THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

ROOSEVELT SIMMONS.....Petitioner

Vs.

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

Unpublished Opinion No. 2018-UP-333
(S.C. Ct. App. Filed July 18, 2018)

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATION OF COUNSEL

Counsel certifies that the Petitioner has filed a Petition for Rehearing and the Court of Appeals has denied Rehearing by Order dated September 20, 2018.

QUESTIONS PRESENTED FOR REVIEW

1. Did the Circuit Court have jurisdiction to hear a collateral attack upon a Magistrates Court judgment in conjunction with all the issues before it?

2. Does Charleston County Ordinance10-50 et seq. require collection of user fees like ad valorem taxes; if not, is the collection of a user fee a general class of case over which the Magistrates Court has subject matter jurisdiction?

3. Does Charleston County Ordinance10-50 et seq. require Petitioner to pay a user fee when no services were rendered to him, and if so, does it violate Equal Protection?

4. Did the Court of Appeals err in holding that Respondent Charleston County Sheriff's Department did not arbitrarily and discriminatorily enforce the judgment?
5. Did the Court of Appeals fail to disregard the discretionary immunity defense and err in dismissing the wrongful retention claim against Respondent Charleston County Sheriff's Department?
6. Is there a reasonable inference of malice from all of the evidence and did the Court of Appeals err in dismissing the Tort Claims Act claim against Respondent Long?
7. Did the Court of Appeals exceed its authority in remanding the Sixth Count to address an issue not raised below?

STATEMENT OF THE CASE

In February 2011, Petitioner filed an action for declaratory relief to invalidate a 2009 Sheriff's sale of real property known as TMS 498, valued at $70,000.00 which was sold to Respondent Mase and Company, LLC for $600.00 to satisfy a judgment for an unpaid user fee for solid waste collection in the amount of $144.00. Petitioner alleged that the judgment was invalid because: (1) the Magistrates Court had no jurisdiction to collect these fees and that S.C. Code Ann. Section 44-55-1210 required that collection be in the same manner as real estate taxes, R. p. 15-17; (2) the County Auditor removed the fee from his tax bill thereby waiving the fee, R. p. 18-19; (3) Petitioner derived no benefit from such fees as required by SC Code Section 44-55-1210 because Charleston County did not receive or collect any solid waste from him. R. p. 18-19. Petitioner also sought damages for violation of his right to Equal Protection due to the arbitrary and discriminatory manner in which the fees were collected. R. p. 21-22. The Complaint was amended to assert equitable grounds upon which to invalidate the user fee judgments and sale of TMS 498, R. p. 31, Para. 28; to add

Respondent Charleston County Revenue Collections Department who collected the fees and Respondent Harry Long, the Sheriff's Deputy who levied on and sold TMS 498 as Defendants on the basis that they had violated Equal Protection in the collection of the user fee and in the arbitrary and discriminatory act of levying and selling real property when personalty was available, R. p. 64; and to assert a Fifth Count (Tort Claims Act) against Respondent Charleston County Sheriff's Department for negligent retention of Respondent Long and against Respondent Harry Long for malice in conducting the levy and sale of real property and against TMS 498. R. p. 64-65. In April 2012, Petitioner obtained leave of Court and added a Sixth Count to vacate the Sheriff's sale because the amount of the sale was grossly inadequate in relation to the fair market value of the property. R. p. 103-107.

Respondents Al Cannon Jr., Charleston County Sheriff's Department,Charleston County Revenue Collections Department and Harry Long (hereinafter the "County Respondents") moved for summary judgment as to all counts based on various Tort Claims Act immunity defenses and that the Magistrates Court had jurisdiction over the collection of user fees. R. p. 102,172-178.

The Circuit Court denied their Motion except as to Respondent Long. R. p. 9. County Respondents filed a motion for reconsideration and for the first time asserted that the Circuit Court had no jurisdiction to hear the Complaint. R. p. 510-511. The Court by Order dated June 17, 2013 granted reconsideration and dismissed the Complaint. R. p. 11-15. The Court found that Petitioner had not appealed the Magistrates Court judgments and was barred from collaterally attacking them in Circuit Court, R. p. 12-13; that all the causes of action necessarily flowed from the judgments and the Court had no jurisdiction over them, R.p.13; that the County

Respondents were immune under the South Carolina Tort Claims Act. R. p. 13-14; that Petitioner was not entitled to relief as matter of law for a denial of equal protection and had not presented a genuine issue of fact. R. p.14-15. Petitioner filed a timely Motion to Alter or Amend the Judgment pursuant to S.C.R.C.P. 59(e), R. p. 556-572, which was denied, R.p.16, and an appeal to the Court of Appeals was filed.

The Court of Appeal affirmed in part and reversed in part. The Court held that Petitioner should have sought relief from the Magistrates Court judgment in Magistrates Court and that the Magistrates Court had jurisdiction to hear a suit to collect a user fee. Appendix at 4-5. The Court held that Petitioner's Equal Protection claim could have been heard in Magistrate's Court and that the collection of the user fee from Petitioner did not violate equal protection; and that there was no evidence that Respondent Long had acted arbitrarily in enforcing the judgment against real property. Appendix at 5-6. The Court held that Petitioner did not establish a sufficient nexus between Respondent Long's lengthy history of violating Sheriff's Department procedure and being subject to numerous disciplinary actions and the acts complained of to support a claim of negligent retention. Appendix at 6. The Court held that there was no evidence of malice upon which to support Petitioner's Tort Claims Act claims against Respondent Long. Appendix at 7.

The Court of Appeals reversed dismissal of the Sixth Count to set aside the Sheriff's sale due to inadequacy of price and remanded to the Circuit Court to hold a hearing on laches. By order dated September 20, 2018, the Court of Appeals denied Petitioner's petition for Rehearing. Appendix at 8.

ARGUMENT IN SUPPORT OF PETITION

I. THE CIRCUIT COURT HAD JURISDICTION TO CONSIDER ALL THE ISSUES

The Court of Appeals erred in holding that the Circuit Court did not have jurisdiction to review the Magistrates Court jurisdiction over collection of user fees. Petitioner contended that the Circuit Court had jurisdiction to hear and decide all the issues based upon the circumstances of the case. Appellant's Brief at 20-23. "[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.49,62, 723 S.E.2d 211, 218 (Ct. App. 2011). "[I]t is clear that anyone who asks to have such jurisdiction limited in any way must be able to point out some constitutional or statutory provision establishing such limitation." Ex parte Ware Furniture Co., 49 S.C. 20(1897) (MacIver, C.J., dissenting). "[I]ssues relating to subject matter jurisdiction may be raised at any time, cannot be waived even by consent, and should be taken notice of by the [Court of Appeals] on our own motion." Bunkum v. Manor Properties, 321 S.C. 95, 467 S.E.2d 758 (Ct. App. 1996). Bunkum held that subject matter jurisdiction can be attacked collaterally pursuant to an R 60(b), S.C.R.C.P. independent action and not precluded by the failure to appeal or file a post-trial motion. 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. R 60(b), SCRCP does not specifically prevent the Circuit Court from vacating a judgment of a lower court. Since the Rule does not contain such a restriction, the Circuit Court should not have imposed such a limitation on itself because to do so would unduly restrict its authority as a court of general jurisdiction.

Petitioner further contended that the Magistrates Court did not have jurisdiction to hear the Fourth (Equal Protection), Fifth (Tort Claims Act) and Sixth (inadequacy of price)

Counts due to the jurisdiction limit of $7500.00. Appellant's Brief at 24-25. By reversing dismissal of the Sixth Count and remanding it to the Circuit Court, the Court of Appeals apparently agreed that the Circuit Court had jurisdiction over that Count but did not address the other Counts.

II THE COURT OF APPEALS ERRED BY INTERPRETING THE MAGISTRATES COURT ACT TO INCLUDE THE COLLECTION OF USER FEES

The Court of Appeals ignored the plain language of Charleston County Ordinance 10-56 that states that the treasurer shall collect " the annual disposal user fee . . . in the same manner as taxes are collected . . . " S.C. Code Ann. Section 44-55- 1220 states: "The governing body of any county which engages in the collection and disposal of solid waste is authorized to promulgate such rules and regulations as it may deem necessary to carry out the functions authorized by this article." 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. There was no authority given to collect the user fee by suit in Magistrates Court. Therefore, the plain language of the Ordinance requires that the method to collect a user fee would be a tax sale with right of redemption. See S. C. Code Ann. Section 12-51-90.

The Court of Appeals cited the General Welfare Statute, S.C. Code Ann. Section 4-9-30(5)(a) (counties can assess uniform service charges) to indicate that the Magistrates Court had subject matter jurisdiction. Appendix at 4. It is an established principle of statutory interpretation that the particular statute takes precedence over the more general. See Terpin v. Darlington County Council, 286 S.C. 112,114, 332 S.E.2d 771, 773 (1985)(general welfare

statute cannot provide the basis to regulate activities which are subject of a specific statute); Atlas Food Sys. & Servs., Inc. v. Crane Nat'l Vendors Div. of Unidynamics Corp., 319 S.C. 556, 558, 462 S.E.2d 858, 859 (1995).

The Court of Appeals held that user fees were in the general class of Magistrates Court cases "arising on contracts for the recovery of money only" under S.C. Code Ann. Section 22-3-10(1). Appendix at 4. The Court of Appeals relied upon Bardoon Properties, NV v. Eidolon Corp., 326 S.C. 166, 485 S.E. 2d 371 (1997) which was decided on the issue of standing and does not support an interpretation of the Magistrates Court Act which expands that Court's subject matter jurisdiction when as here, there is no pertinent subject matter jurisdiction. A user fee collection case is not a type of contract case. A user fee is a type of a tax and is not voluntary. See Brown v. Horry County, 308 S.C. 180, 185, 417 S.E.2d 565(1982)(a user fee is a type of tax that is uniform and paid into a special fund); Powell v. Chapman, 260 S.C. 516, 197 S.E.2d 287 (1973)(a tax is an enforced contribution, collected to raise revenue for public or governmental purposes). Therefore cases, the Court of Appeals holding that collection of a user fee is of the "general class of a contract case" is contrary to established law.

Further, County Respondents did not assert that collection of a user fee was the "general class of a contract case" before the Circuit Court, R. p. 163-178,417-420, 459-46, or before the Court of Appeals or ask that the lower Court ruling be affirmed on any basis found in the Record under Rule 208(a)(2), S.C.A.C.R. See County Respondents' Brief at 37-40. Since the Circuit Court did not make any ruling on that issue, County Respondents were barred from raising it before the Court of Appeals and it should not have been considered. Brashier v. South Carolina Dept. of Transp., 327 S.C. 179, 186 fn. 7, 490 S.E.2d 8 (1997)

(additional ground for sustaining dismissal not raised below will not be considered). The Court of Appeals deviated from Rule 220(b), S.C.A.C.R. (basis for opinion must be "fairly arising upon the record") by considering that a user fee was part of a general class of contract case when the issue was not preserved for appeal and not fairly arising from the record.

In summary, the Court of Appeals should have relied upon the language of the Charleston County Ordinance that establishes the manner for collecting user fees. There is no specific statutory authority in the Magistrates Court Statute, S.C. Code Ann. Section 22-3-10 creating jurisdiction over the collection of a user fee. Finally, this Court should not permit the Opinion of the Court of Appeals as to Magistrates Court jurisdiction to remain in effect for reasons which are not set forth on the face of the Record.

III. THE COURT OF APPEALS ERRED ON THE FACTS AND LAW IN DISMISSING THE EQUAL PROTECTION CLAIMS

In dismissing part of Petitioner's Fourth Count Equal Protection claim, the Court of Appeals held that there was a rational basis to collect the user fee from Petitioner, namely to reduce trash on private property. Petitioner contends that the Court disregarded the plain language of Charleston County Ordinance Section 10-51(8) which "grants the county council the power . . . to levy fees against persons for whom services are provided."

In dismissing the other part of Petitioner's Equal Protection claim, the Court of Appeals held that Respondent Long did not act arbitrarily in enforcing the user fee judgment. Appendix at 5-6. The Court disregarded the plain language of S.C. Code Ann. Section 15-39-80 that requires the Sheriff to execute upon personalty before real property and allowed Respondent Long to arbitrarily ignore registered motor vehicles and farm and heavy machinery he found and execute on real property he thought was worth $24,000.00 to satisfy

a $144.00 judgment. Petitioner contends that the Court of Appeals did not correctly apply established law and disregarded the facts in the Record on Appeal.

1. Application of the user fee to non-users violates equal protection

Petitioner contended that Charleston County Ordinance Section 10-51(8) only required "persons for whom services are provided" to be liable for the user fees. It is not disputed that Petitioner did not use or receive any trash collection services from Charleston County. Respondent Charleston County Revenue Collection Department's own witness, George Boniface admitted that the purpose of the Ordinance was to impose fees on persons for whom services were provided. R. p. 276, page 25 line 12 to 17. Where the language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed, and the Court has no right to impose another meaning. State v. Pitman, 373 S.C. 527, 647 S.E. 2d 144 (2007).

Since he did not use or receive any Charleston County solid waste disposal services, he was not similarly situated to other residential property owners to whom the Charleston County Ordinance was applied and thus was subject to "disparate treatment". Appellant's Brief at 26-27. Therefore, the burden of proof is upon the County Respondents to show a rational basis for imposing the user fee upon Petitioner consistent with its purpose. Harbit v. City of Charleston, 382 S.C. 383, 675 S.E.2d 776 (Ct. App. 2009). See. S. C. Code Ann. Section 44-55-1210(granting counties authority to regulate solid waste disposal and to levy fees against persons for whom services are provided).

The Court of Appeals held that the purpose of the user fee was to reduce trash on private property, so the user fee could be charged to non-users. Appendix at 5. Charleston County did not assess a uniform charge applicable to all property owners whether or not they

used the service, such as a school tax. Instead it passed an Ordinance which according to the enabling legislation allowed it to levy a fee against persons for whom services are provided. Charleston County Ordinance 10-51 et seq. does not mandate that Petitioner send his trash to a county facility for disposal. He can dispose of it on his own property if he does not create a nuisance. Charleston County Ordinance Section 10-69 (2). The express purpose of the Ordinance is to provide solid waste removal services for users and to charge a fee. The Court of Appeals adopted a purpose for imposing a fee which is not consistent with the plain language of the Ordinance and thus does not satisfy the rational basis test to justify disparate treatment under the Equal Protection Clause. The Court of Appeals relied upon a general purpose of the Ordinance which was not directly related to the purpose for which the user fee was imposed. The Court of Appeal is treating the user fee like a tax since the purpose of a tax is to fund an overall public benefit for which all property owners can be taxed, see Powell v. Chapman, 260 S.C. 516, 197S.E. 2d 287(1973); thus, a general use should not be applied to a user fee. Therefore, Respondent County Revenue Collections Department failed to demonstrate any rational basis to impose the solid waste disposal fee on Petitioner.

The issue presented herein is novel. The two prior decisions by this Court, Skyscraper Corp. v County of Newberry, 323 S.C. 412, 416-417, 475 S.E. 2d 764, 766 (1996) and Brown v. County of Horry, 308 S.C. 180, 417 S.E.2d 565 (S.C. 1992) which both upheld the imposition of user fees did not specifically deal with the issue of whether a non-user can be liable for a user fee. In Skyscraper Corp. v County of Newberry, 323 S.C. 412, 416-417, 475 S.E. 2d 764, 766 (1996), this Court found that "while Skyscraper alone does not generate all of the solid waste produced in the Parr Building, as landlord, Skyscraper clearly benefits from the collection and disposal of the solid waste from [tenants in] its building." Skyscraper

Corp. supports Petitioner's contention that use of Charleston County solid waste removal services is an essential basis for imposition of the user fee, whether by the owner or a tenant.

Similarly, Brown v. County of Horry, 308 S.C. 180, 417 S.E.2d 565 (S.C. 1992) supports the same proposition. In Brown, this 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."308 S.C. at 567,568. Plaintiff claimed that a vehicle tax imposed for road maintenance violated equal protection because the owners of registered vehicles were charged the same rate whether they lived within or without the municipality. This Court held: "The classification rests on a reasonable basis as the vehicle owners are the persons who most often would use the roads." 308 S.C. 569, 417 S.E. 2d 569. Both Skyscraper Corp. and Brown rely upon the fact that the plaintiff was receiving services to determine that the claimed disparate treatment did not violate equal protection. Unlike either plaintiff he did not receive any benefit since he chose to dispose of his own trash onsite without violating the ordinance. Therefore, Petitioner contends that the holdings and dicta in both cases support his contention that the user fee cannot constitutionally be applied to non-users.

In summary, Petitioner is not similarly situated with all other persons for whom the user fee was imposed because he receives no benefit from these services. The enabling statute and County Ordinance establish that the purpose is to provide services for those who will pay a fee. There is no rational basis to collect a user fee from a person who receives no benefit of the services for which the fee is imposed and Respondent Charleston County Revenue Collections Department efforts to collect it are arbitrary and discriminatory. The Court of Appeals held that a general benefit justifies the imposition of the fee and by so

doing is treating the user fee as a tax, applied to all residents. Neither of the user fee cases decided by this Court addressed whether a non-user could be liable for a user fee; and the holdings in each relied upon the fact that the user was receiving a direct benefit, namely that services were being provided. Therefore, this Court should grant this Petition to decide this novel issue.

2. There was sufficient evidence of willful disregard of enforcement procedures to establish a violation of Equal Protection

The Court of Appeals held that Respondent Long did not act arbitrarily by levying on real property, TMS 498. Appendix at 6. Petitioner contends that the facts in the Record do not justify the Court's ruling. Respondent Long did a record search and found several motor vehicles titled in Petitioner's name without any liens including a "classic" 1955 Desoto but disregarded them. Appellant's Brief at 29, R. p. 397, para.7. Although he thought one of the vehicles was too old, he did not investigate the others although he admitted they might be worth looking into. R. p. 302, page128, line 2 to 16; R. p. 392-394. S.C. Code Ann. Section 15-39-80 requires "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." (emphasis added). The statute is clear that only if sufficient personal property cannot be found, then the officer enforcing the judgment may execute on real property. Public officials have duty of good faith in the execution of their duties. State v Hess, 279 S.C. 14, 21, 301 S.E. 2d 547, 551 (1983). Respondent Long did not have the discretion to ignore the motor vehicles he found in Petitioner's name. He had to determine if they had adequate equity. See Sheriff's Department Regulations, R. p. 362. By admitting that the vehicles were worthy of pursuing, Respondent Long was obligated to determine if

there was adequate equity to satisfy the judgment of $144.00 plus costs of sale before he could disregard them to levy on any real property.

The Court of Appeals said that there was no evidence of any record of Appellant's ownership of farm machinery and heavy equipment. Appendix at 6. County Respondents did not raise that claim below but asserted it before the Court of Appeals and did not ask that the lower Court ruling be affirmed on any basis found in the Record on Appeal under Rule 208(a)(2), S.C.A.C.R. County Respondents' Brief at 30, 40. In his Reply Brief at p. 16, Petitioner argued that an which was not raised below cannot be considered. Brashier v. South Carolina Dept. of Transp., 327 S.C. 179,186 fn. 7, 490 S.E.2d 8,12 (1997). Therefore, this argument should not have been considered as it was waived.

The Court of Appeals also erred in its comment about farm and heavy machinery because Respondent Long had actual knowledge of them as potential sources to satisfy the user fee judgment since they were in plain view when he came to Petitioner's house in August 2009. R. p. 397; R. p. 295, page 76 lines 8 to 22. The Court of Appeals assumed that searching the public records was all that was required of respondent Long before he could levy on real property. This assumption is not in accordance with the language of the statute which only says that the officer must be unable to "find" personal property. "The primary or fundamental rule of statutory construction a court must follow is to ascertain and give effect to the legislature's intention or purpose as expressed in the statute." Green v. Thornton, 265 S.C. 436, 219 S.E. 2d 827(1975). The purpose of the statute is to prioritize which of the debtor's assets are to be utilized to satisfy a judgment and personalty was the first type of asset to be sought. The statute does not limit the Sheriff's duty to find personalty by

conducting a record search so the Court should not have limited how a Deputy " finds" personalty.

Petitioner urges this Court to review that decision which does not comport with the statute's plain language. Respondent Long was on duty when he came to Petitioner's house. His duty to find personalty did not cease when he conducted a record search just because he decided to ignore motor vehicles (wrongly) and chose instead to levy on TMS 498. Petitioner urges this Court to consider whether Respondent Long was arbitrarily ignoring his duty after he found substantial personal assets but did not levy upon and sell them as required under S.C. Code Ann. Section 15-39-80.

Other evidence of willfulness is that Respondent Long decided to levy on TMS 498 because he knew the appraised value in the county tax system was $23,900, R. p. 297, page 81, line3 to 22 which was far in excess of the $144.00 judgment. The Court of Appeals agreed that the sale price was grossly inadequate and remanded for a hearing but failed to acknowledge that this was further evidence of a denial of Equal Protection.

In summary, the Court's finding that Respondent Long did not act arbitrarily is not supported in the Record. It is uncontested that Respondent Long ignored registered motor vehicles and farm and heavy machinery in plain view before levying and selling TMS 498 to enforce a judgment in the amount of only $144.00. Petitioner contends that the Court of Appeals overlooked these facts as prima facie evidence his arbitrarily enforcing S.C. Code Ann. Section 15-39-80 and violative of Equal Protection in its dismissal of the Fourth Count.

IV. THE COURT OF APPEALS ERRED IN FINDING THAT THE COUNTY SHERIFF'S DEPARTMENT EXERCISED DISCRETION AND BY NOT FINDING A NEXUS BETWEEN THE HISTORY OF MISCONDUCT AND THE ACT COMPLAINED OF

Petitioner contends that the Court of Appeal erred in dismissing his claim of negligent retention of Respondent Long by Respondent Charleston County Sheriff's Department for two reasons: (1) the Court failed to address Petitioner's argument that the Respondent Charleston County Sheriff's Office did not meet its burden of proof on the exercise of discretion in retention of Respondent Long; and (2) the Court of Appeals used an overly stringent "nexus" test to prevent the issue causation of Respondent County Sheriff's negligence in retention of Respondent Long from going to a jury. Appendix at 6.

1. Sheriff's Office did not prove that it exercised discretion in retaining Deputy Long

The Court of Appeals initially stated that Respondent County Sheriff's Department had discretionary immunity from suit under S.C. Code Ann. Section 15-78-60(5) for retaining Respondent Long. Appendix at 6. The Court noted that this immunity was "contingent on proof the government entity, faced with alternatives, actually weighed competing considerations and made a conscious choice using accepted professional standards". Id. However, the Court never addressed Petitioner's argument that Respondent had failed to meet its burden of proof on the issue. See Appellant's Brief at 18-19, 31-33. The Circuit Court below never considered the negligent retention claim in dismissing the Fifth Count as to the Respondent County Sheriff but relied entirely upon County Respondents' claims of immunity as to the conduct of Deputy Long in enforcing the judgment. R. p. 13-14.

Petitioner asserted that County Respondents never raised any Tort Claim Act discretionary immunity to Petitioner's claim of negligent retention of Respondent Long.

Appellant's Brief at 32. Respondent never argued that it exercised discretion in retaining Respondent Long or that the Circuit Court decision should be affirmed for any basis shown on the Record. See County Respondents' Brief at 30-33. Because it was not raised and argued below, the Court of Appeals should never have considered this argument. Brashier v. S.C. Dept. of Transp., 327 S.C. 179, 186 fn. 7, 490 S.E.2d 8, 12(1997).

Respondent County Sheriff's Department admitted that it had no documents concerning any decision to retain Respondent Long. R. p. 368 No. 5 and R. p. 369, No. 5. Each of the disciplinary reports involving Respondent Long refers to the incident in question and does not consider any earlier misconduct. R. p. 310-323. Sergeant Wilson, one of Respondent Long's superiors believed that what happened in the past had no bearing on his evaluation of Long. R. p. 374, page 35, line 15 to page 36, line 4. Respondent County Sheriff's Department policy required "gradually increasing actions for each successive instance of employee misconduct. . . [T]he employee may be subject to termination for the accumulation of violations." R. p. 383, Section III, B (3). The evidence is overwhelming (and not denied by County Respondents) that Respondent Charleston County Sheriff's Office Department never followed its own policy of progressive punishment. Therefore, based upon the Record on Appeal, the Court should have found that Respondent Charleston County Sheriff's Department was not entitled to discretionary immunity for a claim of negligent retention.

2. The issue of causation was for the jury

Petitioner contends that the Court of Appeals incorrectly applied the " nexus" test instead of allowing the jury to determine probable cause. Appendix at 6. "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." Small v. Pioneer Mach., Inc., 329 S.C. 448,464, 494 S.E. 2d 835,843(Ct. App. 1997). "The exception to the rule that this issue is for the jury is that reasonable minds could not differ as to the lack of causation." Kase v. Ebert, 392 S.C. 57, 707 S.E.2d 456 (Ct. App. 2011).

Prior decisions by the Court of Appeals involving of the "nexus" test, Kase v. Ebert, 392 S.C. 57, 707 S.E.2d 456 (Ct. App. 2011) and Doe v. ATC, Inc.,367 S.C. 199, 624 S.E.2d 447(Ct. App. 2005) are not dispositive of this case since they are entirely distinguishable. In Kase, there was a substantial time lapse (20 years) between the disciplinary conduct and the act complained of. Kase v. Ebert, 392 S.C. 57, 63, 707 S.E.2d 456, 459 (Ct. App. 2011)

The Court of Appeals relied upon Doe v. ATC, Inc.,367 S.C. 199, 624 S.E.2d 447(Ct. App. 2005) for its determination that there was no nexus between the prior disciplinary violations and the act complained of, sale of real not personal property. Appendix at 6. Petitioner contends that Doe also is distinguishable because Doe involved what may be considered as a single incident of less serious sexual misconduct, in which the complainant was hesitant to file a formal complaint with the employer, followed by a very serious pattern of sexual misconduct. Doe v. ATC, Inc.,367 S.C. 199, 624 S.E.2d 447, 451(Ct. App. 2005) The holding in Doe is that the employer had no notice based upon the first incident that the employee's misconduct would escalate to more serious misconduct and had no reason to fire him based upon the single incident. Id.

Unlike the single incident in Doe, Respondent Long had a history of misconduct. Respondent Long was subject to numerous disciplinary actions since joining the Sheriff's Department including two (2) suspensions and three (3) letters of reprimand. These actions

all involved serious breaches of Department policy and included: failing to transport a black male suspect he arrested to a court hearing resulting in the suspect being issued 3 contempt citations; an unauthorized absence and neglect of duty (to walk his dog); a motor vehicle accident for which he was found to be responsible; conducting warrantless search without probable cause; failure to timely serve an arrest warrant allowing the suspect to escape; violating standing policy by not obtaining a search warrant resulting in loss of thousands of dollars and other evidence of a crime resulting in Probationary Status due to failure to meet Professional Responsibility Standards. Respondent Long was also cited for five separate instances of violations of Department policy or decorum for which no disciplinary action was taken, including yelling at supervisors after being removed from an interview of a suspect; failure to respond to a call; failure to document a crime victim interview; and unauthorized appearance at a search. His own partner accused him of lying and refused to work with him.R.p.310-323, 441-443. The Record is clear that Respondent Long had a history of violating Sheriff's Department policy and procedure of all types.

Contrary to the facts in Doe, Respondent County Sheriff Office had notice of a six-year history of serious disciplinary violations which according to its own policy should have resulted in escalating discipline and termination. Respondent Long violated various Department regulations, procedures and legal and ethical standards. His pattern of behavior amply demonstrated a failure to observe numerous Department procedures. Many of the prior incidents were much more serious that his failure to levy on personal property, including conducting a warrantless search without probable cause; failure to timely serve an arrest warrant allowing the suspect to escape; violating standing policy by not obtaining a search warrant resulting in loss of thousands of dollars and other evidence of a crime. Several of

Respondent Long's infractions directly involved third persons including a suspect in jail who was held in contempt because Deputy Long did not pick him up and take him to a hearing, and a crime victim.

Moreover, the standard for negligent retention cases, relied upon in Doe v. ATC, Inc., supra, 624 S.E. 2d at 451, contained in the Restatement (Second) of Torts Section 317, Comment c states: "whether the employer knew the offending employee was "in the habit of misconducting [himself] in a manner dangerous to others. . ." The Court of Appeals determination that there is no "nexus" is contrary to the Record on Appeal because the Respondent County Sheriff's Department had ample evidence of Respondent Long's "habit of misconducting [himself] in a manner dangerous to others". See also 27 Am. Jur. 2d, Employment Relationship, Section 374 at p. 884 (2014)(the harm is caused by the "quality" of employee that employer had reason to believe would be likely to cause harm). Respondent Long's habit of misconducting himself involved serious breaches of Department regulations that affected the public, criminal defendants and fellow officers. Respondent's Long's misconduct (or "quality" as in Am. Jur 2d.) can be called negligence, laziness, dereliction of duty but whatever the label, Respondent County Sheriff's Department had reason to believe that he could do harm to others because of this characteristic.

As Petitioner argued below, Appellant's Reply Brief at 18, "[i]t is not necessary for a plaintiff to demonstrate the defendant should have foreseen the particular event which occurred but merely that the defendant should have foreseen [its]negligence would probably cause injury to someone." Parks v. Characters Night Club, 345 S.C. 484, 491 548 S.E.2d 605 (Ct. App. 2001) (citing Greenville Memorial Auditorium v. Martin, 301 S.C. 242, 245, 391 S.E.2d 546,548 (1989)). Respondent Long's prior misconduct almost entirely involved

breaches of regulations as well as argumentative behavior. The conduct that Petitioner complained of involved failure to follow statutory procedure and department policy in enforcing judgments against personal property.

Appellant contends that the Court of Appeals incorrectly applied the nexus test by insisting that the prior misconduct be identical to the Petitioner's complained of behavior. This is too rigid and should not be how the law is applied in the future. The general rule required the issue of causation to be submitted to the jury unless reasonable minds could not differ. Neither Doe nor Kase support the Court of Appeals decision to apply the exception to that rule. Accordingly. Petitioner asks this Court to review how the nexus test should be applied in a more elaborate case.

V. THE COURT OF APPEALS ERRED BY DISMISSING THE MALICE CLAIM AGAINST RESPONDENT LONG

The Court of Appeals failed to recognize the inferences of malice in the many actions taken by Respondent Long by holding that the issue was speculative. Appendix at 7. The Court erred in dismissing the Fifth Count because the reasonable inferences did not support only one conclusion, Hart v. Doe, 261 S.C. 116,120 198 S.E.2d 526,528 (1973); and the issue of malice is normally a jury question. See e.g. Swinton Creek v Edisto Farm Credit, 334 S.C. 469, 485, 514 S.E. 2d 126, 134 (1999).

The Court of Appeals acknowledged that Respondent Long believed that Petitioner had threatened him with violence if he came to post a notice of sale. Appendix at 7. The Court then said that Respondent Long did not take the threat personally because he tried to convince Petitioner to pay off the judgment by sending letters and making phone calls and consulted his supervisor about levying on TMS 498. Id. The Court of Appeals' logic is faulty because it is based upon an incomplete analysis of the facts. The fact that Respondent Long

did his job in certain respects does not automatically lead to only one conclusion: that he did not act out of malice in other ways. In determining whether any triable issues of fact exist, this Court must view all the evidence and all inferences which can be reasonably drawn therefrom 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).

Petitioner contends that other evidence supports an inference of malice. Respondent Long's collection file indicates that "[Petitioner] is going to very difficult to collect judgments from". R. p. 378. Given the number of letters and phone calls that allegedly went unanswered and the threat of violence if Respondent Long went to the property, it is reasonable to conclude that Respondent Long considered Petitioner uncooperative and would make his job more difficult. That is the most likely inference and it would be personal.

Respondent's Long's true attitude toward Petitioner is plainly evident when he ignored personal property, motor vehicles which he admitted were worth pursuing and farm and heavy equipment that were in plain view to enforce a $144.00 judgment against real estate which he believed was worth $24,000. Selling real property to satisfy a user fee judgment was highly unusual because Respondent Long had done it only three times in enforcing hundreds of judgments. R. p. 302, page 125, lines 3-6; R. p. 348, Answers to Interrogatories No. 17. The evidence shows that Respondent Long was personally invested in getting the real estate sold because he went to the chambers of the Master in Equity in August 2009 to confirm that a pending suit involving TMS 498 had been dismissed to be sure that his sale could go forward. See R. p. 292, page 61, line 25 to page 63, line 24.

The evidence overwhelmingly supports the inference that Respondent Long ignored the statutory requirement to levy upon personal property he found before any real estate out

of malice and in so doing willfully harmed Appellant. Where there is no dispute as to the evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should not be granted. Hamilton v. Miller, 301 S.C. 45, 389 S.E.2d 652 (1990).

Petitioner contends that the Court of Appeals also erred in dismissing the malice claim because it did not consider the appropriate standard for dealing with malice cases as set forth in Pridgen v. Ward, 391 S.C. 238, 705 S.E.2d 58 (Ct. App.2011) i.e. the existence of a motive to harm. In Pridgen, the Court of Appeals affirmed denial of a directed verdict against a claim of malice based upon evidence that Defendants had a motive to harm plaintiff. "The jury could infer from the relationship of the Appellants, as well as the nature of their actions, that they intended to harm [plaintiff]." 705 S.E. 2d at 63. The evidence supports an inference that Respondent Long had a motive to harm Petitioner: he believed Petitioner threatened him personally if he came to the house and he believed that Petitioner was making his job more difficult. See 65 C.J.S. Negligence, Section 18 at page 303(2010 ed.)(malice arises from some purpose). The inherent nature of their relationship was adversarial and is evidenced by their actions. Petitioner allegedly threatened to use force to stop a levy and execution and Respondent Long didn't try to be thorough in his search for personal assets once he found real estate to avoid prolonged contact with Respondent.

The issue of whether a reasonable inference of malice can be drawn from the surrounding circumstances is normally left to the jury. See e.g. Swinton Creek v Edisto Farm Credit, 334 S.C. 469, 485, 514 S.E. 2d 126, 134 (1999); Duckworth v First Nat'l Bank, 254 S.C. 563, 176 S.E. 2d 287(1970); West v Moorehead, 396 S.C. 1, 720 S.E. 2d 495, 499

(Ct. App. 2011). The facts here support a reasonable inference of malice sufficient to defeat summary judgment. See Hill v York County Sheriff's Department, 313 S.C. 303,308, 437 S.E.2d 179,182 (Ct. App. 1993) cert. den (1994). "When only one reasonable inference, not just one inference, but one reasonable inference, can be deduced from the evidence, it becomes a question of law for the court." Hart v. Doe, 261 S.C.116,120, 198 S.E.2d 526, 528 (1973).

In summary, there are three reasons for this Court to consider this claim: (1) the Court of Appeals failed to consider all the facts which raised an inference of malice, i.e. ignoring valuable motor vehicles and farm and heavy equipment to levy and then sell TMS for $600.00 roughly 2% of what the County assessed this property for, in order to collect $144.00; (2) there is a reasonable inference based upon the circumstances that Respondent Long had a motive to harm Petitioner for threatening him if he came out to post the property and making his job difficult; and (3) claims of malice are normally reserved for the jury. Accordingly, Petitioner respectfully seeks review of this issue because there is more than one reasonable inference that may be drawn from all the evidence.

VI. THE COURT OF APPEALS REMANDED THE SIXTH COUNT WITH IMPROPER DIRECTIONS

The Court of Appeals remanded the Sixth Count with directions to conduct a hearing regarding laches, an issue that had never been raised below by Respondent Mase and Company, LLC. The Court of Appeals agreed with Petitioner that the Sixth Count, inadequacy of sale price, should not have been dismissed. Appendix at 7-8. However, the Court of Appeals directed the Circuit Court on remand to conduct a hearing as to whether the Sixth Count should be barred by laches. Id. Petitioner argued that this issue was not raised below and that Respondent Mase and Company had not provided any legal citation to

support its claim for laches as appeared in the Court's Opinion. Appellant's Reply Brief at 20-21.

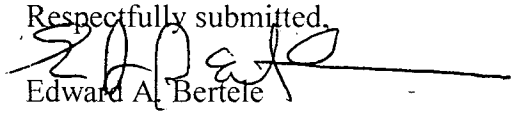
Petitioner seeks review and reversal of this part of the Opinion because it violates established principles of appellate review. See State v Crocker, 366 S.C. 394,399 n.1, 621 S.E. 2d 890, 893 n.1 (Ct. App. 2005)(arguments unaccompanied by legal citation do not preserve an issue for appellate review); State v Freiburger, 366 S.C. 125,134, 620 S.E. 2d 737,741(2005) (argument on appeal not raised below is not preserved for review). See Rule 220(b), S.C.A.C.R.

Therefore, the issue of laches was not properly before the Court of Appeals and the Court should not have ordered it to be considered on remand. Any other action to be taken by the Circuit Court on remand should be left up to that Court.

CONCLUSION

Petitioner respectfully requests that this Court grant his Petition for Writ of Certiorari to review the Court of Appeals Opinion affirming the dismissal of all claims against the County Respondent and ordering a hearing on laches for the reasons set forth herein.

Respectfully submitted,



Edward A. Bertele
Attorney for Petitioner
Roosevelt Simmons

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

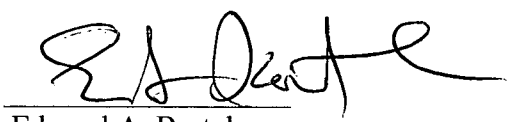
ROOSEVELT SIMMONS.....Petitioner

Vs.

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

CERTIFICATION OF SERVICE

I hereby certify that a true copy of the Petition for Writ of Certiorari and Appendix was served upon the Respondents' attorneys, Christopher Dorsel, Esq. and Wendy Keefer, Esq. and the Clerk of the Court of Appeals by regular mail postage prepaid at their last known mailing addresses.



Edward A. Bertele

October 22, 2018

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October 22, 2018

Mr. Daniel Shearouse, Clerk
Supreme Court
Supreme Court Building
1231 Gervais Street
P.O. Box 11330
Columbia, SC 29211

Re: Simmons v. Mase and Company, LLC et al.
Appellate Case No. 2014-002575

Dear Mr. Shearouse:

I am enclosing for filing the following: original and six copies of the Petition for Writ of Certiorari by Petitioner Roosevelt Simmons; two copies of the Appendix (one unbound); the Certification of Service and my check for $250.00 for the filing fee. If you have any questions, please do not hesitate to call. Thank you for your kind assistance.

Cordially,

Edward A. Bertele

CC: Christopher T. Dorsel, Esq.
Wendy R. Keefer, Esq.
Clerk of Court of Appeals

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October 22, 2018

Ms. Jenny Abbott Kitchings, Clerk
South Carolina Court of Appeals
1220 Senate St.
PO Box 11629
Columbia, SC 29211

Re: Simmons v. Mase and Co., LLC et al.
Case No. 2014-002575

Dear Ms. Kitchings:

I am enclosing for filing one copy of the Petitioner for Writ of Certiorari to the South Carolina Supreme Court and a Certificate of Service. Thank you for your kind assistance.

Very truly yours

Edward A. Bertele

Encl:
CC: Chris Dorsel, Esq.
Wendy Keefer, Esq.

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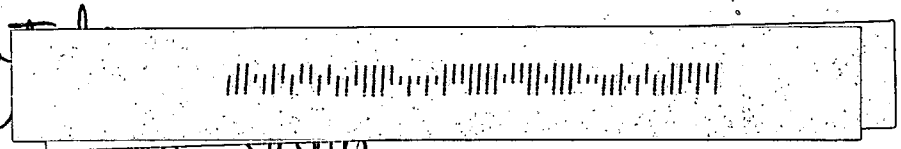

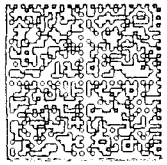

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