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.	No. 65419
TIMOTHY TOM, AN INDIVIDUAL, Appellant, vs. INNOVATIVE HOME SYSTEMS, LLC, A NEVADA LIMITED LIABILITY COMPANY, Respondent.	No. 66006

ORDER DENYING REHEARING

Respondent Innovative Home Systems, LLC, (IHS) has filed a petition for rehearing of this court's opinion reversing in part, vacating in part, and remanding the district court's grant of summary judgment in favor of IHS. Contrary to IHS's assertion on rehearing that this court overlooked certain matters, the issues raised in the rehearing petition were not raised prior to rehearing and, thus, are not appropriate bases upon which to grant rehearing. *See* NRAP 40(c). To the extent the rehearing petition raises jurisdictional issues, however, this court may nonetheless review them in the first instance on rehearing. *See Landreth v. Malik*, 127 Nev. 175, 179, 251 P.3d 163, 166 (2011). And having considered the jurisdictional arguments raised by IHS as well as appellant

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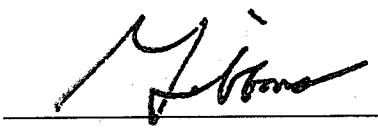
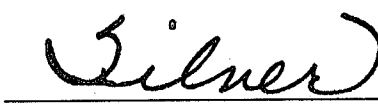
Timothy Tom's response to those arguments, we conclude that IHS's arguments do not demonstrate that rehearing of this matter is warranted.[1] Accordingly, we deny the rehearing petition. *See* NRAP 40(c).

It is so ORDERED.



_____, C.J.
Gibbons



_____, J.
Silver

TAO, J., concurring:

I join in the decision to deny rehearing, as the ultimate conclusion that we first reached (remand) should not change, but I believe that further explanation is warranted.

Underlying our original conclusion in this case is the question of which entity – the district court or the board – possesses subject matter jurisdiction to determine whether a license is needed, a question whose

[1]Our denial of rehearing does not necessitate or preclude IHS from seeking relief in the district court on remand based on the approach advanced by our concurring colleague. We make no comment, however, as to how the district court should resolve this issue in the event that IHS brings such a request for relief before it.

answer will guide the district court in handling the rest of this case on remand.

This appeal revolves largely around procedural, rather than evidentiary, facts. IHS did some electrical work in Tom's house for which Tom allegedly did not pay, so IHS filed a notice of lien against Tom's residence. Tom responded to the lien by filing a complaint with the contractors' board, asking it to find IHS in violation of NRS 624.212, which requires contractors to have licenses to do certain kinds of electrical work and mandates that the board "shall" issue a cease-and-desist order to any unlicensed contractor who fails to comply.

IHS then sued Tom for breach of contract, and Tom responded by asserting the judicial affirmative defense, based in NRS 624.320, that IHS was not entitled to payment because unlicensed contractors cannot sue to be paid for work done in violation of NRS Chapter 624.

While the lawsuit was pending, the contractors' board investigated Tom's complaint but eventually closed the matter without issuing a cease-and-desist letter, an advisory opinion, or any written findings of fact or conclusions of law. The district court interpreted the closure of Tom's board complaint as an affirmative determination that IHS did not need a license, and granted summary judgment in favor of IHS. In our original decision in this appeal, we concluded that this was error because the board's non-action is not entitled to preclusive effect, and consequently remanded the matter back to the district court for further proceedings.

The issue that will confront the district court on remand is this: since the board has not yet affirmatively concluded that IHS did or did not need a license, what should the district court do next to answer

that question – answer the question itself, or make the board answer it? The answer to this question implicates issues of subject-matter jurisdiction and the related doctrine of "primary jurisdiction."

Questions of jurisdiction are never waived and may be raised at any time, even *sua sponte* by the court on appeal. *See Baldonado v. Wynn Las Vegas, LLC*, 124 Nev. 951, 964-65, 194 P.3d 96, 105 (2008); *Vaile v. Eighth Jud. Dist. Ct.*, 118 Nev. 262, 276, 44 P.3d 506, 515-16 (2002) ("subject matter jurisdiction cannot be waived"). This is so because questions of jurisdiction go to whether the court has the fundamental power to grant the requested relief and enforce its own judgment. If the court has no power to grant relief – either because it lacks jurisdiction over the subject matter, the dispute is moot or not yet ripe, or a party does not have the legal right to seek or receive the requested relief – then its ruling is legally void and not much more than a meaningless advisory opinion whether or not any party raised a timely objection below. *See State Indus. Ins. Sys. v. Sleeper*, 100 Nev. 267, 269, 679 P.2d 1273, 1274 (1984) ("There can be no dispute that lack of subject matter jurisdiction renders a judgment void"). A failure of subject matter jurisdiction cannot be waived because parties cannot artificially invest a court with a power it does not constitutionally have by ducking their heads and pretending the problem does not exist. *Vaile*, 118 Nev. at 276, 44 P.3d at 515-16 (2002) ("subject matter jurisdiction cannot be waived"); *Swan v. Swan*, 106 Nev. 464, 469, 796 P.2d 221, 224 (1990) (subject matter jurisdiction "cannot be conferred by the parties").

Where a matter is statutorily assigned to the jurisdiction of an executive-branch board, it might belong exclusively to that board, or it might be resolvable both by the board as well as by a district court; the

question is how the particular statute was written. Where the Legislature has conferred exclusive jurisdiction over some matter to an administrative agency, "the courts lack subject-matter jurisdiction except on [a petition for judicial] review." *Nevada Power Co. v. Eighth Jud. Dist. Ct.*, 120 Nev. 948, 959, 102 P.3d 578, 586 (2004).

The initial inquiry, therefore, is whether the Legislature intended NRS Chapter 624 to assign the question of licensing exclusively to the board, or whether the power is shared by the board and the district courts. In *Nevada Power*, the Nevada Supreme Court concluded that the Legislature had exclusively assigned original jurisdiction over any challenge to utility rates to the Public Utilities Commission because the relevant statute (a) was "plenary," meaning broad; (b) authorized the agency to entertain, investigate, and resolve consumer complaints relating to the rates; (c) gave the agency authority to give prospective relief from rate violations; and (d) made the agency's rulings on complaints subject to judicial review. 120 Nev. at 957-59, 102 P.3d at 584-85.

All of these factors apply equally to NRS Chapter 624. The contractors' board statute gives the board broad authority to create and enforce its own regulations; the board is authorized to entertain, investigate, and resolve complaints relating to licensing questions; the board has authority to give relief arising from licensing violations, including issuing cease-and-desist orders and petitioning for injunctive relief; and the board's rulings are appealable via petitions for judicial review. *See* NRS 624.165, 624.212, 624.510(4).

Consequently, I would conclude that the Legislature has conveyed original jurisdiction to the board to decide whether any particular contractor needs a license to do any particular work. The

district courts of this state therefore do not possess original subject-matter jurisdiction to decide these matters; that power rests first with the board.

But as clear as this may appear, that is not the end of the matter in this case. Had IHS or Tom framed their claims and defenses solely in terms of the need for a license (for example, if Tom sued IHS for a statutory violation of NRS 624.212), then their claims and defenses would belong exclusively to the board rather than the district court and the court would have to dismiss them for lack of subject-matter jurisdiction. But IHS's claim is framed far more broadly; specifically, for breach of contract (among other claims), and Tom's defense is also broadly framed as an affirmative defense to that contract claim. Neither is grounded exclusively in the business of the board. Constitutionally, district courts possess original jurisdiction over claims sounding in tort and contract, *Nevada Power*, 120 Nev. at 960, 102 P.3d at 587, which means that the contractors' board would not have proper jurisdiction to resolve the entirety of IHS's breach of contract claim and Tom's defenses thereto.

So the problem here is that, on the one hand, the district court has proper constitutional jurisdiction over IHS's claim for breach of contract and Tom's defenses to it; but, on the other hand, the board has proper statutory jurisdiction over a piece (or at least a premise) of that claim upon which the validity of the claim and its defenses necessarily depend.

When a claim is jurisdictionally divided between a board and a district court, as this one is, the division implicates the doctrine of "primary jurisdiction." Primary jurisdiction is a concept of judicial deference and discretion triggered whenever a claim is originally cognizable in the courts but "enforcement of the claim requires the

resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body." *Id.* at 962, 102 P.3d at 587-88 (quoting *United States v. W. Pac. R. Co.*, 352 U.S. 59, 64 (1956)). Under this doctrine, courts should "sometimes refrain from exercising jurisdiction so that technical issues can first be determined by an administrative agency." *Sports Form v. Leroy's Horse & Sports*, 108 Nev. 37, 41, 823 P.2d 901, 903 (1992).

> The doctrine is premised on two policies: (1) the desire for uniformity of regulation and, (2) the need for an initial consideration by a tribunal with specialized knowledge. Thus, in every case the question is whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation.

Nevada Power, 120 Nev. at 962, 102 P.3d at 588 (internal quotation marks and citations omitted).

Application of the doctrine is discretionary with the court. *Id.* Consequently, if the district court concludes that it desires the expertise of the board in helping determine whether IHS needed a license, and believes that the board's involvement would help promote uniformity of regulation, it can defer action on the underlying contract claim until the board finally resolves the licensing question. But the district court need not do so if it determines instead that the policies underlying the doctrine of primary jurisdiction would not be met through such deference.

In this case, it appears that whether IHS ought to be required to have a license to do the particular work at issue is a technical question better answered with the assistance of the specialized knowledge and practical experience of the members and staff of the contractors' board, all of whom know considerably more about this subject than any court likely

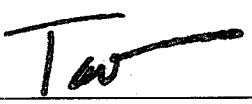
would. I would also think that decisions on what kinds of electrical work should require a license, and what kinds should not, ought to be as uniform as possible. So it seems to me that the policies underlying the primary jurisdiction doctrine are generally met in this case.

Therefore, on remand, I would suggest that the district court let the board employ its expertise to determine whether IHS needs a license. Under NAC 624.120, "any person" can ask for an advisory opinion from the board, and I read that to mean that the district court could ask for one itself if it wanted to, or it can order Tom or IHS to initiate a request. This case is in its early stages before the district court and discovery appears not yet to have commenced, so there appears to be ample time for such a request to be submitted to and answered by the board.

The complicating factor here – and why I hesitate to simply mandate that the district court defer action to the board in this particular case – is that Tom initially complained to the board about IHS's lack of a license, but the board did not follow through with his complaint (at least, it closed the investigation without a final written disposition answering whether a license was needed). Tom did not pursue the board's inaction further, but simply gave up without exhausting his possible avenues of redress and let the board's initial decision lie untouched, leaving the question pending only in district court.

In view of this, the question becomes what the district court can have the board do on remand to answer a question that it previously declined to adjudicate. Legally, I would think that filing a complaint with the board seeking action against a specific contractor is not the same thing as requesting a written advisory opinion from the board on whether that

contractor needs a license. Furthermore, I do not see any legal impediment within the applicable statutes or administrative regulations that would bar the filing of a successive request to answer the same question as one previously closed (especially if a different person makes the request under court order), so I presume that none exists. I also presume that the board would do whatever the district court expressly orders it to do toward getting this question answered. But as neither party has briefed this exact question, all things considered I think it best to leave some discretion for the district court to figure out what the board can still do to answer this question and how to get it to do it.



_____, J.
Tao

cc: Hon. Adriana Escobar, District Judge
Howard & Howard Attorneys PLLC
Snell & Wilmer, LLP/Las Vegas
Eighth District Court Clerk