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NO. 41451-1-II

COURT OF APPEALS  
DIVISION II  
OF THE STATE OF WASHINGTON

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FRANK PUPO, SR., and JANIS PUPO, husband and wife,

Appellants,

vs.

ALBERTSON'S, INC., a foreign corporation, SUPERVALU, INC., a  
foreign corporation, and NEW ALBERTSON'S, INC., a Washington  
corporation,

Respondents.

BY   
STATE OF WASHINGTON  
JUL 7 11:55 AM  
COURT OF APPEALS  
DIVISION II

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**BRIEF OF APPELLANT**

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## I. ASSIGNMENTS OF ERROR

### *ASSIGNMENTS OF ERROR*

No. 1: The trial court erred in restricting the plaintiffs from introducing evidence of, and arguing regarding, Albertson's subsequent use of pallet guards.

No. 2: The trial court erred in ruling that the defendants did not controvert feasibility of the use of pallet guards on multi pallet displays.

No. 3: The trial court erred in denying plaintiffs' motion for additur and/or new trial.

### *ISSUES PERTAINING TO ASSIGNMENTS OF ERROR*

No. 1: After Frank Pupo fell, Albertson's directed placement of a pallet guard on the display over which he tripped. Did the trial court err in restricting plaintiffs from introducing evidence of, and arguing about, Albertson's subsequent use of pallet guards where:

- The defendant had a previous practice of using pallet guards;
- The evidence established that "somebody might have forgot to put them on;"
- Albertson's incident report listed the pallet guards as "defective equipment?"

No. 2: Whether the trial court erred in ruling that the defendants did not controvert the feasibility of placing pallet guards on multi pallet displays where:

- The defendant contended that such pallet guards would not work effectively and would create safety hazards; and
- After the fall, defendant directed placement of pallet guards on the display involved in the fall.

No. 3: Did the trial court err in denying plaintiffs' motion for a new trial where:

- The evidence established without contradiction that plaintiff suffered injury and experienced pain and suffering after the fall;
- The jury awarded all of the economic damages that plaintiff submitted, including surgical and rehabilitation expenses; and
- The jury awarded nothing for non-economic damages?

No. 4: Whether this court should remand this case for new trial limited to issues of non-economic damages and apportionment of fault where the original issues in the case were separate and distinct and subject to separate questions on the special verdict form and where justice does not require resubmission of the entire case to the jury.

## **II. STATEMENT OF THE CASE**

### **A. STATEMENT OF FACTS**

#### **1. FACTS OF THE INCIDENT**

Frank and Janis Pupo brought this premises liability case against Albertson's. They sought damages for injury sustained when Frank Pupo tripped over an unguarded pallet located in the produce section of the

defendant's premises in Gig Harbor, Washington on July 21, 2007. Clerk's Papers (CP) 37-42; Report of Proceedings (RP) 4, 6, 109.

In the summer of 2007, Albertson's Gig Harbor store set up a watermelon display near the main entrance. RP 111. It consisted of six pallets with six cardboard bins of watermelon sitting on top. The display was three pallets long by two pallets wide. RP 111-112, 114, 163, 171; CP 18-39 (p. 8).

On the date of the incident, Mr. Pupo noticed people standing around the entrance of the store. They had gathered near a seafood kiosk to the right of the watermelon display. Albertson's located the watermelon display and the kiosk approximately eight to nine feet apart. RP 112; Exhibit 8; Appendix 3; Exhibit 36; Appendix 4.

Mr. Pupo compared entering the store to "walking into a crowded baseball game..." RP 359. The people in between the seafood kiosk and the watermelon display blocked Mr. Pupo's view of things in front of him. RP 361. Albertson's did not place cones or post warnings about the edge of the watermelon display. The corner of the pallet display protruded "maybe three inches." CP 184 (p. 17).

As Mr. Pupo made his way through the group of people, he caught his foot on the corner of the watermelon display and fell down. RP 116. At first, Mr. Pupo did not know what he fell over. He knew he hooked his foot on something. After he got up and looked at it, he saw that it was a pallet. He did not notice the pallet sticking out before he hit it. RP 117.

Mr. Pupo caught the edge of the pallet with his left foot. He could not be sure whether his foot went into the opening on the pallet or not. RP 171-172.

Janis Pupo did not go into the store with her husband. A woman came to her car and told Mrs. Pupo that her husband had fallen. Mrs. Pupo rushed to the store. As she entered, she saw "a congested mess." She saw a lot of people, a very large display of watermelons and a kiosk that she was not used to seeing at Albertson's. RP 585-588; Exhibit 36. Mr. Pupo told his wife that he tripped on a pallet. RP 590.

Mrs. Pupo took Frank Pupo to urgent care at MultiCare in Gig Harbor. They x-rayed his shoulder, examined him and referred him to an orthopedic surgeon. RP 117-118, 165-166.

After that, Mr. Pupo returned to the store. He asked for the manager. Nathan Cutler met with him, and filled out an incident report. RP 166-167; CP 1838-1839 (pp. 5, 7-8); Exhibit 11; Appendix 1.

## **2. ALBERTSON'S PALLETED WATERMELON DISPLAYS**

Richard Liegal worked as the produce manager at the Gig Harbor Albertson's from 2001 or 2002 until 2008. RP 632-633. He testified that Albertson's produce shipments, including watermelons, came off the truck on pallets. He stated that Albertson's could not display produce on the floor because of food safety issues. RP 635-636.

According to Liegal, Albertson's always received watermelons in a corrugated cardboard bin resting on a pallet. RP 636, 638. The pallets

had dimensions of three feet by four feet. RP 640. Some of the bins completely covered the pallet. CP 1829 (p. 11). Others did not come up flush with the corners of the pallet. Liegal said the bins “come on perfectly square, some are tapered, some have yellow arrows down the sides.” RP 645. If a pallet protruded from the edge of a pallet display, Liegal agreed it could pose a safety hazard. CP 1829 (p. 11); CP 1831 (p. 18).

July was the biggest month for watermelon sales. The Gig Harbor Albertson’s would go through 1,000 to 3,000 pounds, or four bins of watermelons, per day. RP 638. From the time he started at Albertson’s until 2007, Liegal placed watermelon displays near the store entrance during June, July and August every year. He kept the display centered to maintain an entryway on both sides. RP 639.

In July, Liegal placed four and sometimes six bins at the front entrance of the store. RP 640. The display would run 12 feet long and six feet wide. Liegal arranged the pallets in a straight line so no one could get in between the bins. Each bin contained 700 to 800 pounds or more of watermelon. RP 640-641.

### **3. ALBERTSON’S USE OF PALLET GUARDS**

Albertson’s used pallet guards. These consisted of plastic guards that interlocked to go around a pallet display. They protected the pallet and guarded the sides of the pallet to prevent things from getting underneath them. Liegal testified that pallet guards also helped to prevent

people from tripping on pallets. He characterized the guards as "safety things." He stated "we use them all the time." CP 1825 (p. 8). Assistant manager Nathan Cutler agreed about the safety benefits of pallet guards. CP 1841 (pp. 16-17). They "protect from trips." CP 1840 (p. 13).

The Gig Harbor Albertson's store had at least 12 to 15 pallet guards in the summer of 2007. The store had used pallet guards ever since it opened. CP 1829 (p. 3).

The pallet guards were three feet long, and they could extend to about four feet. They fit a standard pallet. Albertson's could connect pallet guards because "they just slide together at the ends." Liegal claimed that he did not use pallet guards with six-pallet displays because he "had a hard time with them staying standing." He said that with that many together, the guards would "want to be loose and fall away from the display." RP 642.

Liegal testified that with single pallets, Albertson's "would always use a pallet guard." RP 644. He stated that with displays over two pallets, "the pallet guards cause more problems than I seen [sic] them doing good." RP 644.

Liegal admitted that a request for pallet guards that would fit better around a six pallet display came up at some department managers' meetings. However, he never received any feedback on the issue so it never happened. RP 659. He confirmed that he trained others that, if one

puts a pallet on the floor, one should put a pallet guard on it. RP 659; CP 1830 (p. 14).

Liegal did not know why the pallet display Mr. Pupo encountered did not have pallet guards on it. It would take about five minutes to put pallet guards around a four pallet display. Liegal conceded that "it is possible that somebody just forgot to put those pallet guards on that day..." RP 653-654; CP 1830 (pp. 14-15).

Liegal also agreed that pallet guards make a pallet display safer. He wanted to use them when he could. Liegal conceded that if a display was too large to effectively use pallet guards, he could reduce the size of the display or break it up into smaller parts. If he broke up a display, he could actually use pallet guards around the whole display. Albertson's always had plenty of pallet guards. He agreed that it was feasible to put pallet guards around a four pallet display, and that Albertson's did so. In fact, he had done so himself, because it made a pallet display safer. RP 655-657.

He also "definitely" wanted his pallet displays neat and flush without protruding edges. RP 660. He agreed that a trip "can definitely happen" if a pallet sticks out beyond the edge of the display, protruding underneath it. RP 660. According to produce manager Nicholas Mayr, pallet guards rounded off the corners of pallets. They also helped prevent trips and falls. CP 1847-1848 (pp. 8-9).

A juror submitted the following question to Mr. Liegal (RP 672):

Whether or not it is possible to put pallet guards on the front two and the rear two to safeguard pedestrians, in other words all four corners would then be covered?

Liegal answered (RP 672):

As a manager that is something that -- whoever came up with that is brilliant. I would seriously look at it in my department and see if that would work. I would definitely consider that, yes.

Liegal also testified that the pallet at issue was a standard three foot by four foot brown pallet, with two open ends and two enclosed sides. The three foot sides had the open ends. RP 676.

#### **4. FRANK PUPO'S INJURIES AND DAMAGES**

Immediately after he fell, Mr. Pupo felt pain. He also hurt his knee, which swelled up. RP 117. His wife drove him to an Urgent Care in Gig Harbor, where he received an x-ray of his shoulder. RP 118. He reported to an orthopedic surgeon's office on July 23. He received a cortisone shot in his knee. He received referral to orthopedic surgeon Spencer Coray, M.D. for treatment. Dr. Coray performed a surgery on Mr. Pupo's right shoulder on September 14, 2007. RP 119-120.

Following the surgery, Mr. Pupo felt very uncomfortable. His wife had to assist him with bathing and dressing. He had pain and poor range of motion. RP 121. Mr. Pupo received physical therapy. He also worked with a trainer at a fitness center. Mr. Pupo reported that he had not experienced a day that he had not felt some pain. RP 122-123.

Mr. Pupo reported a restricted range of motion in his right shoulder. He endured varying pain, depending on his activities. His

shoulder injury also affected his golf game. Mr. Pupo still had symptoms in his right arm at the time of trial. RP 123-128.

Plaintiffs called three lay witnesses to testify about general damages. This included Frank Pupo, Jr. (RP 471-491), John Mazzuca (RP 134-158) and Janis Pupo (RP 564-611).

Frank Pupo, Jr. testified about his father's pain during the fall. He told the jury that his father wore a sling, had a reduced range of motion, had difficulty playing with grandchildren, needed assistance with loading and unloading vehicles, could not shoot a basketball and experienced difficulty getting in and out of a car. RP 483-486.

John Mazzuca, one of Frank Pupo's best friends, testified about Mr. Pupo's physical conditions and capabilities both before and after the incident. He testified that Mr. Pupo "was in a fair amount of pain." He also testified that Mr. Pupo's golf game deteriorated after the injury. Previously he shot a consistent 85-86. After the incident, his score was closer to 100. Mr. Pupo's swing had changed dramatically. RP 144-147.

Janis Pupo testified that her husband engaged in numerous and vigorous activities previous to his fall at Albertson's; his right shoulder did not restrict these activities. RP 572-583. After her husband fell, she entered the store and saw him with ice on his shoulder, looking "pretty white." She felt he was "obviously in pain." He had hurt the right side of his body, including his shoulder and knee. RP 589.

Mrs. Pupo described the medical treatment her husband received, and his response to that treatment. RP 592-595. She described his limitations and self care. She told the jury that Mr. Pupo struggled with any activity that required him to raise his right arm. RP 596.

Dr. Coray testified that an MRI showed that Mr. Pupo had sustained a tear of the rotator cuff including of the supraspinatus and infraspinatus muscles of the right shoulder. RP 190. He recommended that Mr. Pupo have surgery to repair the injury because "he was extremely symptomatic at that point." RP 201. He characterized Mr. Pupo's rotator cuff tear as "on the bigger side." RP 204. He testified that Mr. Pupo had a recurrent injury to the tendon in the shoulder in July of 2008 that "directly related" to the injury for which he treated Mr. Pupo in August of 2007. RP 204-205.

Dr. Coray last saw Mr. Pupo on May 3, 2010. On that date, Mr. Pupo had weakness and abduction on external rotation and mild pain with overhead activities. He characterized the weakness and limitations "as permanent." RP 206. Dr. Coray testified that the fall of July 2007 and the need for surgery in September of 2007 were connected to each other. RP 207-208.

Plaintiffs called Theodore Becker, Ph.D. to testify. Dr. Becker specializes in biomechanics in human performance. RP 277-279. He testified at length about the residual restrictions in Frank Pupo's shoulder. RP 277-351.

The defense called James Russo, a retired orthopedic surgeon. CP 1855-1856. He found atrophy, loss of range of motion and loss of strength in Mr. Pupo's right shoulder. CP 1873-1874. Dr. Russo testified that the fall at Albertson's aggravated a pre-existing right rotator cuff problem. CP 1894. He also testified that Mr. Pupo would not fully recover from the September, 2007 right rotator cuff surgery. CP 1897-1899.

Dr. Russo did not have any major issues or disagreements with Dr. Theodore Becker's report. CP 1904. Dr. Russo also stated that Mr. Pupo had fallen directly on his right shoulder, which "creates a lot of shoulder pain." CP 1918. Dr. Russo also felt that Mr. Pupo suffered a contusion from the direct blow to his shoulder. CP 1928. On cross-examination, Dr. Russo admitted the following (CP 1930):

If somebody had a pre-existing problem with a rotator cuff, in that instance, they would definitely be more vulnerable to further injury to the rotator cuff as to compared to a perfectly intact rotator cuff.

Dr. Russo conceded that Dr. Coray's treatment was reasonable. CP 1932-1933. Dr. Russo agreed that if Mr. Pupo had not fallen, he probably would not have been a candidate for rotator cuff surgery in September of 2007. CP 1934.

## **B. STATEMENT OF THE CASE**

### **1. PROCEDURAL HISTORY**

#### **a. PRELIMINARY PLEADINGS**

Frank Pupo suffered injury on July 21, 2007. Plaintiffs filed suit on June 13, 2008. CP 3-7. Plaintiffs amended their complaint twice to

correct issues relating to the identity of defendants. CP 8-11, 35-42.  
Albertson's answered plaintiffs' three complaints. CP 12-19, 43-46.

**b. RULINGS REGARDING PALLET GUARDS AND  
SUBSEQUENT REMEDIAL MEASURES**

**i. PLAINTIFFS' 2009 PRETRIAL MOTION TO  
ADMIT EVIDENCE**

On August 6, 2009, plaintiffs moved in limine to admit evidence that Albertson's subsequently installed pallet guards on the display which tripped Frank Pupo. CP 411-430. The motion relied upon the testimony of Nathan Cutler, who gave his deposition on January 29, 2009. CP 423. During the course of his deposition, Cutler testified about Albertson's use of pallet guards. He described them as follows (CP 428, p. 22):

Q What's a pallet guard?

A Um, they go around our pallet displays.

Q They're placed around the pallet displays outside?

A Yes.

Q Are they used inside the store, too?

A Occasionally.

Q What are they intended to do?

A They are to protect from trips.

Q They basically keep people from hooking their foot on the corner of a pallet that's protruding from the edge of a display?

A Correct.

Cutler stated that Albertson's placed pallet guards on the display involved in Mr. Pupo's fall, after he fell (CP 428, pp. 23-24; emphasis added):

Q So the store had them at the time, they just weren't out?

A Correct.

\* \* \*

Q So after the fall, you talked to Produce. They bring out the pallet guards, and then did they actually set up pallet guards around the six-pallet display, that you recall?

A I believe so.

Q **So they had the equipment to do it, it just hadn't been done before the fall?**

A **There might have been pallet guards already up and there might have been an exposure.**

Q **What do you mean?**<sup>1</sup>

A **Well, typically what happens is they pull pallets out and they pull them inside the store. And they stock the watermelon inside the store, and they'll bring out the remainder of them and put them outside.**

**And somebody might have forgotten to put them on.**

Q So the pallet guards, is that something that Albertson's has used for a long time before the fall? How long do you remember having them available?

A I'm not too sure.

Q Since you've worked there?

A Yes.

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<sup>1</sup> The trial court later struck the underlined passage from the designation of Mr. Cutler's testimony to be read to the jury. RP 557.

Plaintiffs first argued that ER 407 did not bar evidence of subsequent placement of the pallet guards because Albertson's did not use them for the first time as a result of Mr. Pupo's injury. CP 414-415. Second, plaintiffs argued that even if ER 407 applied, the court should admit the evidence as proof of control, feasibility of precautionary measures and for controversion of testimony. CP 415-418. Plaintiffs highlighted that the defendant had disputed the feasibility of using pallet guards on large displays. CP 418-419. Finally, plaintiffs argued that the defendant had opened the door to admission of the pallet guard use. CP 419, 482-489.

Albertson's opposed the motion. CP 431-481. Albertson's argued that the use of pallet guards constituted a subsequent remedial measure, that it did not contest feasibility and that plaintiffs did not need the evidence to present their case. CP 431-438.

The parties argued the motion on September 4, 2009. RP 3. Plaintiffs' counsel emphasized that the prior use of pallet guards rendered ER 407 inapplicable. RP 6.

Defense counsel countered that prior use of the pallet guards did not matter. He stated "the fact that Albertson's did a measure after the accident is a subsequent remedial measure." RP 8. Defense counsel conceded that the jury should hear evidence that Albertson's used pallet guards in general. RP 11-12.

In response, plaintiffs' counsel observed that Albertson's actually did contest feasibility, because it insisted that pallet guards are not safe with larger displays. RP 12-13.

The court denied the motion, ruling that Albertson's did not dispute the issues of feasibility, dominion and control with respect to the pallet guards. The court did not comment upon plaintiffs' contention that pallet guard use did not constitute a subsequent remedial measure. RP 14.<sup>2</sup>

**ii. MOTION FOR PREADMISSION OF ALBERTSON'S INCIDENT REPORT**

The parties argued pretrial motions in limine on September 29, 2010. Plaintiffs moved to preadmit the incident report Albertson's prepared as a result of Mr. Pupo's fall. CP 869-911. Albertson's employee Nathan Cutler filled out the report, entitled "Customer/Vendor Incident Worksheet," on July 21, 2007. CP 906; Exhibit 11; Appendix 1.<sup>3</sup> Cutler testified that he filled out the report contemporaneously with the incident. CP 898 (p. 6).<sup>4</sup> The report itself stated the following (CP 906; Exhibit 11; Appendix 1):

<p><b>Is there any defective equipment or conditions to be repaired or replaced?</b></p> <p>Describe: <u>pallet guards</u></p>	<p><b>Yes/No</b></p>
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<sup>2</sup> The parties and the court continued the trial from December 4, 2009 to September 27, 2010. CP 845-846.

<sup>3</sup> Plaintiffs supported the motion with Cutler's deposition testimony. CP 897-904.

<sup>4</sup> Albertson's initially resisted producing the report. CP 894. Plaintiffs moved to compel. In resisting the motion, the defense said nothing about subsequent remedial measures. CP 943, 949-950, 954-955.

Thus, Cutler found that "pallet guards" constituted "defective equipment or conditions to be repaired or replaced..." CP 906; Exhibit 11; Appendix 1. Cutler characterized the document as "basically a legal document." CP 899 (p. 10). He stated that employees filled out the report "for Risk Management purposes," "keeping track," making changes and remembering what happened and who saw it. CP 898-899 (pp. 9-10). Cutler directed "one of our pallet people" to put the guards on. CP 1841 (p. 14).

Plaintiffs argued that the court should admit the report because it bore relevance to the case, qualified as a business record and contained statements against the defendant's interest. CP 873-878.

Albertson's resisted the motion to preadmit the incident report. It argued that the report contained evidence of subsequent remedial repair and constituted hearsay. CP 912-918.

In reply, plaintiffs argued that Albertson's had never contended that the incident report contained subsequent remedial measure evidence until resisting the motion for preadmission. In addition, the reply argued that the use of pallet guards did not constitute a subsequent remedial measure. Albertson's used the guards before the fall, had them available at the time of the fall, and simply did not use them on the day in question. Plaintiffs argued that the subsequent use of pallet guards rebutted Albertson's argument that pallet guards made multi pallet displays more dangerous. CP 947-952.

At oral argument, plaintiffs again emphasized that the use of pallet guards was neither subsequent nor remedial, and that Albertson's had used pallet guards for years before the fall. RP 41. Counsel also observed that Nicholas Mayr testified in his deposition that Albertson's still built its displays the way it did before the incident. RP 42; CP 997 (p. 16).

In response, counsel for Albertson's again argued that the use of pallet guards constituted a subsequent remedial measure. Albertson's urged that Cutler had no personal knowledge of the incident and that Mr. Pupo came back hours later to report the incident to Mr. Cutler. RP 44-49.

The court granted the motion and admitted the report, at RP 51, as follows (emphasis added):

THE COURT: Alright. Well, here is what I am going to do: I don't dispute that the Court did rule subsequent remedial measures would not be admitted, but if there is no guard, it is pretty hard to find that this is a subsequent remedial measure. The motion is granted. Preadmission of the report by the assistant can be used by the plaintiffs. It is going to go to weight. Jury will decide. Was it feasible to put the guards up? Was it not feasible to put the guards up? They didn't put them up at the beginning. After the fall they put it up. **It doesn't feel like a subsequent remedial measure at that point. So, okay on that.**

**iii. THE COURT'S RULING REGARDING  
SUBSEQUENT REMEDIAL MEASURES WHILE  
REVIEWING THE PARTIES' DESIGNATIONS OF  
RICHARD LIEGAL'S DEPOSITION TESTIMONY**

Plaintiffs designated excerpts from the deposition of Richard Liegal to be read to the jury. CP 975-989. The defendants objected and counter designated excerpts. CP 1066-1068. The trial court ruled upon the designations and the objections on October 6, 2010. RP 527, 536-550.

Plaintiffs designated a passage running from page 10, line 16 to page 13, line 2 of Liegal's deposition. CP 976, 981. Defense counsel objected that a photograph referenced in the testimony depicted "subsequent remedial repair." RP 536-537; CP 981 (p. 10).<sup>5</sup> Plaintiffs' counsel countered that "showing the pallet guards that they forgot to put on is not subsequent, it's not remedial." RP 537. The court commented that the jury would have to decide whether Albertson's forgot or not, as a factual issue. CP 537. The court struck the testimony, at RP 539-540, as follows:

THE COURT: This doesn't go to the issue of feasibility. What I allowed for Mr. Mayr's testimony to be read goes to the considerations that the store may or may not look at in various sizings of displays to use the guards. They made the decision not to put them on. Everybody has to live with that now. So they are not the same. What I am going to do with regard to the first - - that first objection is the court reserved ruling on that. I realize what my ruling was last fall in the subsequent remedial measure, and in looking at my notes the issue was whether or not this truly is a subsequent remedial measure, or something else.

This is not an easy question. Because of the factual issue, the jury will have to decide whether or not Albertson's should have put the guards on or not. That is your case in short version. Let me just double check my notes again. I looked at this this morning.

I think with the evidence that's been presented in the stipulation that there is no dispute about it was feasible, then regardless of what Albertson's did after is not relevant. The jury is going to decide whether they should have put it up, or not. Whether they put it up or not is not relevant after the fact. That is why it doesn't feel like on one hand a subsequent remedial action. The carpet wasn't torn, so I will grant the objection. It won't be read. I have crossed it out.

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<sup>5</sup> The photograph depicted pallet guards on a pallet. CP 981 (pp. 10-12).

**iv. THE COURT'S RULINGS REGARDING THE  
DESIGNATED DEPOSITION TESTIMONY OF  
NATHAN CUTLER**

Plaintiffs designated passages from the deposition of Nathan Cutler to be read before the jury. CP 713-724. The defense offered objections and counter designations. CP 1069-1070. The court ruled on the designation and objections on October 6, 2010. RP 527, 551-560.

The defense objected to a passage running from page 23, line 2 through page 24, line 15 of the deposition. CP 1069. This section concerned subsequent placement of pallet guards on the display over which Mr. Pupo fell. CP 722 (pp. 23-24). Defense counsel objected that this testimony involved subsequent remedial repairs. RP 553. The court struck three lines. RP 556-557. The excerpt quoted below shows the testimony at issue, with the evidence the court struck underlined (RP 557; CP 722):

Q So after the fall, you talked to Produce. They bring out the pallet guards, and then did they actually set up pallet guards around the six-pallet display that you recall?

A I believe so.

Q So they had the equipment to do it, it just hadn't been done before the fall?

A There might have been pallet guards already up and there might have been an exposure.

Q What do you mean?

A Well, typically what happens is they pull pallets out and they pull them inside the store. And they stock

watermelon inside the store, and they'll bring out the remainder of them and put them outside.

And somebody might have forgotten to put them on.

The court thus permitted Cutler's testimony that Albertson's set up pallet guards after the fall, and that "somebody might have forgotten to put them on" before the fall.<sup>6</sup> Plaintiffs presented this testimony to the jury. CP 1841 (p. 14).

**v. THE COURT'S REFUSAL TO PERMIT PLAINTIFFS TO READ THE RESPONSE TO A REQUEST FOR ADMISSION REGARDING PLACEMENT OF PALLET GUARDS AFTER THE FALL**

Plaintiffs submitted a request for admission asking that the defense admit that Nathan Cutler immediately had pallet guards installed around the display after Mr. Pupo's fall. The defendant admitted the request. CP 959; RP 627. The defendant objected to reading this request for admission on the basis of subsequent remedial repair. The court sustained the objection, ruling that reading the request for admission was "contrary to my rulings, so I am not going to do that." RP 627-628.

**vi. THE COURT'S RULINGS REGARDING SUBSEQUENT REMEDIAL MEASURES DURING THE TESTIMONY OF DANIEL JOHNSON**

Plaintiffs called Daniel Johnson, Ph.D., a psychologist, to testify. He holds a certification in professional ergonomics, which is essentially a certification in human factors. CP 351-354.

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<sup>6</sup> Richard Liegal agreed during his live testimony. RP 653-654.

During his examination, Dr. Johnson began to describe changes that had occurred after Mr. Pupo's fall. The court sustained the defense objection. RP 365. Subsequently, plaintiffs' counsel requested a recess, which the court granted. RP 373-374. Counsel then offered argument regarding the court's rejection of Dr. Johnson's testimony regarding a publication dealing with retail operations. RP 373-378. The court denied plaintiffs' counsel's request for an offer of proof about the publication. The court stated that it would not permit Dr. Johnson to testify about the subsequent use of pallet guards, because he did not go to the site. RP 375-376. However, the court agreed that it had ruled that the use of the guards after the fall did not constitute a subsequent remedial measure, at RP 376, as follows:

MR. MESSINA: I think we argued that motion, and you said that it was not a subsequent remedial measure.

THE COURT: Correct.

**c. THE COURT PROHIBITED PLAINTIFFS FROM ARGUING CUTLER'S TESTIMONY TO THE JURY**

At the close of Liegal's testimony, the court solicited questions for him from the jury. The court then excused the jury to review the questions with counsel. RP 663-670. During this conference, plaintiffs' counsel requested permission to examine Liegal regarding Nathan Cutler's deposition testimony regarding use of the pallet guards after Mr. Pupo's fall.<sup>7</sup> Counsel pointed out that Cutler's testimony had been read to the jury without objection. Defense counsel objected, stating that the evidence

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<sup>7</sup> Cutler's deposition testimony is found at CP 1841 (pp. 14-15).

involved a subsequent remedial measure. RP 666-669. The court denied the request. Plaintiffs' counsel asked for clarification in the following colloquy, at RP 669-670:

MR. MESSINA: Your Honor, just some guidance. In final argument can we mention that this [Cutler's testimony] was read to the jury?

THE COURT: You know - -

MR. VERTETIS: So he wants to bring up the fact that there was a subsequent remedial repair?

THE COURT: No, it can't be read.

MR. MESSINA: The court has ruled in motions in limine that it was not a subsequent remedial measure.

THE COURT: No, I reserved ruling. You all keep disregarding. I reserved ruling. I said it felt like it wasn't. Now I have heard the testimony and it feels like it is, and that's the way I have been ruling. So, no, I don't want, asked and answered, rehashing what we have been over now.

So I will look at Mr. Cutler's testimony to see if that was, in fact, read. We will revisit it in the morning.

The next morning, plaintiffs' counsel asked again whether the court would permit comment on Cutler's testimony in final argument. RP 684. Defense counsel objected that the evidence constituted subsequent remedial repair. It asked that the court restrain plaintiffs' counsel from commenting upon Cutler's testimony. RP 685.

Plaintiffs' counsel observed that the court admitted Cutler's testimony and that the record contained the testimony. The court agreed. RP 685. The argument concluded as follows, at RP 686:

MR. MESSINA: Well, you know, he says they admit feasibility. So, I have it's not feasible to use these pallet guards on the big displays. So, I think that opens the door for not only the admissibility of that testimony, but comment on it. Counsel has nowhere admitted feasibility of using pallet guards on the big displays. Everything they have talked about has said it is not feasible, not feasible, dangerous, can't do it.

THE COURT: I think the testimony here by Mr. Cutler is what role did you have in putting the guards on. I believe you told one of your people to put the guards on, and really the rest of that testimony is about the guards and the interlocking Lego analogy. I did allow that testimony. My ruling is consistent. You may not comment on that.

MR. MESSINA: So just leave that out of our arguments?

THE COURT: Yes.

In summary, the court admitted Cutler's testimony that he directed others to bring out pallet guards and place them around the six pallet display after Mr. Pupo fell. The court admitted Cutler's testimony that "somebody might have forgotten to put them on." CP 1841 (pp. 14-15). Nonetheless, the court prohibited the plaintiffs from arguing that same evidence to the jury.

**d. THE DEFENSE CONTENDED THAT IT COULD NOT USE PALLET GUARDS WITH MULTI PALLET DISPLAYS**

Albertson's counsel repeatedly urged that Albertson's could have feasibly could have put up pallet guards. *See, e.g.*, RP 9, 11, 47, 539, 555.

Notwithstanding these "concessions," defense counsel declared during opening statement that Albertson's would not use pallet guards on "large displays." RP 9/30/2010, pp. 10, 19. Defense counsel called

Richard Liegal to testify that Albertson's could not use pallet guards around a multi pallet display. RP 462, 657, 662, 672, 692-693, 697. The deposition testimony of Liegal read to the jury contains similar passages. CP 1828, 1832 (pp. 9, 23). Liegal said in court that he had a hard time with them staying standing. When he put that many together they would become loose and fall away from the display. RP 462.

The deposition testimony excerpts of Nicholas Mayr and Nathan Cutler read to the jury contained similar contentions. CP 1848 (pp. 7-8); CP 1842 (p. 18).

In his opening statement, defense counsel claimed that Albertson's only used guards with single pallets, and not with multiple pallet displays. RP 9/30/2010, 9-10, 19.

Plaintiffs argued that with these tactics, the defendant had placed feasibility and practicality at issue. CP 13, RP 7, 50, 686. The court remained unmoved.

During closing argument, plaintiffs referenced the decision to use or not use pallet guards, and criticized the quality of the pallet guards. However, plaintiffs could not highlight the testimony in evidence that immediately after the fall the defendant chose to place the pallet guards on the display that someone had "forgot" to put in place. Plaintiffs could not argue that the defendant actually placed pallet guards that supposedly would not work onto the multi pallet display that tripped Mr. Pupo. RP 709-711.

Defense counsel, in closing argument, repeatedly argued the non-feasibility of using pallet guards on larger displays. Defense counsel asserted that Albertson's rule was "one pallet, pallet guard. More than two pallets, no pallet guards." RP 748-749. Defense counsel asserted "the rules are, anything larger than two bins, you don't get a pallet guard." RP 749. Defense counsel emphasized again that "pallet guards do not get placed on large six bin pallets." RP 761. Defense counsel drove home the point that pallet guards were not feasible with larger displays, as follows (RP 751):

For all of the reasons that we talked about, Rich Liegal acted reasonably. He thought about these pallet guards on the large bins, and what did he say? It'll sway. They are too big. It doesn't work. It's safer not to have them. Okay. It is safer not to have them than to have them. That is an, it's a big, open, obvious condition. People are going to see this large watermelon pallet-display and it's reasonable not to have them.

The trial court's ruling prohibited plaintiffs' counsel, in rebuttal, from pointing out to the jury that Nathan Cutler did exactly what Albertson's protested that it could not do. RP 762-772.

**e. CLOSING ARGUMENTS AND JURY VERDICT**

Plaintiffs' counsel requested that the jury award \$47,517.97 in medical bills. RP 723; Exhibit 12; Appendix 3. Counsel also argued for \$327,000 in non-economic damages, including nature and extent of injury,

loss of enjoyment of life, pain, disability, and emotional distress.<sup>8</sup> RP 724-728.

In his closing, defense counsel relentlessly targeted Frank Pupo. He repeatedly emphasized Frank Pupo's "personal responsibility." RP 735, 737-738. He emphasized the "open and obvious" nature of the pallet display, and told the jury that Mr. Pupo "passed it at least 7 times." RP 738-739.

Defense counsel proclaimed over and over that Albertson's could not use pallet guards with multi pallet displays. RP 748-749, 751, 761.

With respect to injuries, defense counsel acknowledged that Mr. Pupo sustained "right shoulder x-ray and shoulder contusion." RP 744-745. Counsel agreed that Mr. Pupo sustained "[c]ontusion without a question, pain without a question..." RP 744. Defense counsel told the jury that "a gross award of somewhere around one hundred thousand dollars, including medical bills, would be reasonable." RP 760.

Plaintiffs' counsel offered rebuttal argument. RP 762-772. The court's ruling stopped plaintiffs' counsel from rebutting defense counsel's assertions about the impracticability of using pallet guards on multi pallet displays. The court's ruling precluded plaintiffs' counsel from observing to the jury that Nathan Cutler directed placement of pallet guards on that display because "someone forgot" and that their absence constituted "defective equipment." CP 1841 (p. 14); Exhibit 11; Appendix 1.

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<sup>8</sup> The Court's Instruction No. 17 set forth these elements of damages for the jury. CP 1212-1213.

The jury delivered its verdict on October 11, 2010. RP 782; CP 1219-1221. The jury found both Albertson's and Frank Pupo negligent and concluded that both parties' negligence proximately caused injury to Mr. Pupo. CP 1219-1220; RP 782-784. The jury awarded the entire \$47,517.97 in economic damages that Mr. Pupo requested. CP 1220; RP 784. However, the jury awarded no non-economic damages. *Id.* The jury apportioned fault 90% to Frank Pupo and 10% to Albertson's. CP 1221; RP 785.

**f. PLAINTIFFS' MOTION FOR NEW TRIAL**

On October 27, 2010, plaintiffs moved for additur or new trial. CP 1271-1325. The motion argued that the court's rulings regarding subsequent remedial measures constituted error. Specifically, plaintiffs argued that the court first ruled the installation of pallet guards after Mr. Pupo's injury did not constitute a subsequent remedial measure. CP 1274-1275. Next, plaintiffs argued that the defendant clearly challenged feasibility of placing pallet guards on multi pallet displays. CP 1275. Plaintiffs observed that the court permitted Nathan Cutler's testimony that he ordered placement of pallet guards on the pallet display at issue. After that, plaintiffs pointed out that the court limited evidence of the use of pallet guards, restricted the cross-examination of Richard Liegal on the subsequent use of pallet guards, and instructed plaintiffs' counsel not to mention Cutler's testimony during closing argument. Plaintiffs argued that this unannounced change of position constituted legal error and

irregularity in the proceedings, justifying a new trial. CR 59(a)(1). CP 1275.

Finally, plaintiffs requested a new trial based upon the failure of the jury to award non-economic damages. CP 1276-1277. Plaintiffs requested that the court order additur or new trial on the issue of non-economic damages. CP 1280-1285. Plaintiffs also requested that the court vacate the jury's percentage allocation of fault remand for a new trial on this issue as well. CP 1285-1288.

The defense argued that the evidence supported the verdict, that the court should not order additur because of disputed evidence and that the court correctly ruled regarding subsequent remedial measures. CP 1326-1349.

The trial court denied the plaintiffs' post trial motions. RP 11/5/2010, 27-30; CP 1438-1439. This appeal followed.

### **III. ARGUMENT**

#### **A. THE TRIAL COURT COMMITTED ERROR OF LAW WHEN IT RULED THAT ALBERTSON'S PLACEMENT OF PALLET GUARDS ON THE DISPLAY THAT INJURED FRANK PUPO CONSTITUTED A SUBSEQUENT REMEDIAL MEASURE**

##### **1. THE STANDARD OF REVIEW**

The court's application of facts to an evidence rule presents a question of law. *Dickerson v. Chadwell Inc*, 62 Wn.App. 426, 432-433, 814 P.2d 687 (1991). *See, also, Kamla v. The Space Needle Corporation*, 105 Wn.App. 123, 128-129, 19 P.3d 461 (2001); *Tucker v. Caterpillar, Inc.*, 564 N.W.2d 410 (Iowa 1997). This Court should apply de novo

review to the trial's ruling that ER 407 barred admission of the subsequent application of pallet guards.

**2. ALBERTSON'S SUBSEQUENT PLACEMENT OF PALLET GUARDS ON THE DISPLAY THAT INJURED FRANK PUPO DID NOT CONSTITUTE A SUBSEQUENT REMEDIAL MEASURE BECAUSE THE PRACTICE EXISTED BEFORE THE INCIDENT**

ER 407 reads as follows:

When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

The testimony of Nathan Cutler and Richard Liegal establish that the placement of pallet guards on multi pallet displays existed at Albertson's before the day Frank Pupo fell. They both conceded that "someone might have forgotten" to place a guard on the display at issue. CP 1830 (pp. 14-15), 1841 (p. 14); RP 653-654. If the practice had started in response to Mr. Pupo's fall, then no one could have "forgotten" to follow a practice that did not previously exist.

Nonetheless, the trial court seems to have accepted the defense argument that, because Cutler ordered the "forgotten" pallet guard installed after the fall, that such action constituted a subsequent remedial measure. This ruling represents an erroneous conception of the nature of a subsequent remedial measure under rule 407.

No Washington case has directly set forth the definition of a subsequent remedial measure. However, numerous out-of-state cases have addressed the issue.

In *Klutman v. Sioux Falls Storm*, 769 N.W.2d 440 (2009), the plaintiff hurt his knee during a charity football game on the artificial turf in the defendant's facility and sued.

The court granted a motion in limine precluding mention of subsequent remedial measures taken with regard to the turf. However, at trial, the defendant's president testified on direct examination that the turf had been used from 2001 until trial without anyone claiming injury from catching their foot under the turf. Based on this testimony, the court allowed the plaintiff to impeach the president with the fact that after the plaintiff's injury, the defendant taped the seams of the turf. On appeal, the defendant contended that the court committed error because the evidence of seam taping constituted a subsequent remedial measure. The Supreme Court of South Dakota rejected this argument and affirmed admission of the evidence, at 451-452 as follows (emphasis the court's):

Although the Storm contends that the trial court erred in admitting this evidence under the impeachment exception, we conclude the evidence was admissible because it did not involve a subsequent remedial measure. By its language, SDCL 19-12-9 (Rule 407) only applies to remedial actions taken "after an event;" hence the denomination as *subsequent* remedial measures. The rule "was designed to ensure that the threat of legal liability would not discourage remedial measures to improve products." (Citation omitted) Consequently, predetermined measures do not qualify as inadmissible subsequent remedial measures under the rule:

The word “remedial” means “*intended* for a remedy or for the removal or abatement of a disease or of an evil.” Webster’s Third Int’l Dictionary 1920 (1993) (emphasis added). Thus, a “measure” is “remedial” if it is intended to address the occurrence of an event by making the event less likely to happen in the future. Therefore, measures that are taken after an event but that are predetermined before the event are not “remedial” under [the rule], because *they are not intended to address the event. Ranches v. City and County of Honolulu*, 115 HI 462, 168 P.3d 592, 597-98 (2007).

In this case, the cross-examination of Steen revealed that taping occurred after the date of the injury. Norm Stone, a trainer with the Storm, testified that although taping color changed from green to white after the incident, taping was a practice that preceded the date of Gaylen’s injury. Because the record presented to this court indicates that taping occurred both prior to and after Gaylen’s injury, Steen’s cross-examination did not concern the type of subsequent remedial measure prohibited by SDCL 19-12-9 (Rule 407). We therefore affirm the trial court without considering the impeachment exception.

Further support comes from *Ranches v. City and County of Honolulu*, 168 P.3d 592 (2007), upon which the *Klutman* court relied. In that case, the plaintiff slipped and fell on a slippery floor in the defendant’s restroom. The plaintiff sought to introduce evidence that the defendant had started to resurface the floor before the fall. The trial court granted the defense motion in limine to exclude this evidence as a subsequent remedial measure under the Hawaii equivalent of ER 407. The Supreme Court of Hawaii reversed. The court held as follows, at 597-598 (emphasis the court’s):

HRE Rule 407 entitled “[s]ubsequent *remedial* measures” (emphasis added) provides in relevant part that “[w]hen, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event.” The word, “remedial” means “*intended* for a remedy or for the removal or abatement of a disease or of an evil.” *Webster's Third New Int'l Dictionary*, 1920 (1993) (emphasis added). Thus, a “measure” is “remedial” if it is intended to address the occurrence of an event by making the event less likely to happen in the future. Therefore, measures that are taken after an event but that are predetermined before the event are not “remedial” under HRE Rule 407, because *they are not intended to address the event.*” See, *Schmeck v. City of Shawnee*, 651 P.2d 585, 600 (Kan. 1982) (holding that the City’s ordering and installation of traffic signal control devices at an intersection where plaintiff had been injured were not “remedial” because the City’s actions “had been *predetermined* ... many, many months prior to [the] accident,” and the city had “merely *completed* something which had *started* long before the plaintiff’s accident.” (First emphasis added and following emphases in original)); 23 Charles Alan Wright & Kenneth Graham Jr. *Federal Practice & Procedure* § 5283, at 104-05 & 105 n. 43 (1<sup>st</sup> ed. 1980) (observing that when FRE Rule 407 is read to require a “causal relationship” between the accident and the measures, “exclusion would not be required where the motivation for the remedial measure was not the prevention of a recurrence of the action at issue,” such as where “the defendant undertook repairs as a result of an earlier accident.”) Because such measures are not “remedial,” it follows that evidence of such measures is not inadmissible under the plain language of HRE Rule 407.

The *Ranches* court concluded that “actions taken by respondent prior to the plaintiff’s fall would not be afforded protection under HRE Rule 407, because the policy consideration behind the statute would not apply ...” *Ranches*, at 599. The court stated that the defendant could not “benefit from the protections of HRE 407 simply because it was in the

middle of the resurfacing project when the accident took place." *Id.* at 600. The court concluded as follows at 601:

HRE 407 was designed to encourage defendants who are first notified of a dangerous condition to make repairs, without fear of prejudicing their defense in ensuing litigation. It was not, however, designed to protect defendants who knew of a condition, had initiated steps to remedy it, but did not finish before an innocent party was injured. *See Cupp*, 138 S.W.3d at 776 ("the purpose of the exclusionary rule is to protect a defendant who has been first alerted to the possibility of danger after an accident ... a defendant who is aware of the problem ... prior to the accident is not entitled to the same protection").

In sum and based on the foregoing, the measures taken by Respondent in this case, that began prior to Jerry's accident and continued thereafter cannot be characterized as either subsequent or remedial and, therefore, cannot be precluded under HRE Rule 407, notwithstanding the fact that they were completed after Jerry's accident. To the extent the court excluded such evidence under HRE Rule 407 grounds, it reversibly erred, and insofar as the ICA premised its judgment on such a ruling, the ICA gravely erred.

In a like manner, the testimony of Nathan Cutler and Richard Liegal establish that the practice of using pallet guards on the watermelon display preexisted Frank Pupo's fall. Mr. Pupo's fall therefore had nothing to do with the initiation of the practice. The practice existed; someone just "forgot" to follow it. Therefore, the practice was neither "subsequent" nor "remedial" with respect to Mr. Pupo's fall.

Cutler's decision to direct placement of a pallet guard simply does not qualify as a subsequent remedial measure. Liegal made it clear that pallet guards had been used at the Gig Harbor store ever since it opened. CP 1829 (p. 13).

Admitting this evidence in no way controverts the purpose of ER 407. Because the policy preexisted the fall, admitting evidence of the use of pallet guards after the fall would in no way deter Albertson's from following its preexisting policy. As in *Klutman* and *Ranches*, resumption of the procedure after the plaintiff's fall "did not show a change in policy designed to remedy any previous deficiencies in safety procedure." Hence, neither the rule nor the reason for ER 407 applies.

The trial court therefore committed error of law when it ruled that Nathan Cutler's direction to place a pallet guard after Mr. Pupo's fall constituted a subsequent remedial measure. This error unfairly prejudiced the plaintiff. The jury received a one-sided presentation of the parties' fault. As a result, the jury apportioned ninety percent of the fault to Frank Pupo, because it did not hear the evidence about Albertson's failure to follow its own practices. This error of law requires reversal and a new trial on the issue of apportionment of fault.<sup>9</sup>

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<sup>9</sup> See also *Schmeck v. City of Shawnee*, 232 Kan.11, 651 P.2d 585, 599 (Kan., 1982) (measures which have been started long before plaintiff's incident could not be characterized as subsequent remedial conduct); *Keller Industries v. Volk*, 657 So.2d 1200, 1203 (Fla.App. for Dist. 1995) (post manufacture and pre-accident design changes in ladder are not "subsequent remedial measures" within the meaning of Rule 407); *Priolo v. Lefferts General Hospital, Inc.*, 54 Misc.2d 654, 283 N.Y.S.2d 203, 206-207 (N.Y.S.1967) (where owner contracted for repair to handrail before fall, evidence of post-fall repair should not be excluded as subsequent remedial measures); *Northern Assur. Co. v. Louisiana Power & Light, Co.*, 580 So.2d 351 (1991) (evidence of remedial measures in place before the event in litigation did not show policy change designed to remedy previous deficiencies. Therefore, Rule 407 did not exclude them); *Tucker v. Caterpillar, Inc.*, 564 N.W.2d 410 (Iowa 1997) (product decal produced in 1986, article published in 1989 and manual revisions in 1999 not subsequent remedial measures in response to later product injury incident); *Boggs ex rel. v. Lay*, 164 S.W.3d 4, 21 (Mo.App. E.D., 2005) ("the purpose of the exclusionary rule is to protect the defendant who has first been alerted to the possibility of danger after an accident and has been induced by the accident to make the repair to prevent further injury." A defendant who was aware of the problem and has proposed measures for remediation prior to the accident is not entitled to the same protection).

### **3. THE DEFENDANT CONTESTED FEASIBILITY OF USING PALLET GUARDS ON MULTI PALLET DISPLAYS**

Defense counsel declared that Albertson's did not contest feasibility regarding the use of pallet guards. See, e.g. RP 9, 11, 47, 539, 55. However, defense counsel repeatedly denied that Albertson's could use pallet guards on large displays because of practicability and safety concerns. RP 9/30/2010, pp. 10-19, 462, 657, 662, 672, 692-693, 697; CP 1832 (p. 23), 1848 (p. 78), 1842 (p. 18). These protestations actually controverted the feasibility of using pallet guards on multi pallet displays.

No Washington cases define feasibility under ER 407. However, where Washington's evidence rules mirror their Federal counterparts, Washington courts look to federal case law interpreting the Federal Rules as authority. *In Re Detention of Pouncy*, 168 Wn.2d 382, 392, 229 P.3d 678 (2010).

The United States of Court of Appeals for the Eighth Circuit discussed the meaning of feasibility under Rule 407 in *Anderson v. Malloy*, 700 F.2d 1208 (8th Cir. 1983). In that case, the plaintiff suffered rape at the defendant's motel. At trial, plaintiffs attempted to show that after the assault, the defendants installed peep holes safety chains in the doors of the units. The trial court excluded the evidence under Federal Rule of Evidence 407. 700 F.2d, at 1212-1213.

On appeal, the plaintiffs asserted that defendant controverted the feasibility of the ability of use of peepholes and safety chains and that the

trial court erred in excluding the evidence. The Eighth Circuit agreed. 700 F.2d, at 1213.

One of the defendants argued that peepholes would create a false sense of security and were unnecessary. The Court of Appeals found that this act controverted feasibility, as follows, at 700 F.2d, at 1213-1214:

Whether something is feasible relates not only to actual possibility of operation, and its cost and convenience, but also to its ultimate utility and success in its intended performance. That is to say "feasible" means not only "possible" but also means "capable of being utilized . . . or dealt with successfully." *Webster's 3rd New International Dictionary* 831 (unabridged ed 1967); See *Black's Law Dictionary*, 549 (5th ed. 1979) ("reasonable assurance of success.") See also *American Airlines, Inc. v. United States*, 418 F.2d 180, 196 (5th Cir. 1969) (defendant's witness had testified that an airplane altimeter in issue was "feasible and safe and there was no reason to change it;" plaintiff allowed to show defendant changed altimeter design after crash).

For the defendant to suggest that installation of peep-holes and chain locks would provide a false sense of security not only infers that the devices would not successfully provide security, but it also infers that the devices would in fact create a lesser level of security if they were installed. With this testimony, the defendants controverted the installation of these devices, because the defendant Malloy in effect testified that these devices were "not capable of being utilized or dealt with successfully."

The defendants' counsel took advantage of the situation and in closing argument to the jury said that the evidence showed that the defendants in providing security "did everything anybody recommended that they do. What more can they do? ... is there any evidence from any reliable source [the defendants] could have or should have done anything more?" With such a suggestion implanted in the minds of jurors by Malloy's testimony, the plaintiffs' counsel had every right to rebut that suggestion by showing that defendants had in fact installed these devices after Linda Anderson was raped.

The plaintiffs were entitled to show affirmatively that these devices were feasible, and furthermore to impeach the credibility of the defendants by showing that, although defendants had testified that they had done everything necessary for a secure motel, and that chain locks and peepholes would not be successful, they in fact took further security measures after Linda Anderson was raped, and in fact installed the same devices they testified could not be used successfully. Under rule 407, the evidence could not be used by the plaintiffs to prove the defendants' negligence, and a limiting instruction would warn the jury of this restriction in its admission. But we think it was an abuse of discretion for the trial court to refuse to admit the only evidence that would effectively rebut the inferences created by the defendants...

We find the trial court committed prejudicial error in the ruling discussed above; accordingly, we vacate the judgment of the district court and remand the case for a new trial.

Similarly, Albertson's has contested the feasibility of using pallet guards on multi pallet displays. Albertson's counsel and its witnesses emphasize that pallet guards were not "capable of being utilized successfully" on multi pallet displays. This obviously contested feasibility of using pallet guards on such displays, and controverted the "stipulation" to feasibility.

Nathan Cutler's directive to employees to place pallet guards on the display that injured Frank Pupo directly rebutted Albertson's contention that it did not and could not use pallet guards on multi pallet displays. The trial court erroneously handcuffed the plaintiffs from rebutting this contention. This constituted error prejudicial to the plaintiffs. As a result, the jury received an unbalanced and unfair

argument of the evidence which skewed the apportionment of fault between Frank Pupo and Albertson's.

In *Dewick v. Maytag Corporation*, 324 F.Supp.2d 894 (N.D. Illinois 2004), plaintiff sued the manufacturer of a kitchen range for injuries sustained by a child climbing inside the broiler compartment. The defendant moved in limine to exclude subsequent remedial measures, including design changes after the child's injuries. As in the case at bench, the defendant sought to prevent admission of the subsequent changes by stipulating to feasibility. However, the defendant still contended that the changes would not have prevented the child's harm. The court rejected the defendant's duplicitous approach, at 324 F.Supp.2d, at 903, as follows:

On that score, Dewicks contend that evidence of the later design changes is admissible because Maytag has placed feasibility into controversy by taking the position that these changes did not render the oven safer and would not have prevented Michael's injury (citation to the record omitted). Maytag quickly counters by agreeing to "stipulate that the subsequent remedial measures at issue were feasible at the time of the Dewick accident," while still maintaining that its "alternative designs would not have prevented the Dewick accident" (citation to the record omitted). In other words, Maytag claims, it is disputing only the effectiveness of the measures and not their feasibility (*Id.*).

But that specious distinction constitutes an unsuccessful effort to remove the feasibility of an earlier correction of the claimed defect from the controverted issues category. Under the caselaw, the feasibility inquiry encompasses a whole slew of interrelated components, including not only the question of the possibility of correction as such but also more nuanced considerations such as the "economy, practicality, and effectiveness" of such corrections (*See Oberst v. Int'l Harvester Co*, 640 F.2d 863, 865 (7th Cir. 1980); *Anderson v. Malloy*, 700 F.2d 1208, 1213 (8th Cir. 1983)). Because effectiveness is thus

interlaced with feasibility as contemplated by Rule 407, Maytag proposed stipulation as to "feasibility" is quickly negated by its explicit that it is *not* stipulating that those changes would effectively have prevented Michael's injury. And with the issue of feasibility thus remaining in play, evidence about any later design changes that Maytag made to the range would be admissible according to Rule 407 (citation omitted).

As in *Dewick*, Albertson's contentions about the ineffectiveness, hazard and impracticability of placing pallet guards on multi pallet displays negates its "stipulation" to "feasibility." The trial court erroneously permitted Albertson's to stipulate to feasibility and dispute feasibility at the same time. Plaintiffs could not rebut Albertson's controversion of feasibility because of the trial court's restriction of evidence and argument. This constituted error. This court should reverse and remand for a new trial on apportionment of fault.<sup>10</sup>

## **B. THE TRIAL COURT ERRED IN DENYING PLAINTIFFS' MOTION FOR NEW TRIAL BASED UPON THE JURY'S FAILURE TO AWARD NON-ECONOMIC DAMAGES**

### **1. THE STANDARD OF REVIEW**

A court's order denying a new trial receives less appellate deference than one granting a new trial because denial concludes the parties' rights. A trial court abuses its discretion when it denies a motion for a new trial where the verdict runs contrary to the evidence. *Palmer v. Jensen*, 132 Wn.2d 193, 197-198, 937 P.2d 597 (1997).

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<sup>10</sup> See, also, *Breese v. Mercury Marine Division of Brunswick Corporation*, 793 F.2d 1416 (5th Cir. 1986) (evidence of later operation manual into which manufacturer of outboard motor placed warnings about absence of kill switch was admissible to show feasibility of warnings where manufacturer had introduced evidence only the retailer could properly instruct ultimate consumer regarding kill switch use).

**2. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING A NEW TRIAL BECAUSE THE UNDISPUTED EVIDENCE SUPPORTED AN AWARD FOR GENERAL DAMAGES BUT THE JURY REFUSED TO AWARD THEM**

*Palmer, supra*, involved a personal injury claim resulting from a motor vehicle collision. After trial, the jury awarded damages exactly equal to the special damages claimed. The parties disputed whether this meant that the jury awarded no general damages. The Supreme Court concluded that the jury's verdict included no compensation for pain and suffering. *Palmer*, 137 Wn.2d, at 201.

Plaintiff argued that case law mandated that an injured plaintiff receive general damages. The Supreme Court concluded that there existed no per se rule that every plaintiff who sustained injury must receive general damages. However, a plaintiff who substantiates pain and suffering is entitled to general damages. Accordingly, the adequacy of a verdict turns on the evidence. *Palmer*, 132 Wn.2d, at 202.

Two plaintiffs suffered injury: a mother and child. The Supreme Court reviewed the evidence from the child's pediatrician and determined that the jury could easily have concluded that he did not deserve damages for pain and suffering. *Palmer*, 132 Wn.2d, at 202-203.

Turning to the mother, the Supreme Court reviewed evidence from her treating physicians and physical therapists. The court concluded that this evidence substantiated her claim that she had experienced pain and suffering for over two years after the collision. Accordingly, the Supreme

Court held that the jury's verdict providing no pain and suffering damages ran contrary to the evidence. As a result, the court found that the trial court abused its discretion in denying a motion for new trial and remanded for a new trial on damages. 132 Wn.2d, at 202-203.

In *Fahndrich v. Williams*, 147 Wn.App. 302, 194 P.3d 1005 (2008), a similar result ensued after a trial. In that case, plaintiff sued for injuries and damages sustained in two collisions. At trial, she testified to ongoing headaches and physical limitations. Her family and friends corroborated this testimony.

The plaintiff's doctors gave differing testimony about diagnosis and the cause of symptoms. Neither defendant presented evidence to dispute the plaintiff's claim that she suffered pain. One of the defendants contested whether her collision caused certain problems. *Fahndrich*, 147 Wn.App. 302, 194 P.3d 1005 (2008).

The jury received a special verdict form segregating economic damages and non-economic damages. The jury awarded economic damages for each collision, but no non-economic damages for either. The plaintiff moved for a new trial based upon the failure to award non-economic damages for pain and suffering. The trial court denied the motion and the plaintiff appealed. *Fahndrich*, at 305.

The Court of Appeals, citing *Palmer*, agreed that a plaintiff who substantiated her pain and suffering with evidence deserved non-economic damages. *Fahndrich*, at 306. As in *Palmer*, the court held that whether a

jury may deny economic damages depends on the evidence. The court analyzed the evidence and granted a new trial, at 308-309 as follows:

Here, Fahndrich presented extensive evidence of her pain and suffering, and Williams and Mullins presented no evidence to contradict it. Fahndrich, as well as friends and family members, testified about the changes in Fahndrich's life as a result of the accidents. And she sought virtually continuous treatment for her pain from several treatment providers during the six years between the April 2000 accident and trial. While the medical witnesses disagreed about the diagnosis to attach to her subjective reports of neck pain and headaches, the defendants did not seriously challenge that Fahndrich had the symptoms or that the April and November 2000 accidents had caused them. Moreover, as discussed above, the jury award of \$25,000 in special damages eliminates the possibility that it found Fahndrich's injuries "minimal" and therefore, not warranting an award for general damages.

As in *Palmer*, Fahndrich is entitled to a new trial because "the jury found that the accident caused injuries but believe the plaintiff suffered no pain." *Ma'ele v. Arrington*, 111 Wn.App. 557, 562, 45 P.3d 557 (2002). The evidence does not support the conclusion that Fahndrich suffered no pain or disability as a result of her collisions with Williams and Mullins. Thus, the trial court abused its discretion in denying her a new trial.

We reverse and remand for a new trial on damages.

*Palmer* and *Fahndrich* are directly on point. As in *Palmer*, the jury awarded all economic damages Pupo requested and nothing for non-economic damages. As in *Fahndrich*, the jury awarded Pupo substantial economic damages, but zero for non-economic damages. The jury awarded Mr. Pupo \$47,517.97 in non-economic damages, which represented the total of the medical bills he had claimed. CP 1258;

Exhibit 12; Appendix 2. As in *Fahndrich*, this eliminates the possibility that the jury considered his non-economic damages minimal.

Mr. Pupo's medical expenses included cost of his rotator cuff surgery. Exhibit 12. Dr. Coray found a direct connection between the fall and the surgery. RP 207-208. Dr. Russo conceded that if Mr. Pupo had not fallen, he would not have required the surgery. CP 1934 (p. 83). Frank Pupo, Sr., Janis Pupo, Frank Pupo, Jr., and John Mazzuca testified in detail about Mr. Pupo's difficult and painful recovery, and his ongoing residual problems. RP 144-147, 483-486, 572-596. Mr. Pupo made clear that his arm has never returned to its pre-fall condition. RP 117-128.

The defendant did not controvert this testimony. Instead, it tried to blame any injuries on pre-existing conditions or wear and tear. Nonetheless, the fact that the jury awarded the cost of the surgery indicates that it accepted that the injury resulted from the fall. Therefore, the evidence clearly supported an award of noneconomic damages for the surgery itself, the recovery from the surgery and the ongoing symptoms. The jury's decision to award nothing for these losses ran contrary to the evidence and requires reversal and a new trial on general damages.

The defense cited *Gestson v. Scott*, 116 Wn.App. 616, 67 P.2d 496 (2003) in resisting Pupo's motion for new trial. CP 1329-1334. However, the court can easily distinguish *Gestson*. In that case, the plaintiff sued over a motor vehicle collision involving minimal property damage. At trial, the plaintiff claimed substantial damages, including medical

expenses in excess of \$65,000. The jury awarded \$458.34, the cost of an emergency room visit, and no general damages. *Gestson*, 116 Wn.App., at 618-619.

The trial court granted the plaintiff's motion for new trial and the defendants appealed. The Court of Appeals observed that a jury may award special damages and no general damages when the record would support a verdict omitting general damages, citing *Palmer, supra*, at 621-622.

The court observed that the plaintiff offered no evidence of pain, suffering or inconvenience with respect to her visit to the emergency room. Nor did she specify the length or value of the time she spent during her emergency room visit. Accordingly, the court concluded that the record supported the jury award of only special damages for the expenses related to the emergency room visit. Consequently, the trial court erred in granting a new trial on the assumption that the law did not permit the jury to award only special damages. *Gestson*, at 620-621.

In contrast to *Gestson*, the jury in the case at bench did not award minimal medical expenses limited to a single visit. Instead, it awarded all of the medical expenses that the plaintiffs submitted, including the cost of rotator cuff surgery and rehabilitation from that surgery. CP 1258; Exhibit 12. Dr. Coray related the rotator cuff surgery to the fall. RP 207-208. Dr. Russo conceded that if Mr. Pupo had not fallen, he would not have been a candidate for rotator cuff surgery. CP 1934. Defense counsel conceded

that plaintiff suffered injury and deserved a verdict in the range of \$100,000. RP 760. This differs markedly from *Gestson*.

In *Gestson*, the jury, reviewing hotly contested evidence, rejected all medical treatment save for a single emergency room visit. That fact rendered the verdict acceptable. In contrast, in spite of disputed evidence, the jury found all of Mr. Pupo's medical treatment related to the fall. No one disputed that Mr. Pupo suffered pain and disability as a result of the fall, surgery and rehabilitation. The jury disregarded that evidence. The trial court abused its discretion when it refused to order a new trial. This court should reverse.

**C. THE COURT SHOULD ORDER A NEW TRIAL LIMITED TO ALLOCATION OF FAULT AND GENERAL DAMAGES**

Courts have the authority to limit issues on a new trial in those cases where it clearly appears that the original issues were distinct and separate from each other and that justice does not require resubmission of the whole case to the jury. *McCurdy v. Union Pacific Railroad Company*, 68 Wn.2d 457, 471 (1966). A limitation of issues in retrial should only be imposed where the issue to be retried is so distinct and separable from the other issues that a trial of the issue alone can take place without injustice or complication. *Lahmann v. Sisters of St. Francis*, 55 Wn.App. 716, 724 (1989).

*Mina v. Boise Cascade Corporation*, 104 Wn.2d 696 (1985) illustrates the principle. The plaintiff sued two trucking companies for injuries sustained in successive automobile collisions. The jury found the

first trucking company negligent and the motorist eighty-five percent comparatively negligent. The plaintiffs in the first trucking company case appealed. The Court of Appeals reversed and ordered a retrial limited to liability. The Supreme Court affirmed. The court held, at 707-708, as follows:

A new trial may be limited to certain issues where it clearly appears that the original issues were distinct and justice does not require resubmission of the entire case to the jury. *McCurdy v. Union Pac. R.R.*, 68 Wn.2d 457, 413 P.2d 617 (1966). If there is a possibility that the verdict was a result of a compromise, limiting retrial to certain issues is improper. *Myers v. Smith*, 51 Wn.2d 700, 321 P.2d 551 (1958). While compromised verdicts were a problem when contributory negligence was a complete defense, the possibility of compromised verdicts has been largely eliminated by the adoption of comparative negligence and the use of special verdict forms. *Crawford v. Miller*, 18 Wn.App 151, 566 P.2d 1264 (1977).

In this case, the jury was properly instructed on damages and the special verdict form contained separate questions relating to liability and damages. Further, each party had an opportunity to present evidence on the damages question. On appeal, neither party has argued that the amount of damages was excessive or insufficient. *See France v. Peck*, 71 Wn.2d 592, 430 P.2d 513 (1967). Under these circumstances, a retrial limited to the issue of liability is appropriate.

This case lends itself to a retrial limited to the issue of apportionment of fault. First, the court submitted a six question special verdict form to the jury. Obviously, each question presented a discrete issue for resolution by the jury. Thus, the questions of allocation of fault and general damages present inquiries separate from the other issues the jury had to resolve.

Substantial evidence supported the jury's finding of negligence on both the part of Albertson's and the plaintiff, and the issue of causation. Therefore, there is no reason to revisit those issues. Likewise, substantial evidence supported the jury's award of economic damages. Those issues need not undergo retrial. Limiting the retrial to apportionment of fault and general damages will in no way serve to cause an injustice to either party. Accordingly, the plaintiffs respectfully request that the court remand for a new trial limited to the issues of apportionment of fault and general damages.

#### **IV. CONCLUSION**

This court should reverse the trial court's order denying a new trial. The trial court committed error of law in ruling that ER 407 applied to Cutler's directive to place pallet guards on the display that tripped Mr. Pupo. The court also erred in ruling that the defendant did not contest feasibility of placing pallet guards on multi pallet displays. The court compounded these errors when, after admitting the testimony of Nathan Cutler that he ordered subsequent placement of pallet guards, it prohibited the plaintiffs from arguing the same to the jury. As a result, the plaintiffs could not rebut the defendant's contentions about the supposed non-feasibility of the use of pallet guards on multi pallet displays. This caused the jury to issue an unfair and skewed apportionment of fault.

The trial court also erred in refusing to order a new trial after the jury awarded all of the plaintiffs' claimed medical expenses but no general

damages. No one disputed that Frank Pupo sustained non-economic loss, but the jury disregarded that evidence. The court should order a new trial.

The issues the jury decided are discrete, as indicated by the multiple question special verdict form. This court should order a new trial on the issues of apportionment of fault and general damages.

DATED this 6 day of July, 2011.

MESSINA BULZOMI CHRISTENSEN

By 

JOHN L. MESSINA 4440

STEPHEN L. BULZOMI 15187

JAMES W. MCCORMICK 32898

Attorneys for Plaintiffs



# CUSTOMER/VENDOR INCIDENT WORKSHEET

1. Report ALL customer incidents within 48 hours of occurrence or notification by telephone to Risk Management Call Center at 1-800-828-8299.
2. Use this Worksheet to collect the necessary information. The Key Person who completed the investigation should immediately complete the first two sections of this Worksheet (Claimant and Accident/Injury sections), then complete the specific section that applies. Do not send this worksheet in. You may discard after this incident appears on your weekly unit summary chargeback report.
3. The Key Person who completed the investigation and the Worksheet should immediately call in the report.
4. This worksheet and the phone number above are for internal use only. They are not to be given to the customer, or anyone outside of the company. Contact your Regional Claims Office with any additional information or questions.
5. Remember to send all photos, videos, sweep sheets and estimates regarding this incident to the appropriate Regional Claims Office and please label these documents with the claim number, store number, claimant name and date of loss.

**Claimant**  
 Store # 406  
 Full Name Frank Pardo  
 Address 6615 72nd Ave NW  
 City Gig Harbor State WA Zip 98332  
 Phone Numbers: Home ( ) 858 777-2000  
 Sex M Date of Birth 5/10/37 Age 70  
 Marital Status M Name of Spouse Janice  
 Occupation Retired  
 Social Security Number 532-38-8008  
 If child, names of parents or guardians \_\_\_\_\_  
 Customer  Vendor \_\_\_\_\_  
 If photographs of the incident scene were taken, be sure to clearly label with claimant name, Social Security Number, accident date and store number, then send to local claims office!  
 Do you recommend an adjuster contact the customer?  Yes  No  
 If No, explain: \_\_\_\_\_  
 Does the store have a CCTV system?  Yes  No  
 If Yes, is the CCTV system functional?  Yes  No  
 Was the incident recorded on CCTV?  Yes  No  
 Has the store completed the CCTV Incident Worksheet?  Yes  No  
 Attach CCTV Worksheet to video and place in a secure location.

**Accident/Injury Description**  
 Name of employee conducting store investigation: \_\_\_\_\_  
 Incident Date 7-21-07 Time 3:50  
 Date any employee became aware of incident 7-21-07 Time 3:50  
 Who noticed: Debra Polce

Describe the weather conditions at the time of incident: Over, cool  
 Where did it occur? outside by water main dig  
 Inside Store? \_\_\_\_\_  
 Outside Store?   
 Describe how it happened: trip  
 Does the store question the customer's version?  Yes  No  
 If Yes, explain: \_\_\_\_\_  
 Is there a 3<sup>rd</sup> party involved? (another customer, contractor, vendor, CAM)  Yes  No  
 If Yes, Name: \_\_\_\_\_  
 Phone: ( ) \_\_\_\_\_ Contact: \_\_\_\_\_  
 Describe how this third party is involved/responsible for the incident: \_\_\_\_\_  
 Describe injury: Right Shoulder, right knee  
 Part of body: \_\_\_\_\_  
 Will/Did customer need medical attention?  Yes  No  Unknown  
 Was customer taken by ambulance?  Yes  No  
 Names of witnesses: \_\_\_\_\_  
 Address: \_\_\_\_\_  
 Phone Numbers: \_\_\_\_\_  
 Is there any defective equipment or conditions to be repaired or replaced?  Yes  No  
 Describe: pallet (can-)  
 Was any employee exposed to another person's blood or bodily fluids?  Yes  No  
 Name: \_\_\_\_\_

### SLIP AND FALL

Height \_\_\_\_\_ Weight \_\_\_\_\_  
 Describe the type of footwear customer was wearing: \_\_\_\_\_  
 Was any foreign substance on bottom of footwear?  Yes  No  
 Describe alleged foreign substance or debris that was slipped on: \_\_\_\_\_  
 Did store verify existence of foreign substance/debris?  Yes  No  
 How did it get on the floor/area? \_\_\_\_\_  
 Did the substance appear slipped on?  Yes  No  
 How long had the debris/substance been there? \_\_\_\_\_  
 How did you determine that? \_\_\_\_\_  
 How much area did it cover? \_\_\_\_\_  
 If spilled from container, have you preserved the container?  Yes  No  
 If not isolate and label it!  
 Was any associate aware of the condition before the incident?  Yes  No  
 Associate's Name: \_\_\_\_\_  
 How long before was the area inspected? \_\_\_\_\_  
 Name of associate who inspected area: \_\_\_\_\_  
 Who inspected area after incident? \_\_\_\_\_

Did the incident occur on non-skid flooring?  Yes  No  
 Did the customer complete a blue Slip & Fall Form?  Yes  No  
 Were any caution cones out?  Yes  No How many? \_\_\_\_\_  
 How far was the customer from nearest cone? \_\_\_\_\_  
 Were mats in place?  Yes  No How many? \_\_\_\_\_  
 How far was customer from nearest mat? \_\_\_\_\_

### TRIP AND FALL

Height 5' 8" Weight 198  
 Describe the type of footwear customer was wearing: Shoes  
 Was any foreign substance on bottom of footwear?  Yes  No  
 What did the customer say caused them to trip? pallet  
 Did store verify what customer says caused them to trip?  Yes  No  
 If mat, what did customer say was wrong with it? \_\_\_\_\_  
 Was mat rented?  Yes  No  
 Has the mat been isolated?  Yes  No  
 If not isolate and label it!

**SEE REVERSE SIDE FOR CHILD FALL FROM CART, CART HIT CAR, FALSE ARREST, STRUCK BY CART AND PRODUCT CLAIMS.**

7/21/2007 – 7/21/2007	Medical Imaging Northwest	28.00
7/21/2007 – 7/21/2007	Dr. Richard Schoen	144.00
7/23/2007 – 2/18/2009	Tacoma General Hospital	224.00
	Dr. Spencer Coray	10,402.00
8/3/2007 – 7/14/2008	Union Avenue Open MRI	2033.00
9/6/2007 – 9/6/2007	St. Clare Hospital	142.60
9/14/2007 – 9/14/2007	St. Clare Hospital	31,226.37
10/2/2007 – 2/27/2009	Bruce Snell, P.T.	3,318.00
<b>Subtotal</b>		<b>\$47,517.97</b>

# ALBERTSON'S

ENTRANCE TO INSIDE

ENTRANCE

11 CARTS

FELL



PALLET EXTENDS 6" FROM CARDBOARD BOX

EXHIBIT # 8

SIS RD

ENTRANCE

KIOSK

MELONS

CAN

EXHIBIT NO. 1  
NAME PUPPO  
DATE 3-20-09 KRH



STATE OF WASHINGTON )

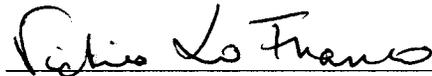
: ss.

County of Pierce )

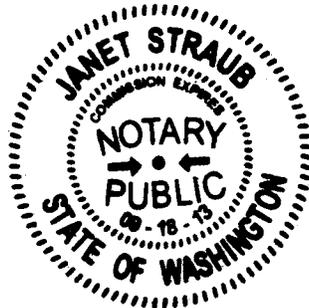
Vickie LoFranco, being first duly sworn, on oath deposes and says:

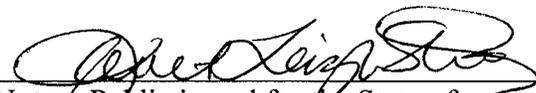
That on July 6, 2011, I delivered, via Legal Messengers, a copy  
of Brief of Appellant for service upon:

Thomas B. Vertetis, Esq.  
Pfau Cochran Vertetis Kosnoff  
911 Pacific Ave Ste 200  
Tacoma, WA 98402

  
\_\_\_\_\_  
VICKIE LOFRANCO

SIGNED AND SWORN to before me on the 6<sup>th</sup> day of July,  
2011, by Vickie LoFranco.



  
\_\_\_\_\_  
Notary Public in and for the State of  
Washington, residing at Tacoma.  
My appointment expires 9/18/13



STATE OF WASHINGTON )

County of Pierce ) : ss.

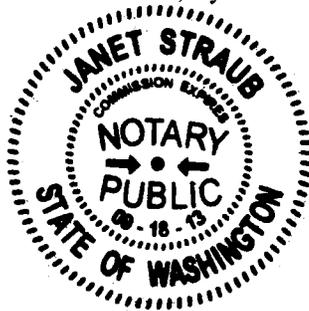
Vickie LoFranco, being first duly sworn, on oath deposes and says:

On July 6, 2011, I filed, via Legal Messengers, the original and 1 copies of Brief of Appellants with the Clerk of the Court of Appeals.

Vickie Lo Franco  
VICKIE LOFRANCO

SIGNED AND SWORN to before me on the 6<sup>th</sup> day of July,

2011, by Vickie LoFranco.



Janet Straub

Notary Public in and for the State of Washington,  
residing at Tacoma.

My appointment expires 9/18/13