STATE OF MICHIGAN

COURT OF APPEALS

ALAN LAMB,

Plaintiff-Appellant,

v

DAV TYRE ENTERPRISES, INC., d/b/a JIFFY LUBE,

Defendant-Appellee,

and

TYRONE SMITH,

Defendant.

UNPUBLISHED
April 29, 2004

No. 243770
Wayne Circuit Court
LC No. 01-130186-NO

Before: Cooper, P.J., and Griffin and Borrello, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting the motion for summary disposition filed by defendant ("Jiffy Lube"). We affirm.

This case arose after plaintiff fell into an open pit at Jiffy Lube, defendant's place of business. Plaintiff had taken his vehicle to defendant's business for an oil change and to have the interior of his automobile cleaned. Plaintiff pulled into the service bay where there was a pit underneath his car for defendant's employees to change his oil. Because plaintiff also wanted the interior of his vehicle cleaned, he exited his vehicle and walked toward the customer service lounge. As plaintiff walked along the left side of his car, he turned to his right, directly in front of his car, and fell into the open pit. As a result of his fall, plaintiff sustained a blood clot in his right leg and a fracture of his left ankle. Plaintiff alleged damages for payment of medical bills, wage loss, and lost stock investment opportunities.

Defendant moved for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10), arguing that the oil pit was at all times open and obvious. Plaintiff argued that because Jiffy Lube was dimly lit and there were no cautionary signs regarding the open pit, there were genuine issues of fact regarding whether the open and obvious doctrine applied. The trial court granted summary disposition pursuant to MCR 2.116(C)(10) "for the reasons stated on the record."

Thereafter, plaintiff filed a motion for reconsideration, which was dismissed by the trial court for not being timely filed pursuant to MCR 2.119(F).

A trial court's decision on a motion for summary disposition is reviewed de novo. *Rose v National Auction Group, Inc*, 466 Mich 453, 461; 646 NW2d 455 (2002). "In reviewing such a decision, we consider the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted by the parties in the light most favorable to the party opposing the motion. Summary disposition under MCR 2.116(C)(10) is appropriately granted if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Id.* (citation omitted).

Plaintiff first argues that the trial court erred in granting summary disposition because his testimony that the garage was dimly lit and there were no warning signs created a genuine issue of material fact about whether the open pit was open and obvious. We disagree.

Generally, a premises possessor owes an invitee a duty "to exercise reasonable care to protect the 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). A premises possessor is not, however, required to protect an invitee from open and obvious dangers. *Id.* at 517. "Whether a danger is open and obvious depends on whether it is reasonable to expect an average user of ordinary intelligence to discover the danger upon casual inspection." *Weakley v Dearborn Heights*, 240 Mich App 382, 385; 612 NW2d 428 (2000); *Novotney v Burger King Corp*, 198 Mich App 470, 474-475; 499 NW2d 379 (1993). To survive a motion for summary disposition, a plaintiff must "come forth with sufficient evidence to create a genuine issue of material fact that an ordinary user upon casual inspection could not have discovered the existence" of the hazard. *Novotney, supra*, 198 Mich App 475.

Although plaintiff claimed that the garage was dimly lit, he admitted that he was able to see the manager, which makes it reasonable to expect an average customer of ordinary intelligence to discover the open pit upon casual inspection, especially given the surrounding red floor, black mats, and yellow three-inch metal barrier that surrounds the pit. Plaintiff had been to this Jiffy Lube location more than five times and was aware that there were open pits in the floor. Thus, plaintiff failed to present sufficient evidence to "create a genuine issue of material fact that an ordinary user upon casual inspection could not have discovered the existence" of the open pit. *Novotney*, *supra* at 474. Therefore, the trial court did not err in granting Jiffy Lube's motion for summary disposition.

Next, plaintiff argues that the trial court erred in granting summary disposition because he presented a genuine issue of material fact regarding whether the open pit contained special aspects that made it unreasonably dangerous. We disagree.

"[A]n open and obvious condition might be unreasonably dangerous because of special aspects that impose an unreasonably high risk of severe harm." *Lugo*, *supra* at 518. If "special aspects of a condition make even an open and obvious risk unreasonably dangerous, the premises possessor has a duty to undertake reasonable precautions to protect invitees from that risk." *Id.* at 517. 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.* at 519. In *Maurer v Oakland Co Parks & Recreation Dep't*, a

companion case to *Bertrand v Alan Ford, Inc*, 449 Mich 606, 614; 537 NW2d 185 (1995), the Court determined that summary disposition in the defendant's favor was appropriate because the plaintiff's only asserted basis for finding that the condition was dangerous was that she did not see it. Here, plaintiff likewise has asserted no basis other than that he failed to see the open pit in the instant case.

Although plaintiff fails to identify any special aspects of the open pit, he likens the pit to an unguarded thirty foot deep pit in the middle of a parking lot, as hypothesized in *Lugo*, *supra*, 464 Mich 518. The *Lugo* Court reasoned that a large pit in a parking lot would present a situation where in the condition would be unreasonably dangerous because it would be unexpected, "at least absent reasonable warnings or other remedial measures being taken." *Id.* at 518. But, in this case plaintiff took his vehicle to a business where he knew there were open pits. Because the pits at defendant's business are expected, we find no special aspects that made the pits unreasonably dangerous. Additionally, the red floor surrounding the open pit and the three-inch yellow vertical metal barrier constitute reasonable precautions, reasonable warnings, or remedial measures. See *id.* at 517-518. Therefore, the trial court did not err in granting Jiffy Lube's motion for summary disposition.

Finally, plaintiff argues that the trial court erred in granting summary disposition because it refused to consider plaintiff's deposition testimony, which was attached to Jiffy Lube's motion for summary disposition. We disagree. Although the trial court chastised plaintiff for his failure to attach his deposition transcript to his response to Jiffy Lube's motion for summary disposition, there is no evidence to support plaintiff's contention that the trial court refused to consider the deposition transcript in ruling on the motion. In any event, we find nothing in plaintiff's deposition testimony that would disturb our conclusion that the open pit was open and obvious and did not contain any special aspects that created an unreasonable risk of danger.

Affirmed.

/s/ Jessica R. Cooper
/s/ Richard Allen Griffin
/s/ Stephen L. Borrello