
NO. 41451-1-II
COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

RECEIVED
SUPERIOR COURT
DIVISION II
JAN 11 2011
TACOMA, WA

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

Appellants,

vs.

ALBERTSONS', INC., a foreign corporation, SUPERVALU, INC., a foreign corporation, and NEW ALBERTSONS', INC., a Washington corporation,

Respondents.

APPELLANTS' REPLY BRIEF

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I. REPLY TO RESPONDENTS' STATEMENT OF THE CASE

A. THE TRIAL COURT ADMITTED AND EXCLUDED EVIDENCE REGARDING SUBSEQUENT REMEDIAL MEASURES AND RESTRICTING PLAINTIFFS' COUNSEL'S CLOSING ARGUMENT.

The respondents observe that the trial court made numerous rulings regarding subsequent remedial measures. However, they ignore that the trial court ruled inconsistently. The following summarizes the trial court's rulings:

1. The court denied the motion to preadmit evidence that Albertsons subsequently placed pallet guards on the display that injured Frank Pupo. RP 14.
2. The court pre-admitted Exhibit 11, Albertsons' incident report prepared as a result of Pupo's fall. The report stated that pallet guards constituted "defective equipment or conditions to be repaired or replaced..." CP 906; Exhibit 11. The court commented at RP 51:

The motion is granted. Preadmission of the report by the assisting can be used by the plaintiffs. It is going to go to wait. 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 them up. It doesn't feel like a subsequent remedial measure at that point. So, okay on that.

3. In striking deposition testimony of Richard Liegal designated by the plaintiffs, the court commented "the jury is going to decide whether they forgot [to place pallet guards] or not. That is a factual question." RP 537.

4. The court permitted plaintiffs to present Nathan Cutler's deposition testimony that he had the produce department set up pallet guards around the 6 pallet display after Pupo fell and that "somebody might have forgotten to put them[pallet guards] on. RP 557; CP 1841, (pp. 14-15).
5. The court refused to permit plaintiffs to read a defense response to a request for admission that Nathan Cutler immediately ordered pallet guards installed around the display after Pupo's fall. RP 627; CP 959.
6. The court prohibited Daniel Johnson from testifying about the subsequent use of pallet guards because he did not go to the site. RP 375-376. However, the court agreed that use of the pallet guards after the fall did not constitute a subsequent remedial measure. RP 376.
7. Richard Liegal agreed that "it is possible that somebody just forgot to put those pallet guards on that day..." The defense did not object. RP 652-657; CP 1830 (p. 14).
8. The court prohibited the plaintiffs from arguing or commenting to the jury that Cutler directed others to bring out pallet guards and place them around the six pallet display after Pupo fell, and that somebody might have forgotten to put the pallet guards on. RP 686, CP 1841 (pp.14-15).

Thus, the court ruled that Albertsons' subsequent use of pallet guards did and did not constitute subsequent remedial measure. It admitted evidence that Albertsons' placed pallet guards after the fall, and excluded such evidence. The defense never moved to strike the evidence the court admitted, and never proposed a limiting instruction. Instead defense counsel asked the court to prohibit plaintiffs' counsel from arguing Cutler's testimony. RP 670, 685-685.

Although the court stated that “the jury is going to decide” whether Albertsons “forgot” to place pallet guards before Pupo’s fall, the court prohibited plaintiffs’ counsel from arguing that issue to the jury.

In contrast, counsel for the defense freely argued against the use of pallet guards on a 4-6 bin display. RP 748-749, 751, 761. Defense counsel argued at length that pallet guards would not have made a difference. RP 756, 759. Because of the trial court’s order limiting plaintiffs’ counsel’s argument, the plaintiffs could not rebut these contentions. RP 762-772.

II. ARGUMENT.

A. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT PREVENTED PLAINTIFFS’ COUNSEL FROM ARGUING TO THE JURY REGARDING CUTLER’S AND LIEGAL’S TESTIMONY.

The trial court has discretion to shape the permissible scope of closing argument, based on the evidence introduced and the arguable inferences there from. *Martin v. Huston*, 11 Wn.App. 294, 302, 522 P.2d 192 (1974). An attorney’s argument may highlight reasonable inferences from the evidence submitted at trial. *Christensen v. Munsen*, 122 Wn.2d 234, 243, 867 P.2d 626 (1994). Inferences reasonably deducible from a fact constitute evidence as competent as the fact itself. Counsel may properly point out and comment on such inferences during closing argument. *Chicago, M&PS Ry. Co., v. True*, 62 Wash. 646, 652, 114 P.515 (1911). During closing argument, the law permits counsel a very

wide sweep. Argument need not confine itself to the very precise bounds which limit the court's instructions. The courts must allow counsel a reasonable latitude in arguing the case to the jury. *Krieger v. McLaughlin*, 50 Wn.2d 461, 464-465, 313 P.2d (1957).

Once the trial court admitted Cutler's and Liegal's testimony, and Exhibit 11, the parties should have been free to argue the inferences that the jury should draw from the evidence. In fact, the trial court had already specifically directed that the jury would decide whether Albertsons "forgot" to place pallet guards or not, because that presented "a factual question." RP 537.

From the testimony of Cutler and Liegal, Pupo's counsel could have argued that Albertsons acted negligently because it "forgot" to place pallet guards around the display that injured Frank Pupo. Counsel could have argued that Exhibit 11, identifying "pallet guard" as a defective condition, bolstered this inference. Counsel also could have argued that Cutler's testimony that he directed placement of pallet guards onto the display after Pupo fell reinforced the inference further. Instead, the court tied counsel's hands and the jury heard a truncated argument from the plaintiff. This unfairly skewed the apportionment of fault. The trial court abused its discretion.

Rather than acknowledge these obvious conclusions, the defense engages in some broken field running that finds no support in the facts or law, at pp. 18-19, as follows:

Contrary to Mr. Pupo's reasoning, both Mr. Cutler and Mr. Liegal testified in their deposition that someone *might* have forgotten to install a pallet guard on the large display that Mr. Pupo tripped over. A fair characterization of their testimony is that they were simply speculating about why pallet guards were not on the display at issue. To accept Mr. Pupo's reasoning to their testimony shows a custom to routinely install pallet guards on large displays, this court would have to improperly assume (1) that Albertsons had a policy to install pallet guards on displays and (2) that someone actually forgot to put the pallet guards up. To put differently, Mr. Pupo asks this court to assume that his argument is true.

Pupo offers no such suggestion. Pupo agrees that the jury should try the facts, not the court in ruling upon the admissibility of testimony. This court should reject the respondents' imaginative distortion of appellants' argument.

The trial court properly admitted Cutler's and Liegal's testimony in Exhibit 11 because the evidence bore relevance to the negligence of the defendants and to the cause of Pupo's trip and fall. The defense could freely argue inferences favorable to them from that evidence and highlight any weakness in the plaintiffs' argument. As the trial court observed, resolution of such issues rested with the jury. RP 537. Plaintiffs simply asked for admission of relevant evidence and a chance to argue that evidence. The trial court denied that chance when it restricted plaintiffs' counsel's argument.

Albertsons argues at pp. 18-20 that the facts did not support a conclusion that Cutler's and Liegal's testimony established a practice of placing pallet guards on large displays. This argument simply asks this court to resolve all inferences in favor of the defense. The defense has

simply argued the inferences from the evidence in their favor. Cutler's and Liegal's testimony also support inferences favorable to Pupo's case. The fact that one can argue contrary inferences from evidence does not render evidence inadmissible. Again, the jury resolves competing inferences, not the court in ruling upon the admission of evidence.

The defense incorrectly argues at p. 20 that the court did not "abuse its discretion in rejecting Mr. Pupo's belief that Albertsons' routinely install pallet guards on large displays..." In reality, the court never so ruled. This assertion finds no support in the record, as the respondents' failure to cite to the record confirms.

The defendant never moved to strike the testimony of Cutler's and Liegal's and Exhibit 11. Instead, defense counsel asked for the following relief (RP 685):

So I think the most appropriate thing to do it just order Mr. Messina and Mr. McCormick not to comment on that testimony. I am just asking for a curative instruction. I think it would highlight it too much, but at the end of the day Your Honor has been very clear on that subject. Remedial repairs are not to be a part of this case, and it would be inappropriate to highlight them.

Although defense counsel said that he requested "a curative instruction," the defense never submitted such an instruction and the trial court never read such an instruction to the jury.

Having acknowledged that the court admitted evidence the defense deemed prejudicial and inadmissible, defense counsel chose to gamble on the verdict, and hope the jury would not remember the testimony, having

successfully persuaded the trial court to silence plaintiffs' counsels' comments about it.

No reasonable judge would have restricted plaintiffs' counsel's closing argument in such an unfair fashion. This court should reverse and remand for a new trial on apportionment of fault.¹

B. THE TRIAL COURT COMMITTED ERROR OF LAW IN CONCLUDING THAT ALBERTSONS' PLACEMENT OF PALLET GUARDS AFTER PUPO FELL CONSTITUTED A SUBSEQUENT REMEDIAL MEASURE.

1. THE RESPONDENTS HAVE MISSTATED THE STANDARD OF REVIEW OF THE TRIAL COURT'S ER 407 RULINGS

The defense states, at p. 16, this court should apply an abuse of discretion standard to review the court's ER 407 rulings. However, this case involves determination of whether facts apply to ER 407, not a discretionary weighing of relevance and/or prejudice. A trial court's ruling on the 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).

In *Dickerson*, the plaintiff sued a bar for injuries sustained as a result of an assault by another patron. The bar contended that the plaintiff provoked the incident by slapping his girlfriend. The bar presented

¹ In their opening brief, appellants ask that this court remand for a partial new trial on the issues of apportionment of fault and general damages. In their brief, the respondents did not dispute this request for relief as inappropriate. Therefore, the court should conclude that the respondents concede that, upon reversal, the court should remand for a partial new trial on apportionment of liability and general damages, as appellants' request.

evidence that the plaintiff had slapped his girlfriend previously. The plaintiff objected that ER 403 barred admission of prior “bad acts” to show propensity to commit the same act at the time at issue. The trial court overruled the objection, and admitted the evidence. After trial, the court realized its error and granted a new trial. The trial court ruled that it had committed error of law in ruling that ER 403 did not bar evidence of the prior slap. The Court of Appeals affirmed the trial court’s ruling that it committed error of law. *Dickerson*, at 432-433.

In a like manner, in the case at bench, the trial court’s ruling that Albertsons’ subsequent placement of pallet guards constituted a subsequent remedial measure barred by ER 407 involved a question of law. Accordingly, this court should apply de novo review. *Dickerson*, at 432-433.²

2. THE EVIDENCE ESTABLISHED THAT ALBERTSONS FOLLOWED A PREEXISTING PRACTICE OF PLACING PALLET GUARDS ON MULTI-PALLET DISPLAYS. THEREFORE THE TRIAL COURT COMMITTED ERROR OF LAW IN EXCLUDING CUTLER’S DIRECTIVE TO PLACE PALLET GUARDS AFTER THE FALL UNDER ER 407.

The heart of the dispute about the applicability of ER 407 to this case concerns whether the evidence shows that Albertsons had a practice of placing pallet guards on multi-pallet displays that preexisted Mr. Pupo’s

² Respondents, at p. 17, incorrectly state that Pupo “argues that the trial court abused its discretion” in excluding of evidence of Albertsons’ subsequent pallet guard placement, citing the brief of Appellant, at p. 29. Pupo never argued that the trial court abused its discretion in excluding this evidence. He has always contended that the court’s ruling involved error of law.

fall. As stated previously, Cutler's and Liegal's testimony that someone might have "forgot" to place a pallet guard on the display establishes that the practice preexisted Mr. Pupo's fall.

The respondent, at pp. 18-20, insists that the evidence did not establish a preexisting practice of placing pallet guards. The respondent reaches this conclusion by weighing its view of Liegal's and Cutler's testimony against other evidence it submitted which asserted that Albertsons did not use pallet guards on multi-pallet displays. Reduced to its essence, the respondents' argument suggests that the trial court must have conducted its own factual inquiry, weighed the evidence and concluded, notwithstanding Cutler's and Liegal's testimony and Exhibit 11, that Albertsons did not have a prior practice of placing pallet guards on multi-pallet displays. This argument has flaws.

First, nothing in the record indicates that the court conducted such an inquiry or made such a ruling. Second, the court ruled at least twice that subsequent placement of the pallet guards did not constitute a subsequent remedial measure. RP 51, 376.

Third, any vagueness in the testimony of Cutler and Liegal concerned whether someone "forgot" to place a pallet guard, not whether the practice of placing pallet guards on multi-pallet displays preexisted Mr. Pupo's fall.

Cutler's and Liegal's testimony, and Exhibit 11, clearly demonstrate that Albertsons had a practice of placing pallet guards on

multi-pallet displays that predated Mr. Pupo's fall. Accordingly, the trial court committed error of law when it excluded evidence of Albertsons' subsequent placement of pallet guards on the display that injured Frank Pupo. It compounded this error of law by abusing its discretion in restricting plaintiffs' closing argument. These errors affected the jury's apportionment of fault to Frank Pupo, denying him a fair trial.

3. THE RESPONDENTS HAVE NOT DISTINGUISHED APPELLANTS OUT OF STATE AUTHORITY.

Appellants cited *Ranches v. City and County of Honolulu*, 168 P.3d 592 (2007) and *Klutman v. Sioux Falls Storm*, 769 N.W.2d 440 (2009), in their opening brief. Brief of appellants, pp. 30-34. These cases stand for the proposition that Rule 407 does not apply if the action that a party asserts constitutes a subsequent remedial measure predated the event that gave rise to the cause of action. *Ranches*, at 596-601; *Klutman*, at 451-452.

The respondent equivocally tries to distinguish *Ranches* and *Klutman*, at pp. 21-22. It argued that Albertsons did not "routinely use pallet guards on large displays." Respondents added that Albertsons' "typical procedure" was to avoid the practice. Respondents' brief, p. 22. This half-hearted argument reinforces the conclusion that Cutler's and Liegal's testimony and Exhibit 11 demonstrate that Albertsons had a preexisting practice of placing pallet guards on multi-pallet displays. If

not, Albertsons would have unequivocally denied the existence of the practice.

Respondents have tacitly conceded that they agree with *Ranches* and *Klutman*: If a claimed “subsequent remedial measure” preexisted the event giving rise to the lawsuit, Rule 407 does not apply. Because the evidence established Albertsons’ preexisting practice, the trial court committed error of law in excluding Albertsons’ subsequent placement of pallet guards on the display that injured Mr. Pupo. This court should reverse and remand for a new trial on apportionment of fault.

4. ALBERTSONS CONTESTED THE FEASIBILITY OF INSTALLING PALLET GUARDS ON LARGE FOOD DISPLAYS.

ER 407 permits admission of a subsequent remedial measure when offered to dispute feasibility of precautionary measures, if controverted.³

Albertsons employed a two-pronged strategy regarding feasibility. First, it speciously proclaimed that it conceded the feasibility of placing pallet guards on multi-pallet displays. It then undermined that “concession” by repeatedly protesting that it could not use pallet guards on large displays because of practicability and safety concerns. *See, e.g.*, RP 9/30/2010 pp. 10-19, RP 462, 657, 662, 672, 692-693, 697; CP 18, 32 (p. 23), 1848 (p. 78), 1842 (p. 18). The trial court erroneously accepted respondents’ “concession” at face value and disregarded the vigorous undermining of that “concession.”

³ Of course, one does not reach the issue of feasibility if the measure at issue preexisted the date of incident and thus, does not constitute a true remedial measure.

As stated in appellants' opening brief, no Washington cases define "feasibility" under ER 407. Federal Courts have defined the term as used in Federal Rule of Evidence 407, upon which the Washington rule is based. The Eighth Circuit held that feasibility "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." "Feasible" means not only "possible" but also means "capable of being utilized or dealt with successfully. *Anderson v. Malloy*, 700 F.2d 1208, 1213 8th Cir. (1983).

Albertsons repeatedly protested that pallet guards were not "capable of being utilized successfully" on multi-pallet displays. *Malloy* confirms that this argument contested feasibility. The trial court erred in concluding otherwise. Further, in *Malloy*, the defendants argued that they "did everything anybody recommended that they do." Defense counsel argued "what more could they do?...Is there any evidence from any reliable source [the defendants] could have or should have done anything more?" *Malloy*, at 1214. The 8th Circuit held that with such a suggestion implanted in the minds of the jurors, plaintiff's counsel "had every right to rebut that suggestion" by showing that the defendants had in fact installed devices claimed to be subsequent remedial measures after the rape at issue in the case. *Malloy*, at 1214.

In a like manner, Albertsons' counsel argued as follows, at RP 751:

For all the reasons 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 is safer not to have them. Okay. It is safer not to have them than to have them.

Like the plaintiffs in *Malloy*, Pupo had every right to rebut such argument by showing that the defendants had in fact installed pallet guards on the display that injured Mr. Pupo after he fell. The trial court erred in ruling that Albertsons did not contest feasibility.

Albertsons relies on *Wick v. Clark County*, 86 Wn.App. 376, 936 P.2d 1201 (1997) to support its argument about feasibility. In *Wick*, the plaintiff suffered injury after a car hit him while he was bicycling. After the collision, the defendant county posted a sign greeting "Limited Sight Distance 20 m.p.h." The defendant moved in limine to exclude evidence of this and other subsequently posted signs under ER 407. The plaintiff contested the motion, arguing that the defense contested feasibility by presenting evidence that warning signs would not slow traffic. This court disagreed. It held, at 384 the following (emphasis in original):

The County's witnesses did not testify as to the *feasibility* of putting up warning signs. Rather, witnesses testified that warning signs would not be *effective*. Furthermore, the County never mentioned feasibility in its closing argument.

Wick does not apply here. In that case, the County's witness testified that warning signs with or without speed advisories do not effectively reduce speed. The court held that this testimony did not place feasibility at issue. Notably, the County did not claim that it could not

have placed warning signs in the manner the plaintiff contended would be appropriate. The County did not claim that warning signs would make the condition more dangerous. The County did not claim that warning signs would fall apart or fall over if placed. Albertsons' protestations about the use of pallet guards on multi-pallet displays differed markedly from the evidence offered by the defense in *Wick*. *Wick* does not apply.

Jones v. Robert E. Bayley Const. Co. Inc., 36 Wn.App. 357, 674, P.2d 679 (1984) is on point. In that case, the defendant acted as the general contractor for construction of a store and warehouse. The plaintiff worked for the roofing subcontractor. He fell through a skylight hole. Someone had removed a plywood cover from the hole before he fell. After this incident, the defendant cut the skylight covers to fit which eliminated the need to remove them.

The plaintiff sought to present evidence of the defendant's subsequent decision to cut the skylight covers to fit. The trial court excluded the testimony. The Court of Appeals reversed, at 361 as follows:

Where feasibility is disputed, evidence of subsequent change is admissible. *Brown v. Quick Mix Co.*, 75 Wn.2d 833, 838-839, 454 P.2d 205 (1969). Although before trial, Bayley admitted feasibility of the change and dominion and control to make the change. Bayley elicited testimony at trial that placed these issues in dispute. The evidence was, therefore, admissible. Bayley's superintendent testified on direct that Stanley's foreman told him the covers would have to be removed even if they were cut to fit. Stanley's foreman denied the conversation. Evidence of the subsequent change was also admissible to impeach the testimony of Bayley's superintendent.

The testimony of Bayley's superintendent mirrors the defense contentions about the use of pallet guards on multi-pallet displays. As in the case at bench, the defendant in Jones contested the effectiveness of the subsequent remedial measure. As in Jones, evidence that Albertsons' actually used the pallet guards on the display that injured Mr. Pupo impeaches Liegal's contentions. The trial court therefore erred in excluding evidence, and argument, about Albertsons' subsequent placement of the pallet guards.

Finally, Albertsons' claim that Mr. Pupo invited error by supposedly raising the issue of feasibility and ignoring Albertsons' offer to stipulate. Albertsons does not cite to the record to support this contention, because the record does not exist. Albertsons itself contested feasibility vigorously throughout the entire trial. The court should disregard this misguided attempt to fabricate a claim of invited error.

In conclusion, Albertsons sought to have it both ways. It sought to keep out the subsequent placement of pallet guards by paying lip service to stipulating to "feasibility." Having done so, it worked vigorously to undermine that stipulation. The trial court erred in prohibiting the plaintiff from rebutting Albertsons' contention about feasibility and impeaching Albertsons' contention that placement of pallet guards on multi-pallet guard displays would not work. The trial court's rulings prejudiced the plaintiff and helped and caused the jury to reach a lopsided apportionment

of fault. This court should reverse and remand for new trial on apportionment of fault.

C. THE TRIAL COURT’S EXCLUSION OF THE SUBSEQUENT PALLET GUARD INSTALLATION AND RESTRICTION IN PLAINTIFFS’ CLOSING ARGUMENT DID NOT CONSTITUTE HARMLESS ERROR.

Albertsons argues that the trial court’s exclusion of the subsequent pallet guard placement constituted harmless error.⁴

Albertsons claims that no harm occurred because the court did admit some evidence of subsequent change, because Pupo presented evidence of negligence and because Pupo tripped on the edge of the pallet. Appellants will address these contentions in turn.

1. THE ADMISSION OF CUTLER’S AND LIEGAL’S TESTIMONY DID NOT RENDER THE COURT’S ERROR HARMLESS.

Albertsons claims that Mr. Pupo “managed to squeeze by the trial court” evidence that Albertsons’ used pallet guards after the fall. Respondents’ brief, pp. 31-33. The argument has several flaws.

First of all, Pupo “squeezed” nothing past the trial court. The trial court admitted Cutler’s testimony about subsequently placing pallet guards and that someone “forgot” to place the pallet guards before the fall in open court, after vigorous discussion and objection by defense counsel. RP

⁴ Albertsons’ harmless error argument disregards the trial court’s restriction of plaintiffs’ closing argument. Obviously, excluding evidence and precluding evidence about admitted evidence compounds any prejudice resulting from error.

553-558. Even a casual perusal of the record demonstrates the claim that Pupo “squeezed” something by the trial court is complete nonsense.

Second, Albertsons claims “the trial court inadvertently admitted the portion of Mr. Cutler’s deposition cited above in which Mr. Cutler indicated that he thought Albertsons installed pallet guards after the incident.” Respondents’ brief, p. 32. Again, the record belies this assertion. RP 553-558. This mischaracterization of the record renders the credibility of the entire argument highly questionable, and the court should disregard it for this reason alone.⁵

Setting aside the respondents’ distortion of the record, the court’s admission of Cutler’s testimony did not render the error harmless. Respondent ignores that the court prevented the appellants from arguing the evidence to the jury.

That trial court’s error clearly prejudiced the appellant as the jury’s apportionment of fault demonstrates.

2. THE TRIAL COURT LIMITED THE PLAINTIFFS’ ARGUMENT OF THE CASE WHICH PREJUDICED THEM.

The respondents make the curious assertion that “[t]he trial court did not limit Mr. Pupo from presenting his case.” This contention cannot withstand a pin prick of scrutiny. No one disputes that the trial court restricted Mr. Pupo from fully arguing the evidence to the jury. The

⁵ The respondents’ disregard that plaintiffs elicited an admission from Liegal that someone might have forgot to place the pallet guard before Pupo fell without any objection. RP 652-657; CP 1830 (p. 14). Presumably plaintiffs did not “squeeze this testimony into evidence, and the court did not “inadvertantly” admit it.

defense had no such restrictions. The jury apportioned fault 90% to Mr. Pupo, which demonstrates the consequences of the court's error.

Mr. Pupo could not argue all of the evidence that the court admitted that established the defendants' negligence. Mr. Pupo could not rebut the defendants' contention that pallet guards would not have worked on the display that injured him. Thus, the trial court's limitation of the evidence and argument did prejudice Mr. Pupo and denied him a fair trial.

3. THE INFERENCES FROM THE EVIDENCE ESTABLISH THAT PALLET GUARDS WOULD HAVE PREVENTED MR. PUPO'S INJURY.

The defense claims that a pallet guard would have made no difference because Mr. Pupo testified that he caught his foot on the "corner" or "edge" of the pallet. Mr. Pupo conceded that he did not know whether his foot went into the pallet opening. RP 171.

However, Exhibit 11 recorded the presence of a "defective condition" consisting of the absence of a pallet guard. Nathan Cutler directed placement of a pallet guard after Mr. Pupo fell. This evidence supports inferences that Albertsons thought that a pallet guard would have prevented the fall. The plaintiffs could not argue this inference to the jury because of the court's evidentiary rulings and restriction of argument. Mr. Pupo could not balance the unfair defense argument and receive a fair apportionment of fault. As a result, the claim of harmless error falls far short of reality.

D. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING MR. PUPO'S MOTION FOR NEW TRIAL BASED ON THE JURY'S REFUSAL TO AWARD NON-ECONOMIC DAMAGES.

Our Supreme Court has held that plaintiff who substantiates pain and suffering is entitled to general damages. *Palmer v. Jensen*, 132 Wn.2d 193, 202, 937 P.2d 597 (1997). See also, *Fahndrich v. Williams*, 147 Wn.App. 302, 194 P.3d 1005 (2008).⁶

The *Fahndrich* court explained the principle well, 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.

⁶ Both of these cases are discussed in Appellants' opening brief, at pp. 40-42.

We reverse and remand for a new trial on damages.

As in *Palmer* and *Fahndrich* the facts here established without contradiction that Mr. Pupo suffered pain, suffering and disability which mandated an award of non-economic damages, especially given the jury's award of all of Mr. Pupo's medical expenses. The following facts highlight the evidence of non-economic damages:

- The jury awarded Mr. Pupo all of the medical bills that he had claimed, for an award of \$47,517.97 in economic damages. CP 1258, Exhibit 12.
- The medical expenses included the cost of rotator cuff surgery. Exhibit 12.
- Dr. Coray found a direct connection between the fall and the rotator cuff surgery. RP 207-208.
- Dr. Russo conceded 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 extensively about Mr. Pupo's symptoms of pain, suffering and disability after he fell, about his surgery, his difficult and painful recovery from the surgery and his ongoing residual problems. RP 144-147, 483-486, 572-596. Mr. Pupo testified that his shoulder never returned to its pre-fall condition.
- Theodore Becker, Ph.D. testified extensively about restrictions and weaknesses in Frank Pupo's shoulder. RP 277-351.
- Dr. Russo testified that the fall at Albertsons aggravated a pre-existing right rotor cuff problem in Mr. Pupo's shoulder. CP 1894. He testified that Mr. Pupo would not fully recover from the September 2007 right rotator cuff surgery. CP 1897-1899.
- Dr. Russo testified that Mr. Pupo had fallen directly on his right shoulder, which "creates a lot of shoulder pain." CP 1918.

- Dr. Russo testified that Mr. Pupo suffered a contusion from the direct blow to his right shoulder. CP 1928.

The jury awarded \$10,402 in medical expenses charged by Dr. Coray. This included his surgical treatment, the surgery and the post-surgical treatment. The jury awarded \$3,318 for the physical therapy provided by Bruce Snell, P.T. This physical therapy ran from October 2, 2007 through February 27, 2009. Obviously, a surgery involves great pain and discomfort. Equally obviously, nearly 15 months of physical therapy supports inferences of pain and discomfort recovering from surgery. The defense did nothing to contradict the testimony of the Pupos and Mr. Mazzuca about the pain and suffering Mr. Pupo experienced after the fall and the surgery.

Hence, the evidence supported an award of non-economic damages for the injury itself, the surgery, the recovery from the surgery and the ongoing limitations. The jury's decision to award nothing for these losses contradicted the evidence and requires reversal and a new trial on general damages.

The defense argues that the jury heard "disputed evidence regarding causation of Mr. Pupo's right rotator cuff tear, as well as evidence of chronic right shoulder problems existing 6 years before the subject fall." Respondent's brief, p. 38. However, Dr. Russo conceded any preexisting problems with Mr. Pupo's rotator cuff meant that he "would definitely be more vulnerable to further injury to the rotator cuff as to compared with a perfectly intact rotator cuff." CP 1930. Dr. Russo also

conceded that Dr. Coray's treatment was reasonable. Finally, and most conclusively, 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 1932-1934.

Notwithstanding the defense arguments about preexisting conditions and Mr. Pupo's recovery, the record patently demonstrates that Mr. Pupo experienced non-economic damages as a result of his fall at the Albertsons' store. These facts distinguish this case from *Lopez v. Salgado-Guadarama*, 130 Wn.App. 87, 122 P.3d 733 (2005) and *Gestson v. Scott*, 116 Wn.App. 616, 67 P.3d 496 (2003), cited by the respondents.

For example, in *Lopez*, the defense experts testified no objective medical findings supported the plaintiff's complaints of pain, and that the plaintiff should have recovered from any injuries quickly after the accident. *Lopez*, at 92. The defense evidence "allowed the jury to conclude that any pain Mr. Lopez felt as a direct result of the accident was short lived." *Lopez*, at 93. In contrast, in the case at bench, the defense did not dispute that Mr. Pupo suffered symptoms after the fall. Instead, the defense contested causation and claimed that the surgery resulted from pre-existing conditions. The jury obviously rejected that contention because it awarded medical expenses for all of Mr. Pupo's treatment, including the surgery and rehabilitation from the surgery. The jury's refusal to award non-economic damages simply cannot stand in the face of its acknowledgement that the fall caused the surgery and the rehabilitation.

In *Gestson*, the plaintiff submitted special damages for medical expenses in excess of \$65,000. The jury awarded \$458.34, the cost of an emergency room visit, and no general damages. This evidence showed that the jury did not accept that all of the medical treatment related to the incident at issue. Instead, the jury felt it reasonable for the plaintiff to have visited the emergency room to be checked, but did not suffer any non-economic damages. *Gestson*, 116 Wn.App., at 618-619. The jury in the case at bench awarded all of the medical expenses but no general damages. These facts contrast dramatically with *Gestson*.

Pursuant to *Palmer, Fahndrich*, supra, the trial court abused its discretion by failing to order a new trial on general damages. This court should reverse and remand.

III. CONCLUSION

Pupo respectively requests that this court reverse the trial court's ruling denying his motion for a partial new trial and remand for new trial on the issues of apportionment of fault and general damages only.

DATED this 23 day of September, 2011.

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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY _____
DEPUTY

NO. 41451-1-II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

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

Plaintiffs-Appellants,

vs.

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

Respondent.

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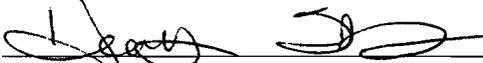
County of Pierce) : ss.

Heather Stamper, being first duly sworn, on oath deposes and says:

That on September 23, 2011, I delivered, via e-mail a copy of

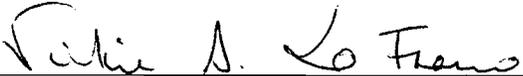
Appellant's Reply Brief for service upon:

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Tacoma, WA 98402


HEATHER STAMPER

SIGNED AND SWORN to before me on the 26th day of
September, 2011, by Heather Stamper.




Notary Public in and for the State of
Washington, residing at Tacoma.
My appointment expires 4-15-13