

ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

FRANCHISE TAX BOARD OF THE STATE
OF CALIFORNIA,

Supreme Court Case No: 53264

Appellant,

District Court Case No: A382999

v.

GILBERT P. HYATT,

FILED

MAY 21 2009

Respondent.

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT

BY S. Young
DEPUTY CLERK

**RESPONSE BY RESPONDENT GILBERT P. HYATT TO APPELLANT'S MOTION
FOR PREHEARING CONFERENCE PURSUANT TO NRAP 33**

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09-12636

1 Respondent Gilbert P. Hyatt submits this Response to Appellant FTB's Motion for a
2 Prehearing Conference Pursuant to NRAP 33.

3 NRAP 33 contemplates that in an appropriate case, this Court may require the attorneys
4 for the parties to appear before the Court or a Justice of the Court for a prehearing conference to
5 consider simplification of the issues and other matters as the Court may direct. The rule does
6 not suggest that a prehearing conference would generally be set at the request of a party.

7 Specifically, the rule states:

8 *The court may direct the attorneys for the parties to appear before the*
9 *court or a justice thereof for a prehearing conference to consider the*
10 *simplification of the issues and such other matters as may aid in the disposition*
11 *of the proceeding by the court. The court or justice shall make an order which*
12 *recites the action taken at the conference and the agreements made by the parties*
13 *as to any of the matters considered and which limits the issues to those not*
14 *disposed of by admissions or agreements of counsel, and such order when*
15 *entered controls the subsequent course of the proceeding, unless modified to*
16 *prevent manifest injustice.*

17 The rule is for the convenience of the Court, not so much the parties, and this Court has
18 not on its own selected this case for a prehearing conference. Possibly, this is because this
19 Court recognized that a prehearing conference is not indicated in this case. Hyatt notes that this
20 Court unilaterally exempted this case from its settlement program.²

21 FTB notes that this is a big case, and suggests mostly based on the size of the case that a
22 prehearing conference would assist FTB—not this Court—in presenting its case. FTB then
23 suggests, incorrectly, that there are some simple issues this Court could decide piecemeal, in a
24 vacuum and without the benefit of the full record of the jury trial, that might obviate the need
25 for this Court to consider the case as a whole.

26 Hyatt agrees that this is a big case regarding appeal, but this Court and other appellate
27 courts regularly handle big cases within the procedures of the rules. Hyatt does not agree with
28 FTB's characterization of the facts and procedural posture of this case, but this is not the time or

¹ NRAP 33 (emphasis added).

² See Court order dated February 18, 2009.

1 place to address those issues. Hyatt further does not agree that any issues in this case may be
2 resolved on a review of a partial record. The legal issues presented can only be resolved
3 properly in the context of the entire case, and most particularly in light of the evidence presented
4 by Hyatt of FTB's intentional misconduct over a period extending longer than a decade.

5 This case, then, does not differ from other large cases brought before this Court. Hyatt
6 believes that bifurcation of some issues, selected by the party which did not prevail at trial, is a
7 bad precedent for how this Court handles large cases. The entirety of the evidence and legal
8 arguments presented at the trial will not be before this Court in such a Prehearing Conference or
9 bifurcated appeal. Any appellant would love to pick legal issues which it believes are its
10 strongest, limit the record to eliminate adverse evidence against it, and then reserve the ability to
11 appeal further, if its self-selected issues are resolved against it. This simply is not an efficient
12 way for an appellate court to handle its docket, nor does it provide fair judicial review to the
13 respondent based on the entire record.

14 The two issues the FTB has identified for preliminary determination are comity and
15 discretionary immunity. These issues are inextricably intertwined with the entire record in the
16 trial court and cannot be decided in a vacuum, without that record. To the extent that it presents
17 a legal issue, the FTB lost the discretionary immunity argument in prior proceedings before this
18 Court and before the United States Supreme Court. As presented in this case at this stage, the
19 alleged immunity argument is simply the flip side of the argument whether Hyatt presented
20 evidence of intentional misconduct on the part of FTB sufficient to uphold the verdict—a
21 substantial evidence question. Both the discretionary immunity and the comity arguments are
22 entirely dependent on an analysis of the evidence of FTB's bad faith, intentional misconduct,
23 evidence that was presented to a jury over a period of four months.

24 Without addressing these issues further (and piecemeal as FTB invites) in this
25 Response—the briefs will be the appropriate place to address the issues—Hyatt notes that he is
26 doubtful that any attempt to limit briefing to preclude a discussion of the evidence will serve the
27 purposes of this Court contemplated by the Rule. What FTB apparently contemplates is briefing
28 and decision of some issues, followed by briefing and decision of other issues, followed by

1 briefing and decision of still other issues. Such a process will be endless—a good thing for FTB,
2 which has been allowed to proceed on appeal with a stay not supported by a bond—and will
3 certainly not promote the interests of timely administration of this appeal, at least not from the
4 Court’s perspective. As the record reflects, Mr. Hyatt is over 71 years old, and he filed this case
5 in January, 1998, more than 11 years ago. The FTB motion simply delays these appellate
6 proceedings, probably for several years under the FTB’s scenario, depriving Mr. Hyatt of a final
7 adjudication to which he is entitled in timely fashion under the rules. The jury found that FTB
8 fraudulently delayed its audits and the protests intentionally and in bad faith for many years. This
9 finding was based on evidence presented over a period of four months. The FTB’s motion, while
10 ostensibly seeking to simplify the appeal and expedite its determination, will in all likelihood have
11 exactly the opposite effect. Prejudging its own arguments as meritorious, the FTB sees judicial economy
12 in a cut-to-the-chase declaration that FTB wins as a matter of law. But all of the FTBs arguments are
13 factually based, and are inextricably interwoven with all of the evidence presented in this case at trial.
14 They can be resolved only upon an analysis of the entire record. The process of making any kind of a
15 reasoned attempt to bifurcate this appeal and limit the record to be considered by this court is in itself
16 daunting as a matter of logistics, and could not possibly be accomplished without severe prejudice to
17 Hyatt. Simply stated, a review on the entire record of all of the issues the parties elect to advance is
18 mandated in order to reach a correct decision on appeal. Hyatt believes that the process suggested by
19 FTB will result in more delay, not expedition of the case; delay that should not be tolerated.

20 In sum, a prehearing conference is not warranted in this case, particularly on the grounds
21 set forth by the FTB. Having so stated, Hyatt is certainly not averse to meeting with the Court
22 or a justice thereof to discuss how this appeal should proceed, if the Court or a justice thereof
23 believes that a meeting will expedite and facilitate the processing of this appeal or provide a
24 mechanism for developing a realistic briefing schedule. However, the FTB should submit its
25 position in advance on how much additional time it requests, what issues it seeks to hear in what

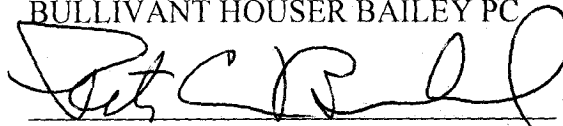
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1 order, and what electronic process it is suggesting, so Hyatt has time to review and respond,
2 rather than being presented with FTB's proposal and being asked to respond immediately at any
3 such hearing.

4 Dated this 20 day of May, 2009.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I certify that I am an employee of BULLIVANT HOUSER BAILEY PC and that on this 20th day of May, 2009, I caused the above and foregoing document entitled **RESPONSE BY RESPONDENT GILBERT P. HYATT TO APPELLANT'S MOTION FOR PREHEARING CONFERENCE PURSUANT TO NRAP 33** to be served as follows:

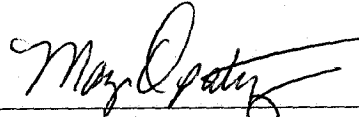
- by placing same to be deposited via federal express, in a sealed envelope and addressed to as follows:
- Pursuant to EDCR 7.26, to be sent via facsimile; and/or
- to be hand-delivered;

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