

IN THE SUPREME COURT OF THE STATE OF NEVADA

GERALD R. NOVOTNY; AND  
SIBLINGS PARTNERS, L.P., A  
DELAWARE PARTNERSHIP,  
Petitioners,

vs.

THE SECOND JUDICIAL DISTRICT  
COURT OF THE STATE OF NEVADA,  
IN AND FOR THE COUNTY OF  
WASHOE, AND THE HONORABLE  
PETER I. BREEN, DISTRICT JUDGE,  
Respondents,

and

KEITH A. NOVOTNY; AND JOHN A.  
LARSEN,  
Real Parties in Interest.

No. 44615

**FILED**

**FEB 15 2006**

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *J. Richards*  
CHIEF DEPUTY CLERK

ORDER GRANTING PETITION

This is an original petition for a writ of mandamus or prohibition challenging several district court orders related to an arbitration proceeding. Second Judicial District Court, Washoe County; Peter I. Breen, Judge.

We grant the petition for a writ of mandamus because a district court does not have the authority to remand counterclaims that were not submitted to the arbitral proceeding when a motion to confirm an arbitration award is pending before the court.

Precipitated by a business dispute and pursuant to an agreement, Keith A. Novotny initiated an arbitration proceeding against petitioners Gerald R. Novotny and Siblings Partners, L.P. During the course of arbitration, Gerald and Siblings moved for permission to file counterclaims against Keith, but the arbitrator denied their motion.

Apparently, no party appealed the arbitrator's denial or filed a motion to compel arbitration of those counterclaims with the district court. Instead, Gerald and Siblings incorporated their proposed counterclaims into a complaint, which they filed with the district court against Keith and John A. Larsen.

Subsequently, the arbitrator adjudicated Keith's claims against Gerald and Siblings, awarding monetary damages to Keith. Gerald and Siblings filed a motion to vacate the award with the district court, while Keith moved to confirm it. The district court denied Gerald and Siblings' motion to vacate, but held in abeyance Keith's motion to confirm until the arbitrator clarified his award with detailed findings pursuant to NRS 38.237(4)(c).<sup>1</sup> Additionally, the district court, sua sponte, reversed the arbitrator's decision regarding Gerald and Siblings' counterclaims, ordering that they be determined by arbitration pursuant to NRS 38.237(4)(b). The court reasoned that remanding would allow for the resolution of all issues between the parties prior to any further court intervention.

In a subsequent order, the district court clarified/reiterated that the counterclaims were to be heard by the same arbitrator that had decided the original matter, and not by a three-arbitrator panel as requested by Gerald and Siblings. The district court also ordered that the arbitration proceeding include Larsen.

Gerald and Siblings now petition this court for a writ of mandamus or prohibition directing the district court to vacate its order

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<sup>1</sup>The arbitrator subsequently clarified his award with detailed findings. The district court's remand for clarification is not at issue in the petition.

mandating the inclusion of Gerald and Siblings' counterclaims in the arbitration case. They contend that the district court exceeded its authority. We agree.

Writ relief is an extraordinary remedy within the sound discretion of this court.<sup>2</sup> A writ of mandamus is available to control an arbitrary or capricious exercise of discretion.<sup>3</sup> A writ of prohibition is available to arrest the proceedings of any tribunal when such proceedings are without or in excess of the jurisdiction of such tribunal.<sup>4</sup>

A court may only remand a matter to an arbitrator where provided by statute or by consent of the parties.<sup>5</sup> As evidenced by the parties' presence before us, they do not consent to remand. The issue then is whether the district court is authorized to remand via statute. The construction of a statute is a question of law subject to de novo review.<sup>6</sup>

NRS 38.237 generally governs when an arbitrator may make changes to an award. NRS 38.237(4) specifically enumerates the limited circumstances under which a court may remand a matter to an arbitrator when a motion to confirm, vacate, modify or correct is pending before the

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<sup>2</sup>State v. Dist. Ct., 116 Nev. 953, 957, 11 P.3d 1209, 1211 (2000).

<sup>3</sup>See NRS 34.160; see also Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 603, 637 P.2d 534, 536 (1981).

<sup>4</sup>Beazer Homes Nevada, Inc. v. Dist. Ct., 120 Nev. 575, 579, 97 P.3d 1132, 1135 (2004).

<sup>5</sup>Tretina Printing, Inc. v. Fitzpatrick & Assocs., Inc., 640 A.2d 788, 794 (N.J. 1994); Sydnor Pump & Well Co. v. County School Bd. of Henrico County, 28 S.E.2d 33, 39 (Va. 1943).

<sup>6</sup>Beazer Homes, 120 Nev. at 579, 97 P.3d at 1135.

court. In Health Plan of Nevada, Inc. v. Rainbow Medical, LLC, we summarized those circumstances:

The arbitrator may correct or modify an award to address mathematical miscalculations or mistakes in the description of a person, thing or property referenced in the award. Remand is also appropriate to correct technical deficiencies in the form of the award or to request the arbitrator to make a decision on a submitted claim that was not addressed in the award. Finally, a remand is also authorized for an arbitrator to clarify an award.<sup>7</sup>

NRS 38.237(4)(b) specifically authorizes remand to an arbitrator who has not addressed or made a final and definite award on a submitted claim.

Because Gerald and Siblings never submitted their counterclaims to the arbitral proceeding, we conclude that the district court was not authorized to remand under NRS 38.237(4)(b). Although, Gerald and Siblings had moved the arbitrator for permission to file their counterclaims against Keith, the arbitrator denied Gerald and Siblings' motion and refused to broaden the arbitration. No party appealed the ruling or moved to compel arbitration of the counterclaims with the district court.

Because the arbitrator did not grant Gerald and Siblings permission to file the counterclaims, and no party challenged that ruling, the counterclaims were not "submitted" to the arbitral proceeding for purposes of NRS 38.237(4)(b). Consequently, that statute could not serve as the basis for the district court's remand of the counterclaims. Simply because remanding would allow for resolution of all issues between the

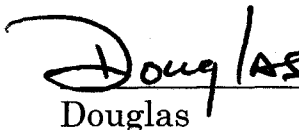
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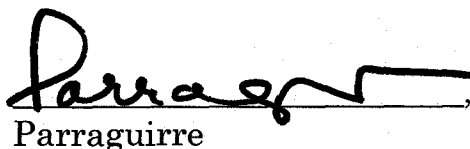
<sup>7</sup>120 Nev. 689, 695-96, 100 P.3d 172, 177 (2004) (footnote call numbers omitted).

parties prior to any further court intervention which is not a sufficient reason for remand apart from meeting one of the limited circumstances in NRS 38.237(4). And other than clarifying an award under (4)(c), no other ground for remand under NRS 38.237(4) applies to this case. Thus, we conclude that the district court erred in remanding Gerald and Siblings' counterclaims to the arbitrator pursuant to NRS 38.237(4)(b). Accordingly, we

ORDER the petition GRANTED AND DIRECT THE CLERK OF THIS COURT TO ISSUE A WRIT OF MANDAMUS instructing the district court to vacate its order mandating the inclusion of Gerald and Siblings' counterclaims in the arbitration case, as well as its subsequent orders regarding the original arbitrator and Larsen.<sup>8</sup>

 \_\_\_\_\_, C.J.  
Rose

 \_\_\_\_\_, J.  
Douglas

 \_\_\_\_\_, J.  
Parraguirre

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<sup>8</sup>We do not address the other issues raised in the petition, which relate to these subsequent orders, because they are premised on the assumption that the district court would be authorized to remand the matter to the arbitrator for further consideration under NRS 38.237(4)(b).

cc: Second Judicial District Court Dept. 7, District Judge  
Jack R. Hanifan  
Watson Rounds  
John A. Larsen  
Porter Simon  
Washoe District Court Clerk