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 REPLY BRIEF

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ARGUMENT IN RESPONSE AND REBUTTAL

ISSUE I

HAVE CHANGING CONDITIONS IN FLORIDA ALTERED PUBLIC POLICY AS ANNOUNCED IN *SELBY VS. 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 Court displayed great deference to the interests of the livestock industry "...as an important part of Florida agri-business...." in *Selby v. Bullock*, 287 So.2d 18,21 (Fla. 1973). This established the public policy in Florida. The *Selby* plaintiff, unlike Fisel, sought to eliminate fault as an element of an action under Florida Statute §588.15. *See, generally, Selby*.

The legislature did not intend liability without fault when it enacted the Warren Act because it specifically used the words "carelessly" and "negligently". Nothing in the Warren Act, however, requires plaintiffs in livestock cases to follow any different procedure or to meet any different or higher standard of proof of negligence, than do plaintiffs in any other type of case seeking compensation for "negligently" or "carelessly" caused damages. This case is not about "rewriting" laws or "eliminating" proof of negligence. This case is about trying livestock cases under the same rules, doctrines, and principles as all other negligence cases.

The Third District Court of Appeals created the rule that there is no inference of negligence from a cow standing in the road twelve (12) years after the Florida legislature enacted the Warren

Act. *Gordon v. Sutherland*, 130 So.2d 520 (Fla 3d DCA 1961). This rule is a creature of the courts and not of the Florida legislature. Furthermore, it is based upon an overbroad reading of *Lynch v. Durrance*, 77 So. 2nd 458 (Fla. 1955). It is appropriate for the Florida Supreme Court to modernize the tort law and to reconsider old unsatisfactory court made rules. *See*, *e.g.*, *Insurance Company of North America v. Pasakarnis*, 451 So.2d 447, 451 (Fla 1984); *Hoffman v. Jones*, 280 So.2d 431 (Fla. 1973); *and Gates v. Foley*, 247 So.2d 40, 43 (Fla. 1971). This Court is not required to stick its head in the sand and ignore important changes in the State.

Defendants and *Amicus* use the terms strict liability and absolute liability freely without considering what these terms mean. Strict or absolute liability is the rule that a person may be liable merely for acting even in the absence of fault. *See*, *e.g.*, 55 Fla. Jur. 2d, Torts, §9. *See*, *also*, *Isaacs v. Powell*, 267 So.2d 864 (Fla. 2d DCA 1972). It is generally reserved for ultra-hazardous activities or activities which may be beneficial but should pay their own way. *See*, *e.g.*, *City Service Company v. State*, 312 So.2d 799 (Fla. 2d DCA (1975). *See*, *also*, *Isaacs*. Strict liability makes one a virtual insurer but not an absolute insurer. The victim's own fault may be a defense where it is an intervening, efficient, independent fault which solely causes the result. *See*, *Isaacs* at 866. *See*, *also*, Fla. Stat. §676.04 (1993)(Negligence of the person bitten which is the approximate cause of the biting reduces owner's liability).

In contrast, the Wynns, or any other livestock owner sued for negligence, may provide evidence they did not negligently violate Florida Statute §588.14 or, if it was negligently violated, one or more of the usual defenses to negligence applies to reduce or eliminate their liability. Florida Statute §588.14 mandates that livestock owners keep their livestock off the public roadways. If they carelessly or negligently fail to comply with this duty, they are liable to the victim in damages.

Amicus Curiae relies entirely upon the red herrings of strict liability and *res ipsa loquitur*, which are not issues in this case. Only Florida Farm Bureau has raised the issue of *res ipsa loquitur*. It devotes an extraordinary number of pages and case citations to this non-issue, perhaps because it is easier to argue against this strawman than the issues Fisel did raise. Fisel will not rise to the bait and distract this Court from the real issues.

Amicus, who is an insurer of livestock owners, warns of "drastic economic implications" if this Court applies the same doctrines of negligence to the livestock industry as have been applied to every other Florida industry. Yet, *Amicus'* own brief demonstrates the fallacy of this claim. Conditions in Florida have changed sufficiently that this is no longer true, if it ever was. According to *Amicus*, livestock collisions are rare and the risk of serious harm is "scant". If collisions are rare and the risk of serious injury is "scant", then the risk of personal injury lawsuits is equally scant. The only "drastic economic implications" in this case are those Fisel stands to suffer. The

Wynns are not even in the livestock "business." The seriousness of the livestock collision problem depends on whether you are in the car when it hits the animal.

Fisel does not ask this Court to "eliminate an essential element" of §588.14 or §588.15, to "eliminate fault", nor to change the burden of proof. Sections 588.14 and 588.15 are completely silent on burdens of proof and "essential elements", which is the point the Appellant has been trying to make. The legislative intent of the Warren Act is to hold livestock owners liable in negligence. The use of the words "negligently" and "carelessly" in the disjunctive with other words in no way alters the burden of proof for negligence or creates a higher standard than where non-livestock owners act negligently.

On page ten (10) of its brief, *Amicus* uses the terms "fault" and "scienter" interchangeably. This illustrates the way Florida Statute §588.14 and §588.15 have been construed since *Gordon*. "*Scienter* is defined as `knowingly, to signify guilty knowledge', ..." *Brod v. Jernigan*, 188 So.2d 575, 580 (Fla. 2d DCA 1966)(Emphasis in original). The question certified likewise implies a requirement of knowledge as to how the gate came to be open. The word "scienter" has no place in the discussion of negligence, which requires neither knowing action nor guilty knowledge.

Sections 588.14 and 588.15 should be harmonized and read together. When the two (2) statutes are read together, the duty of livestock owners to keep their animals off the roadway is clear as

is their liability in negligence for failing to do so. Nothing in these two (2) statutes imposes a higher burden of proof on the Plaintiff than in any other negligence case. It is not the Plaintiff's duty to prove "scienter". Of course, if a Plaintiff can prove a willful or intentional act, he or she may still recover.

The parties are in complete agreement concerning the evolution of livestock law in Florida. Florida adopted the common law after Spain ceded Florida to the United States. The common law, as it applied to livestock, was statutorily abrogated around 1823 when open range laws were enacted. In 1949, the open range laws were repealed when the Warren Act was passed. *Hendry v. Rockow*, 238 So.2d 588 (Fla. 1970), *adopting*, *Rockow v. Hendry*, 230 So.2d 717 (Fla. 2d DCA 1970). Consequently, Florida Statute §588.14 and §588.15 are to be strictly construed to the extent they are in derogation of the common law.

The open range laws, which were Florida Statute §§588.02 to 588.06, imposed a burden upon the public at large that they fence their lands in order to keep other people's livestock off of their property. Livestock could range and graze on all unenclosed lands free of charge. Livestock owners had no liability for resultant damages. *See*, *Seaboard Airline Railway Company v. Coxetter*, 90 S. 469, 472 (Fla. 1921) *quoting*, *Savannah, etc. Railway Company v. Geiger*, 21 Fla. 669, 58 Am. Rep. 697.

The free ranging cattle did not mix well with automobile traffic. Finally, Governor Fuller Warren was elected upon the

promise to "get the cattle off the highways". *Beaver v. Howerton*, 223 So.2d 62, 64, *fn.* 1 (Fla. 2d DCA 1969). The Warren Act lifted the burden of fencing land from individual land owners and placed it back on the livestock owners. The Warren Act did not impose new burdens upon livestock owners. Rather, it was the enactment of Florida Statute §§588.02 to 588.06 which gave livestock owners privileges and rights they did not previously enjoy at common law. The common law liability for damages was somewhat restored by allowing damages against negligent livestock owners. But 126 years of free range tradition and deference to the cattle industry did not die with the Warren Act. The Courts continued to be reluctant to allow suits against livestock owners and held that violation of the Warren Act, which includes penal sanctions, did not justify an inference of negligence.

The Fifth DCA suggested this area of the law would benefit from some clarification. *Amicus* asserts that the Appellant "accuses" the Supreme Court and the Fifth District Court of Appeals of confusion. The Appellant accuses no one. She does, however, assert that the state of the law is confused, as did the Fifth DCA in its opinion below.

Fisel does not believe *Selby* controls the outcome of this case. She seeks the reversal of the summary judgment entered by the trial court on two (2) grounds: (1) the established doctrine of negligence *per se* applies to this case as it does to any other negligence case involving violation of an appropriate statute, and (2) there were sufficient fact issues under the particular

circumstances of this case to allow the plaintiff to proceed to trial.

The Fifth DCA apparently felt constrained by the public policy stated in *Selby*. Changing conditions in the twenty-one (21) years since *Selby* have altered the balance of interests weighed in *Selby*. There is now scant likelihood significant negative economic consequences would occur to the shrinking cattle industry if it was held to the same doctrines of negligence as all other industries and businesses in the state of Florida. There is no public policy basis for affording greater protection to cattle owners than to other businesses.

ISSUE II

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

The most striking feature of both the Answer Brief and the *Amicus Curiae* Brief is that neither distinguishes *DeJesus v. Seaboard Coastline Railroad Company*, 281 So.2d 198 (Fla. 1973), *Nicosia v. Otis Elevator Co.*, 548 So. 2d 854 (Fla. 3rd DCA 1989), or any other case dealing with negligence *per se*. No one argues the doctrine does not apply because they cannot.

Both assume the use of the words "negligently" and "carelessly" together with "intentionally" and "willfully" in the disjunctive somehow "prohibits" the application of the well recognized doctrine of negligence *per se*. Neither cites any case for the proposition that negligence *per se* is the equivalent of

strict liability. The clear legislative intent of Florida Statute §§588.14, 588.15, and 588.24 is to protect the motoring public from collisions with livestock, and to hold livestock owners civilly and criminally liable for the negligent or intentional failure to keep livestock off of the roads. Nothing in these statutes alters the burden of proof or the methods of proof available in a livestock collision lawsuit.

If this Court agrees that the violation of Florida Statute §588.14 is negligence *per se*, then the statute will be read to the jury along with this instruction:

> Violation of this statute is negligence. If you find that a person alleged to have been negligent violated this statute, such person was negligent. You should then determine whether such negligence was a legal cause of the injury complained of. Fla. Std. Jury Inst. (Civ.) 4.9.

This Court, of course, approved this instruction. The "Note On Use" which accompanies this standard jury instruction advises it should not be used in "strict liability" cases, because strict liability is predicated on violation of a statute enacted to protect a particular class of persons who cannot protect themselves. The violator of a strict liability statute is liable for the consequent injury regardless of whether the violation was a "proximate" or "legal" cause of the injury by the traditional tests. *See*, Fla. Std. Jury Inst. (Civ.) 4.9, "Note On Use" (Citations omitted). The "Comment" to that section provides that it is negligence *per se* to violate a penal statute or ordinance enacted to protect a particular class of persons from a particular

injury or type of injury. *See*, Fla. Std. Jury Inst. (Civ.) 4.9, "Comment", *citing*, *DeJesus*. The Legislature establishes a minimum standard of reasonable care to which every reasonably careful person must adhere when it enacts such a statute. *Id*. Negligence *per se* and strict liability are not synonymous and require different jury instructions.

The Legislature has had twenty-one (21) years since the *Selby* decision to amend the Warren Act if it wished to do so. It has had the same number of opportunities to abrogate the doctrine of negligence *per se*. All it would have to do is to enact a statute saying, "The violation of any statute shall neither be considered negligence *per se* nor evidence of negligence in any action for damages brought in the courts of this State." It has not done so, despite the enactment of the Tort Reform Act, the Uniform Contribution Among Joint Tortfeasors Act, and many other laws dealing with matters of negligence law.

Many hundreds or thousands of statutes were on the books when *DeJesus* was decided. As far as the Appellant is aware, Florida Statute §588.14 is the only statute which existed in 1973 to which *DeJesus* has not been applied. The words "carelessly" and "negligently" in §588.15 do not make §588.14 different from all other statutes in the state of Florida.

Amicus contends the Legislature could have revisited and amended the Warren Act had it intended to "eliminate" proof of negligence. Elimination of negligence is not the issue. At the time the Warren Act was enacted, this Court would not adopt the

doctrine of negligence *per se* for another twenty-four (24) years. The Legislature would have to have been prescient to have anticipated the future doctrine of negligence *per se* and to have side-stepped it via the enactment of Florida Statute §588.15 using the words "carelessly" and "negligently". No other statute in effect in 1973 had to be amended before the application of negligence *per se*.

Nothing in Florida Statute §588.15 requires a "affirmative act" of negligence. Negligence consists of either doing something a reasonable careful person would not do or in failing to do something that a reasonable careful person would do. *See, e.g., Miriam Masheck, Inc. v. Mausner*, 264 So.2d 859 (Fla. 3d DCA 1972). *Amicus* speaks in terms of the "burden of proof" established within the Warren Act and the "degree of fault" required. There is no unique burden of proof or degree of fault established within the statute. Fisel's burden is the same as any other plaintiff in a negligence action. She must show by the greater weight of the evidence that the Wynns did do, or did not do, what a reasonably careful person would do under the particular circumstances of this case. Fisel asks for no alteration or amendment of §588.15. She asks only for consistency in the application of the law as it now exists.

Amicus takes a very broad view of *In re: Investigation of Circuit Judge*, 93 So.2d 601 (Fla. 1957), which considered the law of impeachment. The Court noted Florida had no summary method of impeachment, although some other states did have summary methods

for impeachment. This Court stated it was bound to follow the only impeachment method allowed by law. The Court would not substitute "judicial cerebration" for law or for that for which it thought should be the law. *Id.* at 607. Application of an existing doctrine of negligence law to this case is not the substitution of judicial cerebration for law.

Amicus asserts that an actual violation of the statute is a prerequisite to a finding of negligence *per se*. The Wynns did violate Florida Statute §588.14. There is no dispute Fisel struck the Wynns' cow on a public road while it was not under the manual control of a person. "Livestock `running at large' or `straying' shall mean any livestock found or being on any public road of this state....not under manual control of a person." Fla. Stat. §588.13(3) (1993). Whether Florida Statute §588.14 was violated is a jury questions. *See*, Fla. Std. Jury Inst. (Civ.) 4.9.

The Appellant would like to point out two (2) errors in the *Amicus* brief. First, Paula Fisel was not "standing" on the roadway when she was hit. She was hit by an oncoming car while running for her life. R. 100, Line 6-102, Line 18 (D. Fisel pages 76-79). Second, this case is not about a failure to plead facts. Fisel plead a *prima facie* case of negligence using the language of Florida Statute §588.15 R. 1-3. The trial court ruled as a matter of law that the undisputed facts did not establish negligence relying upon *Gordon* and *Lee v. Hinson*, 160 So. 2nd 166 (Fla. 2nd DCA 1964).

Florida Statute §588.14 was enacted to protect the motoring public from collisions with livestock. Paula Fisel was a member of the motoring public who was injured when her vehicle struck a cow in a public highway in violation of §588.14. This case meets all the requirements of negligence *per se* and the summary judgment should be reversed. This case should be remanded with instructions for the giving of the negligence *per se* instruction to the jury.

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 has a range of options available to give Paula Fisel her day in court - from the very narrow to the very broad. This issue presents the narrowest opportunity for this court to rule. The Court can rule that issues of fact and law remain to be determined by a jury, given the particular circumstances of this case. The second issue presents a middle ground. That is, the Court can rule that a violation of Florida Statute §588.14 is negligence *per se* or evidence of negligence in an action brought pursuant to the authority of Florida Statute §588.15. The result would be that negligence cases under §588.15 would be brought under the same rules and doctrines as all other negligence cases in Florida. Finally, the Court could take the very broadest approach of all, which is that suggested by Issue I. The first issue would allow this Court to rule that changing conditions have altered public policy and that is the basis for "new" law in this area.

The Plaintiff favors the middle ground, which would allow this Court to simply apply existing well established principles of law. The result would be consistency rather than ground breaking precedence.

This case presents a classic jury question. Negligence is typically a jury issue because what is reasonable under the circumstances involves a specific standard of care and is an issue upon which reasonable people can disagree. *Spadafora v. Carlo*, 569 So.2d 1329, 1331 (Fla. 2d DCA 1990).

> Negligence is the failure to use reasonable care. Reasonable care is that degree of care which a reasonably careful person would use under like circumstances. Negligence may consist either in doing something that a reasonably careful person would not do under like circumstances or in failing to do something that a reasonably careful person would do under like circumstances. Fla. Std. Jury Inst. (Civ.) 4.1.

All Fisel seeks is the right to argue to a jury that the Wynns failed to do what a reasonably careful person who had forty (40) head of cattle on their property with unhampered access to an unlocked gate regularly used for ingress and egress near a public road would do. In contrast, the Appellees and *Amicus* ask this Court to maintain a standard which overlooks careless or negligent acts and requires a showing of intent, or willfulness, or an "affirmative act", or "scienter" in order to impose liability upon livestock owners. This is a perfect example of how the law of negligence has been lost in this discussion. As presently construed, Florida Statute §588.15 has no force and its intent has been destroyed.

A jury should be allowed to determine whether the gate was open because Frank Wynns, who was the last known person to have used the gate, failed to latch it properly, or whether it was reasonably foreseeable an unlocked gate regularly used to enter and exit property where forty (40) cattle had unhindered access to some of the cows to escape to the nearby public road. A cheap padlock could easily have prevented this accident. The summary judgment should be reversed and Paula Fisel should be allowed to present her case to a jury on remand. The jury and not the trial judge should decide whether the Wynns failed to use reasonable care under the particular circumstances of this case.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail on this 17th day of July, 1995 to: Frank Miller, Esquire for STEPHEN K. STUART, Stuart and Strickland, P.A., 217 Howell Avenue, Brooksville, FL 34601; George A. Vaka, Esquire, and Tracy Raffles Gunn, Esquire, Post Office Box 1438, Tampa, Florida 33601; and to BILLY ARNOLD SIZEMORE, Rt. 1, Box 341L, Webster, Florida.

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