

THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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APPEAL FROM COLLETON COUNTY  
COURT OF COMMON PLEAS

R. Thayer Rivers, Jr., Special Referee

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Case No. 2009-CP-15-1148

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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, ..... Respondents,

v.

Catherine W. Brooks, ..... Appellant.

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FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

- I. THE SPECIAL REFEREE ERRED IN DETERMINING THAT THE DEEDS CONVEYING THE SUBJECT PROPERTY TO THE APPELLANT DID NOT PASS FEE TITLE, BUT RATHER CONSTITUTED AN EQUITABLE MORTGAGE AGAINST THE LAND.
  
- II. THE SPECIAL REFEREE ERRED IN DETERMINING THAT THE RESPONDENTS WOULD BE ENTITLED TO A DECLARATION THAT THE DEEDS CONVEYING THE SUBJECT PROPERTY TO THE APPELLANT DID NOT PASS FEE TITLE, BUT RATHER CREATED A RESULTING TRUST SUCH THAT APPELLANT HOLDS LEGAL TITLE TO THE LAND FOR THEIR BENEFIT.

## 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-15-1068, 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 until 2008, 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. (R. 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. (R. 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 to 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. (R. 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) Appellant thereafter served her Notice of Appeal on September 22, 2011.

### FACTS

At the heart of both the above cases is a dispute regarding the ownership of several parcels of real property in Colleton County. In two deeds, the first dated March 19, 1996, and recorded in Book 717 at Page 129 in the records of Colleton County, and the second dated February 5, 2003 and recorded in Book 1004 at Page 61 in said records, the late Kenneth Walker (d/o/d September 20, 2008) conveyed five tracts of land (hereinafter the "Property") to his sister, Catherine Brooks.<sup>1</sup> (R. pp. 671 & 675) Mrs. Brooks claims full ownership of these lands while Kenneth Walker's sons, (and Mrs. Brooks' nephews) Roger Walker, Jimmy Walker, and Wilson Walker (the "Walkers"), claim that when their father deeded these lands to Mrs. Brooks, he did so pursuant to an oral contract, first formed in 1996 and amended thereafter in 2003 and 2004, whereby Mrs. Brooks would convey the property back to her brother upon his payment of \$60,000. The Walkers further assert that part of this consideration (\$32,600) was paid during Kenneth Walker's lifetime and that they have offered to pay the remaining balance to Mrs. Brooks, but that she has refused to convey the property back to them. All issues in this matter arise from this dispute between Mrs. Brooks and the Walkers.

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<sup>1</sup> In his deed from 2003, Kenneth Ray Walker also purported to convey a sixth tract of approximately 1.838 acres to Mrs. Brooks, but it appears that he had previously conveyed this parcel to his nephew, John R. Walker, in 1994.

ARGUMENTS

**I. THE SPECIAL REFEREE ERRED IN DETERMINING THAT THE DEEDS CONVEYING THE SUBJECT PROPERTY TO THE APPELLANT DID NOT PASS FEE TITLE, BUT RATHER CONSTITUTED AN EQUITABLE MORTGAGE AGAINST THE LAND.**

As the S.C. Court of Appeals recently stated in Horry County v. Ray, 382 S.C. 76; 674 S.E.2d 519, 522 (Ct. App. 2009):

The appellate court's standard of review in equitable matters is our own view of the preponderance of the evidence. Williams v. Wilson, 349 S.C. 336, 339-40, 563 S.E.2d 320, 322 (2002). "An action to establish an equitable lien and to establish lien priorities is an action in equity." Fibkins v. Fibkins, 303 S.C. 112, 115, 399 S.E.2d 158, 160 (Ct. App. 1990) (citations omitted).

Likewise, in Settlemyer v. McCluney, 359 S.C. 317, 596 S.E.2d 514, 516 (Ct. Ap. 2004):

In an action in equity, tried by the judge alone, ... this Court has jurisdiction to find facts in accordance with its views of the preponderance of the evidence." Stackhouse v. Cook, 271 S.C. 518, 521, 248 S.E.2d 482, 484 (1978).

Thus, in reviewing the Order of the Special Referee, this Court has great latitude in determining the proper disposition of the issues on appeal.

In his Order, the Special Referee stated:

... I believe that the facts in this case are actually controlled by Gregorie & Son v. Hamlin, 273 S.C. 412, 257 S.E.2d 699 (S.C. 1979). In that case a deed which was regular on its face was given along with a right acknowledging a debt and an agreement to re-convey the premises upon a payment of a stated sum of money was held to be an equitable mortgage. (R. p. 9, para. 5)

In Hamlin, the court based its determination that a deed absolute from Gregorie to Hamlin should be viewed as an equitable mortgage on seven factors<sup>2</sup>:

- 1) That there was an existence of debt from Gregorie to Hamlin which debt survived the

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<sup>2</sup> The Hamlin opinion also discusses an eighth factor, the defense of laches, which is not being addressed in this Brief.

January 31, 1961 conveyance;

- 2) There was a deed, plus a separate agreement, to re-convey the subject property;
- 3) There were previous negotiations of the parties which indicated that a) there was no discussion between the parties as to a sale; b) there was no discussion between the parties as to price or consideration; c) Hamlin claims to have purchased "OAKLAND" from a third party which never held legal title; d) Hamlin never attempted to have the property appraised prior to the sale; e) there was no contract of sale preceding the conveyance.
- 4) The consideration stated as a purchase price was grossly inadequate for the more than six hundred (600) acres of "OAKLAND" Plantation in 1961;
- 5) The dealings between the parties were as creditor and debtor;
- 6) The terms of the agreement for reconveyance quite clearly set out the intentions of the parties in 1961;
- 7) The burden of proof by the Plaintiff has been carried by clear, definite and convincing evidence;

Id. 257 S.E.2d at 702. The Special Referee committed error because the course and conduct of the relations between Mrs. Brooks and Kenneth Walker were radically different than those between Gregorie and Hamlin. Thus, when the Hamlin factors are applied to the case at bar, it is clear that the decision of the Special Referee must be reversed and Mrs. Brooks recognized as the fee simple owner of the Property.

a) **1<sup>st</sup> Hamlin Factor: Outstanding Debt**

First, there is no evidence of an outstanding debt between Mrs. Brooks and Kenneth Walker that would suggest that his deeding the property to her was intended as some form of security. Kenneth Walker conveyed land along Cooks Hill Road to Mrs. Brooks in a two deeds dated March 1996 and February 2003. (R. pp. 671 & 675) While there is ample evidence in the record that Mrs. Brooks provided much needed support to Kenneth, there is no evidence that there was a outstanding debt to support his conveying his land to her as security pending repayment, much less a series of debts which would support the argument that he made such security pledges in 1996 and again in 2003. This is very different from the situation in Hamlin, where the evidence indicated that:

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.

Id. 257 S.E.2d at 700; and,

Both Hamlin and Gregorie were involved in the discussions with the First National Bank relative to this loan. As a result of these discussions with the Bank, a note and mortgage were executed on January 26, 1961 by Ferdinand Gregorie, Sr., in favor of the First National Bank of South Carolina in the amount of Thirty-Five Thousand (\$35,000.00) Dollars. The note but not the mortgage was guaranteed by Hamlin.

Id. 257 S.E.2d at 701. In fact, the deed from Gregorie to Hamlin, as well as the repurchase agreement, was executed at the same time as the January 1961 mortgage to First National Bank.

Id.

The relationship between Gregorie and Hamlin stands in sharp contrast to that which existed between Mrs. Brooks and Kenneth Walker. Brooks and Walker were siblings, and her testimony makes it plain that their relationship during the period relevant to this case was, though punctuated by bitter, sometimes bordering on violent, disagreements, on the whole familial and affectionate.

Note also that the evidence indicates that when Kenneth Walker wished to enter into a debtor/creditor relationship with a family member he knew how to do so. In July 1991, Kenneth gave a mortgage, in the original principal amount of \$10,000, to Patsy Walker; his niece and Mrs. Brooks' daughter. This mortgage was recorded in the records of Colleton County in Book 458 at Page 277. In June of 1998, Patsy Walker assigned this mortgage to her aunt, and the sister of both Mrs. Brooks and Kenneth Walker, Jane W. Ballagh<sup>3</sup> (hereinafter "Ballagh"). (R. p. 528) At the time of the assignment, Kenneth had paid very little against the principal of the mortgage,

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<sup>3</sup> In her testimony, Jane Ballagh stated that while the mortgage listed Patsy Walker as the

such that a payment ledger kept by Ballagh indicates that when Mrs. Brooks began making payments on Kenneth's behalf, there was still a balance of \$9,270.10 owed on the loan. (R. p. 525)

Beginning in July 2000, Mrs. Brooks began making payments on the loan and eventually paid it off in 2004. (R. p. 527) At that time, Ballagh executed a satisfaction of the mortgage. (R. p. 531) The value of this evidence is that it shows that Kenneth Walker could, and did, enter into a formal debtor/creditor relationship with members of his family. Had this been his intent at the time he deeded the Property to Mrs. Brooks in 1996 and 2003, then it is logical to infer that he would have structured those conveyances as mortgages, just as he did with Patsy Walker and Ballagh. But, rather than give a security interest to Mrs. Brooks, he conveyed outright title to her. If he had intended anything other than an absolute conveyance, then he would have executed a mortgage, not a deed.

**b) 2<sup>nd</sup> & 6<sup>th</sup> Hamlin Factors: Reconveyance Agreement**

The most striking difference between the facts of the case at bar and those in Hamlin is the total lack of any reconveyance agreement. This element also comprises the crux of the Special Referee's misapplication of settled law. In Hamlin, the court cited to American Jurisprudence, 2<sup>nd</sup> Edition for the proposition that:

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. 55 Am.Jur.2d, Mortgages.

The key to the S.C. Supreme Court's decision in Hamlin was its view that the documents executed on January 26, 1961, including a note and mortgage to First National Bank of South

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mortgagee, she herself had made the loan to Kenneth Walker. (R. p. 151, ln. 5 – p. 152, ln. 2)

Carolina, a deed from Gregorie to Hamlin, and a repurchase agreement back to Gregorie, were to be read as a single transaction which rendered Hamlin's deed an equitable mortgage.

Between Mrs. Brooks and Kenneth Walker the facts are very different. There are two deeds, dated March 1996 and February 2003 respectively, which on their face convey fee simple title to Mrs. Brooks. There is no evidence of any agreement contemporaneous to either deed which indicates that Kenneth Walker retained any right to re-purchase the property. Instead, both the Walkers and the Special Referee, rely on two hand-written notes to provide the terms of the alleged agreement to convey the property back to Kenneth Walker. The first note, dated July 16, 2004, states:

... I, Kenneth Walker would like for all the money from Larry Herndon 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 at Walterboro, S.C. Any money Kenneth pays Catherine W. Brooks will be toward the sixty thousand dollars.

(R. p. 532) The second document, Plaintiff's Exhibit 15, is an undated document in the form of a rough ledger with a caption stating "Kenneth [s]tarting at \$60,000 – Kenneth gave me." (R. p. 524) The ledger lists dates starting with "2003" and ending "7-3-08", and amounts of money purportedly received by Mrs. Brooks. On the far right of the page, there is a descending balance down from \$60,000. The final amount listed is \$27,400. (R. p. 524) Based on the amounts listed on this exhibit, the Special Referee determined that the Walkers would be entitled to receive title to the Property in exchange for a payment of \$27,400 to Mrs. Brooks. (R. p. 9, para. 3)

The Special Referee erred in determining that these hand-written notes constituted a reconveyance agreement along the lines of that found in Hamlin. First, the documents presented as Plaintiff's Exhibits 15 and 18 were not drafted contemporaneously with either the March 1996 or February 2003 deeds. (R. pp. 524 & 532) The only evidence of the time at which these

documents were written is the date of July 16, 2004 stated in Plaintiff's Exhibit 18. (R. p. 532) As for Plaintiff's Exhibit 15, the monies listed for 2003 and 2004 are stated as annual totals while monthly payments begin to be listed with January 2005. (R. p. 524) The best inference that may be drawn, therefore, is that Plaintiff's Exhibit 15 was initially drafted sometime in early 2005, and certainly no earlier than the July 2004 date of Plaintiff's Exhibit 18. These dates are important because it is clear that Plaintiff's Exhibits 15 & 18 were drafted over eight years after the March 1996 deed from Kenneth to Mrs. Brooks and at least a year and a half after his February 2003 deed. Contrast this with the facts in Hamlin in which the deed from Gregorie to Hamlin, and the re-purchase agreement Hamlin signed in favor of Gregorie, were signed on the same day, along with the mortgage and note (which Hamlin signed as guarantor) from Gregorie to the First National Bank of South Carolina. Hamlin, 257 S.E.2d at 701.

Second, the Special Referee disregarded Mrs. Brooks' logical explanation of the meaning and circumstances of Plaintiff's Exhibits 15 & 18. It is uncontroverted by either side that the Property has generated income for many years in a couple of different ways. First, there is a building on the property that has been rented by a third party; for the period relevant to this case, by Eagle Disposal, and its successor in interest, American Bio-Mass, LLC. (R. p. 144, ln. 4 – p. 145, ln. 19) In addition, sand and fill dirt were sold from the property (R. p. 153, ln. 24 – p. 154, ln. 9) Mrs. Brooks made clear in her testimony that she was willing to sell the land to Kenneth for \$60,000 (R. p. 311, lns. 9-15), and that she worked with him on a venture that she hoped would make this a reality. This involved a plan to dredge sand from a pond located on the property which would be purchased by Larry Herndon. (R. p. 273, ln. 16 – p. 274, ln. 9) Unfortunately, this plan never came to fruition, and Brooks never received any money from the

sand operation. (R. p. 294, Ins. 9-24 & p. 309, Ins. 9-20) This testimony begs the question of the source of the sums listed on Plaintiff's Exhibit 15. (R. p. 524) As Mrs. Brooks explains, the amounts listed were derived from payments coming in from the existing leases to American Bio-Mass, LLC and Wood Brothers, Inc. (R. p. 275, ln. 15 – p. 276, ln. 14) Therefore, the monies shown on Plaintiff's Exhibit 15 were those already belonging to Mrs. Brooks. As she testified:

- We got [\$]42,300, right, but he still hadn't paid me none of my money, because that was my money. (R. p. 285, ln. 20 – p. 286, ln. 10);
- Kenneth never paid me any money that was his money.” (R. p. 294, Ins. 8-12);
- Q: All right. But you did – you actually got paid 32,600 –  
A: Of my own money. Boy I think you're hard of understanding.  
(R. p. 308, Ins. 16-19);
- Until I got my \$60,000, I wouldn't give you air if you was in a jug if you told me you'd give me \$60,000. They didn't pay me any of my money. I mean they didn't pay me any of their money. They paid me my money. (R. p. 309, Ins. 16-20)

Thus, the evidence presented at trial plainly shows that Mrs. Brooks did not receive the \$60,000 from Kenneth's venture with Larry Herndon, but rather from lease payments to which she was already entitled.

Why then did Mrs. Brooks write out most of the annotations listed on the ledger? While it is clear that Mrs. Brooks and Kenneth Walker had a loving relationship, it is equally certain that it could be rocky. There were times that Mrs. Brooks was clearly afraid of her younger brother. As she explained in her testimony:

- 1) At one point, Mrs. Brooks called one of the banks in Walterboro and asked that Roger Walker no longer be allowed to cash checks which were made out to her. Thereafter, this was made known to Kenneth and Mrs. Brooks was afraid that: “I was going to be attacked.” (R. p. 287, ln. 6)
- 2) She also stated that “Kenneth would slap the devil out of you, . . . .” (R. p. 287, ln. 25)

3) In response to a series of questions from the Walkers counsel about the note and ledger, and why she wrote them, Mrs. Brooks testified:

A: I did what Kenneth asked me to do, yes. I wrote that. No. Kenneth never paid me any money that was his money. . . . (R. p. 294, lns. 8-10)

...  
A: I did anything Kenneth asked me to do, except he offered for them to kill my husband if I would split the insurance with him. . . . (R. p. 294, lns. 16-18)

This testimony shows that Mrs. Brooks was afraid of her brother, and generally tried to do what would keep him happy.

The best inference to be drawn from the evidence, then, is that Mrs. Brooks wrote the note and ledger which became Plaintiff's Exhibits 18 and 15 because Kenneth wanted her to, and complying to his wish in this regard would keep him on friendly terms. This inference is further supported by the fact that writing out the note and keeping the ledger cost her nothing. Since Mrs. Brooks knew that only she could convey the property back to Kenneth, there was no harm in keeping the ledger in accordance with his wishes because, at the end of the day, she was only going to sell if she were paid.

Mrs. Brooks testified that she was willing to sell the property back to Kenneth for \$60,000. (R. p. 311, lns. 9-15) But because that money never materialized, she never considered executing a deed and never relinquished title to the Property.

c) **3<sup>rd</sup> Hamlin Factor: Negotiation of Price &**  
**5<sup>th</sup> Hamlin Factor: Relationship of the Parties:**

Mrs. Brooks and Kenneth Walker negotiated as to the price she was to pay for the property. The 1996 deed from Kenneth to Mrs. Brooks states consideration of \$13,250.00 (R. p. 671) Mrs. Brooks testified that she and Kenneth went to the office of Auburn Bridges, Esquire, an attorney in Walterboro, and discussed this amount as reflecting the money she had actually given to him or paid on his behalf. (R. p. 278, ln. 20 – p. 280, ln. 2; p. 299, ln. 17 – p. 303, ln. 8)

There was no discussion of her giving Kenneth a mortgage. (R. p. 278, ln. 20 – p. 280, ln. 7; p. 301, lns. 6-11)

At the trial of this case, no evidence was presented of extensive negotiations of terms between the parties prior to Kenneth Walker's 1996 and 2003 deeds. However, this fact, as well as Mrs. Brooks not obtaining appraisals of the various parcels, or the absence of written contracts of sale, does not carry the same weight in this case as these factors did in Hamlin. The interactions between Kenneth Walker and Mrs. Brooks were not primarily related to business. They were brother and sister who had grown up together on the Property. Having been raised on the land, Mrs. Brooks had no need of an appraisal to estimate its worth in purely economic terms. Likewise, the absence of a written sales contract between siblings is not probative of a brother's intent to convey to his sister.

In this way there is a similarity between this case and Hamlin, because in each instance the relationship of the parties determined the character of the transaction. Hamlin had a long history of giving loans to Gregorie. Thus, it makes perfect sense to read the transaction of January 1961 as a continuation of their longstanding debtor/creditor relationship. On the other hand, Mrs. Brooks and Kenneth Walker were siblings who had a stormy, but ultimately close relationship, which does not show the hallmarks of lender to borrower so obvious between Gregorie and Hamlin.

**d) 4<sup>th</sup> Hamlin Factor: Inadequacy of Consideration:**

The deed in Hamlin stated consideration of \$35,000 for a tract of approximately 600 acres, while the evidence before the court showed that within two years of the transaction,

portions of the land had actually been sold for \$2,000 per two-acre lot. Id. 257 S.E.2d at 705. As noted for Hamlin's 3<sup>rd</sup> and 5<sup>th</sup> factors in the previous section, the vastly different relationship of the parties in this case denudes this element of any real probative value. Family members can, and often do, transfer property to one another for little or no consideration.

Further, the evidence of value which was presented in the case indicates that the great disparity seen in Hamlin is not present here. The court in Hamlin determined that consideration was inadequate because Hamlin had "purchased" land for \$35,000 which market conditions demonstrated was easily worth \$300,000 to \$600,000. Id. 257 S.E.2d at 705. In his Order, the Special Referee notes that while there is no evidence of specific amounts being owed at particular times, the amount never "exceeded \$60,000". (R. p. 5) The Special Referee further observed that the taxable values assigned to the parcels Kenneth conveyed to Mrs. Brooks in 1996 was approximately \$36,000 for that year, while the additional parcel conveyed in 2003 was valued for tax purposes at approximately \$85,000. (R. pp. 5-6) Assuming that Kenneth was indebted to Mrs. Brooks in the amount of \$60,000, a comparison of the values indicates that he deeded her property worth approximately twice this figure. Compare this to the situation in Hamlin in which \$35,000 was said to have purchased property worth nearly ten to twenty times this amount. Thus, the inadequacy of consideration found in Hamlin is not repeated in the present action.

e) **7<sup>th</sup> Hamlin Factor: Conveyance shown to be mortgage by clear and convincing evidence:**

Finally, the Special Referee erred in determining that the Walkers are entitled to the Property because they have not proven their case by clear and convincing evidence. In analyzing the evidence, this Court should consider the following:

- 1) The 1996 and 2003 deeds from Kenneth Walker to Mrs. Brooks (R. pp. 671 & 675) clearly indicate an intent to convey fee title to the various parcels of the Property. Neither contains any sort of reverter clause or re-conveyance language of any kind.
- 2) The evidence shows that when Kenneth Walker intended to provide a security interest in real property to a family member who was loaning him money, he did so. This is clearly demonstrated in the mortgage he executed in favor of Patsy Walker and Jane Ballagh.<sup>4</sup> (R. p. 528)
- 3) The Special Referee largely based his determination on the unsigned note dated July 16, 2004 (R. p. 532) and the ledger (R. p. 524), even going so far as to state that the ledger was the “most persuasive” document. (R. p. 9, para. 10) In so ruling, the Special Referee completely ignored the extensive testimony of Mrs. Brooks that she was willing to sell the property to Kenneth Walker, and that she hoped that the dredging venture with Larry Herndon would generate the revenue which would allow Kenneth to pay her off. (R. p. 273, ln. 16 – p. 274, ln. 9) But, this proposed dredging operation did not prove to be profitable and Mrs. Brooks never received any money from it. (R. p. 294, lns. 9-24; p. 309, lns. 9-20)
- 4) As argued in subsection b) above, Mrs. Brooks was at times fearful of Kenneth and wrote the note and ledger to pacify him.

In light of this evidence, it does not seem that the Special Referee had clear and convincing evidence upon which to base his ruling.

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<sup>4</sup> As was noted above, Jane Ballagh testified that the actual loan secured by this mortgage was made by her in the first place.

**II. THE SPECIAL REFEREE ERRED IN DETERMINING THAT THE RESPONDENTS WOULD BE ENTITLED TO A DECLARATION THAT THE DEEDS CONVEYING THE SUBJECT PROPERTY TO THE APPELLANT DID NOT PASS FEE TITLE, BUT RATHER CREATED A RESULTING TRUST SUCH THAT APPELLANT HOLDS LEGAL TITLE TO THE LAND FOR THEIR BENEFIT.**

In his Order, the Special Referee stated that the Walkers had "... prayed for and shown sufficient testimony to be entitled to a declaration of a resulting trust in the matter,..." (R. p. 9, para. 5) In spite of this determination, the Special Referee continued by finding the facts more in line with an equitable mortgage theory, and it is on this basis that he decided the case. But, just as the Special Referee erred in determining that Brooks held only an equitable mortgage to the Property, he likewise erred in determining that the Walkers were entitled to ownership of the Property under the theory of resulting trust.

In Bowen v. Bowen, 352 S.C. 494, 575 S.E.2d 553 (S.C. 2003), the S.C. Supreme court discussed the imposition of a resulting trust:

Equity devised the theory of resulting trust to effectuate the intent of the parties in certain situations where one party pays for property, in whole or in part, that for a different reason is titled in the name of another. Hayne Fed. Credit Union v. Bailey, 327 S.C. 242, 248-249, 489 S.E.2d 472, 475 (1997) (citing McDowell v. South Carolina Dep't of Social Servs., 296 S.C. 89, 370 S.E.2d 878 (Ct.App.1987)). The general rule is that when real estate is conveyed to one person and the consideration paid by another, it is presumed that the party who pays the purchase money intended a benefit to himself, and accordingly a resulting trust is raised in his behalf. Id. at 249, 489 S.E.2d at 475. The presumption, however may be rebutted and the actual intention shown by parol evidence. Id.

The problem with the Special Referee's conclusion is that the evidence in no way fits the requirements of a resulting trust as described in Bowen. In order for the facts of this case to even raise the issue, a third party would have needed to convey the Property to Mrs. Brooks while Kenneth Walker paid the consideration. Although the parties disagree on many points, there is

simply no suggestion by either side that any such event took place. Since there is absolutely no evidence which would support the contention that Mrs. Bowers held title in a resulting trust for the benefit of Kenneth Walker, the Special Referee's determination is incorrect.

CONCLUSION

Appellant respectfully requests that this Court reverse the judgment of the Special Referee and issue an Order confirming Mrs. Brooks' fee simple ownership of the Property.



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May 15, 2012

THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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APPEAL FROM COLLETON COUNTY  
COURT OF COMMON PLEAS

R. Thayer Rivers, Jr., Special Referee

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Case No. 2009-CP-15-01148

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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, ..... Respondents,

v.

Catherine W. Brooks, ..... Appellant.

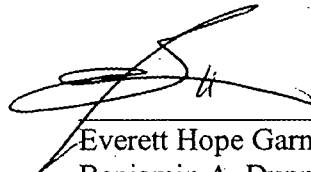
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CERTIFICATE OF COUNSEL

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The undersigned hereby certifies that this Final Brief complies with Rule 211(b), SCACR.

May 15, 2012



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**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.

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**FINAL BRIEF OF RESPONDENTS**

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## TABLE OF AUTHORITIES

### CASES

<i>Gregorie &amp; Son v. Hamlin</i> , 273 S.C. 412, 257 S.E.2d 699 (1979) . . . .	<u>-15-</u> , <u>-16-</u> , <u>-19-</u> , <u>-21-</u> , <u>-22-</u>
<i>Hall v. Hall</i> , 41 S.C. 163, 19 S.E. 305 (1894) . . . . .	<u>-22-</u>
<i>I'On, L.L.C. v. Town of Mt. Pleasant</i> , 338 S.C. 406, 526 S.E.2d 716 (2000) . . . . .	<u>-24-</u>
<i>Jones v. Leagan</i> , 384 S.C. 1, 681 S.E.2d 6 (Ct.App. 2009) . . . . .	<u>-22-</u>
<i>QHG of Lake City, Inc. v. McCutcheon</i> , 360 S.C. 196, 600 S.E.2d 105 (Ct.App. 2004) . . . .	<u>-15-</u>
<i>Shiver v. Arthur</i> , 54 S.C. 184, 32 S.E. 310 (1899) . . . . .	<u>-22-</u>
<i>Wall v. Huguenin</i> , 305 S.C. 100, 406 S.E.2d 347 (1991) . . . . .	<u>-20-</u> , <u>-21-</u>

## STATEMENT OF THE ISSUES ON APPEAL

- I. THE SPECIAL REFEREE CORRECTLY DETERMINED THAT THE DEEDS CONVEYING THE SUBJECT PROPERTY TO THE APPELLANT DID NOT PASS FEE TITLE, BUT RATHER CONSTITUTED AN EQUITABLE MORTGAGE AGAINST THE LAND
  
- II. AS AN ADDITIONAL SUSTAINING GROUND, THIS COURT SHOULD FIND A CONTRACT BETWEEN THE APPELLANT AND DECEDENT FOR APPELLANT TO RECONVEY THE SUBJECT PROPERTIES TO THE DECEDENT, OR HIS HEIRS, UPON TOTAL REPAYMENT OF \$60,000

## STATEMENT OF THE FACTS

The individual Respondents herein, Roger Wendell Walker and Jimmy Ray Walker and Wilson Whitney Walker, are the three (3) surviving children and heirs at law and named devisees under the Last Will and Testament dated 01/27/1988 of their late father and the Decedent herein, Kenneth Ray Walker a/k/a Kenneth R. Walker (See R. 533-537; Plaintiffs' Exhibit No. 19 in Trial Transcript for 5/26/2011), who died testate on 9/20/2008 in Colleton County, South Carolina (See R. 658; Plaintiffs' Exhibit No. 22 in Trial Transcript for 6/17/2011). The Estate of Kenneth Ray Walker is being administered with the Colleton County Probate Court at Estate Case No. 2008-ES-15-226 (See R. 660-670; Plaintiffs' Exhibit Nos. 24 & 25 in Trial Transcript for 6/17/2011); and the Respondent, Roger Wendell Walker, was duly appointed on 10/15/2008 to act and serve as the Personal Representative of the Estate of Kenneth Ray Walker by the Colleton County Probate Court Judge (See R. 659; Plaintiffs' Exhibit No. 23 in Trial Transcript for 6/17/2011) in accordance with Item III of the Will dated 01/27/1998 of the late Kenneth Ray Walker (See R. 533-537; Plaintiffs' Exhibit No. 19 in Trial Transcript for 5/26/2011). The Decedent herein, Kenneth Ray Walker, was a lifelong resident of Colleton County, South Carolina and he was the youngest brother of the Appellant herein, Catherine W. Brooks, who now and for most of her adult life resided in Richland County, South Carolina.

All of the disputed claims at issue in these cases entirely revolve around and relate and pertain to the proper characterization and categorization of the prior transfers and conveyances of title, pursuant to a 1996 Deed and a 2002 Deed as more fully described and referenced herein below, by the late Kenneth R. Walker (d/o/d: 9/20/2008), as Grantor, in and to a total of 41.68+- acres of land comprised of five (5) separate parcels of real property situate in Colleton County, South Carolina (See R. 345-348; Plaintiffs' Exhibit No. 5 in Trial Transcript for 5/26/2011) unto and in the name of his older sister, Catherine W. Brooks, as Grantee, by executing two (2) separate deeds dated 3/19/1996 and 2/5/2002, respectively, for the purported consideration as stated therein for the total aggregate amount of \$13,255.00 (See R. 671-677; Plaintiffs' Exhibit Nos. 26 & 27 in Trial

Transcript for 6/17/2011), with the first such deed of conveyance being subject to an outstanding First Mortgage Lien from Kenneth R. Walker, as Mortgagor, in favor of his niece, Patsy Walker, as Mortgagee, in the principal amount of \$10,000.00 dated 7/17/1991 and recorded on 7/18/1991 in Colleton County Mortgage Book 458, at Page 277, and encumbering a 9.50+- acre parcel of land being a portion of the aforesaid 26.52+- acres conveyed by the first deed on 3/19/1996, which Mortgage was subsequently assigned from Patsy Walker, as Assignor, unto and in favor of Jane W. Ballagh, as Assignee, by Assignment of Mortgage dated 6/27/1998 and filed for public record in Colleton County and subsequently cancelled and satisfied and discharged on 2/23/2004 by Jane W. Ballagh, who is the sister of Kenneth R. Walker and Catherine W. Brooks. (See R. 528-531; Plaintiffs' Exhibit No. 17 in Trial Transcript for 5/26/2011). Catherine W. Brooks also placed a \$20,000.00 mortgage lien on and encumbering all of the property conveyed to her under the 1996 Deed from her brother, Kenneth R. Walker, by her execution on 11/28/1996 of a Mortgage of Real Estate in the principal amount of \$20,000.00 in favor of another brother, Roy C. Walker, Mortgagee, which Mortgage was recorded on 12/9/1997 in Colleton County Mortgage Book 740, at Page 10, and such Mortgage was thereafter canceled and satisfied and discharged of public record on 3/10/2004 by Roy C. Walker, as the Mortgagee. (See R. 782-786; Defendant's Exhibit No. 4 in the Trial Transcript for 6/17/2011) This \$20,000.00 Mortgage executed by Catherine W. Brooks and filed of public record by Roy C. Walker, for the express and intended sole purpose in regard thereto, as admitted and acknowledged at trial by Catherine W. Brooks, of attempting to block and prevent their other sister, Jane W. Ballagh, as Mortgagee, from filing a mortgage foreclosure action against Kenneth R. Walker, as Mortgagor, as to the above-referenced \$10,000.00 Mortgage encumbering the aforesaid 9.50 acre tract of land. (See R. 268-272; Pages 248 through 252 of the Trial Transcript for 6/17/2011).

The first deed was executed on 3/19/1996 by Kenneth R. Walker, as the Grantor, unto and in favor of Catherine W. Brooks, as the Grantee, and was recorded on 3/19/1996 with the Colleton County Clerk of Court's Office in Deed Book 717, at Page 129 (See R. 671-674; Plaintiffs' Exhibit

No. 26 in Trial Transcript for 6/17/2011). 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). This first deed in 1996 transferred and conveyed thereunder a total of 26.52+- acres of land that the Special Referee found had an aggregated assessed fair market value of \$36,000 at the time of the 1996 conveyance. R. 5; August 26, 2011 order, p. 3. Appellant has not challenged this valuation so that finding is the law of the case.

The aforesaid 26.52+- acres of land conveyed by the first 1996 Deed was comprised of four (4) separate parcels of land described herein as a 2.50 acre tract of land designated as TMS No. 195-00-00-130 and a 9.50 acre tract of land designated as TMS No. 195-00-00-155 and a 3.52 acre tract of land along with an adjoining and contiguous 11.0 acre tract of land which together are collectively designated as TMS No. 195-00-00-066 (14.52 acres). R. 671-674 and 737-739; Plaintiffs' Exhibits 26 and 36.

The second deed was executed on 2/5/2002 by Kenneth R. Walker, as the Grantor, unto and in favor of his sister, Catherine W. Brooks, as the Grantee, with a stated total consideration therein of \$5.00 and with such Deed being recorded on 2/11/2003 with the Colleton County Clerk of Court's Office in Deed Book 1004, at Page 61 (See R. 675-677; Plaintiffs' Exhibit No. 27 in Trial Transcript for 6/17/2011), and actually only validly transferring and conveying thereunder a single 15.16+- acre parcel of land designated as TMS No. 195-00-00-069. This parcel of land is described as 15.16+- acres in the 2002 Deed but is referenced by the Colleton County Tax Assessor as a 15.30 acre parcel of land which by itself had an actual assessed fair market value of \$87,400.00 at the time of its conveyance according to the Colleton County Tax Assessor. (See R. 736; Plaintiffs' Exhibit No. 35 in Trial Transcript for 6/17/2011)(Also see R. 257; Page 344, Lines 12-14 of the Trial Transcript for

6/17/2011 where Special Referee Thayer Rivers mistakenly references the assessed fair market value of 15.30 acre parcel of land as being \$85,000.00).

The aforesaid 15.16+- parcel of land designated as TMS No. 195-00-00-069 and listed as 15.30 acres by the Colleton Tax Assessor contains within it as part and parcel thereof the land with the commercial buildings and improvements thereon located at 36 Clearwater Drive, Walterboro, SC 29488 that has been continuously leased from 2/21/1999 through the present time to American Bio-Mass, Inc. f/k/a Eagle Disposal, Inc., as the Tenant(s), pursuant to written Lease Agreements with a current rental rate of \$800.00 per month. (See R. 345-523; Plaintiffs' Exhibit Nos. 5 through 14, inclusive, in the Trial Transcript for 5/26/2011) This second 2002 Deed also purported to transfer and convey therewith a 1.838 acre tract of land now designated as TMS No. 195-00-00-152, which attempted transfer and conveyance of such 1.838 acre tract of land unto Catherine W. Brooks, as Grantee, by Kenneth R. Walker, as Grantor, was in fact of no legal force or effect since the 1.838 acre tract of land had already previously been conveyed by Kenneth R. Walker, as Grantor, unto John R. Walker, as Grantee, by Deed dated 4/19/1994 and recorded on 4/20/1994 with the Colleton County Clerk of Court's Office in Deed Book 626, at Page 5 (See R. 312-344; Plaintiffs' Exhibit No. 1 in Trial Transcript for 5/26/2011).

The 1996 Deed and the 2002 Deed were both executed by Kenneth R. Walker, as Grantor, unto and in favor of his sister, Catherine W. Brooks, as Grantee, with the express understanding that such deeds and real estate titles would be held in trust by Catherine W. Brooks for the sole benefit of Kenneth R. Walker for the intended purpose of providing adequate collateral as requested and required and accepted by his sister, Catherine W. Brooks, in order to secure the repayment to her of any and all prior or contemporaneous loans she made direct to her brother, Kenneth R. Walker, and of any and all prior or contemporaneous advances of money made by her on his behalf to pay for certain items and services provided to him and to pay off his debts owed to others and various other financial aid and assistance already previously provided to him in the past by his sister and also to secure any and all additional loans and advances of money to pay for certain items and services

provided to him and to pay off his debts owed to others and various other financial aid and assistance to be provided to him in the future when Kenneth R. Walker needed it from his sister, Catherine W. Brooks, as she agreed to do and did. (See R. 778-779; Plaintiffs' Exhibit No. 43 and R. 295-305; Pages 310-320 in the Trial Transcript for 6/17/2011).

Catherine W. Brooks acknowledged under oath in her trial testimony that she never exercised any rights or dominion or control whatsoever over any of the aforesaid properties conveyed to her in trust by her brother, Kenneth R. Walker, by his 1996 Deed and his 2002 Deed to hold as secured collateral for his sole use and benefit. Catherine W. Brooks additionally admitted under oath in her testimony given at trial 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, Kenneth R. Walker, 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).

Further evidence that the Deeds of Conveyance executed in 1996 and 2002 by Kenneth R. Walker, as Grantor, in favor of his sister, Catherine W. Brooks, as Grantee, did not constitute outright conveyances of title to property but were instead actually intended to be treated and construed as and held in trust by the grantee, Catherine W. Brooks, as "Equitable Mortgages" or "Trust Deeds" as collateral to secure both past loans and advances and also future loans and advances made by her to and on behalf and for the benefit of her brother and grantor, Kenneth R. Walker, is found in her own testimony given under oath at the trial in this case where she stated, as follows: "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." (See R. 289; Page 295, Lines 5-8 in the Trial Transcript for 6/17/2011).

Catherine W. Brooks also additionally admitted under oath in her testimony given at the trial in this case 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 (Catherine W. Brooks) is paid \$60,000.00

by or on behalf of Kenneth Walker that she is to release to Kenneth Walker 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).

Catherine W. 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 Catherine W. 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 Catherine W. 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).

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 further 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).

Catherine W. Brooks actually did as she promised to do financially for and on behalf of her brother, Kenneth R. Walker, 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, Catherine W. 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 R. Walker by his sister, Catherine W. 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 R. 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 R. 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 R. Walker needed and required and which his sister, Catherine W. 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 R. 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. 778-779; Plaintiffs' Exhibit No. 43 in Trial Transcript for 6/17/2011)

All of the monies and funds that Catherine W. Brooks loaned to her brother, Kenneth R. Walker, and advanced and paid out disbursed on his behalf and for his benefit, is more fully shown and reflected and appears by the various entries in the hand-written loan ledger that Catherine W. 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 R. Walker, from 9/6/1993 through 2/20/2004. This hand-written loan ledger prepared by Catherine W. Brooks shows and reflects that prior to Kenneth R. Walker's execution of his first deed in her favor on 3/19/1996 that she loaned out direct to Kenneth R. 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. 778-779; Plaintiffs' Exhibit No. 43 in Trial Transcript for 6/17/2011).

Catherine W. Brooks also testified under oath during the trial of this case that she gave her brother, Kenneth R. Walker, 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). Catherine W. Brooks also stated in her trial testimony given under oath that she bought her brother, Kenneth R. Walker, 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).

The hand-written Loan Ledger that Catherine W. Brooks personally kept in order to keep track of and account for all of her monies and funds that she loaned to her brother, Kenneth R. Walker, 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. (See 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 Catherine W. Brooks 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 Catherine W. Brooks 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, Kenneth R. Walker, as the Borrower, to the single cash payment in the lump sum amount of \$5,000.00 made by Catherine W. Brooks on 10/26/1999 to her sister, Jane W. Ballagh, as the Lender, for and on behalf of their brother, Kenneth Walker, as the Borrower. (See 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 Catherine W. Brooks (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 covering the period of time from 2003 through 7/3/2008 and prepared by Catherine W. Brooks (See R. 524; Plaintiffs' Exhibit No. 15 in Trial Transcript for 5/26/2011).

Both the late Kenneth R. Walker, 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 herein, to pay and did tender in certified funds unto Catherine W. Brooks 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 Kenneth R. Walker, 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. Catherine W. Brooks 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 Kenneth R. Walker 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).

In her counterclaim, Brooks alleged tortuous interference with contractual relations. R. 129-131; Defendant's counterclaim, p. 8-10. In this counterclaim she alleges Roger Wendell Walker misappropriated funds from leases on the subject property for removal of sand and or fill-dirt and

other monies rightfully belong to her. The trial judge found, “[t]he Defendant’s claims are not substantiated by the evidence and are hereby dismissed.” R. 10; August 26, 2011 order, p. 8, ¶1. Brooks has not appealed or challenged this factual finding. Thus the Defendant’s claim that Roger Walker inappropriately endorsed and negotiated lease payment checks on the subject properties that were made out to her has been definitely rejected, belying the Appellant’s claim that the Respondents were misappropriating funds from the subject properties. This strengthens Respondents’ argument that Appellant held title to these properties in trust for the sole use and benefit of the decedent and his heirs.

Appellant’s initial brief also failed to challenge the following factual findings of the trial court, which this court should now consider conclusive: There was a long standing fiduciary relationship between Mrs. Brooks and her younger brother, the late Kenneth Walker. R. 7; August 26, 2011 order, p.5, ¶1. Mr. Walker deeded properties to Mrs. Brooks that were greatly in excess of any amount of money ever owed her. Nothing in the deeds or testimony would indicate that was a gift. R. 7; August 26, 2011 order, p. 5, ¶3. Mrs. Brooks acquiesced in Kenneth Walker and his son Roger totally controlling the premises during most of the time that the properties in question were in her name. R. 7; August 26, 2011 order, p. 5, ¶4. The tenants of the premises for the most part dealt with exclusively with either Kenneth Walker or his son, Roger Walker, and they were not even aware of the role of Mrs. Brooks until shortly after the death of Kenneth Walker. Mrs. Brooks has admitted writing the note which is in evidence which sets out the agreement between the parties that Kenneth owed her \$60,000.00 and upon the payment of that, she would deed the premises back to him (now his Estate). R. 7-8; August 26, 2011 order, pp. 5-6, ¶5.

## ARGUMENT

“In an action in equity tried by the judge alone, this Court can make findings of facts in accordance with our own view of the preponderance of the evidence. However, this does not require us to ignore the fact that the special referee was in a better position to assess the credibility of witnesses.” *QHG of Lake City, Inc. v. McCutcheon*, 360 S.C. 196, 600 S.E.2d 105, 107 (Ct.App. 2004).

Here 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. See Appellant’s initial brief, pp. 11-12. Note further that her claims of being afraid of her brother are belied by Appellant’s own argument that her relationship with the Decedent were “on the whole familial and affectionate.” Appellant’s initial brief, p. 7.

1. The Special Referee Correctly Determined That the Deeds Conveying the Subject Property to the Appellant Did Not Pass Fee Title, but Rather Constituted an Equitable Mortgage Against the Land
  - a. Using the test set forth in *Gregorie & Son v. Hamlin*, 273 S.C. 412, 257 S.E.2d 699 (1979), the Special Referee correctly determined that Respondents proved the existence of an equitable mortgage

Relying upon the case of *Gregorie & Son v. Hamlin*, 273 S.C. 412, 257 S.E.2d 699 (1979), the Special Referee determine that the deeds conveying an interest in the subject properties from Kenneth Ray Walker to Catherine W. Brooks did not intend to pass fee title but instead constituted an equitable mortgage against the land. There was substantial evidence to support this determination.

*Gregorie* sets forth multiple factors for determining whether a deed that appears to transfer fee simple title is, instead, an equitable mortgage. Those factors are: 1) Existence and Survival of

Debt; 2) Deed plus Separate Agreement; 3) Previous Negotiations of Parties; 4) Inadequacy of Consideration/price; 5) Dealings Between Parties; 6) Terms of the Contract for Conveyance. *Id.*, 257 S.E.2d at 703-06. *Gregorie* also discusses the burden of proof necessary for a showing of equitable mortgage. *Id.* at 707-708. It further discusses laches concerns, which Appellant concedes are not relevant to this case. Appellant's initial brief, p. 5, n. 2. A review of the facts of this case demonstrates that the Special Referee correctly applied *Gregorie* in determining an equitable mortgage existed.

It is noteworthy that Appellant never challenges the Special Referee's finding that the transfers of property from Decedent to Appellant were not a gift. Her brief then fails to explain why Decedent would transfer property worth \$87,400.00 in 2003 for \$5.00 and love and affection. If these transfers were not gifts—a position neither party claims—then the best explanation is that these transfers were intended as equitable mortgages. The year 2003, when the last of the subject properties was transferred to Appellant, is the first year showing payments from Decedent to Appellant on the ledger identified as Plaintiffs' Exhibit 15. Her own testimony supports a finding of equitable mortgage: "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.

Appellant claims that "The Special Referee committed error because the course and conduct of the relations between Mrs. Brooks and Kenneth Walker were radically different than those between *Gregorie* and Hamlin." Appellant's initial brief, p. 6. However the Special Referee found, and Appellant, does not challenge, that Appellant had a fiduciary relationship with the Decedent. This provides stronger argument for equitable relief in Respondents' favor than under the facts of *Gregorie*.

There is ample testimonial evidence reflected in the record of this case that supports the finding of the existence of a special fiduciary or caretaker type of relationship between the Decedent herein, the late Kenneth R. Walker, and his older sister and the Appellant herein, Catherine W.

Brooks, who loved and felt sorry for and looked out for and stood up for her baby brother, Kenneth R. Walker, since he was a child, in part because he suffered with a severe speech impediment his entire life and as a result was constantly teased and picked on. (See R. 258; Page 234, Lines 2-13 and see R. 262; Page 238, Lines 5-11 in the Trial Transcript for 6/17/2011). Catherine W. Brooks often times acted in a fiduciary or caretaker type of capacity similar to a trustee on behalf of and for the benefit of her brother, Kenneth R. Walker, in his role as the beneficiary. This very close and special relationship was based on a mutual bond of love and trust and confidence developed over a long period of time between such siblings by and through their course of dealings with each other over the years. (See R. 258-260; Page 234, Line 2 through Page 236, Line 3 and see R. 263; Page 240, Lines 4-9 in the Trial Transcript for 6/17/2011). From January of 1993 through August 4, 2008, Catherine Brooks managed a lot of Kenneth Walker's basic financial affairs for him and she also handled his money for him and paid his monthly bills for him out of and his designated payee for his monthly SSI disability checks received from the Social Security Administration. (See R. 780; Plaintiffs' Exhibit No. 44 and see R. 277; Page 265, Lines 17-25 and see R. 282-283; Page 275, Line 22 through Page 276, Line 25 in Trial Transcript for 6/17/2011) Catherine W. Brooks assisted her brother, Kenneth R. Walker, in applying for and obtaining his SSI benefits from the Social Security Administration and in getting on Medicaid and she made sure that he always had plenty of groceries in his house and she also helped him get his telephone service restored and in getting his power turned back on and she had Comcast cable service hooked up at his house. (See R. 259-261; Page 235, Line 22 through Page 237, Line 4, and see R. 280-284; Page 271, Line 20 through Page 272, Line 16, and see Page 275, Line 14 through Page 277, Line 25, in the Trial Transcript for 6/17/2011). Catherine W. Brooks also had a special bank account set up at the Wachovia Bank in Walterboro for the sole use and benefit of her brother, the late Kenneth R. Walker, who could withdraw money from such bank account from time to time by talking to a Wachovia employee by the name of Ardie who would in turn call Catherine W. Brooks for the purpose of authorizing such requested withdrawal so Kenneth R. Walker could obtain adequate funds to pay for certain necessities which

he could not otherwise afford. (See R. 261; Page 237, Lines 16-21 in the Trial Transcript for 6/17/2011). This all supports the Special Referee's determination that a fiduciary relationship existed between Appellant and Kenneth Walker.

Appellant further argues that "there is no evidence of an outstanding debt between Mrs. Brooks and Kenneth Walker that would suggest that his deeding the property to her was intended as some form of security." Appellant's initial brief, p. 6. This is belied by Plaintiffs' exhibits 15, 18, and 43 which shows a \$60,000 loan from Respondent to Kenneth Walker that Kenneth Walker was slowly paying back in the years leading up to his death.

Appellant's brief notes that Kenneth Walker knew how to provide a mortgage to family members as security for them loaning him money, thus implying that had he intended the transfer of title to Appellant to be something other than a transfer of fee simple property, he would have provided Appellant a mortgage. Appellant's initial brief, p. 7. However Appellant fails to consider that Kenneth Walker did not have a fiduciary relationship with Patsy Walker, but did have a fiduciary relationship with Appellant. Thus the formalities Kenneth Walker observed with Patsy Walker, were not required when dealing with his fiduciary.

Appellant argues that the \$32,600 that Kenneth Walker paid Appellant prior to his death, as shown on the ledger identified as Plaintiffs' Exhibit 15, does not count towards the \$60,000 figure that she agreed would be sufficient for her to "release to Kenneth Walker all the property off Cooks Hill Road at Walterboro S.C." See R. 532; Plaintiffs' Exhibit 18. Her brief argues that these funds do not count because she "did not receive the \$60,000 from Kenneth's venture with Larry Herndon, but rather from lease payments to which she was already entitled." Appellant's initial brief, p. 11. However Plaintiffs' Exhibit 18, indicates that "*Any* money Kenneth pays Catherine W. Brooks will be toward the sixty thousand dollars." Emphasis added. Further Plaintiffs' Exhibit 18 indicates that Appellant expected some of these \$60,000 funds to come from funds received from Larry Herndon. Appellant's argument that funds she received from Kenneth Walker do not count towards the \$60,000 because they were her funds is inconsistent with the agreement that *any* funds she received

from Kenneth would apply.

Further her claim that the “plan to dredge sand from a pond located on the property which would be purchased by Larry Herndon .... [u]nfortunately, this plan never came to fruition, and Brooks never received any money from the sand operation” (Appellant’s initial brief, pp. 10-11) is belied by the \$39,394.81 Herndon and his companies paid between 2003 and 2005. R. 694-733; Plaintiffs’ Exhibits 31 and 32. These funds appear to be some of the funds used by Kenneth Walker to pay Appellant back the \$60,000. It is noteworthy that Appellant claims she was entitled to these lease payments but allowed the funds from Herndon and his company to go to Kenneth Walker despite the checks actually being written to her. This is further indication that the Appellant and Kenneth Walker never intended these deeds to transfer fee simple title.

The facts of this case meet the criteria of *Gregorie*. There was a \$60,000 debt that Kenneth Walker owed his sister. R. 532 and 778-779; Plaintiffs’ Exhibits 18 and 43. At the time of his death, \$27,400.00 of this debt remained. R. 524; Plaintiffs’ Exhibit 15. While the deeds purport to transfer fee simple title, Kenneth Walker and his sister had a separate agreement that she would return the properties off of Cooks Hill Road once Kenneth paid her \$60,000.00. R. 532; Plaintiffs’ Exhibit 18. Ms. Brooks’ own testimony acknowledges substantial negotiations between her and Kenneth Walker regarding return of the land at issue. The consideration Kenneth Walker received from this land was greatly below any reasonable fair market values at the time of these transfers.

The Special Referee found, and Appellant does not challenge, that she was a fiduciary for Kenneth Walker. The dealings of Ms. Brooks and her brother after he provided her title to these properties indicates an expectation that Kenneth Walker and his son, Roger Walker, would exercise dominion over these properties. They negotiated and entered contracts for the extraction of raw materials from the land. They negotiated and received rents for portions of these properties. They endorsed the checks that were made out to the Appellant, without her apparent objection. Such course of conduct demonstrates an expectation that Kenneth Walker had actual dominion over these properties. Finally, the terms of the contract for conveyance are described in Plaintiffs’ Exhibit 18,

a document that Appellant admits drafting and is consisting with testimony that she and Kenneth Walker had an agreement in which she would transfer title back to these properties once Kenneth Walker had paid her \$60,000 total from “[a]ny money.”

The fact pattern in this case bears resemblance to the facts in *Wall v. Huguenin*, 305 S.C. 100, 406 S.E.2d 347 (1991). In that case an alcoholic landowner, beset by financial problems and in need of funds, deeded property to his neighbors in 1974. The conveyance contained the following handwritten option to repurchase, drafted by the parties themselves:

The agreement between Weldon Wall and Ed Huguenin that the latter has the right to buy back all of the land that he presently owns as of this date plus a hundred more acres contiguous to the present holdings at the appraised valuation at such time as convenient provided the land stays in the name of Ed Huguenin (or immediate family) the appraiser selected by each to select one additional appraiser to determine appraised [value].

*Id.*, 406 S.E.2d at 348.

The total purchase price was approximately \$223,000. The Walls did not give Huguenin a note to secure the purchase price, nor was any purchase money received at time of the transaction. Rather, Huguenin, his mind and judgment impaired by the alcoholism, relied on the Walls to keep a record of the money owed to him. After the conveyances, the Walls mortgaged Roseland to its full value. Six years after the transfer, Huguenin sued for an accounting. That lawsuit resolved in 1982. In 1986, Wall brought a lawsuit to quiet title and the special referee ruled principally in favor of Wall. Huguenin’s heirs then attempted to exercise the option to repurchase Roseland. Wall then moved before the special referee to reopen the case to determine the validity of the option.

In its opinion the Supreme Court found the option was still valid, despite the lapse of thirteen years, holding:

The language of the option clearly grants to Huguenin the determination of a time “convenient” for repurchase of Roseland, thereby maximizing the uncertainty of when that might occur: “The latter [Huguenin] has the right to buy back all of the land ... *at such time as convenient.*” [Emphasis supplied]. Employment by the parties of the word “convenient” demonstrates the peril inherent in the drafting of important legal documents by persons unqualified to understand the impact of the language used.

*Id.* at 349.

In upholding this option, the Supreme Court commented upon the fact that these were not mere business dealings but, rather, were similar to close family transactions:

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 actual familial relationship in this case provides the same inference that existed in *Wall*: these conveyances were not "mere business dealings" but rather were "close family transactions." The formality the law might otherwise expect regarding transfer of title to property or agreements to transfer title back did not exist here. However, the record amply demonstrates an expectation that Kenneth Walker would exercise dominion over this property, and that Catherine Brooks would transfer the properties back to him upon payment of \$60,000 total from any source.

- b. Appellant's brief overstates the Respondents' burden of proof to prove an equitable mortgage

Appellant's initial brief argues that Respondents failed to prove an equitable mortgage existed by "clear and convincing evidence." Appellant's initial brief, p. 15. This overstates the Respondents' burden of proof.

The *Gregorie* opinion does not require clear and convincing evidence to prove an equitable mortgage, stating:

This allegation [of equitable mortgage] must be sustained by testimony prima facie showing that it is true. When this is done, it removes the presumption arising from the fact that a paper is presumed to be what its face imports. 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.

*Gregorie, supra*, 257 S.E.2d. at 707-08.

The *Gregorie* court found that the Plaintiff had more than met its burden of proof:

*Gregorie* has established the transaction as being security for the debt to Hamlin in the way of an equitable mortgage by clear, specific, definite, and convincing evidence; this showing was more than the presentment of a Prima facie case sufficient to initiate presumptions as

to the nature of the instruments, 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.

*Id.* at 708.

*Gregorie* cites *Shiver v. Arthur*, 54 S.C. 184, 191, 32 S.E. 310, 312-313 (1899) on the issue of burden of proof. However *Shiver* does not discuss what evidentiary burden was required to prove a conveyance of land other than to indicate that, based upon the holding in *Hall v. Hall*, 41 S.C. 163, 19 S.E. 305 (1894), the burden rests upon the grantee. From *Gregorie*, it does not appear that a clear and convincing burden of proof is required to find an equitable mortgage. Rather it appears that once a moving party has made a prima facie case of equitable mortgage, the opposing party has the burden of disproving the case. Thus, Appellant's claim that Respondents failed to meet their evidentiary burden of proving an equitable mortgage by clear and convincing evidence (Appellant's initial brief, p. 15) overstates Respondents' burden of proof.

Even at this higher burden of proof there was clear and convincing evidence, some of which was based on adverse credibility determinations against the Appellant, justifying the Special Referee's decision that an equitable mortgage existed. However, Respondents were only required to make a prima facie showing of an equitable mortgage. As argued above, Respondents met this evidentiary burden. Appellant then had the burden of adequately rebutting Respondents' showing. This she has failed to do.

- c. Because the Special Referee's decision was based upon credibility determinations with substantial evidentiary support, his ruling is entitled to extra deference

While this Court is entitled to make its own factual determinations, it should give deference to the credibility determinations of the Special Referee. "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). The Special Referee did not find the Appellant's poorly-substantiated claims to be credible. His credibility determinations are explicable. The Respondents provided substantial documentary evidence supporting their position that an equitable mortgage existed between Catherine Brooks and Kenneth Walker. The Appellant provided

little documentary evidence refuting this. Respondents' argument that an equitable mortgage existed is consistent with the facts and testimony presented at trial. Appellant's argument is inconsistent with much of what was presented at trial and is primarily supported by her own self-serving testimony, which the Special Referee did not find credible.

To accept Appellant's argument on appeal one would have to believe that there was an agreement between her and Kenneth Walker to transfer back the subject properties for \$60,000, but it was completely different agreement than that reflected in Plaintiffs' exhibits 15, 18 and 43. Further, one would have to find that this agreement, without any documentary evidence supporting it, should be given credence over an agreement that has documentary support in her own handwriting. Even if you accept Appellant's argument, she still cannot explain why she left Kenneth Walker complete dominion over the subject properties, including allowing him and his son to negotiate checks written to her and receive rental payments on the subject properties, without taking any action. Appellant's brief provides no explanation as to why the Special Referee's credibility determinations were mistaken; she simply argues that this Court should accept her version of the facts.

To reverse the Special Referee's decision, this Court would need to disregard his credibility determinations, ignore the substantial evidence of an equitable mortgage, and elevate the credibility of the Appellant over the credibility of the Respondents' witnesses, the documentary evidence, and the parties' course of conduct after Kenneth Walker provided her the deeds to the subject properties. Appellant's brief argues a theory of the case that the Special Referee, for the excellent reasons explained above, rejected. This Court should uphold the Special Referee's decision that an equitable mortgage existed.

2. As an Additional Sustaining Ground, this Court Should Find a Contract Between the Appellant and Decedent for Appellant to Reconvey the Subject Properties to the Decedent, or His Heirs, upon Total Repayment of \$60,000

“[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).

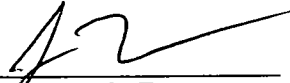
The court should affirm the Special Referee’s decision by finding that Appellant and Kenneth Walker had a contract in which she would transfer title back to these properties once Kenneth Walker had paid her \$60,000 total from “[a]ny money” and that he had paid her \$32,600 of that amount by the time of his death. R. 524, 532; Plaintiffs’ Exhibits 15 and 18. As discussed above, there is substantial evidence sustaining this contract. Accordingly, the Respondents should be entitled to fee simple title to these subject properties upon payment of the remaining \$27,400.

## CONCLUSION

For the reasons discussed above, this Court should affirm the lower court's decision.

May 15, 2012

Respectfully submitted,



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

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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 ..... Respondents,

v.

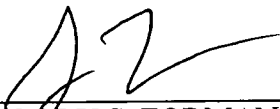
Catherine W. Brooks, ..... Appellant.

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**CERTIFICATE OF COUNSEL**

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The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

  
\_\_\_\_\_  
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May 15, 2012

THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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APPEAL FROM COLLETON COUNTY  
COURT OF COMMON PLEAS

R. Thayer Rivers, Jr., Special Referee

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Case No. 2009-CP-15-1148

---

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, ..... Respondents,

v.

Catherine W. Brooks, ..... Appellant.

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FINAL REPLY BRIEF OF APPELLANT

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## ARGUMENTS

### I. KENNETH WALKER'S DEEDS TO CATHERINE BROOKS WERE NOT EQUITABLE MORTGAGES.

On page 16 of their Brief, Respondents state:

It is noteworthy that Appellant never challenges the Special referee's finding that the transfers of property from decedent to Appellant were not a gift. Her brief then fails to explain why Decedent would transfer property worth \$87,400.00 in 2003 for \$5.00 and love and affection. If these transfers were not gifts-a position neither party claims-then the best explanation is that these transfers were intended as equitable mortgages.

(Final Brief of Respondents, p. 16). While it is clearly the Respondents' position that the deeds from Decedent Kenneth Walker to the Appellant Catherine Brooks were equitable mortgages, characterizing these deeds in this manner is not the "best explanation" of what actually occurred. The better view is that the relationship between Mrs. Brooks and her brother, Kenneth Walker, was multifaceted. When Kenneth Walker deeded property to Mrs. Brooks, he was obviously aware that he was conveying land to a close family member with whom he shared a close relationship and who helped him out financially. (R. p. 4) Thus, even though Kenneth Walker's conveyances to Mrs. Brooks were not simply gifts, it is nonsensical to claim that his feelings for his sister played no part in his deeding the land to her. Taking this into account, the best explanation is that Kenneth Walker's 1996 and 2003 deeds were exactly what both purport to be on their faces; fee simple conveyances of property to his sister, Catherine W. Brooks.

Likewise, Respondents further argue that Mrs. Brooks' own testimony provides evidence of an equitable mortgage:

Her own testimony supports a finding of equitable mortgage: "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."

(Final Brief of Respondents, p. 16). Here again the Respondents ignore the better explanation; that Kenneth Walker conveyed property to his sister as payment for her taking care of him.

II. APPELLANT WAS NEVER PAID ANY MONEY OTHER THAN WHAT SHE WAS OWED AS OWNER OF THE PROPERTY.

Respondents further argue that since Mrs. Brooks received some money from the land, she was therefore being paid by Kenneth Walker to deed the land back. First, they cite the handwritten note identified as Plaintiff's Exhibit 18 as stating that "Any money Kenneth pays Catherine W. Brooks will be toward the sixty thousand dollars." (Final Brief of Respondents, p. 18) They also point to Plaintiffs' Exhibits 31 and 32 as indicating that Larry Herndon paid Mrs. Brooks nearly forty thousand dollars between 2003 and 2005. (Final Brief of Respondents, p. 19) This argument simply ignores the facts of the case. The checks from Lowcountry Concrete, Inc., and Colleton Sand Plant, Inc., (R. pp. 694 & 719) both companies owned by Mr. Larry Herndon, were paid to Mrs. Brooks pursuant to her lease with Mr. Herndon dated May 1, 2003. (R. p. 686) This lease involved the removal of sand from a 118.87-acre parcel owned by Respondent Roger Walker (R. p. 687) The companion lease for the use of Roger Walker's property, also dated May 1, 2003, was introduced at trial as Plaintiffs' Exhibit 29. (R. p. 678) The payments to Mrs. Brooks were based on Mr. Herndon's right to discharge spoil and waste water on Mrs. Brooks land as well as the use of the office and truck scales located on Mrs. Brooks property. (R. pp. 686-87)

Respondents also attempt to claim that these payments constituted portions of the \$60,000 referenced in Plaintiff's Exhibits 15 and 18. (R. pp. 524 & 532) But, as Mrs. Brooks explained at trial, she was willing to sell her land to Kenneth Walker for \$60,000, and though Kenneth at the time had no money, she hoped that Kenneth would be able to generate this sum

by means of dredging sand from the pond on his property which Larry Herndon would then purchase.<sup>1</sup> (R. p. 273, ln. 16 – p. 274, ln. 9; p. 311, lns. 9-15) Unfortunately, this plan never came to fruition, and Brooks never received any money from the proposed sand operation. (R. p. 294, lns. 9-24; p. 309, lns. 9-20) For this reason, Mrs. Brooks was never paid any money other than that which already belonged to her as the rightful owner of the property.

III. THE FACTS OF THIS CASE DO NOT MATCH THOSE FOUND IN WALL V. HUGUENIN.

The Respondents' attempt to cast this action as being in the mold of Wall v. Huguenin, 305 S.C. 100, 406 S.E.2d 347 (1991), fails entirely. In Huguenin, the deed in question contained, on its face, an option to repurchase the Huguenin ancestral estate known as Roseland. Id. 406 S.E.2d at 348. Thus, the relationship between Wall and Huguenin was established at the time of the initial conveyance such that the issue facing the Supreme Court was if the Huguenin family's option to repurchase had survived the twelve years that passed since the deed had been executed. In the present action, there were no contemporaneous re-conveyance agreements between Kenneth Walker and Catherine Brooks when he conveyed property to her in 1996 and 2003. The handwritten notes identified as Plaintiffs' Exhibits 15 and 18 both post-date these deeds and thus cannot be read with them to form an option to repurchase, much less equitable mortgages. (R. pp. 524 & 532)

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<sup>1</sup> The pond was located on property owned by Kenneth Walker, but the spillway for the pond was located on Mrs. Brooks' property.

IV. RESPONDENTS' MISAPPREHEND APPELLANT'S ARGUMENT AS TO THE APPLICABLE STANDARD OF PROOF IN THIS CASE.

Respondents further contend that Mrs. Brooks incorrectly argues that F. Gregorie & Son v. Hamlin, 273 S.C. 412, 257 S.E.2d 699 (1979), requires them to prove the existence of an equitable mortgage by clear and convincing evidence. (Final Brief of Respondents, p. 21). The relevant passage from Hamlin states:

Gregorie has established the transaction as being security for the debt to Hamlin in the way of an equitable mortgage by clear, specific, definite, and convincing evidence; this showing was more than the presentment of a Prima facie case sufficient to initiate presumptions as to the nature of the instruments, 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.

Id. 257 S.E.2d at 708. Because Gregorie's evidence that the deed to Hamlin was, from its execution, meant to be a mortgage was so great, "clear, specific, definite, and convincing" according to the opinion, the Supreme Court found that the deed in question was obviously a mortgage.

Mrs. Brooks' point here is to show that the evidence presented by the Respondents, upon which the Special Referee relied in finding the existence of an equitable mortgage, pales in comparison to that presented in Hamlin. Consider the Supreme Court's findings in this regard:

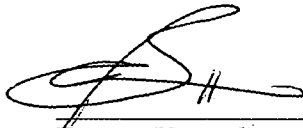
The application by Gregorie was for a loan, and all the negotiations which were conducted were with respect to the form of the security upon the premises in question; and Gregorie at no time made any pretense that he would have sold "OAKLAND" Plantation for the sum actually advanced by Hamlin or for five times that amount. There is simply not a word anywhere that suggests a sale in any logical application of the facts in evidence.

Id. 257 S.E.2d at 706. The situation in the present action is precisely the opposite. Here, there is no evidence that there was any contemporaneous agreement to re-convey when Kenneth Walker

executed his deeds in 1996 and 2003. Thus, while Hamlin presented the court with a situation in which a deed was obviously intended to be a mortgage, such overwhelming evidence simply does not exist in this case.

CONCLUSION

For the additional reasons presented herein, Appellant respectfully requests that this Court reverse the judgment of the Special Referee and issue an Order confirming Mrs. Brooks' fee simple ownership of the Property.



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May 15, 2012

THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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APPEAL FROM COLLETON COUNTY  
COURT OF COMMON PLEAS

R. Thayer Rivers, Jr., Special Referee

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Case No. 2009-CP-15-01148

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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, ..... Respondents,

v.

Catherine W. Brooks, ..... Appellant.

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CERTIFICATE OF COUNSEL

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The undersigned hereby certifies that this Final Reply Brief complies with Rule 211(b), SCACR.

May 15, 2012



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