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An Open and Obvious Result That Wasn't So Obvious? Court of Appeals Grants Reconsideration, Then Reaffirms Its Prior Holding

By Drew Broaddus

In our February 23, 2012 issue of *Boundaries,*[1] we discussed *Chesser v Radisson Plaza Hotel,* released February 14, 2012, Case No. 299776, and its analysis of when a condition is "effectively unavoidable" so as to defeat the "Open and Obvious Doctrine" of *Lugo v Ameritech Corp,* 464 Mich 512 (2001). In the first *Chesser* opinion (which had originally been designated for publication), the panel held that the defendant's motion for summary disposition should have been granted, and plaintiff's trip and fall claim should have been dismissed, on the grounds that the "hazard" (an elevated platform in a conference hall) was open and obvious and did not present a special aspect. In that opinion, the panel devoted significant attention to rejecting the notion that the hazard was "effectively unavoidable." However, on April 5, 2012, the Court of Appeals granted a motion for reconsideration, and vacated the February 14, 2012 opinion. On April 17, 2012, it issued a new opinion.

SECREST WARDLE NOTES:

The new *Chesser* opinion reaffirms that, in determining whether a condition is open and obvious, courts must consider what a reasonable person in plaintiff's position would have apprehended. The fact that a particular plaintiff did not notice the condition is irrelevant.

Motions for reconsideration are rarely filed in the Court of Appeals, and it is even rarer for such motions to be granted. Even more unusual is the fact that this panel granted such a motion, only to reach the same result on reconsideration (albeit for slightly different reasons). It appears that the panel had second thoughts about some aspect of the February 14, 2012 opinion's "special aspect/effectively unavoidable" analysis.

The *Chesser* suit arose out of plaintiff's fall off a stage during an event at defendant's hotel. Plaintiff 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. The stage was set up some distance from the wall behind it, and there was no guardrail at the rear of it. On the day of the incident, plaintiff entered the room about ten minutes before the conference was to start. She went up the stairs and was admittedly aware that she was on an elevated stage. She traversed almost the entire length of the stage without incident on the way to her seat.

About 25 minutes into the program, plaintiff stood up to give her speech. At that time, she realized there was an open space at the rear of the stage and she had to move to the right of the chairs in order to avoid the edge. Plaintiff had given speeches to audiences before, and in fact, had done so the previous day. She approached the podium without incident and gave her speech. Upon returning to her seat, she walked behind two chairs without difficulty but, when she passed the third chair, she fell off the stage. She testified that she did not notice any changes to the configuration of the seating, and that nothing had touched or pushed her; she simply "stepped on air."

Defendant moved for summary disposition, arguing that the hazardous condition of the back of the stage was open and obvious and was avoidable. The trial court denied the motion. In its April 17, 2012 opinion, the Court of Appeals reversed (as it did

[1] An Open and Obvious Result? Court Holds That Repeatedly Avoided Condition Is Not "Effectively Unavoidable" by Drew Broaddus.

on February 14, 2012), finding that "the trial court erred by denying defendant's motion for summary disposition." In the new opinion, the appellate panel focused on the first step in the inquiry – was the condition open and obvious? – as opposed to the "special aspect/effectively unavoidable" analysis that was the focus of the first opinion. In finding that the danger of falling off a raised platform was open and obvious, the April 17, 2012 opinion explained:

> …[P]hotographs submitted by the parties and Ms. Chesser's testimony [demonstrate] … 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 an elevated surface 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.
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> …[B]oth parties make arguments based on what Ms. Chesser personally did or did not actually know. Plaintiff in particular appears to rely on the fact that there is no testimony from anyone else about their observations of or experiences on the stage. While true, the parties have both submitted photographs clearly showing that anyone who approached the stage from either end could see that there was a gap between the stage and the wall and that the walking area on the stage behind the chairs was narrow. Plaintiff essentially presents a tautological argument … that because she did not see the hazards presented and nobody else has presented testimony on point, the hazards must not have been apparent. The standard, however, is what *a reasonable person* in plaintiff's position would have apprehended, not what a specific plaintiff was aware of.… [I]t 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.

In contrast to the first opinion's lengthy discussion of what is "effectively unavoidable," the April 17, 2012 opinion contains only a passing reference to this issue. Also of note, the new opinion is designated "unpublished" whereas the vacated February 14, 2012 opinion had been designated "for publication."

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