

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 [Signature]

**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.” 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 owned, 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 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 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.

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 county 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 in 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,

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Attorney for plaintiff, Roosevelt Simmons

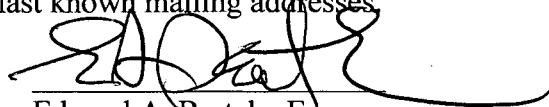
By: 

Dated: February 11, 2013
Charleston, SC

2011-CP-10-1084

CERTIFICATION OF SERVICE

I hereby certify that a true copy of the within Opposition to county defendants motion to reconsider 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.

February 11, 2013

FILED

2013 FEB 13 PM 1:18

JULIE J. ARMSTRONG
CLERK OF COURT

BY _____

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February 11, 2013

Ms. Julie J. Armstrong
Clerk of the Court
Charleston County Courthouse
100 Broad Street
Charleston, SC 29401

Re: Simmons v. Mase and Co, LLC. et al
Case No. 2011-CP-10-1084

Dear Ms. Armstrong:

Enclosed for filing is plaintiff's Opposition to the motions of the county defendants for reconsideration to be heard by Judge Dennis on February 14th. Also enclosed is a Certificate of Service Thank you for your kind assistance in this matter.

Very truly yours,



Edward A. Bertele, Esq.

Encl:

CC: Chris Dorsel, Esq. w/o enclosure

Wendy Keefer, Esq. “ “