No. 339858

DIVISION III, COURT OF APPEALS
OF THE STATE OF WASHINGTON

MICA CRAIG,

Appellant,

vs.

WAL-MART STORES, INC.,

Respondent.

ON APPEAL FROM ASOTIN COUNTY SUPERIOR COURT
(The Honorable Scott Gallina)

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

Appellant Mica Craig traveled to his local Wal-Mart store to purchase a bag of mulch. While in the self-service garden center, Mr. Craig was bitten by a rattlesnake on the mulch pallet. This particular Wal-Mart is located in an area commonly known for rattlesnakes. Yet, rather than taking precautions to ensure that such snakes were not a hazard to its customers, Respondent Wal-Mart, Inc. situated and conducted its garden center business in such a way that enticed snakes unto the property where Wal-Mart expected its customers to locate and handle the products that they were purchasing.

There is no question that Wal-Mart owes a duty of ordinary care to its invitees. The scope of that duty was the ultimate question before the trial court. Mr. Craig presented evidence, including an expert declaration, establishing that Wal-Mart created conditions making the presence of rattlesnakes within its garden center foreseeable and that

Wal-Mart did not take reasonable precautions to minimize or warn of the risk. Wal-Mart presented evidence and a contrary expert declaration stating that the risk was not foreseeable, denying any duty.

The trial court was required to view this competing evidence in the light most favorable to Mr. Craig, the non-moving party. To the contrary, the trial court wholly ignored Mr. Craig's evidence and expert's opinions. The trial court failed to view the evidence under the proper standard and erred in granting summary judgment to Wal-Mart. Mr. Craig is entitled to have a jury determine whether Wal-Mart created the conditions that caused his injury, whether his injury was foreseeable, and whether Wal-Mart took reasonable precautions to prevent it. Accordingly, Mr. Craig respectfully requests this Court reverse the trial court's order granting summary judgment and remand for further proceedings.

II. ASSIGNMENTS OF ERROR

A. The trial court erred in granting Wal-Mart's motion for summary judgment despite significant issues of material fact as to whether Wal-Mart's mode of operation caused the conditions that led to Mr. Craig's snakebite injury.

B. The trial court erred in granting Wal-Mart's motion for summary judgment despite significant issues of material fact as to whether Mr. Craig's injury was foreseeable and whether Wal-Mart took appropriate precautions to prevent the injury.

C. The trial court erred in determining foreseeability and the scope of Wal-Mart's duty as a matter of law.

III. STATEMENT OF THE CASE

On Friday May 11, 2012, the Appellant, Mr. Mica Craig, travelled to the Clarkston, Washington Wal-Mart to purchase a bag of mulch. CP 199-200. Once he arrived at Wal-Mart, Mr. Craig drove to the outdoor garden center, where the mulch was being sold. CP Id.

Entering the area where mulch was merchandised for sale on pallets, Mr. Craig bent down to identify a price. CP Id. The price tag was located on the lower portion of the wooden pallets

on which the mulch was stacked. CP 215. The pallets sat approximately three (3) inches from the ground and six (6) to eight (8) inches apart. CP 55; CP 100.

Mr. Craig was unable to determine the price of the mulch because the price display was partially obstructed by what appear to be debris. CP 200. Mr. Craig bent down to clear the debris with his hand. CP Id. As he did so, the object that Mr. Craig originally believed was natural debris lunged up and bit him, clinging on to his hand. CP Id. Mr. Craig yelled, shaking the snake off his hand and stomping on it with his foot. CP Id. Mr. Craig was taken to a nearby clinic, where he was given ice to treat the bite. CP 177. His hand became very swollen, prompting him to seek emergency care at a local hospital, where he was admitted. CP 45-46; CP 57-58. Mr. Craig incurred over $100,000 in medical bills. CP 2, ¶ 10.

Wal-Mart had set up its garden center in the parking lot away from the main retail building and adjacent to several tracts of undeveloped land. CP 211-213. There was no fence or other

barrier between the parking lot/garden center and the undeveloped tracts. CP Id. The Clarkston area is so commonly known as a natural habitat for rattlesnakes that there are various landmark names that contain the word rattlesnake. CP 217. Rattlesnakes are known to be more active in the spring and summer months when they have left their winter dens. CP 196. The garden center is in place from the months of March to July. CP 70. Various Wal-Mart managers and employees testified that rodent/mouse (a common source of food for snakes) sightings are a common occurrence at Wal-Mart. CP 69-70; CP 86; CP 102; CP 114. Mousetraps are set up not only inside the main building, but also on the property perimeter. CP 70. On the date of Mr. Craig's snakebite incident, the pallets in the garden center were spaced only 6-8" apart, when 12-18" is the policy. CP 55; CP 100; CP 103. Although not specific to the Clarkston location, many other of Wal-Mart's chain stores across the country have had reported incidents of customer

snakebites, specifically in their outdoor garden centers. CP 223-229.

IV. ARGUMENT AND AUTHORITY

A. Standard of Review

The standard of review of an order of summary judgment is de novo, with the appellate court performing the same inquiry as the trial court. Smith v. Safeco Ins. Co., 150 Wn.2d 478, 483, 78 P.3d 1274, 1276 (2003); Young v. Key Pharmaceuticals, Inc., 112 Wn.2d 216, 226, 770 P.2d 182 (1989). In reviewing a summary judgment, "all facts and reasonable inferences are considered in a light most favorable to the non-moving party, while all questions of law are reviewed de novo." Cowlitz Stud Co. v. Clevenger, 157 Wn.2d 569, 573, 141 P.3d 1, 3 (2006). The moving party must first show the absence of an issue of material fact. Young, supra at 226. The burden then shifts to the non-moving party to set forth specific facts showing a genuine issue for trial. Id., citing CR 56(e). A court must deny summary judgment when a party raises a material factual dispute. Smith,

supra, at 485-486, citing Balise v. Underwood, 62 Wn.2d 195, 200, 381 P.2d 966 (1963). The legal inquiry shapes what is a material fact. Smith, at 486. A genuine issue is one upon which reasonable people may disagree; a material fact is one controlling the litigation's outcome. Keck v. Collins, 181 Wn. App. 67, 90, 325 P.3d 306, 317 (Wash. Ct. App. Div. 3 2014), affirmed at 184 Wn.2d 358, citing Morris v. McNicol, 83 Wn.2d 491, 494, 519 P.2d 7 (1974) and Ranger Ins. Co. v. Pierce County, 164 Wn.2d 545, 552, 192 P.3d 886 (2008). If reasonable persons might reach a different conclusion, the motion should be denied. Klinke v. Famous Recipe Fried Chicken, Inc., 94 Wn.2d 255, 256-57, 616 P.2d 644 (1980).

"Summary judgment procedure ... is a liberal measure, liberally designed for arriving at the truth. Its purpose is not to cut litigants off from their right of trial by jury if they really have evidence which they will offer on a trial, it is to carefully test this out, in advance of trial by inquiring and determining whether such evidence exists." Keck, supra at 86-87, citing

Preston v. Duncan, 55 Wn.2d 678, 683, 349 P.2d 605 (1960) (internal citation omitted). "The object and function of summary judgment procedure is to avoid a useless trial. A trial is not useless, but is absolutely necessary where there is a genuine issue as to any material fact." Keck, supra (internal citations omitted); Babcock v. State, 116 Wn.2d 596, 599, 809 P.2d 143 (1991) ("Summary judgment exists to examine the sufficiency of legal claims and narrow issues, not as an unfair substitute for trial."). Only where reasonable minds could reach but one conclusion from the admissible facts in evidence, may summary judgment be granted. LaMon v. Butler, 112 Wn.2d 193, 199, 770 P.2d 1027 (1989). Where different, competing inferences may be drawn from the evidence, the issue must be resolved by the trier of fact. VersusLaw, Inc. v. Stoel Rives, L.L.P., 127 Wn. App. 309, 320, 111 P.3d 866, 871 (Wash. Ct. App. Div. 1 2005), citing Hudesman v. Foley, 73 Wn.2d 880, 889, 441 P.2d 532 (1968).

If the trial court fails to apply the proper standard, the appellate court must overturn summary judgment. See Keck, supra at 93; Lamon v. McDonnell Douglas Corp., 91 Wn.2d 345, 353, 588 P.2d 1346, 1350 (1979) ("Viewing the inferences created by the affidavit of plaintiff's engineering witness in a light most favorable to plaintiff, we are satisfied it created an issue of material fact which necessitated the denial of summary judgment."); see also Smith, supra at 486 (summary judgment reversed after wrong standard applied).

Mr. Craig submitted admissible evidence establishing the existence of genuine issues of material fact as to whether Wal-Mart created the conditions that caused Mr. Craig's injury, whether Wal-Mart had a duty to protect its customers from the existence of rattlesnakes on its property, whether Wal-Mart breached that duty, and whether Wal-Mart took proper precautions to protect its customers. Clearly reasonable minds can disagree as the parties each submitted expert declarations containing opposing opinions on these issues. Viewing such

evidence in the light most favorable to Mr. Craig, summary judgment for Wal-Mart was improper and must be reversed. Lamon, 91 Wn.2d at 353.

B. Mr. Craig presented evidence establishing significant issues of material fact as to whether Wal-Mart's mode of operation caused the conditions that led to his snakebite injury.

A plaintiff in a negligence case must establish (1) a duty, (2) a breach of that duty, (3) a resulting injury, and (4) proximate cause between the breach and the injury. Tincani v. Inland Empire Zoological Soc'y, 124 Wn.2d 121, 127-128, 875 P.2d 621 (1994). The threshold determination of whether a duty exists is a question of law. Id., at 128. In actions involving premises liability, "the plaintiff's status as either an invitee, licensee, or trespasser determines the scope of the duty of care owed by the owner or occupier of the premises to the plaintiff." Zenkina v. Sisters of Providence, 83 Wn. App. 556, 922 P.2d 171 (Wash. Ct. App. Div. 1 1996). It is undisputed that Mr.

Craig was an invitee. CP 177. As such, he was owed a duty of ordinary care. Id. at 561.

In Iwai v. State, 129 Wn.2d 84, 915 P.2d 1089 (1996), our State Supreme Court further defined the duty of care owed by the possessor of land to invitees by adopting Restatement 2d of Torts § 343. The Restatement states that a landowner is liable for harm caused to its invitees by a condition on its land if it:

> (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
> (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
> (c) fails to exercise reasonable care to protect them against the danger.

Id., at 96.

1. Where there is evidence that Wal-Mart's mode of operation caused Mr. Craig's injury, he need not establish actual or constructive notice as an element of his negligence claim.

Wal-Mart argued that Mr. Craig had to prove actual or constructive notice for the trial court to impose liability. However, there are two exceptions to the notice requirement in premises liability cases. As laid out in the Restatement as adopted by the Iwai Court:

> An owner or occupier of land may be liable to an invitee for injuries resulting from a dangerous condition on the land of which the owner or occupier does not have actual or constructive knowledge if (1) the specific unsafe condition is foreseeably inherent in the nature of the owner's or occupier's business or mode of operation or (2) the owner or occupier caused the hazardous condition.

Restatement 2d of Torts § 343. This has become known as the "Pimental exception."

The Supreme Court, in Pimentel v. Roundup Co., 100 Wn.2d 39, 49, 666 P.2d 888 (1983), clarified the approach under the two exceptions stating as follows:

> This does not change the general rule governing liability for failure to maintain premises in a reasonably safe condition: the unsafe condition must either be caused by the proprietor or his employees, or the proprietor must have actual or constructive notice of the unsafe condition. Such notice need not be shown, however, when the

> nature of the proprietor's business and his methods of operation are such that the existence of unsafe conditions on the premises is reasonably foreseeable. This exception merely eliminates the need for establishing notice and does not shift the burden to the defendant to disprove negligence. The plaintiff must still prove that defendant failed to take reasonable care to prevent the injury.

Id., at 49.

2. Reasonable minds could disagree on whether Wal-Mart created the conditions that caused Mr. Craig's rattlesnake bite injury.

The trial court was required to view the evidence on summary judgment, and all reasonable inferences therefrom, in the light most favorable to Mr. Craig. Where reasonable persons could reach different conclusions, the trial court should have denied the motion. Klinke, 94 Wn.2d at 256-257.

Wal-Mart had set up its garden center in the parking lot away from the main building and adjacent to several tracts of undeveloped land. CP 211-213. There was no fence or other barrier between the parking lot/garden center and the undeveloped tracts. CP Id. The Clarkston area is so commonly known as a natural habitat for rattlesnakes that there are

landmark names that contain the word rattlesnake. CP 217. Rattlesnakes are known to be more active in the spring and summer months when they are leaving their winter dens. CP 196. The garden center is in place from the months of March to July. CP 70. Rodent/mouse sightings are a common occurrence at Wal-Mart, thus providing a source of food for snakes. CP 69-70; CP 86; CP 102; CP 114.

Although not specific to the Clarkston store, many other of Wal-Mart's chain stores across the country have had reported incidents of customer snakebites, specifically in their garden centers. CP 223-229. Wal-Mart's garden center is a self-service operation that requires the customers to handle their own mulch and other products. CP 54-55; CP 70-72. On the date Mr. Craig was bitten, the pallets in the garden center were spaced only 6-8" apart, when 12-18" is the policy. CP 55; CP 100; CP 103.

By setting up the garden center in the parking lot location near undeveloped land, in an area known for rattlesnakes, where rodents/mice are commonplace, where customers are

required to handle their own products, and by placing pallets close together in such a way that provided shelter for snakes, Wal-Mart caused the exact conditions that caused Mr. Craig to come into contact with the snake that bit him. On notice that snakebites are common in its garden centers, Wal-Mart still chose to arrange the garden center in this location and manner and not to provide any signage warning customers of the danger.

Daniel Beck is a PhD in Ecology and Evolutionary Biology with specific knowledge and expertise related to rattlesnake ecology, habitat use and behavior. CP 194. Mr. Beck prepared and presented an affidavit in support of Mr. Craig's opposition to Wal-Mart's Motion for Summary Judgment. CP 194-196. Mr. Beck testified that these above-described conditions were factors in the presence of the snake that bit Mr. Craig, creating a material question of fact as to whether Wal-Mart caused the conditions that resulted in his injury.

The trial court stated that "Walmart was under no duty to exercise such care until it knew or had reason to know that dangerous acts by wild animals were occurring or were about to occur." CP 275. That is the wrong standard where there is a material question of fact as to whether Wal-Mart caused the conditions resulting in the injury. Restatement 2d of Torts, § 343; Pimental, supra, at 49. Viewing the facts and all reasonable inferences in Mr. Craig's favor, the trial court erred in granting summary judgment.

C. Mr. Craig presented evidence establishing significant issues of material fact as to whether Mr. Craig's injury was foreseeable and whether Wal-Mart took proper precautions to prevent it.

There is also a material question of fact as to whether Mr. Craig's injury was foreseeable, such that Wal-Mart had a duty to take precautions to prevent it. As described in the previous section, the Pimental exception (precluding the need to establish actual or constructive notice of a dangerous condition) includes circumstances under which the nature of the

proprietor's business and his methods of operation are such that the existence of unsafe conditions on the premises is reasonably foreseeable. Pimental, 100 Wn.2d, at 49. An injured customer need not prove that the owner or employees caused the unsafe condition or had actual or constructive knowledge of the condition when, given the nature of the business and its actual methods of operation, the condition was continuous or reasonably foreseeable." Wiltse v. Albertson's, Inc., 116 Wn.2d 452, 453 805 P.2d 793 (1991). The concept of foreseeability, therefore, is what determines the extent and scope of the land possessor's duty. Rikstad v. Holmberg, 76 Wn.2d 265, 268, 456 P.2d 355 (1969).

1. The scope of Wal-Mart's duty is a jury question.

While the existence of a duty is a question of law based on considerations of public policy, "[o]nce this initial determination of legal duty is made, the jury's function is to decide the foreseeable range of danger thus limiting the scope

of that duty." Jarr v. Seeco Constr. Co., 35 Wn. App. 324, 329-330, 666 P.2d 392, 395-396 (Wash. Ct. App. Div. 1 1983), citing Bernethy v. Walt Failor's, Inc., 97 Wn.2d 929, 933, 653 P.2d 280 (1982). Summary judgment shall be denied if the plaintiff raises questions of fact as to foreseeability. See Iwai, supra, at 102.

Neither party located or identified a Washington case on all fours and instead cited to out of state authority with closer factual scenarios. In cases without the unusual combination of circumstances present here, summary judgment on the issue of foreseeability may be appropriate. See, e.g. Overstreet v. Gibson Product Co., 558 S.W.2d 58, 61-62 (Tex. Civ. App. San Antonio 1977). In Overstreet, the court found a retailer not liable for a snakebite where there was no evidence that the defendant or employees knew of the presence of the snake in the store. However, the Overstreet court explained that if there was "evidence to support the inference that defendant had reason to know that the snake was present or might reasonably

be expected to be present, thus creating a danger for a person in plaintiff's class," then summary judgment would not be appropriate. Id., at 62.

In its analysis, the Overstreet court cited to DeLuce v. Fort Wayne Hotel, 311 F.2d 853 (6th Cir. 1962), a case where such evidence capable of supporting an inference did exist and created a duty. Id. (rat bite foreseeable and hotel had duty to prevent injury where there was evidence of the presence of rats in the alley adjoining the hotel and on the sidewalk in front of the hotel, but no rats had even been seen inside the hotel). The DeLuce case is the closest factual scenario to the one before this Court.

2. Reasonable minds could disagree as to whether the potential for snakebite injuries in the garden center was a foreseeable risk and whether Wal-Mart took proper precautions.

As to foreseeability, the trial court held:

> Nothing in this case indicates that there was any relation between the snake which inflicted the injury and Walmart's mode of operation of its business. There has been no evidence produced that Walmart enticed or encouraged patrons to handle snakes in the garden center

> or pick up sticks in the parking lot as part of its business operations.

CP 273. The trial court also held:

> There is simply no evidence whatsoever of any snake activity of any kind anywhere on the premises of this particular Walmart store and a complete lack of evidence that Walmart's mode of business operations would somehow encourage or promote invitees to encounter and interact with wild animals.

CP 274 (emphasis added). Ironically, as outlined in the previous section, this is exactly the evidence that Mr. Craig presented (that Wal-Mart's mode of business operations in the setup and running of the garden center encouraged snake activity in an area where customers were likely to encounter them); the trial court appears to have prematurely and improperly weighed the credibility of the parties' experts on this exact and ultimate issue of fact. See Morinaga v. Vue, 85 Wn. App. 822, 828, 935 P.2d 637, 640-641 (Wash. Ct. App. Div. 3 1997) ("Summary judgment is proper when reasonable persons looking at all the evidence could reach only one conclusion. Id. Summary judgment is not proper when credibility issues involving more

than collateral matters exist."); Amend v. Bell, 89 Wn.2d 124, 129, 570 P.2d 138, 141 (1977), citing Balise v. Underwood, 62 Wn.2d 195, 381 P.2d 966 (1963) ("...the court should not resolve a genuine issue of credibility at a summary judgment hearing. If such issue is present, the motion should be denied. An issue of credibility is present if there is contradictory evidence or the movant's evidence is impeached.")

The trial court also asked the wrong question in denying evidence of snakes being seen on the exact premises. The correct question is, based upon Wal-Mart's mode of business operations in the garden center, given the common knowledge of rattlesnakes in the vicinity, and numerous occurrences of snakebites at its other garden center locations, was it foreseeable that snakes could be present and did Wal-Mart take reasonable, or any, precautions to avoid endangering its customers.

> An owner of a self-service establishment has actual notice that his mode of operation creates certain risks of harm to his customers. Since a self-service operation

> involves the reasonable probability that these risks will occur, these risks are foreseeable. Thus, it is not necessary to show actual or constructive notice of the specific hazard causing injury, and it becomes the task of the jury to determine whether the proprietor has taken all reasonable precautions necessary to protect his invitees from these foreseeable risks.

Pimentel, 100 Wn.2d at 45, citing Ciminski v. Finn Corp., 13 Wn. App. 815, 820-821, 537 P.2d 850, review denied, 86 Wn.2d 1002 (1975).

Contrary to the trial court's holdings as stated above, the parties presented affidavits and evidence establishing the following undisputed facts (citations to the record located above) that made the possibility of rattlesnakes entering the Wal-Mart garden center and endangering customers handling their products foreseeable.

- the garden center was set apart from the main store in the parking lot near several tracts of undeveloped land;

- the garden center was set up during March – July, the time of year that rattlesnakes are moving outside of their winter dens;

- the store is in an area commonly known as rattlesnake habitat;

- the garden center was not separated by a fence or other barrier from the undeveloped tracts;

- rodent/mouse sightings are common at the property;
- the pallets in the garden center where the snake was encountered were stacked too close together in such a manner as to provide a hiding place for snakes; and

- the garden center is self-service, such that customers are required to pick up their products directly from the pallets.

Dr. Beck opined that the above circumstances would increase the likelihood of encounters with snakes and other potentially dangerous pests and that Wal-Mart failed to take reasonable precautions to address that risk. CP 194-196. That Wal-Mart's expert stated otherwise is of no consequence as the weighing of opinion testimony falls directly in the province of the jury, not a trial judge on summary judgment.

Despite this perfect storm of conditions to attract rattlesnakes to the Wal-Mart garden center—conditions created by Wal-Mart—Wal-Mart did not even take the care to put up

warning signs or create some barrier to hinder the ability of snakes to enter and hide in the garden center where customers could encounter them and risk injury.

Wal-Mart's mere denial of ever having seen a snake on the property is not dispositive. Based upon the evidence and all reasonable inferences therefrom, when viewed in the light most favorable to the non-moving party, reasonable people could disagree as to whether Wal-Mart knew of or should have foreseen the danger, but still did nothing to protect its patrons.

The trial court further suggested that the doctrine of animals ferae naturea (wild game) dictated a finding of "no duty to control the State's snake's movements." CP 274; but see The Landings Ass'n, Inc. v. Williams, 318 Ga. App. 760, 761, 736 S.E.2d 140, 141 (Ga. Ct. App. 2012) ("where there is evidence from which a jury could find that the defendant should have anticipated the presence of the wild animal and that it was reasonably foreseeable that its presence would render the premises unsafe for visitors, the defendant will not be entitled

to judgment as a matter of law purely on the basis of the doctrine of animals ferae naturae.").

Viewing the above undisputed facts in the light most favorable to Mr. Craig, reasonable people could certainly disagree on whether the possibility of rattlesnake encounters was foreseeable and whether it was reasonable for Wal-Mart to forego any precautions or warnings whatsoever. The trial court may determine an event as unforeseeable as a matter of law only if the occurrence is so highly extraordinary or improbable as to be wholly beyond the range of expectability. Otherwise, the question of foreseeability is a question for the trier of fact. Johnson v. State, 77 Wn. App. 934, 942 894 P.2d 1366 (Wash. Ct. App. Div. 1 1995); Iwai, supra, at 102 ("Summary judgment shall be denied if the plaintiff raises questions of fact as to foreseeability."). The undisputed evidence of multiple snakebites occurring at other Wal-Mart garden centers nullifies any prospect of establishing the risk as "highly extraordinary or improbable as to be wholly beyond the range of expectability."

D. Restatement 2d of Torts § 344 is subject to the same foreseeability analysis as under Restatement 2d of Torts § 343.

The trial court's order does not address Restatement 2d of Torts § 344 as presented by Wal-Mart in its motion for summary judgment. However, even if § 344 did apply and the trial court had granted Wal-Mart's motion on that basis, it would be subject to the exact same analysis of foreseeability described above for Restatement 2d of Torts § 343.

Section 344 of the Restatement 2d of Torts states:

> A possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon the land for such a purpose, for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons or animals, and by the failure of the possessor to exercise reasonable care to
>
> (a) discover that such acts are being done or are likely to be done, or
>
> (b) give a warning adequate to enable the visitors to avoid the harm, or otherwise to protect them against it.

McKown v. Simon Prop. Grp, Inc., 182 Wn.2d 752, 766-767, 344 P.3d 661, 666-667 (2015). Although in the context of criminal behavior, not animal behavior, the McKown Court goes on to state that the language of section 344 "narrows the duty inquiry to whether the specific acts in question were foreseeable rather than whether the landowner should have anticipated any act from a broad array of possible criminal behavior or from past information from any source that some unspecified harm is likely." Id., at 667.

As with § 343, Washington courts have determined in applying Restatement 2d of Torts § 344 that an act may be deemed unforeseeable as a matter of law "only if the occurrence is so highly extraordinary or improbable as to be wholly beyond the range of expectability." As discussed above, other such similar occurrences at Wal-Mart garden centers nullify that scenario. Regardless of whether under Restatement section 343 or 344, the question of foreseeability remains a question for the trier of fact. Nivens v. 7-11 Hoagy's Corner, 133 Wn.2d 192,

205, 943 P.2d 286 (1997); Hansen v. Friend, 118 Wn.2d 476, 824 P.2d 483 (1992); Johnson, 77 Wn. App. at 942.

As described in the previous section, the evidence presented and relied upon by Mr. Craig to prove reasonable foreseeability here, under conditions actually created by Wal-Mart, unquestionably meets the minimal legal threshold necessary to survive summary judgment.

V. CONCLUSION AND RELIEF REQUESTED

Mr. Craig carried his burden of establishing genuine issues of material fact as to whether, under the particular facts and circumstances present here, Wal-Mart created the conditions that caused the injury, the injury was foreseeable, and Wal-Mart had a duty to take reasonable precautions to protect him from a rattlesnake bite in its garden center.

The trial court erred in its application of the law and its failure to view the facts and all reasonable inferences in the light most favorable to the non-moving party, Mr. Craig. Accordingly, Mr. Craig respectfully requests this Court reverse

the trial court's order granting summary judgment to Wal-Mart and remand the case to the trial court for further proceedings.

RESPECTFULLY SUBMITTED this 27th day of May, 2016.

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CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury according to the laws of the State of Washington that on this date I caused to be served in the manner noted below a copy of ***Appellant's Opening Brief*** on:

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DATED this 27th day of May, 2016, at Seattle, Washington.

Lia Maria Fulgaro, Paralegal