

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

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HEAT & FROST INSULATORS AND  
ALLIED WORKERS LOCAL 16,

Appellant,

v.

LABOR COMMISSIONER OF THE STATE  
OF NEVADA; THE UNIVERSITY OF  
NEVADA, RENO; CORE CONSTRUCTION;  
and RENO TAHOE CONSTRUCTION,

Respondents.

Case No. 71848  
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Elizabeth A. Brown  
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Appeal from the Second Judicial District Court, Washoe County  
The Honorable Elliott A. Sattler, District Judge  
District Court Case No. CV16-00353

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**RESPONDENT UNIVERSITY OF NEVADA, RENO'S  
ANSWERING BRIEF**

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## **TABLE OF CONTENTS**

TABLE OF AUTHORITIES .....	ii
I. ROUTING STATEMENT .....	1
II. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW .....	1
III. STATEMENT OF FACTS .....	1
A. Underlying Investigation and Determinations. ....	1
B. Petition for Judicial Review. ....	3
IV. SUMMARY OF THE ARGUMENT .....	4
V. ARGUMENT .....	5
A. “Excusable neglect” does not equate to a “showing of good cause.” .....	5
B. Heat & Frost did not demonstrate good cause for failing to timely complete service. ....	6
1. Heat & Frost failed to exercise diligence in ascertaining and complying with the service requirements.....	8
2. Heat & Frost failed to exercise diligence after learning of its service failure.....	10
VI. CONCLUSION .....	11
CERTIFICATE OF COMPLIANCE.....	13
STATUTORY ADDENDUM .....	15
CERTIFICATE OF SERVICE .....	17

## **TABLE OF AUTHORITIES**

### **Cases**

<i>Dallman v. Merrell</i> , 106 Nev. 929, 803 P.2d 232 (1990) .....	7, 8, 11
<i>Domino v. Gaughan</i> , 103 Nev. 582, 747 P.2d 236 (1987) .....	6
<i>Huckabay Prop., Inc. v. NC Auto Parts, LLC</i> , 130 Nev. Adv. Op. 23, 322 P.3d 429 (2014) .....	11
<i>Moseley v. Eighth Judicial Dist. Court</i> , 124 Nev. 654, 188 P.3d 1136 (2008) .....	5, 6, 10
<i>Saavedra-Sandoval v. Wal-Mart Stores</i> , 126 Nev. 592, 245 P.3d 1198 (2010) .....	7, 8, 11
<i>Scrimmer v. Eighth Judicial Dist. Court</i> , 116 Nev. 507, 998 P.2d 1190 (2000) .....	6, 7, 8

### **Statutes**

2015 Nev. Stat., ch. 160, § 28, at 722 .....	9
NAC 338.112(1)(c) .....	3
NRS 233B.130 .....	passim
NRS 233B.130(2)(c) .....	3, 8, 9, 10
NRS 233B.130(2)(c)(1) .....	8, 9
NRS 233B.130(5) .....	passim
NRS 338.070(1) .....	2

### **Rules and Other Authorities**

A.B. 53, 78th Leg. (Nev. Dec. 20, 2014) .....	9
NRAP 17 .....	1

NRAP 28(i) .....	5
NRCP 4 .....	6, 8
WDCR 12(4) .....	11

## **I. ROUTING STATEMENT**

Petitioner Heat & Frost Insulators Local 16's ("Heat & Frost") Petition for Judicial Review ("Petition") challenges a final administrative ruling issued by the Nevada Labor Commissioner ("Commissioner") dated February 2, 2016. *See* Joint Appendix ("JA") 0001-17. Thus, this appeal is presumptively assigned to the Court of Appeals, because it is an "[a]dministrative agency case except those involving tax, water, or public utilities commission determinations." NRAP 17(b)(4).<sup>1</sup>

## **II. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW**

Did the District Court properly dismiss Heat & Frost's Petition for lack of jurisdiction where Heat & Frost (1) failed to timely serve the Petition upon the Office of the Attorney General ("AG") as required by NRS 233B.130, (2) failed to properly file and submit a motion to extend the time within which to effectuate such service, and (3) otherwise failed to demonstrate "good cause" for its other failures?

## **III. STATEMENT OF FACTS**

### **A. Underlying Investigation and Determinations.**

The Board of Regents of the Nevada System of Higher Education on behalf of the University of Nevada, Reno ("University") awarded a construction contract to Core Construction ("Core"), as construction manager at risk, with respect to the

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<sup>1</sup> The University's brief cites the version of NRAP 17 in existence at the time this appeal was docketed.

University's West Stadium Utility Trench project, UNR Project No. 1211-P238 ("Project"). JA 0006. Core, in turn, hired Reno-Tahoe Construction, Inc. ("RTC") as one of its subcontractors on the Project. *Id.*

On or about August 11, 2015, Heat & Frost filed a Verified Complaint for Prevailing Wage Violations ("Wage Complaint") with respect to the Project, alleging that RTC had underpaid its employees by misclassifying them as Laborers and Operating Engineers, when they were allegedly doing work falling primarily within the job description of Mechanical Insulators. JA 0006-7. Heat & Frost specifically pointed to the task of installing Gilsulate, a granular material used to insulate underground piping. JA 0006.

By letter dated September 15, 2015, the Commissioner directed the University to investigate the claim contained in the Wage Complaint under NRS 338.070(1). JA 0007. After the University requested and received from the Commissioner an extension of time to complete the investigation, it issued a determination on November 9, 2015, concluding that RTC had not violated Nevada prevailing wage laws. *Id.*

Heat & Frost filed a timely objection to the University's determination on or about November 19, 2015. *Id.* On February 2, 2016, the Commissioner issued its Order Affirming Awarding Body's Determination, concluding that the allegations contained in the Wage Complaint "are unsubstantiated." JA 0006-8; JA 0008:2-3.

Specifically, the Commissioner agreed with the University that “[t]he nature of the Project required a different method for applying the Gilsulate that required the work of Operating Engineers and Laborers.” JA 0007:18-23. As expressly permitted under NAC 338.112(1)(c), the Commissioner affirmed the University’s determination without conducting an administrative hearing.

**B. Petition for Judicial Review.**

On February 18, 2016, Heat & Frost timely filed its Petition with respect to the Commissioner’s Order Affirming Awarding Body’s Determination. JA 0001-17. Heat & Frost served the Petition for Judicial Review on the Commissioner, the University, Core, and RTC, but failed to timely serve the AG as required under NRS 233B.130(2)(c). JA 0017-26; JA 0033-36; *see also* Opening Brief at 5. The Commissioner therefore moved, on April 15, 2016, to dismiss the Petition for Judicial Review for lack of subject matter jurisdiction. JA 0027-32. The University and Core each timely joined in the Commissioner’s Motion to Dismiss. JA 0116.

Heat & Frost did not serve the Petition for Judicial Review on the AG until April 25, 2016; 21 days after the April 4, 2016 deadline required under NRS 233B.130(5). JA 0056-57. Further, while Heat & Frost filed a belated Motion for Extension of Time to Serve Petition (“Motion for Extension”) on April 26, 2016—which was opposed—Heat & Frost neither filed a reply in support of the Motion for Extension nor submitted the same to the District Court for decision. JA 0046-51;

JA 0065-69; JA 0094:16-18. Despite the Motion for Extension not being properly submitted, the parties and District Court discussed at length the issue of whether Heat & Frost had made a “showing of good cause” to extend the time to serve the AG under NRS 233B.130(5). *See e.g.*, JA 0079:15-22; JA 0082:6-86:8; JA 0094:23-102:1; JA 0104:20-106:22; JA 0110:10-111:12. The District Court concluded the hearing by noting that although it was unclear procedurally if the Motion for Extension should or could be submitted at that late date, he would nonetheless review the briefs and arguments that had been raised in relation thereto. JA 0112:22-113:24.

Thereafter, on November 3, 2016, the District Court granted the Commissioner’s Motion to Dismiss. JA 0116-123.

#### **IV. SUMMARY OF THE ARGUMENT**

Heat & Frost did not carry its burden to make a “showing of good cause” to extend the time to complete service upon the AG.

The requirement that Heat & Frost serve the Petition upon the AG was publically available through multiple sources, and had been the law for almost 10 months by the time Heat & Frost completed its belated service and filed the untimely Motion to Extend. The purported basis for not timely serving the AG—that Heat & Frost relied upon printed and electronic versions of NRS 233B.130 that Heat & Frost knew or should have known in 2016 had not been updated since 2013—shows a lack



of diligence. That lack of diligence, coupled with Heat & Frost's subsequent failure to act promptly and diligently after discovering the jurisdictional defect, militates against any finding of good cause.

Because Heat & Frost failed to make a showing of good cause, the District Court's dismissal of the Petition should be affirmed.

## **V. ARGUMENT**

The University, pursuant to NRAP 28(i), hereby joins in and adopts by this reference the arguments made in Sections III through V of the Answering Brief filed by the Commissioner. The University answers separately as to Heat & Frost's arguments contained in Section VI of its Opening Brief.

### **A. "Excusable neglect" does not equate to a "showing of good cause."**

Heat & Frost argues that because the failure to timely complete service was allegedly "due to excusable neglect," it has somehow made a sufficient "showing of good cause" under NRS 233B.130(5). *See* Opening Brief at 26. However, as stated by the Supreme Court in *Moseley v. Eighth Judicial Dist. Court*, "good cause" is a distinct legal standard from "excusable neglect." 124 Nev. 654, 688 n. 66, 188 P.3d 1136, 1146 n. 66 (2008). Specifically, "[g]ood cause generally is established when it is shown that the circumstances causing the failure to act are beyond the individual's control." *Id.* "Excusable neglect," on the other hand, "requires a showing that the party acted in good faith and had a reasonable basis for its failure

to comply with the applicable limitations period.” *Id.* Thus, even if Heat & Frost had demonstrated excusable neglect, such a showing is insufficient to establish good cause.

**B. Heat & Frost did not demonstrate good cause for failing to timely complete service.**

Because the Supreme Court has not issued any published decisions under NRS 233B.130(5), cases applying NRCP 4(i)’s similar good cause requirement are instructive.

For example, the Supreme Court found good cause existed to extend the service period under NRCP 4 where local counsel, who was originally engaged only to file but not serve the complaint, attempted service within the 120-day period but could not complete the same until 9 days after the deadline. *See Domino v. Gaughan*, 103 Nev. 582, 584, 747 P.2d 236, 237 (1987). There, the Court concluded that difficulties counsel encountered in serving the summons and complaint and in communicating with out-of-state counsel, together with counsel’s illness during that period, established good cause. *Id.* In another decision, *Scrimmer v. Eighth Judicial Dist. Court*, 116 Nev. 507, 998 P.2d 1190 (2000), after identifying 10 factors to be considered in evaluating good cause,<sup>2</sup> the Supreme Court found good cause existed

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<sup>2</sup> “Appropriate considerations include: (1) difficulties in locating the defendant, (2) the defendant’s efforts at evading service or concealment of improper service until after the 120-day period has lapsed, (3) the plaintiff’s diligence in attempting to serve the defendant, (4) difficulties encountered by counsel, (5) the running of the

in two consolidated appeals. In the first appeal, the Supreme Court found good cause existed because although service was delayed by 13 days due to on-going settlement negotiations, the plaintiff had moved, and the trial court granted, a motion to extend the time to complete service and service was completed within the extended timeframe. *Id.* at 517, 998 P.2d at 1196. Likewise, the Supreme Court concluded that the trial court did not abuse its discretion in finding good cause to extend the service deadline in a second appeal where the delay was caused by a break-up of the law firm representing the plaintiff, and counsel promptly moved to extend the deadline upon discovering the issue. *Id.* at 517-18, 998 P.2d at 1197.

Conversely, the Supreme Court agreed that good cause did not exist to excuse service made 108 day late where, although counsel claimed he had difficulty finding the defendant after hiring a process server and searching through the telephone and city directories, counsel failed to avail himself of public records through which the defendant's address was readily available. *See Dallman v. Merrell*, 106 Nev. 929, 930, 803 P.2d 232, 232-33 (1990). Similarly, in *Saavedra-Sandoval v. Wal-Mart Stores*, the Supreme Court concluded that “none of the *Scrimmer* factors justif[ied] an

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applicable statute of limitations, (6) the parties' good faith attempts to settle the litigation during the 120-day period, (7) the lapse of time between the end of the 120-day period and the actual service of process on the defendant, (8) the prejudice to the defendant caused by the plaintiff's delay in serving process, (9) the defendant's knowledge of the existence of the lawsuit, and (10) any extensions of time for service granted by the district court.” *Id.* at 516, 998 P.2d at 1196.

extension of time” where the plaintiff’s process server failed to serve the defendant’s correct registered agent. 126 Nev. 592, 598, 245 P.3d 1198, 1201 (2010). In so concluding, the Court noted that although the process server provided an affidavit claiming the person served within the deadline was the defendant’s registered agent (*see id.* at 594, 245 P.3d at 1199), the plaintiff failed to exercise due diligence to properly ascertain the identity of the registered agent through available public records. *Id.* at 598, 245 P.3d at 1201.

As discussed further below, similar to the plaintiffs in *Dallman* and *Sandoval*, Heat & Frost failed to exercise diligence in two respects. First, it failed to exercise diligence in identifying and complying with NRS 233B.130(2)(c)’s requirement to serve the AG, despite the fact that the requirement was readily ascertainable through public records. Second, after learning of the service failure, it failed to exercise diligence in completing and requesting an extension of time to complete service on the AG. Each of these failures in diligence negates the “showing of good cause” required to extend the time within which to complete service. *See Scrimmer*, 116 Nev. at 516-17, 998 P.2d at 1196 (underlying the 10 “good cause” factors “is the policy behind Rule 4(i)—to encourage the diligent prosecution of complaints.”).

**1. Heat & Frost failed to exercise diligence in ascertaining and complying with the service requirements.**

At the time the Petition was filed, NRS 233B.130(2)(c) unequivocally required Heat & Frost to serve its Petition on the AG. *See* NRS 233B.130(2)(c)(1)

(“Petitions for judicial review must . . . [b]e served upon: (1) The Attorney General, or a person designated by the Attorney General, at the Office of the Attorney General in Carson City”). Yet, Heat & Frost had failed to satisfy NRS 233B.130(2)(c)(1) by the time the Commissioner served its Motion to Dismiss, and the period within which to have completed service had already expired. *See* JA0027-32. Heat & Frost attempts to excuse that failure, claiming to have been unaware of the requirement to serve the AG because it relied upon an older version of NRS 233B.130 that did not contain the amendments made to that statute in 2015. *See* Opening Brief at 27. That excuse lacks merit.

The Legislature does not change the law in secret. The bill amending NRS 233B.130, Assembly Bill 53, was introduced and made publicly available on December 20, 2014. *See* A.B. 53, 78th Leg. (Nev. Dec. 20, 2014); *see also* JA 0105:6-11. It was thereafter signed into law on May 25, 2015, with an effective date of July 1, 2015. *See* 2015 Nev. Stat., ch. 160, § 28, at 722. Thus, by the time Heat & Frost filed its Petition on February 18, 2016, nearly 14 months had elapsed since the requirement to serve the AG had been proposed, and the requirement had been enshrined into Nevada law for over 7 months. *See* JA 0098:4-9 (“THE COURT: . . . “You know, it’s not like they [the Legislature] changed it [NRS 233B.130(2)(c)] on July 1st and on July 2nd it wasn’t available. It was the law for seven months by the time that you filed your petition for judicial review.”).

Moreover, Heat & Frost has acknowledged that in trying to ascertain the service requirements for the Petition, it did not access an up-to-date legal research service like Westlaw or LexisNexis, but instead relied upon electronic and published copies of the Nevada Revised Statutes which had not been updated since 2013. JA 0053:3-13. Additionally, although Heat & Frost could have located a copy of A.B. 53 and the relevant changes to NRS 233B.130(2)(c) through the Legislative Counsel Bureau's website, it apparently failed to check the correct portion of that website, and further failed to review the 2015 Session Advance Sheets published by the Legislative Counsel Bureau. *See* JA 0066-67 n. 2. Given that Heat & Frost knew or should have realized that its research materials were no longer current in light of the intervening Legislative Session, diligence required it to have checked one of the several publically available, up-to-date sources. The failure to have done so, which was completely within Heat & Frost's control, militates against a showing of good cause. *See Moseley*, 124 Nev. at 688 n. 66, 188 P.3d at 1146 n. 66.

**2. Heat & Frost failed to exercise diligence after learning of its service failure.**

The Commissioner filed its Motion to Dismiss, pointing-out Heat & Frost's lack of compliance with NRS 233B.130 on April 15, 2016. JA 0027-32. The Motion to Dismiss was electronically served on Heat & Frost the same morning. *See* JA 0032. Despite being made aware of this jurisdictional defect, Heat & Frost failed to act promptly and instead waited until April 26, 2016, to file its Motion for Extension.

JA0046-51. As noted by the District Court, 68 days had elapsed from the date Heat & Frost filed its Petition and its request to extend the time to complete service. JA0100:6-14.

Moreover, although Heat & Frost filed a belated Motion to Extend on April 26, 2016, it failed to take the steps, either prior to or after the August 19, 2016 hearing, needed to bring the motion before the District Court. Specifically, local rules of procedure required Heat & Frost to file a written request for submission of the Motion to Extend in order to notify the filing office to submit the same to the District Court for decision. *See* WDCR 12(4). Yet, Heat & Frost failed to file a reply in support of its Motion to Extend, and, more importantly, also failed to file a written request for submission. *See* JA 0094:16-20; *see also* JA 0121:21-23. Heat & Frost could not offer any explanation for this lack of diligence during the August hearing, and has failed to do so to date. *See id.* at 0094:22-23. This additional lack of diligence negates a showing of good cause, and the District Court's decision should be affirmed. *See Dallman*, 106 Nev. at 930, 803 P.2d at 232-33; *Saavedra-Sandoval*, 126 Nev. at 598, 245 P.3d at 1201.

## **VI. CONCLUSION**

The public policy supporting resolution of cases on their merits is not limitless. *See Huckabay Prop., Inc. v. NC Auto Parts, LLC*, 130 Nev. Adv. Op. 23, 322 P.3d 429, 433 (2014) (“a party cannot rely on the preference for deciding cases

on their merits to the exclusion of all other policy considerations”). NRS 233B.130 clearly required Heat & Frost to timely serve the Petition upon the AG, and Heat & Frost’s lack of diligence in ascertaining and complying with that requirement negates its claim to have made a “showing of good cause” under NRS 233B.130(5). The University, therefore, respectfully request this Court to affirm the District Court’s dismissal of Heat & Frost’s Petition for Judicial Review.

DATED this 9<sup>th</sup> day of June, 2017.

/s/ Bryan Wright

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## **CERTIFICATE OF COMPLIANCE**

1. I hereby certify the foregoing brief complies with the formatting requirements contained in NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Times New Roman.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it does not exceed 30 pages.

3. Finally, I certify that I have read this brief, and to the best of my knowledge, information, and belief, it is not frivolous or imposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the 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

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accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 9<sup>th</sup> day of June, 2017.

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## **STATUTORY ADDENDUM**

### Washoe District Court Rules

#### **Rule 12. Motions; points and authorities and decisions.**

1. Except as provided in Rule 1, all motions shall be accompanied by points and authorities and any affidavits relied upon. Motions for support or allowances and opposition thereto in divorce and separate maintenance actions shall include disclosure of the financial condition of the respective parties upon a form approved by the court pursuant to Rule 40 of these rules.
2. The responding party shall file and serve upon all parties, within 10 days after service of a motion, answering points and authorities and counter-affidavits.
3. The District Attorney's Office shall have 21 days to respond to any motions to seal criminal records pursuant to NRS 179.245.
4. The moving party may serve and file reply points and authorities within 5 days after service of the answering points and authorities. Upon the expiration of the 5-day period, either party may notify the filing office to submit the matter for decision by filing and serving all parties with a written request for submission of the motion on a form supplied by the filing office. The original of the submit form shall be delivered to the filing office. Proof of service shall be attached to the motion and response.
5. Decision shall be rendered without oral argument unless oral argument is ordered by the court, in which event the individual court department shall set a date and time for hearing.
6. All discovery motions shall include the certificate of moving counsel certifying that after consultation with opposing counsel, they have been unable to resolve the matter.
7. Except by leave of the court, all motions for summary judgment must be submitted to the court pursuant to subsection 4 of this rule at least 30 days prior to the date the case is set for trial.
8. The rehearing of motions must be done in conformity with D.C.R. 13, Section 7. A party seeking reconsideration of a ruling of the court, other than an order which may be addressed by motion pursuant to N.R.C.P. 50(b), 52 (b), 59 or 60, must file a motion for such relief within 10 days after service of written notice of entry of the

order or judgment, unless the time is shortened or enlarged by order. A motion for rehearing or reconsideration must be served, noticed, filed, and heard as is any other motion. A motion for rehearing does not toll the 30-day period for filing a notice of appeal from a final order or judgment.

9. If a motion for rehearing is granted, the court may make a final disposition of the cause without reargument, or may restore it to the calendar for reargument or resubmission, or may make such other orders as are deemed appropriate under the circumstances of the particular case.

10. Drop box filing.

(a) Papers eligible for filing. All papers and pleadings, including motions, oppositions and replies may be filed in the drop box located outside the Court Clerk's Office, with the exception of filings which require the payment of filing fees. Filings which require the payment of filing fees must be made directly with the Court Clerk's Office.

(b) Procedure. Papers may be filed in the drop box during all hours the courthouse is open. Papers must be date and time stamped prior to being placed in the drop box. Drop box filings shall be deemed filed as of the date and time noted on the paper or pleading. If a drop box filing has not been date and time stamped, the paper or pleading shall be deemed filed at the time it is date and time stamped by the Court Clerk.

[As amended; effective December 10, 1998.]

## **CERTIFICATE OF SERVICE**

Pursuant to NRAP 25(d) I hereby certify that I am an employee of the University of Nevada, Reno, an institution of the Nevada System of Higher Education, and that on the 9<sup>th</sup> day of June, 2017, I electronically filed and served the preceding document by using the Court's electronic filing system which will send a notice of electronic filing to the following:

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