THE STATE OF SOUTH CAROLINA
In the Supreme Court

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, ... Petitioners,

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.

PETITION FOR WRIT OF *CERTIORARI*

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Pursuant to Rule 242, S.C.A.C.R, the Petitioners petition for the issuance of a writ of *certiorari* to review the final decision of the Court of Appeals in the matter above.

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

The Petitioners contend that this matter deals with what are, in South Carolina precedent, novel questions of law.

The Petitioners contend that substantial Constitutional issues are directly involved in this matter.

To the extent allowed, the Petitioners restate and by this reference reargue all matter set out in their Briefs and referenced in the Record on Appeal and in the Appendix submitted herewith.

CERTIFICATE OF COUNSEL

Counsel for Petitioners certifies that the Petition for Rehearing herein was made and finally ruled on by the Court of Appeals on August 20, 2015.

QUESTIONS PRESENTED FOR REVIEW

Do public utilities have a duty to provide service?
Can service be denied for a "collateral matter"?
Is an unrelated contract a "collateral matter"?
What is the effect of the common-law rule on collateral matters?
Can service be denied due to a third party's debt?
Can service be denied due to the debt of a roommate, spouse or family member?

STATEMENT OF THE CASE

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 Petitioners 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 Petitioners attempted to negotiate a repayment schedule with the CITY. The terms demanded by the CITY were set at a level which Willis, who works 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.

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

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 Petitioners.

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 Petitioners. 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 Defendants moved for summary judgment, which was granted by the Circuit Court by Order of April 9, 2012. This appeal followed.

By its per curiam decision of June 24, 2015, the Court of Appeals affirmed the ruling of the Circuit Court. The Petitioners filed their Petition and Memorandum for Rehearing dated July 8, 2015. By Order dated August 20, 2015, the Court of Appeals denied the Petitioner's request for Rehearing.

ARGUMENT:

PUBLIC UTILITIES HAVE A COMMON-LAW DUTY TO SERVE

All public utilities - investor owned, municipal or cooperative - are subject to a common law duty to serve. [1] This Rule has been recognized by the South Carolina Supreme Court in *Gwynette*

1 *United Fuel Gas Co.* v. *R.R. Comm'n*, 278 U.S. 300, 49 S.Ct. 150,73 L.Ed. 390 (1929); *N.Y. EX REL. Woodhaven Gaslight Co.* v. *Pub. Serv. Comm.*, 269 U.S. 244, 46 S.Ct. 83,70 L.Ed. 255 (1925); *Allen's Creek Properties* v. Clearwater, 679 So.2d 1172 (Fla. 1996). As discussed in

v. *Myers*, 237 S.C. 17, 115 S.E.2d 673 (1960).

It is the status of "public utility" that creates a corresponding responsibility to provide service for all who request service and are willing to pay for it.[2] As stated by one court, "such duties arise from the public nature of a utility, and statutes providing affirmatively therefor are merely *declaratory* of the common law."[*emphasis added*][3] Some public utilities are also common carriers, which must accept all applicants for service at reasonable, posted rates.[4]

The duty to serve is not absolute.[5] Utilities may deny service for good cause but may not act arbitrarily or engage in prohibited discrimination. In general, the same limits apply to a refusal to serve, to a termination of service, and to a refusal to reconnect service after termination.

UTILITY SERVICE CANNOT BE DENIED DUE TO A "COLLATERAL" MATTER

Public utilities occasionally seek to impose conditions on consumers requesting utility service that have nothing to do with the customer's present utility contract or account. Court decisions, as well as state utility regulations, are general accord in holding that a public utility cannot refuse to render the service which it is authorized by its charter to furnish, or impose service constraints, because of some collateral matter unrelated to that service.[6]

NATIONAL CONSUMER LAW CENTER, *Access to Utility Service* 3d Ed. (2006), Chapter 3.1 *et seq.*, three "types" of utility providers are referred to as public utilities: Private investor owned utility companies; municipal, or city, providers; and rural electric cooperatives (also known as electric membership corporations). Counsel for Petitioners acknowledges out that almost all of the discussion in the earlier portion of this Brief is drawn from that source.

2 *See, e.g., Denver Welfare Rights Org.* v. *Pub. Util. Comm'n*, 547 P.2d 239 (Colo. 1976) (interest of utility customer in the continuation of utility service is limited to his ability and willingness to assume financial responsibility for that service); *Ten Broek* v. *Miller*, 216 N.W. 385, 386 (Mich. 1927) ("Payment of proper charges for service supplied is a reasonable condition of the right to receive it," *citing* 20 C.J. 33); *accord Komisarek* v. *New England Tel. & Tel. Co.*, 282 A.2d 671 (N.H. 1971); *Miller* v. *Roswell Gas & Elec. Co.*, 166 P. 1177 (N.M. 1917); *Josephson* v. *Mountain Bell*, 576 P.2d 850 (Utah 1978).

3 *Overman* v. *Southwestern Bell Tel. Co.*, 675 S.W.2d 419, 424 (Mo.App. 1984) [*emphasis added*].

4 *E.g., U.S.* v. *Ross*, 713 F.2d 389 (8th Cir. 1983); *Beavers* v. *Fed. Ins. Co.*, 113 N.C.App. 254, 437 S.E.2d 881 (N.C.Ct.App.), *review denied*, 336 N.C. 602, 447 S.E.2d 384 (N.C. 1994); *Employers Mut. Co.* v. *Chicago and N. Western Transp. Co.*, 521 N.W.2d 692 (Iowa 1994) (*rehearing denied*).

5 *N. States Power Co.* v. *Nat'l Gas Co.*, 606 N.W2d 613 (Wis.App. 1999) (no enforceable duty to provide service to mobile home park where customers there satisfied with alternative service.).

6 64 AM.JUR.2D *Public Utilities* § 18 (1972); ANNOTATION, *Right of Municipality to Refuse Services Provided by it to a Resident for Failure of Resident to Pay for other Unrelated Services*, 60 A.L.R.3d 714 (1974). *See, e.g., Dale* v. *City of Morganton*, 270 N.C. 567, 155 S.E.2d 136 (N.C. 1967) (when acting as an electric utility, a municipality (like a private company) may not

A collateral matter can generally be defined as a dispute which is the subject of a separate transaction, either between the utility and the consumer, or between the utility and some other person, which is distinct from, and irrelevant to, the utility's immediate duty to furnish a particular service. The definition of "collateral" will vary from state to state, however, and may raise difficult questions of the interaction of commission regulations and state common law.

Collateral matters may include:

1 Non-payment of unrelated contracts with the utility;

2 Non-payment for services provided by a separate business run by the utility; or

The common law rule against denying service because of collateral disputes is justified by the status of utilities - monopolies which provide essential services-as quasi-public entities, which hold a public franchise. The common law rule forbids utilities to coerce payment of separate and unrelated obligations by threatening to withhold the necessities of life from the prospective customer. Utilities must use the judicial process, as any other creditor would, to settle a dispute, and may not exploit their control over a necessity to punish the consumer for not acceding to their one-sided demands.[7]

3 Non-payment of another person's utility bill.

AN UNRELATED CONTRACT IS A "COLLATERAL MATTER"

A utility, as a general rule, may not refuse to provide service based on a dispute arising out of a contract separate from the contract to provide the particular service in question. This question often arises when a utility denies service to a customer based on an old debt, such as an old utility bill from a prior residence, or a completely unrelated debt. At common law, a utility could not refuse to enter into a new contract for service because of an old debt, disputed or not, from some other place and time.[8] Some commissions have applied this rule in their orders and

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refuse to provide service due to a "controversy unrelated to the service sought"); *Gas-Light Co. of Balt.* v. *Colliday*, 25 Md. 1 (1866) (when several contracts are made between the same parties for different pieces of property, each requiring its own meter, a failure to comply with any terms in one furnishes no excuse or grounds to the company to withhold service from another).

7 An example of a case in which the court would not allow the utility to engage in subtle coercion to circumvent the ordinary debt collection processes was *Elwell* v. *Atlanta Gas Light Co.*, 51 Ga.App. 919, 181 S.E. 599 (Ga.App. 1935) ("Justice and fair dealing," the court said, require that a public utility resort to the judicial process to enforce the claim, there being no grounds to allow a utility to be "both judge and jury" in a dispute).

8 *See* ANNOTATION: *Right of Public Utility to Deny Service at One Address Because of Failure to Pay for Past Service Rendered at Another,* 73 A.L.R3d 1292 n.3 (1976) (treats denial of service as encompassing both an initial refusal to render service upon application of the customer and a subsequent discontinuance of service which has been provided); *Lloyd* v. *Wash. Gas Light Co.*,

regulations,[9] but at least thirty states (including South Carolina) explicitly permit some regulated utilities to deny service, or at least to require deposits, if customers owe a debt for prior utility services to that company (or in some cases to other specified utilities).[10]

COMMON LAW RULE ON COLLATERAL MATTERS

A Municipal utility is not subject to the Regulations of the South Carolina Public Service Commission[11], and no other statutes apply to provide guidance. The CITY's actions are therefore subject to the common law and to the requirements of the United States and South Carolina Constitutions. The common law rationale is that at some point the debt becomes so "unrelated"

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12 D.C. (1 Mackey) 331 (1881); *Berner* v. *Interstate Power Co.*, 57 N.W.2d 55 (Iowa 1953); *Gaslight Co. of Balt.* v. *Colliday*, 25 Md. 1 (1866); *Josephson* v. *Mountain Bell Tel. & Tel. Co.*, 576 P.2d 850 (Utah 1978) (telephone company may not disconnect an individual's home telephone for failure to pay accounts due on a business telephone). *But see Moore* v. *S. Bell*, 176 So.2d 558 (Fla. 1965) (plaintiff telephone subscriber failed to state a cause of action for exemplary damages against a telephone company for the disconnection of service, when it was alleged that plaintiff's home service was charged for a bill which the owner of business property sold by plaintiff failed to pay, that upon failure of the plaintiff to pay such bill his home telephone was disconnected, and that such disconnection was wrongful, willful and without probable cause);.*Soler* v. *Consol. Edison Co.*, 53 A.D.2d 558, 384 N.Y.S.2d 468 (N.Y. 1976), *app. dismissed*, 41 N.Y.2d 944, 394 N.Y.S.2d 640 (1977) (electric company was entitled to terminate service to a residence of a customer because of the customer's failure to make payment in full for electric services furnished to his sole proprietorship business).

9 These rules are often in the context of terminations, although the same principles apply to the initial right to service. *Komisarek* v. *New England Tel. & Tel. Co.*, 282 A.2d 671 (N.H. 1971) (telephone company's tariff could not reasonably be construed to authorize the termination of a customer's existing service by reason of arrearages as to a discontinued line); *RE Rules and Regulations Governing the Disconnection of Utility Services*, 2 Pub.Util.Rep.4th 209 (Vt. 1973) (public utility company may not disconnect service solely upon a customer's failure to pay for merchandise, appliances, or special services, for concurrent service received at a different metering point, residence, or location or for a different class or type of utility service except in certain case involving off-peak usage of energy). *But see Rivera* v. *Consol. Edison Co. of N.Y., Inc.*, 17 Pub.Util.Rep.4th 238 (N.Y. 1976) (public utility, as a condition of continued service, may require payment by a recipient of such service of unpaid bills, not only at the present address of such recipient but also at the former address of such recipient. However, the existence of a preexisting debt to a public utility for services rendered while an applicant for utility service was not on public assistance cannot serve as a bar for current service by an applicant who is currently receiving public assistance). Rules sometimes contain these prohibitions on denying service for this type of collateral matter. *See, e.g.*, 3 ALASKA ADMIN. CODE § 52.450(D)(3) (utility may not disconnect for non-payment of bill related to another class of service at a different service location). *But see, e.g.*, TEX. ADMIN. CODE Tit. 16 § 25.23(a)(5), *Pub. Util. Comm'n of Tex. Substantive Rule* 25.23(a)(5) (service may be declined if applicant is indebted to *any* utility for the same kind of service) [*emphasis added*].

10 *DePass* v. *Broad River Power Co.*, 173 S.C. 387, 176 S.E. 325 (1934).

11 S.C. Public Service Commission Reg.s §§ 103-301 (electrical) and 103-701 (water).

to the current supply of utility service that utilities lose their right to a special method of collecting the debt.

The broad common law rule has been applied by some commissions and upheld by courts, although often in the context of service being terminated.[12] In South Carolina, the Public Service Commission allows those utilities under its oversight to refuse service if a non-paying previous occupant "shall benefit from such new service".[13] There is, to Petitioners' knowledge, no precedent allowing a utility to deny service to a credit-worthy landlord at a new address.

DENIAL OF SERVICE DUE TO THIRD PARTY'S DEBT

The CITY seeks to coerce payment of a debt with which the customer has no connection or requires as a condition of service that the customer pay the preexisting debt owed by a person who lived with the customer. In doing so, the utility violates the common law rule on "collateral matters". That is, a public utility is prohibited from refusing to render service because of some collateral matter not related to that service. In the absence of an applicable and valid regulation, this situation will be governed by Constitutional considerations and State contract law, which

12 *Komisarek* v. *New England Tel. & Tel. Co.*, 282 A.2d 671 (N.H. 1971) (telephone company's tariff could not reasonably be construed to authorize the termination of a customer's existing service by reason of arrearages as to a discontinued line); *Josephson* v. *Mountain Bell Tel. & Tel. Co.*, 576 P.2d 850 (Utah 1978) (telephone company may not disconnect an individual's home telephone for failure to pay accounts due on a business telephone); *RE Rules & Regulations Governing the Disconnection of Utility Services*, 2 Pub.Util.Rep.4th 209 (VI. 1973) (public utility company may not disconnect service solely upon a customer's failure to pay for merchandise, appliances, or special services, for concurrent service received at a different metering point, residence, or location or for a different class or type of utility service except in certain case involving off-peak usage of energy). *But see Moore* v. *S. Bell*, 176 So.2d 558 (Fla. 1965) (plaintiff telephone subscriber failed to state a cause of action for exemplary damages against a telephone company for the disconnection of service, when it was alleged that plaintiffs home service was charged for a bill which the owner of business property sold by plaintiff failed to pay, that upon failure of the plaintiff to pay such bill his home telephone was disconnected, and that such disconnection was wrongful, willful and without probable cause); *Soler* v. *Consol. Edison Co.*, 53 A.D.2d 558, 384 N.Y.S.2d 468 (1976), *app. dismissed*, 41 N.Y.2d 944, 394 N.Y.S.2d 640 (1977) (electric company was entitled to terminate service to a residence of a customer because of the customer's failure to make payment in full for electric services furnished to his sole proprietorship business); *Rivera* v. *Consol. Edison Co.*, 17 Pub.Util.Rep.4th 238 (N.Y. 1976) (public utility, as a condition of continued service, may require payment by a recipient of such service of unpaid bills, not only at the present address of such recipient but also at the former address of such recipient. However, the existence of a preexisting debt to a public utility for services rendered while an applicant for utility service was not on public assistance cannot serve as a bar for current service by an applicant who is currently receiving public assistance).

13 24A S.C. Code Ann. Public Service Commission Reg.s 103-343 (electrical) and 103-736 (water); municipal utilities are excluded from the scope of these Regulations: 103-301 and 103-701.

forbids the imposition of implied contract or *quantum meruit* liability on one party when an express contract already exists with another,[14]

DEBTS OF ROOMMATE, SPOUSE OR FAMILY MEMBER

A utility may refuse service to an applicant or seeks to disconnect service to a customer because that person is living with a third party who is currently in arrears for utility service. The third party might be a roommate or could be a family member. This situation often arises when an adult son or daughter must return to the parental home because of unemployment, illness or a failed marriage. In general, again, the rule agreed upon by most commissions is that the utility may not refuse to provide service to one person based on the delinquency of another and may not prevent a customer from living with an individual who has a delinquent utility bill.[15] In South Carolina, the Public Service Commission allows those utilities under its oversight to refuse service if a non-paying previous occupant "shall benefit from such new service".[16] In general, this will be permitted *if* the applicant resided with the delinquent customer at the time the debt was incurred *and* will continue to reside with him or her. These regulations have been seen to

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14 *See, e.g.,Cal. Apartment Assoc.* v. *City of Stockton*, 80 Cal.App.4th 699 (2000) (court finds invalid a city ordinance that attempts to impose liability on landlord or subsequent tenant for the unpaid water, sewer, and refuse bills of a tenant).

15 *Donovan* v. *Gen. Tel. Co.*, 19 Pub.Util.Rep.3d 49 (Cal. 1957) (telephone company cannot deny service because another member of the household is delinquent); *IN RE Tampa Elec. Co.*, 49 Pub.Util.Rep.4th 547 (Fla. P.S.C. 1982) (electric company can only hold the customer of record responsible for the customer's bill and cannot force another person, not legally responsible for the debt to pay that debt to obtain or continue service); *Walton Elec. Membership Corp.* v. *Snyder*, 270 Ga. 62, 508 S.E.2d 167 (Ga. 1998), *aff'g* 226 Ga.App. 673, 487 S.E.2d 613 (Ga. App. 1997) (co-op acted tortiously and punitive damages could be awarded when co-op threatened to terminate service to member who married another member who was delinquent.); *Wright* v. *S. Bell Tel. & Tel. Co.*, 169 Ga.App. 454, 313 S.E.2d 150 (Ga.App. 1984) (termination of service to parents' home was wrongful when it was used to coerce them into paying son-in-law's debt); *Smith* v. *Tri-County Elec. Membership Corp.*, 689 S.W.2d 181 (Tenn.App. 1985) (electric company policy of denying service to a customer when anyone owing on an old bill planned to live in the residence was held unreasonable, arbitrary, and violation of due process.); *Boone* v. *Mountain Fuel Supply Co.*, Case No. 85-057-04, (Utah Sept. 4, 1985) (practice of denying natural gas service to a new contracting residential customer until the new customer pays the outstanding delinquent balance owed for prior service provided to the roommate of the new customer was held not to be permitted under a natural gas utility's tariff); *IN RE Black Hills Power & Light Co.*, Docket No. 9339, Sub 3 (Wyo. Nov. 27 1970) (utility services is supplied on an individual basis and cannot be refused because a member of customer's family is indebted to the company). *See also IN RE Brazil*, 21 B.R. 333 (Bankr. N.D.Ohio 1982) (ECOA violation to refuse gas service to wife unless husband, who owed arrears, moved out of house).

16 24A S.C. Code Public Service Commission Reg.s 103-343 (electrical) and 103-736 (water); municipal utilities are excluded from the scope of these Regulations: 103-301 and 103-701.

raise difficult questions concerning whether the legislature properly delegated to the respective Commission the power to abrogate the State's common law or contract.

In the absence of a valid and applicable regulation, a utility's attempts to impose liability on third parties will be limited by the State's law of contract. One of the most basic doctrines of contract law is that no implied contract can exist with one party when an express contract regarding the same subject matter has been made with another party.[17] Thus, when an applicant enters into an express contract for service, through which the utility agrees to provide service and the applicant agrees to pay for the service provided, liability for that service cannot be imposed on a person not a party to the express contract,[18] such as a family member, roommate[19] or, as

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17 *See, e.g.,Gantt* v. *Morgan*, 199 S.C. 138, 18 S.E.2d 672 (1942); *N.Y. Tel. Co.* v. *Teichner*, 69 Misc. 2d 135, 137, 329 N.Y.S.2d 689,692 (1972); *Vetco Concrete Co.* v. *Troy Lumber Co.*, 256 N.C. 709, 124 S.E.2d 905 (1962); 17 C.J.S. *Contracts* § 6 (1999).

18 "Breach of contract cannot be made the basis of an action for damages against defendants *who* did *not execute it and who did nothing to assume its obligations." Gold* v. *Gibbons*, 178 Cal.App.2d 517, 3 Cal.Rptr. 117, 118 (1960) [*emphasis added*]; *accord, Trancik* v. *USAA Ins. Co.*, 354 S.C. 549, 581 S.E.2d 858 (Ct.App. 2003)

19 *O'Neal* v. *City of Seattle*, 66 F.3d 1064 (9th Cir. 1995) (city policy of denying water service to tenant based on past tenant's unpaid bill violated equal protection); *Sterling* v. *Village of Maywood*, 579 F.2d 1350, 1355 (7th Cir. 1978), *cert. denied*, 440 U.S. 913, 99 S.Ct. 1227, 59 L.Ed.2d 462 (1979); *Koger* v. *Guarino*, 412 F.Supp. 1375 (E.D.Pa. 1976) (utility "has no legitimate interest in collecting delinquent water bills from those who have no responsibility therefor"); *Price* v. *South Central Bell*, 294 Ala. 144, 313 So.2d 184 (1975) (public utility has no right to cut off service to customer in order to compel that customer to pay the bill of a former subscriber); *Donovan* v. *Gen. Tel. Co.*, 19 Pub.Util.Rep.3d 49 (Cal. 1957) (denial of service based on delinquent bill of another household member is unreasonable); *IN RE Tampa Elec. Co.*, 49 Pub.Util.Rep.4th 547 (Fla. 1982) (utility ordered to stop policy of discontinuing service for failure to settle prior indebtedness incurred by an agent or any family member); *Walton Elec. Membership Corp.* v. *Snyder*, 270 Ga. 62, 508 S.E.2d 167 (Ga. 1998), *aff'g* 226 Ga.App. 673, 487 S.E.2d 13 (Ga. App. 1997) (co-op acted tortiously, and punitive damages could be awarded, when co-op threatened to terminate service to member who married another member who was delinquent.); *Wright* v. *S. Bell Tel. & Tel. Co.*, 169 Ga.App. 454, 313 S.E.2d 150 (1984) (married daughter moved back to parental home for a time after separating from husband, left behind unpaid phone bill in husband's name at former marital home; termination of service to parents home was wrongful, when it was used to coerce them into paying son-in-law's debt. Remanded to trial court to resolve factual questions, whether phone company's action was willful and whether recording stating that service had been terminated was defamatory.); *Vanderberg* v. *Kan. City Mo. Gas Co.*, 126 Mo.App. 600, 105 S.W. 17 (Ct.App. 1907) ("there is no more reason for compelling a married woman to pay her husband's debt, for the payment of which she is not legally bound, than there would be for compelling her to pay the debt of a stranger. The attempt made by defendant to coerce her into paying such debt was unreasonable and her failure to submit to such coercion afforded no lawful excuse for defendant's refusal to enter into a contract with her"); *Smith* v. *Tri-County Elec. Membership Corp.*, 689 S.W.2d 181 (Tenn.App. 1985) (electric company had a policy of denying service to a customer when anyone owing on an old bill planned to live in the residence establishing service. Utility agreed to begin service to Smith when he stated that Hix, who owed electric company on a delinquent account from a former residence, would not be living with him. After a warning, when a utility employee ascertained

here, a landlord. A similar argument will limit the application of quasi-contract, or *quantum meruit* liability.[20]

SUMMARY

The CITY maintains in its e-mail of June 24, 2009 that it will extend utility service to the Petitioners, but that:

> "before we can establish service for you at this location, if [the tenant] has any prior debts to the City of Rock Hill, those must be settled."[21]

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that Hix was living with the plaintiff, electric service was terminated "even though plaintiff contracted for the electric service, was using the service, was not delinquent, owed the defendant no bills for prior service at any location, and had no connection with the delinquent customer when her bills were incurred." Court concluded that the collection scheme was unreasonable, arbitrary and violated both equal protection of the law and due process.); *Boone* v. *Mountain Fuel Supply Co.*, Case No. 85-057-04, (Utah Sept. 4, 1985) (practice of denying natural gas service to a new contracting residential customer until the new customer pays the outstanding delinquent balance owed for prior service provided to the roommate of the new customer was held not to be permitted under a natural gas utility's tariff); *IN RE Black Hills Power & Light Co.*, Docket No. 9339, Sub 3, (Wyo. Nov. 27 1970) (electric company was required to eliminate the provision of a proposed rule that service would not be supplied if "any member of his immediate family is indebted to the company for service previously supplied at the same or other premises," since utility services is supplied on an individual basis). *See also IN RE Brazil*, 21 B.R. 333 (Bankr. N.D.Ohio 1982) (ECOA violation to refuse gas service to wife unless husband, who owed arrears, moved out of house.); *Southwestern Bell Tel. Co.* v. *Bateman*, 223 Ark. 432, 266 S.W.2d 289 (1954) (service cannot be denied because husband owed the telephone company for a phone rental, but this fact may be considered by the company in determining the applicant's credit rating in so far as the rating would affect the amount of deposit required); *Granbois* v. *Big Horn County Elec. Coop.*, 986 P.2d 1097,296 Mont. 45 (Mont. 1999). *But see Escamilla* v. *So. Cal Edison Co.*, 56 C.P.U.C. 562,1994 WL 880663 (Cal.Pub.Util.Comm'n 1994) (roommates jointly and severally liable for electric bill regardless of who is listed as customer of record); *Tubbs* v. *La. Power & Light Co.*, 349 So.2d 994 (La.App.2d Cir. 1977) (when plaintiff never informed the defendant power company at the time he left his marital domicile that he no longer lived there and would not be responsible for services rendered at that address, the power company was not shown to have been aware of such facts, when the plaintiff was notified of past due balances incurred thereafter by his wife upon the opening of a new account and the company followed the Public Service Commission's rules in notifying the plaintiff that the service would be discontinued if the past due amount was not paid, the plaintiff could not recover against the power company for damages arising from the discontinuance of electric service for the short time upon such non-payment of such account).

20 *Bolen* v. *Paragon Plastics, Inc.*, 747 F.Supp. 103, 106-07 (D.Mass. 1990); *Lewis v. Holy Spirit Ass'n for the Unification of World Christianity*, 589 F.Supp. 10, 13 (D.Mass. 1983); *Cascadeh* v. *Magryta*, 225 N.W. 511, 247 Mich. 267 (Mich. 1929).

21 RECORD ON APPEAL, Deposition of ROBERT K. MARSHALL, JR., p.207,Depo.p.63, l.25 – p.208, Depo.p.65, l.4.; Deposition Ex. 2., p.220.

[*Emphasis added.*]

Based on the Record herein, the above-referenced "settling" of the debts in question means either their payment or the establishment of a payment schedule satisfactory to the CITY. To be plain, the CITY interprets, and invokes, Sections 29-2 and 29-31 of its Municipal Code to deny service to both Willis and to the MARSHALLS individually, in the absence of settling the third party debt owed at another location. The interpretation and application of the cited Municipal Ordinances is an unwarranted interference with the Petitioners' personal right to contract with tenants. Under the modern analysis of such statutory enactments, the same can survive only if held to have a rational relationship to a legitimate interest of government.[22] Despite the high standard thus stated, the Petitioners contend the desired and apparent intent of those portions of the Municipal Ordinances 29-2 and 29-31 in collecting past due debts cannot be demonstrated to have a rational relationship to the claimed right to interfere with the Petitioners' rental of property on which they themselves will be responsible for the utilities. The Petitioners are not the unpaid collection agents of the CITY, nor can they be made such. On the basis of the other precedent cited, the debt of Willis' roommate cannot be used to deny him service.

The Petitioners would further point out that a strict application of the Ordinances in question effectively bars the Tenant Willis from legally residing within the CITY. This effect can only be characterized as overreaching and unreasonable.

The harm done to the Petitioners, and their tenants and potential tenants, by the application or interpretation of the Municipal Ordinances referenced above renders the CITY and its agents liable in tort. As discussed above in the discussion of Constitutional rights and in the footnote below, once service is established in an area by a provider, the consumer has a Fourteenth Amendment due process right to that supply of service.[23] The CITY and its agents

22 *R.L. Jordan Company* v. *Boardman Petroleum*, 338 S.C. 475, __, 527 S.E.2d 763, 765 (2000), *citing* 2 Rotunda & Nowak, TREATISE ON CONSTITUTIONAL LAW, § 15.4 (1992).

23 *Memphis Light, Gas & Water Div.* v. *Craft*, 436 U.S. 1, 98 S.Ct. 1554, 56 L.Ed.2d 30 (1978). *See also Koger* v. *Guarino*, 412 F.Supp. 1375, 1386 (E.D.Pa. 1976), *aff'd without op.*, 549 F,2d 795 (3d Cir. 1977). Note, however, that in certain limited situations, some Courts have found that Due Process does *not* apply. *See, e.g., Garcia* v. *Irizarny*, 829 F.Supp. 523, 529 (D. P.R. 1993), aff'd, 34 F.3d 117 (1st Cir. 1994) (court noted that the plaintiffs had no property interest in the continued receipt of water services *for which they never contracted)* (emphasis added); *Village of Sterling* v. *Maywood*, 579 F,2d 1350, 1354 (7th Cir. 1978), *cert. denied*, 440 U.S. 913, 99 S.Ct. 1227, 59 L.Ed.2d 462 (1979) (court disagreed with *Koger, Davis*, and *Lamb* v. *Hamblin*, 57 F.R.D. 58 (D.Minn. 1972) that water service is a necessity and therefore an entitlement; rather, the court is not persuaded that the plaintiff, as a "mere water user, had a legitimate claim of entitlement to continued water service once the landlord requested termination of that service.").

have deprived the Petitioners, individually and through their actual and potential tenants, of that Federal and State right. Even assuming their right to demand payment for a third party debt from Willis or the MARSHALLS, the CITY has established no procedure to set payment schedules, and have provided for no review of a demanded payment schedule.[24] Precedent is clear that the Due Process clause requires that certain elements of fundamental fairness be present in the process leading to denial or termination of utility service. In this case, the determination of what repayment terms would be available to the potential tenant were left to the sole discretion of the CITY's agent.[25]

The Petitioners assert that the effect of the denial of due process to the potential tenant, the lack of consideration of his financial circumstances, and the CITY's application and interpretation of its Municipal Ordinances 29-2 and 29-31, create a situation where they have failed in their duty to supply service (both as to the Petitioners and as to the potential tenant) and where the resulting damage to the Petitioners by this failure is foreseeable. Under South Carolina precedent relating to damages recoverable in tort, this is sufficient to establish proximate cause for such damages to the Petitioners and its recoverability.[26] The Petitioners are entitled to have the Summary Judgment set aside as a matter of law.

DECISION OF THE COURT OF APPEALS

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

24RECORD ON APPEAL, Deposition of Lori Thomas, November 30, 2011, p.166, Depo.p.24, l.3 – p.168, Depo.p.29, l.11.

25RECORD ON APPEAL, Deposition of Lori Thomas, November 30, 2011, *id.*

26 *Bramlette* v. *Charter-Medical-Columbia,* 302 S.C. 68, 393 S.C. S.E.2d 914 (1990); *Hill* v. *York County Sheriff's Dept.,* 313 S.C. 303, 437 S.E.2d 179 (Ct.App. 1993), *cert. denied* (1994).

conditions; and, (3) the classification rests on some reasonable basis. "); . . . . [*Marshall* v. *City of Rock Hill ET AL.*, Unpublished Opinion No. 2105-UP-304.]

FEDERAL PRECEDENT

The Petitioners 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.[27]

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.

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27 *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 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).

ADDITIONAL GROUNDS

By the City of Rock Hill's ordinances[28], 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 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 Petitioners respectfully suggest that this conclusion is inadequate at best

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

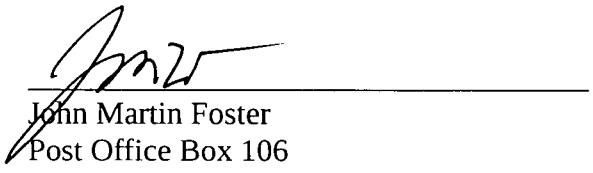
SECOND GROUNDS FOR DECISION BELOW

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 the Petition and Memorandum for Rehearing were raised, in a timely and proper fashion, at all stages of these proceedings.

Respectfully submitted,



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September 17, 2015

Rock Hill, South Carolina

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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, ... Petitioners,

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.

CERTIFICATE OF SERVICE

I certify that on September 17, 2015, I served the Petition for Writ of *Certiorari*, the Appendix, and this Certificate of Service on the following counsel of record, parties or persons:

Wm. Mark White
Jeremy D. Melville
Spencer & Spencer, PA
PO Box 790
Rock Hill, SC 29731

by depositing the same with the United States mail, with sufficient first class postage attached, properly addressed to the clerk of the Court, and with a copy also directed to the respective last known address(es) of those attorney(s) and/or persons set out below; or

by hand delivering copies of the same to the following persons, or by leaving the same at that person's office with that person's clerk or some other person in charge thereof, or by leaving

it in a conspicuous place therein; of if the office was closed or the person to be served has no office, by leaving a copy at that person's dwelling place or usual place of abode with some person of suitable age and discretion then residing therein, all pursuant to Rule 233(b), S.C.A.C.R.

September 17, 2015

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