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**

I.

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 this Court may evaluate possible disqualifications or recusal.

1. Tommy Williams and Donald Williams
   Appellants

2. Claiborne County School District,
   Geronimo Hardwood Timber, LLC a/k/a
   Good Hope Timber, Inc., and Anderson-Tully Company
   Appellees

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s/ Wren C. Way
WREN C. WAY, Attorney for Appellants
Thomas and Donald Williams

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STATEMENT OF THE ISSUES

It was an abuse of discretion and misinterpretation of the law for the lower court to hold that the adoption of a road map and road register system by the Claiborne County Board of Supervisors, pursuant to §65-7-4, Miss Code Ann., established Ross Road as a public road across the properties of appellants.

V.

STATEMENT OF THE CASE

On October 19, 2009, Claiborne County School District, Good Hope Timber, Inc., and Anderson-Tully Company filed their Petition to Confirm Right-of-Way against Thomas Williams. (RE-1) Later amendments by petitioners substituted Geronimo Hardwood Timber, LLC in the place of Good Hope Timber, Inc, (RE-15), and added the defendant's brother, Donald Williams, as an additional defendant.. (RE-8).

In their petition, plaintiffs asserted that Ross Road was a public county road since it was so designated in the year 2000 by the Claiborne County Board of Supervisors on their County Road Register which was attached to the petition as Exhibit "A". (RE-7). This document contains a general, non-legal description of the course of the road: " Beginning at the approximate Northeast corner of Section 26, T13N, R4E and runs in a Southeast direction through Section 27, Section 26, Section 7, and Section 18 to its terminus in the Northwest quarter of Section 18."

The Road Register clearly states that the Ross Road surface type was "PAVED".

It is significant to note that no one testified on behalf of plaintiffs Anderson-Tully Company or Geronimo Land Company, nor did any member of the Board of Supervisors, School Board or Superintendent of such board testify about their respective past use of Ross Road, nor

use by the general public past the paved portion of Ross Road behind two gates erected by appellants and their predecessors-in-title forty-five years ago.

VI.

SUMMARY OF THE ARGUMENT

Appellees' rely solely upon their allegedly lawful adoption, in the year 2000, of a Road Map and Road Registry System pursuant to § 65-7-4, Miss Code Ann (2000), that Ross Road is a public road from its beginning at Old Port Gibson Road and paved up to the property of appellants where the two access and cattle gates are located at the pavement's end. They further contend that, pursuant to such adoption by the board, and so adjudged by the lower court, that Ross Road continues on through appellants' pasture all the way through section 7 (16th Section lieuland) and onto the lands of Anderson-Tully (See Ex. 9 and 14).

Appellants argue that such a legal conclusion as to the "road" past the gate and across appellants' property does not comport with the stated intent of § 65-7-4, nor the restated intent found in § 65-7-4.1 (see attachments) that only established, publically used roads be so designated. The use of the "road" on Williams' property is now and, to the memory of aged citizens, has always been a fenced in pasture that has never been put to a public use; that Ross Road ends at the gates and the asphalt.

VII

ARGUMENT

Plaintiffs, Claiborne County School Board, Anderson-Tully Company and Geronimo Timber (Good Hope) filed their petition and amended petition to declare what is allegedly "Ross Road" in Claiborne County to be a public road extending through properties of defendants and all plaintiffs.

Without regard to the factual history of the public's use of the road, Plaintiffs rely solely on the recent map (Exhibit "5") prepared by the county's engineers which allegedly replicates the county's Road Map, and shows such extension. Although the statutory requirement (§ 65-7-4, 2000) that the county Board of Supervisors adopt a map of all county public roads and file same in the office of the Chancery Clerk, that specific map, although available to Plaintiffs at the courthouse where the hearing was held, was never certified and introduced into evidence. Defendants objected to entry into evidence of Exhibit "5" under evidentiary rules (MRE 1005, 902 AND 1002). Further, the county engineer testified that Exhibit "5" was drawn from the maps of the Mississippi Department of Transportation, but those base maps were, also, not introduced into evidence. Defendants sought to produce an official county map prepared by the Mississippi Department of Transportation (Exhibit "6-ID") which directly contradicts the engineer's testimony and proves the assertions of defendants that the road terminates at the end of the pavement before the locked gates. Defendants again profert that exhibit as an aid to the Court. Likewise, the statutory requirement that the county's Road Register describe the surface of the road, the Road Register introduced into evidence by plaintiffs states that Ross Road is "PAVED" (Exhibit "1) which also contradicts plaintiff's claim that the road extended past the paved, maintained portion of the actual road, and is in direct accord with the claim of defendants'.

Thus, plaintiffs sought to rest their case solely that, as a matter of law, Ross Road was a

public road by the adoption, in the year 2000, of a County Road Map that was never introduced into evidence, although available in the Clerk's office, and a Road Register, which, contrary to the Plaintiff's position, describes the road as "paved". These facts further bolster the assertion of the Williamses that "Ross Road" ends at the paved portion thereof.

The question of the actual use of Ross Road by the plaintiffs past the paved portion is totally lacking. None of the plaintiffs testified that they or anyone else had made any use of the "road" past the pavement, which "road" was described by several area witnesses as merely a "cow path". Ms. Barnes with the school board testified that she had been back to the school section "once", and that was with the game warden who had previously sought and was granted permission by the Williamses to go through their property. Any use of the "road" by the remaining plaintiffs was by testimony of the defendants and their witnesses that, to the contrary, plaintiffs' loggers always used Curtis Road to the north, not Ross Road; that the very few times they came through the Williams property, they did so only after getting defendants' permission to haul logs from isolated patches of woods. There was no testimony to the contrary, whatsoever, contradicting defendant's testimony that no member of the public, including the plaintiff's, ever used the "road" without the permission of the defendants. There is absolutely no evidence, or suggestion thereof, of any map or other delineation of the entirety of Ross Road , past the gates, that existed at any time prior to the year 2000.

The recently (November 10, 2010) decided case of ***Paw Paw Island Land Co., Inc. And Warren County, Mississippi v. Issaquena and Warren Counties Land Co., LLC*** ,(No 2008-CA-01632-SCT) is dispositive of many of the issues in this case favorably for the appellants. In ***Paw Paw Island,*** the road in question ran from Mississippi Highway 465 in Warren County, over the mainline Mississippi River levee, and terminated at Paw Paw Island. Several decades ago, a private gate was placed across the road on the protected side of the levee and was later relocated

to the river side of the levee. The county maintained the road only to the gate. As mandated by statute (Miss. Code§ 65-7-4), in 2000 the county's Board of Supervisors adopted a map showing the road to be .6 of a mile, ending past the gate and up to Paw Paw Island. As in this case, the plaintiffs contended that this Board action automatically made the road public its entire length, without protest from the land owner.

The Supreme Court said "No".

" The chancellor also cited case law outlining the three exclusive methods for creating a public road: ' prescription, dedication, or pursuant to statutory provisions.' ***Ladner v Harrision County Board of Supervisors***, 793 So. 2d 637,639 (Miss. 2001). See Miss. Code Ann. § 65-7-57 (Rev. 2005) (petition); Miss. Code Ann.§ 65-7-89 (Rev 2005) (eminent domain)."

As in ***Paw Paw*** and ***Ladner***, and as in this case, there is absolutely no testimony or evidence in the record of Ross Road, past the Williams' gates, being acquired by the county by prescription by public use, dedication, eminent domain or by landowner petition, the only legal means of such creation.

Thomas and Don Williams testified that their father purchased their property in 1965; that Ross Road was then a gravel road which ended at a gate and fence erected prior to that time by the previous owner, Mr. Perkins, to limit access and to turn cattle, the sole use to which the land has been used for decades. Long time members of the community in the area and the Williamses testified that the county later black-topped the road in the late 1970's, again ending at the gate. There is no "road" beyond the gate, only cattle trails, paths and pasture.

Alonzo Jones, the county's designated road manager testified:

Q. Mr. Jones, I'm going to hand you what's been introduced as Exhibit 1 and ask if you recognize that? I'll tell you it's a copy of the road Registry of Claiborne County.

A. Yes.

Q. Okay, and the road is named what?

A. Ross Road.

Q. Okay, and what surface type is on the Road Registry?

A. It says the type is paved.

Q. Paved?

A. Uh-huh.

Q. Okay, is Ross Road paved?

A. Up to the gate.

Q. Up to the gate?

A. Uh-huh.

Q. But it says paved on that Road Registry and that's where you maintain it is to the gate?

A. To the gate. (T 32-33)

Sheila Barnes, 16th section manager for the School Board, stated that she went to the school section one time in her 15 years as such manager. In 2008, she was accompanied by a game warden who had the Williamses' prior permission to go upon the property. (T- 43) She testified:

Cross Examination By Mr. Way:

Q. Ms. Barnes, I understand that you've worked for the School Board since '95, is that right?

A. No, I've worked in that office since '95. I've been employed since 1987.

Q. You say you were on this property in 2008?

A. Yes sir. We went out to visit the property.

Q. And how did you get there?

A. We went in the school vehicle.

Q. And who?

A. The School District vehicle.

Q. Okay, but I mean by what route?

A. Through Mr., through a road, Ross Road by Mr. Williams' house.

Q. Okay, and you went back on there?

A. Yes sir.

Q. Did you get to talk to Mr. Williams any?

A. No, we were with the game warden.

Q. Okay, who had access through those gates?

A. Yes sir.

Q. And that's how you got back there?

A. Yes sir.

Q. You don't happen to have a copy of that letter to Mr. Williams, do you?

A. Oh, no, sir. I have a copy but I didn't bring it.

Q. You didn't bring it with you?

A. No, sir.

Q. But in that you – exactly tell me what that letter says again.

A. That we'd like to set up an appointment with him to discuss right of way to the Section.

Q. And that's all it said?

A. Well, we also put in there about the revenue that we have lost during the years by the Section not being leased out.

Q. And I don't have the letter. You asked the Williams for access to the 16th section?

A. We asked to meet with him so we could discuss it, yes, sir.

Q. To discuss access to the 16th Section?

A. Yes, sir. Uh-huh.

Q. To your recollection, if you remember, does it say anything about Ross Road, that letter?

A. Not to my knowing.

Q. If you remember.

A. Not to my knowing.

Q. Okay. The letter didn't say we demand access through there, did it?

A. No, sir.

Q. You asked for access through there?

A. Yes, sir.

Q. In 2008, that was a little bit ago. Describe how the surface and the terrain of the road as you went back there to the 16th Section. What was it like after you left the pavement?

A. It's just grown up.

Q. Kind of a path through there?

A. It's a path, yes, sir, there is a path.

Q. Has the timber been cut?

A. Not that I know of, no, sir." (T 43, 44 & 45)

Dirk Chrestman was called to testify as Plaintiffs' first witness. He was a draftsman instrumental in preparing the legislatively mandated County Map and Road Register in the years 1999 and 2000. He did so based on a 1995 map of Claiborne County prepared by the Department of Transportation, but no such base map was introduced into evidence to corroborate that

testimony. (T-20) Then he prepared a map (Ex.5), dated April 19, 2010, allegedly based on a portion of the 2000 map he had prepared. (T-21) The 2000 map was likewise not introduced into evidence to corroborate this testimony, although it was available supposedly at the Chancery Clerk's office on the courthouse where the case was tried.

On cross examinantion, Chrestman testified with regard to the Road Register and Map:

"A. It says it's paved.

Q. Paved?

Q. And you could take that to mean blacktopped or concreted?

A. It could be DBST. It would be a waterproof surface.

Q. It wouldn't be a dirt path, would it?

A. No.

Q. Did you go and physically look at Ross Road?

A. No, sir

Q. Did any of your people go out there?

A. No, sir. (T- 22)

MR. WAY: Your Honor, that's all we have of this witness. I renew my objection to Exhibit 5. That's the map because it's based on the map that's not, that's available to the witness and he has it and he didn't bring it for us to compare. It was prepared – there is an existing county road map in this building that was adopted in 2000 and it's not before the Court. We object to a simulated exhibit copy." (T-26)

Alonzo Jones testified for appellee's at trial. He had been the county's road manager since October 15, 2005 (T 29) He was questioned on direct examination about exhibit 5, the map:

"Q. And does Ross Road cross through the Claiborne County School Board Section?

A. Yes.

Q. Section 7 and it goes into Section 18, is that correct?

A. That's correct.

Q. And are you familiar with this road?

A. Yes.

Q. Okay, and as the Claiborne County Road Manager do you consider that a public road?

A. According to our Road Registry it's a public road, uh-huh.

Q. Okay, and as far as you know it has been at least since we developed this Road System, is that correct?

A. Since I've been here, since I've been Road Manager it has.

Q. Okay, and do you know whether or not the county has worked Ross Road?

A. We've worked Ross Road up to the gate. There is a gate was placed on that road some years before I got there but we just worked up to the gate and we turned around because unless we have authority from the Sheriff's Department or some other source we don't take down gates. We worked up to the gate.

Q. Okay, and do you know where that gate is?

A. Yes.

Q. Do you know where it is on the map?

A. Approximately where it is at. I can't just say exactly but it's before you get to Section 7.

Q. Do you know when that gate was put up there?

A. Me personally, I don't know but I've talked to, and this is hearsay but I talked to the Road Manager prior to me and they said the gate was installed after the county

went into the unit system so that was years before I became Road Manager."(T-)

(emphasis added)

The next witness for appellee was Sheila Brown who testified on direct examination that she was the 16th Section Manager for the Claiborne County School District since 1996 (T 36,37). With regard to past access to the 16th Section land lieu land, being Section 7, she testified on direct examination:

"Q. Okay, tell me what is that document that you have?

A. This is a hunting and fishing lease contract.

Q. I'll hand you this document.

A. Yes, sir.

Q. Now that was in 1996, is that right?

A. Yes, sir.

Q. Is that a true and correct copy of the lease?

A. Yes, sir.

Q. Now was that lease, was the School District able to maintain that lease?

A. No, sir.

Q. Why not?

A. Because at the time this section was leased to Off Road Hunting Club they did not have access to get in to the property so the School District had to return their monies.

Q. Now what was preventing them from having access to it?

A. They didn't have access to get into the section.

Q. Okay.

A. There was no right of way.

Q. Was there a road that goes into the section?

A. Yes.

Q. Would that be Ross Road?

A. Yes, sir.

Q. What prevented them from traveling Ross Road?

A. A gate.

Q. And was that the gate the Williams had put up?

A. Yes, sir.

Q. So as a result of that the School District could not fulfill that lease and had to return the money, is that correct?

A. Yes, sir.

Q. Now has the School District been able to lease that land at any time during the time that you have been coordinator other than the lease that you just talked about?

A. No, sir.

Q. And why is that, you have not been able to lease it?

A. Because we have no right of way to the section.

Q. No access?

A. No access to get into the section.

Q. Has there come a time when there has been some discussion between the School District and the Williams in connection with this property?

A. Yes, sir.

Q. Tell the Court what that was about.

A. A letter was sent to Mr. Williams asking him to come to the Superintendent's office to meet with the District concerning leasing Section 7 to work out an

agreement with him where we lease the land to have access to get into the property.

Q. Did he agree to allow access for lease purposes?

A. No, sir.

Q. He refused to allow access?

A. Yes, sir." (T-) (emphasis added)

Appellees final witness was Gloria Dobson, Claiborne County Chancery Clerk and Clerk for the Board of Supervisors. The County Road System map is kept in her office but was not produced to legitimize the prior testimony of Chrestman that his copy of a copy of a copy of the road map was authentic. She simply testified that notice of the map was published and that neither Donald nor Thomas Williams attended the public meeting to protest. This was done in order to bolster plaintiffs' contention that the adoption of the map and Road Register as mandated by the Legislature in Miss. Code Ann. § 65-7-4 automatically makes all roads shown thereon as "public roads".

That is clearly an erroneous legal position as pointed out in the ***Paw Paw Island*** case (at page 23) :

"The statutes cited offer no support for the county's position. In 1989, the county was carrying out its function to "inventory" county roads, indicating that the county was to make a "list' of what it already had, not acquire new roads. 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."(emphasis added)

THE ROAD REGISTRY SYSTEM AND MAP OF ROADS

The state Legislature enacted § 65-7-1 et seq (effective July 1, 1998) restating the jurisdiction of all county boards of supervisors to have full jurisdiction over all matters relative to the public roads of the county. (§ 65-7-1 (1)). That code section further dictates that "all such exisiting county roads shall be opened and worked at least sixteen (16) feet wide, where practical, and in no case less than ten (10) feet wide."

Ross Road, past the Williamses' gates has never been worked by the county. (T-ms.templeton)

Miss. Code Ann. § 65-7-4 then compels the board of supervisors, on or before July 1, 2000, to make an inventory of all existing public roads and to establish both a county Road Map and Road Register System of all such county roads to be maintained, and that such Map and Register be up-dated by July 1 of each succeeding year. Before adoption of the Map AND Road Register, the board had to publish notice of a public meeting, or hearing, in a local newspaper. The minutes of these proceedings were to be recorded. As to the legislative intent, it was made clear, in subsection (6) thereof, that the map and register " shall include all public roads that the

board of supervisors determines, consistent with fact, as of July 1, 2000, or such date the official record is adapted are laid out and open according to law." (emphasis added)

If that "intent" was not sufficiently clear, the Legislature found it necessary to later enact Miss. Code Ann. § 65-7-4.1, effective April 17, 2000, which restates the legislature's intent:

"Legislative intent

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." (emphasis added)

The map entered into evidence is not the map adopted by the Claiborne County Board of Supervisors. Indeed, there is no proof that such a map may be located in the office of the chancery clerk as required by law. The clerk gave testimony at trial but did not mention the alleged map. She did present minutes of the board meeting where the board adopted an "Official Map" ,but no minutes evidencing adoption of the Road Register. (Ex. 2, Pg. 2)

The Notice of Public Hearing (Ex. 2, p. 3) gives notice of a hearing regarding an "official map and road registry" but the road register description is sorely lacking. Miss. Code Ann. § 65-7-4 ((2) (6)) requires that the road register must contain the terminal points of each road and a " general description" of the terminal points of such road. The description of Ross Road states that it begins " at the approximate Northeast corner of Section 26, T13N, R4 EAST." This beginning point (at the Natchez Trace (see Ex. -)) is contrary to everyone's testimony that Ross Road

commences, instead, at Old Port Gibson Road in Section 3, T14N, R4E. (See Ex. 5). It is also said to terminate in Section 18 but Ex.5 clearly shows that Section 18 is in another township and range.

Therefore, the map produced is not the best evidence of the map adopted by the board of supervisors which, if it exists, should be in Gloria Dotson's office close to the court room, and the Road Register's " general description of the terminus points" are likewise in error as is the required notice to the public and the minutes of the Adoption hearing.

This argument is made should this Court reverse the ***Paw Paw Island*** case and hold, contrary to the stated legislative intent, that the mere adoption, by the board of supervisors, of a road map and road system register legally confers public status on all roads properly set out therein.

Prior to the legislature's adoption of § 65-7-4 in 2000 and, later, § 65-7-4.1, this Court heard and determined George County v. Davis, 721 So 2d 1101 (Miss.1998). In 1995 the George County Board of Supervisors had declared, on its minutes, certain smaller, secondary roads to be "public" and began paving them. After a formal complaint was filed, the Department of Audit for the state conducted an investigation of the roads and declared 28 of them to be private roads upon which public funds could not be used for construction or maintenance. The Board filed a declatory judgment action in the Chancery Court asking, inter alia, that the roads be declared as public. The chancellor heard evidence and made personal inspections of the roads and deemed some as public by the acquisition method (petition) set out in Miss. Code § 65-7-57; some were deemed to be public up to a certain point (usually a residence or a property line) and private thereafter; and the remaining roads declared public or private according to the laws of prescription, i.e. the public character of the past and present public use of the roads for the requisite years to establish adverse possession by the public. Twelve (12) of those roads were

deemed to be private by the chancellor and four (4) were held to be public. Feeling aggrieved, the Board appealed the chancellor's findings, positing that they had maintained eight (8) of the roads for a period of more than the ten year prescriptive period.

The Supreme Court disagreed holding:

> "Conversely, the Opinion [of the chancellor] reiterates the established case law in Mississippi; in order for a road to become public by prescription the road must be habitually used by the public in general for a period of ten years, **and** such use must be accompanied by a claim by the public of the right so to do. In order for the roads to be public by prescription, all the required elements must be present. This Court has previously identified the required elements. The county claims the road public by prescription and, therefore, has the burden of proving, as does an individual claimant, that the use is:
>
> (1) open, notorious and visible;
> (2) hostile;
> (3) under claim of ownership;
> (3) exclusive;
> (4) peaceful; and
> (5) continuous and uninterrupted for ten years.
>
> Myers v. Blair, 611 So.2d 969, 971 (Miss. 1992) (citations omitted).
>
> Furthermore, this Court has consistently held that the Board of Supervisors can only act through its minutes. Martin v. Newell, 198 Miss. 809, 23 So.2d 796 (1945); Noxubee County v. Long, 141 Miss. 72, 82, 106 So. 83, 86 (1925); Smith v. Board of Supervisors, 124 Miss. 36, 86 So. 707 (1921).

It is to be presumed that, if a road of Tallachatchie County, is necessary for the public convenience to be established as a public one, the Board of Police will perform their duty, and take the proper steps to constitute it a public road, under the sanctions of the law; and if there be no such declaration by that body, the road, though open to public use, could be considered in law but a private road." (At page 1107)

The chancellors' decision based upon testimony and the [illegible] trial, as well as his personal viewing of each road, was correct in [illegible]olic character to the road in each instance. Most of the roads in ques[illegible], to which the court held:

Not true in this case!

"Therefore, the chancellor's ruling that this road only serves the one house and is therefore private in nature, was not manifest error." (At page 1108)

Although the Board maintained another of the roads, the Board contended that it was public not only because it served a residence, but also because it provided access to other lands that had no other access, specifically school lands:

"They allege that the court should have declared Mergenschroer Drive public based upon the fact that ' it also is the only access to a tract of Sixteen[th] Section Land, which is cruised by various timber companies.' However, the appellees point out that the court had the benefit of the road's history, photographs, and land maps, and nevertheless found no public use, necessity, or convenience for this road. Moreover, there was testimony that this road dead-ends at Larry Mergenschroer's residence, thereby serving one residence. The chancellor's Ruling indicates that even though it 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. The Board has failed to show that the chancellor abused his discretion in ruling Mergenschroer Drive to be a private road." (at page 1109)(emphasis added)

It should be noted that there are no residences beyond the Williamses' gates, nor has Claiborne County EVER worked a roadway past those gates, nor was there any evidence of a general public " use, necessity or public convenience" beyond the gates at Don Williams' home. It was only cow paths and completely enclosed pastureland.

Even if plaintiff's had sustained their burden of proving Ross Road once had been a county road, which they did not, that fact, standing alone, is not enough given the overwhelming, un-rebutted proof that the roadway past the paved portion has been abandoned by the county as shown by non-use by the public. The testimony given by several elderly residents of the road and the area, including the defendants, was that Ross Road has always ended at the home of the defendant, Don Williams, who now occupies the former home of a Mr. Perkins. The road, then called "Perkins Road", began at Old Port Gibson Road and was graveled for several miles up to the Perkins home, where it stopped at the gate and fence. It was later crossed over by the Natchez Trace through a bridge - tunnel. The gravel roadbed was built and maintained by Claiborne County until approximately 1970 when the county poured an asphalt surface over the gravel up to Don Williams home, where it stopped. Two locked gates are located at the paved road's terminus. The first gate was erected by Perkins, the Williamses' predecessor in title. The 2nd gate was erected by defendants' father, Felix Williams, in 1965. The first gate was erected to prohibit public access to the Perkins property and the second to like wise restrict access and to turn cattle, which has always been and continues to be the use to which the Perkins and Williams property behind the gates has been put for decades. Only the Williamses and their permittees have made use of this property now belonging to Don and Tom Williams after being partited from their

fathers' estate.

Nothing appears of record that the county acquired any part of Ross Road by legal methods. But case law establishes that a public road may be otherwise created by prescription, i.e., ordinary public use over the years such as use by residents, mail routes, presence of utilities, etc., along the roadway. It is not disputed that Ross Road up to the residence of Don Williams is a public road, county maintained. It is likewise not disputed by anyone, especially in this record, that the property past the paved portion of Ross Road has no public characteristics whatsoever. It is pastureland.

The case of ***Medina v. State er rel. Summers***, 354 So 2d 779 (Miss.1978) is particularly on point. The Court held that, in litigation between private individuals, a public road could be established by public use rather than formally acquired, but the appellee took the position that a portion of that road could only be closed, in private litigation, predicated upon the county's compliance with § 65-7-121of the code which addresses road closure. The *Medina* Court disagreed and held that an order of the board of supervisors was not the only means of a county surrendering the public's right to use a road.

> " Admittedly, such an order would be an unequivocal and simple answer to the loss of public character. However, protracted non-use of a road by the public has the capability of ripening into an unequivocal surrender of its public character without a formal order of closure by a board of supervisors or the highway commission." (at page 783).

The *Medina* Court went even further and, quoting from *Picayune Wood Products Co., v. Alexander Mfg., Co.*, 86 So 2d (1956), which, like this case and *Medina*, involved private litigants, held:

". . . the appellant does contend that a road can be closed only by an order of the board of supervisors. . . But under the authorities mentioned above, a road may be abandoned by the county and the traveling public without an order of the board of supervisors; and the right which the county has in the roadway may be extinguished by abandonment and non-user for the statutory period of ten years.(at 86 So 2d 483) ". . . the trend of authority seems to be that mere non-user for the period fixed by the statute of limitations for acquiring title by adverse possession affords a presumption, though not a conclusive one, of extinguishment, even in a case where no other circumstances indicating an intention to abandon appears; and if there has been in the meantime some act done by the owner of the land charged with the easement, inconsistent with or adverse to the right, a much stronger presumption of extinguishment will arise. . .The Court ultimately held the road in controversy was abandoned by non-use" (86 So 2d 484, emphasis added)

"Cook Landing Road north of the present boat docks has unequivocally lost its public character in our opinion. It was abandoned by formal order of the board of supervisors below mean sea level of 418 feet. Those portions of the road above 418 feet sea level ceased to be maintained by the board of supervisors and additionally Medina admitted erecting a fence across the road north of Medina Road. These factors, closure and inundation of portions of the road, lack of maintenance for more than twenty years, and

nonuser of the portions not inundated, constrain the conclusion of a clear intention to abandon. We think, therefore, the trial judge did not err in his finding that the road had lost its public character."

(354 So 2d 784)

Plaintiffs have totally failed to carry their burden of proof. Conversely, the case presented by Tom and Don Williams is profoundly stronger factually than the facts noted in *Medina*. That portion of the "road" past the pavement was never opened , constructed or maintained by the county. It has always been, and remains, a cow pasture. Locked gates were placed at the end of the gravel road by Mr. Perkins and Felix Williams, Tom's and Don's father, and for the last 45 years no one has come through those locked gates except by permission from the Williamses. If ever this cow path was a public road, it has never been so used by the public. Even if it ever had been so used by the public, its public character from non-use has existed for more than 45 years, well in excess of the statutory prescriptive period.

The Complaint and claim of the plaintiffs and the Judgment of the lower court should be reversed and rendered.

VIII

CONCLUSION

A clear reading of the statutes (§ 65-7-4 and § 67-5- 4.1) dictates that a county road designated upon the map and register must be presently in existence, i.e, established, maintained and in use at the time the county declares that road as "public". The specific legislative intent of these laws is not only stated in both statutes but also in numerous opinions of the Attorney General. The county is prohibited from expending funds except upon truly public roads that, "consistent with fact", are "laid out and open". If Ross Road is declared "public" past the gates, can the plaintiffs, and even the defendants, require the county to construct and maintain, in accordance with law, the "road" behind the gates that will serve only wild, unoccupied property? A positive response, it is submitted, flies in the face of the intent of the statutes that require the board of supervisors to inventory existing roads before mapping and registering same as county roads.

The evidence is clear that there is not now nor has there ever been a "public road" past the gates . The cow paths and pasture past the gates have never been subject to defined public use. No one testified that the public in general nor was the proof of plaintiffs' at all persuasive that public usage existed. The infinitesimally slight use made by plaintiffs (and absolutely none by Geronimo Timber) was, without any proof to the contrary, at the permission of defendants. In accord with both statute and recent case law, this case must be reversed and rendered.

Plaintiffs, Claiborne County School Board, Anderson-Tully Company and Geronimo Timber (Good Hope) filed their petition and amended petition to declare what is allegedly "Ross Road" in Claiborne County to be a public road extending through properties of defendants and all plaintiffs.

Without regard to the factual history of the public's use of the road, Plaintiffs rely solely on

the recent map (Exhibit "5") prepared by the county's engineers which allegedly replicates the county's Road Map, and shows such extension. Although the statutory requirement (§ 65-7-4, 2000) that the county Board of Supervisors adopt a map of all county public roads and file same in the office of the Chancery Clerk, that specific map, although available to Plaintiffs at the courthouse where the hearing was held, was never certified and introduced into evidence. Defendants objected to entry into evidence of Exhibit "5" under evidentiary rules (MRE 1005, 902 AND 1002). Further, the county engineer testified that Exhibit "5" was drawn from the maps of the Mississippi Department of Transportation, but those base maps were, also, not introduced into evidence. Defendants sought to produce an official county map prepared by the Mississippi Department of Transportation (Exhibit "6-ID") which directly contradicts the engineer's testimony and proves the assertions of defendants that the road terminates at the end of the pavement before the locked gates. Defendants again profert that exhibit as an aid to the Court. Likewise, the statutory requirement that the county's Road Register describe the surface of the road, the Road Register introduced into evidence by plaintiffs states that Ross Road is "PAVED" (Exhibit "1) which also contradicts plaintiff's claim that the road extended past the paved, maintained portion of the actual road, and is in direct accord with the claim of defendants'.

Thus, plaintiffs sought to rest their case solely that, as a matter of law, Ross Road was a public road by the adoption, in the year 2000, of a County Road Map that was never introduced into evidence, although available in the Clerk's office, and a Road Register, which, contrary to the Plaintiff's position, describes the road as "paved". These facts further bolster the assertion of the Williamses that "Ross Road" ends at the paved portion thereof.

The question of the actual use of Ross Road by the plaintiffs past the paved portion is totally lacking. None of the plaintiffs testified that they or anyone else had made any use of the "road" past the pavement, which "road" was described by several area witnesses as merely a "cow path". Ms.

Barnes with the school board testified that she had been back to the school section "once", and that was with the game warden who had previously sought and was granted permission by the Williamses to go through their property. Any use of the "road" by the remaining plaintiffs was by testimony of the defendants and their witnesses that, to the contrary, plaintiffs' loggers always used Curtis Road to the north, not Ross Road; that the very few times they came through the Williams property, they did so only after getting defendants' permission to haul logs from isolated patches of woods. There was no testimony to the contrary, whatsoever, contradicting defendant's testimony that no member of the public, including the plaintiff's, ever used the "road" without the permission of the defendants. There is absolutely no evidence, or suggestion thereof, of any map or other delineation of the entirety of Ross Road , past the gates, that existed at any time prior to the year 2000.

It is respectfully submitted that plaintiff's have failed to sustain their legal burden of proving that Ross Road, past the paved portion, has been established as a public county road. Appellants respectfully request that this cause be reversed and rendered.

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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 3rd DAY of February, 2011.

Wren C Way
WREN C. WAY, MSB [redacted]