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FILED

JUL 28 2009

IN THE SUPREME COURT OF THE STATE OF NEVADA

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

FRANCHISE TAX BOARD OF THE STATE
OF CALIFORNIA,

Supreme Court Case No.: 53264

District Court Case No.: A382999

Appellant,

v.

GILBERT P. HYATT,

Respondent.

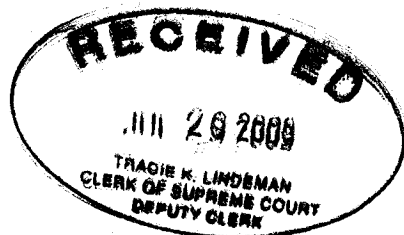
RESPONDENT GILBERT P. HYATT'S:

- (1) **OPPOSITION TO MOTION BY
MULTISTATE TAX COMMISSION
FOR LEAVE TO FILE *AMICUS*
CURIAE BRIEF;**
- (2) **MOTION TO STRIKE *AMICUS*
CURIAE BRIEF OF THE STATE
OF UTAH**
- (3) **MOTION TO STRIKE NOTICE OF
CONCURRENCE**

**RESPONDENT GILBERT P. HYATT'S (1) OPPOSITION TO MOTION FOR LEAVE
TO FILE *AMICUS* CURIAE BRIEF; (2) MOTION TO STRIKE *AMICUS* CURIAE
BRIEF OF THE STATE OF UTAH; AND (3) MOTION TO STRIKE NOTICE OF
CONCURRENCE**

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Respondent Gilbert P. Hyatt ("Hyatt") hereby opposes the Multistate Tax Commission's Motion for Leave to File *Amicus Curiae* Brief, moves to strike the *amicus curiae* brief of the State of Utah, and moves to strike the notice of concurrence of the State of Nevada. Both proposed *amici* reargue the issue of sovereign immunity, which was decided *in this case* by this Court and the United States Supreme Court several years ago, and repeat the arguments already asserted by Appellant Franchise Tax Board of the State of California ("FTB") in its opening brief. The Notice of Concurrence applies only to the two proposed *amicus* briefs, and if those briefs are not accepted by this Court for filing, then the Notice of Concurrence must also be stricken.

1. Argument in support of requested relief.

Hyatt files this opposition to the motion for leave to file the proposed *amicus* brief submitted by the Multistate Tax Commission and this motion to strike the *amicus* brief of the State of Utah (joined by 15 states) for two reasons. First, each *amicus* brief asserts the same false premise that state sovereign immunity prohibits intentional tort actions against taxing agencies, even though this Court and the United States Supreme Court have already ruled otherwise in this case. Second, each brief mimics arguments set forth in appellant Franchise Tax Board of California's (the "FTB") Opening Brief. If these briefs are not permitted for filing, then the State of Nevada's Notice of Concurrence should also be stricken.¹

¹ Although not related to the instant motion, Hyatt notes the unusual role of the State of Nevada Attorney General in acting as local counsel under SCR 42(3)(c). NRS 228.070(3) restricts the Attorney General from private practice: "Except as otherwise provided in NRS 7.065, the Attorney General shall not engage in the private practice of law." (NRS 7.065 allows for government attorneys to represent indigent parties under certain circumstances.) Under SCR 42(14), the Nevada attorney of record must meet certain responsibilities, constituting the practice of law: (a) be responsible for and actively participate in the representation of the client (here, the Multistate Tax Commission and 16 states); (b) be present at all matters in open court; and (c) ensure compliance with all state and local rules of practice, as well as with all applicable Nevada procedural and ethical rules. Furthermore, serving as local counsel for a non-

1 Each proposed *amicus* argues that, as a matter of state sovereign immunity, tax agencies
2 of one state should not be subjected to tort suits, even for intentional bad faith conduct, in a sister
3 state. That ship has sailed. This Court *in this case* and the United States Supreme Court *in this*
4 *case* and in prior precedent found no such constitutional bar. This Court also refused to dismiss
5 the intentional torts claim on the basis of comity.

6 The proposed *amici* attempt to argue that the case tried to the jury by Hyatt was not the
7 intentional tort case approved by this Court. This is absolutely false. The very case Hyatt tried
8 to the jury is the same case he presented to and argued to this Court seven years ago, in urging
9 that he should be permitted to present these claims to a jury. This includes but was not limited to
10 his bad faith fraud claim, in which he briefed and argued to this Court that the FTB's audit
11 *conduct* (not its assessment of taxes) was carried out in bad faith with the intent to injure Hyatt,
12 entitling him to a jury trial to evaluate the FTB's *conduct*.²

13 Any argument that the issue of whether the FTB has immunity, or otherwise cannot be
14 held liable, for its bad faith intentional misconduct, breaches of confidentiality and privacy,
15 abuse of process, etc., carried out in part in Nevada and directed specifically at a Nevada resident
16 were answered long ago and have become the law of the case, per decisions by this Court and the
17 highest court in this country. Many of the same states filed *amici* briefs in the United States
18 Supreme Court, which rejected arguments on the same issues presented before this Court today.
19 Such policy-level arguments by the two proposed amici as to why these decisions were wrong
20 are no longer at issue in this case.

21
22
23 governmental commission and other governments could arguably affect the Attorney General's
24 constitutional and statutory duties to represent its client, the State of Nevada.

² Hyatt's July 2, 2001 Petition for Rehearing, at pp. 6-8, attached hereto as Exhibit "A".

1 Second, the *amici* simply mimic the arguments of the FTB in asserting immunity³ and
2 against the imposition of punitive damages.⁴ An *amicus* serves no purpose if it merely mimics
3 the arguments of the real party in interest. The term “amicus curiae” means friend of the court,
4 not friend of a party. *Long v. Coast Resorts, Inc.*, 49 F.Supp.2d 1177, 1178 (D.Nev. 1999),
5 citing *Ryan v. Commodity Futures Trading Commission*, 125 F.3d 1063 (7th Cir. 1997).⁵ Judge
6 Posner wrote that “judges should be assiduous to bar the gates to *amicus* briefs that fail to
7 present convincing reasons why the parties’ briefs do not give us all the help we need for
8 deciding the appeal.”⁶

9 Hyatt and this Court should not need to expend their resources considering the *amici*
10 pleadings at this stage of the litigation, given the incredible volume of materials already before
11 this Court and the possible additional *amici* who may wish to be heard, if the Court were to open
12 this door to these two applicants. In this case alone, FTB’s proposed Opening Brief is 118 pages,
13 with more than 23,000 pages in 93 volumes of FTB’s Appendix.⁷ The *amicus* process should not
14 be permitted to send not-so-subtle messages to the Court that the FTB has been able to generate
15 support for its positions, especially where the proposed *amicus* briefs simply repeat the
16 arguments and citations already contained in FTB’s 118-page brief.

17 _____
18 ³ For example, the proposed MTC brief at pp. 5-13 and the proposed Utah brief at pp. 6-17 cite many of
19 the same cases and make the same discretionary function immunity and comity arguments as the FTB’s
20 opening brief in more than 30 pages, at Sections IV(B), IV(C) and IV(E).

21 ⁴ For example, the proposed MTC brief at pp. 13-22 and the proposed Utah brief at pp. 17-18 cite many
22 of the same cases and make the same punitive damages arguments as the FTB’s opening brief in Section
23 IV(H).

⁵ *Cf.*, *Neonatology Associates v. Commissioner of Internal Revenue*, 293 F.3d 128 (3rd Cir. 2002),
outlining a more liberal standard in evaluating *amicus* motions.

⁶ *Ryan v. Commodity Futures Trading Comm’n*, 125 F.3d 1062, 1064 (7th Cir. 1997); *see also United States v. Microsoft Corp.*, 2002 WL 319819 (D.D.C. 2002).

⁷ FTB has requested leave to file its 118-page Opening Brief, and Hyatt is not aware if this request has
been granted. FTB prepared its Appellant’s Appendix without any consultation with Hyatt on a possible

1 Traditionally, the role of *amici* has been to act as a friend of the court, providing guidance
2 on questions of law. The function of an *amicus* brief is to serve for the Court's benefit in
3 assisting the Court in cases of general public interest and in providing assistance to existing
4 counsel. *United States v. Gotti*, 755 F.Supp. 1157, 1158 (E.D.N.Y. 1991). A motion for leave to
5 file an *amicus* brief should not be granted unless the court "deems the proffered information
6 timely and useful." *See Yip v. Pagano*, 606 F.Supp. 1566, 1568 (D.N.J. 1985) (quoting 3A C.J.S.
7 *Amicus Curiae* Section 3 (1973)). Allowing an *amicus* may be improper, if the proposed
8 submission merely reiterates arguments or authority already submitted to the Court. *Price v.*
9 *New York City Board of Education*, 837 N.Y.S.2d 507, 516-517 (N.Y. 2007). The *Price* Court
10 explained why *amicus* briefs should not be routinely accepted, with points that fit precisely the
11 FTB, Multistate Tax Commission and Utah's attempts here:

12 It is undisputed that an *amicus* as the term is translated, can be a real friend to the
13 court in a complex case, alerting the court to unrepresented implications to persons not
14 parties to the action and to bring to the court's attention cases or recent reversals or
affirmances of authorities cited by the parties, or other matters, such as legislative history
relevant to the matter before the Court.

15 Unfortunately, the process has deteriorated and some of those claiming to be
16 *amici* are really enemies posing in friend's clothing. While help for the court is
commendable, the *amicus* process has often become a burden. As a court should consider
17 each application to submit an *amicus* before accepting or rejecting it, each ill considered
amicus application puts an unnecessary and unwarranted burden on the Court, as such
18 application must be read and addressed, if only to be rejected.

19 The contents of too many *amicus* submissions have gone far past their purpose.
For example, as an *amicus* proper function is to advise the court of the law and the
20 implication of a decision of the Court on the matter before it on other matters, the
inclusion of factual material is almost always improper. Factual material submitted to the
21 court by an *amicus* should not be subject to less scrutiny and contravention by opposing
parties than factual material submitted by a party. Unless the Court makes the *amicus* a
22 party, such is impossible when factual material is submitted by an *amicus*.

23 Joint Appendix under NRAP 30(a), so Hyatt must also prepare his own Respondent's Appendix to
24 include matters FTB chose not to include in its Appendix.

1 Similarly, an *amicus* which merely alerts the Court to their "position" or submits
2 petitions signed by persons interested in a particular result constitutes an improper
3 attempt to influence the Court to make its decision on other than on the facts and the law.
4 If the law and facts support a particular result, the Court must reach such result rather
5 than conform its decision to political or popular pressure. Such material should not even
6 be submitted.

7 The final type of an improper *amicus* is one which merely reiterates arguments or
8 authority already submitted to the Court. This is wasteful and essentially frivolous as it
9 can add nothing to the process except to waste the Court's time (as the Court must at least
10 read an application to submit an *amicus* to decide if it should accept it), and can only act
11 to delay the Court in completing its duty to render a timely decision.

12 Unfortunately, there is also no appropriate route for the Court to protect it against
13 frivolous or improper *amicus* submissions or their use as a tactic to delay a proceeding,
14 except, perhaps only where a party can have been found to have participated in or
15 induced an *amicus* to file. Existing sanctions which create disincentives to frivolous or
16 dilatory conduct of parties extend only to the parties to a litigation and not to an *amicus*.
17 See 29 New York Court Rules § 130-1.1.

18 *Id.*, 837 N.Y.S. 2d at 516-517)

19 Each of Judge Stone's concerns about improper *amicus* filings are of concern here as
20 well. The Utah brief argues the underlying facts of this case, raising inferences that were
21 obviously rejected by the jury and are beyond the scope of appellate review. Judge Stone notes,
22 "...the inclusion of factual material is almost always improper", in the context of an *amicus*
23 brief.⁸ Judge Stone is also concerned about *amicus* briefs that "merely alert[] the Court to their
'position'" as constituting improper attempts to influence the Court to make its decision based on
political or popular pressure, rather than the facts and the law.⁹ Judge Stone is also concerned

20 ⁸ *Id.*, at 516. For example, p. 4 of Utah's proposed brief includes factual material: "In the present case,
21 Hyatt maintained a safe deposit box in California long after he claimed to have moved to Nevada." (Utah
22 brief at 4:26-28). Utah also includes other disputed facts: "Here, documentation showed that Hyatt's
23 alleged sale of his California home, and his purchase of a Nevada home, occurred after his claimed move
date." (Utah brief, 5:2-4). Further, "In the present case, Hyatt took many of these steps [to establish
residency], but most were long after his alleged move date; and he certainly had an impressive team of
tax-savvy advisers." (Utah brief, 5:10-12).

⁹ *Id.*, at 516. For example, the MTC brief says, "The Commission files this brief to express concern with
certain aspects of the lower court's proceedings in this matter." (1:4-5).

1 about *amicus* briefs that merely reiterate arguments and authorities, as a waste of valuable court
2 time, even to review and reject the proposed submissions.¹⁰ Finally, Judge Stone notes that the
3 courts have power only over parties, in order to police frivolous or improper *amicus* filings. If,
4 in fact, the FTB participated in or induced either of the two proposed *amici* to file, which is a
5 reasonable inference given the relationships among the FTB, the Multistate Tax Commission,
6 and the other states, then this Court has authority to protect itself against frivolous or improper
7 *amicus* submissions,” as Judge Stone noted in his *Price* opinion.¹¹

8 Given the repetitive nature of the proposed *amici* briefs and their blatant attempt to
9 reargue the law of the case, no showing has been made to warrant the filing of an *amicus* brief by
10 either the Multistate Tax Commission or the State of Utah.

11 **2. This Court's decision in *this* case disposed of the sovereign immunity issue.**

12 Hyatt cites to part of his briefing to this Court approximately 7 years ago that outlined the
13 claims and supporting evidence for the claims he sought to try — claims which the District Court
14 (with now Justice Saitta then presiding as trial judge) had approved in denying the FTB's
15 summary judgment motion. This Court found, unambiguously, that the intentional tort claims
16 can and must be tried to a jury. In making the ruling, the Court specifically rejected the FTB's
17 sovereign immunity arguments.

18 The Court reviewed the summary judgment order decided by the District Court in 2000
19 (then-District Court Judge Saitta presiding). While the Court initially agreed to consider the
20 FTB's writ petition on the jurisdictional issue, it ultimately reviewed the entire record of the case.

21
22 ¹⁰ See fns 2 and 3, *infra.*, showing where the proposed *amici* briefs simply repeat arguments and
authorities from the FTB Opening Brief.

23 ¹¹ Query, e.g., how the State of Utah and the 15 joining states are knowledgeable about how “tax-savvy”
Hyatt’s advisers are, or how they know *anything* about disputed facts. Clearly, the implication is that the
FTB told them these “facts” and approved of Utah arguing facts in a purported *amicus* brief.

1 After initially finding (prior to receiving any briefing on the issue) that Hyatt did not have facts
2 to support any of his claims, the Court reversed itself after receiving briefing on that very issue,
3 ruling it had "granted the [FTB's] petition . . . on the basis that Hyatt did not produce sufficient
4 facts to establish the existence of a genuine dispute justifying denial of the summary judgment
5 motion."¹² The Court then held: "Having considered the parties documents and the entire record
6 before us, we grant Hyatt's petition for rehearing, vacate our June 13, 2001 order and issue this
7 order in its place."¹³

8 Again, the Court reversed its prior order and returned Hyatt's bad-faith fraud claims and
9 the rest of Hyatt's then-pending intentional tort claims to the trial court. In its order, this Court
10 stated, among other things, that:

11 Franchise Tax Board . . . moved for summary judgment, or dismissal under
12 NRCP 12(h)(3), arguing that the district court lacked subject matter jurisdiction
13 because principles of sovereign immunity, full faith and credit, choice of law,
14 comity and administrative exhaustion all required [*5] the application of
15 California law, and under California law Franchise Tax Board is immune from all
16 tort liability. The district court denied the motion. The writ petition in Docket No.
17 36390 challenges that decision. The Multistate Tax Commission has filed an
18 *amicus curiae* brief.

19 . . .

20 Preliminarily, we reject Franchise Tax Board's arguments that the doctrines of
21 sovereign immunity, full faith and credit, choice of law, or administrative
22 exhaustion deprive the district court of subject matter jurisdiction over Hyatt's tort
23 claims. First, although California is immune from Hyatt's suit in federal courts
24 under the Eleventh Amendment, *it is not immune in Nevada courts*. Second, the
25 Full Faith and Credit Clause does not require Nevada to apply California's law in
26 violation of its own legitimate public policy.¹³ Third, the doctrines of sovereign

¹² See *Franchise Tax Board of California v. Eighth Judicial District*, 2002 Nevlexis 57, *2 (2002), a copy of which is attached hereto as Exhibit "B".

¹³ *Id.*

1 immunity and full faith and credit determine the choice of law with respect to the
2 district court's jurisdiction, while Nevada law is presumed to govern with respect
3 to the underlying torts. ¹⁵ Fourth, *Hyatt's tort claims, although arising from the*
4 *audit, are separate from the administrative proceeding*, and the exhaustion
5 doctrine does not apply. The district court has jurisdiction; however, we must
6 decide whether it should decline to exercise its jurisdiction under the doctrine of
7 comity.

8 ...

9 [The] Franchise Tax Board statutory immunity for intentional torts *does*
10 *contravene Nevada's policies and interests in this case*. As previously stated,
11 *Nevada does not allow its agencies to claim immunity for discretionary acts taken*
12 *in bad faith*, or for intentional torts committed in the course and scope of
13 employment. *Hyatt's complaint alleges that Franchise Tax Board employees*
14 *conducted the audit in bad faith, and committed intentional torts during their*
15 *investigation*. We believe that greater weight is to be accorded Nevada's interest
16 in protecting its citizens from injurious intentional torts and *bad faith acts*
17 *committed by sister states' government employees*, than California's policy
18 favoring complete immunity for its taxation agency.

19 ...

20 And if the [deliberative process] privilege were to apply, it would be overwritten
21 by Hyatt's demonstrated need for the documents based on his claims *of fraud and*
22 *government misconduct*.¹⁴

23 The above holdings by the Nevada Supreme Court are definitive and conclusive, and the
law of the case. Yet they are ignored by the *amici*. There is no reason to allow *amici* to reargue
the law of the case.

Similarly, where the proposed *amici* have a substantial relationship to one of the litigants,
the proffered input becomes nothing more than an additional brief of the litigant. The Multistate
Tax Commission "is an intergovernmental state tax agency working on behalf of states and

¹⁴ *Id.*, at *4, 8, 11, 12.

1 taxpayers to administer, equitably and efficiently, *tax laws that apply to multistate and*
2 *multinational enterprises.*¹⁵ California is a “contact member” of the Multistate Tax
3 Commission, and the FTB represents the State of California on the Commission.¹⁶ Of the other
4 states joining in Utah’s proposed brief, Utah, Arkansas, Colorado, Idaho, Missouri, North Dakota
5 and Washington are also “contact members.” Maryland is a “sovereignty member,” while
6 Florida, Maine, Ohio, Oklahoma, Tennessee, and Vermont are “associate & project members.”¹⁷
7 In essence, then, California has enlisted the help of a commission charged with dealing with tax
8 laws that apply to businesses that operate in more than one state or country (*not* the situation in
9 this case), as well as a group predominantly consisting of member states in that commission, to
10 seek to present arguments as friends of the Court. They are simply friends of the FTB, adding
11 almost 50 pages of repetitive arguments to the FTB’s 118-page Opening Brief. To contend that
12 the interests of the Commission and the other states will not be adequately addressed by the FTB
13 is simply not true, to the extent that the Commission and the other states even have interests that
14 differ from that of the FTB. The FTB has vigorously argued that Nevada should grant the FTB
15 sovereign immunity as a matter of comity. The interests of the Commission and the FTB are
16 identical in this case.

17
18 ¹⁵ Proposed *amicus* brief at 1-2. Web-site of Multistate Tax Commission,
www.mtc.gov/about.aspx?id=40, last reviewed July 26, 2009.

19 ¹⁶ Web-site of Multistate Tax Commission, www.mtc.gov/Aboutstatemap.aspx, and
www.mtc.gov/about.aspx?id=1818, last reviewed July 26, 2009. See Cal. Rev. & Tax. Code § 38011
20 (appointing the executive director of the FTB to represent California on the Commission in even-
numbered calendar years and the executive secretary of the State Board of Equalization to represent
California in odd-numbered calendar years).

21 ¹⁷ “Compact members” are states that have enacted the Multistate Tax Compact into their state law.
22 “Sovereignty members” are states that “support the purposes of the Multistate Tax Compact through
regular participation in, and financial support for, the general activities of the Commission.” “Associate
members” are “states that participate in Commission meetings and otherwise consult and cooperate with
23 the Commission...” Web-site of Multistate Tax Commission, www.mtc.gov/about.aspx?id=1818, last
reviewed July 26, 2009. Nevada is not a member of the Multistate Tax Commission, nor are Delaware
and Virginia, the only two non-members seeking to join in the Utah brief.

1 **3. Conclusion.**

2 The *amicus curiae* process is not intended to simply add parties on one side of the
3 scorecard in a showing of quantity, or a way to get additional pages of briefing in excess of what
4 may be allowed by this Court. Instead, the process should be limited to input from different
5 perspectives on policy matters not adequately being addressed by the parties at bar. The two
6 proposed *amici* do not do anything except try to send a message to this Court that they disagree
7 with the already-decided law of the case and do not like what a Nevada jury did to protect the
8 rights of a Nevada citizen. The amici here should not be permitted to address a subject decided
9 years ago. Nor should they be permitted to merely mimic the arguments of the FTB. No
10 showing is made for allowing *amici* to file their respective proposed *amicus* briefs.

11 DATED: July 28, 2009.

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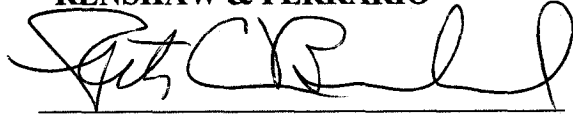
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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this appellate brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellant Procedure in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirement of the Nevada Rules of Appellate procedure.

DATED this 28 day of July, 2009.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I certify that I am an employee of **KUMMER KAEMPFER BONNER RENSHAW & FERRARIO** and that on this 28 day of July, 2009, I caused the above and foregoing document entitled **RESPONDENT GILBERT P. HYATT'S: (1) OPPOSITION TO MOTION BY MULTISTATE TAX COMMISSION FOR LEAVE TO FILE *AMICUS* CURIAE BRIEF (2) MOTION TO STRIKE *AMICUS* CURIAE BRIEF OF THE STATE OF UTAH (3) MOTION TO STRIKE NOTICE OF CONCURRENCE** to be served as follows:

- ☒ [X] by placing same to be deposited for federal express mailing in the United States, in a sealed envelope upon which postage was prepaid in Las Vegas Nevada; and/or
- ☐ [] Pursuant to EDCR 7.26, to be sent via facsimile; and/or
- ☐ [] to be hand-delivered;

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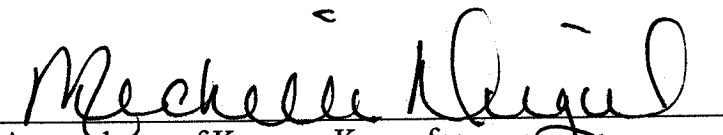
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10 **IN THE SUPREME COURT OF THE**
11 **STATE OF NEVADA**

12 FRANCHISE TAX BOARD OF THE STATE)
13 OF CALIFORNIA,)

14 Petitioner,)

15 vs.)

16 EIGHTH JUDICIAL DISTRICT COURT of)
the State of Nevada, in and for the County of)
17 Clark, Honorable Nancy Saitta, District Judge,)

18 Respondent,)

19 and)

20 GILBERT P. HYATT,)

21 Real Party in Interest.)

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Case No. 36390

**REAL PARTY IN INTEREST
GILBERT P. HYATT'S PETITION
FOR REHEARING RE THE
COURT'S JUNE 13, 2001 ORDER
GRANTING PETITION FOR WRIT
OF MANDAMUS**

**CONFIDENTIAL INFORMATION
TO BE FILED UNDER SEAL**

TABLE OF CONTENTS

Page

I.	Issues presented.	1
A.	Did the Court overlook or misapprehend genuine, material facts at issue when it concluded "that there is no probative evidence to support Hyatt's [tort] claims?"	1
B.	Did the Court overlook or misapprehend the law when it granted the FTB's petition "on grounds other than those alleged in the petition?"	1
II.	Summary of argument and relief requested	1
III.	The Court has overlooked or misapprehended Hyatt's substantial evidence of the FTB's invasion of Hyatt's privacy by its illegal disclosures of Hyatt's private facts	1
A.	Elements of claim	1
B.	Supporting evidence	1
1.	Hyatt reasonably expected an audit by the FTB with no public disclosure of his private information	2
2.	The FTB unreasonably and illegally divulged Hyatt's private facts	4
i.	The FTB wrongly disclosed the address of Hyatt's secret research lab	4
ii.	The FTB wrongly disclosed Hyatt's social security number	5
iii.	The FTB wrongly disclosed to Hyatt's Japanese licensees that he was being investigated, thereby destroying Hyatt's patent licensing business	5
IV.	The Court has overlooked or misapprehended substantial evidence of the FTB's fraud	6
A.	Elements of claim	6
B.	Supporting evidence	6
1.	The one-sided fraudulent audit	6
2.	The \$9 million fraud penalty and the FTB's urging Hyatt to settle	8
3.	Hyatt was damaged by the FTB's fraud	9
V.	The Court overlooked or misapprehended the law when it granted the FTB's petition "on grounds other than those alleged in the petition."	10
VI.	Hyatt again requests leave to file an additional briefing specifically addressing the evidentiary support for his claims	10

I. Issues presented.

- A. Did the Court overlook or misapprehend genuine, material facts at issue when it concluded "that there is no probative evidence to support Hyatt's [tort] claims?"
- B. Did the Court overlook or misapprehend the law when it granted the FTB's petition "on grounds other than those alleged in the petition?"

II. Summary of argument and relief requested.

Hyatt sued the FTB for torts based on its invasion of his privacy and its fraudulent conduct. Since the Court decided the Writ Petition on issues not raised, briefed or argued, Hyatt has minuscule space to describe – *for the first time to this Court* – his specific claims and the evidence that has been overlooked or misapprehended by the Court. Despite an enormous record, he has space here to address a scant portion of the sufficient probative evidence *in the record* of prima facie claims regarding: (i) a single invasion of privacy claim – disclosure of private facts – and (ii) his fraud claim. Hyatt has equally strong supporting evidence for his various other related tort claims, but no space to address them. Hyatt therefore requests rehearing on all of his tort claims. Surely this Court must accord respect for the fact that the district court twice validated Hyatt's tort claims, the discovery commissioner saw and heard sufficient evidence to indicate that the FTB may be guilty of fraud, and even the FTB did not challenge in its writ petition the sufficiency of Hyatt's evidence. Indeed, the record is irrefutably alive with supportive evidence.

III. The Court has overlooked or misapprehended Hyatt's substantial evidence of the FTB's invasion of Hyatt's privacy by its illegal disclosures of Hyatt's private facts.

- A. Elements of claim: (i) disclosure or publicity of private facts; and (ii) a reasonable expectation of privacy in regard to the disclosed facts.¹

B. Supporting evidence:

The evidence establishes beyond any doubt that the FTB violated its own non-discretionary

¹ This claim is really two: the more recently emerged invasion of informational/constitutional privacy and the more traditional branch of disclosure of private facts. Each claim involves the disclosure of private facts for which an expectation of privacy had been created and for which a reasonable person would find offensive – particularly informational/constitutional privacy under which disclosure of private, personal information gathered by the government is *per se* unlawful. See detailed discussion in Hyatt's opposition to the FTB's motion for summary judgment on pages 21-26 and 31-33, respectively, [Appdx., Exh. 27]. See also Cal. Const., Art. I, Sec. 1. For the Court's convenience and for clarity in this petition, Hyatt has attached an Appendix hereto containing copies of all exhibits cited herein. Hyatt cites to the attached Appendix in the following format: [Appdx., Exh. "x"]. All exhibits included in the attached Appendix are materials from the record before the Court, and the record cite for each exhibit is set forth in the table of contents for the Appendix.

1 rules, regulations, and procedures in illegally disclosing Hyatt's private information and thereby injuring
2 Hyatt. Regardless of whether an individual owes taxes to California, the FTB has no right to ignore its
3 own confidentiality requirements and commit actionable privacy torts under the guise of a tax audit.
4 This claim, and all of Hyatt's claims, are for torts committed by the FTB irrespective of the independent
5 tax proceeding in California.

6 The Court incorrectly concluded that Hyatt's only evidence in support of this claim (and all
7 others) consisted of his own allegations. The Court overlooked a record replete with documentary
8 evidence, affidavits, and depositions of third persons that establish this claim.

9 **1. Hyatt reasonably expected an audit by the FTB with no public disclosure of
his private information.**

10 As addressed below, based on the FTB's own published regulations, statutory requirements, and
11 explicit representations to Hyatt and his representatives, Hyatt rightly and reasonably expected that the
12 FTB would keep his private information confidential. Hyatt's heightened privacy concerns were, he
13 thought, allayed by the FTB's explicit promises to Hyatt and citations of law mandating confidentiality.

14 There are numerous examples of FTB publications mandating confidentiality. "It is the *auditor's*
15 responsibility to maintain the security of *all* confidential data during the audit process and to prevent *any*
16 unauthorized disclosure."² The FTB is forbidden from providing "confidential information to persons to
17 whom issuance of this information has not been authorized."³ The FTB emphasizes: "It is the
18 responsibility of FTB agents to ensure that confidential information is not disclosed to unauthorized
19 persons."⁴ Auditors are instructed: "*If in doubt, don't disclose*," repeating this mandatory, non-
20 discretionary requirement 16 times in 14 pages in one manual.⁵ The FTB even warns its auditors of
21 possible private lawsuits for unauthorized disclosures.⁶ Yet, included in the FTB's definition of
22 confidential information is the very type of information it disclosed regarding Hyatt.⁷

23 The record is overflowing with evidence, testimonial and documentary, that provided Hyatt with

24 ² FTB Field Audit Manual, at FTB 3762 [Appdx., Exh. 1].

25 ³ FTB Statement of Incompatible Activities and Rules of Conduct, at (1), paragraph I(3) [Appdx., Exh. 2].

26 ⁴ FTB Disclosure Education Manual, at 11 [Appdx., Exh. 3].

27 ⁵ FTB Disclosure Education Manual, emphasis in original [Appdx., Exh. 3].

28 ⁶ FTB Disclosure Education Manual, at 14 [Appdx., Exh. 3].

⁷ FTB Statement of Incompatible Activities and Rules of Conduct, at (3), paragraph II(2), at (5), paragraph IV, and at
(7), paragraph IX [Appdx., Exh. 2]; FTB Disclosure Education Manual, at 4 (emphasis added), at 5, and at 13 [Appdx., Exh. 3];
and FTB Security and Disclosures Manual, at H 06603, H06659 [Appdx., Exh. 4].

1 an absolute, reasonable expectation that his unique need for privacy would be strictly honored by the
2 FTB as stated verbally and in writing, and as required by its own rules. In its initial audit letter, the FTB
3 promised "confidential treatment of any personal and financial information from the auditor assigned to
4 you."⁸ In the same document, the FTB sent Hyatt its Privacy Notice, FTB Form #1131,⁹ that
5 represented to Hyatt that the FTB was subject to the California privacy act¹⁰ and was required to
6 disclose "why we ask you for information." The FTB indicated that it would only share information
7 with the IRS and other governmental agencies. *It uttered no hint that it intended to divulge Hyatt's*
8 *private information to non-governmental third parties at the unfettered discretion of its auditors.* It
9 nonetheless did so on a grand scale as summarized below.

10 The affidavit of Eugene Cowan, Hyatt's tax attorney, explained in great detail the lengths Hyatt
11 and his representatives went to obtain assurances from the FTB regarding confidentiality.¹¹ The FTB
12 clearly understood Hyatt's compelling need for keeping not only his private information confidential but
13 also the fact that he was being audited to the point that Hyatt's insistence upon confidentiality was so
14 non-negotiable that the FTB promised strict confidentiality as a *quid pro quo* for obtaining the
15 information and documents its auditors claimed it needed to complete the audit.¹²

16 Hyatt is by all accounts, a recognized world-class inventor, researcher and licensor whose
17 demands for strict confidentiality were solidly based upon concerns of industrial espionage and theft of
18 trade secrets.¹³ Having previously experienced the disastrous effects of security leaks early in his
19 career,¹⁴ Hyatt's need for confidentiality was paramount, as he had licensed many of the world's largest
20 corporations on crucial technologies and was negotiating with many others.¹⁵ The FTB was keenly
21 aware that Hyatt's privacy concerns were both reasonable and non-negotiable, as his secret research lab
22 and secret document files were located in a highly confidential setting not available or discernible as
23

24 ⁸ FTB Form #1131 [Appdx., Exh. 5].

25 ⁹ FTB Form #1131 [Appdx., Exh. 5].

26 ¹⁰ Officially known as the California Information Practices Act of 1977 ("IPA"), Cal. Civ. Code §§ 1798 *et seq.*

27 ¹¹ Cowan Affid., ¶¶ 9-26 [Appdx., Exh. 6], submitted in opposition to the FTB's motion for summary judgment.

28 ¹² Cowan Affid., ¶¶ 9-26 [Appdx., Exh. 6].

¹³ Hyatt Affid., ¶¶ 18b, 131, 137 [Appdx., Exh. 7].

¹⁴ Hyatt Affid., ¶¶ 80, 130-31, 137 [Appdx., Exh. 7].

¹⁵ Hyatt Affid., ¶¶ 44, 67, 85, 86 [Appdx., Exh. 7].

1 such to the public.¹⁶ Security was so important to Hyatt that he even purchased the facility containing
2 his research lab and invaluable documents through the Kern trust¹⁷ to avoid public disclosure.

3 **2. The FTB unreasonably and illegally divulged Hyatt's private facts.**

4 In violation of the FTB's non-discretionary regulations and statutory requirements, as well as its
5 explicit representations to Hyatt, and contrary to this Court's "findings" that the FTB "complied with its
6 internal operating procedure" and acted "in line with a standard investigation . . . pursuant to its statutory
7 authority," the FTB publicly, repeatedly, and defiantly disclosed Hyatt's private information.

8 **i. The FTB wrongly disclosed the address of Hyatt's secret research lab.**

9 The FTB's disclosure of Hyatt's highly secret Las Vegas address to third parties was a calculated
10 outrage.¹⁸ Despite express assurances that it would not reveal Hyatt's secret information, the FTB
11 violated its own regulations and disclosed Hyatt's secret Las Vegas address to utility companies,
12 including Southwest Gas Corp., Silver State Disposal Service, and Las Vegas Valley Water District¹⁹
13 and to three separate newspapers.²⁰ As a result, Hyatt's painstaking care in locating, securing, and
14 protecting a secret facility was all for naught, as the FTB made it available to public knowledge, a fact
15 that is of the utmost concern and disgust to Hyatt for reasons that any reasonable person in his situation
16 would consider to be of compelling importance.²¹

17 This reprehensible effort to publicly expose Hyatt's secret address resulted in a major security
18 risk and loss of time and money. As a direct result of the FTB's deliberate privacy violation, Hyatt was
19 forced to purchase another Nevada property, under another trust, and move the research lab, his
20 sensitive documents, and intellectual property to this new location.²² Since 1995 when the FTB
21 publically disclosed the secret research lab address, various ones of Hyatt's most sensitive trade secrets
22 have appeared in commercial products and in publications.²³

23
24
25 ¹⁶ Hyatt Affid., ¶¶ 10-133, 137 [Appdx., Exh. 7].

26 ¹⁷ Michael Kern is a prominent Certified Public Accountant in Las Vegas.

27 ¹⁸ Portions of FTB 1991 tax year audit file: H01639, H01614, H01643, H01853, and FTB 01992 [Appdx., Exh. 8].

28 ¹⁹ Portions of FTB 1991 tax year audit file: H 01639, 01641, 01643 [Appdx., Exh. 9].

²⁰ Portions of FTB 1991 tax year audit file: H 01637, 01853, 01855, 01857, 01899 [Appdx., Exh. 10].

²¹ Hyatt Affid., ¶ 137-138 [Appdx., Exh. 7].

²² Hyatt Affid., ¶ 138 [Appdx., Exh. 7].

²³ Hyatt Affid., ¶¶ 80, 130-31, 137 [Appdx., Exh. 7].

1 **ii. The FTB wrongly disclosed Hyatt's social security number.**

2 Hyatt had strong reasons to expect that the FTB would respect his right to keep his social
3 security number confidential given FTB representations and published policies. Yet, the FTB made over
4 40 *unauthorized and illegal disclosures to third parties.*²⁴ None of the recipients were disclosed to Hyatt
5 in advance, as was required by law and FTB regulation, before the FTB disclosed a taxpayer's social
6 security number.²⁵

7 **iii. The FTB wrongly disclosed to Hyatt's Japanese licensees that he was being**
8 **investigated, thereby destroying Hyatt's patent licensing business.**

9 After assurances of strict confidentiality, Hyatt reluctantly agreed to provide excerpts of his
10 agreements with his Japanese patent licensees, Hitachi and Matsushita, and his membership in the
11 Licensing Executives Society.²⁶ Hyatt contractually committed to his Japanese licensees that the
12 agreements would remain strictly confidential.²⁷ The FTB violated Hyatt's privacy rights by sending
13 excerpts of the licenses to his Japanese licensees, making clear that Hyatt was under investigation by the
14 FTB, and disclosing that the licensing agreements had been disclosed by Hyatt in violation of the
15 agreements' confidentiality provisions.²⁸

16 The effect of the licensing disclosures by the FTB in breach of its commitment to Hyatt and the
17 confidentiality clause of the licenses, was significant. Hyatt's patent licensing business was destroyed.
18 From the time of the FTB's unlawful disclosure, Hyatt has obtained no new licensees at all, and his
19 royalty income from new licensees dropped to zero.²⁹

20 The record thus reflects, irrefutably, that there was widespread, unlawful dissemination of
21 Hyatt's personal and confidential information by the FTB. At least 90 pieces of correspondence were
22 disseminated by the FTB to individuals, businesses, trade groups, licensees, etc., whose collective
23 membership totaled in the thousands.³⁰

24
25 ²⁴ Portions of FTB 1991 tax year audit file [Appdx., Exh. 8].

26 ²⁵ IPA, § 1798.15 [Appdx., Exh. 12]; FTB Security and Disclosure Manual, at H 06706 [Appdx., Exh. 4].

27 ²⁶ Hyatt Affid., ¶ 138 [Appdx., Exh. 7].

28 ²⁷ Cowan Affid., ¶¶ 8-26 [Appdx., Exh. 6].

²⁸ FTB 02143 and 02147 [Appdx., Exh. 11].

²⁹ Hyatt Affid., ¶¶ 136, 162 [Appdx., Exh. 7].

³⁰ Cox Narrative Report, at H00039-00078, [Appdx., Exh. 13].

1 **IV. The Court has overlooked or misapprehended substantial evidence of the**
2 **FTB's fraud.**

3 **A. Elements of claim:** One or more knowingly false representations, made with the intent
4 it be relied upon, and it is reasonably and detrimentally relied on by a party, resulting in
5 damage to that party.³¹

6 **B. Supporting evidence:**

7 The FTB made two types of false promises to induce Hyatt's cooperation with the audit: (i) that
8 the FTB would keep Hyatt's information confidential, and (ii) that the FTB would conduct a fair,
9 unbiased review. The FTB not only breached its promises, but it sought an extorted settlement from
10 Hyatt by overtly threatening further disclosure and publicity. The evidence and damages regarding the
11 first false promise are essentially the same as that addressed in the above section on the closely-related,
12 but separate, invasion of privacy claim. This section therefore addresses the second false promise.

13 As summarized below, Hyatt has established that the lead auditor created false evidence – which
14 is a criminal offense under California law³² – and used it to try to extort a settlement from Hyatt.

15 **1. The one-sided fraudulent audit.**

16 The FTB publicly claims to be fair and impartial in its dealings with taxpayers. It professes to
17 interpret the law evenly and fairly with neither a state nor a taxpayer point of view. FTB personnel have
18 testified to this in depositions.³³ Hyatt's first auditor, Marc Shayer, even testified that he promised to
19 conduct a fair and unbiased audit.³⁴

20 Yet, the record shows that the FTB's methods at that time targeted high-income, former
21 California residents, rewarded its own auditors based on the amount they could assess (measured by a
22 cost-benefit ratio), penalized auditors who found "no change" in their audits, and used penalties as
23 "bargaining chips" to induce settlements, making the Hyatt audit the biggest potential boost to any
24 auditor's career.³⁵

25 The FTB's third auditor, Sheila Cox, fully acknowledged in deposition testimony that she
26 focused exclusively on information obtained which could be construed as supporting the FTB's
27

28 ³¹ See, e.g., *Albert H. Wohlers and Co. v. Bartgis*, 114 Nev. 1249, 969 P.2d 949 (Nev. 1998).

³² See, e.g., Cal. Rev. & Tax Code § 461, Cal. Pen. Code § 134.

³³ Illia depo., p. 303 [Appdx., Exh. 14]. See also the FTB Mission Statement [Appdx., Exh. 28].

³⁴ Shayer depo., pp. 474, 476, 482-83 [Appdx., Exh. 15].

³⁵ See supporting deposition excerpts and documents cited and included in Hyatt's *Crime/Fraud* brief to the discovery
commissioner [Appdx., Exh. 29]; see also Les depo., pp. 226-228, 615, 674, 678, 684-687 [Appdx., Exh. 17].

1 position.³⁶ She completely ignored documentary evidence and witness statements directly contrary to
2 the FTB's preordained conclusion.³⁷ She did not investigate the most relevant information. If she had,
3 she would have had to conclude Hyatt was a Nevada resident from September 26, 1991 to the present.

4 The FTB did not conduct a legitimate, bona-fide audit. Instead, the FTB conducted a biased,
5 fraudulent investigation in which Cox destroyed key evidence that supported Hyatt (e.g., her
6 contemporaneous handwritten notes and computer records of bank account analysis).³⁸ Relevant to her
7 intent, Cox told her husband and others during the Hyatt audits that she was "going to get the Jew
8 bastard."³⁹ After the audit was concluded and she had assessed Hyatt millions of dollars in trumped-up
9 taxes and penalties, she *telephoned* Hyatt's bitter ex-wife from whom he had been divorced for many
10 years and bragged about the "conviction."⁴⁰ Cox was hardly a fair and unbiased auditor. The discovery
11 commissioner even declared that the FTB may have committed fraud and accordingly ordered that Hyatt
12 was entitled to further discovery on this point.⁴¹

13 The FTB disregarded, refused to investigate, ignored, and "buried" the facts favorable to Hyatt
14 which it uncovered during its invasive "audit." For example, the FTB simply ignored:

- the current neighbors in Nevada who supported Hyatt's Nevada residency claim;
- the former neighbors in California who told of Hyatt's move to Nevada;
- the friends and business associates who knew of Hyatt's move to Nevada;
- the adult son who knew of Hyatt's move to Nevada;
- Nevada rent, utilities, telephones, and insurance payments of Hyatt;
- Nevada voter registration and driver's license of Hyatt;
- Nevada home purchase offers and escrow papers of Hyatt;
- Nevada religious, professional, and social affiliations of Hyatt; and
- Hyatt's changes of address from California to Nevada address.⁴²

19 The FTB ultimately prepared and set forth two Narrative Reports totaling 70 pages which
20 supposedly detail the evidence in favor of its conclusion concerning Hyatt's residency as well as
21 asserting fraud penalties against Hyatt.⁴³ The depositions conducted to date establish that the FTB
22 ignored substantial evidence from Hyatt's neighbors, business associates, and friends favorable to Hyatt
23

24 ³⁶ Cox depo., pp. 168-69, 1618-19 [Appdx., Exh. 16].

25 ³⁷ Cowan Affid., Exhibit 14 thereto [Appdx., Exh. 6].

26 ³⁸ Cox depo., pp. 17, 174-175, 190, 341, 342, 423-24, 569, 605, 661, 861, 971 [Appdx., Exh. 16].

27 ³⁹ Les depo., p. 10 [Appdx., Exh. 17].

28 ⁴⁰ Maystead depo., pp. 182-84 [Appdx., Exh. 18].

⁴¹ November 9, 1999 hearing transcript (excerpt), pp. 55-56 [Appdx., Exh. 26].

⁴² Cowan Affid., Exhibit 14 thereto [Appdx., Exh. 6].

⁴³ Cox Narrative Report, at H00039-00078 [Appdx., Exh. 13].

1 and contrary to the FTB's pre-determined conclusion.⁴⁴ It never even interviewed Hyatt. The FTB did
2 not even speak with Hyatt's son, Dan, with whom Hyatt had a close ongoing relationship, who loaned
3 Hyatt his utility trailer for Hyatt's move to Las Vegas, and who visited with Hyatt in Las Vegas during
4 April 1992. Rather than interviewing two of Hyatt's long-time business associates, the FTB proceeded
5 to audit them, seeking through intimidation to separate them from Hyatt.⁴⁵

6 Instead, the FTB interviewed and obtained statements from estranged relatives and an ex-wife
7 that were falsely termed "affidavits," and which formed the cornerstone of the FTB's "case" despite the
8 complete lack of credibility and relevance of the statements.⁴⁶ More importantly, the statements
9 contained in the "non-affidavits" were nothing more than vague and general attacks on Hyatt and
10 provided no specific evidence supporting the FTB's conclusions. The only specific statements in the
11 unsworn "affidavits" were expressly disclaimed by the declarant in concluding that she could not be
12 held to what is stated therein in a court of law.⁴⁷ In other words, the "cornerstone" of the FTB's case
13 was built on sand that crumbles upon even mild cross-examination.

14 2. The \$9 million fraud penalty and the FTB's urging Hyatt to settle.

15 The FTB not only assessed Hyatt taxes for a period after which he had moved to Nevada based
16 on its trumped-up investigation, it assessed Hyatt penalties for alleged fraud in regard to his Nevada
17 residency. The penalties amounted to an additional 75% of the alleged taxes. The FTB teaches its
18 auditors to use the fraud penalty as a "bargaining chip" to obtain "agreement" from the taxpayer to pay
19 the assessed tax.⁴⁸ To make its point, the FTB's penalties training manual has on its cover a menacing
20 "skull and cross-bones,"⁴⁹ an attitude of intimidation directed at Hyatt through tortious conduct.

21 In classic extortion form, Jovanovich boldly "suggested" to Hyatt's representative that settling at
22 the "protest stage" would avoid public revelation of Hyatt's personal and financial information.
23 Deposition testimony has confirmed that Jovanovich, the FTB's first protest officer, told Hyatt's tax
24 representative that if he did not settle at the outset of the protest stage,⁵⁰ the privacy and confidentiality

25 ⁴⁴ Cox depo., pp. 1181, 1187-1188 [Appdx., Exh. 16]; Cowan Affid., Exhibit 14 [Appdx., Exh. 6].

26 ⁴⁵ Cox depo., pp. 29, 168-69, 181, 1460-61, 2021 [Appdx., Exh. 16]; Hyatt Affid., ¶ 164 [Appdx., Exh. 7].

27 ⁴⁶ Maystead depo., pp. 182-84 [Appdx., Exh. 18]; Hyatt affid., ¶¶ 63, 164, 174, 175, 181 [Appdx., Exh. 7].

28 ⁴⁷ H 00302-07 [Appdx., Exh. 19].

⁴⁸ Ford depo., pp. 128-29 [Appdx., Exh. 20].

⁴⁹ FTB H 08950 [Appdx., Exh. 21].

⁵⁰ Cowan Affid., ¶ 32 [Appdx., Exh. 6].

1 that Hyatt so valued would be lost.⁵¹

2 Specifically, she told Hyatt's tax representative that it would be necessary for the FTB to engage
3 in extensive additional requests for information from Hyatt as that is its practice "in high profile, large
4 dollar" residency audits. In fact, Ms. Jovanovich's own hand-written notes confirm that she told Hyatt's
5 tax representative that in such cases the FTB will conduct an in-depth investigation and exploration "of
6 many unresolved facts and questions" related to Hyatt.⁵² Jovanovich also testified that she understood
7 Hyatt had a unique and special concern regarding his privacy⁵³ and that he was "paranoid" about his
8 privacy – an understanding shared among the FTB auditors and the FTB residency unit.⁵⁴

9 **3. Hyatt was damaged by the FTB's fraud.**

10 Hyatt, having no reason to suspect that the FTB, as an organ of California government, would
11 act in a false, predatory manner, reasonably relied on the truthfulness of the assurances and
12 representations (both explicit and implied) by the FTB and its agents.⁵⁵ Thus relying, Hyatt agreed to
13 cooperate with the FTB and provide it with his highly sensitive and confidential information and
14 documents.⁵⁶ Hyatt in fact relied upon the false representations and assurances of the FTB and its agents
15 to his extreme detriment, as explained above.

16 Two simple facts demonstrate the potential magnitude of the damages.

- 17 1. In the past four years prior to the FTB's early-1995 tortious invasions of Hyatt's privacy,
18 he closed license agreements for hundreds of millions of dollars.
- 19 2. After the FTB's early-1995 tortious invasions of Hyatt's privacy, he was not able to close
20 a single new license agreement.⁵⁷

21 If Hyatt's right to a trial is not taken from him, he will prove that the timing of the FTB's tortious
22 conduct and the total destruction of his licensing program is not coincidental, but rather the former
23 caused the latter. In addition to his economic damages, Hyatt suffered emotional distress.⁵⁸

24 ⁵¹ Jovanovich depo., pp. 50-52, 168, 185-186 [Appdx., Exh. 23].

25 ⁵² Jovanovich notes from June 12, 1997 [Appdx., Exh. 24].

26 ⁵³ Jovanovich depo., p. 125, lns. 20-24 [Appdx., Exh. 23].

27 ⁵⁴ Jovanovich depo., p. 126, lns. 4-8 [Appdx., Exh. 23].

28 ⁵⁵ Hyatt Affid., ¶¶ 10-12 [Appdx., Exh. 7].

⁵⁶ Cowan Affid., ¶¶ 9-26 [Appdx., Exh. 6].

⁵⁷ Hyatt Affid., ¶ 136 [Appdx., Exh. 7].

⁵⁸ This Court has upheld a compensatory damages award for emotional distress "as a result of [a defendant's] fraudulent misrepresentations, concealment, and a bad faith course of conduct." See *Albert H. Wohlers & Co. v. Bartgis*, 114 Nev. 1249, 969 P.2d 949, 958 (1998).

1 V. **The Court overlooked or misapprehended the law when it granted the FTB's**
2 **petition "on grounds other than those alleged in the petition."**

3 First, the Court's order violates Hyatt's due process rights by denying Hyatt his day in court
4 without even a hearing before this Court on an issue never raised in the FTB's writ petition. Second, the
5 order is contrary to this Court's own line of cases reversing district court orders that mistakenly grant
6 summary judgment when material issues of fact are in dispute and that require all reasonable inferences
7 to be drawn in favor of the non-moving party, as well as its line of cases refusing to review denials of
8 summary judgment.

9 These propositions are self evident and very familiar to this Court. Hyatt has no more space in
10 this petition to further develop these points, except to emphasize that the Court is not only unfairly
11 denying him his day in court but is doing so prematurely before he has completed discovery. A
12 substantial part of discovery, including court-ordered discovery, was pending when the Court stayed the
13 action. The remaining discovery was detailed in an affidavit submitted to the district court as an
14 alternative ground for denying the FTB's summary judgment motion.⁵⁹ Given this Court's disagreement
15 with the district court regarding the sufficiency of the evidence after its own review and reweighing,
16 Hyatt renews his request to complete discovery before his case is dismissed on such grounds.

17 VI. **Hyatt again requests leave to file an additional briefing specifically**
18 **addressing the evidentiary support for his claims.**

19 Hyatt requested leave of court to file a petition in excess of the Court's ten- page limit.⁶⁰ Hyatt
20 again renews this request. Whether the Court is inclined to grant or deny the petition, Hyatt should be
21 given a full and fair opportunity to demonstrate the adequacy of his evidence to date. It may be his only
22 "day in court."

23 DATED this 2 day of July, 2001

HUTCHISON & STEFFEN

BERNHARD & LESLIE, CHTD.

By: 

Peter C. Bernhard, Esq.

Bryan Murray, Esq.

Attorneys for Gilbert P. Hyatt

27 ⁵⁹ Bourke Affidavit, ¶¶ 182, 183, and 186 [Appdx., Exh. 25].

28 ⁶⁰ Hyatt filed his request to exceed the ten page limitation for petitions for rehearing and to extend the time for filing
such petitions on June 18, 2001. As of the filing of this petition, the Court had not ruled on this request.


1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I am an employee of Bernhard & Leslie, and that on this 7th day of July,
3 2001, I served a true and correct copy of the foregoing **REAL PARTY IN INTEREST GILBERT P.**
4 **HYATT'S PETITION FOR REHEARING RE THE COURT'S JUNE 13, 2001 ORDER**
5 **GRANTING PETITION FOR WRIT OF MANDAMUS** via regular mail, in a sealed box(s) upon
6 which postage was prepaid, to the addresses noted below, upon the following:

7
8 Thomas R.C. Wilson, Esq.
9 McDonald, Carano, Wilson, McCune,
10 Bergin, Frankovich & Hicks
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12 California Attorney General
13 300 South Spring Street
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Los Angeles, California 90013

14 Honorable Nancy Saitta
15 Department XVIII
16 Eighth Judicial District Court of the State of Nevada
in and for the County of Clark
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10
11 **IN THE SUPREME COURT OF THE**
12 **STATE OF NEVADA**

13 FRANCHISE TAX BOARD OF THE STATE
OF CALIFORNIA,

14 Petitioner,

15 vs.

16 EIGHTH JUDICIAL DISTRICT COURT of
the State of Nevada, in and for the County of
17 Clark, Honorable Nancy Saitta, District Judge,

18 Respondent,

19 and

20 GILBERT P. HYATT,

21 Real Party in Interest.
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Case No. 36390

**APPENDIX OF EXHIBITS CITED
IN REAL PARTY IN INTEREST GIL
HYATT'S PETITION FOR
REHEARING RE THE COURT'S
JUNE 13, 2001 ORDER GRANTING
PETITION FOR WRIT OF
MANDAMUS**

**CONFIDENTIAL INFORMATION TO
BE FILED UNDER SEAL**

1
2 Real party in interest Gil Hyatt attaches to his Petition for Rehearing this Appendix containing
3 copies of all exhibits cited in his petition. Each exhibit cited in the petition and attached hereto is from
4 the record before the Court. Copies of the cited exhibits have been compiled in this Appendix for the
5 convenience of the Court. The record cite for each attached exhibit is set forth in brackets¹ after the
6 description of the exhibit in the table of contents below.

7
8 **Table of Contents re Attached Exhibits**

- 9
10 1. FTB Field Audit Manual [*Supp. Hyatt Appendix, Vol. XI, Exh. 31*].
11
12 2. FTB Statement of Incompatible Activities and Rules of Conduct for Departmental
13 Employees [*Supp. Hyatt Appendix, Vol. XIII, Exh. 38*].
14
15 3. FTB Disclosure Education Manual [*Supp. Hyatt Appendix, Vol. XIII, Exh. 39*].
16
17 4. FTB Security and Disclosures Manual [*Supp. Hyatt Appendix, Vol. XI, Exh. 30*].
18
19 5. FTB Form #1131 [*Hyatt Appendix, Vol. VII, Exh. 11 (Exhibit 18 thereto)*].
20
21 6. E. Cowan Affidavit (minus exhibits) [*Hyatt Appendix, Vol. VIII, Exh. 15*].
22
23 7. G. Hyatt Affidavit (excerpts and minus exhibits) [*Hyatt Appendix, Vol. VIII, Exh. 12*].
24
25 8. Portions of FTB 1991 tax year audit file on Gil Hyatt [*Supp. Hyatt Appendix, Vol. X, Exh. 28*].
26

27 ¹ The term "Hyatt Appendix" refers to volumes I through VII of the appendix of exhibits Hyatt submitted on July 7,
28 2000 with his Answer to the FTB "discovery" writ. The term "Supp. Hyatt Appendix" refers to volumes VIII through XIV of
the supplemental appendix of exhibits Hyatt submitted on October 13, 2000 with his Answer to the FTB "jurisdictional" writ.

- 1 9. Portions of FTB 1991 tax year audit file on Gil Hyatt [*Hyatt Appendix, Vol. VII, Exh. 11*
2 (*Exhibit 11 thereto*)].
- 3
- 4 10. Portions of FTB 1991 tax year audit file on Gil Hyatt [*Hyatt Appendix, Vol. VII, Exh. 11*
5 (*Exhibit 12 thereto*)].
- 6
- 7 11. Portions of FTB 1991 tax year audit file on Gil Hyatt [*Hyatt Appendix, Vol. VII, Exh. 11*
8 (*Exhibit 2 thereto*)].
- 9
- 10 12. Information Practices Act of 1977, California Civil Code § 1798 *et seq.* [*Hyatt Appendix,*
11 *Vol. V, Exhibit 8 (Exhibit 1 thereto)*].
- 12
- 13 13. Cox Narrative Report [*Hyatt Appendix, Vol. VII, Exh. 11 (Exhibit 1 thereto)*].
- 14
- 15 14. S. Illia deposition transcript excerpts [*Hyatt Appendix, Vol. VII, Exh. 11 (Exhibit 31 thereto)*].
- 16
- 17 15. M. Shayer deposition transcript excerpts [*Hyatt Appendix, Vol. VII, Exh. 11 (Exhibit 28 thereto)*].
- 18
- 19 16. S. Cox deposition transcript excerpts [*Hyatt Appendix, Vol. VII, Exh. 11 (Exhibit 29 thereto)*].
- 20
- 21 17. C. Les deposition transcript excerpts [*Hyatt Appendix, Vol. VII, Exh. 11 (Exhibit 37 thereto)*].
- 22
- 23 18. P. Maystead deposition transcript excerpts [*Hyatt Appendix, Vol. VII, Exh. 11 (Exhibit 35*
24 *thereto)*].
- 25
- 26 19. Beth Hyatt "affidavit" to FTB [*Hyatt Appendix, Vol. VII, Exh. 11 (Exhibit 21 thereto)*].
- 27
- 28 20. C. Ford deposition transcript excerpts [*Hyatt Appendix, Vol. VII, Exh. 11 (Exhibit 32 thereto)*].


- 1
- 2 21. Skull and Crossbones cover page for Penalties Manual (H08950) *[Hyatt Appendix, Vol. VII,*
- 3 *Exh. 11, (Exhibit 22 thereto)]*.
- 4
- 5 22. First Amended Complaint *[FTB Appendix Filed July 7, 2000, Vol. 1, Exh. 4]*.
- 6
- 7 23. A. Jovanovich deposition transcript excerpts *[Hyatt Appendix, Vol. VII, Exh. 11 (Exhibit 30*
- 8 *thereto)]*.
- 9
- 10 24. A. Jovanovich's hand-written notes of June 12, 1997 *[Hyatt Appendix, Vol. VII, Exh. 11 (Exhibit*
- 11 *3 thereto)]*.
- 12
- 13 25. T. Bourke Affidavit (excerpts and minus exhibits) *[Hyatt Appendix, Vol. VIII, Exh. 13]*.
- 14
- 15 26. November 9, 1999 transcript excerpt from hearing by Discovery Commissioner *[Hyatt*
- 16 *Appendix, Vol. VII, Exh. 11 (Exhibit 5 thereto)]*.
- 17
- 18 27. Gil Hyatt's Opposition to FTB's Motion for Summary Judgment *[Hyatt Appendix, Vol. VII,*
- 19 *Exh. 11]*.
- 20
- 21 28. FTB Mission Statement *[Hyatt Appendix, Vol. III, Exh. 6 (Exhibit 19 thereto)]*.
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1 29. Appendix to Plaintiff Gil Hyatt's Post-Hearing Memorandum Containing Prima Facie
2 Showing of FTB Consultation with Attorneys to Further Future and Ongoing Extortion,
3 Breach of Confidentiality Statute, and Fraud ("Hyatt Crime/Fraud brief") [Hyatt Appendix,
4 Vol. II, Exh. 4].

5
6 DATED this 2 day of July, 2001.

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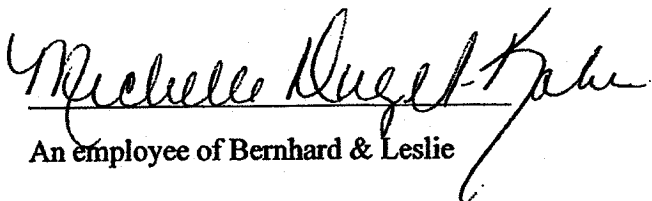
CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Bernhard & Leslie, and that on this 2nd day of July, 2001, I served a true and correct copy of the foregoing **APPENDIX OF EXHIBITS CITED IN REAL PARTY IN INTEREST GIL HYATT'S PETITION FOR REHEARING RE THE COURT'S JUNE 13, 2001 ORDER GRANTING PETITION FOR WRIT OF MANDAMUS** via regular mail, in a sealed box(s) upon which postage was prepaid, to the addresses noted below, upon the following:

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Honorable Nancy Saitta
Department XVIII
Eighth Judicial District Court of the State of Nevada
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An employee of Bernhard & Leslie

LEXSEE 2002 NEVLEXIS 57



Caution

As of: Jan 17, 2008

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, Petitioner, vs. THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK AND THE HONORABLE NANCY M. SAITTA, DISTRICT JUDGE, Respondents, and GILBERT P. HYATT, Real Party in Interest, FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, Petitioner, vs. THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE NANCY M. SAITTA, DISTRICT JUDGE, Respondents, and GILBERT P. HYATT, Real Party in Interest.

No. 35549, No. 36390

SUPREME COURT OF NEVADA

2002 Nev. LEXIS 57

April 4, 2002, Filed

SUBSEQUENT HISTORY: [*1] Writ of certiorari granted: *Cal. Franchise Tax Bd. v. Hyatt*, 2002 U.S. LEXIS 7586 (U.S. Oct. 15, 2002).

Writ of certiorari granted *Franchise Tax Bd. v. Hyatt*, 154 L. Ed. 2d 289, 123 S. Ct. 409, 2002 U.S. LEXIS 7586 (U.S., 2002)

Motion denied by *Franchise Tax Bd. v. Hyatt*, 154 L. Ed. 2d 911, 123 S. Ct. 1012, 2003 U.S. LEXIS 909 (U.S., 2003)

Affirmed by Franchise Tax Bd. v. Hyatt, 2003 U.S. LEXIS 3244 (U.S., Apr. 23, 2003)

PRIOR HISTORY: *Franchise Tax Bd. of Cal. v. Eighth Judicial Dist. Court of Nev.*, 2001 Nev. LEXIS 55 (Nev., June 13, 2001)

DISPOSITION: Previous opinion of June 13, 2001 vacated on rehearing. In Docket No. 35549, writ of mandamus granted in part. In Docket No. 35549, writ of prohibition granted in part. Stay of district court proceedings vacated.

CASE SUMMARY:

PROCEDURAL POSTURE: Petitioner, California tax board, petitioned for a writ of mandamus or prohibition,

challenging the Eighth Judicial District Court of Nevada, in and for Clark County's determination that certain documents were not protected and releasing them to respondent taxpayer, and challenged the denial of its motions for summary judgment or dismissal.

OVERVIEW: The taxpayer sued the tax board in Nevada for intentional torts and one negligent act. The board argued that under California law, it was immune from all tort liability. The appellate court found that although California was immune from the taxpayer's suit in federal courts under the Eleventh Amendment, it was not immune in Nevada courts. The district court should have refrained from exercising its jurisdiction over the negligence claim under the comity doctrine, as affording the board statutory immunity for negligent acts did not contravene any Nevada interest. However, affording the board statutory immunity for intentional torts did contravene Nevada's policies and interests. Nevada had an interest in protecting its citizens from injurious intentional torts and bad faith acts. The attorney-client privilege did not apply to the documents, except for one, because the board did not demonstrate that in-house counsel was acting as an attorney, or that the communications between the counsel and other employees were kept confidential within the agency. An extraordinary writ was not

available to the board to review discovery orders because the board had remedies on appeal.

OUTCOME: The writ of mandamus was granted to the tax board for summary judgment as to the negligence claim, and denied as to the intentional tort claims; the writ of prohibition was granted in part prohibiting the district court from requiring the board to release one document, and denied with respect to all other documents.

LexisNexis(R) Headnotes

Civil Procedure > Remedies > Writs > General Overview

[HN1] Prohibition is a more appropriate remedy than mandamus for the prevention of improper discovery.

Civil Procedure > Remedies > Writs > General Overview

[HN2] The appellate court may issue an extraordinary writ at its discretion to compel the district court to perform a required act, or to control discretion exercised arbitrarily or capriciously, or to arrest proceedings that exceed the court's jurisdiction. An extraordinary writ is not available if petitioner has a plain, speedy and adequate remedy in the ordinary course of law.

Civil Procedure > Discovery > Privileged Matters > General Overview

Civil Procedure > Remedies > Writs > Common Law Writs > Mandamus

Civil Procedure > Remedies > Writs > Common Law Writs > Prohibition

[HN3] A petition for a writ of prohibition may be used to challenge a discovery order requiring the disclosure of privileged information. A petition for a writ of mandamus may be used to challenge an order denying summary judgment or dismissal; however, the appellate court generally declines to consider such petitions because so few of them warrant extraordinary relief. The appellate court may nevertheless choose to exercise its discretion and intervene, as to clarify an important issue of law and promote the interests of judicial economy.

Administrative Law > Sovereign Immunity Governments > State & Territorial Governments > Claims By & Against Torts > Public Entity Liability > Immunity > General Overview

[HN4] Nevada has expressly provided its state agencies with immunity for discretionary acts, unless the acts are taken in bad faith, but not for operational or ministerial acts, or for intentional torts committed within the course and scope of employment. California has expressly provided its state taxation agency with complete immunity.

Civil Procedure > Jurisdiction > General Overview Governments > State & Territorial Governments > Claims By & Against Torts > Procedure > Commencement & Prosecution > Subject Matter Jurisdiction

[HN5] The Full Faith and Credit Clause does not require Nevada to apply California's law in violation of its own legitimate public policy. The doctrines of sovereign immunity and full faith and credit determine the choice of law with respect to the district court's jurisdiction, while Nevada law is presumed to govern with respect to the underlying torts.

Civil Procedure > Jurisdiction > Jurisdictional Sources > General Overview

Constitutional Law > Relations Among Governments > Full Faith & Credit

Governments > Courts > Judicial Comity

[HN6] The doctrine of comity is an accommodation policy, under which the courts of one state voluntarily give effect to the laws and judicial decisions of another state out of deference and respect, to promote harmonious interstate relations. In deciding whether to respect California's grant of immunity to a California state agency, a Nevada court should give due regard to the duties, obligations, rights and convenience of Nevada's citizens and persons within the court's protections and consider whether granting California's law comity would contravene Nevada's policies or interests.

Governments > State & Territorial Governments > Claims By & Against

Torts > Public Entity Liability > Immunity > Sovereign Immunity

[HN7] An investigation is generally considered to be a discretionary function, and Nevada provides its agencies with immunity for the performance of a discretionary function even if the discretion is abused.

Tax Law > State & Local Taxes > Administration & Proceedings > Audits & Investigations

Torts > Business Torts > Bad Faith Breach of Contract > General Overview

Torts > Intentional Torts > General Overview

[HN8] Nevada does not allow its agencies to claim immunity for discretionary acts taken in bad faith, or for intentional torts committed in the course and scope of employment.

Administrative Law > Judicial Review > Administrative Record > Disclosure & Discovery
Administrative Law > Judicial Review > Reviewability > Standing
Civil Procedure > Remedies > Writs > General Overview

[HN9] Although an extraordinary writ may be warranted to avoid the irreparable injury that would result from a discovery order requiring disclosure of privileged information, extraordinary writs are not generally available to review discovery orders.

JUDGES: Maupin, C.J. Young, J., Agosti, J., Shearing, J., Leavitt, J. ROSE, J., concurring in part and dissenting in part.

OPINION

ORDER GRANTING PETITION FOR REHEARING, VACATING PREVIOUS ORDER, GRANTING PETITION FOR A WRIT OF MANDAMUS IN PART IN DOCKET NO. 36390, AND GRANTING PETITION FOR A WRIT OF PROHIBITION IN PART IN DOCKET NO. 35549

In Docket No. 35549, Franchise Tax Board petitioned this court for a writ of mandamus or prohibition, challenging the district court's determination that certain documents were not protected by attorney-client, work product or deliberative process privileges, and its order directing Franchise Tax Board to release the documents to Gilbert Hyatt. In Docket No. 36390, Franchise Tax Board separately petitioned this court for a writ of mandamus, challenging the district court's denial of its motions for summary judgment or dismissal, and contending that the district court lacks subject matter jurisdiction over the underlying tort claims because Franchise Tax Board [*2] is immune from liability under California law. Alternatively, Franchise Tax Board sought a writ of prohibition or mandamus limiting the scope of the underlying case to its Nevada-related conduct.

On June 13, 2001, we granted the petition in Docket No. 36390 on the basis that Hyatt did not produce sufficient facts to establish the existence of a genuine dispute justifying denial of the summary judgment motion. Because our decision rendered the petition in Docket No. 35549 moot, we dismissed it. Hyatt petitioned for rehearing in Docket No. 36390 on July 5, 2001, and in response to our July 13, 2001 order, Franchise Tax Board answered on August 7, 2001. Having considered the parties'

documents and the entire record before us, we grant Hyatt's petition for rehearing, vacate our June 13, 2001 order and issue this order in its place.

We conclude that the district court should have declined to exercise its jurisdiction over the underlying negligence claim under comity principles. Therefore, we grant the petition in Docket No. 36390 with respect to the negligence claim, and deny it with respect to the intentional tort claims. We also deny the alternative petition to limit the scope of trial. [*3] We further conclude that, except for document FTB No. 07381, which is protected by the attorney work-product privilege, the district court did not exceed its jurisdiction by ordering Franchise Tax Board to release the documents at issue because Franchise Tax Board has not demonstrated that they were privileged. Therefore, we grant the petition for a writ of prohibition¹ in Docket No. 35549 with respect to FTB No. 07381, and deny the petition with respect to all the other documents.

1 [HN1] Prohibition is a more appropriate remedy than mandamus for the prevention of improper discovery. *Wardleigh v. District Court*, 111 Nev. 345, 350, 891 P.2d 1180, 1183 (1995).

Background

The underlying tort action arises out of Franchise Tax Board's audit of Hyatt--a long-time California resident who moved to Clark County, Nevada--to determine whether Hyatt underpaid California state income taxes for 1991 and 1992. After the audit, Franchise Tax Board assessed substantial additional taxes and penalties [*4] against Hyatt. Hyatt formally protested the assessments in California through the state's administrative process, and sued Franchise Tax Board in Clark County District Court for several intentional torts and one negligent act allegedly committed during the audit.

During discovery in the district court case, Hyatt sought the release of all the documents Franchise Tax Board had used in the audit, but subsequently redacted or withheld. Franchise Tax Board opposed Hyatt's motion to compel on the basis that many of the documents were privileged. The district court, acting on a discovery commissioner's recommendation, concluded that most of the documents were not privileged and ordered Franchise Tax Board to release those documents. The district court also entered a protective order governing the parties' disclosure of confidential information. The writ petition in Docket No. 35549 challenges those decisions.

Franchise Tax Board then moved for summary judgment, or dismissal under NRCP 12(h)(3), arguing that the district court lacked subject matter jurisdiction because principles of sovereign immunity, full faith and

credit, choice of law, comity and administrative exhaustion all required [*5] the application of California law, and under California law Franchise Tax Board is immune from all tort liability. The district court denied the motion. The writ petition in Docket No. 36390 challenges that decision. The Multistate Tax Commission has filed an amicus curiae brief in support of Franchise Tax Board's comity argument.

Propriety of Writ Relief

[HN2] We may issue an extraordinary writ at our discretion to compel the district court to perform a required act,² or to control discretion exercised arbitrarily or capriciously,³ or to arrest proceedings that exceed the court's jurisdiction.⁴ An extraordinary writ is not available if petitioner has a plain, speedy and adequate remedy in the ordinary course of law.⁵

2 NRS 34.160 (mandamus).

3 *Round Hill Gen. Imp. Dist. v. Newman*, 97 Nev. 601, 637 P.2d 534 (1981) (mandamus).

4 NRS 34.320 (prohibition).

5 NRS 34.170; NRS 34.330.

[*6] [HN3] A petition for a writ of prohibition may be used to challenge a discovery order requiring the disclosure of privileged information.⁶ A petition for a writ of mandamus may be used to challenge an order denying summary judgment or dismissal; however, we generally decline to consider such petitions because so few of them warrant extraordinary relief.⁷ We may nevertheless choose to exercise our discretion and intervene, as we do here, to clarify an important issue of law and promote the interests of judicial economy.⁸

6 *Wardleigh*, 111 Nev. at 350-51, 891 P.2d at 1183-84.

7 *Smith v. District Court*, 113 Nev. 1343, 950 P.2d 280 (1997).

8 *Id.*

Docket No. 36390

Nevada and California have both generally waived their sovereign immunity from suit, but not their Eleventh Amendment immunity from suit in federal court, and have extended the waivers to their state agencies or public employees, except when state statutes expressly provide immunity.⁹ [HN4] Nevada [*7] has expressly provided its state agencies with immunity for discretionary acts, unless the acts are taken in bad faith, but not for

operational or ministerial acts, or for intentional torts committed within the course and scope of employment.¹⁰ California has expressly provided its state taxation agency, Franchise Tax Board, with complete immunity.¹¹ The fundamental question presented is which state's law applies, or should apply.

9 NRS 41.031; Cal. Const. Art. 3, § 5; Cal. Gov't Code § 820.

10 See NRS 41.032(2); *Foster v. Washoe County*, 114 Nev. 936, 941, 964 P.2d 788, 791 (1998); *State, Dep't Hum. Res. v. Jimenez*, 113 Nev. 356, 364, 935 P.2d 274, 278 (1997); *Falline v. GNLV Corp.*, 107 Nev. 1004, 1009, 823 P.2d 888, 892 (1991).

11 See Cal. Gov't Code § 860.2; *Mitchell v. Franchise Tax Board*, 183 Cal. App. 3d 1133, 228 Cal.Rptr. 750 (Ct. App. 1986).

[*8] *Jurisdiction*

Preliminarily, we reject Franchise Tax Board's arguments that the doctrines of sovereign immunity, full faith and credit, choice of law, or administrative exhaustion deprive the district court of subject matter jurisdiction over Hyatt's tort claims. First, although California is immune from Hyatt's suit in federal courts under the Eleventh Amendment, it is not immune in Nevada courts.¹² Second, [HN5] the Full Faith and Credit Clause does not require Nevada to apply California's law in violation of its own legitimate public policy.¹³ Third, the doctrines of sovereign immunity and full faith and credit determine the choice of law with respect to the district court's jurisdiction,¹⁴ while Nevada law is presumed to govern with respect to the underlying torts.¹⁵ Fourth, Hyatt's tort claims, although arising from the audit, are separate from the administrative proceeding, and the exhaustion doctrine does not apply. The district court has jurisdiction; however, we must decide whether it should decline to exercise its jurisdiction under the doctrine of comity.

12 *Nevada v. Hall*, 440 U.S. 410, 414-21, 59 L. Ed. 2d 416, 99 S. Ct. 1182 (1979).

[*9]

13 *Id.* at 421-24.

14 *Id.* at 414-21.

15 *Motenko v. MGM Dist., Inc.*, 112 Nev. 1038, 1041, 921 P.2d 933, 935 (1996).

Comity

[HN6] The doctrine of comity is an accommodation policy, under which the courts of one state voluntarily give effect to the laws and judicial decisions of another state out of deference and respect, to promote harmonious interstate relations.¹⁶ In deciding whether to respect California's grant of immunity to a California state agency, a Nevada court should give due regard to the duties, obligations, rights and convenience of Nevada's citizens and persons within the court's protections and consider whether granting California's law comity would contravene Nevada's policies or interests.¹⁷ Here, we conclude that the district court should have refrained from exercising its jurisdiction over the negligence claim under the comity doctrine, but that it properly exercised its jurisdiction over the intentional tort claims.

¹⁶ *Nevada v. Hall*, 440 U.S. at 424-27; *Mianecki v. District Court*, 99 Nev. 93, 98, 658 P.2d 422, 424-25 (1983).

[*10]

¹⁷ *Mianecki*, 99 Nev. at 98, 658 P.2d at 425.

Negligent Acts

Although Nevada has not expressly granted its state agencies immunity for all negligent acts, California has granted the Franchise Tax Board such immunity.¹⁸ We conclude that affording Franchise Tax Board statutory immunity for negligent acts does not contravene any Nevada interest in this case. [HN7] An investigation is generally considered to be a discretionary function,¹⁹ and Nevada provides its agencies with immunity for the performance of a discretionary function even if the discretion is abused.²⁰ Thus, Nevada's and California's interests are similar with respect to Hyatt's negligence claim.

¹⁸ *Cal. Gov't Code* § 860.2; see *Mitchell*, 228 Cal.Rptr. at 752.

¹⁹ *Foster*, 114 Nev. at 941-43, 964 P.2d at 792.

²⁰ *NRS* 41.032(2).

[*11] *Intentional Torts*

In contrast, we conclude that affording Franchise Tax Board statutory immunity for intentional torts does contravene Nevada's policies and interests in this case. As previously stated, [HN8] Nevada does not allow its agencies to claim immunity for discretionary acts taken in bad faith, or for intentional torts committed in the course and scope of employment. Hyatt's complaint alleges that Franchise Tax Board employees conducted the audit in bad faith, and committed intentional torts during their investigation. We believe that greater weight is to be accorded Nevada's interest in protecting its citizens

from injurious intentional torts and bad faith acts committed by sister states' government employees, than California's policy favoring complete immunity for its taxation agency.²¹ Because we conclude that the district court properly exercised its jurisdiction over the intentional tort claims, we must decide whether our intervention is warranted to prevent the release of documents that Franchise Tax Board asserts are privileged.

²¹ See *Mianecki*, 99 Nev. at 98, 658 P.2d at 425.

[*12] *Docket No. 35549*

Franchise Tax Board invoked the deliberative process, attorney-client and work-product privileges as barriers to the discovery of various documents used or produced during its audit. The district court decided that most of the documents were not protected by these privileges, and ordered Franchise Tax Board to release them. With one exception, we conclude that the district court did not exceed its jurisdiction by ordering Franchise Tax Board to release the documents.

The deliberative process privilege does not apply because the documents at issue were not predecisional; that is, they were not precursors to the adoption of agency policy, but were instead related to the enforcement of already-adopted policies.²² And if the privilege were to apply, it would be overridden by Hyatt's demonstrated need for the documents based on his claims of fraud and government misconduct.²³

²² See *Coastal States Gas Corp. v. Department of Energy*, 199 U.S. App. D.C. 272, 617 F.2d 854, 866-68 (D.C. Cir. 1980).

²³ See *In re Sealed Case*, 326 U.S. App. D.C. 276, 121 F.3d 729, 737-38 (D.C. Cir. 1997).

[*13] The attorney-client privilege does not apply because Franchise Tax Board did not demonstrate (1) that in-house-counsel Jovanovich was acting as an attorney, providing legal opinions, rather than as an employee participating in the audit process,²⁴ or (2) that the communications between Ms. Jovanovich and other Franchise Tax Board employees were kept confidential within the agency.²⁵

²⁴ See *Upjohn Co. v. United States*, 449 U.S. 383, 389-97, 66 L. Ed. 2d 584, 101 S. Ct. 677 (1981); *United States v. Chen*, 99 F.3d 1495, 1501-02 (9th Cir. 1996); *United States v. Rowe*, 96 F.3d 1294, 1297 (9th Cir. 1996); *Texaco Puerto Rico v. Department of Consumer Aff.*, 60 F.3d 867, 884 (1st Cir. 1995).

25 See *Coastal States*, 617 F.2d at 862-64.

The work-product privilege does apply, however, to document FTB No. 07381. This memorandum documenting a telephone conversation between Franchise Tax Board attorneys Jovanovich and Gould [*14] should be protected from disclosure. When the memorandum was generated, Jovanovich was acting in her role as an attorney representing Franchise Tax Board, as was Gould. The memorandum expresses these attorneys' mental impressions and opinions regarding the possibility of legal action being taken by Franchise Tax Board or Hyatt. Thus, this one document is protected by the attorney work-product privilege.²⁶

26 See *Wardleigh*, 111 Nev. at 357, 891 P.2d at 1188.

Finally, although Franchise Tax Board also challenges the district court's protective order, we decline to review the propriety of that discovery order in this writ proceeding. [HN9] Although an extraordinary writ may be warranted to avoid the irreparable injury that would result from a discovery order requiring disclosure of privileged information, extraordinary writs are not generally available to review discovery orders.²⁷ Franchise Tax Board has a plain, speedy and adequate remedy; it may challenge the order on appeal if it is aggrieved [*15] by the district court's final judgment.

27 *Clark County Liquor v. Clark*, 102 Nev. 654, 659, 730 P.2d 443, 447 (1986).

Conclusion

We conclude that the district court should have declined to exercise jurisdiction over the negligence claim as a matter of comity. Accordingly, we grant the petition in Docket No. 36390 in part; the clerk of this court shall issue a writ of mandamus directing the district court to grant Franchise Tax Board's motion for summary judgment as to the negligence claim. We deny the petition in Docket No. 36390 with respect to the intentional tort claims, and we deny the alternative petition to limit the scope of trial.

We conclude that the district court exceeded its jurisdiction by ordering the release of one privileged document, but that Franchise Tax Board has not demonstrated that the district court exceeded its jurisdiction by ordering it to release any of the other discovery documents at issue. Accordingly, we grant the petition in Docket No. 35549 in part; [*16] the clerk of this court shall issue a writ of prohibition prohibiting the district court from requiring Franchise Tax Board to release document FTB No. 07381. We deny the writ petition in Docket No. 35549 with respect to all other documents.

We vacate our stay of the district court proceedings.

It is so ORDERED.²⁸

28 The Honorable Nancy Becker, Justice, voluntarily recused herself from participation in the decision of this matter.

Maupin, C.J.

Young, J.

Agosti, J.

Shearing, J.

Leavitt, J.

DISSENT BY: ROSE

DISSENT

ROSE, J., concurring in part and dissenting in part:

I would not grant comity to the petitioners in this case and would grant immunity only as given by the law of Nevada. In all other respects, I concur with the majority opinion.

In *Mianecki v. District Court*,¹ we were faced with a similar issue when the State of Wisconsin requested comity be granted by Nevada courts in order to recognize Wisconsin's sovereign immunity. In refusing to grant comity and recognize Wisconsin's sovereign [*17] immunity, we stated:

In general, comity is a principle whereby the courts of one jurisdiction may give effect to the laws and judicial decisions of another jurisdiction out of deference and respect. The principle is appropriately invoked according to the sound discretion of the court acting without obligation. "In considering comity, there should be due regard by the court to the duties, obligations, rights and convenience of its own citizens and of persons who are within the protection of its jurisdiction." With this in mind, we believe greater weight is to be accorded Nevada's interest in protecting its citizens from injurious operational acts committed within its borders by employees of sister states, than Wisconsin's policy favoring governmental immunity. Therefore, we hold that the law of Wisconsin should not be granted comity where to do so would be contrary to the policies of this state.

1 99 Nev. 93, 98 658 P.2d 422, 424-25 (1983)
(internal citations omitted).

Based on this [*18] very similar case, I would not grant comity to California, and I would extend immunity to the agents of California only to the extent that such

immunity is given them by Nevada law. Denying a grant of comity is not uncommon, as California has denied comity to the state of Nevada in years past.²

2 Nevada v. Hall, 440 U.S. 410, 418, 59 L. Ed. 2d 416, 99 S. Ct. 1182 (1979).

Rose, J.