IN THE
# ARIZONA COURT OF APPEALS
**DIVISION ONE**

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JEFFREY KLEINMAN, et al., *Plaintiffs/Appellants*,

*v.*

BANNER HEALTH, et al., *Defendants/Appellees*.

No. 1 CA-CV 19-0444
FILED 3-26-2020

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Appeal from the Superior Court in Maricopa County
No. CV2015-013479
The Honorable Timothy J. Thomason, Judge

**AFFIRMED**

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COUNSEL

Ahwatukee Legal Office, P.C., Phoenix
By David L. Abney
*Counsel for Plaintiffs/Appellants*

Campbell, Yost, Clare & Norell, P.C., Phoenix
By Sigurds M. Krolls, Rachel A. DaPena
*Counsel for Defendants/Appellees*

Jones, Skelton & Hochuli, P.L.C., Phoenix
By Eileen Dennis GilBride
*Counsel for Defendants/Appellees*

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**MEMORANDUM DECISION**

Judge Jennifer M. Perkins delivered the decision of the Court, in which Presiding Judge David D. Weinzweig and Judge James B. Morse Jr. joined

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**P E R K I N S**, Judge:

**¶1** Dr. Jeffrey Kleinman, M.D. and his wife, Mona Kleinman ("Plaintiffs"), appeal from a jury verdict against them on their negligence claim after Dr. Kleinman tripped and fell in an operating room. Their sole contention is that the trial court erred by instructing the jury on assumption of the risk. We affirm.

## FACTUAL AND PROCEDURAL BACKGROUND

**¶2** Just before 8 a.m., Dr. Kleinman entered the operating room ("O.R.") at Banner Boswell Medical Center ("Banner") to provide anesthesia services. Once inside the O.R. he fell and fractured his left patella. None of the other employees in the O.R. witnessed Dr. Kleinman's fall.

**¶3** Almost two years later, Plaintiffs sued Banner for negligence, claiming that Dr. Kleinman tripped over a misplaced electrical box and extension cord that blocked his path. Banner disputed Plaintiffs' claims.

**¶4** A nine-day jury trial ensued. Plaintiffs' counsel objected to Banner's proposed jury instruction on assumption of the risk. The trial court noted that it thought the instruction was "cumulative" and did not "add[] one iota to the case," but gave it because Banner had "put on sufficient evidence that would support the defense."

**¶5** The jury returned a verdict for Banner. The court denied Plaintiffs' motion for new trial, concluding that a sufficient factual basis existed for the instruction, and that any error was harmless because the result would have been the same without the instruction. Plaintiffs timely appealed.

## DISCUSSION

**¶6** Plaintiffs argue the trial court erred by instructing the jury on assumption of the risk because no evidence supported that instruction. We

review the court's decision to give the instruction and its later denial of Plaintiffs' new trial motion for an abuse of discretion. *Stafford v. Burns*, 241 Ariz. 474, 478, ¶ 10 (App. 2017).

**¶7** There are two types of assumption of the risk: express and implied. Implied assumption of the risk, the only type at issue here, requires three elements be met: (1) defendant's conduct poses a risk of harm to plaintiff; (2) plaintiff has actual knowledge of the risk and appreciates its magnitude; and (3) plaintiff voluntarily subjects himself to the risk under circumstances that show his willingness to accept that particular risk. *Hildebrand v. Minyard*, 16 Ariz. App. 583, 585 (1972).

**¶8** Despite Plaintiffs' contentions, we need not address whether there was sufficient evidence to support the assumption of the risk instruction here because the instruction did not prejudice Plaintiffs. The trial court instructed the jury that "[i]f you apply the defense of assumption of the risk, the [trial court] will later reduce Plaintiff[s'] full damages by the percentage of fault you have assigned to [Plaintiffs]." Plaintiffs do not argue on appeal that this instruction misstated the law.

**¶9** The trial court also gave the jury two alternative verdict forms. If the jury found in favor of Plaintiffs it would fill out the first form, which required it to state the full damages and apportion fault to both parties in terms of percentage. The jury left this form blank. If the jury found in favor of Banner then it would use the second verdict form. The jury signed this form.

**¶10** The jury would have only considered the assumption of the risk instruction if they had filled out the first verdict form (finding Banner liable for damages to Plaintiffs and apportioning fault), which they did not do. *See Hudgins v. Sw. Airlines, Co.*, 221 Ariz. 472, 482, ¶ 16 (App. 2009) ("[W]e must presume the jury followed [the trial court's] instruction[.]"). We find the assumption of the risk instruction did not prejudice Plaintiffs because the jury found no liability to offset. *See Am. Pepper Supply Co. v. Fed. Ins. Co.*, 208 Ariz. 307, 309, ¶ 7 (2004) (quoting *Gemstar Ltd. v. Ernst & Young*, 185 Ariz. 493, 504 (1996)) ("To warrant reversal, the jury instruction must have been not only erroneous, but 'prejudicial to the substantial rights of the appealing party.'").

**CONCLUSION**

**¶11** We affirm. Plaintiffs request their reasonable costs incurred on appeal. Because Plaintiffs are not the prevailing party, we decline to award costs.


AMY M. WOOD • Clerk of the Court
FILED: AA