

IN THE SUPREME COURT OF THE STATE OF NEVADA

MARIA HEATON, AN INDIVIDUAL,

Appellant,

vs.

ELLIS, BANDT, BIRKIN, KOLLINS &
WONG, PLLC, A NEVADA DOMESTIC
PROFESSIONAL LIMITED LIABILITY
COMPANY, D/8/A DESERT
RADIOLOGY; SHELIN AGRAWAL &
HYER, PLLC, A NEVADA DOMESTIC
PROFESSIONAL LIMITED LIABILITY
COMPANY, D/B/A DESERT
RADIOLOGY; AND FARHAD SANI,
M.D.,

Respondents.

Supreme Court No. 84926

Electronically Filed
Jul 25 2022 04:25 p.m.
District Court Case No. A818370
Elizabeth A. Brown
Clerk of Supreme Court

**NOTICE OF OBJECTION TO
MODIFICATION OF CAPTION**

COMES NOW Respondent FARHAD SANI, M.D. hereby files a Notice of Objection to Modification of Caption. It is Defendant Farhad Sani, M.D.'s position that the inclusion of Teresa Gubler and Margaret R. Leavitt, individually and as Co-Special Administrators of the Estate of Maria Heaton, Deceased, as Appellants in this matter is improper.

Pursuant to NRAP 3A(a): "A **party** who is aggrieved by an appealable judgment or order may appeal from that judgment or order, with or without first moving for a new trial." (Emphasis added). "NRAP 3A(a) limits the right of appeal to 'parties aggrieved' by a district court's decision." *Valley Bank of Nevada v. Ginsburg*, 110 Nev. 440, 446, 874 P.2d 729, 734 (1994). The *Ginsburg* Court ruled

that a “person or entity is not a party within the meaning of NRAP 3A(a) unless that person or entity has been served with process, appeared in the court below *and* has been named as a party of record in the trial court.” *Id.* at 448, 874 P.2d at 735 (emphasis in original).

Here, this matter was dismissed in the trial court because following Plaintiff Maria Heaton’s death no proper party was substituted as a plaintiff in this matter pursuant to NRCP 25(a)(1).¹ Neither Teresa Gubler nor Margaret R. Leavitt were named as parties of record in the trial court below. As such, neither is a proper appellant in this matter and Defendant does not agree that the caption should be modified to include either.

DATED this 25th day of July, 2022.

MESSNER REEVES LLP

/s/ Courtney Christopher
DAVID J. MORTENSEN, ESQ. (NBN 2547)
COURTNEY CHRISTOPHER, ESQ. (NBN 12717)
8945 West Russell Road, Suite 300
Las Vegas, Nevada 89148
Telephone: (702) 363-5100
Facsimile: (702) 363-5101
Attorneys for Respondent Farhad Sani, M.D.

¹ Notice of Entry of Order Granting Motion to Dismiss, dated May 24, 2022, attached hereto as **Exhibit “A”**.

CERTIFICATE OF SERVICE

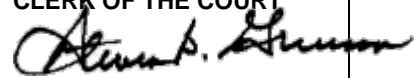
On this 25th day of July, 2022, pursuant to Administrative Order 14-2 and Rule 9 of the NEFCR, I caused the foregoing **NOTICE OF OBJECTION TO MODIFICATION OF CAPTION** to be transmitted to the person(s) identified in the E-Service List for this captioned case as follows. A service transmission report reported service as complete and a copy of the service transmission report will be maintained with the document(s) in this office.

Travis E. Shetler, Esq. (NBN 04747)
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P: 702-792-5855
*Attorneys for Defendants Ellis Bandt
Birkin Kollins and Wong, PLLC dba
Desert Radiology and Shelin,
Agrawal & Hyer, PLLC, dba Desert
Radiology*

/s/ Tya Frabott
Employee of MESSNER REEVES LLP

Exhibit A



NEOJ

DAVID J. MORTENSEN, ESQ.
Nevada Bar No. 2547
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dlinford@messner.com

Attorneys for Defendant Farhad Sani, M.D.

DISTRICT COURT

CLARK COUNTY, NEVADA

MARIA HEATON, an individual,

Plaintiffs,

vs.

ELLIS, BANDT, BIRKIN, KILLINS &
WONG, PLLC, a Nevada Domestic
Professional Limited Liability Company, dba
DESERT RADIOLOGY; SHELIN,
AGRAWAL & HYER, PLLC, a Nevada
Domestic Professional Limited Liability
Company, dba DESRT RADIOLOGY;
FARHAD SANI, MD, DOES 1 through 10,
inclusive; and ROE ENTITIES 1 through 10,
inclusive;

Defendants.

Case No. A-20-818370-C

Dept. No. 15

NOTICE OF ENTRY OF ORDER

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A-20-818370-C

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DATED this 24th day of May, 2022.

/s/ Derek Linford

Attorneys for Defendant Farhad Sani, M.D.

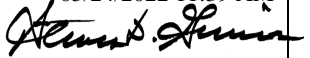
1 **CERTIFICATE OF SERVICE**

2 On this 24th day of May, 2022, pursuant to Administrative Order 14-2 and Rule 9 of the
3 NEFCR, I caused the foregoing **NOTICE OF ENTRY OF ORDER** to be transmitted to the
4 person(s) identified in the E-Service List for this captioned case in Odyssey E-File & Serve of the
5 Eighth Judicial District Court, County of Clark, State of Nevada. A service transmission report
6 reported service as complete and a copy of the service transmission report will be maintained with
7 the document(s) in this office.

8 Steven M. Burris, Esq. (NBN 00603)
9 Travis E. Shetler, Esq. (NBN 04747)
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*Attorneys for Defendants Ellis Bandt Birkin
Kollins and Wong, PLLC dba Desert Radiology
and Shelin, Agrawal & Hyer, PLLC, dba Desert
Radiology*

17 /s/ Tya Frabott
18 Employee of MESSNER REEVES LLP
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CLERK OF THE COURT

ORDR

DAVID J. MORTENSEN, ESQ.
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COURTNEY CHRISTOPHER, ESQ.
Nevada Bar No. 12717
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dlinford@messner.com

Attorneys for Defendant Farhad Sani, M.D.

DISTRICT COURT

CLARK COUNTY, NEVADA

MARIA HEATON, an individual,

Plaintiffs,

vs.

ELLIS, BANDT, BIRKIN, KILLINS &
WONG, PLLC, a Nevada Domestic
Professional Limited Liability Company, dba
DESERT RADIOLOGY; SHELIN,
AGRAWAL & HYER, PLLC, a Nevada
Domestic Professional Limited Liability
Company, dba DESERT RADIOLOGY;
FARHAD SANI, MD, DOES 1 through 10,
inclusive; and ROE ENTITIES 1 through 10,
inclusive;

Defendants.

Case No. A-20-818370-C

Dept. No. 15

**ORDER GRANTING DEFENDANT
FARHAD SANI, MD'S MOTION TO
DISMISS PLAINTIFF'S COMPLAINT
AND DEFENDANTS ELLIS BANDT
BIRKIN KOLLINS AND WONG, PLLC
DBA DESERT RADIOLOGY AND
SHELIN, AGRAWAL & HYER, PLLC,
DBA DESERT RADIOLOGY'S
PEREMPTORY JOINDER TO MOTION
TO DISMISS PLAINTIFF'S COMPLAINT**

On March 23, 2022, Defendant FARHAD SANI, MD (hereinafter "Dr. Sani") filed a Motion to Dismiss Plaintiff's Complaint and on March 28, 2022, Defendants ELLIS, BANDT, BIRKIN, KILLINS & WONG, PLLC, dba DESERT RADIOLOGY and SHELIN, AGRAWAL & HYER, PLLC, dba DESERT RADIOLOGY (hereinafter "Desert Radiology Defendants") filed a Joinder to

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1 the Motion to Dismiss. Thereafter, Plaintiff filed an Opposition to the Motion to Dismiss and Joinder
2 on April 1, 2022, Defendant Dr. Sani filed a Reply on April 14, 2022, and Desert Radiology
3 Defendants filed a Joinder to the Reply on April 19, 2022.

4 On May 9, 2022, Defendant Dr. Sani's Motion to Dismiss and Desert Radiology Defendants'
5 Joinder came before this court for oral argument. Travis E. Shetler, Esq. appeared on behalf of
6 Plaintiff, Derek Linford, Esq. appeared on behalf of Defendant Dr. Sani, and Sean M. Kelly, Esq.
7 appeared on behalf of Desert Radiology Defendants. Pursuant to the arguments of said hearing, the
8 pleadings and papers on file, and good cause appearing, the Court hereby GRANTS Defendant Dr.
9 Sani's Motion to Dismiss and Desert Radiology Defendants' Joinder thereto.

10 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiff's Complaint is
11 DISMISSED in its entirety pursuant to NRCP 25(a)(1).

12 On June 15, 2021, Plaintiff Maria Heaton, the sole Plaintiff in this lawsuit passed away. On
13 September 20, 2021, Plaintiff's counsel filed a Suggestion of Death Upon the Record. Pursuant to
14 NRCP 25(a)(1), Plaintiff's counsel had 180 days after the filing of the Suggestion of Death Upon the
15 Record to file a Motion to Substitute a proper party, which expired on March 21, 2022. Plaintiff's
16 counsel failed to file the required Motion to Substitute by March 21, 2022, and as such the Court is
17 compelled to dismiss Plaintiff's Complaint.

18 NRCP 25(a)(1) provides that if the motion is not made within 180 days the claims by or
19 against the decedent must be dismissed. However, Nevada case law has provided a possible exception
20 to this rule. The Nevada Supreme Court has held that the deadline to substitute a proper party may be
21 extended after it has expired under NRCP 6(b) only on a showing of excusable neglect. *Moseley v.*
22 *Eighth Jud. Dist. Ct.*, 124 Nev. 654 (2008). In *Moseley*, the Nevada Supreme Court ruled that to
23 establish excusable neglect and extend the time to file for substitution under NRCP 25(a)(1), the party
24 must "demonstrate that (1) it acted in good faith, (2) it exercised due diligence, (3) there is a
25 reasonable basis for not complying within the specified time, and (4) the nonmoving party will not
26 suffer prejudice." *Id.* at 667-68.

27 The facts of the case are important. Plaintiff's counsel was the attorney for the appointment
28

1 of Special Co-Administrators for Plaintiff Maria Heaton's Estate. As such, Plaintiff's counsel was
2 aware of the appointment, and this is not a case where Plaintiff's counsel was not aware of the
3 appointment. The appointment of Special Co-Administrators occurred well before the 180-day
4 deadline to file a motion to substitute expired. There was no obstruction on the part of Defendants or
5 Defendants' counsel in this matter. Plaintiff's counsel represented that prior to the deadline to file the
6 motion to substitute, he asked his paralegal if the document had been filed. Plaintiff's counsel was
7 not specific as to which document he was speaking, and as a result, when the question was answered
8 in the affirmative, it was for the wrong case. Plaintiff's counsel's reliance on his paralegal's response
9 is not excusable neglect. The lateness of Plaintiff's Suggestion of Death does not factor into this
10 Court's decision.

11 The facts of this case are not similar to the facts of the *George v. United States*, 208 F.R.D.
12 29 (D. Conn. 2001) or *Al-Jundi v. Estate of Rockefeller*, 757 F.Supp. 206 (W.D.N.Y. 1990), wherein
13 the *Moseley* Court noted excusable neglect could exist. First, in the *George* case, excusable neglect
14 was found because "any delay in moving for substitution was not due to any inaction on the part of
15 the deceased plaintiffs counsel" and that "she moved for an extension of time to be substituted as the
16 personal representative...four days after receiving the documentation reflecting the appointment."
17 *Moseley*, 124 Nev. at 666. This ruling does not apply to this case as the delay in moving for
18 substitution was due to inaction on the part of Plaintiff's counsel.

19 Second, in the *Al-Jundi* case, the court noted excusable neglect existed when following the
20 defendant's death "decedent's daughter refused to be appointed, but she also objected to the plaintiff's
21 efforts to have an administrator ad litem appointed" and the "decedent's attorney attempted to stall
22 any substitution." *Moseley*, 124 Nev. at 667. This ruling also does not apply to this case as there was
23 no obstruction or interference by Defendants or Defendants' counsel.

24 In applying the four factors identified by the *Moseley* Court to the facts of this case, the Court
25 finds that there is no question Plaintiff's counsel acted in good faith and there would be no prejudice
26 in this matter. However, the Court finds that Plaintiff's counsel did not exercise due diligence and
27 Plaintiff's counsel did not have a reasonable basis for not complying within the specified time. Based

on the finding of lack of due diligence and no reasonable basis for failing to comply within the specified time on behalf of Plaintiff's counsel, the Court cannot find excusable neglect. As such the Court is compelled to Grant the Motion to Dismiss and Joinder thereto and dismiss Plaintiff's Complaint.

Respectfully submitted by:

MESSNER REEVES LLP

/s/ Derek Linford

David J. Mortensen, Esq. (NBN 2547)
Courtney Christopher, Esq. (NBN 12717)
Derek Linford, Esq. (NBN 14909)
8945 West Russell Road, Suite 300
Las Vegas, Nevada 89148
*Attorneys for Defendant
Farhad Sani, M.D.*

Approved as to form and content by:

LAW OFFICES OF TRAVIS E. SHETLER, PC

Refused to sign

Travis E. Shetler, Esq. (NBN 004747)
3202 W. Charleston Blvd.
Las Vegas, NV 89102
Attorney for Plaintiff

Approved as to form and content by:

McBRIDE HALL

/s/ Sean Kelly

Robert C. McBride, Esq. (NBN 7082)
Sean M. Kelly, Esq. (NBN 10102)
8329 W. Sunset Road, Suite 260
Las Vegas, NV 89113
*Attorneys Defendants
Ellis Bandt Birkin Kollins and Wong, PLLC
dba Desert Radiology and Shelin, Agrawal &
Hyer, PLLC, dba Desert Radiology*

ORDER

Pursuant to the foregoing, and good cause appearing therefrom:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendant FARHAD SANI, MD's Motion to Dismiss and Defendants ELLIS, BANDT, BIRKIN, KILLINS & WONG, PLLC, dba DESERT RADIOLOGY and SHELIN, AGRAWAL & HYER, PLLC, dba DESERT RADIOLOGY's Joinder are GRANTED pursuant to NRCP 25(a)(1), and Plaintiff's Complaint is DISMISSED in its entirety.

IT IS SO ORDERED.

Dated this 24th day of May, 2022


DISTRICT JUDGE

**61B 4AD 69F6 408A
Joe Hardy
District Court Judge**

From: Derek Linford
Sent: Monday, May 23, 2022 3:10 PM
To: Tya Frabott
Cc: Stephanie Prescott; Courtney Christopher
Subject: FW: Heaton adv. Sani / Our File No. 10555.0025 / ORDER - DUE TODAY
Attachments: ORDR - Order Granting Motion to Dismiss (06351674xA9B4D).docx

Follow Up Flag:
Flag Status:

From: Derek Linford
Sent: Monday, May 23, 2022 3:05 PM
To: 'Sean M. Kelly' <smkelly@mcbridehall.com>; Travis Shetler <travis@shetlerlawfirm.com>
Cc: Courtney Christopher <CChristopher@messner.com>; Stephanie Prescott <sprescott@messner.com>
Subject: RE: Heaton adv. Sani / Our File No. 10555.0025 / PROPOSED ORDER GRANTING MOTION TO DISMISS

Good Afternoon,

Our office will go ahead and submit our proposed Order today. We will indicate that Plaintiff's counsel does not approve and attach our emails to the submission.

Thank you,
Derek

DEREK K. LINFORD
Attorney
Messner Reeves LLP
O: 702.363.5100 **E:** dlinford@messner.com
8945 W. Russell Road, Suite 300, Las Vegas, NV 89148

From: Sean M. Kelly <smkelly@mcbridehall.com>
Sent: Friday, May 20, 2022 1:01 PM
To: Derek Linford <DLinford@messner.com>; Travis Shetler <travis@shetlerlawfirm.com>

Cc: Courtney Christopher <CChristopher@messner.com>; Stephanie Prescott <sprescott@messner.com>
Subject: [EXTERNAL] - RE: Heaton adv. Sani / Our File No. 10555.0025 / PROPOSED ORDER GRANTING MOTION TO DISMISS

I would agree...Judge Hardy wanted a detailed Order, one that is likely more detailed than the court's minutes.

Sean M. Kelly, Esq.
smkelly@mcbridehall.com | www.mcbridehall.com

8329 West Sunset Road
Suite 260
Las Vegas, Nevada 89113
Telephone: (702) 792-5855
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MCBRIDE HALL
ATTORNEYS AT LAW

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From: Derek Linford <DLinford@messner.com>
Sent: Friday, May 20, 2022 12:57 PM
To: Travis Shetler <travis@shetlerlawfirm.com>
Cc: Courtney Christopher <CChristopher@messner.com>; Stephanie Prescott <sprescott@messner.com>; Sean M. Kelly <smkelly@mcbridehall.com>
Subject: RE: Heaton adv. Sani / Our File No. 10555.0025 / PROPOSED ORDER GRANTING MOTION TO DISMISS

Hi Travis,

Do you have any suggestions on how to edit the proposed Order to limit it? I based the Order on my notes from Judge Hardy's ruling at the hearing. I do believe Judge Hardy had asked that the Order include his detailed findings. I am available this afternoon to discuss further if you would like. I can be reached on my cell at 208-965-4408.

Thank you,
Derek

DEREK K. LINFORD
Attorney
Messner Reeves LLP
O: 702.363.5100 **E:** dlinford@messner.com
8945 W. Russell Road, Suite 300, Las Vegas, NV 89148

From: Travis Shetler <travis@shetlerlawfirm.com>
Sent: Friday, May 20, 2022 12:29 PM
To: Derek Linford <DLinford@messner.com>

Cc: Courtney Christopher <CChristopher@messner.com>; Stephanie Prescott <sprescott@messner.com>; Sean M. Kelly <smkelly@mcbridehall.com>

Subject: [EXTERNAL] - RE: Heaton adv. Sani / Our File No. 10555.0025 / PROPOSED ORDER GRANTING MOTION TO DISMISS

Good afternoon,

I have reviewed the order.

I do not think the Order should include language which stretches so far beyond the court minutes. I will sign off if we can limit it accordingly

Thank you and enjoy your weekends.

Travis

From: Derek Linford <DLinford@messner.com>

Sent: Thursday, May 19, 2022 8:08 AM

To: Travis Shetler <travis@shetlerlawfirm.com>

Cc: Courtney Christopher <CChristopher@messner.com>; Stephanie Prescott <sprescott@messner.com>; Sean M. Kelly <smkelly@mcbridehall.com>

Subject: FW: Heaton adv. Sani / Our File No. 10555.0025 / PROPOSED ORDER GRANTING MOTION TO DISMISS

Hi Travis,

I wanted to follow-up on our proposed Order. The Order is due to the Court Monday, 5/23. Let me know if you have any requested changes, or if it is approved to submit with your e-signature.

Thank you,
Derek

DEREK K. LINFORD

Attorney

Messner Reeves LLP

O: 702.363.5100 **E:** dlinford@messner.com

8945 W. Russell Road, Suite 300, Las Vegas, NV 89148

From: Derek Linford

Sent: Thursday, May 12, 2022 2:14 PM

To: travis@shetlerlawfirm.com

Cc: Courtney Christopher <CChristopher@messner.com>; Stephanie Prescott <sprescott@messner.com>; Sean M. Kelly <smkelly@mcbridehall.com>

Subject: RE: Heaton adv. Sani / Our File No. 10555.0025 / PROPOSED ORDER GRANTING MOTION TO DISMISS

Hi Travis,

I just wanted to follow-up on our proposed Order. Please let me know if there are any requested changes, or if it is approved to submit with your e-signature.

Thank you,

Derek

DEREK K. LINFORD

Attorney

Messner Reeves LLP

O: 702.363.5100 E: dlinford@messner.com

8945 W. Russell Road, Suite 300, Las Vegas, NV 89148

From: Sean M. Kelly <smkelly@mcbridehall.com>

Sent: Wednesday, May 11, 2022 12:46 PM

To: Derek Linford <DLinford@messner.com>

Cc: travis@shetlerlawfirm.com; Courtney Christopher <CChristopher@messner.com>; Stephanie Prescott <spreScott@messner.com>

Subject: [EXTERNAL] - Re: Heaton adv. Sani / Our File No. 10555.0025 / PROPOSED ORDER GRANTING MOTION TO DISMISS

Thanks for preparing. You can use my e-signature.

Thank you,

Sean M. Kelly, Esq.

smkelly@mcbridehall.com | www.mcbridehall.com

[8329 West Sunset Road](#)

[Suite 260](#)

[Las Vegas, Nevada 89113](#)

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On May 11, 2022, at 12:44 PM, Derek Linford <DLinford@messner.com> wrote:

Good afternoon Travis and Sean,

Attached please find our proposed Order Granting the Motion to Dismiss and Joinder thereto. Please advise of any suggested changes, or if approved to submit with your e-signatures.

Thank you,
Derek

DEREK K. LINFORD

Attorney

☎: 702.363.5100 E: dlinford@messner.com

8945 W. Russell Road, Suite 300, Las Vegas, NV 89148

www.messner.com



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1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

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6 Maria Heaton, Plaintiff(s)

CASE NO: A-20-818370-C

7 vs.

DEPT. NO. Department 15

8 Ellis, Bandt, Birkin, Kollins &
9 Wong, PLLC, Defendant(s)

10
11 **AUTOMATED CERTIFICATE OF SERVICE**

12 This automated certificate of service was generated by the Eighth Judicial District
13 Court. The foregoing Order was served via the court's electronic eFile system to all
recipients registered for e-Service on the above entitled case as listed below:

14 Service Date: 5/24/2022

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