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No. 67405-6

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

AFR2 LLC D/B/A JARBO

Respondent

v.

SCHUCHART CORPORATION

Appellant and Cross-Respondent

v.

DEMOLITION MAN, Inc.

Cross-Appellant

**REPLY BRIEF OF APPELLANT/CROSS-RESPONDENT,
SCHUCHART CORPORATION TO AFR2 LLC d/b/a JARBO**

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Pursuant to RAP 10.3(c), Appellant Schuchart Corporation (“Schuchart” hereinafter) submits this reply to the Brief of Respondent AFR2 LLC a/b/a Jarbo (“Jarbo” hereinafter).

I. ARGUMENT

A. Standard of Review

(1) Abuse of discretion is the standard of review only when the challenged instruction is not misleading and/or there is no legal error. Even if a jury instruction is misleading, it will not be reversed unless prejudice is shown. *Keller v. City of Spokane*, 146 Wn.2d 237; 44 P.3d 845, 852 (2002) (citing *Walker v. State* 67 Wash. App. 611, 615, 837 P2d 1023 (1992)). However, a clear misstatement of the law in a jury instruction is presumed to be prejudicial. *Keller*, 44 P. 3d at 852 (citing *State of WA v. Wanrow* 88 Wn.2d 221, 239, 559 P2d 548 (1977)). In *Keller*, the Supreme Court¹ used this reasoning to determine that a jury instruction given by the trial court was misleading and legally erroneous and therefore grounds for reversal. *Keller*, 44 P. 3d at 852-853. The facts and relevant procedural history in *Keller* are as follows: Keller and Balinski crashed at an intersection in the City of Spokane where Balinski had a stop sign but Keller did not. Keller sued both Balinski and the City

¹ All mentions of the “Supreme Court” in this memo refer to the Supreme Court of the State of Washington.

for negligence. Specifically, Keller alleged that the intersection was dangerous, that the City was aware of the danger and had acted negligently in not adding stop signs so as to render the intersection a four-way stop. The City conceded that the intersection had problems but it argued that the problems weren't severe enough to cause the accident, and that the accident would not have occurred if Keller had not been negligent in the manner he was operating his motorcycle. At the City's request, the trial court gave the jury the following instruction (Instruction 13):

“A city has a duty to exercise ordinary care in the signing and maintaining of its public streets to keep them in a condition that is reasonably safe for ordinary travel by persons using them in a proper manner and exercising ordinary care for their own safety.

It is the duty of the city to eliminate an inherently dangerous condition, if one exists, and its existence is known, or should have been known to the city in the exercise of reasonable care.

Inherently dangerous, as used herein, means a danger existing at all times so as to require special precautions to prevent injury.”

Id. at 847. Keller objected to Instruction 13 and asked the court to instead instruct the jury that the City's duty and breach are to be determined independent of his own negligence. The court refused, stating that that was not the law. The jury returned a special verdict finding that both Keller

and Balinski had acted negligently, but that the City had not. Keller appealed the jury verdict as to the finding that the City was not negligent.

The Court of Appeals reversed, and the Supreme Court affirmed such reversal. Specifically, the Supreme Court found that:

“to the extent instruction 13 allowed the jury to premise the City's duty on Keller's negligence, it was misleading and legally erroneous. The trial court specifically refused to give Keller's requested instruction regarding comparative fault to clarify the City's duty because it erroneously concluded that that was not the law... Furthermore, taken as a whole, instruction 13 did not allow Keller to argue his theory of the case—that the City's negligence is to be determined independent of Keller's negligence. The second two paragraphs of instruction 13, which include the City's duty as to "inherently dangerous conditions," do not clarify the City's primary duty. It would still be possible for the jury to conclude that the City owed Keller no duty at all if it determined that Keller was negligent. **Although it is unclear whether the jury would have reached a different conclusion had it been properly instructed, to the extent that the instruction misstated the law, it is presumed to be prejudicial.** Cf. *State v. Wanrow*, 88 Wash.2d at 239. Finally, as Keller contends and the Court of Appeals agreed, the instruction erroneously allows a jury to determine the City's primary duty, a function which is properly left to the court. *Suppl. Br. of Resp't* at 12 (citing *Folsom v. Burger King*, 135 Wash.2d 658, 958 P.2d 301 (1998); *Schooley v. Pinch's Deli Market, Inc.*, 134 Wash.2d 468, 951 P.2d 749 (1998)); *Keller*, 104 Wash. App. at 556.”

(emphasis added), *Id.* at 852-853. Based on this reasoning, the Supreme Court remanded the case for a new trial. As illustrated in *Keller*, once a court has established that a jury instruction is legally erroneous, prejudice is presumed and the erroneous instruction is grounds for reversal.

(2) Prejudice is presumed by the reviewing court when the instruction includes a clear misstatement of the law and the court will make a thorough examination of the record to determine whether such error was prejudicial or merely harmless. “Error is prejudicial if it affects, or presumptively affects, the outcome of the trial.” *Walker v. State* (1992) 67 Wn. App. 611, 618, 837 P.2d 1023 (1992). Where a court cannot be certain whether erroneous instructions affected the outcome of the trial, the error is prejudicial and, therefore, reversible. *Id.* Additionally, as noted above in *Keller*, although a misleading jury instruction will not be reversed unless prejudice is shown, a “clear misstatement of the law...is presumed to be prejudicial.” *Keller. Id at 852.*

Neither *Stiley v. Block*, 130 Wn.2d 486, 925 P.2d 194 (1996), nor *State v. Aguirre*, 168 Wn.2d 350, 229 P.3d 669 (2010), make any reference to the appellant’s burden to show prejudice when it is not presumed by the court. *Stiley*, 130 Wn.2d at 201 begins the analysis of the jury instructions by noting that “[t]rial court error on jury instructions is not a ground for reversal unless it is prejudicial” but never analyses appellant’s arguments (or lack of arguments) showing prejudice. The court in *Stiley* performs its own analysis and ultimately determines that if there was error, it was not harmful to appellant. *Stiley*, 130 Wn.2d 201-

202. Similarly, after the court in *State v. Aguirre* notes that “[e]ven if an instruction may be misleading, it will not be reversed unless prejudice is shown by the complaining party,” [*State v. Aguirre* at 676], it went on to determine that the jury instruction was proper because it correctly stated the law, and never addressed whether or not the appellant showed prejudice. *State v. Aguirre*, 168 Wn.2d 676. Moreover, the cases *Stiley* and *State v. Aguirre* cite for the presumption that prejudice must be shown *Brown v. Spokane County Fire Protection Dist. No. 1* (1983) 100 Wn.2d 188, 668 P.2d 571 (1993) and *Keller Id*, respectively and make no mention of what kind of burden the appellant has to show prejudice.

However, in *Blaney v. International Ass'n of Machinists*,¹⁵¹ *Wn.2d* 203, 87 P. 3d 757, the Supreme Court indicates that it is the job of the court to determine whether or not a jury instruction is prejudicial once it has been established that such instruction was erroneous. *Id.* at 761. Specifically, the Supreme Court stated:

“An erroneous jury instruction is harmless if it is ‘not prejudicial to the substantial rights of the part[ies] ..., and in no way affected the final outcome of the case.’ *State v. Britton*, 27 Wash.2d 336, 341, 178 P.2d 341 (1947). A prejudicial error, on the other hand, affects or presumptively affects the results of a case, and is prejudicial to a substantial right. *Id.* **When considering erroneous instructions, this court presumes prejudice, subject to a comprehensive examination of the record:**

When the record discloses an error in an instruction given on behalf of the party in whose favor the verdict was returned, the error is presumed to have been prejudicial, and to furnish ground for reversal, unless it affirmatively appears that it was harmless. *However, it becomes our duty, whenever such a question is raised, to scrutinize the entire record in each particular case, and determine whether or not the error was harmless or prejudicial.* Id. at 341, 178 P.2d 341 (citation omitted; emphasis added).”

Blaney, 87 P. 3d at 761 (emphasis in bold added, emphasis in italics in original opinion). In accordance with *Blaney* and *State v. Britton*, once it has been established that jury instruction is erroneous, the court will then make a thorough examination of the record to determine whether the error was harmless or prejudicial. Thus the burden to prove prejudice does not rest on the appellant.

(3) An objection to an instruction must contain enough specificity to apprise the trial court of such party’s position so that the trial court has an opportunity to correct the error. The purpose of the rule is satisfied when the trial court is adequately informed of the objecting party’s position in arguing another or related matter.

A party objecting to a jury instruction must sufficiently apprise the trial court of any alleged error so that the trial court was afforded an opportunity to correct the matter, if such correction was necessary. *Van Hout v. Celotex Corp.*, 121 Wn.2d 697, 703, 853 P.2d 908 (1993) (citing CR 51(f)). Specifically, the Supreme Court stated, “[o]ur rules require that

exceptions to instructions shall specify the paragraphs or particular parts of the charge excepted to and shall be sufficiently specific to apprise the trial judge of the points of law or question of fact in dispute. The purpose is to enable the trial court to correct any mistakes in the instructions in time to prevent the unnecessary expense of a second trial.” *Id.* (citing *Nelson v. Mueller*, 85 Wn.2d 234, 238; 533 P.2d 383 (1975) and *Roumel v. Fud*, 62 Wn.2d 397, 399-400; 383 P.2d 283 (1963)). In *Van Hout*, the Supreme Court determined that the trial court, along with counsel for Van Hout and Celotex, attempted to draft jury instructions which would accurately reflect the standards of the Washington Products Liability Act (the “WPLA”). *Van Hout v. Celotex Corp.*, 121 Wn.2d at 703. The Supreme Court held that, because the “parties never discussed whether the court’s instructions were an accurate statement of the manufacturer’s duties under pre-WPLA law....[it was] unreasonable to suggest that the exceptions taken by Celotex were adequate to apprise the trial court that its instructions erroneously described the manufacturer’s duties under pre-WPLA common law theories...At most, Celotex informed the trial judge that its view of what negligence meant in context of the WPLA differed from the court’s interpretation.” *Id.* The Supreme Court ultimately held

that the Court of Appeals erred in reversing based on a theory never presented to the trial court.

The court in *Egede-Nissen v. Crystal Mountain*, 93 Wn.2d 127; 606 P.2d, 1214 (1980) cited to the same CR 51(f) and *Nelson/Roumel* language as *Van Hout. Egede-Nissen*, 93 Wn.2d at 134. Based on this standard, the Supreme Court determined that because Crystal Mountain did not take exception to the disputed jury instruction at trial on the ground that it “confuses the questions of the scope of the invitation and the existence of a breach of the applicable duty” but instead merely objected that the instruction failed to label plaintiff as a trespasser, Crystal Mountain did not apprise the trial court of the defect in the disputed jury instruction as found and discussed by the Court of Appeals. *Id.* Based on this discrepancy between what was raised at trial and what was raised on appeal, the Supreme Court held that the disputed jury instruction cannot serve as the basis for a new trial. *Id.*

However, in *Queen City Farms, Inc. v. Central Nat'l Ins. Co. of Omaha*, 126 Wn.2d 50; 882 P.2d 703 (1994), the Supreme Court clarified the applicability of CR 51(f), stating that “under some circumstances compliance with the purpose of the rule will excuse technical noncompliance.” *Id.* at 63. In its holding, the Supreme Court referenced its

earlier decision in *Falk v. Keene Corp.*, 113 Wn.2d 645; 782 P.2d 974 (1989). In *Falk*, the Supreme Court held that, despite the fact that Falk did not state on the record a specific exception to the disputed jury instruction, his objection to the failure to give a different proposed instruction clearly apprised the trial court of the point of law in dispute. *Id.* at 658. The Supreme Court determined that it was clear that Falk's position was that his proposed instruction correctly stated the law, and that the disputed jury instruction did not. *Id.*

B. Schuchart's Assignments of Error to the Erroneous Instructions Given to the Jury and the Trial Court's denial of its CR 50 Motion for Judgment as a Matter of Law (addressing each issue related to the erroneous instructions) Clearly Warrant Reversal

(1) Schuchart's theory of the case was not only that work in the Greenstein building did not cause a dust plume in Jarbo's storage space, it was also that Schuchart was not negligent as a general contractor, and was not responsible for the work of its independent contractors, if they were negligent and caused dust to get into the Jarbo space next door.

As noted in *Keller*, one of the factors the Supreme Court used to determine that the jury instruction was misleading and legally erroneous was that it did not allow Keller to argue his theory of the case. *Keller v. City of Spokane*, 44 P. 3d 845 at 852. As in *Keller*, the *res ipsa loquitur*

and abnormally dangerous activity jury instructions prevented Schuchart presenting its theories of the case. Specifically, the doctrine of *res ipsa loquitur* prevented Schuchart from arguing that it was not negligent as a general contractor and that it was not responsible for the work of its independent contractors, if such independent contractors were in fact responsible for the damage to Jarbo's property. Instructing the jury on *res ipsa loquitur* coupled with the abnormally dangerous activity instruction rendered Schuchart's arguments irrelevant because any finding of negligence of its independent contractors under that doctrine automatically attached to Schuchart.

Similarly, all by itself, the abnormally dangerous activity jury instruction rendered meaningless Schuchart's arguments regarding negligence (Jarbo's argument is focused only on causation), because if the jury found causation (that the dust was from the Greenstein building), the court's instructions also erroneously allowed the jury to find that sandblasting was abnormally dangerous, and at that point the negligence finding against Schuchart was automatic: damage due to sandblasting would be a breach of a nondelagable duty by Schuchart (and could not be a breach by its subcontractors).

(2) No Washington case law indicates that an appellant must specify prejudice in an appellate brief. Moreover, *Blaney* indicates that the court will review the record for prejudice once an instruction has been shown to be erroneous.

As discussed in section A(2) above, neither *Stiley* nor *State v. Aguirre* make any reference to an appellant's burden to show prejudice. Nor do any of the cases they cite to with respect to the required showing of prejudice. Also, please see the discussion of *Blaney v. International Ass'n of Machinists* (2004) 87 P. 3d 757 in item 2 above. In *Blaney*, the Supreme Court held that once a jury instruction has been found erroneous, the court will then examine the record to determine if such error was harmless or prejudicial. *Id.* at 761. Furthermore, as noted in A(2) above, (1) when a court cannot be certain whether erroneous instructions affected the outcome of the trial, the error is prejudicial [*Walker v. State*] and (2) clear misstatement of the law is presumed to be prejudicial [*Keller v. City of Spokane*].

C. Schuchart's Instruction-Specific Challenges.

1. The Res Ipsa Louqitur Instruction (Instruction 13, CP 1856)

(a) Schuchart Did Preserve its Challenge to the Instruction and Addressed it in the Appeal Brief.

At RP 1236-1237 the attorney representing Schuchart made the point that Jarbo was alleging that two entities were responsible for sandblast material allegedly falling on the Jarbo clothing in the building next door: Schuchart and the sandblasting subcontractor, Aqua-Brite. Thus, when an entity does not have exclusive control of the of the instrumentality allegedly causing the damage, res ipsa does not apply. The Appellant Brief of Schuchart does make this argument at page 15 of its brief. Regarding the first element of res ipsa, that the injury is of a type that is so palpably negligent that negligence may be inferred as a matter of law, Schuchart's attorney stated that regarding res ipsa that "...this time (sic) is not a case where it should apply. Res ipsa applies when there is...no proof of negligence." RP 1236. Not very artful perhaps, but certainly sufficient to advise the trial judge that the negligence alleged by Jarbo is not the type of act that ordinarily does not happen in absence of someone's negligence. Schuchart's appeal brief addresses that element of res ipsa at pg. 14. Thus, both of the first two elements of res ipsa set forth in Instruction No. 13 were sufficiently challenged and have been argued on appeal.

(b) Schuchart's Challenges to Instruction 13 Show the Clear Error of Giving that Instruction in this Case.

Jarbo repeats in this section of its brief on appeal that the instruction did not prevent Schuchart from arguing “its no-causation theory to the jury.” This (again) ignores the fact that Jarbo was basically relieved of its burden of proving negligence of Schuchart by the res ipsa instruction coupled with each of the other challenged instructions taken together.

2. The Vicarious Liability Instruction No. 14.

(a) If a party objects to an instruction at trial, and then proposes more favorable language for such objectionable instruction after it becomes clear that the trial court will be moving forward with the instruction using an opposing party’s less favorable language, the objecting party does not waive its original objection. This is an exception to the general rule that a party cannot later object to an instruction that it originally proposed.

Typically, “a party cannot request an instruction, and then claim error because it was given.” *Vangemert v. McCalmon*, 68 Wn.2d 618, 414 P. 2d 617, 625 (1966). However, a defendant does not waive its right to challenge an instruction which it had requested at trial in response to a similar but less favorable instruction proposed by the opposition. *In re*

Griffith, 102 Wn.2d 100, 102; 683 P.2d 194 (1984) (citing *United States v. Squires*, 440 F.2d 859 (2d Cir.1971)).

Like the defendants in *Griffith* and *Squires*, Schuchart objected to the original instruction 14, but once it became apparent that the court was going to move forward with the instruction notwithstanding Schuchart's objection, Schuchart tried to temper the unfavorable instruction with more accurate language. RP 1237, CP 876. By doing so, Schuchart did not waive its objection to Instruction No. 14.

As noted by Jarbo in its brief at page 37, Schuchart's argument to the trial court regarding lead-based paint and inherently dangerous activity fully apprised the trial court of Schuchart's position that it could not be held vicariously liable because there was no "inherently dangerous activity." RP 1240. The trial court confused the entire matter by giving this instruction that a : "...subcontractor's work is inherently dangerous..." (Instruction No. 14), in combination with Instruction No. 19 regarding "lead hazards associated with lead-based paint...." This virtually directed a verdict against Schuchart.

(b). The Giving of Instruction No. 14 regarding "inherently dangerous" work of a subcontractor, together with Instruction No. 19 regarding "lead hazards associated with lead-based paint" was Clear Error.

The issues are addressed in Schuchart's opening brief at pages 17 through 23. The trial court was more than aware of Schuchart's position regarding the lack of evidence and law to support each of the instructions. CP 1075.

Subsections IV.C.3 and D are adequately addressed in Schuchart's opening brief on appeal.

II. RAP 18.9(a) REQUEST FOR FEES

The multiple instructional errors raised by Schuchart on this appeal go directly to the fact that the challenged instructions were highly prejudicial to Schuchart's position that it was not *negligent*, and that its independent subcontractors would be liable for any damage the jury did find was *caused* by the work of said subcontractors. Jarbo again attempts to frame the issue from the perspective only of causation, and not negligence, an essential element of its claims against Schuchart. The challenged instructions virtually directed a verdict against Schuchart on negligence, and thereby prejudiced Schuchart, and were contrary to law and not supported by substantial evidence. This is far from an appeal with "no possibility of reversal."

III. CONCLUSION

Schuchart respectfully requests that this court reverse the judgment against Schuchart and remand this case for trial.

DATED this 16th day of April, 2012.

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