

**THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

**APPEAL FROM LAURENS COUNTY
IN THE CIRCUIT COURT
THE HONORABLE EUGENE C. GRIFFITH, JR.,
CIRCUIT COURT JUDGE**

Civil Action No.: 2008-CP-30-1120

William D. Farrow, Jr. and
Karen W. Farrow,

RESPONDENTS,

versus

Jerry W. Darby,

APPELLANT.

FINAL APPELLANT'S BRIEF

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STATEMENT OF ISSUES ON APPEAL

- I. The Trial Court committed an error of law in admitting prior incidents of straying cows as evidence that Mr. Darby owned the cow involved in the accident with Mr. Farrow or was negligent in causing the accident because:
 - A. the Trial Court failed to exercise discretion as to the admissibility of each prior incident and used a one year cutoff as the criteria for admissibility;
 - B. the Farrows did not establish that such prior incidents were substantially similar to the accident at issue;
 - C. the Trial Court failed to use the proper legal test when exercising discretion for admitting prior incidents where there is no evidence of a present incidence with which to establish a nexus to any prior incident and no evidence of any act of negligence in either the prior incidents or the present incident; and
 - D. Mr. Darby was unfairly prejudiced by the admission of such evidence where well-established case law has long recognized the prejudice that results from the improper introduction of multiple non-probative prior incidents which has the effect of prejudicing the jury in several ways, including:
 - i. painting the defendant in an unflattering light through unrelated prior events in spite of their having no probative value to establish any present negligent act;
 - ii. giving the jury the imprimatur of the court that it is proper evidence to be considered in reaching a verdict; and
 - iii. giving the plaintiff the opportunity to emphasize prior incidents and further give credence to the jury that the non-probative evidence of unconnected prior incidents actually proves that the defendant was negligent in this case.
- II. Mr. Darby is further entitled to a new trial due to unfair prejudice resulting from the Trial Court's error in admitting testimony about Mr. Darby's herding of cattle and previous defective conditions at the Burdette Road cattle pasture where the Farrows presented no evidence at trial that Mr. Farrow's accident with a cow occurred because of either of these conditions.

STATEMENT OF THE CASE

This case arises out of an accident that occurred when the Plaintiff, William D. Farrow, was riding his motorcycle at dusk on July 24, 2008 on Dials Church Road in Laurens County and collided with a cow standing in the middle of the roadway. Where the cow came from and how it came to be on the roadway is unknown. The cow disappeared immediately after the accident and has never been identified.

Despite not knowing (1) of any negligent act by Mr. Darby, (2) to whom this unidentified cow belonged, or (3) how the cow came to be on the roadway, Mr. Farrow and his wife brought suit against Jerry W. Darby on December 19, 2008 for negligence and loss of consortium. [R.pp. 6-10; Complaint.] Mr. Darby owns pastures near and adjacent to Dials Church Road in which he keeps cattle. [R.pp. 6-7; Id. at ¶¶ 5-6.]

On January 23, 2009, Mr. Darby filed an answer denying the material allegations of the complaint. [R.pp. 11-17; Answer.]

Prior to trial, the parties entered into a partial settlement agreement in which Mr. Darby agreed to pay at least \$50,000.00 for a low and no more than \$750,000.00 as a high. The parties agreed this constituted a full settlement as to the issue of the Farrows' damages. This amount was not disclosed to the jury.

The parties would present to the jury only issues relating to liability. The jury would be asked to determine:

1. Whether Mr. Darby was the owner of the alleged cow involved in the accident with Mr. Farrow?
2. Whether Mr. Darby was negligent and that such negligence proximately caused Mr. Farrow's injuries?
3. Whether Mr. Farrow was negligent and that his negligence proximately caused his injuries?

4. What percentage of negligence was attributable to Mr. Darby and what percentage of negligence was attributable to Mr. Farrow?

If the jury answered no to either Question Numbers 1 or 2, the Farrows would receive \$50,000.00.

If the jury answered yes to both Question Numbers 1 and 2 and no to Question Number 3, the Farrows would receive \$750,000.00.

If the jury answered yes to Question Numbers 1, 2, and 3 and found Mr. Farrow 51% negligent, the Farrows would receive \$50,000.00.

If the jury answered yes to Question Numbers 1, 2, and 3 and found Mr. Farrow 50% or less at fault, the Farrows would receive \$750,000.00 reduced by the percentage of Mr. Farrow's fault as determined by the jury.

Under the agreement, the parties would retain the right to appeal and to make any and all other dispositive motions and/or post-trial motions as they would otherwise be entitled to make. [R.pp. 18-26; Pre-Trial Agreement.]

Prior to trial, Mr. Darby additionally filed a motion in limine to exclude certain evidence from admission during the trial, including "[t]estimony from any witness which relates to prior or subsequent incidents of stray cattle at or near the intersection of the accident" and "[r]ecords of 911 calls made to report cows loose in the area" on the grounds that this type of evidence was, among other things, irrelevant and prejudicial. [R.pp. 27-28; Motion.]

A hearing on this motion in limine was held prior to the trial before the Trial Court on January 28, 2011. [R.pp. 47-113; Hearing Tr.]

The jury trial was held from January 31 – February 3, 2011. [R.pp. 114-720; Trial Tr.]

With respect to Mr. Darby's motion in limine, the Trial Court ultimately ruled that the Farrows could present testimony of any and all prior incidents of straying cattle if they occurred one (1) year or less prior to July 24, 2008, the date of the accident. [R.pp. 379, 685; Id. at pp. 326, 636.]

The jury returned a verdict on February 3, 2011, finding:

1. Mr. Darby was the owner of the alleged cow involved in the accident with Mr. Farrow;
2. Mr. Darby was negligent and such negligence proximately caused Mr. Farrow's injuries;
3. Mr. Farrow was also negligent and his own negligence proximately caused his own injuries; and
4. Mr. Darby was 65% negligent and Mr. Farrow was 35% negligent.

[R.pp. 1-2; 716-717; Verdict Form; Trial Tr. pp. 837-838.]

Under the terms of the pre-trial agreement, the award of damages to the Farrows totaled \$487,500.00 after the reduction of Mr. Farrow's 35% negligence.

Mr. Darby timely filed his post-trial motions on February 17, 2011 which included a motion for a new trial based on the admission of prejudicial evidence including, but not limited to "incidents of prior stray cattle sightings . . ., evidence related to alleged poor fencing conditions . . ., evidence related to alleged poor herding techniques, [and] lay opinion evidence related to the frequency with which Darby's cows escape." [R.pp. 38-39; 718-719; Post-Trial Motion; Trial Tr. pp. 839-840.]

The Trial Court denied the post-trial motions on March 23, 2011. [R.p. 4; Order.] Mr. Darby timely filed a Notice of Appeal with this Court on April 20, 2011.

STATEMENT OF FACTS

On July 24, 2008, Mr. Farrow was involved in a motorcycle accident near Gray Court in Laurens County.

On the day of the accident, Mr. Farrow decided to visit his grandfather's grave at Dials Church located at the end of Dial Church Road. [R.pp. 628-629; Trial Tr. pp. 575-576.] He left his home around 6:00 or 6:30 p.m. on his motorcycle and traveled the seven to ten minute trip to Dials Church. He stayed for approximately thirty minutes and left when it was still light outside. [R.pp. 632-633, 659-660; Id. at pp. 579-580, 606-607.]

When Mr. Farrow left the church, he headed home north on Dials Church Road. He said he was traveling 35 to 40 miles per hour. [R.pp. 633-634, 660-661; Id. at pp. 580-581, 607-608.]

Mr. Farrow testified that as he was driving down Dials Church Road right before the intersection with Cooley Road, that "suddenly there was a cow in the road. It was just there." [R.p. 635; Id. at 582.] He said the cow was in his lane of travel when he saw it and that he did not see the cow before then. [R.pp. 636, 662; Id. at pp. 583, 609.]

After Mr. Farrow saw the cow, he claimed he tried to stop, but nevertheless collided with the cow. [R.pp. 638-640; Id. at pp. 585-87.]

Mr. Farrow had no idea where the cow came from, where it was heading, or where it went after he struck the cow. [R.pp. 637, 662; Id. at pp. 584, 609.] He has never been able to identify the cow that was involved in the accident. [R.p. 664; Id. at p. 611.]

The first known person to arrive upon the scene of the accident was Rebecca Willis. She was traveling north on Dials Church Road headed from the church when she saw a motorcycle in the road and a man in the ditch right before the intersection with

Cooley Road. She went to her husband's grandparents' house, two houses down from where the accident happened, and called 911 at 8:48 p.m. She said it was still light outside at this time. [R.pp. 122-126, 130; Id. at pp. 69-73, 77.]

Ms. Willis testified that when she drove by the accident scene, she did not see any cows outside their enclosures at any point. She saw no evidence of a cow being there and had no idea what Mr. Farrow had hit. She did not see anything wrong with the fence around the pasture on Dials Church Road next to the area of the accident. [R.pp. 132-133; Id. at pp. 79-80.]

James Shields, chief of the Green Pond Volunteer Fire Department, arrived on the accident scene at 9:02 p.m. before nightfall. After treating Mr. Farrow, he observed the motorcycle and noticed feces, along with brown, black, and white hairs on the motorcycle. [R.pp. 139-143, 145-146, 148; Id. at pp. 86-90, 92-93, 95.]

Mr. Shields, however, did not observe any loose cows in the area. He testified that while driving to the accident scene, he did not see any cows and did not see any cows roaming about loose. He was also not aware of any defect in the fence around the pasture next to the accident. [R.pp. 147-148, 150; Id. at 94-95, 97.]

Niles Wood, also a member of the Green Pond Volunteer Fire Department, additionally responded to the accident scene at close to dusk. [R.pp. 429, 431; Id. at pp. 376, 378.] He also did not see any loose cows in the area when he was driving to the accident scene or when he arrived at the scene. [R.pp. 433, 442, 448; Id. at pp. 380, 389, 395.] To his knowledge, no one noticed anything wrong with the fence around the adjacent pasture. [R.p. 448; Id. at p. 395.]

Terry Burdette, who operates a wrecker service, was called by the highway patrol to respond to the accident on the night of July 24, 2008 to pick up the wrecked motorcycle. [R.pp. 392-393; Id. at pp. 339-340.] He also noticed black hairs and feces on the bike, but he did not observe any loose cows when he was traveling to the accident scene or when he arrived at the accident scene. He had no knowledge of any cows being out that evening. He did not see any evidence of any breach in the fence around the adjacent pasture. [R.pp. 399, 401-404; Id. at pp. 346, 348-351.]

It is undisputed that no one knows where the cow came from prior to the collision with Mr. Farrow or how it came to find itself upon the roadway. It is also undisputed that the cow involved in the collision has never been identified. [R.pp. 618-619; Id. at pp. 565-566.] None of the individuals who arrived at the accident scene after it occurred and who testified at trial saw any evidence of loose cows in the area.

The named defendant in this case, Mr. Darby, does own and/or lease cattle pastures in the area surrounding the general area of the accident, including a pasture off of Dials Church Road adjacent to the accident site on the left side of the road from the direction Mr. Farrow was traveling. This pasture is enclosed with an electrified fence. It is marked as "F1" on the Plaintiff's Exhibit No. 40, an aerial photograph of the area. [R.pp. 174-190; 799; Id. at pp. 121-137; Plaintiff's Ex. No. 40.]

Mr. Darby was using a total of three pastures for cattle at the time of the accident. [R.p. 269; Trial Tr. p. 216.] He used the one on Dials Church Road adjacent to the scene of the accident marked as "F1" on Plaintiff's Exhibit No. 40, one off Burdette Road a little over a mile away from the accident scene marked as "F3", and another further down

Dials Church Road marked as “V” on the exhibit. [R.pp. 331; 799; Trial Tr. p. 278; Plaintiff’s Ex. No. 40 .]

The first responders to the accident scene did not observe any breach in the fence surrounding the Dials Church Road pasture, and the Farrows did not present any evidence of any breach in Mr. Darby’s other fenced pastures at the time of Mr. Farrow’s accident. [R.pp. 132-133, 150, 302, 448, 686; Trial Tr. pp. 79-80, 97, 249, 395, 638.] The Farrows did not offer any evidence of any type of negligent act by Mr. Darby.

Mr. Darby was not the only owner of cow pastures in the general area of the accident. Harry Hayes owned black angus cows in the general area off of Dials Church Road. [R.pp. 320-323, 474-475; Id. at pp. 267-270, 421-422.] Niles Wood and his grandfather also owned cattle pastures in the general area. [R.pp. 443-444; Id. at pp. 390-391.] Mr. Darby further testified that within a two to three mile radius of his pastures, Ray Stoddard, Sonny Stoddard, Boyd Stoddard, and Terry Varner also had cattle pastures. [R.p. 682; Id. at p. 633.]

At the end of the case, there was still no evidence in the record of any negligent act of Mr. Darby, no evidence of how the cow came to be standing in the road, no evidence of whose cow was in the accident, and no evidence of where the cow in the accident went after Mr. Farrow collided with it.

STANDARD OF REVIEW

While the denial of a new trial motion rests within the discretion of the trial court, where the trial court's findings are wholly unsupported by the evidence or the conclusions reached are controlled by error of law, the appellate court may reverse the trial court's denial of the motion for new trial. Vinson v. Hartley, 324 S.C. 389, 405, 477 S.E.2d 715, 723 (Ct. App. 1996).

The admissibility of evidence is also within the sound discretion of the trial court, but can be reversed on appeal upon an abuse of discretion or the commission of legal error prejudicing the defendant. An abuse of discretion occurs when the trial court's ruling is based on an error of law or a factual conclusion that is without evidentiary support. See Fields v. Regional Med. Ctr. Orangeburg, 363 S.C. 19, 25-26, 609 S.E.2d 506, 509 (2005); Wright v. Craft, 372 S.C. 1, 33-34, 640 S.E.2d 486, 503-04 (Ct. App. 2006).

"To warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the rulings and the resulting prejudice, i.e., that there is a reasonable probability that the jury's verdict was influenced by the challenged evidence or lack thereof." Fields, 363 S.C. at 26, 609 S.E.2d at 509.

"The trial court . . . is charged with the duty of determining issues of law. As a part of this duty, the trial court serves as the gatekeeper and must decide whether evidence submitted by a party is admissible pursuant to the Rules of Evidence as a matter of law." Watson v. Ford Motor Co., 389 S.C. 434, 445, 699 S.E.2d 169, 174 (2010). "[T]he trial court is required to make certain preliminary findings regarding admissibility requirements, such as qualification of experts, reliability of the substance of the

testimony, and substantial similarity of alleged similar incidents, before a jury may hear the evidence. If these preliminary requirements are not met, as a matter of law, the trial court may not permit the jury to consider the evidence.” Id. at 456, 699 S.E.2d at 180.

If the trial court does not properly perform its function as a gatekeeper and does not make the necessary findings about the substantial similarity of the alleged similar incidents, that constitutes an error of law which should be reversed by this Court.

ARGUMENT

- I. The Trial Court committed an error of law in admitting prior incidents of straying cows as evidence that Mr. Darby owned the cow involved in the accident with Mr. Farrow or was negligent in causing the accident because:**
- A. the Trial Court failed to exercise discretion as to the admissibility of each prior incident and used a one year cutoff as the criteria for admissibility;**
 - B. the Farrows did not establish that such prior incidents were substantially similar to the accident at issue;**
 - C. the Trial Court failed to use the proper legal test when exercising discretion for admitting prior incidents where there is no evidence of a present incidence with which to establish a nexus to any prior incident and no evidence of any act of negligence in either the prior incidents or the present incident; and**
 - D. Mr. Darby was unfairly prejudiced by the admission of such evidence where well-established case law has long recognized the prejudice that results from the improper introduction of multiple non-probative prior incidents which has the effect of prejudicing the jury in several ways, including:**
 - i. painting the defendant in an unflattering light through unrelated prior events in spite of their having no probative value to establish any present negligent act;**
 - ii. giving the jury the imprimatur of the court that it is proper evidence to be considered in reaching a verdict; and**
 - iii. giving the plaintiff the opportunity to emphasize prior incidents and further give credence to the jury that the non-probative evidence of unconnected prior incidents actually proves that the defendant was negligent in this case.**

Under South Carolina statutory law, “[i]t shall be unlawful for the owner or manager of any domestic animal of any description willfully or negligently to permit any such animal to run at large beyond the limits of his own land or the land leased, occupied or controlled by him.” S.C. CODE ANN. § 47-7-110.

This statute “does not impose an absolute duty to prevent the escape of livestock from the owner’s custody and control. At least negligence in permitting the animals to stray is of the essence of the proscribed conduct. Some evidence which an inference of such negligence may be drawn is required. The mere presence of unattended animals on a highway is insufficient to support a conclusion that the statute has been violated.” McCullough v. Gatch, 251 S.C. 171, 174, 161 S.E.2d 182, 183 (1968); see also Williams v. Smalls, 390 S.C. 375, 380-81, 701 S.E.2d 772, 775 (Ct. App. 2010) (finding strict liability is not to be imposed when stock strays onto a highway or roadway and that negligence is instead the appropriate standard).

For liability to arise under this statute, the plaintiff must at a minimum prove two things: (1) to whom the loose animal belongs, and (2) that the owner willfully or negligently allowed its animal to run loose beyond its enclosures.

What happened the night of the collision between Mr. Farrow and the unidentified cow is a complete mystery. Mr. Farrow did not see where the cow came from or how it came to be on the roadway before he collided with the cow. No other trial witness observed straying cows on the day of the accident.

Mr. Farrow did not know where the cow was heading or went after the collision. No other trial witness who responded after the accident saw any cow loose after the accident.

While Mr. Darby owns a pasture on Dials Church Road adjacent to the accident, no breach in this fence was discovered by anyone, and the Farrows did not present any evidence that there was a breach in this fence or any other cattle pasture fence operated

by Mr. Darby. [R.pp. 132-133, 150, 302, 448, 686; Trial Tr. pp. 79-80, 97, 249, 395, 638.] Nor they present any other evidence of a negligent act by Mr. Darby.

The Farrows could not determine to whom the cow belonged or how it came to be on the roadway right before the collision with Mr. Farrow. They could not find a negligent act committed by Mr. Darby. In their effort to build a case against Mr. Darby, the Farrows offered at trial evidence of other incidents of straying cattle as proof that Mr. Darby owned the cow involved in the accident and as evidence of Mr. Darby's negligence. The Trial Court allowed the Farrows to present evidence of other incidents of straying cattle that occurred during the one year period preceding the accident. [R.pp. 379, 685; *Id.* at pp. 326, 636.]

South Carolina Law Generally Prohibiting the Admission of Other Incidents

"Evidence of similar accidents, transactions, or happenings" is admissible under South Carolina law only "where there is some special relation between them tending to prove or disprove some fact in dispute." Whaley v. CSX Transp., Inc., 362 S.C. 456, 482-83, 609 S.E.2d 286, 300 (2005). Evidence of other accidents has the potential to be highly prejudicial; and therefore, "a plaintiff must present a factual foundation for the court to determine that the other accidents [or incidents] were *substantially similar* to the accident at issue." *Id.* at 483, 609 S.E.2d at 300 (emphasis added); see also Watson v. Ford Motor Co., 389 S.C. 434, 453, 699 S.E.2d 169, 179 (2010); Bagwell v. McLellan Stores Co., 216 S.C. 207, 216, 57 S.E.2d 257, 261 (1949). This State's Supreme Court has recognized that this is a "stringent standard for admissibility." Branham v. Ford Motor Co., 390 S.C. 203, 230, 701 S.E.2d 5, 19 (2010).

The trial court is required to make certain preliminary findings regarding admissibility requirements for evidence, including the substantial similarity of alleged similar incidents, before a jury can hear such evidence. If those threshold admissibility requirements are not met, the trial court may not, as a matter of law, permit the jury to consider the evidence. Watson, 389 S.C. at 456, 699 S.E.2d at 180.

The Prior Incidents of Straying Cows Offered by the Farrows

At trial, the Farrows brought in multiple witnesses to testify as to prior incidents of straying cows in the general area of the accident.

1. Malinda Griffin

The first witness, Malinda Griffin, testified that while she was driving down Dials Church Road on July 11, 2008 around 8:00 p.m. in the evening, she saw cows in the road and on the side of the road. She had to stop her car and blow her horn to get them to move so she could pass. [R.pp. 342-345; Trial Tr. pp. 289-292.] Ms. Griffin had absolutely no knowledge of who owned these cows though. She also had no knowledge of how these cows got out of their enclosures or from where they came. [R.pp. 348-349; Id. at pp. 295-296.]

2. Richard Marshall

The next witness the Farrows presented with respect to prior incidents of straying cows was Richard Marshall. He lives off of Burdette Road near where Mr. Darby has a pasture on this same road. [R.p. 350; Id. at p. 298.] This pasture is a little over a mile from the accident site on Dials Church Road. [R.pp. 354, 386; Id. at pp. 301, 333.]

Mr. Marshall testified that he had observed cows out of their pastures on Burdette Road on June 21, 2008. [R.p. 360; Id. at 307.] He took several pictures of the cows that

were out in his yard, his neighbor's yard, and in Burdette Road. [R.pp. 361, 363; 770-80; Id. at pp. 308, 310; Plaintiffs' Exs. 26-33 (Photographs).]

Mr. Marshall also admitted that he had no idea how the cows escaped and came to be in his yard. [R.pp. 384-385; Trial Tr. pp. 331-332.]

3. Niles Wood

The Farrows also offered testimony from Niles Wood, one of the first responders, that he had also previously seen cows outside their pastures in the vicinity of the accident. [R.p. 437; Id. at 384.] He testified that he saw these cows out on Cooley Road, not Dials Church Road where the accident occurred. He said the cows were walking along the edge of the road outside the pasture. When Mr. Wood drove by, he said the cows jumped back over the fence into the pasture. He believed the cows might be Mr. Darby's and he talked to him about it and Mr. Darby said he would take care of it. [R.pp. 438-439; Id. at pp. 385-386.]

Mr. Wood also testified that he saw cows out on Cooley Road in the year prior to the accident. He said he thought they were Mr. Darby's cows only because they again hopped back over the fence into his pasture. He did not notify Mr. Darby of the cows out that day. [R.pp. 440-441, 449; Id. at pp. 387-388, 396.]

4. Thomas Graham

The Farrows presented the testimony of Thomas Graham who also lives near Dials Church Road. [R.pp. 454-455; Id. at pp. 401-402.] He testified that he had observed cows out on Dials Church Road, although he was not sure if he could say he had seen the cows out during the year prior to the accident or if it was outside that timeframe. [R.p. 458-459; Id. at pp. 405-406.]

5. Jimmy Miller

Jimmy Miller who resides with Richard Marshall on Burdette Road stated he had also seen cows out on his property, but he testified he did not know affirmatively to whom the cows belonged. He called 911 on June 21, 2008 to report a lot of cows out on the road and in his yard. [R.pp. 494, 497-510; Id. at pp. 441, 444-457.] Mr. Miller had no idea how the cows had escaped from their enclosure. [R.p. 520; Id. at p. 467.]

6. John Harrison.

The Farrows also read into evidence the deposition of John Harrison who lives off Dials Church Road and testified that he had seen cows out in the area of Dials Church Road and Cooley Road every once in a while although he did not know how often. He did not remember seeing any cows out in the six months prior to the accident. [R.pp. 808-828; Deposition of Harrison (Court Ex. No. 7).]

7. Wayne Darby.

In addition, the Farrows elicited testimony from Mr. Darby himself about a few times that his cows had escaped. Mr. Darby had one cow out down below his house on Burdette Road after some fisherman had been slipping in the Burdette Road pasture and fishing in the pond and broke a strand of wire. Mr. Darby found the cow out, put the cow back in the enclosure, and fixed the barbed wire fence. [R.pp. 213-216, 242, 307; Trial Tr. pp. 160-163, 189, 254.]

Mr. Darby also testified that he had a cow get out of its enclosure on Cooley Road when a pond dried up in dry weather and the cow was able to walk around the fence and get in a neighbor's yard, but Mr. Darby also testified that he later fixed that problem by putting a strand of fence there. [R.pp. 217, 241; Id. at pp. 164, 188.]

Mr. Darby also said that about six months prior to the accident he had a calf pull the wire off the charger of the electric fence in the Dials Church Road pasture and escape. Mr. Darby put the wire back on and has had no more problems with cows pulling the wire off and escaping. [R.pp. 299-302, 305-306; Id. at pp. 246-249, 252-253.]

The Trial Court Failed to Exercise Discretion as to the Admissibility of Each Prior Incident and Improperly Used a One Year Cutoff as the Criteria for Admissibility

The Trial Court should not have admitted the prior incidents of straying cows as evidence of Mr. Darby's ownership of the unidentified cow or of Mr. Darby's negligence.

South Carolina law contains a strict requirement that "a plaintiff must present a factual foundation for the court to determine that the other accidents [or incidents] were substantially similar to the accident at issue" before evidence of other incidents can be admitted. Watson, 389 S.C. at 453, 699 S.E.2d at 179. There must be some special relation between the accident and other incidents tending to prove or disprove some fact in dispute. Id.

The Trial Court committed error as a matter of law because it did not make any preliminary findings as to whether each prior incident was substantially similar to the accident at issue. The Trial Court rather used a one year time period for the admissibility of prior incidents. That is the wrong legal standard under which discretion is to be exercised.

The use of a non-discretionary benchmark like the one year cutoff is not the exercise of discretion. It is the failure to exercise discretion which is therefore an error of law. "A failure to exercise discretion amounts to an abuse of that discretion. . . . When a trial judge is vested with discretion but his ruling reveals no discretion was in fact

exercised, an error of law has occurred.” CEL Prods., LLC v. Rozelle, 357 S.C. 125, 130, 591 S.E.2d 643, 645 (Ct. App. 2004).

The standard for admissibility of prior incidents is that they are substantially similar to the accident at issue. The standard is important as a gate keeping function because of the inherent prejudicial nature of prior incidents. Watson, 389 S.C. at 453-54, 699 S.E.2d at 179-180.

The Trial Court’s use of a one year cutoff as the only standard for whether the prior incidents were admissible and its failure to analyze whether each incident was substantially similar to the accident at issue constitutes an error of law, and a new trial is warranted for that error.

The Prior Incidents of Straying Cattle are Not Similar to the Accident

The Farrows failed to establish that any of these prior incidents of straying cattle stemmed from the same or similar circumstances that led to the cow involved in Mr. Farrow’s accident being on the roadway. They did not show that the incidents were substantially similar to the accident and failed to establish a special relation between the other incidents and Mr. Farrow’s accident.

Given the complete unknown nature of how the unidentified cow came to be in the roadway prior to the collision with Mr. Farrow, it is quite clear that the Farrows cannot establish any factual foundation to show that the other incidents of straying cows were substantially similar to the accident.

There are also many differences between the prior incidents and the accident at issue. Malinda Griffin and Jimmy Miller did not even know if the cows they saw loose even belonged to Mr. Darby. Certainly this type of evidence cannot be used by the

Farrows to prove that Mr. Darby either owned the cow involved in the accident or was negligent in relation to the accident.

Richard Marshall and Jimmy Miller saw cows out near their property on Burdette Road, a little over a mile away from the accident scene on Dials Church Road. Neither had no idea how the cows they saw loose escaped. The difference in the location of the prior incidents and the accident scene eliminates any similarity.

Niles Wood also saw cows out on Cooley Road and not Dials Church Road. He also said he saw cows jumping over the fences. There is no evidence that any cow jumped over one of Mr. Darby's fences on the day of the accident.

Thomas Graham was not even sure if he saw cows out on Dials Church Road in the year prior to the accident or if it was over a year from the date of the accident. The remoteness alone eliminates any similarity.

John Harrison could also not give much information about cows he had seen out on Dials Church Road and was pretty sure he had not seen cows out in the last six months.

The incidents Mr. Darby testified to himself were each isolated incidents that the evidence shows did not happen on the day of Mr. Farrow's accident. One incident involved fishermen breaking a strand of a fence when trying to get into Mr. Darby's pasture on Burdette Road to fish. Mr. Darby fixed that fence, and there is no evidence that fishermen broke a fence on the day of the accident.

The next incident Mr. Darby testified to involved cows walking through the dried up pond to escape to his neighbor's yard but that he fixed that problem by putting a

strand of fence by the pond. There is no evidence that fence was broken on the day of the accident.

Finally, Mr. Darby testified that a calf pulled the wire off the charger of the electric fence in the Dials Church Road pasture and escaped about six months prior to the accident. Mr. Darby put the wire back on, and there is also no evidence that a cow pulled the wire off and escaped on the day of the accident.

The Farrows offered no evidence at trial that the isolated incidents to which Mr. Darby testified or the other prior incidents described by other witnesses were anything like what happened on the day of Mr. Farrow's accident with the unidentified cow.

The prior incidents of loose cattle, some of which may not have even belonged to Mr. Darby, are not relevant as to whether Mr. Darby owned the cow involved in Mr. Farrow's accident or whether Mr. Darby was negligent on the day of the accident. There are other cattle owners in the area, including Harry Hayes, Niles Wood, Ray Stoddard, Sonny Stoddard, Boyd Stoddard, and Terry Varner. [R.pp. 320-323, 443-444, 474-475, 682; Trial Tr. pp. 267-270, 390-91, 421-422, 633.] Mr. Darby testified that he had seen cows belonging to others out in the general area of the accident at other times. [R.pp. 320-323; Id. at pp. 267-270.] At one point a bull belonging to Harry Hayes escaped and got into one of Mr. Darby's pastures. [R.pp. 324-326; Id. at pp. 271-273.]

Niles Wood even admitted that his cows had gotten out of his pastures before, either when a tree fell on a fence, a deer ran through a fence, or the fence was not well-maintained. [R.pp. 444-445; Id. at pp. 391-392.] Mr. Wood admitted that Mr. Darby has even helped him to retrieve his own loose cattle. [R.p. 449; Id. at p. 396.]

The cow that Mr. Farrow hit therefore could have been the cattle of anyone in the area. It could have been a cow that escaped from a passing cattle truck. The bottom line is that no one knows to whom the cow that Mr. Farrow hit belongs or how it ended up on the road.

Moreover, there is no evidence that the prior incidents of straying cows involved any negligence by Mr. Darby or anyone else. None of the witnesses who had observed cows out prior to the accident affirmatively knew how the cows had escaped from their enclosures.

Several witnesses, including the Farrows' expert, testified that sometimes cows do just get out even without a negligent act by their owner. [R.pp. 444-445, 619, 624, 683-684; Id. at 391-392, 566, 571, 634-635.] A tree may fall on a fence, a deer may run through a fence, lightening may hit the electric fence and destroy the electric box, new cattle might be fighting and push through the fence, or a third person may intentionally or negligently break the fence such as a car hitting the fence. If the Farrows cannot even show that these prior incidents of stray cows were caused by a negligent act, then certainly these prior acts cannot be used to show negligence on the part of Mr. Darby in connection with the accident at issue.

The testimony regarding the prior incidents of straying cows does not therefore meet the qualification that the former incidents must have happened under circumstances substantially the same or similar to those existing at the time of the injury for which the suit was brought. The cows in the previous incidents, which may or may not have even belonged to Mr. Darby, may have gotten loose under totally different circumstances than the cow that Mr. Farrow hit. See Bagwell, 216 S.C. at 216, 57 S.E.2d at 261 (observing

in a slip and fall case that the assistant manager's statement that he had slipped on the floor several times himself did not meet the qualification that the former accident happen under substantially the same circumstances as the accident at issue where the "assistant manager could have slipped on [the] floor when it was being mopped with Myco-sheen or under other circumstances wholly dissimilar to those existing when [the plaintiff] was injured.").

There are two South Carolina cases that have discussed the admissibility of evidence of prior stray animal escapes in the context of negligence actions against owners of stray animals involved in motor vehicle collisions. Although both cases held that under the particular facts that the trial court did not abuse its discretion in admitting such evidence, the two cases are factually distinguishable in two important aspects: (1) the defendants in those two cases admitted ownership of the animal involved in the accident; and (2) the plaintiffs each had a specific theory of negligence and the prior escapes were admitted to show that the animals could get out in that specific way.

In Reed v. Clark, the plaintiffs were injured when their vehicle collided on the highway with a horse that escaped from a nearby pasture owned by the defendant. One of the plaintiffs was driving at night when suddenly three horses darted in front of him. He collided with two of the horses. One horse remained at the scene and was retrieved by the defendant's daughter. A portion of the defendant's fence restraining the horses had been crushed down apparently by the escaped horses. 277 S.C. 310, 312, 286 S.E.2d 384, 386 (1982).

The defendant argued that the trial court erred in admitting evidence of prior escapes of his horses on at least five occasions of which an employee of the defendant

was aware. One of the horses involved in the previous escapes was the same one that collided with the plaintiffs.

The Supreme Court held that the trial court did not err in admitting such evidence because “[t]he 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.” Id. at 314-15, 286 S.E.2d at 387.

In Reed, the owner knew it had a horse that had a propensity to escape and therefore evidence of the horse’s previous escapes was admissible. That horse was actually involved in the collision with the plaintiffs and accordingly, there was a special relation between the previous incidents and the accident at issue.

Here there is no such special relation between the prior stray cow sightings and the cow involved in Mr. Farrow’s accident. The cow that Mr. Farrow hit has never been identified. It is unknown who owned the cow, where it came from, or how it escaped. There is no link between the prior incidents and the accident at issue as in Reed.

Similarly, in Oconee Roller Mills, Inc. v. Spitzer, the trial court admitted over the defendant’s objection testimony about a prior escape of cattle in a negligence action involving an accident between the plaintiff’s tractor-trailer and the defendant’s cow. In that accident, the defendant also admitted that the cow belonged to him. 300 S.C. 358, 359, 387 S.E.2d 718, 719 (Ct. App. 1990).

In the Oconee case, there was conflicting testimony creating an issue of fact as to whether the defendant’s cattle guard was defective at the time of the accident. The plaintiff’s theory of the case “was that the cattle guard had deteriorated and was not

effective to retain the cattle in the pasture.” The trial court admitted evidence about a prior escape of cattle where a witness testified that one of the cows crossed back over the cattle guard. This Court found no error in the admission of the prior escape as it was evidence that pertained to the issue of negligence in guarding the cattle. Id. at 359-60, 387 S.E.2d at 719.

Unlike the plaintiff in the Oconee case, the Farrows do not have any theory of how the cow Mr. Farrow hit escaped. No one knows who the cow belonged to or where it came from or how it became loose and ended up in the middle of the road. There is no link between this cow’s escape and the evidence of other stray cow sightings. In Oconee, there was a link between the accident at issue and the prior escape – that both occurred when a cow crossed a defective cattle guard and the evidence was therefore admissible.

Where in this case such a link is missing and the circumstances between the prior escapes and the accident at issue are not at all similar, the evidence should be excluded. See Keyser v. Lackey, 523 S.W.2d 295, 298 (Tex. Civ. App. 1975) (excluding evidence of prior cattle escapes where conditions under which the cattle escaped on the prior occasions were not shown to be the same as those which existed on day of plaintiff’s collision with cow; “[t]he two escapes by the cattle [were] not connected in any special way.”); see also Watson, 389 S.C. at 454, 699 S.E.2d at 179-80 (holding trial court erred in admitting evidence of similar incidents involving sudden acceleration in Ford Explorers where previous incidents involved Explorers made in different years and which were completely different models and where plaintiffs failed to show a similarity of causation between the malfunction in the instant case and the malfunction in the other

incidents); Whaley, 362 S.C. at 483-84, 609 S.E.2d at 300 (holding the trial court erred in permitting a locomotive engineer allegedly injured as a result of exposure to excessive heat in a locomotive cab to submit evidence of prior employee complaints about heat and evidence that other employees had suffered heat stroke where the plaintiff engineer did not establish that the other reported complaints and injuries had occurred under the same or similar circumstances as his injuries).

There is certainly no direct evidence indicating that it was one of Mr. Darby's cows that escaped and that Mr. Darby was negligent for the escape. If the Farrows want to use circumstantial evidence to establish negligence and ensuing liability, they "must show such circumstances as would justify the inference that the injuries . . . were due to a negligent act on the part of the defendant; the matter may not be left to mere conjecture or speculation." Legette v. Smith, 265 S.C. 573, 576-77, 220 S.E.2d 429, 430 (1975) (where the plaintiffs failed to present evidence explaining why the top of a septic tank caved in resulting in the death of a child, the defendant could not be held liable for negligence where there was no direct evidence of negligence and the matter was left to mere conjecture and speculation).

The prior incidents of straying cattle only leave one to conjecture or speculate as to whether it may have been one of Mr. Darby's cows that got out of its enclosure and onto the roadway. This does not create a justifiable inference that Mr. Darby owned the cow at issue, was negligent in having a cow escape, and caused Mr. Farrow's injuries, especially where there is not any other evidence that anything was defective in Mr. Darby's pastures on the day of the accident.

The Evidence of Prior Incidents Was Highly Prejudicial

Even evidence that is relevant may be excluded “if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” Rule 403, SCRE.

The evidence of prior cattle escapes that the Trial Court permitted the Farrows to present immensely and unfairly prejudiced Mr. Darby. “Unfair prejudice from the introduction of evidence occurs when it has an undue tendency to induce a decision on an improper basis.” State v. Bright, 323 S.C. 221, 226, 473 S.E.2d 851, 854 (Ct. App. 1996); see also Johnson v. Horry County Solid Waste Auth., 389 S.C. 528, 534, 698 S.E.2d 835, 838 (Ct. App. 2010); Kennedy v. Griffin, 358 S.C. 122, 127, 595 S.E.2d 248, 250 (Ct. App. 2004).

The Farrows were allowed to present numerous witnesses at trial who testified to seeing cows out in the general area of the accident. The majority of the witnesses could not affirmatively say if the cows they saw out even belonged to Mr. Darby. None of the witnesses knew how the cows in the previous incidents escaped or whether there was even any negligence involved with the prior incidents. It is extremely prejudicial for a jury to hear such evidence of prior incidents and possibly base their verdict on this evidence where Mr. Darby cannot even be linked to all of the prior incidents. See Bright, 323 S.C. at 226, 473 S.E.2d at 853-54 (“The State’s cross-examination of Bright regarding the fires that occurred fifteen years ago, where there is no probative evidence linking him to any wrongdoing in connection with their occurrences, affords great potential for prejudice and should not have been allowed.”).

The admission of this type of evidence has the inevitable tendency to raise a spurious presumption of negligence on the part of Mr. Darby and should be inadmissible. The evidence of prior incidents tends to distort the picture and encourage jurors to give greater credence to the assumption that it must have been Mr. Darby's cow involved in the accident simply because Mr. Darby's pastures were adjacent to the accident scene. If a juror continues to hear over and over again from witnesses that the witness assumed the cow out belonged to Mr. Darby because the cow was out near Mr. Darby's pasture, then the juror may give this assumption undue merit merely based on the sheer repetition of it. The Farrows' counsel further highlighted this improper evidence during closing arguments, inducing the jury to make their decision on an improper basis. [R.pp. 687-691; Trial Tr. pp. 784-788.]; Watson, 389 S.C. at 454, 699 S.E.2d at 179-80. This both misleads the jury and prejudices Mr. Darby's ability to obtain a fair trial.

To allow irrelevant but unflattering non-probative evidence to be used can only have the effect of (1) creating prejudice because it has no probative value in the law and (2) creating an impression that there is evidence in the case that the jury must consider.

But where is the true probative evidence of a negligent act? The Farrows have not shown any evidence of a negligent act, such as a breach in a fence, the power being turned off the electric fence, a gate being left open, and so on.

Therefore, not only is the evidence of prior incidents non-probative of some negligent act, the Farrows have never even identified what act of negligence is alleged.

Because the Farrows did not establish that the other cattle strayed under similar circumstances as the cow he hit, much less substantially similar circumstances, and such evidence unfairly prejudiced Mr. Darby, the Trial Court erred in admitting the prior

incidents of stray cows as evidence of Mr. Darby's ownership of the cow and of Mr. Darby's negligence. The Trial Court further erred as a matter of law in using a one year cutoff prior for the standard of admissibility instead of the substantially similar standard. A new trial is warranted on these grounds.

II. Mr. Darby is further entitled to a new trial due to unfair prejudice resulting from the Trial Court's error in admitting testimony about Mr. Darby's herding of cattle and previous defective conditions at the Burdette Road cattle pasture where the Farrows presented no evidence at trial that Mr. Farrow's accident with a cow occurred because of either of these conditions.

The Trial Court also permitted the Farrows to present, over the objection of Mr. Darby, evidence about certain cattle practices of Mr. Darby that had absolutely no correlation to the accident. This included extensive testimony by Mr. Darby, Richard Marshall, and Jimmy Miller on Mr. Darby's herding practices which involves moving cattle from one pasture to another. [R.pp. 330-339, 355-360, 380-382, 511-513; Trial Tr. pp. 277-286, 302-307, 327-329, 458-460.] The Farrows elicited testimony from all three which suggested a cow could easily escape while being moved, for example, when the gates have to be left open during the rotation process and Mr. Darby might have a straggler. [R.pp. 335-339, 358-360, 512-513; Id. at pp. 282-286, 305-307, 459-460.]

Such testimony was highly prejudicial because Mr. Darby had not been herding cattle the day of the accident and had not even herded his cattle in the month prior to the accident. [R.pp. 333, 384, 512, 611; Id. at pp. 280, 331, 468, 558.] The herding of cattle did not contribute to the cause of the accident and any testimony relating to herding should have been excluded by the Trial Court. [R.p. 611; Id. at p. 558]; see Kennedy v. Griffin, 358 S.C. 122, 128-29, 595 S.E.2d 248, 251 (Ct. App. 2004) (finding the probative value of toxicology results showing the presence of marijuana in the plaintiff

motorist's system at the time of the collision was substantially outweighed by unfair prejudice where there was no correlation between the marijuana and the accident).

Likewise, the Trial Court also allowed the Farrows to present evidence about previous poor fencing conditions at the Burdette Road pasture, including breaches in the fence and a fence being on the ground, even though the Farrows presented no evidence that on the day of the accident the Burdette Road fencing was in a defective condition. [R.pp. 383-385, 388-390, 515-519; Trial Tr. pp. 330-332, 335-337, 462-466.] If there is no evidence that the fence was in poor condition on the day of the accident, then allowing the jury to hear about past conditions might possibly induce the jury to speculate to a cause of the accident not supported by the evidence.

Even though the herding of cattle and the fencing at the Burdette Road pasture had nothing to do with Mr. Farrow's accident, their admission into evidence by the Trial Court suggests that these two things did have something to do with the accident and that Mr. Darby did something wrong. If the Farrows cannot show that the herding of cattle or poor fencing conditions at the Burdette Road pasture caused the accident, then the Trial Court should have prohibited any such testimony at trial. A new trial is also warranted due to this error.

CONCLUSION

Mr. Darby is entitled to a new trial as a matter of law for the injection into the trial of extremely prejudicial and improper evidence. First, the Trial Court erred as a matter of law in using a one year cutoff period as the standard for admissibility of the prior incidents instead of the correct substantially similar standard.

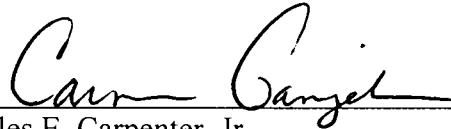
Second, the Trial Court should not have admitted the prior incidents of straying cows where the Farrows could not establish that such incidents were substantially similar to the accident at issue. The testimony of Malinda Griffin, Richard Marshall, Niles Wood, Thomas Graham, Jimmy Miller, John Harrison, and Mr. Darby relating to prior incidents should be excluded in a new trial, as well as any exhibits relating to prior incidents including photographs of cows out on previous occasions.

Third, the Trial Court should have prohibited the Farrows from eliciting testimony about Mr. Darby's herding techniques and how a cow could escape during the process of herding when there was no evidence that Mr. Darby had been herding cattle the day of the accident or even during the month prior to the accident. The herding of cattle did not contribute to or cause the accident and any such testimony about herding should also be excluded in a new trial.

Fourth, the Trial Court should have also prevented the Farrows from presenting testimony about previous defective conditions at the Burdette Road pasture when the Farrows did not present any evidence that the Burdette Road pasture was in a defective condition on the day of the accident. Where the Farrows did not show that the Burdette Road fencing conditions on the day of the accident contributed to or caused the accident, the testimony should have been excluded and should be excluded upon a new trial.

For the reasons set forth herein, Appellant Jerry W. Darby respectfully requests this Court to reverse the above described rulings of the Trial Court and remand for a new trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Carm Ganjehsani", written over a horizontal line.

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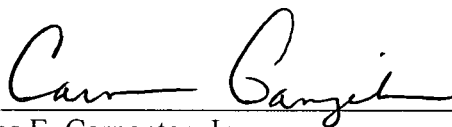
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July 26, 2012.

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Final Appellant's Brief complies with Rule 211(b), SCACR.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Charles E. Carpenter, Jr.", written over a horizontal line.

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