FLORIDA SUPREME COURT,
STATE OF FLORIDA

PAULA MICHELLE FISEL,

APPELLANT

CASE NO. 85,285

VS.

WILLIAM C. WYNNS and
FRANK R. WYNNS,

APPELLEE

_____/

APPELLANT'S INITIAL BRIEF

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SUMMARY OF ARGUMENT

ISSUE I

Cases construing the Warren Act, which is Florida Statute sections 588.12 to 588.26, have not kept pace with changes in the State of Florida and the law of negligence. In the forty-six (46) years since the Warren Act was passed, Florida has experienced explosive growth in vehicles registered, drivers licensed, and miles travelled. Tourists and new residents are the mainstay of the Florida economy and livestock raising has declined.

Traditionally, livestock owners have been shown amazing deference when their animals are found on the public roads in violation of Florida Statute section 588.14. No inferences are drawn from the fact an animal is found on the road in contravention of a state law intended to protect the motoring public from such an occurrence. At common law, a livestock owner kept his animals on his premises or answered for damages in trespass to those injured by the wandering stock. The common law was revived in 1949 when Florida Statute sections 588.02 to 588.06, which created an open range state, were repealed and the Warren Act passed. Florida Statute sections 588.14 and 588.15 should be construed in pari materia in accordance with their purpose. They should be strictly construed to the extent they are in derogation of the common law.

The law in this area is neither recent nor consistent. The District Courts of Appeal have struggled to distinguish cases with little difference to allow plaintiffs to present their cases to a jury. It is up to the Supreme Court to clarify and modernize the law.

ISSUE II

The Florida Supreme Court has defined negligence per se as the violation of a statute establishing a duty to take precautions to protect a particular class of persons from a particular injury, or injury type, where (1) the Plaintiff belongs to the protected class; (2) suffers an injury of the type the statute was designed to prevent; and (3) the violation of the statute was a proximate cause of the injury. All of these factors exist in this case.

Livestock owners, however, have been able to violate the clear prohibition of Florida Statute Section 588.14 for more than thirty (30) years without the violation constituting negligence per se or evidence of negligence in an action for damages under Florida Statute Section 588.15. Nothing in either statute prohibits application of the doctrine of negligence per se. There is no logical distinction between livestock cases and all other negligence cases involving violations of statutory duties. Applying a principle of negligence law first adopted in Florida over twenty (20) years ago will not make livestock owners "virtual insurers" of motorists, anymore than it has made any other group which has lived with negligence per se for twenty (20) years "insurers". The livestock owner is in the best position to control his gates and fences and to see that his animals stay off the public roads. The cost relative to the potential injury is low. In this case, a chain and $12.00 padlock could have prevented many thousands of dollars in losses to people and property.

It is by definition negligence per se to violate Florida Statute Section 588.14. At a minimum, it is evidence of

negligence. The summary judgement should be reversed on the grounds it is negligence per se to violate Florida Statute section 588.14 and the plaintiff has made a prima facie case sufficient to avoid summary judgment. A trial should be held on all issues and the jury should be allowed to determine whether the violation of section 588.14 was the proximate cause of Fisel's injuries. The jury should receive a negligence per se instruction.

ISSUE III

Summary judgment was improper because genuine issues of material fact remain for a jury to decide. Paula Fisel's vehicle collided with a black cow that was on a public roadway at night. The cow had escaped from its pasture through an open gate, which was one of two (2) gates used for access to a residence. The cow was pastured on land surrounding the residence. There were forty (40) cows on the property, and all of the cows had unhampered access to the gate. The gate was not equipped with a padlock or cattle gap.

The Appellees do not know how the gate came to be open. No holes were found in the fence and there is no other way the two (2) cows known to have escaped could have gotten loose. Frank Wynns was the last person known to have used the gate on the Friday afternoon before the pre-dawn Sunday accident. He testified he closed and latched it and reentered through another gate.

The jury should be allowed to decide whether the Appellees used reasonable care under the particular circumstances of this case where their gate was not padlocked and was used for ingress and egress to a residence. The trial court apparently concluded it

was not foreseeable that an intervening cause, such as a person opening the unlocked gate, could result in the escape of the cow involved in the accident. The Fifth DCA ruled there was no inference a trespasser or visitor opened the gate. If not, how did the gate open absent negligence of the Defendants in securing the gate?

The Appellant submits that where a residence access gate, which opened on pasture land containing forty (40) head of cattle, was not padlocked or equipped with a cattle gap, a zone of risk was created and it was reasonably foreseeable someone would open the gate and leave it unlatched allowing some of the forty (40) cows to escape. It is not necessary that the defendant foresee a particular risk or act so long as the incident causing injury was foreseeable and within the scope of the risk created. Only a fully independent and unforeseeable intervening cause can absolve the original tortfeasor of liability. A foreseeable act of a third party is merely a concurring cause, and not a superseding cause insulating the tortfeasor from liability.

The jury should be allowed to decide whether the Wynns were negligent either because the gate was not latched properly by Frank Wynns or because it was foreseeable the access gate might be opened and left open by a visitor or trespasser. If there is no inference of a trespasser or other intervening cause absolving the Wynns of liability, as asserted by the Fifth DCA, then the Wynns have failed to sustain the very heavy burden imposed on the movant for summary judgment. The summary judgment should be reversed because material issues remain for determination.

STATEMENT OF THE CASE AND FACTS

Just after midnight on March 15, 1992, Paula Fisel's vehicle struck a black cow standing in the westbound lane of County Road 48 near Bushnell in Sumter County. Frank and William Wynns owned the cow. R. 4,5, 10, and 146, lines 19-25 (D. F. Wynns p. 2). Frank Wynns was called to the scene at about 1:00 a.m.. R. 150, lines 21-24 (D. F. Wynns p.6).

Fisel's damaged vehicle stopped sideways across the eastbound lane of County Road 48. R. 95, lines 19-25 (D. Fisel p. 71). Billy Arnold Sizemore was driving eastbound on County Road 48 when he came upon the scene of the recent accident headed straight for Fisel's damaged vehicle R. 2 and 97, lines 9-11; 100, lines 17-19; and 102, lines 7-11 (D. Fisel pp. 73, 76, and 78). Ms. Fisel's passenger, Athena Estrada, escaped from the vehicle but fell before reaching the roadside. R. 98, line 25 through 100, line 19 (D. Fisel pp. 74-76). Fisel tried to get out on the driver's side, which was away from the oncoming eastbound car, but the door was jammed shut. Prior to hitting the cow, that door worked fine. R. 98, lines 11-18 (D. Fisel p. 74). After exiting the truck via the passenger's door, Ms. Fisel ran to help the fallen Ms. Estrada and Mr. Sizemore's car hit her. R. 100, line 6 through 102, line 18 (D. Fisel pp. 76-79).

Ms. Fisel suffered a severe fracture of her lower right leg and lacerations. She has serious scarring of her right leg and elbow. R. 110, line 7 through 111, line 24 (D. Fisel pp. 86 and 87) R. 140, line 11 through 141, line 13 (D. Fisel pp. 116-117). The

leg fracture did not heal well, and rods and screws were surgically inserted to fix the break. R. 118, line 10 through 119, line 1 (D. Fisel pp. 94-95). She has residual pain and faces more surgery to remove the hardware. R. 113, lines 10-25 and 131, line 18 through 132, line 24 (D. Fisel pp. 89, 107, and 108). Ms Fisel is in her early twenties.

Frank Wynns found the western gate to his property open following the accident. R. 154, lines 1-22 and 160, line 20 through 161, line 2. (D. F. Wynns pp. 10, 16, and 17). This gate opens onto a limerock road, and is 1400 feet from County Road 48. R. 148, lines 18-21; 158, lines 18-20; and 162, lines 23-25 (D. F. Wynns pp. 4, 14 and 18). It is one (1) of two (2) gates regularly used for access to the home of Frank Wynns. R. 148, lines 22-25 (D. F. Wynns p. 4). Frank Wynns home is visible from County Road 48. R. 147, lines 9-11 (D. F. Wynns p. 3)

Frank and William Wynns had forty (40) head of cattle on Frank Wynns' property at the time of the accident. R. 148, lines 9-15 (D. F. Wynns, p. 4). The cows had free run of the entire property. R. 148, line 22 through 149, line 5 (D. F. Wynns pp. 4 and 5). The cows were kept in by a barbed wire fence with four (4) gates. Two (2) gates were permanently closed and the other two (2), including the west gate, were used for ingress and egress. R. 11; R. 145-183. There were no barriers between the cows and the open gate. The morning after the accident Frank Wynns found one of his cows in an adjacent pasture east of his property. R. 156, lines 10-14 (D. F. Wynns p. 12). Mr. Wynns knows of no other way the two (2) cows

could have escaped other than through the open western gate. R. 164, line 18 through 165, line 3 (D. F. Wynns pp. 20-21).

Frank Wynns does not know how the western gate came to be open. R. 154, lines 9-10 (D. F. Wynns p. 10). He used the western gate the Friday before the early Sunday morning accident on his way into town. He claims he closed the gate behind him. R. 154, lines 11-20 (D. F. Wynns p. 10). A sliding latch secured the western gate. R. 155, lines 1-5 (D. F. Wynns p. 11). There was no padlock on the gate. R. 161, line 16 through 162, line 11; and 175, lines 11-13 (D. F. Wynns pp. 17, 18, and 31). He reentered his property through the eastern gate rather than the western gate. R. 174, line 14 through 175, line 6 (D. F. Wynns pp. 30-31).

Ms. Fisel sued the Wynns and Sizemore in February, 1993. Count I alleged William C. Wynns and Frank R. Wynns intentionally, willfully, carelessly, or negligently suffered or permitted their livestock to run at large or stray upon the public roads resulting in a collision between Ms. Fisel's vehicle and their cow, and her subsequent collision with Sizemore's vehicle. R. 1 and 2. She alleged Mr. Sizemore's vehicle would not have hit her "but for" the collision with the Wynns' cow. R. 2. Count II of the Complaint is against Billy Arnold Sizemore for negligence. R. 2. Mr. Sizemore is unrepresented.

Counsel for the Wynns denied the essential elements of the Complaint, and alleged three (3) affirmative defenses. R. 4 and 5. Frank and William Wynns filed a two (2) page Motion for Summary Judgement. R. 15-16. The affidavit of Frank R. Wynns was served

later, and Judge Booth struck it as untimely. R. 192. The Court granted the Motion for Summary Judgement, and entered Final Judgment for the Wynns on August 20, 1993. R. 192-193 and 296. The trial court found the Wynns "...in no way intentionally, willfully, carelessly, or negligently permitted their livestock to roam upon a public highway...." R. 296. An appeal to the Fifth District Court of Appeal was timely filed.

Oral argument was held before Chief Judge Harris and Judges Griffin and Dauksch on April 19, 1994. The Fifth D.C.A. issued an opinion en banc authored by Chief Judge Harris on October 14, 1994. Judges Dauksch and Griffin dissented with separate opinions. App. R. 3-15. Fisel then moved to certify the question pursuant to Florida Rule of Appellate Procedure 9.330(a) on the basis of great public importance and express and direct conflict with cases applying the doctrine of negligence per se. App. R. 16-18. The Fifth D.C.A. granted the Motion and certified a question on February 17, 1995. App. R. 19-22. This appeal was then timely taken to this Court.

ISSUE I

HAVE CHANGING CONDITIONS IN FLORIDA ALTERED PUBLIC POLICY AS ANNOUNCED IN SELBY V. BULLOCK, 287 SO.2D 18 (FLA. 1973), SO THAT A LIVESTOCK OWNER MAY NOW BE LIABLE FOR INJURIES RESULTING WHEN THE OWNER'S LIVESTOCK WANDERS THROUGH AN OPEN GATE AND THE REASON THE GATE IS OPEN IS UNKNOWN?

This is the question the majority of the Fifth District Court of Appeal certified. It implies a livestock owner may not be held liable in most circumstances. In fact, there are few successful

livestock cases reported. A plaintiff must almost show the livestock owner shooed the livestock onto the road. The Fifth District believes the following quote from Selby states the public policy:

> The Warren Act [the statutes involved in the action] has delegated responsibilities and rights among livestock owners and motorists consistent with the goals of promoting the safety of highway users and the livestock industry. Any modification of this position should be done by the Legislature. To require fencing by the livestock owner and in addition thereto, hold him strictly liable, would place an impossible burden on the livestock industry. Those in the livestock industry would become virtual insurers, and this would retard and diminish stock raising as an important part of Florida agri-business.

Selby at 21 (as quoted on pages three (3) and four (4) of the Fifth District's en banc opinion.) App. R. 5 and 6.

It is important to place the above quote in the context of the issues raised in Selby. The Selby plaintiff argued it was a denial of equal protection not to hold cow owners strictly liable for damages in the same manner as dog owners. The Warren Act's requirement of proof of negligence did not unconstitutionally create an unreasonable classification. Selby at 22. Fisel does not seek to impose strict liability on the livestock industry. She does seek to have this Court clarify the law and establish that motorists injured by livestock on public roads have the same rights and legal doctrines available to them as other victims of negligence.

The Florida Supreme Court has considered the Warren Act, which is Florida Statute sections 588.12 to 588.26, at least three (3)

times. See, Lynch v. Durrance, 77 So.2d 458 (Fla. 1955); Hendry v. Rockow, 238 So.2d 588 (Fla. 1970); and Selby v. Bullock, 287 So.2d 18 (Fla. 1973), adopting, Rockow v. Hendry, 230 So.2d 717 (Fla. 2d DCA 1970). In Lynch and Selby, this Court was more concerned with constitutional issues than the specific facts of the case. Selby does not mention the underlying facts except to say it involves a "classic" motor vehicle versus livestock collision where a motorist hit a cow at night. The plaintiff presented a prima facie case of negligence and the case went to the jury. Selby at 20. The Supreme Court adopted an entire Second DCA opinion as its own in Hendry.

The Warren Act's purpose is to put livestock owners under a duty to prevent stock from running at large or straying upon public roads. Selby at 21-22; and Davidson v. Howard, 438 So.2d 899, 901 (Fla. 4th DCA 1983). It does not require livestock owners to fence their property as stated in Selby. See, Davidson at 901. See, also, Zuppardo v. O'Hare, 487 So.2d 39, 40 (Fla. 2d DCA 1986). How the livestock owner complies with his Warren Act duty is irrelevant. He can use a fence, wall, tether, or anything else that works. Davidson at 901. Florida Statute sections 588.01 to 588.11 concerning a "legal fence" and "legally enclosed land" were enacted to protect landowners from human trespassers and not as part of the Warren Act. Zuppardo at 40.

The Fifth DCA interpreted the "legal fence" statutes as applying to the Warren Act and as providing some measure of immunity for wandering livestock, as did the Selby court. This is

indicative of the confused state of the law in this area. On the one hand, the Supreme Court has held that the Warren Act mandates fencing. On the other hand, two District Courts of Appeal have held there is no mandatory fencing requirement for owners of livestock, except as protection from trespassers. Even if the fencing laws were mandatory and relevant to the Warren Act, compliance would only be evidence of due care and would not conclusively prove the exercise of due care, especially in light of non-compliance with another equally relevant statute. Nicosia v. Otis Elevator Co., 548 So.2d 854 (Fla. 3d DCA 1989). The violation of a statute is usually strict liability negligence per se, negligence per se, or prima facie evidence of negligence, except when the statute is Florida Statute section 588.14 and then a violation is meaningless. The Warren Act has been construed so as to create a class of cases where there is "strict non-liability" per se for defendants.

English common law required livestock owners to keep their livestock on their premises or suffer damages for their trespass. Hendry v. Rockow, 238 So.2d 588 (Fla. 1970), adopting, Rockow v. Hendry, 230 So.2d 717 (Fla. 2d DCA 1970). See, also, Harris v. Baden, 154 Fla. 373, 17 So.2d 608 (1944). Florida adopted English common law after Spain ceded it to the United States. Fencing laws enacted as Florida Statute sections 588.02 to 588.06 abrogated the common law and legislatively created an open range state, but the common law was revived when these fencing laws were repealed in 1949. Rockow, 230 So.2d at 719. See, also, Dutton Phosphate Co.

v. Priest, 67 Fla. 370, 65 So. 282 (1914), and Selby at 22 (Dissenting opinion).

The usual appellate construction of the Warren Act defeats the purpose of the Warren Act and deviates liberally from the common law. In fact, the Fifth DCA's majority opinion below got the common law exactly backward. It wrote, without citation, that Florida was an "open range state" before the enactment of Chapter 588, and that a motorist hitting a cow owed damages to the cow owner. Actually, Chapter 588 was not enacted at one time as a whole, and the legal fencing requirements are not a part of the Warren Act. See, generally, Rockow, Davidson, and Zuppardo. App. R. 4. Again, this is due to the confused state of the law. The Warren Act must be strictly construed to the extent it is in derogation of the common law. See, 49 Fla. Jur. 2nd, Statutes, section 192.

Sections 588.14 and 588.15 should be read in pari materia and the Warren Act should be construed in accordance with its purpose. Welch vs. Baker, 184 So.2d 188, 190 (Fla. 1st D.C.A. 1966). The Appellant respectfully submits that in actuality section 588.14 has been ignored and not read in pari materia. The result is that the Warren Act has not been construed according to its purpose to keep livestock off the roads.

Tourists and new residents are the two (2) most important businesses in Florida. Both often travel by car. In 1949, there were 867,500 automobiles, buses, and trucks registered in Florida. University of Florida Bureau of Economic Research, Florida

Statistical Abstract 1967, Table 16.150 (1967). (App. 1) In 1974, the year after Selby was decided, there were 6,296,550 licensed drivers and 6,750,609 registered vehicles. These vehicles drove 61,397,000,000 vehicle miles. Florida Department of Highway Safety and Motor Vehicles, Traffic Crash Facts 1993, pg. 6 (1993). (App. 7) [hereinafter "1993 Traffic Crash Facts"]. In 1993, there were 11,767,409 licensed drivers and 11,159,938 registered vehicles which travelled 119,768,000,000 vehicle miles. Id. This Court is certainly aware that Florida is the fourth most populous state in the United States, and that Florida's highways have become increasingly crowded and congested. There has been a substantial increase in drivers, vehicles, and miles travelled on Florida's roads.

In contrast, the number of cattle and calves declined 5.1 percent between 1987 and 1992 from 1,879,124 to 1,783,968. University of Florida Bureau of Economic and Business Research, Florida Statistical Abstract 1994, Table 9.34 (1994). (App. 6). Collisions with animals caused 331 accidents in 1993 resulting in two (2) deaths and 252 injuries. 1993 Traffic Crash Facts at pg. 37. (App. 7) The number of car versus animal collisions varies from year to year. See, Florida Statistical Abstracts 1967 to 1994 which are included in the appendix. (App. 1-6) Whether livestock collisions are a "big problem" probably depends on whether you are one of the hundreds involved annually in such collisions.

Florida's appellate courts have led the way in modernizing tort law. Insurance Co. of North America v. Pasakarnis, 451 So.2d

447 (Fla. 1984). The Supreme Court recognizes a continuing responsibility to see the law remains fair and realistic as society and technology change. Id., citing, Hoffman v. Jones, 280 So.2d 431 (Fla. 1973). The rule that the presence of a cow on a public road, where the Warren Act prohibits it to be, does not create an inference of negligence, or even an inference of a violation of section 588.14, is court made. The Supreme Court abdicates its function when it refuses to reconsider an old, unsatisfactory court made rule. Id.

The Appellant submits that why the law concerning livestock collisions should be clarified and updated is best considered in light of the issues raised below. The Appellant seeks recognition that livestock cases have remained in a Rip Van Winkle like slumber while the law of negligence and the State of Florida have continued forward.

ISSUE II

WHETHER THERE IS NEGLIGENCE PER SE OR EVIDENCE OF NEGLIGENCE WHEN FLORIDA STATUTE SECTION 588.14 HAS BEEN VIOLATED RESULTING IN HARM TO A MOTORIST DUE TO A COLLISION WITH LIVESTOCK ON A PUBLIC ROAD

Florida Statute sections 588.14 and 588.15, which are a part of the Warren Act, are directly applicable to this case. They read in their entirety as follows:

Section 588.14 - **DUTY OF OWNER:**

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

Section 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....

See, Secs. 588.14 and 588.15, Fla. Stat., (1991).

Florida Statute section 588.14 creates a statutory duty to keep livestock off of public roads. Livestock owners have been able to violate the statutory duty imposed in Florida Statute section 588.14 without fear the violation would constitute strict liability negligence per se, negligence per se, evidence of negligence, or even the inference the statute had been violated. The Third DCA established this rule when it stated the following with respect to Florida Statute Section 588.15:

> [T]here is no merit in appellant's contention that the fact that an animal was running at large on the highway justified an inference that defendants had violated the statute.

Gordon v. Sutherland, 131 So.2d 520, 522 (Fla. 3d DCA 1961).

Livestock are not ordinarily found upon the highways absent some negligence. The Third DCA focused on section 588.15, which establishes a statutory cause of action for damages, while apparently ignoring the statutory duty of section 588.14. Section 588.15 was intended to establish a statutory basis for damages for a violation of section 588.14 not to modify the duty of section 588.14."

Permit" is defined as: "To suffer, allow, consent, let; to give leave or license; to acquiesce by failure to prevent,...." BLACK'S LAW DICTIONARY (5th Ed. 1979). Thus, the word "permit" does not imply an intentional or voluntary act. Livestock are "permitted" to roam by failing to prevent them. The words "negligently" and "carelessly" in section 588.15 show the action for damages is not founded upon strict liability, which would bar such defenses as contributory negligence.

The Third DCA cited Lynch for the proposition that an inference of negligence is not supported by the presence of a cow on a public road, but it admitted "...the Lynch (sic) case is not of itself important to the present appeal...." Gordon set the tone for all subsequent livestock collision cases, which have relied upon Gordon for the following proposition:

> The mere fact that the defendant's [livestock] were running at large upon the public highway does not justify an inference that the defendant intentionally, willfully, carelessly or negligently permitted them to so run at large on the highway in violation of sec. 588.14, Florida Statutes, F.S.A.

Lee v. Hinson, 160 So.2d 166, 167 (Fla. 2d DCA 1964), cert den'd, 166 So.2d 594 (Fla. 1964) citing, Gordon. See, also, Welch at 190.

Although this proposition supposedly arose from the Supreme Court's holding in Lynch, nothing in Lynch supports it. Thus, a basic premise of Gordon appears faulty. Lynch was concerned with the interplay between a Highlands County ordinance and the Warren Act. The local ordinance limited liability to only those livestock

owners who willfully and intentionally allowed their livestock to roam at large. Lynch at 459. (Emphasis in original). The Warren Act applies to those who are merely negligent. The Supreme Court held it "...would do violence to and completely defeat the plain legislative intent...." to require proof of willful and intentional conduct in contravention of the terms of the Warren Act.

The Supreme Court reversed a dismissal of the plaintiff's complaint for failure to allege the defendant acted willfully or intentionally. Lynch at 460. Thus, the plaintiff was permitted to proceed on a theory of negligence with nothing more to support it than the allegation he hit a cow in the road. The Court also stated: "That it is unlawful for cattle to run at large anywhere in Florida under the Warren Act is irrefutable...." Lynch at 460. (Emphasis supplied). How this lead to the "no inference of negligence" holding in Gordon is inexplicable. It is time to reconsider the no inference rule established by Gordon.

It is negligence per se to violate a statute establishing a duty to take precautions to protect a particular class from a particular injury or type of injury. deJesus vs. Seaboard Coast Line Railroad Co., 281 So.2d 198, 200 (Fla. 1973). The purpose of the statute in deJesus was to protect automobile drivers and their passengers from colliding with unlit trains. deJesus at 201. The Warren Act's purpose is to reduce deaths, personal injuries, and property damages caused to the motoring public by collisions with animals on the public roads. Welch at 190. Thus, both statutes protect the same class of people from the same injuries; i.e.,

automobile drivers and their passengers from personal injury and death.

Given the identical purpose and protected class, it is difficult to reconcile the contradiction involved in the rule that it is negligence per se to violate the statute concerning unlit trains, but that not even an inference of negligence is justified for a violation of section 588.14. No one, including the majority of the Fifth DCA, has distinguished deJesus and explained why the doctrine of negligence per se is inapplicable in this case.

Negligence per se has not destroyed the hundreds of industries to which it applies. It has not made building owners insurers of elevator passengers, restaurateurs insurers of their patrons, or boat race promoters insurers of participants. See, e.g., Nicosia supra; Concord Florida, Inc. v. Lewin, 341 So.2d 242, 245 (Fla. 3d DCA 1976); and Torres v. Offshore Professional Tour, Inc., 629 So.2d 192 (Fla. 3d DCA 1993). Applying negligence per se to livestock cases will not destroy the cattle industry or create an impossible burden.

A number of states already apply negligence per se to livestock collisions. See, generally, 29 ALR 4th 431, "Collision With Domestic Animal" Section 6. Many more states recognize an animal's presence on the highway justifies a presumption or inference of negligence, or at least makes a prima facie case of negligence. Id. at section 7(a). The States listed include California, Georgia, Idaho, Iowa, Missouri, Kentucky, and Texas. Florida cases are cited in the annotation for the opposite view.

Yet two (2) Florida cases are relied upon for the proposition the mere presence of an animal on the highway supports an inference of negligence, even where there is no indication the animals had previously gotten loose. Id. at section 10(a), citing, Dawson v. Johnson, 226 So.2d 445 (Fla. 3rd DCA 1969), and Davison v. Schwartz Farms, Inc., 309 So.2d 610 (Fla. 2d DCA 1975). This illustrates the confused state of the law on this issue in Florida. As the Fifth D.C.A. said: "[T]he case law in this area is neither recent nor totally consistent....." App. R. 10.

A New Mexico court sustained a judgement against the owners of two (2) horses where a gate was found "sprung open" after an accident. The plaintiff relied upon a New Mexico Statute prohibiting an owner of livestock from "... negligently permitting his livestock to run at large upon any part of a public highway which is fenced on both sides." Roderick v. Lake, 778 P. 2d 443 (N.M. App. 1989). Another statute prohibited anyone from negligently permitting livestock to wander or graze upon a fenced highway. Id. The New Mexico court applied negligence per se because all four (4) factors for its application were present; i.e., (1) a statute prohibiting conduct; (2) the defendant's violation of that statute; (3) the plaintiff's membership in the class of persons protected by the statute; and (4) the harm or injury to the plaintiff is of the type the statute sought to prevent. Id. at 445. It was for the trier of fact to determine credibility and weigh the testimony of one defendant that he shut the gate and somebody else had to open it to let the horses out.

Roderick at 446.

Negligence per se is the violation of a statute establishing a duty to take precautions to protect a particular class of persons from a particular injury, or injury type, where (1) the plaintiff belongs to the class protected, (2) suffered an injury of the type the statute was designed to prevent, and (3) the violation of the statute was the proximate cause of the injury. dejesus at 201. All of these factors are present in this case. Florida Statute section 588.14 was designed to protect the motoring public from collisions with livestock on public roads. Fisel was (1) a member of the motoring public who (2) collided with a cow on a public road resulting in injuries, and (3) the violation of the statute was the proximate cause of her injury. Violation of any other type of statute is prima facie evidence of negligence. Id.

Florida's appellate courts have been struggling with the harshness of a strict application of the principles espoused in Gordon and Lee. The result has been strained attempts to distinguish cases on the basis of facts which seem to have little difference. See, e.g., Hughes v. Landers, 215 So.2d 773 (Fla. 2d DCA 1968), cert den'd, 225 So.2d 916 (Fla. 1969). (Questions of fact remain where gate tied shut found down after accident); James v. Skinner, 464 So.2d 588 (Fla. 2d DCA 1985) (Horse could have brushed taut chain over head of bent nail to which it was secured to hold gate shut); and Vespi v. Driggers, 631 So.2d 1102 (Fla. 2d DCA 1993) (Fact issue sufficient to avoid summary judgment raised where gate secured by barbed wire wrapped around post).

A violation of section 588.14 is by definition negligence per se in an action for damages under section 588.15. Fisel can make a prima facie case of negligence and should be allowed to proceed to trial. The trier of fact can weigh the credibility of Frank Wynns and whether the Wynns failed to use reasonable care under the particular circumstances of this case by permitting their cattle to escape through an unlocked gate used for access to a residence, and to which forty (40) head of cattle had unhampered access. The summary judgment should be reversed and this case remanded for trial. The jury should be given a negligence per se instruction at trial.

ISSUE III

WHETHER SUMMARY JUDGMENT WAS IMPROPERLY ENTERED FOR FRANK AND WILLIAM WYNNS WHERE GENUINE ISSUES REMAIN AS TO THEIR NEGLIGENCE IN ALLOWING THEIR COW TO ROAM UPON A PUBLIC ROADWAY AT NIGHT

This Court is so familiar with the requirements for summary judgment, the undersigned would not repeat them if it were not his duty. The Wynns, as the movants, must prove the absence of a genuine issue of material fact. Holl v. Talcott, 191 So.2d 40, 43 (Fla. 1966). Summary judgement is improper if the record reflects the existence of any issue of material fact, the possibility of any issue, or even the slightest doubt an issue might exist. Snyder v. Cheezem Development Corp., 373 So.2d 719 (Fla. 2d DCA 1979). (Citations omitted). See, also, Grissett v. Circle K Corp. of Texas, 593 So.2d 291, 293 (Fla. 2d DCA 1992), and Wilson v. Woodward, 602 So.2d 547 (Fla. 2d DCA 1992). If the evidence raises

any issue of material fact, if it will allow different reasonable inferences, or if it tends to prove the issues, it should be submitted to the jury. Moore vs. Morris, 475 So.2d 666, 668 (Fla. 1985). See, also, Wallace v. Pensacola Rent-A-Wreck, Inc., 616 So.2d 1048, 1050 (Fla. 5th DCA 1993). The movants must overcome all reasonable inferences drawn in favor of the opponent. Holl at 43. This heavy burden is justified because summary judgement is in derogation of the constitutionally protected right to trial. Id. at 48. Summary judgement should be denied where differing inferences may be deduced from otherwise undisputed facts. See, 4444 Corporation v. City of Orlando, 598 So.2d 287 (Fla. 5th DCA 1992), and Florida Power and Light Company v. Daniell, 591 So.2d 284 (Fla. 5th DCA 1991).

Summary judgment is cautiously granted in negligence cases. Moore at 668. Negligence is not ordinarily adjudicated on summary judgement. Jones v. Crews, 204 So.2d 24 (Fla. 4th DCA, 1967). Negligence and probable cause are normally jury questions unless there is only one possible conclusion. Regency Lake Apartments Associates, Ltd. v. French, 590 So.2d 970, 972-3 (Fla. 1st DCA 1991) (Appeal from a directed verdict, but similar standards apply). The evidence supporting a negligence claim is frequently susceptible to more than one interpretation. Id. at 972. Summary judgment should be denied unless the facts are so crystallized only questions of law remain. Moore at 668.

Fisel's Complaint charges the Wynns with permitting their livestock to "willfully, carelessly or negligently" wander upon a

public highway. "Carelessly" and "negligently" are synonyms. The question is whether the Wynns negligently allowed their cow to be upon a public roadway at night. Negligence is:

> ... the failure to use that degree of care, diligence and skill that is one's legal duty to use in order to protect another person from injury. The degree of care required is ordinary and reasonable care according to a particular set of circumstances.

Miriam Mascheck, Inc. v. Mausner, 264 So.2d 859, (Fla. 3rd DCA 1972).

What is reasonable under the particular circumstances involves the specific standard of care and is an issue upon which reasonable people can disagree. Thus, it is typically a jury issue. Spadafora v. Carlo, 569 So.2d 1329, 1331 (Fla. 2d DCA 1990) (Citations omitted). Reasonable care under a particular set of circumstances is the very essence of negligence. Any doubt as to a question of negligence should always be resolved in favor of a jury trial. Goode v. Walt Disney World Co., 425 So.2d 1151, 1154 (Fla. 5th DCA 1982), pet. for rev. den'd, 436 So.2d 101 (Fla. 1983).

The Wynns argued that because the gate was closed with a sliding latch, which allegedly could only be opened by a person and could not be bumped open by an animal, they were not negligent as a matter of law. R. 15-6, and 185-9. The trial court and the appellate courts are required to view the evidence in the light most favorable to Fisel. All competing inferences must be drawn in her favor. Thoma v. Cracker Barrel Old Country Store, Inc., 20 F.L.W. D219 (Fla. 1st DCA 1995). It is for the jury to determine

whether the preponderance of evidence supports the inferences suggested by the plaintiff. Thoma at D220. The existence of other possible inferences does not require affirmance of a summary defense judgment. Id.

Several inferences must be drawn in favor of the Wynns in order to conclude that Fisel could not prove negligence; i.e., that under the particular circumstances of this case the Wynns used reasonable care to prevent their livestock from wandering on a public road. One must infer:

(1) that Frank Wynns really did close the gate and securely latch it when he used it the Friday before the pre-dawn Sunday accident (Cf. Hughes v. Landers, 215 So.2d 773 (Fla. 2d DCA 1968), cert den'd, 225 So.2d 916 (Fla. 1969)(Unsupported inference of trespasser opening tied gate rejected); and

(2) that a cow did not bump the gate open; and

(3) that a trespasser, or a visitor, opened the latched but unlocked gate, which was used for access to a residence, and allowed the cows to escape; and

(4) that it was unforeseeable a trespasser, or visitor, would one (1) day or night unlatch the unlocked gate, which is one (1) of two (2) gates used for access to a residence, and leave it open; and

(5) that it was unforeseeable that in such a case some of the forty (40) cows, which had free run of the forty (40) acres and unhampered access to the gate, would escape through the unlocked, and now also unlatched, gate and make it to the nearby County Road.

Nonetheless, all reasonable inferences must be drawn in favor of the non-movant. The trial court could have, and should have, drawn the following inferences in Fisel's favor:

(1) that Frank Wynns may not have firmly latched the gate when he used it the Friday before the pre-dawn Sunday accident (no evidence of trespassers has been produced) See, Hughes, supra; and

(2) that the Wynns failed to use ordinary and reasonable care by not having a padlock, or a cattle gap, or some other safety

device on an unlocked gate to which forty (40) head of cattle had free access and which opened on a limerock road which intersected with a nearby public road; and

(3) that it was foreseeable a trespasser, or visitor, could unlatch the unlocked gate, which is one (1) of two (2) gates used for access to a residence, and leave it open or not firmly latched; and

(4) that the Wynns could foresee that in such a case some of the forty (40) cows, which had free run of the forty (40) acres owned by Frank Wynns, would escape through the unlocked, and now also unlatched, gate and make it to the nearby County Road.

The Fifth District Court of Appeal's en banc opinion faults the Plaintiff for failing to allege or prove that a trespasser or visitor left the gate open. App. R. 6. Florida Rule of Civil Procedure requires the plaintiff to plead "....a short and plain statement of the ultimate facts showing that the pleader is entitled to relief....." Fla. R. Civ. P. 1.110(b) Negligence is an ultimate fact. Trawick, Fla. Prac. and Pro., Sec. 6-16. It suffices to allege that the defendant negligently "operated his motor vehicle," "failed to supervise construction," "designed the building," or "manufactured the product." Id. See, also, Fla. R. Civ. P. Forms 1.945, 1.946 and 1.951. Fisel alleged the Wynns "....carelessly, or negligently suffered or permitted their livestock to run at large upon or stray upon the public roads...." R. 2, paragraph 6 of the Complaint. These allegations suffice to state a cause of action for negligence.

It is the Defendants who wish the Court to infer from Frank Wynns deposition testimony that he last used the gate; closed and latched the gate; did not use the gate again; had no visitors; is unaware of how the gate came to be open; and that the gate could not be opened except by "human hands and fingers" that some

"unauthorized person" left the gate open. App. R. 4; and R. 12. It is the Wynns who relied upon Lee v. Hinson to obtain summary judgment. The only evidence of anyone using the gate in the thirty-six (36) hours before the accident is Frank Wynns' own testimony he used the gate Friday and latched it behind himself. Apparently, the gate was open long enough to allow the cow found in the neighbor's pasture on the east side of Wynns' property to reach safety before the accident.

The essence of the Wynns' argument is that because only human hands and fingers could operate the gate latch and it could not be bumped open by a cow, they were not negligent as a matter of law. This argument assumes it was unforeseeable that someone might open the unlocked gate used for access to a home and allow the cows to escape. Where a statute creates a duty, it is not necessary for the negligent party to foresee a particular incident, (i.e., it is not necessary that the Wynns foresee Fisel's collision), if the likelihood of a cow escaping through an unlocked gate is reasonably foreseeable. Concord at 244-5. The issue is whether Fisel's collision was in the scope of the risk created by the Wynns allowing forty (40) cows ready access to an unlocked residence gate. The Wynns have raised the inference that an unexpected trespasser opened the gate and that this was an intervening cause insulating them from liability. In Concord, which involved a criminal act of arson by a madman, the court relied on the following from the Restatement of Torts, 2d:

> Where the negligent conduct of the actor creates or increases the risk of a particular

> harm and is a substantial factor in causing that harm, the fact that the harm is brought about through the interaction of another force does not relieve the actor of liability, except where the harm is intentionally caused by a third person and is not within the scope of the risk created by the actor's conduct. [Emphasis supplied].

Concord at 245, quoting, Section 442B, Intervening Force Causing Same Harm as that Risked by Actor's Conduct, Restatement of Torts, 2d.

The scope of the risk the Wynns created was that some of their cows would escape if anyone opened the unlocked residence gate to which the cows had easy access. The supposed acts of the unknown, unseen, unproven third party, who logically must have opened the gate if Mr. Wynns latched it and an animal could not open it, were within the scope of the risk created by the unlocked residence gate opening into pasture land filled with cows near a public road. Consequently, it does not relieve the Wynns of potential liability.

The Fifth DCA relied on Gordon for the proposition that the mere presence of a cow on the public roads raises no inferences in Fisel's favor. It then noted that there was "....no pleading, no evidence, and no inference that the gate was left open by a trespasser." App. R. 9, fn. 3. How did the Wynns obtain summary judgment if this fact remained to be decided? A jury might conclude Frank Wynns failed to properly latch the gate in the absence of proof of an intervening cause. If it cannot be inferred a third party opened the gate and Frank Wynns testified no animal could open the latched gate and that he latched it, then how did the gate come to be open? A gate cannot open by itself absent

negligence in securing it. In order for the Wynns to obtain summary judgment, it must be inferred that the gate was opened by some unforeseeable intervening cause for which the Wynns are not liable and that this insulates them from liability.

If Frank Wynns left his front door unlocked and had his television stolen, people would likely say it was foreseeable even if no one had stolen his television before. Why then is it unforeseeable that someday his unlocked residence gate would be opened and two (2) of his cows would escape? The Concord defendant was not liable for the unforeseen act of a madman, but because its failure to follow the fire code created a risk of injury to patrons by fire. Wynns' failure to lock his gate or to equip it with a cattle gap, or to keep his cows in an enclosure without a gate used for access to his home, created a foreseeable risk of injury to motorists passing his residence on County Road 48. Foreseeability, proximate cause, and intervening cause are for the trier of fact to decide. Pamperin v. Interlake Companies, Inc., 634 So.2d 1137, 1139 (Fla. 1st DCA 1994).

The car theft cases the Fifth DCA cited are examples of cases where both negligence per se and common law negligence may apply. It is true that one of the factors considered in the ignition key cases is whether the car was parked in a high crime area. See, e.g., Vining v. Avis Rent-A-Car Systems, Inc., 354 So.2d 54, 56 (Fla. 1977). But this was not the sole issue determining liability. It is one particular circumstance to be considered in the case. A violation of the "Unattended Motor Vehicle" statute

also constitutes negligence per se regardless of where the car is parked.

The Fifth DCA held that the plaintiffs submitted a prima facie common law negligence case for the jury in the foreseeability of a car theft where the "Unattended Motor Vehicle" statute was inapplicable and there was no evidence of prior vehicle thefts or of "high crime" in the area. Reteneller v. Putnam, 589 So.2d 328, 331 (Fla. 5th DCA 1991). There was, however, testimony of crime on other construction sites. Id. In a later appeal of the same case, the Fifth DCA further clarified that the plaintiffs' pleadings encompassed a common law negligence claim, which did not include a violation of the "Unattended Motor Vehicle" statute. Eaton Construction Co. v. Edwards, 617 So.2d 858, 861 (Fla. 5th DCA 1993).

The pickup truck involved in Reteneller and Eaton had been left unattended with the keys in the ignition on a private posted construction site. An Eaton company employee commandeered the truck to chase a car thief. Id. at 859-60. Although there were no prior criminal activities on that site and the truck was not stolen but was commandeered by an employee, the plaintiffs still had a common law negligence claim against the truck owner for leaving the keys in the truck. Id. at 861.

In Gordon v. Sutherland, Gordon's automobile collided with two (2) black angus cows on a public roadway. Gordon at 521. The gate to the cow pasture was fastened with a shutter type latch, and wrapped and tied with a rope. After the accident, the gate was

latched but the rope was now tied with a different knot. The next day Jeep tire tracks were found going through the gate across the property and out a rear gate. Id. The Wynns have produced no such evidence of trespassers here. Also, the case states the opened gate was one of four (4) adjoining the highway but it does not say if the gate was used for access to a residence, as is the case here, or was used only to access a pasture. Id. Later cases have held landowners liable for the foreseeable actions of trespassers. See, e.g., Davis vs. Johnson, 288 So.2d 554 (Fla. 2nd DCA 1974).

In Lee, horses escaped onto a public highway through a gate secured by a chain and snap hook only a human could operate. cf. James at 589 (Horse could have brushed taut chain holding gate shut over head of bent nail to which the chain was secured to escape); Hughes, supra (Jury question as to whether horse owner actually secured gate); and Vespi, supra (Statement that piece of barbed wire wrapped around wooden post secured gate raises fact issue sufficient to avoid summary judgment). Hinson provided affidavits from himself and every other person authorized to use the gate to conclusively establish neither he nor his employees opened the gate. The Wynns have not, and cannot, provide such affidavits. See, e.g., Matarese vs. Leesburg Elks Club, 171 So.2d 606, 608 (Fla. 2d DCA 1965).

The western gate is used for access to Frank Wynns' home. R. 148, lines 16-25 (D. F. Wynns, p.4) In photographs of the western gate attached to the deposition of Frank Wynns, tire ruts can be seen going through the gate and across the pasture which shows

regular use of the gate. Anyone visiting, or attempting to visit, Frank Wynns (e.g. a friend, service person, or salesperson) could use this unlocked gate. It is virtually impossible for the Wynns to show no one authorized by them used the gate, and that it was unforeseeable someone would.

Four (4) years later the same court would reject an unsupported inference that a trespasser was responsible for untying a gate. See, Hughes, supra. In Hughes, Landers claimed he did not know how his horse escaped. After the accident, the gate was down. He had fed the horse at 7:00 P.M. three (3) hours and twenty (20) minutes before the 10:20 p.m. accident, and then put it in the enclosed pasture and tied the gate shut. Hughes at 774. Of course, the Gordon defendant had also tied his gate shut. Although the defendant put the inference that an unknown person untied the gate into the minds of the jury, there was no proof offered to support this claim. Id. The Court distinguished Gordon, Lee, and Hinson on the grounds that in each case the defendant clearly showed an unknown third person was involved or the escape was not reasonably foreseeable. Id. at 775. The court noted that an untied gate could be one possible cause of the horse getting out and stated: "It is also a question of fact as to whether or not the Appellee did tie the cattle gap gate after feeding the horse." Id. at 775. In other words, the jury could disbelieve the defendant's testimony and conclude the gate was down due to the defendant's negligence. See, also, Leonardi v. Williams, 526 So.2d 222 (Fla. 4th DCA 1988) (Issues of fact remaining in consolidated

appeals as to whether defendants properly secured cattle enclosures)(Citations omitted).

The trier of fact must decide whether an intervening cause, such as an "unknown person or force" opening an unlocked gate, is foreseeable. If the intervening cause is foreseeable, the original negligent actor may still be held liable. City of Riviera Beach vs. Palm Beach County School Board, 584 So.2d 84, 86 (Fla. 4th DCA 1991). Only a fully independent and unforeseeable intervening cause absolves the original tort-feasor of liability. Loomis v. Howell, 604 So.2d. 1241, 1242 (Fla. 1st DCA 1992). It is not necessary for the original tortfeasor to foresee the precise injury or the precise manner in which the injury may occur. Id. See, also, Concord. Foreseeable acts of third persons are merely concurring causes and not superseding causes insulating tortfeasors from liability, where the acts of a third person combine with the tortfeasor's negligence to bring harm upon an innocent party. Homan vs. County of Dade, 248 So.2d 235 (Fla. 3rd DCA 1971), and State Farm Insurance Co. vs. Nu Prime Roll-A-Way of Miami, Inc., 557 So.2d 107, 109 (Fla. 3rd DCA 1990).

The courts of other states have recognized that where a gate has been found open after a collision involving livestock that the livestock owner could be negligent. Where the livestock owner had good fences and good gates, negligence was implied where a gate was found open and his livestock was upon the highway. The gate, fence, and enclosure are usually within the care, custody, and control of the livestock owner, and the gate is his responsibility.

29 ALR 4th, "Collision With Domestic Animals", 431, 547 section 13(a), citing, Gabbard v. Areno, 302 So. 2d. 45 (La. App. 1974).

A Missouri court affirmed a judgement for a motorist where the livestock owner found a gate he had checked earlier open after an accident. The open gate and animal on the road created a jury question, which the jury resolved in favor of the motorist. Id., citing, King v. Furry, 317 S.W. 2d 690 (Mo. App. 1958). Where a livestock owner testified the animals were in a well fenced pasture and that both gates thereto were fastened some six (6) hours before the collision, the appellate court reversed a judgement of dismissal for the defendant where at least one gate was found open after the accident. Id., citing, Scanlan v. Smith, 66 Wash. 2d 601, 404 P. 2d. 776 (1965) (Presence of livestock on roadway raised permissible inference of negligence). The trial court usurped the jury's function in deciding negligence against the plaintiff.

There is no disputing that Wynns gate could easily have been equipped with a padlock and that a lock would have prevented unknown use of the gate. R. 175 (D. F. Wynns p. 31, Lines 11-17). The gate is now equipped with a padlock. The cost of preventing unknown use of the gate is small relative to the potential risk of $12.00 padlock and chain would have prevented the western gate from being opened by a human or a cow.

When accepted principles concerning foreseeability of intervening causes (i.e., the unknown, unseen, unproven third party who must have opened the latched gate) are applied to the undisputed particular circumstances of this case, it is apparent issues of fact remain for a jury to decide. The Summary Final

Judgement should be vacated and this cause remanded for trial so the jury can decide whether Frank Wynns really shut and latched the gate, or whether it was foreseeable someone might open an unlocked gate used for access to a residence and allow some of the forty (40) cows kept on the premises to escape to the nearby public road causing serious injuries to Paula Fisel.

CONCLUSION

It is negligence per se to violate a statute creating a duty to protect a particular class from a particular injury or type of injury where, as here, the plaintiff is a member of the class protected, suffered an injury of the type the statute was intended to prevent, and the statutory violation was the proximate cause of the injury. At a minimum, it is prima facie evidence of negligence. The Appellant has made a prima facie case of negligence sufficient to go to the jury. Upon remand, the jury should be instructed that a violation of Florida Statute section 588.14 is negligence per se.

Genuine issues of material fact remain for the jury to determine. The jury should be allowed to determine whether the Wynns acted reasonably under the particular circumstances of this case in failing to lock a residence gate to which forty (40) head of cattle had unhampered access near a public road. The final summary judgement should be reversed and this cause remanded for trial on all issues.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail on this 3rd day of April, 1995 to: Frank Miller, Esquire for STEPHEN K. STUART, Stuart and Strickland, P.A., 217 Howell Avenue, Brooksville, FL 34601 and to BILLY ARNOLD SIZEMORE, Rt. 1, Box 341L, Webster, Florida.

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