

COURT OF APPEALS
DIVISION II
11:21:38 AM
STATE OF WASHINGTON
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NO. 41451-1-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

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

Respondents,

vs.

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

Appellants.

RESPONDENTS' BRIEF

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ORIGINAL

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I. INTRODUCTION

The crux of Frank Pupo's argument on this appeal is that the trial court erred in excluding evidence that Albertson's installed pallet guards *after* he tripped over a pallet. Mr. Pupo is not persuasive because the court properly excluded this evidence as a subsequent remedial repair under ER 407.

The only injury that Mr. Pupo sustained after tripping over an obvious pallet was a bruise to a chronic, debilitating, and pre-existing right shoulder condition. The jury heard all the relevant evidence, deliberated for two days, and returned a verdict that allocated 90 percent comparative fault of the accident to Mr. Pupo.

As this court's review of the record will reveal, the court made sound evidentiary decisions, the jury carefully considered all evidence, and Mr. Pupo received a fair trial. The jury verdict simply reflects that jury disagreed with Mr. Pupo's theory, not that he was prejudiced from a trial court's decision to exclude evidence of a subsequent remedial repair. Accordingly, Albertson's respectfully asks this court to deny Mr. Pupo's request for a new trial.

II. STATEMENT OF THE CASE

A. **Mr. Pupo visited Albertson's and tripped over a large pallet display**

On a warm, sunny July afternoon, Mr. Pupo visited the Gig Harbor Albertson's to buy some whipping cream. III VRP at 116-17, 164-65. Mr.

Pupo had patronized this particular store weekly since it opened, or for about 7 years. III VRP at 111, 163. This occasion was slightly different, though, because Mr. Pupo noticed that more people than usual were congregating between two food displays located just outside the entrance. III VRP at 111-12. The crowd caught Mr. Pupo's attention and roused his curiosity. III VRP at 111-12; IV VRP at 359.

Mr. Pupo approached the crowd and made his way through on the side nearest to the left display, which contained watermelons. III VRP at 111-12; IV VRP at 359. As he was passing the watermelon display, Mr. Pupo looked over to the right display, caught his left foot on something, and fell. III VRP at 111-12; IV VRP at 359. He was not wearing sunglasses. III VRP at 165.

An Albertson's employee arrived to help Mr. Pupo by giving him some ice and helping him over to rest on some nearby patio furniture. III VRP at 116-17; 165; IV VRP at 589. Before leaving, Mr. Pupo examined the watermelon display and realized that he caught his foot on the corner of a pallet on which the bins of watermelon rested. III VRP at 117. Mr. Pupo did not know whether his foot went inside the pallet. III VRP at 171-72.

On June 13, 2008, Mr. Pupo sued Albertson's, alleging that it negligently, carelessly, and unlawfully installed the watermelon display. CP at 3, 25-28, 39-42.

B. Albertson's does not use pallet guards on large displays because doing so is generally ineffective.

Watermelons arrive at Albertson's in large corrugated paper bins. VI VRP at 636. Due to each bin's average 750 pound weight, Albertson's leaves them in the bins and moves them around on pallets. VI VRP at 636-38. On an average July day, the busiest month for watermelon, the Gig Harbor Albertson's would sell approximately 1,000 to 3,000 pounds a day. VI VRP 638. To meet demand, Albertson's displayed additional bins of watermelon in front of the store. IV VRP 638.

The watermelon display at issue here was 2 pallets wide and 3 pallets deep, for a total of 6 pallets. VI VRP at 640, 650-51; CP at 1839 (p. 9). Each pallet measures 3 by 4 feet, making this display about 6 feet wide and 12 feet deep. VI VRP at 640. The pallets are constructed in such a way that 2 by 4 lumber closes off the 4 foot side but not the 3 foot side, which is left open so that pallet jacks can slide into the pallets to lift them. VI VRP at 636; Excerpt of Proceedings (Oct. 6, 2009¹) at 8-9. Accordingly, the 12 foot side of the display did not contain any openings. Excerpt of Proceedings (Oct. 6, 2009) at 8-9.

On single pallet displays, Albertson's always uses pallet guards, which are designed to wrap around the pallet to close the gaps. VI VRP at 644.

¹ The cover page states October 6, 2009, but the proceeding occurred on October 6, 2010. See Excerpt of Proceedings (Oct. 6, 2009) at 3.

Pallet guards are designed to fit around a single standard pallet. VI VRP at 642. When guards are linked together to cover multi-pallet displays, though, the guards tend to be loose and fall away from the display. VI VRP at 642. Due to this design, Albertson's generally would not use them on larger displays, like the watermelon display here. VI VRP at 642, 657; CP at 1832 (p. 23). Albertson's had a policy that single display pallets required a pallet guard; however, Albertson's generally did not have an official pallet guard policy for large displays. VI VRP at 644, 655, 657; CP at 1830 (p. 14). Instead, designing the food displays and determining whether to use a pallet guard was left to the discretion of the employee creating the display. VI VRP at 644, 655, 657; CP at 1830 (p. 14).

C. The trial court made several rulings on evidence of subsequent remedial measures.

1. Rulings on Motions in Limine

i. August 2009 Motion

On August 6, 2009, Mr. Pupo moved in limine to admit evidence that Albertson's installed pallet guards after the incident. CP at 411; I VRP at 4. On September 4, the trial court heard oral arguments on whether ER 407 bared the evidence as a subsequent remedial measure. I VRP at 3.

Mr. Pupo argued that this evidence was not a subsequent remedial measure because Albertson's custom was to routinely use pallet guards. I VRP at 6; CP at 414-15. Alternatively, Mr. Pupo argued that this evidence

was admissible because Albertson's contested the feasibility of using the pallet guards. I VRP at 12-13; CP at 415.

Albertson's countered that installing pallet guards after Mr. Pupo's fall was a subsequent remedial measure. I VRP at 7-10; CP at 435. Albertson's also admitted that using pallet guards was feasible. I VRP at 9; CP at 435.

The court denied Mr. Pupo's motion. I VRP at 14. The court stated, "I think that *Bartlett [v. Hantover]*, 84 Wn. 2d 426, 429, 526 P.2d 1217 (1974) and *Hyjek [v. Anthony Industries]*, 133 Wn.2d 414, 418, 944 P.2d 1036 (1997) apply. And I am going to deny the motion." I VRP at 14.

ii. September 2010 Motion

A little over one year later, on September 4, 2010, Mr. Pupo moved in limine to admit an incident report that Albertson's made after the incident. CP at 869; II VRP at 39. The report contained a question that stated, "Is there any defective equipment or conditions to be repaired or replaced?" CP at 906; Ex. 11. "Yes" was circled and "pallet guards" was written on the blank space provided. CP at 906; Ex. 11.

Mr. Pupo argued that the incident report "is critical to the fact that [Albertson's] didn't have pallet guards installed on [the watermelon display at issue], and it identifies that as a defect." II VRP at 40. His theory was that Albertson's had pallet guards, used them on large displays, and forgot to use

them on the watermelon display at issue.

Albertson's responded that Mr. Pupo sought to use the incident report as evidence of a subsequent remedial measure, which the trial court had prohibited in its September 4 ruling. II VRP at 46-47. Albertson's argued that the court should similarly prohibit Mr. Pupo from using the report to argue that Albertson's installed pallet guards after the incident in response to Mr. Pupo's fall. II VRP at 46-47. Albertson's sought to prevent Mr. Pupo from arguing that it identified pallet guards as a defective condition on the display and then put some up in response. II VRP at 47-48.

The trial court ruled:

Well, here is what I am going to do: I don't dispute that the Court did rule subject remedial measures would not be admitted, but if there is no guard, it is pretty hard to find that this is subsequent remedial measure. The motion is granted. Preadmission of the report filled out by the assistant can be used by the plaintiffs. It is going to go to weight. 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.

II VRP at 51.

2. Rulings on Deposition Excerpts

Mr. Pupo sought to read excerpts of depositions at trial. Albertson's objected to certain portions, and on October 6, 2010, the trial court considered whether to admit the deposition excerpts. VI VRP at 536, 528

(Mr. Mayr); 539 (Mr. Liegal); 553 (Mr. Cutler). Three of those are relevant to this appeal.

i. Nicholas Mayr

Albertson's objected to a portion of Mr. Mayr's deposition because that portion was based on his viewing of photographs of the pallet guards that Albertson's installed after Mr. Pupo's fall. VI VRP at 528; CP at 995. Mr. Pupo responded that the evidence is relevant because Mr. Mayr has direct knowledge of pallets. VI VRP at 528-29. The trial court excluded the evidence. VI VRP at 529.

ii. Richard Liegal

Albertson's next objected to a portion² of Mr. Liegal's deposition because that portion mentioned a photo of the pallet guards that Albertson's installed after Mr. Pupo's fall. VI VRP at 536; CP at 981. Mr. Pupo argued,

Your Honor has ruled that there is a subsequent remedial repair in this case. It was neither subsequent or remedial. The testimony, in fact, Mr. Liegal [sic] testified, we can retread this if we need to, but showing the pallet guards that they forgot to put on is not subsequent, it's not remedial. They had them before. It was the policy to use them. They didn't use them this time. It's well established, and it's

² The portion to which Albertson's objected states:

Q: Let's talk about displays for a minute. I'm going to show you Exhibit 4. This fall involved a pallet display in front of the store. And I'll ask you, do you typically in the summers have pallet displays that look similar to the display that's depicted in Exhibit 4?

A: Yes.

CP at 981.

admitted fact that they put them on afterwards.

VI VRP at 537. The trial court responded, “Well, I think the jury is going to decide whether they forgot or not. That’s a factual question.” Albertson’s then interjected,

Judge, Mr. [Pupo] and I have to agree to disagree. We came up and got the order on September 4th of 2009 denying that they could admit these photos into evidence. That’s what they are trying to do, they are just trying to ignore the Court’s order on admitting the evidence. They want to put this photo, it is subsequent, it happened after the accident, and it is remedial in the sense that it was done after the accident to hopefully to promote another fall. Albertsons [sic] has conceded it was feasible.

VI VRP at 537-38. Mr. Pupo responded by insisting that feasibility is an issue; Albertson’s then offered to craft a jury instruction wherein it would stipulate that the pallet guards were feasible on a large display. VI VRP at 539. The court ruled:

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 that first – that first objection is the Court reserved ruling on that. I realize that my ruling 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 Albertsons should have put the guards up or not. That is your case in short version. . . .

I think with the evidence that’s been presented and

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's why I said 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.

VI VRP at 539-40.

iii. Nathan Cutler

Lastly, Albertson's objected to the following portion of Mr. Cutler's deposition on the ground that it discussed subsequent remedial repairs:

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.

VI VRP at 553; CP at 722. Mr. Pupo argued that the trial court should allow this testimony to be read:

Well, yeah, [Mr. Cutler] put them on after, and this is the exact testimony that counsel argued a minute ago was going to come in, and here it is. He is going to talk about putting the guards on after. That is exactly what happened. It's not a subsequent remedial measure. There is nothing about it that makes it that. It's an admitted fact in this case, and you heard the argument here that concessions are feasible. They put the guards on. The jury should hear that they put the guards on, and this is the guy they have identified who put them on.

VI VRP at 553. Albertson's countered,

Judge, there is a disconnect here. I will say it for the last time: Albertsons [sic] has filed a motion back in September to keep all of the subsequent remedial actions out. Any comments about what happened to that pallet after the fall is a

subsequent remedial measure. Your Honor has ruled on that. VI VRP at 553. The trial court reviewed Mr. Cutler's deposition for evidence of Albertson's installing the pallet guards after the fall. VI VRP at 556-59. The court did not exclude the portion of Mr. Cutler's deposition cited above. VI VRP at 556-58.

3. Ruling on Request for Admission

Mr. Pupo sought to introduce into evidence his request for admission number 16, which states:

Admit that Nathan Cutler immediately had the pallet guards installed around the display in response to Mr. Pupo's fall.

Answer: Admit.

CP at 205; VI VRP at 627. Albertson's responded that the request for admission is evidence of a subsequent remedial repair. VI VRP at 627-28. The court excluded the evidence: "It's contrary to my rulings, so I am not going to do that." VI VRP at 628.

4. Ruling on Offer of Proof

Mr. Pupo asked Mr. Liegal on cross-examination whether the pallet guards were installed after Mr. Pupo fell. VI VRP at 660. Albertson's objected, and the trial court sustained. After the jury was excused, Mr. Pupo requested to make an offer of proof on this objection. VI VRP at 668. Mr. Pupo argued that he should be able to discuss the evidence because the court did not exclude the portion of Mr. Cutler's deposition (cited above) where

Mr. Cutler said that he believed that Albertson's setup pallet guards around the display at issue after the fall. VI VRP at 668.

Albertson's responded:

[H]e is ignoring the Court's order. It is absolutely clear this Court has ordered months before the trial that evidence of subsequent remedial repairs don't come in. And Your Honor, we have done this four, five, six times today. He keeps trying to get this evidence in. He is defying the Court's order, and he is threatening a mistrial if he keeps trying to do it.

VI VRP at 668-69. Mr. Pupo countered that "[t]he Court has ruled in motions in limine that it was not a subsequent remedial measure." VI VRP at 670. The trial court disagreed, and stated:

No, I reserved ruling. You all keep disregarding. I reserved ruling. I said that it felt like it wasn't. Now I have heard the testimony and it feels like it is [a subsequent remedial repair], 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.

VI VRP at 670.

D. Mr. Pupo's had a history of preexisting knee and should problems before he tripped over the pallet display.

Mr. Pupo had a serious, chronic history of right shoulder and lower extremity injuries and limitations prior to this incident. III VRP at 104-05; IV VRP at 196, 352. Six years prior to Mr. Pupo's fall at Albertson's, he experienced knee and shoulder pain severe enough to seek medical attention and surgical intervention. III VRP at 104. In 2001, Mr. Pupo saw Dr. Richard Gray for pain in both shoulders. III VRP at 104-05. A 2001 MRI

showed a tear in the supraspinatus and infraspinatus tendons of his right rotator cuff. IV VRP at 196. Dr. Gray injected Cortisone into Mr. Pupo's right shoulder and performed surgery on the left shoulder. III VRP at 105.

Mr. Pupo continued to experience knee problems. Before the fall at Albertson's, Mr. Pupo's right knee had caused him to limp for years and had prompted him to seek a total right knee replacement. III VRP at 110; IV VRP at 352, 357. He visited Dr. Steven Teeny, an orthopedic surgeon, less than a year before his fall at Albertson's for related mobility problems. IV VRP at 352.

On July 23, 2007, after the incident, Mr. Pupo visited Dr. Teeny to follow up his visit to Urgent Care and received a cortisone shot in his right knee. III VRP at 118. Mr. Pupo then saw Dr. Spencer Coray, an orthopedic surgeon focusing on shoulder evaluations. IV VRP at 187. Dr. Coray based his initial diagnosis of a possible cuff tear on his physician's assistant's notes. IV VRP at 188. An August 3, 2007 MRI of Mr. Pupo's shoulder again showed a tear of the supraspinatus and infraspinatus muscles. IV VRP at 190. Dr. Coray was not immediately told of Mr. Pupo's prior right shoulder problems, visits to Dr. Gray, or cortisone shots—all of which can contribute to tears. IV VRP at 191. Dr. Coray did not review records from Mr. Pupo's other providers. IV VRP at 225-26.

Mr. Pupo's fall "injured [his shoulder] to the point that it became symptomatic enough to be addressed." IV VRP at 227. The post-fall x-ray showed severe osteoarthritis, or inflammation, in Mr. Pupo's shoulder and a calcification of Mr. Pupo's supraspinatus tendon. IV VRP at 233. The calcification occurred prior to the fall at Albertson's. IV VRP at 233.

Dr. Russo, Albertson's board-certified orthopedic surgeon and the only physician who reviewed Mr. Pupo's complete medical file, stated that "the fall at Albertson's had produced a contusion [a bruise] in [Mr. Pupo's] shoulder . . . [aggravating] preexisting symptoms."³ CP 1992; 2020. Dr. Russo reviewed the August 3, 2007, MRI, which showed "decreased volume and fatty infiltration in some of the rotator cuff muscles" and explained to the jury:

[These] are signs of long-standing rotator cuff pathology. [Decreased volume and fatty infiltration are] not seen with partial thickness tears [and are] almost exclusively seen with full thickness tears. The reasons [for this] is when the rotator cuff tendon is totally torn, it just doesn't function anymore. So it undergoes atrophy. Atrophy means to get smaller, to lose volume, become a nonfunctioning muscle. [And] [w]hen that lasts long enough, the muscle actually starts to become infiltrated with fat."

CP 2001-02. Because the volume loss and fatty infiltration found would require "at least three to six months" of atrophy to be evident on an MRI,

³ Dr. Russo's testimony was presented to the jury via video, a preservation deposition having been performed on October 1, 2010. VII VRP 698.

Dr. Russo opined that the tear predated Mr. Pupo's July 21 fall. CP 2005. Dr. Coray agreed that the mild volume loss and fatty infiltration could indicate muscle atrophy due to a prior tear. IV VRP at 244-45. Dr. Coray also admitted that the pain from a shoulder contusion and the pain from a torn rotator cuff muscle would be difficult to differentiate. IV VRP at 242. The July 21, 2007 x-ray report supports Dr. Russo's diagnosis of contusion. CP at 2020.

The records of Mr. Pupo's visits to Drs. Hassan and Gray from March to October of 2001 further substantiate Mr. Pupo's pre-existing shoulder condition. CP at 2006-07. In 2001, Mr. Pupo complained of bothersome right shoulder abduction and flexion, which was limited to 100 degrees. CP at 1882. Dr. Russo's May 21, 2009 examination of Mr. Pupo found that his flexion had increased, enabling him to resume household chores and responsibilities. CP at 2006-07.

Arthroscopic surgery on Mr. Pupo's shoulder took place only two weeks after Mr. Pupo's fall. IV VRP at 201, 242, 249. Following surgery, Mr. Pupo reported that his strength improved. IV VRP at 250. Mr. Pupo had no limitations on his physical activity in 2008. IV VRP at 252, 257.

Mr. Pupo returned to work soon after the incident, traveled, and actively participated in a three-day golf tournament within six months of the injury, and could perform many daily activities without difficulty or

limitation. III VRP at 143, 177. Mr. Pupo testified that his shoulder injury had impacted his golf game, changing his handicap from a 14 to a 22. III VRP at 125. However, Mr. Pupo admitted that his prior knee problems had also impacted his ability to play. III VRP at 175. Mr. Pupo and his friend John Mazzuca testified at trial that, following Mr. Pupo's shoulder surgery, Mr. Pupo was able to participate in an annual Las Vegas golf tournament in March 2008. III VRP at 143, 177. During that trip, Mr. Pupo warmed up on the driving range, and then played three rounds of golf. III VRP at 177. Further, Mr. Pupo testified that he does not take any pain medications. III VRP at 120.

Mr. Pupo experienced shoulder and knee pain. III VRP at 117. Albertson's employees gave Mr. Pupo ice for his knee and shoulder. He refused further medical attention and elected to drive to an Urgent Care in Gig Harbor. III VRP at 118. An x-ray revealed no fractures or other obvious defects. III VRP at 118.

E. The Jury returned a fair verdict.

The jury returned a verdict in favor of Mr. Pupo and awarded damages in the amount of \$47,517.97. CP 1263-65. This amount was reduced by the 90% comparative fault the jury attributed to Mr. Pupo, resulting in a verdict of \$4,751.80 against Albertson's. CP 1263-65.

III. ARGUMENT

A. Evidence that Albertson's installed pallet guards after Mr. Pupo tripped was properly excluded as a subsequent remedial under ER 407.

1. Standard of Review

Appellate courts review a trial court's evidentiary ruling for an abuse of discretion. *Proctor v. Huntington*, 146 Wn. App. 836, 852, 192 P.3d 858 (2008). "A trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons, i.e., if the court relies on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard, or bases its ruling on an erroneous view of the law." *Proctor*, 146 Wn. App. at 852.

2. Installing pallet guards after Mr. Pupo fell was a subsequent remedial repair.

ER 407 states:

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.

Here, Albertson's took measures after Mr. Pupo's fall that, if taken previously, might have made him less likely to trip over the large pallet display. Under ER 407's plain meaning, this evidence is not admissible to

prove Albertson's negligence in connection with not having pallet guards up at the time Mr. Pupo tripped.

Mr. Pupo contends that, even though Albertson's installed pallet guards *after* he fell, installing them was not a subsequent remedial measure because Albertson's allegedly used them on large displays and simply forgot to do so here. Br. of App. at 29. Mr. Pupo argues that the trial court abused its discretion in excluding evidence of Albertson's installing the pallet guards after he fell. Br. of App. at 29. But the court did not abuse its discretion because the only evidence that Albertson's used pallet guards on large displays was equivocal at best, particularly when viewed with other evidence that using pallet guards on larger displays was not typically done.

According to Mr. Pupo, two excerpts from Mr. Cutler's and Mr. Liegal's deposition show that Albertson's used pallet guards on large displays. He first cites the following statement that Mr. Cutler made:

Q: So they had the equipment to [install pallet guards], 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 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.*

Br. of App. at 29; CP at 1830 (pp. 14-15), 1841 (p. 14); RP at 653-54 (emphasis added).

He next cites the following statement that Mr. Liegal made:

Q: Do you know why the display that was in front of the Gig Harbor store on July 21, 2007, the day Mr. Pupo fell, didn't have pallet guards around it?

A: No.

Q: When we had an opportunity to speak with Mr. Cutler, it's his belief and testimony – he was in a deposition similar to this one – and he said that somebody might have forgotten to put them on. I'm asking you, do you think that's a possible reason why they weren't in place that day?

A: It could have been possible, yes.

Br. of App. at 29; CP at 1830 (p. 14) (emphasis added).

From the foregoing testimony, Mr. Pupo reasons that Albertson's had a policy to use pallet guards on large displays because "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." Br. of App. at 29. Clearly, Mr. Pupo's reasoning mischaracterizes Mr. Cutler's and Mr. Liegal's testimony.

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 that their testimony shows a custom to routinely install pallet guards on large displays, this court would need to improperly assume (1) that

Albertson's had a policy to install pallet guards on large displays and (2) that someone actually forgot to put pallet guards up. Put differently, Mr. Pupo asks this court to assume that his argument is true.

Instead, the evidence before the trial court belies his argument: (1) Mr. Cutler lacked firsthand knowledge of the display at issue, and (2) Mr. Liegal testified that using pallet guards on larger displays not typically done. Mr. Cutler was an assistant store manager who neither investigated the accident nor spoke to Mr. Pupo until he returned to the store later that night.⁴ CP at 1840. By his own admission, Mr. Cutler had no responsibility or expertise in creating produce displays or evaluating their safety. CP at 1839-40.

Similarly, the following testimony from Mr. Liegal supports a finding that Albertson's did not have a custom of routinely installing pallet guards on large displays:

Q. When you say "use them all the time," what is, I guess the practice or policy for when you use pallet guards when you have a pallet display out on the floor?

A. When you have a stand-alone pallet, you put a pallet

⁴ Mr. Cutler testified:

Q: Do you know if anybody has ever, from your own personal knowledge, tripped and fallen on a pallet at Albertson's, say that was left on the floor, that was being used on the floor to stock goods? Somebody caught the edge of the pallet, and tripped and fell?

A: No. Not that I've ever seen.

CP at 1840.

guard around it.

Q. What do you mean by ‘stand-alone pallet’?

A. That would be, you know, one pallet. If it would be a display bigger than that, you wouldn’t even use them.

[. . .]

Q: Okay. So if you have a larger display, what do you do to make sure that it’s safe and doesn’t have those issues if you’re not going to use pallet guards?

A: Just, you’d have to make sure [. . .] your pallets are parked square and close together so nothing is sticking out.

[. . .]

Q: Would you typically use pallet guards for displays that are four to six pallets?

A: No.

CP at 1828 (p. 8), 1829 (p. 10), 1832 (p. 23); *see also* VI VRP at 642, 644 (Albertson’s generally did not use pallet guards on 6 pallet displays but Albertson’s “would always use a pallet guard” on single pallet displays). Mr. Liegal clearly testified that Albertson’s had a practice of using pallet guards on single pallet food displays, not larger displays. Instead, when it came to larger displays, Albertson’s employees would do the best they could to make the display safe and reduce protruding edges by aligning the pallets close together.

The trial court did not abuse its discretion in rejecting Mr. Pupo’s belief that Albertson’s routinely installed pallet guards on large displays—Mr. Pupo simply failed to present any evidence to support his position. Albertson’s did not install pallet guards on large displays, but did so here solely in response to Mr. Pupo’s fall. Consequently, trial court did not abuse

its discretion in finding that Albertson's installed the pallet guard after Mr. Pupo tripped and that doing so was a subsequent remedial act under ER 407.

3. The cases Mr. Pupo cites are inapposite.

Mr. Pupo attempts to analogize this case to *Ranches v. City and County of Honolulu*, 168 P.3d 592 (2007), and *Klutman v. Sioux Falls Storm*, 769 N.W.2d 440 (2009). These cases are inapposite.

In *Ranches*, the City of Honolulu was in the midst of resurfacing a public restroom floor. *Ranches*, 168 P.3d at 595. Plaintiff used the restroom and slipped on the floor. *Ranches*, 168 P.3d at 595. After the incident, the city resumed resurfacing project. *Ranches*, 168 P.3d at 595. Defendant moved in limine to exclude evidence of subsequent remedial measures, including the resurfacing project. *Ranches*, 168 P.3d at 595. The trial court agreed, and excluded evidence of the city's floor resurfacing project, including actions taken before the fall. *Ranches*, 168 P.3d at 596. Hawaii's Supreme Court reversed, holding that "the measures taken by [defendant] in this case that began prior to [plaintiff's] accident and continued thereafter cannot be characterized as either subsequent or remedial and, therefore, cannot be precluded under HRE 407." *Ranches*, 168 P.3d at 601. "[M]easures 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.*" *Ranches*, 168 P.3d at 598-99 (emphasis in original).

Klutman relied on the reasoning in *Ranches*. In *Klutman*, plaintiff was playing an informal game of touch football when he caught his foot between the seams of two pieces of turf, fell, and severely injured his knee. *Klutman*, 769 N.W.2d at 444. Plaintiff sued the sponsor of the football game. *Klutman*, 769 N.W.2d at 444. At trial, the defendant's president testified that, after the incident, the turf seams had since been taped. *Klutman*, 769 N.W.2d at 444. Another defendant witness testified that tape had been used on the seams prior to the date of the injury. *Klutman*, 769 N.W.2d at 445. Defendant appealed, arguing that the trial court erred in allowing evidence of a subsequent remedial measure. *Klutman*, 769 N.W.2d at 444, 451. South Dakota's Supreme Court held that the court did not err in allowing evidence seam taping because it was not a subsequent remedial measure: the taping occurred both prior to and after plaintiff's injury. *Klutman*, 769 N.W.2d at 451-52.

Here, unlike both *Ranches* and *Klutman*, there is no concrete evidence that Albertson's custom was to routinely use pallet guards on large displays. To the contrary, Albertson's policy was to use them on small displays, where they were effective. Although Albertson's *could* use them on large displays, its typical procedure was to avoid them because they did more harm than good. *Ranches* and *Klutman* were cases where the record clearly demonstrated that defendant was taking a predetermined measure that merely continued after

the incident. In contrast, the record here shows that Albertson's reacted to Mr. Pupo's fall by installing pallet guards on a large display.

4. Albertson's did not contest the feasibility of installing pallet guards on large food displays.

ER 407 does not require a court to exclude evidence of subsequent remedial measures when "offered for another purpose, such as . . . feasibility of precautionary measures." See, e.g., *Wick v. Clark County*, 86 Wn. App. 376, 383, 936 P.2d 1201 (1997), *overruled on other grounds*, *Keller v. City of Spokane*, 146 Wn.2d 237, 249, 44 P.3d 845 (2002) ("Evidence of subsequent remedial measures may be admitted if feasibility is *controverted*." (emphasis in original). Where a defendant concedes feasibility, the plaintiff cannot alone make it an issue. *Wick*, 86 Wn. App. at 384 (citing *Bartlett*, 84 Wn. 2d at 429 ("It takes, however, two parties to make a factual allegation a contested matter in a case.")). Washington court have been cautioned that

before admitting the evidence for...other purposes [such as feasibility], the court should be satisfied that the issue on which it is offered is of substantial importance and is actually, and not merely formally in dispute, that the plaintiff cannot establish the fact to be inferred conveniently by other proof, and consequently that the need for the evidence outweighs the danger of its misuse.

Bartlett, 84 Wn.2d at 430, (citing C. McCormick, Evidence § 275 (E. Clearly 2d ed. 1972)).

Mr. Pupo asserts that Albertson's controverted the feasibility of using pallet guards on large pallet displays because Albertson's counsel and

witnesses stated that pallet guards were not capable of being used successfully on large pallet displays. Br. of App. at 35. He is misguided because Albertson's position at every step was that the pallet guards could be placed around the displays. In fact, Albertson's even agreed to stipulate that the pallet guards were feasible on a large display. VI VRP at 539.

Wick is instructive. There, a car hit plaintiff while he was bicycling on a county road. *Wick*, 86 Wn. App. at 378. After the accident, the defendant county posted a sign reading, "Limited Sight Distance 20 m.p.h." *Wick*, 86 Wn. App. at 378. In a motion in limine, the defendant moved under ER 407 to exclude evidence that it had posted "Limited" or "Impaired Sight Distance" signs and a 20 m.p.h. speed limit sign after the accident. *Wick*, 86 Wn. App. at 382. Plaintiff opposed the motion, insisting that feasibility was at issue. *Wick*, 86 Wn. App. at 382. Defendant responded that it did not dispute feasibility, whereupon Plaintiff demanded a stipulation, but Defendant refused. *Wick*, 86 Wn. App. at 382. The trial court granted defendant's motion to exclude the evidence because the defendant had not controverted the feasibility. *Wick*, 86 Wn. App. at 382. At trial, defendant's expert witnesses testified that warning signs, with or without speed advisories, are not effective in reducing speed. *Wick*, 86 Wn. App. at 379.

On appeal to this court, plaintiff argued that the defendant raised feasibility by presenting testimony that the warning signs would not slow

traffic. *Wick*, 86 Wn. App. at 384. This court disagreed, reasoning that defendant's witnesses "did not testify as to the feasibility of putting up warning signs [but rather] testified that warning signs would not be *effective*." *Wick*, 86 Wn. App. at 384 (emphasis in original). "We conclude that because feasibility was not an issue, the evidence of repairs was not admissible." *Wick*, 86 Wn. App. at 384.

Here, Albertson's did not dispute the feasibility of installing pallet guards on a large display. Instead, like in *Wick*, Albertson's position was that such pallet guards were not effective, and its witnesses testified accordingly. Mr. Liegal testified that he usually did not use pallet guards on 6 pallet displays because they were flimsy when wrapped around too many pallets. When the displays were larger than 2 pallets, Mr. Liegal chose not to use them because they caused more problems than they solved. VI VRP at 644. Even on cross-examination, Mr. Liegal maintained his position that using pallet guards on large displays was feasible, just not effective:

- Q: I am going to ask you about a four pallet display. You are not saying that it's not feasible to put pallet guards around a four pallet display, are you?
- A: I am saying that I would not recommend it in my experience.
- Q: So, you are saying it's not feasible to put pallet guards around a four pallet display?
- A: *It is feasible.*
- Q: And in fact, it's done, isn't it?
- A: It can be done, yes.

VI VRP at 657 (emphasis added). Based on the foregoing caselaw and

evidence, the trial court did not abuse its discretion in finding that Albertson's did not challenge the feasibility of using pallet guards on large displays.

Regardless, Mr. Pupo invited error, if any, by raising the issue of feasibility himself and then ignoring Albertson's offer to stipulate. The invited error doctrine "prohibits a party from setting up an error at trial and then complaining of it at appeal." *State v. Pam*, 101 Wn.2d 507, 511, 680 P.2d 762 (1984), *overruled on other grounds by State v. Olson*, 126 Wn.2d 315, 893 P.2d 629 (1995). The doctrine is applied even in cases where the error resulted from neither negligence nor bad faith. *City of Seattle v. Patu*, 147 Wn.2d 717, 720, 58 P.3d 273 (2002).

In the present case, Albertson's expressly stipulated that the pallet guards were feasible on a large display. VI VRP at 539. However, Mr. Pupo chose to ignore Albertson's offer, ostensibly to create error for appeal. *See* VI VRP at 539. Mr. Pupo did not seek to admit evidence that Albertson's installed pallet guards after the incident in order to prove feasibility; they simply wanted the evidence repeatedly shown to the jury as proof of Albertson's negligence.

5. Excluding evidence that Albertson's installed pallet guards after Mr. Pupo tripped is consistent with the principles underlying ER 407.

The trial court's decision to exclude evidence of Albertson's

subsequent remedial repair is consistent with the two principles underlying ER 407. Those two principles are: (1) it may discourage developing safety measures and (2) it is generally not relevant. *Hyjek*, 133 Wn.2d at 418.

- i. Evidence that Albertson's installed pallet guards after Mr. Pupo tripped is irrelevant and unfairly prejudicial under ER 403.*

Historically, courts have excluded evidence of subsequent remedial repairs because such evidence “is of little probative value, since repair may not be an admission of fault.” *Hyjek*, 133 Wn.2d at 418 (citing *Columbia & Puget Sound R.R. Co. v. Hawthorne*, 144 U.S. 202, 207-08, 12 S. Ct. 591, 36 L. Ed. 405 (1892)). Indeed, as early as 1899, Washington courts have recognized the high likelihood that remedial measures could be confused with an admission of negligence:

A person may have exercised all the care which the law required, and yet, in the light of his new experience, after an unexpected accident has occurred, and as a measure of extra caution, he may take additional safeguards. The more careful a person is, the more regard he has for the lives of others, the more likely he would be to do so; and it would seem unjust that he could not do so without being liable to have such acts construed as an admission of prior negligence.

Carter v. City of Seattle, 21 Wash. 585, 589, 59 P. 500, 501 (1899).

“Traditional reasons for excluding post-accident changes are that such changes are not relevant to alleged tort-feasor’s objective conduct and perception before the accident, but rather to his subjective beliefs which are not pertinent to the question of negligence.” *Codd v. Stevens Pass, Inc.*, 45 Wn.

App. 383, 406, 725 P.2d 1008 (1986). Evidence of subsequent measures can have the “prejudicial effect of showing by inference that the defendant himself must have believed his prior [action or inaction] was negligent because he subsequently altered the premises.” *Bartlett*, 84 Wn.2d at 430. “Subjective belief of a defendant in a negligence action is not relevant to the issue of his negligence.” *Bartlett*, 84 Wn.2d at 430, *citing Peterson v. Betts*, 24 Wn.2d 376, 165 P.2d 95 (1946); *see, e.g., Anderson v. Malloy*, 700 F.2d 1208, 1213 (8th Cir. 1983) (Probative worth of any evidence not excluded by ER 407 must outweigh any risk of prejudice).

In sum, Washington caselaw acknowledges that evidence of subsequent remedial repairs is minimally relevant and highly prejudicial: a jury may apply a subjective rather than an objective standard after hearing evidence of the defendant’s kneejerk reaction to an injury that a plaintiff attributes to the defendant. Courts have found that evidence of subsequent remedial repair is of little value, since the subsequent change is not an admission of fault. *See Hyjek*, 133 Wn.2d 414 (citing *Columbia*, 144 U.S. 202 at 207-08).

ER 403 states that relevant evidence may be “excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” “The

[trial] court has broad discretion to exclude evidence it considers unduly prejudicial.” *Codd*, 45 Wn. App. at 406 (citing ER 403).

Here, evidence that Albertson’s placed pallet guards around the subject display after Mr. Pupo tripped is highly prejudicial and is only evidence Mr. Cutler’s subjective belief that omitting pallet guards contributed to Mr. Pupo’s tripping. Mr. Cutler did not see Mr. Pupo trip; instead, he understood the situation entirely secondhand from the Mr. Pupo’s rendition of the facts.

Further, allowing evidence that Albertson’s installed pallet guards after Mr. Pupo tripped would have excited the jury into immediately assuming that Albertson’s negligently created and maintained the display. Such evidence would have been unfairly prejudicial where Albertson’s act in putting up the display could have been merely a precautionary measure until it could understand the facts of the situation better. ER 403. The trial court was correct to exclude prejudicial evidence with minimal relevancy and probative weight.

ii. *Allowing evidence that Albertson’s installed pallet guards after Mr. Pupo tripped would discourage future safety precaution efforts.*

Washington courts also exclude evidence of subsequent remedial repairs to encourage safety precautions. *Hjyek*, 133 Wn.2d at 418 (citing Karl B. Tegland, 5 Wash. Prac. *Evidence* § 131, at 471 (3d ed.1989)); *see also Codd*, 45

Wn. App. 393. ER 407 encourages parties to implement safety measures by ensuring that such steps will not be used against them in a future lawsuit. *Hyjek*, 133 Wn.2d at 419, (citing *Carter v. City of Seattle*, 21 Wash. 585, 59 P. 500 (1899)); *see also* ER 407 advisory committee note. Introducing evidence of subsequent remedial repairs may discourage parties from seriously considering safety precautions. *Hyjek*, 133 Wn.2d at 418-19.

Here, the trial court's decision to exclude the evidence at issue is in line with the policy of encouraging parties from implementing safety precautions. If the court had allowed such evidence, Albertson's would be forced to rethink any remedial measures—such as the temporary one employed here—that they take after unfortunate and unavoidable accidents.

B. Even if the trial court erred in excluding evidence that Albertson's installed pallet guards after Mr. Pupo tripped over a pallet, the error was harmless.

Rulings of the trial court are only reversible when they prejudice a party. *Brown v. Spokane County Fire Protec. Dist. 1*, 100 Wn.2d 188, 196, 668 P.2d 571 (1983). An error is prejudicial to a party if it affects the outcome of the trial. *Brown*, 100 Wn.2d at 196. A harmless error is a trivial error, which in no way affects the outcome of the case. *Crittenden v. Fibreboard Corp.*, 58 Wn. App. 649, 659, 794 P.2d 554 (1990). Here, any error was harmless.

Mr. Pupo complains on appeal that he deserves a new trial because the trial court erred in excluding evidence that Albertson's installed pallet

guards after Mr. Pupo tripped. But what Mr. Pupo completely fails to acknowledge is that though his incessant and relentless requests, Mr. Pupo actually managed to squeeze some of this very evidence by the trial court's consistent ruling to exclude it. He also fails to acknowledge that he presented evidence of Albertson's alleged negligence—the jury just did not believe his theory. Finally, the evidence that Mr. Pupo complains about evidence not being admitted that is irrelevant in light of evidence that Mr. Pupo tripped over the corner, which is something that the pallet guards would not have prevented.

1. Mr. Pupo managed to squeeze by the trial court evidence that Albertson's used pallet guards after the fall.

Mr. Pupo first moved in limine to admit evidence that Albertson's installed pallet guards after the incident. The court denied his request. He then requested the court to admit Mr. Mayr's deposition testimony that referred to a photo taken after the incident showing the display with pallet guards. The court denied his request. Mr. Pupo did not stop, though, and asked the court to admit Mr. Liegal's deposition testimony that also referred to a photo taken after the incident showing the display with pallet guards. Again, the court denied his request. Finally, on his fourth attempt, Mr. Pupo requested the court to admit an excerpt of Mr. Cutler's deposition that contained the following:

[Mr. Pupo]: 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?

[Mr. Cutler]: I believe so.

VI VRP at 553; CP at 1841 (p. 14). Over Albertson's objection, the trial court inadvertently allowed this evidence into trial. Finally, Mr. Pupo asked the court to admit his pretrial request for admission that Mr. Cutler had pallet guards installed after the fall; the court denied this request.

The record shows that the trial court inadvertently admitted the portion of Mr. Cutler's deposition cited above in which Mr. Cutler indicated that he thought Albertson's installed pallet guards after the incident. Specifically, Mr. Pupo sought to use this evidence to cross-examine Mr. Liegal, asking him, "Were [the pallet guards] installed after Mr. Pupo fell?" VI VRP at 660. Albertson's objected, and Mr. Pupo made an offer of proof to the court, essentially arguing that because the court had allowed in this evidence of a subsequent remedial repair, s Mr. Pupo should be permitted to discuss the evidence. The trial court stated:

No, I reserved ruling. You all keep disregarding. I reserved ruling. I said that it felt like it wasn't. Now I have heard the testimony and it feels like it is [a subsequent remedial repair], 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.

VI VRP at 670. Mr. Pupo kept disregarding the court's order and by mere persistence was able to get some of the evidence admitted. Thus, Mr. Pupo managed squeeze by the trial court evidence that Albertson's installed pallet

guards after the incident.

However, because this evidence went to the jury, any error that the trial court may have committed in refusing other such evidence was harmless. The court, albeit inadvertently, gave Mr. Pupo precisely what he wanted. Although Mr. Pupo could not elicit testimony and argue about the evidence, the jury nonetheless heard evidence that Albertson's installed pallet guards after Mr. Pupo fell. In fact, the jury heard this evidence of a subsequent remedial repair without receiving a limiting instruction. This evidence severely undermines his position on appeal that he did not receive a fair trial.

In addition to receiving the evidence he sought, Mr. Pupo succeeded in persuading the trial court to admit Mr. Cutler's incident report over Albertson's vehement objection. The incident report stated, "Is there any defective equipment or conditions to be repaired or replaced?" CP at 906; Ex. 11. "Yes" was circled and "pallet guards" was written on the blank space provided. CP at 906; Ex. 11. Although this incident report does not explicitly state that Albertson's installed pallet guards after Mr. Pupo' tripped over the display, the report does raise a strong inference that Albertson's would, or at the very least should, install them. As Mr. Cutler stated in his deposition, the report is used to "[make] changes, if any need to happen." CP 913.

2. Mr. Pupo presented evidence that Albertson's was negligent; the jury just did not believe his theory.

The trial court did not limit Mr. Pupo from presenting his case. Mr. Pupo elicited testimony at trial that Albertson's failed to install pallet guards on the display that Mr. Pupo tripped over; that pallet guards make displays safer; that Albertson's had plenty of pallet guards; that Albertson's could have made smaller displays so that pallet guards could be effective; that someone may have forgotten to put pallet guards on the display Mr. Pupo tripped over. VI VRP at 651-56. Mr. Pupo presented his evidence and received a fair trial; the jury simply disagreed with him on the degree to which Albertson's was negligent.

Mr. Pupo fails to demonstrate how hearing additional evidence of the subsequent repair would have changed the outcome of the case. Apparently, Mr. Pupo is upset that the trial court did not give them unfettered discretion to use evidence of a subsequent remedial repair to show negligence. The aforementioned evidence, though, clearly shows that the jury simply found Albertson's partially negligent.

3. Mr. Pupo complains about evidence not being admitted that is irrelevant in light of evidence that Mr. Pupo tripped over the corner

Furthermore, the record contains evidence that, if the jury believed, would have rendered the entire pallet guard issue meaningless: Mr. Pupo's testimony that he tripped on the corner of the pallet and that his foot did not

even enter the portion a pallet guard was designed to protect. Specifically, Mr. Pupo testified on direct that he “caught [his] foot on the corner.” III VRP at 116. On cross, Albertson’s asked, “I want to make sure that we are clear is your foot didn’t go into the pallet. It caught the edge?” III VRP at 171. Mr. Pupo replied, “I don’t know whether it went in or not.” III VRP at 171. Albertson’s then impeached Mr. Pupo with his deposition testimony, in which Mr. Pupo agreed that he remembered tripping on the edge of the pallet. III VRP at 171-72. After being impeached, Albertson’s asked, “So it’s your deposition, that was your testimony that your left foot caught the edge of the pallet?” Mr. Pupo responded, “Yes.” III VRP at 172.

Based alone on Mr. Pupo’s testimony that he tripped on the corner, any error the trial court may have committed with regard to excluding evidence that Albertson’s installed pallet guards after the incident is clearly harmless. The jury had a perfectly valid reason to reject Mr. Pupo’s theory that Albertson’s was negligent in failing to install pallet guards. Although the jury apportioned Albertson’s 10 percent of the liability, this 10 percent could easily be the result of the jury finding the display’s location negligent, as opposed to Albertson’s decision not to install pallet guards.

Mr. Pupo received a fair trial. Accordingly, if this court finds that the trial court erred in admitting evidence that Albertson’s installed pallet guards after he tripped, such error was harmless in light of the record as a whole.

C. The trial court did not abuse its discretion in denying Mr. Pupo's motion for new trial.

A trial court's decision to deny a motion for a new trial is reviewed for abuse of discretion. *Palmer v. Jensen*, 132 Wn.2d 193, 197, 937 P.2d 597 (2011) (citing *Wooldridge v. Woolett*, 96 Wn.2d 659, 668, 638 P.2d 566 (1981)). There is no abuse of discretion where sufficient evidence supports the jury's verdict. *McUne v. Fuqua*, 45 Wn.2d 650, 652, 277 P.2d 324 (1954).

A request for a new trial raises the basic question of whether the party received a fair trial. *Dybdahl v. Genesco Inc.*, 42 Wn. App. 486, 488, 713 P.2d 113 (1986) (citing *Olpinski v. Clement*, 73 Wn.2d 944, 951, 442 P.2d 260 (1968)). "The determination of the amount of damages is within the province of the jury, and courts hesitate to interfere with a jury's damage award when fairly made." *Palmer*, 132 Wn.2d at 197.

To determine if the record supports the jury's verdict for the purpose of deciding a motion for a new trial, the court must view the evidence in the light most favorable to the non-moving party. *Kobfield v. United Pac. Ins. Co.*, 85 Wn. App. 34, 41, 931 P.2d 911 (1997). Damages so inadequate that they are unmistakably the product of passion or prejudice can warrant a new trial, but an award without general damages does not automatically require a new trial. CR 59(a)(5); RCW 4.76.030; *Cooperstein v. Van Natter*, 26 Wn. App. 91, 611 P.2d 1332 (1980), *overruled on other grounds*, 117 Wn.2d 426, 815 P.2d 1362 (1991).

There is no “*per se* rule that general damages must be awarded to every plaintiff who sustains an injury.” *Lopez v. Salgado-Guadarama*, 130 Wn. App. 87, 93, 122 P.3d 733 (2005) (citing *Palmer*, 132 Wn.2d at 201). A jury may award special damages and no general damages when “the record would support a verdict omitting general damages.” *Gestson v. Scott*, 116 Wn. App. 616, 620, 67 P.3d 496 (2003) (citing *Palmer*, 132 Wn. at 197). In *Lopez*, the plaintiff was the victim of a low-speed rear-end motor vehicle accident. *Lopez*, 130 Wn.App. at 90. The defendants contested whether plaintiff’s medical treatment was necessary and whether plaintiff’s testimony regarding pain and suffering was credible. *Lopez*, 130 Wn. App. at 89-90. Ultimately, the contested evidence regarding Mr. Lopez’s injuries was adequate to support the verdict. *Lopez*, 130 Wn. App. at 92.

In *Gestson*, the jury awarded the plaintiff, a woman with a long history of back problems, the cost of an emergency room visit but no additional medical specials or general damages. *Gestson*, 116 Wn. App. at 619. The Court of Appeals held that a new trial was inappropriate because the record “contain[ed] sufficient evidence to support the jury’s conclusion that [the defendant] was not liable” for the plaintiff’s injuries. *Gestson*, 116 Wn. App. 625. Ultimately, “the record contain[ed] sufficient evidence to support the jury’s conclusion that the Gestsons failed to prove...that the car accident caused” the plaintiff’s injury. *Gestson*, 116 Wn. App. at 625.

Lopez and *Gestson* collectively shed light on the relevant factors in determining whether the plaintiffs established undisputed general damages which are beyond legitimate controversy. The courts consider questions such as whether the defendant disputed the plaintiff's version of the facts, whether the plaintiff's credibility was put into question, and whether the jury could have reasonably concluded that the plaintiff incurred medical expenses as a result of the accident, while at the same time concluding he failed to carry his burden of proving general damages. Evidence of pre-existing conditions also substantiates an award of special damages and no general damages. *Gestson*, 116 Wn. App. at 619.

In this case, 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 six years before the subject fall. III VRP at 104-05. The defendant's treating physician conceded that the MRI report suggested that the tear existed before the fall. IV VRP at 244-45. From this evidence, the jury reasonably concluded that Mr. Pupo incurred medical expenses as a result of the fall, but failed to carry his burden of proving general damages. CP at 1263-65. It is apparent that Mr. Pupo failed to prove that any pain and suffering he experienced was the effect of the fall at Albertson's and not from the well-documented pre-existing condition. In fact, Mr. Pupo admitted that he did not take any pain medications. Similarly,

the jury also heard that Mr. Pupo was able to resume golf, travel, and household chores soon after his surgery. III VRP at 125, 149, 177; IV VRP at 358. Importantly, Dr. Russo, Albertson's retained board certified surgeon, clearly testified that Mr. Pupo suffered nothing more than a contusion to his right shoulder. CP at 1992, 2020.

Mr. Pupo was not denied substantial justice: he presented his case and prevailed on the issue of negligence and proximate cause. However, Mr. Pupo failed to meet his burden to prove general damages. Because the damages awarded were not unreasonable and were within the range of reasonable judgments, the jury's verdict should stand.

IV. CONCLUSION

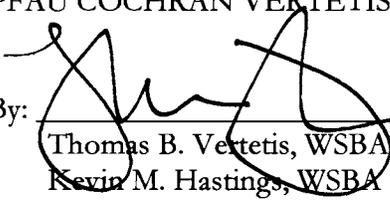
Albertson's respectfully requests that this court denies Mr. Pupo's appeal in its entirety. If this court holds that the trial court abused its discretion in excluding evidence that Albertson's installed pallet guards after Mr. Pupo's fall, Albertson's respectfully requests that this court remand only on the liability issue, as the jury has already determined the damages issue. Likewise, if this court holds that the trial court abused its discretion in refusing to grant Mr. Pupo a new trial, Albertson's respectfully requests that this court remand only for the issue of damages.

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RESPECTFULLY SUBMITTED this 24th day of August, 2011.

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