IN THE SUPREME COURT OF THE STATE OF NEVADA

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FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,

Appellant/Cross-Respondent,

vs.

GILBERT P. HYATT,

Respondent/Cross-Appellant.

_____/

No. 53264

APPELLANT'S PETITION FOR REHEARING

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PETITION FOR REHEARING

Pursuant to NRAP 40, appellant FTB hereby petitions for rehearing of portions of the court's opinion issued on September 18, 2014.

I

General grounds for rehearing

Pursuant to NRAP 40(c)(2) the grounds for rehearing are: (1) the court overlooked or misapprehended a material fact or a material question of law; or (2) the court overlooked, misapplied or failed to consider a statute, rule or decision.

FTB contends that the court's opinion overlooks parts of its own decision. For example, as found by this court, Hyatt did not have an objectively reasonable expectation of privacy in his name, address and social security number since he had made them public facts. Yet, at another place in the opinion this court found disclosure of that same information by FTB was outrageous or extreme giving rise to an IIED claim, and had been a breach of a promise to maintain that information as confidential upholding the fraud claim. Compare Op. 26 -27 with Op. 38 and 47.

Similarly, the court's opinion reaches the conclusion that the district court's erroneous evidentiary and jury instruction rulings were prejudicial for one element of Hyatt's claims, but harmless for other elements. This court, however, expressly acknowledged that "it is unknown how much weight the jury gave" to these erroneous rulings. Op. 58. By so doing, the court did not correctly apply the standard for prejudicial error: "might" the result have been different absent the district court's errors. Had FTB been allowed to present evidence that the court acknowledges was improperly excluded, and had the jury been properly instructed, the jury might have reached a different verdict on the IIED and fraud claims, both liability therefor and damages.

As set forth herein, because the opinion overlooks or misapprehends that (1) there are irreconcilable inconsistencies in the opinion; (2) there was no evidence to support essential elements of Hyatt's IIED and fraud claims; (3) the district court's evidentiary and jury instruction errors were prejudicial; and (4) Hyatt's IIED claim was time barred, rehearing is warranted.

II

Rehearing on IIED portions of opinion

A. No IIED as a matter of law

The court's opinion reversed the judgment against FTB as to damages for intentional infliction of emotional distress (IIED), but affirmed on liability. In affirming on liability, the court misapprehended or overlooked conclusions found in its own opinion, evidence in the record and FTB's arguments, as explained below. Rehearing should be granted regarding this court's determination on liability. The IIED claim should be dismissed, or at a minimum a retrial on both liability and damages is required.

1. Alleged extreme conduct by FTB

Certain findings in the court's opinion demonstrate that FTB did not engage in extreme conduct sufficient to give rise to liability for IIED. By affirming the jury verdict of liability for IIED, the court's opinion overlooked conclusions from its own opinion, critical evidence and arguments.

The opinion held: "FTB's contacts with third parties through letters, demands for information, or in person was not highly offensive to a reasonable person and did not falsely portray Hyatt as a 'tax cheat.' In contacting third parties, FTB was merely conducting its routine audit investigations." Op. 31-32 (emphasis added). Additionally, the opinion held Hyatt "lacked an objective expectation of privacy in the information" at issue, his name, address, and social security number since he had made the information "public facts." Op. 26-27.

Despite these holdings in one part of the opinion, another part affirmed the jury's liability determination on Hyatt's IIED claim using the same evidence but now against FTB. Op. 47. We respectfully contend that these different positions in the opinion cannot be reconciled.

a. Disclosure of information

The opinion stated that FTB disclosed personal information that it promised to keep confidential, i.e., name, address and social security number, which the court deemed evidence of extreme and severe conduct. Op. 47. Earlier in the opinion, however, the court specifically recognized that the information was already public. Op. 26-27. As the opinion correctly noted, "the record shows that Hyatt's name, address, and social security number had been publicly disclosed on several occasions, before FTB's disclosures occurred, in old court documents from his divorce proceedings and in a probate case." Op. 26-27. "Hyatt also disclosed the information himself when he made the information available in various business license applications completed by Hyatt." Op. 27. The court concluded, therefore, that Hyatt "lacked an objective expectation of privacy in the information" and therefore could not as a matter of law prevail on his tort claims for invasion of privacy. Op. 27.

Finding error on the false light claim, this court also held that "FTB's contacts with third parties through letters, demands for information, or in person was not highly offensive to a reasonable person and did not falsely portray Hyatt as a 'tax cheat.' In contacting third parties, FTB was merely conducting its routine audit investigations." Op. 31-32 (emphasis added). The court also held that Hyatt "did not demonstrate that the litigation roster contained any false information." Op. 31. The court concluded: "The record before us reveals that no evidence presented by Hyatt in the underlying suit supported the jury's conclusion that FTB portrayed Hyatt in a false light." Op. 32. For the same reasons, the disclosure of

this public information that did not either portray Hyatt in a false light or invade his privacy, it cannot be considered extreme and severe conduct.

b. Protest delay

The court held that FTB delayed resolution of Hyatt's protests for 11 years, which the court deemed to be evidence of extreme and severe conduct. Op. 47. This overlooks the fact that the district court erroneously precluded FTB from presenting evidence explaining numerous reasons for the delay. The district court did so as an attempt to prevent FTB from presenting evidence of Hyatt's residency and tax liability (28AA 6509-10), at the same time erroneously allowing Hyatt to challenge those same findings and instructing the jury that it could consider the appropriateness of the residency conclusions. Op. 48-53. Delay tactics by Hyatt's own lawyers and accountants were largely responsible for the delay. See detailed facts at AOB 20-21, 23-27. Yet the jury was never allowed to hear the entire story. See also, discussions and facts at AOB 46, 64-65, 66; ARB 21-26.

c. Alleged disparaging remarks

To support its conclusion for liability for IIED, the court pointed to evidence that an auditor who worked on the case made disparaging remarks about Hyatt and his religion. Op. 47. But this was testimony by only one witness, who had been fired by FTB for misconduct, who had a grudge against the auditor in question, who testified about an alleged isolated disparaging comment, and who later back-tracked on that testimony once she learned that Hyatt had taken it out of context. ARB 8-10. The alleged comment was vehemently denied by the auditor and by FTB's other witnesses, who testified that they never heard the auditor use such language, and such language would have been completely out of character for her. *Id.* The auditor alleged to have made the comment was but one of 37 FTB employees who were involved with the audit and protest. *Id.* The work of that auditor was reviewed at four separate levels. *Id.* Also, the alleged comment did

not come to light until long after Hyatt's lawsuit was filed, and Hyatt therefore could not have suffered any extreme emotional distress from the comment before he filed his lawsuit and asserted his IIED cause of action.[1] *Id.*

d. Environment at FTB

The court found extreme and severe conduct, claiming FTB fostered an environment in which the imposition of tax assessments was the objective of audits. Op. 47. But at an earlier point in the opinion the court concluded that "in conducting the audits, FTB was not required to act with Hyatt's interests in mind; rather it had a duty to proceed on behalf of the State of California's interests." Op. 35. Hyatt's audit became adversarial, because he and his lawyers and accountants made it adversarial. The auditors had dozens of red flags, from the very beginning, showing that Hyatt had not moved to Nevada when he claimed, and that he was guilty of tax fraud under California law. (See plethora of evidence discussed at AOB 26, 64, and ARB 11-16.) With a mass of evidence showing that Hyatt lied about the date he moved to Nevada—in order to avoid millions of dollars in California tax liability on his $350 million income from his patent—FTB

[1] FTB respectfully requests the court to modify the opinion, to delete the name of the auditor identified at page 38. During the litigation, Hyatt hired a consultant for the Nevada litigation, Candace Les, a former FTB employee who had been terminated. 33 AA 8234 (46); 34 AA 8257. Hyatt's consultant, Ms. Les, was the only witness who testified as to the disparaging comment allegedly made by the other auditor. Initially, Les claimed that the other auditor made the comment, but in subsequent testimony, Les backtracked on her allegations after she read some of Hyatt's briefs that made Les and her original testimony the centerpiece of those submissions. 34 AA 8256 (135-36). The other auditor vehemently denied making any such disparaging remarks (41 AA 10151 (128-29)), and her friends and co-workers testified that they never heard her make any such remarks. 46 AA 11390 (138); 11461 (78). The jury never made a factual finding as to the truth or accuracy of Les's testimony on this point. We respectfully contend that it is unfair for the other auditor's identity to be included in this court's published opinion in such a personal and negative context.

employees were fully justified in having a goal of collecting unpaid taxes.[2] Moreover, the court overlooked the fact that Hyatt's own experts testified that they found no evidence of extortion (the goal of FTB's audits as alleged by Hyatt) or fraud. AOB 19, 22.

The court's opinion recognized that IIED requires "extreme and outrageous conduct on the part of the defendant." Op. 44. The opinion also correctly held that much of the conduct about which Hyatt complained "was not highly offensive to a reasonable person." Op. 31 (emphasis added). FTB respectfully contends that, in affirming the jury's liability determination on IIED, the court misapprehended the record, and that Hyatt's evidence failed to establish extreme and outrageous conduct, as a matter of law. As such, the liability determinations on IIED must be reversed. Notably, the court relied upon the same determinations in upholding the fraud claim. Op. 47. For the same reasons that the IIED claim fails as a matter of law, as discussed *infra*, so too does the fraud claim.

2. The "garden variety" emotional distress limitation

As the court correctly recognized, another essential element of the IIED tort is the requirement of extreme or severe emotional distress suffered by the plaintiff.

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[2] Much of the evidence showing Hyatt's efforts to hide the true date of his move to Nevada (if he moved here at all) was learned by FTB during the protest stage, which, as described further below, involved further de novo investigation and gathering of evidence by the protest officer. Actually, this was evidence that was in addition to—and essentially confirmed—the volumes of other evidence FTB had already gathered in the earlier audit stage. The district court adopted Hyatt's characterization of this new additional evidence as "after acquired" evidence, and the district court precluded the jury from hearing such evidence. E.g., 28 AA 6509-10. Thus, the jury only heard a half-truth regarding evidence showing Hyatt's manipulation of the date of his move, and the jury heard only a half-truth regarding FTB's Herculean efforts to obtain accurate information during the protest proceedings, in the face of obstructive efforts by Hyatt's team of attorneys and accountants.

Op. 44. The opinion states that as a result of Hyatt's refusal to disclose medical records, he "was precluded at trial from presenting any medical evidence of severe emotional distress." Op. 44. This is not entirely correct. Rather, as the record shows, the discovery consequence imposed on Hyatt by the discovery commissioner and the district court was that Hyatt was prohibited from claiming anything more than "garden variety" emotional distress at trial.

Hyatt's medical records could have shown prior emotional distress, alternative sources of emotional distress, the absence of any complaints to his doctors, and other similar evidence establishing the lack of any severe or extreme emotional distress caused by FTB.[3] 15 AA 3507-08 (summarizing discovery commissioner's stated concerns regarding fact that Hyatt's medical records could contain information for the defense on the IIED claim). When Hyatt refused to disclose his medical records, the discovery commissioner gave Hyatt a choice: disclose your medical records, or if you do not, you will be limited to recovery of only "garden variety" emotional distress damages at trial. 15 AA 3536-47.

Hyatt did not object to the discovery commissioner's ruling, and the ruling became the order of the court. 15 AA 3549. Hyatt chose not to produce the records; thus, he was limited to proving "garden variety" emotional distress. With this significant limitation on Hyatt's damages, which was a consequence of his own choice not to disclose his medical records, FTB sought dismissal of the IIED claim, because Hyatt was barred from proving extreme or severe emotional distress. 15 AA 3504-63. The district court denied the motion. 45 AA 11207.

FTB's opening and reply briefs in this appeal established that the IIED claim failed as a matter of law, and that the district court should have dismissed the

[3] Hyatt's medical records likely also contained his California/Nevada home addresses, which he would have provided to medical providers during key time frames. This information might have helped determine the residency issue.

claim. Hyatt made a discovery choice not to disclose his medical records, precluding him from proving anything other than "garden variety" emotional distress. AOB 93-96; ARB 94-99. "Garden variety" emotional distress, by its name and its very nature, cannot possibly be considered "extreme or severe." See cases cited at AOB 94-95.

This court's opinion overlooked FTB's arguments regarding the "garden variety" limitation, and the impact of that limitation on Hyatt's ability to recover on an IIED cause of action. Rehearing should be granted on this issue. The IIED claim should be dismissed as a matter of law, based on Hyatt's choice not to disclose medical records, thereby depriving Hyatt from claiming he suffered severe and extreme emotional distress.

B. Harmless error analysis regarding IIED liability claim

The court's opinion identified numerous evidentiary and jury instruction errors committed by the district court. The court determined that the errors were prejudicial on the issue of damages on the IIED claim, but harmless on the question of liability. Op. 56-58. In finding harmless error on liability, the opinion overlooked or misapprehended controlling law, material facts in the record, and arguments in FTB's briefs. E.g. AOB 67, 99; ARB 77. The opinion also overlooks another part of the opinion which expressly acknowledged that "it is unknown how much weight the jury gave" to the erroneous rulings. Op. 58.

When a district court has committed error in a jury trial, the appellant is not required to prove that the jury definitely (or even most likely) would have reached a different result without the error. Rather, as the opinion in this case recognizes, prejudice is demonstrated where the record reflects that, but for the error, "a different result might have been reached." Op. 57 (emphasis added). This "might have" standard is a reflection of the need for confidence in jury verdicts, i.e., the

public's need for confidence that litigants will not be subjected to jury verdicts that are based upon incomplete or inaccurate evidence and wrong jury instructions.

This court has repeatedly used the "might have" standard for evaluating whether error at a jury trial necessitates a new trial. See e.g., *Nevada Power Co. v. 3 Kids, L.L.C.*, 129 Nev. __, __, 302 P.3d 1155, 1157 (2013); *Wyeth v. Rowatt*, 126 Nev. __, __, 244 P.3d 765, 778 (2010); *Cook v. Sunrise Hosp. & Med. Ctr., L.L.C.*, 124 Nev. 997, 1006, 194 P.3d 1214, 1219 (2008) (cited at Op. 57 in the present case). Alternatively, this court has occasionally held that a new trial is required where, but for the error, the jury "may have" reached a different result. See e.g., *Posas v. Horton*, 126 Nev. __, __, 228 P.3d 457, 459 (2010).

Initially, there can be no serious dispute over the fact that the district court's multiple cumulative errors permeated the trial in this case. The district court allowed the jury to hear inadmissible evidence favoring Hyatt, prevented the jury from hearing admissible evidence favoring FTB, and, through erroneous jury instructions, failed to give the jury correct legal guidance for the verdict. Consequently, the jury did not hear a complete and a fair story of FTB's conduct, to satisfy the factual predicate of IIED liability, or fraud for that matter. And the jury did not hear correct jury instructions to establish the legal predicate for liability.

As the opinion recognizes, there are four essential elements for liability on the IIED tort: (1) the defendant's extreme and outrageous conduct; (2) the defendant's intent to cause emotional distress, or reckless disregard for causing emotional distress; (3) the plaintiff suffered extreme or severe emotional distress; and (4) causation (i.e., the defendant's conduct caused the emotional distress). Op. 44. Those elements are similar to the elements for establishing liability for fraud: (1) the defendant made a false representation that the defendant knew or believed to be false; (2) that the defendant intended to persuade the plaintiff to act or not act

based upon the representation; and (3) that the plaintiff had reason to rely on the representation and suffered damages. Op. 36-37. The district court's errors went to the very heart of these elements.

For example, the opinion found evidence of IIED and fraud based upon things such as FTB's alleged delay of Hyatt's administrative protest for 11 years. The alleged 11-year delay was important in this court's evaluation, and the opinion emphasized it three times. Op. 8 ("The protests lasted over 11 years"); Op. 38 ("FTB took 11 years to resolve Hyatt's protests" as evidence of IIED); Op. 47 (FTB "delayed resolution of Hyatt's protests for 11 years" as evidence of fraud). But the district court's evidentiary rulings prevented FTB from admitting exhibits or providing testimony to explain reasons for the delay; to show that much of the delay was not caused by FTB, but was actually caused by Hyatt and his attorneys and accountants; and to explain why the delay did not reflect any intent by FTB to cause Hyatt emotional distress. (See evidence catalogued at AOB 63-67 and ARB 23.) This excluded evidence was directly relevant on the first, second and fourth essential elements of the IIED tort.[4] The opinion identified other multiple significant errors committed by the district court, all of which certainly might have impacted jurors in evaluating whether FTB employees were guilty of committing the IIED tort.

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[4] The opinion states that a protest is a review of an audit for accuracy or changes. Op. 8. This suggests review analogous to appellate review. Actually, a protest hearing officer's review is a "fresh look" de novo review. The hearing officer is not limited to evidence already existing in the audit files, and the officer is free to consider new evidence. AOB 20. Here, the protest delay was caused by myriad factors, including Hyatt's slow and incomplete responses to the protest officer's requests for evidence, FTB's need to deal with complexities involving a protective order Hyatt had obtained, and Hyatt's unsuccessful but time-consuming California judicial challenges regarding procedures and information FTB was requesting. E.g. AOB 20-21, 23-25.

1. Evidence challenging audit conclusions

The opinion held that the district court erred by admitting extensive evidence that challenged FTB's audit conclusions. Op. 49-51. This evidence included testimony by multiple experts (Op. 49-50), and "several instances" in which the evidence violated a prior ruling against Hyatt's ability to challenge audit conclusions. Op. 50.

The opinion recognized multiple instances of improperly admitted evidence that the jury heard and saw on this topic, including: (1) "evidence challenging whether FTB made a mathematical error [$24 million] in the amount of income that it taxed"; (2) "whether an auditor improperly gave credibility to certain interviews of estranged family members"; (3) whether an auditor "appropriately determined that certain information was not credible or not relevant"; and (4) other evidence identified by the opinion that "challenged various aspects of the fraud penalties." Op. 50.

On this same inadmissible topic, the opinion held that the district court erred by improperly admitting Hyatt's expert testimony, which "went to the audits' determinations and had no utility in showing any intentional torts ...." Op. 50 (emphasis added). The inadmissible expert testimony "is precisely what this case was not allowed to address." Op. 51. The opinion recognized FTB's accurate argument regarding four different experts that the district court erroneously allowed Hyatt to use at trial. Op. 49-50.

For example, the court's opinion identified Hyatt's primary expert witness, Malcolm Jumelet [spelled "Jumulet" in the opinion], as a witness who was erroneously allowed to express expert opinions critical of how FTB analyzed and weighed information obtained in the audits. Op. 50; 44 AA 10943(165). Hyatt's expert testimony, including Jumelet's testimony, violated the restriction against the

jury considering accuracy of audit conclusions. Op. 50. As such, the opinion held that the district court abused its discretion by admitting this evidence. Op. 51.

The jury heard nearly two full days of testimony from Jumelet. 44 AA 10814-10946. Hyatt's trial attorneys then relied heavily on Jumelet's testimony in their closing arguments. In his initial closing argument, Hyatt's counsel referred the jury to Jumelet's testimony dozens of times. E.g., 52 AA 12835-36, 12853, 12893, 12894, 12901, 12905, 12910, 12912, 12915, 12923. Hyatt's counsel expressly asked the jury to tie Jumelet's testimony to the IIED claim. 52 AA 12894(28-29) (counsel discusses Jumelet's testimony, immediately followed by: "The FTB certainly knew how to inflict the emotional distress on Mr. Hyatt.") Hyatt's counsel also tied Jumelet's testimony to the fraud claim. 52 AA 12915-14. In the rebuttal closing argument, Hyatt's counsel again referred the jury to Jumelet's testimony numerous times. E.g. 53 AA 13166-67, 13169, 13172, 13176.

With "a number of Hyatt's witnesses" that were erroneously allowed to focus on whether the audit results were correct—including four expert witnesses (Jumelet and three others) on this topic—the improper evidence surely "might have" impacted jury deliberations on the first two essential elements of the IIED tort (whether FTB's conduct was extreme and outrageous, and whether FTB employees intended to cause emotional distress) and the first two elements of the fraud tort. It was therefore not harmless error. See *Nevada Power*, 129 Nev. at__, 302 P.3d at 1157.

2. Improper jury instruction regarding audit conclusions

In addition to holding that the district court committed numerous evidentiary rulings, this court also held that the district court erred by giving a jury instruction that improperly allowed the jury to consider the "appropriateness and correctness of the analysis conducted by the FTB employees in reaching its residency determination and conclusion." Op. 53. This instruction "violated the

jurisdictional limit that the district court [a prior judge in the case] imposed in this case." *Id.*

The opinion quoted the erroneous instruction, giving italics emphasis to the part in which the district court told jurors they were not prohibited from considering whether FTB was correct in its residency determination and conclusion. The opinion also gave italics emphasis to a sentence in the instruction singling out Jumelet's opinions. Op. 53; see 53 AA 1324-43 (district court erroneously instructs jurors: "There is nothing in Jury Instruction No. 24 that would prevent Malcolm Jumelet from rendering an opinion about the appropriateness or correctness of the analysis conducted by FTB employees in reaching its residency determinations and conclusions.").

In his rebuttal closing argument, Hyatt's counsel specifically drew this instruction to the jury's attention. 53 AA 13166(21)-13167(23). Hyatt's counsel quoted both of the two sentences that this court's opinion highlighted as erroneous. *Id.* at (22-23). After reading the erroneous instruction, he immediately followed with: "And, Ladies and Gentlemen, that's exactly what we've been talking about through the entire trial." *Id.* at (23).

The observation by Hyatt's counsel was correct: Hyatt and his attorneys had been focusing on the appropriateness and correctness of FTB's audit conclusions "through the entire trial," which lasted four months. This court held that such a focus—which included expert testimony, and which culminated in the erroneous jury instruction—was error. Accordingly, there was (1) error in the extensive evidence devoted to Hyatt's improper efforts to impeach the audit conclusions; (2) error in a jury instruction on this same evidence; and (3) extensive emphasis on the evidence and the erroneous jury instruction when Hyatt's attorneys gave their closing arguments to the jury. In these circumstances, it is impossible to conclude that the errors might not have influenced the jury's evaluation of liability for the

IIED tort or the fraud tort. The error cannot be deemed harmless. See *Nevada Power*, 129 Nev. at__, 302 P.3d at 1157.

3. Adverse inference instruction

The district court allowed the jury to draw an adverse inference against FTB based upon spoliation of evidence, but erroneously prohibited FTB from presenting evidence against the inference. Op. 54-56. This error was monumental, because in closing arguments, Hyatt's attorneys were allowed to argue that the jury could use the adverse spoliation inference to fill important gaps in evidence, in Hyatt's favor, particularly on the liability elements. 55 AA 12915. In arguing for a liability finding on IIED and fraud, Hyatt's counsel specifically, and prejudicially, pointed to the adverse inference instruction:

> "Where is it most likely that the FTB's true intent could be ascertained?" 52 AA 12915 (110) (emphasis added).
>
> "So the most honest, the most legitimate, the most accurate reflection of the FTB's intent may have been in the electronic evidence that was destroyed after the FTB was put on notice of this litigation and after it had been requested." *Id.* (emphasis added).
>
> "We don't know what those electronic documents said. But you're entitled to infer that whatever was in them was adverse, unfavorable to the Franchise Tax Board. So we think this fills in any gap you may otherwise have in wondering whether or not the FTB acted intentionally, what their motives were, what their conduct was. *Id.* (110-111)(emphasis added).
>
> There should be no doubt about the intentional nature of the FTB's actions inflicting emotional distress on Mr. Hyatt. If you need the inference, use it." *Id.* (emphasis added).

Evidence regarding FTB's intent—an essential element of liability for both the IIED and fraud tort—was hotly contested throughout the trial. The district court allowed Hyatt's counsel to convince the jury to use the spoliation adverse

inference that "fills in any gap you may otherwise have in wondering whether or not FTB acted intentionally, what their motives were, what their conduct was" regarding "FTB's actions inflicting emotional distress on Mr. Hyatt." 55 AA 12915. Yet FTB had been erroneously precluded from presenting evidence "to explain why nothing harmful was destroyed." Op. 55-56. In these circumstances, it is impossible to conclude that the error could not have had an impact on the verdict.

4. Loss of patent, and federal tax audit

The opinion held that the district court erred by excluding evidence concerning Hyatt's loss of his patent and his federal tax audit. Op. 58. His patent was the genesis of his $350 million income; and the federal tax audit, which was occurring during the same time as FTB's audit, resulted in Hyatt paying a multi-million dollar settlement to the IRS. 34 AA 8467-69. The opinion recognized that such evidence related to "whether Hyatt's emotional distress was caused by FTB's conduct or one of these other events." Op. 58. Causation is the fourth essential element to establish liability for an IIED claim. Op. 44. Exclusion of this critical relevant evidence went directly to the issue of causation—an essential element to establish IIED liability—and cannot possibly have been harmless.

5. Conclusion regarding harmless error contention

Each of the district court's errors, considered alone, could have easily influenced the verdict. See e.g., *Posas,* 126 Nev. at __, 228 P.3d at 459 (single error regarding jury instruction required new trial); *Carver v. El-Sabawi*, 121 Nev. 11, 107 P.3d 1283 (2005) (same); *Driscoll v. Erreguible*, 87 Nev. 97, 482 P.2d 291 (1971) (erroneous use of two words in jury instruction required reversal). Moreover, this court expressly adopted the sliding scale approach to the evidence required to demonstrate the severe emotional distress element under IIED. Op. 47.

That approach intertwines the liability facts with the damage facts in determining recovery for severe emotional distress damages. *Id.*

The district court's multiple cumulative errors compounded the prejudice, almost surely influencing the jury's decision. Because these multiple errors went to the fundamental underpinnings of the IIED claim and the fraud claim, FTB was denied a fair trial on liability for both the IIED and fraud claims. This court's opinion overlooked or misapprehended the record, or misapplied case law dealing with harmless error. But for the errors—individually or collectively—the verdict "might have" been different.

C. Statute of limitations defense regarding IIED

The court's opinion affirmed FTB's liability for IIED, but remanded for a new trial limited to damages. Op. 67. In doing so, the court overlooked FTB's argument that the claim was time barred, and that the district court erred by granting judgment as a matter of law to Hyatt on FTB's affirmative defense based on the statute of limitations. This was raised in FTB's opening brief at AOB 96-98, and the reply brief at ARB 101-107 (and in FTB's supplement filed June 22, 2012). FTB was entitled to present its defense to the jury, and a new trial should be granted on liability for the IIED claim.

The two-year time limit starts when "the injured party discovers or reasonably should have discovered facts supporting a cause of action." *Petersen v. Bruen*, 106 Nev. 271, 274, 792 P.2d 18, 20 (1990). The focus is on the injured party's knowledge of or access to facts. *Massey v. Litton*, 99 Nev. 723, 728, 669 P.2d 248 (1983). The time limit is triggered when the plaintiff has enough facts from which a reasonable person would be on inquiry notice of a possible cause of action. *Massey*, 99 Nev. at 727-28.

The statute of limitations is triggered even if the plaintiff does not know all the facts, as long as the plaintiff knows enough facts to constitute an appreciable

manifestation of the cause of action. Cf. *Libby v. District Court*, 130 Nev. __, __, 325 P.3d 1276, 1280-81 (2014) (medical malpractice statute of limitations was triggered upon appreciable manifestation of injury, even though plaintiff was not aware of cause of injury or full extent of defendant's negligence).

At trial, the district court erroneously granted Hyatt's motion for judgment as a matter of law on this affirmative defense. Undisputed evidence established that Hyatt discovered, or reasonably should have discovered, his cause of action more than two years before he filed his lawsuit:

- March 6, 1995: Hyatt's bank sent him an FTB letter the bank had received, showing Hyatt's social security number. 77 AA 19073-74.
- March 8, 1995: Hyatt sent a memo to his accountant regarding FTB's letter to the bank. 77 AA 19072.
- April 5, 1995: Hyatt sent a memo to his accountant and one of his attorneys, stating: "The FTB appears to be sending out demand letters to many entities to whom I wrote checks in late 1991 and 1992," and he attached copies of letters, which contained his social security number. 77 AA 19119-21.
- August 2, 1995: FTB sent Hyatt's accountant and attorneys a 39-page letter fully describing the entire scope of FTB's investigation, and detailing information gathered from all third-party sources contacted by FTB as of that time. 66 AA 16388-427.
- August 30, 1995: Hyatt's representative responded to the FTB's letter, acknowledging the numerous contacts and activities of FTB, and even expressing suspicions that FTB had failed to maintain confidentiality. 66 AA 16433-454. (Hyatt is concerned that "confidentiality may have been compromised").

Therefore, from March through August of 1995, at the latest, Hyatt was fully aware of the scope of the audit, the fact that FTB had contacted numerous third parties (disclosing the fact that Hyatt was being audited/investigated), and the fact that FTB sent numerous letters with demands, containing information such as his name, address and social security number. His representatives had received the lengthy FTB letter fully describing FTB's audit activities, and his representatives had even voiced suspicion that FTB breached confidentiality. This was all more than two years before Hyatt filed his complaint.

This evidence established that the non-fraud tort claims, such as the IIED claim, were barred by the statute of limitations. But when the district court granted JMOL to Hyatt at trial, dismissing FTB's affirmative defense, the district court erred by not viewing the evidence and all inferences in favor of FTB, rather than Hyatt. See *Nelson v. Heer*, 123 Nev. 217, 222, 163 P.3d 420, 424 (2007). Accordingly, a new trial is necessary on liability for IIED, based on the statute of limitations defense, in addition to the damages trial this court ordered. See *Bemis v. Estate of Bemis*, 114 Nev. 1021, 1025, 967 P.2d 437, 440 (1998) (where factual question exists regarding plaintiff's discovery of claim, statute of limitations is a question of fact to be determined by the jury); *Day v. Zubel*, 112 Nev. 972, 977, 922 P.2d 536, 539 (1996) (stating that "[t]he appropriate accrual date for the statute of limitations is a question of law only if the facts are uncontroverted"). Because the court's opinion overlooked this issue, rehearing should be granted.

III

Rehearing on the fraud judgment

A. No fraud as a matter of law

The court's affirmance of the district court's fraud ruling likewise warrants rehearing because of internal inconsistencies within the opinion related to FTB's audit process that overlook the appropriate standard of review and critical evidence

presented by FTB. In the opinion, the court held that the district court did not err by refusing to grant FTB's request for judgment as a matter of law on the fraud claim because substantial evidence supported each fraud element. Op. 37-39. Hyatt was required to prove his fraud claim, however, by clear and convincing evidence. *Clark Sanitation v. Sun Valley Disposal*, 87 Nev. 338, 341, 487 P.2d 337, 339 (1971). On appeal, this court was required to use the same exacting standard and to "consider the sufficiency of the evidence in light of that [clear and convincing] standard." *Id.* The opinion, however, overlooked or misapplied this case law and, indeed, did not once mention the clear and convincing standard in its fraud analysis. Op. 36-38 (only reviewing jury's fraud verdict for "substantial evidence" when question on de novo review was whether the district court improperly denied FTB's motion for judgment as a matter of law); see AOB 73.

As the opinion recognized, fraud requires a representation that the defendant knew or believed was false; the defendant intended to persuade the plaintiff to rely on the false statement; and the plaintiff relied on the statement to his detriment. Op. 36-37. The court noted that the fraud claim was based upon representations made to Hyatt about the audits' processes. Op. 4. To support its fraud analysis, the opinion identified four alleged representations FTB made to Hyatt at the onset of the audit: FTB employees would treat Hyatt with courtesy; requests for information would be clear and concise; personal and financial information would be treated confidentially; and the audit would be completed within a reasonable time.[5] Op. 6. In affirming the district court, the court overlooked conclusions

[5] Hyatt argued that his fraud claim was also based upon statements in other FTB documents, such as FTB's mission statement, which contained a statement that taxpayers would be treated "fairly and impartially." Op. 37; AOB 70-71. But as FTB established, Hyatt never received or relied on these other documents. *Id.* FTB's initial notice to Hyatt contained the only representations on which this court's opinion relied in the fraud analysis. Op. 37. Yet, Hyatt's entire

found in its own opinion, evidence in the record and FTB's arguments, as explained below.

1. No fraudulent intent

There was not a shred of evidence—let alone clear and convincing evidence—that at the time FTB sent Hyatt the initial audit notice, FTB really did not intend to treat him with courtesy, request information in a clear and concise manner, keep financial and personal information confidential, or complete the audit in a reasonable time. These representations by FTB, sent in a letter from auditor Marc Shayer who began Hyatt's audit, were what this court deemed the factual predicate for FTB's purported fraudulent intent. Op. 37. Without evidence of FTB's fraudulent intent and beliefs at the time these statements were made, the fraud claim must fail as a matter of law. See Op. 36-37, *citing Bulbman, Inc. v. Nevada Bell*, 108 Nev. 105, 825 P.2d 588 (1992); *Tail-Si Kim v. Kearney*, 838 F.Supp.2d 1077, 1097-98 (D. Nev. 2012) (holding that representation from real estate agent that buyers could place "trust and confidence" in him "is a promise of future performance that is not actionable unless made without intent to perform") (emphasis added).

Where a plaintiff, like Hyatt, bases his claim for fraud on a statement of future promises, the plaintiff must provide evidence that, at the time the statement was made, the defendant never intended to honor his statement. *Tallman v. First National Bank of Nev.*, 66 Nev. 248, 261, 208 P.2d 302 308 (1949). Hyatt offered no such evidence. Fraudulent intent may not be inferred from a subsequent failure to perform a promise. *Id; Bulbman,* 108 Nev. at 112. Yet, all of the evidence cited by the court as evidence of FTB's intent in 1993, were subsequent failures to

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(continued) presentation on his fraud claim to the jury was based upon this non-existent "fairly and impartially" representation. AOB 70-77.

perform. Op. 38. And none of those failures were attributable to the auditor who began Hyatt's audit.

a. No evidence of intent not to satisfy representations made in 1993 Privacy Notice

None of the evidence offered by Hyatt suggested (much less proved by clear and convincing evidence) that the FTB auditor who made these representations at the outset of the audit did not intend at that time to adhere to them. Marc Shayer was the auditor who made those representations to Hyatt. As FTB pointed out in its reply brief, nothing in Shayer's testimony indicated that he did not intend to satisfy these aspirational goals. (ARB 62, *citing* 45 AA 11221 (159:6-11)). And, Hyatt never offered any evidence that Shayer did not live up to the representations of courtesy, clear and concise information, confidentiality or completion of the audit in a reasonable time. Indeed, Hyatt later tried to enlist Shayer to work on Hyatt's behalf as an expert in this litigation, which obviously Hyatt would not have done if Shayer sought to perpetuate a fraud against him. 45AA11209 (110-111), 11227 (184). Absent evidence that Shayer had fraudulent intent or that FTB had a policy or practice imposed upon all employees when the FTB's privacy notice was sent to Hyatt in 1993, Hyatt's fraud claim necessarily failed as a matter of law. See *Clark Sanitation*, 87 Nev. at 341, 487 P.2d at 339.

b. Temporal disconnect between 1993 Privacy Notice and alleged evidence of fraud

The facts to which the court cites as alleged evidence of fraudulent intent are not attributable to Shayer, post-date his sending of the 1993 Privacy Notice and cannot retroactively demonstrate that Shayer had fraudulent intent. Op. 38. For example, the opinion states that "Hyatt presented evidence that FTB disclosed his social security number and home address to numerous people and entities and that FTB revealed to third parties that Hyatt was being audited." Op. 38. As FTB

pointed out in its reply brief, FTB did not promise Hyatt to keep his name, address, social security number or the fact that he was under audit confidential. ARB 63. Moreover, the court's conclusion that disclosure of Hyatt's social security number and home address could give rise to fraud contradicts the court's finding elsewhere in the opinion that Hyatt could not recover for invasion of privacy because he "lacked an objective expectation of privacy" in his name, address and social security number and that disclosure of the fact he was under audit did not portray him in a false light. Op. 27-28, 31-32. If disclosure of this information failed to meet the preponderance of evidence standard for a privacy tort, or a false light tort, it certainly does not constitute clear and convincing evidence of fraudulent intent.

The other facts on which this court based its fraud finding likewise fail this standard. Op. 38. Hyatt did not establish that Shayer sent letters to Hyatt's doctors or was responsible for the duration of Hyatt's protests. Likewise, alleged disparaging comments made by Sheila Cox in 1995 cannot be attributable to Shayer in 1993, nor be indicative of his intent at the time the representations were made. ARB 64-65. The court overlooked these insurmountable factual and legal barriers to Hyatt's fraud claim.

c. Hyatt's expert testimony undermines fraud allegation

To support his allegation of fraudulent intent, Hyatt advanced a theory that FTB purportedly had a "culture" that drove auditors to make assessments. Hyatt relied upon expert testimony from Jumelet and Sjoberg regarding imposition of fraud penalties to support that theory. This court held that "the expert testimony regarding the fraud penalties went to the audits' determinations and had no utility in showing any intentional torts unless it was first concluded that the audits' determinations were incorrect." Op. 50 (emphasis added). Yet in the opinion, to support upholding the fraud verdict, the court cited to alleged evidence presented

by Hyatt at trial that "that FTB promoted a culture in which tax assessments were the end goal whenever an audit was undertaken." Op. 38.

In addition to overlooking its own decision, the court also overlooked key evidence, that Hyatt's very own experts, conceded at trial. See AOB, p. 19 ("Notably Jumelet, who was Hyatt's lead expert, acknowledged he found no evidence of Hyatt's extortion allegations (which were the foundation to Hyatt's bad faith allegations)). 44 AA 10846 (130)"); AOB at p. 22, fn. 18 ("In the sampling of audits he reviewed during these years, [Hyatt's expert] Sjoberg specifically testified that he saw 'no instances' in which the 'auditors artificially inflated assessments, fabricated assessments, made bogus or phony assessments.' 33 AA 8161 (95-96) (emphasis added)."). In upholding the district court's denial of FTB's motion for judgment as a matter of law on fraud, this court overlooked this evidence from Hyatt's own experts, which was echoed by FTB's witnesses. It also contradicts the court's own opinion in discussing the invasion of privacy torts. Op. 31-32.

2. No actionable representation

Additionally, the opinion overlooked and failed to consider FTB's arguments and extensive legal citations to case law from Nevada and other jurisdictions holding that fraud claims are only actionable for statements that are clear, specific, unambiguous and measurable statements of fact. AOB 71-73. Fraud claims cannot be based upon general statements or aspirational goals or opinions. *Id.* They must be based upon objective, measurable statements of fact. *Id.*

In *Bulbman*, for example, the defendant allegedly made general representations regarding the cost, performance and reliability of a proposed phone system for the plaintiff's business. This court held that the representations were not actionable in fraud, as a matter of law, because the representations merely

constituted "commendatory sales talk about the product ('puffing'), also not actionable in fraud." 108 Nev. at 111, 825 P.2d at 592. Similarly, in *Minehan v. United States*, 75 Fed. Cl. 249, 260-62 (2007), an IRS mission statement stated that taxpayers would receive "top quality service," and they would be treated with "integrity and fairness." The court held that the statements were merely aspirational in nature, containing no specific promises that could be the basis of a fraud claim.[6] *Id.* at 260; see also *Knelman v. Middlebury College*, 898 F.Supp.2d 697, 709 (D. Vt. 2012) (holding that "[l]anguage in a college handbook or other official statement that is merely aspirational in nature, or that articulates a general statement of a school's ideals, goals, or mission is not enforceable" (internal quotations omitted)).

Preliminarily, Hyatt never contended that he was not treated with courtesy. Moreover, courtesy consists of showing good manners or being polite (www.dictionary.com), which is a purely subjective concept that is entirely in the eye of the beholder. Conduct that is courteous to one person might seem rude to another person. If a defendant can be held liable in fraud for making broad general statements, such as a statement that the plaintiff will be treated "courteously," floodgates of litigation and claims will be opened. For example, Las Vegas Metro police cars show the slogan "To Protect and To Serve." If Metro fails to protect someone, can a fraud claim against Metro be premised on this slogan? This court's opinion would seem to allow such an absurd consequence.

The court should also consider public policy consequences of the opinion's holding that a statement promising future courteous treatment by a government agency (or, for that matter, a private business) can form the basis of a fraud action.

[6] Similar cases are provided at AOB 72-73 and ARB 40-41. E.g., *Smith v. Allstate Ins. Co.*, 160 F.Supp.2d 1150, 1154 (S.D. Cal. 2001) ("good hands" slogan not actionable).

The opinion would deter governments and businesses from telling people they will be treated fairly and courteously. Such statements of aspirational goals and ideals should be encouraged, not discouraged by the threat of a fraud lawsuit.

Similarly, the statement that requests for information would be stated clearly and concisely is equally subjective, and Hyatt never contended that FTB's requests lacked clarity. The statement that the audit will be completed in a "reasonable time." is likewise too vague to form the basis of a fraud claim. Reasonableness, like courtesy, is a purely subjective concept, open to widely differing views of whether a time frame was reasonable or unreasonable.

It is noteworthy that FTB's initial audit notice only stated that "the audit" would be completed in a reasonable time. Op. 6. The notice did not say that the entire process, including taxpayer protest proceedings, were included in that statement. Indeed, FTB could not have made such a representation at that time regarding the protest stage, because, as this case so clearly illustrates, the protest stage can be subjected to numerous delays caused by the taxpayer or other outside influences over which FTB has no control. Here, the court's opinion perceived an unreasonable delay in the 10-year time frame for the protest stage. Op. 8, 38, 47. But in reality, the audit only took two years, and it was the audit that was the focus of FTB's initial notice contemplating a "reasonable time" for completion.

Furthermore, FTB's statement that Hyatt's personal and financial information would be treated confidentially was satisfied or was otherwise not actionable in fraud. As the opinion itself correctly noted, "the record shows that Hyatt's name, address, and social security number had been publicly disclosed on several occasions, before FTB's disclosures occurred, in old court documents from his divorce proceedings and in a probate case." Op. 26-27. "Hyatt also disclosed the information himself when he made the information available in various business license applications completed by Hyatt." Op. 27. Hyatt "lacked an

objective expectation of privacy in the information." Op. 27. Yet despite these correct observations, the opinion nevertheless held that FTB could be liable for fraud in disclosing essentially the same information. There was no clear and convincing evidence of fraud based upon this part of FTB's initial notice letter to Hyatt.

Accordingly, Hyatt's fraud claim failed as a matter of law, and rehearing should be granted on this issue. Or at a minimum a new trial on both liability and damages should be ordered for the same reasons described at pages 8-15.

IV

Conclusion

For the foregoing reasons, the court overlooked or misapprehended material facts and arguments. As such, the court should grant rehearing on the limited issues discussed above.

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CERTIFICATE OF COMPLIANCE FOR PETITION FOR REHEARING

1. I hereby certify that this petition for rehearing complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this petition has been prepared in a proportionally spaced typeface using in 14 point Times New Roman type style.

2. The petitioning party has filed a motion seeking permission to file this petition for rehearing containing 8,132 words. If the motion is granted, this petition will comply with the page or type-volume limitations of NRAP 40(b)(3) because it will contain the number of words allowed by the court.

DATED: Oct. 3, 2014

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CERTIFICATE OF MAILING

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

Peter Bernhard
Mark Hutchison
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I further certify that on this date I served a copy, postage prepaid, by U.S. Mail to:

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DATED: October 3, 2014

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