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UNPUBLISHED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. 2005-004973-NO

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

JANSEN, P.J. (*concurring*).

I fully concur in the result reached by Judge OWENS in this case. I write separately to point out that, although I am unconvinced that the open and obvious danger doctrine of federal maritime law is coextensive with the open and obvious danger doctrine of Michigan law *in all respects*, the trial court's application of Michigan's open and obvious danger doctrine in this case does not require reversal. For purposes of federal maritime law, "[i]t is well-settled law that there is no duty to warn of an open and obvious danger that an ordinary prudent person would take reasonable steps to avoid," *McMellon v United States*, 395 F Supp 2d 422, 435 (SD WV, 2005), and "[w]hen there is no duty, there can be no breach of duty and hence no negligence," *Gemp v United States*, 684 F2d 404, 407 (CA 6, 1982). Likewise, under Michigan law, there is generally no duty to warn of open and obvious dangers that a reasonably prudent person would

take steps to avoid. *Joyce v Rubin*, 249 Mich App 231, 238-239; 642 NW2d 360 (2002). "[T]he 'no duty to warn of open and obvious danger' rule is a defensive doctrine that attacks the duty element that a plaintiff must establish in a prima facie negligence case." *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 95-96; 485 NW2d 676 (1992). Accordingly, both the open and obvious danger doctrine of federal maritime law and the open and obvious danger doctrine of Michigan law attack the duty element of a plaintiff's negligence claim.

Judge O'CONNELL appears to suggest that because federal maritime law is based on common-law principles, there are two applicable duties in cases of maritime premises liability—a duty to warn *and* a duty to exercise reasonable care in inspecting or maintaining the ship. I am unconvinced that the common law imposed on property owners in all cases *both* the duty to exercise reasonable care in inspecting or maintaining the premises *and* the duty to warn. I acknowledge that some jurisdictions have concluded that both duties existed separately and independently of one another at common law. See, e.g., *Gargano v Azpiri*, 110 Conn App 502, 510; 955 A2d 593 (2008) (holding that "[u]nder the common law, a possessor of land owes an invitee two separate duties: the duty to inspect and maintain the premises to render them reasonably safe, and the duty to warn of dangers that the invitee could not reasonably be expected to discover," and that "pursuant to the common law, a possessor of land has a duty to maintain the premises in a reasonably safe condition, despite the openness and obviousness of a defect of which an invitee has knowledge"). But the majority rule "imposes on the owner or occupant the *alternative* duty of making the premises reasonably safe *or* warning of such dangers as are not known or obvious to the invitee." 65A CJS, Negligence, § 459, p 148 (emphasis added). Michigan appears to follow this majority rule. See *Marietta v Cliff's Ridge, Inc*, 385 Mich 364, 371; 189 NW2d 208 (1971) (observing that the duty of an owner or occupier of land "is to remedy *or* warn of dangers which are known to him or which, in the exercise of reasonable care, he should have discovered") (emphasis added).

Similarly, the duty to exercise reasonable care in maintaining or inspecting a ship is not separate and independent from the duty to warn in maritime premises liability cases. It is true that "'the owner of a ship in navigable waters owes to all who are on board for purposes not inimical to his legitimate interests the duty of exercising reasonable care under the circumstances of each case.'" *Federal Marine Terminals, Inc v Burnside Shipping Co*, 394 US 404, 415; 89 S Ct 1144; 22 L Ed 2d 371 (1969), quoting *Kermarec v Compagnie Generale Transatlantique*, 358 US 625, 632; 79 S Ct 406; 3 L Ed 2d 550 (1959). But "warning . . . of any hazards on the ship or with respect to [the ship's] equipment that are known to the vessel or should be known to it in the exercise of reasonable care" is part and parcel of the overall duty to exercise reasonable care under the circumstances. *Scindia Steam Navigation Co, Ltd v De Los Santos*, 451 US 156, 166-167; 101 S Ct 1614; 68 L Ed 2d 1 (1981). After much research, I cannot agree with Judge O'CONNELL's contention that there are two separate and independent duties of care required of vessel owners in maritime premises liability cases. I conclude that a vessel owner's duty to warn is included in the overall duty to exercise reasonable care in maintaining or inspecting the ship, and that the open and obvious danger doctrine of federal maritime law is therefore not limited only to the duty to warn. Any error in applying Michigan's open and obvious danger doctrine rather that the open and obvious danger doctrine of federal maritime law was plainly harmless in this case.

/s/ Kathleen Jansen