STATE OF MICHIGAN

COURT OF APPEALS

NORMA CHESSER and TERRY CHESSER, Plaintiffs-Appellees,	UNPUBLISHED April 17, 2012
v	No. 299776 Kalamazoo Circuit Court
RADISSON PLAZA HOTEL AT KALAMAZOO CENTER, a/k/a GREENLEAF HOSPITALITY GROUP INC, Defendant-Appellant.	LC No. 09-000636-NI

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

PER CURIAM

In this interlocutory appeal, defendant appeals by leave granted an order denying its motion for summary disposition.[1] The trial court found that there was a question of fact as to whether the hazard involved was open and obvious. We reverse.

This matter arises out of plaintiff Norma Chesser's fall off a raised platform-stage 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 stage and, as she explained, was aware that she was on an elevated surface. At the time, she did not believe the situation to be dangerous. Because her assigned seat was on the left side of

[1] 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.

the stage, she traversed almost the entire length of the stage to get to her seat; she did 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 stage 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 stage. 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 stage.

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. The trial court denied the motion, holding in part that there was a genuine question of fact as to whether this was an open and obvious hazard 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 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.

It is worth noting that both 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.[2] Plaintiff essentially presents a tautological argument, bordering on *res ipsa loquitur*: 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, 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.

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

[2] On reconsideration, plaintiff has inappropriately provided a new photograph not previously shown to us. Nevertheless, plaintiff contends that this new photograph shows that a pillar would have blocked her view of the gap from where she approached the stage. This, too, is clearly incorrect: the pillar was not all the way at the end of the stage, and it was clearly a pillar rather than the entire back wall. Pillars definitionally do not take up entire walls. Furthermore, plaintiff's argument presumes a two-dimensional, rather than a three-dimensional, view of the world. Nothing about this new photograph tends to show that the gap was imperceptible.

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. Consequently, the trial court erred by denying defendant's motion for summary disposition.

Reversed.

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