

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM LAURENS COUNTY
COMMON PLEAS COURT
Eugene C. Griffith, Jr., Circuit Court Judge

Case No. 2008-CP-30-1120

William D. Farrow, Jr. and
Karen W. Farrow, Respondents,
v.
Jerry W. Darby, Appellant.

RESPONDENT'S INITIAL BRIEF

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May 7, 2012.

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STATEMENT OF ISSUES ON APPEAL

- I. Did the trial court commit an error in admitting evidence of prior incidents of the Appellant's livestock escaping from his pasture?

- II. Did the trial court commit an error in admitting evidence that the Appellant allowed gates to his pastures to remain open and unattended while herding?

- III. Does any error alleged by the Appellant constitute sufficient basis for reversal or a new trial?

- IV. Can the verdict be affirmed on any other basis appearing in the record?

STATEMENT OF FACTS

Respondent, William Farrow, was injured when the motorcycle he was driving struck a cow. 604-605. Farrow testified that although he attempted to brake and steer around the cow, his motorcycle stuck the cow. 605. The motorcycle came to a stop in the road near the point of impact and Farrow was shortly thereafter observed in a nearby ditch. 70.

Darby, the Appellant in this case, testified that he has cows in the pasture adjacent the location of the accident. 122. Darby leases the land all around the accident location and is the only person keeping cows on those properties. 123-124. Near the accident scene there was dry grass within Darby's pasture and lush green grass outside of the pasture near the road. 184. Darby admitted that cows escape enclosures when hungry and that if one escaped his pasture, looking at the photo of the scene near the accident, it would be attracted to the grass by the roadway. 184-185.

Plaintiff's expert, Dr. Worrell, testified that Darby's field next to the accident scene was suffering from drought and overgrazing. 509. Worrell testified that the Darby's cows in the field adjacent to the accident scene were not receiving sufficient hay in a manner which would sufficiently supplement their grazing. 510. Worrell testified that cattle leave enclosures when they are hungry or thirsty. 525.

Observing photographs of the accident scene and Darby's adjacent pasture, Worrell testified that he would expect a stray cow from Darby's pasture to graze in the green grass along the roadway. 532.

Rebecca Willis was the first person on the scene of the Respondent's accident saw the Respondent lying in the ditch with the motorcycle in the road. 76. It appeared to Willis that the accident had happened right before she arrived at the scene. 78. The only cows that she saw near the scene were in Darby's pasture just ahead of where the accident occurred. 77; 83. When responding to Willis' 911 call, Assistant Fire Chief James Shields did not observe any roaming or wandering cows while he was in route to the scene. 95. Nor did the tow truck driver, who picked up Farrow's motorcycle from the wreck scene, observe any stray cows as he approached or departed the wreck scene. 348

Farrow observed the cow immediately prior to impact and was aware that he was going to hit it. 587. Burdett, the tow truck driver observed cow hair on Farrow's motorcycle as a result of the impact. 346. Shields observed long brown, black and white hair and cow feces on the motorcycle. 93. Darby admitted having cows with a mixture of black, brown, white hair. 287. The next nearest cattle other than Darby's belonged to Harry Hayes and were registered Black Angus. 422. Hay's Black Angus only have black hair. 422. Farrow's expert in microscopy and

trace evidence examination, Jeffrey Hollifield, removed hairs from Farrow's motorcycle and studied them microscopically. 430. Hollifield found the hairs to be brown in color and determined that they came from a cow. 431. Of the hairs he collected from Farrow's motorcycle, none were black. 437.

Dr. Worrell testified that proximity had a great influence on determining from which pasture a stray cow originated and that it was likely that the cow involved in the accident came from a pasture near the scene. 554. Woods testified that if cows did get out of a pasture that they would stay close to that pasture. 397. Earlier in the day before the Respondent's accident, Darby's cows were observed inside the pasture near where the accident occurred. 383. James Graham testified that the two pastures near the scene have only Darby's cows in them. 405.

Woods testified that during the year leading up to the date of the accident Woods saw Darby's cows outside of the fence of Darby's pasture in the vicinity of the accident. 385. Richard Marshall, who lives in the vicinity testified that in the year prior to the accident he had observed breaches in Darby's fencing around his pasture. 331. Woods also testified that one occasion he observed some of Darby's cows walking on the outside of the fence by the side of the road next to Darby's pasture. 386. When Woods approached the cows they jumped back over Darby's fence into his pasture. 386. Woods saw several of Darby's cows jump the fence to

Darby's pasture on more than one occasion. 388. Dr. Worrell testified that cows and calves can jump a fence. 524.

Jimmy Miller, who lives in the vicinity of the accident has also seen Darby's cows out of their pasture numerous times and has had to chase off Darby's cows that were in his yard. 449; 455-456. Miller testified that he watched some of the cows just run through the fence back into Darby's pasture. 449. Woods also testified that he had observed Darby's cows out of the pasture on more than one occasion. Woods knew the cows to be Darby's and actually watched them return to Darby's pasture and jump the fence. 385-386.

Marshall testified to breaches in Darby's fence. 331. Marshall also testified that he had seen Darby's cows outside of the pasture and actually jump Darby's fence. Marshall notified Darby of this. 301-302. Thomas Graham testified that he had observed cows loose near Darby's pasture and said that he was not surprised when he heard that there had been an accident involving a cow. 408.

On at least one occasion Woods informed Darby that his cows were jumping the fence, and Darby said that he would take care of it. 385. Miller who had also seen Darby's cows out had called several times to let him know but Darby would not even return his call. 467. Just one month prior to the accident Miller reported cows being out on the road by calling 911. 451; 455. Just two weeks prior to the

accident Malinda Griffin had to stop for cows blocking the roadway immediately adjacent to Darby's pasture. 289-294. Darby admitted that one of his cows had been out of the fence shortly before the accident. 189.

Richard Marshall, who lives in the vicinity of the accident testified that in the year prior to the accident he had observed breaches in Darby's fence on one of his pastures. 331. Miller testified that a section of fence was in regular disrepair on one of Darby's pastures. 463. Miller actually saw Darby's fence down for up to a week at one time. 463. The defects that Miller saw in Darby's pasture fencing would be obvious to someone that was checking on the fence condition. 466. Darby testified that portions of his fence are forty years old and admitted that his cows do get out. 190.

Although Darby claimed that he periodically checked the electric fence with a meter, on cross-examination Darby could not even say what readings he was supposed to check for to ensure the fence was effective for his cattle. 200-205. Darby also admitted that he hadn't checked the fence near the accident scene since the weekend preceding the accident, so he couldn't say whether it was working at the time of the accident. 205. Although Darby testified that he visibly inspected the electric fence, Dr. Worrell testified that the manner in which Darby claimed to visually inspect his fences at dusk looking for electricity arching would not ensure

that the fence was working effectively. 194; 527.

Woods testified that it was the responsibility of the owner of the cow to maintain fencing to keep them in to avoid injury. 398. Worrell also testified that if someone's cattle get through fencing on a regular basis, the enclosure and security of the animals is not being attended to properly. 527. There was also testimony that while herding his cattle Darby would leave gates to two of his pastures open with one or both either partially or completely unattended. 305. Worrell testified that in light of the history of escapes, Darby's failure to attend to the cattle or fencing leading up to the accident was unreasonable. 529. Dr. Worrell also testified that in his opinion Darby was careless as a cattleman in the management and guarding of his cows. 556. 545.

ARGUMENT

Standard of Review

Determinations of relevance are largely within the trial court's discretion and its decision to either admit or reject evidence will not be disturbed on appeal unless there is an abuse of such discretion amounting to an error of law to the prejudice of the appellant's rights. Merrill v. Barton, 250 S.C. 193, 156 S.E.2d 862 (1967).

The admissibility of evidence is within the sound discretion of the trial court and will not be reversed on appeal absent an abuse of discretion or the commission of legal error prejudicing the defendant. Wright v. Craft, 372 S.C. 1, 33, 640 S.E.2d 486, 503 (Ct.App. 2006)

I. ADMISSION OF PRIOR INSTANCES OF ESCAPING CATTLE WAS CONSISTENT WITH THE JURISPRUDENCE OF THIS STATE AND WITHIN THE COURT'S PROPER EXERCISE OF DISCRETION.

The evidence of which the Appellant complains in this case is the same type of evidence that has been held admissible in negligence cases involving the containment of livestock, from which, the present case can not be distinguished.

This Court has recognized that under the jurisprudence of this State, there is

a duty upon stock owners not to willfully or negligently permit animals to run at large. Williams v. Smalls, 390 S.C. 375 (Ct.App. 2010). The Court has also recognized the statutory duty placed on the owners of livestock: “It is unlawful to willfully or negligently allow stock to run at large. See S.C. Code Ann. § 47-7-110 (1987).” Williams, *supra*. The Court has also further held that “liability for collisions with stock wandering into a highway rests on a negligence theory. See Swindler v. Peay, 227 S.C. 157, 161, 87 S.E.2d 296, 299 (1965) see also Reed v. Clark, 277 S.C. 310, 314, 286 S.E.2d 384, 387 (1982); McCullough v. Gatch, 251 S.C. 171, 175, 161 S.E.2d 182, 183-84 (1968) (both applying a negligence standard under the predecessor of section 47-7-130 in cases where a car collided with stock in the highway).” Williams v. Smalls, 390 S.C. 375 (Ct.App. 2010).

The applicable statute in South Carolina is § 47-7-110, Code of Laws of South Carolina (1976), which provides in part as follows:

It shall be unlawful for the owner or manager of any domestic animal of any description wilfully or negligently to permit any such animal to run at large beyond the limits of his own land or the lands leased, occupied or controlled by him.

S.C. Code Section 47-7-110.

To recover under this statute, one must offer evidence from which a jury could infer at least negligence in permitting the animals to stray. McCullough v.

Gatch, 251 S.C. 171, 161 S.E.2d 182 (1968).

As general rule, evidence of similar acts is admissible in South Carolina where there is some special relation between them which would tend to prove or disprove some fact in dispute. JKT Company, Inc. v. Hardwick, 274 S.C. 413, 265 S.E.2d 510 (1980). "It is simply a rule of relevance, logic, and common sense."

Brewer v. Morris, 269 S.C. 607, 239 S.E.2d 318 (1977).

Dealing with livestock in particular, it was noted that evidence of similar instances of allowing stock to escape or wander is admissible under the jurisprudence of this State:

In 4 Am. Jur.2d Animals § 86, we find the following:

. . . [T]he owner or keeper of a domestic animal is bound to take notice of the general propensities of the class to which it belongs, and also of any particular propensities peculiar to the animal itself of which he has knowledge or is put on notice; and insofar as such propensities are of a nature likely to cause injury he must exercise reasonable care to guard against them and to prevent injuries which are reasonably to be anticipated from them. In this respect, a vicious or dangerous disposition or propensity may consist of mere mischievousness or playfulness of the animal, which, because of its size or nature, might lead to injury, for it is the act of the animal, rather than its state of mind, which charges the owner or keeper with liability.

Reed v. Clark, 277 S.C. 310, 286 S.E.2d 384 (1982).

In Reed the Court held that evidence of the repeated escape of livestock was competent evidence as to negligence of the owner:

The fact that the same horse had escaped numerous times, even though from a different pasture with a different fence, is at least some competent evidence showing the propensity of this particular animal to seek freedom outside a fenced area. This propensity takes on increased significance in light of the large size of a horse and the proximity to a major highway. Knowledge by the employee of this horse's inclination to escape is imputed to the defendant. 4 Am. Jur.2d Animals § 87. This evidence was properly admitted.

Reed v. Clark, 277 S.C. 310, 286 S.E.2d 384 (1982).

Applying Reed, evidence of the repeated escape of Darby's cows is probative as to the issue of negligence. This evidence goes directly to establishing the propensity of Darby's herd to escape. If foreseeable or known to Darby, this propensity to escape bears directly on Darby's duty of care. If Darby knows that his herd is escaping, then has a duty to protect against it in the future. This is especially true if he knows or should know how the escapes are occurring.

It is not essential under Reed that Farrow establish which of Darby's cows were escaping. Nor is it necessary that Farrow show that the cow involved in the accident was known for escaping. Under Reed it is only necessary that Farrow establish that members of Darby's herd were escaping.

As indicated by the Court in Reed, evidence relating to the propensity of a particular animal *or of the class* are both relevant. In the present case Darby's herd constitutes a class, or is part of a class, which was shown to have a propensity to

escape, especially given the conditions of fencing and feed as presented in this case.

It is therefore immaterial to the issue that the specific cow that Farrow hit could not be located, or identified specifically as being one of the cows that had escaped previously. Whether the particular animal involved in the accident with Farrow can be identified as having previously escaped is not required under Reed.

In Oconee Roller Mills, Inc., v. Spitzer, the plaintiff entered evidence of a prior escape of the defendant's cows. There was no evidence to show that the cow involved in the accident was also one of the cows involved in the prior escape. In its review of the case this Court held that there is no requirement that the prior escape involve the same animal that was involved in the accident. Oconee Roller Mills, Inc., v. Spitzer, 300 S.C. 358, 387 S.E.2d 718 (Ct. App. 1990). It is therefore only necessary that the record show that the cows in question belonged to Darby's herd. The threshold question is simply whether there is evidence, direct or circumstantial, establishing Darby's ownership of the escaping cows. A review of the record shows that there to be such evidence.

The strays observed by Marshall and Miller on July 28, 2008 were identified by Marshall as being Darby's cows. Miller testified that he actually observed some of the cows return to Darby's pasture and run through the fence.

Likewise, Woods testified to instances of Darby's cows being on or about the roadway adjacent to Darby's pasture. Like those observed by Marshall and Miller, Woods observed the stray cows return to Darby's pasture by jumping the fence. Harrison and Graham¹ also testified that the stray cows they observed were Darby's.

Griffin testified that on July 11, 2008, she observed strays grazing near the roadway immediately adjacent to Darby's pasture. 290. There was testimony at trial that only Darby pastured cows in this immediate area. That his cows were under fed, his pasture over-grazed, and the roadway grass outside of the pasture lush. There was also expert and lay testimony offered that the cow's proximity to the pasture was a major factor in determining where the cows originated.

Admittedly, much of the case is based on circumstantial evidence. While the Appellant's argument attempts to ignore the circumstantial evidence or its value, our Courts have long held that circumstantial evidence is sufficient to establish a case for negligence. "Any fact in issue may be proved by circumstantial evidence as well as direct evidence, and circumstantial evidence is just as good as direct

¹Also, although included in his brief on appeal, at trial the Appellant did not object, move to strike the response, or request a limiting or curative instruction as to this particular testimony by Graham.

evidence if it is equally as convincing to the trier of the facts.” St. Paul Fire and Marine Ins. Co. v. American Ins. Co., 251 S.C. 56, 59-60, 159 S.E.2d 921, 923 (1968). The question as to ownership, or any other fact in this case, is merely one of whether or not there is evidence in record, whether direct or circumstantial, from which such a fact could be found or inferred. A review of the record shows sufficient evidence to establish Darby’s ownership of all of the cows in question.

In all but one of the prior escapes the witnesses specifically identified the cows as being Darby’s cows or cows from his pasture. As to the stray cows observed by Griffin on the day of the accident, those strays were in the roadway or grazing immediately adjacent to Darby’s pasture. Due to the circumstances established in this case relevant to their being underfed, the overgrazing of the pasture, a tendency to remain close to their pasture upon escape, and their immediate proximity to Darby’s pasture when seen, create a strong inference that all of these cows belonged to Darby as well.

The same analysis applies to the cow that Farrow struck. In addition to all of the foregoing facts, there was also testimony that no stray cow was observed by any of the persons as they approached or departed from the scene. The only cows observed by the person arriving immediately after the accident were those in Darby’s pasture. Witnesses driving on the road near the accident failed to observe

any stray or injured cow. Considering the immediacy in which Griffin and others arrived, it can be inferred from the evidence that the accident cow came from Darby's pasture and returned to Darby's pasture. As a result, there is evidence in record sufficient to establish that all of the cows in questions were from Darby's herd.

Applying Reed to the facts of this case, evidence of the repeated escape of Darby's cows is clearly relevant as it establishes the propensity of Darby's cows to such behavior. Reed does not hold that propensity evidence be limited to the particular animal involved in an accident as the Appellant appears to argue. Reed allows propensity evidence to include evidence of the class to which an animal belongs. In this case, whether class is viewed as broadly as cattle in general, or more appropriately as Darby's herd in particular, the escaping cows all have been shown to be in a group of stock that has a propensity to escape under the conditions present in this case. This is the same type of evidence contemplated in Reed.

Given the facts of the present case, the Appellant's reliance on the Texas case of Keyser v. Lackey is misplaced. A careful review of Keyser shows that its operative facts are completely different from those in the present case. In Keyser the cattleman was found have been properly maintaining his fencing at the time of

the accident. There was no evidence that the cattleman's fences at the time of the accident were in any way inadequate or contributed to the escape of the cow that caused the accident. Instead, the accident was found to be the direct result of an unknown third party's leaving the gate open after stealing a cow from Lackey's herd. The cattle thief's leaving the gate open resulted in the escape of cow.

In Keyser, where the escape being litigated was caused by an open gate, a single escape through a section of downed fence a year earlier was held to have no relevance. The sole issue in Keyser, as presented on review, was whether or not Lackey was negligent solely based on his failure to padlock his gate. There was no proof that Lackey failed to maintain his fence in general or that the condition of the fence was related to the escape. Because Keyser involves almost the opposite facts as presented in the present case, its ruling can not be applied here. Keyser v. Lackey, 523 S.W.2d 295 (Tex.Civ.App. 13 Dist. 1975).

Appellant contends that the trial court's limitation on the evidence Farrow was allowed to introduce somehow constituted an abuse of discretion. To the extent that the Appellant claims that the court failed to consider the issue and properly exercise its discretion, the record shows to the contrary. There was an extensive pre-trial motion at which the issue of admissibility of prior escape evidence was argued by both parties. PT. 1-67. While the trial judge expressed a

belief that he should put some time limits on the evidence in relation to the accident, it was clear that he would make rulings on an individual basis as the evidence was presented during trial. PT. 24-25. The court never made a blanket ruling on admissibility as the Appellant contends. There was therefore, no abuse of discretion in the manner in which the trial judge considered the evidence of each instance of prior escape.

Appellant's argument that the trial court abused its discretion by placing a one year limit to Farrow's evidence is also without support. After considering the issue in limine the court expressed concern that Farrow's evidence should be limited to events that were reasonably close in both time and proximity to the accident. MT. 24. Although this concern was stated as a general proposition, and generally applied throughout the trial, the court clearly reserved any ruling until it heard each witness. As to the reasonableness of year, the trial court's ruling is consistent with this Court's decision in Oconee Mills.

In Oconee Mills there was evidence that the prior escape occurred either 9 or 21 months prior to the accident. The Court held that there was no abuse in discretion in allowing prior escape evidence, reasoning that the jury could assess the relevance of the evidence as it pertained to the issue of negligence in guarding the cattle. The same holds true in the present case. The trial court carefully

considered the issue and made a ruling, leaving the jury to assess the relevance of the evidence. There was therefore, no abuse of discretion.

While each case will undoubtedly vary based on its particular facts, in the present case it is important to note that it is not a single event, but rather evidence of a long and continuous pattern of events to which the Appellant objects. The longer and more continuous those events, the more relevant to the issue of negligence. The evidence offered in this case established a continued pattern of neglect on the part of Darby. In light of the record, allowing evidence of prior escapes occurring within one year preceding the accident does not constitute a ground for reversal of the verdict.

The Appellant's argument that the prior escape evidence is unconnected or prejudicial simply overlooks all of the evidence in the record from which the jury could reasonably infer both the ownership of all cows at issue in this case and, that all of the escapes occurred as a result of Darby's failure to maintain fencing sufficient to contain his stock. Under Reed and Oconee Mills prior escape evidence of the same type has been held admissible in livestock liability cases. Under the facts in record, the court's admission of evidence was a proper exercise of discretion.

II. EVIDENCE OF APPELLANT LEAVING GATES OPEN AND UNATTENDED WHILE HERDING STOCK WAS RELEVANT AS EVIDENCE OF DISREGARD OF THE DANGER PRESENTED BY CATTLE ON THE ROADWAY.

Evidence of Darby's herding technique was relevant to his disregard of the danger inherent in creating a potential for his cattle to escape and reach the roadway. As indicated in Reed, when the propensities of livestock are of a nature likely to cause injury, the owner must exercise reasonable care to guard against them and to prevent injuries which are reasonably to be anticipated from them. In Reed the court recognized that by virtue of its size or nature, livestock could cause injury. In this case, the size of a cow, or even a calf, is such that it would pose a significant risk to drivers if allowed on the roadway.

The evidence offered showed that Darby left the gates of his pastures open and unattended while moving cattle between pastures. Farrow offered evidence that this practice could allow Darby's unattended cattle to escape to the roadway. From this evidence the jury could infer a conscious disregard by Darby of the danger inherent in any situation where livestock could escape to the roadway. Evidence of his indifference to the danger is relevant, regardless of the manner in which Darby may allow the hazard to occur. It is not the manner in which the cows may get there that is the operative fact, but Darby's indifference to the potential

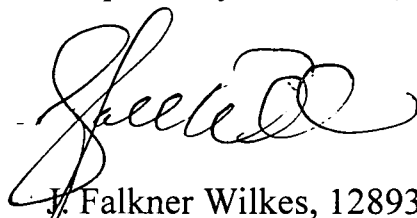
that his unattended cattle be in the road by any means that makes this evidence relevant.

Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. Because this evidence establishes Darby's indifference to the danger associated with having his cows be able to escape, it is probative as to the issue of negligence. As a result, it was within the judge's discretion to allow its admission under Reed and Oconee Mills.

CONCLUSION

Based on the foregoing, and any other ground appearing in the record, the decisions of the lower court, the verdict, and judgment should be affirmed and relief to the Appellant denied.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "J. Falkner Wilkes". The signature is fluid and cursive, with a large initial "J" and "W".

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APPEAL FROM LAURENS COUNTY
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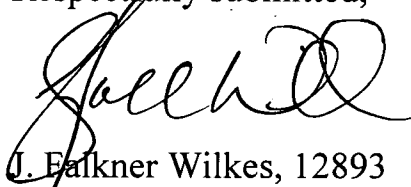
CERTIFICATE OF SERVICE

I certify that on the 7th day of May, 2012, I served the Respondent's Initial Brief and Designation of Matter to be Included in the Record on Appeal on the Appellant by placing a copy in the United States Mail, postage prepaid, addressed to counsel of record as follows:

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