

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

**RECEIVED**

Appeal From York County  
Court of Common Pleas  
John C. Hayes, III, Circuit Court Judge

NOV 13 2015

**S.C. SUPREME COURT**

Case No. 2009-CP-46-03360  
Appellate Case No. 2015-001965

Robert K. Marshall, Jr., and  
Donna Chapman Marshall,  
doing business as "Rock Hill Property  
Management," a South Carolina  
general partnership, . . . . .

*Petitioners*  
~~Appellants,~~

v.

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.

**RETURN TO PETITION FOR A WRIT OF CERTIORARI**

W. Mark White  
Jeremy D. Melville  
SPENCER & SPENCER, P.A.  
226 East Main Street  
P.O. Box 790  
Rock Hill, SC 29731  
Tel: (803) 327-7191

ATTORNEYS FOR RESPONDENTS

TABLE OF CONTENTS

Counter-Statement of Case . . . . . 3

Arguments

I. THE QUESTIONS PRESENTED FOR REVIEW BY APPELLANTS DO NOT  
WARRANT THE ISSUANCE OF A WRIT OF CERTIORARI . . . . . 7

II. THE COURT OF APPEALS PROPERLY UPHELD THE TRIAL COURT'S  
GRANT OF SUMMARY JUDGMENT IN FAVOR OF THE CITY . . . 11

Conclusion . . . . . 15

## COUNTER-STATEMENT OF THE CASE

Appellants Robert K. Marshall and Donna Chapman Marshall d/b/a "Rock Hill Property Management" ("Appellants"), a commercial enterprise engaged in the property rental business, filed this action against the City of Rock Hill, Carey F. Smith and Lori Thomas (collectively, "City")<sup>1</sup> seeking damages and injunctive relief under 42 U.S.C. § 1983 ("§ 1983") claiming that §§ 29-2 and 29-31 of the Code of Ordinances for the City of Rock Hill (collectively, the "Ordinance") violated rights to substantive due process and equal protection under the Fourteenth Amendment of the United States Constitution. (Complaint, R. p. 4, ¶ 23.)

On April 18, 2012, the Honorable John C. Hayes entered an order granting the City's motion for Summary Judgment (the "Order").

On June 24, 2015 the South Carolina Court of Appeals filed an unpublished memorandum opinion upholding the trial court's grant of summary judgment.

### Facts

As with any utility provider, the City is burdened by unpaid utility bills after a utility customer relocates.

---

<sup>1</sup> Carey F. Smith and Lori Thomas were named in the action solely in their representative capacities on behalf of the City of Rock Hill.

Unpaid utility charges have a material impact on the public fisc, amounting to over \$ 1 million dollars in lost payments to the City per year. (Thomas Aff., R. p. 65, ¶ 3.)

To mitigate the losses from utility consumer delinquencies and to recover these losses from the specific consumers that benefitted directly from the consumption of City utilities, as opposed to imposing a surcharge upon all utility consumers, the City passed an ordinance requiring delinquent consumers to pay past due account balances prior to receiving utility service at a new location. Section 29-31(d) of the Code of Ordinances for the City of Rock Hill (the "Ordinance") provides as follows:

Service shall not be provided at a new location to any consumer delinquent at a prior location. All members of any family occupying the same household may be deemed consumers for the purpose of this section, regardless of the name in which service is registered.<sup>2</sup>

The Ordinance provides an important method for the City to collect delinquent utility charges specifically from those customers that have failed or refused to pay for utility services. (Thomas Aff., R. pp. 65-66, ¶ 4, R. p. 66, ¶ 6.)

The Ordinance is patterned on other legal remedies allowed by South Carolina law and by other jurisdictions. Analogous rules can be found in the regulations promulgated by

---

<sup>2</sup> "Family" is defined to include all persons living together in a dwelling unit. (Rock Hill Code of Ordinances, § 29-31(e), R. p. 226.)

the South Carolina Public Service Commission as well as the statutes governing utility providers in North Carolina.

The Ordinance is enforced uniformly with respect to all persons applying for initial utilities. When a person applies for utilities services with the City, that person is required to fill out an application and Customer Service Agreement ("Service Agreement"). (Thomas Aff., R. p. 66, ¶ 7.) The Service Agreement expressly provides that (i) the consumer agrees to pay for all services; (ii) the City may discontinue service if the consumer breaches the agreement; (iii) if service is disconnected for cause, the consumer agrees to pay all outstanding invoices for service to be restored; and (iv) the agreement is effective at the new address if the consumer moves to another location.

The Service Agreement requires that the applicant identify all other persons residing at the location for which utilities are to be provided (collectively "Consumers"). (Thomas Dep., R. p. 164, p. 16, lines 9-12.) The City checks the designated Consumers for delinquencies. (Thomas Dep., R.p. 164, p. 16, lines 13-15.) If this search reveals a Consumer has a payment delinquency from a previous location, that Consumer is required to pay the delinquency before being permitted to receive utilities at the new location. (Thomas Dep., R. p. 168, p. 31, lines 21-25, p. 32, lines 1-8.)

At the center of Appellants' claims is Charles Willis, a third-party to this lawsuit. On or about May 29, 2009, Willis entered into a lease with Appellants to rent property located at 1066 Cherokee Avenue in Rock Hill, South Carolina ("Cherokee Property"). (Robert Marshall Dep., R. p. 195, p. 15, line 9.) Willis requested City utilities at the Cherokee Property. (Thomas Aff., R. p. 66, ¶ 11.) At the time of application, Willis was delinquent on his utilities account with the City from a previous location. (Thomas Aff., R. p. 66, ¶ 9; Robert Marshall Dep., R. p. 215, p. 93, lines 23-25, p. 94, lines 1-2.) Willis had signed a Service Agreement with the City relating to utilities provided at this previous location. (Thomas Aff., R. p. 66, ¶¶ 7, 8.) Pursuant to the Ordinance, Willis was required to enter into a payment plan to satisfy his delinquencies prior to obtaining utilities at the new location. (Thomas Aff., R. p. 67, ¶ 12.) Willis did not agree to a repayment plan to address his delinquency. (Thomas Aff., R. p. 67, ¶ 15.)

Subsequently, Appellants sought to circumvent the Ordinance by requesting that utilities be provided for Willis in the name of Appellants. (Thomas Aff., R. p. 67, ¶ 16.) Pursuant to the Ordinance, Appellants were advised that Willis would have to satisfy the debt or agree to a payment plan to satisfy his debt prior to receiving utilities at the Cherokee

Property. (Thomas Aff., R. p. 67, ¶ 17.) It is undisputed that the City has never attempted to hold Appellants liable for the past due account of Willis, or any other tenants or potential tenants of Appellants. (Thomas Aff., R. p. 67, ¶ 18; Appellants' Answers to Interrogatories, R. p. 86, No. 8.; Robert Marshall Dep., R. p. 204, p. 49, lines 8-10.)

Willis ultimately satisfied his delinquency with the City and the City provided utilities to Willis at the Cherokee Property. (Robert Marshall Dep., R. p. 195, p. 16, lines 13-18.) Appellants subsequently evicted Willis for failure to pay rent. (Robert Marshall Dep., R. p. 195, p. 16, lines 24-25, R. p. 196, p. 17, lines 1-5.)

#### ARGUMENT

**I. The Questions Presented for Review by Appellants do not warrant the issuance of a Writ of Certiorari.**

In the Petition for Writ of Certiorari ("Petition"), Appellants ask this Court to review six vague questions<sup>3</sup>. These questions do not relate to or flow from any purported specific errors made by the trial court, but rather are academic questions bearing little or no relationship to the

---

<sup>3</sup> (1) Do public utilities have a duty to provide service? (2) Can service be denied for a "collateral matter"? (3) Is an unrelated contract a "collateral matter"? (4) What is the effect of the common-law rule on collateral matters? (5) Can service be denied due to a third party's debt? (6) Can service be denied due to the debt of a roommate, spouse or family member? (Petition, p. 3.)

actual facts and issues decided in this matter.<sup>4</sup> For this reason alone it would be proper for the Court to deny Appellants' Petition. See Sullivan Co. v. New Swirl, Inc., 313 S.C. 34, 36, 437 S.E.2d 30, 31 (1993) (stating that "[b]road general statements of issues made by an appellant may be disregarded by this Court"); Forest Dunes Associates v. Club Carib, Inc., 301 S.C. 87, 89, 390 S.E.2d 368, 370 (Ct. App. 1990) (stating that "[e]very ground of appeal ought to be so distinctly stated that the reviewing court may at once see the point which it is called upon to decide without having to 'grope in the dark' to ascertain the precise point at issue").

An independent basis to deny the Petition is that the six questions presented by Appellants for review were not raised to and ruled upon by the trial court. The issues raised to and ruled upon by the trial court were specific constitutional legal principles applicable to an equal protection challenge and a substantive due process challenge to a legislative act brought under 42 U.S.C. § 1983. The trial court properly and meticulously applied these legal principles in its analysis of the Ordinance and in the granting of summary judgment. Appellants' Petition wholly disregards these legal principles.

---

<sup>4</sup> The questions presented for review by Appellants' appear to have been pulled from Access to Public Utilities, a text published by the National Consumer Law Center. See National Consumer Law Center, Access to Utility Service (5th ed. 2011).

Citing cases pertinent to the law of issue preservation, the Court of Appeals acknowledged Appellants' failure to preserve issues in this appeal. 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."); Chaistain 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) motion."). Because the issues presented by Appellants' for review were not preserved for appeal, certiorari is unwarranted.

Finally, Appellants have not identified any law, issues or characteristics of this case that would typically warrant the issuance of a writ of certiorari. "A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons. The following, while neither controlling nor fully measuring the Supreme Court's discretion or power to grant review in general, indicate the character of reasons which will be considered:

- (1) Where there are novel questions of law.
- (2) Where there is a dissent in the decision of the Court of Appeals.
- (2) Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court.
- (3) Where substantial constitutional issues are directly involved.
- (4) Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court."

Rule 226(b), SCACR.

Appellants' Petition contains a sweeping statement that this case involves novel questions of law and substantial constitutional issues; yet Appellants offer no support for this cursory statement.

The arguments presented and the record do not present a substantial constitutional issue. This case does not involve a fundamental right, a suspect constitutional classification or any allegations of disparate treatment. Appellants concede that their constitutional challenge to the Ordinance is subject to mere rational basis review. Failure to satisfy the mere rationality standard of review for an ordinance is not a novel question of law. Moreover, there is no dissent in the decision of the Court of Appeals; there is no conflict with a decision of the South Carolina Supreme Court; and the Court of Appeals decision does not conflict with a decision of the United States Supreme Court.

II. The Court of Appeals properly upheld the trial court's grant of summary judgment in favor of the City

The underlying action involves a cause of action under 42 U.S.C. § 1983 grounded in claims that the Ordinance violated Appellants' rights to equal protection and substantive due process. The trial court properly determined that Appellants' § 1983 claim fails as a matter of law.

The City's Final Brief filed with the Court of Appeals addresses the elements and constitutional standards relating to Appellants' claims, the findings of fact and conclusions of law of the trial court, the numerous grounds upon which the trial court's decision should be sustained, and the fatal defects in Appellants' arguments. This Return does not seek to repeat in full the arguments set forth in Respondents' Brief. Based on the Petition, it appears Appellants only seek review of the trial court's ruling that the Ordinance is rationally related to a legitimate governmental purpose. (Order, p. 5.)

Appellants' concede in the Final Brief of Appellants and again in the Petition for Writ of Certiorari that the proper standard of constitutional review for the Ordinance in this case is mere rationality. (Petition, p. 12; Brief of Appellants, p. 21.) Critically, Appellants have not appealed and take no exception to the trial court's ruling that the Ordinance does not implicate a "fundamental right" or draw

upon a suspect classification. (Order, pp. 3-4.) Appellants also have not appealed and take no exception to the trial court's ruling that the Ordinance is facially neutral and applies equally to all persons seeking utilities for a delinquent consumer. (Order, R. pp. 3-4; Appellants' Answers to Interrogatories, R. p. 86, No. 8; Robert Marshall Dep., R. p. 214, p. 89, lines 7-25, p. 90, line 1; Donna Marshall Dep., R. p. 222, p. 7, lines 3-8.)

Therefore, this matter involves the proper application of the Rational Basis test. Town of Hollywood v. Floyd, 403 S.C. 466, 480, 744 S.E.2d 161, 168 (2013). Judge Hayes and the Court of Appeals found that Appellants failed to satisfy their burden of proof. Appellants' proof fails even without affording legislative enactment of the Rock Hill City Council the prescribed substantial deference. Sloan v. S. Carolina Bd. of Physical Therapy Examiners, 370 S.C. 452, 480-81, 636 S.E.2d 598, 613 (2006).

The record uniformly reveals that the Ordinance is facially neutral and applies equally to all persons seeking utilities for a delinquent Consumer. All applicants for utility service have to complete the Customer Service Agreement and disclose the Consumers to reside at the location. Irrespective of the identity of the applicant, the Ordinance prevents a delinquent Consumer from receiving

utilities at a new location without redressing the prior delinquency.

Given this case invokes the lowest threshold of review (mere rationality), the governmental purpose need only be hypothetical to pass muster. Sloan, 370 S.C. at 480-81, 636 S.E.2d at 613. The governmental purpose of the Ordinance easily exceeds this minimal standard. The rationale is manifest, and fair. Rather than forcing all utilities consumers or the general public fisc to pay or absorb unpaid delinquent utility accounts, the Ordinance focuses the burden on those individuals who are directly benefitted from the consumption of the utilities. Any notion that a municipality lacks such latitude is misplaced. See Sloan v. City of Conway, 347 S.C. 324, 331, 555 S.E.2d 684, 687 (2001) (rejecting claim of unconstitutional disparate treatment where higher rates were charged to non-residents because Court found reasonable hypothesis in government's attempt to improve the condition of the public fisc); S.C. Code Ann. § 5-7-60 (1976) (codifying Home Rule general police powers).

Moreover, the Ordinance is patterned on other legal remedies allowed by South Carolina law and by other jurisdictions. The Ordinance is analogous to the regulations promulgated by the South Carolina Public Service Commission, which provide as follows:

No electrical utility shall be required to furnish its service or to continue its service to any applicant who, at the time of such application, is indebted or any member of his household is indebted, under an undisputed bill to such electrical utility for service previously furnished such applicant or furnished any other member of the applicant's household. However, for the purposes of this regulation, the electrical utility may not consider any indebtedness which was incurred by the applicant or any member of his household more than six years prior to the time of application.

26 S.C.Code Ann.Reg. 103-342(k). Additionally, the regulations provide regulated utilities even greater rights in that an "electrical utility may terminate a consumer's service should the consumer be in arrears on an account for service at another premise." 26 S.C.Code Ann.Reg. 103-342(1).<sup>5</sup>

Likewise, the Ordinance is analogous to North Carolina statutes that permit a city to "suspend or disconnect service to a consumer because of a past-due and unpaid balance for services incurred by another person who resides with the consumer [where] the consumer and the person were members of the same household at a different location when the unpaid balance for service was incurred" or "the person was a member of a consumer's current household at a different location when the unpaid balance for service was incurred." N.C. Gen. Stat. § 160A-314.

---

<sup>5</sup> Similar provisions for water and sewer utilities are set forth at 26 S.C. Code Ann. Regs. 103-735(M), (N) and 26 S.C.Code Ann.Reg. 103-535(L), (M).

CONCLUSION

The Petition for Writ of Certiorari should be denied because (1) Appellants have failed to raise any proper questions for review in the Petition for Writ of Certiorari and (2) because the Court of Appeals was proper in upholding the grant of summary judgment in favor of the City.

Respectfully submitted,

By: 

W. Mark White  
Jeremy D. Melville  
SPENCER & SPENCER, P.A.  
226 East Main Street  
P.O. Box 790  
Rock Hill, SC 29731  
Tel: (803) 327-7191

ATTORNEYS FOR RESPONDENTS

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

**RECEIVED**

Appeal From York County  
Court of Common Pleas  
John C. Hayes, III, Circuit Court Judge

NOV 13 2015

**S.C. SUPREME COURT**

Appellate Case No. 2015-001965

Robert K. Marshall, Jr., and  
Donna Chapman Marshall,  
doing business as "Rock Hill Property  
Management," a South Carolina  
general partnership, . . . . .

*Petitioners*  
Appellants,

v.

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.

**PROOF OF SERVICE**

I certify that the foregoing Return to Petition for a  
Writ of Certiorari has been served by depositing a copy in the  
United States Mail, postage prepaid, on November 9, 2015,  
addressed to:

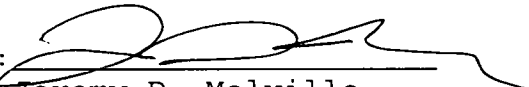
John Martin Foster  
223 East Main Street, Suite 520  
P.O. Box 106  
Rock Hill, SC 29731

Rock Hill, SC

SPENCER & SPENCER, P.A.

Date: November 9, 2015

By:



Jeremy D. Melville  
SC Bar No. 77473  
226 E. Main Street  
Rock Hill, SC 29730  
Tel: (803)327-7191  
Fax: (803)327-3868

ATTORNEYS FOR RESPONDENTS