

## Exhibit 6

PROGRESS REPORT

TAXPAYER Hyatt, Gilbert					AUDITOR SC		
REPRESENTATIVE Mike Kern / Eugene Cowan					TELEPHONE NO.		
TELEPHONE NO.							
DATE	INITIALS	ACTION TAKEN				TIME	
		DATE ASSIGNED	TAX YEAR(S)	MODEL NUMBER	ESTIMATED DATE OF COMPLETION:	CURRENT HOURS	TOTAL TO DATE
		DATE SCOPE	EARLIEST STATUTE DATE	ESTIMATED HOURS TO COMPLETE AUDIT:	O	F	
8/2/95	SC	Completed revisions to letter, prepared waiver, and sent to Mike Kern & Eugene Cowan - (follow up 8/31/95)					
8/8/95	SC	Sent 6227 Form to Jeanne Houston of PAR to obtain copy of Gilbert Hyatt's 1992 tax return from IRS. Prepared and sent letter to Las Vegas Sun, OC Register, & Times OC as suggested by Becky Medina.				2	542
8/11/95	SC	Worked on narrative and correspondence index.				8	550
8/16/95	SC	Organized correspondence. Spoke to Eugene Cowan - they are working on the response; they want to request copies of affidavits - I told him that I am not able to give copies at this time.				2	552
8/17/95	SC	Received response from LA times - Received response from Las Vegas Sun.					
8/18/95	SC	Completed narrative.				8	560
8/22/95	SC	Printed narrative and sent a copy to John Toyama.				1	561
8/23/95	SC	Discussed case with Ann Jovanovich of Legal - Worked on organization of workpapers.				5	566
8/29/95	SC	Organized workpapers and began to close case.				8	574
8/30/95	SC	Eugene Cowan brought letter of response to office - Prepared and sent response w/ deadline of 9/22/95. Sent waiver w/ deadline of 9/8/95.				8	582

FTB 4432 (REV. 4-88)

11/20

FTB 03475

0003-00035  
RA020014

\_\_\_\_\_

W/P

Received call from the taxpayer's representative Eugene Cowan. He said that they are working on a response to the determination letter. He wants to request copies of the affidaviits. I told him that we are not able to give copies of anything until the case is at protest.

**CONFIDENTIAL**

H 00174

4/54

RA000072

SC 8/30/95



STATE OF CALIFORNIA

**FRANCHISE TAX BOARD**

333 N. GLENDALE BLVD., SUITE 200

BURBANK, CA 91502-1170

TELEPHONE: (818)

556-2942

8/31/95

Mr. Eugene G. Cowan  
c/o Riordan & McKinzie  
300 South Grand Avenue  
Los Angeles, CA 90071

Re: FTB audit of Gilbert P. Hyatt for 1991

Dear Mr. Cowan:

We have reviewed your letter dated August 30, 1995. Based upon our initial review, it is apparent that further information and/or documents will be needed to make a determination. In order to provide the taxpayer with enough time to gather the necessary information, a waiver on the Statute of Limitations will be needed to extend the Statute. All cases must be submitted to review seven months prior to expiration of the Statute. For this reason, a waiver is enclosed, which should be signed by the taxpayer and sent to my office by September 8, 1995.

We are not able at this time to provide copies of any documentation or correspondence obtained during the course of the audit. These items will be made available to you upon your request at the protest level, after the case is closed.

The audit report is not disputing that the taxpayer now lives in Las Vegas. The purpose of the audit is to determine when the taxpayer established ties with the state of Nevada and when he severed his ties with California.

The documentation provided establishing that the taxpayer resides in Las Vegas has not been ignored by the FTB. It is not our intention to disregard information and documentation. We are aware that the taxpayer did begin to establish ties in Nevada in early 1992. It is our position that the ties established by the taxpayer in Nevada in the latter part of 1991 were formalisms, such as changing voter registration, to give the appearance of Nevada residency.

The FTB acknowledges that the taxpayer is a private person who puts a significant effort into protecting his privacy. It was noted that the apartment rented by the taxpayer in Las Vegas did not have any security gates or protection to prevent visitors from coming directly to the apartment. His home in Las Vegas did not have any gates or walls to keep visitors out.

3/1/92

Response sent to  
RP on 8/30/95

A01106

2001-1110

AA16455

**RIORDAN & MCKINZIE**  
A PROFESSIONAL LAW CORPORATION

ORANGE COUNTY OFFICE  
885 TOWN CENTER DRIVE  
SUITE 1800  
COSTA MESA, CALIFORNIA 92626  
(714) 433-8800  
FAX (714) 548-3244

CALIFORNIA PLAZA  
300 SOUTH GRAND AVENUE  
TWENTY-NINTH FLOOR  
LOS ANGELES, CALIFORNIA 90071  
TELEPHONE (213) 629-4824  
FAX (213) 323-8550

WESTLAKE OFFICE  
5743 CORSA AVENUE, SUITE 118  
WESTLAKE VILLAGE, CA 91362  
(818) 708-1800 (805) 498-4888  
FAX (818) 708-2956

RICHARD J. RIORDAN  
(RETIRED)

FILE NO.

EUGENE G. COWAN  
DIRECT DIAL  
(213) 228-8616

September 6, 1995

08-160-002

Franchise Tax Board  
333 North Glenoaks Boulevard  
Suite 200  
Burbank, California 91502-1170

Re: Extension of Statute of Limitation by Gilbert Hyatt

Dear Franchise Tax Board:

Per your response letter dated August 31, 1995, enclosed are two executed original Waiver Extending Statute of Limitations for Proposing Deficiency Assessments for Mr. Hyatt's 1991 taxable year. Please note that the extensions are limited, but should be adequate to allow the Franchise Tax Board to submit Mr. Hyatt's case to review seven months prior to the expiration of the statute. If more time is needed in the future, Mr. Hyatt will consider executing another limited Waiver further extending the statute.

Your August 31 letter states that the Franchise Tax Board is not able to provide copies of documentation or correspondence obtained during the course of an audit until the case has reached the protest level. As you know, we requested copies of the affidavits (and other correspondence) you obtained in the course of Mr. Hyatt's audit in order that we could fully respond to the allegations contained in the penalty supplement to the Franchise Tax Board's audit report. Since you are not complying with our request and your August 31 letter does not refer to the penalty settlement, we conclude that you have withdrawn the penalty supplement pending review of additional information. Please let us know if this is not the case.

A01122

P.2

SEP 07 '95 12:08PM RIORDAN & MCKINZIE

2001-1126

AA16471

**RIORDAN & MCKINZIE**  
A PROFESSIONAL LAW CORPORATION

Franchise Tax Board  
September 6, 1995  
Page 2

We intend to respond to the requests made in your August 31 letter timely. We will keep you informed if we will be delayed in supplying certain documentation you have requested or that we believe will assist you in your determination. Please contact me if you have any questions.

Sincerely,



Eugene G. Cowan  
of Riordan & McKinzie

EGC:pme

cc: Gil Hyatt  
Mike Kern, CPA

69686.1

2001-1127

A01123

SEP 07 '95 12:04PM RIORDAN & MCKINZIE

AA16472

1 (Jury present)

2 THE BAILIFF: Please remain in order. Department X  
3 is now in session, the Honorable Jessie Walsh presiding.

4 THE COURT: Good morning. Please be seated.

5 UNIDENTIFIED SPEAKER: Good morning.

6 THE COURT: Morning ladies and gentlemen of the jury.

7 THE JURORS: (Indiscernible).

8 THE COURT: It's nice to have you all here smiling.

9 (Off-record colloquy)

10 THE COURT: Counsel stipulate to the present of the  
11 jury?

12 MR. HUTCHINSON: Yes, Your Honor.

13 MS. LUNDVALL: Yes, Your Honor.

14 THE COURT: Very well. Reswear our witness, please.

15 THE CLERK: Please raise your right hand.

16 SHEILA COX, PLAINTIFF'S WITNESS, SWORN

17 THE WITNESS: I do.

18 THE CLERK: Please be seated stating your full name  
19 spelling your last name for the record.

20 THE WITNESS: Sheila Grady Cox, C-o-x.

21 DIRECT EXAMINATION

22 BY MS. LUNDVALL:

23 Q Morning, Ms. Cox.

24 A Morning.

25 Q Did your routine after court change much last night?

1 A This section about closing the case?

2 Q Yes. At this point will you explain to the members of  
3 the jury as to the differences between a preliminary  
4 determination letter versus a closing letter.

5 A Okay. A preliminary determination letter is sent to  
6 the taxpayer when we have a position that we wish to present to  
7 them. We've gathered facts, and we're going to present our  
8 position to them.

9 They have an opportunity to respond or provide  
10 further documentation at this time, and then once they've  
11 either -- they can either just say close the case or they can  
12 choose not to respond and we will close the case, or they can  
13 send us further documentation that we'll continue to analyze.

14 At some point we get to the point where we're  
15 actually closing the case, and this is when the case is sent to  
16 our supervisor for review, and then the supervisor looks at it.  
17 They may send it back to us and say, hey, you need to look at  
18 this or you need to do something else.

19 Once it gets through the supervisor level, it will go  
20 up to Sacramento, and we've closed the case, but it's still not  
21 closed per se because even Sacramento may send it back to us  
22 and say you need further development on these issues. So we  
23 prepare a closing letter when we turn in the case to our  
24 supervisor, but that is not until the case is truly gone  
25 through review and been closed.



## Exhibit 5

State of California  
FRANCHISE TAX BOARD  
Disclosure Office  
P. O. Box 1468  
Sacramento, CA 95812-1468



September 30, 1996

Gilbert Hyatt  
4012 South Rainbow Blvd., Ste. 612  
Las Vegas, NV 89103

Re: Request for Audit File  
Gilbert Hyatt  
SSN: 069-30-9999  
Tax Year 1991

This letter is in response to the letter dated May 1, 1996 (copy enclosed), wherein your representative, Eugene G. Cowan of Riordan & McKinzie, requested a copy of the audit file for tax year 1991.

Enclosed is a copy of the requested file. In accordance with the Government Code, Civil Code, Revenue and Taxation Code and Attorney/Client privilege, the file documents have been edited to exclude information exempt from disclosure.

If I can be of further assistance in this matter, you may contract me at the below listed phone number.

*Julie Meyer*  
Julie Meyer  
Disclosure Specialist

Telephone: (916) 845-3769  
FAX : (916) 845-4849

Enc.

cc: Eugene G. Cowan

FTBDO-00001

RA014113

## Exhibit 4

COPY

DISTRICT COURT  
CLARK COUNTY, NEVADA  
\*\*\*\*\*

COPY  
FILED  
JUN 21 8 52 AM '09  
CLERK OF THE COURT

GILBERT P. HYATT,

Plaintiff,

vs.

CALIFORNIA STATE FRANCHISE  
TAX BOARD,

Defendant  
.....

CASE NO. 1382998

DEPT. NO. X

Transcript of  
Proceedings

BEFORE THE HONORABLE JESSIE WALSH, DISTRICT COURT JUDGE

**JURY TRIAL - DAY 61**

FRIDAY, JULY 18, 2008

APPEARANCES:

FOR THE PLAINTIFF:

DONALD J. KULA, ESQ.  
MICHAEL K. WALL, ESQ.  
JOHN STEFFEN, ESQ.

FOR THE DEFENDANT:

PAT LUNDVALL, ESQ.  
CARLA B. HIGGINBOTHAM, ESQ.

COURT RECORDER:

VICTORIA BOYD  
District Court

TRANSCRIPTION BY:

VERBATIM DIGITAL REPORTING, LLC  
Littleton, CO 80120  
(303) 798-0890

Proceedings recorded by audio-visual recording, transcript  
produced by transcription service.

1 maintained for the purpose of restraining the assessment or  
2 collection of taxes. And that's what this is about. That's  
3 the defense.

4 And if that's the defense, that prohibits the case  
5 from going forward. And this case has been through multiple  
6 stages and we don't -- and now, at this point in time, it  
7 would be inappropriate to ask the jury to say that this was a  
8 suit that should not have been maintained from the beginning.  
9 Not, this is a defense to the action, but this suit cannot be  
10 maintained. That's the defense.

11 THE COURT: I agree, Mr. Wall.

12 MR. KULA: Thank you, Your Honor.

13 THE COURT: But I think we made a good enough  
14 record of both counsel's objections for the record.

15 MR. KULA: Thank you, Your Honor.

16 MR. WALL: Thank you, Your Honor.

17 MS. HIGGINBOTHAM: That brings us to the statute of  
18 limitations defense which the Court granted Mr. Hyatt's Rule  
19 50(a) motion on.

20 MS. LUNDVALL: We would ask for reconsideration of  
21 that ruling, Your Honor, for the second time.

22 MR. WALL: This is the second request and we would  
23 ask that there not be reconsideration. There's nothing new  
24 before the Court.

25 THE COURT: I think we've addressed it enough.

1 MS. HIGGINBOTHAM: And if I could just make a  
2 record, Your Honor. We understand the Court's ruling. Of  
3 course we would just like our objections noted for the  
4 record.

5 THE COURT: Absolutely.

6 MS. HIGGINBOTHAM: Okay. Thank you. I think that  
7 takes us past 13 -- or 113 and 114. And that brings us into  
8 the privilege defenses. The instruction that's located on  
9 114 is a prefatory instruction that just simply defines the  
10 distinction between an absolute privilege and a conditional  
11 privilege for the jury. We've actually asserted several  
12 different privileges within the context of our instructions.  
13 And this particular instruction is simply an attempt to  
14 explain to the jury what the distinction is between absolute  
15 privilege which is a complete defense to claims versus a  
16 qualified privilege which is one that requires a showing of  
17 specific conduct of some sort.

18 This isn't intended to be an instruction that goes  
19 to substantive issues other than simply to explain the  
20 distinctions between absolute and qualified privileges. It's  
21 somewhat similar to the instruction that we have that talks  
22 about these are the claims of invasion of privacy and then  
23 you'll be instructed further on those particular claims.

24 MR. WALL: Your Honor, we believe it would be  
25 premature to even discuss this instruction until we have

## Exhibit 3

COPY

DISTRICT COURT  
CLARK COUNTY, NEVADA  
\*\*\*\*\*

COPY

GILBERT P. HYATT,  
Plaintiff,  
vs.

CALIFORNIA STATE FRANCHISE  
TAX BOARD,

Defendant  
.....

CASE NO. A-38999

DEPT. CLERK OF THE COURT X

Transcript of  
Proceedings

FILED

JUN 21 8 52 AM '08

BEFORE THE HONORABLE JESSIE WALSH, DISTRICT COURT JUDGE

JURY TRIAL - DAY 61

FRIDAY, JULY 18, 2008

APPEARANCES:

FOR THE PLAINTIFF: DONALD J. KULA, ESQ.  
MICHAEL K. WALL, ESQ.  
JOHN STEFFEN, ESQ.

FOR THE DEFENDANT: PAT LUNDVALL, ESQ.  
CARLA B. HIGGINBOTHAM, ESQ.

COURT RECORDER:

VICTORIA BOYD  
District Court

TRANSCRIPTION BY:

VERBATIM DIGITAL REPORTING, LLC  
Littleton, CO 80120  
(303) 798-0890

Proceedings recorded by audio-visual recording, transcript  
produced by transcription service.



Page 142

1 would withdraw.  
 2 THE COURT: Very well.  
 3 MS. LUNDVALL: 132, same principle, so we will  
 4 withdraw; 133 while I would love to have this instruction  
 5 concerning voter registration fraud, I think that we'll  
 6 withdraw.  
 7 THE COURT: All right.  
 8 MS. LUNDVALL: And that takes us, then, to -- we  
 9 now get into the series regarding damages, but there were a  
 10 couple of general instructions that we had proffered that  
 11 were not discussed in the context of our general  
 12 instructions. And so, and they're very brief and they are  
 13 based upon rulings that the Court has already made in this  
 14 case. And so therefore, I would first take the Court, then,  
 15 to 26.  
 16 MR. WALL: Your Honor, just for your information,  
 17 this is fine that we're going to go through this. There --  
 18 in the packet that was presented to us from Ms. Higginbotham,  
 19 they have included an instruction which was not approved by  
 20 this Court, but which we said we had to revisit and they did  
 21 not include an instruction which we had discussion on, but  
 22 there was no determination one way or the other. Those are  
 23 two related instructions and we'll need to address those at  
 24 some point.  
 25 MS. LUNDVALL: If we can start at -- I have no idea

Page 144

1 when we read it to the jury, it was in the form of, you will  
 2 hear evidence.  
 3 MS. HIGGINBOTHAM: Right.  
 4 THE COURT: Now, it's you have heard evidence.  
 5 MS. HIGGINBOTHAM: Yeah, we should make that  
 6 change. I think that's --  
 7 MS. LUNDVALL: That's an excellent point, Your  
 8 Honor.  
 9 MS. HIGGINBOTHAM: -- a good point.  
 10 MS. LUNDVALL: Next we would go to, there are four  
 11 instructions, 30, 31, 32 and 33. These are all pretrial  
 12 rulings that the Court made in advance of trial. And as a  
 13 matter of fact, on all of these, I had made reference to  
 14 these in my opening statement. The plaintiffs have taken the  
 15 position that I shouldn't have made comment on these, that  
 16 these were appropriate for legal instruction, then, by the  
 17 Court. So I would not imagine that there should be  
 18 objection, then, to 29 -- or excuse me, 30, 31, 32 and 33.  
 19 MR. WALL: We actually have objection to all of  
 20 those, Your Honor, beginning with number 30. The fact that  
 21 they may engage in investigation upon mere suspicion is not  
 22 relevant to this case. It's -- and it puts into the case a  
 23 standard which is a criminal standard or has nothing to do  
 24 with the tort actions in this case. And therefore, it's not  
 25 appropriate to be instructing the jury on that, that they can

Page 143

1 what he's talking about, but if we finish with this, then I'm  
 2 certain that we will get to what Mr. Wall is contending. At  
 3 page --  
 4 THE COURT: Well, we have about 45 minutes. So  
 5 whatever we can get done.  
 6 MS. LUNDVALL: That's why I'm going to talk very  
 7 fast.  
 8 THE COURT: Okay.  
 9 MS. LUNDVALL: At 26 --  
 10 THE COURT: What page am I going to? Twenty-six of  
 11 their --  
 12 MS. LUNDVALL: Twenty-six of ours.  
 13 THE COURT: 26. Okay.  
 14 MS. LUNDVALL: Twenty-six of ours is the discussion  
 15 concerning the fact that the jury is not going to be making  
 16 determinations regarding Mr. Hyatt's residency, his  
 17 penalties, et cetera. This is the exact same instruction the  
 18 Court has read to the jury at the introduction of the case  
 19 and has heard multiple times. And I don't believe there was  
 20 objection to this.  
 21 MR. WALL: I just had one question. Is it the same  
 22 language that has been read previously?  
 23 MS. LUNDVALL: Yes, it is.  
 24 MR. WALL: Well, then, we don't object.  
 25 THE COURT: The only difference, of course, is that

Page 145

1 have -- that they can do an investigation. We've never, ever  
 2 argued they can't do an investigation. The argument is that  
 3 they have to do a fair and honest, unbiased investigation.  
 4 And that's why we think that this injects into the case  
 5 issues that are not in the case and are covered by the  
 6 elements instructions.  
 7 MS. HIGGINBOTHAM: Your Honor, this particular  
 8 instruction has nothing to do with the criminal  
 9 investigation. This is the direct language with respect to  
 10 whether or not the FTB, as an administrative agency, can  
 11 begin an audit investigation. And the language from the  
 12 cases discusses the fact that an administrative agency, like  
 13 a Grand Jury, can conduct an investigation in order to -- on  
 14 the mere suspicion that the law has been violated, or to  
 15 ensure for itself that the law has not been violated. It is  
 16 not a criminal law standard.  
 17 And in fact, there is -- not only the cases that  
 18 we've cited for this, but also in the case between the  
 19 Franchise Tax Board and Mr. Hyatt in the subpoena litigation,  
 20 this same standard is referenced in that particular case.  
 21 And if the Court would like, I have a copy of that case for  
 22 the Court to review.  
 23 THE COURT: Well, my question is, is the language  
 24 contained in this instruction consistent with the case  
 25 because I'm not certain of that.

COPY

DISTRICT COURT  
CLARK COUNTY, NEVADA  
\*\*\*\*\*

COPY

GILBERT P. HYATT,

Plaintiff,

vs.

CALIFORNIA STATE FRANCHISE  
TAX BOARD,

Defendant.

CASE NO. 21-839-09

DEPT. NO. X

Transcript of  
Proceedings

FILED

BEFORE THE HONORABLE JESSIE WALSH, DISTRICT COURT JUDGE

JURY TRIAL - DAY 66

FRIDAY, JULY 25, 2008

APPEARANCES:

FOR THE PLAINTIFF:

PETER C. BERNHARD, ESQ.  
MARK HUTCHISON, ESQ.  
DONALD J. KULA, ESQ.

FOR THE DEFENDANT:

PAT LUNDVALL, ESQ.  
CARLA B. HIGGINBOTHAM, ESQ.  
JAMES BRADSHAW, ESQ.

COURT RECORDER:

VICTORIA BOYD  
District Court

TRANSCRIPTION BY:

VERBATIM DIGITAL REPORTING, LLC  
Littleton, CO 80120  
(303) 798-0890

Proceedings recorded by audio-visual recording, transcript  
produced by transcription service.

Page 54

1 THE COURT: Yes.

2 MR. KULA: -- that was said. Can I go to that?

3 THE COURT: Yes.

4 MR. KULA: Okay. And does the Court have the  
5 transcript? We're going to start of page 26 of -- excuse me,  
6 page 28 of yesterday's transcript.

7 THE COURT: Okay.

8 MR. KULA: And if you go right -- if you go right  
9 to it, line 15. Ms. Lundvall says, "She goes on to instruct  
10 you that, in fact, you are not permitted to determine or make  
11 any factual determination related to the appropriateness of  
12 the analysis," again it's a rough transcript, "conducted by  
13 FTB employees in reaching it's residency conclusion. So  
14 you're not -- so, not only are you not permitted to make  
15 determinations regarding Mr. Hyatt's residency, the  
16 assessments, the penalties, and the interest, you are not  
17 permitted to make any factual determinations regarding the  
18 appropriateness of the analysis conducted with the FTB."

19 Now, that's the very language that's not in the  
20 appropriate instruction. That was mistakenly included.

21 And that -- and then it goes on to page 29,  
22 "Similarly, in other words, how they weighed the evidence,  
23 how they selected evidence, how they gathered evidence, how  
24 they used evidence in their analysis. You are not permitted  
25 to make any determinations concerning the appropriateness of

Page 56

1 to be given to the jury as an instruction. I disagree as far  
2 as with that. But if that's what their representation is,  
3 then I want to take that representation.

4 And once again, I'm directing the Court then to the  
5 language that is at lines 12 through 16 then, of your  
6 instruction. Because it gives as far as what we believe.  
7 It's the sentence that begins, "Likewise." And if I -- I'd  
8 like to, as if the Court doesn't mind, take a look as far as  
9 at the document that Mr. Bernhard handed you to ensure that  
10 it is similar then -- or it is the same then that was read.

11 This is different. This is different. This is not  
12 the introductory statement that was -- that was given to --  
13 and what I'd like to do is to match it against then,  
14 whatever --

15 THE COURT: Is is this one?

16 MR. KULA: Your Honor --

17 MS. LUNDVALL: -- transcript.

18 MR. KULA: -- the easy thing to do is to look at  
19 the April 24th transcript that I believe we gave you a page  
20 of and that the Court read into the record -- that -- that's  
21 what's in the record --

22 MR. HUTCHISON: Right.

23 MR. KULA: -- as to what was read to the jury.

24 MR. HUTCHISON: Did we give her a copy of that?

25 MR. KULA: Yes, I believe we did.

Page 55

1 that. That's another portion, as far as this instruction,  
2 that goes to speak about additional factual determinations  
3 related to the propriety, the correctness of the tax, and the  
4 determination of the FTB to assess Mr. Hyatt penalties and/or  
5 interest on the tax assessments, or the correctness of the  
6 analysis conducted by the FTB in reaching those conclusions.

7 The next paragraph again, at the end, repeats that.  
8 "(Indiscernible) you are not permitted to make any factual  
9 determination regarding the correctness of the analysis  
10 conducted by the FTB."

11 And then, on the next several pages they go on and  
12 talk about Mr. Jumelet's testimony, and how basically, that  
13 has to be disregarded. That's the curative instruction that  
14 Mr. Hutchison's referring to.

15 MS. LUNDVALL: And Your Honor, from this  
16 perspective -- and this is the point then, that I'm trying to  
17 make. I'm now moving past the issue. And I'm not trying to  
18 -- I disagree as far as wholeheartedly with the issue as to  
19 the jury instruction being changed.

20 But the question now becomes, is whether or not  
21 that my argument is different than what the instruction that  
22 the Court is now going to give to the jury.

23 And now, I want to use, as far as their same  
24 argument back against them. They contend that there was  
25 never any dispute that this introductory statement was going

Page 57

1 MR. BERNHARD: April 21st.

2 MR. KULA: It's April 21st, I'm sorry.

3 THE COURT: April 21st, or July --

4 MR. KULA: April 21st. I'm sorry, Your Honor.

5 THE COURT: Okay.

6 MR. HUTCHISON: And this is -- this is the one  
7 where both Ms. Lundvall and I said, "Yeah, that's right.  
8 This is it."

9 MR. KULA: Right before opening statements.

10 MS. HIGGINBOTHAM: Well, the language that Ms.  
11 Lundvall's --

12 MR. KULA: It's starts on --

13 MS. HIGGINBOTHAM: -- referencing you to is on page  
14 40, page -- lines 1 through 7 of that transcript right here,  
15 at the top. The "likewise" language.

16 MR. KULA: What page did you say, Ms. Higginbotham?

17 MR. HUTCHISON: Page 40, lines 1 through 8, I  
18 believe. It starts with "likewise."

19 MR. KULA: Um-hum.

20 MS. HIGGINBOTHAM: And Your Honor, while there's a  
21 pause in this, I just feel that I need to make a  
22 representation to the Court. I at no time intentionally  
23 intended to misrepresent to plaintiff's counsel anything with  
24 respect to my belief, as to the instruction that was being  
25 given.

1 And I feel compelled to do that, in light of Mr.  
2 Wall's statements, and to be forthright to plaintiff's  
3 counsel. I never intentionally did anything to misrepresent  
4 what I believed to be the same instruction. And so with that  
5 I just feel compelled to make that statement.

6 THE COURT: Okay.

7 MR. HUTCHISON: And Your Honor, I --

8 MS. LUNDVALL: The --

9 MR. HUTCHISON: Your Honor, I --

10 MS. LUNDVALL: The language --

11 MR. HUTCHISON: -- fully accept that. That's not  
12 what we heard from Ms. Lundvall, though. That was what I  
13 expected to hear from the Franchise Tax Board at the  
14 beginning of this entire proceeding, but it's not what we  
15 heard. So I do accept that, and appreciate that.

16 MS. LUNDVALL: It is, as far that -- when the Court  
17 -- when I asked the Court whether or not that if you needed a  
18 representation to me that -- somehow, that we did something  
19 intentional; I said no.

20 MR. HUTCHISON: It's a big blame game, is what I'm  
21 talking about, Judge. The first things out of Ms. Lundvall's  
22 mouth were how my client and I were to blame for this.

23 MS. HIGGINBOTHAM: And back to page 40, Your Honor,  
24 at line 1, "likewise," I believe, Ms. Lundvall, is where you  
25 wanted to go.

1 MS. LUNDVALL: The language that -- and I don't --  
2 and it sounds like that the Court has as transcript from the  
3 -- from the actual trial in front of you.

4 THE COURT: Yes, I've been handed several  
5 transcripts, it looks like.

6 MS. LUNDVALL: All right. The language that I  
7 believe was read by the Court to the jury that we were  
8 relying upon, "Likewise, you are not permitted to make any  
9 determinations related to the propriety of the tax  
10 assessments issued by FTB against Mr. Hyatt."

11 And then it goes on, "Including, but not limited to  
12 the correctness or incorrectness of the taxes assessed, or  
13 the determinations of FTB to assess Mr. Hyatt penalties  
14 and/or interest on those assessments."

15 When you take a look, as far as at the language  
16 then, when you're talking about the propriety, or the  
17 determinations that were made, that's exactly as far as what  
18 our argument has always been, that they do not get to ask  
19 this jury to re-weigh the evidence.

20 And that's what Mr. Jumelet said that he had his  
21 heartburn with, is that they didn't weigh the evidence  
22 properly. That's what his testimony was, and that's what I  
23 highlighted. And now, that's what they want to strike from  
24 my argument. And that's where I'm now going to, that their  
25 request to the Court goes too far.

1 MR. HUTCHISON: I just want to make sure she's  
2 finished. Your Honor, first-off, it's a disingenuous  
3 argument because she didn't read to you the second paragraph.

4 Starting at line 8, "The residency and tax  
5 assessment determination and all factual and legal issues,"  
6 the assessment is not -- you can't substitute the word  
7 "analysis" or "evaluation" for determination. It says right  
8 there, "The residency and tax assessment determination."  
9 That has -- that has reference to the 8295 determination  
10 letter.

11 Now they want to come in and try to make some  
12 clever, spin-the-word lawyer argument that, "Oh, what that  
13 really meant was the same thing that we argued, which is the  
14 jury can't consider anything related to the appropriateness  
15 of the analysis conducted by the Franchise Tax Board  
16 employees in reaching its residency determinations and  
17 conclusions. Which even -- in the language that they are  
18 suggesting is inherently inconsistent.

19 So the determination, you can't substitute,  
20 "analysis, evaluation" for that. The next -- the next  
21 paragraph tells you what that is. It's the residency and tax  
22 assessment determinations. They made a determination. They  
23 were going to assess taxes, and he was a California resident  
24 for a period of time. You don't -- you don't -- rework that.

25 That's not -- that's not what they argued. Ms.

1 Lundvall didn't argue that. MS. Lundvall didn't get up and  
2 say, "You are not allowed" -- I mean, "You cannot evaluate  
3 the determination by the Franchise Tax Board in terms of it's  
4 residency, and it's tax assessment.

5 What she got up and argued was quoting from the  
6 language that never should have been there, "You -- Mr.  
7 Jumelet, and you, because the Judge has instructed you,  
8 cannot evaluate the appropriateness of the analysis conducted  
9 by the FTB employees in reaching its residency determinations  
10 and conclusions."

11 That's what she argued, which Ms. -- Mr. Kula has  
12 read to the repeatedly, and that's the part that has to be  
13 stricken. And I don't know that we have to have a page and  
14 line cite number if we're striking the argument. We can  
15 refer to that particular argument. That argument should  
16 never have been made with the correct jury instruction.

17 Now if she wants to get back up and say, "Well, I  
18 still get to make the same argument, even under what the  
19 Judge has said." Great, let her make that. I would love to  
20 have her make that. I would love to have her make that  
21 decision. Then I'm going to point out to the jury just, as I  
22 did to you, how disingenuous it is, and how it can't be  
23 sustained, and how she's trying to mislead the jury.

24 Well, I hope she does, if she thinks she can get up  
25 and do it. Because it is an absolute misrepresentation of

## Exhibit 2

ORIGINAL

FILED

FEB 7 9 11 AM '06

*Christy L. Bingham*  
CLERK

1 DCRR  
2 Mark A. Hutchison (4639)  
3 Hutchison & Steffen  
4 Peccole Professional Park  
5 10080 West Alta Drive, Suite 200  
6 Las Vegas, NV 89145  
7 (702) 385-2500  
8  
9 Peter C. Bernhard (734)  
10 Bullivant Houser Bailey PC  
11 3980 Howard Hughes Pkwy., Ste. 550  
12 Las Vegas, NV 89109  
13 Telephone: (702) 650-6565  
14 Attorneys for Plaintiff Gilbert P. Hyatt

DISTRICT COURT  
CLARK COUNTY, NEVADA

GILBERT P. HYATT,

Plaintiffs,

v.

FRANCHISE TAX BOARD OF THE STATE  
OF CALIFORNIA, and DOES 1-100 inclusive,

Defendants.

Case No.: A382999

Dept. No.: X

DISCOVERY COMMISSIONER'S REPORT  
AND RECOMMENDATIONS

Date of Hearing: December 9, 2005  
Time of Hearing: 10:00 a.m.

FILED UNDER SEAL BY ORDER OF THE  
DISCOVERY COMMISSIONER DATED  
FEBRUARY 22, 1999

3980 Howard Hughes Pkwy., Ste. 550  
Las Vegas, NV 89109  
Telephone: (702) 650-6565  
Facsimile: (702) 650-2095

3980 Howard Hughes Pkwy., Ste. 550  
Las Vegas, NV 89169  
Telephone: (702) 650-6565  
Facsimile: (702) 650-2995

1                                    **NATURE OF ACTION AND APPEARANCES**

2                    On December 9, 2005, the Discovery Commissioner held a dispute resolution  
3 conference. The Discovery Commission reports and recommends the following:

4                                    **DISCOVERY COMMISSIONER'S**

5                                    **REPORT AND RECOMMENDATIONS**

6                                    DISPUTE RESOLUTION CONFERENCE DATE: December 9, 2005.

7                                    **APPEARANCES:**

8  
9  
10           Plaintiff:     Mark Hutchison, Esq., of Hutchison & Steffen and Peter C. Bernhard,  
                                 Esq., of Bullivant Houser Bailey PC.  
11  
12           Defendant:   James W. Bradshaw, Esq., and Pat Lundvall, Esq., of McDonald Carano  
                                 Wilson LLP.

13                                    I.

14                                    **FINDINGS**

15                    The Discovery Commissioner listened to the discussions of counsel relative to  
16 deposition scheduling. Specifically, the parties agreed to meet-and-confer on Monday,  
17 December 12, 2005 to discussion deposition scheduling. The FTB clarified that Steve Illia will  
18 be its witness for all of the Rule 30(b)(6) subjects in Hyatt's notices served last August to which  
19 the FTB does not object. The FTB will serve its objections before the meet-and-confer  
20 scheduled for Monday, December 12, 2005. Mr. Illia's deposition will commence on December  
21 21, 2005. Penny Bache will not be the FTB's witness for any of the Rule 30(b)(6) subjects  
22 noticed by Hyatt. The issues to be addressed at the December 12, 2005 meet-and-confer include  
23 the following: scheduling Penny Bauche's deposition as a percipient witness; scheduling a  
24 second day for Steve Illia's deposition as a Rule 30(b)(6) witness; scheduling Terry Collins'  
25 deposition; and scheduling completion of Gil Hyatt's, Grace Jeng's, Eugene Cowan's, and Mike  
26 Kern's respective depositions. (December 9 2005 transcript, 3:3 - 10:22)  
27  
28

3980 Howard Hughes Pkwy., Ste. 550  
Las Vegas, NV 89169  
Telephone: (702) 630-6565  
Facsimile: (702) 630-2993

1 The Discovery Commissioner also heard further arguments of counsel relative to the  
2 FTB's renewed request for production of Mr. Hyatt's medical records.

3  
4 Having heard the discussions on deposition scheduling and the oral arguments relating to  
5 Mr. Hyatt's medical records, the Discovery Commissioner recommends as follows:

6  
7 II.

8 RECOMMENDATIONS

9 1. IT IS HEREBY recommended that the Court adopt the following Order:  
10 Regarding depositions, the parties are to report to the Discovery Commissioner at the next  
11 Discovery Status Check scheduled for January 13, 2005, at 10:00 a.m., what depositions remain  
12 and when they are going to take place. (December 9, 2005 hearing transcript, 20:17 - 21: 9)

13 2. Regarding the FTB's request for production of Hyatt's medical records, Hyatt must  
14 inform the FTB at the meet-and-confer scheduled for Monday, December 12, 2005 at 1:30 p.m.,  
15 whether or not Hyatt is claiming he sought, or will seek, medical treatment for the emotional  
16 distress he claims that was caused by the FTB. (December 9, 2005 hearing transcript, 12:24 -  
17 14:2; 16:11-12)

18  
19 (a) If Hyatt answers "yes", that he did seek or will seek medical treatment for the  
20 emotional distress he claims that was caused by the FTB and will rely on that treatment to  
21 support his claim for emotional distress, Hyatt waives any right to privacy concerning his  
22 medical condition, must produce his medical records immediately, and the FTB may pursue an  
23 independent medical examination. (December 9, 2005 hearing transcript, 17:13-17; 18:16-25)

24 (b) If Hyatt answers "no", that he did not and will not seek any such medical  
25 treatment and will not be relying on his medical records or a medical professional to establish  
26 his claim for emotional distress, Hyatt's right to privacy in his medical records will be protected,  
27 and he need not produce his medical records to the FTB. (December 9, 2005 hearing transcript,  
28



3980 Howard Hughes Pkwy., Ste. 550  
Las Vegas, NV 89109  
Telephone: (702) 680-6563  
Facsimile: (702) 680-3995

1 17:13-17; 18:16-25) But at trial, Hyatt will not be allowed to offer any evidence of medical  
2 treatment for the alleged emotional distress. (December 9, 2005 hearing transcript, 14:10-18;  
3 16:20-23) Hyatt nonetheless will not be prevented from making a claim of emotional distress,  
4 of the garden variety nature, as many courts have referred to it, based on having some kind of  
5 stressful situation. But Hyatt will not be allowed to allege that his distress, however he may  
6 characterize it, was severe enough in any way that he needed to seek any kind of medical care.  
7 Any testimony by Hyatt to the contrary, prior to the designation given on December 12, 2005,  
8 will be stricken and cannot be used. (December 9, 2005 hearing transcript, 19:13-19).

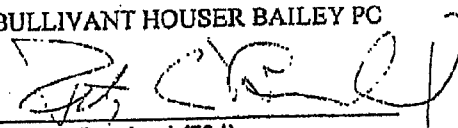
9 Dated this 20<sup>th</sup> day of January, 2006.

10  
11   
DISCOVERY COMMISSIONER

12 Submitted by:

13 HUTCHISON & STEFFEN  
14 Mark A. Hutchison (4639)  
15 10080 West Alta Drive, St. 200  
16 Las Vegas, Nevada 89145

17 BULLIVANT HOUSER BAILEY PC

18   
19 Peter C. Bernhard (734)  
20 3980 Howard Hughes Pkwy., Ste. 550  
21 Las Vegas, Nevada 89109  
22 Attorneys for Plaintiff Gil Hyatt  
23  
24  
25  
26  
27  
28

3980 Howard Hughes Pkwy., Ste. 350  
Las Vegas, NV 89109  
Telephone: (702) 650-5565  
Facsimile: (702) 650-3995

NOTICE

Pursuant to NRCP 16.1(d)(2), you are hereby notified you have five (5) days from the date you receive this document within which to file written objections.

[Pursuant to E.D.C.R. 2.34(f), an objection must be filed and served no more than five (5) days after receipt of the Commissioner's Report. The Commissioner's Report is deemed received when signed and dated by a party, his attorney or his attorney's employee, or three (3) days after mailing to a party or his attorney, or three (3) days after the clerk of the court deposits a copy of the Report in a folder of a party's lawyer in the Clerk's office.]

A copy of the foregoing Discovery Commissioner's Report was:

✓ Mailed to Plaintiff/Defendant on the 23<sup>rd</sup> day of Jun., 2006 at the following address:

James W. Bradshaw, Esq.  
McDonald Carano Wilson  
100 West Liberty Street, 10<sup>th</sup> Floor  
P.O. Box 2670  
Reno, Nevada 89505  
Attorney for Defendant

✓ Placed in the folder of Plaintiff/Defendant's counsel in the Clerk's office on the 23<sup>rd</sup> day of Jun., 2006.

SHIRLEY R. PARRAGUIRRE

By:

Mary Dagle  
Deputy Clerk

MARY DAGLE

Case Name: *Hyatt v Franchise Tax Board*  
Case Number: A382999

**ORDER**

The Court, having reviewed the above report and recommendations prepared by the  
Discovery Commissioner, and,

The parties having waived the right to object thereto,

No timely objections having been filed thereto,

Having received the objections thereto and the written arguments in support of  
said objections, and good cause appearing,

IT IS HEREBY ORDERED the Discovery Commissioner's Report and  
Recommendations are affirmed and adopted.

IT IS HEREBY ORDERED the Discovery Commissioner's Report and  
Recommendations are affirmed and adopted as modified in the  
following manner. (attached hereto)

IT IS HEREBY ORDERED that a hearing on the Discovery Commissioner's  
Report is set for \_\_\_\_\_, 2006.

Dated this 3 day of Feb, 2006.

Justin Nelson  
DISTRICT COURT JUDGE

3980 Howard Hughes Pkwy., Ste. 550  
Las Vegas, NV 89103  
Telephone: (702) 650-5565  
Facsimile: (702) 650-2995

**Exhibit 1**

**UNOFFICIAL TRANSCRIPT**

**JUNE 18, 2012**

**ORAL ARGUMENT BEFORE THE NEVADA SUPREME COURT**

**(Prepared from Video Record of Oral Argument)**

1 COURT CLERK: The Honorable Chief Justice Cherry presiding.

2 CHIEF JUSTICE CHERRY: Good morning everybody. Please be seated. This is Case No.  
3 53264 Franchise Tax Board vs. Hyatt. It says The State of California. Excuse me, Franchise  
4 Tax Board of The State of California vs. Hyatt. Ms. Lundvall for the appellant. Mr. Bernhard  
for the respondent. Ms. Lundvall.

5 PAT LUNDVALL: Thank you Your Honor. Pat Lundvall and Robert Isenberg on behalf of the  
6 State of California's the Franchise Tax Board. We intent to reserve 10 minutes for the issues  
7 that were identified in the Court's Order and we thank you for the opportunity for further  
argument on these issues.

8 I'm going to begin with the new issue that the Court added to the list and that is Issue Number  
9 6, the Statute of Limitations issue. I intend to, or the reason why that I am going to start with  
that issue is for a few reasons.

10 Number one, the evidence upon which that that issue is based is uncontroverted. Also, the  
11 parties agree upon the law that should be applied to that uncontroverted evidence and, in fact,  
12 this Court recently reaffirmed that law in the Wynn vs. Sunrise Hospital decision. The only real  
13 dispute between the parties concerns the application of the law to those uncontroverted facts and  
14 that is the DeNovo Review then by this Court. Fourth, and finally, as he did in the District  
Court in the race to this Court, Mr. Hyatt mistakes the contents of the uncontroverted evidence  
and so, it therefore it appears that that evidence then warrants some discussion.

15 So let's talk about...

16 JUSTICE HARDESTY: Before you get into your argument, Ms. Lundvall, on this issue, I  
17 wonder if you could clarify something if you have it handy, and if you don't then I would  
18 request through the Chief that you supplement your argument with a direct citation to the record  
19 as to where Franchise Tax Board sought dismissal of the Intentional Infliction of Emotional  
Distress claim based upon the Statute of Limitations. Our review of the record doesn't disclose  
that, or at least I have not been able to locate it, but if it exists, it should be identified for us.

20 PAT LUNDVALL: I don't have that citation off the top of my head, ...

21 JUSTICE HARDESTY: Right

22 PAT LUNDVALL: ...Your Honor but we would be happy to supplement.

23 JUSTICE HARDESTY: It's kind of a small record so I assumed you would be able to point to  
24 it in a hurry, but I would make that request of you, and obviously if [Respondent's] Counsel  
25 wants to point out it's missing, let us know. Thank you.

26 PAT LUNDVALL: Let me return then as far as that uncontroverted evidence and see what Mr.  
27 Hyatt knew and when he knew it. I think it bares mention because this Court has in many of its  
28 Statute of Limitations decisions that the same law firm that represented Mr. Hyatt during the  
audit also represented him in filing the Complaint in this action. And also, as underscored in  
the Wynn vs. Sunrise Hospital case, what we are looking for, is when Mr. Hyatt knew of facts

1 that would lead an ordinarily prudent person to investigate the matter further. That's what we  
2 are looking for.

3 In the spring of 1995, Mr. Hyatt was actually given physical copies of the Demands for  
4 Information that were sent to various third parties. Those Demands that were actually given to  
5 him contained some of the information that he claimed was confidential in the form of which  
6 was the predicate to his Non-Fraud claims. Also in the spring of 1995, Mr. Hyatt authored and  
7 sent a memo along with a sample demand and some additional materials that he had gathered  
8 from third parties to his attorneys and his accountants and he noted in his memo that, in fact, the  
9 FTB was sending these demands to individuals and entities that he had written checks to in  
10 1991 and 1992. Those checks included the Nevada DMV, his temple in Las Vegas, Centel  
11 Telephone in Nevada, Wagon Trails Apartments in Nevada, Nevada Power Company. So for  
12 Mr. Hyatt to suggest as he does in his brief that he was unaware that there were any demands  
13 being sent into Nevada or that he was unaware of the form of those demands is simply no true  
14 to the record facts. But he argues that he was unaware of the scope of the FTB's investigation.

15 So let's examine then what the record facts reveal. In August of 1995 a thirty-nine page letter  
16 that was sent by the FTB to Mr. Hyatt and his attorneys. This letter outlined the full scope, the  
17 full breadth, and the entirety of the FTB's investigation. It revealed nearly everyone and every  
18 entity sent a demand letter and the information that they had received back. It explained in  
19 great detail field visits the FTB auditors made both to Las Vegas as well to his neighborhood as  
20 well as to the businesses that he had frequented. They chronicled the conversations they had  
21 with individuals, everyone from his trash collector to his mailman to his apartment complex  
22 manager to a receptionist. The letter also revealed that every third party contact that he claimed  
23 could support then his Nevada residency had been contacted. Every medical facility had been  
24 contacted and that was revealed in the letter; attorneys, accountants, investment  
25 bankers...advisors, bankers, medical providers, the two Japanese companies, public agencies to  
26 whom his Las Vegas address had been disclosed. All of that was revealed in the August of  
27 1995 letter. In other words, by August of 1995, the entirety of his Non-Fraud claims had been  
28 revealed to Mr. Hyatt. And in response to that letter, his attorneys sent back a reply that said  
that they had feared that Mr. Hyatt's confidentiality had been breached after a review of that  
letter. That sounds like an admission of the finding that is required by Wynn vs. Sunrise  
Hospital that would lead an ordinarily prudent person to investigate further. All of these facts  
were uncontroverted. We believe that the District Court erred by not dismissing the Non-Fraud  
claims, or at the very minimum, she erred by not allowing the FTB to argue the Affirmative  
Defense to the jury. The end result after a DeNovo Review that either six of his claims should  
be dismissed, or at the very minimum, there should be remand on those six claims for resolution  
on the Statue of Limitations Defense.

Turning, then, to the first issue Resolution...

JUSTICE PICKERING: Could you, before you do that, comment on the Continuing Wrong  
Doctrine and its applicability to your Statute of Limitations argument?

PAT LUNDVALL: Mr. Hyatt doesn't really discuss or apply the Continuing Wrong Doctrine,  
but he kind of throws it out there as applicable. When, in fact, though if you take a look at other  
portions of his brief it appears he applies that Continuing Wrong Doctrine to his Fraud claim.  
And we don't contend that his Fraud claim was subject to the Statute of Limitations. In other  
words, he cites the delay in the resolution of his protest. He cites additional information that he

1 received regarding the analysis that was employed by the FTB as part of his fraud claim that he  
2 uncovered at a later point in time and it was ongoing. And so from that perspective that appears  
3 to go to his Fraud claim and not to his Non-Fraud claims.

4 JUSTICE PICKERING: Thank you.

5 PAT LUNDVALL: Turning to issue number one then and resolution of issue number one  
6 which deals with the intentional torts and the bad faith aspect actually serves a dual purpose. It  
7 resolves whether or not that Mr. Hyatt is entitled to the exception that he advocated to this Court  
8 during our first argument for Intentional Torts or Bad Faith. But it also resolves the issues as to  
9 whether or not that any of his Intentional Tort claims should have made it to the jury in the first  
10 place.

11 Let me start then with his Fraud claim. And, given the amount of time, I cannot raise each and  
12 every issue that we claimed was dispositive in our briefs. But what I would like to do is simply  
13 highlight the more obvious issues that demonstrate the legal defects that Mr. Hyatt claims for  
14 which dismissal via Summary Judgment should have occurred so that these claims never would  
15 have made it to trial.

16 Mr. Hyatt alleged two representations as his foundation for his Fraud claim. His first was an  
17 implied representation of treating him fairly and impartially. It is absurd to contend that any  
18 court would recognize a fairness and impartiality representation as sufficient foundation for a  
19 fraud claim. And it is notable that Mr. Hyatt cannot advance any argument or any case that in  
20 fact supports such a foundation. In fact, we brought to the Court's attention many, many cases  
21 that said it is insufficient. Why? Because it is too vague. Fairness, impartiality, are issues like  
22 beauty. They vary and they are dependent upon the eye of the beholder. So when you had an  
23 insufficiently vague representation it cannot serve then as the foundation for a fraud claim.

24 The second foundation...let me back up as far as to one issue then as well. He also never  
25 demonstrated any fraudulent intent that would have existed at the time that that purported  
26 representation was implied from the notice that was sent out. He would have had to prove and  
27 allege a policy and practice but he did neither and, in fact, his experts suggested to the contrary.

28 As to his Confidentiality representation. Once again, it is important to examine the record facts.  
The only representations of confidentiality that were proven by Mr. Hyatt concerned his  
business papers. His business licensing program for which that he feared industrial espionage.  
And there was no evidence that he supplied that any of that had been breached or had been  
violated or had been disclosed.

In the first argument before the Court, Mr. Hyatt contended that the disclosure, the letter that  
had been sent to Matsushita and Fujitsu was the proof of in fact that disclosure. But let's look at  
this in context. Mr. Hyatt had a contract with Matsushita. He was the one contracting party,  
Matsushita was the other contracting party. We asked him for when Matsushita paid him under  
that contract and he refused to give us that information. We sent a letter to Matsushita  
enclosing a one page of that contract, in other words, we were sending to Matsushita a  
document that was already in their own files. Same with Fujitsu. And therefore, insufficient  
foundation for a fraud claim based upon any Breach of Confidentiality.

1 Let me then turn to his Invasion of Privacy claims. And I am going to examine these as a group  
2 because there is a common denominator to all three of his Invasion of Privacy claims as well as  
3 his claim that he characterizes as Breach of Confidentiality in an actuality it's also the second  
prong then of his Fraud claim that has this as a common denominator.

4 Mr. Hyatt alleged that in fact information privacy was at issue under these Invasion of Privacy  
5 claims. And the information that was at issue was set forth in Jury Instruction Number 43. Jury  
6 Instruction Number 43 made it clear that the only information that was at issue under these  
7 claims was his name, his address, and his social security number. So, the first issue that Mr.  
8 Hyatt has to prove under each and every one of those is that somehow he had an objective  
9 expectation of privacy in that information. And that is a legal issue under the Peter vs.  
10 Baroncini case for the court to resolve in the first instance. And the Montano case makes it  
11 abundantly clear that when you have information that is found in the public record, they become  
12 public facts and public facts cannot serve as the foundation for an Invasion of Privacy claim.  
13 Montano from this court, Cox from the U.S. Supreme Court and the restatement second on tort  
14 is uniform on this particular point that if the information is found in the public record it is an  
15 insufficient foundation then to serve for an Invasion of Privacy claim. Mr. Hyatt's name, his  
16 social security number, and his Nevada address were public records. They were found within  
public records and they were public facts.

17 Not only as far as to litigation had his social security number been found. His voter registration  
18 form asked for his address as well as his social security number and at that point in time, during  
19 the 1993 to 1995 time frame voter registrations were public documents you could receive and  
20 obtain access to all of them. His business license that he applied for within Clark County, social  
21 security number, address found within there as well. He paid property taxes as far as on his  
22 home. These were all public records and therefore an insufficient foundation for any Invasion  
23 of Privacy claim.

24 Turing to the Abuse of Process claim. This is a claim that is designed to protect the integrity of  
25 the court. Therefore it requires some form of judicial process. There was no judicial process  
26 that was employed by the FTB in resolving the audit against Mr. Hyatt and he pointed to that.

27 Last, his Intentional Infliction of Emotional Distress claim. As a discovery sanction for failure  
28 to turn over his medical records, Mr. Hyatt was limited to Garden Variety Emotional Distress.  
The order was expressed as made by the Discovery Commissioner as well as the District Court  
that in fact his recovery was limited to Garden Variety Emotional Distress. In the cases are  
uniform in holding that Garden Variety Emotional Distress is not severe emotional distress to  
serve as an adequate predicate. Moreover, in Bartmittler as well as in Vetsinger this Court had  
indicated when there is no physical impact that a party is obligated to come forward with  
objective evidence of their severe emotional distress and without his medical records he didn't  
have that. And so therefore, each and every one of these claims were subject and should have  
been dismissed pretrial.

Let me turn then to the issue about Bad Faith. Before this court, Mr. Hyatt contends that he has  
not flip-flopped on this issue. So let's examine what the record reveals. When we settle jury  
instructions in this case, Mr. Hyatt argued, and I'm going to quote:

Bad Faith is not an element of any cause of action.



1            "We had the burden to prove the elements of our causes of action and Bad Faith  
2            is not one of those elements.

3 JUSTICE PARRAGUIRRE: There were actually two Bad Faith instructions given, weren't  
4 there?

5 PAT LUNDVALL: Yes there were. There were two definitional instructions. When we got to  
6 the issue though of who bore the burden of proof on Bad Faith, Mr. Hyatt took the position that  
7 it was the FTB that bore the burden of proving that in fact we had not acted in bad faith. And  
8 what the District Court did then is that she refused to give any jury instructions dealing with the  
9 burden of proof on bad faith. In other words, she agreed with each of his representations about  
10 how bad faith was not one of the essential elements for which that he bore the burden of proof.

11 Let me as far as discuss a little bit for his reversal on this particular point. All of his complaints,  
12 all of his pretrial activity, all of his advocacy before this court and the U.S. Supreme Court had  
13 allege extortion as the foundation then for his bad faith argument. When he got to trial,  
14 however, he didn't present any evidence of extortion to the jury. And two of his experts  
15 admitted that they found no extortion. So from an evidentiary standpoint he was in a bind. And  
16 he tried to get out of that bind then by removing bad faith as a proof or one of his burdens of  
17 proof in the essential elements of his claim. And the District Court agreed with him.

18 And so let's get to how he argued this issue then to the jury. His Complaint ultimately ended up  
19 being an exhibit at the time of trial. We went through and demonstrated to the jury how  
20 extortion was a common denominator to all seven of his Causes of Action and when you go  
21 through his complaint you will see that extortion is that common denominator. We pointed that  
22 out to the jury, pointed out to the jury also that he offered no proof of extortion and therefore  
23 failed in his burden of proof. In rebuttal, Mr. Hyatt's counsel took the position that my  
24 argument was misleading. That I wasn't the sheriff, that in fact it was Judge Walsh who told  
25 them what the law was and what they had to prove. And what they had to prove was the  
26 essential elements of their claims.

27 The verdict forms contained no finding of bad faith and contrary to the briefs there were  
28 express...it was expressed to this court that in fact those verdict forms did contain such a  
finding. And the jury was never instructed, as he also claims in his brief, that somehow that  
they were supposed to determine if the FTB had conducted the audits in bad faith.

Turning then to the next issue, and that is the Audit Conclusions. We submit that all of the  
claims should be dismissed by this court. However, if in fact that after going through either the  
Discretionary Function Immunity Analysis or going through the Statute Of Limitations Analysis  
or going through the Legal Sufficiency Analysis that this court determines that in fact some of  
the claims still warrant a remand then back to the District Court, the court is going to need to  
give instructions to the District Court based upon some of the errors that were conducted by the  
District Court some of which turned out to be outcome determinative.

Let me turn first to the issue about the Audit Conclusions. And I think in this regard that it  
bears mention of what the damages indicate. The jury did not explain what their damages were,  
but the evidence offers the only plausible explanation. And that is this: \$52,000,000 that was  
awarded for the Invasion of Privacy that was the amount of his tax liability to the State of  
California at the time. \$85,000,000 in Emotional Distress damages, how you get that is to add

1 the two fraud penalties from the '91 and the '92 audit determination and you measure those  
2 across 15 years as was argued the period of time that Mr. Hyatt was subjected then or had that  
3 hanging over his head. Neither sum have anything to do with his Common Law Claims but  
4 everything to do with in fact the audit conclusions. That Mr. Hyatt was putting on trial the audit  
5 conclusions was made abundantly clear during closing arguments, particularly during rebuttal.  
6 In response to my argument, in rebuttal, Mr. Hyatt's counsel stood up and said that I didn't  
7 argue the rightness or the correctness of the audit conclusions and therefore that was an  
8 admission by me that in fact those audit conclusions were wrong, that the audit conclusions  
9 were unfair.

10 If you also take a look then at the final jury instruction 24, the District Court informed the jury  
11 that it was ok to analyze and evaluate the correctness of those audit conclusions and it was ok  
12 for their expert to offer his opinion on those correctness. Prior to that instruction the judge only  
13 allowed evidence that only went to issues of the audit conclusions. She allowed an expert to  
14 testify on cooperation. Cooperation had nothing to do with the essential elements of his claims,  
15 but had everything to do with whether or not that the audit conclusions were right. She allowed  
16 an expert on how wealthy people live. Had nothing to do with the common law claims but it  
17 had everything to do then with the rightness of the audit conclusions.

18 And in closing, Mr. Hyatt argued that in fact that the jury in Nevada was permitted to be a  
19 check and balance upon the decisions that were being made by the executive branch and the  
20 legislative branch in the State of California.

21 Also, and I am going to run through this issue quickly, deals with the permissive imprints under  
22 Bass Davis. There was a negligence foliation finding that was made but in fact the District  
23 Court transmuted that finding into a mandatory presumption. In Bass Davis, as well as cases  
24 that were relied upon in Bass Davis it was made clear that when you have a permissive  
25 inference two things result. 1. Is that the jury is permitted to hear why it is that this evidence  
26 isn't in front of them to allow them then to decide whether or not they are going to apply the  
27 adverse inference or not. 2. Is that you can never ship the burden of proof then to the party that  
28 wasn't able on the essential elements. You can't shift that burden of proof, but that's what  
happened in both instances in this particular...at the time of trial.

Next there needs to be instruction concerning that the FTB is entitled to the statutory caps and  
that there should be no instructions on punitive damages. And the simplest and the quickest  
way to take a look at this is to analyze that California's immunity statutes are complete.  
Nevada's immunity statutes end up with a segment then that is able to be permitted and to be  
tried, but only up to the caps of \$75,000. And so under the law of this case, comedy requires  
that Nevada be treated no worse than a similar Nevada agency would be treated under similar  
circumstances.

JUSTICE DOUGLAS: Counsel, in California is there a specific statute 'cause looking at it  
California talks in terms of specific statutes of immunity?

PAT LUNDVALL: Yes there is, Your Honor. There are specific statutes that  
...unintelligible...to the FTB not only for compensatory claims but also for punitive damage  
claims. And last, I suppose, there is no common law opportunity for instructions on punitive  
damages against a government agency.

1 JUSTICE HARDESTY: Ms. Lundvall, before you turn to that, I would like to follow up on  
2 Justice Douglas' comment, in Nevada vs. Hall, California didn't afford Nevada any extended  
3 immunity, I wonder if we should take from that the conclusion that California wouldn't grant  
4 similar immunity protections and therefore under authorities that address that issue refuse to  
5 apply our immunity here.

6 PAT LUNDVALL: We hope that this court applies the same analysis as Nevada v. Hall  
7 because in Nevada v. Hall the circumstances were that Nevada had limitations but California  
8 did not on the amount of damages. In fact, under the California Tort Claims Act, is that  
9 immunity has been waived on certain portions of that but there is no limit similar to what  
10 Nevada has. Nevada v. Hall went through the exact analysis as did this court, as well as the  
11 U.S. Supreme Court...

12 JUSTICE HARDESTY: You don't treat the decision in that case as an indication by California  
13 that it would reject our immunities here?

14 PAT LUNDVALL: No, Your Honor, I don't. As a classic example, if in fact my contention is  
15 that that analysis as applied would forbid any jury instruction on punitive damages. It's this  
16 analysis that's the same, the outcome is different because of the differing state policies that were  
17 at issue but the analysis that let to that conclusion is the same in all of those decisions.

18 JUSTICE HARDESTY: Would the analysis similarly result in the imposition of a \$75,000 cap  
19 as opposed to the absence of any immunity if we disagreed with your position on the viability of  
20 the tort claims?

21 PAT LUNDVALL: If I understand the court's question, is that if in fact a case were brought  
22 from California what would be at issue then is taking a look at California's public policies as  
23 reflected in their own statutory scheme. As in Nevada v. Hall, that statutory scheme did not put  
24 any caps on the available claims for which immunity had been waived under its tort claims act.  
25 Whereas Nevada had. But when you run through the analysis that California is not supposed to  
26 make its public policies secondary then to another state no different than in this case Nevada  
27 didn't make its public policies secondary then to another state and so the analysis is identical  
28 because of the different public policies that are at issue in the states the outcome was different.

JUSTICE HARDESTY: Thank you.

CHIEF JUSTICE CHERRY: You have about 2 minutes and 45 seconds left. If you want to  
reserve some time, just let me know.

PAT LUNDVALL: I will reserve my time for rebuttal, thank you.

CHIEF JUSTICE CHERRY: Bernhard

UNKNOWN VOICE 1: Who's the respondent?

UNKNOWN VOICE 2: Mr. Hyatt

1 PETER BERNHARD: Mr. Chief Justice and Members of the Court, my name is Peter Bernhard  
2 of the law firm Kaempfer Crowell appearing this morning on behalf of Respondent Gil Hyatt,  
may it please the Court.

3 The court has asked us to address whether Mr. Hyatt adequately demonstrated and presented  
4 bad faith evidence. Unintelligible...in question was the jury instructed or did it make findings  
5 of bad faith. And the answer clearly, based on the record, is yes. Jury instruction 25 on bad  
6 faith reflects what came up at trial. Both sides tried this case based on whether the FTB  
committed bad faith or whether it had acted in good faith...

7 JUSTICE PARRAGUIRRE: Weren't there contrary indications throughout that they weren't  
8 pursuing bad faith as part of the claim and that the instructions were simply definition?

9 PETER BERNHARD: The issue is: what was the bad faith evidence used for and it was not  
10 used as an element of a claim, it was used as evidence to prove intent which is the element of  
the claim. How do you prove that a state agency acted intentionally? One way is to show bad  
faith...

11 JUSTICE PICKERING: Is there a jury instruction that says that? I mean the jury is given  
12 definitional instructions as to what bad faith is or isn't we have no jury finding on bad faith and  
I'm not sure where the jury was told by the court it should use the concept of bad faith.

13 PETER BERNHARD: Well I think, at least in part, that goes to the argument when the  
14 instructions were settled and that is: the Court said I'm not going to tell the jury what they can  
15 or can't do but I will let each side argue whether or not bad faith was presented and tie it to your  
16 elements from our perspective to show intent. And the FTB then argued for the converse, that  
the FTB acted in absolute good faith and conducted an ordinary audit.

17 JUSTICE HARDESTY: Well, that's an interesting ruling counsel, without an instruction that  
18 assigns the burden of proof to a party on that issue becomes rather difficult for the jury to arrive  
19 at that conclusion. And why is there no special verdict on bad faith if that's what everybody's  
going to try?

20 PETER BERNHARD: Well, I think the instruction itself made out what the test of bad faith  
21 was, and neither side quarreled with that test and that was evidence of a dishonest purpose or  
22 conscious wrongdoing. We argued to the Court, to the jury, that the evidence showed that and  
therefore you could find bad faith under that accepted definition and the jury could then use that  
to say the FTB had the intent to commit the intentional torts.

23 JUSTICE DOUGLAS: Mr. Bernhard, why was there not a special verdict form? Was a request  
24 for a special verdict form made as is?

25 PETER BERNHARD: Not by either side because the issue was not whether a special finding  
26 was required, the issue was whether the evidence of bad faith established the element of intent.  
27 And that's just like any other evidence. You don't ask a jury in each and every case, every time  
there is a disputed fact, to reach a special verdict.

1 JUSTICE HARDESTY: But why would the Franchise Tax Board ask for a special verdict form  
2 on bad faith when you have indicated or trial counsel has indicated that you're not pursuing a  
claim for bad faith.

3 PETER BERNHARD: The difference again, Justice Hardesty, is that it's not a claim for bad  
4 faith. There is no instruction on a bad faith tort. The instruction is that in order to prove intent,  
5 we argued to the jury, as permitted by the court properly, that Mr. Hyatt could show bad faith of  
6 the FTB in the conduct of the investigation. And that is an adequate and perfectly appropriate  
conclusion for the jury, well within its province.

7 JUSTICE DOUGLAS: But as we sit here, you say it's not an element, then why do we need it?

8 PETER BERNHARD: How do you prove intent? Evidence, admissible evidence.

9 JUSTICE DOUGLAS: Well let's go back. Why do we even need it if you are saying it's not  
10 an element, it's not a part of what you're doing?

11 PETER BERNHARD: It is part of what we're doing, it's part of our...

12 JUSTICE DOUGLAS: If it is part of what you're doing, why don't we have a special verdict  
13 form? I guess it's kind of circular but that's what...

14 PETER BERNHARD: Because the special verdict does not have to decide or resolve each and  
every factual instance or dispute.

15 JUSTICE GIBBONS: Neither side requested special interrogatories or special verdicts so it's  
16 kind of a done deal as far as the appeal is concerned, so the question is, is that your only  
argument on bad faith was that it was one of the component to establish intent. Is that correct?

17 PETER BERNHARD: It was one of, and one of the major series of evidence, which I can go  
18 through to show that the intent was there not to conduct an ordinary audit. That was the key  
19 issue that the jury understood very well and had to have decided that the FTB did not conduct  
20 an ordinary audit. The FTB had to have conducted a bad faith audit in order for the jury to  
21 reach the verdict it did. If the jury felt the FTB had acted in good faith, there would not have  
22 been any intent to support any of the intentional torts. And I think that was very clear from the  
instruction. And that was very appropriate in that we did establish there was a dishonest  
23 purpose, conscious wrongdoing, and the jury reached that verdict by having to get to that point  
and decide the bad faith issues. And they could have decided it either way. But it is impressed  
24 within their verdicts that they did find that here. And the irony, with respect to this bad faith  
issue, the FTB, during the audit, was expressing greater and greater concern and doubt about  
25 whether it even had a residency case. And as it was expressing these doubts, what did they do?  
They ratcheted up the stakes and called Mr. Hyatt a fraud. You would think if these reviewers  
26 decided that there were doubts about the case they would say "Oh, let's go back and make sure  
we have a tax case first." But no, they used penalties as bargaining chips. Let's add a fraud  
penalty here, 75% of the tax and see if this guy will pay us some money.

27 The fraud penalty is reserved, as the evidence showed, only for the very clearest of cases. The  
28 evidence showed all of the different things that the FTB was concerned about. First from the  
obsessions of the auditor, we talked about those last time. Where Ms. Cox created this fiction

1 about Mr. Hyatt, that he had to live in a gated community, her anti-Semitic remarks, gloating  
2 with the estranged family members that they got him, investigating his garbage, looking at mail,  
lying, fear of kidnapping, these are all things that this auditor became obsessed with.

3 And then you had Ms. Jovanovich and her crusade to establish fraud penalties at this time in  
4 every residence case. You had administrators motivated by assessments, not supportable  
5 assessments, there budget was based on what they assessed. So the higher the assessment they  
6 didn't care how it turned out. They weren't concerned whether it was right or wrong. They  
weren't concerned whether they were abusing this individual.

7 Ms. Jovanovich had written Ms. Cox's fraud penalty. Ms. Cox consulted with her from day  
8 one. Mr. Shea consulted with her from day one. She was the lawyer advising them and who  
9 does the FTB choose to appoint as the first protest hearing officer? Anna Jovanovich. Is that  
10 conscious wrongdoing? Yes. They appointed a person who knew this case from the beginning  
11 and who had actually advised Ms. Cox and wrote her fraud penalty...portions of it. There was  
an audit reviewer who said "let's make the case stronger. You've written up a good report, Ms.  
Cox, but let's make it stronger in favor of the FTB." He didn't know anything about the facts.  
All he wanted to do was have a sustainable penalty that could be used to try to extort money  
from a man they either knew didn't owe it, or had grave doubts that he owed it.

12 They added \$24,000,000 for 1992. That money was received after the date the FTB said he  
13 moved to Nevada. Then they added the 75% penalty on top of that. This was like the perfect  
14 storm. Where the person's directly responsible for this audit and investigation and those who  
15 were supposed to be independent evaluators, and this very impartial thing was not just some  
16 platitude, Mr. Shea testified at trial, that yes, he meant that, he believed that, that the FTB had  
an obligation to be fair and impartial and not to reach judgments based on whether they are  
meeting their numbers for a specific fiscal year. Is that a dishonest purpose? Is that conscious  
wrongdoing?

17 The FTB doesn't quarrel that a dishonest purpose or conscious wrongdoing is an appropriate  
18 test of bad faith. Instead they argue simply, well the jury should have believed us. The jury  
19 should have found that we acted in good faith that we conducted an ordinary audit, and that Mr.  
20 Hyatt simply is wrong. But that's not the providence of this court to decide whether the FTB  
21 presented a case that should have been believed by the jury. The jury heard this evidence after  
four, four and a half months and this court should not say 'had we been in the jury box we  
would have reached a different conclusion'.

22 This leads into the points that the court has asked us to address concerning the caps on  
23 compensatory damages, the prohibitions against punitive damages as a matter of comedy. As  
24 we discussed last time before this court, comedy comes into play if, and only if, it serves  
25 Nevada's public policy. It's a completely voluntary doctrine, and has to give due regard the  
rights of Nevada's citizens. And as this court said in its 2002 decision, in this case, this court  
26 has to consider whether granting comedy would contravene Nevada's policies or interest. And  
as I argued last time, the Nevada policy to protect its citizens is imbedded in our constitution.  
27 In 2002, this court said as to intentional torts we don't think state policy allows us to grant  
comedy to California and follow its law on complete immunity.

28 So we went to trial on the intentional torts. This Court drew the line on comedy at the  
inadvertent or negligent acts since even those inadvertent acts...even negligence can cause

1 harm. But this court at that time said since these by hypothesis are truly unintended they are  
2 negligent, they are not deliberate. We will grant comedy in those instances in the State of  
3 California. Damage caps, punitive damages were not at issue then we were still discussing  
4 whether or not immunity would be granted. So neither this court nor the Supreme Court had  
5 occasion to look at whether or not Nevada's public policy would be furthered by granting  
6 comedy on the issue of statutory caps on damages. That's here before this court for the first  
7 time. So what the FTB is asking is that you impose a \$75,000 cap on damages as a voluntary  
8 act of comedy for the most deliberate and despicable behaviors that the jury found that we had  
9 proven in this case. And I respectfully submit that is not compatible with Nevada's interests.

10 This court recognized in 2002 that intentional sister state misconduct is not as deserving of the  
11 respect that comedy embodies than negligence or inadvertent or unintended acts of a sister state  
12 actor. So denying full recourse to Nevada citizens who are intentionally harmed would simply  
13 strike the wrong balance. Should this court grant comedy to favor intentional, deliberate,  
14 despicable behavior of an out of state agency and by granting deference, or should this court  
15 protect its citizens as it's bound to do. Adopting the policy of limited compensation would  
16 leave Nevada with no effective way to deal with this intentional misconduct of officials of a  
17 sister state.

18 If a Nevada agent were to say "I want to go out and get this guy" for whatever reason, maybe I  
19 will be promoted, maybe my budget will be increased. He has to think, before he does anything  
20 wrong, "I could get fired if I go after this guy." It's a pre-wrongdoing deterrent that a Nevada  
21 agency can't take action to protect its citizens by not letting agent get out of hand and the right  
22 for Mr. Hyatt to petition the government for redress, to be able to go to the government and say  
23 "your Nevada actor is out of line here". That's a very important right and, again, that's  
24 imbedded in the Constitution, to go to the government and you can try to minimize, well maybe  
25 the legislature would come in and change the law but the point is these are important rights that  
26 Nevada citizens have to protect themselves against rouge conduct by Nevada actors.

27 Now what about the California actor? He says "hey, I can go after this guy. I don't have to  
28 worry. California wants to get this guy. They are trying to prevent California people from  
moving to Nevada. They want to make sure that we tax them when they try to leave the state  
whether they owe it or not. So I might even get a promotion if I get this guy. I'm not going to  
get fired by the State of California. Nevada can't fire me, they have no jurisdiction, they're not  
my employer. And Nevada would protect me and my agency with a statutory cap of \$75,000.  
It becomes the cost of doing business. So, why not? There is no pre-wrong doing deterrent."

JUSTICE DOUGLAS: Mr. Bernhard, as you are going into this, and as I am listening to this  
Council talked in terms of Nevada vs. Hall. What is your take on Nevada vs. Hall?

PETER BERNHARD: Well clearly, Nevada vs. Hall is the case that stands for that proposition  
that California did not extend comedy to Nevada.

JUSTICE DOUGLAS: I understand that, but analysis of it, not just the other hyperboil but the  
analysis...

PETER BERNHARD: No, that's the result ...

JUSTICE DOUGLAS: as today...

1 PETER BERNHARD: That's the result of that case.

2

3 JUSTICE DOUGLAS: I understand that but she said if she will apply today would be different.  
Give us your take.

4

5 PETER BERNHARD: I'm sorry; I don't think she said if it were tested today the result would  
be different. I think the point of Nevada v. Hall is that first as to sovereign immunity California  
6 does not have the aspects of sovereignty when it comes to the State of Nevada, just as Nevada  
was not given the elements of sovereignty when it was in California, treated just like the other  
7 tort visor.

8 JUSTICE DOUGLAS: She seemed to imply that if we took the facts, weeded them as of today,  
and I understand what you are saying in principal, but just looking at it so I am asking for that  
9 analysis.

10 PETER BERNHARD: The Nevada v. Hall results and the Nevada v. Hall analysis means that  
this court is not bound by any constitutional premise or provision to give immunity or to  
11 recognize caps on damages. That Nevada makes that decision solely as a matter of comedy.  
And California did not grant comedy in that case because they wanted the unlimited damages  
12 that California law provided. In this case they are saying well now we do want Nevada to grant  
comedy, which I think it inconsistent, I think it's an appropriate fact in analyzing comedy to  
13 say, would California or has California granted comedy to Nevada in similar circumstances?  
The answer is no.

14

15 JUSTICE DOUGLAS: Is it a request to look at a case-by-case analysis? Looking at what is  
going on partially what you are arguing today?

16

17 PETER BERNHARD: Absolutely. It's a policy analysis on what is the policy of Nevada and is  
it consistent with that policy for the court to grant comedy voluntarily to the State of California  
18 and I submit no on the statutory caps just as on intentional tort immunity. We argued against  
comedy on (unintelligible), but the court said "no, we think because it was inadvertent we will  
19 grant comedy." But I think the court probably drew the line at intentional acts and under those  
same concepts, because those acts are intentional, the cap should not be applied to limit  
20 damages.

21

22 And Mr. Hyatt testimony was compelling about those damages at a minimum the damage he  
has suffered should be the rule. Compensatory damages should compensate the Nevadan for  
23 the wrongdoing intentional acts of the out of state actor. We have seen how serious the  
professional humiliation can be, we are all aware of the HOA cases, I mean some people have  
24 even committed suicide over professional humiliation...

25 JUSTICE DOUGLAS: Counsel, that...I'm not sure that quite fits because the ones who did that  
were the alleged wrongdoers so...

26

27 PETER BERNHARD: well and that's what...

28 JUSTICE DOUGLAS: ...that fits in this case.



1 PETER BERNHARD: But that's why Mr. Hyatt was so...the distress was so great for him.  
2 His professional standing was affected with letters to these professional licensing agencies and  
3 the patent business to the licensees in Japan. And we were precluded from bringing in  
4 evidence, of course that's our cross-appeal, I know we're not to address that today, but there  
could have been hundreds of millions more in damages if we were allowed to present some  
substantial evidence.

5 JUSTICE DOUGLAS: Please don't go there because there is a lot of information there that I  
6 don't think we want to get into today.

7 PETER BERNHARD: Alright, well what we have though is intentional behaviors by the FTB,  
8 deliberately taken over a long period of time, they were not inadvertent, they were deliberate.  
9 There is no other way to protect Nevada citizens. For eleven years the FTB had the power to  
10 issue its final decision in the protest and allow Mr. Hyatt to have redress before a third party  
11 independent body, the Board of Equalization. The FTB kept saying "Oh, we need more  
12 information." But they have the power to say "You didn't give us enough information we are  
going to rule against you." But they held that back until the eve of trial. Is that conscious  
wrongdoing? Is there a dishonest purpose behind that? Keeping Mr. Hyatt, as we argued at  
trial, under the \$8,000 a day interest accrual? Every time he gets up in the morning he knows  
the FTB claims that he owes \$8,000 more based on their assessments.

13 JUSTICE GIBBONS: Mr. Bernhard, what about the damage calculation argument Ms.  
14 Lundvall made about calculation and varied type damages and how, at least her analysis, on  
how the jury came to that. What is your position as far as the damage calculation?

15 PETER BERNHARD: Well its pure speculation, for one thing, on what went on in that jury  
16 room. We don't have any idea about what went on in that room. We think that it was a  
17 conscientious jury, that looked at all of these issues, deliberated for a long time, listened  
18 attentively for four and a half months, and now to try to say that they suddenly were calculating  
19 damages based not on the court's instructions but based on some numbers the FTB came out  
20 and they sat there and I think the FTB, for frankly, was backed into that argument for this  
21 appeal. I don't even figure that out in my head if it's even true. I don't have any idea. But it's  
22 nothing that we or the FTB has any evidence whatsoever that this jury did something like that.  
We presented the damages, the evidence, and showed how egregious it was. And remember, in  
punitive damages, intentional infliction of emotional distress the extent of the bad conduct is a  
factor in the damages. And that's again, clearly established in the principal of law. The jury  
can consider the egregiousness of behavior...

23 JUSTICE PICKERING: Could you comment on Ms. Lundvall's point that emotional distress  
24 damages were restricted to so-called garden variety damages and \$85,000,000 by anyone's  
account is not garden variety?

25 PETER BERNHARD: Sure, and the context again needs to be clarified, there was no discovery  
26 sanction relating to this at all. Mr. Hyatt made a deliberate decision after Commissioner Bigger  
27 gave him the option to say "would you like to reveal your personal medical records to the FTB  
28 in this case? If you do, then you will be able to argue those damages. But if you don't, then  
you will not be able to come into court at trial and submit evidenced of medical harm. You  
have to make that choice." And Mr. Hyatt made that choice, and under the circumstances I  
understand his choice. "I don't want my medical records begin produced in discovery."

1 JUSTICE PICKERING: He received an additional benefit, did he not, in that their argument in  
2 that there were other factors contributing to his emotional distress, those were kept from the jury  
3 as well, correct?

4 PETER BERNHARD: Well, that's correct on the surface, but what the fact is that those  
5 incidents occurred prior to the emotional distress that Mr. Hyatt claimed in this case. There was  
6 an IRS audit going on in '94 and '95 that was resolved. Mr. Hyatt satisfied his obligations to  
7 the Federal government. It wasn't until October of 1996 when he got the audit file that he  
8 recognized what these people had done to him, and he saw based on the decision of this court,  
9 after the FTB tried to withhold their internal notes, that they had gone after him.

10 JUSTICE PICKERING: Wasn't there also evidence of a contemporaneous loss of his business,  
11 his patent or his license and that was excluded?

12 PETER BERNHARD: Correct, because the dates didn't match. The date of that was in 1995.

13 JUSTICE PICKERING: Ok, so that was not tied in your analysis to his choice of garden  
14 variety emotional distress damages?

15 PETER BERNHARD: No.

16 JUSTICE PICKERING: Ok.

17 PETER BERNHARD: That was a conscious decision by Mr. Hyatt knowing that he would  
18 probably have a stronger damage case if he did open up his medical records. But he made that  
19 choice. It was not a sanction. There was no prohibition against him doing it. If he had wanted  
20 to produce medical records, he could have done that.

21 JUSTICE HARDESTY: But in the context if the Statute of Limitations defense, Mr. Bernard, it  
22 is my understanding of your argument that it was when the audit report was provided in '95 that  
23 his emotional distress occurred.

24 PETER BERNHARD: No, no, the audit report did not. If you recall from the testimony, at trial  
25 the FTB argued that this was a preliminary determination letter and Ms. Lundvall took Ms. Cox  
26 through that in direct exam, but this is just preliminary. So at trial, when the FTB was trying to  
27 prove it acted in good faith, that was a preliminary determination letter asking Mr. Hyatt's  
28 council to submit alternative information. That was not any sort of inquiry notice that would  
put him on guard that they had violated his privacy or were causing him distress. In fact, he  
believed them when Ms. Cox said let's submit other material, and we did submit other material  
in August and September and October of 1995. And...

JUSTICE HARDESTY: Emotional distress occurred when the determination letter arrived?

PETER BERNHARD: No, no, when the audit file arrived. The preliminary determination  
letter in August 1995 the FTB argued that they had not reached a final decision. We knew later,  
after looking at the file and the notes that this court ordered to be produced, that that was not  
true, that that really was the final decision they were going to make. But they call it a  
preliminary determination letter.

1 Now for Statute of Limitations purposes they say "even though we told you at the time it's  
2 preliminary it can be changed and not final, that put us on some sort of notice to start the statute  
3 running." Immediately after we got the preliminary determination letter in August of '95, Mr.  
4 Cowan, the tax attorney, called Ms. Cox, and it's noted in her file, her progress notes and her  
5 written report August 14, 1995, "Mr. Cowan called and asked me to give him the Affidavits that  
6 were anonymous in that determination letter...preliminary letter." Ms. Cox puts in her own  
handwriting and then in her own written report "I told him we're not going to give him anything  
until we close the case." So even if you argue that somehow he should be suspicious of FTB's  
bad faith and invasion of privacy at that time, we did inquire.

7 And we asked for the audit file even into 1996. And remember, the key date here is going to be  
8 January 7<sup>th</sup> of 1996. He didn't know until after that date all the claims are timely. In April of  
9 1996 we asked for the audit file from Ms. Cox again and what did she say then? "Oh I don't  
10 have it anymore. You have to go through channels and go find it at the disclosure office." It  
11 took them six months after that inquiry, which Mr. Cowan again asked for in the first part of  
12 May of '96, took them six months to get that information to him. Mr. Hyatt read that in October  
13 of '96 and that's when he realized both the content of the information that had been  
14 disseminated, remember that preliminary determination letter was only a summary of the  
investigation, it did not include the back-up documents that were sent. He had no idea that the  
newspaper was given his social security number. He had no idea that this dating service in  
Orange County, not only was given his social security information, but also sent back how  
unsuccessful Mr. Hyatt was because he couldn't get a date at a dating service.

15 JUSTICE DOUGLAS: Mr. Bernhard, since you are kind of in to that, that was going to be my  
16 question anyway, they discussed invasion of privacy and seemed to say it wasn't there. You've  
17 begun to touch upon it why it was there. A couple of examples from your standpoint as why the  
argument was present this morning doesn't work.

18 PETER BERNHARD: Sure. First of all, Ms. Lundvall referred to in that point to instruction 43  
19 and argued to this court that the only thing the jury was told was that the name, address, and  
20 social security number were items subject to invasion of privacy. Here's what the instruction  
21 says:

22 Mr. Hyatt alleges that FTB violated his right to information privacy by sending  
23 request for information to third parties which included information about Hyatt,  
24 including his name and address and social security number.

25 Does that mean the jury was instructed they couldn't look at the disclosures of his professional  
26 information? No. It says "including name, address, and social security number." So that was a  
27 part of the privacy tort, but everything they disclosed to third parties was part of the invasion of  
28 privacy which resulted in the damage to him.

JUSTICE PICKERING: You have only a short period of time, but could you address Ms.  
Lundvall's argument on the Statute of Limitations to the effect that, not that she deserve  
summary judgment as a matter of law on the statute of limitations, but rather that the District  
Court erred in determining as a matter of law the statute of limitations was not an issue in not  
giving it to the jury.

1 PETER BERNHARD: Right and I think that Ms. Lundvall conceded that there was no dispute  
2 on the facts of what notice was given. And under the Wynn case from May 31<sup>st</sup>, the court again  
3 restated the law that if evidence irrefutable demonstrates the accrual date, if the facts are  
4 uncontested then it is a matter of law. And we didn't know on the summary judgment phase  
5 whether or not the FTB would have other evidence of Mr. Hyatt's knowledge. But they didn't  
6 present anymore at trial so we moved up the close of the FTB's case, as appropriate, but they  
7 had not proven an affirmative defense because those facts were irrefutably demonstrating that  
8 until he got the audit file, and again, it is important to know, as Justice Hardesty indicated, they  
9 never raised the emotional distress tort in a Motion for Summary Judgment. I'm anxious to see  
10 if Ms. Lundvall can find that in the record that she...

11 JUSTICE PICKERING: On the statute of limitations issue, you are saying it was never tested?

12 PETER BERNHARD: Correct. It was never tested on the Partial Summary Judgment Motion  
13 for Emotional Distress, so I submit that because those facts were irrefutable demonstrating the  
14 date was October of 1996, all of those claims fall within the two-year statute. Emotional  
15 Distress clearly does because they have never raised it as a defense, now it's trying...the FTB  
16 lumps it together as the non-fraud torts. Well, you've got to look at each one separately. When  
17 did he know enough to put him on notice of the invasion of privacy torts, the breach of  
18 confidentiality torts, the abuse of process tort, and finally, emotional distress, and he did not  
19 have any clue how they had been out to get him until he saw the back-up information in that  
20 file. That's when the door opened and he saw what they had done to him, that's when he saw  
21 the scope and content of the invasion of privacy, that's when the puzzle came together "Why  
22 aren't they listening to me? Well because they were trying to use me to meet numbers. They  
23 were trying to use me, even though they had doubts whether I owed the taxes or not, as a  
24 bargaining chip with fraud penalties." That's when the cause of action accrued and not before.  
25 So all of the claims are timely and all of the claims should be resolved in Mr. Hyatt's favor.

26 Thank you very much for your time and attention.

27 CHIEF JUSTICE CHERRY: Thank you Mr. Bernhard. Ms. Lundvall. Let's round her off to  
28 three minutes please.

PAT LUNDVALL: Thank you, Your Honor. There was a number of issues that were raised so  
I am going to try to go through these as quickly as possible to try to bring some clarity to them.

Number one, as to the bad faith contention that was advanced by Mr. Bernhard, their argument  
is contradictory. They took the position in the District Court, time and time again in the settling  
of jury instructions that they did not bear the burden of proof on bad faith. And they repeated  
that over and over again. But now before you they come and they say "well, we were able to  
argue bad faith as proof of the intent element for which we bore the burden of proof." Well,  
wait a minute. On one hand you are saying "I don't bear the burden of proof on bad faith" and  
that's repeated as far as their representations, but on the other hand they say "well but we can  
use it to prove intent and we know that we bear the burden of proof on that." That required a  
bridge between those by which the District Court did not give that bridge then to the jury then  
so they could understand what any instruction in that regard was. Moreover, when you look at  
their application of that, it was their position that they only had to prove essential elements of  
their claims, nothing more.

1 Next, Mr. Bernhard argues that, in fact, that there should be no caps on the compensatory  
2 damages. In the principal argument, they advanced here today, as well as what he advanced in  
3 his brief, was this. Is that Hyatt, here in Nevada, could have gone to a Nevada legislature and to  
4 say "Hey, there is someone in one of Nevada's administrative agencies that is doing bad things.  
5 Protect me."

6 Well he had that same right in California and the record reveals that he exercised that right  
7 repeatedly. He had huge political clout that was demonstrated, as far as to the jury, in the State  
8 of California and he exercised that political clout in the State of California. And so whatever, as  
9 far as the bad issue then, resolved, it does not resolve as to whether or not there should not be an  
10 application of comedy as per the law of the on this appeal. He also suggested that somehow  
11 that that there is a difference between caps on damages and the immunity issue that was  
12 previously decided. Well the caps on damages are part of our immunity statutes. The caps on  
13 damages are part of "we have waived immunity" up to a certain point. And so it's all part of the  
14 immunity analysis.

15 Next he contends that the sanction that was imposed against Mr. Hyatt for failing to turn over  
16 his medical records as proof of his severe emotional distress was limited. He claims before you,  
17 that in fact, the only thing that sanction required of him was that he couldn't use his medical  
18 records at the time of trial. To the contrary, Discovery Commissioner Bigger has echoed by the  
19 District Court said that he was limited to garden variety emotional distress. And garden variety  
20 emotional distress was not severe emotional distress under the litany of cases then that we  
21 brought to the court's attention.

22 In addition, and to answer the court's question then on the issue concerning the patent, Mr.  
23 Hyatt, it took him twenty years to get his patent. And it took him five years to lose it. And then  
24 for the next eight years after his loss he tried to regain it. This was something that went to his  
25 core and his identity. For which that he received hundreds of millions of dollars, and all of the  
26 loss of his patent and the litigation over the loss of his patent was contemporaneous with the  
27 FTB and pretrial Mr. Hyatt's attorneys took the position that this was an issue that should be  
28 presented, and it was only at trial that they flip-flopped again and convinced the then court that  
this evidence should be excluded. All of which could possibly have been found within medical  
records as to what the cause of his claimed emotional distress.

CHIEF JUSTICE CHERRY: Your time is up Ms. Lundvall.

PAT LUNDVALL: Thank you, Your Honor.

CHIEF JUSTICE CHERRY: Thank you Mr. Bernhard and Ms. Lundvall for your excellent  
arguments in this matter. This matter has been submitted. We will be in recess.

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

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

5                   Appellant/Cross Respondent,

6                   v.

7           GILBERT P. HYATT,

8                   Respondent/Cross Appellant

Case No. 53264 Electronically Filed  
Jun 26 2012 08:29 a.m.  
Tracie K. Lindeman  
Clerk of Supreme Court

9                   **RESPONDENT'S SUPPLEMENT PROVIDED AT THE REQUEST OF**  
10                   **THE COURT**  
11                   **(ORAL ARGUMENT: JUNE 18, 2012)**

12                   At the oral argument on June 18, 2012, the Court asked counsel for  
13                   Appellant to provide a supplement directly citing to the record as to "where  
14                   Franchise Tax Board sought *dismissal* of the intentional infliction of emotional  
15                   distress claim based on the statute of limitations."<sup>1</sup> Justice Hardesty also invited  
16                   Respondent's counsel to point out where emotional distress was "missing" from  
17                   FTB's attempts to dismiss that claim based upon the statute of limitations.<sup>2</sup> This  
18                   is Respondent's supplement as allowed by Justice Hardesty's comment.

19  
20                   Appellant admits in its Supplement that it did not seek dismissal of the  
21                   emotional distress claim, based on the statute of limitations. It has now  
22  
23  
24

25  
26                   <sup>1</sup> See, Exhibit "1" attached hereto at p. 1, lines 16-25, an unofficial transcript made  
27                   from the video record, beginning approximately one minute, fifty-seven seconds  
28                   into Appellant's argument and continuing until approximately three minutes into  
                 said argument (emphasis added).

<sup>2</sup> *Id.*

1 “corrected” the statement on page 96, lines 5-6 of its Opening Brief.<sup>3</sup> The FTB,  
2 rather than simply giving that response to Justice Hardesty’s request, then argues  
3 why it believes it preserved this issue for appeal. It asserts that “FTB can assure  
4 the court that the statute of limitations contention was fully preserved regarding  
5 Hyatt’s claim for intentional infliction of emotional distress.”<sup>4</sup> This assurance is  
6 not correct. The FTB asserts five instances that it claims preserved this issue.  
7  
8 Respondent respectfully submits that each of those five instances is missing a  
9 critical showing: that FTB met the requirements for preserving an issue for  
10 appeal.<sup>5</sup> In sum, the fact that the FTB may have identified the statute of  
11  
12  
13

---

14 <sup>3</sup> This is another example of misstatements of the record by FTB. *See, e.g.*, (i)  
15 using the term “sanctions” in Respondent’s June 18, 2012, opening and rebuttal  
16 argument, stating that Respondent was sanctioned by the discovery commissioner  
17 and the district court, when no sanction was ever imposed. *See*, Exhibit “1” at  
18 4:19-20 and at 17:10-12. Respondent simply chose not to reveal his medical  
19 records to the FTB, as permitted by the Discovery Commissioner and the trial  
20 court (*see*, Discovery Commissioner Report and Recommendations, Court Order,  
21 AA03544-AA03549, attached hereto as Exhibit “2”), and (ii) requiring the trial  
22 court to correct Jury Instruction 24, prohibiting determination of tax and residency  
23 issues but allowing consideration of audit analysis, after counsel assured the court  
24 and opposing counsel that the proffered instruction was the same as the instruction  
25 that had been read to the jury numerous times during trial. It was not. (*See*, trial  
26 transcripts for July 18, 2008 (AA12667: 143:14 through 144:9) and for July 25,  
27 2008 (AA13020-AA13021: 57:20 through 58:5), attached hereto as Exhibit “3”).

28 <sup>4</sup> Appellant’s Supplement Provided at the Request of the Court, filed June 22,  
2012, at 1:20-23.

<sup>5</sup> To preserve an objection to the failure of the trial court to give a particular jury  
instruction (here, as to FTB’s statute of limitations defense), NRCP 51 requires a  
party to object and distinctly state the grounds for the objection. A general  
objection is generally inadequate to preserve the issue for appeal, unless there is  
“plain error”. *Johnson v. Egtegar*, 112 Nev. 428, 434-435, 916 P.2d 271, 275  
(1996), and cases cited therein, where this Court concluded that since “the district  
court was adequately apprised of the issue of law involved and was given an  
opportunity to correct the error”[,], Rule 51’s requirements were met.

1 limitations issue in various contexts as a possible defense does not preserve the  
2 issue for appeal, particularly for the emotional distress claim.

3  
4 1. FTB asserts that raising the statute of limitations as an affirmative  
5 defense in its Answer preserved the issue as to the emotional distress claim. This  
6 is not correct. A trial court does not rule on defenses in an answer. It only rules  
7 on matters properly brought before it by motion or in settling jury instructions.<sup>6</sup>  
8 Therefore, the trial court could not have erred because it did not issue any ruling  
9 on the FTB's answer, and there is no trial court "ruling" that this Court can  
10 evaluate on appeal.  
11  
12

13 2. FTB asserts that submitting proposed jury instruction 112 prior to the  
14 beginning of trial preserved the issue for appeal. This is not correct. The NRCP  
15 51(c)(1) requirement is missing: i.e., a party must object on the record and  
16 "...stat[e] distinctly the matter objected to and the grounds of the objection." The  
17  
18  
19

---

20 <sup>6</sup> While an affirmative defense serves to put other parties on notice of an issue, an  
21 affirmative defense is not a motion calling for the district court to rule, which is  
22 required to preserve an issue for appeal. See *Williams v. Cottonwood Cove*  
23 *Development*, 96 Nev. 857, 860-61, 619 P.2d 1219, 1221 (1980) (even without  
24 pleading, defense was raised in motion, to which opponent had an opportunity to  
25 and did respond). The district court needs arguments and issues raised to it to be  
26 aware of a party's position, so as "to allow the trial court to rule intelligently and  
27 to give the opposing party the opportunity to respond to the objection." *Landmark*  
28 *Hotel & Casino v. Moore*, 104 Nev. 297, 299, 757 P.2d 361, 362 (1988). Indeed,  
even the recognized exception to the rule requiring a contemporaneous objection  
at trial still requires both that the issue is fully raised to the district court before  
trial and that the court made a definitive ruling. *Richmond v. State*, 118 Nev. 924,  
931-32, 59 P.3d 1249, 1254 (2002). That purpose is not fulfilled by a mere  
affirmative defense.



1 pretrial submission of a jury instruction is not sufficient to preserve an issue for  
2 appeal.<sup>7</sup>

3  
4 3. FTB asserts that stating a statute of limitations defense in its trial  
5 memorandum preserves the issue on appeal. This is not correct. As with a party's  
6 answer and affirmative defenses, a trial memorandum is not ruled upon by the trial  
7 court. The FTB claim, therefore, is missing any court ruling on its trial  
8 memorandum, it is missing Respondent's opportunity to address any such  
9 objection to non-existent ruling, and it is missing a distinct statement of objection  
10 and grounds relating to the emotional distress claim. Therefore, the FTB's trial  
11 memorandum's general reference that all of Respondent's non-fraud claims are  
12 time barred is not sufficient to preserve for appeal any statute of limitation bar as  
13 to the emotional distress claim.  
14  
15  
16  
17

---

18 <sup>7</sup> FTB does not cite to any part of the record during which jury instructions were  
19 settled, showing that (i) it advanced its proposed instruction 112; (ii) it explained  
20 why the emotional distress claim should be evaluated as to its timeliness by the  
21 jury; or (iii) it objected to the trial court's refusal to give that instruction, with a  
22 distinct statement that its objection went to the emotional distress claim on  
23 grounds distinctly stated as applicable to that claim, i.e., why it felt that  
24 Respondent should have discovered facts about the FTB's conduct that caused his  
25 emotional distress at any date prior to receipt of the audit file in October, 1996.  
26 The only allusion to FTB proposed instruction 112 is in the trial transcript for July  
27 18, 2008, where FTB counsel refers back to the arguments made on the Rule 50  
28 motion, and the trial court reaffirms its Rule 50 ruling and agrees that those  
objections are preserved (July 18 transcript 62:17-63:5, a copy of which is  
attached as Exhibit "4"). Those Rule 50 objections did not address the emotional  
distress claims (except as lumped together with the privacy, confidentiality and  
abuse of process claims, without any analysis of the statute of limitations on  
emotional distress) and did not explain why Respondent should have known facts  
that would put him on notice of his emotional distress claim. This is explained  
more fully in Point 4, below, dealing with the Rule 50 arguments.

1           4.     FTB asserts that its response to Appellant's Rule 50 motion and its  
2 immediate, oral motion for reconsideration preserves the issue for appeal.<sup>8</sup> This is  
3 not correct. The FTB asserted a general objection to all of the non-fraud torts, but  
4 did not make a specific emotional distress objection with a distinct statement of  
5 grounds applicable to that claim.<sup>9</sup> Therefore, the arguments on the Rule 50  
6 motion and the immediate motion for reconsideration are not sufficient to preserve  
7 the issue for appeal. Not only did the FTB fail to assert that facts showing  
8  
9

10           <sup>8</sup> FTB lumps the Rule 50 motion and its motion for reconsideration into the same  
11 paragraph (FTB Supplement at p. 3, lines 12-15). It made its oral motion for  
12 reconsideration immediately after the trial court ruled on the Rule 50 motion,  
13 without citing any new facts or law, and simply reiterated the same points it had  
14 made earlier. Respondent objected to this procedure, but the trial court patiently  
15 heard the argument again, then properly denied the motion for reconsideration  
(July 16, 2008, transcript, p. 10-41). Neither the arguments on the Rule 50 motion  
nor the arguments on the motion for reconsideration distinctly explained why the  
emotional distress claim was time barred.

16           <sup>9</sup> Respondent testified that he did not know, until he received the audit file in  
17 October, 1996, all that the FTB did, and that he became increasingly distressed  
18 from and after that time, as he learned, among other things, (i) the identity of the  
19 purported affiants; (ii) the number of requests and demands for information; (iii)  
20 the content of those requests and demands; (iv) the disclosure of the  
21 correspondence and contract information to his Japanese licensees; and (v)  
22 Jovanovich's involvement in the earliest stages of the audit and her editing of the  
23 preliminary determination letter. Respondent's distress was compounded as he  
24 discovered additional FTB abuses: publication of the Litigation Roster, including,  
25 e.g., the amount of tax claimed by FTB and the amount of penalties; the threat that  
26 if Respondent did not settle, the FTB would pursue him in great detail and his  
27 private matters would become public; the 11-year follow-up where those threats  
28 came to fruition; the Ford notes questioning whether FTB had a residency case, let  
alone a penalty case; the Embry memo, acknowledging how difficult the residency  
case was and therefore exploring a sourcing theory to tax Respondent; the  
HEAD'S UP memo asking whether Respondent's case was being held up to  
"make our numbers"; and the Smith memo, disclosing Jovanovich's position that  
most residency audits should assess a fraud penalty. This information relating to  
the emotional distress claim was not made known until the audit file was received  
and later, and much of it includes evidence of continuing wrongs intended to  
cause Respondent emotional distress well within the emotional distress statute of  
limitations.

1 Respondent's emotional distress were known in April or August, 1995, it  
2 continuously argued at trial that the facts disclosed at those times were simply  
3 preliminary determinations, inviting Respondent to provide additional  
4 information, and Respondent had no reason to believe the FTB was intending to  
5 inflict emotional distress, while he still believed the FTB was giving him a fair  
6 shake and was willing to consider additional information.<sup>10</sup>  
7  
8

9         5.     FTB asserts that its Motion for Judgment as a Matter of Law or  
10 alternatively, its Motion for New Trial, preserved this issue on the emotional  
11 distress claim. This is not correct. As with the Rule 50 motion, the FTB did not  
12 state why it believed that facts putting Respondent on notice of his emotional  
13 distress claim were known by him prior to his receiving the audit file in October,  
14 1996. Therefore, this FTB motion is missing any assertion that the emotional  
15 distress claim is time-barred, and the record is missing any showing that the  
16 district court was apprised of the issue of law involved on that claim and given the  
17 opportunity to correct any asserted error. Therefore, this motion is not sufficient  
18 to preserve the issue for appeal.  
19  
20  
21

22         In sum, in none of the five instances did the FTB set forth at all, let alone  
23 with sufficient distinction to preserve an objection for appeal, how the statute of  
24 limitations for Respondent's emotional distress claim could have commenced  
25

---

26  
27 <sup>10</sup> In fact, Respondent provided significant additional documentation to the FTB  
28 after receiving the preliminary determination letter. *See, e.g.*, letters and  
attachments from Eugene Cowan to Sheila Cox, ARA 00093-ARA00220 and  
ARA-02032-ARA02120.

1 earlier than October, 1996, when he finally received the FTB's audit file.<sup>11</sup> The  
2 FTB does not explain in any of those five instances the fact that Respondent,  
3 through his tax attorney, requested the audit file and information contained therein  
4 between August, 1995, and October, 1996, but the FTB refused to provide such  
5 information.<sup>12</sup> Without that information, Respondent simply lacked knowledge of  
6 the facts that caused him such distress, learning those during the significant time  
7 required to review the 2000+ pages of the audit file in the weeks and months after  
8 October, 1996, well within the statute of limitations.  
9  
10

11 The FTB cannot have it both ways: it cannot assert to the jury that the  
12 preliminary, tentative letters were part of a fair and impartial attempt to get all  
13 facts from Respondent so it could reach a correct final decision,<sup>13</sup> and then argue  
14 to this Court that those same letters should have alerted Respondent to the torts  
15 sufficient to start the limitations period.  
16  
17

18 Respondent respectfully submits that missing from the record on appeal is  
19 any showing that the FTB sought dismissal of the emotional distress claim, based  
20 upon the statute of limitations, and any showing that the FTB argued or preserved  
21

---

22 <sup>11</sup> See, September 30, 1996, letter to Eugene Cowan enclosing audit file  
23 (RA014113), a copy of which is attached hereto as Exhibit "5".

24 <sup>12</sup> See Cox progress report for August 14, 1995 (RA020014), her typewritten  
25 report (RA000072), and the first page of her August 31, 1995 letter to Cowan  
26 (AA16455). Ironically, her August 31, 1995, letter asks Mr. Hyatt to waive the  
27 FTB's statute of limitations "in order to provide the taxpayer with enough time to  
gather the necessary information", and Mr. Hyatt granted FTB's waiver request  
(AA16471-16472), copies of which are attached hereto as Exhibit "6".

28 <sup>13</sup> See Trial Transcript, June 5, 2008, examination of Sheila Cox by FTB counsel,  
13:2-13, a copy of which is attached hereto as Exhibit "7".

1 for appeal the statute of limitations defense on Respondent's emotional distress  
2 claim.

3 Dated this 25 day of June, 2012

4 KAEMPFER CROWELL RENSHAW  
5 GRONAUER & FIORENTINO

6 By: 

7 PETER C. BERNHARD (NSBN 734)  
8 8345 W. Sunset Road, Ste. 250  
9 Las Vegas, NV 89113  
10 Telephone (702) 792-7000

11 MARK A. HUTCHISON (NSBN 4639)  
12 MICHAEL K. WALL (NSBN 2098)  
13 Hutchison & Steffen  
14 10080 Alta Drive, Ste. 200  
15 Las Vegas, NV 89145  
16 Telephone No. (702) 385-2500

17 DONALD J. KULA (Calif. Bar. No.  
18 144342)  
19 PERKINS COIE  
20 1888 Century Park East, Ste. 1700  
21 Los Angeles, CA 90067-1721  
22 Telephone (310) 788-9900

23 DANIEL F. POLSENBERG (NSBN  
24 2376)  
25 Lewis & Roca  
26 3993 Howard Hughes Pkwy, Ste, 600  
27 Las Vegas, NV 89169

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

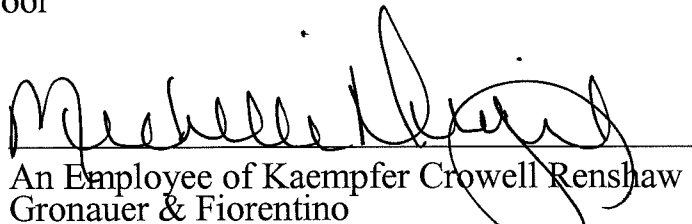
1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRAP 25, I hereby certify that I am an employee of Kaempfer  
3 Crowell Renshaw Gronauer & Fiorentino, and that I served true and correct copies  
4 of the foregoing **RESPONDENT'S SUPPLEMENT PROVIDED AT THE**  
5 **REQUEST OF THE COURT** on this 25<sup>th</sup> day of June, 2012 by depositing said  
6  
7 copies in the United States Mail, postage prepaid thereon, upon the following:

8 Patricia Lundvall, Esq.  
9 McDonald Carano Wilson LLP  
10 2300 West Sahara Avenue, Suite 1000  
11 Las Vegas, Nevada 89102

12 Robert L. Eisenberg  
13 Lemons, Grundy & Eisenberg  
14 6005 Plumb Street, Suite 300  
15 Reno, NV 89519

16 James A. Bradshaw, Esq.  
17 McDonald Carano Wilson LLP  
18 100 West Liberty Street, 10<sup>th</sup> Floor  
19 Reno, NV 89501

20  
21  
22  
23  
24  
25  
26  
27  
28  
  
An Employee of Kaempfer Crowell Renshaw  
Gronauer & Fiorentino