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.

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APELLANT'S FINAL REPLY BRIEF

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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."

In their Initial Brief, the Respondents Ralph Ray Kearns, Jr. and Cheryl Lynn J. Kearns ("Kearns") argue that this issue is not preserved for appeal. Respondents Kearns' Brief, pg. 2. This issue, however, was expressly and specifically raised and argued.

In his Complaint, the Appellant alleged that the document entitled "Agreement to Terminate Covenants" was improperly executed and recorded. ROA, pg. 54, ¶12. The Appellant asked that the Court "declare that the Agreement to Terminate Covenants is null and void." ROA, pg. 55 (prayer for relief).

At trial, the Respondents Kearns argued that the alleged improper execution of the Agreement to Terminate Covenants was simply the result of a "scribner's error (sic., scrivener's error) and the improper execution should accordingly be ignored.

In response to this "scrivener's error" defense, the Appellant argued to the Court that the requirements for the execution and recording of the Agreement to Terminate Covenants could not be ignored because these requirements were statutorily mandated by §30-5-30 of the South Carolina Code of Laws. Appellant's Post Trial Brief, pp. 3 – 4.

The issue now before the Appellate Court was expressly argued to the trial Court **before** the trial Court made a decision in this case. At the conclusion of testimony, the trial Court invited the parties to submit briefs (ROA, pg. 164, lines 9 – 18) and in his Post Trial Memorandum the Appellant argued:

> "Accordingly, the first 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), and 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, of 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."

ROA, pg. 41.

After the trial Court rendered its judgment in favor of the Respondents, the Appellant timely file a motion pursuant to Rule 59 of the South Carolina Rules of Civil Procedure to alter, amend or reconsider the judgment. The first specification of error states:

> "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."

ROA, pg. 31, ¶1.

This issue accordingly, was expressly argued before the trial Court and is properly preserved for appeal.

Turning to the merits of the argument, the Respondents Kearns correctly notes that Black's Law Dictionary defines a grantor as "the person by whom a grant is made." "Grant" means "to bestow; to confer." *Traylor v. State,* 117 Tex. Crim. 323, 326, 36 S.W.2d 506, 507 (1930). "Grant is held to be a synonym of conveyance." *Dearing v. Brush Creek Coal Company*, 182 Tenn. 302, 308, 186 S.W.2d 329, 331 (1945).

A "grantor," accordingly, is a person who is bestowing, conferring, or conveying something to someone else. In the instant case, the signatories to the Agreement to Terminate Covenants were neither bestowing, conferring, nor conveying anything to anyone. As the document itself attests, they were simply agreeing.

The Agreement to Terminate Covenants does not satisfy the mandatory execution and

recording requirements of §30-5-30 of the South Carolina Code of Laws and the failure to comply with the statutorily mandated requirements cannot be ignored as mere clerical or scrivener's errors.

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.

The Respondents Kearns argue that this issue is not properly preserved for appeal.

This issue, however, was expressly alleged in the Complaint. ROA, pp. 54 - 55, ¶¶12 and 13. This issue was expressly argued before the trial Court during the trial. ROA, pg. 151, line 5 to pg. 153, line 4 and pg. 157, line 14 to pg. 158, line 12. This issue was argued and briefed in the Appellant's Post Trial Memorandum. See ROA, pp. 42 – 43. Finally, after the trial Court made its ruling, this issue was expressly raised in Appellant's Rule 59 Motion to Alter, Amend or Reconsider the trial Court's judgment. See, ROA, pp. 33 – 35.

As Respondents Kearns correctly note in their Brief, the trial Court expressly ruled on this issue. See Respondents Kearns' Brief, pg. 3, and Order dated May 27, 2016, pg. 3.

This issue, accordingly, is preserved for appeal.

The Respondents Kearns, in their Brief, do not address the merits of this issue, and no further Reply is accordingly tendered by Appellant.

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.

In their brief, the Respondents Kearns simply ask the Appellate Court to defer to the Master's findings. The Respondents Kearns state:

> "In this equity matter, the Master sits as both the finder of fact and determines the law applicable."

Respondents Kearns' Initial Brief, pg. 3. Appellants agree that this is an equity matter, but disagree with the implication that the Master's findings of fact are binding on the Appellate Court. To the contrary, in this equitable action, the Appellate Court has jurisdiction to find facts in accordance with its own view of the preponderance of the evidence.

"When legal and equitable actions are maintained in one suit, each retains its own identity as legal or equitable for purposes of the applicable standard of review on appeal." *Corley v. Ott*, 326 S.C. 89, 92 n. 1, 45 S.E.2d 97, 99 n. 1 (1997). The reviewing Court should "view the actions separately for the purpose of determining the appropriate standard of review." *Jordan v. Holt*, 362 S.C. 201, 205, 608 S.E.2d 129, 131 (2005). In an action in equity, tried by the Judge alone, without a reference, the Appellate Court has jurisdiction to find facts in accordance with its own view of the preponderance of the evidence. *Townes Associates, Ltd. v. City of Greenville,* 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976). On the other hand, when reviewing an action at law, on appeal of a case tried without a jury, the Appellate Court's jurisdiction is limited to the correction of errors at law, and the Appellate Court will not disturb the Judge's findings of fact as long as they are reasonably supported by evidence. *Epworth Children's Home v. Beasley*, 365 S.C. 157, 164, 616 S.E.2d 710, 714 (2005).

The applicable standard of review in this case, accordingly, depends upon whether this is

an action at law or an action in equity. The "[c]haracterization of an action as equitable or legal depends on the Appellant's main purpose in bringing the action." *Verenes v. Alvanos,* 387 S.C. 11, 16, 690 S.E.2d 771, 773 (2010). An action, such as the one now before this Court, to rescind or set aside a contract or an agreement is an action in equity. See, e.g., *Moore v. Benson,* 390 S.C. 153, 163, 700 S.E.2d 273, 278 (Ct.App. 2010) (The "main purpose" of the case was to seek "the equitable remedy to rescind the contract."); *Dixon v. Dixon*, 362 S.C. 388, 395, 608 S.E.2d 849, 852 (2005) (finding action to rescind contract and set aside a deed is an equity).

The Respondents Kearns concede that the pending action is an "equity matter." Respondents' Initial Brief, pg. 3. The sole purpose of this action is to rescind the Agreement. This Court, accordingly, is free to find the facts in accordance with its own view of the preponderance of the evidence. In the case *sub judice*, the testimony and evidence that lot owners were pressured and induced to execute the Agreement to Terminate Covenants by, among other things, the false representation that if the covenants were retained the lot owners would be forced to begin paying dues and assessments to a homeowner's association 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."

The Respondents Kearns assert that this issue is not preserved for appeal. This issue, however, was expressly raised, in writing, to the trial Court. See Plaintiff's Post Trial Memorandum, pg. 7. It was also expressly raised and argued to the Master in Equity in the Appellant's Motion to Alter, Amend or Reconsider. See ROA, pp. 34 – 35.

Respondents Kearns argue that the Appellant, in his Complaint, do not seek any affirmative relief against the named Defendants. This is true in the sense that the Complaint does not seek the recovery of any damages or monetary relief. The Complaint is purely one for declaratory relief. See Complaint, prayer for relief. The Complaint, however, expressly asserts that the Agreement to Terminate Covenants was "improperly executed and recorded," and that the signatures on the Agreement were "fraudulently induced and/or coerced." ROA, pp. 54 and 55, ¶¶12 and 14. The Complaint expressly alleges that the Agreement to Terminate Covenants "is fatally defective and should not have been recorded." *Id.*, pg. 13. The relief sought by the Complaint is a declaration by the Court that the Agreement to Terminate Covenants is "null and void, *ab initio*." *Id.*, prayer for relief. As previously noted by Appellant in his primary brief, the vast majority of the lot owners who executed the Agreement to Terminate Covenants failed to file an Answer or other responsive pleading to the Complaint and 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, Ltd., 286 S.C. 486, 488 – 89, 334 S.E.2d 528, 530 (Ct.App. 1985).

In short, nearly every lot owner who executed the Agreement to Terminate Covenants, by failing to refute the allegations of the Complaint, agreed that he or she was tricked or fraudulently induced into executing the Agreement, and joined in the Appellant's request that the Agreement be declared to be null and void.

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.

The Respondents Kearns assert that this issue is not preserved for appeal. This issue was expressly raised and argued to the Master in Equity before he made a decision in this case. ROA, pp. 44 – 45. After the Master in Equity made his decision, it was again raised by the Appellant in his Motion to Alter, Amend or Reconsider. ROA, pg. 35.

The Respondents Kearns do not address the merits of this issue and, accordingly, no further Reply to this issue is made by Appellant.

CONCLUSION

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" is null and void and 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,

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CERTIFICATE OF SERVICE

Undersigned certifies that the Appellant's Final Reply Brief to be Included in Record on Appeal, 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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in a post office or official depository under the exclusive care and custody of the United States Postal Service, on July 7, 2017.

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