STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL GODDE, Plaintiff-Appellant,	UNPUBLISHED October 26, 1999
v	No. 210676 Allegan Circuit Court
BITTERSWEET SKI RESORT, INC., Defendant-Appellee.	LC No. 92-015576 NO

Before: Gage, P.J., and White and Markey, JJ.

PER CURIAM.

Plaintiff appeals from the circuit court's decision upholding an arbitration decision of no cause of action in this case involving the ski area safety act of 1962 (SASA), MCL 408.321 *et seq.*; MSA 18.483(1) *et seq.* We reverse.

Plaintiff filed an action to recover for injuries he sustained while downhill skiing at defendant Bittersweet Ski Resort. The parties stipulated to a dismissal of the circuit court action and agreed to arbitrate the matter pursuant to MCR 3.602. Following a hearing, the arbitrator found that plaintiff's accident was caused in part by uneven terrain, which is an obvious and necessary risk skiers assume under the SASA, MCL 408.342(2); MSA 18.483(22)(2), and that the speed at which plaintiff was skiing also was a cause of the accident. The arbitrator concluded that defendant's compliance or noncompliance with the SASA's requirements regarding marking closed hills was irrelevant, and responsibility for plaintiff's injuries need not be apportioned, because plaintiff's injuries were attributable in part to a risk assumed by plaintiff under the act, and as to which defendant's liability was limited under the act by virtue of that assumption.

Judicial review of arbitration decisions is very limited. *Byron Center Pub Schools Bd of Ed v Kent Co Ed Ass'n*, 186 Mich App 29, 31; 463 NW2d 112 (1990). A court may not review an arbitrator's factual findings or decision on the merits, *id*, and will set aside an arbitrator's award and decision only where it clearly appears on the face of the award or in the reasons for the decision that the arbitrator through an error of law has been led to a wrong conclusion and that, but for such error, a substantially different award must have been made. *Dohanyos, supra*. Plaintiff asserts that the arbitrator exceeded his authority.

Initially, we observe that contrary to defendant's assertions, the issue whether the arbitrator exceeded his authority is preserved for appeal. The parties expressly agreed that their arbitration would proceed pursuant to MCR 3.602, which applies to statutory arbitration under the Uniform Arbitration Act, MCL 600.5001 *et seq*.; MSA 27A.5001 *et seq*. The court rule provides that on the application of a party, a court shall vacate an award if the arbitrator exceeded his power. MCR 3.602(J)(1)(c). The court rule also provides that "[a]ppeals may be taken as from orders or judgments in other civil actions." MCR 3.602(N). The reference in the arbitration agreement to defendant's motion for summary disposition did not foreclose appeals on the bases recognized by the court rule; rather, it expressly preserved the right to appeal issues raised in defendant's motion.[1] Further, the statutory interpretation that formed the basis of the arbitrator's decision was, in fact, asserted in defendant's motion for summary disposition, and therefore plaintiff's appeal is properly before us, even accepting defendant's reading of the arbitration agreement.

Plaintiff first contends that the arbitrator exceeded his power by deciding a question of law. An arbitrator exceeds his power when he acts beyond the material terms of the contract from which he draws his authority, or in contravention of controlling principles of law. *Dohanyos v Detrex Corp (After Remand)*, 217 Mich App 171, 176; 550 NW2d 608 (1996). Arbitrators may decide legal questions when required to do so by the case. *DAIIE v Gavin*, 416 Mich 407, 444; 331 NW2d 418 (1982). Thus, the mere fact that the arbitrator decided a question of law is not a basis for vacating the arbitration award.

Plaintiff next claims that the arbitrator exceeded his power by making a material error of law. We agree.

Section 22 of the SASA provides in pertinent part:

> (1) While in a ski area, each skier shall do all of the following:
>
> (a) Maintain reasonable control of his or her speed and course at all times.
>
> * * *
>
> (d) Ski only in ski areas which are marked as open for skiing on the trail board described in section 6a(e).
>
> (2) Each person who participates in the sport of skiing accepts the dangers that inhere in that sport insofar as the dangers are obvious and necessary. Those dangers include, but are not limited to, injuries which can result from variations in terrain; surface or subsurface snow or ice conditions; bare spots; rocks, trees, and other forms of natural growth or debris; collisions with ski lift towers and their components, with other skiers, or with properly marked or plainly visible snow-making or snow-grooming equipment. [MCL 408.342; MSA 18.483(22).]

Section 6a of the SASA provides in pertinent part:

> Each ski area operator shall, with respect to operation of ski area, do all of the following:
>
> ***
>
> (d) Mark the top of or entrance to each ski run, slope and trail which is closed to skiing, with an appropriate symbol indicating that the run, slope, or trail is closed, as prescribed by rules promulgated under section 20(3).
>
> (e) Maintain 1 or more trail boards at prominent locations in each ski area displaying that area's network of ski runs, slopes, and trails and the relative degree of difficulty… and indicating which runs, slopes, and trails are open or closed for skiing.

Section 24 of the SASA provides:

> A skier or passenger who violates this act, or an operator who violates this act shall be liable for that portion of the loss or damage resulting from that violation.

Relying on *Barr v Mt Brighton, Inc*, 215 Mich App 512; 546 NW2d 273 (1996), the arbitrator concluded that defendant's non-compliance with its statutory duty to mark the entrance to closed trails with an appropriate symbol indicating the closure was irrelevant[2] because plaintiff's injury was due in part to a condition (variation in terrain) as to which plaintiff assumed the risk under the SASA.[3] The arbitrator found it unnecessary to apportion liability for the loss under section 24 of the SASA.[4] However, *Barr, supra*, upon which the arbitrator relied, was effectively overruled by the decision of the conflict panel in *Dale v Beta-C, Inc*, 227 Mich App 57; 574 NW2d 697 (1997), and therefore we refer the matter back to the arbitrator for further proceedings.

In *Skene v Fileccia*, 213 Mich App 1; 539 NW2d 531 (1995), this Court held that the plaintiff injured roller skater's action was barred by the assumption of risk provisions of the roller skating safety act (RSSA), MCL 445.1721 *et seq.;* MSA 18.485(1) *et seq.* Relying on cases decided under the SASA, the *Skene* Court concluded that the assumption of risk clause of the RSSA rendered the reasonableness of the roller-skating rink operator's conduct irrelevant. *Id.* at 5. In *Barr, supra*, the plaintiff alleged a violation of the ski-area operator's statutory duty to properly mark closed trails. Relying on *Skene*, the *Barr* Court held that the assumption of risk provision of the SASA is not dependent on the operator's compliance with other sections of the SASA.[5]

The prior vacated opinion in *Dale*, 223 Mich App 802; 566 NW2d 640 (1997), affirmed the dismissal of the plaintiff roller-skater's complaint only because constrained to do so by *Skene*. The *Dale* conflict panel rejected the underlying premise of the prior cases that if an injury arises out of a circumstance that is covered by the assumption of risk provision of the RSSA, the operator's non-compliance with its own statutory duties under the act is irrelevant. The conflict panel concluded that this construction of the RSSA rendered the liability provisions of the RSSA, sections 3 and 6, nugatory.

The conflict panel's interpretation of §5 of the RSSA undermines efforts to distinguish this SASA case on the basis of that dissimilarity in the statutes. To be sure, §5 of the RSSA contains a final clause that is not found in the otherwise analogous provisions of the SASA:

> Each person who participates in roller skating accepts the danger that inheres in that activity insofar as the dangers are obvious and necessary. Those dangers include, but are not limited to, injuries that result from collisions with other roller skaters or other spectators, injuries that result from falls, and injuries which involve objects or artificial structures properly within the intended travel of the roller skater *which are not otherwise attributable to the operators breach of his or her common law duties.* [MCL 44.17625; MSA 18.485(5). Emphasis added.]

However, the conflict panel held that the final clause of §5 of the RSSA applies only to the immediately preceding language, so that the skater's assumption of risk is limited only with respect to injuries involving objects or artificial structures properly within the intended travel of the skater. The conflict panel explained in summation that a roller skater assumes the risks of the sport under §5, *but does not assume the risk of an operator violating its prescribed duties under the act* and, with the exception of injuries that involve objects or artificial structures properly within the intended travel of the skater, the skater's assumption of risk is neither limited nor nullified by an operator's breach of a *common law* duty. 227 Mich App at 70.

Thus, we conclude that because in the instant case plaintiff alleged that defendant violated the SASA, rather than a common-law duty, the arbitrator should have determined whether defendant violated the SASA and, if so, taking into account plaintiff's assumption of certain risks under §22(2) and plaintiff's violation of his own statutory duties under §§ 22(1)(a) and (d), should have ascertained, pursuant to § 24, the portion of plaintiff's damage, if any, that resulted from defendant's violation of the SASA.

There appears to be little, if any, disagreement between the majority and dissent regarding the applicable law. The difference lies in the interpretation of the arbitrator's decision. In fact, were we to interpret the arbitrator's decision as the dissent does, we would also affirm. However, we are unable to glean from the opinion the two findings we believe necessary for affirmance. First, although the arbitrator discussed the issue, he never made a finding regarding whether the top of the ski run was properly marked. Second, although the arbitrator clearly found that plaintiff's injury was in part caused by the uneven terrain and plaintiff's excessive speed, we do not read his decision as including a finding that any failure to properly mark the top of the trail played no part in plaintiff's fall as a factual matter. Rather, the arbitrator dismissed the relevance of the causation inquiry based on his reading of *Barr:*

> In the context of this Act the following facts are pertinent. The ski area had determined that the Hawthorne Hill was closed on the night of the incident. It did have trail boards in compliance with the Act indicating that Hawthorne was not open. The claimant denies that he saw the trail boards but the testimony is uncontroverted that they did exist. *The testimony is in sharp dispute as to whether the hill was marked in*

accordance with the Act and regulatory provisions under the Act with appropriate signage. The ski operator's testimony and depositions indicated that the ski area often marked closed hills with a sign indicating that it was closed. The sign itself is not in compliance with the regulatory rules and the clear implication of the testimony of the witnesses is that often the required roping and flags were not used. In contrast Michael DeHahn a member of the National Ski Patrol testified that Hawthorne on the night in question was marked out of bounds and that there were "ribbons" at the tope of the hill and signs. He testified that there were yellow ribbons displayed at the tope of the hill. From his testimony one could find that there was substantial compliance with the Act and its regulatory rules. The claimant and his friend Mr. Adams testified that they saw no such signs and that the top of Hawthorne was not appropriately marked. Claimant testifies that after his accident a member of the ski patrol, went to the top of the hill to mark it closed. He also testifies that many other people were skiing on the slope on that night.

This case then raises the issue of whether the assumption of risk provisions contained in the MCL 408.342(2) which provides that a skier "…accepts the dangers that inhere to that sport insofar as the dangers are obvious and necessary" bars recovery if the ski area operator does not make the tope of the hill "closed." In *Barr v Mt. Brighton Incorporated*, Court of Appeals #165754, LC # 91-011639- NO, an opinion issued for publication, the Court dealt with a remarkably similar case, although somewhat distinguishable on facts. In that case the ski area did not mark as closed an area containing trees. The plaintiff skier struck one of the trees and was rendered a quadriplegic. In its opinion at page 3 of the slip sheet opinion the Court said:

> " * * * the Act does not condition application of the assumption of risk provision, MCL 408.342(2); MSA 18.483(22)(2), on compliance with other sections of the Act. Thus, by the mere act of skiing, a skier accepts the risk that he may be injured in a manner described by the statute." Skene, at 6-7; Schmitz, supra at 696.

Careful analysis of the opinion in Bar v Mt. Brighton Incorporated, supra., leads to the conclusion that the act must be construed in such a manner as to hold that the acceptance of risk of dangers from variations in terrain, which certainly was a cause of claimant's injuries in this case, is not dependent on compliance with the other provisions of the Act. It is true that the court in *Barr, supra*, does indicate that a comparative negligence standard would apply and the conduct of the ski operator would be relevant where the causation of the accident did not relate to obvious and necessary risks assumed by the skier, such as an accident caused by failure to mark equipment in compliance with the Act. *In my construction of the act I conclude that this accident was caused in part by the terrain, which is an obvious and necessary*

> *risk that is assumed by the skier and that if the ski operator did not comply with the Act in appropriately marking the top of the ski area the non-compliance is irrelevant. The claimant indicates that he was aware of the Skier's code and knew that he assumed the risk of variations in terrain. In addition, the claimant testified that he was skiing this Black Diamond hill in a tucked position in order to achieve more speed. He indicated that he saw the variation in terrain, i.e., the hole and that the snow conditions immediately surrounding the hole were powdery, although he did testify that the run down the hill was icy and crusty. In my judgment, a proximate cause of this skier's injuries was the speed at which he was skiing and his inability to avoid a danger that he saw. Because of my construction of the Act, it is not necessary to determine a comparative percentage. The Act limits liability of the ski operator for variations in terrain, the skier having assumed the risk.*
>
> Under all of these circumstances it is necessary that I render an Arbitration Award of no cause of action.

Lastly, while we also have regard for the arbitrator's experience, ability and understanding of the law, the arbitrator decided the case in reliance on cases that were effectively overruled.

Reversed and remanded for further proceedings in arbitration.. We do not retain jurisdiction.

/s/ Helene N. White
/s/ Jane E. Markey

[1] The agreement states:

> It is further understood and agreed that any confirmation of award will be timely submitted to the Allegan County Circuit Court thereafter preserving the right of appeal to the Michigan Court of Appeals on all issues raised and related to Defendant's Motion and Brief for Summary Disposition of Dismissal.

[2] Both parties appear to assert that the arbitrator found in their favor on this issue. However, we do not read the arbitrator's decision as deciding the issue either way. The arbitrator noted the testimony in support of each position and concluded that "if the ski operator did not comply with the Act in appropriately marking the top of the ski area the non-compliance is irrelevant." See pp 6-8, *infra*.

[3] The arbitrator explained:

> In my construction of the act, I conclude that this accident was caused *in part* by the terrain, which is an obvious and necessary risk that is assumed by the skier and that if

> the ski operator did not comply with the Act in appropriately marking the top of the ski area the non-compliance is irrelevant. [Emphasis added.]

[4] After discussing plaintiff's own conduct and responsibility, the arbitrator continued:

> In my judgment, *a* proximate cause of this skier's injuries was the speed at which he was skiing and his inability to avoid a danger that he saw. Because of my construction of the Act, it is not necessary to determine a comparative percentage. The Act limits liability of the ski operator for variations in terrain, the skier having assumed the risk. [Emphasis added.]

[5] The Court also rejected the argument that the operator's conduct violated the SASA in the first instance.