

IN THE SUPREME COURT OF THE STATE OF NEVADA

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JOHN S. WALKER, and RALPH

ORTEGA,

Petitioners,

Case No.:

Electronically Filed
Mar 04 2020 10:42 a.m.
Elizabeth A. Brown
Clerk of Supreme Court
80358

VS.

THE SECOND JUDICIAL DISTRICT

COURT and BARRY L. BRESLOW, as

District Court case nos.:

District Judge,

CV18-01798 and CV18-02032

Respondents.

SHEILA MICHAELS, and KATHERYN

FRITTER, real parties in interest.

REPLY IN FURTHER SUPPORT OF MOTION TO STAY SHORT TRIAL

PROCEEDINGS

Petitioners, JOHN S. WALKER and RALPH ORTEGA, hereby file their Reply in Further Support of Motion to Stay Short Trial Proceedings, and submits the following Points and Authorities, exhibits and argument in support thereof.

Dated this 4th day of March, 2020.

William R. Kendall /s/

William R. Kendall, Esq.

State Bar No. 3453

137 Mt. Rose Street

Reno, NV 89509

POINTS AND AUTHORITIES

1. Irreparable or serious injury to Petitioners

Petitioners have not asserted preservation of resources, time, effort or financial reasons to stay the short trial proceedings.

Respondents argue that Petitioners have “already wasted resources, time and effort by waiting to file the writ petition and the motions to stay. In response to this, Petitioners point out that there is no proscribed time frame for filing a writ of mandamus or motions to stay. Furthermore, although the writ process is an “extraordinary” proceeding, in this case it is not an “emergency.” No one is going to die, no property will be irretrievable lost, and there is no danger of losing evidence or witnesses.

However, allowing the short trials to go forward while the writ is still pending could result in:

1. Short trial verdicts;
2. A writ from the Supreme Court reversing the District Court and ordering the Requests for Trial De Novo stricken;
3. A resulting incongruency where short trials should never have taken place in light of the potential writ order;
4. A resulting procedural issue on how to reconcile the short trial verdicts and a writ striking the trial de novos that lead to the verdicts.

All of the above can be avoided by simply postponing the short trials until the

1 Supreme Court has ruled upon the writ petition. No one would be prejudiced by the
2 delay and justice will eventually be served.

3 Furthermore, regardless of what could happen at short trial, the alleged bad
4 faith participation in the arbitration process by requesting trial de novo in every case
5 that they loose without regard to the facts and circumstances of each individual case
6 would persist. Such conduct is in great need of review by this Court as it severely
7 undermines the Arbitration Program.
8

9 **2. Prevailing on the merits**

10 Petitioners demonstrated that of the 10 cases that McMillen/Farmers took to
11 arbitration and lost (from the beginning of McMillen's employment with Farmers),
12 they filed requests for trial de novo **in every single one of them.** That is a 100%
13 de novo rate. In striking contrast, the Nevada Supreme Court statistics show a
14 consistent de novo rate in Washoe County of about 15 % over 15 years. (See 2015
15 Annual Report of the Nevada Judiciary, ADR summary, at p. 35.)
16

17 Respondents make the fallacious argument that every case McMillen has ever
18 handled in his career with Farmers ought to be considered when assessing his de
19 novo rate. Of course, that is erroneous when we are only assessing the cases
20 which McMillen/Farmers lost at arbitration and thereafter filed for trial de novo.
21

22 McMillen/Farmers claims about their successes at short trial are simply
23 wrong. A close analysis of the cases that went to short trial, as was done by
24 Petitioners at the evidentiary hearing, demonstrates that McMillen/Farmers obtained
25
26
27

1 a better financial outcome in only one case.

2 McMillen/Farmers’ entire discussion of what Petitioner’s Statistical Analysis
3 expert “did not consider” is irrelevant and are simply multiple “red herrings.” They
4 continue to attempt to divert the focus from McMillen/Farmers’ abominable de
5 novo rate to a multitude of case that have nothing to do with requesting trial de
6 novos.
7

8 To criticize the expert for not offering an opinion on whether
9 McMillen/Farmers files for trial de novo without regard to the facts and
10 circumstances of each case is disingenuous and fallacious. The expert’s opinions
11 were limited to statistical analysis of the high de novo rate of McMillen/Farmers. It
12 was not his place to then draw any conclusions from that circumstantial evidence.
13

14
15 **3. Proof that McMillen/Farmers filed requests for trial de novo in every**
16 **case without regard to the facts and circumstances of each case.**

17 It is fantasy to expect that there would ever be direct evidentiary proof that
18 they filed for trial de novo in every case without regard to the facts and
19 circumstances of each case. There would never be a witness break down and
20 confess on the witness stand. Nor would there ever be a “smoking gun” memo from
21 Farmers to McMillen instructing him to file for trial de novo without regard to the
22 facts and circumstances of each case.
23

24
25 So how is it proven that they engaged in such bad faith conduct? In *Gittings*
26 *v. Hartz*, 116 Nev. 386 (2000), the Supreme Court instructs on how such evidence
27

1 could be presented. The Court says: "...competent statistical information that
2 demonstrates that an insurance company has routinely filed trial de novo requests
3 without regard to the facts and circumstances of each individual case may be used
4 to support a claim of bad faith." *Gittings* at 394. A 100 % rate demonstrates that
5 filing a request for trial de novo is "routine." This is sufficient circumstantial
6 evidence of bad faith.
7

8 Thus, statistical analysis of the McMillen/Farmers 100% de novo data can
9 and has been presented to show that they file for trial de novo in every case without
10 regard to the facts and circumstances of each case.
11

12 Petitioners submit that they have a likelihood of prevailing on the merits.

13 **First** the uncontroverted evidence shows that McMillen/Farmers filed for
14 trial de novo in every case (100 %) they lost since McMillen began working
15 for Farmers. This is circumstantial evidence of bad faith.
16

17 **Second**, uncontroverted and un-impeached expert statistical analysis
18 testimony was presented establishing that McMillen/Farmers de novo cases at an
19 alarmingly higher rate than the 15 % average experienced in Washoe County.
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21 **Third**, the District Court chose to disregard the un-assailed expert testimony
22 and substitute his own lay opinions in place thereof in order to reach his
23 conclusions. This is an abuse of discretion.
24

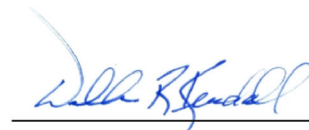
25 **Fouth**, *Gittings* held that "This statistic [52 %] raises a question in this
26 court's mind as to whether this percentage constitutes bad faith per se in violation
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28

1 of Rule 2(A) of the Nevada Arbitration Rules.” *Gittings* at 391-392. Disregarding
2 the strikingly higher de novo rate of McMillen/Farmers as compared to the 52 %
3 rate of Allstate in *Gittings*, the District Court abused its discretion in not finding
4 that McMillen/Farmers percentage constituted bad faith per se in violation of Rule
5 2(A) of the Nevada Arbitration Rules.
6

7 **4. Conclusions**

8 Petitioners submit that an order staying the short trial proceedings in both
9 cases is warranted. The fact is, it just makes good judicial sense to stay the short
10 trial proceedings while the Supreme Court is evaluating the Petition for a Writ of
11 Mandamus.
12

13 Respectfully submitted, this 4th day of March, 2020.
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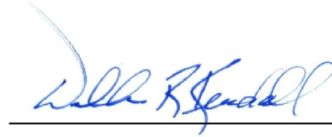
22 (775) 324-6464

23 Attorney for Petitioners
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Respondent

Dated this 4th day of March, 2020.



William R. Kendall