No. 323145
COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

CLINESMITH CATTLE COMPANY, INC., a Washington corporation: CALF CREEK CATTLE COMPANT, INC., a Washington corporation; J.W. HARDER LIVESTOCK, INC., a Washington corporation, and J.J.H. LIVESTOCK, INC., a Washington corporation, partners of HARDEN RANCHES, a Washington general partnership; HERBERT and DORTHY KENT, husband and wife; GLADYS KENT; TRUSTEE OF ALFRED R. KENT FAMILY TRUST; ALFRED J. OCHOA, a married man dealing as his separate property; and BAR U RANCH, CO., a Washington corporation, Appellants

v.

KINCH FARMS, INC., a Washington corporation, Respondent

AMENDED OPENING BRIEF OF APPELLANTS

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I. INTRODUCTION

On August 10, 2009, Respondent Kinch Farms, Inc. ("Kinch Farms") started a crop-clearing fire, a "controlled burn," on the edge of its land in Adams County. Prevailing winds soon blew the fire to Appellant Ochoa's adjoining property and burned a few acres before seemingly being put out. The next day, while Kinch Farms ignored it, the fire rekindled and burned up approximately 5000 acres of all the Appellants' (the "Neighbors") downwind crops. The issue at trial was, of course, who had to pay for the loss – the entity that started the fire and allowed it to spread, or the victims?

There was no dispute that Kinch Farms, the fire-starter, had a duty under statute, RCW 4.24.010 and RCW 76.04.730, to conduct its burn safely and keep the flames in check. And there was strong evidence that Kinch Farms had been careless and imprudent, for example by failing to ever check a weather forecast, or to post a watch on the second day, even though it well knew the risks. Despite this, the jury returned a verdict for the defendant.

The jury, however, was misled by erroneously admitted "evidence" that was actually legal argument in the cloak of expert opinion. Kinch Farms took advantage of errors by the trial judge,

over the Neighbors' objections, to have its expert witness effectively pre-instruct the jury on two key issues. First, the expert misled the jury to believe that Kinch Farms could delegate its duty of care to the local fire protection district (the "fire department") volunteer firefighters. That is not a matter of expert opinion, it is a matter of law, and it is not what the law says. Second, he misled the jury to the effect that Kinch Farm's compliance with the long-term environmental burn permit (the "DOE Permit") and the daily burn decision issued by the Department of Ecology ("DOE") was evidence of safety precautions. That too was a matter of law, and not what the law actually provides. These problems were compounded by a further error of the trial court, which refused to issue a curative instruction that Kinch Farms could not delegate its duty to the volunteer fire protection district. These cumulative errors robbed the jury – and the Neighbors – of a fair chance for a just verdict in accord with the facts and the law.

II. ASSIGNMENTS OF ERROR

Appellants assign the following errors: [1]

[1] Appellants identified additional errors in the Notice of Appeal, based on the trial court's denial of summary judgment. Those issues are hereby withdrawn in order to focus on the primary errors of the trial court.

1. The trial court erred by denying Appellants' Motion in Limine (CP 302), which requested exclusion of the following:

> Argument and testimony contending that the burn permit absolves or relieves Defendant from responsibility for any "hazardous, dangerous or negligent activities associated with the burn."

2. The trial court erred by denying Appellants' Motion in Limine, which requested exclusion of:

> Argument and testimony that any actions of the volunteer fire department relieve Defendant of responsibility for any "hazardous, dangerous or negligent activities associated with the burn."

ISSUE AS TO ASSIGMENTS OF ERROR 1 AND 2:

Did the admission of evidence pursuant to the trial court's denial of Appellants' motion in limine mislead and prejudice the jury so that trial was unfair and a new trial should have been granted, where Respondent used the opportunity to misinform the jury that the fire protection district supposedly had sole authority and jurisdiction as to how to fight the fire, that the DOE Permit was issued based on fire-safety issues, and that the standards used by the DOE were relevant to the standards of negligence under RCW 4.24.040?

3. The trial court erred by refusing to give Appellants' requested jury instruction WPI 12.09 Non-delegable Duties (modified) (CP 470):

> Defendant is not relieved of its duty to kindle and care for a controlled burn upon its property and to prevent it from rekindling at such time and in such manner as would a prudent, careful person, to prevent it from spreading and doing damage to other person's property by delegating or seeking to delegate that duty to another person or entity.

ISSUE AS TO ASSIGNMENT OF ERROR NO. 3:

The jury having already heard legal opinion 'evidence' that Respondent could delegate and did delegate its duty to safeguard its burn, did the trial court's failure to give Appellants' requested Instruction WPI 12.09 (modified) (CP 470) make the instructions as a whole materially misleading, and was that error prejudicial and not harmless?

4. The trial court erred by entering its Judgment For Defendant Kinch Farms, entered December 12, 2013 (CP 731).

5. The trial court erred by entering its Order Denying Plaintiffs' Motion For New Trial, Reconsideration, And Amendment Of Judgment, entered on February 6, 2014 (CP 762).

ISSUE AS TO ASSIGNMENTS OF ERROR NOS. 4 AND 5:

Due to the above errors, individually and cumulatively, should the judgment entered by the trial court have been vacated and should it now be vacated, and a new trial ordered with appropriate

restrictions limiting argument and submission of evidence to the jury, and appropriate instructions given to the jury?

III. STATEMENT OF THE CASE

A. Background Facts.

Both sides moved for summary judgment below, and few material facts were in dispute – the parties agree on the basics of what took place on the ground, and what physical actions Kinch Farms took and did not take, and disputed whether Kinch Farms' legal duties under statute had required it to do more. CP-17 *et seq.*; CP 94 *et seq.*. For simplicity, the undisputed facts are here cited primarily to admissions at trial by Kinch Farms' own agents.

1. Kinch Farms started a controlled burn on a windy day.

On August 10, 2009, Kinch Farms set out to clear dense stubble and straw left over from its grain harvest in its 120-acre irrigated "circle 6." RP vol.IV 79:9-80:3. Although most farmers in the region have switched to safer methods of disposal, Kinch Farms chose to dispose of the stubble by setting it afire, a "controlled burn" as it is called in the industry. RP vol.V 65:12-22; RP vol.IV 66:15-24. As a precondition to the controlled burn, Kinch Farms had obtained its seasonal DOE Permit from the Washington Department of Ecology, which issues such permits pursuant to its mission to improve air quality. RP vol.IV 72:9-12; Ex. 8.

The DOE Permit is good for several months and does not purport to list specific dates on which burns will meet environmental standards; the permit-holder has to call the DOE on the day of the intended burn for that day's burn decision. Ex. 8 at 2. The DOE Permit expressly states that "[t]he party performing the burn is responsible for any hazardous, dangerous or negligent activities associated with the bum. The permitting authority cannot be held responsible." *Id.*

Kinch Farms prepared circle 6 by disking the perimeter of the circle and by deploying equipment (tractor, disk, water truck) and manpower composed of A.J. Miller, Joe Kinch and Rod Kinch, the principals of Kinch Farms. RP vol.V 19; RP vol.IV 66:25-68:19; RP vol.II 137:19-20. At or shortly after 9:00 AM on August 10, 2009, Joe Kinch called the DOE "burn line" and heard a recording that it was a "burn day" for DOE permit purposes. RP vol.V 19:11-20.

The controlled burn began between 1:00 PM and 1:30 PM. RP vol.II 160:6-9. As A.J. Miller acknowledged, Kinch Farms knew, among other things, the following: (1) Plaintiff Ochoa's Crop Residue Program ("CRP") ground lay downwind of Circle 6, separated only by the 26-foot wide gravel Sutton Road, (2) Ochoa's CRP ground had "a lot of fuel to burn," as much as Circle 6 did, (3) "pasture, CRP, other farm ground" lay beyond Ochoa's CRP ground, and (4) if the fire escaped there was a

danger of potential damage to the Neighbors' property. RP vol.II 153:9-155:7. Kinch Farms also knew it was likely that the wind would come up stronger in the afternoon, as it had every day that month and usually did at that time of year. RP vol.II 155:9-21.

2. <u>The fire spread and was temporarily suppressed.</u>

The wind did indeed come up that afternoon as usual, and around 4:00 PM the fire spread to one of Kinch Farms' adjoining circles, and across Sutton Road into Ochoa's CRP field. RP vol.IV 150:13-14. Kinch Farms immediately used its equipment to encircle and contain the fire, and called the fire department. RP vol.IV 90-91. Because the three principals of Kinch Farms were at the scene with their equipment, the fire was "mostly out" by the time the fire department firefighters arrived. RP vol.II 220:10. That day, the Neighbors lost only about 7 acres of Ochoa's CRP ground to the fire. RP vol.V 76:22-77:5.

The firefighters left before 7:00 PM, when they could see no smoke or flames. RP vol.II 75:3-5, 220:6. Fire Chief Dainty told Kinch Farms' representative to "watch it" and to put more water in the barrow pit, or ditch, beside the road. RP vol.II 220:11-22. The ash in the barrow pit had been too hot to touch, and was still a hot spot when they left. RP vol.II 103:8-24, 106:25, 111:5-6.

When the fire department left, Kinch Farms was aware that "everybody knows" that there was a risk of the fire rekindling. RP vol.II 229:21-231:20; *see also* RP vol.II 229:21-230:3. Kinch Farms also knew that "if there was going to be a flare-up, that [the barrow pit] might be the spot." *Id.* Despite this knowledge, Kinch Farms did not assess its independent duty to prevent rekindling and spread of the fire; there was no evidence that the principals even discussed what action was appropriate. Rod Kinch had already left before the fire department. RP vol.V 101:2-4. A.J. Miller concedes that Chief Dainty told him to "just watch it," without any specifics. RP vol.II 220:20-22, 227:3-4.

3. Kinch Farms watched intermittently from a distance without its equipment.

Without any specific plan, Kinch Farms 'watched' the danger site by doing a drive-by every few hours (without getting out of the vehicle), and A.J. Miller took a look from his house a mile away several times before going to bed. RP vol.II 227:20-229:4. Rod Kinch drove over again at about 9:00 am the next morning and looked for ten minutes, from his truck. RP vol.V 78:7-25. A.J. Miller drove by in his truck about 9:00 am and about noon. RP vol.IV 100:12-101:10; RP vol.IV 102:18-103:23. Miller and Kinch saw no smoke, but the evidence was that embers that do not produce smoke can still reignite a fire. RP vol.V 10:13-20. Joe Kinch

didn't go by the fire site at all. RP vol.V 32:24-33:14. Their equipment was back at home with them, not out at the site. RP vol.IV 105.

4. <u>The fire rekindled and went out of control by the time Kinch Farms arrived.</u>

With no considered or established watch or precaution against a rekindle and flare-up, the fire rekindled. Joe Kinch saw the smoke from more than a mile away, but thought it was probably just dust blowing in the wind. RP vol.V 33:3-14. He called A.J. Miller, who looked out and concluded the fire had rekindled and was burning Ochoa's CRP ground, called the fire department, and drove the water truck to the fire site. RP vol.IV 104:19-107:17. The wind had come up – strong. *Id.* Joe Kinch said: "on that second day, when it was blowing, when I got there, I remember it was blowing hard enough that, once I got to the tractor, I couldn't catch the thing." RP vol.V 27:24-28:2. In the time it took for Kinch Farms to bring its equipment back to the site, well before the fire department could get there, the fire went from a smolder to a raging fire, so out of control that A.J. Miller feared for his life. *Id.*

Had someone been there watching, with the equipment still on hand, as they had been the previous day, the fire could have been stopped again. Kinch Farms, not having a plan, not having analyzed the known

risks, gambled one day of a watchman's labor, against 5,000 acres of the Neighbors' property – and lost.

B. Errors at Trial.

At trial, the Neighbors repeatedly litigated, including by motion in limine, the key issues of whether the DOE Permit or the fire department's intervention relieved Kinch Farms of its statutory duty – whether Kinch Farms could effectively delegate its duty of care to those agencies. CP 302-04. The trial court denied the motions in limine. SRP 22-23, SRP 32.

As a result, much of the trial was devoted to testimony, especially expert testimony, about the supposed authority of the fire department to take over the site and exclude Kinch Farms, and about Kinch Farms' supposed legal right to rely on the DOE Permit and the DOE's August 10, 2009 burn decision. Some highlights of this improper testimony follow. Testimony of defense expert witness and former Fire Chief, Bill Steele:

RP vol.V 117
22 Q. And in your investigation, why is it
23 important to talk with the fire chief at the time of this
24 fire?
25 A. Well, specifically, the statute gives the

RP vol.V 118
1 authority, the agency having jurisdiction is the fire
2 department. ….
15 Q. And also during your investigation, did you
16 have an opportunity to talk, confer, investigate the
17 Department of Ecology and their issuance of burn days?
18 A. Yes, I did. I contacted the conservation

19 district here in Ritzville and talked to the general
20 manager. I had a conversation about how Adams County
21 receives and issues the agricultural burning and they
22 advised me that the jurisdiction for the burn/no burn
23 line was with the Department of Ecology.

RP vol.V 119

13 Q. So, I mean, this seems to be very important,
14 but it sounds like in your past experience, you have
15 routinely worked with the Department of Ecology in your
16 capacity as a fire chief?
17 A. It is important, and the Department of
18 Ecology, since the Clean Air Act of, I believe, 1970 or
19 '71, when it was approved by the legislature, since that
20 time, the Department of Ecology has made a specific
21 effort to support fire department operations in their
22 effort to manage smoke intrusions and air quality.
23 Although their primary focus is air quality,
24 meaning good air for all of us to breathe, their other
25 focus or their other point is to support fire departments

RP vol.V 120

1 with their administrative rules, WACs that the Department
2 of Ecology has, to assist fire departments statewide in
3 enforcing burning regulations, fire safety regulations…

RP vol.V 121

5 Q. Was, in your opinion, did Kinch Farms
6 reasonably conduct or start an agricultural burn on
7 August 10th, 2009?
8 A. The first part that is important is that they
9 went through the process of applying for and obtaining a
10 permit from the conservation district here.

RP vol.V 128

22 Q. We've heard testimony that the Department of
23 Ecology is not concerned with fire safety. Is that true?
24 I mean, did you find that to be true in your
25 investigation?

RP vol.V 130

1 A. That's absolutely not true. The Department
2 of Ecology is just as concerned about fire safety and
3 about public safety as any other state agency would be….
6 Particularly, the Department of Ecology would
7 be concerned about an uncontrolled wildfire….
14 And that's further, my experience further
15 tells me that the Department of Ecology assists fire
16 departments statewide on a routine basis for fire safety
17 concerns. They have a set of WACs and rules that
18 administratively they can go, I don't want to say go
19 after, but they can encourage compliance with fire safety
20 rules from the Department of Natural Resources or Fire
21 District 7…
25 Q. You keep mentioning the term WACs, and I

RP vol.V 131

1 believe that's a legal term of art. Can you explain to
2 the jury what a WAC is?….
5 WACs are generally written rules, and they're written by
6 the state agencies that are involved…

RP vol.V 139

24 Q. Okay, in your experience, should Kinch Farms
25 have posted a 24-hour watch themselves on this burn area

RP vol.V 140

1 on August 11, 2009?
2 A. And I understand that's an issue here, and
3 the answer is, no, and the specific reason the answer is
4 no is because it's somebody else's property. Where the
5 fire department has, the agency having injured, the fire
6 department can decide whether or not a fire watch is
7 needed and supply one of their members to, in this case,
8 the fire department would have had that jurisdiction and
9 the decision to do that or to not do that….
18 That happens on a regular basis with fire
19 departments if it is that person's land. Where this
20 issue becomes you are not the landowner, I don't, as a
21 fire chief, Chief Dainty doesn't, as the fire chief, have
22 authority to assign somebody else to be responsible for
23 somebody else's land. It's not appropriate.

24 He doesn’t have the authority to do that

RP vol.V 141

13 In the scenario that we have here, the fire
14 department is, A, clearly responsible for the decision to
15 have a fire watch or not; and then has the authority or
16 the jurisdiction to assign one of their personnel or to
17 contract with somebody else, unless it is the specific
18 landowner that is there.

RP vol.V 145

3 Q. And, you know, Mr. Wruble opined that Kinch
4 Farms should have checked the forecast, but your
5 contention is that they did, with the Department of
6 Ecology burn line?
7 A. Well, yes. I believe they did based on using
8 the Department of Ecology's, the Department of Ecology’s
9 National Weather Service Fire Prediction Report, to say
10 that it's going to be safe to do a burn today or it's not
11 safe to do a burn today.

RP vol.V 156

10 Q. Okay, is it your contention that, because
11 they had met the conditions of this permit, they can’t be
12 responsible for the escape of the fire?
13 A. Well, notwithstanding any other negligent act
14 that they may have done, not responding across the street
15 and trying to take immediate control action or something
16 like that.

RP vol.V 158

2 A. … we’re not talking about a
5 gust that lasts ten seconds or 15 seconds. We’re talking
6 about a sustained, measurable wind, greater than what is
7 allowed in the permit. You would be obligated to stop
8 burning. You would be outside of the conditions of the
9 permit.

RP vol.V 159

16 Q. Here's my question. When I say fire safety,
17 I am talking about a runaway burn that consumes the

18 neighbor's property. Are you testifying that that is a
19 concern of DOE?
20 A. I believe it is a concern of DOE's.

RP vol.V 173

2 Knowing that the forecast for Tuesday is
3 higher than what they just went through, does not the
4 reasonable man post a watch to make sure the embers don't
5 reignite?
6 A. That would be a determination made by the
7 fire chief, and the fire chief made the determination
8 that it wasn't necessary.

Fire Chief Brian Dainty testified similarly:

RP vol.IV 183

23 Q. And when you left the scene on August 10, 2009, did you
24 delegate any fire suppression authority to Kinch Farms?
25 A. Absolutely not.

RP vol. IV 184

8 When we're called out and activated by a paging system,
9 the fire chief now pretty much has control of their
10 ground, and it's his call on what needs to be done with
11 the situation at hand.

RP vol. IV 185

8 A. When -- my experience -- I've burned four or five
9 times, and my experience is when DOE gives you a burn
10 day, you take advantage of it. They're the experts
11 that know what the metrologists that want you to burn
12 at certain times, certain climates, certain winds.

RP vol. IV 186

15 But as a farmer and DOE, you got to flip your
16 hat around the other way. And if you want to continue
17 to practice your farming practices, then, DOE is God in
18 that book.
19 Q. So you rely on DOE?
20 A. I rely on DOE. They're the ones with the

21 meteorologists that determine whether you burn or not.

RP vol. IV 223
7 Q. Is it your belief that you controlled everyone there
8 including landowners or only the fire department?
9 A. Well, I control the firefighters. I usually don't look
10 at us controlling the landowners, but if need be, yes,
11 I have asked landowners to leave the scene on structure
12 fires for safety reasons. They were kind of
13 interfering, so I asked them to leave and I stated to
14 them that they relinquished that power to me when they
15 call EMS; and if they don't leave, I'll have to call
16 the sheriff's department…

Defense counsel artfully planted these points in other witness' testimony as well. In cross-examination, he asked the Neighbors' expert to confirm that Fire Chief Dainty "took complete control of all fire suppression," and had told the expert so, and had said he had no "authority" to "turn over" fire suppression to Kinch Farms, that Kinch Farms had obtained a DOE Permit and a DOE burn decision, and that "the Department of Ecology decided that [Kinch Farms] can start at 11:00 a.m. and out by 5:00 p.m." RP Vol. III 67:16-21, 199:21-200:3, 211:5-11, 215:13-15, 216:1-3; RP Vol. IV 29:20-21. And, backed up by their experts' legal opinions, Kinch Farms' principals testified to the effect that "If it was a 20 mile an hour wind day, DOE wouldn't have – I'm sure wouldn't have permitted this burn to have happened," that they "got out of the fire department's way," and similar statements. RP Vol. IV 54:10-14, 94:10-11; *and see* RP Vol. IV 29, 72:9-12; RP Vol. V 47:16-19, 93.

The Neighbors requested a curative jury instruction based on WPI 12.09 Non-delegable Duties:

> Defendant is not relieved of its duty to kindle and care for a controlled burn upon its property and to prevent it from rekindling at such time and in such manner as would a prudent, careful person, to prevent it from spreading and doing damage to other person's property by delegating or seeking to delegate that duty to another person or entity.

CP 470. Kinch Farms argued that this instruction is primarily used for contractor vicarious-liability cases and would confuse the jury; and the trial court refused to give the instruction. CP 575-77, CP 708, CP 709-28.

The jury, based on the distorted view of the law presented as expert opinion, and without the curative instruction, returned a defense verdict. The Neighbors timely moved for reconsideration, which was denied, and this appeal was timely noticed.

IV. ARGUMENT

A. Standard of Review

1. Admission of evidence is reviewed for abuse of discretion.

This Court reviews the decisions of the Superior Court to admit or exclude evidence, including expert evidence, for abuse of discretion. *State v. Olmedo,* 112 Wn. App. 525, 530, 49 P.3d 960 (2002). A trial court

abuses its discretion when its order is manifestly unreasonable or based on untenable grounds." *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993). Evidentiary error that results in prejudice is grounds for reversal. *State v. Neal*, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001). An error is prejudicial if, "within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected." *State v. Smith*, 106 Wn.2d 772, 780, 725 P.2d 951 (1986).

2. Jury instructions are reviewed *de novo.*

Jury instructions are reviewed *de novo*, and a legally insufficient instruction is reversible error where it prejudices a party. *Thompson v. King Feed & Nutrition Serv., Inc.*, 153 Wn.2d 447, 453, 105 P.3d 378 (2005). The instructions are considered in their entirety and "are sufficient if they: (1) permit each party to argue his theory of the case; (2) are not misleading; and (3) when read as a whole, properly inform the trier of fact of the applicable law." *Capers v. Bon Marche, Div. of Allied Stores*, 91 Wn. App. 138, 142, 955 P.2d 822, 825 (1998). Even an instruction that correctly states the law requires reversal if the instructions as a whole mislead the jury as to disputed issues. *Id.* In determining whether there was prejudice of this sort, this Court will consider whether the prevailing party took advantage of the potentially misleading nature of the jury

instructions to misinform the jury as to the applicable law. *Id.* at 144-45 (reversing and remanding for new trial because opposing counsel in closing argument exploited inconsistency in instructions and verdict form to mislead jury as to applicable law).

A party is entitled to have the court instruct the jury on his theory of the case when there is substantial evidence to support it. *Kelsey v. Pollock*, 59 Wn.2d 796, 798, 370 P.2d 598, 599 (1962).

B. Respondent Exploited the Trial Court's Erroneous Ruling to Misinform the Jury on Material Points of Applicable Law.

1. <u>Kinch Farms' duty to control its fire was prescribed by statute.</u>

The jury in this matter was charged to determine whether Kinch Farms failed to live up to its duty established in two statutes. Under RCW 76.04.730: "It is unlawful for any person to negligently allow fire originating on the person's own property to spread to the property of another." And under RCW 4.24.010:

> Except as provided in section 1 of this act, if any person shall for any lawful purpose kindle a fire upon his or her own land, he or she shall do it at such time and in such manner, and **shall take such care of it to prevent it from spreading and doing damage to other persons' property, as a prudent and careful person would do**, and if he or she fails so to do he or she **shall be liable** in an action on the case to any person suffering damage thereby to the full amount of such damage.

(Emphasis added). The jury's proper task was to determine whether Kinch Farms had taken care of its 'controlled' burn to prevent it from spreading and doing damage to the Neighbors' farms, "as a prudent and careful person would do."

2. The trial court's erroneous denial of Appellants' Motions in Limine opened the door to highly prejudicial, improper evidence.

The proper evidence against Kinch Farms was strong, nearly overwhelming. As described above, Kinch Farms knew the risk of fire spreading if the wind went above 15 mph; it knew that the winds picked up speed later in the day and had regularly exceeded 15 mph by the end of the afternoon that month; and yet it failed to check the weather forecast for the area at any time during the two days when it could have quenched the fire. Kinch Farms also knew, indeed its representative said that "everyone knows" that a damped fire can re-kindle; and Kinch Farms was even expressly warned by the Fire Chief to keep an eye on the Ochoa property where the blaze had spread, but it merely looked from a car or from a distance at random times, without stationing someone there with

firefighting equipment, so that by the time it noticed the fire had rekindled, smoke was visible miles away and is could not control the fire.[2]

As shown above, Kinch Farms relied primarily on two points. First, that the fire department had moved in and taken over "jurisdiction" of the fire, leaving Kinch Farms, as it argued at closing, in the role of a mere "good neighbor."[3] Second, that by getting a burn permit from the DOE, and following its conditions, Kinch Farms had acted reasonably under the law.

The Neighbors, as set forth above, moved in limine to exclude these arguments in the guise of evidence. They also argued at objected vigorously at trial that Kinch Farms could not delegate its duty to control the fire to the fire department, and that any evidence about the fire department amounted to an attempt to prove delegation.[4]

The trial court's erroneous rulings in limine[5] opened the door to an evidentiary travesty, as Kinch Farms' experts devoted much of their testimony to misinforming the jury as to the legal impact of the actions of the fire department and the DOE. The jury was misled to the effect that Kinch Farm's statutory duty was mitigated by or delegated to those

[2] RP Vol.II 229:21-231:20; RP Vol.II 229:21-230:3; RP Vol.V 227:20-229:4; RP Vol.V 78:7-25; RP Vol.V 32:24-33:14; RP Vol.IV 100:12-101:10; RP Vol.IV 102:18-103:23; RP Vol.V 33:3-14: RP Vol.IV 104:19-107:17.
[3] RP Vol.V 132:15-16.
[4] RP Vol. II. 218:6-15; Vol.IV 4:8-7:2.
[5] SRP 22-23, 32, RP Vol. IV 6-7.

agencies as a matter of law. And at closing, counsel for Kinch Farms repeated and relied heavily on those erroneous, misleading points of law.[6]

3. Kinch Farms' experts should not have been allowed to testify as to the fire department's supposed authority.

It is one of the "cornerstones of our system of jurisprudence," that a jury decides facts while "all matters of law are to be determined and declared by the court." *Ball v. Smith*, 87 Wn.2d 717, 722-23, 556 P.2d 936 (1976) (trial judge properly excluded expert testimony as to applicability of Seattle Electrical Code). This principle, dating back at least to Blackstone, is enshrined in our Constitution: "Judges…shall declare the law." Wash. Const. Art. IV § 16.

Because law is for the judge, not the jury, "[f]or an expert to testify to the jury on the law usurps the role of the trial judge." *State v. Clausing*, 147 Wn.2d 620, 628, 56 P.3d 550, 555 (2002). As the Supreme Court explained: "Each courtroom comes equipped with a 'legal expert,' called a judge, and it is his or her province alone to instruct the jury on the relevant legal standards." *Id.* (quoting *Burkhart v. Wash. Metro. Area Transit Auth.*, 112 F.3d 1207, 1213 (D.C.Cir.1997)). If any other expert were allowed to testify to the law, each party "would find an expert who would state the law in the light most favorable to its position," confusing the jury

[6] RP vol. VII 35:18-23, 36:1-5, 37:1-7, 41:4-8, 42:10-13, 45:13-17; *and see* RP vol. I 17:20-22, 18:8-15, 19:7-10, 21:4-5, 24:6-7 (opening statement).

and placing the lawyers "in the impossible position of making these legal arguments to a lay jury." *Id.* at 629 (quoting *Askanase v. Fatjo,* 130 F.3d 657, 672-73 (5th Cir.1997)). Thus, the Judicial Council Comment on ER 704 states: "Except for testimony concerning foreign law, experts are not to state opinions of law or mixed fact and law." 5B Wash. Prac., Evidence Law and Practice § 704.1 (5th ed.).

For example, an expert may not testify as to "whose duty it is" to do some act under a government contract. *City of Seattle v. Erickson*, 99 Wash. 543, 545, 169 P. 985 (1918). They may not tell a jury inadmissible legal conclusions such as why a homeowner's association is referred to in its plat dedication, or what authority an association has. *Ebel v. Fairwood Park II Homeowners' Ass'n*, 136 Wn. App. 787, 791, 150 P.3d 1163 (2007). It was error under ER 704 to allow an expert to testify that certain Department of Labor and Industries regulations applied to the defendant's construction project and that the defendant had violated those standards. *Everett v. Diamond,* 30 Wn. App. 787, 792, 638 P.2d 605 (1981).

Nevertheless, under the guise of expert testimony about reasonableness, Kinch Farms' experts testified, as quoted at length above, that the fire department had "jurisdiction," "took control," lacked "authority" to "delegate" or "turn responsibility over" for fire control duty to Kinch Farms, and could lawfully require Kinch Farms to stand down, so

that Kinch Farms had no right to decide to post a fire watch, or to post a fire watch, only the fire department could, and so forth, on and on, throughout the trial.[7] This evidence was all the more confusing to the jury, and prejudicial to the Neighbors' case, coming from Fire Chief Dainty, and from Bill Steele, who testified that he himself used to be a fire protection district chief too.[8] The jury could not have helped believing that Fire Chief Dainty and Fire Chief Steele knew the law about fire protection districts.

4. Kinch Farms' experts opined erroneously that the fire department had the legal right to restrain or relieve Respondent's duty to control the fire.

Arguing law to the jury was far from harmless in this case, because Kinch Farms' experts materially misstated the law. When Fire Chief Steele and Fire Chief Dainty told the jury that the law required Kinch Farms to stand down when the fire department took over, they did not know, or at least did not tell the jury, that a fire protection district is specifically prohibited under Washington law from issuing exculpatory authorization to a landowner to manage a fire. Chief Dainty's fire district

[7] RP vol. II 211:5-11, 213:13-16, 218:6-15; vol.IV 29:20-22, 167:11-12, 169:11-19, 183:24-25, 184:8-11, 223:7-17, vol.V 117:25-118:4, 139:24-140:24, 141:13-18, 142:1-2, 142:11-14, 173:2-8.
[8] RP vol. V 112:1-3.

could have issued burn permits itself, RCW 52.12.101, but the statute expressly provides that such a permit would not exculpate the recipient:

> The permittee shall comply with the terms and conditions of the permit, **and** shall maintain a responsible person in charge of the fire at all times who shall maintain the fire under control, not permit it to spread to other property or structures, and extinguish the fire when the authorized burning is completed or when directed by district personnel. **The possession of a permit shall not relieve the permittee from liability for damages resulting from the fire for which the permittee may otherwise be liable.**

RCWA 52.12.104 (emphasis added). *A fortiori*, the Fire Chief certainly could not "relieve the permittee from liability for damages resulting from the fire" after the fact, merely by helping Kinch Farms to suppress the blaze or by deciding his men had done enough. So when Fire Chief Dainty opined to the jury several times that he never relinquished or delegated the fire department's "control" of the site to Kinch Farms, and when Fire Chief Steele repeatedly opined to the jury that the fire department had "jurisdiction" and "authority" over the fire site, and that Chief Dainty could not and did not "assign" Kinch Farms to do what the Burn Act expressly requires it to do – control the spread of its fire – they grossly misled the jury about applicable Washington law.

Indeed, controlling Washington precedent holds in strong terms that a landowner cannot avoid liability by relying on a fire protection agency. The governing case on point is *Galbraith v. Wheeler-Osgood Co.*,

123 Wash. 229, 234-35, 212 P. 174 (1923). In *Galbraith*, the appellant seemingly had a far better argument than Kinch Farms for escaping liability. A statute required that appellant, as the owner of timberland, to clear its logging debris under the direction of the state forester, or to pay all costs of removal if it failed to obey the forester. *Galbraith*, 123 Wash. at 233. With the appellant's consent, the forester directed the district fire warden to start a controlled burn on its property. *Id.* at 232-33. After the fire escaped and damaged neighboring property, the appellant argued that "where the law takes away a man's judgment, volition, and control as to the time, manner, and method of performing an act, he cannot be held for the consequences of the act." *Id.* at 234. The Supreme Court squarely rejected this attempt to pass the buck:

> It is a mistake to say he is compelled in such a case to surrender entirely to the forester's judgment. While he is possibly required to follow the directions given by the forester, **clearly it is always within his power** to refuse to proceed if he thinks the forester's precautions inadequate, and within his power **to take precautions in addition to those prescribed by the forester**. In other words, if an owner undertakes to abate a nuisance of this sort by burning under the direction of the forester, he is an actor in the proceeding; **a joint actor with the forester it may be, but liable nevertheless** for any loss caused to a third person by a negligent performing of the burning.

Id. at 234-35 (emphasis added). Just so, Kinch Farms could have and should have acted with prudence after the fire department left the scene, and the fire department's brief intervention gave Kinch Farms no legal shield whatsoever.

On similar facts, a few years later the Supreme Court vacated a judgment for the defendant landowner following a bench trial, and ordered judgment for fire damages to be entered in the plaintiff's favor. *Wood & Iverson v. Nw. Lumber Co.*, 138 Wash. 203, 211, 244 P. 712 (1926) *aff'd en banc*, 141 Wash. 534, 252 P. 98 (1927). The Court held that the trial court had erred because, "[n]otwithstanding the fact that the fire was started, directed, and supervised by fire wardens of the state, respondent could not escape liability on that ground alone." *Id.* at 208. The landowner simply cannot avoid his duty to control the fire by pointing fingers at the fire department.

In the related context of a landowner's common-law duty to control even accidental fires spreading from its land, the Supreme Court resolved the same issue the same way in *Babcock v. Seattle School Dist. No. 1*, 168 Wash. 557, 12 P. 2d 752 (1932). In *Babcock*, the defendant school district, like Kinch Farms, was sued for allowing a fire to spread from its property. The school district, like Kinch Farms, argued that it could delegate its duty under the Burn Act to its sister agency, the fire

department. The Supreme Court squarely rejected that notion: "**We cannot follow appellant in its argument that it could rely upon the Seattle fire department to protect it against liability** to third parties arising from appellant's well-nigh wanton negligence and the resulting destruction of property." *Babcock*, 168 Wash. at 561-62 (emphasis added).

Other states follow the same rule. The California Court of Appeals, for example, cited *Galbraith* in holding: "there is no merit in appellants' contention that participation of the assistant state forester relieved them from the exercise of due diligence nor did it relieve them of liability for damages caused by their negligence in maintaining the fire." *Leuteneker v. Fisher*, 155 Cal.App.2d 33, 36, 317 P.2d 143, 144 (Cal. Ct. App. 1957). And in Kentucky, the Court of Appeals held that a fire department's decision not to chop out paneling to make sure a house fire was out was not an intervening cause that could relieve the defendant of liability when the fire destroyed the house after the firemen left the scene. *Peterson v. Bailey*, 571 S.W.2d 630, 632-33 (Ky. Ct. App. 1978). The Kentucky appellate court held that under fundamental negligence principles, even a negligent would-be rescuer did not break the chain of proximate cause, unless he was "utterly foolhardy or extraordinary." *Id.*

In its briefs to the trial court, Kinch Farms mistakenly relied on *Walters v. Mason Cnty. Logging Co.*, 139 Wash. 265, 271, 246 P. 749 (1926). *Walters*, however, states just the same principles as the cases above. The *Walters* Court simply upheld judgment for the defendant, who had worked with the fire warden and the plaintiff to try to put out the forest fire, because all of them did their best without any negligence. *Id.* In no way does *Walters* suggest that by working with the fire warden, the defendant could have escaped liability, if he or the warden had been negligent. Quite the contrary, the Court considered the warden's lack of negligence essential to the landowner's defense. *Id.* ("Under all the evidence in the case, respondent, the fire wardens, and even appellant himself, used every possible effort and every available man.")

Thus, the law is clear that Kinch Farms could not avoid liability based on the fire department's presence, acts, or implied advice. Any other rule would be highly undesirable as public policy. Such a rule would reduce a landowner's duty simply to calling the fire department. Once the firefighters arrived, even if they failed to finish the job, as here, the landowner would have no further responsibility. The upwind landowner could, like Kinch Farms, fail to set a watch, send its men and equipment home, and escape scot-free. The jury was exposed by the trial

court's error and by Kinch Farms' exploitation of that error to just that dangerous and erroneous misstatement of the law.

5. Kinch Farms' expert testified erroneously that the DOE permit showed reasonable care.

Kinch Farms' misrepresentation of the law went further. Where even a Fire Protection District cannot grant tort immunity by issuing a burn permit, the Washington Legislature could never have intended for a Department of Ecology burn permit to immunize the permit holder from his statutory tort liability for fire damage. Where a landowner cannot rely on the judgment of a district fire warden or a fire district team right there on the spot as to how to keep a burn controlled, Kinch Farms could not rely on DOE's issuance of a burn permit and burn day decision. Yet that is just what the trial court's erroneous ruling allowed Kinch Farms to argue to the jury through its expert witnesses and in closing argument.

The primary purpose of a DOE burn permit is made clear by its enabling statute, the Washington Clean Air Act, Ch. 70.94 RCW (the "Clean Air Act"). The Clean Air Act requires burn permits for agricultural field burning and authorizes the DOE to issue the permits. RCW 70.94.6528. But the Clean Air Act is **not** intended or designed to regulate fire safety. Rather, it is expressly intended to "preserve, protect, and enhance the **air quality** for current and future generations."

RCW 70.94.011 (emphasis added). While the Clean Air Act provides much guidance on best practices to minimize the impact of agricultural burning on health and the environment, it says nothing at all about how to limit the spread or re-ignition of agricultural burns. The Clean Air Act does not address, for example, the width or number of fire breaks and back-burns, the proper method for burning a circle, the maximum permissible wind speed at which to kindle an agricultural burn, or how to prevent the rekindling of agricultural burns.

The DOE's implementation of the Clearn Air Act's mandates with respect to agricultural burning is found in WAC 173-430-010. These regulations too are focused narrowly on environmental and public health concerns. The regulations expressly state their limited purpose:

> A variety of strategies to control and reduce the impact of **emissions** are described throughout Chapter 70.94 RCW, including controls on **emissions created from agricultural burning**. The act intends that public health be protected and also allows for agricultural burning that is reasonably necessary. The act also requires that burning be restricted and regulated to address the potentially competing goals of both **limiting air pollution** and allowing agricultural burning. Chapter 70.94 RCW authorizes the Washington State Department of Ecology (ecology) and local air authorities to implement the provisions of that act related to agricultural burning. This rule establishes control strategies for agricultural burning in the state to

> minimize adverse **health and the environmental effects** from agricultural burning…."

WAC 173-430-010 (emphasis added). The DOE then enumerates nine strategies to carry out the intent of the regulation. None of the nine strategies relate to fire safety. *Id.*

The DOE's issuance of a daily burn decision is merely a way to carry out its air quality mission. The DOE's public-facing website and instructions to applicants and permit holders provides:

> "To **help reduce smoke-related environmental and health concerns**, the Department of Ecology's Eastern Washington Burn Team makes a daily burn/no-burn decision called the "burn call" for agricultural burning permit holders. The burn call provides daily current and forecasted **air quality conditions** and burn decisions to citizens."

http://www.ecy.wa.gov/programs/air/aginfo/agricultural_homepage.htm. (emphasis added). Nothing in the regulations suggests that the daily burn decision provides or takes into account fire safety standards.

Likewise, the DOE is not required to consider the risk or scale of potential fire damage when issuing a permit, but only to "condition all permits to ensure that the public interest in air, water, and land pollution and safety to life and property is fully considered" by the permit holder himself. RCW 70.94.6528. When issuing a permit, the DOE is supposed to consider, along with several factors relating to smoke and air quality, the risk of escape onto another's property. But the DOE application form

does not even ask the applicant how far his or her land extends beyond the burn area – the DOE apparently deems its duty in that regard accomplished by instructing the permit holder to follow local fire safety laws and rules. Ex. 8 at 13; WAC 173-430-020.

Despite this, Fire Chief Dainty told the jury that when it came to burns, "the DOE is God."[9] He testified that even he would rely on the DOE and its experts to decide when it was safe to burn.[10] And Fire Chief Steele testified that the DOE burn decisions were based in part on neighbors' fire safety, that the DOE worked closely with fire departments, who could carry out their public safety mission by enforcing DOE regulations, that a burn day notice was as good or better than checking a weather report, and that getting the permit and notice relieved Kinch Farms of liability for starting the burn on a gusty day.[11] These statements had the effect of misinforming the jury that just by complying with the DOE Permit, Kinch Farms exercised due care against the spread of its fire.

Similar errors have led to reversal of a defense verdict. For example, in *Vannoy v. Pac. Power & Light Co.*, 59 Wn.2d 623, 633-34, 369 P.2d 848 (1962), the Supreme Court was asked whether it was error for the trial court to admit evidence that the appellant, a power company,

[9] RP Vol. IV 186:13.
[10] RP Vol. IV 185.
[11] RP Vol.V 161:16-20, 128:22-127:10, 127:22-25, 128:1-7, 130:14-24, 145:3-11, 156:10-16.

had not acquired an easement for its power line, which broke, leading to the death of the plaintiff's husband. The Court answered that it was not merely error, but reversible error, because:

> The legal status of appellant vis-a-vis the property owner is germane to no issue in the case. The appropriateness of the location of the wiring is an issue separate and distinct from that of legal status. The location of the line is relevant; its legal status is not. It made not a particle of difference to the decedent whether or not the power company had procured an easement from the property owner to maintain the transmission line. The easement (or trespass) question was delved into by respondent at great length and the matter consumes many pages of the record. The only function which this evidence might have served would have been to prejudice the jury in evaluating appellant's case. The evidence invited the jury to attach special significance to a thoroughly irrelevant issue to the detriment of the power company.

Vannoy, 59 Wn.2d at 633-34. Just so here, the jury was informed at length about whether Kinch Farms had met the supposed conditions of the DOE Permit, which was irrelevant to the question of whether it had acted negligently with regard to fire safety.

Similarly, in *Thomas v. Inland Motor Freight*, 190 Wash. 428, 440-41, 68 P.2d 603 (1937), a verdict for plaintiff was reversed and a new trial ordered, because the jury was asked to render a verdict upon whether the defendant's trucks had been overloaded under a statute, but the evidence at most tended to show that "they carried loads greater than they

were licensed to carry," and much was made during trial of the license applications, "which were immaterial and were bound to be confusing and prejudicial." The same reasoning applies here, where the jury was misled into placing importance on a confusing, prejudicial non-issue of whether Kinch Farms complied with its air quality permit. Notably, one factor that led the *Thomas* Court to hold that the trial court's error was not harmless, was that "the jury returned for further instructions and that one of its members requested additional light as to the legal limit of weight on trucks." *Thomas*, 190 Wash. at 441; *and see In re Det. of Post*, 145 Wn. App. 728, 748-49, 187 P.3d 803 (2008) *aff'd*, 170 Wn.2d 302, 241 P.3d 1234 (2010) (improper admission of evidence not harmless, where "the evidence was significant enough to the jury that several of its members posed questions to Anderson about [it].") Similarly here, Mr. Steele purported to interpret the DOE Permit for the jury, misinforming them that under the DOE Permit, Kinch Farms could rely on the wind speed limit in that day's daily DOE burn decision, and only consider the average sustained wind speed, not the speed of gusts of wind lasting as long as ten or fifteen minutes.[12] That issue was clearly of great importance to the jury – two out of seven questions posed by the jury to Mr. Steele involved wind speed, and the very first question from the jury was how long a

[12] RP Vol.V 158:2-9.

"gust" has to last before it could be considered a "sustained wind" for purposes of Kinch Farms' supposed legal rights under the DOE Permit.[13] Therefore, Steele's misleading legal opinion strongly distorted the jury's understanding of the applicable law.

C. The Trial Court's Failure to Issue a Curative Instruction Made the Instructions as a Whole Prejudicially Misleading.

The trial court's errors in allowing in legal opinions as evidence were compounded by its failure to give the curative instruction requested by the Neighbors. The jury had been told that the fire department had jurisdiction and had not "released" or "given" authority to Kinch Farms to guard against rekindling. They had been told that getting the DOE Permit meant Kinch Farms was not negligent in starting a burn on a gusty day. An instruction that Kinch Farms could not delegate its statutory duty to prevent fire damage from its lands would have at least mitigated these errors. For instance, in *Jones v. Robert E. Bayley Const. Co., Inc.*, 36 Wn. App. 357, 362-63, 674 P.2d 679, 683 (1984) *overruled in irrel. part by Brown v. Prime Const. Co., Inc.*, 102 Wn.2d 235, 684 P.2d 73 (1984), the trial court had instructed the jury that employers have a duty to furnish a safe workplace, but without the non-delegability instruction, the plaintiff was unable to effective "argue his theory that the general contractor has a

[13] RP vol. VII 179:11-180:5.

special, nondelegable duty distinct from the duty of [the subcontractor],” and this was held to be prejudicial error requiring a new trial.

The trial court rejected that instruction, however, apparently based on Kinch Farm’s argument that the pattern ‘non-delegability” instruction at WPI 12.09 is only used in vicarious liability claims. It is true that the instruction most often comes up in that context, because a jury rarely needs this point clarified except when there was already evidentiary error. But the instruction is appropriate in any “circumstances that could mislead jurors into thinking that a non-delegable duty has been delegated,” which is what happened here. 6 Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 12.09 (6th ed.) (Washington State Supreme Court Committee on Jury Instructions Note on Use).

While Kinch Farms should not have been allowed in the first place to introduce erroneous legal opinions about fire department supposedly taking over its responsibilities or about supposedly being able to rely on the DOE Permit to set a safe day and wind speed for the burn, a trial court can sometimes mend its errors with an instruction that clarifies the law. In *State v. Olmedo*, 112 Wn. App. 525, 533, 49 P.3d 960 (2002), an expert witness was erroneously allowed to opine that the defendant’s storage tank did not meet Department of Transportation standards. The Court of Appeals reversed the resulting conviction, noting that the trial court had

exacerbated the evidentiary error by failing to even give an instruction as to what the department's standards were, or what regulations applied, leaving the jury nothing to go on but the expert's legal conclusion. *Olmedo*, 112 Wn. App. at 535; *and see Thola v. Henschell*, 140 Wn. App. 70, 85, 164 P.3d 524 (2007) (verdict for plaintiff reversed because trial judge failed to instruct the jury on preemption, misleading jury into applying evidence of trade secret misappropriation to preempted claims). Similarly here, the Superior Court and Kinch Farms set the jury up for failure by allowing the evidence in, and then the Superior Court missed its last chance to lessen the problem. The result was a verdict against the manifest weight of proper evidence, obtained by error, and in substantial injustice. A fresh jury should be given a fair chance to determine the facts under the law as it truly stands.

V. CONCLUSION

For the reasons set forth herein, the decision of the trial court should be vacated and a new trial ordered.

Dated this 20th day of October, 2014.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury that the following facts are true and correct:

I am a citizen of the United States, over the age of 18 years, and not a party to or interested in the above-entitled action.

On October 30, 2014, I served or caused to be served a copy of the foregoing document on counsel of record for Respondent by personal service at the following address:

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