

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

NICHOLAUS BAKKE,
Appellant,
vs.
AMERICAN FAMILY MUTUAL
INSURANCE COMPANY, AS
SUBROGEE OF ASSATA SMITH; AND
ASSATA SMITH,
Respondents.

No. 75342-COA

FILED

NOV 13 2019

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

Nicholaus Bakke appeals from a judgment entered on an arbitration award following a district court order striking his request for trial de novo.¹ Eighth Judicial District Court, Clark County; Joseph Hardy, Jr., Judge.

Bakke was driving a vehicle owned by Diana S. Cordero when he was in an accident with respondent Assata Smith. Smith's insurer, respondent American Family Mutual Insurance Company (AFM), paid money relating to Smith's claim and later brought suit against Bakke and Cordero for subrogation. Smith later intervened in the suit to recover

¹Respondents argue that this appeal was untimely because Bakke did not file his notice of appeal within 30 days of service of the notice of entry of the order granting the motion to strike his request for trial de novo. This argument is without merit, however, as Bakke timely appealed from the judgment on the arbitration award under NAR 18(F) (providing that, after a district court strikes a trial de novo request, it shall enter judgment on the arbitration award and such judgment is appealable, but review on appeal is limited to, as relevant here, the order striking the trial de novo request).

damages from Bakke and Cordero that were not covered by AFM. Bakke and Cordero were originally jointly represented by counsel, but after counsel realized there was a conflict he withdrew. After counsel withdrew, but before Bakke and Cordero obtained new counsel, AFM's motion to deem requests for admission admitted was granted in part, which resulted in Bakke and Cordero being deemed to admit that AFM paid \$18,261.27 in damages and that Bakke had permission to drive Cordero's vehicle.

The matter then proceeded to court-annexed arbitration and the arbitrator found in favor of AFM and Smith. Bakke filed a timely request for trial de novo and AFM moved to strike the request, which Bakke opposed. The district court later granted the motion, finding that Bakke and Cordero failed to timely respond to discovery despite AFM sending several letters to them. The court further found that they failed to respond to requests for admission, resulting in several of the requests being deemed admitted. In addition, the court found that Bakke and Cordero had not responded to requests for production of documents and interrogatories, and that they failed to make themselves available to have their depositions taken. Finally, the court found that Cordero failed to appear at the arbitration, that Bakke appeared telephonically, but was disconnected prior to cross-examination, that they failed to present any other witnesses, and that no other testimony was presented to refute Smith's testimony. Based on these findings, the district court determined that Bakke and Cordero failed to defend the case in good faith and failed to meaningfully participate in the arbitration process. After granting the motion to strike, the district court entered judgment on the arbitration award and both Bakke and

Cordero appealed. Cordero's appeal was later dismissed without prejudice by the Nevada Supreme Court on February 13, 2019.²

Under NAR 22(A), “[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.” The decision to strike a request for a trial de novo is reviewed for an abuse of discretion. *Gittings v. Hartz*, 116 Nev. 386, 391, 996 P.2d 898, 901 (2000). 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); *Otak Nev., LLC v. Eighth Judicial Dist. Court*, 129 Nev. 799, 805, 312 P.3d 491, 496 (2013).

On appeal Bakke argues that the district court abused its discretion in its application of Nevada case law. Specifically, he argues that the district court should not have relied on his failure to present witnesses in determining he did not defend the case in good faith. And while respondents largely failed to respond to this argument, they do summarily assert that Bakke frustrated the purpose of arbitration by not having witnesses appear. But as the supreme court stated in *Gittings*, the “[m]ere failure of a party to attend or call witnesses in an arbitration hearing does not amount to bad faith or a lack of meaningful participation.” 116 Nev. at 392, 996 P.2d at 902. This maxim from the *Gittings* case is especially pertinent here, given that testimony was provided by both Bakke and Smith, and AFM provides no explanation as to what additional witnesses

²In light of the supreme court's dismissal of Cordero's appeal, the clerk of the court shall modify the caption for this matter to conform to the caption on this order.

were necessary under the circumstances presented in this case. Indeed, as the supreme court noted in *Gittings*, the “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. Thus, we conclude that the district court abused its discretion in relying on Bakke’s failure to call witnesses as a basis to strike his request for trial de novo.

Bakke further argues that some of the findings on which the striking of his trial de novo was based are not supported by substantial evidence in the record. Specifically, Bakke asserts that the court’s findings that he failed to make himself available for deposition and that AFM sent several letters regarding discovery were not supported by substantial evidence. He further asserts that he meaningfully participated in the arbitration process by, among other things, appearing and testifying at the arbitration hearing. While respondents assert that Bakke frustrated the purpose of the arbitration, they do not dispute his assertions that certain of the district court’s findings in striking the trial de novo request were not supported by the record or otherwise address Bakke’s examples of how he meaningfully participated in the arbitration process. As a result, respondents have conceded these points. *See O’Connell v. Wynn Las Vegas, LLC*, 134 Nev. 550, 555 n.3, 429 P.3d 664, 669 n.3 (Ct. App. 2018) (determining that a respondent concedes an issue when it fails to respond to the appellant’s argument on that issue).

Respondents do however link their assertion that Bakke frustrated the purpose of the arbitration to his failure to respond to certain discovery requests. Although respondents do not mention the requests for admission in conjunction with this argument, we nonetheless note that

Bakke was previously sanctioned for this conduct by having certain of the requests deemed admitted. With regard to the failure to respond to interrogatories and requests for production of documents, respondents are correct that such conduct could be evidence of bad faith participation. In *Casino Properties, Inc. v. Andrews*, our supreme court determined that the appellant failed to participate in good faith because it did not provide information sought in discovery until 10 days prior to the arbitration, which compromised the respondents' ability to depose the proper parties and form an adequate arbitration strategy. 112 Nev. 132, 135, 911 P.2d 1181, 1183 (1996). But here, respondents do not argue, and the district court did not find, that the failure to provide the requested discovery had any impact whatsoever on the arbitration proceedings or their ability to present their case.

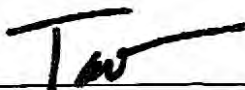
In this case, Bakke's conduct in failing to respond to interrogatories or requests for production could arguably be sufficient to warrant an alternative sanction. But given the district court's improper reliance on Bakke's failure to call witness and respondents' concession that certain of the findings the court made in support of its decision to strike the trial de novo request were not supported by the record, we cannot conclude that the failure to respond to interrogatories or requests for production, under the circumstances of this case, provides sufficient grounds for completely striking a trial de novo request. *See Gittings*, 116 Nev. at 392, 996 P.2d at 902 (concluding that, while certain of appellant's actions were insufficient to support striking a trial de novo request, the imposition of alternative sanctions may have been warranted).

For the reasons set forth above, we conclude the district court abused its discretion in striking Bakke's request for trial de novo and

entering judgment on the arbitration award. *See id.* at 391, 996 P.2d at 901.
Accordingly, we

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


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Joseph Hardy, Jr., District Judge
Barron & Pruitt, LLP
Rogers, Mastrangelo, Carvalho & Mitchell, Ltd.
Yan Kenyon
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Eighth District Court Clerk