

STATE OF MICHIGAN
COURT OF APPEALS

JODY A. LUNSFORD,

Plaintiff-Appellant,

v

WILLIAMSBURG VILLAGE APARTMENTS,
L.L.C.,

Defendant-Appellee.

UNPUBLISHED

March 8, 2007

No. 273115

Oakland Circuit Court

LC No. 2005-069555-NO

Before: Servitto, P.J., and Talbot and Schuette, JJ.

PER CURIAM.

Plaintiff appeals as of right from a circuit court order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10) in this premises liability action. We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff alleged that she tripped on a mound of dirt on the premises of defendant's apartment complex in which she resided. The trial court found that there were questions of fact whether defendant had notice of the alleged hazard, but concluded that any such condition was open and obvious and lacked any "special aspects." The court further concluded that a claim based on defendant's statutory duty to maintain common areas in a condition fit for the use intended, MCL 554.139(1)(a), was not viable because the evidence failed to show that this duty was breached.

Summary disposition may be granted under MCR 2.116(C)(10)¹ when "there is no genuine issue of material fact, and the moving party is entitled to judgment . . . as a matter of law." This Court reviews a trial court's decision on a motion for summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

¹ Defendant's motion was brought pursuant to MCR 2.116(C)(8) and (10). The trial court did not identify the particular subrule that was the basis for granting the motion, but the court relied on evidence outside the pleadings. Therefore, this Court will treat the decision as having been based on MCR 2.116(C)(10). *Krass v Tri-County Security, Inc*, 233 Mich App 661, 664-665; 593 NW2d 578 (1999).

Plaintiff argues that there is a genuine issue of material fact whether the condition was open and obvious.

Invitors “are not absolute insurers of the safety of their invitees.” *Bertrand v Alan Ford, Inc*, 449 Mich 606, 614; 537 NW2d 185 (1995). “In general, a premises possessor owes a duty to an invitee to exercise reasonable care to protect an invitee from an unreasonable risk of harm caused by a dangerous condition on the land.” *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001) (citation omitted). The duty generally does not encompass warning about or removing open and obvious dangers unless the premises owner should anticipate that special aspects of the condition make even an open and obvious risk unreasonably dangerous. *Id.*, p 517. Whether a hazardous condition is open and obvious depends on whether it is reasonable to expect that an average person with ordinary intelligence would have discovered the danger and risk presented upon casual inspection. *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 474-475; 499 NW2d 379 (1993).

Andy Schuhart, who performed maintenance for the complex, testified that when he examined the general area of the accident the following day, he saw “piles” where the parking lot and grass met, and that these were created when the parking lot was plowed, moving snow and some chunks of asphalt to the side. Schuhart’s testimony demonstrates that any hazard created by these “piles” was open and obvious. Plaintiff did not present contrary admissible evidence showing a genuine issue of material fact regarding the visibility of the alleged hazard. Plaintiff testified that she did not see what caused her fall. She relied on her cousin’s observations and belief that plaintiff fell on a mound of dirt, but plaintiff failed to present any legally admissible evidence concerning her cousin’s observations. Plaintiff testified that the reason she did not see the “pile” was because of the lighting. However, she never saw the condition and admitted that she did not know the size of the alleged pile. Her opinion regarding its visibility was mere speculation. A party opposing a motion for summary disposition must present more than conjecture and speculation to meet its burden of providing evidentiary proof establishing a genuine issue of material fact. *Libralter Plastics, Inc v Chubb Group of Ins Cos*, 199 Mich App 482, 486; 502 NW2d 742 (1993). Moreover, to the extent that plaintiff attributes the fall to inadequate lighting, the lighting itself may be considered an open and obvious condition that an invitee may reasonably be expected to discover. See *Singerman v Muni Service Bureau, Inc*, 455 Mich 135, 141; 565 NW2d 383 (1997).

We disagree with plaintiff’s argument that there were “special aspects” that made the condition unreasonably dangerous despite its open and obvious nature.

Pursuant to *Lugo, supra*, p 517, if special aspects of a condition make even an open and obvious risk unreasonably dangerous, the landowner has a duty to undertake reasonable precautions to protect his invitees. But “only those special aspects that give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided will serve to remove that condition from the open and obvious danger doctrine.” *Id.*, p 519. The *Lugo* Court provided two examples to illustrate when a condition could be considered unavoidable or unreasonably dangerous: (1) when the floor of a commercial building with a single exit is covered with water, the open and obvious doctrine would not apply because the condition would be essentially unavoidable; (2) when an unguarded 30-foot hole exists in the middle of a parking lot, the open and obvious doctrine would not bar liability because the situation “would present such a substantial risk of death or severe injury to one who fell in the pit that it would be unreasonably

dangerous to maintain the condition, at least absent reasonable warnings or other remedial measures being taken.” *Id.*, p 518.

In this case, the alleged hazard was not effectively unavoidable; plaintiff could have chosen another path. Additionally, the danger posed by a pile of dirt or debris at the edge of a parking lot is not comparable to that of an unguarded 30-foot hole.

Relying on *Benton v Dart Properties, Inc*, 270 Mich App 437; 715 NW2d 335 (2006), plaintiff argues that the open and obvious doctrine does not apply to a claim that a landlord violated its statutory duty to maintain a common area. MCL 554.139(1)(a). Plaintiff has not addressed the basis of the trial court’s decision. The trial court’s reasoning with respect to the alleged breach of defendant’s statutory duties was not based on the open and obvious doctrine, but on the court’s determination that plaintiff had not shown that the lawn was not fit for its intended use. MCL 554.139(1)(a). Because plaintiff does not address the basis for the trial court’s decision, she is not entitled to appellate relief. *Roberts & Son Contracting, Inc v North Oakland Dev Corp*, 163 Mich App 109, 113; 413 NW2d 744 (1987) (appellate relief is precluded where the appellant fails to address the basis of the trial court’s decision).

Affirmed.

/s/ Deborah A. Servitto
/s/ Michael J. Talbot
/s/ Bill Schuette