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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM NEWBERRY COUNTY
Court of Common Pleas

Charles M. Watson Jr., Special Referee

Appellate Case No.: 2023-001143

Case No.: 2022-CP-36-00326

Lena Sue Yarborough ....Appellant,

v.

Joel F. Yarborough, III..Respondent.

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE ISSUES ON APPEAL

I. Did the Special Referee err in finding Deed 482-207 in the Newberry Timber Tract's chain of title unambiguously conveyed a tenancy in common with a right of survivorship, despite the plain language of the conveyance was commonly considered to create a joint tenancy with right of survivorship in 1998 or, alternatively, in failing to find Deed 482-207 was ambiguous and susceptible to more than one reasonable interpretation, including a joint tenancy with a right of survivorship?

II. Did the Special Referee err in finding Appellant did not present clear extrinsic evidence of the grantor's intent to convey the Newberry Timber Tract to herself and Respondent as joint tenants with a right of survivorship and thus failing to consider the extrinsic evidence?

STATEMENT OF THE CASE

This appeal arises out of a partition action filed by Appellant Lena Sue Yarborough ("Appellant") against her brother, Respondent Joel F. Yarborough III ("Respondent"), relating to four properties passing to them outside the estate of their mother—Bonnelle G. Yarborough. Only one of those properties is the subject of this appeal: the Newberry Timber Tract.

On August 19, 2022, Appellant initiated this case in Newberry County, seeking partition of four properties Appellant and Respondent own together in Newberry and Fairfield Counties. (R. 156). Respondent did not answer or otherwise respond in the time allotted under Rule 12 of the South Carolina Rules of Civil Procedure, and the circuit court entered default against Respondent on October 13, 2022. Later, the circuit court referred the case to a Special Referee, Charles M. Watson Jr. ("Special Referee"), and he set aside the default on April 25, 2023, and allowed Respondent to file an Amended Answer. (R. 147); (R. 150).

After Respondent filed his Amended Answer to the Complaint on May 1, 2023, the Special Referee inquired about which of the four properties the Parties disputed ownership. On May 5, 2023, counsel for Respondent, for the first time, explained what he believed to be the respective ownership interests of the Parties in the four properties and claimed Respondent owned the Newberry Timber Tract outright. (R. 178). The Special Referee ordered the Parties to file motions for summary judgment regarding the Parties' ownership interests, and the Parties filed cross-motions for summary judgment on May 22, 2023, in which they agreed to the ownership of all properties except the Newberry Timber Tract. (R. 30); (R. 27). The Parties disagreed whether Deed 482-207 related to the Newberry Timber Tract, granted by Bonnelle to herself and Respondent in 1998, conveyed a joint tenancy with a right of survivorship ("JTWRS") or a tenancy in common with a right of survivorship ("TICWRS"). If the Deed conveyed a JTWRS, then it was

undisputed that Appellant and Respondent held the property together as tenants in common after Bonnelle's death because Bonnelle severed the JTWRS by executing Deed 2242-183 in 2020, creating a life estate for herself with the remainder to Appellant. If the Deed conveyed a TICWRS, then Respondent owned the entirety of the Newberry Timber Tract.

On May 25, 2023, without a hearing on the motions, the Special Referee issued an Order granting Respondent's motion for summary judgment and denying Appellant's motion for summary judgment as to the ownership of the Newberry Timber Tract, finding Deed 482-207 "unambiguously" conveyed an interest as tenants in common with a right of survivorship that could not be severed by later Deed 2242-183. (R. 3). Appellant timely moved to reconsider, alter, or amend the Order pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure on June 5, 2023. (R. 11). Without any opposition or additional hearing on the matter, the Special Referee denied the Rule 59(e), SCRCP, motion by Order on June 16, 2023. (R. 7).

Appellant timely filed and served the notice of appeal on July 13, 2023, seeking review of the Special Referee's Orders. (R. 1).

STANDARD OF REVIEW

An appellate court will review a grant of a motion for summary judgment under the same standard as applied by the circuit court under Rule 56 of the South Carolina Rules of Civil Procedure. *Lanham v. Blue Cross & Blue Shield of S.C., Inc.*, 349 S.C. 356, 361, 563 S.E.2d 331, 333 (2002) (citing *Baughman v. American Tel. & Tel. Co.*, 306 S.C. 101, 410 S.E.2d 537 (1991)). "When the parties file cross-motions for summary judgment, the issue becomes a question of law for the [c]ourt to decide de novo." *S.C. Pub. Interest Found. v. Calhoun Cnty. Council*, 432 S.C. 492, 495, 854 S.E.2d 836, 837 (2021) (citing *Wiegand v. U.S. Auto. Ass'n*, 391 S.C. 159, 163, 705 S.E.2d 432, 434 (2011)).

ARGUMENT

Respondent has never challenged the validity of the life estate for the Newberry Timber Tract, located at Book 2242 Page 183 in Newberry County, that Bonnelle G. Yarborough ("Bonnelle") granted to herself with a remainder to Appellant in 2020. (R. 53–56). Rather, Respondent argues that he solely owns the Newberry Timber Tract because he contends that Bonnelle executed a prior deed, twelve years earlier, in 1998 located at Book 482 Page 207 in Newberry County, ("Deed 482-207"), (R. 44–47), that conveyed the Newberry Timber Tract to herself and Respondent as a TICWRS that could not be severed by the 2020 life estate deed ("Deed 2242-183"). On the contrary, Appellant contends Deed 482-207 conveyed a JTWRS that Bonnelle could and did sever in 2020 by executing Deed 2242-183.

Therefore, the Special Referee properly found that "[t]he determination of the interests that the parties own in the Newberry Timber Tract depends entirely upon the construction of" Deed 482-207. (R. 4); *see also* (R. 7 ("The distinction is significant because the Defendant claims ownership of the property through the survivorship provisions of the Deed, while the plaintiff claims ownership through a subsequent deed which she argues severed the survivorship provision of the Deed and conveyed a one-half interest to her. If the Words of Inheritance created a [JTWRS], the Plaintiff's claim would be valid. If the Words of Inheritance create a [TICWRS], the Plaintiff's claim would fail.")).

The Special Referee erred, however, in finding that Deed 482-207 contains "words of inheritance in the granting clause [that] have well established meaning in our jurisprudence" and "unambiguously creates a Tenancy in Common with an indestructible right of survivorship." (R. 4–5). Instead, Deed 482-207 either unambiguously creates a JTWRS under the particular facts of this case, or, in the alternative, is at the very least ambiguous, such that the Special Referee was

required to look to extrinsic evidence of Bonnelle's intent which clearly shows her intention to create a JTWRS in 1998.

The Court should therefore reverse the Special Referee, find Deed 482-207 creates a JTWRS that Bonnelle can and did sever in 2020 in Deed 2242-183, and hold that Appellant and Respondent now hold equal interests in the Newberry Timber Tract as tenants in common.

I. The Special Referee erred in finding Deed 482-207 unambiguously created a TICWRS.

Deed 482-207 is titled "Joint Tenancy with Right of Survivorship" and includes granting clause language to Bonnelle and Respondent "for and during their joint lives and upon the death of either of them, then to the survivor of them, his or her heirs and assigns, forever, in fee simply, together with every contingent remainder and right of reversion . . . ." (R. 45). The Special Referee erred in finding this language unambiguously creates a TICWRS.

The Special Referee focused primarily on *Smith v. Cutler*, 366 S.C. 546, 623 S.E.2d 644 (2005), in finding that the granting clause here is unambiguous and has "well established meaning in our jurisprudence and control the interpretation of the Deed." (R. 5). In *Cutler*, the wife granted the property to herself and her new husband, using the same granting clause language here. 366 S.C. at 548, 623 S.E.2d at 645–46. Ultimately, our supreme court held the conveyance in those circumstances was a TICWRS. *Id.* at 551, 623 S.E.2d at 647. However, as explained below, *Cutler* is not controlling here for several important reasons the Special Referee ignored.

A. The plain language of Deed 482-207 unambiguously created a JTWRS.

In 1998, when Bonnelle executed Deed 482-207, *Cutler* had yet to be decided. Thus, it was not "well-settled" that a conveyance of land "for and during their joint lives, and upon the death of either of them, then to the survivor of them, his or her heirs and assigned forever, in fee simple" "unambiguously" created a TICWRS. At that time, that language was often used under

common and statutory law to create a JTWRS. Considering the law in 1998 relating to the granting clause language and the remaining provisions of Deed 482-207, the Court should reverse the Special Referee and find Deed 482-207 unambiguously created a JTWRS.

i. In 1998, practitioners commonly considered the plain language of the granting clause in Deed 482-207 to create a JTWRS.

In 1998, when Bonnelle executed Deed 482-207, granting her and her son (Respondent) a joint ownership interest in the Newberry Timber Tract, there was no common or statutory law clearly establishing that a conveyance of land "for and during their joint lives, and upon the death of either of them, then to the survivor of them, his or her heirs and assigned forever, in fee simple" "unambiguously" created a TICWRS. Rather, in 1998, ample authority indicates practitioners frequently used this language under common and statutory law to create a JTWRS, not a TICWRS. *See Free v. Sandifer*, 131 S.C. 232, 237, 126 S.E. 521, 523 (1925) (stating that a deed containing the words "joint" and "survivor" "are apt words for the creation of an estate in joint tenancy"); *see also* S.C. Code Ann. § 62-2-804 (1996) (providing that a deed can create a JTWRS, where one party conveys to himself and another person and "expressly provides for a right of survivorship," and failing to identify any other specific language to that end); Paul W. Dillingham & Claire T. Manning, *To fee or Not to fee, two deed drafting traps created by recent changes in S.C. Law*, S.C. LAWYER, at 39 (Mar. 2007) (stating that, before 2000, "many practitioners, attempting to create a survivorship form of ownership, used and followed the language: 'for and during their joint lives and upon the death of either of them, then to the survivor of them, his and her heirs and assigns forever in fee simple'" and others commonly used "as joint tenants with rights of survivorship and not as tenants in common"); Claire Manning, *Drafting Survivorship Deeds Continues to be a Concern*, *available at* https://letstalkdirtsc.com/2018/03/28/drafting-survivorship-deeds-continues-to-be-a-concern/ (last visited Aug. 31, 2023) (explaining that, before *Cutler*, the granting

clause "for an during their joint lives and upon the death of either of them, then to the survivor of them, his and her heirs and assigns forever in fee simple" and "as joint tenants with rights of survivorship, and not as tenants in common" were both commonly used and "most practitioners did not believe different estates were created by the different language commonly in use [but that] joint tenancy was created in both cases").

In 2000, the General Assembly enacted section 27-7-40 of the South Carolina Code regarding "Creation of a joint tenancy" to provide that a joint tenancy would be *conclusively* created by the familiar words "as joint tenants with rights of survivorship, and not as tenants in common." The General Assembly also recognized that this statutory language was "*[i]n addition to* any other methods for the creation of a joint tenancy in real estate which may exist by law." S.C. Code Ann. § 27-7-40 (emphasis added). *See also, supra,* Dillingham *et al., To fee or Not to fee*, at 39 (noting that, only after 2000, did most practitioners use the language set out in the statute "as joint tenants with rights of survivorship, and not as tenants in common" to create a JTWRS). Accordingly, when Bonnelle executed Deed 482-207 in 1998, seven years before *Cutler* and two years before the General Assembly enacted section 27-7-40, there was no magic language approved by common or statutory law by which a deed drafter could clearly and conclusively create a JTWRS, or TICWRS for that matter.[1]

[1] The Special Referee placed significant weight on the fact that South Carolina has long recognized the estate of a TICWRS and particularly in 1953 in *Davis v. Davis*, 223 S.C. 182, 75 S.E.2d 46 (1953). (R. 10); *see also* (R. 5 ("[T]he Supreme Court, in *Cutler*, did not create TIC ROS as a new estate.")). *Davis* and the recognition of TICWRS in South Carolina, however, has no control over—or any relevance to—this case. The granting clause in *Davis* was completely different from the one at issue here, and the Court there recognized the TICWRS because the grantor spouse tried to convey a tenancy by the entirety by to both spouses, which had been abolished by that time. 223 S.C. at 185–87, 75 S.E.2d at 47–49. Appellant has never argued that a TICWRS cannot be created. Rather, Appellant argues that one was not created here in Deed 482-207.

In fact, most practitioners did not know that the granting clause in Deed 482-207 could create a TICWRS until the supreme court issued its opinion in *Cutler* in 2005. *See, supra*, Dillingham, *et al.*, *To fee or Not to fee*, at 48 (In 1998, "most practitioners did not think different estates were created by the different language" as later suggested by the Supreme Court of South Carolina in *Cutler*.). It was, therefore, an error of law for the Special Referee to hold that in 1998, Deed 482-207's granting clause "for and during their joint lives and upon the death of either of them, then to the survivor of them, his and her heirs and assigns forever in fee simple" were "words of settled legal import" and "unambiguously" created a TICWRS. Instead, ample authority provides that practitioners commonly used the same granting clause language to create a JTWRS. Therefore, the Court should reverse the Special Referee and find there was no settled law on the issue in 1998 and the granting clause unambiguously created a JTWRS.

ii. The plain language of the four corners of Deed 482-207 unambiguously created a JTWRS.

Considering the common usage of "for and during their joint lives and upon the death of either of them, then to the survivor of them, his and her heirs and assigns forever in fee simple" to create a JTWRS in 1998, *see supra* Section I.A, the Court should find the plain language of Deed 482-207 unambiguously creates a JTWRS.

First and foremost, in considering a deed, the "the intention of the grantor must be ascertained and effectuated," *Wayburn v. Smith*, 270 S.C. 38, 41, 239 S.E.2d 890, 892 (1977), from "the four corners of the deed," *K & A Acquisition Grp., LLC v. Island Pointe, LLC*, 383 S.C. 563, 682 S.E.2d 252, 262 (2009). *See also Sandy Island Corp. v. T.S. Ragsdale*, 246 S.C. 414, 420, 143 S.E.2d 803, 806 (1965) ("In construing a deed it is elementary that the cardinal rule of construction is to ascertain and effectuate the intention of the parties, unless that intention contravenes some well settled rule of law or public policy."). "Moreover, in ascertaining such intention the deed

must be construed as a whole, and effect given to every part thereof, if such can be done consistently with law." *Wayburn*, 270 S.C. at 41–42, 239 S.E.2d at 892 (citing *Bean v. Bean*, 253 S.C. 340, 170 S.E.2d 654 (1969)).

From the outset of the four corners of deed 482-207, Bonnelle clearly intended to convey to herself and Respondent a JTWRS. Deed 482-207 is titled, "Warranty Deed (Joint Tenants with Right of Survivorship)." (R. 45). The Special Referee improperly disregarded the Deed title, simply ignoring this language and citing several cases as authority for doing so. (R. 8–9). However, none of those cases stand for the proposition that the title of a deed should be discounted or disregarded as a matter of law. Further, each of those cases recognize at least that "in ascertaining such intention the deed must be construed as a whole, and effect given to every part thereof, if such can be done consistently with law."[2] *Wayburn*, 270 S.C. at 41–42, 239 S.E.2d at 892 (citing *Bean*, 253 S.C. 340, 170 S.E.2d 654).

And, as explained above, the Court's interpretation of the granting clause *Cutler*, should not negate this clearly stated intention. Bonnelle, and her able counsel at the time with Pope & Hudgens, PA, were unaware of how the Court would later interpret the granting language in *Cutler*. Also, the deed title in *Cutler* is notably very different from the one here. (R. 48–49). The *Cutler*

[2] *See Batesburg-Leesville Sch. Dist. v. Tarrant*, 293 S.C. 442, 445, 361 S.E.2d 343, 345 (Ct. App. 1987) (noting "the cardinal rule of construction of a deed" is "to ascertain and effectuate the intention of the parties, unless that intention contravenes some wellsettled rule of law or public policy"); *Cnty. of Abbeville v. Knox*, 267 S.C. 38, 40, 225 S.E.2d 863, 864 (1976) (stating the intention of the grantor prevails if consistent with applicable legal principles and is "unavailing [only] . . . where words of settled legal import are used and contrary principles are encountered" (quoting *Cresswell v. Bank of Greenwood*, 210 S.C. 47, 41 S.E.2d 393 (1947))); *Wallace v. Taylor*, 127 S.C. 121, 131–32, 120 S.E. 838, 841 (1924) (ascertaining the intent of the grantor was not for the children to take any part of the land assigned to another); *Wilson v. Poston*, 129 S.C. 345, 351, 123 S.E. 849, 851 (1924) (stating a grantor's intent "cannot be allowed effect, if in so doing the established rules of construction be contravened").

deed provided for a "Warranty Deed (Jointly for Life with Remainder to Survivor)." (R. 49). Whereas Deed 482-207 plainly provides for a "Warranty Deed (Joint Tenants with Right of Survivorship)." (R. 45). This difference matters because it demonstrates clear intent within the four corners of Deed 482-207 to create a JTWRS, not a TICWRS like the title of the deed at issue in *Cutler* suggests.

"The effect of a deed is to be ascertained from the language of the instrument as a whole rather than from the words of particular clauses." 26A C.J.S. *Deeds* § 204; *see also* 26A C.J.S. *Deeds* § 202 ("It is the duty of the court to construe a deed as a whole, and interpret[it] to give effect to every part of the document, with all the parts considered together."). Coupled with the common use of the conveyance of land "for and during their joint lives, and upon the death of either of them, then to the survivor of them, his or her heirs and assigned forever, in fee simple" to create a JTWRS in 1998, the Court should conclude that Deed 482-207 as a whole is susceptible to only one reasonable interpretation—an interpretation that comports with the Deed's title—a JTWRS.

B. Alternatively, Deed 482-207 is at least ambiguous and susceptible to more than one reasonable interpretation, including a JTWRS, under the particular circumstances here.

To the extent the granting clause in Deed 482-207 could be interpreted as the Special Referee did—as conveying a TICWRS—the common and statutory law in South Carolina in 1998 also allowed for the same language to convey a JTWRS. Coupled with the plain language of Deed 482-207, including the Deed's Title, the Court should conclude Deed 482-207 is at least subject to more than one reasonable interpretation and is therefore ambiguous, requiring consideration of extrinsic evidence of Bonnelle's intent to create a JTWRS.

"A [deed] is ambiguous when the terms of the [deed] are reasonably susceptible of more than one interpretation." *Bluestein v. Town of Sullivan's Island*, 429 S.C. 458, 462, 839 S.E.2d 879, 881 (2020) (alteration in original) (quoting *S.C. Dep't of Nat. Res. v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 302–03 (2001)). "When the [deed] is ambiguous the court may take into consideration the circumstances surrounding its execution in determining the intent." *Id.* (alteration in original) (quoting *Williams v. Teran, Inc.*, 266 S.C. 55, 59, 221 S.E.2d 526, 528 (1976)).

At the very least, Deed 482-207's granting clause was subject to more than one reasonable interpretation when it was executed in 1998. On one hand, the Special Referee improperly considered it as unambiguously conveying a TICWRS at the time. As discussed above, this "unambiguous" construction is not supported by any statutory or common law. Further, the Special Referee's conclusion conflicts with the fact that three former members of this Court—two of whom went on to the state supreme court—found that the same granting language in *Cutler* "unambiguously created a joint tenancy with rights of survivorship" in 2004. *Smith v. Rucker*, 357 S.C. 532, 536, 593 S.E.2d 497, 499 (Ct. App. 2004), *overruled by Smith v. Cutler*, 366 S.C. 546, 623 S.E.2d 644 (2005). And in reversing *Rucker* in *Cutler*, the Court did not disagree that the language was ambiguous. Instead, the Court looked to extrinsic evidence as well as the equities at play to interpret the meaning of the granting clause in that particular case. Here, extrinsic evidence of Bonnelle's intent is clear as explained below, and the circumstances and equities at play in *Cutler*—in a spousal relationship—are not present here.

To be sure, the facts in *Cutler* are significantly distinguishable from the facts here. In *Cutler*, the wife granted the property to herself and her new husband. 366 S.C. at 548, 623 S.E.2d at 645–46. Shortly after her husband had become incapacitated and "[d]ue to conflict between the

families," the husband's son brought the partition action. *Id.* The Court identified that "the question before this Court centers on the type of ownership held by both husband and wife and whether the property is subject to partition." *Id.* at 550, 623 S.E.2d at 647. In interpreting the conveyance, the Court first stated, "the language of the deed clearly indicate[d] that the parties intended to create a right of survivorship." *Id.* at 551, 623 S.E.2d at 647. The Court then went on, however, to determine what type of ownership the husband and wife held together, looking at extrinsic evidence to make that determination.

Specifically, the Court noted "[the wife], a woman in her seventies, and [husband], a man in his eighties, married in June 2000. The property at issue was bought by [the wife] and owned by her most of her adult life. No other person owned an interest in the property until after the marriage when [the wife] deeded a share to [the husband]." *Id.* at 548 n.1, 623 S.E.2d at 645 n.1. And the wife *testified* as to her intention in executing the deed: "she wanted to make sure that if she were to predecease [her husband] that he would get the property." *Id.* Finally, the Court noted, in equity, that the wife and the husband "were married and no act, such as filing for divorce, inconsistent with the intent to remain married had been taken. A successful partition action [instituted by husband's son] would result in a forced sale of the property which had been [wife's] home since 1958." *Id.* at 548, 623 S.E.2d at 645–46.

Only after considering this testimony and the equities—extrinsic evidence—did the Court conclude that the wife intended to create a TICWRS because "the property will go only to the survivor of the parties and the future interest [would] not vest until death of one of the co-owners," unlike a JTWRS. *Id.* at 551, 623 S.E.2d at 647. The Court did not hold, however, that, outside the context of a wife and a husband, a conveyance of land "for and during their joint lives and

upon the death of either of them, then to the survivor of them, his and her heirs and assigns forever in fee simple" were "words of settled legal import" and "unambiguous" as a matter of law.

What is more, the deed in *Cutler* like the Deed here, was executed after the General Assembly amended section 62-2-804 of the South Carolina Code in 1996 to allow for a party to convey to herself and another person a JTWRS so long as that party "expressly provides for a right of survivorship." Further, the deed in *Cutler* like the Deed here was also executed before the General Assembly later enacted section 27-7-40 of the South Carolina Code in 2001 to provide a method by which a deed could conclusively establish JTWRS by use of the language "as joint tenants with right of survivorship, not as tenants in common."

Davis v. Davis, 223 S.C. 182, 75 S.E.2d 46 (1953), a case also relied on by the Special Referee, similarly interprets a deed between a husband and a wife as a TICWRS, noting the equitable nature of that result there. The Court in *Davis* created the estate of TICWRS because South Carolina had abolished tenancy by the entirety, property held between spouses, at that time. *Id.* at 185, 75 S.E.2d at 47. It makes sense that one spouse may want to grant an *indestructible* right of survivorship to herself and her spouse. In that context, the import of an indestructible future interest is that neither spouse can unilaterally sever the TICWRS without the other spouse's consent. The purpose of this concept, especially at the time the Court decided *Davis*, is obvious in the context of a husband and wife: "It is to prevent the anomaly of a philandering husband conveying his interest to his girlfriend, resulting in wife and girlfriend becoming cotenants upon his death." Joby C. Castine, *Deeds of Conveyance*, S.C. BAR, at 145 (2019).

In this context, however, Bonnelle granted the Newberry Timber Tract to herself and Respondent, her son. It does not make sense that Bonnelle would intend to grant an indestructible right of survivorship to herself and Respondent. For all the reasons above, it is more than

reasonable to conclude that Bonnelle granted to herself and Respondent, her son, a JTWRS in 1998, within the four corners of Deed 482-207.

To this end, the Court should recognize that the Deed is at least ambiguous on its face. "When intention is not expressed accurately in the deed[,] evidence aliunde may be admitted to supply or explain it." *K & A Acquisition Grp., LLC*, 383 S.C. at 682 S.E.2d at 262. "The instrument is not thereby varied or contradicted but is explained or corrected." *Id.*; *see also Bellamy v. Bellamy*, 292 S.C. 107, 111, 365 S.E.2d 1, 3 (Ct. App. 1987) ("When the language in a deed is ambiguous, extrinsic evidence is admissible to aid the court in determining the grantor's intentions."). Therefore, the Court should find the Special Referee erred in failing to conclude that Deed 482-207 was at the very least subject to more than one reasonable interpretation and that extrinsic evidence demonstrated Bonnelle's intent to convey a JTWRS.

II. The Special Referee erred in finding Appellant did not present clear extrinsic evidence of the grantor's intent to convey the Newberry Timber Tract to herself and Respondent as JTWRS and thus failing to consider the extrinsic evidence.

In his Order denying Appellant's motion to reconsider, the Special Referee erroneously stated that, "[e]ven if [he] were to find the deed ambiguous, no extrinsic evidence of the grantor's intent was presented to [him] in connection with the Plaintiff's motion for summary judgment." (R. 9). Appellant not only included ample extrinsic evidence of Bonnelle's intent to grant a JTWRS but also submitted substantial argument related to the same. (R. 36–39).

To be sure, there is persuasive evidence of Bonnelle's intent to create a JTWRS in Deed 482-207. Initially, Bonnelle would have known the difference between a Deed entitled "Warranty Deed (Jointly for Life with Remainder to Survivor)," as was the case in *Cutler*, and Deed 482-207 entitled "Warranty Deed (Joint Tenants with Right of Survivorship)." Bonnelle came to own the Newberry Timber Tract after her mother, Ethel Graham, died in 1994. Ethel Graham originally

conveyed the Tract to Bonnelle and herself in Deed 327-334 titled, "Warranty Deed (Jointly for Life with Remainder to Survivor)" in 1990. (R. 50–52). When Bonnelle granted the Tract to herself and Respondent as "Joint Tenants with Right of Survivorship" in 1998 in Deed 482-207 though, Bonnelle did not provide for that language in the title of the deed. Instead, while represented by able counsel, Bonnelle expressly titled Deed 482-207, "Joint Tenants with Right of Survivorship."

Further, when Bonnelle granted herself a life estate with a remainder in fee simple to Appellant in the Newberry Timber Tract in Deed 2242-183 in 2020, she obviously believed she had the right to destroy the joint tenancy and create a life estate for herself with the remainder to Appellant. She did not believe that she had created an indestructible TICWRS.

In 2020 too, Bonnelle also granted herself a life estate with a remainder to Appellant in other properties subject to the partition action below. Specifically, Bonnelle granted a life estate with a remainder to Appellant in 1807 Livingston, Pomaria, South Carolina in Deed 562-16. (R. 57–60). Notably, Bonnelle held 1807 Livingston with Respondent as "Joint Tenancy with Right of Survivorship."[3] (R. 61–65). Thus, at the time of granting herself a life estate in the Newberry Timber Tract in 2020, Bonnelle clearly considered the joint tenancy related to 1807 Livingston expressed in Deed 576-221 the same kind of tenancy as expressed in Deed 482-207. And it is

[3] The title of Deed 576-221 is the same as the title of Deed 482-207: "Joint Tenancy with Right of Survivorship." The granting language in Deed 576-221 is different, stating "Bonnelle G. Yarborough and Joel F. Yarborough, III as Joint Tenants with Right of Survivorship and not Tenants in Common." (R. 61–65). Importantly, Bonnelle executed Deed 576-221 in 2001, after the General Assembly enacted section 27-7-40(a) of the South Carolina Code, requiring the language "not as tenants in common" to be inserted after any creation of a joint tenancy with a right of survivorship. However, Bonnelle executed Deed 482-207, at issue here, three years before the General Assembly enacted section 27-7-40(a), and seven years before the Supreme Court issued its opinion in *Cutler* interpreting the granting clause language at issue there.

clear that Bonnelle knew the difference between "Joint Tenants with Right of Survivorship" and "Jointly for Life with Remainder to Survivor" as her mother, Ethel Graham, granted 1807 Livingston to Bonnelle in this way in 1990 in Deed 327-334. (R. 66–68).

The same can be said for the relationship between the parties to the Fairfield Timber Tract, another property subject to the partition action below. In 2020, Bonnelle granted herself a life estate with a remainder in fee simple to Appellant in the Fairfield Timber Tract. (R. 69–72). Before then, Bonnelle held the Fairfield Timber Tract with Respondent as "Joint Tenancy with Rights of Survivorship,"[4] like 1807 Livingston, as shown in Deed RJ-345. (R. 73–76).

Therefore, in 2020, Bonnelle clearly thought her ownership interest in the Newberry Timber Tract was identical to her ownership interests in 1807 Livingston and the Fairfield Timber Tract, all JTWRS that could be severed unilaterally. This extrinsic evidence supports the construction that Bonnelle must have intended Deed 482-207 to convey a JTWRS and not a TICWRS to herself and Respondent.

Because the Special Referee relied so heavily on *Cutler*, it is prudent to note again that extrinsic facts were not only weighed in construing the Deed there, but the extrinsic facts are significantly distinguishable from the facts here, in addition to the title of the Deed in *Cutler* being, "Warranty Deed (Jointly for Life with Remainder to Survivor)." (R. 49); *see supra* Section I.B. The Court looked to extrinsic evidence to interpret the meaning of the granting clause, noting that

[4] Bonnelle executed this deed in 2002. Again, the title of Deed RJ-345 is the same as the title of Deed 482-207: "Joint Tenancy with Right of Survivorship." The granting language in Deed RJ-345 is different, stating "Bonnelle G. Yarborough and Joel F. Yarborough, III as Joint Tenants with Right of Survivorship and not Tenants in Common." Like with 1807 Livingston, Bonnelle executed Deed RJ-345 in 2002, after the General Assembly enacted section 27-7-40(a), requiring the language "not as tenants in common" to be inserted after any creation of a JTWRS. However, Bonnelle executed Deed 482-207, at issue here, in 1998, four years before the General Assembly enacted section 27-7-40(a), and seven years before the Court issued its opinion in *Cutler* interpreting the granting clause language at issue there.

the wife *testified* that she granted the property as she did because "she wanted to make sure that if she were to predecease [the husband] that he would get the property." 366 S.C. at 548 n.1, 623 S.E.2d at 645 n.1. Therefore, there was extrinsic evidence that the wife in *Cutler* did not intend to create a JTWRS and allow for anyone to force the sale of her home under her feet by severing the tenancy.

Here, however, Bonnelle understood the concept of JTWRS, as she granted this tenancy to herself and Respondent in 1807 Livingston and the Fairfield Timber Tract discussed above. In executing Deed 482-207 (Newberry Timber Tract) in 1998, Deed 562-16 (1807 Livingston) in 2001, and Deed RJ-345 (Fairfield Timber Tract) in 2002, Bonnelle entitled each Deed the same, "Joint Tenancy with Right of Survivorship." Bonnelle's intent in this regard can be contrasted with her mother's 1990 conveyances to Bonnelle and herself of the Newberry Timber Tract in Deed 327-334 and 1807 Livingston in Deed 327-334, and contrasted with the wife in *Cutler*, who used the title, "Warranty Deed (Jointly for Life with Remainder to Survivor)." When coupled with Bonnelle's execution of Deed 2242-177 (Newberry), Deed 2242-180 (1807 Livingston), and Deed 1432-195 (Fairfield), all granting herself a life estate with the remainder in fee simple to Appellant and thereby severing the joint tenancies, there could not be any more clear and unambiguous evidence demonstrating that Bonnelle, as Grantor, expressly intended to create a "Joint Tenancy with Right of Survivorship" in Deed 482-207.

CONCLUSION

The Special Referee failed to adequately account for the unique facts and circumstances presented in this case—where Bonnelle Yarborough conveyed a property to herself and her son, Respondent—and the historical development of the law and common practices related to JTWRS at the time Bonnelle executed Deed 482-207. In this specific context, in 1998, Deed 482-207

unambiguously created a JTWRS. At the very least, the Special Referee erred in failing to consider Deed 482-207 was reasonably susceptible to more than one reasonable interpretation and allowing for consideration of extrinsic evidence of Bonnelle's intent to grant a JTWRS. Determining the intent of the grantor in deed interpretation cases has always been of paramount importance under the common law. The Court should therefore reverse the Special Referee and find Deed 482-207 conveys a joint tenancy with right of survivorship that Bonnelle severed with Deed 2242-183. Consequently, Appellant and Respondent own a half interest each the Newberry Timber Tract.

Respectfully submitted,

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Columbia, South Carolina
November 10, 2023

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM NEWBERRY COUNTY
Court of Common Pleas

Charles M. Watson Jr., Special Referee

Appellate Case No.: 2023-001143

Case No.: 2022-CP-36-00326

Lena Sue Yarborough ....Appellant,

v.

Joel F. Yarborough, III...Respondent.

CERTIFICATE OF COUNSEL

I, Beth B. Richardson, Esquire, attorney for Appellant Lena Sue Yarborough certify that the Final Brief of Appellant Lena Sue Yarborough complies with Rule 211(b) of the South Carolina Appellate Court Rules.

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PROOF OF SERVICE

Pursuant to Rule 262(c)(3), SCACR, I certify that I have caused the **FINAL BRIEF OF APPELLANT** to be served on the following counsel of record by AIS email at the following addresses:

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Mr. Verner:

Pursuant to Rule 262(c)(3), SCACR, attached for service upon you via email please find the following:

- Appellant's Final Brief and the Proof of Service for the same; and
- Record on Appeal and the Proof of Service for the same.

The attached will be filed with SC Court of Appeals this morning. A copy of this email will be filed with each Proof of Service.

With kindest regards,
Cyndi Nygord

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