

IN THE COURT OF APPEALS 02/25/97

OF THE

STATE OF MISSISSIPPI

NO. 94-CC-00913 COA

ROY A. THOMAS AND WIFE,

WINNIE SUE THOMAS

APPELLANTS

v.

MARLIN LEE, KATIE LEE, GILBERT SYLVESTER, OUIDA BROWNLEE, JEFFREY SYLVESTER, KAREN SYLVESTER, KELVIN C. LOTT, AND GRACE T. LOTT

APPELLEES

**THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B**

TRIAL JUDGE: HON. RICHARD W. McKENZIE

COURT FROM WHICH APPEALED: PERRY COUNTY CIRCUIT COURT

ATTORNEYS FOR APPELLANTS:

SHERRA L. HILLMAN

J. C. MARTIN, JR.

ATTORNEYS FOR APPELLEE:

JACK PARSONS

REBECCA C. TAYLOR

NATURE OF THE CASE: COUNTY BOARD OF SUPERVISORS DENIED APPELLANTS' PETITION TO ESTABLISH PRIVATE ROAD ACROSS APPELLEES' LAND PURSUANT TO SECTION 65-7-201 OF THE MISSISSIPPI CODE

TRIAL COURT DISPOSITION: DISMISSED APPELLANTS' APPEAL AND BILL OF EXCEPTIONS TO BOARD OF SUPERVISORS' DENIAL OF THEIR PETITION

BEFORE BRIDGES, P.J., COLEMAN, AND DIAZ, JJ.

COLEMAN, J., FOR THE COURT:

The Perry County Board of Supervisors (the Board) denied the Thomases' petition to establish private road for ingress and egress across parcels and tracts of land owned by the Appellees, Marlin Lee, Katie Lee, Gilbert Sylvester, Ouida Brownlee, Jeffrey Sylvester, Karen Sylvester, Kelvin C. Lott, and Grace T. Lott. The Thomases appealed the Board's denial of their petition to establish a private road to the Perry County Circuit Court by filing a bill of exceptions with that court. The circuit court denied the Thomases' appeal and dismissed their bill of exceptions. The Thomases have appealed from the circuit court's dismissal of their appeal of the Board's dismissal of their petition. We reverse and remand to the circuit court with instructions to remand this case to the Board of Supervisors of Perry County for its further consideration of the Appellants' petition.

I. Facts

On June 11, 1990, Clarence Thomas and Ruth S. Thomas, husband and wife, conveyed by warranty deed to their son, Roy Alton Thomas, and Winnie Sue Thomas, wife of Roy Alton Thomas, a parcel of land which contained approximately fourteen acres. The boundaries and shape of this parcel of land are important. It was located in the northwest corner of the Southeast Quarter (SE 1/4) of the Northeast Quarter (NE 1/4) of Section 25. The township and range are not important.

The parcel of land was bounded on the south and the east by Gaines Creek which ran in a rough arc from the west boundary of the SE 1/4 of the NE 1/4 northwesterly to the north boundary of the SE 1/4 of the NE 1/4. Gaines Creek formed the irregular hypotenuse of this triangularly shaped parcel of land. As described in the Thomases' warranty deed, its northern boundary measured approximately 880 feet; and its eastern boundary measured approximately 900 feet.

Marlin Lee and Katie M. Lee, husband and wife, owned all of the south 666 feet of the Northeast Quarter (NE 1/4) of the Northeast Quarter (NE 1/4) of Section 25 which lay west of the same Gaines Creek that formed the eastern and southern boundaries of the Thomas parcel of land. In other words, Marlin and Katie M. Lee's parcel of land joined the Thomases' parcel of land all along its north side. Lucian Neil Lee owned the remainder of the Northeast Quarter (NE 1/4) of the Northeast Quarter (NE 1/4) of Section 25 which lay north of the south 666 feet owned by Marlin and Katie M. Lee and west of Gaines Creek. Gilbert Sylvester and Bonnie Sylvester, husband and wife, owned the Southwest Quarter (SW 1/4) of the Northeast Quarter (NE 1/4) of Section 25. Thus, Gilbert and Bonnie Nell Sylvester's tract of land joined the Thomases' parcel land all along its west side.

No public road ran to or across the Thomases' fourteen-acre parcel of land. For at least forty five years before Clarence and Ruth S. Thomas conveyed this land to their son and his wife, the Thomases had gotten to their parcel of land only by traveling on some old log roads which ran from a public road west of their parcel of land across the parcels of land which Marlin and Katie M. Lee,

husband and wife, and Lucian Neil Lee owned. As we noted the Lee parcels were located north of the Thomases' fourteen-acre parcel of land. When the Lees acquired ownership of the two parcels of land located north of the Thomases' parcel of land, they built fences along their property lines, and these fences necessarily closed the old log roads to the Thomases' use. The Appellant, Roy Thomas asked the Lees if he could continue to use the old log road for access to his fourteen-acre parcel of land, but the Lees refused to allow him to use the roads because of their fences.

We noted that the public road nearest to the Thomases' land was located more than one-half mile to the west of their land. It ran generally northerly and southerly in the West One-half (W ½) of the Northwest Quarter (NW ¼) of Section 25. A dead-end public road ran easterly from this public road to the residence of Ouida Brownlee, which was located in the East One-half (E ½) of the Northwest Quarter (NW ¼) of Section 25. This dead-end public road which ran to the Ouida Brownlee residence was located on the boundary between the North One-half (N ½) and the South One-half (S ½) of the Northwest Quarter (NW ¼) of Section 25.

Before Roy Lee and his wife acquired the subject parcel of land from his parents, Gilbert Sylvester built his own private road from the end of this dead-end public road near Ouida Brownlee's home to a point near his home which was located in the Southwest Quarter (SW ¼) of the Northeast Quarter (NE ¼) of Section 25. We noted that Gilbert Sylvester's land joined the Thomases' fourteen-acre parcel of land all along its west boundary. Sylvester's private road continued easterly from near Ouida Brownlee's home in a straight line along the boundary between the North One-half (N ½) and the South One-half (S ½) of both the Northwest Quarter (NW ¼) and the Northeast Quarter (NE ¼) of Section 25. It cost Gilbert Sylvester \$4,000 to build his private road.

After he had completed his private road to his residence, Gilbert Sylvester and his wife, Bonnie Nell Sylvester, conveyed a parcel of land which contained 1.66 acres to their son, Jeffrey Sylvester, and his wife, Karen Sylvester. This 1.66 acre parcel of land was so located on the north side of the Southwest Quarter (SW ¼) of the Northeast Quarter (NE ¼) that the north boundary of this 1.66 acre parcel was also the north boundary of the Southwest Quarter (SW ¼) of the Northeast Quarter (NE ¼). Consequently, the Sylvesters' private road ran across and along the northern boundary of Jeffrey and Karen Sylvester's 1.66 acre parcel of land.

Kelvin C. Lott owned the Southeast Quarter (SE ¼) of the Northwest Quarter (NW ¼). It lay adjacent to the eastern boundary of the Southwest Quarter (SW ¼) of the Northeast Quarter (NE ¼) which Gilbert and Bonnie Nell Sylvester owned. Ouida Brownlee's parcel of land was north of and contiguous to Kelvin C. Lott's tract of land. Lott's tract is important because the private road which Gilbert Sylvester built from the Ouida Brownlee land to his house ran across the northern boundary of his tract, the Southeast Quarter (SE ¼) of the Northwest Quarter (NW ¼).

All of the foregoing facts, while somewhat tedious, are material to the issues in this case because in their petition to the Perry County Board of Supervisors, the Appellants, Roy and Winnie Sue Thomas, proposed that their private road begin at the end of the Sylvester private road and continue due east along the boundary between the North One-half (N ½) and the South One-half (S ½) of the Northeast Quarter (NE ¼) of Section 25. In other words, the Thomases proposed to the Board that the road continue east from where it ended near the residence of Gilbert Sylvester astride the boundary between the Marlin Lee land on the north and the Sylvester land on the south to the

northwest corner of the Thomases' fourteen-acre parcel of land.

The obvious consequence of the Thomases' proposal was that they would travel first the dead-end public road from the primary public road which ran generally northerly and southerly in the West one-half (W ½) of the Northwest Quarter (NW 1/4) to near the residence of Ouida Brownlee. Then they would travel the Sylvesters' private road from near Ouida Brownlee's residence to near the home of Gilbert and Bonnie Sue Sylvester. By traveling the Sylvesters' private road, the Thomases would cross the northern boundary of the 1.66 acre parcel of land which Gilbert and Bonnie Sue Sylvester had conveyed to their son and his wife, Jeffrey and Karen Sylvester. Finally, the Thomases would travel from the end of the Sylvesters' private road across the Thomases' private road to their property. The length of the Thomases' private road would be between seven and eight hundred feet.

Before they filed their petition to the board of supervisors to establish private road for ingress and egress, the Thomases had employed an attorney other than the one who represented them in their petition to the Board to write both Gilbert Sylvester and Marlin Lee to ask each of them if they would grant them an easement and the price that each of them wanted for that easement. The letters which this attorney wrote were dated April 12, 1993. The Thomases filed their petition with the Perry County Board of Supervisors on October 4, 1993.

II. Course of litigation

A. Hearing before the Perry County Board of Supervisors

The hearing before the Perry County Board of Supervisors on the Thomases' petition to locate their private road began December 6, 1993. To this hearing, the Thomases had summoned as parties only Gilbert Sylvester, Marlin Lee, and Ouida Brownlee. During this hearing, the Board quickly discovered that Kelvin C. Lott, Jeffrey and Karen Sylvester, and Kelvin C. Lott and Grace T. Lott were also necessary parties to the Thomases' petition because they also owned land which the proposed private road would cross. The Board moved to continue the hearing until January 25, 1994, to allow the Thomases to summon the remaining land owners.

After the remaining land owners were either duly summoned or had filed their consent to the Board's conducting a hearing, the Board held another hearing on January 25, 1994. At that hearing, Roy A. Thomas testified that his wife and he had failed in their effort to buy easements from Marlin Lee and Gilbert Sylvester and that an easement from them was necessary because Gaines Creek formed the southern and eastern boundary of their fourteen-acre parcel of land. On cross-examination by counsel for all four of the Sylvesters, Thomas testified that since he had owned this parcel of land, he had waded Gaines Creek to get to it. He explained that he was not always able to cross the creek because "[m]ost of the time you can't access it because the least rain rise [sic] up the creek." He added that he had no other way to get to the land. Thomas then explained:

We used to access through logging roads before these pasture fences were put up in through this way here, through Mr. Lee's property and this county road that goes up through here. There was a logging road.

When the Sylvesters' counsel asked Thomas how many times he had accessed this parcel of land without wading the creek, he replied, "I've never accessed the property by automobile." Thomas then explained that the logging roads were the way his parents and their children used to access this land, but that even then they accessed it only two or three times a year, and that was to cut fire wood in the fall or just to check the land in the spring. The land was in timber.

Thomas then called Gilbert Sylvester as the next witness. Sylvester testified that he and his neighbor, Marlin Lee, had paid around \$4,000 to build the private road to which the Thomases wanted to join their private road. Sylvester acknowledged that Roy Thomas had offered to pay \$333.33 to him, Marlin Lee, and one other land owner, whom Sylvester did not specifically identify, as Thomas' one-fourth of the cost of building the Sylvesters' private road. Sylvester explained that the old log road traversed the lands of both Marlin and Lucian Neil Lee. On further examination by his counsel, Sylvester verified that one of the Lees had fenced his land, which closed the log roads and denied the Thomases further access over the log road to their fourteen-acre parcel of land. Sylvester then stated, "I don't want no [sic] right-of-way to be given." Among his reasons for opposing the Thomases' petition for their private road was that it would diminish the value of his and his son's land to the west of the Thomases' land.

Bonnie Nell Sylvester and her son, Jeffrey Sylvester, were witnesses who opposed the Thomases' petition to build their private road. Among their reasons for opposing the private road were their fears for the safety of Jeffrey Gilbert's three children who lived on his 1.66 acre parcel of land from the increased traffic that the Thomases' use of the Sylvesters' private road would cause. They also feared that the increased traffic would reduce the value of their land. Jeffrey Sylvester opined that the Thomases' private road would reduce the value of his land by one-half.

Ouida Brownlee acknowledged in her testimony that she had received Roy Thomas' offer to pay her at the rate of \$500 per acre for an easement across her land but that she had not responded to his offer. She testified that she understood the Thomases' "wanting to get to their property," but she too objected to the additional traffic which the Thomases' use of the private road would cause. She further agreed that the Thomases' private road would not do any additional damage to her land because the Sylvester private road already traversed it.

Karen Sylvester testified to oppose the Thomases' proposal. Kelvin Lott testified that he did not have any objection to the Thomases' building their private road and that he was somewhat "caught in the middle" of the controversy. Katie Lee, wife of Marlin Lee, testified that Roy Thomas had written her husband and her to offer to buy an easement across their land and that he had also offered to reimburse them for his share of the existing Sylvester private road. Lee would not sell her husband's and her land for any sum of money. The Sylvesters' counsel called Roy Thomas for additional examination. During this examination, Thomas again stated that he bought the property from his parents with full knowledge that he did not have a legal right-of-way to it.

After Thomas' examination, the Board voted to take the matter under advisement. On the 7th day of February, 1994, by a vote of three in favor of the motion to deny the petition with one supervisor's recusal and another supervisor's abstaining, the Board entered an Order Denying Petition. In its order, the Board made the following findings of fact:

1. According to testimony from each side, alternative routes of access had been used by

petitioners and/or their predecessors in interest.

2. Prior to seeking this right-of-way, other means of reasonable access over the land of others had not been properly explored, namely the land of Mr. L. N. Lee.

IT IS, THEREFORE, ORDERED by the Board of Supervisors of Perry County, Mississippi, as follows:

1. Based upon findings of fact, the board finds the petition is not reasonable.
2. The petition of Roy A. Thomas and wife, Winnie Sue Thomas, is hereby denied.

B. Appeal to the Circuit Court of Perry County

On February 25, 1994, the Board's clerk executed an "appeal bond fees" receipt in which he acknowledged that the Thomases had paid the sum of \$10.00 "as the appeal bond fee as so approved by the Board of Supervisors on that date." The receipt recited: "This appeal bond is being paid in reference to the appeal being filed in Circuit Court in reference to the Perry County Board of Supervisors' denial of a petition filed by Roy A. Thomas and wife, Winnie Sue Thomas Vs. Marlin Lee, Gilbert Sylvester, and Ouida Brownlee."

The Thomases filed a pleading entitled "An Appeal and Bill of Exceptions" in the Perry County Circuit Court on March 2, 1994, copies of which they served by mail, postage prepaid, on all landowners or the attorneys for landowners who were so represented. Without the filing of any written response from any of the landowners, the circuit court conducted a hearing on the Thomases' appeal and bill of exceptions on June 21, 1994. Present at that hearing were Sherra L. Hillman and J. C. Martin, Jr., who represented the Thomases, and Eddy Parsons, who represented the Sylvesters and perhaps other landowners, although the record only states that Parsons represented the "Defendants." The transcript of the hearing reveals that it was composed solely of respective counsels' argument for or against the Board's dismissal of the Thomases' petition. The circuit court took the matter under advisement; and on August 15, 1994, that court rendered an order of dismissal in which it found and adjudicated as follows:

THIS DAY this cause came on appeal and bill of exception pursuant to § 11-51-67 of the Mississippi Code of 1972, as annotated and amended, and the Court having considered same finds it has jurisdiction of the parties and of the subject matter and, further, finds as follows, to-wit:

...

III.

This Court finds that the Board was not incorrect or committed no manifest error and therefore the appeal as requested by Roy A. Thomas and Winnie Sue Thomas should be denied. It is, therefore,

ORDERED, ADJUDGED, AND DECREED that the appeal and bill of exception

heretofore filed in this cause is hereby denied and this appeal dismissed at the costs of the Plaintiffs, Roy A. Thomas and Winnie Sue Thomas.

The Thomases appeal from this order of dismissal. According to the brief of the Appellee, Gilbert Sylvester is the only landowner who actually responded to the Thomases' appeal. It is important to note that Gilbert Sylvester filed no cross-appeal.

III. Issues and the law

The Thomases include in their brief the following four issues for this Court's consideration, analysis, and resolution:

- (1) Whether or not Appellants' land is landlocked as to access to Appellants?
- (2) If Appellants' land is landlocked, as claimed, whether they are entitled under the law and the facts, to access to their land?
- (3) Whether or not the proposed route of access is the most reasonable means of access?
- (4) Whether or not Appellants' made good faith efforts to purchase access from Appellees, but were refused?

None of the Appellees cross-appealed. Nevertheless, Gilbert Sylvester, the one landowner in whose name an appellee's brief was filed, poses these two issues in his brief for our consideration, analysis, and resolution:

1.

Whether the lower court was correct in upholding the decision of the Board of Supervisors in this cause.

2.

Whether this court has jurisdiction to consider this appeal.

A. Whether this court has jurisdiction to consider this appeal.

We must first deal with the second issue in Sylvester's brief, which is "Whether this court has jurisdiction to consider this appeal," because if this Court does not have jurisdiction, we need proceed no further. We have noted that Gilbert Sylvester perfected no cross-appeal in this case. Concerning issues not raised on cross-appeal, the Mississippi Supreme Court has stated:

For an appellee to raise an argument other than a response to the appellant, the appellee must comply with the requirements for filing a cross-appeal with this Court. Where an

appellee raises an issue not raised by the appellant without filing a notice for cross-appeal, it is within this Court's discretion to either address or ignore the issue.

Morrow v. Morrow, 591 So. 2d 829, 832 (Miss. 1991). Nevertheless, this Court must address this issue because "[w]hether raised by the parties or not, [the Mississippi Supreme Court] is required to note its own lack of jurisdiction." *Michael v. Michael*, 650 So. 2d 469, 471 (Miss. 1995) (citations omitted). If the Mississippi Supreme Court must note its own lack of jurisdiction, then so must this Court.

Section 11-51-75 of the Mississippi Code of 1972 authorizes an appeal from a judgment or decision of the board of supervisors to the circuit court by way of filing a bill of exceptions with the circuit court. Sylvester argues that the following portion of Section 11-51-75 supports his position on this issue:

[a]ny person aggrieved by a judgment or decision of the board of supervisors . . . may appeal within ten (10) days from the date of adjournment at which session the board of supervisors . . . rendered such judgment or decision, and may embody the facts, judgment and decision in a bill of exceptions which shall be signed by the person acting as president of the board of supervisors."

Sylvester next emphasizes that while the Board's order denying petition was dated February 7, 1994, the Thomases did not file their appeal and bill of exceptions until March 2, 1994, which was twenty three days after the date of the order from which they appealed to the circuit court. Therefore, Sylvester argues, the appeal was filed more than ten days from the date of the order, a violation of Section 11-51-75. Sylvester's position is that this delay of thirteen days over and above the ten days allowed the Thomases to appeal to the circuit court robbed that court of its jurisdiction of their appeal.

Subject matter jurisdiction cannot be waived. *In re Adoption of R.M.P.C.*, 512 So. 2d 702, 706 (Miss. 1987) (subject matter deals with the power and authority of a court to consider a case and may not be waived). Sylvester does not argue that the circuit court lacked subject matter jurisdiction; instead he asserts that the Thomases filed their appeal and bill of exceptions more than ten days after the date of the Board's order which denied their petition. Neither can the parties waive the circuit court's appellate jurisdiction of a case. Long ago the Mississippi Supreme Court explained in *Turner v. Simmons*, 99 Miss. 28, 29, 54 So. 658 (1911):

Statutes limiting the time which appeals shall be taken are both mandatory and jurisdictional, and must be strictly complied with. The court is without power to ingraft any exception on the statute. When the statute is not complied with, the Supreme Court is without jurisdiction of the cause, which will be dismissed, either on motion of appellee or by this court of its own motion. This court is without power to make any other order.

While the foregoing quotation dealt specifically with the supreme court, and not the circuit court, the Mississippi Supreme Court included this quotation with implied approval in its majority opinion in *Moore v. Sanders*, 569 So. 2d 1148, 1150 (1990), in which it held that the circuit court had no authority to consider an attempted appeal from the board of supervisors' order because there was no bill of exceptions to support the appeal from the order of the board of supervisors to the circuit court.

Nevertheless, the short answer to Sylvester's position on this issue is that the record contains nothing to support his assertion that the Thomases filed their appeal more than "ten (10) days from the date of adjournment [of the] session [of] the board of supervisors [during which the board] rendered such judgment or decision." The record contains no evidence of the date on which the Perry County board of supervisors adjourned its February term. To the contrary, the record in this case supports the Thomases' timely filing of their appeal and bill of exceptions. Section 19-3-17 of the Mississippi Code of 1972 provides for the length and recess of the board of supervisors' regular meetings. It plainly allows boards of supervisors to sit in regular meetings for the transaction of business for a period "not longer than ten days in any month" and to recess "from time to time."

We previously noted that the record contains the receipt of the Board's clerk, Dan Ready, for the Thomases' payment of the appeal bond fee in the amount of \$10.00. The receipt is headed "IN THE PERRY COUNTY BOARD OF SUPERVISORS, FEBRUARY TERM OF 1994." The receipt recites that the Board approved the amount of the fee on February 25, 1994. We find it reasonable to infer from the heading and date of the receipt that the Perry County Board of Supervisors was still in its February term as of February 25. Neither is there anything in the record from which this Court might determine that the Board's remaining unadjourned in its regular February term through February 25 violated Section 19-3-17.

Section 11-51-75 only requires that the appeal from the board's "judgment or decision" be "within ten (10) days from the date of adjournment at which session the board of supervisors . . . rendered such judgment or decision. . . ." Miss. Code Ann. § 11-51-75 (1972). In the absence of Sylvester's placing in the record any evidence that the Board had adjourned its February, 1994, regular meeting more than ten days before March 2, the date that the Thomases filed their appeal and bill of exceptions, we find that the Thomases complied with the requirement of Section 11-51-75 by filing their appeal and bill of exceptions within ten days of the adjournment of the February term of the Perry County Board of Supervisors. This Court further finds that the Thomases' compliance with Section 11-51-75 bestowed jurisdiction of the case *sub judice* on the circuit court.

While he did not specifically assign the following complaint as an issue, we note that Sylvester also objects to the circuit court's and this Court's consideration of the transcripts of the testimony taken at the hearings before the Board. He objects because these transcripts were not embodied in the Thomases' bill of exceptions. He argues that because Section 11-51-75 requires that "[t]he court shall either in term time or in vacation hear and determine the same on the case as presented by the bill of exceptions as an appellate court," the circuit court could not consider the transcripts since they were not embodied in the bill of exceptions.

We note that John W. Anderson, president or acting president of the Board, signed the pleading which the Thomases filed on March 2. Above Anderson's signature appear the words, "Noted as to

this Bill of Exceptions by the President or acting president of the Board of Supervisors of Perry County, Mississippi." The filing of a bill of exceptions, which Section 11-51-75 requires the president of the board to sign, is a prerequisite to the successful appeal from the judgment or decision of a board of supervisors. *McIntosh v. Amacker*, 592 So. 2d 525, 527 (Miss. 1991). We find that the Thomases' pleading which they entitled "Appeal and Bill of Exceptions," and which the president, or acting president, signed was sufficient to bestow jurisdiction of this case on the circuit court.

However, whether the bill of exceptions should have incorporated, or "embodied" the transcripts of the two hearings before the Board is not an issue of jurisdictional magnitude. Sylvester's counsel participated fully in the circuit court's hearing on the Thomases' appeal without once objecting to that court's consideration of those transcripts. Just before the circuit judge adjourned the hearing, he advised the litigants:

Obviously, I am going to have to read the record before I can give a ruling and I hope to have one to you as quickly as possible. I presume that everybody had a right to have their say before the Board and all that will be in the record.

After the circuit judge advised the attorneys for the Thomases and Sylvester that he intended to read the transcript of the hearings before the Board, Sylvester's counsel did not object to the circuit court's review of those transcripts. The clerk's papers contain no motion by Sylvester to strike these transcripts.

This issue is not before us because Sylvester made no cross-appeal; neither did Sylvester object to the trial court's perusal of the transcripts. As we earlier noted, "Where an appellee raises an issue not raised by the appellant without filing a notice for cross-appeal, it is within this Court's discretion to either address or ignore the issue." *Morrow*, 591 So. 2d at 832. To preserve error, counsel must object. *See McQuarter v. State*, 574 So. 2d 685, 688 (Miss. 1990) (unless timely and specific objection is made to allegedly improper testimony, the objection is deemed waived and may not be raised on appeal).

B. Appellants' issues

Now that we have decided that the circuit court had jurisdiction to review the Board's denial of the Thomases' petition as an appellate court, we proceed to consider, analyze, and resolve the Thomases' four issues which we quoted on page 10 of this opinion.

1. Constitutional and statutory authority

Section 110 of the Mississippi Constitution provides:

The legislature may provide, by general law, for condemning rights of way for private roads, where necessary for ingress and egress by the party applying, on due compensation being first made to the owner of the property; but such rights of way shall not be provided for in incorporated cities and towns.

Miss. Const. a. IV, § 110. Harmoniously with Section 110 of the Mississippi Constitution, Section 65-7-201 of the Mississippi Code of 1972 provides for the manner in which a person who desires to have a private road laid across the land of another may proceed. Section 65-7-201 reads:

When any person shall desire to have a private road laid out through the land of another, when necessary for ingress and egress, he shall apply by petition, stating the facts and reasons, to the board of supervisors of the county, which shall, the owner of the land being notified at least five days before, determine the reasonableness of the application. If the petition be granted, the same proceedings shall be had thereon as in the case of a public road; but the damages assessed shall be paid by the person applying for the private road, and he shall pay all the costs and expenses incurred in the proceedings.

Miss. Code Ann. § 65-7-201 (Rev. 1991).

2. Earlier cases which involved Section 65-7-201

A review of earlier interpretations and applications of Section 65-7-201 by the Mississippi Supreme Court is informative in our consideration of these issues. In *Quinn v. Holly*, 244 Miss. 808, 146 So. 2d 357 (1962), the Jackson County Board of Supervisors granted appellees' petition to have a private road laid out through the appellants' land. *Quinn*, 146 So. 2d at 358. On the Quinns' appeal to the circuit court, that court affirmed the board of supervisors' judgment granting the Hollys' petition. *Id.* The supreme court reversed the circuit court's affirmance of the board's order, and remanded the case because it thought that the board's judgment, as entered, did not cover the damage to the Quinns' remaining property. *Quinn*, 146 So. 2d at 359. Another reason the supreme court remanded the case was that it was not clear from the proof as to what was meant by there being access to the petitioners "for a number of years through a road which they have let grow up in bushes," and which would allegedly have afforded the petitioners reasonable access to their property over land other than that of the defendants. *Id.* The evidence showed that the Hollys' ten-acre parcel of land was divided by the Mary Walker Bayou, which ran northwesterly and southeasterly across the property. *Id.* The appellants, John W. and William Clark Quinn, had pled as a defense that the Hollys had access to the east portion of their property and had had said access for a number of years through a road which the Hollys had allowed to grow up in bushes and had not used. *Id.* The Quinns further pled, like Sylvester in the case *sub judice*, that the Hollys could build a bridge across the bayou. *Id.*

The supreme court reversed and remanded the case to the circuit court not because the board of supervisors was wrong to grant the petition but because the board had failed to allow for the damage to the Quinns' remaining land and because the issue of whether the Hollys might have had access to their property by another route had not been satisfactorily resolved by the board of supervisors. In reversing the circuit court's affirmance of the board of supervisor's judgment, the supreme court wrote:

We have concluded that the requirement in Sec. 8419, [predecessor to Section 65-7-201 of the Mississippi Code of 1972], that the private road be 'necessary for ingress and

egress' only means that the same should be reasonably necessary and practical and not absolutely necessary; and that to construe the statute otherwise would defeat the wholesome purpose for which the same was enacted.

Id.

In *Reid v. Horne*, 208 So. 2d 780, 781 (Miss. 1968), the circuit court affirmed the board of supervisors' granting the petitioners a private road across Reid's land. *Id.* at 781. This time, the board had awarded Reid one thousand dollars for the damage to his land which would result from Horne's construction of his private road. *Id.* at 783. The supreme court affirmed the circuit court's affirmance of the board's decision. *Id.* at 784. The supreme court commented as follows about the evidence which the board of supervisors considered:

There was conflict in the evidence as to whether there were other roads over which the appellees might travel, one being to the east and another to the north; but there was evidence that these roads were not usable and did not extend to the appellees' land. It was also indicated that it was not feasible to extend these two roads to appellees' land. In addition to this evidence, the board also viewed the property. The board was supported by evidence and presumably by its inspection in holding that the outlet requested was the only reasonable means of ingress and egress for the petitioners.

Id. at 783. Again, the evidence was conflicting, but the supreme court opined that it was sufficient to warrant the board's granting the appellee's petition for their private road across the appellant's land. In the case *sub judice*, Thomas testified that since he had owned the fourteen-acre parcel of land, he had gained access to it only by wading Gaines Creek, and that he had never used the old log roads across the Lees' land as his father and his family had once done before the Lees had fenced their land and blocked the log roads so that they were no longer usable.

In *Rotenberry v. Renfro*, 214 So. 2d 275, 276 (Miss. 1968), the board of supervisors granted Renfro's petition to establish a private road across the lands of others. The Mississippi Supreme Court held that "the Board of Supervisors and the Circuit Court should have permitted separate trials upon the issue of damages to the owners of each parcel of land crossed by the established, private road." *Id.* at 277. The supreme court explained: "[i]t is the duty of the Board of Supervisors to go upon the premises and assess the damages sustained by the landowner because of the easement across his land." *Id.*

The supreme court also held that the evidence sustained the board's finding that the petitioner had been "unable to obtain a reasonable right-of-way from all of the surrounding property owners." The supreme court noted that the statute made the petitioner's inability to obtain such a right-of-way a prerequisite to petitioning the board for a private road. *Id.* at 278. In the case *sub judice*, Roy Thomas testified that he had been unable to acquire a right-of-way from Lee and Sylvester. Of further

relevance to the facts in the case *sub judice* is this sentence from *Rotenberry*:

There can be no doubt that petitioner's property is landlocked and that it is unreasonable to expect the petitioner to build a private bridge across the Tallahatchie River or the Yocona Drainage Channel in order to reach his land.

Id. In the case *sub judice*, the Perry County Board of Supervisors' denial of the Thomases' petition left them with no alternative but to build a bridge across Gaines Creek, which ran along the southern and eastern boundaries of their land.

Alpaugh v. Moore, 568 So. 2d 291 (Miss. 1990), reached the Mississippi Supreme Court as an appeal from the chancery court's award to appellees, Francis and Lorraine Moore, of an easement by necessity over and across the Alpaughs' land. *Id.* at 292-93. The chancellor also found that Section 65-7-201 was available to the Moores to permit them to pursue an action to establish a private way across the Alpaughs' land. *Id.* at 293. The supreme court reversed the chancellor's award of the easement by necessity because it found that the Alpaughs, who were residents of New Orleans, had not been properly served with process to subject them to the personal jurisdiction of the chancery court. However, the supreme court concurred with the chancellor's suggestion that Section 65-7-201 permitted the Moores to establish a private road. *Id.*

The Moores' land was similarly situated to the Thomases' land in the case *sub judice* in that their land was surrounded on three sides by the Wolf River. *Id.* In response to the Alpaughs' contention that the Moores could build a bridge across the Wolf River to gain access to their land, the supreme court opined:

[The Moores'] property is bound on three (3) sides by water and on the fourth side by the Alpaugh property. The Alpaughs erroneously contend that the Moores cannot show "necessity" because they have failed to explore the option of building a bridge to their land. This burden, however, will not be required due to the unreasonableness inherent in such an undertaking. *Rotenberry v. Renfro*, 214 So. 2d 275 (Miss. 1968).

Alpaugh, 568 So. 2d at 293.

From our review of these four cases, we distill the following generalizations about the Mississippi Supreme Court's interpretation and application of Section 65-7-201. First, Section 110 of the Mississippi Constitution and Section 65-7-201 establish a "wholesome purpose" that no land be entirely inaccessible in this state. Second, the petitioners' land to which they seek to establish a private road need not be "landlocked" as that term is usually defined and employed in the law. Third, to promote its "wholesome purpose," Section 65-7-201's requirement that the private road be 'necessary for ingress and egress' only means "that the same should be reasonably necessary and practical and not absolutely necessary."

3. Standard of Review

Almost fifty years ago in *Board of Supervisors v. McCormick*, 207 Miss. 216, 42 So. 2d 177, 179 (1949), the supreme court established the following standard by which the court should review a judgment or decision of the board of supervisors:

[T]he court to which the appeal is taken should only inquire into whether or not the order is reasonable and proper according to the facts disclosed before the board, that is to say, whether or not its decision is supported by substantial evidence or is arbitrary or capricious, or beyond the power of the board to make, or whether it violates any constitutional right of the complaining party.

4. Application of Section 65-7-201 to this case in accordance with the standard of review

In the case *sub judice* the Board found that "alternative routes of access had been used by petitioners and/or their predecessors in interest" and that the Thomases had not properly explored "other means of reasonable access over the land of others . . . namely the land of Mr. L. N. Lee." Thus, the Board found that the Thomases' petition was "not reasonable" and denied it.

With deference to the Thomases' four issues, this Court finds that the issue central to their appeal is whether the Board's order denying petition "is supported by substantial evidence or is arbitrary or capricious, or beyond the power of the board to make, or whether it violates any constitutional right of the complaining party." We elect to resolve this appeal by applying the standard of review to the Board's order denying the petition.

Had the Board decided that the Thomases were entitled to have a private road laid through the lands of Sylvester and the other land owners, such an order would not have been beyond its power to make because Section 65-7-201 authorized it to do so. In this instance, the Board did nothing, so it can hardly be asserted that its order was beyond its power to make. Although Section 110 of the Mississippi Constitution authorizes the legislature to "provide, by general law, for condemning rights of way for private roads, where necessary for ingress and egress by the party applying," the Thomases do not argue that Section 110 vests them with a constitutional right to procure a private road for ingress and egress which the Board's order denied them. However, this Court cannot ignore the Mississippi Supreme Court's describing the purpose of Section 65-7-201 as "wholesome."

We next evaluate whether the Board's order was supported by substantial evidence. Was the Board's finding that "alternative routes of access had been used by petitioners and/or their predecessors in interest" supported by substantial evidence? Roy Thomas testified that since he had owned the fourteen-acre parcel of land which was the subject of his wife's and his petition, he had gained access to it only by wading Gaines Creek, but that almost every rain made the creek rise so that wading it became impractical. He further testified that he had never driven a vehicle onto this land since his wife and he had bought it from his parents. He testified that while his father and his family had used

old log roads which ran across the Lees' land to get to this fourteen-acre parcel of land, the Lees' fencing their land had stopped their using these log roads for access to the land. Indeed, the adjoining landowners all testified that they opposed the Thomases' crossing their land to get to the fourteen-acre parcel of land. There was no evidence that the Thomases had any access to their land other than by fording Gaines Creek.

True, the Board found that "alternative routes of access had been used by petitioners and/or their predecessors in interest," but that finding does not answer the pertinent question of whether the Thomases currently had an alternative route of access to their fourteen acres of land. There was no evidence that they had such an alternative route other than to cross Gaines Creek. Thus, we hold that this finding of the Board was irrelevant. We further find that the denial of the Thomases' petition because they had access other than fording Gaines Creek was supported by no evidence at all. Thus, pursuant to our standard of review, we are warranted in reversing the circuit court's affirmance of the Board's order denying the petition.

To further justify its denial of the Thomases' petition, the Board also found that "the Thomases had not properly explored "other means of reasonable access over the land of others . . . namely the land of Mr. L. N. Lee." First of all, we interpret this finding to mean that the Board accepted Roy Thomas' testimony and exhibits that he had unsuccessfully tried to negotiate the acquisition of an easement across the lands of Marlin Lee, Sylvester, and the other land owners. However, L. N. Lee's land was in no way contiguous to the Thomases' land. We have already noted that L. N. Lee's land lay North of Marlin Lee's land, and that it was Marlin Lee's land which was contiguous to the Thomases' land on its northern boundary. There was no point in attempting to negotiate with L. N. Lee for an easement across his land to reach the Thomases' land because such an easement could never reach the Thomases' land. The record does not demonstrate with certainty that the old log road over which the Thomases had once enjoyed access to these fourteen acres of land actually traversed any of L. N. Lee's land.

In *Watkins v. Mississippi Board of Bar Admissions* , 659 So. 2d 561, 568 (Miss. 1995), the Mississippi Supreme Court adopted the following definitions of "arbitrary" and "capricious":

Although neither is susceptible of exact definition, we find it necessary to attempt to define arbitrary and capricious as the terms relate to agency decision making and rule modifications.

'Arbitrary' means fixed or done capriciously or at pleasure. An act is arbitrary when it is done without adequately determining principle; not done according to reason or judgment, but depending upon the will alone,--absolute in power, tyrannical, despotic, non-rational,--implying either a lack of understanding of or a disregard for the fundamental nature of things. 'Capricious' means freakish, fickle, or arbitrary. An act is capricious when it is done without reason, in a whimsical manner, implying either a lack of understanding of or a disregard for the surrounding facts and settled controlling principles.

We find that the foregoing definitions of arbitrary and capricious are applicable to the Board's finding

that it must deny the Thomases' petition because, in part, the Thomases had not properly explored "other means of reasonable access over the land of others . . . namely the land of Mr. L. N. Lee." That decision implied "a lack of understanding of or a disregard for the fundamental nature [of the location and inaccessibility of the Thomases' fourteen-acre parcel of land]."

This Court cannot determine from the record in this case whether it was feasible for the Thomases to build a bridge across Gaines Creek to gain access to their land. In three of its opinions to which we earlier referred, the Mississippi Supreme Court determined that "requiring the petitioners in those cases to build a bridge to gain access to their land was unreasonable." However, that determination would seem to be factual and thus peculiar to each case. However, in the absence of any evidence in the case *sub judice* to indicate that the Thomases' bridging Gaines Creek to gain access to their land was feasible, those three cases suggest that requiring them to bridge the creek or to ford the creek on foot is not the kind of access contemplated by Section 65-7-201 of the Mississippi Code.

5. Relationship of the Thomases' four issues to our decision in this case

We earlier noted that because Sylvester had not cross-appealed, we need not ordinarily consider any of his issues, although we did analyze and decide adversely to him his second issue about whether this Court had jurisdiction of this appeal. Our so noting is perhaps ironical because we realize that this opinion is composed as though it were in response to Sylvester's first issue, which was whether the circuit court was correct in upholding the decision of the Board.

We now respond to the Thomases' four issues in the following manner. As for their first issue, whether their land was landlocked, we concluded that Section 65-7-201 did not specifically require that the petitioners' land be "landlocked" as that term is traditionally because of earlier opinions of the Mississippi Supreme Court interpreting and applying that section. With regard to their second issue, we concluded that under the law and the facts of this case, the Thomases were entitled to access to their land. We find it unnecessary to decide their third issue, whether their proposed route is the most reasonable means of access, because the members of the Perry County Board of Supervisors are more capable than this Court to locate the most reasonable route of access to the Thomases' land. The Mississippi Supreme Court explained in *Rotenberry* that: "[i]t is the duty of the Board of Supervisors to go upon the premises and assess the damages sustained by the landowner because of the easement across his land." Their last issue, whether they made good faith efforts to purchase access from the Appellees, who refused their offers, we resolved by implication when we dealt with the arbitrary and capricious manner in which the Board denied the Thomases' petition because they had not negotiated with L. N. Lee for a right-of-way across his land.

C. Reversal and procedure on remand

This Court concludes that the application of the appropriate standard of review to the evidence in this case in light of the supreme court's interpretation and application of Section 65-7-201 to similar circumstances requires it to find that the Board's denial of the Thomases' petition to establish a private road for ingress and egress was not supported by substantial evidence with regard to its first finding that "alternative routes of access had been used by petitioners and/or their predecessors in interest" and was arbitrary and capricious both with regard to this first finding and with regard to its other finding that the Thomases had not properly explored "other means of reasonable access over the land of others . . . namely the land of Mr. L. N. Lee." Because the circuit court found that "the

Board was not incorrect or committed no manifest error," this Court holds that it erred when it denied and dismissed the Thomases' appeal; and we therefore reverse its order of dismissal rendered on August 15, 1994.

Section 11-51-75 of the Mississippi Code of 1972 provides: "If the judgment be reversed, the circuit court shall render such judgment as the board . . . ought to have rendered, and certify the same to the board of supervisors" We have held that the circuit court erred when it found that "the Board was not incorrect or committed no manifest error." Instead, the circuit court ought to have found, as we have, that the Board's denial of the Thomases' petition to establish a private road for ingress and egress was not supported by substantial evidence and was arbitrary and capricious. The circuit court ought then to have entered its order reversing the Board's denial of the Thomases' petition and remanding the matter to the Perry County Board of Supervisors for their further consideration of that Petition and their award to the Thomases of a private road across the lands of the Appellees.

In *Quinn v. Holley*, the supreme court recited that it reversed and remanded the case because the circuit court had erred when it affirmed the board of supervisors's grant of a similar petition for a private road, but the court's opinion is not explicit about whether it remanded the case to the circuit court or, bypassing the circuit court, directly to the board of supervisors. *Quinn*, 146 So. 2d at 359.

However, in *Cook v. Board of Supervisors*, 571 So.2d 932 (Miss. 1990), the Mississippi Supreme Court held that the Lowndes County Board of Supervisors had erred when it awarded a contract for ambulance services to the local hospital rather than to Cook, who had previously provided that service to the residents of Lowndes County. *Id.* at 937. It then held that the Lowndes County Circuit Court had erred when it affirmed the board's award of that contract to the hospital, rather than to Cook. *Id.* The supreme court remanded the case to the Lowndes County Circuit Court, but then explained: "[All]we decree is that the Lowndes County Board of Supervisors proceed faithfully in accordance with the legislative mandate." *Id.* The supreme court's exhortation to the Board indicates that the supreme court had remanded *Cook* to the Lowndes County Circuit Court in anticipation that the circuit court would in turn enter an appropriate order remanding the matter to the Lowndes County Board of Supervisors for that board to comply with the contents of the supreme court's opinion. We follow the same procedure in the case *sub judice* by remanding this case to the Perry County Circuit Court for its entry of an order consistent with this opinion by which it remands this matter to the Perry County Board of Supervisors for its further action on the Thomases' petition for a private road consistent with this Court's findings and adjudication in this opinion. Our remand to the circuit court seems consistent with the provision of Section 11-51-75 of the Mississippi Code of 1972, which requires that the circuit court "shall render such judgment as the board . . . ought to have rendered, and certify the same to the board of supervisors" Miss. Code Ann. Sec.11-51-75.

We remand this case to the circuit court so that it may render a judgment that the board of supervisors is to grant the Thomases' petition to establish private road for ingress and egress and then proceed to comply with the statutory procedure for locating an appropriate route for the Thomases' private road and for compensating those landowners across whose land the private road traverses for their damages.

IV. Summary

We find that the Perry County Circuit Court had jurisdiction of this case and, thus, so does this

Court. We further find: (1) that the decision of the Board to deny the Thomases' petition to establish private road was not supported by any evidence as to their having other means of access to their land, (2) that the determination that the Thomases had other means of access to their land was arbitrary and capricious, and (3) that by relying on the Thomases' failure to negotiate with L. N. Lee for a right-of-way across his land, which was in no way contiguous to the Thomases' parcel of land, the decision was further arbitrary and capricious. Therefore, this Court reverses the circuit court's order of dismissal of the Thomases' appeal and remands this case to that court with instructions to enter its judgment reversing the Board's denial of the Thomases' petition and directing the Board to proceed with its further consideration of the Thomases' petition to locate a private road as the Board may deem appropriate in accordance with this opinion.

THE ORDER OF DISMISSAL OF THE PERRY COUNTY CIRCUIT COURT IS REVERSED AND REMANDED WITH INSTRUCTIONS TO ENTER ITS JUDGMENT IN ACCORDANCE WITH THIS OPINION AND TO CERTIFY THAT JUDGMENT TO THE PERRY COUNTY BOARD OF SUPERVISORS IN ACCORDANCE WITH SECTION 11-51-75 OF THE MISSISSIPPI CODE OF 1972. COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLEE, GILBERT SYLVESTER.

BRIDGES, C.J., McMILLIN AND THOMAS, P.JJ., BARBER, DIAZ, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR. HERRING, J., NOT PARTICIPATING.