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 REPLY BRIEF

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STATEMENT OF ISSUES IN REPLY

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II. The Trial Court failed to analyze whether each prior incident was substantially similar to the accident at issue and instead improperly used a one year cutoff as the criteria for admissibility.

III. The Farrows have not disputed Mr. Darby's argument that the Trial Court erred in admitting testimony about previous defective conditions at the Burdette Road cattle pasture where there was no evidence at trial that Mr. Farrow's accident with a cow occurred because of defective fencing conditions at this pasture.

IV. Mr. Darby is entitled to a new trial due to unfair prejudice resulting from the Trial Court's error in admitting testimony about Mr. Darby's herding techniques where the Farrows presented no evidence at trial that Mr. Farrow's accident with a cow occurred because of herding of cattle by Mr. Darby.

V. The Farrows' Statement of Issues on Appeal Numbers III. and IV. should be disregarded where the Farrows do not argue such issues in their brief.

ARGUMENT IN REPLY

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 or was negligent in causing the accident where the Farrows (1) could not establish any evidence of a present incidence with which to establish a nexus to any prior incident and (2) did not establish that such prior incidents were substantially similar to the accident at issue.

South Carolina law generally prohibits the admission of prior acts unless there is some special relation between the evidence of similar accidents, transactions, or happenings and the current incident 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). Because evidence of other accidents is highly prejudicial, the "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.

If there is therefore ever any reason to admit evidence of a prior bad act, there always needs to be evidence of a present or current bad act to have a link to and a foundation for the prior bad act. In other words, even if Mr. Darby was previously negligent in one method of his cattle management, it does not mean anything probative about the rest of his work unless there is some evidence to show it is: (1) the same kind of negligent work, and (2) has some causal relationship to the accident.

Given the complete unknown nature of how the unidentified cow came to be the roadway prior to the collision with Mr. Farrow, the critical missing link is evidence of some negligent act by Mr. Darby in connection with Mr. Farrow's accident. The Farrows cannot establish any factual foundation to show that the other incidents of straying cows were substantially similar to the accident at issue when no one knows how the cow came to be on the roadway.

The Farrows begin their analysis with the idea that the admissibility of evidence based on relevance is within the discretion of the trial judge. While they are correct that a trial judge has discretion on the relevance of potential evidence, evidence of prior incidents is so recognized as prejudicial that there are special rules to prevent it and the courts have set a "stringent standard for admissibility." Branham v. Ford Motor Co., 390 S.C. 203, 230, 701 S.E.2d 5, 19 (2010).

There is some discretion but it is a confined and particularized discretion.

South Carolina law prohibits the admission of prior bad acts unless there is a special relationship between the prior act and the present act. See, e.g., Whaley v. CSX Transp., Inc., 362 S.C. 456, 482-83, 609 S.E.2d 286, 300 (2005). When a party seeks to admit evidence of prior bad acts, the burden is on that party to establish the requisite elements to satisfy the exception to the general rule that they are not admissible. Id. at 483, 609 S.E.2d at 300 ("[A] ***plaintiff must present a factual foundation*** for the court to determine that the other accidents were substantially similar to the accident at issue.") (emphasis added).

The Farrows want to put the burden on Mr. Darby to show an abuse of discretion. In one sense, they are correct. On appeal with respect to the question of the admissibility of evidence, Mr. Darby has the burden of showing an abuse of discretion. But in this case with this specific evidence, there is a guideline to when that evidence is admissible and not just a general question of relevance. To overcome the general prohibition against the admissibility of prior incidents, there is a requirement that whatever the plaintiff wants to admit into evidence must bear a particular relationship to the other existing evidence about the particular conduct at issue in the case. Id.

The trial judge is then required to make certain preliminary findings regarding the substantial similarity of the alleged similar incidents before a jury can even hear such evidence. If those threshold admissibility requirements are not met, the trial judge may not, as a matter of law, permit the jury to consider the evidence. Watson v. Ford Motor Co., 389 S.C. 434, 456, 699 S.E.2d 169, 180 (2010).

The Farrow have yet to establish, either at trial or in their Respondents' Brief, what conduct was undertaken by Mr. Darby that was done negligently that caused the unidentified cow, which has never even been proven to have belonged to Mr. Darby, to escape. The Farrows state that Mr. Darby's fence has been in disrepair before. But there is no proof here that a broken fence was the problem. The Farrows state that Mr. Darby has left a gate open before while herding cows. But there is also no proof here that an open gate was the problem either. The Farrows have absolutely no proof of any negligent act done by Mr. Darby that led to Mr. Farrow's collision with a cow.

The Farrows did not meet their burden in establishing a factual foundation showing that the other prior incidents of straying cattle were substantially similar to the accident of issue when they cannot even show a potential negligent act by Mr. Darby that led to the collision. The trial judge should have excluded the prior incidents as evidence of either Mr. Darby's ownership of the unidentified cow or of Mr. Darby's negligence.

What the Farrows did at trial and what they do in their Respondents' Brief is cobble together a cluster of circumstantial evidence of prior incidents, none of which proves that Mr. Darby was negligent with respect to the accident at issue. The sheer volume of evidence may have given the jury the impression that Mr. Darby must have owned the cow and must have been negligent. But when the prior incidents are closely

analyzed, they do not prove who owned the unidentified cow, what happened or what was the negligent act.

In his Appellant's Brief, Mr. Darby has already extensively analyzed how the prior incidents were actually substantially different from what happened on the day at issue and how several witnesses did not even know if the cows they previously saw out even belonged to Mr. Darby. See Appellant's Brief, pp. 18-22. The trial judge should have excluded the prior incidents of straying cows as evidence of Mr. Darby's ownership of the unidentified cow or of his negligence on the basis of the substantial differences alone.

As to ownership of the cow, the Farrows may have some circumstantial evidence of ownership such as evidence regarding the proximity of Mr. Darby's cattle pastures to the scene of the accident and evidence regarding whether Mr. Darby's cattle were being properly fed so that they would not escape their enclosures when hungry. But prior incidents which have no relation to the accident at issue cannot be used to prove ownership.

Key in this case as to whether the prior incidents of straying cows are admissible is the Farrow's inability to point to any negligent act, much less any act, of Mr. Darby that caused one of his cows to be on the roadway at the time of the accident. Without any foundation for the court to determine whether the previous incidents were substantially similar to the current incident, these prior incidents are inadmissible as a matter of law. The prior incidents do not speak to any act of negligence or any fact of causation as to how a cow got out on the day of the accident and whether or not any negligent act of Mr. Darby's enabled or caused the cow to escape.

The Farrows were perhaps able to create a fairly strong impression in front of the jury that cows escape from Mr. Darby's pastures more often than should happen. That is not very different, however, from saying that someone is a bad driver and therefore at a particular time and place he or she was negligent and that negligence was the proximate cause of an accident. There must be evidence that the prior incidents were substantially similar to the acts alleged in the case in order to fit the exception that prior incidents are not admissible.

In this case, there is no evidence or proof of what actually happened to bring about the accident; therefore, there is nothing to use as a link to any of the prior incidents of straying cows.

The Farrows rely upon Reed v. Clark, 277 S.C. 310, 286 S.E.2d 384 (1982) and Oconee Roller Mills, Inc. v. Spitzer, 300 S.C. 358, 387 S.E.2d 718 (Ct. App. 1990) to support their argument that the trial judge properly admitted the prior incidents of straying cows into evidence. As pointed out in Mr. Darby's Appellant's Brief, these cases are factually distinguishable in two significant aspects: (1) the defendants in those cases each 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, the owner knew it had a horse that had a propensity to escape. That horse was actually involved in the collision with the plaintiffs and therefore, there was a special relation between the horse's previous escapes and the accident at issue. Reed, 277 S.C. at 314, 286 S.E.2d at 387.

In Oconee, the trial court admitted evidence of a prior escape of a cow belonging to the defendant that had crossed over a defective cattle guard. The plaintiffs involved in the accident with another cow admittedly owned by the defendant also theorized that the cow had crossed over a defective cattle guard. Accordingly, there was a link between the accident at issue and the prior escape – that both occurred when a cow crossed a defective cattle guard. Oconee, 300 S.C. at 359-60, 387 S.E.2d at 719.

This case does not have any link between the prior escapes and the accident at issue. The Farrows did not establish that required link at trial or in their Respondents' Brief.

The trial judge erred in admitting the prior incidents as evidence of Mr. Darby's ownership of the cow and of Mr. Darby's negligence where the Farrows never established that the other cattle strayed under similar circumstances as the cow Mr. Farrow hit, much less substantially similar circumstances. This evidence unfairly prejudiced Mr. Darby, and he is entitled to a new trial.

II. The Trial Court failed to analyze whether each prior incident was substantially similar to the accident at issue and instead improperly used a one year cutoff as the criteria for admissibility.

The Farrows also object to Mr. Darby's argument that the trial judge failed to exercise discretion as to the admissibility of each prior incident and improperly used a one year cutoff as the criteria for admissibility. While the Farrows argue that the "court never made a blanket ruling on admissibility," the record shows otherwise.

> Trial Court: I think the jury understands that I've made a preliminary ruling that the testimony you all are to consider is July of '07 to July of '08, the behavior. That's what we're looking at and evaluating.

[R.pp. 685, 379; Trial Tr. p. 636; see also id. at 326.]

While the trial judge overruled Mr. Darby's counsel's objections to testimony about prior incidents of straying cattle before each separate witness's testimony, the trial judge undertook absolutely no analysis to determine whether each prior incident was substantially similar to the accident at issue. [R.pp. 342, 350-351, 363, 380-381, 437, 510, 523-534; Trial Tr. pp. 289, 297-98, 310, 327-28, 384, 457, 470-481.] That is the required standard for admissibility of prior incidents, and the trial judge ignored that standard.

The trial judge erred as a matter of law in using a one year cutoff prior to the accident for the standard of admissibility instead of the substantially similar standard. Mr. Darby is entitled to a new trial to correct that error.

III. The Farrows have not disputed Mr. Darby's argument that the Trial Court erred in admitting testimony about previous defective conditions at the Burdette Road cattle pasture where there was no evidence at trial that Mr. Farrow's accident with a cow occurred because of defective fencing conditions at this pasture.

Mr. Darby also argued in his Appellant's Brief that he is entitled to a new trial with respect to the trial judge's error in admitting testimony about Mr. Darby's herding of cattle and previous defective fencing condition at the Burdette Road pastures where the Farrows presented no evidence that the accident occurred because of either of these conditions.

The Farrows have not disputed in their brief that the Trial Court erred in admitting evidence about the previous poor fencing conditions at the Burdette Road pasture where there was no evidence that the Burdette Road fence was in poor condition on the day of the accident and no evidence that it was a causal factor of the accident. If a respondent fails to respond to an issue in his brief, the appellate court may treat the failure to respond

as a confession that the appellant's position is correct. First Union Nat'l Bank v. FCVS Communications, 321 S.C. 496, 502, 469 S.E.2d 613, 617 (Ct. App. 1996), rev'd on other grounds, 328 S.C. 290, 494 S.E.2d 429 (1997).

IV. Mr. Darby is entitled to a new trial due to unfair prejudice resulting from the Trial Court's error in admitting testimony about Mr. Darby's herding techniques where the Farrows presented no evidence at trial that Mr. Farrow's accident with a cow occurred because of herding of cattle by Mr. Darby.

With respect to whether the trial judge properly admitted evidence of herding even though Mr. Darby had not been herding the day of the accident and had not even herded cattle in the month prior to the accident [R.pp. 333, 384, 521, 611; Trial Tr. pp. 280, 331, 468, 558], the Farrows contend that evidence of Mr. Darby's herding techniques was relevant to Mr. Darby's indifference to the danger associated with having his cows potentially escape.

Evidence of Mr. Darby's herding techniques was not relevant of anything. We do not know how the accident happened so we do not know if Mr. Darby's alleged indifference to the danger of cows escaping had anything to do with the accident.

Moreover, the herding of cattle did not contribute to the cause of the accident, and the law is that the trial judge should have excluded this evidence where there was no correlation between herding and the accident. 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).

V. The Farrows' Statement of Issues on Appeal Numbers III. and IV. should be disregarded where the Farrows do not argue such issues in their brief.

The Farrows purport to have two other statement of issues on appeal: "III. Does any error alleged by the Appellant constitute sufficient basis for reversal or a new trial and IV. Can the verdict be affirmed on any other basis appearing in the record." The Farrows, however, do not address either issue in their brief and therefore, these two issues should be disregarded. Bell v. Bennett, 307 S.C. 286, 294-95, 414 S.E.2d 786, 791 (Ct. App. 1992) (an issue which is not argued in the brief is deemed abandoned).

CONCLUSION

For the reasons set forth in the Appellant's Brief and herein, 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 on the following grounds:

1. The trial judge erred as a matter of law in using a one year cutoff period as the standard for admissibility of the prior incidents of straying cattle and cattle escapes instead of the correct substantially similar standard;

2. The trial judge should not have admitted the prior incidents of straying cattle where the Farrows could not establish that such incidents were substantially similar to the accident at issue;

3. The trial judge should have prohibited the Farrows from eliciting testimony about Mr. Darby's herding techniques where there was no evidence that Mr. Darby had been herding cattle the day of the accident or even during the prior month and therefore, the herding of cattle did not contribute to or cause the accident; and

4. The trial judge should have also prohibited the Farrows from presenting evidence about previous defective fencing conditions at the Burdette Road pasture where

the Farrows did not present any evidence that the Burdette Road pasture was in a defective condition on the day of the accident and therefore contributed to or caused the accident. In addition, the Farrows have not disputed in their Respondents' Brief that such evidence should have been excluded at trial.

Mr. Darby accordingly respectfully requests this Court to reverse the above described rulings of the trial judge and remand for a new trial.

Respectfully submitted,

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July 26, 2012.

CERTIFICATE OF COMPLIANCE

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

Respectfully submitted,

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