

IN THE SUPREME COURT OF THE STATE OF NEVADA

JACQUELIN A. BAUER,

No. 35561

Appellant,

**FILED**

Vs.

SEP 07 2001

MINER CHIROPRACTIC OFFICE, AND DON  
MINER,

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *J. R. [Signature]*  
CHIEF DEPUTY CLERK

Respondent.

ORDER OF REVERSAL AND REMAND

This is an appeal from an order granting a motion to strike a request for trial de novo following court-annexed arbitration.

Appellant Jacquelin A. Bauer contends that the district court abused its discretion by granting respondent Don Miner's motion to strike Bauer's request for a trial de novo following court-annexed arbitration. In particular, Bauer challenges the district court's two grounds for concluding that she did not participate in arbitration in good faith: (1) failing to accept a settlement amount that was greater than the available arbitration award; and (2) failing to properly seek to exempt the case from arbitration when she had no intention of accepting any award available through the arbitration program. We agree and conclude that the district court abused its discretion.

Our recent cases drawing the parameters of "good faith participation" have resoundingly confirmed that the constitutional right to civil trial outweighs the arbitration program's policy of judicial economy.<sup>1</sup> In Campbell we held that a party's refusal "to enter into meaningful settlement

<sup>1</sup>See Campbell v. Maestro, 116 Nev. 380, 386 n.5, 996 P.2d 412, 416 n.5 (2000); Gittings v. Hartz, 116 Nev. 386, 390, 996 P.2d 898, 901 (2000).

negotiations" is "not pertinent to the question of good faith participation in the arbitration program."<sup>2</sup> In this case, although the offer of judgment was greater than the award that Bauer could have obtained through arbitration, we conclude that denying Bauer her right to a trial de novo was not justified because, under Campbell, she had no duty to settle. Likewise, although we question Bauer's motives in proceeding with arbitration when she clearly had no intention of accepting any arbitration award, we will not deny Bauer her right to trial for failing to exempt the case from the arbitration program.<sup>3</sup>

Although we conclude that denying Bauer her right to a jury trial was not justified under the circumstances, we also note that other sanctions provided in NAR 22(B) might be appropriate for the district court to assess.<sup>4</sup>

Bauer next argues that, according to NRS 48.105 and NRCP 68(e), the district court should not be allowed to consider Miner's offer of judgment. Regarding NRS 48.105, we conclude that the district court may consider the offer of judgment under the "another purpose" exception contained therein.<sup>5</sup> Also, NRCP 68(e) precludes admitting offers of judgment but makes an exception for a "proceeding to determine costs and fees." Thus, the district court may consider the

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<sup>2</sup>Campbell, 116 Nev. at 385, 996 P.2d at 415.

<sup>3</sup>Miner also alleges that Bauer failed to participate in good faith during discovery by failing to produce a doctor's examination report and failing to be examined by a certain doctor as agreed. But after reviewing the record and considering the totality of circumstances, we conclude that Bauer's participation was within the parameters of meaningful participation defined by Gittings, Campbell, and their predecessors.

<sup>4</sup>See Gittings, 116 Nev. at 392 n.5, 996 P.2d at 902 n.5; Campbell, 116 Nev. at 385, 996 P.2d at 415.


<sup>5</sup>NRCP 48.105(2).


offer of judgment in a proceeding to determine "costs and fees" under NAR 22(B).

Finally, Miner contends that when he tendered an offer of judgment that met or exceeded the full remedy available in the forum, the case was rendered moot. We need not address this contention because it was not raised below.<sup>6</sup> In any event, in light of Nevada's strong policy favoring the right to trial, we conclude that the argument would fail.

We conclude that the district court abused its discretion in granting Miner's motion to strike Bauer's request for trial de novo. Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.

  
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Shearing J.

  
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Rose J.

cc: Hon. Michael P. Gibbons, District Judge  
Mark L. Sturdivant  
Rands, South & Gardner  
Erickson Thorpe & Swainston, Ltd.  
Douglas County Clerk

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<sup>6</sup>See Dermody v. City of Reno, 113 Nev. 207, 210, 931 P.2d 1354, 1357 (1997).

AGOSTI, J., dissenting:

I dissent.

While the majority rightfully questions Bauer's motives in proceeding with arbitration and concedes she clearly had no intention of accepting an award, it would grant her a trial de novo. The majority rests its result on the proposition that Bauer has no duty to settle her lawsuit. While that may be an accurate statement of the law in general, it is not dispositive of this case.

If Bauer never intended to accept even the maximum award permissible, then she had a duty pursuant to NAR 5 to seek an exemption from arbitration. While she may, as a general proposition, have no duty to settle her case, she does have a very specific duty to seek an exemption from arbitration if she thinks her case has a probable value exceeding \$40,000.00. The arbitrator gave her ample time to file a motion for exemption with the arbitration commissioner, and she declined to do so.<sup>1</sup> Under NAR 5(A), Bauer's duty to seek an exemption is mandatory. "[I]f a party believes that a case should not be in the program, that party must file with

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<sup>1</sup>Bauer originally filed her case in the Second Judicial District Court, where the limit for the arbitration program is \$40,000.00. She did not make a statement of exemption from arbitration in her complaint. Venue was changed to the Ninth Judicial District Court after Miner so moved. Bauer did not oppose the motion. In the Ninth Judicial District, the arbitration limit at the relevant time was \$25,000.00 per NAR 3 and NJDCR 4. After the case was transferred to the Ninth Judicial District Court, Bauer stipulated with Miner in the selection of the arbitrator. On the day set for arbitration, Bauer made an oral motion to the arbitrator to exempt the case from arbitration. NAR 5(A) requires such a motion to be in writing and made to the arbitration commissioner, not to the arbitrator. For that reason, the motion was denied by the arbitrator who offered to delay his decision for thirty days to allow Bauer an opportunity to make the appropriate written motion to the appropriate authority. She declined the opportunity and elected not to pursue the motion. The offer that Miner made to Bauer was for \$40,000.00 plus interest, costs and attorney's fees.

the arbitration commissioner a request to exempt the case from the program."<sup>2</sup> This is a benign rule; despite the time limits it articulates governing when exemption may be sought, the rule also permits the court to consider and grant even an untimely request for exemption from the arbitration program.

NAR 22(A) states that a party to a case in arbitration who fails to prosecute or defend the case in good faith waives the right to a trial de novo. In my opinion, Bauer's failure to seek an exemption from the arbitration program, when she clearly had no intention of resolving her case within the limits of the program, constitutes bad faith within the meaning of NAR 22(A). Bauer allowed the case to languish in the arbitration program for nearly one year. She never, by any appropriate means, sought an exemption from the program. She participated in the selection of an arbitrator. On the day set for the arbitration, she made an oral motion directed to the arbitrator to exempt the case from arbitration. She declined the arbitrator's offer to delay his decision so she could make the appropriate written motion for an exemption to the arbitration commissioner, after her oral motion was denied because it was not a cognizable motion under the Nevada Arbitration Rules. She refused a settlement offer in excess of \$40,000.00, well beyond the arguable \$25,000.00 limit in the Ninth Judicial District and beyond the maximum award available in the Second Judicial District. She disregarded her obligation under NAR 5 to seek an exemption. She wasted the time of everyone involved in the arbitration and the precious resources of both the arbitration program and the district court.

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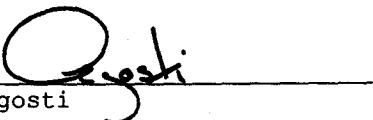
<sup>2</sup>NAR 5(A).

This very court approved and adopted the Nevada Arbitration Rules. In adopting those rules we directed the district courts to compel parties to arbitrate in good faith. We reposed considerable discretion in the district courts in carrying out the provisions governing the program.<sup>3</sup>

If NAR 22(A) is to have any meaning, and if NAR 2(D) is to have meaning, then this court ought to support the district court's exercise of discretion in this instance. To reverse the district court's decision is to effectively ignore the rules we ourselves adopted. If Bauer's conduct in this case does not constitute a failure to arbitrate in good faith, or at the very least if we do not recognize room within the sound, wise and considerable discretion of the district court to so find, then we will never find a case where refusing trial de novo is justified.

The majority's decision divests the district courts of a powerful and necessary sanction for the enforcement of all the rules governing our court-annexed arbitration program. If we are unwilling to support the district courts in the sound exercise of their considerable discretion, then we relieve all parties of the incentive to arbitrate in good faith and to settle their cases when it is appropriate.

I would affirm the district court's decision to strike Bauer's request for a trial de novo.

  
Agosti

J.

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<sup>3</sup>NAR 2(D).