

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

BRIEF OF APPELLANT

Michael B. King, WSBA No. 14405
Jason W. Anderson, WSBA No. 30512
Justin P. Wade, WSBA No. 41168
CARNEY BADLEY SPELLMAN, P.S.
701 Fifth Avenue, Suite 3600
Seattle, Washington 98104-7010
Telephone: (206) 622-8020
Facsimile: (206) 467-8215
Attorneys for Appellants

FILED
COURT OF APPEALS
DIVISION II
2015 FEB 12 PM 1:19
STATE OF WASHINGTON
BY  DEPUTY

TABLE OF CONTENTS

	<u>Page</u>
APPENDICES	ii
TABLE OF AUTHORITIES.....	iii
I. INTRODUCTION.....	1
II. ASSIGNMENTS OF ERROR AND ISSUES ON APPEAL	4
A. Assignments of Error.	4
B. Statement of Issues.	4
III. STATEMENT OF THE CASE.....	5
A. Verl Lee was injured while attempting to fix a variable frequency drive (VFD) for Willis Enterprises. Lee sued Willis and its employee, Daniel Fletcher, for negligence, alleging severe hearing loss due to an electrical arc blast.....	5
B. Before trial, the trial court entered partial summary judgment on liability, ruling that Fletcher was negligent as a matter of law.....	8
1. Fletcher’s story.....	8
(a) Fletcher volunteered to help Lee in his attempt to repair the VFD, then deferred to Lee’s authority and expertise during the course of the work.....	8
(b) Lee eventually determined that the VFD’s internal fan was stuck. Lee explained to Fletcher that, without a working fan, the VFD, and thus the mill, would remain down. Lee then tried to fix the problem, but without success.....	10

Page

(c)	Fletcher announced that he wanted to try to restart the fan by tapping it with a screwdriver. Lee did not object but instead illuminated the fan with a flashlight, allowing Fletcher to see it clearly. <i>Fifteen seconds then elapsed between Fletcher's announcing his intention to tap the fan blade and his attempt to tap it.</i>	11
2.	Lee's conflicting story: Fletcher got the screwdriver and announced he was going to tap the fan blade, and attempted to do so -- actions taken so quickly that Lee barely had time to complete a spoken objection just before Fletcher set off an arc blast.	14
3.	There was no reason for Fletcher to anticipate that his actions would lead to an electrical arc blast that could damage a bystander's hearing.....	15
4.	Other Willis employees testified it would have been reasonable for Fletcher to rely on Lee as the expert.....	17
5.	The trial court granted the Lees' motion for summary judgment on liability.	18
C.	Although the trial court granted the Lees' pre-trial motion for summary judgment on the issue of negligence, the court denied the Lees' pre-trial motion for summary judgment on Fletcher and Willis's affirmative defense of contributory fault.	21
D.	The trial court's evidentiary rulings at trial.....	22
1.	The trial court prohibited Fletcher and Willis from offering evidence that there was an agreement for Fletcher to tap the fan.....	22

	<u>Page</u>
2. The Lees were allowed to introduce evidence that Fletcher’s employer believed he needed to be kept on a “short leash,” even though the trial court denied a motion allowing the Lees to add a negligence claim against Willis.....	25
E. The jury returned a verdict for the Lees, finding Fletcher 90% at fault.	29
F. Fletcher and Willis unsuccessfully moved for a new trial.	29
IV. ARGUMENT	30
A. The trial court erred in deciding on summary judgment that Fletcher was negligent as a matter of law.....	30
1. Standard of review.....	30
2. The trial court erred in determining that injury to Lee from Fletcher’s actions was foreseeable as a matter of law.	32
(a) Foreseeability is a question of fact and limits the scope of the duty owed by the defendant to the plaintiff.....	32
(b) Reasonable minds could differ as to whether Fletcher should have known that his actions could create an unreasonable risk of harm to Lee.....	35
3. The trial court also erred in rejecting as a matter of law Fletcher’s reasonable reliance upon Lee’s implicit assurance of safety.	39
(a) A person may reasonably rely upon another’s implicit assurance of	

	<u>Page</u>
safety, particularly where the other has superior knowledge or expertise.....	39
(b) The right to rely upon an implicit assurance of safety is particularly strong in the context of a master- servant relationship.	40
(c) Reasonable minds could differ as to whether Lee gave an implicit assurance of safety, upon which Fletcher was entitled to rely.	43
4. Had the trial court allowed the jury to decide Fletcher’s negligence, the jury could well have rendered a defense verdict.	46
B. The trial court’s evidentiary errors require a new trial on contributory negligence.....	49
1. Standard of review.....	49
2. The trial court erred in excluding Fletcher’s testimony as to his perception of Lee’s state of mind to show that Lee implicitly approved of Fletcher’s attempt to tap the fan blade.	49
3. The trial court erred in admitting evidence of Fletcher’s character, contrary to ER 404(a).....	52
V. CONCLUSION	55

APPENDICES

Page(s)

Appendix A: Illustrative Exhibit (p. 13 of Brief) with
Record References A-1

TABLE OF AUTHORITIES

	<u>Page(s)</u>
Washington Cases	
<i>Alston v. Blythe</i> , 88 Wn. App. 26, 943 P.2d 692 (1997).....	39, 45, 50
<i>Aores v. Great Northern Ry. Co.</i> , 166 Wash. 17, 6 P.2d 398 (1931)	39
<i>Baxter v. Morningside, Inc.</i> , 10 Wn. App. 893, 521 P.2d 946 (1974).....	42
<i>Bell v. Hegewald</i> , 95 Wn.2d 686, 628 P.2d 1305 (1981).....	45, 50
<i>Bodin v. City of Stanwood</i> , 130 Wn.2d 726, 927 P.2d 240 (1996)	31
<i>Breimon v. General Motors Corp.</i> , 8 Wn. App. 747, 509 P.2d 398 (1973).....	52
<i>Browning v. Ward</i> , 70 Wn.2d 45, 422 P.2d 12 (1966).....	40, 41
<i>Brundridge v. Fluor Federal Services, Inc.</i> , 164 Wn.2d 432, 191 P.3d 879 (2008)	51,52
<i>Burr v. Clark</i> , 30 Wn.2d 149, 190 P.2d 769 (1948)	34, 38
<i>Christen v. Lee</i> , 113 Wn.2d 479, 780 P.2d 1307 (1989).....	30
<i>Christiansen v. McLellan</i> , 74 Wash. 318, 133 P. 434 (1913).....	41, 42
<i>Dorr v. Big Creek Wood Products</i> , 84 Wn. App. 420, 927 P.2d 1148 (1996).....	39
<i>Evans v. Yakima Valley Transp. Co.</i> , 39 Wn.2d 841, 239 P.2d 336 (1952).....	30
<i>Gordon v. Deer Park School District No. 414</i> , 71 Wn.2d 119, 426 P.2d 824 (1967)	31, 34
<i>Green v. Hooper</i> , 149 Wn. App. 627, 205 P.3d 134 (2009)	53

	<u>Page(s)</u>
<i>Harbeson v. Parke-Davis, Inc.</i> , 98 Wn.2d 460, 656 P.2d 483 (1983).....	35
<i>Hayes v. Wieber Enterprises, Inc.</i> , 105 Wn. App. 611, 20 P.3d 496 (2001).....	50
<i>Himango v. Prime Time Broadcasting, Inc.</i> , 37 Wn. App. 259, 680 P.2d 432 (1984)	52
<i>Hisle v. Todd Pac. Shipyards Corp.</i> , 151 Wn.2d 853, 93 P.3d 108 (2004).....	31
<i>Hull v. Davenport</i> , 93 Wash. 16, 159 P. 1072 (1916).....	42
<i>Hunsley v. Giard</i> , 87 Wn.2d 424, 553 P.2d 1096 (1976).....	30, 33, 34
<i>Huston v. First Church of God</i> , 46 Wn. App. 740, 732 P.2d 173 (1987).....	33
<i>In re Estate of Black</i> , 153 Wn.2d 152, 102 P.3d 796 (2004)	50
<i>In re Pers. Restraint of Duncan</i> , 167 Wn.2d 398, 219 P.3d 666 (2009).....	49
<i>Kennett v. Yates</i> , 41 Wn.2d 558, 250 P.2d 962 (1952)	32, 33
<i>Lamborn v. Phillips Pacific Chemical Co.</i> , 89 Wn.2d 701, 75 P.2d 215 (1978).....	50
<i>Leek v. Tacoma Baseball Club</i> , 38 Wn.2d 362, 229 P.2d 329 (1951).....	34
<i>Panitz v. Orengo</i> , 10 Wn. App. 317, 518 P.2d 726 (1973)	39
<i>Peterson v. Betts</i> , 24 Wn.2d 376, 165 P.2d 95 (1946).....	36
<i>Rikstad v. Holmberg</i> , 76 Wn.2d 265, 456 P.2d 355 (1969)	33
<i>Rose v. Nevitt</i> , 56 Wn.2d 882, 355 P.2d 776 (1960).....	40
<i>Salas v. Hi-Tech Erectors</i> , 168 Wn.2d 664, 230 P.3d 583 (2010)	49, 50, 54

	<u>Page(s)</u>
<i>Saldivar v. Momah</i> , 145 Wn. App. 365, 186 P.3d 1117 (2008)	51
<i>Schooley v. Pinch’s Deli Market, Inc.</i> , 134 Wn.2d 468, 951 P.2d 749 (1998).....	32, 33
<i>State v. Contreras</i> , 57 Wn. App. 471, 788 P.2d 1114 (1990).....	50
<i>State v. Gregory</i> , 158 Wn.2d 759, 147 P.3d 1201 (2006).....	50
<i>State v. Stenson</i> , 132 Wn.2d 668, 940 P.2d 1239 (1997).....	49
<i>System Tank Lines, Inc. v. Dixon</i> , 47 Wn.2d 147, 286 P.2d 704 (1955).....	40
<i>Thomas v. French</i> , 99 Wn.2d 95, 659 P.2d 1097 (1983).....	54
<i>Wells v. City of Vancouver</i> , 77 Wn.2d 800, 467 P.2d 292 (1970)	32, 33
<i>Wilson v. Steinbach</i> , 98 Wn.2d 434, 656 P.2d 1030 (1982).....	31
<i>Winsor v. Smart’s Auto Freight Co.</i> , 25 Wn.2d 383, 171 P.2d 251 (1946).....	31, 34, 36, 37
<i>Young v. Caravan Corp.</i> , 99 Wn.2d 655, 663 P.2d 834, 672 P.2d 1267 (1983).....	31

Other State Cases

<i>City of Bedford v. Zimmerman</i> , 262 Va. 81, 547 S.E.2d 211 (Va. 2001).....	40
<i>Palsgraf v. Long Island R. Co.</i> , 248 N.Y. 339, 162 N.E. 99 (N.Y. 1928).....	32, 33
<i>Rodrigues v. State</i> , 52 Haw. 156, 472 P.2d 509 (Haw. 1970).....	34

Page(s)

Federal Cases

Williams v. Bunker Hill & Sullivan Mining & Concentrating Co., 200 F. 211 (9th Cir. 1912)..... 42

Constitutional Provisions, Statutes and Court Rules

ER 403..... 22

ER 404(a) 4, 5, 52, 53, 54

ER 404(b) 54

RESTATEMENT (SECOND) OF TORTS § 281, cmt. c (1965) 35

RESTATEMENT (SECOND) OF TORTS § 289 (1965)..... 36

RESTATEMENT OF (SECOND) TORTS § 290 (1965)..... 36

RESTATEMENT (SECOND) OF TORTS § 291 (1965)..... 34

RESTATEMENT OF TORTS § 289 (1939) 36

RESTATEMENT OF TORTS § 289, cmt. b (1939)..... 34

RESTATEMENT OF TORTS § 291 (1939) 34

Other Authorities

5A K. TEGLAND, WASH. PRAC.: EVID. § 218(2) (3rd ed. 1989)..... 51

5A K. TEGLAND, WASH. PRAC.: EVID. § 602.4 (5th ed. 2014)..... 51

I. INTRODUCTION

This case illustrates that it is rarely appropriate to take the issue of negligence from the jury. It also illustrates how a fair jury trial on contributory fault can be prejudiced by evidentiary error.

Plaintiff and Respondent Verl Lee, an experienced electronics technician, was injured while trying to repair a “variable frequency drive” (“VFD”) at a mill owned and operated by Defendant and Appellant Willis Enterprises. Lee claimed that a Willis employee, Defendant and Appellant Daniel Fletcher, was negligent when he used a screwdriver to try and free a stuck cooling fan that was preventing the VFD from working. Fletcher inadvertently allowed the screwdriver to come into contact with the VFD’s electrically charged surface, setting off a loud “arc blast.” The intense noise permanently damaged Lee’s hearing, and his lawsuit (joined by his wife) sought compensation for this injury.

The trial court granted the Lees’ pre-trial motion for summary judgment, holding as a matter of law that Fletcher was negligent when he tried to unstick the fan with a screwdriver, and that Willis was liable for this negligence under the rule of *respondeat superior*. To the trial court, this was a matter of “common sense.”

Unfortunately, the trial court’s notion of common sense ran roughshod over a basic principle of negligence law -- that a party is liable in negligence only for a *foreseeable* injury. Here, the jury could reasonably have concluded that a hearing-damaging arc blast was not a foreseeable consequence of using a screwdriver to unstick the VFD fan.

While it may have been “common sense” that the screwdriver’s contacting the VFD’s electrically charged surface could have further damaged the VFD (*e.g.*, by blowing out circuits), or given *Fletcher* an electrical shock, Lee himself testified there was no reason for Fletcher to have foreseen the possibility of a hearing-damaging arc blast. Lee, a trained electronics technician who admitted to having worked on hundreds of VFDs, testified he had no idea that touching a screwdriver to a VFD’s charged surface could generate such a blast. The jury was entitled to weigh this evidence, in deciding whether the Lees had met their burden to show not just injury, but *foreseeable* injury.

The jury also was entitled to weigh the evidence showing that Fletcher was not negligent because he reasonably relied on Lee’s expertise, and an assurance of safety implicit in Lee’s acquiescence in, and assistance with, Fletcher’s attempt to unstick the fan. The defendants submitted deposition testimony showing Fletcher announced his intention to tap the fan with the screwdriver, and *fifteen seconds* then elapsed between that announcement and the attempted tap. The deposition testimony also showed that, during this time, Lee not only did not object to Fletcher’s proposed course of action -- Lee had helpfully shone a flashlight down on the fan, illuminating it so Fletcher could see it better. Lee disputed Fletcher’s story, insisting that Fletcher was warned not to tap the fan with the screwdriver and claiming that Fletcher’s story was an after-the-fact fiction contrived to cover up his responsibility for Lee’s

injury. The trial court erroneously denied Fletcher (and his employer) the chance to have a jury decide who was telling the truth: Fletcher or Lee.

For either of these reasons, the judgment on the jury's verdict in favor of the Lees must be vacated. Fletcher and Willis are entitled to a *trial* on the threshold issue of negligence.

In addition, Fletcher and Willis are entitled to a new trial on the issue of contributory fault. The trial court excluded evidence showing that Fletcher only tapped the fan with the screwdriver because Lee impliedly agreed to Fletcher's announced plan to do so. This evidence was plainly relevant to the jury's assessment of the relative fault of Lee and Fletcher, and therefore should have been allowed.

The trial court further erred in allowing the jury to hear testimony that Fletcher's employer should have kept Fletcher "on a short leash," because of a tendency to act impulsively and without first getting permission. The Lees had sought to hold Willis liable based solely on the rule of *respondeat superior*, and the trial court had held the Lees to that theory, denying their motion during trial to add a claim of direct negligence against Willis. Absent such a claim, the "short leash" evidence could only have been relevant to a claim that Fletcher acted in conformity with a character trait of impulsiveness, and such a claim is barred by ER 404. The prejudicial impact of such "character" evidence on the jury's assessment of contributory fault is an additional reason for ordering a new trial on that issue.

II. ASSIGNMENTS OF ERROR AND ISSUES ON APPEAL

A. Assignments of Error.

1. The trial court erred in entering a partial summary judgment on liability, determining that Fletcher was negligent as a matter of law. *See* CP 351-53, 365.

2. The trial court erred in excluding evidence of an implied agreement between Fletcher and Lee to proceed with attempting to tap the fan blade. *See* RP (2/13/14) 101-04, RP (2/19/14) 9, RP (2/20/14) 84-86, RP (2/21/14) 13-21, RP (2/27/14) 503-04, 534-35; CP 576, 608, 630.

3. The trial court erred in admitting evidence of Fletcher's character, contrary to ER 404(a). *See* RP (2/21/14) 80-82, 91; CP 624.

4. The trial court erred in denying Fletcher and Willis's motion for a new trial. *See* CP 938-39.

B. Statement of Issues.

1. Was it error to rule that Fletcher was negligent as a matter of law where a genuine issue of material fact existed as to whether a reasonable person in Fletcher's position should have foreseen that attempting to tap the fan blade could create an unreasonable risk of harm to a bystander such as Lee, from the noise of an electrical arc blast?

2. Was it error to rule that Fletcher was negligent as a matter of law where a genuine issue of material fact existed as to whether Fletcher reasonably relied upon an implicit assurance of safety by Lee and an implied agreement to proceed with tapping the fan blade?

3. Did the trial court err in excluding Fletcher's testimony as to his perception of Lee's state of mind, which was relevant to prove Lee's implicit approval of, and assistance with, Fletcher's attempt to tap the fan blade, thus demonstrating Lee's contributory negligence?

4. Was Fletcher prejudiced by the erroneous exclusion of his testimony as to Lee's state of mind, where Lee's approval of and assistance with Fletcher's attempt to tap the fan blade were central to the contributory negligence case against Lee?

5. Was it error to admit evidence of Fletcher's supposed character trait of tending to act impulsively and without permission, where ER 404(a) mandates exclusion of such evidence?

6. Was Fletcher prejudiced by the erroneous admission of character evidence because the evidence, particularly when combined with the trial court's exclusion of evidence of an implied agreement, strongly suggested that Fletcher acted in conformity with this character by attempting to tap the fan blade without Lee's permission?

III. STATEMENT OF THE CASE

A. Verl Lee was injured while attempting to fix a variable frequency drive (VFD) for Willis Enterprises. Lee sued Willis and its employee, Daniel Fletcher, for negligence, alleging severe hearing loss due to an electrical arc blast.

Willis Enterprises, Inc. ("Willis") operates a mill in Oakville, Washington, that turns whole logs into wood chips. CP 966.¹ A disabled "variable frequency drive" ("VFD") brought the mill down on January 25, 2010. CP 975-76. A VFD "takes an input voltage, turns it into a DC voltage, changes the frequency on it so it will change the voltage to speed up or slow down motors as needed, and turns it back into an AC voltage going out." CP 967, 972. The VFD was necessary to operate the drum that debarked the logs. CP 993, 1013. The mill could not do anything with the logs until they were debarked. CP 993.

The VFD, weighing roughly 100 to 150 pounds, was mounted to the interior back wall of a 6 foot by 6 foot cabinet. CP 981-82, 1035.²

¹ The copy of the Declaration of Ray W. Kahler (11/27/2013) on file with the Superior Court was missing several pages of exhibits while others were out of sequence. Fletcher and Willis are citing to the complete and correct copy, CP 960-1071, made part of the record through a stipulation and order correcting the record. *See* CP 956-958.

² *See also* CP 87 for the best quality reproduction of the picture of the variable frequency drive.

The cabinet, “almost like a little room,” had doors that opened out and was elevated slightly off the ground. CP 981-82, 1035. The VFD itself also had a front panel, or cover. CP 155, 265. There were holes on top of the cabinet. CP 266. Inside the VFD were capacitors, which weighed about 20 pounds each and were mounted to a panel inside the VFD. CP 978-79, 1013. There were nine capacitors inside the VFD, mounted in sets of three to three panels. CP 978-79. Above the capacitors was the fan -- small, black, and square -- mounted flat toward the top of the VFD to blow air down into the drive and cool off the capacitors. CP 1012, 1017-19, 1035 (picture of the VFD and the cabinet), CP 1037 (picture of the fan).³

Willis did not have an electrician on staff at its Oakville facility, so it called on a contractor, Advanced Electrical Technologies, to send a technician to fix the VFD. CP 968, 991, 993. Advanced Electrical Technologies employed Verl Lee as an electronics technician (not an electrician), and dispatched him to Willis to repair the VFD. CP 972, 975. Lee was injured during the repair attempt when a Willis employee, Daniel Fletcher,⁴ attempted to restart the stalled cooling fan by tapping it with the blade of a screwdriver but instead caused a loud electric arc blast. Specifically, the Lees alleged the following occurred after Lee informed Fletcher that a non-operational cooling fan in the VFD prevented the VFD, and therefore the mill, from running:

³ See Exhibits 2, 14, 17, and 28 for visual reference regarding the positioning of the VFD inside the VFD cabinet. Exhibit 8 shows a close-up of the fan at issue.

⁴ Fletcher’s nickname is “Detroit,” and he was sometimes referred to by that nickname during the course of deposition testimony and at trial.

VERL LEE tried several more times to start and stop the VFD to see if the fan would recover, but it did not. VERL LEE then again positioned himself inside the enclosure to look at the fan. VERL LEE was looking down at the fan from the top of the VFD unit as he had done before, when DANIEL FLETCHER, who was standing outside the enclosure in front of the VFD, said, "I think I can hit the fan from here with my screwdriver and maybe that will make it turn." VERL LEE, while still inside the enclosure, immediately responded, "No, you can't," at which time there was an immediate loud explosion.

CP 3-4.

Lee and his wife Marsha Lee (the "Lees") filed a personal injury lawsuit against Willis, and Daniel Fletcher, on November 13, 2012, in Grays Harbor County Superior Court, alleging that the *noise* from the explosion damaged Lee's hearing and caused the Lees' damages. CP 1-7. The Lees alleged that Fletcher was negligent and that Willis was liable under the doctrine of *respondeat superior* for Fletcher's actions within the scope of his employment. CP 4-5. The Lees did not plead any theories of direct liability, such as negligent supervision or negligent entrustment, against Willis. The Lees' theory of negligence was that Fletcher "was not qualified to work on the unit and lacked adequate training to work on the unit[, and that it] is unsafe and negligent for a person who lacks adequate training to insert a screwdriver in a high-voltage Variable Frequency Drive when the power is on to the unit." CP 4-5.

Willis and Fletcher denied that Fletcher was negligent and contended that it was instead negligent for Lee, the person qualified to work on the unit, "to encourage or permit or allow or direct Defendant FLETCHER, or any person who lacks adequate training, to take any

action with respect to the equipment without close and careful supervision.” CP 11.

B. Before trial, the trial court entered partial summary judgment on liability, ruling that Fletcher was negligent as a matter of law.

The Lees moved for summary judgment on liability, arguing that Fletcher was negligent as a matter of law and that Willis, in turn, was liable for its employee’s negligence. CP 116-34.

The following statement of the facts is based on the evidence that was before the trial court when it granted the Lees’ motion for summary judgment. Fletcher and Lee told conflicting stories about the events leading up to, and the moments just before, the accident. Fletcher and Lee were the only witnesses to those events.

1. Fletcher’s story.

(a) Fletcher volunteered to help Lee in his attempt to repair the VFD, then deferred to Lee’s authority and expertise during the course of the work.

On January 25, 2010, Lee reported to Willis and was referred to Fletcher, who took him to the VFD. CP 975-76. Fletcher was a “loader operator” at the mill. CP 966, 1005. His job duties were to schedule the chip trucks, and to schedule and load the “hog fuel” trucks.⁵ CP 966. Fletcher told Lee he had already tried everything he knew to restart the

⁵ “Hog fuel is a byproduct of the chipping. It’s the bark that comes off, plus any residual fiber that falls off the logs. It’s ground up into a finer material that the mills can use to burn for power.” CP 966.

VFD. CP 976. Fletcher then volunteered to help. CP 1008, 1016. Fletcher understood that his role with Lee was to “help him get [the VFD] running.” CP 264. Lee had worked at Willis, and with Fletcher, before. CP 259, 993.

After being shown to the VFD, Lee performed a power-on test of the parameters to determine whether an incorrect setting was the cause of the overheating. CP 977. Next, Lee connected a meter to the VFD’s power lines to test for a short circuit in a motor. CP 977. After those initial unsuccessful diagnostic efforts, Lee told Fletcher they “were going to have to take [the VFD] apart.” CP 977. Lee asked Fletcher to get an air hose that Lee could use to blow out the VFD, and Fletcher did so. CP 977. Lee removed the front panel to the VFD and blew out what he could. CP 977.

When Lee was ready to start removing the capacitors, he told Fletcher to “stand back now” because he was going to remove the capacitors. CP 977. Lee explained to Fletcher the dangers involved with capacitors. CP 978-79. Lee testified that he would not let Fletcher touch the capacitors because they “can hold a charge for quite some time[,]” which apparently meant that he did not have Fletcher grab hold of the capacitors when they were in the panel, while allowing Fletcher to help Lee set the capacitors on the ground after they were removed from the panel. CP 979.

Fletcher also assisted Lee by holding the screws while he took the capacitors out. CP 978-79. Finally, Fletcher helped Lee put the capacitors

back in place after Lee finished blowing them out with the air hose. CP 978.

- (b) Lee eventually determined that the VFD's internal fan was stuck. Lee explained to Fletcher that, without a working fan, the VFD, and thus the mill, would remain down. Lee then tried to fix the problem, but without success.**

After the VFD had been reassembled, Lee turned the power back on, but the VFD still would not restart. CP 154, 981-82. Lee then tried working with the VFD's display screen, and as he was doing so he "looked down from the top and saw that the fan was not turning." CP 981. Fletcher testified that the "fan was moving" for a couple minutes after they blew out the capacitors and put them back together, but that the fan did not turn when they tried to start the entire machine back up again: "[W]e tore it all apart, we put it back together and the fan was turning, and then we shut it off, we turned it back on and the fan wasn't turning." CP 263, 1020.

Lee explained the problem to Fletcher: "I told him [Fletcher] -- I said, 'There's our problem. The fan is not turning. . . . It's a little \$15 fan. And that's what causing our problem.'" CP 320.

Lee tried squirting WD-40 down into the fan. CP 982. When the WD-40 failed to unstick the fan, Lee and Fletcher looked around for a

spare new or old replacement fan. CP 982. They did not find one and returned to the VFD. CP 982.⁶

After the WD-40 and the failed search for a replacement fan, Lee explained to Fletcher that he wanted to check if the fan was turning slowly or not at all. CP 982. Although the VFD's front panel, or cover, remained open after the capacitors were put back in place, a transformer partially obscured Lee's view of the fan from the front of the VFD. CP 156, 265, 979. Lee "got up inside the 6x6 [VFD cabinet] and got over to the section where [he] could look with [his] little flashlight down inside." CP 982. Lee was on tiptoes to see down inside the VFD to the fan. CP 982. Lee confirmed the fan was not turning, telling Fletcher that "nothing is making the fan turn." CP 982.

(c) Fletcher announced that he wanted to try to restart the fan by tapping it with a screwdriver. Lee did not object but instead illuminated the fan with a flashlight, allowing Fletcher to see it clearly. *Fifteen seconds then elapsed between Fletcher's announcing his intention to tap the fan blade and his attempt to tap it.*

Fletcher thought he could get the stuck fan turning again if he tapped it. CP 294. 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.

⁶ Lee's testimony puts the search for the replacement fan before he tried squirting the WD-40 into the fan. CP 320-22.

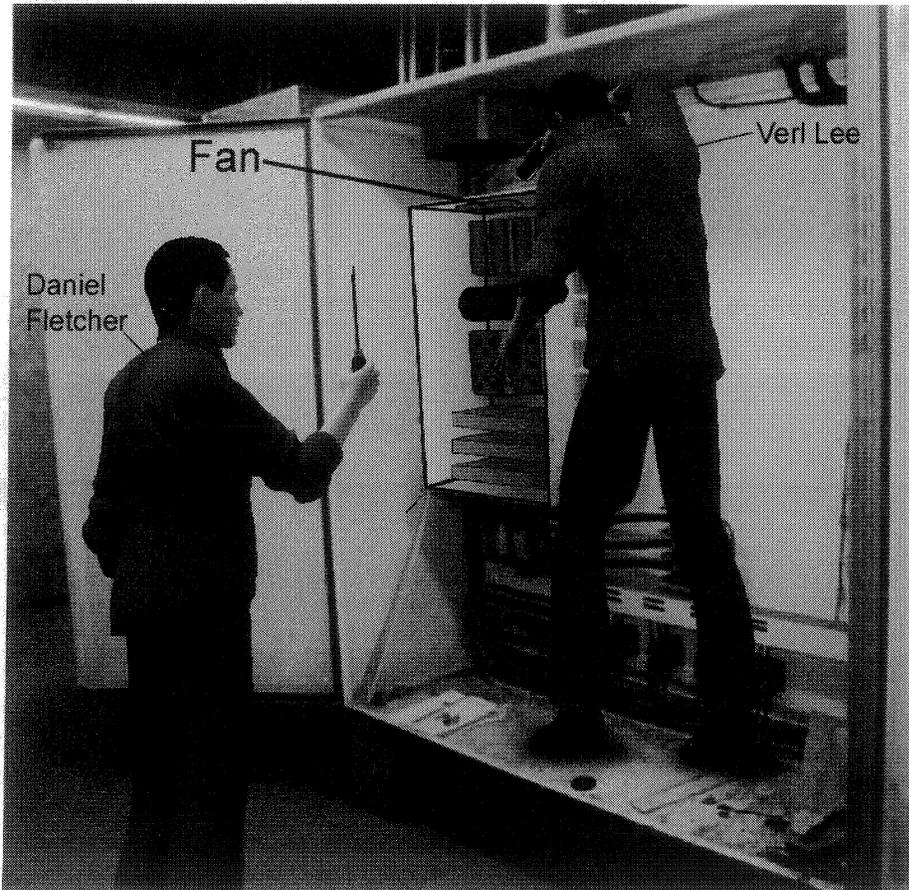
Fletcher had about an inch of room within which to get at and hit the fan. CP 278. While “[i]t wasn’t much[.]” room, Fletcher thought it would be “plenty.” CP 277-78. He compared what he was about to do to the electronic board game “Operation,” in which players attempt to remove an object without touching the side of the container in which the object is placed. CP 278.

Fletcher testified that Lee was in the VFD cabinet shining his flashlight for a “couple minutes” before Fletcher attempted to restart the fan. CP 1016. Fletcher testified that: “[Lee] got up there to see if the fan was turning[.]” 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.” CP 272-73. *See also* CP 266 (describing holes on top of the VFD cabinet through which Lee was shining the light). Fletcher testified that: “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.” CP 273.

Fletcher testified that Lee was “probably looking at [him]” when he turned around to get the screwdriver. CP 1025. Fletcher testified that he knew that Lee saw him with the screwdriver “[b]ecause he was up there on the top and when I swung around he’d seen me with the screwdriver. And that’s when 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.” CP 274. *See also* CP 281 (Fletcher testifying that Lee saw the screwdriver).

To aid the Court’s understanding of the circumstances of the accident, Fletcher and Willis provide the following illustration of the relative positions of Fletcher and Lee at the moment when Fletcher, after picking up the screwdriver, turned and said he was going to tap the fan with it:



This rendering is based on the evidence before the trial court on summary judgment. *See* Appendix A (with record references).

Fifteen seconds went by between when Fletcher announced he was going to tap the fan with the screwdriver and when he actually tried. CP 271. During that 15 seconds, Lee just “stood there and held that flashlight to where [Fletcher] could see [the fan].” CP 270. Lee had an opportunity to tell Fletcher not to do it, but did not do so. CP 297, 1025.

Fletcher testified that he thought Lee was holding the flashlight so Fletcher could identify the place to tap the fan, and Fletcher considered that act to be Lee’s indication of his agreement that tapping the fan with the screwdriver was a proper way to proceed. CP 282. Fletcher expected Lee to say something if Lee thought it was dangerous. CP 282, 306.

2. Lee’s conflicting story: Fletcher got the screwdriver and announced he was going to tap the fan blade, and attempted to do so -- actions taken so quickly that Lee barely had time to complete a spoken objection just before Fletcher set off an arc blast.

In Lee’s version of the events, immediately before the electrical arc, he had gotten up inside the six foot by six foot enclosure to determine whether the fan was spinning slowly or not at all; shining his flashlight down at the fan, Lee saw that the fan was not turning. CP 181, 982. Lee explained that he was illuminating the fan to see the center of the fan with the writing on it; if it was spinning, he would not be able to read the writing. CP 319.

Lee told Fletcher the fan was not turning and Fletcher replied that he thought he could hit the fan with a screwdriver. CP 982. Lee

remembered Fletcher saying “I think I can get it to turn if I tap it from down here.” CP 323.

Lee testified that Fletcher had already bent down to pick up the screwdriver by the time Lee said “no, you can’t.” CP 323, 982. Lee said that was as much as he could say before Fletcher went in with the screwdriver. CP 982. Lee testified that he thought he had said enough to stop Fletcher, because he had already made Fletcher “mad” when he earlier told Fletcher not to do something. CP 180.

3. There was no reason for Fletcher to anticipate that his actions would lead to an electrical arc blast that could damage a bystander’s hearing.

As Fletcher tried to tap the fan with the screwdriver, he unintentionally hit the screwdriver against either the bar beside the fan or the probes on the power leads instead of the fan. CP 275, 277, 298.⁷ Lee described what happened after Fletcher attempted to tap the fan as the loudest sound he had ever heard. CP 982. Fletcher’s screwdriver was welded in place and the VFD was destroyed. CP 983. An electrical arc blast had occurred. CP 973. This arc blast was the cause of Lee’s hearing injury, for which he sought compensation in this action.

Fletcher had not had any training or instruction in electrical arc blasts before the incident. CP 1009. He had never heard of electrical arc blasts. CP 1009. Although Fletcher testified that there was a sign on the

⁷ Fletcher was so close to the VFD that he felt the heat from the arc blast and had his eyebrows singed. CP 1023.

cabinet that said high voltage, Fletcher did not understand what voltages were involved in VFDs. CP 153, 1009. He knew the VFD was energized, but did not know how to tell which parts of the VFD were energized and which parts were not. CP 263, 1010. He did not know whether there was a high risk of an arc blast if he stuck the screwdriver into the VFD while it was energized. CP 153.

For his part, Lee did not anticipate that hearing protection would be necessary because an electrical arc had never occurred during the course of his work on hundreds of VFDs. CP 180, 973. Lee did not anticipate that the dangers of working on an energized VFD would include an electrical arc. CP 974-75. He had no “reason to anticipate that anything would make any noise, because we were dealing with just the VFD.” CP 974. Lee’s expert, Paul Way, testified that Lee had no reason to be wearing hearing protection there was no reason “to anticipate that an electrical arc blast would occur in connection with the diagnostic assessment [Lee] was doing on the VFD.” CP 108.

Although Lee said he tried to tell Fletcher not to try to tap the fan with the screwdriver, Lee also said that he did not expect that an arc blast might result from what Fletcher was about to do. CP 316. Lee’s main concern was that sticking something metal in the VFD would short something out and damage the VFD. CP 316. The reason Lee turned the power off when he disassembled the unit was so that anything he touched would not be energized. CP 975. But he only would have expected severe

or fatal injuries to *himself* if *he* touched something that was energized. CP 975.

Lee also testified that he would not expect Fletcher to know anything more about the possible consequences than Lee did, since he was the expert. CP 316-17.

4. Other Willis employees testified it would have been reasonable for Fletcher to rely on Lee as the expert.

The Willis mill manager, Patrick Carl, and other mill employees agreed that someone who is not qualified to work on a variable frequency drive should not get close to, or put a screwdriver into, a variable frequency drive while it is energized. CP 969 (Walter Brannock), 1068 (Raymond Ramberg), 1071 (Michael Koonrad), 1000 (Patrick Carl), 1032 (Todd Charlton), 1051 (Rex Waltrip). One employee agreed to the same, “unless there is a supervisor there watching you do it.” CP 1071. None of the Willis employees testified that the reason for not working on an energized VFD was to avoid the risk of hearing damage from a loud electrical arc blast.

Carl would have told Fletcher to rely on the judgment and suggestions of the expert, Lee. CP 1001. *See also* CP 967 (Brannock testifying that he would do “[b]asically whatever a contractor asks of” him when assigned to assist a contractor called to the mill). Carl would expect Lee to make decisions about the amount of help that was needed. CP 1001. Carl would not expect Fletcher to do anything without being instructed or asked to do so by Lee. CP 1001.

Similarly, the mill's operations manager, Todd Charlton, testified that "Verl was in charge of the situation. He is the licensed electrician." CP 1030. "[W]hen two people are working together and one of them is a professional, you would think they would be in control of the other one." CP 1032. Charlton agreed that it would be against common sense if Fletcher did something without asking or being directed by Lee. CP 1030-31. Charlton thought Lee should have told Fletcher not to be involved because he was in charge. CP 1032. Another Willis employee thought that the contractor should say so if he is uncomfortable with someone helping. CP 1051. "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.

5. The trial court granted the Lees' motion for summary judgment on liability.

The Lees moved for summary judgment on liability. They argued that Fletcher was not qualified to work on the VFD and "should not have taken any action with regard to the drive unless requested by Mr. Lee." CP 116-17, 133. Lee claimed on summary judgment that he "did not in any way direct or encourage Mr. Fletcher to put the screwdriver into the drive[]" and that he was only able to say "No, you can't" before Fletcher acted. CP 117, 122, 128-29, 133.⁸ The Lees argued that Fletcher was

⁸ Lee argued that Fletcher admitted that it all happened very fast, as if Fletcher was referring to *his* actions, *see* CP 122, when Fletcher was in fact testifying about the explosion happening so fast he could not be sure if there was sound or just a flash. *See* CP 1016, 1021.

negligent as a matter of law, and that Willis was vicariously liable for the negligence of Fletcher. CP 128, 133.

Willis and Fletcher opposed the motion for summary judgment on their liability, arguing that the most telling fact was Lee's admission that he did not expect anything worse than a harmless short could result from Fletcher's action, and that he did not anticipate an arc blast. CP 229-32. Willis and Fletcher further argued the following: that the only two people present at the time of the event disagreed about what happened, CP 225-26; that Lee was the expert, CP 226-27; that Lee had the opportunity to tell Fletcher not to tap the fan and did not say "no" but instead continued shining his flashlight on the fan, knowing what Fletcher was doing, so that Fletcher could see to tap the fan. CP 228.

Willis and Fletcher argued that, for purposes of summary judgment, the trial court would have to assume that Fletcher's account of the events is true and that summary judgment should be denied where Lee did not say "no" after Fletcher announced his plan despite knowing what Fletcher was doing and having the opportunity to object, and where Lee collaborated with him by holding the flashlight so he could see to tap the fan. CP 235-36. Willis and Fletcher noted that summary judgment is particularly inappropriate when the issues relate to a person's state of mind or issues of intent and that summary judgment should not be granted on issues related to whether a party consented to, had knowledge of, or was mistaken about something. CP 237.

During the motion hearing, Fletcher and Willis further argued that a finding of negligence as a matter of law would be improper because Fletcher believed his actions had been approved by Lee, “the guy that was running the show.” RP (1/21/14) 9-11. “[I]t appeared to Mr. Fletcher to be a reasonable thing to do, it obviously appeared to Mr. Lee to be a reasonable thing to do, and they went ahead with it. And that standing alone is not negligence.” *Id.* at 11.

The trial court granted the Lees’ motion, ruling that “common sense tells us” that “there’s liability by sticking a screwdriver into an energized area.” CP 351-52; RP (1/21/14) 13. The trial court later explained that it inferred that the Willis employees were “hedging” their opinions and that “sitting around casually with them I think they would have said, boy, that was a stupid thing for him to stick that screwdriver in that drive.” RP (5/12/14) 1048. The court also stated that it thought Fletcher’s deposition testimony could be read similarly, by “reading between the lines.” RP (5/12/14) 1048-49.

Willis and Fletcher moved for reconsideration, arguing that the jury could find that “[n]o one present in that room, including Mr. Fletcher believed or feared or knew that something dangerous was going to happen.” CP 357 (emphasis omitted). Willis and Fletcher argued that, crediting their version of the circumstances, Fletcher believed he was collaborating with Lee to solve the problem with the VFD. CP 359. Willis and Fletcher argued that the jury should determine whether it was negligent for Fletcher to rely on the consent or agreement of Lee, and that

under the version of the facts most favorable to the defendants, there was an agreement between the two men on the method of repairing the VFD. CP 360-61.

The trial court denied the motion for reconsideration on January 29, 2014.⁹ The trial court also denied a post-trial motion by Fletcher and Willis to set aside the summary judgment ruling. RP (3/5/14) 888-89, 903-04.

C. Although the trial court granted the Lees' pre-trial motion for summary judgment on the issue of negligence, the court denied the Lees' pre-trial motion for summary judgment on Fletcher and Willis's affirmative defense of contributory fault.

Willis and Fletcher pleaded the affirmative defense of contributory fault, claiming that Lee's negligence was a proximate cause of his damages. CP 12. The Lees argued there was no evidence that Lee failed to exercise reasonable care for his own safety or that anything he did caused his injuries. CP 199. The Lees argued that Lee had a right to assume that Fletcher would exercise reasonable care. CP 199, citing WPI 12.07. The trial court denied the Lees' motion for summary judgment dismissal of Willis and Fletcher's contributory fault defense, allowing the jury to determine whether there was any contributory fault from Lee. CP 349. The trial court reasoned that:

⁹ During motions in limine, the Lees sought to exclude argument that Fletcher and Willis were not at fault on the basis that the court already granted summary judgment holding otherwise. CP 384. Over the objections of Fletcher and Willis, the trial court ruled that there could be no argument that Fletcher was not negligent. RP (2/13/14) 98; CP 512, 630.

there's enough in the record if you believe Mr. Fletcher's testimony that he was -- I guess whether he was invited or not, was allowed by their actions to be around the workplace area there, and he said he said, I'm going to tap this, and waited about 15 seconds. I think it's an issue of fact as to whether or not a person with the expertise that Mr. Lee had would have been reasonable for his own protection to say, hey, you stay away from this workplace. I'm doing this. Go do some other work or don't touch a thing, you know, this is my show here.

RP (1/21/14) 18.

D. The trial court's evidentiary rulings at trial.

1. The trial court prohibited Fletcher and Willis from offering evidence that there was an agreement for Fletcher to tap the fan.

The Lees moved in limine to exclude argument that Fletcher had an agreement with Lee to tap the fan, citing a lack of evidence and ER 403. CP 385-87. Fletcher and Willis opposed this motion on the basis that Fletcher's deposition testimony provided evidentiary support for his belief that Lee agreed with his plan and for the related assertion that he believed he was working as a team with Lee. CP 512-16. The evidence cited by Fletcher and Willis included the following testimony from Fletcher: that Lee was shining the flashlight so Fletcher could identify where to tap the fan, CP 512, citing CP 263; that he considered Lee's continued shining of the flashlight on the fan after he announced he was going to tap it to be an agreement that tapping the fan was the way to proceed CP 515-16, citing CP 282; that fifteen seconds elapsed between when Fletcher said he would tap the fan and when he did CP 514, citing

CP 271; and that Fletcher would have expected Lee to say something if his plan was dangerous. CP 516, citing CP 282.

During the motion in limine hearing, the trial court stated that “[f]actual witnesses are supposed to testify about what happened. And [there] isn’t any evidence that they have any written or oral agreement to that extent, to do anything.” RP (2/13/14) 101. The court clarified that Fletcher would be allowed to testify as to his perception, although he would not be allowed to testify that from his perspective Lee appeared to agree with his plan. RP (2/13/14) 101-04; CP 576. The order on the Lees’ motion in limine (not entered until February 25, the fourth day of trial) excluded “argument or testimony that there was an ‘agreement’ between Daniel Fletcher and Verl Lee for Mr. Fletcher to try to ‘tap the fan’ with a screwdriver. Mr. Fletcher cannot speculate about what Mr. Lee was thinking or testify about what he believes Mr. Lee understood or agreed to.” CP 630.

The issue arose during opening statements, which were not recorded, resulting in the following clarifications from the trial court:

And then specifically regarding what Mr. Fletcher’s perception was, I said that he can talk about everything he did that day or didn’t do and everything that Mr. Lee did or didn’t do as far as not telling him to, you know, stop, don’t put that in here, but he couldn’t say what was in Mr. Lee’s mind, that Mr. Lee understood that I was going to stick the screwdriver up there to tap the fan, because he can’t read his mind or know what is in Mr. Lee’s mind.

RP (2/19/14) 9.

And that is the critical issue in this case as to the case of the plaintiff is, is that Mr. Lee did not have time to respond, that he

just all of a sudden said, I'm going to hit the fan and he hit it, and, boom, it went off. There's a dispute – a key dispute of facts there. And so I prohibited – prohibited the testimony of Mr. Fletcher as to what Mr. Lee was thinking or whether he was agreeing, because that is speculation on – on his part.

*Id.*¹⁰

The issue arose again during Fletcher's testimony when he testified that Lee was pointing the flashlight so he could see the fan and the Lees objected. The trial court sustained objections as to Fletcher's understanding and thoughts on why Lee was shining a light on the fan. RP (2/20/14) 84-86. Fletcher also testified that Lee was holding the flashlight when he told Lee he was going to tap the fan so that he could see the fan. The trial court sustained the Lees' objection and struck the "so I could see it" part of Fletcher's answer. RP (2/20/14) 86. *See also* RP (2/27/14) 503-04. The trial court ruled that Fletcher was allowed to describe what took place but prohibited testimony about what was going on in Lee's mind because the trial court thought there was no evidence of a verbal agreement. RP (2/21/14) 14-16.

Fletcher and Willis objected that not all human interaction is spoken, and that Fletcher should be allowed to testify about his perceptions. The trial court prohibited Willis and Fletcher "from having [their] witnesses testify about what Mr. Lee -- Lee's thought process was because he's the only one that knows that. And you can't speculate about what other parties or witnesses were thinking." RP (2/21/14) 15-16. The

¹⁰ The court instructed the jury to disregard statements made about Fletcher speculating what Lee was thinking. CP 608.

trial court further ruled that: “I was prohibiting the conclusion or opinion by Mr. Fletcher that Mr. Lee understood what he was going to do.” RP (2/21/14) 18. Fletcher and Willis argued that it was a fair inquiry whether a person believed that the other person acquiesced. RP (2/21/14) 19. The trial court disagreed, further ruling that Fletcher and Willis could not ask Fletcher if he saw or heard anything to make him think that Lee was agreeing or not agreeing. RP (2/21/14) 19-20. The trial court prohibited Fletcher from answering whether he thought Lee did not want him to proceed with the screwdriver. RP (2/27/14) 534-35.

The trial court allowed that Fletcher and Willis could put it all together in closing, which they did without evidentiary support. RP (2/21/14) 20-21; RP (3/5/14) 1009-10 (arguing in closing that Fletcher assumed he and Lee had an agreement); RP (3/5/14) 1014 (rhetorically asking what Lee was doing with the flashlight if not showing Fletcher where to tap the fan).

2. **The Lees were allowed to introduce evidence that Fletcher’s employer believed he needed to be kept on a “short leash,” even though the trial court denied a motion allowing the Lees to add a negligence claim against Willis.**

Walter Brannock, the millwright at the Willis facility, worked with Fletcher on a daily basis and stated during his deposition that Fletcher is “kind of a doer, and if you don’t coach him and tell him what to do, he just does.” CP 966, 969. Brannock added that “you just kind of keep [Fletcher] on a short leash.” CP 969. Fletcher and Willis moved in

limine, and before trial, to exclude such character evidence at trial. CP 477, 524-25.

The Lees argued that evidence of Fletcher's tendencies to do things without asking or being asked was relevant to the issue of comparative fault because *Willis* assigned Fletcher to Lee without telling Lee of his tendencies. CP 485. The Lees claimed they were not offering it to show Fletcher's tendency toward negligence but to show the negligence of *Willis*, by way of its knowledge about Fletcher and its decision to nonetheless assign him to Lee without a warning about watching him closely. RP (2/13/14) 167. "They [Willis] shouldn't have put him in that room in the first place, that's the point." RP (2/13/14) 167-68. The court initially reserved its ruling on the issue. RP (2/13/14) 169; CP 577.

On the third day of trial, the Lees argued that the "short leash" evidence was relevant to the knowledge of *Willis* and that Fletcher and Willis would open the door to the "short leash" evidence if they had their experts testify that Lee should have taken charge of Fletcher and set boundaries for him. RP (2/21/14) 6-7 (emphasis added). The trial court ruled that the evidence was to remain excluded unless there was "a big push" made on the theory that Lee needed to control Fletcher. RP (2/21/14) 10-11. The trial court apparently thought the "short leash" evidence would be relevant to "whether or not a reasonable *employer* should have notified this contractor or Labor and Industry about his tendency." RP (2/21/14) 11 (emphasis added).

The issue arose again during the voir dire of the Willis operations manager, Todd Charlton. Fletcher and Willis wanted to ask Charlton whether it was the practice of Willis to have employees do what contractors say, to which Charlton would have answered that hopefully the employees do as asked. RP (2/21/14) 79. The Lees argued that opened the door to the “short leash” evidence. RP (2/21/14) 80. The trial court agreed, stating that the Lees should be able to explore whether Willis conveyed that the employee in his control had a “tendency to act.” RP (2/21/14) 81. Charlton testified before the jury on questioning from Willis and Fletcher that Willis expects its employees, when assisting contractors, to do what the contractor asks them. RP (2/21/14) 83-84. When the trial court entered the ruling on the motions in limine on February 25, 2014, it ruled that the “short leash” evidence would be allowed “due to testimony presented by the Defendants during trial.” CP 624.

Brannock testified during questioning by the Lees that Fletcher needed be kept on a “short leash” and that he did not tell that to contractors. RP (2/21/14) 91. The Lees used that testimony in closing to argue that *Willis* knew Fletcher needed to be told what to do but that *Willis* assigned Fletcher anyway. RP (3/5/14) 928. The Lees argued that *Willis* failed to carry out its obligations to warn Lee and to supervise Fletcher despite its knowledge that he needed to be kept on a “short leash” and that he had a tendency to do things on his own. RP (3/5/14) 931, 940-41.

The Lees' complaint alleged only that Willis was liable for Fletcher's negligence under *respondeat superior*. CP 2, 5. No theories of direct liability, such as negligent supervision or negligent entrustment, were pleaded against Willis. At the close of the Lees' case, Fletcher and Willis moved the court to exclude evidence that Willis was negligent in any way other than through the actions of Fletcher. RP (2/27/14) 457-64. The Lees objected, arguing that the jury should be able to consider the fault of Willis when comparing fault. RP (2/27/14) 457-58. The court ruled that it did not want to hamstring the Lees from arguing that Willis, and not Lee, was in charge of Fletcher and his tendencies. RP (2/27/14) 460. The Lees represented to the court that they would not ask for a separate line for apportionment of liability to Willis apart from *respondeat superior*. RP (2/27/14) 477.

Fletcher and Willis objected to questions related to the independent negligence of Willis during the Lees' cross-examination of Fletcher. RP (2/27/14) 528-29. Fletcher and Willis moved for a mistrial due to the submission of evidence on the irrelevant issue of the independent negligence of Willis. RP (2/27/14) 539.

After the close of trial, the Lees moved for leave to amend their complaint to conform to the evidence on the issue of Willis's independent negligence for lack of training and violation of safety rules. CP 950-55. The Lees wanted the jury to be able to attribute fault to Willis. *Id.* But the Lees again represented that they were not asking for a line on jury form. RP (3/4/14) 879. The trial court ruled that it could not cut off the Lees

from asking questions about what Willis should do with its own employees. *Id.* Fletcher and Willis argued that they did not consent to adding a cause of action just because they asked questions on an issue. RP (3/5/14) 889-90. The trial court stated that it found the complaint “very detailed on one theory and one theory only, that’s the negligence of Mr. Fletcher, the vicarious liability of Willis Enterprises.” RP (3/5/14) 890. The trial court ruled that the Lees should have amended the complaint during discovery if they wanted an amendment, that Fletcher and Willis did not consent to trying the issue of Willis’s independent liability, and that the defendants would have been prejudiced by granting the motion to amend. RP (3/5/14) 891-92.

E. The jury returned a verdict for the Lees, finding Fletcher 90% at fault.

The jury was instructed that Fletcher was negligent and that his negligence was a proximate cause of Lee’s injuries. CP 682; RP (3/6/14) 1028. The jury found Fletcher to be 90% at fault and Lee to be 10% at fault. CP 684. The trial court entered a judgment against Fletcher and Willis for \$3,880,357.36, consisting of \$4,217.50 in costs and \$3,876,139.86, ninety percent of the damages awarded by the jury. CP 705-06.

F. Fletcher and Willis unsuccessfully moved for a new trial.

Willis and Fletcher moved for a new trial on several issues, including the trial court’s improper grant of summary judgment on the issue of Fletcher’s negligence, the trial court’s decision to allow evidence

related to the negligence of Willis, and the trial court's improper exclusion of Fletcher's testimony that he understood Lee to have agreed with his plan to tap the fan. CP 725-43.

The trial court denied the motion for a new trial. CP 938-39. Fletcher and Willis timely appealed from the judgment on the verdict and the order denying the new trial motion. CP 941-49.

IV. ARGUMENT

A. The trial court erred in deciding on summary judgment that Fletcher was negligent as a matter of law.

1. Standard of review.

"Not every act which causes harm results in liability." *Hunsley v. Giard*, 87 Wn.2d 424, 434, 553 P.2d 1096 (1976). Negligence cannot be assumed because of the mere fact that an accident occurred; it must be established by a preponderance of direct evidence or reasonable inferences from established facts. *Evans v. Yakima Valley Transp. Co.*, 39 Wn.2d 841, 846, 239 P.2d 336 (1952).¹¹ The defendant's conduct is judged based on the circumstances as they appeared to him at the time of the occurrence:

Foresight, not retrospect, is the standard of diligence. It is nearly always easy, after an accident has happened, to see how it could have been avoided. But negligence is not a matter to be judged after the occurrence. It is always a question of what reasonably

¹¹ The elements of a negligence action are (1) the defendant owed the plaintiff a duty, (2) the defendant breached the duty, (3) injury resulted to the plaintiff, and (4) the defendant's breach of duty was a proximate cause of the injury. *Christen v. Lee*, 113 Wn.2d 479, 488, 780 P.2d 1307 (1989).

prudent men under the same circumstances would or should, in the exercise of reasonable care, have anticipated.

Gordon v. Deer Park Sch. Dist. No. 414, 71 Wn.2d 119, 124, 426 P.2d 824 (1967), quoting *Winsor v. Smart's Auto Freight Co.*, 25 Wn.2d 383, 387, 171 P.2d 251 (1946).

This Court reviews a summary judgment de novo, engaging in the same inquiry as the trial court. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860-61, 93 P.3d 108 (2004). Summary judgment may be granted only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). The court must consider all facts, and all reasonable inferences from the facts, in the light most favorable to the nonmoving party. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). If reasonable persons could reach different conclusions from the facts and reasonable inferences, summary judgment must be denied. *Id.*

To conclude that a defendant's negligence is established as a matter of law, the court must find that there is neither evidence, nor any reasonable inference from the evidence, that could support a verdict for the defendant. *Gordon*, 71 Wn.2d at 122-23. "Negligence is generally a question of fact for the jury, and should be decided as a matter of law only 'in the clearest of cases and when reasonable minds could not have differed in their interpretation' of the facts." *Bodin v. City of Stanwood*, 130 Wn.2d 726, 741, 927 P.2d 240 (1996), quoting *Young v. Caravan Corp.*, 99 Wn.2d 655, 661, 663 P.2d 834, 672 P.2d 1267 (1983).

The trial court ruled that Fletcher was negligent as a matter of law, reserving only the issues of contributory negligence and damages to be resolved by the jury. This was error because the evidence and reasonable inferences raised disputed fact questions regarding whether (1) injury to Lee was reasonably foreseeable to Fletcher and (2) Lee implicitly assured Fletcher that his actions did not create an unreasonable risk of harm.

2. The trial court erred in determining that injury to Lee from Fletcher’s actions was foreseeable as a matter of law.

(a) Foreseeability is a question of fact and limits the scope of the duty owed by the defendant to the plaintiff.

The existence of a legal duty is a question of law for the court; once it is determined that a duty exists, however, the jury decides the scope of the duty by analyzing the foreseeability of harm to the plaintiff. *Schooley v. Pinch’s Deli Market, Inc.*, 134 Wn.2d 468, 474, 477, 951 P.2d 749 (1998). “Foreseeability is normally an issue for the trier of fact and will be decided as a matter of law only where reasonable minds cannot differ.” *Schooley*, 134 Wn.2d at 477; *see also 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.”); *Kennett v. Yates*, 41 Wn.2d 558, 565, 250 P.2d 962 (1952), citing *Palsgraf v. Long Island R. Co.*, 248 N.Y. 339, 162 N.E. 99, 101 (N.Y.1928) (“The range of reasonable apprehension or foreseeability, if varying inferences from the

evidence are possible, is a question for the jury.”); accord *Rikstad v. Holmberg*, 76 Wn.2d 265, 270, 456 P.2d 355 (1969).

“The duty to use ordinary care is bounded by the foreseeable field of danger.” *Wells*, 77 Wn.2d at 803. Foreseeability is not analyzed as an element of proximate cause; rather, it serves to limit the scope of the duty owed. *Schooley*, 134 Wn.2d at 477; *Rikstad*, 76 Wn.2d at 268; see also *Palsgraf*, 162 N.E. at 101. The purpose of this limitation is to ensure that “actors are responsible only for the foreseeable consequences of their acts.” *Schooley*, 134 Wn.2d at 477. Foreseeability thus determines whether the duty “embraces that conduct which resulted in injury to the plaintiff.” *Rikstad*, 76 Wn.2d at 270. “The risk reasonably to be perceived defines the duty to be obeyed[.]” *Kennett*, 41 Wn.2d at 564, quoting *Palsgraf*, 162 N.E. at 100. “If the defendant could not reasonably foresee any injury as the result of his act, or if his conduct was reasonable in the light of what he could anticipate, there is no negligence, and no liability.” *Hunsley*, 87 Wn.2d at 435, quoting W. PROSSER, TORTS § 43 at 250 (4th ed. 1971).

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. *Huston v. First Church of God*, 46 Wn. App. 740, 744, 732 P.2d 173 (1987). “Basic in the law of negligence is the tenet that the duty to use care is predicated upon knowledge of danger, and the care which must be used in any particular situation is in proportion to the actor’s knowledge, actual or imputed, of

the danger to another in the act to be performed.” *Id.*, quoting *Leek v. Tacoma Baseball Club*, 38 Wn.2d 362, 365-66, 229 P.2d 329 (1951); *see also Burr v. Clark*, 30 Wn.2d 149, 155, 190 P.2d 769 (1948).

To result in liability, the foreseeable risk of harm must further have been an *unreasonable* risk:

In order that an act may be negligent it is necessary that the actor should realize that it involves a risk of causing harm to some interest of another, such as the interest in bodily security. But this of itself is not sufficient to make the act negligent. Not only must the act involve a risk which the actor realizes or should realize, but the risk which is realized or should be realized must be unreasonable.

Gordon v. Deer Park Sch. Dist. No. 414, 71 Wn.2d 119, 124, 426 P.2d 824 (1967), quoting *Winsor v. Smart's Auto Freight Co.*, 25 Wn.2d 383, 388, 171 P.2d 251 (1946), quoting RESTATEMENT OF TORTS § 289, cmt. b (1939). An unreasonable risk is one that outweighs the utility of the act or the particular manner in which it is done. *Winsor*, 25 Wn.2d at 388, citing RESTATEMENT OF TORTS 291 (1939); *see also* RESTATEMENT (SECOND) OF TORTS § 291 (1965).

The concept of foreseeability further limits the scope of the defendant's duty by defining the class of foreseeable plaintiffs. “[T]he 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*, 87 Wn.2d at 436, quoting *Rodrigues v. State*, 52 Haw. 156, 472 P.2d 509, 512 (Haw. 1970). Thus, a defendant

“will be liable only to those persons foreseeably endangered by his conduct.” *Harbeson v. Parke-Davis, Inc.*, 98 Wn.2d 460, 480, 656 P.2d 483 (1983). “If the actor’s conduct creates...a recognizable risk of harm only to a particular class of persons, the fact that it in fact causes harm to a person of a different class, to whom the actor could not reasonably have anticipated injury, does not make the actor liable to the persons so injured.” RESTATEMENT (SECOND) OF TORTS § 281, cmt. c (1965).

(b) Reasonable minds could differ as to whether Fletcher should have known that his actions could create an unreasonable risk of harm to Lee.

The trial court erred in ruling as a matter of law that the risk of injury to Lee from Fletcher’s actions was reasonably foreseeable to Fletcher, where neither actual nor imputed knowledge that tapping the fan blade with a screwdriver posed an unreasonable risk of harm -- specifically, in the form of a hearing-shattering arc blast -- was established beyond dispute.

First, there was no evidence that Fletcher had actual knowledge of any risk of harm to Lee, a bystander, as a result of his attempting to tap the fan blade. Fletcher was employed as a loader operator and lacked any qualifications or expertise in electricity. CP 966, 1005, 1009. He testified specifically that he lacked any understanding of the voltages involved with the VFD. CP 327, 1009. The testimony established only that he was aware of some risk from accidental contact with an energized part of the VFD; that is, a minor, harmless short. CP 153, 263, 1009, 1021, 1025.

This is why he moved slowly and with care -- action he compared to playing the game of Operation. CP 278. He testified that he did not know what an electrical arc blast was, which meant he also did not know what could cause one or that it could make a noise so loud as to cause hearing loss to someone in the vicinity. CP 153, 159, 327, 335, 1025. Had the jury been allowed to decide the issue of Fletcher's negligence, it would have been entitled to believe Fletcher's testimony that he knew none of the facts that might have caused him to anticipate that his actions posed an unreasonable risk of harm to Lee. *See Peterson v. Betts*, 24 Wn.2d 376, 388-89, 165 P.2d 95 (1946).

Second, as to imputed knowledge, an actor is charged with recognizing only the risks of harm that a reasonable person would recognize, while exercising such perception, knowledge, intelligence, and judgment as a reasonable person would possess, and such superior knowledge as actually possessed by the actor. *Winsor*, 25 Wn.2d at 387-88, citing RESTATEMENT OF TORTS § 289 (1939); *see also* RESTATEMENT (SECOND) OF TORTS § 289 (1965). In evaluating the actor's knowledge, the actor is deemed to know "the qualities and habits of human beings and animals and the qualities, characteristics, and capacities of things and forces in so far as they are matters of common knowledge at the time and in the community." RESTATEMENT (SECOND) OF TORTS § 290 (1965).

Reasonable minds could differ as to whether Fletcher, absent actual knowledge but in the exercise of due care, should have known (1) the risk of an electrical arc blast occurring, (2) the risk of serious injury

(specifically, hearing damage) from such a blast, and (3) that a bystander such as Lee was within the field of danger for such injury. No evidence was presented that the nature, causes, and risks of electrical arc blasts to bystanders are matters of common knowledge to a person, such as Fletcher, who lacks special qualifications or expertise. Yet the trial court effectively charged Fletcher as a matter of law with knowing that the utility of his attempting to tap the fan blade with a screwdriver -- potentially getting the mill up and running without further hassle or delay -- was outweighed by the risk of loss of hearing from an arc blast. *See Winsor*, 25 Wn.2d at 388.

To appreciate the absurdity of charging Fletcher with such imputed knowledge, one need only consider that Lee, who held himself out as an expert with regard to electricity generally and the VFD specifically, testified in deposition that there was no reason to anticipate that an electrical arc blast, endangering bystanders, might occur while working on a VFD with the power on. CP 974-75. The Lees' electrical engineering expert, Mr. Way, similarly testified there was no reason to anticipate that an electrical arc blast would occur, even with the power on and the VFD cabinet open. CP 108.

Indeed, Lee anticipated that the worst that might result from Fletcher's actions was a minor electrical short that could damage some electronics; he did not expect the drive to explode. CP 181. One holding himself out as an expert and accepting employment to repair particular equipment is presumed to know the nature and character of the work

involved. *Burr*, 30 Wn.2d at 156. If Lee, with his superior knowledge and expertise, did not anticipate a loud electrical arc blast from Fletcher's actions, and thought the worst that might result was a harmless short, then certainly Fletcher cannot be charged *as a matter of law* with imputed knowledge that the harm ultimately sustained by Lee, a bystander, was within the foreseeable field of danger.

In ruling that Fletcher was negligent as a matter of law, the trial court reasoned "common sense tells us" that "sticking a screwdriver into an energized area" is not a "reasonable thing to do." The court implicitly decided that injury was reasonably foreseeable as a matter of law, but evidently did not analyze the issue completely or correctly. Even assuming it were common knowledge that injury to *oneself* is foreseeable from accidental contact with an energized part of a VFD, it is far from clear that an unreasonable risk of harm to a bystander, from the noise of an arc blast, should be anticipated -- particularly by one without specialized knowledge or expertise. Reasonable persons could thus differ as to whether Lee was a foreseeable plaintiff.

Even assuming there could be no dispute that Fletcher acted negligently with regard to his *own* safety (which would be at issue only if Fletcher were the plaintiff), it was error to rule as a matter of law that he was negligent toward Lee. That was an issue only the jury could properly decide.

3. The trial court also erred in rejecting as a matter of law Fletcher's reasonable reliance upon Lee's implicit assurance of safety.

(a) A person may reasonably rely upon another's implicit assurance of safety, particularly where the other has superior knowledge or expertise.

A person who gives an assurance of safety has a duty to exercise reasonable care in doing so. *See, e.g., Alston v. Blythe*, 88 Wn. App. 26, 943 P.2d 692 (1997) (holding that, if a driver waved the plaintiff to cross in front of his truck, he had a duty to exercise reasonable care by first ascertaining whether it was safe for her to cross); *Panitz v. Orange*, 10 Wn. App. 317, 518 P.2d 726 (1973) (holding that a bus driver's negligence was an issue for the jury where, if he waved the plaintiff across the street, he had a duty to exercise reasonable care in doing so).

One is not negligent if he acts in reasonable reliance upon an express or implied assurance of safety. *See Aores v. Great Northern Ry. Co.*, 166 Wash. 17, 6 P.2d 398 (1931) (rejecting an argument that the plaintiff was contributorily negligent as a matter of law in crossing at a gated railroad crossing without looking, where an implicit assurance of safety arose because a train had passed, the gates raised, and the bell stopped ringing). A reliance defense is particularly strong where the person giving the assurance has superior knowledge or expertise. *See, e.g., Dorr v. Big Creek Wood Prods.*, 84 Wn. App. 420, 927 P.2d 1148 (1996) (holding that the trial court properly refused to instruct on implied primary assumption of the risk where the plaintiff was injured by a falling branch after the defendant, a professional logger, waved him to come

over; the court held that plaintiff did not assume the risk of reliance on the assurance of safety implicit in the logger's gesture); *City of Bedford v. Zimmerman*, 262 Va. 81, 547 S.E.2d 211 (Va. 2001) (rejecting an argument that the plaintiff electrician was contributorily negligent as a matter of law in cutting a service wire without testing for live current where in addition to an express assurance, he reasonably relied upon the utility's ordinary practice of installing a plastic cover to indicate live current).

That others were in a position to appreciate the risk of harm and warn the defendant, but gave no warning, is also relevant to the question of negligence. *See Rose v. Nevitt*, 56 Wn.2d 882, 887, 355 P.2d 776 (1960).

(b) The right to rely upon an implicit assurance of safety is particularly strong in the context of a master-servant relationship.

In the context of a master-servant relationship, the servant is entitled to rely on the master's implicit assurance of safety in performing the work as directed or expected, unless the danger was so plain and obvious that no reasonable person would have proceeded. *See, e.g., Browning v. Ward*, 70 Wn.2d 45, 422 P.2d 12 (1966); *System Tank Lines, Inc. v. Dixon*, 47 Wn.2d 147, 286 P.2d 704 (1955).

The circumstances in *System Tank Lines* were analogous to this case, except that the injured worker was the one in Fletcher's shoes. System Tank Lines brought its gasoline tanker truck to an independent repair shop when its own shop was closed due to a strike. 47 Wn.2d at

149. Mr. Holinka, a foreman in System's shop, was working at the independent shop during the strike. *Id.* at 149-50. Holinka asked Clarence Dixon, an experienced welder not from System, to perform a weld on System's tanker truck. *Id.* While Holinka knew that the truck had not been sufficiently cleaned to be safe for welding, Dixon did not and was injured when the tank exploded while he was welding. *Id.* at 150. Affirming the judgment on a verdict for Dixon against System, the Supreme Court concluded that the evidence was sufficient to support findings that Holinka was working on System's behalf and that Dixon reasonably relied upon an assurance of safety that was implicit in Holinka's request of him. *Id.* at 151.

In *Browning*, the plaintiff housekeeper had both hands full after retrieving a vacuum from upstairs, when she realized she did not have the detachable power cord. 70 Wn.2d at 47. The defendant homeowner promptly found the cord and draped it unsecured over the plaintiff's forearm, saying, "Okay, you are ready to go now." *Id.* The plaintiff then proceeded down the stairs, dropped the cord, and slipped on it, resulting in injury. *Id.* at 48. Rejecting an argument that the plaintiff was contributorily negligent as a matter of law, the Supreme Court affirmed the judgment on a verdict for the plaintiff. *Id.* at 50. The court reasoned that the jury was properly allowed to decide the question of contributory negligence because reasonable minds could differ as to whether it was reasonable for the plaintiff to continue down the stairs, where the

defendant's actions and words carried an implicit assurance of safety.
*Id.*¹²

The existence of a master-servant relationship does not depend on formalities, but may arise based on the circumstances. “[W]here one volunteers or agrees to assist another, to do something for the other’s benefit, or to submit himself to the control of the other, even without an agreement for or expectation of reward, if the one for whom the service is rendered consents to its being performed under his direction and control, then the service may be rendered within the scope of a master-servant relationship.” *Baxter v. Morningside, Inc.*, 10 Wn. App. 893, 896-97, 521 P.2d 946 (1974). For instance, one may become another’s servant where he is “lent by his master to another for some special service so as to become, as to that service, the servant of such third party.” *Christiansen v. McLellan*, 74 Wash. 318, 320, 133 P. 434 (1913) (quotation omitted).

¹² The Supreme Court has applied the same principle in other cases, to similar results. *See, e.g., Hull v. Davenport*, 93 Wash. 16, 159 P. 1072 (1916) (reversing a judgment that the plaintiff was contributorily negligent as a matter of law for using an elevator that lacked signals, where a standing order to “use the elevator” carried an implicit assurance of safety); *Christiansen*, 74 Wash. 318 (rejecting the argument that the plaintiff assumed the risk as a matter of law by driving down an obviously steep slope, where the master’s direction carried the implicit assurance that it was a reasonably safe thing to do). *See also Williams v. Bunker Hill & Sullivan Mining & Concentrating Co.*, 200 F. 211 (9th Cir. 1912) (reversing judgment for defendant on contributory negligence where plaintiff harmed by electric shock knew generally of the hazard associated with exposed wires, but not the degree of risk).

(c) Reasonable minds could differ as to whether Lee gave an implicit assurance of safety, upon which Fletcher was entitled to rely.

Had the jury been allowed to decide Fletcher's negligence in this case, it could have found that Lee and Fletcher had a master-servant relationship. The receptionist at Willis, at the instance of management, had Fletcher show Lee to the malfunctioning VFD and assist him. CP 2-3, 328, 975-76. Lee accepted Fletcher's assistance by involving him in attempting to diagnose and fix the VFD. Lee repeatedly directed Fletcher's work, such as by asking him to retrieve an air hose and accepting his assistance in removing and re-installing the capacitors. CP 977-78. Lee discussed the equipment problem with Fletcher and kept Fletcher apprised of his assessment of the problem while they worked together on the capacitors, searching for a replacement fan, and trying to get the stuck fan to turn. CP 977-78, 982. Lee exercised authority over Fletcher, including by directing him in handling the capacitors. CP 977, 979.

Even absent a master-servant relationship, Lee plainly had superior knowledge and expertise as compared with Fletcher, and Fletcher was well aware of this. Fletcher knew that Lee was brought in to work on the VFD due to his expertise. CP 264-66. In addition, Lee made known to Fletcher that he was the expert with regard to the VFD by instructing Fletcher about the VFD and its parts throughout the process of diagnosing and attempting to fix the problem. CP 977-78, 982. Significantly, Lee also asserted authority over matters of safety, repeatedly directing Fletcher

to “stand back” and explaining the potential hazard of transient voltage in the capacitors. CP 977-79. Fletcher thus had reason to expect that Lee would speak up if he thought Fletcher was about to do something unsafe.

Moreover, Fletcher presented evidence from which a jury could conclude that Lee gave an implicit assurance of safety specifically with regard to tapping the fan blade. Lee involved Fletcher in attempting to get the fan unstuck. After announcing that the fan was “our problem” and unsuccessfully trying several things to get it to turn (*e.g.*, restarting the VFD and spraying the fan with W-D 40), Lee said, “[N]othing is making the fan turn,” which Fletcher could reasonably take as an invitation to participate in trying to get the fan to turn. CP 320-22, 982. After Fletcher then announced that he would tap the fan blade with a screwdriver, and asked Lee to shine the flashlight at a certain spot, Lee complied by shining the flashlight down on the fan from the top of the VFD, illuminating it for Fletcher. CP 270-74.

Fifteen seconds then elapsed as Fletcher approached the VFD and extended his hand with the screwdriver, before carefully attempting to tap the fan blade, affording Lee ample opportunity to object to Fletcher’s actions or physically stop him. CP 271. But, according to Fletcher, Lee voiced no objection. CP 270, 274-75, 297, 282. Nor did Lee physically attempt to stop Fletcher from inserting the screwdriver, even though the two men were in close proximity inside the VFD cabinet. Instead, for the entire 15 seconds between Fletcher’s announcement and his careful insertion of the screwdriver, Lee continued shining the flashlight on the

fan as Fletcher had requested. CP 270-71, 274. The Panel is invited to track 15 seconds on a clock or stopwatch to appreciate fully the significance of this passage of time.

Although Lee did not verbally tell Fletcher to go ahead and tap the fan blade, an assurance or agreement may be implied from one's acts, omissions, gestures, or body language. *Bell v. Hegewald*, 95 Wn.2d 686, 690, 628 P.2d 1305 (1981); *Alston*, 88 Wn. App. at 698. Lee's continuing to shine the flashlight on the fan blade after Fletcher announced he would tap it -- and, indeed, shining the flashlight on the very spot requested by Fletcher -- could reasonably be understood by Fletcher as demonstrating Lee's approval of his actions. The jury would have been entitled to find from the evidence that Lee implicitly approved Fletcher's action in attempting to tap the fan blade, and assured him that doing so would not subject either himself or (more importantly in this case) Lee, to an unreasonable risk of harm.

Although there was testimony from some of Fletcher's supervisors and co-workers to the effect that an unqualified person generally should not work on an energized VFD or insert anything into it, there was related testimony that it would not be a concern "[if] there is a supervisor there watching you do it." CP 1071. In addition, three employees, including the mill manager, Mr. Carl, testified that a worker in Fletcher's shoes could reasonably have expected that Lee, as a person holding himself out as qualified to work on the VFD and put in charge of the situation, would

stop Fletcher from any actions that created an unreasonable risk of harm. CP 999, 1030-32.

In denying Willis's motion for a new trial, and by way of further explaining his pre-trial summary judgment ruling, the trial court reasoned that the Willis employees were "hedging" their opinions and that "sitting around casually with them I think they would have said, boy, that was a stupid thing for him to stick that screwdriver in that drive." RP (5/12/14) 1048. The court further opined that Fletcher's deposition testimony was "almost along those lines, not worded that way, but reading between the lines." RP (5/12/14) 1048-49. With all due respect to the trial court, the court may not "read between the lines" for the benefit of the moving party when ruling on a summary judgment motion. These were matters that properly should have been considered by the jury, not the court.

The jury could have concluded that Lee made an implicit assurance of safety upon which Fletcher was entitled to rely. It thus was error for the trial court to rule on summary judgment that Fletcher was negligent as a matter of law, precluding a reliance defense.

4. Had the trial court allowed the jury to decide Fletcher's negligence, the jury could well have rendered a defense verdict.

But for the summary judgment determination that Fletcher was negligent, Willis could have put on its defense that the risk of harm to a bystander such as Lee, from attempting to tap the fan blade, was not reasonably foreseeable to Fletcher. The jury would have been instructed that (1) the scope of a person's duty to exercise ordinary care is

determined by the foreseeable risk of harm presented by the person's conduct, and (2) a foreseeable injury is one that an ordinary person, under the circumstances, would recognize as creating an unreasonable risk of harm to a person in the defendant's position. In addition, the jury would have been instructed on Fletcher's right to rely on any implicit assurance of safety.

To be sure, the jury would have been presented with conflicting versions of the incident. Fletcher would have testified that Lee had 15 seconds to object or stop him from attempting to tap the fan blade, but only continued shining the flashlight on the fan. Lee would have testified that he immediately told Fletcher he could not attempt what he had proposed to do. In determining whether Lee made an implicit assurance of safety, the jury would have been entitled to weigh Fletcher's and Lee's credibility and decide whose version of events was correct.

The jury could well have decided to credit Fletcher's testimony. While Lee in his summary judgment motion characterized the notion that Lee implicitly approved Fletcher's actions as an "after-the-fact fiction," CP 132, the jury could instead have found that Lee's claim that he verbally told Fletcher not to tap the fan blade was an after-the-fact fiction, and instead believed Fletcher's testimony that Lee said nothing during his 15 seconds to object. The jury could have concluded that Lee approved of Fletcher's tapping of the fan blade because he thought it might work. Lee was frustrated that a \$15 fan was all that was keeping the mill from running, that he was unable to find a quick replacement, and that all his

attempts to get the fan unstuck had failed, and he was willing to let Fletcher try his idea. *See* CP 320-22. The jury could also have concluded that Lee allowed Fletcher to proceed because *Lee himself* did not appreciate the nature and scope of the risk of an arc blast, should Fletcher accidentally contact an energized surface in the VFD. *See* 316-17. Had the jury drawn these factual conclusions, it would have found that Fletcher reasonably relied upon Lee's silent acquiescence in Fletcher's plan and that Lee's injury was unforeseeable.

Important to the jury's evaluation of Lee's credibility would have been the fact that, at trial, he contradicted his deposition testimony on a key issue. At his deposition, Lee testified unambiguously that he was holding the flashlight and shining it at the fan -- the flashlight was not just resting on top of the VFD:

Q. And you were holding a flashlight?

A. Yes.

Q. And the flashlight was on the fan?

A. No. Well, shining on the fan, yes.

CP 181; *see also* CP 982. But at trial, Lee insisted that he was not holding the flashlight: that instead it was just "sitting there on its own" on top of the VFD. RP (2/20/14) 145. Presumably, Lee changed his testimony because he realized that his holding and directing of the flashlight demonstrated his implicit approval of Fletcher's proposed action and supported a finding of contributory negligence on his part. Had summary judgment not been granted on liability, Willis would have been able to use

Lee's deposition testimony to impeach his credibility -- and not just in the context of a trial on contributory negligence.

It was error to grant summary judgment on negligence, and Willis is entitled to a trial on that issue.

B. The trial court's evidentiary errors require a new trial on contributory negligence.

1. Standard of review.

A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 668, 230 P.3d 583 (2010). A trial court abuses its discretion when it renders a decision that is "manifestly unreasonable or based upon untenable grounds or reasons." *Id.*, quoting *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997). "A decision is based on untenable grounds or for untenable reasons if the trial court applies the wrong legal standard or relies on unsupported facts." *Id.*, quoting *In re Pers. Restraint of Duncan*, 167 Wn.2d 398, 402-03, 219 P.3d 666 (2009).

2. The trial court erred in excluding Fletcher's testimony as to his perception of Lee's state of mind to show that Lee implicitly approved of Fletcher's attempt to tap the fan blade.

Just as Lee's implicit approval and assurance of safety would have been a key component of Fletcher and Willis's defense case had summary judgment not been granted, it should have been a key component of their contributory negligence case. Fletcher should have been allowed to testify that Lee not only withheld any objection to his announced plan to tap the

fan blade with a screwdriver, but appeared to acquiesce in and even assist with Fletcher's attempt to unstick the fan. But the trial court excluded Fletcher's testimony as to his perception of Lee's state of mind, thus limiting Fletcher and Willis's ability to prove contributory negligence.

Relevant evidence generally is admissible, unless an evidence rule requires its exclusion. ER 402; *Salas*, 168 Wn.2d at 669. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. Evidence tending to establish a party's theory, or to qualify or disprove the testimony of an adversary, is relevant evidence. *Hayes v. Wieber Enters., Inc.*, 105 Wn. App. 611, 617-18, 20 P.3d 496 (2001), citing *Lamborn v. Phillips Pac. Chem. Co.*, 89 Wn.2d 701, 706, 575 P.2d 215 (1978). "The threshold to admit relevant evidence is low and even minimally relevant evidence is admissible." *Salas*, 168 Wn.2d at 669, quoting *State v. Gregory*, 158 Wn.2d 759, 835, 147 P.3d 1201 (2006).

An assurance or agreement may be implied from one's acts, omissions, gestures, or body language, without spoken words. *See Bell*, 95 Wn.2d at 690; *Alston*, 88 Wn. App. at 698. While ER 602 requires that a lay witness testify based on personal knowledge, "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), quoting *State v. Contreras*, 57 Wn. App. 471, 477, 788

P.2d 1114 (1990), quoting 5A K. TEGLAND, WASH. PRAC.: EVID. § 218(2) (3d ed. 1989). *Accord* 5A K. TEGLAND, WASH. PRAC.: EVID. § 602.4 (5th ed. 2014). For instance, in *Contreras*, the appellate court held that a witness was properly allowed to testify that the victim evinced no doubt when identifying his attacker. 57 Wn. App. at 477-78.

Similarly, here, Fletcher witnessed events that were relevant to prove Lee's state of mind at the time of the incident, and thus had firsthand knowledge to state an opinion regarding that state of mind. Fletcher was allowed to testify that, after he announced his plan to tap the fan blade and asked Lee to shine the flashlight on a certain spot, Lee did not object but rather complied with Fletcher's request. RP (2/20/14) 84-86, RP (2/27/14) 503-06. But he was precluded from testifying as to his perception that the reason Lee kept shining the flashlight was to enable Fletcher to tap the fan blade. *Id.* This testimony regarding Lee's state of mind was relevant and admissible, and the trial court erred in excluding it.

This error was not harmless. Evidentiary error requires reversal if, "within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." *Saldivar v. Momah*, 145 Wn. App. 365, 401, 186 P.3d 1117 (2008); *accord Brundridge v. Fluor Fed. Svcs., Inc.*, 164 Wn.2d 432, 446, 191 P.3d 879 (2008). Fletcher's excluded testimony was essential to the defense theory that Fletcher was acting with the expert's implicit approval and that Lee was contributorily negligent in allowing Fletcher to proceed. Further, Fletcher and Willis's industrial hygienist expert was denied the ability to rely on the excluded

testimony to opine that Lee was responsible for preventing any misunderstandings about the planned course of action. *See* RP (3/4/14) 810-20, 824-29. Had the jury concluded that Lee acquiesced in Fletcher's plan, it may well have found Lee more than 10% at fault. A new trial is required on contributory negligence, and Fletcher's testimony as to Lee's state of mind should also be admitted in the trial on Fletcher's negligence.

3. The trial court erred in admitting evidence of Fletcher's character, contrary to ER 404(a).

Evidence of a person's character or a trait of character is not admissible to prove action in conformity with that character on a particular occasion. ER 404(a); *Brundridge*, 164 Wn.2d at 444; *see, e.g., Himango v. Prime Time Broadcasting, Inc.*, 37 Wn. App. 259, 265, 680 P.2d 432 (1984) (holding that a defamation plaintiff's extramarital sexual activity was not admissible to prove truth of defendant's statement that he made advances on another's wife); *Breimon v. Gen. Motors Corp.*, 8 Wn. App. 747, 752-53, 509 P.2d 398 (1973) (pre-rule case holding that the trial court properly excluded, in a products liability case against an automobile manufacturer, testimony that the defendant "always was a fast driver" and drove "dangerously").

The trial court admitted Mr. Brannock's testimony that "[Fletcher is] kind of a doer. And if you don't coach him and tell him what to do, he just does. ... You just kind of keep him on a short leash." RP (2/21/14) 80-82, 91. This "short-leash" testimony tended to prove that, when he attempted to tap the fan blade with a screwdriver, Fletcher acted in

conformity with his purported character as someone who acted without direction or permission. It was plainly inadmissible for that purpose under ER 404(a).

The trial court ruled that Willis opened the door to this character evidence by presenting testimony that, when a Willis employee is working alongside a specialist contractor, Willis considers the contractor to be in charge of that employee. *See* RP (2/21/14) 75-76. The court reasoned that the short-leash testimony became relevant to show that, in placing Lee in charge of Fletcher, Willis failed to inform Lee of Fletcher's tendencies. RP (2/21/14) 80-82. But Brannock's testimony could only have been relevant for this purpose had the Lees alleged a claim of direct negligence by Willis, apart from vicarious liability. They did not. CP 2-5.

The Lees eventually moved for leave to amend their complaint to allege a direct negligence claim, just prior to closing arguments, tacitly acknowledging that there could have been no other proper basis to admit the short-leash testimony. CP 950-55. But the trial court properly denied that motion because the Lees failed to raise the issue timely when they obtained the testimony during discovery, and Willis relied on the absence of a timely motion for leave to amend in preparing its defense. *See* RP (3/5/14) 891-94. Willis did not consent to a trial on direct negligence and would have been prejudiced by the amendment. RP (3/5/14) 891-94. *See Green v. Hooper*, 149 Wn. App. 627, 636-38, 205 P.3d 134 (2009).¹³

¹³ Notwithstanding the denial of the motion for leave to amend, the Lees argued in closing that Willis failed to warn Lee about Fletcher's tendencies. RP (3/5/14) 931.

Because the Lees' sole claim against Willis was vicarious liability, the short-leash testimony could only have been relevant to prove that Fletcher acted in conformity with a tendency to do things on his own. Under ER 404(a), it was inadmissible for that purpose.¹⁴

This error was not harmless. While the jury was instructed that Fletcher was negligent as a matter of law, it was nevertheless charged with determining Fletcher's relative fault, as compared with Lee's. The trial court's erroneous admission of testimony that Fletcher tended to act on his own carried a significant risk of prejudice because -- particularly when combined with the trial court's erroneous exclusion of evidence of an implied agreement between Fletcher and Lee to proceed with attempting to tap the fan blade -- it strongly suggested that Fletcher acted in conformity with this character by attempting to tap the fan blade without Lee's permission. While there is no way to know for certain the value the jury placed on the improperly admitted character evidence, the jury ultimately allocated 90% of the fault to Fletcher. "Where there is a risk of prejudice and 'no way to know what value the jury placed upon the improperly admitted evidence, a new trial is necessary.'" *Salas*, 168 Wn.2d at 673, quoting *Thomas v. French*, 99 Wn.2d 95, 105, 659 P.2d 1097 (1983). A new trial is required on contributory negligence.

¹⁴ The exception in ER 404(b), which allows admission of evidence of prior bad acts to prove facts other than action in conformity with one's character, does not apply. The trial court did not admit evidence of prior bad acts, but only evidence of Fletcher's character generally.

V. CONCLUSION

This Court should vacate the judgment on jury verdict, and remand for a trial on the issue of negligence and a new trial on the issue of contributory negligence.

Respectfully submitted this 12th day of February, 2015.

CARNEY BADLEY SPELLMAN, P.S.

By Michael B King
Michael B. King, WSBA No. 14405
Jason W. Anderson, WSBA No. 30512
Justin P. Wade, WSBA No. 41168
Attorneys for Appellants

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.

NO. 46374-1-II

DECLARATION OF
SERVICE

FILED
COURT OF APPEALS
DIVISION II
2015 FEB 12 PM 1:19
STATE OF WASHINGTON
BY  DEPUTY

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 following documents:

- *Correspondence of Michael B. King to the Case Manager, enclosing color copies;*
- *Appellants; Motion to Dismiss Cross-Appeal, and to Close Briefing with the Filing of Appellants' Brief;*
- *Appellants' Motion for Leave to file Overlength Brief;*
- *Appellants' Opening Brief;*
- *Declaration of Service; and,*
- *CD of the Verbatim Report of Proceedings*

on the below-listed attorney(s) of record by the method(s) noted:

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

Keith Leon Kessler Ray W. Kahler Stritmatter Kessler Whelan Coluccio 413 8 th St. Hoquiam, WA 98550-3607 keith@stritmatter.com ray@stritmatter.com	Thomas Avery Brown Brown Lewis Janhunen & Spencer 101 S. Main Street P.O. Box 111 Montesano, WA 98563- 0111 Tom.brown@lawbljs.com
Craig W. Weston 1408 16th Avenue Longview, WA 98632-2901 cww@rw-law.com	

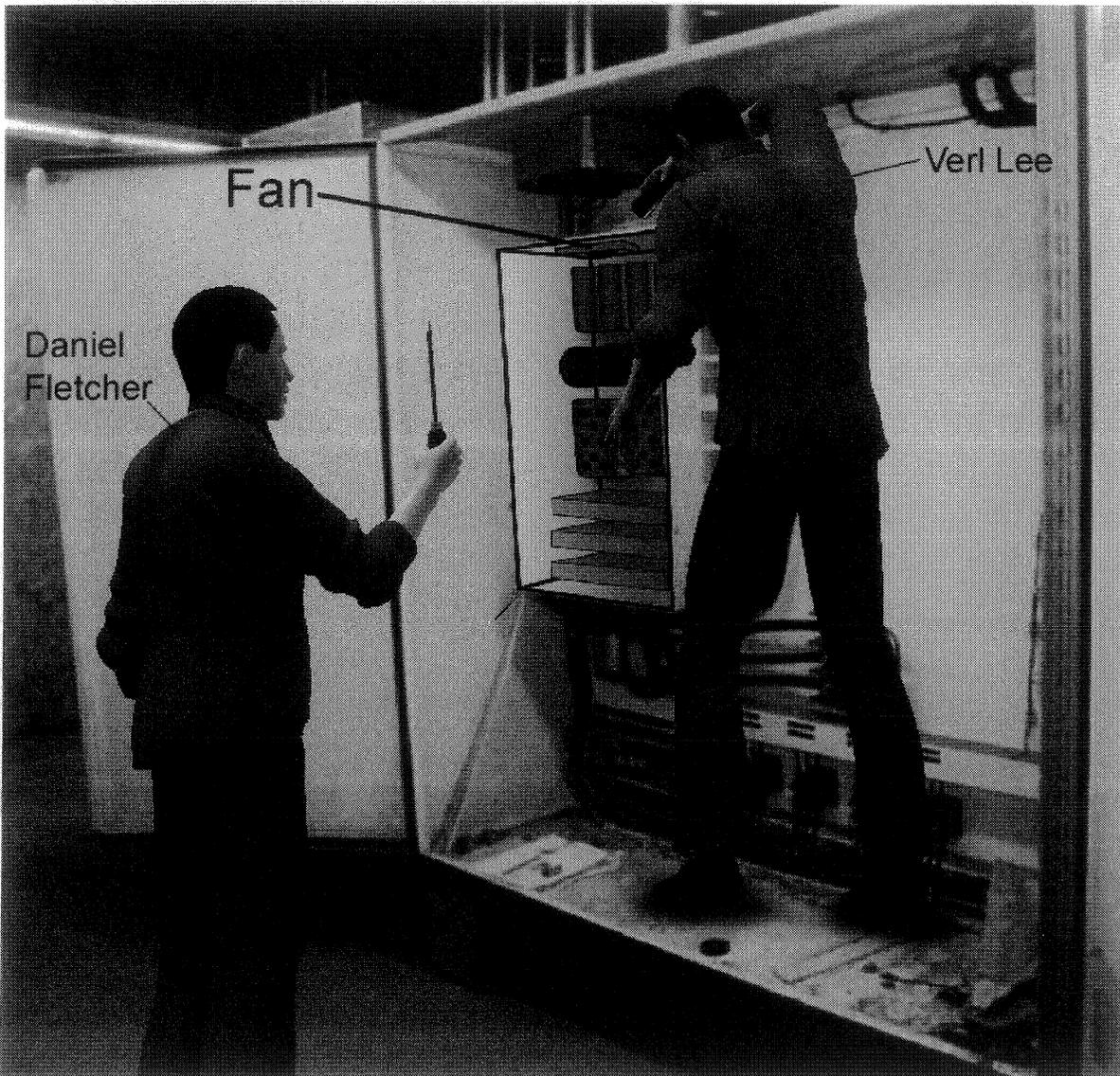
DATED this 12th day of February, 2015.



Patti Saiden, Legal Assistant

APPENDIX A

Illustrative Exhibit (p. 13 of Brief) with Record References



The above illustration, printed at page 14 of Appellant's Opening Brief, is a modified version of the photograph found in the summary judgment record at CP 1035 (see also CP 87 for best quality image). The illustrative renderings of the two men, the VFD, and the location of the cooling fan involved in this case are based on evidence in the summary judgment record as follows:

- Positions of Fletcher and Lee: CP 266, 274, 281, 981, 982, 999, 1017, 1018, 1019, 1025.
- Description of the VFD: CP 87, 155, 265, 979, 981, 1035.
- Location of Fan: CP 88, 266, 981, 1012, 1017, 1018, 1037.