

1 IN THE SUPREME COURT OF THE STATE OF NEVADA

2 FRANCHISE TAX BOARD OF
3 THE STATE OF CALIFORNIA,

4 Appellant/Cross-Respondent

5 v.

6 GILBERT P. HYATT,

7 Respondent/Cross-Appellant /

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Apr 13 2012 12:19 p.m.
CASE NO. 53264
Tracie K. Lindeman
Clerk of Supreme Court

8 **APPELLANT'S SUPPLEMENTAL AUTHORITIES**

9 **(ORAL ARGUMENT: MAY 7, 2012)**

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11 Appellant Franchise Tax Board of the State of California (FTB) hereby submits
12 the following supplemental authorities, pursuant to NRAP 31(e). Oral argument is
13 scheduled for Monday, May 7, 2012, before the full court.

14 Pursuant to Rule 31(e), supplemental authorities may be filed when pertinent and
15 significant authorities come to a party's attention after the party's brief has been filed,
16 but before a decision. Such authorities must state concisely, and without argument, the
17 legal proposition for which each supplemental authority is cited, with the page(s) of the
18 brief to which the supplemental authorities relate.

19
20 **I**

21 **The *Berkowitz/Gaubert* Test and Subjective Intent**

22 The following recent opinions supplement the cases at pages 35-36 of Appellant's
23 Opening Brief, regarding the test for discretionary function immunity.

24 1. *Spotts v. United States*, 613 F.3d 559 (5th Cir. 2010).

25 This case is cited for the legal propositions that: (1) discretionary function
26 immunity, under the test articulated in *Berkovitz ex rel. Berkovitz v. United States*, 486
27 U.S. 531 (1988) and *United States v. Gaubert*, 499 U.S. 315 (1991), is established where
28 the acts at issue were discretionary and were based upon considerations of social,

1 economic or political policy [*id.* at 567-68]; and (2) the focus is not on subjective intent
2 in exercising the discretion conferred, but rather, is on the nature of the actions taken
3 and whether they are susceptible to a policy analysis [*id.* at 572-73].

4 2. *Dichter-Mad Family Partners v. United States*, 707 F.Supp.2d 1016
5 (C.D.Cal. 2010).

6 This case is cited for the legal propositions that: (1) United States Supreme Court
7 precedent requires an examination of “the nature of the actions taken and whether they
8 are susceptible to policy analysis,” not “the agent’s subjective intent in exercising the
9 discretion conferred by statute of regulation;” therefore, the government employee’s
10 “subjective reasons for deciding how to investigate . . . are irrelevant . . .” [*id.* at 1045];
11 and (2) allegations that government agents acted out of personal animus, fear of liability,
12 with improper deference, or out of spite with respect to the discretionary investigatory
13 decisions constituted “subjective reasons for deciding how to investigate” and were
14 therefore irrelevant to the discretionary function immunity inquiry [*id.* at 1045].

15 II

16 Discretionary Nature of Investigatory Functions

17 The following recent opinions supplement the cases at pages 42-43 of Appellant’s
18 Opening Brief, regarding whether actions taken during investigations conducted by
19 government entities are discretionary functions.

20 1. *Dupris v. McDonald*, 2012 WL 210722 (D. Ariz. 2012).¹

21 This case is cited for the legal propositions that: (1) investigations conducted by
22 government entities are discretionary functions [*id.* at *10]; (2) “Congress did not intend
23 to provide for judicial review of the quality of investigative efforts” [*id.*]; and (3)
24 discretionary function immunity applies “despite investigative deficiencies, including
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27 ¹ Unpublished federal opinions and orders may be cited for their persuasive,
28 if non-binding, precedential value. *Schuck v. Signature Flight Support*, 126 Nev. ___,
n. 2, 245 P.3d 542, 547, n. 2 (2010).

1 mishandling, altering, and failing to obtain and preserve physical evidence, irregularities
2 in the . . . interviewing procedures, and failure to consider all the evidence . . . failing
3 to interview a certain witness . . . or conducting a ‘haphazard’ investigation” [*id.*].

4 2. *Tabman v. F.B.I.*, 718 F.Supp.2d 98 (D.D.C. 2010).

5 This case is cited for the legal proposition that investigations conducted by
6 government entities are discretionary functions, and “[w]here the investigator’s conduct
7 during an investigation is inextricably tied to the overall discretionary decision to
8 investigate and then prosecute plaintiff, such actions are included” within the scope of
9 discretionary function immunity [*id.* at 105].

10 **III**

11 **Discretionary Nature of California Legislature’s Tax Amnesty Program**

12 The following recent opinion supplements the authorities at pages 48-49 of
13 Appellant’s Opening brief regarding the discretionary nature of the California
14 Legislature’s creation of the tax amnesty program.

15 *River Garden Ret. Home v. Franchise Tax Bd.*, 113 Cal. Rptr. 3d 62 (Cal. Ct.
16 App. 2010).

17 This case is cited for the legal propositions that: (1) the California Legislature
18 exercised its discretion to create the tax amnesty program in order to achieve its policy
19 goal of alleviating California’s fiscal crisis by “[accelerating] the collection of
20 unreported and underreported tax liabilities, bringing taxpayers into the tax system
21 through outreach and streamlined efforts, all to the end of achieving fiscal benefits” [*id.*
22 at 85]; and (2) the amnesty program was not a form of coercion to taxpayers to pay their
23 liabilities; rather, it was a program in which there were benefits to participating, and
24 adverse consequences for not participating, and a taxpayer could undertake a
25 cost-benefit analysis to determine if participation was worthwhile [*id.* at 86].

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IV

Policy Reasons Underlying Discretionary Function Immunity

The following recent opinions supplement the authorities at pages 51-52 of Appellant’s Opening brief regarding the policy reasons underlying discretionary function immunity.

1. *Sanchez ex rel. D.R.-S. v. United States*, 671 F.3d 86 (1st Cir. 2012).

This case is cited for the legal proposition that the policy reasons behind discretionary function immunity are to “prevent judicial ‘second-guessing’ of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort” [*id.* at 93].

2. *Dichter-Mad Family Partners v. United States*, 707 F.Supp.2d 1016 (C.D.Cal. 2010).

This case is cited for the legal proposition that the general policy bases justifying discretionary function immunity include: (1) traditional principles of separation of powers, under which courts refrain from reviewing or judging the propriety of policymaking acts of coordinate branches of government; (2) “courts should not subject the sovereign to liability where doing so would inhibit vigorous decisionmaking by government policymakers;” and (3) “in the interest of preserving public revenues and property, courts should be wary of creating huge and unpredictable government liabilities by exposing the sovereign to damage claims for broad policy decisions” [*id.* at 1033-34].

This case is further cited for the legal proposition that the policy behind discretionary function immunity must be applied to prevent courts from making “allocative decisions,” such as which matters to investigate or pursue; these decisions would require a court to “[take] over the job of planning the agency’s entire agenda, something neither authorized by statute nor part of their constitutional role” [*id.* at 1038].

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V

Allegations of Bad Faith in the Context of Discretionary Function Immunity

The following recent opinions supplement the cases at pages 52-55 of Appellants' Opening Brief, and pages 31-33 and 36-37 of Appellants' Reply Brief, regarding whether allegations of bad faith are irrelevant to the analysis of whether a government agency is entitled to discretionary function immunity.

1. *Dupris v. McDonald*, 2012 WL 210722 (D. Ariz. 2012).

This case is cited for the legal propositions that: (1) allegations of bad faith do not prohibit the application of discretionary function immunity, [*id.* at *11]; and (2) the allegation that a government entity acted in bad faith is not relevant to the discretionary function immunity inquiry [*id.*].

2. *Olaniyi v. District of Columbia*, 763 F.Supp.2d 70 (D.D.C. 2011).

This case is cited for the legal propositions that: (1) allegations of malicious intent do not prohibit the application of discretionary function immunity [*id.* at 92]; and (2) allegations that the government "maliciously [instituted] proceedings against [the plaintiff]" are not relevant where the acts forming the basis for the allegations were based on discretionary decisions [*id.* at 92].

3. *Dichter-Mad Family Partners v. United States*, 707 F.Supp.2d 1016 (C.D.Cal. 2010).

This case is cited for the legal proposition that allegations that government agents acted out of personal animus, fear of liability, with improper deference, or out of spite with respect to the discretionary investigatory decisions constituted "subjective reasons for deciding how to investigate" and were therefore irrelevant to the discretionary function immunity inquiry [*id.* at 1045].

4. *Tabman v. F.B.I.*, 718 F.Supp.2d 98 (D.D.C. 2010).

This case is cited for the legal proposition that a government agency's discretionary decision, and the agency's conduct in furtherance of that discretionary decision, are protected by discretionary function immunity "even if there was an

1 'improper, tortious, and constitutionally defective manner in which the [decision] was
2 carried out'" [*id.* at 105].

3 VI

4 **Statutory Bar of Punitive Damages Against Government Entities**

5 The following recent opinion supplements the cases at pages 108-109 of
6 Appellant's Opening Brief, regarding whether Nevada statutory law bars punitive
7 damages arising out of state tort claims against state government entities.

8 *Bryan v. Las Vegas Metro. Police Dept.*, 349 F. App'x 132, 135 (9th Cir. 2009).

9 This case is cited for the legal proposition that NRS 41.035(1) bars punitive
10 damages arising out of state tort claims against government entities and officers [*id.* at
11 135-36].

12 VII

13 **Common Law Bar of Punitive Damages Against Government Entities**

14 The following recent opinions supplement the cases at pages 109-111 of
15 Appellant's Opening Brief, regarding whether awards of punitive damages against
16 government entities are barred by the common law.

17 1. *L & F Homes and Development v. City of Gulfport, Miss.*, 2011 WL
18 5563205 (U.S. S. D. Miss., 2011).

19 This case is cited for the legal propositions that (1) a government entity is entitled
20 to absolute immunity from punitive damages under the common law [*id.* at *2]; (2)
21 pursuant to *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981), there is a
22 "judicial disinclination" to award punitive damages against government entities [*id.* at
23 *3]; (3) punitive damages should not be awarded against the citizens and taxpayers of
24 a government entity, based upon conduct by elected officials [*id.* at *3]; and (4) a
25 motion to dismiss should be granted when a complaint seeks punitive damages against
26 a government entity, in the absence of specific and express statutory authority allowing
27 such punitive damages [*id.* at 2-4].


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Benchmark Ins. Co. v. Sparks, 127 Nev. ___, 254 P.3d 617 (2011).

This case is cited for the legal proposition that although a pretrial interlocutory order denying summary judgment is not independently appealable, such an order can be challenged in an appeal from the final judgment in a case; a challenge to a pretrial denial of summary judgment is “properly before this court” in the appeal from the final judgment. *Id.* at ___, 254 P.3d at 620.

DATED: April 13, 2012



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CERTIFICATE OF MAILING

I certify that I am an employee of Lemons, Grundy & Eisenberg and that on this date Appellant's Supplemental Authorities were filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the master list as follows:

- Carla Higginbotham
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- Pat Lundvall
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I further certify that on this date I served a copy, postage prepaid, by U.S. Mail to:

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DATED: 4/13/12

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