

1 IN THE SUPREME COURT OF THE STATE OF NEVADA

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3 FRANCHISE TAX BOARD OF
4 THE STATE OF CALIFORNIA,

Appellant,

5 v.

6 GILBERT P. HYATT,

Respondent

Electronically Filed
Mar 06 2012 10:16 a.m.
CASE NO. 53264
Tracie K. Lindeman
Clerk of Supreme Court

7 _____ /
8 **OPPOSITION TO MOTION TO POSTPONE ORAL ARGUMENT**

9 Appellant FTB hereby opposes respondent Hyatt's motion to postpone the oral argument
10 presently scheduled for April 3, 2012.

11 **1. Hyatt's proposed 30-day postponement**

12 Hyatt's motion, which was filed nearly a week after this court issued its oral argument
13 notice, requests a 30-day postponement of the oral argument date, until "early May 2012."
14 (Motion, p.1.) This appeal is presently scheduled for a one-hour argument before the en banc
15 court. This court's website reveals that an en banc oral argument calendar is not yet scheduled
16 in May 2012. Hyatt's motion presumes that the court will hold en banc oral arguments in May,
17 yet this might not occur. Therefore, unless the court decides to schedule en banc arguments
18 during summer months, postponement of the April 3, 2012 argument in this case could result
19 in a delay until the Fall of 2012. Full briefing in this case (including briefs on the cross-appeal)
20 was concluded nearly 18 months ago. Hyatt's requested delay should not be allowed.

21 **2. Complexity of the case**

22 Hyatt's motion first argues that this case involves a large verdict, with oversized briefs
23 dealing with numerous complex issues, and with a multi-volume appendix. (Motion, p. 1.)
24 Although it is true that the briefs and the appendix deal with numerous complex issues, this
25 court's order of February 24, 2012, severely limits the issues for oral argument, thereby
26 significantly paring down the need for preparation for the oral argument. The court's order
27 states that "the parties should only prepare to address" eight narrow and specific issues
28 identified by the court. And as Hyatt's motion expressly concedes, some of these eight issues

1 actually overlap each other. (Motion, p. 1.) In other words, counsel’s preparation for one issue
2 will include preparation for other issues, which will reduce the overall preparation time for the
3 eight issues.

4 Hyatt’s motion provides two short paragraphs discussing the complexity of this case. Yet
5 the motion fails to indicate why Hyatt’s team of very experienced appellate attorneys cannot
6 adequately prepare for the eight overlapping discreet issues to be addressed at oral argument.
7 Accordingly, this portion of Hyatt’s motion provides no basis for postponing oral argument.

8 **3. Counsel Hutchison’s calendar conflict**

9 Hyatt’s motion next relies upon the alleged participation of counsel Mark Hutchison in
10 a United States Supreme Court oral arguments in federal cases dealing with the Affordable Care
11 Act. The motion argues that Hutchison’s involvement in the Supreme Court arguments will
12 impair his ability to prepare for this court’s oral argument in Hyatt’s case. Significantly, the
13 motion concedes that Hutchison is merely “one of” Hyatt’s team of appellate attorneys in the
14 present case. (Motion, page 2.) And the motion fails to indicate that Hutchison will be the
15 attorney on Hyatt’s appellate team who will actually be arguing for Hyatt in this case. As such,
16 Hyatt’s motion fails to establish that Hutchison’s involvement in the federal cases justifies a
17 postponement of the oral argument in the present case.

18 Furthermore, the United States Supreme Court’s website indicates that the health care
19 cases to be argued later in March have approximately 100 parties and amicus participants,
20 including 26 state government entities and officers. (www.supremecourt.gov). The lead state
21 entity in the health care challenge is the State of Florida. The State of Nevada is merely one of
22 26 states who joined in the health care challenges. The Supreme Court’s on-line docket sheets
23 identify nearly 100 attorneys involved in the cases, yet the docket sheets do not identify
24 Hutchison as counsel of record. (*Id.*, link to docket numbers 11-398 and 11-400.) Additionally,
25 the “merits brief” filed in the Supreme Court, which is available on-line, indicates that the State
26 of Nevada is represented by “Brian Sandoval, Governor of Nevada,” as counsel for Nevada.
27 (*Id.*, link to ABA site for on-line merits briefs.)

28

1 Hyatt's motion concedes that attorney Hutchison will not be arguing the national health
2 care cases at the Supreme Court. Nonetheless, Hyatt's motion alleges that Hutchison "will be
3 preparing his co-counsel for that argument." (Motion, page 2.) Hyatt's motion fails to provide
4 any elaboration, or even the slightest explanation, regarding (1) the nature and extent to which
5 Hutchison will be working with the national attorneys who will be arguing the health care cases
6 at the Supreme Court; (2) the dates or number of days on which Hutchison will allegedly be
7 preparing other attorneys for their Supreme Court arguments; or (3) the amount of time
8 Hutchison plans to spend assisting the other attorneys. In light of the numerous state
9 governments and other parties involved in the Supreme Court cases, with their nearly 100
10 attorneys, it appears fairly obvious that Hutchison will have only *de minimus* involvement, if
11 any, in preparation of other attorneys for the Supreme Court arguments.

12 Under these circumstances, Hyatt's motion is entirely deficient in its attempt to use
13 Hutchison's involvement in the health care cases as an excuse for a delay of oral argument in
14 the present appeal. Hutchison's minimal involvement in the Supreme Court health care cases
15 provides no justification for a postponement of the oral argument in this court, particularly in
16 the absence of any indication that Hutchison will himself be presenting the oral argument for
17 Hyatt in this appeal.

18 **4. Tactical advantage for Hyatt**

19 Finally, Hyatt's motion to postpone the oral argument will provide him with a tactical
20 advantage in ongoing administrative proceedings in California. As this court is aware, the FTB
21 imposed millions of dollars in taxes and penalties against Hyatt. Hyatt then challenged the taxes
22 and penalties, initiating audit and protest proceedings through FTB administrative channels in
23 California. The taxes and penalties were upheld, and Hyatt then filed administrative appeals
24 with the California Board of Equalization (BOE), to review FTB's determinations. Hyatt's
25 appeal to the California BOE consists of *de novo* review by that state agency, and Hyatt's BOE
26 appeal is still pending. In fact, Hyatt's next brief in the California BOE appeal is due for filing
27 on May 5, 2012.


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1 Throughout the California BOE appeal process, Hyatt has consistently attempted to use
2 the Nevada judgment to his advantage. Specifically, he has asked the California BOE to rely
3 on the Nevada jury's verdict as a basis for summarily deciding the tax appeal in Hyatt's favor.
4 (See Exhibit 1, p. 6, n. 18, and p. 11, lines 8-10.) In other words, in Hyatt's currently-pending
5 California administrative appeal with the California BOE, Hyatt is contending that the Nevada
6 jury's decision, and the resulting district court judgment, are essentially binding in the BOE
7 appeal, even though the Nevada judgment is being challenged in the appeal pending in this
8 court. As long as this Nevada appeal is pending, Hyatt will continue to make his argument in
9 the California BOE proceedings, and he will continue to rely on the Nevada district court
10 judgment. Thus, delays in the appeal in this court work to Hyatt's distinct advantage in the
11 ongoing California BOE administrative appeals. This tactical advantage is presumably one of
12 the underlying reasons for Hyatt's motion to postpone the oral argument in this case.

13 **5. Conclusion**

14 For the foregoing reasons, Hyatt's motion should be denied. Oral argument should
15 remain scheduled for April 3, 2012.

16 DATED: 2/6/12

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EXHIBIT 1

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8 BEFORE THE STATE BOARD OF EQUALIZATION
9 OF THE STATE OF CALIFORNIA

10
11
12 In the Matter of the Appeal of
13 GILBERT P. HYATT
14

Case No. 435770

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19 **APPELLANT'S OPENING BRIEF**

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21 **Taxable Year 1991**
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1 generated by the auditor in preparation for the visit.¹⁶ Nor do the audit files contain the picture of
2 Ms. Les in front of Mr. Hyatt's Tara home. Both audit narratives (1991 and 1992) discuss and rely
3 heavily upon an earlier March 1995 visit to Las Vegas by the auditor and her activities during such
4 visit.¹⁷ But there is no mention of the November 1995 Las Vegas visit with Ms. Les eight months
5 later. Given the auditor's extensive list of "activities needed to be done in Las Vegas," coupled with
6 the activities described by Ms. Les,¹⁸ it is unbelievable for this November 1995 visit to Las Vegas by
7 the auditor in pursuit of information pertaining specifically to the Hyatt audit to *not* show up in either
8 of the audit files for the 1991 or 1992 audits of Mr. Hyatt. The absence of any references in the audit
9 files to this Las Vegas visit is suspect.

10 Moreover, the impropriety of the auditor's behavior during the November 1995 Las Vegas
11 visit is inexcusable. The auditor makes a "stealth visit" to Las Vegas for a specific, pre-planned
12 "Hyatt" agenda. She looks in a citizen's mailbox, goes into his gated yard, goes through his garbage,
13 and looks in his windows. There is no conceivable basis for arguing this sort of conduct by a
14 representative of FTB is appropriate, or necessary, or rational, or reasonable in the scope of a
15 residency audit. The auditor was never given permission by Mr. Hyatt, whatsoever, to engage in any

16 ¹⁶ See Ex. 7, fax of "Activities Needed to be Done in Las Vegas," from S. Cox to C. Les.

17 ¹⁷ Annex VI, CCC BATES Documents (FTB 1991 Narrative Report, pp. 3, 28, 43-44 (CCC 00966, 00991, 01006 - 01007)
and FTB 1992 Narrative Report, pp. 6-8 (CCC 00008 - 00010)).

18 ¹⁸ FTB may claim the auditor testified in *Hyatt v. FTB* that she did not engage in any of the activities testified to by Ms.
19 Les. However, on August 6, 2008, a jury in the District Court of Clark County, Nevada, in *Hyatt v. FTB*, Case No.
20 A382999, rendered a verdict in favor of Mr. Hyatt. Damages were awarded in Mr. Hyatt's favor in the amount of \$85
21 million for intentional infliction of emotional distress, \$52 million for invasion of privacy, \$1.1 million for attorneys' fees
22 expended in the administrative process ongoing in California and \$250 million for punitive damages. (See August 31,
23 2008 Franchise Tax Board Public Litigation Roster, p. 7, <http://www.ftb.ca.gov/law/litrstr/index.shtml>.) This verdict
24 controls how (seemingly) conflicting evidence from trial must be interpreted. Under Nevada law, the truth or falsity of
25 the testimony of witnesses is for the jury, "it being the exclusive judge of the credibility" of witnesses. (*Ferris v.*
26 *Albright's Courtesy Elec. Co.* (1954) 70 Nev. 528, 531, 275 P.2d 755, 756.) "It is the prerogative of the trier of fact to
27 evaluate the credibility of witnesses and determine the weight of their testimony. Where there is substantial evidence to
28 support the findings of the trial court, [an appellate court] will affirm the judgment even though the evidence is
conflicting." (*Rowland v. Pepire* (1983) 99 Nev. 308, 312, 662 P.2d 1332, 1334.) (Citations omitted.) It is for this reason
that even an appellate court is "not in a position to overturn a decision based upon the credibility of live witnesses."
(*Desert Valley Const. & Employers Ins. Co. of Nevada v. Hurley* (2004) 120 Nev. 499, 504, 96 P.3d 739, 743.) The case
is reviewed by referring "only to the testimony most favorable to the plaintiff's theory of the case" (*Rocky Mountain*
Product Trucking Co. v. Johnson (1962) 78 Nev. 44, 50, 369 P.2d 198, 201) based on the judgment in the district court in
favor of Mr. Hyatt. Comparable rules exist under California law. (See 9 WITKIN, CALIFORNIA PROCEDURE § 365
at 421-24 (5th ed. 2008).) Accordingly, to the extent FTB introduces in this SBE appeal proceeding testimony evidence
by Ms. Cox or other FTB witnesses in *Hyatt v. FTB* to rebut testimony evidence in *Hyatt v. FTB* presented by Mr. Hyatt
in this SBE appeal proceeding, we contend this Board in making its determination must refer only to the testimony most
favorable to Mr. Hyatt based on the judgment in the Nevada district court in his favor.

1 rebuttal. Aside from what was already provided (and ignored) during the protest, a complete rebuttal
2 to FTB's alleged facts in the Determination Letter is set forth separately in Annex VIII.

3 These activities engaged in by the auditor and the protest hearing personnel — the very audit
4 activities that led to the assessment and the very protest activities that led to sustaining the assessment
5 — cannot be condoned, let alone be considered “reasonable and rational.” For over ten years FTB
6 has defended the reprehensible conduct of its employees toward Mr. Hyatt, both during the audit and
7 protest and in the Nevada courts in a lawsuit brought by Mr. Hyatt against FTB for tortious conduct.
8 On August 19, 2008, a Nevada jury found in favor of the taxpayer in *Hyatt v. FTB* for tortious
9 conduct, including Mr. Hyatt's fraud cause of action, and awarded substantial damages, including
10 \$250 million in *punitive* damages, with a total award of \$388 million to the taxpayer.⁴⁰

11 Accordingly, FTB did not carry its initial burden in this case to show why its assessment is
12 reasonable and rational.

13 **II. MR. HYATT WAS A NEVADA RESIDENT COMMENCING IN SEPTEMBER 1991**

14 While residency cases are intensively factual in nature, there are several legal standards under
15 which those facts are to be evaluated. The legal analysis begins with the statute. Section 17014(a)
16 defines “resident” to include: (1) Every individual who is in California for other than a temporary or
17 transitory purpose; or (2) Every individual who is domiciled in California who is outside the state for
18 a temporary or transitory purpose.⁴¹ Any individual who is not a resident is, by process of
19 elimination, a nonresident.⁴²

20 **A. Mr. Hyatt Was Domiciled in Nevada Commencing in September 1991**

21 Domicile has been defined as the “one location with which for legal purposes a person is
22 considered to have the most settled and permanent connection, the place where he intends to remain
23 and to which, whenever he is absent, he has the intention of returning...”⁴³ “Residence” and
24

25 ⁴⁰ See fn. 18, *supra*.

26 ⁴¹ See also 18 Cal. Code of Regs. § 17014(a).

27 ⁴² Cal. Rev. & Tax. Code § 17015; 18 Cal. Code of Regs. § 17014(a).

28 ⁴³ *Whittell v. Franchise Tax Bd.* (1964) 231 Cal.App.2d 278, 284; see also 18 Cal. Code Regs. § 17014(c) (stating “[a]nother definition of ‘domicile’ consistent with the [foregoing] is the place where an individual has fixed his habitation and has permanent residence without any present intention of permanently removing therefrom”).

1 CERTIFICATE OF MAILING

2 I certify that I am an employee of Lemons, Grundy & Eisenberg and that on this date
3 Appellant's Opposition to Motion to Postpone Oral Argument was filed electronically with the
4 Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance
5 with the master list as follows:

- 6 Carla Higginbotham
7 Megan Starich
8 Charles Howle
9 Peter Bernhard
10 Mark Hutchison
11 Pat Lundvall
12 Michael Wall

13 I further certify that on this date I served copies of this Opposition, postage prepaid, by
14 U.S. Mail to:

15 Donald J. Kula
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23 DATED: 3/6/12

24 *Chula Shapiro*