

Attorney's Fees. Upon a finding by the court that an unsuccessful pleading, motion, or other paper filed in connection with an action under this section was filed in bad faith or for purposes of harassment, the court shall award to the prevailing party attorney's fees reasonable in relation to the work expended in responding to the pleading, motion, or other paper.

Equitable Mortgage: Taken from Long v. Storms, 50 Or App 39 (1981).

It is well settled that a deed, absolute on its face, may be shown to be a mortgage. As explained by the Supreme Court in Umpqua Forest Ind., supra at 614, 217 P.2d 219: "Our decisions establish that if the intent appears that property was conveyed and received as security for the fulfillment of an obligation, the form of the instrument becomes immaterial and the true nature of the transaction may be shown by parol evidence. Neither fraud, mistake nor accident need be proven. The primary inquiry relates to the intention of the parties at the time the transaction was consum(m)ated. Harmon v. Grants Pass Banking & Trust Co., 60 Or. 69, 118 P. 188. Mutual intent is to be determined, not alone by the instruments executed, but also by the attendant circumstances and the conditions under which the instruments were delivered. The issue can be resolved only after considering the situation of the parties, the price fixed relative to the value of the property and the conduct of the parties, both before and after the transaction, insofar as such conduct prospectively or retrospectively throws light upon the intent of the parties at the time of the transaction." (Citations omitted, emphasis supplied.)

Circumstances the Umpqua court pointed to as indicia that a mortgage was intended include: the fact that negotiations originated from an application for a loan, the dire financial straits of the grantor, the grantor's continued possession of the property, the intimate business or social relationship of the parties, failure of the grantee to carefully investigate the title of the grantor, failure of the grantee to ascertain the value of the property, inadequacy of consideration, and the lack of bargaining between the parties as to the value of the property with the controlling consideration being the profit inuring to the grantee.

Further indication of intent to create a mortgage is present: " * * * (w)hen a deed absolute in form, is accompanied by an option to repurchase, the instruments must be considered together. The option does not of itself convert the transaction into a mortgage, but it is a circumstance to be considered in favor of the existence of a mortgage." (Citations omitted.) 188 Or. at 642, 217 P.2d 219. We recognize that a deed, absolute on its face, is presumptively what it appears to be and that evidence must be clear and convincing to support a finding that the deed is in reality a mortgage. Umpqua Forest Ind., supra at 645-46, 217 P.2d 219; Fry v. O. H. Overmyer Co., Inc., 269 Or. 281, 292, 525 P.2d 140 (1974). Nevertheless, as pointed out by the Umpqua court, " * * * while recognizing the rule requiring clear and convincing evidence, the authorities in this and other states have also approved the rule applying peculiarly in courts of equity.