

6-17628

**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.

Petition for Rehearing of Appellant Jerry W. Darby

Charles E. Carpenter, Jr.
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**Attorneys For Appellant
Jerry W. Darby**

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MAR 14 2013
SC Court of Appeals

Petition for Rehearing of Appellant Jerry W. Darby

The Appellant petitions this Court to rehear and/or reconsider and modify its decision in the appeal of this case. The Opinion is in error and misapplies or overlooks the following issues:

1. The Trial Court committed an error of law in admitting prior incidents of straying cows as evidence because the Farrows did not establish that such prior incidents were substantially similar to the accident at issue;
2. 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;
3. 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 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;
4. 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 giving the jury the imprimatur of the court that it is proper evidence to be considered in reaching a verdict;

5. 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 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;

6. 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;

7. 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;

8. 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 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;

9. 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;

10. The Farrows did not dispute in the appeal 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;

11. 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;

12. The Court of Appeals has applied an erroneous standard of review in concluding that it reviewed the admissibility of prior incidents and actions under an abuse of discretion standard because that is an error of law in the admissibility of prior acts;

13. The Court of Appeals has applied an erroneous standard of review in concluding that it reviewed the admissibility of prior incidents and actions under an abuse of discretion standard because that is an error of law when the Trial Court failed to exercise discretion in admitting

evidence of prior actions and events, and, instead of exercising discretion, used and arbitrarily cut off of one year as a standard. The Trial Court decided that anything more than a year before the accident stayed out of evidence and anything less than a year prior to the accident came into evidence; where is not an exercise of discretion;

14. The Court of Appeals is in error in characterizing the evidence as admissible on the issue of ownership for evidence that was offered for the purpose of establishing negligence as asserted by the Respondent in the Respondent's brief;

15. The Court of Appeals is in error in characterizing the evidence as admissible on the issue of ownership when even if it could be considered that some part of the evidence of prior events somehow related to ownership, that does not change the standard of review and the requirement that the proponent of the evidence show a substantial relationship between the evidence of prior conduct and the issue to which the evidence is purported to relate;

16. The Court of Appeals is in error in characterizing the evidence as admissible on the issue of ownership when an examination of most if not all of the objectionable evidence has no probative value on the issue of ownership of the cow in this accident;

17. The Court of Appeals is in error in characterizing the evidence as admissible on the issue of ownership when the record reflects that most if not all of the objectionable evidence was never proffered to establish ownership, but was for the purpose of trying to establish negligence, for which the Opinion of the Court of Appeals impliedly correctly concludes it is inadmissible;

18. The Opinion of the Court of Appeals is in error in finding that "...the trial court did not abuse its discretion in admitting the evidence for the purpose of showing Darby owned the cow..." when that is not the purpose for which the trial court admitted "... evidence of (1) previous sightings of cows outside his pastures; (2) the condition of the fences around some of his pastures; and (3) his practices in moving cattle between pastures;

19. The Court of Appeals is in error in treating evidence of past bad acts as simply a matter of discretion for the trial judge when it is inadmissible as a matter of law unless that is some specific special showing of a connection between the past acts and the present allegations;

20. The Court of Appeals is in error in failing to apply the South Carolina case law precedents which have held that evidence of prior bad acts is by its nature so prejudicial that it is not admissible unless that is a special showing of a connection;

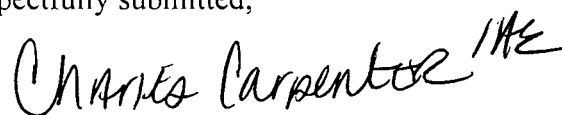
21. The Court of Appeals is in error in finding that the standard for the trial judge is to simply do a standard evidentiary test of weighing probative value against prejudicial effect when the evidence is of prior bad acts because prejudice has been established as a matter of law and not by a weighing of the trial court;

22. The Court of Appeals in is error in overlooking that there is no special connection between the objectionable evidence and any act of negligence because the plaintiff never identified any act of negligence to prove. The plaintiff has not alleged or shown a specific act of negligence. He hasn't contended that the farmer was negligent in transferring cows from one pasture to another. He hasn't contended that the farmer had a hole in the fence the cows could escape through. He hasn't contended the farmer negligently left the gate open.

Conclusion

The Opinion of the Court of Appeals should be granted a Rehearing and the Judgment of the Trial Court should be reversed, a New Trial should be granted, and this case remanded for a New Trial.

Respectfully submitted,

A handwritten signature in black ink that reads "Charles Carpenter" with a stylized "Jr." or similar initials to the right.

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Attorney for Appellant - Petitioner,
Date: March 14, 2013.

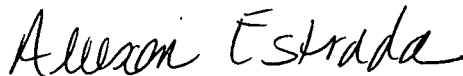
CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that I have served the foregoing Petition for Rehearing, dated March 14, 2013 by personally depositing a copy of the same in a United States Postal Service mailbox, postage prepaid, addressed to the parties indicated below:

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Date: March 14, 2013.

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Via Hand Delivery

March 14, 2013

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: *Farrow v. Darby*
Civil Action No. 08-CP-30-1120
Tracking No. 201190648

Dear Ms. Kitchings:

I am enclosing for filing the original and six copies of the Appellant Darby's Petition for Rehearing in the above referenced matter, along with our Certificate of Service.

By copy of this letter, we are serving a copy of this Petition on all counsel of record. Counsel please make a note of our new mailing address listed above and revise your contact information for me accordingly.

If you should have any questions, please do not hesitate to contact me.

Sincerely,

Charles E. Carpenter, Jr.

CEC/ae

Enclosures

cc: Cameron G. Boggs, Esquire (w/enc.)
J. Faulkner Wilkes (w/enc.)
George V. Hanna, IV, Esquire (w/enc.)

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