STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Roosevelt Simmons
☒ Plaintiff

v.

Mase And Company, LLC Et Al

☐ Defendant.

IN THE COURT OF COMMON PLEAS

CASE NO.
2011-CP-10-1084

# MOTION AND ORDER INFORMATION FORM AND COVER SHEET

| Plaintiff's Attorney: | Defendant's Attorney: |
|---|---|
| Edward A. Bertele, Bar No. 72521 | , Bar No. |
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☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

**SECTION I: Hearing Information**

Nature of Motion: R 59(e) motion to alter/amend judgment
Estimated Time Needed: 10 Court Reporter Needed: ☒ YES / ☐ NO

**SECTION II: Motion/Order Type**

☐ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☒ Plaintiff / ☐ Defendant — July 8, 2013 — Date submitted

**SECTION III: Motion Fee**

☒ PAID – AMOUNT: $25.
☐ EXEMPT: (check reason)
- ☐ Rule to Show Cause in Child or Spousal Support
- ☐ Domestic Abuse or Abuse and Neglect
- ☐ Indigent Status ☐ State Agency v. Indigent Party
- ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
- ☐ Motion for Stay in Bankruptcy
- ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
- ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter:

☐ Other:

**JUDGE'S SECTION**

☐ Motion Fee to be paid upon filing of the attached order.
☐ Other:

JUDGE

CODE: __________ Date: __________

**CLERK'S VERIFICATION**

Collected by: __________

Date Filed:

☐ MOTION FEE COLLECTED: __________

SCCA/233 (11-03)

☐ CONTESTED – AMOUNT DUE: ______________

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

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

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

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

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

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

## BASIS FOR THIS MOTION

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

judgments, the Court still has jurisdiction over Tort Claims Act and constitutionally based civil claims which do not rely upon the invalidity of the judgments but assert that plaintiff's rights were violated in their enforcement. These are claims over which the Magistrate's Court has no jurisdiction and could 0nly be brought before this Court.

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

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

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

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

transcripts which were appended to the party's papers. For the sake of economy, plaintiff will not resubmit then now but will make specific reference to them throughout this motion. Plaintiff's arguments in support of reconsideration are set forth in detail below.

**A. Lack of Jurisdiction**

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

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

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

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

The county asserts that the only way for this Court to hear the issue is by appeal citing R 19, SCRMC, and that plaintiff has failed to timely appeal. "The failure of a party to comply with the procedural requirements for perfecting an appeal may deprive the court of 'appellate' jurisdiction over the case, but it does not affect the court's subject matter jurisdiction. Skinner v. Westinghouse Elec. Corp., 380 S.C. 91, 668 S.E.2d 795 (2008). Therefore, this court has subject

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

The cases on which the defendants rely, Town of Hilton Head Island v. Godwin, 370 S.C. 221, 634 S.E.2d 59 (Ct. App. 2006); Brewer v South Carolina Highway Dept., 261 S.C. 52, 198 S.E. 2d 256 ( 1973) and O'Rourke v Atlantic Paint Co., 74 S.E.930 (1912) are not controlling . All of these cases concern compliance with the Magistrate Court rules for motions or appeals from judgments. The restrictions upon motions based upon mistake, neglect, inadvertence, fraud or newly discovered evidence are subject to a time limitation of one year, based upon the policy of encouraging diligent action. See R 12, SCRMC. Similarly appeals from judgments must be filed within 30 days of written notice. See R 18, SCRMC. These time limitations do not apply to challenges to subject matter jurisdiction. The court's subject matter jurisdiction is subject to collateral attack in a separate action. See e.g. Bunkum v. Manor Properties, 321 S.C. 95,100, 467 S.E.2d 758 (Ct. App. 1996) ("issues relating to subject matter jurisdiction may be raised at any time, cannot be waived even by consent, and should be taken notice of by this court on our own motion.").

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

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

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

**B. Violations of Tort Claims Act**

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

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

judgment or discretion by the government entity. SC Code Ann Section 15-78-60 (5). The other exemptions do not pertain to the county's retention of Deputy long. Immunity under the Tort Claim Act is an affirmative defense and the county defendants have the burden of proof to establish that the alleged tort is subject to immunity. Summer v. Carpenter, 328 S.C. 36, 492 S.E.2d 55 (1997). Discretionary immunity is contingent on proof the government entity, faced with alternatives, actually weighed competing considerations and made a conscious choice using accepted professional standards. Wooten ex rel. Wooten v. South Carolina Dep't of Transp., 333 S.C. 464, 511 S.E.2d 355 (1999). Plaintiff pointed out in its initial Opposition at pages 25-26 that the county failed to establish how it exercised its discretion concerning the retention of Deputy Long and how it was entitled to immunity as matter of law. The county never addressed this issue in their various replies to the opposition or in their motion for reconsideration. Therefore, there are no facts upon which the Court could find that the Sheriff's Department was entitled to immunity from a claim for wrongful retention.

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

The Court said that the county defendant actions were taken to enforce county user fee judgments and were immune under SC Code Ann. Sect.15-78-60(3) (4), (5), (11) and (23). Order at 3-4. Plaintiff asserted in opposition that the allegations of the Fifth Count that Deputy Long was acting out of malice eliminate the claim of immunity. Opposition at 34-35. S.C. Code Ann. Sect 115-78-70(b) states: "Nothing in this chapter may be construed to give an employee . . . immunity from suit if is proved that employee's conduct . . . constituted actual malice [or] intent

to harm…." Therefore the immunity under SC Code Ann. Sect.15-78-60(3), (4), (11) and (23) do not apply to acts resulting from malice or intent to harm. See South Carolina State Budget and Control Bd. .v Prince, 304 S.C.241, 403 S.E.2d 643 (1991)(no Tort claim immunity for employee who acted with actual malice).

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

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

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

In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn there from must be viewed in the light most favorable to the nonmoving party. Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53, 518 S.E.2d 301 (Ct. App. 1999). If triable issues exist, those issues must be submitted to the jury. Young v. South Carolina Dept. of Corrections, 333 S.C. 714,718, 511 S.E.2d 413,415 (Ct. App. 1999). Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Brockbank v. Best Capital Corp., 341 S.C. 372, 534 S.E.2d 688 (2000). Summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is disagreement concerning the conclusion to be drawn from those facts. Moriarty v. Garden Sanctuary Church of God, 341 S.C. 320, 534 S.E.2d 672 (2000). Under the summary judgment standard, the court gives every benefit of the doubt to the non-moving party. Watters v. Terminix Service, Inc. 376 S.C.632, 635, 658 S.E. 2d 110,111 ( Ct. App. 2008).

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

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

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

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

**C. Violation of Section 1983**

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

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

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

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

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

In Harbit v. City of Charleston, 382 S.C. 383, 675 S.E.2d 776 (Ct. App. 2009), the Court of Appeals said that the Equal Protection clause of the Fourteenth Amendment "requires that 'the states apply each law, within its scope, equally to persons similarly situated, and that any differences of application must be justified by the law's purpose.'"(citation omitted) Simmons is not similarly situated to persons whose garbage is collected or who receive a benefit from the county disposal facilities. The country has no rational basis to enforce an ordinance against a person for whom it was not intended to apply. Simmons objected to the user fee every year it was put on his tax bill. Therefore, the Court should reconsider its Order because plaintiff has made out a prima facie case of an unequal application of the law, contrary to its purpose in violation of the Fourteenth Amendment.

There is another basis for reconsideration of dismissal of the Fourth Count. Simmons also contends that the county is not entitled to summary judgment on his claim that the Sheriff's Department and Deputy Long violated his right to equal protection by arbitrarily and discriminatorily enforcing user fee judgments against his property. Deputy Long was obliged to follow the law in carrying out his duties. S.C. Code Ann. Section 15-39-80 states that any execution of judgment "shall require the Officer. . . (1) to satisfy the judgment out of the personal property of such debtor and, if sufficient personal property cannot be found, out of the real property belonging to him." The facts are not in dispute that Simmons owned several motor vehicles that were registered with the Department of Motor Vehicles and well as a boat and several large pieces of construction and farm equipment, all in plain view around his home.

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

In Village of WillowBrook v. Olech, 528 U.S. 562 (2000), the Supreme Court said: "'[t]he purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents.'" Id at 564. The Supreme Court found that allegations that municipal action was "'irrational and wholly arbitrary' . . . are sufficient to state a claim for relief under traditional equal protection analysis." Id. at 565. (Citation omitted). Olech recognized that disparate treatment which violates equal protection need not be directed at a class of persons but may involve only a single individual, i.e. a class of one. Id. See Town of Iva ex rel. Zoning Administrator v. Holley, 374 S.C. 537, 649 S.E.2d 108 (Ct. App. 2007) (violation of the Equal Protection Clause may be based on arbitrary and purposeful discrimination in the administration of the law being enforced). In addition, governmental action based upon ill will or vindictiveness or other ulterior motive may violate equal protection. Engquist v. Oregon Dep't of Agriculture, 478 F.3d 985, 993 (9th Cir.2007)( In an equal protection claim based on selective enforcement of the law, a plaintiff can show that a defendant's alleged rational basis for his acts is a pretext for an impermissible motive); Forseth v. Village of Sussex, 199 F.3d 363 (7th Cir. 2000)( allegations of pecuniary advantage); Esmail v. Macrane, 53 F.3d 176 (7th Cir. 1995) (equal protection violate predicated on prosecutorial discretion exercised out of an illegitimate desire to 'get' defendant). In Lazy Y Ranch Ltd. v. Behrens, 546 F.3d 580, 591 (9th Cir. 2008)

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

Simmons previously established ( see Section B above) that there were material issues of disputed fact. Deputy Long claimed to have made several attempts to contact Simmons to resolve the judgment and Simmons disregarded these. Simmons denies receiving the letters or speaking to Long before he came to Simmons house in August 2009 to serve the writ of execution. Deputy Long believed that Simmons threatened him and the entire Sheriff's Department. Simmons also alleges that Deputy Long was motivated by malice or ill will in ignoring readily available personal property to levy on real estate out of desire to get Simmons for threatening him. Simmons was the record owner of various items of personal property such as several autos registered to his name, a boat, several pieces of heavy equipment, all of which were in plain view to anyone including defendant Long when he came to Simmons house in August 2009. Simmons Affidavit, para.7. Long didn't remember seeing any personal property during his visit. Long deposition at page 76, line 11 to 20. Deputy Long ignored personal property belonging to Simmons that may have been worthwhile to pursue real estate instead, contrary to S.C. Code. Ann Section 15-39-80. Sale of the personal property would not have been any more work than the real estate. Deputy Long sold TMS 498 without a minimum bid. Deputy Long claimed that he was required to offer the property for the amount of the advertising but the Sheriff's Department Policy and Procedure Manual, which Long had a copy of, does not contain any such requirement. Deputy Long only "breezed through it. Moreover, there is no requirement under the South Carolina Code for setting the minimum bid of sheriff sale, except for S. C. Ann. Section 15-41-10 which requires a minimum bid in the case of property subject to homestead exemption in the amount of the exemption and no less. Finally,

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

In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn there from must be viewed in the light most favorable to the nonmoving party. Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53, 518 S.E.2d 301 (Ct. App. 1999). If triable issues exist, those issues must be submitted to the jury. Young v. South Carolina Dept. of Corrections, 333 S.C. 714,718, 511 S.E.2d 413,415 (Ct. App. 1999). Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Brockbank v. Best Capital Corp., 341 S.C. 372, 534 S.E.2d 688 (2000). Summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is disagreement concerning the conclusion to be drawn from those facts. Moriarty v. Garden Sanctuary Church of God, 341 S.C. 320, 534 S.E.2d 672 (2000). Under the summary judgment standard, the court gives every benefit of the doubt to the non-moving party. Watters v. Terminix Service, Inc. 376 S.C.632, 635, 658 S.E. 2d 110,111 ( Ct. App. 2008).

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

In summary, there are sufficient facts upon which to establish the existence of ill will or ulterior motive . He has also shown that the Deputy Long (1) acted under the color of state law,

and (2) deprived him of a constitutional right – to equal protection of the law. See e.g. Ewing v. City of Stockton , 588 F.3d 1218, 1223 (9th Cir. 2009) " A person acts under color of state law, if he exercise[s] power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." Dang Vang v. Vang Xiong X. Toyed, 944 F.2d 476, 479 (9th Cir. 1991). Deputy Long was authorized to conduct the levy and sale of property to satisfy judgments. Simmons contends that the manner in which he performed these duties, by exercising his power out of ill will and a desire to get Simmons for an alleged threat, deprived of his interest in TMS 498. Simmons has made out prima facie case of a violation of 42 USC Section 1983. Accordingly, the Court should reconsider dismissing the Fourth Count on this additional basis.

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

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

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

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

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

**E. Sixth Count remains**

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

## CONCLUSION

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

Respectfully submitted,

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

By: ____________________

Dated: July 8, 2013
Charleston, SC

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

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

ROOSEVELT SIMMONS )
Plaintiff )
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Vs. )
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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 JUL 10 PM 1:50
JULIE J. ARMSTRONG
CLERK OF COURT
BY___

CERTIFICATION OF SERVICE

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

Edward A. Bertele, Esq.

July 8, 2013

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July 8. 2013

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

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

Dear Ms. Armstrong:

Enclosed are the Plaintiff's motion to alter or amend the judgment and certificate of service and Motion cover sheet together with the filing fee. Thank you for your kind assistance in this matter.

Very truly yours,

Edward A. Bertele, Esq.

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