

STATE OF MICHIGAN
COURT OF APPEALS

STACEY R. COLEMAN,

Plaintiff-Appellant,

v

APPLEBEE'S OF MICHIGAN, INC.,

Defendant-Appellee,

and

ROSS PROPERTIES, INC.,

Defendant.

UNPUBLISHED

June 29, 2010

No. 288878

Oakland Circuit Court

LC No. 2008-088486-NO

Before: WHITBECK, P.J., and METER and FORT HOOD, JJ.

FORT HOOD, J. (*dissenting*).

I respectfully dissent. The trial court's decision regarding a motion for summary disposition is reviewed de novo on appeal. *Kuznar v Raksha Corp*, 481 Mich 169, 175; 750 NW2d 121 (2008). In evaluating the dispositive motion, the court reviews the entire record in the light most favorable to the party opposing the motion. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). When ruling on a motion for summary disposition, the court does not assess the credibility of the witnesses. *White v Taylor Distributing Co*, 482 Mich 136, 139; 753 NW2d 591 (2008). "Summary disposition is suspect where motive and intent are at issue or where the credibility of a witness is crucial." *Foreman v Foreman*, 266 Mich App 132, 135-136; 701 NW2d 167 (2005). When the truth of a material factual assertion made by a moving party is contingent upon credibility, summary disposition should not be granted. *Id.* at 136. The trial court may not make factual findings or weigh credibility when deciding a motion for summary disposition. *In re Handelsman*, 266 Mich App 433, 437; 702 NW2d 641 (2005). When the evidence conflicts, summary disposition is improper. *Lysogorski v Bridgeport Charter Twp*, 256 Mich App 297, 299; 662 NW2d 108 (2003). Inconsistencies in statements given by witnesses cannot be ignored. *White*, 482 Mich at 142-143. Rather, application of disputed facts to the law present proper questions for the jury or trier of fact. *Id.* at 143. A condition discoverable by an ordinary user upon casual inspection may not be open and obvious if the hazard is undeterminable because of darkness. See *Abke v Vanderberg*, 239 Mich App 359, 362-363; 608 NW2d 73 (2000); *Knight v Gulf & Western Properties, Inc*, 196 Mich App 119, 129-130; 492 NW2d 761 (1992).

Plaintiff testified that when she arrived at defendant's establishment, she walked diagonally into the restaurant because of the location of parked cars and did not pass the raised concrete island in the area of her fall. When plaintiff left the restaurant, it was dark outside. Plaintiff carried a small child in the parking lot, but asserted that she nonetheless watched where she was walking. As plaintiff walked past the raised concrete island, the top of her shoe became lodged in a crack near the side of the island, and she fell to the ground. Although defendant's representatives maintained that they regularly monitored the parking lot for lighting issues, the parties disputed whether there was a light in the area of the fall on the date in question. Two other adults who dined with plaintiff at the restaurant reported that the area was dark at the time of the fall. Two days later, plaintiff returned to the restaurant to take photographs and reported that there was still no lighting in the area in question. The photographs taken on that date reportedly do not contain artificial lighting other than the flash from the camera.

Viewing the evidence in the light most favorable to plaintiff as the nonmoving party, I would conclude that the underlying conflicting factual issues present a question for the jury. *White*, 482 Mich at 142-143; *Corley*, 470 Mich at 278.

I would reverse.

/s/ Karen M. Fort Hood