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- by Roger McEowen\* and Erika K. Eckley\*\*

### Overview

Pasture burning is an important grass management tool in the Flint Hills of Kansas and elsewhere. Done properly, it can provide significant benefits for ranchers. But if conducted improperly, damages from an out-of-control fire can be significant. The Kansas Department of Health and Environment (KDHE) has developed regulations that must be followed when conducting a controlled burn in Kansas<sup>1</sup>. While following the regulations is not a guarantee that problems won't arise when conducting a controlled burn, if they are followed and problems arise, that can be an important factor on the liability issue. Importantly, pasture burning in Kansas is not a strict liability tort - liability is handled under negligence principles.<sup>2</sup> Indeed, the Kansas Court of Appeals has stated, "In Kansas, farmers and ranchers have a right to set controlled fires on their property for agricultural purposes and will not be liable for damages resulting if the fire is set and managed with ordinary care and prudence, depending on the conditions present."<sup>3</sup>

But, if damages result as the result of negligence associated with a controlled burn, how are those damages to be computed? A recent Kansas case answers that question.

### *Evenson v. Lilley*<sup>4</sup>

This case focuses on the appropriate way to compute damages resulting from a controlled burn of pastureland. The controlled burn was conducted by the defendant on pastureland that the defendant leased from another party in the Flint Hills. On the

day of the fire, weather and wind conditions were favorable for a controlled burn. The defendant was aided by his teenage children (daughter and son) in conducting the burn. The defendant also had a water tank in his pickup that was used at the site. The defendant lit a backfire and then started the controlled burn. Unfortunately, the wind shifted direction and the fire jumped the fence between the tracts. The defendant and his children attempted to contain the fire, but did not call local authorities for assistance. As a further attempt to control the fire, the defendant drove around the property to come at it from a different angle but he still did not call the fire in. By the time the defendant had relocated his position in an attempt to fight the fire, the fire was out of control, and the defendant called the fire in. The plaintiff's adjacent 160-acre tract was burned. The defendant admitted negligence in the conduct of the controlled burn, so the issue before the court was focused on the plaintiff's damages. The plaintiffs owned the adjacent tract, and used it primarily for recreational purposes although a portion of the tract was leased for crop production. When they purchased the tract in 2002 (for \$400 per acre) the tract contained pine trees, fruit trees and grape and berry plants. The plaintiffs' property also contained a utility building, three-sided pole barn and a lean-to. Each of the structures was wooden with a tin roof. Before the fire in the spring of 2006, the plaintiffs estimated that the value of the property was \$160,000. A year after the fire, the plaintiffs sued the pastureland owner for their damages, claiming that they sustained \$125,000 of property damage.

**Trial court's opinion.** On the defendant's motion for a ruling on the proper measure of damages to be used in the case, the defendant argued that the damage to the plaintiffs' property was permanent and, as such, the damage award was the difference in the before and after value of the property (i.e., damages were to be measured in terms of damage to the property as a whole). Thus, any damage award was capped at the fair market value of the property at the time of the fire. An appraisal of the property, commissioned by the defendant, pegged the before and after difference in the value of the property at \$4,687. On the other hand, the plaintiffs argued that damages should be the cost to repair the fire damage and restore the property to its status before the fire (i.e., the cost to replace all of the specific items that were damaged).

Accordingly, the plaintiffs submitted an estimate of \$307,999 to replace the damaged trees on their property, plus another \$23,500 to replace the outbuildings with new metal buildings.

Alternatively, if the before-and-after approach was to be used, the plaintiffs estimated their loss to be \$300 per acre plus about another \$3,000 for debris removal. The trial court determined that the damage to the plaintiffs' property was permanent and that the damages were to be measured by the loss in the tract's value. The defendant's appraisal on the damage issue was adopted along with the defendant's debris clean-up cost estimate, resulting in a damage award for the plaintiff of \$7,687 plus interest. The plaintiffs appealed.

**Appellate opinion.** On appeal, the only issue before the court was whether the trial court applied the correct measure of damages. The appellate court reiterated the principle that the purpose of an award of damages in a tort case is to make the injured party "whole again." However, the measure of damages is subordinate to the goal of compensating an injured party for the injury done and an injured party is not "entitled to a windfall." The court cited prior Kansas caselaw where the courts allowed recovery of damages to specific items where the evidence showed a distinct and separate value for those items. But, the court noted, the plaintiffs in this case did not produce any evidence as to the value of the trees as part of the tract. Instead, the plaintiffs only produced evidence of the replacement cost of the trees if they were replaced by a nursery. The plaintiffs wanted the replacement value of their trees and other items irrespective of the cost of replacement. But, the

court disagreed, calling the plaintiffs' theory "patently unreasonable" that was not supported by Kansas caselaw. Replacement cost, by itself, is not an accurate measure of the value of loss to property. So, the trial court was correct in valuing damages by examining the evidence concerning the loss in value to the plaintiff's property. As for the damages to the structures, the court noted that Kansas law pegs the recovery in such cases to the reasonable value of the building at the time and place of destruction. While the plaintiff provided an estimate of the cost to replace the structures, the proposed replacements were not of the same type as the structures that were destroyed and did not account for the depreciation of the structures. On the other hand, the defendant did provide an estimate of the replacement costs of equivalent structures, reduced by depreciation. Thus, the trial court's adoption of the defendant's calculation of damages to the structures was appropriate.

**Kansas Supreme Court opinion.**<sup>6</sup> The court stated that its review was limited to whether the damages in the case should have been determined based on whether they were "permanent" or "temporary" in nature. If they were permanent, then the damages would be assessed based on the fair market value of the property immediately before and immediately after the fire. If the damages were temporary, meaning that the property could be restored, then the damages would be the reasonable cost of repair necessary to restore the property not to exceed the fair market value.

The court quickly came to the conclusion, however, that the question regarding whether damage to trees was permanent or temporary was not helpful. Instead, the court determined the damages should be determined based on how the trees were used and their intrinsic value to the property. So, the court declared that it would follow the general rule that damages to trees is to be evaluated in light of the loss of value to the entire property subject to explicit showing of quality that makes the damaged trees unique through intrinsic value or revenue generation.

In reviewing the evidence of damages in the case, the court upheld the district court's figures. The court stated that the plaintiff failed to present any evidence of loss of income from the trees or sentimental value to allow damages in addition to the value to the land or that they should be entitled

to any replacement to make them whole. Likewise, the plaintiff provided figures for new structures that were much improved from the original structures destroyed, so the trial court was not in error for using the evidence from the defendant showing the actual depreciated value of the decade-old and poorly-conditioned buildings.

The court was also concerned that the plaintiff's damage claims looked suspiciously like a windfall. The plaintiffs' property lost little appraised value, but they sought damages in an amount equal to the entire value of their property. The court reiterated that the plaintiffs were entitled to be put back in the position they were in before the injury, but they were not entitled to receive a windfall profit.

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\*Leonard Dolezal Professor in Agricultural Law, Iowa State University, Ames, Iowa; Director of the ISU Center for Agricultural Law and Taxation. Member of the Iowa and Kansas Bar Associations and licensed to practice in Nebraska.

\*\* Staff Attorney, Center for Agricultural Law and Taxation.

<sup>1</sup> The regulations are accessible at [http://www.kdheks.gov/befs/download/dist\\_offices/KS\\_Open\\_Burning\\_Regulations.pdf](http://www.kdheks.gov/befs/download/dist_offices/KS_Open_Burning_Regulations.pdf).

<sup>2</sup> Koger v. Ferrin, 926 P.2d 680 (Kan. Ct. App. 1996).

<sup>3</sup> *Id.*

<sup>4</sup> 43 Kan. App. 2d 573; 228 P.3d 420 (2010).

<sup>6</sup> No. 102,100, 2012 Kan. LEXIS 445 (Kan. Sup. Ct. Aug. 17, 2012).