STATE OF MICHIGAN

COURT OF APPEALS

ALIQEMAL HYSNI, M.D.,[1] and BESSIE HYSNI,

Plaintiffs-Appellees/Cross-Appellants,

v

CORNWALL PLUMBING, INC.,

Defendant-Appellant/ Counterdefendant,

and

SINGH DEVELOPMENT CO., LTD., and SINGH MANAGEMENT CO.,

Defendants-Counterplaintiffs/Cross-Appellee.

UNPUBLISHED
February 3, 2004

No. 243564
Oakland Circuit Court
LC No. 00-026975-NO

Before: Owens, P.J., and Schuette and Borrello, JJ.

PER CURIAM.

Defendant Cornwall Plumbing appeals by leave granted from the trial court's order denying Cornwall's motion for summary disposition under MCR 2.116(C)(8) and MCR 2.116(C)(10). Plaintiffs cross appeal from the order dismissing defendants Singh Development Co., Ltd. and Singh Management Co. from the case.[2] This case arose when plaintiff Aliqemal Hysni[3] (now deceased) received second- and third-degree burns on his back after getting into his

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[1] Plaintiff's name also appears in the lower court and appellate records as "Aliqemal" and "Aliquimal." The correct spelling is Aliqemal.

[2] The Singh defendants moved for summary disposition under MCR 2.116(C)(8) and MCR 2.116(C)(10), but concede on appeal that summary disposition under MCR 2.116(C)(8) would have been inappropriate.

[3] Plaintiff Bessie Hysni's claims are derivative. Thus, for ease of reference, the singular "plaintiff" will refer to Aliqemal Hysni only.

shower. The shower and shower elements were installed by Cornwall Plumbing, a subcontractor for Singh Development and Singh Management Company. Singh Development built, developed, and owned the apartment complex, and Singh Management managed, operated, and maintained the complex. Plaintiffs alleged that the scald guard and "limit stop screw" with which the shower was equipped had not been properly installed and that the hot water temperature gauge was set to the highest level, causing the water's temperature to unexpectedly surge to approximately 150 degrees. We affirm the trial court's decision in part and reverse and remand in part for the reasons set forth below.

We review a trial court's decision on a motion for summary disposition under MCR 2.116(C)(10) de novo. On review, we "'consider the available pleadings, affidavits, depositions, and other documentary evidence in a light most favorable to the nonmoving party and determine whether the moving party was entitled to judgment as a matter of law.'" *Michigan Education Employees Mutual Ins Co v Turow*, 242 Mich App 112, 114; 617 NW2d 725 (2000), quoting *Unisys Corp v Comm'r of Ins*, 236 Mich App 686, 689; 601 NW2d 155 (1999).

Likewise, we review a trial court's decision on a motion for summary disposition under MCR 2.116(C)(8) de novo. *Beaty v Hertzberg & Golden, PC*, 456 Mich 247, 253; 571 NW2d 716 (1997). MCR 2.116(C)(8) tests the "legal sufficiency of the complaint" and permits dismissal of a claim where the opposing party has failed to state a claim on which relief can be granted. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999); MCR 2.116(C)(8). Only the pleadings are examined; documentary evidence is not considered. *Id.* Where the claim is "so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery," the motion should be granted. *Id.*

When defendant Cornwall Plumbing moved for summary disposition, claiming that the nature of the scalding water was open and obvious, the trial court held that Cornwall had not presented support for its proposition that the open and obvious defense was available to it as a contractor in a general negligence case. The trial court was correct. Our current jurisprudence holds that the open and obvious defense is available in premises liability cases and failure-to-warn cases. See *Lugo v Ameritech Corp*, 464 Mich 512; 629 NW2d 384 (2001), *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995), *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992), *Glittenberg v Doughboy Recreational Industries (On Rehearing)*, 441 Mich 379, 398-399; 491 NW2d 208 (1992), and *Owens v Allis-Chalmers Corp*, 414 Mich 413, 425; 326 NW2d 372 (1982).

Cornwall claims that our decision in *Millikin v Walton Manor Mobile Home Park, Inc*, 234 Mich App 490; 595 NW2d 152 (1999), stands for the proposition that the open and obvious doctrine is available under any theory of liability and points specifically to the following statement in that opinion: "The logic of [the discussed] cases, as well as the language they employed, demonstrates that the doctrine protects against liability whenever injury would have been avoided had an 'open and obvious' danger been observed, regardless of the alleged theories of liability." *Id.* at 497. But Cornwall ignores the context of our ruling. The specific issue we decided was whether the plaintiff could avoid the open and obvious defense by couching her complaint in terms of general negligence rather than failure to warn, the latter area of which, of course, permits an open and obvious defense. Our statement preceding the one on which Cornwall relies was, "On the basis of *Riddle*[, *supra*] and *Bertrand*[, *supra*] [premises liability cases] and their analysis of applicable precedents, we conclude that the open and obvious

doctrine applies to this premises liability case, notwithstanding plaintiff's avoidance of a 'failure to warn' allegation in drafting her complaint." *Id.* at 497. Thus, we do not read *Millikin* as extending the open and obvious defense to theories outside the ones examined in that case – premises liability and failure to warn. If we meant to extend the open and obvious defense to any general negligence case, we would not have found it necessary to redefine the plaintiff's cause of action as one for which the open and obvious doctrine was available. Thus, we affirm the trial court's refusal to grant summary disposition to Cornwall.

In their cross-appeal, plaintiffs claim that the trial court erroneously dismissed the Singh defendants on the basis that the scalding nature of the shower water was open and obvious. Plaintiffs assert that the open and obvious doctrine was not available to the Singh defendants because they had a statutory duty under MCL 554.139 to render fit premises and to keep the premises in reasonably good repair. We agree.

New developments in that area of the law require us to reverse the trial court's decision. In *Woodbury v Bruckner*, 467 Mich 921, 921; 658 NW2d 482 (2002), a premises liability case in which the plaintiff claimed a violation of MCL 554.139, and the defendant claimed the alleged danger was open and obvious, the Supreme Court remanded the case to this Court to determine "whether the defendants violated the 'reasonable repair' requirement of MCL 554.139(1)(b)" in lieu of granting leave to appeal. In so doing, the Court held, "The open and obvious doctrine cannot be used to avoid a specific statutory duty." *Id.*, citing *Jones v Enertel, Inc*, 467 Mich 266, 267; 650 NW2d 334 (2002). In turn, we remanded the case to the trial court to resolve the factual dispute about the statute's applicability. *Id.* Then in *O'Donnell v Garasic*, ___ Mich App ____; ____NW2d ____(2003), this Court held that the "open and obvious doctrine is not available to deny liability to an injured invitee or licensee on leased or licensed residential premises when such premises presents [sic] a material breach of the specific statutory duty imposed on owners of residential properties. . . . " *Id.* at slip op 7.

The Supreme Court's holding in *Woodbury* as well as this Court's decision in *O'Donnell* dictates here that the open and obvious defense is unavailable to the Singh defendants if they violated the statutory duty as plaintiffs claim. Because the trial court did not examine whether Singh violated the statute, deciding instead that the hot water was open and obvious, this case demands further factual development. We therefore reverse the trial court's order granting summary disposition to the Singh defendants and remand this case for further proceedings in accordance with this opinion.

Affirmed in part and reversed and remanded in part. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ Bill Schuette
/s/ Stephen L. Borrello