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DEC 06 2018

S.C. SUPREME COURT

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Unpublished Opinion No. 2018-UP-333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)

REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI

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and Harry Long

REPLY ARGUMENT

I. THERE IS NO VALID BASIS FOR MAGISTRATES COURT JURISDICTION OVER USER FEE COLLECTION

Petitioner contended that the Magistrates Court does not have jurisdiction of a suit to collect a user fee because: 1)the enabling statute S.C. Code Ann. Section 44-55- 1220 allows the County to determine how to collect the solid waste user fee and the Charleston County Ordinance adopted pursuant to it states that the user fee shall be collected like a tax; 2) S.C. Code Ann. Section 44-55- 1220 takes priority over the Public Welfare Statute S.C. Code Ann. Section 4-9-30(5)(a), relied upon by the Court of Appeals, in determining how user fees are to be collected; 3) the collection of a user fee is not a contract claim and thus is not a general class of case over which the Magistrates Court has jurisdiction. Petition at 7-8. County Respondents' Return failed to rebut these arguments with any relevant citations. Return at 6-8.

County Respondents' response to the clear language of Charleston County Ordinance 10-56 is to claim that the language authorizing the user fee to be collected like a tax is satisfied when the Auditor adds the user fee to the same bill as property taxes. Return at 6. That does not deal with the entire issue of collection, where as here, the bill is unpaid, because Petitioner denied he was liable for it. County Respondents cite to Charleston County Ordinance Section 10-60(b) that allows the Sheriff to collect a delinquent tax, an argument that they never presented below, see County Respondents' Brief at p. 26, 27, 37 and is thus waived. See Brashier v. South Carolina Dept. of Transp., 327 S.C. 179,186 fn. 7, 490 S.E.2d 8,12 (1997). Furthermore, County Respondents did not cite to any authority for the County Sheriff to institute suit in Magistrates Court over such a fee. Therefore, County Respondents have failed to present any legal basis to overcome application of the plain language of the

Charleston County solid waste collection ordinance requiring user fees to be collected like property taxes including tax sale and foreclosure. Because the Court of Appeals ignored this issue in deciding Magistrates Court jurisdiction, its decision should be reversed on that basis alone.

The second reason which Petitioner argued to reverse the Court of Appeals decision was its reliance on the General Welfare Statute, S.C. Code Ann. Section 4-9-30(5)(a). County Respondents do not deny the established principle of statutory interpretation that the particular statute takes precedence over the more general, see e.g. 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); or that Terpin v. Darlington County Council, 286 S.C. 112,114, 332 S.E.2d 771, 773 (1985) stands for the proposition that the General Welfare Statute cannot provide the basis to regulate activities which are subject of a specific statute. Since S.C. Code Ann. Section 44-55- 1220 allows the County to determine how to collect the solid waste user fee and the Charleston County Ordinance adopted pursuant to it states that the user fee shall be collected like a tax, it takes priority over S.C. Code Ann. Section 4-9-30(5)(a).

County Respondents argue for jurisdiction based upon S.C. Code Ann. Section 4-9-30(14) which merely gives the counties power to "enact ordinances and to enforce them in courts created by the general law including magistrates courts". Return at p. 7. County Respondents have not provided any legal citation that this enforcement power could occur without any legislative action by the county council and this argument should be rejected. Arguments unaccompanied by legal citation do not preserve an issue for appellate review. See State v Crocker, 366 S.C. 394,399 n.1, 621 S.E. 2d 890, 893 n.1 (Ct. App. 2005).

Charleston County Council could have included a provision in the user fee ordinance to allow a suit for collection in Magistrates Court, but this did not happen. The Court of Appeals decision usurps the legislative function of County Council under the guise of judicial interpretation and should not stand for that reason as well.

Finally, the third reason to reverse the Court of Appeals decision is that it expands Magistrates Court jurisdiction without any legal basis to do so. County Respondents do not deny that they did not assert that collection of a user fee was the "general class of a contract case" before the Circuit Court 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. Nor do County Respondents deny that 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). Therefore, County Respondents cannot deny that the Court of Appeals erred 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 and thereby the Court from Rule 220(b), S.C.A.C.R. (basis for opinion must be "fairly arising upon the record").

County Respondents do not attempt to support the basis for the Court of Appeals decision that jurisdiction arises under S.C. Code Ann. Section 22-3-10(1) (suits for contract damages) but rely upon a general theory of jurisdiction not articulated by the Court of Appeals: jurisdiction over an injury to the County under S.C. Code Ann. Section 22-3-10(2). County Respondents raised this argument below, but it was not adopted by the Court of Appeals and this Court should reject this as well. County Respondents have not cited any

legal authority for the proposition that failure to pay a user fee causes damage to the property or person of the County. Arguments unaccompanied by legal citation do not preserve an issue for appellate review. See State v Crocker, 366 S.C. 394,399 n.1, 621 S.E. 2d 890, 893 n.1 (Ct. App. 2005).

County Respondents erroneously cite T v. T, 378 S.C. 127, 662 S.E.2d 413 (Ct. App. 2008) as holding that Magistrates Court has specific jurisdiction over the cases enumerated under S.C. Code Ann. Section 22-3-10, as well as jurisdiction over the general class of cases related to those. Return at p. 8. T v T arose from a decision of a Family Court which dismissed a suit to overturn a prior child support order because of a lack of subject matter jurisdiction/res judicata. 662 S.E.2d at 416. There was no involvement with the Magistrates Court and the Court of Appeals quickly reframed the issue as "not jurisdiction but res judicata/collateral estoppel" and the power of the Court to reconsider an earlier decision in which paternity was not disputed, based upon genetic testing. 662 S.E.2d at 416-419. The Court of Appeals 's reference to the "general class of case" principle was merely dicta. Id. Dove v Gold Kist, Inc., 314 S.C. 235, 442 S.E. 2d 598(1994), the other case upon which County Respondents rely also does not refer to Magistrates Court jurisdiction but concerns an appeal from the Workers' Compensation Commission to the Circuit Court. This Court held in Gold Kist that the Circuit Court had jurisdiction to determine the correct venue for a Workers' Compensation Commission appeal even if it couldn't decide the appeal. 314 S.C. at 239, 442 S.E. 2d at 601.

County Respondents further misstate the Court of Appeals' holding in Rock Hill Body Co. v. Rainey, 294 S.C. 426, 365 S.E.2d 228 (Ct. App. 1987). In Rainey, the Court interpreted S.C. Code Ann. Section 29-15-10 which authorizes the Magistrate to sell property

subject to a mechanics lien to allow the Magistrates Court to determine the amount of a contested lien. Rock Hill Body Co. v. Rainey, supra, 294 S.C. at 429, 365 S.E.2 at 230. Rainey is limited to its facts and does not appear ever to have been cited as authority for the broader proposition which the County Respondents urge upon this Court. The Rainey case is clearly distinguishable since the Magistrate Court had express subject matter jurisdiction over sales of property subject to mechanic liens; the only issue was whether the amount of the lien was within its subject matter jurisdictional limit of $7500.00 and the Magistrates Court was able to decide that at least.

The Court of Appeals reliance on the contract provision of the Magistrate Court Act as a general class of case has no basis in law. As Petitioner has established, a user fee is a type of tax and is involuntary, Brown v Horry County, 308 S.C. 180, 185, 417 S.E.2d 565, 568 (1992)("a service charge may possess points of similarity to a tax"); 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). It has none of the characteristics of a contract.

In summary, neither the Court of Appeals or County Respondents have shown that there is a general class of case within the four corners of S.C. Code Ann. Section 22-3-10 to which a user fee belongs that would allow the Magistrates Court to exercise subject matter jurisdiction over user fee collection cases. Furthermore, even if there was such a general class of case, there is no reported case which holds that the "general class of cases" principle of determining Circuit Court jurisdiction should be extended to a court of limited jurisdiction such as Magistrates Court. This principle has been applied only in a very few cases arising in Circuit Court. Petitioner urges this Court to grant his Petition in order consider whether the

Court of Appeals correctly applied this principle to a court of limited jurisdiction without having identified an existing jurisdictional basis in the statute.

As to the issue of the Circuit Court jurisdiction, County Respondents merely repeat the Court of Appeals ruling. Return at p. 8. Also, they do not address the further basis for the Circuit Court's jurisdiction, that the claims based upon the validity and enforcement of the user fee were beyond the jurisdictional limits ($7500.00) of the Magistrates Court. Petition at 6-7. County Respondents thereby waive their right to contest this issue. Brashier v. South Carolina Dept. of Transp., 327 S.C. 179, 186 fn. 7, 490 S.E.2d 8 (1997).

II. BY RECEIVING AN INDIRECT BENEFIT PETITIONER IS NOT LIABLE FOR A USER FEE UNDER THE COUNTY ORDINANCE

Petitioner has demonstrated that the caselaw and the terms of the Charleston County user fee ordinance do not require him to pay a user fee unless he receives services, which he did not; if the ordinance did require this it would violate equal protection. Petition at 9-13. County Respondents contend that this claim is barred by a res judicata effect of the Magistrates Court judgment, an issue which the Court of Appeals raised sua sponte. Return at p. 9. Petitioner has previously addressed the Magistrates Court lack of subject matter jurisdiction over user fees and the Circuit Court's ability to hear all the issues arising therefrom including constitutional and Tort Act claims outside the Magistrates Court's subject matter jurisdiction and incorporates those arguments herein. Petition at 6-9. If the Court resolves that issue in Petitioner's favor, the res judicata issue becomes moot. Furthermore, the Court of Appeals properly considered the equal protection issue because it had been raised below and was not asserted at the time of the Magistrates Court judgment

which was rendered as a default. See Crowe v Crowe, 289 S.C. 330, 331, 345 S.E.2d 498,499 (1986)(default judgment does not result in res judicata on jurisdictional issue); Catawba Indian Nation v State, 407 S.C. 526, 536,756 S.E. 2d 900, 906 (2014)(party asserting collateral estoppel must demonstrate that issue was actually litigated in prior action); Restatement (Second) of Judgments Section 27 Comment e (1982)(no issues litigated in a judgment by default).

The Court of Appeals justified its decision to permit the County to impose a user fee against Petitioner because he received a secondary or indirect benefit, less trash from outside sources on his property. App. at p.5 Petitioner addressed this argument based upon the language of the Ordinance whose purpose was to provide services for a fee and not to charge for potential secondary benefits, such as reduced amounts of trash for other private property. Petition at 10-11. County Respondents argue that Charleston County Ordinance Section 10-55, which was never cited by the Court of Appeals, supports its interpretation that user fees can be charged to persons who receive no services. Return at p. 10. The provision to which County Respondents refer states: "a system of annual disposal user fees will benefit the owners of all real property that generate solid waste, and such user fees will also benefit owners of real property that do not generate solid waste in that the imposition of such fees will assist in the alleviation of litter and solid waste from unimproved forested lands and other unimproved parcels of real property within the county." Charleston County Ordinance 10-55. Based upon County Respondents' interpretation of this provision, all land regardless of whether it is improved would be subject to the user fee because it receives some indirect benefit. However, the subject property, TMS 498, which is unimproved is not subject to a user fee. R. p. 395, Para. 2; 397, para. 7. County respondents admit this. Return at p. 1. Since

an unimproved lot is not subject to a user fee but potentialy receives a secondary benefit, Petitioner who disposes of his own waste on site should likewise not be subject to a user fee because he receives the same secondary benefit. Therefore, County Respondents' interpretation of the language of this provision is contradicted by the County's own implementation of it which County Respondents readily admit.

Ordinance 10-55 does not clearly express that all property must pay a user fee because the owners either receive direct or indirect benefits. There is no case which says that a property which receives a secondary benefit should be included under the scope of the ordinance. The more reasonable interpretation of that section is that generators of solid waste who require disposal services benefit from the user fee system and that those would do not require disposal services also benefit from them even though they do not pay for them. By adopting this interpretation, this Court need not consider whether the user fee can be applied to non- users without violating equal protection. See Baker v Allen, 220 S.C.141,153, 66 S.E.2d 618,623(1951) ("ordinarily the courts will not pass upon a constitutional question unless a decision upon that point becomes necessary to the determination of the cause").

Finally, this Court has recognized that the imposition of a user fee will not be invalidated because it provides a secondary benefit to those who do not pay. See Brown v. County of Horry, 308 S.C. 180,185, 417 S.E.2d 565, 568 (1992); Robinson v Richland County Council, 293 S.C. 27, 32, 358 S.E. 2d 392, 396 (1987). Therefore, Charleston County Ordinance 10-55 should be interpreted as Petitioner urges, to allow non- users of the Charleston County disposal system to be free of any obligation to pay for it and thus avoid the question of an equal protection violation without affecting the validity of the Ordinance.

III. THE SHERIFF'S DEPARTMENT HAD NO DISCRETION IN ENFORCEMENT OF THE JUDGMENT

In support of the second part of the Fourth Count equal protection claim, Petitioner demonstrated that County Respondent Long arbitrarily and unreasonably enforced the judgment against real property. Petitioner's argument is based upon the plain language of S.C. Code Ann. Section 15-39-80. Petition at 13. Respondent Long "found" personal property namely the motor vehicles that were registered to Petitioner and farm and other machinery when he came to Petitioner's residence. Petition at 13-15. County Respondents have not provided any contrary argument or citation as to the meaning of this provision. Petitioner's claim of an equal protection violation is based upon County Respondent Long's failure to follow the statute by his arbitrary decision to avoid any further investigation into the motor vehicles or even consider the farm and other equipment, when the law required him to do so. County Respondent Long admitted that the motor vehicles might be worth pursuing but gave no explanation for his failure to do so; and his refusal to investigate the farm machinery is also unexplained. County Respondents state that Respondent Long "made a discretionary decision to proceed against unimproved property." Return p. 2. The statute is clear and gives no discretion to the Sheriff's Deputy to ignore any personalty he finds. He must pursue it until the value of personalty is exhausted and then proceed against real estate. Any other interpretation would give wide latitude in enforcement and result in unequal application of the law, as here. What Respondent Long did is clearly arbitrary and outside the limits of what the law allows. He violated Petitioner's right to equal protection because his actions lacked a "rational basis" and the Court of Appeals should have so found. Accordingly, Petitioner requests this Court to review those findings.

IV. THE FIFTH COUNT TORT CLAIM SHOULD BE SUBMITTED TO THE JURY

In support of his Fifth Count Tort Claim Act claim, Petitioner demonstrated that the Court of Appeals wrongly decided that Respondent County Sheriff's Department exercised discretion in retaining Respondent Long. Petitioner asserted that Respondent County Sheriff's Department did not raise such immunity before the Circuit Court or argue it on appeal or ask that the Circuit Court decision be affirmed on any basis found in the record. Petition at Petition at 16-17. Respondent County Sheriff's Department does not deny or rebut these contentions and they are therefore undisputed. The law is clear that Respondent County Sheriff's Department waived this issue on appeal and that the Court of Appeals erred by ruling that discretionary immunity was established based upon the Record on Appeal. Brashier v. South Carolina Dept. of Transp., 327 S.C. 179,186 fn. 7, 490 S.E.2d 8,12 (1997)

Petitioner also demonstrated that the Court of Appeals erred by ruling that there was no nexus between the prior misconduct of Respondent Long and the acts complained of. Petition at 17-21. Petitioner addressed the holding in Doe v. ATC, Inc.,367 S.C. 199, 624 S.E.2d 447(Ct. App. 2005) upon which the Court of Appeals relied and distinguished the basis for that holding and the present facts, namely a single incident versus a pattern of behavior. Petition at p. 18-20. County Respondents deny that there could be any nexus between Respondent Long's walking his dog while on duty and improperly enforcing a judgment or that there were any similar incidents of selling property improperly. Return at p. 12. County Defendants cannot deny that Respondent Long was in the habit of "misconducting himself", see Restatement (Second) of Torts Section 317, Comment c, as is evidenced by his lengthy and varied list of disciplinary offenses and suspensions, reprimands and other punishments. Petition at 18-20. Moreover, it is well established that plaintiff need

not prove the defendant should have foreseen the particular event which occurred. Parks v. Characters Night Club, 345 S.C. 484, 491 548 S.E.2d 605 (Ct. App. 2001). Therefore, the County Respondents argument that the dissimilarity between the events is evidence of no nexus is wrong based upon the law of causation.

County Respondents do not attempt to justify the Court of Appeals' decision based upon the Doe case but assert that the decision is supported by another case, Kase v. Ebert, 392 S.C. 57, 707 S.E.2d 456 (Ct. App. 2011). However, the Court of Appeals in Kase only relied upon the "nexus test" in considering the claim of negligent hiring. Kase v. Ebert, 392 S.C. at 63, 707 S.E.2d at 459. It affirmed dismissal of the negligent retention claim on the basis that the employer was not liable as a matter of law since the conduct complained of was outside the scope of employment. Kase v. Ebert, 392 S.C. at 64, 707 S.E.2d at 460.Therefore, Kase cannot support the arguments advanced by County Respondents in their defense of the Court of Appeals' decision.

In the absence of any controlling decision by this Court, Petitioner contends that the applicable principle is that questions of causation are normally for the jury. Small v. Pioneer Mach., Inc., 329 S.C. 448,464, 494 S.E. 2d 835,843(Ct. App. 1997).

Finally, County Respondents have failed to justify the Court of Appeals departure from several of this Court's precedents that allowed the jury to determine malice. For example, in Jones v Garner, 250 S.C. 479,489, 158 S.E. 2d 909, 914 (1968), relied upon by the Court of Appeals below, this Court held that: "While there are strong circumstances negativing the existence of actual malice, the reasonable inferences to be drawn from the evidence were correctly left . . . to the jury to resolve." See Duckworth v First Nat'l Bank, 254 S.C. 563, 574, 176 S.E. 2d 287, 303 (1970); Swinton Creek Nursery v EFC, 334 S.C.

469,485, 514 S.E. 2d 126 (1999)("Factual inquiries, such as whether defendants acted in good faith . . . are generally left in the hands of the jury"). By calling the existence of malice "speculation" the Court of Appeals was substituting its judgment for that of a jury, under circumstances where there is not only one reasonable inference from all the evidence.

As Petitioner demonstrated, Petition at 23, the Court of Appeals did not address the issue of motive. County Respondents likewise did not dispute that a motive for malice could have arisen based upon the relationship of the parties and the nature of their actions. See Pridgen v. Ward, 391 S.C. 238, 705 S.E.2d 58, 63 (Ct. App.2011) ("The jury could infer from the relationship of the Appellants, as well as the nature of their actions, that they intended to harm [plaintiff].") Respondent Long was trying to collect a $144.00 judgment. He was statutorily obligated to levy and execute on personal property or real estate if none could be found. Petitioner believed that he had no liability to pay user fees. Petitioner allegedly threatened to use force to stop a levy and execution by the County Sheriff's Department. Their relationship was inherently adversarial. The evidence supports a reasonable inference that Respondent Long believed Petitioner threatened him personally if he came to the house and that Petitioner was making his job more difficult. Respondent bypassed the motor vehicles which he admitted might be worth proceeding against in favor of 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. Respondent Long was personally invested in getting the real estate sold because he went to the chambers of the Master in Equity to confirm that a pending suit involving TMS 498 had been dismissed to be sure that his sale could go forward. The facts demonstrate that County Respondent Long wasn't thorough in his

execution of personal assets once he found real estate. Respondent had a motive to complete the execution quickly because he believed that Petitioner was going to try to delay it. The reasonable inference is that Respondent Long did not want to have to deal with several assets of much lesser value. The reasonable inference is that by trying to get the execution done quickly, Respondent Long intentionally disregarded the rights of Petitioner in dismissing the personalty of lesser value than the real estate. Another reasonable inference is that Respondent Long intentionally ignored the personalty because he had "ill will" toward Petitioner because of his threats.

County Respondent Long's letters to Petitioner to encourage him to pay the judgment do not evidence of a lack of malice because these do not negate the end result: sale of a $24,000 parcel of real property to partially satisfy a $144.00 judgment, which sale was overturned based on the inadequacy of the price. Therefore, the Court of Appeals erred by failing to consider the presence of a motive which provides the basis for these reasonable assumptions. Because there was not only one reasonable inference from all of the evidence, Hart v. Doe, 261 S.C.116,120, 198 S.E.2d 526, 528 (1973), the issue of malice should have been submitted to the jury.

V. A HEARING ON THE LACHES DEFENSE IS PREMATURE

It is undisputed that in this appeal, neither the County Respondents or Respondent Mase and Company, LLC asked for the relief as ordered by the Court of Appeals if the dismissal of the Sixth Count was reversed. County Respondents contend only that they raised laches as an affirmative defense. Return at p. 14. Petitioner contended that the hearing on the laches defense ordered by the Court of Appeals was inappropriate and that any action on the

issue should be left up to the Circuit Court. Petition at 25. Before this Court, County Respondents essentially agree. Return at p. 14. Therefore, the Court should consider this request as unopposed.

CONCLUSION

Petitioner respectfully contends that Petitioner has identified numerous errors of law in the Court of Appeals decision, which County Respondents have ignored or attempted to evade in their Return, as well as areas of the law which need this Court's guidance. County Respondents have not demonstrated that the Court of Appeals decision is based upon sound reasoning or precedent. Accordingly, Petitioner respectfully requests that his Petition be granted.

Respectfully submitted,

Edward A. Bertele
Attorney for Petitioner
Roosevelt Simmons

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DEPARTMENT and HARRY LONG ..... Respondents

CERTIFICATION OF SERVICE

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

Edward A. Bertele

November 30, 2018