IN THE SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

THOMAS WILLIAMS AND DONALD WILLIAMS — APPELLANTS

VS. — CASE NO. 2010-CA-1408

CLAIBORNE COUNTY SCHOOL DISTRICT, GERONIMO HARDWOOD TIMBER, LLC a/k/a GOOD HOPE TIMBER, INC., AND ANDERSON-TULLY COMPANY — APPELLEES

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RESPONSE TO CROSS APPEAL
OF
CLAIBORNE COUNTY SCHOOL BOARD

For the reasons set forth in the following reply Argument of appellees, cross-appellants' "claim" is without merit. Further, the claim is based on total speculation. Claimant never advised appellants of any claim, right or demand to cross their property. In fact, as hereinafter shown, claimant sought to obtain a written easement from appellants to the 16th section lieu land. The lower court made no award to claimants based on the evidence, or lack thereof, nor did the chancellor address this baseless claim. This claim should remain dismissed.

ARGUMENT

All appellees' briefs seek to bolster the erroneous Judgment of the lower court that the entirety of Ross Road, both paved and as otherwise depicted upon the county's Map and Road Register adopted by the Board of Supervisors in 2000, automatically makes the entire road "public". That the "road" past the Williams' gates and through their pasture, which portion has never been acquired or maintained by the county, is now a public road simply by its designation upon such map and register. Nowhere do appellees refute Appellants' Brief that is squarely based of case and statutory law that the lower court erred in such a conclusion

There is absolutely no testimony of any county maintenance or public use of this physically non-existent "road" past the gates. In fact, undisputed testimony from the witnesses that lived in the area for many years was that there is not now nor has there ever been a road past the gates - only pasture and cattle trails that meander all over that pasture. The testimony of Don and Tommy Williams clearly established that they had always been asked for permission by others (game wardens and foresters) to go through the gates and across their pasture. They could not give consent to use the designated road " because no road existed".

The statutes that demand that the counties affected thereby clearly designate the public roads to be maintained on a county map and registry, and filed with the Chancery Clerk,(§ 65-7-4 and § 65-7-4.1) of all county public roads that are presently being maintained by the county are, by the plain wording of the statutes, clearly intended to prohibit the county from expending funds on private projects. Only existing roads presently being maintained may be so registered and mapped and, therefore, maintained by the county with public funds used therefor.

The specific statute (§ 65-7-4) concerning the designating of public roads is plain. The

intent of that statute is separately detailed in § 65-7-4.1. It, too, is plain, and applies to existing roads in the county with the clear directive that it is does not apply to roads that do not exist and cannot be interpreted to establish new roads. There is not one scintilla of evidence that the Williamses cow pasture past the gates was ever used by the public as a roadway. The only testimony about anyone crossing the pasture was from these appellants and their witnesses, and that pertained to a game warden and a forester, and on one occasion, when, years ago, Anderson-Tully crossed the property, all after specifically seeking and getting the permission of appellants. That testimony is not disputed in the record. Even appellee, Claiborne County School Board, through its secretary Sheila Barnes, testified that several years ago she had called appellants seeking to obtain a written easement across the pasture to accommodate the school board's hunting lessees. At no time prior to this suit did the school board contend that they had the right to access appellants' property over a public road.

The legal position depended upon by the appellees (that the entirety of Ross Road appears on the road registry and county road map adopted in 2000, ergo, by that fact alone, it is a "public road") is directly contrary to the Supreme Court holding in George County v Davis, 721 So 2d 1101 (Miss 1998); Ladner v Harrision County Board of Supervisors, 793 So 2d 637 (Miss 2001); and the most recent Paw Paw Island Land Company, Inc. v Issaquena and Warren Counties Land Companies, 51 So 3d 916 (Miss. 2010).

Likewise, appellees' legal position contravenes §67-7-4, Miss. Code Ann. and disobeys the legislature's stated intent in §67-7-4.1.

In the George County case the county sought to establish several roads as public because of prescriptive use for the requisite years and because they had maintained the road. But there was no proof presented that the road had a public character. The Court held that there must be

evidence that the public has an interest in the road or that is " has served the necessity and convenience of the public in the past." (at page 1110). " The Chancellor's ruling that is has been maintained by the Board for a substantial number of years, this, in and of itself does not make it a public road in the absence of any evidence of public use." (at page 1109).

" This Court has stated 'the property of the citizen... should not be lost to him... particularly so where there has been no conveyance or dedication of the right of way by deed or when there is no record evidence of its having been appropriated for public use by constitutional and statutory procedure.' (at p.p. 926-927, citing Armstrong v Itawamba County, 16 So 2d 752, 754 (1944).

The George County decision predates the enactment of Code sections 67-7-4 (1998) and 67-7-4.1 (2000)

The appellee's wholly failed to prove at trial that Ross Road past the gates had ever been created for public use, and was so publically used by one of the three ways this Court has long recognized in many past cases presenting the issue: they are

1. Prescription
2. Dedication, or
3. Pursuant to statutory authority (Petition §65-7-57, and Eminent Domain §65-7-89)

Again, see George County v Davis (supra, at pg.1106, immediately under heading "Legal Analysis"; Ladner v Harrison County Board of Supervisors, 793 So 2d 637, 638 (Miss 2001); and Paw Paw Island Land Company, Inc. v Issaquena and Warren Counties Land Companies (supra at page 628).

Miss. Code §65-7-4 is the statutory method whereby the Legislature commands the Board

of Supervisors to catalog and map all existing roads maintained by the county. The succeeding 65-7-4.1, as to legislative intent, then states that the map and registry system is not to " lay out, open, designate or otherwise establish new public roads, but to document and record existing roads which are, at the time of the initial adoption of said map and register, adjudicated by the board, consistent with fact, to be public roads by dedication, under the methods provided by statute, or by prescription and required by public convenience and necessity." (emphasis added)

The cases previously cited decided on how public roads are created are in concert with and, in fact, are, word for word, incorporated in the very statute the lower court wrongfully held to have created a public road where, never before, had such road been acquired by prescription, dedication, petition or eminent domain or required by public convenience or necessity.

Directly applicable to the instant case, The Paw Paw Island Court succinctly stated the following relevant holdings:

" In June 2000, the Board carried out the statutorily required functions of preparing and adopting an 'official map designating and delineating all public roads on the county road system" and a "county road system register.' Miss. Code Ann. § 65-7-4 (Rev. 2005). The register was to include the name of the road and a 'general reference to the terminal points and course of each such road.' Miss. Code Ann. § 65-7-4(2) (Rev. 2005)' (at pg 921, 922)

" This Court has stated ' the property of the citizen . . . should not be lost to him . . . particularly so where there has been no conveyance or dedication of the right of way by deed or when there is no record evidence of its having been appropriated for public use by constitutional and statutory procedure.' Armstrong v. Itawamba County, 195 Miss. 802, 810, 16 So.2d 752, 754 (1944)." (at page 926, 927)

" The county argues that 0.6 miles of Paw Paw Road became public solely by the Board's inclusion of the road on the county road map in 1989. The facts indicate that this assertion is not correct. The road was gated at that time (as depicted on the map), and all witnesses testified it had been gated for decades and has continued to be ever since. No evidence was presented of public maintenance inside the gate for at least the last thirty years, and only sporadically before that. A county road sign indicates that county maintenance ends at the gate. Two county supervisors testified that, as a part of their obligation to inspect all county roads, they never inspected the road beyond the gate." (at page 927).

"... There is no evidence of dedication of the road to the county. The county relied on its 1988 resolution as evidence that the road had become public. Further, a county supervisor testified that he had no knowledge of the road having been dedicated or becoming a county road by any other statutory method. See Ladner v.Harrison County Bd. of Supervisors, 793 So.2d 637, 639(Miss. 2001)." (at page 927).

" The chancellor correctly identified the only methods for creating a public road. The county made no claim at trial that the disputed portion of the road had ever become a public road by any of these methods, instead relying on the 1989 map for its claim. The Legislature has made clear its intent regarding these map-and-registry requirements, as follows:

> The Legislature of the State of Mississippi finds and determines as a matter of public policy and legislative intent that the proceedings and public hearing required for initial adoption of the official map and county road system register required by Section 65-7-4, Mississippi Code of 1972, are not intended to lay out, open, designate or

> otherwise establish new public roads, but to document and record existing roads which are, at the time of the initial adoption of said map and register, adjudicated by the board, consistent with fact, to be public roads by dedication, under the methods provided by statute, or by prescription and required by public convenience and necessity. Miss. Code Ann. § 65-7-4.1 (Rev. 2005).

We find no error by the chancellor, either factually or legally, in finding that the road west of the gate is private and that the county never had title to the road." (at page 928, 929)

CONCLUSION

It is respectfully submitted that the lower court erred in holding that the entirety of Ross Road past the Williams' gates was an "existing, established, maintained public road" as commanded by statutory law. The lower court's finding would have the effect of the public seizure of appellant's private property in violation of both the State Constitution and the United States Constitution.

Clearly, both the facts and the law require that this cause be reversed and rendered and the cross appeal denied.

Respectfully Submitted,
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CERTIFICATE OF SERVICE

I, Wren C. Way, do hereby certify that I have this day mailed a true and correct copy of the above and foregoing Appellant's Brief to:

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SO CERTIFIED, THIS THE 6th DAY of July, 2011.

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