IN THE COURT OF APPEALS OF THE STATE OF NEVADA

SANDRA MARIBEL MARTINEZ, INDIVIDUALLY,
Appellant,
vs.
JULIA BEATRIZ GOMEZ, INDIVIDUALLY; MARTHA OCHOA-GONZALEZ, INDIVIDUALLY; AND EMMA MARIELA BARRIENTOS-LAINEZ, INDIVIDUALLY,
Respondents.

No. 74357-COA



*ORDER OF AFFIRMANCE*

Sandra Maribel Martinez appeals from a judgment on an arbitration award in a tort action. Eighth Judicial District Court, Clark County; Richard Scotti, Judge.

Following court-mandated arbitration in a personal injury action that resulted in an award to respondents Julia Beatriz Gomez, Martha Ochoa-Gonzalez, and Emma Mariela Barrientos-Lainez, appellant Sandra Maribel Martinez timely requested a trial de novo. Respondents moved to strike Martinez's request, and the district court granted the motion, concluding that Martinez failed to defend her 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 Martinez's request, focusing on her failure to personally participate in discovery and attend the arbitration hearing (even though her counsel appeared on her behalf), or to authorize her attorneys to represent her, concede liability, and request a trial de novo on her behalf. The district

court entered judgment on the arbitration award in favor of respondents and later denied Martinez's motion for reconsideration.[1]

On appeal, Martinez asserts that the district court abused its discretion when it struck her request for a trial de novo and denied her motion for reconsideration, concluding that she did not participate in arbitration in good faith.[2] Martinez also argues that the district court abused its discretion by sua sponte raising issues in its findings of fact that were never previously raised by either party and by sanctioning Martinez for failure to participate in arbitration when one of the respondents also failed to participate in discovery. Finally, Martinez disputes several of the district court's findings of fact and conclusions of law.

The Nevada Constitution provides litigants with the right to a jury trial, but it 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 22. *Gittings v. Hartz*, 116 Nev. 386, 390, 996 P.2d 898, 901 (2000). Specifically, "the 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," and the district court may strike a party's request for such trial if he or she has not acted in good faith. *Id.* (quoting NAR

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

[2]Although Martinez listed denial of her motion for reconsideration as an issue on appeal, she did not discuss it in her analysis. Instead, she focused solely on whether the court erroneously struck her request for a trial de novo. So, because she provided no discussion on that issue beyond raising it initially, she has not cogently argued it, and this court need not consider it. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006).

22(A)) (internal quotation marks omitted). 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 a trial de novo are reviewed for an abuse of discretion. *Id.* A district court abuses its discretion where it disregards controlling law or its factual findings are not based on substantial evidence. *MB Am., Inc. v. Alaska Pac. Leasing Co.*, 132 Nev. 78, 88, 367 P.3d 1286, 1292 (2016); *Campbell v. Maestro*, 116 Nev. 380, 383, 996 P.2d 412, 414 (2000).

This court defers to the district court's findings of fact and will disturb them only if they are clearly erroneous or are not supported by substantial evidence. *Hunter v. Gang*, 132 Nev. 249, 262, 377 P.3d 448, 457 (Ct. App. 2016). But we review the district court's conclusions of law de novo. *Bedore v. Familian*, 122 Nev. 5, 9–10, 125 P.3d 1168, 1171 (2006). "Substantial evidence" means "evidence that a reasonable mind might accept as adequate to support a conclusion." *Whitemaine v. Aniskovich*, 124 Nev. 302, 308, 183 P.3d 137, 141 (2008).

In its order, the district court based its conclusion that Martinez did not act in good faith primarily on factual findings, most of which pertain to Martinez's failure to personally participate in the arbitration proceedings, even though counsel participated in arbitration apparently on her behalf. Generally, "[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.* 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."). But the facts here are distinguishable from those earlier cases.

In *Chamberland*, failure to conduct discovery and to attend the arbitration hearing did not amount to a lack of meaningful participation. But here, Martinez not only did not personally participate in any arbitration proceedings, she failed even to respond to plaintiffs' discovery requests. Moreover, she failed to attend her properly noticed deposition in addition to the arbitration hearing. Indeed, it appears that she never communicated with counsel hired by the insurance company at any time during the proceedings. Counsel provided responses to respondents' interrogatories based on a statement Martinez allegedly made to insurance company agents at the time of the incident, but those statements were not made under oath or subject to cross-examination. What is more, Martinez did not verify and sign the interrogatory responses. We conclude that those combined failures constitute a lack of meaningful participation.[3]

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[3]Martinez argues that in *Casino Properties, Inc. v. Andrews*, 112 Nev. 132, 911 P.2d 1181 (1996), the supreme court articulated three factors that, "when combined rise to the level of failed good faith participation," and

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Martinez urges this court to conclude that the actions of her counsel satisfy the good-faith-participation requirement. But nothing in the arbitration rules' language indicates that counsel's actions may take the place of a party's when the party's action is required. *See Pawlik v. Deng*, 134 Nev. ___, ___, 412 P.3d 68, 70-71 (2018) (reviewing a question of statutory interpretation de novo and noting that the court will not go beyond the statute's plain language when it is clear on its face). Action or inaction by a party *or* his or her attorney may rise to the level of failure of good-faith participation. NAR 22(A) (providing that "[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" (emphasis added)); *see Casino Props.*, 112 Nev. at 135-36, 911 P.2d at 1182-83 (affirming denial of trial de novo because the defendant had impeded the arbitration proceedings by repeatedly failing to provide information plaintiffs had requested—eventually informing plaintiffs that the requested information did not exist only ten days before the arbitration hearing, by which time it was too late for the plaintiffs to act on the information). But certain activities are the sole province of the party, such as, notably here, responding to interrogatories or other discovery requests requiring the party's personal knowledge or authority. NRCP 33(b)(1)-(2)

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together establish "the standard needed for striking a request for trial de novo." She argues that because those specific factors were not present in this case, her request should not have been stricken. But that argument is unconvincing. The *Casino Properties* court merely applied the facts of that case to the existing standard—failure to prosecute or defend a case in good faith—and concluded that those facts met that standard. *Id.* at 135-36, 911 P.2d at 1183; *see* NAR 22(A).

("Each interrogatory shall be answered . . . in writing under oath . . . [and] [t]he answers shall first set forth each interrogatory asked, followed by the answer or response *of the party*. . . . The answers are to be signed *by the person* making them, and the objections signed *by the attorney* making them." (emphasis added)); NAR 11(A) ("Types of discovery [allowed by the arbitrator] shall be those permitted by the Nevada Rules of Civil Procedure, but may be modified in the discretion of the arbitrator to save time and expense."). Thus, de novo review demonstrates that neither the rules' language nor Nevada cases support Martinez's argument.

Martinez argues that others of the district court's findings of fact are erroneous. Specifically, she argues that the district court erred in finding that her counsel did not have authority to act on her behalf. 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). Because the parties did not present Martinez's insurance policy to the district court while litigating her request for a trial de novo, the district court did not have an adequate factual record from which it could infer that Martinez'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 parties' pleadings as the basis for a particular

finding and therefore "had no factual record to support [its] conclusion").[4] However, any error here would be harmless. Martinez does not explain how the complained-of error prejudiced her or impacted the outcome of the case. *See* NRCP 61; *Khoury v. Seastrand*, 132 Nev. 520, 539, 377 P.3d 81, 94 (2016) (concluding that an appellant must show the errors "affect[ed] [her] substantial rights so that, but for the alleged error, a different result might reasonably have been reached" (internal quotation marks omitted)). Ultimately, Martinez's complete lack of participation was the essential fact in the district court's analysis. Whether her counsel had authority to represent her is incidental to the finding that she did not participate at all in the arbitration and thereby failed to defend the case in good faith.[5]

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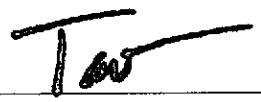
[4]Martinez presents additional evidence on appeal that was not presented to the district court to support her argument that her counsel were authorized to represent her pursuant to the terms of the insurance contract. Namely, she provides a copy of an insurance contract's terms and conditions, but nothing in that document identifies Martinez as the policyholder. Further, this court cannot consider new evidence on appeal. *See Carson Ready Mix, Inc. v. First Nat'l Bank of Nev.*, 97 Nev. 474, 476-77, 635 P.2d 276, 277-78 (1981). Accordingly, we decline to consider Martinez's arguments insofar as they rely upon that evidence.

[5]We can similarly dispense with the remaining disputed findings of fact. Nothing in the record shows that respondents were prejudiced by Martinez's delay in conceding liability until her arbitration brief. Also, the record does not demonstrate that Martinez's counsel harbored an "obvious secret intent" to request a trial de novo. Further, the district court did not explain why four of Martinez's unverified interrogatory responses were made in bad faith. But even if the district court had explained or supported those findings with substantial evidence, the outcome would have been the same. Because Martinez failed to participate in the arbitration at all, she did not provide meaningful participation. Thus, these incidental errors in fact finding, real or alleged, have no bearing on the final conclusion that she did not defend the case in good faith during the arbitration. Consequently, any error is harmless.

Thus, the district court did not err in concluding that Martinez's nonparticipation constituted a lack of meaningful participation in the arbitration proceedings, and, consequently, a failure to participate in good faith. Therefore, the district court did not abuse its discretion in granting respondents' motion to strike Martinez's request for trial de novo.[6] Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, A.C.J.
Douglas



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Tao

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[6]Martinez's remaining issues are unsupported by relevant authority. First, she argues that the district court abused its discretion or committed reversible error by sua sponte raising issues in its findings of facts never previously raised by either party. She cites to no authority to support this assertion. *See Edwards*, 122 Nev. at 330 n.38, 130 P.3d at 1288 n.38. Next, she argues that the district court abused its discretion or committed reversible error by sanctioning Martinez for failure to participate in arbitration when one of the respondents, Barrientos-Lainez, also failed to participate in discovery. Here, again, Martinez fails to support her argument with relevant authority or cogent argument. She cites one unpublished case from this court, *Okoya v. Nev. State Bank, F.A.*, Docket No. 68279 (Order of Affirmance, Mar. 6, 2017), but even if that case were citable as precedent, which it is not, *see* NRAP 36(c)(3), it is inapposite. Finally, Martinez provides no authority to support her assertion that Barrientos-Lainez's failure to participate in discovery should preclude her from collecting her arbitration award. *See Edwards*, 122 Nev. at 330 n.38, 130 P.3d at 1288 n.38. Thus, we do not consider these arguments.

cc: Hon. Richard Scotti, District Judge
Dana Jonathon Nitz, Settlement Judge
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