

STATE OF MICHIGAN
COURT OF APPEALS

JACQUELINE DIANNE JUDD,
Plaintiff-Appellant,

v

DANIEL ESCHMAN,
Defendant-Appellant.

UNPUBLISHED
July 1, 2004

No. 246603
Oakland Circuit Court
LC No. 02-038851-NO

Before: Neff, P.J., and Zahra and Murray, JJ.

NEFF, P.J. (*dissenting*).

I respectfully dissent. In my view, this case presents too close a question to justify summary disposition. Summary disposition under MCR 2.116(C)(10) is proper if there is no genuine issue of material fact, i.e., when, giving the benefit of reasonable doubt to the opposing party, the record leaves open no issue upon which reasonable minds could differ. *West v GMC*, 469 Mich 177, 183; 665 NW2d 468 (2003).

Plaintiff's deposition testimony states that at approximately 5:00 a.m. on March 19, 2001, she drove into defendant's driveway to deliver the newspaper to his front door per his instruction. It was dark, and the driveway was not well-lighted. Two vehicles parked in front of defendant's garage blocked illumination from the garage's exterior lights, which were very dim. As plaintiff set her foot down to get out of her car, she slipped on a patch of ice that had formed, apparently because of cracks in the driveway. She fell on the pavement and suffered severe injuries. When she later backed out of the driveway, she could see that the driveway was shiny, but she had not noticed the ice when she pulled into the driveway because she was looking ahead at the house or defendant's truck. The roads and other driveways in general were not slippery that morning.

Contrary to the trial court's findings, it is not clear that an average person with ordinary intelligence would have discovered the danger upon casual inspection. Under the combination of factors involved in this case, including the darkness, the driveway configuration and condition, and the poor illumination, reasonable minds could differ whether an ordinary user would discover the danger. *White v Badalamenti*, 200 Mich App 434, 437; 505 NW2d 8 (1993); *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 474-475; 499 NW2d 379 (1993). An average person, getting out of a vehicle in a darkened driveway, may not discover that the pavement beside the vehicle was icy before setting a foot down and falling. Whether the

icy patch in the driveway was “open and obvious” in this case is a question of fact properly decided by the jury. *White, supra*.

/s/ Janet T. Neff