IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

FRANK PUPO, SR. and JANIS PUPO, husband and wife, Appellants, v. ALBERTSON'S, INC., a foreign corporation; SUPERVALU, INC., a foreign corporation; and NEW ALBERTSON'S, INC., a Washington corporation, Respondents.	No. 41451-1-II UNPUBLISHED OPINION

Penoyar, J. — In this trip and fall case, Frank Pupo appeals the trial court's exclusion of evidence that, after the fall, Albertson's, Inc. installed pallet guards on the large watermelon display that Pupo tripped over, ruling that such evidence was an inadmissible subsequent remedial measure. Pupo argues that installing the guards was neither subsequent nor remedial and that Albertson's contested the feasibility of installing the guards. Because the evidence was actually admitted and Pupo presented his pallet-guard theory to the jury, any error was harmless. Pupo also appeals the denial of his motion for a new trial, arguing that the jury improperly awarded all the requested economic damages, including medical expenses for rotator cuff surgery, but zero noneconomic damages. Since the zero noneconomic damage award is inconsistent with the remainder of the jury's verdict and with the undisputed evidence that Pupo suffered pain, we reverse and remand for a new trial on noneconomic damages.

FACTS

On July 21, 2007, Frank Pupo drove to an Albertson's grocery store in Gig Harbor to buy

whipping cream. After parking his car, Pupo walked in the store's main entrance, where he encountered Albertsons's watermelon display. The display consisted of six pallets with six cardboard bins of watermelon sitting on top. Each pallet was three feet by four feet. A corner of the pallet stuck out from the cardboard bins. About eight or nine feet to the right of the watermelon display was a seafood kiosk.

As Pupo approached the main entrance, he noticed people gathered near the seafood kiosk. Pupo made his way through the crowd on the side nearest the watermelon display. The crowd blocked Pupo's view in front. As he passed the watermelon display, Pupo looked toward the seafood kiosk, caught his left foot on the corner of the watermelon display and fell down. He later examined the display and realized that he had caught his foot on the corner of a pallet on which the cardboard bins had rested. Pupo did not know whether his foot had gone inside the pallet.

Pupo's wife took him to the hospital, where he had an x-ray on his right shoulder, which revealed a contusion. After that, Pupo returned to the store to fill out an incident report. Nathan Cutler, an Albertson's employee, filled out the report. The report answered "Yes" to the question, "Is there any defective equipment or conditions to be repaired and replaced?" Clerk's Papers (CP) at 906; Ex. 11. Cutler described the defective equipment or conditions as "pallet guards." CP at 906; Ex. 11.

On single pallet displays, Albertson's always uses pallet guards, which are designed to wrap around the pallet to close the gaps. Although the pallet guards fit one pallet, employees could connect the pallet guards because "they just slide together at the ends" To fit several pallets. 6 Report of Proceedings (RP) at 642. While Albertson's had a policy that single display pallets

require pallet guards, there was no official pallet guard policy for large displays. Rich Liegal, the produce manager, did not use pallet guards with six-pallet displays because he "had a hard time with them staying standing" and the guards would "want to be loose and fall away from the display." 6 RP at 642.

Within several days of the fall, Pupo went to an orthopedic surgeon, who gave him a cortisone shot in his right knee, which still hurt from the fall. Pupo then saw Dr. Spencer Coray, an orthopedic surgeon who focused on shoulders. Pupo had complained of right shoulder pain as early as 2001, resulting in an MRI and a cortisone shot. On August 3, 2007, Pupo had an MRI revealing a tear of the supraspinatus and infraspinatus muscles. Pupo had arthroscopic surgery on his right shoulder on September 14, 2007. Pupo received physical therapy and worked with a personal trainer at a fitness center.

Pupo sued Albertson's for negligently causing his injuries. Pretrial and during trial, Pupo sought to call several witnesses to testify that Albertson's had placed pallet guards around the large displays after the incident. The trial court denied Pupo's requests. Over Albertson's objection, the trial court admitted an excerpt of Cutler's deposition to be read to the jury, in which Cutler explained that, after the fall, he had talked to the produce department, which had set up pallet guards around the six-pallet display and that "somebody might have forgotten to put [the pallet guards] on" the watermelon display. CP at 722. The court precluded Pupo from mentioning this testimony during his closing argument. Albertson's conceded that it was feasible to put up pallet guards. It elicited testimony that the pallet guards had a hard time standing on large displays because they would become loose and fall away from the display.

The jury found that both Albertson's and Pupo were negligent and that negligence by both

proximately caused Pupo's injury. It apportioned 90 percent fault to Pupo and 10 percent fault to Albertson's. The jury awarded Pupo's requested $47,517.97 in economic damages. The jury awarded him no noneconomic damages.

Pupo moved for additur or a new trial, arguing that the trial court improperly precluded him from introducing evidence that Albertson's installed pallet guards after the incident and that the jury improperly failed to award noneconomic damages. The trial court denied the motion, and Pupo appeals.

ANALYSIS

I. Evidence of Subsequent Remedial Measure

Pupo argues that the trial court erred when it excluded evidence that Albertson's added pallet guards to the display after Pupo's injury because such evidence constituted a subsequent remedial measure. He argues that the evidence was not a subsequent remedial measure because Albertson's had placed the pallet guards on the large displays before Pupo's injury and because Albertson's had controverted the feasibility of placing pallet guards on the large displays. Albertson's argues that the trial court properly excluded evidence of a subsequent remedial measure and that it had always stipulated that it was feasible to place pallet guards on the displays. We hold that Pupo presented the jury with evidence of and argument on the post-accident placement of the pallet guards and so any error was harmless.

When a party challenges an evidentiary issue, we review whether the trial court's decision was untenable or unreasonable. *Proctor v. Huntington*, 146 Wn. App. 836, 852, 192 P.3d 958 (2008). ER 407 provides:

> 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.

This rule codifies the common law doctrine that precludes evidence of subsequent remedial measures as a proof of an admission of fault. *Hyjek v. Anthony Indus.*, 133 Wn.2d 414, 417, 944 P.2d 1036 (1997). The underlying policy is that such evidence is not relevant because the repair does not indicate a breach of a duty and that such evidence may discourage development of safety measures. *Hyjek*, 133 Wn.2d at 418.

Pretrial, Pupo moved in limine to admit evidence from several witnesses that Albertson's had placed pallet guards on the watermelon display after Pupo's injury. He contended that this was not a subsequent remedial measure because Albertson's had placed pallet guards on displays before and because Albertson's disputed the feasibility of using the pallet guards. Albertson's argued that using the pallet guards constituted a subsequent remedial measure and that it did not contest feasibility. The trial court denied Pupo's motion.

Albertson's objected to Pupo's request to admit the incident report stating that the pallet guards were a defect requiring repair as a subsequent remedial measure. The trial court ruled that the report was not a subsequent remedial measure.

The jury heard evidence in various forms from Albertson's employees Cutler and Liegel that tended to show that the lack of pallet guards was a defect, that someone may have forgotten to install the guards, and that guards were installed after the incident. The trial court excluded other similar evidence and forbade Pupo from referring during closing to some of the evidence that was admitted at trial. Liegal, Cutler, and another Albertson's employee also testified that they

did not use pallet guards around a multiple pallet display because the guards had a hard time staying standing. Liegal testified that Albertson's did not have a policy or practice for routinely installing pallet guards on large displays.

The "feasibility" exception to ER 407 comprises situations where the parties dispute whether the remedial measure is realistic; whether it could be accomplished and at what cost or convenience. *Brown v. Quick Mix Co.*, 75 Wn.2d 833, 838-40, 454 P.2d 205 (1969); *Wick v. Clark County*, 86 Wn. App. 376, 384, 936 P.2d 1201 (1997), *overruled on other grounds, Keller v. City of Spokane*, 146 Wn.2d 237, 44 P.3d 845 (2002); *Reil v. State*, 4 Wn. App. 976, 977, 484 P.2d 1150 (1971); *Meabon v. State*, 1 Wn. App. 824, 825-27, 831, 463 P.2d 789 (1970). While Pupo cites an Eighth Circuit case for the contrary proposition,[1] feasibility does not include utility and effectiveness. *Wick*, 86 Wn. App. at 384. Thus, the rule prohibited Pupo from rebutting Albertson's assertion that the pallet guards would not be effective by pointing out that Albertson's did install them. This result is consistent with ER 407's rationale in that it encourages any safety measure that might possibly be effective. And the evidence and argument that were excluded were of limited relevance since they did not show Albertson's negligence before the incident but, rather show what two non-experts thought might have helped in hindsight.

During closing argument, Pupo argued that ordinary care required Albertson's to put guards on its display pallets because "people can trip on them." 7 RP at 708. Albertson's argued that it did not place pallet guards on large six-bin pallets. It argued that it was safer not to have the pallet guards on the large displays. The trial court prevented Pupo from discussing Cutler's testimony. In rebuttal, Pupo argued that Albertson's "broke its own rules" as well as the rule that

[1] *Anderson v. Malloy*, 700 F.2d 1208 (8th Cir. 1983).

it exercise ordinary care for the safety of its customers. 7 RP at 763.

While the trial court's rulings were arguably inconsistent, we see no substantial error in its application of ER 407. We reverse only when an error prejudices a party. *Brown v. Spokane County Fire Prot. Dist. No. 1*, 100 Wn.2d 188, 196, 668 P.2d 571 (1983). An error is prejudicial to a party if it affects the trial outcome. *Brown*, 100 Wn.2d at 196. A harmless error is one "which is trivial, formal, or merely academic and which in no way affects the outcome of the case." *State v. Gonzales*, 90 Wn. App. 852, 855, 954 P.2d 360 (1998); *see Crittenden v. Fibreboard Corp.*, 58 Wn. App. 649, 659, 794 P.2d 554 (1990).

Here, the jury heard that Albertson's could have used pallet guards on the larger displays, and Pupo argued that using the pallet guards on the watermelon display was appropriate. Pupo also argued to the jury during his closing argument that the pallet guards should have been installed, which was his theory of the case. Even assuming that the trial court acted erroneously, any error was harmless because the jury could rely on much of the same facts Pupo argues should have been admitted and because Pupo still argued his theory of the case.

II. Jury's Failure to Award Non-Economic Damages

Pupo argues that the trial court should have granted his motion for new trial because the jury failed to award noneconomic damages where there was no evidence or reasonable inference from the evidence that he was not entitled to pain and suffering. Albertson's argues that the jury's verdict was proper. We hold that the jury's failure to award noneconomic damages was error because that verdict is inconsistent with the evidence and the jury's economic damages award.

We are reluctant to interfere with a jury's damage award because determining the amount of damages is within the jury's province. *Lock v. City of Seattle*, 162 Wn.2d 474, 486, 172 P.3d

705 (2007) (quoting *Palmer v. Jensen*, 132 Wn.2d 193, 197, 937 P.2d 597 (1997)). CR 59(a)(7) allows a trial court to grant a new trial when "there is no evidence or reasonable inference from the evidence to justify the verdict or the decision" or if the decision is contrary to law. We review whether the trial court's ruling was untenable or unreasonable. *Locke*, 162 Wn.2d at 486. We examine the record to determine whether sufficient evidence, viewed in the light most favorable to the non-moving party, supports the verdict. *Palmer*, 132 Wn.2d at 197.

Pupo had a history of right shoulder and lower extremity injuries and limitations before the incident. Six years before the fall, he sought medical attention in his right shoulder, requiring an MRI showing a possible tear in his right rotator cuff.[2] A doctor injected cortisone into the right shoulder. Pupo also experienced knee problems, requiring him to seek a total left knee replacement.

Pupo felt pain in his shoulder and knee after the fall. He received a cortisone shot in his knee. He saw an orthopedic surgeon for a shoulder evaluation, and a subsequent MRI showed a tear in his right rotator cuff. Six weeks after the incident, Pupo had surgery on his right shoulder to repair the rotator cuff.

Following surgery, Pupo had pain and a poor range of motion. He received physical therapy and worked with a trainer at a fitness center. He reported that he had not experienced a day where he had not felt some pain. A friend, Pupo's wife, and Pupo's son testified that Pupo had increased difficulty interacting with his grandchildren, playing sports, and getting in and out of a car.

[2] It is undisputed that Pupo had a preexisting condition in his shoulder prior to the fall. The experts disputed whether there was a complete tear or a full tear in 2001 when Pupo had the first MRI.

Pupo's doctor testified that the fall was connected to the need for surgery. The surgery was necessary because Pupo was "extremely symptomatic at that point." 4 RP at 201. The doctor opined that the weakness and limitations were "permanent." 4 RP at 206.

Albertson's expert never testified that Pupo did not experience pain. He testified that the fall produced a contusion in Pupo's shoulder and aggravated preexisting symptoms. He agreed with Pupo that the fall created a lot of shoulder pain and that Pupo would not fully recover from the surgery. The expert opined that Pupo's doctor's treatment was reasonable and that if Pupo had not fallen, he would not have been a candidate for rotator cuff surgery in September 2007. During closing, Albertson's argued that if the jury found it negligent, the total award should be "somewhere around a hundred thousand dollars." 7 RP at 760.

The jury awarded Pupo his requested $47,517.97 in economic damages for the medical bills. The jury awarded no noneconomic damages.

Pupo argues that the trial court should have ordered a new trial because the jury's failure to award noneconomic damages is inconsistent with the evidence, relying on *Palmer*, 132 Wn.2d 193, and *Fahndrich v. Williams*, 147 Wn. App. 302, 194 P.3d 1005 (2008). We agree that, following *Palmer* and *Fahndrich*, the jury's verdict is inconsistent with the evidence.

A plaintiff who substantiates his pain and suffering with evidence is entitled to noneconomic damages. *Palmer*, 132 Wn.2d at 201. In *Palmer*, the plaintiff argued that she was entitled to a new trial because the jury's damages award included only economic damages but not noneconomic damages. 132 Wn.2d at 198-201. The court noted that the plaintiff had been treated with pain medication and physical therapy for neck pain, low back pain, headaches, and

sleep difficulties for over a year after the accident, and that her treatment providers testified that she had constant pain and difficulty sleeping. *Palmer*, 132 Wn.2d at 202. The defendants did not introduce any evidence disputing these damages. *Palmer*, 132 Wn.2d at 196. The Supreme Court held that the jury's omission of general damages was contrary to the evidence. *Palmer*, 132 Wn.2d at 203.

On similar facts, we came to the same conclusion in *Fahndrich*, 147 Wn. App. 302. There, Fahndrich's car collided with Williams's car, causing Fahndrich's head to whip back and forth and to strike the headrest. *Fahndrich*, 147 Wn. App. at 303-04. She suffered pain in her neck, head, and back, and a doctor diagnosed her with myofascial pain syndrome. *Fahndrich*, 147 Wn. App. at 304. Seven months after the collision, Fahndrich was in another collision, but neither car sustained damage. *Fahndrich*, 147 Wn. App. at 304. Fahndrich's symptoms increased, and she reported jaw joint pain. *Fahndrich*, 147 Wn. App. at 304. Fahndrich sued both drivers, and neither defendant presented evidence disputing that Fahndrich suffered pain. *Fandrich*, 147 Wn. App. at 304-05. The second driver disputed whether the collision caused Fahndrich's jaw joint pain. *Fahndrich*, 147 Wn. App. at 305. The jury awarded Fahndrich economic damages but awarded her no noneconomic damages. *Fahndrich*, 147 Wn. App. at 305.

We reversed and remanded for a new trial on damages, holding that "'the jury found that the accident caused injuries but believed the plaintiff suffered no pain.'" *Fahndrich*, 147 Wn. App. at 309 (quoting *Ma'ele v. Arrington*, 111 Wn. App. 557, 562, 45 P.3d 557 (2002)). We explained that the defendants did not present evidence contradicting the changes to Fahndrich's life as a result of the accidents. *Fahndrich*, 147 Wn. App. at 308. The economic damages award eliminated the possibility that Fahndrich's injuries were minimal, not warranting an award.

Fahndrich, 147 Wn. App. at 308-309.

Here, like in *Fahndrich* and *Palmer*, Pupo presented extensive evidence of his pain and suffering, and Albertson's did not present evidence contradicting it. Pupo, his friend, and his family testified about the changes in Pupo's life because of his shoulder. He required surgery on the rotator cuff, followed by physical therapy and training. While the medical experts disagreed about the extent of Pupo's preexisting injury to his shoulder, Albertson's did not challenge that Pupo suffered pain or that the treatment was unreasonable.[3] Albertson's expert agreed that if Pupo had not fallen, he would not have been a candidate for rotator cuff surgery in September 2007. And like in *Palmer* and *Fahndrich*, the jury's award for medical expenses eliminates the possibility that it found Pupo's injuries were minimal or not causally related to the fall. *Palmer*, 132 Wn.2d at 196, 203; *Fahndrich*, 147 Wn. App. at 309. As in *Palmer* and *Fahndrich*, we hold that Pupo is entitled to a new trial because "'the jury found that the accident caused injuries but believed the plaintiff suffered no injuries.'" *Fahndrich*, 147 Wn. App. at 309 (quoting *Ma'ele*, 111 Wn. App. at 562).

[3]Albertson's incorrectly relies on *Lopez v. Salgado-Guadrama*, 130 Wn. App. 87, 122 P.3d 733 (2005), and *Gestson v. Scott*, 116 Wn. App. 616, 67 P.3d 496 (2003). In *Lopez*, the defendant presented expert testimony that no objective medical findings supported Lopez's extensive complaints of pain and that any pain was short-lived, so there was evidence supporting the jury's failure to award noneconomic damages. 130 Wn. App. at 92-93. Here, Albertson's presented no such evidence. In *Gestson*, the jury awarded only expenses for an emergency room visit and not for other claimed expenses allegedly resulting from the accident, including spinal surgery and noneconomic damages. 116 Wn. App. at 619. We held that there was sufficient evidence to support the jury's conclusion that Gestson failed to prove that the car accident caused the neck injury. *Gestson*, 116 Wn. App. at 625. Here, in contrast, the jury concluded that the fall caused the injuries that necessitated the surgery, physical therapy, and training. Given those injuries, there was evidence of Pupo's pain and suffering.

We reverse and remand for a new trial on noneconomic damages.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Penoyar, J.

We concur:

Armstrong, J.

Hunt, J.