IN THE SUPREME COURT OF THE STATE OF NEVADA

ESTATE OF CARL F. RAY, JR., BY AND THROUGH ANGELLA JARMILLO, SPECIAL ADMINISTRATOR,

Appellant,

vs.

RONALDO ENGELKE,

Respondent.

No. 34720

FILED

DEC 07 2000

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from an order of the district court striking a request for trial de novo. We conclude that the district court erred in granting the motion because appellant's conduct during the arbitration proceedings did not rise to the level of failed good faith participation. We therefore reverse the district court's order and remand this matter for further proceedings.

Respondent Ronaldo Engelke filed a complaint for personal injuries arising from an automobile accident against Carl F. Ray, Jr.[1] Ray answered the complaint, and the parties proceeded to the court-annexed arbitration program.

The court appointed an arbitrator who issued a discovery order and notification of arbitration hearing. An early arbitration conference was held telephonically. Both parties engaged in discovery during the arbitration process.

The arbitration hearing was conducted on April 8, 1999. At the arbitration, Engelke was the sole witness. Ray did not contest liability during the arbitration, but rather

[1]Ray passed away while the case was in arbitration, and by stipulation, a special administrator was appointed. Both Ray and the Estate of Carl F. Ray, Jr., are referred to as "Ray" in the remaining portion of this order.



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predicated his defense on challenging the validity of the medical bills submitted by Engelke. Ray offered the expert fee audit reports of David Oakden as evidence contesting the amount of Engelke's medical bills. Ray also cross-examined Engelke regarding the length of his physical therapy, his period of recovery, and about a possible pre-existing injury.

The arbitrator found that Ray was negligent and that Engelke's medical treatment and charges were reasonable. The arbitration award specified that Engelke receive $7,165.27 in special damages for medical costs, $10,000.00 for pain and suffering, and $2,500.00 for attorney's fees and costs.

Following the arbitration hearing, Ray filed a timely request for trial de novo. Engelke then filed a motion to strike Ray's request for trial de novo, which Ray opposed. Engelke's motion to strike argued that Ray failed to participate in the arbitration in good faith as required by Nevada Arbitration Rule ("NAR") 22 because Ray did not contest liability and did not provide any medical evidence to dispute the medical treatment that Engelke received.

The district court granted the motion. The district court order reads in pertinent part:

> Defendant's failure to contest liability and failure to present competent medical evidence, constitutes bad faith participation in the arbitration process. The expert report produced by the Defendant was insufficient to contest the customary charges for Plaintiff's medical bills. There was no competent evidence introduced at the arbitration to contest the medical treatment that Plaintiff received, or that the treatment was unreasonable and not related to the accident.
> THEREFORE,
> IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Plaintiff's Motion to Strike Defendant's Request for Trial De Novo is hereby GRANTED.

Ray appealed from the order striking his request for trial de novo.

The purpose of Nevada's mandatory, non-binding, court-annexed arbitration program "is to provide a simplified procedure for obtaining a prompt and equitable resolution of certain civil matters." NAR 2(A). Arbitration hearings are intended to be informal, expeditious and consistent with the purposes and intent of the arbitration rules. NAR 2(D).

A party to the court-annexed arbitration program has a right to a trial de novo if he or she requests it within thirty days after the arbitration award is served. See NAR 18. The failure of the party, however, "to either prosecute or defend a case in good faith during the arbitration proceedings . . . constitute[s] a waiver of the right to a trial de novo." NAR 22(A). We review an order granting a motion to strike a request for trial de novo for abuse of discretion. See Casino Properties, Inc. v. Andrews, 112 Nev. 132, 911 P.2d 1181 (1996).

This court has held that "good faith" participation is congruent with "meaningful participation." Casino Properties, 112 Nev. at 135, 911 P.2d at 1182-83. There is no single determinative factor when considering good faith; it is the totality of circumstances during the arbitration process that the district court must balance before granting a motion to strike a request for trial de novo. See Campbell v. Maestro, 116 Nev. __, __, 996 P.2d 412, 415 (2000) (listing a variety of factors which may be relevant to whether a party participated in good faith); Gittings v. Hartz, 116 Nev. __, __, 996 P.2d 898, 901-903 (2000) (suggesting that a number of factors, although not supportive of the district court's order striking a trial de novo request in that case, could be

considered by a trial court in striking a trial de novo request).

Additionally, not only must the district court consider the totality of circumstances, its order striking a trial de novo request must describe what type of conduct was at issue and, where necessary, how that conduct rose to the level of failed good faith participation. See Chamberland v. Labarbera, 110 Nev. 701, 705, 877 P.2d 523, 525 (1994) (remarking that the record on appeal in arbitration cases is often scant, making review in this court extremely difficult).

Here, the district court struck the request for trial de novo because Ray failed to contest liability and failed to present competent medical evidence to controvert Engelke's evidence. We conclude that the district court erred in striking the request for trial de novo.

First, as pointed out in Gittings, the failure to contest liability does not necessarily form a lack of good-faith participation by the defendant who requested a trial de novo. See Gittings, 116 Nev. at __, 996 P.2d at 902. We note that Gittings was never intended to be read as a formulaic checklist of "do's and don'ts." The district court is authorized to strike a request for trial de novo when it is based on the totality of circumstances presented; this case does not present such an opportunity.

Second, a party's decision not to present countervailing medical evidence at the arbitration, for example, does not categorically support an order striking a request for trial do novo. As this court observed more generally in Gittings:

> There may be many valid reasons why a party would not wish to expend money at the arbitration stage of a case on medical experts. Effective cross-examination may be sufficient to point out discrepancies

> in a person's claim of injury without such testimony, or without presentation of "countervailing medical evidence."

Gittings, 116 Nev. at ____, 996 P.2d at 902. Ray, as the defendant, was not under an affirmative obligation to produce evidence to overcome the initial burden of proof, as Engelke was. Ray's counsel was entitled to cross-examine the plaintiff and his evidence, and his decision not to present "competent medical evidence" of his own does not support the district court's order striking the request for trial de novo. Moreover, Ray did present the expert analysis of David Oakden as evidence contesting the amount of Engelke's medical bills, even though he was not required to do so. Whether or not this evidence was persuasive does not change that it was offered in good faith.

We therefore conclude that the district court erred in striking the request for trial de novo. Accordingly, the order of the district court is reversed, and this matter is remanded for further proceedings consistent with this order.

It is so ORDERED.

Young, J.

Maupin, J.

Becker, J.

cc: Hon. Lee A. Gates, Chief District Judge
Marina E. Kolias
Edward M. Bernstein & Associates
Clark County Clerk