

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

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**BRIEF OF APPELLANT AND
CROSS-RESPONDENT, SCHUCHART CORPORATION**

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I. INTRODUCTION

Jarbo sued Schuchart to recover damages allegedly sustained on February 3, 2009, when dust settled onto some Jarbo clothing inventory that was stored in the basement of a building at 511 Boren Avenue in Seattle. Schuchart was the general contractor for a project at the Greenstein Warehouse (“the Project”), an adjacent building separated by a six-inch space between the two eighteen-inch thick building walls. Jarbo alleged that demolition work at the Project “... created a large plume of dust in the storage space, which settled on and irreparably damaged Jarbo’s inventory.” (CP 2, para. 3.4 of the Complaint).

Schuchart investigated and found no evidence that work of any of its subcontractors caused dust to travel from the Project to the basement of 511 Boren Avenue. Jarbo complained that “jackhammering” was the cause of dust in its own building falling on the clothing. Schuchart’s demolition subcontractor, Cross-Appellant Demolition Man, Inc. (hereinafter “Demolition Man”), had been breaking up concrete floors at the Project (and the only subcontractor whose work could be considered or confused with “jackhammering”). Therefore, after this action was commenced by Jarbo,

Schuchart joined Demolition Man as a third-party defendant, seeking indemnity under the subcontract should Jarbo prevail in any manner on its claims against Schuchart for damage caused by demolition work.

Then, shortly before trial, Jarbo switched its target to the work of a non-party sub-subcontractor, Aqua-Brite, that performed sandblasting of paint in the basement of the Project. At trial, Jarbo did not pursue its claim that the dust was created by “jackhammering” and argued instead that it was sandblasting dust from Aqua-Brite’s work in the Project basement that traveled to the 511 Boren building and settled on the clothing. Shortly after the initial Jarbo complaints regarding dust on its inventory, Schuchart had completely “ruled out” the possibility that the dust on the clothes was from sandblasting in the basement of the Project traveling to the basement of 511 Boren.

The case was tried to a jury in King County and Jarbo sought, and received from the trial judge, instructions on *res ipsa loquitur*, agency, and inherently dangerous activity (sandblasting) and safety regulations regarding lead-based paint activities (even though no personal injury to any person was involved in the case) for the purpose of arguing strict liability of Schuchart for the activity of independent contractor, Aqua-Brite.

The jury returned a verdict for Jarbo in the sum of \$390,385.00, finding Schuchart 100% liable for damage to the inventory, and assigning no fault to Demolition Man or to Aqua-Brite. (CP 1875-1876). This appeal followed.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in giving Instruction No. 13 to the jury on Res Ipsa Loquitur. (CP 1856, Appendix 1).
2. The trial court erred in giving Instruction Nos. 14 and 19 to the jury regarding strict liability of Appellant Schuchart Corporation (hereinafter "Schuchart") for "abnormally dangerous activity," to-wit: the sandblasting activity of its subcontractor Aqua-Brite. (CP 1857, Appendix 2 and 3).
3. The trial court erred in giving Instructions Nos. 15, 16 and 17 regarding agency flowing from erroneous Instruction No. 14. (CP 1858-1862, Appendix 4, 5 and 6).
4. The trial court erred when it denied Schuchart's CR 50 Motion for Judgment as a Matter of Law, raising each of the issues related to Assignments of Error 1, 2 and 3. (CP 1879-1887, RP 1073-1086; CP 1232, lines 21-24).

Schuchart took exception to the above cited instructions (RP 1236-1241) and raised all of the issues pertaining to the erroneous instructions in its CR 50 motion (CP 1879-1887) and in its trial brief (CP 950-967).

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court commit error when it allowed Jarbo to rely upon *res ipsa loquitur*'s inference of negligence against Schuchart? (Assignment of Error Nos. 1 and 4).
2. Did the trial court commit error by instructing the jury that Schuchart could be held strictly liable for the work of sandblasting subcontractor Aqua-Brite because that work was an "abnormally dangerous activity?" (Assignment of Error Nos. 2 and 4).
3. Did the trial court commit error by instructing the jury that it could find that subcontractors on the Project were "agents" of Schuchart and that Schuchart would be liable for negligence of the subcontractors? (Assignment of Error Nos. 3 and 4).
4. Was there competent and substantial evidence to support Jarbo's contentions (and related jury instructions) that Schuchart was liable for any negligence of its subcontractors? (Assignment of Error No. 4).

IV. STATEMENT OF THE CASE

A. Statement of Facts: Jarbo claims that it observed "...a large plume of dust that developed in our [Jarbo's] storage area." (RP 256, Exhibit 1). Michael Kaplan of Jarbo testified that this observation was at about 4:00 p.m. on February 3, 2009. (RP 296-297; See also RP 234, 271, 345). Jarbo attributed the dust to "jackhammering" taking place on the Project site on February 3, 2009. (RP 257, Exhibit 1, See RP 1218-1220, Exhibit 73). Schuchart's subcontractor, Demolition Man, had been removing a concrete floor on the first floor of the Project site (not the basement) that day and Schuchart understood that demolition activity was what Jarbo alleged resulted in dust settling on clothing stored in the basement at 511 Boren Avenue (hereinafter "the Jarbo space or "the storage room.). (RP 257-260, CP 372). However, Demolition Man had stopped working at 2:30 p.m. on February 3, 2009, according to Britt Barton, the Demolition Man supervisor on site that day. (RP 181, 210).

In addition, there was no sandblasting taking place on February 3, 2009, in the basement of the Project when Jarbo supposedly observed the large plume of dust. (RP 894-897, 920-921, 956-957, Exhibit 41). Sandblasting in the Project basement started on February 4, and Schuchart then tested dust observed in the Jarbo storage room for lead and it was negative: no lead

which may have been present had any sandblasting material migrated through the two brick walls and the six inch air space in-between them and somehow gotten into the Jarbo storage room. (RP 906, 908). The inside of the basement wall in the Project was not itself sandblasted and contained no lead paint, only the interior columns and ceiling in the space were sandblasted. (RP 231, 914, 245) Despite this, at trial Jarbo contended the “dust” was actually sandblast material resulting from sandblasting in the basement of the Project. (RP 414-416). Neither Demolition Man or Aqua-Brite, the sandblast sub-subcontractor, was on site after 2:30 p.m. on February 3. (RP 897)

Schuchart did not then, and does not to this day, believe that any activity on the Project caused dust to settle onto the Jarbo clothing, and early on Schuchart “ruled out” sandblasting in the basement of the Project as the source of any dust in the Jarbo space. (RP 372-376, 408-418).

In addition to work at the Project, there was significant construction work all around the 511 Boren Avenue building at the time of this “dust” damage: Amazon was constructing buildings at South Lake Union and huge trucks and equipment were going by on the road next to the 511 Boren Avenue building, and there was pile driving ongoing to support the office buildings under construction nearby. (RP 434-435; 450-452, 897-898)

There was also a remodel of a restaurant (The Speak-Easy) right next to the Jarbo storage room in the basement of the 511 Boren building where wallboard cutting and tile cutting was ongoing and drywall dust covered everything in the basement. (RP 905-906). The work on the restaurant was a complete remodel with cutting and sanding of drywall, cutting concrete and cutting tile and all of that work created dust that could have settled on the Jarbo inventory. (RP 914-915; RP 1029-1040, RP 1056). The storage room for these allegedly valuable samples and old inventory was nothing but a chicken wire fence and some plastic. (RP 297, 843-844; RP 1032-1033).

Jarbo originally alleged that

...there must have been dust in the presence (sic) in the walls up there, may have been dust present on the walls and ceilings in our basement for years. These dust particles have been undisturbed and have never damaged any merchandise or samples in the store in the basement. However, the insensitivity of the work on the shared wall appears to have been enough to dislodge these particles and cause them to become airborne.

(RP 260-261, Exhibit 1).

Jarbo was alleging that vibration from the demolition work caused dust already existing in the Boren building to become disturbed and settle onto its inventory in the basement. Not, as alleged at trial, that dust came from the Project site and that the dust was actually sandblast material from sandblasting in the basement of the Project.

B. Procedural History. On August 21, 2009, Jarbo filed its complaint against Schuchart alleging that “Demolition work at the project site created a large plume of dust in the storage space, which settled on and irreparably damaged Jarbo’s inventory.” (CP 27). Therefore, Schuchart answered and brought in the demolition subcontractor, Demolition Man, seeking indemnity under the subcontract. This is about as uncommon as jay-walkers in downtown Seattle, but managed to cause much confusion (real or pretend) among the parties and the trial court.

At trial, after Jarbo rested, Schuchart moved to dismiss Jarbo’s claims that Schuchart could be liable for the negligence of its independent contractors; and, dismiss claims raised at trial by Jarbo (not in its complaint) that Schuchart was strictly liable for any activity of Aqua-Brite based on an argument that sandblasting was an “abnormally dangerous activity.” (RP 1073-1085; CP 1879-1887). The court denied the motion (RP 1232) and then gave Jarbo’s instructions on *res ipsa loquitur*, agency of the subcontractors and “abnormally dangerous activity.” This appeal followed the verdict of the jury finding Schuchart 100% at fault for Jarbo’s claimed damages and awarding Jarbo \$390,385.00. (CP 1875-1876).

V. SUMMARY OF ARGUMENT

It was error to instruct the jury on *res ipsa loquitur* and allow

an inference of negligence against Schuchart. (Instruction No. 13, CP 1856, Appendix 1). There is simply no evidence of the conditions that must be present for application of the doctrine of res ipsa loquitur.

Determination that an activity is an “abnormally dangerous activity” is a question of law for the court to determine, not a jury question. It was reversible error for the court to instruct the jury that it could find that sandblasting was an “abnormally dangerous activity.” (Instruction No. 14, CP 1857, Appendix 2). Further, such a finding even by the trial court would not be supported by the evidence.

There was no evidence presented by Jarbo to support instructions that Schuchart could be liable for damage to clothing inventory caused by the negligence of the independent contractors on the Project on the following grounds argued by Jarbo: (1) that the subcontractors were “agents” of Schuchart; and/or (2) because the sandblasting subcontractor failed to follow statutory safety regulations regarding “lead-based paint activities,” which clearly apply to safety of persons and not to the alleged personal property damage in this case of dust settling onto clothing stored in a basement. (Instructions Nos. 15, 16, 17 and 19, CP 1858-1860, 1862, Appendix 3, 4, 5, and 6).

The above issues were all addressed in Schuchart's Motion for Judgment as a Matter of Law after Jarbo rested its case which the trial court denied. Even viewing the evidence in a light most favorable to Jarbo at that point, there was no substantial evidence or reasonable inference from the evidence to allow the issue of Schuchart's liability for the alleged damages to go to the jury with instructions on res ipsa loquitur, abnormally dangerous activity, agency or violation of safety regulations regarding "lead-based paint activity."

VI. ARGUMENT

A. Standard of Review:

If each of the elements of res ipsa loquitur are not satisfied, no presumption of negligence can be maintained. *Tinder v. Nordstrom*, 84 Wn. App. 787, 792, 929 P.2d 1209 (1997). Whether res ipsa loquitur applies is a question of law. *Curtis v. Lein*, 169 Wn.2d 884, 889, 239 P.3d 1078 (2010), quoting *Pacheco v. Ames*, 149 Wn.2d 431, 436, 69 P.3d 324 (2003). The doctrine is not favored: "[i]t is 'ordinarily sparingly applied, 'in particular and **exceptional cases**, and only where the facts and the demands of justice make its application essential.'" (emphasis added) *Curtis*, at 889-890. There is not sufficient evidence in

this case to support the elements of Instruction No. 13 on *res ipsa loquitur*.

Determination of whether an activity is an "abnormally dangerous activity" is a question of law. *Klein v. Pyrodyne Corp.*, 117 Wn.2d 1, 6, 810 P.2d 917 (1991). It is not an issue for the jury.

In determining whether the evidence was sufficient to support giving an instruction, this Court will view the evidence in the light most favorable to the party requesting the instruction. *State v. Jarvis*, 160 Wn.App 111, 120, 246 P.3d 1280 (2011). Instructions are improper where they mislead the jury or if they improperly inform the jury of the applicable law. *Id.* Moreover, "If a party proposes an instruction setting forth the language of a statute, the instruction will be 'appropriate only if the statute is applicable, reasonably clear, and not misleading. [citing case]" *Barrett v. Lucky Seven Saloon, Inc.*, 152 Wn2d 259, 267, 96 P.3d 386 (2004).

A motion under CR 50(a)(1) for judgment as a matter of law is reviewed *de novo* on appeal. *Davis v. Microsoft Corp.*, 149 Wn.2d 521, 530-31, 70 P.3d 126 (2003). "Granting a motion for judgment as a matter of law is appropriate when, viewing the evidence most favorable to the nonmoving party, the court can say, as a matter of law, there is no

substantial evidence or reasonable inference to sustain a verdict for the nonmoving party.” Sing v. John L. Scott, Inc., 134 Wn.2d 24, 29, 948 P.2d 816 (1997).

B. Issues:

1. The trial court committed reversible error by allowing Jarbo to rely upon res ipsa loquitur for the inference of negligence and causation.

(Instruction No. 13, CP 1856, Appendix 1)

For the doctrine of res ipsa loquitur to apply, it must be established that

(1) the accident or occurrence producing the injury is of a kind which ordinarily does not happen in the absence of someone’s negligence, (2) the injuries are caused by an agency or instrumentality within the exclusive control of the defendant, and (3) the injury-causing accident or occurrence is not due to any voluntary action or contribution on the part of the plaintiff.

Zukowsky v. Brown, 79 Wn.2d 586, 593, 488 P.2d 269 (1971). It is only where the circumstances leave no room for a different presumption that the maxim applies.

The recent opinion of our Supreme Court in *Curtis* restated the general scenario under which this doctrine may be “sparingly” applied:

The doctrine of res ipsa loquitur spares the plaintiff the requirement of proving specific acts of negligence in cases where a plaintiff asserts that he or she suffered injury, the cause of which cannot be fully explained, and the injury is of a type that would not ordinarily result if the defendant

were not negligent. In such cases the jury is permitted to infer negligence. The doctrine permits the inference of negligence on the basis that the evidence of the cause of the injury is practically accessible to the defendant but inaccessible to the injured person.

Curtis at 890 (quoting from *Pacheco v. Ames*, 149 Wn.2d 431, 436, 69 P.3d 324 (2003)).

Compare this scenario with the evidence in our case: Jarbo **did** offer an explanation for the cause of its injury: sandblasting in the basement of the Project without sufficient precautions being taken (by someone) to prevent sandblast material from escaping the basement and miraculously migrating into the basement storage area in the 511 Boren Avenue building. Having dust settle on clothing dumped in a basement area of an old building separated from the rest of the basement by chicken wire and torn plastic sheets is not the type of injury that would result absent negligence by Schuchart and/or its subcontractors.

Furthermore, evidence of the manner of the alleged injury to Jarbo's inventory was certainly not "inaccessible" to Jarbo. Jarbo employee and brother of the Jarbo owner, Michael Kaplan, testified that he witnessed a "plume" of dust late on February 3, 2009, that Jarbo attributed first to vibration from demolition work, and before trial, to sandblasting. (RP 271). However, there was no sandblasting at the Project on that date

and at that time and even Demolition Man had ceased its work over an hour before the plume observation. (RP 894-897, 920-921, 956-957, Exhibit 41, RP 181, 210). Jarbo had control of its storage area, could have immediately collected dust samples, had them analyzed, taken photographs, gone into the Project and observed what work was ongoing, who was present, and what equipment was being used. Jarbo did none of this.

Specifically addressing the first element of *res ipsa loquitur* (the accident or occurrence producing the injury is of a kind which ordinarily does not happen in the absence of someone's negligence), the court in *Curtis* noted that at least one of the following conditions must be present:

- (1) When the act causing the injury is so palpably negligent that it may be inferred as a matter of law, *i.e.*, leaving foreign objects, sponges, scissors, etc., in the body, or amputation of a wrong member; (2) when the general experience and observation of mankind teaches that the result would not be expected without negligence; and (3) when proof by experts in an esoteric field creates an inference that negligence caused the injuries.' "

Schuchart submits that its activity and that of its subcontractors on the Project is not "...so palpably negligent" that negligence may be inferred as a matter of law (such as leaving scissors in the body after an operation, or amputation of a healthy arm or leg). The resulting "injury" to Jarbo's inventory was not only to be expected, but inevitable given the

lack of care Jarbo exercised in protecting the inventory from dust from construction right next to its storage area (the Speak-Easy), or from vibration from building of the Amazon campus at South Lake Union going on all around the 511 Boren Avenue building, and huge construction trucks and equipment driving right by the building all day. Finally, there was absolutely no expert testimony that Schuchart as a general contractor on the Project was negligent in any manner in connection with the activity of any of the independent contractors working on the site.

Addressing the second element of *res ipsa loquitur* which must be present: that the injuries are caused by an agency or instrumentality within the **exclusive control** of the defendant, the evidence is replete with other potential/likely/more likely causes of dust settling on the Jarbo clothing as a result of all of the above described construction activity within the basement at 511 Boren and all around that building. On this topic the Supreme Court in *Curtis* at 894 was very clear:

“...’*res ipsa loquitur* is inapplicable where there is evidence that is *completely* explanatory of how an accident occurred **and no other inference is possible that the injury occurred another way.**” (emphasis added). It cannot be seriously contested that, at a minimum, there was an inference that the dust damage was due to the construction work in the

Speak-Easy immediately next to the Jarbo storage space, or dust settling from vibration of construction work on the Amazon buildings. (RP 816-821, 1196-1197) .

Asked if there was any other construction in the area (other than the work at the Project), Britton testified:

All kinds. ...The place directly across the street ... were building an entire new site for Amazon. And they had hundreds upon hundreds of trucks, coming in and out of that site every day.... Giant semi-truck dual-rigs have two dumping containers on each one, like I said there were hundreds of them.... I don't know what kind of vibrations that they caused on the street. But they also were pile driving behind us. They were building a new structure to the south of us. They were pile driving to the west of us. They were pile driving to the east of us. ... Pile driving is using a giant crane with a pile driving mechanism on it to hammer down giant pieces of steel in the earth to stabilize it... [They were driving steel beams into the ground?] Yes. [Could you feel the pile driving from where you were?] Yes. ... It's for hours on end. ... They had been doing it before we got there and they were doing it when we left. They were all over the site.

(CP 197-199).

In addition to the other potential causes, the evidence was uncontradicted that there was no lead in the dust on the clothing that was tested and the only lab test of the dust in evidence in the case showed no sand, no lead, but only wallboard and some concrete dust. (RP 906, Ridings testimony pages RP 1173-1174, 1180-1181, CP 1038-1043).

There is no evidence that Jarbo could not have (or did not) take its own samples and test them for lead paint chips. So how can it be said that sandblast from the basement of the Project is the only possible source of dust, but not the Speak-Easy construction work in the basement of the 511 Boren building? (RP 1196-1197) To ask this question is to answer it.

2. The trial court committed reversible error when it instructed the jury that it could fine that sandblasting in the basement of the Project building is an “abnormally dangerous activity” with or without the presence of lead paint residue in the basement of the Project.

Sandblasting in the basement of the Project building is not an “abnormally dangerous activity” with or without the presence of lead paint residue. Our Supreme Court in *Klein v. Pyrodyne Corp.*, 117 Wn.2d 1, 6-7, 810 P.2d 917 (1991), set out the elements that must be present in order to impose strict liability on a party for “abnormally dangerous activities:”

The basic principle of *Rylands v. Fletcher, supra*, has been accepted by the Restatement (Second) of Torts (1977) Section 519 of the Restatement provides that any party carrying on an "abnormally dangerous activity" is strictly liable for ensuing damages. The test for what constitutes such an activity is stated in *section 520 of the Restatement*. Both Restatement sections have been adopted by this court, and determination of whether an activity is an "abnormally dangerous activity" is a question of law. [citing cases]

Section 520 of the Restatement lists six factors that are to be considered in determining whether an activity is "abnormally dangerous". The factors are as follows:

- (a) existence of a high degree of risk of some harm to the person, land or chattels of others;
- (b) likelihood that the harm that results from it will be great;
- (c) inability to eliminate the risk by the exercise of reasonable care;
- (d) extent to which the activity is not a matter of common usage;
- (e) inappropriateness of the activity to the place where it is carried on; and
- (f) extent to which its value to the community is outweighed by its dangerous attributes.

Restatement (Second) of Torts § 520 (1977). As we previously recognized in *Langan v. Valicopters, Inc.*, *supra* at 861-62 (citing *Restatement (Second) of Torts § 520*, comment *f* (Tent. Draft 10, 1964)), the comments to *section 520* explain how these factors should be evaluated:

Any one of them is not necessarily sufficient of itself in a particular case, and ordinarily several of them will be required for strict liability. On the other hand, it is not necessary that each of them be present, especially if others weigh heavily. Because of the interplay of these various factors, it is not possible to reduce abnormally dangerous activities to any definition. **The essential question is whether the risk created is so unusual, either because of its magnitude or because of the circumstances surrounding it, as to justify the imposition of strict liability for the harm that results from it, even though it is carried on with all reasonable care.** *Restatement (Second) of Torts § 520, comment f (1977)*.

(emphasis added).

The court in *Klein* at 9 held that setting off public fireworks displays was "...an activity that is not "of common usage" and that presents an ineliminably high risk of serious bodily injury or property damage." Specifically, the court in *Klein* at 7 found that enough factors were present to persuade the court that fireworks displays are abnormally dangerous activities justifying the imposition of strict liability. In doing so, the court held that 'strict liability ... may not be imposed absent the presence of at least one of the factors stated in clauses (d), (e), and (f).'" *Klein* at 8.

In the present case, Jarbo did not present evidence sufficient to satisfy even one of the six factors relative to the property damage claimed in this case and certainly the last three factors are clearly inapplicable: (a) Jarbo's evidence and contentions were that sandblast material could have been contained had walls in the Project basement been patched. (RP 1247) Thus, sandblasting in the basement of the Project did not present a "high degree of risk" to Jarbo's inventory in the basement of the building next door; (b) there was no evidence presented that by engaging in sandblasting at the Project that this activity presented any "great risk of harm" to Jarbo's inventory next door; (c) Jarbo's evidence and argument was that Schuchart or its subcontractors could have and should have

prevented the harm to the Jarbo inventory, not that sandblasting presented the type of risk that could not be eliminated even if reasonable care were taken; (d) there is no evidence that sandblasting in restoration or remodel of old buildings is uncommon; (e) there is no evidence that it was inappropriate to sandblast paint from areas in the Project basement; and, (f) there is no evidence that the value of the sandblasting in the Project basement was outweighed by any “danger.”

Finally, it is beyond question that there must be a nexus between the activity and the harm done. Jarbo relied upon RCW 70.103.010 and Washington Administrative Code regulations promulgated thereunder in support of its proposed Instruction No. 21 (CP 944-945) which became the Court’s Instruction No. 19. (CP 1862). The statute and codes clearly deal with potential harm to **persons** from lead based paint, not dust with lead paint chips in it settling on old inventory and samples like Jarbo’s that were tossed that into a basement.

Restatement Second (Torts) Sec. 519(2) provides a specific limit to the doctrine of strict liability for abnormally dangerous activity:

“This strict liability is limited to **the kind of harm**, the possibility of which makes the activity abnormally dangerous.

(emphasis added) The comment to this section fully explains how unfairly prejudicial and erroneous it was for the jury to be instructed (and allowed) to find that sandblasting by Aqua-Brite was an abnormally dangerous activity because the material might contain (was not ever shown to contain) lead paint residue. This section of the Restatement and the full comment was reproduced in the this court's opinion in *WSU v. Industrial Rock Prods., Inc.*, 37 Wn.App. 586, 590-591, 681 P.2d 871 (1984), rev. denied 102 Wn.2d 1008 (1984):

Restatement Second (Torts) Sec. 519 **“Comment on Subsection(2) provides:**

e. Extent of protection. The rule of strict liability stated in Subsection (1) applies only to harm that is within the scope of the abnormal risk that is the basis of the liability. One who carries on an abnormally dangerous activity is not under strict liability for every possible harm that may result from carrying it on. For example, the thing that makes the storage of dynamite in a city abnormally dangerous is the risk of harm to those in the vicinity if it should explode. If an explosion occurs and does harm to persons, land or chattels in the vicinity, the rule stated in Subsection (1) applies. If, however, there is no explosion and for some unexpected reason a part of the wall of the magazine in which the dynamite is stored falls upon a pedestrian on the highway upon which the magazine abuts, the rule stated in Subsection (1) has no application. In this case the liability, if any, will be dependent upon proof of negligence in the construction or maintenance of the wall. So also, the transportation of dynamite or other high explosives by truck through the streets of a city is abnormally dangerous for the same reason as that which makes the storage of the

explosives abnormally dangerous. If the dynamite explodes in the course of the transportation, a private person transporting it is subject to liability under the rule stated in Subsection (1), although he has exercised the utmost care. On the other hand, if the vehicle containing the explosives runs over a pedestrian, he cannot recover unless the vehicle was driven negligently.”

Not only is there a complete lack of sufficient evidence to support the courts’ instructions on abnormally dangerous activity, it was error to allow the jury to determine whether any activity on the Project site was an abnormally dangerous activity, as that is an issue for the court to determine.

“Function of court. Whether the activity is an abnormally dangerous one is to be determined by the court, upon consideration of all the factors listed in this Section, and the weight given to each that it merits upon the facts in evidence. In this it differs from questions of negligence. Whether the conduct of the defendant has been that of a reasonable man of ordinary prudence or in the alternative has been negligent is ordinarily an issue to be left to the jury. The standard of the hypothetical reasonable man is essentially a jury standard, in which the court interferes only in the clearest cases. A jury is fully competent to decide whether the defendant has properly driven his horse or operated his train or guarded his machinery or repaired his premises, or dug a hole. **The imposition of strict liability, on the other hand, involves a characterization of the defendant's activity or enterprise itself, and a decision as to whether he is free to conduct it at all without becoming subject to liability for the harm that ensues even though he has used all reasonable care. This calls for a decision of the court; and it is no part of the province of the jury to decide whether an industrial**

enterprise upon which the community's prosperity might depend is located in the wrong place or whether such an activity as blasting is to be permitted without liability in the center of a large city. (emphasis added)

Restatement (Second) of Torts Section 520, Comment 1.

However, this is exactly what the trial court allowed by giving instructions 14 and 19 at Jarbo's request. The court would either have to find or tell the jury that sandblasting under the circumstances was a hazardous activity, or not give any instruction on hazardous activity. The result of this error was to improperly instruct the jury on the law and to mislead the jury, at a minimum, all to the prejudice of Schuchart.

3. The trial court erred in giving Instructions Nos. 15, 16 and 17 regarding agency flowing from erroneous Instruction No. 14. (CP 1858-1862, Appendix 4,5 and 6).

One who engages an independent contractor is not liable to others for the negligence of the independent contractor. *See Epperly v. City of Seattle*, 65 Wn.2d 777, 781, 399 P.2d 591 (1965); WPI 50.11.

An independent contractor may be distinguished from an agent in that he is a person who contracts with another to do something for him, but who is not controlled or subject to the control of the other in the performance of such contract, but only as to the result. A principal, on the other hand, has the right to control the conduct of an agent with respect to matters entrusted to him.

Liljeblom v. Dep't of Labor & Indus., 57 Wn.2d 136, 144, 356 P.2d 307 (1960).

The difference between an independent contractor and an employee is whether the employer can tell the worker how to do his or her job. Employers are not liable for injuries incurred by independent contractors because employers cannot control the manner in which the independent contractor works.

Kamla v. Space Needle Corp., 147 Wn.2d 114, 119, 52 P.3d 472 (2002).

The employer must have retained at least some degree of control over the manner in which the work is done. **It is not enough that he has merely a general right to order the work stopped or resumed, to inspect its progress or to receive reports, to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations and deviations.** Such a general right is usually reserved to employers, but **it does not mean that the contractor is controlled as to his methods of work, or as to operative detail.** There must be such a retention of a right of supervision that the contractor is not entirely free to do the work in his own way.

Id. At 121 (citation omitted, emphasis added).

Jarbo claimed that Schuchart is liable for Aqua-Brite's sandblasting activity and any negligence in connection with that activity because Schuchart exercised control over Aqua-Brite and/or due to the inherently dangerous nature of the sandblasting. However, Jarbo failed to present sufficient evidence at trial to support the instructions.

Under well-settled Washington Supreme Court authority, for Schuchart to be held responsible for the work of an independent contractor, Schuchart would have had to have retained control as to the means or methods of the subcontractor's work. *Kamla*, 147 Wn.2d at 119. Jarbo presented no evidence that this was the case. It is uncontested that the subcontractors were responsible for their own work and were not controlled by Schuchart. (RP 1221-1222).

Schuchart hired Grayhawk, a subcontractor, for lead paint removal on the columns, beams and ceiling in the basement of the Greenstein building and in so doing placed Grayhawk in charge of this aspect of the project. (RP 419-420) Grayhawk selected Aqua-Brite to perform the sandblasting in the basement. (RP 419-420) Mr. Rutkowski testified at trial that the subcontractors were responsible for the containment of the dust caused by their work. (RP 449, 713-714) Mr. Ruthokski further testified, and the Daily Job Logs supported, that the sandblasters brought in their own equipment to perform the work and created a negative air system in the basement to contain the sandblasting materials and the resulting dust. It is not enough that Schuchart had merely a general right to order the work stopped or resumed, to inspect its progress or to receive reports, to make suggestions or recommendations which need not

necessarily be followed, or to prescribe alterations and deviations. Such a general right is usually reserved to employers, but **it does not mean that the contractor is controlled as to his *methods of work, or as to operative detail***. In other words, the operative question is whether Schuchart retained the right to control the activity alleged to have caused injury. It did not.

4. The trial court erred when it denied Schuchart's CR 50 Motion for Judgment as a Matter of Law, raising each of the issues related to Assignments of Error 1, 2 and 3? (CP 1879-1887, RP 1073-1086; CP 1232, lines 21-24).

“Granting a motion for judgment as a matter of law is appropriate when, viewing the evidence most favorable to the nonmoving party, the court can say, as a matter of law, there is no substantial evidence or reasonable inference to sustain a verdict for the nonmoving party.” *Sing v. John L. Scott, Inc.*, 134 Wn.2d 24, 29, 948 P.2d 816 (1997). Substantial evidence is evidence sufficient to persuade a fair-minded, rational person that the premise is true. *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000).

The evidence in this case simply did not support the instructions on res ipsa loquitur, abnormally dangerous activity, violation of safety regulations and/or agency, but those instructions allowed Jarbo to argue that

Schuchart was strictly liable for the activity of its subcontractors; and/or that any negligence in the performance of the sandblasting work could be inferred against Schuchart and constituted breach of a nondelagable duty.

VII. CONCLUSION

Schuchart, a general contractor, was unfairly tried as a result of errors of law by the trial court in allowing the instructions proposed by Jarbo on *res ipsa loquitur*, abnormally dangerous activity (which is not even a jury question), and agency; which wrongfully allowed the jury to find Schuchart liable, strictly liable, for the alleged negligent activity of its independent subcontractors. In addition, the instructions simply were not supported by sufficient evidence. The instructions were improper under the law and confusing, at best. Schuchart's motion for judgment as a matter of law at the close of Jarbo's case should have been granted.

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

VIII. APPENDIX

- A1 Instruction No. 13
- A2 Instruction No. 14
- A3 Instruction No. 19

A4 Instruction No. 15

A5 Instruction No. 16

DATED this 25th day of January, 2012.

LAW OFFICE OF WILLIAM J. O'BRIEN

By: 
William J. O'Brien, WSBA No. 5907
Attorneys for Appellant and Cross-
Respondent, Schuchart Corporation

APPENDIX 1

INSTRUCTION NO. 13

If you find that:

(1) the occurrence producing the damage is of a kind that ordinarily does not happen in the absence of someone's negligence; and

(2) the injury was caused by an agency or instrumentality within the exclusive control of the defendant; and

(3) the injury-causing occurrence was not due solely to a voluntary act or omission of the plaintiff;

then, in the absence of satisfactory explanation, you may infer, but you are not required to infer, that the defendant was negligent and that such negligence produced the damage complained of by the plaintiff.

APPENDIX 2

INSTRUCTION NO. 14

A general contractor is legally responsible for damages caused by its own negligence. It is also legally responsible for damages caused by the negligence of a subcontractor when:

1. The subcontractor is the general subcontractor's agent; or
2. The general contractor caused, knew of, and sanctioned the subcontractor's conduct; or
3. The general contractor is required by statute or administrative regulation to take precautions or implement specific safeguards for the safety of others; or
4. The subcontractor's work is inherently dangerous or the work undertaken is likely to create a peculiar risk of the type of harm alleged.

APPENDIX 3

INSTRUCTION NO. 19

The Washington State Legislature has declared that "lead hazards associated with lead-based paint represent a significant and preventable environmental health problem." Lead-based paint activities therefore must be "conducted in a way that protects the health of the citizens of Washington state and safeguards the environment."

In recognition of these hazards, Washington's Department of Labor and Industries adopted safety regulations for construction work that may occupationally expose an employee to lead. These regulations require that all surfaces "be maintained as free as practicable of accumulations of lead," and that "[c]ompressed air shall not be used to remove lead from any surface unless the compressed air is used in conjunction with a ventilation system designed to capture the airborne dust created by the compressed air."

If you find that the damage to Jarbo's merchandise was caused by an independent contractor sandblasting materials that contained lead, then Defendant Schuchart had a nondelegable duty to ensure that the independent contractor complied with all safety regulations and is liable for any damage caused by the independent contractor's failure to do so.

APPENDIX 4

INSTRUCTION NO. 15

An agent is a person employed under an express or implied agreement to perform services for another, called the principal, and who is subject to the principal's control or right to control the manner and means of performing the services.

APPENDIX 5

INSTRUCTION NO. 16

Any act or omission of an agent within the scope of authority is the act or omission of the principal.

APPENDIX 6

INSTRUCTION NO. 17

Schuchart is being sued as the principal and Jarbo claims Demolition Man was acting as Schuchart's agent. Schuchart denies that Demolition Man was acting as its agent.

If you find that Demolition Man was Schuchart's agent and was acting within the scope of authority, then any act or omission of Demolition Man was the act or omission of Schuchart.

If you do not find that Demolition Man was acting as the agent of Schuchart, then you may not find Schuchart is liable for its conduct under the rule that the act of the agent is the act of the principal.

No. 67405-6

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

SCHUCHART CORPORATION

APPELLANT,

**RECEIVED
COURT OF APPEALS
DIVISION ONE**

JAN 25 2012

VS.

AFR2 LLC D/B/A JARBO

RESPONDENT

CERTIFICATE OF SERVICE

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Attorney for Appellant, Schuchart Corporation
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The undersigned declares as follows:

I am over the age of 18, not a party to this action, and competent to be a witness herein.

On the 25TH day of January 2012, I caused to be filed the original and one copy of the Brief of Appellant and Cross-Respondent, Schuchart Corporation and served a true and correct copy to the following as indicated:

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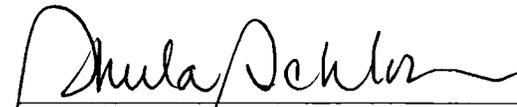
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Dated this 25th day of January 2012.

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Sheela Schlore, Legal Assistant