

THE STATE OF SOUTH CAROLINA
in The Supreme Court

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S.C. 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.

APPENDIX

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**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

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 09/20/2008), Jimmy Ray Walker, and Wilson Whitney Walker as surviving children and Devisees of the Decedent, Kenneth Ray Walker, who died testate on 09/20/2008, Respondents,

v.

Catherine W. Brooks, Appellant.

Appellate Case No. 2011-199991

Appeal From Colleton County
R. Thayer Rivers, Jr., Special Referee

Opinion No. 5112
Heard January 15, 2013 – Filed April 10, 2013

REVERSED

Everett H. Garner and Benjamin A. Dunn, II, both of Holler, Garner, Corbett, Ormond, Plante & Dunn, of Columbia, for Appellant.

Gregory S. Forman, of Charleston, and Everett W. Bennett, Jr., of Walterboro, for Respondents.

LOCKEMY, J.: Catherine W. Brooks appeals the Special Referee's (Referee) ruling that she held only an equitable mortgage on the subject property. We reverse.

FACTS

This case revolves around the characterization of two deeds given to Brooks by her brother, Kenneth Ray Walker (Decedent), which purportedly conveyed properties on Cooks Hill Road in Colleton County (Cooks Hill properties). Decedent owned and lived on two hundred acres of his family's farm in Colleton County, including the Cooks Hill properties. In the years prior to Decedent deeding the Cooks Hill properties to Brooks, Decedent's other sister, Jane Ballagh, helped him financially. At one point, Ballagh mortgaged some of Decedent's property in an effort to save his homestead. The mortgage was eventually placed in her name¹ and was satisfied at a later point by Brooks, on behalf of Decedent.

Brooks financially supported Decedent during the 1990s and into the beginning of the early 2000s. Her financial support included but was not limited to providing Decedent with a telephone line, paying his power and cable bill, buying him groceries, and giving him cash on at least a weekly basis. Brooks claimed she spent "everything in this world" on Decedent. During this time, she also helped him receive Social Security Disability (SSD) benefits and was made his trustee by the federal government for purposes of those SSD benefits. All parties testified she had a close familial relationship with Decedent.

In 1996, Decedent executed the first deed of the Cooks Hill properties to Brooks for \$13,250.00. The property was assessed in the amount of \$36,000.00. Brooks testified Decedent conveyed the land to her because she did more for him than anybody in his life, and he told her not to allow anyone to "fool her out of it" after he passed away. She stated Decedent requested only \$13,250.00 for the property because she had already spent so much of her money supporting him; however, she admitted never writing him a check or giving a lump sum to him in consideration to Decedent for the deed. She then explained the sum was placed on the deed simply because the attorney required it. Decedent made a second conveyance of the Cooks Hill properties, approximately fifteen acres, to Brooks in 2003 for a nominal sum. That property was assessed at \$85,000.00.

¹ The mortgage was originally recorded in Patsy Walker's name, but was then assigned to Ballagh.

After the execution of each deed, Decedent continued negotiating leases with businesses operating on the Cooks Hill properties, collecting rent from those businesses for his own personal use, and maintaining the Cooks Hill properties. Roger Wendell Walker, one of Decedent's sons, would often pick up rent checks and cash them for his father. At times, Decedent would direct Roger to cash the check and deposit a certain amount into Brooks's bank account. Two witnesses working for companies leasing land within the Cooks Hill properties testified to the direct involvement they had with Roger and Decedent, even after the deeds were executed. Brooks admitted she never exercised any dominion or control over the Cooks Hill properties.

Several writings presented were alleged to be related to the execution of the two deeds. First, on July 16, 2004, Brooks handwrote an agreement on behalf of Decedent that provided Decedent

would like for all the money from Larry Herndon [with Lowcountry Sand and Gravel (Lowcountry)] to be paid to Catherine W. Brooks until she is paid sixty thousand dollars at that time she is to release to Kenneth Walker all the property off Cooks Hill Road . . . Any money Kenneth pays Catherine W. Brooks will be toward the sixty thousand dollars.

(Repurchase Memorandum).

Roger explained he leased his own property, which was separate from the Cooks Hill properties, to Lowcountry for sand dredging and received all monies from that lease. There was a second lease between Lowcountry and Brooks, because the water runoff from the sand dredging ran across the Cooks Hill properties. Brooks stated Decedent had proposed sand dredging from a pond on the Cooks Hill property, which they would offer to Herndon for purchase, and the profits from that potential venture are what are referenced in the Repurchase Memorandum. She stated the venture never came to fruition. However, Brooks further 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.

A second 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.² The Repurchase Memorandum established that any monies paid to Brooks from the sand dredging were to be subtracted from the balance in the Ledger in exchange for the return of the Cooks Hill properties. Roger claimed that once the balance in the Ledger was paid, it was understood the Cooks Hill properties would be re-conveyed to Decedent. Roy Walker, Decedent's brother, confirmed that Brooks agreed to sign the property back to Decedent. Brooks asserted Decedent's payments in her ledger appearing to pay down the \$60,000.00 consisted of rent that was ultimately hers, because the Cooks Hill properties were in her name. Thus, she essentially "was being paid with her own money." Brooks conceded that had Decedent paid her the \$60,000.00 from profit off of Lowcountry's sand dredging business, she would have deeded the Cooks Hill properties back to Decedent.

A third document in Brooks's handwriting contained a list of costs, including but not limited to Brooks's payments to satisfy Ballagh's previous mortgage on Decedent's property, the costs of preparing the deeds for the Cooks Hill properties, a motor transmission, and light bills (Cost List). At the top of the Cost List, the document has a header stating "Money For Dredge." Roger asserted the Cost List showed how Brooks totaled the \$60,000.00 debt shown on the Ledger. Brooks testified it was simply a coincidence that the figures on the Cost List with interest totaled close to \$60,000.00. She claimed the \$60,000.00 balance on the Ledger originated when Decedent told her Lowcountry's sand dredging was going to begin, and the profit from the sand dredging would be split between her and Decedent. She testified Decedent randomly chose a sum of \$60,000.00 to pay Brooks from his profit from the sand dredging.

After Decedent's death, Brooks claimed the deeds were intended to place title of the Cooks Hill properties in her name and were absolute on their face; thus, she was the rightful owner of the properties. Brooks testified she did not have anything to leave her children without the Cooks Hill properties because she had given all her money to Decedent, and her children wanted an inheritance. She admitted attempts were made prior to and after Decedent's death to pay off the

² She indicated she documented some of the payments because Decedent asked her to do so, and she did anything he asked because of his intimidating nature.

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.

Decedent's sons and heirs, Roger, Jimmy Ray Walker, and Wilson Whitney Walker (collectively referred to as Respondents) brought this action claiming they were the rightful owners of the Cooks Hill properties, as heirs of Decedent, and Brooks's deeds were intended to create an equitable mortgage in the properties in return for the financial assistance Brooks provided to Decedent during his lifetime.

The Referee found a longstanding fiduciary relationship existed between Brooks and Decedent, and Brooks helped to financially support Decedent several times. Further, he found Decedent deeded properties to Brooks that were valued at much greater amounts than any debt Decedent ever owed her. He also found Brooks knowingly allowed Decedent and one of his sons to totally control the premises during the time the properties were in her name, and the tenants of the properties for the most part dealt exclusively with Decedent or one of his sons. Finally, he noted Brooks admitted she wrote the note that stated Decedent owed her \$60,000.00, and upon payment of that debt, she would deed the properties back to him.

The Referee stated these facts were controlled by *Gregorie & Son v. Hamlin*, 273 S.C. 412, 257 S.E.2d 699 (1979), and the evidence supported a finding of an equitable mortgage. Thus, the Referee determined that upon payment of the debt found to be owed by Respondents to Brooks, Respondents were entitled to a deed conveying the properties to them. This appeal followed.

STANDARD OF REVIEW

On appeal from an action sounding in equity, "this court may view the facts in accordance with our preponderance of the evidence." *Anderson v. Buonforte*, 365 S.C. 482, 488, 617 S.E.2d 750, 753 (Ct. App. 2005). "However, we should not disregard the findings of the special referee, who was in a better position to weigh the credibility of witnesses." *Id.* (citing *Tiger, Inc. v. Fisher Agro, Inc.*, 301 S.C. 229, 237, 391 S.E.2d 538, 543 (1989)).

LAW/ANALYSIS

Equitable Mortgage

Brooks argues the Referee erred in determining the deeds conveying the Cooks Hill properties did not pass fee title, but rather constituted an equitable mortgage against the land. Specifically, she contends the present facts are distinguishable from *Gregorie*, and thus, the Referee erred in his application of that case. We agree.

In *Gregorie*, the subject property (Oakland Plantation) was owned by an oil distributorship, Gregorie & Son, that was experiencing financial difficulty. 273 S.C at 415, 257 S.E.2d at 700. Gregorie & Son was having particular difficulty with two of its suppliers, Arkansas Fuel Oil Corporation (Arkansas Fuel) and Carolina Fleets, Inc. (Carolina Fleets). *Id.* Hamlin was a neighbor and longtime friend of the family that owned Gregorie & Son, and he began loaning money to the business in the 1950s at the request of one of the Gregories. *Id.* Additionally, Hamlin co-signed a promissory note held by Arkansas Fuel in the principal amount of \$30,000.00 and was the one financially responsible promisor. *Id.*

During that time, Gregorie & Son's operation was turned over from father, Gregorie, Sr., to son, Gregorie, Jr. *Id.* In 1960, Arkansas Fuel and Carolina Fleets began pressing for collections upon their respective debts. *Id.* The amount of money needed to pay the debts to both Arkansas Fuel and Carolina Fleet was \$39,791.68. *Id.* at 416, 257 S.E.2d at 701. Attempts to sell Gregorie & Son in 1961 because of its continuing debt were unsuccessful, and Hamlin and Gregorie, Jr., approached First National Bank of South Carolina (First National) about the possibility of a loan to pay off Gregorie & Son's debts. *Id.* The loan was secured by Oakland Plantation. *Id.* As a result of discussions, First National and Gregorie, Sr. executed a note and mortgage on January 26, 1961, in the amount of \$35,000.00. *Id.* The note, but not the mortgage, was guaranteed by Hamlin. *Id.* On the same date, Gregorie, Sr., executed a deed purporting to convey Oakland Plantation to Hamlin, the consideration being the assumption of the balance due on the note to First National and five dollars. *Id.* In addition to the deed, Gregorie, Jr., on behalf of Gregorie, Sr., and Hamlin executed a repurchase agreement on January 31, 1961. *Id.*

A second mortgage was executed on behalf of Gregorie & Son, Gregorie, Sr., and Gregorie, Jr., in favor of Hamlin in the amount of \$35,000.00. *Id.* at 417, 257

S.E.2d at 701. Security for this mortgage was real estate and rolling stock of Gregorie & Son. *Id.* The question before the court was whether the deed conveying Oakland Plantation and the accompanying agreement was intended as a deed absolute or as security for a debt and hence a mortgage. *Id.* at 414, 257 S.E.2d at 700.

The court found an equitable mortgage did exist, and outlined eight factors it considered in its determination: (1) the existence and survival of a debt; (2) a deed plus a separate agreement; (3) previous negotiations of parties; (4) inadequacy of consideration/price; (5) dealings between parties; (6) terms of the contract for conveyance; (7) burden of proof; and (8) defenses.³ *Id.* at 419, 257 S.E.2d at 702.

We will now examine the relevant *Gregorie* factors in the context of the present facts.

Outstanding Debt

Brooks contends the Respondents presented no evidence of an outstanding debt between her and Decedent to indicate the deeds to the Cooks Hill properties were absolute in nature. We disagree.

A strong indicia of whether the purported conveyance was intended as security for a debt or was a sale or deed is reflected by the existence or lack thereof of a debt or liability between the parties either existing prior to the contract or rising from a loan made at the time of the contract whereby the debt is still left subsisting after the transaction in question.

Id. (citing *Hamilton v. Hamer*, 99 S.C. 31, 57-58, 82 S.E. 997, 1004 (1914)).

The effect of [the] existing debt usually turns out to be "that the payment[] stipulated for [in] the agreement to reconvey is in reality the payment of this existing debt, [then] the whole transaction amounts to a mortgage, whatever language the parties may have used, and

³ All parties admit the eighth factor of defenses is irrelevant under the present facts.

whatever stipulations they may have inserted in the instrument[. . .]."

Id. at 420, 257 S.E.2d at 702 (quoting *Hamilton*, 99 S.C. at 35, 82 S.E. at 999). The *Gregorie* court noted an uncontested memorandum of agreement accurately outlined the history of the relationship between Gregorie, the debtor, and Hamlin, the creditor, and the existence of a debt between them. *Id.* at 420, 257 S.E.2d at 702-03. The court also found it compelling that the payment stipulated in the agreement to re-convey was approximately the same amount as the amount of the existing debt. *Id.* at 421, 257 S.E.2d at 703.

Here, the evidence established an existing debt between Decedent and Brooks. Brooks testified she spent all her personal money helping Decedent. She purchased groceries, gave him cash, and helped with utilities. The Cost List enumerated debts accrued from 2003 until 2008, providing an even clearer example of the amount Decedent owed Brooks. The debt was close to \$60,000.00 with interest included, which was the amount enumerated in the Repurchase Memorandum for re-purchase of the Cooks Hill properties. Accordingly, Brooks presented evidence of an existing and surviving debt between the two parties.

Deed In Addition to a Separate Agreement

Brooks claims the Repurchase Memorandum was not contemporaneous with the deeds, which she argues was necessary to find an equitable mortgage. Under these facts, we agree the documents were not executed within a reasonable time frame to be construed together, but we decline to adopt the proposition that the documents must be executed contemporaneously to find an equitable mortgage.

"Where a separate instrument is executed as a part of the same transaction as the conveyance, the two instruments are construed together if the writing is in the nature of a conditional sale or a re-purchase agreement." *Id.* (citing 54a Am. Jur. 2d *Mortgages* § 86 (2009)). The *Gregorie* court found "a conveyance accompanied by a re-purchase agreement is a strong circumstance to be considered in the determination between a deed absolute and equitable mortgage." *Id.* at 422, 257 S.E.2d 703.

Here, the first deed was executed on March 19, 1996. The second deed was executed on February 5, 2002. The Repurchase Memorandum was executed on July 16, 2004. Unlike the repurchase agreement in *Gregorie*, the Repurchase

Memorandum here did not accompany the deeds because it was written more than a year after the execution of the second conveyance. *See* 59 C.J.S. *Mortgages* § 71 (2009) (stating "the character of the transaction is fixed at its inception, and as a general rule, the only facts and circumstances that may be considered in determining whether a mortgage was intended are those which existed at the time the instrument was executed"). The Ledger has costs beginning in 2003, but the actual origin date of the Ledger is unknown. These documents are insufficient to support a finding of an equitable mortgage. We believe it would undermine public policy to allow such vague documentation to support a change in the nature of a document, which on its face is an absolute deed, to an equitable mortgage, particularly in this instance, in which the Repurchase Memorandum was written nearly a year after the execution of the final deed. This factor is a strong indicator the conveyances were not intended to be an equitable mortgage.

Previous Negotiations of Parties

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.

Addressing this factor, the *Gregorie* court stated "[o]n the question whether a deed absolute in form was intended as a mortgage, it is proper to consider the previous negotiations of the parties, their agreements and conversations[, conduct,] and the course of dealings between them prior to and leading up to the deed in question." *Id.* (quoting 59 C.J.S. *Mortgages* § 76 (2009)). The *Gregorie* court listed five indicators used to determine whether or not a sale was in fact intended:

1. That there was no evidence that the owner desired to sell or that the lender desired to purchase.
2. That during the negotiations nothing was said about a sale of that property.
3. That no price was fixed as a selling value of the property and no discussion along that line was had.
4. 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.

5. That the grantees made no inquiry as to the value of the land.

Id. at 422, 257 S.E.2d at 703-04.

In *Gregorie*, the "circumstances . . . indicate[d] overwhelmingly that no outright sale was ever contemplated by either party." *Id.* at 422, 257 S.E.2d at 704. The court found there was neither an agreement to sell nor a contract of sale. *Id.* at 423, 257 S.E.2d at 704. Further, it found significant the party claiming title established absolutely no evidence he took any of the normal and customary steps that would indicate he was buying the property. *Id.*

The circumstances in *Gregorie* that overwhelmingly established a sale was not contemplated by either party are not present here. The Repurchase Memorandum was written nearly a year after the final conveyance, and thus, it was not evidence of any prior negotiations between the parties. The close relationships and familial transactions resulted in informal and inadequately documented transactions, unlike in *Gregorie*, in which a business entity was involved. 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. The second conveyance was for a nominal amount of money, but it was conveyed approximately eight years later, and during that time, Brooks had continued to help Decedent financially. We note Decedent was familiar with the process of mortgaging his property, because he previously mortgaged his property to Ballagh, yet he chose to deed the land in question to Brooks. Accordingly, we do not find the previous negotiations of the party support the argument that a mortgage was intended instead of the absolute deed that was executed.

Inadequacy of Consideration/Price

Brooks maintains the vastly different relationship of the parties in this case negates this factor of any real probative value. We agree.

"[I]f the consideration passing between the parties, or the amount to be paid by the grantor on exercising his right to repurchase, would be fairly proportioned to the value of the property, if considered as a debt or loan secured by a mortgage thereon, but grossly inadequate if regarded as the price of the land on an absolute sale, this will tend

strongly to show that a sale could not have been intended, but that the transaction should rather be treated as a mortgage."

Id. at 424-25, 257 S.E.2d at 705 (quoting 59 C.J.S. *Mortgages* § 77 (2009)).

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.

Dealings Between the Parties

Brooks argues that as with prior negotiations between her and Decedent, her dealings with Decedent were not business related, and as such, no evidence substantiated the existence of an equitable mortgage. We agree.

The *Gregorie* court noted that "another indicia of customary and normal course of dealings which gives aid in determining the intention of the parties is how the contact between the parties to the transaction originated, and if the grantor attempted to borrow money at the inception of the transaction." *Id.* at 426, 257 S.E.2d at 706.

Here, Brooks helped Decedent financially throughout the last years of his life. 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. In *Gregorie*, the transaction in question "was a direct result of Gregorie[, Sr.,] making application for a loan to both First National Bank and to Hamlin," whereas here, no specific transaction occurred for which Decedent would intend to mortgage the property. Again, Decedent and Brooks had an ongoing relationship in which she provided financial aid to him, and it appears Decedent deeded these properties on his own accord. This factor weighs in favor of Brooks.

Terms of Contract for Conveyance

Brooks contends neither the terms of the deeds nor the Repurchase Memorandum contained any evidence to show Decedent retained an interest in the property. We agree.

The terms of the contract must be examined, and significantly, the court must find whether the repurchase agreement sets a deadline whereby if the money owed is not paid by that time, then the creditor claims to have an absolute fee simple title. *Id.* at 428-29, 257 S.E.2d at 706-07. In *Gregorie*, the court noted two cases where the repurchase agreements set a deadline whereby if the money owed was not paid by that time, the creditor claimed to have an absolute fee-simple title. *Id.* at 429, 257 S.E.2d at 707. The court found no reason for such a stipulation if one already had title under the absolute deed received from the grantee. *Id.* We also find noteworthy the *Gregorie* court found Hamlin's own testimony, the party attempting to establish an absolute deed, convincingly showed a sale was not contemplated. *Id.* at 429-30, 257 S.E.2d at 707.

In the present case, Brooks's testimony did not produce such convincing evidence in favor of an equitable mortgage. Further, the Repurchase Memorandum did not have a stipulation granting Brooks a fee absolute should Decedent fail to meet a deadline for payment of \$60,000.00. The Repurchase Memorandum simply stated that after Decedent paid \$60,000.00 to Brooks, she would deed the Cooks Hill property back to him. Brooks was adamant the property was sold or given to her in fee absolute because of her financial support to Decedent. The record contains no evidence of any language in the Repurchase Memorandum that would give rise to an inference of a mortgage. Accordingly, we find this factor weighs in favor of Brooks.

Burden of Proof

Finally, an allegation that a deed, absolute on its face, is in fact a mortgage "must be sustained by testimony prima facie showing that [the allegation] is true." *Id.* at 431, 257 S.E.2d at 707. "When this is done, it removes the presumption arising from the fact that a paper is presumed to be what its face imports." *Id.* at 431, 257 S.E.2d at 707-08. "When this is done, it is incumbent on the mortgagee to remove the inferences that may be drawn from such prima facie showing. This is sometimes spoken of as the burden of proof, but it is simply making it incumbent on the mortgagee to disprove the case as then made." *Id.* at 431, 257 S.E.2d at 708.

While the Repurchase Memorandum and Decedent's Cost List may have created a prima facie showing the deeds created equitable mortgage, we find Brooks has disproved that showing. *See* 54a Am. Jur. 2d *Mortgages* § 93 (stating for a court to find an instrument absolute on its face was intended by the parties as a mortgage,

"[t]he evidence must be, according to various statements, clear and convincing, plain, credible, satisfactory, unequivocal, unambiguous, and conclusive and [i]t will not suffice if composed of loose and random statements, or facts and circumstances of doubtful import"). As we stated above, many of the factors that must be shown to establish an equitable mortgage did not fall in Respondents' favor.

CONCLUSION

The writings and testimony presented in this case were vague and inadequate and simply did not come close to the amount of evidence put forth in *Gregorie* to establish an equitable mortgage. Moreover, the Repurchase Memorandum in the present case was written long after the second conveyance, which we find is a strong indicator that at the time of execution, the conveyances were not intended to be an equitable mortgage. Brooks successfully disproved Respondents' prima facie showing. Accordingly, the Referee's order is

REVERSED.

SHORT and KONDUROS, JJ., concur.

THE STATE OF SOUTH CAROLINA
in The Court of Appeals

APPEAL FROM COLLETON COUNTY
In the Court of Common Pleas

R.Thayer 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 Respondents,

v.

Catherine W. Brooks, Appellant.

PETITION FOR REHEARING

Respondents, by and through their undersigned counsel and pursuant to the authority of SCACR 221(a), petition this Honorable Court to rehear this appeal. The matters overlooked or misapprehended by the court are as follows:

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 contract. 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 Decedant, 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 Decedant 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 contract as an additional sustaining ground and the Court of Appeals’ own opinion acknowledges this repurchase memorandum as an existing contract 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 Decedant 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 makes factual findings that are not justified from the record, incorrectly determines and weighs 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 Respondents. For all of the reasons raised above this Court should rehear the matter and affirm the lower court's ruling.

RESPECTFULLY SUBMITTED,



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April 24, 2013

The South Carolina Court of Appeals

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 09/20/2008), Jimmy Ray Walker, and Wilson Whitney Walker as surviving children and Devisees of the Decedent, Kenneth Ray Walker, who died testate on 09/20/2008, Respondents,

v.

Catherine W. Brooks, Appellant.

Appellate Case No. 2011-199991

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Paul G. Short, Jr.

J.

AK

J.

James E. ...

J.

Columbia, South Carolina

cc:

Benjamin Allen Dunn, II
Everett H. Garner
Gregory Samuel Forman
Everett W. Bennett, Jr.
R. Thayer Rivers, Jr.

FILED

10 June 2013