

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

**Case No. 53264**

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA

Electronically Filed  
Jun 24 2016 10:04 a.m.  
Tracie K. Lindeman  
Clerk of Supreme Court

Appellant/Cross-Respondent,

v.

GILBERT P. HYATT,

Respondent/Cross-Appellant

---

APPEAL FROM JUDGMENT – EIGHTH JUDICIAL DISTRICT COURT  
STATE OF NEVADA, CLARK COUNTY  
HONORABLE JESSIE WALSH, DISTRICT JUDGE

---

**APPELLANT’S MOTION FOR SUPPLEMENTAL BRIEFING  
FOLLOWING MANDATE FROM THE  
SUPREME COURT OF THE UNITED STATES**

---

ROBERT L. EISENBERG (#950)  
Lemons, Grundy & Eisenberg  
6005 Plumas Street, Third Floor  
Reno, Nevada 89509  
775-788-2000 (Phone)  
[rl@lge.net](mailto:rl@lge.net)

PAT LUNDVALL (#3761)  
Debbie Leonard (#8260)  
Rory T. Kay (#12416)  
McDonald Carano Wilson LLP  
2300 W. Sahara Avenue, Ste. 1200  
Las Vegas, Nevada 89102  
(702) 873-4100 (Phone)  
[lundvall@mcdonaldcarano.com](mailto:lundvall@mcdonaldcarano.com)  
[dleonard@mcdonaldcarano.com](mailto:dleonard@mcdonaldcarano.com)  
[rkay@mcdonaldcarano.com](mailto:rkay@mcdonaldcarano.com)

*Attorneys for Appellant/Cross-Respondent  
Franchise Tax Board of the State of California*

## TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	PERTINENT PROCEDURAL HISTORY .....	3
	A.    The California Administrative Proceedings.....	3
	B.    Hyatt I from USSC .....	4
	C.    Trial .....	6
	D.    Appeal and 2014 Opinion from NSC.....	6
	1.    Discretionary function immunity .....	7
	2.    Tort claims .....	7
	3.    Damages.....	8
	E.    Hyatt II from USSC.....	9
III.	ARGUMENT.....	11
	A.    The Court Did Not Apply <i>Falline</i> to Dismiss Hyatt’s IIED Claim as a Matter of Law, a Right That a Nevada Government Agency Would Have Enjoyed .....	11
	B.    The Evidence That the Court Deemed Sufficient to Support Hyatt’s Fraud Claim Against FTB Would Not Have Sufficed to Demonstrate Fraud Against a Nevada Government Agency .....	12
	C.    The Court’s Analysis of Discretionary Function Immunity Differed Against FTB Than Against Nevada Government Agencies .....	14
	D.    By Allowing Hyatt to Try the Audit Conclusions as Intentional Torts and Deeming the District Court’s Errors “Harmless,” this Court Deprived FTB of the Deference the Court Has Provided to Nevada Government Agencies.....	19
	E.    The Court Discriminated Against FTB Relative to Similarly Situated Nevada Government Agencies When It Allowed Hyatt to Pursue This Case Before Exhausting His Administrative Remedies in California.....	24
IV.	CONCLUSION.....	28

CERTIFICATE OF COMPLIANCE.....30  
CERTIFICATE OF SERVICE .....31

## TABLE OF AUTHORITIES

### Cases

<i>ASAP Storage, Inc. v. City of Sparks</i> , 123 Nev. 639, 173 P.3d 734 (2007).....	14
<i>Benson v. State Engineer</i> , 130 Nev. Adv. Op. 78, 358 P.3d 221 (Sept. 24, 2015).....	25, 26
<i>Butler v. Bayer</i> , 123 Nev. 450, 168 P.3d 1055 (2007).....	17
<i>Carroll v. Lanza</i> , 349 U.S. 408 (1955).....	5, 6
<i>City of Boulder City v. Boulder Excavating, Inc.</i> 124 Nev. 749, 191 P.3d 1175 (2008).....	passim
<i>Deja Vu Showgirls v. State, Dep’t of Tax.</i> , 130 Nev. Adv. Op. 73, 334 P.3d 392 (2014).....	25
<i>Falline v. GNLV</i> , 107 Nev. 1004, 823 P.2d 888 (1991).....	passim
<i>Fox v. State</i> , unpublished disposition, Case No. 54137, 2011 WL 2225000 (Jan. 18, 2011) .....	17
<i>Franchise Tax Bd. of Calif. v. Hyatt</i> (“2014 Opinion”), 130 Nev. Adv. Op. 71, 335 P.3d 125 (2014).....	passim
<i>Franchise Tax Bd. of Calif. v. Hyatt</i> (“Hyatt I”), 538 U.S. 488 (2003).....	passim
<i>Franchise Tax Bd. of Calif. v. Hyatt</i> (“Hyatt II”), 136 S.Ct. 1277 (U.S. 2016) .....	passim
<i>Gonzalez v. Las Vegas Metro. Police Dep’t</i> , unpublished disposition, Case No. 61120, 2013 WL 7158415 (Nov. 21, 2013).....	15
<i>In re Lietz Constr.</i> , 47 P.3d 1275 (Kansas 2002).....	13
<i>Int’l Game Tech., Inc. v. Second Jud. Dist. Ct. of Nev.</i> , 122 Nev. 132, 127 P.3d 1088 (2006).....	20

<i>Malecon Tobacco v. State, Dep't of Taxation</i> , 118 Nev. 837, 59 P.3d 474 (2002).....	20, 24
<i>Martinez v. Maruszczak</i> , 123 Nev. 433, 168 P.3d 720 (2007).....	passim
<i>Meridian Gold v. State, Dep't of Taxation</i> , 119 Nev. 630, 81 P.3d 516 (2003).....	20
<i>Mesagate Homeowner's Ass'n v. City of Fernley</i> , 124 Nev. 1092, 194 P.3d 1248 (2008).....	26
<i>Niklaus v. Miller</i> , 66 N.W.2d 824 (Neb. 1954) .....	13
<i>Palmieri v. Clark County</i> , 131 Nev. Adv. Op. 102, 367 P.3d 442 (2015).....	17
<i>Ransdell v. Clark County</i> , 124 Nev. 847, 192 P.3d 756 (2008).....	14, 16, 18, 19
<i>Seiffert v. City of Reno</i> , unpublished disposition, Case No. 60046, 2014 WL 605863 (Feb. 13, 2014).....	15
<i>State Civil Service Com'n v. Hoag</i> , 293 P. 338 (Colo. 1930).....	14
<i>State Dep't of Taxation v. Masco Builder</i> , 129 Nev. Adv. Op. 83, 312 P.3d 475 (2013).....	24
<i>Warner v. City of Reno</i> , unpublished disposition, Case No. 52728, 126 Nev. 767, 367 P.3d 832 (Sept. 28, 2010).....	15
<i>Whitehead v. Nevada Com'n on Judicial Discipline</i> , 110 Nev. 874, 878 P.2d 913 (1994).....	13
<b>Statutes</b>	
NRS 41.035 .....	28
NRS 360.291 .....	13
NRS 360.2905 .....	13
NRS 372.670.....	19

**Other Authorities**

Cal. Gov't Code §860.2 .....4  
Cal. Revenue & Tax. Code §21007 ..... 8, 13  
The Law of Workmen's Compensation § 68.34(a) (1987 & Supp.1990) .....11

**Rules**

NRAP 36 .....15

## I. INTRODUCTION.

In 2002, this Court held that it would grant immunity to Appellant Franchise Tax Board of the State of California (“FTB”) against Respondent Gilbert Hyatt’s tort claims to the same extent a Nevada government agency would be similarly protected. In 2003, the United States Supreme Court approved of this approach, finding that “[t]he Nevada Supreme Court sensitively applied principles of comity with a healthy regard for California’s sovereign status, relying on the contours of Nevada’s own sovereign immunity from suit as a benchmark for its analysis.” *Franchise Tax Bd. of Calif. v. Hyatt* (“*Hyatt I*”), 538 U.S. 488, 499 (2003).

In 2014, this Court did not live up to its commitment of equal treatment to a sister State. *See Franchise Tax Bd. of Calif. v. Hyatt* (“2014 Opinion”), 130 Nev. Adv. Op. 71, 335 P.3d 125 (2014). On April 19, 2016, the Supreme Court of the United States issued an opinion that deemed the 2014 Opinion of this Court unconstitutional because it was based on “a special rule of Nevada law that is hostile to its sister States.” *Franchise Tax Bd. of Calif. v. Hyatt* (“*Hyatt II*”), 136 S.Ct. 1277, 1283 (U.S. 2016). The Supreme Court vacated the judgment of this Court and remanded the case “for further proceedings not inconsistent” with the Supreme Court’s opinion. The mandate from the Supreme Court issued on May 23, 2016.

Read in conjunction, *Hyatt I* and *Hyatt II* unequivocally outline a constitutional duty to treat FTB, a California government agency, no differently than this Court would treat a Nevada government agency. The Full Faith and Credit Clause commands this Court to evaluate Hyatt’s claims against FTB—liability, damages, and defenses—no worse than if FTB were a home-state government agency. The Court did not do so in its 2014 Opinion.

For example, in the 2014 Opinion, this Court reaffirmed its previous decision in *Falline v. GNLV*, 107 Nev. 1004, 823 P.2d 888 (1991), which expressly held that claims for intentional infliction of emotional distress were not available against Nevada government agencies. *Id.* at 1013, 823 P.2d at 894. As this Court explained, “this particular tort would, at least in many instances, embrace conduct that would support a claim for punitive damages and we have held that such damages are unavailable in the type of action presented by the instant case[.]” *Id.* Yet, against a multitude of admitted legal and evidentiary errors, this Court upheld a finding of liability against FTB on Hyatt’s IIED claim.

In addition, this Court upheld a finding of fraud against FTB based upon standard representations contained in a statutorily required notice of audit sent to Hyatt, nearly identical to those issued by Nevada’s own taxing authorities, even though no opinion of this Court has ever allowed a fraud claim to advance against any Nevada government agency. This Court affirmed the fraud verdict without

examination of the evidence under a clear and convincing standard and without requiring Hyatt to overcome the presumption of good faith in the performance of statutorily required actions afforded to Nevada government agencies. Finally, in determining whether to grant discretionary function immunity, require exhaustion of administrative remedies, or evaluate whether the district court's multitude of legal and evidentiary errors were prejudicial or harmless, this Court needed to imagine FTB as Nevada's taxing authority. But the Court did not.

Because of what was not done by this Court, FTB moves for leave to file supplemental briefing in light of the Supreme Court's *Hyatt II* opinion. FTB respectfully submits that numerous aspects of this Court's 2014 Opinion were tainted by the hostility to a sister State that the Supreme Court deemed unconstitutional. Because this Court's 2014 Opinion has been vacated, FTB posits that additional briefing will be of assistance to ensure that the Court's post-mandate proceedings comply with the Supreme Court's directive.

## II. PERTINENT PROCEDURAL HISTORY.

### A. The California Administrative Proceedings.

Hyatt is a former California resident who received hundreds of millions of dollars in licensing fees on certain technology patents he purported to own. *Hyatt I*, 538 U.S. at 490-91. FTB conducted residency audits of Hyatt for the 1991 and 1992 tax years and concluded that Hyatt did not move from California to Nevada

before October 1991, as he had claimed, but remained a California resident until April 1992. Hyatt protested the 1991 and 1992 audits through an administrative procedure internal to FTB. The protests were resolved against Hyatt. In December 2008, Hyatt filed for administrative review of those protests with the California State Board of Equalization. *See* 92 AA 22939-45. That administrative review is ongoing and has not been resolved.

B. Hyatt I from USSC.

Just after the administrative proceedings had commenced in California, Hyatt filed suit against FTB in the Eighth Judicial District Court of Nevada seeking declaratory relief concerning his residency and alleging various tort claims concerning FTB's residency audits.

On the tort claims, FTB moved the district court for summary judgment on the ground that it was entitled to complete immunity from suit as it would be in California. Under California law, no public entity can be held liable for any injury caused by "instituting any judicial or administrative proceeding or action for or incidental to the assessment or collection of a tax," or by any "act or omission in the interpretation or application of any law relating to a tax." Cal. Gov't Code §860.2. FTB argued that the Full Faith and Credit Clause, along with principles of sovereign immunity and comity, required the Nevada courts to grant FTB that complete immunity. *Hyatt I*, 538 U.S. at 491-92.

The district court denied the motion, and FTB petitioned this Court for a writ of mandamus to order dismissal of the case. *Id.* at 492. Ultimately, this Court acknowledged, under comity, that “FTB should be granted partial immunity **equal to the immunity a Nevada government agency would receive[.]**” 2014 Opinion, 335 P.3d at 133 (emphasis added). The Court ordered the district court to dismiss Hyatt’s claim for negligent misrepresentation but allowed his intentional tort claims to proceed.

FTB filed a petition for certiorari in the United States Supreme Court, arguing that the Full Faith and Credit Clause required Nevada to apply the California statute granting FTB complete immunity. The Supreme Court granted certiorari and affirmed. The Supreme Court acknowledged, however, that “States’ sovereignty interests are not foreign to the full faith and credit command.” *Hyatt I*, 538 U.S. at 499. The Full Faith and Credit Clause prohibits “a State [from] exhibit[ing] a ‘policy of hostility to the public Acts’ of a sister State.” *Id.* (quoting *Carroll v. Lanza*, 349 U.S. 408, 413 (1955)). Since this Court had held it would grant FTB the same protections that a Nevada government agency would enjoy under similar circumstances—thereby placing FTB on an equal footing with Nevada government agencies—full faith and credit was afforded California. Based on this Court’s 2002 holding, the Supreme Court considered this Court to have

“sensitively applied principles of comity” by “relying on the contours of Nevada’s own sovereign immunity from suit.” *Id.*

C. Trial.

Following the Supreme Court’s decision in *Hyatt I*, the case returned to the district court. After lengthy discovery, pretrial proceedings and trial involving a multitude of errors as acknowledged by this Court, the jury found for Hyatt on all his claims, awarding him just over \$1 million on his fraud claim, \$52 million for invasion of privacy, \$85 million for emotional distress, and \$250 million in punitive damages. The district court added over \$2.5 million in costs and \$102 million in prejudgment interest to the jury verdict, for a total judgment against FTB of over \$490 million.

D. Appeal and 2014 Opinion from NSC.

FTB appealed the numerous errors made by the district court, including that FTB should have been afforded discretionary-function immunity; Hyatt’s tort claims failed as a matter of law; the district court made prejudicial evidentiary and instructional errors; and other errors. In an opinion entered on September 18, 2014, this Court affirmed in part and reversed in part. *See* 2014 Opinion, 335 P.3d at 157.

1. Discretionary function immunity.

In the 2014 Opinion, the Court concluded that FTB was not entitled to the discretionary-function immunity analysis that Nevada had expressly adopted in *Martinez v. Maruszczak*, 123 Nev. 433, 446, 168 P.3d 720, 729 (2007) and its progeny, on the basis that “[d]iscretionary-function immunity does not apply to intentional and bad-faith tort claims.” 2014 Opinion, 335 P.3d at 157 (citing and affirming *Falline*, 107 Nev. at 1009 & n. 3, 823 P.2d at 892 & n. 3).

2. Tort claims.

The Court held that Hyatt’s claims for invasion of privacy, abuse of process, and breach of a confidential relationship failed as a matter of law. However, the Court affirmed the jury’s verdict that found FTB liable for IIED and fraud. Although the Court embraced *Falline* for the proposition that there is no discretionary function immunity for intentional or bad-faith conduct, the Court did not apply to FTB the language in *Falline* that prohibited, as a matter of law, an IIED claim against a Nevada government agency. As the *Falline* court emphasized, “this particular tort would, at least in many instances, embrace conduct that would support a claim for punitive damages and we have held that such damages are unavailable in the type of action presented by the instant case[.]” 107 Nev. at 1012, 823 P.2d at 894.

Even though no Nevada decision has ever found fraud against a Nevada government agency, this Court also concluded that there was sufficient evidence for the jury to find fraud based on a document that FTB had provided Hyatt at the outset of his audit explaining what Hyatt should expect from the process. Notably, this Court did not evaluate the sufficiency of the evidence under the required clear and convincing standard. *Clark Sanitation v. Sun Valley Disposal*, 87 Nev. 338, 341, 487 P.2d. 337, 339 (1971). The document that the Court held contained the representations that gave rise to the fraud claim, FTB Form 1015, was developed by FTB pursuant to the legislative directive found in Cal. Revenue & Tax. Code §21007. Form 1015 informed Hyatt that he could expect “[c]ourteous treatment by FTB employees,” “[c]onfidential treatment of any personal and financial information,” and “[c]ompletion of the audit within a reasonable amount of time.” 54 AA 13401. Even though Hyatt offered no evidence concerning creation or issuance of that form document required by California statute, in the Court’s view a reasonable jury could conclude these were “fraudulent representations,” FTB “knew [they] were false,” and FTB “intended for Hyatt to rely on [them].” 2014 Opinion, 335 P.3d at 144.

### 3. Damages.

Having affirmed the IIED and fraud verdicts, the Court refused to apply to FTB the statutory damages cap applicable to a Nevada government entity. At the

same time, however, the Court held that “[b]ecause punitive damages would not be available against a Nevada government entity,” FTB was immune from punitive damages. *Id.* at 154. The Court therefore struck the punitive damages award but upheld the more than \$1 million in damages against FTB for fraud (before prejudgment interest) and remanded for retrial on IIED damages, citing evidentiary and jury-instruction errors. *Id.* at 157.

E. Hyatt II from USSC.

After issuance of the 2014 Opinion, FTB petitioned the United States Supreme Court for certiorari. The Supreme Court granted certiorari and vacated this Court’s judgment as unconstitutionally discriminatory against a sister State. *Franchise Tax Bd. of Calif. v. Hyatt (Hyatt II)*, 578 U.S. \_\_\_, 136 S.Ct. 1277, 1283 (2016). The Supreme Court held,

The Nevada Supreme Court has ignored both Nevada’s typical rules of immunity and California’s immunity-related statutes ... Instead, it has applied a special rule of law that evinces a ‘policy of hostility’ toward California ... Doing so violates the Constitution’s requirement that ‘Full Faith and Credit shall be given in each State to the public Acts, Records and judicial Proceedings of every other State.’ *Id.* at 1281, quoting *Hyatt I*, 538 U.S. at 499 and U.S. Const. Art. IV §1.

As noted by the Supreme Court when describing *Hyatt I*:

Nevada had permitted Hyatt to sue California in Nevada courts... Nevada's courts recognized that California's law of complete immunity would prevent any recovery in this case. The Nevada Supreme Court consequently did not apply California law. It applied Nevada law instead. We upheld that decision as consistent with the Full Faith and Credit Clause. *Id.* at 1281 (internal citations omitted).

The Supreme Court rejected the 2014 Opinion, however, as “a critical departure from [the Nevada Supreme Court's] earlier approach.” *Id.* at 1282.

Nevada has not applied the principles of Nevada law ordinarily applicable to suits against Nevada's own agencies. Rather, it has applied a special rule of law applicable only in lawsuits against its sister states, such as California. *Id.*

The Supreme Court took particular issue with this Court's stated rationale for its “discriminatory hostility” against a sister State:

Such an explanation, which amounts to little more than a conclusory statement disparaging California's own legislative, judicial, and administrative controls, cannot justify the application of a special and discriminatory rule. Rather, viewed through a full faith and credit lens, a State that disregards its own ordinary legal principles on this ground *is* hostile to another state. *Id.* at 1282 (emphasis in the original).

Because this Court discriminated against California when failing to apply Nevada's own rules, the Supreme Court vacated the judgment and remanded the case “for further proceedings not inconsistent with this opinion.” *Id.* at 1283. FTB submits that this Court's “discriminatory hostility” towards California pervaded the entire 2014 Opinion.

### III. ARGUMENT.

#### A. The Court Did Not Apply *Falline* to Dismiss Hyatt’s IIED Claim as a Matter of Law, a Right That a Nevada Government Agency Would Have Enjoyed.

On appeal, FTB contended that *Falline* had been implicitly over-ruled by *Martinez* and its progeny. See Appellant’s Opening Brief (“AOB”) at 35:2-4 and 52:12-55:18. This Court rejected that contention and re-affirmed *Falline*. 2014 Opinion, 335 P.3d at 139. To the extent the Court embraced *Falline*, it had a constitutional obligation to apply the *Falline* case to FTB in the same manner it did to a Nevada government agency. See *Hyatt II*, 136 S.Ct. at 1282-83.

In *Falline*, as to an IIED claim, the Court deemed summary dismissal to be warranted because no such claim could be brought against a government agency:

[T]his particular tort would, at least in many instances, embrace conduct that would support a claim for punitive damages and we have held that such damages are unavailable in the type of action presented by the instant case. Moreover, recognizing a cause of action for emotional distress in [an administrative] context raises the specter of “almost every emotion-based case turning up as some kind of tort suit.”

*Id.* at 1013, 823 P.2d at 894, quoting The Law of Workmen’s Compensation § 68.34(a) at 13–116 (1987 & Supp.1990).

There is no reason why this general principle would not apply FTB. See *id.* Yet as to FTB, the Court not only declined to dismiss Hyatt’s IIED claim as a matter of law, but it held that FTB’s admittedly routine audit procedures

constituted extreme and outrageous conduct. *See* 2014 Opinion, 335 P.3d at 148-49. The Court's failure to apply *Falline* in *toto* to FTB constituted disparate treatment that the Supreme Court confirmed is constitutionally prohibited. *See Hyatt II*, 136 S.Ct. at 1282-83.

B. The Evidence That the Court Deemed Sufficient to Support Hyatt's Fraud Claim Against FTB Would Not Have Sufficed to Demonstrate Fraud Against a Nevada Government Agency.

There is no precedent in Nevada to hold a Nevada government agency liable for fraud. What's more, there is no precedent in Nevada to hold a Nevada government agency liable for any tort based upon the statements that the State Legislature requires a Nevada government agency to make. Yet, as another example of anti-California hostility, that is precisely the basis on which this Court affirmed the jury's fraud verdict.

In his operative complaint, Hyatt alleged that FTB represented to him that it would conduct an unbiased, good-faith audit and maintain the confidentiality of the information he disclosed to FTB. 2014 Opinion, 335 P.3d at 131. At trial Hyatt relied upon a mission statement as the source of FTB's alleged misrepresentation, but he reversed course before this Court upon demonstration he never actually received FTB's mission statement. Hyatt then pointed to a 1991 notice of audit. In the 2014 Opinion, this Court embraced the 1991 notice of audit to Hyatt as being the source of FTB's alleged fraudulent misrepresentations. *Id.* at 145. The audit

notice is mandated by California's Legislature. Calif. Revenue & Tax. Code §21007. Having been developed and distributed to taxpayers by legislative mandate, the FTB employee who provided Hyatt with the notice of audit was merely performing an act required by California's Legislature and cannot be deemed to have intended to defraud Hyatt by sending the mandatory notice.

Like California, Nevada's Legislature has set certain standards by which the Department of Taxation must treat taxpayers. *See* NRS 360.291. This is known as the Taxpayers' Bill of Rights. *See* NRS 360.2905. Included within the Taxpayers' Bill of Rights is the requirement that "officers and employees of the Department [treat the taxpayer] with courtesy, fairness, uniformity, consistency and common sense." NRS 360.291(1)(a). This is precisely the type of representation that the Court deemed sufficient to support the jury's fraud verdict against FTB. *See* 2014 Opinion, 335 P.3d at 144-45.

There is no authority that would allow the Nevada Department of Taxation to be made liable for fraud based on the statements contained in the Taxpayers' Bill of Rights. In fact, in Nevada and elsewhere, courts have long held that government actors are presumed to be acting in good faith in the performance of their required acts. *See. e.g., In re Lietz Constr.*, 47 P.3d 1275, 1289 (Kansas 2002); *Whitehead v. Nevada Com'n on Judicial Discipline*, 110 Nev. 874, 921, 878 P.2d 913, 942 (1994); *Niklaus v. Miller*, 66 N.W.2d 824, 828 (Neb. 1954); *State*

*Civil Service Com'n v. Hoag*, 293 P. 338, 342 (Colo. 1930). Pursuant to *Hyatt II*, California government agents should be afforded the same presumption when they are sued in Nevada, and Hyatt made no showing to rebut that presumption. See Part III(C), *infra*.

C. The Court's Analysis of Discretionary Function Immunity Differed Against FTB Than Against Nevada Government Agencies.

In every single case since *Martinez* but this one, this Court has looked past the labels a plaintiff assigned to their claims to examine the actual conduct of the defendant government agency within the paradigm of the *Berkovitz-Gaubert* test. See *City of Boulder City v. Boulder Excavating, Inc.*, 124 Nev. 749, 752, 191 P.3d 1175, 1177 (2008) (after liability for intentional tort claims was established at trial, Nevada Supreme Court analyzed facts of government conduct to find discretionary function immunity applied); *Ransdell v. Clark County*, 124 Nev. 847, 854-58, 192 P.3d 756, 761-64 (2008) (analyzing immunity on summary judgment by requiring plaintiff to produce evidence of non-immune conduct even though intentional torts had been alleged); *ASAP Storage, Inc. v. City of Sparks*, 123 Nev. 639, 656, 173 P.3d 734, 745 (2007) (deciding discretionary function immunity issue in context of summary judgment motion after intentional torts were alleged); *Seiffert v. City of Reno*, unpublished disposition, Case No. 60046, 2014 WL 605863 at \*1 (Feb. 13,

2014)<sup>1</sup> (evaluating discretionary function immunity within the context of summary judgment to conclude that plaintiff failed to show disputed issue of material fact as to whether defendant’s “conduct was entitled to immunity under the *Martinez* test”); *Gonzalez v. Las Vegas Metro. Police Dep’t*, unpublished disposition, Case No. 61120, 2013 WL 7158415 at \*2-3 (Nov. 21, 2013) (holding that the subjective intent of the government actor does not matter when evaluating governmental immunity and applying discretionary function immunity on summary judgment, despite allegations of an intentional tort in complaint); *Warner v. City of Reno*, unpublished disposition, Case No. 52728, 126 Nev. 767 at \*2, 367 P.3d 832 (Sept. 28, 2010) (applying discretionary function immunity in the context of a summary judgment motion after intentional torts were alleged in complaint). Unlike its disparate treatment of FTB, as to Nevada government agencies, this Court has found discretionary function immunity even when the plaintiff had pled intentional torts and even when liability for intentional torts has been found after trial.

For example, *City of Boulder City v. Boulder Excavating, Inc.* involved claims against a Nevada public entity for defamation, intentional/malicious interference with contractual relationships, and conspiracy—all intentional torts. 124 Nev. at 752, 191 P.3d at 1177. At trial, the district court expressly found that

---

<sup>1</sup> Although recent amendments to NRAP 36 allow citations to unpublished decisions issued on or after January 1, 2016 for “their persuasive value,” FTB cites to unpublished decisions that pre-date that time simply to show the Court’s disparate treatment of FTB, not as precedent.

the government employee had intentionally interfered with a contract, violated Nevada statutes, and violated the plaintiff's due process rights. The trial judge "found an intentional tort," and this Court observed that the assertion of liability "was entirely based upon the alleged intentional, arbitrary, and capricious conduct of [the employee]." *Id.* at 757, 191 P.3d at 1180. Nonetheless, this Court found that the defendant government entity was entitled to discretionary function immunity. *Id.* at 755-60, 191 P.3d at 1180-82.

The *Boulder City* Court applied the *Berkovitz-Gaubert* test to evaluate the City's conduct, notwithstanding that all of the plaintiff's claims were based upon "alleged intentional, arbitrary, and capricious conduct." 124 Nev. at 752, 191 P.3d at 1180. Although the plaintiff pled and proved at trial the claim of "intentional interference with contractual relationship" against the Nevada government entity, this Court concluded under the *Berkovitz-Gaubert* test that the City was entitled to discretionary function immunity because the acts at issue were discretionary and based upon policy determinations. *Id.* at 1181-82.

Similarly, in *Ransdell*, the plaintiff's complaint included claims against a Nevada public entity for trespass to property, conversion, nuisance, and violations of his constitutional rights. Although these claims are "intentional" torts, this Court nevertheless evaluated immunity based on the facts of the case, not the label of "intentional" given the claims by plaintiff's counsel. 124 Nev. at 854-58, 192

P.3d 761-64. In resolving the appeal of the grant of summary judgment, this Court applied the *Berkovitz-Gaubert* test to hold that the defendants were entitled to discretionary function immunity, despite the intentional nature of the torts alleged in the complaint. *Id.* at 761-762. The Court applied the test to all of the government conduct complained of, irrespective of causes of action pled, to conclude that Clark County was entitled to complete discretionary function immunity for all claims, including the intentional tort causes of action. *Id.* at 764.

As these cases show, the *Berkovitz-Gaubert* test, as adopted in *Martinez*, requires this Court to analyze the facts of any given case within the law of discretionary function immunity, no matter what stage in the proceedings the case below reached. The Court has also taken this same approach for other types of governmental immunity in claims against Nevada government entities. *See Palmieri v. Clark County*, 131 Nev. Adv. Op. 102, 367 P.3d 442 (2015) (“in the qualified immunity context, bare allegations of malice are insufficient to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery”) (internal quotation omitted); *see also Fox v. State*, unpublished disposition, Case No. 54137, 2011 WL 2225000 at \*2 (Jan. 18, 2011) (citing *Butler v. Bayer*, 123 Nev. 450, 466, 168 P.3d 1055, 1066 (2007) and *Martinez* to dismiss an intentional tort claim based on qualified immunity after looking to the

undisputed facts in a motion for summary judgment – not the allegations of the complaint).

In Hyatt's operative complaint each of his intentional torts had a common allegation: FTB allegedly trumped up its audit conclusions to extort a settlement from him. Every claim Hyatt alleged was premised on that common allegation. *See* 14AA 3257-3300. It is that allegation that allowed Hyatt to survive a motion to dismiss by invoking *Falline*. At trial, however, Hyatt presented no evidence of extortion, and Hyatt's own experts admitted they found no evidence of either extortion or trumped-up audit conclusions. *See, e.g.*, 44 AA 10846 (130), 33 AA 8060 (67), 33 AA 8060 (69) – 8061 (73). Indeed, Hyatt's attorneys also conceded at trial that they were not pursuing a bad faith claim, that their case was not a bad-faith case, and that no element of any claim required a showing of bad faith. *See* 51 AA 12502 (79), 12507 (99) (100), 12511 (110-111). At their urging, the district court did not give any jury instructions for bad faith. 53 AA 13218-50; 54 AA 251-87.

On appeal, FTB urged the Court to utilize the same analysis used in *City of Boulder* and *Ransdell*; that is, in reviewing for discretionary function immunity for FTB, the Court should apply the same analysis applied to Nevada government entities to look past the labels and examine the actual evidence presented at trial and the admissions made by Hyatt's counsel and expert witnesses. AOB at 52:19-

53:3. Although this Court did that in *City of Boulder, Ransdell*, and other decisions involving Nevada government agencies, as to FTB the Court did not, thereby depriving FTB of any genuine evaluation for discretionary function immunity protections. In other words, the Court treated California differently than Nevada's home-state agencies.

D. By Allowing Hyatt to Try the Audit Conclusions as Intentional Torts and Deeming the District Court's Errors "Harmless," this Court Deprived FTB of the Deference the Court Has Provided to Nevada Government Agencies.

This Court has never allowed a taxpayer to launch a collateral attack on the Nevada Department of Taxation's fact finding and legal conclusions through institution of a tort action. In fact, NRS 372.670 provides:

No injunction, writ of mandate or other legal or equitable process may issue in any suit, action or proceeding in any court against this state or against any officer of this state to prevent or enjoin the collection under this chapter of any tax or any amount of tax required to be collected.

Such an action would lead to economic chaos in Nevada's tax-collecting functions.

Indeed, in ordering that a False Claim Act action against Nevada's Department of Taxation be dismissed, the Court held:

[S]tate law entrusts the primary responsibility for making factual evaluations under, and legal interpretations of, the revenue statutes to the expertise of Nevada's Department of Taxation. Accordingly, the Attorney General's assertion that an FCA action implicates issues that are better left, initially, to the tax department's expertise constitutes a basis for good cause dismissal.

*Int'l Game Tech., Inc. v. Second Jud. Dist. Ct. of Nev.*, 122 Nev. 132, 138, 127 P.3d 1088, 1093 (2006).

[T]he determinations of fact-based legal issues under the tax statutes should not be made by the courts; rather, those determinations are “best left to the Department of Taxation, which can utilize its specialized skill and knowledge to inquire into the facts of the case.” Further, we have repeatedly recognized the authority of agencies, like the tax department and Tax Commission, to interpret the language of a statute that they are charged with administering; as long as that interpretation is reasonably consistent with the language of the statute, it is entitled to deference in the courts.

*Id.* at 157-58, 127 P.3d at 1106 (quoting *Meridian Gold v. State, Dep't of Taxation*, 119 Nev. 630, 636–37, 81 P.3d 516, 520 (2003) and *Malecon Tobacco v. State, Dep't of Taxation*, 118 Nev. 837, 841 &842 n.15, 59 P.3d 474, 477 & n.15 (2002)). Indeed, in *Malecon*, the Court recognized that, in light of the fact-based constitutional questions raised by the Taxpayers’ lawsuit, should this Court “address the Taxpayers’ claims without the benefit of the Department of Taxation’s expertise, we would usurp the Department’s role as well as contravene the Supreme Court’s directive to give deference to an agency’s reasonable interpretation of the law and facts at issue.” 118 Nev. at 841 & 842 n.15, 59 P.3d at 477 & n.15.

In this case, the Court correctly recognized multiple instances of improperly admitted evidence that the jury heard and saw on the topic of whether FTB came to the right conclusion concerning FTB’s audits of Hyatt and the amount of tax and

penalties he owed to California, 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.” 2014 Opinion, 335 P.3d at 150. From the opening statement at trial, Hyatt’s counsel claimed it was the jury’s job to review FTB’s conclusion and act as a “check and balance” against FTB’s audit determinations made against Hyatt. 52 AA 12837 (90).

On this same inadmissible topic, the Court 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 ....”** 2014 Opinion, 335 P.3d at 150. (emphasis added). The inadmissible expert testimony from Malcolm Jumelet “is precisely what this case was not allowed to address.” *Id.* As a result, the Court held that the district court abused its discretion by admitting this evidence yet inexplicably deemed the district court’s error “harmless.” *Id.* at 157.

The jury heard nearly two full days of testimony from Hyatt’s expert Malcolm Jumelet, who expressed expert opinions critical of how FTB analyzed

and weighed information obtained in the audits. *Id.* at 150; 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 dozens of times to Jumelet's testimony that FTB had reached the wrong result concerning Hyatt's tax liability. *See, 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.") In the rebuttal closing argument, Hyatt's counsel again referred the jury to Jumelet's testimony numerous times. *See, e.g.*, 53 AA 13166-67, 13169, 13172, 13176. Although this improper evidence might readily have impacted jury deliberations on the first two essential elements of IIED (whether FTB's conduct was extreme and outrageous, and whether FTB employees intended to cause emotional distress), the Court's 2014 Opinion deemed it harmless error.

In addition to holding that the district court committed numerous evidentiary errors, 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." 2014 Opinion, 335 P.3d at 151. As the Court

noted, this instruction “violated the jurisdictional limit that the district court imposed in this case.” *Id.*

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

This Court appropriately held that Hyatt’s focus on the audit conclusion—which included expert testimony, and which culminated in the erroneous jury instruction and closing argument—was error. 2014 Opinion, 335 P.3d at 149-50. Yet the Court deemed this error harmless, thereby affording FTB none of the deference it would have extended to a Nevada government agency. In light of the deference owed to FTB, the district court’s instructional and evidentiary errors that allowed Hyatt to convert his trial into an attack on the audit findings can be nothing other than prejudicial. As the Supreme Court made clear in *Hyatt II*, this

Court needed to treat FTB as one of its own and give FTB the same deference that would be afforded a Nevada agency.<sup>2</sup>

E. The Court Discriminated Against FTB Relative to Similarly Situated Nevada Government Agencies When It Allowed Hyatt to Pursue This Case Before Exhausting His Administrative Remedies in California.

The Court's disparate treatment of FTB is also demonstrated by the Court allowing Hyatt to pursue his Nevada action before exhausting his administrative remedies in California. For many years, the Court has vindicated the doctrine of administrative exhaustion when applying it to cases in which the Nevada Department of Taxation was a party. *See Malecon*, 118 Nev. at 839, 59 P.3d at 475-76 (2002) ("Ordinarily, before availing oneself of district court relief from an agency decision, one must first exhaust available administrative remedies."); *see also State Dep't of Taxation v. Masco Builder*, 129 Nev. Adv. Op. 83, 312 P.3d 475, 478 (2013) ("[T]he exhaustion doctrine provides that, before seeking judicial relief, a petitioner must exhaust any and all available administrative remedies, so as to give the administrative agency an opportunity to correct mistakes and perhaps avoid judicial intervention altogether.").

---

<sup>2</sup> Numerous other evidentiary errors likewise demonstrate the Court's disparate treatment of FTB, and if granted leave to file supplemental briefing, FTB would highlight those errors as well.

Indeed, on the very day that the Court issued its 2014 Opinion, it recognized that Nevada courts grant considerable deference to the Nevada Department of Taxation in evaluating exhaustion of administrative remedies:

While facial constitutional challenges may bypass the administrative exhaustion requirement, we have held that as-applied constitutional challenges hinging on factual determinations cannot. In making that determination, we reasoned that given an agency's expertise in the area of the dispute, it is in the best position to make the factual determinations necessary to resolve that dispute.

*Deja Vu Showgirls v. State, Dep't of Tax.*, 130 Nev. Adv. Op. 73, 334 P.3d 392, 397 (2014). The Court dismissed the *Deja Vu* plaintiff's as-applied challenge to a Nevada statute because the company failed to exhaust its administrative remedies. In other words, the Court confirmed that a plaintiff must overcome this substantial hurdle before it can sue a Nevada agency in a Nevada state court. *See id.*

Less than a year later, in the case of *Benson v. State Engineer*, the Court reaffirmed the importance of applying the exhaustion doctrine to protect Nevada agencies. 130 Nev. Adv. Op. 78, 358 P.3d 221 (Sept. 24, 2015). In that case, the Court declined to entertain a challenge to the State Engineer's decision to cancel a water permit because the petitioner failed to exhaust her administrative remedies and could not otherwise prove that administrative review would provide her "no relief at all." 130 Nev. Adv. Op. 78, 358 P.3d at 226. The Court correctly noted that the exhaustion doctrine serves vital policy purposes for both Nevada agencies and courts alike:

[T]his stricter standard [that the administrative review would provide no relief at all] will provide the district court with a fully developed record and administrative decision, including factual findings by an administrative body with expertise in water appropriation. This will place the district court in a better position, acting in an appellate capacity, to determine issues such as whether a party has proved adequate grounds for having a permit restored with its original appropriation date. Lastly, the stricter standard will provide the State Engineer with the opportunity to correct its mistakes and protect judicial resources.

*Id.*; see also *Mesagate Homeowner's Ass'n v. City of Fernley*, 124 Nev. 1092, 1099, 194 P.3d 1248, 1252-53 (2008) (explaining that the exhaustion doctrine's purpose is to permit agencies to correct their mistakes and conserve judicial resources).

Reading the cases in harmony, it is clear that the Court has historically granted considerable deference to Nevada agencies in the application of the doctrine of administrative exhaustion. The Court did not give FTB this same deference. By failing to hold Hyatt to the same exhaustion standards, the Court acted with hostility to its sister State.

During briefing before this Court, FTB argued that the exhaustion doctrine was a jurisdictional limit prohibiting Hyatt from introducing evidence regarding “any issues that were the subject matter of the administrative tax proceedings between FTB and Hyatt in California.” AOB at 58:6-7. FTB noted that it was inappropriate for the district court to consider Hyatt's claims and to empanel a jury to act as an appellate review body while the California Board of Equalization

(“BOE”) was conducting administrative proceedings regarding Hyatt’s claims. *See id.* at 58:15-28. Indeed, FTB’s methods of collecting evidence during Hyatt’s tax audit and the analysis flowing from that collection are the very issues that the BOE is reviewing administratively. *See id.* at 59:3-10. Thus FTB argued that these issues—many of which went to the very core of Hyatt’s tort claims in this case—were inappropriately considered by the district court. *See id.* at 59:10-12.

Despite the Court’s consistent application of the exhaustion doctrine to cases involving Nevada government agencies, the Court failed to apply the doctrine here as a jurisdictional limit that benefits FTB. Instead, the Court characterized FTB’s argument as evidentiary, subject to an abuse of discretion standard. *See* 2014 Opinion, 335 P.3d at 149. Although there may be tangential benefits to FTB from the exclusion of evidence, characterizing FTB’s argument as evidentiary and not as a jurisdictional limit misses the importance of the exhaustion doctrine. By declining to apply the exhaustion doctrine as it has to a Nevada government agency, the Court put FTB in a position that the Nevada Department of Taxation has never occupied.

To treat FTB the same as the Court has historically treated the Nevada Department of Taxation and other Nevada government agencies, and to comply with the Supreme Court’s prohibition against discriminatory treatment of a sister

State, the Court should stay or dismiss Hyatt's case until such time as he has exhausted his administrative remedies in California.

#### IV. CONCLUSION.

FTB respectfully contends that this Court's hostility towards a sister State that the Supreme Court deemed unconstitutional infected the entirety of the 2014 Opinion. In its affirmance of the fraud and IIED verdicts and analysis of discretionary function immunity and the exhaustion doctrine, this Court did not treat FTB as it would FTB's Nevada counterpart. To address the disparate treatment towards FTB that pervades the now-vacated 2014 Opinion, the Court must not only apply the damages cap of NRS 41.035 but must conduct its review of the jury's verdict within the prism that FTB is a Nevada government agency. To ensure compliance with the Supreme Court's remand instructions, FTB respectfully requests the opportunity to provide further briefing to the Court on these issues.

Dated this 23<sup>rd</sup> day of May, 2016.

McDONALD CARANO WILSON LLP

By: /s/

PAT LUNDVALL  
DEBBIE LEONARD  
RORY KAY

2300 W. Sahara Avenue, Ste. 1200  
Las Vegas, Nevada 89102  
(702) 873-4100 (Phone)

*Attorneys for Appellant*

**AFFIRMATION**

Pursuant to NRS 239B.030, the undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

Dated this 23rd day of May, 2016.

McDONALD CARANO WILSON LLP

By: /s/ \_\_\_\_\_

PAT LUNDVALL

DEBBIE LEONARD

RORY KAY

2300 W. Sahara Avenue, Ste. 1200

Las Vegas, Nevada 89102

(702) 873-4100 (Phone)

*Attorneys for Appellant*

## CERTIFICATE OF COMPLIANCE

I hereby certify that this motion 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 it has been prepared using Microsoft Word 2010 in 14-point font, Times New Roman style. Because this motion exceeds 10 pages, a motion for leave to exceed the page limit has been filed concurrently herewith.

Dated this 23<sup>rd</sup> day of May, 2016.

McDONALD CARANO WILSON LLP

By: /s/  
PAT LUNDVALL  
DEBBIE LEONARD  
RORY KAY  
2300 W. Sahara Avenue, Ste. 1200  
Las Vegas, Nevada 89102  
(702) 873-4100 (Phone)

*Attorneys for Appellant*

**CERTIFICATE OF SERVICE**

Pursuant to NRCP 5(b), I certify that I am an employee of McDonald Carano Wilson LLP and on the 23rd day of May, 2016, I certify that I electronically filed the foregoing with the Clerk of the Court by using the ECF system which served the following parties electronically:

Peter Bernhard  
Mark Hutchinson  
Michael Wall  
Daniel Polsenberg  
Bruce J. Fort  
Charles Wayne Howle  
Clark Len Snelson

I further certify that on this date I served a copy, postage prepaid, by U.S.

Mail to:

Donald J. Kula  
Perkins Coie  
18888 Century Park East, Suite 1700  
Los Angeles, California 90067-1721

/s/ Pamela Miller  
An employee of McDonald Carano Wilson, LLP