STATE OF MICHIGAN

COURT OF APPEALS

ROBERT RUTAN and DEBORAH RUTAN, Plaintiffs-Appellees, v GEORGE KERASOTES CORPORATION and GKC MICHIGAN THEATRES, INC., Defendants-Appellants.	UNPUBLISHED May 15, 2008 No. 275371 Jackson Circuit Court LC No. 05-000516-NI

Before: Jansen, P.J., and Zahra and Gleicher, JJ.

PER CURIAM.

In this action brought to enforce an arbitration award, defendants appeal by right the circuit court's order entering judgment for plaintiffs in the amount of $135,000, denying defendants' motion to set aside the award, and awarding plaintiffs sanctions in the amount of $1,000. We affirm.

This action arises from an injury caused by a defective seat in a movie theater. Plaintiffs entered a darkened movie theatre and then entered a row of empty seats. Plaintiff Robert Rutan was injured when he attempted to sit down and the back of the chair released, causing him to fall backward to the floor. Although defendants contended that the broken seat was an open and obvious hazard because it was marked with yellow caution tape, plaintiffs testified that they did not see the tape before sitting down.[1]

The parties agreed to submit the case to binding arbitration. Following an arbitration hearing, the panel awarded plaintiff Robert Rutan $135,000. Defendants subsequently filed a motion in circuit court to vacate the arbitration award, arguing that the arbitrators exceeded their powers by committing an error of law when they denied defendants' motion for a directed verdict, which had been based on the open and obvious danger doctrine. The circuit court denied defendants' motion and granted plaintiffs' motion for entry of judgment in accordance with the

[1] Plaintiffs did admit that when the lights came up, they could see a small piece of tape partly behind the upright chair cushion. However, plaintiffs' testimony in this regard does not affect our resolution of this appeal.

arbitration award. The court also determined that defendants' motion to vacate the arbitration award was frivolous and awarded plaintiffs sanctions in the amount of $1,000.

On appeal, defendants first argue that the circuit court erred by denying their motion to vacate the arbitration award. Defendants contend that they were not liable for the injury to plaintiff Robert Rutan because the hazard posed by the defective chair was open and obvious as a matter of law. Defendants assert that the arbitrators committed an error of law by disregarding the open and obvious danger doctrine.

We review de novo a circuit court's decision involving an arbitration award. *Saveski v Tiseo Architects, Inc*, 261 Mich App 553, 554; 682 NW2d 542 (2004). A court's power to modify, correct, or vacate an arbitration award is limited. However, an arbitration award may be vacated when an arbitrator exceeds his or her powers by committing a material error of law. MCR 3.602(J)(2)(c); *Dohanyos v Detrex Corp (After Remand)*, 217 Mich App 171, 175-176; 550 NW2d 608 (1996). "[A]rbitrators have exceeded their powers whenever they act beyond the material terms of the contract from which they primarily draw their authority, or in contravention of controlling principles of law." *Id*. at 176. "[A] reviewing court's ability to review an award is restricted to cases in which an error of law appears from the face of the award, or the terms of the contract of submission, or such documentation as the parties agree will constitute the record." *Id.* "The character or seriousness of an error of law which will invite judicial action to vacate an arbitration award . . . must be error so material or so substantial as to have governed the award, and but for which the award would have been substantially otherwise." *DAIIE v Gavin*, 416 Mich 407, 443; 331 NW2d 418 (1982). As explained in *DAIIE*:

> Arbitration by its very nature, restricts meaningful legal review in the traditional sense. As a general observation, courts will be reluctant to modify or vacate an award because of the difficulty or impossibility, without speculation, of determining what caused an arbitrator to rule as he did. The informal and sometimes unorthodox procedures of the arbitration hearings, combined with the absence of a verbatim record and formal findings of fact and conclusions of law, make it virtually impossible to discern the mental path leading to an award. Reviewing courts are usually left without a plainly recognizable basis for finding substantial legal error. It is only the kind of legal error that is evidence without scrutiny of intermediate mental indicia which remains reviewable, such as that involved in these cases. In many cases the arbitrator's alleged error will be as equally attributable to alleged "unwarranted" factfinding as to asserted "error of law." In such cases the award should be upheld since the alleged error of law cannot be shown with the requisite certainty to have been the essential basis for the challenged award and the arbitrator's findings of fact are unreviewable. [*Id.* at 429.]

A premises possessor generally "owes a duty to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land," but that duty does not "generally encompass the removal of open and obvious dangers." *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001).

We agree with the circuit court that there was no basis in evidence for concluding that the hazardous condition in this case, i.e., the defective chair, was open and obvious as a matter of

law. "Whether a danger is open and obvious depends on whether it is reasonable to expect that an average person with ordinary intelligence would have discovered the danger on casual inspection." *Teufel v Watkins*, 267 Mich App 425, 427; 705 NW2d 164 (2005). There was evidence that the defective condition of the seat would not have been apparent to a casual observer. Plaintiffs testified that when they approached the chair, it was standing in its normal upright position, with the seat cushion raised. Plaintiffs also testified that they did not see any caution tape on the chair, or anywhere else, before they sat down. Unlike the cases on which defendants rely, there was no reason for plaintiffs to anticipate any risk of harm in taking a seat in the theatre. Although defendants contend that they marked the seat with yellow caution tape to warn patrons not to use the seat, there was conflicting evidence concerning the amount of tape used, its location, and the manner in which it was placed. Both plaintiffs denied that a photograph submitted by defendants, showing a seat marked with caution tape, accurately depicted the condition of the seats they encountered before sitting down.

We conclude that there were genuine questions of fact in this case concerning whether the condition was open and obvious and whether defendant had posted adequate warnings of the condition. See, e.g., *Pippin v Atallah*, 245 Mich App 136, 144; 626 NW2d 911 (2001). In other words, defendants take issue with the arbitrators' findings of fact—not with any pure errors of law allegedly committed by the panel. See *DAIIE*, *supra* at 429. Because a material error of law was not apparent from the face of the arbitration award, the circuit court properly denied defendants' motion to vacate the award.

Defendants also argue that the circuit court erred by determining that their motion to vacate the arbitration award was frivolous and by awarding plaintiffs sanctions in the amount of $1,000.

As an initial matter, we note that this argument is not properly before us because it has not been raised in defendants' statement of the questions presented. MCR 7.212(C)(5); *Ypsilanti Fire Marshal v Kircher*, 273 Mich App 496, 553; 730 NW2d 481 (2007). At any rate, however, we find that defendants' argument in this regard lacks merit. MCR 2.625(A)(2) provides that if a court finds that an action or defense was frivolous, costs shall be awarded as provided by MCL 600.2591. An action or defense is "frivolous" within the meaning of the statute (1) if it was intended to harass, injure, or embarrass the prevailing party, (2) if the party had no reasonable basis to believe that the facts underlying the party's legal position were true, or (3) if the party's legal position was devoid of arguable legal merit. MCL 600.2591(3)(a)(*i*)-(*iii*). A court's determination that an action is frivolous is reviewed for clear error. *Kitchen v Kitchen*, 465 Mich 654, 661; 641 NW2d 245 (2002).

Defendants agreed to submit this matter to binding arbitration. After receiving an unfavorable arbitration decision, defendants attempted to relitigate the issue in circuit court under the guise of arguing a material error of law, despite the existence of a bona fide evidentiary dispute concerning the condition of the chair and the presence and adequacy of any warnings. The circuit court did not clearly err by finding that defendants' attempt to relitigate the facts of this case was frivolous. Moreover, defendants' motion to vacate the arbitration award, which did nothing more than attack the arbitrators' findings of fact, was devoid of legal merit. We perceive no clear error in the circuit court's award of sanctions.

Affirmed.

/s/ Kathleen Jansen
/s/ Brian K. Zahra
/s/ Elizabeth L. Gleicher