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STATE OF WASHINGTON

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

DEPUTY

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VERL LEE and MARSHA LEE, husband and wife,

Respondents,

v.

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

Appellants.

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Appeal from Superior Court of Grays Harbor County  
Honorable F. Mark McCauley  
NO. 12-2-00891-1

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BRIEF OF RESPONDENT

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## I. INTRODUCTION

We are all taught as children not to stick anything into an electrical socket. The trial court correctly ruled that Defendant Daniel Fletcher's action in sticking a screwdriver into an energized high voltage electrical device was negligent as a matter of law. Mr. Fletcher's own co-workers and supervisors testified that one should not stick a screwdriver into an energized Variable Frequency Drive (VFD).

Further, even if the trial court erred in granting summary judgment on the issue of negligence, any error was harmless<sup>1</sup> because Defendant Fletcher and his co-workers and supervisors, as well as Defendants' expert witnesses, admitted at trial that Defendant Fletcher should not have stuck a screwdriver into the Variable Frequency Drive, and that Defendant Fletcher's action caused the electrical arc blast that injured Plaintiff Verl Lee. As a result of the trial testimony, the trial court granted judgment as a matter of law on the issue of proximate cause, which Defendants do not challenge on appeal. Given the admissions at trial, the trial court would have been required to grant judgment as a matter of law on Defendant Fletcher's negligence if summary judgment had not been previously granted on that issue.

The evidentiary rulings challenged by Defendants were well within the trial court's broad discretion. The trial court allowed Defendant

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<sup>1</sup> "Error is not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." *Maicke v. RDH, Inc.*, 37 Wn. App. 750, 754, 683 P.2d 227 (1984) (quoting *State v. Tharp*, 96 Wn.2d 591, 599, 637 P.2d 961 (1981)).

Fletcher to testify about everything that he observed Mr. Lee do and every interaction he had with Mr. Lee but properly precluded Mr. Fletcher from speculating about what Mr. Lee was thinking. There was no evidence that they had any discussion that would have given Mr. Fletcher personal knowledge of what Mr. Lee was thinking when he was holding a flashlight and looking down into the Variable Frequency Drive.

Likewise, the trial court allowed testimony from Mr. Fletcher's supervisor that Fletcher tended to do things without being asked and that he needed to be "kept on a short leash" only after Defendants opened the door to that testimony. The trial court warned Defendants that if they presented testimony that Mr. Lee was in charge of Mr. Fletcher, such testimony would open the door to evidence of what Defendant Willis Enterprises' employees knew about Mr. Fletcher but failed to tell Mr. Lee.

Plaintiffs have been waiting over five years for justice. Defendants were afforded a full and fair trial by an experienced trial court judge.<sup>2</sup> This Court should affirm.

## **II. RESTATEMENT OF ISSUES**

1. Did the trial court correctly rule that Defendant Fletcher was negligent as a matter of law in sticking a screwdriver into an energized Variable Frequency Drive, in light of:

- a. the undisputed evidence that sticking a screwdriver into an energized electrical device is unsafe, and

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<sup>2</sup> Judge McCauley has been on the bench for 20 years. RP 1051 (5/12/14).

- b. Fletcher's own testimony that Verl Lee did not ask him to stick the screwdriver into the VFD; did not direct him to stick the screwdriver into the VFD; and did not in any way encourage him to stick the screwdriver into the VFD?
2. Was any alleged error in granting summary judgment on the issue of negligence harmless in light of admissions by Defendants' employees and experts at trial, which would have required that the trial court grant judgment as a matter of law on the issue of negligence if summary judgment had not been previously granted?
3. Did the trial court act within its broad discretion in prohibiting Defendant Fletcher from speculating about what Verl Lee was thinking while he was using a flashlight to examine the fan in the VFD?
4. Did the trial court act within its broad discretion in admitting evidence of Defendant Fletcher's tendency to do things without being asked and need to be "kept on a short leash" after Defendants' own witnesses opened the door to such testimony by testifying that Verl Lee was in charge of Fletcher, and because such evidence was relevant to the jury's determination of the parties' relative fault?

### **III. STATEMENT OF FACTS**

#### **A. The electrical arc blast**

On January 25, 2010, Verl Lee, an electronics technician<sup>3</sup> employed by Advanced Electrical Technologies, was dispatched to

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<sup>3</sup> Electronics technicians like Mr. Lee deal with troubleshooting components and controls for electronic devices. Electricians deal with installing electrical wiring. RP 20, 23-26, 38 (2/20/14); RP 31-33 (2/25/14, afternoon). Defendants repeatedly refer to Mr. Lee trying to "repair" the VFD. In fact, Mr. Lee was troubleshooting the VFD –

Defendant Willis Enterprises' mill in Oakville<sup>4</sup> because a variable frequency drive (VFD)<sup>5</sup> at the mill was shutting down due to a high temperature alarm, rendering the mill inoperable. Mr. Lee was told by his supervisor that someone would show him where the problem was when he arrived at the mill. CP 975.

Mr. Lee went to the office upon arriving at the mill. The receptionist reported to the mill manager, Patrick Carl, that Mr. Lee was there, and Mr. Carl told the receptionist to get "Detroit" to take Mr. Lee to the VFD.<sup>6</sup> CP 975, 993.

Mr. Lee did not recognize the name "Detroit," which is a nickname for Defendant Daniel Fletcher, an equipment operator at the mill. CP 975, 1006. Mr. Fletcher's job is to load and dispatch chip trucks and clean the roadway at the mill. CP 1005.

Mr. Lee had no supervisory control over Mr. Fletcher. Rather, Mr. Fletcher's supervisor was the mill manager, Patrick Carl. CP 1000, 1013. Todd Charlton, Willis Enterprises' Operations Manager, agreed that Mr. Lee had no responsibility to supervise Mr. Fletcher:

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determining what was wrong with it. RP 33 (2/25/14, afternoon).

<sup>4</sup> The mill processes logs into chips. CP 966.

<sup>5</sup> The VFD converted AC to DC and back to AC to control the frequency of the electrical current, and thereby control the speed of motors at the mill. CP 972. The VFD involved voltages of over 480 volts. CP 968.

<sup>6</sup> It was Willis Enterprises' standard procedure to assign someone to meet contractors at the office and accompany them to where they needed to work. CP 1006, 1007, 975, 967, 992, 993.

Q. I mean, all I'm saying is you didn't call Advanced Electric out for the purpose of supervising your employees at the mill; is that correct?

A. They do not – no, they are not to supervise our employees. It is a separate company. It is a different company.

Q. Okay.

A. They – the only involvement – it is not to supervise our employees, no.

CP 1031.

Mr. Fletcher escorted Mr. Lee to the electrical room and took him to the cabinet where the VFD was located. CP 1013-1014. The doors to the cabinet were open. CP 976.<sup>7</sup>

Mr. Fletcher had little to do because the mill was down, so he decided to observe Mr. Lee. CP 1007, 1008, 992. He occasionally left to load trucks with chips that had been produced before the mill went down. CP 1012, 1014, 1015.

Mr. Lee began by checking the parameters (settings) on the VFD to see if the temperature parameters might be set too low. CP 977, 1014. He was unable to get the VFD running by changing the parameters. He then used a meter to test for a short in the wiring coming in or out of the VFD and did not find a short. CP 977.

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<sup>7</sup> CP 87 and Exhibit 14 (attached as Appendix A) show the enclosure where the VFD was located. The VFD shown is a replacement VFD that was installed after the incident involved in this case. It is a different model than the VFD involved in this case.

Not finding any obvious problem, Mr. Lee turned off the power to the VFD and removed the cover while Mr. Fletcher was out loading a chip truck. CP 1014. When Mr. Fletcher returned, Mr. Lee asked if there was an air hose he could use to clean dirt out of the VFD. Mr. Fletcher provided Mr. Lee with a nearby air hose. CP 1013, 1014. With the power to the drive off, Mr. Lee tried to clean it out with air. He could not get to one area that he wanted to clean and told Mr. Fletcher that he would need to remove the capacitors.<sup>8</sup> CP 974-975, 977, 978, 1014.

As Mr. Lee removed the capacitors, Mr. Fletcher held the screws and set the capacitors on the floor after Mr. Lee removed them. CP 978, 1013. After Mr. Lee used the air hose to clean the area where the capacitors had been, Mr. Fletcher held the capacitors in place while Mr. Lee reinstalled them. CP 978, 1014. Mr. Fletcher did nothing with regard to the VFD other than hold screws and set the capacitors on the floor after they were removed and then hold them in place while Mr. Lee reinstalled them. CP 1015. Mr. Fletcher did not touch the rest of the VFD. CP 981. During most of the time that Mr. Fletcher was with Mr. Lee, Mr. Fletcher was simply standing around watching him.<sup>9</sup> CP 1016, 975 (every time

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<sup>8</sup> There are nine capacitors. They are mounted on panels that contain three capacitors each. There were three panels, which weighed about 20 pounds each. CP 978-979, 1013.

<sup>9</sup> Although Mr. Fletcher repeatedly used the term “we” in describing what *Mr. Lee* did with regard to the VFD (*see, e.g.*, CP 263, 1020), Mr. Fletcher testified that the only thing he actually did with regard to the VFD was hold the capacitors as Mr. Lee removed them and then hold the capacitors as Mr. Lee reinstalled them. CP 1016. Other than that, Mr. Fletcher testified that he was simply standing and watching Mr. Lee. CP 1016.

Patrick Carl came into the electrical room on the day of the incident, Fletcher was just standing there).

After cleaning the VFD with the air hose and replacing the capacitors, Mr. Lee turned the power to the VFD back on. Mr. Lee needed to have the power on to do testing to try to diagnose the problem with the VFD. CP 974, 980, 981. The cover to the drive remained off. CP 1014.

With the power on again,<sup>10</sup> Mr. Lee went back to work on the display on the VFD and then got inside the cabinet so that he could look down into the top of the VFD. From that vantage point, he could see that the fan<sup>11</sup> was not turning.<sup>12</sup> CP 981. Mr. Lee mentioned that he was going to put a little bit of oil on the fan to see if that would get it to turn. CP 982. He squirted some WD-40 onto the center of the fan, but nothing happened. CP 982.

At that point, Mr. Lee asked Mr. Fletcher to contact the mill manager and report that the fan was not working. Mr. Fletcher told Mr. Lee that the mill manager wanted them to look through the parts rooms at the mill to see if they could find a spare fan that could be used in the VFD.

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<sup>10</sup> Mr. Fletcher claims that the fan ran briefly when the power to the VFD was turned on again. CP 1014. Mr. Lee testified that the fan never ran. CP 981. Whether or not the fan ran briefly when the power to the VFD was turned on again is not a material question of fact for purposes of determining whether Mr. Fletcher was negligent in sticking a screwdriver into an energized high voltage electrical device.

<sup>11</sup> Exhibit 8 shows the fan after the VFD was partially disassembled after the electrical arc blast.

<sup>12</sup> The fan was mounted flat (horizontally) toward the top of the VFD. It blew air down into the VFD. CP 1020.

CP 982, 994. Mr. Fletcher took Mr. Lee to some parts rooms to look for a fan, but they did not find anything. CP 982.

After returning to the electrical room, Mr. Lee stepped inside the cabinet again to look down into the VFD at the fan to verify that the fan was not turning at all, as opposed to turning very slowly. CP 982. He positioned his head over the top of the VFD and used a flashlight to see the center of the fan.<sup>13</sup> He determined that it was not moving and remarked to Mr. Fletcher that the fan was not turning.<sup>14</sup> CP 982.

At that point, about 30 seconds before the explosion, Mr. Fletcher turned around and grabbed a screwdriver from a toolbox. CP 270. He turned around with the screwdriver in his hand and said that he was going to tap the fan with the screwdriver.<sup>15</sup> CP 275-276, 1016, 1019, 1026. Mr.

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<sup>13</sup> Mr. Lee could not see the blades of the fan looking down from the top of the VFD because a transformer was in the way. He could see the center of the fan, which had writing on it, and by looking at the writing, he could tell whether the fan was turning. CP 32, 35.

<sup>14</sup> Defendants repeatedly refer to the fan being “stuck.” There is no evidence that the fan was “stuck” as opposed to being dead or inoperable for some other reason. Mr. Lee only told Mr. Fletcher that it was not turning.

<sup>15</sup> The illustration of the position of the parties at the time of the incident included at page 13 of Appellants’ brief is inaccurate. As shown in Exhibits 42 and 43, there were many components of the VFD between Mr. Fletcher and the fan. Mr. Fletcher had to insert the screwdriver in between the capacitor banks to try to reach the fan. CP 271; RP 76 (2/20/14). (Mr. Lee had previously warned Mr. Fletcher not to reach into the drive while it was energized. RP 123-124 (2/20/14).) Further, the fan was not in the position shown in the illustration -- there were filters and a transformer above the fan. See CP 32, 35; RP 127-128 (2/20/14). In addition, Mr. Fletcher was standing closer to the VFD than depicted in Appellants’ illustration when he said he was going to try to tap the fan. Exhibit 28 is a reenactment by Mr. Fletcher and Patrick Carl depicting the positions of Mr. Fletcher and Mr. Lee at the time of the incident. Mr. Fletcher testified that he was about a foot away from the VFD when he turned around with

Fletcher testified that he waited 10-15 seconds after saying that he was going to tap the fan, before sticking the screwdriver into the energized VFD.<sup>16</sup> CP 1017-1018.

Mr. Fletcher testified that Mr. Lee had been in the cabinet looking at the fan with a flashlight for a couple of minutes before the explosion. CP 267. Mr. Fletcher testified that Mr. Lee did not say anything to him during that time. CP 267-268, 272, 274-275. Mr. Fletcher testified that, before he turned around with a screwdriver in his hand<sup>17</sup> and said he was going to try to tap the fan, at most 15 seconds before the explosion, he had not said anything to Mr. Lee about trying to hit the fan. CP 270-271, 273-274, 1025. Mr. Fletcher testified that Mr. Lee was doing the same thing *after* Mr. Fletcher turned around with a screwdriver in his hand as he had been doing for approximately two minutes *before*: shining the flashlight on the fan. CP 330, 1025. It is undisputed that Mr. Lee had been shining the flashlight on the fan for his own purposes – to see if the fan was turning -- before Mr. Fletcher said he was going to tap the fan with a screwdriver. CP 982. It is undisputed that Mr. Lee said nothing to encourage Mr. Fletcher to stick a screwdriver into the energized VFD. CP 1025.

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the screwdriver in his hand. RP 72-73 (2/20/14).

<sup>16</sup> At trial, Mr. Fletcher testified that he waited 10 seconds, rather than 15, before sticking the screwdriver into the drive. RP 507 (2/27/14).

<sup>17</sup> Defendant Fletcher's claim that Mr. Lee was "probably looking at him" (*BOA* at p.12, citing CP 1025) when he turned around to get the screwdriver is rank speculation. It goes without saying that Fletcher could not have seen what was happening behind him.

Mr. Lee testified that, after Mr. Fletcher said he was going to hit the fan with the screwdriver, he was able to say only, “No, you can’t,”<sup>18</sup> before Mr. Fletcher inserted the screwdriver into the VFD, setting off an electrical arc blast, which caused a bright flash of light (CP 1010, 1016, 1021, 1023), an extremely loud noise, and blew up the VFD. CP 982, 979, 108. It happened very fast. CP 1016, 1021.

Mr. Fletcher’s action in sticking a screwdriver into the energized VFD caused an electrical arc blast. CP 108. The screwdriver was welded into place, and numerous parts of the VFD were burned and/or melted. CP 973, 982-983, 1017, 1023. In a statement written within a week after the incident (CP 1022), Mr. Fletcher stated as follows:

So when I tried to hit the fan to make it work, I hit one of the main power source[s] and there was a big flash and boom.

CP 1039; *see also* CP 1042-1043. There was smoke from the electrical arc blast. CP 1044. Mr. Fletcher’s eyebrows were burned as a result of the heat from the electrical arc blast, and his face was red. CP 1023, 1043, 997.

In a recorded interview with a Department of Labor & Industries investigator, Mr. Fletcher stated that the electrical arc blast sounded like a “gunshot,” like a “.410 shotgun.” CP 1043-1044. Another Willis Enterprises employee, Rex Waltrip, was in a storage area in a room next to the electrical room and heard what he described as a “very high pitched”

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<sup>18</sup> Mr. Fletcher testified that Mr. Lee did not say anything.

sound, like “a loud firecracker.” CP 1048, 1050. After hearing the noise, Mr. Waltrip yelled out, “Are you guys okay?” CP 1047. When he did not get an answer, he immediately went to the electrical room to investigate. CP 1022, 1047, 1049.

Immediately after the explosion, Mr. Fletcher closed his eyes and said, “I think I’m blind, I don’t think I can see.” CP 1011, 1020, 1021. Mr. Lee walked him outside. Mr. Fletcher had trouble seeing when he first opened his eyes and kept blinking his eyes, but he could see. CP 983, 1023. Mr. Lee, however, had a “terrible ringing” in his head, as well as pain behind his eyes, and he heard a clicking and swooshing sound every time he spoke. CP 983.

The two men then returned to the electrical room to assess the damage to the VFD. Mr. Fletcher removed the screwdriver, which was welded in place as a result of the electrical arc blast, by hitting it with a hammer. CP 1024, 1026. Exhibits 32 and 33 show the damage to the screwdriver.

Exhibits 3-6 and 9 show some of the components of the VFD that were damaged as a result of the electrical arc blast. The VFD was damaged beyond repair. CP 998, 1023, 1044.

**B. Mr. Lee’s damages**

After numerous medical appointments, Mr. Lee was ultimately diagnosed with tinnitus, hyperacusis, recruitment, phonophobia, depression, and insomnia. RP 14, 42-43 (2/25/14, morning); CP 1119, 1124, 1130-1133, 1135-1137, 1219, 1236-1237. Seven tones ring in his

head, seven days a week, 24 hours a day. CP 986. He also has chronic pain behind his eyes. CP 985-986, 987-988.

Vocational rehabilitation counselor and case manager Anthony Choppa testified that Mr. Lee is unemployable. RP 86 (2/25/14, afternoon). Mr. Choppa worked with Mr. Lee's medical providers to determine his future medical and care needs and testified regarding those future needs. RP 93-147 (2/25/14, afternoon). Economist Christina Tapia, Ph.D. calculated Mr. Lee's past loss of earnings and benefits to be \$319,000; his future loss of earnings and benefits to be \$197,414; and the cost of his future medical and care needs to be in the range of \$732,208 to \$789,312. RP 192, 198, 203 (2/26/14).

Several lay witnesses testified about the dramatic changes in Mr. Lee's life, as well as his wife's life. RP 39-41 (2/20/14); RP 239-267, 360-370, 375-422 (2/26/14); RP 431-480 (2/27/14). William Martin, Ph.D., the Director of the OHSU Tinnitus Clinic (CP 1089-1090), which has treated more tinnitus patients than any other clinic in the world (CP 1092), testified that the severity of Mr. Lee's tinnitus was worse than 94% of patients who have been treated at the clinic and that it is a permanent condition. CP 1125-1126, 1213. Dr. Martin testified that Mr. Lee's tinnitus, hyperacusis, and related conditions were caused by the acoustic trauma he experienced in the electrical explosion. CP 1149-1151. Dr. Martin testified that Mr. Lee's tinnitus is a very high-pitched continuous ring, almost like fingernails on a chalkboard. CP 1124. Dr. Martin testified about the profound impact of Mr. Lee's tinnitus and hyperacusis

on all aspects of his life, including his ability to work, engage in recreational activities, and perform household tasks. CP 1127-1129, 1133-1135, 1156-1158.

Defendants do not claim any error with regard to the jury's determination of Plaintiffs' damages. Defendants' appeal is limited to the issues of negligence and contributory negligence.

**C. Defendant Fletcher's co-workers and supervisors testified that one should not stick a screwdriver into an energized Variable Frequency Drive.**

Defendant Willis Enterprises' own employees, including Defendant Fletcher's supervisors, testified that one should not stick a screwdriver into an energized VFD. CP 1051, 1068, 1071, 969, 1000, 1032.

Defendant Fletcher admitted that he was totally unqualified to take any action with regard to the VFD. CP 1009. He further admitted that one should not put a screwdriver into an energized VFD. CP 1025.

**D. Defendant Fletcher was not "working together" with Mr. Lee on the VFD; he was simply standing and watching Mr. Lee most of the time.**

Defendant Fletcher testified that Mr. Lee never asked him for help, and that he did not assist Mr. Lee with anything other than holding the capacitors when Mr. Lee took them out and put them back in:

- Q. Did – was there anything that Verl asked you to help him with while he was working on the vector drive that day?
- A. Not – no. I just kind of volunteered to help him, because he wanted – like I said, tear them capacitors out and stuff,

and they're not light.

Q. Other than – other than holding the capacitors when he was taking them out and then putting them back in, was there anything else that you helped him with that day, that you volunteered to help him with?

A. No, not that I know of. Can't recall anything that I helped him with, no.

CP 1016; *see also* CP 1027.

**E. The trial court's summary judgment ruling on negligence.**

In response to Plaintiffs' motion for summary judgment on Defendant Fletcher's negligence, Defendants argued that Mr. Lee wanted Mr. Fletcher to stick the screwdriver into the VFD. Defendants pointed to Mr. Fletcher's testimony that he allegedly waited 15 seconds after he said he was going to try to tap the fan, before he stuck the screwdriver into the energized VFD, and that Mr. Lee did not say anything to him. RP 8, 10-11 (1/21/14). The trial court ruled that, even if Mr. Lee was negligent in failing to say something to try to stop Mr. Fletcher from sticking the screwdriver into the VFD, Mr. Lee's contributory negligence did not excuse Mr. Fletcher's own negligence:

[I]t's kind of like I'm going to run that red light and I'm driving in a passenger's [car] and he says, well, go for it. That doesn't excuse the negligence of running the red light the fact that the passenger/owner of the vehicle said go for it. They may both be negligent . . . . You encouraged me to do a stupid thing. But the fact that it was his [car] and he was in charge of it doesn't mean that all of a sudden running a red light is not negligence.

RP 9-10 (1/21/14).

The trial court ruled that, even though there was a question of fact as to whether Mr. Lee was also at fault, Defendants presented no evidence that Mr. Fletcher's action in sticking a screwdriver into an energized VFD was something a reasonably careful person would do:

. . . I don't know that anybody's really arguing that sticking a screwdriver into this energized area would be reasonable and careful.

RP 9 (1/21/14).

. . . I'm probably the most unhandy of any person in the world. I mean, you don't put metal around anything energized at all. That's common sense.

RP 13 (1/21/14).<sup>19</sup>

#### **F. The trial**

The jury found Defendant Fletcher 90% at fault and Mr. Lee 10% at fault.

### **IV. ARGUMENT**

#### **A. Standard of review**

The trial court's summary judgment ruling is reviewed de novo.

The evidentiary rulings challenged by Defendants are reviewed for an abuse of discretion. *Cox v. Spangler*, 141 Wn.2d 431, 439, 5 P.3d 1265 (2000) ("A trial court has broad discretion in ruling on evidentiary matters

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<sup>19</sup> The trial court granted summary judgment only on the issue of Defendant Fletcher's negligence, not on the issue of proximate cause. CP 352. The trial court granted judgment as a matter of law on the issue of proximate cause at the close of the evidence, based on the undisputed evidence at trial that Mr. Fletcher's action in sticking a screwdriver into the energized VFD caused the electrical arc blast. RP 898 (3/5/14).

and will not be overturned absent manifest abuse of discretion.”); *Maicke v. RDH, Inc.*, 37 Wn. App. 750, 752, 683 P.2d 227 (1984).

**B. The trial court properly granted summary judgment on the issue of Defendant Fletcher’s negligence.**

Defendant Fletcher admitted that he stuck a screwdriver into a high voltage electrical device,<sup>20</sup> knowing that it was energized. As a matter of law, he did not exercise reasonable care. Summary judgment on the issue of negligence was properly granted. *See, e.g., Amend v. Bell*, 89 Wn.2d 124, 129, 570 P.2d 138 (1977) (“The party opposing summary judgment must be able to point to some facts which . . . refute the proof of the moving party in some material portion, and . . . the opposing party may not merely recite the incantation, ‘Credibility,’ and have a trial on the hope that a jury may disbelieve factually uncontested proof.” (quoting *Reinieri v. Scanlon*, 254 F. Supp. 469, 474 (S.D.N.Y 1966)); *Estate of Jones v. State*, 107 Wn. App. 510, 518, 15 P.3d 180 (2006) (breach and proximate cause may be determined as a matter of law where reasonable minds could not differ about them).

Daniel Fletcher admitted that he knew the VFD was energized when he stuck the screwdriver in it. CP 1020-1021. He admitted that he put the screwdriver into the energized VFD on his own, without any direction from Verl Lee. CP 1019, 1025, 1027. Other Willis Enterprises employees admitted that they knew not to touch a VFD other than pressing

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<sup>20</sup> Defendant Fletcher knew there were high voltage signs on the cabinet that housed the VFD. CP 153.

the reset button on the front panel, and they knew not to put a screwdriver into an energized VFD. CP 1051, 1068, 1071, 969, 1000, 1032.

Mr. Fletcher admitted that he was not qualified to work on a VFD. CP 1009. The only action he had taken with regard to a VFD prior to the day of the incident was to push the reset button. CP 1009.

Although Defendants claim that there was some implicit “agreement” by Verl Lee to shine the flashlight so that Mr. Fletcher could see the fan, Mr. Fletcher admitted that Mr. Lee did not ask him to take any action with regard to the fan or the VFD, let alone try to “tap it” by inserting a screwdriver into the energized VFD, and that it was Mr. Fletcher’s own idea to do so:

Q. Did – did Verl tell you to put – put the screwdriver in or to try to tap the fan? Did he ask you to do that?

A. No. We kind of both – we – I just said I was going to tap it and he didn’t say nothing – not to. He just stood there and was going to, like I said, hold the flashlight and watch me do it. . . .

Q. Did he – did he direct you in any way about where to put the – put the screwdriver?

A. No.

Q. Did you – did you ask him where to put the screwdriver or did you just stick it into the drive –

A. Just assumed – huh?

Q. Go ahead.

A. I just assumed that – well, there was only one – where – there was only one spot<sup>21</sup> where you could actually go in there to hit the fan, and that was when I went to try to hit it and it caught the bar beside it or whatever.

CP 1019; CP 1025, 1027 (Mr. Lee did not ask him to try to tap the fan and did not in any way encourage him to put the screwdriver into the VFD).

Mr. Fletcher testified that Mr. Lee did not say anything to him while Mr. Lee was standing in the cabinet shining the flashlight into the VFD:

Q. And Verl, during the time that Verl was in the enclosure with the flashlight, he – he didn't say anything to you; is that right?

A. That's right.

CP 1019.

Mr. Fletcher testified that he did not say anything to Mr. Lee about trying to tap the fan with a screwdriver until he already had the screwdriver in his hand. CP 1019.

Q. And before the time that you turned around and grabbed the screwdriver, turned around and said you were going to tap the fan, had you and Verl talked about trying to hit the fan or tap the fan with anything before that?

A. No.

CP 1025. Mr. Fletcher further testified that he never even made eye contact with Mr. Lee when he said he was going to try to tap the fan with the screwdriver. CP 1025.

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<sup>21</sup> Mr. Fletcher compared what he did to playing the game "Operation." CP 1021 ("[I]t wasn't a very big spot there. I just – apparently like, you know, the game Operation, you know how you just try to go through there and just hit it? Well, that's just apparently what happened.").

In fact, Defendants' own industrial safety expert, Michelle Copeland, testified at trial that there was no agreement between Mr. Fletcher and Mr. Lee to try to tap the fan with a screwdriver. RP 816, 825 (3/4/14) ("I don't believe there was any agreement. I'm not trying to imply that there was. I don't think there was."). Rather, Ms. Copeland testified that there was the opposite of an agreement -- "a general lack of consensus as to what they were doing." RP 829 (3/4/14).

After hearing Mr. Lee and Mr. Fletcher's testimony, the trial court noted repeatedly that there was no evidence that Mr. Lee agreed to have Mr. Fletcher stick the screwdriver into the VFD:

... [T]here is no evidence right now that Mr. Lee agreed, in the sense of saying, yes, or waved him in, or did something like that or, shook his head yes, go ahead. So phrase your hypothetical in a way that [reflects] Mr. Fletcher's actual testimony.

RP 189 (2/21/14) (the trial court's comment was made outside the presence of the jury, in the context of ruling on an objection); *see also* RP 14-16 (2/21/14); RP 816-817 (3/4/14) ("[I]t's clear from the testimony that I heard from both people that there was no agreement.").

Mr. Fletcher's supervisor, Patrick Carl, testified that a Willis Enterprises employee who is assigned to accompany a contractor working at the mill should not do anything on their own with regard to the equipment the contractor is working on, but only at the request of the contractor. Mr. Carl testified that this was "common sense." CP 994, 1001-1002 ("I would expect Dan [Fletcher] not to do anything."). Mr.

Carl agreed that Willis Enterprises employees who are assigned to accompany a contractor should keep out of the contractor's way and let them do their job. CP 1000. Willis Enterprises' Operations Manager, Todd Charlton, likewise testified that Mr. Fletcher should not have taken any action with regard to the VFD without being asked to do so by Mr. Lee. CP 1031, 1033.

There is no evidence to support Defendants' claim that Mr. Lee was shining the flashlight so that Mr. Fletcher could see the fan. As Defendant Fletcher admits, there is no evidence that Mr. Lee said *anything* to Mr. Fletcher to suggest that he was shining the flashlight into the VFD for the purpose of helping Mr. Fletcher to see where to stick a screwdriver into the VFD to hit the fan. CP 1019, 1027.

Plaintiffs submitted a declaration from an electrical engineer, Paul Way, in support of their motion for summary judgment. Mr. Way stated that Mr. Fletcher acted in an unsafe manner in sticking the screwdriver into the VFD when it was energized, and that his action caused an electrical arc blast. CP 107-109. Defendants did not present any expert testimony to contest Mr. Way's opinion regarding Mr. Fletcher's negligence.

Daniel Fletcher had a common law duty to exercise reasonable care for the safety of others:

Negligence is the failure to exercise ordinary care. It is the doing of some act that a reasonably careful person would not do under the same or similar circumstances or the

failure to do some act that a reasonably careful person would have done under the same or similar circumstances.

WPI 10.01; *System Tank Lines v. Dixon*, 47 Wn.2d 147, 151, 286 P.2d 704 (1955). “Ordinary care” means the care a reasonably careful person would exercise under the same or similar circumstances. WPI 10.02; *LaMoreaux v. Foskett*, 45 Wn.2d 249, 255, 273 P.2d 795 (1954); *Baughn v. Malone*, 33 Wn. App. 592, 597, 656 P.2d 1118 (1983).

It is beyond dispute that a reasonably careful person would not stick a screwdriver into an energized high voltage electrical device. The trial court properly ruled that, under the facts of this case, Daniel Fletcher was negligent as a matter of law.<sup>22</sup> He was admittedly unqualified to work on a VFD. CP 1009. His supervisors testified that he should not have put a screwdriver into an energized VFD without being directed to do so by Mr. Lee. CP 994, 1000, 1001-1002, 1031, 1033. Mr. Fletcher admitted that, when someone from Advanced Electric was working on equipment at the mill, he should stay out of their way unless they ask him to help with something. CP 1025. Mr. Fletcher admitted that Mr. Lee did not ask him to put a screwdriver into the energized VFD. CP 1025. Mr. Fletcher’s co-workers and supervisors admitted that it is unsafe to put a screwdriver into an energized VFD. Defendants’ mill manager testified: “Nobody should stick a screwdriver in a VFD if it’s live.” CP 999. Under these facts, the

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<sup>22</sup> *Schwartz v. Elerding*, 166 Wn. App. 608, 615, 270 P.2d 630 (2012) (“Duty is the duty to exercise ordinary care, or, alternatively phrased, the duty to exercise such care as a reasonable person would exercise under the same or similar circumstances. Breach is the failure to exercise such care as a reasonable person would exercise under the same or similar circumstances.”).

trial court properly ruled that Daniel Fletcher was negligent as a matter of law.

**C. It was foreseeable that injuries could occur as a result of sticking a screwdriver into an energized high voltage electrical device.**

This Court should not consider Defendants/Appellants' argument regarding foreseeability at pages 32-38 of their brief, because the argument was not presented to the trial court in Defendants' summary judgment response brief. The word "foreseeable" does not even appear in the argument section of Defendants' summary judgment response brief, nor was the issue mentioned during oral argument on the motion.<sup>23</sup> CP 225-237; RP 7-11 (1/21/14); RAP 2.5(a); RAP 9.12 (on review of an order granting summary judgment, the appellate court will consider only issues called to the attention of the trial court); *Van Hout v. Celotex Corp.*, 121 Wn.2d 697, 702, 853 P.2d 908 (1993); *Babcock v. State*, 116 Wn.2d 596, 606, 809 P.2d 143 (1991) ("In reviewing the trial court's decision, we confine ourselves to the issues the parties have raised and which the trial court considered."). Even if the Court considers Defendants' argument regarding foreseeability, the argument fails both as a matter of law and fact.<sup>24</sup>

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<sup>23</sup> Defendants complain that the trial court "did not analyze the issue completely or correctly" when Defendants did not even present the issue to the trial court for consideration. *BOA* at 38.

<sup>24</sup> Defendants claim that, if the trial court had not granted summary judgment on negligence, the jury would have been instructed on foreseeability. *BOA* at pp.46-47. Defendants cite no authority for this claim. There is no pattern instruction on the issue of foreseeability. It would be highly unusual for a trial judge to give the instructions proposed

The issue with regard to foreseeability is not whether Defendant Fletcher subjectively understood what the result of sticking a screwdriver into an energized high voltage device would be.<sup>25</sup> The test of foreseeability is an objective one; whether Fletcher himself understood the risk is not the issue. *Ayers v. Johnson & Johnson*, 117 Wn.2d 747, 764, 818 P.2d 1337 (1991) (“Foreseeability is a matter of what the actor knew or should have known under the circumstances; it turns on what a reasonable person would have anticipated.”); *King v. City of Seattle*, 84 Wn.2d 239, 248, 525 P.2d 228 (1974) (“Liability is not predicated upon the ability to foresee the exact manner in which the injury may be sustained.”), overruled on other grounds by *City of Seattle v. Blume*, 134 Wn.2d 243, 947 P.2d 223 (1997); *Berglund v. Spokane County*, 4 Wn.2d 309, 319-320, 103 P.2d 355 (1940) (“The manner in which the risk culminates in harm may be unusual, improbable and highly unexpected, from the point of view of the actor at the time of his conduct. And yet, if

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by Defendants at pp.46-47, and it is rank speculation to suggest that a trial judge would ever depart so significantly from the pattern instructions and give such unusual instructions. See, e.g., *Koker v. Armstrong Cork, Inc.*, 60 Wn. App. 466, 480-481, 804 P.2d 659 (1991) (affirming trial court’s refusal to give a proposed instruction that a manufacturer’s duty to use ordinary care is bounded by the foreseeable range of danger, and noting that the issue of a defendant’s duty is a question of law for the court, not a question for the jury).

<sup>25</sup> *King v. City of Seattle*, 84 Wn.2d 239, 249, 525 P.2d 228 (1974) (“When the thing done produces immediate danger of injury, and is a substantial factor in bringing it about, it is not necessary that the author of it should have had in mind the particular means by which the potential force he has created might be vitalized into injury.” (quoting *Johnson v. Kosmos Portland Cement Co.*, 64 F.2d 193 (6<sup>th</sup> Cir. 1933), overruled on other grounds by *City of Seattle v. Blume*, 134 Wn.2d 243, 947 P.2d 223 (1997)).

the harm suffered falls within the general danger area, there may be liability, provided other requisites of legal causation are present.” (quoting Harper on Torts, 14, §7)). Where reasonable minds cannot differ as to the extent of a duty, as determined by foreseeability, it becomes a question of law for the court. *Jones v. Leon*, 3 Wn. App. 916, 924, 478 P.2d 778 (1970).

As Defendants acknowledge, Defendant Fletcher is deemed to know “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.”<sup>26</sup> *BOA* at 36. As any child knows, electricity is dangerous, and it is dangerous to stick a screwdriver into an energized electrical device. See, e.g., *Tauscher v. Puget Sound Power & Light*, 96 Wn.2d 274, 280, 635 P.2d 426 (1981) (“electrical work is considered by most to be an inherently dangerous activity”); *Scott v. Pacific Power & Light Co.*, 178 Wash. 647, 654, 35 P.2d 749 (1934) (“Electricity is one of the most dangerous agencies ever discovered by human science . . . .” (quoting *Geismann v. Missouri-Edison Elec. Co.*, 73 S.W. 654, 659 (Mo. 1903))).

Defendant Fletcher had even more knowledge about electricity than the average person, having taken an electrical course at Centralia College. CP 60. He was aware that there were “high voltage” warning

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<sup>26</sup> Illustration 1 to *Restatement (Second) of Torts* § 290 (1965) gives the following example: “A climbs a tree to look at a bird’s nest, and takes hold of an electric power line carrying a current of 100 volts, which runs through the tree. A is completely ignorant of the danger from the power line, although that danger is a matter of common knowledge in the community. A is negligent notwithstanding his ignorance.”

signs on the cabinet that housed the VFD. CP 153. He knew not to “mess with wiring or anything like that, because I don’t know what I’m doing.”<sup>27</sup> CP 63.

Defendants’ industrial safety expert, Michelle Copeland, testified that “there is a very high danger potential in working with electrical . . . I don’t think anyone argues that particular point – can be very, very dangerous.” RP 802-803 (3/4/14). Defendants’ mill manager testified: “as a person that is not a journeyman electrician, there’s no way in hell that I would have been in that cabinet with that thing powered up.” CP 999. Defendants’ claim that there was no foreseeable risk of injury to Verl Lee, who was standing directly next to and with his head over the energized VFD when Defendant Fletcher stuck a screwdriver into the high voltage device, is absurd. While the risk of injury could have taken various forms – including sparks, a fire, high heat, a concussive blast, or loud noise from an electrical explosion – the risk of injury was clearly present.

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<sup>27</sup> As the comments to the *Restatement (Second) of Torts* sections cited by Defendants state, it is negligent to take action with regard to a situation when, as Mr. Fletcher testified, he “did not know what he was doing.” See, e.g., *Restatement (Second) of Torts* § 289 (1965), Comment j (“It is not necessary that the actor should realize that the circumstances surrounding him are such as to make his conduct likely to cause harm to another. It is enough that he should realize that his perception of the surrounding circumstances is so imperfect that the safety or danger of his act depends upon circumstances which at the moment he neither does nor can perceive. In such case it is negligent for him to act if a reasonable man would recognize the necessity of making further investigation. If he acts without such investigation, he must, as a reasonable man, realize that his act involves a risk depending upon the character of the unknown surrounding.”).

Defendant Fletcher's co-workers testified that they knew not to touch an energized VFD. CP 99, 1032, 1068, 1071. Defendants' mill manager, Patrick Carl, testified that there is a risk of an arc blast if someone sticks a screwdriver into an energized VFD. CP 991; RP 41 (2/21/14). Defendants' Operations Manager, Todd Charlton, likewise testified that there is a risk of an arc blast if you stick a screwdriver into any kind of electrical device. RP 72 (2/21/14).

Defendants' own electrical expert, Keith Lane, testified at trial that an arc blast will occur when a screwdriver approaches an energized part. RP 685 (3/4/14). Mr. Lane testified that an arc blast involves the release of a large amount of energy in a very short period of time, including a large release of sound and light. RP 685-686 (3/4/14). In this case, the sound wave that occurred as a result of the arc blast would have reflected off the top of the cabinet in the area where Mr. Lee's head was located. RP 719-720 (3/4/14); RP 125 (2/21/14); CP 1113, 1153-1154.

When Mr. Fletcher stuck the screwdriver into the energized VFD, he caused an electrical fault, which produced an arc – a very high energy, loud explosion. RP 117-124 (2/21/14). It is well-known that arc-induced explosions can cause hearing damage. RP 125 (2/21/14).

In support of their argument that it was not foreseeable that an explosion could occur as a result of sticking a metal object into an energized high voltage electrical device, Defendants misrepresent Mr. Lee's testimony. Mr. Lee testified that he did not expect an electrical arc to occur *in connection with the troubleshooting work he was doing* on

the VFD. *BOA* at 16. Mr. Lee did not expect an electrical arc to occur because he knew what he was doing and would not have touched energized components of the VFD when the power was on.<sup>28</sup> CP 974-975. He did not expect that Mr. Fletcher would do something as stupid as sticking a metal object into an energized VFD. CP 180, 181. Mr. Lee testified that it would be dangerous to touch components of the VFD with the power on, just as it is dangerous to stick a pocket knife into an electrical socket. CP 974-975. Mr. Lee testified that, when Mr. Fletcher announced that he was going to try to tap the fan with the screwdriver, Mr. Lee assumed that there would be a short<sup>29</sup> and that the VFD was going to blow up “and it’s going to be ugly.” CP 983.

The evidence clearly shows that a dangerous electrical event was foreseeable as a result of Mr. Fletcher sticking a screwdriver into an energized VFD. Mr. Lee, who was standing directly next to the VFD, with his head directly over the VFD, was clearly within the zone of danger

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<sup>28</sup> Defendants misrepresent the testimony of Plaintiffs’ electrical engineering expert, Paul Way. *BOA* 37. Defendants state that Mr. Way testified that there was no reason to anticipate that an electrical arc blast would occur but leave out the second half of the sentence: “There was no reason for Verl Lee to anticipate that an electrical arc blast would occur *in connection with the diagnostic assessment he was doing on the VFD.*” (emphasis added) Mr. Way was absolutely clear that sticking a screwdriver into an energized VFD was unsafe and that it caused an electrical arc blast. CP 108; RP 117-119, 122-123, 127, 131-133, 183, 186-187 (2/21/14) (“even as a kid, I would have thought [sticking a fork in an electrical outlet is] a bad idea”), 190, 194 (there was no possible way to insert a screwdriver into the energized VFD in a safe manner).

<sup>29</sup> The terms “arc flash” and “short” are interchangeable. A “short” is what causes an arc flash to occur. RP 193 (2/21/14).

created by Defendant Fletcher's conduct.<sup>30</sup> As a matter of law, it was foreseeable that Defendant Fletcher's conduct presented hazards to Mr. Lee. *See, e.g., Rikstad v. Holmberg*, 76 Wn.2d 265, 269, 456 P.2d 355 (1969) (“[T]he pertinent inquiry is not whether the actual harm was of a particular kind which was expectable. Rather, the question is whether the actual harm fell within a general field of danger which should have been anticipated.” (quoting *McLeod v. Grant County School Dist.*, 42 Wn.2d 316, 255 P.2d 360 (1953))).

**D. Even if the trial court erred in granting summary judgment on the issue of Defendant Fletcher's negligence, any error was harmless because the trial court would have been required to grant judgment as a matter of law on the issue of Defendant Fletcher's negligence based on Defendants' admissions at trial.**

At trial, Defendant Fletcher admitted the following:

- Although he had electrical training in high school, he was not qualified to work on electrical equipment at the mill. RP 55-57 (2/20/14). He knew that the cabinet that housed the VFD had a sign that said “High Voltage.” RP 57 (2/20/14). He understood that he should not touch anything on the VFD other than pressing the reset button. RP 58-59 (2/20/14). He had never touched the VFD before the day of the incident, other than pressing the reset button. RP 58-59 (2/20/14); RP 527-528 (2/27/14).
- Mr. Lee did not ask him for help with anything on the day of the incident. RP 80-81 (2/20/14); RP 529 (2/27/14). Mr. Fletcher *volunteered* to hold the capacitors as Mr. Lee removed them from the VFD. RP 65-66 (2/20/14). Most of the time, Mr. Fletcher was standing around and watching Mr. Lee. RP 81 (2/20/14).

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<sup>30</sup> As Defendants acknowledge, “the two men were in close proximity inside the VFD cabinet.” *BOA* at p.44.

- The power to the VFD was off when Mr. Lee was removing the capacitors. Mr. Fletcher was aware that the power had been turned back on after Mr. Lee cleaned the VFD with an air hose. RP 66-68 (2/20/14).
- Mr. Lee did not say anything to Mr. Fletcher while he was standing in the cabinet using a flashlight to look at the fan. RP 68-69, 75 (2/20/14). After Mr. Fletcher already had the screwdriver in his hand, he said that he was going to try to tap the fan. RP 69-70, 86, 94 (2/20/14); RP 529 (2/27/14). Mr. Fletcher did not recall making eye contact with Mr. Lee after he said he was going to stick the screwdriver into the VFD. RP 81-82, 89 (2/20/14); RP 529-530, 532 (2/27/14). Mr. Fletcher did not say anything to Mr. Lee about trying to tap the fan with a screwdriver until Mr. Fletcher turned around with a screwdriver in his hand. RP 94 (2/20/14); RP 531 (2/27/14). According to Mr. Fletcher, after he said he was going to tap the fan with a screwdriver, Mr. Lee continued doing the same thing he had already been doing for two or three minutes – shining a flashlight into the top of the VFD. RP 86, 87, 88 (2/20/14).
- Mr. Fletcher knew that if a technician like Mr. Lee was called to work at the mill, Mr. Fletcher should stay out of his way unless asked to do something. RP 82 (2/20/14); RP 529 (2/27/14). Mr. Lee did not ask Mr. Fletcher to try to hit the fan with a screwdriver, and did not in any way direct him where to put the screwdriver. RP 72, 82-83 (2/20/14); RP 531 (2/27/14). Mr. Lee did not in any way encourage Mr. Fletcher to put the screwdriver into the VFD. RP 81 (2/20/14); RP 531 (2/27/14).
- Mr. Fletcher knew that the VFD was energized when he stuck the screwdriver into the VFD and knew that he should not put a screwdriver into an energized VFD. RP 82 (2/20/14); RP 531 (2/27/14).

Q. [Y]ou would agree at – at the time of this incident you were – that – that you shouldn't have -- you shouldn't stick a screwdriver into a variable frequency drive that's energized?

...

A. Correct.

Q. And you knew that the power was on to the drive when you stuck the screwdriver into the drive on that – on the day of the incident?

A. Correct.

RP 538 (2/27/14).

- When he stuck the screwdriver into the energized VFD, a big flash and a boom like a shotgun blast occurred. He closed his eyes because he thought he was going to be blind. RP 76 (2/20/14).

Willis Enterprises' mill manager, Patrick Carl, testified that the rule at the mill was that employees like Mr. Fletcher could press the reset button on the VFD, but they were not allowed to touch anything else. RP 33-34 (2/21/14). Mr. Carl testified that Mr. Fletcher knew that he was not allowed to go into electrical equipment. RP 48 (2/21/14). Mr. Carl testified that he assigned Mr. Fletcher to be Mr. Lee's company escort the day of the incident. He testified that Mr. Fletcher should have stayed out of Mr. Lee's way and should not have done anything on his own, but only at the direction of Mr. Lee. RP 37-38, 41-42 (2/21/14). Mr. Carl admitted that it is unsafe for anyone to put a screwdriver into an energized VFD. RP 41 (2/21/14).

Mr. Fletcher's co-worker Rex Waltrip testified that he knew not to touch the VFD other than pressing buttons on the control panel, and not to put a screwdriver into an energized VFD. RP 53-54 (2/21/14). Mr. Fletcher's co-worker Michael Koonrad testified that Willis Enterprises employees should stay out of the way of contractors called to work at the mill and that one should not stick a screwdriver into an energized VFD

unless someone tells you to do it. RP 61, 65-66 (2/21/14). Mr. Fletcher's supervisor, millwright Walter Brannock, also testified that someone who is not qualified to work on a VFD should not stick a screwdriver into an energized VFD, and that Willis Enterprises employees should stay out of a contractor's way and let them do their job. RP 92 (2/21/14).

Willis Enterprises' Operations Manager, Todd Charlton (RP 69 (2/21/14)), testified that Mr. Fletcher should not have done anything with regard to the VFD without being asked to do so by Mr. Lee. RP 72, 73-74, 85-86 (2/21/14).

Defendants' electrical engineering expert, Keith Lane, admitted at trial that what Defendant Fletcher did was "not a good idea." RP 671 (3/4/14). Mr. Lane admitted that Mr. Fletcher should not have stuck a screwdriver into the VFD and that he acted in an unsafe manner in doing so. RP 764, 772 (3/4/14) ("I agree that Mr. Fletcher should not have stuck the screwdriver into the drive"), 773 ("with respect to the screwdriver, of course not, he shouldn't have stuck that in there"). Mr. Lane testified that no one should stick a screwdriver into live electrical equipment, whether they are qualified to work on it or not. RP 771 (3/4/14). Mr. Lane testified that Mr. Fletcher should not have done anything at all with regard to the VFD without being asked to do so by Mr. Lee. RP 773 (3/4/14).

Defendants' industrial safety expert, Michelle Copeland, likewise admitted that Mr. Fletcher should not have stuck anything into the VFD without first getting permission from Mr. Lee, and that it is unsafe for

anyone to stick a screwdriver into an energized VFD. RP 848, 852 (3/4/14).

Plaintiffs' electrical engineering expert, Paul Way, likewise testified that it is unsafe for anyone to stick a screwdriver into an energized electrical device of any kind. RP 131-132 (2/21/14).

Both parties' electrical engineering experts agreed that the cause of the electrical arc blast was Mr. Fletcher sticking a screwdriver into the energized VFD. RP 133 (2/21/14); RP 710-712, 749, 750, 751, 764-765 (3/4/14).

Based on the admissions by Defendants' witnesses at trial, Plaintiffs moved for judgment as a matter of law on the issue of proximate cause. The trial court granted the motion based on the undisputed evidence that Defendant Fletcher's action in sticking a screwdriver into the energized VFD caused the electrical arc blast. RP 898 (3/5/14). Defendants do not challenge that ruling on appeal.

Likewise, if the trial court had not already established Defendant Fletcher's negligence on summary judgment, the trial court would have been required to grant judgment as a matter of law on the issue of negligence at the close of the evidence at trial, based on the admissions and undisputed evidence set forth above:

. . . As I see it under [Defendants'] theory, and maybe you disagree, if they're both doing something so stupid as everybody has agreed, nobody – none of the employees of the defense, none of the experts have said it was a good idea. And the testimony even in a light most favorable to Mr. Fletcher is – because he didn't get a response within 10

to 15 seconds, he thought it was okay to do it or he thought he was getting a shining light okay to do it, he still did an incredibly stupid thing. He said he – he talked about that game Operation. Well, we all know if you ever play that Operation game you have to be very fine or else you're going to have the buzzer go off and that – that would basically be an admission that he was going to do this, he knew it was live and he knew it was incredibly dangerous in there because of the electricity and he was going to do some fine maneuver.

*I find as a matter of law that was negligence*, even if it was condoned by Mr. Lee who was then also being incredibly negligent both of them and then you need to compare.<sup>31</sup> But there's no way I can find Mr. Fletcher, under either scenario of the facts as testified by all of the parties, as not being negligent.

RP 903-904 (3/5/14) (emphasis added); *see also* RP 898 (3/5/14).

Judge McCauley reiterated his reasoning in ruling on Defendants' motion for a new trial:

So even if you look at all of the evidence in a light most favorable to Mr. Fletcher and the defense Willis Enterprises, in this case it – I thought it was an easy ruling. It was basically – it came down to that was really a stupid negligent thing to do, that you couldn't justify no ordinary person under the same or similar circumstances knowing that that was highly energized and the narrow spot to put it in – I think Mr. Brown even argued it was like that game Operation where you've got to be very precise or else you're going to touch the zinger, in this case the power,

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<sup>31</sup> As the trial court correctly noted, any contributory fault on the part of Mr. Lee would not preclude finding that Mr. Fletcher was negligent as a matter of law. *Clements v. Blue Cross of Washington & Alaska, Inc.*, 37 Wn. App. 544, 546-547, 682 P.2d 942 (1984) (“While a plaintiff's negligence may reduce the amount of damages, perhaps even to nothing in an appropriate case, it does not preclude finding the defendant negligent. The trial court properly entered summary judgment on the issue of defendants' negligence.”).

that's going to do some incredibly bad things. And even if you believed his side of the story that he – he thought he conveyed that to Mr. Lee and that Mr. Lee was approving it somehow by holding the flashlight, all of that would mean to me – and I think I stated it probably at the time, something along the lines that just means there were two incredibly careless people joining in on the act, but it wouldn't make his act not negligent in any way I could see. And that's why I granted the motion on negligence and then left it wide open for the argument of the defense, which was much of the trial about if they were both negligent if Mr. Lee should have been held much more responsible because of his expertise and the fact that he should have been in charge even if it wasn't articulated or agreed to. But to me that was an easy decision as far as Mr. Fletcher being negligent and so I'm sticking with that ruling.

RP 1049-1050 (5/12/14).

Because the trial court would have been required to grant judgment as a matter of law as to Defendant Fletcher's negligence based on the admissions by Defendants' witnesses at trial, any alleged error in granting summary judgment on the issue of Fletcher's negligence would be harmless and would not be a sufficient basis to reverse the judgment in this case.<sup>32</sup> RCW 4.36.240; *see also Gross v. City of Lynnwood*, 90 Wn.2d 395, 401, 593 P.2d 1197 (1978) (“We are committed to the rule that we will sustain the trial court's judgment upon any theory established by the pleadings and supported by the proof.”); *Jones v. Leon*, 3 Wn. App. 916,

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<sup>32</sup> Judicial economy is one of the reasons for this doctrine, because it would be pointless to reverse and remand a case to achieve the same result in the end. *Washington Appellate Practice Deskbook*, p.3-12 (3<sup>rd</sup> ed. 2005).

919-920, 478 P.2d 778 (1971) (if judgment as a matter of law should have been granted, verdict should be affirmed to avoid a needless retrial).

**E. Defendants' claim that Mr. Fletcher reasonably relied upon an "implicit assurance of safety" by Mr. Lee is not supported by the facts or the law.**

First, it should be noted that Defendants did not cite any of the legal authority argued at pages 39-45 of their brief to the trial court in response to Plaintiffs' summary judgment motion. CP 225-237. These are all new arguments presented for the first time on appeal and should therefore not be considered by the Court. RAP 2.5(a); RAP 9.12; *Van Hout v. Celotex Corp.*, 121 Wn.2d 697, 702, 853 P.2d 908 (1993) ("An appellate court may dispose of an issue by applying a theory which was not precisely raised on appeal only if the trial court was adequately apprised of the party's position.").

Second, all of the cases cited by Defendants in support of the proposition that "one is not negligent if he acts in reasonable reliance upon an express or implied assurance of safety" involved affirmative conduct – waving a pedestrian across a street;<sup>33</sup> waving someone to walk through an active logging area;<sup>34</sup> raising the gates at a railroad crossing and stopping the warning bell;<sup>35</sup> and a representation from a city electrical inspector that the power to a temporary meter had been disconnected.<sup>36</sup> Here, in

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<sup>33</sup> *Alston v. Blythe*, 88 Wn. App. 26, 943 P.2d 692 (1997); *Panitz v. Orange*, 10 Wn. App. 317, 518 P.2d 726 (1973).

<sup>34</sup> *Dorr v. Big Creek Wood Products, Inc.*, 84 Wn. App. 420, 927 P.2d 1148 (1996).

<sup>35</sup> *Aores v. Great Northern Ry. Co.*, 166 Wash. 17, 6 P.2d 398 (1931).

<sup>36</sup> *City of Bedford v. Zimmerman*, 547 S.E.2d 211 (Va. 2001). Not

contrast, Defendant Fletcher admitted that Mr. Lee did not in any way encourage him to stick the screwdriver into the energized VFD (CP 79), and Defendant Fletcher admitted that he put the screwdriver into the energized VFD even though he claimed that Mr. Lee did not say anything, react, or respond in any way to his statement that he was going to try to tap the fan with a screwdriver. RP 531-532 (2/27/14). Defendants do not cite any authority holding that silence and inaction can give rise to an “implied assurance of safety.” Neither the law nor the facts support Defendants’ argument.

**F. The Court should disregard Defendants’ master-servant argument, which is being raised for the first time on appeal.**

Plaintiffs moved to dismiss Defendants’ “loaned servant” affirmative defense before trial. Defendants responded by withdrawing the defense. CP 240. Having abandoned the loaned servant defense in the trial court, Defendants cannot raise a loaned servant argument on appeal. *BOA* at pp. 40-42; RAP 9.12; *Babcock v. State*, 116 Wn.2d 596, 606, 809 P.2d 143 (1991) (“In reviewing the trial court’s decision, we confine ourselves to the issues the parties have raised and which the trial court considered.”).

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surprisingly, Defendants cite no authority for their claim that, if the trial court had not granted summary judgment on the issue of negligence, the jury would have been “instructed on Fletcher’s right to rely on any implicit assurance of safety.” *BOA* at p.47. There is no authority supporting such an instruction under the facts of this case.

In the cases cited by Defendants where a master-servant relationship was created, the master affirmatively requested that the servant perform a task.<sup>37</sup> In this case, Defendant Fletcher admits that Mr. Lee did not ask him to do anything. CP 70. Defendants' claim that "Lee repeatedly directed Fletcher's work" is completely unsupported by the evidence. *BOA* at p.43.<sup>38</sup> By Defendant Fletcher's own admission, Mr. Lee never asked him to take any action with regard to the VFD. CP 70. It is undisputed that Mr. Fletcher did not stick the screwdriver into the energized drive under Mr. Lee's direction and control. CP 73.

Defendants' recitation of the evidence that Mr. Fletcher knew that Mr. Lee had expertise with regard to the VFD and had explained the

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<sup>37</sup> *System Tank Lines v. Dixon*, 47 Wn.2d 147, 286 P.2d 704 (1955) (master asked servant to perform a weld on a tanker truck that had not been adequately cleaned of gasoline to be safe for welding, unbeknownst to the servant; servant alleged that master affirmatively represented that the tank trailer was safe for welding); *Browning v. Ward*, 70 Wn.2d 45, 422 P.2d 12 (1966) (master placed an unsecured electrical cord across the forearm of a servant who was carrying a vacuum and attachments down stairs and said to the servant words to the effect, "Okay, you are ready to go now," which the servant understood to mean that she should continue going down the stairs and finish her work); *Baxter v. Morningside*, 10 Wn. App. 893, 521 P.2d 946 (1974) (supervisor of volunteer worker requested that volunteer drive to a warehouse to pick up building materials and deliver them to another location).

<sup>38</sup> The evidence cited by Defendants in support of this claim is that Mr. Lee asked Defendant Fletcher to retrieve an air hose and accepted Defendant Fletcher's volunteered assistance in holding screws and putting the capacitors on the floor as Mr. Lee removed them. *BOA* at p.43. Asking an employee of a mill where you are a visitor for an air hose and allowing them to hold screws does not by any stretch of the imagination constitute "directing" their work. Likewise, Mr. Lee telling Mr. Fletcher not to touch the capacitors when they were still energized does not constitute "exercising authority" over Mr. Fletcher but simply amounts to fulfilling one's duty of ordinary care toward others.

danger of the VFD to Mr. Fletcher (*BOA* at p.44) simply demonstrates Mr. Fletcher's clear negligence in sticking a screwdriver into an energized VFD without receiving any direction or permission from Mr. Lee to do so. CP 73, 79. The evidence is undisputed that Mr. Lee did not ask, direct, or encourage Mr. Fletcher to stick a screwdriver into the VFD while it was energized. CP 73, 79.

Defendants' claim that Mr. Lee was "put in charge of Mr. Fletcher" (*BOA* at p.45) is also contrary to the evidence.<sup>39</sup> Mr. Fletcher was Willis Enterprises' employee. Defendants' mill manager, Patrick Carl, admitted that he was Mr. Fletcher's supervisor. CP 1000. Likewise, Defendants' Operations Manager, Todd Charlton, testified that Defendant Willis Enterprises did not call Mr. Lee's company, Advanced Electrical Technologies, to the mill to supervise Willis Enterprises' workers. CP 1031.

**G. The trial court acted well within its discretion in prohibiting Defendant Fletcher from speculating about what Mr. Lee was thinking as he used a flashlight to examine the fan.**

This case involves a negligence claim, which is governed by an objective reasonable person standard. Whether a person subjectively intended to run a stop sign and cause a collision is irrelevant in a negligence claim:

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<sup>39</sup> Mr. Lee testified at trial that no one at Willis Enterprises said anything to him about Mr. Fletcher or what his role was. RP 111 (2/20/14).

. . . Negligence is conduct, and not a state of mind. In most instances, negligence consists of heedlessness or carelessness, which makes the negligent party unaware of the results that may follow from his act. It may also exist where the actor has considered the possible consequences and has exercised his own judgment. The issue is not whether the defendant knows he has taken an unreasonable risk, but rather whether he should know it is an unreasonable risk.

Reasonable care is an external standard, based upon what society demands of an individual rather than upon the individual's own notions of what is proper conduct. . . .

*DeWolf & Allen, 16 Washington Practice: Tort Law and Practice, § 2:29* (4<sup>th</sup> ed. 2014). Whether Defendant Fletcher subjectively intended to blow up the VFD when he stuck a screwdriver in it to try to tap the fan is irrelevant.<sup>40</sup>

The applicable standard is what a reasonable person would have done. Defendant Fletcher unilaterally picked up a screwdriver, and stuck it into an energized high voltage electrical device. Defendants' own employees admitted that a reasonable person would not stick a screwdriver in an energized VFD. Even Defendant Fletcher admitted that one should not stick a screwdriver in an energized VFD. CP 1025.

The trial court allowed Mr. Fletcher to testify to everything he observed Mr. Lee do and all of the interactions they had on the day of the incident. RP 9 (2/19/14); RP 84-92 (2/20/14), RP 492-512, 525-526, 533-

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<sup>40</sup> Defendant relies on cases in which the defendant's knowledge of the danger is an element of the claim. *See, e.g., Huston v. First Church of God of Vancouver*, 46 Wn. App. 740, 732 P.2d 173 (1987) (premises liability case – church's knowledge of the danger of a hallway floor was an element of the claim).

537 (2/27/14). The trial court only prevented Mr. Fletcher from *speculating* about what was in Mr. Lee's mind as he was holding the flashlight and looking at the fan. RP 16-121 (2/21/14), 87 (2/20/14) ("I'll allow him to describe what [Mr. Lee] was doing but not to describe what may or may not have been in [Mr. Lee's] mind."). The trial court acted well within its discretion in excluding speculation by Mr. Fletcher about what Mr. Lee was thinking. *See, e.g., Moore v. Hagge*, 158 Wn. App. 137, 158, 241 P.3d 787 (2010) (speculative testimony properly excluded); *Miller v. Likins*, 109 Wn. App. 140, 147-148, 34 P.3d 835 (2001) (speculative expert opinions properly excluded).

Despite the irrelevance of Mr. Fletcher's subjective intent, Mr. Fletcher testified that he believed he was doing the right thing with the screwdriver. RP 534 (2/27/14). Defense counsel argued in closing argument that Mr. Lee somehow acquiesced in Mr. Fletcher sticking the screwdriver into the VFD through his conduct that day. RP 20-21 (2/21/14). Defense counsel argued in closing that Mr. Fletcher thought he and Mr. Lee had an agreement for Mr. Fletcher to try to tap the fan with a screwdriver, based on the fact that Mr. Lee continued to shine the flashlight on the fan after Mr. Fletcher stated his intent to tap the fan with a screwdriver. RP 1009-1010 (3/5/14). Defendants had a full and fair opportunity to argue their theory of the case based on the admissible evidence.

Defendants cite no legal authority that supports their claim that, under the facts of this case, an implied agreement could exist by which

Mr. Lee agreed to have Mr. Fletcher stick a screwdriver into the energized VFD. Unlike *Alston v. Blythe*, 88 Wn. App. 26, 943 P.2d 692 (1997), cited by Defendants, where a driver affirmatively waved a pedestrian across a street, it is undisputed that there was no affirmative request or action by Mr. Lee for Mr. Fletcher to stick a screwdriver into the energized VFD. Likewise, *Bell v. Hegewald*, 95 Wn.2d 686, 628 P.2d 1305 (1981), the only other case cited by Defendants, simply held that a contract can be oral, and that evidence that a real estate agent stated that a commission would be charged on three occasions was sufficient to create a question of fact as to whether an oral contract existed.<sup>41</sup> Here, in contrast, there is no statement or affirmative act by Mr. Lee. Defendant Fletcher admits that Mr. Lee did not ask him to stick the screwdriver into the VFD and in no way encouraged him to do so. CP 79.

The trial court acted well within its discretion in prohibiting Mr. Fletcher from speculating about what he thought Mr. Lee was thinking as he used a flashlight to examine the fan in the VFD. In *State v. Farr-Lenzini*, 93 Wn. App. 453, 970 P.2d 313 (1999), the defendant was prosecuted for attempting to elude a police officer. The defendant claimed that she was not aware of the police officer pursuing her for most of the

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<sup>41</sup> Defendants cite *Bell* for the proposition that “an assurance or agreement may be implied from one’s acts, omissions, gestures, or body language without spoken words.” *BOA* at p.50. That is not the holding of *Bell*. *Bell* involved verbal requests for a commission from a real estate agent. An oral agreement has to be based on verbal communication. Contrary to Defendants’ argument, an agreement cannot be formed based on one party’s speculation about what the other party was thinking.

pursuit and that, upon realizing that there was a police officer behind her, she pulled over. Over objection, the police officer testified at trial that it appeared to him that the defendant knew he was behind her and was attempting to get away from him. *State v. Farr-Lenzini*, 93 Wn. App. at 458. The Court of Appeals held that it was prejudicial error to allow the police officer to speculate about the driver's state of mind. *State v. Farr-Lenzini*, 93 Wn. App. at 461-465.

The trial court properly limited Mr. Fletcher's testimony to observations of which he had personal knowledge, and prohibited him from speculating about what Mr. Lee was thinking. *See, e.g., Lords v. Northern Automotive Corp.*, 75 Wn. App. 589, 598, 881 P.2d 256 (1994) (ER 602 prohibits a witness from testifying on a matter unless the witness has personal knowledge of it; speculation is improper), overruled on other grounds, *Mackay v. Acorn Custom Cabinetry, Inc.*, 127 Wn.2d 302, 898 P.2d 284 (1995). Defendants' "implied agreement" theory was contradicted by Defendant Fletcher's own testimony that Mr. Lee did not in any way encourage him to put the screwdriver into the VFD. CP 79.

**H. The trial court acted well within its discretion in allowing testimony that Mr. Fletcher "needed to be kept on a short leash" after Defendants opened the door to that evidence.**

Walter Brannock, Willis Enterprises' millwright and second in command after the mill manager, testified that Mr. Fletcher had a tendency to do things without being asked and needed to be kept on a short leash. CP 969. The trial court initially excluded this testimony but

warned Defendants that if they took the position that Mr. Lee was in charge of Mr. Fletcher, that could open the door to the evidence because if Defendant Willis Enterprises assigned Mr. Fletcher to accompany Mr. Lee on the day of the incident and expected Mr. Lee to control Mr. Fletcher, Mr. Lee would have been entitled to know that Mr. Fletcher had a tendency to act on his own and needed to be watched carefully. RP 9-11 (2/21/14).

On examination by defense counsel, Defendants' Operations Manager, Todd Charlton, testified as follows:

Q. And is it fair to state that the policy of your company is that when one of your employees is with a contractor, the contractor is in charge of that project?

A. Correct.

RP 75 (2/21/14).<sup>42</sup>

The trial court ruled that this testimony opened the door<sup>43</sup> to Walter Brannock's testimony that Mr. Fletcher needed to be kept on a short leash:

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<sup>42</sup> Defendants misstate the testimony of Todd Charlton that the trial court ruled opened the door to Mr. Brannock's "short leash" testimony. Defendants cite Mr. Charlton's testimony at RP 79 (2/21/14). It was his testimony cited above that caused the trial court to rule that Defendants had opened the door to the "short leash" testimony. RP 459-460, 462-465 (2/27/14); RP 874-875, 877-878 (3/4/14).

<sup>43</sup> Under the "opening the door" doctrine, when one party injects evidence into a trial, the opposing party may offer evidence that might otherwise be inadmissible to rebut any unfair inferences that might otherwise arise from the original evidence. *State v. Gefeller*, 76 Wn.2d 449, 455, 458 P.2d 17 (1969), overruled on other grounds by *State v. Hill*, 123 Wn.2d 641, 870 P.2d 313 (1994); *Woodruff v. Spence*, 88 Wn. App. 565, 569, 945 P.2d

[Judge McCauley] [W]hen the defense is making an – obviously, a significant point of the fact that Mr. Lee was in charge, then I think the flip side of that as far as the plaintiff being able to explore, well, if they’re turning over an employee and expecting Mr. Lee to be in charge of that employee, then I think if they know anything about his tendencies, that would be potentially something that Mr. Lee should know. Since he’s now being in charge, it should be conveyed, at least it’s a reasonable theory that it should be conveyed; so he’s aware of what he’s getting to be in charge of. . . . So I think it’s going to be fair game to get into – not to get into specific acts of Mr. Fletcher on one occasion dug up something or did something stupid, but just, generally, if he had a tendency to act, you know, and you kind of had to keep him on a short leash, and that he would act on his own without certainly being asked to do that because that’s apparently in the deposition, that Mr. Brannock expressed that opinion. . . .

RP 80-81 (2/21/14); *see also* RP 459-460, 462-465, 475-476, 539-541 (2/27/14); RP 1053-1054 (5/12/14).<sup>44</sup>

Further, as the trial court ruled, in order to determine whether Mr. Lee was at fault, as alleged by Defendants, and to what degree, the jury had to compare Mr. Lee’s fault with Defendant Fletcher and Defendant Willis Enterprises’ fault. RP 875-876 (3/4/14); RP 892-893 (3/5/14). Mr. Brannock’s testimony that Mr. Fletcher tended to do things without being asked and needed to be kept on a short leash was relevant to rebut Defendants’ defense that Mr. Lee was in charge of Mr. Fletcher and was also relevant to the jury’s comparison of Mr. Lee’s fault to Defendants’

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745 (1997); Teglund, 5 *Washington Practice, Evidence*, § 103.14 (5<sup>th</sup> ed. 2014).

<sup>44</sup> Mr. Brannock’s testimony about Mr. Fletcher being a “doer” and needing to be kept on a “short leash” appears at RP 91 (2/21/14).

fault.<sup>45</sup> The fact that Willis Enterprises' management knew that Mr. Fletcher needed to be "kept on a short leash" but did not tell Mr. Lee that when they assigned Mr. Fletcher to accompany Mr. Lee was relevant to the jury's determination of whether Mr. Lee was at fault and to what degree.

Mr. Brannock's testimony that Mr. Fletcher had a tendency to do things on his own and that he needed to be kept "on a short leash" was relevant because Willis Enterprises assigned Mr. Fletcher to be with Mr. Lee even though the company knew that Mr. Fletcher needed to be kept on a short leash. Despite this knowledge, no one at Willis Enterprises informed Mr. Lee about the need to keep Mr. Fletcher on a short leash. Both of these facts were relevant to refute Defendants' claim of contributory negligence on the part of Mr. Lee.

In order to show contributory negligence, the Defendants had to prove that Mr. Lee did some act that a reasonably careful person would not do under the same or similar circumstances or that he failed to do some act that a reasonably careful person would have done under the same or similar circumstances. CP 673; WPI 11.01; WPI 10.01. Willis Enterprises' knowledge regarding Mr. Fletcher and his dangerous propensities, as well as their failure to inform Mr. Lee about these matters, has direct bearing on how Mr. Lee should have acted in these circumstances. It is disingenuous to claim on the one hand that Mr. Lee

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<sup>45</sup> RP 892-893 (3/5/14).

somehow failed to “properly supervise” Mr. Fletcher, while on the other hand failing to tell Mr. Lee that Mr. Fletcher required supervision based on his tendency to act on his own without permission.

The probative value of this evidence outweighed any potential that this evidence might have had to be prejudicial. This is particularly true when the Defendants themselves opened the door to this evidence by raising contributory negligence as a defense. By raising this defense, the Defendants asked that the jury compare their fault with the alleged fault of Mr. Lee. *See* RCW 4.22.070. As the trial court ruled, in making this comparison, the jury was entitled to consider all evidence of Defendants’ negligence – including evidence of Defendant Willis Enterprises’ negligence. RP 874-878 (3/4/14); RP 892-893 (3/5/14).

Defendants argue that Mr. Brannock’s testimony “could only have been relevant . . . had the Lees alleged a claim of direct negligence by Willis, apart from vicarious liability.” *BOA* at 53. Plaintiffs moved at the close of the evidence to amend their Complaint to conform to the evidence presented at trial (CP 1329-1357) – specifically, to include a claim against Willis Enterprises for its independent negligence for, among other things, assigning Mr. Fletcher to be Mr. Lee’s company escort and not telling Mr. Lee that he needed to watch Mr. Fletcher and keep him on a short leash.<sup>46</sup>

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<sup>46</sup> There was other evidence of Willis Enterprises’ independent negligence presented at trial beyond their negligence in assigning Mr. Fletcher to be Mr. Lee’s company escort and in failing to tell Mr. Lee what they knew about Mr. Fletcher, including that Willis Enterprises failed to train their employees on what they should and should not do when assigned to accompany contractors working at the mill. RP 57, 61 (2/20/14); RP 85

The trial court denied Plaintiffs' motion. Plaintiffs cross-appealed the trial court's denial of this motion. CP 1394.

Plaintiffs believe the trial court correctly admitted Mr. Brannock's testimony after Defendants' witnesses opened the door to it and for purposes of the jury's comparative fault determination. But if this Court finds that the trial court abused its discretion in making this evidentiary ruling, one of several grounds upon which the Court could find that any error was harmless<sup>47</sup> is that the trial court erred in denying Plaintiffs' motion to amend the Complaint to conform to the evidence to include an independent negligence claim against Willis Enterprises. Defendants admit that evidence of Willis Enterprises' failure to tell Mr. Lee what they knew about Mr. Fletcher would have been relevant to a claim of direct negligence by Willis Enterprises. *BOA* at 53.

There would not have been any prejudice to Defendants as a result of amending Plaintiffs' Complaint to include a claim for Willis Enterprises' independent negligence, because questions had been asked throughout discovery about Willis Enterprises' safety rules and lack of training of their employees. CP 1333, 1335-1357. These were not new issues that were raised for the first time during trial and should have come as no surprise to Defendants. The trial court should have granted

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(2/21/14); RP 835-837, 839-840, 843 (3/4/14).

<sup>47</sup> Any error in admitting the "short leash" testimony would also be harmless because Defendant Fletcher's negligence had already been determined as a matter of law.

Plaintiffs' motion to amend the Complaint to conform to the evidence presented at trial under CR 15(b).

## V. CONCLUSION

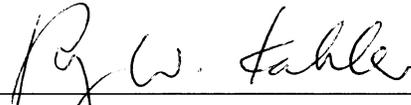
The evidence was undisputed that no reasonable person would stick a screwdriver into an energized VFD. Given Defendants' admissions, the trial court properly granted summary judgment on the issue of Defendant Fletcher's negligence. Further, even if the trial court had not granted summary judgment before trial, the admissions of Defendants' employees and experts at trial would have required the trial court to grant judgment as a matter of law at the close of the evidence.

The evidentiary rulings challenged by the trial court were well within the trial court's broad discretion. The trial court properly prohibited Defendant Fletcher from speculating about what Verl Lee was thinking as he used a flashlight to look at the fan in the VFD. And Defendants' own witnesses opened the door to testimony that Mr. Fletcher needed to be kept on a short leash, after being warned in advance that they would open the door to such evidence if they testified that Mr. Lee was in charge of Mr. Fletcher.

There was no error in this case. Defendants received a full and fair trial. The jury accepted Defendants' arguments in part and found 10% comparative fault on the part of Mr. Lee.

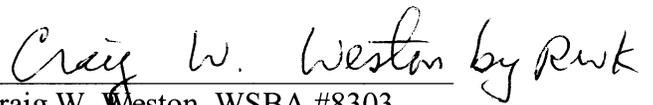
This Court should affirm.

Respectfully submitted this 13th day of April, 2015.



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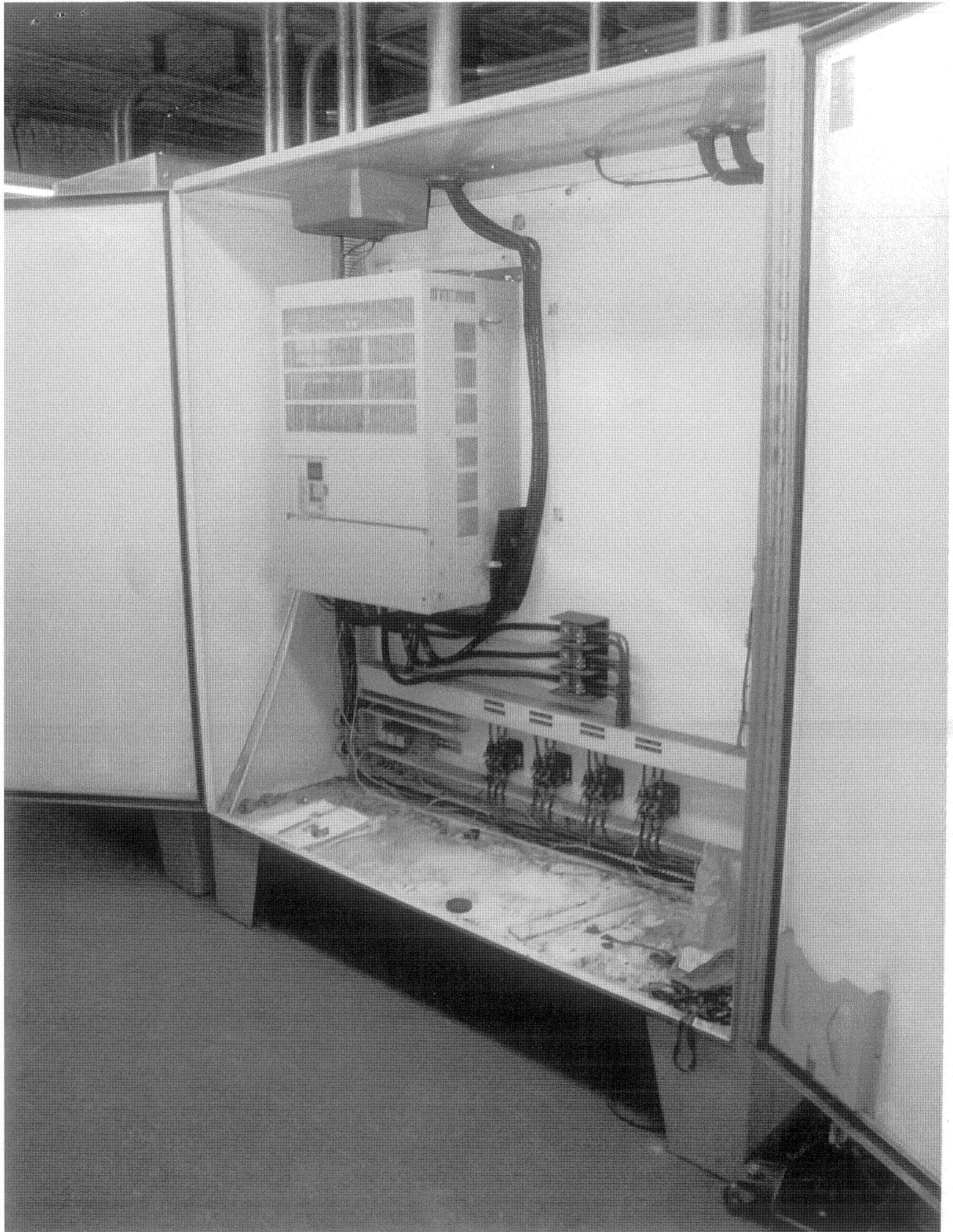
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# Appendix A



**CERTIFICATE OF SERVICE**

I certify that I served a copy of the foregoing document:

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