COURT OF APPEALS
DECISION
DATED AND FILED

December 16, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 96-2424

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

JAMES HAYETT,

PLAINTIFF-APPELLANT,

V.

KEMPER SECURITIES, INC.,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County: JACQUELINE D. SCHELLINGER, Judge. *Affirmed.*

Before Fine, Schudson and Curley, JJ.

CURLEY, J. James Hayett appeals from the trial court's order denying his motion to vacate an arbitration award that dismissed his action against his former employer, Kemper Securities, Inc. Hayett claims, for a number of reasons, that the arbitration award should be vacated because, under § 788.10, STATS., there was "evident partiality" on the part of the arbitrators. Because

Hayett has failed to establish evident partiality as defined by § 788.10(1)(b), STATS., we affirm.

I. BACKGROUND.

Hayett worked as a securities broker for Kemper Securities for approximately six years. He left Kemper in May of 1990 after disobeying an order not to have contact with a complaining customer while Kemper was investigating the matter.[1] A requirement of the National Association of Securities Dealers (NASD), which regulates the securities business, obligated Kemper to file a form called a Uniform Notice of Termination (U-5) upon Hayett's departure.[2] In order to obtain new employment in the securities field, Hayett was required to provide copies of the U-5 to prospective employers. During Hayett's search for new employment, he discovered that Kemper had filed a U-5 indicating he had misappropriated money from a customer. Later, Kemper corrected the contents by filing an amended U-5 which stated: "There was no evidence that funds had been misappropriated, nor had the client asserted any such claim."

Based upon the filing of the initial U-5, Hayett sued Kemper claiming, *inter alia*, that he was defamed and that Kemper's action in filing the original U-5 hampered his job search, resulting in a substantial business loss as he was unemployed for approximately six weeks. Kemper answered the complaint and, in its answer, notified Hayett that he had obligated himself to arbitrate this dispute under the terms of his membership in the NASD. This led to the parties'

[1] Hayett states he was terminated; Kemper describes his departure as a resignation.

[2] The NASD both operates the NASDAQ Stock Exchange and regulates the activities of the NASDAQ members and their agents. The NASD, as a condition of registration, requires arbitration of disputes between its brokers and agents.

agreement to arbitrate the matter, a process that took over four months to complete. Ultimately the arbitration was decided in favor of Kemper. Hayett then sought to vacate the arbitration award in the circuit court. The trial court denied his motion, finding that there was no basis to vacate the arbitration award under the provisions of § 788.10(1)(b), STATS. Hayett now appeals.

Standard of Review

Arbitration awards are presumed valid and may only be vacated upon a showing that a statutory ground for vacatur exists. ***Richco Structures v. Parkside Village*, *Inc.***, 82 Wis.2d 547, 553, 263 N.W.2d 204, 209 (1978). Section 788.10(1)(b), STATS., requires a trial court to vacate an arbitration award upon proof, by clear and convincing evidence, that there was evident partiality on the part of the arbitrator. *See* ***DeBaker v. Shah***, 194 Wis.2d 104, 117, 533 N.W.2d 464, 468 (1995); § 788.10(1)(b), STATS. An arbitrator is evidently partial if a reasonable person would "conclude it 'evident', that is clear, plain, and apparent," that the arbitrator was partial to one party to the arbitration. *See* ***DeBaker***, 194 Wis.2d at 117, 533 N.W.2d at 468. Whether the facts of a case meet the evident partiality standard of § 788.10(1)(b), STATS.,[3] is a question of law which we review *de novo*. ***Id***. at 112, 533 N.W.2d at 466.

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[3] Section 788.10, STATS., provides:

> **Vacation of award, rehearing by arbitrators.**
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> **(1)** In either of the following cases the court in and for the county wherein the award was made must make an order vacating the award upon the application of any party to the arbitration:
>
> (a) Where the award was procured by corruption, fraud or undue means;

(continued)

II. ANALYSIS.

Hayett argues that the arbitration award should be vacated because the following facts show evident partiality on the part of the arbitrators: (1) the NASD arbitration rules were not followed; i.e., discovery requests were untimely, his request for an adjournment was denied, the entire hearing was not transcribed, and there was a delay of three months in the hearing; (2) the NASD refused to supply him with a copy of the arbitrators' findings of fact and conclusions of law; (3) statistics show that broker dealers are more successful in arbitration awards than are security agents, hence, there is a systemic bias against him; and, finally, (4) one of the witnesses who testified before his arbitration panel became a member of an NASD committee during the arbitration process; therefore, the panel must have favored this witness's testimony. We conclude that none of these facts prove by clear and convincing evidence that the arbitrators were evidently partial.

Hayett first argues that the arbitration panel's failure to follow its own rules shows evident partiality. He cites to various discovery problems he

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> (b) Where there was evident partiality or corruption on the part of the arbitrators, or either of them;
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> (c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced;
>
> (d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made.
>
> **(2)** Where an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.

encountered, both prior to the arbitration hearing, as well as during the hearing. Alleged rule violations include untimely responses to his discovery requests, which led to his request for adjournment which was denied; a three-month delay between the presentation of his case and the calling of Kemper's witnesses; and the failure of the NASD officials to transcribe the entire hearing. According to Hayett, these violations are examples of industry bias and, as such, are synonymous with evident partiality.

Although discovery requests were resisted by Kemper, Hayett ignores the fact that he prevailed on these matters. The arbitrators required Kemper to turn over a multitude of documents and permitted the deposition of Kemper's witness. Since the arbitrators sided with Hayett on these issues, it is difficult to view their decision as evidence of bias against him. The record also reflects that the delay was occasioned by the fact that the entire arbitration was originally scheduled to take only five days, but Hayett did not finish his presentation until the fourth day. Thus, contrary to Hayett's suggestion that the arbitration was delayed to assist Kemper in preparing a defense, it appears that Hayett's actions were partly to blame for the adjournment.

Hayett also claims that the panel was evidently partial because "over half of the record of the first five hearing sessions either were [sic] never made or were destroyed by the NASD." In his reply brief, Hayett claims that the NASD's failure to record the hearings violated NASD Code of Arbitration Procedure section 37, and that the NASD's actions are a "fundamental problem." Section 788.10(1)(c), STATS., provides, in part, that the circuit court "must make an order vacating the award … [w]here the arbitrators were guilty … of any other misbehavior *by which rights of any party have been prejudiced*." (Emphasis added.) Although it is difficult to precisely discern the exact nature of Hayett's

argument, we presume that his statement that the NASD's actions created a "fundamental problem" amounts to a claim that his rights were prejudiced by their alleged failure to record certain testimony. We are not persuaded by Hayett's argument.

First, Hayett has only provided us with a specific citation to a NASD Code of Arbitration Procedure section in his reply brief, rather than in his brief in chief. Second, Hayett has not included a copy of the NASD Code of Arbitration Procedures, or even a relevant subsection of the rules, in the appendix to his brief. As has been oft repeated, the court of appeals is not a performing bear, and we do not appreciate Hayett's unexplained failure to provide us with a copy of these administrative procedures. *See* ***State v. Waste Management, Inc.***, 81 Wis.2d 555, 564, 261 N.W.2d 147, 151 (1978). Third, the only specific claims which Hayett makes which would support an allegation of prejudice involve the alleged failure of the NASD to record the testimony of Gerald Baker. However, although Hayett claims that "there is no record of Mr. Baker ever being called to testify," Hayett admits, in the very next sentence in his reply brief, that a record does in fact exist. This is not surprising since the record does contain a sixteen-page transcript of Baker's testimony in response to questioning by Hayett's attorney. In addition, contrary to Hayett's claim that "there is no record of the introductory questioning of Mr. Baker," the sixteen pages of testimony begins with Baker being sworn in as a witness.

Fourth, even assuming that there are relevant portions of Baker's testimony that were not transcribed, Hayett has failed to persuasively argue that he was prejudiced by the NASD's failure to transcribe that testimony. Hayett claims to present "numerous illustrations of the fundamental problem of the lack of a record," but goes on to name only two problems in his particular case. Hayett first

states that "respondent's brief repeats the assertion that Mr. Baker was a witness 'called by Mr. Hayett.'" Thus, Hayett seems to be implying that he did not call Baker as a witness. Hayett, however, admits in his brief in chief that Baker was his witness, and the transcript reveals that Hayett's attorney did in fact question Baker on direct examination. Therefore, this claim of prejudice makes little sense. Hayett then seems to claim that he has been prejudiced because "there is no record of the introductory questioning of Mr. Baker, wherein he would have disclosed his position and relationship with the NASD to the panel." To the contrary, Baker's affidavit asserts that he did not disclose his relationship to the panel. Hayett, however, has not stated exactly what Baker would have testified to, or how the lack of that information prejudices his appeal. Instead, Hayett seems to claim that, without the transcript, which as stated previously does in fact exist, he cannot prove what Baker testified to, and therefore cannot succeed on appeal. Baker, however, was Hayett's witness. Hayett presumably would remember what he had asked Hayett and what his answers had been. Therefore, Hayett's claims seem disingenuous at best. Thus, for all of the preceding reasons, we conclude that Hayett has failed to show that the NASD's failure to record the entire proceeding constitutes misbehavior which prejudiced his rights.

Hayett next contends that the NASD's failure to supply him with the findings of fact and conclusions of law which originally accompanied the arbitrators' decision shows evident partiality. Hayett, while conceding he is not entitled to these findings and conclusions under the NASD rules, nevertheless argues that their failure to provide them is "a deliberate attempt by the NASD to reduce the chances of a successful appeal of an arbitration decision," which proves evident partiality. We disagree. The only requirement found in Chapter 788 concerning the arbitrators' decision is that it be in writing. Hayett was provided a

written decision signed by the panel members. Accordingly, this argument also fails to prove evident partiality.

Hayett attempts to prove evident partiality on the basis of certain reports and statistical information which attack the NASD's performance as a self-regulating organization. One of the submitted reports reflects the Security and Exchange Commission's (SEC) dissatisfaction with the way the NASD runs the NASDAQ stock exchange. His submitted research also includes evidence that securities agents prevail in only 12% of arbitration proceedings between agents and brokers. Hayett posits that this is sufficient proof that the arbitration process is flawed and, therefore, evidence of evident partiality. We are not persuaded.

First, the SEC reports say virtually nothing about the propriety of the way the NASD conducts its arbitrations. The fact that the NASD may or may not be a good watchdog of the stock exchange does not lead to Hayett's desired conclusion that its arbitration panels are biased in favor of the industry. Moreover, he has presented nothing that suggests that the individual members of his panel evinced any bias towards him, nor has he proven that his panel members were involved in arbitrations which were captured by the statistical data he cited. The evident partiality requirement of § 788.10(1)(b) is a reasonable person standard which is only met when a reasonable person would "conclude it 'evident', that is, clear, plain, and apparent," that the arbitrator was partial to one party to the arbitration. *See* ***DeBaker***, 194 Wis.2d at 117, 533 N.W.2d at 468. The arguments offered by Hayett do not satisfy the reasonable person standard. "It is the supreme court's policy to encourage arbitration and [a]n arbitrator's award is therefore presumptively valid and will be disturbed only where invalidity is shown by clear and convincing evidence." ***McKenzie v. Warmka***, 81 Wis.2d 591, 598, 260

N.W.2d 752, 755 (1978). Here, without more, Hayett has not met his burden of proof.

Finally, Hayett claims the panel displayed evident partiality because a fact witness that he called to testify became a member of a NASD committee several months after testifying at his arbitration. Hayett posits that the panel must have favored Kemper because of the testimony of this high ranking NASD committee member. Gerald Baker, the compliance officer for Kemper, was, indeed, a witness in the case, and he testified as a fact witness to one of the key issues in the case—whether at the time of the U-5 filing Kemper had a reasonable basis for reporting the claimed misappropriation. Baker, however, did not become a member of the NASD Business Conduct Committee of District 8 (DBCC) until months after his testimony. Hayett's belief that the arbitrators knew of his forthcoming committee membership is purely speculative. Further, an affidavit presented to the trial court reflects that Baker knew none of the arbitrators, nor has he ever spoken with them since this arbitration. Moreover, the work of the DBCC is unrelated to that of the arbitration panels.

We also note that it was Hayett, not Kemper, who called this witness. Certainly Hayett would have explored this witness's credentials before calling him. Finally, Hayett's complaint that he has no idea whether Baker disclosed any relationship with the members of the arbitration panel or his committee membership due to the failure of the panel to record the hearing appears to be disingenuous. As noted previously, there is a transcript of Baker's direct examination. Secondly, surely Hayett would recall the answers he asked of his own witness regarding his relationship with the panel members as well as his professional involvements. It is Hayett's burden to present clear and convincing evidence of evident partiality. He has failed to do so.

Inasmuch as arbitration awards are presumed to be valid, Hayett has failed to substantiate his claim of "evident partiality." For the aforementioned reasons, we affirm.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

SCHUDSON, J. *(dissenting)*. Most of Hayett's arguments are weak. One argument, however, is ironclad.

The majority refers to Hayett's argument regarding "the failure of the NASD officials to transcribe the entire hearing." Majority, slip op. at 5. Hayett's briefs, however, do not merely argue that NASD failed "to transcribe the entire proceeding." His brief-in-chief specifically argues that "contrary to its own rules, … the NASD either failed to record, or destroyed much of the testimony of the witnesses during the first five hearing days." Kemper, merely responding that Hayett's argument is "only innuendo about failed tape recordings," never disputes Hayett's contention and, therefore, admits that NASD failed to make or preserve the record. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Securities Corp.***, 90 Wis.2d 97, 109, 279 N.W.2d 493, 499 (Ct. App. 1979) (unrefuted arguments are deemed admitted). Hayett's reply brief further specifies that "[t]he NASD Code of Arbitration Procedure Sec. 37 specifically provides that a stenographic report[] or a tape recording of all arbitration hearings *shall* be kept."

Hayett is correct. Section 37 of the Code of Arbitration Procedure provides:

> *A verbatim record by stenographic reporter or tape recording of all arbitration hearing shall be kept.* If a party or parties to a dispute elect to have the record transcribed, the cost of such transcription shall be borne by the party or parties making the request unless the arbitrators direct otherwise. The arbitrators may also direct that the record by transcribed. If the record is transcribed at the request of any party, a copy shall be provided to the arbitrators.

(Emphasis added.)[4] Section 788.10(1)(c), STATS., in part, provides that the circuit court "*must make an order vacating the award* … [w]here the arbitrators were guilty … of *any other misbehavior by which the rights of any party have been prejudiced*." (Emphasis added.) Of course, one of the "rights of any party" in a NASD arbitration action is the right to appeal. Without the recording "of all arbitration hearings" as required by sec. 37, a transcript can never exist for circuit court or appellate review and the appeal right becomes meaningless.

Thus, under § 788.10(1)(c), NASD's violation of its own rule requiring that a record be maintained "prejudiced" Hayett by effectively eliminating his right to both circuit court and appellate review. Accordingly, I respectfully dissent.

[4] The majority is miffed by Hayett's failure to "include[] a copy of the NASD Code of Arbitration Procedures, or even a relevant subsection of the rules, in the appendix to his brief." Majority, slip op. at 6. Although I agree he should have done so, I also point out that Hayett did refer to the relevant rule accurately and specifically. Thus, looking it up was an easy task–certainly not the judicial dance of a "performing bear." *See* ***State v. Waste Management, Inc.***, 81 Wis.2d 555, 564, 261 N.W.2d 147, 151 (1978).