

IN THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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APPEAL FROM THE BEAUFORT COUNTY  
COURT OF COMMON PLEAS

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

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CASE NO.: 2014-CP-07-1402  
APPELLATE CASE NO. 2016-001866

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**RECEIVED**

JUN 09 2017

**SC Court of Appeals**

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,

Defendants

OF WHOM

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, 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, BENJAMIN KOLB, WILLIAM MARK FRY, ELIZABETH ANN FRY, MARK A. COOK, and ROSE M. COOK are

Respondents.

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RESPONDENTS' INITIAL BRIEF

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## STATEMENT OF CASE

On or about April 16, 2014 there was filed with Office of the Register of Deeds for Beaufort County, South Carolina that document entitled "Agreement to Terminate Covenants", effectively terminating the Restrictive Covenants for Oakmont Subdivision. This document was recorded after a majority of the lot owners of Oakmont Subdivision met and signed the document, affirming their intent to terminate the restrictions.

On June 11, 2014 the Appellant filed this action to rescind the Agreement to Terminate Covenants. In his First Cause of Action, Appellant alleged the Agreement to Terminate Covenants was improperly executed and recorded for the following reasons:

1: On Page 13 of the document a witness swore before a notary public that she saw certain individuals sign the Agreement to Terminate Covenants. On April 1, 2014 however Appellant avers that those individuals did not sign until April 9, 2014.

2: Signatures of one of the signors to the Agreement to Terminate Covenants was not notarized.

3: The Agreement to Terminate Covenants was signed by Cesar and Kim Garcia, who were no longer owners of property in Oakmont Subdivision.

4: That the Agreement to Terminate Covenants was tampered with after having been signed and notarized by adding names to the list of lot owners.

For a Second Cause of Action the Appellant alleges Fraud in The Inducement in that certain signors to the Agreement to Terminate Covenants were induced or coerced into signing the document by being falsely informed of certain matters.

The matter came to trial on August 4, 2015, The Honorable Marvin H. Dukes, III, Beaufort County Master in Equity, presiding. After taking the testimony and reviewing briefs

submitted by Appellant and Respondent Kearns, Judge Dukes issued his Order and Decree finding that the Agreement to Terminate Covenants was neither entered into fraudulently nor under fraudulent inducement. He further found that the Agreement to Terminate Covenants contained an adequate number of signatures of the then lot owners of Oakmont Subdivision to accomplish its intended purpose of terminating the “Covenants and Lot Restrictions of Oakmont Subdivision”. In ruling for the Respondent herein, Judge Dukes ruled: The “Agreement to Terminate Covenants” filed in the Register of Deeds for Beaufort County, South Carolina on April 16, 2014 in Record Book 3315 at Page 1529 is hereby confirmed and upheld”.

On June 5, 2016 Appellant filed his Motion to Alter, Amend or Reconsider (Rule 59, SCRPC). After a full hearing on the motion, on August 15, 2016 Judge Dukes issued his Order denying Appellant’s Motion to Alter, Amend or Reconsider.

From those Orders Appellant appeals.

#### ARGUMENT

1. DID THE MASTER ERR 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 IN AS MUCH AS THE SIGNERS OF THIS DOCUMENT WERE NOT “GRANTORS, MORTGAGORS, VENDORS OR LESSORS”?

This issue was neither raised in Appellant’s Complaint nor argued at the trial of the case. It first appeared at the Motion to Reconsider. As such, this issue is not preserved for appeal.

That given, the Agreement to Terminate Covenants fully complies with S. C. Code Ann. Section 30-5-30 (2014). Additionally, Appellant seems to define the term “grantor” as applying only to one who issued a deed of conveyance. Grantor is defined in Black’s Law Dictionary as “The person by whom a grant is made”. It envisions far more than simply one

who issues a deed of conveyance of real property and certainly applies to those signing the Agreement to Terminate Covenants.

The Agreement to Terminate Covenants is proper for recording. No error was committed by the Master.

2. DID THE MASTER IN EQUITY ERR 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, IN AS MUCH AS IT IS EVIDENT FROM THE FACE OF THE DOCUMENT THAT IT WAS FALSELY OR FRAUDULENTLY EXECUTED?

This issue was neither raised in Appellant’s Complaint nor was it argued at the trial of the case. As such, this issue is not preserved for appeal.

That given, after considering the testimony presented at trial of the case, the Master made a specific finding that “Although the Agreement to Terminate Covenants contain some irregularities, I do not believe it is fraudulent and specifically find the “Agreement to Terminate Covenants” not to be fraudulent.” (Judge Dukes Order and Decree dated May 27, 2016 at Page 3).

3. DID THE MASTER ERR 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 COVENANTS” WERE FRAUDULENTLY OBTAINED OR INDUCED?

The Master made no error in his finding that the signatures on the document entitled “Agreement to Terminate Covenants were not fraudulently obtained or induced. In this equity matter, the Master sits as both the finder of fact and determines the law applicable.

Immediately after taking the testimony, the Master specifically stated on the record: “Let me first say with regard to the fraud cause of action, I’m going to deny the Plaintiff’s relief on the fraud and inducement cause of action. I just didn’t hear enough evidence that would have caused—I just really heard from one property owner. And it didn’t really rise to

the level of any sort of effect on his free will or anything like that. And this document and his testimony... don't rise to the level of any kind of fraudulent inducement". (Transcript, p. 64-65).

Judge Dukes got it right.

4. DID THE MASTER ERR 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"?

This issue was not raised during the trial of the case. As such, this issue is not preserved for appeal.

That given as such, there appears to be no affidavits of default in the record. Additionally, Paragraph 6 of Appellant's Complaint states: "Each of the individuals or entities named herein as Defendants solely because he, she or it is the owner of a lot in Oakmont Subdivision and accordingly may have an interest in the outcome of this declaratory judgment action. The Plaintiff is not seeking any affirmative relief against the named Defendants. Simply by making any particular individual or entity as a Defendant, the Plaintiff is not implying or asserting that said Defendant engaged in any improper or wrongful conduct. To the contrary, since each Defendant owns property affected by the "Agreement to Terminate Covenants" which is sought to be rescinded in this lawsuit, each Defendant has been made a party so that if he, she or it wishes, said Defendant may either join in or oppose the requested relief, or simply take no action and leave it up to the Court to decide of the subject document should be rescinded."

Having invited the Defendants to take no action if they so desired, the Appellant cannot now hold a Defendant's failure to respond to the Complaint against that Defendant.

5. DID THE MASTER IN EQUITY ERR 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?

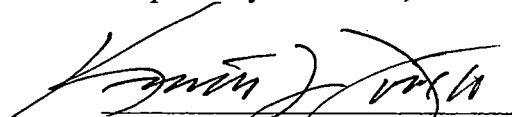
This issue was neither raised in Appellant's Complaint nor was it presented and/or argued at trial of the case. As such, this issue is not preserved for appeal.

#### CONCLUSION

Many of the issues raised in this appeal were neither mentioned in Appellant's Complaint nor were they presented at trial. As such, those issues are not preserved for appeal. As to those issues properly preserved, the Honorable Master in Equity, as the finder of fact, specifically found against the Appellant and in favor of the Defendants/Respondents. The Master made no errors of law.

It is accordingly respectfully requested that the South Carolina Court of Appeals affirm the order of the Beaufort County Master in Equity in all respects.

Respectfully Submitted,



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Attorney for Respondents Kearns

Beaufort, South Carolina  
June 7, 2017

CERTIFICATE OF SERVICE

The undersigned certifies that RESPONDENTS' INITIAL BRIEF, to which this certificate is affixed, was served upon the parties to this action by depositing a copy of same via first class U.S. Mail, postage pre-paid on June 7, 2017 to the following:

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June 7, 2017

Honorable Jenny Abbott Kitchings  
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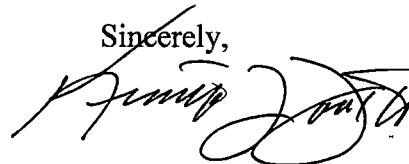
Re: Thomas O'Brien v. Van Dam, et al.  
Case No: 2014-CP-07-01402  
Appellate Case No.: 2016-001866

Dear Mrs. Kitchings:

Enclosed please find Respondents' Initial Brief in the above referenced case. The designation of the matter as presented by Mr. Kuhn is proper.

Should you have any questions, please feel free to contact our office.

Sincerely,



Kenneth L. Tootle

KLT/een  
Encl.  
cc: See list attached hereto

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