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

REPLY BRIEF OF APPELLANTS

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I. INTRODUCTION

Throughout the trial, Appellee Kinch Farms misinformed the jury that the actions of the fire department and the Department of Ecology relieved it of responsibility for its negligence. That incorrect statement of the law, as Appellants (the "Neighbors") showed in their opening brief, should never have been put in front of the jury in the guise of evidence. In its Appellee's Brief, Kinch Farms argues that this was mere "harmless error," a "minor" and "cumulative" part of its evidence. It asserts that since it never used the word "delegated" to the jury, the jury could not have been misled. And it argues that the Neighbors 'opened the door' by anticipatorily discussing the DOE Permit and the fire department.

In fact, though, Kinch Farms' attempt to pass responsibility off onto government agencies was a central theme of its defense, repeated over and over again from opening statement through direct and cross examination to closing argument. With or without the word "delegation," it misled the jury into believing that it was up to the fire department to decide whether to set a watch after the fire, and it was the DOE that decided when it was safe to burn in the first place. Since those two decisions were at the heart of Kinch Farms' negligence, the jury was effectively told that Kinch Farms was not negligent as a matter of law.

Kinch Farms thus went far beyond the scope of any 'open door,' by arguing law in the guise of fact. A non-delegation instruction would have effectively countered its improper argument, but that instruction was rejected by the trial court. The trial court's errors thus infected the whole trial, and a new trial should have been ordered.

II. ARGUMENT

A. Kinch Farms Misstates the Standard of Review.

Most of Kinch Farms' Argument is based on a fundamental mistake of law. It argues unnecessarily and at great length that the jury had sufficient evidence to reach a defense verdict, which, according to Kinch Farms, is the beginning and end of this Court's inquiry. Appellee's Brief at 12-13, 15-24. Kinch Farms' reliance on *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 108, 864 P.2d 937 (1994), however, is misplaced.

Burnside merely states the standard—"clearly unsupported by substantial evidence"—used on an appeal from denial of a motion under CR 50 or CR 59 for judgment as a matter of law or a new trial based on alleged insufficiency of the evidence. *Burnside*, 123 Wn. 2d at 107-108 ("Simpson Paper maintains the evidence was insufficient to support a finding..."). Kinch Farms argues that under *Burnside*, this is a relatively low bar for the appellee. But insufficient evidence is not the sole ground

on which a new trial may be granted under CR 59, and the Neighbors did not appeal based on insufficiency of evidence; they assigned error to the trial court's admission of improper evidence, to its failure to give a curative jury instruction, and to its denial of their motion in limine (which is before this Court under RAP 2.4). Appellants' Brief at 3-5. When the reviewing court in *Burnside* was called on to decide whether a new trial was needed due to the admission of certain evidence, it asked whether the trial court had abused its discretion by admitting irrelevant or otherwise improper evidence, not whether the other evidence in the case was sufficient. *Burnside*, 123 Wn.2d at 107. Sufficiency of evidence, and most of Kinch Farms' argument, are irrelevant in this appeal.

B. The Strength of the Neighbors' Evidence Helps Show that the Evidentiary Errors and Missing Instruction were not 'Harmless.'

Therefore, and contrary to Kinch Farms' argument, the Appellants' Brief discusses the strength of their evidence, not to show that Kinch Farms failed to meet the low bar of "sufficient evidence," but rather to show that the trial court's errors, and Kinch Farms' abuse of those errors, were not harmless. An evidentiary error is prejudicial, not harmless, if "within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected." *In re Det. of Post*, 170 Wn. 2d 302, 314, 241 P.3d 1234 (2010) (quoting *State v. Neal*, 144 Wn.2d

600, 611, 30 P.3d 1255 (2001)). Where the proper evidence was evenly balanced, or weighed heavily in favor of the appellant, as here, the improper evidence likely tipped the scale. *See id.* at 315 (jury deadlock in first hearing implies improper evidence in second hearing was prejudicial). This is especially true where, as here, the appellee's use of the evidence, as here, was "not merely in passing, but was thorough, systematic, and repeated," and where, as here, the jury considered the issue important enough to ask related questions. *Id.* at 315.

Kinch Farms argues that it produced 'sufficient evidence,' but it does not and could not argue that the weight of the evidence at trial was in its favor. As set forth in the Neighbors' opening brief, Kinch Farms' negligence was blatant. Kinch Farms concedes that when it set the fire, it knew it should keep men, water, and a tractor and disc on hand to fight any escaping flames. Appellants' Brief at 3. Those are the precautions that it took on August 10th. *Id.* But the next day it did not take those necessary precautions. It stood down, even though it knew full well that crop fires often rekindle, even though it had been warned to keep a watch on the site, even though it had seen how quickly fire spread in the Neighbors' dry crop stubble, and even though it knew that the prevailing winds regularly came up in the afternoon and would blow any rekindled smolder right into the stubble (and away from Kinch Farms). *Id.* at 7-8.

Instead of taking the precautions it knew were necessary, it merely kept a desultory watch for smoke from miles away and did two drive-bys early in the day, before the winds came up. *Id.* at 8-9.

Kinch Farms' properly-admitted evidence, without more, does not outweigh that damning before-and-after picture. As discussed below, what tipped the balance were Kinch Farms' legal arguments, improperly admitted in the guise of evidence, to the effect that the decision not to set a watch was not up to Kinch Farms, that following the DOE Permit and burn-day notice carried out its duty, and that other key decisions were in the hands of the DOE or the fire department. Thus, introduction of that 'evidence' and the failure to give a curative instruction were prejudicial, not harmless error.

C. Kinch Farms Systematically Repeated as a Theme of its Defense Improper 'Evidence' that it Relied on and Delegated its Duty of Care to the Fire Department and DOE.

Contrary to Kinch Farms' brief, the 'evidence' that Kinch Farms could and did rely on the fire department and the DOE was not a trivial, minor part of the trial. Kinch Farms relied on it heavily and used it over and over again. As cited in the Neighbors' opening brief, Kinch Farms raised the issue early in its opening statement, at length, including:

RP vol. I 17
20 Our evidence is going to show that Kinch
21 Farms reasonably relied on government authorities when

22 they conducted this burn.

RP vol. I 18

8 You will also hear that the Department of
9 Ecology takes into consideration wind direction and
10 wind speed and you'll hear testimony that they don't
11 like issuing burn permits if there's going to be
12 weather forecasted at more than 15 mile an hour.

RP vol. I 19

7 You'll hear testimony on August 10, 2009,
8 the Department of Ecology issued what's called a burn
9 day.

RP vol. I 20

4 And the fire department arrived on the scene and Fire
5 Chief Dainty is the man in charge.
****
21 Around 7:00, Mr. Dainty declares this fire
22 extinguished.

Kinch Farms returned to these themes again and again during trial. Two fire chiefs testified as Kinch Farms' experts. When Fire Chief Steele was asked the key question, "in your experience, should Kinch Farms have posted a 24-hour watch themselves on this burn area on August 11, 2009," RP vol. V 139-140, he adeptly shifted ground to answer that setting a watch **at all** was the fire department's, and **only** the fire department's, responsibility:

RP vol.V 140

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.

Kinch Farms had him repeat that point in another context, in case any juror had missed it the first time:

RP vol.V 173 (Emphasis added)

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.

And Fire Chief Dainty himself said even more strongly, for example:

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 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…

These were only a few of dozens of times that Kinch Farms brought out such testimony, telling the jury that the fire department had "jurisdiction," that the DOE supports the fire department in fire suppression efforts, that the DOE permit and burn day decision were a good substitute for Kinch Farms' independent judgment, that getting the permit was important evidence as to whether Kinch Farms' conduct was reasonable, that the DOE was "God" when it came to that decision, that the fire chief "has control" of the site and did not "relinquish" it to Kinch Farms, and so forth and so on. *See* Appellants' Brief at 10-15, 20-21, 23, 32. [1]

Kinch Farms emphasized these points throughout its closing argument, right up to its final words to the jury (emphasis added):

RP vol. VI 35
18 And so let's talk about what is the evidence
19 here that they used reasonable care when they started
20 this fire. Well, you've heard plenty of testimony,
21 they obtained the burn permit from the one licensing
22 source in Adams County for burns, the Department of
23 Ecology.

RP vol. VI 39-41
24 Mr. Dainty, based on his personal observations and
25 experience as a fire chief, determined that the Kinch's
1 fire line was adequate to prevent the spread of a fire.
****
15 Fire Chief Dainty stated he thought this
16 fire was extinguished. He saw no reason to post a

[1] 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, 54:10 14, 72:9-12, 94:10-11, 169:11 19, 184:8-11, RP vol. V 47:16-19, 93, 117:22-118:2, 118:15 23, 119:13-120:3, 121:5-10, 129:22-130:21, 139:24-140:24, 141:13-18, 145:3-10, 115:16-20, 173:2-8, 184:8-11, 185:8-12, 186:15-21.

17 watch.
****
24 He has all that knowledge. He knows
25 exactly about the prevailing winds. He has lived there
1 all his life. He knows what's upwind. He knows what's
2 in the CRP. He is charged with fire safety in this
3 district, in this district that Kinch Farms was in.
4 And he determined that a 24-hour watch was not
5 necessary. And he had all the knowledge that Kinch
6 Farms had. But, in addition, the added responsibility
7 of protection and fire safety in that district, and he
8 determined that a watch wasn't needed.

RP vol. VI 42

8 You heard some testimony about proximate cause,
9 the idea that you have a direct sequence of events that
10 causes the damage. **Well, here, there isn't a direct**
11 cause, because you had Fire Chief Dainty come on the
12 scene and state: When I come on the scene, I'm in
13 control. I am calling the shots. If this thing needs
14 a watch, I'm posting the watch. And he didn't do that
15 here.

RP vol. VI 45

13 **And ladies and gentlemen, they used reasonable**
14 care. They called the DOE. They had the procedures in
15 place. **And when it got out, they called the fire**
16 department and they suppressed it. The fire chief
17 himself said this was out.
18 Thank you.

Where Kinch Farms started and ended its case by telling the jury that it had properly counted on the fire department and DOE to decide what care was needed to prevent escape, to judge the weather conditions, and to put out the fire, and that getting an ecological permit was a vital part of reasonable care, it is disingenuous for Kinch Farms now to say that

these were trivial, minor parts of the trial. It is even more disingenuous to argue that it never argued "delegation" to the jury. Its case was all about delegation.

Even on appeal, Kinch Farms is still arguing delegation. It argues that "[t]he jury had every right to know what actions the fire department performed when they arrived at the scene [because] reasonable care requires great thoroughness in extinguishing fire," and "[t]o evaluate **Kinch Farms'** reasonable care, the jury needed to know why the **fire department** declared the fire extinguished." Appellee's Brief at 25 (emphasis added). But it is Kinch Farms' reasonable care, not the fire department's or the DOE's, that is at issue. Kinch Farms is again requesting, on appeal, to be judged by the efforts of the fire department and not its own subsequent failures, despite clear law that it could not delegate its duty to the fire department.

D. Failure to Give a Curative Jury Instruction was Error.

To see how badly Kinch Farms misinformed the jury on the law, and how much a curative jury instruction was needed, it is helpful to see how Kinch Farms now mischaracterizes the governing case law. To start with, nothing in *Wood & Iverson* suggests that there could ever be a fact pattern under which a landowner could properly rely on the state to fight his fire. The fire department's role here was smaller than the fire wardens'

in that case, where they "started, directed, and supervised" the burn; "[n]otwithstanding" which, the Supreme Court held without qualification that "respondent could not escape liability on that ground alone." *Wood & Iverson v. Nw. Lumber Co.*, 138 Wash. 203, 208, 244 P. 712 (1926) *aff'd en banc*, 141 Wash. 534, 252 P. 98 (1927). Neither can Kinch Farms, and the jury should not have been told otherwise.

Similarly, it is irrelevant that the defendant landowner in *Galbraith v. Wheeler-Osgood Co.*, 123 Wash. 229, 212 P. 174 (1923) expressly agreed to accept the state forester's fire-control instructions, whereas Kinch Farms merely summoned the fire department to the site, *see* Appellee's Brief at 40. If anything, Kinch Farms therefore had less basis than the *Galbraith* appellant to rely on the department's judgment. That the *Galbraith* landowner's liability arose under a different statute is also beside the point; what matters it that under that statute too, the jury had to decide whether he was liable "for any loss caused to a third person by a negligent performing of the burning." *Galbraith v. Wheeler-Osgood Co.*, 123 Wash. 229, 235, 212 P. 174 (1923). The standard was the same: negligence. The Supreme Court rejected the landowner's attempt to blame the state forester for giving him bad directions, because ultimate responsibility stayed with the landowner and he was free to act with more care than the forester had advised. *Id.* That principle is exactly the

opposite of what Kinch Farms' experts pre-instructed the jury, when, for instance, Fire Chief Steele opined that Kinch Farms had reasonably not set a watch, because "that would be a determination made by the fire chief, and the fire chief made the determination that it wasn't necessary." RP vol. V at 173. The jury should not have been told, falsely, that there was a special exemption to the landowner's legal duty of care.

The proper cure for these and other incorrect and improper pre-instructions would have been to instruct the jury that, no, Kinch Farms could not delegate its duty of care. Kinch Farms now argues that a non-delegation instruction, if used unnecessarily, might confuse a jury. This jury had already been put into confusion about the law, and leaving out the instruction removed the last chance to protect the jury. [2]

E. There was No "Open Door" to Argue Law to the Jury.

Lastly, the 'opened door' principle did not license Kinch Farms to present expert testimony on law to the jury. When Mr. Wruble testified that he had considered the warning given to Kinch Farms by Fire Chief Dainty, it might have been appropriate for Fire Chief Dainty to deny he gave such a direction. It was grossly inappropriate for him and Fire Chief

[2] The question may arise, why did the Neighbors' experts and counsel not tackle those incorrect statements of law head-on during trial? The answer is simply that to respond squarely would have meant arguing law to the jury. The proper ways to deal with these errors were to move in limine and to seek a curative jury instruction. Those attempts having failed, the Neighbors' only recourse is this appeal.

Steele to also say, several times, that he had no right to give Kinch Farms such direction or otherwise "delegate" his supposedly exclusive authority over the site to Kinch Farms. Kinch Farms had the ultimate responsibility under Washington law, and to mis-instruct the jury otherwise was well beyond the scope of any 'opened door.' Likewise, Mr. Wruble's testimony on the DOE's historic role did not open the door to a lecture on the WACs. Furthermore, Mr. Wruble's testimony was in anticipation of the improper testimony which the trial court's erroneous pre-trial rulings authorized Kinch Farms to introduce; anticipatory rebuttal testimony does not open the door to the testimony that it rebuts.

III. CONCLUSION

For the reasons set forth herein and in Appellants' opening brief, the judgment of the trial court should be vacated and a new trial ordered.

Dated this 5th day of January, 2015.

Respectfully submitted,

/s/ R. Bruce Johnston

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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 January 5, 2015, 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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