

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE LEXUS PROJECT, INC., A NEW  
YORK NOT FOR PROFIT  
CORPORATION, BY ROBIN  
MITTASCH AS TRUSTEE EX REL. A  
CERTAIN DOG NAMED ONION,  
Appellant,  
vs.  
CITY OF HENDERSON, NEVADA AND  
HENDERSON ANIMAL CARE AND  
CONTROL,  
Respondents.

No. 60977

FILED

DEC 19 2013

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY   
DEPUTY CLERK

*ORDER OF REVERSAL AND REMAND*

This is an appeal from a district court order denying a preliminary injunction. Eighth Judicial District Court, Clark County; Joanna Kishner, Judge.

In the underlying district court action, The Lexus Project, Inc. (Lexus), filed a complaint seeking injunctive relief to prevent the City of Henderson (the City) from euthanizing the dog that killed Elizabeth Keller's one-year-old grandchild. When Lexus filed the complaint, it had not had any contact with Keller. Shortly thereafter, Keller transferred her ownership interest in the dog to Lexus. By then, the district court had dismissed the Lexus complaint for lack of standing. Although no evidentiary hearing had been held, the district court filed lengthy findings of fact and conclusions of law, including a finding that "Keller voluntarily relinquished custody of the animal to the City."

Lexus moved to reconsider, attaching Keller's affidavit and the document whereby Keller transferred ownership to Lexus. The City opposed reconsideration, arguing that Keller had nothing to transfer to Lexus because the night the child died, Keller had signed a form that

transferred her ownership to the City. Keller's affidavit relates her memory of the circumstances under which she signed the transfer papers:

When Animal Control arrived on the scene, I was attempting to retrieve the injured baby, Jeremiah.

The Animal Control Officer, without explaining what the form was, pushed a form at me and told me to sign it, which I did.

At no time did the Animal Control Officer explain to me that I was giving up or transferring ownership of [the dog] to the City of Henderson, and it was not, nor was it ever, my intent to do so.

Because it found the transfer to the City to be proper, the district court held that Lexus was not the owner of the dog and that it lacked standing. As a result, it denied Lexus's motion for a preliminary injunction and refused to reconsider it in light of the Keller affidavit regarding the transfer. Lexus appealed. We conclude that the district court abused its discretion by failing to hold an evidentiary hearing on the threshold matter of standing because there is a disputed factual question of whether the transfer of the dog by Keller to the City was invalidated by duress, making her transfer of ownership to Lexus effective, and whether Lexus was entitled to notice from the City as the owner of the dog.

An order refusing to grant an injunction is an appealable order. NRAP 3A(b)(3). We review the grant or denial of a preliminary injunction for an abuse of discretion. *Labor Comm'r of State of Nev. v. Littlefield*, 123 Nev. 35, 39, 153 P.3d 26, 28 (2007). If a person is suffering from duress, that may prevent him or her from making a knowing and voluntary decision. *Peardon v. Peardon*, 65 Nev. 717, 764-66, 201 P.2d 309, 332-33 (1948). Evidentiary hearings are generally contemplated for preliminary injunction motions when there are disputed facts.

Therefore, we REVERSE the district court order denying the preliminary injunction and REMAND this matter to the district court for evidentiary proceedings consistent with this order.<sup>1</sup>

Pickering, C.J.  
Pickering

Gibbons, J.  
Gibbons

Hardesty, J.  
Hardesty

Cherry, J.  
Cherry

cc: Hon. Joanna Kishner, District Judge  
Ara H. Shirinian, Settlement Judge  
Las Vegas Litigation Firm  
Lee, Hernandez, Landrum, Garofalo & Blake, APC  
Lemons, Grundy & Eisenberg  
Richard Bruce Rosenthal & Associates, P.C.  
Henderson City Attorney  
Eighth District Court Clerk

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<sup>1</sup>The stay entered in this court's August 24, 2012 order remains in effect pending further proceedings in district court.

SAITTA, J., with whom DOUGLAS and PARRAGUIRRE, JJ., agree, dissenting:

Notwithstanding the issue of potential duress that the majority identifies, I respectfully dissent. The issue of duress is not controlling on the outcome of this case for two reasons. First, Keller failed to exhaust her administrative remedies because she did not challenge the determination of viciousness within the time allowed by the Henderson Municipal Code. Second, the issue of duress in the purported transfer of ownership to the City is insufficient to create standing for Lexus because it is unlawful to transfer ownership of a vicious animal to a private party. So, any transfer of Keller's ownership of the dog to Lexus would be illegal. Finally, even if these two factors are ignored, the majority misapplies the abuse of discretion standard when holding that the district court abused its discretion by failing to hold an evidentiary hearing on an issue that the parties did not cogently raise and about which the parties declined to present evidence or witnesses.

*Relevant Procedural History*

To fully understand the significance of the error in the majority's abuse of discretion analysis, this case's procedural history must be considered. In its complaint and motion for a temporary restraining order and a preliminary injunction, Lexus argued that it had standing to contest the dog's confinement by the City because of a trust it created for the dog's benefit. Lexus did not suggest that Keller involuntarily transferred the dog to the City under duress. Consistent with its theory that only the trust could represent the dog's interest, Lexus argued in its motion for the temporary restraining order and the preliminary injunction that Keller intentionally relinquished the dog because she and her family "turned on [the dog] to ease their own guilt and culpability for what

happened.” With its motion, Lexus submitted documentary evidence to demonstrate the existence of a pet trust. It did not raise a theory of duress or submit any evidence to suggest duress.

During the hearing for the temporary restraining order and preliminary injunction, Lexus broached the idea that Keller was distressed when she relinquished ownership of the dog. Lexus’s attorney stated, “Distraught and grieving on the same day of the incident, in fact within an hour or two after the incident, . . . Keller was made to sign off her rights of [the dog], releasing him into the custody of Henderson Animal Control.” In its argument, Lexus did not return to this theory but continued to press the argument that it had standing as trustee of the pet trust established for the benefit of the dog. At no other time during the hearing or in briefing the motion did Lexus allege any facts that suggest duress.

The district court advised Lexus’s counsel during the hearing that it would hear witness testimony because “[t]here was absolutely no limitation” on either party’s right to present witnesses or evidence. Despite the opportunity to present witness testimony and evidence to the district court, Lexus did not call any witnesses or introduce new evidence and it certainly did not present evidence of duress. It did not even seek a continuance on its motion to locate witnesses. At the end of the hearing, the district court found that Lexus lacked standing and denied its motion for a temporary restraining order and a preliminary injunction.

One day after the hearing and the district court’s ruling, Keller purportedly transferred her ownership interest in the dog to Lexus and signed an affidavit stating that she did not intentionally transfer

ownership to the City. Lexus then filed a motion for reconsideration based on a fact that did not exist at the time the judge denied its motion.

*Administrative exhaustion did not occur*

We have repeatedly explained, either in terms of subject matter jurisdiction or ripeness, that a party's failure to exhaust all administrative remedies precludes judicial review. *Allstate Ins. Co. v. Thorpe*, 123 Nev. 565, 571, 170 P.3d 989, 993 (2007) (stating that "whether 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"); see also *City of Henderson v. Kilgore*, 122 Nev. 331, 336 n.10, 131 P.3d 11, 15 n.10 (2006) (noting that the failure to exhaust administrative remedies makes a matter unripe for judicial review); *Rosequist v. Int'l Ass'n of Firefighters Local 1908*, 118 Nev. 444, 448, 49 P.3d 651, 653 (2002), *overruled on other grounds by Thorpe*, 123 Nev. at 573 n.22, 170 P.3d at 995 n.22 (providing that the "[f]ailure to exhaust administrative remedies generally deprives a district court of subject matter jurisdiction"). Any lawsuit filed in the district court before the exhaustion of all administrative remedies is simply nonjusticiable. *Thorpe*, 123 Nev. at 571, 170 P.3d at 993. "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." *Id.* at 571-72, 170 P.3d at 993-94.

Henderson Municipal Code (HMC) 7.20.050(A)(3) states that an owner of an animal that has been declared vicious may "[f]ile with the animal control officer a written request for hearing before the animal

advisory committee to determine if the declaration that the animal is vicious should be upheld.” Additionally, the code does not require that the dog’s owner be notified of his or her right to appeal—the owner simply must be notified that the dog has been declared to be vicious. HMC 7.20.050(A). On the date of the incident, an animal control officer notified Keller that he had determined that the dog was vicious. Though Keller had knowledge of the viciousness designation, she did not challenge that designation within the ten days allowed by section 7.20.050(A) of the code. Even if Lexus had obtained an ownership interest in the dog during this period, which it indisputably did not do, it did not challenge the viciousness designation within the ten-day period. Because the administrative remedy was not exhausted, this case is nonjusticiable.

Remanding this case for an evidentiary hearing on the issue of Keller’s duress at the time she relinquished ownership of the dog to the City cannot resolve this issue. An animal control officer declared the dog to be vicious before Keller signed ownership over to the City. The determination of viciousness, not the owner’s surrender of the dog, triggers the ten-day window for the owner to act. HMC 7.20.050(A). After an animal is deemed to be vicious, the owner has ten days to (1) “[v]oluntarily relinquish ownership of the animal for euthanasia” by animal control, (2) “[p]rovide written proof to the animal control officer that the animal has been euthanized by a properly licensed veterinary clinic,” or (3) file a written request for a hearing to challenge the designation of viciousness. HMC 7.20.050(A)(1)-(3). During the hearing process, the owner must surrender the animal to animal control. HMC 7.20.050(A)(3). Thus, if Keller did not voluntarily relinquish her ownership of the dog on the date of the incident, she had ten days to

surrender it, euthanize it, or file an appeal of the designation. If appealing the designation, she would have been required to surrender custody of the dog to the City for the duration of the appeal. Because this duty does not depend on the presence or absence of duress, the question of duress is immaterial to administrative exhaustion. And, because administrative exhaustion did not occur, this case is nonjusticiable and the district court's judgment should be affirmed.

*A transfer of ownership of the dog to Lexus would have been illegal after a determination of viciousness*

HMC 7.20.020(A) prohibits “[a]ny owner to possess or transfer ownership of a vicious or dangerous animal within the city, except as provided in” section 7.20. The only exception to the prohibition on transferring ownership of a vicious animal is that an owner may surrender the animal to the City for euthanasia. HMC 7.20.050(A)(1). Once the dog was declared vicious, Keller's only option for transferring ownership would have been to surrender her ownership interest to the City. She could not have lawfully transferred ownership to Lexus. Regardless of whether she voluntarily transferred her ownership interest in the dog to the City on the date of the incident, the designation of viciousness would have prevented her from transferring her ownership interest to Lexus.

*The majority incorrectly applies the abuse of discretion standard*

The majority correctly observes that “this court reviews preliminary injunctions for abuse of discretion.” *Labor Comm'r of State of Nev. v. Littlefield*, 123 Nev. 35, 39, 153 P.3d 26, 28 (2007). Under abuse of discretion review, we are “not [to] substitute our judgment for that of the district court.” *Young v. Johnny Ribeiro Bldg., Inc.*, 106 Nev. 88, 92, 787 P.2d 777, 779 (1990). Because the evidence suggesting duress came into existence *the day after* the hearing on the motion for a temporary




restraining order and a preliminary injunction and the district court's denial of the motion, the district court could not have considered such evidence in exercising its discretion to deny the motion. Instead, the district court considered the evidence that the parties presented to it. It gave each party an opportunity to present evidence and witnesses. Yet, Lexus chose not to use the opportunity to raise, let alone support, a theory of duress with evidence. Because the parties did not bring any witnesses or evidence to be considered at an evidentiary hearing, it cannot be an abuse of discretion not to hold the hearing that the majority requires on remand.

Here, the majority seems to be suggesting that the district court abused its discretion because it did not hold an evidentiary hearing on an issue only obliquely referenced in an attorney's argument. The district court offered the parties an opportunity to present evidence at the hearing. Thus, the majority's holding suggests that the failure to delay proceedings to allow Lexus to produce facts and witnesses to support a passing argument by counsel is an abuse of discretion. By this reasoning, the majority appears to substitute its discretion for that of the district court and maybe even for that of Lexus's counsel, who failed to present evidence of duress when it had an opportunity. The intrusiveness of its review means that the majority is substantially deviating from the abuse of discretion standard of review.


### *Conclusion*

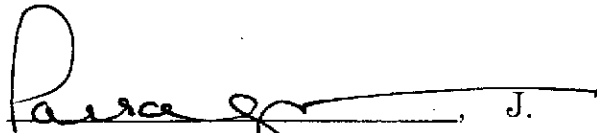
Keller failed to appeal the determination of viciousness to the animal advisory committee, so administrative exhaustion did not occur. This makes the present case nonjusticiable. Also, the issue of duress regarding Keller's transfer of ownership to the City is irrelevant because

she could not legally transfer ownership of the dog to Lexus after it was deemed vicious. Finally, the majority substantially deviates from and misapplies the abuse of discretion standard in its review of the district court's decision not to hold an evidentiary hearing. For these three reasons, remanding this case for an evidentiary hearing is inappropriate. I would affirm the district court's order.

 \_\_\_\_\_, J.  
Saitta

We concur:

 \_\_\_\_\_, J.  
Douglas

 \_\_\_\_\_, J.  
Parraguirre