STATE OF MICHIGAN

COURT OF APPEALS

GERALDINE J. GLOD,

Plaintiff-Appellant,

v

CLINTON RIVER CRUISE COMPANY, INC.,

Defendant/Third-Party Plaintiff-Appellee,

and

DSI INDUSTRIES, INC., d/b/a DOOR SOLUTIONS, and EVANGELICAL HOMES OF MICHIGAN, d/b/a PATHWAYS TRANSITION CARE,

Defendants,

and

JANET YOUNG,

Third-Party Defendant.

UNPUBLISHED
January 27, 2009

No. 279422
Macomb Circuit Court
LC No. 05-004973-NO

Before: Jansen, P.J., and O'Connell and Owens, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting summary disposition to defendants, Evangelical Homes of Michigan, d/b/a Pathways Transition Care (Evangelical Homes), and DSI Industries, Inc., d/b/a Door Solutions (DSI). On appeal, plaintiff challenges the trial court's earlier orders granting summary disposition to defendant, Clinton River Cruise Company, Inc.

(defendant), denying her motion to amend her complaint, and denying her motion to reconsider the order granting summary disposition to defendant under maritime law. We affirm.[1]

I. Facts

This negligence case arises out of injuries that plaintiff suffered when she tripped and fell on defendant's vessel, the Clinton Friendship. The fall occurred while plaintiff crossed a five or six-inch tall doorway coaming, designed to prevent water entry from the bow to the dining area. She suspects that her foot became caught on one of two features on the coaming, either the tubing protruding two inches inward from the top of the coaming or the metal plate that secured a sliding bolt to lock the door.

On appeal, plaintiff argues that the trial court improperly applied Michigan's open and obvious danger doctrine in granting defendant's motion for summary disposition. Plaintiff also argues that the trial court abused its discretion when it denied her motions to amend her complaint and for reconsideration, asserting that the open and obvious danger doctrine would not apply to her premises liability, ordinary negligence and common carrier claims under maritime law.

II. Standard of Review

This Court reviews a lower court's determination regarding a motion for summary disposition de novo. *Hinkle v Wayne Co Clerk*, 467 Mich 337, 340; 654 NW2d 315 (2002). A motion under MCR 2.116(C)(10) tests the factual support of a plaintiff's claim. *Auto-Owners Ins Co v Allied Adjusters & Appraisers, Inc*, 238 Mich App 394, 396-397; 605 NW2d 685 (1999). "In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), we consider the affidavits, pleadings, depositions, admissions, or any other documentary evidence submitted in [the] light most favorable to the nonmoving party to decide whether a genuine issue of material fact exists." *Singer v American States Ins*, 245 Mich App 370, 374; 631 NW2d 34 (2001). Summary disposition is appropriate only if there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. *MacDonald v PKT, Inc*, 464 Mich 322, 332; 628 NW2d 33 (2001).

"Decisions concerning the . . . granting or denying [of] motions to amend pleadings, are within the sound discretion of the trial court and reversal is only appropriate when the trial court abuses that discretion." *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997). This Court also reviews a trial court's decision on a motion for reconsideration for an abuse of discretion. *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000). An abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes. *Barnett v Hidalgo*, 478 Mich 151, 158; 732 NW2d 472 (2007).

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[1] On appeal, plaintiff does not challenge the trial court's order granting summary disposition to Evangelical Homes and DSI. We also note that defendant voluntarily dismissed its third-party claim against Janet Young below.

III. Maritime Law

A state court has jurisdiction over a claim arising out of an accident that occurred in navigable waters under the "savings to suitors" clause in 28 USC 1333(1). *Hendricks v Transportation Services of St. John, Inc*, 41 VI 21, 26-27 (Sup Ct, 1999). However, federal maritime law, rather than forum law, governs the resolution of such controversies. *Kermarec v Compagnie Generale Transatlantique*, 358 US 625, 628; 79 S Ct 406; 408, 3 L Ed 2d 550 (1959); *Beard v Norwegian Caribbean Lines*, 900 F2d 71, 73 (CA 6, 1990). Therefore, maritime law applies to plaintiff's claims. Nevertheless, where forum law supplements but does not conflict with maritime law, a court may apply the local law, *Hendricks, supra* at 30; *Luby v Carnival Cruise Lines, Inc*, 633 F Supp 40-41 n 2 (SD Fl, 1986).

In granting defendant's motion for summary disposition, the trial court applied Michigan law. Specifically, under Michigan law, an invitor has a common law duty to exercise reasonable care to protect an 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). However, an invitor is not required to protect an invitee from open and obvious dangers unless special aspects exist. *Id.* at 516-517. A condition is open and obvious if "'an average user with ordinary intelligence [would] have been able to discover the danger and the risk presented upon casual inspection.'" *Corey v Davenport College of Business* (*On Remand*), 251 Mich App 1, 5; 649 NW2d 392 (2002), quoting *Novotney v Burger King Corp* (*On Remand*), 198 Mich App 470, 475; 499 NW2d 379 (1993). On appeal, we must determine whether the application of Michigan law, as opposed to federal maritime law, constituted error.

In a maritime premises liability action, a ship owner is under a duty to its passengers to exercise reasonable care. *Kermarec, supra* at 632; *Hendricks, supra* at 31. Where maritime travel presents more danger to a passenger than he would encounter in daily life, a higher degree of reasonable care may be warranted. *Rainey v Paquet Cruises, Inc*, 709 F2d 169, 171-172 (CA 2, 1983). However, there is no higher degree of care necessary where maritime travel presents "trifling dangers which a passenger meets 'in the same way and to the same extent as he meets them daily in his home or in his office or on the street, and from which he easily and completely habitually protects himself.'" *Id.* at 171, citing *Livingston v Atlantic Coast Line R Co*, 28 F2d 563, 566 (CA 4, 1928).

Under maritime law, the defendant's duty of reasonable care and duty to warn of dangerous conditions are precluded when a danger is as obvious to the injured party as to the defendant. *Luby, supra* at 40-42; *Deroche v Commodore Cruise Line*, 31 Cal App 4th 802, 807-810 (1994) (the defendant had no duty to warn the plaintiff of the obvious danger that the standard of medical care available during the cruise may be lower than is typically available in the United States). In *Luby, supra* at 41, the plaintiff, a passenger, sued the defendant, the owner of a cruise ship, for damages she sustained when she tripped on the coaming surrounding the shower in her cabin's bathroom. The plaintiff alleged that the defendant breached its duty by (1) concealing the coaming from her and (2) failing to warn her of its existence. *Id.* The Southern District Court of Florida ruled that, under both maritime law and Florida law, the defendant had a duty of reasonable care and a duty to warn the plaintiff of dangerous conditions. *Id.* at 41-42. However, it held that the defendant did not breach these duties because the coaming was an obvious condition. *Id.*

Comparing Michigan and maritime law, we conclude that the open and obvious danger doctrine similarly precludes liability where an invitee or passenger should have discovered and realized a dangerous condition. Therefore, the trial court did not err when it applied Michigan law to defendant's motion for summary disposition because the outcome would have been the same under maritime law. *Hendricks, supra* at 30; *Luby, supra* at n 2.

Plaintiff maintains that, pursuant to maritime law, even if the open and obvious danger doctrine applies to the duty to warn under her premises liability claim, it does not apply to the duty of reasonable care in her remaining negligence claims. We disagree.

The court in *Luby, supra* at 41-42, held that there is no duty of reasonable care where a dangerous condition is obvious. Again, where the forum law supplements, but does not conflict with maritime law, a court may apply the local law. *Hendricks, supra* at 30; *Luby, supra* at 40-41 n 2. Michigan has not limited the open and obvious danger doctrine to claims alleging that the defendant failed to provide a warning. *Millikin v Walton Manor Mobile Home Park, Inc*, 234 Mich App 490, 495; 595 NW2d 152 (1999). Instead, it has extended the doctrine to the duty element of any prima facie negligence case where a dangerous condition existed. *Id*. at 495-496. In both her ordinary negligence and common carrier claims, plaintiff alleged that defendant allowed a dangerous condition to exist. Considering *Luby* and supplementing Michigan law, it would have been appropriate to grant defendant's motion for summary disposition on plaintiff's ordinary negligence and common carrier liability claims.

Plaintiff also maintains that defendant owed her a higher degree of care, under *Rainey, supra* at 171-172, that could not be precluded by the open and obvious danger doctrine. She claims that elderly passengers would not encounter coamings, with tubing and a metal plate, in ordinary life on land. While perhaps true, we disagree that the conditions precluded the open and obvious danger doctrine.

Steps are open and obvious conditions on land and navigable waters. Here, the coaming and tubing were distinct because their white color contrasted with the gray deck. Similarly, the silver-colored metal plate contrasted with the white coaming. The trial court noted that thousands of other passengers crossed the threshold without incident. Moreover, plaintiff crossed the threshold safely on a previous voyage on the vessel. Therefore, the coaming resembles a "trifling danger" described in *Rainey*, similar to dangers encountered and protected against daily. Therefore, no higher duty of reasonable care was necessary. *Rainey, supra* at 171.

Finally, plaintiff maintains that maritime law regarding comparative negligence suggests that the open and obvious danger doctrine does not negate a defendant's duty. We disagree.

Under maritime law, "contributory negligence can be considered only in mitigation of damages." *Carey, supra* at 207. The Third and Fifth Circuits have addressed the interplay between the maritime contributory negligence rule and the open and obvious danger doctrine. *Kirsch, supra* at 1030-1031; *Morris v Compagnie Maritime Des Chargeurs Reunis, SA*, 832 F2d 67, 71 (CA 5, 1987). Specifically, the Third Circuit noted that negating liability under the duty element for an open and obvious danger is similar in result to precluding recovery under the damages element because of a plaintiff's contributory negligence. *Kirsch, supra* at 1031 n 6. Nevertheless, both courts found that an open and obvious danger existed, thereby negating the

defendant's duty and negligence. *Kirsch*, *supra* at 1033-1034; *Morris*, *supra* at 71. Following this trend, we reject plaintiff's contributory negligence argument.

IV. Amendment of Complaint and Motion for Reconsideration

Plaintiff maintains that the trial court abused its discretion when it denied her motions to amend her complaint and reconsider the order granting defendant's motion for summary disposition under maritime law.

If a trial court grants summary disposition pursuant to MCR 2.116(C)(8), (C)(9), or (C)(10), it must give the parties an opportunity to amend their pleadings pursuant to MCR 2.118 unless the amendment would be futile. *Weymers*, *supra* at 658. Similarly, under MCR 2.119(F), a motion for rehearing or reconsideration will not be granted where it presents the same issues ruled on by the court. *Churchman*, *supra* at 233. Instead, the moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error. *Id.*

Plaintiff's motion to amend the complaint was futile. Similarly, reconsideration of defendant's motion for summary disposition under maritime law would not have resulted in a different disposition. Regardless of whether the trial court applied Michigan or maritime law, the open and obvious danger doctrine would have precluded recovery. Therefore, we conclude that the trial court did not abuse its discretion when it denied plaintiff's motions to amend her complaint and reconsider the order granting summary disposition.

Affirmed.

/s/ Donald S. Owens