IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN S. WALKER, and RALPH ORTEGA,

Petitioners,

vs.

THE SECOND JUDICIAL DISTRICT COURT and BARRY L. BRESLOW, as District Judge,

Respondents.

SHEILA MICHAELS and KATHERYN FRITTER, real parties in interest.

Case No. 80358

Electronically Filed
May 28 2020 01:53 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

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IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN S. WALKER, and RALPH ORTEGA, Petitioners, vs. THE SECOND JUDICIAL DISTRICT COURT and BARRY L. BRESLOW, as District Judge, Respondents. SHEILA MICHAELS and KATHERYN FRITTER, real parties in interest.	Case No. 80358

NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the justices of this court may evaluate possible disqualification or recusal.

1. All parent corporations and publicly-held companies owning 10 percent or more of the party's stock: None; real parties in interest are individuals.

2. Names of all law firms whose attorneys have appeared for the party or amicus in this case (including proceedings in the district court or before an administrative agency) or are expected to appear in this court:

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Law Offices of Karl H. Smith - Reno

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3. If litigant is using a pseudonym, the litigant's true name: N/A

DATED: May 28, 2020

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TABLE OF CONTENTS

NOTE REGARDING PETITIONERS' APPENDIX 1

STATEMENT OF FACTS AND PROCEDURAL BACKGROUND 1

A. Statement of facts regarding Walker v. Michaels case 1

B. Statement of facts regarding Ortega v. Fritter case 3

C. Procedural background for the two cases after the de novo requests 4

1. The two cases were consolidated for the motions to strike 4

2. Judge Breslow holds an evidentiary hearing 5

a. Arguments of counsel 5

b. Gilbert Coleman's testimony 7

c. The district court rendered its decision at the conclusion of the evidentiary hearing 9

ARGUMENT 10

A. Extraordinary relief is neither available nor appropriate 10

1. General legal principles applicable to writs of mandamus 11

a. A petitioner must establish the district court's failure to comply with a mandatory duty, or the district court's manifest abuse of discretion 11

b. A petitioner must also demonstrate the lack of a plain, speedy and adequate remedy at law 12

c. A writ petitioner must establish a legal question; this court will not determine factual questions 13

2. Petitioners have failed to satisfy these requirements.....14

a. Petitioners have not established the district court's failure to comply with a mandatory duty, or the district court's manifest abuse of discretion.....14

b. An extraordinary writ should be denied because Petitioners have not established the lack of a plain, Speed and adequate remedy at law.....15

c. A writ should be denied because the petition seeks review of factual determinations 18

B. Defendants did not waive their constitutional right to jury trials 20

1. The constitutional right to a jury trial cannot be waived excepts in a manner prescribed by law 20

2. There was no showing of bad faith "during the arbitration proceedings".....21

a. A request for trial de novo is not filed during the arbitration proceedings; it is filed *after* the proceedings.....21

b. There was no failure to participate in good faith during the arbitration proceedings.....23

(1) The defense meaningfully participated in the Ortega case during the arbitration proceedings 24

(2) The defense meaningfully participated in the Walker case during the arbitration proceedings 26

C. There was no bad faith involving the requests for trial de novo.....26

1. *Gittings* does not support broad reliance on conclusory opinions and incomplete statistics 27

2. The district court did not manifestly abuse its discretion by finding the statistics insufficient to establish bad faith 31

a. The district court was not required to accept Petitioners' incomplete and unconvincing statistics 31

b. McMillen and Farmers considered the facts and circumstances of each case when deciding whether to request a trial de novo 34

c. The statistics were not sufficient for this court to find that the district court manifestly abused its discretion 37

D. The district court did not manifestly abuse its discretion regarding Coleman 40

CONCLUSION 45

TABLE OF AUTHORITIES

Cases

Albert H. Wohlers & Co. v. Bartgis,
114 Nev. 1249, 969 P.2d 949 (1998) 19

Allstate Ins. Co. v. Miller,
125 Nev. 300, 212 P.3d 318 (2009) 18

Barngrover v. Fourth Judicial Dist. Court,
115 Nev. 104, 979 P.2d 216 (1999) 13

California v. Green,
399 U.S. 149 (1970) 43

Casino Props. Inc. v. Andrews,
112 Nev. 132, 911 P.2d 1181 (1996) 18, 23

Chamberland v. Labarbera,
110 Nev. 701, 877 P.2d 523 (1994) 21, 23

Consol. Generator-Nevada, Inc. v. Cummins Engine Co., Inc.,
114 Nev. 1304, 971 P.2d 1251 (1998) 18

Davis v. Barkaszi,
35 A.3d 739 (N.J. Super. 2012) 43, 44

Edsall v. Huffaker,
859 A.2d 274 (Md. App. 2004) 43

Ewing v. Sargent,
87 Nev. 74, 482 P.2d 819 (1971) 40, 41

Gittings v. Hartz,
116 Nev. 386, 996 P.2d 898 (2000) 4, 8, 20, 22, 23, 24, 27, 28, 29, 30, 31, 36, 37, 39

Haley v. District Court,
128 Nev. 171, 273 P.3d 855 (2012) 11

Hansen v. Eighth Judicial Dist. Court,
116 Nev. 650, 6 P.3d 982 (2000) 12, 16

Harrison v. Roitman,
131 Nev. 915, 362 P.3d 1138 (2015) 42

Heilig v. Christensen,
91 Nev. 120, 532 P.2d 267 (1975) 12

Hickey v. Eighth Judicial Dist. Court,
105 Nev. 729, 782 P.2d 1336 (1989) 13

Mitchell v. Bailey & Selover, Inc.,
96 Nev. 147, 605 P.2d 1138 (1980) 18

NAD, Inc. v. Eighth Judicial Dist. Court,
115 Nev. 71, 976 P.2d 994 (1999) 13

Otak Nevada, LLC v. Eighth Judicial Dist. Court,
129 Nev. 799, 312 P.3d 491 (2013) 19

Pan v. Eighth Judicial Dist. Court,
120 Nev. 222, 88 P.3d 840 (2004) 10, 12

Panko v. Grimes,
123 A.2d 799 (N.J. Super. 1956) 43

People v. Arias,
913 P.2d 980 (Cal. 1996) 42

Poulos v. Eighth Judicial Dist. Court,
98 Nev. 453, 652 P.2d 1177 (1982) 10

Quintero v. McDonald,
116 Nev. 1181, 14 P.3d 522 (2000) 41, 42

Round Hill Gen. Imp. Dist. v. Newman,
97 Nev. 601, 637 P.2d 534 (1981) 13

Saavedra-Sandoval v. Wal-Mart Stores, Inc.,
126 Nev. 592, 245 P.3d 1198 (2010) 22

Seim v. State,
95 Nev. 89, 590 P.2d 1152 (1979) 20

Smith v. District Court,
107 Nev. 674, 818 P.2d 849 (1991) 10

State v. District Court (Armstrong),
127 Nev. 927, 267 P.3d 777 (2011) 11, 15, 40

State v. Wright,
4 Nev. 119 (1868) 11, 12

Thomas v. Eighth Judicial Dist. Court,
133 Nev. 468, 402 P.3d 619 (2017) 14

United States v. Tavares,
843 F.3d 1 (1st Cir. 2016) 42

Washoe County v. City of Reno,
77 Nev. 152, 360 P.2d 602 (1961) 12, 16, 17

Wier v. Allstate Ins. Co.,
2018 WL 1308570 (Mich. App.; March 13, 2018; unpublished) 44

Wrenn v. State,
89 Nev. 71, 506 P.2d 418 (1973) 42

Wynn Resorts, Ltd. v. Eighth Judicial Dist. Court,
133 Nev. 369, 399 P.3d 334 (2017).....13, 14

Rules and Statutes

NRAP 30(c)(1) 1
NRS 34.160 11
NRS 34.170.....12
NAR 22 .....18, 21, 23, 26
NAR 22(A) 18, 21, 22, 23

Other

Merriam-Webster Online Dictionary (2020) 14
Nevada Constitution 20, 21
J. Wigmore, *Evidence,* §§ 2034, 1367 (3rd ed. 1940)…….. 41, 43

NOTE REGARDING PETITIONERS' APPENDIX

Petitioners' appendix is a mass of confusion. For example, it contains multiple volumes, with volume numbers that do not seem logical, and with different methods of numbering the pages in the different volumes. It fails to comply with NRAP 30(c)(1), because it contains a transcript that does not have appendix page numbers. And it is incomplete, because it omits several pages of exhibits that were attached to defense counsel's declaration in opposition to the motion to strike in the Ortega case.[1]

Despite these shortcomings, this answer will attempt to provide accurate appendix citations, to the extent possible.

STATEMENT OF FACTS AND PROCEDURAL BACKGROUND

A. Statement of facts regarding Walker v. Michaels case.[2]

On June 16, 2018, Defendant Michaels was making a right turn when Plaintiff Walker was riding his bicycle, without a helmet, and ran into the right

[1] In the Ortega case there were 14 exhibits attached to the opposition to the motion to strike. 1 App. 205. Petitioners' appendix contains a cover page for Exhibit 8, but not the actual exhibit. And the appendix omits Exhibits 9 through 12. These missing documents are provided in the appendix accompanying this answer.

[2] The facts in this portion of the answer are primarily taken from the facts set forth in Michaels's opposition to the motion to strike her request for trial de novo. 6A App. 166. Each fact recited in the opposition is supported by a citation to the exhibit or the part of the McMillen declaration where the fact can be found. These facts were not contested to any significant degree during proceedings on the motions to strike the requests for trials de novo.

side of Michaels's vehicle. Plaintiff was going "around 8 to 12 miles an hour." 6A App. 166:21-24. As he approached the intersection he saw pedestrians crossing the street when he was about 40 feet from the crosswalk. 6A App. 166:24-28. Three or four vehicles had stopped to let the pedestrians cross the street, and the Michaels vehicle was at the front. *Id.*

Walker was about 30 feet behind the Michaels vehicle when he saw the vehicle, and Michaels had already "proceeded into a right turn." 6A App. 167:1-5. Walker testified that the Michaels vehicle was moving slowly, executing a right turn, when Walker proceeded to run into the Michaels vehicle. *Id.* at 167:4-8.

After the accident, Walker said he was okay; police were not called; and Walker was not taken away by ambulance. *Id.* at 167:12-13. Walker went to Renown the next day and was diagnosed with unspecified sprains of the right shoulder and elbow. *Id.* at 167:18-19. He claimed approximately $9,109.00 in medical expenses and lost wages of less than $500. *Id.* at 167:18-21.

An independent witness, Don Mello, saw everything. He was following the Michaels vehicle; he saw Michaels stop for a pedestrian at the intersection, with her right turn signal on; and he saw Michaels start the right turn when the pedestrian finished crossing the street. *Id.* at 167:22-25; 168:4 (turn signal was on). Mello observed that Walker was accelerating on his bicycle as he passed Mello's vehicle; Walker continued to accelerate as Michaels initiated the right

turn; and Walker rode his bicycle into the side of Michaels's car. *Id.* at 167:26 – 168:3. Mello believed Walker had time to hit his brakes and stop, but he did nothing to try and stop. *Id.* at 168:4-7.

Walker sued Michaels, and the case proceeded to arbitration in the court annexed arbitration program. The defense served an offer of judgment in the amount of $1,001, reflecting the defense evaluation of what the case was worth. 6B App. 245. The arbitrator (a personal injury plaintiff attorney, Graham Galloway) awarded $12,469.60, with only a 20 percent deduction for comparative fault (for an accident that could have easily been viewed as entirely the plaintiff's own fault). 6A App. 168:13-16. With an arbitration award that was more than 12 times the amount of the defense evaluation of the case reflected in the offer of judgment, Michaels filed a request for trial de novo.

B. Statement of facts regarding Ortega v. Fritter case.[3]

This case stemmed from an auto accident that occurred on November 6, 2017 at an intersection in Reno. It was undisputed that Defendant Fritter rear-ended Plaintiff Ortega; the only dispute was the extent of damages resulting from

[3] The facts in this portion of the answer are primarily taken from the facts set forth in Fritter's opposition to the motion to strike her request for trial de novo. 1 App. 206. Each fact recited in the opposition is supported by a citation to the exhibit or the part of the McMillen declaration where the fact can be found. These facts were not contested to any significant degree during proceedings on the motions to strike the requests for trials de novo.

the accident. 1 App. 206:24-26. Ortega had no complaints of injury at the scene of the accident; he continued to work as a mechanic and lift heavy objects at work; he continued to ride his performance road bikes performing stunts; and he had no verified loss of income. *Id.* at 207:1-4.

Ortega sued Fritter, and the case was assigned to the court annexed arbitration program. The defense served an offer of judgment in the amount of $14,000 (which presumably reflected the defense evaluation of what the case was worth). *Id.* at 207:10-11. The arbitrator awarded $20,448, which was approximately 46 percent more than the defense valuation of the case, as reflected in the offer of judgment. *Id.* 207:12-13. The award was also higher than what the defense believed a reasonable jury would award, based upon recent jury verdicts in similar matters in Washoe County. *Id.* at 207:4-6. Therefore, the defense filed a request for a trial de novo.

C. Procedural background for the two cases after the de novo requests.

1. The two cases were consolidated for the motions to strike.

The plaintiffs in the two cases were represented by the same attorney, William Kendall, who moved to strike the request for trial de novo in each case. The motions were nearly identical, and they relied almost exclusively on *Gittings v. Hartz*, 116 Nev. 386, 996 P.2d 898 (2000). 1 App. 18-24; 6 App. 15-21. The

defendants filed oppositions in both cases.[4] Ortega case: 1 App. 190 (McMillen declaration), 1 App. 206 (opposition); Walker case: 6A App. 166 (opposition), 7 App. 281 (McMillen declaration).

The motion in the Ortega case had been assigned to Hon. Connie Steinheimer, who determined that the case should be consolidated with the Walker case, for purposes of determining the similar motions in the two cases. Therefore, Judge Steinheimer assigned to Ortega case to Hon. Barry Breslow, who was the Washoe County district judge responsible for the Alternative Dispute Resolution Program. 3 App. 565:24-25, 566:16-20.

2. Judge Breslow holds an evidentiary hearing.

a. Arguments of counsel.

Judge Breslow held a lengthy evidentiary hearing on November 12, 2019, with a transcript consisting of 122 pages. 4 App. Tr. 1-122 (without appendix page numbers). He first noted that he had reviewed the briefing, the exhibits, and the legal authorities presented by the parties. 4 App. Tr. 5.

Attorney Kendall, counsel for both plaintiffs, described how he had personally searched court data on the Washoe County web site, obtaining three years of information that Kendall represented as every case in which defense counsel McMillen had been counsel of record. *Id.* at 6:14-17. Kendall then

[4] Detailed information from the motions and the oppositions will be provided later in this answer.

provided his own personal summary of the hearsay information he had located. *Id.* at 6-7.

Kendall's arguments included his own personal interpretation of information he had gathered on ten or eleven cases (including the Ortega and Walker cases). *Id.* at 10-11. These cases supposedly represented cases in which defense counsel McMillen (and Farmers) requested trials de novo after arbitration awards. *Id.* Kendall argued, in essence, that the information he was proffering to Judge Breslow demonstrated that there were no reasonable bases for the requests for trial de novo in the cases he had located. *Id.* at 10-14.

In defense, counsel McMillen pointed to evidence showing that of the ten cases in which he filed requests for trials de novo in Kendall's limited sampling of cases, four actually went to trial; and in those four trials, three (75 percent) resulted in verdicts less than the arbitration awards. *Id.* at 31:3-10. McMillen also pointed out that Kendall's sampling was significantly incomplete, because it omitted many cases that settled after arbitration awards, and other cases for which Farmers accepted the awards. *Id.* at 39-43.

For this court's evaluation of Judge Breslow's discretionary decision in this writ proceeding, it is noteworthy that, during the hearing, Judge Breslow summarized his own extensive personal experience in the arbitration program. He noted that he is the judge in Washoe County who "oversees the whole program."

Id. at 21:18-19. Since 1992, before becoming a judge, he had been involved in the arbitration program more than one hundred times as a practicing attorney, an arbitrator, and counsel for arbitrators. *Id.* at 21:19-22. As such, "I have a sense of how the program is supposed to work." *Id.* at 21:23. He also indicated his sensitivity to the constitutional right to trial by jury, and the need to balance the policy of quick economic justice with the right to trial by jury. *Id.* at 22:10-14. The judge also expressed his concern with "such a modest-sized sampling [of cases] here," consisting of only 10 or 11 cases. *Id.* at 21:13-20.

b. Gilbert Coleman's testimony.

At the evidentiary hearing, Kendall called an economist, Gilbert Coleman, to testify as an expert witness. McMillen objected because Coleman had not been timely disclosed, but the judge overruled the objection. 4 App. Tr. 50. Coleman testified (based primarily upon the information he obtained from attorney Kendall) that he looked at 13 cases with arbitration awards for plaintiffs in the last year, and McMillen requested trials de novo in 11 of the cases. *Id.* at 53. Coleman found this to be "significantly higher" than the rate for such requests in Washoe County. *Id.* at 54:5.

On cross-examination, Coleman conceded that his analysis did not indicate whether Farmers looks at the facts and circumstances of individual cases before filing requests for trials de novo. *Id.* at 62:15-18. Nor did he perform an analysis

of McMillen's total caseload. *Id.* at 62:22. He also did not do an analysis of all the cases on which McMillen and Farmers could have potentially requested trials de novo. *Id.* at 64:19-22. In fact, Coleman's expert report contained a table of cases, but his report conceded that there was "one piece of information missing from the table," and the important missing information consisted of the "number of cases eligible for a de novo request." *Id.* at 66:6-12.

In response to a question by the judge, Coleman also conceded that he had not been asked to draw any correlations regarding how much more often Farmers and McMillen request trials de novo compared to other people in Washoe County within the nine-year time frame between 2006 and 2015. *Id.* at 68:15-20.

During Coleman's testimony, the district court asked him about the *Gittings* court's explanation of the discovery commissioner's criticism of Allstate in that case, specifically, the fact that Allstate requested trials de novo in at least 52 percent "of the cases it was involved with." *Id.* at 83:21–84:1-5. The district court observed that the *Gittings* court did not look only at Allstate cases that went through the arbitration process, but instead, looked at the broader scope of cases that Allstate "was involved with." *Id.* at 84:2-16. Coleman conceded that he did not consider all cases that Farmers and McMillen were involved with; he only looked at cases where arbitration awards went against them. *Id.* at 85:6-14; 86:9-14.

c. The district court rendered its decision at the conclusion of the evidentiary hearing.

Having considered all the evidence and arguments of counsel, the district court rendered its decision at the conclusion of the hearing. 5 App. Tr. 3. The court made the factual determination that Farmers had not engaged in bad-faith arbitration practices. *Id.* at 5:6-7. The court also made the factual determination that "based on this fairly limited sample for this limited time period," and taking into account various other circumstances, the actions of Farmers and defense counsel McMillen did not rise to the level of bad faith. *Id.* at 5:15-19.

The district court also left the door open to additional proceedings and evidence in the future, if additional evidence were to suggest "in more convincing fashion" that the requests for trials de novo by Farmers were not the product of a case-by-case analysis, and the court "will take a look at it again, if and when that time arises." *Id.* at 5:20-24 – 6:1-4. "So if the Court had a larger data point, more cases, more time, with a similar percentage, the results here might be different." *Id.* at 6:15-17.

The district court then issued its written order, consistent with determinations made at the hearing. 3 App. 569. The order found:

> After considering the briefings, evidence and argument, the Court finds that based on the fairly limited sample for this limited time period, and taking into account the uniqueness of the individual

> cases, the results obtained on those cases that went to trial, and other circumstances, the Court is not convinced that the identified requests for trial de novo statistically demonstrate that Farmers actions rise to the level of bad faith.
>
> As a result, the Court finds that Farmers Insurance and Adam McMillen have not engaged in bad faith arbitration practices.

3 App. 571:8-12.

ARGUMENT

A. Extraordinary relief is neither available nor appropriate.

Petitioners seek a writ of mandamus to compel the district court to issue an order striking both requests for trials de novo. The decision to entertain a petition for extraordinary relief is within this court's sole discretion. *Smith v. District Court*, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991). A writ petitioner bears the burden of demonstrating that extraordinary relief is warranted. *See Pan v. Eighth Judicial Dist. Court*, 120 Nev. 222, 228, 88 P.3d 840, 844 (2004).

The high standard for granting extraordinary relief is clear. This court limits its discretion to those cases presenting serious issues of substantial public policy, or involving important precedential questions of statewide interest. *Poulos v. Eighth Judicial Dist. Court*, 98 Nev. 453, 455, 652 P.2d 1177, 1178 (1982).

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1. General legal principles applicable to writs of mandamus

a. A petitioner must establish the district court's failure to comply with a mandatory duty, or the district court's manifest abuse of discretion.

A writ of mandamus may be issued to compel the performance of an act which the law specifically enjoins as a duty resulting from an office, trust or station. NRS 34.160.

Mandamus is available to control a manifest abuse of discretion, or where a district court has arbitrarily or capriciously exercised discretion. *State v. District Court (Armstrong)*, 127 Nev. 927, 931, 267 P.3d 777, 779 (2011). A manifest abuse of discretion is a clearly erroneous interpretation of law, or a clearly erroneous application of a law or rule. *Id.* at 932, 267 P.3d at 780. In other words, a writ will not be issued to control a district court's ordinary discretionary action. Something much more is required. The abuse of discretion must be so serious and extreme that it can be characterized as a manifest abuse or an arbitrary or capricious abuse of discretion. *See Haley v. District Court*, 128 Nev. 171, 175, 273 P.3d 855, 858 (2012).

Mandamus does not lie to correct errors where an action has been taken, but rather, lies to compel the exercise of judgment or the rendering of a decision where a failure of justice would otherwise result from delay or a refusal to act. *See State*

v. Wright, 4 Nev. 119, *2 (1868) (court refused to issue writ to set aside dismissal because purpose of mandamus is to compel action, nor correct errors).

b. A petitioner must also demonstrate the lack of a plain, speedy and adequate remedy at law.

Writs of mandamus may only be issued when there is the lack of a plain, speedy and adequate remedy in the ordinary course of law. NRS 34.170. An appeal constitutes a plain, speedy and adequate remedy at law. *See Heilig v. Christensen*, 91 Nev. 120, 122-23, 532 P.2d 267, 269 (1975). When a party may ultimately challenge an interlocutory order in an appeal from the final judgment in a civil case, the party has a plain, speedy and adequate remedy at law, and extraordinary relief is precluded. *Pan*, 120 Nev. at 224-25, 88 P.3d at 841.

The fact that an extraordinary writ would be a more expeditious remedy is not the criterion. *Washoe County v. City of Reno*, 77 Nev. 152, 156, 360 P.2d 602, 603 (1961). "A remedy does not fail to be speedy and adequate, because, by pursuing it through the ordinary course of law, more time probably would be consumed than in a mandamus proceeding." *Id.*; *cf. Hansen v. Eighth Judicial Dist. Court*, 116 Nev. 650, 658, 6 P.3d 982, 986-87 (2000) (in context of stay in writ petition case, court held that litigation expenses, even if substantial, do not constitute irreparable or serious harm).

The rule precluding extraordinary relief for review of interlocutory orders is necessary to avoid the opening of a flood gate of writ proceedings challenging such orders. Nevertheless, this court has recognized a narrow exception for cases in which an appeal from the final judgment would not constitute an adequate remedy under the circumstances. The court has exercised its discretion sparingly in such cases, entertaining writ petitions where compliance with the district court's order "could cause irreparable harm" to the petitioner. *Hickey v. Eighth Judicial Dist. Court*, 105 Nev. 729, 731, 782 P.2d 1336, 1338 (1989). Extraordinary relief is only warranted in such cases upon a showing of "irreparable harm or extreme prejudice." *NAD, Inc. v. Eighth Judicial Dist. Court*, 115 Nev. 71, 78, 976 P.2d 994, 998 (1999); *Barngrover v. Fourth Judicial Dist. Court*, 115 Nev. 104, 110, 979 P.2d 216, 220 (1999) (extraordinary relief available to prevent irreparable harm).

c. A writ petitioner must establish a legal question; this court will not determine factual questions.

This court's discretion to entertain a petition for a writ of mandamus will not be exercised unless legal, rather than factual, issues are presented. *Round Hill Gen. Imp. Dist. v. Newman*, 97 Nev. 601, 604, 637 P.2d 534, 536 (1981) (writ denied where factual issues existed); *Wynn Resorts, Ltd. v. Eighth Judicial Dist.*

Court, 133 Nev. 369, 373, 386, 399 P.3d 334, 341, 349 (2017) (court declined to engage in fact-finding; that is a task for district courts).

This court applies the substantial evidence standard in reviewing a district court's factual determinations in a writ proceeding. *See e.g., Thomas v. Eighth Judicial Dist. Court*, 133 Nev. 468, 471, 402 P.3d 619, 624 (2017).

2. Petitioners have failed to satisfy these requirements.

a. Petitioners have not established the district court's failure to comply with a mandatory duty, or the district court's manifest abuse of discretion.

The petition makes no effort to establish any mandatory duty, required by law, with which the district court failed to comply. There is no law mandating a district court to grant a motion to strike a request for trial de novo, and Petitioners fail to advance any argument establishing that such a law exists.

Similarly, Petitioners have failed to establish even an ordinary, run-of-the-mill abuse of discretion, let alone a much more serious **manifest** abuse of discretion. Extraordinary relief should be extraordinary. This is why mandamus requires a heightened showing of a **manifest** abuse of discretion. Something is "manifest" if it is readily apparent or obvious. *See Merriam-Webster Online Dictionary* (2020). As noted above, this court has declared that an abuse of discretion is manifest when it is a clearly erroneous interpretation of law, or a

clearly erroneous application of a law or rule. *State v. District Court (Armstrong)*, 127 Nev. at 931-32, 267 P.3d at 779-80.

In the present case, the district court carefully considered all of the written legal arguments and exhibits presented by the parties. The district court then held an evidentiary hearing, at which the court heard testimony and extensive oral arguments of counsel. After taking everything into consideration, the district court made the factual determination that, in the two personal injury lawsuits at issue here, Defendants and their attorney (and their insurance company) did not act in bad faith by rejecting the arbitration awards and by requesting trials de novo—thereby asserting their constitutional right to jury trials. The district court properly exercised its fact-finding role and properly exercised its discretion to apply the facts to the law. The district court did not abuse its discretion at all, let alone manifestly abuse its discretion.[5]

b. An extraordinary writ should be denied because Petitioners have not established the lack of a plain, speedy and adequate remedy at law.

Petitioners seek review of the district court's pretrial interlocutory decision on whether the requests for trials de novo were filed in bad faith. The petition should be denied because the district court's decision is the type of interlocutory

[5] The merits of the district court's decision on Petitioners' motions will be discussed more comprehensively in this answer, below.

ruling that is subject to review in the ordinary course of appellate proceedings on appeal from the final judgment.

The petition largely glosses over this critical requirement for issuance of a writ—the lack of a plain, speedy and adequate remedy at law. The petition's only argument on this requirement is that a writ is appropriate "to reduce expenses for litigants and to reduce the impact on judicial resources." Petition at 18-19. As discussed above, however, this court has soundly rejected the argument that writs are appropriate where participation in a legal action would be inconvenient, time-consuming or expensive. *Washoe County*, 77 Nev. at 156, 360 P.2d at 603 (time consideration); *cf. Hansen*, 116 Nev. at 658, 6 P.3d at 986-87 (litigation expenses, even if substantial, do not constitute irreparable or serious harm, for purposes of stay analysis in writ case).

The same analysis applies in this case. If this court denies the petition and lifts that stay presently in place, both trials will proceed in the short trial program. 3 App. 571:18-19. Under short trial rules, each trial will be held relatively soon; there will be little or no additional discovery; the expenditure of expenses and attorneys' fees will be limited; documentary evidence and expert reports will admitted at trial under simplified procedures; and the trials will be conducted with strict time limits (three hours per side), to facilitate trials of no more than one day in length. *See* NSTR 1(a), 8, 12, 16, 19, 21. There will be no great burden that

would somehow justify this court's interlocutory intervention with an extraordinary writ.

After each short trial, the trial judges can determine whether sanctions should be imposed on defendants for filing the requests for trials de novo in each case. *See* NSTR 31 (providing sanctions if a defendant requests a trial de novo and does not obtain a verdict that reduces the arbitration award). There are two potential scenarios. First, Petitioners receive verdicts that are **less than** the arbitration awards, and Petitioners can appeal, raising appellate challenges to any interlocutory orders, including the district court's order denying the motion to strike the requests for trial de novo. If this court rules that the district court's decision was erroneous, and that the error was prejudicial, the higher arbitration award can simply be reinstated. Although this procedure might involve some extra time and expenses for a petitioner, this does not create the lack of a plain, speedy and adequate remedy. *See Washoe County*, *supra* (expenditure of extra time does not equate to lack of a plain and speedy remedy).

Second, Petitioners receive verdicts that are **more than** the arbitration awards, and Petitioners will be able to recover the full judgments plus costs and applicable attorneys' fees. In that situation, the requests for trials de novo will have caused no harm—certainly no harm that could possibly be characterized as serious or irreparable.

Under either scenario, there is no lack of a plain, speedy and adequate remedy through normal appeal rights at the conclusion of the trials, like in virtually every other civil case. As such, this court's denial of a writ petition will not result in the lack of a plain, speedy and adequate remedy for the Petitioners. Consequently, the petition should be denied.

c. A writ should be denied because the petition seeks review of factual determinations.

As noted above, extraordinary relief is not available for review of a district court's factual determinations.

NAR 22 provides that the right to a trial de novo is only waived if a party or attorney fails "to either prosecute or defend a case **in good faith** during the arbitration proceedings." NAR 22(A) (emphasis added). Within this context, "good faith" equates to "meaningful participation." *Casino Props. Inc. v. Andrews*, 112 Nev. 132, 135, 911 P.2d 1181, 1182-83 (1996).

The question of whether a party acts in good faith or bad faith is a question of fact. *See Mitchell v. Bailey & Selover, Inc.*, 96 Nev. 147, 150, 605 P.2d 1138, 1139 (1980) (good faith presented question of fact); *Consol. Generator-Nevada, Inc. v. Cummins Engine Co., Inc.*, 114 Nev. 1304, 1312, 971 P.2d 1251, 1256 (1998) (good faith presented question of fact); *Allstate Ins. Co. v. Miller*, 125 Nev. 300, 305, 212 P.3d 318, 322 (2009) (bad faith presented question of fact).

In reviewing a determination of good faith or bad faith, this court "will not disturb a trial court's findings of fact unless they are clearly erroneous and not based on substantial evidence." *See Albert H. Wohlers & Co. v. Bartgis*, 114 Nev. 1249, 1258, 969 P.2d 949, 956 (1998), *as amended Feb. 19, 1999* (in context of insurance bad faith); *Otak Nevada, LLC v. Eighth Judicial Dist. Court*, 129 Nev. 799, 805, 312 P.3d 491, 496 (2013) (in context of good faith settlement).

In the present case, the district court observed that it was not convinced that the requests for trials de novo rose to the level of bad faith. 3 App. 571:10-12. Further, the district court made the express finding of fact that defense counsel and the insurance company "have not engaged in bad faith arbitration practices." 3 App. 571:13-14.

There was abundant evidence supporting the district court's factual determinations. This evidence included the declaration of defense counsel, exhibits attached to the declaration, the evidence presented at the evidentiary hearing, defense counsel's additional information and arguments provided at the hearing, statistical data provided by the defense, the very limited sample of litigated cases provided by Petitioners' counsel, and the incomplete analysis of statistical evidence by Petitioners' expert. 3 App. 569-71. Accordingly, writ relief is not available for review of the district court's factual determination of no bad faith.

B. Defendants did not waive their constitutional right to jury trials.

1. The constitutional right to a jury trial cannot be waived except in a manner prescribed by law.

Civil litigants in Nevada have the fundamental constitutional right to a civil jury trial under our constitution, which provides: "The right of trial by Jury shall be secured to all and remain inviolate forever." Nev. Const, art. 1, § 3. The constitutional right to a jury trial may be waived only "in the manner to be prescribed by law." *Id.*

In the context of jury trial waivers in court annexed arbitration cases, this court has appropriately characterized the right as an "**important** constitutional right to a jury trial." *Gittings*, 116 Nev. at 391, 996 P.2d at 901 (emphasis added). This important constitutional right should not be denied lightly. *E.g. Gittings*, 116 Nev. at 391, 996 P.2d at 901 (holding that "the important constitutional 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"); *cf. Seim v. State*, 95 Nev. 89, 96, 590 P.2d 1152, 1156 (1979) (this court takes a narrow view of waivers of constitutional rights).

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2. There was no showing of bad faith "during the arbitration proceedings."

a. A request for trial de novo is not filed during the arbitration proceedings; it is filed *after* the proceedings.

As noted above, a waiver of the constitutional right to a jury trial can only occur "in the manner to be prescribed by law." Nev. Const, art. 1, § 3. NAR 22 provides a manner prescribed by law in which the constitutional right to a jury trial may be waived. This rule states that "[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." NAR 22(A) (emphasis added). This manner of waiving the constitutional right to a jury trial is narrow, specific and precise. The waiver only occurs if a party or attorney fails to prosecute or defend a case in good faith "during the arbitration proceedings." A request for trial de novo does not occur "during the arbitration proceedings." Rather, such a request necessarily occurs **after** the arbitration proceedings, i.e., after the arbitration hearing and after the arbitration award.

The narrow provision for waiving the constitutional right to a jury trial for conduct "during the arbitration proceedings" should not apply to conduct after the arbitration, such as filing a request for trial de novo. For example, in *Chamberland v. Labarbera*, 110 Nev. 701, 877 P.2d 523 (1994), this court reversed an order

striking a request for trial de novo. But the motion to strike dealt solely with conduct that occurred during the arbitration proceedings, such as not conducting discovery and the defendant driver's failure to appear at the arbitration hearing.[6]

Accordingly, the conduct at issue in the present case is not within the narrow confines of NAR 22(A)'s provision dealing with a waiver of the constitutional right to a jury trial, because the conduct here did not occur "during the arbitration proceedings." As such, the rule's waiver provision was not applicable. Thus, the district court's decision to deny the motion to strike the de novo request should be upheld, even though the decision was not based upon inapplicability of the rule. *See Saavedra-Sandoval v. Wal-Mart Stores, Inc.*, 126 Nev. 592, 599, 245 P.3d 1198, 1202 (2010) (this court will affirm if district court reached correct result, even if for wrong reason).

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[6] In *Gittings*, the district court found six reasons for striking the defendant's request for trial de novo. All but one dealt with conduct before or during the arbitration hearing, such as failure to attend the hearing, failure to request an independent medical examination, and failure to call witnesses at the hearing. The sixth reason dealt with the insurance company's history of requesting trials de novo. This court remanded for further proceedings on the sixth reason. The opinion did not discuss the question of whether a request for trial de novo occurs "during the arbitration proceedings," or after the arbitration proceedings, for purposes of evaluating a waiver of the important constitutional right to a jury trial. It appears that nobody raised the issue in *Gittings*.

b. There was no failure to participate in good faith during the arbitration proceedings.

In the district court, in his reply in support of the motion to strike, Petitioners' counsel criticized the defense opposition for providing details showing that the defense "meaningfully participated in good faith during the arbitration process," and Petitioners' counsel argued that "this is not the issue." 7 App. 286:3-6. This is **precisely** the issue—indeed, the **only** issue—on a motion to strike a request for trial de novo, because under NAR 22, the right to a trial de novo, including the constitutional right to a jury trial, is only waived if a party or attorney fails "to either prosecute or defend a case **in good faith during the arbitration proceedings**." NAR 22(A) (emphasis added).

As noted above, "good faith" equates to "meaningful participation," for purposes of evaluating a request for trial de novo. *Casino Props. Inc.*, 112 Nev. at 135, 911 P.2d at 1182-83. An arbitration hearing is meaningless when a party simply "goes through the motions," does not seriously attempt to oppose the other party's evidence or legal contentions, or takes a "lackadaisical approach to the process." *Gittings*, 116 Nev. at 393, 996 P.2d at 902. Even if a defendant fails to conduct discovery or attend the arbitration hearing, the defendant meaningfully participates in the arbitration proceedings by engaging in cross-examination and disputing alleged injuries. *See Chamberland*, 110 Nev. at 705, 877 P.2d at 525.

In *Gittings*, on which Petitioners heavily rely, the defendant failed to request an independent medical examination, attend the arbitration hearing, call any witnesses, contest liability, or present any countervailing medical evidence. But the defendant had participated in discovery, filed an arbitration brief, and participated at the arbitration hearing by conducting cross-examination and presenting arguments against the plaintiff's claimed damages. This court held that none of the defendant's failures—or even the combination of all of them—established a lack of good faith or a lack of meaningful participation during the arbitration proceedings under these circumstances. *Gittings*, 116 Nev. at 393-94, 966 P.2d at 902-03.

In the two lawsuits at issue here, both defendants fully and meaningfully participated during the arbitration proceedings, without a hint of bad faith. And when Petitioners challenged the requests for trials de novo, defense counsel repeatedly and successfully established that there was full, meaningful participation during the arbitration proceedings.

(1) The defense meaningfully participated in the Ortega case during the arbitration proceedings.

In the Ortega lawsuit, defense counsel McMillen argued and demonstrated that he meaningfully participated on behalf of Defendant Fritter during the arbitration proceedings. Counsel's opposition to the motion to strike contained his

declaration establishing that he prepared and served an initial production of documents and witnesses, served requests for discovery from Ortega, served interrogatories, served two supplemental discovery disclosures, and took the plaintiff's deposition. 1 App. 190:21-28. He also served an arbitration brief, served an offer of judgment, and attended the arbitration hearing, where he cross-examined the plaintiff, and vigorously represented Fritter. 1 App. 191:1-10, 210:13-18.

When the arbitrator rendered a decision, the arbitrator made no finding of bad faith participation by either party, and the arbitrator never even alluded to any lack of meaningful participation in the arbitration process by Fritter, her defense counsel, or her insurance company. 1 App. 191:13, 210:21-23.

At the hearing on the motion to strike, defense counsel argued that there was good faith participation during the arbitration proceedings, and the district court observed that there was good faith participation "through the arbitration award," and that "[t]here's no issue there." 4 App. Tr. 108:1-4.

Accordingly, there was no lack of good faith at all "during the arbitration process" in the Ortega lawsuit. Therefore, the district court correctly denied the motion to strike.

(2) The defense meaningfully participated in the Walker case during the arbitration proceedings.

Defense counsel made a similar argument and presentation in the Walker case. There, defense counsel engaged in written discovery, took Plaintiff Walker's deposition, served an offer of judgment, prepared an arbitration brief, attended the arbitration hearing, cross-examined Walker, presented a defense witness, and vigorously represented Defendant Michaels. 6A App. 171:9-15; 7 App. 281:18-28. And like the Ortega case, the arbitrator in the Walker case never alluded to any bad faith or lack of meaningful participation by Defendant Michaels, her counsel or her insurance company.[7] 6A App. 171:18-19.

Accordingly, there was no lack of good faith at all "during the arbitration process" in the Walker lawsuit. Therefore, the district court correctly denied the motion to strike.

C. There was no bad faith involving the requests for trials de novo.

Even if this court determines that a request for trial de novo occurs "during the arbitration process," and that such a request is therefore within the scope of NAR 22's potential sanction for bad faith participation, there is still no basis for a writ of mandamus in these two cases. The district court made factual

[7] The district court's comment at the hearing—that there was "no issue" about the defense good faith participation through the time of the arbitration award—was equally applicable to the Walker case (as well as the Ortega case). 4 App. Tr. 108:1-4.

determinations supported by evidence, and properly exercised its discretion in finding no bad faith by Farmers or defense counsel McMillen. As such, extraordinary relief should be denied.

1. *Gittings* does not support broad reliance on conclusory opinions and incomplete statistics.

Petitioners exclusively relied on *Gittings* in the district court, and their writ petition also heavily relies on that case. Initially, this court should note that the writ petition in this case grossly mischaracterizes *Gittings.* The petition asserts that in *Gittings* "the Supreme Court noted certain statistics," and the petition asserts:

> The Court [i.e., the Supreme Court] held that "This statistic raises a question **in this court's mind** as to whether this percentage constitutes bad faith per se in violation of Rule 2(A) [sic] of the Nevada Arbitration Rule." Pet. 24:15-18 (emphasis added).

The petition then goes on to assert:

> The Court [i.e., the Supreme Court] characterized Allstate's 52% rate as "the high percentage of trial de novo requests" (Id. at 392)… Pet. 24:19-22.

These assertions are wrong and misleading. The Nevada Supreme Court in *Gittings* did not make the findings attributed to this court by the petition. Those findings and holdings **were made only by the district court.** The *Gittings* court

merely recited the district court's findings as part of the factual background for the opinion. *Gittings*, 116 Nev. at 392-93. The Supreme Court did not adopt those findings as its own, and the petition in this case is wrong to suggest otherwise.[8]

In any event, the *Gittings* opinion, which has already been discussed to some extent above, arose from a severe car accident case in which the defendant ran a red light and plowed into the passenger side of the plaintiff's car with enough force to bend the frame of the plaintiff's car. Both vehicles were deemed total losses. The plaintiff had four months of chiropractic care, and she missed three months of work. The case was assigned to the court-annexed arbitration program, resulting in an arbitration award of $9,000 plus interest and costs.

The defendant (insured by Allstate) filed a request for a trial de novo. The plaintiff moved to strike the request, asserting that the defense failed to arbitrate in good faith. Specifically, the plaintiff argued that the defendant-driver did not personally attend the arbitration hearing, defense counsel called no witnesses and produced no medical evidence, defense counsel did not request an independent medical examination (IME), and defense counsel conducted only cursory cross-examination and argument during the arbitration hearing. *Gittings*, 116 Nev. at 389, 996 P.2d at 900. At a hearing on the motion, the plaintiff offered an

[8] Petitioners quote the *Gittings* phrase "in this court's mind" twice, both times indicating that this was the Nevada Supreme Court's mind. Pet. 8:7-9 and 24:15-17. But as the *Gittings* opinion clearly indicates, the quote "this court's mind" is what was in the district court's mind, not the Supreme Court's.

additional argument that Allstate requested trials de novo in too many cases, based upon statistics compiled by the discovery commissioner. *Id.* at 390, 392, 966 P.2d at 900-01. The district court granted the motion and struck the request for trial de novo.

This court reversed, holding that although a party's failure to participate in good faith can result in a waiver of a trial de novo, "good faith" equates with "meaningful participation" in arbitration proceedings. *Id.* at 390, 996 P.2d at 901. An arbitration is meaningless when a party simply "goes through the motions" and does not seriously attempt to convey valid objections to the other party's evidence and legal contentions. *Id.* at 393, 996 P.2d at 902. A defendant's participation is **not** meaningless—and is therefore in good faith—where defense counsel conducts discovery, counsel has legitimate reasons for not requesting an IME, the defendant has a legitimate reason for not personally attending the arbitration hearing, and defense counsel relies on cross-examination of the plaintiff's witnesses instead of calling defense witnesses. *Id.* at 392-93, 996 P.2d at 901-02. For all of these reasons the district court erred in *Gittings* by determining that the defense did not meaningfully participate in the arbitration proceedings.

The *Gittings* court then turned its attention to the discovery commissioner's finding that Allstate requested trials de novo in at least 52 percent of the cases "it is involved with." *Id.* at 391, 393-94, 996 P.2d at 901, 903. The *Gittings* opinion

provided no information about what the discovery commissioner meant by cases Allstate "was involved with." Nor did the *Gittings* court provide its own explanation of that phrase—or provide any insight into the scope of cases that were either included or excluded in the discovery commissioner's evaluation of cases that Allstate was allegedly "involved with," for purposes of the discovery commissioner's statistical finding.

Despite this shortcoming, the *Gittings* court recognized the general concept that "competent statistical information that demonstrates that an insurance company has routinely filed trial de novo requests without regard to the facts and circumstances of each individual case may be used to support a claim of bad faith." *Id.* at 394, 996 P.2d at 903. Although Allstate filed a "comparatively high percentage of de novo requests," there was no support for a conclusion that Allstate "automatically requests a trial de novo regardless of the arbitration process." *Id.* Striking the request for trial de novo—and thereby depriving the defendant of her constitutional right to a jury trial—would not be approved without a "more comprehensive qualitative and quantitative statistical analysis." *Id.*

At most, *Gittings* only stands for the proposition that a district court has discretion to strike a defendant's request for trial de novo if:

(1) there is a comprehensive qualitative and quantitative statistical analysis;

(2) the analysis consists of competent statistical information;

(3) the statistics show a comparatively high percentage of de novo requests when considering the cases an insurance company has been "involved with" (whatever that phase means);

(4) the evidence proves that the insurance company routinely files trial de novo requests without regard to the facts and circumstances of individual cases; and

(5) the insurance company automatically requests a trial de novo regardless of the arbitration process.[9]

2. The district court did not manifestly abuse its discretion by finding the statistics insufficient to establish bad faith.

a. The district court was not required to accept Petitioners' incomplete and unconvincing statistics.

The motions to strike prepared by Petitioners' counsel relied on information and statistics he allegedly gleaned from the Washoe County court clerk's online website regarding only one Farmers attorney—Adam McMillen—who was the target of the motion. 1 App. 19:19-20 (indicating that Petitioners' counsel

[9] Even if these five requirements were somehow all satisfied in a case, Nevada appellate courts would still not necessarily issue an extraordinary writ requiring a district court to strike a request for trial de novo. In addition to the five *Gittings* requirements, a writ will be denied unless (1) the petitioner demonstrates a manifest abuse of discretion by the district court; **and** (2) there is no evidence supporting the district court's factual determinations; **and** (3) the petitioner lacks a plain, speedy and adequate remedy at law.

performed a "person search" for only one name, Adam McMillen). The motions provided no information for other Nevada counties.

The result of counsel's name search for the Ortega motion yielded 21 pages of cases showing McMillen's name. 1 App. 19:21-22. For the Walker motion there were 12 pages of cases showing McMillen's name. 6 App. 16:19-20. From these multiple pages of cases, Petitioners' counsel selected only 11 cases handled by McMillen, including the Ortega and Walker cases—all during a limited time frame—for purposes of attempting to show a bad faith pattern of requesting trials de novo. 1 App. 20:13-24 (Ortega); 6 App. 17:13-25 (Walker). Petitioners' counsel did not include the actual statistics that were subsequently provided by McMillen to the district court.

In opposing the motions, McMillen provided a comprehensive declaration containing data regarding his cases. 1 App. 190-203 (declaration in Ortega case dated July 25, 2019). For example, he had been working for Farmers since October 30, 2017, and since that date he had been assigned more than 180 cases. 1 App. 192:9-10. He had participated in settling and/or resolving 54 matters outside of the mandatory arbitration program in various courts throughout Nevada. 1 App. 192-99. He had settled and/or resolved 29 matters in the mandatory arbitration program **prior** to the arbitration hearings; and he settled and/or resolved 11 matters in the mandatory arbitration program **after** arbitration awards but prior to short

trials (in two of those cases, defendants represented by McMillen accepted the arbitration awards). 1 App. 192-201 (¶¶ 19, 20). Eight of these cases settled below the amounts of the arbitration awards, and in one case the arbitration award was paid by Farmers after the trial de novo request was stricken due to an untimely arbitrator fee. 1 App. 199:9-11.

Moreover, since working for Farmers, McMillen tried six cases in the short trial program in all counties after defense-filed requests for trials de novo. Of those six trials, five resulted in reductions of the arbitration awards, and only one trial resulted in a verdict that was not less than the arbitration award; and he tried one case in the short trial program after the plaintiff, not McMillen, had filed a request for trial de novo. 1 App. 201:16—202:25. Since working for Farmers, McMillen tried only one case to verdict in the short trial program where prior defense counsel had requested a trial de novo, and where the verdict was not less than the arbitration award. 1 App. 202:26—203:6. In all of his numerous cases while working for Farmers, he had never been found to have participated in bad faith. 1 App. 203:18.

These statistics overwhelmingly demonstrated that McMillen (and his employer, Farmers) settled more cases than they tried in the short trial program or any other courts. These statistics also constituted persuasive evidence that

McMillen and Farmers only try cases after carefully considering the facts and circumstances of each case.

Regarding McMillen's participation in the short trial program after arbitration awards, of the six matters that he tried to verdict where the defense had filed the request for trial de novo, the arbitration award was reduced in five of those cases. 1 App. 212:10-12. In other words, juries found that the arbitration awards were too high in five out of McMillen's six trials in which the defense had requested the trial de novo (i.e., approximately 84 percent of his trials).

b. McMillen and Farmers considered the facts and circumstances of each case when deciding whether to request a trial de novo.

As an officer of the court, defense counsel McMillen filed declarations in which he swore—without contradiction—that in the cases he handles for Farmers, "[e]very case I handle, and every decision regarding a request for trial de novo, is carefully made and based upon the facts and circumstances of each individual case." 1 App. 191:14-15 (Ortega case); 7 App. 282:1-2 (Walker case). His declarations were supported by summaries and documentation showing justification for a belief that the arbitration awards were too high. This alone constitutes substantial evidence supporting the district court's determination of no bad faith, which is all that is needed to defeat the writ petition in this case.

At the hearing on the motions, McMillen answered the court's questions and provided further explanations for his decisions—to rebut the contention that he made the de novo decisions in bad faith. For example, McMillen explained that of the ten Washoe County cases in which he had filed requests for trials de novo, four went to trial, with the juries rendering verdicts less than the arbitration awards in three of the four trials. McMillen noted that this defense success rate was 75 percent, therefore indicating to him that "when we file a request for trial de novo, that means the jury is seeing it differently from the arbitrator." 4 App. Tr. 31:3-13. Even in the fourth trial, which did not result in a verdict reducing the arbitration award, the jury simply confirmed the amount of the arbitration award. 4 App. Tr. 33:12-18. Thus, **none** of the jury verdicts awarded more money than the arbitration awards.[10] *Id.*

McMillen also explained the defense thought process in the two cases. In the Walker case, McMillen noted the plaintiff's own admission that he rode his bicycle into the defendant's car, without attempting to stop when the defendant was making her right turn. 4 App. Tr. 111:14-23. Despite the strong defense case

[10] The decision on whether to request a trial de novo is not an exact science. When deciding whether to request a trial de novo, a defense attorney and an insurance company are certainly justified in considering their experience and observations about whether juries in personal injury cases in certain counties tend to award less money than arbitrators tend to award in the same cases. Accordingly, McMillen had the right to believe, based upon his experience, that there was a good chance of a jury "seeing it differently from the arbitrator" in many of his cases. 4 App. Tr. 31:3-13.

on liability, the arbitrator made an award that McMillen thought was "extremely" favorable to the plaintiff. *Id.* at 111:24—112:1-2. These facts resulted in the decision to request a trial de novo. *Id.*

In the Ortega case, McMillen was aware that the plaintiff had no complaints of injury at the accident scene; the plaintiff continued to work as a mechanic and lift heavy objects after the accident; the plaintiff continued to ride his performance stunt motorcycles; and the plaintiff had no verified loss of income. 4 App. Tr. 112:3-9. McMillen and Farmers requested a trial de novo "because the arbitration award was outside of what we would consider a reasonable award that a jury would provide." 4 App. Tr. 112:10-12.

McMillen correctly observed: "The statistics also demonstrate that I and Farmers only try cases after carefully considering the facts and circumstances of each case." 4 App. Tr. 115:10-12. And he noted: "All requests for trial de novo were based upon the facts and circumstances of each individual case, and there's no evidence to the contrary." 4 App. Tr. 115:13-16.

The information provided by McMillen was also more than sufficient to satisfy the requirement of meaningful participation. And the information was more than adequate to support the district court's decision to deny the motions to strike, particularly in light of the *Gittings* holding that a request for trial de novo requires a showing that an insurance company has routinely filed trial de novo requests

"without regard to the facts and circumstances of each individual case." *Gittings*, 116 Nev. at 394, 996 P.2d at 903.

c. The statistics were not sufficient for this court to find that the district court manifestly abused its discretion.

With an absence of evidence proving that McMillen and Farmers did not meaningfully participate in the arbitration, Petitioners needed to fall back on their statistical argument under *Gittings*. That contention, however, required Petitioners to present a comprehensive qualitative and quantitative statistical analysis; competent statistical information; a high percentage of de novo requests for cases Farmers has been "involved with" in litigation; a pattern of filing trial de novo requests without regard to the facts and circumstances of individual cases; and a showing of automatically requesting trials de novo regardless of the arbitration process. *Gittings*, 116 Nev. at 390-94, 996 P.2d at 901-03.

The defense oppositions to the motions to strike demonstrated the sparsity and unreliability of Petitioners' statistical information, at least for purposes of determining a pattern of bad faith by Farmers that might be sufficient to grant Petitioners' motions and thereby deny the Defendants their constitutional right to jury trials. In addition to the written oppositions showing the deficiencies in the data, McMillen also responded to the district court's questions at the hearing regarding cases not contained in Petitioners' motions. When asked whether

Petitioners' counsel had missed cases, McMillen observed that there were "several" missing cases, and he gave an example. 4 App. Tr. 40. McMillen also noted that he filed de novo requests in only seven percent of all the cases he had handled as a Farmers attorney (i.e., the cases he had been involved with). 4 App. Tr. 43.

During the hearing, the district court recognized the lack of a comprehensive qualitative and quantitative statistical analysis, and the lack of competent statistical information. For example, the court expressed concern with "such a modest-sized sampling [of cases] here," consisting of only 10 or 11 cases. 4 App. Tr. 21:13-20. The court also noted: "I'm struggling with the limited sample of cases that movant believes exists" to establish their point. 4 App. Tr. 44:21-23. Finally, at the conclusion of the hearing, when rendering the decision finding that Petitioners had not proven bad faith participation by the defense, the court even observed that the result might be different "if the Court had a larger data point, more cases, more time, with a similar percentage." 5 App. Tr. 6:15-17.

To obtain an extraordinary writ of mandamus, Petitions must show that the district court manifestly abused its discretion and had a mandatory duty to grant the motions to strike. Petitioners have failed to make such a showing. The district court was well within its sound discretion in denying the motions based, in part, on insufficient data for a showing of a pattern of bad faith.

Finally, the court should note that *Gittings* did not hold that statistics alone can constitute a basis for striking a request for trial de novo in an individual case, without a showing of other bad faith conduct during the arbitration proceedings in the case. Yet Petitioners appear to be arguing that lopsided historical statistics alone can provide the sole ground for striking a request for trial de novo, even if the defendant has otherwise participated in good faith. For example, in the present case, Petitioners contend that historical statistics in Farmers cases justify striking the requests for trials de novo. Petitioners essentially asked the district court—and they ask this court—to ignore other factors such as legitimate reasons that may have justified the defense decisions to reject the arbitration awards.

This court should recognize the quandary that will be created if the court accepts Petitioners' argument and renders such a holding. The holding would essentially preclude an insurance company from ever again rejecting an arbitration award and requesting a trial de novo in any case, once a court has determined that lopsided historical statistics show bad faith by the insurance company. In every case subsequent to such a finding, every plaintiff would always be able to rely on the historical data and the finding of bad faith in the prior unrelated case, and thereby strike the subsequent requests, regardless of the reasons for the requests. Such a result would be intolerable, was never contemplated by the arbitration rules or by any of this court's precedent, and most likely would violate the constitutional

rights (due process and the right to a jury trial) of the insurance companies and their insureds.

D. The district court did not manifestly abuse its discretion regarding Coleman.

Petitioners contend that the district court's rejection of Coleman's opinion was an abuse of discretion. Pet. 21-24. That is the wrong standard. To obtain extraordinary relief, Petitioners must establish a **manifest** abuse of discretion, or an **arbitrary or capricious** exercise of discretion. *State v. District Court (Armstrong), supra,* 127 Nev. at 931, 267 P.3d at 779.

Petitioners initially rely on *Ewing v. Sargent*, 87 Nev. 74, 482 P.2d 819 (1971), for the proposition that uncontradicted testimony may not be arbitrarily rejected. Pet. at 21-22. There are two flaws in Petitioners' reliance on *Ewing.* First, the petition does not establish that the district court's evaluation and rejection of Coleman's opinion was arbitrary. Second, *Ewing* does not hold that a trier of fact must necessarily accept an expert's testimony in a case where there is no rebuttal expert, as Petitioners seem to be arguing. In fact, *Ewing* supports the proposition that a trier of fact may reject a witness's testimony, even if arguably uncontradicted.

The *Ewing* appellant contended that the district court erred by rejecting testimony of a witness who was arguably uncontradicted. This court held,

however, that the district court's ruling was proper, in part because the testimony was incomplete. *Id.* at 77, 482 P.2d at 821. Additionally, the court held that "under settled legal principles," the testimony of the witness was not binding on the trier of fact, "even if it constituted an unequivocal assertion" regarding the matter in issue. *Id.* at 77–78, 482 P.2d at 821–22. "Precedents of this court establish beyond cavil that it is the prerogative of the trier of fact to evaluate the credibility of any witness's testimony," and to reject it where the testimony is impeached, incredible, or conflicts with other evidence or inferences arising from evidence. *Id.*

The *Ewing* court quoted a section in Dean Wigmore's treatise on evidence, with the section titled "General Principle; One Witness may Suffice; **An Uncontradicted Witness need not be Believed**." *Id.* at 78–79, 482 P.2d at 822 (emphasis added) (quoting J. Wigmore, *Evidence*, § 2034, at 259-263 (3d ed. 1940)). The court approved of Dean Wigmore's observation that "the mere assertion of any witness does not of itself need to be believed, even though he is unimpeached in any manner; because to require such belief would be to give a quantitative and impersonal measure to testimony." *Id.*

This case is governed by *Quintero v. McDonald*, 116 Nev. 1181, 14 P.3d 522 (2000), which was a personal injury case where the plaintiff's chiropractor was the only expert medical witness at trial. The jury found liability against the

defendant, but the jury awarded zero personal injury damages. On appeal, the plaintiff argued that she was entitled to damages because her expert evidence regarding injuries was "uncontroverted." *Id.* at 1184, 14 P.3d at 523-24.

The *Quintero* court disagreed and affirmed the defense verdict. The court held that although the defense did not present its own expert, cross-examination testimony elicited from the plaintiff's expert controverted the plaintiff's claim. *Id.* Regarding the absence of a defense medical witness, the *Quintero* court also held that even though the defense did not present its own witness, **"the jury was not bound to assign any particular probative value to any evidence presented."** *Id.* (emphasis added).

When expert testimony is presented, "it is for the trier of fact to weigh the credibility of the expert's opinion." *Harrison v. Roitman*, 131 Nev. 915, 923, 362 P.3d 1138, 1143 (2015). Expert testimony can for the most part be no better than the information provided to the expert. *United States v. Tavares*, 843 F.3d 1, 6 (1st Cir. 2016) (referring to this as the "garbage in, garbage out" principle). The probative value of an expert's opinion depends on the accuracy of facts that the expert assumes to be true. *See Wrenn v. State*, 89 Nev. 71, 73-74, 506 P.2d 418, 419-20 (1973). It is permissible, and indeed common, to argue that an opposing expert's opinion is compromised by incomplete information. *People v. Arias*, 913 P.2d 980, 1039 (Cal. 1996). The United States Supreme Court has recognized that

cross-examination is "the greatest legal engine ever invented for the discovery of truth." *California v. Green*, 399 U.S. 149, 158 (1970) (quoting 5 J. Wigmore, *Evidence* § 1367 (3d ed. 1940)).

Edsall v. Huffaker, 859 A.2d 274 (Md. App. 2004) was a personal injury case in which the plaintiff's doctor testified to causation, but the defendant offered no affirmative evidence. The jury awarded zero damages. The *Edsall* court affirmed, holding that although the defendant did not present expert testimony, this did not make the plaintiff's evidence "uncontroverted." *Id.* at 278. Thus, the defendant was entitled to challenge the plaintiff's medical expert on the ground that the doctor's opinion was equivocal, and the jury was entitled to reject the plaintiff's doctor's opinion, despite the fact that the defendant had presented no additional evidence (i.e., no defense expert testimony). *Id.*

Expert testimony is not necessarily conclusive merely because it is uncontradicted by an expert for the opposing party. *See Panko v. Grimes*, 123 A.2d 799, 803 (N.J. Super. 1956) ("Evidence is not necessarily conclusive because uncontradicted."). It is always within the function of the trier of fact to evaluate the facts on which an expert's opinion is based, and to determine the value or weight of the opinion. *Id.* at 804.

The reliability of an expert's opinion depends on the competency and integrity of the facts on which the opinion rests. *Davis v. Barkaszi*, 35 A.3d 739,

745 (N.J. Super. 2012). Although an expert's evidence may stand uncontradicted by other evidence, it may still be controverted in the sense that its trustworthiness is challenged; the weight of the evidence, even though uncontradicted, is determined by the trier of fact. *Id.* An opposition expert is not necessary to contradict an expert at trial if there are conflicting inferences in the evidence; even a slight conflict in the evidence makes the issue one for the trier of fact. *Id.* It is for the trier of fact to determine whether an expert's opinion should be accepted or rejected, based on an evaluation of the accuracy of facts underpinning the expert's opinion. *Id.* at 746. An expert's reliance on disputed or incomplete facts leaves the credibility of the expert's opinions open to attack. *See Wier v. Allstate Ins. Co.*, 2018 WL 1308570, *6 (Mich. App.; March 13, 2018; unpublished).

In the present case, Coleman's opinions were based upon information provided to him by Petitioners' counsel. The information was limited in its time frame, the number of cases included, and other factors. Judge Breslow was well within his discretion—as the ultimate trier of fact on the questions presented in the motions to strike the requests for trial de novo—in evaluating the extent to which the judge would rely on Coleman's opinions. There was no manifest abuse of discretion and no arbitrary or capricious exercise of discretion in the district court's decision.

CONCLUSION

The fundamental requirements for extraordinary writ relief are clearly not satisfied in this case. Further, the district court was well within its discretion in making the determinations it made regarding the lack of bad faith by Farmers and defense counsel McMillen. The petition should be denied, and the defendants should be allowed to exercise their constitutional rights to jury trials.

Dated: May 28, 2020

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this answer complies with the formatting requirements of NRAP 32(a), including the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6), because this answer has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman type style.

2. I also hereby certify that I have read this answer, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this answer complies with all applicable Nevada Rules of appellate procedure, in particular NRAP 28(e)(1), which requires every assertion regarding matters in the record to be supported by appropriate references to page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying answer is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated: May 28, 2020

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of LEMONS, GRUNDY & EISENBERG, and on this date, the foregoing Answer of Real Parties in Interest and Appendix to Answer of Real Parties in Interest was filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the master service list as follows:

William Kendall
Adam McMillen

I further certify that on this date I served a copy of the foregoing by U.S. mail to:

Hon. Barry L. Breslow, District Court Judge
75 Court Street
Department 8
Reno, Nevada 89501

DATED: May 28, 2020

/s/ Margie Nevin
Employee of Lemons, Grundy & Eisenberg