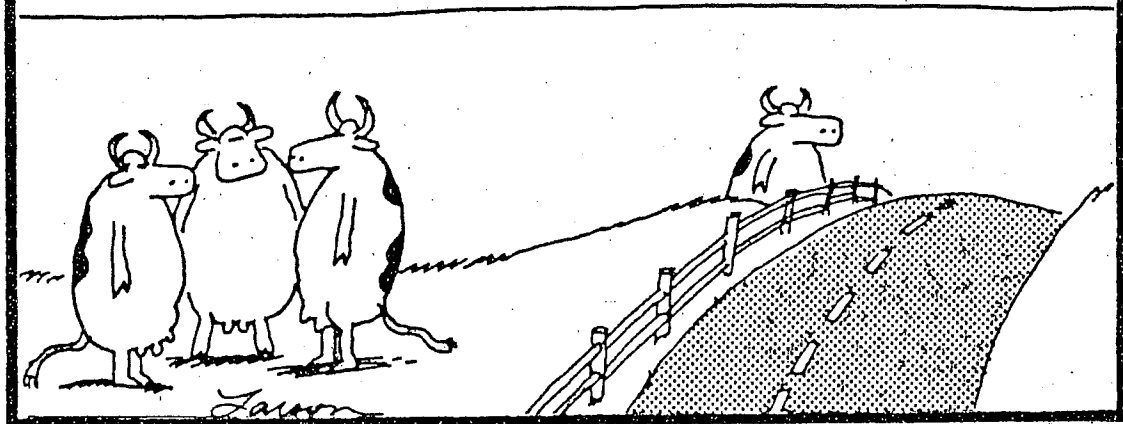
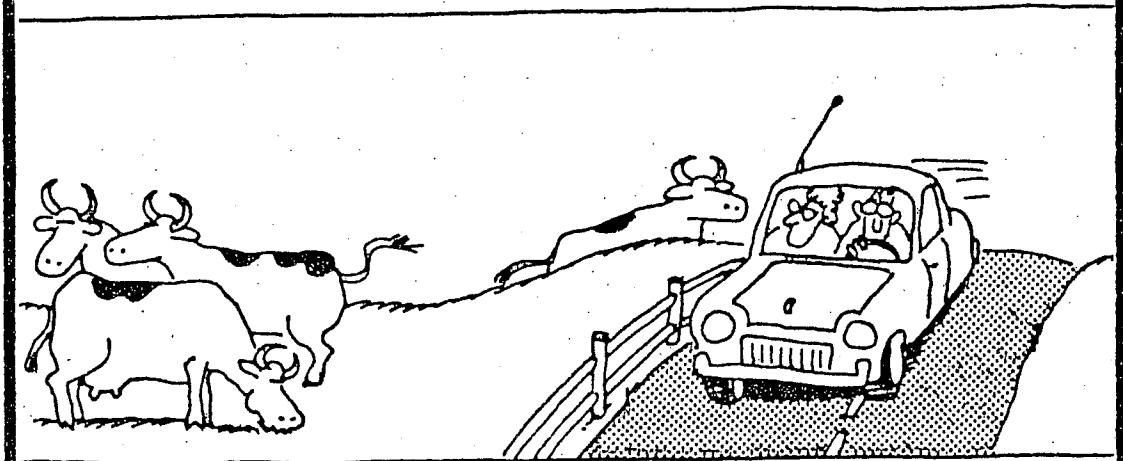
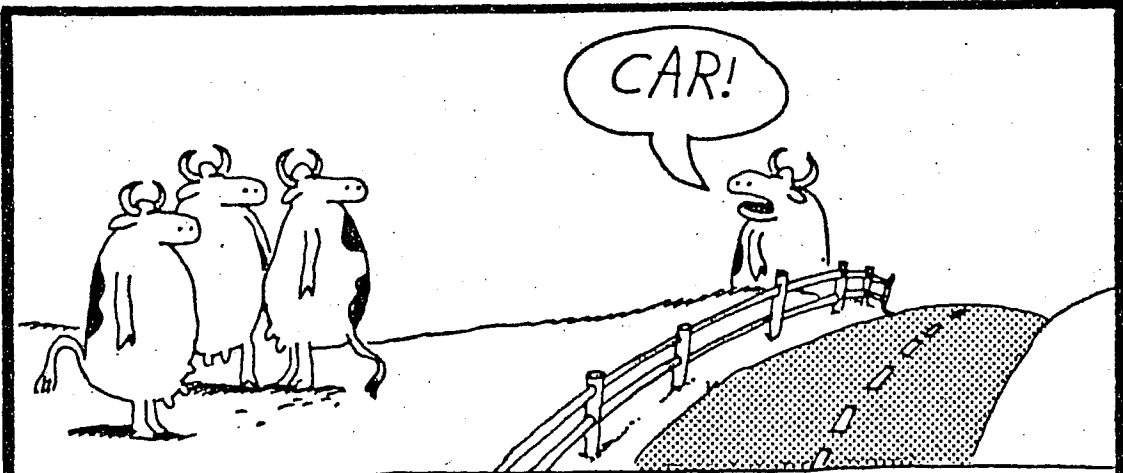
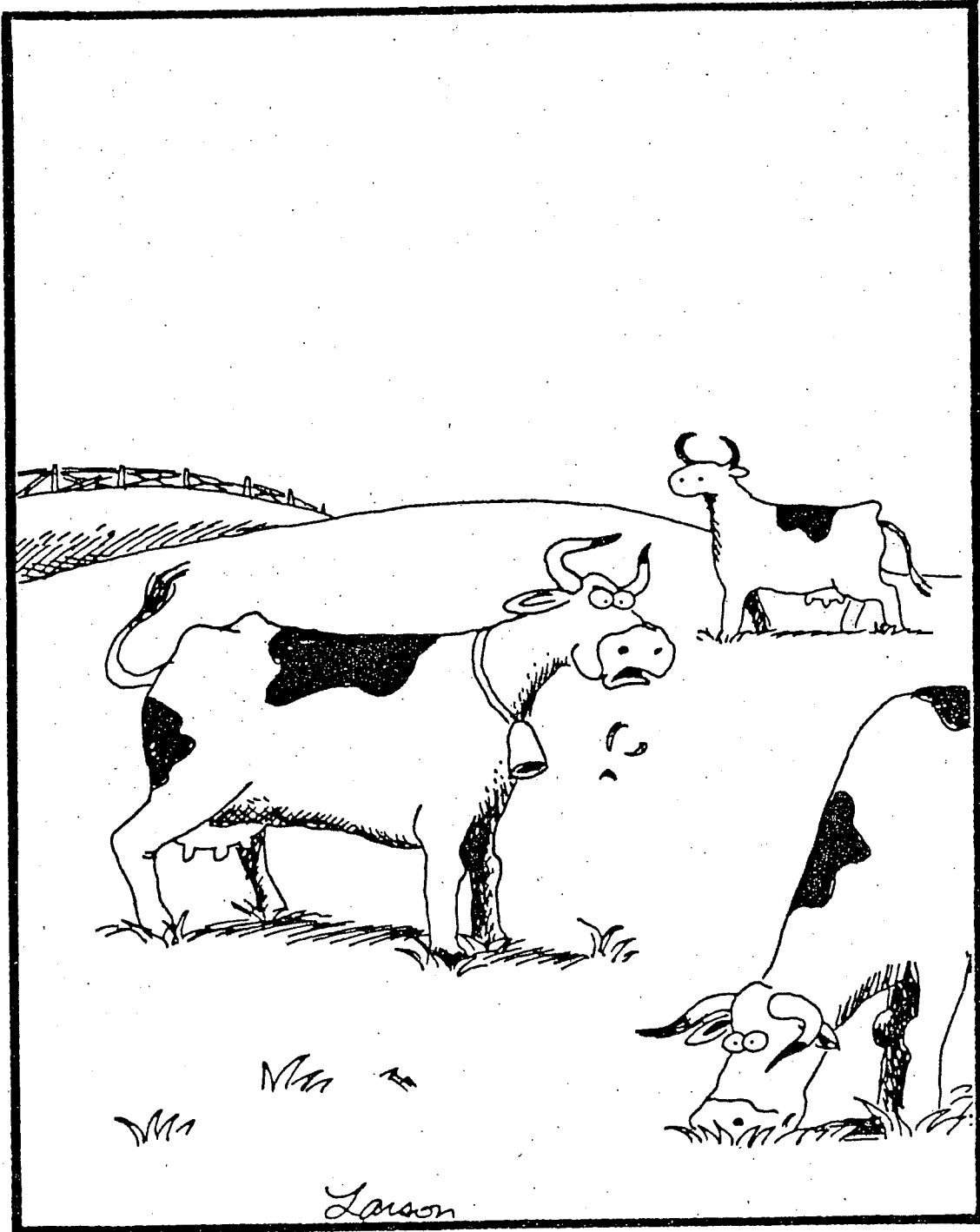


**OPEN RANGE/  
HERD DISTRICTS**

**BLACK ICE AND  
NEGLIGENCE PER SE**

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"Hey, wait a minute! This is grass! We've been eating grass!"

## OPEN RANGE

Livestock areas in Idaho fall into two categories outside cities and villages: "Open range" areas and "herd districts." "Open range" is defined by Idaho Code § 25-2402 as all areas of the state not within the cities, villages, or already created herd districts. Animals may roam freely in open range areas without their owners risking liability. In herd districts, however, animals may not roam freely and owners incur a duty to keep livestock fenced.

In *Adamson v. Blanchard*, 133 Idaho 602 (1999), the Supreme Court addressed the issue of whether the Idaho legislature intended to grant absolute immunity from liability for negligence to an owner of domestic animals involved in an accident on a public highway where the owners of those animals had established that the animals were lawfully on the highway at the time of the accident.

The Supreme Court, in deciding the legislative intent, looked at Idaho Code § 25-2118 concerning animals on open range, and Idaho Code § 25-2119, concerning animals lawfully on the highway. The Supreme Court recognized that both of the statutes were simultaneously enacted and related to the same subject. Therefore, the statutes are *in pari materia* and should be construed together to effectuate legislative intent. Idaho Code § 25-2118 states:

### **Animals on Open Range - No Duty to Keep from Highway.**

No person owning, or controlling the possession of, any domestic animal running on open range, shall have the duty to keep such animal off any highway on such range, and shall not be liable for damage to any vehicle or for injury to any person riding therein, caused by collision between the

vehicle and the animal. "Open range" means all unenclosed lands outside the cities, villages and herd districts, upon which cattle by custom, license, lease, or permit, are grazed or permitted to roam.

The Supreme Court found that Idaho Code § 25-2118 relieves owners of livestock roaming on open range of the duty to keep such stock off the highway and grants absolute immunity from liability for any damages stemming from a collision between the vehicle and the animal. In contrast, the Supreme Court found that Idaho Code § 25-2119 addresses only an owners right to drive animals on public roads, or otherwise lawfully position animals upon the highway, and grants immunity only from liability for negligence associated with this activity. The Supreme Court found that because the legislature used absolute language in Idaho Code § 25-2118, it intended to completely immunize owners and open range owners from liability under any cause of action, and in Idaho Code § 25-2119, the legislature used more limited language because it intended to immunize owners from a negligence cause of action only in the limited situation where animals are lawfully present on the highway.

Therefore, the Supreme Court held that Idaho Code § 25-2119 affords an absolute grant of immunity from liability for negligence to an owner who has established that his animals were lawfully on the highway.

The *Adamson* case referenced above is illustrative of how these statutes operate. There, the Blanchards were driving their band of approximately 900 sheep on the highway shortly after sunrise. The Blanchards drove a pickup truck in front of the sheep, with emergency flashers activated, and with a passenger holding a red flag out the window. Behind the sheep, the Blanchards utilized a pickup towing a stock

trailer, with emergency signals activated. A sheriff's deputy also drove a vehicle with its emergency lights activated among the band of sheep. That morning Adamson was driving in his pickup truck down Highway 20 in the same direction as the sheep. Adamson came upon the sheep and two vehicles stopped behind the Blanchards' pickup and trailer. Adamson stopped behind the second vehicle. At that time, another driver approached the stock vehicles at a high rate of speed and was apparently unable to stop in time. He drove his truck into the rear of Adamson's pickup, severely injuring Adamson.

Adamson filed a complaint in federal court against the driver that hit him, and the Blanchards, asserting a negligence cause of action. The other driver failed to appear, and default was entered against him. The Blanchards then moved for summary judgment, asserting that Idaho Code § 25-2119 was a bar to Adamson's negligence claim. Judge Winmill postponed ruling on the Blanchards' summary judgment motion pending a ruling by the Supreme Court as to the legislative intent of Idaho Code § 25-2119.

#### **CONCLUSION**

1. Check ordinances of locality where accident occurred.
2. Urge counsel to file a Motion for Summary Judgment.

## BLACK ICE AND NEGLIGENCE PER SE

In Idaho, winter weather frequently produces a condition known as "black ice" on many of the states highways, roadways and bridges. In addressing the liability of a driver involved in an accident caused by "black ice," Idaho courts have found that icy roads will not excuse a driver of liability.

The Idaho Court of Appeals in, *Leavitt v. Swain*, 131 Idaho 765 (1998), discussed the liability of a driver who lost control of her car due to "black ice." Evidence at trial revealed that the driver who lost control of her car on the "black ice" had crossed the centerline and hit an oncoming vehicle. The Court of Appeals found that under two (2) Idaho statutes, Idaho Code §§ 49-630 and 49-631, drivers are required to operate their vehicles on the right side of the highway and to pass oncoming vehicles on the right. It is negligence per se for a driver to violate these statutes unless a valid excuse for the violation is shown. *Teply v. Lincoln*, 125 Idaho 773 (1984). The court found that icy road conditions do not serve as an excuse to violate these statutes.

Therefore, any driver of a vehicle who losses control of their vehicle because of icy roads and thereby violates a statute of the state of Idaho will be held strictly liable for that violation. The fact that icy roads caused the driver to violate the statute through no fault of their own will not absolve the driver of liability. Thus, driving over the speed limit, crossing the center line or any other violation of a statute by a driver,

even if caused by icy roads, will make the driver strictly liable for violation of the statute, or negligent per se.

The *Leavitt* case is instructive in this regard, and the facts surrounding the case are as follows: On New Years Day, 1994, Leavitt and Swain were involved in a head-on collision. Following the accident, Swain admitted that she had lost control of her car on an icy road and may have slid over the center line and into Leavitt's oncoming vehicle. The jury in deciding the case assigned 75% of the negligence causing the accident to Swain and 25% to Leavitt. Dissatisfied with the jury's award, Leavitt filed alternate motions for a new trial and/or an additur and for a judgment notwithstanding the verdict. Each motion was denied by the district court.

In addressing whether the district court erred in not granting Leavitt's motion for a judgment notwithstanding the verdict on liability, the Court of Appeals reviewed the standard for granting of such a motion. The Court of Appeals stated that they must determine whether, admitting the truth of the nonmovant's evidence and drawing every legitimate inference most favorable to the nonmovant, there exists substantial evidence upon which the jury could properly find for the nonmoving party. *Curtis v. Ferth*, 123 Idaho 598 (1993).

After applying this standard, the Court of Appeals concluded that the district court improperly denied Leavitt's motion. The court found that all of the evidence on the cause of the collision pointed to Swain's negligence. Each of the witnesses to the collision indicated that Swain lost control of her car when it started sliding on the icy road, and Swain herself testified that she was driving in the northbound lane when the

back-end of her vehicle started to skid on the ice. The Court found that Leavitt's version of the accident was consistent with Swain's. Further, the police officer in charge of investigating the accident concluded that the collision occurred when Swain's vehicle crossed the center line. The Court of Appeals found that under two Idaho statutes, Idaho Code §§ 49-630 and 49-631, drivers are required to operate their vehicles on the right side of the highway and to pass oncoming vehicles on the right. It is negligence per se for a driver to violate these statutes unless a valid excuse for the violation is shown. *Teply v. Lincoln*, 125 Idaho 773 (1984). The court found that icy road conditions do not serve as an excuse to violate these statutes. Therefore, the Court of Appeals found that the uncontroverted testimony that Swain's car slid across the center line was sufficient to establish negligence per se. The Court further found that testimony at trial included no evidence of any negligence on the part of Leavitt. The Court ultimately found that there was no evidentiary basis for the jury's apportionment of a part of the negligence to Leavitt, and therefore, the District Court's denial of the motion for a judgment notwithstanding the verdict on the issue of liability was in error.

However, upon further review, the Idaho Supreme Court found that Leavitt's motions for a directed verdict and J.N.O.V., were properly denied by the district court. The Supreme Court stated that upon a motion for J.N.O.V., the moving party admits the truth of all the adverse evidence and all inferences that can be drawn legitimately from it. *Lanhim v. Idaho Power Co.*, 130 Idaho 46 (1997). It is not a question of no evidence on the side of the nonmoving party, but rather, whether there

is substantial evidence upon which a juror could find for the nonmoving party. The Supreme Court stated that it would not make a finding of substantial evidence in favor of a nonmoving party if it concluded that there can be but one conclusion as to the verdict that reasonable minds could have reached.

In this case, the Supreme Court found that the district court identified several areas where the evidence, if construed in a light most favorable to Swain, could lead to different verdicts by reasonable juries. The Supreme Court found that the district court and the jury had heard evidence that Leavitt knew the road was icy and yet still traveled at 35 mph. Additionally, the Supreme Court found that Leavitt hit his breaks on the ice prior to impact, that there was debris in both lanes of travel, and that Swain never admitted that she crossed the center line. The Court concluded that this evidence, while circumstantial and not dispositive, must be construed in favor of Swain and the jury verdict. Construing the evidence thus, the Supreme Court found that it could lead to the conclusion that Leavitt had been 25% negligent and stated that conflicting circumstantial evidence is sufficient to withstand a motion for J.N.O.V. *Juarez v. Aardema*, 128 Idaho 687 (1996). Therefore, the Supreme Court affirmed the district court's decision denying Leavitt's motion for a new trial and judgment notwithstanding the verdict.