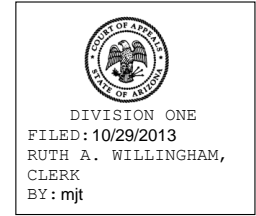


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz.R.Sup.Ct. 111(c); ARCAP 28(c);
Ariz.R.Crim.P. 31.24



**IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE**

WILLIS and KATHY HAWS, husband and) 1 CA-CV 12-0580
wife,)
)
) DEPARTMENT C
Plaintiffs/Appellants,)
) **MEMORANDUM DECISION**
v.) (Not for Publication -
) Rule 28, Arizona Rules
TOWN OF EAGAR, a municipal) of Civil Appellate
corporation in the State of) Procedure)
Arizona,)
)
)
Defendant/Appellee.)
)

Appeal from the Superior Court in Apache County

Cause No. S0100CV201100180

The Honorable Donna J. Grimsley, Judge

AFFIRMED

Goodman Law, PLLC Phoenix
by Jeremy M. Goodman
Attorneys for Plaintiffs/Appellants

The Doyle Law Firm, PC Phoenix
by William H. Doyle
Attorneys for Defendant/Appellee

H O W E, Presiding Judge

¶1 The Haws appeal from the entry of summary judgment
against them on their claim that the Town of Eagar, Arizona, was

negligent in maintaining and inspecting its sewer system. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 The undisputed facts are as follows: The Haws own a home in Eagar. In December 2010, sewage backed up in the sewer line and flooded the Haws' home. An obstruction in the main sewer line that the Town owned and operated caused the backup and flood. The Town had inspected the sewer line one to two months before the flood without incident. After the backup and flood had occurred, the Town began inspecting the sewer line at least twice a week.

¶3 The Haws sued the Town for its negligence in maintaining and inspecting the sewer line. The Town moved for summary judgment, arguing that its only duty was to exercise ordinary or reasonable care to keep the sewers in safe condition, and that it had met this duty by its sewer inspection schedule. As part of this schedule, the Town inspects sewer manholes that have regular problems every two to three months, and also examines manholes in the vicinity of those with regular problems. The Haws opposed the motion for summary judgment, arguing that the following warranted a denial of the Town's motion: (1) The doctrine of *res ipsa loquitor* gave rise to an inference of negligence on the part of the Town; (2) The Town negligently maintained conditions in its sewer system, which

allowed introduction of foreign objects into the system; (3) The Town failed to perceive foreseeable threats to the sewer system's integrity; and (4) The Town was on notice for at least twenty years that the manhole covers did not protect the sewer from the entry of foreign objects.

¶4 The court ruled that the applicable standard was whether the Town had exercised ordinary and reasonable care to keep the sewer line from obstruction. Based on the evidence and argument presented, the court found that the Town did not "fail[] to exercise the requisite level of care" and granted the motion for summary judgment.

¶5 The Haws moved for reconsideration which was denied. The Haws timely appeal.

DISCUSSION

¶6 On appeal, the Haws argue that summary judgment was improper because the determination whether the Town's inspection schedule was adequate and whether the manhole covers adequately secured the sewer against debris were questions of fact for a jury.

¶7 Summary judgment may be granted when no genuine issue exists regarding any material fact and the moving party is entitled to judgment as a matter of law. *Johnson v. Earnhardt's Gilbert Dodge, Inc.*, 212 Ariz. 381, 385 ¶ 15, 132 P.3d 825, 829 (2006). We determine de novo whether any issues of material fact

exist and whether the trial court properly applied the law. *Eller Media Co. v. City of Tucson*, 198 Ariz. 127, 130 ¶ 4, 7 P.3d 136, 139 (App. 2000). We view the evidence in the light most favorable to the nonmoving party. *Tilley v. Delci*, 220 Ariz. 233, 236 ¶ 7, 204 P.3d 1082, 1085 (App. 2009).

¶8 The party moving for summary judgment must produce evidence that it believes demonstrates the absence of a genuine issue of material fact and must explain why summary judgment is warranted. *Nat'l Bank of Ariz. v. Thruston*, 218 Ariz. 112, 115 ¶ 14, 180 P.3d 977, 980 (App. 2008). If the nonmoving party has the burden of proof of the claim or defense at trial, the moving party need not disprove the nonmoving party's claim or defense, but need only point out the lack of evidence on an essential element of the claim or defense. *Id.* at 117 ¶ 22, 180 P.3d at 982. If the moving party meets its burden, the burden shifts to the nonmoving party to present sufficient evidence demonstrating the existence of a disputed fact. *Id.* at 119 ¶ 26, 180 P.3d at 984. The nonmoving party cannot then rest on its pleadings, but must call to the court's attention evidence to explain why the motion should be denied. *Id.* "If the party with the burden of proof on the claim or defense cannot respond to the motion by showing that there is evidence creating a genuine issue of fact on the element in question, then the motion for summary judgment

should be granted." *Orme Sch. v. Reeves*, 166 Ariz. 301, 310, 802 P.2d 1000, 1009 (1990).

¶9 General statements or allegations by counsel are insufficient to defeat a summary judgment motion: "When a motion for summary judgment is made and supported as provided in this Rule, an opposing party may not rely merely on allegations or denials of its own pleading; rather, its response must, by affidavits or as otherwise provided in this Rule, set forth specific facts showing a genuine issue for trial. If the opposing party does not so respond, summary judgment, if appropriate, shall be entered against that party." Ariz. R. Civ. P. 56(e)(4); see also *In re Estate of Kerr*, 137 Ariz. 25, 29-30, 667 P.2d 1351, 1355-56 (App. 1983) *disapproved on other grounds by In re Estate of McGathy*, 226 Ariz. 277, 246 P.3d 628 (2010).

¶10 To establish a claim for negligence, the Haws must have shown that the Town had a duty to conform to the standard of care; the Town breached this duty; that a connection existed between the Town's conduct and the resulting injury; and that they suffered actual damages. *Wickham v. Hopkins*, 226 Ariz. 468, 470 ¶ 8, 250 P.3d 245, 247 (App. 2011) (listing the elements for negligence). In moving for summary judgment, the Town argued that "[t]he duty of a municipality to keep its sewers in repair involves the exercise of a reasonable degree of watchfulness in ascertaining their condition from time to time and preventing

them from becoming dilapidated or obstructed," citing *City of Tucson v. Hughes*, 23 Ariz. App. 350, 351, 533 P.2d 561, 562 (1975). The Town argued that it exercised a reasonable degree of watchfulness in ascertaining the condition of its sewers from time to time by complying with its regular sewer inspection schedule.

¶11 To survive the motion for summary judgment, the Haws had to point to specific evidence demonstrating that a question existed regarding whether the Town had breached its duty. Alternatively, if the Haws could not do so by the time required for a response to the summary judgment motion, they could have requested time for further discovery under Arizona Rule of Civil Procedure 56(f). Instead, the Haws rested upon their claims that the Town was negligent because it failed to protect the sewer system from foreign objects and that the sewer inspections were too infrequent. The superior court, however, cannot rely on the Haws' unsupported claims. Although the Haws attached to their opposition two unsworn, unsigned written statements described as "Affidavits," the superior court could not properly have considered those documents as evidence in considering the Town's

