

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MARTIN LIRA-RIVERA, AN
INDIVIDUAL,
Appellant,
vs.
SUSANA MONTALVO, AN
INDIVIDUAL,
Respondent.

No. 72297

FILED

MAR 22 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

Martin Lira-Rivera appeals from a judgment on an arbitration award in a tort action. Eighth Judicial District Court, Clark County; Douglas Smith, Judge.

Following court-mandated arbitration in a personal injury action that resulted in an award to respondent Susana Montalvo, Lira-Rivera timely requested a trial de novo. Montalvo moved to strike Lira-Rivera's request, and the district court granted her motion, concluding that Lira-Rivera failed to defend his case in good faith during the arbitration proceedings. The district court issued written findings of fact and conclusions of law in support of its order striking Lira-Rivera's request, focusing on Lira-Rivera's failure to personally attend the arbitration hearing (even though his counsel appeared on his behalf), to call witnesses, to contest liability, and to present any evidence that he had personally desired or requested a trial de novo. The district court then entered judgment on the arbitration award in favor of Montalvo.¹

On appeal, Lira-Rivera challenges the district court's order granting the motion to strike his request for a trial de novo, and contends

¹We do not recount the facts except as necessary to our disposition.

that his conduct exceeded minimum standards of good-faith participation in the arbitration proceedings and that the district court erred by considering inappropriate and irrelevant factors in its good-faith analysis. We agree.²

The Nevada Constitution provides litigants with the right to a jury trial, but states that the parties may waive that right “in all civil cases in the manner to be prescribed by law.” Nev. Const. art. 1, § 3. One such method of waiver is provided in Nevada Arbitration Rule (NAR) 22. *Gittings v. Hartz*, 116 Nev. 386, 390, 996 P.2d 898, 901 (2000). Specifically, “[t]he failure of a party or an attorney to either prosecute or defend a case in good faith during the arbitration proceedings shall constitute a waiver of the right to a trial de novo,” NAR 22(A), and the district court may strike a party’s request for such trial if he has not acted in good faith. *Gittings*, 116 Nev. at 390, 996 P.2d at 901. For purposes of NAR 22(A), this court equates “good faith” with “meaningful participation” in the arbitration proceedings. *Id.* “However, the important constitutional right to a jury trial is not waived simply because individuals can disagree over the most effective way to represent a client at an arbitration proceeding.” *Id.* at 391, 996 P.2d at 901. Decisions to strike a request for trial de novo are reviewed for an abuse of

²Montalvo presents an additional issue in her answering brief, arguing that this court does not have jurisdiction to consider the appeal. However, the Nevada Supreme Court considered the same arguments in a motion to dismiss filed by Montalvo and concluded they are without merit. See *Lira-Rivera v. Montalvo*, Docket No. 72297 (Order, November 6, 2017). Accordingly, consideration of this jurisdictional issue is barred under the law-of-the-case doctrine. See *Dictor v. Creative Mgmt. Servs., LLC*, 126 Nev. 41, 44, 223 P.3d 332, 334 (2010) (“The law-of-the-case doctrine provides that when an appellate court decides a principle or rule of law, that decision governs the same issues in subsequent proceedings in that case.”).

discretion. *Id.* A district court abuses its discretion where it disregards controlling law or its factual findings are not based on substantial evidence. See *MB Am., Inc. v. Alaska Pac. Leasing*, 132 Nev. ___, ___, 367 P.3d 1286, 1292 (2016); *Campbell v. Maestro*, 116 Nev. 380, 383, 996 P.2d 412, 414 (2000).

In this case, the district court based its conclusion that Lira-Rivera did not act in good faith primarily on factual findings, most of which pertain to Lira-Rivera's failure to personally attend the hearing, to call witnesses, and to contest liability, even though his counsel participated in the arbitration on his behalf. However, "[m]ere failure of a [defendant] to attend or call witnesses in an arbitration hearing does not amount to bad faith or a lack of meaningful participation." *Gittings*, 116 Nev. at 392, 996 P.2d at 902. In *Gittings*, the supreme court also held that "[the defendant's] decision not to seriously contest liability at the arbitration hearing or seek an independent medical examination provides insufficient grounds for completely striking a demand for a trial de novo." *Id.* (noting that "[e]ffective 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'"). Moreover, in *Chamberland v. Labarbera*, where the defendant similarly chose not to conduct discovery before the arbitration or personally attend the hearing, the supreme court held that it was an abuse of discretion for the district court to strike the defendant's request for a trial de novo. 110 Nev. 701, 705, 877 P.2d 523, 525 (1994) ("Arbitration matters often involve simple disputes and meager claims for damages that do not warrant expensive pre-arbitration discovery or sophisticated 'trial' techniques.").

Here, even though Lira-Rivera did not personally attend the arbitration, his counsel did. Lira-Rivera's counsel filed an arbitration brief in advance of the hearing, and during the arbitration, he presented argument and cross-examined Montalvo. Montalvo fails to demonstrate how anything would have been different had Lira-Rivera also personally attended the proceedings along with counsel. At the very least, it cannot be said that Lira-Rivera showed bad faith or utterly refused to meaningfully participate in the arbitration when both parties agree that counsel did indeed actively participate in the arbitration process before, during, and after the hearing. Accordingly, the district court abused its discretion by striking Lira-Rivera's request for a trial de novo based on its findings. *Gittings*, 116 Nev. at 393, 996 P.2d at 902 (holding that a defendant's failure to personally attend the hearing, to call witnesses, to contest liability, and to request an independent medical examination "cannot be the basis for striking a request for trial de novo"); see also *MB Am.*, 132 Nev. at ___, 367 P.3d at 1292 ("An abuse of discretion can occur when the district court . . . disregards controlling law.").

Montalvo argues both below and on appeal, and the district court's remaining findings seem to adopt her position, that Lira-Rivera did not personally desire or request a trial de novo, and that this, in tandem with his deposition testimony stating that he wanted his insurer to resolve the matter and compensate Montalvo, demonstrates that Lira-Rivera's defense counsel rejected the arbitration award and requested a trial de novo without his client's approval. The district court apparently concluded this was a strong indication that Lira-Rivera (or, more probably, his counsel) entered into the arbitration proceedings with the intention of requesting a

trial de novo from the outset.³ While we question the inferential link between those propositions, we need only point out that neither the district court nor Montalvo cited any authority in support of the notion that an insured must personally desire and request a trial de novo before his insurer-provided counsel may, in good faith, request such relief, and we know of no such authority. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (holding that this court need not consider claims that are not cogently argued or supported by relevant authority).


We note that a request for a trial de novo essentially constitutes rejection of a possible settlement (i.e., the arbitration award), and such a decision typically rests with the client. *See* RPC 1.2(a) (“A lawyer shall abide by a client’s decision whether to settle a matter.”). However, liability insurance policies generally give insurers the “right to control settlement discussions and [the] right to control litigation against the insured.” *Allstate Ins. Co. v. Miller*, 125 Nev. 300, 309, 212 P.3d 318, 324 (2009).

³We take this opportunity to note that the district court merely listed its findings and legal conclusions without explaining in any depth how its findings relate to one another or justify its conclusion that Lira-Rivera failed to defend his case in good faith. District courts issuing orders under NAR 22(A) are required to set forth “specific written findings of fact and conclusions of law . . . describing what type of conduct was at issue and *how* that conduct rose to the level of failed good faith participation.” *Chamberland*, 110 Nev. at 705, 877 P.2d at 525 (emphasis added) (requiring such findings because they “facilitate[] appellate review [and] impress[] upon the district court the severity of [NAR 22(A)] sanction[s]”). Accordingly, we caution the district court to be mindful of its obligations under *Chamberland* to not only issue written findings of fact and conclusions of law, but also to explain its reasoning.

Because the parties did not present Lira-Rivera's insurance policy to the district court while litigating his request for a trial de novo, the district court did not even have an adequate factual record from which it could infer that Lira-Rivera's counsel was acting without authorization. *See Gittings*, 116 Nev. at 393, 996 P.2d at 902 (holding that the district court erred where it relied solely on statements contained in the pleadings of the parties as the basis for a particular finding and therefore "had no factual record to support [its] conclusion").⁴ Thus, we conclude that the district court abused its discretion when it found that Lira-Rivera failed to defend his case in good faith.

Based on the foregoing, we

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


_____, J.
Tao


_____, J.
Gibbons

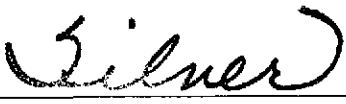
⁴Montalvo presents additional evidence on appeal that was not presented to the district court to support her argument that Lira-Rivera's counsel requested the trial de novo and filed this appeal without Lira-Rivera's approval, including Lira-Rivera's failure to personally attend the settlement conference held pursuant to NRAP 16 and emails between the parties' attorneys indicating that Lira-Rivera's counsel was unable to locate Lira-Rivera. Assuming this evidence could somehow demonstrate that Lira-Rivera did not defend his case in the arbitration proceedings in good faith, this court cannot consider new evidence on appeal. *See Carson Ready Mix v. First Nat'l Bank of Nev.*, 97 Nev. 474, 476-77, 635 P.2d 276, 277-78 (1981). Accordingly, we decline to consider Montalvo's arguments insofar as they rely upon that evidence.

SILVER, J., dissenting:

I would affirm the district court's findings as they are supported by substantial evidence that the appellant acted in bad faith during the arbitration proceedings and therefore the district court did not abuse its discretion in striking Lira-Rivera's request for a trial de novo.

Lira-Rivera testified at his deposition that he took full responsibility for his actions and that he was an illegal driver, and admitted that his driving was illegal and dangerous. And, critically, the district court made specific findings that Lira-Rivera's counsel entered into the arbitration "with the intention from the outset of rejecting its outcome and demanding trial de novo." *See Casino Props. Inc., v. Andrews*, 112 Nev. 132, 135-36, 911 P.2d 1181, 1182-83 (1996) (affirming the trial court's denial of a trial de novo where the appellants did not participate in good faith at arbitration). Considering the facts collectively, substantial evidence supports the district court's findings that appellant acted in bad faith during the arbitration proceedings.

Based on the foregoing, I respectfully dissent as I believe the district court's detailed findings were supported by substantial evidence and striking Lira-Rivera's request for a trial de novo was proper under these facts.


_____, C. J.
Silver

cc: Hon. Douglas Smith, District Judge
Eva Garcia-Mendoza, Settlement Judge
EAD Law Group LLC
Law Office of April N. Bonifatto
Eighth District Court Clerk