issued by the Magistrates Court against plaintiff Roosevelt Simmons for nonpayment of a user fee imposed against TMS 282-00-00-138 also owned by plaintiff.
41. Defendant Mase and Company, LLC purchased the subject property for the sum of six hundred dollars (\$600.00) but the judgment remains unsatisfied.

42. On or about February 2010, defendant J. Al Cannon, Jr., Sheriff of Charleston County (the Sheriff) executed a deed purporting to transfer title to TMS 498 to defendant Mase and Company, LLC. The deed was recorded in the office of the Register of Mesne Conveyances of Charleston County in Deed Book 0109 page 498.

43. The sale price was so grossly inadequate as to shock the conscience.

44. The fair market value of the subject property is approximately \$70,000.00

WHEREFORE, plaintiff requests that judgment be entered against the defendants as follows:

1. A declaration that the Sheriff's deed to real property designated as TMS 283-00-00-498 to defendant Mase and Company, LLC, recorded in the office of the RMC of Charleston County in Deed Book 0109 page 498 is void and of no effect and that an Order thereupon be entered in the record of the Recorder of Mesne Conveyances;
2. A declaration invalidating all judgments entered against Simmons relating to payment of user fees imposed against TMS 282-00-00-138 and TMS 311-00-00-024 and 311-00-00-032;
3. Declaratory and injunctive relief against defendants' future imposition of user fees;
4. Compensatory damages;
5. Punitive damages;
6. An award of counsel fees and costs to the plaintiff;
7. Such other relief as the Court deems just and equitable.



Edward A. Bertele, Esq.
1812 Pierce Street
Charleston, SC 29492
(843) 471-2082 phone
Attorney for Plaintiff Roosevelt Simmons

Dated: November 29, 2012

IN THE COURT OF COMMON PLEAS
IN THE NINTH JUDICIAL CIRCUIT
CASE NO. 2011-CP10-1084

FILED
2012 NOV 30 AM 11:58
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

I hereby certify that a true copy of the plaintiff's Amendment to Second Amended Complaint was served upon the defendants' attorneys, Christopher Dorsel, Esq. and Wendy Keefer, Esq. by regular mail postage prepaid at their last known mailing address,


Edward A. Bertele, Esq.

RS15

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	IN THE NINTH JUDICIAL CIRCUIT
 ROOSEVELT SIMMONS,	)	
	)	Case No: 2011-CP-10-1084
Plaintiff,	)	
	)	
v.	)	DEFENDANT MASE AND
	)	COMPANY, LLC'S ANSWER
MASE and COMPANY, LLC, J. AL CANNON,	)	TO PLAINTIFF'S AMENDMENT
JR., CHARLESTON COUNTY SHERIFF'S	)	TO SECOND AMENDED
DEPARTMENT, CHARLESTON COUNTY,	)	COMPLAINT, CROSS-CLAIM AND
CHARLESTON COUNTY REVENUE	)	COUNTERCLAIM
COLLECTIONS DEPARTMENT and	)	
HARRY LONG, ¹	)	
	)	
Defendants.	)	
	)	

Counsel for Defendant, Mase and Company, LLC (MASE) (and its sole member, Charles E. Masencup), hereby files this Answer to Plaintiff's Amendment To Second Amended Complaint by denying each and every allegation not herein expressly admitted, reserving all rights to amend this answer and/or to file motions pursuant to Federal Rule of Civil Procedure, including but not limited to Rules 12 and 15, and as plead herein, and by alleging as follows.

Though not named an actual party to this action, to the extent any answer is deemed required from Mase and Company, LLC's sole member, Charles E. Masencup, this Answer is intended to serve as that pleading. MASE's responses to the first 37 paragraphs of Plaintiff's Second Amended Complaint, which allegations are unchanged in Plaintiff's most recently filed Amendment To Second Amended

¹ Pursuant to a recent court order in this matter, all claims against Defendant Harry Long were dismissed. As Plaintiff filed a motion seeking to reverse this decision, Mr. Long is included in this responsive pleading only to the extent the prior court decision dismissing the claims against him is reversed.

Complaint, remain unchanged and are repeated below for the convenience of the Court and the parties.

FOR A FIRST DEFENSE

1. Answering allegations of Paragraph 1 of the Plaintiff's Second Amended Complaint, MASE has insufficient information and knowledge either to admit or deny those allegations and, therefore, denies those allegations.
2. The allegations of Paragraph 2 of Plaintiff's Second Amended Complaint states conclusions of law, which conclusions MASE is required neither to admit nor deny.
3. Answering the allegations of Paragraph 3 of Plaintiff's Second Amended Complaint, MASE has insufficient information and knowledge either to admit or deny those allegations and, therefore, denies those allegations.
4. Answering the allegations of Paragraph 4 of Plaintiff's Second Amended Complaint, MASE has insufficient information and knowledge either to admit or deny those allegations and, therefore, denies those allegations.
5. Answering the allegations of Paragraph 5 of Plaintiff's Second Amended Complaint, MASE has insufficient information and knowledge either to admit or deny those allegations and, therefore, denies those allegations.
6. Answering the allegations of Paragraph 6 of Plaintiff's Second Amended Complaint, MASE has insufficient information and knowledge either to admit or deny those allegations and, therefore, denies those allegations.

7. The allegations of Paragraph 7 of Plaintiff's Second Amended Complaint state conclusions of law, which conclusions MASE is required neither to admit nor deny.
8. The allegations of Paragraph 8 of Plaintiff's Second Amended Complaint state conclusions of law, which conclusions MASE is required neither to admit nor deny.
9. Upon information and belief, MASE admits the allegations of Paragraph 9 of Plaintiff's Second Amended Complaint but craves reference to the actual sales, title and deed documents referenced for their exact terms.
10. The allegations of Paragraph 10 of Plaintiff's Second Amended Complaint state conclusions of law, which conclusions MASE is required neither to admit nor deny.
11. The allegations of Paragraph 11 of Plaintiff's Second Amended Complaint state conclusions of law, which conclusions MASE is required neither to admit nor deny.
12. Answering the allegations of Paragraph 12 of Plaintiff's Second Amended Complaint, MASE admits only that, upon information and belief, TMS 283-00-00-498 is undeveloped land. The remaining allegations of Paragraph 12 either state conclusions of law not requiring a response from MASE or include facts about which MASE has insufficient information and knowledge either to admit or deny and, therefore, those allegations are denied.

13. Answering the allegations of Paragraph 13 of Plaintiff's Second Amended Complaint, MASE reasserts and realleges each and every allegation of Paragraphs 1 through 12 above as if set forth herein verbatim.
14. The allegations of Paragraph 14 of Plaintiff's Complaint state either conclusions of law MASE is required neither to admit nor deny or include allegations about which MASE has insufficient information and knowledge either to admit or deny and, therefore, those allegations are denied.
15. The allegations of Paragraph 15 of Plaintiff's Second Amended Complaint state conclusions of law, which conclusions MASE is required neither to admit nor deny.
16. The allegations of Paragraph 16 of Plaintiff's Second Amended Complaint state conclusions of law, which conclusions MASE is required neither to admit nor deny.
17. The allegations of Paragraph 17 of Plaintiff's Second Amended Complaint state conclusions of law, which conclusions MASE is required neither to admit nor deny.
18. The allegations of Paragraph 18 of Plaintiff's Complaint state either conclusions of law MASE is required neither to admit nor deny or include allegations about which MASE has insufficient information and knowledge either to admit or deny and, therefore, those allegations are denied.

19. Answering the allegations of Paragraph 19 of Plaintiff's Second Amended Complaint, MASE reasserts and realleges each and every allegation of Paragraphs 1 through 18 above as if set forth herein verbatim.
20. MASE has insufficient information and knowledge either to admit or deny the allegations of Paragraph 20 of Plaintiff's Second Amended Complaint and, therefore, denies those allegations.
21. MASE has insufficient information and knowledge either to admit or deny the allegations of Paragraph 21 of Plaintiff's Second Amended Complaint and, therefore, denies those allegations.
22. MASE has insufficient information and knowledge either to admit or deny the allegations of Paragraph 22 of Plaintiff's Second Amended Complaint and, therefore, denies those allegations.
23. MASE has insufficient information and knowledge either to admit or deny the allegations of Paragraph 23 of Plaintiff's Second Amended Complaint and, therefore, denies those allegations.
24. MASE has insufficient information and knowledge either to admit or deny the allegations of Paragraph 24 of Plaintiff's Second Amended Complaint and, therefore, denies those allegations.
25. MASE has insufficient information and knowledge either to admit or deny the allegations of Paragraph 25 of Plaintiff's Second Amended Complaint and, therefore, denies those allegations.

26. The allegations of Paragraph 26 of Plaintiff's Second Amended Complaint state conclusions of law, which conclusions MASE is required neither to admit nor deny.
27. The allegations of Paragraph 27 of Plaintiff's Second Amended Complaint state conclusions of law, which conclusions MASE is required neither to admit nor deny.
28. Answering the allegations of Paragraph 28 of Plaintiff's Second Amended Complaint, MASE reasserts and realleges each and every allegation of Paragraphs 1 through 27 above as if set forth herein verbatim.
29. The allegations of Paragraph 29 of Plaintiff's Second Amended Complaint state conclusions of law, which conclusions MASE is required neither to admit nor deny.
30. The allegations of Paragraph 30 of Plaintiff's Second Amended Complaint state conclusions of law, which conclusions MASE is required neither to admit nor deny.
31. The allegations of Paragraph 31 of Plaintiff's Second Amended Complaint state conclusions of law, which conclusions MASE is required neither to admit nor deny.
32. Answering the allegations of Paragraph 32 of Plaintiff's Second Amended Complaint, MASE reasserts and realleges each and every allegation of Paragraphs 1 through 31 above as if set forth herein verbatim.

33. MASE has insufficient information and knowledge either to admit or deny the allegations of Paragraph 33 of Plaintiff's Second Amended Complaint and, therefore, denies those allegations.
34. MASE has insufficient information and knowledge either to admit or deny the allegations of Paragraph 34 of Plaintiff's Second Amended Complaint and, therefore, denies those allegations.
35. MASE has insufficient information and knowledge either to admit or deny the allegations of Paragraph 35 of Plaintiff's Second Amended Complaint and, therefore, denies those allegations.
36. MASE has insufficient information and knowledge either to admit or deny the allegations of Paragraph 36 of Plaintiff's Second Amended Complaint and, therefore, denies those allegations.
37. MASE has insufficient information and knowledge either to admit or deny the allegations of Paragraph 37 of Plaintiff's Second Amended Complaint and, therefore, denies those allegations.
38. Answering the allegations of Paragraph 38 of Plaintiff's Amendment To Second Amended Complaint, MASE reasserts and realleges each and every allegation of Paragraphs 1 through 37 above as if set forth herein verbatim.
39. Upon information and belief, MASE admits that a judicial sale of property took place at which MASE, through the normal and regular course of such sale, successfully bid, paid for and acquired property previously owned by Plaintiff. Answering the remaining specific allegations of Paragraph

39, MASE craves reference to any and all documents related to that sale for the exact date and other details.

40. MASE has insufficient information and knowledge either to admit or deny the allegations of Paragraph 40 of Plaintiff's Amendment To Second Amended Complaint but believes those allegations to be generally accurate, though MASE had no knowledge as to the allegations prior to institution of this litigation.
41. Answering the allegations of Paragraph 41 of Plaintiff's Amendment To Second Amended Complaint, MASE admits it purchased the subject property for the sum specified, such sum being the winning bid at a judicial sale of the property. MASE has insufficient information and knowledge as to the status of the referenced judgment either to admit or deny those allegations.
42. Answering the allegations of Paragraph 42 of Plaintiff's Amendment To Second Amended Complaint, MASE craves reference to the document(s) identified for the terms and other information about that document(s).
43. MASE denies the allegations of Paragraph 43 of Plaintiff's Amendment To Second Amended Complaint.
44. MASE has insufficient information and knowledge either to admit or deny the allegations of Paragraph 44 of Plaintiff's Amendment To Second Amended Complaint and, therefore, denies those allegations.

FOR A SECOND DEFENSE
MOTION TO DISMISS
(Rules 8 and 12)

45. Plaintiff failed to state any cause of action against MASE or its sole member, Charles E. Masencup, on which relief may be granted. Indeed, the only allegation directly identifying either of these entities/person alleges merely that MASE purchased property from the County of Charleston. No allegations of bad faith or knowledge of any issues regarding the property on the part of MASE or Masencup are made in the Plaintiff's pleadings. Any dispute about whether the County properly sold such property is between Plaintiff and the other Defendants to this action and can be addressed solely by money damages, which damages this Defendant has no reason to believe should be awarded, and need not involve MASE, the current owner and good faith purchaser for value of the property at issue. Thus, the Amended Complaint should be dismissed, as to this Defendant, with prejudice, pursuant to Federal Rules of Civil Procedure, Rules 8 and 12 and costs and fees awarded to MASE for having to defend this frivolous suit as to this Defendant. MASE also expressly reserves the right to file a motion to dismiss or for judgment on the pleadings, pursuant to Rule 12 of the Federal Rules of Civil Procedure, specifically but not limited to Rule 12(c), once all pleadings are filed in this matter.

FOR A THIRD DEFENSE
(No Constitutional Claim Against MASE)

46. Though Plaintiff's Second Amended Complaint appears to assert causes of action only against the other Defendants, to the extent any constitutional claim is intended to be made against MASE, such claim may not proceed

as constitutional violations of the nature raised in Plaintiff's Second Amended Complaint may only be committed by state actors. Neither MASE nor Masencup are state actors.

FOR A FOURTH DEFENSE
(Comparative Negligence/Sole Negligence)

47. Any injuries or damages sustained by Plaintiff, all of which are denied as related to any action or inaction of MASE or its sole member, are due to and caused by Plaintiff's own negligence, gross negligence, recklessness, wantonness, and/or illegal behavior or that of the other Defendants as more specifically described in the cross-claim contained herein.

FOR A FIFTH DEFENSE
(Waiver, Estoppel, Laches, Acquiescence, Stale Demand, Statute of Limitations, Service of Process, Proximate Cause, and Failure to Mitigate)

48. Plaintiff's claims are barred, in whole or in part, and particularly as relates to MASE and its sole member, by the doctrines of estoppel, laches, waiver, acquiescence, stale demand, statute of limitations, service of process, lack of proximate cause between any act or omission of MASE or its sole member and the damages claimed, and/or failure to mitigate Plaintiff's damages.
49. Further answering Plaintiff's Second Amended Complaint, Plaintiff failed to take any steps to maintain ownership of the property or otherwise protect his claimed interest prior to its sale, which property was purchased in good faith by MASE from Charleston County. Plaintiff thereby failed to mitigate his damages and instead MASE became the legal

owner of the property, maintaining it and incurring and assuming any and all liabilities and costs of such ownership.

FOR A SIXTH DEFENSE
(Good Faith Purchaser)

50. Defendant MASE purchased the relevant property in good faith, for value determined through a bidding process, and with no knowledge or information from which a reasonable person could or should have deduced that title would not be cleanly provided to the relevant property upon the payment of the purchase price provided by this Defendant. As such a good faith purchaser for value, this Defendant is entitled to dismissal of any and all claims against it, to retain ownership of the property purchased, and for reimbursement by Plaintiff and/or the other Defendants for any and all costs and fees related to defense of this litigation.

FOR A SEVENTH DEFENSE
(Lack of Standing)

51. In connection with Plaintiff's Sixth Count (Inadequacy of Sale Price), the appropriate remedy, should any cause of action exist for such claim for any party, would be a return of the property to the County for the purposes of conducting another sale, which remedy does not result in any recovery or benefit to Plaintiff. Thus, as a party lacking any interest in the outcome, Plaintiff lacks standing to pursue any such cause of action. Should Plaintiff have some other interest, which interest could only be related to any remaining unsatisfied judgments against Plaintiff and in

favor of the County of Charleston, that claim lies only as between Plaintiff and any County defendants and cannot legally or equitably result in a required transfer of the property from good faith purchaser MASE.

FOR AN EIGHTH DEFENSE
& COUNTERCLAIM
(South Carolina Frivolous Civil Proceedings Sanctions Act)

52. Pursuant to the South Carolina Frivolous Proceedings Sanctions Act, S.C. Code § 15.26.10, et seq., MASE and/or its sole member are entitled to recover from Plaintiff their attorney's fees and court costs incurred in litigating this matter, along with lost business opportunities resulting from the *lis pendens* placed on the property by Plaintiff. As a good faith purchaser for value of the relevant property, and with no allegations contained in Plaintiff's Second Amended Complaint, Plaintiff's Amendment To Second Amended Complaint, or any other pleading asserting any facts on which it could be determined that this Defendant did not purchase the relevant property in good faith and without knowledge of any reasons why such property was not available for purchase and rightfully purchased by MASE, naming this Defendant in this action is inappropriate and amounts to a frivolous civil proceeding against this Defendant.

FOR AN EIGHTH DEFENSE
& AS A CROSS-CLAIM AGAINST
DEFENDANTS J. AL CANNON, JR., CHARLESTON COUNTY SHERIFF'S
DEPARTMENT, CHARLESTON COUNTY, CHARLESTON COUNTY REVENUE
COLLECTIONS DEPARTMENT AND HARRY LONG
(Negligence)

53. In reliance upon the property's being offered for sale by one or more the Defendants named above, MASE incurred various costs and expenses related to the purchase and maintenance of the relevant property and other damages, including but not limited to costs incurred to defend this litigation and lost business opportunities, which costs and other damages were proximately caused by one or more of these Defendants' negligence, either alone or in combination with the negligence of Plaintiff as earlier alleged.

FOR A NINTH DEFENSE
& AS A CROSS-CLAIM AGAINST
DEFENDANTS J. AL CANNON, JR., CHARLESTON COUNTY SHERIFF'S
DEPARTMENT, CHARLESTON COUNTY, CHARLESTON COUNTY REVENUE
COLLECTIONS DEPARTMENT AND HARRY LONG
(Indemnification)

54. Any and all damages awarded to Plaintiff in this action, which damages are denied, against Defendant MASE (or its sole member), were the result of actions or inactions of the other Defendants such that MASE (and/or its sole member) is entitled to full indemnification from the other Defendants for any such amounts entered against it, indemnification for the full fair market value of the property at issue if such property is awarded to Plaintiff, and indemnification for all fees and costs incurred by MASE in defending this action.

Wherefore, having fully answered the Second Amended Complaint, Defendant MASE (and its sole member) hereby prays that the Second Amended Complaint, including all claims contained therein, be dismissed with prejudice, that Plaintiff be responsible for all costs associated with

defendant this action and for such other relief as is requested in this pleading
or is otherwise deemed just and proper by this Court.



Wendy J. Keefer
Keefer & Keefer, LLC
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December 10, 2012

Attorneys for Defendant MASE and
COMPANY, LLC and its sole member,
Charles E. Masencup

IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON
ROOSEVELT SIMMONS,

Plaintiff,

v.

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

Defendants.

IN THE COURT OF COMMON PLEAS
IN THE NINTH JUDICIAL CIRCUIT
C/A NO.: 2011-CP-10-1084

**ANSWER TO AMENDMENT TO
SECOND AMENDED COMPLAINT ON
BEHALF OF DEFENDANTS' J. AL
CANNON, JR., SHERIFF OF
CHARLESTON COUNTY,
CHARLESTON COUNTY,
CHARLESTON COUNTY REVENUE
COLLECTIONS DEPARTMENT, AND
HARRY LONG**

(Jury Trial Demanded)

Come now the defendants, J. Al Cannon, Jr., Sheriff of Charleston County, Charleston County,
Charleston County Revenue Collections Department and Harry Long ("Defendants") and hereby
answer the plaintiff's Amendment to Second Amended Complaint to wit:

FOR A FIRST DEFENSE
(Qualified General Denial)

All specifically not admitted herein should be deemed denied.

38. Requires no response.
39. Admit.
40. Admit.
41. Admit.
42. Admit only so much that would show that the sheriff's office executed a deed in favor of
Mase and Company and the deed was registered.

FILED
2012 DEC 17 PM 1:16
JULIE J. ARMSTRONG
CLERK OF COURT
BY *[Signature]*

43. Calls for legal conclusions requiring no response and is therefore denied.
44. Deny, including subparts.

FOR A SECOND DEFENSE
(Rules 8 and 12)

45. Plaintiff has failed to state a cause of action for which relief can be granted. Further, this Second Amended Complaint should be dismissed for all applicable reasons in accordance with Rule 12 and Rule 8 of the Federal Rules of Civil Procedure.

FOR A THIRD DEFENSE
(No Constitutional Violation)

46. The alleged actions/inactions claimed by the plaintiff did not rise to the level of a constitutional violation and the plaintiff did not suffer any infringement of constitutional and/or federal rights, privileges or immunities.

FOR A FOURTH DEFENSE
(Comparative Negligence/Sole Negligence)

47. Any injuries or damages sustained by the plaintiff, all of which are expressly denied, are due to and caused by the plaintiff's own negligent, gross negligent, reckless, wanton, and illegal behavior.

FOR A FIFTH DEFENSE
**(Waiver, Estoppel, Laches, Acquiescence, Stale Demand, Statute of Limitations,
Service of Process and Proximate Cause)**

48. Plaintiff's claims are barred, in whole or in part, by the doctrines of *estoppel*, laches,

waiver, acquiescence, stale demand, statute of limitations, service of process and/or the acts of the answering defendants were not the proximate cause of the damages.

FOR A SIXTH DEFENSE
(South Carolina Frivolous Civil Proceedings Sanctions Act)

49. Under the South Carolina Frivolous Civil Proceedings Sanctions Act, Sections 15-36-10 et seq of the South Carolina Code of Laws, Defendants are entitled to recover their attorney's fees and court costs incurred in litigating this matter.

FOR AN SEVENTH DEFENSE
(Sovereign Immunity - Tort Claims Act)

50 As to any alleged violation of common law or state law, the Defendants assert the protections and provisions of the South Carolina Tort Claims Act, S.C. Code Ann. §15-78-10, et seq, pertinent portions thereto.

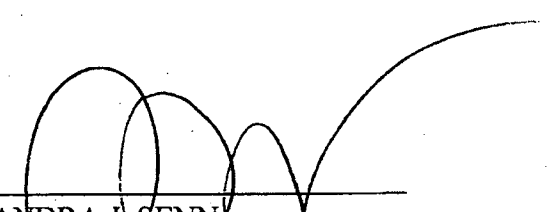
FOR A EIGHTH DEFENSE
(Failure to Mitigate)

51 Plaintiff's claims are barred or must be reduced by his failure to mitigate damages, should there be any damages.

FOR A NINTH DEFENSE
(Standing)

52. The plaintiff does not have standing to bring this lawsuit as he is not a real party in interest.

Wherefore, having fully answered the Amendment to the Second Amended Complaint, the answering Defendants hereby pray that the Complaint be dismissed with prejudice; that plaintiff be responsible for all costs associated with defending this action; and for all such further relief as this court deems just and proper. In addition, the defendants reserve the right to amend to allege additional affirmative defenses or other defenses as they become known throughout the course of discovery.



SANDRA J. SENN
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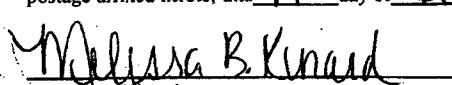
December 14, 2012

Charleston, South Carolina

Attorneys for Defendants Sheriff Al Cannon,
Charleston County Sheriff's Department,
County of Charleston Revenue Collections
Charleston County and Harry Long

CERTIFICATE OF MAILING

I hereby certify that I have mailed a copy of the above and foregoing to counsel of record in said proceeding to his office address with sufficient postage affixed hereto, this 14 day of December, 2012.



Melissa B. Kinard

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

ROOSEVELT SIMMONS,

Plaintiff,

v.

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

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CIVIL ACTION NO.: 2011-CP-10-1084

ANSWER ON BEHALF OF
DEFENDANTS' J. AL CANNON, JR.,
CHARLESTON COUNTY SHERIFF'S
DEPARTMENT, CHARLESTON
COUNTY, CHARLESTON COUNTY
REVENUE COLLECTIONS
DEPARTMENT AND HARRY LONG TO
DEFENDANT MASE AND COMPANY,
LLC ANSWER TO PLAINTIFF'S
AMENDMENT TO SECOND AMENDED
COMPLAINT, CROSS-CLAIM AND
COUNTERCLAIM

(Jury Trial Demanded)

Come now the defendants, J. Al Cannon, Jr., Sheriff of Charleston County, Charleston County Sheriff's Department, Charleston County, Charleston County Revenue Collections Department and Harry Long, ("these Defendants") and hereby answer the Cross-Claims of Defendant Mase and Company, LLC, ("Defendant Mase") included in Defendant Mase's Answer to Plaintiff's Amendment to Second Amended Complaint, Cross-Claim, and Counterclaim of Defendant Mase and Company, LLC as follows:

FOR A FIRST DEFENSE
(Qualified General Denial)

All specifically not admitted herein should be deemed denied.

1. These Defendants would show that Paragraphs 1-49 of Defendant Mase's Answer to Plaintiff's Amendment to Second Amended Complaint, Cross-Claim and Counterclaim are not directed at these Defendants and therefore no response is required. To the extent a response is required to said Paragraphs, these Defendants deny any allegations against these Defendants.

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2. These Defendants deny the allegations of Paragraph 50 of Defendant Mase's Answer to Plaintiff's Amendment to Second Amended Complaint, Cross-Claim and Counterclaim as they apply to them, but would admit that any damages, should there be any proven, incurred by Defendant Mase were solely caused by Plaintiff.

3. These Defendants deny the allegations of Paragraph 51 of Defendant Mase's Answer to Plaintiff's Amendment to Second Amended Complaint, Cross-Claim and Counterclaim as they apply to them, but would admit that Plaintiff lacks standing to bring a cause of action for Inadequacy of Sale Price.

4. These Defendants deny the allegations of Paragraph 52 of Defendant Mase's Answer to Plaintiff's Amendment to Second Amended Complaint, Cross-Claim and Counterclaim as they apply to them, but would admit that any damages, should there be any proven, incurred by Defendant Mase were solely caused by Plaintiff.

5. These Defendants deny any allegations of Paragraph 53 of Defendant Mase's Answer, Cross-Claim and Counterclaim as they apply to these Defendants.

6. These Defendants deny any allegations of Paragraph 54 of Defendant Mase's Answer, Cross-Claim and Counterclaim as they apply to these Defendants.

FOR A SECOND DEFENSE
(Rules 8 and 12)

7. Defendant Mase has failed to state a cause of action for which relief can be granted. Further, the Cross-Claims should be dismissed for all applicable reasons in accordance with Rule 12 and Rule 8 of the South Carolina Rules of Civil Procedure.

2535

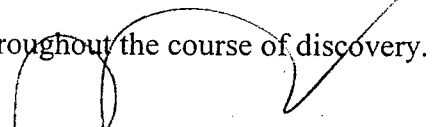
FOR AN THIRD DEFENSE
(Sovereign Immunity - Tort Claims Act)

8. As to any alleged violation of common law or state law, these Defendants assert the protections and provisions of the South Carolina Tort Claims Act, S.C. Code Ann. §15-78-10, et seq., pertinent portions thereto.

FOR A FOURTH DEFENSE
(Failure to Mitigate)

9. Defendant Mase's claims are barred or must be reduced by his failure to mitigate damages, should there be any damages.

Wherefore, having fully answered Defendant Mase's Cross-Claim, these Defendants hereby pray that the Cross-Claim be dismissed with prejudice; that Defendant Mase be responsible for all costs associated with defending this action; and for all such further relief as this court deems just and proper. In addition, these Defendants reserve the right to amend to allege additional affirmative defenses or other defenses as they become known throughout the course of discovery.



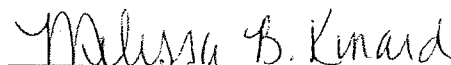
SANDRA J. SENN
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Charleston, SC 29422
(843) 556-4045

December 21, 2012
Charleston, South Carolina

Attorneys for Defendants J. Al Cannon, Jr.,
Sheriff of Charleston County, Charleston
County Sheriff's Department, Charleston
County, Charleston County Revenue
Collections Department and Harry Long

CERTIFICATE OF MAILING

I hereby certify that I have electronically served and mailed a copy of the above and foregoing to counsel of record in said proceeding to their office addresses with sufficient postage affixed hereto, this 21 day of December, 2012.



Melissa B. Kinard

2536
3

IN THE COURT OF COMMON PLEAS
IN THE NINTH JUDICIAL CIRCUIT
CASE NO. 2011CP10-1084

**PLAINTIFF'S MOTION TO ALTER
OR AMEND JUDGMENT**

PLEASE TAKE NOTICE that on the tenth day following service of the within NOTICE of MOTION or as soon thereafter as counsel may be heard, plaintiff Roosevelt Simmons, by his attorney, Edward A. Bertele, Esq. shall move before the Court of Common Pleas for the Ninth Judicial Circuit at the Charleston County Courthouse, 100 Broad Street, Charleston, SC 29401 for an Order pursuant to South Carolina Rules of Civil Procedure 59(e) to alter or amend the Order dated November 20, 2012 dismissing the Second Amended Complaint as to defendant Harry Long. Plaintiff relies upon the pleadings filed heretofore and the reasons set forth herein for the filing of this motion.

BASIS FOR THIS MOTION

This action arises out of the levy, execution and sale of certain real property by Defendants County of Charleston and the Sheriff's Department and Deputy Harry Long. The Fifth Count of the Second Amended Complaint alleges a Tort Claim against the Sheriff's

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Department based upon the actions of its employee, defendant Long in executing and levying upon real property owned by Simmons. Second Amended Complaint, para. 33 & 34.

Furthermore, the Fifth Count specifically alleges 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.” Id. para. 35. Also, the Fourth Count alleges a civil rights violation by the county and Harry Long in that Long arbitrarily and discriminatorily executed on the real property and denied Simmons equal protection of the law. Id. para. 28- 31.

Defendants County of Charleston and Harry Long filed a motion to dismiss as to Long in which they contended that Long was acting solely within the scope of his authority in connection with the levy, execution and sale of Simmons property and thus was immune from suit. See Motion to dismiss Defendant Harry Long, dated February 20, 2012. That was the sole basis for the motion. It was repeated in defendants’ Memorandum in support of defendants’ motion for summary judgment, at page 13, but no further basis for relief was made in any subsequent filing. Plaintiff opposed this motion on the basis that the employee exemption was inapplicable due to the allegation that Long had acted with malice and ill will. See Plaintiff’s Opposition to Motions of County defendants dated August 2, 2012 at page 34-35. Plaintiff also contended that Long was named as a defendant under the Fourth Count for civil rights violations, Id. at 35, and that there were material issues of disputed fact as to these claims. Id at 35-37.

On November 7, 2012, the Court heard the motion to dismiss as well as other motions filed by the plaintiff and the county. By order dated November 20, 2012, the Court denied summary judgment as to the plaintiff and the county but granted dismissal of the Second Amended Complaint as to defendant Harry Long. The decision does not contain any findings

although it indicates that formal order is to follow. Plaintiff contends that the court's decision dismissing the Second Amended Complaint as to defendant Long did not address the legal issues asserted in the plaintiff's opposition, which are more fully discussed below and respectfully requests that the Court reconsider its decision and alter/amend its order to deny this motion.

LEGAL ARGUMENT

In their motion to dismiss, the county defendants relied solely upon the argument that defendant Harry Long is a government employee and immune from suit pursuant to S.C. Code Ann. Section 15-78-70(a). In his opposition to the motion, Simmons asserted that Section 70(b) removes any governmental immunity for an employee 's "conduct not within the scope of his official duties or that constituted . . . actual malice [or] intent to harm . . ." and cited 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). Simmons further contended that he had alleged actual malice by Long as part of the Tort Claim in the Fifth Count, 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." The county did not respond to this argument in any of its subsequent pleadings. Therefore the court should reconsider its decision because the county did not refute that acts done by an employee out of malice are outside of the statutory exemption and plaintiff had alleged malice. 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).

Further the court should reconsider its decision because summary judgment was not appropriate either. 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 Fifth Count alleged that Long acted out of malice. The county did not address Simmons allegations of malice in its motion or in respond to his opposition papers that the motion record contained evidence sufficient to support a claim of malice and the material facts were in dispute. Plaintiff's Opposition at page 34-35, 37. Therefore, the county did not even argue that there was no evidence of malice.

Simmons did not rely upon mere allegations of malice in opposing defendants' motion. Simmons submitted Long's deposition testimony, attached as Exhibit F to plaintiff's opposition to the county motions. Long stated that he believed Simmons had threatened him in a telephone call. Long stated that he later filed an incident report and "blue flagged" Simmons property meaning that Sheriff's Department employees were to be cautious when entering there. Long admitted that he did not pursue information about all the motor vehicles Simmons owned to determine whether he should levy upon them as required by statute, before levying on real property. See Plaintiff's opposition to defendants' motion at page 7-9. Simmons denied ever making the phone call. Simmons asserted that when Long came to his home in August 2009, he disregarded numerous other items of personal property in plain view such as a boat and trailer, tractor, backhoe and other heavy equipment. See Simmons Affidavit at para. 6&7. "Actual malice [under the Tort Claims Act] refers to common law actual malice, and has been defined by situations where "defendant was actuated by ill will in what he did, with the design to causelessly and wantonly injure the plaintiff." Swicegood v. Lott, 379 S.C. 346, 665 S.E.2d 211 (Ct. App. 2008) (quotations omitted).

Plaintiff asserted that Long's testimony supported his contention that defendant Long acted out of malice. Simmons contended that Long was hostile as result of the alleged telephone threat and had already made up his mind to punish Simmons for threatening him when he went to his house; that he ignored the existence of personal property in plain sight on which he could have levied because he was intent on punishing Simmons by levying on real property. Under the summary judgment standard, the court gives every benefit of the doubt to the non-moving party. Watters v. Terminix Service, Inc. 376 S.C.632, 635, 658 S.E. 2d 110,111 (Ct. App. 2008).

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). If triable issues exist, those issues must be submitted to the jury. Young v. South Carolina Dept. of Corrections, 333 S.C. 714,718, 511 S.E.2d 413,415 (Ct. App. 1999). Simmons contends that the reasonable inferences support his claim that Long acted out of malice such that summary judgment should be denied.

Simmons also contends that since the court denied the county defendants' motion for summary judgment as to the Fifth Count alleging a tort and that Long has no immunity from suit for a tort, there is no basis to grant it as to defendant Long.

In addition, Simmons had filed a motion to compel discovery against the county for failure to produce portions of defendant Long's disciplinary file pertaining to an earlier incident involving a criminal defendant arrested by Long and for county files relating to other user fee judgments which Long enforced. The basis for these requests was to determine whether there were racial components in these actions that demonstrated a pattern and practice of discriminatory behavior. Plaintiff's Motion to Compel discovery at page 3. In opposition to

defendants motions for summary judgment Simmons had contended that discovery was not complete as to these (and other demands) such that summary judgment should not have been granted. Plaintiff's opposition at defendants' motion for summary judgment at pages 37-38. These discovery demands include Sheriff's Department files relating to enforcement of user fee judgment against those two property owners to determine whether there is a pattern or practice in the manner in which the Deputy Long levies upon real property; and information pertaining to the conduct of Deputy Long that resulted in a reprimand which was contained in his personnel file. These also relate to Simmons claims of ill will and possible bias. Plaintiff also requested a copy of Sheriff's Department arrest file that defendant Long was disciplined for mishandling, which relates to his propensity to violate Department procedures and a possible racial motivation. Simmons asserted he was entitled to have the requested material in order to respond to the county's summary judgment motion as to the Fourth and Fifth Counts; that the requested material is relevant to Simmons allegations regarding Deputy Long's conduct toward him; that the information is solely within the control of the county. The county had known about all these discovery requests for many months; and that Simmons is prejudiced by the county's refusal to provide it. The discovery motion was resolved by the parties at the motion hearing. Since discovery had not been completed as to facts pertaining to Long's pattern and practices involving racial components, summary judgment dismissing defendant Long should not have been granted.

Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Brockbank v. Best Capital Corp., 341 S.C. 372, 534 S.E.2d 688 (2000). 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). Since

the county did not assert that there was no basis in the record to find malice and since the plaintiff asserted that there was a disputed issue of material fact as to malice summary judgment should not have been granted.

Finally, the court should reconsider its decision because the Fourth Count asserts a civil rights claim against Long which his motion did not address and for which there is no governmental immunity or other basis to dismiss the complaint. The Count denied that summary judgment as to the Fourth and Fifth Counts and there is no basis to grant it to defendant Long individually since the county only alleged the exemption under the Tort Claim Act as the basis for immunity .

CONCLUSION

Simmons respectfully requests the court to reconsider its decision and alter or amend the judgment to deny dismissal of defendant Long.

Respectfully submitted,

Edward A. Bertele, Esq.
1812 Pierce Street
Charleston, SC 29492
(843) 471-2082
Attorney for plaintiff, Roosevelt Simmons
By: _____

Dated: December 4, 2012
Charleston, SC

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
IN THE NINTH JUDICIAL CIRCUIT
CASE NO. 2011CP10-1084

ROOSEVELT SIMMONS)
Plaintiff)

Vs.)

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

FILED
2013 FEB 13 PM 1:18
JULIE J. ARMSTRONG
CLERK OF COURT
BY 

**PLAINTIFF'S OPPOSITION TO
DEFENDANTS COUNTY OF CHARLESTON,
SHERIFF'S DEPARTMENT AND HARRY LONG
FOR RECONSIDERATION**

Plaintiff herewith submits his opposition to the County of Charleston, Sheriff's Department and Harry Long (county defendants) motion for reconsideration of this Court's denial of their motions for summary judgment. The county defendants' motion states that their main argument for summary judgment was directed at the issue of jurisdiction, both that of the Circuit Court to hear this case and of the Magistrate's Court to hear the user fee suits. See Motion at page 1- 2. Therefore, plaintiff believes that the county defendants are not seeking reconsideration of any other issues for which summary judgment was denied and will limit his response to the question of jurisdiction.

REPLY ARGUMENT

In their original motion to dismiss, the county defendants sought dismissal of the First, Second and Third Counts on the basis that the Magistrate's Court had subject matter jurisdiction

over suits to collect user fees under the language of the statute enabling counties to adopt public welfare ordinances, S.C. Code Ann. Section 4-9-30(14). (Memorandum at pages 4-9). County defendants submitted a Supplemental Memorandum dated August 14th arguing that this Court lacked jurisdiction because plaintiff failed to appeal the Magistrate's Court judgment and is procedurally barred and that the various user fee judgments have become the "law of the case". County defendants Amended Supplemental Memorandum dated August 31st raised an additional argument for Magistrate's Court jurisdiction: that a suit to collect user fees is a suit to recover "damages to the person of Charleston County". In their motion for reconsideration, the county defendants reassert all of these prior arguments and emphasize that subject matter jurisdiction is a question of law. Plaintiff contends that the Court correctly denied the county defendants' motion for the reasons set forth below.

The county defendants assert that the trial court's decision to deny summary judgment as stated on the record at the November 10th motion hearing was based upon its determination that there were facts in dispute. Motion at page 1. Defendants contend that the jurisdiction of the Circuit Court to hear this case is a question of law. Plaintiff contends that the Court implicitly determined that it had jurisdiction to hear this case and that its decision was correct. See Section A. below. Plaintiff further contends that the Court also correctly decided that the county defendants were not entitled to summary judgment dismissing the First, Second and Third Counts of the complaint on the merits because there were disputed issues of fact and the County defendants were not entitled to judgment as a matter of law. See Sections B & C, below.

A. The trial court's decision regarding its jurisdiction over this action is correct.

Simmons previously argued that the circuit court has jurisdiction to hear this case for several reasons and the country defendants have failed to rebut these in their motion to

reconsider. Plaintiff incorporates all of the earlier arguments by reference and summarizes them as follows. The Circuit Court is a court of general jurisdiction. " Subject matter jurisdiction is ' the 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) (quotation omitted). "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, 723 S.E.2d 211, 218 (Ct. App. 2011). " [I]t is clear that anyone who asks to have such jurisdiction limited in any way must be able to point out some constitutional or statutory provision establishing such limitation." Ex parte Ware Furniture Co., 49 S.C. 20 (1897) (MacIver, C.J., dissenting). The county defendants have not pointed to any limitation of the jurisdiction of this court to hear an action under SCRCP 60(b) to vacate a lower court judgment. SCRCP 60(b) does not specifically limit the power of the Circuit Court from vacating a judgment of a lower court. Since the rule does not contain such a restriction, this Court should not impose such a limitation on itself because to do so would unduly restrict its authority as a court of general jurisdiction.

Simmons is seeking relief which is entirely within the power of this Court to grant: a declaratory judgment that the user fee judgments are invalid along with the Sheriff's deed. Rule 60(b), SCRCP states that in addition to motions post judgment to vacate a judgment, the court may also "entertain an independent action to relieve a party from a judgment". 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." ^{T.V.T.} 378 S.C. at 136, 662 S.E.2d at 417. See National Surety Co. of N.Y. v. State Bank of Humboldt, 120 Fed. 593

(8th Cir. 1903). Therefore, Rule 60 (b) provides that relief in the form of vacating an earlier judgment may be granted in a subsequent action based upon an equitable analysis.

Furthermore, Simmons has asserted other claims for civil rights violations and tort against the County and Sheriff's Department over which the Magistrate's Court has no jurisdiction. If Simmons had filed an appeal from the July 2000 user fee judgment, it would have been heard in this court. See S.C. Code Ann. Section. § 14-5-340. See R 18, S.C. R. Magistrate's Court. Instead Simmons utilized the remedy of R 60(b) by bringing an independent action. Therefore, this court has the power to entertain an independent action under R 60(b) which does not contain any limit on the court's power to review a lower court's decision under appropriate circumstances.

The county defendants previously asserted that the limitations on filing a post trial motion or appeal are a bar to this court's jurisdiction but these are not applicable to a R 60(b) independent action. " [t]he 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. Skinner v. Westinghouse Elec. Corp., 380 S.C. 91, 668 S.E.2d 795, (S.C. 2008). R 60(b) does not establish any time limit for independent actions to vacate a judgment. Thus, the county defendants' arguments that the applicable time periods for filing post trial motions or appeal have run are not pertinent. The cases on which the defendants rely, 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) all deal with the direct appeals from lower court decisions. Since this case is not an appeal but an independent action pursuant to R 60(b), Godwin and the cases it relied upon are entirely distinguishable for this and other reasons.

In summary, county defendants' argument that this court is without jurisdiction is incorrect. They have not pointed to any specific statutory limitation to this court's general jurisdiction and R 60(b) permits this very type of action under appropriate circumstances, which are present here. See Bunkum v. Manor Properties, 321 S.C. 95,100, 467 S.E.2d 758 (Ct. App. 1996), ("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."). Bunkum has been relied upon subsequently in Ness v. Eckerd Corp., 350 S.C. 399, 566 S.E.2d 193, 195 (Ct. App. 2002); Brown v. Greenwood School Dist. 50 Bd. of Trustees, 344 S.C. 522, 544 S.E.2d 642, 643 (Ct. App. 2001) and Eldridge v. City of Greenwood, 331 S.C. 398, 408 503 S.E.2d 191, 196 (Ct. App. 1998). Therefore Bunkum and cases relying upon it establish that subject matter jurisdiction can be attacked collaterally by a R 60(b) independent action without being barred by the failure to appeal or file a post trial motion.

B. There are material facts in dispute

The county defendants seek reconsideration on the assertion that the First, Second and Third Counts of the Complaint involve only legal issues and may be decided as a matter of law. The county defendants do not address the factual allegations in these counts and have not admitted that all of them are true. Under SC Rule 56(c), 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 (1991). Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Bayle v. South Carolina Dep't of Transp., 344 S.C. 115, 119, 542 S.E.2d 736, 738 (Ct. App. 2001), cert. denied; Young v. South Carolina Dep't of Corrections, 333 S.C. 714, 511 S.E.2d 413 (Ct. App. 1999).

Plaintiff incorporates his earlier arguments regarding the existence of material issues of fact being in dispute and summarizes them as follows. Simmons contends that there are material facts in dispute as to his right to relief from the user fee judgments, based upon exceptional circumstances under all of the Counts or due to mistake, inadvertence or excusable neglect as alleged in the Second and Third Counts. These facts provide an additional basis for relief in addition to the claim of the Magistrate's Court lack of subject matter jurisdiction. Simmons submitted an affidavit contesting the basis for all of the user fee judgments; i.e. that he never received notice of the complaint in Magistrate's Court that was filed in 2000 or the entry of a judgment; that he never received notice of efforts to enforce the judgment from the Sheriff's Department until Deputy Long came to his house in August 2009; that he had no notice of the subsequent complaints or judgments for user fees. He also asserted that the county official 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. Thus there are material facts in dispute as to: 1) whether Simmons had reason to believe that the county had waived the user fee; 2) whether Simmons reasonably believed that he was not liable for a user fee because he received no services; 3) whether it would be inequitable to enforce a judgment against Simmons for fees imposed on TMS 032 which he never owner, but only held in his name to protect his family's heirs interest; 4) whether it would be inequitable to enforce a user fee judgment against ^{him} as the owner of TMS 024 because the Tax Assessor erroneously placed Simmons name as the record owner after Simmons requested that the tax bills be sent to him because they were not getting paid.

These facts which are in dispute support Simmons contention that there are exceptional circumstance justifying relief from the judgments and that there was mistake, inadvertence or

excusable neglect to allow the judgments to be reopened under the First, Second and Third Counts of the Complaint. Therefore, the Court was correct that there are material facts in dispute.

In summary, the existence of disputed issues of material fact precluded the Court from granting the county defendants' motion as to the First Second and Third Counts. These disputed facts relate not to the issue of Magistrate's Court's lack of jurisdiction but to other circumstances justifying relief.

C. The county defendants are not entitled to judgment as a matter of law.

The county defendant's motion to reconsider should also be denied because they are not entitled to judgment as to the Magistrate's Court jurisdiction over user fee suits as matter of law. Plaintiff incorporates his previous analysis of the General Welfare Statute, S.C. Code Ann. Section 4-9-30(14) upon which the county defendants rely, which can be summarized as follows. The cited section allows **violations** of local general welfare ordinances [including user fee ordinances] to be heard and disposed of in courts created by the general law including the magistrates' courts of the county." It is not reasonably subject to dispute that the county brought multiple actions against Simmons to collect the user fees due for several years and not for any violation of the user fee ordinance, such as by collecting a penalty or fine for failure to pay them. All of the complaints sought judgment for the amount of the unpaid user fees. All the judgments were entered for the amount of user fees (plus court costs). This distinction between a fee and a penalty is critical because whatever the language of the General Welfare statute, Charleston County has not adopted any ordinance giving the Magistrate's Court jurisdiction over suits for the collection of user fees. 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 the General Welfare Law Section 14 cannot be a basis for jurisdiction over user fees suits when the county has not passed an ordinance to create jurisdiction.

Even if the cited provision could be interpreted as a source of independent jurisdiction without the need for a local ordinance, this section 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. . . ." In plain language, the Legislature has prohibited counties which enact general welfare 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). In other words, according to the very section upon which the county defendants rely, the county cannot adopt any ordinance which confers jurisdiction over user fee violations which contradicts the general law. 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. Since the Magistrate's Court only has jurisdiction over fines and penalties and the complaints were

brought to collect the user fee, the country defendants' argument over the meaning of Section 4-9-30(14) is fatally flawed.

Furthermore, 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 (S.C. 1985), the Supreme Court found that a county ordinance regulating the sale of fireworks adopted pursuant to S.C. Code Ann. Section 4-9-30(14) was invalid under the language in that section prohibiting ordinances contrary to general laws. In particular, S. C. Code Ann. Section 23-35-10 et seq. regulates the sale, storage and use of fireworks; and specifically, Section 23-35-150 creates penalties for violation of the Act. The Court held: "The challenged ordinance has penalty provisions and concerns a matter provided for by the general law. The ordinance is thus invalid. . . The respondent contends that the county acted within its police power and that the ordinance is valid so long as it does not conflict with provisions of the general law. We disagree; we are bound by the express terms of § 4-9-30(14)." Simmons contends that Terpin controls and bars

any attempt by the county defendants to overcome the provisions of S.C. Code Ann. Section 22-3-10.

The provisions of Section 4-9-30(14) deal with violations of ordinances not suits to collect fees. The obvious intention of this statute is that fines and penalties were to be enforced in Magistrate's Court. That is the intent behind the use of the word "violation". That is the language in Ordinance Section 10-70: "violation." By interpreting Section 4-9-30(14) as pertaining to suits for fines and penalties, the Court can harmonize the provisions with these other general law. However, the country is urging an interpretation which causes this provision to conflict with other laws. A suit to enforce a law is 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". Charleston County did not sue Roosevelt Simmons 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. This Court should not expand its authority about what the Legislature has expressly granted.

As another basis for Magistrate Court's subject matter jurisdiction, the county contended that such a suit to collect a user fee is a suit to recover damages for injury to the person of Charleston County. Amended Supplemental memo at page 7. This is a completely farfetched and unjustified interpretation of the Magistrate's Court jurisdiction under Section 22-3-10(2) which applies to personal injury or property damage claims within the jurisdictional limits of the court.

The county is attempting to create a new cause of action which is clearly not warranted. The county does not provide a single case citation to support its bizarre theory. Failure to pay a user fee does not cause any injury to any person and Charleston County is not even a person within the commonly understood meaning of the word, it is a governmental entity. Charleston has not sustained any injury to its property. Charleston County has not been damaged in the traditional sense by Simmons 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.

In summary, plaintiff urges this court to adopt a harmonious interpretation of the plain language of S.C. Code Ann. Section 4-9-30(14)(General Welfare Statute) with SC Code Ann. Section 22-3-10(1) & (3) (Magistrate's Court jurisdiction) . These provisions together with 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" establish that the Magistrate's Court has no jurisdiction over user fee suits.

D. The law of the case is not applicable.

Although not a " jurisdictional" argument , the county defendants assert in their motion that the Magistrate's Court jurisdiction cannot be collaterally attacked. This is an apparent reference to their "law of the case" argument. . Amended Supplemental Memorandum at page 5. Plaintiff incorporates his earlier argument as to the inapplicability of the law of the case doctrine, summarized as follows. The "law of the case" doctrine does not create a lack of jurisdiction. It is a rule which the Court can apply to dismiss an action in appropriate

circumstances. The county defendants previously relied on Judy v. Martin, 381 S.C. 455, 674 S.E.2d 151 (S.C. 2009). However, the Supreme Court described the doctrine in that case as follows: "Under the law-of-the-case doctrine, a party is precluded from relitigating, after an **appeal**, matters that were either not raised on appeal, but should have been, or raised on appeal, but expressly rejected by the appellate court." (emphasis added). As stated by the Supreme Court , the law of the case doctrine is not applicable here. In this case, there was no appeal from the Magistrate's Court judgments because plaintiff never appeared or had notice of them. Therefore, the principle underlying the decision in Judy as well as the facts here clearly support Simmons contention that the "law of the case' principle does not bar this action.

CONCLUSION

For the reasons set forth above and in his earlier opposition to county defendants' motions for summary judgment, plaintiff respectfully requests that the Court deny the county defendants motion for reconsideration.

Respectfully submitted,

Edward A. Bertele, Esq.
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Charleston, SC 29492
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Attorney for plaintiff, Roosevelt Simmons
By: _____

Dated: February 11, 2013
Charleston, SC

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
IN THE NINTH JUDICIAL CIRCUIT
CASE NO. 2011CP10-1084

ROOSEVELT SIMMONS)
Plaintiff)

Vs.)

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

**PLAINTIFF'S MOTION TO ALTER
OR AMEND JUDGMENT**

FILED
2013 JUL 10 PM 1:50
JULIE J. ARMSTRONG
CLERK OF COURT

PLEASE TAKE NOTICE that on the tenth day following service of the within NOTICE of MOTION or as soon thereafter as counsel may be heard, plaintiff Roosevelt Simmons, by his attorney, Edward A. Bertele, Esq. shall move before the Court of Common Pleas for the Ninth Judicial Circuit at the Charleston County Courthouse, 100 Broad Street, Charleston, SC 29401 for an Order pursuant to South Carolina Rules of Civil Procedure 59(e) to alter or amend the Order filed June 21, 2013 dismissing the Second Amended. Plaintiff relies upon the pleadings and documents filed heretofore and the reasons set forth herein for the filing of this motion.

BASIS FOR THIS MOTION

Plaintiff respectfully requests that the Court reconsider its decision dismissing the Second Amended Complaint for these reasons. The Court's decision that it lacked jurisdiction, Order at 2-3, is not consistent with its authority as a court of general jurisdiction and not dictated by any statute or case. Even if the Court lacked jurisdiction over the validity of user fee

judgments, the Court still has jurisdiction over Tort Claims Act and constitutionally based civil claims which do not rely upon the invalidity of the judgments but assert that plaintiff's rights were violated in their enforcement. These are claims over which the Magistrate's Court has no jurisdiction and could Only be brought before this Court.

The Court dismissed the Fourth Count that the Sheriff's Department arbitrarily and discriminatorily enforced the user fee judgment relying on Skyscraper Corp. v Newberry County, 323 SC 412(1996) and a lack of a genuine issue of material fact. Order at 4. Plaintiff asserts that there were facts in dispute concerning the existence of arbitrary, willful and malicious conduct that were sufficient to justify denial of summary judgment; and that the county defendants are not entitled to summary judgment as matter of law because the user fee ordinance was not intended to apply to persons who do not receive any services or any benefit from them.

The Court dismissed the Fifth Count on the basis that these defendants were exempt from the Tort Claims Act waiver of immunity. Order at 3. Plaintiff asserts that these acts were subject to exceptions to Tort Claims Act exemptions; and there were sufficient facts in dispute to justify denial of summary judgment.

The Order did not address the Sixth Count which added by amendment after the Court's initial decision denying the County defendants motion for summary judgment. The County defendants did not seek reconsideration of the order granting the amendment or seek summary judgment dismissing the Sixth Count. Therefore, plaintiff seeks an Order that the Sixth Count was not dismissed under the terms of its June 21 Order.

The pleadings filed by the county defendants in support of summary judgment and by plaintiff in opposition are voluminous and refer to numerous documents and deposition

transcripts which were appended to the party's papers. For the sake of economy, plaintiff will not resubmit then now but will make specific reference to them throughout this motion.

Plaintiff's arguments in support of reconsideration are set forth in detail below.

A. Lack of Jurisdiction

In its initial motion for summary judgment, the County defendants sought summary judgment dismissing the first three counts of the Second Amended Complaint (seeking to invalidate the various user fees judgment against plaintiff) on the basis that the judgments were valid and that the Magistrate's Court had subject matter jurisdiction to collect a Charleston County user fee. Plaintiff addressed this argument in his initial Opposition dated August 2, 2012 at pages 13-18; plaintiff's Further Opposition dated August 14, 2012 at pages 1-4; and plaintiff's Opposition to Amended Supplemental Memorandum of County defendants at pages 6-8. These arguments are incorporated herein fully and include the following. The Magistrate's Court is a court of limited jurisdiction and a suit to collect a user fee is not one of the categories over which it has subject matter jurisdiction. The General Welfare Statute, S.C. Code Ann Section 4-9-30(14) does not independently create jurisdiction in the Magistrate's Court. Charleston County had not adopted any ordinance to authorize suit to collect user fees in connection with its user fee ordinance. Plaintiff repeats and reiterates all of those arguments which have not been addressed by this Court in dismissing the First, Second and Third Counts of the Second Amended Complaint.

In the Supplemental Memorandum of County Defendants dated August 14, 2012, county defendants first asserted that this Court did not have jurisdiction over this suit because plaintiff had failed to appeal the user fee judgments and was barred from challenging jurisdiction by the law of the case. In his initial Opposition and Opposition to Amended Supplemental

Memorandum dated September 6, 2012, which are incorporated fully herein, plaintiff asserted various bases to rebut these contentions. These include the following. This Court is a court of general jurisdiction and its authority to vacate a judgment of a lower court is not prohibited by statute or rule. The precedent relied upon by the county defendants all deal with direct appeals from lower court decisions involving defaults not an attack on its subject matter jurisdiction. Plaintiff also asserted that there was precedent for a Circuit Court to review the lack of subject matter jurisdiction even if the judgment had not been appealed previously. Finally plaintiff asserted that an action to vacate a judgment under R 60(b) SCRCP involves an equitable analysis and there were sufficient facts in dispute to deny summary judgment.

Plaintiff respectfully requests reconsideration of the Court's Order because its decision is based upon an unnecessarily narrow view of its own jurisdiction. " [I]t is clear that anyone who asks to have such jurisdiction limited in any way must be able to point out some constitutional or statutory provision establishing such limitation." Ex parte Ware Furniture Co., 49 S.C. 20(1897) (MacIver, C.J., dissenting). The county defendants have not pointed to any limitation of the jurisdiction of this court to hear an action under SCRCP 60(b) to vacate a lower court judgment. The statutory provisions and magistrate's court rules upon which the county defendants have relied, e.g. S.C Code Ann. Section 22-3-1000 and R 19, SCRMC deal with post trial motions or appeals. They do not address attacks upon the lower court's jurisdiction.

The county asserts that the only way for this Court to hear the issue is by appeal citing R 19, SCRMC, and that plaintiff has failed to timely appeal. "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. Skinner v. Westinghouse Elec. Corp., 380 S.C. 91, 668 S.E.2d 795 (2008). Therefore, this court has subject

matter jurisdiction to consider the matter of the lower court's jurisdiction to enter the judgment on a user fee in an appropriate case.

The cases on which the defendants rely, 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) are not controlling . All of these cases concern compliance with the Magistrate Court rules for motions or appeals from judgments. The restrictions upon motions based upon mistake, neglect, inadvertence, fraud or newly discovered evidence are subject to a time limitation of one year, based upon the policy of encouraging diligent action. See R 12, SCRMC. Similarly appeals from 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. The court's subject matter jurisdiction is subject to collateral attack in a separate action. See e.g. Bunkum v. Manor Properties, 321 S.C. 95,100, 467 S.E.2d 758 (Ct. App. 1996) ("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.").

Although the Court did not rely upon the county defendants' argument that plaintiff was barred by the "law of the case" doctrine, plaintiff asserts that this principle does not support dismissal either. The case upon which county defendants relied, Judy v. Martin, 381 S.C. 455, 674 S.E.2d 151 (S.C. 2009) is not controlling as a basis for dismissal. In Judy, plaintiff appealed from an earlier Magistrate Court judgment to the Circuit Court which affirmed it. Plaintiff later filed an independent action in Circuit Court to reopen the question of subject matter jurisdiction. The Supreme Court applied the law of the case doctrine which it described as follows: "Under the law-of-the-case doctrine, a party is precluded from relitigating, after an **appeal**, matters that

were either not raised on appeal, but should have been, or raised on appeal, but expressly rejected by the appellate court.” (emphasis added). 381 S.C. at 458, 674 S.E.2d at 153. Thus the factual situation in Judy is unlike that here. Plaintiff never appealed the user fee judgment or sought the opportunity to attack its jurisdiction until now; thus there is no law of the case. If as the county defendants allege, the Circuit court did not have jurisdiction to hear a the challenge to the magistrate court’s jurisdiction under R. 60(b), the Supreme Court would have said so and dismissed the appeal on that basis without having to reach the law of the case doctrine.

Plaintiff also asserted that there were material facts in dispute upon which to deny summary judgment and incorporates them fully herein. See Plaintiff’s Opposition to Summary Judgment at 17-18, Opposition to County Motion for Reconsideration at 5 -7. The facts in dispute include the plaintiff’s lack of notice of the user fees judgment, his efforts to have them removed from the tax bill for all of the years in question, his denial of any service for solid waste removal and the unfairness of enforcing judgments against plaintiff under all of the circumstances. Id.

B. Violations of Tort Claims Act

Plaintiff respectfully asks for reconsideration of the Court’s Order dismissing the Fifth Count (Tort Claims Act claim). As set forth in his initial Opposition, the Second Amended Complaint, Para 35 alleges that “the Sheriff’s Department was negligent in retaining defendant Long as an employee prior to the time he undertook work on the Simmons judgment” and that as a result plaintiff was injured. The Court did not consider the first element, wrongful retention, in its Order.

Wrongful retention is subject to only one of the immunities asserted by the county in its initial motion or its motion for reconsideration or as discussed by the court: it is the exercise of

judgment or discretion by the government entity. SC Code Ann Section 15-78-60 (5). The other exemptions do not pertain to the county's retention of Deputy Long. Immunity under the Tort Claim Act is an affirmative defense and the county defendants have the burden of proof to establish that the alleged tort is subject to immunity. Sumner v. Carpenter, 328 S.C. 36, 492 S.E.2d 55 (1997). Discretionary immunity is contingent on proof 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). Plaintiff pointed out in its initial Opposition at pages 25-26 that the county failed to establish how it exercised its discretion concerning the retention of Deputy Long and how it was entitled to immunity as matter of law. The county never addressed this issue in their various replies to the opposition or in their motion for reconsideration. Therefore, there are no facts upon which the Court could find that the Sheriff's Department was entitled to immunity from a claim for wrongful retention.

The Court's Order did also not address the county defendants' assertion regarding evidence of wrongful retention and relied only upon the assertion of immunity. Plaintiff reiterates his position that there was sufficient evidence of negligent retention. See Plaintiff's Opposition at pages 6-12, 28-30; Supplemental Opposition at 1-8.

The Court said that the county defendant actions were taken to enforce county user fee judgments and were immune under SC Code Ann. Sect. 15-78-60(3) (4), (5), (11) and (23). Order at 3-4. Plaintiff asserted in opposition that the allegations of the Fifth Count that Deputy Long was acting out of malice eliminate the claim of immunity. Opposition at 34-35. 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 it is proved that employee's conduct . . . constituted actual malice [or] intent

to harm....” Therefore the immunity under SC Code Ann. Sect.15-78-60(3), (4), (11) and (23) do not 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).

Plaintiff asserts Deputy 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.” In interpreting the analogous language of Section 60(17) of the Tort Claims Act, the Court of Appeals stated that: “Actual malice in this situation refers to common law actual malice, and has been defined by situations where “defendant was actuated by ill will in what he did, with the design to causelessly and wantonly injure the plaintiff.” Swicegood v. Lott, 379 S.C. 346, 665 S.E.2d 211 (Ct. App. 2008) (quotations omitted). Accord McBride v. School Dist. of Greenville County, 389 S.C. 546, 698 S.E.2d 845 (Ct. App. 2010) (Common law malice means the defendant acted with ill will toward the plaintiff, or acted recklessly or wantonly, i.e., with conscious indifference of the plaintiff's rights).

There is ample evidence in the record to support a claim of malice based upon Long's deposition. Long believed that Simmons threatened him. Long filed an incident report and “blue flagged” Simmons property meaning that Sheriff's Department employees were to be cautious when entering there. Long never investigated to see what condition Simmons motor vehicles were in or whether there were other items of personalty that he could levy upon. He did not see items of personalty when he went to the Simmons house in August 2009. Opposition at pages 7-9.

These assertions are facts in dispute. Simmons denies calling the Sheriff's Office in April 2009 or threatening Deputy Long. Simmons claims that there were numerous items of personal property at his home when Deputy Long came there in August 2009. Simmons Affidavit, Para. 5-7. These facts are material to the issue of whether Deputy Long acted out of ill will toward Simmons. See Opposition at 37. Supplemental Opposition at 1-8. Therefore the county defendants are not entitled to summary judgment on the Tort Act claim based upon the evidence which supports Simmons claim that Deputy Long acted with malice and hostility toward Simmons.

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). If triable issues exist, those issues must be submitted to the jury. Young v. South Carolina Dept. of Corrections, 333 S.C. 714, 718, 511 S.E.2d 413, 415 (Ct. App. 1999). Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Brockbank v. Best Capital Corp., 341 S.C. 372, 534 S.E.2d 688 (2000). 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). Under the summary judgment standard, the court gives every benefit of the doubt to the non-moving party. Watters v. Terminix Service, Inc. 376 S.C. 632, 635, 658 S.E. 2d 110, 111 (Ct. App. 2008).

The reasonable inferences to be drawn for the evidence is that Deputy Long was sufficiently concerned about Simmons alleged threats against him or any member of the Sheriff's Department to take action i.e. by "blue flagging" Simmons property. Deputy Long

admitted that he was not diligent in pursuing other assets of Simmons even though there was no more work involved in levying on personalty than real estate. The reasonable inference from Deputy Long's lack of diligence and levy and execution upon TMS 498 and selling it for \$600 without a minimum bid to satisfy the judgment (which is still unsatisfied) is that he had ill will toward Simmons related to the alleged threats. The Court must allow plaintiff the benefit of all reasonable inferences and should reconsider its order finding that there were not sufficient facts in dispute.

Plaintiff also previously asserted that the issue of causation of his damages is a matter for the jury which precluded the granting of summary judgment and incorporates that argument fully herein. See plaintiff's Opposition to Amended Supplemental memorandum of County Defendants at 8-9.

In summary, plaintiff has shown how the county defendants are not entitled to immunity from the Tort Claims Act claim of negligent retention; and that the enforcement of the judgment by Deputy Long is not subject to immunity if it was carried out with malice and ill will. Plaintiff has shown that there are facts from which reasonable inferences can arise that Deputy Long acted out of malice or ill will. Based upon the foregoing, plaintiff respectfully requests reconsideration of the Order dismissing the Fifth Count alleging Tort Claim act violations.

C. Violation of Section 1983

Plaintiff respectfully requests reconsideration of the Order dismissing the Fourth Count alleging a Section 1983 violation. Plaintiff previously asserted several reasons in opposition to the county's argument for dismissal in his Opposition at pages 17-24 and incorporates them fully herein. The reasons for reconsideration include the following. The holding in Skyscraper Corp. v Newberry County, 323 SC 412(1996), cited by the Court does not indicate that the Fourth

Count should be dismissed as matter of law. There, the Supreme Court upheld the collection of a user fee from the owner of a commercial property for the collection of solid waste generated by the tenants. The Supreme Court said that the fee could be imposed for the benefit that the owner received from having tenants who received service and thus was obligated for their fee. Thus Skyscraper Corp. stands for the proposition that someone benefitting from the user fee is responsible to pay it. Brown v. County of Horry, 308 S.C. 180, 417 S.E.2d 565 (S.C. 1992) also cited by the county supports the same proposition. In Brown, the Supreme Court said: "A service charge is imposed on the theory that the portion of the community which is required to pay it receives some **special benefit** as a result of the improvement made with the proceeds of the charge." (emphasis added). Plaintiff here has not asserted that the user fee is unconstitutional per se but that it is being applied against him even though he has not received any service from the county and therefore it is unconstitutional to do so. See Opposition at page 18-24.

Plaintiff previously referred to the Charleston County ordinance creating user fees for solid waste disposal to establish that its purpose also was to collect user fees from the persons who utilize the disposal facilities. Ordinance Section 10-51(8) specifically states that it is relying on S. C. Code Ann. Section 44-55-1210 which "grants the county council the power to provide and regulate solid waste . . . and to levy fees against **persons for who services are provided.**"(emphasis added).

Simmons contends and it is not disputed that he does not receive any solid waste disposal services or use any county facilities for solid waste collection and the county's motion for summary judgment has not provided any evidence to refute this. Ordinance 10-51 et seq. does not mandate that Simmons send his trash to a county facility. He can dispose of it on his own

property as long as he does not create a nuisance. See Ordinance Section 10-69 (2). Therefore Simmons is not liable under Ordinance 10-56 because he is not a "person for who services are provided".

In Harbit v. City of Charleston, 382 S.C. 383, 675 S.E.2d 776 (Ct. App. 2009), the Court of Appeals said that 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.'" (citation omitted)

Simmons is not similarly situated to persons whose garbage is collected or who receive a benefit from the county disposal facilities. The country has no rational basis to enforce an ordinance against a person for whom it was not intended to apply. Simmons objected to the user fee every year it was put on his tax bill. Therefore, the Court should reconsider its Order because plaintiff has made out a prima facie case of an unequal application of the law, contrary to its purpose in violation of the Fourteenth Amendment.

There is another basis for reconsideration of dismissal of the Fourth Count. Simmons also contends that the county is not entitled to summary judgment on his claim that the Sheriff's Department and Deputy Long violated his right to equal protection by arbitrarily and discriminatorily enforcing user fee judgments against his property. Deputy Long was obliged to follow the law in carrying out his duties. S.C. Code Ann. Section 15-39-80 states that any execution of 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." The facts are not in dispute that Simmons owned several motor vehicles that were registered with the Department of Motor Vehicles and well as a boat and several large pieces of construction and farm equipment, all in plain view around his home.

Deputy Long ignored the motor vehicles that he uncovered in his record search as being too old even though he admitted that one or more of them might be worth pursuing. The 1955 Dodge is a "classic" The judgment he was enforcing was for a minimal amount.

In Village of Willow Brook 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 violate predicated on prosecutorial discretion exercised out of an illegitimate desire to 'get' defendant). In Lazy Y Ranch Ltd. v. Behrens, 546 F.3d 580, 591 (9th Cir. 2008)

the Court of Appeals held that administrative costs were not a valid reason to overcome a prima facie claim of disparate treatment.

Simmons previously established (see Section B above) that there were material issues of disputed fact. Deputy Long claimed to have made several attempts to contact Simmons to resolve the judgment and Simmons disregarded these. Simmons denies receiving the letters or speaking to Long before he came to Simmons house in August 2009 to serve the writ of execution. Deputy Long believed that Simmons threatened him and the entire Sheriff's Department. Simmons also alleges that Deputy Long was motivated by malice or ill will in ignoring readily available personal property to levy on real estate out of desire to get Simmons for threatening him. Simmons was the record owner of various items of personal property such as several autos registered to his name, a boat, several pieces of heavy equipment, all of which were in plain view to anyone including defendant Long when he came to Simmons house in August 2009. Simmons Affidavit, para.7. Long didn't remember seeing any personal property during his visit. Long deposition at page 76, line 11 to 20. Deputy Long ignored personal property belonging to Simmons that may have been worthwhile to pursue real estate instead, contrary to S.C. Code. Ann Section 15-39-80. Sale of the personal property would not have been any more work than the real estate. Deputy Long sold TMS 498 without a minimum bid.

Deputy Long claimed that he was required to offer the property for the amount of the advertising but the Sheriff's Department Policy and Procedure Manual, which Long had a copy of, does not contain any such requirement. Deputy Long only "breezed through it. Moreover, there is no requirement under the South Carolina Code for setting the minimum bid of sheriff sale, except for S. C. Ann. Section 15-41-10 which requires a minimum bid in the case of property subject to homestead exemption in the amount of the exemption and no less. Finally,

S.C. Code Ann. Section 15-39-610 states that the "sheriff or officer shall and may sell, by auction, the lands, tenements, goods and chattels so taken or so much thereof as shall be sufficient to **satisfy** the judgment for the best price that can be got for them. (emphasis added). Deputy Long sold property appraised at \$70,000 and assessed for \$24,000 for \$600. The sale proceeds were insufficient to satisfy the judgment. In over the course of 4 ½ years, Deputy long only sold two other properties for user fee judgments. Plaintiff's Opposition, Exhibit G, Sheriff's Department Answers to Interrogatories

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). If triable issues exist, those issues must be submitted to the jury. Young v. South Carolina Dept. of Corrections, 333 S.C. 714, 718, 511 S.E.2d 413, 415 (Ct. App. 1999). Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Brockbank v. Best Capital Corp., 341 S.C. 372, 534 S.E.2d 688 (2000). 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). Under the summary judgment standard, the court gives every benefit of the doubt to the non-moving party. Watters v. Terminix Service, Inc. 376 S.C. 632, 635, 658 S.E. 2d 110, 111 (Ct. App. 2008).

The facts presented above provide a sufficient basis for the inference that Deputy Long was out to get Simmons. This Court should allow all reasonable inferences in favor of the plaintiff.

In summary, there are sufficient facts upon which to establish the existence of ill will or ulterior motive . He has also shown that the Deputy Long (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). Deputy Long was authorized to conduct the levy and sale of property to satisfy judgments. Simmons contends that the manner in which he performed these duties, by exercising his power out of ill will and a desire to get Simmons for an alleged threat, deprived of his interest in TMS 498. Simmons has made out prima facie case of a violation of 42 USC Section 1983. Accordingly, the Court should reconsider dismissing the Fourth Count on this additional basis.

As plaintiff has shown, the Fourth Count contains two separate allegations of violation of equal protection. Both are meritorious for the reasons set forth above. Accordingly, plaintiff respectfully reconsideration of the Court’s order dismissing the Fourth Count.

D. Reliance on lack of jurisdiction as to Fourth and Fifth Counts

The Court should reconsider dismissing the Fourth and Fifth Counts on the basis that the Court does not have jurisdiction to review the validity of the user fee judgments. The Fourth Count, Para alleges civil rights violations against the County defendants because the user fee is being unconstitutionally applied to him; this claim which do not rely upon the invalidity of those judgments. The Fourth Count also alleges that Deputy Long, acting under the authority of the Sheriff’s Department by arbitrarily and discriminatorily executing on other real property owned by Simmons not in compliance with SC Code Section 15-39-80 denied Simmons equal protection under 42 USC section 1983. Even if the user fee judgments are valid, the county defendants are still liable to the plaintiff for the manner in which they enforced the ordinance and

the judgments which are collected based on that enforcement. This Court clearly has subject matter jurisdiction over alleged violations of 42 U.S.C Section 1983.

Similarly this Court has jurisdiction over Tort Claim Act claims. The county defendants cite no statutory authority that indicates otherwise. This argument for dismissal was not based upon any reference to the pleadings or legal authority and is totally unsupported. It should be rejected as a basis to dismiss the remaining counts.

E. Sixth Count remains

The Sixth Count was not mentioned in the Order. The county defendants never filed a motion to dismiss it after this Court granted plaintiff's motion to amend the Second Amended Complaint in November 2012. They did not mention it in their motion for reconsideration. Accordingly this Court should amend its Order to indicate that it has not been dismissed.

CONCLUSION

For the reasons set forth above, plaintiff respectfully requests this Court to reconsider its Order dismissing the Second Amended Complaint.

Respectfully submitted,

Edward A. Bertele, Esq.
1812 Pierce Street
Charleston, SC 29492
(843) 471-2082

Attorney for Plaintiff Roosevelt Simmons
By: 

Dated: July 8, 2013
Charleston, SC

STATE OF SOUTH CAROLINA	)	
	)	COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	
Roosevelt Simmons,	)	
	)	
v.	)	Case No. 11-CP-10-1084
	)	
Mase & Company, <i>et. al.</i>	)	
	)	
Defendants.	)	

TRANSCRIPT OF HEARING

The within Hearing in the above-captioned matter was held on November 7, 2012, before The Honorable R. Markley Dennis in Courtroom 4B of the Charleston County Courthouse, 100 Meeting Street, Charleston, South Carolina; attended by counsel as follows:

APPEARANCES:

Edward A. Bertele, Esq.
 1812 Pierce Street
 Charleston, South Carolina 29492
 Appearing for Plaintiff

Christopher T. Dorsel, Esq.
 40 Calhoun Street
 Charleston, South Carolina 29402
 Appearing for all Defendants except Mase & Co, L.L.C.

Wendy J. Keefer, Esq.
 (Information Not Provided)
 Appearing for Defendant Mase & Co, L.L.C.

Deborah Garrison
Circuit Court Reporter – 9th Judicial Circuit
 P O Box 901
 Johns Island, South Carolina 29457
dgarrison@sccourts.org

1 THE COURT: Roosevelt Simmons
2 versus Mase & Company, L.L.C.

3 MR. DORSEL: Good morning, Your
4 Honor.

5 THE COURT: Good morning. Thank
6 you for your patience. I apologize for
7 keeping you waiting. If you would, identify
8 yourselves and the party that you're
9 representing.

10 MR. BERTELE: Yes, Your Honor.
11 Edward Bertele, representing the Plaintiff,
12 Roosevelt Simmons.

13 THE COURT: Thank you.

14 MR. DORSEL: Chris Dorsel. I'm
15 representing all defendants except for Mase
16 & Company. That includes Al Cannon,
17 Charleston County Sheriff's Office,
18 Charleston County Revenue Collections
19 Department and Harry Vaughn.

20 MS. KEIFER: Wendy Keefer,
21 appearing for Mase & Company, L.L.C.

22 THE COURT: All right. It's a
23 Motion to amend and a Motion to quash, and
24 a Motion for summary judgment.

25 MR. BERTELE: Your Honor, ---

1 THE COURT: There are several
2 Motions, it appears.

3 MR. BERTELE: Yes, Judge.

4 THE COURT: Are all of them open/
5 viable?

6 MR. DORSEL: Yes, Judge.

7 THE COURT: Which order y'all want
8 to take them. It doesn't matter to me. Is
9 your Motion for summary judgment dispositive?

10 MR. DORSEL: Yes.

11 THE COURT: All right, let me hear
12 your Motion.

13 MR. DORSEL: Your Honor, this is a
14 fairly complicated case. It involves the
15 solid waste recycling fee, otherwise known as
16 the "user fee" that we see on our property
17 tax bills. For a number of years, based on a
18 misunderstanding of law, Mr. Simmons, the
19 plaintiff in this case, has never paid that.
20 That's ten, fifteen years.

21 After a while, the revenue
22 department started instituting actions on
23 that, in the magistrate court, on these
24 unpaid judgments; ended up getting a number
25 of judgments against him.

1 In 2009, they began trying to
2 contact -- they took the judgments to the
3 sheriff's office. In the end, what happened
4 is that the property was sold at a judicial
5 sale, Sheriff's sale.

6 Now, I say that we're all here today
7 because of a misunderstandings of the law by
8 Mr. Simmons. It's unfortunate. I believe
9 that there were three.

10 First of all he said that the user
11 fee didn't apply to him because he didn't get
12 garbage pickup. It's for solid waste
13 recycling and disposal, it's not the solid
14 waste recycling collection fee. So he didn't
15 think that he had to pay it.

16 Similarly with the storm water fee,
17 he didn't feel like he had to pay that. And
18 a direct quote from his deposition, "Because
19 I don't feel that I have to pay for an act of
20 God. I can't stop it from raining." So
21 there was just some misunderstandings there.

22 The second one was that he -- every
23 year he went down to the auditor's department
24 and said 'at least take the user fee off.'
25 They took it off the tax bill because it's

1 not a tax fee, it's an administerial duty.
2 He thought when that happened that they
3 waived it and he didn't have to pay it
4 anymore.

5 And then the last one, and, uh, --
6 when the Sheriff's Office went -- and Deputy
7 Long started ---

8 THE COURT: Mr. Dorsel, why would
9 they take it off?

10 MR. DORSEL: They take it off
11 because -- the reason that it is on the tax
12 bill is ---

13 THE COURT: What is that supposed
14 to mean, though? 'They took it off.'

15 MR. DORSEL: Well, what when it is
16 taken off, he signs off on a form and gives a
17 reason as to why they can't ---

18 THE COURT: I understand. But you
19 took it off. What's the reason for taking it
20 off? What is that supposed to imply?

21 MR. DORSEL: Because -- well, I
22 guess the answer to that is why it is on
23 there. The reason why it is on there is to
24 save on the mailing, so they put the fee on
25 the tax bill rather than to send out two

1 bills.

2 THE COURT: We can debate what it
3 is. Clearly -- you can call it a fee, it's a
4 tax. That's nothing new to anybody. I mean,
5 I don't -- I don't know why -- I think that
6 we do that to make it more powerful, but --
7 but I don't know -- my concern is that when
8 somebody goes and says, 'I don't want that, I
9 am not going to pay that' and they take it
10 off, what is that person supposed to do --
11 who has come there to get it removed, says
12 'I am not going to pay it.' What is that
13 supposed to say to that person?

14 MR. DORSEL: Well, when he signs a
15 form that says 'I understand that this
16 doesn't end my duty to pay this. That it
17 will be sent to the revenue department.' At
18 that point, he is under -- on notice that ---

19 THE COURT: I -- okay.

20 MR. DORSEL: So, anyway, the third
21 mistake that was made was that when the
22 Sheriff's Department instituted actions
23 against -- or instituted the collection of
24 these fees, Deputy Long in the Sheriff's
25 Office sent him four letters. In his

1 deposition he said that he treated them like
2 junk mail and threw them away. So eventually
3 it was sold at the Sheriff's sale.

4 Now, the lawsuit was filed -- or the
5 sale occurred in December of 2009, the
6 property was sold in December 2009. The Deed
7 is from February 2010. This lawsuit was
8 first filed February 2011; which, uh, it has
9 been amended twice, and there's another
10 Motion to amend the Complaint.

11 In the second amended Complaint, the
12 five causes of action are to invalidate the
13 Sheriff's Deed in the Sheriff's sale; to
14 invalidate user fee judgments; to invalidate
15 judgments against other properties; civil
16 rights violation for protection; and then a
17 tort claims action against the Sheriff's
18 Office and Deputy Long. All with the purpose
19 to invalidate the Sheriff's fees.

20 The main reason that they give for
21 this is that the magistrate court had no
22 jurisdiction. What they say is that this
23 kind of -- to collect a one hundred forty-
24 four dollar (\$144) judgment, that the County
25 should have gone to the Circuit Court or the

1 Master or something like that, that you can't
2 go to magistrate court.

3 THE COURT: Okay.

4 MR. DORSEL: Our position on that
5 is that -- first of all, what he's trying to
6 do, the sale of this property was based on a
7 2000 judgment, the year 2000 judgment. So
8 here in 2012, 2011, he's trying to appeal a
9 judgment from a 2000 magistrate court. So
10 our first position is that this Court doesn't
11 have jurisdiction over this. The reason for
12 that is that the case law says that the
13 appropriate method for challenging a judgment
14 in the magistrate court is through post-trial
15 Motions or through an appeal.

16 There are cases, one that says the
17 only remedy of a party against whom a
18 judgment is rendered is either to appeal or
19 make a Motion for a new trial and appeal the
20 case if that Motion is refused. That is the
21 *Atlantic Food Company* case.

22 There is also some question about
23 the plaintiff saying, 'Well, I didn't know
24 about these judgments. I didn't know about
25 them.' There is a similar case, it's the

1 *Town of Hilton Head v. Godwin.* In that case
2 -- in involved some criminal matter, but what
3 happened was that he didn't realize that he
4 had been found guilty of a CDV charge. About
5 seven years later he went to go apply for a
6 gun permit and they said, 'No, you've got a
7 conviction.' He said, 'I never knew about
8 it.' Then he waited seven months and sent in
9 basically an appeal of the magistrate court
10 conviction. The Court said that the only --
11 the proper remedy is a direct appeal in
12 accordance with the Rules or post-trial
13 Motions. And if you're going to claim that
14 you didn't have notice for these seven years
15 or, say, contest it, you waited seven months
16 and that was outside the thirty-day timeframe
17 or the five- and ten-day timeframe for post-
18 trial Motions.

19 So here what we have is Mr. Simmons,
20 who got this judgment against him in 2000.
21 In 2011, when he filed this lawsuit, he knew
22 about these judgments, yet took no action to
23 appeal or file any kind of post-trial
24 Motions. It's our position that he knew
25 about this well before, at least in 2010 when

1 he came into the user fee department and
2 complained about the sale. But at least in
3 2011 he had notice, so he has -- but he did
4 not file an appeal and he did not file any
5 post-trial Motion. Instead, he filed this
6 collateral lawsuit trying to challenge
7 judgment all the way back to 2000, to have
8 this Court overturn those judgments based on
9 -- basically on jurisdictional issues in the
10 magistrate court.

11 Now, -- so with regard to -- I guess
12 with the first three causes of actions, to
13 invalidate the user fees, the Sheriff's sale,
14 to say that the user fee is invalidate all
15 around, uh, and to invalidate other user fee
16 judgments against him, it's our position that
17 he does not have -- that this Court does not
18 have jurisdiction to hear those because none
19 of them have been appealed, no post-trial
20 Motions, nothing along those lines.

21 And plaintiff has brought up the
22 fact that a 60(b) Motion ---

23 THE COURT: Mr. Dorsel, let me
24 just say this. There are multiple Motions
25 right now. I am going to ask y'all to step

1 down. I'm going too hear these other cases
2 and then I'll hear your case because this is
3 going to take some time.

4 MR. DORSEL: Thank you.

5 MR. BERTELE: Your Honor, can we be
6 moved to the end of the line?

7 THE COURT: Absolutely. No
8 problem. You bet.

9 MR. BERTELE: We appreciate you
10 taking the time.

11 THE COURT: Sure. No problem.
12 Sorry to interrupt you, Mr. Dorsel.

13 (RECESS)

14 THE COURT: Mr. Dorsel, thank you
15 so much for permitting me to interrupt you
16 and y'all's kindness to stand aside. We can
17 go forward now. Be happy to hear from you.

18 MR. DORSEL: Just to kind of sum up
19 the first point that I made about this Court
20 not having jurisdiction over these claims.
21 What the plaintiff has claimed or is claiming
22 here, he's challenging a judgment from
23 magistrate's court ---

24 THE COURT: Let me interrupt you,
25 if I could.

1 MR. DORSEL: Sure.

2 THE COURT: Because one thing --
3 I think that I heard this correctly. You
4 mentioned a judgment of 2000 and ---

5 MR. DORSEL: Correct.

6 THE COURT: And you mentioned an
7 action -- of course, the Deed was 2010. But
8 the action to enforce the judgment was prior
9 to 2010, I assume.

10 MR. DORSEL: Right.

11 THE COURT: So it was within the
12 ten-year period.

13 MR. DORSEL: Right.

14 THE COURT: Okay, I just wanted to
15 be sure of that. All right, continue.

16 MR. DORSEL: Now, uh, -- so he's
17 challenging that judgment from 2000, which is
18 more than ten years old. It is our position
19 that this court doesn't have subject matter
20 jurisdiction. The plaintiff cites multiple
21 cases which he claims, says that it does have
22 subject matter jurisdiction, that subject
23 matter jurisdiction can be waived.

24 All of the cases -- and I went
25 through every single one of them, and I

1 pointed them out in my memo, deal with direct
2 appeals. This is not a direct appeal.

3 You know, according to plaintiff's
4 argument, he could challenge subject matter
5 jurisdiction twenty or thirty years after a
6 judgment occurred. All of the cases that
7 deal with direct appeal, none say that ten
8 years after a judgment that you can file a
9 separate lawsuit.

10 Plaintiff claims that he never got
11 notice of these judgments and we dispute
12 that. For summary judgment purposes ---

13 THE COURT: Were the judgments
14 recorded?

15 MR. DORSEL: Yes. He had them and
16 in February of 2011 the South Carolina
17 Supreme Court, in *O'Rourke* says that his only
18 remedy is post-trial Motion or appeal. The
19 *Town of Hilton v. Godwin* says the same thing.

20 So it's our position that this Court
21 doesn't have subject matter jurisdiction.
22 His claims regarding the user fees or the
23 judgments on the user fees that were never
24 appealed in post-trial Motions are barred in
25 this court at this time because of a lack of

1 appeals or post-trial Motions.

2 That applies to the first, second
3 and third causes of action.

4 What plaintiff has also said is that
5 this is -- comes in under 60(b). I am not
6 entirely certain which of the subsections of
7 60(b) that he is relying on, but if it is
8 mistaken or inadvertence, there's no evidence
9 of fraud. One way that he is claiming is
10 that he claims that the judgment is void.
11 That's one of his other causes of action, is
12 subject matter jurisdiction in the magistrate
13 court.

14 What he has claimed is that the
15 magistrate court doesn't have subject matter
16 jurisdiction under South Carolina statute.
17 What he relies on is Section 22-3-10 of the
18 South Carolina Code, and claims -- which
19 provides a whole list of categories for
20 magistrate court jurisdiction.

21 Now, he says that the user fee
22 doesn't fall under any category. He
23 references contracts, then penalty, fines and
24 forfeiture but he leaves out subsection two.

25 Subsection two specifically says

1 that in actions for "damages or injuries to
2 rights pertaining to the person or personal
3 or real property", uh, and here the County of
4 Charleston has the right, pursuant to
5 ordinances, to institute user fees. If
6 someone does not pay that user fee, it's an
7 injury to the right of Charleston County,
8 which brings it under 22-3-10(2) and,
9 therefore, the magistrate court would have
10 jurisdiction over an action for user fees.

11 The flip side of that is for every
12 time that someone doesn't pay the user fee
13 and the County wants to institute an action,
14 they'd have to institute them in the Circuit
15 Court for a hundred and forty-four (\$144)
16 dollars -- or with the Master-in-Equity for a
17 hundred forty-four dollars.

18 So it's our position that any
19 question or any cause of action dealing with
20 the subject matter jurisdiction is without
21 merit, because there is subject matter
22 jurisdiction for those judgments.

23 The second cause of action, it deals
24 with invalidating the actual user fee. There
25 are several cases that the Supreme Court, in

1 *Salisbury Corporation v. County of Newport*
2 that specifically said that counties have the
3 power to assess services charges for solid
4 waste disposal. There's a Charleston County
5 ordinance, Article IV, that allows for the
6 solid waste disposal and resource recovery
7 system. So not the solid waste collection.

8 In the second cause of action where
9 he says this user fee is invalid, what he's
10 really saying is, in paragraph fourteen, that
11 the County doesn't remove his trash and, so,
12 he's not required to pay the user fee.

13 In paragraph fifteen, the user fee
14 is "illegal" because he didn't get trash
15 pickup.

16 All of these are -- just mistakes of
17 what it is about.

18 In addition to what I talked about
19 earlier with the Auditor taking off the fee,
20 the ordinance specifically states that no
21 administerial act or act of omission or
22 commission on the part of the Auditor shall
23 operate to defeat the payment of the annual
24 disposal user fee imposed by the provision of
25 the article.

1 So, again, in his Complaint he
2 claims that the sole reason the user fee is
3 invalid or illegal is because of no trash
4 pickup. That's what he said in his
5 deposition, as well.

6 But the clear purpose of the user
7 fee is for the public health. It's assessed
8 against all residents.

9 The user fee department, uh,
10 actually went to the Plaintiff's property in
11 1999 to see if he could waive it and they
12 determined that he had a house on the
13 property and he had to pay that fee.

14 The user fee is legal according to
15 the statute, according to ordinance and
16 according to the Supreme Court.

17 In the third cause of action he
18 talks about user fees on nonowned property.
19 He gives the same reasons, no trash pick up
20 provided. He claims that it wasn't his
21 property, so he shouldn't have to pay it.
22 But Peggy Alton (phonetic), who has worked
23 in the Auditor's office since the 1970's
24 talked about heirs property, when an heir
25 comes in and says 'I am responsible for

1 paying the taxes', they put the name in the
2 system and generate the tax bill. Mr.
3 Simmons in his Complaint, paragraph twenty-
4 three, admits that he voluntarily paid the
5 taxes on the property, which indicates that
6 he is responsible for the property. And his
7 reason for not paying user fees, no trash
8 pickup, is invalid.

9 Again, all of these user fees on the
10 nonowned property should have been appealed
11 or ---

12 THE COURT: You don't need to
13 argue all that.

14 MR. DORSEL: Okay.

15 THE COURT: I understand.

16 MR. DORSEL: Okay. Now, the fourth
17 cause of action is his Constitutional equal
18 protection clause. Two theories:

19 The user fees as it applies to
20 him violates equal protection; and

21 Deputy Long, who is with the
22 judgment department, the Sheriff's Depart-
23 ment, arbitrarily, discriminatorily executed
24 against the property.

25 Well, first of all with regard to

1 the user fee as it applies to Mr. Simmons, it
2 does not apply to equal protection. The case
3 that I cited earlier, the *Salisbury v. County*
4 *of Newberry* (sic), the Supreme Court held
5 basically that if the user fee, uh ---

6 THE COURT: You quoted this in
7 here. I'm familiar with -- I understand
8 that. Why don't we do this? Your memo is
9 fully incorporated -- rather than pleading
10 all of this -- I understand your position on
11 that.

12 MR. DORSEL: Okay.

13 THE COURT: That is well placed in
14 the record here. Let me hear -- are there
15 any other positions concerning the Motion for
16 summary judgment other than what you've set
17 forth now?

18 MR. DORSEL: Well, the last one is
19 the negligence claim. I've set out in my
20 memo all of the tort claim defenses and, uh,
21 uh, my ---

22 THE COURT: Why don't we do this?
23 Why don't we hear from Mr. Bertele and then
24 I'll let you respond to that?

25 MR. DORSEL: Okay.

1 THE COURT: Mr. Bertele? I'll be
2 happy to hear from you, sir.

3 MR. BERTELE: Thank you, Your
4 Honor. As Your Honor pointed out earlier,
5 the user fee is a type of tax. It's for that
6 reason that it is included on the tax bill.
7 In fact, the Ordinance which Charleston
8 County adopted back in the '80s provides how
9 the user fee is supposed to be collected. It
10 specifically indicates -- and so do the
11 cases, that the user fee is to be collected
12 from persons for whom services are provided.

13 Now, the head of the revenue
14 collection department, Mr. Bonifay,
15 (phonetic), was deposed and he admitted that.

16 The skyscraper case that was
17 referred to earlier says the same thing.

18 So our position is that whether it
19 is for collection or for disposal, Mr.
20 Simmons is not getting any service. He
21 doesn't get any trash removal, he doesn't
22 make use of the facilities, so therefore
23 under the plain language of the statute as
24 the ordinance has been interpreted, he's not
25 obligated to pay a user fee.

1 But let me try to go back a second
2 and deal with some additional facts, because
3 the case -- the case is not quite as simple
4 as Mr. Dorsel has indicated that it is.

5 Mr. Simmons owns multiple properties
6 and the property on which the user fee was
7 imposed is the parcel where he has his house,
8 which is set back from the road. The other
9 ---

10 THE COURT: Excuse me -- (talks to
11 counsel on unrelated action). Excuse me for
12 interrupting you.

13 MR. BERTELE: Thank you, Judge.
14 What happened here is that the County charged
15 Mr. Simmons a user fee, allegedly for
16 collecting trash on the property where he has
17 a house, and then sold the property that has
18 no house on it to satisfy the judgment. That
19 in fact is, uh, enough of case for defective
20 sale.

21 Mr. Simmons owns various pieces of
22 real property, he owns various pieces of
23 personal property. That's another issue in
24 the case as far as how the County sheriff
25 conducted the levy and execution in this

1 case.

2 Mr. Simmons also has an heir's
3 interest in property on River Road. He did
4 pay the taxes. In fact, there is no question
5 that he's paid the taxes on all of the
6 properties that he owns or has an official
7 interest in. The record is clear, it's not
8 disputed, that every year since anybody can
9 remember he went to the tax office and
10 complained about the user fee, and they took
11 it off the tax bill. Why would they do that?
12 Well, they have a form. He filled it out,
13 it's 'initial here, user fee waived' at the
14 bottom -- excuse me, "removed." And it's
15 signed by ---

16 THE COURT: Does it also state
17 what Mr. Dorsel represented?

18 MR. BERTELE: It says that the,
19 (reading): "User fee department will review
20 my claim and notify me of the findings."

21 THE COURT: Is that attached to
22 your memorandum, Mr. Dorsel?

23 MR. BERTELE: It is attached to my
24 Motion for partial summary judgment, Exhibit
25 B1.

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1 THE COURT: Thank you, sir.

2 MR. BERTELE: As I said, each and
3 every year that Mr. Simmons got a tax bill
4 where the tax bill had a user fee on it, he
5 went down to the County, to the Auditor's
6 office, the Treasurer, made his complaint,
7 filled out the form, they waived the user
8 form. They indicated on the form "User fee
9 removed." We've attached copies of every one
10 of these that we could find in his
11 possession, and it's really not disputed that
12 this has been his procedure from 2000 up to
13 the present time. Each and every year he's
14 paid the real estate taxes.

15 And Mr. Simmons, no one believed
16 that he had an obligation that would have
17 been enforceable against him to pay this fee
18 or he would have been somehow challenged it
19 and made his opposition to pay these user
20 fees known.

21 It's our position that when the
22 County filed its action in 2000, he was never
23 -- he never received notice. There's nothing
24 in the record to indicate that he did get
25 notice of the user fee lawsuit. It was

1 entered as a default, it was entered for the
2 amount of eighty-nine dollars (\$89).

3 In the Complaint -- in the
4 Complaint, Judge, the County does not allege
5 that this is under the appropriate section of
6 the magistrate's court's jurisdiction, that
7 this is a suit for real or personal property
8 of the County. It says that it is a suit to
9 collect a user fee.

10 They have an obligation to assert a
11 jurisdictional basis of the suit, and in
12 their Complaint they didn't do it. They
13 assert it now, after the fact. So
14 essentially, we say, they're bound by Rule 8
15 of the South Carolina Rules of Procedure
16 which obligates them to put everybody on
17 notice as to what the basis of the suit was,
18 and they didn't do that.

19 They've alleged from the very
20 beginning that somehow the magistrate court's
21 jurisdictional statute should be interpreted
22 to allow collection of a user fee. There are
23 no provisions under any of the sections which
24 relate to it. The magistrate court can hear
25 an action for contract damages. It has other

1 jurisdiction but it doesn't -- but juris-
2 diction, under Section 22-3-10, I believe
3 that it is, does not encompass a suit of this
4 type. It's plain and clear, it couldn't be
5 any clearer.

6 The County has argued that somehow
7 the general welfare statute allows the
8 bringing of the action in magistrate's court.
9 But there is no provision in the general
10 welfare statute that can give jurisdiction to
11 magistrate's courts.

12 The general welfare statute provides
13 that counties may enact ordinances for the
14 general welfare and that, for violation of
15 those ordinances, they may collect penalties.
16 Well, the user fee ordinance provides that if
17 the user fee is not paid, then the tax
18 collector will impose a delinquency fee or
19 fine. That is not what was sued on. Again,
20 it was for the user fee, not for a penalty.

21 There really is no way for the Court
22 to interpret the user fee, the jurisdictional
23 statute of 22-3-10 or the general welfare
24 statute as allowing a suit to be brought for
25 user fees in magistrate court. The County is

1 asking the Court to make a twisted inter-
2 pretation of the two statutes which can't be
3 reconciled in order to somehow justify ---

4 THE COURT: Mr. Bertele, you need
5 to just stop. This isn't going to be decided
6 on summary judgment. Folks, you're going to
7 have to try it. Sorry. There's no other way
8 to do it. There are too many issues here to
9 -- there's more than a scintilla of evidence
10 of an issue here. So I'm denying the Motion
11 -- both. Yours, as well, Mr. Dorsel. I am
12 denying both. You can try your case.

13 I think you're going to have a
14 difficult time prevailing on the issue of
15 jurisdiction, but I can't rule on that.
16 That's just ruling piecemeal. The better
17 thing to do is to leave it for the trial
18 court. So I'm not going to -- I can't
19 dispose of this Complaint on summary
20 judgment. There is no need to dispose of
21 partial actions, because it is all part and
22 parcel. It's all intertwined.

23 For instance, one of the issues is
24 'did you seize the requisite amount of
25 property?' Should there have been something

1 else other than that? That's an issue.

2 Sorry.

3 Thank you very much. The Motions
4 for summary judgment are denied.

5 MR. DORSEL: Your Honor, may I
6 just ask -- there are a couple of other
7 claims, like negligent retention.

8 THE COURT: I understand that.
9 You resolve those. You know which ones that
10 you are going to have to deal with.
11 Negligent retention, what do you mean?

12 MR. DORSEL: Basically they've
13 brought a negligence action against the
14 Sheriff's Department. They named both the
15 Sheriff's Department and Deputy Long. I have
16 a Motion to dismiss Harry Long in the tort
17 claims action.

18 THE COURT: Absolutely. That's
19 granted.

20 MR. DORSEL: Okay. Thank you.

21 MR. BERTELE: Judge, may I be
22 heard on ---

23 THE COURT: Mr. Bertele, you can't
24 sue him individually, sir.

25 MR. BERTELE: Yes, I can.

1 THE COURT: All right. How?

2 MR. BERTELE: With all due
3 respect, ---

4 THE COURT: With all due respect,
5 please tell me how.

6 MR. BERTELE: Yes, because the
7 tort claims immunity doesn't apply to an
8 employee who acted under malice or improper
9 motive.

10 THE COURT: Where do you allege
11 that? Where is there any evidence of that?

12 MR. BERTELE: Well, uh, Deputy
13 Long testified that ---

14 THE COURT: Where -- what am I
15 relying on to prove malice?

16 MR. BERTELE: In the record, the
17 deposition of Deputy Long, who is a named
18 defendant, he testified that Mr. Simmons
19 called him on the telephone and threatened
20 him. We deny that.

21 What happened subsequently is that
22 Deputy Long took it upon himself to disregard
23 the, uh, the property of Mr. Simmons, uh, --
24 I'm sorry, Judge. Excuse me for a second.
25 I'm going along in the wrong direction so let

1 me just try to start again. I apologize for
2 the confusion.

3 Negligent retention. The negligent
4 retention claim is based upon -- if I could
5 just look at my notes.

6 THE COURT: Take your time.

7 MR. BERTELE: We filed a supple-
8 mental opposition to their summary judgment
9 Motion back, uh, in August. Everything was
10 carried (phonetic).

11 But, in any event, discovery as
12 disclosed -- and apparently all of this is
13 under seal, so I'm not exactly sure how much
14 I can ---

15 THE COURT: "All of this" --
16 "this" meaning what?

17 MR. BERTELE: Deputy ---

18 THE COURT: What is under seal?

19 MR. BERTELE: --- Long's personnel
20 file and the allegation, the information that
21 is contained in the personnel file. So I ---

22 THE COURT: How is that before me?

23 MR. BERTELE: Well, it's -- every-
24 thing has been sealed that's been submitted
25 to the Court based on a confidentiality

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1 Order. What I have in my papers, in my
2 supplemental opposition on page six, is a
3 list of disciplinary infractions of which
4 Deputy Long has been found guilty. We
5 contend that this puts the County on notice
6 that it had a problem, a longstanding
7 problem, with an employee in following
8 procedure.

9 Under the case law, and we cited the
10 case of.---

11 THE COURT: How do you still get
12 to name Deputy Long? You have a suit against
13 the County if they retained somebody that
14 they should have retained.

15 MR. BERTELE: Yes.

16 THE COURT: But that doesn't give
17 you a lawsuit against him.

18 MR. BERTELE: Well, Deputy Long
19 is named as a defendant based on the
20 violation of equal protection. As I said
21 before, he is alleged to have acted with
22 malice towards the plaintiff.

23 THE COURT: You can argue that one
24 up the street. The Motion is granted as to
25 Deputy Long individually.

1 MR. BERTELE: Okay.

2 MR. DORSEL: The only other
3 question that I have for the Court is, is the
4 tort claim ---

5 THE COURT: "Up the street"
6 meaning Columbia.

7 MR. BERTELE: Yes, sir.

8 MR. DORSEL: Of the claimed
9 immunities here, first of all with regard to
10 -- they sued the revenue department, who is
11 charged with, when someone doesn't pay their
12 user fee, of trying to collect those user
13 fees. They fall under ---

14 THE COURT: Charleston County is
15 the defendant, is it not?

16 MR. DORSEL: There are multiple
17 defendants under the ---

18 THE COURT: You don't need the
19 departments. The County takes in every --
20 doesn't the County -- are you saying that
21 they have to sue an individual department?

22 MR. DORSEL: No, I'm trying to
23 get the individual departments out. The
24 charge is against Al Cannon and ---

25 THE COURT: It's against Al

1 Cannon.

2 MR. DORSEL: --- Charleston
3 County.

4 THE COURT: And Charleston County.
5 Right. That's the way that it ought to be
6 styled. Okay? I don't know what -- I mean,
7 that's really helpful, I guess, for some-
8 thing. I don't know what. But I'll grant
9 you that.

10 MR. DORSEL: Then I guess the only
11 other question that I have for the Court is,
12 with regard to judicial sale, was the sale
13 after a valid court Order?

14 THE COURT: I don't know the
15 problems -- now that somebody is challenging
16 it, are you saying that the time ran for
17 challenging the sale?

18 MR. DORSEL: Well, with regards to
19 the argument I'm making right now, under the
20 Tort Claims Act, they have immunity from
21 quasi-action or inaction, administrative
22 action or initiation of ---

23 THE COURT: Well, the problem is
24 that I'm not going to rule on -- that's
25 precisely what I'm talking about. I am not

1 going to rule on the Tort Claims Act itself,
2 on the action that he's brought, on a
3 property situation. I'm just telling you
4 that there's obviously something that has to
5 be -- you have to -- you can't just be
6 arbitrary in selecting the property. You've
7 got to select -- I understood the law when I
8 was practicing, and I had this issue. You
9 had to pick a property that didn't -- that
10 would really accommodate and satisfy what the
11 judgment was. Which creates a little ---

12 MR. DORSEL: Well, I guess that
13 brings up an interesting issue because the
14 County -- you know, they sued them because of
15 what the Auditor did, because of what the
16 revenue department did. The Sheriff's
17 Department is separate ---

18 THE COURT: I understand that.
19 But the Sheriff's Department, we've agreed --
20 that's why I asked you. It's all under one
21 umbrella. Everybody is involved in this.
22 That's fine. It doesn't matter to me who is
23 doing it. The bottom line is that -- that's
24 precisely my point, that needs to be resolved
25 in trial. Thank you.

1 MR. BERTELE: Judge, in addition
2 I've got a Motion to add an additional cause
3 of action, to set aside the Sheriff's sale,
4 the 2000 judgment, on the basis of the
5 inadequacy of price. That is recognized as a
6 basis to invalidate a sale. There's a number
7 of cases that apply that rule.

8 THE COURT: You oppose the
9 amendment?

10 MR. BERTELE: Yes, Your Honor.

11 THE COURT: On what basis?

12 MR. BERTELE: Well, the basis is
13 that it is a very seldom used cause of
14 action.

15 THE COURT: I understand that.

16 MR. BERTELE: But all the cases
17 that apply it, the real party in interest is
18 someone who was a party to the sale or
19 someone who benefitted from the sale.

20 The issue I have here is that if
21 this is allowed, if the Court says 'okay, you
22 can resell this property' or 'you have to
23 resell this property', then the County goes
24 back and sells it again and this ---

25 THE COURT: Mr. Dorsel has to

1 intend for that to happen, don't they?

2 MR. BERTELE: This is true.

3 THE COURT: So they're only asking
4 for an amendment to frame an issue. Thank
5 you, sir. Motion is granted. What else?

6 MR. BERTELE: Last, but not least,
7 Judge, I filed a Motion to compel discovery.
8 Mr. Dorsel didn't oppose it and he's provided
9 almost ---

10 THE COURT: Y'all talked about
11 that, I assume?

12 MR. BERTELE: Well, we ---

13 THE COURT: You need to do that
14 before I sanction you for violation of Rule
15 11. You may want to step out and talk to him
16 and then come back and tell me what he will
17 provide you. Thank you, sir. Before I hear
18 anything further -- you're getting
19 dangerously into a sanction area.

20 MR. DORSEL: Your Honor, I do have
21 one more ---

22 THE COURT: Okay.

23 MR. DORSEL: And this is the last
24 one. On the cross claim, uh, Ms. Keefer
25 represents Mase & Company, who was a party

1 that bought this property at the Sheriff's
2 sale.

3 THE COURT: I see Mase. How do I
4 dismiss anything right now? I mean, if you
5 win, then she is protected. If you lose ---

6 MS. KEEFER: If he wins, then I
7 win.

8 THE COURT: If he loses, then you
9 may have something. So, I can't rule on
10 that. Thank you, sir. So that's denied.

11 MS. KEEFER: Your Honor, may I
12 approach. I just wanted to tell you that you
13 have a wonderful law clerk.

14 (OFF-RECORD BENCH CONFERENCE)

15 (COUNSEL CONFER)

16 MR. BERTELE: Judge, I wanted to
17 address perhaps a misapprehension that
18 exists. I did confirm with counsel before
19 I filed the Motion about resolving ---

20 THE COURT: Mr. Dorsel -- Mr.
21 Bertele, I don't care when you talk. What I
22 find, what I have historically found, and I
23 think Rule 11 goes up until the time that I
24 decide it, unless you talk with him -- and I
25 was going to ask him going forward -- you

1 don't need to clarify a thing. I'm about to
2 clarify. My question is going to be, what is
3 it that you want and why do they say that
4 they won't give it to you?

5 MR. BERTELE: We've reached an
6 agreement.

7 THE COURT: I figured that you
8 might have, because you talked. That's
9 precisely why I require that.

10 MR. BERTELE: Yes, sir.

11 THE COURT: And I think it's a
12 Rule 11 violation unless you do that. So,
13 thank you, sir. And you don't have agree
14 with me, so -- I wasn't implying that you
15 hadn't talked, but you obviously hadn't --
16 but you're resolved it now. So the matter
17 has been resolved.

18 MR. BERTELE: Yes, Judge.

19 THE COURT: Okay. Thank you.
20 Have a good day.

21 (HEARING CONCLUDED)

22

23

24

25

R 609

Charleston, South Carolina
January 20, 2015

STATE OF SOUTH CAROLINA	)	
	)	COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	
Roosevelt Simmons,	)	
	)	
v.	)	Case No. 11-CP-10-1084
	)	
Mase & Company, <i>et. al.</i>	)	
	)	
Defendants.	)	

TRANSCRIPT OF HEARING

The within Hearing in the above-captioned matter was held on March 20, 2013, before The Honorable R. Markley Dennis in Courtroom 4B of the Charleston County Courthouse, 100 Meeting Street, Charleston, South Carolina; attended by counsel as follows:

APPEARANCES:

Edward A. Bertele, Esq.
 1812 Pierce Street
 Charleston, South Carolina 29492
 Appearing for Plaintiff

Christopher T. Dorsel, Esq.
 40 Calhoun Street
 Charleston, South Carolina 29402
 Appearing for all Defendants except Mase & Co, L.L.C.

Deborah Garrison
Circuit Court Reporter – 9th Judicial Circuit
 P O Box 901
 Johns Island, South Carolina 29457
dgarrison@sccourts.org

1 THE COURT: Roosevelt Simmons
2 versus Mase & Company, L.L.C. I guess we
3 will hear the Motion to reconsider first.

4 MR. DORSEL: Your Honor, Chris
5 Dorsel here on behalf of all the defendants
6 except Mase & Company, L.L.C.

7 THE COURT: Okay.

8 MR. DORSEL: The reason we filed
9 this Motion to reconsider is because one of
10 the key determinations in this case is
11 jurisdiction. Our position is that this
12 court does not have jurisdiction over this
13 entire case.

14 What this case is about is about
15 user fee judgment. It all comes from a 2000
16 magistrate court judgment against the
17 Plaintiff, Roosevelt Simmons, for unpaid user
18 fee.

19 What the plaintiff has done, more
20 than ten years after that judgment was
21 entered, is has filed this lawsuit saying
22 that judgment was invalid. He made some
23 determinations or arguments about subject
24 matter jurisdiction in magistrate's court.
25 But really before we can even get to that,

1 we've got to determine whether this court has
2 the jurisdiction to even hear these claims.

3 What our position is, is that he's
4 trying to do basically an improper appeal.

5 How we know that is because in
6 plaintiff's own federal court filings he
7 asked it to be remanded, and he says "this
8 court cannot determine whether the magistrate
9 court had jurisdiction, because that would
10 review appellate review of these decisions."
11 So in federal court pleadings what he has
12 already said is that he is trying to get an
13 appellate review of these proceedings.

14 Now he's trying to do the same thing
15 in the Court of Common Pleas.

16 This is a completely improper
17 appeal. Defendants are very prejudiced. I
18 called the magistrate's court to get the case
19 file and they say that they don't have it
20 anymore. So here we are, in 2013, trying to
21 figure out if a magistrate court judgment
22 from 2000 was valid or invalid when we don't
23 have the case file, when there was never any
24 post-trial Motions, there was never any kind
25 of direct appeal of this issue. Instead,

1 we're dealing with this in this lawsuit in
2 2013.

3 Every single claim in this case --
4 and he even says that his other claims are
5 inextricably intertwined with the other ones
6 regarding jurisdiction. That's what the
7 plaintiff's attorney has said. And it's
8 true. All the other ones are about equal
9 protection, enforcing and executing against
10 an invalid judgment or a 2000 magistrate's
11 Order, or the training necessary for the
12 Sheriff to make a determination on this
13 invalid judgment because of a 2000 magistrate
14 court judgment.

15 So our position -- and, really,
16 before we can get to anything else, we have
17 to answer this threshold question of whether
18 this court has jurisdiction to even hear any
19 of these matters in this case. It is the
20 defendants' position that this court does not
21 have jurisdiction and that the case should be
22 dismissed on those grounds.

23 THE COURT: What's -- I still
24 don't understand why this court doesn't have
25 jurisdiction.

1 MR. DORSEL: Well, what we've put
2 in our briefs, which is on the record, is
3 that in order for you to appeal a magistrate
4 court's judgment, you ---

5 THE COURT: I understand that.
6 But it's not an appeal. It's a suit about
7 the judgment that was filed.

8 MR. DORSEL: Right. Correct.

9 THE COURT: Why doesn't this court
10 -- why isn't this court the proper place to
11 determine the issues raised in that suit?

12 MR. DORSEL: Because that suit was
13 filed eleven (11) years after that judgment.
14 It was filed more than a year after the
15 plaintiff had notice of this judgment. What
16 all the case law says is that you either have
17 to file post-trial Motions within the times
18 set by the rule or you have to appeal the
19 cases. That's our basis for this one, that
20 there's no argument that the plaintiff can
21 make for basically filing an appeal eleven
22 years after the fact and almost a year after
23 he had notice of these issues.

24 THE COURT: Okay. Let me hear
25 from you?

1 MR. BERTELE: Thank you. Good
2 morning, Judge. First, the case was
3 originally brought in Circuit Court with
4 removal by the County. Judge Gergel decided
5 that there was there ---

6 THE COURT: Gergel.

7 MR. BERTELE: Gergel, excuse me.
8 Judge Gergel decided that there was no
9 federal court jurisdiction. Under United
10 States Supreme Court cases, a federal court
11 cannot oversee anything that goes on in a
12 state court. So it case came back here,
13 which is where it should properly be.

14 Now, for the County Council to stand
15 here on a Motion for reconsideration claiming
16 that this court lacks jurisdiction without
17 asserting a single statute, rule or anything
18 which limits this court's jurisdiction,
19 particularly in light of our allegation.

20 THE COURT: How do you have the
21 right to bring this action on a judgment that
22 has already expired?

23 MR. BERTELE: The right is under
24 Rule 60(b), Judge, which allows for an
25 independent action. Okay?

1 The issue in the case, as I see it,
2 is whether we can establish the basis on
3 which that earlier judgment should be
4 invalidated. That is what Rule 60(b) is all
5 about. It allows this court to hear
6 proceedings and take testimony with respect
7 to what went on in an earlier case, to make a
8 decision based upon equitable circumstances
9 and decide whether that judgment should be
10 invalidated. There is no limit with respect
11 to time or the status of the lower court
12 contained in the Rules.

13 THE COURT: 60(b) is reviewing a
14 judgment and having a judgment set aside.
15 Correct?

16 MR. BERTELE: Rule 60(B) deals with
17 setting aside a judgment that has been
18 previously rendered. You're setting forth
19 now either the basis -- set forth some after-
20 discovered evidence, some excusable mistake,
21 or some nature of that nature. Is that what
22 you're talking about?

23 MR. BERTELE: Not exactly, Your
24 Honor.

25 THE COURT: Okay. Well, then what

1 is the basis that you have to attack a
2 judgment that has been on the record for
3 thirteen years?

4 MR. BERTELE: Because of how the
5 Supreme Court has interpreted 60(b). 60(b)
6 has two parts. The first deals with the
7 traditional Motion to vacate a judgment,
8 which is made in the court where the judgment
9 was entered based upon excusable neglect or
10 mistake or some such other reason. And then
11 the second part of 60(b) says that this Rule
12 does not prevent or prohibit an independent
13 action based upon exceptional circumstances
14 or extraordinary ---

15 THE COURT: Well, what are -- what
16 is the basis for that? That's what I am
17 asking you?

18 MR. BERTELE: The basis for that is
19 that, number one, the magistrate court did
20 not have jurisdiction.

21 THE COURT: How do I -- how do we
22 determine that?

23 MR. BERTELE: We can determine it by
24 looking at the judgments that were entered by
25 the magistrate's court; and the facts we've

1 alleged in this case, namely that Mr. Simmons
2 had no notice of the filing of the original
3 Complaint in magistrate's court.

4 THE COURT: Why didn't you bring
5 the action in magistrate's court?

6 MR. BERTELE: Because we have other
7 claims against the County in addition to what
8 we're asserted under the first three counts
9 of the Complaint. We have a civil rights
10 claim. We have a tort claim, both against
11 the County and one of its employees.

12 The issue I think counsel is
13 confusing between subject matter
14 jurisdiction, which we believe that this
15 court has since there is no impediment to
16 this court hearing this case. Now, when
17 counsel wants to raise other defenses, he's
18 able to do that but we contend that, uh, and
19 we've presented the facts in our, uh, -- in
20 our reply brief, with the original Motion,
21 that there are facts in dispute which should
22 not permit this court to dismiss this claim
23 on its face without having and going forward
24 with a trial.

25 So the issue of this court's

1 jurisdiction, I think, is plain. This is a
2 court of general jurisdiction. We've cited
3 the Constitution of this state and case law
4 which states that this is where cases are
5 brought, and there is no limitation on the
6 cases that can be -- that the County brought
7 before this court.

8 Number two, Rule 60 says -- I
9 believe it says what I say that it says, and
10 the Supreme Court has said that this court
11 can entertain an independent action to vacate
12 a judgment. There is no case law that I've
13 found that limits the time within which that
14 action can be brought or that limits a
15 judgment which can be brought before the
16 court to have a determination as to whether
17 that judgment should be invalidated. The
18 court of general jurisdiction, the rule
19 provides that you can hear this type of case
20 and therefore the threshold question that the
21 County is raising on this Motion for
22 reconsideration is whether this court can
23 proceed. I believe for all those reasons
24 that the court can proceed.

25 Now, with respect to the underlying

1 issue of the case, namely the validity of
2 those judgments, there's many, many arguments
3 to be presented -- and which we have already
4 presented -- to establish that the
5 magistrate's court did not have jurisdiction.

6 We look at the magistrate's statute,
7 which provides for jurisdiction over certain
8 kinds of things. A suit for user fee is no
9 contained within the specifics items which
10 are contained in that statute. And the
11 county has made other arguments about how it
12 should be interpreted. We've addressed those
13 in our initial opposition to this summary
14 judgment. We've addressed them again on our
15 Motion for reconsideration.

16 So either as a threshold question as
17 to this court's jurisdiction or as to the
18 underlying issue of the magistrate court's
19 jurisdiction, we believe that we have
20 presented compelling arguments why this case
21 should not be dismissed at either of those
22 two levels.

23 Last, but not least, the facts in
24 dispute here concern Mr. Simmons' knowledge
25 of those judgments. That would be

1 inequitable under all the circumstances to
2 enforce those judgment in the way in which it
3 was enforced here.

4 Then we have the issue of the claims
5 not related specifically to the magistrate's
6 court jurisdiction, which are whether the
7 County, whether its deputy sheriff
8 arbitrarily and unreasonably enforced the
9 statute with respect to levy and execution on
10 Mr. Simmons' real property as opposed to his
11 personal property.

12 THE COURT: When did all these
13 acts take place?

14 MR BERTELE: The levy and execution
15 occurred, I believe, in 2009. It resulted in
16 the sale of Mr. Simmons' property the
17 following year and it was that sale which
18 triggered this action. Thank you, Judge.

19 THE COURT: Response?

20 MR. DORSEL: Yes, Your Honor.
21 First of all, with regard to 60(b), my
22 understanding of that rule, and the court's
23 interpretation of it, is that what the
24 plaintiff has to show is the reason for the
25 -- or the time for the Motion under that

1 rule. The likelihood of success and
2 prejudice to the defendant.

3 The timeliness of the Rule, if you
4 look at just the judgment in 2000, this case
5 was filed eleven years after that judgment.
6 But as I said earlier, it was also filed more
7 than about a year after he had actual notice
8 of these judgments against him. He cannot
9 say that he never had judgment. So more than
10 a year. So we've got that -- the plaintiff
11 has that issue with the timeliness. We
12 definitely have arguments against that.

13 And then the third one, which is
14 prejudice to the defendants, as I've already
15 mentioned, the case file is gone for the 2000
16 judgment that he is now trying to say they
17 made a mistake. This should have been
18 handled in either post-trial motions or ---

19 THE COURT: Mr. Dorsel, let me ask
20 you something.

21 MR. DORSEL: Yes, sir?

22 THE COURT: You are asking me to
23 dismiss this before all of that is developed,
24 aren't you?

25 MR. DORSEL: No, because we've had

1 -- this case has been going on for about two
2 years now. We've done probably seventeen
3 depositions, all kinds of discovery. There
4 is -- Discovery has been basically completed
5 in this case.

6 You know, whether plaintiff -- as I
7 said, the plaintiff is trying to bring in an
8 appeal of the judgment from 2000, and every-
9 thing is related to that.

10 THE COURT: Okay. Thank you very
11 much. We will look at the file further and
12 we will let you know. Thank you.

13 MR. BERTELE: Your Honor, with
14 respect to my Motion to alter and -- I didn't
15 want to let you forget that one.

16 THE COURT: Yes, sir. Thank you.
17 How could I forget it?

18 MR. BERTELE: Judge, the issue
19 relates to your Order of November 20th
20 dismissing the Complaint in its entirety
21 against Deputy Long.

22 The argument was made in the
23 County's initial Motion to dismiss that
24 County employees who are acting within the
25 scope of their duties are immune from suit.

1 We believe that the following
2 section of the Tort Claims Act states that
3 County employees are not immune from suit if
4 they are acting with actual malice or ill
5 will. Therefore, we believe that the County
6 employee is an appropriate party in this
7 case. If ---

8 THE COURT: Based on what?

9 MR. BERTELE: Based on the fact that
10 they are not exempt ---

11 THE COURT: Show me the evidence
12 that they were acting with some ill will,
13 that raises any inference of that.

14 MR. BERTELE: The evidence which we
15 submitted in our opposition to summary
16 judgment dismissing that count -- the fifth
17 count, I believe that it is -- is the
18 deposition of Deputy Long, in which he
19 indicated, in which he testified that Mr.
20 Simmons, he believed, called him and
21 threatened him on the telephone; that if --
22 if Deputy Long came to his house to carry out
23 an execution of the judgment. When Deputy
24 Long came to his house, he ignored personal
25 property which was in plain view and

1 proceeded to levy on Mr. Simmons' house for
2 a judgment of approximately six hundred
3 dollars. We believe that is a question of
4 fact that should go to the jury for
5 determination.

6 THE COURT: Thank you, sir.

7 MR. BERTELE: In addition, the
8 fourth count of the Complaint raises a civil
9 rights violation, for which there is no
10 immunity from suit.

11 THE COURT: Okay.

12 MR. BERTELE: Thank you, Judge.

13 THE COURT: Thank you, sir. Do
14 you wish to be heard?

15 MR. DORSEL: Just briefly, Your
16 Honor.

17 THE COURT: Thank you.

18 MR. DORSEL: First off, I'd like to
19 point out the fact that he keeps talking
20 about the fact of the deputy enforcing the
21 statutes and ill will -- the Tort Claims Act,
22 15-78-60(4) talks about immunity to the
23 enforcement.

24 Just very briefly on this ill will,
25 there is absolutely no basis for this. What

1 the plaintiff failed to leave out is that the
2 deputy, Harry Long, sent not one, not two,
3 not three, not four but five letters about
4 this. He came out to his house to personally
5 serve him with notice of the sale. What the
6 plaintiff has said in his deposition is that
7 he treated all of those like junk mail and
8 threw letters from the County Sheriff away.
9 There is absolutely no evidence of ill will,
10 except one conversation -- which from Mr.
11 Bertele's argument -- sounds like the ill
12 will might have been on the part of Mr.
13 Simmons, for threatening the deputy.

14 THE COURT: The bottom line is
15 that this case -- if the Supreme Court or the
16 Court of Appeals wants to overturn that, so
17 be it. Thank you. I'm not inclined to alter
18 that.. Thank you.

19 (HEARING CONCLUDED)
20
21
22
23
24
25

STATE OF SOUTH CAROLINA)
) CERTIFICATE
COUNTY OF CHARLESTON)

I, the undersigned Deborah Garrison, Circuit Court Reporter for the 9th Judicial Circuit, hereby certify that the foregoing is a complete and accurate transcript of the hearing held in the within action heard on March 20, 2013 before The Honorable R. Markley Dennis, Jr.;

I further certify that I am neither kin nor counsel to any of the parties and have no interest in the outcome of this action.

Deborah Garrison

Deborah Garrison

Charleston, South Carolina
JANUARY 20, 2015

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CIVIL ACTION NO.: 2:11-CV-00709-RMG

ROOSEVELT SIMMONS,

Plaintiff,

-vs-

MASE AND COMPANY, LLC, J. AL CANNON, JR., Sheriff
for Charleston County, and CHARLESTON COUNTY

Defendants.

THE DEPOSITION OF ROOSEVELT SIMMONS,
taken on behalf of the Defendant, on October 10, 2011,
commencing at 10:15 a.m., at the Law Offices of Senn
Legal, 3 Wesley Drive, Charleston, South Carolina,
29407.

Reported by: Douglas K. Liperote
Spectrum Reporting Services

1 us. What is that?
 2 A. This looks to be like a tax bill from the
 3 County. Yes, this is a tax bill for 1995.
 4 Q. And this is for property 138 it looks like?
 5 A. Yes, that's the TM Number on this.
 6 Q. And that's where you live?
 7 A. Yes.
 8 Q. So then do you know if these taxes were
 9 paid, the \$482?
 10 A. Definitely.
 11 Q. Okay. This is another document provided by
 12 your attorney.
 13 (Whereupon, Exhibit 6 was
 14 marked for identification.)
 15 BY MR. DORSEL:
 16 Q. It looks like a 1998 tax bill?
 17 A. Yes, this is the same.
 18 Q. Okay. Do you have any other tax bills for
 19 the last 15 years?
 20 A. Yes, I have all of them. I got tax bills
 21 that go back to the 50s.
 22 Q. Okay. I did see a couple from the 50s, but
 23 I definitely didn't see one for every year. Could you
 24 provide those to your attorney?
 25 A. Yes. Excuse me, Mr. Dorsel.

1 Q. Yes.
 2 A. We have to go back to the record on them
 3 depositions. I had one deposition with the Berkeley
 4 Electric case in an attorney's office.
 5 Q. All right. When was that taken?
 6 A. It was taken in 2008, I think. I'm not
 7 sure.
 8 Q. Okay. And that's perfectly fine if you
 9 need to go back at any time and correct something.
 10 A. Yeah. Well, I'm not sure that it was 2008.
 11 Q. Okay. One issue has been the user fee,
 12 obviously. What's your understanding of what the user
 13 fee is?
 14 A. My understanding is that a user fee is --
 15 that they're supposed to provide service to you for
 16 anything they pick up. They pick up recycling on
 17 Kitford Road, but they do not pick up garbage. And
 18 they wouldn't pick up anything on my property because I
 19 have a private road.
 20 Q. Would they pick up your recycling?
 21 A. I don't even have a recycling bin. They
 22 give it to the other neighbors, but I don't have one.
 23 Q. Okay. So is your understanding of the user
 24 fee that people pay that so that the County will come
 25 and pick up their trash?

1 A. For services, yes.
 2 Q. Do you know what else the user fee is for?
 3 A. No.
 4 Q. But your understanding is that the user fee
 5 is only for trash pickup?
 6 A. Well, I understand it as I read it, Mr.
 7 Dorsel, a user fee, business license fee, storm water
 8 bill, none of that pertained to me. So if it don't
 9 pertain to me, why should I pay for it?
 10 Q. If it doesn't pertain to you, why should
 11 you pay for it?
 12 A. Yeah, I don't get no services, to make it
 13 short.
 14 Q. Have you read the actual ordinance that
 15 established the user fee?
 16 A. Well, I know it established back in '78,
 17 but that was supposed to have been -- when they come
 18 out with that, it supposed to have been for ten years.
 19 And now I found out that they sold the incinerator. So
 20 they're still charging the people for it, but the
 21 County done sold that incinerator that the tax payers
 22 were supposed to contribute.
 23 Q. Okay. Do you think you should have to pay
 24 the user fee?
 25 A. No.

1 Q. And why not?
 2 A. I don't get no service.
 3 Q. And when you say service you mean trash
 4 pickup?
 5 A. Trash pickup or nothing. I don't get no
 6 service from the County. My road, I maintain my road
 7 and everything.
 8 Q. Have you ever paid the user fee?
 9 A. No.
 10 Q. Why not?
 11 MR. BERTELE: Asked and answered.
 12 A. Because I don't get no service. That's the
 13 reason, Mr. Dorsel.
 14 Q. The reason has always been the same?
 15 A. Same, yes.
 16 Q. Okay. Do you remember when you first got
 17 billed for that user fee?
 18 A. No, I can't recollect. I think it was back
 19 in the '80s or the '90s, but my attorney have all that
 20 information.
 21 (Whereupon, Exhibits 7 and 8 were
 22 marked for identification.)
 23 BY MR. DORSEL:
 24 Q. This is Exhibit 7. It's an Official Tax
 25 Receipt. It looks like for 138. It looks like you

1 Q. You can answer.
 2 A. To me, yes.
 3 Q. So you're —
 4 A. He knows where I live at.
 5 Q. Right. But you think —
 6 A. I don't do to — Mr. Chris, I don't do too
 7 much telephone conversation with nobody, because
 8 telephone conversation, I see of me you ain't
 9 face-to-face, I'm not dealing with you. I've got to
 10 know who I'm dealing with, and that's my way of taking
 11 care of business.
 12 Q. Okay. But you don't remember any telephone
 13 conversation before the sale with Deputy Long?
 14 A. No, sir.
 15 Q. All right.
 16 (Whereupon, Exhibit 22 was
 17 marked for identification.)
 18 BY MR. DORSEL:
 19 Q. This is Exhibit 22. It's a May 11 letter.
 20 Do you remember receiving this letter?
 21 A. No, I don't. For one, I don't never
 22 see a — I don't see a TMS number, nothing on this. I
 23 don't know what they are talking about in this letter.
 24 I only respond to TMS number with the County. Or
 25 anything concerning my family property, I recognize it

1 as a TMS number.
 2 Q. I understand that.
 3 (Whereupon, Exhibit 23 was
 4 marked for identification.)
 5 BY MR. DORSEL:
 6 Q. Exhibit 23 is a letter from June 18, 2009.
 7 A. Same thing, yeah.
 8 Q. Do you remember receiving that letter?
 9 A. Is that a copy of — May, June? No, I
 10 don't remember receiving this. Again, it don't have a
 11 TMS number.
 12 Q. Okay. Now, I understand you don't remember
 13 seeing it. Do you think you didn't receive any of
 14 these letters?
 15 A. If I did, I should have them.
 16 Q. I agree. I mean, do you think you didn't
 17 receive any of them?
 18 A. I didn't receive them.
 19 Q. Do you think there's a chance you received
 20 them and you just threw them away?
 21 A. It's possible if there's no tax number on
 22 it. If it's concerning any property I'm dealing
 23 with — I get a lot of junk mail. They put other
 24 people's mail in my box. And if it don't concern a TMS
 25 number or just a bill, I don't make it a habit of

1 creating no bills, because I'm living on Social
 2 Security.
 3 Q. I understand that, but this is a letter
 4 from the sheriff's office.
 5 A. I haven't received it. I haven't seen
 6 nothing like that.
 7 Q. So your position is that you have not
 8 received the letters that we've marked as Exhibits 20,
 9 21, 22 and 23?
 10 A. No, I haven't received them.
 11 Q. Okay. And do you know why you wouldn't
 12 have received them?
 13 A. I don't know if they had been sent to me.
 14 Q. Well, look at the address on all of them.
 15 A. I see the address. It don't mean nothing,
 16 Mr. Chris.
 17 Q. But the address is your address?
 18 A. The address is my address. My address is
 19 listed in the telephone book. My address has been the
 20 same for years. My daddy used this address.
 21 Q. I understand. But what I'm wondering is
 22 how you didn't receive any of these letters?
 23 A. I haven't received them. Not to my memory.
 24 If I did, I don't know whether I throw it away or what,
 25 because of no TMS number. I don't know whether you're

1 talking about 024, 032, or any property that I'm paying
 2 taxes on.
 3 Q. But if you received a letter that says
 4 "Please do not ignore this matter as it can place your
 5 property at risk of being sold at a public auction if
 6 this is not satisfied," does it matter what property
 7 number it —
 8 A. It doesn't matter.
 9 Q. So you would just throw that away?
 10 A. More likely I would if it has no TMS number
 11 on it.
 12 Q. Okay. So you don't remember getting any of
 13 these letters and you don't remember any conversations
 14 with Deputy Long on the telephone?
 15 A. No.
 16 Q. But you do remember Deputy Long coming out
 17 and serving you with a summons?
 18 A. Yes.
 19 (Whereupon, Exhibit 24 was
 20 marked for identification.)
 21 BY MR. DORSEL:
 22 Q. Let me show you this Exhibit Number 24, and
 23 tell me what that is.
 24 A. This says here Levy Notice.
 25 Q. Okay. Do you remember receiving this?

1 A. Because he was prejudice, I guess. Why
2 would you change the jury? Hey, you had a jury there
3 and they granted me \$6,000, which would have covered
4 the cost of those tanks and the gas. For \$3,000, I
5 couldn't buy the tank back, so now I'm renting the
6 tank.

7 Q. Okay. And so you think if you received any
8 kind of Magistrate Court summons, you may have ignored
9 it because it came from Judge Gerard?

10 A. Yes.

11 Q. Now, let's see here. When Deputy Long came
12 to you, what did you all talk about?

13 A. We didn't talk about nothing, but he passed
14 me the summons and I took it out of his hand, and I was
15 outside working. I put it in the house, and when I
16 come in that evening, I looked at it and come to find
17 out it was from the Small Claims Court for a user fee.
18 So it rings a bell that they already took the user fee
19 off, why are they serving you a summons?

20 Q. Okay. So you think he served you with a
21 summons from Small Claims Court?

22 A. On account of the user fee. I thought it
23 was from the Small Claims Court. But when I got in
24 there and looked at it, it was from a business license
25 user fee. I don't have a business license. I'm not

1 gone?

2 A. I wouldn't have gone, but there's four
3 residents behind this property that they would have
4 been glad to buy it for \$600 because they don't have a
5 right-of-way to get to their house. Berkeley Electric,
6 St. John Water Company, they would have bought it for
7 \$600 rather than be sued for those easement.

8 Q. Do you remember anyone, either Deputy Long
9 or anyone with the User Fee Department, telling you
10 that all you had to do was pay a little bit towards the
11 fees against you?

12 A. No, I wouldn't have. If I had received a
13 letter like that I wouldn't have acknowledged it,
14 because why pay a little bit if they already took it
15 off? The County, what they're doing don't make sense.
16 One do one thing and the other one do another thing.
17 So, they're looking for me to do their job.

18 Q. What do you mean, "do their job?"

19 A. If they don't know the difference between
20 138-024 and all these different properties, and 498,
21 you just don't put nobody's name on a deed, not as long
22 as I've been living.

23 Q. Do you understand that the user fee that
24 they say you didn't pay was for the 138 property?

25 A. The user fee bill was on all - the user

1 using anything. And the user fee had already been
2 removed from my tax bill.

3 Q. So what did you do after that?

4 A. I leave it alone.

5 Q. Did you try and contact Deputy Long and ask
6 him about it?

7 A. No.

8 Q. Did you try and contact the User Fee
9 Department?

10 A. I done went to the head of the County and I
11 thought that was sufficient.

12 Q. When you say the head of the County, who
13 are you talking about?

14 A. The Charleston County Auditor's Office.

15 Q. But after Deputy Long came to your house
16 and served you, did you go back and talk to anyone with
17 the auditor's department?

18 A. No. The next year I went to them and had
19 them remove it. They did remove it.

20 Q. Okay. Now the Sheriff's Sale that it's
21 talking about, did you go to the Sheriff's Sale?

22 A. No.

23 Q. Did you know about the Sheriff's Sale?

24 A. No, I didn't.

25 Q. If you had known about it, would you have

1 fee bill was 499, 135, 0320, 24. All these they
2 enforce a user fee, all because I'm paying the taxes.
3 What is it - and I had it removed and it's still the
4 same thing. Why go back to the user fee or go back
5 downtown on Broad Street and they already removed it
6 off the bill?

7 Q. Okay. So you didn't know about the
8 Sheriff's Sale?

9 A. No.

10 Q. Did they ever contact you about the fact
11 that it had been sold?

12 A. When I find out the property was sold when
13 I went to investigate about, I didn't receive a tax
14 bill. Ms. Ellington personally got on the computer and
15 told me the property was sold. You have to go upstairs
16 to the recording office. And I went upstairs and they
17 give me a printout of the sale of the property. And I
18 couldn't get back home to know they sold that much
19 property for \$600.

20 (Whereupon, Exhibit 26 was
21 marked for identification.)

22 BY MR. DORSEL:

23 Q. Let me show you Exhibit 26. It's a
24 January 7, 2010 letter. Did you receive this letter?

25 A. Again, Mr. Dorsel, I see on here 283-00-498

1 was sold at a public auction. If I had seen this, I
 2 wouldn't have to go down to the tax office to find out
 3 that the property was sold.
 4 Q. But that is your name and your proper
 5 address?
 6 A. Yes, it is.
 7 Q. But you've never seen this letter we've
 8 marked as Exhibit 26?
 9 A. Not that I can remember. And I wouldn't
 10 have thrown it out. It's got 498 on it.
 11 Q. So do you think you would have thrown it
 12 away, or?
 13 A. Well, if I did, I might have thrown it
 14 away. Like I say, I get a lot of junk mail. I get a
 15 lot of crazy calls.
 16 Q. Would you consider a letter from
 17 J. Al Cannon, Sheriff of Charleston County, junk mail?
 18 A. Yes, if it don't have anything connected to
 19 me.
 20 Q. But it has your name and address --
 21 A. No, but they got Gary Simmons here.
 22 Q. Where?
 23 A. They got Gary Simmons on the first letter.
 24 Not this one.
 25 Q. Okay.

1 A. So I wouldn't have thrown this away.
 2 Q. Okay. But did you do anything with this?
 3 A. I went down and paid my taxes for the next
 4 year, and that's when I learned that the property was
 5 sold.
 6 Q. All right. So after you got the printout
 7 of the sale, what did you do?
 8 A. I went back down to Ms. Moseley and I
 9 showed her why the property was sold, because we was
 10 discussing whether I paid the tax or not for the
 11 following year. If the property was on delinquent tax
 12 sale, it wasn't nothing to do about it. I should have
 13 known to pay the taxes. So when she looked at it again
 14 she said she never has heard of the County selling
 15 property for a user fee. And that's when I took it
 16 upon myself to file a lawsuit against the County for
 17 selling it.
 18 Q. Well, did you go talk with anyone else?
 19 A. No. I hired a lawyer just like I would
 20 ordinarily do.
 21 Q. I thought you said you went up to Leeds
 22 Avenue?
 23 A. No, I called Leeds Avenue. I didn't go up
 24 there, I called there.
 25 Q. So who else --

1 A. I talked to people. I didn't get no
 2 information.
 3 Q. Did you ever talk to Jim Lane?
 4 A. Jim Lane and several other people I talked
 5 to. They passed me down the line, like I say.
 6 Q. You never had any --
 7 A. Mr. Miller. I remember him because when I
 8 first called him -- when I first called him he was on
 9 his way to a meeting. That's why I can remember him.
 10 He was on the way to a meeting, called him back at a
 11 certain time and he would look into the file. When I
 12 called him back he started passing me down. The last
 13 one they passed me to was Ms. Scarborough, and I left
 14 her a message and her machine says, I'm out from my
 15 desk, leave a message. I ain't never heard nothing
 16 from her. And that's when I ended up in a legal --
 17 Q. Did you ever have any kind of conversation
 18 of any substance with anyone from the User Fee
 19 Department?
 20 A. No, I didn't have no use to do that,
 21 because the County had already taken it off my bill.
 22 Q. But they had sold your property.
 23 A. Well, if they sold it, they sold it wrong.
 24 Q. But you said you went to the User Fee
 25 Department, or called up there?

1 A. I called them and asked them about Gary
 2 Simmons and the sale of the property.
 3 Q. And what did they tell you?
 4 A. Nobody couldn't give me no information.
 5 They didn't want to give me no information.
 6 Q. Did they tell you why the property was
 7 sold?
 8 A. They passed me down the line. I know why
 9 the property was sold because I got the deed in my hand
 10 from Mase and Company.
 11 Q. And why was the property sold?
 12 A. It was sold for a user fee.
 13 Q. And for not paying user fee?
 14 A. Yep. Yes, I'm sorry.
 15 Q. That's okay. Do you remember any kind of
 16 conversation of substance with anybody from the User
 17 Fee Department?
 18 A. No more than Ms. Peggy Ellington down at
 19 County Assessor's Office
 20 Q. The auditor's office?
 21 A. The auditor's office.
 22 Q. Did you talk with anyone at the assessor's
 23 office?
 24 A. No. Only the record office upstairs, only
 25 there and to the assessor's office.

Chris Dorsel

From: edward bertele <ebertele@msn.com>
Sent: Monday, April 15, 2013 5:01 PM
To: Dennis, R. Markley Jr. Law Clerk (Kamila Szymczynska-Sas)
Cc: Chris Dorsel; Wendy Keefer
Subject: Re: Simmons v. Charleston County, et al. (Case No. 2011-CP-10-1084)

Kamila: I have reviewed the county defendants original summary judgment motion consisting of a Memorandum of Law dated July 26, 2012, a Supplemental memorandum dated August 14 and an Amended Supplemental memorandum dated August 31, 2012. Only in the August 14 and 31 st memoranda do the county defendants assert that the court does not have subject matter jurisdiction to overturn magistrate Court judgments as requested in Counts One, two and Three. There is no argument made in those memoranda that the Fourth and Fifth Counts should be dismissed because they relate to the validity of the Magistrate's court judgments. The county asserts other reasons to dismiss those counts such as Tort Claims Act immunity and those were addressed in my replies. Those counts can stand whether or not the judgments were valid since they assert wrongful retention of Deputy Long (Fourth Count) and constitutional violations involved in enforcing the judgment (Fifth Count) However the proposed order contains dismissal of all of the Counts on the basis that the Fourth and Fifth counts were related to the other counts for which the Court was asked to reconsider its decision. Therefore I respectfully suggest that the order of reconsideration is improper since it exceeds the scope of the original summary judgment motion. Also the Sixth Count was the subject of a motion for leave to amend which Judge granted on Nov 20 but the county defendants never moved to reconsider. therefore, the order of reconsideration is also Improper since it dismisses the Sixth Count which was not part of defendants original motion and which they never asked to be reconsidered. I appreciate the opportunity to bring this matters to the Court's attention.

Edward A. Bertele, Esq.
Attorney at Law
1812 Pierce Street
Charleston, SC 29492
(843) 471-2082

----- Original Message -----

From: Dennis, R. Markley Jr. Law Clerk (Kamila Szymczynska-Sas)
To: Chris Dorsel
Cc: wendykeefer@yahoo.com ; ebertele@msn.com ; Meghan Zealy
Sent: Friday, April 12, 2013 9:12 AM
Subject: RE: Simmons v. Charleston County, et al. (Case No. 2011-CP-10-1084)

Mr. Dorsel-Thank you for the proposed order. If there are any proposed changes from the other parties, I would appreciate receiving them by email before Tuesday morning (April 16, 2013).

Cordially,

Kamila

--
Kamila Szymczynska-Sas
Law Clerk to the Honorable R. Markley Dennis, Jr.
P.O. Box 1800
300 B California Avenue
Moncks Corner, SC 29461
Moncks Corner: 843-719-4673
Charleston: 843-958-5062

R¹ 634

Cell phone: 843-323-5353
Email: MDennisLC@sccourts.org

-----Original Message-----

From: Chris Dorsel [<mailto:chris@sennlegal.com>]
Sent: Thursday, April 11, 2013 5:11 PM
To: Dennis, R. Markley Jr. Law Clerk (Kamila Szymczynska-Sas)
Cc: wendykeefe@yahoo.com; ebertele@msn.com; Meghan Zealy
Subject: re: Simmons v. Charleston County, et al. (Case No. 2011-CP-10-1084)

Kamila,

Attached, as requested, is the Proposed Order in this matter. I have attached it in Word format, but please let me know if another format would be better. I have also copied all counsel of record on this email.

Thank you for your attention to this matter, Chris Dorsel

Christopher T. Dorsel
Senn Legal, LLC
3 Wesley Drive
Charleston, SC 29407
(843)556-4045
chris@sennlegal.com

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From: Dennis, R. Markley Jr. Law Clerk (Kamila Szymczynska-Sas)
[<mailto:MDennisLC@sccourts.org>]
Sent: Tuesday, April 02, 2013 1:34 PM
To: Chris Dorsel; 'Edward Bertele'
Cc: 'Wendy Keefer'
Subject: Simmons v. Charleston County, et al. (Case No. 2011-CP-10-1084)

All,

As you know Judge Dennis took Defendant's Motion to Reconsider under advisement on March 20, 2013. Judge Dennis has decided to grant Defendant's Motion to Reconsider and thus ultimately grant Defendant's Motion for Summary Judgment. Mr. Dorsel-I would appreciate if you could prepare a proposed order based on your argument in the Motion to Reconsider. I would appreciate if you could email the proposed order to my attention and copy all parties on that correspondence.

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R 635

Cordially,

Kamila

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Kamila Szymczynska-Sas
Law Clerk to the Honorable R. Markley Dennis, Jr.
P.O. Box 1800
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Moncks Corner, SC 29461
Moncks Corner: 843-719-4673
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<http://www.eset.com>

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