

STATE OF MICHIGAN
COURT OF APPEALS

LOUISE RORIE,

Plaintiff-Appellant,

v

ST. MARY ROMAN CATHOLIC CHURCH,

Defendant-Appellee.

UNPUBLISHED

March 11, 2010

No. 290051

Genesee Circuit Court

LC No. 08-088044-NO

Before: Servitto, P.J., and Bandstra and Fort Hood, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendant's motion for summary disposition. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Plaintiff tripped on a speed bump in defendant's parking lot. It was dark and plaintiff was in a hurry. Although plaintiff had driven over the speed bump several times in the past and knew it was there, she did not see it because of the darkness.

Plaintiff sued on the theory of premises liability. Defendant moved for summary disposition, arguing that the speed bump was open and obvious and that it did not create an unreasonable risk of harm, and that defendant had no notice of any risk of harm created by the speed bump. Plaintiff asserted that she was not arguing the speed bump was unreasonably dangerous, just that it was not open and obvious because it was not painted in a contrasting color and the lot was too dark for her to see it. Plaintiff also argued that the open and obvious hazard doctrine was overruled by the comparative negligence statute, MCL 600.2958, which was enacted after the seminal case law was decided. The statute provides in relevant part: "in an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, a plaintiff's contributory fault does not bar that plaintiff's recovery of damages." MCL 600.2958.

The trial court disagreed with plaintiff's statutory argument, noting that *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001), was decided after the comparative negligence statute was enacted, and remained the controlling law. The court also found the speed bump was an open and obvious danger that an average person of ordinary intelligence would discover upon casual inspection, and that it did not create an unreasonable risk of harm. The court found the facts analogous to three unpublished cases cited by defendant, involving a

cart corral in a parking lot, a speed bump with faded paint that was known to the plaintiff, and a manhole cover in an area of darkness in poor lighting.

We review de novo a trial court's decision to grant or deny a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Although substantively admissible evidence submitted at the time of the motion must be viewed in the light most favorable to the party opposing the motion, the non-moving party must come forward with at least some evidentiary proof, some statement of specific fact upon which to base his case. *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999); *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). Statutory interpretation is a question of law that we also consider de novo on appeal. *Detroit v Ambassador Bridge Co*, 481 Mich 29, 35; 748 NW2d 221 (2008).

First, we disagree with plaintiff's assertion that MCL 600.2958 requires the trial court to let the question of the obviousness of the condition be decided by a jury. Our Supreme Court made it clear in *Lugo* that "the open and obvious doctrine should not be viewed as some type of 'exception' to the duty generally owed invitees, but rather as an integral part of the definition of that duty." *Lugo, supra* at 516. Whether *Lugo* was correctly decided is not a question for this Court, which remains, of course, bound by *Lugo* until and unless our Supreme Court overturns it. As the law stands now, the open and obvious hazard doctrine is applied to determine if the defendant owed the plaintiff a duty. If so, the next step is to determine if the duty was breached (a jury question, generally). Comparative negligence does not come into the analysis until after the defendant is found to have acted negligently. *Romain v Frankenmuth Mut Ins Co*, 483 Mich 18, 22; 762 NW2d 911 (2009); *Dawe v Dr Reuvan Bar-Levav & Assoc, PC*, 279 Mich App 552, 560; 761 NW2d 318 (2008).

Nor did the trial court err in finding the speed bump was an open and obvious hazard as a matter of law. A premises possessor owes a duty to use reasonable care to protect invitees from an unreasonable risk of harm caused by dangerous conditions on the premises unless the dangers are open and obvious. *Lugo, supra* at 516. "Where the dangers are known to the invitee or are so obvious that the invitee might reasonably be expected to discover them, an invitor owes no duty to protect or warn the invitee unless he should anticipate the harm despite knowledge of it on behalf of the invitee." *Id.* (quoting *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992)). However, where special aspects of a condition make even an open and obvious risk unreasonably dangerous, the possessor must take reasonable steps to protect invitees from harm. *Lugo, supra* at 517. Special aspects are those that "give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided." *Id.* at 519. Neither a common condition nor an avoidable condition is uniquely dangerous. *Corey v Davenport College of Business (On Remand)*, 251 Mich App 1, 8-9; 649 NW2d 392 (2002).

Plaintiff admitted she knew the speed bump was there. She was aware of the darkness. Under the current case law, the condition was therefore open and obvious to her.

Affirmed.

/s/ Deborah A. Servitto
/s/ Richard A. Bandstra
/s/ Karen M. Fort Hood