

STATE OF MICHIGAN
COURT OF APPEALS

DOROTHY G. URBEN,

Plaintiff-Appellee

v

SPEEDY OIL, INC., a/k/a SPEE-DEE LUBE,

Defendant-Appellant.

UNPUBLISHED

January 10, 2013

No. 307789

Wayne Circuit Court

LC No. 10-014238-NO

Before: SAWYER, P.J., and SAAD and METER, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted an order denying its motion for summary disposition in this premises-liability action involving a fall into an oil pit at an oil-change facility. We reverse.

Defendant argues that there were no genuine issues of material fact regarding whether an ordinary user upon casual inspection would have discovered the existence of the oil pit and that, therefore, the condition was open and obvious. Defendant further argues that there were no special aspects making the condition unreasonably dangerous and that defendant undertook adequate precautions concerning any danger posed by the pit.

We review do novo a trial court's ruling concerning a motion for summary disposition. *Watts v Michigan Multi-King, Inc*, 291 Mich App 98, 102; 804 NW2d 569 (2010). In deciding 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 a light most favorable to the nonmoving party. Where the proffered evidence fails to establish a genuine issue of material fact, the moving party is entitled to judgment as a matter of law." *Watts*, 291 Mich App at 102 (citation omitted).

For premises liability, the general rule is that a "premises possessor owes a duty to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land." *Laier v Kitchen*, 266 Mich App 482, 488; 702 NW2d 199 (2005) (citation and quotation marks omitted). "[I]f the particular activity or condition creates a risk of harm *only* because the invitee does not discover the condition or realize its danger, then the open and obvious doctrine will cut off liability if the invitee should have discovered the condition and realized its danger." *Bertrand v Alan Ford, Inc*, 449 Mich 606, 611; 537 NW2d 185 (1995) (emphasis in original). "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.” *Eason v Coggins Memorial Christian Methodist Episcopal Church*, 210 Mich App 261, 264; 532 NW2d 882 (1995). A premises possessor is not required to protect an invitee from open and obvious dangers unless special aspects of a condition make even an open and obvious risk unreasonably dangerous. *Bertrand*, 449 Mich at 610-614.

We conclude that the oil pit was open and obvious as a matter of law. Plaintiff testified that defendant’s service garage was dark at the time of the accident. However, she also testified that the day was very sunny, and an employee of defendant stated that the sun penetrates the building through the large doors, which were open at the time of the accident. Photographs showing large doors corroborate this assertion. In addition, a red metal “lip” outlined the pit, and there was an expanse of blue-and-black rubber flooring between the bay door and the edge of the pit. In addition, the facility had multiple signs in the service bay stating “please watch your step.” Given the precautions employed and given the nature of the building (an oil-change facility), it is reasonable to expect that an average customer of ordinary intelligence would discover the pit upon casual inspection. The pit created a risk of harm only because plaintiff did not discover the condition or realize its danger.¹ *Id.* at 611. Thus, the condition was open and obvious.

An open and obvious condition might be unreasonably dangerous because of special aspects. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 517-518; 629 NW2d 384 (2001). In determining whether a condition presents a special aspect, courts should consider whether the open and obvious condition is effectively unavoidable or whether it presents a high risk of severe harm. See *id.* at 518.

Plaintiff claims that the oil pit was unreasonably dangerous because it presented a substantial risk of death or serious injury. Falling into an oil pit may indeed involve a high likelihood of severe harm. However, there were markings and warnings in the facility, as discussed above. In addition, the oil pit was effectively avoidable, and an oil pit is simply not an unexpected or unusual condition within an oil-change facility. It was not unreasonably dangerous to have this pit, with the accompanying markings and warnings, in the middle of a bay of an oil-change facility. See, generally, *Lugo*, 464 Mich at 518 (discussing circumstances under which it might be unreasonably dangerous to maintain a condition). There were no genuine issues of material fact regarding whether the oil pit was unreasonably dangerous.

Plaintiff emphasizes that there were malfunctioning “covering grates” in the facility and that the grates were improperly stacked at one end of the pit, essentially leaving only one effective grate. However, testimony established that even if the standard practice had been used and all three grates, instead of just one, had been properly deployed, there *still* would have been a gap of four feet—the gap that allows the workers to service a car that is positioned in the bay. Testimony further established that plaintiff walked over the one grate that was in place, and as noted by defendant, there is simply no basis from which to conclude that plaintiff would not have

¹ Plaintiff testified that she “wasn’t looking down at [her] feet when [she] was walking.” She stated that she was “looking for a doorway that said waiting room.”

fallen into the gap even if the grating had covered more of the pit.² Moreover, and significantly, even with only the one grate in place, the pit remained open and obvious and not unreasonably dangerous, as discussed above.

Plaintiff additionally emphasizes that defendant's employee acted improperly by failing to adequately direct her to the waiting room of the facility. First, the evidence reveals that the employee *did* direct plaintiff in the general direction of the waiting room, and there was a small customer door that plaintiff could have used. Second, the employee's action does not change the fact that the pit was an open and obvious condition without special aspects.³

Reversed and remanded for entry of judgment in favor of defendant. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Henry William Saad
/s/ Patrick M. Meter

² Plaintiff argues that she must have fallen into the end of the pit that did not have any grating over it. In support, plaintiff cites the deposition of defendant's employee Wassim Elsis, Jr., but Elsis's testimony is not definitive on this point. On the other hand, employee Kevin Turner testified that he *knew*, based on the circumstances, that plaintiff had to have walked over the grate.

³ We note that plaintiff does not make a separate argument regarding ordinary negligence but intertwines her argument about the employee's actions into the premises-liability analysis. This is in accord with *Buhalis v Trinity Continuing Care Services*, 296 Mich App 685, 692; 822 NW2d 254 (2012), where the Court emphasized that cases involving allegedly dangerous conditions on land sound in premises liability.