STATE OF MICHIGAN

COURT OF APPEALS

JERRY STOKEN,

Plaintiff-Appellant,

and

DEPARTMENT OF SOCIAL SERVICES,

Intervening Plaintiff,

v

PINE KNOB SKI RESORT,

Defendant-Appellee.

UNPUBLISHED
December 30, 1997

No. 197294
Oakland Circuit Court
LC No. 93-465427-NO

Before: Jansen, P.J., and Doctoroff and Gage, JJ.

PER CURIAM.

Plaintiff appeals as of right the circuit court's order dismissing his negligence claim against defendant. The dismissal was based on an arbitrator's finding in favor of defendant pursuant to an arbitration agreement entered into between the parties. We affirm.

On the evening of February 17, 1993, plaintiff went to defendant's ski facility. At approximately 8:00 p.m. that evening, plaintiff skied from the "Phase I" slope to "The Wall," an expert slope, at a significant rate of speed. Due to the steep nature of "The Wall," plaintiff became airborne at the ridge separating the two slopes. A bright orange section of fencing was located approximately twenty to forty feet down "The Wall." Within seconds of his landing, plaintiff crashed into the fence, striking a piece of wood that anchored the fence. As a result of the crash, plaintiff suffered a severely broken leg that required the placement of metal rods within his leg and incapacitated him for over three months.[1]

Plaintiff then filed the present action against defendant, claiming that defendant was negligent in failing to warn and/or protect him from the dangers of the hidden fence. The parties agreed to settle the

dispute through binding arbitration. After a two-day hearing, the arbitrator found that plaintiff had failed to establish a valid cause of action. In accord with the parties' arbitration agreement and the arbitrator's finding, the circuit court entered an order finding no cause of action and dismissed plaintiff's claim.

Plaintiff first argues that the arbitrator's award is fatally defective because the arbitrator failed to take the oath mandated by MCR 3.602(E)(1)[2] prior to hearing this matter. Plaintiff did not raise this issue below, and it is therefore not preserved for our review. *Federated Publication, Inc v Board of Trustees of Michigan State University*, 221 Mich App 103, 119; 561 NW2d 433 (1997). However, we note that neither party alleges that the arbitrator was not impartial. Both parties agreed to the selection of the arbitrator without objection. The record demonstrates that the arbitrator received testimony presented by both parties and presented an award in an educated and well-informed fashion. Moreover, plaintiff has not shown that he suffered any prejudice from the selection of the arbitrator, his conduct during the arbitration proceedings, or his failure to take an oath. We thus decline to further review the issue.

Plaintiff next argues that the arbitrator erred by failing to determine whether defendant's conduct violated the common law "open and obvious" doctrine. As an initial matter, we note that we agree with plaintiff that the Michigan Ski Safety Act, MCL 408.321 *et seq.*; MSA 18.483(1) *et seq.*, which dictates the duties of ski resort operators and the risks assumed by skiers, does not abrogate the common law "open and obvious" doctrine or its exceptions. The legislative intent underlying the Ski Safety Act was to supplement the existing rules of negligence. *Barr v Mt Brighton*, 215 Mich App 512, 521 n 5; 546 NW2d 273 (1996).[3] Because the Ski Safety Act was intended to coincide with the existing liability laws, the common law rules of premises liability remain pertinent to this action.

The parties contend that the standard of review is de novo pursuant to their arbitration agreement.[4] However, by mandating the standard of review by which this Court is to review the arbitration award, the parties have sought to dictate this Court's role in their dispute. Parties are prohibited from reaching a private agreement that dictates a role for public institutions. *Brucker v McKinlay Transport*, 454 Mich 8, 17; 557 NW2d 536 (1997). Therefore, we disregard the clause in the parties' arbitration agreement dictating the standard of review for this appeal. *Id*. at 17, 19. Because the arbitration agreement indicated that judgment could be entered on the arbitrator's findings, the arbitration in this matter was statutory arbitration and is thus governed by MCL 600.5001 *et seq.*; MSA 27A.5001 *et seq.* *Id.* at 14-15. This Court will set aside a statutory arbitration award "[w]here it clearly appears on the face of the award or in the reasons for the decision, being substantially a part of the award, that the arbitrators through an error of law have been led to a wrong conclusion and that, but for such error, a substantially different award [would] have been made." *Dohanyos v Detrex Corp*, 217 Mich App 171, 176; 550 NW2d 608 (1996).

We find no such error of law on the part of the arbitrator. As our Supreme Court has noted, a premises owner "has a duty to exercise due care to protect [a business invitee] from dangerous conditions [on the land]. However, where the dangers are known to the invitee or are so obvious that the invitee might reasonably be expected to discover them, an invitor owes no duty to protect or warn the invitee unless he should anticipate the harm despite knowledge of it on behalf of the invitee." *Riddle*

v McLouth Steel Products Corp, 440 Mich 85, 96; 485 NW2d 676 (1992) (citations omitted). Plaintiff argues that there was insufficient evidentiary support to find that the danger in the present case, the fence, was "obvious." He further contends that the arbitrator's award must be overturned because the arbitrator did not consider the common-law exception to the "open and obvious doctrine" of situations requiring that the business invitor "should anticipate the harm." We disagree with both arguments.

The arbitrator made detailed factual findings and determined that the fence in question could be observed from at least forty feet up the slope, that it was also visible from the bottom of the slope, and that the chair lift servicing the hill passed directly over the fence. Moreover, although the incident occurred at night, the arbitrator found that "the area appears to be sufficiently illuminated with lighting on each of the chair lift towers." The arbitrator further noted that plaintiff was "an advanced skier" and continued:

> He claimed that he never saw the subject fence; although he acknowledges riding up the chair lift before the accident which brought him immediately over the subject fence and less than ten feet from the fence. Furthermore, he testified that he had been skiing down "The Wall" more than one time the night that the accident occurred. As stated previously, Plaintiff was familiar with the Skiers Responsibility Code which provides that among other things a skier must maintain reasonable control of his or her speed and course at all times. Visibility was 'fairly decent' on the night of the accident.

The arbitrator also determined that the fence in question was "erected for a legitimate purpose so as to protect skiers from the snow gun but more importantly to control the direction of ski traffic," and the fence and its posts were "obvious and necessary." Moreover, the arbitrator found that defendant complied with the statutory requirement of posting a visible sign warning of the location of its equipment. Therefore, according to the arbitrator, the danger was open, obvious, and necessary, and defendant complied with statutory safety requirements.

Judicial review of an arbitrator's decision is very limited. We may not review an arbitrator's factual findings or decision on the merits of the case. *Port Huron Area School Dist v Port Huron Ed Ass'n*, 426 Mich 143, 150; 393 NW2d 811 (1986). Moreover, we believe the arbitrator's factual findings and ultimate decision on the merits were in accord with the evidence. We find no error of law that led the arbitrator to a wrong conclusion about the evidence. *Dohanyos, supra* at 176.

Plaintiff also seeks to challenge the arbitrator's decision not to admit a videotape of the ski slope made the subsequent year. However, plaintiff's failure to include this evidentiary issue in his statement of questions presented precludes appellate review of this issue. *Hammack v Lutheran Social Services of Michigan*, 211 Mich App 1, 7; 535 NW2d 215 (1995).

Plaintiff's final argument is that defendant was in violation of the Ski Area Safety Act and that the violation of the Act constituted negligent conduct that proximately caused plaintiff's injuries. We disagree.

MCL 408.326a; MSA 18.483(6a) provides:

> Each ski area operator shall, with respect to operation of a ski area, do all of the following:
>
> *****
>
> (b) Mark with a visible sign or other warning device the location of any hydrant or similar fixture or equipment used in snow-making operations located on a ski run, as prescribed by rules promulgated under section 20(3).

Rule 20, as promulgated pursuant to the above statute, states:

> When a ski run, slope, or trail is open to the public, the ski area operator shall mark snowmaking devices as stated in this rule.
>
> *****
>
> (4) Visible flagging or fencing shall be installed where any hose, cord, or similar equipment is laying on a ski run. The flagging or fencing shall be installed between the device and the normal approaching ski traffic. Where flagging is used, the flags shall be not more than 10 feet apart.

Plaintiff contends that the fence at issue was marking a snow-making hose which was located underneath. Upon review of the record before us, we find that plaintiff failed to demonstrate that the hose was present on the day of the incident or that it ran under the fence. Although photographs taken after the incident show a hose located along side the fence, plaintiff's testimony did not refer to the hose. Moreover, the fence itself was orange-colored as a warning to skiers to stay out of the area, and testimony revealed that the fence was constructed as a means of controlling skier traffic traversing the ski runs. No evidence established that defendant was in violation of the Ski Area Safety Act, and the arbitrator properly concluded that plaintiff did not prove any violation of the act. We note that even if plaintiff had shown that a hose ran under the fence on the evening of the incident, no evidence was presented that the alleged violation proximately caused plaintiff's injuries.

Accordingly, for all of the above reasons, we affirm the circuit court's order dismissing plaintiff's claim.

/s/Kathleen Jansen
/s/ Martin M. Doctoroff
/s/ Hilda R. Gage

[1] Because he did not have health insurance, Medicaid paid a portion of plaintiff's medical costs. The parties stipulated to allow the Department of Social Services of the State of Michigan (DSS) to

intervene because of the existence of a Medicaid lien totaling $9,000. However, the DSS took no part in the arbitration, nor is it a party to the present appeal.

[2] MCR 3.602(E)(1) provides:

> Before hearing testimony, the arbitrator must be sworn to hear and fairly consider the matters submitted and to make a just award according to his or her best understanding.

[3] This Court's determination that the Ski Safety Act coincides with the common law was based upon the Senate's own analysis. Senate Legislative Analysis, SB 49, Second Analysis, April 17, 1981, provides:

> It is the intent of the bill to coincide, not conflict, with existing comparative negligence law. The bill simply reiterates the point that persons are liable to the extent that damages and injuries are caused by their own actions. The bill encourages all persons to seriously accept responsibility for their own safety and that of others.

[4] The arbitration agreement states, "The standard of review for the arbitrator shall be the same as that for a Judge as if the case had been resolved through a bench trial."