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

Case No. 2009-CP-46-03360

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.

REPLY BRIEF OF APPELLANTS

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ARGUMENT:

APPLICABILITY OF *DAVIS* v. *WEIR*

The Appellants have cited the decision of the Federal Fifth Circuit 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]

In the case at hand, the Appellants requested utility service in their name. There is no claim that they owed for any utility service, either on their own or at their potential tenant's last address.

In their Brief, the Respondents maintain that the holding in *Davis* is vitiated by that of the Federal Fifth Circuit in *Chatham* v. *Jackson,* 613 F.2d 73 (5th Cir. 1980). *Chatham* involved a claim of substantive due process by the landlord when utility service was denied to its building by reason of a tenant's unpaid bills. In *Chatham,* the Federal Fifth Circuit distinguished the *Davis* holding because of an intervening Georgia case (discussed below) and "because we find constitutional and policy considerations different when the risk of nonpayment is placed on the landlord. . . "[2] In short, the different facts in *Chatham* (which are not present in this case) resulted in a different decision.

The intervening Georgia case was that of *Bowery Savings Bank* v. *DeKalb County,* 240 Ga. 52, 242 S.E2d 50 (1978). The relevant portion of that case "held that Dekalb County had a valid lien on the rental property, enforceable against the property owner, for unpaid water bills of its tenants".[3]

The question of liens for non-payment has no relevance to this appeal. In *Chatham,* the Fifth Circuit cited with approval the language of the Georgia Supreme Court in *Bowery Savings*:

> These [earlier Georgia] cases are modified by *Davis* v. *Weir, supra,* to the extent that non delinquent tenants must constitutionally be provided with . . . services as individuals upon proper application and payment for installation of meters. However, the basic ruling of our cases that the delinquent service charges are liens against the property which

1 *Davis* v. *Weir,* 497 F.2d 139 (5th Cir. 1974) *quoting Davis* v. *Weir,* 359 F.Supp. at 1027 (N.D.Ga. 1973).
2 *Id.,* 613 F.2d at 76.
3 *Id.*

authorize the discontinuance of such services to the owner of the property remains unchanged.

[242 S.E.2d at 52; matter in brackets added for clarity.]

In this case on appeal, two parties made application to the City for service. If we assume that the potential tenant was responsible for a past debt, the same is not true of the Plaintiffs. The holding of *Davis* v. *Weir*, as affirmed by the Federal Fifth Circuit, stands and is applicable to the action which is the subject of this appeal.

The Appellants would also point out that 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).

STANDARD OF REVIEW

The Respondent argue with the Appellants' citation of *Gwynette* v. *Myers*, 237 S.C. 17, 115 S.E.2d 673 (1960):

> The term 'affected with a public interest' is not susceptible of precise definition. In *Wolff Packing Co. v. Court of Industrial Relations*, 262 U.S. 522, 43 S.Ct. 630, 634, 67 L.Ed. 1103, the court classified businesses clothed with a public interest as follows: (1) those operating under a public grant of privileges *expressly or impliedly* imposing the affirmative duty of rendering a public service upon demand of *any member of the public, e.g. common carriers and public utilities*; (2) certain exceptional occupations which from the early days of the common law have been considered as affected with a public interest, e.g. those of operators of inns, cabs, and grist-mills; and (3) those which, though not public at their inception, may be fairly said to have been devoted by their owners to the public use.
>
> [*Id.*, 237 S.C. At 25, 115 S.E.2d at 677; *emphasis added.*]

Gwynette is cited for the proposition that a public utility is subject to the duty cited by that case: service of any member of the public upon demand. This citation comes under the Appellants' discussion of the broad precedent under the common law requiring service from a public utility.

The Respondents cite this case to invoke the later holding of our Supreme Court in *R.L. Jordan Company* v. *Broad Petroleum*, 338 S.C. 475, 527 S.E.2d 763 (2000). Making a different

point, the Respondents cite the case for the standard for the review of a legislative act. *Id.*, 338 S.C. at 477, 527 S.E.2d at 765. In *R.L. Jordan Company*, the Supreme Court states the re-defined standard as follows:

> Legislation is not "overturned unless the law has no rational relationship to any legitimate interest of government."
> [*Id.*, citation omitted.]

The Appellants acknowledge this to be the standard of review on a municipal ordinance, as held in *Sunset Cay, LLC* v. *City of Folly Beach*, 357 S.C. 414, 593 S.E.2d 462 (2004). In that case., the Supreme Court stated:

> "The purpose of the substantive due process clause is to prohibit government from engaging in arbitrary or wrongful acts regardless of the fairness of the procedures used to implement them." *In re Treatment and Care of Luckabaugh*, 351 S.C.122, 140, 568 S.E.2d 338, 347 (2002) (internal quotes omitted). We apply this same standard in reviewing challenges to a municipal ordinance.
> [*Id.*, 593 S.E.2d at 470.]

APPLICATION OF STANDARD OF REVIEW

By the City of Rock Hill's ordinances, the Plaintiff's 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.[4] As worded in the 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 debtor the right to live within the City until he pays or makes arrangements agreeable to it.

The Appellants maintain 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, Ordinances having the effect of banishment on both the Plaintiffs as landlord, and upon their potential tenants, are urged as

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

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, barred even in criminal law as against public policy.

The City Ordinances in question cannot meet the standard for review which the City accurately cites. In their application, these Ordinances are arbitrary, wrongful and in violation of due process.

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March 19, 1984

Rock Hill, South Carolina

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CERTIFICATE OF COUNSEL

The undersigned certifies that this final Reply Brief of Appellants complies with Rule 211(b), S.C.A.C.R.

March 20, 2014

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CERTIFICATE OF SERVICE

I certify that I have served the Reply Brief of Appellants, dated March 20, on the following counsel or persons of record:

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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 above; 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 262, S.C.A.C.R.

March 20, 2014

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