STATE OF MICHIGAN

COURT OF APPEALS

PAUL FREEL,

Plaintiff-Appellee,

v

BELLE TIRE DISTRIBUTORS, INC.,

Defendant- Appellant.

UNPUBLISHED
February 11, 2021

No. 351660
Oakland Circuit Court
LC No. 2019-171350-NI

Before: GLEICHER, P.J., and K. F. KELLY and RIORDAN, JJ.

PER CURIAM.

Paul Freel tripped after his foot became entangled in a packaging strap on the floor of a Belle Tire service garage. Although he did not fall, Freel sustained a foot fracture. The issue presented is whether the packaging strap was an open and obvious danger, absolving Belle Tire of liability for the accident.

Freel's encounter with the strap was captured on the store's surveillance camera. The strap is visible in the black and white footage despite that the recording quality is poor. Because the strap was discoverable on casual inspection, it was open and obvious as a matter of law. We reverse the circuit court's contrary decision and remand for entry of judgment in favor of Belle Tire.

I. FACTS

Freel stopped at Belle Tire to fill a tire with air. The air pump on the outside of the premises was not working, so Freel entered the service garage to seek assistance. As he walked into the garage and toward a Belle Tire employee, Freel stepped on a packaging strap. The strap appears to have encircled or stuck to part of Freel's shoe. As he turned around to exit the garage, Freel stepped on the strap with his other foot and tripped. He managed to right himself and continued outside. Freel testified that he did not see the strap when he entered the garage but admitted that he had no trouble discerning it when he returned to retrieve it.

Belle Tire sought summary disposition based on the open and obvious danger doctrine. In *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 517; 629 NW2d 384 (2001), our Supreme Court

explained that "a premises possessor is not required to protect an invitee from open and obvious dangers." Surveillance video in hand, Belle Tire argued that the packaging strap was readily apparent. The circuit court ruled that a question of fact exists regarding the strap's visibility. Belle Tire sought leave to appeal, which we granted.

II. ANALYSIS

Belle Tire's motion for summary disposition raised a single issue: the open and obvious danger doctrine. The parties have assumed that Freel was an invitee, despite that he entered an area of the premises that did not appear to be open to the general public.[1] With regard to invitees, a premises owner has a "legal duty . . . to exercise reasonable care to protect invitees from an unreasonable risk of harm caused by a dangerous condition of the land that the landowner knows or should know the invitees will not discover, realize, or protect themselves against." *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995) (quotation marks and citation omitted). Belle Tire has also not challenged that the packaging strap on the garage floor was inherently dangerous, or argued that the presence of a packaging strap on the floor of a working garage could not constitute negligence.

The inquiry required when a defendant raises the open and obvious danger defense is summarized neatly in *Novotney v Burger King Corp*, 198 Mich App 470, 475; 499 NW2d 379 (1993), as follows: "Would an average user with ordinary intelligence have been able to discover the danger and the risk presented upon casual inspection? That is, is it reasonable to expect that the invitee would discover the danger?" Accordingly, when confronted with Belle Tire's motion for summary disposition, Freel bore the burden of "com[ing] 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 danger. *Id.*

A condition is open and obvious when "an average person with ordinary intelligence would have discovered the [condition] upon casual inspection." *Hoffner v Lanctoe*, 492 Mich 450, 461; 821 NW2d 88 (2012). When a potentially dangerous condition "is wholly revealed by casual observation," the premises owner owes its invitees no duty to warn of the danger's existence. *Novotney*, 198 Mich App at 474. This is so because "an obvious danger is no danger to a reasonably careful person." *Id.* We apply an objective standard when gauging whether a danger was open and obvious. *Lugo*, 464 Mich at 524. Because the test is objective, we do not consider whether a *particular* plaintiff should have realized that the condition was dangerous. Instead, we focus only on whether a reasonable person in the plaintiff's position would have foreseen the danger. *Kennedy v Great Atlantic & Pacific Tea Co*, 274 Mich App 710, 713; 737 NW2d 179 (2007).

[1] "An invitee is a person who enters upon the land of another upon an invitation which carries with it an implied representation, assurance, or understanding that reasonable care has been used to prepare the premises, and make [it] safe for [the invitee's] reception." *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596-597; 614 NW2d 88 (2000) (quotation marks and citation omitted, alterations in original).

Freel rests his opposition to summary disposition on the fact that he did not see the strap before he stepped on it. But the video reveals the strap on the floor, and it is not hidden or obscured by any other garage debris. Because the packaging strap was visible on casual inspection, *Lugo* instructs that Belle Tire had no duty to warn Freel of its presence on the floor.

We reverse and remand for entry of judgment in favor of Belle Tire.

/s/ Elizabeth L. Gleicher
/s/ Kirsten Frank Kelly
/s/ Michael J. Riordan