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"When Fire Breaks Out": Recognizing the Inherently Dangerous Activity of Prescribed Burning in Florida

D. Kent Safriet

Miguel Collazo III

"WHEN FIRE BREAKS OUT":* RECOGNIZING THE INHERENTLY DANGEROUS ACTIVITY** OF PRESCRIBED BURNING IN FLORIDA

*Miguel Collazo, III**** & *D. Kent Safriet*****

INTRODUCTION

Imagine you inherit a 2000-acre property containing old-growth hardwoods, pine flatwoods, marshes, wetlands, and wildlife. Your grandfather acquired the property in the early 1950s and managed it his

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* "*When fire breaks out* and catches in thorns so that the stacked grain or the standing grain or the field is consumed, the one who started the fire shall make full restitution." *Exodus* 22:6 (New Revised Standard Version) (emphasis added).

** *See* Madison v. Midyette, 541 So. 2d 1315, 1318 (Fla. 1st DCA 1989) (concluding as a matter of law that the clearing of land by fire is an inherently dangerous activity).

*** Shareholder, Hopping Green & Sams, P.A., Tallahassee, Florida; University of Florida, J.D., *cum laude*, 2003; University of Florida, M.A.U.R.P., 2003; University of South Florida, B.A. (English), *summa cum laude*, 2000.

**** Shareholder, Hopping Green & Sams, P.A., Tallahassee, Florida; University of South Carolina, J.D., 1999; Clemson University, B.S. (Aquaculture, Fisheries and Wildlife Biology), 1995.

entire life so that you and your children could enjoy it. One day, you notice your neighbor—who owns an adjacent property very similar to yours—burning his property during a predictably dry time of year. Weeks go by. Judging from the plumes of smoke emanating from your neighbor's property, the fire continues to smolder. You start to get nervous. Are properly-managed prescribed burns supposed to smolder for six weeks? Your friends tell you that so far your neighbor's prescribed burn has caused two wildfires and smoked out the adjacent highway twice; this does not inspire confidence. More smoldering. Then the inevitable happens—the supposedly "controlled" prescribed burn jumps the creek and destroys about 800 acres of your 2000-acre family tree farm. When you are finally able to confront your neighbor about the damages, he responds by shrugging his shoulders and giving you a copy of the state's certified prescribed burning statute. "Prescribed burning is a good thing," he says. "Your loss, unless you can prove I was grossly negligent."

Much has been made about the benefits of prescribed burning.[1] While acknowledging these benefits, this Article focuses on the recent experience of two brothers in Franklin County, Florida, J. Gordon Shuler and T. Michael Shuler, who were subjected to almost six years of obstruction, delay, and litigation against two state agencies for a prescribed burn gone very wrong. We intend to shed some light on how the State of Florida's prescribed burn statute, Section 590.125, *Florida Statutes*,[2] was construed in this case and subsequently amended to further insulate prescribed burners from liability.

THE PRESCRIBED BURN

The Board of Trustees of the Internal Improvement Trust Fund of the State of Florida (Board of Trustees) is the owner of an approximately 3267-acre property located within Tate's Hell State Forest in Franklin County, Florida (the "Prescribed Burn Area").[3] Pursuant to Chapter 590, Florida Statutes, the Department of Agriculture and Consumer Services, Division of Forestry (Forestry)[4] is responsible for managing Tate's Hell

1. *See* FLA. STAT. § 590.125(3)(a) (2007); Initial Brief for Defendant-Appellant, at 1–3, Fla. Dep't of Agric. and Consumer Serv. v. Shuler Ltd. P'ship, 139 So. 3d 914 (Fla. 1st DCA 2014) (No. 1D13-0592) [hereinafter Initial Brief]. *See also* Stephen McCullers, Note, *A Dangerous Servant and a Fearful Master: Why Florida's Prescribed Fire Statute Should be Amended*, 65 FLA. L. REV. 587, 591–602 (2013).

2. FLA. STAT. § 590.125 (2007). All statutory citations are to the 2007 version of the *Florida Statutes* unless otherwise indicated.

3. Pretrial Statement, at 963, Shuler Ltd. P'ship v. Fla. Dep't of Agric. and Consumer Serv., No. 2011-66-CA (Fla. 2d Cir. Ct. 2012) [hereinafter Pretrial Statement].

4. Effective September 2011, Forestry reverted to its old name: the "Florida Forest

State Forest, including the Prescribed Burn Area, for the Board of Trustees.[5] Shuler Limited Partnership (Shuler) is the owner of an approximately 2182-acre property located just west of the Prescribed Burn Area (Shuler's Pasture), which is separated from the Prescribed Burn Area by only Cash Creek.[6]

On April 9, 2008, on behalf of the Board of Trustees, Forestry and its employees commenced a prescribed burn officially known as (19) High Bluff 37 (the Prescribed Burn) in Tate's Hell State Forest within the Prescribed Burn Area.[7] The Prescribed Burn caused three wildfires over a period of approximately 45 days: on April 21, 2008, it caused a wildfire officially known as (19) High Bluff Fire; on May 6, 2008, it caused a wildfire officially known as (19) High Bluff 2 Fire; and on May 13, 2008, it caused a wildfire on Shuler's Pasture officially known as (19) Pasture Fire.[8] It also twice smoked over U.S. Highway 98 requiring closure of the road, endangering motorists.[9] The Prescribed Burn was not finally extinguished until May 23, 2008.[10]

JURY TRIAL

After attempting to resolve the matter amicably, Shuler gave the required statutory notice[11] and on February 28, 2011 filed a lawsuit for damages against Forestry and the Board of Trustees.[12] Shuler's complaint alleged that Forestry's[13] decision to ignite and method of conducting the Prescribed Burn was negligent (Count I); violated Section 590.13, Florida Statutes (Count II); was negligent *per se* (Count III); and/or was grossly negligent (Count IV).[14] Shuler further alleged that Forestry's statutory

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Service." *See The Department of Agriculture and Consumer Services' Division of Forestry Now Bears Its Original Name: Florida Forest Service*, FLORIDA DEPARTMENT OF AGRICULTURE & CONSUMER SERVICES, http://www.freshfromflorida.com/News-Events/Press-Releases/2011-Press-Releases/The-Department-of-Agriculture-and-Consumer-Services-Division-of-Forestry-Now-Bears-Its-Original-Name-Florida-Forest-Service (last accessed on May 19, 2014).

5. Pretrial Statement, *supra* note 3, at 964.

6. *Id.*

7. *Id.*; Answer Brief of Plaintiff-Appellee Shuler Ltd. P'ship, App. B, 1, Shuler, 139 So. 3d 914 (No. ID13-0592) [hereinafter Answer Brief].

8. Pretrial Statement, *supra* note 3, at 964–65; Answer Brief, *supra* note 7, Apps. C–E.

9. *See* Answer Brief, *supra* note 7, App. B, 16, 23; Trial Transcript, at 378–79, 382–84, 286–87, Shuler, No. 2011-66-CA (Fla. 2d Cir. Ct. 2012) [hereinafter Transcript].

10. Pretrial Statement, *supra* note 3, at 965.

11. *See* FLA. STAT. § 768.28(6)(a) (2007).

12. Complaint at 3, 19, *Shuler*, No. 2011-66-CA (Fla. 2d Cir. Ct. 2012).

13. Unless otherwise noted, all references to Forestry herein should be construed to also include the Board of Trustees.

14. Joint Motion for Leave to File Amended Pleadings at 989-1002, *Shuler*, No. 2011-66-CA (Fla. 2d Cir. Ct. 2012). The complaint originally included a count for strict liability, but this

violations and negligent acts in conducting the Prescribed Burn caused the Pasture Fire, which damaged or destroyed 835 acres of Shuler's timber and resulted in other damages to Shuler.[15]

Shuler presented six witnesses at trial. First, Mr. T. Michael Shuler and Mr. J. Gordon Shuler, the partnership's managing partners, each testified about the history of Shuler's Pasture, the Pasture Fire and the damages it caused them, and their interactions with Forestry's personnel during and after the Pasture Fire.[16] Second, Mr. Michael Dooner of Southern Forestry Consultants, Inc., who was tendered and accepted as an expert in timber damage appraisals, testified that based upon his post-wildfire assessments Shuler had suffered approximately $834,018 in unmitigated damages due to the Pasture Fire.[17] Third, Mr. Ray Horne of Forestland Management, Inc., who was tendered and accepted as an expert in certified prescribed burning, testified that in his opinion Forestry's conduct of the Prescribed Burn presented a clear and present danger to the lives and property of adjacent property owners, motorists on the highway, and Forestry's own personnel.[18]

Shuler also presented the testimony of Forestry personnel. Mr. Victor Rowland, Mr. Joseph Taranto's immediate supervisor at Forestry, admitted that he issued Mr. Taranto, the certified prescribed burn manager (CPBM) responsible for the Prescribed Burn, a Notice of Violation (NOV) because his actions relating to the Prescribed Burn violated Section 590.125, Florida Statutes.[19] The NOV, which was admitted into evidence, revealed three independent violations of Section 590.125, Florida Statutes: failure to provide adequate firebreaks at the burn site and sufficient personnel and firefighting equipment for control of the Prescribed Burn; failure to limit the duration of the Prescribed Burn to the two-day time period authorized in the written prescription; and failure to keep the Prescribed Burn within the predetermined area identified in the written prescription.[20] Additionally, Mr. James Karels, Director of Forestry, admitted that Forestry was Board of Trustees' agent for purposes of managing and conducting prescribed burns in Tate's Hell State Forest.[21]

Forestry's answers admitted and denied various allegations, and raised all of the following defenses: Shuler's Count I (negligence) was

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count was dismissed and the complaint subsequently amended to include the count in gross negligence.

15. *Id.* at 989, 991, 994, 998, 1001.
16. Transcript, *supra* note 9, at 98–151, 218–23, 224–36.
17. *Id.* at 242–93, 327–36.
18. *See id.* at 355–404, 500–07.
19. *Id.* at 510–26, 536–40; Answer Brief, *supra* note 7, App. F.
20. Transcript, *supra* note 9, at 513–21; Answer Brief, *supra* note 7, App. F.
21. Transcript, *supra* note 9, at 541–43, 595–97.

not actionable at law; the NOV issued to Mr. Taranto was, as a matter of law, improperly issued and therefore properly rescinded; no agency relationship existed between Forestry and the Board of Trustees, and therefore the Board of Trustees could not be held vicariously liable for Forestry's actions; Shuler's claims were governed by sovereign immunity; and Shuler failed to mitigate its damages.[22]

Forestry presented a total of 18 witnesses at trial. In addition to also presenting testimony from Mr. Rowland, Mr. Karels, and Mr. Taranto (via video deposition) in their case-in-chief, Forestry solicited fact testimony regarding its conduct of the Prescribed Burn from 11 other Forestry employees, including Mr. Kenneth Weber, manager of the Tallahassee Forestry Center Field Unit.[23] Additionally, Forestry presented the testimony of Mr. John Costigan, deputy general counsel at the Department of Agriculture and Consumer Services, who testified regarding his legal interpretations of the certified prescribed burn statute and the propriety of the NOV issued to Mr. Taranto;[24] Mr. Leonard Wood, who was tendered and accepted as an expert in forestry and timber land appraisals, and questioned the methodology used in Shuler's timber damage appraisal;[25] and Mr. Joseph Ferguson, who was tendered and accepted as an expert in certified prescribed burning and testified that Forestry's conduct of the Prescribed Burn was not negligent.[26] Finally, the Board of Trustees presented the testimony of Ms. Marianne Gengenbach, coordinator of land management programs at the Division of State Lands, who testified that the Board of Trustees does not consider Forestry to be its agent for land management purposes.[27]

On November 1, 2012, after a seven-day trial receiving, reviewing and weighing all of the evidence, the jury entered a verdict in favor of Shuler on all four counts of the complaint and awarded Shuler $741,496.00 in damages.[28] Forestry and the Board of Trustees appealed the jury verdict to the First District Court of Appeal.[29]

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22. Answer and Defenses to Second Amended Complaint, at 1–7, *Shuler*, No. 2011-66-CA (Fla. 2d Cir. Ct. 2012).

23. The other ten witnesses were Mr. Sean Luchs (Forestry meteorologist), Mr. Travis Bentley (Forestry ranger), Mr. Christopher Crosby (Forestry ranger), Mr. Michael Newell (Forestry ranger), Ms. Opal Fulton (Forestry ranger), Mr. Calvin Setterich (Forestry pilot), Ms. Odessa Conley (Forestry clerk/tower person), Mr. Richard Smith (Forestry ranger), Mr. Bryce Thomas (Forestry supervisor), and Mr. James Shiver (Forestry firefighter). *See* Transcript, *supra* note 9, at 614–25; 691–1408.

24. *See id.* at 654–91.

25. *See id.* at 1430–1566.

26. *See id.* at 1570–1675.

27. *See id.* at 1408–29.

28. Final Judgment, at 1351–52, *Shuler*, No. 2011-66-CA (Fla. 2d Cir. Ct. 2012).

29. *Shuler*, 139 So. 3d at 915.

APPEAL

Forestry alleged all of the following assignments of error on appeal (among others): the jury verdict on gross negligence was not supported by competent substantial evidence;[30] the trial court improperly construed Chapter 590, Florida Statutes;[31] the trial court improperly received certain evidence regarding damages to Shuler's Pasture;[32] the trial court improperly denied Forestry and the Board of Trustees' motion to amend its answers regarding the date when the Prescribed Burn was "extinguished;"[33] and the trial court improperly denied the Board of Trustees' motion to dismiss it as a party to the case.[34]

On May 12, 2014, over a year after Forestry took its appeal to the First District Court of Appeal, the Court resolved the case on narrow grounds. In a one-page *per curiam* opinion, Judges Philip Padovano and Simone Marstiller affirmed the jury verdict.[35] Judges Padovano and Marstiller explained:

> PER CURIAM.
>
> This is an appeal from a judgment based on a jury verdict. The Division of Forestry conducted a controlled burn of state property in Franklin County but before the fire was completely extinguished an ember from the smoldering fire drifted onto the [Shuler's] property destroying 835 acres of trees. The jury based its verdict for [Shuler] on negligence, negligence per se, gross negligence and a violation of section 590.13, Florida Statutes.
>
> One of the arguments on appeal is that the evidence was insufficient to support the jury's finding of gross negligence. We conclude that a jury could reasonably find the appellants [Forestry and the Board of Trustees] were grossly negligent, based on expert testimony and other evidence presented by the appellees at trial. Whether negligence is ordinary or gross is a question to be resolved by the jury. *See Courtney v. Florida Transformer, Inc.*, 549 So. 2d 1061 (Fla. 1st DCA 1989). If there is some evidence from which a jury could make a finding of gross negligence, and in this case there is, the appellate court must affirm. Our resolution of this issue makes it unnecessary to consider the other principal arguments for reversal discussed in the dissent.

30. Initial Brief, *supra* note 1, at 18.
31. *See id.* at 22–36.
32. *Id.* at 37.
33. *Id.* at 41.
34. *Id.* at 46.
35. *Shuler*, 139 So. 3d at 915.

For these reasons, we conclude that the appellants have failed to demonstrate the existence of reversible error.

Affirmed.[36]

Forestry had argued that there was no competent substantial evidence upon which the jury could have based a finding of gross negligence at trial.[37] Shuler responded that the jury was entitled to resolve whether Forestry's conduct of the Prescribed Burn rose to the level of gross negligence and, based upon considerable competent substantial evidence presented at trial, the jury properly resolved that question in favor of Shuler.[38] Moreover, the Court could not reweigh the evidence on appeal.[39] Ultimately, Shuler prevailed on this key issue and, as noted by the Court, it was therefore "unnecessary to consider the other principal arguments for reversal discussed in the dissent."[40]

DISSENT

Although the Court may have deemed it unnecessary to address "the other principal arguments for reversal discussed in the dissent," the reader may find them interesting. Judge Scott Makar's dissenting opinion spanned approximately 30 pages.[41] The first 11 pages of the opinion described the history of and purpose for the certified prescribed burning statute, Tate's Hell State Forest and Shuler's Pasture, Forestry's conduct of the Prescribed Burn and its subsequent "mopping up" of the Prescribed Burn Area, the three wildfires caused by the Prescribed Burn, including the Pasture Fire, and the procedural posture of the case.[42]

The remainder of the dissent focused on "the cumulative effect of three statutory interpretation errors[,]" which Judge Makar concluded "resulted in [Forestry] being denied a fair opportunity to defend itself under the correct legal standards, thereby warranting reversal and a new trial."[43] Specifically, Judge Makar sympathized with Forestry's arguments—that the trial court misinterpreted the certified prescribed burning statute to allow claims other than gross negligence, should not have disallowed Forestry from using the statutory definition of "extinguished" in its defense, and should not have precluded Forestry

36. *Id.*
37. Initial Brief, *supra* note 1, at 18.
38. *See* Answer Brief, *supra* note 7, at 6–13.
39. *Id.* at 13.
40. *Shuler*, 139 So. 3d at 915.
41. *Id.* at 915–28 (Makar, J. dissenting).
42. *Id.* at 915–20 (Makar, J., dissenting).
43. *Id.* at 928 (Makar, J., dissenting).

from arguing that CPBMs were not legally required to be onsite beyond the initial burn period.[44]

With respect to the first issue—whether the trial court misinterpreted Chapter 590, Florida Statutes, to allow claims other than gross negligence—Forestry specifically argued that the trial court improperly construed Section 590.125(3)(c), Florida Statutes[45] Section 590.125(3)(c), Florida Statutes, provides that:

> Neither a property owner nor his or her agent is liable pursuant to s. 590.13 for damage or injury caused by the fire or resulting smoke or considered to be in violation of subsection (2) for burns conducted in accordance with this subsection unless gross negligence is proven.[46]

Forestry contended that Shuler's Count I (negligence) was not actionable because this provision only subjects CPBMs to liability if gross negligence is demonstrated.[47] In his dissenting opinion, Judge Makar reiterated that the Legislature elevated the standard for liability in prescribed burning cases from negligence to gross negligence "[d]ue to the threat of fire-related lawsuits[.]"[48] Accordingly, Forestry contended, it was legal error for the trial court to permit Shuler to pursue and ultimately prevail upon its count in simple negligence.[49]

Shuler's position, however, emphasized the importance of conducting prescribed burns "in accordance with" the statute, in light of the inherently dangerous nature of prescribed burning.[50] The argument: CPBMs who fail to comply with the statute—especially where failures to comply with the statute could so easily devastate lives and property—should not benefit from so heightened a standard of liability. If a CPBM were to conduct a prescribed burn in accordance with Section 590.125(3), Florida Statutes, then in that case he or she would merit the protection of the more demanding gross negligence standard under the statute.[51] On the other hand, if a CPBM were to conduct a prescribed burn in a way that is not in accordance with the statute, then he or she would not merit the protection of the statute (having not acted "in accordance" with it), and

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44. *Id.* at 920 (Makar, J., dissenting).

45. Initial Brief, *supra* note 1, at 11.

46. FLA. STAT. § 590.123(3)(c).

47. *Id.* at 13–18.

48. *Shuler*, 139 So. 3d at 916 (Makar, J., dissenting).

49. Initial Brief, *supra* note 1, at 13–18; *see also Shuler*, 139 So. 3d at 915 (Makar, J., dissenting) (reaching the same conclusion based upon the same authority).

50. *See* Madison v. Midyette, 541 So. 2d 1315, 1319 (Fla. 1st DCA 1989); Midyette v. Madison, 559 So. 2d 1126, 1128 (Fla. 1990) (recognizing the same).

51. Answer Brief, *supra* note 7, at 16–18.

simple negligence would be enough to establish liability.[52]

The term "prescribed burning" is defined in the statute as "the *controlled* application of fire *in accordance with a written prescription* for vegetative fuels under specified environmental conditions *while following appropriate precautionary measures that ensure that the fire is confined to a predetermined area* to accomplish the planned fire or land management objectives."[53] It "is a land management tool that benefits the safety of the public, the environment, and the economy of the state" by, among other things, reducing vegetative fuel load, which "reduces the risk and severity of wildfire, thereby reducing the threat of loss of life and property," and by ensuring "biological diversity" and the proper management of "forestland" and "rangeland."[54] It would seem that under the statute's plain language, a certified prescribed burn should always be controlled, conducted in accordance with a written prescription, and "confined to a predetermined area[.]"[55]

Ultimately, the trial court agreed with Shuler's interpretation of the statute and permitted it to proceed with Count I. Moreover, although Judge Makar concluded in his dissent that "[t]he record establishes that [Forestry] fully complied with all statutory requirements for the prescribed burn as outlined in the prescription plan."[56] Shuler presented evidence at trial strongly suggesting otherwise, upon which the jury based its determination that Forestry had indeed violated statute.[57] One item, the NOV, was effectively an admission against interest by Forestry that its own employee had violated Section 590.125, Florida Statutes, in three ways.[58] Judge Makar made no mention of the NOV in his dissenting opinion.

The second of Judge Makar's "three statutory interpretation" issues was whether the trial court erred in disallowing Forestry from using the statutory definition of "extinguished" in its defense.[59] According to Judge Makar, "[u]se of the statutory definition would have allowed [Forestry] to show the certified prescribed burn was conducted in accordance with the statute, undercutting claims it was negligent or grossly so."[60] Forestry argued, and Judge Makar agreed, that its admission that the Prescribed Burn was not finally "extinguished" until May 23, 2008 was based upon a *layman's* definition of the term, not the *legal* one found in Section

52. *Id.*
53. FLA. STAT. § 590.125(1)(a) (emphasis added).
54. FLA. STAT. § 590.125(3)(a).
55. *See id.*
56. *Shuler*, 139 So. 3d at 922 (Makar, J., dissenting).
57. Answer Brief, *supra* note 7, at 17–18, n.8.
58. *Id.* at 3–4.
59. *Shuler*, 139 So. 3d at 919 (Makar, J., dissenting); Answer Brief, *supra* note 7, at 22.
60. *Shuler*, 139 So. 3d at 924 (Makar, J., dissenting).

590.125(1)(d), Florida Statutes (defining a certified prescribed burn as "extinguished" once there is "no spreading flame").[61] Accordingly, Forestry contended, the trial court should have permitted them to withdraw the admission and a pre-trial stipulation to conform them and the evidence at trial to the legal definition of "extinguished."[62]

However, Forestry could not credibly argue that it originally understood Shuler's definition of the term "extinguished" to be a layman's definition, and not the one in the statute. In February of 2012, Forestry's own director, Mr. Jim Karels, testified at his deposition concerning the definition of the word "extinguished" and ratified Forestry's admission that the Prescribed Burn was not "extinguished," as that term is *used under the statute*, until May 23, 2008.[63] All depositions and written discovery were completed by early September 2012, yet—eight months later, notwithstanding Mr. Karels' earlier testimony—the Pretrial Statement executed by Forestry on September 21, 2012 *still* reflected that the Prescribed Burn was extinguished on May 23, 2008.[64] Only after Shuler filed a motion in limine on September 25, 2012, which alerted Forestry to the significance of its admission, did it file motions to amend or withdraw the admission and stipulation (both of which were filed in October, only weeks before trial).[65]

Judge Makar also suggested that the trial court improperly rejected Forestry's request to amend its admission and stipulation based solely on prejudice to Shuler.[66] But Shuler argued both before the trial court and in its answer brief that permitting Forestry to amend its answer and admissions would have been both prejudicial and *futile* in light of the *unchallenged stipulation*, which was obtained voluntarily and without fraud, misrepresentation, or mistake of fact.[67] The standards governing the amendment of pleadings and admissions are different than those that govern stipulations.[68] Judge Makar did not address the issue of whether

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61. *Id.*; Initial Brief, *supra* note 1, at 41–46.

62. Initial Brief, *supra* note 1, at 41–46.

63. Plaintiff's Motion to Strike, Motion for Sanctions, and Response in Opposition to Defendants' Motions for Leave to File Amended Answers to Plaintiff's Request for Admissions and Withdraw and Amend Certain Stipulated Facts of the Pretrial Statement, at 1063–67, *Shuler*, No. 2011-66-CA (Fla. 2d Cir. Ct. 2012) [hereinafter Motion to Strike].

64. *Id.* at 1025–27.

65. *Id.* at 972–78; Plaintiff's motion in Limine at 975, *Shuler*, No. 2011-66-CA (Fla. 2d Cir. Ct. 2012).

66. *See Shuler*, 139 So. 3d at 924 (Makar, J., dissenting).

67. Answer Brief, *supra* note 7, at 38–39.

68. *See* Fla. R. Civ. P. 1.370(b) (permitting the withdrawal or amendment of *admissions* unless the party who obtained same would be prejudiced); *cf.* LPI/Key W. Assocs., Ltd. v. Beachcomber Jewelers, Inc., 77 So. 3d 852, 854–55 (Fla. 3d DCA 2012) (recognizing that stipulations are binding upon both the parties *and the court*, unless not voluntarily undertaken or if obtained by fraud, misrepresentation, or mistake of fact); Seminole Elec. Coop., Inc. v. Dep't of Envtl. Prot., 985 So. 2d 615, 621 (Fla. 5th DCA 2008) (recognizing the same).

the trial court was bound by the stipulation in his dissenting opinion, or how it might have affected the trial court's decision-making with respect to the answers and admission.

Judge Makar also contended that

> [b]ecause of the trial court's incorrect ruling, the jury was erroneously told and led to believe that [Forestry] continually violated the statute by failing to have extinguished the fire during the forty-five day period, when in fact the certified prescribed burn was deemed extinguished because its flames were not spreading with monitoring and mopping up ongoing.[69]

But the jury based its verdict on evidence to the contrary: in addition to Mr. Karels' statement, other factual evidence and admissions on file[70] supported the jury's conclusion that the Prescribed Burn was *not* extinguished, under *any* definition of the word, on each day of the Prescribed Burn as posited by Forestry's witnesses and adopted by Judge Makar in his dissenting opinion.[71] The third "statutory interpretation" issue was whether the trial court improperly precluded Forestry from arguing that CPBMs were not legally required to be at the Prescribed Burn Area beyond the initial burn period.[72] Forestry argued that the trial court erred with respect to the meaning of "completion" in section 590.125(3)(b)1.[73] Section 590.125(3)(b)1 imposed the following requirement on CPBMs: "Certified prescribed burning pertains only to broadcast burning. It must be conducted in accordance with this subsection and: 1. May be accomplished only when a certified prescribed burn manager is present on site with a copy of the prescription *from ignition of the burn to its completion.*"[74]

While the term "extinguished" was defined in the statute to mean that "no spreading flame for . . . certified prescribed burning . . . exist[s][,]"[75] the term "completion" as used in section 590.125(3)(b)1 of the Florida Statutes was not defined. Forestry argued that use of the term "completion" in this context referred to completion of *ignition* of the burn,[76] whereas Shuler argued that it referred to completion of the

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69. *Shuler*, 139 So. 3d at 925 (Makar, J., dissenting) (internal quotations omitted).

70. *See, e.g.*, Pretrial Statement, *supra* note 3, at 964 (admitting that the Prescribed Burn caused three wildfires on April 12, May 6, and May 13, 2008).

71. *Shuler*, 139 So. 3d at 923–24 (Makar, J., dissenting); *see* Initial Brief, *supra* note 1, at 43; Pretrial Statement, *supra* note 3, at 963–65; Motion to Strike, *supra* note 63, at 1064.

72. *Shuler*, 139 So. 3d at 919–20 (Makar, J., dissenting).

73. Initial Brief, *supra* note 1, at 22–26.

74. FLA. STAT. § 590.125(3)(b)(1) (emphasis added).

75. *See* FLA. STAT. § 590.125(1)(d).

76. Initial Brief, *supra* note 1, at 22–26.

prescribed burn itself.[77] Forestry conceded that it did not have a CPBM on site with a copy of the burn prescription beyond the initial two-day period of the Prescribed Burn, which meant that it had effectively admitted to violating the statute under Shuler's construction of the statute.[78] In its initial brief, Forestry acknowledged that "the interpretation of a statute is a purely legal matter" and that the trial court "could make a final legal determination as to what the law is[.]"[79] Indeed, the trial court was entitled to decide what "completion" meant under Section 590.125(3)(b)1, Florida Statutes, without any evidentiary input from the parties.[80] Nevertheless, over Shuler's objection, the trial court held an in-chambers hearing on the interpretive dispute and received evidence—in effect, legal opinions—from both parties.[81]

Forestry presented two experts with significant experience in certified prescribed burning, Mr. Karels and Mr. Weber.[82] Mr. Karels was also involved with certain 1999 amendments to Chapter 590, Florida Statutes.[83] However, neither Mr. Karels nor Mr. Weber were lawyers or had any experience construing statutes.[84] On the other hand, Shuler presented Mr. Michael Shuler, a lawyer with extensive experience drafting and construing ordinances for Franklin County, but none specific to prescribed burning.[85] Ultimately, the trial court construed the statute in a way that was consistent with Shuler's interpretation.[86]

A plain reading of the statute buttressed the trial court's construction of Section 590.125(3)(b)1, Florida Statutes. The First District Court of Florida Indicated the "[w]hen the language of a statute is clear, unambiguous, and conveys clear and definite meaning, there is no reason for resorting to the rules of statutory interpretation and construction, and the statute must be given its plain and obvious meaning."[87] According to the dictionary,[88] the second definition of the word "completion" is "the state of being completed," and the second definition of the word "complete" is "finished; ended; concluded." Consequently, the

77. Answer Brief, *supra* note 7, at 18–23.

78. *Shuler*, 139 So. 3d at 919 (Makar, J., dissenting); Answer Brief, *supra* note 7, at 19; Pretrial Statement, *supra* note 3, at 966.

79. Initial Brief, *supra* note 1, at 22 n.9, 25.

80. Kasischke v. State, 991 So. 2d 803, 807 (Fla. 2008) (recognizing that statutory interpretation is a purely legal matter).

81. Answer Brief, *supra* note 7, at 23–24.

82. *Shuler*, 139 So. 3d at 925–26 (Makar, J., dissenting).

83. *Id.* at 926.

84. Answer Brief, *supra* note 7, at 24.

85. *Id.*

86. *Id.* at 24–25.

87. Vreuls v. Progressive Emp'r Servs., 881 So. 2d 688, 690 (Fla. 1st DCA 2004).

88. *See* Completion, DICTIONARY.COM, *available at* http://dictionary.reference.com/browse/completion?s=t (last visited Oct. 30, 2014).

Prescribed Burn could not have been "completed" any sooner than on May 23, 2008—the same day Forestry stipulated that it was finally "extinguished" (*i.e.*, there was "no spreading flame."[89] Shuler also argued that, taken to its logical end, Forestry's construction of the statute would have been absurd; it would have permitted a CPBM to ignite a prescribed burn, then leave and go home while the fire continues to burn, because completion of *ignition* of the burn had been accomplished.[90] The trial court apparently found Shuler's argument persuasive.

In his dissenting opinion, Judge Makar lamented that "[t]he trial court ultimately excluded [Forestry's] experts' testimony, allowed Mr. Shuler's testimony, and ruled consistently with [Shuler's] interpretation of the statute."[91] He also wrote that

> [t]he trial court erred in rejecting [Forestry's] interpretation of its own statute, and allowing the jury to hear only the testimony of Mr. Shuler. . . . Simply because this is a tort case does not nullify [Forestry's] expertise on the topic nor negate deference to [Forestry's] interpretation of a statute related to [Forestry's] regulatory functions.[92]

But these comments were misleading. First, the dissent suggested that the *jury* was permitted to hear Mr. Shuler's testimony on how the statute should be interpreted, but not Forestry's testimony on the same subject.[93] However, Mr. Shuler did *not* testify to the *jury* regarding how the statute should be interpreted—only to the trial court, out of sight of the jury, and at the same hearing that Forestry did.[94] After the trial court ruled on the proper construction of the statute, the trial court was entitled to preclude evidence contrary to it (having been deemed irrelevant, in light of the trial judge's ruling) from Forestry at trial—although it is worth noting that the trial judge did not preclude all such evidence.[95]

Additionally, with respect to agency deference, none of the cases cited by Forestry or Judge Makar involved situations where the agency in question was defending itself against a claim for damages in a civil action.[96] The U.S. Supreme Court has recognized that an agency should not be afforded deference where it is defending itself in a lawsuit for

89. Answer Brief, *supra* note 7, at 20–21; Pretrial Statement, *supra* note 3, at 965.

90. Answer Brief, *supra* note 7, at 22–23.

91. *Shuler*, 139 So. 3d at 926 (Makar, J., dissenting).

92. *Id.* at 926–27.

93. *See id.* at 927.

94. Answer Brief, *supra* note 7, at 23–24.

95. *Id.* at 27, 42; Transcript, *supra* note 9, at 857, 878–79, 907–10, 928–29, 932, 1003–05.

96. Answer Brief, *supra* note 7, at 28–29; Transcript, *supra* note 9, at 857, 878–79, 907–10, 928–29, 932, 1003–05.

damages.[97]

Ultimately, in light of the jury's gross negligence determination, it was unnecessary to address Judge Makar's statutory interpretation issues. Whether Judges Padovano and Marstiller would have agreed with Judge Makar on one or more of them will remain the subject of speculation.

2013 AMENDMENTS

In the 2013 Florida Legislative Session, mere months after the *Shuler* jury rendered its verdict, the Florida House (April 24, 2013) and Senate (May 2, 2013) passed C.S./H.B. No. 7087, which Governor Rick Scott approved on June 28, 2013 as Chapter 2013-226, Laws of Florida.[98] Section 25 of Chapter 2013-226 contained numerous amendments to Section 590.125, Florida Statutes.[99] Although the final bill analysis made no mention of *Shuler*, many of these amendments were very likely intended to address the statutory interpretation issues that preoccupied the parties and the trial court during the litigation, and would later prompt Judge Makar to write his 30-page dissenting opinion.

Section 25 of Chapter 2013-226 amended the definitions in Section 590.125, Florida Statutes, to add new definitions for "certified prescribed burning," "contained," "gross negligence," and "smoldering."[100] All of these definitions would have been relevant and relied upon to some degree in the *Shuler* litigation. Note that the jury was instructed on two definitions for "gross negligence," including the one added by Chapter 2013-226, but this amendment has made it the only definition now available under Chapter 590, Florida Statutes.[101] Section 25 of Chapter 2013-226 also revised the definitions of "prescribed burning" and "prescription," and replaced the definition of "extinguished" with one for "completed," which provides that for "[b]roadcast burning, no continued

97. Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 213 (1988) (finding that "[d]eference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate"); Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 741 (1996) (recognizing that "[t]he deliberateness of such positions, if not indeed their authoritativeness, is suspect"); *see also* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 519 (1989).

98. *See* Fla. H.R. Comm. on Agric. & Natural Res., CS/HB 7087 (2013) Staff Analysis 1 (Apr. 23, 2013).

99. *See* Ch. 2013-226, § 25, 2013 Fla. Laws 35–39.

100. *Id.*

101. Plaintiff's Amended Requested Jury Instructions and Verdict Form at 909, 1329, *Shuler*, No. 2011-66-CA (Fla. 2d Cir. Ct. 2012). The other definition for gross negligence, which Shuler proposed, provided: "A person may be found grossly negligent where there is a composite of circumstances which together constitute clear and present danger, and the person is aware of such danger, yet still undertakes a conscious, voluntary act or omission that is likely to result in injury." *Id.* at 925; Final Jury Instructions at 6, *Shuler*, No. 2011-66-CA (Fla. 2d Cir. Ct. 2012).

lateral movement of fire across the authorized area into entirely unburned fuels within the authorized area."[102] Recall that both of these terms were at issue in the litigation (although "completion" was not previously defined; this definition for "completion" is similar to the former definition of "extinguished").

Additionally, Section 25 of Chapter 2013-226 amended the criteria for conducting certified prescribed burns in many significant ways. It revised Section 590.125(3)(b)1, Florida Statutes, such that CPBMs only need to be present on-site with a copy of the prescription "until the burn is completed [see new definition above], after which the [CPBM] is not required to be present" (no longer "from ignition of the burn to its completion"). With respect to written prescriptions, it now provided that "[a] new prescription or authorization is not required for smoldering that occurs within the authorized burn area unless new ignitions are conducted by the [CPBM]" and "[m]onitoring the smoldering activity of a certified prescribed burn does not require a prescription or an additional authorization even if flames begin to spread within the authorized burn area due to ongoing smoldering."[103]

With respect to adequate firebreaks at the burn site and sufficient personnel and firefighting equipment to contain the fire within the authorized burn area, the statute now provided that "[f]ire spreading outside the authorized burn area on the day of the certified prescribed burn ignition does not constitute conclusive proof of inadequate firebreaks, insufficient personnel, or a lack of firefighting equipment,"[104] "[i]f the certified prescribed burn is contained within the authorized burn area during the authorized period, a strong rebuttable presumption shall exist that adequate firebreaks, sufficient personnel, and sufficient fire-fighting equipment were present,"[105] and "[c]ontinued smoldering of a certified prescribed burn resulting in a subsequent wildfire does not by itself constitute evidence of gross negligence under this section."[106] Section 25 of Chapter 2013-226 also revised Section 590.125(3)(c), Florida Statutes, to protect "leaseholder[s]," "contractor[s]," and "legally authorized designee[s]," in addition to property owners and their agents, from liability for damage or injury caused by fire, "including the reignition of a smoldering, previously contained burn."[107]

Had all of these amendments been part of the statute in 2008, Shuler could not have argued that Forestry violated the statute in many of the ways that it did at trial. For example, Shuler could not have argued that

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102. Ch. 2013-226, § 25, 2013 Fla. Laws at 35–39.
103. FLA. STAT. §§ 590.125(3)(b)(2)(a)–(b) (2007).
104. FLA. STAT. § 590.125(3)(b)(5)(a).
105. FLA. STAT. § 590.125(3)(b)(5)(b).
106. FLA. STAT. § 590.125(3)(b)(5)(c).
107. FLA. STAT. § 590.125(3)(c).

Forestry violated the statute because it failed to have a CPBM on-site from "ignition of the burn to its completion" or failed to obtain a new prescription or authorization after the first two days of the Prescribed Burn.[108] Given the now separate definitions of "certified prescribed burning" and "smoldering" and associated provisions, Shuler could not have characterized smoldering as an unauthorized continuation of the Prescribed Burn.[109] Nor could Shuler have argued that Forestry's burn prescription itself violated the statute because Forestry failed to include a plan to extinguish the Prescribed Burn, because the new definition for "prescription" does not require any such plan.[110]

Nevertheless, Forestry still would not have escaped liability under the statute, because the standard remains gross negligence under Section 590.125(3)(c), Florida Statutes (2013), and Shuler's expert, Mr. Horne, testified that Forestry's conduct of the Prescribed Burn was grossly negligent for many additional reasons beyond statutory violations, such as failing to give greater consideration to the time of year the Prescribed Burn was ignited; the sheer size of the Prescribed Burn; the likelihood of losing control of the Prescribed Burn; failing to keep the Prescribed Burn out of wetland areas, which prolonged smoldering; the inability and/or unwillingness by Forestry to extinguish smoldering areas to the interior of the Prescribed Burn; and permitting the Prescribed Burn to smolder for forty-five days, cause three wildfires, and smoke out the adjacent highway twice.[111] "If there is [only] some evidence from which a jury could make a finding of gross negligence, . . . the appellate court must affirm."[112] Even discounting the statutory violations, it appears there was sufficient evidence of gross negligence in this case to support the jury verdict.[113]

CONCLUSION

The recent amendments to Section 590.125, Florida Statutes, were clearly intended to make it more difficult for innocent adjacent landowners (like the Shulers) to hold prescribed burners (primarily large-scale burners like Forestry) legally accountable for their escaped prescribed burns. By statutorily recognizing that "[c]ontinued smoldering of a certified prescribed burn resulting in a subsequent wildfire does not by itself constitute evidence of gross negligence under this section," and

108. *See* Answer Brief, *supra* note 7, at 17 n.8.
109. *See id.* at 12–14.
110. *See id.* at 12.
111. *Id.* at 17–22.
112. *Shuler*, 139 So. 3d at 915.
113. *See id.*

protecting "leaseholder[s]," "contractor[s]," and "legally authorized designee[s]," in addition to property owners and their agents, from liability for damage or injury caused by fire, "including the reignition of a smoldering, previously contained burn."[114] The Legislature has further shifted the risk of escaped prescribed burns to private individuals (and their insurers) and away from large-scale burners like Forestry.

Instead of reexamining and improving its prescribed burning practices in light of the *Shuler* litigation, Forestry has simply clarified and codified those practices (*e.g.*, permitting prescribed burns to smolder indefinitely during dry times of the year) into state law, making it more likely that they will continue—thereby maintaining or increasing the current risk to the public. Given how rare it is (or should be) for an inherently dangerous prescribed burn to escape its boundaries and cause significant damage to an adjacent property—and how important prescribed burning is to CPBMs and the State of Florida—one would think that burners like Forestry would be more than willing to occasionally compensate innocent adjacent landowners harmed by their escaped prescribed burns. To the contrary, rather than making proper restitution "when fire breaks out,"[115] it appears that prescribed burners will just continue to hide behind the state's certified prescribed burning statute—come what may.

114. *See* §§ 590.125(3)(b)(5)(a)–(c).

115. *See supra* text accompanying note 1.