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A GUIDE FOR PROPERTY OWNERS AND INSURERS IN A LITIGIOUS SOCIETY

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# An Open and Obvious Result? Court Holds That Repeatedly Avoided Condition Is Not "Effectively Unavoidable"

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Attorneys representing businesses and their insurers have become very familiar with the "Open and Obvious Doctrine" of *Lugo v Ameritech Corp,* 464 Mich 512 (2001). *Lugo* states that a property owner has a duty to protect invitees from "an unreasonable risk of harm caused by a dangerous condition on the land" but, the duty *does not* "encompass removal of open and obvious dangers." *Id.* Open and obvious dangers are those which an average person with ordinary intelligence could reasonably be expected to discover, upon casual inspection. Although some form of this defense had existed under Michigan law for decades, *Lugo* made the open and obviousness of a hazard determinative of the defendant's duty – an issue of law decided by a judge – whereas it had previously related to the plaintiff's contributory or comparative negligence – something typically argued before a jury. *Lugo* thereby expanded the class of trip and fall cases that may be dismissed via motion.

**SECREST WARDLE NOTES:**

**Invitees are not expected to completely avoid using premises in order to avoid a hazardous condition. *Chesser* dispels the notion that a hazard can be "avoidable," for premises liability purposes, if the injured party simply could have refused to use the premises. Previous decisions have gone as far as to say, for example, a customer should not enter a retail establishment if they see the sidewalk is icy; the hazard could be avoided by going somewhere else. See Torres v Goodwill Industries, released December 7, 2010, Case No. 292138. Such reasoning is no longer persuasive in light of *Chesser*.**

Even when a condition is open and obvious, there can still be liability when "special aspects" of a condition "make even an open and obvious risk unreasonably dangerous." *Slaughter v Blarney Castle Oil*, 281 Mich App 474 (2008). In such cases, "the premises possessor has a duty to undertake reasonable precautions to protect invitees from that risk." *Id.* "The special aspects that cause even open and obvious conditions to be actionable are those that make the conditions effectively unavoidable, or … impose an unreasonably high risk of severe harm." *Id.*

The Michigan Court of Appeals recently took a close look at what is "effectively unavoidable" in *Chesser v Radisson Plaza Hotel,* released February 14, 2012, Case No. 299776 (for publication). The 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." *Chesser, supra* at *2.

Defendant moved for summary disposition arguing that the avoidable hazardous condition at the rear of the stage was open and obvious. The trial court denied defendant's motion, but the Court of Appeals reversed easily finding defendant was entitled to summary disposition and that "the danger posed by the raised stage with its narrow walking area and unguarded rear" was open and obvious. *Chesser, supra* at *3. In the appellate panel's view, the case turned on "[t]he more difficult question" of "whether the hazardous condition was effectively unavoidable." *Id.* The panel held that it was avoidable.

The panel first rejected defendant's argument that plaintiff "technically had a choice whether to ascend the stage, so the hazard therefore must be avoidable…." *Id.* This argument was deemed nonsensical because "[b]eing 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." *Id.* A condition is "effectively unavoidable" if it cannot be avoided without avoiding the premises altogether. The panel saw "no meaningful difference between avoiding the premises and avoiding using the premises. Just because Ms. Chesser *technically could have* refused to ascend the stage, the hazard was not therefore effectively avoidable." *Id.*

Defendant also argued that the hazard was effectively avoidable because others, including plaintiff, did avoid it. The panel accepted this argument, but not wholeheartedly:

> …[I]t 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." …[T]he 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 [here]…. The number of times a hazard is safely bypassed will eventually show that that avoidance of harm is not a statistical fluke. … [T]he 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. …[T]he statistical fluke was Ms. Chesser's fall, not the other speakers' safety. Consequently, we conclude that under these circumstances, … the hazard was not effectively unavoidable. *Id.* at *3-*4 (emphasis in original).

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