IN THE COURT OF APPEALS
STATE OF GEORGIA

E. HILTON MORGAN	*	
Appellant	*	
v.	*	
	*	Court of Appeals No. A10A1914
LEANN K. HORTON, Individually,	*	
as Surviving Spouse of Ronnie C. Horton,	*	
Sr., Deceased and LEANN K. HORTON,	*	
as Administrator of the Estate of	*	
Ronnie C. Horton, Sr.	*	
Appellees.	*	

APPELLANT'S BRIEF

E. HILTON MORGAN appeals from the Brantley Superior Court's March 30, 2009 order denying his motion for summary judgment.

Part One

INTRODUCTION AND STATEMENT OF PROCEEDINGS BELOW

Under the supervision and direction of the local forestry unit's chief ranger, Morgan conducted a prescribed burn of a tract of land near a local highway. Two days after the burn was completed, the area continued to smolder, and a pocket of the residual smoke combined with heavy fog suddenly obscured visibility on the highway in the early morning hours. Robert Riendeau stopped his tractor trailer directly in the northbound portion of the highway. The vehicle driven by Ronnie C. Horton, Sr. collided into the rear of Riendeau's tractor trailer, and Horton was

killed instantly. Plaintiffs sued Morgan and Riendeau, alleging that their negligence caused the death of Horton. **[R.10]**[1] Morgan moved for summary judgment **[R.235-272]** on the basis that no issue of material fact remains for jury deliberation and he is entitled to judgment as a matter of law, relying on:

(1) the statutory policy found in Georgia's Prescribed Burning Act, OCGA § 12-6-145 et seq., and Forest Fire Protection Act, OCGA § 12-6-80 et seq., favoring prescribed burning;

(2) the undisputed material facts which demonstrate as a matter of law that his prescribed burn was conducted pursuant to – and within the allotted time for – a permit in complete compliance with these Acts;

(3) the fact that in jumping through every procedural hoop prescribed by the Acts and in precisely following the dictates of the Chief Forestry Ranger, Morgan exercised extraordinary care in conducting the prescribed burn when ***gross negligence*** must be shown in order for him to be found liable under the Acts.

The trial court denied summary judgment **[R.760]**, but issued a certificate of immediate review **[R.769]**. Morgan filed his application for appeal to this Court pursuant to OCGA § 5-6-34 (b). This Court granted the application **[R.786]**, and this appeal follows.

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[1]Riendeau was subsequently dismissed. See R.216-218.

STATEMENT OF FACTS

The Georgia Forestry Commission is in charge of all prescribed forestry burnings within the State by individuals. Deposition of Barry Chesser ("Chesser Dep.") 14:1-15 **[R.404]**; OCGA §§ 12-6-81; 12-6-83; 12-6-145 et seq. The Commission's local units provide all necessary equipment, manpower, physical assistance, and verbal advice on how to burn and when to burn. Chesser Dep. 112:20-24 **[R.502]**. The Brantley County Forestry Unit issues approximately 4,000 permits per year, about half of which are issued to landowners for controlled burning. Chesser Dep. 99:23-25, 100:1 **[R.489-490]**. In order to obtain a controlled burn permit in the State of Georgia, an individual must contact his local county forestry unit and request issuance of the permit. Chesser Dep. 14:16-17, 23-25; 15:1, 16-19 **[R.404-405]**; OCGA §§ 12-6-90; 12-6-91. The weather forecast determines whether the county forestry unit will issue a burn permit for any given day. Chesser Dep. 15:23-25, 16:1-3 **[R.405; 406]**. The Georgia Forestry Commission issues daily burning guidelines based on the weather conditions for that day. Chesser Dep. 16:2-3 **[R.406]**. The Commission's Macon office has a meteorologist on staff who reviews the weather conditions each day; at the time of this accident, the meteorologist issued the weather update to the district office in Waycross once a day at 6:30 each morning, and the burn guidelines were based on the information contained in that weather report. Chesser Dep. 16:4-19

[R.406]. The district office in turn disseminated the information by 8:30 each morning to the county units, including the Brantley County Forestry Unit. Chesser Dep. 16:12-19, 17:1-5 **[R.406; 407]**. Because the local unit would not know the weather conditions or guidelines in advance, it would issue no permit until it received these from the district office. Chesser Dep. 17:6-19 **[R.407]**. Fog was a consideration in determining when to issue a permit, because the mixture of smoke and fog could be a problem for visibility for nearby highways. Chesser Dep. 99:2-10 **[R.489]**. Other factors the Forestry Unit took into consideration were wind speed and relative humidity. Chesser Dep. 102:8-15 **[R.492]**.

Brantley County Forestry Unit Chief Ranger Barry Chesser was trained in wildfire management and prescribed burning since he began working for the Commission in 1973. Chesser Dep. 7:23; 8:6-25; 9:5-7; 11:11-25 **[R.397-399; 401]**. This training focused on how different weather factors affect fires and smoke from fires. Chesser Dep. 9:19-24 **[R.399]**. Morgan approached Chesser about firebreak plowing and burning a certain portion of his property for reforesting. Chesser Dep. 95:3-11 **[R.485]**; Deposition of E. Hilton Morgan ("Morgan Dep.") 14:25; 15:1-9; 49:20-25, 50:17-24 **[R.585-586; 620-621]**. Morgan had no experience doing this type of burn, Morgan Dep. 40:17-25, 41:1-22; 70:18 **[R.611-612; 641]**, and he was completely dependent on Chesser's expertise in determining how it should be conducted. See Morgan Dep. 52:17-19; 53:17-19, 24-25; 54:1-3;

61:6-7 **[R.623-625; 632]**. Morgan asked Chesser to devise a plan to establish firebreaks and otherwise to conduct a safe controlled burn. Chesser Dep. 30:13-15 **[R.420]**. Chesser in fact came up with such a plan by blocking off the entire tract into four smaller portions to help eliminate smoke problems. Chesser Dep. 30:16-25, 31:1-3 **[R.420-421]**. Chesser thus had to cut firebreaks in four different places, which cost Morgan more, because it required more time than a burn that size would normally take. Chesser Dep. 31:4-11 **[R.421]**. The county plowed the firebreaks around November 12, 2001, Morgan Dep. 50:5-14 **[R.621]**, with Chesser deciding where they would go, Chesser Dep. 31:22-24 **[R.421]**, supervising the plowing, and determining when they were adequate. Chesser Dep. 28:18-25, 29:1 **[R.418-419]**. Chesser informed Morgan that the Forestry Unit would only issue a burn permit on a day when the winds had been blowing from the east for more than one day to account for the smoke. Chesser Dep. 33:2-6, 10-16 **[R.423]**.

On the morning of December 4, 2001, Chesser went to Morgan and recommended that the permit be issued and the burn take place that day, because the winds had blown in an easterly direction for more than one day. Chesser Dep. 33:2-9 **[R.423]**; Morgan Dep. 51:18-25, 52:1-7 **[R.622-623]**. Moreover, the forecast for that day was for no fog, with only a slight chance of fog that night; for the following day, the forecast was for no fog. Chesser Dep. 105:2-11 **[R.495]**. And the forecast called for no wind direction shift for December 4. Chesser Dep.

107:10-25, 108:1-8 **[R.497-498]**. In Chesser's opinion, December 4, 2001, was thus the best day for a burn since the time that Morgan had requested the permit. Chesser Dep. 33:24-25, 34:1-5 **[R.423-424]**; Morgan Dep. 52:4-7 **[R.623]**. Chesser thus informed Morgan that on the 4th, he could or should be able to "burn without a problem." Chesser Dep. 105:13-16 **[R.495]**. Chesser made the decision about which day would be good for the burn based on the information he had available at that time and from his experience. Chesser Dep. 132:21-24 **[R.522]**. Chesser accordingly had the Forestry Unit issue Morgan a burning permit for that day on December 4, 2001. Chesser Dep. 20:19-22; 28:10-15 **[R.410; 418]**.

Chesser anticipated that the burn would start around 10:30 that morning and end by 4:00 that afternoon. Chesser Dep. 21:22-25; 22:1-2 **[R.411-412]**. Chesser was present at the site during the burn. Chesser Dep. 21:24-25; 29:2-7 **[R.411; 419]**. Morgan actually started the fire in Chesser's presence as scheduled at around ten o'clock in the morning on the designated tract, utilizing a "burning torch" he had obtained from the Forestry Unit.[2] The burn was conducted and completed on that particular tract that day at around 4:00 p.m. as planned. Chesser Dep. 27:18-21; 87:7-11 **[R.417; 477]**; Chesser Dep. Exh. 6: Letter from D.C. Wynn, Super.

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[2]Chesser Dep. 29:80-12; 52:16-19 **[R.419; 442]**. Morgan states that Chesser or someone else set the fire. Morgan Dep. 53:19-25, 60:17-20; 64:13-20 **[R.624; 631; 635]**. This contradiction is not material for summary judgment purposes.

Dist. Forester, to Fred Allen, Dir., Ga. Forestry Comm ("Wynn Letter") **[R.538]**. The fire never jumped the firebreaks. Chesser Dep. 34:15-20; 53:4-10 **[R.424; 443]**. By the end of the day, the residual smoke was light, and it was blowing from the east away from the highway. Chesser Dep. 32:21-25; 33:1 **[R.422-423]**.

In Chesser's opinion, Morgan set the fire correctly: Chesser, in fact, would not have allowed Morgan to set it incorrectly, since he was setting it in Chesser's presence. Chesser Dep. 52:20-24 **[R.442]**. Moreover, in Chesser's opinion, there was nothing else that could have been done to reduce the amount of smoke, especially since Chesser and Morgan took extra precautionary measures to reduce the amount of smoke, including dividing the tract into smaller portions to burn and completing the burn early. Chesser Dep. 53:12-19 **[R.443]**. Chesser said nothing to Morgan on December 4 that led him to believe that the fire had to be out by the end of the day. Morgan Dep. 67:17-20 **[R.638]**. The burn was complete: all that remained was residual smoke. Chesser Dep. 27:20-21 **[R.417]**. The next day, Chesser went to the site three times; Morgan drove to the site at least a couple of times, as well. Chesser Dep. 49:19-24 **[R.439]**; Morgan Dep. 73:10-17 **[R.644]**.

The procedure followed by the Forestry Unit at that time was that if over a hundred acres was to be burned, or if the Unit determined that there was otherwise a risk of a burn creating a smoke problem, the Unit was required to notify the Georgia State Patrol, which would determine whether warning signs should be put

in place on a highway. Chesser Dep. 25:4-11 **[R.415]**. The State Patrol was then required to notify the Georgia Department of Transportation to put up signs and signals warning the motoring public of the possibility of smoke and lowered visibility. Chesser Dep. 26:10-13 **[R.416]**. They were placed on the highway on each side of the area that might be impacted by the smoke because of lowered visibility for motorists. Chesser Dep. 26:2-23 **[R.416]**. If the road needed to be closed, blocked or reduced to one-lane traffic, the State Patrol would have flagmen on both ends of the smoke either to stop vehicles or to let them through slowly with caution. Chesser Dep. 49:14-18 **[R.439]**.

The fog potential for December 4 had been "none" during the day, "slight" for the night of the 4th, and none for the morning of the 5th. Chesser Dep. 131:6-9 **[R.521]**. The fog potential forecast for the night of December 5 and the early morning hours of December 6, however, was "high". Chesser Dep. 34:12-14; 46:21-25 **[R.424; 436]**. In addition, the "smoke dispersal index" (which is primarily determined by cloud cover, Chesser Dep. 44:5 **[R.434]**) for the night of the 5th was very low, meaning, it was predicted that smoke would not disperse well at all. Chesser Dep. 45:5-19 **[R.435]**. And since the wind typically dies down at dawn, smoke mixed with fog would lie close to the ground and not move. Chesser Dep. 43:2-5; 45:16-19 **[R.433; 435]**. Moreover, during the day, the residual smoke did not blow towards the highway at all – it instead blew in the desired easterly

direction. Chesser Dep. 34:20-25 **[R.424]**. But the forecast for that night was for the possibility of a wind shift. Chesser Dep. 38:14-22 **[R.428]**. For all of these reasons, the Brantley County Forestry Unit notified the State Patrol on December 5, the day after Morgan's burn, warning of the continuing possibility of smoke mixed with fog that night, which could affect driver visibility. Chesser Dep. 26:16-23; 48:4-7; 87:21-25, 88:1-20 **[R.416; 438; 477-478]**. See also Wynn Letter **[R.538]**. The State Patrol dispatcher indicated that they would monitor the situation and have signs put up if necessary. Chesser Dep. 24:14-25; 25:1; 88:16-20 **[R.414-415; 478]**; Wynn Letter **[R.538]**. But that evening, the State Patrol did not ask the DOT to put up any warning signs, and no warning signs were erected. Chesser Dep. 48:15-21 **[R.438]**.

Chesser did not instruct Morgan on December 5 to put the residual smoke out because of the anticipated fog problem for that night, nor did Chesser suggest to Morgan that he was required to do so. Chesser Dep. 133:1-4 **[R.523]**. The Forestry Commission did not eliminate the residual smoke when it realized the potential for a smoke and fog problem because that was not the procedure the agency followed. Chesser Dep. 133:5-8 **[R.523]**. The procedure the Commission followed was to notify the landowner of the potential problem and ask him to monitor the situation; if he reported a problem, then the Commission followed the procedure for notifying the State Patrol and having signs put up or the roads

closed. Chesser Dep. 133:9-11 **[R.523]**. Chesser informed Morgan of the possibility of heavy fog for the night of December 5, and the visibility problems that could ensue with the fog/smoke mixture; he instructed Morgan to monitor the situation, Chesser Dep. 134:6-12 **[R.524]**, and if a problem developed, to call the local "911," and ask them to alert the State Patrol to put signs up or shut down the road. Chesser Dep. 136:5-19 **[R.526]**. But Chesser also told Morgan that he had already requested the State Patrol to have signs put up on the highway and informed Morgan that it was the responsibility of the State Patrol to do so. Chesser Dep. 136:23-25, 137:1-5 **[R.526-527]**; Morgan Dep. 80:10-20 **[R.651]**.

Morgan got up about 5:30 the morning of December 6, and about 6:00 to 6:15 a.m., he drove down U.S. Hwy. 301/Ga. 23 to see what was going on with the controlled burn. Morgan Dep. 87:5-18 **[R.658]**. He then drove into town to a restaurant and ate breakfast. Morgan Dep. 87:10-13 **[R.658]**. The morning before, on December 5, he had noticed no fog, but the morning of December 6, he noted that the fog was heavy; but with his car lights on, he could see the length of a car light – probably a hundred yards. Morgan Dep. 87:19-25; 88:1-14 **[R.658-659]**.

On U.S. Hwy. 301/Ga. 23, at 6:56 a.m., Ronnie C. Horton, Sr. was traveling in a north bound direction; by that time, the highway was obscured by fog and smoke. See Complaint ¶ 5, **[R.11]**. Riendeau stopped his tractor trailer directly in the northbound portion of the highway and remained there for some time. See

Complaint ¶ 7, **[R.11]**. Horton's vehicle collided into the rear of Riendeau's tractor trailer, and Horton was killed instantly. Shortly after the accident occurred, Chesser learned of it, and he arrived at the scene. Chesser Dep. 57:1-20 **[R.447]**. Chesser's primary concern was to determine if warning signs had been put up; he determined that they had not. Chesser Dep. 67:16-22 **[R.457]**. Signs should have been erected on the highway from one-half to one-quarter mile before the area of the accident. Chesser Dep. 68:7-25, 69:1-7 **[R.458-459]**.

The State Forestry Commission determined that the next appropriate action on its part was to do a "total mop-up" of the site of the Morgan fire, whereby the Commission brings in heavy equipment to extinguish the residual smoke completely. Chesser Dep. 113:13-15, 114:3-25, 115:1-25, 116:1-21 **[R.503-506]**. Here, crawler tractors with water buffalos – 400-gallon water tanks with engines mounted on the back – were brought to the area to begin the mop-up. Chesser Dep. 114:5-9 **[R.504]**. The Commission also utilized "Mark III pumps," which pumped water out of the ground to refill the water buffalos. Chesser Dep. 115:9-16 **[R.505]**. None of this equipment, however, was available to the Commission locally – it was brought in from other parts of the State. Chesser Dep. 116:15-21 **[R.506]**. Landowners do not have access to this type of equipment. Chesser Dep. 114:20-24 **[R.504]**; Affidavit of Barry Chesser, Exhibit "A", Brief in Support of Motion for Summary Judgment ("Chesser Affidavit") ¶ 6 **[R.271-272]**. Chesser

did not discuss this equipment, its availability, or its utility for stopping the smoldering with Morgan until after the accident. Chesser Dep. 116:22-25, 117:1-8 **[R.506-507]**. Chesser did not mention to Morgan before the accident that the Commission would do a complete mop-up of the site if the smoke got out of hand, and prior to the accident, Chesser did not give Morgan the option of having a mop-up done of the site. Chesser Dep. 134:13-17 **[R.524]**. The Commission did not bill Morgan for the use of this equipment or otherwise for the mop-up. Morgan Dep. 107:3-7; 137:22-25, 138:1-2 **[R.678; 708-709]**.

In Chesser's opinion, Morgan did everything that he could possibly have done to conduct the burn properly and safely. Chesser Dep. 91:9-11 **[R.481]**. Morgan could have done nothing more than he did to reduce the smoke on the morning of December 6th, other than avoiding doing a controlled burn on the 4th. Chesser Dep. 90:24-25, 91:1-11 **[R.480-481]**. Morgan followed all guidelines that he could possibly follow and in fact "went above and beyond" attempting to avoid any problems. Chesser Dep. 91:4 **[R.481]**. Morgan contacted Chesser and relied on him to make the decisions as to how to conduct the controlled burn and when to do it, based on the weather forecast and other guidelines, and Morgan followed Chesser's directions exactly. Chesser Dep. 91:3-11 **[R.481]**. Moreover, according to Chesser, there is "nothing actually physically that [a landowner] can do" to stop the residual smoke from a controlled burn. Chesser Dep. 113:17-18 **[R.503]**.

Part Two

ENUMERATIONS OF ERROR

A. Summary judgment should have been granted on Plaintiffs' claim that Morgan was negligent in creating a smoke hazard on his property adjacent to a nearby public roadway.

B. Summary judgment should have been granted on Plaintiffs' claim that Morgan was negligent in failing to ensure that the burning of his property adjacent to the public roadway was extinguished at the time that his permit had expired.

C. Summary judgment should have been granted on Plaintiffs' claim that Morgan was negligent in failing to properly obtain a permit to allow continued smoldering and burning of his property on December 6, 2001.

D. Summary judgment should have been granted on Plaintiffs' claim that Morgan was negligent in failing to prevent smoke from his property from entering onto the public roadway.

E. Summary judgment should have been granted on Plaintiffs' claim that Morgan was negligent in allowing an excessive amount of property adjacent to a public roadway to be burned.

F. Summary judgment should have been granted on Plaintiffs' claim that Morgan was negligent in failing to have proper equipment to eliminate the smoke hazard and to monitor the smoke created from his property.

G. Summary judgment should have been granted on Plaintiffs' claim that Morgan was negligent in failing to warn the public and others regarding the smoke coming from his property.

H. Summary judgment should have been granted on Plaintiffs' claim that Morgan was negligent in creating a hazardous nuisance.

Part Three

STANDARD OF REVIEW

On appeal from the denial of summary judgment, this Court construes the evidence and all reasonable inferences from the evidence most strongly in favor of the non-movant and reviews the trial court's ruling de novo. *Bishop v. Farhat*, 227 Ga. App. 201, 203 (3) (489 SE2d 323) (1997). A defendant seeking summary judgment who does not bear the burden of proof at trial "must demonstrate by reference to evidence in the record that there is an absence of evidence to support at least one essential element of the non-moving party's case." *Lau's Corp. v. Haskins*, 261 Ga. 491, 495 (4) (405 SE2d 474) (1991). If there is insufficient evidence to create a genuine issue as to any essential element of a claim of plaintiff, that claim "tumbles like a house of cards." *Id.* at 492.

ARGUMENT AND CITATION OF AUTHORITIES

I. ***Overview.*** The historical common law view was that you were negligent if you set a fire on your land, which created smoke that lead to injury on an adjacent highway. Recognizing the importance of natural resources, safety to the public, and the timber industry in this State, however, and recognizing the benefits offered by prescribed burning, the Georgia Legislature by statute abrogated the common law by declaring a policy favoring prescribed burning, establishing a permitting process for prescribed burns, and vesting authority over all prescribed burns in the hands of the State Forestry Commission. See OCGA § 12-6-146 (a).

II. ***Historical View of Burning on One's Land.*** The Restatement (Second) of Torts provides, "A possessor of land is subject to liability for physical harm to others outside of the land caused by an activity carried on by him thereon which he realizes or should realize will involve an unreasonable risk of physical harm to them under the same conditions as though the activity were carried on at a neutral place." Restatement (Second) of Torts, § 371. The illustration given for this rule states: "A is burning brush on his farm, at a place one hundred feet from a public highway. A high wind blows smoke from the brush fire in a thick curtain across the highway, obstructing the view of passing motorists. Because their view is obstructed B and C, driving automobiles, collide in the smoke, although they are in

the exercise of all reasonable care, and are injured. A is subject to liability to both B and C." *Id.*[3]

III . ***"Prescribed" or "Controlled" Burning.***

A. ***The Legislative Policy Favoring Prescribed Burns.*** In the Prescribed Burning Act, OCGA § 12-6-145 et seq., and the Forest Fire Protection Act, OCGA § 12-6-80 et seq., the Georgia Legislature abrogated the common law as enunciated in the Restatement (Second) of Torts § 371. The Prescribed Burning Act defines "prescribed burning" as "the controlled application of fire to existing vegetative fuels under specified environmental conditions and following appropriate precautionary measures, which causes the fire to be confined to a predetermined area and accomplishes one or more planned management objectives or to mitigate catastrophic wildfires." OCGA § 12-6-147 (2). In the Act, the Legislature declares "that prescribed burning is a resource protection and land management tool which benefits the safety of the public, Georgia's forest resources, the environment, and the economy of the state;" the Act then describes seven specific benefits of prescribed burning. OCGA § 12-6-146 (a). It also

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[3]The text notes that the illustration is taken from older case law starting from 1890. See, e.g., *Lavelle v. Grace*, 348 Pa. 175 (34 A2d 498, 150 ALR 366) (1943); *Dugan v. St. Paul & Duluth R. Co.*, 43 Minn. 414 (45 NW 851) (1890); *Howser v. Cumberland & Pa. R. Co.*, 80 Md. 146 (30 A. 906, 27 LRA 154) (1894).

develops the Legislature's purpose of promoting "the continued use of prescribed burning for community protection, silvicultural, environmental, and wildlife management purposes." OCGA § 12-6-146 (b). As for curbing forest fires, in the Georgia Forest Fire Protection Act, the Legislature describes prescribed burning as "an effective method of reducing fuel loads and the potential hazards and impact associated with uncontrolled fires." OCGA § 12-6-81. Moreover, in that Act, prescribed burning is legislatively deemed to be a property right of the landowner. OCGA § 12-6-148 (a) (3).

B. ***The State Forestry Commission's Permitting Process.*** The General Assembly created the State Forestry Commission to "foster, improve, and encourage reforestation" and promote "better forestry practices." OCGA §§ 12-6-5 (a) (1), (2); see also OCGA § 12-6-5.1 (legislative findings regarding the need for improved reforestation). With regard to fire fighting, the General Assembly authorized the Commission "[t]o conduct and direct fire prevention work," that is, preventing, detecting, and combating fires. OCGA § 12-6-5 (a) (5). In the Forest Fire Protection Act, the General Assembly reiterated the need to protect against uncontrolled fire and to preserve forest lands and forest resources and gave the Commission authority to direct and supervise "all forest fire protection work," including all aspects of prescribed burning. OCGA §§ 12-6-81; 12-6-83. As noted above, the Legislature found that prescribed burning helps in

limiting uncontrolled fires. OCGA § 12-6-81. The Forest Fire Protection Act requires permits for all prescribed burning, with certain not applicable exceptions. OCGA §§ 12-6-90; 12-6-91; 12-6-148 (a) (4). The permit is obtained from the forest ranger or authorized employee of the forest unit of the county where the burn is to take place. OCGA § 12-6-90 (a). The permit "grant[s] permission for a controlled burn to take place at the location specified by the applicant at a time approved by the county forest ranger or by the other authorized employee of the forestry unit serving the county." *Id.* The purpose of the permit requirement is to enable the forestry service to supervise fires for the safety of the public, particularly of people who pass on a nearby highway or who have trees or houses nearby. *Butler v. McCleskey*, 208 Ga. App. 341, 343 (1) (430 SE2d 631) (1993).

The Commission's director is authorized to prohibit controlled burning or to permit it "only upon such conditions and under such regulations as in his judgment are necessary and proper to prevent the destruction of property." OCGA § 12-6-17 (a). Prescribed burning is only allowed where "an individual with previous prescribed burning experience or training is in charge of the burn and is present on site until the fire is adequately confined to reasonably prevent escape of the fire from the area intended to be burned." OCGA § 12-6-148 (a) (1). In this case, that person was Chief Ranger Barry Chesser.

IV. *Enumerations of Error.*

A. ***Summary judgment should have been granted on Plaintiffs' claim that Morgan was negligent in creating a smoke hazard on his property adjacent to a nearby public roadway.*** In this allegation of the complaint, plaintiffs are attempting to revive the old common law as stated in the Restatement (Second) of Torts, *supra*, but this is simply no longer the law in Georgia. The State's legislative policy now favors prescribed burning, and Morgan is in the class to be protected by the statutes governing prescribed burns. The Prescribed Burning Act expressly states that "No property owner or owner's agent conducting an authorized prescribed burn under this part shall be liable for damages or injury caused by fire or resulting smoke ***unless it is proven that there was gross negligence in starting, controlling, or completing the burn."*** OCGA § 12-6-148 (b) (Emphasis supplied). As will be discussed more in detail, Morgan "conduct[ed] an authorized prescribed burn" as a matter of law. Moreover, the facts of this case unequivocally demonstrate that Morgan could not be found grossly negligent. The Georgia Code describes "gross negligence" in this fashion:

> In general, slight diligence is that degree of care which every man of common sense, however inattentive he may be, exercises under the same or similar circumstances. As applied to the preservation of property, the term 'slight diligence'

> means that care which every man of common sense, however inattentive he may be, takes of his own property. The absence of such care is termed gross negligence.

OCGA § 51-1-4.

Morgan exercised not mere slight or ordinary care – he instead exercised ***extreme*** caution in preparing for and carrying out this prescribed burn. Chesser stated emphatically that Morgan "went above and beyond" attempting to avoid any problems, and that Morgan could have done nothing more to reduce the smoke on the morning of December 6th, other than avoiding doing a prescribed burn on the 4th. Morgan followed all guidelines that he could possibly follow. He contacted Chesser and relied on him as the expert to make the decisions as to how to conduct the controlled burn and when to do it, based on the weather forecast and other guidelines. Morgan followed Chesser's instructions precisely and did everything that he could possibly have done to conduct the burn properly and safely. And according to Chesser, a landowner can do nothing to stop the residual smoke from a controlled burn – only the Forestry Service is equipped to stop the smoke and will do so – as in this case – in an emergency. Chesser Dep. 113:17-18 **[R.503]**. If a landowner can do nothing to stop the smoldering, "allowing" the smoke cannot be "gross negligence" as a matter of law. A jury question is presented only when reasonable men could disagree as to whether the facts alleged constitute gross

negligence. *McDaniel v. Gysel*, 155 Ga. App. 111 (270 SE2d 469) (1980); *Hayes v. Lakeside Village Owners Ass'n*, 282 Ga. App. 866, 869 (640 SE2d 373) (2006). Here, no amount of negligence can reasonably be inferred – certainly not gross negligence.

B. ***Summary judgment should have been granted on Plaintiffs' claim that Morgan was negligent in failing to ensure that the burning of his property adjacent to the public roadway was extinguished at the time that his permit had expired.*** The permit in this case was issued for December 4, 2001, from 10:30 a.m. until 4:00 p.m. All the evidence in this case is that the controlled burn on Morgan's property finished by 4:00 p.m. on December 4, 2001. Chesser Dep. 27:18-21; 87:7-11 **[R.417; 477]**; Wynn Letter **[R.538]**. A Forestry Commission report expressly states, "This controlled burn was conducted ***and completed by approximately 4:00 p.m.*** on [December 4, 2001]," and "the ***burn was permitted properly*** and correct weather for burn was favorable." Wynn Letter **[R.538]**. Thus, the "burning" of Morgan's property was in fact completed within the permit period. Morgan was under no legal requirement to stop residual smoke or smoldering flame that resulted from the properly permitted burn – and as stated, could not have stopped it in any event.

As a matter of policy and procedure, the Forestry Commission does not consider residual smoke or smoldering flame that is a natural result of a prescribed

burn to constitute "burning" outside of the permit period. Wynn Letter **[R.538]**; Chesser Affidavit ¶ 5 **[R.272]**; Chesser Dep. 113:24-25, 114:1-2 **[R.503-504]**. By statute, the Forestry Commission is granted "power to make and enforce all rules and regulations necessary for the administration of forest fire protection," OCGA § 12-6-83, and an agency's interpretation of its own policies and procedures in implementing a statute is given great deference. *Insurance Dept. &c. of Georgia v. St Paul Fire &c. Ins. Co.*, 253 Ga. App. 551, 552 (559 SE2d 754) (2002). To determine whether an agency's policy or procedure in implementing a statute is authorized by that statute – in this case, the prescribed burning permitting requirements – necessitates an understanding of the statute. See OCGA §§ 12-6-90 and 12-6-91. Courts apply the appropriate rules of statutory construction to assist in this process, the cardinal rule being to ascertain the legislative intent and purpose in enacting the law and to construe the statute to effectuate that intent. *Hicks v. Florida State Bd. of Administration*, 265 Ga. App. 545, 547 (1) (594 SE2d 745) (2004). Although courts are "not bound to blindly follow" an agency's interpretation, they defer to its interpretation when it reflects the meaning of the statute and comports with legislative intent. *Id.* Courts defer to the agency in matters involving the interpretation of the statutes it is empowered to enforce and give great deference to the agency's policy decisions, because the State agencies provide a "high level of expertise and an opportunity for specialization unavailable

in the judicial or legislative branches" that enable such agencies to "make rules and enforce them in fashioning solutions to very complex problems." *Albany Surgical v. Dept. of Community Health*, 257 Ga. App. 636, 638 (1) (a) (572 SE2d 638) (2002). If as in this case the statute is silent or ambiguous as to the specific issue, the question for the Court is whether the agency's answer to that issue is based on a permissible construction of the statute. *Ga. Dept. of Revenue v. Ga. Chemistry Council*, 270 Ga. App. 615, 617 n.7 (607 SE2d 207) (2004).

Here, the Forestry Commission is charged with implementing the prescribed burning permit requirements of OCGA §§ 12-6-90 and 12-6-91. The permit "grant[s] permission for a controlled burn to take place at the location specified by the applicant ***at a time approved by the county forest ranger***." OCGA § 12-6-90. The legislative intent and purpose in enacting the law is obviously to assure that the Forestry Commission retains absolute control to determine the safest appropriate time for a prescribed burn. The Forestry Commission's policy of setting the time allotted in the permit for the actual time when the fire is burning, and not during the period afterwards when it is smoldering, is a practical matter. As is obvious from this case, determining how long residual smoke might emit from a prescribed fire – or even errant "flames" as Plaintiffs allege – is impossible for anyone, including the Forestry Commission experts, to determine. Chesser Dep. 113:24-25, 114:1-2 **[R.503-504]**. Thus, this Court should construe the "time

approved by the county forest ranger" in the statute exactly as the Forestry Commission does, that is, to mean only when the controlled burn is actually taking place. This is the only pragmatic approach; moreover, the Forestry Commission's interpretation of the meaning of the "time approved by the county forest ranger" reflects the meaning of the statute and comports with legislative intent.

In their Response to Morgan's summary judgment motion, Plaintiffs averred – for the first time – that they have found numerous witnesses who saw flames coming from Morgan's property on December 5, 2001, and attached several affidavits of these discovered witnesses. While Morgan vigorously disputes this assertion as a matter of fact, for purposes of summary judgment, it is immaterial whether the "smoldering remains" of a prescribed burn include flame as well as smoke. The Forestry Commission determines in any event when, for purposes of the permit period, the "burning" is complete, and in this case, the "burn" period concluded on December 4, 2001, as permitted. Plaintiffs can point to no authority whatsoever for the proposition that if some flames occur at a prescribed burn site after the forestry unit has determined that the burn is complete, then the landowner is required to obtain another burn permit. They can point to no authority because there is no authority for this contention. Plaintiffs' desperate attempts to create factual and legal issues are unavailing, and the trial court should have so found. Accordingly, summary judgment should have been granted on Plaintiffs' claim that

Morgan was negligent for failing to "extinguish" the "burn" after his permit expired.

C. ***Summary judgment should have been granted on Plaintiffs' claim that Morgan was negligent in failing to properly obtain a permit to allow continued smoldering and burning of his property on December 6, 2001.*** As demonstrated in subpart B., *supra*, the prescribed burn in this case was properly permitted and began and ended within the time allotted for the burn in the permit. In suggesting that Morgan failed to properly obtain a permit for the burn, the plaintiff is obviously trying to squeeze the facts of this case into the holding of *Butler v. McCleskey*, supra, 208 Ga. App. 341, which held that the failure to notify forestry agents of one's intent to burn a field is negligence per se. *Id.* at 344 (1). Morgan properly notified, and depended completely on the help of, the Forestry Service in conducting his burn. The holding in *Butler v. McCleskey* is thus inapplicable to this case. Moreover, this allegation effectively restates the claim described in subpart B., and for the reasons cited therein, summary adjudication was appropriate on this contention, as well.

D. ***Summary judgment should have been granted on Plaintiffs' claim that Morgan was negligent in failing to prevent smoke from his property from entering onto the public roadway.*** In this allegation, the plaintiffs ask the Court to impose a duty on Morgan to carry out an impossible task: to prevent smoke from a

properly permitted prescribed burn on his property from spreading in a certain direction. Chief Ranger Barry Chesser made clear that there would always be residual smoke and smoldering remains after a burn – it is unavoidable. Chesser Dep. 113:24-25, 114:1-2 **[R.503-504]**. The law does not impose a duty on a landowner to carry out the impossible, and much less so when by statute liability may only be imposed for gross negligence, and the duty imposed is one of "slight diligence." OCGA § 51-1-4.

E. ***Summary judgment should have been granted on Plaintiffs' claim that Morgan was negligent in allowing an excessive amount of property adjacent to a public roadway to be burned.*** Based on his experience and training, Chief Ranger Chesser conceived of a plan to break up the tract of Morgan's land into four pieces in order to reduce the amount of smoke and the possibility of the fire spreading. Only one of those pieces – approximately 15 acres – was burned on December 4, 2001, the portion furthest from the highway. See Chesser Dep. Exh. 5 (map of area) **[R.537]**. As noted above, the county plowed the firebreaks, with Chesser deciding where they would go, supervising the plowing, and determining when they were adequate. The undisputed evidence shows that Morgan was completely ignorant of the manner of determining how much acreage could safely be burned at a time and was totally dependent on the expertise of the Forestry Commission to make this determination on his behalf. A defendant's training and

experience may be taken into account in determining whether his conduct constitutes negligence. See, e.g., *Bills v. Lowery*, 286 Ga. App. 301, 303 (648 SE2d 779) (2007). The Forestry Commission is charged by statute with the expertise to determine how much of the property was safe to include in the burn, and Chief Ranger Chesser in fact had that expertise. Morgan was entitled to rely on, and in fact was required to rely on, this expertise and cannot be liable in negligence – gross or otherwise – for the decision of how much of his property to burn.

F. ***Summary judgment should have been granted on Plaintiffs' claim that Morgan was negligent in failing to have proper equipment to eliminate the smoke hazard and to monitor the smoke created from his property.*** Chief Ranger Chesser testified that he as a representative of the Forestry Commission was in charge of supervising this prescribed burn. He also testified unequivocally that no ordinary landowner would be expected to have the type of heavy equipment required for eliminating all residual smoke in an emergency – only the Forestry Commission was capable of such a task. He also made clear that Morgan did everything reasonable – and beyond – to make sure the fire would burn safely, including relying completely on Chesser's expertise. The standard is ***reasonableness***. Asking Morgan to do more – i.e., bringing in heavy, expensive equipment to extinguish all residual smoke, as Plaintiffs' so-called expert suggests – is patently unreasonable and demands that Morgan exercise ***extraordinary*** care,

making him effectively an insurer of the public's safety. See OCGA § 51-1-3. But this, as noted, is not the law. Morgan can only be held liable for ***gross*** negligence. The failure to have massive, heavy equipment available for the possibility of residual smoke blowing across a highway does not constitute gross negligence as a matter of law. To rule otherwise guts the plain Legislative intent of the Prescribed Burning Act.

And even if Morgan had been constantly monitoring the smoke situation, nothing could have been done to prevent the smoke from blowing across U.S. Hwy. 301/Ga. 23 at the time or in the quantity that it did. A pocket of thick smoke appeared on the highway suddenly, completely obscuring vision. Nothing in Morgan's power could have prevented this sudden occurrence except foregoing the burn completely – and Morgan cannot be liable for a supervised, prescribed burn in light of the State's legislative policy favoring controlled burns.

G. ***Summary judgment should have been granted on Plaintiffs' claim that Morgan was negligent in failing to warn the public and others regarding the smoke coming from his property.*** Morgan had no duty to warn the public of the possibility of smoke on the highway, because he had no authority to do so. Only the Department of Transportation on advice of the State Patrol had the authority to erect warning signs on the highways. See OCGA § 32-6-50 (a); *Fraker v. C.W. Matthews Contr. Co.*, 272 Ga. App. 807, 812-813 (3) (614 SE2d 94) (2005). As a

matter of law, Morgan cannot be charged with the negligence of the State Patrol in failing to advise the DOT that signs were needed after the Forestry Unit urged the State Patrol to do so.

H. ***Summary judgment should have been granted on Plaintiffs' claim that Morgan was negligent in creating a hazardous nuisance.*** Under Georgia's Prescribed Burning Act, if a prescribed burn is properly permitted, as in this case, it cannot be characterized as a nuisance as a matter of law. See OCGA § 12-6-148 (a) (2). Prescribed burning conducted under the requirements of the Act is "considered in the public interest ***and shall not create a public or private nuisance***." For this reason, the court should also have granted summary judgment on this particular claim.

CONCLUSION

The mere occurrence of an unfortunate event is not sufficient, of itself, to authorize an inference of negligence. Charles R. Adams III, *Georgia Law of Torts* 92 (2008). Here, the undisputed facts demonstrate the absence of any evidence suggesting that Hilton Morgan was negligent. Moreover, the plaintiffs have failed to demonstrate under the statutory law relating to prescribed burns or any common law theory that Morgan should be found liable. The purpose of summary judgment is to expeditiously determine cases without the necessity for a formal trial where there is no substantial issue of fact. *Bowman v. United States Life Ins. Co.*, 167 Ga.

App. 673, 676 (2) (307 SE2d 134) (1983). In the present case, there are no material facts in dispute, and Morgan is entitled to judgment as a matter of law. Summary judgment was therefore appropriate.

Respectfully submitted this 21st day of June, 2010.

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CERTIFICATE OF SERVICE

This is to certify that I have this day served all counsel of record with E. Hilton Morgan's Appellant's Brief by depositing a copy of same in the United States Mail with adequate postage thereon and addressed as follows:

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