IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

YANCY ANDERSON,
Plaintiff/Appellant,

v.

QUIKTRIP CORPORATION,
Defendant/Appellee.

No. 2 CA-CV 2015-0007
Filed November 20, 2015

Appeal from the Superior Court in Pinal County
No. CV201201043
The Honorable Daniel A. Washburn, Judge

AFFIRMED

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f).

COUNSEL

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By Theodore A. Julian, Jr., Melissa Iyer Julian,
and Daryl Manhart
Counsel for Appellee

MEMORANDUM DECISION

Judge Espinosa authored the decision of the Court, in which Presiding Judge Miller and Chief Judge Eckerstrom concurred.

¶1 In this personal injury action, appellant Yancy Anderson seeks the reversal of the jury's verdict in favor of appellee QuikTrip Corporation (QuikTrip). He contends the trial court abused its discretion by admitting certain evidence and by refusing his requested jury instructions. For the following reasons, we affirm.

Factual and Procedural Background

¶2 The facts relevant to the issues on appeal are essentially undisputed. Around 7:30 p.m. in April 2010, Anderson was leaving a QuikTrip convenience store in Casa Grande when he slipped off a sidewalk curb and was injured. Just before the accident, a QuikTrip employee had begun washing the walkway with a commercial-grade "powerwasher" that sprayed pressurized water. According to trial testimony, the store's exterior walkways are washed two to three times a week at the discretion of the store manager, and the store is open twenty-four hours a day with the fewest customers between midnight and early morning.

¶3 In April 2012, Anderson filed this negligence action. After a trial in which the jury found in favor of QuikTrip, the trial court entered judgment in accordance with the jury's verdict. We have jurisdiction over Anderson's appeal pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(1).

Evidentiary Ruling

¶4 Anderson first argues the trial court erred by allowing evidence showing a lack of prior powerwashing incidents at Arizona QuickTrip stores. Before trial, QuikTrip moved in limine to exclude thirty-eight incident reports involving powerwashing at

several of its stores in Arizona. Contemporaneously, Anderson moved to preclude QuikTrip from introducing evidence and arguing "there ha[d] never been other injury incidents involving power-washing at [QuikTrip] stores" which, he asserted, "would tend to isolate [Anderson]'s incident while intimating the procedure is reasonably safe."

¶5 At the hearing on the motions, Anderson sought admission of the incident reports, arguing he anticipated that the two QuikTrip employees would testify "they [we]re not aware of any other injury incidents ever taking place at a QuikTrip involving their powerwashing activities." He contended the reports would be "substantive proof of notice to [QuikTrip] . . . that powerwashing activity creates a dangerous condition, and notice to them that their policies and procedures with regard[] to how that is done is not reasonably safe."

¶6 QuikTrip argued the incident reports should be excluded for lacking foundation and not having "any real probative value." And it asserted its motion to preclude other accidents "corresponds to [Anderson]'s [m]otion in [l]imine . . . to preclude [QuikTrip] from saying that there were no other accidents." Alternatively, QuikTrip maintained it should be permitted to "put [the incident reports] into perspective," by introducing "evidence of how many customers [it has] at the 105 stores in Arizona." The trial court subsequently denied QuikTrip's motion in part, permitting Anderson to offer incident reports pertaining to slips and falls on its sidewalks but not in other areas. It also denied Anderson's motion to exclude evidence showing a lack of prior incidents, stating it was "part and parcel" of QuikTrip's motion to preclude evidence of other accidents "in that if . . . , in fact, [QuikTrip claims no other accidents], . . . you've got [the incident reports] to assist and argue . . . against it."

¶7 In his opening statement at trial, Anderson informed the jury:

> [T]his was [not] the very first time that a customer had slipped on a walkway after powerwashing activities outside. . . .

> [Y]ou'll be able to read other incident reports of other customers that walked outside on a walkway at QuikTrip locations here in Arizona for the three years before [he] fell, and you will see that it happens and QuikTrip knows about it.

In its opening statement, QuikTrip acknowledged this was not its first slip and fall occurrence and noted Anderson "ha[d] collected over a two-year period up to 11 different incidents . . . 11, under all kind[s] of different circumstances, 11 in a two-year period in 105 different QuikTrip stores throughout . . . Arizona." Anderson objected based on relevance, but was overruled.

¶8 At trial, the store manager[1] testified as follows:

> Q. . . . Can you give us an idea of how many customers that you would see in that store in any given shift or given day or given week? What is the best way of doing it?
>
> A. I would say about a thousand per shift that store.
>
> Q. About a thousand per shift during your night shift. And is that a ten-hour shift?
>
> A. Ten-hour shift, yeah. 9 or 10.
>
> Q. I could figure out this math if I wasn't accurate before, but let's just estimate[] it at 100 customers per hour?
>
> A. It would average to that, yes.
>
> Q. . . . So if it takes an hour to do the powerwashing, on average you are going

[1]The store manager's official title was "first assistant" but we refer to him as the manager for purposes of clarity and convenience.

> to have up to 100 customers come through your store during the powerwashing activity every day?
>
> A. Yes.
>
> Q. Is that right?
>
> A. Yes.
>
> Q. . . . 100 customers an hour, 100 customers a day while there's powerwashing going on if it's done once a day. Times 365 is 36,500 customers per year per store while powerwashing is going on. Is that right?
>
> A. Yes.
>
> Q. So 100 customers while the powerwashing is going on every day for a year, 36,000. And then there's 105 stores in the State of Arizona?
>
> A. Yes.
>
> Q. If there's 100 stores that's 3.65 million customers per year in Arizona, alone, that are visiting QuikTrip stores while powerwashing is going on?
>
> A. Yes.

In its closing argument, QuikTrip asserted: "3.68 million customers frequenting a QuikTrip convenience store while the powerwashing is going on and there are 11 incidents in over two years. So we are talking . . . almost 7.5 million people in that timeframe in Arizona alone frequenting the store during powerwashing and we have less than a dozen inciden[t]s where someone, for some reason or some circumstance, happens to have fallen."

¶9 Anderson maintains that the evidence "lacked foundation, was unfairly prejudicial and should not have been admitted by the trial court." "'We will not disturb the superior court's ruling on the admissibility of evidence unless it abused its discretion or misapplied the law.'" *Taylor-Bertling v. Foley*, 233 Ariz. 394, ¶ 3, 313 P.3d 537, 540 (App. 2013), *quoting Girouard v. Skyline Steel, Inc.*, 215 Ariz. 126, ¶ 10, 158 P.3d 255, 258 (App. 2007).

¶10 Anderson contends "the general rule is that evidence as to the lack of prior incidents is not admissible," citing *Jones v. Pak-Mor Mfg. Co.*, 145 Ariz. 121, 124, 128-29, 700 P.2d 819, 822, 826-27 (1985). However, in *Jones*, a product liability case, our supreme court overturned precedent holding that evidence of the absence of prior accidents was per se inadmissible. *Id.* at 124, 128-29, 700 P.2d at 822, 826-27. Observing that "safety-history is relevant," the court noted that such evidence had been rejected in part because of a type of "negative evidence" problem, i.e., "there have been prior accidents but the witness does not know about them." *Id.* at 125-26, 700 P.2d at 823-24. It held that trial courts have discretion under Rule 403, Ariz. R. Evid., to "admit evidence of safety-history concerning both the existence and the nonexistence of prior accidents," provided that the proponent establishes that "had [there] been prior accidents, the witness probably would have known about them." *Id.* at 127-28, 700 P.2d at 825-26 (but noting "scales tip strongly in favor of rejection of the evidence" where plaintiff alleges premises negligently designed or maintained). In a later case, the court indicated that the rule may apply in premises liability actions. *See Isbell ex rel. Isbell v. State*, 198 Ariz. 291, ¶ 9, 9 P.3d 322, 324 (2000).

¶11 Anderson further argues that the evidence lacked foundation. He notes that the store's manager described the number of customers passing through Arizona QuikTrip stores during powerwashing activities, but "[t]here was no testimony or other proof indicating [the manager] was responsible for investigating all prior incidents in Arizona, charged with compiling data regarding prior powerwashing incidents, or ever in a position to do so." The manager, however, did not testify about the occurrence or absence

of accidents at QuikTrip stores statewide.[2] As such, there was no need to establish that he would have known about such incidents had they occurred. To the extent Anderson believes the manager was not qualified to testify to customer traffic at Arizona stores in general—asserting that QuikTrip "applied the limited knowledge of one store manager to every QuikTrip store in Arizona over the course of two years"—he did not raise that objection at trial.[3] The issue is therefore waived. *See Estate of Reinen v. N. Ariz. Orthopedics, Ltd.*, 198 Ariz. 283, ¶ 9, 9 P.3d 314, 317 (2000) ("An objection to proffered testimony must be made either prior to or at the time it is given, and failure to do so constitutes a waiver.").

¶12 Anderson next asserts that the "evidence and argument regarding the lack of prior incidents" was unfairly prejudicial. As noted above, the store manager did not testify to a lack of accidents statewide. QuikTrip's counsel, however, asserted in closing that there were "less than a dozen incidences where someone . . . happens to have fallen." The jury was subsequently instructed that "statements or arguments made by the lawyers in the case are not evidence" absent a stipulation as to a particular fact. *See also Taylor-Bertling*, 233 Ariz. 394, ¶ 19, 313 P.3d at 542 ("What lawyers say in trial is not evidence."). And Anderson elicited evidence that every slip and fall might not have generated an incident report and argued the point. In his closing, he urged:

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[2]The manager testified he had no personal knowledge of any customer slipping during walkway washing, and Anderson does not question the foundation of the manager's testimony about the absence of falls at the manager's own store.

[3]Indeed, an objection may have been appropriate. In addition to the store manager's foundation for estimating customer traffic at other stores, it appears the estimated number of customers should have been limited to those entering or leaving the store while the sidewalk was being washed. The manager testified this was done two to three times a week, whereas the calculation he testified to assumed washing once a day.

> If we searched for the incident report involving [Anderson], it doesn't even mention powerwashing. If someone doesn't report it in the store, we don't know about that. I don't know how many other times [people] have fallen at other QuikTrip [stores] as a result of powerwashing activities. We know it's happened many times in a short timeframe.

Because Anderson had the opportunity to object to the store manager's estimates regarding customer traffic at other QuikTrip locations and he was able to argue that not every slip and fall would result in an incident report, we cannot say the trial court abused its discretion by implicitly finding no unfair prejudice.

Jury Instructions

¶13 Anderson next challenges the trial court's refusal to provide his requested jury instructions. The first was modeled on "Premises 1" of the Revised Arizona Jury Instructions, Third Edition. *See* State Bar of Arizona, *Revised Arizona Jury Instructions (Civil)* Premises Liability 1 (3d ed. 1997). The second requested instruction was titled "Affirmative Duty" and provided:

> Defendant Quik[T]rip Corporation, as the operator of a business, has an affirmative duty to make and keep its premises reasonably safe for use by its customers. Failure to perform this duty is negligence.

Anderson's third requested instruction was titled "Definition of Duty" and stated:

> The duty of Defendant QuikTrip Corporation to maintain its premises means that it has a duty to warn its customers of a dangerous condition that Defendant knew or had reason to know was present on its premises, the duty to

> inspect the premises to discover dangerous conditions, and the duty to take reasonable precautions to protect its customers from foreseeable dangers.
>
> A dangerous condition is a condition which creates an unreasonable risk of harm to a person.

After argument by the parties, the court rejected Anderson's proposed instructions. It determined Premises Liability 1 of the Fifth Edition of RAJI (Civil)[4] was appropriate and stated it "d[id] not find . . . [it was] required to use the 3rd edition or an instruction similar." As for Anderson's second and third requested instructions, the court found them unnecessary, reasoning "nothing would be added by using those instructions because Premises 1 is adequate."

¶14 In its final instructions, the court informed the jury on premises liability as follows:

> Premises Liability 1
>
> Notice of Unreasonably Dangerous Condition
>
> As the owner of a business, Defendant QuikTrip is required to use reasonable care to warn of, safeguard or remedy an unreasonably dangerous condition of which Defendant QuikTrip had notice. Plaintiff Anderson claims that Defendant

[4]The Premises Liability 1 instruction was unchanged between the fourth and fifth editions of RAJI. *Compare* State Bar of Arizona, *Revised Arizona Jury Instructions (Civil)* Premises Liability 1 (4th ed. 2005), *with* State Bar of Arizona, *Revised Arizona Jury Instructions (Civil)* Premises Liability 1 (5th ed. 2013). Thus, although the parties reference the fourth edition in their briefs, we cite the fifth edition, as did the trial court.

> QuikTrip had notice of the unreasonably dangerous condition that caused harm to Plaintiff Anderson. Defendant QuikTrip had notice of the unreasonably dangerous condition if you find any of the following:
>
> 1. Defendant QuikTrip or its employees created the condition; or
>
> 2. Defendant QuikTrip or its employees actually knew of the condition in time to provide a remedy or warning; or
>
> 3. The condition existed for a sufficient length of time that Defendant QuikTrip or its employees, in the exercise of reasonable care, should have known of it.
>
> If you find that Defendant QuikTrip had notice of the unreasonably dangerous condition and failed to use reasonable care to prevent harm under the circumstances, then Defendant QuikTrip was negligent.

¶15 This court reviews a trial court's denial of a requested jury instruction for an abuse of discretion, *Ritchie v. Krasner*, 221 Ariz. 288, ¶ 30, 211 P.3d 1272, 1283 (App. 2009), and views the evidence in the light most favorable to the requesting party, *Cotterhill v. Bafile*, 177 Ariz. 76, 79, 865 P.2d 120, 123 (App. 1993). "A trial court must give a requested instruction if (1) the evidence presented supports the instruction, (2) the instruction is proper under the law, and (3) the instruction pertains to an important issue that is not dealt with in any other instruction." *Czarnecki v. Volkswagen of Am.*, 172 Ariz. 408, 411, 837 P.2d 1143, 1146 (App. 1991).

¶16 The court, however, need not give an instruction that is covered adequately by other instructions. *See State v. Hoskins*, 199 Ariz. 127, ¶ 75, 14 P.3d 997, 1015 (2000); *see also Cotterhill*, 177 Ariz. at 80, 865 P.2d at 124 ("trial judge has considerable discretion in

deciding whether more specific instructions are necessary to avoid misleading the jury"). "[T]he test is whether the instructions adequately set forth the law applicable to the case." *State v. Rodriguez*, 192 Ariz. 58, ¶ 16, 961 P.2d 1006, 1009 (1998). "We will not overturn a verdict unless we have 'substantial doubt about whether the jury was properly guided.'" *Smyser v. City of Peoria*, 215 Ariz. 428, ¶ 33, 160 P.3d 1186, 1197 (App. 2007), *quoting City of Phx. v. Clauss*, 177 Ariz. 566, 568, 869 P.2d 1219, 1221 (App. 1994).

¶17 QuikTrip first contends that Anderson's argument "is not a [legal] challenge to the correctness of RAJI (Civil) 4th Premises Liability 1," but rather a cloaked "sufficiency of the evidence" argument, which he failed to preserve on appeal because he did not move for a new trial. "The failure of the appellant to move for new trial precludes an examination of the sufficiency of the evidence which is a requisite to reviewing the court's refusal to instruct on specified theories of law." *Lewis v. S. Pac. Co.*, 105 Ariz. 582, 583, 469 P.2d 67, 68 (1970). Below, Anderson proposed three instructions, arguing that Premise Liability 1, Fourth and Fifth Editions, did not accurately state Arizona law. Because Anderson maintains this legal argument on appeal, rather than arguing that the evidence supported his instructions, we are persuaded he preserved this issue even in the absence of a motion for new trial. *See State Farm Fire & Cas. Ins. Co. v. Grabowski*, 214 Ariz. 188, ¶ 12, 150 P.3d 275, 279 (App. 2007) (party challenging legality of jury instruction, rather than whether evidence supported the instruction, need not move for new trial to preserve issue for appellate review).

¶18 As QuikTrip points out, Anderson appears to concede that the trial court's premises liability instruction is a correct statement of law.[5] *See Desert Mountain Props. Ltd. P'ship v. Liberty*

[5]Acknowledging that "RAJI (Civil) 4th Premises Liability 1 may technically be appropriate in cases where notice is disputed," in a footnote Anderson points out his objection below to the instruction's use of the word "unreasonably" to describe "dangerous condition," asserting "the correct argument is whether a condition poses 'an unreasonable risk of harm.'" Our caselaw, however, equates "an unreasonably dangerous condition" with a "condition

Mut. Fire Ins. Co., 225 Ariz. 194, ¶ 11, 236 P.3d 421, 426 (App. 2010) (appellate court reviews de novo whether jury instruction correctly states the law). But he maintains it is "incomplete" because it did not define QuikTrip's duty of care to Anderson, did not define a "dangerous condition," and did not set forth QuikTrip's additional responsibilities to take reasonable precautions and inspect the premises. QuikTrip responds that Anderson's requested instructions were "duplicative 'refinements' or restatements of the same duty and standard already fully addressed in the model instruction that was given." We address each proffered instruction in turn.

Requested Instruction on "Affirmative Duty"

¶19 Anderson argues the trial court erroneously failed to instruct that QuikTrip had an "affirmative duty to make and keep its premises reasonably safe for use by [its customers]," as set forth in his requested instruction number two, citing *Preuss v. Sambo's of Ariz., Inc.*, 130 Ariz. 288, 635 P.2d 1210 (1981), among other cases. In *Preuss*, our supreme court stated that although the law is clear that a business has an "affirmative duty to make the premises reasonably safe for use by invitees," it is not an insurer of their safety and "not required to keep the premises absolutely safe." *Id.* at 289, 635 P.2d at 1211. Further, the mere occurrence of a slip and fall on the business premises is insufficient to prove negligence on the part of the proprietor. *Id.* Citing these principles, the court stated:

> "the plaintiff must prove either, 1) that the . . . dangerous condition (was) the result of defendant's acts or the acts of his servants,

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creat[ing] an unreasonable risk of harm," *see Hagan v. Sahara Caterers, Inc.*, 15 Ariz. App. 163, 165-66, 487 P.2d 9, 11-12 (1971), and the phrase is regularly used in this context, *see, e.g., Daugherty v. Montgomery Ward*, 102 Ariz. 267, 269-70, 428 P.2d 419, 421-22 (1967); *McMurtry v. Weatherford Hotel, Inc.*, 231 Ariz. 244, ¶ 23, 293 P.3d 520, 528 (App. 2013); *Parness v. City of Tempe*, 123 Ariz. 460, 462, 600 P.2d 764, 766 (App. 1979). This issue is further discussed below in the section titled *Requested Jury Instruction on "Definition of Duty."*

> or 2) that defendant had actual knowledge or notice of the existence of the . . . dangerous condition, or 3) that the condition existed for such a length of time that in the exercise of ordinary care the proprietor should have known of it and taken action to remedy it (i.e., constructive notice)."

Id., *quoting Walker v. Montgomery Ward & Co.*, 20 Ariz. App. 255, 258, 511 P.2d 699, 702 (1973). These criteria are reflected in RAJI (Civil) 5th Premises Liability 1. *Compare id.* at 289, 635 P.2d at 1211, *with RAJI (Civil) 5th* Premises Liability 1.[6]

¶20 Here, the trial court's instruction set forth the correct criteria for premises liability as established by our supreme court. Although a trial court may decide more specific instructions are necessary, it has considerable discretion in doing so. *See Cotterhill*, 177 Ariz. at 80, 865 P.2d at 124; *see also Smedberg v. Simons*, 129 Ariz. 375, 378, 631 P.2d 530, 533 (1981) (approving instruction that "landlord had the duty to use reasonable or ordinary care . . . to make and keep the premises reasonably safe for the tenant's use"). Because the instruction incorporated the business owner's duty to use reasonable care and in view of the facts of this case, we cannot say we have substantial doubt about whether the jury was properly guided in the absence of the specific statement of law requested by Anderson. *See Smyser*, 215 Ariz. 428, ¶ 33, 160 P.3d 1197.

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[6]Anderson cites *Simon v. Safeway, Inc.*, for the proposition that a landowner's duty of care to business invitees "is not limited to dangerous conditions." 217 Ariz. 330, ¶ 18, 173 P.3d 1031, 1038 (App. 2007) (landowner's duty of care "encompasses activities on the land"). It is uncontested here, however, that "'[t]he duty to maintain the safety of common areas applies not only to physical conditions on the land but . . . also to dangerous activities on the land.'" *Id.* ¶ 16, *quoting Martinez v. Woodmar IV Condos. Homeowners Ass'n*, 189 Ariz. 206, 210, 941 P.2d 218, 222 (1997) (second alteration added, first alteration in *Simon*).

¶21 In his reply brief, Anderson maintains that the RAJI (Civil) 5th Premises Liability 1 blurs the distinction between duty and standard of care, citing *Markowitz v. Ariz. Parks Bd.*, 146 Ariz. 352, 355, 706 P.2d 364, 367 (1985). He asserts, "[r]ather than defining the duty as an affirmative one, special and distinct from the duty of reasonable care owed [to] an invitee, . . . Premises Liability 1 uses the term 'reasonable care' while 'equating the concept of duty with specific details of conduct.'" In *Markowitz*, the court cautioned against "equat[ing] the concept of duty with specific details of conduct," noting it is "'better to reserve duty for the problem of the relation between individuals which imposes upon one a legal obligation for the benefit of the other'" rather than viewing duty as specific conduct such as posting signs or fixing potholes. *Id.*, *quoting Coburn v. City of Tucson*, 143 Ariz. 50, 52, 691 P.2d 1078, 1080 (1984). Here, neither party disputed QuikTrip's duty to Anderson. And that duty was implicit in the premises liability instruction given by the trial court. Further, the instruction did not indicate a standard of conduct, that is, specify what the proprietor must do or must not do to satisfy his or her duty. *See Grafitti-Valenzuela ex rel. Grafitti v. City of Phx.*, 216 Ariz. 454, ¶ 13, 167 P.3d 711, 715 (App. 2007) (whether defendant exercised the care required to satisfy its duty generally question of fact for jury). Accordingly, we see no error.

Requested Jury Instruction on "Definition of Duty"

¶22 Anderson next challenges the trial court's duty instruction as deficient for failing to "state [QuikTrip]'s additional responsibility 'to take reasonable precautions to protect invitees from foreseeable dangers' and mak[ing] no reference to a possessor's responsibility to inspect the premises for dangerous conditions." As QuikTrip points out, the instruction provided that as a business owner, it was "required" to "warn of, safeguard, or remedy" unreasonably dangerous conditions it created, knew of, or should have known of. We agree that the instruction's use of "safeguard" rather than "protect" is inconsequential and that a "duty to inspect" is encompassed by the instruction's directive that liability attaches when a condition "existed for a sufficient length of time" that the business or its employees "in the exercise of reasonable care should have known of it."

¶23 Anderson further contends the instruction was inadequate because it did not "define a 'dangerous condition,' which in Arizona is a condition 'that creates an unreasonable risk of harm to a person,'" citing *Berne v. Greyhound Parks of Ariz., Inc.*, 104 Ariz. 38, 41, 448 P.2d 388, 391 (1968). However, the context in which the quoted language is used is one of contrast, rather than to establish a definition for dangerous condition. In *Berne*, our supreme court compared "defective conditions" and "dangerous conditions," holding that "[d]efective conditions are not necessarily dangerous conditions" and noting "[t]he test of a defective condition as a dangerous condition is whether there [h]as thereby been created an unreasonable risk of harm." *Id.* (applying principle that "[t]he standard of care to be exercised does not impose liability for conditions from which an unreasonable risk of harm is not to be anticipated"). Although the model RAJI instruction has replaced the terms "defective condition" and "dangerous condition," as used in *Berne*, with "dangerous condition" and "unreasonably dangerous condition" respectively, the concept remains essentially the same.[7] Because Arizona law has not defined a "dangerous condition" as stated in Anderson's requested instruction, and the RAJI instruction captures the concept as expressed by our supreme court, the trial court did not err by declining to provide Anderson's instruction.

Prejudice

¶24 Even when an instruction is flawed, we will not overturn the jury's verdict "unless there is substantial doubt about whether the jury was properly guided." *Clauss*, 177 Ariz. at 568, 869 P.2d at 1221. Absent prejudice that affects a substantial right of the appellant, reversal is not required. *Id.* "We will not presume prejudice; it must appear affirmatively in the record." *Id.* at 568–69, 869 P.2d at 1221–22.

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[7]Regarding a "dangerous condition," the drafters of the RAJI instruction stated "[i]t is conceivable that harm could arise from almost any object or condition" and noted "[n]egligence is the failure to correct or warn of an unreasonably dangerous condition," citing Restatement (Second) of Torts § 343. *See RAJI (Civil) 5th* Premises Liability 1.

¶25 Anderson contends that the "shortcomings" in the trial court's instructions were material to his case. He points out he had advanced a theory that QuikTrip was negligent in powerwashing the walkway in the evening instead of after midnight when the store had the fewest customers "in order to maintain the premises in a reasonably safe condition." He asserts that had "the jury agreed powerwashing presented an unreasonable risk of harm when performed at 7:30[]p.m., and it caused [him] to get hurt, it could have found" in his favor. He argues that the court's instruction "unfairly favored [QuikTrip]'s position at trial when given in isolation" because "[i]t did not state [QuikTrip] owed an 'affirmative duty' to [Anderson]"; "[i]t limited the standard of care to exercising reasonable care to warn, safeguard, or remedy an unreasonably dangerous condition on the premises"; and it "repeated the term 'unreasonably dangerous condition' four times without a definition." Consequently, he asserts, "the jury was misled, [Anderson] suffered unfair prejudice, and [QuikTrip]'s liability exposure was unlawfully reduced."

¶26 Assuming, arguendo, that the trial court's instruction was deficient, we note that in his closing argument Anderson repeatedly asserted that QuikTrip had a duty to maintain its property in reasonably safe condition. He argued "[a]n unreasonable danger is one that could be prevented" and "[t]he evidence has shown that this was a condition that could have been prevented; that it would not have been unreasonable for it to have been prevented." He further stated it was "ultimately [QuikTrip's] responsibility to use reasonable care to correct, safeguard or warn of a condition" and that QuikTrip had failed to use reasonable care by not electing to powerwash the exterior when the store was least busy. Anderson, therefore, fully informed the jury of his view of the applicable law in a manner consistent with the trial court's instructions, *see State v. Bruggeman*, 161 Ariz. 508, 510, 779 P.2d 823, 825 (App. 1989) (closing arguments may be considered in assessing adequacy of a particular instruction), and he provided the jury with his theory of how the powerwashing may have constituted an "unreasonably dangerous condition," *see RAJI (Civil) 5th*, Premises Liability Intro. ("unreasonably" not defined in premises liability

instruction because parties expected to argue what "unreasonably" means in context of their specific case).

¶27 Finally, Anderson maintains he was prejudiced by the trial court's instruction in that "[i]t only describes the standard of care required of a possessor as to 'unreasonably dangerous conditions'" but "does not define a 'dangerous condition'" as one "that creates an unreasonable risk of harm to a person." He does not explain, however, how the difference in terminology affected his substantial rights. *See Clauss*, 177 Ariz. at 568, 869 P.2d at 1221. We discern no such impact and cannot say that Anderson's rights were materially affected by the court's refusal to proffer his requested instructions. *See id.*; *cf. Dart v. Wiebe Mfg., Inc.*, 147 Ariz. 242, 250, 709 P.2d 876, 884 (1985) (error considered prejudicial where challenged instructions "cut to the very heart of the case and misapply the applicable legal theories").

Costs

¶28 Both QuikTrip and Anderson request their taxable costs on appeal. As the prevailing party on appeal, QuikTrip is entitled to an award of its costs upon compliance with Rule 21, Ariz. R. Civ. App. P. *See* A.R.S. § 12-341[8]; *Assyia v. State Farm Mut. Auto. Ins. Co.*, 229 Ariz. 216, ¶ 32, 273 P.3d 668, 675 (App. 2012) (cost award to successful party mandatory).

Disposition

¶29 For the foregoing reasons, the judgment is affirmed.

[8]Although QuikTrip cites A.R.S. § 12-342 in support of its request for costs, that section "applies when the appellant's position is worsened after appeal." *Henry v. Cook*, 189 Ariz. 42, 43-44, 938 P.2d 91, 93-94 (App. 1996).