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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM NEWBERRY COUNTY
Court of Common Pleas

Charles M. Watson Jr., Special Referee

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Appellate Case No.: 2023-001143

Case No.: 2022-CP-36-00326

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Lena Sue Yarborough .....Appellant,

v.

Joel F. Yarborough, III.....Respondent.

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# REPLY BRIEF OF APPELLANT

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## ARGUMENT

Respondent failed to address the significant issues before the Court on appeal and Appellant's arguments establishing the Special Referee erred in several respects when determining Deed 482-207 unambiguously created a tenancy in common with a right of survivorship (TICWRS) rather than a joint tenancy with right of survivorship (JTWRS). Instead, the arguments Respondent makes in response to Appellant's brief are the same surface level arguments presented to the Special Referee below and should be rejected for at least *three* reasons.

*First*, Respondent is wrong that "South Carolina did not recognize the joint right of survivorship created in deeds until 2000." Resp't's Br. at 5. To be sure, in 2000, the General Assembly enacted a statute to specifically provide for JTWRS. S.C. Code Ann. § 27-7-40 (Supp. 2004). But, before this time, including in 1998 when Bonnelle G. Yarborough executed the particular deed at issue here, Deed 482-207, "the estate of joint tenancy still existed in South Carolina." *Smith v. Cutler*, 366 S.C. 546, 551, 623 S.E.2d 644, 647 (2005); *see also* S.C. Code Ann. § 62-2-804 (1996) (providing for the "Effect of provision for survivorship on succession to joint tenancy").

In *Cutler*, after one party insisted that JTWRS had been abolished, the Court specifically rejected the argument stating, "joint tenancy has not been entirely abolished. Joint tenancy was disfavored as a rule of construction, but has existed and continues to exist today." *Id.* at 551 n.4, 623 S.E.2d at 647 n.4 (citing *Herbemont v. Thomas*, 15 Chev. Eq. 21 (S.C. 1839); *Ball v. Deas*, 2 Strob. Eq. 24 (S.C. 1848)). Further, when enacting section 27-7-40, the General Assembly 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). Therefore, Respondent's argument that Deed 482-207 did not create a JTWRS simply because Bonnelle executed it before 2000 fails.[1]

*Second*, Respondent quotes the granting clause language from *Cutler* four times over rather than responding in any meaningful way to Appellant's argument that *Cutler* does not control here for many reasons. Although the granting clause language in Deed 482-207 is the same as the granting clause language in *Cutler*, in 1998, when Deed 482-207 was executed, there was ample authority indicating that practitioners in South Carolina frequently used that granting clause language under common and statutory law to create a JTWRS. Just as the Special Referee did, Respondent ignores whole cloth these legal citations and sources. Further, coupling the common usage with the Deed title, "Warranty Deed (Joint Tenants with Right of Survivorship)," which is different from the deed title in *Cutler*, Bonnelle unambiguously intended to convey to herself and Respondent a JTWRS not a TICWRS, and Respondent fails to respond to this argument in any manner too.

*Third*, if Deed 482-207 did not unambiguously create a JTWRS, the Court must at least find it is susceptible to more than one reasonable interpretation under the circumstances discussed above, including a JTWRS. Respondent does not address this point; perhaps, because it is difficult to escape the fact that even in *Cutler*, three former members of this Court found that the same granting language "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 only after the supreme court looked to extrinsic evidence—that the wife testified "she wanted to make sure that if she were to predecease [her

[1] And to the extent Respondent is arguing Appellant cannot rely on section 27-7-40, Appellant is not and has never relied on that statute to argue Deed 482-207 created a JTWRS.

husband] that he would get the property"—as well as the equities at play—between a husband and wife there, and not between a mother and son as here—did that court interpret the meaning of the granting clause language there to create a TICWRS.

## CONCLUSION

In sum, for the many reasons argued in Appellant's initial brief, the Court should reject Respondent's simple repetition of the Special Referee's errors and find either that Deed 482-207 unambiguously created a JTWRS or, at the very least, is subject to more than one reasonable interpretation and requires consideration of extrinsic evidence to determine the grantor's intent. A review of that extrinsic evidence[2] establishes Bonnelle intended to convey to herself and Respondent a JTWRS, which she could and did sever in 2020 in Deed 2242-183, providing a life estate to herself with the remainder to Appellant. Consequently, the Court should hold Appellant and Respondent now hold equal interests in the Newberry Timber Tract as tenants in common.

[*Signature page to follow*]

[2] As set forth more fully in Appellant's Brief at pages 15–18, the extrinsic evidence here establishes that Bonnelle knew the difference between JTWRS and TICWRS as she held several other properties as JTWRS with Respondent before 2020 and other properties as TICWRS with her mother before that. Further, she later severed the JTWRS she held with Respondent in these other properties in the same manner she intended to sever the Newberry Timber Tract here, by granting to herself a life estate with the remainder to Appellant.

Respectfully submitted,

s/ Beth B. Richardson

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Lena Sue Yarborough .....Appellant,

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**PROOF OF SERVICE**

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

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November 29, 2023

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| **Subject:** | Yarborough Appeal - Motion to File and Final Reply Brief of Appellant |
| **Date:** | Wednesday, November 29, 2023 2:06:10 PM |
| **Attachments:** | image001.png<br>2023-11-29 - Motion for Leave to File Final Reply Brief Out of Time.pdf<br>2023-11-29 - FINAL Reply Brief of Appellant.pdf |

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Good afternoon, Mr. Verner.

The attached is being served on you as attorney for Joel Yarborough. The attached Motion to File and Final Reply Brief of Appellant are being filed with the SC Court of Appeals this afternoon. A copy of this email will be filed with the Proof of Delivery for each.

Please let us know if you have any questions or concerns.

With kindest regards,
Cyndi Nygord

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