

**Court of Appeals, State of Michigan**

**ORDER**

Norma Chesser v Radisson Plaza Hotel at Kalamazoo Center

Docket No. 299776

LC No. 09-000636-NI

David H. Sawyer  
Presiding Judge

Peter D. O'Connell

Amy Ronayne Krause  
Judges

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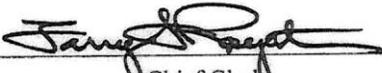
The Court orders that the motion for reconsideration is GRANTED, and this Court's opinion issued February 14, 2012, is hereby VACATED. A new opinion will be issued.



A true copy entered and certified by Larry S. Royster, Chief Clerk, on

APR 05 2012

Date

  
Chief Clerk

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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NORMA CHESSER and TERRY CHESSER,  
  
Plaintiffs-Appellees,

FOR PUBLICATION  
February 14, 2012  
9:15 a.m.

v

RADISSON PLAZA HOTEL AT KALAMAZOO  
CENTER, a/k/a GREENLEAF HOSPITALITY  
GROUP INC,

No. 299776  
Kalamazoo Circuit Court  
LC No. 09-000636-NI

Defendant-Appellant.

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Before: SAWYER, P.J., and O'CONNELL and RONAYNE KRAUSE, JJ.

RONAYNE KRAUSE, J.

In this interlocutory appeal, defendant appeals by leave granted an order denying its motion for summary disposition.<sup>1</sup> We reverse.

This matter arises out of plaintiff Norma Chesser's fall off a raised stage platform while walking on it during an event held on defendant's premises. Ms. Chesser was a speaker at the event, and the stage was set up with stairs at each end, a table along the front with a podium in the middle, chairs at the table, and a space along the back for traversing the stage (or getting from a seat to the podium and back). Both parties have attached photographs of the stage setup. Neither party disputes that the stage was set up some distance from the wall behind it, and there was no guardrail at the back. There also appears to be no dispute that Ms. Chesser genuinely fell, but the extent of her injuries is not at issue in this appeal.

On the day of the incident, Ms. Chesser entered the conference room approximately ten minutes before the conference was scheduled to start. She went up the stairs on the right side of the platform and, as she explained, was aware that she was on an elevated platform. At the time, she did not believe the situation to be dangerous. Because her assigned seat was on the left side of the platform, she traversed almost the entire length of the platform to get to her seat; she did

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<sup>1</sup> The same order also denied a motion by plaintiff for partial summary disposition, but plaintiff has not sought to cross-appeal that decision at this time, and we therefore do not express any views as to the propriety of that decision.

not go up via the left-hand stairs because she had needed to give something to an audience member on the right-hand side of the stage on her way. All of the seats on the right side of the platform were already occupied, so she had to walk behind the filled seats. She had no problems doing so. She took her seat at the table on the left side of the platform. She also had no problems standing for the Pledge of Allegiance.

Approximately 25 minutes into the program, she got up to give her prepared speech. She testified that at that time, she “realized there was a space in the back of the stage and [she] had to move over to the right of the chairs to stay away from the edge.” She testified that she had given speeches to audiences before, and in fact had done so the day before. She made it to the podium with no problems. She spoke for approximately five minutes. She then turned to return to her seat, although she had to pivot somewhat because of the person seated immediately next to the podium. She indicated that the chair was pushed back because “you know, you have to sit,” but it was not pushed back any further than it had been when she walked to the podium. She walked behind two seats without problem; the occupant of the third seat had already given his speech and Ms. Chesser was not aware of whether his chair was pushed back any further than it previously had been. When she got behind that third seat, she fell off the platform.

Ms. Chesser testified that her “first conscious thought was [she] was in midair falling.” She did not recall that any change had occurred to the configuration of any of the chairs on the stage during her speech. She explained that nothing touched or pushed her. Her right foot simply “stepped on air.” She did not hit anything on the way down, either, she simply “landed full force on [her] shoulder.” Ms. Chesser stated that several audience members saw her fall, and according to their descriptions, they “‘just saw [her] and all of a sudden [she] w[as]n’t there.’” Defendant moved for summary disposition pursuant to the argument that the hazardous condition of the back of the stage was open and obvious and was avoidable. The trial court denied the motion, holding in part that there was a genuine question of fact and it would be better for the jury to decide the matter.

A grant or denial of summary disposition is reviewed de novo on the basis of the entire record to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). When reviewing a motion under MCR 2.116(C)(10), which tests the factual sufficiency of the complaint, this Court considers all evidence submitted by the parties in the light most favorable to the non-moving party and grants summary disposition only where the evidence fails to establish a genuine issue regarding any material fact. *Id.* at 120.

“A premises possessor is generally not required to protect an invitee from open and obvious dangers.” *Slaughter v Blarney Castle Oil Co*, 281 Mich App 474, 478; 760 NW2d 287 (2008). “The standard for determining if a condition is open and obvious is whether ‘an average user with ordinary intelligence [would] have been able to discover the danger and the risk presented upon casual inspection.’ The test is objective, and the inquiry is whether a reasonable person in the plaintiff’s position would have foreseen the danger, not whether the particular plaintiff knew or should have known that the condition was hazardous.” *Id.* at 478-479.

We have reviewed the photographs submitted by the parties and Ms. Chesser’s testimony, and we find that it was unambiguously obvious that the stage was raised off the ground, had a

narrow area in which to walk behind the chairs on the stage, and was unguarded at the back. It should go without saying that an average adult would be aware that falling off a raised platform would be dangerous and that there is an increased risk of doing so when maneuvering room is tight and railing is absent. Furthermore, the stairs to ascend or descend the stage were at the far ends, giving anyone approaching the stage a clear view of the situation. Ms. Chesser's testimony indicated that some of the chairs were already occupied when she ascended, so it would have been apparent how little room there was behind occupied, rather than unoccupied, seats.

It is worth noting that both parties make arguments based on what Ms. Chesser did or did not actually know. The standard, however, is what *a reasonable person* in plaintiff's position would have apprehended, not what a specific plaintiff was aware of, so neither party's arguments are apposite. Under the circumstances, it is clear from the evidence that a reasonable person would have been aware of the danger posed by the raised stage with its narrow walking area and unguarded rear.

The more difficult question is whether the hazardous condition was effectively unavoidable. “[I]f special aspects of a condition make even an open and obvious risk unreasonably dangerous, the premises possessor has a duty to undertake reasonable precautions to protect invitees from that risk.’ The special aspects that cause even open and obvious conditions to be actionable are those that make the conditions ‘effectively unavoidable,’ or those that ‘impose an unreasonably high risk of severe harm.’” *Slaughter*, 281 Mich App at 478.

Defendant argues that Ms. Chesser technically had a choice whether to ascend the stage, so the hazard therefore must be avoidable, no matter how embarrassing or awkward such a choice would have been for her. However, the instant situation would not merely have generated awkwardness had Ms. Chesser elected to decline to ascend the stage, unlike the situation in *Joyce v Rubin*, 249 Mich App 231, 242-243; 642 NW2d 360 (2002).<sup>2</sup> Being on defendant's stage was the primary reason for her presence at defendant's premises in the first place. Ms. Chesser could technically have avoided the hazard, but she could not have avoided the hazard without completely undermining her use of defendant's facilities. A condition is “effectively unavoidable” if it cannot be avoided by an invitee without that invitee avoiding the premises altogether. *Hoffner v Lanctoe*, 290 Mich App 449, 461-464; 802 NW2d 648 (2010), lv pending 489 Mich 877 (2011); *Robertson v Blue Water Oil Co*, 268 Mich App 588, 593-595; 708 NW2d 749 (2005). There is no meaningful difference between avoiding the premises and avoiding

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<sup>2</sup> Furthermore, suggesting that embarrassment and awkwardness are mere trifles that a reasonable person should be expected to embrace is, quite simply, ridiculous. Humiliation, social rejection, and the like are deeply and viscerally unpleasant experiences that any reasonable person would internally perceive as a hazard unto itself. While the reasonableness of the decision to face embarrassment instead of some other hazard would likely depend on how much embarrassment would be likely and how grave the other threat appears, the argument in the abstract that embarrassment is preferable reflects a fundamental ignorance of the realities of human behavior.

using the premises. Just because Ms. Chesser *technically could have* refused to ascend the stage, the hazard was not therefore effectively avoidable.

Defendant alternatively argues that the hazard was effectively avoidable because numerous others, including Ms. Chesser during several of her own traversals of the stage, were actually able to avoid it. This argument has merit, but strictly speaking, it goes too far. We note that it is entirely possible for someone to have a stroke of good luck when navigating a hazard, and furthermore, “*effectively* unavoidable” does not necessarily mean “*absolutely* unavoidable.” Consequently, the fact that a plaintiff or other person passed a hazard unscathed does not, all by itself, dispose of whether a hazard is “effectively unavoidable.”

Nevertheless, this argument makes sense as applied to the particular situation before us now. The number of times a hazard is safely bypassed will eventually show that that avoidance of harm is not a statistical fluke. Indeed, defendant cites to a number of unpublished opinions from this Court, all of which involved situations in which a hazard was faced *numerous times by numerous people* without any harm befalling them prior to any injury suffered by the plaintiffs. Unpublished opinions of this Court are not binding under stare decisis. MCR 7.215(C)(1). However, they may be of some persuasive guidance, particularly in an area where there exists limited published case law. *People v Green*, 260 Mich App 710, 721 n 5; 680 NW2d 477 (2004). The cases cited by defendant are consistent with the most rational way of evaluating the effective unavoidability of a hazard where that hazard has been successfully avoided: the more frequently a hazard is traversed without harm, the more likely it is that the hazard is effectively avoidable.

The instant matter does not entail a situation in which a single person avoided a hazard once, nor does it entail a situation in which a great many people avoided a hazard a great many times. But when considered as a whole, it appears not to be a statistical fluke. Ms. Chesser traversed the back of the stage without harm herself. Furthermore, she testified at her deposition that the person seated next to her had already given his speech. While that person was seated closer to the podium, it appears that he also must have traversed much of the stage at least once. The other speakers must also have traversed at least part of the stage, and immediately after Ms. Chesser’s speech, there was a person standing somewhat behind her. The hazard does not appear to have been faced by a great number of people over an extended period of time, but the available evidence shows that the statistical fluke was Ms. Chesser’s fall, not the other speakers’ safety. Consequently, we conclude that under these circumstances, the facts show that the hazard was not effectively unavoidable.

Finally, plaintiffs’ arguments regarding Ms. Chesser’s age are irrelevant: whether an open and obvious condition has “special aspects” resulting in an unreasonably high risk of severe harm depends on the characteristics of the premises and an average prudent person, not the particulars of a given plaintiff. *Mann v Shusteric Enterprises, Inc*, 470 Mich 320, 328-329, 329 n 10; 683 NW2d 573 (2004); *Robertson*, 268 Mich App at 593. This is not to suggest that plaintiffs do not raise important and reasonable concerns, but they are essentially policy issues better directed to the Legislature. Additionally, plaintiffs’ citations to alleged industry standards for stage erection and purported admissions of negligence by defendant’s employees are also irrelevant, because they would pertain only to whether defendant *breached* a duty, not to whether defendant *owed* a duty. These arguments might be relevant to an argument that the condition

had special aspects in the form of being unreasonably dangerous instead of effectively unavoidable. See *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 518-519; 629 NW2d 384 (2001). However, plaintiffs have not actually made any such argument that we can discern, so it is abandoned and should not be considered. *Mitcham v City of Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).

The trial court erred in finding a question of fact whether the hazard was open and obvious. The trial court properly recognized that a dangerous open and obvious condition is not necessarily effectively avoidable simply because it was successfully avoided. However, if the condition is avoided multiple times, that does show that it was effectively avoidable. Here, the hazardous situation of the narrow walking area and unguarded back of the elevated stage was successfully navigated multiple times by multiple people, including Ms. Chesser. The trial court erred in finding that there was a question of fact whether it was effectively unavoidable. Consequently, the trial court erred by denying defendant's motion for summary disposition.

Reversed.

/s/ Amy Ronayne Krause  
/s/ David H. Sawyer  
/s/ Peter D. O'Connell