

**IN THE COURT OF APPEALS OF THE STATE OF NEVADA**

TOM, an individual,

Appellant,

vs.

INNOVATIVE HOME SYSTEMS,  
LLC., a Nevada limited liability  
company,

Respondent.

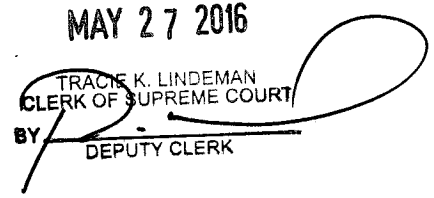
Case No.: 65419

66006

District Court Case No.: A680766

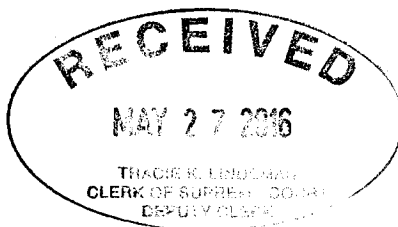
**FILED**

**MAY 27 2016**

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY  DEPUTY CLERK

**APPELLANT TIMOTHY TOM'S ANSWER  
TO PETITION FOR REHEARING**

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16-900653

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## I. ARGUMENT

### A. INTRODUCTION/SUMMARY

Pursuant to NRAP 40 and the Court's Order dated May 10, 2016, Timothy Tom ("TOM") respectfully submits the following Answer to Innovative Home Systems' ("IHS") Petition for Rehearing ("Petition"). At the outset it should be noted that the issue raised by IHS, namely, which adjudicatory body has the right to interpret and enforce Nevada contractor licensing statutes has been raised and fully briefed previously. IHS simply disagrees with this Court's decision and now seeks to supplement its previous arguments with additional authorities it believes supports its position. NRAP 40 does not allow for a rehearing on this basis and thus the Court should deny the pending Petition. Even if the substance of the Petition is addressed it is readily discernable that the Petition lacks merit and should be denied.

IHS argues in its Petition that this Court erred by failing to find that the Nevada State Contractor's Board ("NSCB") has **exclusive** authority to make determinations regarding interpretation and enforcement of the provisions of NRS Ch. 624. IHS is incorrect for numerous reasons including, but not limited to the following: (1) Nevada statutes expressly permit, and require, the courts in Nevada to rule upon the applicability and enforcement of contractor licensing statutes; (2) IHS confuses rulemaking functions which are vested in the NSCB with the

adjudicatory function of the courts; (3) IHS' interpretation of Nevada statutes would result in an absurdity and would render numerous Nevada statutes superfluous; (4) IHS waived any argument it had with regard to the NSCB's role in the pending matter when it filed its Complaint in district court and asserted that it "was either operating under its contractor's license or was providing materials and equipment or performing work and services that did not require a contractor's license" [JA 00001]<sup>1</sup> thus raising the very issue in the District Court which it now claims the District Court had no authority to hear; and, (5) IHS' argument would result in the NSCB exceeding its authority by necessarily ruling upon matters of contract which the Nevada Supreme Court has held are within the exclusive jurisdiction of the courts. Having failed to demonstrate that the NSCB has exclusive jurisdiction over Nevada contracting license laws the Petition should be denied.

## **B. ARGUMENT AND AUTHORITY**

In interpreting the meaning of the Nevada licensing statutes the Court must construe the various statutory provisions as a whole and give meaning to all portions. The Nevada Supreme Court has stated that statutory analysis begins with the "plain meaning rule". *See We the People Nevada v. Secretary of State*, 124 Nev. 874, 881, 192 P.3d 1166, 1170-71 (2008). If the Legislature's intention is

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<sup>1</sup> "JA" refers to the Joint Appendix previously submitted by the parties on appeal.

apparent from the face of the statute, there is no room for construction, and the statute will be given its plain meaning. *Madera v. SIIS*, 114 Nev. 253, 257, 956 P.2d 117, 120 (1998). Statutes should be read as a whole, so as not to render superfluous words or phrases or make provisions nugatory. *Southern Nev. Homebuilders v. Clark County*, 121 Nev. 446, 449, 117 P.3d 171, 173 (2005). The Nevada Supreme Court has noted that a statutorily created administrative agency has no inherent power, “rather, its powers and jurisdiction are determined by statute.” *Nevada Power Co. v. Eighth Judicial Dist. Court*, 120 Nev. 948, 955 – 956, 102 P. 3d 578, 583 - 584 (2004). Any enlargement of express powers by implication must be fairly drawn and fairly evident from the agency objectives and powers expressly granted by the Nevada Legislature. *Id.* at 956, 102 P.3d at 584. Any doubt about the existence of the administrative agency’s power or authority must be resolved against a finding of such power or authority. *Id.*

**1. The District Court is Expressly Authorized to Rule Upon Whether Work Performed by a Contractor Requires a Contractor’s License.**

In support of its Petition IHS references only select statutes from NRS Ch. 624 to the Court. Notably, none of the cited authorities stand for the proposition that the NSCB is the only forum in which the necessity of a contractor’s license may be adjudicated. As admitted by IHS “NRS Chapter 624 does not explicitly grant the NSCB “exclusive jurisdiction” over any of the matter set forth therein.”



See Petition, p. 4. Contrary to IHS' arguments, Nevada statutes expressly grant authority to district courts to rule upon the issue of contractor license issues in the context of both mechanic's lien foreclosures as well as contract actions.

NRS 624.320 states as follows with regard to actions brought by contractors for collection of monies allegedly due and owing for work performed:

No person, firm, copartnership, corporation, association or other organization, or any combination of any thereof, engaged in the business or acting in the capacity of a contractor ***shall bring or maintain any action in the courts of this State for the collection of compensation for the performance of any act or contract for which a license is required by this chapter without alleging and proving that such person, firm, copartnership, corporation, association or other organization, or any combination of any thereof, was a duly licensed contractor*** at all times during the performance of such act or contract and when the job was bid.

(emphasis added). As seen, NRS Ch. 624 not only expressly authorizes, but mandates, that Nevada courts hear and rule upon whether or not, in any given factual situation, a particular claimant, such as IHS, is required to hold a Nevada contractor's license. It should be further noted that the Nevada Supreme Court has sharply curtailed the NSCB's authority in ruling upon contract matters in which its licensing authority was exercised in a manner which affected contract rights. In *Bivins Construction v. State Contractor's Board*, 107 Nev. 281, 283 - 284, 809 P.2d 1268 (1991) the Supreme Court stated as follows with regard to the Board's ruling upon issues of contract:

We are also troubled by the Board's assumption of what was essentially a ***judicial role*** in the resolution of this dispute. Its suspension of appellant's contractor's license pending payment of Pipe's Paving's claim was tantamount to the award of contract damages in a contested case. The Board does not have the authority to impose damages upon parties subject to its licensing authority. *See* NRS 624.300(1). ***The parties' claims and counterclaims regarding their contract raised legal issues properly resolvable only by court of law, if not by the parties themselves.*** We trust the Board will be mindful of these implications in its future decision-making.

(emphasis added).

Similarly, NRS 108.222(2) provides that any person who records and attempts to enforce a mechanic's lien pursuant to the provisions of NRS Ch. 108 must be duly licensed if so required. Critically, the enforcement of the mechanic's lien claim, and necessarily any attended licensure issues are required to be submitted to the appropriate court:

A notice of lien may be enforced ***by an action in any court of competent jurisdiction*** that is located within the county where the property upon which the work of improvement is located, on setting out in the complaint the particulars of the demand, with a description of the property to be charged with the lien.

NRS 108.239(1)(emphasis added). The NSCB itself acknowledges this as contractors are required on residential works of improvement, such as TOM's residence, to provide the owner with a notice in substantially the following form:

## ‘NOTICE TO OWNER’

Pursuant to NRS 108.221 to 108.246, inclusive, a contractor, subcontractor, laborer, supplier of materials or other person or entity who:

(1) Performs work or furnishes materials of the value of \$500.00 or more to improve the value of your property; and

(2) Is not paid for the work or materials,

➔ has a right to place a lien on your property on which the work was performed and to sue you in court to obtain payment.

This means that after a court hearing, your property could be sold by an officer of the court and the proceeds of the sale used to satisfy the amount you owe. If you did not ask for and receive releases of liens from the contractors’ subcontractors, laborers or suppliers of materials, a lien may be placed on your property or you may be sued even if you have paid your contractor in full.

\* \* \*

NAC 624.693 (emphasis added). Nowhere in the prescribed form is the NSCB ever mentioned as the sole arbiter of licensing issues, on the contrary, owners are warned court action may result in the event of a payment dispute. IHS has failed to analyze, or even mention, any of the above-mentioned statutes or regulations which expressly grant authority to the courts to hear matters involving contractor licensing issues and which renders the arguments of IHS to be without merit. Accordingly the Petition of IHS fails and should be denied.

**2. IHS' Interpretation of Nevada Statutes Results in an Absurd Result Which Must Be Rejected.**

**a. IHS' Argument Must be Rejected as it Would Render Nevada Statutes Meaningless**

As noted above, the guiding tenant when interpreting statutes is to give meaning to the unambiguous language contained therein and to do so in a manner which does not result in statutes being rendered meaningless. *See Southern Nevada Homebuilders*, 121 Nev. at 449, 117 P.3d at 173. IHS' interpretation of Nevada statutes results in an absurd outcome which renders provisions of NRS Ch. 624 meaningless and therefore must be avoided. First, as noted above, it is IHS which initiated this action in district court without seeking an advisory opinion or declaratory order of the Board, despite the fact that IHS alleged in its Complaint that it either did not need a contractor's license or that all work performed was done pursuant to the license it had acquired. *See Complaint of IHS*, JA 00001 – 00002. Pursuant to IHS' theory, only the NSCB can make the factual determination of whether or not a contractor is required to be licensed. This would necessarily render NRS 624.320, which mandates a party plead and prove it holds a required contractor's license, meaningless. As noted, such a result should be avoided as there is no basis to assume that the Nevada Legislature enacted a superfluous statute which served no purpose.

Likewise, IHS' interpretation of NRS Ch. 624 is illogical and would result in unintended consequences. Adoption of IHS' position would necessarily mean that each and every time a contractor seeks to foreclose upon a mechanic's lien, which, as noted, must be done in a court of competent jurisdiction, the mechanic's lien claimant would first have to submit the issue of whether its scope of work required a license to the NSCB for determination. One can only imagine the administrative burden this would cause if every mechanic's lien action had to first be brought to the attention of the NSCB for an administrative opinion to be issued. Additionally, this would raise an additional issue in terms of who is made a party to a request from the NSCB for an advisory or declaratory order. By way of example, in the pending matter IHS argues TOM was required to first approach the NSCB for an advisory opinion on whether or not IHS was required to be licensed; however, as such a request would not constitute a formal, adjudicatory proceeding, and IHS would not necessarily be a "party", such an opinion by the NSCB would not be binding or be given preclusive effect in a later proceeding. As this Court correctly noted in its decision, certain requirements must be met before an administrative hearing can be given preclusive effect in a later proceeding. Thus, the NSCB would potentially be asked to engage in a meaningless exercise where an opinion is rendered but which could not be enforced in a later proceeding due to the fact that not all interested parties were given notice of such proceeding, an opportunity to be

represented by counsel and an opportunity to respond to and present evidence. *See Tom v. Innovative Homes Systems*, 132 Nev. Adv. Op. 15, 29 (2016) *citing* NRS 233B.121(1)-(4).

Additionally, in the instance of a mechanic's lien foreclosure action, once a mechanic's lien is recorded, the lien claim will only remain valid for a period of six (6) months unless a court proceeding is initiated. *See* NRS 108.233(1). Under IHS' theory, many mechanic's lien claimants' would lose their rights as an opinion by the NSCB would likely not be forthcoming in that timeframe, particularly if every construction dispute required NSCB intervention. Again, the fact it would not be binding on any subsequent defendant in a future lawsuit also undermines IHS' theory. In a future court proceeding a defendant could raise licensure as an affirmative defense and the matter, according to HIS, would have to be remanded back to the NSCB for further proceedings so that all interested parties were afforded their due process rights to be heard upon the matter.

Ironically, if this Court were to accept IHS' position, it would still be necessary to reverse the lower court with direction that IHS' Complaint be dismissed. It only stands to reason that if a court is without authority to find that IHS was required to have a license, it must necessarily be true that the district court was without authority to find that IHS' did not need a license. While IHS claims that the burden was on TOM to seek an opinion from the NSCB, it was IHS which

alleged that all of its work was either performed pursuant to the license it had acquired or that it did not need a license. JA 00001 – 00002. Having made such an allegation in its Complaint the burden was on IHS to prove the validity of such allegations, not TOM. *Accord* NRS 624.320 (claimant bears the burden of proof to prove compliance with license statutes). Thus, IHS' claim that the District Court was correct in assuming that no license was needed is defeated by its own argument.

**b. IHS' Argument That in the Absence of a Cease and Desist or Declaratory Order From the NSCB it Must be Assumed That IHS Did not Require a Contactor's License Must Be Rejected as IHS Had Already Acquired a Contractor's License at the Time of TOM's Consumer Complaint**

IHS argues a point which was previously briefed before this Court, namely, that the lack of a cease and desist order by the Executive Director of the NSCB necessarily means that the NSCB has made a determination that that no license was required. *See* Answering Brief filed on January 27, 2015 ("Answering Brief"), pp. 19 – 20. As noted in TOM's Reply Brief [pp. 8 – 9], but ignored in the Petition for Rehearing, the NSCB could not have issued a cease and desist order in the current action as IHS had already stopped work at TOM's residence and acquired the needed contractor's license prior to TOM submitting his consumer complaint. TOM submitted his consumer complaint on March 25, 2013. *See* JA 00140 – 00175. IHS had acquired its contractor's license on September 12, 2012. *See* JA

00182. Accordingly, there was no ongoing action for the NSCB to enjoin or otherwise prohibit and to do so would have been a futile act as the issue had become moot. No weight can be given to the NSCB's alleged inaction given the fact that there was no action it could have taken.

**3. The NSCB is the Agency Charged With the Exclusive Power to Issue Administrative Rules but Not Exclusive Power to Adjudicate Those Rules.**

**a. The NSCB May Interpret Nevada's Licensing Laws but is Not Obligated to do so at the Request of Parties.**

IHS' confuses the separate concepts of administrative rulemaking with interpretation and adjudication of those rules. There is no doubt that the NSCB is the administrative body charged with creation of appropriate rules and regulations governing the construction industry in Nevada. *Accord* NRS 624.100(1). Notably, the very statutes which grant to the NSCB power to create reasonable rules and regulations also expressly state that the NSCB it is not the sole source of licensing of Nevada contractors. Specifically, NRS 624.035 states: "The provisions of this chapter shall not be construed to prevent the governing body of any county or incorporated city requiring an additional contractor's license within such political subdivision issued subject to the applicant meeting such additional standards as are reasonable and necessary for the protection of the public in the political subdivision." Additional licensing requirements may be imposed by local



governmental agencies as deemed appropriate, thus undercutting IHS' claim that the NSCB is the exclusive body charged with administering contractor licensure.<sup>2</sup>

Unable to identify any statutory authority vesting exclusive jurisdiction in the NSCB with regard to determinations of whether or not a license is required in a given circumstance, IHS relies upon NAC 624.120 which provides that any person *may* file with the Board a request for a declaratory order or advisory opinion regarding provisions of NRS Ch. 624. *See* Petition, p. 8. However, IHS ignores the fact that the NSCB is not under a duty to issue any such advisory opinion. NRS 624.160(3) states that: "The Board *may provide advisory opinions* and take other actions that are necessary for the effective administration of this chapter and the regulations of the Board." (emphasis added). The NSCB is under no obligation to issue advisory opinions, thus, under IHS' theory a party could be left with no remedies if they were obligated to submit all licensing issues exclusively to the NSCB but the NSCB was under no obligation to issue an opinion. It should also be noted that an advisory opinion is just that – advisory. As noted in the Court's decision the NSCB's advisory opinions are very brief and contain disclaimer language regarding their applicability. *See* 132 Nev. Adv. Op. at 33 – 36.

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<sup>2</sup> It is not difficult to imagine the administrative quagmire that would result if parties litigating a construction dispute were required to first resort to multiple governmental bodies for opinions as to the application of various licensing provisions before filing suit in a court of competent jurisdiction.

**b. Nevada Courts Have Regularly Ruled Upon The Applicability of Nevada's Contractor's Licensing Statutes**

IHS ignores the fact that Court's regularly rule upon the issue of whether or not the lack of a contractor's license will serve to bar a contractor's claim. Dating back to 1958 the Nevada Supreme Court has ruled upon issues pertaining to the effect of having, or not having, a valid Nevada Contractor's license. Indeed, originally, the Nevada Supreme Court held that the lack of a license served as an absolute bar to contract claims asserted by an unlicensed contractor. *See Magill v. Lewis*, 74 Nev. 381, 333 P.2d 717 (1958). Subsequent to *Magill*, the Nevada Supreme Court creating an exception to Nevada licensing statutes and held that if an otherwise unlicensed contractor "substantially complied" with Nevada's licensing scheme, its claim would not necessarily be barred. *See Nevada Equities v. Willard Pease Drilling Co.*, 84 Nev. 300, 440 P.2d 122 (1968) (allowing drilling company lacking correct specialty license to maintain claim). Likewise, in *Day v. West Coast Holdings, Inc.*, 101 Nev. 260, 699 P.2d 1067 (1985) the Nevada Supreme Court allowed a landscaper to maintain a claim when it possessed a general contractor's license and had applied for its needed specialty license. Notably, in the above cases there is no mention of the NSCB having been involved at any step in the proceedings, and yet, the Nevada Supreme Court interpreted Nevada's contractor licensing laws, including creating an exception to the licensing requirements when a party "substantially complies" with the provisions

of NRS Ch. 624. If the NSCB had exclusive jurisdiction the Nevada Supreme Court would have been without authority to make determinations as to whether exceptions exist to the NSCB created rules.

**4. IHS has Waived Any Argument That the Contractor's Board was the Exclusive Arbiter of Determination of the Necessity of a Contractor's License for Work Performed.**

"A waiver is an intentional relinquishment of a known right.... [T]o be effective, a waiver must occur with full knowledge of all material facts." *State, University & Community College Sys. v. Sutton*, 120 Nev. 972, 987, 103 P.3d 8 (2004) citing *Thompson v. City of North Las Vegas*, 108 Nev. 435, 439, 833 P.2d 1132, 1134 (1992). The right to enforce an agreement to arbitrate, like any contract right, can be waived. *Principal Invs., Inc. v. Harrison*, 366 P.3d 688, 693 (2016). Federal courts have found that a party may waive the right to arbitrate when it participates in litigation in a manner that is inconsistent with an intent to arbitrate its legal dispute. *Hoxworth v. Blinder, Robinson & Co., Inc.*, 980 F.2d 912, 926 (3d Cir. 1992). A party waives the right to demand arbitration when it (1) knows of its right to arbitration, (2) acts inconsistently with an intent to arbitrate, and (3) prejudices the opposing party by actively litigating the dispute in another forum. *Id. citing Nev. Gold & Casinos*, 121 Nev. at 90, 110 P.3d at 485. Although IHS argues that the NSCB is the sole arbiter of the pending dispute, to the extent one may analogize the role of the NSCB to that of an arbitrator, IHS' own actions

believe this argument and demonstrate that IHS waived such argument and any rights it may have had to submit the licensing issue to the NSCB.

As the record on appeal indicates, it was IHS that initiated the district court action on April 25, 2013. JA 00001 – 00011. In doing so, IHS raised the issue of its licensure when it alleged: “In performing the acts underlying this complaint, IHS was either operating under its contractor’s license or was providing materials and equipment or performing work and services that did not require a contractor’s license to perform under Nevada law.” JA00001 – 00002. Based upon IHS’ Petition, to the extent the NSCB was a proper, or as IHS’ argues “exclusive”, forum to decide the licensing issue, IHS certainly knew of this fact prior to filing its Complaint in state district court; however, it proceeded to do so anyway. This act coupled with the fact that IHS filed two motions for summary judgment (an original and renewed motion) shows that it had no intention of seeking a licensing determination before the NSCB. *See* Court’s Decision, 132 Nev. Adv. Op. 15, 19 (March 10, 2016) (Noting IHS filed a motion for summary judgment and a renewed motion for summary judgment). Likewise, it cannot be contested that TOM suffered prejudice as judgment was entered against him, even at a time when no reply had been filed in response to TOM’s counterclaims. To the extent IHS had the right to have the NSCB resolve the controversy subject of this matter its actions at all times have been contrary to such rights and evidence a voluntary

relinquishment of any right it now wants to claim it had to invoke the authority of the NSCB.

## **II. CONCLUSION**

The Petition for Rehearing must be denied as the Petition does not raise any issues which were not previously submitted to this Court in the prior filed briefs or at oral argument. IHS' argument that the NSCB has exclusive jurisdiction is belied by the fact that IHS submitted the issuance of licensure in its Complaint filed in the District Court. Likewise, the Nevada Supreme Court has interpreted and decided issues of contractor licensure repeatedly and without the involvement of the NSCB. IHS' analysis ignores plain and unambiguous statutes which not only grant, but mandate, resort to Nevada courts for purposes of interpretation and enforcement of the provisions of NRS Ch. 624. Additionally, IHS' interpretation of Nevada statutes governing contractor licensing would render absurd results which must be avoided. IHS offers no new arguments which were not or could not have been presented as part of the underlying briefing herein. IHS' Petition should be

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denied and the Court's original opinion left undisturbed.

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### III. ATTORNEY'S CERTIFICATE

I hereby certify that I have read this APPELLANT'S ANSWERING BRIEF 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 N.R.A.P. 32, which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page 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. This brief complies with the formatting requirements of Rule 32(a)(4)-(6), and either the page- or type-volume limitations stated in Rule 32(a)(7) and Rule 40(3) as it contains approximately 4035 words.

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#### IV. CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Howard & Howard Attorneys, PLLC. and on the 25<sup>th</sup> day of May, 2016, a true and correct copy of the foregoing document was served on all registered parties by United States First-Class:

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\_\_\_\_\_  
for Howard & Howard