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

REPLY TO ANSWER IN FURTHER SUPPORT OF ORIGINAL PETITION FOR WRIT OF MANDAMUS

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1. SUMMARY OF REPLY ARGUMENT

The vast majority of Farmers' Answer argues irrelevant points. Yet, it fails to directly address the unrefuted fact that of the 12 cases that it lost at arbitration since McMillen became counsel for Farmers, requests for trial de novo were filed in all but one.[1] This is the only issue.

The irrelevant points are:

1) The facts of the *Walker* and *Ortega* cases. The facts are irrelevant because Petitioners have never claimed that Farmers did not participate in either arbitration hearing in good faith. It is what happened after Farmers lost those and the other cases that is relevant;

2) It is not relevant that Farmers had cases that were not in arbitration, that were in other jurisdictions, counties, or other courts, or that were settled;

3) It is not relevant whether Judge Breslow had been involved in arbitrations before becoming a judge, had "a sense of how the program is supposed to work", or is "sensitive" to the right to trial by jury;

4) McMillen's "total caseload" has no relevance to anything;

5) Farmers' multiple pages explaining what they did during the

[1] By the time the Motion to Strike had been filed in Ortega, there were two more cases arbitrated by McMillen which he lost, one of which McMillen de novo'd.

arbitration hearings to show they participated in the hearings in good faith is all irrelevant because the issue here is the filing of requests for trial de novo after the hearings;

6) McMillen's self-serving, completely unverifiable declarations that he acted in "good faith" are irrelevant and incompetent in a statistical analysis.

The relevant evidence is:

1) Since McMillen began his employment with Farmers, there have been a total of 12 cases arbitrated and lost by McMillen;

2) Of those 12 cases that Farmers lost at arbitration, Farmers filed requests for trial de novo in all but one of them. This constitutes a **91.66 % de novo rate;**

3) The Annual Report of the Nevada Judiciary for the Fiscal Year 2015 (the last year of arbitration statistics) shows that the long-term average (10 years) trial de novo rate for the Second Judicial District Court was only 15 %;

4) Farmers did not contest any of this evidence.

Why does Farmers not refute the evidence of 11 out of 12 de novos? The answer is because these facts cannot be refuted. This evidence is in the court

records and was presented in motion and at the hearing. Farmers did not deny this evidence at any point.

Farmers says that the statistical information presented by Petitioners was "allegedly gleaned from the Washoe County court clerk's website...." (Answer at p. 31) Despite alluding to inaccuracy, Farmers did not and does not contest the accuracy of the statistical information or its source. It comes from public record; anyone can view it.

Instead, Farmers attempts to "dilute the pool", by claiming all of McMillen's cases, no matter what the nature, should be considered in determining the de novo rate. Nevertheless, in this matter, we are only concerned with cases that went to arbitration, resulted in a loss to Farmers, and were subsequently de novo'd by Farmers. That evidence shows de novo as a matter of course when they lose.

Farmers also utterly fails to address the District Court's rejection of the only expert testimony that the number of de novo'd case was sufficient for a meaningful statistical analysis, per Dr. Coleman. (App. Vol. 4 p. 10-11) Farmers cannot refer to evidence to refute Dr. Coleman because it failed to offer any rebuttal evidence at the hearing below and its cross-examination was unproductive. Only unsupported argument is proffered.

In *Gittings v. Hartz,* 116 Nev. 386, 996 P.2d 898 (2000), this Court

announced legal principles designed to protect Nevada's Alternative Dispute Resolution program from abuse by insurers who demand a trial de novo as a matter of course and without regard to the facts and circumstances of each individual case. Here, Petitioners found that Farmers had demanded a trial de novo in nearly 100 % of the all of the cases McMillen lost at arbitration.

2. WRIT RELIEF IS JUSTIFIED

Extraordinary relief is warranted here because the conduct of Farmers under review presents serious issues of public policy and concerns important questions of statewide interest. If an insurance company can request trial de novo in every case that it loses at arbitration, such conduct thwarts the very purpose of the Arbitration Program and affects thousands of cases in the program and to be assigned to the program in the future.

Where "an important issue of law needs clarification and public policy is served" by the Court's invocation of its original jurisdiction, an extraordinary writ petition should be entertained. See *State v. District Court,* 127 Nev. 927, 931 (2011).

This writ petition presents the serious issue of bad faith in the Arbitration Program by requesting trial de novo almost every time Farmers loses. This is a substantial public policy issue. Furthermore, this writ presents an important

procedural question of statewide importance to all practitioners and litigants.

3. NAR 22 CLEARLY ENCOMPASSES BAD FAITH IN REQUESTING TRIAL DE NOVO

Farmers makes the argument that the NAR 22 "good faith" requirement only applies during the "arbitration proceedings', attempting to construe that term very narrowly. This completely ignores NAR 22 (B). NAR 22(B) specifically states "If, during the proceedings in the trial de novo, the district court determines that a party or attorney engaged in conduct designed to obstruct, delay or otherwise adversely affect the arbitration proceedings, it may impose, in its discretion, any sanction authorized by NRCP 11 or NRCP 37."

Also, NAR 18(F) indicates that the District Court may strike a request for trial de novo "for any reason", provided it explains the reasons.

Filing requests for trial de novo in every case lost certainly should be characterized as "adversely affecting the arbitration proceedings." Otherwise, a litigant could participate in good faith at, and prior to, the arbitration hearing and then de novo every adverse award.

4. *GITTINGS*

Petitioners' remarks about *Gittings v. Hartz,* 116 Nev. 386 (2000), are accurate. However, Farmers is correct in stating that the statement "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) of the Nevada Arbitration Rules" was made by the *Gittings* District Court. The factual findings discussed in *Gittings*, were, of course, made by the trial court. The *Gittings* Court then reviewed those findings.

The *Gittings* Court held:

1. "...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);
2. Allstate's 52% rate is a "comparatively high percentage of trial de novo requests" (Id. at 392).

Speaking to Allstate's de novo rate of 52 %, the *Gittings* District Court stated 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) of the Nevada Arbitration Rules" (Id. at 392);

Of course, direct evidence that Farmers chose to routinely file requests for trial de novo every time it lost an arbitration would be unlikely. Addressing the type of evidence that would prove this to be bad faith, the Nevada Supreme Court stated: "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.

This statistical information is circumstantial evidence of bad faith. A nearly 100% de novo rate should cement in this Court's mind that such a percentage constitutes bad faith in violation of Rule 2 (A) of the Nevada Arbitration Rules. The District Court should have so found.

5. COLEMAN'S TESTIMONY

Dr. Gilbert Coleman analyzed the statistical information obtained directly from the Washoe County Court website and from the Annual Report of the Nevada Judiciary for the Fiscal Year 2015. (Appendix Vol. 4 at p. 53) He did not consider any of the "dilution" information that Farmers proffers because it was not relevant to a statistical analysis of Farmers' de novo rate. (Appendix Vol. 4 at p. 62-64; 69-70; 74-75) How could cases that were not and could never be subject to a "request for trial de novo" be relevant to analyzing Farmers' de novo rate?

Dr. Coleman is an expert in statistical analysis. (Appendix Vol. 4, Transcript at p. 51) His testimony was uncontroverted, unimpeached and not refuted. Farmers did not offer the testimony of a statistician to rebut or offer any rebuttal evidence.

Dr. Coleman testified that the rate at which Farmers requests trial de novos is

significantly different from the average 15 % rate known to exist in the Second Judicial District. (Id. at p. 54) In direct response to questions about the sufficiency of the number of cases analyzed, he testified that the number was "enough" for statistical analysis. (Id. at p. 54) He also testified that "the Farmers cases handled by Mr. McMillen are trial de novo'd at a rate so much vastly higher than the normal process, that you cannot say that...the Farmers cases are handled in any way even reasonably close to the way it's normally handled in Washoe County." (Id. at 56-57)

According to Dr. Coleman, based upon the trial court's statements and questions about the sufficiency of the number of cases, "With all due respect, Your Honor, that's probably because you don't have a grasp of the way the statistical analysis works." (Id. at 57.)

Farmers says: "...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." (Answer at p. 41) Applying that criteria to Dr. Coleman's testimony, his testimony should not have been rejected. His testimony was not impeached. It was certainly not incredible. It did not conflict with any other evidence.

Attacking Dr. Coleman's testimony, the only argument presented by Farmers

is (1) the information was provided by Petitioner's counsel and (2) was limited in its time frame, the number of cases and other undisclosed "factors." The information analyzed was taken directly from the Washoe County court clerk website and could be verified easily, which Farmers apparently did not do and did not contest. The information was, of course, limited to the time frame of McMillen's employment with Farmers and limited to the cases McMillen lost at arbitration. All other cases that McMillen was "involved in" are irrelevant to the analysis.

The Washoe County Court statistics are irrefutable. McMillen lost 12 arbitration cases in his tenure with Farmers and filed for trial de novo in 11 of them. That is fact.

Farmers presented no evidence below and presents no argument in this proceeding to support its assault upon Dr. Coleman's testimony.

6. THERE IS NO "FACTUAL DETERMINATION" TO BE MADE

The facts of 12 cases lost by McMillen in arbitration, followed by 11 requests for trial de novo, are facts that were not controverted at the hearing and were accepted by the District Court. (See Order, Appendix Vol 7, p. 344) Farmers does not contest those facts here.

This Court is not asked by Petitioners or Farmers to determine the validity of

those statistics. They are a given.

7. THE DISTRICT COURT ABUSED ITS DISCRETION AND ACTED ARBITRARILY AND CAPRICIOUSLY

A writ of mandamus is available to control a (1) manifest abuse or (2) arbitrary or capricious exercise of discretion. *State v. District Court,* 127 Nev. 927, 931 (2011).

A. MANIFEST ABUSE OF DISCRETION

A "manifest abuse of discretion" is a clearly erroneous interpretation of law or a clearly erroneous application of a law or rule. *State v. District Court,* 127 Nev. 927, 931 (2011). Here, the District Court manifestly abused its discretion by erroneously interpreting the law as laid down by *Gettings,* in failing to rule that a nearly 100% de novo rate was not bad faith in violation of Rule 2(A) of the Nevada Arbitration Rules.

If 52 % makes the *Gittings* District Court opine whether bad faith exists as a matter of law, then certainly Farmers' rate of nearly 100 % must constitute bad faith. The District Court's decision to not so find was a clearly erroneous interpretation and application of the law of *Gittings.*

The District Court also erroneously applied rules of evidence in disregarding the uncontroverted, unimpeached, and unrefuted testimony of Dr. Coleman. See

NRS 50.275. Given the utter lack of evidence contrary to Dr. Coleman's testimony, the District Court "manifestly" abused its discretion in disregarding it.

The District Court's conclusion, the only basis enunciated to support its order, is it was "based on the fairly limited sample for this limited time period." (See Order, Appendix Vol 7, p. 344) "An abuse of discretion occurs when the district court's decision is not supported by substantial evidence." *Otak Nev., LLC v. Eighth Judicial District Court,* 129 Nev. 799, 805 (2013); *Wohlers v. Bartgis,* 114 Nev. 1249, 1258 (1998) There was no evidence presented that the number of cases was inadequate in any manner. The only evidence was to the contrary. In this case there is **no evidence supporting the District Court's decision.**

B. ARBITRARY AND CAPRICIOUS

The term "arbitrary" means "founded on prejudice or preference rather than on reason." *State v. District Court,* 127 Nev. 927, 931 (2011). The term "capricious" means "contrary to the evidence or established rules of law." Id. The District Court's decision was not based upon reason supported by the evidence. Rather, it was based upon the District Court's personal preference to substitute its opinion in place of Dr. Coleman's testimony.

The District Court's decision was capricious because it was contrary to the only evidence presented and also was contrary to the established rules of law set

forth in *Gittings*. Farmers concedes that a determination of good or bad faith by a trial court can be overturned when that determination was clearly erroneous **or not based upon substantial evidence.** (Answer at p. 19, citing *Wohlers v Bartgis*, 114 Nev 1249 (1998) and *Ortak Nevada, LLC v. Eighth Judicial District Court,* 129 Nev. 799, 805 (2013))

8. THERE IS NO ADEQUATE REMEDY AT LAW

The issuance of a writ is imperative to vindicate the purpose of Nevada's Alternative Dispute Resolution system. Where Petitioners and the entire Arbitration Program have been victims of an insurer's bad faith in requesting trial de novo in almost all of the cases it loses at arbitration, appeal is not an adequate remedy. This abuse has ramifications far beyond Petitioners' two cases, presenting issues of important public policy and concern. This writ presents important questions of statewide concern. See *Poulos v. Eighth Judicial District Court,* 98 Nev. 453,455 (1982).Farmers' bad faith conduct in abusing the de novo right must be addressed immediately.

9. THERE WILL BE NO "QUANDARY"

Farmers claims that granting this writ will create a "quandary" precluding an insurance company from ever requesting a trial de novo. Nothing could be further from the truth.

Where an insurance company files for de novo in almost every case it loses, it should be punished for bad faith participation in the program, that is true. However, where an insurance company follows the rules and participates in filing requests for trial de novo in good faith, it shall have nothing to fear.

10. CORRELATION BETWEEN TRIAL DE NOVO REQUESTS AND SHORT TRIAL VERDICTS

The *Gittings* Court also referenced analysis of the correlation between requests for trial de novo and verdicts for or against the party who filed the request. With regard to this issue, Petitioners presented evidence at the hearing that of the 6 cases de novo'd by Farmers and taken to short trial verdict, in only one *(Wright v. Pritchard)* did Farmers end up with a better result when the total award, including attorney fees, costs and interest awards are included in the total judgments. (Appendix, Vol. 4,Transcript at p. 11-14) This fact was not competently disputed. (Appendix Vol. 4,Transcript at pp. 12-15) No evidence was submitted to contradict these facts.

Nevertheless, in its Answer, Farmers claims that in 3 out of 4 cases de novo'd and tried at short trial, Farmers obtained verdicts less than the arbitration awards. (Answer at p. 6) Not only is that just not true, Farmers does not even have the numbers correct.

Out of the cases at issue, the following occurred:

Eckert v. Mickelson:	**arb award**:	**$ 32,606.00**
	short trial:	33,212.00
	attorney's fees:	7,000.00
	total short trial:	**$ 40,212.00**
Dalmacio v. Palomar:	arb award:	$ 34,330.00
	fees and costs:	1,969.00
	short trial: Farmers' request for trial de novo stricken	
Elk v. Murphy:	arb award:	$ 16,848.00
	fees and costs:	4,882.00
	total arb award:	**21,730.00**
	short trial:	16,848.00
	fees and costs:	5,132.10
	interest:	2,651.92
	total short trial:	**$ 24,632.02**

Hakansson v. Sloan:	**arb award:**	**$**	**11,942.00**
	short trial:		8,000.00
	fees and costs:		5,939.00
	total short trial:	**$**	**13.939.00**
Hagen v. Green:	arb award:	$	11,233.00
	fees and costs:		3,000.00
	total arb award:		**14,233.00**
	short trial:		8,733.00
	fees and costs:		8,292.00
	total short trial:	**$**	**17,025.00**
Wright v. Pritchard:	arb award:	$	26,372.00
	short trial:		29,827.00

(Reduced by 40% comparative fault to $ 17,896.20)

Out of these 6 short trials, Farmers ended up having to pay more than the arbitration award, including fees, costs and interest, in all but 1 case! That is not bettering one's self and belies any retrospective justification for requesting trial de novo.

11. CONCLUSIONS

The NAR 18 Request for trial de novo is not to be used as an opportunity for the losing party to have second bite at the apple or to pressure the prevailing party to settle for less, delay payment, or increase costs. It must be exercised in good faith to further the purpose of the program "to provide a simplified procedure for obtaining a prompt and equitable resolution of certain civil matters." NAR 2(A). Requesting trial de novo almost every time one loses is not participating in the program in good faith, subjecting the abusing party to sanctions. NAR 22.

The unrefuted statistical data and analysis presented in the court below showed as a matter of law that Farmers has routinely filed a request for trial de novo in **nearly every** case that was lost (11 out of 12). This is unrefuted circumstantial evidence that they did so without regard to the facts and circumstances of each individual case, but, instead, just to get a second bite at the apple or to pressure the prevailing party to settle for less, delay payment, or increase costs.

Petitioners submit that the District Court abused its discretion in rejecting the uncontroverted expert testimony of Dr. Coleman, finding that the number of cases in the analysis was too small. The District Court also abused its discretion in failing to find as a matter of law that the Farmers de novo rate of nearly 100 % is bad faith participation in the Arbitration Program.

The District Court's decision was an arbitrary and capricious exercise of discretion which must be overturned. The only reason the District Court ruled as it did was because it found the number of de novo cases to be too small for statistical analysis. This was contrary to the only evidence on the issue presented by Dr. Coleman. Therefore, it was not based upon substantial evidence at all. Being founded upon preference rather than on reason, it was arbitrary. Since the decision was contrary to the evidence and the established rules of law set forth in *Gittings,* it was capricious.

WHEREFORE, Petitioners pray for the issuance of a Writ of Mandamus commanding:

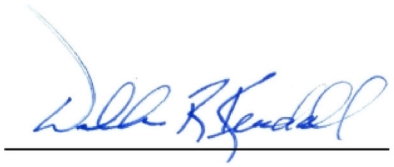
1) Entry of an order by the District Court, pursuant to NAR 22 (A), striking the requests for trial de novo in *Walker v. Michaels,* CV18-01798, and in *Ortega v. Fritter,* CV18-02032;

2) the Entry of judgment in favor of Petitioners by the District Court consistent with the arbitration awards in their cases, along with the opportunity for Petitioner's counsel to present motions for fees and costs in both cases;

3) Entry of an order by the District Court mandating further proceedings on Petitioners' motions for sanctions pursuant to NAR 22 and NRCP 11, and NRS 7.085.

DATED this 8th day of June, 2020.

WILLIAM R. KENDALL, ESQ.



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CERTIFICATE OF SERVICE

The undersigned does hereby swear and declare under penalty of perjury that on the day and date set out below, a true and correct copy of the preceding document was served upon the relevant parties in interest via electronic service through the Court's E-flex system, addressed as follows:

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A true and correct copy of the preceding document was served by mail upon:

Honorable Barry Breslow

Second Judicial District Court, Department 8

75 Court Street

Reno, NV 89501

Respondent

Dated this 8th day of June, 2020.