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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

ERA C. NUNEZ, as personal representative of the Estate of LINDA JOYCE BROWN, Plaintiff/Appellee, v. PROFESSIONAL TRANSIT MANAGEMENT OF TUCSON, INC., an Arizona corporation; and GRACE ZOELLNER, a single woman, Defendants/Appellants.	2 CA-CV 2010-0201 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C20090652

Honorable Stephen C. Villarreal, Judge

AFFIRMED

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and

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V Á S Q U E Z, Presiding Judge.

¶1 In this personal injury action, Professional Transit Management of Tucson, Inc., doing business as SunTran, and Grace Zoellner (collectively, "SunTran"), appeal from the judgment entered after a jury verdict in favor of appellee Era Nunez, as personal representative of the estate of Linda Brown. On appeal, SunTran argues the trial court failed to instruct the jury on the appropriate standard of care. It also contends the court erred in several of its evidentiary rulings, in its rulings on jury instructions, and in refusing to hear SunTran's motion for judgment as a matter of law, filed pursuant to Rule 50, Ariz. R. Civ. P., until after the jury had begun deliberations. For the reasons stated below, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the jury's verdict. *Crackel v. Allstate Ins. Co.*, 208 Ariz. 252, ¶ 3, 92 P.3d 882, 885 (App. 2004). On May 2, 2008, Brown, who was in a wheelchair, boarded a bus operated by SunTran and driven by Zoellner. Following SunTran's standard procedures, Zoellner secured the wheelchair to the bus to prevent the chair from moving but, contrary to SunTran's policy, did not ask Brown if she wished to wear a seat belt to secure her in the wheelchair.

¶3 At one point during the route, after Zoellner had stopped the bus in traffic, she released the brake when traffic began to move, but made a "panic stop" when the vehicle in front of her stopped abruptly. Brown was thrown from her wheelchair and sustained injuries. Although SunTran kept video- and audio-taped footage of the incident, it did not preserve footage of Brown boarding the bus or of Zoellner securing her wheelchair, nor did it preserve Automated Vehicle Locator data that would have shown whether Zoellner was running late that day.

¶4 In January 2009, Brown sued Zoellner and SunTran, claiming Zoellner was negligent in following other vehicles too closely and in failing to ask Brown if she wanted to wear a seat belt. The jury returned a verdict finding SunTran seventy percent at fault and Brown thirty percent at fault and awarded $130,744.50 in damages to Era Nunez, as personal representative of Brown's estate.[1] This appeal followed.

Discussion

I. Standard of Care

¶5 SunTran argues the trial court erroneously instructed the jury that the standard of care for common carriers is "the highest degree of care." SunTran contends "[t]he highest degree of care standard is a remnant of a different time and lacks a sound theoretical underpinning." Whether a jury instruction correctly states the law is a matter of law that we review de novo. *A Tumbling-T Ranches v. Flood Control Dist. of Maricopa County*, 222 Ariz. 515, ¶ 50, 217 P.3d 1220, 1238 (App. 2009). But, "[w]e

[1]Brown died before trial from causes unrelated to the incident and her mother Era Nunez, as representative of Brown's estate, was substituted as plaintiff.

will not overturn a jury verdict on the grounds of an erroneous instruction unless there is substantial doubt as to whether the jury was properly guided in its decision." *Dawson v. Withycombe*, 216 Ariz. 84, ¶ 63, 163 P.3d 1034, 1055 (App. 2007).

¶6 SunTran relies on *Atchison, T. & S.F. Ry. Co. v. France*, 54 Ariz. 140, 143-44, 94 P.2d 434, 436-37 (1939), stating that our supreme court "held a trial court committed reversible error by instructing the jury that common carriers are held to the highest standard of care when the case does not warrant such an instruction." SunTran misinterprets *Atchison*. In that case, the plaintiff claimed she had been thrown from her sleeping berth while travelling on a train operated by the defendant. 54 Ariz. at 141-42, 94 P.2d at 435. Although there was no direct evidence that contradicted the plaintiff's testimony, no evidence clearly corroborated her testimony that she was thrown from her berth, and much of the evidence that did exist was inconsistent with her testimony. *Id.* at 142, 94 P.2d at 435-36.

¶7 The trial court in *Atchison* instructed the jury that the standard of care for a common carrier was "the highest degree of care practicable under the circumstances," and refused to give the defendant's requested instruction that "negligence is the omission to do something which a reasonably prudent man . . . would do [and] it is not intrinsic or absolute, but is always relative to the surrounding circumstances." *Id.* at 143-44, 94 P.2d at 436. The jury returned a verdict for the plaintiff. *Id.* at 141, 94 P.2d at 435.

¶8 On appeal, our supreme court stated "[t]here [wa]s no evidence supporting plaintiff's testimony as to being thrown from her berth," and that "if [it were] sitting as jurors in the present case, [it] might [have held] that the decided weight of the evidence

was against the verdict." *Id.* at 142-43, 94 P.2d at 435-36. Therefore, given the paucity of evidence, the court concluded that even though the highest degree of care instruction accurately stated the law, it was by itself insufficient, and the trial court also should have given defendant's requested instruction. *Id.* at 145, 94 P.2d at 436-37. But, the court expressly stated that "[u]nder some circumstances this failure to give the suggested instruction . . . might not have been prejudicial." *Id.* at 145, 94 P.2d at 437.

¶9 Here, SunTran did not request an additional instruction that might clarify the standard of care for the jury; rather it requested a reasonable care instruction to supplant the highest degree of care instruction. Furthermore, because there was sufficient evidence of SunTran's negligence, the failure to give its reasonable care instruction was not prejudicial to SunTran. The jury heard testimony that Zoellner was negligent in following another vehicle too closely, and it watched footage of Zoellner making a "panic stop," causing Brown to be thrown from her wheelchair. The trial court did not err in refusing SunTran's requested instruction.[2]

[2]SunTran also relies on *Block v. Meyer*, 144 Ariz. 230, 696 P.2d 1379 (App. 1985), for the proposition that it is error to instruct that the standard of care is the "highest degree of care" because such an instruction confuses the jury and is "fraught with peril." But *Block* merely held it was not reversible error for the trial court to instruct the jury that the standard of care for a common carrier is "ordinary care" rather than "'the highest degree of care practicable.'" 144 Ariz. at 234-35, 696 P.2d at 1383-84. It based this decision in part on *Atchison, T. & S.F. Ry. Co. v. France*, 54 Ariz. 140, 143-44, 94 P.2d 434, 436-37 (1939). 144 Ariz. at 234-35, 696 P.2d at 1383-84. And to the extent *Block* holds that it *is* error to instruct the jury on the higher standard, we disagree. *See Napier v. Bertram*, 191 Ariz. 238, n.9, 954 P.2d 1389, 1393 n.9 (1998) (standard of care for common carrier continues to be highest degree of care practicable); *see also City of Phoenix v. Leroy's Liquors, Inc.*, 177 Ariz. 375, 378, 868 P.2d 958, 961 (App. 1993) (appellate court lacks authority to disregard supreme court decisions).

¶10 SunTran nevertheless claims that no supreme court decision has addressed the standard of care for common carriers since *Nichols v. City of Phoenix*, 68 Ariz. 124, 202 P.2d 201 (1949), and maintains Division One of this court "soundly rejected" the highest degree of care standard in *Lowrey v. Montgomery Kone, Inc.*, 202 Ariz. 190, 42 P.3d 621 (App. 2002). But our supreme court as recently as 1998 reaffirmed that the standard of care for a common carrier is "the highest degree of care." *See Napier v. Bertram*, 191 Ariz. 238, n.9, 954 P.2d 1389, 1393 n.9 (1998). And to the extent Division One of this court rejected this standard in *Lowrey*, it lacked the authority to do so. We are bound by the decisions of our supreme court, and "have no authority to overrule, modify, or disregard them." *City of Phoenix v. Leroy's Liquors, Inc.*, 177 Ariz. 375, 378, 868 P.2d 958, 961 (App. 1993).

II. Admissibility of Evidence

¶11 Next, SunTran contends the trial court erred in several of its evidentiary rulings. We review a trial court's evidentiary rulings for an abuse of discretion. *See Cervantes v. Rijlaarsdam*, 190 Ariz. 396, 398, 949 P.2d 56, 58 (App. 1997).

A. Expert Witness Testimony

¶12 First, SunTran argues the trial court erred in admitting the testimony of Robert Coulter, plaintiff's expert witness, because it was based on "Brown's hearsay declaration" that Zoellner did not ask her whether she wanted to wear a seat belt. Before trial, SunTran successfully moved to preclude admission of Brown's unsworn written declaration on the ground it constituted inadmissible hearsay. At trial, Coulter testified Zoellner breached her duty of care by not asking Brown if she wanted to wear a seat belt,

alluding to Brown's unsworn declaration as the basis for this opinion. SunTran objected to Coulter's testimony, arguing Brown's "unsworn declaration [provided] the sole basis for [Coulter's] opinion . . . and that [statement was] expressly barred [in an earlier] ruling as hearsay." The trial court overruled the objection, stating that "[a]n expert is given a lot of latitude in terms of the information that expert reviewed in arriving at their opinion [including] rank hearsay."

¶13 "Under Rule 703, an expert may testify about hearsay facts or data, but only so long as the expert's opinion is based on such facts or data and they are 'of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject.'" *Cervantes*, 190 Ariz. at 402, 949 P.2d at 62, *quoting* Ariz. R. Evid. 703. For the first time on appeal, SunTran argues Nunez "produced no support for the proposition that an inadmissible hearsay declaration is evidence of the type reasonably relied upon by standard of care experts." Because SunTran did not make this argument below, it is waived and we do not consider it further. *See Odom v. Farmers Ins. Co. of Am.*, 216 Ariz. 530, ¶ 18, 169 P.3d 120, 125 (App. 2007). And, even assuming the trial court erred in allowing Coulter to testify about Zoellner's failure to offer the seat belt, the error was harmless. As we discuss below, the court properly instructed the jury that it could construe against SunTran its failure to preserve the video footage of Brown after she had boarded the bus. *See Creach v. Angulo*, 189 Ariz. 212, 214-15, 941 P.2d 224, 226-27 (1997) (error harmless where no showing of prejudice).

B. Prior Similar Incident

¶14 SunTran next argues the trial court erred in admitting testimony that Zoellner had been involved in a prior incident where a disabled passenger had been thrown from a wheelchair when Zoellner had made a "panic stop." SunTran contends this testimony was inadmissible because "[plaintiff] did not present any proper grounds for admission of the evidence, such as proof of motive, intent, opportunity, etc." Nunez counters that the testimony was admissible to show "the bus driver knew from a prior incident that unrestrained people in wheelchairs could go flying if the bus driver made a panic stop."

¶15 Evidence of prior acts is admissible "if it is relevant and 'admitted for a proper purpose.'" *State v. Van Adams*, 194 Ariz. 408, ¶ 20, 984 P.2d 16, 23 (1999), *quoting State v. Gulbrandson*, 184 Ariz. 46, 60, 906 P.2d 579, 593 (1995). Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Ariz. R. Evid. 401. Rule 404(b) generally provides that "evidence of other . . . acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of . . . knowledge." Here, Nunez introduced evidence of the prior incident to establish that "Zoellner kn[ew] if she ma[de] a panic stop [that] people w[ould] go flying." Thus, the evidence was relevant and met the "knowledge" exception under Rule 404(b).

¶16 SunTran argues, however, that "[Nunez] established no time frame for the prior event or . . . the circumstances relating to it." Because SunTran has neither developed this argument nor cited any authority to support it until its reply brief, it is waived. *See* Ariz. R. Civ. App. P. 13(a)(6) (appellant's brief must include argument "with citations to the authorities, statutes and parts of the record relied on"); *see also Dawson*, 216 Ariz. 84, ¶ 91, 163 P.3d at 1061 (court of appeals does not consider arguments made for first time in reply brief); *In re U.S. Currency in amount of $26,980.00*, 199 Ariz. 291, ¶ 28, 18 P.3d 85, 93 (App. 2000). And, "[a]lthough remoteness between incidents affects the weight to be given [evidence] by the jury, it generally does not determine its admissibility." *Van Adams*, 194 Ariz. 408, ¶ 24, 984 P.2d at 21-22.

C. Subsequent Incident

¶17 SunTran next contends it should have been allowed "to inquire of Zoellner whether she followed her standard procedures during [an] encounter [she had] with [the plaintiff] subsequent to the incident." At trial, SunTran acknowledged the purpose for questioning Zoellner about this subsequent encounter, which occurred "months after" the accident, was to establish that Brown "would have understood what . . . Zoellner was saying on the day of the accident" and that, according to Zoellner, Brown also had refused the seat belt during that subsequent encounter. When the trial court asked defense counsel if she was offering the evidence "to show [Brown] was competent . . . on the day of the accident," counsel responded in the affirmative. The court precluded the testimony, finding it was "too attenuated." Because SunTran argues for the first time on

appeal that it wanted only to determine whether Zoellner followed her standard procedures on the day of the accident, this argument is waived. *See Odom*, 216 Ariz. 530, ¶ 18, 169 P.3d at 125.[3]

III. Jury Instructions

¶18 SunTran argues the trial court erred by refusing to instruct the jury on assumption of risk and also challenges the court's rulings on spoliation of evidence instructions requested by both parties. We review a trial court's decision on a requested jury instruction for an abuse of discretion. *See State v. Jeffrey*, 203 Ariz. 111, ¶ 12, 50 P.3d 861, 864 (App. 2002). A defendant is entitled to any instruction reasonably supported by the evidence. *See Ritchie v. Krasner*, 221 Ariz. 288, ¶ 31, 211 P.3d 1272, 1283 (App. 2009). We consider the jury instructions in their entirety and it is not necessary to give an instruction that is adequately covered by another. *See Pima County v. Gonzalez*, 193 Ariz. 18, ¶ 7, 969 P.2d 183, 185 (App. 1998). "Where the law is adequately covered by the instructions as a whole, no reversible error has occurred." *State v. Doerr*, 193 Ariz. 56, ¶ 35, 969 P.2d 1168, 1177 (1998).

[3]SunTran states the trial court's decision not to allow the testimony was a "surprising revisitation of [an earlier] ruling [that] violated the law of the case doctrine." But in its ruling the court merely stated that, although SunTran was precluded from eliciting Zoellner's testimony "specifically about her conversation with the decedent . . . [, it wa]s not precluded from asking . . . Zoellner what her normal practices are or asking if there is any indication that she did not follow her normal practices." Thus, the court's subsequent ruling did not revisit, much less change its earlier ruling. And even assuming it did, "the law of the case doctrine [is a] rule[] of procedure, not substance; thus, [it does] not limit a court's 'power to change a ruling simply because it ruled on the question at an earlier stage.'" *State v. Garcia*, 224 Ariz. 1, ¶ 43, 226 P.3d 370, 382 (2010), *quoting State v. King*, 180 Ariz. 268, 279, 883 P.2d 1024, 1035 (1994).

A. Assumption of Risk Instruction

¶19 SunTran contends the trial court erred in refusing to give an instruction on assumption of risk, finding it was covered adequately by the instruction on comparative negligence. SunTran argues, relying on *Hildebrand v. Minyard*, 16 Ariz. App. 583, 494 P.2d 1328 (1972), that "contributory negligence and assumption of the risk are two separate and independent defenses that have distinct underpinnings," and as such, the court should have given a separate instruction.

¶20 The trial court instructed the jury as follows:

> On Defendant's claim that Linda Brown was at fault, you must decide whether Defendants have proved that Linda Brown was at fault and, under all the circumstances of this case, whether any such fault should reduce [her] full damages. These decisions are left to your sole discretion.
>
> If you decide that Linda Brown's fault should reduce [her] full damages, the Court will later reduce those damages by the percentage of fault you have assigned to [her].
>
> Defendants claim that Linda Brown was at fault for not using a seat belt and/or restraint.
>
> Nonuse of a seat belt bears on the issue of damages and not on any other issue.
>
> On this claim Defendants must prove: Number 1. That Linda Brown did not use an available and operational seat belt and/or restraint; Number 2. That [her] nonuse was unreasonable under all of the circumstances; and Number 3. [Her] nonuse caused injuries that would not have occurred had the seat belt and/or restraint been used.
>
> On Defendant's claim that Linda Brown was at fault for not using a seat belt and/or restraint, you must decide whether Defendants have proved that [she] was at fault and under all the circumstances . . . whether any such fault should

> reduce [her] full damages. These decisions are left to your sole discretion.
>
> If you decide that Linda Brown's fault should reduce [her] damages, the Court will later reduce [her] full damages by the percentage of fault you have assigned to [her].

The jury ultimately found Brown thirty percent at fault.

¶21 Although SunTran is correct that assumption of risk and comparative negligence are separate defenses, these defenses sometimes overlap. *See Grant v. Ariz. Pub. Serv. Co.*, 133 Ariz. 434, 442, 652 P.2d 507, 515 (1982). In *Grant*, the trial court had instructed the jury on assumption of risk, but refused the defendant's requested jury instruction on contributory negligence. 133 Ariz. at 441-42, 652 P.2d at 514-15. The supreme court stated, in dicta,

> [o]ccasionally, the two defenses overlap. There is considerable authority for the proposition that where plaintiff's conduct in encountering a known danger is unreasonable, it may not only manifest a willingness to assume the risk but it may also violate the objective standards applied to determine reasonable care and thus also constitutes contributory negligence. . . . The[se] authorities indicate that in such circumstances it may make little difference what the defense is called and *Meistrich*[*v. Casino Arena Attractions, Inc.*, 31 N.J. 44, 155 A.2d 90 (1959)] holds that there is therefore no error instructing on only one of the defenses since they represent the same basic legal principle regardless of the label used.

Id. at 442, 652 P.2d at 515 (citations omitted). However, the court did not "consider . . . whether this rule applie[d] in Arizona" because it held there was no evidence to support a contributory negligence instruction in that particular case. *Id.* Although it did not decide

the issue, *Grant* suggests that where, as here, the same conduct—the plaintiff's failure to request a seat belt—supports both defenses, it may not be error to instruct on only one.

¶22 And, even if the trial court did err in refusing to instruct the jury on assumption of risk, any error was harmless. *See Creach*, 189 Ariz. at 214-15, 941 P.2d at 226-27. Assumption of risk is not an absolute bar to recovery in Arizona, but merely reduces the amount of a plaintiff's damages. *See* A.R.S. § 12-2505(A). Here, had the jury been instructed on assumption of risk, it would have been instructed that

> [SunTran] claims that [Linda Brown] was at fault by assuming the risk of injury. A person assumes the risk of injury when he has knowledge of a particular risk, appreciates its magnitude, and voluntarily subjects himself to the risk under circumstances that show his willingness to accept that particular risk. As to this claim, [SunTran] must prove: 1. [Linda Brown] assumed a particular risk of injury; and 2. The particular risk was a cause of [Linda Brown]'s injury. You must decide whether [SunTran] has proved that [Linda Brown] was at fault by assuming the risk of injury and, under all the circumstances of this case, whether any such fault should reduce [Linda Brown]'s full damages. These decisions are left to your sole discretion. If you apply the defense of assumption of risk, the court will later reduce [Linda Brown]'s full damages by the percentage of fault you have assigned to [Linda Brown].

State Bar of Arizona, *Revised Arizona Jury Instructions (Civil)* Fault 10 (2005). Thus, in determining whether Brown assumed the risk of her injuries, the jury would have considered her failure to ask for a seat belt, even though she knew she could be injured if the bus came to an abrupt stop. This is the same factor they presumably considered in finding her partially at fault under the comparative negligence instruction.

B. Spoliation of Evidence Instructions

¶23 SunTran contends the trial court erred in giving Nunez's requested spoliation of evidence instruction and refusing to give SunTran's spoliation instruction. Before trial, SunTran preserved video- and audio-tape recordings of Brown's accident, but destroyed a similar recording showing her boarding the bus and Zoellner securing her wheelchair, as well as Automated Vehicle Locator (AVL) data. Also before trial, one of Brown's relatives sold her wheelchair to an unknown third party.

¶24 The trial court instructed the jury that "a litigant has a duty to preserve evidence it knows or reasonably should know is relevant to the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery and/or is the subject of a pending discovery request." The court then told the jury it could assume from SunTran's failure to preserve either the video and audio footage of Brown first entering the bus or the AVL data, that the missing evidence would have been unfavorable to SunTran. SunTran had requested a similar instruction that the jury could draw an unfavorable inference against the plaintiff for disposing of Brown's wheelchair before trial. The court refused to give this instruction.

¶25 On appeal, SunTran argues first that the instruction relating to its destruction of evidence was error because, although SunTran "agree[d] [it] had a duty to preserve evidence prior to the commencement of litigation," this duty only extended to the preservation of "evidence that [it] reasonably knew would be relevant to litigation." And SunTran maintains it "had no objective reason to believe that the [video- and audio-tapes or AVL data were] important or might prove relevant to a not yet asserted claim."

¶26 We cannot say the trial court abused its discretion in finding that, at least as to the video and audio recordings of the exchange between Brown and Zoellner when Brown first boarded the bus, SunTran should have known that the recordings could be relevant to any potential litigation. SunTran did, after all, preserve the video recording of Brown being thrown from the chair, indicating it knew litigation was at least a possibility. SunTran's central defense at trial appears to have been that it was not negligent because Zoellner had asked Brown if she wanted to wear a seat belt and Brown had refused. Thus, it was not unreasonable for the court to presume that SunTran would have kept the recordings if they had supported this claim. Accordingly, the court properly instructed the jury that SunTran's failure to preserve them could lead to an inference that the recordings were adverse to SunTran's position. As for the AVL data that presumably would have shown Zoellner was running late, even if it were error to permit the jury to draw a negative inference from its destruction, SunTran cannot show any prejudice. Zoellner testified that she was running late when the accident occurred.

¶27 But SunTran argues the instruction was unwarranted because SunTran "did not act in bad faith or intentionally destroy evidence." The case SunTran cites, *Smyser v. City of Peoria*, 215 Ariz. 428, 160 P.3d 1186 (App. 2007), does not support SunTran's argument. Rather, *Smyser* merely held that where there was no finding of bad faith, the trial court did not commit reversible error by declining to give a spoliation instruction; it did not, however, suggest it would have been inappropriate to have given the instruction. 215 Ariz. 428, ¶¶ 36-38, 160 P.3d at 1197-98; *see also Souza v. Fred Carries Contracts, Inc.*, 191 Ariz. 247, 250-52, 955 P.2d 3, 6-8 (App. 1997) (where no showing evidence

destroyed in bad faith, dismissal too harsh a sanction but "the trial court's exploration and consideration of appropriate, alternative sanctions [not limited] on remand"). In this case, the trial court found the spoliation instruction requested by Nunez was appropriate to deal with SunTran's failure to preserve the video and audio recordings and AVL data, and we cannot say it abused its discretion in doing so.

¶28 As for the denial of SunTran's requested instruction regarding the plaintiff's disposal of the wheelchair, we need not decide if this constituted error, because any error was harmless. The videotape showed that the wheelchair did not move during the incident, and that Brown was not wearing any seat belt, either one attached to the chair itself or one provided by SunTran. Thus, the jury likely would have reached the same decision whether or not it had been instructed it could consider the disposal of the wheelchair adversely to the plaintiff. *See Creach*, 189 Ariz. at 214-15, 941 P.2d at 226-27.

IV. Motion for Judgment as a Matter of Law

¶29 Finally, SunTran contends the trial court erred by refusing to hear its motion for judgment as a matter of law, filed pursuant to Rule 50, Ariz. R. Civ. P., until the jury had already begun deliberations. Relying on *Waters v. Young*, 100 F.3d 1437 (9th Cir. 1996), SunTran states that "the [trial] court must hear Rule 50 motions, even if it intends to deny them, prior to submitting the case to the jury," and that the trial court's error "caused [SunTran] significant prejudice."

¶30 Again, we need not decide whether the trial court erred by waiting until after the jury had begun its deliberations before hearing SunTran's motion, because

SunTran has failed to establish it was prejudiced by the timing of the court's decision. After SunTran made its motion and argued it should have been heard earlier, the court stated that the day before, during settlement of the final jury instructions, it "heard essentially the arguments concerning the Rule 50 motions," and that "[h]ad it been necessary for [it] to make a decision concerning certain items or elements that should not have gone to the jury," it "would not have instructed the jury . . . in the manner in which they were instructed." The court essentially stated that it would have ruled the same way regardless of when it heard SunTran's motion. Thus, SunTran was not prejudiced by the timing of its motion, and any error was harmless. *See Creach*, 189 Ariz. at 214-15, 941 P.2d at 226-27.

Disposition

¶31 For the reasons stated, we affirm.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge