

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

TIMOTHY TOM, AN INDIVIDUAL,  
Appellant,  
Vs.  
INNOVATIVE HOME SYSTEMS,  
LLC, A NEVADA LIMITED  
LIABILITY COMPANY,  
Respondent.

TIMOTHY TOM, AN INDIVIDUAL,  
Appellant,  
Vs.  
INNOVATIVE HOME SYSTEMS,  
LLC, A NEVADA LIMITED  
LIABILITY COMPANY,  
Respondent.

No. 65419

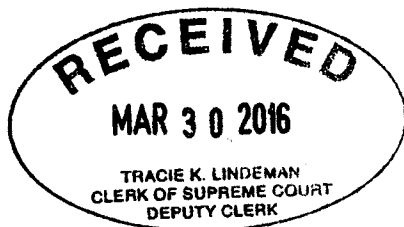
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INNOVATIVE HOME SYSTEMS, INC.'S PETITION FOR REHEARING



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## I. INTRODUCTION AND SUMMARY

Pursuant to the provisions of Nevada Rules of Appellate Procedure Rule 40, Respondent INNOVATIVE HOME SYSTEMS LLC (“IHS”) hereby respectfully petitions the honorable Nevada Court of Appeals to rehear and reconsider its decision in the above captioned matter, on the basis that the honorable Court has overlooked or misapprehended the law and facts of this matter. Specifically, reviewing the published opinion at 132 Nev.Adv.Op. 15 (CA March 10, 2016), the honorable Court has apparently not understood that IHS’ argument on whether IHS needed a contractor’s license is not an issue of fact, but rather an issue of law and jurisdiction. Despite the fact that IHS argued the NSCB has exclusive jurisdiction over the issue of what work requires a contractors’ license in both the trial court and before this honorable Court, this Court’s decision fails to address the jurisdictional issue, at all. The Nevada legislature has exclusively placed this question in the administrative jurisdiction of the NSCB. As such, TOM cannot prevail as a matter of law unless there is a determination by the NSCB that a license is required for IHS’ work. Hence, there is no material issue of fact within the jurisdiction of this court that prevents summary judgment. TOM’s only remedy was to seek a contested case before the NSCB. Having failed to do so, he has failed to exhaust his administrative remedies and his defense on the license issue must be

dismissed as a matter of law. Therefore, IHS requests this honorable Court to rehear this matter and reverse its decision.

## **II. IHS RAISED A QUESTION OF JURISDICTION OVER THE LICENSE ISSUE AT BOTH THE TRIAL COURT AND APPELLATE COURT LEVEL**

Initially, IHS points out that the issue of jurisdiction was raised by IHS in its original motion for summary judgment and in its responding brief before this Court. *See* Joint Appendix (“JA”) JA00353, ll. 3-12:

“Having lost this issue with the Nevada State Contractors Board (“NSCB”) DR. TOM asks this Court to intervene its own determination. But this Court cannot do so. It is simply not a function of this Court to Substitute its judgment for an Administrative agency charged with handling a specific function. [citations].”

JA00631, l. 22 – JA00632, l. 9:

“This Court may not substitute its judgment in place of the NSCB, as whether or not a particular type of work falls within an exception to NRS Chapter 624 or rather requires a license is purely within the discretion of the NSCB. Other than the instant case, no party, including the NSCB, has ever asserted that IHS is obligated to have a contractor’s license for the work it performs. Even after confronted with DR. TOM’s claim that a license was required for the work involved here, the NSCB made no attempt to assert that a license was required under its regulations, which it is statutorily required to do if someone *commenced* a project without the proper license as DR TOM is asserting here. NRS 624.212(1). The NSCB has been directed to adopt regulations to carry out the provisions of NRS Chapter 624. NRS 624.100(1). The NSCB is *not* exempt from the Nevada Administrative Procedure Act. NRS 233B.039. As such, the determination of whether or not certain activities fall within the scope of a given regulation must be determined by the NSCB under the

provisions of the Nevada Administrative Procedure Act. NRS 233B.020(1).”

*See also* IHS’ Responding Appellate Brief, Section IV(B) entitled: **The NSCB is the Exclusive Arbiter of What Work Requires a Contractor’s License under Nevada Law and this Court should not Question its Decision in this Case**, pg. 18-23:

“... It is simply not a function of the courts to substitute their judgement for an Administrative agency charged with handling a specific function....

...[¶¶s]

... [T]he district court had no reason to dispute or call into question the NSCB’s determination. This is not an issue of issue preclusion, but of deference to the administrative agency with jurisdiction over the issue of licensure....”

IHS clearly raised the issue of jurisdiction in the district court and in this honorable Court. The decision of this Court however does not address this threshold issue at all – rather it merely jumps directly to whether the NSCB’s decision constitutes issue preclusion. Doing so raises the threshold question of whether this Court is the proper venue to decide that matter in the first place. Therefore, this request for rehearing is proper.

### **III. THE NSCB HAS EXCLUSIVE JURISDICTION TO DECIDE WHAT WORK REQUIRES A LICENSE UNDER NRS CHAPTER 624 AND WHAT WORK FALLS WITHIN ITS EXCEPTIONS**

The Nevada Supreme Court has noted that an administrative agency has exclusive jurisdiction in situations “where power is clearly conferred or fairly

implied, and is consistent with the purposes for which the [administrative agency] was established by law, the existence of the power should be resolved in favor of the commissioners so as to enable them to perform their proper functions of government.”<sup>1</sup> Indeed, in *City of Reno v. Reno Police Protective Association*,<sup>2</sup> the Court held that the Employee Management Relations Board had exclusive jurisdiction over unfair labor practices and determining whether a matter falls within the scope of mandatory bargaining pursuant to NRS 288.110<sup>3</sup>, despite the fact that the statute did not have explicit language granting the Board exclusive jurisdiction.<sup>4</sup>

While NRS Chapter 624 does not explicitly grant the NSCB “exclusive jurisdiction” over any of the matters set forth therein, the language of the statutes

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<sup>1</sup> *Nevada Power Co. v. Eighth Judicial Dist. Ct. ex rel Cnty. of Clark*, 120 Nev. 948, 956, 102 P.3d 578, 584 (2002) (finding NRS Chapter 704’s declared purpose and policy did not include jurisdiction over the matters at issue because the statute makes it clear that the Public Utilities Commission has jurisdiction over utility rates and service, but not customer fraud).

<sup>2</sup> *City of Reno v. Reno Police Protective Ass’n*, 118 Nev. 889, 895, 59 P.3d 1212, 1217 (2002).

<sup>3</sup> NRS 288.110 contains similar language to NRS Chapter 624 in that it empowers the Employee Management Relations Board to promulgate rules, procedures and to hold hearings to hear complaints, issue orders restricting the actions of aggrieved persons and to seek injunctions before the courts to enforce those orders.

<sup>4</sup> *City of Reno v. Reno Police Protective Ass’n*, 118 Nev. 889, 895, 59 P.3d 1212, 1217 (2002).

which created and govern the NSCB “clearly confer” such power. The declaration of the purpose and policy of NRS Chapter 624 states: “the provisions of this chapter relating to the discipline of licenses are intended to promote public confidence and trust in the competence and integrity of licensees and to protect the health, safety, and welfare of the public.”<sup>5</sup> The various provisions in Chapter 624<sup>6</sup> make it clear that the legislature intended to entrust the NSCB with this task, by empowering it to create regulations governing licensing and to enforce those regulations through administrative hearings. For instance, NRS 624.100 states: “The Board may appoint such committees and make such reasonable bylaws, rules of procedure and regulations as are necessary to carry out the provisions of this chapter.”<sup>7</sup> Critically, NRS 624.220 gives the NSCB the power to create classifications of contractors and determine what kind of license, if any, is required for different types of construction work, and reaffirms that the NSCB is the body

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<sup>5</sup> NRS 624.005.

<sup>6</sup> It is important to note that the NSCB was created by NRS 624.040, and NRS 624.050 requires its members to “hold an unexpired license to operate as a contractor,” to “be a contractor actively engaged in the contracting business and ... so engaged for not less than the last 5 years preceding the date of appointment.” NRS 624.050(1)(a)-(b). The requirements of the Board members demonstrate that the legislature felt they were most qualified to “promote public confidence and trust in the competence and integrity of licenses.”

<sup>7</sup> NRS 624.100.

which creates relevant regulations.<sup>8</sup> The NSCB is “vested with all of the functions and duties related to the administration of this chapter,”<sup>9</sup> “and shall, upon receipt of a written complaint...investigate the actions of any person acting in the capacity of a contractor...without a license,”<sup>10</sup> which constitutes “construction fraud.”<sup>11</sup> To undertake that obligation, the NSCB is empowered to investigate, administer oaths, issue subpoenas, take or compel depositions and conduct hearings,<sup>12</sup> and ultimately issue cease and desist orders to persons acting as contractors without a license.<sup>13</sup> According to the legislative history of NRS 624.212(1), the Legislature removed the requirement of judicial court review after the NSCB’s decision to *relieve the*

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<sup>8</sup> NRS 624.220 (“The Board shall adopt regulations necessary to effect the classification and subclassification of contractors in a manner consistent with established usage and procedure as found in the construction business, and may limit the field and scope of the operations of a licensed contractor to those in which the contractor is classified and qualified to engage as defined by NRS 624.215 and the regulations of the Board.”)

<sup>9</sup> NRS 624.160(1)

<sup>10</sup> NRS 624.160(4).

<sup>11</sup> NRS 624.165(3)(e)(1).

<sup>12</sup> NRS 624.165 through NRS 624.210, inclusive.

<sup>13</sup> NRS 624.212(1). It should also be noted here that in 1995, the 68<sup>th</sup> Nevada Legislature changed NRS 624.212(1) from “*may* issue an order to cease and desist” to “*shall* issue an order to cease and desist” in Senate Bill 399.

*district courts* of the burden of deciding misdemeanor of constructional fraud or license violations.<sup>14</sup>

Thus, it is the NSCB alone that determines whether a person needs a contractor's license to perform work. No Nevada court has jurisdiction to undertake that determination, absent the NSCB's request.<sup>15</sup>

**IV. TOM FAILED TO ASSERT A CONTESTED CASE BEFORE THE NSCB ON THIS ISSUE, AND THUS FAILED TO EXHAUST HIS ADMINISTRATIVE REMEDIES.**

Rehearing is necessary here, because this honorable Court's decision assumes it has jurisdiction to determine whether or not the work that IHS performed requires a license, and then finds that genuine issues of material fact exist on this issue, precluding summary judgment. TOM claimed in his opposition to summary judgment that a NRCP Rule 56(f) denial was proper because expert testimony is necessary for the court to decide if a license was required. JA00616, ll. 25-28. But such expert testimony would be unavailing. As shown above, the factual question of whether IHS' work requires a license is within the exclusive

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<sup>14</sup> See Pg. 17, Hearing on SB399, Minutes 68<sup>th</sup> Legislative Assembly Commerce Committee, April 12, 1995.

<sup>15</sup> See NRS 624.212(2): "If it appears that any person has engaged in acts or practices which constitute a violation of this chapter...the Board may request the Attorney General ... to apply on behalf of the Board to the district court for an injunction restraining the person.... The Board as plaintiff in the action is not required to prove any irreparable injury."

determination of the NSCB. In the absence of an NSCB cease and desist or declaratory order against IHS this Court must find as a matter of law that IHS did not need a license, because neither the district court nor this Court can substitute its own analysis of whether the work performed by IHS required a contractors' license – the NSCB makes that determination exclusively.

If TOM believed that a license was needed, TOM was obligated to request that determination from the NSCB. TOM would have been well within his rights to make a request for a declaratory order from the NSCB, under NAC 624.120:

*Any person may file with the Board a petition for a declaratory order or for an advisory opinion as to the applicability of any provision of chapter 624 of NRS.*

NAC 624.120 (emphasis added.) Hence, the burden was on TOM asserting that a license was necessary to put the issue before the NSCB, as IHS pointed out in its responsive brief before this Court (IHS Responsive Brief, pg. 21-23), and in the district court below (JA00632, ll.14-24). The fact that he chose to file a consumer complaint with the NSCB (normally used for admittedly licensed contractors, by the way) instead of requesting a declaratory order under NAC 624.120 may have been an error, or an attempt to force IHS to complete the work without paying for it. In either case, the NSCB was authorized under NRS 624.170(3) to “take other actions that are necessary for the effective administration of [chapter 624 of NRS].

If TOM failed to get the decision he wanted on the license issue, he was mandated to file a petition for a declaratory order under NAC 624.120, thereby creating a contested case under NRS 233B. TOM failed to do this and thus, as IHS asserted below, failed to exhaust his administrative remedies and that bars raising the issue in court.<sup>16</sup> This honorable Court did not address this issue, and instead found merely that issue preclusion did not apply because a contested case to which TOM was a party did not occur. But that issue is TOM's problem and works against his defenses to IHS' claim and on this appeal. Hence, IHS' petition for rehearing should be granted.

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<sup>16</sup> “[W]hether couched in terms of subject-matter jurisdiction or ripeness, a person generally must exhaust all available administrative remedies before initiating a lawsuit, and failure to do so renders the controversy nonjusticiable. The exhaustion doctrine gives administrative agencies an opportunity to correct mistakes and conserves judicial resources, so its purpose is valuable; requiring exhaustion of administrative remedies often resolves disputes without the need for judicial involvement.” *Allstate Ins. Co. v. Thorpe*, 123 Nev. 565, 571-72, 170 P.3d 989, 993-94 (2007) (internal citations omitted); *see also, e.g., First Am. Title Co. of Nevada v. State*, 91 Nev. 804, 806, 543 P.2d 1344, 1345 (1975) (“[I]t would contravene the well-established rule that administrative remedies must be exhausted prior to seeking judicial relief. The ‘exhaustion doctrine’ is sound judicial policy. If administrative remedies are pursued to their fullest, judicial intervention may become unnecessary.”)

**V. CONCLUSION**

For the reasons specified herein, IHS respectfully requests this Court to grant its petition for rehearing.

Respectfully submitted.

Dated: March 28, 2016.

SNELL & WILMER L.L.P.

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## CERTIFICATE OF COMPLIANCE

I hereby certify that **INNOVATIVE HOME SYSTEMS, INC.'S PETITION FOR REHEARING** complies with the typeface and type style requirements of NRAP 32(a)(4)-(6), because this brief has been prepared in a proportionally spaced typeface using a Microsoft Word 2010 processing program in 14-point Times New Roman type style.

I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because it contains approximately 12,280 words.

Finally, I hereby certify that I have read **INNOVATIVE HOME SYSTEMS, INC.'S PETITION FOR REHEARING**, and to the best of my knowledge, information, and belief, it is not frivolous or interposed 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 accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.



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### CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury, that I am over the age of eighteen (18) years, and I am not a party to, nor interested in, this action. On this date, I caused to be served a true and correct copy of the foregoing **INNOVATIVE HOME SYSTEMS, INC.'S PETITION FOR REHEARING** by method indicated below:

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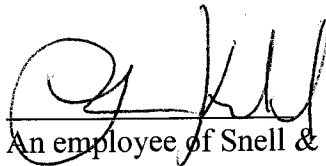
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DATED March 28, 2016.



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