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SEP 23 2013

S.C. SUPREME COURT

APPEAL FROM COLLETON COUNTY
In the Court of Common Pleas

R. Thaler Rivers, Jr., Special Referee

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

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

v.

Catherine W. Brooks, Respondent.

REPLY TO RETURN TO PETITION FOR A WRIT OF CERTIORARI

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Argument

1. The Court of Appeals Did Not Address Walker's Claim of a Contract to Repurchase the Property

Brooks argues that the Court of Appeals properly considered the evidence of a contract to repurchase the property at issue. Respondent's return, p. 5. However nowhere in the Court of Appeals opinion is Walker's contract argument addressed.

While the Court of Appeals considered the implications of the "Ledger" (R., p. 524/Pl. Ex. 15) as well as the "Repurchase Memorandum" (R., p. 532/Pl. Ex. 18) and the "Costs List" (R., pp. 778-779, Pl. Ex. 43) associated therewith, this was done only in the context of its analysis and weighing of the eight (8) factors cited in *Gregorie & Son v. Hamlin*, 273 S.C. 412, 257 S.E.2d 699 (1979) to be used by the Court to determine whether or not a Deed constitutes an equitable mortgage or an outright conveyance of fee title.

The Court of Appeals opinion issued does not address or discuss the Breach and Specific Performance of Contract for Sale of Real Estate claims and causes of action as previously asserted against Brooks by the Estate of Kenneth Ray Walker in its Complaint filed with the Colleton County Common Pleas Court at Civil Case No. 2009-CP-15-1148 ®. pp. 18-56, Complaint/12/31/2009). This issue was specifically briefed (Respondent's Brief, pp. 23-24) and expressly argued on behalf of the Estate of Kenneth Ray Walker before the Court of Appeals as an additional sustaining ground on appeal. Appendix, 14-17; Petition for Rehearing, pp. 1-4.

The Court of Appeals never actually found or concluded or ruled or held therein, with respect to the payments made to Brooks by Kenneth Walker from 1/1/2003 through 7/3/2008 in the total amount of \$32,600.00 as listed and itemized in the "Ledger" (R., p. 524/Pl. Ex. 15), that Brooks "was being paid with her own money" by Kenneth Walker as claimed and alleged and asserted herein by Brooks. Appendix, p. 4. Any such claims or contentions that Brooks "was being paid with her money" as asserted and argued on her behalf in this matter by her legal counsel herein are actually disproved by certain relevant excerpts from such Opinion issued by the Court of Appeals in this case

and set forth, as follows: . . . “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.” Appendix, p. 4. “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.’” Appendix, p.4. “However, Brooks further conceded the Repurchase Memorandum stated she would release the land to Decedent after any payment of \$60,000.00 from Decedent, even if it did not come from Lowcountry’s sand dredging.” Appendix, p. 3.

Certain excerpts from the factual summary as contained and set forth in the Opinion issued in this case by the Court of Appeals are also applicable in this regard and are recited, as follows: “Brooks admitted she never exercised any dominion or control over the Cooks Hill properties.” Appendix, p. 3 “After the execution of each deed, Decedent continued negotiating leases with businesses operating on the Cooks Hill properties, collecting rent from those businesses for his own personal use, and maintaining the Cooks Hill properties. Roger Wendell Walker, one of Decedent’s sons, would often pick up rent checks and cash them for his father. At times, Decedent would direct Roger to cash the check and deposit a certain amount into Brooks’s bank account. Two witnesses working for companies leasing land within the Cooks Hill properties testified to the direct involvement they had with Roger and Decedent, even after the deeds were executed.” Appendix, p. 3.

The Return to the Petition for Writ of Certiorari claims and asserts that Catherine Brooks was afraid of and intimidated by her brother, Kenneth Walker, and also contends that because of such fear and intimidation factor that she would do almost anything he asked her to do within reason such as drafting the "Repurchase Memorandum" and Agreement on 7/16/2004 (R., p. 532/Pl. Ex. 18) and preparing the "Ledger" and listing and documenting Kenneth Walker’s payments therein (R., p. 524/Pl. Ex. 15). Respondent’s return, p. 7.

However, Brooks gave sworn testimony trial that casts a very different light on her

interactions and relationship with her younger brother, Kenneth Walker, with the relevant excerpts therefrom being quoted and set forth, as follows: “Kenneth was my baby brother . . . I was about nine years older than Kenneth . . . Kenneth had a speech problem, and he was the baby and they all picked on him. And I always stood up for him. He slept with me when he was little, and he was like my baby.” (Record, p. 258) . . . “Kenneth and I loved each other almost beyond all things. He’d always tell me, Catherine, if I had a wife, I’d want her to be just like you. And I said boy, you would have something if you had something like me. And he - yes. We loved each other dearly . . . I was the one that told Kenneth that he was going to die, and we sat down on the bed and cried together.” (Record, p. 263) . . . “I think Kenneth was one pitiful human being.” (Record, pp. 296-297). “I told you that Kenneth and I were close.” (R, p. 287). The Honorable R. Thayer Rivers, Jr., Esquire as the duly appointed Special Referee for Colleton County, after holding and conducting the reference hearing in this case implicitly did not find Catherine W. Brooks to be credible. The Special Referee found “[t]he Defendant’s (Brooks’s) claims are not substantiated by the evidence.” (R. 10; Order, 8/26/2011, p. 8, ¶1). The Special Referee also 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; Order, 8/26/2011, p. 7). The Special Referee thus implicitly rejected the claim and contention of Brooks that she merely drafted the “Ledger” and the “Repurchase Memorandum” only because she was afraid of and intimidated by her brother, Kenneth Walker.

On several different occasions during 2008, Brooks refused to accept the payment of any amount of money as tendered by or on behalf of Kenneth Walker. She further refused to execute any Deed conveying the Cooks Hill Properties back to Kenneth Walker or his children after a number of various verbal and written attempts made by Kenneth Walker and by others on behalf of Kenneth Walker to fully pay the debt due and owing to Catherine W. Brooks in the amount of \$27,400.00 as shown and reflected by the “Ledger” (R., p. 524/Pl. Ex. 15) in conjunction with the “Repurchase Memorandum” (R., p. 532/Pl. Ex. 18) and as indicated by the “Costs List.” (R., pp. 778-779, Pl. Ex.

43).

Greed, not fear and intimidation, was the true motivating factor in this property dispute as is indicated by some of the more enlightening excerpts and summaries of the sworn testimony given by Brooks in this trial. As the Court of Appeals notes, "She admitted attempts were made prior to and after Decedent's death to pay off the balance shown on the Ledger in return for the Cooks Hill property, but she refused them. She stated because she had held the property for quite a while, its value had increased, and she would not sell it for less than it was worth." Appendix, pp. 4-5. "After Decedent's death, Brooks claimed the deeds were intended to place title of the Cooks Hill properties in her name and were absolute on their face; thus, she was the rightful owner of the properties. Brooks testified she did not have anything to leave her children without the Cooks Hill properties because she had given all her money to the Decedent, and her children wanted an inheritance.: Appendix p. 4.

2 The Court of Appeals Mischaracterized the Relationship Between Brooks and Kenneth Walker as not being "business related" in Reaching its Decision

Brooks argues the Court of Appeals properly characterized Brooks's relationship with Kenneth Walker in overruling the trial court. Respondent's return, p. 8. The Court of Appeals opinion places too much emphasis on the fact that Brooks and Kenneth Walker were siblings and erroneously concludes that this particular relationship was vastly different from the relationship between Osgood D. Hamlin and Ferd Gregorie in *Gregorie* case.

The Special Referee found, and, in the Court of Appeals Brooks did not challenge, that she was a fiduciary for Kenneth Walker. The dealings of 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 lease contracts and received rents for portions of these properties. They endorsed and cashed the checks that were made out to Brooks, with her knowledge and acquiescence

Walker's final brief provided an extensive analysis of the business dealings between Kenneth

Walker and Brooks that take their relationship outside the purview of mere sibling relationship. Respondent's final brief, pp. 5-13.

The "Cost List" (Record, pp. 778-779, Pl. Ex. 43) actually states as its heading at the beginning thereof as being "Money for Dredge" and shows and reflects varying payments totaling approximately \$23,500.00 made by Brooks to pay for parts and labor required to repair Kenneth Walker's Sand Dredge so it could be used in the production and selling of sand as a joint business venture between Kenneth Walker and Brooks in which she claimed that they agreed to split the profits (Record, pp. 264-265, 274, 287, 291, 299, 301, and 304). This certainly appears to be business related dealings and expenditures as does the \$17,000.00 listed on such "Cost List" being the total amount paid by Catherine Brooks to her sister, Jane Ballagh to satisfy Kenneth Walker's mortgage loan debt owed on the 9.5 acre tract of land that was part of the Cooks Hill property that Kenneth Walker conveyed to Catherine by Deed as an equitable mortgage thereon. (Record, Pp. 266-267, pp. 525-527). Brooks testified at trial that Kenneth Walker told her that she would be set for life if she would spend her money down there to get the sand company running back (Record, p. 287) which Brooks did as indicated by the "Cost List" (Record, pp. 778-779, PL Ex. 43). These kind of expenditures seem to be in the nature of business loans made by Catherine Brooks to her brother, Kenneth Walker, and secured by the Cooks Hill property conveyed by Deeds from Kenneth Walker to Brooks in 1996 and 2002

In *Gregorie*, the statement of facts sets forth as follows: "In the late 1950's and early 1960's the oil distributorship known as F. Gregorie & Son which was owned and operated by members of the Gregorie family, was experiencing financial difficulty . . . The Plaintiff in such action, Osgood D. Hamlin, was a neighboring landowner, kinsman, and longtime friend of the Gregorie family; (and) apparently was particularly close to the elder Mr. Ferd Gregorie. Beginning approximately in the mid-1950's, Hamlin had loaned money to that business at the request of Ferd Gregorie, Sr."

The close and ongoing family and financial relationship between Osgood D. Hamlin and Ferd Gregories, Sr., who were kin to each other, is very similar to and closely approximated in a

number of important ways the longstanding and close ongoing family and financial relationship between Brooks, and her brother the late Kenneth Walker. On Page 2 of his Final Order filed and entered in this case on 8/26/2011, Colleton County Special Referee, R. Thayer Rivers, in summarizing the relevant sworn testimony given under September 19, 2013 oath during the reference he held and conducted in this matter, states, as follows: "He (Kenneth Walker) had many ups and downs financially, but most of the last years of his life were primarily downs. From the family farm (some 200 acres located in rural Colleton County) he ran a mining operation and also rented out a building located on the premises. His sister, the Defendant, Catherine W. Brooks, helped him financially during the 1990's and up into the first part of the decade of 2000-2010. It was testified to by all concerned that he (Kenneth Walker) and she (Catherine Brooks) had a very close relationship and she (Catherine Brooks) helped him (Kenneth Walker) out financially throughout the last years of his life." Finding of Fact No. 1 as set out in that Final Order states: "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.

In light of the comparatively obvious similar close and longstanding family and financial relationships and business dealings between Ferd Gregorie, Sr. and Osgood Hamlin and also by and between Brooks and her brother, Kenneth Walker, in the case at hand, the Court of Appeals erred in determining that Factor No. 3 of "Previous Negotiations of Parties" weighed in favor of Brooks because the Estate of Kenneth Walker presented no evidence of prior negotiations between the parties because their interactions were the result of being siblings and were not business related and thus no hallmarks of a lender and borrower relationship and business dealings existed as they did in the aforesaid F. Gregorie & Son v. Hamlin case. Nothing could be further from the truth since a majority of the funds expended by Catherine on Kenneth's behalf were to repair Kenneth's Sand Dredge so he could get his Sand Plant business up and running and producing business revenues and income once again with the business profits realized therefrom according to Catherine to be split equally between Catherine and Kenneth after Catherine was paid back the debt owed to her by

Kenneth in the total amount of \$60,000.00 per the “Repurchase Memorandum” (Record, p. 532, Pl. Ex. 18) and the ledger (Record, p. 524. Pl. Ex. 15), and also to fully pay and satisfy Kenneth’s mortgage loan debt owed to their sister Jane Ballagh, in the total amount of \$17,000.00 secured by a mortgage encumbering a 9.5 acre commercial tract of land off Cooks Hill Road that was a portion of the property conveyed to Catherine as security by Deed from Kenneth with the final payment on such mortgage being made to Jane Ballagh by Catherine on 2/20/2004. (“Cost List”, R.pp. 778-779. Pl. Ex. 43) and (R. pp.266-267) and (R. pp.525-527. Pl. Ex. 16), Appendix, p. 11. *Gregorie* indicates that such a family relationship may be immaterial with respect to the proper analysis of “Previous Negotiations of Parties.” Consideration of the totality of all of the circumstances in this matter, including the “real intentions of the parties,” leads to a conclusion that “Previous Negotiations of Parties” actually weighs extremely heavily in favor of the Estate of Kenneth Walker in this case.

The Court of Appeals opinion erroneously determined Factor No. 3 of “Previous Negotiations of Parties” to be in favor of Brooks, by its misplaced emphasis on the fact that Brooks and Kenneth Walker were siblings and by its mis-characterization of and neglect and failure to consider the weight of a lot of other sworn testimony and evidence introduced at the non-jury trial held and conducted in this case.

3. The Court of Appeals Did Not Give Appropriate Weight to the Special Referee’s Factual Findings

Respondent argues that the Court of Appeals gave appropriate weight to the Special Referee’s factual finds. Respondent’s return, pp. 11-13. The Court of Appeals not only failed to give appropriate weight to the Special Referee’s factual findings in this case, it virtually disregarded the findings of the Special Referee in all important and vital respects. By erroneously reversing the decision and the findings of fact and the conclusions of law as contained and set forth in the Final Order issued and rendered on 8/24/2011 and filed herein on 8/26/2011 by Colleton County Special Referee, R. Thayer Rivers, Jr. (*Walker v. Brooks*, 403 S.C. 212, 742 S.E. 2d 872 (Ct. App., 2013), the Court of Appeals did not follow the required directives as previously laid out by the South Carolina Supreme Court with respect to reviewing and deciding equity cases and as quoted by the

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

The Court of Appeals disregarded the prior findings of Colleton County Special Referee, R. Thayer Rivers, Jr., Esquire, who previously ruled and decided that the two (2) prior deeds to the Cooks Hill Properties from Kenneth Walker unto and in favor of Brooks actually constituted an equitable mortgage and were not intended to be outright conveyances of fee title; and the Special Referee was in a much better position than the Court of Appeals to observe and to weigh and to analyze the credibility of the testimony given by Brooks and all other witnesses that testified during a non-jury trial that lasted for two (2) full days.

4. The Court of Appeals Did Not Correctly Determine That No Equitable Mortgage Existed Between the Parties

Respondent argues that the Court of Appeals correctly determined that no equitable mortgage existed between the parties. (Respondent’s return, pp. 13-16). The Supreme Court case of *Mason v. Finley*, 124 S.E. 780, 129 S.C. 367 (S.C., 1924) states therein that the courts have consistently utilized the following circumstances as having a tendency to show that the transactions in question constituted equitable mortgages of real estate instead outright conveyances of fee title to real estate (1.) That there was no evidence that the owner desired to sell or that the lender desired to purchase; (2.) That during the negotiations nothing was said about a sale of that property; (3.) That no price was fixed as a selling value of the property and no discussion along that line was had; (4.) That no attempt was made to ascertain the real value of the property upon which a sale would reasonably be based, greater liberality being exercised when a loan was intended; and (5.) That the grantee made no inquiry as to the value of the land.

All five (5) of the aforesaid circumstances indicating and equitable mortgage were present

during and throughout the previous negotiations between Brooks and Kenneth Walker with respect to both the 1996 Deed and the 2002 Deed. This strongly indicates that such Deeds in question were never intended to be bona fide outright sales, but were instead actually intended by both Kenneth Walker and Brooks to constitute Equitable Mortgages to secure valid and existing debts owed by Kenneth R. Walker to Brooks. These debts totaled \$60,000.00 as of the date of the recording on 2/11/2003 of the Second (2nd) Deed executed on 2/5/2002 by Kenneth R. Walker, as Grantor, in favor of Brooks, as Grantee; and such debts as of 7/3/2008 had a total balance in the amount of \$27,400.00 due and owing unto Brooks after crediting all of the payments on account made thereon in the total amount of \$32,600.00 by Kenneth R. Walker unto Brooks from 2/11/2003 through and until 7/3/2008. Brooks personally placed and signed her initials of "CWB" that appear on the Statement of Loan Account Balance for Kenneth R. Walker next to the current balance due and owing figures and next to the credits for the payments made on such loan account by or on behalf of her brother, Kenneth R. Walker, with the initials thereon of "RW" being the initials of Roger Walker all as is listed and itemized and appears on such hand-written Statement of Loan Account Balance introduced into evidence during the trial of this case as Plaintiffs' Exhibit No. 15. This Statement of Loan Account Balance shows and reflects a beginning loan balance due and owing unto Brooks by Kenneth R. Walker on or about 2/11/2003 in the principal amount of \$60,000.00 and it shows and reflects an ending loan balance due and owing unto Brooks by Kenneth R. Walker on and as of 7/3/2008 in the principal amount of \$27,400.00 after crediting all payments made on such loan account from 2/11/2003 through 7/3/2008 by 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 previous negotiations and dealings between Brooks and Kenneth R. Walker prior to the execution of the 1996 Deed and prior to the execution of the 2002 Deed also clearly indicated, as follows: (a) There were no discussions between Brooks and Walker concerning or pertaining to the

sale of the subject real estate; (b) There was no discussion between Brooks and Walker concerning or pertaining to a negotiated or agreed upon price or consideration to be paid by Brooks unto Walker for the purchase of the subject real estate; (c) There was absolutely no indication from any of the sworn testimony given during the non-jury trial in this case or from any of the documentary evidence introduced during the non-jury trial in this case that Brooks ever attempted to have any of the subject Cooks Hill Property at issue appraised prior to the execution of either the 1996 Deed or the 2002 Deed by Kenneth R. Walker; and (d) There was no Agreement to Buy and Sell Real Estate or Contract for Sale of Real Estate ever executed by either Brooks, as Purchaser, or Kenneth R. Walker, as Seller, prior to the executions of the 1996 Deed and the 2002 Deed by Kenneth R. Walker.

The circumstances of this case indicate that no outright bona fide sale was ever intended or contemplated by either the Grantee, Brooks, or the Grantor, Kenneth Walker. In regard to all of the conversations that took place between Walker and Brooks prior to Kenneth Walker's executions of the 1996 Deed and the 2002 Deed there was no testimony or evidence or proof presented at the trial of this case that any words were previously spoken or stated between them about buying or selling the subject real estate located off Cooks Hill Road. There was never at any time any type of proposal made by Kenneth R. Walker to sell all of the property located off Cooks Hill Road to Brooks.

There was no evidence or testimony during the trial of this case that Brooks took any of the normal steps and customary course of action which would tend to indicate that she was actually buying or purchasing, in either 1996 or 2002, from her brother, Kenneth R. Walker all of the properties located off Cooks Hill Road. There was also absolutely no evidence or testimony presented during the trial of this case that Kenneth Walker ever wished or desired to sell all of his properties located off Cooks Hill Road to Brooks, or that Kenneth Walker ever even thought about or considered selling the Cooks Hill Properties to Brooks.

The fact that Kenneth Walker maintained the sole and exclusive use and possession and dominion and control of all of the Cooks Hill property and retained all of the rents and profits and benefits derived therefrom after executing the Deeds thereto in favor of his sister, Brooks and also

made various installment payments in the total sum of \$32,600.00 on his loan debt account to Catherine Brooks from 2003 until his death in 2008 leaving \$27,400.00 as the remaining balance due thereon as more fully shown and reflected by the Ledger (R., p. 524; Pl, Ex 18) are also a strong indicator of and entirely consistent with an Equitable Mortgage being actually mutually intended by both Kenneth Walker and Brooks rather than and instead of an outright conveyance of fee-simple absolute title thereto, especially since all of this occurred with the full knowledge and consent and acquiescence of Brooks.

The *Gregorie* case, which was relied upon heavily and cited extensively as authority in both the Opinion issued by the Court of Appeals in this matter and in the Final Order entered in this case on 8/26/2011 by Colleton County Special Referee, R. Thayer Rivers, Esquire, in ruling and holding that a purported deed in reality constituted an equitable mortgage, outlined eight (8) critical factors that must be considered and analyzed by the Court in making such a determination and decision and such factors are listed, as follows: (1) Existence and Survival of Outstanding Debt; (2) Deed Plus Separate Agreement; (3) Previous Negotiations of Parties; (4) Inadequacy of Price and Consideration; (5) Prior Dealings Between the Parties; (6) Terms of the Contract for Conveyance; (7) Burden of Proof; and (8) Defenses.

The Opinion issued in this case by the Court of Appeals correctly found and ruled that the Estate of Kenneth Ray Walker had satisfactorily met and complied with the First (1st) Factor of "Existence and Survival of Outstanding Debt" by presenting valid evidence of an existing and surviving outstanding debt owed by the Decedent, Kenneth Walker, unto Catherine Brooks in the total amount of \$60,000.00, including accrued interest, which was the same amount as enumerated in both the Ledger and the Repurchase Memorandum and Agreement for the release and reconveyance of all of the Cooks Hill Road Properties back to the Decedent, Kenneth Walker. Brooks acknowledges that the Eighth (8th) Factor of "Defenses" is irrelevant under the facts and circumstances of this particular case.

The Court or Appeals erred in holding Walker did not meet or comply with the Second (2nd)

Factor of "Deed Plus Separate Agreement." The Court of Appeals did not expressly rule or hold or propose in their Opinion entered in this case that the Re-Purchase Agreement had to be executed contemporaneously or simultaneously on even date with the execution of the Deed(s) in question in order for such Deed(s) to be determined and construed to constitute an "Equitable Mortgage" The Opinion issued in this case by the Court of Appeals did however erroneously find and conclude and determine that the additional Separate Agreements in the case at bar being the Repurchase Memorandum of Agreement executed on 7/16/2004 and the Payments Ledger prepared and originated in either 2003 or 2004 was too remote in time from the execution of the first deed in 1996 and from the execution of the second deed in 2002 and from the recording of the 2002 Deed on 2/11/2003 in order to be construed together with such prior Deeds as required so as to constitute an "Equitable Mortgage" under South Carolina Law. This holding is somewhat contrary to 55 Am.Jur.2d, Mortgages, as quoted in *Gregorie*, which provides 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. This is the situation in the case at hand. No requirement of a simultaneous execution of the separate Re-Purchase Agreement on the same exact date as the related Deed is expressly stated or set forth under the applicable provisions of 55 Am.Jur.2d, Mortgages as cited herein above as it just has to be part of the same general transaction as the conveyance of the subject real estate as occurred between Kenneth R. Walker and Brooks with respect to their Repurchase Memorandum of Agreement and Ledger.

Brooks admitted under oath in her sworn testimony that she hand-wrote the Repurchase Memorandum and Release of Property Agreement dated 7/16/2004 which states in essence that at such time as she is paid \$60,000.00 by 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 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). Finding of Fact No. 5 as set forth in the Final Order issued in this matter on 8/24/2011 by Colleton County Special Referee, R. Thayer Rivers, states: "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.

Finding of Fact No. 9 as set forth in the Final Order entered in this matter on 8/26/2011 by Colleton County Special Referee, R. Thayer Rivers, states: "Mrs. Brooks has further acknowledged that the handwriting on top of the Ledger Book setting out the debt between the parties is her handwriting and that she has initialed by a number of payments which went to her." R. 8; August 26, 2011 Order, p. 6, ¶9. Finding of Fact No. 10 as set forth in the Final Order issued in this matter on 8/24/2011 by Colleton County Special Referee, R. Thayer Rivers, states, as follows: "That while the testimony rambles all over the place, the most persuasive document is the ledger which shows that at the time of death of Kenneth Walker he was indebted to the Defendant, Catherine Brooks, in the amount of \$27,400.00." R. 9; August 26, 2011 Order, p. 7, ¶10.

Conclusion of Law No. 5 on Pages 7 and 8 of the Final Order entered in this case on 8/26/2011 by Colleton County Special Referee, R. Thayer Rivers, concluded as a matter of law, "There is nothing from the deed(s) or the circumstances or the evidence of any intention to make a gift and the Re-Conveyance acknowledgment is in the Defendants' (Catherine W. Brooks') own hand-writing, which is admitted by her (Catherine W. Brooks). She (Catherine W. Brooks) further admitted that up to the date of her brother's (Kenneth Ray Walker's) passing, she (Catherine W. Brooks) would re-convey the premises in exchange of the payment of the debt."

Conclusion

Considering the totality of the facts and circumstances in this case an equitable mortgage rather than an outright conveyance of fee title was mutually intended by the parties hereto with respect to both the 1996 Deed and the 2002 Deed of the Cooks Hill Properties from Kenneth Walker, as Grantor, unto and in favor of Carolina Brooks, as Grantee. The Court of Appeals incorrectly

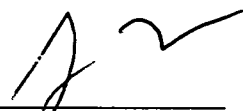
determined that no equitable mortgage existed between Kenneth Walker and Brooks by erroneously reversing the decision and the findings of fact and the conclusions of law as contained and set forth in the Final Order issued and rendered on 8/24/2011 and filed herein on 8/26/2011 by Colleton County Special Referee, R. Thayer Rivers, Jr. (Walker v. Brooks, 403 S.C. 212, 742 S.E. 2d 872 (Ct. App., 2013). Furthermore, Brooks gave sworn testimony under oath during the non-jury trial of this case in which 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." (Record, P. 289). Since Kenneth Walker died on 9/20/2008 before this lawsuit was filed, this sworn trial testimony out of Brooks's own mouth is the best and most reliable indicator that we have in this entire case that the true and mutual intent behind the two (2) deeds for the Cooks Hill properties was not an outright conveyance of fee title at all but rather was meant to instead create an equitable mortgage to secure the debt that Kenneth Walker owed Brooks, based on and as a result of the money that she had already loaned to him or paid or advanced to others on his behalf and/or the moneys that she would in the future loan to him or pay or advance to others on his behalf.

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

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

Respectfully submitted,

September 20, 2013



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**THE STATE OF SOUTH CAROLINA
in The Supreme Court**

APPEAL FROM COLLETON COUNTY
In the Court of Common Pleas

R.Thaler Rivers, Jr., Special Referee

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

RECEIVED
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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 Petitioners,

v.

Catherine W. Brooks, Respondent.

PROOF OF SERVICE

The undersigned hereby certifies that on September 20, 2013 he served one copy of
Petitioners' Reply to Return to Petition for a Writ of Certiorari upon Mr. Benjamin A. Dunn, II,
Attorney for Respondent by placing same in an envelope with proper first class postage affixed
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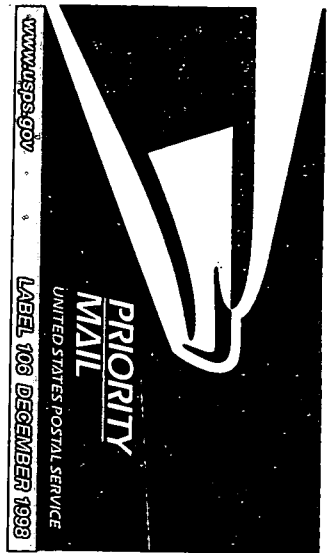
Mr. Benjamin A. Dunn, II
Hollar, Dennis, Corbett, Ormond, Plante & Garner
1777 Bull Street
Columbia SC 29201



GREGORY S. FORMAN, ESQUIRE
Attorney for Petitioners
171 Church Street, Suite 160
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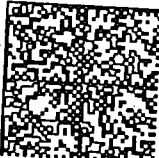
September 20, 2013

Gregory S. Forman, PC
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Charleston, SC 29401



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