

1 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

2
3 FRANCHISE TAX BOARD OF THE STATE
4 OF CALIFORNIA,

5 Appellant/Cross Respondent,

6 v.

7 GILBERT P. HYATT,

8 Respondent/Cross Appellant

Case No. 53264 Electronically Filed
Apr 26 2012 08:50 a.m.
Tracie K. Lindeman
Clerk of Supreme Court

9 **RESPONDENT'S SUPPLEMENTAL AUTHORITIES AND RESPONSE TO**
10 **APPELLANT'S SUPPLEMENTAL AUTHORITIES**

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

12 Respondent/Cross Appellant Gilbert P. Hyatt ("Hyatt") submits the following
13 supplemental authorities, pursuant to NRAP 31(e), including his response to Appellant's
14 Supplemental Authorities:

15 **Supplemental Authorities. (e)** When pertinent and significant authorities come
16 to a party's attention after the party's brief has been filed, but before a decision, a
17 party may promptly advise the Supreme Court by filing and serving a notice of
18 supplemental authorities, setting forth the citations. The notice shall provide
19 references to the page(s) of the brief that is being supplemented. The notice shall
20 further state concisely and without argument the legal proposition for which each
21 supplemental authority is cited. The notice may not raise any new points or issues.
22 Any response must be made promptly and must be similarly limited. If filed less
23 than 10 days before oral argument, a notice of supplemental authorities shall not be
24 assured of consideration by the court at oral argument; provided, however, that no
25 notice of supplemental authorities shall be rejected for filing on the ground that it
26 was filed less than 10 days before oral argument.

27 [As amended; effective July 1, 2009]

28 Unpublished federal opinions and orders, although non-binding, may be cited for
their persuasive value. *Schuck v. Signature Flight Support*, 126 Nev. ___, n. 2, 245 P.3d 542,

1 547, n. 2 (2010). Such citations and unpublished state court cases are included below, not as
2 precedent but to show how various courts have applied the federal *Berkovitz-Gaubert* test to
3 Nevada law set forth in *Martinez v Maruszczak*, 123 Nev. 424, 168 P.3d 720 (2007), and
4 *Falline v. GNLV Corp.*, 107 Nev. 1004, 823 P.2d 888 (Nev. 1991).

5
6 The following opinions supplement (i) the cases at pages 56-60 of Respondent's brief
7 regarding discretionary function immunity, which does not extend to bad faith and intentional
8 conduct, (ii) the cases at pages 61-62 of Respondent's brief regarding the first prong of
9 *Berkovitz-Gaubert* test, requiring that the conduct at issue "...involve an element of individual
10 judgment or choice..." (*Martinez*, 168 P.3d at 729); and (iii) the cases at pages 62-63 of
11 Respondent's brief regarding whether bad faith acts and intentional torts can satisfy the second
12 prong of the *Berkovitz-Gaubert* test as "...based on considerations of social, economic, or
13 political policy" (*Martinez, Id.*). Respondent's supplemental authorities are in chronological
14 order.

15 **A. Respondent's Supplemental Authorities (post-*Martinez*).**

16 1. ***Castaneda v. Planeta***, 2007 WL 3232528 (D. Nev. Oct. 31, 2007) (District
17 Judge Hicks). Citing *Martinez*, the Court found that defendant Shields' decision to strike
18 plaintiff's face was not based on considerations of social, economic, or political policy. The
19 Court found that granting discretionary immunity to defendant Shields was not warranted on
20 summary judgment, because he failed to satisfy the second prong of the *Berkovitz-Gaubert* test.
21 Judge Hicks quoted from *Martinez*' explanation of the second prong from *Berkovitz-Gaubert*:
22 "Thus, if the injury-producing conduct is an integral part of governmental policy-making or
23 planning, if the imposition of liability might jeopardize the quality of the governmental process,
24 or if the legislative or executive branch's power or responsibility would be usurped, immunity
25 will likely attach under the second criterion." *Martinez*, 2007 WL 2948789 at 7.

26 2. ***Roe v. Nevada***, 621 F. Supp. 2d 1039 (D. Nev. 2007) (District Judge Hunt).
27 Immunity under NRS 41.032(2) does not extend to intentional torts, citing *Martinez*: "Because
28 the Nevada Supreme Court [in *Martinez*] interprets [Section] 41.032(2) to compensate

1 negligence victims, the Court finds the discretionary acts statute inapplicable to the intentional
2 torts asserted here.” 621 F.Supp. at 1051.

3 3. **Mason v. University and Community College System of Nevada**, 265 F.App’x
4 585 (9th Cir. 2008) (Circuit Judges Reinhardt and Thomas; District Judge Pro). Under Nevada
5 law, an action performed in bad faith cannot be “discretionary” for purposes of NRS 41.032,
6 because a bad-faith act “occurs outside the circumference of [the actor’s] authority” and “has no
7 relationship to a rightful prerogative even if the result is ostensibly within the actor’s ambit of
8 authority” (citing *Falline*, 823 P.2d at 892, note 3).

9 4. **Zaritsky v. Crawford**, 2008 WL 4132225 (D. Nev. Aug. 29, 2008) (Magistrate
10 Judge Cooke; District Court Judge Mahan). Citing *Martinez*, defendants are not entitled to
11 discretionary-act immunity pursuant to NRS 41.032 because certain discretionary acts do not
12 fall within the scope of discretionary-act immunity “...because they involve ‘negligence
13 unrelated to any plausible policy objectives.’” *Martinez*, 158 P.3d at 728).

14 5. **Neal-Lomax v. Las Vegas Metro. Police Dept.**, 574 F. Supp. 2d 1170 (D. Nev.
15 2008) (District Judge Pro). The discretionary act exception was designed “to prevent judicial
16 second-guessing of legislative and administrative decisions grounded in social, economic, and
17 political policy through the medium of an action in tort.” *Martinez*, 158 P.3d at 729. Citing
18 *Butler ex rel. Biller v. Bayer*, 123 Nev. 450, 158 P.3d 1055 (2007), where Nevada Supreme
19 Court recognized that particular discretionary acts may not be entitled to immunity, where not
20 based on consideration of any social, economic, or political policy.

21 6. **Bryan v. Las Vegas Metro. Police Dept.**, 349 F. App’x 132 (9th Cir. 2009)
22 (Circuit Justices Silverman and Smith; District Judge Kent Dawson). Citing *Martinez*, some
23 actions of individual officers were protected under qualified immunity, but summary judgment
24 was reversed as to one officer because of disputed facts requiring a trial.

25 7. **Morosvillo v. Clark Count**, 2009 WL 3785266 (D. Nev. Nov. 12, 2009) (District
26 Judges Pro and Hicks). Citing to *Martinez* and *Falline*, the district court denied summary
27 judgment, relying on *Falline* for the proposition that an action performed in bad faith cannot be
28 “discretionary” under NRS 41.032 and other Ninth Circuit precedent that government officials

1 do not have discretion to violate legal mandates or constitutional rights. Where there are
2 contested issues of fact concerning (1) a supervisor's retaliatory conduct, and (2) the employer's
3 role in permitting its employee to engage in the retaliatory conduct, the court cannot find, as a
4 matter of law, that the employer did not act in bad faith or in violation of federal law.

5 8. ***Eastman v. City of N. Las Vegas***, 2010 WL 428806 (D. Nev. Feb. 1, 2010)
6 (District Judge Hunt). Citing *Falline*, the Court concludes that Nevada's discretionary
7 immunity statute does not, as a matter of law, shield defendants' from Eastman's lawsuit, since a
8 reasonable juror could conclude that the public officer acted in bad faith.

9 9. ***Sakal v. United States***, 2010 WL 3782135, at 2 (June 14, 2010 S.D.Fla.).
10 Addressing the *Berkovitz-Gaubert* test and holding that "[b]ecause virtually every decision
11 involves some element of judgment or discretion, an interpretation focusing on the "plain
12 import of the statutory language would swallow the general waiver of sovereign immunity in
13 the FTCA." *Gray v. Bell*, 712 F.2d 490, 508 (D.C.Cir.1983). Following the language of the
14 statute literally, nearly every government action or decision would be exempt from suit. . . .
15 The *Gray* Court thoroughly analyzed the language and legislative history of the discretionary
16 function exception and came to two general conclusions. *Gray*, 712 F.2d at 509. First, Congress
17 intended to preserve sovereign immunity for "some undefined category of discretionary
18 governmental acts but to abrogate that protection for ordinary, day-to-day acts of governmental
19 negligence." *Id.* Second, Congress expected courts to refer to "preexisting notions of sovereign
20 immunity" to determine the boundaries of the exception. *Id.*

21 10. ***Belch v. Las Vegas Metro. Police Dept.***, 2011 WL 1070175 (D. Nev. Mar. 21,
22 2011) (District Judge Navarro). Citing *Martinez*, *Falline*, and *Wright v. Wynn*, 682 So.2d 1
23 (Ala. 1996), the Court recognizes that (i) the difference between non-actionable abuses of
24 discretion and actionable bad-faith violations of rights appears to turn on the actor's mental
25 state; and (ii) when an actor crosses the line to a malicious intent to violate a person's rights,
26 discretionary-act immunity does not apply even if *Martinez* test is satisfied. However, because
27 no bad faith is alleged to have been present during the course of the allegedly negligent training
28

1 and supervision, the Court applies discretionary function immunity as to the negligent training
2 and supervision claim.

3 11. **Huff v. N. Las Vegas Police Dept.**, 2011 WL 1399804 (D. Nev. Apr. 13, 2011)
4 (District Judge Pro). Citing *Martinez* and *Falline*, the motion to dismiss was denied, based on
5 plaintiff's allegations that defendants decided beforehand that anyone visiting a particular
6 property would be stopped and physically abused, regardless of whether any legal basis existed
7 to do so. Although defendants argued that after *Martinez*, Nevada no longer recognizes a bad
8 faith exception, Judge Pro noted that the Nevada Supreme Court has applied *Falline* after
9 *Martinez* in *City of Boulder City v. Boulder Excavating, Inc.*, 191 P.3d 1175, 1182 (Nev.2008).

10 12. **Romero v. Las Vegas Metro. Police Dept.**, 2011 WL 1561077 (D. Nev. Apr. 25,
11 2011) (District Judge Hunt). The Court finds that a material factual dispute exists, requiring
12 denial of plaintiff's summary judgment motion as to discretionary function immunity.

13 13. **LaJocies v. City of N. Las Vegas**, 2011 WL 2036972 (D. Nev. May 24, 2011)
14 (District Judge Navarro). Citing *Martinez* and *Falline*, the Court denies summary judgment as
15 to battery and mayhem claims, finding issues of fact as to bad faith of the actors, including
16 failure to conduct follow-up investigation, spoliation of evidence, alteration of reports, so
17 summary judgment denied as to battery and mayhem claims.

18 14. **Scott v. Las Vegas Metro. Police Dept.**, 2:10-CV-1900-ECR; 2011 WL 2295178
19 (D. Nev. June 8, 2011) (District Judge Reed). Citing *Martinez*, injury-producing conduct of
20 officers cannot be in furtherance of any social, economic or political policy and cannot be found
21 to be an integral part of governmental policy-making or planning. Imposition of liability would
22 improve the quality of the governmental process, as to the alleged conduct. The LVMPD's
23 alleged failure to adequately train its officers is not based on a policy judgment of the type
24 discretionary immunity is intended to protect.

25 15. **Trujillo v. Powell**, 2011 WL 3419504 (D. Nev. Aug. 2, 2011) (District Judge
26 Jones). Citing *Martinez* and *Falline*, discretionary function immunity is not infinitely broad,
27 and there is no discretionary immunity for acts taken in bad faith. Absent evidence that state
28

1 actor violated any statute or official policy, defendants are entitled to discretionary immunity
2 from the state law claims.

3 16. **Walker v. State**, 801 N.W.2d 548 (Iowa 2011). Citing *Martinez*, discretionary
4 function immunity did not apply as a matter of law, since decisions made by the correctional
5 staff in the supervision of the inmates did not involve the evaluation of broad public policy
6 factors.

7 17. **The Big East Conference v. West Virginia University**, 2011 WL 6933720
8 (Superior Court of Rhode Island, December 27, 2011). Citing *Nevada v Hall*, 440 U.S. 410
9 (1979), and *Faulkner v. University of Tennessee*, 627 So.2d 362 (Ala. 1992), comity is a matter
10 of judicial discretion based on the interests of the forum state, and by applying West Virginia's
11 sovereign immunity law on the basis of comity, it would violate Rhode Island public policy
12 providing its citizens with a remedy for wrongs they suffer and likely deprive a Rhode Island
13 citizen of its ability to obtain full redress for its grievances.

14 18. **Turner v. Gallagher Bassett Services, Inc.**, 55632, 2012 WL 170118 (Nev. Jan.
15 17, 2012). NRS 616D.030 was enacted by the Legislature to change the result in *Falline* and
16 provided that the administrative fines are the exclusive statutory remedies for the bad faith
17 actions of third-party administrators under Nevada's workman's compensation statutes.

18 19. **Allen v. Clark County Det. Ctr.**, 2012 WL 395646 (D. Nev. Feb. 7, 2012)
19 (District Judge Hunt). Citing *Martinez*, the court finds that an adequately-pled claim for
20 intentional infliction of emotional distress, from which the Court could reasonably infer extreme
21 and outrageous conduct by the actor, withstands a motion to dismiss under NRS 41.032.

22 20. **Jarvis v. City of Mesquite Police Dept.**, 2012 WL 600804 (D. Nev. Feb. 23,
23 2012) (District Judge Pro). Applying *Martinez* and *Falline*, the Court finds that plaintiff
24 presented no evidence of bad faith or constitutional violations, therefore plaintiff's allegations
25 of negligence are barred by discretionary function immunity.

26 21. **Rhodes v. United States**, 2012 WL 777336 (March 7, 2012 W.D.N.Y.).
27 Addressing the *Berkovitz-Gaubert* test in the context of law enforcement investigation and
28 prosecution, and holding "the discretionary function exception bars claims of malicious

1 prosecution against government “investigative and law enforcement agents aiding in the
2 investigation to whether to prosecute.” *See Morales v. United States*, Nos. 94 Civ. 6845, 94 Civ.
3 8773, 1997 WL 285002, at *1 (S.D.N.Y. May 29, 1997) (*citing Moore v. Valder*, 65 F.3d 189,
4 196–97 (D.C.Cir.1995)). “However, the exception does not protect investigative and law
5 enforcement agents from such claims where the actions of those agents are ‘sufficiently
6 separable’ from the ‘protected discretionary decision’ to prosecute.” *Id.* (*quoting Moore*, 65
7 F.3d at 196)."

8 22. ***Cavalieri v. Las Vegas Metro. Police Dept.***, 2012 WL 846466 (D. Nev. Mar. 13,
9 2012) (District Judge Reed). Citing *Martinez*, the Court disagreed that defendants have shown
10 conclusively, at this stage in the litigation, that decisions by the individual defendants were
11 based on social, economic, or political policy, declining to apply NRS 41.032 immunity to
12 dismiss the wrongful death claim against the individual defendants.

13 **B. Respondent’s Responses to Appellant’s Supplemental Authorities**

14 1. ***Spotts v. United States***, 613 F.3d 559 (5th Cir 2010). The discretionary function
15 exception does not apply if the challenged actions in fact violate a federal statute, regulation, or
16 policy. If an actor violates a mandatory regulation, immunity does not apply, because there is
17 no room for choice and the action will be contrary to policy. Citing *Berkovitz*, 486 U.S. at 547
18 (“[I]f the [agency]’s policy did not allow the official who took the challenged action to [act] on
19 the basis of policy considerations[,] the discretionary function exception does not bar the
20 claim.”). As the circuits have concluded, the reason for this rule is obvious—a federal employee
21 cannot be operating within his discretion if he is in fact violating a nondiscretionary policy:

22 Just because the discretionary function exception would generally shield
23 the government from FTCA liability otherwise arising from [a] policy
24 decision, it does not follow that the government is automatically shielded
25 from such liability when the acts of the particular agents seeking to
26 implement that policy violate another federal law, regulation, or express
27 policy. Actions taken to carry out a discretionary policy must be taken
28 with sufficient caution to ensure that, at a minimum, some other federal
law is not violated in the process. *Johnson v. Sawyer*, 980 F.2d 1490,
1503 (5th Cir.1992), *vacated on other grounds*, 47 F.3d 716 (5th
Cir.1995).

1 *Spotts*, at 568.

2 2. ***Dichter-Mad Family Partners v. United States***, 707 F.Supp.2d 1016 (C.D.Cal.
3 2010. "[t]he Ninth Circuit has noted that "the distinction between protected and unprotected
4 decisions can be difficult to apprehend, but this is the result of the nature of government
5 actions—they fall 'along a spectrum, ranging from those totally divorced from the sphere of
6 policy analysis, such as driving a car, to those fully grounded in regulatory policy, such as the
7 regulation and oversight of a bank.' " *Soldano v. United States*, 453 F.3d 1140, 1145 (9th
8 Cir.2006) (quoting *Whisnant v. United States*, 400 F.3d 1177, 1181 (9th Cir.2005)). This
9 distinction is drawn in part from the Supreme Court's discussion in *Gaubert*, in which the Court
10 explained:

11 There are obviously discretionary acts performed by a Government agent
12 that are within the scope of his employment but not within the
13 discretionary function exception because these acts cannot be said to be
14 based on the purposes that the regulatory regime seeks to accomplish. If
15 one of the officials involved in this case drove an automobile on a
16 mission connected with his official duties and negligently collided with
17 another car, the exception would not apply. Although driving requires the
18 constant exercise of discretion, the official's decisions in exercising that
19 discretion can hardly be said to be grounded in regulatory policy.

20 *Gaubert*, 499 U.S. at 325 n. 7, 111 S.Ct. 1267."

21 ***Dichter-Mad Family Partners***, at 1028.

22 3. ***Dupris v. McDonald***, 2012 WL 210722 (*D. Ariz. 2012). Not all actions taken
23 by government investigators are protected by the discretionary function immunity doctrine.
24 "There is a clear contrast between the investigation undertaken by the Task Force and cases
25 where courts have found that the government forfeited the protections of the discretionary
26 function exception. For example, in *Reynolds v. United States*, 549 F.3d 1108, 1112–14 (7th
27 Cir. 2008), the court ruled that the discretionary function exception did not apply to protect two
28 federal government investigators from suit in an action alleging that the agents submitted a
knowingly false affidavit to the state prosecutor, resulting in the plaintiff's prosecution and
subsequent loss of her job. In *Limone v. United States*, 497 F.Supp.2d 143 (D.Mass.2007), the
court found that the discretionary function exception did not preclude liability where FBI agents

1 suborned perjured testimony, resulting in wrongful murder convictions, and where the FBI
2 concealed information that would have ex-posed the agents' activities. Finally, in *Patel v.*
3 *United States*, 806 F.Supp. 873, 876 (N.D.Cal.1992), the court found that the discretionary
4 function exception did not apply to the officers' decision to burn down a structure while
5 executing a search warrant because the decision was "not based on considerations rooted in
6 social, economic or political policy." *Dupris*, at 9.

7 4. *Tabman v. F.B.I.*, 718 F.Supp2d 98 (D.D.C. 2010). Not all discretionary acts of
8 a government actor are protected by the discretionary function immunity. "Assuming the
9 conduct at issue involves an element of judgment, the Court then must consider whether that
10 judgment is the kind of judgment that the discretionary function was designed to shield. *See*
11 *Hayes v. United States*, 539 F.Supp.2d at 400. "Because the purpose of the exception is to
12 "prevent judicial 'second-guessing' of legislative and administrative decisions grounded in
13 social, economic, and political policy through the medium of an action in tort," when properly
14 construed, the exception "protects only governmental actions and decisions based on
15 considerations of public policy.'" *United States v. Gaubert*, 499 U.S. at 323, 111 S.Ct. 1267
16 (quoting *Berkovitz v. United States*, 486 U.S. at 537, 108 S.Ct. 1954)." *Taubman*, at 104

17 "Plaintiff concedes that established case law makes clear that decisions whether or not to
18 initiate prosecution are discretionary within the meaning of the FTCA's discretionary function
19 exception, *see* Opp. at 8, but he notes that certain categories of prosecutorial misconduct may be
20 "removed sufficiently from the decision to prosecute so that the discretionary function clause
21 would not provide any protection." *Gray v. Bell*, 712 F.2d at 515. . . . *Tabman*, at 104.

22 In order to succeed under *Gray*, plaintiff "must allege that the defendant 'breached a
23 duty sufficiently separable from the decision-making function to be non-discretionary and
24 outside the exception.'" *Tabman*, at 104.

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

26 Exceptions to discretionary function immunity are narrower in the military context. "We also
27 concluded there is a "particularly strong argument for limiting the rule of *Gaubert* where the
28 exercise of military authority is involved, in view of the numerous cases cautioning the courts to


1 avoid interfering with the exercise of discretionary military authority.” Id. at 27–28 (*citing*
2 *United States v. Shearer*, 473 U.S. 52, 57, 105 S.Ct. 3039, 87 L.Ed.2d 38 (1985)).” *Sanchez*, at
3 93-94.

4 6. ***Olaniyi v. District of Columbia***, 763 F. Supp.2d 70, 92 (D. D.C. 2011).

5 Plaintiff’s malicious prosecution claim was dismissed based on the federal statutory bar that
6 exempts the federal government from such claims, and for that reason allegations of malicious
7 intent did not factor into the decision.

8 Dated this 25th day of April, 2012

9 KAEMPFER CROWELL RENSHAW
10 GRONAUER & FIORENTINO

11 By: 
12 Peter C. Bernhard (NSBN 734)
13 8345 W. Sunset Road, Ste. 250
14 Las Vegas, NV 89113
15 Telephone (702) 792-7000

16 MARK A. HUTCHISON (NSBN 4639)
17 MICHAEL K. WALL (NSBN 2098)
18 Hutchison & Steffen
19 10080 Alta Drive, Ste. 200
20 Las Vegas, NV 89145
21 Telephone No. (702) 385-2500

22 Donald J. Kula (Calif. Bar. No. 144342)
23 PERKINS COIE
24 1888 Century Park East, Ste. 1700
25 Los Angeles, CA 90067-1721
26 Telephone (310) 788-9900

27 **Attorneys for Respondent Gilbert P. Hyatt**
28

KAEMPFER CROWELL RENSHAW
GRONAUER & FIORENTINO
8345 West Sunset Rd., Suite 250
Las Vegas NV 89113
Telephone: (702) 792-7000
Facsimile: (702) 796-7181

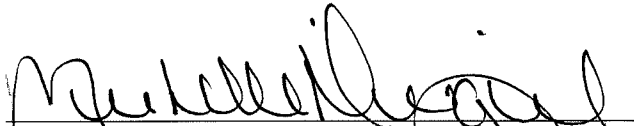
CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I hereby certify that I am an employee of Kaempher Crowell Renshaw Gronauer & Fiorentino, and that I served true and correct copies of the foregoing **RESPONDENT'S SUPPLEMENTAL AUTHORITIES** on this 25th day of April, 2012 by depositing said copies in the United States Mail, postage prepaid thereon, upon the following:

Patricia Lundvall, Esq.
McDonald Carano Wilson LLP
2300 West Sahara Avenue, Suite 1000
Las Vegas, Nevada 89102

Robert L. Eisenberg
Lemons, Grundy & Eisenberg
6005 Plumb Street, Suite 300
Reno, NV 89519

James A. Bradshaw, Esq.
McDonald Carano Wilson LLP
100 West Liberty Street, 10th Floor
Reno, NV 89501


An Employee of Kaempfer Crowell Renshaw
Gronauer & Fiorentino