THE STATE OF SOUTH CAROLINA
in The Supreme Court

APPEAL FROM COLLETON COUNTY
In the Court of Common Pleas

R.Thaler Rivers, Jr., Special Referee

Civil Action No. 2009-CP-15-1148 and 2009-CP-15-1068

Roger Wendell Walker, as the Personal Representative of the Estate of Kenneth Ray Walker and Individually as a surviving child and Devisee of the Decedent, Kenneth Ray Walker (d/o/d 9/20/2008), Jimmy Ray Walker, and Wilson Whitney Walker, as surviving children and Devisees of the Decedent, Kenneth Ray Walker . . . . Petitioners,

v.

Catherine W. Brooks, ... Respondent.

PETITION FOR A WRIT OF CERTIORARI

Gregory S. Forman
Attorney for Petitioners
171 Church Street, Suite 160
Charleston, SC 29401
(843) 720-3749

Everett W. Bennett
Attorney for Petitioners
148 South Jeffries Boulevard
P.O. Box 693
Walterboro SC 29488
(843) 549-9225

Other counsel of record:
Mr. Benjamin A. Dunn, II
Attorney for Respondent
Hollar, Dennis, Corbett, Ormond, Plante & Garner
1777 Bull Street
Columbia SC 29201
(803) 765-2968

Index

Certificate of Counsel

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on June 10, 2013.

Question Presented

1. Did the Court of Appeals err in failing to address the Petitioners' additional sustaining ground of specific performance of contract?
2. Did the Court of Appeals err in reversing the trial court and finding that there was not an equitable mortgage between the parties?

Statement of the Case

This matter arises from two cases which were both filed in the Court of Common Pleas for Colleton County. The first case, filed on December 3, 2009 as Case No. 2009-CP-15-1 068, was styled Catherine Brooks v. Roger Walker, Enterprise Bank of South Carolina and Bank of Walterboro. In this action, Catherine Brooks (hereinafter "Mrs. Brooks" or "Brooks") alleged that from 2004 until2008, her nephew, Roger Walker, converted to his own use various payments she was owed as owner of several parcels of land in Colleton County; these being specifically lease payments, payments for the removal of sand and/or fill dirt, and proceeds from an insurance policy. ®. pp. 12-17) In addition, as most, or all, of these payments were processed through the Enterprise Bank of South Carolina or the Bank of Walterboro, Mrs. Brooks sued these institutions for negligence. In his Answer, Roger Walker moved to dismiss the Complaint for failure to properly state a claim of conversion, and further averred that the payments at issue were meant for the use and benefit of his father, Kenneth Ray Walker (hereinafter "Kenneth Walker" or "Kenneth"), that Mrs. Brooks held title to the land in question for the benefit of Kenneth Walker, and several additional defenses including statute of limitations, laches, ratification, estoppel, and waiver. ®. pp. 108-120) The Defendants Enterprise Bank of South Carolina and Bank of Walterboro answered with general denials, several affirmative and equitable defenses, and, in the case of the Bank of Walterboro, asserted several cross-claims against its fellow Defendants.

The second action, filed on December 31, 2009 as Case No. 2009-CP-15-1148, was styled Roger Wendell Walker, as the Personal Representative of the Estate of Kenneth Ray Walker and individually as a surviving child and Devisee of the Decedent, Kenneth Ray Walker (d/o/d 9/20/2008), Jimmy Ray Walker, and Wilson Whitney Walker as surviving children and Devisees of the Decedent, Kenneth Ray Walker, who died testate on 9/20/2008 v. Catherine W. Brooks. In this case, Roger Walker, Jimmy Ray Walker, and Wilson Whitney Walker (hereinafter the "Walkers") alleged that two deeds executed by their late father, Kenneth Walker, to his sister, and their aunt, Mrs. Brooks, were not meant to convey fee title to Mrs. Brooks, but were executed so that she might hold title for his benefit. (R. pp. 18-56) They further claimed that Kenneth Walker entered into an oral contract with Mrs. Brooks in March 1996, which was first modified in early 2003, and again by a written statement in July 2004, whereby she agreed to convey the property back tci him upon the payment of $60,000. They also claimed that a portion of this money had already been paid to Mrs. Brooks, and that they had offered to pay the outstanding balance, but Mrs. Brooks refused to convey the property back, thereby breaching her contract with the late Kenneth Walker or his devisees. In her Answer, Mrs. Brooks denied the Walkers contentions and plead several other defenses including duress, laches, unclean hands, the statute of frauds, and the applicable statute of limitations. ®. pp. 121-131)

By consent of the parties the cases were consolidated for mediation and trial. Mediation was conducted on February 4, 2011 and resulted in a settlement agreement between Mrs. Brooks and the Defendants Enterprise Bank of South Carolina and the Bank of Walterboro. Thereafter, by Order dated May 11, 2011, the consolidated cases were referred to the Honorable R. Thayer Rivers, Jr., as Special Referee, for trial without a jury. The trial was conducted in two separate, day-long hearings on May 26, 2011 and June 17, 2011. At the conclusion of the evidence, both the Appellant and Respondents agreed to reserve their rights as to all motions. The Special Referee issued his Order on August 26, 2011 which awarded title to the subject real property to the Walkers upon payment of$27,400 to Mrs. Brooks. (R. p. 10, para. 3). Respondent thereafter served her Notice of Appeal on

September 22, 2011.

On April 10, 2013, the Court of Appeals issued a decision reversing the lower court and finding there was no equitable mortgage. Appendix, p. 1. Petitioners filed a Motion for Rehearing on April 24, 2013. Appendix, p. 14. The Court of Appeals denied this motion on June 10, 2013. Appendix, p. 34.

Argument

1. The Court of Appeals failed to address the Respondents' additional sustaining ground of specific performance of contract

Respondents' brief argued that Decedent had a contract with Appellant (Brooks) to repurchase the land at issue for $60,000 and that he had partially performed on that contract prior to his death. Respondent's brief, pp. 23-24. The Court of Appeals' opinion fails to address this additional sustaining ground. The Court's own opinion notes that in this "Repurchase Memorandum," Appellant "conceded the Repurchase Memorandum stated she would release the land to Decedent after ***any*** payment of $60,000.00 from Decedent, even if it did not come from Lowcountry's sand dredging." Opinion, p. 3. It further notes "She admitted attempts were made prior to and after Decedent's death to pay off the balance shown on the Ledger in return for the Cooks Hill property, but she refused them. She stated because she had held the property for quite a while, its value had increased, and she would not sell it for less than it was worth."

Respondents' initial complaint pled specific performance of this contact. R 23-36. The hand-written Loan Ledger that Brooks personally kept in order to keep track of and account for all of her monies and funds that she loaned Decedent, and that she advanced and paid out and disbursed on his behalf and for his benefit from and beginning in 9/6/1993 through and until and ending on 2/20/2004 was the total aggregate principal amount of $52,798.67 for such time period according to the tape attached to such hand-written Loan Ledger R. 278-279; Plaintiffs' Exhibit No. 43 in the Trial Transcript for 6/17/2011. The $17,000.00 figure listed next to the name "Jane" on such hand-written Loan Ledger as kept and prepared by Appellant is a portion of the total aggregate Loan

Ledger amount of $52,798.67. The figure of $17,000.00 as entered upon such Loan Ledger is arrived at by adding the mortgage loan payments in the total aggregate amount of $11,600.00 as made by Appellant on a monthly basis from 7/4/2000 through 2/20/2004 unto her sister, Jane W. Ballagh, as the Lender, for and on behalf of their brother, the Decedent, as the Borrower, to the single cash payment in the lump sum amount of $5,000.00 made by Appellant on 10/26/1999 to her sister, Jane W. Ballagh, as the Lender, for and on behalf of their brother, the Decedent, as the Borrower. R. 525-531; Plaintiffs' Exhibit Nos. 16 & 17 and see R. 781; Defendant's Exhibit No. 1 in the Trial Transcript for 5/26/2011 and also see R. 266-267; Page 246, Lines 20-25 and Page 247, Lines 1-12 in the Trial Transcript for 6/17/2011. This total Loan Ledger figure of $52,798.67, after adding interest thereto at the annual rate of 13.0% with a five (5) year payout, comes very close to equaling the repayment amount of $60,000.00 as contained in the hand-written Loan Repayment and Release of Property Agreement dated 7/16/2004 and prepared by Appellant (See R. R. 532; Plaintiffs' Exhibit No. 18 in Trial Transcript for 5/26/2011)and (See R. 251-256; Pages 216 through 221 in Trial Transcript for 6/17/2011) and as set forth in the hand-written Statement of Loan Account Balance (referenced as "Ledger" in Court's Opinion) covering the period of time from 2003 through 7/3/2008 and prepared by Appellant (See R. 524; Plaintiffs' Exhibit No. 15 in Trial Transcript for 5/26/2011).

Both the Decedent, prior to his death on 9/20/2008, and his son and the duly appointed Personal Representative of his Estate, Roger Walker, after his father's death on 9/20/2008, attempted on several occasions by and through Respondents' legal counsel, to pay and did tender in certified funds unto Appellant the loan account balance justly due and owing unto her in the principal amount of $27,400.00, as shown and reflected by the above-referenced hand-written Statement of Loan Account Balance for Kenneth R. Walker, along with a proper General Warranty Deed for her consideration and execution for the purpose of conveying all such properties back to Decedent, as Grantee, on the first attempt prior to his death on 9/20/2008 and conveying the property back to Roger Wendell Walker, as Personal Representative for the Estate of Kenneth Ray Walker on the last attempt after such Decedent's death on 9/20/2008. Appellant steadfastly refused to accept the loan balance payment as tendered to her in the principal amount of $27,400.00 and she also adamantly refused to sign or execute all such Deeds as forwarded and presented to her on behalf of Decedent the first time and on behalf of Roger W. Walker the second time and on behalf of Roger Wendell Walker, as the Personal Representative for the Estate of Kenneth Ray Walker, on the third and last time for her consideration along with the tender of such loan account balance payment in the amount of $27,400.00. (See R. 195-200; Page 108, Lines 7-25, and Pages 109-112, and Page 113, Lines 1-19, and R. 220-237; Page 148, Lines 15-25, and Pages 149-164, and Page 165, Lines 1-7, and R. 304-308; Pages 319 through 323 and see R. 740-777; Plaintiffs' Exhibit Nos. 40 & 41 & 42 in the Trial Transcript for 6/17/2011).

The year 2003, when the 2002 Deed transferring the last of the subject properties to Brooks was actually recorded, when the last of the subject properties was transferred to Brook, is the first year showing payments from Decedent to her on the ledger identified as Plaintiffs' Exhibit 15.

The Special Referee implicitly did not find the Appellant credible. He found "[t]he Defendant's claims are not substantiated by the evidence." R. 10; August 26, 2011 order, p. 8, ¶1. He further found that "the testimony rambles all over the place, [and] the most persuasive document is the ledger which shows that at the time of the death of Kenneth Walker he was indebted to the Defendant, Catherine Brooks, in the amount of $27,400.00." R. 9; August 16, 2011 order, p. 7. Thus the Special Referee implicitly rejects Appellant's claim that she merely drafted that ledger because she was afraid of her brother.

"[A] respondent–the 'winner' in the lower court–may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court." *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716, 723 (2000). Here Respondents were entitled to raise specific performance of this contact as an additional sustaining ground and the Court of Appeals' own opinion acknowledges this repurchase memorandum as an existing contact between Brooks and Decedent. For this reason, the Court of Appeals should either rehear this appeal and affirm the lower court on this additional sustaining ground or remand the matter back to the lower court for further factual findings on this contractual claim.

2. The Court of Appeals erred in finding the parties' sibling relationship distinguished this case from *Gregorie & Son v. Hamlin*, 273 S.C 412, 257 S.E.2d 699 (1979) and in finding that the lack of previous negotiations of the parties argued against there being an equitable mortgage

The Court of Appeals opinion, in analyzing whether previous negotiations between the parties led to the conclusion that no equitable mortgage existed, distinguished this case from *Gregorie* because the parties in this case were siblings, holding:

> Brooks argues Respondents presented no evidence of prior negotiations between the parties because their interactions were the result of being siblings and were not business related. Thus, no hallmarks of a lender and borrower relationship existed as they did in *Gregorie*. We agree.

Opinion, p. 9.

This was an error. First there were familial relationship between the parties in *Gregorie*. As that opinion notes:

> In the late 1950's and early 1960's the oil distributorship known as F. Gregorie & Son which was owned and operated by members of the Gregorie family, was experiencing financial difficulty, such economic problems apparently being fairly well known throughout the financial community in the County of Charleston. The company was having particular difficulty with two of its suppliers, to wit: Arkansas Fuel Oil Corporation of Shreveport, Louisiana, and Carolina Fleets, Inc. of Anderson, South Carolina.
>
> The Plaintiff in this action, Osgood D. Hamlin, was a neighboring landowner, *kinsman*, and longtime friend of the Gregorie family; apparently was particularly close to the elder Mr. Ferd Gregorie. Beginning approximately in the mid-1950's, Hamlin had loaned money to that business at the request of Ferd Gregorie, Sr. In addition, Hamlin co-signed a promissory note held by Arkansas Fuel Oil Corporation in the principal amount of Thirty Thousand ($30,000.00) Dollars, he being the one promisor thereon at that point financially responsible.

Gregorie, 257 S.E.2d at 700 (emphasis added).

The longstanding and close ongoing family and financial relationship between Osgood D. Hamlin and Ferd Gregories, Sr. is similar to the longstanding and close ongoing family and financial relationship between Catherine W. Brooks and her brother, Kenneth R. Walker.

Brooks testified that she gave her brother at least $100.00 per week to buy and pay for his groceries from January of 1993 after she retired through and until July of 1997 because he did not have any income or money coming in during this period of time. (See R. 258-260 and R. 303; Pages 234 -236 and Page 318, Lines 9-22 in the Trial Transcript for 6/17/2011). Brooks also testified that she bought her brother, an old car to drive and haul wood in for heat after his truck was taken from him. (See R. 265; Page 242, Lines 5-12 in the Trial Transcript for 6/17/2011).

Brooks actually did as she previously promised to do financially for and on behalf of her brother, and she began doing so almost immediately as contemplated by such financial arrangements orally made and mutually agreed to by and between them as was quickly thereafter evidenced and corroborated. Only nine (9) days after the execution and recording of the first deed on 3/19/1996, Brooks loaned and advanced on 3/28/1996 the sum of $5,000.00 for a motor and transmission and she loaned and advanced on 4/2/1996 the sum of $1,500.00 for bearings and shaft and 20 large belts and she loaned and advanced on 4/4/1996 the sum of $2,000.00 for a frame and she loaned and advanced on 4/11/1996 the sum of $1,400.00 for labor for welding and she loaned and advanced on 4/23/1996 the sum of $1,500.00 to rent a torch, all of which aforesaid loans to and advances of money on behalf of Kenneth Walker by his sister, Catherine Brooks, were a portion of the necessary costs and expenses as required to repair the old broken down Sand Dredge belonging to her brother. Kenneth Walker needed his old Sand Dredge to be fixed as soon as possible so that he could once again work and attempt to earn a living but he was flat broke at the time and could not afford to pay for such expensive repairs based on his current financial resources. However, Kenneth Walker did own some very valuable land containing construction quality dirt and sand for mining and sale purposes that could be used as collateral to secure all necessary loans and debts and advances that Kenneth Walker needed and required and which his sister, Catherine Brooks, has already financed for him in the past and indicated she was willing to continue doing so in the future as long as she received adequate collateral from her brother, Kenneth Walker, to secure his repayment back to her of such past loan debts and any and all monetary advances made by her in the future on his behalf and for his benefit. (See R. 278-279; Plaintiffs' Exhibit No. 43 in Trial Transcript for 6/17/2011)

All of the monies and funds that Catherine Brooks loaned to her brother, Kenneth Walker, and advanced and paid out disbursed on his behalf and for his benefit, are more fully shown and reflected and appears by the various entries in the hand-written loan ledger that Catherine Brooks personally kept in order to keep track of and account for all of her monies and funds that she loaned out to and advanced and paid out and disbursed for and on behalf and for the benefit of her brother, Kenneth Walker, from 9/6/1993 through 2/20/2004. This hand-written loan ledger prepared by Catherine Brooks shows and reflects that prior to Kenneth Walker's execution of his first deed in her favor on 3/19/1996 that she loaned out direct to Kenneth Walker and/or advanced and paid out and disbursed on his behalf and for his benefit at least $6,486.00 pursuant to the following entries contained in such Loan Ledger: 9-6-93: Allied Steel Chas. - $348.00; Cola Supply - $588.00; 5-5-95: Cash K.W. - $500.00; 1-25-96: Cash K.W. - $150.00; Light Bill Spring 94 thru June 97 Approx - $1,800.00; Telephone Bill Spring 94 thru June 97 - $1,100.00; All Back County Taxes Approx - $2,000.00. (See R. 278-279; Plaintiffs' Exhibit No. 43 in Trial Transcript for 6/17/2011).

Brooks additionally admitted that she hand-wrote the Loan Repayment and Release of Property Agreement dated 7/16/2004 which states in essence that at such time as she is paid $60,000.00 by or on behalf of Kenneth Walker that she is to release to him all of the property off Cooks Hill Road at Walterboro, S.C. and that any money Kenneth (Walker) pays Catherine W. Brooks will be toward the $60,000.00. (See R. 290-292; Pages 305 through 307 in the Trial Transcript for 6/17/2011 and see R. 532; Plaintiffs' Exhibit No. 18 in the Trial Transcript for 5/26/2011).

Brooks personally placed and signed her initials of "CWB" that appear on the Statement of Loan Account Balance for Kenneth R. Walker next to the current balance due and owing figures and next to the credits for the payments made on such loan account by or on behalf of her brother, Kenneth R. Walker, with the initials thereon of "RW" being the initials of Roger Walker all as is listed and itemized and appears on such hand-written Statement of Loan Account Balance introduced into evidence during the trial of this case as Plaintiffs' Exhibit No. 15. This Statement of Loan Account Balance shows and reflects a beginning loan balance due and owing unto Brooks by

Kenneth R. Walker in 2003 in the principal amount of $60,000.00 and it shows and reflects an ending loan balance due and owing unto Brooks by Kenneth R. Walker on and as of 7/3/2008 in the principal amount of $27,400.00 after crediting all payments made on such loan account from 2003 through 7/3/2008 by or on behalf of Kenneth R. Walker in the total sum of $32,400.00 (See R. 524-537; Plaintiffs' Exhibit Nos. 15 and 18 in the Trial Transcript for 5/26/2011 and see R. 191-195; Page 104, Lines 18-25, and Pages 105-107, Page 108, Lines 1-10, and see R. 293-294; Page 308, Lines 8- 25 and Page 309, Lines 1-15 in the Trial Transcript for 6/17/2011).

Brooks' own statement of her brother's intent when he deeded her this land indicates his intent to provide the land as security for debt and not as an outright sale or gift: "And I took my children's money, what they would have gotten, put it down there. Kenneth told me, don't worry, Cat, you'll have the land to cover it." R. 289; Page 295, Lines 5-8 in the Trial Transcript for 6/17/2011.

The lower court, summarizing the relevant sworn testimony given under oath during the reference, properly found as follows:

> He [Kenneth Walker] had many ups and downs financially, but most of the last years of his life were primarily downs. From the family farm (some 200 acres located in rural Colleton County) he ran a mining operation and also rented out a building located on the premises. His sister, the Defendant, Catherine W. Brooks, helped him financially during the 1990's and up into the first part of the decade of 2000-2010 . . . It was testified to by all concerned that he and she [Catherine Brooks] had a very close relationship and she helped him out financially throughout the last years of his life.

R. 4. August 26, 2011 Order, p. 2.

In light of the comparatively obvious similar close and longstanding family and financial relationships between Ferd Gregorie, Sr. and Osgood Hamlin in *Gregorie* and between Catherine W. Brooks and Kenneth Walker in the case at bar, Respondents believe the Court of Appeals improperly analyzed Factor No. 3 of "Previous Negotiations of Parties" because such analysis should not be impacted in any adverse manner or fashion whatsoever by the fact that Catherine W. Brooks and the late Kenneth Walker were siblings. There is no indication in *Gregorie* that such a family relationship makes any difference with respect to the proper analysis of this factor ; in fact there was a kin relationship between the parties in that case.

The Respondents also contend that based on the entire record in this case including all of the testimony and evidence presented at the reference hearing in this matter and the Special Referee's findings of fact and conclusions of law made and rendered as a result thereof and in consideration of the totality of all of the circumstances in this matter including the "real intentions of the parties", that Factor No. 3 of "Previous Negotiations of Parties" actually weighs extremely heavily in favor of the Respondents in the case at hand. The Respondents further accordingly contend that the Court of Appeals in its Opinion previously entered in this case has thus erroneously determined Factor No. 3 of "Previous Negotiations of Parties" to be in favor of Brooks, by its misplaced emphasis on the fact Brooks and Kenneth Walker were siblings and by its mis-characterization of and failure to consider much of the testimony and evidence introduced at the reference hearing.

In *Wall v. Huguenin*, 305 S.C. 100, 406 S.E.2d 347 (1991), the Supreme Court noted that the "highly personal attachment" between the parties mitigated against the formalities for real estate contracts that a more arms-length negotiation might require:

> The option agreement must also be examined in light of the highly personal attachment of the Huguenin family to Roseland, their homeplace for two centuries....
> Indeed, the language of the agreement manifests the parties' recognition of Roseland as family land by providing that it must stay in the Huguenin name. This indicates that the earlier conveyances were not mere business dealings but, rather, were similar to close family transactions.

Id. at 350.

The Court of Appeals reliance upon the sibling relationship in this case to discount Respondents' claim of equitable mortgage has no support in prior case law.

3. Given that the Court of Appeals found in Respondents' favor in many of the *Gregorie* factors, it erred in reversing the Special Referee

The Court of Appeals found there was an outstanding debt between the Brooks and Decedent. Opinion, p. 7. It found that there was a Deed In Addition to a Separate Agreement and declined to adopt the proposition that the documents must be executed contemporaneously to find an equitable mortgage. Opinion, p. 8. It found the consideration for these transfers were inadequate. Opinion, p. 11. It found that Respondents made "a prima facie showing the deeds created equitable mortgage." Opinion, p. 12.

Given that the Court of Appeals found these factors in favor of Respondents, the decision to reverse the Special Referee's decision is without justification.

4. The Court of Appeals erred in finding the five factors listed in *Gregorie* to determine whether or not a sale was in fact intended indicates these parties intended to sell rather than mortgage the properties at issue

The Court of Appeals opinion cites the five factors listed in *Gregorie* to determine that these parties intended to sell rather than mortgage the properties at issue. Opinion, pp. 9-10. The opinion states, "The circumstances in *Gregorie* that overwhelmingly established a sale was not contemplated by either party are not present here." Opinion, p. 10. However an analysis of these factors leads to the opposite conclusion.

As to the first factor, **That there was no evidence that the owner desired to sell or that the lender desired to purchase**, the evidence shows that Kenneth Walker and his son continued to exercise dominion over the property and that his expectation was that he would get the property back when he paid Brooks $60,000.

Brooks acknowledged in her trial testimony that she never exercised any rights or dominion or control whatsoever over any of the properties conveyed to by her brother through his 1996 Deed and his 2002 Deed. Rather Brooks held onto these deeds as secured collateral while Kenneth Walker continued through and until his death on 9/20/2008 to possess and occupy and control and maintain all of the properties for his sole and exclusive use and benefit. Brooks additionally admitted under oath that she also never maintained any of the above-described properties previously conveyed to her in trust by her brother or negotiated any of the lease contracts in regard thereto all of which was handled and taken care of by either her brother or his son, Roger Walker, as his father's authorized agent on his father's behalf. (See R. 288; Page 293, Lines 8-23 in the Trial Transcript for 6/17/2011).

Kenneth Walker also kept and retained for his sole and exclusive use and benefit all of the rents and profits and income and revenues generated by and realized from all of the subject properties. The assertions by the Respondents in this case that their aunt, Catherine W. Brooks, as grantee, was holding the titles to all of the properties as previously conveyed to her by their father, Kenneth R. Walker, pursuant to the 1996 Deed and the 2002 Deed, in trust as collateral to secure certain loan debts owned to her by Kenneth R. Walker and for the sole use and benefit of Kenneth R. Walker, is clearly corroborated and evidenced by the fact that Kenneth R. Walker continued to use and occupy and possess and also continued to solely and exclusively maintain and take care of, with the help and assistance of his son, Roger W. Walker, from 1996 through and until his death on 9/20/2008, all such above-described properties so conveyed in trust to hold as secured collateral unto his sister, Catherine W. Brooks. (See R. 141-143; Page 41, Line 24, and Page 42, and Page 43, Lines 1-8, and R. 351-354; Plaintiffs' Exhibit No. 8 in the Trial Transcript for 5/26/2011 and see R. 161-166; Page 74, Lines 12-25, and Pages 75-78 and Page 79, Lines 1-19, and see R. 217-219; Page 130, Lines 13-25, and Page 131, and Page 132, Lines 1-4 of the Trial Transcript for 6/17/2011 and see R.634-735; Plaintiffs' Exhibit No. 33 in the Trial Transcript for 6/17/2011). Kenneth R. Walker and/or his son, Roger Walker, on his father's behalf and for his father's benefit, also continued from 1996 through 9/20/2008 to negotiate and handle all Lease Agreements and Contracts entered into with respect to such properties and to collect and keep and retain for the sole use and benefit of Kenneth R. Walker all the rental payments and income received from the Tenants of such leased properties (See R. 132-140; Pages 32-40 of the Trial Transcript for 5/26/2011 and see R. 355-484; Plaintiffs' Exhibit Nos. 9 and 10 and 11 and 12 in the Trial Transcript for 5/26/2011 and see R. 166-191; Page 79, Lines 20-25, and Pages 80-103, and Page 104, Lines 1-17 and see R. 247-250; Page 210, Lines 17-25, and Page 211, and Page 212, and Page 213, Lines 1-11 of the Trial Transcript for 6/17/2011 and see R. 686-733; Plaintiffs' Exhibit Nos. 30 and 31 and 32 in Trial Transcript for 6/17/2011) and to collect and keep and retain for the sole use and benefit of Kenneth R. Walker all income earned and revenues received from the sale of dirt and sand situate on such properties. (See R. 155-160; Pages 23 through 28 of the Trial Transcript for 6/17/2011 and see R. 538-654;

Plaintiffs' Exhibit No. 20 of the Trial Transcript for 5/26/2011 and R. 655-657; Plaintiffs' Exhibit No. 21 of the Trial Transcript for 6/17/2011).

Kenneth R. Walker, with the aid and assistance of his son, Roger Walker, as his expressly authorized agent for and on his behalf and for his benefit, collected and received, after the conveyance of such above-described properties in trust to hold as secured collateral unto his sister, Catherine W. Brooks, the total aggregate gross amount of $38,250.00 in rent checks as paid from 6/10/2004 through 9/22/2008 by American Bio-Mass, Inc., as Tenant, with respect to the Lease Contract(s) for the land and commercial buildings and improvements located at 36 Clearwater Drive, Walterboro, SC 29488 and being a portion of TMS No. 195-00-00-069 (15.30 acres) (See R. 139-140; Pages 39-40 and R.361-484; Plaintiffs' Exhibit Nos. 11 and 12 in the Trial Transcript for 5/26/2011).

Kenneth R. Walker, with the aid and assistance of his son, Roger Walker, as his authorized agent for and on his behalf, also collected and received and kept and retained for Kenneth R. Walker's own personal use and benefit, after the conveyance of such above-described properties in trust to hold as secured collateral unto his sister, Catherine W. Brooks, a vast majority of the rental income and rent checks as paid from 5/1/2003 through 8/10/2005 by Larry Herndon's old solely owned company known and trading as Lowcountry Concrete, Inc., as Tenant (See R. 694-718; Plaintiffs' Exhibit No. 31 of Trial Transcript for 6/17/2011), and by Larry Herndon's new solely owned company known and trading as Colleton Sand Plant, Inc., as Tenant (See R. 719-733; Plaintiffs' Exhibit No. 32 of Trial Transcript for 6/17/2011), pursuant to the terms and conditions as set forth in the Lease Contract entered into on 5/1/2003 by and between Henry L. Herndon a/k/a Larry Herndon, as Lessee, and Catherine W. Brooks, as Lessor, with respect to the subject 17.10+-acre tract of land located just off Cooks Hill Road and being designated as TMS No. 195-00-00-069 (See R. 686-693; Plaintiffs' Exhibit No. 30 of Trial Transcript for 6/17/2011 and see R. 201-216; Pages 114 through 129, inclusive, in the Trial Transcript for 6/17/2011 and see R. 678-685; Exhibit

Plaintiffs' Exhibit No. 29 in the Trial Transcript for 6/17/2011).

The moneys and funds that Kenneth R. Walker received the sole use and benefit of from 5/1/2003 through 8/10/2005 from the collection of lease payments made by Henry L. Herndon a/k/a Larry Herndon d/b/a Lowcountry Concrete, Inc. and Colleton Sand Plant, Inc., as Lessor(s), pursuant to the provisions of the Lease Contract entered into on 5/1/2003 in regard to TMS No. 195-00-00-069 with Catherine W. Brooks, as Lessee, was in the total aggregate amount of $39,394.81. (See R. 686-733; Plaintiffs' Exhibit Nos. 30 and 31 and 32 in the Trial Transcript for 6/17/2011)

Kenneth R. Walker, with the aid and assistance of his son, Roger Walker, as his authorized agent for and on his behalf, also collected and received and kept and retained for Kenneth R. Walker's own personal use and benefit, after the conveyance of such above-described properties in trust to hold as secured collateral unto his sister, Catherine W. Brooks, the total aggregate gross amount of $37,296.00 in checks as paid for dirt used and bought from the borrow pit located thereon from 9/26/2006 through 8/19/2008 by Wood Brothers, Inc., as Lessee/Vendee, in regard to the Real Estate Lease/ Borrow Pit Contract executed and entered into and effective as of 3/3/2005 with respect to the subject borrow pit that was situate upon a portion of TMS No. 195-00-00-066 (14.52+- acres), which was a part and parcel of such above-described properties previously conveyed by and under the first 1996 Deed in trust to Catherine W. Brooks by her brother, Kenneth R. Walker, to hold as secured collateral for his sole use and benefit and being a portion of (See R. 155-160; Pages 23 through 28 of the Trial Transcript for 6/17/2011 and see R. 538-654; Plaintiffs' Exhibit No. 20 of the Trial Transcript for 5/26/2011 and R. 655-657; Plaintiffs' Exhibit No. 21 of the Trial Transcript for 6/17/2011).

As for the second *Gregorie* indicator, **That during the negotiations nothing was said about a sale of that property**, as noted above Brooks' own testimony indicates that the deed was intended to be security for funds she had previously provided Kenneth Walker. "And I took my children's money, what they would have gotten, put it down there. Kenneth told me, don't worry, Cat, you'll have the land to cover it." R. 289; Page 295, Lines 5-8 in the Trial Transcript for 6/17/2011.

The Court of Appeals further erred in finding "The price of Decedent's first conveyance was discussed, and Decedent indicated he was selling the land at a lower price due to the financial support Brooks had given him." Opinion, p. 10. Even though this first deed in 1996 contained therein a stated consideration paid in the amount of $13,250.00, no moneys or funds or any other valuable consideration whatsoever changed hands or were actually paid out or received or exchanged by and between Kenneth R. Walker (Grantor) and his sister Catherine W. Brooks (Grantee) with respect to such real property as described thereunder on the date that this first deed was executed on 3/19/1996 (See R. 278-280; Page 269, Lines 20-25; and Page 270, Lines 1-25; and Page 271, Lines 1-6 of Trial Transcript for 6/17/2011).

As to the third factor, **That no price was fixed as a selling value of the property and no discussion along that line was had**, Appellant's testimony showed that the price for the property deeded in 1996 was a fiction and did not reflect the actual value of the property. Brooks testified, "He [Kenneth Walker] said, I had already paid so much, and he said, we'll just say you paid $13,500 for it -- $13,250 I believe it was. I said, whatever you say, Kenneth." R 279; June 17, 2011 transcript, p. 270, lines 11-14. The stated price of $13,250.00 was not the sales value of the property and Brooks did not actually pay these funds to Kenneth Walker when the deed was issued. The Special Referee found that the subject property had an assessed fair market value of $36,000.00 at the time of the 1996 Deed. R. 5; August 26, 2011 order, p. 3. Appellant has not challenged this valuation so that finding is the law of the case.

The 2002 Deed stated nominal consideration of $5.00, clearly not the actual true sale value of the subject property. R. 675-677; Plaintiffs' Exhibit No. 27 in Trial Transcript for 6/17/2011

There was no evidence presented supporting Brooks' position on the fourth *Gregorie* indicator: **That no attempt was made to ascertain the real value of the property upon which a**

sale would reasonably be based, greater liberality being exercised when a loan was intended. As no attempt was made to determine the value of these properties, this indicator argues that a loan, rather than sale was intended.

The fact pattern in *Gregorie* is highly on point. There the deed consideration was $35,000.00 while the lowest value placed on the land was $300,585.00 and the repurchase agreement amount was $79,000. *Gregorie*, 257 S.E.2d at 705. Here the deed consideration was $13,255 while the fair market value at the times of conveyances was $123,400 and the repurchase agreement was $60,000. The ratios are very similar. From this the *Gregorie* court concluded:

> The transaction in question overwhelmingly demonstrates the inadequacy of the price as recited in the deed. The only reasonable inference therefore, is that the transaction in question could not have been intended as a sale but rather the conveyance was intended to secure Hamlin's debt and was in the nature of a mortgage.

Id. The Court of Appeals erred in not reaching a similar conclusion.

The final *Gregorie* indicator, **That the grantees made no inquiry as to the value of the land**, again works in Respondents' favor as there was no evidence showing Brooks or her brother attempted to value the properties at the times the deeds were executed.

Contrary to the Court of Appeals opinion, these five *Gregorie* indicators show that an equitable mortgage, and not an outright sale, was what Brooks and her brother intended.

5. The Court of Appeals erred in finding that the inadequacy of consideration does not support Respondents' claims of equitable mortgage

The Court of Appeals opinion actual contradicts itself. First the opinion agrees with Brooks that "the vastly different relationship of the parties in this case negates this factor [inadequacy of consideration] of any real probative value." Opinion, p. 10. Yet in its discussion on this issue, the Court finds that the inadequacy of consideration favors Respondents' position:

> This factor weighs in favor of Decedent. A review of the record establishes the deeds reflect a lower price than the assessed value of the land. The first conveyance was given for a relatively more reasonable price than the second, which was simply a nominal value. However, Brooks admitted never paying a lump sum amount for consideration of the first conveyance.

Opinion, p. 11.

6. To the extent the Court of Appeals discounts inadequacy of consideration in finding no equitable mortgage due to the "vastly different relationship of the parties in this case," such weighing has no factual or legal basis

As noted above, the *Gregorie* involved a kin relationship. Further, as argued above, Brooks relationship with her brother was such where Brooks was concerned about the sums she was providing her brother and wanted security for these sums. That is the reason she agreed to a repurchase agreement in which the Decedent could reclaim these lands by paying her $60,000, even if that $60,000 came from proceeds generated from the use of this land.

Neither the Court of Appeals nor Brooks argues that these deeds were intended as gifts, nor did Brooks challenge the special referee's finding that a fiduciary relations existed between Brooks and her brother. While one might not expect there to be adequate consideration in inner-spousal or parent-to-child or grandparents-to-grandchildren transfers of property, one would expect fair and true consideration where the parties are siblings and where a fiduciary relationship exists and where the parties previous financial dealings indicate that this property was transferred as a form of security.

7. The Court of Appeals erred in finding prior negotiations between Brooks and Decedent were not business related

The Court of Appeals opinion finds that Brooks' dealings with Decedent prior to the deed transfers "were not business related, and as such, no evidence substantiated the existence of an equitable mortgage." Opinion, p. 11. As noted above, Brooks' dealings with Decedent were business related and she was, in fact, his fiduciary and designated trustee at the time of the second deed transfer. Thus, this conclusion is inaccurate.

In support of its conclusion the Court finds, "The record does not contain evidence the conveyances arose out of Decedent's specific need for any further money, other than his continuing and ongoing need for financial help to live." Opinion, p. 11. While this is technically accurate, it ignores Brooks' own testimony that her brother deeded her the property in 1995 as security for the funds she had been providing him. "And I took my children's money, what they would have gotten, put it down there. Kenneth told me, don't worry, Cat, you'll have the land to cover it." R. 289; Page 295, Lines 5-8 in the Trial Transcript for 6/17/2011.

8. Where the trial court found Brooks not credible, the Court of Appeals erred in making factual findings in her favor based on her own testimony

The Court of Appeals bases its decision in Brooks favor based, in part, on her own testimony. However her testimony was found uncredible by the trial court. The Special Referee implicitly did not find Brooks credible. He found "[t]he Defendant's claims are not substantiated by the evidence." R. 10; August 26, 2011 order, p. 8, ¶1. He further found that "the testimony rambles all over the place, [and] the most persuasive document is the ledger which shows that at the time of the death of Kenneth Walker he was indebted to the Defendant, Catherine Brooks, in the amount of $27,400.00." R. 9; August 16, 2011 order, p. 7.

Especially improper is the opinion's finding that "Brooks's testimony did not produce such convincing evidence in favor of an equitable mortgage." Opinion, p. 12. Given that Brooks was defending against a claim of equitable mortgage, one would not expect her testimony to produce "convincing evidence" to support the opposing parties' position.

Brooks own testimony lends support to the equitable mortgage claim. Her brother kept dominion of the properties he deeded to her and kept the proceeds generated from these properties. The repurchase memorandum allowed her brother to buy back these properties with funds generated from these properties. This is substantial evidence that the indent of Kenneth Walker was not to provide Brooks fees simple to these properties but to provide her securities for this debts to her.

"The Special Referee, as trier of fact, has the task of assessing the credibility, persuasiveness, and weight of the evidence presented." *Jones v. Leagan*, 384 S.C. 1, 681 S.E.2d 6, 12 (Ct.App. 2009). This court's opinion failed to give proper deference to the Special Referee's credibility determinations.

9. Especially when there was partial performance, the Court of Appeals erred in finding the time delay between the repurchase agreement and the conveyances argued against an equitable mortgage

A major factor in the Court of Appeals decision to find against the Respondents' claim of equitable mortgage is the time between the conveyances and the repurchase agreement. The ledger, demonstrating a $60,000 debt from Decedent to Brooks and prepared by Brooks begins showing repayments in 2003. R. 524; Plaintiffs' Exhibit No. 15 in Trial Transcript for 5/26/2011. This is the same year the Deed to the second conveyance was registered. The repurchase agreement, listing the same $60,000 obligation, was executed the following year.

In finding there was too great a time gap between the second conveyance and the repurchase agreement to create an equitable mortgage, the Court of Appeals ignores the ledger that confirms and supports the repurchase agreement and is almost contemporaneous with the filing of the second deed. It further ignores the fact that the amount listed as Decedent's debt to Brooks in the ledger is the exact same amount as the repurchase price in the memorandum.

10. In finding "no hallmarks of a lender and borrower relationship existed as they did in *Gregorie*" the Court of Appeals ignores the ledger demonstrating a $60,000 debt

In finding that previous negotiations of the parties mitigated against a finding of equitable mortgage, the Court of Appeals distinguishes *Gregorie* by finding "no hallmarks of a lender and borrower relationship existed as they did in *Gregorie*." Opinion, p. 9. However, the Court of Appeals own opinion notes:

> [A] document consisting of Brooks's and Decedent's handwriting reflected Decedent's starting balance owed to Brooks in the amount of $60,000.00 (Ledger). Roger testified the Ledger was to account for the balance Decedent owed Brooks. After the initial $60,000.00 figure, the Ledger detailed numerous payments, of which many were initialed by Brooks to show her receipt of those payments.

Opinion, p. 4. Further the Court of Appeals found an outstanding debt existed between Brooks and Decedent. Opinion, pp. 7-8.

Additionally, Decedent needed funds from Brooks to pay off debts to others. This ledger prepared Brooks shows and reflects that prior to Kenneth Walker's execution of his first deed in her favor on 3/19/1996 that she loaned out direct to Kenneth Walker or paid out or disbursed on his behalf and for his benefit at least $6,486.00 pursuant to the following entries contained in such Loan Ledger: 9-6-93: Allied Steel Chas. - $348.00; Cola Supply - $588.00; 5-5-95: Cash K.W. - $500.00;

1-25-96: Cash K.W. - $150.00; Light Bill Spring 94 thru June 97 Approx - $1,800.00; Telephone Bill Spring 94 thru June 97 - $1,100.00; All Back County Taxes Approx - $2,000.00. R. 778-779; Plaintiffs' Exhibit No. 43 in Trial Transcript for 6/17/2011. That ledger further reflects a $17,000 debt to his sister Jane Ballagh that was paid off by Brooks and was included in this $60,000 obligation. R. 778-779; Plaintiffs' Exhibit No. 43 in Trial Transcript for 6/17/2011.

This hallmark of a lender and borrower relationship explains why Decedent continued to exercise dominion over the subject properties after he conveyed title to Brooks. The Court of Appeals erroneous conclusion that no lender and borrower relationship existed caused it to also erroneously conclude April 24, 2013 that Brooks' familial relationship with her brother mitigated against a finding of equitable mortgage.

11. Given that the Court of Appeals found the Repurchase Memorandum did not have to be contemporaneous with the transfer to create an equitable mortgage, the Court of Appeals was without justification in finding the documents were not executed within a reasonable time frame to be construed together

The Court of Appeals declined to find that the Repurchase Memorandum had to be contemporaneous with the transfer to create an equitable mortgage. Opinion, p. 8. There is simply no basis in law for the Court therefore concluding that "the documents were not executed within a reasonable time frame to be construed together."

12. The Court of Appeals improperly weighed the *Gregorie* factors by ignoring the overwhelming weight of the evidence that Decedent did not intend to provide fee simple title to Brooks

The *Gregorie* case repeatedly references the term "intention of the parties" in determining whether an equitable mortgage exists. The Court of Appeals' opinion notes this. Opinion, p. 11. However, it then incorrectly determines the parties' intent.

The fact that Kenneth Walker continued to exercise dominion and control over all of the properties deeded to Brooks is good evidence of intent. That Brooks had a ledger showing a $60,000 debt from her brother and then executed a Repurchase Memorandum in that amount is evidence of intent. That Brooks accepted payment of proceeds from land she "owned" to be applied to the Repurchase Memorandum is evidence of intent. Brooks own behavior indicates that the parties' intent was that she held title to these lands as security for a debt and not as a fee simple landowner.

"The magnitude of the overwhelming evidence is sufficient by itself to declare the deed absolute in form as an equitable mortgage as a matter of law." *Gregorie*, 257 S.E. 2nd at 704.

Conclusion

The Court of Appeals' opinion made factual findings that are not justified from the record, incorrectly determined and weighed many of the *Gregorie* factors and ignores the real intention of the parties. It further failed to rule upon an additional sustaining ground raised by the Petitioners.

For the reasons stated, Petitioners asks this Court to grant a petition for writ of certiorari.

Respectfully submitted,

July 22, 2013

Gregory S. Forman
Attorney for Petitioners
171 Church Street, Suite 160
Charleston, SC 29401
(843) 720-3749
(843) 614-5086 (fax)
attorney@gregoryforman.com

Everett W. Bennett
Everett W. Bennett
Attorney for Petitioners
148 South Jeffries Boulevard
P.O. Box 693
Walterboro SC 29488
(843) 549-9225

THE STATE OF SOUTH CAROLINA
in The Supreme Court

APPEAL FROM COLLETON COUNTY
In the Court of Common Pleas

R.Thaler Rivers, Jr., Special Referee

Civil Action No. 2009-CP-15-1148 and 2009-CP-15-1068

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S.C. Supreme Court

Roger Wendell Walker, as the Personal Representative of the Estate of Kenneth Ray Walker and Individually as a surviving child and Devisee of the Decedent, Kenneth Ray Walker (d/o/d 9/20/2008), Jimmy Ray Walker, and Wilson Whitney Walker, as surviving children and Devisees of the Decedent, Kenneth Ray Walker . . . . Petitioners,

v.

Catherine W. Brooks, ... Respondent.

PROOF OF SERVICE

The undersigned hereby certifies that on July 24, 2013 he served one copy of Petitioners' Petition for Certiorari upon Mr. Benjamin A. Dunn, II, Attorney for Respondent by placing same in an envelope with proper first class postage affixed thereto, and addressed as follows:

Mr. Benjamin A. Dunn, II
Hollar, Dennis, Corbett, Ormond, Plante & Garner
1777 Bull Street
Columbia SC 29201

GREGORY S. FORMAN, ESQUIRE
Attorney for Petitioners
171 Church Street, Suite 160
Charleston, SC 29401
(843) 720-3749

Charleston, South Carolina