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THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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,..... Petitioners,

v.

Catherine W. Brooks,..... Respondent.

BRIEF OF RESPONDENT

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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 Complaint, Catherine Brooks (Hereinafter “Mrs. 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 lapse of the 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, in favor of 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 land 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 they had offered to pay the outstanding balance, but Mrs. Brooks refused to convey the land back, thereby breaching her contract with the late Kenneth Walker. In her Answer, Mrs. Brooks denied the Walkers contentions and pled 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 ¶ 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. Petitioners then filed their Petition for Writ of Certiorari to this Court on July 22, 2013 and by Order dated November 6, 2014, this Court granted Certiorari to review the decision of the Court of Appeals.

FACTS

At the heart of the cases involved in this appeal 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, the Respondent in this matter.¹ (R. pp. 671 & 675). Mrs. Brooks claims full ownership of these lands while the Petitioners, Kenneth Walker's sons, (and Mrs. Brooks' nephews) Roger Walker, Jimmy Walker, and Wilson Walker, claim that when their father deeded these lands to Mrs. Brooks, he did so pursuant to an oral contract, initially formed in 1996 and thereafter amended in 2003 and 2004, whereby Mrs. Brooks would convey the Property back to her brother upon his payment of \$60,000. Petitioners further assert that part of this purchase price (\$32,600) was paid during Kenneth Walker's lifetime and though they have offered to pay the remaining balance to Mrs. Brooks, she has refused to convey the Property back to them. All issues in this appeal arise from this dispute between Mrs. Brooks and the Walkers.

¹ 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

ARGUMENT

In their Brief to this Court, the Walkers make twelve arguments in support of their contention that the Court of Appeals erred in reversing the judgment of the Special Referee. These twelve points may be condensed down to two fundamental theories by which they claim Mrs. Brooks should be compelled to surrender ownership of the Property:

- 1) Under the holding of *Gregorie & Son v. Hamlin*, 273 S.C. 412, 257 S.E.2d 699 (1979), the deeds from Kenneth Walker to Mrs. Brooks should be read in conjunction with a note and ledger, both written by Mrs. Brooks, as equitable mortgages requiring Mrs. Brooks to reconvey the property to Kenneth upon payment of \$60,000.
- 2) In the alternative, the note should be viewed as a contract between Mrs. Brooks and Kenneth Walker for the repurchase of the subject property for \$60,000, and the ledger demonstrates partial performance of this contract.

In this Brief, Respondent will show that Petitioners are incorrect in both assertions and the Court of Appeals correctly determined that the Property rightfully belongs to Mrs. Brooks.

I. THE COURT OF APPEALS PROPERLY DETERMINED THAT THE NOTE AND LEDGER DO NOT CONVERT KENNETH WALKER'S DEEDS INTO EQUITABLE MORTGAGES.

Of the twelve arguments presented in Petitioners' Brief, ten argue the Court of Appeals erred in its application of the holding in *Gregorie & Son v. Hamlin*, 273 S.C. 412, 257 S.E.2d 699 (S.C. 1979), to the facts of this case. In *Gregorie & Son*, this Court determined that a deed absolute from Ferd[inand] Gregorie to Osgood Hamlin was in reality an equitable mortgage based on seven factors²:

- 1) There existed a debt from Gregorie to Hamlin and this debt survived the January 31, 1961 conveyance;

parcel to his nephew, John R. Walker, in 1994.

² The *Gregorie & Son* opinion also discusses an eighth factor, the defense of laches, which is not at issue in this appeal.

- 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 the land, "OAKLAND" Plantation, 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 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 clearly set out the intentions of the parties in 1961; and,
- 7) Plaintiff had satisfied his burden of proof by clear, definite and convincing evidence.

Id. 257 S.E.2d at 702. The Court of Appeals compared the facts of *Gregorie & Son* to those in the present action and determined the course of conduct between Mrs. Brooks and Kenneth Walker was radically different than that between Gregorie and Hamlin. This analysis made it clear that the decision of the Special Referee must be reversed and Mrs. Brooks recognized as the fee simple owner of the Property.

The facts establishing this distinction are uncontested. Kenneth Walker conveyed land along Cooks Hill Road to Mrs. Brooks in two deeds dated March 1996 and February 2003. (R. pp. 671 & 675). An examination of these deeds shows them to be facially valid and there is no language in either document indicating Kenneth Walker had any intent other than conveying fee simple title in the Property to Mrs. Brooks. Petitioners attempt to establish a reconveyance agreement between the parties through two hand-written documents. The first, 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.

(Hereinafter “Note”) (R. p. 532). The second is an undated document in the form of a rough ledger with a caption stating “Kenneth [s]tarting at \$60,000 – Kenneth gave me.” (Hereinafter “Ledger”) (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 contents of the Note and Ledger, Petitioners contend Kenneth Walker’s 1996 and 2003 deeds should be interpreted as equitable mortgages requiring Mrs. Brooks to reconvey the Property in exchange for a payment of \$27,400. (R. p. 9, para. 3).

The problem with Petitioners’ argument is that the factors present in *Gregorie & Son*, which led this Court to read Ferd Gregorie’s deed as an equitable mortgage, simply aren’t present in this case. This fact is demonstrated by an analysis of the individual elements this Court relied on in deciding *Gregorie & Son*.

a) 1st *Gregorie & Son* Factor: Outstanding Debt.

First, there is no evidence of an outstanding debt between Mrs. Brooks and Kenneth Walker that would suggest 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 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 of an outstanding debt to support his conveying land to her as security pending repayment; much less a series of debts giving credence to the argument that he made such security pledges in 1996 and again in 2003.

This is very different from the situation in *Gregorie & Son*:

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, both the deed from Gregorie to Hamlin and the repurchase agreement were executed at the same time as the January 1961 mortgage to First National Bank.

Id.

The evidence also 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. Ballagh³ (Hereinafter "Ballagh"). (R. p. 528). At the time of the assignment, Kenneth had paid very little against the principal of the mortgage, 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). Mrs. Brooks began making payments on the loan in July of 2000, and finally paid it off in 2004. (R. p. 527). At that time, Ballagh executed a satisfaction of the mortgage. (R. p. 531).

³ In her testimony, Jane Ballagh stated that while the mortgage listed Patsy Walker as the mortgagee, she herself had made the loan to Kenneth Walker. (R. p. 151, ln. 5 – p. 152, ln. 2).

This mortgage proves that when Kenneth intended to use land as collateral, he did so directly, and that he had experience in entering into formal debtor/creditor relationships 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 Jane Ballagh. Kenneth Walker didn't give a security interest to Mrs. Brooks; he conveyed outright title to her. If he had intended anything other than an absolute conveyance, he would have executed mortgages in 1996 and 2003, not deeds.

b) 2nd & 6th *Gregorie & Son* Factors: Reconveyance Agreement.

The most striking difference between the facts of the case at bar and those in *Gregorie & Son* is the total lack of any reconveyance agreement. In *Gregorie & Son*, this Court cited from American Jurisprudence, 2nd Edition for the proposition:

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 this Court's decision in *Gregorie & Son* was its view that the documents executed on January 26, 1961, including a note and mortgage to First National Bank of South 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.

The interactions and relationship between Mrs. Brooks and Kenneth Walker present a very different set of facts. The deeds from Kenneth to Mrs. Brooks were themselves executed years apart, March 1996 and February 2003 respectively, and neither deed shows any indication of any repurchase agreement. Nor is there evidence of any agreement contemporaneous to either

deed indicating Kenneth Walker retained any right to re-purchase the Property. Instead, Petitioners rely on the Note and Ledger to define the terms of the alleged agreement requiring Mrs. Brooks to convey the land back to Kenneth Walker. But, the facts of this case simply don't allow the Note and Ledger to be cast in the same mold as the repurchase agreement in *Gregorie & Son*.

First, the Note and Ledger were not drafted contemporaneously with either the March 1996 or February 2003 deeds. The only evidence of a specific date for the drafting of either document is the reference to "July 16, 2004" made in the Note. (R. p. 532). As for the Ledger, the monies listed for 2003 and 2004 are stated as annual totals while monthly payments begin to be listed in January 2005. (R. p. 524). The best inference that may be drawn, therefore, is that the Ledger was initially drafted sometime in early 2005, and certainly no earlier than the July 2004 date listed in the Note. Thus, it appears the Note and Ledger 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. This is a very different situation from what this Court faced in *Gregorie & Son* where the deed and re-purchase agreement 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. *Gregorie & Son*, 257 S.E.2d at 701.

Although the years separating Kenneth Walker's deeds to Mrs. Brooks from the Note and Ledger make it very difficult to describe these documents as a reconveyance agreement, there is a more fundamental reason why Petitioners' equitable mortgage argument must fail. 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;

Eagle Disposal, and its successor in interest, American Bio-Mass, LLC. (R. p. 144, ln. 4 – p. 145, ln. 19). In addition, various parties have paid to extract sand and fill dirt from the Property (R. p. 153, ln. 24 – p. 154, ln. 9). Though the revenues generated from these activities on the Property belonged to Mrs. Brooks, this money went to Kenneth, or to the Walkers ostensibly for Kenneth's benefit, for many years as described by Mrs. Brooks in her testimony (R. p. 275, ln. 15 – p. 276, ln. 14), and in detail by Petitioners in pages 10-12 of their Brief. Mrs. Brooks also 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 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).

So, if the sand dredge operation failed to generate any income, what was the source of the monies Kenneth supposedly paid Mrs. Brooks as listed on the Ledger? (R. p. 524). The simple fact is the amounts listed were derived from payments coming in from the existing contracts with American Bio-Mass, LLC and Wood Brothers, Inc. (R. p. 275, ln. 15 – p. 276, ln. 14). Therefore, Mrs. Brooks didn't receive the payments listed on the Ledger from Kenneth's venture with Larry Herndon, but rather from lease payments to which she was already entitled. 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, 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).

In other words, Kenneth's "payments" to Mrs. Brooks were made with money that already belonged to her. For this reason, Kenneth never actually paid Mrs. Brooks any amount toward the \$60,000 referenced in the Note and Ledger.

Why then did Mrs. Brooks write out most of the annotations listed on the Ledger? While Mrs. Brooks and Kenneth Walker generally had a loving relationship, there were times when 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 at times, and generally tried to do what would keep him happy.

The best inference to be drawn from the evidence, then, is Mrs. Brooks wrote the Note and Ledger, which became Plaintiff's Exhibits 18 and 15, because Kenneth wanted her to, and complying with his wish in this regard would keep him on friendly terms. This inference is

further supported by the fact that writing 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 the purchase price was paid.

Mrs. Brooks was willing to sell the Property back to Kenneth for \$60,000. (R. p. 311, Ins. 9-15). But, because that money never materialized, she never considered executing a deed and never relinquished title to the Property. For this reason, Petitioners' argument that the Note and Ledger should be adjudicated as a repurchase agreement must fail. Even if, for the sake of argument, Petitioners were correct in asserting the parties intended a repurchase agreement, Kenneth Walker never paid Mrs. Brooks any of the agreed consideration. Thus, the Court of Appeals correctly found in Mrs. Brooks' favor and its judgment should be upheld.

c) 3rd *Gregorie & Son* Factor: Negotiation of Price &
5th *Gregorie & Son* Factor: Relationship of the Parties.

Petitioners argue that because: a) There is no evidence the parties engaged in extensive negotiations prior to Kenneth's 1996 and 2003 deeds; b) There were no written contracts preceding the sales; and, c) Mrs. Brooks obtained no appraisals of the various parcels, the deeds should be adjudicated equitable mortgages. While the absence of formalities might indicate the presence of a reconveyance agreement in some situations, under the facts of this case, these factors simply don't carry the same weight as they did in *Gregorie & Son*.

As an initial matter, there was evidence presented at trial that Mrs. Brooks and Kenneth Walker negotiated the price of 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 Waltherboro, 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).

In addition to this direct evidence of negotiations, the more fundamental flaw in Petitioners' argument is that the interactions between Kenneth Walker and Mrs. Brooks were not primarily related to business. They were siblings who had grown up together. (R. p. 258, lns. 2-13). Her life-long relationship with Kenneth and her roots on the land relieved Mrs. Brooks of the need for formal, written contracts or appraisals when dealing with the Property.

Petitioners' argument also fails to consider that, just as in *Gregorie & Son*, the relationship of the parties determined the character of the transaction. Osgood Hamlin had a long history of giving loans to Ferd Gregorie. *Gregorie & Son*, 257 S.E.2d at 700. Therefore, 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 family members who had a close, though sometimes stormy, relationship. Because of this familiarity, they interacted with far less formality than mere business associates.

d) 4th *Gregorie & Son* Factor: Inadequacy of Consideration.

The deed in *Gregorie & Son* stated consideration of \$35,000 for a tract of approximately 600 acres, while the evidence showed that within two years of the transaction, portions of the land had actually been sold for \$1,000 an acre. *Id.* 257 S.E.2d at 705. Similar to the 3rd and 5th elements of the test applied in *Gregorie & Son*, the vastly different facts of 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 indicates the vast disparity between

purchase price and value found in *Gregorie & Son* is not present here. In *Gregorie & Son*, this Court determined the purchase price to be inadequate because Hamlin had “purchased” land for \$35,000 which market conditions demonstrated was worth \$300,000 to \$600,000. *Id.* 257 S.E.2d at 705. In this case, the Order of the Special Referee observed that the taxable values of the parcels Kenneth conveyed to Mrs. Brooks in 1996 were approximately \$36,000, while the additional parcel conveyed in 2003 had a tax value of approximately \$85,000. (R. pp. 5-6). Assuming *arguendo* 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. This difference in value is in no way comparable to *Gregorie & Son* 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 *Gregorie & Son* is not present in this case.

e) 7th *Gregorie & Son* Factor: Conveyance Shown to be Mortgage by Clear and Convincing Evidence.

Finally, Petitioners request that the Court of Appeals’ holding be reversed must fail because they have not proven their case by clear and convincing evidence. In determining the relative weight of Petitioners’ 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.⁴ (R. p. 528).

⁴ 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 COURT OF APPEALS PROPERLY DETERMINED THAT EVEN IF THE NOTE AND LEDGER CONSTITUTED A CONTRACT UNDER WHICH MRS. BROOKS WOULD CONVEY THE PROPERTY BACK TO KENNETH WALKER UPON THE PAYMENT OF \$60,000, KENNETH NEVER PAID ANY OF THE PURCHASE PRICE.

In addition to their contention that Kenneth Walker's deeds to Mrs. Brooks should be deemed equitable mortgages under *Gregorie & Son v. Hamlin*, 273 S.C. 412, 257 S.E.2d 699 (1979), Petitioners also argue that the Note and Ledger prove the existence of a purchase contract between the parties that was partially performed prior to Kenneth's death. (Pet. Brief pp. 35-38). There are several reasons why this argument must fail.

First, in order to argue the Note and Ledger formed a purchase contract whereby Mrs. Brooks would convey the Property to Kenneth upon receipt of \$60,000, Petitioners must concede that Mrs. Brooks held fee title to the Property. If she did not hold title to the Property, then she would have nothing to convey to Kenneth and there would be no reason for him to enter into a contract to buy the Property from her.

Second, Petitioners claim the Court of Appeals failed to address their contract theory of recovery in overturning the verdict of the Special Referee. This argument is simply incorrect 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 [Kenneth]. Roy Walker, [Kenneth's] brother, confirmed that Brooks agreed to sign the property back to [Kenneth]. Brooks asserted [Kenneth'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 [Kenneth] 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). This passage demonstrates the Court of Appeals considered Petitioners' contract theory, but rejected it.

The above passage is also useful because it highlights both the strongest point and the fatal flaw in Petitioners' contract theory. It is entirely correct that Mrs. Brooks was perfectly willing to convey the Property back to Kenneth if he paid her \$60,000.⁵ She testified at trial that she was perfectly willing to sell the land to Kenneth, and if Kenneth's attempt to dredge and sell sand from a pond located on the Property had worked, then he might have generated income with which to pay her. (R. p. 311, lns. 9-15; R. p. 273, ln. 16 – p. 274, ln. 9). Mrs. Brooks' good faith in the fact that this venture could become a reality is demonstrated by an earlier loan ledger documenting payments to her brother from September 1993 through February 2004. (R. pp. 278-79). This ledger shows that in 1996, Mrs. Brooks gave Kenneth over \$10,000 for a motor, transmission, belts, bearing, a shaft, frame, and welding all in an effort to repair the sand dredge. (R. p. 778). With this work having been completed, Mrs. Brooks could fully expect that Kenneth, at minimum, had a real opportunity to make the dredge operable in 2004 when she wrote the Note. But, 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). Thus, the best Petitioners are able to do is to argue that since Kenneth forwarded some of the funds generated by the lease payments, money which belonged to Mrs. Brooks, they should be given credit for partial performance under the Note. This position makes no sense, and if adopted by this Court, will

⁵ At page 36 of their Brief, Petitioners give a detailed accounting of how the \$60,000 figure

result in Mrs. Brooks being forced to sell her property to Petitioners in exchange for \$27,400.

Such a result is contrary to the basic principles of law and equity and must be rejected.

III. THE COURT OF APPEALS COMMITTED NO ERROR IN GIVING CREDENCE TO RESPONDENT'S TESTIMONY.

Petitioners' seventh argument states:

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.

As an initial matter, when reviewing the decision of a lower court in an equitable matter, appellate courts "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:

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).

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

In addition to the fact that both the Court of Appeals and this Court should ultimately make their own determinations of facts in equitable matters, the idea that the Special Referee somehow made a generalized determination that Catherine Brooks wasn't credible incorrectly characterizes the Order of the trial court.

At page 29 of their Brief, Petitioners argue that the Special Referee "implicitly did not find Brooks credible" because he stated in his Order:

The Defendant's [Brooks'] claims are not substantiated by the evidence, (R. p. 10, ¶ 1).; and,

[Mrs. Brooks'] testimony rambles all over the place, [and] the most persuasive document

roughly equals the documented amounts Mrs. Brooks gave to Kenneth or paid on his behalf.

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. p. 9 ¶ 10).

These comments show that the Special Referee took a different view of the meaning of the Ledger than Mrs. Brooks and the Court of Appeals, but do not indicate that he found Catherine Brooks lacking in credibility.

CONCLUSION

For the reasons stated herein, Respondent Catherine Brooks respectfully requests that this Court affirm the decision of the Court of Appeals.



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January 16, 2015

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IN THE SUPREME COURT

RECEIVED

JAN 16 2015

APPEAL FROM COLLETON COUNTY
COURT OF COMMON PLEAS

S.C. Supreme Court

R. Thayer Rivers, Jr., Special Referee

C.A. Nos. 2009-CP-15-1148 & 2009-CP-15-1068

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v.

Catherine W. Brooks, Respondent.

CERTIFICATE OF COUNSEL

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

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PROOF OF SERVICE

I certify that I have served the Brief of Respondent on Petitioners 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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