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

ORAL ARGUMENT REQUESTED

REPLY BRIEF OF APPELLANTS

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SMEPA's argument contains three general ideas. First, it asserts that the Lees failed to offer any proof, of any kind, that the powerline sitting on the Lee's property is inoperative. Second, it asserts that the Chancellor did not analyze the case as though the Lee's had claimed abandonment. Finally, SMEPA argues that the language of the instrument should be construed against the Lees as James L. Lee was the Grantor, and that for those reasons, the Chancellor was correct in refusing to enforce the reverter clause. However, for the reasons stated in the Lee's Brief, and in this Reply, SMEPA's argument must fail.

The claim of SMEPA that no evidence was presented by the Lees that the powerline was inoperative ignores the stipulations agreed to by both parties, and the testimony of Mr. Lee.

A review of SMEPA's Conclusion is telling. It underscores a fundamental disagreement between the Lees, and SMEPA regarding what constitutes relevant proof in this case. From the beginning, the Lees have considered this matter to be fairly simple from a conceptual standpoint. In short, it is their position that there was an agreement, and SMEPA failed to abide by that agreement. The agreement stated, in pertinent part, that should SMEPA's poles, wires, etc. (powerline) remain inoperative for a period of one year, then the rights granted by the agreement would revert to the James Lee. (As mentioned, Marsha Lee married James Lee after execution of the subject R.O.W. Agreement and acquired her interest in the property as a

result of their marriage). It is undisputed that SMEPA's power line was de-energized and disconnected for a period of greater than one (1) year. In other words, it was dead. In its Legal Argument, SMEPA states (paraphrasing) that the Lees offered no proof that the line was inoperative, and that they should have offered proof of action or inaction that would have triggered the reversionary clause. Further, in its Conclusion, SMEPA states:

> "As plainly seen it [sic] of 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",..."

This statement by SMEPA evinces a complete lack of appreciation for the significance of evidentiary stipulations, or agreed statements of fact. Exhibit "I" in the record is a stipulation entered into by the parties to this litigation, and states that the parties agree to the items contained within the stipulation as to substance and form. Significantly, Stipulation No. 4 reads as follows:

> "The power line which the Defendant placed on the subject easement has been de-energized, that is no electricity has flowed through the wires, for a period of excess of ten (10) years."

Additionally, Stipulation No. 5 reads as follows:

> "The segment of line which is located on the property of the Plaintiffs is disconnected at both ends."

Clearly, these two stipulations alone are clear and convincing proof that SMEPA's power line is not functioning, working, or

operating. Therefore, it is "inoperative". The Supreme Court of Mississippi has held:

> "A stipulated fact is one which both parties agree is true. Where the parties file and gain Court approval of a formal stipulation agreement as Wilburn and Hobson have done, the factual issues addressed in the agreement are forever settled and excluded from controversy. Neither party can later change position." *Wilburn v. Hobson*, 608 So.2d 1187 (Miss. 1992) citing *Johnston v. Stenson*, 434 So.2d 715 (Miss. 1983); *Vance v. Vance*, 63 So.2d 214 (Miss. 1953); *Stone v. Reichman-Crosby Co.*, 43 So.2d 184 (Miss. 1949)

Stated another way, stipulations <u>*are*</u> proof, assertions by SMEPA to the contrary notwithstanding. In addition to the proof offered in the form of stipulations, Mr. James Lee offered testimony consistent with the stipulations entered into by the parties, and also offered proof in the form of testimony evincing his belief that the reverter clause had been triggered, as he desired for SMEPA to remove its power line from his property. As much as SMEPA would like to make this case complicated, it simply is not. SMEPA makes much of the fact that the only witness called by the Plaintiffs was Mr. Lee himself. That is because his testimony, coupled with the stipulations, provided the only relevant evidence from which the Chancellor should have based his decision. In the end, all that was required to be shown by the Lees was that they were the proper parties to the suit, that the right-of-way instrument admitted into evidence was valid, that said right-of-way instrument contained a reverter clause, and that the reverter clause had been triggered. Arguably, the

stipulations alone would have been sufficient proof to support the Lees' claim for relief. It was incumbent upon the Chancellor to enforce the R.O.W. Agreement by affording the words of the agreement their plain and ordinary meaning. It stands to reason, that "plain and ordinary" should not require expert testimony; and in truth, it does not. Apparently, SMEPA believes that the Lees should have employed the expert services of an etymologist, who could have offered an expert opinion as to the meaning of the word "inoperative". As a practical matter, it seems absurd that an expert would testify to the meaning of one word in a contract or deed, and begs the question, "Why stop with just one word?" One can only imagine the length of a trial, chocked full of experts, each one offering his or her opinion as to the meaning of various words of an agreement. This is simply not necessary, and more importantly is not required under the law. ***See***, *Interstate Company v. Garnett*, 122 So. 373(Miss. 1929). Contrary to the assertions of SMEPA, and as previously argued, the meaning of the word "inoperative" is a determination to be made by the Court based on the plain and ordinary meaning of the word, not based on testimony of an employee of SMEPA. In this case, the relevant proof supporting the Lees' claim for relief is in the form of stipulations, and testimony establishing the facts that the instrument is valid, the line is disconnected at both ends, and that it did not transmit electricity for the requisite period of time. As SMEPA acknowledges, the Court determined the meaning

of the word "inoperative" to be "not functioning" or "not working". The Lees established clearly, and convincingly, that the powerline was not functioning or working. SMEPA's discussion of "uses", or "purposes" that the line may have ignores the language of the instrument, and confuses those concepts with the line's character as either being "operative", or "inoperative". Furthermore, its suggestion that various components of the powerline are functioning, and therefore "operative", such as the claim that the poles are continuing to function since they are holding up the wires (and that is the function of a pole), speaks for itself, and highlights the flawed logic employed by SMEPA in making its decisions throughout the course of this matter.

Because the testimony of Mr. Lee, coupled with the stipulations agreed to by the parties, clearly show that the powerline was "inoperative" according to the plain and ordinary meaning of that word, the court erred in refusing to enforce the reverter clause in the agreement.

The Chancellor erred by requiring the Lees to prove abandonment as a condition of reversion when such a requirement was not part of the subject R.O.W. agreement.

SMEPA posits in its brief that the Chancellor never relied upon the legal theory of abandonment in analyzing the merits of this case. The record reveals otherwise. The Lees stated in their brief that they believe that the Chancellor erred

by analyzing the present case based on the rule announced in *Burnham* that "mere non-use is not sufficient evidence of complete **abandonment** to work a forfeiture."(emphasis added). The Lees still believe the Chancellor's analysis was flawed because in essence, he placed a burden on the Lees which was not found within their agreement with SMEPA. That is, rather than requiring the Lees to prove that the powerline had been "inoperative" for a period of at least one year, he required them to prove that SMEPA had abandoned its easement altogether. Further evidence of the Chancellor's error can be seen in his opinion when he references sums of money that have been expended maintaining the powerline easement as support for his decision not to enforce the reverter clause. In so doing, he was attempting to show that SMEPA has not *abandoned* its easement, when the issue was not whether the easement had been abandoned, but rather whether the power line had been inoperative for the requisite period of time. This is what the Lees were attempting to point out in their brief. Whether the Chancellor was requiring them to show abandonment because he believed their claim was based on the doctrine of abandonment, or whether it was because he believed that the subject right-of-way agreement required abandonment as a condition of reversion is of no moment. Clearly, he placed an obligation upon the Lees to show that SMEPA had abandoned its easement, when all they had to show was that the power line had been inoperative for a period of at least one

(1) year. Furthermore, SMEPA apparently believes that the Lees were required to show abandonment as a condition of relief, as it cites the case of *Florida Power Corp. v. Lynn*, 594 So.2d 789 (Fla. Dist. Ct. App. 1992) in its Argument. The *Florida Power* case involved a R.O.W. Instrument that granted the power company the right to an easement for "such period of time as it may use the same or until the use thereof is **abandoned**, (emphasis added)". The instrument in this case did not employ such language, nor contain such a requirement as a condition of reversion. SMEPA's belief that the *Florida Power* case is similar, and therefore persuasive, is misguided. It would only be persuasive if the R.O.W. instrument in this case required the same conditions for reversion as the instrument in *Florida Power* required. Clearly, it does not. In summary, SMEPA's argument is simply that since the powerline had not been abandoned, then the reverter clause had not been triggered. However, this argument is incorrect, as the pertinent question is whether the powerline was "operative" or "inoperative", and not whether or not the line had been abandoned. This question is easily answered by the undisputed, uncontradicted, and agreed proof that the powerline is disconnected at both ends, and does not transmit electricity. Common sense dictates that a dead, disconnected powerline is "inoperative". As such, the rights granted by the R.O.W. instrument have reverted to the Lees, and the Chancellor erred in not adjudicating such.

Construction of the Reverter Clause.

As stated time and again, the Lees believe the language of the reverter clause was unambiguous and should, therefore, be afforded its plain and ordinary meaning as required by law. SMEPA admits that the language is clear and unambiguous, but then proceeds to discuss rules of construction that only apply after the court has made the legal determination that the language of the instrument is ambiguous, and cites the case of *Yazoo & M.V.R. Co. v. Lakeview Traction Co.*, 56 So. 393, 395 (Miss. 1911) for its rule that clauses such as the one in the subject R.O.W. Agreement are construed against the Grantor. While this is an accepted rule of construction, similar to the other well known rule of construction requiring that the language of a deed or contract be construed against the drafter, it is inappropriate to employ this, or any other rule of construction without first making a determination as a matter of law that the language of the instrument is ambiguous. ***See***, *Royer Homes of Mississippi, Inc. v. Chandeleur Homes, Inc.*, 857 So.2d 748, 751 (Miss. 2003). The Chancellor never made such a finding in this case, and therefore, to advocate construing the language of the instrument using second, and third tier rules of construction, is to place the cart in front of the horse. The Lees believe the evidence in this case is overwhelming that SMEPA's powerline is "inoperative" according to the plain and ordinary meaning of that word, and have stated that this case should be reversed and rendered in

their favor. However, it is also their position that if this court has questions regarding ambiguity, then this matter should be remanded to the trial court for proper construction.

Conclusion

At the end of the day, the only disputed issue at trial was whether SMEPA's power line, which currently sits on the Lee's property, was operative, or inoperative. If it has been operative since it was placed on the Lee's property without an interruption equal to, or greater than, one (1) year, then SMEPA retains the rights granted to it under the right-of-way agreement. However, if at the time it became de-energized and disconnected on both ends it became "inoperative" then the rights granted to SMEPA under the agreement reverted to the Lees and SMEPA should be required to remove its powerline, and all other equipment from the Lee's property.

As the Lees mentioned earlier in this case, the question to ask is not whether expert engineers who are employees of the power company believe the line is operative, but rather what the average, everyday, reasonable person would say when asked whether the line was "operative", or "inoperative", after it was explained to that person that the line he or she was looking at was disconnected at both ends, and had not transmitted electricity for a period in excess of ten years. The answer most certainly would be "inoperative", and the Chancellor erred in not adjudicating such. The rights granted to SMEPA have reverted to

the Lees, and SMEPA should be required to remove its material from the property of the Lees at once. If this Honorable Court determines the language of the subject R.O.W. instrument to be ambiguous, then this matter should be remanded to the trial court for further proceedings.

CERTIFICATE OF SERVICE

I, K. C. Hightower, Attorney for Appellants, do hereby certify that I have this date hand-delivered, a true and correct copy of the above and foregoing **Reply of Appellants** to:

Hon. Johnny L. Williams
Chancery Court Judge
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Trial Judge

Hon. Jeff Bowman
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SO CERTIFIED, this the 23 day of December, 2008.

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