# THE FLORIDA SENATE

**SPECIAL MASTER ON CLAIM BILLS**

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| DATE | COMM | ACTION |
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| 12/31/14 | SM | Unfavorable |
| 3/31/15 | JU | Pre-meeting |
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December 31, 2014

The Honorable Andy Gardiner
President, The Florida Senate
Suite 409, The Capitol
Tallahassee, Florida 32399-1100

Re: **SB 62** – Senator Bill Montford
Relief of Shuler Limited Partnership

## SPECIAL MASTER'S FINAL REPORT

THIS IS A CONTESTED EXCESS JUDGMENT CLAIM FOR $670,493. THE SUIT SEEKS COMPENSATION FROM THE GENERAL REVENUE FUND FOR THE ALLEGED NEGLIGENCE OF THE DIVISION OF FORESTRY IN DESTROYING THE SHULER LIMITED PARTNERSHIP'S TIMBER AFTER CONDUCTING A PRESCRIBED BURN IN TATE'S HELL STATE FOREST.

BACKGROUND INFORMATION:

**1998 Florida Wildfires**

An unprecedented number of wildfires burned in Florida between May and July, 1998, destroying approximately 500,000 acres of land, 150 structures, and 86 vehicles. The economic impact of the fires was estimated to exceed $1 billion[i] and the costs of fighting the fires surpassed $130 million.[ii]

**1999 Legislative Response**

In response to the devastating 1998 fires, the Legislature enacted significant statutory changes in 1999 to encourage the use of prescribed burns and thereby reduce wildfires.[iii] A prescribed burn is described as the controlled application of fire under specified environmental conditions while following precautionary measures that confine the fire to a predetermined area.[iv] The burn destroys vegetation, which is

a naturally occurring fuel source, and reduces the potential and severity of wildfires. The prescription is the written plan for starting and controlling the prescribed burn.[v]

In the 1999 legislation,[vi] the Legislature found that "prescribed burning is a land management tool that benefits the safety of the public, the environment, and the economy of the state." The legislation also found that the application of periodic fire benefitted natural wildlife and when used in the state's parks and preserves, was essential to maintain the resources "for which these lands were acquired."[vii]

**The Liability Standard is Changed from Negligence to Gross Negligence:** To further its policy of encouraging prescribed burns, the Legislature reduced the risk of lawsuits to those conducting the burns. Specifically, the 1999 legislation, which remains current law, provides that a person who conducts a controlled burn is not liable for damages or injuries caused by smoke or fire unless the person is grossly negligent. Gross negligence means that a person's conduct is "so reckless or wanting in care that it constituted a conscious disregard or indifference to the life, safety, or rights of persons exposed to such conduct."[viii] Under the prior law, a person conducting a controlled burn could be held liable for negligence. Thus, the 1999 Legislature apparently decided that the benefits of controlled burns generally outweighed the associated risks of controlled burns.

**The Two Properties Involved in the Lawsuit**

**Tate's Hell State Forest and Prescribed Burns:** Tate's Hell State Forest is situated between the Apalachicola and Ochlockonee rivers in Franklin County. The expansive tract of land consists of more than 202,000 acres, which the state began purchasing in 1994. The forest supports a variety of ecosystems, wildlife, rare species of animals and plants, and serves to protect the Apalachicola Bay from freshwater runoff.[ix]

The Division of Forestry, as manager of Tate's Hell, endeavors to conduct prescribed burns on approximately 40,000 to 50,000 acres of the forest annually to reduce the vegetation fuels on the ground that feed forest fires. By burning this predetermined amount of acreage each year on a rotating cycle, the entire forest experiences a prescribed burn every 3 to 5 years. The prescribed burn managers and

firefighters conduct a planning meeting in advance of the next year's burns, often in October, to determine which areas will be burned and plan and schedule the burns.

**Shuler Limited Partnership[x] and Shuler's Pasture:** Shuler Limited Partnership owns a tract of land west of the Tate's Hell State Forest in Franklin County which consists of approximately 2,182 acres. The property is known as Shuler's Pasture and is separated from Tate's Hell by Cash Creek on its easternmost boundary. The property has been owned by the Shuler family since the 1950s and was passed down to the Shuler brothers who acquired it in 1997. Before the wildfire giving rise to this claim, Shuler's Pasture was described as being made up equally of pine flatwoods and bog or marsh.

LITIGATION HISTORY:

**Litigation**

On February 28, 2011, the Shuler Limited Partnership filed a Complaint in the Circuit Court of Franklin County alleging that an ember escaped from a 2008 prescribed burn conducted by the Division of Forestry in Tate's Hell State Forest and destroyed 835 acres of its timber. The Shulers' Amended Complaint named the Department of Agriculture and Consumer Services, Division of Forestry, State of Florida, and the Board of Trustees of the Internal Improvement Trust Fund, State of Florida, as Defendants. The lawsuit ultimately alleged negligence, statutory violations, negligence per se, and gross negligence.

**Mediation:** The parties attempted to mediate the claim in Tallahassee on September 24, 2012, 1 month in advance of the trial. After approximately 3 and one-half hours of mediation, the parties were unable to resolve the claim and the mediator declared an impasse.

**Circuit Court:** A 7-day jury trial was held between October 24, 2012, and November 1, 2012, at the Franklin County Courthouse in Apalachicola. The jury found in favor of the Shuler Limited Partnership on each count and rendered a verdict for $741,496 in damages and an additional $28,997 in costs. The Division of Forestry appealed.

**Court of Appeal:** On May 12, 2014, the First District Court of Appeal issued a succinct three paragraph, 2-1 per curiam decision upholding the lower court. Of the several arguments raised on appeal, the court addressed only the issue of

whether the evidence was insufficient to support the jury finding of gross negligence. Concluding that the jury could reasonably have found that the Division was grossly negligent and that the issue of whether negligence is ordinary or gross is a question rightfully resolved by the jury, the court affirmed the trial court. The court noted that its resolution of the negligence issue made it unnecessary to consider the other arguments on appeal.

A detailed dissenting 13-page opinion was filed by the third judge. In his dissent, the judge concluded that, due to "highly prejudicial legal errors" which were analyzed in depth in the dissent, the trial was unfair and a new trial should be held.

The Division of Forestry has stated that, while it had hoped to pursue an appeal after the Motion for Rehearing was denied, it discussed its options with the Solicitor General and concluded that the appellate rules did not provide it any basis for an appeal to the Florida Supreme Court.

**Claim Bill Hearing**
A day-long hearing was held on November 13, 2014, before the House and Senate special masters. Each side presented its case and was afforded the opportunity to question the opposing side's witnesses.

FINDINGS OF FACT:

The Division of Forestry conducted a certified prescribed burn on April 9 and April 10, 2008, in Tate's Hell State Forest. After the 2-day burn was complete, the Division of Forestry continued inspecting and monitoring the smoldering area to make certain that the burn was contained and that there were no spreading flames.

On May 13, 2008, a fire broke out on Shuler's Pasture. No one observed how the fire started. However, the Division stipulated that the fire probably was a spotover from the smoldering remains of a certified prescribed burn in Tate's Hell State Forest which was extinguished 33 days earlier. A spotover is a secondary fire that is ignited by an ember that is somehow lifted from the initial burn area and carried on the wind to a nearby property. For this spotover to have occurred, an ember would have apparently been picked up and carried westward by the wind over Cash Creek to the Shuler property where it ignited. Cash Creek is estimated to be between 800 and 1,300 feet wide.

The Division of Forestry personnel were the first to observe the fire. They responded to the fire and requested and received additional firefighting equipment and personnel from nearby counties to contain the fire. However, due to several complicating factors discussed later in this report, the Division was unable to contain the growing flames. Ultimately, 835 acres of the Shuler's timber was destroyed by the fire.

**The Prescription or Written Prescribed Burn Plan**

According to the Tallahassee District Prescribed Burn Packet that was introduced into evidence at trial, the preliminary burn plan for the prescribed burn at Tate's Hell was developed on October 19, 2007, almost 6 months in advance of the burn. Testimony elicited at trial demonstrated that approximately 10 foresters and certified prescribed burn managers were involved in developing the written plan, referred to as the prescription. According to the burn packet, the Division was approved to burn a specific tract of 3,267 acres in the High Bluff area of Tate's Hell State Forest which was previously burned in 2005.

Before initiating the burn, the Division developed a detailed burn plan prescription describing precisely the area to be burned, the dates and hours for the burn operation, the purpose and objectives of the burn, the preferred weather factors, firing techniques and ignition methods, flame length, and equipment and personnel to be used. Certified prescribed burn manager Joseph Taranto reviewed and checked boxes on the prescription form indicating that he complied with the pre-burn checklist requirements and briefed the crew members before conducting the burn. Mr. Taranto, a certified prescribed burn manager since 2004, worked with the Division since 1999 and previously conducted 71 prescribed burns in Tate's Hell State Forest. He testified at trial through a pre-recorded video deposition because he would be deployed to Afghanistan during the trial. His check marks in the necessary boxes on the prescription form indicated, that among other things, all prescription requisites were met, the necessary authorization was obtained, all equipment that was required for the burn was at the scene and fully operational, and the crew members were properly briefed and assigned their responsibilities.

Testimony at trial showed that before the burn began, the foresters and burn managers surveyed the tract of land and determined that the burn area contained adequate firebreaks around the burn area.

**Conducting the Prescribed Plan**

**Authorization:** On the morning of April 9, 2008, Mr. Taranto called the Division's dispatch office in Tallahassee to request authorization to conduct the burn. The weather forecast for this particular day provided a wind blowing from the east which would blow the smoke from the prescribed burn away from residents in Eastpoint and away from Highway 65. Upon receiving data from Mr. Taranto, which was entered into a computer program, the dispatch office determined that the weather conditions were acceptable and authorized the burn. The employees met together and Mr. Taranto briefed them on how the burn was to be conducted, weather conditions, what each person's responsibilities were, which radio channels they would operate under, and conditions for which they should be watchful.

**Ignition of the Burn and the Presence of the Prescribed Burn Manager:** Mr. Taranto then lit a test fire that was favorable and instructed a helicopter crew to begin laying a baseline on the westernmost boundary of the property near Cash Creek. The purpose of the baseline was to create a burn area that increased the containment line to about 30 feet and provided a larger buffer zone next to Cash Creek. This practice is known as a backing fire that has the effect of reducing the wind's ability to move a fire beyond the containment line because the fuel it would feed upon has already been consumed and because it moves against the wind, unlike a head fire that moves with the wind. If the fire had been ignited on the easternmost boundary of the property with an east wind, it would have become a wildfire blowing with the wind.

The helicopter proceeded to drop small chemical balls that ignited upon impact on the ground along a predetermined grid pattern. The small fires eventually grew into a single fire that was more manageable than igniting one extremely large fire that burns much hotter. Mr. Taranto called in his ignition reports to headquarters throughout the day letting them know what percentage of the ignition phase was complete.

The fire developed as planned throughout the day, and the fire's progress was stopped at the end of the day. When Mr. Taranto determined that no flames were spreading, the fire was no longer consuming vegetation, and remained within the containment lines, he dismissed the work crew for the day at approximately 7:00 p.m. or slightly later. According to Mr. Taranto, he was the first person on the scene that morning and the last to leave at the end of the day. No escaping fires were reported and no trees were being burned, only the undergrowth around the trees.

On April 10, the second day authorized for the prescribed burn, Mr. Taranto again called the dispatch office in Tallahassee and received the necessary authorization to conduct the burn. The same methods and procedures were followed. Once Mr. Taranto determined that the flames were stopped and not spreading, and the burn was confined within the containment lines, the crew was released. No spotovers were reported on either day of the burn.

**Mopping Up:** On the days following the 2-day prescribed burn, the fire continued to smolder as planned. The crews monitored the burn area and "mopped up" which means the crews worked the outer perimeter of the fire and reduced the heat along the edges by using water, shovels, and rakes to increase the buffer area and cool it. The goal is to ensure that the burn and its continued smoldering remain contained to protect nearby property from the chances of an escaped fire. Mr. Taranto established in his deposition that the fire was checked once or twice each day by one to three firefighters who rode around in trucks or fire engines until no smoke, heat, or embers were observed in the burn area.

Mr. Taranto further testified that he saw no error in how the prescribed burn plan was prepared or implemented and that he had all of the resources that he needed to conduct the prescribed burn.

**Firebreaks:** The four firebreaks surrounding the prescribed burn area consisted of Highway 65 on the eastern boundary, the water bodies of Cash Creek and East Bay on the northern and western boundaries, and another road that ran along the southern boundary. Additional firebreaks consisted of interior roads in Tate's Hell State Forest which previously were created by loggers or by the Division.

Mr. Taranto demonstrated that because of the large number of interior roads in the prescribed burn area, he was able to stop the fire at any point he felt necessary to prevent its spread should the weather change with a strong wind.

**Personnel:** Mr. Taranto established in his deposition that seven forestry personnel were present for the prescribed burn. Six of those seven were certified prescribed burn managers. He believed that he had sufficient personnel to conduct the operation and did not need to call in any additional people.

**Equipment:** According to Mr. Taranto's testimony, two employees were on the scene in bulldozers that were used to suppress the fire. Two employees were present in fire engines that held 350 to 500 gallons of water each. The remaining three employees served as ground patrol and used pickup trucks equipped with 50 gallons of water or more which were used for fire suppression. The employees had radios in their vehicles to communicate with each other during the prescribed burn. If additional resources were needed, the Division had access to a few tractors in nearby Carrabelle and could request assistance from the U.S. Forest Service, local fire departments, and other agencies such as the Florida Fish and Wildlife Conservation Commission, which also had fire engines. These additional resources were not needed during the 2-day prescribed burn.

**Spotovers after the Controlled Burn**

As mentioned earlier, a spotover is a separate fire that is ignited by an ember that is somehow lifted from the immediate burn area and carried on the wind to a nearby area outside of the initial burn area. According to testimony at trial elicited from different workers in the Division of Forestry, these occur as often as in 10 to 20 percent of fires. A spotover may occur when an area did not burn or was not consumed during the initial ignition phase because the conditions might have been too wet or the humidity was too high, but the weather conditions change, something dries out and is rekindled by a smoldering object, and an ember travels and ignites in a second location.

On April 21, 2008, 11 days after the prescribed burn was extinguished, a spotover occurred east of the prescribed burn area. The fire was referred to as the High Bluff fire. An ember

was picked up and traveled across Highway 65 and landed on state owned property. The fire was soon contained after burning approximately 10 acres of land.

Similarly, on May 6, 2008, 26 days after the prescribed burn was extinguished, a second spotover occurred east of the burn area. This fire was referred to as the High Bluff 2 fire. The ember also traveled across Highway 65 and landed on state owned property. The fire was also contained.

**Difficulties of Extinguishing The Shuler Pasture Fire**

The fire on Shuler's Pasture occurred 33 days after the prescribed burn was extinguished. According to trial testimony from several forestry workers, the Division had difficulty containing the fire, unlike the other spotovers, because of the conditions on the Shuler land. The firebreaks on the property were not wide enough for the Division's equipment to progress through, much of the land was boggy and would not support the large firefighting equipment, the land contained thick undergrowth that could not be traveled through, and no prescribed burns had been conducted to eliminate the inhibiting undergrowth.

CLAIMANT'S ARGUMENTS:

The Shulers alleged that the prescribed burn conducted by the Division of Forestry on April 9 and 10, 2008, which smoldered for weeks, caused the wildfire on Shuler's Pasture on May 13, 2008. The four counts alleged in the original Complaint were:

Count I – The respondents were negligent in their decision to ignite the prescribed controlled burn and negligent in the method of conducting the burn.

Count II – The prescribed burn violated section 590.13, F.S. (2007), which regulates controlled burns.

Count III – The respondents were negligent per se.

Count IV – The respondents were strictly liable.

When the jury was asked to evaluate counts II and IV, they were instructed to consider whether the Shuler fire was foreseeable by a reasonably careful person. Later, the trial court permitted the Shulers to amend Count IV to delete a

claim for strict liability and replace it with one for gross negligence.

In an effort to demonstrate the Division of Forestry's alleged negligence, the Shulers offered testimony that:

- The prescribed burn manager received a notice of violation[xi] for the manner in which the prescribed burn was conducted, thereby demonstrating negligence on his part;
- The burn was not completed in accordance with the 2-day prescription but extended for 45 days;
- Experts believed that the burn was not conducted correctly;
- The Division of Forestry personnel who fought to extinguish the fire at Shuler's Pasture were not adequately equipped to combat the fire.

RESPONDENT'S ARGUMENTS: The Division filed a Motion to Dismiss the Complaint and argued that any claim other than gross negligence was not permitted under the law as written. At trial, the Division offered testimony from the prescribed burn manager that the burn was conducted in conformance with its standard procedures and that all other needed personnel and equipment were on the scene for the prescribed burn. Forestry officials also testified that the prescribed burn was properly conducted.

Additional forestry personnel testified about the adequacy of personnel and equipment on site to extinguish the Shuler property fire, such that no negligence was committed in trying to contain and extinguish the fire.

On appeal, the Division argued that the jury trial was unfair, that the jury was misled about the proper legal standards that applied, that evidence was improperly admitted, and that conclusions were improperly drawn from that evidence. The Division also argued that it did not commit gross negligence and that the escaped ember that started the Shuler fire was not foreseeable, due to the wide expanse of the Cash Creek firebreak.

JURY VERDICT AND DAMAGES: The jury found that the Division violated the prescribed burn statute during the time between April 10 and May 23 while the burn smoldered and was, therefore, liable for negligence, a statutory violation, negligence per se, and gross negligence.

The jury awarded damages in the amount of $741,496 and costs were taxed for an additional amount of $28,997.

CONCLUSIONS OF LAW:

**Summary Statement**

Under section 590.125(3), F.S. (2007), the Division is legally responsible for the Shulers' damages only if the Shulers prove that the Division was grossly negligent.

The Shulers' theory of this claim is that the ember that started the fire on Shuler's Pasture was foreseeable and the Division, when conducting the prescribed burn, should have acted in such a manner as to have prevented their loss. The Shulers focus not on the 2-day prescribed burn period, but on the activities after the 2-day prescribed burn, from April 11 through May 23, when the Division was mopping up. The Shulers' theory, however, is not persuasive because it requires the Division to be responsible for weather conditions that occurred 6 weeks after the conditions under which the burn was authorized. Moreover, the manner in which the Division planned and conducted the fire and subsequently monitored the smoldering phase demonstrate that it was not grossly negligent.

**The Statute and Legal Standard Involved in this Case**

The primary certified prescribed burn statute in question, s. 590.125(3)(b), F.S. (2007), requires, among other things, that:

- A written prescription be prepared before authorization from the Division of Forestry is given;
- A certified prescribed burn manager be present on site with a copy of the prescription from ignition of the burn to its completion;
- An authorization to burn be obtained from the Division of Forestry before the burn is ignited; and
- Adequate firebreaks and sufficient personnel and firefighting equipment be present to control the fire.

Section 590.125(3)(c), F.S. (2007), provides that a property owner or his or her agent is not liable for damage or injury caused by the fire … for burns conducted in accordance with the subsection unless gross negligence is proven.

Gross negligence was defined as conduct that was so reckless or wanting in care that it constituted a conscious disregard or indifference to the life, safety, or rights of

persons exposed to such conduct. Section 768.72(2)(b), F.S. (2007).

**Trial Court Errors**

The trial court issued several rulings that the dissenting appellate opinion characterized as "highly prejudicial legal errors in the interpretation of the open burn statute" and concluded that the jury trial in Franklin County was "unfair and a new one warranted."[xii] After reviewing the extensive trial and appellate records that exceeded 2,000 pages, the undersigned finds the dissenting opinion to be very persuasive and accurate. The errors prohibited the Division from presenting accurate testimony and evidence to the jury. As a result of these errors, the jury was misled and the Division did not receive a fair trial.

These three errors in the trial were intertwined and involved:

- The interpretation of the gross negligence standard;
- The statutory interpretation of when the controlled burn was extinguished; and
- The interpretation of "completion" as to how long the prescribed burn manager was required to be on the site of the burn.

**The Gross Negligence Standard**

**The trial court committed error by allowing the jury to consider any standard of negligence other than gross negligence:** The Shulers argued in the trial court that the Division could be held liable for negligence, statutory violations of the prescribed burn statute, and negligence per se if the burn was not conducted in accordance with the prescribed burn statute until the burn was completely extinguished 45 days later. However, this position, which the trial court accepted, is inconsistent with the prescribed burn statute, s. 590.125(3)(c), F.S. (2007), which entitles a person to damages caused by a controlled burn only if "gross negligence is proven." The position also eviscerates the legislative policy of encouraging controlled burns in s. 590.125, F.S. (2007).

Even if the statute could be read to allow causes of action other than actions for gross negligence, the evidence shows that the Division complied with the statute. The Shulers' arguments that the Division violated the statute, making the protections of gross negligence standard inapplicable, are

based on several misinterpretations of the statute. According to the dissenting judge in the appellate decision, "the cumulative effect of [these] statutory interpretation errors resulted in the Division being denied a fair opportunity to defend itself under the correct legal standards."

Specifically, the errors by the trial court prevented the Division from showing the jury that the controlled burn was extinguished, as required by the prescription, within the 2-day period of the prescription. The errors also prevented the Division from showing that the certified prescribed burn manager was present at the controlled burn as required by statute from its ignition to completion.

**The fire was "extinguished" at the end of the 2-day burn period:** The Shulers argued that because the Division violated the controlled burn statute, it was not protected by the gross negligence standard. Instead, according to the Shulers, the Division was responsible for the Shulers' losses because the prescribed burn was not extinguished during the 2-day period of the prescription. The Shulers' position, however, seems based on a layman's interpretation of the term "extinguished," instead of its statutory definition. Under s. 590.125(1)(d), F.S. (2007), a fire is extinguished when the visible flames, smoke, or emissions from a certified prescribed burn cease. The evidence in this matter showed that the prescribed burn was extinguished per the statutory definition by the end of the 2-day prescribed burn period. Thus, the fact that the fire continued to smolder does not show that the Division violated the statute.

Nevertheless, the Division, before it was aware of all of the facts of the case, stipulated in the trial court proceeding that the fire was not extinguished within the 2-day prescribed burn period. When the Division became aware of its mistake, it sought to amend its pleadings. The trial court denied the request on the grounds that the proposed amendment coming so close to trial was prejudicial to the Shulers.[xiii] At that same time, October 9, 2012[xiv], the trial court permitted the Shulers to amend their complaint to add a count for gross negligence. As a result, the jury was incorrectly told to believe that the Division was continuously in violation of the controlled burn statute for 45 days.[xv] Even if the trial court's decision preventing the Division from amending its stipulation was fair under the circumstances, the stipulation is not

binding in a special master proceeding. Under Senate Rule 4.81(5), a special master hearing is a *de novo* proceeding in which stipulations are not binding on the special master or the Senate. Thus, based on the evidence and the law, I find that the prescribed burn was extinguished within the 2-day prescribed burn period.

**The certified prescribed burn manager was present from the ignition of the prescribed burn until its "completion:"** Under s. 590.125(3)(b)1. F.S., (2007), a certified prescribed burn manager must be present at the site of a controlled burn "from ignition of the burn to its completion." The Shulers argue that the Division violated the controlled burn statute because the certified prescribed burn manager was not present at the site of the controlled burn until its completion. The Shulers' argument, however, is based on its misinterpretation of the word "completion" which the trial court accepted during a pretrial ruling.

Under the Shulers' interpretation, the statute requires a controlled burn manager be on the site of a controlled burn continuously from the ignition of the fire until it is completely extinguished. Under this interpretation, the Division should have had a certified burn manager on site 24 hours a day for 45 days.

According to the Division, the statute requires a certified burn manager to be on the site of a controlled burn from ignition until the completion of the ignition phase of the burn. Under this interpretation, the statute required that the Division's controlled burn manager be on site only during the 2-day prescribed burn period.

In resolving the dispute over the meaning of "completion," which was not defined in the statute, the trial court heard testimony during a pre-trial hearing. In support of its position, the Division offered the expert testimony of the Director of the Florida Forest Service, who among other relevant credentials such as serving as a certified prescribed burn manager for more than 25 years, helped rewrite the controlled burn statute in 1999. The Division also offered the expert testimony of a district manager of field operation of the Florida Forest Service who served as a certified prescribed burn manager for 25 years and who had supervised several hundred controlled burns each year. In support of its position,

the Shulers presented one of its partners, an attorney who was seeking more than $800,000 in the lawsuit. He opined that the statute clearly requires that a certified controlled burn manager be onsite until a controlled burn is completely extinguished.

Although the Shulers' attorney had no previous experience with the controlled burn statute, the court accepted the Shulers' interpretation of the statute and prohibited the Division from offering testimony at trial to the contrary.[xvi]

I find that the Division's interpretation of the meaning of completion is the correct interpretation for several reasons. First, the Division administers the statute and regularly conducts prescribed burns, and courts are typically deferential to a state agency's interpretation of the statutes it administers.[xvii]

Second, the Shulers' interpretation of the statute would severely limit the ability of the Division to conduct controlled burns that reduce the risk of wildfires throughout the state. The Division's personnel would be stretched too thin. Highly qualified certified controlled burn managers would be relegated to spending most of their time dealing with smoldering burns instead of the more critical tasks of planning controlled burns and managing the ignition phase of controlled burns. After the Tate's Hell prescribed burn was extinguished or completed, the burn area was checked once or twice a day by other personnel, which was reasonable, not unreasonable or grossly negligent, under the circumstances.

Third, the wording of a related statutory provision indicates that the word "completion" is synonymous with "extinguished." In other words, a certified prescribed burn manager must be on the site of a controlled burn until no spreading flames exist. Under s. 590.125(2)(a)5., F.S. (2007), when a noncertified person conducts a controlled burn, "Someone must [be] present until the fire is extinguished." If a noncertified person, who does not have the training or experience of a certified controlled burn manager, can leave the site of a controlled burn when no spreading flames exist, certainly a certified prescribed burn manager, who is in a better position to assess the risks of spreading flames, may leave a prescribed burn when it is extinguished.

The evidence in this matter showed that the Division's prescribed burn manager was on the site of the Tate's Hell prescribed burn from ignition to the completion of the ignition phase. As a result, the Division's conduct was consistent with the prescribed burn statute.

**DAMAGES**

Because the Division did not commit an act of gross negligence, the Division is not legally liable to the Shulers. However, even though no one observed the origin of this fire, the Division of Forestry stipulated that the Shuler fire must have been ignited by an ember from the smoldering prescribed burn conducted in Tate's Hell State Forest. Therefore, if the Legislature believes that the state is morally responsible, though not legally culpable, for this substantial property loss of 835 acres of timber, the Legislature could award some measure of compensation to the Shulers as an act of legislative grace.

Determining the Shulers' loss is not possible based upon the evidence submitted at trial or at the special master hearing.

In closing arguments to the jury, the Shulers asked the jury to award damages of $834,018, a figure calculated by the Shulers' expert, Mr. Michael Dooner. The jury, however, apparently disagreed with Mr. Dooner's estimate because it awarded $741,496, nearly $100,000 less.

The undersigned did not find the damage estimates of Mr. Dooner as persuasive as the opinions of Mr. Leonard Wood, the expert representing the Division of Forestry. Mr. Wood noted that the Shulers, in order to arrive at accurate damages, had a responsibility to salvage the damaged trees as quickly as possible before they began to degrade and lose value. This did not occur. The better practice would have been to bring in multiple buyers to move the timber to market as quickly as possible, which also did not occur. Mr. Wood also found it unacceptable that the Shuler expert did not conduct a timber cruise to assess damages until January, 2011, more than 30 months after the fire, thereby rendering his methodology questionable and statistically unsound for assessing damages.

Mr. Wood expressed no confidence in several categories of damages put forth by the Shulers' expert including value assignments of

- $334,846 for standing dead timber, a category that is affected by how quickly the trees are salvaged;
- $111,615 as an additional value of standing dead timber for non-forced sale;
- $91,644 for growth loss because no growth study was performed; and
- $85,342 for "downgrading" the marketability of timber to a lower, less desirable category due to the fire because the claim was not substantiated.

Mr. Wood also questioned assessments of:

- $60,747 for "forced sale" damages because he did not agree with Mr. Dooner's definition of "forced sale" damages;
- $5,985 for cut trees that were not actually hauled from the land because those would become the property of the logging company;
- $32,160 for a weight loss claim of 15 percent of the timber's weight due to a loss of moisture caused by the fire;
- $57,250 for reforestation for preparing and planting trees because it is a separate business decision which would be a form of giving them double damages since they were already being awarded the profits from the trees being removed and sold due to the fire;
- $30,249 for fees and commissions to Mr. Dooner which he felt should have been borne by the Shulers; and
- $24,180 for roadwork because it is a capital cost of the landowner who would enjoy the benefits of having a road after the cutting and removal of the timber.

To further complicate computing the actual loss, Mr. Wood did not offer any counter estimate at trial. He stated that it would be very difficult to accurately develop projections based upon the findings provided by Mr. Dooner because so much time had elapsed between the initial fire and Mr. Dooner's assessment of the land. When asked at the claim bill hearing if the Division of Forestry would like to offer an estimate for damages if there were an act of legislative grace,

the Division responded that "it respectfully declines to make such an offer."

In addition to the $100,000 award that was paid to the Shulers and their legal counsel, the Shulers also received $202,489 for selling timber from their land which was damaged in the fire.

ATTORNEYS FEES:

Section 768.28, F. S., limits the claimant's attorney fees to 25 percent of the claimant's total recovery by way of any judgment or settlement obtained pursuant to s. 768.28, F.S. The claimant's attorney has acknowledged this limitation and verified in writing that nothing in excess of 25 percent of the gross recovery will be withheld or paid as attorney fees.

RECOMMENDATIONS:

Based upon the foregoing, the undersigned recommends that Senate Bill 62 be reported UNFAVORABLY.

Respectfully submitted,

Eva M. Davis
Senate Special Master

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[i] U.S. FIRE ADMIN., USFA-TR-126, WILDLAND FIRES, FLORIDA - 1998 (1998). http://www.usfa.fema.gov/downloads/pdf/publications/tr-126.pdf (last visited December 19, 2014).
[ii] Fla. H.R. Comm on Agric., CS for HB 1535 (1999) Staff Analysis (June 15, 1999).
[iii] *Id*.
[iv] Section 590.026(3)(a), F.S. (1997).
[v] Rule 5I-2.003(21), F.A.C.
[vi] Chapter 99-292, s. 9, Laws of Fla.
[vii] *Id.*
[viii] Section 768.72, F.S. (2007).
[ix] Fla. Dep't of Agric. & Consumer Servs., http://www.freshfromflorida.com/Divisions-Offices/Florida-Forest-Service/Our-Forests/State-Forests/Tate-s-Hell-State-Forest/Tate-s-Hell-State-Forest (last visited December 22, 2014).
[x] The Shuler Limited Partnership consists of Michael Shuler, Gordon Shuler, and two trusts. For simplicity, this report will refer to the Claimants as either the Shuler Limited Partnership or the Shulers.
[xi] The special master did not find this testimony to be persuasive because the Division presented testimony from multiple witnesses that the notice of violation was improperly issued, the notice of violation was rescinded soon after it was issued well in advance of the filing of the lawsuit, and that other similar notices of violation were also rescinded when the general counsel pointed out that their initial interpretation of the statute for issuing notices of violation was flawed.

[xii] *Department of Agriculture and Consumer Services, Division of Forestry, State of Florida, and the Board of Trustees of the Internal Improvement Trust Fund, State of Florida v. Shuler Limited Partnership*, 139 So. 3d 914, 915 (Fla. 1st DCA 2014)(Makar, J., dissenting).
[xiii] *Id*. at 919.
[xiv] *See* Initial Brief of Defendant-Appellant, p.42.
[xv] *Department of Agriculture and Consumer Services*, *supra* note xii, at 919.
[xvi] The court's error in accepting the Shulers' interpretation, was compounded by the Shulers' closing statement to the jury. The jury was told that the Division stipulated to being in violation of the controlled burn statute for 45 days because the certified controlled burn manager was not present after the burn was extinguished.
[xvii]The dissenting opinion cited in *Department of Agriculture and Consumer Services, supra* at 927, notes that "the entire case centered on the Division's regulatory functions, requiring deference to the Division's interpretation." *See Health Options, Inc. v. Agency for Health Care Admin*., 889 So. 2d 849, 851 n. 2 (Fla. 1st DCA 2004) and *Chiles v. Dep't of State, Div. of Elec*., 711 So. 2d 151, 155 (Fla. 1st DCA 1998).