IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

DIVISION ONE
FILED: 11/22/2011
RUTH A. WILLINGHAM, CLERK
BY: DLL

MARY F. D'AMBROSIO,	)	No. 1 CA-CV 10-0876
	)	
Plaintiff/Appellant,	)	DEPARTMENT C
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
CITY OF PHOENIX,	)	Rule 28, Arizona Rules of
	)	Civil Appellate Procedure)
Defendant/Appellee.	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CV2009-026559

The Honorable John A. Buttrick, Judge

REVERSED AND REMANDED

Mary F. D'Ambrosio — Phoenix
Plaintiff/Appellant *In Propria Persona*

The Elardo Law Firm, P.C. — Phoenix
By Michael A. Rossi
Attorney for Defendant/Appellee

B R O W N, Judge

¶1 Mary D'Ambrosio appeals the trial court's order granting summary judgment in favor of the City of Phoenix ("the City"). For the reasons that follow, we reverse and remand for further proceedings.

BACKGROUND

¶2 D'Ambrosio sued the City, alleging she tripped and fell on an uneven sidewalk and suffered injuries as a result. Several months later, the City moved for summary judgment. In the statement of facts supporting the motion, the City relied on a portion of D'Ambrosio's deposition in which she related the following.

¶3 D'Ambrosio was walking from her home to a bus stop. As she walked on a sidewalk in the area of Virginia and 21st Avenue in Phoenix, where there "are high and low areas," her "toe got caught between one slab and the next slab," which caused her to trip and fall. The difference in height of the two concrete slabs was "maybe the difference of half an inch or so." D'Ambrosio also stated that she did not know how long the unevenness of the sidewalk had existed or whether the City was aware of the condition of the sidewalk at the time she fell. She stated further that the "sidewalk was not in good condition" and there was a lack of maintenance or repair.

¶4 The City also included an affidavit from Brian Hinrichs, Deputy Street Transportation Director for the City, who stated that the City (1) did not create the condition or defect on the sidewalk where D'Ambrosio fell, (2) received no complaints regarding the condition of the sidewalk for a ten-

year period prior to her fall, and (3) had no notice of a condition or defect with the subject sidewalk.

¶5 In its motion, the City asserted that "the defect that the Plaintiff complains of . . . is so slight and inconsequential that no reasonable juror could differ with regard to whether the defect was sufficient in character or extent to form a basis for actionable negligence." The City argued further that D'Ambrosio could not show that the City had notice of the defect. D'Ambrosio's response to the motion, titled "Answer to Defendant," made several factual assertions but did not include any affidavits or supporting documentation. The trial court granted the motion, stating only that it had "considered Defendant's Motion for Summary Judgment [and] case authority" and that there was "no opposition" to the motion. In response to a subsequent pleading from D'Ambrosio, the court clarified that it had reviewed D'Ambrosio's "Answer to Defendant" and considered it as a response to the City's motion. The court then reaffirmed its prior ruling. D'Ambrosio timely appealed.

DISCUSSION

¶6 A court may grant summary judgment when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Ariz. R. Civ. P. 56(c). We view the evidence in the light most favorable to the

party against whom judgment was entered, and determine de novo whether there are genuine issues of material fact and whether the superior court misapplied the law. *Unique Equip. Co. v. TRW Vehicle Safety Sys., Inc.*, 197 Ariz. 50, 52, ¶ 5, 3 P.3d 970, 972 (App. 1999). "The burden of persuasion on the summary judgment motion is heavy. [W]here the evidence or inferences would permit a jury to resolve a material issue in favor of either party, summary judgment is improper." *Comerica Bank v. Mahmoodi*, 224 Ariz. 289, 292, ¶ 19, 229 P.3d 1031, 1034 (App. 2010) (internal quotation omitted).

A. Failure to Comply with Rule 56(e)

¶7 The City argues that the trial court properly granted summary judgment because D'Ambrosio's "Answer to Defendant" failed to comply with Rules of Civil Procedure 7.1(b) and 56(e). While we agree that D'Ambrosio's responsive pleading failed to set forth a genuine issue of material fact as provided in Rule 56(e), this does not relieve the City of its burden to show it is entitled to judgment as a matter of law. Rule 56(e) states that if an adverse party does not respond in accordance with the rules, "summary judgment, *if appropriate*, shall be entered against the adverse party." Accordingly, a non-moving party's failure "to file controverting affidavits does not in and of itself make the granting of summary judgment 'appropriate.'" *N. Contracting Co. v. Allis-Chalmers Corp.*, 117 Ariz. 374, 377, 573

P.2d 65, 68 (1977); *Nat'l Bank of Ariz. v. Thruston*, 218 Ariz. 112, 115, ¶ 16, 180 P.3d 977, 980 (App. 2008) ("The moving party's burden of persuasion on the motion remains with that party; it does not shift to the non-moving party.").

¶8 In considering whether the trial court appropriately granted summary judgment, we rely only on the facts presented by the City in its motion, viewing the inferences in the light most favorable to D'Ambrosio. Thus, it is immaterial to our decision that D'Ambrosio failed to comply with the procedural rules in her "Answer to Defendant."

B. Alleged Defect

¶9 In Arizona, "[t]he standard of care imposed upon a municipality is that of an ordinarily prudent [person]." *Beach v. City of Phoenix*, 136 Ariz. 601, 603, 667 P.2d 1316, 1319 (1983) (recognizing that the streets and ways of a municipality "are held by it in trust for the public") (internal quotations and citation omitted). Thus, the City owes a duty "to keep its streets and sidewalks reasonably safe for travel by the public. That duty remains constant, though the acts which are necessary to fulfill it vary depending upon the circumstances, including the obvious character of the obstruction." *Id.* (citation and internal quotation omitted). However, "[t]he City is not an insurer of the safety of pedestrians and therefore is not liable for an injury, absent a finding of negligence." *Id.* Not every

defect imposes liability "because the nature of some defects is such that a reasonable person would not anticipate danger from their existence and the City, therefore, would not be negligent in failing to remove them." *Id.* at 603-04, 667 P.2d at 1319-20. But when the evidence shows that reasonable people could disagree as to whether injury resulting from the defect is foreseeable, the factual question of negligence should be decided by the jury. *Id.* at 604, 667 P.2d at 1320.

¶10 The City acknowledges that whether a municipality has been negligent in maintaining a sidewalk is generally a question of fact for the jury. However, as it did in the superior court, the City suggests it is entitled to judgment as a matter of law here because the approximate one-half inch height difference in the sidewalk slabs is "so slight and inconsequential that no reasonable juror could differ with regard to whether the defect was sufficient in character or extent to form a basis of actionable negligence." In support, the City relies on *City of Phoenix v. Weedon*, 71 Ariz. 259, 226 P.2d 157 (1950), asserting that "the Arizona Supreme Court held that a 7/8" height difference in a sidewalk is inconsequential and the issue should not have been submitted to the jury." The City therefore concludes that because "the unevenness/height difference [here] is even less than the height difference in *Weedon*," it is "not unreasonably dangerous as a matter of law."

¶11 The City's analysis of *Weedon* is clearly flawed. Although the *dissent* in *Weedon* concluded that the seven-eighths of an inch difference in sidewalk height "was so slight and inconsequential as not to form the basis of an action for negligence," *Id.* at 266, 226 P.2d at 161, the majority upheld a jury verdict in favor of the plaintiff based on evidence that the plaintiff tripped and fell after stubbing her toe on a portion of sidewalk that was uneven by seven-eighths of an inch. *Id*. at 261, 264-65, 226 P.2d at 158, 160-61. The majority relied on the fact that "[t]en of the twelve jurors believed that liability on the part of the city was adequately shown" and stated that "[u]nder these circumstances we cannot say, as a matter of law, that reasonable minds might not differ on whether the defect which is here involved was dangerous." *Id.* at 264-65, 226 P.2d at 160-61.

¶12 Thus, *Weedon* stands for the general proposition that "[i]f reasonable minds can differ as to whether a sidewalk is defective, the question is one for the jury." *Cooley v. Arizona Pub. Serv. Co. ("APS")*, 173 Ariz. 2, 2-3, 839 P.2d 422, 422-23 (App. 1991) (citing *Weedon*, 71 Ariz. at 264, 226 P.2d at 160). The *Weedon* court also concluded that "[n]o hard and fast rule can be laid down . . . as to the character or extent of the defect in the . . . sidewalk necessary to form the basis for

actionable negligence, but each case must stand upon its own particular facts." 71 Ariz. at 263-64, 226 P.2d at 160.

¶13 This court applied the principles from *Weedon* in *Cooley*. 173 Ariz. at 2-3, 839 P.2d at 422-23. In *Cooley*, the plaintiff sued APS for injuries she sustained after tripping on an uneven portion of APS's sidewalk, which the plaintiff estimated as being raised by about three-quarters of an inch. 173 Ariz. at 2, 839 P.2d at 422. Citing *Weedon*, we held that the trial court erred in determining as a matter of law that the sidewalk was not defective. *Id.* at 2-3, 839 P.2d at 422-23.

¶14 Here, D'Ambrosio estimated in her deposition that the height difference in the uneven portion of sidewalk that caused her to fall was "half an inch or so." We cannot say that a possible difference in estimation of one-quarter of an inch turns a question of fact into a question of law. As our supreme court noted in *Weedon*, it would be an intolerable "inroad on the province of the jury . . . . [t]o attempt to fix an arbitrary height or depth of irregularity applicable to all cases." 71 Ariz. at 265, 226 P.2d at 161 (internal quotations and citation omitted); *Dillow v. City of Yuma*, 55 Ariz. 6, 11, 97 P.2d 535, 537 (1940) ("The decisions establish that an irregularity may be so slight that the court is required as a matter of law to say that such unevenness is not evidence of lack of reasonable care, but there is a shadow zone where such question must be submitted

to a jury whose duty it is to take into account all the circumstances. To hold otherwise would result in the court ultimately fixing the dividing line to the fraction of an inch, a result which is absurd.") (citation omitted). On the facts before us, we cannot say that the alleged defect in the sidewalk was so slight or inconsequential that a reasonable juror could not find it was dangerous.[1]

C. Constructive Notice

¶15 D'Ambrosio admitted in her deposition that she did not have proof that the City had actual notice of this uneven portion of the sidewalk, so she must show that the City had constructive notice of the condition. *See Cooley*, 173 Ariz. at 3, 839 P.2d at 423. "To raise a disputed question of material fact on the issue of constructive notice, [the plaintiff] must produce evidence from which it can be inferred that the raised area existed long enough that [the landowner], by the exercise of reasonable diligence, should have known about it." *Id.* In *Cooley*, we held that "the very nature of a defect such as [an uneven sidewalk], which a jury could find is neither transitory

[1] With its statement of facts supporting summary judgment, the City also included a "photograph of the subject condition." The "photograph" in our record, which presumably was the same document filed in the superior court, is a grainy black and white photocopy. The details of the sidewalk are completely indiscernible. There is nothing in the "photograph" supporting a finding that the alleged defect was not dangerous as a matter of law.

nor one that usually arises suddenly, is enough to support an inference that it had been in existence for sufficient time to put [the landowner] on notice." *Id.* In the present case, the only evidence offered by the City, through Hinrichs' affidavit, relates to actual notice. The City presented no evidence that it had inspected the sidewalk at any point prior to D'Ambrosio's fall or that the raised slab was a recent occurrence. Given that the nature of the defect here, a raised slab of concrete, is of the precise type described in *Cooley*, the presumption of constructive notice applies. Thus, to the extent that the trial court granted summary judgment based on the City's lack of notice, the court erred.

CONCLUSION

¶16 Based on the foregoing, we conclude that the City is not entitled to judgment as a matter of law on D'Ambrosio's negligence claim. We therefore reverse the trial court's entry of summary judgment and remand for further proceedings consistent with this decision.

/s/
_____
MICHAEL J. BROWN, Presiding Judge

CONCURRING:

/s/
_____
LAWRENCE F. WINTHROP, Chief Judge

/s/
_____
PHILIP HALL, Judge