

No. 46374-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

VERL LEE and MARSHA LEE, husband and wife,

Respondents,

v.

WILLIS ENTERPRISES, INC., a Washington corporation,
and DANIEL FLETCHER,

Appellants.

ON APPEAL FROM GRAYS HARBOR COUNTY SUPERIOR COURT
Honorable F. Mark McCauley

APPELLANTS' REPLY BRIEF

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I. ARGUMENT

A person exercises reasonable care if they avoid foreseeable risks to others. The Lees failed to meet their burden of proving, as a matter of law, that Fletcher should have known that his actions -- trying to tap a stuck fan -- would result in an unreasonable risk of harm for Lee, a bystander. The Lees failed to prove that every reasonable person would have appreciated that Fletcher's actions posed an unreasonable risk of harm to those standing near the equipment. In fact, there was evidence to support a finding that even Lee, an expert on electronics, did not foresee such a risk. A jury should have been allowed to decide whether the arc blast risk was reasonably foreseeable.

A jury should also have been allowed to decide whether Fletcher was negligent if he relied on Lee's expertise and the assurance of safety implicit in Lee responding to Fletcher's proposal with 15 seconds of silence and a continued shining of the flashlight. The jury could have found those actions created an implied assurance of safety that a reasonable person could have relied upon.

Both of these issues were preserved. Nor can the trial court's error in granting summary judgment on them be excused as harmless.

The trial court also erred at trial by preventing Fletcher from testifying as to his impressions that Lee continued holding the flashlight so that Fletcher could see to tap the fan, and that he understood that Lee acquiesced to his plan. This testimony was relevant to contributory fault,

and was admissible under ER 602 because Fletcher was there to witness events and statements relevant to prove Lee's state of mind.

The trial court further erred at trial by admitting testimony that Fletcher had a tendency to act impulsively and needed to be kept on a short leash. The Lees do not dispute that was character evidence, but argue that Fletcher and Willis made the evidence relevant by pursuing the theory that Lee failed to control the project he was called out to perform. Pursuing that theory, however, did not create an unfair inference as to Fletcher's character that could only have been rebutted through the use of character evidence. The Lees also ignore that the bar against character evidence is an express exception to the general admissibility of relevant evidence.

This Court should reverse and remand for a trial on negligence and a new trial on contributory negligence.

A. The trial court erred in deciding that Fletcher was negligent, where the Lees failed to prove that the injury to Lee from Fletcher's actions was foreseeable as a matter of law.

Contrary to the Lees' assertion, Fletcher and Willis do not claim as a matter of law that there was "no foreseeable risk of injury" to Lee, Respondent's Brief, at 25; the issue is whether a jury question was presented. The Lees cannot avoid this issue by asserting that Fletcher did something generally "unsafe" that could foreseeably injure himself or damage the equipment. The "defendant's obligation to refrain from particular conduct is owed *only to those who are foreseeably endangered by the conduct and only with respect to those risks or hazards whose*

likelihood made the conduct unreasonably dangerous.” Hunsley v. Giard, 87 Wn.2d 424, 436, 553 P.2d 1096 (1976) (quotation and citation omitted) (emphasis added).

1. The scope of the duty at issue was for the jury to decide, because reasonable minds could differ as to whether Fletcher knew or should have known that his actions could create an unreasonable risk of harm to Lee.

Fletcher and Willis cited the correct test for foreseeability, which is not a purely subjective test: “Whether the risk was reasonably foreseeable to the defendant depends on the extent of his *actual or imputed knowledge* of the risk of harm at the time of the injury-causing occurrence.” Appellant’s Brief, at 33 (emphasis added), citing *Huston v. First Church of God*, 46 Wn. App. 740, 744, 732 P.2d 173 (1987). This appeal relies on the same standard supported by the Lees’ case law. See Respondent’s Brief, at 23, quoting *Ayers v. Johnson & Johnson*, 117 Wn.2d 747, 764, 818 P.2d 1337 (1991) (“Foreseeability is a matter of *what the actor knew or should have known* under the circumstances; it turns on what a reasonable person would have anticipated” (emphasis added)). Fletcher did not know, nor is there uncontested proof that he should have known, that his actions created an unreasonable risk of harm to Lee.

(a) There is no evidence that Fletcher in fact knew of the risk of harm to Lee from his actions.

The Lees cite no evidence, let alone undisputed evidence, that Fletcher in fact knew that his actions created an unreasonable risk of causing an electrical arc blast. Whether he knew more about electricity

than most people, or was aware there was a high voltage warning sign on the cabinet that housed the VFD, or knew not to “mess with wiring,” CP 63, does not show that he knew that attempting to tap the fan could cause an electrical arc blast that could damage a bystander’s hearing.

In fact, the summary judgment record shows the opposite: Fletcher did not know he created a risk of an arc blast by putting the screwdriver into the energized VFD. CP 153. He had not heard of electrical arc blasts or arc flashes before the incident. CP 159, 327. He did not know how to tell which parts of the VFD were energized. CP 1010. He did not understand the voltages involved. CP 1009. If he “had known there was a power source like it was there, [he] would have never done that.” CP 263. Fletcher knew not to “mess with wiring” because he did not know what he was doing, but he was not messing with wiring when the accident occurred -- he thought he could tap the fan if he moved carefully, like in the game of Operation. Even if that action was in some way “unsafe” and therefore contrary to “common sense,” there is no evidence Fletcher actually knew *he endangered others* by doing what he did.

(b) The jury was denied the opportunity to decide whether Fletcher reasonably should have known about the risk of harm to Lee.

The Lees likewise failed to establish as a matter of law that Fletcher, or any reasonable person in his position, *should* have known that his actions created an unreasonable danger to Lee. Fletcher and Willis did not misrepresent Lee’s testimony that an electrical arc was not among the

dangers he anticipated from an energized VFD. *See* Appellant’s Brief, at 16, citing CP 974-75. Lee testified that he would not tear apart the VFD and blow it out with air while it was energized for the same reason that he would not stick a pocket knife in a wall socket (because it would be dangerous), but when asked whether the dangers would include an electrical arc he replied, “Not anticipated, no.” CP 974-75. He thought *the person touching* energized equipment could be injured or even killed, but an arc blast was “[n]ot anticipated.” *Id.* He explained that he has “worked on basically hundreds of VFDs, and I’ve never seen an electrical arc out of one. And I have never been concerned about wearing hearing protection while working on one.” CP 973.

Lee’s “main concern” with Fletcher’s action was that “he would short something out and damage the drive more than it was with just -- with being just that little fan.” CP 316. To the extent Lee expected a short of some kind, he did not expect an arc blast that would “blow up the whole drive.” CP 317. Where Lee, the expert on site, expected only a minor short and did not expect an arc blast, the jury could have found that a reasonable person in Fletcher’s position should not be charged with knowing the potential consequences of his actions. CP 230, quoting Lee’s deposition testimony (CP 316-17).

The Lees cite to *trial* testimony from their electrical expert Mr. Way¹ to argue that an “arc flash” and a “short” are interchangeable.

¹ Under RAP 9.12, the Lees cannot undo the effect of Lees’ testimony before the trial court on summary judgment by citing on appeal to evidence that only came in at trial.
(Footnote continued next page)

Respondent's Brief, at 27 n.29. But Lee himself explained that, while he expected a short of the kind that could further damage the VFD, he did not expect an arc blast. CP 181, 316-17. The Lees state that one of the reasons Lee gave for not expecting an electrical arc was that he did not expect Fletcher to use the screwdriver as he did since that is not something Lee would have done while working on an energized VFD. Respondent's Brief, at 27; *see* CP 180-81, 974. In addition, the Lees point to Lee's testimony that he assumed the VFD was "going to blow" when Fletcher announced his plan. Respondent's Brief, at 27; *see* CP 983. But there is no doubt that Lee still did not expect an arc flash even when it became clear what Fletcher was going to do:

Q: Okay. And did you -- when you told him not to do that, was your expectation that there might be an arc flash?

[Lee]: *No.*

CP 181 (emphasis added).

To the extent there was a conflict in the testimony, this only demonstrates that summary judgment was not appropriate. Lee's testimony would allow a jury to find that causing an arc blast is not among the objectively foreseeable dangers of working around an energized VFD. The same applies to the testimony from the Willis mill manager who thought there was a risk of an arc blast if someone sticks a screwdriver into an energized VFD -- while a jury could weigh that testimony in favor

This point will be addressed when Fletcher and Willis discuss the Lees' claim of harmless error. *See* § I.C.

of foreseeability, the jury would nevertheless have to resolve a factual dispute to come to that conclusion. *See* CP 991.

Adding to the factual dispute, the Lees' electrical engineering expert confirmed that there was no reason to anticipate an electrical arc blast would occur: "There was no reason for Verl Lee to anticipate that an electrical arc blast would occur in connection with the diagnostic assessment he was doing on the VFD." CP 108.² Here, the electrical arc blast occurred "*in connection with* the diagnostic assessment" Lee was doing on the VFD. CP 108 (emphasis added). The jury could reasonably infer from Mr. Way's testimony that a reasonable actor in Fletcher's position would not be able to anticipate that the actions he took in connection with Lee's diagnostic assessment would result in a risk of serious injury to bystanders. None of Mr. Way's *trial* testimony cited by the Lees would make such an inference unreasonable. *See* Respondent's Brief, at 26, 27 n.28.³ That Mr. Way considers Fletcher's actions unsafe does not establish as a matter of law that Fletcher should have known the

² Fletcher and Willis did not misrepresent or selectively quote that testimony. They quoted the relevant portion in full on page 16 of the Opening Brief and then accurately paraphrase the statement on page 37 of the Opening Brief in the argument section.

³ In fact, Mr. Way's trial testimony is conflicting. On one issue, he opines that there was no "known hazard" associated with Lee's work in the cabinet, such that he did not consider the cabinet to be a confined space. RP (2/21/14) 182-83 (opining that there was a hazardous component inside the cabinet, but no known hazard on the sides of the panels that Mr. Lee was accessing). Yet, on another issue, Mr. Way's opinion is that it is well-known that arc-induced explosions can cause danger to hearing. RP (2/21/14) 125. Even if the Lees had offered such evidence at summary judgment, it does not establish as a matter of law that a reasonable person who would not have Mr. Way's extensive expertise, *should have* known that. That the Lees had to cite to expert testimony to make their argument about foreseeability only proves that such knowledge should not be imputed to Fletcher.

risk of an electrical arc blast occurring, that there could be a serious injury from such a blast, and that a bystander would be within the field of danger for such an injury.

Much of the evidence marshalled by the Lees on the alleged danger of Fletcher's actions suffers from the same defect -- it goes to Fletcher's alleged breach of the standard of care by doing something generally "unsafe," and does not address the scope of the duty owed. For example, the Lees claim that Fletcher's co-workers testified that they knew not to touch an energized VFD, but they did not identify the harm they were seeking to avoid. In fact, one co-worker testified that a mill worker might not know the potential hazards: "Perhaps the other person shouldn't be there but he -- maybe he doesn't know he shouldn't be there. Maybe he just didn't realize the hazard there." CP 1051.

Nor does the dangerousness of working around electricity in general relieve the Lees of their foreseeability obligations. None of the Lees' cases establishes that electricity is so dangerous that all injuries in any way connected with it, including hearing damage suffered by a bystander, will be deemed foreseeable as a matter of law. Nor does Washington impose such a standard. *See Frisch v. Pub. Util. Dist. No. 1 of Snohomish County*, 8 Wn. App. 555, 557, 507 P.2d 1201 (1973) (holding that utility company in a case arising from an electrical shock "is not responsible for accidents which cannot be anticipated"). The trial court nevertheless ruled that summary judgment was proper because there is "liability by sticking a screwdriver into an energized area[.]" ignoring,

as did the Lees, whether the general field of danger -- a risk that bystanders will suffer hearing loss -- should have been anticipated. Fletcher and Willis pointed out in their motion for reconsideration that the only basis in the moving papers for granting the motion was the assertion that it is negligent to stick a screwdriver into an electrical device. CP 356-57. That is not enough to prove as a matter of law that bystanders are foreseeably endangered by such conduct.

Disagreements about the foreseeability of the arc blast should have been presented to the jury. The Lees' failure to conclusively rebut competent evidence from which a factfinder could rule in favor of Fletcher and Willis makes summary judgment inappropriate. *See Weatherbee v. Gustafson*, 64 Wn. App. 128, 132, 822 P.2d 1257 (1992) (burden of proof does not shift to nonmoving party when the moving party does not "eliminate competent evidence in the record" from which a finder of fact could draw reasonable inferences in support of the non-moving party's theory of the case).

(c) The jury, not the trial court, must decide whether the injury fell within the ambit of the risk.

Foreseeability is normally an issue for the trier of fact. *See, e.g., Schooley v. Pinch's Deli Market, Inc.*, 134 Wn.2d 468, 477, 477 P.2d 749 (1998); *Wells v. City of Vancouver*, 77 Wn.2d 800, 803, 467 P.2d 292 (1970) ("It is for the *jury* to decide whether a general field of danger should have been anticipated" (emphasis added)). While a separate instruction on foreseeability is appropriate where the evidence creates a

fact question on that issue, the jury properly decides foreseeability regardless of whether a separate instruction is given or the issue is simply argued by counsel based on the general instructions.

The court in *Koker v. Armstrong Cork, Inc.*, did **not** hold that the jury may not be instructed on foreseeability. 60 Wn. App. 466, 804 P.2d 659 (1991). The court held that the instruction proposed by the *plaintiff* and given to the jury conformed to the rule that, for the issue of foreseeability, the “question is whether the actual harm fell within a general field of danger which should have been anticipated.” *Koker*, 60 Wn. App. at 480, quoting *McLeod v. Grant County Sch. Dist. No. 128*, 42 Wn.2d 316, 321, 255 P.2d 360 (1953). The court then decided that the trial court did not abuse its discretion in refusing to give the *defendant’s* proposed instruction on foreseeability; the court noted that the common law duty of ordinary care was set forth in another instruction and that the defendant was able to argue its theory of the case, such that an *additional* instruction on foreseeability was not necessary. *Id.* at 481.

2. Fletcher and Willis preserved the issue of foreseeability.

Fletcher and Willis opposed the Lees’ motion for summary judgment on liability, and in their opposition they quoted Lee’s testimony that he, the expert on site, did not expect that Fletcher’s actions would have resulted in an explosion that would blow up the whole drive. CP 229-32 (Defendants’ Response to Plaintiffs’ Motion for Summary Judgment re: Liability). Thus, the following admissions from Lee were

called to the trial court's attention on the issue of knowledge of the danger:

Q: Okay. And did you – when you told [Fletcher] not to do that, was your expectation that there might be an arc flash?

[Lee]: No.

* * * *

Q: . . . What did you think would happen if [Fletcher accidentally touched something else]? You said, 'Don't do it.'

A: Yes.

Q: And so you were guarding against what?

A: My assumption would be if you stick anything metal – and he had an old screwdriver that was just all metal shaft – there are so many electronic components and stuff in there that he would *short something out and damage the drive* more that [sic] it was with just – with being just that little fan. And that was my main concern.

Q: Okay. And you wouldn't expect MR. FLETCHER to have any more knowledge about the possible consequences than you have. You were the expert on site; right?

A: Yes.

Q: And so your expectation was is that there would be a – that he could cause a short?

A: Of some sort, yes. But *I did not expect it to blow up the whole drive*. I expected, you know, that he would blow out some of the electronics or something but . . .

CP 230 (emphasis added).

That an expert on VFDs did not foresee the consequences of Fletcher's actions can only mean that reasonable minds could differ as to whether Fletcher should have known that his actions could create an

unreasonable risk of harm to Lee. Lee's testimony thus created a question of fact on whether Fletcher's duty extended to Lee. Fletcher and Willis put that admission before the trial court in the opposition to summary judgment on liability, calling it "[p]erhaps the most telling testimony[.]" CP 229. Further, Fletcher and Willis argued that questions about the knowledge of a party, *i.e.*, whether a party knew or should have known something, are not appropriate for resolution on summary judgment. CP 237. Fletcher and Willis preserved their foreseeability argument under RAP 9.12 by presenting the relevant evidence to the trial court as a basis to deny summary judgment on liability.

There is no requirement that a party opposing summary judgment cite to the trial court what proves to be the crucial case law for resolving an appeal from the grant of that judgment.⁴ And no citations should even be necessary for such a basic concept of negligence law as foreseeability. As then Judge Gerry Alexander wrote for this Court in *Huston v. First Church of God*, "[b]asic in the law of negligence is the tenet that the duty to use care is predicated upon knowledge of danger[.]" 46 Wn. App. at 744 (quoting *Leek v. Tacoma Baseball Club, Inc.*, 38 Wn.2d 362, 365-66,

⁴ See *State Farm Mut. Auto. Ins. Co. v. Amirpanahi*, 50 Wn. App. 869, 872 n. 1, 751 P.2d 329 (1988) ("Although appellants did not argue [the determinative case] to the trial court, they did argue [its] ... basic reasoning . . . This court can review these issues despite lack of citation to the crucial case law and treatises."); *Walla Walla County Fire Prot. Dist. No. 5 v. Wash. Auto Carriage, Inc.*, 50 Wn. App. 355, 357 n. 1, 745 P.2d 1332 (1987) ("There is no rule preventing an appellate court from considering case law not presented at the trial court level."); *Nickerson v. City of Anacortes*, 45 Wn. App. 432, 437, 725 P.2d 1027 (1986) ("In any event, it is not necessary to cite all supporting authority in the trial court in order to preserve a substantive issue for appeal. It is only necessary that the issue be raised.").

229 P.2d 329 (1951)). This should be especially true when a party is before such an experienced trial court judge as Judge McCauley. See Respondent's Brief, at 2 n.2 (noting that Judge McCauley has been on the bench for 20 years). Fletcher and Willis raised the issue of foreseeability to the trial court by presenting the evidence a jury could have relied upon in deciding that Fletcher should not have been expected to know about the risk of an arc blast, and then pointing out on reconsideration that it was legal error to find Fletcher negligent as a matter of law merely because he stuck a screwdriver into an electrical device. CP 356-57. The obvious problem with that assertion was it failed to address whether the injury to the plaintiff foreseeably fell within the general field of danger.

Second, in addition to Fletcher and Willis's emphasizing the determinative evidence on foreseeability, the subsuming issue of Fletcher's duty to Lee was also before the trial court. As the Lees argued, in "a negligence action, a plaintiff must establish (1) *the existence of a duty to the plaintiff*, (2) breach of that duty, (3) a resulting injury, and (4) that the breach was the proximate cause of the injury." CP 337 (emphasis added), citing *Lowman v. Wilbur*, 178 Wn.2d 165, 169, 309 P.3d 287 (2013). The Lees further argued that "Fletcher's duty to exercise ordinary care for the safety of others is established by the common law." CP 337. Raising the defendant's duty, however, necessarily implicated the concept of foreseeability, which "serves to define the scope of the duty owed." *Schooley*, 134 Wn.2d at 477. Where the issue of a party's duty is before the court, the legal standards related to that issue are pertinent for

consideration even if not cited to the trial court. *Osborn v. Pub. Hosp. Dist. 1*, 80 Wn.2d 201, 206, 492 P.2d 1025 (1972) (considering a statute and related rules on the issue of safety standards for hospitals that were not brought to the attention of the trial court since the issue of a hospital's duty for the safety of its patients was before the trial court).

The purpose of RAP 2.5(a), and the underlying doctrine of preservation of error that the rule embodies, is “to afford the trial court an opportunity to correct any error, thereby avoiding unnecessary appeals and retrials.” *Smith v. Shannon*, 100 Wn.2d 26, 38, 666 P. 351 (1983) (citation omitted). Here, Willis and Fletcher “afford[ed] the trial court an opportunity” to recognize that there was a fact issue with regard to whether Fletcher knew or should have been charged with knowing that his actions posed an unreasonable risk of harm to Lee. Moreover, the Lees plainly recognized that this was the case, for they met that argument in reply by citing Washington Practice for the proposition that the “issue is not whether the defendant knows he has taken an unreasonable risk, but rather whether he should know it is an unreasonable risk.” CP 343, quoting DeWolf & Allen, 16 WASH. PRAC.: TORT LAW AND PRAC., § 2:29. In sum, there was sufficient notice to the trial court that Willis and Fletcher were challenging whether an arc blast, as opposed to a shock to Fletcher or damage to the VFD, was reasonably foreseeable. Accordingly, there is no valid basis for refusing to reach the merits of the foreseeability issue.

B. The defense theory that Mr. Fletcher reasonably relied upon an “implicit assurance of safety” by Mr. Lee was supported by law and evidence establishing a prima facie case.

1. Fletcher and Willis established a prima facie case of an implicit assurance of safety.

An implicit assurance of safety need not arise from “affirmative conduct.” Respondent’s Brief, at 35. Silence may be deemed a representation or manifestation of assent where there is a duty to speak. *Suburban Janitorial Svcs. v. Clarke Am.*, 72 Wn. App. 302, 310-11, 863 P.2d 1377 (1993). Once Fletcher announced his plan to tap the fan with a screwdriver, Lee had a duty to speak, particularly in light of his superior knowledge and greater expertise with VFDs, to preserve his own safety if he thought Fletcher’s plan posed an unreasonable risk of harm. *See* CP 673 (court’s instructions 7 & 9). That is why a trial was held on contributory negligence in this case. RP (1/21/14) 18-19. A question of fact existed on whether Fletcher could reasonably rely upon Lee’s silence.

Moreover, the evidence showed Lee doing more than simply remaining silent. Even if it were necessary for Willis and Fletcher to show that Lee engaged in affirmative conduct to demonstrate an implicit assurance of safety, they presented evidence sufficient to make a prima facie case on that point. Fletcher testified that Lee complied with Fletcher’s request to shine the flashlight so that he could see to tap the fan:

A. ... [H]e got in there because I wanted to tap it when he was in the box. And I said it would be better if you had the flashlight up on top so you could shine it down through the deal to see it.

* * * *

He was going to hold the flashlight up there so I could tap the fan and just so it was more light. Because it was dark in the back of the component, and we had to put more light in there so we can hit it just to get it to work.

* * * *

I said I was going to tap the -- tap the fan but I need the flashlight up on top, the flashlight up there, because we were shining it through here, and we thought it would be easier to shine it from the top to see it so we could just tap it.

* * * *

A. ... I told him to hold the flashlight in a certain spot so I could -- because it shined right on top of it and I was going to, like I said, tap it.

Q. ... [D]id you tell him about shining the flashlight in a certain spot before or after you said you were going to tap the fan?

A. Before. I said shine it -- I said hold it right there because I could see it really good.

Q. ... [A]fter that, you said you were going to tap the fan?

A. He knew, yeah, because I said I was going to tap it before, and then that's when I said hold the flashlight right there, because it was shining right on top of it and I was going to tap it.

CP 272-74. Fletcher's testimony that Lee complied with his request to shine the flashlight so he could see to tap the fan provided prima facie evidence of affirmative conduct, analogous to gesturing someone into harm's way. *See* Appellants' Brief, at 39-40 (citing cases).

The testimony of one of Fletcher's fellow employees confirms that a reasonable person could rely on the implicit assurance of safety provided by one with superior knowledge. That employee agreed that someone who is not qualified to work on the VFD should not stick a screwdriver

into it when it is energized, but added that such action would be ok if “there is a supervisor there watching you do it.” CP 1071. While the Lees present the co-workers as having presented a unified front on the reasonableness of Fletcher’s actions, this contrary testimony creates an issue of fact on whether a reasonable employee could be assured of safety by one in a position of authority or with superior knowledge.

That some of Willis and Fletcher’s cited cases involved a master-servant relationship does not reflect an attempt to revive an abandoned affirmative defense. In contrast to the “fellow servant” affirmative defense Willis and Fletcher abandoned before trial, reliance on an implicit assurance of safety is an ordinary defense, *i.e.*, a means of negating the element of breach by showing that Fletcher exercised reasonable care.⁵ And contrary to the Lees’ assertion, finding a master-servant relationship does not require evidence that Lee directed Fletcher to tap the fan blade. The existence of a master-servant relationship can be inferred from the surrounding circumstances. *Baxter v. Morningside, Inc.*, 10 Wn. App. 893, 896-97, 521 P.2d 946 (1974). This is so, regardless of whether Willis Enterprises representatives intended to put Fletcher under Lee’s authority. *See id.* In any event, while the analogy to master-servant cases is an apt one, no finding of a master-servant relationship is required before the jury

⁵ The Lees refer to Willis and Fletcher’s affirmative defense of “Injury by Fellow Servant,” CP 13, which they struck after the Lees moved to dismiss this and another affirmative defense. CP 240. The Worker’s Compensation Act bars an action against a fellow employee. RCW 51.04.010; *see Davis v. Early Constr. Co.*, 63 Wn.2d 252, 257-58, 386 P.2d 958 (1963). This affirmative defense would have allowed Willis and Fletcher to avoid liability if Fletcher was found to be a loaned servant of Lee. *See id.*

may find that Fletcher reasonably relied on an implicit assurance of safety by Lee. *See* Appellants' Brief, at 39-40.

2. The implicit assurance or agreement issue was preserved.

The defense theory that Fletcher reasonably relied on an implicit assurance of safety or agreement by Lee is not a “new argument[] presented for the first time on appeal[.]” Respondent's Brief, at 34. The Lees acknowledged in their moving papers that Willis and Fletcher had asserted in interrogatory answers that Lee had agreed with Fletcher's plan to try to restart the fan by tapping it with a screwdriver. CP 129. Responding to the Lees' summary judgment motion, Willis and Fletcher advanced precisely the theory expressly anticipated by the Lees -- that Lee had agreed with Fletcher's plan to try to restart the fan by tapping it with a screwdriver. *E.g.*, CP 237. Willis and Fletcher cited Fletcher's testimony that, after Fletcher announced his plan, Lee had adequate opportunity to object but said nothing. CP 228, 237. In addition, Willis and Fletcher cited Fletcher's testimony that he asked Lee to shine the flashlight so he could see to tap the fan, and that Lee complied. CP 228. Although the Lees derided Fletcher's version of events as an “after-the-fact fiction” and countered that Lee did not, in fact, remain silent but tried to tell Fletcher to stop, CP 132, these credibility and factual disputes plainly were for the jury to assess.

Moreover, Willis and Fletcher specifically argued that Lee's agreement with, and participation in, Fletcher's plan carried with it an

implicit assurance of safety. The response to the summary judgment motion cited Lee's testimony regarding his experience and qualifications, which went to the reasonableness of Fletcher's reliance. CP 226-27. In reply, the Lees cited *System Tank Lines v. Dixon*, 47 Wn.2d 147, 286 P.2d 704 (1955), a case that Willis and Fletcher then flagged in their motion for reconsideration, correctly describing it as one "where two men were working together in a potentially dangerous arrangement, and one of the men made assurances to the other about the safety of the situation they were in." CP 360. Analogizing to *System Tank Lines*, Willis and Fletcher explained: "That case boiled down to a question of whether it was reasonable for one of the litigants *to rely on the assurances of another litigant.*" CP 360 (emphasis added).

In sum, the implicit assurance or agreement issue was preserved. That Willis and Fletcher did not cite to the trial court all of the legal authorities now cited on appeal does not bar consideration of this properly preserved argument. As already discussed, an appellant is not limited to citing the same legal authorities cited to the trial court. *See, e.g., Nickerson*, 45 Wn. App. at 437.

C. The error in granting summary judgment on liability was not harmless.

This Court cannot look to the trial record to determine the harmful effects of the ruling because the summary judgment ruling itself shaped the trial. Before trial, the Lees requested a motion in limine excluding any argument or testimony that Fletcher and Willis were not at fault based on

the trial court's summary judgment ruling on liability. CP 384; RP (2/13/14) 94. Fletcher and Willis objected. CP 512; RP (2/13/14) 97. The trial court ruled that it was "going to prohibit the defendants from claiming that Mr. Fletcher was not negligent, I have already ruled on that[.]" CP 630; RP (2/13/14) 98. *See also* RP (3/5/14) 917 (Fletcher and Willis arguing, in the context of jury instructions, that they "were ordered not to contest the issue of negligence . . .").

The verdict on contributory negligence also is no indication that the jury rejected the defenses Fletcher and Willis were prevented from presenting because of the summary judgment. The issue of foreseeability to Fletcher of the risk of harm to Lee was not before the jury, nor was it expressly or implicitly addressed by the verdict. Nor can the verdict be deemed conclusive on the implicit assurance or agreement theory. If anything, the verdict assigning 10% of the fault to Lee shows that the jury agreed that Lee was given a meaningful opportunity to object and said nothing. The jury should also have been allowed to decide whether Fletcher should have been held liable in the first place.⁶

⁶A reasonable inference could have been drawn, for example, that Lee was willing to let Fletcher proceed with tapping the fan blade because Lee was frustrated that nothing was making the fan turn and he wanted to get the job done that day. In turn, the jury could also have reasonably concluded that Lee later could not accept that he, the expert, had made a bad call which resulted in the arc blast and his own injuries. Unlike Fletcher, Lee refused to be interviewed by the Department of Labor and Industries. And, as discussed in Appellants' Brief, at p. 48, Lee's story about the incident changed at trial in what the jury could have concluded was an implausible attempt to further evade responsibility for what ensued when Fletcher attempted to carry out a plan that he reasonably believed Lee had approved.

The Lees also cannot undo the effect of Lee's testimony before the trial court on summary judgment, by citing on appeal to evidence that only came in at trial. Under RAP 9.12, this Court may not consider trial testimony in reviewing the trial court's summary judgment when that evidence was not before the court on summary judgment. The summary judgment meant Fletcher and Willis never got a trial on the threshold question of liability. That the Lees offered new evidence at trial that arguably strengthened their case on liability does not relieve the Lees of their obligation to prove that case to the satisfaction of a jury.

D. The illustrative exhibit is accurate.

The illustrative exhibit provided by Fletcher and Willis is an accurate representation of the evidence before the trial court on summary judgment. *See* Appellant's Brief, at 13. The testimony on CP 32 confirms that the fan is positioned near the top of the VFD -- the transformer referred to on that page partially blocked Lee's view of the fan from the front of the VFD, not from the top. *See* CP 32. The testimony on CP 35 only confirms that the fan was at the top of the VFD because Lee could see the center of it when he looked down inside the VFD from the top of the unit. CP 35. Whether the fan was at the top of the VFD with a filter above it, or at the top of the VFD with no filter above it, does not change the fact that the fan was located at the top of the VFD. *See* CP 88, 266, 1012 ("But the fan sits up on top"), 1017-18 ("It's a little black square fan that's pointing downwards, where it cools the capacitors off"), 1037.

Exhibits 42 and 43, which show the insides of the VFD, were not part of the summary judgment record and thus were not referenced by the illustrative exhibit. *See* RAP 9.12. Moreover, the exhibits (copies of which are attached as the only appendix to this brief) depict only a jumble of disaggregated parts, not how a properly assembled VFD actually looks. The illustrative exhibit was intended to show the relative positions of the “two men, the VFD, and the location of the cooling fan,” not the precise path taken by Fletcher’s screwdriver, which obviously was a tight path from the reference to Operation. In any event, there is evidence in the summary judgment record to show that Fletcher did not have to insert the screwdriver between the capacitors because they were lower than the fan: “But the fan sits up on top a little higher than what the capacitors are.” CP 1012.⁷

The illustrative exhibit correctly shows the relative position of the two men based on the evidence available to the trial court on summary judgment. Fletcher testified he picked up a screwdriver from a toolbox sitting down along the wall a foot or two from where he was standing, turned around and told Lee he was going to tap the fan. CP 270, 273-76, 296-97, 1010. Fletcher testified that he was “way back from the vector

⁷ The Lees cite to CP 271 to assert that the capacitors were between Fletcher and the fan, but the testimony on CP 271 does not definitively stand for that proposition considering Fletcher’s clarification that the fan points downwards to cool off the capacitors, meaning the fan must be *above* the capacitors. *See* CP 1017-18. That Fletcher then agrees that he had to stick the screwdriver between the capacitor banks to tap the fan does not disprove Fletcher’s earlier testimony. And in any event, Fletcher and Willis do not deny that Fletcher did not have much room to work with when he used the screwdriver --the illustrative exhibit was not intended to show that detail.

drive” when he “grabbed the screwdriver and told [Lee] I was going to tap it.” CP 1019. Then Fletcher said he was a “foot, if that[]” away from the drive. CP 1019. The tool chest from which Fletcher grabbed the screwdriver was “[a] foot, two feet” from the drive. CP 1019. The illustrative exhibit was not intended to suggest a greater distance, and the Court is invited to view the illustrative exhibit with this acknowledgment in mind.

E. Two errors during trial require a new trial on contributory negligence.

1. The trial court erred by excluding evidence that Lee implicitly approved Fletcher’s attempt to tap the fan blade.

Fletcher’s testimony that he thought Lee kept shining the flashlight on the fan to enable him to tap the fan blade was relevant to the issue of allocating fault between Fletcher and Lee, and therefore should not have been excluded. Such evidence would have strengthened Fletcher’s defense that Fletcher was acting with an expert’s implicit approval and that Lee should be held primarily responsible for his own injury. Under the reasonable person standard, it is not negligent to act in reasonable reliance upon an express or implicit assurance of safety, particularly where the person giving the assurance has superior knowledge or expertise. *See* Appellant’s Brief, at 39-40. Evidence showing that Fletcher was relying on Lee, and specifically on Lee’s shining the flashlight to enable Fletcher to better direct the screwdriver toward the fan blade, goes directly to the degree of Lee’s responsibility for the accident that ensued, and the jury

should have been allowed to take that evidence into account in making its allocation of fault. That reasonable minds could differ in the conclusions drawn from such evidence does not make Fletcher's testimony irrelevant or speculative.

Fletcher's perception of Lee's state of mind and whether he thought Lee appeared to agree with his plan is admissible under ER 602: a witness "may testify about the state of mind of another, so long as the witness personally witnessed events or heard statements that are relevant to prove the other person's state of mind." *In re Estate of Black*, 153 Wn.2d 152, 167, 102 P.3d 796 (2004) (quotation and citation omitted). Here, Fletcher personally witnessed events relevant to proving Lee's state of mind, and was erroneously barred from testifying to the conclusions he was entitled to draw from those events about Lee's state of mind.⁸ Nor was this error harmless: While Fletcher and Willis were allowed to argue the point during closing, arguments from counsel are not evidence and the jury lacked the benefit of testimony that would have reasonably allowed them to apportion more fault to Lee and less fault to Fletcher.

2. The trial court erred by allowing testimony that Fletcher acted in conformity with his tendencies.

The testimony cited by the Lees as having "opened the door" to evidence of Fletcher's tendencies supports Fletcher and Willis's theory that Lee was expected to be in control of the project, but it did not open

⁸ This case thus is not like *State v. Farr-Lenzini*, in which a police officer was not allowed to testify as to a defendant's guilt without providing an adequate factual basis. 93 Wn. App. 453, 465, 970 P.2d 313 (1999).

the door to otherwise inadmissible evidence. *See* Respondents' Brief, at 43, citing RP (2/21/14) 75.⁹ While the Lees would naturally want to rebut such testimony, there is no *unfair* inference from the testimony that would go un rebutted without the use of inadmissible character evidence. Fletcher and Willis did not place the character of Fletcher at issue and then seek to bar the Lees from further inquiry.¹⁰ The testimony cited by the Lees as having opened the door did not suggest that Fletcher had certain exemplary tendencies, so as to necessitate the use of character evidence in rebuttal. The Lees were fully able to challenge the evidence that Lee was expected to be in control of the project through cross-examination at trial; there was no need for the trial court to allow the Lees to add inadmissible character evidence to that challenge.

The Lees' argument implies that character evidence should come in if relevant to Mr. Lee's comparative fault. ER 404, however, does not contain an exception for relevance; rather, the rule's bar on character evidence is itself an exception from the general rule that relevant evidence is admissible. Moreover, the Lees primarily used the evidence to prove

⁹ Fletcher and Willis correctly stated the sequence of events leading to the trial court's ruling to admit evidence of Fletcher's tendency to do things without being asked and the need to keep him on a short leash. *See* Appellants' Brief, at 26-27, citing RP (2/21/14) 6-7, 10-11, 79-81, 83-84; CP 624.

¹⁰ In *Woodruff v. Spence*, cited by the Lees, a witness opened the door to otherwise irrelevant testimony by making assertions that were contradictory to that evidence. 88 Wn. App. 565, 569-70, 945 P.2d 745 (1997). As stated in the other case cited by the Lees, "[i]t would be a curious rule of evidence which allowed one party to bring up a subject, drop it at a point where it might appear advantageous to him, and then bar the other party from all further inquiries about it." *State v. Gefeller*, 76 Wn.2d 449, 455, 458 P.2d 17, 20 (1969), *overruled on other grounds by State v. Hill*, 123 Wn.2d 641, 870, P.2d 313 (1994). But Fletcher and Willis did no such thing here.

the *irrelevant* issue of the freestanding negligence of Willis. The Lees argue the trial court was justified in concluding that the evidence that Fletcher acted in conformity with his character was relevant to compare the fault of Lee with the fault of Fletcher *and Willis Enterprises*, and the trial court did indeed allow the evidence for precisely that reason, saying it would be relevant to “whether or not a reasonable employer should have notified” Lee about Fletcher’s tendencies. RP (2/21/14) 11. The jury, however, was not being asked to decide what a reasonable employer would have done, because there was no claim against Willis save that it was liable for Fletcher’s negligence under the doctrine of *respondeat superior*. See CP 2, 5.

That the error was not harmless is demonstrated by the Lees’ exploitation of it in closing argument, when they castigated Willis for knowing that Fletcher needed to be told what to do, then failing either to warn Lee or supervise Fletcher. RP (3/5/14) 928, 931, 940-41. The Lees argue that the error would have been harmless in the alternate universe where the trial court had granted their motion to amend the complaint to include claims against Willis for its independent negligence. The problem, of course, is that the trial court did not grant their motion to amend, which makes evidence that might have been relevant, in a trial in which the claim was allowed, *irrelevant* in the actual trial in which the claim was not allowed.

Nor did the trial court abuse its discretion in ruling that the Lees could not amend their complaint after the close of the trial to include the

APPENDIX

independent negligence of Willis, on the grounds that Fletcher and Willis did not consent to trying the issue and would be prejudiced if the motion was granted. RP (3/5/14) 891-92; *see Wilson v. Horsley*, 137 Wn.2d 500, 505, 974 P.2d 316 (1999) (denial of motion to amend reviewed for abuse of discretion). As the trial court reasonably concluded, if Fletcher and Willis knew there was a freestanding claim against Willis before the end of trial, “they could have hired experts and talked about what specific training is done in the industry, what the standard is and so forth[.]” RP (3/5/14) 892.

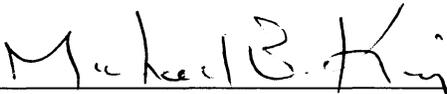
II. CONCLUSION

This Court should vacate the judgment and remand for a trial on liability and a new trial on contributory fault.

Respectfully submitted this 17th day of June, 2015.

CARNEY BADLEY SPELLMAN, P.S.

By



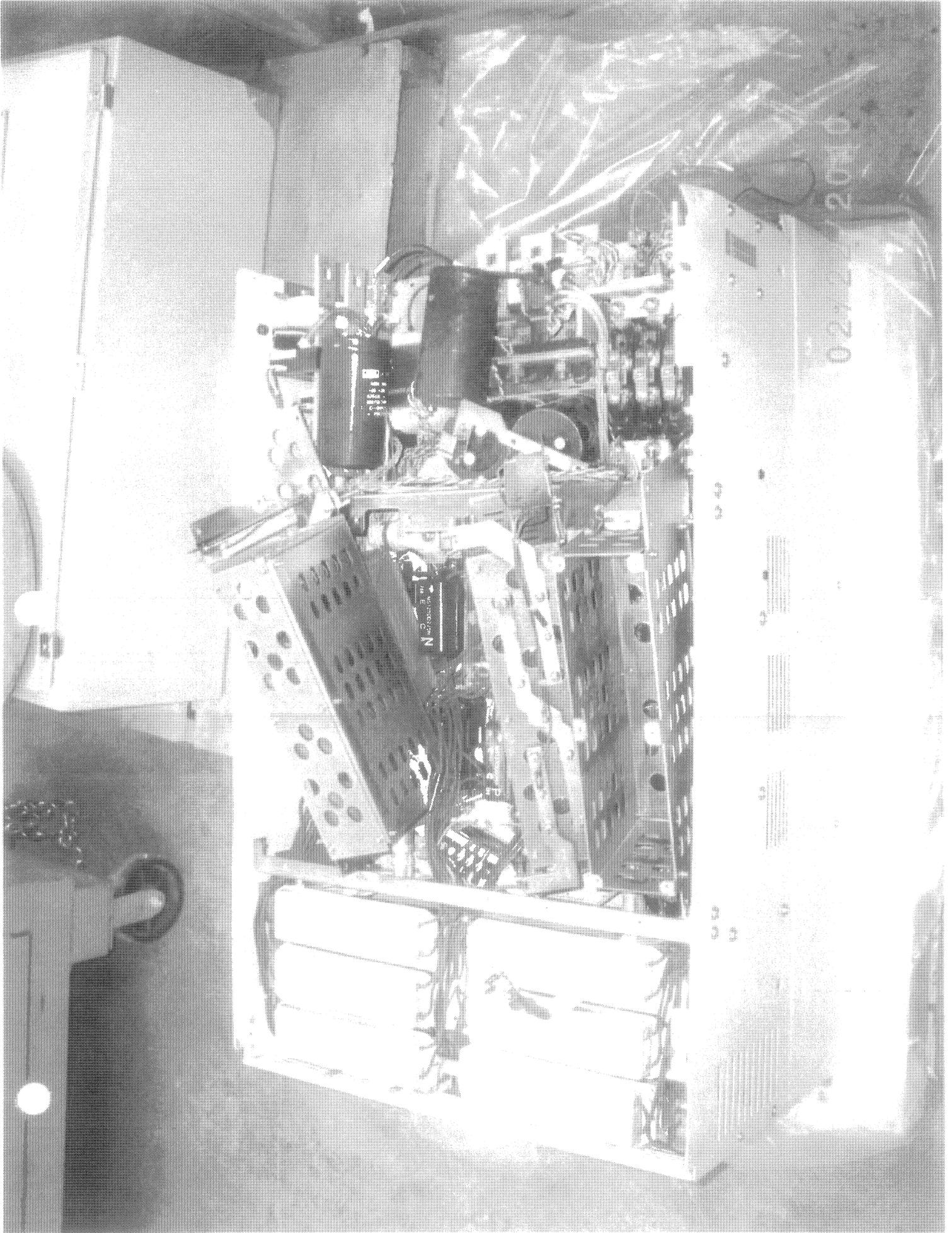
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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

Email and first-class United States mail, to the following:

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DATED this 17th day of June, 2015.


 Patti Salden, Legal Assistant

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