

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

Dec 22 2020

SC Court of Appeals

Town of Lexington South Carolina, Respondent,

v.

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

**APPELLANTS' RESPONSE TO RESPONDENT'S MOTION TO DISMISS
AND INCLUDED MEMORANDUM**

The Appellants Patty Cox Wingard, as Trustee for PLCW Trust, and Scott's Furniture Company, Inc. respond to the motion to dismiss of the Town of Lexington as follows:

1. The Town of Lexington has moved to dismiss the appeal on the basis that notice of the appeal was not filed with the Clerk of Court for Lexington County. Appellants acknowledge that notice of the appeal was not filed with the Clerk of Court for Lexington County. However, the notice of appeal was timely served upon the Town, filed with the South Carolina Court of Appeals, and served upon the trial judge, Alison Lee. (Notice of Appeal filed with Lexington County Clerk of Court is attached as Exhibit A.)

2. As shown by the attached documents, once the error was pointed out by the Town of Lexington, the Appellants filed with the Clerk of Court for Lexington County as required by the rules.
3. As a result, the notice of appeal has now been filed with the Clerk of Court for Lexington County. All deadlines were complied with as far as filing with the Court of Appeals and service upon the Town. In addition, the notice of appeal was served upon the trial judge Allison Lee.
4. The deficiency has now been remedied. All parties were on notice of the appeal. The Court of Appeals received the notice of filing within the required time. The trial judge received the notice within the required time.
5. The Appellants acknowledge that service of a notice of appeal within thirty days is a jurisdictional requirement pursuant to Appellate Rule 203(b). *See, Elam v. S.C. Dep't of Transp.*, 361 SC 9, 602 S.E.2d 772 (2004). However, the notice of appeal was timely served.
6. Although the Town's motion suggests that a failure to file a copy of the notice of appeal with the Clerk of Court is jurisdictional, the Appellants know of no authority for this suggestion and have not found any upon a thorough search of precedent.
7. In fact, South Carolina Rule of Civil Procedure 5(e) addresses filing with the court. It indicates that documents may be filed with the judge upon the judge's consent. The notice of appeal was served upon the trial judge. In addition, South Carolina Rule of Civil Procedure 5(d) indicates that "[u]pon failure of a party to file other pleadings, motions, or papers the court may permit filing"

Thus, the Rules of Civil Procedure do not contemplate a failure to file a notice of appeal with the County Clerk as a jurisdictional defect.

8. The Town of Lexington requests that this court dismiss the appeal pursuant to Rule 203(d)(3) which indicates that “if the notice of appeal is not timely filed or the filing fee is not paid in full, the appeal shall be dismissed, and shall not be reinstated except as provided by Rule 260.” This rule does not indicate whether it addresses filing with the Court of Appeals solely, or the Court of Appeals and the Circuit Court. The filing fee is submitted directly to the Court of Appeals; thus the rule implies it solely addresses filing with the Court of Appeals. This appeal was timely filed with the Court of Appeals and the filing fee was timely paid. If the court determines that the appeal should be dismissed for failure to timely file notice with the Clerk of Court for Lexington County, the Appellants ask that the appeal be reinstated pursuant to Rule 260 as contemplated by the clear language of Rule 203(d)(3).
9. Rule 260 of the South Carolina Rules of Appellate Practice indicates that a dismissed appeal may be reinstated by leave of the court upon good cause shown after notice to all parties. The Appellants request that, if this matter is dismissed, that it be reinstated upon good cause shown. Good cause includes the Appellants’ diligent pursuit of the appeal, the timely notice to all parties, the timely filing with the Court of Appeals, the timely payment of the appellate fee, and the timely filing of the appeal with the circuit court judge. The failure to file with the Clerk of Court of Lexington County has been corrected and has not prejudiced any party in any way. In fact, the Town did not suggest a problem with the appeal until five months after service upon it. As a result,

there is no prejudice, the Appellants have made a good faith attempt to comply with all of the rules, and the Appellants ask that if the court dismisses the appeal for failure to file a copy with the Clerk of Court of Lexington County, that the appeal be reinstated pursuant to Rule 260 as contemplated by the South Carolina Rules for Appellate Practice.

10. If the court is inclined to dismiss this appeal pursuant to the Town's motion, the Appellants also request an opportunity to pursue further briefing. The Appellants have found no case law supporting the Town's contention that a failure to file the notice of appeal with the county clerk divests the court of jurisdiction. If the court is inclined to create new law in the fashion, the Appellants request an opportunity to brief the issue further.

Respectfully submitted,

s/James Edward Bradley
James Edward Bradley, SC Bar #66130
Sierra D. Carini, SC Bar #103885
Moore Taylor Law Firm, P.A.
P.O. Box 5709
West Columbia, SC 29171
(803) 796-9160
Ward@mttlaw.com
Sierra@mttlaw.com
Attorneys for Appellants

December 22, 2020

EXHIBIT A

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Case No. 2018-CP-32-03352

RECEIVED
Jul 29 2020
SC Court of Appeals

Town of Lexington South Carolina, Respondent,

v.

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

NOTICE OF APPEAL

Patty Cox Wingard, as Trustee for PLCW Trust, and Scott's Furniture Company, Inc. appeal the order of the Honorable Alison Renee Lee signed on May 4, 2020, and filed by the Clerk on that date. Appellants timely filed a Motion to Reconsider and Rule 59(E) Motion which were both denied by Order of the Honorable Allison Renee Lee dated July 15, 2020, and filed with the Clerk of Court's Office on that same date. Appellants received electronic notice of entry of this order on July 15, 2020.

[Signature block to follow}

ELECTRONICALLY FILED - 2020 Dec 21 2:25 PM - LEXINGTON - COMMON PLEAS - CASE#2018CP3203352

Respectfully submitted,

July 29, 2020

s/James Edward Bradley
James Edward Bradley, SC Bar #66130
Moore Taylor Law Firm, P.A.
P.O. Box 5709
West Columbia, SC 29171
(803) 796-9160
ward@mttlaw.com
Attorney for Appellants

Other Counsel of Record:

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Case No. 2018-CP-32-03352

RECEIVED

Jul 29 2020

SC Court of Appeals

Town of Lexington South Carolina, Respondent,

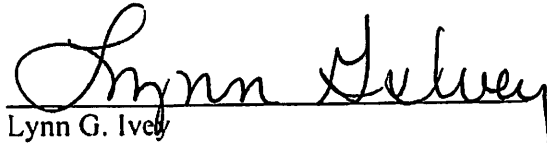
v.

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 Notice of Appeal on the Respondent by depositing a copy of same in the United State Mail, postage prepaid, on July 29, 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
July 29, 2020



July 29, 2020

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

RECEIVED
Jul 29 2020
SC Court of Appeals

VIA ELECTRONIC FILING

Re: Town of Lexington South Carolina vs. Patty Cox Wingard, as Trustee for
PLCW Trust, and Scott's Furniture Company, Inc.
C/A No.: 2018-CP-32-03352

Dear Ms. Kitchings:

Enclosed for filing is a notice of appeal in the above case. Also enclosed are the following:

1. Proof of service of the Notice of Appeal on the Respondent; and
2. A copy of the orders which are to be challenged on appeal;

Thank you for your consideration.

Sincerely,

Lynn G. Ivey
Assistant to James Edward Bradley

Enclosures

cc: The Honorable Allison Renee Lee (via First Class mail)
Clifford O. Koon, Jr., Esq. (via First Class mail)
Bradford T. Cunningham, Esq. (via First Class mail)
Patty Wingard (via Email)

ELECTRONICALLY FILED
 2020 DEC 2 12:25 PM
 LEXINGTON - COMMON PLEAS - CASE#2018CP3203352

S. Jahue Moore
 J. Mark Taylor
 James Edward Bradley
 Sheila McNair Robinson
 Christian G. Spradlin
 William H. Edwards
 Stanley L. Myer
 Jane H. Downer
 S. Jahue Moore,
 John C. Bradley,
 Melissa K. Moore
 William B. Fortin
 Ralph Nichols Riley,
 Lester McGill Bell,
 Bryan C. Lett
 Edward Hood Dawson
 Sierra D. Carri
 Nicole E. Jackson
 Robert D. Hazen
 C. David Sawyer,
 Billy C. Coleman
 1916-20

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)
Town of Lexington South Carolina,)
)
Plaintiff,)
)
v.)
)
Patty Cox Wingard, as Trustee for PLCW)
Trust, and Scott's Furniture Company, Inc.,)
)
Defendants.)
_____)

IN THE COURT OF COMMON PLEAS
ELEVENTH JUDICIAL CIRCUIT

Case No.: 2018-CP-32-03352

ORDER

RECEIVED

Jul 29 2020

SC Court of Appeals

Patty Cox Wingard, as Trustee for PLCW Trust, and Scott's Furniture Company, Inc. ("Defendants") filed a Rule 59(e) Motion and Motion for Reconsideration, in response to the Court's Order filed on May 4, 2020. Town of Lexington South Carolina ("Plaintiff") responded to Defendant's Motion to Reconsider.

DISCUSSION

Defendants seek reconsideration of the Order arguing: (1) the Court did not rule on the Defendant's counterclaim to return the water line if the Contract was rescinded by the Town; and (2) the Court erred when it decided that the words "heirs and assigns" contained in the Agreement between Wingard and the Town do not create a permanent agreement.

1. Defendants' Counterclaim

The Defendants brought a counterclaim asserting: if the Agreement is not enforceable, the Town must return the consideration given – ownership and control of the water lines – to it for entering into the Agreement. (Def. Ans. ¶19(d), (e)). Defendants, in their Answer, wanted the Court to declare that the Wingard family owned the water lines that were the subject of the 1961 Agreement and the 1961 Resolution. (Ans. ¶19(f)) Further, the Wingard family was seeking to charge a reasonable fee for the Town using the water line to deliver water to its customers. (Ans. ¶19(g)). The Defendants argue the Court did not address the counterclaim in the May 4, 2020 Order.

The Town argues that the two documents – the 1961 Agreement and the 1961 Resolution (collectively "1961 Agreements") – relate to different water lines. (Pl. Response p. 2-3). The 1961 Agreement allowed Wingard to connect a six inch line to the new six inch line the Town was

installing in 1961 along Northwoods Road to extend water to the Lakewood area - Georgia Lane Road. The Town's water project, called Northwoods Waterline Project, began in 1961 and was finished in 1962. The project installed six inch water lines from Wessinger Drive to Highway 378 and 565 feet on a portion of Northwoods to Hamilton Street.

The October 1961 Resolution allowed Wingard to "take up" the old two inch line along Northwoods Road (which was replaced by the Town's six inch line). The Resolution further allowed Wingard to use the old two inch line on Hamilton Street to provide water service to Lakewood subdivision. The Lakewood subdivision was developed north of Northwoods Road, except Block E, where Scott's Furniture is located, which is on the south side of Northwoods Road. The two inch line Wingard installed on Hamilton Street does not touch or intersect the property upon which Scott's Furniture Store sits.

Defendants Exhibit 5 is a 1958 plat of the Lakewood subdivision. It shows that Hamilton Street runs parallel to Northwoods Road (delineated on the plat as S.C. Hwy. No S-32-392). The October 1961 Resolution referencing the two inch line to be installed on Hamilton Street has no relationship to the September 1961 Agreement that involves the six inch line Wingard installed on Georgia Lane to connect to the Town's line on Northwoods Road. Georgia Lane Road intersects both Hamilton Street and Northwoods Road. All of these streets are north of the Scott's Furniture property. Georgia Lane Road and Northwoods Road intersect at the rear entrance of Scott's Furniture property.

Scott's Furniture property is serviced by the six inch line on Northwoods Drive that was installed by the Town during the 1961 Northwoods Waterline Project. When Scott's Furniture property was developed in 1972, the lines from the property were connected to the six inch line on Northwoods Drive. The 1961 Agreements do not refer to any property contiguous to the Town. The Town is not seeking to annex the property affected by the 1961 documents. Wingard received the benefit of his bargain.

Defendants assert that the contract was rescinded and therefore, they are entitled to be returned to the *status quo ante*. Rescind, as it relates to a contract amounts to the unmaking of the contract, or undoing of it from the beginning, not merely a termination. *Black's Law Dictionary* (5th Ed. 1979). It is declaring the contract void in its inception, putting an end to it as though it never was. *Id.* The parties performed under the 1961 Agreements. They received benefit from the agreements since 1961. The sole issue before the Court was to construe the contract and

determine whether the Town was required to continue to provide water service in perpetuity. The parties cannot be returned to the *status quo ante*.

Based upon the interpretation of the agreements between the parties, the allegations in the Defendants' Answer and Counterclaim are inconsistent with those documents and the decision of the Court, thus must be denied.

2. Perpetuity of the 1961 Agreement

The Court determined the 1961 Agreement is silent as to express terms creating a perpetual nature of the agreement. After careful consideration of the record in this case and the arguments raised by Defendants, this Court is unable to discover any new material fact or principle of law that was either overlooked or disregarded in the previous Order on this issue.

ORDER

Therefore, it is **ORDERED** that Defendants' Counterclaim is **DENIED** and the Motion to Reconsider is also **DENIED**.

AND IT IS SO ORDERED!

Signature page to follow.



Lexington Common Pleas

Case Caption: Town Of Lexington South Carolina VS Patty C Wingard Trustee
Plcw Trust , defendant, et al
Case Number: 2018CP3203352
Type: Order/Other

IT IS SO ORDERED!

s/ Alison Renee Lee, Chief Administrative Judge
for 2020

Electronically signed on 2020-07-15 13:31:15 page 4 of 4

ELECTRONICALLY FILED - 2020 Dec 21 2:25 PM - LEXINGTON - COMMON PLEAS - CASE#2018CP3203352
ELECTRONICALLY FILED - 2020 Jul 15 2:39 PM - LEXINGTON - COMMON PLEAS - CASE#2018CP3203352



***** IMPORTANT NOTICE - READ THIS INFORMATION *****
NOTICE OF ELECTRONIC FILING [NEF]

A filing has been submitted to the court RE: 2018CP3203352

Official File Stamp: 07-15-2020 02:39:30 PM
Court: CIRCUIT COURT
Common Pleas
Lexington
Case Caption: Town Of Lexington South Carolina VS Patty C Wingard Trustee Plcw Trust , defendant, et al
Document(s) Submitted: Order/Other Order/Other
Filed by or on behalf of: Alison Lee

This notice was automatically generated by the Court's auto-notification system.

The following people were served electronically:

Clifford O. Koon, Jr. for Town Of Lexington South Carolina
Bradford T. Cunningham for Town Of Lexington South Carolina
James Edward Bradley for Patty C Wingard Trustee Plcw Trust et al

The following people have not been served electronically by the Court. Therefore, they must be served by traditional means:

ELECTRONICALLY FILED - 2020 Dec 21 2:25 PM - LEXINGTON - COMMON PLEAS - CASE#2018CP3203352

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)
Town of Lexington South Carolina,)
Plaintiff,)
v.)
Patty Cox Wingard, as Trustee for PLCW)
Trust, and Scott's Furniture Company, Inc.,)
Defendants.)

IN THE COURT OF COMMON PLEAS
ELEVENTH JUDICIAL CIRCUIT

Case No.: 2018-CP-32-03352

ORDER
(NON-JURY)

RECEIVED

Jul 29 2020

SC Court of Appeals

Plaintiff, Town of Lexington, South Carolina ("the Town"), filed a Declaratory Judgment action to determine whether it has the right to terminate water services to a property owned by, Defendant Patty C. Wingard, as Trustee for PLCW Trust, ("PLCW Trust") located at 705 North Lake Drive ("subject property"). A bench trial was held on October 17 – 18, 2019. Clifford O. Koon, Esq. represented the Plaintiff and James Edward Bradley, Esq. represented the Defendants.

BACKGROUND

The Town is a municipality in the State of South Carolina that provides water and sewer services through utilities owned by the Town. The Town has a policy of requiring utility customers who receive water and sewer services to petition to be annexed into the Town if the Town becomes contiguous to their property. The property at 705 North Lake Drive is owned by the PLCW Trust which leases the property to Scott's Furniture Company.

The Town filed this declaratory judgment action pursuant to S.C. Code Ann. § 15-53-20 claiming a right to terminate water service to the subject property upon reasonable notice. The PLWC Trust and Scott's Furniture Company deny the Town's right to terminate water service claiming that such a right violates the contract between the Town and Henry Wingard executed on September 30, 1961. Additionally, the Defendants argue that the October 13, 1961 Town resolution requires the Town to sell water to the subject property without requiring annexation as a precondition of the sale. The Defendants also seek attorney's fees if successful.

SUMMARY OF EVIDENCE

The parties stipulated to the following facts: (1) Scott's Furniture Store is contiguous to the Town; (2) Patty C. Wingard is the trustee of the PLCW Trust; and (3) the PLCW Trust owns the

subject property. Six witnesses testified at the hearing: John D. Hanson, Patty C. Wingard, Bryson Scott, Thomas "Tom" Wingard, Georgia Wingard Berger, and James A. Lutz.

John Hanson, Director of Planning, Building, and Technology for the Town, testified he is familiar with the Town's annexation policy. The policy requires out-of-town utility customers to annex into the Town, if the property is contiguous to the Town, as a requirement to receive utility service. Mr. Hanson testified that an out-of-town utility customer whose property is not contiguous to the Town at the time utility service begins, may receive utility service only if the out-of-town customer signs an agreement to have the property annexed upon becoming contiguous. The utility service is provided at a higher rate than those customers located in the Town. Hanson identified Scott's Furniture on a county map contiguous to the Town. Pl. Ex. 3.

Patty C. Wingard, the widow of Henry Wingard and co-trustee of the PLCW Trust, testified that her late husband, in 1961, built the two-inch water line on Hamilton Street to service the residential portion of Lakewood, a subdivision he developed. She remembered seeing the two-inch water line being installed in front of her house on the corner of Hamilton Street and Georgia Lane. Hamilton Street is two blocks from the Scott's Furniture property and runs parallel to Northwood Road. Northwood Road lies between the Scott's Furniture and Hamilton Street.

Bryson Scott ("Scott"), co-owner of Scott's Furniture Company, testified that his father built the furniture store at its present location in 1962 and the Town has provided water service at Scott's Furniture since then. Scott took over the business in 1978. The property was initially used as a student parking lot by Lexington High School, which at the time was located across the street from the Scott's Furniture property. There was a gas station near the property that was owned by Henry Wingard.

Tom Wingard, son of Henry and Patty Wingard, testified about the 2013 letter he received from the Town seeking to annex the subject property. Pl. Ex. 3. As the executor of the PLCW Trust, Tom replied to the Town's letter, expressing that PLCW did not consent to be annexed into the Town. Def. Ex. 4. Tom testified about several drawings, tax maps, plats, and other documents showing the Lakewood subdivision and the location of Scott's Furniture. The Scott's Furniture property is a parcel in Block "E" of Lakewood Subdivision.

Georgia Wingard Berger, daughter of Henry and Patty Wingard and co-trustee of the PLCW Trust, testified she became aware of the contract between Henry Wingard and the Town in 2013. She knew her father, Henry Wingard, provided water lines to the Town in exchange for

water service to his properties. She was only four years old when the property was developed. Georgia's testimony was cumulative to the testimony of her brother, Tom Wingard.

James Allen Lutz ("Lutz"), Utility Director for the Town of Lexington, has worked for the Town for twenty-nine years and is responsible for maintaining the Town's water systems. He testified the water line in question was constructed in 1961 and completed in 1962. When the Town and Henry Wingard entered the agreement in 1961, the Town permitted Henry Wingard to dig up the existing two-inch water line and replace it with a six-inch water line. Further, Lutz testified that in 2006, the Town replaced the two-inch water lines with six-inch water lines to accommodate growing demands. According to Lutz, there is a requirement for utility customers to annex into the Town to receive water service if the property becomes contiguous to the Town. Lutz does not know when the Town created this policy.

EXHIBITS

Plaintiff's Exhibit 1 – Town of Lexington GIS
Plaintiff's Exhibit 2 – 1962 map of water distribution system for the Town of Lexington
Plaintiff's Exhibit 3 – County GIS Town of Lexington
Plaintiff's Exhibit 4 – 2013 Letter from Town of Lexington to Henry Wingard regarding annexation of property at 705 N. Lake Drive
Defendant's Exhibit 1 – October 13, 1961 Town of Lexington Resolution between Henry Wingard and Mayor J.K. Addy
Defendant's Exhibit 2 – September 30, 1961 Agreement between Henry Wingard and Mayor J.K. Addy
Defendant's Exhibit 3 – 2013 Letter from the Town of Lexington regarding annexation of property at 705 North Lake Drive
Defendant's Exhibit 4 – Letter from Thomas Wingard in response to the 2013 annexation letter from the Town of Lexington
Defendant's Exhibit 5 – 1958 Plat of Subdivision of Lakewood
Defendant's Exhibit 6 – 1972 Plat of Lakewood Subdivision, Block E
Defendant's Exhibit 7 – Aerial map of Town of Lexington limits
Defendant's Exhibit 8 – County map of the Lakewood Subdivision

FINDINGS OF FACT

Based upon the testimony and the exhibits presented, this Court makes the following findings of fact:

1. On September 30, 1961, Henry Wingard and J. K. Addy, the Mayor of Lexington, signed an Agreement ("Agreement") permitting Henry Wingard to connect a six-inch water line onto the Town's existing water line with the goal of extending the water system into the "Lakewood Area – George Lane Road." Def. Ex. 2.

2. The Agreement provided that the Town, "shall maintain said line after it is completed and agrees to sell water to the Party of the Second Part within the limits of its existing water system." Def. Ex. 2.
3. On October 13, 1961, the Lexington Town Council passed a resolution executed by Henry Wingard, the Mayor, and Councilmen present, granting Henry Wingard permission to "take up the present 2-inch water main where the new 6-inch water main was put and install the 2-inch on Hamilton Street." Def. Ex. 1.
4. The resolution also stated, "It is agreed that the Town shall maintain said water line after it is completed and it is further agreed that the Town shall afford water services to the party of the second part, their heirs and assigns within the limits of the Town's water system at the prevailing water rates charged by the Town." Def. Ex. 1.
5. After entering into the agreement and resolution, Henry Wingard installed a two-inch water main on Hamilton Street at his own expense. The Town also had the right to tap onto the water line and incorporate it into its water distribution system. Def. Ex. 1.
6. The parties operated under the agreement and resolution for over fifty-five years. During this time, the Town continued to sell water to Henry Wingard, and upon his death in 2006, the Town continued to sell water to his heirs as owners of the property located at 705 North Lake Drive.
7. In 2013, the Town sent a letter asking the owners of the property to sign a petition to be annexed within the Town's limits. Def. Ex. 3.
8. The PLCW Trust declined to do so based upon the long standing arrangements with the Town to provide water services for the subject property. Def. Ex. 4.

CONCLUSIONS OF LAW

Plaintiff brought this action pursuant to South Carolina's Uniform Declaratory Judgment Act ("the Declaratory Judgment Act"), which grants the court "power to declare rights, status, and other legal relations whether or not further relief is or could be claimed." S.C. Code Ann. § 15-53-20. "To state a cause of action under the Declaratory Judgment Act, a party must demonstrate a justiciable controversy." *Thompson v. State*, 415 S.C. 560, 565, 785 S.E.2d 189, 191 (2016). A justiciable controversy is a "real and substantial controversy which is appropriate for judicial determination, as distinguished from a dispute or difference of a contingent, hypothetical, or

abstract character." *Id.* The Court should liberally construe and administer the Declaratory Judgment Act. *Id.*; *see also* S.C. Code Ann. § 15-53-130.

The Town argued it has the right to discontinue water service to the Scott's Furniture property unless annexed into the Town's limits. Further, the Town argued the contract between the Town and Henry Wingard may be terminated upon reasonable notice to the other party. Notice of the Town's intent to terminate water service to Scott's Furniture property if not annexed into the Town's limits was provided to Defendants in 2013. The Defendants, however, argue the contract is enforceable because the resolution stated that, "the Town shall afford water services to the party of the second part [Henry Wingard], their heirs and assigns." Def. Ex. 1.

The Town relied on *Childs v. Columbia*, 87 S.C. 566, 70 S.E. 296 (1911), in which the plaintiff sued the City of Columbia ("City") alleging the City, in an agreement 10 years earlier, would furnish his residence and other structures he owned with water. The agreement did not have any provision for duration or termination. At his own expense, Childs built water lines from his properties and connected it to the City's distribution mains. After serving the plaintiff's properties for ten years as out-of-town customers, the City imposed an out-of-town rate several times higher than the in-town-rate. Childs argued he was entitled to the same rate charged to in-town customers.

The Supreme Court held that "the city was under no public duty to furnish water to the plaintiff at reasonable rates or to furnish it at all." *Childs*, 87 S.C. at 566, 70 S.E. at 298. According to the Court, the "fatal defect of the complaint is that it alleges a contract indefinite as to the price and duration of the service, conferring no right on the plaintiff to require the service of the city beyond the day fixed by reasonable notice of its intention to increase the rate charged, or to cease altogether to furnish water." *Id.* 87 S.C. at 566, 70 S.E. at 299 (emphasis added). The Court determined the only "reasonable intention that can be imputed to the parties is that the contract may be terminated by either, on giving reasonable notice of his intention to the other." *Id.*, 87 S.C. at 566, 70 S.E. at 298. The Supreme Court reasoned that "where the parties to a contract express no period for its duration, and no definite time can be implied from the nature of the contract or from circumstances surrounding them, it would be unreasonable to impute to the parties an intention to make a contract binding themselves perpetually." *Id.*

Historically, "perpetual contracts have not been favored in South Carolina and are generally upheld only where the perpetual nature of the agreement is an express term of the contract." *Carolina Cable Network v. Alert Cable TV, Inc.*, 316 S.C. 98, 101, 447 S.E.2d 199, 201

(1994). In this case, the September 30, 1961 agreement states, "the Town shall maintain said line after it is completed and agrees to sell water to [Henry Wingard] within the limits of its existing water system." The agreement lacks specific duration. As in *Childs*, the agreement between parties expressed no period for its duration and no definite time can be implied from the nature of the contract or from the circumstances surrounding it. Based upon the document, the only reasonable intention to be drawn is that the contract may be terminated by either party, after reasonable notice of his intention to the other. The Town provided notice to the Defendants of its intent to discontinue water service to the Scott's Furniture property if it was not annexed into the Town's limits.

PLCW Trust and Scott's Furniture Company argues the Agreement between the Town and Henry Wingard is enforceable because the Town agreed to provide services to Mr. Wingard's "heirs and assigns." Defendants relied on *Creswell v. Bank of Greenwood*, 210 S.C. 47, 41 S.E.2d 393 (1947), and argue the Supreme Court construed the words "heirs and assigns" to mean a permanent gift of fee simple interest in the conveyance of land. Defendants misread this case. The deed in *Creswell* stated, "To be his, his heirs and assigns forever." *Creswell* 210 S.C. at 47, 41 S.E.2d at 395 (emphasis added). The construction of these words in the deed "leave no room for speculation upon the intent of the grantor." *Creswell*, 210 S.C. at 55, 41 S.E.2d at 397. The deed clearly shows the intention of the grantor to divest himself completely of possession by its terms including the word "forever", which signifies perpetuity.

The Agreement between Henry Wingard and the Town does not contain the express terms creating the perpetual nature of the agreement. More specifically, the agreement and the resolution are completely devoid of any term of duration. As stated in *Childs*, "the only reasonable intention that can be imputed to the parties is that the contract may be terminated by either, on giving reasonable notice of his intention to the other." 87 S.C. at 572, 70 S.E. at 298. The Town gave the Defendants reasonable notice of its intent to disconnect water service if the Defendants did not annex into the Town. The Town has the right to terminate water service if the Defendants do not petition to be annexed within the Town's limits.

IT IS THEREFORE DECLARED AND ORDERED that the Town is within its lawful rights to demand that Defendants agree to annex the Scott's Furniture property as a requirement for the Town to continue to provide water service to the property.

IT IS FURTHER ORDERED that upon continued refusal of Defendants to agree to annexation of the Scott's Furniture property, the Town is authorized to terminate water service to the property after 90 days from the date of this order.

Signature page to follow.

ELECTRONICALLY FILED - 2020 Dec 21 2:25 PM - LEXINGTON - COMMON PLEAS - CASE#2018CP3203352
ELECTRONICALLY FILED - 2020 May 04 10:30 AM - LEXINGTON - COMMON PLEAS - CASE#2018CP3203352



Lexington Common Pleas

Case Caption: Town Of Lexington South Carolina VS Patty C Wingard Trustee
Plcw Trust , defendant, et al
Case Number: 2018CP3203352
Type: Order/Other

IT IS SO ORDERED!

s/ Alison Renee Lee

Electronically signed on 2020-05-04 10:18:51 page 8 of 8

ELECTRONICALLY FILED - 2020 Dec 21 2:25 PM - LEXINGTON - COMMON PLEAS - CASE#2018CP3203352
ELECTRONICALLY FILED - 2020 May 04 10:30 AM - LEXINGTON - COMMON PLEAS - CASE#2018CP3203352



***** IMPORTANT NOTICE - READ THIS INFORMATION *****
NOTICE OF ELECTRONIC FILING [NEF]

A filing has been submitted to the court RE: 2018CP3203352

Official File Stamp: 05-04-2020 10:30:01 AM
Court: CIRCUIT COURT
Common Pleas
Lexington
Case Caption: Town Of Lexington South Carolina VS Patty C Wingard Trustee Plcw Trust , defendant, et al
Document(s) Submitted: Order/Other Order/Other
Filed by or on behalf of: Alison Lee

This notice was automatically generated by the Court's auto-notification system.

The following people were served electronically:

Clifford O. Koon, Jr. for Town Of Lexington South Carolina
Bradford T. Cunningham for Town Of Lexington South Carolina
James Edward Bradley for Patty C Wingard Trustee Plcw Trust et al

The following people have not been served electronically by the Court. Therefore, they must be served by traditional means:

ELECTRONICALLY FILED - 2020 Dec 21 2:25 PM - LEXINGTON - COMMON PLEAS - CASE#2018CP3203352



***** IMPORTANT NOTICE - READ THIS INFORMATION *****
NOTICE OF ELECTRONIC FILING [NEF]

A filing has been submitted to the court RE: 2018CP3203352

Official File Stamp: 12-21-2020 02:25:46 PM
Court: CIRCUIT COURT
Common Pleas
Lexington
Case Caption: Town Of Lexington South Carolina VS Patty C Wingard Trustee Plcw Trust , defendant, et al
Document(s) Submitted: Appeal/Notice of Appeal to Court of Appeals
- E-Filing/Additional Parts
- E-Filing/Additional Parts
Filed by or on behalf of: James Edward Bradley

This notice was automatically generated by the Court's auto-notification system.

The following people were served electronically:

Clifford O. Koon, Jr. for Town Of Lexington South Carolina
Bradford T. Cunningham for Town Of Lexington South Carolina
James Edward Bradley for Patty C Wingard Trustee Plcw Trust et al

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