IN THE COURT OF APPEALS OF THE STATE OF NEVADA

NEVADA GENERAL INSURANCE COMPANY; AND JAMES ROBERT LEE CELAYA, Petitioners, vs. THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE JOSEPH HARDY, JR., DISTRICT JUDGE, Respondents, and LADINE ROS, Real Party in Interest.	No. 73514-COA
JAMES ROBERT LEE CELAYA, Appellant, vs. LADINE ROS, Respondent.	No. 74450-COA
JAMES ROBERT LEE CELAYA, Appellant, vs. LADINE ROS, Respondent.	No. 75087-COA

FILED

OCT 31 2019

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER GRANTING IN PART AND DENYING IN PART PETITION FOR WRIT RELIEF (DOCKET NO.73514-COA), ORDER OF REVERSAL AND REMAND (DOCKET NO. 74450-COA AND NO. 75087-COA)

This is a consolidated original petition for a writ of prohibition and mandamus and appeal from a district court order striking a request for trial de novo and an order awarding attorney fees and costs. Eighth Judicial District Court, Clark County; Joseph Hardy, Jr., Judge.

On September 19, 2014, James Robert Lee Celaya was in a car accident with Ladine Ros. After Ros filed a complaint against Celaya for

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negligence, the case proceeded through Nevada's mandatory arbitration program. The record demonstrates that after analyzing Ros' medical records, Celaya filed an arbitration brief disputing the amount of Ros' damages. Celaya did not conduct any discovery before the arbitration hearing, and he did not personally appear at, or call any witnesses at, the arbitration hearing. Celaya did not contest liability at the arbitration hearing. However, Celaya's counsel cross-examined Ros as to the extent of her medical damages.

The arbitrator awarded Ros $24,000, and Celaya requested a trial de novo. Ros moved to strike Celaya's request, arguing that Celaya and his insurance provider, Nevada General Insurance Company (NGI), arbitrated in bad faith, and that NGI has a pattern and practice of routinely requesting trial de novo regardless of the circumstances in each individual case. As an alternative to striking Celaya's request for trial de novo, Ros asked the district court to order discovery and an evidentiary hearing to investigate NGI and determine whether the insurance company was using trial de novo to abuse the arbitration process.

The district court denied Ros' motion to strike in part, declining to strike Celaya's request for trial de novo at the time, but granted Ros' request for discovery and an evidentiary hearing. The district court found that Celaya's and NGI's conduct "[indicated] a lack of meaningful participation" during arbitration, and so the court required additional information before it could grant Ros' motion to strike. In its order, the district court concluded that *Gittings v. Hartz*, 116 Nev. 386, 996 P.2d 898 (2000), directed district courts to investigate an insurance company's practices via discovery to create a statistical analysis that would determine whether the insurance company routinely requested trial de novo to circumvent the arbitration program.

Soon after, Ros served Celaya and NGI[1] with interrogatories and requests for production of documents. A pattern emerged where NGI produced less information than desired, Ros moved to show cause, and the district court heard the motion and ordered NGI to comply. Ros moved to show cause a total of five times; her reasons for the motions varied, but largely revolved around NGI's failure to satisfactorily answer her written discovery requests. As a result, the district court ordered NGI to pay Ros' counsel monetary sanctions of $20,000 on three separate occasions for a total of $60,000.

After Ros' fifth motion to show cause, the district court struck Celaya's request for trial de novo, finding that NGI had a pattern and practice of filing for trial de novo to frustrate the arbitration program. The district court's order almost exclusively focused on NGI's conduct in responding to post-arbitration discovery requests, including NGI's failure to maintain certain records regarding its history of requesting trials de novo on behalf of its insureds. The district court also relied on a lone statistic (apparently derived from records produced by NGI), which supported that NGI had requested trial de novo in 80.3% of arbitration cases where the plaintiff received *some* monetary award. The district court also turned the previously awarded $60,000 in sanctions into an award of attorney fees and costs to be paid to Ros.[2]

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[1]Although the discovery requests were addressed to both Celaya and NGI, they exclusively asked for information from NGI.

[2]We do not recount the facts except as necessary to our decision. We note, however, that it appears from the record that NGI has already paid the $60,000 to Ros.

During the discovery period, Celaya petitioned[3] for a writ of mandamus or prohibition, arguing that the district court should have denied Ros' motion to strike and that the district court exceeded its jurisdiction by ordering NGI to produce written discovery and by ordering NGI to pay sanctions. We deny the writ petition in part regarding the motion to strike and discovery issues. *Edwards v. City of Reno*, 45 Nev. 135, 143, 198 P. 1090, 1092 (1921) ("Appellate courts do not give opinions on moot questions or abstract propositions."). However, we grant the petition in part as to the issue of sanctions, and we address these sanctions below within our discussion of the appeal. *Gonzalez v. Eighth Judicial Dist. Court*, 129 Nev. 215, 217, 298 P.3d 448, 449-50 (2013) (providing that the decision to consider a writ petition is within the court's discretion, and that the court may do so to control a lower court's manifest abuse of discretion).

On appeal, NGI[4] argues that the district court abused its discretion (1) by finding Celaya did not meaningfully participate in arbitration and by striking Celaya's request for trial de novo, (2) by ordering discovery into NGI's internal practices based on *Gittings*, and (3) by awarding Ros sanctions and attorney fees.[5] We agree that the district court abused its discretion by striking Celaya's request for trial de novo when there was no evidence of bad faith during the arbitration proceedings.

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[3]The clerk of court later added NGI as a party to the writ petition.

[4]While Celaya is the appellant, we address NGI here because the issues on appeal and a majority of the litigation below revolve around NGI's conduct.

[5]We decline NGI's invitation to overturn *Gittings*. *See* Nev. Const. art. 6, § 4; *see also* NRAP 36(c) (a published opinion creates mandatory precedent). We therefore do not consider the parties' other arguments on this issue.

We review a district court order striking a request for a trial de novo under the abuse of discretion standard. *Gittings*, 116 Nev. at 391, 996 P.2d at 901. Nevada litigants have the right to a civil jury trial under the state constitution. Nev. Const. art. 1, § 3. This right may be waived under Nevada Arbitration Rule 22, which 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). Within this context, "good faith" equals "meaningful participation." *Casino Props. Inc. v. Andrews*, 112 Nev. 132, 135, 911 P.2d 1181, 1182-83 (1996).

We recognize that "[a]rbitration matters often involve simple disputes and meager claims for damages that do not warrant expensive pre-arbitration discovery or sophisticated trial techniques." *Chamberland v. Labarbera*, 110 Nev. 701, 705, 877 P.2d 523, 525 (1994) (internal quotation marks omitted). And, "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." *Gittings*, 116 Nev. at 391, 996 P.2d at 901. In fact, "terminating [the] right to further participate in the litigation process" is a "severe" and "draconian sanction." *Chamberland*, 110 Nev. at 705, 877 P.2d at 525. Further, where a defendant contests liability in bad faith but also validly contests damages, "the severe sanction of striking a request for a trial de novo [is] not warranted." *Campbell v. Maestro*, 116 Nev. 380, 384, 996 P.2d 412, 415 (2000).

A defendant's choice to conduct no discovery before the arbitration hearing is not evidence of bad faith where liability is not a serious issue, the plaintiff provides copies of all relevant medical records, and damages are modest. *Chamberland*, 110 Nev. at 705-06, 877 P.2d at 525. Failure "to attend or call witnesses in an arbitration hearing" or to spend

money on medical experts at the arbitration stage does not amount to bad faith. *Gittings*, 116 Nev. at 392, 996 P.2d at 902. Moreover, "[e]ffective cross-examination may be sufficient to point out discrepancies in a person's claim of injury without [expert] testimony, or without presentation of countervailing medical evidence." *Id.* (internal quotation marks omitted).

Here, the district court improperly struck Celaya's request based largely on conduct during discovery that occurred *after* the arbitration proceedings had concluded. *See* NAR 22(A) (providing that a failure to "defend a case in good faith *during the arbitration proceedings* shall constitute a waiver of the right to a trial de novo" (emphasis added)). Moreover, when examining the conduct that happened *during* the arbitration proceedings, the district court struck Celaya's request based on conduct that is not evidence of bad faith under Nevada law. For example, liability was not a serious issue in this case, so Celaya's choices not to appear at the arbitration hearing or to conduct no discovery were not evidence of bad faith. Additionally, the record demonstrates that Celaya possessed Ros' medical records prior to submitting his arbitration brief and prior to the arbitration hearing. It is unclear why the district court found Celaya's apparent failure to independently request those medical records was evidence of bad faith. Further, Celaya submitted an arbitration brief disputing damages and cross-examined the plaintiff at the arbitration hearing about the extent of her damages, which Nevada law states may be sufficient in the place of medical experts or countervailing medical evidence. *Gittings*, 116 Nev. at 392, 996 P.2d at 902. The district court made no findings detailing why the arbitration brief and cross-examination were insufficient and instead

improperly struck Celaya's request purely based on the lack of defense medical experts and evidence.[6]

Additionally, and the record is unclear on this fact, but even if Celaya abandoned his liability defense right before or at the arbitration hearing, that is not evidence of bad faith. *Cf. Campbell*, 116 Nev. at 384, 996 P.2d at 414. If Celaya had in fact disputed liability in bad faith at the arbitration (which is not the case), the severe sanction of striking his request for trial de novo was not warranted where, as here, he validly disputed damages. In that case, the district court should have limited the trial de novo to damages. *See Gittings*, 116 Nev. at 392 n.5, 996 P.2d at 902 n.5. Nevada law is clear that the right to a jury trial by filing a trial de novo is not waived because litigants disagree over the best arbitration strategy. *Id.* at 391, 996 P.2d at 901. Therefore, we conclude that Celaya meaningfully participated in the arbitration proceedings, and the district court abused its discretion by striking his request for trial de novo.[7]

Consequently, because there was no bad faith, the district court should have granted Celaya's request for trial de novo and should not have ordered the discovery or the ensuing sanctions. For these reasons, we reverse the district court's order striking Celaya's request for trial de novo. We vacate the district court's discovery orders, sanctions, and award of attorney

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[6]We note that arbitration proceedings are not usually transcribed, as was the case here, thus we do not know the details of Ros' cross-examination conducted by Celaya's counsel at the arbitration, nor the specific arguments Celaya's counsel made in closing.

[7]It is also worth noting that Ros, who had the burden of proof, also failed to conduct any discovery in advance of the arbitration proceedings. Thus, it is difficult to ascertain how Celaya failed to participate in the arbitration process in good faith, such as by failing to comply with written discovery, since none was served.

fees and order the $60,000 be returned to NGI.[8] And, we remand this matter to the district court, reinstating Celaya's trial de novo.[9] Accordingly, we

ORDER the petition DENIED IN PART AND GRANTED IN PART AND DIRECT THE CLERK OF THIS COURT TO ISSUE A WRIT OF MANDAMUS instructing the district court to order the $60,000 be returned to NGI. We also ORDER the judgments of the district court REVERSED AND VACATED AND REMAND this matter to the district court for proceedings consistent with this order.

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Bulla

cc: Hon. Joseph Hardy, Jr., District Judge
Lewis Roca Rothgerber Christie LLP/Las Vegas
Resnick & Louis, P.C./Las Vegas
Injury Lawyers of Nevada
Eighth District Court Clerk

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[8]We also note that NGI was not a party to the underlying case, and, therefore, the district court erred by ordering the company to answer interrogatories and requests for production of documents as this type of discovery is limited to parties. *See* NRCP 33(a); NRCP 34(a)(1)(A). We decline to address under what circumstances discovery, such as that permitted by NRCP 30(b)(6) and NRCP 45, might be properly served on an insurance company in a third-party case because we find Celaya participated in the arbitration in good faith. Although the Nevada Rules of Civil Procedure were amended in March 2019, the amendments did not affect the application of the pertinent rules in this case.

[9]In light of our decision, we decline to reach the remaining issues in this appeal.