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**Apr 27 2021**

**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM LEXINGTON COUNTY  
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

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Appellate Case No. 2020-001043

Case No. 2018-CP-32-03352

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Town of Lexington South Carolina, ..... Respondent,

v.

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

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**INITIAL REPLY BRIEF OF APPELLANT**

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## INTRODUCTION

Respondent's brief makes two main arguments: (1) the term heirs and assigns only relates to the transferability of title or rights; and (2) the contract between Henry Wingard and the Town was not rescinded; therefore, the Town should keep the consideration given by Henry Wingard without honoring its obligation to provide water.

## ARGUMENTS

### **I. The Town's Argument That the Term "Heirs and Assigns" Only Concerns Transferability Robs the Term of Its Ordinary Meaning.**

The term "heirs and assigns" by its everyday meaning shows an intent to be bound into the future, as an heir does not exist until the grantor has died. Furthermore, the Supreme Court of South Carolina in *Rush v. Hilton*, 83 S.C. 444, 65 S.E. 525 (1909) dealt with a similar issue.

In *Rush*, the Supreme Court of South Carolina found that Hilton was permitted to harvest timber because he had been assigned that right by a prior party in interest. That party had a clause in the grant which gave him and his "heirs and assigns," the right to harvest timber. *Id.* Like the deed in *Rush*, the Town's contract uses the term "heirs and assigns" to denote both a period of duration and a right to transfer. To hold otherwise would not give the term heirs any meaning at all because an heir cannot exist until death. Therefore, this Court should find that the term "heirs and assigns" is a term of duration in the context of the contract between Henry Wingard and the Town.

### **II. The Town's Reliance upon *Marrujo v. Sanderson*, 2008 NMCA 112, 191 P.3d 588 (N.M.App. 2008), Is Misplaced.**

The Town of Lexington relies upon *Marrujo v. Sanderson*, 2008 NMCA 112, 191 P.3d 588 (N.M.App. 2008) to argue that the term "heirs and assigns" is never a term of duration. That case is not similar to this case and favors the Wingards. It is also not binding upon this Court as it is from a foreign jurisdiction.

In *Marrujo*, the predecessors in interest of the Marrujos conveyed property to the predecessors in interest of the Sandersons. The deed contained a reservation, which provided that the grantors, their heirs and assigns, reserved all timber measuring a certain circumference. Throughout the years, there were fights about whether the Marrujos were still allowed to access the property to harvest timber that was in the deed. The Marrujos filed suit to enforce their right to harvest the timber, and the Sandersons brought a motion for summary judgment.

The New Mexico Court of Appeals held that the term heirs and assigns was an ambiguous term of duration as it related to the deed. It found in favor of the Sandersons due to a New Mexico Supreme Court case that held a perpetual right in timber should only be upheld if the parties plainly manifested their intention.

If this Court follows the New Mexico decision and finds the term “heirs and assigns” ambiguous, it should construe the term in favor of the Wingards and against the Town. The agreement is in a Town ordinance on Town letterhead. Thus, the Town is the drafter. And, ambiguous terms are construed against the drafting party. Resolving the ambiguity created by the Town in favor of the Wingards requires that the phrase “heirs and assigns” create a term of duration such that the agreement is enforceable.

### **III. The Town Seeks to Rescind Its Contract and Retain the Benefit It Received.**

The Town argues that this case “is not about the rescission of any contract.” Rescission is an “abrogation or undoing of [a contract] from the beginning, which seeks to create a situation the same as if no contract ever had existed.” *Government Employees Ins. Co. v. Chavis*, 254 S.C. 507, 516, 176 S.E.2d 131, 135 (1970). A contract existed between Henry Wingard and the Town. A contract requires offer, acceptance, and consideration. *Carolina Amusement Co. v. Connecticut Nat'l Life Ins. Co.*, 313 S.C. 215, 437 S.E.2d 122 (Ct.App.1993). Here the agreement and resolution

show the offer and acceptance. There was consideration because Henry Wingard and his heirs and assigns received the right to water from the Town at its normal rates. The Town also received a benefit. It received the ability to expand its water system outside the town limits by using the water lines installed by Mr. Wingard. At the Town's urging, the Trial Court rescinded the contract. It allowed the Town to break its promise to provide water while retaining the water lines the Town received in exchange for this promise.

Therefore, if this Court finds the Town does not have to honor its promise, the Wingards are entitled to the return of the water lines given in exchange for that promise.

### **CONCLUSION**

This Court should require the Town to honor its promise to provide water service to the Wingards. If the Court allows the Town to break its promise, the Court should require the Town to return the water lines given in exchange for the Town's promise. The government itself is the source of law. And, even more than its citizens, the government must keep its promises. To do less creates a government in which people cannot trust.

Respectfully Submitted,

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**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 Reply Brief on the Respondent by depositing a copy of same in the United States Mail, postage prepaid, on April 26, 2021, and by electronic mail, addressed to its attorneys of record as follows:

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April 26, 2021