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STATEMENT REGARDING ORAL ARGUMENTS

Oral arguments is requested so that this Honorable Court will have the fullest opportunity to understand Plaintiffs' fundamental argument that there were genuine issues of material fact that requires jury determination in regards to: 1) Defendant's breach of duty to keep his own animals safely fenced in or was negligent in the construction of the containment fence; 2) the foreseeability of an injury to a driver resulting from a collision from an escaped farm animal; and 3) whether the Defendant knew or had reason to know the fence was in a state of disrepair which jeopardized or increased the likelihood of an animal escaping.

STATEMENT OF THE ISSUES

I. The Circuit Court erred as a matter of law and abused its discretion in granting summary judgment because there are genuine issues of material fact regarding whether the owner was negligent in his confinement of three horses.

II. The Circuit Court erred in granting the Defendant's summary judgment because negligence may be established through circumstantial evidence and the Plaintiffs presented ample circumstantial evidence to present a genuine issue of material fact for jury determination.

STATEMENT OF THE CASE

A. COURSE OF PROCEEDINGS AND DISPOSITION

This is an appeal from an adverse Summary Judgment for the Defendant/Appellee which has its genesis in the Circuit Court of George County, Mississippi. The Plaintiffs, Diana Ladnier and Lawrence Ladnier, hereinafter referred to as "LADNIER", filed this cause of action on or about June 12, 2009, alleging that in the early morning hours on January 2, 2008, at approximately 12:02 a.m., Diana Ladnier was traveling southbound on River Road in George County, Mississippi. While proceeding below the posted speed limit, unbeknownst to her, three horses suddenly and without warning jumped in the path of Ladnier's motor vehicle, which she was unable to avoid, and caused her to crash into one of the horses. Defendant/Appellee, Joseph Hester, hereinafter referred to as "HESTER," admitted that he owned and was responsible for keeping the horses fenced in and away from a highly traveled road. As a result of this incident Mrs. Ladnier suffered injuries which required back surgery and other related medical treatment.

After commencing this cause of action, discovery ensued. Hester then filed his Motion for Summary Judgment on June 2, 2010. Ladnier filed their response to Motion for summary judgment on June 24, 2010. The summary judgment order was entered by the Honorable Circuit Judge Kathy Jackson on July 22, 2010. Ladnier filed their timely Notice of Appeal on July 27, 2010.

Ladnier's Notice of Appeal to this Honorable Court alleges two separate issues which individually and collectively denied Plaintiffs justice and a fair remedy as provided for by law. Ladnier's case presents genuine issues of material facts reserved for jury determination. Ladnier submits to this Honorable Court that they are entitled to reversal of the lower court's summary judgment and remand for trial on the merits.

STATEMENT OF RELEVANT FACTS

In the early morning hours of January 2, 2008, Diana Ladnier was driving her 2007 Chevrolet Malibu in a southerly direction on River Road in Lucedale, Mississippi. Mrs. Ladnier was on her way back home from work at the George County Correctional Facility at 12:02 a.m. Shortly after midnight, Ladnier approached the intersection of Joe Fairly Road and River Road, traveling approximately fifty (50) mph in a fifty-five (55) mph speed zone, when suddenly and without warning three horses escaped from Defendant's property and ran out in front of her vehicle. Ladnier violently struck one of the horses in an unavoidable crash causing major property damage to the front of the vehicle and causing her serious bodily injury which will affect her for the remainder of her life. The crash resulted in permanent injuries to Diana Ladnier and also required lower back surgery. To date, Ladnier has incurred well over $68,997.60 in medical bills for her lower back surgery and related medical treatment. As a result of her injuries, Ladnier also lost her employment as a Correctional Officer with the George County Correctional Facility.

It has been established through sworn deposition testimony that Joseph Hester is the owner of the subject property where the horses were housed, purchasing this property around March of 2006. *Deposition Joseph Hester 13:15* (March 10, 2010), attached hereto as R. E. #7. This particular property contains a house and sits on approximately 6⅔ acres. *Depo. Hester 16:22.* There are approximately three acres fenced for the horses. *Depo. Hester 17:13.* Hester testified that the acreage on the west side of the property contained a boundary fence, constructed of three strands of barbed wire approximately four-feet in height. The north side included a boundary fence with field wire approximately four-feet high. On the east side, there is an adjoining wooden fence and on the south side was three-strand barbed wire, with the exception

of one particular small section, which was fenced with what is known as "field fence", a field mesh fence as shown in the photograph attached hereto as R E. #8. *Depo. Hester 52:8.* After installing a gate where barbed wire once was, Hester chose to install "field fence" in the corner instead of reinstalling a barbed wire section. *Depo. Hester 27:19; 33:8.* Hester testified that one end of the "field fence" was attached to the wood post with regular fence staples and the other end with just fasteners on the posts. *Depo. Hester 77:3—79:20.*

Hester testified this was the only type of "field fence" that he had on this entire enclosure. Hester also testified that on the date in question he housed three horses on this three acres without the benefit of a barn or any other type of enclosure to protect the horses from the elements. *Depo. Hester 42:15.* Further, Hester testified that he would allow his horses to graze on Bahia grass in their neighbor's pasture across the street at least one week out of every month prior to this incident taking place. *Depo. Hester 70-73.* Hester also stated that it is his experience that horses like to lean against fences. *Depo. Hester 56:2.* Hester also agreed that horses like to roam. *Depo. Hester 57:4.* After the collision with Lanier, the inspection of the field revealed the "field fence" was found smashed down and the other two horses (not injured) were found grazing in the neighbor's pasture. *Depo. Hester 75:2.*

Hester further testified that of the three horses, one weighed approximately 1,000 pounds and the others were between 800 and 900 pounds. *Depo. Hester 55:16-22.* Hester further agreed there are certain responsibilities that come with keeping horses, including making certain there are properly constructed enclosures so that the horses do not get free and pose a hazard to drivers. *Depo. Hester 65:9.* Hester also agreed that the stretch of highway at River Road and Fairley Road is a dark, unlit intersection; and a black or dark-colored horse in an unlit section of

this particular roadway could pose a hazard to a motorist if those horses escaped. *Depo. Hester 68:14.*

ARGUMENT OF THE LAW

Standard of Review

This Court reviews orders granting motions for summary judgment *de novo*. *Mantachie Natural Gas v. Mississippi Valley Gas Co.*, 594 So.2d 1170, 1172 (Miss. 1992). Summary Judgment may be granted only "if the pleadings, depositions, answers to interrogatories and admission on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Webb v. Jackson*, 583 So.2d 946, 949 (Miss. 1991) (quoting *Mink v. Andrew Jackson Casualty Ins. Co.*, 537 So.2d 431, 433 (Miss. 1988), *see also*, Miss.R.Civ.P. 56(c). The "[a]dmissions, and pleadings, answers to interrogatories, depositions, affidavits are viewed in light most favorable to non-moving party, as he is given the benefit of every reasonable doubt." *Spartan Food Systems, Inc. v. American National Insurance Co.*, 582 So.2d 399, 402 (Miss. 1991), see also, *McFadden v. State*, 580 So.2d 1210, 1213 (Miss. 1991). The moving party bears the burden of showing that no genuine issue of material fact exists. *Tucker v. Hinds County*, 558 So.2d 869, 872 (Miss. 1990).

The Circuit Court "does not try issues; rather [it] only determines whether there are issues to be tried." *Burkes v. Fred's stores of Tennessee, Inc.*, 768 So.2d 325 (Miss. 2000). The Circuit Court should deny a motion for summary judgment "unless it is established beyond a **reasonable doubt** that the plaintiff would be unable to prove **any facts** to support the issues presented in the complaint." *Branch v. State Farm Fire and Casualty Co.*, 759 So.2d 430 (Miss. 2000) (emphasis added). To that end, "[a]ll motions for summary judgment should be viewed with great skepticism and if the trial court is to err, it is better to err on the side denying the motion." *Ratliff v. Ratliff*, 500 So.2d 981, 981 (Miss. 1986).

To be successful on appeal, Ladnier must demonstrate that the Circuit Court erred in granting summary judgment in favor of Hester by showing that there exists a genuine issue of material fact with regard to each element of the negligence claim: (1) a duty was owed by Hester to Ladnier; (2) Hester's breach of that duty; (3) evidence which demonstrates that Hester's breach of his duty was the proximate cause of the damages sustained by Ladnier; and (4) damages. *Magnusen v. Pine Belt Inv. Corp.*, 963 So.2d 1279, 1282 (Miss. Ct. App. 2007) (quoting *Crain v. Cleveland Lodge 1532, Order of Moose*, 641 So.2d 1186, 1189 (Miss. 1994)). This Court reviews a grant of summary judgment *de novo*, as they raise a question of law. *Price v. Park Mgmt.*, 831 So.2d 550, 551 (Miss. Ct. App. 2002) (citing *Carter v. Harkey*, 774 So.2d 392, 394 (Miss. 2000)). "When evaluating a motion for summary judgment, the court must view all of the evidence in the light most favorable to the nonmoving party." *Id.*

ARGUMENT

I. THE CIRCUIT COURT ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETIONIN GRANTING SUMMARY JUDGMENT BECAUSE THERE ARE GENUINE ISSUES OF MATERIAL FACT REGARDING WHETHER THE OWNER WAS NEGLIGENT IN HIS CONFINEMENT OF THREE HORSES.

Examining the evidence in the light most favorable to Ladnier, as the non-movant, and giving them the benefit of all favorable inferences, this Court should find that the facts and inferences reveal factual questions that reasonable minds could arrive at different conclusions. A jury should answer whether Hester was negligent in using "field fence" in substitution for barbed wire in housing three large horses. Therefore, this Court should reverse summary judgment because there is a real jury issue of whether Hester's choice of barbless fencing was reasonable under the circumstances which presents a factual question for the jury to decide.

The court in *Barrett v. Parker*, 757 So.2d 182 (Miss. 2000), laid out the elements for a negligence claim in Mississippi for a livestock and roadway accident:

> "Before a motorist can recover on his claim against the owner of the cow, he must prove by a preponderance of the evidence that the owner of the cow was negligent by proving that the owner:
>
> (1) Failed to exercise reasonable care to keep the cow from being at large, and
>
> (2) That such failure, if any, resulted in the escape of the cow from its enclosure, and
>
> (3) That the cow owner's failure to exercise such reasonable care proximately caused the injury to the motorist who collided with the cow."

Id. at 188. For the appeal at bar, the Court is considering element number one and whether there was any genuine issue of material fact that lends itself to any "breach of duty." The Appellants submit to this Honorable Court that Hester's decision to use "field fence" as

opposed to something stronger, such as barbed wire, and more suitable to housing 1,000 pound animals, came with foreseeable consequences and risks. Those consequences and risks were the escape of the livestock and the possibility that they may be struck by an automobile on the adjacent roadway. In conclusion, Ladnier submits that a jury, not a judge, must decide the question whether Mr. Hester took an unjustified and substantial risk when choosing to use "field fence" for a section of fencing to restrain three (3) half ton horses. It appears that the trial judge overlooked or disregarded many of the surrounding factors and circumstances in regards to the escaped horses. The trial court judge abused her discretion by granting summary judgment.

In the trial court's Order granting summary judgment, the Court stated that:

> "Ladniers have produced no evidence that Mr. Hester failed to act with reasonable care or that that the horses had any propensities that might cause injury or possessed vicious dispositions. At the hearing the Ladnier's conceded that the horses had not escaped the field in the previous two years they were housed there. The only facts presented were that horses like to lean against fences. The fact that horses in general have a tendency to lean against fences would not put a reasonable person on notice that these horses would trample the fence and escape, thereby causing injuries to a motorist."

Or. Granting Def's. Mot. S.J. 2 (July 22, 2010). With all due deference to the trial court, Ladnier submits to this court that the trial court is acting as the fact finder in assuming that the portion of the enclosure that was erected, "field fence", was reasonable under the circumstances and not a breach of his duty. Ladnier submits that the trial court, in granting summary judgment, disregards many of the factual circumstances that lead to the escape of the horses. Consequently, Ladnier respectfully submits that reasonable minds could surely differ on whether the construction or choice of the small section of fence called "field fence" was reasonable under the circumstances.

In Hester's brief in support of the motion for summary judgment, counsel opposite states that the "fencing used was standard issue cattle and horse fence." *Def's Memo in Sup. Mot. S.J.* 9 (June 6, 2010). Should this Court take counsel opposite's contention that the fence was "standard issue cattle and horse fence" as 100% truth or should this Court allow a jury to make that determination? Ladnier purports that the section of field fencing was inadequate from the date it was constructed and would like to submit as much for a jury determination. Hester knew or should have known that "field fence" with no barbs was inadequate to detain three 1,000 pound horses, and thus, contained substantial risk. A jury of reasonable minds could easily differ in the opinion of whether the section of "field fence" compared to the "barbed wire" fencing on the rest of the acreage, is reasonably prudent under the circumstances. The difference in strength and size become immediately discernable to a reasonably minded person when looking at the picture and considering the circumstances.

a. ***In considering all of the evidence in the light most favorable to Ladnier, there is substantial evidence presented where a reasonable and fair-minded person in the exercise of impartial judgment could arrive at a verdict in favor of the Plaintiffs.***

Most importantly, a jury, not a judge, should make the factual determination of whether Hester's choice of fencing material and fence construction was reasonable considering the underlying facts and circumstances. Ladnier respectfully submits to this Court that when weighing and viewing all available evidence in the light most favorable to them, this Court should reverse the trial court's Order granting summary judgment and remand the case to be set for trial on the merits.

There are countless factors to take into consideration in determining whether Hester's section of fencing was unreasonable under the circumstances. In short: 1) type of fencing and

characteristics of the "field fence" (no barbs or spikes); 2) construction of fencing (staples used and clamps used); 3) size of field compared to size of animals; 4) size and nature of horses being confined; 5) nature of Diego, the horse, to be "curious," have a "propensity to roam," be the "boss of the pen," and how all the horses "like to lean against the fences"; 6) no barn or trees for horses to shelter themselves; 7) the horses being grazed across the street for one (1) week out of every month on the Bahia grass in the neighbor's pasture; and 8) circumstantial evidence in support of an inadequate containment.

i. ***A reasonable person should have known that "field fence" with no barbs or spikes could be compromised if 1000 pound horses lean against the fence, and thus, created a dangerous hazard for drivers.***

Most important for the fact finder or jury to consider is the general characteristics of "field fence" which had no spikes or barbs to prevent animals from escaping or pressing against the fence with too much force.

Ladnier avers that Hester was negligent under the circumstances in trying to fence in three horses, each weighing 1,000 pounds or more, with only "field fence." "Field Fencing" is not barbed wire. Field fencing is a "box wire" with no barbs or spikes to prevent or deter animals from leaning or pressing against it to escape or "roam." "Field fence" can best be described as a sturdier type of "chicken wire." Under the circumstances, it was foreseeable that a 1,000 pound horse or potentially three 1,000 pound horses could compromise the frail nature of the "field fence." Therefore, Hester has breached his duty to exercise reasonable care to prevent the foreseeable escape of the horse in question, and the harm done was of the sort expected to occur in such circumstances.

A reasonable person may conclude that a fence housing half-ton horses should have barbs or spikes to prevent the horses from resting, scratching themselves, or trying to escape with too much force. On the other hand, "barbed wire" fencing has spikes and tacks on it to prevent the farm animal from pushing too hard against it, whether scratching itself or trying to escape or roam. After all, Hester was not fencing in small farm animals such as chickens, goats, and sheep; rather he was attempting to restrain three large horses. Hester even testified that Diego, the horse actually hit, "was a real curious nature-type horse," and further testified that Diego "definitely wanted to be the boss of the pen." *Depo. Hester 49:18.* **Hester even stated that the horses liked to lean against the fences**. *Depo. Hester 55:23.*

This knowledge, in addition to the circumstances of the instant case, present genuine issues of material fact about the adequacy of a barbless box fence and should therefore be submitted to a jury. Sound and reasonable minds could surely differ when weighing the circumstances surrounding whether Hester was negligent in constructing the fence with such a light duty, box wire "field fence." Hester should have known the "field fence" section of fencing would not be sufficient if the horses ever leaned up against it or pushed on that section. When trying to detain such large, 1,000 pound, "curious" animals, reasonable minds could conclude that a sturdy fencing with barbs should have been used. A jury should answer the question of whether Hester satisfactorily met his duty of care and acted reasonably under the circumstances in the confinement of his three large horses.

ii. The passage of time with no escape does not negate the question of whether Hester should have known a smaller, shorter, barbless fence was reasonable under the circumstances.

The Appellee will attempt to make the argument that he had no reason to know the field fence was inadequate because it had housed the animals for a period of time leading up to the

incident in question. Hester will further attempt to render his actions reasonable by stating that the fence was in good repair and he made inspections with due attention. This Court should analyze this argument closer because there is a factual question of whether "field fencing" of the size and quality used, even in mint condition, might not be adequate to detain horses in question. Moreover, just because the confinement worked for any amount of time does not negate Hester's negligence, as he was merely the recipient of good fortune prior to the subject event in the case at bar.

For argument sake, hypothetically consider when a person forgets to turn a gas stove off or forgetfully leaves an electric iron turned on. The mere time passage of an hour, a week, a month, or a year or more does not negate the negligent act of leaving the gas stove burning or an electric appliance power on. Just because the negligent act does not burn down the house immediately, the act itself is still negligent. The ever present risk of the house burning down is a true foreseeable risk. The same standard goes for a person who forgets to put a child safety lock on a window where children play; or a person leaves a loaded gun in a place where children frequent. The court should agree that mere time passage, or an accident not occurring, does not negate the negligent acts previously mentioned. Such an analogy can be made of these hypothetical situations to that of the Hester's selection of fencing.

The same standard should be applied to Hester's selection of "field fence". In the aforementioned hypothetical situations, and the issue of Hester's field fencing construction, the situation is negligence simply waiting on proximate cause. A person's negligent act should not go unaccounted for based strictly on the passage of time before an injury occurs. Hester should have known of the possibility that the horses could or would eventually lean against the small

portion of fencing without "barbs", that the fence could or would be breached, and that the horses could or would easily escape.

A jury must weigh the factors surrounding the escape in determining whether the landowner acted unreasonably. Ladnier respectfully asks this Court to recognize the trial court's error in summarily dismissing the case. With all due deference, the trial court judge took it upon herself to act as fact finder in regard to Hester's negligence or breach of his duty of care in regards to the negligent confinement.

iii. The picture of "field fence" should be viewed and weighed by the jury; the size, quality, height, and adequacy should be compared to the barb wire fencing in the background.

Ladnier submits that the trial court did not fully study and consider the picture of "field fence" photograph as evidence of the fence that was supposed to contain the half-ton horses. Exhibit R E. #8. The photo was produced in discovery, as Ladnier was unable to get a high resolution picture of the field fence because it was taken down after the incident. In the low quality photograph, the "field fence" is in the foreground and "barbed wire" fence is in the background. The "field fence" is noticeably smaller, contains no barbs or spikes, and appears weaker and less sturdy than the barbed wire fence directly behind it. A jury should be able to consider the picture as circumstantial evidence to determine whether Hester was negligent in using the "field fence" as a section of perimeter fencing for housing half-ton animals. The support posts of the "field fence" appear to be much smaller, weaker, and cheaper when compared to the barbed wire fence directly behind it. In fact, the size and apparent frailty is almost shocking to the viewer. Further, the "field fence" was attached to the posts with nails and fence staples. *Depo. Hester 79:10.* These details present a question of fact for a jury to make the

determination of whether Hester was negligent in attempting to house horses with a section of frail "field fence" that presented an actual risk of being compromised.

This Court should also take into account that the great majority of the field was fenced with "barbed wire" fencing adequate enough to detain the animals to a certain area of land, and only a portion or small area used of "field fence." This Court should cautiously consider that Hester consciously chose to substitute a portion of barbed wire section with a section of "field fence." When looking at the attached photo, this Court should realize that it was not "if" but "when" the horses would lean against, or trample, this small and inadequate fencing. It was only a matter of time before one of the horses would lean against the "field fencing." Ladnier respectfully submits that this section of fencing was the proverbial ticking time-bomb waiting to explode. The factors and circumstances should be considered by a jury in the interest of justice and as a matter of law. Ladnier suffered grave injuries directly due to Hester's negligence in constructing the "field fence" and the jury, not the judge, should weigh the factors to determine if Hester acted reasonably in housing three half-ton horses.

The risk versus reward of using "field fencing" must also be considered. "Field fencing" is a cheaper and easier to install alternative to barbed wire fencing. A reasonably minded person can plainly notice the difference in strength between "field fence" and "barbed wire" fencing by the naked eye. The question of whether the adequacy of fencing used under the circumstances is a question for the jury to decide, not a question for the court to decide. When all of the facts are taken into account and viewed in light most favorable to the non-movant, summary judgment must be denied when there is any genuine issue of material fact presented, as in the case at bar.

II. THE CIRCUIT COURT ERRED IN GRANTING THE DEFENDANT'S SUMMARY JUDGMENT BECAUSE NEGLIGENCE MAY BE ESTABLISHED THROUGH CIRCUMSTANTIAL EVIDENCE AND THE PLAINTITFFS PRESENTED AMPLE CIRCUMSTANTIAL EVIDENCE TO PRESENT A GENUINE ISSUE OF MATERIAL FACT FOR JURY DETERMINATION.

Ladnier respectfully submits to this Honorable Court that the dangerous condition in this case, the inadequate "field fence," can be traced to the negligent manner in which Hester selected the box fencing or "field fence", as opposed to barbed wire fencing, or the negligent manner in which he constructed the barricade. The question for the jury should be whether Hester should have known that the barbless fence was unreasonably safe in housing such large and powerful animals.

Negligence may be proven through circumstantial evidence, and it would be reasonable for a jury to conclude that Hester acted unreasonably in choosing to use "field fence" to barricade half-ton farm animals.

The appropriate question before the jury should be whether Mr. Hester breached his duty, by using a barbless "field fence", to keep his livestock contained on his premises and off of the street where automobiles travel, and whether, as a result of that breach, Diane Ladnier was injured. It is certainly reasonable for a jury to determine that the fence was inadequate under the circumstances and that it was reasonably foreseeable for a 1,000 pound animal to breach the confinement and escape. Ladnier would submit to this Court that not only did she offer a genuine issue of material fact for jury determination, but ample evidence exists for the jury to find on behalf of Diane Ladnier.

This court in *K-Mart Corp. v. Hardy*, 735 So.2d 975 (Miss. 1999), stated, "in determining whether there was sufficient evidence on the question of defendant's negligence for decision of

that issue by a jury, two well established principles should be kept in mind. One is that negligence may be established by circumstantial evidence in the absence of testimony by eyewitnesses, provided circumstances are such as to take the case out of the realm of conjecture and place it within the field of legitimate inference..." *Id.* at 981. (citing *Downs v. Choo*, 656 So.2d 84, 90 (Miss. 1995).

Ladnier avers that one explanation of the horse escaping and being in the road is Hester's faulty construction or unreasonable choice of "field fence" for a small section of the barricade, resulting in the escaped livestock. Therefore, Ladnier requests this Court to find such an inference to be a reasonable or reliable inference for the jury to make. Consequently, this Court should find that Ladnier not only met their burden of proof, but there is ample evidence for the jury to find on their behalf. Therefore, this Court should reverse the trial court's Order of summary judgment and remand the case for a jury determination of negligent confinement.

The circumstantial evidence of the dilapidated fence with no barbs provide the inference that the horses pushed against the fence with enough force to destroy it. Additionally, it would be a reasonable inference that had there been barbs on the fence, the horses would not have pushed against it with enough force to tear it down. In the words of the Court in *Hardy*, this circumstantial evidence takes the case out of the realm of conjecture and places it within the field of legitimate inference. This inference coupled with Hester's knowledge of the horses leaning against the fence should alone call for a factual determination for a jury regarding whether the "field fence" was reasonable under the circumstances.

Common sense should be the guide in this case. Hester put up a section of small, inadequate fencing with no barbed wire that was woefully ineffective in containing 1,000 pound horses. Ladnier submits that a jury should decide whether her grievous injuries were a

foreseeable risk of the negligent confinement. The circumstantial evidence in this case is overwhelming, and the court should consider numerous factors when making a determination of whether there are any genuine issues of material facts. First, this Court should consider the photo of the dilapidated box wire "field fence" as discussed *supra*. Just by analyzing the photo of the fence, common sense dictates that this type of constraint was not adequate to detain half-ton animals.

The fenced area in which the horses were detained encompassed only three acres, which is not a very large tract to roam. *Depo. Hester 17:13*. Even though horses are domesticated animals, it is common sense that horses have a natural tendency to roam, graze, and want to run. This Court should also recognize the facts showing that there was no place for the horses to seek shelter in the fenced area. There was no barn or shelter to protect the three horses from the elements. *Depo. Hester 42:19*. Moreover, Hester testified that he generally allowed the horses to graze across the street in a neighbor's pasture one week out of every month on Bahia grass up until this accident occurred. *Depo. Hester 70:21-73:5*. Hester also testified that he would usually just feed the horses hay in the winter. *Depo. Hester 72:1*.

With nothing but dry hay to eat, combined with being confined in a small fenced-in area, a reasonable inference can be drawn that the horses desired to graze on the preferred Bahia grass in the neighbor's pasture. Common sense leads the reasonable person to know that nature's instinct will drive animals towards food and the pastures in which they graze. Hester should have known the horses would attempt to get out if they could. Hester knew or should have known that the horses were attracted to the pasture where the horses were allowed to graze on the Bahia grass. Ladnier submits to the court, and would submit to a jury, that the horses were potentially attempting escape to feed in the pasture where they were frequently led to graze.

Hester, as the horses' owner and care taker, knew or should have known that the horses could compromise the "field fence." Circumstantial evidence supports this probability, as indicated by the fact that the other two horses, which escaped and were not involved in the collision, were found in the neighbor's pasture grazing on the Bahia grass.

A jury should also be allowed to determine whether the construction of the fence was adequate. Hester testified that the "field fence" was attached to the posts with fence staples. Upon investigation after the horses got out, evidence shows that the "field fencing" was mashed down to the ground. *Depo. Hester 75.* Hester further testified the entire fence was totally on the ground, or at most two feet off the ground, when he found it. With all facts weighed in favor of Ladnier, Appellants submit that there are genuine issues of material facts of whether the small section of fence that was erected out of barbless "field fence" was adequate under the circumstances to withstand the weight of three horses, weighing 1,000 pounds each, that Hester testified like to lean against the fence.

Just as stated in *Hardy*, a plaintiff may make out a *prima facie* case of negligence based upon circumstantial evidence. In the case at bar, the Plaintiffs have gone beyond circumstantial evidence and presented actual facts and knowledge possessed by Hester that lend themselves to a breach of his duty to confine his horses. It has been shown through testimony that there is a question of material fact for the jury to decide; i.e., whether the fence that was erected by Hester was unreasonable under the circumstances. These general issues of material facts of which reasonable minds could differ must preclude summary judgment.

Based on the foregoing facts and circumstances, when viewed in the light most favorable to the non-movant, there are issues of material fact reserved solely for jury determination. The jury should answer the question of whether Hester's construction of the barbless fence was

reasonable under all of the circumstances. A jury could also determine that the construction of the fence was unreasonable and inadequate based on the staples or fasteners that were used. The judge of the lower court abused the discretion of the court when she took the defense counsel's contention that "the fencing used was standard issue cattle and horse fence." Based on the surrounding factors, a jury could certainly find that the small, barbless, and dilapidated fencing carried a reasonably foreseeable risk of escape of 1,000 pound animals and Hester knew or should have known of that risk. Based on the aforementioned, Ladnier respectfully submits that this Honorable Court reverse the trial court's Order granting summary judgment and remand the case to allow jury determination.

CONCLUSION

In conclusion, LADNIER would submit to this Honorable Court, as outlined in their arguments above, that they should be entitled to a reversal of the summary judgment granted by the trial court and remanded for a jury to decide whether HESTER acted unreasonably in his confinement of his horses.

RESPECTFULLY SUBMITTED, this the 28 day of October, 2010.

DIANE LADNIER and LAWRENCE LADNIER, Appellants

By: _____
GARNER J. WETZEL, ESQUIRE

_____
JAMES K. WETZEL, ESQUIRE

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that I have this day mailed by United States Mail, postage prepaid, a true and correct copy of the above and foregoing Brief of Appellant to: Tristan Russell Armer, Esquire, with the law firm of Heidelberg Steinberger Comer & Burrow at their mailing address of Post Office Box 1407, Pascagoula, MS 39568 and to Patrick Collins, Esquire (*Pro Hac Vice*), at his usual mailing address of Post Office Box 3062, Daphne, AL 36526, and to Honorable Judge Kathy Jackson, Circuit Court of George County, Post Office Box 998, Pascagoula, MS 39568.

SO CERTIFIED, this the 28 day of October, 2010.

GARNER J. WETZEL, ESQUIRE

JAMES K. WETZEL, ESQUIRE

JAMES K. WETZEL & ASSOCIATES
James K. Wetzel (MSB [redacted]
Garner J. Wetzel (MSB [redacted]
Post Office Box I
Gulfport, MS 39502
(228) 864-6400 ofc
(228) 863-1793 fax
ATTORNEYS FOR APPELLANTS