

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.

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**APPELLANT'S ANSWER TO RESPONDENT'S
PETITION FOR REHEARING**

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Appellant FTB hereby answers respondent Hyatt's petition for rehearing.

I

INTRODUCTION

A petition for rehearing is appropriate where the court misapprehended or overlooked material facts or law; a petition for rehearing may not be used to reargue matters considered and decided in the court's initial opinion. NRAP 40; *see Gordon v. District Court*, 114 Nev. 744, 745, 961 P.2d 142, 143 (1998). Rehearings are not granted to review matters that are of no practical consequence. *In re Hermann*, 100 Nev. 149, 151, 679 P.2d 246, 247 (1984).

In the present case, Hyatt's petition reargues matters that were briefed by the parties and fully considered in the court's opinion. Further, the petition raises technical contentions that are of no practical consequence to the court's ultimate decision on the issues to which Hyatt's contentions relate. Finally, the petition's factual contentions are not accurate and do not demonstrate any material misapprehension by this court. The petition is without merit and should be denied.

II

HYATT'S ADDRESSES

A. California and Nevada addresses

Regarding Hyatt's invasion of privacy causes of action, Hyatt's petition contends that this court erroneously focused on his California address, not his Nevada address on Tara Avenue. Pet. 1-2. Hyatt's entire premise for this part of his petition is that his invasion of privacy claims were based upon FTB's disclosures of his Tara address, not his California address.

First, this court's opinion does not indicate that its analysis of the invasion of privacy claims was limited to consideration of FTB's disclosure of Hyatt's California address. Second, Hyatt's privacy claims at trial were vague and generic

as to which addresses were involved. For example, Hyatt's opening statement to the jury made only general references to disclosure of Hyatt's "address" (32 AA 7942-75) or his "addresses" (plural) (32 AA 7974(132) (line 4)). Third, Hyatt's Tara Avenue address was also a matter of public record and Hyatt himself made it public knowledge.

Therefore, although Hyatt now contends that his privacy claims were clearly limited to disclosure of his Tara address, not his California address, the record on this point is not nearly as clear as Hyatt contends. Even if this court focuses solely on FTB's disclosure of the Tara address, Hyatt's privacy claims still fail as a matter of law, for the reasons discussed in the next section of this answer.

B. No expectation of privacy regarding Tara address

This court's opinion observed that Hyatt lacked an objective expectation of privacy regarding his address. Op. 26-27. Hyatt's petition criticizes the opinion, asserting that he did have a reasonable expectation of privacy in the Tara address at the time FTB disclosed that address. Pet. 6-8. He contends there were no public records or public disclosures linking him to the Tara address before FTB's disclosures, and "he took great effort to keep [his Tara address] private and confidential." Pet. 7 (lines 6-8). He also contends that he "had taken significant steps to protect the secrecy of this address." Pet. 7 (lines 14-15).

In challenging the opinion, Hyatt's petition repeatedly refers to FTB's briefs, contending that the briefs provided incorrect information and arguments regarding Hyatt's addresses. E.g., Pet. 1-2, 6. The petition asserts that this court relied on inaccurate information in FTB's briefs in the court's analysis of Hyatt's privacy claims. Pet. 5 (Heading IIIA: "The Court's ruling relative to Hyatt's 'address' was based on the FTB's inaccurate citation to evidence of Hyatt's prior California address being in the public record."). The time for Hyatt to assert alleged

inaccuracies in FTB's briefs was in Hyatt's own briefs, not in a petition for rehearing. In any event, facts in FTB's briefs were accurate. And although the opinion summarized both parties' contentions regarding various issues, the opinion did not blindly rely on factual information in the briefs. The court relied on its own independent review of the record. E.g., Op. 26 ("Here, the record shows that Hyatt's name, address, and social security number had been publicly disclosed on several occasions, . . ."; emphasis added).

In evaluating the public records defense to invasion of privacy torts, this court's opinion properly relied on *Montesano v. Donrey Media Grp.*, 99 Nev. 644, 668 P.2d 1081 (1983) and Restatement (Second) of Torts §652D cmt. b (1977). Op. 26. These authorities hold that a defendant cannot be held liable for disclosing information about a plaintiff that was already public. *Id.* The public records defense is not limited to court-filed documents. Rather, the defense is available to any public records or information that the plaintiff has publicly disclosed. As indicated in Comment b of the Restatement, "there is no liability for giving publicity to facts about the plaintiff's life that are matters of public record, such as the date of his birth, the fact of his marriage, his military record, the fact that he is admitted to the practice of medicine or is licensed to drive a taxicab, or the pleadings that he has filed in a lawsuit."

Contrary to Hyatt's contentions, the record clearly shows that Hyatt himself disclosed his Tara address to many members of the public. For example, Hyatt purchased a washer and dryer from Sears; the sales document shows that Hyatt gave the people at Sears his personal information linking him to the Tara address, including "Gilbert P. Hyatt" at 7335 Tara, Las Vegas, Nevada, with his phone number. 79 AA 19742. Hyatt made several purchases from All State Sand & Gravel, each time providing his Tara address to the people at that company. 79

AA 19743-48. He obtained a cost estimate from We Can Do It Construction, providing his Tara address, his phone number and his fax number to employees of that company. 38 ARA 9464-69.

Hyatt also gave his Tara address to people who worked for BNC Maintenance & Repair, for work on his air conditioner. 79 AA 19750. He twice provided his Tara address to employees of CAL AIR, for air conditioning work, and he personally signed and accepted the charges for work performed by employees of that company at his Tara home. 80 AA 19751-52; 31 ARA 7630-33. He gave his Tara address to Paul M. Watkins, for appliance repairs. 80 AA 19753. When he purchased a piano from Southern Nevada Music, he provided his 7335 Tara home address to employees of that store, for delivery of the piano; and when the piano was delivered to his Tara home by the music store's employees, Hyatt signed for the delivery. 38 ARA 9482-83.

Despite having disclosed his Tara address to all of these people, Hyatt's petition now contends that the only document "that even remotely linked Hyatt to the Tara property" was a check for his payment of property taxes. Pet. 7, fn 5. He contends that this was "a check deep in the County Treasurer's files," and that the check was "hardly readily accessible to the public." *Id.* Actually, testimony at trial showed the opposite. The Assistant Director for the Clark County Treasurer's Office testified as follows:

Q Okay. Now once a person makes a property tax payment on a particular piece of real property, is that record a matter of public record?

A The receipt is a matter of public record as to who paid it and in some cases, the instrument that paid it.

Q Okay. And do you ever have occasion where someone will call the Treasurer's Office and ask who paid for the real property taxes on a particular piece of property?

A Yeah, that happens every day.

47 AA 11626 (74-75)

Q Okay. And so could anybody call the Treasurer's Office and receive this information about a property tax payment on a particular piece of property?

A Yes.

47 AA 11626 (75)

Q Now, just to make sure that I'm clear, once a person makes a property tax payment on a particular piece of property, that becomes a matter of public record. Is that correct?

A Correct.

47 AA 11626 (76)

Q When somebody makes a property – a request for information about a property tax payment, could they get a copy of the check that was used to make that payment with?

A Yes. We – depending on the request, we provide the bill itself and any payment copies of that if that's requested. . . .

47 AA 11626 (77)

Q Okay. But in 1993 to 1995, would a check copy have been provided?

A Yes. It was standard office practice to provide any check copies that were requested.

Q And just to make clear, this is any member of the public that would call and ask for that information, they could receive that?

A Yes, yes.

47 AA 11627 (78)

Thus, there is no basis for Hyatt's contention (Pet. 7, fn 5) that his address information was buried "deep in the County Treasurer's files," and that the information was "hardly readily accessible to the public."

Hyatt's petition also complains that his "private Nevada address on Tara" was disclosed in FTB letters to third parties, "despite the fact that Hyatt had taken significant steps to protect the secrecy of this address." Pet. 7 (lines 12-15). Hyatt cites to three FTB letters in his appendix at 83 RA 20746 - 84 RA 20751. These were letters to two public utilities and a garbage company, who would have already known the information. As this court's opinion observed, Hyatt had no objective expectation of privacy regarding FTB's disclosures of information to third parties who already had the information in their possession, as a matter of law. Op. 27, fn 7.

Hyatt's petition would have this court believe he took great efforts to keep his address private and confidential. Pet. 6-8. His answering brief contended that he "strives hard to maintain a private, low key, and unassuming lifestyle." RAB 134. Yet the record shows that Hyatt and his publicist actively sought publicity regarding his computer chip patent. 48 AA 11984-92. Representatives of the media went to Hyatt's home and conducted extensive personal interviews; there were hundreds of magazine and newspaper articles published about Hyatt; and he was the subject of an episode on the nationally syndicated television show "Hard Copy." 39 AA 9726 (114); 79 AA 19732-38; 89 AA 22068-137; 28 ARA 6993. "Hard Copy" displayed numerous pictures of Hyatt's Tara house and his

neighborhood, and Hyatt conceded that his Tara home was shown on “Hard Copy.” 28 ARA 6993-99; 38 AA 9332(132).

Accordingly, despite Hyatt’s present contention that he took great efforts to hide the fact that he owned and lived at the Tara home, undisputed evidence shows that he disclosed his Tara address to numerous members of the public, and that the public had access to this information. This court’s opinion was correct in concluding that Hyatt lacked an objective expectation of privacy. This court did not overlook or misapprehend anything regarding Hyatt’s Nevada address, and the opinion correctly determined that FTB’s disclosure of that address did not invade Hyatt’s privacy.

C. Independent grounds for rejecting Hyatt’s privacy claim regarding disclosure of his Tara address

1. No damages

Even if the court gives some credence to Hyatt’s arguments regarding the Tara address, Hyatt’s lack of damages provides an independent ground for this court’s rejection of Hyatt’s privacy claim based upon disclosure of his Tara address. As FTB noted in its opening and reply briefs (AOB 102-03; ARB 121-24), although Hyatt may have had concerns about industrial espionage and maintaining secrecy regarding his patent work (Pet. 8 (lines 1-5)), there was absolutely no evidence that in all of the years since FTB’s disclosures of Hyatt’s Tara address, he was ever the target of industrial espionage, theft of his patent work, or any other actual damage whatsoever resulting from the disclosure of his

Tara address. There was no evidence of any damages whatsoever caused by FTB's limited disclosure of Hyatt's Tara address.¹

2. Statute of limitations

FTB's defense based upon the statute of limitations also provides an independent ground for rejecting Hyatt's privacy claim based upon disclosure of the Tara address. As FTB argued in its opening and reply briefs, Hyatt's invasion of privacy claim was barred by the two-year statute of limitations. AOB 96-98; ARB 101-107. FTB sent Hyatt (through his CPA) a detailed 39-page letter on August 2, 1995, thoroughly disclosing all of the details of FTB's audit investigation. 66 AA 16388-427. This letter made clear that FTB had obtained information related to Hyatt's Tara home that could only have been obtained by disclosing his address to third parties. FTB's letter disclosed that "Southwest Gas Corporation has provided information that Gilbert Hyatt is not the customer of record for 7335 Tara." 66 AA 16396. The letter disclosed that "The Las Vegas Valley Water District has provided information that the account for 7335 Tara was established on 4/1/92." *Id.* The letter also stated that "Silver State Disposal Service in Las Vegas has provided information that the account at 7335 Tara was opened on 4/1/92 in the name of Michael Kern [Hyatt's CPA]." *Id.*

The statute of limitations commences when a party discovers, or reasonably should have discovered, facts supporting a cause of action. "Inquiry notice" is sufficient. *Massey v. Litton*, 99 Nev. 723, 728, 669 P.2d 248, 251 (1983). Hyatt

¹ As Hyatt conceded, the \$52 million jury award for invasion of privacy damages did not include emotional distress damages, which were "different and separate from" the invasion of privacy damages. RAB 132. The jury awarded emotional distress damages (\$85 million) separately. 54 AA 13309.

filed his lawsuit more than two years after receiving FTB's disclosures regarding dissemination of his Tara address. His invasion of privacy claim, based upon disclosure of that address, was clearly barred by the statute of limitations.

III

HYATT'S SOCIAL SECURITY NUMBER

Hyatt contends that this court overlooked or misapprehended the law when it concluded that FTB's dissemination of his social security number was not actionable, "because it was contained in decades-old court records." Pet. 8. Specifically, Hyatt contends that this court overlooked or misapprehended case law establishing an expectation of privacy in a person's social security number. Pet. 9-10. Hyatt made the identical argument in his answering brief. RAB 97-103. He specifically argued that this court should reject FTB's references to Hyatt's social security number "buried in decades old court files," and "buried in old government records, not easily accessible." RAB 97. Hyatt's petition cites many of the same cases he cited in his answering brief. RAB 99-101. As such, his petition violates NRAP 40(c)(1), which prohibits a party from rearguing matters already presented in the briefs.

This court obviously did not overlook Hyatt's arguments and legal authorities in the answering brief. The opinion discusses and analyzes the public records defense, under which a defendant cannot be liable for disclosing information that was already public. Op. 26. The opinion refers to "old court documents" that contain Hyatt's information. Op. 26. The opinion then specifically addresses the contention that Hyatt is now again making in his rehearing petition: "Hyatt maintains that these earlier public disclosures were from long ago, and that the disclosures were only in a limited number of documents, and therefore, the information should not be considered as part of the public domain."

Op. 27. The court rejected Hyatt's contention, citing established Nevada precedent, and holding that there is no time limit on the application of the public records defense. Op. 27.

In essence, Hyatt's rehearing petition is indirectly asking this court to overrule *Montesano*, on which this court relied. Op. 26. The *Montesano* court rejected the idea that isolated or stale public records cannot be the bases of the public records defense. *Montesano* involved dissemination of information relating to an arrest of the plaintiff that occurred when the plaintiff was a minor. The publication occurred 24 years later. The *Montesano* court held that, despite the old age of the public records, "materials property contained in a court's official records are public facts." *Id.* At 649.

Hyatt's answering brief did not ask this court to overrule *Montesano* regarding old public records. To the extent that Hyatt is now attempting to use his rehearing petition as an avenue to overrule *Montesano*, Hyatt's effort should be flatly rejected. See NRAP 40(c)(1)(no point may be raised for the first time on rehearing). In any event, *Montesano* is still good law and should not be discarded.

Accordingly, Hyatt is absolutely wrong in his contention that this court overlooked or misapprehended his argument that "decades old" public records can be ignored.

It is noteworthy that at the time of FTB's audit activities in the early 1990s, many of Hyatt's public disclosures of his social security number were not "old" at all. For example:

1. Hyatt disclosed his social security number in his divorce filings in 1975 (80 AA 19811), but the case was re-opened and it was still ongoing in the early 1990s. 82 AA 20308; 83 AA 20599.

2. In 1991, Hyatt was embroiled in probate litigation involving his mother's estate. On September 25, 1991, he filed a probate court declaration with two attached exhibits showing that in November of 1990 he had disclosed his social security number to his three adversaries in the case. The exhibits attached to Hyatt's court-filed declaration contained his social security number. 78 AA 19387(Affid. ¶20), 19393 (exhibits containing social security number).

3. In December of 1992, Hyatt disclosed his social security number in a business license application with the State of Nevada. 78 AA 19426.

4. Also in December of 1992, he disclosed his social security number in a business license application with the City of Las Vegas. 78 AA 19429.

5. In July of 1994, he disclosed his social security number in his Nevada voter registration form. 78 AA 19441.

As part of his argument, Hyatt also contends: "In this age of identity theft, old conceptions of when it is okay to disclose an individual's social security number must be revised for a modern age." Pet. 10 (lines 18-19). This ignores the fact that FTB's conduct occurred in the early 1990s, when social security numbers were commonly used as a means of identification. E.g., 77 AA 19100-02 (voter registration form); 78 AA 19429 (business license application). For example, social security numbers were used by the Nevada DMV as drivers' license numbers; and when people cashed checks, they were typically asked to provide their drivers' license numbers (which were their social security numbers).² 48 AA 11801(94-97).

² Until 1995, a county clerk in Nevada could provide a voter's social security number in response to an inquiry, because such information was a matter of public record. In 1995, NRS 293.558 was amended to preclude the county clerk from providing a registered voter's social security number, driver's (continued)

In the early 1990s, identify theft concerns were not nearly as prevalent as they are today. Hyatt recognizes that “almost everyone’s social security number is in some kind of public record,” and that in Nevada, “social security numbers were on individual driver’s licenses for a long time.” Pet. 9 (lines 21-23). Hyatt cites a California statute that protects confidentiality of social security numbers, but he concedes that this statute “was recently passed.” Pet. 11 (lines 25-26).

Despite modern views regarding privacy of social security numbers, FTB’s conduct must be evaluated by standards that existed at the time of the conduct, i.e., the early 1990s. Individuals should have an opportunity to know what the law is and to conform their conduct accordingly. *Landgraf v. USI Film Products*, 511 U.S. 244, 265, 114 S.Ct. 1483, 1497 (1994). For that reason, “the principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal.” *Id.* In the present case, FTB’s conduct occurred more than 20 years ago, when prevailing standards were different from today’s standards. It would be grossly unfair for this court to accept Hyatt’s proposal to hold FTB liable for violating modern privacy standards regarding social security numbers, when those standards did not exist at the time of FTB’s activities.

This court was absolutely correct in determining that Hyatt’s social security number had been publicly disclosed on several occasions before FTB’s disclosures

(continued) license number or identification number under any circumstance. NRS 293.558(2). Under the amended statute, however, a voter’s address and telephone number are part of the public record open to public disclosure unless the voter specifically requests that such information is withheld from public access. NRS 293.558(3). There was no evidence that Hyatt made such a request.


occurred. Op. 26. The court was also correct in observing that Hyatt had disclosed the information himself. Op. 27. Hyatt's reliance on the fact that some of the public disclosures were "old" does not change the result. As Hyatt's attorney correctly observed in his closing argument to the jury: "Once your privacy has been gone, you can't get it back." 52 AA 12907 (80) (lines 4-5). Here, once Hyatt himself disclosed his social security number to members of the public and in his public court-filed papers, his privacy in that information was gone, and he could not get it back.

IV

CONCLUSION

For the foregoing reasons, Hyatt's petition for rehearing lacks merit and should be denied.

Dated: Oct. 21, 2014


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**CERTIFICATE OF COMPLIANCE FOR
ANSWER TO HYATT'S PETITION FOR REHEARING**

1. I hereby certify that this answer to Hyatt's 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 answer has been prepared in a proportionally spaced typeface using in 14 point Times New Roman type style. This answer also complies with the word limitation of NRAP 40(b)(3) because it contains 3,579 words.

DATED: Oct. 21, 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 Answer to Respondent'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: 10/21/14

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