IN THE SUPREME COURT OF MISSISSIPPI

NO. 2014-CA-01673

GORDON T. KLEYLE **APPELLANT**

VS.

MYRNA DEOGRACIAS AND PHILLIP DEOGRACIAS, INDIVIDUALLY AND/OR d/b/a THE RAILROAD CAFE´, LLC **APPELLEES**

APPEAL FROM THE CIRCUIT
COURT OF PEARL RIVER COUNTY

APPELLEES' PRINCIPAL BRIEF

ORAL ARGUMENT NOT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

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

1. The Appellant is Mr. Gordon T. Kleyle (hereinafter, "Kleyle"; pronounced "Kiley") an adult resident citizen of Pearl River County, Mississippi.

2. Mr. Kleyle is represented before the Court by Mr. Bryan R. Bledsoe and Mr. F. Douglas Montague, practicing with the firm Montague, Pittman & Varnado, P.A., in Hattiesburg.

3. Myrna and Philip[1] Deogracias ("the Deograciases), the Appellees, are adult

[1] Mr. Deogracias spells his first name with one "l." All of the pleadings and the notice of appeal have his first name spelled correctly. Nevertheless, the style of the case as prepared by the Clerk uses the more common spelling, "Phillip."

resident citizens of Peal River County, Mississippi.

4. In December of 2011, "The Railroad Cafe´, LLC," was dissolved by action of the Secretary of State. See, https://corp.sos.ms.gov/corp/portal/c/page/corpBusinessIdSearch/portal.aspx?#.

5. The Deograciases are represented here by T. Jackson Lyons as Lead Appellate Counsel, and Mr. Richard C. Fitzpatrick. Mr. Lyons practices from offices in Jackson, and Mr. Fitzpatrick practices from his offices in Poplarville.

6. The trial court ordered the joinder of the Alabama Great Southern Railroad Company ("Railroad"). The Railroad is Mr. Kleyle's landlord. Upon agreement of the Parties that the Railroad would "participate in reasonable discovery," it was dismissed. The Railroad did not raise any claims in this litigation based on any breach of its lease with Kleyle.

SO CERTIFIED, this the 18th day of September, 2015.

/s/ T. Jackson Lyons

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ISSUE

In the Deograciases' motion to dismiss, they contended that the express terms of the lease between the Railroad and Kleyle rendered void any purported conveyance by Kleyle of a leasehold interest to the Deograciases. [V. 2: C.P. 177-80] Stated differently, the Deograciases' motion reasoned that the lease to Kleyle did not grant him any right or power to convey a sublease to the Deograciases because the Railroad's lease deemed any such purported transfers as "void." Paraphrasing the Circuit Court, it simply ruled that "void" meant "void" and agreed with the Deograciases that Kleyle's purported sublease to them was void *ab initio*.

The issue, then, is whether the Circuit Court was correct that the anti-assignment clause rendered Kleyle powerless to convey that which he did not own, or whether Kleyle merely breached his lease with the Railroad leaving that entity with contractual recourse.

STATEMENT REGARDING ORAL ARGUMENT

While the Parties state the issue differently, all agree that the Court confronts a single legal issue. The Parties also concur that there is no direct Mississippi precedent. Nevertheless, it appears that the Parties -- while reaching different results -- contend that the issue is resolved by applying basic

rules of real property and contract law. Kleyle has already requested that no oral argument be ordered, so the Parties again agree: oral argument would be an undue tax on the Court's and Parties' resources.

STATEMENT OF THE CASE

A. Facts and Procedural History[2]

In May of 2011 Kleyle filed suit against the Deograciases claiming, *inter alia*, that they had entered into a lease arrangement with him to operate a restaurant in Poplarville. [V. 1: C.P. 2] The restaurant lease was for a term of two years, ending in February of 2010, at a monthly rent of $1,850.00. [V. 1: C.P. 2-3]

According to the complaint, the Deograciases defaulted in August of 2008, and Kleyle claimed rent arrears of $24,000. [V. 1: C.P. 3] In addition, Kleyle alleged other damages to items of personal property within the restaurant, such as the ice maker. [V. 1: C.P. 4]

The Deograciases answered in mid-June, 2011, claiming, *inter alia*, that the copy of the lease attached to the complaint was invalid, that there was only an oral month-to-month agreement, and that verbal notice of cancellation was

[2] Of course, normally these matters are separately stated. However, this case has had a somewhat unusual procedural course driven by the unusual procedural posture of the Parties, to wit, a defendant defending on the basis of a lease between other parties. Because the case was decided as a matter of law, see *infra*, under the circumstances it appears more efficient to combine the statements in this case.

given to Kleyle when operation of the restaurant ceased in October of 2008. [V. 1: C.P. 16-17, 18] Their answer also claimed that the rent was in the monthly amount of $1,550.00. [V. 1: C.P. 18] A bevy of additional defenses, both affirmative and otherwise, were raised including that the complaint failed to state a claim cognizable under Mississippi law. [V. 1: C.P. 16-17, 19-20]

Apparently after some discovery and Mr. Kleyle's swapping counsel a few times [e.g., V. 1: C.P. 6, 34, 40, 46, 71, 72, 77], the Deograciases moved, *inter alia*, to add the Railroad as a party in January of 2013. [V. 1: C.P. 50] Attached to the motion was the Railroad's lease with Kleyle that had been filed of record in November of 2005. [V. 1: C.P. 52] Dated May 1, 2004, the lease called for an initial base rent to be adjusted periodically with reference to the Consumer Price Index. [V. 1: C.P. 53-54]

While the lease defined the "term" of the lease to begin May 1, 2004, to "continu[e] thereafter on a periodic basis," the "adjustment date" for the rent was on an annual basis. [V. 1: C.P. 53] The rationale appears to have been that the lease was only "periodic" instead of "annual" because of the parties' termination right on thirty day's notice. [V. 1: C.P. 53]

The land leased to Kleyle was defined as "certain real property located at Milepost 125 in Poplarville . . . having an area of 27,200 square feet . . . together

with the right to maintain Tenant's existing building and paved parking lot and all improvements thereon . . .. The Land and the Improvements are collectively referred to herein as the "Premises." [V. 1: C.P. 53] "Tenant's building" is not defined, nor is it clear how a permanent structure would be "tenant's." As usual, the lease provided that Kleyle could remove trade fixtures and other moveables, but that permanent improvements -- "[u]nless otherwise agreed by the parties hereto -- would become the Railroad's property. [V. 1: C.P. 55-56, ¶¶ 6 and 7]

More relevant to the trial court's ruling is paragraph 12 of the lease, commonly known as an "anti-assignment" clause. In relevant part it says: "[Kleyle] may not assign this Lease or any interest thereunder or sublet the Premises in whole or in part . . . without the prior written consent of the [Railroad]. . . . All requests for an assignment or sublease shall be accompanied by a copy of the proposed assignment or sublease agreement and an administrative fee in the amount of $750.00. . . . Any assignment or sublease made in violation of this Paragraph 12 shall be void and shall constitute a default hereunder." [V. 1: C.P. 56-57]

Based on the scheduling order [V. 1: C.P. 47], the Deograciases amended their answer in January of 2013. [V. 1: C.P. 63] For present purposes of the

appeal of the trial court's order, the amended answer added little of import, but alleged that the Railroad Cafe´, LLC, had been transferred to a third party and that their transferee had entered into a new lease with Kleyle. [V. 1: C.P. 63-64] Kleyle denied that the Railroad had an interest in the litigation or that he had entered into any agreements with a third party. [V. 1: C.P. 78]

In May, 2013, the circuit court ordered joinder of the Railroad. [V. 1: C.P. 80] Following this order, the Deograciases again amended their answer. As their "second defense," the Deograciases moved for dismissal inasmuch as the lease between the Railroad and Kleyle voided any sublease, written or verbal, to the Deograciases. The Railroad's lease with Kleyle was an exhibit [V. 1: C.P. 82 *et seq.*]

The Railroad answered in August with a motion to dismiss it. [V. 1: C.P. 106] While insisting that it was not a Rule 19 party, the Railroad offered that "to the extent the parties seek to conduct any discovery regarding [the Railroad's] knowledge relevant to any issue . . . a corporate deposition pursuant to [Rule 30(b)(6)] would be a much more appropriate, efficient and cost-effective manner of accomplishing this goal . . .." [V. 1: C.P. 107-08]

Following consultation of the Parties' counsel, an agreed order to dismiss the Railroad was entered on the condition that the Railroad "participate in

reasonable discovery as may be requested by counsel for the parties . . .." [V. 1: C.P. 110] After somewhat more squabbling over what constituted "reasonable discovery" and what capacity the Railroad would assume to answer such (party vs. non-party) [V. 1: C.P. 114, 116, 126, 130; V. 2: C.P. 153], the Parties all settled for the Railroad's production of an affidavit from its corporate representative addressing the Parties' concerns. [V. 2: C.P. 167-70] In May of 2014, the Railroad again requested dismissal upon its production of the requested affidavit; the Parties all agreed the Railroad should be dismissed and the order was entered. [V. 2: 159, 174]

The Railroad's affidavit was from its real property manager, Ms. Ann S. Powell. [V. 2: C.P. 169] Ms. Powell verified that the lease previously reproduced from the land records of Pearl River County was the lease between the Railroad and Kleyle. Powell repeated verbatim the lease's anti-assignment clause from paragraph 12. [V. 2: C.P. 169-70] Upon a search of the Railroad's records, Ms. Powell averred that no written request had ever been received from Mr. Kleyle seeking permission to sublease the premises. She concluded by noting that "[i]n general, [the Railroad] does not recognize subleases, transfers and/or assignments of leases entered into by tenants who did not obtain prior written permission from [the Railroad] to do so." [V. 2: C.P. 170, ¶

8]

Subsequently, in August of 2014 the Deograciases moved to dismiss based on Ms. Powell's affidavit and the language of the lease stating that any attempt to sublease or assign any interest in the lease without written consent from the Railroad was "void and shall constitute a default hereunder." [V. 2: C.P. 177, 179] The Parties also stipulated that the affidavit "is admissible for all purposes and the averments stated therein are true and correct and admissible as evidence as to the facts stated therein." [V. 2: C.P. 183]

Later that month, Kleyle responded, first, that the Deograciases had no rights -- as third-party beneficiaries or otherwise -- under the lease between the Railroad and Kleyle. Second, Kleyle claimed that the Deograciases would be "unjustly enriched" if the case were dismissed. While not clear, this appears to be based on Kleyle's alleged rent arrearages due from the Deograciases. Third, Kleyle claimed that he did not sublease in violation of the Railroad's lease with him because he owned the building and only the land below and around belonged to the Railroad. [V. 2: C.P. 202-04]

The circuit court held a short hearing on the motion to dismiss on August 27, 2014. After hearing argument, the court noted that "the plain language or the lease [between the Railroad and Kleyle] is what the Court will

have to hang our hat on. And the plain language on the lease is "shall not assign." [V. 3: T. 15]

The circuit court, the Honorable Prentiss Harrell presiding throughout, dismissed the case on August 29, 2014. Kleyle promptly requested "reconsideration." [V. 2: C.P. 211] The motion was equally promptly denied in late October. [V. 2: C.P. 226] Kleyle timely appealed on November 24, 2014. [V. 2: C.P. 227]

I. The trial court was correct as a matter of law that the unequivocal and unambiguous language of the Railroad's lease deprived Kleyle of any power to assign any interest in the lease absent the Railroad's express written permission.

A. Standard of Review

As noted *supra*, this case has had an atypical course of proceeding. A Rule 12 motion to dismiss requests a ruling on a matter of law, to wit, whether the complaint states a claim recognized at law. A Rule 56 motion also requests a ruling on a matter of law, to wit, whether there are disputed facts requiring a trial. Usually these motions are sequential and separated in time by discovery. This is not always required under the Rules, however.

For example, Rule 12(h)(2) provides that "[a] defense of failure to state a claim upon which relief can be granted . . . may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the

pleadings, or at the trial on the merits." Of course, Rule 12(b) requires that the motion be considered in accordance with Rule 56 "[i]f . . . matters outside the pleading are presented to and not excluded by the court . . .."

Recently the Supreme Court has endorsed a "bright line" rule: it is the judge's duty, when considering matters outside pleadings on a Rule 12 motion, to give notice of the conversion of the motion and apply the other procedural protections of Rules 12 and 56. Any other procedure amounts to reversible error. *Ground Control, LLC v. CAPSCO Indus., Inc.,* 120 So.3d 365, 372, ¶¶ 19-22 (Miss. 2013)(*en banc*).

Here, the court's decision was styled a "dismissal" and it was a ruling based on a motion expressly identified as one asking for the complaint's dismissal "For Failure to State a Claim." [V. 2: C.P. 177] However, the Parties' submissions relied, essentially, on the Railroad lease, the purported sublease to the Deograciases, and a stipulation incorporating an affidavit from the Railroad's employee verifying its lease.

Two questions arise: were these items "outside" the pleadings, or has Kleyle waived any procedural rights he might otherwise have under Rules 12 and 56? Whether the three items were "outside" the pleadings requires consideration of Rule 10. Rule 10 provides that any document upon which a

claim or defense is based be attached to or filed with the pleading. Further, a Rule 10 document becomes part of the relevant pleading "for all purposes." These requirements are expressly stated in subsections (d) and (c): "(c) Adoption by Reference; Exhibits. Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes. (d) Copy Must Be Attached. When any claim or defense is founded on an account or other written instrument, a copy thereof should be attached to or filed with the pleading unless sufficient justification for its omission is stated in the pleading."

The express language of Rule 10 means that the sublease and lease are part of the pleadings for all purposes, including, obviously, a motion to dismiss. The sublease was attached to the complaint, and the Railroad's lease was attached to the Deograciases' Supplemental and Amended Defenses and Answer. [V. 1: C.P. 6-15; C.P. 81-97] This leaves the matter of the stipulation and affidavit.

The stipulation simply provides that the affidavit's facts are unchallenged by the Parties and "admissible for all purposes and the averments stated therein are true and correct . . .." [V. 2: C.P. 183] No cases have been found in

Mississippi where parties have, on a Rule 12(b) motion, stipulated certain facts, and following which no complaint was raised about the trial court's having considered those facts either following the court's ruling or on appeal.

These facts are closely parallel to those facing the Seventh Circuit in *United States v. Risk*, 843 F.2d 1059 (7th Cir. 1988). Risk was a banker in Indianapolis who got in trouble for appearing to assist a person -- who was actually an Internal Revenue Service undercover agent -- in evading currency reporting laws.

The government provided Risk with documents complying with "voluntary disclosure" requirements, the criminal counterpart to pre-discovery disclosure. Risk filed a motion to dismiss using the documents provided to him by the government, claiming that there was no case to be tried. The district court agreed based, in part, on the government's concession that the facts presented by Risk "accurately summarize[] the facts which give rise to the indictment." *Id.* at 1060. The government did not object to Risk's submission of the government's materials with his Rule 12 motion[3], nor did the government challenge the authority of the district court to consider those

[3] While not identical, the civil and criminal counterparts of Rule 12 provide essentially the same function: to challenge the indictment/complaint's sufficiency to state an offense/claim. The Seventh Circuit held that the district court did not improperly try the case but found that there was no case at all because the face of the indictment alleged violation of a statute to which Risk's acts did not apply. *Id.* at 1061.

facts in ruling on the motion to dismiss. *Id.* at 1061.

Only on appeal did the government object to the district court's consideration of the undisputed facts contained in its own documents. *Id.* The Seventh Circuit merely said, "Now it is too late. Under the unusual circumstances of this case, we find that the district court acted properly." *Id.*

Under the unusual procedural posture of this case, the same may be said with the exception that Kleyle has never objected -- even on appeal -- to any use of the circuit court of the stipulation. It is important to note that the Seventh Circuit was not ruling that any factual material proffered with a motion to dismiss was proper. Rather, it ruled only that undisputed facts, agreed upon by both parties, could be considered where the party who might object failed to do so.

In other words, Kleyle has waived a known procedural right and it is too late to object in a reply brief. Under Mississippi law, a party may waive a known procedural right where the party "actively participates in a lawsuit or takes other action inconsistent with the right . . ." which "substantially invokes the judicial process to the detriment or prejudice of the other party." *Lemon Drop Properties, LLC v. Pass Marianne, LLC*, 73 So.3d 1131, 1135, ¶12 (Miss. 2011)(*en banc)*, *quoting Mississippi Credit Ctr., Inc. v. Horton*, 926 So.2d 167, 179 (Miss.2006)

(citations omitted). As a practical matter, given the somewhat atypical procedure involved, there is little difference between Kleyle's waiving any claim to his "coversion" rights -- that only could occur now in a reply brief -- and from being estopped to make such a claim now.

Estoppel is usually a protection of the integrity of the justice system and prevents a party from later asserting a position inconsistent with one earlier stated. *Carroll v. Carroll*, 78 So.3d 332, 337, ¶16 (Miss.App. 2010), *citing Kirk v. Pope*, 973 So.2d 981, 991, ¶ ¶ 31-32 (Miss.2007). There are three requirements: "(1) the party is judicially estopped only if its position is clearly inconsistent with the previous one; (2) the court must have accepted the previous position; and (3) the non-disclosure must not have been inadvertent."

Here only the first two items are relevant inasmuch as there has been no non-disclosure of Kleyle's earlier posture. (1) Any change of mind now on Kleyle's part would be clearly inconsistent with his arguments below and here as well. (2) The circuit court clearly embraced Kleyle's position so far as it appears even unto this appeal.

In this case, there seems little reason to consider this confusion surrounding the application of Rule 12 as reversible error. The standard of review is the same: plenary. The standards for judgment as a matter of law may

be stated somewhat differently at different procedural points on litigation's timeline, but each is a question of law to which this Court applies *de novo* review. The trial court's rationale is not deferred to nor does it need to be adopted by the appellate court -- or even be correct -- so long as the correct result is reached. *Satterfield v. State*, 158 So.3d 380, 382, ¶¶ 3-4 (Miss.App. 2015).

B. Under Mississippi contract law, the Railroad lease is unambiguous and its provision omitting the right or power to convey any interest without written permission should be applied as written: the sublease is void.

At issue here is a proper construction of the anti-assignment clause in the Railroad lease. Perhaps most famously in *Royer Homes of Mississippi, Inc. v. Chandeleur Homes, Inc.*, 857 So.2d 748, 751-53, ¶ ¶ 7-11) (Miss. 2003), the Supreme Court held that "[t]he question of law/question of fact dichotomy requires a two-step inquiry in contract law. First of all, it is a question of law for the court to determine whether a contract is ambiguous and, if not, enforce the contract as written. Questions concerning the construction of contracts are questions of law that are committed to the court rather than questions of fact committed to the fact finder. Appellate courts review questions of law de novo."

Mississippi contract law has been stable since at least *Perkins*. In reviewing the "four corners" of a written instrument, the courts apply a three-tiered approach. The "tiers" may overlap and are not necessarily analytically

separate and distinct. First, the court uses meanings ordinarily attached to the parties' words to determine if the terms are unambiguous within the four corners of the document. If the written terms of the agreement are susceptible of more than one reasonable interpretation, then so-called canons of construction may be used, in effect overlaying the wisdom of the past to cajole sense from the instrument. Finally, extrinsic evidence may be admitted, not to vary the terms, but to clarify their meaning so that the contract's terms may be applied to the parties' controversy. *Lee v. South Mississippi Elec. Power Ass'n*, 17 So.3d 597, 600, ¶¶ 10-11 (Miss.App. 2009), *citing Pursue Energy Corp. v. Perkins*, 558 So.2d 349, 352 (Miss.1990).

There are two provisions relevant to this case. The "premises" covered by the Railroad lease and the "anti-assignment" clause governing Kleyle's power over those premises. The first paragraph of the lease identifies the "premises" governed by the lease as about 27,200 square feet in Poplarville on Magnolia Street. This land had building and paved parking improvements. Together, "[t]he Land and Improvements are collectively referred to herein as the "Premises." [V. 1: C.P. 88]

The anti-assignment clause provided that Kleyle could not "assign this Lease or any interest thereunder or sublet the Premises in whole or in part . . .

without the prior written consent of the [Railroad]. . . . Any assignment or sublease made in violation of this Paragraph 12 shall be void and shall constitute a default hereunder." [V. 1: C.P. 91-92]

Kleyle raised the issue, belatedly, with the trial court concerning his ownership of the building, and also here. The argument appears to be that what he had always claimed was a sublease prior to his response to the motion to dismiss was in fact a lease distinct from his lease with the Railroad, therefore falling outside the terms of the Railroad lease. [See, V. 3: T. 12]

The words used to describe the premises governed by the lease are unambiguous. The 27,200 square feet on Magnolia Street had a building and a parking lot on them. The area of land and its improvements constituted all the "Premises" to be governed by the terms of the lease. Whether Kleyle owns the building as he claims, the building was still part of the "Premises" that he agreed would be governed by the lease terms. If, because of this, Kleyle was surrendering some of his rights to do whatever he wished with his property, then so be it.

As for the anti-assignment provision, it forbids Kleyle from assigning the lease or any interest separable from it. Relevant here, the lease forbids Kleyle from subleasing "the Premises in whole or in part . . . without the prior written

consent of the landlord." The stipulation and affidavit provide really only one relevant fact: no written request -- or presumably payment of the stiff application fee -- was made by Kleyle. Nor has he contended throughout the litigation that he had. Again, one searches in vain for an ambiguous word, phrase, or sentence.

Finally, the anti-assignment clause states that any attempt to avoid the injunction against subdividing Kleyle's leasehold estate "shall be void . . .." So much seems clear: the sublease -- or lease as Kleyle would have it during the oral hearing -- violates the terms of the Railroad's lease disallowing and voiding any unpermitted subdivision of the lease.

The number of contract cases in Mississippi -- stating that if the terms of the contract are not ambiguous, then Mississippi courts apply the terms as stated -- while not infinite are certainly legion. See, *e.g.*, *Limbert v. Mississippi University for Women Alumnae Ass'n, Inc.*, 998 So.2d 993, 999, ¶¶13-14 (Miss. 2008). Here, Kleyle has never argued that his lease with the Railroad is defective in any manner. If he read the lease -- and such knowledge is imputed as a matter of law -- he must have known that he was violating its terms by entering any sublease, either the printed one that he relies upon, or the oral one the Deograciases assert existed.

The phrase used in the lease is "shall be void." The Railroad and Kleyle did not say "voidable on the Railroad's demand" or words to that effect. The sublease, of whatever nature, to the Deograciases is void. Like the circuit court here, the Supreme Court has long held that "void" means void, a nullity, and upheld the avoidance where the contract is clear and unambiguous. See, *Hall v. Eastman, Gardiner & Co.*, 89 Miss. 588, 43 So. 2 (1907).

Hall involved the sale of timber in Simpson County. The instrument was verbose, conveying "all the timber" on the described land, easements to cut and retrieve the timber, the right to construct any necessary instrumentalities to remove the cut timber including rail spurs, the right to erect or remove any buildings necessary to the logging, and so forth. *Id.* at 608-09, 43 So. at 3.

Notably, the contract required that all this commence and end within one year of Eastman's beginning to log: "It is especially covenanted and agreed that as to [the parcels] herein described and conveyed[,] this deed shall continue and remain in force until said Eastman, Gardiner & Company, their successors and assigns, commence to cut and lumber the same, and for one year thereafter, and then to become void and of no effect . . .." *Id.*

The Supreme Court held that "void" meant void, i.e., that the deed provided its own time of expiration. Mirroring the state of the law one

hundred years later, the Court held that "[w]e have not been able to see how there could have been any serious difficulty in the construction of this instrument. Courts must look at the whole instrument, not at one clause. They must get the purpose from the whole instrument, and they have a right to look to the situation of the parties who made the instrument, to the subject-matter embraced in the instrument, and to all the conditions surrounding the parties executing the instrument. When this is done, as it must, of course, be done to reach the true intent of the parties, all difficulty in the construction of this instrument instantly disappears." *Id.* at 613, 43 So. at 4.

While this would seem to answer the question about whether Kleyle could ever enter into an unpermitted sublease, some more observations may be helpful. For example, Kleyle argues that the Deograciases cannot claim any "rights" under the Railroad lease as third party beneficiaries or otherwise. This mischaracterizes the operation of the Railroad lease with respect to what Kleyle may do under it. The Deograciases make no claims to any rights under the Railroad contract, only that Kleyle's act in dealing with them were invalidated by his own agreement with the Railroad.

For example, in a recent case from Ohio, a leasing firm, Bass-Fineberg, leased a bus to Modern Auto Sales, Inc., and one Michael Cipriani. *Bass-*

Fineberg Leasing, Inc. v. Modern Auto Sales, Inc., 9th Dist. Medina No. 13CA0098-M, 2015-Ohio-46, ¶2. As here, the lease prohibited the co-lessees from assigning any rights or obligations to a third party without Bass-Fineberg's written consent. The lease also provided that Modern/Cipriani could purchase the bus at the end of the lease for $1.00. *Id.*

Cipriani contacted one Anthony Allie of BVIP Limo Services, Ltd. ("Limo") to repair the bus. Limo was not paid for the repairs, retained possession of the bus, and Cipriani and Modern defaulted on the lease to Bass-Fineberg. *Id.* at ¶3. Shortly, circumstances became more complicated. Limo's representative, Allie, and Modern/Cipriani entered into an agreement the court of appeals called "difficult to understand." It's terms were that Limo/Allie would pay Bass-Fineberg to bring the Modern/Cipriani account current with Modern/Cipriani agreeing to make monthly payments to Limo/Allie, which would then be forwarded to Bass-Fineberg to pay for the bus. Limo/Allie were to make the payments and take title to the bus from Bass-Fineberg. *Id.* at ¶5.

What happened next is a little confused. At a meeting with the three parties, the Bass-Fineberg representative took the check from Allie, but claimed he never was presented with the agreement between Cipriani and Allie. *Id.* at ¶4. At any rate, Bass-Fineberg never approved the Cipriani-Allie

deal. Circumstances degraded from there with Allie keeping the bus, Bass-Fineberg filing replevin and other actions, and Cipriani, apparently defaulting on everyone.

On appeal, Bass-Fineberg argued that there never was a deal between Cipriani and Allie because of the lease's anti-assignment clause. The Ninth District agreed, stating that "'Ohio enforces anti-assignment clauses where there is clear contractual language prohibiting an assignment.' [citation omitted] Violations of a non-assignment provision in a contract render the resulting agreement null and void. [citation omitted]." *Id.* at ¶ 15.

The Ohio court of appeals concluded that, "[a]s the lease agreement prohibited an assignment without Bass-Fineberg's consent, the agreement between Cipriani and Allie was void. If a contract is void, then an obligation under it never existed." *Id.* at ¶19. The law in Mississippi is similar. See, *Ground Control*, 120 So. 3d at 369-71, ¶¶12-15 (contract remedies unavailable under void contract but that does not foreclose recovery under quantum meruit/unjust enrichment theories).

Also analogous to this case is *Holloway v. Republic Indem. Co. of Am.*, 341 Or. 642, 147 P.3d 329 (2006). That case involved an anti-assignment clause in a worker's compensation policy: "[y]our rights or duties under this policy may

not be transferred without our written consent." The employer in that case hired a manager who allegedly harassed Holloway due to her gender. Eventually Holloway filed suit alleging various tort claims. Republic declined to defend and Holloway settled with her employer for a sum of money and took an assignment of any rights under the employer's policy with Republic. *Id.* at 645-47, 147 P.3d at 331-32.

The Oregon high court analogized the interpretation of the anti-assignment clause in the insurance policy to the similar question arising in leases containing anti-assignment provisions. Where the anti-assignment provision is broadly worded to encompass all rights and duties of the lease, then a corporate tenant that merges with another corporation and assigns the lease to the merged entity violates the anti-assignment clause and the assignment is a nullity. *Id.* at 652, 147 P.3d at 334-35, *citing Pacific First Bank v. New Morgan Park Corp.*, 319 Or. 342, 876 P.2d 761 (1994).

The *Holloway* Court held that the anti-assignment clause was not ambiguous and stated that "[b]ecause the assignment was not valid, Holloway obtained no rights against Republic." *Id.* at 653, 147 P. 3d at 335. The Court should hold the same in this case.

The Deograciases deem it prudent to add one final point. Many states,

including Mississippi, do not venture in contract construction cases beyond applying the unambiguous terms of the contract. However, with respect to anti-assignment clauses some states take a different view, though perceiving the policy basis for these alternative view is not easy.

As an example, the *en banc* Colorado Supreme Court, in *Condo v. Conners*, 266 P.3d 1110, 1111 (Colo. 2011)(*en banc*), considered whether an anti-assignment provision in a limited liability company's operating agreement rendered void an assignment to Condo of a member's voting rights and right to receive distributions from the LLC. This partial assignment of the member's rights to Ms. Condo was the result of a divorce settlement with her assignor/ex-husband, Thomas Banner. *Id.* at 1113.

The operating agreement stated that "a Member shall not sell, assign, pledge or otherwise transfer any portion of its interest in [the LLC] . . . without the prior written approval of all of the Members." *Id.* Condo argued that even if the assignment of the contract rights violated the anti-assignment clause, it was nevertheless legally binding as a mere contract breach, remediable by the LLC members through application of ordinary contract law to her assignor. She argued that this was the "modern" approach to anti-assignment provisions in light of the credit-based economy and the public

policy supporting the free alienability of contract rights. *Id.* at 1116.

Addressing Condo's argument about the "classic" (and outmoded) approach to anti-assignment clauses, compared to the so-called "modern" approach, the Colorado high court phrased the issue this way: "If the anti-assignment clause rendered Banner powerless to make a nonconforming assignment, the assignment was void and the present claims cannot stand. If, in contrast, Banner had the power but not the right to make the assignment, the assignment can be said to have occurred— albeit wrongfully— and Condo's present claims against the defendants may survive summary judgment." *Id.* at 1117.

The Colorado Court observed that the "modern" approach would define a nonconforming assignment as an unlawful act constituting a breach of the duty not to assign, which breach could then be remedied by the other party to the contract through a breach of contract action. *Id.* at 1117-18. The Colorado Court declined the invitation to overlook the words used by the parties to the LLC agreement. Viewing the agreement as a whole in light of the state's LLC statute, the Court ruled that the provision deprived a member of the power to assign unless the assent of the other members was first obtained. *Id.* at 1118-19.

Worth noting also was the Colorado Court's reliance on the modern

approach as exemplified by the Restatement (Second) of Contracts § 322(2)(a) (1981) (general presumption that assignment in violation of an anti-assignment clause is merely a breach of the contract and is therefore still legally effective, can be overcome if "a different intention is manifested" in the anti-assignment clause); id. cmt. c (explaining that it " depends on all the circumstances" whether the nonassigning contract parties are bound to perform any rights that are assigned in violation of the terms of an anti-assignment clause). *Id.* at 1118.

The Restatement takes a policy position in favor of treating an anti-assignment clause as a contract duty not to assign. Nevertheless, specific language in an anti-assignment clause, even in the absence of words such as "void," and other pertinent circumstances, allows a properly worded anti-assignment clause to render the parties powerless to assign save upon terms provided in the anti-assignment clause.

In this case, the lease did use the "magic" word "void." But at least the four corners of Paragraph 12 bear some consideration. The anti-assignment clause did more than just forbid Kleyle from assigning or subletting. It provided a clear process (and a fee) for obtaining the Railroad's permission to sublet. Only a failure to abide the lease's procedure and obtain the Railroad's

consent rendered a sublease "void." While the lease does not state that the Railroad would not unreasonably withhold its consent, neither does Paragraph 12 say that the Railroad would retain the sole discretion to make arbitrary decisions. Mr. Kleyle might have a very different case today had he simply complied with his own promises in the lease.

II. Conclusion

The Court should affirm the circuit court's ruling based on the unequivocal and unambiguous language of the lease. Without the power to assign or sublease the "Premises," the purported sublease to the Deograciases is, as stated in the lease, void and a nullity.

Respectfully submitted,

MYRNA DEOGRACIAS AND
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By: /s/ T. Jackson Lyons

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CERTIFICATE OF SERVICE

The undersigned counsel of record hereby certifies that the above and foregoing Appellee's Brief has been filed with the Clerk, and served upon the following counsel, by electronic transfer through the MEC system:

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So certified, this the 18th of September, 2015.

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