NO. 323145

STATE OF WASHINGTON, COURT OF APPEALS
DIVISION III

CLINESMITH CATTLE COMPANY, INC., a Washington corporation; CALF CREEK CATTLE COMPANY, INC., a Washington corporation; J.W. HARDER LIVESTOCK, INC., a Washington corporation, and J.J.H. LIVESTOCK, INC., a Washington corporation, partners of HARDER RANCHES, a Washington general partnership; HERBERT and DOROTHY 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/Plaintiffs

vs.

KINCH FARMS, INC., a Washington corporation,

Appellee/Defendant.

RESPONSE TO BRIEF OF APPELLANTS

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I. INTRODUCTION

This case is about whether Kinch Farms utilized the care of a reasonably prudent person under same or similar circumstances when it started and conducted a controlled burn on its property on August 10, 2009. The evidence presented at trial clearly established that, despite the fire escaping, Kinch Farms utilized reasonable care. As such, the jury returned a defense verdict. Contrary to Plaintiffs' various assertions, the trial court did not abuse its discretion when it allowed the jury to consider all the facts and circumstances surrounding Kinch Farms' decision to burn and subsequent efforts to control the fire. Therefore, this Court must reject Plaintiffs' appeal of the defense verdict.

II. STATEMENT OF THE CASE

A. Conditions of The Land and Fire Preparation.

This case centers on a fire that occurred on August 10 and 11 of 2009 approximately 20 miles east of Ritzville, Washington. The Plaintiffs in this matter filed suit, alleging that Defendant Kinch Farms negligently started and/or allowed a fire to spread from its property to adjacent property. After a nearly two-week trial, an Adams County jury returned a

defense verdict. *Contrary to Plaintiffs' statement in their appeal brief, the facts of the case were vigorously contested.*

Kinch Farms is owned and operated by three principals, Ron Kinch, Joe Kinch, and A.J. Miller. All three individuals are experienced farmers. CP Vol. IV, p. 65; Vol. V, p. 64, lns. 17-20; CP Vol. IV, p. 18, lns. 1-10. As part of its farming practice, Kinch Farms utilizes controlled burns to manage disease and crop stubble. CP Vol. V, p. 65, lns. 15-17. Ron Kinch, as principal of Kinch Farms, had been conducting controlled burns to manage weed growth on his farm since 1996. CP Vol. IV, p. 66, lns. 7-14; CP Vol. V, p. 65, lns. 8-11.

In the summer of 2009, Kinch Farms determined that it needed to conduct a controlled burn on Circle 6, a crop circle on its property. The first step in conducting a controlled burn in Adams County is to obtain a burn permit from the Department of Ecology ("DOE"). CP Vol. V, p. 121, lns. 5-14. On August 4, 2009, Ron Kinch completed application for, and obtained, a burn permit. CP 136, Ex. 7 and 8. Kinch Farms then waited for the DOE to declare a "burn day" in Adams County.

In the meantime, Kinch Farms prepared Circle 6 for the controlled burn, which involved several tasks. First, Joe Kinch created a fire break around Circle 6 with a tractor and disk. CP Vol. IV, p. 72, lns. 15-24; CP Vol. V, p. 19, lns. 9-20. The purpose of a fire break was to eliminate all combustible material within the fire break so as to minimize the risk of the fire spreading to other areas. CP Vol. V, p. 20, lns. 25; p. 21, lns. 1-8. Next, Kinch Farms posited several pieces of fire suppression equipment on Circle 6, including a tractor and disc and a 1,000 gallon water truck. CP Vol. IV, p. 67, lns. 3-25; p. 68, lns. 1-8; CP Vol. V, p. 19, lns. 21-25; Vol. V, p. 69, lns. 8-16.

The area near Circle 6 also possessed a natural fire barrier to the northeast. In Adams County, the prevailing winds generally come out of the southwest CP Vol. II, p. 68, lns. 8-12. Northeast of Circle 6 is Plaintiff Ochoa's CRP land. CP 136, Ex. 11, 12, and 13. However, between Circle 6 and Ochoa's land is Sutton Road, a gravel road. CP Vol. V, lns. 1-20. During trial, testimony confirmed that Sutton Road acted as a fire barrier between Plaintiff Ochoa and Kinch Farms' land. CP Vol. V, p. 125, lns. 19-23.

On August 10, 2009, Kinch Farms contacted the DOE and learned that August 10 was a burn day between 1:00 p.m. to 4:00 p.m. CP Vol. IV, p. 75, lns. 6-9; CP Vol. V, p. 19, lns. 16-20. CP 136, Ex. 9. The permit provided that burns were not permitted if winds exceeded 15 mph. CP 136, Ex. 9. A.J., Joe, and Ron believed it was a good day to conduct a controlled burn. CP Vol. IV, pp. 5-12; CP Vol. V, p. 22, lns. 3-9. The wind speeds at the time were below 10 mph. CP Vol. IV, pp. 8-10; CP Vol. V, p. 23, lns. 15-25; p. 24, lns. 1-2; CP Vol. V, p. 68, lns. 22-25. Other witnesses testified they believed it was a good day to conduct a controlled burn. CP Vol. IV, p. 186, lns. 4-7. In addition, it had rained a week before. In fact, one witness confirmed that he still had moisture in his crop on August 10, 2009. CP Vol. V, p. 24, lns. 3-11.

On the morning of August 10, A.J., Joe, and Ron contacted the local fire department, sheriff, and neighbors to notify them that they were planning to conduct a controlled burn. CP Vol. IV, p. 75, lns. 1-25, p. 76, lns. 1-20; CP Vol. IV, p. 147, lns. 16-25; CP Vol. V, p. 66, lns. 17-25; CP Vol. V, p. 67, lns. 1-9.

B. Kinch Farms Conducted a Reasonable Controlled Burn On August 10, 2009.

Around 1:00 p.m. on August 10, 2009, Rod, A.J., and Joe began a controlled burn on Circle 6. Prior to starting the burn, Joe checked a wind gauge that was located in his pickup truck and determined that the wind speed was less than 10 mph. CP Vol. V, p. 24, lns. 18-24.

The process in which Kinch Farms conducted the controlled burn was very methodical. First, the method used to light a fire was controlled via a propane torch with a "long extension" to ensure the flames came out "slowly." CP IV, p. 68, lns. 6-13. Using a propane torch, Joe and Rod Kinch created a "back burn" on the northeast section of Circle 6 that was approximately 10-15 yards wide. CP Vol. IV, p. 80, lns. 19-20; CP Vol. V, p. 24, lns. 18-24; CP Vol. V, p. 70, lns. 9-17. This provided a safeguard against fire escape. CP Vol. IV, p. 81, lns. 16-19; CP Vol. V, p. 25, lns. 4-15; CP Vol. V, p. 70, lns. 20-24. Kinch Farms then created a second back burn approximately 10 yards wide adjacent to the first back burn. CP Vol. IV, p. 82, lns. 13-15. This built additional fire protection so that the fire "can extinguish itself" as Kinch Farms conducted its burn. CP Vol. IV, p. 83, lns. 6-9; CP Vol. V, p. 26, lns. 1-5. The back burn was placed in the northeast section of Circle 6 to prevent the fire from

spreading onto Ochoa's property. CP Vol. IV, pp. 6-12 CP Vol. V, p. 25, lns. 1-15. Once the back burns were finished, Kinch Farms began burning downwind in "manageable" sections, forcing the fire into the back burns so that the fire extinguished itself. CP Vol. IV, p. 83, lns. 6-9; CP Vol. IV, p. 84, lns. 21-24; CP Vol. V, p. 71, lns. 3-4. In short, Joe and Rod would light one parcel on fire, wait for the parcel to burn out, and then proceed to the next parcel. CP Vol. IV, pp. 86-90.

While Ron and Joe were conducting the controlled burn, A.J. sat in the water truck and kept watch on the fire progression to ensure that none of the fire escaped Circle 6. CP Vol. IV, p. 88, lns. 9-19; CP Vol. V, p. 26, lns. 15-20. To quickly communicate with each other, both A.J. and Joe were in radio communication. CP Vol. IV, p. 90, lns. 23-25.

Around 3:30 p.m., Kinch Farms was nearly finished with the controlled burn. CP Vol. IV, p. 90, lns. 6-14. They had begun mop up operations to ensure all portions of the fire were out. CP Vol. IV, p. 90, lns. 6-14; CP Vol. V, p. 27, lns. 2-14; CP Vol. V, p. 71, lns. 14-25. At that time, A.J. spotted a fire just outside Circle 6 that was still on Kinch Farms' property. CP Vol. IV, lns. 18-20; CP Vol. V, p. 27, lns. 10-12. Ron and Joe immediately responded and began creating a fire line around the

escaped fire. CP Vol. IV, p. 91, lns. 1-9; CP Vol. V, p. 27, lns. 13-14. Shortly thereafter, A.J. spotted a second fire, this time to the northeast on Ochoa's CRP land. CP Vol. IV, p. 91, lns. 5-9. A.J. contacted the fire department immediately. CP Vol. IV, p. 92, lns. 3-9. He then rushed over to Ochoa's property and began applying water. CP Vol. IV, p. 93, lns. 7-25. Ron began creating a fire line around the fire on Ochoa's property. CP Vol. V, p. 73, lns. 1-25.

Now, before diving into the fire department's response, it should be stressed that the wind speed at the time the fire jumped from Kinch Farms onto Ochoa's property was contested at trial. A weather station at Ritzville recorded the highest sustained wind on August 10, 2009, at 14 mph, a wind gust at 17 mph, and an average wind speed of 8 mph. CP 136, Ex. 6. Fire Chief Dainty, who was six miles away from Kinch Farms, testified that he never thought the winds reached dangerous speeds on August 10, 2009. CP Vol. IV, p. 182, lns. 14-17[1].

[1] Plaintiffs state under their "fact" section that the wind was blowing so hard it decreased visibility on August 10, 2009. However, this was not evidence. These statements came from Walt Wruble, who was reciting what Chief Dainty allegedly told him during his investigation. CP Vol. IV, p. 188. Prior to this testimony, the trial court issued a limiting instruction informing the jury not to consider this portion of Wruble's testimony as evidence, but as a basis for Wruble's opinion. CP Vol. III, p. 187.

C. Kinch Farms Quickly Suppressed The Fire on Ochoa's Property.

When the fire department (District 7) arrived to Ochoa's property, Kinch Farms had most of the fire under control. CP Vol. IV, p. 152, lns. 18-25. At that time, the fire chief for District 7 was Brian Dainty. CP Vol. IV, p. 146, lns. 12-18.

Chief Dainty arrived to the scene and began directing fire suppression efforts on Ochoa and Kinch Farms' land. CP Vol. IV, p. 154, lns. 3-25; CP Vol. V, p. 155, lns. 1-25; CP Vol. 156, lns. 1-25. He brought with him 12 voluntary firefighters and six fire trucks. CP 136, Ex. 10. While the fire department was conducting its own fire suppression activities, Kinch Farms continued to fight the fire by creating additional fire lines and pouring water on the burn scene. CP Vol. V, p. 30, lns. 6-10. A.J. testified that he activated the sprinkler pivot on Circle 6 to begin putting water on the ground. CP Vol. IV, p. 94, lns. 19-25; p. 95, lns. 5-15.

During the mop-up phase of the fire suppression, one of the firefighters, Mr. Jessup, placed his hand into a ditch and discovered that it was still hot. CP Vol. IV, p. 157, lns. 11-25; CP Vol. IV, p. 158, lns. 1-25. Chief Dainty responded immediately by placing more water on the ditch. CP Vol. IV, p. 159, lns. 1-12.

The fire department was on the scene for some three hours. *See* CP 136, Ex. 28. During that time, the fire department's water tender was refilled on Kinch Farms' property. CP Vol. IV, p. 156, lns. 18-21. Chief Dainty testified that the fire department never departs from a fire scene without emptying all of its water. CP Vol. IV, p. 167, lns. 22-23.

Around 7:00 p.m., Chief Dainty determined that the fire was sufficiently extinguished. CP Vol. IV, p. 165, lns. 13-23. He testified at trial that he left the scene on August 10 feeling that the fire was extinguished. CP Vol. IV, p. 166, lns. 12-17. He further testified that he did not believe the fire would rekindle. CP Vol. IV, p. 166, lns. 18-19. According to Chief Dainty's report, only two acres of Ochoa's land were burned after the mop-up operations were complete. CP 137, Ex. 28.

As the fire department was packing up to leave, Chief Dainty and A.J. had a conversation as to what to do after the fire department departed the scene. What was said was disputed, CP Vol. IV, p. 167, lns. 2-12, but A.J. came away from the conversation with the understanding that he should pour more water in the ditch between Ochoa's CRP land and Sutton Road. He believed Chief Dainty also told him to "watch it." CP Vol. II, p. 220, lns. 15-22. Chief Dainty testified at trial that he never

explicitly asked A.J. to pour more water on the ditch or to watch the site. CP Vol. IV, p. 167, lns. 11-25.

D. Kinch Farms Continued To Engage In Fire Suppression Activities After The Fire Department Left the Scene.

After the fire department left the scene, A.J. and Joe continued to pour water into the ditch between Sutton Road and Ochoa's property for approximately two hours. CP Vol. IV, p. 98, lns. 7-14; CP Vol. V, p. 31, lns. 16-23; CP Vol., V, p. 32, lns. 17-23. A.J. testified that he and Joe laid "thousands of gallons" of water in the ditch between Ochoa's property and Sutton Rd. CP Vol. IV, p. 98, lns. 7-14. Joe testified he and A.J. poured 1,500 gallons of water in the ditch. CP Vol. V, p. 32, lns. 5-8. In addition, A.J. turned the Circle 6 sprinkler pivot on full power, dumping approximately a quarter of an inch of water on the ground in a 12-hour period. CP Vol. IV, p. 96, lns. 3-10. Joe and A.J. stayed by the burn a few hours after the fire department left the scene. CP Vol. 99, lns. 10-22.

While A.J. and Joe were pouring water into the ditch, Ron Kinch contacted Jerry Snyder, the manger of Ochoa's CRP land. CP Vol. V, p. 77, lns. 16-18; Vol. V, p. 78, lns. 1-3.

E. Kinch Farms Conducted a Reasonable Watch Over the Burn Area.

A.J. and Joe left the scene after 9:00 p.m. on August 10. CP Vol. IV, p. 99, lns. 10-22; CP Vol. V, p. 32, lns. 16-18. However, A.J. continued to watch the burn area from his house throughout the night. CP Vol. IV, lns. 4-11.

On August 11, 2009, no less than four individuals, at different times, inspected the burn area between 7:00 a.m. and 12:00 noon. In the morning, *Chief Dainty* returned to the burn area. CP Vol. IV, p. 169, lns. 22-25; p. 170, lns. 1-9. He saw nothing of concern and was satisfied that the fire was extinguished. CP Vol. IV, p. 170, lns. 1-9. Around 8:00 a.m., *Jerry Snyder*, on behalf of Ochoa, inspected the burn area. CP Vol. 134, lns. 16-22. Like Chief Dainty, he saw nothing that warranted contacting Kinch Farms or the fire department. CP Vol. II, p. 135, lns. 1-9. A little after Snyder left the scene, *A.J.* drove by the burn area. CP Vol. IV, p. 101, lns. 4-10. Like Chief Dainty and Snyder, A.J. saw nothing of concern. CP Vol. IV, p. 101, 1-25. Around 10:00 that morning, *Ron Kinch* drove out to the burn area. Like A.J., Snyder, and Chief Dainty, Ron saw nothing of concern. Around 12:00 p.m., *A.J. again* drove by the burn area and,

again, did not see anything of concern. CP Vol. IV, p. 102, lns. 18-25; p. 103, lns. 1-20.

F. The Fire Unexpectedly Rekindles.

Fifteen hours after the fire department left the scene, around 1:00 p.m., the winds in the area began to pick up. Joe spotted smoke from his home and immediately contacted A.J. CP Vol. V, p. 33, lns. 5-14. A.J. confirmed there was indeed a fire on Ochoa's property. CP Vol. IV, p. 105, lns. 1-17. The fire department was contacted again. CP Vol. IV, p. 105, lns. 8-10. From this fire, Plaintiffs suffered damage. The fire was eventually extinguished on August 12, 2009.

III. ARGUMENT

A. Standard of Review.

1. An Appellant Court Strongly Presumes a Jury Verdict is Correct.

An Appellant court cannot substitute its judgment for that of a jury. Burnside v. Simpson Paper Co., 123 Wn.2d 93, 108, 864 P.2d 937 (1994). A jury verdict cannot be overturned unless it is clearly unsupported by substantial evidence, i.e., evidence that, if believed, would support the verdict. Id. When considering a jury verdict for substantial evidence, the appellant court must consider all evidence and draw all reasonable

inferences in the light most favorable to the verdict. Ketchum v. Wood, 73 Wn.2d 335, 336, 438 P.2d 596 (1968). (Emphasis added)

An appellate court will presume that a jury fairly and objectively considered the evidence. Phelps v. Wescott, 68 Wn.2d 11, 410 P.2d 611 (1966).

> The inferences to be drawn from the evidence are for the jury....The credibility of witnesses and the weight to be given to the evidence are matters within the province of the jury and even if convinced that a wrong verdict has been rendered, the reviewing court will not substitute its judgment for that of the jury, so long as there was evidence which, if believed, would support the verdict rendered.

Burnside, 123 Wn.2d at 107, 864 P.2d at 945 (quoting State v. O'Connell, 83 Wn.2d 797, 839, 523 P.2d 872 (1974). A reviewing court strongly presumes the jury's verdict was correct. Burchfiel v. Boeing Corp., 149 Wn.App. 468, 205 P.3d 145 (2009).

Here, the jury awarded a defense verdict. As such, this Court must presume that the verdict was based on substantial evidence.

2. Trial Court's Decision Granting or Denying a Motion in Limine is Reviewed Under an Abuse of Discretion Standard.

"The granting or denial of a motion in limine is within the discretion of the trial court, subject only to review for abuse." Fenimore v. Donald M. Drake Constr. Co., 87 Wn.2d 85, 91, 549 P.2d 483 (1976).

3. Trial Court's Decision Admitting or Excluding Evidence is Reviewed Under an Abuse of Discretion Standard.

Admitting or excluding evidence is reviewed for abuse of discretion. Parrott-Horjes v. Rice, 168 Wn.App. 438, 444-445, 276 P.3d 376, 379 (2012).

4. The Adequacy of Jury Instructions are Reviewed De Novo.

The adequacy of jury instructions are reviewed de novo. Gregorie v. City of Oak Harbor, 170 Wn.2d 628, 635, 244 P.3d 924 (2010). The test for sufficiency of instructions involves three determinations: (1) the instructions permit the party to argue that party's theory of the case; (2) the instructions are not misleading; and (3) when read as a whole, all the instructions properly inform the trier of fact on the applicable law. Douglas v. Freeman, 117 Wn.2d 242, 256-57, 814 P.2d 1160, 1168 (1991). "No more is required." Id.

"Prejudice is presumed if the instruction contains a clear misstatement of law; *prejudice must be demonstrated if the instruction is merely misleading.*" Andfinson v. FedEx Ground Package System, Inc., 174 Wn.2d 851, 860, 281 P.3d 289, 294 (2012) (Emphasis added).

B. Fire Starting and Fire Escape is Governed by the Negligence Standard.

Only under limited circumstances can a landowner be liable for damages caused by a fire originating from his or her land. To establish liability, the plaintiff must prove that the defendant failed to use reasonable care in either: (1) starting the fire; or (2) failing to extinguish the fire if it spreads to neighboring lands. *See* e.g., Walters v. Mason County Logging Co., 139 Wash. 265, 271, 246 Pac. 749, 751 (1926).

In the matter of field fires, *starting* a fire on one's own land will not, in and of itself, support liability. RCW 4.24.040. As provided by statute:

> 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 a time and in such manner, and shall take such care of it to prevent it from spreading and doing damage to other person's property, *as a prudent and careful person would do*, and if he or she fails to do so 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.

RCW 4.24.040 (emphasis added). Once a field fire is burning, the landowner has the duty to use reasonable care to contain it. Sandberg v. Cavanaugh Timber Co., 95 Wash. 556, 561 164 Pac. 200 (1917).

Furthermore, *escape* of a field fire, in and of itself, does not support liability so long as the landowner used reasonable care to contain the fire. Washington law provides:

> [i]t is unlawful for any person to *negligently* allow fire originating on the person's own property to spread to the property of another.

RCW 76.04.740; Mensik v. Cascade Timber Co., 144 Wash. 528, 536, 258 Pac. 323 (1927). Reasonable care requires urgent speed, vigorous attack, and great thoroughness in reaching and putting out a fire when it escapes. Arnhold v. U.S., 284 F.2d 326, 329 (9th Cir. 1960) (applying Washington law).

It must be stressed that these types of fire cases are couched in negligence and not strict liability. *See* e.g., Criscola v. Guglielmelli, 50 Wn.2d 29, 31, 308 P.2d 239, 241 (1957); Walters, 139 Wash. at 271, 246 Pac. at 751. The plaintiff must present evidence showing the defendant acted in a negligent manner in either causing the fire or in attempting to put out the fire if it spreads. Walters, 139 Wash. at 271, 246 Pac. at 751.

Moreover, the law is protective of individuals who lawfully start fires on their property for business purposes because fire is important and useful for economically clearing land. *See* Stephens v. Mutual Lumber Co., 103 Wash. 1, 6-7, 173 Pac. 1031 (1918). In Stephens, the Court stated:

> In logging operations and in the clearing of new lands it is necessary to build fires and to destroy waste. This cannot be done without a certain hazard to other property, but the law does not for that reason deny the right to maintain fire in the prosecution of legitimate business, *nor will it charge one with negligence who fails to put out a fire which is not*

> *threatening when such fire by some new cause lodges on the property of another or goes beyond the control of the person who set it out.*

103 Wash. at 7, 173 Pac. at 1031 (emphasis added). In fact, the Stephens court noted that forcing landowners to "guarantee the security" of their neighbors' land would be "the destruction of all civilized society." 103 Wash. at 7, 173 Pac. at 1034 (quoting Ryan v. New York Central Railroad Co., 35 N.Y. 210).

The case of Walters v. Mason County Logging Co. is important to this Court's analysis. There, a fire originated from the defendant's land. 139 Wash. at 265, 246 Pac. at 749. Once the fire was discovered, the fire warden immediately sent men to begin fighting the fire. Id. at 266, 246 Pac. at 749. The men worked as much as 18 hours a day to put out the fire. Id. Nearly a week later the fire was apparently under control. Id. at 267, 246 Pac. at 750. However, the winds became stronger and the fire flared back up. Id. After the fire flared back up, it burned the plaintiff's land and destroyed his logs, donkey engine, and trucks. Id. at 268, 246 Pac. at 750.

The case went to trial. After argument was concluded, the jury returned a verdict in favor of the plaintiff in the sum of $6,537. Id. The defendant then filed a motion for judgment notwithstanding the verdict. Id. The trial court granted the defendant's motion for judgment notwithstanding the verdict and dismissed the plaintiff's action. Id.

The Supreme Court stated that the parties trying to control the fire used every possible effort and every available man to suppress the fire. Id. The court noted that the firefighting was done under the direction of a fire warden and a representative of the Washington Fire Association. Id. The court concluded that the judgment notwithstanding the verdict was appropriate:

> The evidence is simply irresistible that all of the parties, and all of the men, did everything possible to extinguish, or suppress, the spread of the fire, from the time it was discovered, until it finally resulted in the sudden destruction of appellant's property.

Id. at 272, 246 Pac. at 751. As such, the Washington Supreme Court affirmed the trial court's entry of judgment notwithstanding the verdict. Id.

C. The Evidence Demonstrated That Kinch Farms Did Not Act in a Negligent Manner.

Although Plaintiffs never explicitly argue it, their position rests on the assumption that there was a lack of evidence demonstrating Kinch Farms acted in a reasonable manner. This assumption is false.

First, the evidence demonstrated conclusively that Kinch Farms reasonably prepared to conduct a controlled burn on Circle 6. This included creating a fire line, creating back burns, and placing fire suppression equipment near Circle 6, which included a tractor and disc and

water truck. In regard to the fire line, Chief Dainty testified that, based on his personal observations, the fire line was more than adequate. CP Vol. IV, p. 162, lns. 15-25. Second, Kinch Farms began the burn when the wind conditions were below 10 mph. Third, Kinch Farms conducted the burn in a methodical and safe manner with fire safety in mind, burning only small sections of Circle 6 at a time. Fourth, when the fire escaped to Ochoa's CRP land, Kinch Farms responded in a prompt and reasonable manner by contacting the local fire department and engaging in fire suppression activity. Chief Dainty confirmed that, based on his personal observations, Kinch Farms was prepared to handle the situation when the fire escaped. CP Vol. IV, p. 181, lns. 18-25. Fifth, weather records indicated that the winds in the area never exceeded 15 mph, thus keeping in line with the permit. Sixth, Kinch Farms performed a reasonable watch on the burn area after the fire was declared extinguished by the fire department.

Moreover, Kinch Farms' expert, Bill Steele, opined that Kinch Farms acted in a reasonable manner starting the fire at issue. CP Vol. V, p. 129, 13-15. Steele supported this opinion by stressing Kinch Farms' planning, its placement and use of equipment, and weather conditions at

the time the burn was commenced. CP Vol. V, pages 129-131. Steele further opined that Kinch Farms' containment strategy was reasonable. CP Vol. V, p. 131, lns. 19-25; p. 132, lns. 1-25. He pointed out that Sutton Road was a natural fire barrier between Ochoa and Kinch Farms' land that needed to be taken into consideration. CP Vol. V, p. 126, lns. 1-7. He described Sutton Road as an "anchor point" when conducting a controlled burn. CP Vol. IV, p. 122, lns. 17-23. Steele further confirmed that *not every fire requires* a 24-hour "fire watch" after it is extinguished. CP Vol. V, p. 134, lns. 6-9.

Importantly, Steele opined that an agricultural fire can be conducted in sustained wind speeds of 15 mph. CP Vol. V, p. 139, lns. 10-18. Ritzville weather recording station indicated that the sustained wind speeds in the area never exceeded 14 mph. CP 136, Ex. 6. Thus, if the jury believed Steele, then Kinch Farms was reasonable in conducting a controlled burn on August 10, 2009.

Plaintiffs make numerous assertions that their evidence was "overwhelming." However, Plaintiffs' various "strong arguments" were countered at trial as being untrue or requiring the jury to weigh witness credibility.

For example, although Plaintiffs testified that their land was dangerously "dry" on August 10, 2009, Byron Allen, a neighbor of Kinch Farms, testified that it had rained and there was still moisture in his crop the morning of the first fire. CP Vol. II, p. 44, lns. 11-13; CP Vol. II, p. 87, lns. 14-18. Further, Steele opined that most agricultural burns occur in July or August. CP Vol. V, p. 136, lns. 1-5.

Additionally, in his opening statement, Plaintiffs' counsel represented to the jury that A.J. Miller explicitly turned down fire department assistance in conducting a controlled burn. This fact was untrue, as Byron Allen testified that he was only reminding A.J. that fire department resources were available should he request assistance with the controlled burn. CP Vol. IV, p. 55, lns. 1-24; p. 56, lns. 1-13.

In their appeal brief, Plaintiffs assert that the ground was still hot when the fire department departed the scene. Plaintiffs omitted from their brief that Chief Dainty was well aware of this incident and responded to the "hand burn" incident by applying more water to the area in question.

> Q. So after you hear from Mr. Jessup that the ditch is hot, what did you do in response?
>
> A. ...What I did was I sent trucks down to start watering down the ditch.

CP Vol. IV, p. 158, lns. 18-24. Before leaving the scene, Chief Dainty had the fire department "flood" the ditch between Sutton Road and Ochoa's property. CP Vol. IV, p. 159, lns. 1-12.[2]

Plaintiffs also asserted that a 24-hour continuous watch should have been provided on the property. For this proposition, Plaintiffs relied on their expert, Walt Wruble, and the expert opinions of Plaintiffs Harder and Clinesmith, who were all ranchers but allowed to testify to what should be the reasonable care regarding fire suppression despite defense counsel's objections. CP Vol. II, pp. 20-26; CP Vol. III, pp. 48-57; Vol. III, pp. 133-137. However, Clinesmith and Harder were both ranchers with "ranch land" which contained cow manure. CP Vol. III, p. 35, lns. 9-10. Importantly, Wruble, Steele, and Chief Dainty confirmed that cow manure presented a unique risk of fire rekindle. Steele noted that a fire watch should be posted on ranch land because firefighters are not going to check all "cow patties" to ensure the fire was extinguished. CP Vol. V, p. 135, lns. 17-22. Chief Dainty described "cow puckies" as "fire wicks." CP Vol. V, p. 176, lns. 3-9. He testified that most fire rekindles in his district occurred because of cow manure. CP Vol. IV, p. 177, lns. 2-5.

[2] A.J. testified that he was not aware of Jessup's hand burning incident. CP Vol. IV, p. 97, lns. 18-20.

Plaintiff Harder even confirmed that cow manure presented a unique fire risk. CP Vol. III, p. 52, lns. 18-25. Chief Dainty confirmed that Ochoa's CRP land or Kinch Farms possessed no cow manure that increased the risk of fire rekindle. CP Vol. IV, pp. 11-12. Finally, Chief Dainty testified that it was not common practice in his fire district (District 7) for a private landowner to post a 24-hour watch. CP Vol. 170, lns. 24-25; CP Vol. 171, lns. 1-5.

Plaintiffs also relied heavily on the weather forecasts, arguing that it was unreasonable to burn when 20 to 25 mph wind speeds were predicted. This evidence, however, was refuted by the Defendant in three ways. First, *and importantly,* there was evidence presented that demonstrated the sustained *winds never exceeded 14 mph on the day of the first fire.* CP 136, Ex. 6. This exhibit was buttressed by Chief Dainty, who testified that he personally saw nothing on August 10 that made him think the winds speeds were of such great intensity that it was unsafe to burn. CP Vol. IV, p. 182, lns. 14-17. Chief Dainty further testified that he did not observe the winds "out of control" on August 10. CP Vol. IV, p. 186, lns. 1-7. Second, there was testimony presented from witnesses that the weather forecasts for Adams County are unreliable. CP Vol. IV, p. 226,

lns. 13-18 (Chief Dainty did not follow weather forecasts due to unreliability); CP Vol. II. p. 89, lns. 13-21. The jury, who are all Adams County residences, were more than capable of weighing this testimony and judging the weather forecasts for themselves. Third, one witness at trial testified that the DOE did not declare burn days if excessive winds were forecasted. CP Vol. V, p. 22, lns. 10-19.

There was sufficient evidence to justify the jury's conclusion that Kinch Farms acted in a reasonable manner on August 10 and August 11. The mere escape of a fire is insufficient to establish liability. Further, Plaintiffs' various pieces of evidence were rebutted and required the jury to weigh credibility of the evidence and testimony. *See* Burnside, 123 Wn.2d at 107, 864 P.2d 937 (jury must weigh witness credibility). Thus, the jury's verdict was appropriate and supported by substantial evidence.

D. The Trial Judge Did Not Abuse His Discretion In Allowing Testimony Concerning What Actions The Fire Department Performed On August 10 and August 11, 2009.

1. Evidence Concerning the Fire Department's Actions Was Properly Admitted so the Jury Could Evaluate Whether Kinch Farms Utilized Reasonable Care Under the Circumstances.

The trial court did not abuse its discretion when it allowed testimony concerning the fire department's actions on August 10 and August 11,

2009. The case that Kinch Farms presented to the jury, from opening statement to closing argument, was based *on what Kinch Farms did to meet its duty to exercise ordinary care*, given all the facts and circumstances of what transpired. This position comports with Washington law. *See* RCW 4.24.040 (setting fire is governed by negligence standard); RCW 76.04.740 (same); Criscola, 50 Wn.2d at 31, 308 P.2d at 241 (negligence standard).

Thus, the question before the jury was whether Kinch Farms utilized the care a reasonably prudent person would have under same or similar circumstances. The jury had every right to consider whether Kinch Farms promptly contacted the fire department once the fire had escaped its property. *See* Arnhold, 284 F.2d at 329 (reasonable care requires urgent speed and vigorous attack). The jury had every right to know what actions the fire department performed when they arrived at the scene. *See* Id. (reasonable care requires great thoroughness in extinguishing fire). The jury needed to know whether Kinch Farms negligently interfered with the fire department's fire suppression efforts. To evaluate Kinch Farms' reasonable care, the jury needed to know why the fire department declared the fire extinguished on August 10, 2009. *See* Walters, 139 Wash. at 271,

246 Pac. At 751 (court considered fire warden's representations to evaluate defendant's reasonable care). Finally, the jury needed to know *what circumstances led Kinch Farms not to post a continuous 24-hour watch.*

At trial, Chief Dainty strongly disagreed with Plaintiffs' assertion that a continuous 24-hour watch needed to be posted after the fire department left the scene. He believed there was little chance of the fire rekindling when he left the scene on August 10. CP Vol. IV, p. 180, lns. 4-10. Chief Dainty opined that Kinch Farms' actions after the fire was extinguished were reasonable under the circumstances. CP Vol. IV, p. 182, lns. 4-6. Bill Steele, Kinch Farms' expert, agreed. There was no abuse of discretion in allowing Chief Dainty and Steele to provide testimony and opinions concerning the circumstances surrounding the fire on August 10, 2009. These circumstances—interactions with fire department personnel, the conditions of the land, etc.—were critical for the jury to evaluate Kinch Farms' conduct on August 10 and August 11.

Plaintiffs assert that the jury was misled to believe Kinch Farms delegated its duty to the fire department. They point to Chief Dainty's use of the words and phrases of "control," "authority," and "turn over" during

his testimony. However, this assertion is defeated by a simple fact—the evidence presented at trial showed that *Kinch Farms itself did not believe it was relieved of any duty to properly extinguish the fire.* For two hours after the fire department left the scene, A.J. and Joe continued to apply water to the burn area. A.J. maintained a watch the entire night from his home. Both A.J. and Ron drove past the burn area the morning of August 11, 2009, to determine if the fire was extinguished. Plaintiffs asserted these acts were an insufficient fire patrol; *however, it was for the jury to decide whether Kinch Farms' subsequent conduct breached a standard of care. See* Nivens v. 7-11 Hoagy's Corner, 83 Wn.App. 33, 47, 920 P.2d 241, 247 (1996).

Because Kinch Farms never argued that it delegated its duty to use reasonable care in starting, controlling, or extinguishing the fire, the cases of Babcock v. Seattle School Dist., No. 1, 169 Wash. 557, 12 P.2d 752 (1932); Leuteneker v. Fisher, 155 Ca.App.2d 33 (Cal. Ct. App. 1957); and Peterson v. Bailey, 571 S.W.2d 630, 632-33 (Ky. Ct. App. 1978), are not applicable to this case. Instead, this case falls squarely within the holding of Walters v. Mason County Logging Co. Similar to the situation in Walters, Kinch Farms and the Adams County Volunteer Fire Department

believed that the August 10 fire was extinguished. *See* Id. at 271, 246 Pac. at 751. Like in Walters, Kinch Farms fought the fires on both August 10 and August 11 in conjunction with the fire department. *See* Id. Like the defendant is Walters, Kinch Farms did everything it could to contain and fight the fires that occurred on August 10 and August 11.

There was no testimony, evidence, or arguments presented to the jury that misled the jury to believe Kinch Farms delegated its duty to use reasonable care to the fire department. The trial court did not abuse its discretion when it allowed the jury to consider the actions of the fire department.

2. Assuming This Court Believes Fire Department's Actions Were Not Admissible at Trial, Plaintiffs Opened the Door During Their Case-in-Chief Regarding the Fire Department's Conduct.

Washington law is clear—otherwise inadmissible evidence is admissible if a party opens the door to the evidence during direct examination. *See* Ang v. Martin, 118 Wn.App. 553, 561-62, 76 P.3d 787, 792 (2003).

> It would be a curious rule of evidence which allowed one party to bring up a subject, drop it at a point where it might appear advantageous to him, and then bar the other party from all further inquiries about it. Rules of evidence are designed to aid in establishing the truth. To close the door after receiving only a part of the evidence not only leaves

> the matter suspended in air at a point markedly advantageous to the party who opened the door, but might well limit the proof to half-truths.

State v. Gefeller, 76 Wash. 449, 455, 458 P.2d 17, 20 (1969).

During direct examination, Mr. Wruble was asked by Plaintiffs' counsel to testify to the jury about a conversation he had with Chief Dainty, Nick Johnston, and Byron Allen during his investigation. CP Vol. IV, p. 187, lns. 18-20. Under direct examination, and during Plaintiffs' case-in-chief, Mr. Wruble testified to the jury that the fire department "told" Kinch Farms to "put on some more water" and to "watch the fire" for the "rest of the evening." CP Vol. IV, p. 189, lns. 20-25. Walt Wruble's testimony cumulated with the assertion that the fire department had "requested that [Kinch Farms] continue watching the fire to make sure that it had not or would not rekindle." CP Vol. p. 190, lns. 1-3.

Because Plaintiffs presented testimony concerning the conversation between Chief Dainty and A.J., it became an issue as to *what* Chief Dainty meant by asking A.J. to "watch" the property. During the Defendant's case-in-chief, Defendant called Chief Dainty to the stand. Chief Dainty denied ever requesting or telling Kinch Farms to watch the burn area in the

terms as provided by Walt Wruble. CP Vol. IV, p. 167, lns. 1-25. Chief Dainty noted that he did not believe he had the authority to order a private property owner to maintain a "watch." CP Vol. IV, p. 169, lns. 1-25. Chief Dainty testified that he would have posted a watch himself if he believed the fire would rekindle. CP Vol. IV, p. 168, lns. 1-9. Chief Dainty's testimony called into question Mr. Wruble's investigation and credibility before the jury[3].

Likewise, Bill Steele's testimony also called into question Walt Wruble's investigation and opinions. Steele opined, based on his experience and training, that fire departments do not request private homeowners to set a fire patrol if there is a concern a fire will rekindle. CP Vol. V, pp. 140-141.[4] Plaintiffs' counsel never objected to this

[3] Plaintiffs' counsel never requested a limited instruction.

[4] Plaintiffs' various attacks on Steele's testimony concerning his background are without merit and deserve little discussion. Steele never opined that Kinch Farms delegated its duty to the fire department. In fact, Steele testified that a landowner who originates the fire has the responsibility of controlling the fire. CP Vol. V, p. 173, lns. 9-11. He could also explain to the jury specific terms, such as "WAC." As part of his investigation Steele can, and must, disclose, if asked, the individuals he interviewed. *See* ER 702-703. Steele can discuss his background during testimony, including his experience as a fire chief. In weighing Steele's credibility, the jury has every right to consider an expert's background and his or her thoroughness in investigating the facts of the case.

testimony, which is fatal to their appeal. *See* ER 103; RAP 2.5 (issue waived if brought up for first time on appeal).

Therefore, to the extent any testimony was improper concerning the fire department's actions after the fire was declared extinguished on August 10, 2009, said testimony was admissible because Plaintiffs opened the door to this type of evidence.[5]

E. The Trial Judge Did Not Abuse Its Discretion In Allowing Testimony And Evidence Concerning The Department Of Ecology's Burn Permit.

1. Kinch Farms' Actions of Obtaining a Burn Permit Showed Utilizing Reasonable Care Under the Circumstances, and Therefore Was Admissible.

The trial court did not abuse its discretion in allowing testimony and evidence concerning the Department of Ecology's Burn Permit.

Plaintiffs' contention that the burn permit process should not have been admissible is without merit. It was not denied at trial that the first step in conducting a controlled burn in Adams County was to obtain a

[5] It is anticipated that Plaintiffs will argue they had to open the door because of the trial court's denial of their motion in limine. This is untrue. The Plaintiffs moved for an order prohibiting Defendant from arguing they were relieved of liability because of the DOE and/or fire department's actions. Defendant never argued this proposition during trial. Further, Plaintiffs' motion in limine was simply too broad and lacked specificity as required by ER 103 when dealing with the nuances of witness testimony. Thus, this position is without merit.

burn permit from the DOE. This required applicants to fill out an application. Once the applicant received a burn permit, they then had to contact the Department of Ecology to see if it was declared a "burn day."

Contrary to Plaintiffs' assertions in their appeal brief, Defendant never once argued that the burn permits and or a "burn day" declaration from the DOE relieved them of a duty to conduct a controlled burn in a reasonable manner. Instead, the trial focused on what weather conditions needed to be present for the DOE to declare it a burn day. Bill Steele opined it was reasonable to conduct a controlled burn with sustained wind speeds at 15 mph and that the DOE would not issue a burn day if wind speeds exceeded 15 mph. CP Vol. V, p. 139, lns. 1-25.

Testimony at trial further established that the DOE would not declare it a burn day if the winds were forecasted to exceed 15 mph. Joe Kinch testified that the DOE would explicitly inform landowners that it was not issuing a burn day because high winds were forecasted. CP Vol. V, p. 22, lns. 10-19. Rod Kinch confirmed that the DOE does not declare burn days when high wind speeds were forecasted. CP Vol. V, p. 68, lns. 1-4. To buttress this position, Defendant entered as evidence, without objection, a page from the DOE's own website that provided:

> Agricultural burning is generally allowed if weather conditions are favorable. Under ideal conditions, smoke will rise several hundred feet, and winds will carry smoke away. Generally, under high pressure systems, smoke will stay close to the ground. Wind direction and speed are also taken into account when a burn call is made. High winds (above 15 mph) may hold smoke near the ground...

CP 136, Ex. 34. This exhibit further stated that the DOE reviewed weather reports prior to determining whether to allow burning. Id. *And, importantly, a weather reporting station at Ritzville confirmed that the sustained wind speeds in Ritzville never exceeded 15 mph.* CP 136, ex. 6.

There was no chance the jury would believe the DOE permit relieved Kinch Farms of liability. The burn permit provided: "The party performing the burn is responsible for any hazardous, dangerous or negligent activities associated with the burn." CP 136, Ex. 8. This exhibit further noted that individuals should "not burn during poor weather conditions such as inversions or strong winds." CP 136, Ex. 8. These provisions were highlighted by Plaintiffs in their case-in-chief. CP Vol. II, p. 184. With the permit language being read to the jury, it was clear to them that simply obtaining a burn permit would not relieve Kinch Farms of conducting a reasonable and safe burn. *See* Phelps, 68 Wn.2d 11, 410 P.2d 611 (presumed jury will objectively consider evidence).

Therefore, the trial judge did not commit an abuse of discretion in allowing testimony concerning the DOE and the permit process.

2. <u>In Direct Examination, Plaintiffs Opened the Door to Testimony Concerning The DOE Fire Permitting Process</u>.

During their case-in-chief, Plaintiffs' counsel, in *direct examination of their own expert*, Walt Wruble, elicited information concerning the Department of Ecology fire permit requirements.

> Q. And then were you able to arrive at opinions as a result of your investigation?
>
> A. Yes...There was approval given by the Department of Ecology; however, they're just general;--essentially general requirements and they're for wide varying areas by they make a requirement that there's no burning above 15 miles an hour.

Later, Plaintiffs' counsel asked Walt Wruble to explain to the jury how the Department of Ecology issued burn permits. Vol. III, p. 173, lns. 18-25; p. 174 lns. 1-25. During his direct examination by Plaintiffs' counsel, Mr. Wruble testified there were "no requirements for fire safety or anything else in the Department of Ecology permits." Vol. III, p. 175, lns. 1-2. Further, during direct examination, Mr. Wruble provided testimony as to how the Department of Ecology interpreted the Clean Water Act. Vol. III, p. 175, lns. 5-13. Under direct examination by Plaintiffs' counsel, Walt

Wruble provided testimony *concerning safety conflicts* between the DOE and the Department of Natural Resources concerning the issuance of fire permits. p. 175, lns. 19-25; p. 176, lns. 1-10.

Because Plaintiffs opened the door concerning the DOE permitting process, Kinch Farms was allowed to enter its own testimony and exhibits concerning the DOE and the circumstances needed to issue a burn permit. *See* State v. Gefeller, 76 Wash. 449, 455, 458 P.2d 17, 20 (1969). Again, Plaintiffs' counsel did not object to this evidence during trial, which is fatal. *See* ER 103; RAP 2.5 (issue waived if brought up for first time on appeal).

Therefore, the trial court did not commit an abuse of discretion by allowing testimony concerning the DOE into evidence.

F. The Judge Did Not Err in Refusing to Issue a Jury Instruction Concerning Delegation.

Plaintiffs are not arguing that the patterned jury instructions issued by the Court were misstatements of the law, and therefore, prejudice is not presumed. *See* Andfinson, 174 Wn.2d at 860, 281 P.3d at 294. Instead, Plaintiffs appear to be arguing that the jury instructions were misleading because the Court did not issue a "nondelegable" instruction. Not only is

Plaintiffs' assertion false, but they have also failed to show prejudice. Thus, Plaintiffs' contention must be rejected.

First, as outlined above, Defendant never argued that it had delegated its duty to use reasonable care to set, contain, or extinguish a fire to the DOE and/or fire department.

Second, the patterned jury instructions given to the jury properly informed them of the applicable law, and thus allowed Plaintiffs' to argue the theory of their case. For example, Instruction No. 14 provided:

> Statutes in Washington provide as follows:
>
> **RCW 4.24.040:**
>
> 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 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.
>
> **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.
>
> The violation of a statute, if any, is not necessarily negligence, but may be considered by you as evidence in determining negligence.

CP 135. In addition, the jury was also given the pattern jury instructions on negligence and duty of care (Instructions No. 7, No. 10, and No. 11) which all clearly articulated the negligence standard to the jury. *See* CP 135. The general instruction on the parties' claims, Instruction No. 7, reiterated Plaintiffs' negligence claim, borrowing from the language of RCW 4.24.040:

> Instruction No. 7.
>
> The claims and defenses of the parties are as follows.
>
> The claims of the plaintiff. The plaintiff claims that the defendant was negligent in kindling and caring for a controlled burn upon his property at such time and in such manner as to prevent it from spreading and rekindling and doing damage to plaintiffs' property as a prudent and careful person would do…
>
> The claims and defenses of the defendant. The defendant claims that it was not negligent in starting or containing the fire on his property…

CP 135.

Importantly, all of the jury instructions provided to the jury were based on the Washington Pattern Jury Instructions. *See* CP 135. Thus, the jury was provided with clear instructions that properly informed them that Kinch Farms had a duty to act as a prudent and careful person would (a

negligence standard) in kindling, caring for, and preventing a fire from spreading.

Third, the trial court could have committed error by issuing a jury instruction on nondelegable duties, specifically, WPI 12.09. The comments to WPI 12.09 provide that nondelegable duties generally involve a form of vicarious liability. 6 Wash. Prac., Wash. Pattern Jury Instr. Civ. 12.09 (6th ed.); *see* Prosser and Keeton, § 71, at 511; *see also* Jackson v. Standard Oil Co. of California, 8 Wn.App. 83, 95, 505 P.2d 139 (1972). This issue arises primarily in circumstances involving subcontracted work. *See* Jones v. Robert E. Bayley Const. Co., Inc., 36 Wn.App. 357, 674 P.2d 679 (1984), overruled on other grounds in Brown v. Prime Const. Co., Inc., 102 Wn.2d 235, 240, 684 P.2d 73 (1984); *see also* Keegan v. Grant County Public Utility Dist. No. 2, 34 Wn.App. 274, 283–84, 661 P.2d 146 (1983) (approving an instruction on nondelegability because work had been contracted out). In cases where subcontracting or vicarious liability is involved, jurors could speculate that the legal duty was transferred along with the work being subcontracted; hence, they would need to be instructed that nondelegable duties are not transferred along with the subcontracted work. *"However, for cases that do*

not similarly raise questions in jurors' minds about potential delegability, the committee recommends that the instruction not be given" (emphasis added). *See* 6 Wash. Prac., Wash. Pattern Jury Instr. Civ. 12.09 (6th ed.)

Importantly, and key to this Court's review, Washington courts have written that nondelegability instructions *should be avoided.* "[N]on-delegability" is a "formidable" word to use with a jury. Kelley v. Great Northern Ry. Co., 59 Wn.2d 894, 904-05, 371 P.2d 528 (1962). Nondelegability instructions are often not necessary to utilize in a case, as doing so could mislead jurors into thinking a nondelegable duty sets a higher standard of care than does a delegable duty. Cf. Strandberg v. Northern Pac. Ry. Co., 59 Wn.2d 259, 367 P.2d 137 (1961); Sage v. Northern Pac. Ry. Co., 62 Wn.2d 6, 16, 380 P.2d 856 (1963); Kelley v. Great Northern Ry. Co., 59 Wn.2d 894, 904-05, 371 P.2d 528.

The reasons for not giving the nondelegability instruction are particularly poignant in this rekindled fire case. As noted previously, fire cases such as this case are couched in the reasonable-person standard and not strict liability. *See* Criscola v. Guglielmelli, 50 Wn.2d 29, 31, 308 P.2d 239, 241 (1957). Giving a nondelegable duty instruction in this case would have couched the reasonable-person standard in terms of strict liability and

would have misled the jury, which has been Appellants' goal since the beginning of this case and as restated in Appellants' brief: "the issue at trial was, of course, who pays for the loss – the entity that started the fire and allowed it to spread and rekindle, or the victims...." This statement *is a misstatement of the law.* The simple fact that a fire spreads and rekindles on one's land, absent a specific finding of negligence, does not impose liability on the entity that started the fire for a legitimate purpose. Negligence must be present, and that was the real issue on which Kinch Farm's liability hinged, and on which Plaintiffs lost.

Even the case cited by Appellants, Wood & Iverson v. Wilson, did not base its holding on "nondelegable duties" or jury instructions regarding such duties, but on the issue of whether, on the facts of Wood & Iverson, the defendant was relieved from liability because of actions of the fire wardens, in which he actively and voluntarily joined and initiated. 140 Wash. 61, 248 P. 68 (1926).

The Galbraith v. Wheeler-Osgood Co. case also cited by Appellants is similarly unpersuasive. 123 Wash. 229, 212 P. 174 (1923). It involved an agreement between a state forester and the owner to remove a fire hazard by burning it. Id. at 232-233, 212 P. at 175. No agreement is

involved in this case to render the fire department and Kinch Farms joint actors in either conducting or suppressing the controlled burn (not only that, but there is also no mention of a "nondelegable" duty in Galbraith). *See* Id. Further, the case of Galbraith dealt with a completely different statute (a public nuisance law). See 123 Wash. at 175-76, 212 P. at 175. The statutes in this case, combined with the jury instructions, clearly outlined the law for the jury that it was Kinch Farms' responsibility to use reasonable care in the start and control of the fire.

It is also unclear how could the Babcock case cited by Appellants possibly apply to the facts of their case. 169 Wash. 557, 12 P.2d 752. Babcock involved an argument between two state agencies as to whether a school district, a public corporation, is absolved from a duty to exercise ordinary care where another municipal corporation with jurisdiction, the City of Seattle, maintained a fire department for purposes of fire suppression. *See* 168 Wash. at 561-562, 12 P.2d at 561. Kinch Farms never argued to the jury that it was absolved from its duty to exercise ordinary care.

A nondelegable duty instruction was clearly inappropriate on the facts of this case: it would have confused the jury, it was unnecessary in

light of the standard negligence instructions, and it would have been prejudicial. Allowing testimony, on the other hand, as to what the fire department did, said, or believed needed to be done was clearly appropriate and necessary in establishing what a reasonable person would do and would not do under all the facts and circumstances.

G. Any Mistake Made By The Judge By Admitting Evidence Is Harmless Error.

An evidentiary ruling that is in error is not grounds for reversal. Mutual of Enumclaw Ins. Co. v. Gregg Roofing, Inc., 178 Wn.App. 702, 728-29, 315 P.3d 1143, 1156 (2013). There must be a showing of prejudice. Id. Without prejudice, there can be no reversal. Id. "[I]mproper admission of evidence constitutes harmless error if the evidence is cumulative or of only minor significance in reference to the evidence as a whole." Hoskins v. Reich, 142 Wn.App. 557, 570, 174 P.3d 1250, 1256 (2008).

Here, any error made by the trial judge in admitting evidence was harmless. Plaintiff has demonstrated no prejudice; especially in light of the numerous pieces of evidence supporting that Kinch Farms acted reasonable at all times during August 10 and August 11.

Therefore, no reversal is warranted.

IV. CONCLUSION

This Court must deny the Plaintiffs' request for a reversal of a jury verdict. There was significant evidence presented at trial that Kinch Farms utilized reasonable care in starting, containing, and controlling the fire on August 10 and August 11, 2009. It is black letter law that merely because an accident occurred does not mean someone is liable. Hunsley v. Giard, 87 Wn.2d 424, 434, 553 P.2d 1096, 1102 (1976). No errors were committed by the trial court by admitting evidence concerning the DOE permit process and the fire department's actions.

Further, to the extent this Court finds that the trial court committed an error, any error was harmless.

DATED this 3rd day of December 2014.

EWING ANDERSON, P.S.

By: _____
KENT NEIL DOLL, JR., WSBA 40549
Attorney for Appellee/Defendant

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of December 2014, a true and correct copy of the foregoing document was served on the following in the manner set forth herein:

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