ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
D. P. MARSHALL, JR., JUDGE

DIVISION II

CA07-295

19 December 2007

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| ANNIE ROBERTS and CECIL ROBERTS, APPELLANTS | AN APPEAL FROM THE JEFFERSON COUNTY CIRCUIT COURT [CV-04-752-2] |
| v. | THE HONORABLE JODI RAINES |
| UNITED WATER, INC. and DONALD FRAZIER, APPELLEES | DENNIS, CIRCUIT JUDGE |
| | AFFIRMED |

While visiting her husband one evening as he worked on a rent house that Donald Frazier owned in Pine Bluff, Annie Roberts stepped in a hole, fell, and injured herself. There was a hole in the front yard because one of the water meters there was missing its concrete lid. Mrs. Roberts and her husband sued Frazier and United Water Arkansas, Inc.,[1] the utility that owned the meter. The circuit court granted summary judgment to both Frazier and United Water.

The Robertses' appeal presents two questions. We must first decide whether the circuit court abused its discretion by striking the materials that the Robertses offered in opposition to Frazier's and United Water's motions for summary judgment. Then, with the

[1]United Water is incorrectly named in the style of this case.

contents of the summary-judgment record settled, we must decide whether Frazier and United Water were entitled to judgment as a matter of law. We hold that the circuit court did not abuse its discretion when it struck the Robertses' tardy responsive materials. And we affirm the summary judgments because no genuine issue of fact existed and Frazier and United Water violated no duty they owed to Mrs. Roberts.

I.

The record issues must be resolved first. A rather detailed procedural history disposes of those issues. After discovery, United Water moved for summary judgment in November 2005 with supporting excerpts from depositions. The Robertses filed a response within the time prescribed by Rule of Civil Procedure 56(c)(1). They disputed the utility's entitlement to summary judgment, but offered no supporting materials. Instead, they requested sixty additional days to file a brief and documents, stating that trial was seven months away and that no prejudice or inconvenience would result. The Robertses also sent a proposed precedent granting the extension to the circuit judge. Meanwhile, Frazier also moved for summary judgment with supporting materials. The Robertses filed a similar response to Frazier's motion.

The circuit court signed and filed the Robertses' proposed order, giving them the requested two-month extension. The court, however, did not send the file-marked order to the parties. The Robertses' extension ran in February 2006. The court scheduled a hearing on the summary-judgment motions for early May. The day before that hearing, the

Robertses filed a brief and materials opposing summary judgment. Those materials included an affidavit from Mrs. Roberts, which she said supplemented her deposition testimony and United Water said contradicted it. The Robertses also offered an affidavit from a private investigator who had spoken with Pine Bluff residents and a United Water employee about problems with water-meter covers.

The May hearing was not held. United Water and Frazier then moved to strike the Robertses' opposing materials. The Robertses opposed this motion, arguing that the pendency of their request for more time to respond tolled Rule 56's deadlines until they were informed of the circuit court's ruling on their request. The circuit court, with a different judge now presiding, heard argument on the motions for summary judgment and the motions to strike at the same time. For the same reasons argued below, the Robertses argue on appeal that the circuit court abused its discretion by striking their belated opposing materials.

We see no abuse of discretion on this record. Rule 56(c)'s timetable is clear and controlling absent some court-ordered extension based on good cause. The point of this unique briefing schedule is to give the parties adequate, but not unlimited, time to brief and argue a potentially dispositive motion. *Craft v. Arkansas Louisiana Gas Co.*, 8 Ark. App. 169, 173, 649 S.W.2d 409, 411 (1983). Rule 56(f) provides the avenue for the non-moving party to seek more time to respond if an extension is necessary to do discovery or present opposing affidavits. *Jenkins v. Int'l Paper Co.*, 318 Ark. 663, 669, 887 S.W.2d 300, 303 (1994). The Robertses did not follow this avenue. Even construing the request for more

time embedded in their response as a motion, they got the relief they sought. The circuit court signed and filed the extension order, which the Robertses had proposed.

Neither the circuit court nor the circuit clerk was obligated to send counsel the file-marked order. The Robertses should have monitored the docket in their case to see what the circuit court had done with their proposed precedent and what they needed to do to respond to the pending motions for summary judgment. *Arkco Corp. v. Askew*, 360 Ark. 222, 226–27, 200 S.W.3d 444, 447–48 (2004). The Robertses' contrary argument from Rule of Civil Procedure 6 and *Edwards v. Szabo Food Service, Inc.*, 317 Ark. 369, 877 S.W.2d 932 (1994) is misplaced. Rule 56 controls. The circuit court had discretion to allow or strike the Robertses' untimely responsive materials, *McMullan v. Molnaird*, 24 Ark. App. 126, 130–31, 749 S.W.2d 352, 354 (1988), and that discretion was not abused in this case.

II.

Taken in the light most favorable to the Robertses, these were the undisputed facts of record as settled by the motion to strike. Frazier hired Mr. Roberts to paint and repair a rent house that Frazier owned in Pine Bluff. On the evening of her accident, Mr. Roberts was working on the premises and a relative dropped Mrs. Roberts off there. Frazier was present. He spoke to Mrs. Roberts and did not ask her to leave. Frazier departed first. When Mr. Roberts finished his work for the day, he and Mrs. Roberts walked down the driveway toward his truck, which was parked on the street.

It was December; it was dark; and leaves were on the ground. Mrs. Roberts cut across

the corner of the yard to get to the passenger side of her husband's truck. She did not see a hole in the ground—a hole created by the absence of the concrete cover on one of United Water's two meters on the premises. Mrs. Roberts stepped in the hole, fell, and injured herself.

The parties agree that the meter was in a utility easement. The record does not disclose the precise distance of the meter from the edge of the street, but in the photographs it appears to be about two feet or so from the curb. There was no sidewalk.

Mr. Roberts looked around the yard for the missing cover but could not find it. He had not noticed that the cover was missing during his work at the house. Before Mrs. Roberts's fall, neither Frazier nor United Water knew that the concrete cover for the water meter was missing.

III.

We take the merits in two steps. As to Frazier the dispositive question is: what duty as a landowner did he owe Mrs. Roberts? Duty is always a question of law for the court. *Bader v. Lawson*, 320 Ark. 561, 564, 898 S.W.2d 40, 42 (1995). Arkansas follows the common law rule. The scope of Frazier's duty depends on whether Mrs. Roberts was a trespasser, a licensee, or an invitee on his property. *Slavin v. Plumbers & Steamfitters Local 29*, 91 Ark. App. 43, 45–46, 207 S.W.3d 586, 588–89 (2005). Unlike her husband, she was either a trespasser or a licensee because she did not enter the premises for the mutual benefit of herself and Frazier. *Bader*, 320 Ark. at 564, 898 S.W.2d at 42. Because Frazier knew that

she was at his rent house and did not tell her to leave the premises, Mrs. Roberts probably had an implied license to remain. But whether she was a licensee or a known trespasser makes no legal difference.

"Whether [s]he be called a trespasser or licensee, the same rule of law applies, and that is that the only duty owing [her] was not to willfully or wantonly injure [her] and to exercise ordinary care under the circumstances to avoid injury to [her] after discovering [her] peril." *Baldwin v. Mosley*, 295 Ark. 285, 287, 748 S.W.2d 146, 147 (1988) (quotation and emphasis omitted). Willful and wanton conduct is a course of action showing a deliberate intention to harm, or utter indifference or conscious disregard of another's safety. *Bader*, 320 Ark. at 565, 898 S.W.2d at 43. Negligence, no matter how gross, is not willful and wanton conduct. *St. Louis Southwestern Ry. Co. v. Clemons*, 242 Ark. 707, 709, 415 S.W.2d 332, 333 (1967). If a landowner discovers that a licensee is in peril, then his duty of ordinary care is to warn her of hidden dangers. *Bader*, 320 Ark. at 565, 898 S.W.2d at 43.

In light of the record and this governing law, the circuit court correctly granted summary judgment to Frazier. There was no proof of willful and wanton conduct by this landowner, either as a matter of intent to harm or utter indifference or conscious disregard of Mrs. Roberts's safety. It was undisputed that Frazier did not remove the meter cover or know that it had been removed. No duty for him to warn her arose because he knew neither that the hole was there nor that Mrs. Roberts was planning to cut across the yard. *Heigle v.*

*Miller*, 332 Ark. 315, 321–22, 965 S.W.2d 116, 120 (1998). As the circuit court ruled, Frazier was entitled to judgment as a matter of law.

We also affirm the circuit court's entry of summary judgment for United Water. Whether United Water's duty is defined by our law for owners and occupiers of land, as the circuit court held, or by general negligence principles, as the Robertses argue, United Water violated no duty of care to Mrs. Roberts.

Mrs. Roberts was not in the utility's easement for the mutual benefit of herself and United Water. She was cutting across the yard in the dark for her own convenience. As to United Water, under the tripartite standard she was either a trespasser or a licensee. Again we need not decide which, because United Water's greatest possible duty was the same toward both. Mrs. Roberts offered no evidence of willful and wanton conduct by the water company. United Water did not know that she was in any peril, and therefore no duty to warn arose. *Heigle*, 332 Ark. at 321, 965 S.W.2d at 120.

The Robertses also argue that, in any event, United Water had a duty of ordinary care to maintain its water meters for the public's safety, and that the circuit court erred by not addressing this issue. They rely on decisions about the duty of a utility to maintain its equipment in or near public roads and sidewalks. *E.g.*, *Southwestern Telegraph & Telephone Co. v. Beatty*, 63 Ark. 65, 37 S.W. 570 (1896). As United Water points out, this analysis must be stretched to fit the undisputed facts here: a water meter on private property some feet from a public way. Our supreme court has held that the tripartite standard applies to third

parties, such as building contractors, who occupy private premises temporarily. *DeVazier v. Whit Davis Lumber Co*., 257 Ark. 371, 373–75, 516 S.W.2d 610, 612–13 (1974). We see no meaningful distinction between that situation and this one, where a utility occupies private property semi-permanently with some appurtenance. But we need not and do not reach this question.

Assuming United Water had a duty of ordinary care, this record discloses no breach of it. There was no evidence that United Water removed the cover and created the hole. There was no evidence that United Water knew the cover was missing from this meter box. There was no evidence that, with United Water's knowledge, the public used the easement across Frazier's yard like a sidewalk. There was no evidence that, by ordinance or otherwise, Pine Bluff regulated the utility's placement of water meters and that the placement of this meter offended any such regulation.

Accidents happen. But more than Mrs. Roberts's unfortunate fall is required to create actionable negligence by United Water. *Mahan v. Hall*, 320 Ark. 473, 477, 897 S.W.2d 571, 573 (1995). Assuming that the utility had a duty of ordinary care to the public (and thus to Mrs. Roberts) to maintain this meter box in a safe condition for pedestrians, the reasonably foreseeable risks define the scope of that duty. *Ethyl Corp. v. Johnson*, 345 Ark. 476, 481-82, 49 S.W.3d 644, 648 (2001). "In other words, [United Water's] negligence cannot be predicated on a failure to anticipate the unforseen." *Ethyl Corp*., 345 Ark. at 481, 49 S.W.3d at 648 (citation omitted). Absent evidence that United Water removed the cover and left the hole exposed, or knew that the cover was missing and failed to replace it promptly, this kind of accident was not foreseeable.

To create a jury question on foreseeability, the removal of the concrete cover and pedestrian traffic "must be within the range of probability as viewed by the ordinary man, and must, therefore, be more than merely possible." *Ethyl Corp.*, 345 Ark. at 482, 49 S.W.3d at 648 (citation omitted); *see also Boren v. Worthen Nat'l Bank*, 324 Ark. 416, 427, 921 S.W.3d 934, 941 (1996). Here, Mrs. Roberts's accident was among the possible things that might happen around this kind of utility fixture, but on the undisputed facts it was not foreseeable to United Water. We therefore hold that United Water violated no duty of ordinary care in the circumstances either.

Affirmed.

VAUGHT and MILLER, JJ., agree.