

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

2008-CA-00718

JAMES L. LEE AND  
WIFE, MARSHA A. LEE

APPELLANTS

VERSUS

SOUTH MISSISSIPPI ELECTRIC  
POWER ASSOCIATION

APPELLEE

ON APPEAL FROM THE CHANCERY COURT OF  
LAMAR COUNTY, MISSISSIPPI

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**BRIEF OF APPELLEE**  
**SOUTH MISSISSIPPI ELECTRIC POWER ASSOCIATION**

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ORAL ARGUMENT NOT REQUESTED

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**CERTIFICATE OF INTERESTED PARTIES**

The undersigned counsel of record certifies that the following persons have an interest in the outcome of this case. These representations are made in order that the Justices of this Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualifications or recusal.

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## TABLE OF CONTENTS

Certificate of Interested Parties.....	i
Table of Contents.....	iii
Table of Authorities .....	iv
Statement Regarding Oral Argument.....	1
Statement of the Issues.....	2
Statement of the Case.....	3
Summary of Argument .....	8
Standard of Review.....	10
Legal Argument and Analysis .....	11
1. <b><i>Issue on Appeal</i></b> .....	11
2. <b><i>Applicable Law</i></b> .....	11
3. <b><i>Legal Argument</i></b> .....	12
a. <b><i>Analysis of Chancellor’s Findings of Fact               as to the Plain and Ordinary Meaning               of “inoperative”</i></b> .....	12
b. <b><i>Looking to the Right-of-Way Instrument               as a whole to Avoid Ambiguity and Determine               Intent of Grantor</i></b> .....	15
c. <b><i>Analysis of Controlling Case Law</i></b> .....	17
d. <b><i>The Chancellor Never Relied Upon               the Legal Theory of Abandonment</i></b> .....	19
Conclusion .....	21

## **TABLE OF AUTHORITIES**

### **Cases**

<b><i>Board of Supervisors of Franklin County v. Newell</i></b> 213 Miss. 274, 56 So.689 (1952).....	17
<b><i>Burnham v. City of Jackson</i></b> 379 So.2d 931 (Miss. 1980).....	Passim
<b><i>City of Laurel v. Powers</i></b> 366 So.2d 1079 (Miss 1979).....	11
<b><i>Countrywide Home Loans, Inc. v. Parker</i></b> 975 So.2d 233 (Miss. 2008).....	10
<b><i>Florida Power Corp. v. Lynn</i></b> 594 So.2d 789 (Fla. Dist. Ct. App. 1992) .....	18
<b><i>Gray v. Caldwell</i></b> 904 So.2d 212, 214 (¶ 9) (Miss.Ct.App. 2005).....	10
<b><i>Hamilton v. Hopkins</i></b> 834 So.2d 695, 699 (Miss. 2003).....	10
<b><i>Harrell v. Lamar Co., LLC</i></b> 925 So.2d 870 (Miss.Ct.App. 2005) .....	13
<b><i>Harrison v. Roberts</i></b> 989 So.2d 930, 932 (¶11) (Miss.Ct.App. 2008).....	10
<b><i>Jackson v. Peoples Bank and Trust Co.</i></b> 869 So.2d 422, 423 (¶ 5) (Miss.Ct.App. 2004).....	10
<b><i>Kent v. Stevenson</i></b> 127 Miss. 529, 90 So. 241 (1922).....	11
<b><i>Nichols v. Funderburk</i></b> 883 So.2d 554, 556 ( ¶7) (Miss.Ct.App. 2004).....	10
<b><i>Wicker v. Harvey</i></b> 937 So.2d 983, 991 (Miss. 2006).....	16
<b><i>Yazoo &amp; M. V. R. Co. v. Lakeview Traction Co.</i></b> 56 So. 393, 395 (Miss. 1911).....	17

**Secondary Sources**

14 Am.Jur., <i>Covenants, Conditions and Restrictions</i> , § 130 .....	12
19 Am.Jur., <i>Estates</i> , §65;4 <i>Thompson Real Property</i> , §§ 2044, 2063, 2096 .....	12

### **STATEMENT REGARDING ORAL ARGUMENT**

Southeast Mississippi Electric Power Association, Appellee herein, believes that sufficient evidence is found in both the Record and its brief to assist the Court in rendering a decision on the issue presented without the necessity of oral argument.

## **STATEMENT OF THE ISSUE**

Whether the Chancellor abused his discretion in determining that the poles, towers, appliances, wires, anchors and guy wires of Appellee South Mississippi Electric Power Association on Appellant Lee's property pursuant to the underlying Right-of-Way Instrument were not "inoperative", thus holding that the reversionary clause in such Right-of-Way Instrument would remain unenforced.



## STATEMENT OF THE CASE

Approximately twenty-eight years ago, Southeast Mississippi Electric Power Association<sup>1</sup> (hereinafter SMEPA) contacted James L. Lee (hereinafter Lee) and sought a right-of-way easement across a portion of real property he owned in Lamar County, Mississippi. (Tr. 6:18) After Lee and SMEPA negotiated and discussed the proposed right-of-way, Lee granted SMEPA a Right-of-Way Instrument dated February 15, 1980. (Tr. 6:26) One of the concessions Lee obtained from SMEPA in exchange for granting the right-of-way was the addition of a reversionary clause to the Right-of-Way Instrument. (Tr. 6:27). The Right-of-Way Instrument was subsequently filed and recorded with the Chancery Clerk of Lamar County, Mississippi on February 20, 1980. (R. 64-66). The reverter clause in the Right-of-Way Instrument states:

The rights herein granted shall cease and revert to the Grantors, their successors and assigns, upon the expiration of any period of one year occurring after the date the line has been completed and put into operation during which said strip shall remain free of or from such poles, towers, appliances, wires, anchors and guy wires, or during which such poles, towers, appliances, wires, anchors and guy wires shall have remained continuously inoperative. (R.15)

It is undisputed that SMEPA de-energized (ceased the transmission of electricity through the transmission line) the transmission line that crosses the Lee property on July 24, 1995. (Tr. 5:7). On April 10, 2007, Lee filed a Complaint to Remove Cloud from Title and for Injunctive Relief. (R. 6) SMEPA timely answered and the suit proceeded through the discovery process. (R. 16). Trial of this matter was held on January 30, 2008, in the Chancery Court of Lamar County, Mississippi, Honorable Johnny L.

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<sup>1</sup> SMEPA is a not-for-profit organization that provides electrical service for its 11 not-for-profit distribution cooperative members. Those members include Coahoma EPA, Delta EPA, Twin County EPA, Yazoo Valley EPA, Southwest EPA, Magnolia EPA, Pearl River Valley EPA, Southern Pine EPA, Dixie Electric EPA, Singing River EPA and Coast Electric EPA. SMEPA generates and transmits electricity to each of these 11 members, who in turn sell it to the ultimate end user.

Williams, presiding. (R. 64). At trial, a stipulation of fact was entered into by the parties (Tr. Ex. I). After the stipulation was entered, the dispositive issue remained, which was whether SMEPA's poles, towers, appliances, wires, anchors and guy wires on the Lee property had become "inoperative" as contemplated by the language contained in the reversionary clause of the Right-of-Way Instrument.

In support of his position, Lee presented only one witness (himself) and offered only the previously referenced stipulations as evidence. Lee testified that he granted SMEPA an easement along the north side of his property for a power line and that SMEPA thereafter installed wooden poles, guy wires and electric transmitting lines along that easement. (Tr. 4:13-29) Lee further testified that the transmission line is "not connected" to anything at either end (though the line passes aerially over his property) and that the line is de-energized. He stated that he wished to "invoke" the reversionary clause contained in the Right-of-Way Instrument and have all of the encumbrances removed from the property. (Tr. 5:14-24) Lee offered no further proof in support of his contention that SMEPA's actions or inactions concerning the power line triggered the language of the reversionary clause in the Right-of-Way Instrument. Lee offered no proof as to why he believed that the line was "inoperative" or what he believed the language of that clause meant.

In contrast, Southeast Mississippi Electric Power Association called several witnesses including Brad Wolfe, its Chief of Transmission and Support Services, as an expert in electrical engineering to discuss the power line in question. Wolfe testified that SMEPA's rights-of-way and the land department generally are under his purview and that he was familiar with the transmission line that crossed the Lee property. (Tr. 8:26-29;

9:24-26). He stated that the line is a single wooden pole construction, 69 KV insulated transmission line, with three phase conductors. (Tr. 11:1-4). Wolfe further testified that the span of the transmission line across the Lee property is part of a larger line named "Line 91". (Tr. 11:11). Wolfe explained that Line 91 begins near Line 39 and ends at the Oak Grove Substation (which is owned by Pearl River Valley Electric Power Association (hereinafter PRVEPA), a member of SMEPA). (Tr. 11:13-15) The engineer testified that Line 91 became de-energized in July 1995 and is not presently physically connected to Line 39. There is approximately ten (10) feet of space separating each lines' terminal point. (Tr. 14:24-26)

Importantly, Wolfe emphasized that although Line 91 is currently de-energized, the line's de-energized status alone does not render it "inoperative" because electricity can still be transmitted across the line, and Line 91 provides an alternate means of electric transmission service to the Oak Grove Substation should there be a loss of primary transmission service. (Tr. 24:16-17; 15:10-18). Wolfe explained that it would take "a matter of hours" to mobilize a crew to re-energize Line 91 and restore electrical power to the Oak Grove Substation should the primary transmission source fail. (Tr. 16: 5-6)

In describing the physical characteristics of the line itself, Wolfe testified that while the Line 91 traverses a number of separate parcels of property, only three (3) poles, eight (8) guy wires and their accompanying anchors, are physically situated on Lee's property. (Tr. 20:2-20) In other words, there is no "disconnection" occurring on the Lee property at all.

Wolfe stated that although Line 91 is de-energized, it has been continuously maintained by SMEPA since its construction to the same standard and with the same

frequency for all transmission lines, including flying over the line aurally to inspect it every other month. (Tr. 20:27-29). Wolfe noted that SMEPA has spent approximately \$22,000.00 in maintenance costs over the last ten (10) years (when Line 91 has been de-energized) including replacing poles on Line 91 for it to remain operative. (Tr. 21: 1-29) Wolfe testified that Line 91 is capable of transmitting electricity from Point A to Point B today just as it was when it was originally constructed and thus, is not inoperative. (Tr. 24: 7-10).

Wolfe again confirmed that just "because it's de-energized does not mean it is inoperable", and added that the poles, conductors, guy wires, anchors and wires operate today in the same fashion that they did the day the line was installed. Under examination by the Court, Mr. Wolfe testified that it was necessary to keep the line up, although it was now de-energized, as the only backup transmission source for providing electricity to the Oak Grove Substation. (Tr. 36:21)

SMEPA also called Sam Cain, Jr., as an expert witness on electrical engineering to the stand. Mr. Cain is employed as an electrical engineer and manager of operations for PRVEPA and testified that the Oak Grove Substation serves approximately 3,500 end users including the Oak Grove schools, water associations, various medical clinics, residential and commercial customers (Tr. 45:14-18). He testified that Line 91 serves as the only back-up source of power for the Oak Grove Substation. (Tr. 45:19-22) Mr. Cain testified that PRVEPA had 23 distribution substations, 20 of which have a back up source of electric transmission. (Tr. 46:20-27) The only 3 substations without a backup source, according to Mr. Cain, are located on the edges of PRVEPA's system in sparsely populated areas. (Tr. 46:20-27) Mr. Cain echoed Mr. Wolfe's testimony that

Line 91 is functioning today in the same capacity as it was years ago (Tr. 50:2-5). He further testified, regarding Line 91, that the "line is operative; it's just not energized" (Tr. 53:24-25).

After receiving all exhibits, hearing testimony from witnesses and reviewing the written briefs, the Chancellor issued a written Opinion wherein he found that (1) Lee failed to cite any authority supporting his meaning of the word "inoperative"; that (2) SMEPA submitted authority to support its definition of "inoperative"; (3) Lee failed to offer any proof that any of the items referenced in the reversionary clause have been "inoperative" at any point since execution of the Right-of-Way Instrument; that (4) SMEPA presented ample evidence proving that the items referenced in the reversionary clause have been maintained to function properly; (5) Lee's unsupported interpretation of the language of the reversionary clause would cause a forfeiture; and, (6) pursuant to applicable Mississippi case law, strictly construing the language contained in the reversionary clause, SMEPA substantially complied with the requirements of the Right-of-Way Instrument by maintaining the de-energized power lines and denied Lee's requested relief. (R. 64-66)

Aggrieved, Lee appeals these findings of fact and conclusions of law.

## SUMMARY OF THE ARGUMENT

Appellant, James L. Lee, argues that the Chancellor erred when he refused to enforce the reverter clause found in the Right-of-Way Instrument against SMEPA. Lee specifically asserts that the Chancellor erred by not affording the words contained in the Right-of-Way Instrument reversionary clause their "plain and ordinary meaning" in his findings. Essentially, Lee bases this entire line of reasoning on the belief that the Chancellor should have found the word "inoperative" to be synonymous with "de-energized." Lee alternatively submits that the Chancellor erred as a matter of law by applying the law of abandonment to this cause of action, rather than applying the law of contractual/deed language construction to enforce the language contained in the deed.

As will be discussed in more detail herein, the Chancellor not only afforded the words of the Right-of-Way Instrument their plain and ordinary meaning, he applied the only meaning of "inoperative" offered as proof and asserted at trial through testimony received from both Mr. Wolfe and Mr. Cain, and later through definitions submitted in SMEPA's trial brief. In fact, Lee offered no evidence contrary to the Chancellor's interpretation of the plain and ordinary meaning of the word "inoperative" contained in the Right-of-Way Instrument, other than his mere assertions, which were completely unsupported.

Lee's claim that the Chancellor erred in interpreting the legal issues presented in this case via the law of abandonment is of no moment. This argument is a fallacy, a pure canard, based on Lee's misapprehension of the Chancellor's use and citation to *Burnham v. City of Jackson*, 379 So.2d 931 (Miss. 1980). The *Burnham* case was not itself an

abandonment case, but rather turned on the issue of whether land previously designated as a city park should revert to the Plaintiff through certain language contained in a reverter clause. **Burnham** at 932. As noted by the Chancellor in the case *sub judice*, the **Burnham** case stands for the proposition that mere non-use of a particular piece of property is not sufficient to trigger a reverter clause in a deed governing said property. Therefore, the **Burnham** case supports SMEPA's contention that merely ceasing to transmit electricity across the power line in question does not trigger language in a reverter clause. The Chancellor correctly applied the holding of the **Burnham** case to the facts and circumstances herein.

Even the most cursory review of the record and trial transcript reveals the dearth of evidence offered for the Chancellor's review and consideration by Lee at trial below. The Chancellor received all of the argument and evidence, maturely considered same, and ruled in favor of SMEPA. The Chancellor's findings were supported by substantial evidence as applied under the correct legal standard and should not be disturbed.

## **STANDARD OF REVIEW**

In reviewing the Judgment of a Chancery Court, the appellate court "will not disturb the findings of a Chancellor when supported by substantial evidence, unless the Chancellor abused his discretion, applied an erroneously legal standard, was manifestly wrong, or is clearly erroneously." *Hamilton v. Hopkins*, 834 So.2d 695, 699 (Miss. 2003). "It is not the responsibility of this Court to redetermine questions of fact that have been resolved by the Chancellor". *Jackson v. Peoples Bank and Trust Co.*, 869 So.2d 422, 423 (Paragraph 5) (Miss.Ct.App. 2004). The Chancellor sits as the trier of fact, and in doing so, also resolves matters of credibility. *Gray v. Caldwell*, 904 So.2d 212, 214 (Paragraph 9) (Miss.Ct.App. 2005). "This Court defers to a Chancellor's Findings of Fact when they are supported by substantial credible evidence." *Harrison v. Roberts*, 989 So.2d 930, 932 (¶11) (Miss.Ct.App. 2008).

Additionally, where a Chancellor has made no specific findings, the appellant court will proceed on the assumption that the Chancellor resolved all such fact issues in favor of the appellee. *Nichols v. Funderburk*, 883 So.2d 554, 556 (¶7) (Miss.Ct.App. 2004). The appellate court employs a *de novo* standard of review when examining questions of law decided by a Chancery Court. *Countrywide Home Loans, Inc. v. Parker*, 975 So.2d 233 (Miss. 2008).



## **LEGAL ARGUMENT AND ANALYSIS**

### **1. Issue on Appeal**

The only issue on appeal and properly before this Court is whether the Chancellor abused his discretion in determining that Appellee South Mississippi Electric Power Association's poles, towers, appliances, wires, anchors and guy wires referenced in the underlying Right-of-Way Instrument were not "inoperative", thus holding that the reversionary clause in such Right-of-Way Instrument would remain unenforced. Appellant Lee asserts that the Chancellor erred in making this finding by (1) failing to apply the plain and ordinary meaning of the words contained in the reversionary clause and by (2) applying the law of abandonment to this cause of action, rather than applying the law of contractual/deed language construction to determine the plain and ordinary meaning of the language contained in the deed.

### **2. Applicable Law**

Under Mississippi case law, a reversionary clause in a deed is considered a "condition subsequent" and requires a re-entry upon any breach of that condition subsequent. *City of Laurel v. Powers*, 366 So.2d 1079 (Miss. 1979). A condition subsequent in a deed is a condition, which operates upon an estate already vested and renders it liable to be defeated. The estate conveyed remains defeasible until the condition is performed or destroyed or barred by limitations or by estoppel. Conditions subsequent in deeds are not favored in the law and are construed strictly because they tend to cut down and defeat the estate. *Kent v. Stevenson*, 127 Miss. 529, 90 So. 241 (1922).

In the context of reviewing a reversionary clause, the Mississippi Supreme Court has stated the general rule "is well established that a forfeiture will not be applied unless the evidence to that effect is clear and convincing." *Burnham v. City of Jackson*, 379 So.2d 931 (Miss. 1980) (citing 19 Am. Jur. *Estates* § 65;4 *Thompson Real Property* §§ 2044, 2063, 2096). The party asserting the existence of a fact serving as the basis of a condition subsequent has the burden of proof on that issue. *Burnham* at 934 (citing 14 Am.Jur., *Covenants, Conditions and Restriction*, § 130). All of these governing principles should be viewed in light of the abuse of discretion standard employed by appellate courts when reviewing decisions of a chancellor.

### 3. Legal Argument

#### a. Analysis of Chancellor's Findings of Fact as to the Plain and Ordinary Meaning of "inoperative"

As noted in the *Burnham* case, the burden of proof at trial rested solely upon Lee's shoulders to offer clear and convincing evidence that the forfeiture which would result from enforcement of the reversionary clause was justified by an action (or inaction) on SMEPA's part. Any such action (or inaction) should have been offered as proof as the basis for the triggering the condition precedent contained in the reversionary clause. Lee offered no such proof.

Rather than offer any evidence of an action (or inaction) by SMEPA to serve as the triggering basis for the condition precedent, Lee presented only one witness (himself) and offered only the previously referenced stipulation as evidence. Lee simply testified that the line is de-energized and that he wished to "invoke" the reversionary clause contained in the Right-of-Way Instrument and have all of the encumbrances removed

from the property. (Tr. 5:4-24) Lee offered no further proof in support of his contention that SMEPA's actions or inactions concerning the poles, towers, appliances, wires, anchors and guy wires described in the Right-of-Way Instrument triggered the language of the reversionary clause contained therein. Lee offered no proof as to why he believed that any of these items were "inoperative" or what he believed that word meant. It is well established that a Chancellor will not be held in error for dismissing an assertion unsupported by evidence or authority. *See Harrell v. Lamar Co., LLC*, 925 So.2d 870 (Miss.Ct.App. 2005) (holding that assignment of error was properly dismissed by the Chancellor at trial as it was unsupported by any evidence or authority at trial level).

In contrast, SMEPA submitted ample evidence of the meaning of the word "inoperative", including several general definitions of the word "inoperative" to the Chancellor via written briefs, which primarily stated that "inoperative" means "not functioning" or "not working". To the extent the word "inoperative" in the Right-of-Way Instrument means "not functioning" or "not working", the items described in the Right-of-Way Instrument have not been inoperative at any point since the time Lee initially granted the right-of-way to SMEPA.

Since SMEPA's definition of "inoperative" as "not working" or "not functioning" was the only one offered and supported by evidence and authority (and later adopted by the Chancellor for that very reason), under the language of the Right-of-Way Instrument Lee had the burden of proof to demonstrate that the poles, towers, appliances, wires, anchors and guy wires are "not functioning" or "not working." Lee summarily failed to meet his burden at every turn. SMEPA, however, offered further proof that the items were not "inoperative" via testimony of two expert witnesses.

Brad Wolfe emphasized that although Line 91 is currently de-energized, the line's de-energized status alone does not render it "inoperative" because electricity can still be transmitted across the line. Wolfe stated that although Line 91 is de-energized, it has been continuously maintained by SMEPA since its construction to the same standard and with the same frequency as that for all other transmission lines, including flying over the line aerially to inspect it every other month and spending approximately \$22,000.00 in maintenance costs over the last ten (10) years (while Line 91 has been de-energized). This maintenance included replacing poles on Line 91 in order for it to remain operative. Given that SMEPA is a non-profit rural electric cooperative in the business of generating and transmitting electricity, SMEPA simply would not go to such efforts or incur such expense for a line that is inoperative. Wolfe testified that Line 91 is capable of transmitting electricity today just as it was when it was originally constructed and thus, is not inoperative. SMEPA also called Sam Cain, Jr., who testified that Line 91 serves as the only back-up source of power for the Oak Grove Substation. Mr. Cain echoed Mr. Wolfe's testimony that Line 91 is functioning today in the same capacity as it was years ago. He further testified, that Line 91 "is operative; it's just not energized".

Thus, while SMEPA has not transmitted electricity across the subject wires in recent years, such wires do continue to "function" and, thus, are not "inoperative" under the plain and ordinary meaning of that term. Each of the components is in good working order such that, should SMEPA need to transmit electricity across them, it would be able to do so. Indeed, as shown at trial, every substation in Pearl River Valley Electric Power Association's service area, with the exception of three in sparsely populated communities

on the outer edges of such area, has a line similar to the one at issue in this litigation that "functions" as a backup power source.

Further, since the conjunctive "and" is used in describing the items listed in the Right-of-Way Instrument, to prove that such items listed in the reversionary clause are inoperative, Lee had to prove that *all* of the listed items are inoperative, or, by definition, that *none* of the listed items is functioning or working in any way. Each of these items listed in the Right-of-Way Instrument clearly continue to function and, therefore, are not inoperative. For example, testimony at trial clearly established that the poles continue to hold the power lines in suspension and, in fact, are periodically replaced as a part of routine maintenance by SMEPA. Thus, the poles continue to function and, by definition, are not inoperative. Expert testimony established that the anchors for the guy wires, the guy wires and lines themselves located on the Lees' property continue to function as designed and therefore, by definition, are not inoperative.

**b. Looking to the Right-of-Way Instrument as a whole to Avoid**

**Ambiguity and Determine Intent of Grantor**

Lee attempts to expand the issue presented on appeal to include a discussion of the construction of contract/deed language. Lee essentially argues that because he believes the Chancellor did not afford the plain and ordinary meaning to the words of the reversionary clause, the Chancellor should have determined the language to be ambiguous and turned to the Right-of-Way Instrument as a whole to determine Lee's intent. Lee's tautological assertion is disposed of by a quick review of the Record.

The Chancellor did apply the plain and ordinary meaning of the reversionary clause, just not the meaning that Lee wanted. Lee, by and through his counsel, has

continually believed and argued that the word “inoperative” meant “de-energized.” During closing arguments, the Chancellor questioned counsel for Lee about this in the following exchange:

THE COURT: Well, why do they use the word inoperative rather than-

MR. HIGHTOWER: Inoperable?

THE COURT: Well, that may be a word to consider also but de-energized.

Why didn't they say de-energized?

MR. HIGHTOWER: You got me.

(Tr. 55:23-29) Indeed, this question is never answered by Lee. Shortly thereafter, during further discussion among counsel and the Court over the meaning of the word “inoperative”, the Chancellor states that “. . . if they [SMEPA] can go out there and use it [Line 91], then it wouldn't be inoperative.” (Tr. 57:12). Clearly the Chancellor made his finding as to the plain and ordinary meaning of “inoperative” which was to the detriment of Lee's claim.

Quite simply, there has been no evidence offered to suggest that any ambiguity exists within the language of the reversionary clause. Lee notes that deeds are construed in a manner similar to contracts. *Wicker v. Harvey*, 937 So.2d 983, 991 (Miss. 1990). In the present situation, the language in the Right-of-Way Instrument is clear and unambiguous and never uses the word “de-energized” anywhere. In fact, in the first paragraph of the Right-of-Way Instrument, it states that “. . . the grantor does hereby grant to said South Mississippi Electric Power Association...the right to construct, maintain and operate electric lines and all telegraph and telephone lines, towers, poles, appliances, and equipment necessary or convenient with connection therewith....”

(Emphasis Added). The plain language of the document given its ordinary meaning shows that Lee's intent was to grant to SMEPA the right to maintain any equipment that SMEPA found necessary or convenient in connection with the electric lines on the Lee property. The testimony from Wolfe and Cain clearly demonstrate that SMEPA found it both necessary and convenient to maintain all of those listed items in connection with the power lines as a back up energy transmission source. The four corners of the document reveal Lee's intent to allow SMEPA to use his strip of land in any way that related to the construction, maintenance and operation of electric lines. In light of Lee's suggestion to look to the document as a whole, as explained above, under the ordinary meaning of the word "inoperative", the reverter clause in the Right-of-Way Instrument has never been triggered.

c. *Analysis of Controlling Case Law*

Lee failed to assert the existence of a fact serving as the basis of the condition subsequent in the reverter clause and as a result, the Chancellor denied the relief requested. This is in accord with the general rule that a forfeiture is not incurred by the use of land for another purpose consistent with the purpose specified in the reverter clause. *Board of Supervisors of Franklin County v. Newell*, 213 Miss. 274, 56 So.689 (1952). Further, under Mississippi case law, the provisions of a deed in cases of doubt or obscurity are construed most strongly against the grantor and all that is required to defeat a forfeiture under these conditions is substantial compliance with a condition subsequent. *Yazoo & M. V. R. Co. v. Lakeview Traction Co.*, 56 So. 393, 395 (Miss. 1911)(emphasis added). See also *Board of Supervisors of Franklin County v. Newell*, 56 So.2d 689, 696 (Miss. 1952) ("[F]orfeiture clauses with a reversion of the present type

are strictly construed."); *Burnham v. City of Jackson*, 379 So.2d 931, 933 (Miss. 1980) ("We have also said that 'a forfeiture clause in a deed conveying land for a public purpose with a provision for reversion is strictly construed and mere non-use is not sufficient evidence of complete abandonment to work a forfeiture.'" (quoting *Newell*)). The law on this issue is well established in Mississippi and falls squarely against the Lees in this case. Given the fact that (the grantor) Lee's interpretation of the Right-of-Way Instrument would result in a forfeiture and the fact that the Chancellor found that SMEPA, at the very least, substantially complied with the requirements of the Right-of-Way Instrument by maintaining the electric transmission lines, the Court should affirm the decision of the Chancellor pursuant to established Mississippi case law and find in favor of SMEPA.

While not binding under Mississippi law, it is instructive that another jurisdiction has held that a clause similar to that present in the Right-of-Way Instrument did not cause a reversion of an easement to the grantor when a power company ceased to transmit electricity across a power line. *Florida Power Corp. v. Lynn*, 594 So.2d 789 (Fla. Dist. Ct. App. 1992). In *Lynn*, Florida Power Corporation ("FPC") had purchased 100-foot easements across the certain lands. *Id.* at 791. FPC constructed power lines on these lands but de-energized the line in December 1984. *Id.* After de-energizing the line, FPC continued to maintain some of the lines and towers on the disputed property, conducting patrols, inspections, maintenance and repairs. *Id.* The Florida appellate court held that, despite the fact that the language in the Right-of-Way Instrument granting the easement limited FPC's ownership to "such period of time as it may use the same or until the use thereof is abandoned," FPC's ownership was not limited to active and continuous



transmission of electricity. *Id.* at 791-92. The Florida appellate court went on to hold that mere nonuse was not sufficient to cause a reversion under the terms of the easement. *Id.*

The facts in the present situation are even stronger than those found in the Florida case because no part of SMEPA's electric transmission line that crosses the Lee's property has been removed from the easement. Rather, the entire line has been regularly maintained for the purpose of using the line in the future.

*d. The Chancellor Never Relied Upon the Legal Theory of Abandonment*

Lee spends less than one page of his brief arguing this portion of his case. Lee argues that the Chancellor "erroneously analyzed the case as though the Lees were claiming abandonment." Lee simply misapprehends the Chancellor's use and citation to *Burnham v. City of Jackson*, 379 So.2d 931 (Miss. 1980), and the Chancellor's Opinion belies Lee's assertion. Judge Williams stated that the "Plaintiff's [Lee] interpretation of the Right-of-Way clause would result in a forfeiture . . . ." As Lee himself acknowledges, "abandonment" and "triggering the reversionary clause" (causing a forfeiture) are two separate and distinct concepts.

The *Burnham* case was not itself an abandonment case, but rather turned on the issue of whether land previously designated as a city park should revert to the Plaintiff through certain language contained in a reverter clause. *Burnham* at 932. As noted by the Chancellor in the case *sub judice*, the *Burnham* case stands for the proposition that mere non-use of a particular piece of property is not sufficient to trigger a reverter clause in a deed governing said property. Therefore, the *Burnham* case supports SMEPA's

contention that merely ceasing to transmit electricity across the power line in question does not trigger language in a reverter clause. The Chancellor correctly applied the holding of the *Burnham* case to the facts and circumstances herein.

## **CONCLUSION**

For the reasons stated herein, Southeast Mississippi Electric Power Association respectfully submits that the Trial Court properly denied James L. Lee's request to enforce the reverter clause found in the Right-of-Way Instrument dated February 15, 1980. Lee wholly failed to present the Court with any evidence to support his interpretation of the word inoperative or any evidence to suggest that any action (or inaction) on SMEPA's part triggered the language in the reverter clause. As plainly seen in the Record, SMEPA is the only party to this action to present evidence of any kind concerning whether or not Line 91 is not "inoperative", which the Chancellor reviewed and accepted. As such, SMEPA respectfully requests that this Honorable Court affirm the Judgment of the Trial Court as his findings were in line with the overwhelming weight of the evidence and binding Supreme Court precedent.

**CERTIFICATE OF SERVICE**

I, Jeff C. Bowman, one of the attorneys of record for the Appellee, South Mississippi Electric Power Association, do hereby certify that I have this day mailed, by United States Mail, postage prepaid, a true and correct copy of the foregoing *Brief of Appellee* to the following persons:

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This 12th day of December, 2008.

  
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Jeff C. Bowman