IN THE COURT OF APPEALS OF THE STATE OF NEVADA

RYAN TROTMAN,
Petitioner,
vs.
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE JAMES CROCKETT, DISTRICT JUDGE,
Respondents,
and
REBECA OROZCO-SALVATIERRA,
Real Party in Interest.

No. 74497

ORDER GRANTING PETITION FOR WRIT OF MANDAMUS

This is an original petition for a writ of mandamus challenging a district court order denying a motion to strike a request for a trial de novo and granting a motion to amend in a personal injury action.

Petitioner Ryan Trotman was involved in a car accident with real party in interest Rebeca Orozco-Salvatierra. Rebeca filed suit, but mistakenly named Lisa Trotman in place of Ryan. In her answer to Rebeca's complaint, Lisa denied being the driver of the vehicle in the subject accident. The case proceeded through the arbitration program in the district court where Rebeca failed to conduct any written discovery. When Rebeca deposed Lisa, Lisa testified that she was not the driver of the vehicle in the subject accident.

Rebeca did not appear personally at the subsequent arbitration hearing, but was represented by counsel. Lisa's counsel had previously requested a continuance of the arbitration hearing because Rebeca's deposition, which had been noticed three times, was not completed as her

counsel had not shown for the last noticed date. The arbitrator denied the continuance prior to the hearing, but recognized that the arbitration could not go forward without Rebeca present.

At this same scheduled hearing, the parties discussed that Rebeca had not named Ryan, the driver of the subject vehicle. The arbitrator gave Rebeca six days to amend her complaint to name Ryan or the arbitrator would find for the defendant. Rebeca failed to amend her complaint in that time and the arbitrator entered an order in favor of Lisa.

Rebeca requested a trial de novo and moved the district court to amend her complaint in order to properly name Ryan. Lisa moved to strike the request for trial de novo and opposed the motion to amend. The district court granted Rebeca's motion to amend and denied Lisa's motion to strike the request for trial de novo. This petition followed.

A writ of mandamus is available to compel the performance of an act that the law requires or to control an arbitrary or capricious exercise of discretion. NRS 34.160; *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008). "Mandamus will not lie to control discretionary action, unless discretion is manifestly abused or is exercised arbitrarily or capriciously." *Round Hill Gen. Improvement Dist. v. Newman*, 97 Nev. 601, 603-04, 637 P.2d 534, 536 (1981) (citation omitted). "An exercise of discretion is considered arbitrary if it is founded on prejudice or preference rather than on reason and capricious if it is contrary to the evidence or established rules of law." *State, Dep't of Pub. Safety v. Coley*, 132 Nev. ___, ___, 368 P.3d 758, 760 (2016) (internal quotations omitted). Having considered the parties' arguments and the documents on file herein, we conclude that our extraordinary intervention is warranted. *See Smith*

v. Eighth Judicial Dist. Court, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991) (explaining that whether to consider a writ petition is discretionary).

Ryan argues that the district court denied the motion to strike and granted the motion to amend based upon an application of Nevada Rule of Professional Conduct (NRPC) 8.4(d), concluding that the rule required Lisa to affirmatively notify Rebeca that Ryan needed to be named pursuant to NRCP 16.1. Ryan claims that the district court's reasoning is clearly erroneous as the rule's directive that "[i]t is professional misconduct for a lawyer to . . . [e]ngage in conduct that is prejudicial to the administration of justice" does not create an affirmative duty for counsel to notify plaintiff of its error in naming a party. While there are no findings in the district court's written order, at the hearing, the district court used this rule as its basis for denying Lisa's motion to strike plaintiff's request for trial de novo and for granting Rebeca's motion for leave to amend her complaint. *See Pease v. Taylor*, 86 Nev. 195, 197, 467 P.2d 109, 110 (1970) ("[E]ven in the absence of express findings, if the record is clear and will support the judgment, findings may be implied.").

Ryan believes that a writ should issue to correct this interpretation and application of the NRPC, and further asserts that Rebeca's dilatory actions in failing to move to amend her complaint, even after being directed to do so by the arbitrator, warrants a denial of the motion for leave to amend. Ryan bolsters this argument by pointing out the district court's faulty reliance on *Nurenberger Hercules-Werke GMBH v. Virostek*, 107 Nev. 873, 822 P2d 1100 (1991), arguing that Rebeca did not diligently work to ascertain the identity of the driver in the subject accident. Finally, Ryan argues that pursuant to NAR 22(A), Rebeca did not meaningfully participate in arbitration by failing to serve written discovery,

to appear for deposition, to prepare an arbitration brief, to be timely and prepared for arbitration, and then ignoring the arbitrator's directive to file a motion to amend her complaint within a week following the arbitration hearing, which constitutes a waiver of the right to a trial de novo for failure to participate in good faith.

The only argument Rebeca makes in her answer to the petition is that NRPC 8.4 somehow imputes an affirmative duty on the defendant below to inform Rebeca that her complaint named the wrong party. Rebeca includes a heading relating to both the denial of the motion to strike and the granting of the motion to amend, but includes no authority or cogent argument as to the propriety of these actions on the part of the district court. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (holding that claims not cogently argued or supported by relevant authority need not be considered on appeal).

The only basis for the district court's decision in the record is the purported violation of NRPC 8.4(d). *See Marquis & Aurbach v. Eighth Judicial Dist. Court*, 122 Nev. 1147, 1156, 146 P.3d 1130, 1136 (2006) ("This court reviews a district court's interpretation of a statute or court rule . . . de novo, even in the context of a writ petition."). The district court's decision asserts that Lisa's counsel's failure to instruct Rebeca's counsel pursuant to NRCP 16.1(a)(1)(A) that Rebeca should have named Ryan as a party is a violation of the rules of professional conduct. *See* NRCP 16.1(b)(1) (requiring the parties to meet in person to consider the nature and basis of their claims and defenses and the possibilities of settlement or resolution, but not mentioning a duty to disclose a party not named). The plain language of NRCP 16.1 does not require a defendant to instruct a plaintiff on who and how to name a party. *See Morrow v. Eighth Judicial Dist. Court*,

129 Nev. 110, 113, 294 P.3d 411, 414 (2013) ("When a rule is clear on its face, we will not look beyond the rule's plain language."). And this court finds no Nevada case law, statute, or other support for the affirmative duty the district court implies, a proposition Rebeca put forth with no supporting legal authority. *See Edwards*, 122 Nev. at 330 n.38, 130 P.3d at 1288 n.38. It is a manifest abuse of discretion to require an action that is not identified in NRPC 8.4 or NRCP 16.1. *See Round Hill*, 97 Nev. at 603-04, 637 P.2d at 536; *Coley*, 132 Nev. at ___, 368 P.3d at 760.

Moreover, Rebeca did not provide any argument on appeal in support of the denial of the motion to strike and the granted motion to amend, effectively waiving any argument that those decisions were supportable.[1] *See Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) (explaining that what is not raised on appeal is waived). Without any basis in the law to assert a violation of NRPC 8.4(d), we hold that the district court abused its discretion in denying

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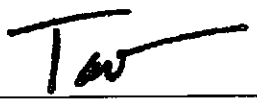
[1]We note that the district court mistakenly relied upon *Nurenberger* in considering the motion to amend, as the lack of discovery and other efforts on the part of Rebeca do not support the third prong of the standard set forth in that case. *See Sparks v. Alpha Tau Omega Fraternity, Inc.*, 127 Nev. 287, 294-96, 255 P.3d 238, 243-44 (2011) (discussing the requirements of diligence as pertains to ascertaining a defendant's true identity for the purpose of substitution of parties). Further, the record shows that Rebeca's actions in arbitration did compromise the other parties' ability to depose the proper parties and form an adequate arbitration strategy as her deposition was stymied, she didn't provide an arbitration brief, and she delayed a necessary motion to amend even after being instructed to amend her complaint by the arbitrator, which would indicate grounds under NAR 22 to strike the request for trial de novo. *See Casino Properties, Inc. v. Andrews*, 112 Nev. 132, 136, 911 P.2d 1181, 1183 (1996) (finding that parties that were untimely in providing information had not meaningfully participated in arbitration in good faith).

the motion to strike and granting the motion to amend based solely on these grounds. *See Round Hill*, 97 Nev. at 603-04, 637 P.2d at 536.

Accordingly, we

ORDER the petition GRANTED AND DIRECT THE CLERK OF THIS COURT TO ISSUE A WRIT OF MANDAMUS instructing the district court to enter an order striking the request for trial de novo and denying the motion to amend.[2]

_____, C.J.
Silver



_____, J.
Tao

_____, J.
Gibbons

cc: Hon. James Crockett, District Judge
Messner Reeves LLP
Richard Harris Law Firm
Kirst & Associates
Eighth District Court Clerk

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[2]We also note that it appears the district court erred in placing the parties back in arbitration once Orozco-Salvatierra requested a trial de novo. *See* NAR 18(D) (stating that following a timely filed request for trial de novo "the case *shall* proceed in the district court as to all parties in the action unless otherwise stipulated by all appearing parties in the arbitration.") (emphasis added); *see also Markowitz v. Saxon Special Servicing*, 129 Nev. 660, 665, 310 P.3d 569, 572 (2013) ("The word 'shall' is generally regarded as mandatory."). In light of our resolution, however, any proceedings following the request for trial de novo are void *ab initio*.