STATE OF MICHIGAN

COURT OF APPEALS

RENEE MICKENS,

Plaintiff-Appellant,

v

DEXTER CHEVROLET COMPANY, a/k/a HARRY SLATKIN BUILDERS, d/b/a SHERWOOD HEIGHTS APARTMENTS, and HARTMAN AND TYNER, INC., d/b/a SHERWOOD HEIGHTS APARTMENTS,

Defendants-Appellees.

UNPUBLISHED
January 14, 2000

No. 208269
Wayne Circuit Court
LC No. 96-616853-NO

Before: Collins, P.J., and Sawyer and Cavanagh, JJ.

CAVANAGH, J. (*dissenting*).

I respectfully dissent.

In deciding whether summary disposition was appropriate, the trial court was required to view the evidence in the light most favorable to plaintiff. See *Smith v Globe Life Ins Co*, 460 Mich 446, 454-455; 597 NW2d 28 (1999). A court may not weigh credibility in deciding a summary disposition motion, *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994), and a court must carefully avoid making findings of fact under the guise of determining that no issue of material fact exists, *Mahaffey v Attorney General*, 222 Mich App 325, 343; 564 NW2d 104 (1997).

Approximately a month after the incident, an insurance adjuster questioned plaintiff regarding the accident, and the following exchange occurred:

Q. Um, so prior to stepping onto the step do you know if it was actually wet or not?

A. Yes it was.

In addition, plaintiff testified during her deposition that both the hallway and stairs were wet.

Plaintiff contends, as she did below, that these statements referred only to her after-the-fact knowledge that the stairs were wet. In my opinion, the majority improperly fails to view plaintiff's statements in the light most favorable to her by disregarding her explanation of her statements. Plaintiff was apparently never asked if she knew before she began ascending the stairway that there was water on the steps, and she never unequivocally stated that she did. Thus, I believe that whether plaintiff was aware of the presence of water on the steps is a question properly left for the trier of fact. I cannot agree with the majority that plaintiff's statements conclusively establish that the danger was open and obvious.[1]

Moreover, whether plaintiff acted reasonably in choosing to try to negotiate the wet rear stairway, in view of the presence of another stairway approximately thirty-five feet away, is also a question for the trier of fact. See *Knight v Gulf & Western Properties, Inc*, 196 Mich App 119, 130; 492 NW2d 761 (1992).

I would reverse.

/s/ Mark J. Cavanagh

[1] Whether a danger is open and obvious depends upon whether it is reasonable to expect an average person of ordinary intelligence to discover the danger upon casual inspection. *Hughes v PMG Building, Inc*, 227 Mich App 1, 10; 574 NW2d 691 (1997). In the present case, the record is silent with regard to whether an average person of ordinary intelligence would have discovered the presence of water on the stairs upon casual inspection. Plaintiff contends that the stairway was poorly lit, while defendants claim that the lighting was perfectly adequate; neither party cites any admissible record evidence in support.