THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

John C. Hayes, III, Circuit Court Judge

Appellate Case No. 2012-212016

ROBERT K. MARSHALL, Jr., and
DONNA CHAPMAN MARSHALL,
doing business as "Rock Hill Property Management",
a South Carolina general partnership, ... Appellants,

vs.

THE CITY OF ROCK HILL, SOUTH CAROLINA,
a municipal corporation,
CAREY F. SMITH, in his capacity as City Manager, and
LORI THOMAS,
in her capacity as Customer Services Manager . . . . . Respondents.

MEMORANDUM ON PETITION FOR REHEARING

The Petitioners petition for a rehearing of the matter above under Rule 221(a), S.C.A.C.R.

This Petition is based upon those certain points, factual and legal, which the Petitioner believes the Court to have overlooked or misapprehended, as set out herein.

THE DECISION ON APPEAL

This decision of this Court was filed June 24, 2015. To the extent allowed, the Petitioners restate and by this reference reargue all matter set out in their Brief and referenced in their Record on Appeal.

BACKGROUND

Defendants SMITH and THOMAS are agents and employees by the Defendant CITY OF ROCK HILL (hereafter collectively "the CITY"). In or about June, 2009, the Appellants ROBERT K. MARSHALL, Jr. and DONNA CHAPMAN MARSHALL, doing business as "Rock Hill Property Management" (hereafter collectively "the MARSHALLS"), were contacted by one Charles Willis, who wished to rent a property managed by them within the CITY. Willis had a delinquent utility account of ca. $749.21 with the CITY. Willis contended the delinquency was incurred by a former roommate after Willis moved out of their former address.

With Willis, the Appellants tried to negotiate a repayment schedule with the CITY. The terms demanded by the CITY were set at a level which Willis, who worked at minimum wage, maintained he could not afford. The MARSHALLS then requested the CITY supply utilities at the above rental premises in their name or that of their company, with Willis as a tenant reimbursing them for service. The MARSHALLS indicated their willingness to all reasonable rules and regulations relating to a normal contract for providing such utility service.

It is undisputed that the CITY has no written guidelines or procedure as to the allowance or denial of repayments for utilities.

There is no question of the good quality of the Appellants' credit standing or that of their company, nor does any cause (other than the Ordinances and policies of the CITY) exist preventing such supply of utility service by the CITY to rental property managed by Appellants.

The CITY, by its agents, refused this request, citing policy and the City Ordinances. THOMAS, on behalf of the CITY, also asserted that supplying utility service to Willis under the circumstances above would result in Willis' past debt being charged to Appellants.

The facts set out above have been repeated at times in the past by the CITY and its agents employees with regard to other rental clients or potential rental clients of the Appellants. The MARSHALLS have, as a result of the CITY's actions,lost potential tenants and rental income.

The MARSHALLS sued by filing of August 5, 2009. By Mr. MARSHALL's Affidavit of March 19, 2012, they claim damages of at least $5,652.00. In addition, they plead for punitive damages, injunctive relief and relief under 42 U.S.C. §§ 1983, 1988(b) and (c). The Respondents moved for summary judgment, which was granted by the Circuit Court by Order of April 9, 2012. This appeal followed.

The unreported decision of the Court of Appeals affirming the decision of the Circuit Court was filed June 24, 2015.

GROUNDS OF APPELLATE DECISION

The *per curiam* decision of the Court of Appeals panel disposes of the argument of Petitioners in this matter on what appear to be two bases. The first is stated as follows:

> We affirm pursuant to Rule 220(b), SCACR, and the following authorities: *Sloan* v. S.C. *Bd. of Physical Therapy Exam'rs*, 370 S.C. 452, 483, 636 S.E.2d 598,614 (2006) ("In order to prove a denial of substantive due process, a party must show that he was arbitrarily and capriciously deprived of a cognizable property interest rooted in state law."); *id.* ("We have held that the standard for reviewing all substantive due process challenges to state statutes, including economic and social welfare legislation, is whether the statute bears a reasonable relationship to any legitimate interest of government. "); *Denene, Inc.* v. *City of Charleston*, 359 S.C. 85, 91, 596 S.E.2d 917, 920 (2004) ("Under the rational basis test, the requirements of equal protection are satisfied when: (1) the classification bears a reasonable relation to the legislative purpose sought to be affected; (2) the members of the class are treated alike under similar circumstances and conditions; and, (3) the classification rests on some reasonable basis. "); . . . .
> [*Marshall* v. *City of Rock Hill* ET AL., Unpublished Opinion No. 2105-UP-304.]

THE OPPOSING PRECEDENT

The Appellants have cited the precedent which holds that denial of service to applicants who happen, by no fault of their own, to be living in a place for which a third party has not paid the utility bill, has been construed by courts to be discriminatory and, when the utility's actions constitute State action (that is where, as here, a municipality is involved), this discrimination can rise to the level of a violation of the Equal Protection Clause of the Fourteenth Amendment. As the Federal Fifth Circuit stated in *Davis* v. *Weir:*

> The fact that a third party may be financially responsible for water service provided under a prior contract is an irrational, unreasonable and quite irrelevant basis upon which to distinguish between other eligible applicants for water service." . . . The Department's actions offend not only equal protection of the law, but also due process.[1]

---

1 *Davis* v. *Weir*, 497 F.2d 139 (5th Cir. 1974) *quoting Davis* was a civil rights action brought by tenant against a city water department because of the department's policy of terminating service to the house without notice to actual user, because of the landlord's refusal to pay the past-due bill. The court held that the city water department's discriminatory rejection of new applications for water service based on the financial obligations of third parties failed to pass 14th Amendment muster under the traditional "rational basis" analysis.

Although *Davis* involved a termination of service, the same reasoning should apply when

The same Federal Precedent must apply, in logic where, as here, the landlord is denied service due to a debt owed by a third party (the tenant or his former roommate.)

The holding of *Davis* v. *Weir* has since been approved, and applied, by other Courts. *See, e.g., Brown* v. *City* of *Barre, Vermont,* 878 F.Supp.2d 469, 486 (D.Vt. 2012); *Pilchen* v. *City* of *Auburn, New. York,* 728 F.Supp.2d 192, 197-98 (S.D.N.Y. 2010). As discussed in the Petitioners' Brief, no opposing precedent is known.

The decision of the Court of Appeals, as it now stands, neither distinguishes the authority under *Davis v. Weir, supra,* nor that of the common law, which prohibits imposing a debt on an innocent third party.

ADDITIONAL GROUNDS

By the City of Rock Hill's ordinances[2], the Plaintiffs potential tenant must pay - on a basis to be solely determined. by a City employee and without review - the sum it demands on the tenant's utility debt. In default of such payment, the person charged with the debt - and any person who allows him a living space - are in violation of the cited City Ordinances. As worded in those Ordinances, this must include the Plaintiffs (as potential landlord), the tenant's friends and any of the tenant's family living within the City. In effect, the City claims the right to deny the utility debtor the right to live within the City until he pays or makes arrangements agreeable to it.

The Petitioners maintain that the effect of the City Ordinances in question is one of banishment from the City: a. debtor who cannot meet the City's requirements cannot obtain the utilities necessary to life, nor can any person within the City lawfully supply them to him. Banishment has been held to be against the public policy of this State in criminal sentencing. *State* v. *Gilliam,* 274 S.C. 324, 262 S.E.2d 923 (1980). Here, City Ordinances having the effect of banishment on both the Plaintiffs as landlord, and upon their potential tenants, are urged as having a "rational relationship to a legitimate "interest of government".

Granting for the sake of this argument that the City has a legitimate interest in collecting

---

an applicant first applies for utility service. *Lake* v. *City of Youngstown Div. of Water,* Case No. 4:93CV2559, slip op. (N.D.Ohio July 14, 1994) (when a municipal water company denied service solely on the basis of a preexisting water bill incurred by a third party at the same address, the plaintiffs had a successful equal protection claim. The court relied in part on *Davis* and rejected the municipal utility's arguments that the instant case should be distinguished from *Davis* because it involved an application for new service, rather than a termination).

2 Sections 29-2 and 29-31 of the Municipal Code of Rock Hill.

a debt, there can be no "rational relationship" in law that will allow the imposition of a civil penalty, which penalty is barred even in criminal law as against public policy.

The City Ordinances in question cannot meet the standard for review which the Court accurately cites in its decision. In their application, these Ordinances are arbitrary, wrongful and in violation of due process. As recited above and to the extent allowed, the Petitioners also restate and reargue by this reference all matter set out in their Brief.

This effect of the City Ordinances – which effect is clear on the face of the language of those ordinances, is unaddressed by the present decision, other than by a general statement that the arguments above fail to meet the recited burden for a violation of equal protection. The Appellants respectfully suggest that this conclusion is inadequate at best

SECOND GROUNDS FOR DECISION

The *per curiam* decision of the Court of Appeals panel disposes of the argument of Petitioners on what appears to be a second basis. It is stated as follows:

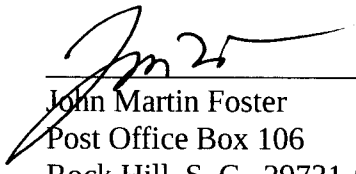
> *McCall* v. *IKON*, 380 S.C. 649, 659-60, 670 S.E.2d 695, 701 (Ct. App. 2008) (noting the order on appeal comes to the appellate court with a presumption of correctness and the burden is on appellant to demonstrate reversible error); *Harris* v. *Campbell*, 293 S.C. 85, 87,358 S.E.2d 719,720 (Ct. App. 1987) (noting our court is "obliged to reverse when error is called to our attention, but we are not in the business of figuring out on our own whether error exists"); *Atl. Coast Builders & Contractors, LLC* v. *Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282,285 (2012) ("[A]n unappealed ruling, right or wrong, is the law of the case. "); *Wilder Corp.* v. *Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review. "); *Chastain* v. *Hiltabidle*, 381 S.C. 508, 515, 673 S.E.2d 826, 829 (Ct. App. 2009) ("When an issue is raised to but not ruled upon by the trial court, the issue is preserved for appeal only if the party raises the same issue in a Rule 59(e)[, SCACR,] motion."). [*Marshall* v. *City of Rock Hill* ET AL., Unpublished Opinion No. 2105-UP-304.]

The standing decision of this Court gives no indication of what error or issue the Petitioners did not raise below or in argument. To that extent, the Petitioners must respond in general terms: it is their position that all issues addressed by their Briefs and by this Petition and Memorandum were raised, in a timely and proper fashion, at all stages of these proceedings.

CONCLUSION

For all the reasons set out and referenced above, the Petitioners request that this matter be reheard by the Court of Appeals, and for any other relief to which they may be entitled in law or equity.

Respectfully submitted,



John Martin Foster
Post Office Box 106
Rock Hill, S. C. 29731-6106
(803) 324-8100
Attorney for Petitioners

July 8, 2015

Rock Hill, South Carolina