

ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

FRANCHISE TAX BOARD OF THE
STATE OF CALIFORNIA,

Case No.: 53264

Appellant/Cross-Respondent,

FILED

vs.

MAY 18 2009

GILBERT P. HYATT,

TRACIE K. LINDEMAN,
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

Respondent/Cross-Appellant.

MOTION FOR PREHEARING CONFERENCE PURSUANT TO NRAP 33

ROBERT L. EISENBERG (NSBN 0950)
LEMONS, GRUNDY, & EISENBERG
6005 Plumas Street, Suite 300
Reno, Nevada 89519
Telephone No.: (775) 786-6868
Facsimile No. (702) 873-9966

PAT LUNDVALL (NSBN 3761)
CARLA HIGGINBOTHAM (NSBN 8495)
2300 West Sahara Avenue, Suite 1000
Las Vegas, NV 89102
Telephone No. (702) 873-4100

Attorneys for Appellant
Franchise Tax Board of the State of California

RECEIVED
MAY 18 2009
TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
DEPUTY CLERK

09-12287

1 Appellant Franchise Tax Board of the State of California ("FTB") moves this court for a
2 prehearing conference to consider the simplification of issues on appeal and other matters that
3 will aid in the disposition of this matter. This motion is made pursuant to NRAP 27, NRAP 33,
4 and is supported by the points and authorities that follow, and the pleadings and papers on file
5 with the court.

6 POINTS AND AUTHORITIES

7 This appeal arises from an action filed by Respondent Gilbert P. Hyatt ("Hyatt") against
8 FTB alleging that FTB committed various intentional torts while conducting a California tax
9 audit of Hyatt.¹ Hyatt filed this lawsuit in January 1998. In all, the pretrial proceedings spanned
10 over 10 years. During that timeframe, certain aspects of this case were presented to this court in
11 three separate extraordinary writs. FTB v. Eighth Judicial Dist. Ct., Docket Nos. 35549 and
12 36390; Hyatt v. Eighth Judicial Dist. Ct., Docket No. 47141. In addition, this case was appealed
13 to the United States Supreme Court. See Franchise Tax Board of California v. Hyatt, 538 U.S.
14 488, 123 S.Ct. 1683 (2003).

15 During discovery, depositions were taken of approximately 155 witnesses -- many of
16 which were deposed across multiple days. In addition, by the close of discovery, more than
17 168,000 documents had been exchanged between the parties. Additionally, during the years
18 leading up to the trial, the parties filed scores of motions, including more than 20 dispositive
19 motions (such as motions for partial summary judgment on various claims and defenses); more
20 than 50 motions in limine dealing with important evidentiary issues; and numerous other
21 motions dealing with important pretrial matters. Several other motions were filed during the
22 trial itself.

23 In April 2008, the case proceeded to trial before the Honorable Jessie Walsh in the Eighth
24 Judicial District Court. The trial lasted approximately four months, with more than 50 witnesses

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27 ¹ FTB is the California state agency charged with enforcing California's personal income tax
28 laws.

1 and thousands of exhibits. Ultimately, the jury returned a verdict in favor of Hyatt. Specifically,
2 the jury awarded Hyatt the following compensatory damages:

- 3 (1) \$85 million dollars in emotional distress damages;
- 4 (2) \$52 million dollars in invasion of privacy damages; and
- 5 (3) approximately \$1.1 million in attorneys fees as special damages.

6 After the jury returned its verdict on compensatory damages, the district judge then
7 determined that FTB could be subject to an award of punitive damages. She therefore allowed
8 the trial to proceed to additional phases, for the jury to decide whether punitive damages would
9 be awarded against FTB, a state government agency, and if so, the amount of punitive damages.
10 The jury awarded Hyatt \$250 million in punitive damages. In total, the jury awarded Hyatt more
11 than \$388 million in compensatory and punitive damages. On September 8, 2008, the district
12 court entered a judgment against FTB (including approximately \$102 million in prejudgment
13 interest) in the total amount of \$490,421,013.81.

14 Shortly thereafter, FTB filed extensive post-trial motions, which the district court denied in
15 their entirety. FTB then filed the instant appeal.²

16 On February 18, 2009, this court entered a scheduling order requiring FTB to file its
17 opening brief on or before June 18, 2009. Since receiving this order, FTB has been diligently
18 working on completing this task. While working through these issues, it has become obvious to
19 FTB's counsel that a prehearing conference between the parties and the court would be greatly
20 beneficial in this case, to streamline issues on appeal, to help avoid costly motion practice, and
21 to aid this court in the efficient resolution of this case. Thus, FTB respectfully requests that this
22 court schedule a prehearing conference pursuant to NRAP 33.

23 NRAP 33 specifically provides as follows:

24 The court may direct the attorneys for the parties to appear before the court or a
25 justice thereof for a prehearing conference to consider the simplification of the
26 issues and such other matters as may aid in the disposition of the proceeding by
the court. The court or justice shall make an order which recites the action taken

27 ² Hyatt has also filed a cross-appeal, seeking review of a pretrial order dismissing his
28 economic damage claims, and thereby seeking an even larger judgment against FTB.

1 at the conference and the agreements made by the parties as to any of the matters
2 considered and which limits the issues to those not disposed of by admissions or
3 agreements of counsel, and such order when entered controls the subsequent
4 course of the proceeding, unless modified to prevent manifest injustice.

5 The purpose of the rule is simple: to give a member of the court an opportunity to meet
6 with counsel for the parties in an unusual and/or highly complex appeal, and to discuss the best
7 ways to handle the case in a manner that promotes the efficient administration of justice in the
8 case. This is accomplished at the conference by simplifying the issues on appeal, streamlining
9 the appeal, establishing requirements for briefing (time limits, page limits, etc.), limiting or
10 simplifying the appendix, and otherwise aiding in the efficient disposition of the appeal. *Id.*

11 For example, in the present appeal, while drafting FTB's opening brief, it has become
12 apparent to FTB's counsel that there are one or two issues that are potentially dispositive of this
13 entire case as tried, specifically, issues dealing with the application of discretionary-function
14 immunity and the doctrine of comity. Resolution of these issues, prior to the resolution of any
15 other issues, would be dispositive. In other words, if the court agrees with FTB's position on
16 these points, the entire case would be resolved -- thereby avoiding the need for extensive
17 briefing of myriad other issues in the appeal, and thereby avoiding the need for the court to
18 spend its limited time and resources reviewing and analyzing non-dispositive issues. Thus, at
19 the Rule 33 conference, the court and the parties could discuss the possibility of bifurcated
20 briefing on the dispositive issues.³

21 At a Rule 33 conference, the presiding Justice and the parties could discuss whether the
22 court and the parties would benefit from a bifurcated briefing schedule. As is plainly evident
23 from FTB's Docketing Statement, FTB contends there are extensive and very unusual and
24 complex appellate issues in this case. In fact, FTB and its counsel believe that the district court
25 made multiple reversible errors both before and during trial. If the court bifurcates briefing and

26 ³ See, e.g., *U.S. v. McGee*, 1992 WL 371327 (9th Cir. 1992)(dispositive conviction issues
27 on appeal bifurcated from sentencing issues); *Richards v. Richards*, 31 P.3d 1002 (Mont.
28 2001)(dispositive jurisdictional issue bifurcated from other issues on appeal); *Rasmussen v.*
General Motors Corp., 2008 WL 2020475 (Wis. App. 2008)(court granted motion to bifurcate
briefing and decision on preliminary appeal issue).

1 subsequently agrees with FTB's position on the dispositive immunity/comity issues, it would be
2 entirely unnecessary for the parties to brief or for the court to consider these numerous other
3 issues (including the issues raised by Hyatt's cross-appeal). This would avoid the filing of
4 overly large and complex briefs. This would also save the parties and the court countless hours
5 spent addressing matters that may be entirely moot after resolution of dispositive issues.

6 In addition, a prehearing conference is warranted based upon the sheer scope of this
7 case. As described above, the pretrial aspects of this litigation lasted approximately 10 years and
8 yielded over 168,000 documents. The pretrial motion practice in this case was enormous and
9 included the filing of over 20 dispositive motions and over 50 motions in limine. In addition, the
10 trial itself lasted four months, with more than 50 witnesses, thousands of exhibits, and multiple
11 motions filed during trial. As a result, the enormity of this case has created special issues on
12 appeal. For example, due to the enormity of this case, it is highly likely that both FTB and Hyatt
13 will need additional time to file their respective briefs. The parties will also inevitably need to
14 file briefs far in excess of the usual page limitation. As such, the parties and the court would
15 greatly benefit by the court's guidance at a Rule 33 conference, at which these issues can be
16 discussed and determined without the necessity of multiple procedural motions during the
17 appeal.

18 In addition, the district court record is massive, consisting of hundreds of thousands of
19 pages. Based on the sheer size of the district court record, there are numerous issues related to
20 the appendix that can be appropriately addressed at a Rule 33 conference. For example, the
21 parties and the presiding Justice can discuss ways in which the appendix could be limited and
22 streamlined, perhaps using modern computer technology or other innovative methods to deal
23 with what will surely be a massive appendix.

24 Accordingly, FTB respectfully requests that this court schedule a prehearing conference
25 pursuant to NRAP 33, to be held by a Justice of the Nevada Supreme Court. At this conference,
26 FTB requests that the following subjects be discussed: (1) whether a bifurcated briefing
27 schedule should be established for this highly unusual appeal; (2) a realistic and workable
28 briefing schedule for both parties; (3) page limitations and other procedural requirements for

1 briefs; and (4) the appendix; and (5) and other matters that will aid the court and the parties in
2 processing this appeal more efficiently, in the interest of the sound administration of justice in
3 this case.⁴

4 Dated this 15th day of May, 2009.

5 McDONALD CARANO WILSON LLP

6 By: Robert L. Eisenberg
7 ROBERT L. EISENBERG (NSBN 0950)
8 LEMONS, GRUNDY, & EISENBERG
9 6005 Plumas Street, Suite 300
10 Reno, Nevada 89519
11 Telephone No.: (775) 786-6868
12 Facsimile No. (702) 873-9966

13 PAT LUNDVALL (NSBN 3761)
14 CARLA HIGGINBOTHAM (NSBN 8495)
15 2300 West Sahara Avenue, Suite 1000
16 Las Vegas, NV 89102
17 Telephone No. (702) 873-4100

18 Attorneys for Appellant
19 Franchise Tax Board of the State of California
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27 ⁴ Concurrently with the filing of this motion, FTB is filing a separate motion to suspend the
28 briefing schedule pending the outcome of this motion.

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CERTIFICATE OF MAILING

Pursuant to NRAP 25, I certify that I am an employee of Lemons, Grundy & Eisenberg and that on this date I caused to be deposited for mailing at Reno, Nevada, and via facsimile, a true copy of the foregoing addressed to:

Mark A. Hutchison
Hutchison & Steffen
10080 Alta Drive
Suite 200
Las Vegas, NV 89145

Peter C. Bernhard
Bullivant Houser Bailey PC
3883 Howard Hughes Parkway
Suite 550
Las Vegas, NV 89169

James Bradshaw
Pat Lundvall
Carla Higgenbotham
McDonald Carano Wilson LLP
100 W. Liberty Street
10th Floor
Reno, Nevada 89505

Donald Kula
Perkins Coie
1620 - 26th Street
Sixth Floor, South Tower
Santa Monica, CA 90404-4013

DATED: 5/15/09

Marta Slonew