IN THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE BEAUFORT COUNTY
COURT OF COMMON PLEAS

HONORABLE MARVIN H. DUKES, III
BEAUFORT COUNTY MASTER-IN-EQUITY AND
SPECIAL CIRCUIT COURT JUDGE

CASE NO.: 2014-CP-07-1402

THOMAS J. O'BRIEN,

Appellant,

vs.

HENRY JAMES VAN DAM, THERESA D. VAN DAM, CLYDE A. SANDERS, JANET S. SANDERS, TIMOTHY D. BROUILLETTE, JULIE LYNN BROUILLETTE, ROBB R. ALEXANDER BONNIE M. ALEXANDER, FLORIEN DAVADI, MARIA OUTEIRAL, CATHERINE A. DAVIS, ANTHONY R. GOMEZ, III, MARY E. GOMEZ, TRAVIS HUTCHINGS, AMY J. HUTCHINGS, BRUCE K. PARKER, SR., MARY E. PARKER, ALBERT L. KEETON, DONNA S. KEETON, GREG BRANTLEY, KENISH D. BRANTLEY, EMERSON G. DICKSON, EVELYN DICKSON, WILLIAM H. WALKER, JR., DEBORAH L.WALKER, LINDA J. GOMEZ, CHARLES J. BRACE, MEREDITH N. BRACE, CHARLES E. HORTON, SHARON J. HORTON, EDWARD CANALES, CAROLINE M. CANALES, MICHAEL L. SAPP, MARJORIE H. SAPP, WILLIAM J. DRAINS, SYMATHA DRAINS, GARY W. TAYLOR, JOHN W. WESTMORELAND, PHYLLIS WESTMORELAND, MIDWEST CONCEPTS CORPORATION, BARRY L. REESE, GREGORY C. POOK, JUDITH A. ATHEY, RICHARD A. GALGANO, RAYMOND F. MATHIS, MAXINE L. MATHIS, BERNARD MCINTYRE, RALPH RAY KEARNS, JR., CHERYL LYNN J. KEARNS, GUY SIDNEY RICHARDSON, LINDA SUE RICHARDSON, DIANNA HUSTON, DANIEL B. MORGAN, MICHELLE J. MORGAN, LARRY G. MERRIFIELD, EILEEN MERRIFIELD, JAMES FARMER, CATHERINE B. FARMER, BRENDA O'SHIELDS, WARREN J. DISBROW, JOHN F. DYKEMAN, CAROL W. DYKEMAN, EVERETT R. LENNEX, ROSITA C. LENNEX, RAUL DENISE

DOMINGUEZ, PAULA CHRISTINE WRIGHT, SHIRLEY A. SNYDER, BENJAMIN J. KILEY, JAMES F. BAUER, REVOCABLE TRUST, BENJAMIN KOLB, WILLIAM MARK FRY, ELIZABETH ANN FRY, MARK A. COOK, ROSE M. COOK AND SHAKY POND, LLC

Respondents.

APELLANT'S INITIAL BRIEF

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II. THE MASTER IN EQUITY ERRED IN FAILING TO FIND AS A MATTER OF FACT, AND CONCLUDE AS A MATTER OF LAW, THAT THE DOUCMENT ENTITLED "AGREEMENT TO TERMINATE COVENANTS" WAS NOT PROPERLY RECORDED OR EXECUTED, INASMUCH AS IT IS EVIDENT FROM THE FACE OF THE DOCUMENT THAT IT WAS FALSELY AND FRAUDULENTLY EXECUTED.

III. THE MASTER IN EQUITY ERRED IN FAILING TO FIND AS A MATTER OF FACT, AND CONCLUDE AS A MATTER OF LAW, THAT THE SIGNATURES ON THE DOCUMENT ENTITLED "AGREEMENT TO TERMINATE CONVENANTS" WERE FRAUDULENTLY OBTAINED OR INDUCED.

IV. THE MASTER IN EQUITY ERRED IN FAILING TO FIND AS A MATTER OF LAW THAT ALL BUT FIVE (5) OF THE LOT OWNERS WHO SIGNED THE DOCUMENT ENTITLED "AGREEMENT TO TERMINATE COVENANTS," BY VIRTUE OF THEIR DEFAULT, HAD ADMITTED AS A MATTER OF LAW BOTH THAT THE DOCUMENT WAS FRAUDULENTLY RECORDED AND THAT THEY WERE FRAUDULENTLY INDUCED INTO EXECUTING THE "AGREEMENT TO TERMINATE COVENANTS."

V. THE MASTER IN EQUITY ERRED IN FAILING TO FIND AS A MATTER OF FACT AND CONCLUDE AS A MATTER OF LAW THAT THE ATTEMPT TO TERMINATE THE RESTRICTIVE COVENANTS DURING THE TERM OF THE AUTOMATIC EXTENSION WAS INEFFECTIVE.

STATEMENT OF THE CASE

A. Procedural History

This is an action to rescind the attempted termination of Restrictive Covenants for Oakmont Subdivision, a residential subdivision located in Beaufort County, South Carolina. The parties are the owners of the lots in Oakmont Subdivision.

This action was commenced by the filing of a Summons and Complaint in the Beaufort County Court of Common Pleas on June 11, 2014. In his Complaint, the Appellant alleges that a document entitled "Agreement to Terminate Covenants," which purports to terminate the Restrictive Covenants for Oakmont Subdivision, was recorded in the Office of the Register of Deeds for Beaufort County on April 16, 2014. In his first cause of action, the Appellant alleges that the "Agreement to Terminate Covenants" was improperly executed and recorded for a number of reasons itemized in the Complaint. In his second cause of action, the Appellant alleges that the "Agreement to Terminate Covenants" was fraudulently induced. As a result, the Appellant requests that the "Agreement to Terminate Covenants" should not have been recorded, or is null and void.

The Respondent Bernard McIntyre filed his Answer to the Complaint on June 24, 2014, alleging that the Covenant and Lot Restrictions for Oakmont Subdivision continue to be valid and should be enforced throughout the subdivision. See Answer of Bernard McIntyre, ¶III. He accordingly requested that the relief prayed for in the Complaint be granted and the Restrictive Covenants continue to be enforced. *Id.*

The Respondent Warren J. Disbrow filed his Answer to the Complaint on July 7, 2014, denying the material allegations of the Complaint and praying that the Complaint be dismissed. See Answer of Warren J. Disbrow.

The Respondent Gary W. Taylor filed his Answer to the Complaint on July 9, 2014, expressing his desire to have the Restrictive Covenants for the subdivision terminated. See Answer of Gary W. Taylor.

The Respondent Paula C. Wright filed her Answer to the Complaint on July 18, 2014, denying the material allegations of the Complaint and requesting that the same be dismissed.

The Respondents Michael L. and Marjorie H. Sapp filed their Answer to the Complaint on July 22, 2014, simply asserting that they were without knowledge or information sufficient to form a belief as to the truth of the material allegations of the Complaint. See Answer of Michael L. and Marjorie H. Sapp.

The Respondents Ralph Ray Kearns, Jr. and Cheryl Lynn J. Kearns filed their Answer to the Complaint on September 9, 2014, denying the material allegations of the Complaint and praying that the Complaint be dismissed.

The Respondent Carol W. Dykeman responded to the Complaint alleging that she was not coerced nor misguided into signing the "Agreement to Terminate Covenants." See Answer of Carol W. Dykeman.

The Respondent Judith A. Athey responded to the Complaint on June 21, 2014 asserting that she opposed the "Agreement to Terminate Covenants" and accordingly did not sign it.

The Respondents Raymond F. and Maxine L. Mathis responded to the Complaint on June 21, 2014, stating that they did not agreement with the "Agreement to Terminate Covenants," and accordingly did not sign it.

The Respondent Barry L. Reese and Gregory C. Pook answered the Complaint on June 30, 2014, stating that neither one of them signed the "Agreement to Terminate Restrictive Covenants," and they both are in favor of keeping the Restrictive Covenants for the subdivision.

Shaky Pond, LLC answered the Complaint on June 21, 2014, stating that it did not agree with the "Agreement to Terminate Restrictive Covenants," and accordingly did not sign the Agreement.

The Respondents Ralph Ray Kearns, Jr. and Cheryl Lynn J. Kearns were represented by Kenneth L. Tootle, Esquire. All of the remaining Respondents are pro se. Of the pro se Respondents, the Respondent Bernard J. McIntyre, is a licensed and practicing attorney.

None of the remaining Respondents filed an Answer or responded to the Complaint.

On June 3, 2015 this case was referred to the Honorable Marvin H. Dukes, III, Master in Equity for Beaufort County, with direct appeal to the South Carolina Court of Appeals. This matter was tried before the Honorable Marvin H. Dukes, III, Master in Equity for Beaufort County, on August 4, 2015. At the conclusion of the hearing, Judge Dukes took the matter under advisement, and gave the parties the opportunity to submit Post-Trial Briefs. The Appellant filed his Post-Trial Brief on September 25, 2015, and the Respondents Kearns filed their Post-Trial Brief on April 19, 2016.

On May 27, 2016 Judge Dukes filed his Order and Decree, concluding that the "Agreement to Terminate Covenants" was valid and enforceable, and effectively terminated the Restrictive Covenants for Oakmont Subdivision.

On June 6, 2016 the Appellant filed a Motion pursuant to Rule 59 of the South Carolina Rules of Civil Procedure for an Order Altering, Amending and Reconsidering the Order and Decree filed on May 27, 2016.

On August 15, 2016 Judge Dukes filed his Order denying the Appellant's Motion to Alter, Amend or Reconsider. The Appellant filed his Notice of Appeal to the South Carolina Court of Appeals on September 7, 2016.

B. Factual Background

Oakmont Subdivision is a residential subdivision located in Beaufort County, South Carolina. The Appellant and each of the Respondents are the owners of homes located within Oakmont Subdivision. The Appellant has resided there since 1989. Tr., pg. 19, line 9.

The subdivision is comprised of single family residences. *Id.,* pg. 21, lines 8-9.

The original Restrictive Covenants for Oakmont Subdivision were duly recorded in the Office of the Register of Deeds for Beaufort County, South Carolina on February 14, 1978 in Record Book 259 at Page 2000. Plaintiff's Exhibit 2.

These Restrictive Covenants were amended pursuant to a document entitled "Amendment to Restrictive Covenants Oakmont Subdivision" which was filed on February 8, 1980 in the Office of the Register of Deeds for Beaufort County in Record Book 227 at Page 799. Plaintiff's Exhibit 3.

The Restrictive Covenants for Oakmont Subdivision contain the following provision:

> 19. All Covenants and Restrictions contained in this Declaration shall run with the land and shall be binding on all parties and persons until January 1, 1985; after which time said Covenants and Restrictions shall be automatically extended for successive periods of five (5) years, unless an instrument signed by a majority of the then property owners within Oakmont Subdivision has been recorded agreeing to change these Covenants in whole or in part or to terminate the same.

Plaintiff's Exhibit 2, pg. 3.

On April 16, 2014 a document entitled "Agreement to Terminate Covenants," which purportedly terminates all Restrictive Covenants in Oakmont Subdivision, was recorded in the Office of the Register of Deeds for Beaufort County, South Carolina in Record Book 3315 at Page

1529. Plaintiff's Exhibit 7.

I. THE MASTER IN EQUITY ERRED IN FAILING TO FIND AS A MATTER OF FACT, AND CONCLUDE AS A MATTER OF LAW, THAT THE DOCUMENT ENTITLED "AGREEMENT TO TERMINATE CONVENANTS" WAS NOT PROPERLY RECORDED OR EXECUTED, INASMUCH AS THE SIGNERS OF THIS DOCUMENT WERE NOT "GRANTORS, MORTGAGORS, VENDORS OR LESSORS."

It is respectfully submitted that the Master in Equity erred in failing to find as a matter of fact, and conclude as a matter of law, that the document entitled "Agreement to Terminate Covenants" was not properly recorded or executed, inasmuch as the signers of this document were not "grantors, mortgagors, vendors or lessors."

Covenants and Lot Restrictions for Oakmont Subdivision were duly recorded in the Office of the Register of Deeds for Beaufort County on February 14, 1978, and amended pursuant to a document recorded on May 12, 1978. These Covenants provide in pertinent part as follows:

> "All covenants and restrictions contained in this declaration shall run with the land and shall be binding on all parties and persons until January 1, 1985; after which time said Covenants and Restrictions shall be automatically extended for a successive period of five (5) years, unless an instrument signed by a majority of the then property owners within Oakmont Subdivision has been **recorded** agreeing to change these covenants in whole or in part or to terminate the same."

Covenants, ¶19 (emphasis added).

Section 19 of the Covenants, quoted above, expressly mandates that an instrument purporting to terminate the Covenants must be recorded. In order to be properly recorded, a document must comply with S.C. Code Ann. §30-5-30 (2014), which is aptly entitled "Prerequisites to Recording." This statute directs that "before any . . . instrument in writing can be recorded in this State, it must be acknowledged or proved" by one of two methods described in subsections (A) or (B) of the statute. By use of the word "must" compliance with the prerequisites

set forth in this statute is mandatory.

Accordingly, in order for a document to be properly recorded in this State, it must be "acknowledged or proved" by one of the two methods set forth in subsections (A) or (B) of §30-5-30. Both subsection (A) and subsection (B) reference the execution of a "deed or other instrument," and the phrase "other instrument" clearly includes a document such as the subject Agreement to Terminate Covenants. Subsection (A), however, has a broader scope of coverage than subsection (B). Subsection (A) is universal in scope, encompassing all types of individuals who execute an instrument. Subsection (B), on the other hand, is limited to a document signed by a "grantor, mortgagor, vendor, or lessor."

An examination of the Agreement to Terminate Covenants reveals that it was drafted in an attempt to comply with subsection (B). The Agreement to Terminate Covenants has a signature line for the lot owner, adjacent to signature lines for two (2) witnesses and then a separate page for one of the witnesses to acknowledge before a notary public that the witness observed the lot owner sign the agreement. This is the format established by subsection (B) of §30-5-30.

Accordingly, a fatal flaw in the Agreement to Terminate Covenants is that, on its face, it was drafted and executed in an attempt to comply with subsection (B), but subsection (B) only applies if the document is being signed by a "grantor, mortgagor, vendor, or lessor." Since the Agreement to Terminate Covenants was signed by lot owners, and not by grantors, mortgagors, vendors, or lessors, subsection (B) does not apply to the Agreement to Terminate Covenants. Proper execution of the Agreement to Terminate Covenants should have been in accordance with subsection (A), under which the instrument may be proved by the affidavit of a subscribing witness to the instrument, taken before some officer within the State competent to administer an oath, such as a notary public.

This error is compounded by the fact that the oath given before the notary on both March 29 as well as again on April 1, 2014 is nonsensical on its face. The typed portion of the oath given to the notary recites as follows:

> Personally appeared before me the first witness named above and made oath that s/he saw the within named _____ sign, seal and as their act and deed, deliver the within written instrument and that s/he with **the other witness named above** witnessed the execution thereof.

Exhibit 7, pp. 12 and 13 of 13. Although this typed portion of the probate to this document expressly references "the first witness named above", as well as "the other witness named above" there is **no** first witness named above, nor is there another witness named above. There oaths, accordingly, are nonsensical on their face, and do not comply with either subsection (A) or subsection (B) of §30-5-30.

Since this document does not comply with the recording prerequisites mandated by §30-5-30, it is not recordable, and accordingly does not satisfy the recording requirement of a document designed to terminate the Oakmont Subdivision Restrictive Covenants.

II. THE MASTER IN EQUITY ERRED IN FAILING TO FIND AS A MATTER OF FACT, AND CONCLUDE AS A MATTER OF LAW, THAT THE DOUCMENT ENTITLED "AGREEMENT TO TERMINATE COVENANTS" WAS NOT PROPERLY RECORDED OR EXECUTED, INASMUCH AS IT IS EVIDENT FROM THE FACE OF THE DOCUMENT THAT IT WAS FALSELY AND FRAUDULENTLY EXECUTED.

It is respectfully submitted that the Master in Equity erred in failing to find as a matter of fact and conclude as a matter of law that the document entitled "Agreement to Terminate Covenants" was not properly recorded or executed, inasmuch as it is evident from the face of the document that it was falsely and fraudulently executed.

Even if subsection (B) of §30-5-30 were applicable, it is evident from the face of the Agreement to Terminate Covenants that this document does not comply with the requirements of subsection (B).

Subsection (B) requires that the signing of the document must be acknowledged by the grantor, mortgagor, vendor, or lessor in the presence of two (2) witnesses, taken before some officer within this State competent to administer an oath (such as a notary public). An examination of the signature pages of the Agreement to Terminate Covenants shows that each lot owner's signature is witnessed by the same two (2) witnesses. The signature of witness number one (1) is not legible, and he is accordingly referred to herein as John Doe. Witness number two (2) appears to be the notary public. Plaintiff's Exhibit #7, pp. 2 – 9 of 13.

One batch of lot owners signed the Agreement on March 29, 2014. A second batch of lot owners signed the Agreement on April 1, 2014. A third and final batch of lot owners signed the Agreement on April 9, 2014. Each of these dates is attested to by the lot owner, witness John Doe, and the notary public.

On March 29, 2014 witness John Doe swore under oath before the notary public that he witnessed the lot owners who are listed on page 12 of the Agreement sign the Agreement. *Id.*, pg.

12 of 13.

Subsequently, on April 1, 2014, witness John Doe swore under oath before the notary public that he witnessed the lot owners listed on page 13 of the Agreement sign the Agreement. *Id.*, pg. 13 of 13. These lot owners include Brenda S. O'Shields, Catherine B. Farmer, Kim D. Garcia, and Cesar A. Garcia. This however is impossible, inasmuch as these individuals did not sign the Agreement until eight (8) days later, on April 9, 2014, as shown on page 9 of the Agreement. *Id.*, pg. 9 of 15. (Mysteriously, pages 10 and 11 of the Agreement were never recorded and pages 12 and 13 were switched. *Id.*

Accordingly, it is incontrovertible that witness John Doe falsely and fraudulently gave his oath to the notary on April 1, 2014 that he personally witnessed the lot owners listed on page 13 of the Agreement execute the Agreement, inasmuch as many of these lot owners had not yet done so.[1] This document, accordingly, fails to satisfy the "prerequisites to recording" set forth in §30-5-30 and was wrongfully recorded. Since under the Covenants recording is a prerequisite to terminating covenants, the Agreement to Terminate Covenants should be stricken and those lot owners desiring to terminate the Covenants should be required to begin again, without committing fraud.

Although no case involving an Agreement to Terminate Covenants can be located, by Appellant's counsel, there are several analogous cases involving deeds. For example, in *Faison v. Lewis, 25 N.Y.3d 220, 32 N.E.3d 400 (2015)* a deed that contained a fraudulent signature was held to be void, and not simply voidable. In so holding, the Court noted that "the fraudulent making of a writing to the prejudice of another's rights" is the same thing as a forgery. In the instant case, the fraudulent oath of witness John Doe in an attempt to comply with §30-5-30 was clearly false

[1] It is also possible that someone "doctored" this document after the fact by adding names, but either way, this document is tainted by fraud.

and impossible, and has prejudiced the rights of the other lot owners. *Id., 25 N.Y.3d at 224, 32 N.E.3d at 402-403.*

The "Agreement to Terminate Covenants" contains additional defects.

Maria Outeiral purportedly signed the "Agreement to Terminate Covenants" on March 29. Plaintiff's Exhibit #7, pg. 6 of 13. Her signature, however, was never notarized. In other words, her name is not listed as one of those individuals on the "probate" portion of this document. *Id.,* pp. 12 and 13 of 13. See also Tr., pg. 31, line 24 to pg. 32, line 11. Additionally, Cesar and Kim Garcia signed this document, purportedly as the owners of Lot 21. *Id.,* pg. 9 of 13. The Garcias are also listed as two (2) of the signatories to the document in the probate portion of the Agreement. *Id.,* pg. 13 of 13. The Garcias, however, had sold their property in Oakmont Subdivision over two (2) years earlier, on March 7, 2012. Plaintiff's Exhibit #5. Tr., pg. 32, line 21 to pg. 33, line 14.

III. THE MASTER IN EQUITY ERRED IN FAILING TO FIND AS A MATTER OF FACT, AND CONCLUDE AS A MATTER OF LAW, THAT THE SIGNATURES ON THE DOCUMENT ENTITLED "AGREEMENT TO TERMINATE CONVENANTS" WERE FRAUDULENTLY OBTAINED OR INDUCED.

It is respectfully submitted that the Master in Equity erred in failing to find as a matter of fact and conclude as a matter of law that signatures to the document entitled "Agreement to Terminate Covenants" were fraudulently obtained.

One of the proponents for terminating the Covenants anonymously left flyers in the mailboxes of lot owners falsely stating that if the Covenants were retained, the lot owners would be forced to begin paying dues and assessments to a home owners association. This, of course, is false.

Transcript, pg. 33, line 18 to pg. 38, line 23 and Plaintiff's Exhibit #6.

A party asserting a claim for fraud in the inducement to enter into a contract must establish (1) a representation, (2) its falsity, (3) its materiality, (4) knowledge of its falsity or reckless disregard of its truth or falsity, (5) intent that the representation be acted upon, (6) the hearer's ignorance of its falsity, (7) the hearer's reliance on its truth, (8) the hearer's right to rely thereon, and (9) the hearer's consequent and proximate injury. *Brown v. Stewart,* 348 S.C. 33, 41, 557 S.E.2d 676, 680 (Ct.App. 2001).

Tim and Julie Brouillette have resided in Oakmont Subdivision since 1999. They signed the Agreement to Terminate the Covenants. Plaintiff's Exhibit #7, pp. 7 and 8 of 13. Mr. Brouillette wanted to keep the Restrictive Covenants in place. He describes being hounded by the preponderance of terminating the covenants. Tr., pg. 41, lines 1 – 10. He and his wife were told that they might have to get rid of their shed if the Covenants remained. *Id.,* pg. 42, line 22 to pg. 43, line 2. They also received the anonymous flyer concerning homeowner's fees if the Covenants remained in place. Tr. pg. 43, lines 3 – 7. As Mr. Brouillette described it:

"And then we (Mr. and Mrs. Brouillette) went ahead and signed the ("Agreement to Terminate Covenants") against our better judgment. (sic). And walking home we talked to each other about we didn't really need to sign the Covenants. We don't like - - we don't like confrontation. We don't like to bicker back and forth. And we want to do what is best for the neighborhood, but we also have neighbors that we don't to irritate at the same time, so we went ahead and signed it against our better judgment.

Q. Did you feel pressured into signing it?

A. Yes.

Q. Would you rather have Covenants over the subdivision?

A. Excuse me?

Q. Would you rather have Covenants for the subdivision?

A. Yes. We wanted to have Covenants.

Tr., pg. 41, line 11 to pg. 42, line 2.

The testimony concerning these false representations that were made in order to induce property owners to sign the "Agreement to Terminate Covenants" was uncontradicted.

IV. THE MASTER IN EQUITY ERRED IN FAILING TO FIND AS A MATTER OF LAW THAT ALL BUT FIVE (5) OF THE LOT OWNERS WHO SIGNED THE DOCUMENT ENTITLED "AGREEMENT TO TERMINATE COVENANTS," BY VIRTUE OF THEIR DEFAULT, HAD ADMITTED AS A MATTER OF LAW BOTH THAT THE DOCUMENT WAS FRAUDULENTLY RECORDED AND THAT THEY WERE FRAUDULENTLY INDUCED INTO EXECUTING THE "AGREEMENT TO TERMINATE COVENANTS."

It is respectfully submitted that the Master in Equity erred in failing to find as matter of law that all but five (5) of the lot owners who signed the document entitled "Agreement to Terminate Covenants" by virtue of their default, had admitted as a matter of law both that the agreement was fraudulently recorded and that they were fraudulently induced into executing the agreement.

Of the lot owners who (purportedly) signed the Agreement to Terminate, only five (5) (Kearns, Disbrow, Dykeman, Wright, and Taylor) filed an Answer denying the material allegations of the Complaint. The other lot owners who filed Answers (Athey, Mathis, Shaky Pond, LLC, Reese, Pook, and McIntyre) answered that they either voted to retain the Covenants by refusing to sign the Agreement or affirmatively requested that the Covenants be reinstated. All the remaining lot owners are in default. The entry of default "is an admission by the defaulting party of the well-pleaded allegations of the Complaint. . . . The Defendant, by waiving a contest and suffering a default to be taken against him, admits the truth of the allegations, set out in the Plaintiff's declaration or complaint . . . . *State Ex Rel Medlock v. Love Shop Limited, 286 S.C. 486, 488-89, 334 S.E.2d 528, 530 (Ct.App. 1985).*

V. THE MASTER IN EQUITY ERRED IN FAILING TO FIND AS A MATTER OF FACT,AND CONCLUDE AS A MATTER OF LAW THAT THE ATTEMPT TO TERMINATE THE RESTRICTIVE COVENANTS DURING THE TERM OF THE AUTOMATIC EXTENSION WAS INEFFECTIVE.

It is respectfully submitted that the Master in Equity erred in failing to find as a matter of fact and conclude as a matter of law that the attempt to terminate the Restrictive Covenants during the term of the automatic extension was ineffective.

Section 19 of the Covenants expressly states that the Covenants "shall be binding on all parties and persons until January 1, 1985; after which time said Covenants and Restrictions shall be automatically extended for successive periods of five (5) years . . . ." Accordingly, on January 1, 2010, the Covenants and Restrictions were automatically extended for five (5) more years, or until December 31, 2014. The Agreement in this case, filed April 26, 2014, wrongfully attempts to prematurely terminate the Restrictive Covenants prior to the expiration of the automatic extension.

"Restrictive Covenants are contractual in nature. *Hoffman v. Cohen, 262 S.C. 71, 75, 202 S.E.2d 36, 365 (1974).* "The language of a Restrictive Covenant is to be construed according to the plain and ordinary meaning attributed to it at the time of execution." *Taylor v. Lindsey, 332 S.C. 1, 4, 498 S.E.2d 862, 864 (1998).*

In the instant case, the Agreement attempts to terminate the Restrictive Covenants prior to the expiration of the automatic renewal term. This cannot be done. In *Brown v. Martin, 288 Mich. App. 727, 794 N.W.2d 857 (2010)* the subdivision's Restrictive Covenants provided for automatic ten (10) year renewals unless an instrument signed by a majority of the then owners of the lots had been recorded. The Court held that an attempt by a majority of the lot owners to terminate the Covenants during the automatic renewal period had no effect. The Court noted that the "automatic extension language would be rendered meaningless if the Covenant could be amended by a

majority vote (less than unanimous) at any time" during the extension period. *Id., 288 Mich. App. at 732, 794 N.W.2d at 860-61.* Numerous other Courts have reached the same conclusion. In *Scholten v. Black Hawk Partners, 184 Ariz. 326, 909 P.2d 393(AZ App. 1995)* the Arizona Supreme Court held that an amendment passed two (2) years into a ten (10) year automatic extension period was not effective, stating that to hold otherwise would render the extension provision meaningless. The same conclusion was reached in *Illini Federal Savings and Loan Assoc. v. Elsah Hills Corporation, 12 Ill. App.3d 356, 445 N.E.2d 1193 (1983); In re Wallace's Fourth Southmoor Addition to the City of Enid, Propps, Inc v. Rogers, 874 P.2d 818 (Okla App 1994),* and in *Mauldin v. Panella, 17 P.3d 837 (Colo App. 2000).*

Accordingly, as a matter of law, the attempt to terminate the Restrictive Covenants during the term of the automatic extension was ineffective. Admittedly, if the vote had been not to renew the Restrictive Covenants, or to terminate the Restrictive Covenants effective midnight of December 31, 2014, the vote would have been valid. As it stands, however, the vote was to terminate the Restrictive Covenants during the term of the automatic renewal, which is impermissible.

CONCLUSION

The Restrictive Covenants for Oakmont Subdivision expressly provide that they can be terminated only by a document that has been properly recorded. The document entitled "Agreement to Terminate Covenants" does not satisfy the prerequisites to recording mandated by S.C. Code Ann. §30-5-30 inasmuch as the signers of this document were not "grantors, mortgagors, vendors or lessors."

The document entitled "Agreement to Terminate Covenants" was not properly executed, inasmuch as it is evident from the face of the document that it was falsely and fraudulently

executed.

Signatures to the document entitled "Agreement to Terminate Covenants" were fraudulently induced and obtained as a result of proponents of the document falsely representing that if the Covenants were retained, the lot owners would be forced to begin paying dues and assessments to a homeowner's association.

The vast majority of homeowners in Oakmont Subdivision, by virtue of their default, admitted as a matter of law the well put allegations of the Complaint, including the allegation that they were fraudulently induced to execute the document.

Finally, by the express terms of the Restrictive Covenants they were automatically renewed on January 1, 2010 for five (5) more years, or until December 31, 2014, and, accordingly, the attempt to prematurely terminate the Covenants during the term of the automatic extension was ineffective.

It is accordingly respectfully requested that the South Carolina Court of Appeals reverse the Order of the Honorable Marvin H. Dukes, III, Beaufort County Master in Equity, filed on May 27, 2016, and declare that the document entitled "Agreement to Terminate Covenants" did not terminate the Restrictive Covenants for Oakmont Subdivision, or for such other appropriate relief as this Honorable Court may deem to be just and proper.

Respectfully submitted,

MOSS, KUHN & FLEMING, P.A.

By: _____

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February 16, 2017

CERTIFICATE OF SERVICE

Undersigned certifies that the Appellant's Initial Brief, to which this certificate is affixed, was served upon the party (s) to this action by hand delivery or by depositing a copy of same, enclosed in a first class, postpaid wrapper properly addressed to the attorney(s) of record:

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February 16, 2017

Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: Thomas J. O'Brien v. Henry James Van Dam, et al.
Case No.: 2015-CP-07-1402

Dear Mrs. Kitchings:

Enclosed please find the Initial Brief of Appellants and Designation of Matter to be Included in the Record on Appeal regarding the above-referenced matter. By copy of this letter and the enclosures I am serving a copy of the same on Respondents.

With kindest regards, I am

Very truly yours,

MOSS, KUHN, FLEMING & SMITH, P.A.

H. Fred Kuhn, Jr.

HFKjr:sr
Enclosures

cc: Kenneth L. Tootle, Esquire
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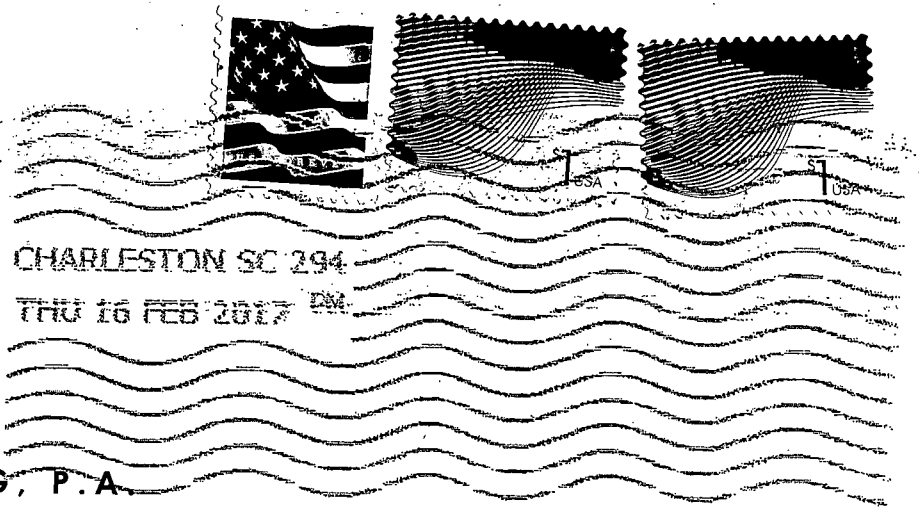

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