

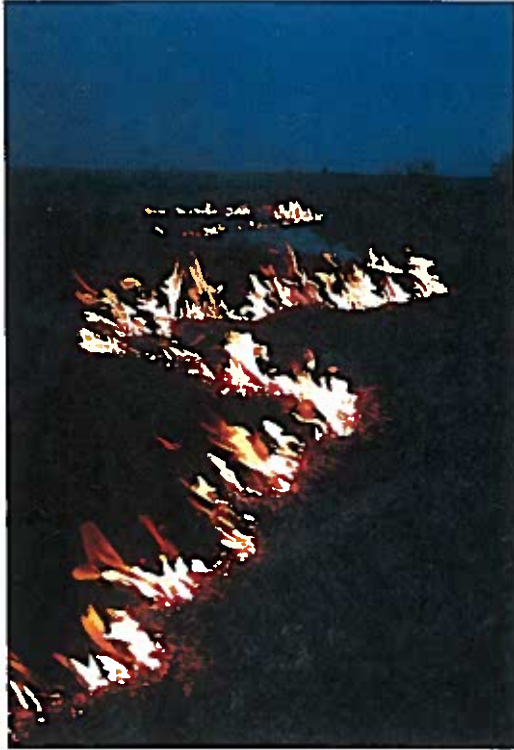
Getting a Handle on Field Burning Cases

If you drive through rural Kansas in springtime you are likely to encounter smoke on the roadway caused by field burning undertaken to remove dead grass and weeds. Unlike a minority of states passing laws to terminate prescribed field burning, Kansas is part of the majority choosing to regulate the practice. Unfortunately, many farmers are unaware of state and county regulations designed to make “controlled burns” safe—safe for neighboring properties and motorists on adjacent roadways. While many farmers have acquired safe practices through years of experience, the danger remains for motor vehicle accidents due to diminished visibility and encroaching flames.

When accidents occur and litigation ensues, counsel for plaintiff and defendant should take the following steps to identify the obligations and duties imposed on farmers who undertake field burning adjacent to a public roadway:

(1) **Review State Regulations.** The central provision is K.A.R. 28-19-648, “Agricultural Open Burning,” which was enacted by the Kansas Department of Health and Environment. It requires that notification be provided to the “local fire control authority” before commencing a burn. K.A.R. 28-19-648(a)(1) The regulation precludes any burning that “creates a traffic safety hazard,” and requires prior notification to appropriate traffic control authorities if “conditions exist that may result in smoke blowing toward a public roadway.” K.A.R. 28-19-648(a)(2) The local sheriff’s office is commonly designated to receive prior notification. K.A.R. 28-19-648 also requires the burning to be supervised until the fire is extinguished. K.A.R. 28-19-648(a)(4) Failure to comply with any of these requirements could support a negligence cause of action.¹

(2) **Determine If County Regulations Exist.** Some Kansas counties have passed burn regulations based on the County Home Rule Act, which provides that “[t]he board of county commissioners may transact all county business and perform all powers of local legislation and administration it deems appropriate, . . .” K.S.A. 19-101a(a). County Home Rule powers are “liberally construed” to give counties “the largest measure of self-government.” K.S.A. 19-101c (“The powers granted counties pursuant to this act shall be referred to as county home rule powers and shall be liberally construed for the purpose of giving to counties the largest measure of self-government.”) See also, *Barnes v. Bd. of County Com’rs of Cowley County*, 47 Kan. App. 2d 353, 358 (2012) (same). The board of county commissioners is vested with the power to enforce all resolutions passed. K.S.A. 19-101d(a)(1) (“The board of county commissioners of any county shall have the power to enforce all resolutions passed pursuant to county



home rule powers, . . .”) Enforcement may result in conviction, with punishment taking the form of fines and/or imprisonment. Hence, county resolutions in Kansas have the full force and effect of law.

(3) **Contact the Sheriff’s Office for Call Logs, Weather Records, and Burn Ban Records.** Sheriff’s records will often show if a party called prior to burning, what the weather conditions were, and whether a “burn ban” was in effect on the day in question. In some jurisdictions, the sheriff’s office will provide weather information to the caller such as wind speed and direction. The information and records maintained by the sheriff will vary greatly from county to county, but such records are invaluable in assessing whether parties complied with pertinent regulations. If weather records are not available from the sheriff, they can and should be obtained independently.

(4) **Review Available Literature on Prescribed Burns.** Reading available literature is an excellent way to identify factual issues and learn standard protocol. Kansas State University publishes a “Prescribed Burning Notebook” and oversees workshops designed to educate the public on how to burn safely. Resources such as these can also be helpful in identifying potential experts.

In closing, a word of caution is in order regarding jury trials. Be sure you know your venue. Jurors in farming communities are familiar with field burning procedures. They will bring knowledge, experience, and a rural viewpoint into deliberations that will affect the outcome of the case. While regulatory provisions may favor the motorist, rural juries balance equities that consider the farmer’s vantage point. The rural mindset is that motorists passing through areas where burning is underway need to be cautious, and under some circumstances, they may need to take an alternate route to avoid smoke and fire. Rural juries do not automatically conclude a farmer was negligent for creating fire along the edge of the road and smoke in the roadway. ■

1. While negligence per se leaps to mind, the strict elements may not be met. For instance, it may be difficult to establish that state or county burn regulations create a private cause of action. See, *Pullen v. West*, 278 Kan. 183, 195-201, 92 P.3d 584 (2004) (negligence per se did not apply to statute that did not create a private cause of action, but rather, was designed to protect the general public).

About the Author



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