

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Appellate Case No. 2020-001043

RECEIVED

Nov 19 2020

SC Court of Appeals

Town of Lexington South Carolina, Respondent,

vs.

Patty Cox Wingard, as Trustee for PLCW Trust,
and Scott's Furniture Company, Inc. Appellants.

INITIAL BRIEF OF APPELLANTS

James Edward Bradley, SC Bar # 66130
Sierra D. Carini, SC Bar # 103885
Moore Taylor Law Firm, PA
1700 Sunset Boulevard (29169)
P.O. Box 5709
West Columbia, SC 29171
(803) 796-9160
ward@mttlaw.com
Sierra@mttlaw.com
Attorneys for Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUES ON APPEAL1

STATEMENT OF CASE2

STATEMENT OF FACTS3

STANDARD OF REVIEW4

ARGUMENTS.....5

 1. THE TERM “HEIRS AND ASSIGNS” IS A CLEAR,
 UNAMBIGUOUS TERM OF DURATION AND THE TRIAL
 COURT ERRED BY FINDING THAT IT WAS NOT AND
 THAT THE TOWN OF LEXINGTON COULD CHOOSE TO
 NO LONGER HONOR ITS OBLIGATION TO THE WINGARDS5

 2. IF THE TERM “HEIRS AND ASSIGNS” IS AN AMBIGUOUS
 TERM OF DURATION, THEN THE COURT SHOULD
 CONSTRUE IT IN FAVOR OF THE WINGARDS8

 3. THE COURT ERRED BY RULING THAT THE TOWN WAS
 NOT REQUIRED TO RETURN TITLE TO THE TWO-INCH
 WATER MAIN THAT IT RECEIVED AS CONSIDERATION
 FOR ITS CONTRACT WITH HENRY WINGARD, HIS HEIRS
 AND ASSIGNS10

CONCLUSION.....11

TABLE OF AUTHORITIES

Cases

Bruce v. Blalock, 241 S.C. 155, 127 S.E.2d 439 (1962).....8

Bowen v. Pub. Agencies Opposed to Soc. Sec. Entrapment, 477 U.S. 41, 52 (1986).....10

C.A.N. Enters., Inc. v. S.C. Health & Human Servs. Fin. Comm’n, 296 S.C. 373,
S.E.2d 584 (1986)5

Chan v. Thompson, 302 S.C. 285, 395 S.E.2d 731 (Ct. App. 1990).....4

Chassereau v. Global Sun Pools, Inc., 373 S.C. 168, 644 S.E.2d 718 (2007)9

Childs v. City of Columbia, 87 S.C. 566, 70 S.E. 296 (1911)8

Columbia East Assocs. V. Bi—Lo, Inc., 299 S.C. 515, 386 S. E.2d 259 (Ct. App. 1989).....13

Douglas v. Medical Investors, 256 S.C. 440, 182 S.E.2d 720 (1971)6

Ellie, Inc. v. Miccichi, 358 S.C. 78, 594 S.E.2d 485 (Ct. App. 2004)8

First Equity Inv. v. United Service Corp, 299 S.C. 491, 386 S.E.2d 245 (1989)10

Gressette v. South Carolina Elec. and Gas, 370 S.C. 377,635 S.E.2d 538 (2006)6

Hawkins V. Greenwood Dev. Corp., 328 S.C. 585, 493 S.E.2d 875 (Ct. App. 1997).....5, 8

Myrtle Beach Lumber Co. v. Willoughby, 276 S.C. 3, 274 S.E.2d 423 (1981)9

Reyahni v. Stone Creek Cove Condominium II Horizontal Property Regime,
329 S.C. 2206, 494 S.E2d 465 (Ct. App 1997).....6

S.C. Dep’t of Natural Res. v. Town of McClellanville, 345 S.C. 617, 550 S.E.2d 299 (2001).....5

Sandy Island Corp. v. Ragsdale, 246 S.C. 414, 143 S.E.2d 803 (1965).....6

Skywaves I Corp. v. Branch Banking & Tr. Co., 423 S.C. 432, 814 S.E.2d 643
(Ct. App. 2018)10

Town of Summerville v. City of North Charleston, 378 S.C. 107, 662 S.E.2d 40 (2008).....5

Wachovia Bank, Nat'l Ass'n v. Blackburn, 407 S.C. 321, 755 S.E.2d 437 (2014)10

Wilbur Smith and Associates v. National Bank of South Carolina, 274 S.C. 296,
263 S.E.2d 643 (1980)6

STATEMENT OF ISSUES ON APPEAL

- 1. DID THE COURT ERR BY RULING THAT THE TERM “HEIRS AND ASSIGNS” WAS NOT A TERM OF DURATION THAT OBLIGATED THE TOWN OF LEXINGTON TO PROVIDE WATER SERVICE TO THE HEIRS AND ASSIGNS OF HENRY WINGARD?**

- 2. DID THE COURT ERR BY DETERMINING THAT THE TERM “HEIRS AND ASSIGNS” WAS NOT AMBIGUOUS, AND THEREBY NOT INTERPRETING THIS TERM IN FAVOR OF THE HEIRS OF HENRY WINGARD?**

- 3. DID THE COURT ERR BY NOT REQUIRING THAT THE TOWN OF LEXINGTON RETURN THE TWO-INCH WATER MAIN TO THE WINGARDS?**

STATEMENT OF THE CASE

This appeal arises from the Respondent Town of Lexington's ("The Town") decision that it no longer had to honor its contract to provide water service to the heirs and assigns of Henry Wingard. On September 17, 2018, The Town filed a declaratory judgment action in the Court of Common Pleas for Lexington County asking the Court to rule that The Town could break its obligation to provide water service to the heirs and assigns of Henry Wingard. (Complaint; R _____).

In response to the declaratory judgment action, Appellant Patty Wingard, as trustee of the PLCW Trust ("Wingard"), filed an answer and counterclaim on October 24, 2018. (Answer; R _____). Ms. Wingard's answer stated that the Court should deny The Town's request on the grounds that The Town had specifically contracted to provide water service to Henry Wingard's heirs and assigns. (Answer; R _____). Her counterclaim demanded that if the Court were to rule that The Town could rescind its contract, she was entitled to the return of the two-inch water main, which was the consideration given for the contract. (Answer; R _____).

The matter was tried before the Honorable Allison Lee, presiding judge of the Eleventh Judicial Circuit on October 17 - 18, 2019. (Tr. of R. p. 1; R _____). The Court issued its order on May 4, 2020. (Order Ruling on Decl. J.; R _____). The Court held that The Town could stop providing water service to the Wingards upon reasonable notice because the term "heirs and assigns" was not a term of duration. (Order Ruling on Decl. J.; R _____).

Ms. Wingard, through counsel, filed a motion for reconsideration on May 14, 2020. (Def.'s Mot. For Recons.; R _____). Ms. Wingard argued that the Court erred by holding that the term "heirs and assigns" was not a term of duration. The Court denied this motion for reconsideration. (Order Den. Mot. For Recons.; R _____). This appeal timely followed. (Notice of Appeal Dated

July 29, 2020; R.____). The Town was served notice of this appeal by depositing a copy of the notice in the United States Mail on July 29, 2020.

STATEMENT OF FACTS

This case concerns whether the government can break its specific promises to its citizens. Henry Wingard was a large property owner in Lexington County, South Carolina. During his lifetime he developed the property that, at the time of this lawsuit, included Scott's Furniture Store. (Tr. Of R. p. 6; R.____). He was responsible for many of the developments of both residential and commercial property within the county, and The Town and Mr. Wingard had a long term symbiotic relationship.

On September 30, 1961, The Town and Henry Wingard executed a contract that required Henry Wingard to install a water main and allowed The Town to tap into this line in exchange for providing water service to him. (Ex. A; R _____)

On October 13, 1961, The Town entered into a second contract with Henry Wingard. (Tr. of R. p. 6; R. _____). This second contract provided that in exchange for Mr. Wingard installing a water main on Hamilton Street and allowing The Town to tap into this water main, The Town would provide water to Mr. Wingard, his **heirs and assigns** within The Town's water system at the prevailing water rates. (Tr. Of R. p. 6; Ex. B; R____). This contract was signed by the Mayor, the four city council members, Mr. Wingard, and attested to by the Clerk for The Town. (Tr. of R. p.7; Ex. B; R. _____).

The Town abided by this contract from 1961 until 2013 without incident. For fifty-two years The Town performed its obligations under the contract without a single complaint. (Tr. of R. p. 7; R. _____). However, in 2013, The Town wrote a letter to Tom Wingard, Henry Wingard's son, asking him to sign a petition allowing The Town to annex the Scott's Furniture property as a

condition of continuing to receive water from The Town. This property was being served by The Town's water supply per the 1961 contract. (Tr. of R. p. 7-8; Ex. C; R. ____). Essentially, The Town wanted the Wingards' property to be annexed into The Town so The Town could levy additional taxes upon the Wingards' property. This was in direct conflict with the agreement between The Town and the Wingards.

Tom Wingard responded to this letter by writing a letter to The Town. (Tr. of R. p.8; Ex. D; R. ____). Tom Wingard informed The Town that the Wingards did not want the property annexed into The Town and that it had an obligation to provide water because it had contracted to provide water to his father and his father's heirs and assigns. (Tr. of R. p. 8; Ex. D; R.____).

The Town never respond to this letter; however, in 2018, The Town filed a declaratory judgment action seeking permission to shut off the water to the Wingards' property unless they agreed to be annexed. (Complaint; R.____). The Town's suit was brought against Patty C. Wingard, as Trustee of the PLCW Trust. (Tr. of R. p.6; R.____).

In response to this lawsuit, the Wingards argued that The Town could not shut off the water to the property because of the contract with The Town that explicitly required The Town to provide water service to the heirs and assigns of Henry Wingard. Additionally, the Wingards counter claimed for possession of the two-inch water main that Henry Wingard had installed and The Town maintained on Hamilton Street in exchange for The Town providing water service to him and his "heirs and assigns" (Tr. of R. p.8-9; R. ____).

STANDARD OF REVIEW

When interpreting a contract, a court must ascertain and give effect to the intention of the parties. *Chan v. Thompson*, 302 S.C. 285, 289, 395 S.E.2d 731, 734 (Ct. App. 1990). To determine the intention of the parties, the court "must first look at the language of the contract"

C.A.N. Enters., Inc. v. S.C. Health & Human Servs. Fin. Comm'n, 296 S.C. 373, 377, 373 S.E.2d 584, 586 (1988). When the language of a contract is clear and unambiguous, the determination of the parties' intent is a question of law for the court. *Hawkins v. Greenwood Dev. Corp.*, 328 S.C. 585, 592, 493 S.E.2d 875, 878 (Ct. App. 1997). Whether a term in a contract is ambiguous is also a question of law. *S.C. Dep't of Natural Res. v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 302-03 (2001). The standard of review applicable to questions of law is de novo. *Town of Summerville v. City of North Charleston*, 378 S.C. 107,110, 662 S.E.2d 40, 41 (2008).

ARGUMENTS

I. THE TERM “HEIRS AND ASSIGNS” IS A CLEAR, UNAMBIGUOUS TERM OF DURATION AND THE TRIAL COURT ERRED BY FINDING THAT IT WAS NOT AND THAT THE TOWN OF LEXINGTON COULD CHOOSE TO NO LONGER HONOR ITS OBLIGATION TO THE WINGARDS.

A. By Determining That The Term Heirs And Assigns Is Not A Term Of Duration, The Court Violated The Established Rules Of Contract Construction And Rendered Those Terms Meaningless.

The Court erred when it ruled that the September 30, 1961, Contract and the October 13, 1961, Contract are terminable at will because they do “not contain the express terms creating the perpetual nature of the agreement.” (May 4, 2020, Order, p.6; R. _____). The Court essentially ruled that because the contract did not contain the word “forever” it was terminable at will and that the term “heirs and assigns” is not a term of duration. (May 4, 2020, Order p.6).

In a grant, the common legal meaning of the terms “heirs and assigns” is that the grant will exceed the life of the party and extend to her descendants or anyone she assigns the right to. *See Black’s Law Dictionary* (11th ed. 2019). Therefore, the words “heirs and assigns” create fee simple ownership in an interest which is inheritable and assignable as the words suggest. *Id.*

Documents relating to an agreement should be interpreted to give effect to all their provisions, if practical. *Reyahni v. Stone Creek Cove Condominium II Horizontal Property Regime*, 329 S.C. 206, 212 494 S.E.2d 465, 468 (Ct. App 1997). (Citing 17A Am. Jur. 2d Contracts §385 (1991)). By ignoring the clear, unambiguous words of the contract and ruling that the contract between Henry Wingard and The Town did not contain words of duration, the Court rendered the clear, unambiguous language in the contract meaningless. The Court should have given the term “heirs and assigns” its logical and ordinary meaning and held that The Town was obligated to honor its obligation of providing water service at the normal rates to the heirs and assigns of Henry Wingard.

B. The Established Legal Meaning Of “Heirs and Assigns” Is A Grant That Exists Beyond The Life Of The Grantee.

The South Carolina Supreme Court has long held that the term “heirs and assigns” creates an assignable, permanent interest. In *Gressette v. South Carolina Elec. And Gas*, 370 S.C. 377, 635 S.E.2d 538 (2006), the Court held that the language “heirs and assigns” indicated an assignable, permanent interest. *Id.* at 383, 635, S.E.2d at 541 (citing *Sandy Island Corp. v. Ragsdale*, 246 S.C. 414, 143 S.E.2d 803 (1965)) (parties may make an easement in gross assignable by the terms of the instrument; commercial easement in gross assignable where language included “successors and assigns”).

Furthermore, in *Douglas v. Medical Investors*, 256 S.C. 440, 182 S.E.2d 720 (1971), the Court held that the words “unto himself, his heirs and assigns” showed an intention to attach the attribute of assignability to the easement. Therefore, the easement was assignable to the appellant.

Similarly, in *Wilbur Smith and Associates v. National Bank of South Carolina*, 274 S.C. 296, 263 S.E.2d 643 (1980), the Supreme Court held that the language “heirs and assigns” bound the estate of a property holder to a contract signed before his death. In *Wilbur*, the property owner

signed a listing agreement with a real estate company. The agreement purported to bind the property owner and his “heirs and assigns,” but the agreement limited this period to 15 years. After the agreement was signed, the property owner passed away, and the real estate company attempted to enforce the agreement against the executor of the owner’s estate. The Court held that the real estate company could enforce the agreement because it included the language that the agreement bound his “heirs and assigns.”

In this case, The Town drafted the resolution and the agreement. The Town purposefully included the term “heirs and assigns.” These are not meaningless words. Instead, the words express a specific intention to provide water services, without the need to be annexed, to the heirs of Henry Wingard in exchange for him installing a water main and allowing The Town to tap into that main. The parties have stipulated that the PLCW Trust is an heir or assign of Henry Wingard. (Tr. of R. 18:22-19:4 R.____). Henry Wingard performed his side of the bargain by installing the water main on Hamilton Street. The Town has a responsibility to live up to its end of the bargain to provide water service to the heirs and assigns of Henry Wingard within the limits of The Town’s water supply.

One may argue that the *Wilbur* case stands for the proposition that the term “heirs and assigns” must be accompanied by an additional term of duration. That is false. Although the agreement in that case included language limiting the agreement's enforceability to fifteen years, that language was not necessary to make the agreement enforceable. Instead, the fifteen-year period was merely an added limitation on the duration of heirs and assigns.

Because the language “heirs and assigns” is unambiguous, readily known, and bargained for by the parties, the Court erred by not giving effect to the clear intent of both Henry Wingard and The Town.

The Town and the Trial Court rely on *Childs v. Columbia*, 87 S.C. 566, 70 S.E. 296 (1911) for the proposition that The Town need not honor its promise. This reliance is misplaced. In *Childs*, the contract did not contain a term of duration, and the Court held that a contract for water service was terminable upon reasonable notice because in that contract, **there was no period of duration** and no definite time could be implied from the nature of the contract or the circumstances. *Id.*, 87 S.C. at 566. In that case, the contract at issue did not contain the term “heirs and assigns” or any other term that could be construed to be a term of duration.

However, The Town’s agreement with Henry Wingard includes “heirs and assigns.” This term is a term of duration. It contemplates The Town providing water after the passing of Henry Wingard. Additionally, the term “heirs and assigns” is a definite term of duration because at some point, Henry Wingard will no longer have an heir or assign. Therefore, the contract is not perpetual. Furthermore, in *Childs*, the city of Columbia had only provided water service for ten years. Here, The Town has provided water service for nearly 55 years. That amount of time shows the Parties’ intent at the time of contracting to provide water service to the “heirs and assigns” of Henry Wingard.

Because the language “heirs and assigns” is unambiguous, readily known, and bargained for by the parties, the Court erred by not giving effect to the clear intent of both Henry Wingard and The Town.

II. IF THE TERM “HEIRS AND ASSIGNS” IS AN AMBIGUOUS TERM OF DURATION, THEN THE COURT SHOULD CONSTRUE IT IN FAVOR OF THE WINGARDS.

A contract is ambiguous when it is open to more than one meaning or its meaning is unclear. *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 94, 594 S.E.2d 485, 493 (Ct. App. 2004); *accord Bruce v. Blalock*, 241 S.C. 155, 160, 127 S.E.2d 439, 441 (1962); *Hawkins v. Greenwood Dev. Corp.*, 328 S.C. 585, 493 S.E.2d 875 (Ct. App. 1997). The Supreme Court of South Carolina has

determined that “(A)mbiguous language in a contract should be construed liberally and most strongly in favor of the party who did not write or prepare the contract and is not responsible for the ambiguity; and any ambiguity in a contract, doubt, or uncertainty as to its meaning should be resolved against the party who prepared the contract or is responsible for the verbiage. *Myrtle Beach Lumber Co. v. Willoughby*, 276 S.C. 3, 8, 274 S.E.2d 423, 426 (1981); see also *Columbia East Assocs. v. Bi-Lo, Inc.*, 299 S.C. 515, 519–20, 386 S.E.2d 259, 261–62 (Ct.App.1989) (“Where the contract is susceptible of more than one interpretation, the ambiguity will be resolved against the party who prepared the contract.”).

If the Court finds that the term “heirs and assigns” is ambiguous, the term should be construed liberally in favor of the Wingards because the original drafting party was The Town. *Chassereau v. Global Sun Pools, Inc.*, 373 S.C. 168, 175, 644 S.E.2d 718, 722 (2007) (“[A] court will construe any doubts and ambiguities in an agreement against the drafter of the agreement.”). The October 13, 1961, agreement/resolution entered into between Henry Wingard and The Town was produced on letterhead which said “Town of Lexington South Carolina.” The resolution/agreement was created via a motion by the town council and later reduced to writing by the same council; therefore, The Town was the agreement's drafter.

Additionally, if the Court finds that the term “heirs and assigns” is ambiguous, the intent of the parties is clear by the circumstances surrounding the contract. The parties performed their obligations for over fifty years without interruption. The Town knew that the intent, at the time of drafting, was to provide water service to the “heirs and assigns” of Henry Wingard, which it did. Seven years after the death of Henry Wingard, The Town decided it no longer wanted to honor its obligation to the “heirs and assigns” of Henry Wingard. There is no evidence that on October 13, 1961, The Town intended the term “heirs and assigns” to mean something other than that The

Town had an obligation to provide water service to Henry Wingard's heirs and assigns. The Town now wants to break its promise to the Wingards in an effort to force the Wingards to annex property into The Town.

III. THE COURT ERRED BY RULING THAT THE TOWN WAS NOT REQUIRED TO RETURN TITLE TO THE TWO-INCH WATER MAIN THAT IT RECEIVED AS CONSIDERATION FOR ITS CONTRACT WITH HENRY WINGARD, HIS HEIRS AND ASSIGNS.

South Carolina's public policy is to hold parties to their contract provisions and the effect of those provisions. *Skywaves I Corp. v. Branch Banking & Tr. Co.*, 423 S.C. 432, 450, 814 S.E.2d 643, 653 (Ct. App. 2018), reh'g denied (June 21, 2018), cert. denied (Nov. 9, 2018) (citing *Wachovia Bank, Nat'l Ass'n v. Blackburn*, 407 S.C. 321, 332, 755 S.E.2d 437, 443 (2014)).

Furthermore, a government's power to enter contracts that confer a right upon a private party carries with it "the concomitant duty to honor those rights." *Bowen v. Pub. Agencies Opposed to Soc. Sec. Entrapment*, 477 U.S. 41, 52 (1986).

If a party, whether it be a government or not, is allowed to rescind a contract and avoid bargained for contractual responsibilities, then that party is required to return any consideration received in exchange for the contract. *First Equity Inv. v. United Service Corp.*, 299 S.C. 491, 496, 386 S.E.2d 245, 248 (1989). If a party were not required to return the consideration received, then that party would be unjustly enriched because they would be allowed to keep the benefit they received from the contract while not providing a benefit to the other party.

This case is an example of one party getting to rescind its contract while keeping the benefit that was the consideration for the contract. Henry Wingard provided The Town a two-inch water main. Additionally, he allowed The Town to tap into that water main and extend water service beyond where The Town was previously capable. That waterline was a benefit to The Town

because it allowed The Town to provide water service to properties it would have not been able to and has increased revenue for The Town through the sale of water for many years.

Henry Wingard installed this water main and conveyed it to The Town in exchange for The Town's promise. Now, The Town believes it may break its promise and stop providing water service to the heirs and assigns of Henry Wingard while continuing to use the water main Henry Wingard installed for The Town's benefit. Fundamental principles of fairness require The Town to return title of the two-inch water main to the heirs and assigns of Henry Wingard if The Town is no longer willing to honor its promise.

This is not merely a case of two private parties. One party is a local government. The natural progression of allowing a government to end an agreement while simultaneously keeping the benefit it received is that citizens will be reluctant to enter into contracts with the government, and the sacred relationship between citizen and government will be tarnished.

CONCLUSION

This Court should find that The Town cannot break its obligation to provide water service to the Wingards because the term "heirs and assigns" is a term of duration that created a clear, unambiguous contract which requires The Town to provide water service.

Or, in the alternative, this Court should find that The Town cannot break its obligation to provide water service to the Wingards because the term "heirs and assigns" created an ambiguous term of duration that should have been interpreted in favor of the "heirs and assigns" of Henry Wingard.

If this Court should find that The Town can break its obligation to provide water service to the Wingards then this Court should order The Town to return title to the two-inch water main on Hamilton Street to the "heirs and assigns" of Henry Wingard because it is fundamentally unfair

and in violation of the rules of contract law to allow The Town to keep the water main and break its promise.

Respectfully submitted,

MOORE TAYLOR LAW FIRM, P.A.

By: s/James Edward Bradley
James Edward Bradley, SC Bar # 66130
Sierra D. Carini, SC Bar # 103885
1700 Sunset Boulevard (29169)
P.O. Box 5709
West Columbia, SC 29171
(803) 796-9160
ward@mttlaw.com
sierra@mttlaw.com
Attorneys for Appellants

West Columbia, South Carolina
November 18, 2020

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

Nov 19 2020

SC Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Appellate Case No. 2020-001043

Town of Lexington South Carolina, Respondent,

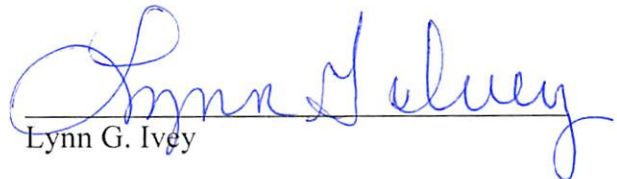
v.

Patty Cox Wingard, as Trustee for PLCW Trust,
and Scott's Furniture Company, Inc. Appellants.

PROOF OF SERVICE

I, Lynn G. Ivey, an employee of the Moore Taylor Law Firm, P.A., certify that I have served the Appellants' Initial Brief and Designation of Matter on the Respondent by depositing a copy of same in the United States Mail, postage prepaid, on November 19, 2020, addressed to its attorneys of record as follows:

Bradford T. Cunningham, Esquire
Clifford O. Koon, Jr., Esquire
P.O. Box 397
Lexington, SC 29071-0397


Lynn G. Ivey

West Columbia, South Carolina
November 19, 2020