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IN THE SUPREME COURT OF THE STATE OF NEVADA

FRANCHISE TAX BOARD OF THE
STATE OF CALIFORNIA,

Appellant/Cross-Respondent

Case No. 53264

Electronically Filed
Aug 24 2010 10:44 a.m.
Tracie K. Lindeman

v.

GILBERT P. HAYTT,

Respondent/Cross-Appellant.

**FTB’S OPPOSITION TO HYATT’S
MOTION FOR LEAVE TO FILE SUR-REPLY**

Appellant/Cross-Respondent Franchise Tax Board of the State of California (“FTB”), hereby files its Opposition to Respondent/Cross-Appellant Gilbert P. Hyatt’s (“Hyatt”) Motion for Leave to File Sur-Reply (“Motion”).

I. ARGUMENT

Hyatt’s Motion is little more than a veiled attempt to manipulate the briefing process so that he can have the last word in the briefing on FTB’s appeal.¹ While Hyatt suggests that his Motion is brought pursuant to this court’s rules, a review of its contents reveals that it is simply another of Hyatt’s tactics designed to unnecessarily multiply these proceedings. In fact, if Hyatt’s goal was in compliance with the Nevada Rules of Appellate Procedure, he would have employed the appropriate tool, i.e. a motion to strike, identifying those portions of the Reply brief he believed should be stricken. Instead, Hyatt provides yet another brief with long and distorted factual and legal contentions in an attempt to distract the court from the serious legal issues raised in this appeal, for no other reason than to gain a second bite at the apple.

¹ Upon receipt of this Opposition, Hyatt will almost certainly want to have the last word on his motion for leave to file a sur-reply brief, and he will undoubtedly file a motion seeking permission to file a reply to this opposition.

1 Hyatt's Motion must be rejected by this court as he has failed to establish that the
2 FTB's Reply brief exceeded the proper scope provided in NRAP 28(c). Additionally,
3 Hyatt has failed to establish that the proper remedy should be an additional brief. In an
4 appeal that has already involved nearly 500 pages of briefing and appendices totaling
5 approximately 60,000 pages, Hyatt asks this court for the opportunity for additional
6 briefing on redundant issues he has already had the opportunity to address in his
7 answering brief. Hyatt has failed to show that his proposed sur-reply is necessary or
8 even useful to this court, and therefore his Motion must be denied and this briefing
9 cycle must end. Alternatively, should the court be inclined to continue this cycle and
10 grant Hyatt's Motion, FTB respectfully requests leave to file a sur-sur-reply to
11 appropriately respond to the various glaring inaccuracies in Hyatt's sur-reply.

12 **A. FTB Diligently Complied with the Requirements of NRAP 28(c) and**
13 **Responded to Issues Raised by Hyatt in his Answering Brief.**

14 FTB diligently complied with NRAP 28(c) in its Reply brief, and took great
15 pains to respond accurately and thoroughly to the issues raised by Hyatt in his
16 Answering Brief. Hyatt fails to demonstrate how the FTB failed to comply with this
17 court's rules in its Reply brief. Hyatt contends that the FTB raised certain matters for
18 the first time in its Reply brief. See Motion, at 1. He complains that the FTB presents
19 "new arguments not put forth in the FTB's opening brief and expands and attempts to
20 develop issues that were at best referenced but not developed in the FTB's opening
21 brief." Id. With this argument, Hyatt appears to assert that a reply brief may only
22 address those matters discussed in the opening brief. This is **not** an accurate statement
23 of the rule.

24 NRAP 28(c) provides that a reply brief must be "limited to answering **any new**
25 **matter** set forth in the **opposing** brief." (emphasis added). This is precisely what the
26 FTB did in its Reply brief. In response to the 218 references in Hyatt's Answering
27 Brief to the jury's purported "bad faith" finding, FTB set forth detailed factual and legal
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1 analysis as to why such a finding could not be inferred.² See Appellant’s Reply Brief
2 (“ARB”) at 5-8. In response to the 17 separate references to the purported “Jew
3 bastard” comment, the fact that Hyatt is Jewish, alleged anti-Semitic comments, and that
4 the FTB was allegedly “openly hostile” to Hyatt based on his religion (RAB 9, 15 (4
5 references), 16 (3 references), 17, 57, 62, 126, 129, 130, 141, 169, 180), the FTB set
6 forth a detailed factual and legal analysis as to why such assertions were not supported
7 by the underlying record. ARB 8-10. In response to Hyatt’s patently false assertion
8 that the jury was never invited to second-guess the FTB’s tax determinations (RAB 76),
9 the FTB presented Corrected Jury Instruction 24 in its Reply brief, which, regardless of
10 how it came before the jury, invited jurors to render their opinion on the
11 “appropriateness and correctness of the analysis conducted by the FTB in reaching its
12 residency determinations and conclusions.” ARB 2. In response to Hyatt’s contention
13 that the FTB’s determinations were based on three affidavits (RAB 125), the FTB
14 presented detailed factual and legal analysis of the extensive residency records relied
15 upon by the FTB. ARB 10-17. In sum, none of these issues were “new issues” raised
16 for the first time by the FTB in Reply. Instead, they were responsive to issues raised by
17 Hyatt in his Answering Brief.

18 FTB diligently complied with the requirements of NRAP 28(c) in its Reply brief.
19 It provided detailed responses to correct the various glaring inaccuracies in Hyatt’s
20 Answering Brief that were at best misleading and at worst patently false. Because Hyatt
21 has not shown that the FTB’s Reply brief exceeded the permissible scope of NRAP
22 28(c), his Motion must be denied.

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26 ² Hyatt grossly mischaracterizes the FTB’s argument regarding the “bad faith”
27 issue. He states that the FTB “argues that evidence of the FTB’s bad faith conduct in
28 the audits should never have been presented to the jury because ‘bad faith’ is not an
element of Hyatt’s intentional tort claims.” See Motion, at 2. FTB has never argued
that purported evidence of “bad faith” should never have been presented to the jury.
Rather, FTB submitted that Hyatt’s bald assertion that the jury expressly found “bad
faith” was legally, and factually, incorrect. ARB 5-8.

1 **B. Hyatt’s Purported “Sur-Reply” is Not the Appropriate Remedy for a**
2 **Case in which a Reply Brief Exceeds its Proper Scope.**

3 Further belying Hyatt’s argument that his proposed sur-reply has anything to do
4 with the rules of this court is the fact that Hyatt has not employed the appropriate tool to
5 remedy the allegedly excessive scope of the FTB’s Reply brief. This court has the
6 ability to determine whether a reply brief contains matters which more properly should
7 have been in the opening brief. See Nevada Ind. Comm’n v. Bibb, 78 Nev. 377, 383-84,
8 374 P.2d 531 (1962). If a reply brief exceeds its proper scope, this court will disregard
9 the new matters. Id.; see also Bongiovi v. Sullivan, 122 Nev. 556, 570 n.5, 138 P.3d
10 433, 443 n.5 (2006) (declining to consider arguments in a Reply brief that were
11 unresponsive to arguments in the answering brief and that were not raised in the
12 opening brief). In sum, no authority exists for Hyatt’s proposition that the filing of a
13 "sur-reply" brief is the appropriate remedy for a case in which a reply brief exceeds its
14 proper scope. As such, Hyatt’s Motion must be denied.

15 **C. If the Court is Inclined to Grant Hyatt’s Motion, then FTB**
16 **Respectfully Requests Leave to File a Sur-Sur Reply to Respond to**
17 **the Additional Glaring Inaccuracies in Hyatt’s Sur-Reply.**

18 Finally, if the court is inclined to Grant Hyatt’s Motion and allow him to file his
19 proposed sur-reply, FTB respectfully requests that, in the interest of fairness, it be
20 allowed to file an additional sur-sur-reply brief to respond to the various new issues and
21 to correct the glaring inaccurate statements of law and fact in the sur-reply.

22 **II. CONCLUSION**

23 Based on the foregoing, the FTB respectfully requests that Hyatt’s Motion for
24 Leave to File a Sur-Reply be denied and his proposed sur-reply stricken. Hyatt has
25 failed to show how the FTB’s Reply brief exceeded the permissible scope provided in
26 NRAP 28(c), or that the remedy for such an issue is an additional sur-reply. In the
27 alternative, should the court be inclined to grant Hyatt’s Motion and consider his sur-
28 reply, the FTB respectfully requests leave to file an additional sur-sur-reply to respond

1 to the various new issues raised by Hyatt and the misstatements of fact and law in his
2 proposed sur-reply.

3 DATED: August 24, 2010.

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