

67405-6

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No. 67405-6-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

AFR2 LLC d/b/a JARBO,

Plaintiff Below and Respondent,

v.

SCHUCHART CORPORATION,

Defendant Below, Third-Party Plaintiff, Appellant and Cross-Respondent,

v.

DEMOLITION MAN, INC.,

Third-Party Defendant Below and Cross-Appellant.

BRIEF OF RESPONDENT AFR2 LLC d/b/a JARBO

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I. INTRODUCTION

Jury instructions are sufficient when, taken as a whole, they allow a party to argue its theory of the case, are not misleading, and properly inform the jury of applicable law. A party cannot challenge an instruction on appeal for reasons different than those proffered at trial. Whether to give a particular instruction to the jury is a matter within the trial court's discretion. Instructional error warrants reversal only if it is prejudicial, i.e., if it affects the outcome of trial. *See infra* at 24-26.

Citing what it deems instructional error, Schuchart Corporation ("Schuchart") asks the Court to reverse the jury's determination that Schuchart negligently allowed dust plumes to invade space occupied by plaintiff/respondent AFR2 LLC, d/b/a/ Jarbo ("Jarbo"), thereby causing nearly \$400,000 in damage to Jarbo. CP 1875-76. But Schuchart has not argued, let alone established, grounds for so doing. The reason is simple. The evidence at trial—evidence glaringly omitted from Schuchart's fact statement—established that Schuchart failed to perform its safety-related duty to ensure dust from sandblasting lead-based paint did not escape its worksite; that two sandblasting mishaps expelled large amounts of dust from the site; those mishaps occurred the same time as dust plumes formed in Jarbo's space; and Schuchart's superintendent admitted the dust in Jarbo's space looked just like sandblasting dust at the worksite.

Given this evidence, it was for the jury to decide whether to believe Jarbo's witnesses, or Schuchart's. For a host of excellent reasons – including implausible and inconsistent testimony by Schuchart's witnesses – the jury rejected Schuchart's witnesses' self-serving, blame-shifting testimony and entered a verdict for Jarbo.

As the party alleging instructional error, it is Schuchart's burden to establish that the arguments it makes on appeal were made to the trial court, the trial court abused its discretion or committed legal error by giving the challenged instructions nonetheless, and the allegedly erroneous instruction(s) somehow kept Jarbo from arguing its theory of the case and affected the outcome of trial. Schuchart has not made, and cannot make, that showing. Jarbo therefore respectfully asks that the judgment entered in its favor be affirmed. Jarbo also asks the Court to award it the fees it incurred responding to this frivolous appeal, pursuant to RAP 18.9(a).

II. RESTATEMENT OF ISSUES

1. Should the Court of Appeals refuse to address alleged instructional error when:

(a) appellant makes no claim the instructions prevented it from arguing its theory of the case to the jury;

(b) appellant makes no claim the challenged instructions affected the outcome of trial; and

(c) the legal and evidentiary challenges raised on appeal were not made to the trial court and/or were waived by appellant's submission of similar instructions?

2. Should the Court of Appeals reject instructional error arguments and affirm the judgment entered on the jury's verdict where the verdict is based on the jury's credibility determinations?

3. Should the Court of Appeals reject instructional error arguments premised on inapposite legal principles?

4. Given appellant's failure to address the key instructional error elements of inability to present its theory of the case and outcome-determining prejudice, and appellant's reliance on unpreserved and inapposite arguments, should the Court of Appeals award plaintiff/respondent its appellate legal fees and costs under RAP 18.9(a)?

III. RESTATEMENT OF THE CASE

A. Introduction

From the outset of this litigation, Jarbo has pursued one claim against Schuchart, *i.e.*, negligence. CP 1-3. Jarbo's complaint alleged that Schuchart had a duty to avoid acts or omissions that would result in damage to Jarbo's personal property; that Schuchart breached that duty by failing to take adequate precautions to ensure demolition work did not damage Jarbo's property; and that Schuchart was responsible for "*damage to*

Jarbo caused by its own actions and those of its subcontractors.” CP 2-3 (emphasis added). Schuchart’s intimations about Jarbo’s change of theory notwithstanding, that is the exact same theory that Jarbo pursued at trial.

Consistent with Jarbo’s theory, the trial court instructed the jury it was Jarbo’s burden to prove that Schuchart, or a subcontractor for which Schuchart was legally responsible, acted negligently, and the negligence proximately caused harm to Jarbo. CP 1852. The jury entered a verdict finding that there was “negligence by Schuchart Corporation, Demolition Man, and/or a non-party entity that was a proximate cause of injury or damage to the plaintiff;” that Jarbo’s damage totaled \$390,385; that Jarbo was not negligent; and that Jarbo’s damage was 100 percent attributable to Schuchart. CP 1875-76. The evidence presented at trial, evidence detailed below, amply supported the jury’s findings.

B. Background Facts

Jarbo designs and manufactures high end women’s clothes sold in boutiques and specialty stores throughout the United States. RP 467-70. At all relevant times, Jarbo leased space at 511 Boren Avenue North in Seattle (“511 Boren”), where Jarbo occupied offices on the first floor, and stored samples and inventory in an unfinished portion of the building’s basement. RP 267-68, 299. Jarbo’s basement storage area was accessible only through a locked door, the exterior walls were concrete, and the space

had no windows. RP 268-69. Jarbo never experienced dust problems in its storage area and indeed, at times used the basement as extra office space. RP 281, 298-99. In early February 2009, when the events at issue occurred, Jarbo employees went into the basement storage area at least once each day as they prepared for a fashion week presentation in New York later that month. RP 267-68, 272.

Next door to 511 Boren is the Greenstein Warehouse building, an older building with lead paint and asbestos throughout. Trial Exhibit (“TEX”) 7 (1/06/09 Rpt. at 3-7); *see* TEX 63-1, 63-121 to -122, TEX 74; RP 335-37. The Greenstein building’s north wall faces the south wall of 511 Boren, behind which was Jarbo’s basement space. TEX 74; RP 335-37. The buildings are externally connected, TEX 63-121 to -124, TEX 74; but there is a six inch air space between the Greenstein building’s north wall and the south wall of 511 Boren, RP 410-11.

In late January 2009, a remodel of the Greenstein building commenced. Schuchart was the general contractor. *See* TEX 31.¹ Because the remodel involved removing asbestos and lead paint, the project was subject to special abatement and worker protection practices. TEX 7 (1/06/09 Rpt. at 3-7); TEX 32-33; RP 230-33. Contractors had to be “no-

¹ TEX 31-44 are Schuchart’s “Daily Job Reports” prepared and submitted by Schuchart’s on-site project superintendent, Jan Christ, each day at roughly 2:30 pm. RP 889-90. If noted at all, events occurring later in the day were described on the subsequent day’s report. RP 956-57.

tified prior to demolition for worker protection and the use of lead safe work practices,” and air levels had to be monitored during sandblasting. TEX 7 (1/06/09 Rpt. at 5-6). Once sandblasting began, the resultant lead dust meant no one could enter the area without a special suit. RP 914. According to its project manager, Dan Rutkowski, RP 228; Schuchart bore responsibility for lead paint abatement issues, RP 443-44.

The first several days of the remodel involved asbestos abatement work by one subcontractor, and demolition work by third party defendant/cross-appellant Demolition Man, another subcontractor. TEX 31-38. Schuchart was responsible for safety and for patching holes in the walls so sandblasting dust and sand would remain inside the building. TEX 35-44; RP 244-45, 885. It was also responsible for scheduling, and by early February was telling subcontractors “to hurry and finish the basement so that the sandblasting company could begin their work[.]” TEX 9.

On Monday, February 2, 2009, and Tuesday, February 3, 2009, a sandblasting sub-subcontractor, Aqua-Brite, set up its equipment. TEX 39-40. After a sandblaster finishes setting up, it tests its equipment before going “full-bore into their job[.]” RP 937.

At approximately 3:30 pm on Tuesday, February 3, 2009, Jarbo employee Michael Kaplan went down to Jarbo’s basement storage area to get clothing for an order. RP 271. He heard a very loud noise (one he de-

scribed as a “machine sound”) coming from behind the wall next to the Greenstein building basement. RP 271-72, 307, 351-52. When Mr. Kaplan unlocked the storage area door and entered the room, he encountered “a plume of dust” that got deeper and thicker, “like a wall,” the farther he moved into the storage area. RP 271, 300. Mr. Kaplan left the basement, as he did not want to walk through or breathe the dust. RP 272, 357. He left a door open to try to get air moving through the area. RP 273-74.

Mr. Kaplan called Jarbo co-owner Cary Roth, who arrived at 511 Boren within 20 minutes. RP 272-73, 471. Mr. Roth saw a dust cloud “roll out of the storage area,” and heard loud noises coming from the Greenstein building. RP 471-72. He and Mr. Kaplan went to the Greenstein building, where they asked the project superintendent, Jan Christ, to look at the situation. RP 274, 471-72; TEX 41. Mr. Christ took a look around and then briefly returned to the Greenstein building. RP 274-75, 472-73. Evidently he ordered a work stoppage, because the noise stopped. *Id.*; RP 356. At trial, the only explanation for the loud noise Mr. Kaplan and Mr. Roth heard (and which then stopped) was that the sandblasters had been testing their equipment. RP 937. If that was the case, Mr. Christ, would not have noted the testing on the daily Job Report for February 3, 2009, as the testing would have occurred after 2:30 p.m., the time when he submitted daily job reports. RP 956-57; *see* n.1, *supra*.

After stopping the Greenstein work, Mr. Christ returned to 511 Boren and asked Mr. Roth and Mr. Kaplan whether there was other construction going on in the building. RP 297-98, 473. Mr. Roth and Mr. Kaplan took him into a different section of the basement where a restaurant/bar (the Speak Easy) was being built. There they found one worker painting the men's bathroom with a roller. RP 297-98, 473-74, 484, 925. There was no dust, and no noisy, dust plume-creating work was underway. RP 474, 564-65; *see* RP 1043-44.

Schuchart was anxious to resume work. RP 275, 278. Its employees boxed up and covered Jarbo's merchandise with plastic. RP 277, 475-76, 900, 902-03. After that, the same loud construction noise Mr. Kaplan had heard before resumed. Mr. Kaplan went into the basement, where he encountered another dust plume. RP 277-78. "[I]t was very thick ... literally at a point where nobody in their right mind would want to walk through this dust cloud." RP 278; *see* RP 477. The dust was so thick it set off the smoke detector, RP 278; a fact reported to Mr. Rutkowski, RP 236. Mr. Christ told Jarbo to blow dust particles out of the smoke detector and wrap it in plastic so that "they could continue working," which Jarbo did. RP 278; *see* TEX 1, 63-109, 63-110; RP 280.

After that, Aqua-Brite used a spotter to "watch[] the sandblast equipment and the sand blast pot particularly for hose blow-outs." TEX

42. Schuchart also “patched holes in the first floor *and the walls in the basement to keep all the sand and dust in the basement.*” TEX 43 (emphasis added); *see also* TEX 44 (Schuchart filled holes “for the blasters”).

By then, however, it was too late, as Jarbo’s merchandise had been ruined. Perhaps because Schuchart was in a hurry for sandblasting work to commence, *see* TEX 9; it had not patched holes in the basement wall before the sandblasters arrived, *see* TEX 31-42; even though (as Mr. Rutkowski admitted) it “was Schuchart’s job to get ... ready for the sandblasters.... [by] filling the holes before the blasters got there.” RP 244-45; *see also see* RP 247, 446 & 721 (Mr. Rutkowski’s admissions Schuchart patched basement walls “after the sandblasting”); RP 213-14 (Demolition Man’s manager’s testimony that those in charge must ensure area is properly contained before letting sandblasting begin); RP 822 & 1189-90 (expert’s explanation of why holes must be patched before sandblasting begins). Schuchart’s after-the-fact measures must have been effective, as no more dust plumes formed in Jarbo’s storage area. TEX 1; RP 281.

C. Sandblasting Mishaps and Schuchart’s Contemporaneous Acts and Admissions

Two sandblasting mishaps at the Greenstein site – mishaps Schuchart never disclosed to Jarbo and which Jarbo first learned of in February 2011, *see infra* at 16-18 – coincided with the dust plumes. The first was a blow out or explosion of the sand hose after regular hours on the second

(February 3, 2009) or third (February 4, 2009) day Aqua-Brite was on the site. RP 214-15; TEX 9. The incident left “sand everywhere” inside and out, and a film of sand “all over the street.” RP 215. The only after hours sandblasting work mentioned at trial was post set-up, pre-work testing; testing that likely took place after hours on February 3, 2009, when Mr. Kaplan heard loud noises in the Greenstein building basement and saw the first dust plume. RP 271, 937; *see* TEX 41.

The second mishap occurred on February 4, 2009, shortly after Aqua-Brite began sandblasting the Greenstein basement. Britt Barton, Demolition Man’s project foreman (RP 181), testified that he and his crew had to vacate the first floor (where they were working) because:

[D]ust is shooting out of every crack, crevice and hole in the entire building – shooting up through the first floor, shooting up through the first floor, all the way up, as far as the roof goes.

We all had to clear out of the first floor so that they could reseal their holes, because the work was unsafe for everybody else in the building.

...

It was immediately affecting our breathing. We couldn’t see two feet in front of us. It was shooting out at really high speeds. I mean, it was kind of amazing how fast it filled up.

RP 187-88; *see also* TEX 9 (Barton letter stating dust complaints began soon after the sandblasters began work in the basement and explaining that “[u]sing compressed air in a confined space such as the basement caused

the sand that they used ... to shoot out of every hole that was not completely sealed.”). The incident caused a work stoppage, as Mr. Barton and his crew had to wait for the dust to settle before resuming their demolition work. RP 188-89. Curiously, Mr. Christ made no mention of the incident in his daily job report, TEX 41; even though he now admits it occurred and that dust shooting out of every crack, crevice and hole of the Greenstein building raised safety issues, particularly since lead-based paint was involved. RP 922-24, 946-48; *see* RP 187-88 (Mr. Barton’s testimony it was unsafe because there was so much dust his crew could not breathe).

Mr. Barton discussed the incident with Mr. Christ. RP 187-89; *see* RP 922-24. Mr. Christ told Mr. Barton that the dust in Jarbo’s space “looks exactly the same as what the sandblasters were doing adjacent to the wall,” RP 189; and indicated he believed sandblasting caused the dust in Jarbo’s space, RP 191, 923. Consistent with that admission, Schuchart tried to repair the damage. It cleaned Jarbo’s damaged clothing twice, vacuumed the space, and wiped down everything it could. RP 251; TEX 14; *see* TEX 43; RP 281, 283-84. Schuchart’s efforts were only partially successful. Even months later, moving boxes in Jarbo’s storage area caused more dust to appear. RP 284. Much of Jarbo’s merchandise was ruined or severely damaged, forcing Jarbo to give it away or sell it at a steep discount, resulting in a loss of nearly \$400,000. CP 1875-76.

D. Schuchart's Blame-Shifting

As explained above, it is uncontroverted that until February 2-6, 2009, Jarbo had no problems with dust. RP 281, 298-99. It had no problems despite on-going work on the Speak Easy in another part of the 511 Boren basement, and despite other construction projects in the area.

That uncontroverted fact has not deterred Schuchart from trying to avoid liability by blaming others for the dust plumes. In its brief to this Court, for example, Schuchart cites the Amazon construction project and other construction work underway in the area in February 2009. App. Br. at 6. That work, however, consisted of excavating and then carrying dirt away from the site. The Amazon project left dirt and mud on cars and sidewalks, but did not create clouds of dust inside other buildings. RP 198-99, 522-25, 631, 886, 897-98. No one ever saw a giant dust plume move down the street, through the door of 511 Boren, and down into the basement. RP 857. Moreover, it was uncontested that other projects in the area had been underway for months (RP 199, 522-23) without causing dust plumes to form in Jarbo's basement space. RP 281, 298-99; TEX 1.

Schuchart also claimed Jarbo's merchandise was damaged by dust from the Speak Easy construction project. As Mr. Christ admitted, however, when the dust plumes formed, painting was the only work underway at the Speak Easy. RP 925; *see also* RP 297-98, 473-74, 484. Moreover,

the Speak Easy's owner testified that dust from her project could not have migrated into Jarbo's space. RP 1042. She had a demise wall built between her space and Jarbo's in the fall of 2008; and her area was at all times secured with heavy plastic. RP 1033-36, 1049. As a result, Jarbo expressed concern about dust just once, when the demise wall was first erected. RP 1038; *see* RP 629.

Schuchart's attempt to shift blame to the Speak Easy project was unconvincing for many other reasons. According to Schuchart, the dust in Jarbo's space was "*residual dust in the duct work and HVAC filters,*" that circulated into Jarbo's space *because someone failed to "turn[] off the HVAC system while they were installing drywall, hanging, taping, finishing and sanding."* TEX 43 (emphasis added). There was no HVAC system in the 511 Boren building that extended into Jarbo's storage area. RP 299, 840. Schuchart's theory was pure fiction.

Schuchart also made much of dust observed in the common basement area and the Speak Easy site by Mr. Rutkowski in late March or early April 2009; and by Schuchart's expert, Ken Ridings, in May 2009. RP 249-51, 1190; TEX 14; CP 139 at ¶ 2. But the Speak Easy work those witnesses saw was completely different than the painting underway when Jarbo's merchandise was ruined. RP 1036, 1044. Moreover, by the time Mr. Rutkowski and Mr. Ridings visited 511 Boren, Schuchart had paid to

have Jarbo's merchandise and storage area cleaned twice. RP 251, 1190-91; TEX 14. The conditions Mr. Rutkowski and Mr. Riding observed and upon which they based their opinions, were wholly unrelated to the February 2009 dust plumes. *See* RP 282-84 (February 2009 dust was much worse than that in the TEX 63 pictures taken several months later).

Despite these critical flaws in Schuchart's blame-the-Speak Easy theory, on April 9, 2009, Mr. Rutkowski told Jarbo's owners that the Speak Easy project, not Schuchart, was to blame for Jarbo's damages. TEX 14. The Roths answered this "sudden shift in ... position" by reminding Mr. Rutkowski that when the dust plumes formed, a single painter was the only worker at the Speak Easy; the first plume formed when "Schuchart commenced the jack hammering/demolition work on the north wall of the [Greenstein building];" and the second plume formed after that work resumed. TEX 1.

The Roths "jack hammering" reference was mistaken. They knew only that dust plumes formed when loud noises came from the Greenstein building basement—not what piece of equipment caused the noise. RP 271-72, 307, 351-52, 471-72, 484. In fact, there was no jack hammering in the Greenstein building during the week of February 2-6, 2009. RP 431; *see* RP 257-60. Schuchart, however, used the Roth's mistake to try to shift blame to yet another entity – Demolition Man. TEX 3, 4, 9; RP

371-73; CP 25-32; *see* RP 1257. It did so knowing the loud noise Mr. Roth and Mr. Kaplan heard between 3:30 and 4:00 pm on February 3, 2009 could not have been caused by Demolition Man's equipment, since Demolition Man's crew left the worksite at 2:30 pm that day.² TEX 51; RP 210. It did so knowing the only contractor shut down because of dust complaints was the sandblasting sub-subcontractor, Aqua-Brite. TEX 41 (February 4, 2009 job report stating Aqua-Brite could only blast "at the basement off and on due to a supposed dust issue next door" and Aqua-Brite helped investigate the source of the dust). And it did so knowing that only sandblasters were working in the Greenstein building basement at any relevant time. TEX 9, 39-43.

Yet Schuchart persisted in blaming Demolition Man up to and during trial.³ Schuchart theorized that vibrations from pounding by Demolition Man's equipment somehow *twice* caused Speak Easy-generated wall-board dust in Jarbo's storage area to shake loose and form an impassable plume. RP 435, 938-39; TEX 4. Mr. Ridings, Schuchart's expert, de-

² Mr. Christ testified the loud noise heard in the 511 Boren basement likely was caused by Aqua-Brite's negative air machine. RP 937; *see* TEX 42 (job report describing sandblasting equipment as "very noisy").

³ At trial, Schuchart asserted the Roths' reference to jack hammering/demolition had misled it into focusing on Demolition Man. *E.g.*, RP 161. But Schuchart admitted Jarbo's reference to demolition work could include sandblasting, RP 421-23; and Schuchart knew all along that Demolition Man was not jack hammering at any relevant time, and was not even on site when the first plume formed. *E.g.*, RP 430-31, TEX 51.

bunked that theory, as he testified that vibration could not have caused the dust plume Mr. Kaplan and Mr. Roth described. RP 1182-83. Schuchart knew its vibration theory was implausible; indeed, Mr. Ridings said so in his March 2011 summary judgment declaration. CP 141. It also knew that most of the dust samples Mr. Ridings took from Jarbo's storage area contained concrete, not wallboard dust, which was yet another reason for the jury to reject Schuchart's blame-shifting theories.⁴ RP 1167-68.

E. Schuchart's Non-Disclosures and Jarbo's Resultant Delayed Acquisition of Information About the Sandblasting

Schuchart's refusal to accept liability for Jarbo's ruined merchandise forced Jarbo to file a negligence action against Schuchart in August 2009. CP 1-3. Schuchart joined Demolition Man as third party defendant. CP 25-32. When Jarbo asked Schuchart to disclose the identity of (and produce documents pertaining to) any person or entity with relevant knowledge, Schuchart never mentioned Aqua-Brite or the sandblasting mishaps that left "sand everywhere" and caused sand and dust to shoot out of every crack and crevice. Instead, Schuchart identified Demolition Man. CP 266-67, 422-24, 438-41.

On February 10, 2011, after discovery had otherwise closed, Schuchart deposed Britt Barton, Demolition Man's Rule 30(b)(6) witness. CP

⁴ For the same reasons, Schuchart's attempts to link the dust in Jarbo's space to vibration from other nearby construction projects were also untenable.

267, 321-22, 418 ¶ 3. Jarbo learned for the first time about the sandblasting mishaps described above and Mr. Christ's admission that the sandblasting dust in the Greenstein building looked exactly like the dust in Jarbo's basement storage area. CP 321-36; *see* RP 476 (Cary Roth's testimony that he knew nothing about sandblasting and no one ever mentioned sandblasting before February 2011); RP 479 (same).

Jarbo also learned how sandblasting dust could have entered its storage area. CP 329-30, 333. As Mr. Barton testified at trial, before Aqua-Brite began sandblasting in the Greenstein building basement, Demolition Man removed sheetrock from the exterior walls. Doing so exposed walls that were "very old, decrepit, sagged, not in great shape," with plainly visible cracks, gaps, and spaces between the bricks. RP 185-86; *accord* RP 926 (Mr. Christ's admission regarding condition of wall).

The exterior wall of the 511 Boren basement adjacent to the Greenstein building also was porous. Mr. Kaplan testified that after the dust settled, he saw holes in the wall and "could actually even feel some air kind of going through ... [i]f you put your hand up real close[.]" RP 284; *see* RP 912 (Mr. Christ's admission air flowed through holes in the 511 Boren wall); RP 819 (Schuchart's expert's similar admission). If air could enter Jarbo's space, so could dust—especially dust driven by com-

pressed air blasting at 800 pounds per square inch and which shot out of every hole, crack and crevice in the Greenstein building. RP 187-88, 214.

Despite these facts, despite Mr. Christ's admission the dust in Jarbo's space looked "the exact same" as the Greenstein building sandblasting dust, and despite his belief sandblasting caused the dust plumes in Jarbo's storage area, RP 189, 191; Schuchart never disclosed to Jarbo that sandblasting might have caused the dust. By time of trial, the reasons for its nondisclosure were clear: if the dust came from sandblasting, Schuchart was liable because it had not timely patched holes; and sandblasting lead paint is an inherently dangerous activity for which general contractors are vicariously liable. RP 1246-48; *see infra* at 27-30, 37-40, 45-49. It is at best ironic and at worst, deliberately misleading, for Schuchart to now complain that "shortly before trial, Jarbo switched its target to the work of a non-party ... Aqua-Brite, that performed sandblasting ... [and Jarbo] did not pursue its claim that the dust was created by 'jackhammering[.]'" App. Br. at 2. As the trial court recognized, if Jarbo was late in focusing on Aqua-Brite, Schuchart had only itself to blame as it was Schuchart that misled Jarbo by blaming Demolition Man, by failing to disclose Aqua-Brite's activities, and by giving false interrogatory answers. RP 725-26.

F. Schuchart's Lack of Credibility

Schuchart's primary theory of the case was that the dust in Jarbo's

space was not caused by any activity in the Greenstein building. RP 165-66. The jury had ample reason to reject that theory, not only because of the evidence detailed above, but because Schuchart's witnesses were not credible. Messrs. Rutkowski and Ridings formed opinions based on conditions that did not exist in February 2009, *see supra* at 12-14; and Mr. Christ's self-serving testimony was not believable.

For example, Mr. Christ failed to disclose to his employer, incidents that reflected poorly on his own performance. His detailed daily job reports do not mention the February 4, 2009 incident where lead-bearing dust shot from every opening in the Greenstein building and forced a work stoppage; or the one when Aqua-Brite's sandblasting hose blew up and spread sand everywhere. TEX 40-41; RP 948. He did not orally disclose those incidents, either. RP 237, 261-63. And rather than admitting that the dust in Jarbo's space looked exactly like the sandblasting dust in the Greenstein building, RP 189, 261-62; Mr. Christ told his superiors that drywall dust had spread through the HVAC system in the 511 Boren basement. TEX 43. That explanation was particularly preposterous, since there was no HVAC system, RP 840; and painting was the only work going on at the Speak Easy construction site when the dust plumes formed (another fact Mr. Christ never revealed), RP 238-39, 297-98, 925.

Mr. Christ's claim he performed a lead paint test on the Jarbo dust that was negative for lead (testimony Schuchart emphasizes to this Court) was equally unconvincing. RP 906. Mr. Christ's job reports did not mention the test (an omission the jury questioned, RP 950); Mr. Christ never asked the Roths for permission to conduct a test; and no one saw Mr. Christ conduct a test. RP 379, 478-79, 590-91; TEX 41-44. Further, the first ever mention of the alleged test came at trial, the day after Mr. Rutkowski was confronted with a report confirming the presence of lead paint in the Greenstein building and forced to concede that as a result, special safety-related sandblasting practices had been required. RP 230-33, 375; TEX 7 (1/06/09 Rpt. at 3-7); *see* RP 398-403 (Mr. Rutkowski's admission he did not mention the test at his deposition despite being asked about Schuchart's investigative measures).⁵ Those facts, together with the facts that no email or letter mentioned the alleged liability-absolving lead test and Schuchart did not have dust samples collected by its expert, Mr. Ridings, tested for lead, significantly undermined Schuchart's self-serving, undocumented claim. RP 1165; *e.g.*, TEX 1-4.

Also problematic were several other aspects of Mr. Christ's testimony. He testified that he could not remember when he first inspected

⁵ Although not before the jury, Mr. Christ's summary judgment declaration also did not mention a lead test. CP 110-14.

Jarbo's storage space, but also that he first inspected the space the day after Mr. Roth reported the first dust plume.⁶ RP 896. He testified he never saw a dust plume, RP 907, 910; but Mr. Kaplan emphatically testified otherwise. RP 300-01. Mr. Christ testified that everything in the 511 Boren basement was covered in dust, RP 905; but also that there was only "a little dust" in Jarbo's storage area, RP 902. He testified the air in Jarbo's storage area was as clear as the air in the courtroom, RP 907; but other witnesses (including Mr. Rutkowski, who had received a report of the event, RP 236) testified there was so much dust that it set off the smoke alarm, RP 278. Mr. Christ testified on direct that he created a barrier between the Greenstein building and 511 Boren before basement sandblasting commenced, RP 912-14; but could not explain why the first job report to mention that activity was dated February 6, 2009, days after the dust plumes ruined Jarbo's merchandise, TEX 43-44; RP 927-29.

Other inconsistencies contributed to Mr. Christ's lack of credibility. In addition to claiming (wrongly) that the dust in Jarbo's space was spread by a non-existent HVAC system, TEX 43; *e.g.*, RP 299, 840; he claimed vibrations from Demolition Man's concrete removal work had shaken dust loose in Jarbo's storage area, RP 938, 941. But Schuchart's

⁶ Mr. Roth and Mr. Kaplan both testified that Mr. Christ examined the Jarbo space immediately after they first reported the dust plume, but did so only briefly because the dust was still so thick. RP 274-75, 472-73.

expert, Mr. Ridings, testified that scenario would not have caused the dust plumes described by Mr. Kaplan and Mr. Roth. RP 1182-83.⁷ Mr. Christ testified that Demolition Man accidentally punched a large hole in the floor of the Greenstein building. RP 933. But Demolition Man's witness denied that claim and further testified that Schuchart never back-charged for the repairs such an incident would have required. RP 1213-15. Mr. Christ testified he stopped Demolition Man's work after Jarbo complained of dust, RP 937; but Mr. Barton testified otherwise, RP 215-16; and Mr. Christ's job reports established that it was Aqua-Brite (not Demolition Man) that he ordered to stop work and assist in his investigation. TEX 41. Taken together, these many inconsistencies gave the jury ample reason to disbelieve Mr. Christ's testimony.

G. Instructions to the Jury and the Jury's Verdict

Jarbo has consistently alleged that Schuchart is liable for "damage to Jarbo caused by its own actions and those of its subcontractors." CP 2-3; *see also* CP 269-79, 904, 940.⁸ Consistent with that allegation, the trial court instructed the jury it was Jarbo's burden to prove negligence by Schuchart, or by a subcontractor for whom Schuchart was legally respon-

⁷ Schuchart's attempt to blame the dust on vibration from work on other construction sites, including the Amazon site, failed for the same reason.

⁸ Schuchart has inexplicably ignored this, alleging that Jarbo "does not allege that Schuchart was negligent." CP 1880; *see also* CP 955 (Jarbo has not alleged Schuchart "performed any of the supposedly negligent work").

sible, and that the negligence proximately caused harm to Jarbo. CP 1852. The instructions explained that negligence can be found based on a failure to exercise ordinary care, CP 1854; or inferred if three prerequisites are met and no other satisfactory explanation exists, CP 1856.

The trial court also instructed on the four bases for finding Schuchart legally responsible for a subcontractor's negligence: (1) the subcontractor was Schuchart's agent; (2) Schuchart caused, knew of, and sanctioned the subcontractor's conduct; (3) a statute or regulation required Schuchart to take precautions or implement specific safeguards for the safety of others; or (4) the subcontractor's work was inherently dangerous or likely to create a peculiar risk of the type of harm alleged. CP 1857. A series of other instructions explained those concepts. CP 1858-62.

The jury was also instructed on Schuchart's contributory negligence and failure to mitigate defenses, CP 1865-69; on foreseeability, CP 1870;⁹ on the right to assume others will exercise ordinary care, CP 1871; and the duty to see what one using ordinary care would see, CP 1872.¹⁰

The jury entered a verdict for Jarbo and against only Schuchart. CP 1875-76. Based on the evidence described above, the jury had ample reason to reject Schuchart's no-causation theories and the self-serving,

⁹ Schuchart proposed the foreseeability instruction. CP 847, 883.

¹⁰ Schuchart objected to the latter two Demolition Man-proposed instructions, but abandoned its objection on appeal. CP 1142, 1172-73; RP 1239-40.

self-contradictory testimony of its witnesses. Schuchart does not argue otherwise on appeal, which is by itself reason to affirm the trial court and award Jarbo the fees it incurred responding to this frivolous appeal. There are, however, many additional reasons for the Court to do so, including Schuchart's failure to preserve the instructional errors about which it now complains and its flawed and/or inapposite legal analyses.

IV. ARGUMENT

A. Standard of Review

“The general test for reviewing jury instructions is whether the instructions, read as a whole, allow counsel to argue their theory of the case, are not misleading, and properly inform the trier of fact of the applicable law.” *Kirk v. Wash. State Univ.*, 109 Wn.2d 448, 460, 746 P.2d 285 (1987). Whether to give a particular instruction to the jury is a matter within the discretion of the trial court, and absent legal error, is reviewed under an abuse of discretion standard. *Stiley v. Block*, 130 Wn.2d 486, 498-99, 925 P.2d 194 (1996).

Parties are entitled to have the trial court instruct on their theory of the case if there is substantial evidence to support it. *Egede-Nissen v. Crystal Mountain, Inc.*, 93 Wn.2d 127, 135, 606 P.2d 1214 (1980). If on appeal a party makes an evidentiary sufficiency challenge to an instruction, the reviewing court views the evidence in the light most favorable to

the party who requested the instruction. *Mina v. Boise Cascade Corp.*, 37 Wn. App. 445, 448, 681 P.2d 880 (1984), *aff'd on other grounds*, 104 Wn.2d 696, 710 P.2d 184 (1985).

These general rules notwithstanding, instructional error is only grounds for reversal if it is prejudicial, *i.e.*, if it affects the outcome of trial. *Stiley*, 130 Wn.2d at 498-99. “Even if an instruction may be misleading, it will not be reversed unless prejudice is shown by the complaining party.” *State v. Aguirre*, 168 Wn.2d 350, 364, 229 P.3d 669 (2010).

In addition, the party challenging an instruction on appeal must have preserved the alleged error by apprising “the trial court of the precise points of law involved and the reason why it would be error to give the instruction.” *Edge-Nissan*, 93 Wn.2d at 134; *accord* CR 51(f) (party objecting to an instruction “shall state distinctly the matter to which he objects and the grounds of his objection, specifying the number, paragraph or particular part of the instruction to be given ... to which objection is made.”). By so doing, the objecting party gives the trial court an opportunity to correct mistakes in time to prevent the unnecessary expense of a second trial. *Van Hout v. Celotex Corp.*, 121 Wn.2d 697, 702-03, 853 P.2d 908 (1993). Thus absent constitutional ramifications, if instructional challenges made on appeal differ from those made to the trial court, the arguments will not be considered and the alleged error is not grounds for a

new trial. *Van Hout*, 121 Wn.2d at 702-03; *Egede-Nissen*, 93 Wn.2d at 134; *see also Haslund v. City of Seattle*, 86 Wn.2d 607, 614-16, 547 P.2d 1221 (1976) (points of law not provided trial judge will not be considered on appeal); RAP 2.5(a) (errors that may first be raised on appeal).

B. Schuchart Has Failed to Argue or Establish That the Alleged Errors About Which It Complains Warrant Reversal

1. The Challenged Instructions Did Not Prevent Schuchart From Arguing Its Theory of the Case

Schuchart's theory of the case was that work in the Greenstein building did not cause the dust plumes in Jarbo's storage space. RP 165-66. Alleged instructional error is not grounds for reversal if the instructions allow counsel to argue their theory of the case, are not misleading, and when read as a whole, properly state applicable law. *Aguirre*, 168 Wn.2d at 363-64; *Kirk*, 109 Wn.2d at 460. Schuchart has not argued, let alone established, that the trial court's instructions kept it from arguing its no-causation theory to the jury. Nor could it do so, as the trial court gave appropriate causation instructions, CP 1852, 1855; and the vicarious liability instructions Schuchart challenges on appeal are unrelated to causation.

Schuchart had ample opportunity to argue its theory that the dust that damaged Jarbo's merchandise was not proximately caused by work on the Greenstein building. The jury rejected Schuchart's alternative explanations because they were implausible and lacked supporting evidence,

not because it was misled by the trial court's instructions. Under *Kirk* and the myriad other similar cases, Schuchart's appeal is groundless.

2. The Challenged Instructions Did Not Affect the Outcome of Trial

Schuchart's appeal is also groundless for the even more fundamental reason that Schuchart has not argued, let alone shown, prejudice caused by the alleged instructional errors. *E.g., Stiley*, 130 Wn.2d at 498-99.

Schuchart's failure to allege (or argue) in its opening brief how and why the outcome of trial would have been different had the trial court not given the challenged instructions is dispositive. RAP 10.3(c); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (issues first raised in reply brief are not considered).

Regardless, substantial evidence supports the jury's verdict and confirms the jury would have found for Jarbo even without the challenged instructions. Schuchart's witnesses lacked credibility, *see supra* at 18-21; and its alternative causation theories made no sense. The solo painter working at the Speak Easy could not have caused impassible dust plumes to suddenly form in Jarbo's storage space. RP 297-98, 473-74, 484, 925. Other construction work in the area had long been underway without causing dust plumes to appear in Jarbo's space, the street, or anywhere else, RP 281, 298-99, 523-25, 631; and Schuchart's expert admitted that Schuchart's vibration-based blame-shifting theory was untenable, RP 1182-83.

In addition, substantial evidence supported Jarbo's primary theory that Schuchart's own negligence caused Jarbo's damage. *See* RP 1264 (closing argument). Schuchart's challenges to the res ipsa loquitur and vicarious liability instructions therefore fail because Schuchart cannot show that those instructions affected the outcome of trial. In civil cases:

[W]e should not reverse the jury's general verdict because it is impossible to tell [the theory on which] it was based....
Ordinarily a general jury verdict should be upheld where the jury has been instructed on several theories and one of the theories presented is proper.

Farm Crop Energy, Inc. v. Old Nat'l Bank of Wash., 109 Wn.2d 923, 942, 750 P.2d 231 (1988) (emphasis added).

Tellingly, Schuchart does not attempt to establish that it was not itself negligent. In fact, Schuchart ignores the issue. The evidence of Schuchart's own negligence was, however, overwhelming.

It was undisputed that it was Schuchart's duty to ensure that sandblasting dust – dust Schuchart knew might contain lead – did not escape from the Greenstein building. In addition to having overall responsibility for safety, TEX 38; *see also* TEX 35-37; RP 885 (Mr. Christ's testimony that it was Schuchart's job to "control safety"); Schuchart was responsible for pre-sandblasting containment. Mr. Rutkowski admitted it was Schuchart's responsibility to deal with lead paint issues, RP 443-44; and he conceded it "was Schuchart's job to get ... ready for the sandblasters

[by] filling the holes before the blasters got there.” RP 244-45. In addition, Schuchart’s job reports confirmed that it was *Schuchart* that (belatedly) “patched holes in the first floor and the walls in the basement to keep all the sand and dust in the basement” and filled holes “for the blasters.”¹¹ TEX 43-44; *accord* RP 927-29.

It was also undisputed that the only reliable evidence of Schuchart taking action to comply with its duty established that Schuchart waited until February 6 to do so – several days after the dust plumes had ruined Jarbo’s merchandise. TEX 43-44; RP 247, 446-47, 721. Evidently Schuchart was more concerned with keeping to a schedule than with ensuring that lead-bearing sandblasting dust did not escape from the Greenstein building. TEX 9 (Schuchart told Demolition Man to “hurry and finish the basement so that the sandblasting company could begin their work”).

Witnesses also testified that it was Schuchart’s duty to warn Jarbo about the work about to be performed. Mr. Rutkowski testified, for example, that it was Schuchart’s duty to anticipate potential harm to neighbors and to inform neighbors before work begins. RP 260, 443. Mr. Barton testified that it was “Schuchart’s responsibility to deal with the neighbors and take necessary precautions when vibrations are made.” RP 190.

¹¹ In accord was Mr. Barton’s testimony that had he been in charge, he would have made sure the area was properly contained before allowing sandblasting to begin. RP 213-14.

Again, Schuchart failed to perform its duty, as no one contacted Jarbo before work commenced. RP 353, 356, 479, 590-91. Schuchart's arguments notwithstanding, Schuchart's direct negligence was the primary issue in the case and the evidence gave the jury ample reason to find for Jarbo on that theory. That is dispositive of Schuchart's appeal.

C. Schuchart's Instruction-Specific Challenges Fail

1. Schuchart Has Not Established Grounds for Reversal Arising From the Res Ipsa Loquitur Instruction (Instruction 13, CP 1856)

a. Schuchart Did Not Preserve the Alleged Errors About Which It Complains

On appeal, Schuchart makes a host of scattershot arguments about why the trial court should not have given Instruction 13, the res ipsa loquitur instruction. CP 1856; App. Br. at 12-17. Schuchart did not make those arguments to the trial court. Schuchart objected to Instruction 13 on two grounds: (1) res ipsa loquitur "applies when there is no negligence alleged or no proof of negligence" and since Jarbo had alleged negligence, it was not entitled to a res ipsa instruction, RP 1236-37; and (2) there was no evidence of exclusive control because "[w]e don't have exclusive control of the instrumentality that caused the damage, *we were not in control of the sandblasting equipment,*" RP 1237 (emphasis added). Neither argument is repeated on appeal. Schuchart's challenges to Instruction 13 fail for that reason alone. *E.g., Van Hout*, 121 Wn.2d at 702-03; CR 51(f).

b. Schuchart's Instruction 13 Challenges are Legally Untenable

If the Court were to reach Schuchart's legal challenges to Instruction 13, it must reject them. A *res ipsa loquitur* instruction allows (but does not require) the jury to infer negligence when plaintiff has an excusable lack of evidence from which negligence could be established. *Curtis v. Lein*, 169 Wn.2d 884, 889, 239 P.3d 1078 (2010); 16 David K. DeWolf & Keller W. Allen, WASH. PRACTICE, TORT LAW & PRACTICE § 1.53 at 72 (3d ed. 2006); *see* CP 1856. As with any permissible inference, the jury is free to accept or reject it. *Curtis*, 169 Wn.2d at 895. Thus an erroneous permissive inference instruction is unlikely to affect the outcome of trial. *See State v. King*, 22 Wn. App. 330, 334-36, 589 P.2d 306 (where jury properly instructed on elements and burden of proof, giving improper permissive inference instruction was harmless), *aff'd on other grounds*, 92 Wn.2d 541, 599 P.2d 522 (1979). Tellingly, Schuchart never explains how Instruction 13—which permitted only an inference of negligence, and had nothing to do with causation—adversely affected its position at trial or prevented it from arguing its no-causation theory to the jury. These omissions are dispositive.

In any event, the *res ipsa loquitur* instruction was warranted. Such an instruction is particularly appropriate when, as here, the defendant prevented plaintiff from being able to present evidence of negligence. In

Curtis, for example, plaintiff could not prove defendant negligently maintained a dock that collapsed when plaintiff walked on it, because defendants destroyed the dock shortly after the incident. 169 Wn.2d at 887-88; *id.* at 896 (Madsen, C.J., concurring). Res ipsa loquitur applied. 169 Wn.2d at 889-95. Res ipsa loquitur also applied in a case where plaintiff was injured when a scaffolding board broke. Plaintiff was too injured to inspect the board immediately after the accident and defendant did not produce the board or any evidence as to its condition. *Penson v. Inland Empire Paper Co.*, 73 Wash. 338, 346-48, 132 P. 39 (1913).

Here, Schuchart withheld until after discovery closed, information about the sandblasting mishaps that occurred contemporaneously with the dust plumes and Mr. Christ's admission that the dust in Jarbo's area was the same as the sandblasting dust in the Greenstein building. RP 187-89, 214-15; *see supra* at 9-11, 16-18. As a result, Jarbo never had a chance to seek discovery pertaining to Schuchart's (or Aqua-Brite's) sandblasting-related negligence. Moreover, by the time Jarbo learned (through discovery, after litigation commenced) that there had been a sandblasting subcontractor in the Greenstein building basement in February 2009, Schuchart had twice-cleaned Jarbo's storage area, TEX 14; and deliberately and misleadingly caused Jarbo to focus on Demolition Man as the subcontractor whose work caused dust to enter Jarbo's space, CP 25-32.

Further, although Schuchart argues (for the first time on appeal) that Jarbo could have procured evidence establishing the nature and source of the dust when the dust plume incidents occurred, in fact Schuchart lulled Jarbo into believing such efforts were unnecessary. RP 644 (Jarbo viewed Schuchart's clean up efforts as an admission of responsibility). As explained above, upon learning of the dust plumes, Schuchart tried to protect Jarbo's goods and then cleaned the space and the merchandise. Only several months later – after the cleaning efforts were complete – did Schuchart “sudden[ly] shift [its] position regarding the damage[.]” TEX 1. In short, Schuchart's new argument is just another untenable manifestation of Schuchart's blame-the-victim tactic, a tactic that the trial court soundly and properly rejected. RP 724-26.

The trial court also did not err in instructing on *res ipsa loquitur*, because substantial evidence supported each element of the theory with respect to Schuchart; as well as to the sandblasting subcontractor, Aqua-Brite, for whom Schuchart was vicariously liable. *Brown v. Dahl*, 41 Wn. App. 565, 580-83, 705 P.2d 781 (1985) (instruction on *res ipsa loquitur* proper when substantial evidence supports each element, even if defendant presented weighty, competent exculpatory evidence).

The first *res ipsa loquitur* element is that the injury-producing event would not ordinarily happen absent negligence, *i.e.*, when general

experience and observation teaches that the result would not be expected without negligence. *E.g., Curtis*, 169 Wn.2d at 891-92. Here, particularly given the special precautions required when lead paint is sandblasted, only negligence can explain Schuchart's failure to patch holes in the Greenstein building before allowing sandblasting to begin and to thereby ensure against sandblasting dust shooting out of every crack and crevice of the Greenstein building and leaving sand everywhere. Alternatively, only negligence can explain Aqua-Brite having sandblasted in such a way that dust shot outside the Greenstein basement despite the use of special preventative equipment. TEX 7 (1/06/09 Rpt. at 3-7); *see* RP 409.

The second *res ipsa loquitur* element is that defendant had exclusive control of the instrument that caused plaintiff's injury. *Curtis*, 169 Wn.2d at 891, 893. On appeal, Schuchart argues (for the first time) that this element is not met because some Schuchart witnesses (but not its expert) speculated that the dust might have come from another construction project. That is as irrelevant as Schuchart's theory is implausible. A defendant's ability to posit other causes of the incident that led to plaintiff's harm does not preclude instructing the jury on *res ipsa loquitur*. As explained in *Curtis*, "[a] plaintiff claiming *res ipsa loquitur* is not required to eliminate with certainty all other possible causes or inferences in order for *res ipsa loquitur* to apply." 169 Wn.2d at 894 (internal quote marks and

citations omitted). Moreover, as explained above, Schuchart had exclusive control of the permeability of the Greenstein building's exterior walls, as it was Schuchart's duty to patch holes before sandblasting commenced. Alternatively, regarding the presumed negligence of its subcontractor, Schuchart concedes Aqua-Brite had exclusive control of the sandblasting equipment that it evidently mishandled.

The third element is that plaintiff did not contribute to the accident or occurrence. *Curtis*, 169 Wn.2d at 891. The presence of that element is not in dispute. Not only did Jarbo do nothing to cause sandblasting dust to migrate into its space, given Schuchart's failure to warn Jarbo of the potential for that occurring, RP 353, 356, 479, 590-91; and Jarbo's lack of any prior problems with dust despite being surrounded by construction projects, RP 281, 298-99; Jarbo had no reason to take protective measures. Had Schuchart warned Jarbo about the work that was about to commence, Jarbo would have taken appropriate precautions. RP 353.

In sum, the arguments Schuchart makes on appeal regarding Instruction 13 were not made to the trial court, Schuchart has failed to establish prejudice resulting from the jury being instructed it could infer negligence if it found certain elements, and the trial court did not err in giving a *res ipsa loquitur* instruction. Schuchart's challenge to Instruction 13 fails.

2. Schuchart Has Not Established Grounds for Reversal Arising From the Vicarious Liability Instruction (Instruction 14, CP 1857)

a. Schuchart Did Not Preserve and/or Waived the Alleged Error About Which It Complains

On appeal, Schuchart seems to challenge paragraph 4 of Instruction 14, the instruction detailing when Schuchart could be held vicariously liable for its subcontractor's negligence.¹² CP 1857; App. Br. at 17-23. Paragraph 4 states that a general contractor is legally responsible for damages caused by the subcontractor's negligence when "[t]he subcontractor's work is inherently dangerous or the work undertaken is likely to create a peculiar risk of the type of harm alleged." CP 1857 at ¶ 4.

At trial, however, Schuchart objected to paragraph 3 of Instruction 14. RP 1238. Paragraph 3 says contractors are responsible for a subcontractor's negligence when "[t]he general contractor is required by statute or administrative regulation to take precautions or implement specific safeguards for the safety of others[.]" CP 1857 at ¶ 3. Schuchart argued:

Instruction number 14, paragraph 3, is not a correct statement of the law. This is not a safety issue. We are a general contractor, who would be required by the statute or administrative regulation to implement specific safeguards for the safety of the others. It is not applicable in this case.

RP 1238-39.

¹² In its assignments of error, Schuchart references Instruction 19 in its challenge to Instruction 14. However, Schuchart did not object to Instruction 19 at trial. RP 1236-40.

Schuchart did not preserve the alleged error it argues on appeal. In reply, Schuchart may claim otherwise by arguing it somehow preserved its challenge to Instruction 14, ¶ 4 when it argued the *res ipsa loquitur* instruction (Instruction 13) was improper because “[t]here has been no proof that sandblasting lead paint base is inherently dangerous activity.” RP 1240. If so, the Court must reject that argument, as Schuchart’s objection was not specifically directed at Instruction 14 and was too cursory to inform the Court of the specifics of the objection. Moreover, Schuchart could not make that argument at trial (or now) since it, too, proposed an instruction informing the jury that general contractors are liable when “the work for which the independent contractor is hired is ‘inherently dangerous.’”¹³ CP 847, 876. A party waives the right to challenge an instruction if it proposed an instruction in the trial court that contained the same alleged error. *State v. Neher*, 112 Wn.2d 347, 352-53, 771 P.2d 330 (1989).

b. Schuchart’s Instruction 14 Challenge is Legally Untenable

Were the Court to reach the merits of Schuchart’s challenge to Instruction 14, ¶ 4, it must reject them. Schuchart relies on arguments about strict liability for “abnormally dangerous activities,” the RESTATEMENT

¹³ Indeed, Schuchart objected to the trial court’s failure to give Schuchart’s proposed instruction on inherently dangerous activities. RP 1237.

(SECOND) OF TORTS §§ 519-20 (1977), and related case law.¹⁴ The jury was not instructed on strict liability arising from abnormally dangerous activities; it was instructed on vicarious liability for inherently dangerous activities and work likely to create a peculiar risk of the type of harm alleged. CP 1857 at ¶ 4. Such liability is addressed in the RESTATEMENT chapter titled “Liability of an Employer of an Independent Contractor.” *Id.* §§ 409-29. Particularly relevant here is § 427, which concerns “Negligence as to Danger Inherent in the Work,” and provides:

One who employs an independent contractor to do work involving a special danger to others which the employer knows or has reason to know to be inherent in or normal to the work, or which he contemplates or has reason to contemplate when making the contract, is subject to liability for physical harm caused to such others by the contractor’s failure to take reasonable precautions against such danger.

Id. § 427; *see also id.* § 416 (independent contractor’s employer is liable for work employer should recognize is likely to create a peculiar risk of harm to others if special precautions are not taken).

For RESTATEMENT § 427 to apply, “it is not...necessary ... that the work be of a kind which cannot be done without a risk of harm to others, or ... of a kind which involves a high degree of risk of such harm, or that the risk be one of very serious harm, such as death or bodily injury.” *Id.* cmt. b. Instead, it is sufficient that the work “involves a risk, recognizable

¹⁴ Interestingly, at the end of trial Schuchart tried unsuccessfully to assert a strict liability claim against Demolition Man. CP 1098-99.

in advance, of physical harm to others which is inherent in the work itself, or ... *that the employer has special reason to contemplate such a risk under the particular circumstances[.]*" *Id.* (emphasis added). Washington law is in accord. *E.g., Kelly v. Howard S. Wright Constr. Co.*, 90 Wn.2d 323, 330-34, 582 P.2d 500 (1978); *Sea Farms, Inc. v. Foster & Marshall Realty, Inc.*, 42 Wn. App. 308, 311-14, 711 P.2d 1049 (1985).

Moreover, although Schuchart argues there is vicarious liability only for inherently dangerous activities that result in personal injury, App. Br. at 20; that is not the case. In *Sea Farms*, for example, plaintiff alleged that dredging work performed in connection with construction of a nearby marina damaged its oyster beds. 42 Wn. App. at 309-10. The trial court dismissed plaintiffs' claims against the dredging contractor's employer. The Court of Appeals reversed, holding the employer could be vicariously liable under any of several nondelegable duty theories, including inherent dangerousness and peculiar risk of specific harm. 42 Wn. App. at 311-14.

It explained:

An owner may be liable for the negligence of an independent contractor if the work is inherently dangerous or if the work undertaken is likely to be peculiarly dangerous unless special precautions are taken. Neither phrase has ever yet been very well defined by anyone and they are apparently intended to mean very much the same thing.

Whether dredging ... is inherently dangerous need not be considered. We believe that such dredging as was

carried on here may create a peculiar risk of the type of harm alleged, thus creating a nondelegable common law duty.

42 Wn. App. at 314 (citations and internal quote marks omitted).

Schuchart's Instruction 14 arguments ignore these authorities.

They also ignore that sandblasting creates precisely the kind of risk that imposes a nondelegable duty within the purview of RESTATEMENT § 427, § 416, and *Sea Farms*, particularly (although not only) when lead-based paint is involved. As Mr. Barton testified, the second sandblasting mishap created an unsafe situation because the cloud formed so quickly and the dust was so thick that it affected respiration. RP 187-88. Mr. Kaplan testified he could not enter Jarbo's storage area because the dust was too thick to breathe. RP 272, 357. That evidence is by itself sufficient to support Instruction 14, ¶ 4.

Further, the Legislature has declared that "lead hazards associated with lead-based paint represent a significant and preventable environmental health problem," and there is a "need to protect the public from exposure to lead hazards" and to "*safeguard[] the environment.*" RCW 70.103.010(1), (4) (emphasis added). Construction work involving lead paint, including demolition and "[r]emoval ... of materials containing lead," thus is subject to strict regulation. WAC 296-155-17603(1), (2). Certainly the Legislature believes it is inherently dangerous to sandblast lead paint and expel it into the environment. Under the authorities cited

above, and particularly under *Sea Farms*, that also warranted instructing the jury on Schuchart's vicarious liability for Aqua-Brite's negligence. 42 Wn. App. at 313-14 (statutes prohibiting pollution impose nondelegable duty).

In sum, Schuchart's challenge to paragraph 4 (the inherently dangerous paragraph) of the vicarious liability instruction fails because Schuchart did not challenge the paragraph in the trial court; waived any potential challenge to paragraph 4 by also proposing an instruction on a general contractor's liability for inherently dangerous activities; and because its legal arguments are inapposite and untenable. For all of these reasons, the Court must reject Schuchart's challenge to Instruction 14.¹⁵

3. Schuchart Has Failed to Establish Grounds for Reversal Arising From the Agency-Related Instructions (Instructions 15-17, CP 1858-60)

a. Schuchart Did Not Preserve the Alleged Error About Which It Complains

Instruction 15 repeats verbatim, WPI 50.01 (Supp. 2011), which defines an agent as one employed by the principal to perform services, who is subject to the principal's control or right to control the manner and means of performing services. CP 1858. Instruction 16 repeats verbatim

¹⁵ For the same reasons, Schuchart's unpreserved and inadequate attempt to challenge Instruction 19 also fails. *E.g.*, *Cowiche Canyon*, 118 Wn.2d at 809 (reviewing court will not consider arguments not supported by authority); *Saunders v. Lloyd's of London*, 113 Wn.2d 330, 345, 779 P.2d 249 (1989) (issues unsupported by adequate argument and authority will not be considered on review).

WPI 50.03 (Supp. 2011), which states that the act or omission of an agent within the scope of authority is the act or omission of the principal. CP 1859. Instruction 17 is premised on WPI 50.07 (Supp. 2011), the instruction explaining who the jury may find liable when the principal, but not the agent, is sued and the principal denies agency. CP 1860.

At trial, Schuchart challenged these three instructions on the ground that “[p]laintiff never pled agency principal relationship,” and this is “properly a principal independent contractor case, not an agency case.” RP 1239. On appeal, Schuchart challenges the instructions by arguing that Jarbo failed to establish sufficient grounds for instructing on vicarious liability. Schuchart’s arguments on appeal bear no relation to its arguments to the trial court. Its challenge is improperly before the Court.

b. Schuchart’s Challenge to the Sufficiency of the Evidence Supporting Instructions 15-17 Challenges Is Untenable

Not only does Schuchart make entirely new arguments about Instructions 15-17 on appeal, its does not address the three agency-related instructions it challenges or explain how they could have had any impact on a trial where the primary focus was Schuchart’s own negligence. Further, although Schuchart claims its agency instruction challenges “flow[] from erroneous Instruction 14,” App. Br. at 23; Schuchart never challenged the agency paragraph in Instruction 14. CP 1857 at ¶ 1; RP 1236-

40. Nor did it have reason to do so, as that paragraph simply repeated well-settled law that one can be called an independent contractor but still be an agent. *See* CP 940 (citing *Massey v. Tube Art Display, Inc.*, 15 Wn. App. 782, 551 P.2d 1387 (1976)).

Given the above, Schuchart's arguments on Instructions 15-17 are unclear. It appears Schuchart is attempting to argue that Jarbo failed to proffer sufficient evidence of Schuchart's control over Aqua-Brite, the sandblasting subcontractor, to submit to the jury the question of whether Schuchart could be vicariously liable for Aqua-Brite's negligence. If that in fact is Schuchart's argument, it fails for multiple reasons.

Schuchart claims, for example, that it is somehow significant that at trial the testimony was "uncontested that the subcontractors were responsible for their own work and were not controlled by Schuchart." App. Br. at 25. Schuchart's witnesses did proffer conclusory testimony to that effect, but they also testified that Schuchart controlled when, whether, and under what conditions the sandblasters could begin work. In short, testimony regarding control was not the least bit uniform.

Evidence of Schuchart's control included Mr. Rutkowski's admission that it "was Schuchart's job to get ... ready for the sandblasters.... [by] filling the holes before the blasters got there." RP 244-45. Mr. Christ similarly conceded that Schuchart patched holes the exterior walls to keep

sand and dust in the Greenstein building. RP 927; *see also* TEX 43-44; RP 213-14 (Mr. Barton's testimony person in charge is responsible for making sure area is properly contained before allowing sandblasting to begin). Schuchart shut Aqua-Brite down in response to Jarbo's dust plume complaints. TEX 41; RP 215-16. Schuchart thus controlled when Aqua-Brite could begin sandblasting on any particular floor. Schuchart also controlled whether and when Aqua-Brite could resume sandblasting after the sandblasting mishaps caused dust to shoot out of the Greenstein building, RP 187-88, 215-16; as Mr. Christ's job report specifically references Aqua-Brite's work stoppages, TEX 41.

The evidence also established that Schuchart exercised control over safety matters. TEX 35-38; *see also* RP 885 (Mr. Christ's testimony that it was Schuchart's job to "control safety"); RP 443-44 (Mr. Rutkowski's testimony that Schuchart was responsible for lead paint abatement). That was significant, as safety unquestionably is implicated when lead paint is sandblasted. TEX 7 (1/06/09 Rpt. at 3-7). Mr. Christ confirmed that. He testified that after sandblasting began (and after the first dust plume formed), he could not enter the basement because it was too dangerous. He explained: "once they start, you can't go down there, because it is lead dust and everything else.... Because you can't go down

there, because of the lead. You have to pull suits and all of that. We didn't have suits." RP 914.

The evidence of control here is much like the evidence found sufficient to find control in *Massey*. 15 Wn. App. at 788 (employer performed preliminary work, got building permits, and controlled when and where work would be performed). The issue is largely academic, however, as Schuchart itself proposed and does not now challenge, the very instruction that detailed for the jury what constitutes control, *i.e.*, Instruction 18, and which is the only agency instruction for which Schuchart's arguments are relevant. RP 1233; CP 1861. Having failed to do so, Schuchart's evidence-of-control based challenge to Instructions 15-17 fails for the fundamental reasons that Schuchart has not shown prejudice and effectively ratified the instructing-on-agency error about which it complains.

D. The Trial Court Correctly Denied Schuchart's Rule 50(a) Motion

Before the trial court submitted this matter to the jury, Schuchart moved for judgment as a matter of law under CR 50(a). CP 1879-87. Schuchart argued, mistakenly, that "[p]laintiff does not allege that Schuchart was negligent," (beginning with its complaint, Jarbo consistently alleged Schuchart's negligence, CP 1-3); and also that "even if the sandblasters were the cause of plaintiff's damages, Schuchart cannot be held liable for the negligence of its independent contractor and none of the ex-

ceptions to this rule apply in this case.” CP 1880. The trial court properly denied Schuchart’s motion and this Court should affirm.

A party seeking dismissal under Rule 50 faces a heavy burden:

In ruling on a motion for a directed verdict ... *the court must accept the truth of the nonmoving party's evidence and draw all favorable inferences that may reasonably be evinced. The evidence must be viewed in the light most favorable to the nonmoving party. The court may grant the motion only where there is no competent evidence or reasonable inference which would sustain a verdict in favor of the nonmoving party. “If there is any justifiable evidence upon which reasonable minds might reach conclusions that sustain the verdict, the question is for the jury.”*

Lockwood v. AC&S, Inc., 109 Wn.2d 235, 243, 744 P.2d 605 (1987) (emphasis added; citations omitted); *accord Van Hout*, 121 Wn.2d at 706.

Based on the trial evidence, Schuchart could not meet that standard.

As shown above, Jarbo presented substantial evidence that Schuchart was itself negligent and its negligence proximately caused Jarbo’s damage. Evidence establishing the duty and breach elements of Jarbo’s direct negligence claim included testimony and documents establishing Schuchart’s responsibility for patching holes in the wall before allowing sandblasting to begin, and for warning neighbors of potentially dangerous work; and Schuchart’s failure to do so despite knowing the Greenstein building’s basement wall was cracked, sagging, and full of holes. *E.g.*, RP 185-86, 190, 213-14, 244-45, 260, 353, 356, 443, 926-29; TEX 43-44. Evidence establishing causation included Mr. Christ’s admission that the

dust in Jarbo's space looked exactly like sandblasting dust in the Greenstein building; and Mr. Barton's testimony about sandblasting mishaps that caused dust to shoot out of the Greenstein building contemporaneously with dust plumes forming in Jarbo's storage area.¹⁶ RP 187-89, 191, 215, 922-25. Under *Lockwood*, that was more than enough to submit Jarbo's direct negligence claim to the jury. 109 Wn.2d at 243.

There was also ample evidence supporting Jarbo's four vicarious liability theories – theories well established by cases such as *Kelly*, 90 Wn.2d at 330-34; *Sea Farms*, 42 Wn. App. at 311-14; and *Massey*, 15 Wn. App. at 785-90. *See* CP 940, 1857. The sufficiency of the evidence of Jarbo's agency theory is described above. Evidence supporting Jarbo's second vicarious liability theory – that Schuchart caused, knew of, and sanctioned the subcontractor's conduct – included evidence of Schuchart's schedule-driven failure to patch holes in the Greenstein basement wall before letting sandblasting begin, *see* TEX 9, 43-44; and its decision to allow sandblasting to continue despite that omission, even after the first dust plume formed in Jarbo's storage space. As Schuchart's representatives told Mr. Kaplan, the work had to continue. RP 275, 278.

¹⁶ It was also telling that Schuchart could not explain why, if sandblasting were not to blame for the dust, Schuchart belatedly patched holes in the basement walls "to keep sand and dust in the basement," and once it did so, no more dust plumes formed in Jarbo's space. TEX 43; *see* TEX 44; RP 281, 441.

Jarbo's third vicarious liability theory was that Schuchart was required by statute or administrative regulation to take precautions or implement specific safeguards for the safety of others. CP 1857. In its Rule 50 motion, Jarbo argued that the duty to take precautions regarding lead paint belonged solely to the subcontractor. CP 1886-87. Jarbo cited no apposite authority supporting that proposition, however, and the testimony at trial was that Jarbo had overall responsibility for safety, and for ensuring that sandblasting dust did not escape from the Greenstein building. *E.g.*, RP 244-45, 885. Indeed, Mr. Rutkowski testified that Schuchart bore responsibility for dealing with lead paint-related abatement issues. RP 443-44. Regardless, as the *Sea Farms* court made clear, statutorily imposed public safety duties such as those associated with lead paint are non-delegable. 42 Wn. App. at 313-14.

Jarbo's final theory was that Schuchart was vicariously liable because the work performed by its sandblasting subcontractor—removing lead-based paint—was inherently dangerous. Evidence supporting that theory included Mr. Christ's testimony that once sandblasting commenced, it was too dangerous to enter the area without a special suit; Mr. Barton's testimony that the escaped sandblasting dust affected respiration; and testimony and evidence that lead paint is a hazardous material and

special precautions are needed when lead-based paint is sandblasted. RP 187-88, 230-33, 914; TEX 7 (1/06/09 Rpt. at 3-7).

Based on the evidence of Schuchart's direct and vicarious liability, the trial court properly submitted this case to the jury. That the trial court did not err in so doing is confirmed by the fact that the jury in fact found for Jarbo. Schuchart's cursory argument on appeal, an argument that inexplicably rests in part on Schuchart's wholly mistaken assertion that the instructions somehow transformed Jarbo's negligence claim into a strict liability claim, does not establish otherwise. Jarbo respectfully asks the Court to affirm the denial of Schuchart's Rule 50(a) motion.

V. RAP 18.9(a) REQUEST FOR FEES

Schuchart asserts arguments about alleged instructional errors that Schuchart never raised in the trial court and/or were waived when Schuchart submitted similar instructions. Although premising its appeal on instructional error, Schuchart has utterly failed to argue, let alone meet its burden, that the alleged errors prevented it from arguing its no-proximate-cause theory to the jury or affected the outcome of trial.

Under RAP 18.9(a), the Court can award fees a party incurs responding to a frivolous appeal. An appeal is frivolous when the appeal presents no debatable issues on which reasonable minds could differ and is so lacking in merit that there is no possibility of reversal. *Mahoney v.*

Shinpo, 107 Wn.2d 679, 691, 732 P.2d 510 (1987). An appeal premised on unpreserved, unprejudicial alleged instructional error is such an appeal. Jarbo therefore asks the Court to award it the fees it incurred responding to Schuchart's frivolous appeal.

VI. CONCLUSION

For all the reasons stated herein, Jarbo respectfully asks the Court to affirm the judgment entered on the jury's verdict and to award Jarbo the fees and costs it incurred responding to Schuchart's frivolous appeal.

DATED THIS 9th day of March, 2012.

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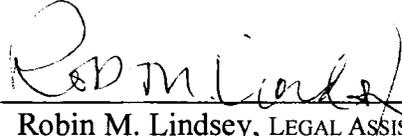
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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that on March 9, 2012, I arranged for the foregoing Brief of Respondent AFR2 LLC d/b/a Jarbo to be served on the parties to this action as follows:

William J. O'Brien, III Law Office of William J. O'Brien 999 Third Avenue, Suite 805 Seattle, Washington 98104	<input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> Electronic mail
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DATED this 9th day of March, 2012, at Seattle, Washington.

By: 
Robin M. Lindsey, LEGAL ASSISTANT
TO Robert M. Sulkin, Malaika M. Eaton and
Barbara H. Schuknecht