

**SUPREME COURT  
STATE OF ARIZONA**

ROXANNE PEREZ, individually,

Plaintiff/Appellant,

v.

CIRCLE K CONVENIENCE STORES,  
INC., a foreign corporation,

Defendant/Appellee.

**Case No. CV-24-0104-PR**

Arizona Court of Appeals  
Case No. 1 CA-CV 22-0425  
Maricopa County Superior Court Case  
No. CV 2020-010129  
(Hon. Joan M. Sinclair)

**AMICUS CURIAE  
SUPPLEMENTAL BRIEF OF  
ARIZONA ASSOCIATION FOR  
JUSTICE/ARIZONA TRIAL  
LAWYERS ASSOCIATION**

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## LEGAL ARGUMENT

### **I. Introduction**

Amicus submits this supplemental brief to address an important issue: the argument that correcting *Perez* would force every premises liability case to go to a jury whenever there is an allegation of an unreasonable danger or negligence. *See* App’s Supp. B., at p. 9, filed on November 26, 2024, (arguing that trials courts would be “barred from granting summary judgment” in premises liability cases); Op. ¶ 15.

This fear is unfounded. Arizona law already provides judges with the tools to grant summary judgment where appropriate—based on clear, conceded facts. *See* [Ariz. R. Civ. P. 56](#).

Amicus takes no position on whether the case of water in *Perez* was unreasonably dangerous. The Court of Appeals’ fundamental error in *Perez* was the method by which summary judgment was granted. Specifically, the Court transformed a breach inquiry—whether the case of water was unreasonably dangerous—into a duty question. This conflation of concepts undermines decades of established tort law, introduces confusion into premises liability cases, and risks destabilizing Arizona’s entire negligence framework.

### **II. Trial courts can grant summary judgment in premises liability cases on the issue of breach of duty**

In Arizona, the law is clear: business owners owe their invitees a duty to maintain reasonably safe premises. [Preuss v. Sambo’s of Arizona, Inc., 130 Ariz.](#)

[288, 289 \(1981\)](#) (“A business proprietor has an affirmative duty to make and keep his premises reasonably safe for customers.”); [Arizona Binghamton Copper Co. v. Dickson, 22 Ariz. 163, 170 \(1921\)](#). This duty arises automatically from the special possessor-invitee relationship and does not depend on specific factual circumstances.

The question of whether a specific condition is unreasonably dangerous, however, belongs to the jury—**unless no reasonable minds could disagree**. See [Markowitz v. Arizona Parks Board, 146 Ariz. 352, 357 \(1985\)](#) (“the general rule to be applied is that where reasonable people could differ as to whether the danger of some injury is foreseeable, the question of negligence is one of fact for a jury to decide”); [Ariz. R. Civ. P. 56](#) (summary judgment is proper when “no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law”).

In some premises liability cases, it may be appropriate for a judge to decide as a matter of law that a defect or act alleged by the plaintiff is not unreasonably dangerous or negligent. For example, a trial court could hold that:

- **A well-lighted Christmas tree**, safely positioned out of high-traffic walkways, would not pose an unreasonable danger as a matter of law.
- **Standard grocery store shelving**, located in a typical aisle configuration, would not be considered unreasonably dangerous simply because a distracted

shopper, looking to the right, walked into shelving on the left.

Such determinations rest on the court’s evaluation of **conceded** facts and the application of established legal principles governing breach—not by redefining the concept of duty.

### **III. The Court of Appeals in *Perez* improperly conflated breach and duty**

The Court of Appeals in *Perez* concluded that the case of water was not unreasonably dangerous. But rather than properly treating this as a breach issue, the Court erroneously characterized it as a question of duty. This conflation undermines decades of settled Arizona tort law. See [Preuss, supra, 130 Ariz. at 289](#) (a business proprietor is under an “affirmative duty to make the premises reasonably safe for use by invitees”).

Granting summary judgment on the issue of breach in cases like *Perez* is appropriate only if the evidence clearly establishes that no reasonable juror could find the condition unreasonably dangerous. [Ariz. R. Civ. P. 56](#). However, a trial court cannot grant summary judgment by declaring that no duty exists because the judge either:

- **Finds that a condition was not unreasonably dangerous.** Even when a condition is unreasonably dangerous, Arizona courts have held that this relates to breach, not duty. See, e.g., [Cummings v. Prater, 95 Ariz. 20 \(1963\)](#) (holding that landlord has a “duty to take those precautions for the safety of the tenant

as would be taken by a reasonably prudent man under similar circumstances,” but affirming summary judgment because “there was no issue of material fact to be tried” as to whether landlord had exercised ordinary care in warning plaintiff who fell over a concrete slab); [\*Berne v. Greyhound Parks of Ariz., Inc.\*, 104 Ariz. 38 \(1968\)](#) (recognizing that defendant “was under an affirmative duty to make the premises reasonably safe” for business invitees, while affirming motion for directed verdict because plaintiff—who slipped and fell on a puddle of liquid—did not present sufficient evidence to establish a breach of duty); [\*McMurtry v. Weatherford Hotel, Inc.\*, 231 Ariz. 244, 253 \(App. 2013\)](#) (“Notwithstanding the existence of a duty, a landowner can be relieved of liability if the injury was caused by an open and obvious condition.”).

- **Finds that a condition was open and obvious.** Whether a condition is open and obvious is not a factor in determining the existence of a duty but is instead one consideration in assessing whether the condition was unreasonably dangerous. *See* [\*Cummings, supra\*, 95 Ariz. at 26-27](#) (“The open and obvious condition is merely a factor to be taken into consideration in determining whether the condition was unreasonably dangerous.”); [\*Markowitz, supra\*, 146 Ariz. at 356](#) (whether a defect or hazard is “open and obvious” is a factor to be considered in determining whether a possessor breached the standard of

care. It is not a factor to be used in determining the existence of the duty). Moreover, whether a condition is “open and obvious” implicates what a plaintiff should have seen, known, or done—issues that go to comparative fault. Under Arizona law, issues of comparative fault are exclusively reserved to the jury. See [A.R.S. Const. Art. 18, § 5](#); [A.R.S. § 12-2505\(A\)](#).

- **Finds that the plaintiff was negligent.** Comparative fault—whether the plaintiff was negligent—is always a question for the jury. *Id.*

#### **IV. Correcting *Perez* will not create a flood of jury trials**

Circle K’s alleged nightmare scenario—that overturning *Perez* will force all premises cases to a jury—is incorrect. Arizona law already provides trial courts with a robust framework for resolving premises liability cases without improperly redefining duty. [Ariz. R. Civ. P. 56](#), ensures that cases with no genuine dispute of material fact are resolved efficiently, while preserving the jury’s role in assessing questions of breach and comparative fault.

This Court can correct the *Perez* decision without creating the nightmare scenario Circle K raises. Doing so would reaffirm decades of settled tort law and preserve the constitutional role of juries in Arizona.

#### **V. *Perez* confuses decades of Arizona tort law**

The concept of duty is well-established in Arizona tort law.

“[D]uty is based on either special relationships recognized by the common

law or relationships created by public policy.” [\*Quiroz v. Alcoa, Inc.\*, 243 Ariz. 560, 563, ¶ 2 \(2018\)](#). In cases involving recognized special relationships—such as the possessor-invitee relationship in *Perez*—duty arises automatically and requires no additional fact-finding. *See, e.g.,* [\*Preuss, supra\*, 130 Ariz. at 289](#) (“A business proprietor has an affirmative duty to make and keep his premises reasonably safe for customers.”); [\*Dinsmoor v City of Phoenix\*, 251 Ariz. 370, 374 \(2021\)](#) (a school owes a “duty to protect students from unreasonable risks of harm” when students are under the school’s supervision and control); [\*Sanchez by & Through Gordon v. City of Tucson\*, 191 Ariz. 128 \(1998\)](#) (a municipality owes a duty to the public to keep its streets in a reasonably safe condition”); [\*Dabush v. Seacret Direct LLC\*, 250 Ariz. 264 \(2021\)](#) (possessor of land owes duty to invitee “if they had legal control of the premises or exercised actual, physical control over it”).

This duty framework is distinct from breach. As the Arizona Supreme Court has explained, “the existence of a duty is not to be confused with details of the standard of conduct.” [\*Markowitz, supra\*, 146 Ariz. at 355 \(1985\)](#). Once a special relationship is established, the question of whether a hazard was open and obvious or unreasonably dangerous goes to the issue of breach—not duty. *See Id. at 356* (“the possibility that the defect or hazard is ‘open and obvious’ is a factor to be considered in determining whether the possessor’s failure to remedy the hazard or provide a warning was unreasonable and therefore breached the standard of care; it is not a

factor to be used in determining the very existence of the duty which is a precondition for the exercise of the standard of care”).

On the other hand, when no special relationship exists, a court may need to evaluate facts to determine whether a duty arises. For example:

- In *Dinsmoor*, the Arizona Supreme Court held that a school did not owe the automatic duty that arises from the school-student relationship because the student was killed after school hours and was no longer under the school’s supervision or control. See [Dinsmoor, supra, 251 Ariz. at 371](#). The Court evaluated whether **other** facts might establish a **different** duty—specifically, whether the killer posed a known threat to the student while under school supervision. Finding “no evidence” to suggest such a threat, the Court concluded that no duty existed as a matter of law. [Id. at 377, ¶ 28](#).
- Similarly, in *Dabush*, the Court held that sublessees lacked the automatic duty of a premises possessor because they had no control over the property. See [Dabush, supra, 250 Ariz. at 266](#). The Court also found “no evidence” that the sublessees had assumed a duty by repairing the roof. [Id. 250 Ariz. at 270, ¶ 21](#).

The decision in *Perez* confuses this clear legal framework by conflating breach with duty. Instead of applying the automatic duty owed by possessors to invitees, the Court improperly used breach-related questions—such as whether the

condition was unreasonably dangerous—to deny the existence of a duty altogether.

This misstep undermines decades of Arizona tort law, creates unnecessary confusion in premises liability cases, and threatens to destabilize the framework for negligence law. If courts can blur duty and breach in premises liability cases, the same error could be applied in other contexts, such as medical malpractice, auto accidents, or any case involving a question of negligence.

#### **VI. Trial courts are already misapplying *Perez* by conflating duty and breach**

The Court of Appeals’ decision in *Perez* is already causing confusion in Arizona’s trial courts. Despite more than a century of cases firmly establishing the duty of a land possessor to an invitee based on their special relationship, trial courts are now mischaracterizing breach determinations as questions of duty. This misapplication of *Perez* ignores settled Arizona law.

The following examples illustrate this troubling trend:

- ***Ahlers v. Twin Pines Gaser, Inc.***, Coconino County Superior Court, Cause No. CV2022-00582. In *Ahlers*, the trial court initially denied a motion for summary judgment. *See* Appendices. But after *Perez* was published, the court reversed its decision, citing *Perez* as “clearly clarif[ying] the ability of the trial court to look at undisputed facts to determine if a ‘duty’ is owed by Defendant or whether ‘duty’ is not owed by Defendant.” *Id.* The court concluded that the plaintiff “failed to demonstrate that the raised cement area on Defendant’s

property created an unreasonably dangerous condition such that Defendant had an affirmative duty to Plaintiff.” *Id.*

- ***Contreras v. Quiktrip Corporation***, Maricopa County Superior Court, Cause No. CV2022-013631. In *Contreras*, the plaintiff tripped on a hose situated in front of a Quiktrip store. *See* Appendices. The trial court initially acknowledged the correct principles of Arizona law, stating that the defendant “owed a duty to Plaintiff to keep the premises safe” and “owed Plaintiff a duty to protect [her] from unreasonable risk of harm.” *Id.* These conclusions are consistent with Arizona’s well-established premises liability framework for invitees. However, relying on *Perez*, the court went on to conclude that based on the evidence, the defendant “had no duty to prevent Plaintiff’s fall given the facts presented.” *Id.*

In both cases, the trial courts made the same critical error: conflating duty and breach. The defendants owed a duty to invitees to maintain their premises in a reasonably safe condition. *See* [Preuss, supra, 130 Ariz. at 289](#). Whether the raised cement area in *Ahlers* or the hose in *Contreras* was unreasonably dangerous is a question of breach—not duty.

If material facts are undisputed, trial courts may properly grant summary judgment on breach in premises liability cases involving a business invitee. But summary judgment on duty in such cases is improper because the duty arises

automatically from the possessor-invitee relationship. The trial courts' decisions in *Ahlers* and *Contreras* demonstrate the immediate, harmful impact of *Perez* and underscore the need for this Court to correct its fundamental error.

## **VII. Conclusion**

The Court of Appeals' decision in *Perez* conflates breach with duty, undermining decades of settled Arizona tort law and created unnecessary confusion in premises liability cases. This misstep not only disrupts the established framework for premises liability cases but also threatens to destabilize negligence law more broadly. Arizona courts already have the tools to resolve cases efficiently through summary judgment on breach when appropriate, without improperly redefining duty or undermining the jury's constitutional role.

This Court should correct *Perez* to reaffirm the clear distinction between duty and breach, preserve the stability of Arizona tort law, and safeguard the integrity of the jury's role in determining factual disputes.

**DATED** this 11<sup>th</sup> day of December, 2024.

**STUDNICKI LAW FIRM**

**SWEET JAMES, LLP**

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF COCONINO

**Elaine Fridlund-Horne, Judge**

Division: 4

Date: June 11, 2024

Jeneé Silva, Judicial Assistant

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**ORDER**

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**CYNTHIA D. AHLERS**, a single woman, )

Plaintiff, )

vs )

**CV 2022-00582**

**TWIN PINES GASER, INC.**, an Arizona )  
corporation; Black Corporations I-V; Black )  
Partnerships I-V; Black Limited Liability )  
Companies I-V; John and Jane Does I-V, )

Defendant. )

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**RULING:**

**Defendant Twin Pines Gaser, Inc. Motion for Reconsideration of the Court's Order Motion for Summary Judgment filed on April 12, 2024**

This Honorable Court has reviewed, weighed and considered this Court's findings and rulings denying the Defendant's Motion for Summary Judgment on April 11, 2024 and denying the Plaintiff's Cross Motion for Summary Judgment on Defendant's Duty on April 11, 2024.

This Court has reviewed, weighed and considered the Defendant's Motion for Reconsideration filed on April 12, 2024 and the Plaintiff's Response filed on April 29, 2024, and the Reply filed on April 30, 2024. (This Court having allowed a response and reply),

This Court is being asked to reconsider Its ruling denying the Defendant's motion for summary judgment in large part due to Defendant's frustration and confusion as to what specific facts now form a genuine issue such that the matter should be submitted to a jury. The second basis for the request is the Court of Appeals Division 1 published case of **Perez v. Circle K Convenience Stores, Inc.** (April 9, 2024 – 2024 WL 1521249) which came down two days prior to this Court's April 11, 2024 Under Advisement Ruling. (UAR).

This Court will not restate the Law in regard to how the Court is required to decide Motions for Summary Judgment as to “Duty” in negligence matters. (full citations are omitted as they are known to both Counsel and are often cited)

The relevant cases that this Court reviewed and considered prior to the UAR are: **Olsen, Markowitz, Webster, Robertson, Martinez, Gipson, Dinsmoor, McDonald, and Woodty.**

**§§335 and 337 of the Restatement (Second) of Torts** as well as all relevant statutes.

On a motion for summary judgment, the Court must view the evidence and all reasonable inferences that such evidence will permit in the way that ***is most favorable to the party opposing summary judgment, and the Court must assume the truth of that party’s allegations.***

Determining credibility, weighing the evidence, and drawing legitimate inferences from the facts are functions for a jury, not the judge. (citations omitted) Lastly, summary judgment is ***inappropriate where the facts, even if undisputed, would allow reasonable minds to differ.***

As an initial matter, Counsel and this Court have had the full opportunity to review the **Perez** case. This Court finds that the **Perez** case does not change the law in the area of “duty” and what can be resolved by the Court and what should be determined by the jury. This Court finds that the **Perez** case, having summarized almost all of the findings of the above-referenced Arizona Supreme Court and Court of Appeals cases, clarifies and refines the inquiry and scope of that inquiry for the Court when answering the legal question of duty.

The **Perez** Court clearly clarifies the ability of the trial court to look at undisputed facts to determine if a “duty” is owed by Defendant or whether “duty” is not owed by Defendant.

The analysis in **Perez**, in pertinent part, is as follows:

“This Court agrees that contributory negligence and assumption of risk are questions for a jury, but it does not read the superior court's ruling as determining those issues. The superior court's role was not to determine whether the condition in the store was “open and obvious” under a standard of care analysis, whether the condition in the store caused Perez's injuries or whether Circle K met the standard of care. **Its role was to determine whether the facts, as established by Perez, created a duty under law for Circle K. In determining duty, the superior court was permitted to examine facts sufficient to establish whether an “unreasonably dangerous” condition existed to trigger a duty by Circle K under law.** (emphasis added by this Court) [Dinsmoor, 251 Ariz. at 376-77, ¶ 27, 492 P.3d at 319-20](#). The superior court's analysis and conclusion are consistent with governing case law in deciding the threshold question—whether a duty exists. (citations omitted) (“The first element [of a claim for negligence], whether a duty exists, is a matter of law for the court to decide.”)(citations omitted). Perez has not shown that duty based on foreseeability has survived the Arizona Supreme Court's directive that “foreseeability is not a factor to be considered by courts when

making determinations of duty.” *Id.* at 144, ¶ 15, 150 P.3d at 231. Moreover, although Perez argues it is a “reasonable inference” that a customer would be distracted by eye-level displays, she never stated that she was distracted by a store display. Perez’s argument—that Circle K should have expected the attractive store displays could distract her—fails. Perez argues that the superior court’s ruling incorrectly determined contributory negligence and assumption of risk, which is a question for a jury. As stated herein, Perez was expected to take care of herself in regard to reasonable risks—such as a trip and fall over a visible object. This requirement is not a determination of contributory negligence or assumption of risk—it is the standard used to determine liability. Because Perez’s evidence fails to demonstrate that the case of water was “unreasonably dangerous,” the superior court was correct in determining that she was responsible for taking care to prevent her injury.”

This Court finds that Plaintiff has failed to demonstrate that the raised cement area on Defendant’s property created an unreasonably dangerous condition such that Defendant had an affirmative duty to Plaintiff. Plaintiff did not take care to prevent her injury by looking where she was walking.

**IT IS HEREBY ORDERED GRANTING DEFENDANT’S MOTION FOR SUMMARY JUDGMENT. DEFENDANT SHALL SUBMIT A FINAL ORDER FOR THIS COURT.**

Dated: June 11, 2024



eSigned by ELAINE FRIDLUND-HORNE, 08/11/2024 15:27:24 8QwgvB3S

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**Hon. Elaine Fridlund-Horne**  
Judge of the Superior Court

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SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2022-013631

11/12/2024

HONORABLE JENNIFER RYAN-TOUHILL

CLERK OF THE COURT  
T. Aird  
Deputy

JULIE ANN CONTRERAS

JASON M KELLY

v.

QUIKTRIP CORPORATION

SUSANNE E INGOLD

RICHARD D LYONS  
ANUPAM BHATHEJA  
JACKSON D HENDRIX  
JUDGE RYAN-TOUHILL

**RULING**

Before the Court is Defendant's June 28, 2024, *Motion for Summary Judgment* [MSJ], Plaintiff's July 29, 2024, *Opposition to Defendant's MSJ*, and Defendant's August 26, 2024, *Reply in Support of Defendant's MSJ*. On November 4, 2024, the parties provided oral argument on the MSJ.

The Court has considered the filings and arguments presented by the parties, the relevant authority and law, and the record of the case. The Court specifically considered all facts and reasonable inferences in the light most favorable to the non-moving party. The Court's rulings are below.

**Summary Judgment Standard**

Rule 56(a) requires the court to "grant summary judgment if the moving party shows that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as

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a matter of law.” Ariz. R. Civ. P.; *Dinsmoor v. City of Phoenix*, 251 Ariz. 370 (2021). The party moving for summary judgment has the burden of establishing the absence of a genuine dispute of fact. *Wells Fargo, N.A., v. Allen*, 231 Ariz. 209, 213 (App. 2012). When the moving party demonstrates no material facts are genuinely in dispute, the non-moving party must then present competent evidence demonstrating a disputed fact exists, which then requires a trial. *See Nat’l Bank of Ariz. v. Thurston*, 218 Ariz. 112, 1156 (App. 2008); *Kelly v. NationsBanc Mortgage Corp.*, 199 Ariz. 284, 287 (App. 2000).

When no genuine dispute over material facts exists, summary judgment is warranted. *Orme School v. Reeves*, 166 Ariz. 301 (1990). However, even when facts may be agreed upon, if the parties have a genuine dispute over inferences to draw from those facts, summary judgment is precluded. *Valley Nat. Bank of Arizona v. J.C. Penney Ins. Co.*, 129 Ariz. 108 (Ct. App. Div. 1 1981). When deciding a motion for summary judgment, the court is not free to speculate “that some slight doubt. . . some scintilla of evidence or some dispute over irrelevant or immaterial facts might blossom into a real controversy in the midst of trial.” *Orme School v. Reeves*, 166 Ariz. at 311.

A party seeking summary judgment has a heavy burden. *Wells Fargo Bank, N.A. v. Allen*, 231 Ariz. 209 (Ct. App. Div. 1 2012). The movant must provide “undisputed admissible evidence that would compel any reasonable juror to find in its favor on every element of its claim.” *Id.* (citing *Comerica Bank v. Mahmoodi*, 224 Ariz. 289 (Ct. App. Div. 1 2010)).

Analysis

On October 12, 2022, Plaintiff filed suit against Defendant Quik Trip, alleging the business committed negligence by failing to train employees, prevent dangerous conditions, and other acts or omissions that caused injury to Plaintiff. Plaintiff also alleged Defendant is liable due to their negligence, recklessness, and carelessness in ensuring a safe environment. Plaintiff contended Defendant was strictly liable and sought punitive damages. Defendant denied liability, argued that Plaintiff assumed the risk, and/or was comparatively negligent.

Undisputed Material Facts

1. Plaintiff was a business invitee at Quik Trip.
2. On October 14, 2020, Plaintiff walked towards the entrance of Quik Trip.

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3. Prior to Plaintiff's presence at the store, Defendant's employee had placed a hose (with attached nozzle) on the walkway.
4. Plaintiff entered the store after stepping over the hose.
5. While Plaintiff was in the store, Defendant's employee wound the hose, which caused the hose to move across the sidewalk towards the employee.
6. Multiple customers walked in and out of the store, stepping over the hose.
7. After less than one minute, Plaintiff exited the store via the same route used to enter the store.
8. Plaintiff stepped on the hose and fell.

Argument

Defendant Quik Trip has an affirmative duty to make their stores safe for customers. *Stephens v. Bashas' Inc.*, 186 Ariz. 427, 430 (Ct. App. 1996). "This duty includes an obligation 'to provide reasonably safe means on ingress and egress.'" *Id.* (internal citation omitted). In most instances, whether a party has breached a duty is left to the trier of fact.

Here, the Court finds that Defendant owed a duty to Plaintiff to keep the premises safe but had no duty to ensure absolute safety. Defendant is not liable for open and obvious dangerous conditions or those conditions known to its customers; however, if Defendant "should anticipate the harm from the condition despite its obviousness, he may be liable for physical injury caused by that condition." *Tribe v. Shell Oil Co., Inc.*, 133 Ariz. 517, 519 (1982). Although foreseeability does not define duty, it is relevant to determining proximate cause. *Gipson v. Kasey*, 214 Ariz. 141, 144 ¶ 17 (2007). A business must use reasonable care to make premises safe for invitees but Defendant "is not an insurer of the safety" for Plaintiff. *Berne v. Greyhound Parks of Ariz., Inc.*, 104 Ariz. 38, 41 (1968).

Defendant owed Plaintiff a duty to protect Plaintiff from unreasonable risks of harm. *Gipson v. Kasey*, 214 Ariz. 141, 143 (2007); *Markowitz v. Arizona Parks Bd.*, 146 Ariz. 352, 355 (1985). The Court must analyze whether the evidence presented shows that the hose in front of the building constitutes an unreasonably dangerous condition. *Perez v. Circle K Convenience Stores, Inc.*, 257 Ariz. 244 ¶ 25 (App. 2024). "The burden of proving negligence rests upon the plaintiff, and it is not incumbent upon the defendant to prove an absence thereof." *Id.* at ¶ 17 (citation omitted).

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Plaintiff has the burden of proving Defendant owed a duty “to conform to a particular standard of conduct to protect her against unreasonable risks of harm.” *Id.* at ¶ 7, quoting *Dinsmoor v. City of Phoenix*, 251 Ariz. 370, 373 ¶ 14 (2021)(internal citation omitted). This is a threshold issue—did Plaintiff present evidence supporting her claim? The answer is no. In her testimony, Plaintiff admitted she could not recall where she was looking when she exited the store. Plaintiff’s SOF, Ex. A, 14:12. Plaintiff stated, “I wasn’t paying attention. I wasn’t looking down, which I should have been looking down instead of looking all around so. . . [.]” *Id.* 14:13-15. Plaintiff also testified that there was nothing on the ground when she entered the store, which is disproven by the video evidence showing the hose was on the ground, in front of the store, when Plaintiff first entered the establishment. Factually, the video shows Plaintiff took the same path in and out of the store, stepping over the hose on the way in. The video also shows other business invitees entering and exiting the store, stepping over the hose. The hose was clearly visible.

Plaintiff not only admitted her distraction by looking around and not down, Plaintiff ignored or did not remember that she crossed over the same hose when entering the store. Moreover, nothing blocked Plaintiff’s view of the hose and Plaintiff admitted she just did not see it. This case, like *Perez*, demonstrates the hose was a dangerous condition but not an *unreasonably* dangerous condition. Similarly, the hose was open and obvious—Plaintiff herself stepped over it when she entered the store and failed to notice the condition when she left the store.

As stated, Defendant had multiple duties: make the store safe for customers and protect the customer from an unreasonable risk of harm. Defendant had no duty to ensure absolute safety, act as an insurer for safety, or protect against reasonable (open and obvious) risks. Here, Plaintiff was aware of the risk (hose) when she entered the store, failed to look around upon exiting the store, and stepped on the clearly visible hose. Defendant has not disputed that Plaintiff fell and suffered injuries, including damage to her knees and hands. However, injury itself “does not give rise to a presumption that a defective condition created an unreasonable risk of harm.” *Perez*, 257 Ariz. 244 ¶ 20. Defendant had no duty to prevent Plaintiff’s fall given the facts presented, and Plaintiff presented no evidence showing the hose was unreasonably dangerous.

In support of her claim, Plaintiff points to Defendant’s policy manual that requires employees to use hoses on either side of the building rather than pulling a hose in front of the store. This is not persuasive. Defendant’s internal policy “does not create a duty that does not exist in law, rather it speaks to the standard of care and whether there was a breach of that standard.” *Perez*, 257 Ariz. 244 ¶ 19. The internal policy may be relevant if Plaintiff were to survive a motion

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

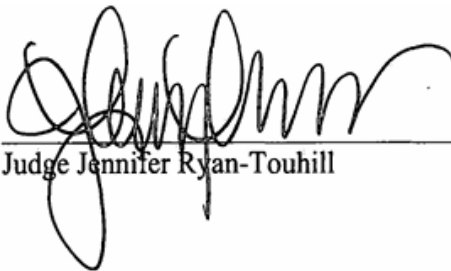
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for summary judgment by proving a duty existed; because Plaintiff has not done so, the Court need not consider what a policy manual stated. For these reasons,

**IT IS ORDERED** granting Defendant's motion for summary judgment.

The Court has considered the merits of each party's position and, using discretion, declines to award attorney's fees and costs to either party. Because of this, the Court finds that no further matters remain pending and judgment is granted pursuant to 54(c), Ariz. R. Civ. P.



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Judge Jennifer Ryan-Touhill

## Certificate of Compliance

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