FILED

OCT 12 2015

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

No. 92390-6
(Court of Appeals No. 32314-5-III)

THE SUPREME COURT
OF THE STATE OF WASHINGTON

FILED
OCT 20 2015
CLERK OF THE SUPREME COURT
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, Petitioners

v.

KINCH FARMS, INC., a Washington corporation, Respondent

PETITION FOR DISCRETIONARY REVIEW

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I. Identity of Petitioner

Petitioners, who were Plaintiffs/Petitioners below, are landowners in Adams County, Washington. When the Defendant/Respondent, Kinch Farms, Inc. allowed a fire, intentionally started on its property as a "controlled burn," to escape, it inflicted severe damage on the just-downwind property of the Plaintiffs/Petitioners. As the Court of Appeals stated: "The fire ultimately consumed 5,000 acres of the neighboring downwind crops, pastures, equipment, fences, gates and buildings." Herein, the Plaintiffs/Petitioners are called the "Neighbors."[1]

II. Citation to Court of Appeals Decision.

The Washington Court of Appeals, Division III, issued its Unpublished Opinion in favor of Respondent on September 10, 2015 under Appeal No. 32314-5 III. A copy of the Unpublished Opinion is attached as Appendix 1. The Court of Appeals reasoned that despite the trial court's denial of Plaintiffs' Motions *In Limine*, Plaintiffs had waived their objections to the improper evidence and argument at trial, and that no curative instruction was appropriate.

III. Issues Presented for Review

Issue #1 – Was the Denial of Plaintiffs' Two Motions *In Limine* Error which was Not Harmless Error?

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[1] The Court of Appeals referred to Petitioners as the "Neighbors."

The short answer is, yes, the trial court should have granted and Plaintiffs' Motions *In Limine* based on WPI 12.09 and governing precedent as discussed below,[2] requesting 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."...
>
> 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." CP. -. (emphasis added).

CP 302-04 (emphasis added).

The Court of Appeals fully misapprehended the impact and result of the denial of the Motions *In Limine* upon the trial, and upon Plaintiff/Petitioner's duty or indeed ability to object further during trial.

Issue #2 – After the Two Motions In Limine were Denied, was it Error, and not Harmless Error, to Then Also Reject the Plaintiff's Requested Instruction Based on WPI 12.09?

The Opinion of the Court of Appeals treated the issues related to (1) the denial of the Motions *In Limine*, and (2) the Requested Jury Instruction based on WPI-12.09, as separate issues, and did not consider

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[2] The requested Instruction was based on WPI-12.09, and also cited as support, *Galbraith et al. vs. Wheeler-Os&ood Co.*, 123 Wash. 229,212 P. 174 (1923); *Wood & Iverson, Inc. vs. Northwest Lum. Co.*, 138 Wash. 203, 244 P. 712 (1926); *Arnhold vs. U.S.*, 284 F.2d 326 (1960).

the issue of whether the one had a material, misleading, impact on the other. A trial court which admits evidence it finds at least marginally relevant, but which contains an obvious prejudicial element, or element which would likely result in "misleading the jury" as contemplated by ER 403, should also give a corrective or balancing instruction to the jury.

IV. Statement of the Case

A. Procedural History

The case was tried from October 8, 2013 through October 16, 2013. CP 731. Judgment was entered in favor of the Defendant on December 12, 2013. *Id.* Plaintiffs filed a Motion for New Trial (CP 734) which was denied by Order of February 6, 2014. CP 762.

Petitioners filed a timely Notice of Appeal, and the matter was briefed and argued before the Court of Appeals, Division 3, issued its opinion. No motions for reconsideration or for publication of the Opinion were made. Petitioners submit this timely Motion for Discretionary Review on Monday, October 12, 2015.

B. Factual Background

As an overall summary of the case, the Neighbors agree with and adopt the final sentence of the Concurring Opinion of Judge Fearing:

> Through no conduct of their own, plaintiff farmers sustained tens of thousands of dollars in damages. The

outcome of this case is unfair.

As a summary of the facts that gave rise to the dispute, the Downwind Neighbors adopt the synopsis of the Court of Appeals, as follows (COA Opinion at 2-3):

> The fire in question was set on August 10, 2009, when Kinch conducted a controlled burn of one of its crop circles, "Circle 6", to manage disease and crop stubble. Kinch Farms is operated by experienced farmers Rod Kinch, Joe Kinch, and A.J. Miller. Kinch obtained a seasonal permit from the state Department of Ecology (DOE) that was good on specific "burn days." Kinch confirmed that August 10th was a "burn day" before starting the fire.
>
> Prior to setting the fire, Kinch created a fire break around Circle 6 by eliminating combustible material. It also stationed a tractor and disc for creating fire breaks and a 1,000 gallon capacity water truck near the operation. Despite these precautions, the fire spread to one of Kinch's adjoining circles and onto a neighbor's field at 4:00p.m. that day. Kinch called the fire department and then used their own equipment to contain the fire. By the time the fire

department arrived, the fire was mostly out. Around 7:00p.m. that night, the fire chief determined that the fire was sufficiently extinguished.

After the fire department left the scene, Mr. Miller and Joe Kinch poured additional water on the concerning spots for two hours before leaving for the night at 9:00p.m. Mr. Miller continued to watch the burn area from his house throughout the night. The next morning, Mr. Miller and Rod Kinch both individually drove by the burn area to be sure there was nothing of concern; the manager of one of the neighboring properties also inspected the burn area. The fire chief returned to the burn area. He saw nothing of concern and was satisfied that the fire was extinguished.

Around 1:00 p.m. that day Joe Kinch spotted smoke from his home. He contacted Mr. Miller who confirmed that the fire had rekindled on the neighboring field. After contacting the fire department, Mr. Miller and Joe Kinch returned to the fire site with their equipment. The winds were strong that afternoon and the fire went from smoldering to raging. The fire ultimately consumed 5,000 acres of the neighboring downwind crops, pastures,

equipment, fences, gates and buildings.

C. Errors Briefed on Appeal.

The trial court made two fundamental errors, analyzed in detail in the Neighbors' Appellate Briefs. First, it denied the Neighbors' two motions *in limine* to exclude argument and testimony "that the burn permit ***absolves or relieves Defendant from responsibility***," and that the actions of the volunteer fire department "***relieve Defendant of responsibility***," for any "hazardous, dangerous or negligent activities associated with the burn." CP 302-04 (emphasis added); SRP 22-23, SRP 32.

Kinch Farms spent much of the trial presenting argumentative evidence of exactly the sort the Neighbors had sought to exclude—as the Court of Appeals observed, this included such extreme statements, by the Fire Chief who responded to Kinch Farms' call, as: that the fire department had the sole "jurisdiction" to set up a fire watch, that once called out, "the fire chief now pretty much has control of their ground, and it's his call on what needs to be done with the situation at hand," and that when it comes to allowing a burn, "DOE is God." COA Opinion at 4.

Despite Kinch Farms' exploitation of the trial court's evidentiary ruling, the trial court erred further by refusing to give a curative instruction, that Kinch Farms could not delegate—to the DOE, to the fire department, or to anyone else—it's clear, statutory duty to perform the

burn safely, with due care for its neighbors' property. RCW 4.24.040.

The Court of Appeals made the following categorical statements, which were Error:

- "there was never any objection to this testimony, so the Neighbors cannot pursue any claim of error in this court" COA Opinion at 8.
- "The trial court correctly determined that the instruction was not applicable to the case." *Id.*.
- "The Neighbors do not contend that the court's instructions were misleading or otherwise incorrect. Instead, they contend that their requested instruction was necessary to cure the testimony of Kinch's witnesses. We disagree. The court did not instruct, and ***Kinch did not attempt to argue, that responsibility for the fire was somehow delegated to the fire department***. The testimony acknowledged the simple truth of the situation when the fire department was on the scene, ***it was in charge of the fire***." *Id.* at 9 (emphasis added).
- "The delegation instruction sought by the Neighbors was not necessary to this case." *Id.* at 10.

While full argument on these points must wait for the merits briefs

before this Court, the Court of Appeals was mistaken, which, as discussed below, raises issues that call for review under RAP 13.4(b).

E. Argument

This case should be reviewed under RAP 13.4(b)(1), (3), and (4). The rulings of the trial court, and the opinion of the Court of Appeals, conflict with the precedent of this Court interpreting a landowner's duty under the Fire Act, RCW 4.24.040. The public's interest in having that duty fully understood could not be clearer now, as we head into another dry year after the worst fire season in Eastern Washington in living memory. Further, because Article 1, §21 of the Washington Constitution makes a right to jury trial inviolate, and Article 1, §3 guarantees due process, and Article 4, §16 governs the charging of juries, the issue of an improperly instructed jury is of Constitutional proportion.

A. The Lower Court's Admission of Improper Evidence and Failure to Give a Curative Instruction Conflict with this Court's Precedent.

Very few reported cases deal with the Fire Act, RCW 4.24.040, which provides that a landowner who kindles a fire on his land, as Kinch Farms did, "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." The two reported cases which deal with the critical interface between fire protection agencies and the private landowner who kindles a fire which subsequently escapes, were not properly analyzed by the trial court or the Court of Appeals this matter. Both *Wood & Iverson v. Nw. Lumber Co.*, 138 Wash. 203, 244 P. 712 (1926) *aff'd en banc,* 141 Wash. 534, 252 P. 98 (1927), and *Galbraith v. Wheeler-Osgood Co.*, 123 Wash. 229, 212 P. 174 (1923), dealt with situations where not only was a state agent on the scene, the fires were kindled with the assistance or direction of a Fire Warden or a State Forester—and both held that the involvement of the fire officials was not a defense to the landowner's non-delegable duties under RCW 4.24.040.

In *Galbraith*, this Court held squarely that: "**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." *Galbraith*, 123 Wash. at 234-35. In *Wood*, this Court reaffirmed that principle: "Notwithstanding 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." *Wood*, 141 Wash. at 208. The heart of these opinions is that the duties of the landowner are not delegable. That is the law, from the two cases most closely analogous to this case. It is respectfully submitted that the opinion of the Court of Appeals, which upheld a ruling allowing such evidence and argument in, and which specifically holds that a non-delegable jury instruction based on WPI-12.09 should not be given, is in direct conflict with those two opinions of the Washington Supreme Court. Both *Galbraith* and *Wood & Iverson* were cited as bases for the requested instruction. CP 470.

To be clear, the Neighbors' Motions *In Limine* were not, as the Court of Appeals apparently construed them, directed at eliminating any evidence regarding involvement in general by government agencies or fire districts – they were directed at preventing evidence which "**absolves or relieves** Defendant of responsibility for any 'hazardous, dangerous ***or negligent*** activities associated with the burn.'" CP 302-04 (emphasis added). They were not designed, as the language highlighted above shows, to bar evidence which would bear on negligence. Although not using the word "delegation" or "transfer" or "assumption" or "control" or " jurisdiction," these motions were designed (and argued) to prevent admission of evidence of those things. They were requested specifically upon the authority of two (2) controlling decisions, *Galbraith, supra* and

Wood & Iverson, supra, which are the established law on the issue of passing off responsibility to someone else when a fire gets away – and burns 5,000 acres of neighboring property.

The Motions *In Limine* were made for that purpose, and the denial of those motions were properly construed by the Plaintiffs/Petitioners as authorizing the introduction of evidence which would have been kept out had the motions been granted. This, of course, placed trial counsel in a very difficult position – it was reasonable for counsel to conclude that objections would be overruled based upon the overarching decision on the Motions *In Limine*, thus prejudicing him (and therefore his clients) before the jury. The Motions *In Limine* **were** the objection – it was overruled – and it was preserved under RAP 2.5(a). A motion *in limine*, when made, is an objection to the offered evidence, and preserves the objection for appeal. If the motion is ruled upon in a definitive manner, objections are preserved. It has long been the procedural law that: "The purpose of a motion in limine is to dispose of legal matters so counsel will not be forced to make comments in the presence of the jury which might prejudice his presentation." *State v. Evans*, 96 Wn.2d 119, 123-24, 634 P.2d 845, 847-48 (1981) *amended*, 649 P.2d 633 (1982). And although there is some difference between ER 103 and FRCP 103, a recent 9th Circuit case reflects well the kind of problem

that happened in this case, and it is respectfully submitted the analysis that case should be applied to this case. In that case, the trial court gave a definitive explanation of the ruling, as did the trial court in this case, and all objections were deemed preserved:

> But the point of in limine resolution of objections is to enable planning and avoid interruptions to a jury trial. Arguing and losing on the 403 objection sufficed to preserve it. An objection to what the court had already ruled unobjectionable would have amounted to taking exception to an evidentiary ruling already made, which Federal Rule of Evidence 103 says is unnecessary.

United States v. McElmurry, 776 F.3d 1061, 1066-67 (9th Cir. 2015). As in that case, the Neighbors' objections to the evidence were under ER 403, based on the obvious prejudice of having fire departments established as the controlling parties, the decision-makers – rather than the landowner who is responsible under the law. While the Court of Appeals mentions only ER 401 and ER 402, the proper analysis is that the objections were made under ER 403. The prejudice caused by Kinch Farms' delegation argument was obvious, the motion should have been granted, and the evidence specifically admitted only for a limited purpose with the requested curative instruction.

In view of *Galbraith*, *supra*, and *Wood & Iverson*, supra, which essentially hold that no proof of delegation provides a legal defense, it is

respectfully submitted that the Court of Appeals' determination that the motions *in limine* need not have been granted, and that "[t]he delegation instruction sought by the Neighbors was not necessary to this case," is clear error. This places the Opinion of the Court of Appeals in direct conflict with controlling authority, calling for review under RAP 13.4(b)(1).

B. A Landowner's Duty to Control Fire is of Substantial Public Interest

The concurring opinion of Judge Fearing in the Court of Appeals emphasizes that this is a matter of significant public interest. The evidence in this case shows that landowners in Eastern Washington's drought-plagued farmlands routinely set fires of this type, and the dreadful fire season just past demonstrates how serious the consequences can be for the whole State. If any further proof were needed of the public interest in landowners keeping rigorous control of their fires, the Legislature's recent amendments to the Forest Practices Act, 2014 c.81, adding RCW 76.04.760, which establishes a statutory cause of action for negligently allowing a fire to spread to forested land, makes clear the strong legislative policy to control and regulate such fires. Escaped fires easily cause catastrophic damage as here – 5,000 acres. The danger, and the strong public policy for assigning liability to the risk-taking landowner,

auger in favor of clarifying the law regarding how the jury should be instructed when a fire escapes and causes significant or catastrophic damages.

It may be argued by Respondent that the public interest is low because the Opinion of the Court of Appeals is Unpublished. The opposite is true. At this point, all guiding authority is over 50 years old and in most cases over 80 years old. The "Fire Act," now codified as RCW 4.24.040, was adopted long before statehood, in 1877, and its language has remained substantively unchanged.[3] It has not been substantively construed in a published opinion for over 50 years. Neither party in this case cited to a Washington case decided after 1957 regarding that statute.[4]

Much has changed regarding the practical application of RCW 4.2 4.040 in Washington since the 1920's. Population has increased, equipment and firefighting methods of changed, rural fire departments are ubiquitous and communication is instant, just to name a few. Some landowners now may well expect that they can satisfy their responsibilities by obtaining an air-quality permit, or having the local Fire Chief sign off, or by calling in the fire department after things get out of hand. A clear reaffirmation is needed, that there is no way to pass the buck. Every

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[3] *See* Laws of Wash. Terr. 1877, § 3 at 300; Code of 1881, § 1226; Rem.Rev. Stat. § 5647.

[4] *Criscola v. Guglielmelli*, 50 Wn. 2d 29, 31, 308 P.2d 239, 241 (1957).

person who starts a burn stays directly responsible.

As the Court will knows, even unpublished opinions serve as a basis for legal advice, arguments, settlements, negotiations, and the like in myriad situations beyond the few actually litigated cases. It is submitted that a definitive, published opinion of the Washington Supreme Court on the subject will serve the public interest of greater certainty as to the analysis and outcome of disputes over escaping fires. Thus, the criteria of RAP 13.4 (b)(4) is met.

C. The Issue of Improper Jury Instructions is of Constitutional Stature.

Further, because the issue of a properly instructed jury is always an issue of Constitutional proportion, it is submitted this case meets the criteria of RAP 13.4(b)(3). The Petitioner recognizes that the court often views these issues as procedural or evidentiary, but the right to a fair jury trial is constitutional. Wash. Const. Art. 1 § 21 (civil jury right is "inviolate"); and see Article 1, §3 (guaranteeing due process); Article 4, §16 (judges "shall declare the law" to the jury). Whenever a jury is improperly instructed, that error should be remedied lest there be a denial of the constitutionally mandated fair jury trial. *See, e.g., Mega v. Whitworth Coll.*, 138 Wn. App. 661, 672, 158 P.3d 1211, 1216 (2007), *rev. den.* 63 Wn.2d 1008, (2008).

Here, although full discussion must await the merits briefs in this Court, the jury was indeed mis-instructed. An instructional error is ***presumed*** to be prejudicial unless, with certainty, it can be shown to be harmless.[5] The two reasons given by the Court of Appeals for affirming the omission of the non-delegation instruction as in WPI-12.09, as based upon *Galbraith, supra* and *Wood & Iverson, supra*, are simply, well – wrong. Those reasons, simply stated, were (1) that Kinch never argued delegation, and (2) that the instruction should only be given in vicarious liability cases.

The Court of Appeals at page 9 stated, "Kinch did not attempt to argue, that responsibility for the fire was somehow delegated to the fire department." This is diametrically opposed to the full fabric of the manner in which the Defendant/Respondent, Kinch, tried the case. As pointed out in much greater detail to the Court of Appeals, Kinch started its improper argument in its opening statement.

> 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.

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[5] "Instructional error is presumed to be prejudicial unless it affirmatively appears to be harmless. *State v. Wanrow*, 88 Wn.2d 221, 237, 559 P.2d 548 (1977)." *State v. Clausing*, 147 Wn.2d 620, 628 (Wash. 2002). See, also *Falk v. Keene Corp.*, 113 Wn.2d 645, 656 (Wash. 1989) and *Keller v. City of Spokane*, 146 Wn.2d 237, 249-250 (Wash. 2002).

And,

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.

The suggestion of delegation continued at every turn, right up to closing.

Dozens of examples are in the record, here are a few:

RP Vol.V 141
[Answer to Defense Counsel by Mr. Steele, Defense Expert]:
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.

In fact, Kinch essentially argued that for Kinch to have any residual obligation, the fire department had to "delegate" back to Kinch:

RP Vol.IV 183
[Question to Fire Chief Dainty from Defense Counsel, Doll]
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.

And Kinch's counsel did exploit the delegation argument in closing. For example:

RP Vol.VI 40
15 Fire Chief Dainty stated he thought this
16 fire was extinguished. He saw no reason to post a
17 watch.
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.** [Emphasis Added].

The Court of Appeals dismisses this clear example of arguing delegation, as solely related to proximate cause. That is simply not the case – it is part of the argument – and it was, like much of the evidence and argument deftly and artfully calculated to fit within the court's denial of motions *In Limine*, while in fact arguing delegation.

That the requested instruction is properly given in the absence of a claim of vicarious liability is obvious from the controlling authority of *Galbraith, supra* and *Wood & Iverson, supra.* The instruction is appropriate in any "circumstances that could mislead jurors into thinking that a non-delegable duty has been delegated," which is exactly 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).

The Court of Appeals Opinion has an internal conflict on the issue of the corrective instruction. The Opinion says at page 3: "The trial court denied the motion, but also notes that the trial court held that

'argument to the effect that it absolves or relieves the defendant of responsibility' would not be proper. RP (Sept. 26, 2013) at 23." Of course, that sounds a lot like the Motion *In Limine* was granted in part—that in effect, the trial court intended that the evidence would be received for a "limited purpose" as contemplated by ER 105. That Rule, ER 105, virtually requires a curative instruction when evidence is received for limited purpose – and the express purpose for which the evidence was ***not*** admitted, was to show delegation, control, jurisdiction, absolving of responsibility, and the like. The requested instruction should have been given.

Lastly, on this issue, 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). It was a significant theory of the Neighbors' case that there was no delegation, based squarely on the holdings in *Galbraith, supra* and *Wood & Iverson, supra*, and the Neighbors were prevented from making that argument with the support of a Pattern Jury Instruction, which accurately stated the law. In connection, see, *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), wherein the trial court had instructed the jury

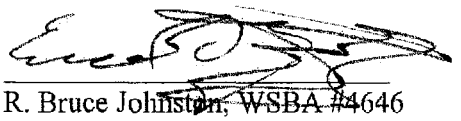
that employers have a duty to furnish a safe workplace. However, without the non-delegability instruction, the plaintiff was unable to effectively "argue his theory that the general contractor has a special, nondelegable duty distinct from the duty of [the subcontractor]," and that was held to be prejudicial error requiring a new trial.

For all of the foregoing reasons, how to instruct a jury on liability for negligence, independent of the actions of third parties, should be clarified by this Court.

F. Conclusion

For the above reasons, the errors of the trial court and the Court of Appeals conflict with the decisions of this Court, and raise issues of great public interest, and of Constitutional import. It is respectfully requested that this Petition for Discretionary Review be granted.

October 12, 2015



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CERTIFICATE OF SERVICE

I hereby certify a duplicate of this PETITION FOR DISCRETIONARY REVIEW was served by hand delivery and by U. S. Postage prepaid on this 12th day of October, 2015 to

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APPENDIX 1

FILED
SEPTEMBER 10, 2015
In the Office of the Clerk of Court
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

CLINESMITH CATTLE COMPANY, INC., a Washington corporation; CALF CREEK CATTLE COMPANY, INC., a Washington corporation; J.W. HARDER LIVESTOCK, INC., a Washington corporation, a 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,	)	No. 32314-5-III
Appellants,	)	UNPUBLISHED OPINION
v.	)	
KINCH FARMS, INC., a Washington corporation,	)	
Respondent.	)	

KORSMO, J. — Appellants' property was damaged after a fire intentionally set by respondent Kinch Farms (Kinch) flared back to life and spread to adjacent properties. A jury, however, rejected their claims for damages. We affirm.

FACTS

The fire in question was set on August 10, 2009, when Kinch conducted a controlled burn of one of its crop circles, "Circle 6", to manage disease and crop stubble. Kinch Farms is operated by experienced farmers Rod Kinch, Joe Kinch, and A.J. Miller. Kinch obtained a seasonal permit from the state Department of Ecology (DOE) that was good on specific "burn days." Kinch confirmed that August 10th was a "burn day" before starting the fire.

Prior to setting the fire, Kinch created a fire break around Circle 6 by eliminating combustible material. It also stationed a tractor and disc for creating fire breaks and a 1,000 gallon capacity water truck near the operation. Despite these precautions, the fire spread to one of Kinch's adjoining circles and onto a neighbor's field at 4:00 p.m. that day. Kinch called the fire department and then used their own equipment to contain the fire. By the time the fire department arrived, the fire was mostly out. Around 7:00 p.m. that night, the fire chief determined that the fire was sufficiently extinguished.

After the fire department left the scene, Mr. Miller and Joe Kinch poured additional water on the concerning spots for two hours before leaving for the night at 9:00 p.m. Mr. Miller continued to watch the burn area from his house throughout the night. The next morning, Mr. Miller and Rod Kinch both individually drove by the burn area to be sure there was nothing of concern; the manager of one of the neighboring

properties also inspected the burn area. The fire chief returned to the burn area. He saw nothing of concern and was satisfied that the fire was extinguished.

Around 1:00 p.m. that day Joe Kinch spotted smoke from his home. He contacted Mr. Miller who confirmed that the fire had rekindled on the neighboring field. After contacting the fire department, Mr. Miller and Joe Kinch returned to the fire site with their equipment. The winds were strong that afternoon and the fire went from smoldering to raging. The fire ultimately consumed 5,000 acres of the neighboring downwind crops, pastures, equipment, fences, gates and buildings.

Appellants, the damaged neighboring property owners (Neighbors), filed suit in the Adams County Superior Court. The matter ultimately proceeded to jury trial before the Honorable David Frazier. Various motions were argued prior to trial; the Neighbors attempted to exclude evidence flowing from the burn permit that they believed would misinform the jury of the legal standards of duty. In particular, they 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."

Clerk's Papers (CP) at 303; Report of Proceedings (RP) (Sept. 26, 2013) at 23.

The trial court denied the motion, but noted that "argument to the effect that it absolves or relieves the defendant of responsibility" would not be proper. RP (Sept. 26, 2013) at 23. The Neighbors then sought to exclude:

> 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."

CP at 303; RP (Sept. 26, 2013) at 23.

The trial court also denied this motion, ruling that evidence concerning the fire department's involvement was admissible on the issue of whether Kinch exercised reasonable care. The trial court declined to rule on whether to exclude testimony and argument about any shift in duty or fault as a result of the fire department's activities.

In accordance with these rulings, testimony concerning the DOE permit and the fire department's involvement were admitted at trial. Without objection, Kinch used words like "jurisdiction," "authority," and "delegate," when questioning its witnesses. For instance, the fire chief was allowed to testify that the fire department had the sole "jurisdiction" to set up a fire watch. He further explained when the fire department is called out "the fire chief now pretty much has control of their ground, and it's his call on what needs to be done with the situation at hand." Concerning the DOE permit, Fire Chief Brian Dainty testified that "DOE is God," explaining that when the DOE authorizes a "burn day," farmers take advantage of it because "[t]hey're the experts."

Although not objecting to the testimony, the Neighbors then requested a curative jury instruction based on *6 Washington Practice: Washington Pattern Jury Instructions: Civil* 12.09, at 161 (6th ed. 2012) (WPI) (Nondelegable 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 at 470.

The trial court declined to give the instruction because vicarious liability was not at issue in the case. RP (Oct. 15, 2013) at 109. The jury was given standard instructions on negligence. The jury returned a defense verdict, finding on the special verdict form that Kinch was not negligent.

Retaining new counsel, the Neighbors moved for a new trial. After the court denied that request, the Neighbors then timely appealed to this court.

ANALYSIS

The Neighbors raise the same challenges that they presented in their motion for a new trial, arguing that Kinch erroneously obtained legal opinion from their witnesses and that the court erred in not giving their requested instruction. We address the testimony issue before turning to the instructional challenge.

Testimony and Motions in Limine

The Neighbors contend that the trial court erred in denying the two noted motions in limine concerning the burn permit and the involvement of the fire department, leading to Kinch misusing the evidence. Because the trial court correctly determined that the

evidence was relevant, there was no error in admitting the testimony. The failure to object to any questioning also forecloses any claim that Kinch misused the evidence.

Since territorial times, Washington has recognized an action for negligent failure to contain a fire.[1] The statute currently provides:

> Except as provided in RCW 76.04.760, 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.

RCW 4.24.040.

Also addressing the issue, RCW 76.04.730 more modernly states: "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 jury was instructed in the language of both of these statutes. CP at 726. The jury, accordingly, also was instructed on the requirements of a negligence action, including the duty of ordinary care. CP at 720, 722-23.

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. Subject to limitations imposed by other rules or constitutional principles, relevant evidence is admissible. ER 402. A trial judge's

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[1] LAWS OF 1877, § 3, at 300.

decision to admit or exclude evidence under these provisions is reviewed for abuse of discretion. *Diaz v. State*, 175 Wn.2d 457, 462, 285 P.3d 873 (2012). Discretion is abused when it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

The Neighbors sought to exclude evidence that DOE had authorized field burning that day as well as the fact that the fire department had responded and eventually left the scene. This evidence was relevant to assessing the reasonableness of Kinch's behavior—it had checked with DOE before burning and it remained and watched the fire scene after the fire department had departed. This information allowed the jury to assess the reasonableness of Kinch's behavior in both setting the fire and then monitoring the scene after the fire had spread to other lands. These were tenable grounds to admit the evidence and, thus, deny the motions in limine. The trial court did not abuse its discretion.

The Neighbors also assert that Kinch went too far in its questioning of the witnesses, particularly the fire experts, and had them testify as to the law. This argument fails for several reasons. First, there was never any objection to this testimony, so the Neighbors cannot pursue any claim of error in this court. RAP 2.5(a). Second, since the court denied the motions in limine, none of the testimony could have violated the ruling. The trial court also expressly reserved further rulings as to the fire department's involvement, but was never asked to consider the testimony in light of that reservation. Finally, the jury was not instructed on any legal concepts such as delegation of duty that

might possibly have been implicated by the testimony. The fact that witnesses may use words that also double as legal concepts does not make that language improper. Without jury instructions addressing the legal issues, there would be no context for the jury to possibly misuse the testimony.

We also note that defense counsel did not exploit the failed motions in limine in closing argument.[2] Accordingly, there was no danger that the jury would misapply the now challenged testimony and consider a legal theory other than negligence.

The trial court did not err in its rulings in limine and the Neighbors have not preserved any claim of error related to the testimony they now seek to challenge.

Proposed Instruction

The Neighbors also contend that the trial court erred in rejecting their proposed curative instruction, based on WPI 12.09. The trial court correctly determined that the instruction was not applicable to the case.

Well settled law governs instructional challenges. Jury instructions are sufficient if they correctly state the law, are not misleading, and allow the parties to argue their

[2] One possible exception to this observation occurred when defense counsel argued that the fire department's departure from the scene without leaving a watch broke the proximate cause between Kinch's initial fire and the subsequent inferno. RP (Oct. 16, 2013) at 42. Plaintiff's counsel did not object, but in rebuttal nicely addressed the issue by pointing out that Kinch could only escape responsibility if the fire department's actions caused the subsequent losses. *Id.* at 46-47. Since the jury decided this case on the basis of negligence, not proximate cause, any error in making this argument was harmless. CP at 766-67.

respective theories of the case. *State v. Dana*, 73 Wn.2d 533, 536-537, 439 P.2d 403 (1968). The trial court also is granted broad discretion in determining the wording and number of jury instructions. *Petersen v. State*, 100 Wn.2d 421, 440, 671 P.2d 230 (1983).

The Neighbors do not contend that the court's instructions were misleading or otherwise incorrect. Instead, they contend that their requested instruction was necessary to cure the testimony of Kinch's witnesses. We disagree. The court did not instruct, and Kinch did not attempt to argue, that responsibility for the fire was somehow delegated to the fire department. The testimony acknowledged the simple truth of the situation—when the fire department was on the scene, it was in charge of the fire. There was never any claim, by testimony or argument or jury instruction, that the department's presence on the scene itself absolved Kinch of responsibility for the fire. And, if there had been, the solution was for the Neighbors to challenge the inappropriate testimony or argument in order to give the trial judge the immediate opportunity to correct any errors.

Rather, this case was tried according to the dictates of our statutory scheme. Was Kinch negligent in burning when it did and with the safety precautions it exercised, or did it act reasonably? The evidence allowed the jury to find for either side. Given that the fire escaped and did damage, a jury verdict for the plaintiffs would have been understandable. Similarly, the defense presented evidence that Kinch acted reasonably in burning when it did and acting as it did to attempt to control the situation. An

appropriately instructed jury of Adams County residents considered the case and determined that Kinch was not negligent. The delegation instruction sought by the Neighbors was not necessary to this case.

The trial court did not abuse its discretion in declining the proffered instruction. There was no error.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Korsmo, J.

I CONCUR:

Siddoway, C.J.

No. 32314-5-III

FEARING, J. (concurring) — We are bound by statute. RCW 4.24.040 imposes on the victim of fire damage the burden of proving negligence by the defendant, even when the defendant intentionally sets a fire. The trial court committed no evidentiary error based on a negligence standard.

Absent the statute, the act of intentionally setting a fire could qualify for strict liability or absolute liability as an abnormally dangerous activity. RESTATEMENT (SECOND) OF TORTS §§ 519 and 520 (1977). *Klein v. Pyrodyne Corp.*, 117 Wn.2d 1, 6, 810 P.2d 917, 817 P.2d 1359 (1991); *Langan v. Valicopters, Inc.*, 88 Wn.2d 855, 861-62, 567 P.2d 218 (1977). The setting of a fire creates a danger of great harm and, as illustrated by the facts of this case, the risk of harm cannot be eliminated by reasonable care.

Kinch Farms intentionally set a fire to increase crop yield or reduce expenses and thereby increase its income. Despite care in tending to the fire, the fire escaped and burned 5,000 acres of neighbors' farmland. Through no conduct of their own, plaintiff farmers sustained tens of thousands of dollars in damages. The outcome of this case is unfair.

I CONCUR:

Fearing, J.

Fearing, J.