FLORIDA SUPREME COURT
TALLAHASSEE, FLORIDA

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CASE NO. 85,285

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PAULA MICHELLE FISEL,

Petitioner,

v.

WILLIAM C. WYNNS and
FRANK R. WYNNS,

Respondents.



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# BRIEF OF AMICUS CURIAE, FLORIDA FARM BUREAU FEDERATION IN SUPPORT OF RESPONDENTS' POSITION

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## STATEMENT OF THE CASE AND FACTS

Amicus Curiae, Florida Farm Bureau Federation, accepts and adopts Respondents' Statement of the Case and Facts.

## SUMMARY OF THE ARGUMENT

This case presents the issue of whether this court should judicially alter the degree of fault expressly required to find a violation of the Warren Act. This court should answer that question in the negative for two reasons. First, this court simply does not have the authority to judicially eliminate the statutory requirement that a claimant under the Warren Act plead and prove at least negligence. This court expressly recognized in Selby that any change in the degree of fault required for such a statutory recovery must be left to the legislature. Despite that invitation from this court in 1974, the legislature has not seen fit to amend the Warren Act. It is respectfully suggested that this court's authority to make legislative amendments has not broadened since the Selby decision.

Second, even if this court had authority to alter the statutory burdens of proof, the asserted basis for that alteration is unfounded. Petitioner asserts that "changed conditions" in the form of fewer farms and more motor vehicle traffic necessitate a reallocation of the risk between the traveling public and livestock owners. Even assuming that this court could alter the proof required under the Warren Act on the basis of "changed conditions," there have been no such "changed conditions." In fact, Petitioner's own Appendix illustrates that although the total number of motor vehicle accidents has increased, the risk of collision between a motor vehicle and an animal has decreased by ninety percent in the past thirty years. This court should reject

Petitioner's assertion that an overall increase in the number of motor vehicle accidents generally compels a shift in the burden of proof against one of the few categories of persons to have actually reduced the risk of harm.

Because this court does not have the authority to change the public policy of this state as expressed by the legislature, and because there are no "changed conditions" as asserted by the Petitioner, the en banc decision of the Fifth District Court of Appeal should be approved.

## ARGUMENT

### I.

**"CHANGED CONDITIONS" DO NOT PERMIT THIS COURT TO JUDICIALLY ELIMINATE AN ESSENTIAL ELEMENT OF A STATUTORY CAUSE OF ACTION, AND IN ANY EVENT THERE ARE NO "CHANGED CONDITIONS" JUSTIFYING A REALLOCATION OF RISK BETWEEN LIVESTOCK OWNERS AND THE MOTORING PUBLIC.**

This case presents the issue of whether this court should judicially alter the degree of fault expressly required to find a violation of the Warren Act. Amicus Curiae, Florida Farm Bureau Federation, respectfully submits that even if "changed conditions" required a strict liability rather than a negligence standard, such an amendment to a statutory cause of action should be made by the legislature, not the courts. Furthermore, there have been no "changed conditions," and the negligence standard currently contained in the Warren Act properly reflects the public policy of the state of Florida.

Florida Statutes chapter 588 and governs "Legal Fences and Livestock at Large." The first part of that chapter sets forth specific fencing requirements. Compliance therewith is a predicate to protection under criminal trespassing statutes. The second part of chapter 588, which is known as the Warren Act, imposes the following duty upon livestock owners:

> **588.14 Duty of owner.** No owner shall permit livestock to run at large or stray upon the public roads of this state.

See generally Welch v. Baker, 184 So. 2d 188, 190 (Fla. 1st DCA 1966) (explaining the history and purpose of the Warren Act). There are two provisions of the Warren Act which set forth

penalties for the violation of this duty. One is civil and one is criminal:

> **588.15 Liability of owner.** Every owner of livestock who intentionally, willfully, carelessly, or negligently suffers or permits such livestock to run at large upon or stray upon the public roads of this state shall be liable in damages for all injury and property damage sustained by any person by reason thereof.
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> * * *
>
> **588.24 Penalty.** Any owner of livestock who unlawfully, intentionally, knowingly, or negligently permits the same to run at large or stray upon the public roads of this state or any person who shall release livestock, after being impounded, without authority of the impounder, shall be guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.[2]

This petition arises out of an automobile accident in which Petitioner, Paula Fisel,[3] was injured when the automobile she was operating struck a cow standing in the road.[4] The Defendants, owners of the cow, were granted summary judgment when they presented evidence demonstrating that they had complied with the fencing requirements of the Warren Act and that the cow's escape

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[2] Section 775.082 provides that a second degree misdemeanor is punishable by a term of imprisonment not exceeding 60 days. Section 775.083 provides that a second degree misdemeanor is punishable by a fine not exceeding $500.00.

[3] For ease of reference herein, Petitioner, Paula Fisel, will be referred to by name or as "Petitioner." Respondents, William and Frank Wynns, will be referred to by name or as "Respondents."

[4] Ms. Fisel was not injured when her vehicle struck the cow. Rather, she was injured when she exited her vehicle after striking the cow and was struck by another vehicle while standing on the roadway.

was not the result of any negligence or carelessness on their part.[5]

Ms. Fisel failed to rebut the evidence demonstrating the exercise of due care by the Defendants, and instead relied upon the legal argument that the mere fact that the cow was located on the roadway created an inference of negligence. Ms. Fisel appealed the summary judgment in favor of the cow-owners Defendants to the Fifth District Court of Appeal, which court affirmed the summary judgment en banc with opinion. See Fisel v. Wynns, 650 So. 2d 46 (Fla. 5th DCA 1994) (en banc). Ms. Fisel now petitions this court to quash the Fifth District's opinion. Specifically, Ms. Fisel asks this court to eliminate the degree of fault specifically required to find a violation of section 588.15, and to find that the mere fact that a cow is located on a public road creates an inference of negligence and constitutes negligence per se under that statute. After the Petitioner moved for certification, the Fifth District certified the following question to the court as a matter of great public importance:

> Have changing conditions in Florida altered public policy as announced in Shelby v. Bullock, 287 So. 2d 18 (Fla. 1973), so that a livestock owner may now be liable for injuries

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[5] Specifically, the Defendants demonstrated that Frank Wynns maintained an appropriate gate and fence on the property where the cow was kept; that the cow escaped through a gate in the fence which was at the rear of his property and 1400 feet from the road on which the accident occurred; that Frank Wynns lived alone on the property where the cow was kept; that he closed the gate the last time he used it before the accident; that he had no employees and no visitors and that no one else would have used the gate; and that he was unaware of how the gate came open. See Fisel v. Wynns, 650 So. 2d 46 (Fla. 5th DCA 1994). This evidence was undisputed.

> resulting when the owner's livestock wanders through an open gate and the reason the gate is open is unknown?

This is not a case of first impression. In Selby v. Bullock, 287 So. 2d 18 (Fla. 1974), this court addressed the very aspect of section 588.15 which is at issue in this case: the requirement that a plaintiff claiming damages as a result of a cow roaming on the roadway prove that the cow owner was negligent in allowing the cow to escape. 287 So. 2d at 19. This court in Selby specifically upheld the statute's requirement that the plaintiff plead and prove fault as a necessary element of the cause of action. 287 So. 2d at 22.[6] In fact, it is well-established that section 588.15 must be read in pari materia with section 588.14. Welch v. Baker, 184 So. 2d at 190. Every reported decision in this state to have addressed civil recovery under the Warren Act has held that the Plaintiff must plead and prove at least negligence in order to recover. See Beaver v. Howerton, 223 So. 2d 62 (Fla. 2d DCA 1969) (affirming a summary judgment in favor of defendants); Welch, 184 So. 2d 188 (Fla. 1st DCA 1966) (affirming a directed verdict in favor of defendants where there was no evidence of negligence); Lee v. Hinson, 160 So. 2d 166 (Fla. 2d DCA 1964) (summary judgment); Gordon v. Sutherland, 130 So. 2d 520 (Fla. 3d DCA 1961) (affirming a directed verdict in favor of defendants).

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[6] It is essential to note for purposes of this particular case that this matter was resolved on a summary judgment motion, not by dismissal. Contrary to Ms. Fisel's assertions in her Initial Brief, the trial court addressing a summary judgment motion is not bound by the allegations of the complaint.

Petitioner recognizes this fact, but urges this court to reevaluate its analysis in Selby due to an asserted change in the public policy of the state of Florida. However, this argument overlooks the essential fact that this court's opinion in Selby was not a judicial finding that the public policy of the state required a finding of negligence before there could be liability under the Warren Act. It was simply an affirmation that the legislature had established a burden of proof within the statute, and the degree of fault required by the statute was not unconstitutional. Selby was based on clear statutory language and established rules of construction, not on then-existing "conditions." It is therefore difficult to comprehend how a change in "conditions" could alter the result in Selby and the express dictates of the Warren Act.

Additionally, a significant alteration to a statutory remedy is a matter for the legislature, not the courts. This court must bear in mind, as it did in Selby, that section 588.15 was itself a drastic change in favor of the motoring public as compared to Florida's then-existing law. The statutory scheme in place prior to the 1949 enactment of the Warren Act followed the "open range" theory. Under this theory, livestock owners were permitted to allow their cattle to roam at will. Not only was a person injured by roaming cattle not permitted to recover from the cattle owner, but the injured party was actually required to pay the cattle owner for any damage to the livestock. See Selby, 287 So. 2d at 22 (Ervin, J., dissenting); Harris v. Baden, 17 So. 2d 608, 612 (Fla. 1944); Seaboard Air Line Ry. Co. v. Coxetter, 90 So. 460 (Fla.

1922); Dutton Phosphate Co. v. Priest, 65 So. 282, 285 (Fla. 1914); Savannah F.& W. Ry. Co. v. Geiger, 21 Fla. 669 (Fla. 1886).

Petitioner argues in her Initial Brief to this court that Florida was not an open-range state prior to the enactment of the Warren Act, and accuses this court, the Fifth District Court of Appeal and the Respondents of "confusion." It appears necessary to completely clarify the history of this body of law in Florida, and to eliminate any confusion by any party or the court. It is true that ancient English common law imposed trespass liability upon the owners of wandering animals for the damages caused thereby. See 2 Fla. Jur., Animals § 25, p. 283. This was the rule in Florida until 1823. Rockow v. Hendry, 230 So. 2d 717, 718 (Fla. 2d DCA 1970), adopted, Hendry v. Rockow, 238 So. 2d 588 (Fla. 1970).[7] However, from 1823 until the 1949 enactment of the Warren Act, a predecessor statute completely abrogated the English common law and adopted the "open-range" rule, which allowed livestock to run at large on public roads, without liability for damages. See Rockow, 230 So. 2d at 718; Harris, 17 So. 2d at 612; Seaboard v. Coxetter, 90 So. at 472.

Therefore, contrary to Petitioner's assertion, this court in Selby and the Fifth District below were correct in finding that the Warren Act actually restricted, rather than broadened, the livestock owner's then-existing rights. See Selby, 287 So. 2d at

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[7] The specific issue addressed in the Rockow case was the standard to be applied in geographic areas which had been exempted from the Warren Act, after the Warren Act displaced the predecessor statute. The specific holding in Rockow does not assist Petitioner in this case, since it is undisputed that the Warren Act applies.

21 ("[i]t is arguable that the requirement of fencing has done more for the protection of the motoring public than the requirement of proof of negligence has done for the protection of livestock owners"); see also Ervin, J., dissenting. Because the Warren Act imposed new liability upon livestock owners which did not previously exist, this court cannot judicially impose broader liability upon livestock owners than is set forth in the clear language of the statute.

The fact that the fault or "scienter" requirement of a statute cannot be overlooked is virtually fundamental. Where the legislature expressly provides for a negligence standard of fault, a court cannot amend the statute to create strict liability. In re Investigation of Circuit Judge, 93 So. 2d 601 (Fla. 1957) (holding that the court has the duty to interpret the law given to it by the legislature, and is "not permitted to substitute judicial celebration for law or command enforcement of that which the supreme court might think the law should be"). The Warren Act contains the following express Legislative finding:

> **588.12 Livestock at large; Legislative findings.** There is hereby found and declared a public necessity for a statewide livestock law embracing all public roads of the state and necessity that its application be uniform throughout the state except as hereinafter provided.

In enacting Chapter 588 and in specifically publishing section 588.12, the Florida Legislature has made clear that it is the branch of government which should regulate straying livestock and

balance the interests between safety on the roads of this state and the rights of livestock owners.

It is significant that the legislature has not seen fit to amend the relevant portions of the Warren Act since this court's 1974 decision in Selby. This court stated at that time that:

> Presumably, the Legislature had all the alternative before it when it enacted section 588.15. It chose to require proof of negligence. It is not this Court's function to re-legislate that Act.

287 So. 2d at 22 (citation omitted). It is respectfully submitted that the court's authority to amend a statutory cause of action is no broader today than it was in 1974. See also Harris v. Baden, 17 So. 2d 608, 612 (Fla. 1944) (en banc) (addressing a special act in Manatee County which limited the open range doctrine, and holding that the legislature's "decision in the matter may not be disturbed by the judicial branch when a valid legislative determination has thus been made"); Dutton Phosphate v. Priest, 65 So. 282, 285 (Fla. 1914) (stating that regulation of livestock and liability therefor is "within the province of the legislature" and that "courts have no power to annul a legislative enactment on the grounds that it is unreasonable in its terms or in its operation, when the statute does not, because of arbitrary unreasonableness, conflict with the superior force of the Constitution").[8] It is well established that where the legislature disagrees with a judicial interpretation of a statute, it responds by amending the statute. See, e.g., Laws of

[8] There is no argument by Ms. Fisel that the Warren Act, with its express requirement of proof of negligence, is unconstitutional facially or as applied.

Florida, Ch. 920-318 § 79, (amending Fla. Stat., § 627.727 in response to this court's decision in MacLeod v. Continental Ins. Co., 591 So. 2d 621 (Fla. 1992)). Despite at least 21 opportunities to amend section 588.14 since the Selby decision, the legislature has expressed no disagreement with this court's longstanding analysis.

Petitioner does not argue that she met her burden on summary judgment, but requests that this court eliminate the essential fault requirement of the statutory cause of action. This request is based upon the contention, without citation, that the uniformly approved burden of proof under the Warren Act is too high, rendering recovery impossible. The plaintiff concludes that the Warren Act with its present negligence standard of fault fails to allocate to livestock owners any of the risk associated with the combination of road travel and livestock raising.

However, the number of reported appellate decisions finding fact issues and evidence of negligence under the Warren Act directly controverts the contention that the legislature's refusal to make the Warren Act a strict liability statute results in any injustice. See, e.g., Vespi v. Driggers, 631 So. 2d 1102 (Fla. 2d DCA 1993) (summary judgment in favor of livestock owners reversed where plaintiff filed an affidavit evidencing that the gate through which the cattle escaped had a substandard latch); Leonardi v. Williams, 326 So. 2d 222 (Fla. 4th DCA 1988); Zuppardo v. O'Hare, 487 So. 2d 39 (Fla. 2d DCA 1986) (defense verdict reversed where the trial court erroneously excluded evidence that the defendant

horse owner did not own the land where her horses were kept, which was adjacent to a major highway, did not have any idea what other people had access to the property or used the gates, and had not checked the fence for three months before the accident); James v. Skinner, 464 So. 2d 588 (Fla. 2d DCA 1985) (fact issue as to whether the latch was sufficient); Davison v. Schwartz Farms, Inc., 309 So. 2d 610 (Fla. 2d DCA 1975); Prevatt v. Carter, 315 So. 2d 503 (Fla. 2d DCA 1975); Davis v. Johnson, 288 So. 2d 554 (Fla. 2d DCA 1974) (reversing a summary judgment for the defendant where the evidence showed that the defendant knew that trespassers frequently left the gate to his property open, but did not attempt to prevent the trespassing or ensure that the gate was kept closed); Dawson v. Johnson, 226 So. 2d 445 (Fla. 3d DCA 1969); Hughes v. Landers, 215 So. 2d 773 (Fla. 2d DCA 1968) (reversing a defense summary judgment where there was evidence that the gate was not properly maintained). In fact, Selby reached this court after the plaintiff presented a prima facie case and the case went to a jury. Selby, 287 So. 2d at 20. These decisions demonstrate that it is not, as the Petitioner contends, impossible to recover under the Warren Act. She simply failed to plead or prove the necessary elements of recovery in this particular case.

Based upon this false assertion that recovery under the Warren Act is too difficult, the Petitioner argues that this court should find that the existence of a cow on the roadway in itself is a violation of section 588.14, thereby establishing negligence per se. The circuity of this argument is apparent when two essential

and undisputed facts are understood. First, it is clear that an actual violation of the relevant statute is a prerequisite to a finding of negligence per se. DeJesus v. Seaboard Coast Line R.R. Co., 281 So. 2d 198, 201 (Fla. 1973). Second, there simply can be no violation of section 588.14 absent a finding of at least negligence on the part of the livestock owner. This requirement is clear on the face of the statute, and has been upheld by this and other courts pursuant to the above-discussed and well-established rules of statutory construction. Due to the fact that the undisputed evidence in this case and the clear terms of the statute combine to mandate the conclusion that there has been no statutory violation, it is difficult to comprehend how this court can even reach the issue of "changed conditions" in this case.

Furthermore, the clear majority of other jurisdictions to have addressed the issue have held that even a proven violation of a statute designed to keep livestock off the roadway does not constitute negligence per se. See Rodgers v. Webb, 335 F.Supp. 581 (E.D. Tenn. 1971) (applying Tennessee law); Byram v. Main, 523 A.2d 1387 (Me. 1987); Couillard v. Hawkins, 330 S.E.2d 293 (S.C. 1985); Reed v. Molnar, 423 N.E.2d 140 (Ohio 1981); Watzig v. Tobin, 642 P.2d 651 (Or. 1982); Scanlan v. Smith, 404 P.2d 776 (Wash. 1965); Parker v. Reter, 383 P.2d 93 (Or. 1963); Ritchie v. Schafer, 120 N.W.2d 444 (Iowa 1963); Smith v. Whitlock, 19 S.E.2d 617 (W.Va. 1942); Porier v. Spivey, 102 S.E.2d 706 (Ga. App. 1958). The few courts finding that negligence per se applied did not overlook the clear prerequisite of an actual violation of the statute. See

generally Annotation: Liability of Owner of Animal for Damage to Motor Vehicle or Injury to Person Riding Therein Resulting From Collision with Domestic Animal at Large in Street or Highway, 29 A.L.R. 4th 431.[9] For all the reasons discussed herein, no court has rewritten a statutorily mandated degree of fault and concluded that a violation of the judicially created strict liability scheme constituted negligence per se.

Florida courts have uniformly held that no inference of negligence arises simply because a livestock owner's cattle is located on a public road. See Gordon v. Sutherland, 131 So. 2d 520, 522 (Fla. 3d DCA 1961) ("any other holding would disregard the plain language of the statute"); Lee v. Hinson, 160 So. 2d 166 (Fla. 2d DCA), cert. denied, 166 So. 2d 594 (Fla. 1964); Welch v. Baker, 184 So. 2d 188 (Fla. 1st DCA 1966). Courts in other jurisdictions have likewise rejected the argument that an inference of negligence arises by the roaming of livestock. See Watzig v. Tobin, 642 P. 2d 651 (Or. 1982); Beck v. Sheppard, 566 S.W.2d 569 (Tex. 1978); Peterson v. Pawelk, 263 N.W.2d 634 (Minn. 1978) (refusing to infer negligence from the fact that a bull was running at large, and emphasizing that the relevant statute negated the possibility of strict liability by prohibiting the livestock owner

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[9] See also Annotation: Liability of Owner of Operator of Vehicle for Damage to Motor Vehicle or Injury to Person Riding Therein Resulting From Collision with Domestic Animal at Large in Street or Highway, 21 A.L.R. 4th 159; Annotation: Liability of Person, Other than Owner of Animal or Owner of Operator of Vehicle for Damage to Motor Vehicle or Injury to Person Riding Therein Resulting From Collision with Domestic Animal at Large in Street or Highway, 21 A.L.R. 4th 132.

from "permitting" his bulls to roam); Barnes v. Frank, 472 P.2d 745 (Colo. 1970); Rhiness v. Dansie, 472 P. 2d 428 (Utah 1970); Rouk v. Halford, 475 P.2d 814 (Okla. 1970); Prickett v. Farrell, 455 S.W.2d 74 (Ark. 1970); McCulloch v. Gatch, 161 S.E.2d 182 (S.C. 1968); Hammarlund v. Troiano, 152 A.2d 314 (Conn. 1959); Wilson v. Rule, 219 P.2d 690 (Kan. 1950); Gardner v. Black, 9 S.E.2d 10 (N.C. 1940); Pepper v. Bishop, 15 Cal. Rptr. 346 (Cal. App. 1961).

Although the Petitioner does not specifically raise the issue, she is in fact asking this court to apply a res ipsa loquitur analysis to determine that the existence of cattle on the roadway entitles her to an inference of negligence. The majority of other states to have addressed the issue have rejected a "res ipsa" inference in roaming livestock cases. See 29 ALR 4th 431 §§(a) and (b). The states rejecting the doctrine follow the same test for its application as is applied in Florida: the doctrine applies only where the mechanism causing injury is within the Defendant's sole and exclusive control, and where the accident is of the sort that does not occur absent negligence. See Goodyear Tire and Rubber Co. v. Hughes Supply, Inc., 358 So. 2d 1339 (Fla. 1978). This court has established that the Defendant's control must be so exclusive that there can be no explanation for the occurrence other than his negligence. Schott v. Pancoast Properties, 57 So. 2d 431 (Fla. 1952).

The courts refusing to allow a res ipsa inference in a roaming animal case have recognized that neither of these elements can be met in such a circumstance. First, unlike inanimate objects, there

can be no sole control over a live animal due to its ability to wander by its own volition. Therefore, res ipsa cannot apply in such cases. See, e.g., Polle v. Gillson, 15 F.R.D. 194 (D.Ark. 1953); Pepper v. Bishop, 15 Cal. Rptr 346 (Cal. App. 1961). Second, it cannot be said that the presence of unattended livestock on a roadway is an event which does not occur absent someone's negligence. See, e.g., Reed v. Molnar, 423 N.E.2d 140 (Ohio 1981). Equally significant is the finding by the California courts that the express provision of a negligence standard in the applicable statute barred a judicial finding that res ipsa applied. See Pepper, 15 Cal. Rptr 346. The Warren Act similarly precludes a res ipsa analysis by this court, even if the requirements for the doctrine could be met. See also Parrish v. Goff, 640 P.2d 869 (Ariz. 1981); Taylor Bros. v. Sork, 348 N.E.2d 42 (Ind. 1976); Brauner v. Peterson, 557 P.2d 359 (Wash. 1976); Prickett v. Farrell, 455 S.W.2d 74 (Ark. 1970); Barnes v. Frank, 472 P.2d 745 (Colo. 1970); Hughes v. W.& S. Const. Co., 196 So. 2d 339 (Miss. 1967); Moon v. Johnston, 337 S.W.2d 464 (Tenn. 1959); Rice v. Turner, 62 S.E.2d 24 (Va. 1950); Wilson v. Rule, 219 P. 2d 690 (Kan. 1950); Gardner v. Black, 9 S.E.2d 10 (N.C. 1940) (all rejecting the argument that a res ipsa presumption applies to roaming livestock).

As discussed in detail above, it is respectfully submitted that this court simply does not have the authority to judicially eliminate a fault element of a statutory cause of action even if the public policy of the state of Florida has changed. "Changing

conditions" are precisely the types of factors that representatives are elected to consider. There have been no changes in the fundamental principles of law or statutory construction which would give this court legal grounds to alter the Selby analysis. The factors which Petitioner asks this court to consider have drastic economic implications which should be addressed by thoughtful and thorough debate in the legislature. Section 588.14 is the result of the legislature's careful balancing of competing interests, and it affects all livestock owners, not just cattle owners. Had the legislature's analysis resulted in a finding that strict liability was warranted, the legislature certainly would have enacted section 588.14 without an express negligence requirement. See, e.g., Fla. Stat. § 767.04.

Nevertheless, it is also clear that there have been no "changed conditions" sufficient to warrant a finding that the public policy of the state of Florida has shifted. Petitioner's evidence of "changed conditions" consists of an Appendix to the Initial Brief in this Petition. Notwithstanding that these materials were not argued below nor presented to the Fifth District, they do not establish any "changed conditions" in any event.

For example, Petitioner argues that Florida's tourism industry is the "changed circumstance" requiring a judicial rewriting of the Warren Act and a reversal of this court's analysis in Selby. Significantly, Texas and California are among the states which do not recognize an inference of negligence or a prima facie case of

negligence from the mere fact that livestock is on the roadway. See, e.g., Pepper v. Bishop, 15 Cal. Rptr. 346 (Cal. App. 1961) (no presumption or inference of negligence); Burnett v. Reaves, 256 P. 2d 91 (Cal. App. 1953) (same) Galeppi Brothers v. Bartlett, 120 F.2d 208 (9th Cir. 1941) (California law); Beck v. Sheppard, 566 S.W.2d 569 (Tex. 1978). Those states also thrive on tourism, and have still seen fit to observe the limited application of the doctrines of negligence per se and res ipsa loquitur and to adhere to well-established rules of statutory construction.

In fact, a thorough review of the statistics provided by the Petitioner verifies that the costs and benefits associated with the coexistence of road travel and livestock maintenance have not changed drastically since the enactment of the Warren Act or since this court's decision in Selby. Petitioner essentially argues that road travel has increased and cattle farming has decreased, and concludes that "changed conditions" necessitate a reallocation of risk between motor vehicle operators and livestock owners. This argument fails for two reasons. First, Petitioner cites no authority for her assertion that an increase in motor vehicle traffic requires a decreased burden of proof for motorists. The public policy of this state is not determined by majority rule. Every shift in relative size of interest groups does not result in a shift of the burdens of proof between them.[10] Second, the

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[10] It must also be noted that Petitioner's Appendix does not support her contention that farming has sharply decreased in Florida. The overall number of farms in the state rose by 57.7% from 1987 to 1992. See Petitioner's Appendix #7. Florida's cattle output in 1993 was over 1.9 million head. See Information Please

statistics provided by Petitioner do not in fact demonstrate any "changed conditions."

The statistics provided in the Petitioner's Appendix do illustrate several other facts which should be of significance to this court in balancing the interests of the motoring public with the interests of the state of Florida in imposing a duty of due care on those persons who raise livestock. First, the risk of serious bodily harm from a collision between an animal and a motor vehicle is scant. Of the almost 200,000 motor vehicle accidents which occurred in Florida in 1993, only 331 involved an animal. See Appendix 7 and Appendix 8 to Petitioner's Initial Brief. Significantly, the materials provided do not allocate these accidents between livestock and domestic or wild animals. Even assuming for purposes of this argument that all of the reported motor vehicle accidents involving "animals" involved livestock subject to the Warren Act rather than household pets or wild animals, these accidents account for only one tenth of one percent of the total accidents in this state in 1993. Further, of those 331 accidents involving animals, 264 (or almost eighty percent) resulted in either minor injuries or no injury whatsoever. Therefore, only three out of every ten thousand motor vehicle

Almanac (1995 ed.) "Agricultural Output by State - 1993 Crops," p. 70. In fact, Florida is the largest cattle state east of the Mississippi. Florida Almanac (1992 ed.).

accidents occurring in the state of Florida in 1993, resulted in serious injury or death due to the involvement of an animal.[11]

These 1993 statistics are significant by themselves for the fact that they demonstrate the relatively low risk of serious injury from a collision with an animal. A comparison of the 1993 figures with the same report from 1964 is even more compelling, and conclusively rebuts the assertion that "changed conditions" require that livestock owners bear more of that risk. Almost 40,000 more motor vehicle accidents occurred in 1993 than in 1964. However, the number of accidents in 1964 involving animals was 3,180, or almost ten times the number of animal-related accidents in 1993.

Regardless of the increase in motor vehicle traffic and accidents generally, the statistics provided by the Petitioner demonstrate that the specific risk of collision between a motor vehicle and an animal has dramatically decreased over the past 30 years. Therefore, the only "changed condition" since this court's analysis in Selby would mandate a stricter, not a lesser, standard of proof for motorists seeking to impose liability upon livestock owners. The Petitioner's appendix conclusively demonstrates that the Warren Act, with its statutory negligence standard, is accomplishing its stated purpose of reducing the number of accidents and injuries to the motoring public from collisions with

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[11] It must be noted that any injury which Ms. Fisel incurred in this accident was not due to the collision of her vehicle with the Wynns' cow. It was instead the result of a second motor vehicle striking Ms. Fisel as she stood in the highway after her collision with the cow.

animals. See Welch v. Baker, 184 So. 2d 188, 190 (Fla. 1st DCA 1966) (explaining the purpose of the Warren Act).

The overall number of motor vehicle accidents which occurs in this state is an unfortunate statistic and certainly a matter of great public concern. However, this court must reject Petitioner's assertion that an increase in the overall number of motor vehicle accidents requires the imposition of additional liability on one of the few groups with a decreased accident rate. Petitioner's own statistics demonstrate that the liability imposed under the Warren Act has been ample incentive for livestock owners to exercise care in avoiding accidents.

Even assuming that the existence of "changed conditions" was sufficient to give this court authority to eliminate an essential element of a statutory cause of action, no such "changed conditions" have occurred. This court should approve the en banc opinion of the Fifth District which again upholds the negligence standard for recovery under the Warren Act.

## CONCLUSION

This court recognized in Selby that it does not have the authority to alter the degree of fault selected by the legislature for recovery under the Warren Act. Furthermore, the "changed conditions" asserted by the Petitioner as grounds for such a judicial amendment simply do not exist. This court should approve the en banc decision of the Fifth District Court of Appeal and again uphold the statutory negligence standard provided in the Warren Act.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail to **Frank A. Miller, Esquire,** 217 N. Howell Avenue, Brooksville, Florida 34601, and **Harry T. Hackney, Esquire,** Post Office Box 491565, Leesburg, Florida 34749-1656, on May 30, 1995.

Tracy Raffles Gunn, Esquire