DIVISION ONE
FILED: 12/15/2011
RUTH A. WILLINGHAM, CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

FAWN WARREN, a single person,	)	No. 1 CA-CV 11-0380 A
	)	
Plaintiff/Appellant,	)	DEPARTMENT B
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
CITY OF PHOENIX, a public entity,	)	Rule 28, Arizona Rules
	)	of Civil Appellate
	)	Procedure)
Defendant/Appellee.	)	

Appeal from the Superior Court in Maricopa County

Cause No. CV2009-092372

The Honorable Karen A. Potts, Judge

AFFIRMED

Tobler & Associates — Mesa
By Maren Tobler Hanson
Nathan Tobler
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Holloway, Odegard, Forrest & Kelly P.C. — Phoenix
By Sally A. Odegard
Matthew M. Nicely
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D O W N I E, Judge

¶1 Fawn Warren appeals from the superior court's grant of summary judgment to the City of Phoenix ("City"). For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Warren stepped off a sidewalk into 19th Avenue to see if a bus was approaching. She stepped into an uncovered hole containing a water valve that was located approximately two feet from the sidewalk. When Warren pulled her foot from the hole, she sustained a deep cut to her leg. She sued the City, alleging it was negligent in "fail[ing] to cover the hole or allow[ing] the hole to become uncovered." The complaint stated that Warren did not know how long the hole existed prior to her injury.

¶3 The City moved for summary judgment. The City acknowledged its duty to maintain its streets in a reasonably safe condition, but asserted that Warren had no evidence the City caused the hole or had actual or constructive notice of it. In opposing the motion, Warren offered photographs taken after her injury to support her claim that the City knew of the hole. She also relied on deposition testimony by an expert witness to support her contention that the City caused the allegedly unsafe condition.

¶4 After oral argument, the superior court granted the City's motion. Warren timely appealed. We have jurisdiction

pursuant to Arizona Revised Statute ("A.R.S.") section 12-2101(B).

DISCUSSION

¶5 Warren has raised one issue on appeal: "Whether there is sufficient evidence that a jury could find that the City of Phoenix caused or contributed to the dangerous condition of an uncovered water valve?" We therefore confine our review to that issue.[1]

¶6 We review the grant of summary judgment *de novo*. *Emmett McLoughlin Realty, Inc. v. Pima County*, 212 Ariz. 351, 353, ¶ 2, 132 P.3d 290, 292 (App. 2006). Although we review the facts in the light most favorable to the party opposing summary judgment, we "consider[] only the evidence presented to the trial court when it addressed the motion." *Brookover v. Roberts Enters.*, 215 Ariz. 52, 55, ¶ 8, 156 P.3d 1157, 1160 (App. 2007) (citations omitted).

¶7 When the moving party "makes a prima facie showing that no genuine issue of material fact exists, the burden shifts to the opposing party to produce sufficient competent evidence to show that there is an issue." *Ancell v. Union Station*

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[1] The issue of notice is not before us, though Warren was not required to prove notice if the City itself created or caused the allegedly dangerous condition. *See Vegodsky v. City of Tucson,* 1 Ariz. App. 102, 109, 399 P.2d 723, 730 (1968); *Isbell v. Maricopa County,* 198 Ariz. 280, 283, 9 P.3d 311, 314 (2000).

Assocs., 166 Ariz. 457, 459, 803 P.2d 450, 452 (App. 1990) (citation omitted). A motion for summary judgment should be granted if the party with the burden of proof fails to offer evidence that creates a genuine issue of fact regarding the element in question. *See* Ariz. R. Civ. P. 56(e) ("[T]he adverse party's response . . . must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party."); *Orme Sch. v. Reeves*, 166 Ariz. 301, 310, 802 P.2d 1000, 1009 (1990).

¶8 Warren relies on the following deposition testimony by her expert to support her contention that the City created the allegedly dangerous condition:

> Q. You would expect, as part of the construction and installation of this type of water valve, that a cover would be placed on top of the hole?
>
> A. I would. I have had cases that involve pumping areas at gas stations as opposed to roadways where vehicular traffic, [sic] if a cover in the roadway is not properly bolted in place, the traffic can cause it to tip back and forth and eventually cause it to leave the hole that it's intended to cover and create pedestrian hazards accordingly.

¶9 Warren's expert disclaimed any knowledge of the water valve or hole at issue in this case. He merely opined that the City would have covered the valve during the original

installation.[2] The expert could not and did not offer opinions about the City's actions or inactions post-installation. He did not know when or how the valve became uncovered. Nor did he provide foundation for any non-speculative comparison between the gas station "cover" scenario described at deposition and the situation presented here. For all of these reasons, the expert's testimony was insufficient to defeat the City's motion. *See Flowers v. K-Mart Corp.*, 126 Ariz. 495, 499, 616 P.2d 955, 959 (App. 1980) (an opponent of a motion for summary judgment "must show that competent evidence is available which will justify a trial"); *Menendez v. Paddock Pool Constr. Co.*, 172 Ariz. 258, 269, 836 P.2d 968, 979 (App. 1991) (requiring a link between the condition alleged and the injury, and rejecting "[s]peculation" that "might blossom into a real controversy at trial") (citation omitted).

¶10 Warren also relies on the fact that a City work crew replaced a water valve 60-70 feet from the one at issue here during the month preceding her injury. That fact, though, does nothing to establish that the City caused the water valve at issue here to become uncovered.

¶11 Warren also argues that the City "is the only known entity . . . that had a duty to inspect and maintain the streets

[2] The record does not establish when the water valve was installed or when it became uncovered.

and water valves." Even accepting this claim as true, it does nothing to establish that the City's actions or inactions caused the valve to become uncovered. Although the City has a duty to "keep its streets reasonably safe for travel," it "is not an insurer of those who travel thereon." *Wisener v. State*, 123 Ariz. 148, 150, 598 P.2d 511, 513 (1979).

¶12 Finally, the record does not support Warren's suggestion that the trial court failed to consider whether there was evidence that the City created the allegedly dangerous condition. Although the court's primary focus was on the question of notice (an issue Warren has not raised on appeal), it also concluded that Warren had not come forward with evidence demonstrating that the City created the condition.[3]

[3] The court also noted that Warren's statement of facts in opposition to the City's motion was supported by references to her own complaint and disclosure statements, rather than affidavits or other competent evidence. *See* Ariz. R. Civ. P. 56(e) ("[A]n adverse party may not rest upon the mere allegations or denials of the adverse party's pleading . . . .").

CONCLUSION

¶13 For the foregoing reasons we affirm the summary judgment entered in favor of the City. As the prevailing party, the City is entitled to recover its appellate costs upon compliance with ARCAP 21.

/s/
MARGARET H. DOWNIE,
Presiding Judge

CONCURRING:

/s/
PETER B. SWANN, Judge

/s/
DONN KESSLER, Judge