STATE OF MICHIGAN

COURT OF APPEALS

GERALDINE J. GLOD,

Plaintiff-Appellant,

v

CLINTON RIVER CRUISE COMPANY, INC.,

Defendant/Third Party-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UNPUBLISHED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.

O'CONNELL, J. (*dissenting*).

I respectfully dissent. I concur with the majority opinion's statement that state courts have jurisdiction over a claim arising from an accident that occurs on navigable waters. However, I note that federal maritime law, not Michigan law, applies to plaintiff's claim. The trial court and the majority err when they conclude that federal maritime law and Michigan law are coextensive with regard to the "open and obvious" defense.[1] I am unaware of any other state

[1] In this case, the trial court applied Michigan law to plaintiff's claim and refused to allow plaintiff to amend her complaint to allege a violation of federal maritime law. I conclude that it (continued…)

or federal court that has adopted Michigan's version of the "open and obvious" defense as expressed in *Lugo v Ameritech Corp, Inc*, 464 Mich 512; 629 NW2d 384 (2001).

I first note that most states recognize some version of the "open and obvious" defense. However, the precise character of the defense and its specific application to the facts of any given case vary greatly from state to state. Further, the "open and obvious" defense as found in federal maritime law is different than Michigan's version of this defense.[2]

In granting defendants' motion for summary disposition, the trial court applied Michigan law. In my opinion, the trial court's decision to apply Michigan law to resolve this case was erroneous.[3] Under federal maritime law, the defendant has a duty of reasonable care and a duty to warn. *Luby v Carnival Cruise Lines, Inc*, 633 F Supp 40, 41 n 1 (SD Fla, 1986), aff'd 808 F2d 60 (CA 11 1986). Under Michigan law, an invitor has a common law 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." *Lugo*, *supra* at 516. However, an invitor is not required to protect an invitee from open and obvious dangers unless special aspects exist.[4] *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.'" *Joyce v Rubin*, 249 Mich App 231, 238; 642 NW2d 360 (2002), quoting *Novotney v Burger King Corp* (*On Remand*), 198 Mich App 470, 475; 499 NW2d 379 (1993).

Michigan has not limited the "open and obvious" defense to claims alleging that the defendant failed to provide a warning. See *Millikin v Walton Manor Mobile Home Park, Inc*, 234 Mich App 490, 495; 595 NW2d 152 (1999). Instead, our courts have extended the "open and obvious" defense to the "duty of reasonable care" element of any prima facie negligence case where a dangerous condition existed. *Id.* at 495-496. Neither plaintiff's nor defendants' appellate briefs cite any cases where the "open and obvious" defense found in federal maritime law has also been extended to include the duty element of any prima facie negligence case where a dangerous condition existed. Although I agree with the trial court that under federal maritime law the "open and obvious" defense is a complete defense to a failure-to-warn claim, I remain

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(…continued)

was error to apply Michigan's version of the "open and obvious" defense to plaintiff's claim, and that the trial court erred when it denied plaintiff's request to amend her complaint. The solution for this error is to remand this case to the trial court and allow both parties to file additional briefs. The briefs should address the differences between the federal maritime "open and obvious" defense and Michigan's version of the "open and obvious" defense.

[2] Neither the trial court nor the majority has analyzed the differences in premises liability under Michigan law and federal maritime law.

[3] Michigan's "open and obvious" defense, as set forth in *Lugo*, adds an additional step not found in federal maritime law. The majority claims that it is merely supplementing federal maritime law. However, in my opinion, adding a distinct step to the "open and obvious" defense is not the same as merely supplementing federal law.

[4] Nothing in the parties' briefs indicates that the "special aspects" exception adopted by the *Lugo* Court exists in federal maritime law.

unconvinced that this defense also has been extended to encompass the "duty of reasonable care" element of a negligence claim.[5]

I would vacate the trial court's decision and remand this case to the trial court with instructions to allow plaintiff to amend her complaint to allege a violation of federal maritime law. Defendants then would be free to file a second motion for summary judgment. Only when the issue is properly briefed can the trial court decide if the "open and obvious" defense under federal maritime law has been extended to the "duty of reasonable care" element of any prima facie negligence case where a dangerous condition exists.

/s/ Peter D. O'Connell

[5] I concur with the majority that Michigan's version of the "open and obvious" defense is a complete bar to plaintiff's claim. I simply disagree with the majority's conclusion that federal maritime law with respect to the "open and obvious" defense is coextensive with Michigan's version of this defense.