

***Bohlmann v. Printz*, 120 Nev. Adv. Rep. 62, 96 P.3d 1155 (2004)¹**

CIVIL PROCEDURE – ALTERNATIVE DISPUTE RESOLUTION

Summary

Appeal from a district court order confirming an arbitration award.

Disposition/Outcome

The arbitrator did not manifestly disregard the law in this case and therefore, the district court order confirming the arbitration award is affirmed.

Factual and Procedural History

This case arises from a collision between a motorcycle ridden by appellant Bohlmann and a truck driven by respondent Printz and owned by Ash, Inc. By written agreement, the parties submitted the case to binding arbitration. Both Ash and the Nevada Highway Patrol (NHP) took photographs of the accident scene just after the accident. The NHP photographs were admitted into evidence by the arbitrator, but the Ash photographs were lost or destroyed before the request for their production because Ash had gone out of business between the accident and the time that the complaint was filed. The arbitrator denied Bohlmann's request to apply a presumption that the lost photographs would have shown evidence that the impact was in Bohlmann's lane. Instead, an NHP officer testified that according to his personal observations of the scene that gouge marks left by the motorcycle were in Printz's lane and thus the point of impact was in Printz's lane.

The arbitrator ruled in favor of Printz and Ash. The arbitrator also indicated that the loss of the photographs by Ash was of little consequence because of the NHP photographs along with the officer's testimony. Bohlmann then filed a motion to vacate the arbitration award alleging that the arbitrator had manifestly disregarded the law by misapplying Nevada law on destruction and or preservation of evidence. The district court disagreed with Bohlmann and confirmed the arbitration award.

Discussion

Prior to addressing Bohlmann's individual arguments, the Nevada Supreme Court discussed the standard of review in reviewing an arbitrator's actions. A district court does not review an arbitrator's actions as an appellate court would review a trial court's actions. An arbitration award may only be vacated if it is "arbitrary, capricious, or unsupported by the agreement" or when an arbitrator has "manifestly disregarded the law."² Here, Bohlmann asserts manifest disregard of the law as the reason that the award should be vacated.

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² See *Wichinsky v. Mosa*, 109 Nev. 84, 89-90, 947 P.2d 727, 731 (1993).

1. Manifest disregard of the law.

A manifest disregard of the law encompasses an error that is “obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator.”³ In order to find a manifest disregard for the law, the arbitrator basically has to appreciate that a particular legal principle should govern and then decide to ignore it in making a decision.⁴ Thus, manifest disregard for the law is a very strict standard and it is difficult to surmount.⁵ Here, after reviewing the applicable portions of the record, the district court correctly concluded that the arbitrator did not manifestly disregard the law by not applying a spoliation presumption in Bohlmann’s favor because Ash lost or destroyed the accident scene photographs.

2. Spoliation presumption.

In Nevada, there is a rebuttable presumption that “evidence willfully suppressed would be adverse if produced.”⁶ A trier of fact may draw this adverse inference, but whether the evidence was willfully suppressed or destroyed is highly factual in nature and the arbitrator can weigh evidence presented by the parties. Here, the arbitrator weighed all of the evidence about the loss and or destruction of Ash’s photographs and determined that the loss was of little consequence in the proceeding. The arbitrator did not find that the evidence was willfully suppressed in order to apply the spoliation presumption and then ignore the evidence which would be grounds for a challenge of manifest disregard for the law.

Conclusion

Bohlmann argued that the arbitrator manifestly disregarded the law by not applying a spoliation presumption in his favor because respondents lost or destroyed the accident-scene photographs. The Nevada Supreme Court found that the record did not indicate that the arbitrator found that evidence was willfully suppressed and concluded that the presumption had to be applied, but then simply ignored or paid no attention to the spoliation presumption. Instead, the award showed that the arbitrator considered and weighed all of the evidence, including the loss or destruction of the photographs, before determining that the owner’s failure to retain the photographs was of little consequence.

³ Graber v. Comstock Bank, 111 Nev. 1421, 1426, 905 P.2d 1112, 1115 (1995) (quoting French v. Merrill Lynch, Pierce, Fenner & Smith, 784 F.2d 902, 906 (9th Cir. 1986)).

⁴ *Id.*

⁵ See Bret F. Randall, Comment, *The History, Application, and Policy of the Judicially Created Standards of Review for Arbitration Awards*, 1992 BYU L. REV. 759, 765-67 (noting that manifest disregard for the law is a virtually insurmountable standard of review).

⁶ NEV. REV. STAT. 47.250(3) (2005).