IN THE SUPREME COURT OF THE STATE OF NEVADA

JUSTIN MARCOS EFFROS AND GARY DELCONTIE, Appellants, vs. DEBRA S. PASSOVOY, Respondent.	No. 34724 FILED APR 06 2001 JANETTE M. BLOOM CLERK OF SUPREME COURT BY [signature] CHIEF DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from an order striking a request for trial de novo. We conclude that the district court erred in granting the motion because appellants' conduct during the arbitration proceedings did not rise to the level of failed good faith participation. We therefore reverse the district court's order and remand this matter for further proceedings.

Respondent Debra S. Passovoy filed a complaint for personal injuries arising from an automobile accident involving appellants Justin Marcos Effros and Gary Delcontie. The complaint alleged, inter alia, that Effros was the driver of a vehicle, owned by Delcontie, that struck Passovoy and caused her injuries. Effros and Delcontie answered the complaint, and the parties proceeded to the court-annexed arbitration program.

The court appointed an arbitrator, and he subsequently issued a discovery order and notification of the arbitration hearing. An early arbitration conference was held telephonically in October 1998, and each party exchanged a list of witnesses and documents. The case then proceeded through discovery. Both parties engaged in written discovery, and Effros and Delcontie took Passovoy's deposition.

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The arbitration hearing was conducted on January 13, 1999. At the hearing, Passovoy and Effros were the sole witnesses.[1] The arbitrator concluded that Effros was negligent and awarded Passovoy $26,000.00 plus costs, pre-judgment interest, and attorney fees. No transcript of the arbitration hearing was taken.

Following the arbitration hearing, Effros and Delcontie filed a timely request for trial de novo. Passovoy then filed a motion to strike the request for trial de novo. Passovoy's motion to strike argued that Effros and Delcontie failed to participate in the arbitration in good faith as required by NAR 22. Specifically, Passovoy argued that Effros and Delcontie failed to present any competent evidence disputing liability or the necessity of Passovoy's medical treatment.

Passovoy also argued that Effros and Delcontie's insurer, Allstate Insurance Company, had an institutional practice of requesting trials de novo, thus evidencing their lack of "good faith" participation. In support of this claim, Passovoy submitted a list of thirty-three case names and docket numbers in which Allstate allegedly sought trials de novo. In addition, Passovoy attached, as an exhibit, an unidentified breakdown of arbitration awards filed from May 15, 1995, through April 18, 1997.[2]

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[1]The district court's order striking appellants' request for trial de novo and Passovoy's motion to strike state that Effros did not appear at the arbitration hearing. However, the arbitration award indicates that Effros was, in fact, present.

[2]The exhibit appears to be a portion of the statistics compiled by the Clark County Discovery Commissioner regarding a study of various insurers and the rate of their requests for trials de novo.

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The district court granted Passovoy's motion. The court's civil court minute order concludes that "[d]efendants['] lack of production of admissible evidence at Arbitration Hearing constitute[d] bad faith."

Subsequently, Passovoy submitted to the district court an order containing ten findings of fact and four conclusions of law. The district court signed the order on May 4, 1999. Included in the findings of fact were the following relevant statements: (1) "At said hearing liability was not disputed by the Defendants"; (2) "At said hearing Defendants failed to present any reports, affidavits or statements to rebut the reasonableness and necessity of medical treatment received by the Plaintiff"; and (3) "That the Defendant failed to appear at the arbitration hearing." The district court, in its conclusions of law, also stated in relevant part:

> Defendants failed to participate in good faith and with meaningful participation at the arbitration hearing as required by Casino Properties, Inc. v. Andrews, 112 Nev. 132, 911 P.2d 1181 (1996)[,] by their failure, at any time during the arbitration of this case to present any exhibits, witnesses or other evidence to challenge liability or the medical treatment and care received by Plaintiff.

Following the issuance of the district court's order striking the request for trial de novo, Effros and Delcontie filed a motion to amend the judgment and a motion for reconsideration to address what they perceived as factual inaccuracies contained in the order. The motions were denied, and this timely appeal followed.

The purpose of Nevada's mandatory, non-binding, court-annexed arbitration program "is to provide a simplified procedure for obtaining a prompt and equitable resolution of

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certain civil matters."[3] Arbitration hearings are intended to be informal, expeditious, and consistent with the purposes and intent of the arbitration rules.[4]

A party to the court-annexed arbitration program has a right to a trial de novo if he or she requests it within thirty days after the arbitration award is served.[5] The failure of the party, however, "to either prosecute or defend a case in good faith during the arbitration proceedings . . . constitute[s] a waiver of the right to a trial de novo."[6] This court reviews an order granting a motion to strike a request for trial de novo for abuse of discretion.[7]

This court has held that "good faith" participation is congruent with "meaningful participation."[8] There is no single determinative factor when considering good faith; it is the totality of circumstances during the arbitration process that the district court must balance before granting a motion to strike a request for trial de novo.[9]

Additionally, not only must the district court consider the totality of circumstances, its order striking a trial de novo request must describe what type of conduct was

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[3]NAR 2(A).

[4]NAR 2(D).

[5]See NAR 18.

[6]NAR 22(A).

[7]See Casino Properties, Inc. v. Andrews, 112 Nev. 132, 911 P.2d 1181 (1996).

[8]Id. at Nev. at 135, 911 P.2d at 1182-83.

[9]See Campbell v. Maestro, 116 Nev. __, __, 996 P.2d 412, 415 (2000) (listing a variety of factors which may be relevant to whether a party participated in good faith); Gittings v. Hartz, 116 Nev. __, __, 996 P.2d 898, 901-03 (2000) (suggesting that a number of factors, although not supportive of the district court's order striking a trial de novo request in that case, could be considered by a trial court in striking a trial de novo request).

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at issue and, where necessary, how that conduct rose to the level of failed good faith participation.[10]

Here, the district court struck the request for trial de novo because Effros and Delcontie failed to contest liability and failed to present competent medical evidence to controvert Passovoy's evidence. We conclude that the district court erred in striking the request for trial de novo.

First, as pointed out in Gittings, the failure to contest liability does not necessarily form a lack of good-faith participation by the defendant who requested a trial de novo.[11] We note that Gittings was never intended to be read as a formulaic checklist of "do's and don'ts." The district court is authorized to strike a request for trial de novo when it is based on the totality of circumstances presented; this case does not present such an opportunity.

Second, a party's decision not to present countervailing medical evidence at the arbitration does not categorically support an order striking a request for trial de novo. As this court observed more generally in Gittings:[12]

> There may be many valid reasons why a party would not wish to expend money at the arbitration stage of a case on medical experts. Effective cross-examination may be sufficient to point out discrepancies in a person's claim of injury without such testimony, or without presentation of "countervailing medical evidence."

Effros and Delcontie, as defendants, were not under an affirmative obligation to produce evidence to overcome the initial burden of proof, as was Passovoy. Effros and

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[10]See Chamberland v. Labarbera, 110 Nev. 701, 705, 877 P.2d 523, 525 (1994) (remarking that the record on appeal in arbitration cases is often scant, making review in this court extremely difficult).

[11]See Gittings, 116 Nev. at __, 996 P.2d at 902.

[12]116 Nev. at __, 996 P.2d at 902.

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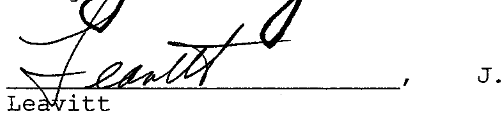
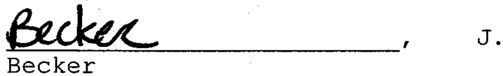
Delcontie's counsel was entitled to cross-examine Passovoy and her evidence, and the decision not to present "evidence to challenge liability or medical treatment" does not support the district court's order striking the request for trial de novo.

In addition, it appears from the record that Effros and Delcontie engaged in meaningful discovery through both written interrogatories and deposing Passovoy. Moreover, they did contest liability and the extent of Passovoy's damages. Effros and Delcontie's theory of the case was that Passovoy had been previously injured in another accident and that her injuries were not caused by the underlying collision.

We therefore conclude that the district court erred in striking the request for trial de novo. Accordingly, we ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.

Young, J.


Leavitt, J.


Becker, J.

cc: Hon. Lee A. Gates, District Judge
Mandelbaum Gentile & D'Olio
George T. Bochanis, Ltd.
Clark County Clerk

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MAR 13 2001

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY [signature]
CHIEF DEPUTY CLERK

ORDER

Cause appearing, oral argument will not be scheduled and this appeal shall stand submitted for decision to the Southern Nevada Panel as of the date of this order on the briefs filed herein. See NRAP 34(f)(1).

It is so ORDERED.

[signature: Maupin], C.J.

cc: Mandelbaum Gentile & D'Olio
George T. Bochanis, Ltd.

01-04501