STATE OF MICHIGAN

COURT OF APPEALS

NICHOLE CLARK,

Plaintiff-Appellant,

v

CLIFF HUCKLEBERRY and JUDY HUCKLEBERRY,

Defendants-Appellees.

UNPUBLISHED
September 3, 2002

No. 231929
Ionia Circuit Court
LC No. 00-020725-NO

Before: Zahra, P.J., and Hood and Jansen, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendants' motion for summary disposition. We reverse.

Plaintiff filed a two-count complaint alleging negligence and breach of contract. Plaintiff resided in a home leased from defendants. Prior to executing the month to month lease, plaintiff and co-tenant Steve McQueen examined the premises and noted the condition of a swinging door with four large panes of glass. Plaintiff alleged that the glass was visibly brittle, and one pane of glass was cracked, but held together by a piece of duct tape. Plaintiff alleged that defendant Cliff Huckleberry acknowledged that the door was faulty, but reassured the prospective tenants that he would repair or replace the door in the near future. Plaintiff alleged that she signed the lease based on this promise. During the course of the lease, McQueen routinely inquired when the door would be fixed. Defendant Cliff Huckleberry allegedly represented that the repair would occur "sometime soon." On February 12, 2000, McQueen left the home after learning about the hospitalization of his grandfather. Plaintiff went to open the door to ask where McQueen was going, and her hand went through one of the panes of glass.

Without addressing the individual counts of the complaint, defendants moved for summary disposition. Defendants alleged that they were not liable because plaintiff had complete possession and control of the premises and the alleged condition was open and obvious. In opposition to the dispositive motion, plaintiff and McQueen submitted affidavits that indicated that defendant Cliff Huckleberry represented that he would fix the door. Plaintiff alleged that defendants had a statutory, common law, and contractual duty to repair the door, but failed to perform in accordance with their representations. Plaintiff cited to case law that indicated that the open and obvious doctrine could not alleviate a statutorily created duty. Plaintiff also alleged that summary disposition was premature because inspection of the glass

door and necessary discovery had not yet occurred. The trial court granted defendants' motion for summary disposition.

Plaintiff first argues that the trial court erred in dismissing the negligence claim. We agree. An appellate court reviews the grant or denial of a motion for summary disposition de novo to determine if the moving party was entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). To establish a prima facie case of negligence, the plaintiff must prove four elements: (1) a duty owed by the defendant to the plaintiff; (2) a breach of that duty; (3) causation, that include cause in fact and legal or proximate cause; and (4) damages. *Case v Consumers Power Co*, 463 Mich 1, 6 n 6; 615 NW2d 17 (2000). In the present case, plaintiff alleged that a statutory duty was owed by defendants as landlord to a tenant pursuant to MCL 554.139. Defendants cannot utilize the open and obvious doctrine to avoid liability where a duty to maintain the leased premises was created by statute. *Haas v City of Ionia*, 214 Mich App 361, 363-364; 543 NW2d 21 (1995); *Walker v City of Flint*, 213 Mich App 18, 20-23; 539 NW2d 535 (1995).[1]

Plaintiff also alleges that the trial court erred in dismissing the breach of contract claim. We agree. Construction and interpretation of a contract presents a question of law that an appellate court reviews de novo. *Bandit Industries, Inc v Hobbs Int'l, Inc (After Remand)*, 463 Mich 504, 511; 620 NW2d 531 (2001). Summary disposition is rarely appropriate in cases involving questions of credibility, intent, or state of mind. *Arbelius v Poletti*, 188 Mich App 14, 18; 469 NW2d 436 (1991). The moving party has the initial burden to support its claim to summary disposition by affidavits, depositions, admissions, or other documentary evidence. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The burden then shifts to the nonmoving party to demonstrate that a genuine issue of disputed fact exists for trial. *Id*. The lease contained the following provisions addressing landlord and tenant repairs:

> Tenant further agrees to maintain said premises in good repair and to deliver and surrender up the same upon termination of said tenancy in the same condition as when taken except for ordinary wear and tear.
>
> The landlord or his authorized agents shall have the right to inspect said premises and repair and maintain the same, and may at any reasonable hour show the same and any part thereof to prospective purchasers, mortgagees, tenants, or

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[1] We note that in *Woodbury v Bruckner*, 248 Mich App 684, 690; ___ NW2d ___ (2001), a panel of this Court addressed MCL 554.139. Although the panel concluded that the open and obvious doctrine could be raised by defendants, the Court's ultimate holding was that the doctrine was inapplicable because a question of fact existed. Specifically, whether an unguarded rooftop porch was unreasonable despite being open and obvious. *Id*. at 696. "Statements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to determination of the case in hand, are, however illuminating, but *obiter dicta* and lack the force of adjudication." *Hett v Duffy*, 346 Mich 456, 461; 78 NW2d 284 (1956) (emphasis in original). See also, *Glus v Brooklyn Eastern District Terminal*, 359 US 231, 235; 79 S Ct 760; 3 L Ed 2d 770 (1959) (dicta is not binding); *Perry v Seid*, 461 Mich 680, 687 n 9; 611 NW2d 516 (2000) (observations by way of dicta are not binding).

agents thereof, and may, at any time, place and maintain one "for sale" sign thereon in event said property is now or hereafter for sale.

In support of the breach of contract claim, plaintiff and McQueen filed affidavits indicating that defendant Cliff Huckleberry acknowledged the need for the repair. The affidavits further indicate that defendants exercised the reservation of rights provision to enter the premises and make the repair by representing that the door would be fixed by them. There is no documentary evidence in the record to indicate that defendants authorized plaintiff or McQueen to repair the door under the tenant duties provision contained in the lease agreement. Accordingly, plaintiff created an issue of fact that precluded summary disposition. *Quinto, supra*.[2]

Reversed and remanded. We do not retain jurisdiction.

/s/ Brian K. Zahra
/s/ Harold Hood
/s/ Kathleen Jansen

[2] Plaintiff also alleges that defendants breached a statutory duty regarding safety glass requirements. However, this issue was not raised, addressed, and decided by the trial court. *Persinger v Holst*, 248 Mich App 499, 507 n 2; 639 NW2d 594 (2001).