IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

DAVID HAMILL AND GUILLERMINA HAMILL, HUSBAND AND WIFE,
Plaintiffs/Appellees,

v.

TROON GOLF, LLC, A DELAWARE CORPORATION;
SWVP LA PALOMA, LLC, A DELAWARE CORPORATION,
Defendants/Appellants.

No. 2 CA-CV 2016-0124
Filed April 25, 2017

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NOT FOR PUBLICATION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).

Appeal from the Superior Court in Pima County
No. C20144926
The Honorable Richard S. Fields, Judge

AFFIRMED

COUNSEL

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MEMORANDUM DECISION

Presiding Judge Staring authored the decision of the Court, in which Judge Espinosa and Judge Eppich[1] concurred.

S T A R I N G, Presiding Judge:

¶1 SWVP La Paloma, LLC and Troon Golf, LLC (collectively, "La Paloma") appeal the trial court's decision granting David and Guillermina Hamill's motion for new trial on their claims arising from David being bitten by a snake on La Paloma's property.[2] By granting the motion for new trial, the court reversed its earlier order granting summary judgment in favor of La Paloma. For the reasons that follow, we affirm the grant of a new trial.

Factual and Procedural Background

¶2 In September 2013, a rattlesnake bit Hamill[3] while he was working on an outdoor dining patio at La Paloma, a country club and resort property. The patio where Hamill was bitten was separated by hedges from an irrigated lawn. Hamill filed a negligence lawsuit against La Paloma for damages arising from the bite. La Paloma subsequently moved for summary judgment, arguing it either did not owe or could not have breached a duty of care to protect against the acts of wild animals on the property unless it had specific knowledge

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[1]The Hon. Karl C. Eppich, a judge of the Pinal County Superior Court, is authorized and assigned to sit as a judge on the Court of Appeals, Division Two, pursuant to Arizona Supreme Court order filed March 8, 2017.

[2]SWVP La Paloma, LLC owns the property, and Troon Golf, LLC manages golf operations and groundskeeping for portions of the property, including the lawn and hedges in the area where the bite occurred.

[3]The disposition of this appeal does not require us to discuss Guillermina or any claims specific to her. Thus, we use "Hamill" throughout the decision.

of danger from a particular animal. Following oral argument, the trial court granted the motion, stating "[n]o reasonable Western jury could find that La Paloma unreasonably and foreseeably exposed [Hamill] to harm."

¶3 The trial court entered a final judgment pursuant to Rule 54(c), Ariz. R. Civ. P., in January 2016, and Hamill timely moved for a new trial.[4] *See* Ariz. R. Civ. P. 59(b). In May 2016, the court granted Hamill's motion for new trial, and this appeal followed.[5] We have jurisdiction pursuant to A.R.S. § 12-2101(A)(5)(a).

Discussion

¶4 On appeal, La Paloma argues the trial court erred in granting Hamill's motion for new trial because (1) La Paloma does not owe a duty of care to protect against wild animal attacks, and (2) Hamill presented insufficient evidence to allow a reasonable jury to conclude La Paloma breached any duty owed to Hamill. We

[4]A motion for new trial may be directed against a grant of summary judgment. *Maganas v. Northroup*, 112 Ariz. 46, 48, 537 P.2d 595, 597 (1975).

[5]Rule 59(i), Ariz. R. Civ. P., requires the trial court to "specify with particularity the ground or grounds for the court's order" granting a new trial. *See also* Ariz. Sup. Ct. Order R-16-0010, Attachment A 171-73, Attachment B 10-11 (Sept. 2, 2016) (concerning renumbering and minor revisions immaterial to our analysis). Here, the court's signed minute entry did not specify any ground. Neither party has asserted the trial court's order lacks specificity, however, and any challenge to the order based on Rule 59(i) is therefore waived. *See Caldwell v. Tremper*, 90 Ariz. 241, 245, 367 P.2d 266, 268 (1962) (failure to request compliance waived right to challenge lack of specificity). Moreover, arguments below focused on evidence of breach, and indicate the trial court's basis was its conclusion it had been mistaken about whether the evidence created any issues of fact concerning breach. *See Liberatore v. Thompson*, 157 Ariz. 612, 619, 760 P.2d 612, 619 (App. 1988) (Rule 59 specificity requirement construed pragmatically according to purpose of ensuring notice of basis for new trial order).

review the trial court's grant of a motion for new trial for an abuse of discretion. *Englert v. Carondelet Health Network*, 199 Ariz. 21, ¶ 5, 13 P.3d 763, 767 (App. 2000). And "[w]e review an order granting a new trial under a more liberal standard than an order denying one." *Id.*, *quoting State Farm Fire & Cas. Co. v. Brown*, 183 Ariz. 518, 521, 905 P.2d 527, 530 (App. 1995).

Existence of Duty

¶5 In order to prevail on a negligence claim, a plaintiff must prove he suffered damages caused by the defendant's breach of a duty of care owed to him. *Gipson v. Kasey*, 214 Ariz. 141, ¶ 9, 150 P.3d 228, 230 (2007). The existence of a duty is a matter of law for the trial court to determine, while breach and causation are factual issues ordinarily reserved for the jury. *Id.* And Arizona courts are expressly admonished not to confuse duty and breach by considering case-specific details such as foreseeability or "the parties' actions in particular cases" when determining duty. *Id.* ¶¶ 14-17, 21. "[T]he duty remains constant, while the conduct necessary to fulfill it varies with the circumstances." *Coburn v. City of Tucson*, 143 Ariz. 50, 52, 691 P.2d 1078, 1080 (1984) (adoption of particular safety features relevant to whether city breached duty to keep streets reasonably safe for travel); *see also Alhambra Sch. Dist. v. Superior Court*, 165 Ariz. 38, 42 & n.7, 796 P.2d 470, 474 & n.7 (1990) (failure to post signs in crosswalk relevant to question of breach but not existence of duty); *Grafitti-Valenzuela ex rel. Grafitti v. City of Phoenix*, 216 Ariz. 454, ¶¶ 10-11, 167 P.3d 711, 715 (App. 2007) (foreseeability of crime at bus stop not relevant to whether city owed duty to keep stop reasonably safe).

¶6 In Arizona, a business owner owes a duty of care "to protect [an invitee] against foreseeable and unreasonable risks of harm," *Bellezzo v. State*, 174 Ariz. 548, 550-51, 851 P.2d 847, 849-50 (App. 1992). In other words, the business owner owes invitees a duty "to maintain its premises in a reasonably safe condition," though it is not "an insurer" of its guests' safety. *Woodty v. Weston's Lamplighter Motels*, 171 Ariz. 265, 268, 830 P.2d 477, 480 (App. 1992); *accord McMurtry v. Weatherford Hotel, Inc.*, 231 Ariz. 244, ¶ 22, 293 P.3d 520, 528 (App. 2013). Here, there is no dispute that Hamill, who was working on the property with La Paloma's consent, was an invitee

and was owed a duty of care.[6] *See Nicoletti v. Westcor, Inc.*, 131 Ariz. 140, 142-43, 639 P.2d 330, 332-33 (1982).

¶7 La Paloma, however, argues the trial court erred by not determining "the scope of [La Paloma's] particular duty . . . in the context of wild animals," and asserts public policy informed by the common law doctrine of *ferae naturae*[7] warrants not imposing a duty unless a landowner does something to introduce, harbor, or possess wild animals. In effect, therefore, La Paloma contends the court abused its discretion by not adopting *ferae naturae* in a negligence case to narrow the scope of La Paloma's duty to invitees. We disagree.

¶8 First, La Paloma's scope-of-duty argument would require consideration of "specific details of conduct" on the part of the landowner, which Arizona has repeatedly rejected as a factor in determining duty. *See Booth v. State*, 207 Ariz. 61, ¶ 13, 83 P.3d 61, 66 (App. 2004), *quoting Coburn*, 143 Ariz. at 52, 691 P.2d at 1080. And, in *Booth*, we explicitly rejected applying *ferae naturae* to create an exception for the acts of wild animals in negligence cases. *See id.* ¶¶ 7-9. We see no reason to disregard or distinguish *Booth* in this negligence case by adopting the doctrine of *ferae naturae* to narrow the scope of La Paloma's duty to its invitees.[8]

¶9 La Paloma relies on several Arizona cases that concern the examination of public policy in considering whether to impose a duty, but not to modify an already well-established one. *See Ontiveros v. Borak*, 136 Ariz. 500, 511, 667 P.2d 200, 211 (1983) (recognizing common law and statutorily imposed duty of tavern owners to exercise care for protection of non-customers endangered by

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[6]In its appellate briefs, La Paloma agreed "that, under Arizona common law, a landowner generally owes a duty toward invitees."

[7]"*Ferae naturae* means 'of a wild nature or disposition.'" *Booth v. State*, 207 Ariz. 61, ¶ 7, 83 P.3d 61, 64 (App. 2004), *quoting Ferae Naturae*, Black's Law Dictionary (7th ed. 1999).

[8]We disagree with La Paloma's assertion at oral argument that affirming the grant of a new trial would have the effect of imposing a heightened duty of care upon landowners. Our decision in this case does not affect Arizona law concerning duty.

intoxicated patrons); *Estate of Maudsley v. Meta Servs., Inc.*, 227 Ariz. 430, ¶¶ 15-22, 258 P.3d 248, 253-54 (App. 2011) (statutorily imposed duty on mental health facilities); *Bloxham v. Glock Inc.*, 203 Ariz. 271, ¶ 10, 53 P.3d 196, 200 (App. 2002) (policy considerations did not support imposing duty on firearms industry to control sales at gun shows to third parties). Moreover, although public policy may sometimes justify protecting "certain entities" from tort liability "we must also consider that 'special rules of nonliability and immunity lead to the encouragement of irresponsibility and consequent harm to society.'" *Booth*, 207 Ariz. 61, ¶ 22, 83 P.3d at 69, *quoting Ontiveros*, 136 Ariz. at 512, 667 P.2d at 212. La Paloma has identified no policy that would be served by immunizing landowners from responsibility for harm caused by the failure to protect invitees from the actions of wild animals.

¶10 We conclude the trial court did not err in determining La Paloma owed a duty to Hamill as an invitee. Neither did the court err by declining to apply the doctrine of *ferae naturae* to the determination of duty in this case.

Breach of Duty

¶11 We turn to the question of whether the trial court correctly reversed its summary judgment ruling, and specifically the existence of issues of material fact concerning whether La Paloma breached its duty of care to Hamill. *See* Ariz. R. Civ. P. 56(a). As noted, breach is a question of fact usually determined by a jury. *Gipson*, 214 Ariz. 141, ¶¶ 9-10, 150 P.3d at 230; *Hill v. Safford Unified Sch. Dist.*, 191 Ariz. 110, 113, 952 P.2d 754, 757 (App. 1997) (jury ordinarily determines whether risk "was foreseeable and unreasonable"). We review a trial court's grant of summary judgment de novo, but view the evidence and reasonable inferences from it in the light most favorable to the party opposing summary judgment. *Felipe v. Theme Tech Corp.*, 235 Ariz. 520, ¶ 31, 334 P.3d 210, 218 (App. 2014). Summary judgment is appropriate "if the facts produced in support of the claim or defense have so little probative value . . . that reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense." *Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990); s*ee also Coburn*, 143 Ariz. at 53-54, 691 P.2d at 1081-82 (requiring additional safety measures unreasonable where evidence indicated risk only to users

traveling on wrong side of road who disobeyed stop sign); *Grafitti-Valenzuela*, 216 Ariz. 454, ¶¶ 14-17, 167 P.3d at 715-16 (summary judgment appropriate absent evidence suggested safety improvements would reduce risk of crime at bus stop). On the other hand, evidence an injury was foreseeable and preventable raises issues of material fact as to breach of duty, including situations involving intervening causes and acts of nonparties. *See Martinez v. Woodmar IV Condos. Homeowners Ass'n, Inc.*, 189 Ariz. 206, 211-12, 941 P.2d 218, 223-24 (1997) (foreseeability of criminal attacks in condominium common areas); *Dunham v. Pima Cty.*, 161 Ariz. 304, 306, 778 P.2d 1200, 1202 (1989) (foreseeability of collisions caused by negligence of plaintiff or other drivers); *Booth*, 207 Ariz. 61, ¶ 21, 83 P.3d at 68 (foreseeability to public entity of collisions with animals crossing highway).

¶12 Viewing the evidence in the light most favorable to Hamill, as we must, there were reports by at least seven La Paloma employees other than Hamill who had personally witnessed or were generally aware of the presence of rattlesnakes on the property at various times in the past. Hamill also elicited evidence La Paloma had not adopted procedures that facilitated the retention of information or evaluation of the effectiveness of its usual practice of relocating venomous snakes captured on the property. Further, Hamill presented some general evidence rattlesnakes are not unpredictable; they tend to avoid humans and seek out areas with access to shelter and food, including small rodents, reptiles, and birds. The risk of rattlesnake bites can thus be minimized by limiting potential hiding places and food sources. Also, employee testimony confirmed the condition of the hedges near the patio where the bite occurred gave snakes a convenient place to hide.

¶13 La Paloma's characterization of reported sightings and general awareness of rattlesnakes on the property as "rumors" and "urban legends" is a matter for the trier of fact. Unless no reasonable person could conclude the evidence established a foreseeable risk of harm, those, and other questions of fact remain for the jury. *See Orme Sch.*, 166 Ariz. at 309, 802 P.2d at 1008. Moreover, our supreme court has made it clear "summary judgment should not be used as a substitute for jury trials simply because the trial judge may believe the moving party *will* probably win the jury's verdict, nor even when the trial judge believes the moving party *should* win the jury's

verdict." *Id.* at 310, 802 P.2d at 1009; *see also Tribe v. Shell Oil Co.*, 133 Ariz. 517, 518, 652 P.2d 1040, 1041 (1982) (summary judgment "generally not appropriate" in negligence cases). Our review here is consistent with this admonition.

¶14 Finally, La Paloma's argument that the resort did not have any specific knowledge about past snake bites or the presence of the particular snake that bit Hamill is not determinative in light of the evidence from which a jury could conclude it failed to take reasonable precautions in light of a known risk. It is well established that a plaintiff need not establish notice of a particular dangerous condition "if the proprietor could reasonably anticipate that hazardous conditions would regularly arise" and failed to exercise reasonable care under the circumstances. *Chiara v. Fry's Food Stores of Ariz., Inc.*, 152 Ariz. 398, 400-01, 733 P.2d 283, 285-86 (1987).

¶15 Accordingly, we conclude Hamill presented sufficient evidence to raise genuine issues of material fact with respect to whether La Paloma breached its duty of care to him. Summary judgment was inappropriate, and the trial court did not abuse its discretion in granting Hamill's motion for new trial.

Disposition

¶16 For the foregoing reasons, we affirm the trial court's decision to grant Hamill's motion for new trial.