

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. Supreme Court

APPEAL FROM COLLETON COUNTY
COURT OF COMMON PLEAS

R. Thayer Rivers, Jr., Special Referee

C.A. Nos. 2009-CP-15-1148 & 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, who died testate on 9/20/2008, Petitioners,

v.

Catherine W. Brooks, Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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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 Respondent and Petitioners agreed to reserve their rights as to all motions. The Special Referee issued his Order on August 26, 2011 which awarded title to the subject real property to the Walkers upon payment of \$27,400 to Mrs. Brooks. (R. p. 10, para. 3) Respondent thereafter

served her Notice of Appeal on September 22, 2011. Oral arguments were presented to the Court of Appeals on January 15, 2013, and on April 10, 2013, the Court of Appeals reversed the Special Referee. *Walker v. Brooks*, 403 S.C. 212, 742 S.E.2d at 869 (Ct. App. 2013). Petitioners filed a Motion for rehearing on April 24, 2013, which the Court of Appeals denied on June 10, 2013.

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, 2002 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.¹ (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:

¹ In his deed from 2002, 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

In their Petition to this Court, the Walkers make numerous arguments in support of their contention that the Court of Appeals erred in reversing the judgment of the Special Referee.

Catherine Brooks would ask this Court to deny the Walkers' Petition because their arguments do not show any error in the determination of the Court of Appeals.

I. THE COURT OF APPEALS PROPERLY CONSIDERED THE EVIDENCE OF A CONTRACT TO REPURCHASE THE PROPERTY.

In their first and tenth arguments, the Walkers contend:

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

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

These arguments are simply not correct because the Court of Appeals clearly considered the Ledger (R. p. 524) and its implications in its opinion:

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

Walker v. Brooks, 403 S.C. 212, 742 S.E.2d at 872-73 (Ct. App. 2013) (emphasis added).

Ultimately, the Court of Appeals determined:

In the present case, Brooks's testimony did not produce such convincing evidence in favor of an equitable mortgage. Further, the Repurchase Memorandum did not have a stipulation granting Brooks a fee absolute should Decedent fail to meet a deadline for payment of \$60,000.00. The Repurchase Memorandum simply stated that after Decedent

paid \$60,000.00 to Brooks, she would deed the Cooks Hill property back to him. Brooks was adamant the property was sold or given to her in fee absolute because of her financial support to Decedent. The record contains no evidence of any language in the Repurchase Memorandum that would give rise to an inference of a mortgage. Accordingly, we find this factor weighs in favor of Brooks.

Id., 742 S.E.2d at 877.

This language shows that the Court of Appeals considered the Petitioners' argument regarding the Repurchase Agreement and Ledger, but also considered Brooks' evidence that the money allegedly paid by Kenneth Walker was actually hers to begin with.

At trial, it was uncontroverted by either side that the disputed 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, lns. 9-24 & p. 309, lns. 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 explained, 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) She also made it clear that this money never belonged to Kenneth Walker:

- 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, lns. 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, lns. 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, lns. 16-20)

Thus, the evidence presented at trial demonstrated 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.

As to Mrs. Brooks' motivation for keeping the Ledger, in a footnote to its opinion, the Court of Appeals noted:

FN2. She indicated she documented some of the payments because Decedent asked her to do so, and she did anything he asked because of his intimidating nature.

This observation is consistent with Brooks' testimony that while she loved her brother Kenneth, he could also be intimidating. 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, Ins. 16-18)

The best inference to be drawn from the evidence, then, is that Mrs. Brooks wrote the Repurchase Memorandum and Ledger 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 these documents 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.

II. THE COURT OF APPEALS PROPERLY CONSIDERED THE RELATIONSHIP BETWEEN MRS. BROOKS AND KENNETH WALKER IN REACHING ITS DECISION.

The Walkers make several arguments that, in essence, the Court of Appeals erred in finding that the sibling relationship between Catherine Brooks and Kenneth Walker made the entire course of their dealings very different from those between the parties in *Gregorie & Son v. Hamlin*, 273 S.C. 412, 257 S.E.2d 699 (1979):

2. The Court of Appeals erred in finding the parties' sibling relationship distinguished this case from *Gregorie & Son v. Hamlin*, 273 S.C. 412, 257 S.E.2d 699 (1979), and in finding that the lack of previous negotiations of the parties argued against there being an equitable mortgage.
5. The Court of Appeals erred in finding that the inadequacy of consideration does not support Respondents' claims of equitable mortgage.
6. To the extent the Court of Appeals discounts inadequacy of consideration in finding no equitable mortgage due to the "vastly different relationship of the parties in this case," such weighing has no factual or legal basis.
7. The Court of Appeals erred in finding prior negotiations between Brooks and Decedent were not business related.

In support of Argument No. 2, that the relationship between Brooks and Kenneth Walker does not distinguish this case from *Gregorie & Son v. Hamlin*, Petitioners argue there was a familial relationship between the parties in *Gregorie*. They specifically cite to the following language from this Court's opinion in that case:

The Plaintiff in this action, Osgood D. Hamlin, was a neighboring landowner, kinsman, and longtime friend of the *Gregorie* family; apparently was particularly close to the elder Mr. Ferd *Gregorie*.

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

The Walkers then continue by arguing:

The longstanding and close ongoing family and financial relationship between Osgood D. Hamlin and Ferd *Gregorie*, Sr. is similar to the longstanding and close ongoing family and financial relationship between Catherine W. Brooks and her brother, Kenneth R. Walker. (Petition p. 7)

This argument is not supported by the facts of *Gregorie* or those of the present case. In the same passage cited above, the *Gregorie* opinion discusses the fact that Hamlin has a long-standing practice of loaning money to *Gregorie* and that he had co-signed a note with Arkansas Fuel Oil Corporation in order to help *Gregorie*. *Id.* While it is clear that there was some family connection between *Gregorie* and Hamlin, there is no comparison to the sibling relationship between Catherine Brooks and Kenneth Walker. More importantly, regardless of whatever family ties linked the parties in *Gregorie*, it is plain that Ferd *Gregorie*, Sr., and Osgood Hamlin had a long history of business dealings. There is simply no parallel to the Brooks/Walker relationship at issue here. Brooks and Kenneth Walker grew-up together, and, as the Court of Appeals noted, she "helped Decedent financially throughout the last years of his life. The record does not contain evidence the conveyances arose out of Decedent's specific need for any further

money, other than his continuing and ongoing need for financial help to live.” *Walker*, 742 S.E.2d at 877. Thus, this case is easily distinguishable from *Gregorie* just as the Court of Appeals determined.

Likewise, the Court of Appeals did not err in its evaluation of the lack of extensive negotiations of terms between the parties prior to Kenneth Walker’s 1996 and 2002 deeds because this factor does not carry the same weight in this case as it did in *Gregorie*. 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 *Gregorie*, because in each instance the relationship of the parties determined the character of the transaction. Osgood Hamlin had a long history of giving loans to Ferd Gregorie, Sr. 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.

The Petitioners argument regarding inadequacy of consideration is further undermined by a comparison of the values involved in *Gregorie* and those found in the present action. The deed between Gregorie and 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 above, 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 *Gregorie* is not present here. The court in *Gregorie* 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. Both the Repurchase Agreement and the Order of the Trial Court reference Kenneth Walker owing Catherine Brooks \$60,000. (R. pp. 5 & 532) The Trial Court further determined 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 2002 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 *Gregorie* in which this Court found that \$35,000 purchased property worth ten to twenty times this amount. Thus, the inadequacy of consideration found in *Gregorie* is simply not found in this case.

III. THE COURT OF APPEALS GAVE APPROPRIATE WEIGHT TO THE SPECIAL REFEREE’S FACTUAL FINDINGS.

When reviewing the decision of a lower court in an equitable matter, appellate courts in this State “may view the facts in accordance with our preponderance of the evidence.” *Anderson v. Buonforte*, 365 S.C. 482, 488, 617 S.E.2d 750, 753 (Ct.App.2005). Likewise, as the Court of

Appeals stated in *Settlemeier 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).

Having said this, it is also true that the appellate court should not simply disregard the determinations of the trial judge who actually heard the testimony. *Anderson*, 617 S.E.2d at 753; *Tiger, Inc. v. Fisher Agro, Inc.*, 301 S.C. 229, 237, 391 S.E.2d 538, 543 (1989). In evaluating this case, the Court of Appeals took heed of both these admonitions. An evaluation of its opinion indicates that the Court of Appeals largely accepted the factual findings of the Special Referee, but reversed based on its view of how those facts are best interpreted in the context of existing case law. Thus, the Petitioners third argument:

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

really isn’t a distinct argument in itself, but merely a general contention that the Court of Appeals got it wrong when it reversed the Special Referee.

Likewise, the Walkers’ eighth argument:

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

is not persuasive. In addition to the fact that *Anderson v. Buonforte* supports appellate courts ultimately making their own determinations of facts in equitable matters, the idea that the Special Referee somehow made a wholesale determination that Catherine Brooks was not credible does not hold water. In their Petition, the Walkers cite the Order of the trial court when it states: “The Defendant’s [Brooks’] claims are not substantiated by the evidence,” (R. p. 10, ¶ 1); and, that Mrs. Brooks “testimony rambles all over the place,” (R. p. 9 ¶ 10) These comments from

the Special Referee do not indicate that he didn't find Catherine Brooks credible, but that when he applied the facts to the *Gregorie* factors he found the Walkers' case more persuasive. On the law, the Court of Appeals disagreed. Thus, there is no indication that the Court of Appeals improperly invaded the province of the Special Referee in reversing his decision.

IV. THE COURT OF APPEALS CORRECTLY DETERMINED THAT NO EQUITABLE MORTGAGE EXISTED BETWEEN THE PARTIES.

The central thrust of the Petitioners disagreement with the Court of Appeals is their contention that it was error to find that no equitable mortgage was created between Catherine Brooks and Kenneth Walker. This argument must fail because the Court of Appeals quite correctly determined that the facts of this case in no way support the conclusion that an equitable mortgage ever existed between the parties.

In their fourth and twelfth arguments the Walkers state:

4. The Court of Appeals erred in finding the five factors listed in *Gregorie* to determine whether or not a sale was in fact intended indicates these parties intended to sell rather than mortgage the properties at issue.
12. The Court of Appeals improperly weighed the *Gregorie* factors by ignoring the overwhelming weight of the evidence that Decedent did not intend to provide fee simple title to Brooks.

If Kenneth Walker did not intend to convey the properties at issue to Catherine Brooks, then why did he execute deeds in 1996 and 2002 which, on their face, purport to give her fee simple title? Contrary to the Walkers' contention, there is, in fact, nothing that he could have done to more clearly indicate his intention to convey fee title to Mrs. Brooks than to execute the 1996 and 2002 deeds. Kenneth Walker clearly understood how to give a mortgage to a family

member, as he did in July of 1991, when he executed a \$10,000 mortgage in favor of his niece, Patsy Walker, which was recorded in the records of Colleton County in Book 458 at Page 277. Further, he could have insisted as a condition of executing the deeds to Mrs. Brooks that she enter into a repurchase contract with him, but again no such bargain was made? The only logical inference that may be drawn from this evidence is that the deeds to Catherine Brooks are exactly what they purport to be, conveyances of fee simple title.

Likewise, Petitioners ninth argument:

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

must fail. The facts of this case paint an extremely straightforward picture: 1) Kenneth Walker conveyed fee simple title to the disputed Property to his sister Catherine Brooks by deeds executed in 1996 and 2002; 2) Sometime after the 2002 deed was executed, Kenneth Walker and Catherine Brooks entered into a contract by which he would repurchase the Property from her in exchange for \$60,000; 3) Although it appears that Kenneth Walker earnestly tried to generate an income stream from which he could pay Mrs. Brooks, he was, largely because of his health, unable to do so, and ultimately never paid Mrs. Brooks anything towards the \$60,000.

Finally, the Petitioners' eleventh argument regarding the time frame in which the various instruments at issue in this case were executed ignores the best inference that may be drawn from the evidence in this case. The eleventh argument states:

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

In evaluating this contention, this Court should consider the Court of Appeals' view of the

totality of the evidence:

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

Here, Brooks helped Decedent financially throughout the last years of his life. The record does not contain evidence the conveyances arose out of Decedent's specific need for any further money, other than his continuing and ongoing need for financial help to live. In *Gregorie*, the transaction in question “was a direct result of Gregorie[, Sr.,] making application for a loan to both First National Bank and to Hamlin,” whereas here, no specific transaction occurred for which Decedent would intend to mortgage the property. Again, Decedent and Brooks had an ongoing relationship in which she provided financial aid to him, and it appears Decedent deeded these properties on his own accord. This factor weighs in favor of Brooks.

Gregorie, 742 S.E.2d at 876-77.

Thus, even though the timing of the deeds (1996 and 2002) relative to the Repurchase Agreement (July 16, 2004) indicate that they that can't be read together to create an equitable mortgage, the Court of Appeals' focus wasn't the dates of the documents so much as the difference in the nature of the transaction in *Gregorie* as opposed to the facts of this case. *Gregorie* involved a single transaction, and this Court interpreted it as such. In contrast, the financial dealings between Mrs. Brooks and Kenneth Walker consisted of numerous, mostly small, interactions spanning more than a decade. The Court of Appeals recognized this distinction and thus determined:

The Repurchase Memorandum was written nearly a year after the final conveyance, and thus, it was not evidence of any prior negotiations between the parties. The close relationships and familial transactions resulted in informal and inadequately documented transactions, unlike in *Gregorie*, in which a business entity was involved. The price of Decedent's first conveyance was discussed, and Decedent indicated he was selling the land at a lower price due to the financial support Brooks had given him. The second conveyance was for a nominal amount of money, but it was conveyed approximately eight years later, and during that time, Brooks had continued to help Decedent financially. We note Decedent was familiar with the process of mortgaging his property,

because he previously mortgaged his property to Ballagh, yet he chose to deed the land in question to Brooks. Accordingly, we do not find the previous negotiations of the party support the argument that a mortgage was intended instead of the absolute deed that was executed.

Id. 742 S.E.2d at 876.

V. THE COURT OF APPEALS CORRECTLY DETERMINED THAT THE PETITIONERS DID NOT PROVE THE EXISTENCE OF AN EQUITABLE MORTGAGE BY CLEAR AND CONVINCING EVIDENCE.

As Chief Justice Ness pointed out in his dissent in *Gregorie*:

It is well settled that in order to convert an apparent deed into a mortgage, the proof must be clear and convincing. *Arnold v. Mattison*, 3 Rich.Eq. 153 (1850); *Thomas v. Bartell*, 261 S.C. 531, 201 S.E.2d 243 (1973).
Id. 257 S.E.2d at 709.

The Court of Appeals cited this principle in its opinion:

While the Repurchase Memorandum and Decedent's Cost List may have created a prima facie showing the deeds created equitable mortgage, we find Brooks has disproved that showing. See 54a Am.Jur.2d *Mortgages* § 93 (stating for a court to find an instrument absolute on its face was intended by the parties as a mortgage, “[t]he evidence must be, according to various statements, clear and convincing, plain, credible, satisfactory, unequivocal, unambiguous, and conclusive and [i]t will not suffice if composed of loose and random statements, or facts and circumstances of doubtful import”). As we stated above, many of the factors that must be shown to establish an equitable mortgage did not fall in Respondents' favor.

Walker v. Brooks, 403 S.C. 212, 742 S.E.2d 869, 877 (Ct. App. 2013).

The Court of Appeals was correct in this assessment; Petitioners have not proven their case by clear and convincing evidence.

VI. THERE IS NO REASON FOR THIS COURT TO REVIEW THE COURT OF APPEALS DECISION UNDER THE SOUTH CAROLINA APPELLATE COURT RULES.

Rule 242(b) of the SCACR states:

(b) Considerations Governing Review. A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons. The following, while neither controlling nor fully measuring the Supreme Court's discretion or power to grant review in general, indicate the character of reasons which will be considered:

- (1) Where there are novel questions of law.
- (2) Where there is a dissent in the decision of the Court of Appeals.
- (3) Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court.
- (4) Where substantial constitutional issues are directly involved.
- (5) Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.

While Mrs. Brooks recognizes that this list is not exhaustive of the reasons why this Court would grant Certiorari, she would note that this matter does not fall into any of the above described categories. First, there is no novel question of law presented in this matter, as the issues in this case were fleshed out in *Gregorie & Son v. Hamlin*, which dealt with the same legal principles. Second, there was no dissent in the Court of Appeals' decision. Third, nothing in the opinion by the Court of Appeals conflicts with prior decisions of this Court. Fourth, there are no substantial constitutional issues at play in this case. And, finally, there are likewise no questions of federal law involved.

CONCLUSION

For the reasons stated herein, Respondent Catherine Brooks respectfully requests that this Court deny the Walkers' Petition for Writ of Certiorari.



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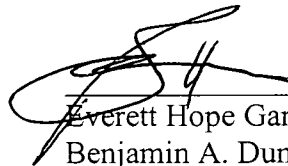
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Catherine W. Brooks, Respondent.

PROOF OF SERVICE

I certify that I have served the Return to Petition for Writ of Certiorari on Roger Wendell Walker, as the Personal Representative of the Estate of Kenneth Ray Walker and individually, Jimmy Ray Walker, and Wilson Whitney Walker by depositing of a copy of same in the U.S. Mail, postage prepaid, on the date listed below addressed to their attorney of record, Gregory S. Forman, Esquire, 171 Church Street, Suite 160, Charleston, S.C. 29401.



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August 23, 2013