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in The Supreme Court

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 BRIEF OF PETITIONERS

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ARGUMENT

1. Brooks' brief fails to acknowledge or include all the evidence introduced at trial by the Walkers as proof of a reconveyance and release of property agreement and also to establish the clear and mutual intent of the parties that Brooks would later reconvey and release all of the property back to Walker

Brooks' brief argues that the only evidence documenting the parties intention that she would return the properties at issue to Walker are Brooks' handwritten ledger showing a beginning balance of \$60,000.00 and listing loan payments made by Walker in the total sum of \$32,600.00 and reflecting a loan balance of \$27,400.00 owed by Walker to Brooks as of July 3, 2008. (Plaintiff's Exhibit 15, R. 524 and Respondent's brief, pp. 6-7) and her handwritten agreement stating that once she (Brooks) is paid \$60,000.00 at that time she (Brooks) is to release unto Kenneth Walker all the property off Cooks Hill Road. Plaintiff's Exhibit 18; R. 532 and Respondent's brief, pp. 6-7. However, there is other additional evidence that is not specifically mentioned or set forth in Brooks' brief that actually proves the mutual intent of the parties hereto for the subject properties to be returned to Walker by Brooks in the future upon Walker's full payment and satisfaction of his \$60,000.00 loan debt owed to Brooks.

Plaintiff's Exhibit 43 (R. 777-779) is a handwritten loan advance and cost ledger entitled "Money for Dredge" Ledger kept by Brooks beginning in 1996 for the purpose of memorializing all funds loaned to Walker and paid out and advanced by Brooks for Walker's benefit. The first deed at issue was executed by Walker and filed by Brooks on March 19, 1996. The first entry in this "Money for Dredge" Ledger is dated March 28, 1996, nine days later. Later in the "Money for Dredge" Ledger there appears other loan advances and debts that predate the first deed in 1996 with the first such loan advance made by Brooks on behalf of Walker being dated September 6, 1993 in the amount of \$348.00 to Allied Steel. This "Money for Dredge" Ledger lists a loan debt value in the total amount of \$52,798.67 which with interest at a reasonable annual rate added thereto is very nearly the same figure of \$60,000.00 as set forth in the release and reconveyance agreement (Plaintiff's Exhibit 18, R. 532) and handwritten loan ledger (Plaintiff's Exhibit 15, R. 524).

Brooks' trial testimony was that a large portion of these loan funds were advanced and paid out by Brooks on Walker's behalf for various parts and labor and materials as required for necessary

repairs to render Walker's sand dredge operational once again. (R. 264-265 and Plaintiff's Exhibit 43, R. 777-779). Plaintiff's Exhibit 43 also reflects that Brooks paid their sister Jane W. Ballagh a total of \$17,000.00 on a mortgage loan debt that Kenneth Walker owed to Jane W. Ballagh as documented in Plaintiff's Exhibit 16 (R. 525 and R. 529-531). Plaintiff's Exhibit 43 also contains an entry by Brooks listing as part of the loan debt due and owing to Brooks by Walker some \$2,000.00 worth of property taxes paid by Brooks on the same property conveyed to her by Walker. If both Brooks and Walker had not mutually intended the deeds from Walker to Brooks to operate as security for a loan debt owed to Brooks by Walker and to be constitute an equitable mortgage with respect to the subject properties, then Brooks would not have listed on Plaintiff's Exhibit 43 as part of the loan debt owed to her by Walker the amount of \$2,000.00 for real property taxes that she paid on what she claims to be her sole and absolute property in fee simple. Plaintiff's Exhibit 43, R. 777-779.

Plaintiff's Exhibit 43 should be considered and construed as additional evidence that the parties hereto mutually intended to establish and create an equitable mortgage. Further, this "Money For Dredge" Ledger is contemporaneous with the initial deed in 1996 transferring and conveying a portion of the subject properties at issue herein from Walker to Brooks.

2. There was ample evidence of an outstanding loan debt owed to Brooks by Walker that would suggest that Walker's deeding of property to Brooks was intended as collateral to secure such loan debt

Brooks' brief argues that there was no evidence of an outstanding debt (*Gregorie* factor one) owed to Brooks by Walker that would suggest his deeding of property to her was intended as a form of security. Respondent's brief, p. 7. There are several indications from the record that Brooks first requested at some time in 1996 and again at some time in 2002 that Walker give her some type of collateral to secure her loan advances being paid out by Brooks for and on behalf of Walker, including Brooks paying off some of Walker's other loan debts, (R. 266-267 and R. 749-751) all of which occurred when and because Brooks stated that she was spending all of her money and all of her children's future inheritance on Kenneth Walker. (R. 262, Lines 7-11 and R. 304, Lines 6-9 and

lines 13-15 and R. 305, lines 11-13).

As previously noted herein above, Plaintiff's Exhibit 43 also constitutes additional evidence of the existence of a valid loan debt in the approximate amount of \$60,000.00 being justly due and owing unto Brooks by Walker. (R. 777-779). Brooks' own brief at pages 13-14 indicates Brooks was willing to give all the property off Cooks Hill Road back to Walker once Walker paid Brooks the total sum of \$60,000.00. R. 311, Lines 9-15. This, by itself, indicates that the deed transfers in 1996 and 2002 were intended as an equitable mortgage for the purpose of securing the repayment of a loan debt owed to Brooks by Walker in the total amount of \$60,000.00, and, contrary to Brooks' argument at page 14 of her brief, such loan debt was primarily business related.

The overwhelming weight of the evidence in the record indicates that there was an existing and ongoing business relationship between Catherine Brooks, as the Lender, and her brother, Kenneth Walker, as the Borrower, which began as early as 1993 (Plaintiff's Exhibit No. 43, R. 777-779) when Brooks first started making loan advances for and on behalf of and for the sole benefit of Walker for the original purpose of financing the necessary repairs as required to put Walker's sand dredge back in good working condition again for use in his sand mining business operations. Walker was already actively engaged in the ongoing business of selling dirt and sand from the subject properties located off Cooks Hill Road in Colleton County when Walker first specifically asked Brooks to finance his sand dredge repairs (R. 264-265 and Plaintiff's Exhibit No. 43, R. 777-779). It appears from the record in this case that Catherine Brooks began providing the requested sand dredge repairs funding and financing in 1993 as an unsecured loan to her brother Kenneth Walker. Plaintiff's Exhibit No. 43, R. 777-779. However, later on in 1996 and in 2002 when the loan advances made by Catherine Brooks, as Lender, for and on behalf of and for the benefit of her brother, Kenneth Walker, as Borrower, became significantly larger in amount, then it became necessary for the increasing loan debt to be secured by Kenneth Walker deeding the subject properties at issue in this matter to his sister, Catherine Brooks, as collateral in 1996 and 2002. R. 58-64.

It would not seem to be logical or rational for a Grantee (Brooks) to negotiate and enter into a separate agreement and contract for the reconveyance of all of the subject properties at issue herein with the original owner and Grantor (Walker) of such properties unless and except there was a loan debt owed to Brooks (Grantee) by Walker (Grantor) that led to and formed the basis for the execution in 1996 and 2002 of the original deeds of conveyance for such property transfers and with both parties thereto mutually intending such deeds of conveyance to in fact be an equitable mortgage for the securing of such loan debt owed to Brooks by Walker rather than an outright and bona-fide sale which was obviously never contemplated by either Walker or Brooks based on the totality of the facts and circumstances of this case. Plaintiff's Exhibit 43 being a handwritten ledger kept by Brooks and entitled "Money For Dredge" further notes that Brooks paid Walker's mortgage loan debt in the total amount of \$17,000.00 due and owing to their sister, Jane W. Ballagh (Plaintiff's Exhibit 16, R. 525 & R. 529-531). The first loan advance entry listed by Brooks on her "Money For Dredge" Ledger (Plaintiff's Exhibit 43, R. 777-779) is dated March 28, 1996, nine days after the first deed from Walker to Brooks was executed and filed on March 19, 1996. Some of the loan advances paid out by Brooks for and on behalf of Walker as listed by Brooks on Plaintiff's Exhibit 43 pre-date the 1996 Deed. Plaintiff's Exhibit 43, R. 777-779.

There was substantial, contemporaneous and consistent evidence from various sources of evidence introduced at the trial in this case that Walker owed Brooks a loan debt in the approximate amount of \$60,000.00 and that Walker began incurring such loan debt at around the same time of his 1996 deed in favor of Brooks. The existence of this loan debt would certainly seem to explain the reason for the prior drafting and keeping by Catherine Brooks of her handwritten Repurchase and Release of Property Agreement/Memorandum (Plaintiff's Exhibit 18, R. 532) and her handwritten Loan Account Payments Ledger (Plaintiff's Exhibit 15, R. 524) and her handwritten "Money For Dredge" Ledger (Plaintiff's Exhibit 43, R. 777-779), all of which such documents were introduced into evidence at the trial in this case by Walker and were all coincidentally prepared by Catherine Brooks in her own handwriting and all of which further justifies and corroborates Walker's claim

of an equitable mortgage in this matter.

3. Walker's failure to exercise the formality he did with other family members in his dealings with Brooks is excused by their fiduciary relationship

Brooks argues that no equitable mortgage could have been intended because when Walker intended to enter debtor/creditor relationships with other family members he knew how to mortgage property. Respondent's brief, pp. 8-9. This ignores the fact that Kenneth Walker had a long-standing fiduciary relationship with his older sister, Catherine W. Brooks, as previously found and determined by the Special Referee in this case. Order, P. 5; R. 7.

There is ample testimonial evidence shown and reflected by the record in this case that supports the finding of the existence of a special fiduciary or caretaker type of relationship between Brooks and Walker. Brooks loved and felt sorry for and looked out for and stood up for her baby brother, since he was a child, in part because he suffered with a severe speech impediment his entire life and as a result was constantly teased and picked on. R. 258; Page 234, Lines 2-13 and see R. 262; Page 238, Lines 5-11 in the Trial Transcript for 6/17/2011. Brooks often times acted in a fiduciary or caretaker type of capacity similar to a trustee on behalf of and for the benefit of her younger brother (Walker). This very close and special relationship was based on a mutual bond of love and trust and confidence developed over a long period of time between such siblings by and through their course of dealings with each other over the years. R. 258-260; Page 234, Line 2 through Page 236, Line 3 and see R. 263; Page 240, Lines 4-9 in the Trial Transcript for 6/17/2011.

From January of 1993 through August 4, 2008, Brooks managed a number of Walker's basic financial affairs for him and she also handled his money for him and she paid his monthly bills for him out of his money. R. 780; Plaintiff's Exhibit No. 44 and see R. 277; Page 265, Lines 17-25 and see R. 282-283; Page 275, Line 22 through Page 276, Line 25 in Trial Transcript for 6/17/2011. Brooks also made sure that Walker always had plenty of groceries in his house, and she also helped him get his telephone service restored, in getting his power turned back on, and having Comcast cable service hooked up at his house. R. 259-261; Page 235, Line 22 through Page 237, Line 4, and see R. 280-284; Page 271, Line 20 through Page 272, Line 16, and see Page 275, Line 14 through

Page 277, Line 25, in the Trial Transcript for 6/17/2011. Brooks also had a special bank account set up at the Wachovia Bank in Walterboro for the sole use and benefit of Walker, who could withdraw money from such bank account from time to time by talking to a Wachovia employee by the name of Ardie who would in turn call Brooks for the purpose of authorizing such requested withdrawal so Walker could obtain adequate funds to pay for certain necessities which Walker probably could not otherwise afford. R. 261; Page 237, Lines 16-21 in the Trial Transcript for 6/17/2011. The extremely close and loving and trusting and confidential relationship that had always existed between Kenneth Walker and his older sister, Catherine Brooks, is quite possibly best shown and demonstrated by the sworn testimony given by Catherine Brooks at the trial in this case, as follows: "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." R.263; lines 7-9.

This all supports the Special Referee's specific finding and determination that a long-standing fiduciary relationship existed between Brooks and Walker. R. 7; August 26, 2011 Order, p.5, ¶1. Brooks did not challenge this finding of fact in her initial brief to the Court of Appeals. It was this type of special trust and confidence that Walker had in Brooks based on and as a result of their long-standing fiduciary relationship with each other that excused Walker from the usual formalities that he would have otherwise ordinarily used and followed had he been dealing with or borrowing money from any family member creditors other than Brooks.

4. Walker meets the second and sixth factors of the *Gregorie & Son v. Hamlin* case

Brooks argues that Walker did not meet the second and sixth factors of *Gregorie & Son v. Hamlin*, 273 S.C. 412, 257 S.E.2d 699 (1979). Respondent's brief, pp. 9-13. The second factor of *Gregorie* is a deed plus a separate agreement and the sixth factor is terms of the contract for reconveyance. It is undisputed that Walker conveyed the subject properties at issue herein to Brooks by two (2) separate deeds executed by Walker in 1996 and in 2002. R. 58-64. Plaintiff's Exhibits 15 and 18 are good evidence that clearly and convincingly prove that Brooks and Walker entered into a separate reconveyance agreement and contract whereby Brooks agreed in her own handwritten

document that she admittedly prepared to reconvey and release all of the subject properties off Cooks Hills Road back to Walker upon his payment to Brooks of \$60,000 representing the full and complete satisfaction and discharge of the total loan debt owed to Brooks by Walker as required under the express terms and conditions of such separate agreement and contract for reconveyance. Plaintiff's Exhibit 15, R. 524, Respondent's brief, pp. 6-7; and Plaintiff's Exhibit 18, R. 532, Respondent's brief, pp. 6-7. Brooks' own trial testimony further corroborates Walker's argument that the second and sixth factors of *Gregorie* have been met as she testified that she was willing to give all the subject properties at issue in this case back to Walker once Walker paid her the total amount of \$60,000.00 that was owed to her by Walker. R. 311, lines 9-15. This admission by Brooks, by itself, demonstrates that the deed transfers in 1996 and 2002 were intended as an equitable mortgage for the purpose of securing the repayment of a loan debt owed to Brooks by Walker in the total amount of \$60,000.00. There is no credible evidence that would indicate that these deeds constituted an outright and bona-fide sale of the subject properties.

Brooks' brief also erroneously argues that Walker's loan payments were made to Brooks with her money because Walker used certain funds and revenues and rents and profits produced from and generated by the subject properties at issue herein to make his loan payments to Brooks which rents, revenues and profits Brooks now and first claimed and alleged after the onset and commencement of the litigation that led to this appeal lawfully belonged to her. It is clear from the record in this case and also from the prior Opinion issued in this case by the S.C. Court of Appeals that the Court of Appeals may have considered but never actually ruled upon was the issue raised by Brooks herein relating to the prior loan payments made to Catherine Brooks by Kenneth Walker from January 1, 2003 through July 3, 2008 in the total amount of \$32,600.00 as listed and itemized in the "Ledger" (R. 524; Plaintiff's Exhibit 15), that Catherine Brooks previously claimed and alleged and asserted in this matter "was being paid with her own money" by Kenneth Walker. *Walker v. Brooks*, 403 S.C. 212, 742 S.E. 2d 869, 873 (Ct. App. 2013). Any such claims or contentions that Catherine Brooks "was being paid with her money" as she has asserted and argued in this matter 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” . . . “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”. . . “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.” *Walker*, 742 S.E. 2d at 873.

Certain excerpts from the factual summary as contained and set forth in the Opinion previously 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 . . . 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.” *Walker*, supra, 742 S.E. 2d at 872.

5. Brooks’ brief incorrectly analyzes the fourth factor of *Gregorie* as to Inadequacy of Price and Consideration

Brooks’ brief argues with respect to the fourth of the *Gregorie* factors on Inadequacy of Consideration/Price that “This difference in value is in no way comparable to *Gregorie & Son* in which \$35,000.00 was said to have purchased properties worth nearly ten to twenty times this amount. Thus, the inadequacy of consideration found in *Gregorie & Son* is not present in this case.” Respondent’s brief, pp. 14-15. First of all the *Gregorie* does not state that the difference in value

is required to be ten (10) to twenty (20) times higher in order to constitute inadequacy of consideration. Furthermore, the actual total assessed fair market value in the aggregate amount of \$123,400.00 (\$36,000.00 for property conveyed by 1996 Deed –See R.5; Order P.3–plus \$87,400.00 for property conveyed by 2002 Deed. R.736; Plaintiff’s Exhibit No. 35) at the time for all of the subject properties conveyed to Brooks by Walker by the Deeds executed in 1996 and 2002 was in actuality 9.30 times higher than the total consideration in the aggregate amount of \$13,255.00 as shown and reflected on the face of such Deeds executed by Walker in favor of Brooks in 1996 and 2002. R. 58-64. Catherine Brooks also testified under oath at the trial in this case that she never actually paid any purchase monies or funds whatsoever to Kenneth Walker at the time of his execution of the 1996 Deed in her favor which had a stated price and consideration therein of \$13,250.00 (R. 299-300 and R. 58-61) or at the time of his execution of the 2002 Deed in her favor which stated a nominal price and consideration therein of \$5.00. R. 62-64.

Brooks’ arguments were rejected by Special Referee Thayer Rivers who found that “Mr. Walker deeded properties to Mrs. Brooks that were greatly in excess of any amount of money ever owed to her. Nothing in the Deeds or testimony would indicate that this was a gift.” R.7; Order P.5. Accordingly, these prior transfers and conveyances of the subject properties at issue herein from Kenneth Walker to Catherine Brooks by the execution of his Deeds in her favor 1996 and in 2002 could not possibly constitute a bona-fide and outright sales in good faith for value paid because the total consideration as stated in both Deeds in the aggregate amount of \$13,255.00 was vastly below and beneath the actual total assessed fair market values of all the subject properties located off Cooks Hill Road at such time in the aggregate amount of \$123,400.00 (\$36,000.00 for property conveyed by 1996 Deed –See R.5; Order p.3 plus \$87,400.00 for property conveyed by 2002 Deed –See R.736; Plaintiff’s Exhibit No. 35. A gross disparity between the sale price and the actual value of the land conveyed by a deed is evidence of the parties’ intent to create a security interest that is actually a mortgage rather than an outright bona-fide sale for and by deed. Thus, the disproportion between the consideration stated on the face of the deed and the actual true fair market value of the land must be

marked since a slight inadequacy of the price will not be considered as of importance. Mere inadequacy of price is not alone sufficient to show that the Deed was intended as a mortgage, nor is it conclusive, but it is entitled to great weight when coupled with other circumstances and especially when supported by proof that a close and confidential relationship existed between the parties to such Deeds such as has already been shown and demonstrated to exist in this case between Brooks and Walker. See 59 C.J.S. Mortgages § 77.

6. Brooks' brief incorrectly analyzes and argues the third and fifth factors of *Gregorie*

Gregorie cites and extensively discusses the third factor, "Previous Negotiations of Parties" from the case of *Mason v. Finley*, 124 S.E. 780, 129 S.C. 367 (1924). *Mason* notes that the courts have consistently utilized the existence of the following five (5) circumstances or factors as having a tendency to show and prove that the transactions in question constituted equitable mortgages of real estate instead of and rather than outright conveyances by deeds of fee-simple 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.

None of these five factors favor Brooks. The negotiations and dealings between Brooks and Walker prior to the execution of the 1996 Deed and prior to the execution of the 2002 Deed indicated as follows: (1) There was no evidence that either Walker (Grantor/Borrower) ever desired or intended to sell or gift the properties to Brooks (Grantee/Lender) or that Brooks (Grantee/Lender) ever desired or intended to purchase the subject properties from Walker (Grantor/Borrower); (2) There were no prior discussions between Brooks and Walker concerning or pertaining to the sale or the purchase of the subject properties located off Cooks Hill Road; (3) There were no prior discussions 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; (4) There was absolutely no indication from any of the sworn testimony or from any of the documentary evidence introduced during the trial in this case that Catherine Brooks ever attempted to have any of the subject properties located off Cooks Hill Road appraised prior to the execution of either the 1996 Deed or the 2002 Deed; and (5) There was no written Agreement to Buy and Sell Real Estate or Contract for Sale of Real Estate ever executed by either Catherine W. Brooks, as Purchaser, or Kenneth R. Walker, as Seller, prior to the executions of the 1996 Deed and the 2002 Deed.

There was no evidence or testimony that Catherine W. Brooks took any of the normal steps and customary course of action that a bona-fide purchaser in good faith in an arms-length transaction would ordinarily take if they were actually “buying” or “purchasing” real estate. There was also absolutely no evidence or testimony presented that Kenneth Walker ever wished or desired or intended to sell the subject properties at issued herein located off Cooks Hill Road to his sister, Catherine W. Brooks. Analyzing the five *Mason* factors with respect to both the 1996 Deed and the 2002 Deed strongly indicates that such deeds were never intended to be bona fide outright sales, but were instead actually intended by both Kenneth Walker and Catherine Brooks to constitute Equitable Mortgages to secure a valid and existing loan debt owed to Brooks by Walker in the total amount of \$60,000.00. Plaintiff’s Exhibit 18; R. 532 and Plaintiff’s Exhibit 15; R. 524 and Plaintiff’s Exhibit 43; R. 777-779. Such loan debt had a beginning unpaid principal balance in the amount of \$60,000.00 due and owing to Brooks by Walker as of February 11, 2003 and, as of July 3, 2008, there was a remaining loan balance in the amount of \$27,400.00 shown and reflected to be due and owing unto Brooks by Walker after crediting all of the loan payments made to Brooks by Walker in the total amount of \$32,600.00 from February 11, 2003 through July 3, 2008. Plaintiff’s Exhibit 15; R. 524.

As to the fifth *Gregorie* factor of “Dealings Between Parties,” there are several indications from the record that Brooks first requested at some time in 1996 and again at some time in 2002 that

Walker give her some type of collateral to secure her loan advances being paid out by Brooks for and on behalf of Walker, including Brooks paying off some of Walker's other loan debts, (R. 266-267 and R. 749-751) all of which occurred when and because Brooks stated that she was spending all of her money and all of her children's future inheritance on Kenneth Walker. (R. 262, lines 7-11 and R. 304, lines 6-9 and lines 13-15 and R. 305, lines 11-13). Catherine Brooks also testified under oath during the trial of this case, "And I took my children's money, what they would have gotten, put it down there. Kenneth told me, don't worry, Cat, you'll have the land to cover it." R. 289, lines 5-8, R. 295, Plaintiff's Exhibit 43; R. 777-779.

The testimony and documents introduced into evidence in this case clearly indicates that there was an existing and ongoing business relationship between Catherine Brooks, as the Lender, and her brother, Kenneth Walker, as the Borrower, which began as early as 1993 (Plaintiff's Exhibit 43; R. 777-779) when Brooks first started making loan advances for and on behalf of and for the sole benefit of Walker for the original purpose of financing the necessary repairs as required to put Walker's sand dredge back in good working condition again for use in his sand mining business operations. Walker was already actively engaged in the ongoing business of selling dirt and sand from the subject properties located off Cooks Hill Road in Colleton County when Walker first specifically asked Brooks to finance his sand dredge repairs (R. 264-265 and Plaintiff's Exhibit No. 43, R. 777-779). It appears from the record in this case that Catherine Brooks began providing the requested sand dredge repairs funding and financing in 1993 as an unsecured loan to her brother Kenneth Walker. (Plaintiff's Exhibit 43; R. 777-779). However, later on in 1996 and in 2002, when the loan advances made by Brooks, as Lender, for and on behalf of Walker, as Borrower, became larger in amount, then it became necessary for the increasing loan debt to be secured by Walker deeding the subject properties at issue in this matter to Brooks, as collateral in 1996 and 2002. R. 58-64.

7. Brooks' brief overstates Walker's burden of proof

Brooks' brief argues that Walker failed to prove an equitable mortgage existed by "clear and convincing evidence." Respondent's brief, p. 15. This overstates Walker's burden of proof.

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

This allegation [of equitable mortgage] must be sustained by testimony prima facie showing that it is true. When this is done, it removes the presumption arising from the fact that a paper is presumed to be what its face imports. When this is done, it is incumbent on the mortgagee to remove the inferences that may be drawn from such prima facie showing. This is sometimes spoken of as the burden of proof, but it is simply making it incumbent on the mortgagee to disprove the case as then made.

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

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

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

Id. at 708.

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

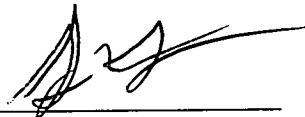
Even at this higher burden of proof there was clear and convincing evidence, some of which was based on adverse credibility determinations against Brooks, justifying the Special Referee's decision that an equitable mortgage existed. However, Walker was only required to make a prima

facie showing of an equitable mortgage. As argued above, Walker met this evidentiary burden. Brooks then had the burden of adequately rebutting Walker's showing. This she has failed to do.

CONCLUSION

In determining and construing whether a deed to property is intended only as security, the chief rule of construction is the pronounced preference of the Courts for gleaning the parties' intent, whenever possible, from written agreements rather than from their self-serving testimony. 54a Am. Jur.2d Mortgages § 86. 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 an additional sustaining ground raised by the Petitioners. For these reasons, this Court should reverse the Court of Appeals and affirm the judgment of the trial court.

Respectfully submitted,



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February 5, 2015

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

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FEB - 6 2015

APPEAL FROM COLLETON COUNTY
In the Court of Common Pleas

S.C. Supreme Court

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,

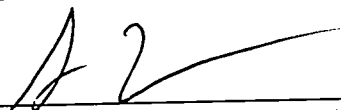
v.

Catherine W. Brooks, Respondent.

PROOF OF SERVICE

The undersigned hereby certifies that on February 5, 2015 he served one copy of the
Reply Brief of Petitioners upon Mr. Benjamin A. Dunn, II, Attorney for Respondent by placing
same in an envelope with proper first class postage affixed thereto, and addressed as follows:

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
Charleston, SC 29401
(843) 720-3749

February 5, 2015

GREGORY S. FORMAN, P.C.

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S.C. Supreme Court

February 5, 2015

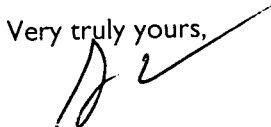
South Carolina Supreme Court
P.O. Box 11330
Columbia, SC 29211

RE: Walker v. Brooks, 2009-CP-15-1148
CA No. 2013-001377

Dear Sir/Madam:

Enclosed please find an original unbound and fourteen bound copies of the Reply Brief of Petitioners along an original proof of service. By copy of this letter I am serving Mr. Dunn with a copy of the Reply Brief of Petitioners and the proof of service.

Very truly yours,



Gregory S. Forman, Esquire

Enclosures

cc: Everett Bennett (w/enclosures)
Benjamin Dunn (w/enclosures)
Roger Walker (w/enclosures)