IN THE SUPREME COURT OF THE STATE OF NEVADA

JAFBROS, INC., Appellant, vs. AMERICAN FAMILY MUTUAL INSURANCE CO., Respondent.	No. 57058
JAFBROS, INC., Appellant, vs. AMERICAN FAMILY MUTUAL INSURANCE CO., Respondent.	No. 57524

FILED
APR 02 2012
TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY A. Ingersoll
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a consolidated appeal from two separate orders of dismissal based on failure to exhaust administrative remedies. Second Judicial District Court, Washoe County; Patrick Flanagan and Steven R. Kosach, Judges. We affirm.

Relevant facts

Jafbros is an auto body repair shop in Sparks, Nevada. Between January and March 2008, Jafbros agreed to repair three vehicles covered by American Family Mutual Insurance Company policies and provided each of the customers with an estimate. Then, between May and August 2008, Jafbros agreed to repair four additional vehicles covered by American Family policies. Allegedly, when the customers forwarded the estimates to American Family, the company told them that the rates were too high and that American Family would only pay the labor rate it had independently established. Not surprisingly, all seven customers then chose to patronize different shops whose rates American Family would pay in full.

12-10195

On May 1, 2008, Jafbros filed the first of the two suits underlying this appeal ("the Department 8 case"). In its complaint Jafbros alleged that American Family wrongfully interfered with Jafbros's contractual relationships with the three customers Jafbros allegedly lost between January and March 2008 due to American Family informing them that it would not pay Jafbros's rates. Jafbros claimed this information was wrongful because Jafbros's repair rates fell within the Department of Business and Industry's Division of Insurance survey rates for 2008, information American Family allegedly knew.[1] Additionally, Jafbros alleged that American Family engaged in unfair trade practices by refusing to pay Jafbros's full rates. Essentially, Jafbros argued that the annual survey set a mandatory range of per se reasonable rates, and thus, an insurer could not unilaterally use a different rate without engaging in unfair trade practices. American Family answered the complaint on November 14, 2008, and pleaded 37 affirmative defenses. Both parties then engaged in extensive discovery and motion practice for the next year and a half.

On April 28, 2010, Jafbros filed a second suit ("the Department 7 case"). This suit centered on the four customers Jafbros lost

---

[1]In 2007, the Legislature transferred the annual survey of rates charged by licensed body shops from the Commissioner of Insurance to the Department of Motor Vehicles. See NRS 690B.015 (2006) (repealed and replaced by NRS 487.685); 2007 Nev. Stat., ch. 132, §§ 3, 8, at 406-07, 408. The parties agree that in January 2008, Jafbros's hourly auto body repair rate was $52 an hour and its paint and material rate was $28 an hour. Later, in February 2008, Jafbros increased its auto body repair rate to $54 an hour. According to the 2008 DMV survey, the hourly labor rates in Washoe County were $53.96 for auto body repair and $33.58 for paint and materials.

between May and August 2008. Once again, Jafbros alleged American Family engaged in wrongful interference with contractual relationships and unfair trade practices. In addition, Jafbros asserted that American Family intentionally, fraudulently, and maliciously misrepresented that Jafbros's labor rates were too high and outside the prevailing rates in Washoe County.

In June 2010, American Family filed separate motions to dismiss for lack of subject matter jurisdiction in both the Department 7 and Department 8 cases. It argued that the district courts lacked jurisdiction over Jafbros's claims because the Insurance Commissioner, pursuant to NRS 686A.015, has exclusive jurisdiction to determine whether the repair rates in the annual survey are mandatory or merely informative.

Both district courts ruled the same way. While they rejected American Family's jurisdictional challenges as framed, they still dismissed Jafbros's complaints without prejudice on the basis that the actions were not ripe for review. Specifically, the courts reasoned that all of Jafbros's claims derived from the prevailing rates survey and Jafbros's assumption that American Family acted wrongfully when it set rates below the survey rates. But the Insurance Commissioner has not determined whether the survey sets mandatory rates or merely provides information. Because this determination lies within the Insurance Commissioner's competence in the first instance, not the judiciary's, the district courts concluded that Jafbros failed to exhaust administrative remedies, requiring dismissal.

These appeals followed. We agree with the district courts' orders and affirm.

Exhaustion of administrative remedies

This court has not set forth the standard of review for an order dismissing a complaint for nonjusticiability. However, it is clear that subject matter jurisdiction is a question of law that this court reviews de novo. Ogawa v. Ogawa, 125 Nev. 660, 667, 221 P.3d 699, 704 (2009). Moreover, this court reviews questions of statutory interpretation de novo. Construction Indus. v. Chalue, 119 Nev. 348, 351, 74 P.3d 595, 597 (2003). Because the nonjusticiability issue in this case centers on the Insurance Commissioner's authority to determine the significance of the prevailing labor rate in NRS 487.686, and the district court's subject matter jurisdiction, this court reviews Jafbros's appeal de novo.

Jafbros argues that exhaustion of administrative remedies is inapplicable here because the doctrine only applies when an administrative agency has original jurisdiction to decide matters that relate to its specialized field. Nevada Power Co. v. Dist. Ct., 120 Nev. 948, 960-61, 102 P.3d 578, 586-87 (2004). Jafbros maintains that its claims have no basis in insurance law because it seeks tort damages for misrepresentation and tortious interference with contractual relations. It follows, according to Jafbros, that the Insurance Commissioner does not have original jurisdiction to decide Jafbros's claims. Additionally, Jafbros argues that exhaustion of administrative remedies is not required where the administrative process would be futile. Malecon Tobacco v. State, Dep't of Taxation, 118 Nev. 837, 839, 59 P.3d 474, 476 (2002). Jafbros argues that the Insurance Commissioner does not have authority to award tort or punitive damages, and thus, resort to the administrative process here would be futile.

We disagree. Jafbros incorrectly pigeonholes all its claims as common law tort claims even though the complaints in both of these cases

clearly include causes of action for unfair trade practices, an area committed to the Insurance Commissioner's exclusive jurisdiction. See NRS 686A.015; Allstate Ins. Co. v. Thorpe, 123 Nev. 565, 572, 170 P.3d 989, 994 (2007).

Jafbros's reliance on Nevada Power is misplaced. There, the administrative law issues, although relevant, were "not predominant," and the district court was able to assess the merits of the underlying contract claims. 120 Nev. at 960, 102 P.3d at 587. By contrast, here, the purpose of the annual rate survey is essential because without it Jafbros's common law tort claims fail.

Jafbros's intentional interference claims cannot stand if the survey is merely advisory. In Nevada, intentional interference with contractual relations requires: (1) a valid contract, (2) the defendant's knowledge of the contract, (3) intentional actions by the defendant designed to disrupt the contractual relationship, (4) actual disruption, and (5) damages. Sutherland v. Gross, 105 Nev. 192, 196, 772 P.2d 1287, 1290 (1989). As in Jafbros v. Geico, Docket No. 55247 (Order of Affirmance, July 18, 2011), Jafbros's pleadings do not establish the elements of intentional interference because the complaints merely allege that American Family communicated its policy to pay no more than the lowest price for repairs it can obtain in the marketplace.[2]

Jafbros's claim of intentional misrepresentation fails for similar reasons. "The elements of intentional misrepresentation are a false representation made with knowledge or belief that it is false or

[2]Reliance on Jafbros v. Geico, Docket No. 55247 (Order of Affirmance, July 18, 2011), is not inappropriate under SCR 123, since the appellant is the same in both that case and this consolidated appeal.

without a sufficient basis of information, intent to induce reliance, and damage resulting from the reliance." Collins v. Burns, 103 Nev. 394, 397, 741 P.2d 819, 821 (1987) (citing Lubbe v. Barba, 91 Nev. 596, 599, 540 P.2d 115, 117 (1975)). Here, American Family merely informed customers of its established repair rates. ~~Jafbros did not allege~~ Jafbros's allegation that American Family knowingly provided the customers with false information to induce its policyholders to patronize other shops cannot be credited unless and until the Insurance Commissioner accepts Jafbros's proposition that the rate survey is binding on American Family.

We therefore conclude that the only way Jafbros could establish these tort claims is if the Insurance Commissioner determines that insurers have a duty to pay the average repair rates reported in the annual survey, or in the alternative, that insurers may not communicate their own prevailing repair rates to customers. Thus, the district courts did not err by dismissing Jafbros's claims for nonjusticiability.

Having determined that Jafbros failed to exhaust administrative remedies in both cases, we now review Jafbros's argument that American Family waived an affirmative defense in Jafbros v. American Family, Docket No. 57524.

Waiver of affirmative defense

This court uses de novo review when considering a challenge to a district court's determination that a defense need not be affirmatively pleaded. Webb v. Clark County School Dist., 125 Nev. 611, 618, 218 P.3d 1239, 1244 (2009).

Jafbros argues that exhaustion of administrative remedies is an affirmative defense that must be specifically asserted in the pleadings. Because American Family did not assert this affirmative defense in its answer to Jafbros's 2008 complaint in the Department 8 case, but instead answered and engaged in active discovery, Jafbros concludes that the defense has been waived. Jafbros further reasons it was unfairly

Amended per order filed 6/01/12.

prejudiced because American Family first argued failure to exhaust administrative remedies in its motion to dismiss after nearly two years of extensive litigation. Notably, Jafbros admits that exhaustion of administrative remedies is not listed in NRCP 8(c). However, it reasons that the list in NRCP 8(c) is not all-encompassing and a party must plead any matter which constitutes an avoidance or affirmative defense. See Schmidt v. Sadri, 95 Nev. 702, 704, 601 P.2d 713, 715, (1979).

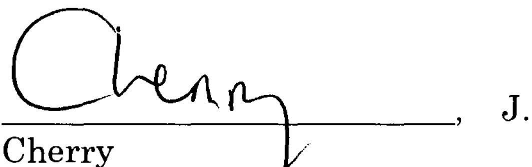
We agree that NRCP 8(c) is not exhaustive. However, in Douglas Disposal, this court held that "[a]n affirmative defense is an argument or assertion of fact that, if true, will defeat the plaintiff's claim even if all allegations in the complaint are true." Douglas Disposal, Inc. v. Wee Haul, LLC, 123 Nev. 552, 557-58, 170 P.3d 508, 513 (2007). Similarly, Black's Law Dictionary defines an affirmative defense as "[a] response to a plaintiff's claim which attacks the plaintiff's legal right to bring an action, as opposed to attacking the truth of claim." 60 (6th ed. 1990).

Unlike affirmative defenses, which aim to defeat a claim on its merits, failure to exhaust administrative remedies embodies the concept that, whatever the claim, the party failed to seek a remedy in the appropriate forum. See 2 Richard J. Pierce, Jr., Administrative Law Treatise, § 15.2 at 1219-20 (5th ed. 2010). Here, the issue was that Jafbros needed to file its complaints with the Insurance Commissioner so that the Insurance Commissioner could assess NRS 487.686 and its impact on Jafbros's claims. American Family did not allege that Jafbros lacked a legal right to the relief it seeks, but rather that Jafbros sought the remedy in the wrong place.

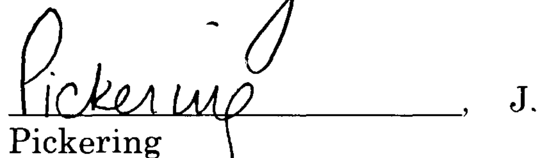
Because failure to exhaust administrative remedies is not an affirmative defense, we conclude that American Family did not waive the issue in the Department 8 case.

For these reasons, we

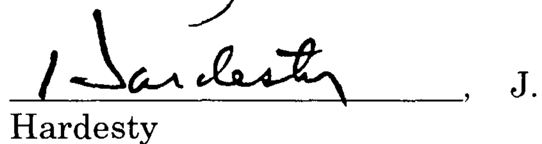
ORDER the judgments of the district courts AFFIRMED.



_______________, J.
Cherry



_______________, J.
Pickering



_______________, J.
Hardesty

cc: Hon. Steven R. Kosach, District Judge
Hon. Patrick Flanagan, District Judge
Paul F. Hamilton, Settlement Judge
Galloway & Jensen
Lewis & Roca, LLP/Reno
Washoe District Court Clerk