IN THE SUPREME COURT OF MISSISSIPPI

NO. 2010-CA-01267

DIANA LADNIER and
LAWRENCE LADNIER **APPELLANTS**

VERSUS

JOSEPH HESTER **APPELLEE**

CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons may have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Honorable Kathy King Jackson, Circuit Court Judge, George County, Mississippi;
2. Diana Ladnier and Lawrence Ladnier, Plaintiffs/Appellants;
3. Joseph Hester, Defendant/Appellee;
4. Garner J. Wetzel, Esq. and James K. Wetzel, Esq., with the law firm of James K. Wetzel & Associates; Attorneys for Plaintiffs; and,
5. Tristan Russell Armer, Esq. with the law firm of Heidelberg, Steinberger, Colmer & Burrow, P.A., and Patrick Collins, Esq., Attorneys for Joseph Hester.

TRISTAN R. ARMER
PATRICK COLLINS
Attorneys for Joseph Hester

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STATEMENT OF THE ISSUES

I. The Circuit Court properly dismissed Plaintiffs' case on summary judgment as there were no genuine issues of material fact and the plaintiffs simply failed to produce evidence that Defendant's negligence caused his horse to escape onto the road.

II. The Circuit Court was correct in ruling that "the Plaintiffs have wholly failed to show that the horses had any propensities to escape or that Mr. Hester failed to act with reasonable care".

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STATEMENT OF THE CASE

Plaintiffs, Diana Ladnier and her spouse Lawrence Ladnier (hereinafter "Ladnier" or "The Ladniers"), filed a complaint against Joseph Hester (hereinafter "Hester") in the Circuit Court of George County, Mississippi. Ladnier alleged that she suffered personal injury when her automobile hit Hester's horse and that Hester's negligence or gross negligence caused the horse to be at large at the time of the accident. Hester answered the complaint denying he was negligent or grossly negligent.

Written and deposition discovery was completed. After discovery, the matter was set for trial and Hester moved the Circuit Court of George County to dismiss Plaintiffs' claims against Hester on the grounds that Plaintiffs could not produce evidence that Hester was negligent in keeping his horse. Defendant averred that the Plaintiffs could not produce evidence that Hester's negligence or gross negligence caused or allowed his horse to escape its fence at the time of the accident. On July 20, 2010, the trial Court granted summary judgment for the Defendant.

Aggrieved by the ruling of the Circuit Court, the Ladniers filed this appeal contesting the finding of the Circuit Court that the Ladniers failed to produce any evidence that Hester was negligent in securing his horse.

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STATEMENT OF RELEVANT FACTS

The above styled case began as an action alleging negligence and gross negligence on the part of Mr. Hester in the maintaining of his horses at his home located in George County, Mississippi. The incident made the subject of this lawsuit was an automobile accident involving a vehicle driven by Plaintiff, Diana Ladnier, and a horse owned by Joseph Hester. Plaintiffs claimed that, on January 2, 2008, Mrs. Ladnier was driving along River Road in George County, Mississippi just before or after midnight when her car hit Mr. Hester's horse. As a result, Diana Ladnier sued Hester for negligence and gross negligence. Lawrence Ladnier sued for loss of consortium.

Plaintiffs, in their Complaint, alleged that the Mr. Hester was negligent and grossly negligent, and thus liable to Plaintiffs, for allowing his horses to roam free on River Road. Plaintiffs claimed that Defendant violated §69-13-111 of the Mississippi Code for allowing his horses to run on a "major county road." (CR. ¶ VI of the Complaint)[1]

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[1] In their response to the Defendant's Motion for Summary Judgment, the Plaintiffs conceded that §69-13-111 did not apply to River Road, nor to this case. (*Plaintiff's Response to Motion for Summary Judgment, p. 2*) The §69-13-111 claim was dropped.

In their remaining claims, the Plaintiffs claimed that Mr. Hester breached his "duty of reasonable care by allowing said horses to enter River Road".

In paragraph "X" of their complaint, Plaintiffs claimed that Mr. Hester was guilty of "gross negligence" and sought punitive damages because of the oppressive and reckless conduct of Defendant.

The evidence presented by both sides in this case conclusively establishes:

1) Plaintiff, Mrs. Ladnier was traveling southbound on River Road just after midnight on January 2, 2008, when the vehicle she was driving struck a horse owned by Mr. Hester. *Complaint ¶IV.*

2) Three horses owned by Mr. Hester escaped from the fenced-in field next to Defendant's home by trampling down the horse and cattle box wire fence. R. at 167-168, 114-115.)

3) Prior to the Date of the accident (January 2, 2008), the horses had been in the fenced area since March of 2006. *R. at 125.*

4) The fence where the horses escaped had been erected in March, 2006. *R. at 125.*

5) The fence where the horse escaped was made of horse and cattle box wire with six foot steel posts spaced approximately every 10 feet. *R. at 114 and R. at 331.*

6) Mr. Hester testified:

"Q (by Mr. Wetzel). By January of '08, they [the horses] had been on the property just shy of two years –

A (by Mr. Hester). That's correct." *R. at 136.*

7) Mr. Hester fed the horses daily. *R. at 127.*

8) Prior to the accident, Mr. Hester had fed the horses at 6:00 p.m., which would have been just six hours before the accident. *R. at 168.*

9) Mr. Hester testified "Most all the time I checked the fence every night during feeding time." *R. at 168.* Mr. Hester said he visually observed the fence on January 1, 2006, at approximately 6 p.m. *R. at 168 and 177.*

10) The Plaintiff, Mrs. Ladnier, testified that she did not know how horses got out of the fence. *R. at 232-233.*

11) Mrs. Ladnier also stated that she knew of no problems with the fence. *R. at 234.*

12) Mr. Ladnier was asked the following in his deposition:

> "Q (by Mr. Armer) Do you have any knowledge that those horses had gotten out of the fence before?
>
> A (by Mr. Ladnier) No. I don't have any idea about that. That's what I said I said, I don't know." *R. at 293.*

13) Counsel for Plaintiff attempted to entice Mr. Hester to state the horses had escaped prior to the accident, to no avail:

> "Q (by Mr. Wetzel) And, prior to January of '08, tell me about – if I understand correctly, from my investigation you had had some prior breakouts of those horses on some occasions in that two-year period, is that correct?
>
> A (by Mr. Hester) No, sir.
>
> Q. (by Mr. Wetzel) You never had any one of those horses ever break out of their enclosure?
>
> A. (by Mr. Hester) Never broke out.
>
> .....

Q. (by Mr. Wetzel) Had there ever been a time where the horse were outside of the enclosure for any reason that they shouldn't have been out?

A. (by Mr. Hester) No, sir." *R. at 136-137.*

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STANDARD OF REVIEW ON APPEAL

This Court's standard of review regarding motions for summary judgment is well established. The Supreme Court reviews summary judgments *de novo*. *Massey v. Tingle*, 867 So. 2d 235, 238 (Miss. 2004) (citing *Hardy v. Brock*, 826 So. 2d 71, 74 (Miss. 2002). The facts are viewed in the light most favorable to the nonmoving party. *Id.* (citing *Robinson v. Singing River Hosp. Sys.*, 732 So. 2d 204, 207 (Miss. 1999)). The existence of a genuine issue of material fact will preclude summary judgment. *Id.* The non-moving party may not rest upon allegations or denials in the pleadings but must set forth specific facts showing that there are genuine issues for trial. *Id.* (citing *Richmond v. Benchmark Constr. Corp.*, 692 So. 2d 60, 61 (Miss. 1997)).

This Court begins its review of the trial court's grant of summary judgment keeping in mind that "the presence of fact issues does not per se entitle a party to avoid summary judgment. The court must be convinced that the factual issue is a material one, one that matters in an outcome determinative sense." *Massey v. Tingle*, 867 So. 2d 235, 238 (Miss. 2004) (citing *Hudson v. Courtesy Motors, Inc.*, 794 So. 2d 999, 1002 (Miss. 2001); *Simmons v. Thompson Mach. of Miss., Inc.*, 631 So. 2d 798, 801 (Miss. 1994)).

Summary judgment has become a well-settled procedure in Mississippi. It is carefully given, but is required under the appropriate circumstance. *Wilbourn v. Stennett, Wilkinson & Ward*, 687 So.2d 1205 (Miss. 1996). Summary judgment is mandated where the respondent has failed to "make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Galloway v. Travelers Insurance Co.*, 515 So.2d 678, 683 (Miss. 1987), *quoting Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct 2548, 2552, 91 L.Ed.2d 265 (1986).

The movant bears the burden of persuading the Court that (1) no genuine issue of material fact exists, and (2) that on the basis of the facts established, the movant is entitled to summary judgment as a matter of law. MRCP 56(c). Once the absence of any genuine issue of material fact has been shown, the burden of rebuttal falls upon the non-moving party. To survive summary judgment, the non-moving party must produce specific facts showing that there is a genuine material issue for trial. MRCP 56(e); *Fruchter v. Lynch Oil Co.*, 522 So.2d 195, 199 (Miss 1988).

"The purpose of this rule is to expedite the determination of actions on their merits and to eliminate unmeritorious claims. . ." MRCP 56 cmt. This rule provides a means to dismiss cases, like the one presently before the Court, brought by those without lawfully compensable claims.

SUMMARY OF THE ARGUMENT

The Ladniers' appeal centers on trying to convince the appellate court that Hester was negligent for using horse and cattle box wire and not barbed wire to secure his horse. They seek to have the court determine for them that horse and cattle wire fencing is so inherently defective that its mere use constitutes negligence. Further, plaintiffs seek this determination based solely upon argument and not fact that the fencing chosen by the defendant is not proper to secure a horse. There is simply no evidence that Hester should have done something but did not, or, did something that he was not supposed to do.

The Ladniers did not produce any testimony, exhibits, or other evidence to support their evolving theories that using horse and cattle box wire is malfeasant or misfeasant. In fact, the evidence is undisputed that his horse had been adequately secured by the fence in question for almost two (2) years before the night the horse escaped. The evidence is also undisputed that Mr. Hester kept his horses well fed and fed his horses on the day of the escape.

If the Plaintiffs had evidence that horse and cattle box wire fencing was inadequate for keeping horses, they should have produced the evidence. The trial court was correct in ruling that "[t]he Plaintiffs have wholly failed to show that the horses had any propensities to escape or that Mr. Hester failed to act with reasonable care."

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ARGUMENT

I. THE CIRCUIT COURT PROPERLY DISMISSED PLAINTIFFS' CASE ON SUMMARY JUDGMENT AS THERE WERE NO GENUINE ISSUES OF MATERIAL FACT AND THE PLAINTIFFS SIMPLY FAILED TO PRODUCE EVIDENCE THAT DEFENDANT'S NEGLIGENCE CAUSED HIS HORSE TO ESCAPE ONTO THE ROAD.

Plaintiffs allege negligence which requires proof that (1) Mr. Hester owed a duty to Plaintiffs; (2) Mr. Hester breached his duty to Plaintiffs; and (3) Plaintiffs sustained damage as a result of Mr. Hester' breach of that duty. *Ball v. Dominion Ins. Corp.*, 794 So.2d 271, 273 (Miss. 2001); *Hardy v. K Mart Corp.*, 669 So.2d 34, 37 (Miss. 1996). The moving party has the burden of showing that no genuine issue of material fact exists and that, viewing the evidence in a light most favorable to the non-moving party, the movant is entitled to a judgment as a matter of law. *McMillan v. Rodriquez*, 823 So.2d 1173 (Miss. 2002).

In their appeal brief, the Plaintiffs cite very little law for the underlying proposition of whether there is liability under the established facts at bar because the law of the State of Mississippi is contrary to Plaintiffs' position. There are several cases that point to the opposite conclusion that the Plaintiffs ask this Court to reach.

In *McMillan, supra*, the plaintiff presented evidence that Mr. McMillan's bull had escaped from its enclosure two months prior to the accident in question. *Id.* at 1176. The court

wrote that "[g]enerally, the owner or keeper of a domestic animal is charged with knowledge of the natural propensities of animals of the particular class to which this animal belongs, and if these propensities are of the kind that might cause injury he must exercise the care necessary to prevent such injuries as may be anticipated." *Id.* at 1178.

As the trial court in the case at bar wrote in its order: "[t]he Ladniers have produced no evidence that Mr. Hester failed to act with reasonable care or that the horses had any propensities that might cause injury or possessed vicious dispositions. At the hearing the Ladniers conceded that the horses had not escaped the field in the previous two years they were housed there." *R. at 449.*[2] The Ladniers had no evidence that Mr. Hester was negligent. Instead they relied solely on the fact that the horses trampled the fence for the first time in two years of confinement and escaped for a fact that Defendant was generally misfeasant. Now, on appeal, they argue that the fencing, which is commonly used for fencing livestock, is by its nature defective or can be implied as defective and its use by Defendant was malfeasant. To avoid the summary judgment, however, Plaintiffs were required to produce evidence, not just an argument, that established the Defendant knew or should have known about the foreseeable failure of fence to restrain his livestock from roaming free, or, that the Defendant breached some known, articulate duty. Ladnier could not produce this evidence because it does not exist.

In another case, *Barrett v. Parker*, 757 So.2d 182 (Miss. 2000), the court held that a plaintiff was required to prove actual negligence on the part of defendant: that the defendant was negligent in allowing his calf to escape onto the road. *Id.* at 185. The court in *Barrett* approved

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[2] Plaintiffs mis-characterize the testimony in their brief when stating that "Hester even stated that *the* horses liked to lean against the fences." *(Plaintiffs' appeal brief p. 13, citing Depo. of Hester 55:23*) Hester was asked a general statement about horses liking to lean against fences, not his particular horses, but horses in general.

the trial court's instruction to the jury on negligence as "correctly set[ting] out the elements which a plaintiff must prove in order to prevail in a negligence action." *Id.* at 188. The court said that the law was as follows: "the owner of a cow, which has escaped its enclosure and has become located upon a county public road is not necessarily liable for injuries sustained by a motorist who collides with such cow on the roadway. *Id.*

The *Barrett* court reiterates that there is no strict liability – Mr. Hester is not liable simply because his horse escaped. The Plaintiffs must prove Mr. Hester's negligence allowed or caused the horse to escape. The Plaintiffs must prove that Mr. Hester failed to exercise reasonable care and that his failure allowed the horse to escape. The Ladniers, to prevail, must prove facts beyond *the horse escaped.*

There is simply no evidence that Mr. Hester failed to exercise reasonable care to keep his horse from being at large. The horses had never escaped their enclosure prior to the night of the Plaintiff's accident. The fence had held for almost two years. Mr. Hester checked the fence at feeding time each day and he had fed the horses at 6:00 p.m. the night of the accident. *R. at 167 and 177.* On the night of the accident Mr. Hester visually observed the fence. *R. at 177.*

The Court in *Barrett* wrote that "it would not be impossible for a cow to escape and get onto a nearby road even though its owner was not negligent in any manner in his confinement of the cow. Therefore, allowing the jury to infer negligence by Parker simply because his yearling was loose on the road would not be appropriate." *Id.* at 187-188. The same would be true for the horse in this case. The Ladniers must show more than the fact that Mr. Hester's horse was on the road to infer negligence. They must produce actual evidence of negligence. The *Barrett* case makes is clear that it is *not* proper to infer negligence simply from the fact that the horse, Diego, was on River Road.

The evidence showed that the horse escaped on the night of the accident by smashing down part of the box wire fencing. *R. at 167-168.* When Mr. Hester inspected the fence after learning that his horses had escaped, he discovered that the horse and cattle box wire had been smashed down to approximately two feet from the ground. *R. at 167-168.* The fencing where the horses escaped was made from four foot "horse and cattle box wire" with six foot steel posts every ten feet. *R. at 114-115.* The only evidence in the record is that the fencing, which the Ladniers now claim was defective, was designed for horses and cattle. If the Ladniers had evidence that horse and cattle box wire was not adequate for horses, that evidence should have been presented to the trial court.

In *Pennyan v. Alexander*, 91 So.2d 728 (Miss. 1957), the plaintiff's automobile ran into a bull owned by the defendant. The court noted that the "general rule relating to liability for the owner of livestock for damages for injuries to motorists...from such livestock being at large" was as follows:

> "the owner of a domestic animal in not under an absolute duty to keep it from being loose and unattended on the highway and its being there is not in itself, or necessarily, unlawful or a wrong to the person injured or to the person whose property is damaged so as to render its owner liable for the injurious consequences that may accidentally flow therefrom." *Id.* at 732.

The court went on to say that "the rule is well-settled" that the owner of an animal should notice the general propensities of a class of animals - horses in our case - and the particular propensities of the animal itself - Mr. Hester's horses.

The horse that Mrs. Ladnier hit was named Diego. Diego himself was described as "real calm" and "pretty much excellent with kids and children." *R. at 141.* None of the three horses had any "mean propensities." *R. at 142.* The *Pennyan* Court said that if an owner has reason to know that a particular horse is "accustomed to kick" or a bull "that is given to assaults," then the

owner had notice of those tendencies and should know that damage may result. *Id.* at 732. There is no dispute in our case that Mr. Hester had no reason to know that Diego would escape. They had been securely enclosed in the same fencing for approximately two years with no effort to escape. There was no evidence that Hester's horses had a propensity to smash down a fence and escape prior to the accident.

The court in *Pennyan* concluded that "the keeper of a domestic animal is not in general responsible for any particular mischief that may be done by such animal which was of a kind not to be expected from him, and which it would not be negligence in the keeper to fail to guard against." *Id.* The *Pennyan* Court positively cited cases from other jurisdictions for the proposition that, in the absence of a statute to the contrary, the owner of livestock is not liable for injuries when the animals are on the highway unless the animal had propensities to engage in acts that would likely or probably result in injury. *Id.* at 733. The *Pennyan* court upheld the trial court's dismissal of the plaintiff's claim because the facts "were not sufficient to show that the owner of the animal involved should have anticipated that injury would result" when the bull escaped from its enclosure and entered the highway. *Id.* at 734.

The law is very favorable to Defendant in the case at bar. There is no statute cited that was violated by Mr. Hester, nor is there evidence that Mr. Hester's horses had a propensity to escape and run on the highway. Absent any evidence of Diego's propensity to run at large or smash down the surrounding fencing, summary judgment is proper.

Defendant Hester will now address the Plaintiffs' arguments in brief in the order presented therein primarily to dispute Ladniers' assertions regarding the state of the evidence in the record.

i. Plaintiffs argue that horse and cattle field fencing is a "dangerous hazard."

The Ladniers claim that field fencing is not adequate for horses and using it creates a "dangerous hazard" for drivers. *Brief of Appellants p. 12.* The Ladniers go so far as to describe horse and cattle box wire fencing as "chicken wire." However, The Ladniers cite no evidence in the record that any fencing other than horse and cattle box wire fence was used in the area wherein Diego escaped. The Ladniers also implore for the Court to find that only barbed wired fencing is adequate to restrain a horse. If this argument, which is not supported by any standards or expert testimony, is taken to its logical conclusion, a huge percentage of cattle and horse fencing in Mississippi is inadequate and hazardous. Mr. Hester testified:

Q. And describe this field wire fence for me, please.

A. It's just basic horse and cattle box wire." *R. at 114, 103-106.*

The Plaintiffs now claim that such fencing is hazardous, but can point to no evidence in the record to support their position. Furthermore, the Plaintiffs claim barbed wire fencing is better than horse and cattle fencing, but again have no evidence to support this claim. The Ladniers did not produce any product warnings, expert testimony or recognized industry standards preferring barbed wire over horse and cattle box fencing to restrain a horse.

This Court has ruled in the past that negligence could not be inferred merely because an animal escaped and caused an accident. *Barrett*, 757 So.2d at 187. The *Barrett* Court said that it would be acceptable to infer negligence if the defendant's "fence was in fact *proved* to be in poor condition." (*Emphasis added*) *Id.* Ladnier, to defeat the summary judgment, must produce actual evidence that the fence was poor condition. There is a complete lack of evidence that Mr. Hester's horse and cattle fence was in a poor condition. In fact the evidence in the record on the condition of the fence was that it had restrained Hester's horses without issue for almost two

years, was inspected regularly and was in perfect working order. Moreover, Diego did not escape because of the condition of the fence, Diego escaped by smashing down the fence.

ii. Plaintiffs argue that only barb wire fencing is adequate without any proof of the same.

In the record below the only evidence presented was that the fence was in good repair and Mr. Hester regularly inspected it to be sure that it remained in good repair. Plaintiffs argue that horse and cattle fencing "might not be adequate to detain horses." Yet the Plaintiffs cannot cite any evidence in the record to support the argument.

The Ladniers imply in their brief that Mr. Hester's fence consisted of only a small portion of horse and cattle box wire or field fencing. This is simply contrary to the evidence. Exhibit 10 to Mr. Hester's deposition clearly shows that approximately half of the fencing was "field wire." *R. at 190.*

The Ladniers also claim on appeal that the use of horse and cattle box wire field fence is "negligence simply waiting on proximate cause." (*Brief of Appellants p. 14*). The trial court ruled that "The Ladniers have produced no evidence that Mr. Hester failed to act with reasonable care." Mississippi law requires that a plaintiff show a defendant "failed to exercise reasonable care to keep the [animal] from being at large." *Id.* at 188. The Ladniers' claim failed not because the court made erroneous findings of facts, but because there were no facts showing Mr. Hester failed to use reasonable care.

iii. The Plaintiff's unsubstantiated claims are legally and factually unfounded.

The Ladniers argued in their brief that a "great majority" of the field was fenced with barbed wire. This is simply untrue. As previously mentioned, Exhibit 10 to Mr. Hester's deposition and his description of the fencing shows that about half of the field was fenced with horse and cattle wire fencing. *R. at 107-113, 190.* The Ladniers claim that the horse and cattle

fencing was a "time-bomb waiting to explode." *Brief of Appellants p. 16.* Again, there is no evidence that the fence was inadequate and that with the mere elapse of time, the fence would fail and the horses would escape. Moreover, there is no evidence that Hester knew or should have known that solely by the lapse of time, his horses were bound to escape. If the Ladniers' argument were true, then simply with the passage time all over George County and the rest of rural Mississippi, we should begin to see the roads of this State filled with wandering livestock.

In addition, Plaintiffs now claim, for the first time on appeal, that the field fencing "is cheaper and easier to install alternative to barb wire fencing." There is no evidence in the record to support this new argument. Nowhere in the record is there testimony or other evidence about the cost of different type fencing and the ease of installing the same.

Summary judgment is mandated where the respondent has failed to "make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Galloway v. Travelers Insurance Co.*, 515 So.2d 678, 683 (Miss. 1987), *quoting Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct 2548, 2552, 91 L.Ed.2d 265 (1986). As the trial court stated: "The Plaintiffs have wholly failed to show that... Mr. Hester failed to act with reasonable care." *R. at 448-449.*

II. THE TRIAL COURT WAS CORRECT IN RULING THAT "THE PLAINTIFFS HAVE WHOLLY FAILED TO SHOW THAT THE HORSES HAD ANY PROPENSITIES TO ESCAPE OR THAT MR. HESTER FAILED TO ACT WITH REASONABLE CARE."

Plaintiffs failed to present any evidence in the record showing Mr. Hester knew, or had reason to know, the horses would escape. As the trial court noted in its order granting summary judgment, "The Plaintiffs admitted that there was no evidence that the horses had ever gotten out in the approximately two years they were housed in the same field with the same fence." The

trial court also noted in its order that "At the hearing the Ladniers conceded that the horses had not escaped the field in the previous two years they were housed there."

The Plaintiffs argue that the jury should be able to infer from the fact that the horses escaped there must be negligence on the part of Mr. Hester. The Supreme Court of Mississippi wrote that "it would not be impossible for a cow to escape and get onto a nearby road even though its owner was not negligent in any manner in his confinement of the cow." *Barrett*, 757 So. 2d at 187-88. Negligence cannot be inferred from circumstantial evidence. *Id.* at 187. There has to be some proof that the defendant "failed to exercise reasonable care to keep the [animal] from being at large." *Id.* at 188. There is no evidence that Mr. Hester failed to use reasonable care. The Ladniers' main argument, that the mere escape is evidence of negligence, is contrary to established Mississippi law.

To the contrary, the evidence in the case at bar showed his fencing was adequate to keep the horses securely with no breach for two years, that he visually inspected it regularly, and that he had fed the horses on the night of the accident at 6 p.m. and did not see any problems with his fence.

Plaintiffs argue that the question for the jury should be whether "Mr. Hester breached his duty by using barbless" fencing. *Brief of Appellants, p. 17.* Ladnier cites no authority that Hester had a duty to used barbed wire in the first instance. There are standards, industry customs or expert opinions in the record regarding the adequacy of the fencing Hester used or that barbed is mandated upon a horse owner. It is incumbent upon the Ladniers to support their theory of liability with evidence at the trial court level - which they did not do.

The Ladniers submitted a photograph with their brief of Hester's fencing produced in discovery by Hester. Mr. Hester testified that the fence in the photograph was "trampled down"

when he looked at it after the accident. *R. at 167.* The fence was pushed down to within two feet of the ground and Mr. Hester pulled it back up after the accident. *R. at 167-168, 170.* The Ladniers claim that Mr. Hester testified he allowed the horses to pasture across the street "one week out of every month on Bahia grass up until this accident occurred." *Brief of Appellants p. 19.* What Mr. Hester said was that he would take them across the street to pasture "[t]hroughout the summer, the previous summer." *R. at 165.* This accident happened on January 2, 2008, some time after the summer.

The Ladniers then combine these two statements by Mr. Hester to reach the conclusion that evidence in the record supports the theory that the horse smashed down the fence in order to go to the pasture across the street to get to Bahia grass and that because Mr. Hester used horse and cattle fencing, it was not sufficient to restrain these hungry horses form going across the street to graze.

As the record clearly shows, Mr. Hester fed his horses hay every day and had fed them at 6 p.m on the night in question. Diego was not hit by Ladnier in the adjacent pasture while satisfying his hunger on Bahia grass either. If the Ladniers wanted to succeed under this theory, they should have produced some evidence, any evidence, that horses will smash down horse and cattle fencing, but not barbed wire fencing, to get to another field to eat Bahia grass, even after they were fed with hay. There is no evidence that horses will smash down a fence to escape to get Bahia grass over eating hay. Ladniers' theory is just an argument. It is not the citation of a fact in the record supporting that theory.

The Ladniers' final argument is that the fence was inadequate "based on the staples and fasteners that were used." *Brief of Appellants p. 21.* There is simply no evidence that the staples came out, allowing the horses to escape.

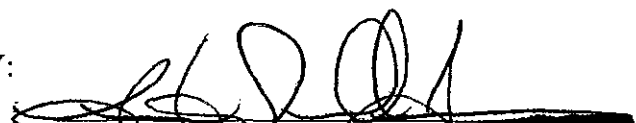
CONCLUSION

Mr. Hester is entitled to judgment as a matter of law because Plaintiffs have no evidence to establish the essential elements of their negligence and gross negligence actions. "[T]here must be some evidence of negligence given a jury before it can determine that a defendant is guilty of negligence." *J.C. Penney Co. v. Sumrall*, 318 So.2d 829, 832 (Miss. 1975). There is no evidence the fence was inadequate. There is no evidence the horses had a propensity to escape. There is no evidence that the horses were underfed or malnourished. There is no evidence that Hester is required to use barbed wire fencing. Finally, there is no evidence that contradicts the reasonable steps taken by Mr. Hester to feed his animals, regularly check his fencing, and to keep his animals secured. Thus, as the trial court correctly found, there is no genuine issue of material fact and Mr. Hester is entitled to a summary judgment as a matter of law that he was not negligent or grossly negligent.

WHEREFORE, the PREMISES CONSIDERED, Defendant, JOSEPH HESTER, respectfully requests that this Honorable Court affirm the decision of the trial court and that the Defendant have all such other and further relief, either at law or in equity, to which he may be justly entitled.

Respectfully Submitted,

BY: HEIDELBERG, STEINBERGER, COLMER & BURROW, P.A.

BY: 

TRISTAN RUSSELL ARME[redacted]
PATRICK COLLINS (Pro Hac Vice)

CERTIFICATE OF SERVICE

I, Tristan R. Armer, of the law firm of Heidelberg, Steinberger Colmer & Burrow, P.A., do hereby certify that I have this date served by United States Mail, postage paid, a true and correct copy of the above and foregoing Brief of Appellee to James K. Wetzel and Garner J. Wetzel, Esquires, Post Office Box I, Gulfport, MS 39502; and to Honorable Kathy Jackson, George County Circuit Court Judge, P. O. Box 998, Gulfport, MS 39568.

Respectfully submitted, this the 29th day of December, 2010.

BY: 
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