

1 IN THE SUPREME COURT OF THE STATE OF NEVADA

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3 FRANCHISE TAX BOARD OF THE
4 STATE OF CALIFORNIA,

Case No. 53264

5 Appellant/Cross-Respondent,
6 vs.

7 GILBERT P. HYATT,

Electronically Filed
Dec 04 2009 09:17 a.m.
Tracie K. Lindeman

8 Respondent/Cross-Appellant.
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11 NOTICE OF RELATED CASE

12 AND

13 REQUEST FOR NOTIFICATION TO THE PANEL IN XTREME FAITH
14 ACADEMY V. LANDRY, CASE NO. 52044 OF THIS MATTER

15 This is an appeal from a \$490 million tort judgment in favor of an individual
16 plaintiff against a California government agency. On February 23, 2009, appellant/cross-
17 respondent Franchise Tax Board of the State of California ("FTB") filed its Civil
18 Docketing Statement. Question 10 of that Docketing Statement asked whether FTB was
19 aware of any cases currently pending before the Nevada Supreme Court that raised the
20 same or similar issues as the appellate issues raised in this case. FTB's Docketing
21 Statement, p. 6. At the time its docketing statement was filed, FTB was unaware of any
22 such cases. Id.

23 FTB was recently made aware of a case currently pending before the Nevada
24 Supreme Court that raises two of the issues raised in FTB's Opening Brief. In order to
25 comply with FTB's duties of candor and to correct information in the record, FTB
26 hereby supplements and updates its answer to Question 10 on its Docketing Statement
27 with the information provided below. Nev. R. Prof. Cond. 3.3.
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1 Currently pending before the Nevada Supreme Court is the case of Xtreme Faith
2 Academy v. Landry, Case No. 52044, which involves tort claims against a government
3 entity. The Landry case raises two of the issues raised in FTB's appeal: (1) the
4 application of discretionary function immunity and the viability of the so-called "bad
5 faith" exception following the adoption of the Berkovitz-Gaubert test; and (2) whether
6 "legal process" is a required element for an abuse of process claim in Nevada.

7 In addition to providing the court notice of the Landry case, FTB respectfully
8 requests that the court provide immediate notice of FTB's appeal to the panel that has
9 been selected to render a decision in Landry. FTB further requests that the panel
10 consider the Landry case in conjunction with FTB's appeal or, at a minimum, review the
11 briefing in this case prior to rendering any decision in Landry.

12 These requests are important for a couple of reasons. First, the Landry case has
13 been fully briefed and oral argument was heard on November 13, 2009. As such, that
14 case has been formally submitted for decision. Having reviewed the briefs and oral
15 argument in Landry, however, it appears that the two overlapping issues in these appeals
16 were not fully developed in Landry.

17 For example, the specific issue related to the so-called "bad faith" exception to
18 discretionary function immunity was not analyzed in detail in either the briefs or oral
19 argument in Landry. Rather, there was a rather brief argument of this issue in the briefs
20 with a citation and argument centered upon one Nevada Supreme Court decision, Falline
21 v. GNLV, Corp., 107 Nev. 1004, 823 P.2d 888 (1991). During the oral arguments in
22 Landry, however, several questions were posed to the attorneys related to this very issue.
23 See Xtreme Faith Academy v. Landry, Case No. 52044, Oral Argument Recording dated
24 11/13/2009. FTB's Opening Brief, on the other hand, has provided this court with an
25 exhaustive analysis of this issue with extensive case law and citations. It is expected that
26 respondent/cross-appellant Gilbert P. Hyatt will address these issues in his Answering
27 Brief. The briefs in this case may be of great benefit and help to the Landry panel in
28 reaching the correct decision on the issue.

1 Moreover, the very significant issue of whether “legal process” is required for an
2 abuse of process claim was also not fully briefed in the Landry case. Here again, if the
3 Landry panel is not immediately made aware of the present appeal and if the panel does
4 not have the opportunity to review the briefs and to consider the extensive arguments
5 contained therein, the panel may be rendering a decision on this important precedent-
6 setting issue without full analysis and legal citations available for consideration.

7 Finally, notice should be given of this appeal to the panel in Landry because it
8 appears the Justices are not aware of the present case. During oral argument, Justice
9 Gibbons noted that the Landry case was the first “big” case to address the issues of
10 discretionary function immunity following the Nevada Supreme Court’s adoption of the
11 Berkovitz-Gaubert test. See Xtreme Faith Academy v. Landry, Case No. 52044, Oral
12 Argument Transcript dated 11/13/2009. By comparison, however, the current appeal is
13 much bigger than Landry in terms of both damages and the overall legal impact the case
14 may have on Nevada jurisprudence.

15 In sum, FTB respectfully supplements its Docketing Statement Question 10 by
16 notifying the Nevada Supreme Court of the Xtreme Faith Academy v. Landry case. Due
17 to the importance of the overlapping issues raised by these two appeals and the
18 impending possibility of a decision in Landry, FTB respectfully requests that the panel in
19 Landry be immediately notified of the current appeal. In addition, FTB respectfully

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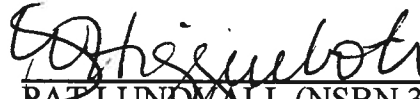
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requests that the Landry panel consider that case in conjunction with the current appeal or, at a minimum, review the briefing in this case prior to rendering any decision.

Dated this 3rd day of December, 2009.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I hereby certify, under penalty of perjury, that I am an employee of McDonald Carano Wilson LLP and that on this date I caused to be delivered in the United States mail, enclosed in a sealed envelope, upon which first class postage was fully prepaid and affixed thereto, a true copy of the **NOTICE OF RELATED CASE AND REQUEST FOR NOTIFICATION TO THE PANEL IN XTREME FAITH ACADEMY V. LANDRY, CASE NO. 52044 OF THIS MATTER**, addressed to the individuals listed below at their last known business addresses as follows:

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