

STATE OF MICHIGAN
COURT OF APPEALS

LAURA GUMINA,

Plaintiff-Appellant,

v

90 LLC, d/b/a PRINCETON COURT
APARTMENTS,

Defendant-Appellee.

UNPUBLISHED
January 23, 2014

No. 312841
Wayne Circuit Court
LC No. 11-010331-NO

Before: STEPHENS, P.J., and M. J. KELLY and RIORDAN, JJ.

PER CURIAM.

Plaintiff, Laura Gumina, appeals as of right the trial court order granting summary disposition in favor of defendant, 90 LLC, in this premises liability action. On appeal, plaintiff argues that the circuit court erred when it found her common-law negligence claim was barred by the open and obvious doctrine, and that the evidence presented a question of fact regarding whether defendant breached its duty to maintain common areas under MCL 554.139(1)(a). We affirm.

I. FACTUAL BACKGROUND

Plaintiff, a resident of defendant's apartment building, was walking toward the parking lot on the day of the accident. She was walking near paver stones, located next to shrubs and bushes, when she tripped on a lump of grass. She testified that the paver stones did not fit her stride, so she walked on the grass when taking this route. She further testified that she did not believe she had to be careful while walking on grass, lighting was not an issue, and that she was not looking down while walking.

After tripping, plaintiff fell onto a bush that recently had been pruned. One of the branches struck her in the eye, causing injury to her right eye resulting in loss of sight.¹ Plaintiff

¹ Plaintiff testified that she did not wear corrective lenses because they caused double vision, so now she was "just strictly blind in that eye" although she could detect "light and color form indistinct." She also testified that it looked "ugly."

acknowledged that an alternate path to the parking lot existed, namely, a sidewalk connecting her front door to the parking lot. When it was snowy or muddy, she would take the sidewalk. She also admitted that had she taken this sidewalk, she would not have fallen into that bush on the day of her accident. However, after her accident, she continued to use the same pathway that she fell on, but now looked at the ground when walking and has avoided further incident.

Plaintiff initiated the instant action against defendant, alleging negligence and citing to MCL 554.139(1), regarding a lessor's duty to keep common areas fit for the intended use. Defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(8) and (10), arguing that plaintiff's claim was barred by the open and obvious doctrine. Plaintiff filed a response and cross-motion for summary disposition under MCR 2.116(C)(10), arguing that the bush was not open and obvious, was unreasonably dangerous, and that defendant violated MCL 554.139(1)(a).

Ultimately, the trial court granted summary disposition in favor of defendant and found that the lump of grass was open and obvious and not effectively unavoidable. Plaintiff now appeals.

II. COMMON-LAW PREMISES LIABILITY

A. STANDARD OF REVIEW

A grant or denial of a motion for summary disposition under MCR 2.116(C)(10) is reviewed de novo. *MEEMIC Ins Co v DTE Energy Co*, 292 Mich App 278, 280; 807 NW2d 407 (2011).² The motion for summary disposition “tests the factual support for a claim and should be granted if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.” *Id.* “A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ.” *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). In reviewing a motion for summary disposition under MCR 2.116(C)(10), a court considers “affidavits, pleadings, depositions, admissions, and other documentary evidence submitted by the parties in the light most favorable to the party opposing the motion.” *Greene v A P Prods, Ltd*, 475 Mich 502, 507; 717 NW2d 855 (2006) (quotations marks and citations omitted). This Court considers only “what was properly presented to the trial court before its decision on the motion.” *Pena v Ingham Co Rd Comm*, 255 Mich App 299, 310; 660 NW2d 351 (2003).

B. OPEN AND OBVIOUS

“In a premises liability action, a plaintiff must prove the elements of negligence: (1) the defendant owed the plaintiff a duty, (2) the defendant breached that duty, (3) the breach was the proximate cause of the plaintiff's injury, and (4) the plaintiff suffered damages.” *Benton v Dart*

² Because the trial court considered evidence outside of the complaint, this is properly reviewed as a motion under MCR 2.116(C)(10).

Props, Inc, 270 Mich App 437, 440; 715 NW2d 335 (2006). “The duty owed to a visitor by a landowner depends on whether the visitor was classified as a trespasser, licensee, or invitee at the time of the injury.” *Sanders v Perfecting Church*, ___Mich App___; ___NW2d___ (Docket No. 308416, issued July 16, 2013 (slip op at 2). A tenant of an apartment complex is an invitee of the landlord. *Benton*, 270 Mich App at 440. “With regard to invitees, a landowner owes a duty to use reasonable care to protect invitees from unreasonable risks of harm posed by dangerous conditions on the owner’s land.” *Hoffner v Lanctoe*, 492 Mich 450, 460; 821 NW2d 88 (2012) (footnotes omitted). A landowner breaches this duty of ordinary care when he knows or should know of a dangerous condition, of which the invitee is unaware, and fails to either fix the defect, guard against it, or warn the invitee about it. *Id.*

Nevertheless, landowners “are not charged with guaranteeing the safety of every person who comes onto their land,” as “[p]erfection is neither practicable nor required by the law[.]” *Id.* at 459, 460. Instead, “possessors of land and those who come onto it exercise common sense and prudent judgment when confronting hazards on the land.” *Id.* at 459. Thus, a landowner owes no duty to protect or warn against a danger that is open and obvious because such danger, by its very nature, “apprise[s] an invitee of the potential hazard, which the invitee may then take reasonable measures to avoid.” *Id.* at 460-461. In other words, an open and obvious danger is no danger at all to a reasonably careful person. *Price v Kroger Co of Michigan*, 284 Mich App 496, 501; 773 NW2d 739 (2009). Rather than an exception to the duty owed to invitees, the open and obvious doctrine is “an integral part of the definition of that duty.” *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001).

“The standard for determining if a condition is open and obvious is whether an average user with ordinary intelligence would have been able to discover the danger and the risk presented upon casual inspection.” *Slaughter v Blarney Castle Oil Co*, 281 Mich App 474, 478; 760 NW2d 287 (2008) (quotation marks, brackets, and citation omitted). This is an objective test, as the inquiry focuses on whether a reasonable person would have seen the danger, not whether the particular plaintiff knew or should have known that the condition was hazardous. *Id.* at 478-479.

In the instant case, regardless of how one defines the hazard, plaintiff has not presented evidence creating a question of fact regarding whether any alleged hazard was open and obvious. Plaintiff concedes on appeal that any hazard posed by the grass and paver walkway was open and obvious. In her deposition, she admitted that the lighting conditions did not pose a problem, and that she now looks at the ground when walking so has avoided falling. Thus, plaintiff’s testimony demonstrates that “she did not see the [hazard] because she wasn’t looking down,” not because of any hidden nature of the grass and paver walkway. *Lugo*, 464 Mich at 521 (quotations marks omitted).

Plaintiff, however, asserts that the hazard posed by the bush near the walkway was not open and obvious, as one would have to inspect the bush closely in order to discern that its branches were sharpened like “spears” or “javelins.” This argument is meritless. Plaintiff’s own photographic evidence shows no such condition, as they reveal nothing more than an ordinary, pruned bush. The pruned branches are openly visible and not covered with foliage. In fact, plaintiff testified that at the time of her fall, the bush had even less foliage. An average person of ordinary intelligence would have been able to observe the danger posed by the bush’s pruned

branches, as that condition was not hidden from view. Further, as stated above, the inquiry is not whether this plaintiff observed the hazard, but whether an objective person would have. *Slaughter*, 281 Mich App at 478. Thus, any hazard posed by the grass, bush, or combination thereof, was open and obvious.

C. SPECIAL ASPECTS

Plaintiff, however, contends that even if the bush was open and obvious, the hazard created by the bush in combination with the walkway had special aspects that made it unreasonably dangerous. Plaintiff argues that because falling is the natural and expected result of walking, and with a severely pruned bush close by, the ordinary danger of falling while walking became unreasonably dangerous. Plaintiff is correct that special aspects of a condition can make even an open and obvious risk unreasonably dangerous, and therefore would require the landowner to take reasonable precautions to protect invitees from that risk. *Lugo*, 464 Mich at 517. A special aspect is a condition of the hazard that is unusual in character, location, or surrounding circumstances. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 617; 537 NW2d 185 (1995). The essential inquiry is not whether the harm was foreseeable, but whether despite its foreseeability, the harm remained unreasonable. *Singerman v Muni Serv Bureau, Inc*, 455 Mich 135, 142-143; 565 NW2d 383 (1997).

In *Lugo*, our Supreme Court delineated two types of special aspects: where the hazard is effectively unavoidable or where it is unreasonably dangerous. *Id.* at 518-519; *Hoffner*, 492 Mich at 463. In both instances, the danger must “give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided[.]” *Hoffner*, 492 Mich at 463 (quotation marks and citation omitted). The Court also stated that “[i]t bears repeating that exceptions to the open and obvious doctrine are *narrow* and designed to permit liability for such dangers only in *limited*, extreme situations.” *Id.* at 472 (emphasis in original).

Here, any danger posed by the walkway, bush, or combination thereof, was not unreasonably dangerous. Plaintiff attempts to characterize this bush as one “pruned in a manner that produced branches protruding out like javelins,” which supposedly “elevates the risk of walking along the uneven path from the normal risks . . . into the risk of suffering severe, permanent injury (such as having an eye impaled onto a pruned branch) or death if the force of the fall is sufficient” However, as discussed above, plaintiff’s photographs reveal nothing more than an ordinary, pruned bush. There simply is nothing unusual, unexpected, nor uniquely dangerous about the condition of the bush. Neither plaintiff’s actual injury nor her “ability to imagine severe harm under highly unlikely circumstances” will transform this danger into one that was unreasonable. *Hoffner*, 492 Mich at 462 (quotation and citation omitted). As our Supreme Court has stated, an unreasonably dangerous condition “must be *more than* theoretically or retrospectively dangerous, because even the most unassuming situation can often be dangerous under the wrong set of circumstances.” *Id.* at 472 (emphasis in original). Plaintiff’s claim in the instant case is a common situation—an ordinary, pruned bush near a walking path—that unfortunately injured plaintiff under the wrong set of circumstances.

Moreover, this alleged hazard was not effectively unavoidable. See *Hoffner*, 492 Mich at 463 (“neither a common condition nor an avoidable condition is uniquely dangerous.”). It is undisputed that the walkway and adjacent bush were entirely avoidable. In her deposition

testimony, plaintiff acknowledged that a sidewalk existed that provided her with a walking path to the parking lot, and that this path entirely avoids the grass and paver walkway. Plaintiff admitted that had she used this sidewalk, she would not have fallen into the bush. And, as discussed above, plaintiff has been able to avoid any hazard posed by the walkway by simply looking at the ground where she was walking. Thus, the alleged hazard was both common and avoidable, so was not unreasonably dangerous. *Hoffner*, 492 Mich at 463.

Lastly, while plaintiff places great emphasis on the severity of her injuries, our Supreme Court has stated:

[I]t is important to maintain the proper perspective, which is to consider the risk posed by the condition *a priori*, that is, before the incident involved in a particular case. It would, for example, be inappropriate to conclude in a retrospective fashion that merely because a particular plaintiff, in fact, suffered harm or even severe harm, that the condition at issue in a case posed a uniquely high risk of severe harm. This is because a plaintiff may suffer a more or less severe injury because of idiosyncratic reasons, such as having a particular susceptibility to injury or engaging in unforeseeable conduct, that are immaterial to whether an open and obvious danger is nevertheless unreasonably dangerous. . . . [The law] does not allow the imposition of liability merely because a particular open and obvious condition has some potential for severe harm. Obviously, the mere ability to imagine that a condition could result in severe harm under highly unlikely circumstances does not mean that such harm is reasonably foreseeable. [*Id.* at 461-462, quoting *Lugo*, 464 Mich at 518 n 2.]

Because plaintiff cannot demonstrate a question of fact regarding defendant's duty of care, defendant was entitled to summary disposition regarding plaintiff's premises liability claim.

III. DUTY PURSUANT TO MCL 554.139(1)

A. PRESERVATION

Plaintiff also raises arguments relating to MCL 554.139(1). "Generally, an issue is not properly preserved if it is not raised before, addressed by, or decided by the lower court[.]" *Gen Motors Corp v Dep't of Treasury*, 290 Mich App 355, 386; 803 NW2d 698 (2010). While plaintiff raised MCL 554.139(1)(a) in her complaint and brief in response to defendant's motion for summary disposition, the trial court did not address the parties arguments relating to MCL 554.139(1)(a). However, "[a]lthough this issue was not decided below, a party should not be punished for the omission of the trial court." *Klooster v City of Charlevoix*, 488 Mich 289, 310; 795 NW2d 578 (2011). Moreover, we may review "an issue of law for which all the relevant facts are available." *Vushaj v Farm Bureau Gen Ins Co of Michigan*, 284 Mich App 513, 521; 773 NW2d 758 (2009).

B. ANALYSIS

Plaintiff argues that by allowing a dangerously pruned bush to exist near the grass and paver walkway, defendant did not maintain the walkway in a manner fit for its intended use as required by MCL 554.139(1)(a). We disagree.

MCL 554.139(1)(a) provides that “[i]n every lease or license of residential premises, the lessor or licensor covenants . . . [t]hat the premises and all common areas are fit for the use intended by the parties.” The legislature has directed that “[t]he provisions of this section shall be liberally construed” MCL 554.139(3). A “common area” is an area “of the property over which the lessor retains control that [is] shared by two or more, or all, of the tenants.” *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 427; 751 NW2d 8 (2008). As plaintiff correctly notes, “the open and obvious danger doctrine cannot bar a claim against a landlord for violation of the statutory duty” under MCL 554.139(1)(a). *Benton*, 270 Mich App at 438.

However, even assuming, *arguendo*, that the route plaintiff took was a common area under MCL 554.139(1)(a), she has not presented evidence raising a question of fact that this path was unfit for its intended use. Under MCL 554.139(1)(a), a lessor has a duty to keep a common area adapted or suited for its intended use. *Allison*, 481 Mich at 429. Yet, “MCL 554.139(1)(a) does not require perfect maintenance” *Hadden v McDermitt Apartments, LLC*, 287 Mich App 124, 130; 782 NW2d 800 (2010). Thus, defendant need not “maintain a [common area] in an ideal condition or in the most accessible condition possible” *Allison*, 481 Mich at 430.

Here, the walkway was fit for its intended use. Plaintiff was able to use the same walking path multiple times without incident. She also continued to use the walkway as her primary means of accessing the parking lot, without incident. She further admitted that she did not believe she had to be careful while walking on grass, lighting was not an issue, and that she was not looking down while walking. Because she now watches where she walks, she has not had a single incident since her fall. Thus, it was plaintiff’s failure to use the bare minimum of caution—watching the ground when walking—that caused her fall, not the condition of the walkway.

Plaintiff, however, argues that the existence of the bush, in its pruned state, made the walkway unfit for its intended use. As previously discussed, the bush did not pose an inordinate danger. Further, under plaintiff’s proposed understanding, the existence of practically any pruned shrub near a walking path would render that walking area unfit for its intended use, as one might fall and be injured. Plaintiff’s comparison to *Hadden, supra*, is likewise unfounded. That case involved a poorly-lit staircase covered in black ice and snow. *Hadden*, 287 Mich App at 126, 130-131. This Court held that the plaintiff presented a question of fact regarding whether the staircase was unfit for its intended use, as such conditions presented more than a mere inconvenience. *Id.* at 132. Unlike the circumstances in *Hadden*, the walkway in the instant case posed no inherent danger bearing any similarity to a poorly-lit staircase covered in ice and snow. See also *Allison*, 481 Mich at 430 (because ice and two inches of snow did not prevent tenants from entering and exiting the parking lot and accessing their vehicles, the plaintiff failed to establish “that tenants were unable to use the parking lot for its intended purpose, and [the plaintiff’s] claim fails as a matter of law.”).

Because plaintiff has not presented evidence creating a question of fact regarding whether defendant breached its duty to maintain common areas as required by MCL 554.139(1)(a), summary disposition is appropriate.

IV. CONCLUSION

Accordingly, the trial court correctly granted summary disposition in favor of defendant. We affirm. Defendant may tax costs consistent with MCR 7.219.

/s/ Cynthia Diane Stephens

/s/ Michael J. Kelly

/s/ Michael J. Riordan