

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

BRIEF OF APPELLANTS

K. C. Hightower
Mississippi Bar No.: [REDACTED]
Pittman, Howedeshell & Hinton, PLLC
140 Mayfair Road, Suite 700 (39402)
P. O. Drawer 17138
Hattiesburg, MS 39404
Telephone: 601-264-3314
Facsimile: 601-261-3411

Attorney for Appellants

CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies pursuant to Mississippi Supreme Court Rule 28(a)(1) that the following persons have an interest in the outcome of the case. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

James L. Lee
54 Morgan Lane
Purvis, MS 39475
Plaintiff/Appellant

Marsha A. Lee
54 Morgan Lane
Purvis, MS 39475
Plaintiff/Appellant

South Mississippi Electric Power Association
7037 US Hwy. 49
Hattiesburg, MS 39402
Defendant/Appellee

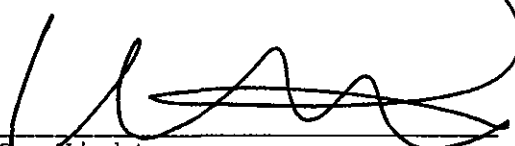
Hon. K. C. Hightower
Trial and Appellate Counsel
for James L. Lee and wife, Marsha A. Lee
Pittman, Howedeshell & Hinton, PLLC
140 Mayfair Road, Suite 700 (39402)
P. O. Drawer 17138
Hattiesburg, Mississippi 39404

Hon. Christopher M. Howdeshell
Trial and Appellate Counsel
for James L. Lee and wife, Marsha A. Lee
Pittman, Howdeshell & Hinton, PLLC
140 Mayfair Road, Suite 700 (39402)
P. O. Drawer 17138
Hattiesburg, Mississippi 39404

Hon. Jeff Bowman
Trial and Appellate Counsel
for South Mississippi Electric Power Association
Jackson, Bowman & Blumentritt
309 S. 40th Ave.
P. O. Box 15517
Hattiesburg, Mississippi 39402

Hon. Johnny L. Williams
Chancery Court Judge
P. O. 1664
Hattiesburg, Mississippi 39403
Trial Judge

SO CERTIFIED, this the 12 day of November, 2008.



K. C. Hightower,
Attorney for Appellant

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STATEMENT OF THE ISSUE

I.

Whether the lower court erred in refusing to enforce the reverter clause contained within the R.O.W. (Right-of-Way) agreement from the James L. Lee to South Mississippi Electric Power Association.

STATEMENT OF THE CASE

This case is one involving a "reverter" clause contained within a Right-of-Way Agreement between James L. Lee and South Mississippi Electric Power Association (hereinafter SMEPA). The R.O.W. agreement granted SMEPA the right to place an above-ground power line on the Lee property, but stated that under certain circumstances, the rights granted under the agreement would revert to James L. Lee. After circumstances arose triggering the reverter clause, the Lees (Marsha Lee's interest arose after her marriage to James Lee) requested that SMEPA remove the power line from their property believing that the rights granted by the R.O.W. agreement had reverted to them. SMEPA refused, and the Lees sued SMEPA to enforce the reverter clause. The case was tried before the Honorable Johnny Williams, Chancellor, on January 30, 2008. The trial court entered an opinion in favor of SMEPA on March 10, 2008 (r. 64 - 66), and on March 17, 2008, the Lees filed their Motion to Amend Opinion or Judgment (r. 67 - 74). On March 26, 2008, the trial court entered a Final Judgment reasserting its finding in favor of SMEPA by stating that it found in accordance with its opinion dated March 7, 2008, and refused to enforce the reverter clause. As the document entered by the Trial Court on March 26, 2008 was entitled "Final Judgment", the Lees, out of an abundance of caution related to procedural compliance, filed an identical version of their Motion to Amend Opinion or Judgment (r. 77 - 84). On April 15, 2008 the

Trial Court entered a Judgment which finally, and ultimately denied the Lees the relief they sought, that being the enforcement of the reverter clause found within the Right-of-Way agreement®. 109). On April 23, 2008, the Lees timely filed a Notice of Appeal to the Supreme Court of Mississippi ®. 111 - 112).

Background

At some time prior to February 15, 1980, SMEPA, desired to acquire an easement upon which to place an above-ground power line. The property upon which the easement would be located was owned by James L. Lee (James L. Lee married Marsha Lee after the execution of the subject R.O.W. agreement.) After negotiation, and on February 15, 1980, the parties executed a simple two page R.O.W. agreement which had been prepared by SMEPA, and recorded the same in the Land Records of Lamar County in Deed Book 6R at Page 216(t. p 5, l. 29-p. 6, l. 2; r.e. 5). Contained within the language of the Right-of-Way agreement was a reverter clause. The clause reads as follows:

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.**(emphasis added).

Approximately 25 years elapsed when James L. Lee learned that the power line on his property was disconnected at both

ends, and de-energized, and had been in that condition for a period of time exceeding 10 years. Mindful of the reverter clause contained within the R.O.W. agreement, and considering the line to be "inoperative," Mr. Lee requested that SMEPA remove its power line from his property, asserting that the rights granted by the agreement had reverted to him, and that SMEPA no longer had a right to maintain a power line on his property. SMEPA refused to remove its power line, and Mr. Lee filed suit in the Chancery Court of Lamar County. After being denied relief in the lower court, the Lees filed the present appeal to the Supreme Court of Mississippi.

SUMMARY OF THE ARGUMENT

The R.O.W. (Right-of-Way) agreement between James L. Lee and SMEPA contains a reverter clause which states, among other things, that should the power line owned by SMEPA, which sits on the Lees' property, remain continuously inoperative for a period of one year, the rights granted by the agreement (allowing SMEPA to place a power line on the Lee property) revert to James L. Lee. At trial, it was stipulated that the power line had been disconnected and de-energized for a time period which exceeded one year, and more accurately, ten years(r.e. 4). In other words, the power line had, at that time, been dead for 10+ years. It was also stipulated that the R.O.W. agreement admitted into evidence was valid, and that the Lees were the proper properties to bring suit. Despite the parties' stipulations, and after hearing the evidence, the court refused to enforce the reverter clause. In so doing, the Chancellor erred by not affording the words of the agreement their plain and ordinary meaning. Instead, the Judge proceeded to analyze the case as though the Lees were claiming abandonment, *rather* than their actual claim which was that the reverter clause contained within the R.O.W. agreement had been triggered, and thus the rights granted thereunder had reverted to them. Importantly, and as mentioned herein, the Lees did not, and are not, claiming that SMEPA abandoned its power line right-of-way across the Lee's property.

Rather, their claim is that the R.O.W. agreement between them and SMEPA contains a reverter clause which has been triggered causing the rights conveyed by the agreement to revert to the them.

Further, as the rights have reverted to the Lees, SMEPA no longer has a right to maintain a power line on the Lee's property, and therefore, must remove the poles, wire, etc. which currently occupy the same.

The lower court should have simply afforded the agreement its plain and ordinary meaning. Had it done so, the facts are undisputed, and the proof is overwhelming that the reverter clause was triggered. Since the lower court did not afford the words of the agreement their plain and ordinary meaning, this case should be reversed, and rendered in favor of James Lee and his wife, Marsha Lee. Alternatively, if this Court determines that the reverter clause is ambiguous, then this matter should be remanded to the lower court for the proper analysis based on rules of construction rather than principles related to the doctrine of abandonment.

ARGUMENT

- I. The Lower Court erred as a matter of law and fact in refusing to enforce the reverter clause found within the subject R.O.W. Agreement.

Reverter Clauses.

Generally speaking, reverter clauses are enforceable. The Supreme Court of Mississippi, in *Gill v. Riley*, 145 So.2d 921 (Miss. 1962), held:

The courts have sometimes held that restrictive covenants relating to the use of property in estates granted on conditional limitations and conditions subsequent are not favored in the law. But generally, they have upheld these provisions when the language employed by the party clearly shows their intent; and there can be no doubt that the parties intended to create such an estate.

In this case, there is absolutely no doubt that the parties to this agreement intended to create a reverter clause. That fact is undisputed, and without question. One need look no further than the language of the document itself which employs the term "revert", resolving any question as to whether or not the parties intended to create such an interest. Furthermore, as the language of the clause is clear and unambiguous, it should be afforded its plain and ordinary meaning.

Construction.

"Deeds are construed in a manner similar to contracts", *Wicker v. Harvey*, 937 So.2d 983, 991 (Miss. 2006). "Contract construction and interpretation requires that the court first consider whether the contract is ambiguous". *Royer Homes of*

Mississippi, Inc. v. Chandeleur Homes, Inc., 857 So.2d 748, 751(Miss. 2003). "...if the contract is unambiguous, this court must accept the plain meaning of a contract as the intent of the parties." *Id.* citing *Ferrara v. Walters*, 919 So.2d 876, 882 Miss. 2005). Furthermore, "The question of whether ambiguity exists within an instrument is one of law", *McDonald v. Mississippi Power Company*, 732 So.2d 893 (Miss. 1999). It is fundamental that if the language of a contract, or in this case a deed, is clear and unambiguous a reviewing court should afford the language, or words of the instrument their plain and ordinary meaning, and that before the Court may employ any other rule of contract construction, it must first determine that the language of the instrument is ambiguous as a matter of law.

The lower court refused to afford the words of the subject R.O.W. agreement their plain and ordinary meaning, and did so without ever determining that the R.O.W. agreement, or more specifically the reverter clause contained therein, to be ambiguous as a matter of law. The Lees argued to the Chancellor in post-trial filings that the language of the subject R.O.W. agreement is not ambiguous, and that the words should be afforded their plain, ordinary meaning. The Chancellor opined that the Lees cited no authority as to the meaning of the word "inoperative", but merely asserted that the word meant "not operating". The Lees still believe that the plain and ordinary

meaning of the word "inoperative" is "not operating" which means "not working" which also means "not functioning". As they stated in their Motion to Amend Opinion or Judgment, the Supreme Court of Mississippi has held, "The Court is supposed to know the popular and ordinary meaning of all English words." *Interstate Company v. Garnett*, 122 So. 373 (Miss. 1929) citing *Rodgers v. Kline*, 56 Miss. 808 (Miss. 1879). "In case the Court doubted as to the meaning of a particular word, it would be proper for the Judge to refer to a standard dictionary and inform himself." *Id.*

The Lees went on to suggest, in their Motion to Amend Opinion or Judgment, that some popular meanings of the word "inoperative" are "not operating" (wordnet.princeton.edu/perl/webwn); "not operative, not in operation" (Random House unabridged dictionary, 2006); "not functioning" (Miriam-Webster's online dictionary). In the end, the trial Court determined that the meaning of the word "inoperative" was "not functioning or not working", and then, based on that determination, stated that there had been no evidence to show that the power line had been inoperative at any point during the time period in question. The Court made this determination despite the fact that the parties to this action stipulated that the power line had not transmitted electricity since 1995, and that it was disconnected at both ends. In other words, it was the lower Court's opinion that SMEPA's power line was still functioning or working despite the fact that it had not

transmitted electricity for a period greater than ten years, and that it was disconnected at both ends. As a basis for the determination that the power line was/is still working or functioning, the trial Court stated that SMEPA had spent upwards of \$20,000.00 over the years in maintaining the poles, wire, guy wires, etc. described in the R.O.W. agreement. The trial court then, somewhat confusingly, stated in its opinion that the purpose of SMEPA's maintenance of the line was to ensure that it **"would function properly should they be needed in the future"**(emphasis added) (r.65). With this statement the trial Court acknowledged, at least implicitly if not expressly, that the power line is not currently functioning. Stated another way, the line is not working or operating. Significantly, if the line was not, at the time of the court's opinion, functioning, working, or operating, and had not been doing so for a continuous period of at least one (1) year, the reverter clause had been triggered. If the reverter clause had been triggered, the rights granted under the subject R.O.W. agreement had reverted to the Lees, and SMEPA should have been ordered to remove the poles, towers, appliances, wires, anchors and guide wires from the Lee's property.

The Chancellor's ruling was based on a faulty analysis. Problematically, the lower Court cited *Burnham v. City of Jackson*, 379 So.2d 931 (Miss. 1980) for its holding that "mere

non-use is not sufficient evidence of complete abandonment to work a forfeiture." This, the Lees believe, is the root of the lower Court's error. Of extreme importance is the fact that the Lees did not sue SMEPA on the theory of abandonment, nor the they seek to offer proof to support such a claim, but rather they pursued their case, and offered proof at trial, on the theory that the reverter clause had been triggered which required SMEPA to take action in the form of removing its power line from the their property. Clearly, the doctrine of abandonment and the triggering of a reverter clause are two separate, and distinct concepts or claims. However, the lower court erroneously analyzed the case as though the Lees were claiming abandonment. Therefore, evidence offered at trial that SMEPA expended sums maintaining the easement, while perhaps relevant in the context of abandonment, was irrelevant for purposes of determining whether a contractual reverter clause in the subject R.O.W. agreement had been triggered. What was relevant at trial, and is relevant now, however, is the undisputed proof that SMEPA's power line had been continuously de-energized and disconnected for a period of at least one (1) year, meaning that it had not functioned, worked, or operated for a period of at least one (1) year. Thus, the reverter clause had been triggered, and therefore the rights granted by James L. Lee to SMEPA in 1980 have reverted to James L. Lee and Marsha A. Lee.

CONCLUSION

The Chancellor erred as a matter of law, and fact, in not enforcing the reverter clause found within the subject R.O.W. agreement. The trial court's error is rooted in its analysis of the Lee's claim based on the doctrine of abandonment when in fact, the their claim was that the reverter clause had been triggered, and not that SMEPA had abandoned its power line Right-of-Way. Additionally, the lower Court determined the meaning of the word "inoperative" to be "not functioning or not working", and then stated, based on that definition, that no proof had been offered to show that the power line has been inoperative. The lower Court took such action in the face of the parties' stipulation that the line has not transmitted electricity since 1995, and is disconnected at both ends. Therefore, the this Honorable Court should reverse the lower Court, and render a decision in favor of the Lees requiring SMEPA to remove its poles, towers, wires, etc. from their property at once. On the other hand, if this Honorable Court determines that the language of the reverter clause is ambiguous, the proper course of action is to remanded this matter the lower court for the proper analysis based on legally recognized procedures for construing the language of deeds, rather than on principles of abandonment.

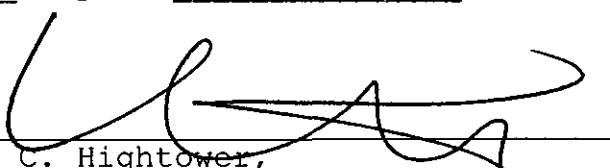
CERTIFICATE OF SERVICE

I, K. C. Hightower, Attorney for Appellant, do hereby certify that I have this date forwarded by United States Mail, postage prepaid, a true and correct copy of the above and foregoing to:

Hon. Johnny L. Williams
Chancery Court Judge
P. O. 1664
Hattiesburg, Mississippi 39403
Trial Judge

Hon. Jeff Bowman
Jackson, Bowman & Blumentritt
309 S. 40th Ave.
P. O. Box 15517
Hattiesburg, Mississippi 39402

SO CERTIFIED, this the 12 day of November, 2008.



K. C. Hightower,
Attorney for Appellant