STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL GODDE,

Plaintiff-Appellant,

v

BITTERSWEET SKI RESORT, INC.,

Defendant-Appellee.

UNPUBLISHED
October 26, 1999

No. 210676
Allegan Circuit Court
LC No. 92-015576 NO

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

GAGE, P.J. (dissenting).

Because I believe the majority has misinterpreted the arbitrator's findings and award, I respectfully dissent.

As the majority correctly states, judicial review of arbitration awards is very limited, especially with respect to the arbitrator's factual findings. This Court is precluded from reviewing or reevaluating the arbitrator's findings of fact and decision on the merits. *Byron Center Pub Schools Bd of Ed v Kent Co Ed Ass'n*, 186 Mich App 29, 31; 463 NW2d 112 (1990).

This case involves a question of skier-ski area operator liability under the Ski Area Safety Act (SASA), MCL 408.321 *et seq*.; MSA 18.483(1) *et seq*. The SASA represents the Michigan Legislature's attempt to statutorily limit the liability of ski area operators while promoting skier safety.

> The Legislature perceived a problem with respect to the inherent dangers of skiing and the need for promoting safety, coupled with the uncertain and potentially enormous ski area operators' liability. Given these competing interests, the Legislature decided to establish rules in order to regulate the ski operators and to set out ski operators' and skiers' responsibilities in the area of safety. As part of this reform, the Legislature has decided that all skiers assume the obvious and necessary dangers of skiing. This is a rational solution for limiting ski area operators' liability and promoting safety. [*Grieb v Alpine Valley Ski Area, Inc*, 155 Mich App 484, 488-489; 400 NW2d 653 (1986).]

The SASA lists certain specific dangers that skiers assume by engaging in the sport, MCL 408.342; MSA 18.483(22), and also enumerates several specific obligations that operators must fulfill in holding a ski area open to the public. MCL 408.326a; MSA 18.483(6a).

Plaintiff claimed that his fall was occasioned by defendant's lack of compliance with these statutory duties. The arbitrator unequivocally found that defendant had satisfied its obligation to designate Hawthorne Hill as closed on defendant's trail board. Plaintiff asserted that defendant did not properly indicate Hawthorne Hill's closure by marking its entrance with an appropriate "closed" symbol, as required by MCL 408.326a(d); MSA 18.483(6a)(d). The only objective hearing witness testified that, at the time of plaintiff's accident, four-inch, yellow caution ribbons crossed the top of Hawthorne Hill, and that "trail closed" signs additionally appeared at the hill's top and sides. While noting the existence of evidence to the contrary, the arbitrator reasoned that from the impartial witness' testimony, "one could find that there was substantial compliance with the Act and its regulatory rules."

The arbitrator proceeded to observe that, even assuming defendant's failure to appropriately designate Hawthorne Hill as closed, this negligent act played no part in plaintiff's fall. In the course of the arbitrator's opinion, he found two factors that contributed to plaintiff's fall: (1) plaintiff's encounter with uneven terrain toward the bottom of Hawthorne Hill, and (2) "the speed at which [plaintiff] was skiing and his inability to avoid a danger that he saw." These factual findings with respect to proximate cause are unassailable by this Court. *Byron Center*, *supra*. Pursuant to the SASA, plaintiff assumes any risk of harm arising from these dangers that inhere in the sport of skiing. MCL 408.342; MSA 18.483(22).

As the majority notes, the arbitrator in the course of his opinion discussed the case of *Barr v Mt Brighton, Inc*, 215 Mich App 512; 546 NW2d 273 (1996). In *Barr*, a panel of this Court opined that application of the assumption of risk provision concerning skiers to bar a plaintiff's claim essentially rendered irrelevant a defendant ski area operator's violation of a statutory duty under the SASA. *Id*. at 519. While I do not dispute the majority's position that this Court effectively overruled *Barr*, *supra* in *Dale v Beta-C, Inc*, 227 Mich App 57; 574 NW2d 697 (1997), thus rejecting the notion "that if an injury arises out of a circumstance that is covered by the assumption of risk provision of the [SASA], the operator's non-compliance with its own statutory duties under the act is irrelevant," I disagree with the majority that the arbitrator's mere citation to the *Barr* case renders his opinion insupportable.

The arbitrator's discussion of *Barr* is irrelevant to a proper disposition of this matter because the instant case does not involve a situation in which both a skier's statutory assumption of the risks inherent in skiing and a ski area operator's violation of its enumerated statutory duties combined to some degree to cause an accident. As I have indicated above, the arbitrator found as a factual matter that both plaintiff's speed and the uneven terrain he encountered proximately caused his fall; these factual findings are conclusive with respect to the causation issue. Furthermore, the procedural posture of this case is distinguishable from *Dale*, *supra*, in which this Court determined that summary disposition pursuant to MCR 2.116(C)(10) had been improperly granted by the trial court when genuine factual issues existed concerning the defendant's failure to comply with its statutory duties. *Dale*, *supra* at 70-71. In contrast, the instant case comes before us post-arbitration, in which the arbitrator held a hearing, examined the record and acted as the factfinder, correctly interpreted and applied the law regarding

plaintiff's assumption of inherent skiing risks, and concluded that because plaintiff assumed the risks of the danger he encountered, he had no cause of action against defendant. I have no doubt that the arbitrator, a distinguished and experienced former circuit judge and active member of the trial attorney community, was fully aware of an understood the terms of the SASA, but deemed its provisions with respect to ski area operator duties irrelevant when only plaintiff's conduct proximately caused his injury.

The majority apparently reads the arbitrator's opinion as contemplating the possibility that defendant's failure to mark the top of Hawthorne Hill somehow contributed to plaintiff's accident, citing the arbitrator's statements that "this accident was caused *in part* by the terrain," and that "[i]n 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." A careful reading of the arbitrator's opinion, however, reveals that the arbitrator found that only the terrain and plaintiff's speed combined to cause the accident. The arbitrator at no time gave the slightest indication that he believed some failure by defendant to comply with the SASA's enumerated ski operator duties played any part in plaintiff's fall. Thus, in light of the arbitrator's interpretation of the instant facts that attributed no involvement by defendant in proximately causing plaintiff's accident, the majority's determination to remand this case to determine "the portion of plaintiff's damage, if any, that resulted from defendant's violation of the SASA" is completely unnecessary.

I would affirm.

/s/ Hilda R. Gage