STATE OF MICHIGAN

COURT OF APPEALS

GREGORY BROWN and RUBEANA BROWN,

Plaintiffs-Appellants,

v

EASTMAN OUTDOORS, INC.,

Defendant-Appellee.

UNPUBLISHED
January 7, 2010

No. 286844
Genesee Circuit Court
LC No. 07-086351-NF

Before: Servitto, P.J., and Fort Hood and Stephens, JJ.

PER CURIAM.

Plaintiffs[1] appeal as of right from the trial court's order granting defendant's motion for summary disposition. We reverse.

Plaintiff was making deliveries in the course of his employment when he slipped and fell on ice at defendant's premises. He attempted to continue to make deliveries, but ultimately had to call another driver to finish his route because of the injury to his knee. During his deposition, plaintiff acknowledged that he saw the icy condition, but claimed that he was unable to deliver to any other location. Specifically, plaintiff testified that he tried to deliver to a different door on another occasion, but was told that he had to deliver to the door in question. On the contrary, defendant's agents testified that delivery would be accepted at different locations. Defendant moved for summary disposition, alleging that the condition was open and obvious and the condition was not effectively unavoidable because of the option to deliver to a different door. Plaintiff asserted that factual issues precluded summary disposition. The trial court granted defendant's motion.

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). The moving party has the initial burden to support its claim for summary disposition by affidavits, depositions, admissions, or other documentary evidence. *Quinto v Cross & Peters Co*, 451 Mich

[1] Because Rubeana Brown raises only a derivative claim of loss of consortium, *Wilson v Alpena Co Road Comm*, 474 Mich 161, 163 n 1; 713 NW2d 717 (2006), the singular plaintiff in this opinion refers to Gregory Brown.

358, 362; 547 NW2d 314 (1996). The burden then shifts to the nonmoving party to demonstrate a genuine issue of disputed fact exists for trial. *Id*. The nonmoving party may not rely on mere allegations or denials in the pleadings. *Id*. Affidavits, depositions, and documentary evidence offered in support of, and in opposition to, a dispositive motion shall be considered only to the extent that the content or substance would be admissible as evidence. *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999).

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*, *supra* at 142-143. Rather, application of disputed facts to the law present proper questions for the jury or trier of fact. *Id*. at 143.[2]

A premises possessor owes a duty to protect invitees from unreasonable risks of harm caused by a dangerous condition on the land. *Lugo v Ameritech Corp*, 464 Mich 512, 516; 629 NW2d 384 (2001). However, the duty does not extend to open and obvious conditions. *Id*. An exception to the open and obvious doctrine exists when "special aspects" make a condition either effectively unavoidable or pose an unreasonably high risk of harm. *Id*. at 517-519. In the context of accumulations of ice that are open and obvious, the premises possessor must take reasonable action within a reasonable period of time after the accumulation of snow and ice to diminish the hazard of injury to the plaintiff only when there is some special aspect that makes the accumulation unreasonably dangerous. *Mann v Shusteric Enterprises, Inc*, 470 Mich 320, 332; 683 NW2d 573 (2004).

In the present case, plaintiff testified that the icy condition that caused his fall was effectively unavoidable because he was told that deliveries had to occur at the location where the ice was located. Additionally, plaintiff testified that ice was able to form in that location because there were no gutters or downspout in that particular location. He indicated that he had spoken to an employee in the shipping department about the missing gutters. On the contrary, defendant's representatives testified that plaintiff would have been entitled to make deliveries elsewhere. The resolution of the credibility of the witnesses regarding the location of the deliveries presents a question for the trier of fact. *Foreman*, *supra*. Moreover, plaintiff has raised a material question of fact regarding special aspects and whether the condition was

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[2] We note that defendant's brief on appeal contains additional transcript pages that were not submitted to the trial court when deciding the dispositive motion. Appellate review is limited to the record established in the trial court, and a party may not expand the record on appeal. *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41, 56; 649 NW2d 783 (2002).

effectively unavoidable. *White, supra*. Defendant did not present any evidence in response to the assertion that it was on notice of missing gutters and downspouts that allowed water to accumulate in the area and re-freeze.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Deborah A. Servitto
/s/ Karen M. Fort Hood
/s/ Cynthia Diane Stephens