COURT OF APPEALS
DECISION
DATED AND RELEASED

April 24, 1997

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-2202-FT

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

BARBARA J. KING AND WISCONSIN EDUCATION ASSOCIATION INSURANCE CORPORATION,

PLAINTIFFS-APPELLANTS,

V.

"JIFFY LUBE" WISCONSIN, QUICK LUBE, INC., AND MUTUAL INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Dane County: MORIA KRUEGER, Judge. *Reversed and cause remanded.*

Before Eich, C.J., Dykman, P.J., and Vergeront, J.

PER CURIAM. Barbara J. King and the Wisconsin Education Association Insurance Corporation ("King") appeal from a summary judgment dismissing negligence claims against "Jiffy Lube" Wisconsin, Quick Lube, Inc.,

and Mutual Insurance Company ("Jiffy Lube").[1] The issues are whether Jiffy Lube was entitled to summary judgment because: (1) King's negligence exceeded Jiffy Lube's as a matter of law; (2) Jiffy Lube complied with the safe-place statute; and (3) the danger resulting in King's injuries was open and obvious. We conclude that genuine issues of material fact preclude summary judgment, including whether the premises presented an open and obvious danger. Therefore, we reverse the summary judgment and remand for trial.

King, a Jiffy Lube customer, sustained injuries while having her car serviced. King drove her car into a service stall, as directed by Jiffy Lube employees. After positioning her car in the stall as directed, King indicated to the employees that she was going to remove her groceries from the car and put them in her trunk. As she was carrying a large grocery bag to the rear of her car, King fell into that part of the lube pit that extended behind her car.

King sued Jiffy Lube for negligence and for violating the safe-place statute, § 101.11, STATS. Jiffy Lube moved for summary judgment, contending it had no duty of ordinary care because the danger was open and obvious. The trial court found that "this [wa]s a clearly marked hazard that was basically just ignored by the plaintiff, and [it could] not [have found] that [Jiffy Lube had] a duty" and granted summary judgment. The trial court reasoned that King confronted:

> a danger which was discoverable in the exercise of ordinary care. Whether the plaintiff knew that she, in fact, had any more pit beyond her car or didn't know, she did know … that she was over a pit or should have known she was over a pit, that she should have foreseen that she had to proceed carefully.

King appeals.

[1] This is an expedited appeal under RULE 809.17, STATS.

When we review a summary judgment, we independently apply the same methodology as the trial court. ***Johnson v. Minnesota Mut. Life Ins. Co.,*** 151 Wis.2d 741, 744, 445 N.W.2d 736, 737 (Ct. App. 1989). Standard summary judgment methodology is described in ***Preloznik v. City of Madison,*** 113 Wis.2d 112, 116, 334 N.W.2d 580, 582-83 (Ct. App. 1983).

First, we examine King's complaint to determine whether she has stated a cause of action. ***Id.*** King has alleged *prima facie* claims of negligence in paragraphs five through nine of her complaint. Second, we examine Jiffy Lube's answer to determine whether it raised defenses to those claims. ***Id.*** Jiffy Lube denied King's allegations and asserted that she was contributorily negligent. We conclude that Jiffy Lube has alleged a defense sufficient to defeat King's claims.

Because the pleadings raise genuine issues of material fact, we next examine the movant's affidavits for evidentiary facts to determine whether Jiffy Lube has made a *prima facie* case for summary judgment. ***Id.*** Jiffy Lube alleges that King's injuries "are a result of [her] own negligence in confronting an open and obvious danger." To support these allegations, Jiffy Lube attaches photographs depicting the warning and coloration of the floor and lube pit. King files an affidavit opposing summary judgment in which she avers that: (1) the photographs do not accurately depict the scene at the time of her accident; (2) Jiffy Lube employees directed her into the stall and therefore she did not observe the dimensions or precise location of the lube pit beneath her car; (3) she was unaware that the lube pit extended behind her car, and if her car was incorrectly positioned over the lube pit, it was because the employees misdirected her; (4) the employees knew she was carrying groceries to her trunk, where the lube pit was exposed; and (5) under these circumstances, the employees should have warned her. King also

averred that Jiffy Lube could have made its premises safer by placing metal screens over the lube pits and by directing customers to remain in their vehicles.

"[S]ummary judgment should be granted when it is clear that a formal trial could serve no useful purpose and could only result in a judgment as a matter of law." ***Zastrow v. Village of Brown Deer,*** 9 Wis.2d 100, 106, 100 N.W.2d 359, 363 (1960). Jiffy Lube contends that a trial would serve no useful purpose because "it is clear and uncontroverted that one party is substantially more negligent than the other and that no reasonable jury could reach a [different] conclusion...." However, summary judgment is rarely appropriate in negligence cases. ***Ceplina v. South Milwaukee Sch. Bd.,*** 73 Wis.2d 338, 342-43, 243 N.W.2d 183, 185 (1976).

Here, there are many disputed issues of material fact including whether: (1) the employees' directions to King were adequate; (2) King's vision was obstructed by the groceries, and if so, to what extent; (3) a reasonable person would have seen the lube pit because there was a warning sign and bright colors distinguishing it from the floor; (4) the premises were as safe as reasonably permissible; and (5) the extension of the lube pit behind the car presented an open and obvious danger. Moreover, in a negligence case, the fact finder must compare the level of negligence of the parties, if it finds that both parties were negligent. The parties' differing views of the foregoing facts are precisely those types of facts that are found at trial, not on summary judgment.

The safe-place statute requires an employer or owner to maintain the premises for employees and frequenters, such as King, in as safe a condition as the nature of the premises reasonably permits. Section 101.11(1), STATS.; ***McGuire v. Stein's Gift & Garden Ctr., Inc.***, 178 Wis.2d 379, 398, 504 N.W.2d 385, 393 (Ct.

App. 1993). Similar to our treatment of negligence claims, claims under the safe-place statute depend upon the facts and circumstances of the particular case and are rarely appropriate for summary judgment. ***Henderson v. Milwaukee County,*** 198 Wis.2d 747, 754, 543 N.W.2d 544, 548 (Ct. App. 1995). This case is no exception. It is the fact finder's responsibility to determine whether the warning sign and distinguishing colors rendered Jiffy Lube's premises as safe as was reasonably permissible and whether additional precautions should have been taken.[2] *See, e.g.,* § 101.11(1); ***McGuire,*** 178 Wis.2d at 398, 504 N.W.2d at 393.

The open and obvious danger defense is applicable when a plaintiff voluntarily confronts an open and obvious condition and a reasonable person in the plaintiff's position would recognize the condition and the risk it presents. ***Laesch v. L & H Indus., Ltd.,*** 161 Wis.2d 887, 897, 469 N.W.2d 655, 659 (Ct. App. 1991). The essence of the trial court's decision is that King cannot recover because the lube pit is an open and obvious danger. However, whether a condition constitutes an open and obvious danger is generally a factual question and therefore inappropriate for summary judgment. *See* ***id.*** at 898, 469 N.W.2d at 659. Here, the nature of the exposed lube pit behind King's car is a factor to consider in assessing the parties' negligence; it does not conclusively bar recovery. We conclude that King has averred sufficient facts which persuade us that the open and obvious danger doctrine does not bar her claims as a matter of law.

[2] For example, the fact finder must determine whether it would have been reasonable for Jiffy Lube to have taken additional precautions, such as directing customers to remain in their vehicles or covering the lube pits with grates, without defeating the purpose of providing efficient or "jiffy" service.

By the Court.—Judgment reversed and cause remanded.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.