

Legal Liability for Prescribed Fire Accidents in the Southeast

Stephen McCullers



Source: Wildfiretoday.com

KING & SPALDING

Outline of Today's Discussion

- Overview of Legal Framework
- General Description of Legislative Efforts to Encourage Fire Use
- State-by-State Discussion of Fire Liability Statutes and Cases
- Questions/Answer Session

Why is Liability such a Concern?

Visibility was so poor that when rescuers first arrived on the scene, they could locate victims only by listening for moans and screams.



A police dashcam photo shows the scene of a school bus crash on Jan. 29, 2012. / ALACHUA COUNTY

Source: cbsnews.com

Florida: Follow-up on escaped Rx fire, smoke, fog, and crashes



Bill

January 31, 2009

smoke



The wreckage of the January 9, 2008 crash on Interstate 4 in Florida. The Ledger.

Last year [Wildfire Today covered](#) the January 9 escaped prescribed fire near Interstate 4 between Orlando and Tampa. An unexpected drop in the relative humidity, according to Division of Forestry investigators, caused the 50-acre project to get out of control and burn an additional 200 acres and one of their dozers. The smoke mixed with fog and reduced visibility on Interstate 4, causing a 70-vehicle accident that claimed the lives of 5 people.

Source: Wildfiretoday.com

Smoke from Forest Service prescribed fire causes school bus crash

Bill Gabbert

January 29, 2011

prescribed fire, smoke



WLOX

Smoke from a prescribed fire in southern Mississippi caused a chain-reaction crash that involved a school bus on Friday. The U. S. Forest Service conducted a prescribed fire near Bethel Road in Harrison County which produced smoke that mixed with fog, reducing the visibility to near zero. As the school bus entered the

smoke on Highway 15, the driver quickly slowed down and was hit from behind, followed by a six-vehicle chain-reaction crash. Thankfully there were no serious injuries.

Barriers to Prescribed Fire

- There are numerous barriers to conducting prescribed fire, including:
 - Budget and staffing constraints
 - Suburban sprawl and the interface between urban areas and natural areas
 - Regulations
 - Public perception/misunderstanding of fire
- Concern about legal liability is usually the greatest concern for private forest owners
 - Some States try to limit this concern

Overview of Legal Framework

- Why are we concerned with State law?
- In the U.S., there are two basic systems of laws:
 - Federal Law
 - State Law
- Federal law derives its power from the Constitution and applies throughout the country
 - Examples include immigration, bankruptcy, and federal criminal law
- State law derives its power from the Sovereign power of the State
 - Examples include criminal, family, and real estate law

Overview of Legal Framework

- All States (except Louisiana) use a “common law” system
 - Law is developed based on legal precedent established by prior cases, including British cases that predate the founding of the U.S.
- “Tort” is the law of a civil wrong that causes harm to someone else
 - Tort law is based on the common law, but State legislatures can change the law through statutes
 - Negligence is the area of tort law involving harm caused by carelessness, not intentional harm

Overview of Legal Framework

- Responsibility will depend on the level of care required for an activity:
 - Strict Liability – Responsible for harm even if there was no negligence
 - Typically used for very dangerous activities, for example keeping dangerous animals or working with explosives
 - Simple Negligence – Responsible for harm if you failed to exercise reasonable care
 - Common standard, applies to car accidents and many other common activities
 - Gross Negligence – Responsible for harm only if you are less careful than even a careless person
 - Lack of care that amounts to reckless disregard for safety

Hypothetical #1

- Joe the Landowner
 - Joe decides he wants to burn his land
 - Without checking the weather report or seeking a burn permit, Joe starts a fire on his property.
 - He does this in July during a drought/burn ban without firebreaks, personnel, or equipment.
 - The fire escapes and burns down his neighbor's house.
 - Is Joe liable for the damage to the house?

Hypothetical #1

- Joe the Landowner
 - Liability under the different standards:
 - Strict Liability – YES!
 - Negligence – YES!
 - Gross Negligence – YES!



Hypothetical #2

- Bob the Forester
 - Bob is hired to burn 100-acres of pine forest
 - Bob does a written prescription, puts in firebreaks, and monitors the weather
 - Bob and his crew initiate the fire on a day when weather conditions are ideal
 - Bob does not, however, get a burn permit. If he had, he would have learned that weather conditions were going to significantly worsen
 - The weather changes resulting in thick smoke on the highway, which causes a major accident

Hypothetical #2

- Bob the Forester
 - Liability?
 - Strictly Liable – YES!
 - Negligence – Maybe? Jury to decide whether it was reasonable for Bob to not check the weather.
 - Gross Negligence – NO! Bob at least showed some level of care in starting the fire.



Hypothetical #3

- Suzy the Burn Manager
 - Suzy and her crew are burning 300 acres of forest
 - Suzy does everything correctly: she gets a burn permit, does a prescription, monitors the weather, coordinates with local agencies, conducts mop-up operations after the fire is extinguished
 - The burn goes according to plan and Suzy and her crew continue checking on the area in the following days
 - A week later, a smoldering stump suddenly reignites and a spark travels $\frac{1}{4}$ mile to another tract
 - The spark starts a fire which destroys valuable timber

Hypothetical #3

- Suzy the Burn Manager
 - Liability?
 - Strict Liability – YES!
 - Negligence – NO! Suzy took reasonable care to make sure the fire was safe.
 - Gross Negligence – NO!
 - Word of caution: these hypotheticals oversimplify a complicated issue and it is very difficult to predict what a jury will find

Legislative Response to Encourage Fire

- To encourage prescribed fire, many States have enacted legislation that changes the common law liability for prescribed fire
- These statutes typically do two things:
 - Define the level of negligence required to find liability (e.g. simple negligence or gross negligence)
 - Clarify that the burden of proof is on the party bringing the lawsuit

Legislative Response to Encourage Fire

- These laws, however, are not a free pass
- They typically require:
 - Increased level of training/certification
 - Specific actions by the burn manager such as:
 - Obtaining a permit
 - Staying on site until the fire is adequately contained
 - Preparing a written prescription

Overview of Southern States' Law

- Simple Negligence/Reasonable Care States
 - Alabama
 - Tennessee
 - Mississippi
 - Louisiana
 - North Carolina
- Gross Negligence States
 - South Carolina
 - Florida
 - Georgia

Simply Negligence/Reasonable Care States



Source: nrcs.usda.gov

Standards of Care

- These States use the simple negligence/reasonable care standard, but may use slightly different language:
 - Alabama Prescribed Burn Act (Section 9-13-270 et seq.) – No liability for property owner or his/her agent “unless it is shown that the property owner or his or her agent failed to act within that degree of care required of others similarly situated”
 - Tennessee Code § 11-4-1003 – No liability “unless negligence is proven”
 - Mississippi Code § 49-19-307 – No liability “unless negligence is proven”

Standards of Care

- Louisiana Statute Title 3 § 17 – There is a “rebuttable presumption of nonnegligence”
- North Carolina Statute § 106-967 – No liability unless “damage results from a negligently or improperly conducted prescribed burning”

Basic Requirements

- The liability statutes do not provide a free ride, rather the prescribed burner must take certain actions to receive liability protection
- All of the above states require:
 - Certified burn manager on site during the fire
 - A burn permit
 - A written prescription (except for Louisiana)
 - In some cases, the prescription must be notarized, shared with the forestry agency, and/or saved in the forester's records

Individual Requirements

- Some of these States include unique requirements to take advantage of the statute:
 - Alabama
 - The burn must be “conducted pursuant to state law and rules applicable to prescribed burning”
 - What are these other laws?
 - Not entirely clear, but Alabama Code § 9-13-11(d) includes requirements for non-certified burning, such as not leaving the fire unattended, which may apply

Individual Requirements

- Louisiana
 - Certified burn manager on site until burn is completed and “declared safe”
 - Louisiana Regulation Title 7, pt. XXXXIX, § 905
 - Fire is completed and “declared safe” when:
 - Ignition process was safely accomplished;
 - Fire is contained within firebreaks; and,
 - Smoke behavior is consistent with weather forecast and prescription for the tract

Individual Requirements

- North Carolina includes an interesting exception to the statute:
 - Landowners who complete their own prescribed fire operations can also take advantage of the liability protection *without being certified*, but:
 - Landowner must follow all other requirements of the statute; and,
 - The tract of forestland must be 50 acres or less

Summary of Requirements for Negligence States

	Ala.	Tenn.	Miss.	La.	N.C.
Certified Burner	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Burn Permit	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Prescription	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>		<input checked="" type="checkbox"/>
-- Notarized	<input checked="" type="checkbox"/>		<input checked="" type="checkbox"/>		
-- One Site		<input checked="" type="checkbox"/>			<input checked="" type="checkbox"/>
-- Saved		<input checked="" type="checkbox"/>			
-- To Landowner and Agency					<input checked="" type="checkbox"/>
Follow other laws	<input checked="" type="checkbox"/>				
"Declared Safe"				<input checked="" type="checkbox"/>	

Gross Negligence States



Source: fws.gov

Gross Negligence Defined

- Gross negligence is defined as “conduct so reckless or wanting in care that it constitutes a conscious disregard or indifference to the life, safety, or rights of persons exposed to such conduct” (Fla.)
 - Basically, gross negligence is the failure to take the slightest amount of care
 - This provides very strong protection to the certified burner

South Carolina

- South Carolina Code § 48-34-40, -50
 - New liability standard in 2012:
 - Property owner or individual conducting the fire is not liable for damages unless gross negligence or recklessness is proven
 - Requirements
 - Certified burn manager must supervise the fire
 - Must have written prescription that is on site during the burn
 - Must have a burn permit

Florida

- Florida Statute § 590.125(3) protects certified burn managers from liability “unless gross negligence is proven”
- Requirements for Certified Burns:
 - A written prescription
 - Certified burn manager on site, supervising the fire with a copy of the prescription
 - Specific consent from the landowner
 - Burn Permit
 - “Adequate firebreaks” and “sufficient personnel and firefighting equipment” to contain the fire

Florida

- Case Law – *Department of Agriculture and Consumer Services v. Shuler Ltd. Partnership* (139 So. 3d 914, Fla. App. Ct. 2014)
 - Facts:
 - 2008 prescribed fire by the Florida Forest Service in Tate's Hell
 - Planned 3,267 acre fire over a two-day period
 - Fire supervised by Certified Prescribed Burn Manager
 - Prescribed fire went as planned both days
 - Crew was released at the end of the second day after it was confirmed flames were not spreading

Florida

- Facts
 - Crew continued monitoring the burn area twice a day
 - A month after the burn, a spotover occurred causing a fire on neighboring private property separated from the tract by a wetland and creek
 - Fire destroyed 835 acres of timber; there were no injuries or other damage

Florida



Florida

- Jury Trial
 - Landowner sued on liability theories of negligence, negligence per se, gross negligence, and statutory violations
 - Forest Service argued only the gross negligence standard should apply, but the Court disagreed
 - Service incorrectly admitted that the fire was not extinguished for 45 days
 - Service tried to correct this error, but the Judge would not allow it
 - Landowner's theory of the case was the liability statute required *continuing* compliance with the statutory requirements for the entire 45 days

Florida

- Jury Trial
 - During closing argument, Landowner's attorney argued the Service:
 - Did not have a plan/prescription for the spotover
 - Burned more acreage than the prescription
 - Exceeded the two day burn window
 - Failed to have a Certified Burn Manager onsite for 45 days
 - Jury agreed at least one of the statutory requirements was violated and there was gross negligence
 - Landowner was awarded \$741,496

Florida

- Appeal
 - In a 2-1 decision, a Florida District Court of Appeal *affirmed* the Jury's verdict with little discussion
 - Dissenting judge wrote a very strong opinion arguing:
 - Gross negligence was the only applicable standard
 - A fire is “extinguished” when there are no spreading flames
 - Certified Burn Manager only had to be on site until the fire was completed; which was 2 days, not 45
 - The trial judge committed multiple legal errors which severely limited the Service's defense
 - Even though jury found gross negligence, the legal errors of the trial judge warrant reversal

Florida

- 2013 Amendment for “Adequate Firebreaks”
 - Statutory revisions clarify what constitutes adequate firebreaks and sufficient personnel
 - Fire spreading outside burn area on the day of the fire is not conclusive proof of inadequate firebreaks
 - “Strong rebuttable presumption” that firebreaks are adequate as long as fire is contained within burn area during the permitted burn period
 - Smoldering that results in a subsequent wildfire alone is not evidence of gross negligence

Florida

- 2013 Amendment for “Completed”
 - “Extinguished” no longer part of the statute
 - “Completed” defined as “no continued lateral movement of fire across the authorized area into entirely unburned fuels within the authorized area”

Florida

- 2013 Amendment for “Smoldering”
 - New prescription or permit is not required for smoldering in the burn area unless new ignitions are conducted by the certified burn manager
 - Burn manager does not have to be on site, and a prescription/permit is not needed, if smoldering causes additional flame spread within burn area
 - Liability protection for reignition of a smoldering, previously contained fire

Georgia

- Georgia Statute § 12-6-148
 - No liability unless it is proven there was *gross negligence* in starting controlling, or completing the burn
 - Requirements – Very limited
 - Must have previous burning experience or training
 - No certification requirements, but there is a certification program
 - Must be present until fire is adequately confined to reasonably prevent escape
 - Must have a burn permit

Georgia

- Case Law

- *Wolfe v. Carter* (314 Ga. App. 854, 2012)

- Smoke on the highway; driver rear ends a semi-truck and another slams into the driver from behind

- Driver sues local forester, who completed a prescribed fire the day before and was the only person in the area the State issued a burn permit

- Court's Holding:

- No evidence that smoke on the highway was from the permitted fire

- Even if the smoke was from the fire, there was no evidence of gross negligence

Georgia

- *Morgan v. Horton* (308 Ga. App. 192, 2011)
 - Landowner without fire experience asked local forestry office for assistance with a burn
 - Experienced ranger developed prescription, selected best day, and assisted with fire
 - Fire continued to smolder the next day, and that night weather conditions changed causing smoke and fog to mix on local highway
 - Tractor trailer stopped on highway due to poor visibility; driver crashed into rear of trailer and was killed
 - Driver's family sued landowner

Georgia

- Family's Arguments:
 - Landowner is not protected from liability because he is not an experienced burner
 - Ranger was not present on site because he left the site a few times
 - Landowner did not follow permit because there were flames within the burn area the day after the permit date

Georgia

- Court's Holding
 - Experienced ranger was “in charge” of the fire despite the fact it was landowner's property and the permit was in landowner's name
 - The landowner was allowed to rely on the ranger's expertise
 - Ranger did not have to be on the site continually and the fire was confined throughout the day
 - A new permit was not required
 - No evidence of gross negligence

Bonus State - Texas



Source: agrilifeextension.tamu.edu

Texas

- The Texas statute does not follow the typical pattern of the other southern States
- Texas Natural Resources Code, § 153.081
 - The landowner is not liable if the burn is conducted by a certified and insured burn manager
 - Statute does not apply if the landowner is certified and conducts the burn on their own property
 - Certified burn manager must have liability coverage:
 - At least \$1 million per occurrence and \$2 million policy period minimum aggregate limit

Texas

- Requirements for Certified Burn Managers
- Texas Agric. Code, Part 13, Chpt. 225-229
 - Must be present at all times during the burn
 - Must have sufficient personnel
 - Must complete a written prescription
 - Must provide notice to nearby properties with “sensitive receptors”
 - Must save records regarding insurance and fires conducted
 - There are additional requirements if there is a current Burn Ban

Conclusion

- Many Southern States have enacted statutes that protect prescribed fire practitioners from liability
- These statutes typically require additional training/certification and include various requirements for conducting the burn
- Practical Advice:
 - Do not cut corners or take risks expecting the liability statutes to protect you
 - Go above and beyond the statute requirements
 - If you have any questions, contact an experienced burn manager and/or an attorney

Questions?



Source: Georgiawildlife.com