IN THE SUPREME COURT OF THE STATE OF NEVADA

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, Appellant/Cross-respondent, v. GILBERT P. HYATT, Respondent/Cross-appellant.	Supreme Court Case No. 53264 District Court Case No. A382999

APPEAL

from the Eighth Judicial District Court, Clark County
THE HONORABLE JESSIE WALSH, District Judge

RESPONDENT GILBERT P. HYATT'S SUPPLEMENTAL APPENDIX

Volume 1 of 2 (Pages 1- 80)

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SUPPLEMENTAL APPENDIX - VOLUME 1 OF 2

	Prior Opinion	Tab No. / Page No.
2002 Opinion (April 4, 2002)	*Franchise Tax Board of the State of California v. Eighth Judicial Court of the State of Nevada*, Supreme Court of Nevada, April 4, 2002 Order Granting Petition for Rehearing, Vacating Previous Order, Granting Petition for a Writ of Mandamus in Part in Docket No. 36390, and Granting Petition for Writ of Prohibition in Part in Docket No. 35549	1 SRA001-SRA014
Hyatt I (April 23, 2003)	*Franchise Tax Board of California v. Hyatt* 538 U.S. 488 (2003) ("*Hyatt I*")	2 SRA 015-SRA 021
2014 Opinion (September 18, 2014)	*Franchise Tax Board of California v. Hyatt* 335 P.3d 125 (Nev. 2014)	3 SRA 022-SRA 056
U.S. Supreme Court Order re Cert. (June 30, 2015)	U.S. Supreme Court Order Granting FTB Petition for Cert., Order List, 576 U.S. ___ (Jun. 30, 2015)	4 SRA 057-SRA 070

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	Prior Opinion	Tab No. / Page No.
Hyatt II (April 19, 2016)	*Franchise Tax Board of California v. Hyatt* __U.S. __, 136 S.Ct. 1277 (2016) ("*Hyatt II*")	5 SRA 071-SRA 080

DATED: October 21, 2016.

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CERTIFICATE OF SERVICE

I certify that I am an employee of HUTCHISON & STEFFEN, LLC and that on this date **RESPONDENT GILBERT P. HYATT'S SUPPLEMENTAL APPENDIX Volume 1 of 2 (Pages 1- 80)** was filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the master service list as follows:

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IN THE SUPREME COURT OF THE STATE OF NEVADA

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, Petitioner, vs. THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE NANCY M. SAITTA, DISTRICT JUDGE, Respondents, and GILBERT P. HYATT, Real Party in Interest.	No. 35549
FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, Petitioner, vs. THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE NANCY M. SAITTA, DISTRICT JUDGE, Respondents, and GILBERT P. HYATT, Real Party in Interest.	No. 36390

FILED

APR 04 2002

CLERK

DEPUTY CLERK

ORDER GRANTING PETITION FOR REHEARING, VACATING PREVIOUS ORDER, GRANTING PETITION FOR A WRIT OF MANDAMUS IN PART IN DOCKET NO. 36390, AND GRANTING PETITION FOR A WRIT OF PROHIBITION IN PART IN DOCKET NO. 35549

In Docket No. 35549, Franchise Tax Board petitioned this court for a writ of mandamus or prohibition, challenging the district

court's determination that certain documents were not protected by attorney-client, work product or deliberative process privileges, and its order directing Franchise Tax Board to release the documents to Gilbert Hyatt. In Docket No. 36390, Franchise Tax Board separately petitioned this court for a writ of mandamus, challenging the district court's denial of its motions for summary judgment or dismissal, and contending that the district court lacks subject matter jurisdiction over the underlying tort claims because Franchise Tax Board is immune from liability under California law. Alternatively, Franchise Tax Board sought a writ of prohibition or mandamus limiting the scope of the underlying case to its Nevada-related conduct.

On June 13, 2001, we granted the petition in Docket No. 36390 on the basis that Hyatt did not produce sufficient facts to establish the existence of a genuine dispute justifying denial of the summary judgment motion. Because our decision rendered the petition in Docket No. 35549 moot, we dismissed it. Hyatt petitioned for rehearing in Docket No. 36390 on July 5, 2001, and in response to our July 13, 2001 order, Franchise Tax Board answered on August 7, 2001. Having considered the parties' documents and the entire record before us, we grant Hyatt's petition for rehearing, vacate our June 13, 2001 order and issue this order in its place.

We conclude that the district court should have declined to exercise its jurisdiction over the underlying negligence claim under comity principles. Therefore, we grant the petition in Docket No. 36390 with respect to the negligence claim, and deny it with respect to the intentional tort claims. We also deny the alternative petition to limit the scope of trial. We further conclude that, except for document FTB No. 07381,

which is protected by the attorney work-product privilege, the district court did not exceed its jurisdiction by ordering Franchise Tax Board to release the documents at issue because Franchise Tax Board has not demonstrated that they were privileged. Therefore, we grant the petition for a writ of prohibition[1] in Docket No. 35549 with respect to FTB No. 07381, and deny the petition with respect to all the other documents.

Background

The underlying tort action arises out of Franchise Tax Board's audit of Hyatt—a long-time California resident who moved to Clark County, Nevada—to determine whether Hyatt underpaid California state income taxes for 1991 and 1992. After the audit, Franchise Tax Board assessed substantial additional taxes and penalties against Hyatt. Hyatt formally protested the assessments in California through the state's administrative process, and sued Franchise Tax Board in Clark County District Court for several intentional torts and one negligent act allegedly committed during the audit.

During discovery in the district court case, Hyatt sought the release of all the documents Franchise Tax Board had used in the audit, but subsequently redacted or withheld. Franchise Tax Board opposed Hyatt's motion to compel on the basis that many of the documents were privileged. The district court, acting on a discovery commissioner's recommendation, concluded that most of the documents were not privileged and ordered Franchise Tax Board to release those documents.

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[1]Prohibition is a more appropriate remedy than mandamus for the prevention of improper discovery. Wardleigh v. District Court, 111 Nev. 345, 350, 891 P.2d 1180, 1183 (1995).

The district court also entered a protective order governing the parties' disclosure of confidential information. The writ petition in Docket No. 35549 challenges those decisions.

Franchise Tax Board then moved for summary judgment, or dismissal under NRCP 12(h)(3), arguing that the district court lacked subject matter jurisdiction because principles of sovereign immunity, full faith and credit, choice of law, comity and administrative exhaustion all required the application of California law, and under California law Franchise Tax Board is immune from all tort liability. The district court denied the motion. The writ petition in Docket No. 36390 challenges that decision. The Multistate Tax Commission has filed an amicus curiae brief in support of Franchise Tax Board's comity argument.

Propriety of Writ Relief

We may issue an extraordinary writ at our discretion to compel the district court to perform a required act,[2] or to control discretion exercised arbitrarily or capriciously,[3] or to arrest proceedings that exceed the court's jurisdiction.[4] An extraordinary writ is not available if petitioner has a plain, speedy and adequate remedy in the ordinary course of law.[5]

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[2]NRS 34.160 (mandamus).

[3]Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 637 P.2d 534 (1981) (mandamus).

[4]NRS 34.320 (prohibition).

[5]NRS 34.170; NRS 34.330.

A petition for a writ of prohibition may be used to challenge a discovery order requiring the disclosure of privileged information.[6] A petition for a writ of mandamus may be used to challenge an order denying summary judgment or dismissal; however, we generally decline to consider such petitions because so few of them warrant extraordinary relief.[7] We may nevertheless choose to exercise our discretion and intervene, as we do here, to clarify an important issue of law and promote the interests of judicial economy.[8]

Docket No. 36390

Nevada and California have both generally waived their sovereign immunity from suit, but not their Eleventh Amendment immunity from suit in federal court, and have extended the waivers to their state agencies or public employees, except when state statutes expressly provide immunity.[9] Nevada has expressly provided its state agencies with immunity for discretionary acts, unless the acts are taken in bad faith, but not for operational or ministerial acts, or for intentional torts committed within the course and scope of employment.[10] California has expressly provided its state taxation agency, Franchise Tax Board,

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[6]Wardleigh, 111 Nev. at 350-51, 891 P.2d at 1183-84.

[7]Smith v. District Court, 113 Nev. 1343, 950 P.2d 280 (1997).

[8]Id.

[9]NRS 41.031; Cal. Const. Art. 3, § 5; Cal. Gov't Code § 820.

[10]See NRS 41.032(2); Foster v. Washoe County, 114 Nev. 936, 941, 964 P.2d 788, 791 (1998); State, Dep't Hum. Res. v. Jimenez, 113 Nev. 356, 364, 935 P.2d 274, 278 (1997); Falline v. GNLV Corp., 107 Nev. 1004, 1009, 823 P.2d 888, 892 (1991).

with complete immunity.[11] The fundamental question presented is which state's law applies, or should apply.

Jurisdiction

Preliminarily, we reject Franchise Tax Board's arguments that the doctrines of sovereign immunity, full faith and credit, choice of law, or administrative exhaustion deprive the district court of subject matter jurisdiction over Hyatt's tort claims. First, although California is immune from Hyatt's suit in federal courts under the Eleventh Amendment, it is not immune in Nevada courts.[12] Second, the Full Faith and Credit Clause does not require Nevada to apply California's law in violation of its own legitimate public policy.[13] Third, the doctrines of sovereign immunity and full faith and credit determine the choice of law with respect to the district court's jurisdiction,[14] while Nevada law is presumed to govern with respect to the underlying torts.[15] Fourth, Hyatt's tort claims, although arising from the audit, are separate from the administrative proceeding, and the exhaustion doctrine does not apply. The district court has jurisdiction; however, we must decide whether it should decline to exercise its jurisdiction under the doctrine of comity.

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[11]See Cal. Gov't Code §860.2; Mitchell v. Franchise Tax Board, 228 Cal. Rptr. 750 (Ct. App. 1986).

[12]Nevada v. Hall, 440 U.S. 410, 414-21 (1979).

[13]Id. at 421-24.

[14]Id. at 414-21.

[15]Motenko v. MGM Dist., Inc., 112 Nev. 1038, 1041, 921 P.2d 933, 935 (1996).

Comity

The doctrine of comity is an accommodation policy, under which the courts of one state voluntarily give effect to the laws and judicial decisions of another state out of deference and respect, to promote harmonious interstate relations.[16] In deciding whether to respect California's grant of immunity to a California state agency, a Nevada court should give due regard to the duties, obligations, rights and convenience of Nevada's citizens and persons within the court's protection, and consider whether granting California's law comity would contravene Nevada's policies or interests.[17] Here, we conclude that the district court should have refrained from exercising its jurisdiction over the negligence claim under the comity doctrine, but that it properly exercised its jurisdiction over the intentional tort claims.

Negligent Acts

Although Nevada has not expressly granted its state agencies immunity for all negligent acts, California has granted the Franchise Tax Board such immunity.[18] We conclude that affording Franchise Tax Board statutory immunity for negligent acts does not contravene any Nevada interest in this case. An investigation is generally considered to be a discretionary function,[19] and Nevada provides its agencies with immunity

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[16]Nevada v. Hall, 440 U.S. at 424-27; Mianecki v. District Court, 99 Nev. 93, 98, 658 P.2d 422, 424-25 (1983).

[17]Mianecki, 99 Nev. at 98, 658 P.2d at 425.

[18]Cal. Gov't Code § 860.2; see Mitchell, 228 Cal. Rptr. at 752.

[19]Foster, 114 Nev. at 941-43, 964 P.2d at 792.

for the performance of a discretionary function even if the discretion is abused.[20] Thus, Nevada's and California's interests are similar with respect to Hyatt's negligence claim.

Intentional Torts

In contrast, we conclude that affording Franchise Tax Board statutory immunity for intentional torts does contravene Nevada's policies and interests in this case. As previously stated, Nevada does not allow its agencies to claim immunity for discretionary acts taken in bad faith, or for intentional torts committed in the course and scope of employment. Hyatt's complaint alleges that Franchise Tax Board employees conducted the audit in bad faith, and committed intentional torts during their investigation. We believe that greater weight is to be accorded Nevada's interest in protecting its citizens from injurious intentional torts and bad faith acts committed by sister states' government employees, than California's policy favoring complete immunity for its taxation agency.[21] Because we conclude that the district court properly exercised its jurisdiction over the intentional tort claims, we must decide whether our intervention is warranted to prevent the release of documents that Franchise Tax Board asserts are privileged.

Docket No. 35549

Franchise Tax Board invoked the deliberative process, attorney-client and work-product privileges as barriers to the discovery of various documents used or produced during its audit. The district court

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[20]NRS 41.032(2).

[21]See Mianecki, 99 Nev. at 98, 658 P.2d at 425.

decided that most of the documents were not protected by these privileges, and ordered Franchise Tax Board to release them. With one exception, we conclude that the district court did not exceed its jurisdiction by ordering Franchise Tax Board to release the documents.

The deliberative process privilege does not apply because the documents at issue were not predecisional; that is, they were not precursors to the adoption of agency policy, but were instead related to the enforcement of already-adopted policies.[22] And if the privilege were to apply, it would be overridden by Hyatt's demonstrated need for the documents based on his claims of fraud and government misconduct.[23]

The attorney-client privilege does not apply because Franchise Tax Board did not demonstrate (1) that in-house-counsel Jovanovich was acting as an attorney, providing legal opinions, rather than as an employee participating in the audit process,[24] or (2) that the communications between Ms. Jovanovich and other Franchise Tax Board employees were kept confidential within the agency.[25]

The work-product privilege does apply, however, to document FTB No. 07381. This memorandum documenting a telephone

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[22]See Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 866-68 (D.C. Cir. 1980).

[23]See In re Sealed Case, 121 F.3d 729, 737-38 (D.C. Cir. 1997).

[24]See Upjohn Co. v. United States, 449 U.S. 383, 389-97 (1981); United States v. Chen, 99 F.3d 1495, 1501-02 (9th Cir. 1996); United States v. Rowe, 96 F.3d 1294, 1297 (9th Cir. 1996); Texaco Puerto Rico v. Department of Consumer Aff., 60 F.3d 867, 884 (1st Cir. 1995).

[25]See Coastal States, 617 F.2d at 862-64.

conversation between Franchise Tax Board attorneys Jovanovich and Gould should be protected from disclosure. When the memorandum was generated, Jovanovich was acting in her role as an attorney representing Franchise Tax Board, as was Gould. The memorandum expresses these attorneys' mental impressions and opinions regarding the possibility of legal action being taken by Franchise Tax Board or Hyatt. Thus, this one document is protected by the attorney work-product privilege.[26]

Finally, although Franchise Tax Board also challenges the district court's protective order, we decline to review the propriety of that discovery order in this writ proceeding. Although an extraordinary writ may be warranted to avoid the irreparable injury that would result from a discovery order requiring disclosure of privileged information, extraordinary writs are not generally available to review discovery orders.[27] Franchise Tax Board has a plain, speedy and adequate remedy; it may challenge the order on appeal if it is aggrieved by the district court's final judgment.

Conclusion

We conclude that the district court should have declined to exercise jurisdiction over the negligence claim as a matter of comity. Accordingly, we grant the petition in Docket No. 36390 in part; the clerk of this court shall issue a writ of mandamus directing the district court to grant Franchise Tax Board's motion for summary judgment as to the negligence claim. We deny the petition in Docket No. 36390 with respect

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[26]See Wardleigh, 111 Nev. at 357, 891 P.2d at 1188.

[27]Clark County Liquor v. Clark, 102 Nev. 654, 659, 730 P.2d 443, 447 (1986).

to the intentional tort claims, and we deny the alternative petition to limit the scope of trial.

We conclude that the district court exceeded its jurisdiction by ordering the release of one privileged document, but that Franchise Tax Board has not demonstrated that the district court exceeded its jurisdiction by ordering it to release any of the other discovery documents at issue. Accordingly, we grant the petition in Docket No. 35549 in part; the clerk of this court shall issue a writ of prohibition prohibiting the district court from requiring Franchise Tax Board to release document FTB No. 07381. We deny the writ petition in Docket No. 35549 with respect to all other documents.

We vacate our stay of the district court proceedings.

It is so ORDERED.[28]

Maupin, C.J.

Young, J.

Shearing, J.

Agosti, J.

Leavitt, J.

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[28]The Honorable Nancy Becker, Justice, voluntarily recused herself from participation in the decision of this matter.

cc: Hon. Nancy M. Saitta, District Judge
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ROSE, J., concurring in part and dissenting in part:

I would not grant comity to the petitioners in this case and would grant immunity only as given by the law of Nevada. In all other respects, I concur with the majority opinion.

In Mianecki v. District Court,[1] we were faced with a similar issue when the State of Wisconsin requested comity be granted by Nevada courts in order to recognize Wisconsin's sovereign immunity. In refusing to grant comity and recognize Wisconsin's sovereign immunity, we stated:

> In general, comity is a principle whereby the courts of one jurisdiction may give effect to the laws and judicial decisions of another jurisdiction out of deference and respect. The principle is appropriately invoked according to the sound discretion of the court acting without obligation. "[I]n considering comity, there should be due regard by the court to the duties, obligations, rights and convenience of its own citizens and of persons who are within the protection of its jurisdiction." With this in mind, we believe greater weight is to be accorded Nevada's interest in protecting its citizens from injurious operational acts committed within its borders by employees of sister states, than Wisconsin's policy favoring governmental immunity. Therefore, we hold that the law of Wisconsin should not be granted comity where to do so would be contrary to the policies of this state.

Based on this very similar case, I would not grant comity to California, and I would extend immunity to the agents of California only to the extent that such immunity is given them by Nevada law. Denying a

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[1]99 Nev. 93, 98, 658 P.2d 422, 424-25 (1983) (internal citations omitted).

grant of comity is not uncommon, as California has denied comity to the state of Nevada in years past.[2]

_____, J.
Rose

[2]Nevada v. Hall, 440 U.S. 410, 418 (1979).

123 S.Ct. 1683
Supreme Court of the United States

FRANCHISE TAX BOARD
OF CALIFORNIA, Petitioner,
v.
Gilbert P. HYATT, et al.

No. 02-42.
|
Argued Feb. 24, 2003.
|
Decided April 23, 2003.

Taxpayer, former California resident who had moved to Nevada, brought state-court action in Nevada against California tax collection agency, alleging negligent misrepresentation, invasion of privacy, fraud and other torts in connection with agency's assessments and penalties for tax year for which taxpayer filed as part-year California resident. The Nevada Supreme Court denied in part agency's petition for writ of mandamus, ordering Clark County District Court to dismiss negligence claim for lack of jurisdiction but finding that intentional tort claims could proceed to trial. Certiorari was granted, 537 U.S. 946, 123 S.Ct. 409, 154 L.Ed.2d 289. The United States Supreme Court, Justice O'Connor, held that Nevada court was not required to extend full faith and credit to California statute conferring complete immunity on California agencies.

Affirmed.

West Headnotes (4)

[1] States
Full Faith and Credit in Each State to the Public Acts, Records, Etc. of Other States
360 States
360I Political Status and Relations
360I(A) In General
360k5 Relations Among States Under Constitution of United States
360k5(2) Full Faith and Credit in Each State to the Public Acts, Records, Etc. of Other States

Whereas Full Faith and Credit Clause is exacting with respect to final judgment rendered by court with adjudicatory authority over subject matter and persons governed by judgment, it is less demanding with respect to choice of laws; Clause does not compel state to substitute statutes of other states for its own statutes dealing with subject matter concerning which it is competent to legislate. U.S.C.A. Const. Art. 4, § 1.

29 Cases that cite this headnote

[2] States
Full Faith and Credit in Each State to the Public Acts, Records, Etc. of Other States
360 States
360I Political Status and Relations
360I(A) In General
360k5 Relations Among States Under Constitution of United States
360k5(2) Full Faith and Credit in Each State to the Public Acts, Records, Etc. of Other States

Nevada court hearing intentional tort action brought by Nevada resident against California tax collection agency based at least in part on conduct occurring in Nevada was not required to extend full faith and credit to California statute conferring complete immunity on California agencies; Nevada high court's determination that affording immunity to foreign state's agency would contravene Nevada's policy of protecting its citizens from injurious intentional torts committed by sister states' government employees relied on contours of Nevada's own sovereign immunity as benchmark and did not exhibit policy of hostility to public acts of California. U.S.C.A. Const. Art. 4, § 1; West's Ann.Cal. Const. Art. 3, § 5; West's Ann.Cal.Gov.Code §§ 820, 860.2; West's NRSA 41.031.

22 Cases that cite this headnote

[3] States
Liability and Consent of State to Be Sued in General
360 States

360VI Actions
360k191 Liability and Consent of State to Be Sued in General
360k191.1 In General
Constitution does not confer sovereign immunity on states in courts of sister states.

3 Cases that cite this headnote

[4] **States**
Full Faith and Credit in Each State to the Public Acts, Records, Etc. of Other States

360 States
360I Political Status and Relations
360I(A) In General
360k5 Relations Among States Under Constitution of United States
360k5(2) Full Faith and Credit in Each State to the Public Acts, Records, Etc. of Other States
Full Faith and Credit Clause does not require state to apply second state's sovereign immunity statutes where such application would violate first state's own legitimate public policy. U.S.C.A. Const. Art. 4, § 1.

29 Cases that cite this headnote

****1684** *Syllabus* [*]

[*] The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

Respondent Hyatt's (hereinafter respondent) "part-year" 1991 California income-tax return represented that he had ceased to be a California resident and had become a Nevada resident in October 1991, shortly before he received substantial licensing fees. Petitioner California Franchise Tax Board (CFTB) determined that he was a California resident until April 1992, and accordingly issued notices of proposed assessments for 1991 and 1992 and imposed substantial civil fraud penalties. Respondent filed suit against CFTB in a Nevada state court, alleging that CFTB had directed numerous contacts at Nevada and had committed negligence and intentional torts during the course of its audit of respondent. In its motion for summary judgment or dismissal, CFTB argued that the state court lacked subject matter jurisdiction because full faith and credit and other legal principles required that the court apply California law immunizing CFTB from suit. Upon denial of that motion, CFTB petitioned the Nevada Supreme Court for a writ of mandamus ordering dismissal. The latter court ultimately granted the petition in part and denied it in part, holding that the lower court should have declined to exercise its jurisdiction over the underlying negligence claim under comity principles, but that the intentional tort claims could proceed to trial. Among other things, the court noted that Nevada immunizes its state agencies from suits for discretionary acts but not for intentional torts committed within the course and scope of employment and held that affording CFTB statutory immunity with respect to intentional torts would contravene Nevada's interest in protecting its citizens from injurious intentional torts and bad faith acts committed by sister States' government employees.

Held: The Full Faith and Credit Clause, U.S. Const., Art. IV, § 1, does not require Nevada to give full faith and credit to California's statutes providing its tax agency with immunity from suit. The full faith and credit command "is exacting" with respect to a final judgment rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, *Baker v. General Motors Corp.,* 522 U.S. 222, 233, 118 S.Ct. 657, 139 L.Ed.2d 580, but is less demanding with respect to choice of laws. The Clause does not compel a State to substitute the statutes of other States for its own statutes dealing with a subject matter concerning which it ***489** is competent to legislate. *E.g., Sun Oil Co. v. Wortman,* 486 U.S. 717, 722, 108 S.Ct. 2117, 100 L.Ed.2d 743. Nevada is undoubtedly competent to legislate with respect to the subject matter of the alleged intentional torts here, which, it is claimed, have injured one of its citizens within its borders. CFTB argues unpersuasively that this Court should adopt a "new rule" mandating that a state court extend full faith and credit to a sister State's statutorily recaptured sovereign immunity from suit when a refusal to do so would interfere with the State's capacity to fulfill its own sovereign responsibilities. The Court has, in the past, appraised and balanced state interests when invoking the Full Faith and Credit Clause to resolve ****1685** conflicts between overlapping laws of coordinate States. See, *e.g., Bradford Elec. Light Co. v. Clapper,* 286 U.S. 145, 52 S.Ct. 571, 76 L.Ed. 1026. However, this balancing-of-interests approach quickly proved unsatisfactory and the Court

abandoned it, *Allstate Ins. Co. v. Hague,* 449 U.S. 302, 308, n. 10, 322, n. 6, 339, n. 6, 101 S.Ct. 633, 66 L.Ed.2d 521, recognizing, instead, that it is frequently the case under the Clause that a court can lawfully apply either the law of one State or the contrary law of another, *Sun Oil Co. v. Wortman, supra,* at 727, 108 S.Ct. 2117. The Court has already ruled that the Full Faith and Credit Clause does not require a forum State to apply a sister State's sovereign immunity statutes where such application would violate the forum State's own legitimate public policy. *Nevada v. Hall,* 440 U.S. 410, 424, 99 S.Ct. 1182, 59 L.Ed.2d 416. There is no constitutionally significant distinction between the degree to which the allegedly tortious acts here and in *Hall* are related to a core sovereign function. States' sovereignty interests are not foreign to the full faith and credit command, but the Court is not presented here with a case in which a State has exhibited a "policy of hostility to the public Acts" of a sister State. *Carroll v. Lanza,* 349 U.S. 408, 413, 75 S.Ct. 804, 99 L.Ed. 1183. The Nevada Supreme Court sensitively applied comity principles 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. Pp. 1687-1690.

Affirmed.

O'CONNOR, J., delivered the opinion for a unanimous Court.

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Opinion

Justice O'CONNOR delivered the opinion of the Court.

We granted certiorari to resolve whether the Nevada Supreme Court's refusal to extend full faith and credit to California's statute immunizing its tax collection agency from suit violates Article IV, § 1, of the Constitution. We conclude it does not, and we therefore affirm the judgment of the Nevada Supreme Court.

I

Respondent Gilbert P. Hyatt (hereinafter respondent) filed a "part-year" resident income tax return in California for 1991. App. to Pet. for Cert. 54. In the return, respondent represented that as of October 1, 1991, he had ceased to be a California resident and had become a resident of Nevada. In 1993, petitioner California Franchise Tax Board (CFTB) commenced an audit to determine whether respondent had underpaid state income taxes. *Ibid.* The audit focused on ***491** respondent's claim that he had changed residency shortly before receiving substantial licensing fees for certain patented inventions related to computer technology.

At the conclusion of its audit, CFTB determined that respondent was a California resident until April 3, 1992, and accordingly issued notices of proposed assessments for income taxes for 1991 and 1992 and imposed substantial civil fraud penalties. *Id.,* at 56-57, 58-59. Respondent ****1686** protested the proposed assessments and penalties in California through CFTB's administrative process. See Cal. Rev. & Tax.Code Ann. §§ 19041, 19044-19046 (West 1994).

On January 6, 1998, with the administrative protest ongoing in California, respondent filed a lawsuit against CFTB in Nevada in Clark County District Court. Respondent alleges that CFTB directed "numerous and continuous contacts ... at Nevada" and committed several torts during the course of the audit, including invasion of privacy, outrageous conduct, abuse of process, fraud, and negligent misrepresentation. App. to Pet. for Cert. 51-52, 54. Respondent seeks punitive and compensatory damages. *Id.,* at 51-52. He also sought a declaratory judgment "confirm[ing][his] status as a Nevada resident effective as of September 26, 1991," *id.,* at 51, but the District Court dismissed the claim for lack of subject matter jurisdiction on April 16, 1999, App. 93-95.

During the discovery phase of the Nevada lawsuit, CFTB filed a petition in the Nevada Supreme Court for a writ of mandamus, or in the alternative, for a writ of prohibition, challenging certain of the District Court's discovery orders. While that petition was pending, CFTB filed a motion in the District Court for summary judgment or, in the alternative, for dismissal for lack of jurisdiction. CFTB argued that the District Court lacked subject matter jurisdiction because principles of sovereign immunity, full faith and credit, choice of law, comity, and administrative exhaustion all required that the District Court apply California law, under which:

> ***492** "Neither a public entity nor a public employee is liable for an injury caused by:
>
> "(a) Instituting any judicial or administrative proceeding or action for or incidental to the assessment or collection of a tax [or]
>
> "(b) An act or omission in the interpretation or application of any law relating to a tax." Cal. Govt.Code Ann. § 860.2 (West 1995).

The District Court denied CFTB's motion for summary judgment or dismissal, prompting CFTB to file a second petition in the Nevada Supreme Court. This petition sought a writ of mandamus ordering the dismissal of the case, or in the alternative, a writ of prohibition and mandamus limiting the scope of the suit to claims arising out of conduct that occurred in Nevada.

On June 13, 2001, the Nevada Supreme Court granted CFTB's second petition, dismissed the first petition as moot, and ordered the District Court to enter summary judgment in favor of CFTB.App. to Pet. for Cert. 38-43. On April 4, 2002, however, the court granted respondent's petition for rehearing, vacated its prior ruling, granted CFTB's second petition in part, and denied it in part. *Id.,* at 5-18. The court held that the District Court "should have declined to exercise its jurisdiction over the underlying negligence claim under comity principles" but that the intentional tort claims could proceed to trial. *Id.,* at 7.

The Nevada Supreme Court noted that both Nevada and California have generally waived their sovereign immunity from suit in state court and "have extended the waivers to their state agencies or public employees except when state statutes expressly provide immunity." *Id.,* at 9-10 (citing Nev.Rev.Stat. § 41.031 (1996); Cal. Const., Art. 3, § 5; and Cal. Govt.Code Ann. § 820 (West 1995)). Whereas Nevada has not conferred immunity on its state agencies for intentional torts committed within the course and scope of ***493** employment, the court acknowledged that "California has expressly provided [CFTB] with complete immunity." App. to Pet. for Cert. 10 (citing Cal. Govt.Code Ann. § 860.2 (West 1995) and *Mitchell v. Franchise Tax Board,* 183 Cal.App.3d 1133, 228 Cal.Rptr. 750 (1986)). To determine which State's law should apply, the court applied principles of comity.

****1687** Though the Nevada Supreme Court recognized the doctrine of comity as "an accommodation policy, under which the courts of one state voluntarily give effect to the laws and judicial decisions of another state out of deference and respect, to promote harmonious interstate relations," the court also recognized its duty to determine whether the application of California law "would contravene Nevada's policies or interests," giving "due regard to the duties, obligations, rights and convenience of Nevada's citizens." App. to Pet. for Cert. 11. "An investigation is generally considered to be a discretionary function," the court observed, "and Nevada provides its [own] agencies with immunity for the performance of a discretionary function even if the discretion is abused." *Id.,* at 12. "[A]ffording [CFTB] statutory immunity for negligent acts," the court therefore concluded, "does not contravene any Nevada interest in this case." *Ibid.* The court accordingly held that "the district court should have declined to exercise its jurisdiction" over respondent's negligence claim under principles of comity. *Id.,* at 7. With respect to the intentional torts, however, the court held that "affording [CFTB] statutory immunity ... does contravene Nevada's policies and interests in this case." *Id.,* at 12. Because Nevada "does not allow its agencies to claim immunity for discretionary acts taken in bad faith, or for intentional torts committed in the course and scope of employment," the court held that "Nevada's interest in protecting its citizens from injurious intentional torts and bad faith acts committed by sister states' government employees" should be accorded ***494** greater weight "than California's policy favoring complete immunity for its taxation agency." *Id.,* at 12-13.

We granted certiorari to resolve whether Article IV, § 1, of the Constitution requires Nevada to give full faith and credit to California's statute providing its tax agency with

immunity from suit, 537 U.S. 946, 123 S.Ct. 409, 154 L.Ed.2d 289 (2002), and we now affirm.

II

[1] The Constitution's Full Faith and Credit Clause provides: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." Art. IV, § 1. As we have explained, "[o]ur precedent differentiates the credit owed to laws (legislative measures and common law) and to judgments." *Baker v. General Motors Corp.,* 522 U.S. 222, 232, 118 S.Ct. 657, 139 L.Ed.2d 580 (1998). Whereas the full faith and credit command "is exacting" with respect to "[a] final judgment ... rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment," *id.,* at 233, 118 S.Ct. 657, it is less demanding with respect to choice of laws. We have held that the Full Faith and Credit Clause does not compel " 'a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.' " *Sun Oil Co. v. Wortman,* 486 U.S. 717, 722, 108 S.Ct. 2117, 100 L.Ed.2d 743 (1988) (quoting *Pacific Employers Ins. Co. v. Industrial Accident Comm'n,* 306 U.S. 493, 501, 59 S.Ct. 629, 83 L.Ed. 940 (1939)).

The State of Nevada is undoubtedly "competent to legislate" with respect to the subject matter of the alleged intentional torts here, which, it is claimed, have injured one of its citizens within its borders. " '[F]or a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.' ***495** " *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 818, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985) (quoting ****1688** *Allstate Ins. Co. v. Hague,* 449 U.S. 302, 312-313, 101 S.Ct. 633, 66 L.Ed.2d 521 (1981) (plurality opinion)); see 472 U.S., at 822-823, 101 S.Ct. 633. Such contacts are manifest in this case: the plaintiff claims to have suffered injury in Nevada while a resident there; and it is undisputed that at least some of the conduct alleged to be tortious occurred in Nevada, Brief for Petitioner 33-34, n. 16. See, *e.g., Carroll v. Lanza,* 349 U.S. 408, 413, 75 S.Ct. 804, 99 L.Ed. 1183 (1955) ("The State where the tort occurs certainly has a concern in the problems following in the wake of the injury"); *Pacific Employers Ins. Co. v. Industrial Accident Comm'n, supra,* at 503, 59 S.Ct. 629 ("Few matters could be deemed more appropriately the concern of the state in which [an] injury occurs or more completely within its power").

[2] CFTB does not contend otherwise. Instead, CFTB urges this Court to adopt a "new rule" mandating that a state court extend full faith and credit to a sister State's statutorily recaptured sovereign immunity from suit when a refusal to do so would "interfer[e] with a State's capacity to fulfill its own sovereign responsibilities." Brief for Petitioner 13 (internal quotation marks omitted).

We have, in the past, appraised and balanced state interests when invoking the Full Faith and Credit Clause to resolve conflicts between overlapping laws of coordinate States. See *Bradford Elec. Light Co. v. Clapper,* 286 U.S. 145, 52 S.Ct. 571, 76 L.Ed. 1026 (1932) (holding that the Constitution required a federal court sitting in New Hampshire to apply a Vermont workers' compensation statute in a tort suit brought by the administrator of a Vermont worker killed in New Hampshire). This balancing approach quickly proved unsatisfactory. Compare *Alaska Packers Assn. v. Industrial Accident Comm'n of Cal.,* 294 U.S. 532, 550, 55 S.Ct. 518, 79 L.Ed. 1044 (1935) (holding that a forum State, which was the place of hiring but not of a claimant's domicile, could apply its own law to compensate for an accident in another State, because "[n]o persuasive reason" was shown for requiring application of the law of the State where the ***496** accident occurred), with *Pacific Employers Ins. Co. v. Industrial Accident Comm'n, supra,* at 504-505, 59 S.Ct. 629 (holding that the State where an accident occurred could apply its own workers' compensation law and need not give full faith and credit to that of the State of hiring and domicile of the employer and employee). As Justice Robert H. Jackson, recounting these cases, aptly observed, "it [is] difficult to point to any field in which the Court has more completely demonstrated or more candidly confessed the lack of guiding standards of a legal character than in trying to determine what choice of law is required by the Constitution." Full Faith and Credit-The Lawyer's Clause of the Constitution, 45 Colum. L.Rev. 1, 16 (1945).

In light of this experience, we abandoned the balancing-of-interests approach to conflicts of law under the Full Faith and Credit Clause. *Allstate Ins. Co. v. Hague,* 449 U.S., at 308, n. 10, 101 S.Ct. 633 (plurality opinion); *id.,* at 322, n. 6, 101 S.Ct. 633 (STEVENS, J., concurring in judgment); *id.,* at 339, n. 6, 101 S.Ct. 633 (Powell, J., dissenting). We have recognized, instead, that "it is frequently the case under the Full Faith and Credit Clause that a court can lawfully apply either the law of one State or the contrary law of another." *Sun Oil Co. v. Wortman, supra,* at 727, 108 S.Ct. 2117. We thus have held that a State need not "substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate." *Pacific Employers Ins. Co. v. Industrial Accident Comm'n, supra,* at 501, 59 S.Ct. 629; see *Baker v. General Motors Corp., supra,* at 232, 118 S.Ct. 657; *Sun Oil Co. v. Wortman, supra,* at 722, 108 S.Ct. 2117; *Phillips Petroleum Co. v. Shutts, supra,* at 818-819, 105 S.Ct. 2965. Acknowledging this shift, CFTB contends that this case demonstrates the need for a new rule under the Full Faith and Credit Clause that will protect "core sovereignty" interests as ****1689** expressed in state statutes delineating the contours of the State's immunity from suit. Brief for Petitioner 13.

We disagree. We have confronted the question whether the Full Faith and Credit Clause requires a forum State to ***497** recognize a sister State's legislatively recaptured immunity once before. In *Nevada v. Hall,* 440 U.S. 410, 99 S.Ct. 1182, 59 L.Ed.2d 416 (1979), an employee of the University of Nevada was involved in an automobile accident with California residents, who filed suit in California and named Nevada as a defendant. The California courts refused to apply a Nevada statute that capped damages in tort suits against the State on the ground that "to surrender jurisdiction or to limit respondents' recovery to the $25,000 maximum of the Nevada statute would be obnoxious to its statutorily based policies of jurisdiction over nonresident motorists and full recovery." *Id.,* at 424, 99 S.Ct. 1182.

[3] We affirmed, holding, first, that the Constitution does not confer sovereign immunity on States in the courts of sister States. *Id.,* at 414-421, 99 S.Ct. 1182. Petitioner does not ask us to reexamine that ruling, and we therefore decline the invitation of petitioner's *amici* States, see Brief for State of Florida et al. as *Amici Curiae* 2, to do so. See this Court's Rule 14.1(a); *Mazer v. Stein,* 347 U.S. 201, 206, n. 5, 74 S.Ct. 460, 98 L.Ed. 630 (1954) ("We do not reach for constitutional questions not raised by the parties").

[4] The question presented here instead implicates *Hall's* second holding: that the Full Faith and Credit Clause did not require California to apply Nevada's sovereign immunity statutes where such application would violate California's own legitimate public policy. 440 U.S., at 424, 99 S.Ct. 1182. The Court observed in a footnote:

> "California's exercise of jurisdiction in this case poses no substantial threat to our constitutional system of cooperative federalism. Suits involving traffic accidents occurring outside of Nevada could hardly interfere with Nevada's capacity to fulfill its own sovereign responsibilities. We have no occasion, in this case, to consider whether different state policies, either of California or of Nevada, might require a different analysis or a different result." *Id.,* at 424, n. 24, 99 S.Ct. 1182.

***498** CFTB asserts that an analysis of this lawsuit's effects should lead to a different result: that the Full Faith and Credit Clause requires Nevada to apply California's immunity statute to avoid interference with California's "sovereign responsibility" of enforcing its income tax laws. Brief for Petitioner 13.

Our past experience with appraising and balancing state interests under the Full Faith and Credit Clause counsels against adopting CFTB's proposed new rule. Having recognized, in *Hall,* that a suit against a State in a sister State's court "necessarily implicates the power and authority" of both sovereigns, 440 U.S., at 416, 99 S.Ct. 1182, the question of which sovereign interest should be deemed more weighty is not one that can be easily answered. Yet petitioner's rule would elevate California's sovereignty interests above those of Nevada, were we to deem this lawsuit an interference with California's "core sovereign responsibilities." We rejected as "unsound in principle and unworkable in practice" a rule of state immunity from federal regulation under the Tenth Amendment that turned on whether a particular state government function was "integral" or "traditional." *Garcia v. San Antonio Metropolitan Transit Authority,* 469 U.S. 528, 546-547, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985). CFTB has convinced us of neither the relative soundness nor the relative practicality of adopting a similar distinction here.

Even were we inclined to embark on a course of balancing States' competing sovereign interests to resolve conflicts of laws under the Full Faith and Credit Clause, ****1690** this case would not present the occasion to do so. There is no principled distinction between Nevada's interests in tort claims arising out of its university employee's automobile accident, at issue in *Hall,* and California's interests in the tort claims here arising out of its tax collection agency's residency audit. To be sure, the power to promulgate and enforce income tax laws is an essential attribute of sovereignty. See *Franchise Tax Bd. of Cal. v. Postal Service,* 467 U.S. 512, 523, 104 S.Ct. 2549, 81 L.Ed.2d 446 (1984) ***499** " '[T]axes are the life-blood of government' " (quoting *Bull v. United States,* 295 U.S. 247, 259-260, 55 S.Ct. 695, 79 L.Ed. 1421 (1935))). But the university employee's educational mission in *Hall* might also be so described. Cf. *Brown v. Board of Education,* 347 U.S. 483, 493, 74 S.Ct. 686, 98 L.Ed. 873 (1954) ("[E]ducation is perhaps the most important function of state and local governments").

If we were to compare the degree to which the allegedly tortious acts here and in *Hall* are related to a core sovereign function, we would be left to ponder the relationship between an automobile accident and educating, on one hand, and the intrusions alleged here and collecting taxes, on the other. We discern no constitutionally significant distinction between these relationships. To the extent CFTB complains of the burdens and expense of out-of-state litigation, and the diversion of state resources away from the performance of important state functions, those burdens do not distinguish this case from any other out-of-state lawsuit against California or one of its agencies.

States' sovereignty interests are not foreign to the full faith and credit command. But we are not presented here with a case in which a State has exhibited a "policy of hostility to the public Acts" of a sister State. *Carroll v. Lanza,* 349 U.S., at 413, 75 S.Ct. 804. The 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. See App. to Pet. for Cert. 10-13.

In short, we heed the lessons learned as a result of *Bradford Elec. Light Co. v. Clapper,* 286 U.S. 145, 52 S.Ct. 571, 76 L.Ed. 1026 (1932), and its progeny. Without a rudder to steer us, we decline to embark on the constitutional course of balancing coordinate States' competing sovereign interests to resolve conflicts of laws under the Full Faith and Credit Clause.

The judgment of the Nevada Supreme Court is affirmed.

It is so ordered.

All Citations

538 U.S. 488, 123 S.Ct. 1683, 155 L.Ed.2d 702, 71 USLW 4307, 03 Cal. Daily Op. Serv. 3364, 2003 Daily Journal D.A.R. 4281

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335 P.3d 125
Supreme Court of Nevada.

FRANCHISE TAX BOARD OF the STATE of California, Appellant/Cross–Respondent,
v.
Gilbert P. HYATT, Respondent/Cross–Appellant.

No. 53264.
|
Sept. 18, 2014.

Synopsis

Background: Taxpayer brought action against out-of-state franchise tax board, alleging intentional torts and bad-faith conduct during audits. After grant of partial summary judgment to board and jury trial on remaining claims, the District Court, Clark County, Jessie Elizabeth Walsh, J., entered judgment in favor of taxpayer and awarded damages. Board appealed and taxpayer cross-appealed.

Holdings: The Supreme Court, Hardesty, J., held that:

[1] discretionary-function immunity under state statute does not include intentional torts and bad faith conduct;

[2] taxpayer did not have objective expectation of privacy in his name, address, and social security number, as would be required to support invasion of privacy claim against board arising out of disclosure of such information;

[3] Supreme Court would officially adopt cause of action for false light invasion of privacy;

[4] whether board made specific representations to taxpayer, regarding treatment of taxpayer's confidential information during audit, that board intended for taxpayer to rely on but which board did not intend to meet was jury question in fraud claim;

[5] extension of state's statutory cap on liability to board would have violated state public policy, and thus principles of comity did not require such extension; and

[6] as a matter of first impression, under comity principles, board was immune from punitive damages.

Affirmed in part, reversed in part, and remanded.

See also 538 U.S. 488, 123 S.Ct. 1683.

West Headnotes (45)

[1] Courts
Comity between courts of different states
States
Relations Among States Under Constitution of United States

106 Courts
106VII Concurrent and Conflicting Jurisdiction
106VII(C) Courts of Different States or Countries
106k511 Comity between courts of different states
360 States
360I Political Status and Relations
360I(A) In General
360k5 Relations Among States Under Constitution of United States
360k5(1) In general

Comity is a legal principle whereby a forum state may give effect to the laws and judicial decisions of another state based in part on deference and respect for the other state, but only so long as the other state's laws are not contrary to the policies of the forum state.

Cases that cite this headnote

[2] States
Relations Among States Under Constitution of United States

360 States
360I Political Status and Relations
360I(A) In General
360k5 Relations Among States Under Constitution of United States
360k5(1) In general

Whether to invoke comity is within the forum state's discretion.

Cases that cite this headnote

[3] States

Full faith and credit in each state to the public acts, records, etc. of other states

360 States
360I Political Status and Relations
360I(A) In General
360k5 Relations Among States Under Constitution of United States
360k5(2) Full faith and credit in each state to the public acts, records, etc. of other states

When a lawsuit is filed against another state in Nevada, while Nevada is not required to extend immunity in its courts to the other state, Nevada will consider extending immunity under comity, so long as doing so does not violate Nevada's public policies.

2 Cases that cite this headnote

[4] Municipal Corporations

Discretionary powers and duties

268 Municipal Corporations
268XII Torts
268XII(A) Exercise of Governmental and Corporate Powers in General
268k728 Discretionary powers and duties

Discretionary-function immunity under state statute does not include intentional torts and bad faith conduct. West's NRSA 41.032.

7 Cases that cite this headnote

[5] Appeal and Error

Cases Triable in Appellate Court

30 Appeal and Error
30XVI Review
30XVI(F) Trial De Novo
30k892 Trial De Novo
30k893 Cases Triable in Appellate Court
30k893(1) In general

The Supreme Court reviews questions of law de novo.

Cases that cite this headnote

[6] Appeal and Error

Sufficiency of Evidence in Support

30 Appeal and Error
30XVI Review
30XVI(I) Questions of Fact, Verdicts, and Findings
30XVI(I)2 Verdicts
30k1001 Sufficiency of Evidence in Support
30k1001(1) In general

A jury's verdict will be upheld on appeal if the verdict is supported by substantial evidence.

Cases that cite this headnote

[7] Appeal and Error

Burden of showing error

30 Appeal and Error
30XVI Review
30XVI(G) Presumptions
30k901 Burden of showing error

Supreme Court will not reverse an order or judgment unless error is affirmatively shown.

Cases that cite this headnote

[8] Torts

Types of invasions or wrongs recognized

379 Torts
379IV Privacy and Publicity
379IV(A) In General
379k329 Types of invasions or wrongs recognized

The tort of invasion of privacy embraces four different tort actions: (1) unreasonable intrusion upon the seclusion of another; (2) appropriation of the other's name or likeness; (3) unreasonable publicity given to the other's private life; or (4) publicity that unreasonably places the other in a false light before the public. Restatement (Second) of Torts § 652A.

Cases that cite this headnote

[9] Torts

Matters of Public Interest or Public Record;Newsworthiness

379 Torts
379IV Privacy and Publicity
379IV(B) Privacy

379IV(B)3 Publications or Communications in General
379k356 Matters of Public Interest or Public Record;Newsworthiness
379k357 In general

Under public records defense, taxpayer did not have objective expectation of privacy in his name, address, and social security number, as would be required to support invasion of privacy claim against other state's franchise tax board alleging intrusion upon seclusion and public disclosure of private facts, arising out of board's disclosure of taxpayer information during audit process, where information had been publicly disclosed on several prior occasions, including in court documents from taxpayer's divorce proceedings and by taxpayer himself through various business license applications. Restatement (Second) of Torts § 652D comment.

Cases that cite this headnote

[10] Torts
Matters of Public Interest or Public Record;Newsworthiness

379 Torts
379IV Privacy and Publicity
379IV(B) Privacy
379IV(B)3 Publications or Communications in General
379k356 Matters of Public Interest or Public Record;Newsworthiness
379k357 In general

One defense to invasion of privacy torts, referred to as the public records defense, arises when a defendant can show that the disclosed information is contained in a court's official records; such materials are public facts, and a defendant cannot be liable for disclosing information about a plaintiff that was already public. Restatement (Second) of Torts § 652D comment.

Cases that cite this headnote

[11] Torts
Miscellaneous particular cases

379 Torts
379IV Privacy and Publicity
379IV(B) Privacy
379IV(B)3 Publications or Communications in General
379k351 Miscellaneous particular cases

Taxpayer did not have objective expectation of privacy in his credit card number, as would be required to support invasion of privacy claim against other state's franchise tax board alleging intrusion upon seclusion and public disclosure of private facts, arising out of board's disclosure of taxpayer information during audit process, where parties to which credit card number was disclosed already had the number in their possession from prior dealings with taxpayer. Restatement (Second) of Torts § 652D comment.

Cases that cite this headnote

[12] Torts
Miscellaneous particular cases

379 Torts
379IV Privacy and Publicity
379IV(B) Privacy
379IV(B)3 Publications or Communications in General
379k351 Miscellaneous particular cases

Taxpayer did not have objective expectation of privacy in licensing contracts of taxpayer's business, as would be required to support invasion of privacy claim against other state's franchise tax board alleging intrusion upon seclusion and public disclosure of private facts, arising out of board's disclosure of taxpayer information during audit process, where parties to which licensing contracts were disclosed already had the information in their possession from prior dealings with taxpayer. Restatement (Second) of Torts § 652D comment.

Cases that cite this headnote

[13] Torts
False Light

379 Torts
379IV Privacy and Publicity
379IV(B) Privacy

379IV(B)3 Publications or Communications in General
379k352 False Light
379k353 In general
Supreme Court would officially adopt cause of action for false light invasion of privacy.

3 Cases that cite this headnote

[14] Torts
Questions of law or fact
379 Torts
379I In General
379k148 Questions of law or fact
Whether to adopt a tort as a viable tort claim is a question of state law.

Cases that cite this headnote

[15] Torts
Particular cases in general
379 Torts
379IV Privacy and Publicity
379IV(B) Privacy
379IV(B)3 Publications or Communications in General
379k352 False Light
379k354 Particular cases in general
Other state's franchise tax board did not portray taxpayer in false light by including taxpayer's audit case on publicly-available litigation roster, despite argument that inclusion of case suggested taxpayer was a "tax cheat" and that taxpayer's case, unlike other cases on roster, was not yet completed, where taxpayer was indeed involved in litigation with board, and roster did not contain any false information.

Cases that cite this headnote

[16] Fraud
Fiduciary or confidential relations
184 Fraud
184I Deception Constituting Fraud, and Liability Therefor
184k5 Elements of Constructive Fraud
184k7 Fiduciary or confidential relations
A breach of confidential relationship cause of action arises by reason of kinship or professional, business, or social relationships between the parties.

Cases that cite this headnote

[17] Fraud
Fiduciary or confidential relations
184 Fraud
184I Deception Constituting Fraud, and Liability Therefor
184k5 Elements of Constructive Fraud
184k7 Fiduciary or confidential relations
Taxpayer did not have confidential relationship with other state's franchise tax board, as would be required for taxpayer to assert an action for breach of confidential relationship against board arising out of board's disclosure to third parties of certain information during audit of taxpayer; in conducting audits, board was not required to act with taxpayer's interest in mind but rather had duty to proceed on behalf of state's interest.

Cases that cite this headnote

[18] Process
Nature and elements in general
313 Process
313IV Abuse of Process
313IV(A) In General
313k173 Nature and elements in general
A successful abuse of process claim requires: (1) an ulterior purpose by the defendants other than resolving a legal dispute, and (2) a willful act in the use of the legal process not proper in the regular conduct of the proceeding.

1 Cases that cite this headnote

[19] Process
Particular cases
313 Process
313IV Abuse of Process
313IV(A) In General
313k192 Particular cases

Other state's franchise tax board did not use legal process in audit dispute with taxpayer, as would be required to support taxpayer's abuse of process claim arising out of board's actions during audit, where board never filed a court action in relation to its demands for information or otherwise during audit.

1 Cases that cite this headnote

[20] Fraud

Elements of Actual Fraud

184 Fraud
184I Deception Constituting Fraud, and Liability Therefor
184k2 Elements of Actual Fraud
184k3 In general

To prove a fraud claim, the plaintiff must show that the defendant made a false representation that the defendant knew or believed was false, that the defendant intended to persuade the plaintiff to act or not act based on the representation, and that the plaintiff had reason to rely on the representation and suffered damages.

4 Cases that cite this headnote

[21] Fraud

Questions for Jury

184 Fraud
184II Actions
184II(F) Trial
184k64 Questions for Jury
184k64(1) In general

It is the jury's role to make findings on the factors necessary to establish a fraud claim.

Cases that cite this headnote

[22] Appeal and Error

Sufficiency of Evidence in Support

30 Appeal and Error
30XVI Review
30XVI(I) Questions of Fact, Verdicts, and Findings
30XVI(I)2 Verdicts
30k1001 Sufficiency of Evidence in Support
30k1001(1) In general

Supreme Court will generally not disturb a jury's verdict that is supported by substantial evidence.

Cases that cite this headnote

[23] Appeal and Error

Sufficiency of Evidence in Support

30 Appeal and Error
30XVI Review
30XVI(I) Questions of Fact, Verdicts, and Findings
30XVI(I)2 Verdicts
30k1001 Sufficiency of Evidence in Support
30k1001(1) In general

Substantial evidence, as would support jury verdict on appeal, is defined as evidence that a reasonable mind might accept as adequate to support a conclusion.

1 Cases that cite this headnote

[24] Fraud

Intent

Fraud

Reliance on representations and inducement to act

184 Fraud
184II Actions
184II(F) Trial
184k64 Questions for Jury
184k64(2) Intent
184 Fraud
184II Actions
184II(F) Trial
184k64 Questions for Jury
184k64(5) Reliance on representations and inducement to act

Whether other state's franchise tax board made specific representations to taxpayer, regarding treatment of taxpayer's confidential information during audit, that board intended for taxpayer to rely on but which board did not intend to meet was jury question, in taxpayer's fraud action against board.

Cases that cite this headnote

[25] States

Relations Among States Under Constitution of United States

360 States
360I Political Status and Relations
360I(A) In General
360k5 Relations Among States Under Constitution of United States
360k5(1) In general

Extension of statutory cap on liability, applicable to government agencies in the state, to out-of-state franchise tax board would have violated state public policy, and thus principles of comity did not require such extension; board operated outside the controls of the state, and state's policy interest in providing adequate redress to its citizens was paramount to providing board with statutory cap on damages. West's NRSA 41.035.

Cases that cite this headnote

[26] Damages

Elements in general

115 Damages
115III Grounds and Subjects of Compensatory Damages
115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses
115III(A)2 Mental Suffering and Emotional Distress
115k57.19 Intentional or Reckless Infliction of Emotional Distress;Outrage
115k57.21 Elements in general

To recover on a claim for intentional infliction of emotional distress, a plaintiff must prove: (1) extreme and outrageous conduct on the part of the defendant; (2) intent to cause emotional distress or reckless disregard for causing emotional distress; (3) that the plaintiff actually suffered extreme or severe emotional distress; and (4) causation.

5 Cases that cite this headnote

[27] Damages

Nature of Injury or Threat

115 Damages
115III Grounds and Subjects of Compensatory Damages
115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses
115III(A)2 Mental Suffering and Emotional Distress
115k57.19 Intentional or Reckless Infliction of Emotional Distress;Outrage
115k57.23 Nature of Injury or Threat
115k57.23(1) In general

In an intentional infliction of emotional distress claim, the plaintiff must set forth objectively verifiable indicia to establish that the plaintiff actually suffered extreme or severe emotional distress.

5 Cases that cite this headnote

[28] Damages

Mental suffering and emotional distress

115 Damages
115IX Evidence
115k183 Weight and Sufficiency
115k192 Mental suffering and emotional distress

While medical evidence is one acceptable manner in establishing that severe emotional distress was suffered for purposes of a claim for intentional infliction of emotional distress, other objectively verifiable evidence may suffice to establish a claim when the defendant's conduct is more extreme, and thus, requires less evidence of the physical injury suffered.

5 Cases that cite this headnote

[29] Damages

Mental suffering and emotional distress

115 Damages
115IX Evidence
115k183 Weight and Sufficiency
115k192 Mental suffering and emotional distress

Evidence was sufficient to support verdict that taxpayer suffered severe emotional distress, as would support taxpayer's claim for intentional infliction of emotional distress against other state's franchise tax board arising out of board's conduct during audits, which included release of confidential information, delayed resolution of taxpayer's protests, and allegedly

making disparaging remarks about taxpayer and his religion, where three witnesses testified that taxpayer's mood changed dramatically, that he became distant and much less involved in various activities, that he started drinking heavily, and that he suffered severe migraines and had stomach problems.

Cases that cite this headnote

[30] **Appeal and Error**
Conduct of trial or hearing in general

Appeal and Error
Rulings on admissibility of evidence in general

30 Appeal and Error
30XVI Review
30XVI(H) Discretion of Lower Court
30k969 Conduct of trial or hearing in general
30 Appeal and Error
30XVI Review
30XVI(H) Discretion of Lower Court
30k970 Reception of Evidence
30k970(2) Rulings on admissibility of evidence in general

Supreme Court reviews both the admissibility of evidence and the propriety of jury instructions for an abuse of discretion.

1 Cases that cite this headnote

[31] **Evidence**
Tendency to mislead or confuse

157 Evidence
157IV Admissibility in General
157IV(D) Materiality
157k146 Tendency to mislead or confuse

Trial court abused its discretion in admitting evidence of fraud penalties imposed on taxpayer pursuant to outcome of audits, in taxpayer's action against out-of-state franchise tax board alleging intentional torts arising out of board's conduct during audit; trial court had already determined that it lacked jurisdiction to address whether the audits' conclusions were accurate, and evidence had no utility in showing any intentional torts unless it was first concluded that audits' determinations were incorrect.

Cases that cite this headnote

[32] **Damages**
Mental suffering and emotional distress

Fraud
Falsity of representations and knowledge thereof

Process
Instructions

Torts
Publications or communications in general

115 Damages
115X Proceedings for Assessment
115k209 Instructions
115k216 Measure of Damages for Injuries to the Person
115k216(10) Mental suffering and emotional distress
184 Fraud
184II Actions
184II(F) Trial
184k65 Instructions
184k65(3) Falsity of representations and knowledge thereof
313 Process
313IV Abuse of Process
313IV(B) Actions and Proceedings
313k213 Instructions
379 Torts
379IV Privacy and Publicity
379IV(B) Privacy
379IV(B)6 Instructions
379k381 Publications or communications in general

Jury instruction stating that nothing prevented jury from considering the appropriateness or correctness of analysis conducted by out-of-state franchise tax board in reaching its determination of taxpayer's residency was error, in taxpayer's action against board alleging invasion of privacy, breach of confidential relationship, abuse of process, fraud, and intentional infliction of emotional distress, arising out of board's conduct during audit process; trial court had already determined that it lacked jurisdiction to address whether the audit's conclusions were accurate, and instruction invited jury to

consider whether audit conclusions regarding taxpayer's residency were correct.

Cases that cite this headnote

[33] Evidence

Suppression or spoliation of evidence

157 Evidence
157II Presumptions
157k74 Evidence Withheld or Falsified
157k78 Suppression or spoliation of evidence

Trial court abused its discretion in precluding out-of-state franchise tax board from presenting evidence explaining steps it had taken to preserve e-mails which were subsequently destroyed in server change, in taxpayer's action against board alleging intentional torts arising out of board's conduct during audits, where taxpayer argued evidence spoliation based on destruction of emails, and jury was given an adverse inference instruction.

1 Cases that cite this headnote

[34] Evidence

Suppression or spoliation of evidence

157 Evidence
157II Presumptions
157k74 Evidence Withheld or Falsified
157k78 Suppression or spoliation of evidence

Under a rebuttable presumption that may be imposed when evidence is willfully destroyed, the burden shifts to the spoliating party to rebut the presumption by showing that the evidence that was destroyed was not unfavorable; if the party fails to rebut the presumption, then the jury or district court may presume that the evidence was adverse to the party that destroyed the evidence. West's NRSA 47.250(3).

Cases that cite this headnote

[35] Evidence

Suppression or spoliation of evidence

157 Evidence
157II Presumptions
157k74 Evidence Withheld or Falsified
157k78 Suppression or spoliation of evidence

A lesser adverse inference, that does not shift the burden of proof, is permissible when evidence is negligently destroyed. West's NRSA 47.250(3).

Cases that cite this headnote

[36] Evidence

Tendency to mislead or confuse

157 Evidence
157IV Admissibility in General
157IV(D) Materiality
157k146 Tendency to mislead or confuse

Trial court abused its discretion in excluding evidence regarding taxpayer's loss of a patent through an unrelated legal challenge, in taxpayer's action for intentional infliction of emotional distress against out-of-state franchise tax board arising out of board's conduct during audit, including disclosure of taxpayer's confidential business information; evidence was probative as to damages, and although evidence may have been prejudicial, it was not unfairly prejudicial. West's NRSA 48.035(1).

Cases that cite this headnote

[37] Evidence

Tendency to mislead or confuse

157 Evidence
157IV Admissibility in General
157IV(D) Materiality
157k146 Tendency to mislead or confuse

Trial court abused its discretion in excluding evidence regarding additional audit of taxpayer by federal Internal Revenue Service, in taxpayer's action for intentional infliction of emotional distress against out-of-state franchise tax board arising out of board's conduct during audit; evidence was probative as to damages, and although evidence may have been prejudicial, it was not unfairly prejudicial.

Cases that cite this headnote

[38] Appeal and Error

Particular Actions or Issues

30 Appeal and Error
30XVI Review
30XVI(J) Harmless Error
30XVI(J)11 Exclusion of Evidence
30k1056 Prejudicial Effect
30k1056.1 In General
30k1056.1(4) Particular Actions or Issues
30k1056.1(4.1) In general

Trial court's evidentiary and jury instruction error warranted reversal as to damages element of taxpayer's intentional infliction of emotional distress claim against out-of-state franchise tax board, arising out of board's conduct during audits; several assertions made by taxpayer as to board's conduct could only have been made through contesting audits' conclusions, which taxpayer should have been precluded from doing, and board was prejudiced by erroneous exclusion of evidence to rebut adverse inference from negligent destruction of certain e-mail evidence.

Cases that cite this headnote

[39] States

Relations Among States Under Constitution of United States

360 States
360I Political Status and Relations
360I(A) In General
360k5 Relations Among States Under Constitution of United States
360k5(1) In general

Under comity principles, other state's franchise tax board was immune from punitive damages for taxpayer's Nevada state law tort claims against board arising out of board's conduct during audits; punitive damages would not have been available against a Nevada government entity. West's NRSA 41.035(1).

Cases that cite this headnote

[40] Damages

Nature and Theory of Damages Additional to Compensation

115 Damages
115V Exemplary Damages
115k87 Nature and Theory of Damages Additional to Compensation
115k87(1) In general

Punitive damages are damages that are intended to punish a defendant's wrongful conduct rather than to compensate a plaintiff for his or her injuries.

Cases that cite this headnote

[41] Municipal Corporations

Damages

268 Municipal Corporations
268XII Torts
268XII(A) Exercise of Governmental and Corporate Powers in General
268k743 Damages

The general rule is that no punitive damages are allowed against a government entity unless expressly authorized by statute.

Cases that cite this headnote

[42] Costs

Form and requisites

102 Costs
102IX Taxation
102k202 Bill of Costs, Statement, or Memorandum
102k204 Form and requisites

Statutory time limit for filing memorandum of costs by prevailing party is not a jurisdictional requirement, and thus trial court had discretion to allow documentation for costs sought after deadline. West's NRSA 18.110.

Cases that cite this headnote

[43] Damages

Mental suffering and emotional distress

Evidence

Damages

Fraud

Weight and Sufficiency

115 Damages
115IX Evidence

115k183 Weight and Sufficiency
115k192 Mental suffering and emotional distress
157 Evidence
157XII Opinion Evidence
157XII(D) Examination of Experts
157k555 Basis of Opinion
157k555.9 Damages
184 Fraud
184II Actions
184II(D) Evidence
184k58 Weight and Sufficiency
184k58(1) In general

Taxpayer's evidence was too speculative to support award of economic damages, in taxpayer's action against franchise tax board for intentional infliction of emotional distress and fraud, in which taxpayer alleged that board's contacting of two Japanese companies, and thus revealing that taxpayer was under investigation, was cause of decline in taxpayer's patent licensing business in Japan, where taxpayer only set forth expert testimony detailing what experts believed would happen, following contact with board, based on Japanese business culture, and no evidence established that any of the hypothetical steps of Japanese business culture actually occurred.

Cases that cite this headnote

[44] Damages
Weight and Sufficiency

115 Damages
115IX Evidence
115k183 Weight and Sufficiency
115k184 In general

Damages cannot be based solely upon possibilities and speculative testimony; this is true regardless of whether the testimony comes from the mouth of a lay witness or an expert.

2 Cases that cite this headnote

[45] Evidence
Circumstantial evidence

157 Evidence
157XIV Weight and Sufficiency
157k587 Circumstantial evidence

When circumstantial evidence is used to prove a fact, the circumstances must be proved, and not themselves be presumed.

1 Cases that cite this headnote

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BEFORE THE COURT EN BANC. [1]

[1] The Honorable Nancy M. Saitta, Justice, voluntarily recused herself from participation in the decision of this matter.

OPINION

By the Court, HARDESTY, J.:

In 1998, inventor Gilbert P. Hyatt sued the Franchise Tax Board of the State of California (FTB) seeking damages for intentional torts and bad-faith conduct committed by FTB auditors during tax audits of Hyatt's 1991 and 1992 state tax returns. After years of litigation, a jury awarded Hyatt $139 million in damages on his tort claims and $250 million in punitive damages. In this appeal, we must determine, among other issues, whether we should revisit our exception to government immunity for intentional torts and bad-faith conduct as a result of this court's adoption of the federal test for discretionary-function immunity, which shields a government entity or its employees from suit for discretionary acts that involve an element of individual judgment or choice and that are grounded in public policy considerations. We hold that our exception to immunity for intentional torts and bad-faith conduct survives our adoption of the federal discretionary-function immunity test because intentional torts and bad-faith conduct are not based on public policy.

Because FTB cannot invoke discretionary-function immunity to protect itself from Hyatt's intentional tort and bad-faith causes of action, we must determine whether Hyatt's claims for invasion of privacy, breach of confidential relationship, abuse of process, fraud, and intentional infliction of emotional distress survive as a matter of law, and if so, whether they are supported by substantial evidence. All of Hyatt's causes of action, except for his fraud and intentional infliction of emotion distress claims, fail as a matter of law, and thus, the judgment in his favor on these claims is reversed.

As to the fraud cause of action, sufficient evidence exists to support the jury's findings that FTB made false representations to Hyatt regarding the audits' processes and that Hyatt relied on those representations to his detriment and damages resulted. In regard to Hyatt's claim for intentional infliction of emotional distress, we conclude that medical records are not mandatory in order to establish a claim for intentional infliction of emotional distress if the acts of the defendant are sufficiently severe. As a result, ***131** substantial evidence supports the jury's findings as to liability, but evidentiary and jury instruction errors committed by the district court require reversal of the damages awarded for emotional distress and a remand for a new trial as to the amount of damages on this claim only.

In connection with these causes of action, we must address whether FTB is entitled to a statutory cap on the amount of damages that Hyatt may recover from FTB on the fraud and intentional infliction of emotional distress claims under comity. We conclude that Nevada's policy interest in providing adequate redress to its citizens outweighs

providing FTB a statutory cap on damages under comity, and therefore, we affirm the $1,085,281.56 of special damages awarded to Hyatt on his fraud cause of action and conclude that there is no statutory cap on the amount of damages that may be awarded on remand on the intentional infliction of emotional distress claim.

We also take this opportunity to address as a matter of first impression whether, based on comity, it is reasonable to provide FTB with the same protection of California law, to the extent that it does not conflict with Nevada law, to grant FTB immunity from punitive damages. Because punitive damages would not be available against a Nevada government entity, we hold, under comity principles, that FTB is immune from punitive damages. Thus, we reverse that portion of the district court's judgment awarding Hyatt punitive damages.

For the reasons discussed below, we affirm in part, reverse in part, and remand this case to the district court for further proceedings.

FACTS AND PROCEDURAL HISTORY

California proceedings

In 1993, after reading a newspaper article regarding respondent/cross-appellant Hyatt's lucrative computer-chip patent and the large sums of money that Hyatt was making from the patent, a tax auditor for appellant/cross-respondent FTB decided to review Hyatt's 1991 state income tax return. The return revealed that Hyatt did not report, as taxable income, the money that he had earned from the patent's licensing payments and that he had only reported 3.5 percent of his total taxable income for 1991. Hyatt's tax return showed that he had lived in California for nine months in 1991 before relocating to Las Vegas, Nevada, but Hyatt claimed no moving expenses on his 1991 tax return. Based on these discrepancies, FTB opened an audit on Hyatt's 1991 state income tax return.

The 1991 audit began when Hyatt was sent notice that he was being audited. This notification included an information request form that required Hyatt to provide certain information concerning his connections to California and Nevada and the facts surrounding his move to Nevada. A portion of the information request form contained a privacy notice, which stated in relevant part that "The Information Practices Act of 1977 and the federal Privacy Act require the Franchise Tax Board to tell you why we ask you for information. The Operations and Compliance Divisions ask for tax return information to carry out the Personal Income Tax Law of the State of California." Also included with the notification was a document containing a list of what the taxpayer could expect from FTB: "Courteous treatment by FTB employees[,] Clear and concise requests for information from the auditor assigned to your case[,] Confidential treatment of any personal and financial information that you provide to us [,] Completion of the audit within a reasonable amount of time[.]"

The audit involved written communications and interviews. FTB sent over 100 letters and demands for information to third parties including banks, utility companies, newspapers (to learn if Hyatt had subscriptions), medical providers, Hyatt's attorneys, two Japanese companies that held licenses to Hyatt's patent (inquiring about payments to Hyatt), and other individuals and entities that Hyatt had identified as contacts. Many, but not all, of the letters and demands for information contained Hyatt's social security number or home address or both. FTB also requested information and documents directly from Hyatt. Interviews were conducted and signed statements were obtained from three of Hyatt's relatives—his ex-wife, his brother, and his daughter—all of whom were ***132** estranged from Hyatt during the relevant period in question, except for a short time when Hyatt and his daughter attempted to reconcile their relationship. No relatives with whom Hyatt had good relations, including his son, were ever interviewed even though Hyatt had identified them as contacts. FTB sent auditors to Hyatt's neighborhood in California and to various locations in Las Vegas in search of information.

Upon completion of the 1991 audit, FTB concluded that Hyatt did not move from California to Las Vegas in September 1991, as he had stated, but rather, that Hyatt had moved in April 1992. FTB further concluded that Hyatt had staged the earlier move to Nevada by renting an apartment, obtaining a driver's license, insurance, bank account, and registering to vote, all in an effort to avoid state income tax liability on his patent licensing. FTB further determined that the sale of Hyatt's California home to his work assistant was a sham. A detailed explanation of what factors FTB considered in reaching its conclusions was provided, which in addition to the

above, included comparing contacts between Nevada and California, banking activity in the two states, evidence of Hyatt's location in the two states during the relevant period, and professionals whom he employed in the two states. Based on these findings, FTB determined that Hyatt owed the state of California approximately $1.8 million in additional state income taxes and that penalties against Hyatt in the amount of $1.4 million were warranted. These amounts, coupled with $1.2 million in interest, resulted in a total assessment of $4.5 million.

The 1991 audit's finding that Hyatt did not move to Las Vegas until April 1992 prompted FTB to commence a second audit of Hyatt's 1992 California state taxes. Because he maintained that he lived in Nevada that tax year, Hyatt did not file a California tax return for 1992, and he opposed the audit. Relying in large part on the 1991 audit's findings and a single request for information sent to Hyatt regarding patent-licensing payments received in 1992, FTB found that Hyatt owed the state of California over $6 million in taxes and interest for 1992. Moreover, penalties similar to those imposed by the 1991 audit were later assessed.

Hyatt formally challenged the audits' conclusions by filing two protests with FTB that were handled concurrently. Under a protest, an audit is reviewed by FTB for accuracy, or the need for any changes, or both. The protests lasted over 11 years and involved 3 different FTB auditors. In the end, FTB upheld the audits, and Hyatt went on to challenge them in the California courts. [2]

[2] At the time of this appeal, Hyatt was still challenging the audits' conclusions in California courts.

Nevada litigation

During the protests, Hyatt filed the underlying Nevada lawsuit in January 1998. His complaint included a claim for declaratory relief concerning the timing of his move from California to Nevada and a claim for negligence. The complaint also identified seven intentional tort causes of action allegedly committed by FTB during the 1991 and 1992 audits: invasion of privacy—intrusion upon seclusion, invasion of privacy—publicity of private facts, invasion of privacy—false light, intentional infliction of emotional distress, fraud, breach of confidential relationship, and abuse of process. Hyatt's lawsuit was grounded on his allegations that FTB conducted unfair audits that amounted to FTB "seeking to trump up a tax claim against him or attempt[ing] to extort him," that FTB's audits were "goal-oriented," that the audits were conducted to improve FTB's tax assessment numbers, and that the penalties FTB imposed against Hyatt were intended "to better bargain for and position the case to settle."

Early in the litigation, FTB filed a motion for partial summary judgment challenging the Nevada district court's jurisdiction over Hyatt's declaratory relief cause of action. The district court agreed on the basis that the timing of Hyatt's move from California to Nevada and whether FTB properly assessed taxes and penalties against Hyatt should be resolved in the ongoing California administrative process. Accordingly, the district ***133** court granted FTB partial summary judgment. [3] As a result of the district court's ruling, the parties were required to litigate the action under the restraint that any determinations as to the audits' accuracy were not part of Hyatt's tort action and the jury would not make any findings as to when Hyatt moved to Nevada or whether the audits' conclusions were correct.

[3] That ruling was not challenged in this court, and consequently, it is not part of this appeal.

FTB also moved the district court for partial summary judgment to preclude Hyatt from seeking recovery for alleged economic damages. As part of its audit investigation, FTB sent letters to two Japanese companies that had licensing agreements with Hyatt requesting payment information between Hyatt and the companies. Included with the letters were copies of the licensing agreements between Hyatt and the Japanese companies. Hyatt asserted that those documents were confidential and that when FTB sent the documents to the companies, the companies were made aware that Hyatt was under investigation. Based on this disclosure, Hyatt theorized that the companies would have then notified the Japanese government, who would in turn notify other Japanese businesses that Hyatt was under investigation. Hyatt claimed that this ultimately ended Hyatt's patent-licensing business in Japan. Hyatt's evidence in support of these allegations included the fact that FTB sent the letters, that the two businesses sent responses, that Hyatt had no patent-licensing income after this occurred, and expert testimony that this chain of events would likely have occurred in the Japanese business culture. FTB argued that Hyatt's evidence was speculative and insufficient

to adequately support his claim. Hyatt argued that he had sufficient circumstantial evidence to present the issue to the jury. The district court granted FTB's motion for partial summary judgment, concluding that Hyatt had offered no admissible evidence to support that the theorized chain of events actually occurred and, as a result, his evidence was too speculative to overcome the summary judgment motion.

One other relevant proceeding that bears discussion in this appeal concerns two original writ petitions filed by FTB in this court in 2000. In those petitions, FTB sought immunity from the entire underlying Nevada lawsuit, arguing that it was entitled to the complete immunity that it enjoyed under California law based on either sovereign immunity, the Full Faith and Credit Clause, or comity. This court resolved the petitions together in an unpublished order in which we concluded that FTB was not entitled to full immunity under any of these principles. But we did determine that, under comity, FTB should be granted partial immunity equal to the immunity a Nevada government agency would receive. In light of that ruling, this court held that FTB was immune from Hyatt's negligence cause of action, but not from his intentional tort causes of action. The court concluded that while Nevada provided immunity for discretionary decisions made by government agencies, such immunity did not apply to intentional torts or bad-faith conduct because to allow it to do so would "contravene Nevada's policies and interests in this case."

This court's ruling in the writ petitions was appealed to and upheld by the United States Supreme Court. *Franchise Tax Bd. of Cal. v. Hyatt,* 538 U.S. 488, 123 S.Ct. 1683, 155 L.Ed.2d 702 (2003). In *Hyatt,* the Supreme Court focused on the issue of whether the Full Faith and Credit Clause of the federal constitution required Nevada to afford FTB the benefit of the full immunity that California provides FTB. *Id.* at 494, 123 S.Ct. 1683. The Court upheld this court's determination that Nevada was not required to give FTB full immunity. *Id.* at 499, 123 S.Ct. 1683. The Court further upheld this court's conclusion that FTB was entitled to partial immunity under comity principles, observing that this 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." *Id.* The Supreme Court's ruling affirmed this court's limitation of Hyatt's case against FTB to the intentional tort causes of action.

Ultimately, Hyatt's case went to trial before a jury. The trial lasted approximately ***134** four months. The jury found in favor of Hyatt on all intentional tort causes of action and returned special verdicts awarding him damages in the amount of $85 million for emotional distress, $52 million for invasion of privacy, $1,085,281.56 as special damages for fraud, and $250 million in punitive damages. Following the trial, Hyatt sought prejudgment interest and moved the district court for costs. The district court assigned the motion to a special master who, after 15 months of discovery and further motion practice, issued a recommendation that Hyatt be awarded approximately $2.5 million in costs. The district court adopted the master's recommendation.

FTB appeals from the district court's final judgment and the post-judgment award of costs. Hyatt cross-appeals, challenging the district court's partial summary judgment ruling that he could not seek, as part of his damages at trial, economic damages for the alleged destruction of his patent-licensing business in Japan. [4]

4 This court granted permission for the Multistate Tax Commission and the state of Utah, which was joined by other states (Arkansas, Colorado, Delaware, Florida, Idaho, Louisiana, Maine, Maryland, Missouri, New Jersey, North Dakota, Ohio, Oklahoma, Tennessee, Vermont, Virginia, and Washington) to file amicus curiae briefs.

DISCUSSION

We begin by addressing FTB's appeal, which raises numerous issues that it argues entitle it to either judgment as a matter of law in its favor or remand for a new trial. As a threshold matter, we address discretionary-function immunity and whether Hyatt's causes of action against PTB are barred by this immunity, or whether there is an exception to the immunity for intentional torts and bad-faith conduct. Deciding that FTB is not immune from suit, we then consider FTB's arguments as to each of Hyatt's intentional tort causes of action. We conclude our consideration of FTB's appeal by discussing Nevada's statutory caps on damages and immunity from punitive damages. As for Hyatt's cross-appeal, we close this opinion by considering his challenge to the district

court's partial summary judgment in FTB's favor on Hyatt's damages claim for economic loss.

FTB is not immune from suit under comity because discretionary-function immunity in Nevada does not protect Nevada's government or its employees from intentional torts and bad-faith conduct

Like most states, Nevada has waived traditional sovereign immunity from tort liability, with some exceptions. NRS 41.031. The relevant exception at issue in this appeal is discretionary-function immunity, which provides that no action can be brought against the state or its employee "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of the State ... or of any ... employee ..., whether or not the discretion involved is abused." NRS 41.032(2). By adopting discretionary-function immunity, our Legislature has placed a limit on its waiver of sovereign immunity. Discretionary-function immunity is grounded in separation of powers concerns and is designed to preclude the judicial branch from "second-guessing," in a tort action, legislative and executive branch decisions that are based on "social, economic, and political policy." *Martinez v. Maruszczak,* 123 Nev. 433, 446, 168 P.3d 720, 729 (2007) (internal quotations omitted); *see also Bailey v. United States,* 623 F.3d 855, 860 (9th Cir.2010). FTB initially argues on appeal that immunity protects it from Hyatt's intentional tort causes of action based on the application of discretionary-function immunity and comity as recognized in Nevada.

[1] **[2]** **[3]** Comity is a legal principle whereby a forum state may give effect to the laws and judicial decisions of another state based in part on deference and respect for the other state, but only so long as the other state's laws are not contrary to the policies of the forum state. *Mianecki v. Second Judicial Dist. Court,* 99 Nev. 93, 98, 658 P.2d 422, 424–25 (1983); *see also Solomon v. Supreme Court of Fla.,* 816 A.2d 788, 790 (D.C.2002); *Schoeberlein v. Purdue Univ.,* 129 Ill.2d 372, 135 Ill.Dec. 787, 544 N.E.2d 283, 285 (1989); ***135** *McDonnell v. Ill.,* 163 N.J. 298, 748 A.2d 1105, 1107 (2000); *Sam v. Estate of Sam,* 139 N.M. 474, 134 P.3d 761, 764–66 (2006); *Hansen v. Scott,* 687 N.W.2d 247, 250, 250 (N.D.2004). The purpose behind comity is to "foster cooperation, promote harmony, and build good will" between states. *Hansen,* 687 N.W.2d at 250 (internal quotations omitted). But whether to invoke comity is within the forum state's discretion. *Mianecki,* 99 Nev. at 98, 658 P.2d at 425. Thus, when a lawsuit is filed against another state in Nevada, while Nevada is not required to extend immunity in its courts to the other state, Nevada will consider extending immunity under comity, so long as doing so does not violate Nevada's public policies. *Id.* at 98, 658 P.2d at 424–25. In California, FTB enjoys full immunity from tort actions arising in the context of an audit. Cal. Gov't Code § 860.2 (West 2012). FTB contends that it should receive the immunity protection provided by California statutes to the extent that such immunity does not violate Nevada's public policies under comity.

Discretionary-function immunity in Nevada

This court's treatment of discretionary-function immunity has changed over time. In the past, we applied different tests to determine whether to grant a government entity or its employee discretionary-function immunity. *See, e.g., Arnesano v. State ex rel. Dep't of Transp.,* 113 Nev. 815, 823–24, 942 P.2d 139, 144–45 (1997) (applying planning-versus-operational test to government action), *abrogated by Martinez,* 123 Nev. at 443–44, 168 P.3d at 726–27; *State v. Silva,* 86 Nev. 911, 913–14, 478 P.2d 591, 592–93 (1970) (applying discretionary-versus-ministerial test to government conduct), *abrogated by Martinez,* 123 Nev. at 443–44, 168 P.3d at 726–27. We also recognized an exception to discretionary-function immunity for intentional torts and bad-faith conduct. *Falline v. GNLV Corp.,* 107 Nev. 1004, 1009 & n. 3, 823 P.2d 888, 892 & n. 3 (1991) (plurality opinion). More recently, we adopted the federal two-part test for determining the applicability of discretionary-function immunity. *Martinez,* 123 Nev. at 444–47, 168 P.3d at 727–29 (adopting test named after two United States Supreme Court decisions: *Berkovitz v. United States,* 486 U.S. 531, 108 S.Ct. 1954, 100 L.Ed.2d 531 (1988), and *United States v. Gaubert,* 499 U.S. 315, 111 S.Ct. 1267, 113 L.Ed.2d 335 (1991)). Under the *Berkovitz–Gaubert* two-part test, discretionary-function immunity will apply if the government actions at issue "(1) involve an element of individual judgment or choice and (2) [are] based on considerations of social, economic, or political policy." *Martinez,* 123 Nev. at 446–47, 168 P.3d at 729. When this court adopted the federal test in *Martinez,* we expressly dispensed with the earlier tests used by this court to determine whether to grant a government entity or its employee immunity, *id.* at 444, 168 P.3d at 727, but we did not address the *Falline* exception to immunity for intentional torts or bad-faith misconduct.

In the earlier writ petitions filed by FTB in this court, we relied on *Falline* to determine that FTB was entitled

to immunity from Hyatt's negligence cause of action, but not the remaining intentional-tort-based causes of action. Because the law concerning the application of discretionary-function immunity has changed in Nevada since FTB's writ petitions were resolved, we revisit the application of discretionary-function immunity to FTB in the present case as it relates to Hyatt's intentional tort causes of action. *Hsu v. Cnty. of Clark,* 123 Nev. 625, 632, 173 P.3d 724, 730 (2007) (stating that "the doctrine of the law of the case should not apply where, in the interval between two appeals of a case, there has been a change in the law by ... a judicial ruling entitled to deference" (internal quotations omitted)).

FTB contends that when this court adopted the federal test in *Martinez,* it impliedly overruled the *Falline* exception to discretionary-function immunity for intentional torts and bad-faith misconduct. Hyatt maintains that the *Martinez* case did not alter the exception created in *Falline* and that discretionary immunity does not apply to bad-faith misconduct because an employee does not have discretion to undertake intentional torts or act in bad faith.

In *Falline,* 107 Nev. at 1009, 823 P.2d at 891–92, this court ruled that the discretionary-function immunity under NRS 41.032(2) did not apply to bad-faith misconduct. The ***136** case involved negligent processing of a workers' compensation claim. Falline injured his back at work and later required surgery. *Falline,* 107 Nev. at 1006, 823 P.2d at 890. Following the surgery, while rising from a seated position, Falline experienced severe lower-back pain. *Id.* at 1006–07, 823 P.2d at 890. Falline's doctor concluded that Falline's back pain was related to his work injury. *Id.* at 1007, 823 P.2d at 890. The self-insured employer, however, refused to provide workers' compensation benefits beyond those awarded for the work injury because it asserted that an intervening injury had occurred. *Id.* After exhausting his administrative remedies, it was determined that Falline was entitled to workers' compensation benefits for both injuries. *Id.* He was nevertheless denied benefits. *Id.* Falline brought suit against the employer for negligence and bad faith in the processing of his workers' compensation claims. *Id.* at 1006, 823 P.2d at 889–90. The district court dismissed his causes of action, and Falline appealed, arguing that dismissal was improper.

On appeal, after concluding that a self-insured employer should be treated the same as the State Industrial Insurance System, this court concluded that Falline could maintain a lawsuit against the self-insured employer based on negligent handling of his claims. *Id.* at 1007–09, 823 P.2d at 890–92. In discussing its holding, the court addressed discretionary immunity and explained that "if failure or refusal to timely process or pay claims is attributable to bad faith, immunity does not apply whether an act is discretionary or not." *Id.* at 1009, 823 P.2d at 891. The court reasoned that the insurer did not have discretion to act in bad faith, and therefore, discretionary-function immunity did not apply to protect the insurer from suit. *Id.* at 1009, 823 P.2d at 891–92.

The *Falline* court expressly addressed NRS 41.032(2)'s language that there is immunity "whether or not the discretion involved is abused." *Falline,* 107 Nev. at 1009 n. 3, 823 P.2d at 892 n. 3. The court determined that bad faith is different from an abuse of discretion, in that an abuse of discretion occurs when a person acts within his or her authority but the action lacks justification, while bad faith "involves an implemented attitude that completely transcends the circumference of authority granted" to the actor. *Id.* Thus, the *Falline* court viewed the exception to discretionary immunity broadly.

Following *Falline,* this court adopted, in *Martinez,* the federal test for determining whether discretionary-function immunity applies. 123 Nev. at 446, 168 P.3d at 729. Under the two-part federal test, the first step is to determine whether the government conduct involves judgment or choice. *Id.* at 446–47, 168 P.3d at 729. If a statute, regulation, or policy requires the government employee to follow a specific course of action for which the employee has no option but to comply with the directive, and the employee fails to follow this directive, the discretionary-immunity exception does not apply to the employee's action because the employee is not acting with individual judgment or choice. *Gaubert,* 499 U.S. at 322, 111 S.Ct. 1267. On the other hand, if an employee is free to make discretionary decisions when executing the directives of a statute, regulation, or policy, the test's second step requires the court to examine the nature of the actions taken and whether they are susceptible to policy analysis. *Martinez,* 123 Nev. at 445–46, 168 P.3d at 729; *Gaubert,* 499 U.S. at 324, 111 S.Ct. 1267. "[E]ven assuming the challenged conduct involves an element of judgment [or choice]," the second step requires the court to determine "whether that judgment [or choice] is of the kind that the discretionary function exception was

designed to shield." *Gaubert,* 499 U.S. at 322–23, 111 S.Ct. 1267. If "the challenged actions are not the kind of conduct that can be said to be grounded in the policy of the regulatory regime," discretionary-function immunity will not bar the claim. *Id.* at 324–25, 111 S.Ct. 1267. The second step focuses on whether the conduct undertaken is a policymaking decision regardless of the employee's subjective intent when he or she acted. *Martinez,* 123 Nev. at 445, 168 P.3d at 728.

FTB argues that the federal test abolished the *Falline* intentional tort or bad-faith misconduct exception to discretionary-function immunity because the federal test is objective, not subjective. Hyatt asserts that an ***137** intentional or bad-faith tort will not meet the two-part discretionary-immunity test because such conduct cannot be discretionary or policy-based.

Other courts addressing similar questions have reached differing results, depending on whether the court views the restriction against considering subjective intent to apply broadly or is limited to determining if the decision is a policymaking decision. Some courts conclude that allegations of intentional or bad-faith misconduct are not relevant to determining if the immunity applies because courts should not consider the employee's subjective intent at all. *Reynolds v. United States,* 549 F.3d 1108, 1112 (7th Cir.2008); *Franklin Sav. Corp. v. United States,* 180 F.3d 1124, 1135 (10th Cir.1999); *see also Sydnes v. United States,* 523 F.3d 1179, 1185 (10th Cir.2008). But other courts focus on whether the employee's conduct can be viewed as a policy-based decision and hold that intentional torts or bad-faith misconduct are not policy-based acts. *Triestman v. Fed. Bureau of Prisons,* 470 F.3d 471, 475 (2d Cir.2006); *Palay v. United States,* 349 F.3d 418, 431–32 (7th Cir.2003); *Coulthurst v. United States,* 214 F.3d 106, 109 (2d Cir.2000).[5] These courts bar the application of discretionary-function immunity in intentional tort and bad-faith misconduct cases when the government action involved is "unrelated to any plausible policy objective [ ]." *Coulthurst,* 214 F.3d at 111. A closer look at these courts' decisions is useful for our analysis.

5 *Coulthurst* is affirmatively cited by the Seventh Circuit Court of Appeals in *Palay v. United States,* 349 F.3d 418, 431–32 (7th Cir.2003). Although the Seventh Circuit in *Reynolds,* 549 F.3d at 1112, stated the proposition that claims of malicious and bad-faith conduct were not relevant in determining discretionary immunity because the courts do not look at subjective intent, the *Palay* court specifically held that discretionary immunity can be avoided if the actions were the result of laziness or carelessness because such actions are not policy-based decisions. *Palay,* 349 F.3d at 431–32. *Reynolds* was published after *Palay,* and while it cites to *Palay* for other unrelated issues, it does not address its holding in connection with the holding in *Palay.*

Courts that decline to recognize bad-faith conduct that calls for an inquiry into an employee's subjective intent

In *Franklin Savings Corp. v. United States,* 180 F.3d at 1127, 1134–42, the Tenth Circuit Court of Appeals addressed the specific issue of whether a claim for bad faith precludes the application of discretionary-function immunity. In that case, following the determination that the Franklin Savings Association was not safe or sound to conduct business, a conservator was appointed. *Id.* at 1127. Thereafter, plaintiffs Franklin Savings Association and its parent company filed suit against defendants the United States government and the conservator to have the conservatorship removed. *Id.* Plaintiffs alleged that the conservator intentionally and in bad faith liquidated the company instead of preserving the company and eventually returning it to plaintiffs to transact business. *Id.* at 1128.

On appeal, the *Franklin Savings* court explained that plaintiffs did not dispute that the conservator had the authority and discretion to sell assets, but the argument was whether immunity for decisions that were discretionary could be avoided because plaintiffs alleged that the conduct was intentionally done to achieve an improper purpose—to deplete capital and retroactively exculpate the conservator's appointment. *Id.* at 1134. Thus, the court focused on the second part of the federal test. In considering whether the alleged intentional misconduct barred the application of discretionary-function immunity under the federal test, the *Franklin Savings* court first noted that the United States Supreme Court had "repeatedly insisted ... that [tort] claims are not vehicles to second-guess policymaking." *Id.* The court further observed that the Supreme Court's modification to *Berkovitz,* in *Gaubert,* to include a query of whether the nature of the challenged conduct was "susceptible to policy analysis [,] ... served to emphasize that courts should not inquire into the actual state of mind or decisionmaking process of federal officials charged with performing discretionary functions." *Id.* at 1135 (internal quotations

omitted). The *Franklin Savings* court ultimately concluded that discretionary-function immunity attaches to bar claims that "depend[ ] on an employee's bad faith or ***138** state of mind in performing facially authorized acts," *id.* at 1140, and to conclude otherwise would mean that the immunity could not effectively function. *Id.* at 1140–41.

Notwithstanding its conclusion, the *Franklin Savings* court noted that such a holding had "one potentially troubling effect"; it created an "irrebuttable presumption" that government employees try to perform all discretionary functions in good faith and that the court's holding would preclude relief in cases where an official committed intentional or bad-faith conduct. *Id.* at 1141. Such a result was necessary, the court reasoned, because providing immunity for employees, so that they do not have to live and act in constant fear of litigation in response to their decisions, outweighs providing relief in the few instances of intentionally wrongful conduct. *Id.* at 1141–42. Thus, the *Franklin Savings* court broadly applied the Supreme Court rule that an actor's subjective intent should not be considered. This broad application led the court to conclude that a bad-faith claim was not sufficient to overcome discretionary-function immunity's application.

Courts that consider whether an employee subjectively intended to further policy by his or her conduct

Other courts have come to a different conclusion. Most significant is *Coulthurst v. United States,* 214 F.3d 106, in which the Second Circuit Court of Appeals addressed the issue of whether the inspection of weightlifting equipment by prison officials was grounded in policy considerations. In *Coulthurst,* an inmate in a federal prison was injured while using the prison's exercise equipment. *Id.* at 107. The inmate filed suit against the United States government, alleging " 'negligence and carelessness' " and a " 'fail[ure] to diligently and periodically inspect' " the exercise equipment. *Id.* at 108. The lower court dismissed the complaint, reasoning that the decisions that established the procedures and timing for inspection involved "elements of judgment or choice and a balancing of policy considerations," such that discretionary-function immunity attached to bar liability. *Id.* at 109. Coulthurst appealed.

In resolving the appeal, the Court of Appeals concluded that the complaint could be read to mean different types of negligent or careless conduct. *Id.* The court explained that the complaint asserting negligence or carelessness could legitimately be read to refer to how frequently inspections should occur, which might fall under discretionary-function immunity. *Id.* But the same complaint, the court noted, could also be read to assert negligence and carelessness in the failure to carry out prescribed responsibilities, such as prison officials failing to inspect the equipment out of laziness, haste, or inattentiveness. *Id.* Under the latter reading, the court stated that

> the official assigned to inspect the machine may in laziness or haste have failed to do the inspection he claimed (by his initials in the log) to have performed; the official may have been distracted or inattentive, and thus failed to notice the frayed cable; or he may have seen the frayed cable but been too lazy to make the repairs or deal with the paperwork involved in reporting the damage.

Id. The court concluded that such conduct did not involve an element of judgment or choice nor was it based on policy considerations, and in such an instance, discretionary-function immunity does not attach to shield the government from suit. *Id.* at 109–11. In the end, the *Coulthurst* court held that the inmate's complaint sufficiently alleged conduct by prison officials that was not immunized by the discretionary-function immunity exception, and the court vacated the lower court's dismissal and remanded the case for further proceedings. *Id.*

[4] The difference in the *Franklin Savings* and *Coulthurst* approaches emanates from how broadly those courts apply the statement in *Gaubert* that "[t]he focus of the inquiry is not on the agent's subjective intent in exercising the discretion conferred ..., but on the nature of the actions taken and on whether they are susceptible to policy analysis." 499 U.S. at 325, 111 S.Ct. 1267. *Franklin Savings* interpreted this requirement expansively to preclude any consideration of whether an actor's conduct was done maliciously or in bad faith, whereas *Coulthurst* ***139** applied a narrower view of subjective intent, concluding that a complaint alleging a nondiscretionary decision that caused the injury was not grounded in public policy. Our approach in *Falline* concerning immunity for bad-faith conduct is consistent with the reasoning in *Coulthurst* that intentional torts and

bad-faith conduct are acts "unrelated to any plausible policy objective[ ]" and that such acts do not involve the kind of judgment that is intended to be shielded from "judicial second-guessing." 214 F.3d at 111 (internal quotations omitted). We therefore affirm our holding in *Falline* that NRS 41.032 does not protect a government employee for intentional torts or bad-faith misconduct, as such misconduct, "by definition, [cannot] be within the actor's discretion." *Falline,* 107 Nev. at 1009, 823 P.2d at 891–92.

In light of our conclusion, we must now determine whether to grant, under comity principles, FTB immunity from Hyatt's claims. Because we conclude that discretionary-function immunity under NRS 41.032 does not include intentional torts and bad-faith conduct, a Nevada government agency would not receive immunity under these circumstances, and thus, we do not extend such immunity to FTB under comity principles, as to do so would be contrary to the policy of this state.

Hyatt's intentional tort causes of action

Given that FTB may not invoke immunity, we turn next to FTB's various arguments contesting the judgment in favor of Hyatt on each of his causes of action.[6] Hyatt brought three invasion of privacy causes of action—intrusion upon seclusion, publicity of private facts, and false light—and additional causes of action for breach of confidential relationship, abuse of process, fraud, and intentional infliction of emotional distress. We discuss each of these causes of action below.

6 We reject Hyatt's contention that this court previously determined that each of his causes of action were valid as a matter of law based on the facts of the case in resolving the prior writ petitions. To the contrary, this court limited its holding to whether FTB was entitled to immunity, and thus, we did not address the merits of Hyatt's claims.

[5] **[6]** **[7]** This court reviews questions of law de novo. *Martinez,* 123 Nev. at 438, 168 P.3d at 724. A jury's verdict will be upheld if it is supported by substantial evidence. *Prabhu v. Levine,* 112 Nev. 1538, 1543, 930 P.2d 103, 107 (1996). Additionally, we "will not reverse an order or judgment unless error is affirmatively shown." *Schwartz v. Estate of Greenspun,* 110 Nev. 1042, 1051, 881 P.2d 638, 644 (1994).

Invasion of privacy causes of action

[8] The tort of invasion of privacy embraces four different tort actions: "(a) unreasonable intrusion upon the seclusion of another; or (b) appropriation of the other's name or likeness; or (c) unreasonable publicity given to the other's private life; or (d) publicity that unreasonably places the other in a false light before the public." Restatement (Second) of Torts § 652A (1977) (citations omitted); *PETA v. Bobby Berosini, Ltd.,* 111 Nev. 615, 629, 895 P.2d 1269, 1278 (1995), *overruled on other grounds by City of Las Vegas Downtown Redev. Agency v. Hecht,* 113 Nev. 644, 650, 940 P.2d 134, 138 (1997). At issue in this appeal are the intrusion, disclosure, and false light aspects of the invasion of privacy tort. The jury found in Hyatt's favor on those claims and awarded him $52 million for invasion of privacy damages. Because the parties' arguments regarding intrusion and disclosure overlap, we discuss those privacy torts together, and we follow that discussion by addressing the false light invasion of privacy tort.

Intrusion upon seclusion and public disclosure of private facts

[9] On appeal, Hyatt focuses his invasion of privacy claims on FTB's disclosures of his name, address, and social security number to various individuals and entities. FTB contends that Hyatt's claims fail because the information disclosed had been disseminated in prior public records, and thus, could not form the basis of an invasion of privacy claim.

[10] Intrusion upon seclusion and public disclosure of private facts are torts grounded in a plaintiff's objective expectation of privacy. ***140** *PETA,* 111 Nev. at 630, 631, 895 P.2d at 1279 (recognizing that the plaintiff must actually expect solitude or seclusion, and the plaintiff's expectation of privacy must be objectively reasonable); *Montesano v. Donrey Media Grp.,* 99 Nev. 644, 649, 668 P.2d 1081, 1084 (1983) (stating that the public disclosure of a private fact must be "offensive and objectionable to a reasonable person of ordinary sensibilities"); *see also* Restatement (Second) of Torts § 652B, 652D (1977). One defense to invasion of privacy torts, referred to as the public records defense, arises when a defendant can show that the disclosed information is contained in a court's official records. *Montesano,* 99 Nev. at 649, 668

P.2d at 1085. Such materials are public facts, *id.,* and a defendant cannot be liable for disclosing information about a plaintiff that was already public. Restatement (Second) of Torts § 652D cmt. b (1977).

Here, 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. Hyatt also disclosed the information himself when he made the information available in various business license applications completed by Hyatt. 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. Hyatt asserts that this results in his objective expectation of privacy in the information being preserved.

[11] **[12]** This court has never limited the application of the public records defense based on the length of time between the public disclosure and the alleged invasion of privacy. In fact, in *Montesano,* 99 Nev. 644, 668 P.2d 1081, we addressed disclosed information contained in a public record from 20 years before the disclosure at issue there and held that the protection still applied. Therefore, under the public records defense, as delineated in *Montesano,* Hyatt is precluded from recovering for invasion of privacy based on the disclosure of his name, address, and social security number, as the information was already publicly available, and he thus lacked an objective expectation of privacy in the information. [7]

[7] Beyond his name, address, and social security number, Hyatt also alleged improper disclosures related to the publication of his credit card number on one occasion and his licensing contracts on another occasion. But this information was only disclosed to one or two third parties, and it was information that the third parties already had in their possession from prior dealings with Hyatt. Thus, we likewise conclude that Hyatt lacked an objective expectation of privacy as a matter of law. *PETA,* 111 Nev. at 631, 895 P.2d at 1279; *Montesano,* 99 Nev. at 649, 668 P.2d at 1084.

Because Hyatt cannot meet the necessary requirements to establish his invasion of privacy causes of action for intrusion upon seclusion and public disclosure of private facts, we reverse the district court's judgment based on the jury verdict as to these causes of action. [8]

[8] Hyatt also argues that FTB violated his right to privacy when its agents looked through his trash, looked at a package on his doorstep, and spoke with neighbors, a postal carrier, and a trash collector. Hyatt does not provide any authority to support his assertion that he had a legally recognized objective expectation of privacy with regard to FTB's conduct in these instances, and thus, we decline to consider this contention. *See Edwards v. Emperor's Garden Rest.,* 122 Nev. 317, 330 n. 38, 130 P.3d 1280, 1288 n. 38 (2006) (explaining that this court need not consider claims that are not cogently argued or supported by relevant authority).

False light invasion of privacy

[13] **[14]** Regarding Hyatt's false light claim, he argues that FTB portrayed him in a false light throughout its investigation because FTB's various disclosures portrayed Hyatt as a "tax cheat." FTB asserts that Hyatt failed to provide any evidence to support his claim. Before reaching the parties' arguments as to Hyatt's false light claim, we must first determine whether to adopt this cause of action in Nevada, as this court has only impliedly recognized the false light invasion of privacy tort. *See PETA,* 111 Nev. at 622 n. 4, 629, 895 P.2d at 1273 n. 4, 1278. "Whether to adopt [this tort] as [a] viable tort claim[ ] is a question of state law." *Denver* ***141** *Publ'g Co. v. Bueno,* 54 P.3d 893, 896 (Colo.2002).

Adopting the false light invasion of privacy tort

Under the Restatement, an action for false light arises when

> [o]ne who gives publicity to a matter concerning another that places the other before the public in a false light ... if
>
> (a) the false light in which the other was placed would be highly offensive to a reasonable person, and
>
> (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

Restatement (Second) of Torts § 652E (1977). The greatest constraint on the tort of false light is its similarity to the tort of defamation.

A majority of the courts that have adopted the false light privacy tort have done so after concluding that false light and defamation are distinct torts.[9] *See Welling v. Weinfeld,* 113 Ohio St.3d 464, 866 N.E.2d 1051 (2007) (explaining the competing views); *West v. Media Gen. Convergence, Inc.,* 53 S.W.3d 640 (Tenn.2001) (same). For these courts, defamation law seeks to protect an objective interest in one's reputation, "either economic, political, or personal, in the outside world." *Crump v. Beckley Newspapers, Inc.,* 173 W.Va. 699, 320 S.E.2d 70, 83 (1984) (internal quotations omitted). By contrast, false light invasion of privacy protects one's subjective interest in freedom from injury to the person's right to be left alone. *Id.* Therefore, according to these courts there are situations (being falsely portrayed as a victim of a crime, such as sexual assault, or being falsely identified as having a serious illness, or being portrayed as destitute) in which a person may be placed in a harmful false light even though it does not rise to the level of defamation. *Welling,* 866 N.E.2d at 1055–57; *West,* 53 S.W.3d at 646. Without recognizing the separate false light privacy tort, such an individual would be left without a remedy. *West,* 53 S.W.3d at 646.

9 This court, in *PETA,* while not reaching the false light issue, observed that " '[t]he false light privacy action differs from a defamation action in that the injury in privacy actions is mental distress from having been exposed to public view, while the injury in defamation actions is damage to reputation.' " 111 Nev. at 622 n. 4, 895 P.2d at 1274 n. 4 (quoting *Rinsley v. Brandt,* 700 F.2d 1304, 1307 (10th Cir.1983)).

On the other hand, those courts that have declined to adopt the false light tort have done so based on its similarity to defamation. *See, e.g., Sullivan v. Pulitzer Broad. Co.,* 709 S.W.2d 475 (Mo.1986); *Renwick v. News & Observer Publ'g Co.,* 310 N.C. 312, 312 S.E.2d 405 (1984); *Cain v. Hearst Corp.,* 878 S.W.2d 577 (Tex.1994). "The primary objection courts level at false light is that it substantially overlaps with defamation, both in conduct alleged and interests protected." *Denver Publ'g Co.,* 54 P.3d at 898. For these courts, tort law serves to deter "socially wrongful conduct," and thus, it needs "clarity and certainty." *Id.* And because the parameters defining the difference between false light and defamation are blurred, these courts conclude that "such an amorphous tort risks chilling fundamental First Amendment freedoms." *Id.* In such a case, a media defendant would have to "anticipate whether statements are 'highly offensive' to a reasonable person of ordinary sensibilities even though their publication does no harm to the individual's reputation." *Id.* at 903. Ultimately, for these courts, defamation, appropriation, and intentional infliction of emotional distress provide plaintiffs with adequate remedies. *Id.* at 903.

Considering the different approaches detailed above, we, like the majority of courts, conclude that a false light cause of action is necessary to fully protect privacy interests, and we now officially recognize false light invasion of privacy as a valid cause of action in connection with the other three privacy causes of action that this court has adopted. Because we now recognize the false light invasion of privacy cause of action, we address FTB's substantive arguments regarding Hyatt's false light claim.

Hyatt's false light claim

[15] The crux of Hyatt's false light invasion of privacy claim is that FTB's demand- ***142** for-information letters, its other contact with third parties through neighborhood visits and questioning, and the inclusion of his case on FTB's litigation roster suggested that he was a "tax cheat," and therefore, portrayed him in a false light. On appeal, FTB argues that Hyatt presented no evidence that anyone thought that he was a "tax cheat" based on the litigation roster or third-party contacts.

FTB's litigation roster was an ongoing monthly litigation list that identified the cases that FTB was involved in. The list was available to the public and generally contained audit cases in which the protest and appeal process had been completed and the cases were being litigated in court. After Hyatt initiated this litigation, FTB began including the case on its roster, which Hyatt asserts was improper because the protests in his audits had not yet been completed. FTB, however, argues that because the lawsuit was ongoing, it did not place Hyatt in a false light by including him on the roster. Further, FTB argues that the litigation roster that Hyatt relied on was not false. When FTB began including Hyatt on the litigation roster, he was not falsely portrayed because he was indeed involved in litigation with FTB in this case. Hyatt did not demonstrate that the litigation roster contained any false information. Rather, he only argued that his inclusion on the list was improper because his audit cases had not

reached the final challenge stage like other cases on the roster.

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.

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. *See Prabhu,* 112 Nev. at 1543, 930 P.2d at 107. Because Hyatt has failed to establish a false light claim, we reverse the district court's judgment on this claim. [10]

10 Based on this resolution, we need not address the parties' remaining arguments involving this cause of action.

Having addressed Hyatt's invasion of privacy causes of action, we now consider FTB's challenges to Hyatt's remaining causes of action for breach of confidential relationship, abuse of process, fraud, and intentional infliction of emotional distress.

Breach of confidential relationship

[16] **[17]** A breach of confidential relationship cause of action arises "by reason of kinship or professional, business, or social relationships between the parties." *Perry v. Jordan,* 111 Nev. 943, 947, 900 P.2d 335, 337 (1995). On appeal, FTB contends that Hyatt could not prevail as a matter of law on his claim for breach of a confidential relationship because he cannot establish the requisite confidential relationship. In the underlying case, the district court denied FTB's motion for summary judgment and its motion for judgment as a matter of law, which presented similar arguments, and at trial the jury found FTB liable on this cause of action. Hyatt argues that his claim for breach of confidentiality falls within the parameters of *Perry* because FTB promised to protect his confidential information and its position over Hyatt during the audits established the necessary confidential relationship. [11]

11 FTB initially argues that Hyatt attempts to blend the cause of action recognized in *Perry* with a separate breach of confidentiality cause of action that, while recognized in other jurisdictions, has not been recognized by this court. We reject this contention, as the jury was instructed based on the cause of action outlined in *Perry.*

In *Perry,* this court recognized that a confidential relationship exists when a party gains the confidence of another party and purports to advise or act consistently with the other party's interest. *Id.* at 947, 900 P.2d at 338. In that case, store owner Perry sold her store to her neighbor and friend, Jordan, knowing that Jordan had no business knowledge, that Jordan was buying the store for her daughters, not for herself, and that Jordan would rely on Perry to run the store for a contracted one-year period after the sale was complete. *Id.* at 945–46, 900 P.2d at 336–37. Not long after the sale, Perry ***143** stopped running the store, and the store eventually closed. *Id.* at 946, 900 P.2d at 337. Jordan filed suit against Perry for, among other things, breach of a confidential relationship. *Id.* A jury found in Jordan's favor and awarded damages. *Id.* Perry appealed, arguing that this court had not recognized a claim for breach of a confidential relationship. *Id.*

On appeal, this court ruled that a breach of confidential relationship claim was available under the facts of the case. *Id.* at 947, 900 P.2d at 338. The court noted that Perry "held a duty to act with the utmost good faith, based on her confidential relationship with Jordan[, and that the] duty requires affirmative disclosure and avoidance of self dealing." *Id.* at 948, 900 P.2d at 338. The court explained that "[w]hen a confidential relationship exists, the person in whom the special trust is placed owes a duty to the other party similar to the duty of a fiduciary, requiring the person to act in good faith and with due regard to the interests of the other party." *Id.* at 947, 900 P.2d at 338.

FTB contends that the relationship between a tax auditor and the person being audited does not create the necessary relationship articulated in *Perry* to establish a breach of confidential relationship cause of action. In support of this proposition, FTB cites to *Johnson v. Sawyer,* which was heard by the Fifth Circuit Court of Appeals. 47 F.3d 716 (5th Cir.1995) (en banc). In *Johnson,* the plaintiff sought damages from press releases by the Internal Revenue Service (IRS) based on a conviction for filing a fraudulent tax return. *Id.* at 718. Johnson was criminally charged based on erroneous tax returns. *Id.* at 718–19. He eventually pleaded guilty to a reduced charge as part of a plea bargain. *Id.* at 718–20. Following the plea agreement,

two press releases were issued that contained improper and private information about Johnson. *Id.* at 720–21. Johnson filed suit against the IRS based on these press releases, arguing that they cost him his job and asserting several causes of action, one being breach of a confidential relationship. *Id.* at 718, 725, 738. On appeal, the Fifth Circuit Court of Appeals affirmed the district court's ruling that a breach of a confidential relationship could not be maintained based on the relationship between Johnson and the IRS, as it was clear that the two parties "stood in an adversarial relationship." *Id.* at 738 n. 47.

Hyatt rejects FTB's reliance on this case, arguing that the *Johnson* ruling is inapposite to the present case because, here, FTB made express promises regarding protecting Hyatt's confidential information but then failed to keep those promises. Hyatt maintains that although FTB may not have acted in his best interest in every aspect of the audits, as to keeping his information confidential, FTB affirmatively undertook that responsibility and breached that duty by revealing confidential information.

But 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 interest. *Johnson,* 47 F.3d at 738 n. 47. Moreover, the parties' relationship was not akin to a family or business relationship. *Perry,* 111 Nev. at 947, 900 P.2d at 337–38. Hyatt argues for a broad range of relationships that can meet the requirement under *Perry,* but we reject this contention. *Perry* does not provide for so expansive a relationship as Hyatt asks us to recognize as sufficient to establish a claim for a breach of confidential relationship.[12] Thus, FTB and Hyatt's relationship cannot form the basis for a breach of a confidential relationship cause of action, and this cause of action fails as a matter of law. The district court judgment in Hyatt's favor on this claim is reversed.

12 Further, we note that the majority of cases that Hyatt cites as authority for a more expansive viewpoint of a confidential relationship involve claims arising from a doctor-patient confidentiality privilege, which does not apply here. *See, e.g., Doe v. Medlantic Health Care Grp., Inc.,* 814 A.2d 939, 950–51 (D.C.2003); *Humphers v. First Interstate Bank of Or.,* 696 P.2d 527, 533–35 (1985).

Abuse of process

[18] **[19]** A successful abuse of process claim requires " '(1) an ulterior purpose by the defendants other than resolving a legal dispute, and (2) a willful act in the use of the ***144** legal process not proper in the regular conduct of the proceeding.' " *LaMantia v. Redisi,* 118 Nev. 27, 30, 38 P.3d 877, 879 (2002) (quoting *Posadas v. City of Reno,* 109 Nev. 448, 457, 851 P.2d 438, 444–45 (1993)). Put another way, a plaintiff must show that the defendant "willfully and improperly *used the legal process* to accomplish" an ulterior purpose other than resolving a legal dispute. *Id.* at 31, 38 P.3d at 880 (emphasis added).

FTB asserts that it was entitled to judgment as a matter of law on Hyatt's abuse of process cause of action because it did not actually use the judicial process, as it never sought to judicially enforce compliance with the demand-for-information forms and did not otherwise use the judicial process in conducting its audits of Hyatt. In response, Hyatt argues that FTB committed abuse of process by sending demand-for-information forms to individuals and companies in Nevada that are not subject to the California law cited in the form.

Because FTB did not use any legal enforcement process, such as filing a court action, in relation to its demands for information or otherwise during the audits, Hyatt cannot meet the requirements for establishing an abuse of process claim. *LaMantia,* 118 Nev. at 31, 38 P.3d at 880; *ComputerXpress, Inc. v. Jackson,* 93 Cal.App.4th 993, 113 Cal.Rptr.2d 625, 644 (2001) (explaining that abuse of process only arises when there is actual "use of *the machinery of the legal system* for an ulterior motive" (internal quotations omitted)); *see also Tuck Beckstoffer Wines L.L.C. v. Ultimate Distribs., Inc.,* 682 F.Supp.2d 1003, 1020 (N.D.Cal.2010). On this cause of action, then, FTB is entitled to judgment as a matter of law, and we reverse the district court's judgment.

Fraud

[20] **[21]** **[22]** **[23]** **[24]** To prove a fraud claim, the plaintiff must show that the defendant made a false representation that the defendant knew or believed was false, that the defendant intended to persuade the plaintiff to act or not act based on the representation, and that the plaintiff had reason to rely on the representation and suffered damages. *Bulbman, Inc. v. Nev. Bell,* 108 Nev. 105, 111, 825 P.2d 588, 592 (1992). It is the jury's role to make findings on the factors necessary to establish a fraud claim. *Powers v. United Servs. Auto. Ass'n,* 114 Nev.

690, 697–98, 962 P.2d 596, 600–01 (1998). This court will generally not disturb a jury's verdict that is supported by substantial evidence. *Taylor v. Thunder,* 116 Nev. 968, 974, 13 P.3d 43, 46 (2000). Substantial evidence is defined as "evidence that a reasonable mind might accept as adequate to support a conclusion." *Winchell v. Schiff,* 124 Nev. 938, 944, 193 P.3d 946, 950 (2008) (internal quotations omitted).

When Hyatt's 1991 audit began, FTB informed him that during the audit process Hyatt could expect FTB employees to treat him with courtesy, that the auditor assigned to his case would clearly and concisely request information from him, that any personal and financial information that he provided to FTB would be treated confidentially, and that the audit would be completed within a reasonable time. FTB contends that its statements in documents to Hyatt, that it would provide him with courteous treatment and keep his information confidential, were insufficient representations to form a basis for a fraud claim, and even if the representations were sufficient, there was no evidence that FTB knew that they were false when made. In any case, FTB argues that Hyatt did not prove any reliance because he was required to participate in the audits whether he relied on these statements or not. Hyatt asserts that FTB knowingly misrepresented its promise to treat him fairly and impartially and to protect his private information. For the reasons discussed below, we reject FTB's argument that it was entitled to judgment as a matter of law on Hyatt's fraud claim.

The record before us shows that a reasonable mind could conclude that FTB made specific representations to Hyatt that it intended for Hyatt to rely on, but which it did not intend to fully meet. FTB represented to Hyatt that it would protect his confidential information and treat him courteously. At trial, 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. In addition, ***145** FTB sent letters concerning the 1991 audit to several doctors with the same last name, based on its belief that one of those doctors provided Hyatt treatment, but without first determining which doctor actually treated Hyatt before sending the correspondence. Furthermore, Hyatt showed that FTB took 11 years to resolve Hyatt's protests of the two audits. Hyatt alleged that this delay resulted in $8,000 in interest per day accruing against him for the outstanding taxes owed to California. Also at trial, Hyatt presented evidence through Candace Les, a former FTB auditor and friend of the main auditor on Hyatt's audit, Sheila Cox, that Cox had made disparaging comments about Hyatt and his religion, that Cox essentially was intent on imposing an assessment against Hyatt, and that FTB promoted a culture in which tax assessments were the end goal whenever an audit was undertaken. Hyatt also testified that he would not have hired legal and accounting professionals to assist in the audits had he known how he would be treated. Moreover, Hyatt stated that he incurred substantial costs that he would not otherwise have incurred by paying for professional representatives to assist him during the audits.

The evidence presented sufficiently showed FTB's improper motives in conducting Hyatt's audits, and a reasonable mind could conclude that FTB made fraudulent representations, that it knew the representations were false, and that it intended for Hyatt to rely on the representations. [13] What's more, the jury could reasonably conclude that Hyatt relied on FTB's representations to act and participate in the audits in a manner different than he would have otherwise, which resulted in damages. Based on this evidence, we conclude that substantial evidence supports each of the fraud elements and that FTB is not entitled to judgment as a matter of law on this cause of action. [14]

13 FTB's argument concerning government agents making representations beyond the scope of law is without merit.

14 FTB further argues that several evidentiary errors by the district court warrant a new trial. These errors include admitting evidence concerning whether the audit conclusions were correct and excluding FTB's evidence seeking to rebut an adverse inference for spoliation of evidence. FTB also asserts that the district court improperly instructed the jury by permitting it to consider the audit determinations. Although we agree with FTB that the district court abused its discretion in these evidentiary rulings and in its jury instruction number 24, as discussed more fully below in regard to Hyatt's intentional infliction of emotional distress claim, we conclude that these errors were harmless as to Hyatt's fraud claim because sufficient evidence of fraud existed for the jury to find in Hyatt's favor on each required element for

fraud. *See Cook v. Sunrise Hosp. & Med. Ctr., L.L.C.,* 124 Nev. 997, 1006, 194 P.3d 1214, 1219 (2008) (holding that when there is error in a jury instruction, "prejudice must be established in order to reverse a district court judgment," and this is done by "showing that, but for the error, a different result might have been reached"); *El Cortez Hotel, Inc. v. Coburn,* 87 Nev. 209, 213, 484 P.2d 1089, 1091 (1971) (stating that an evidentiary error must be prejudicial in order to warrant reversal and remand).

Fraud damages

[25] Given our affirmance of the district court's judgment on the jury verdict in Hyatt's favor on his fraud claim, we turn to FTB's challenge as to the special damages awarded Hyatt on his fraud claim.[15] In doing so, we address whether FTB is entitled to statutory caps on the amount of damages recoverable to the same extent that a Nevada government agency would receive statutory caps under principles of comity.[16] NRS 41.035 provides a statutory cap on liability damages in tort actions "against a present or ***146** former officer or employee of the State or any political subdivision." FTB argues that because it is immune from liability under California law, and Nevada provides a statutory cap on liability damages, it is entitled to the statutory cap on its liability to the extent that the law does not conflict with Nevada policy. Hyatt asserts that applying the statutory caps would in fact violate Nevada policy because doing so would not sufficiently protect Nevada residents. According to Hyatt, limitless compensatory damages are necessary as a means to control non-Nevada government actions. Hyatt claims that statutory caps for Nevada government actions work because Nevada can control its government entities and employees through other means, such as dismissal or other discipline, that are not available to control an out-of-state government entity. Additionally, Hyatt points out that there are other reasons for the statutory caps that are specific only to Nevada, such as attracting state employees by limiting potential liability. Therefore, Hyatt argues that FTB is not entitled to statutory caps under comity because it would violate Nevada's superior policy of protecting its residents from injury.

15 The jury verdict form included a separate damage award for Hyatt's fraud claim. We limit our discussion of Hyatt's fraud damages to these special damages that were awarded. To the extent that Hyatt argues that he is entitled to other damages for his fraud claim beyond the special damages specified in the jury verdict form, we reject this argument and limit any emotional distress damages to his recovery under his intentional infliction of emotional distress claim, as addressed below.

16 FTB argues that under the law-of-the-case doctrine, comity applies to afford it a statutory cap on damages and immunity from punitive damages based on this court's conclusions in the earlier writ petitions. But this court did not previously address these issues and the issues are different, thus, law of the case does not apply. *Dictor v. Creative Mgmt. Servs.,* 126 Nev. 41, 44–45, 223 P.3d 332, 334–35 (2010).

The parties base their arguments on precedent from other courts that have taken different approaches to the issue. FTB primarily relies on a New Mexico Supreme Court case, *Sam v. Estate of Sam,* 139 N.M. 474, 134 P.3d 761 (2006), and Hyatt supports his arguments by mainly relying on *Faulkner v. University of Tennessee,* 627 So.2d 362 (Ala.1992).

In *Sam,* an employee of an Arizona government entity accidentally backed over his child while driving his employer's vehicle at his home in New Mexico. 134 P.3d at 763. In a lawsuit arising out of this accident, the issue before the *Sam* court was whether Arizona's one-year statute of limitation for government employees, or New Mexico's two-year statute of limitation for government employees or three-year general tort statute of limitation law should apply. *Id.* at 764. The court discussed the comity doctrine and concluded that New Mexico's two-year statute of limitations for government employees applied because by doing so it was recognizing Arizona's law to the extent that it did not conflict with New Mexico's law. *Id.* at 764–68.

In reaching this conclusion, the *Sam* court relied on the United States Supreme Court's holdings in *Nevada v. Hall,* 440 U.S. 410, 99 S.Ct. 1182, 59 L.Ed.2d 416 (1979), and *Franchise Tax Board of California v. Hyatt,* 538 U.S. 488, 123 S.Ct. 1683, 155 L.Ed.2d 702 (2003). *Sam,* 134 P.3d at 765–66. The *Sam* court stated that "[b]oth these cases stand for the principle that a forum state is not required to extend immunity to other states sued in its courts, but the forum state should extend immunity as a matter of comity if doing so will not violate the forum state's public policies." *Id.* at 765. Based on this framework for comity, the *Sam* court concluded that Arizona should be entitled to the statute of limitations for government agencies that New Mexico would provide to its government agencies.

Most courts appear to follow FTB's argument regarding how comity applies and that a state should recognize another state's laws to the extent that they do not conflict with its own. *See generally Solomon v. Supreme Court of Fla.,* 816 A.2d 788, 790 (D.C.2002); *Schoeberlein v. Purdue Univ.,* 129 Ill.2d 372, 135 Ill.Dec. 787, 544 N.E.2d 283, 285 (1989); *McDonnell v. Illinois,* 163 N.J. 298, 748 A.2d 1105, 1107 (2000); *Sam,* 134 P.3d at 765; *Hansen v. Scott,* 687 N.W.2d 247, 250 (N.D.2004).

In *Faulkner,* the plaintiff filed a lawsuit against the University of Tennessee after it threatened to revoke plaintiff's doctoral degree. 627 So.2d at 363–64. The issue in *Faulkner* was whether the University of Tennessee (UT) was entitled to discretionary immunity under comity, when both Tennessee and Alabama had similar discretionary-immunity provisions for their states' government entities. *Id.* at 366. Considering the policy of allowing residents legal redress, compared to the immunity policies that both states had, the *Faulkner* court observed that

> [w]e cannot, absent some overriding policy, leave Alabama residents without redress within this State, relating to alleged acts of wrongdoing by an agency of another State, where those alleged acts are associated with substantial commercial activities in ***147** Alabama, We conclude that comity is not such an overriding policy in this instance.

Id. The court rejected the argument that granting comity would not violate Alabama policy because its residents were used to Alabama government entities receiving immunity:

> Agencies of the State of Alabama are subject to legislative control, administrative oversight, and public accountability in Alabama; UT is not. Actions taken by an agency or instrumentality of this state are subject always to the will of the democratic process in Alabama. UT, as an instrumentality of the State of Tennessee, operates outside such controls in this State.

Id. The *Faulkner* court ultimately declined to grant UT immunity under comity. We are persuaded by the *Faulkner* court's reasoning.

This state's policy interest in providing adequate redress to Nevada citizens is paramount to providing FTB a statutory cap on damages under comity. Therefore, as we conclude that allowing FTB a statutory cap would violate this state's public policy in this area, comity does not require this court to grant FTB such relief. *Id.; Sam,* 134 P.3d at 765 (recognizing that a state is not required to extend immunity and comity only dictates doing so if it does not contradict the forum state's public policy). As this is the only argument FTB raised in regard to the special damages awarded under the fraud cause of action, we affirm the amount of damages awarded for fraud. The prejudgment interest awarded is vacated and remanded to the district court for a recalculation based on the damages for fraud that we uphold. In light of our ruling that only the special award of damages for fraud is affirmed, FTB's argument that prejudgment interest is not allowed because future damages were interwoven with past damages is moot.

Intentional infliction of emotional distress

During discovery in the underlying case, Hyatt refused to disclose his medical records. As a result, he was precluded at trial from presenting any medical evidence of severe emotional distress. Nevertheless, at trial, Hyatt presented evidence designed to demonstrate his emotional distress in the form of his own testimony regarding the emotional distress he experienced, along with testimony from his son and friends detailing their observation of changes in Hyatt's behavior and health during the audits. Based on this testimony, the jury found in Hyatt's favor on his intentional infliction of emotional distress (IIED) claim and awarded him $82 million for emotional distress damages.

[26] **[27]** To recover on a claim for IIED, a plaintiff must prove "(1) extreme and outrageous conduct on the part of the defendant; (2) intent to cause emotional distress or reckless disregard for causing emotional distress; (3) that the plaintiff actually suffered extreme or severe emotional distress; and (4) causation," *Miller v. Jones,* 114 Nev. 1291, 1299–1300, 970 P.2d 571, 577 (1998); *see also Barmettler v. Reno Air, Inc.,* 114 Nev. 441, 447, 956 P.2d 1382, 1386 (1998). A plaintiff must set forth "objectively verifiable

indicia" to establish that the plaintiff "actually suffered extreme or severe emotional distress." *Miller,* 114 Nev. at 1300, 970 P.2d at 577.

On appeal, FTB argues that Hyatt failed to establish that he actually suffered severe emotional distress because he failed to provide any medical evidence or other objectively verifiable evidence to establish such a claim. In response, Hyatt contends that the testimony provided by his family and other acquaintances sufficiently established objective proof of the severe and extreme emotional distress he suffered, particularly in light of the facts of this case demonstrating the intentional harmful treatment he endured from FTB. Hyatt asserts that the more severe the harm, the lower the amount of proof necessary to establish that he suffered severe emotional distress. While this court has held that objectively verifiable evidence is necessary in order to establish an IIED claim, *id.,* we have not specifically addressed whether this necessarily requires medical evidence or if other objective evidence is sufficient.

The Restatement (Second) of Torts § 46 (1977), in comments j and k, provide for a sliding-scale approach in which the increased ***148** severity of the conduct will require less in the way of proof that emotional distress was suffered in order to establish an IIED claim. Restatement (Second) of Torts § 46 cmt. j (1977) ("The intensity and the duration of the distress are factors to be considered in determining its severity. Severe distress must be proved; but in many cases the extreme and outrageous character of the defendant's conduct is in itself important evidence that the distress has existed."); Restatement (Second) of Torts § 46 cmt. k (1977) (stating that "if the enormity of the outrage carries conviction that there has in fact been severe emotional distress, bodily harm is not required"). This court has also impliedly recognized this sliding-scale approach, although stated in the reverse. *Nelson v. City of Las Vegas,* 99 Nev. 548, 665 P.2d 1141 (1983). In *Nelson,* this court explained that "[t]he less extreme the outrage, the more appropriate it is to require evidence of physical injury or illness from the emotional distress," *Id.* at 555, 665 P.2d at 1145.

Further, other jurisdictions that require objectively verifiable evidence have determined that such a mandate does not always require medical evidence. *See Lyman v. Huber,* 10 A.3d 707 (Me.2010) (stating that medical testimony is not mandatory to establish an IIED claim, although only in rare, extreme circumstances); *Buckman–Peirson v. Brannon,* 159 Ohio App.3d 12, 822 N.E.2d 830, 840–41 (2004) (stating that medical evidence is not required, but also holding that something more than just the plaintiff's own testimony was necessary); *see also Dixon v. Denny's, Inc.,* 957 F.Supp. 792, 796 (E.D.Va.1996) (stating that plaintiff failed to establish an IIED claim because plaintiff did not provide objective evidence, such as medical bills "or even the testimony of friends or family"). Additionally, in *Farmers Home Mutual Insurance Co. v. Fiscus,* 102 Nev. 371, 725 P.2d 234 (1986), this court upheld an award for mental and emotional distress even though the plaintiffs' evidence did not include medical evidence or testimony. *Id.* at 374–75, 725 P.2d at 236. While not specifically addressing an IIED claim, the *Fiscus* court addressed the recovery of damages for mental and emotional distress that arose from an insurance company's unfair settlement practices when the insurance company denied plaintiffs' insurance claim after their home had flooded. *Id.* at 373, 725 P.2d at 235. In support of the claim for emotional and mental distress damages, the husband plaintiff testified that he and his wife lost the majority of their personal possessions and that their house was uninhabitable, that because the claim had been rejected they lacked the money needed to repair their home and the house was condemned, and after meeting with the insurance company's representative the wife had an emotional breakdown. *Id.* at 374, 725 P.2d at 236. This court upheld the award of damages, concluding that the above evidence was sufficient to prove that plaintiffs had suffered mental and emotional distress. *Id.* at 374–75, 725 P.2d at 236. In so holding, this court rejected the insurance company's argument that there was insufficient proof of mental and emotional distress because there was no medical evidence or independent witness testimony. *Id.*

[28] Based on the foregoing, we now specifically adopt the sliding-scale approach to proving a claim for IIED. Under this sliding-scale approach, while medical evidence is one acceptable manner in establishing that severe emotional distress was suffered for purposes of an IIED claim, other objectively verifiable evidence may suffice to establish a claim when the defendant's conduct is more extreme, and thus, requires less evidence of the physical injury suffered.

[29] Turning to the facts in the present case, Hyatt suffered extreme treatment from FTB. As explained

above in discussing the fraud claim, FTB disclosed personal information that it promised to keep confidential and delayed resolution of Hyatt's protests for 11 years, resulting in a daily interest charge of $8,000. Further, Hyatt presented testimony that the auditor who conducted the majority of his two audits made disparaging remarks about Hyatt and his religion, was determined to impose tax assessments against him, and that FTB fostered an environment in which the imposition of tax assessments was the objective whenever an audit was undertaken. These facts support the conclusion that this case is at the more extreme end of the scale, ***149** and therefore less in the way of proof as to emotional distress suffered by Hyatt is necessary.

In support of his IIED claim, Hyatt presented testimony from three different people as to the how the treatment from FTB caused Hyatt emotional distress and physically affected him. This included testimony of how Hyatt's mood changed dramatically, that he became distant and much less involved in various activities, started drinking heavily, suffered severe migraines and had stomach problems, and became obsessed with the legal issues involving FTB, We conclude that this evidence, in connection with the severe treatment experienced by Hyatt, provided sufficient evidence from which a jury could reasonably determine that Hyatt suffered severe emotional distress.[17] Accordingly, we affirm the judgment in favor of Hyatt on this claim as to liability. As discussed below, however, we reverse the award of damages on this claim and remand for a new trial as to damages on this claim only.

17 To the extent FTB argues that it was prejudiced by its inability to obtain Hyatt's medical records, we reject this argument as the rulings below on this issue specifically allowed FTB to argue to the jury the lack of any medical treatment or evidence by Hyatt.

A new trial is warranted based on evidentiary and jury instruction errors[18]

18 While we conclude, as discussed below, that evidentiary and jury instruction errors require a new trial as to damages on Hyatt's IIED claim, we hold that sufficient evidence supports the jury's finding as to liability on this claim regardless of these errors. Thus, these errors do not alter our affirmance as to liability on this claim.

Early in this case, the district court granted FTB partial summary judgment and dismissed Hyatt's declaratory relief cause of action concerning when he moved from California to Nevada. The district court reached this conclusion because the audits were still under review in California, and therefore, the Nevada court lacked jurisdiction to address whether the audits' conclusions were accurate. The partial summary judgment was not challenged by Hyatt at any point to this court, and thus, the district court's ruling was in effect throughout the trial. Consequently, whether the audits' determinations were correct was not an issue in the Nevada litigation.

[30] On appeal, FTB argues that the district court erroneously allowed evidence and a jury instruction that went directly to whether the audits were properly determined. FTB frames this issue as whether the district court exceeded the case's jurisdictional boundaries, but the issue more accurately involves the admissibility of evidence and whether a jury instruction given by the district court was proper in light of the jurisdictional ruling. We review both the admissibility of evidence and the propriety of jury instructions for an abuse of discretion. *See Hansen v. Universal Health Servs.,* 115 Nev. 24, 27, 974 P.2d 1158, 1160 (1999) (evidence); *Allstate Ins. Co. v. Miller,* 125 Nev. 300, 319, 212 P.3d 318, 331 (2009) (jury instruction).

Evidence improperly permitted challenging audits' conclusions

[31] FTB argues that the district court violated its jurisdictional restriction governing this case, because by allowing Hyatt's claims to go forward based on the evidence presented at trial, the jury was in effect required to make findings on Hyatt's residency and whether he owed taxes. FTB points to the testimony of a number of Hyatt's witnesses that focused on whether the audits' results were correct: (1) Hyatt's tax accountant and tax attorney, who were his representatives during the audits, testified to their cooperation with FTB and that they did not attempt to intimidate the auditor to refute two bases for the imposition of penalties by FTB for lack of cooperation and intimidation; (2) an expert tax attorney witness testified about Hyatt's representatives' cooperation during the audits to refute the lack of

cooperation allegation; (3) an expert witness testified as to the lifestyles of wealthy people to refute the allegation that Hyatt's actions of living in a low-income apartment building in Las Vegas and having no security were "implausible behaviors"; ***150** and especially, (4) expert testimony of former FTB agent Malcom Jumulet regarding audit procedures, and Jumulet's testimony as to how FTB analyzed and weighed the information obtained throughout the audits as challenging the results of the audits reached by FTB. Further, FTB points to Hyatt's arguments regarding an alleged calculation error as to the amount of taxable income, which FTB argues is an explicit example of Hyatt challenging the conclusions of the audits. Hyatt argues that all the evidence he presented did not challenge the audits, but was proffered to demonstrate that the audits were conducted in bad faith and in an attempt to "trump up a case against Hyatt and extort a settlement."

While much of the evidence presented at trial would not violate the restriction against considering the audits' conclusions, there are several instances in which the evidence does violate this ruling. These instances included evidence challenging whether FTB made a mathematical error in the amount of income that it taxed, whether an auditor improperly gave credibility to certain interviews of estranged family members, whether an auditor appropriately determined that certain information was not credible or not relevant, as well as the testimony outlined above that Hyatt presented, which challenged various aspects of the fraud penalties.

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. For example, the expert testimony concerning typical lifestyles of wealthy individuals had relevance only to show that FTB erroneously concluded that Hyatt's conduct, such as renting an apartment in a low-income complex, was fraudulent because he was wealthy and allegedly only rented the apartment to give the appearance of living in Nevada. Whether such a conclusion was a correct determination by PTB is precisely what this case was not allowed to address. The testimony does not show wrongful intent or bad faith without first concluding that the decisions were wrong, unless it was proven that FTB knew wealthy individuals' tendencies, that they applied to all wealthy individuals, and that FTB ignored them. None of this was established, and thus, the testimony only went to the audits' correctness, which was not allowed. These are instances where the evidence went solely to challenging whether FTB made the right decisions in its audits. As such, it was an abuse of discretion for the district court to permit this evidence to be admitted. *Hansen,* 115 Nev. at 27, 974 P.2d at 1160.

Jury instruction permitting consideration of audits' determinations

[32] FTB also argues that the district court wrongly instructed the jury. Specifically, it asserts that the jury instruction given at the end of trial demonstrates that the district court allowed the jury to improperly consider FTB's audit determinations. Hyatt counters FTB's argument by relying on an earlier instruction that was given to the jury that he argues shows that the district court did not allow the jury to determine the appropriateness of the audits' results, as it specifically instructed the jury not to consider the audits' conclusions.

As background, before trial began, and at various times during the trial, the district court read an instruction to the jury that it was not to consider whether the audits' conclusions were correct:

> Although this case arises from the residency tax audit conducted by FTB, it is important for you to understand that you will not be asked, nor will you be permitted to make any determinations related to Mr. Hyatt's residency or the correctness of the tax assessments, penalties and interest assessed by FTB against Mr. Hyatt. Thus, although you may hear evidence during the course of this trial that may be related to the determinations and conclusions reached by FTB regarding Mr. Hyatt's residency and tax assessments, you are not permitted to make any determinations regarding Mr. Hyatt's residency such as when he became or did not become a resident of Nevada.

When jury instructions were given, this instruction was intended to be part of the jury instructions, but somehow the instruction was altered and a different version of this ***151** instruction was read as Jury Instruction 24. To correct the error, the district court read a revised Jury Instruction 24:

> You have heard evidence during the course of this trial that may be related to the determinations and conclusions reached by FTB regarding Mr. Hyatt's residency and tax assessments. You are not permitted to make any determinations regarding Mr. Hyatt's residency, such as when he became or did not become a resident of Nevada. Likewise, you are not permitted to make any determinations related to the propriety of the tax assessments issued by FTB against Mr. Hyatt, including but not limited to, the correctness or incorrectness of the amount of taxes assessed, or the determinations of FTB to assess Mr. Hyatt penalties and/or interest on those tax assessments.
>
> The residency and tax assessment determinations, and all factual and legal issues related thereto, are the subject matter of a separate administrative process between Mr. Hyatt and FTB in the State of California and will be resolved in that administrative process. You are not to concern yourself with those issues.
>
> Counsel for the FTB read and presented argument from the inaccurate Jury Instruction No. 24. To the extent FTB's counsel's arguments cited and relied on statements that are not contained in the correct Jury Instruction No. 24, they are stricken and you must disregard them. You are not to consider the stricken statements and arguments in your deliberations. *There is nothing in the correct Jury Instruction No. 24 that would prevent you during your deliberations from considering the appropriateness or correctness of the analysis conducted by the FTB employees in reaching its residency determination and conclusion. There is nothing in Jury Instruction No. 24 that would prevent Malcolm Jumulet from rendering an opinion about the appropriateness or correctness of the analysis conducted by FTB employees in reaching its residency determinations and conclusions.*

(Emphasis added.) Based on the italicized language, FTB argues that the district court not only allowed, but invited the jury to consider whether the FTB's audit conclusions were correct.

Jury Instruction 24 violated the jurisdictional limit that the district court imposed on this case. The instruction specifically allowed the jury to consider the "appropriateness or correctness of the analysis conducted by the FTB employees in reaching its residency determination and conclusion." As a result, the district court abused its discretion in giving this jury instruction. *Allstate Ins. Co.,* 125 Nev. at 319, 212 P.3d at 331.

Exclusion of evidence to rebut adverse inference

[33] FTB also challenges the district court's exclusion of evidence that it sought to introduce in an effort to rebut an adverse inference sanction for spoliation of evidence. The evidentiary spoliation arose when FTB changed its e-mail server in 1999, and it subsequently destroyed backup tapes from the old server. Because the server change occurred during the pendency of this litigation, FTB sent multiple e-mails to its employees, before the change, requesting that they print or otherwise save any e-mails related to Hyatt's case. Backup tapes containing several weeks' worth of e-mails were made from the old system to be used in the event that FTB needed to recover the old system. FTB, at some point, overwrote these tapes, however, and Hyatt eventually discovered the change in e-mail servers and requested discovery of the backup tapes, which had already been deleted. Because FTB had deleted the backup tapes, Hyatt filed a pretrial motion requesting sanctions against FTB. The district court ruled in Hyatt's favor and determined that it would give an adverse inference jury instruction. An adverse inference allows, but does not require, the jury to infer that evidence negligently destroyed by a party would have been harmful to that party. *See, e.g., Bass–Davis v. Davis,* 122 Nev. 442, 446, 452, 134 P.3d 103, 106, 109 (2006).

At trial, FTB sought to introduce evidence explaining the steps it had taken to preserve any relevant e-mails before the server change. Hyatt challenged this evidence, arguing ***152** that it was merely an attempt to reargue the evidence spoliation. The district court agreed with Hyatt and excluded the evidence. FTB does not challenge the jury instruction, but it does challenge the district court's exclusion of evidence that it sought to present at trial to rebut the adverse inference.

On this point, FTB argues that it was entitled to rebut the adverse inference, and therefore, the district court abused its discretion in excluding the rebuttal evidence. Hyatt counters that it is not proper evidence because in order to rebut the inference FTB had to show that the destroyed evidence was not harmful and FTB's excluded evidence did not demonstrate that the destroyed e-mails did not contain anything harmful.

[34] **[35]** This court has recognized that a district court may impose a rebuttable presumption, under NRS 47.250(3), when evidence was willfully destroyed, or the court may impose a permissible adverse inference when the evidence was negligently destroyed. *Bass–Davis,* 122 Nev. at 447–48, 134 P.3d at 106–07. Under a rebuttable presumption, the burden shifts to the spoliating party to rebut the presumption by showing that the evidence that was destroyed was not unfavorable. 122 Nev. at 448, 134 P.3d at 107. If the party fails to rebut the presumption, then the jury or district court may presume that the evidence was adverse to the party that destroyed the evidence. *Id.* A lesser adverse inference, that does not shift the burden of proof, is permissible. *Id.* at 449, 134 P.3d at 107. The lesser inference merely allows the fact-finder to determine, based on other evidence, that a fact exists. *Id.*

In the present case, the district court concluded that FTB's conduct was negligent, not willful, and therefore the lesser adverse inference applied, and the burden did not shift to FTB. But the district court nonetheless excluded the proposed evidence that FTB sought to admit to rebut the adverse inference. The district court should have permitted FTB to explain the steps that it took to collect the relevant e-mails in an effort to demonstrate that none of the destroyed information contained in the e-mails was damaging to FTB. Because the district court did not allow FTB to explain the steps taken, we are not persuaded by Hyatt's contention that FTB's evidence was actually only an attempt to reargue the spoliation issue. To the contrary, FTB could use the proposed evidence related to its efforts to collect all relevant e-mails to explain why nothing harmful was destroyed. Therefore, we conclude that the district court abused its discretion in excluding the evidence, and we reverse the district court's ruling in this regard.

Other evidentiary errors

[36] **[37]** FTB additionally challenges the district court's exclusion of evidence regarding Hyatt's loss of his patent through a legal challenge to the validity of his patent and his being audited for his federal taxes by the IRS, both of which occurred during the relevant period associated with Hyatt's IIED claim. Hyatt asserts that the district court properly excluded the evidence because it was more prejudicial than probative.

Under NRS 48.035(1), "[a]lthough relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice...." Hyatt argues that this provides a basis for the district court's exclusion of this evidence. We conclude, however, that the district court abused its discretion in excluding the evidence of Hyatt's patent loss and federal tax audit on this basis. Although the evidence may be prejudicial, it is doubtful that it is *unfairly* prejudicial as required under the statute. And in any event, the probative value of this evidence as to Hyatt's IIED claim, in particular in regard to damages caused by FTB as opposed to other events in his life, is more probative than unfairly prejudicial. Accordingly, the district court abused its discretion in excluding this evidence.

Evidentiary and jury instruction errors warrant reversal and remand for a new trial on damages only on the IIED claim

[38] Because the district court abused its discretion in making the evidentiary and jury instruction rulings outlined above, the question ***153** becomes whether these errors warrant reversal and remand for a new trial on the IIED claim, or whether the errors were harmless such that the judgment on the IIED claim should be upheld. *See Cook v. Sunrise Hosp. & Med. Ctr., L.L.C.,* 124 Nev. 997, 1006, 194 P.3d 1214, 1219 (2008) (holding that when there is error in a jury instruction "prejudice must be established in order to reverse a district court judgment," which can be done by "showing that, but for the error, a different result might have been reached"); *El Cortez Hotel, Inc. v. Coburn,* 87 Nev. 209, 213, 484 P.2d 1089, 1091 (1971) (stating that an evidentiary error must be prejudicial in order to warrant reversal and remand). We hold that substantial evidence exists to support the jury's finding as to liability against FTB on Hyatt's IIED claim regardless of these errors, but we conclude that the errors significantly affected the jury's determination

of appropriate damages, and therefore, these errors were prejudicial and require reversal and remand for a new trial as to damages.

In particular, the record shows that at trial Hyatt argued that FTB promised fairness and impartiality in its auditing processes but then, according to Hyatt, proceeded to conduct unfair audits that amounted to FTB "seeking to trump up a tax claim against him or attempt to extort him." In connection with this argument, Hyatt asserted that the penalties FTB imposed against Hyatt were done "to better bargain for and position the case to settle." Hyatt also argued that FTB unfairly refused to correct a mathematical error in the amount assessed against him when FTB asserted that there was no error.

None of these assertions could be made without contesting the audits' conclusions and determining that they were incorrect, which Hyatt was precluded from doing. Further, excluding FTB's evidence to rebut the adverse inference was prejudicial because Hyatt relied heavily on the adverse inference, and it is unknown how much weight the jury gave the inference in making its damages findings. The exclusion of evidence concerning Hyatt's loss of his patent and his federal tax audit, both occurring during the relevant period, relate to whether Hyatt's emotional distress was caused by FTB's conduct or one of these other events. As for the jury instruction, Instruction 24 gave the jury permission to consider the audits' determinations, which the district court had previously precluded it from reaching. As such, all of these errors resulted in prejudice to FTB directly related to the amount of damages Hyatt may be entitled to on his IIED claim. Therefore, a new trial as to the IIED damages is warranted.

Recoverable damages on remand

As addressed above in regard to damages for Hyatt's fraud claim, we reject FTB's argument that it should be entitled to Nevada's statutory cap on damages for government entities under comity principles. Based on our above analysis on this issue, we conclude that providing statutory caps on damages under comity would conflict with our state's policy interest in providing adequate redress to Nevada citizens. Thus, comity does not require this court to grant FTB such relief. *Faulkner v. Univ. of Tenn.,* 627 So.2d 362, 366 (Ala.1992); *see also Sam v. Estate of Sam,* 139 N.M. 474, 134 P.3d 761, 765 (2006) (recognizing that a state is not required to extend immunity and comity, and only dictating doing so if it does not contradict the forum state's public policy). As a result, any damages awarded on remand for Hyatt's IIED claim are not subject to any statutory cap on the amount awarded. As to FTB's challenges concerning prejudgment interest in connection with Hyatt's emotional distress damages, these arguments are rendered moot by our reversal of the damages awarded for a new trial and our vacating the prejudgment interest award.

Punitive damages

[39] The final issue that we must address in FTB's appeal is whether Hyatt can recover punitive damages from FTB. The district court allowed the issue of punitive damages to go to the jury, and the jury found in Hyatt's favor and awarded him $250 million.

[40] **[41]** Punitive damages are damages that are intended to punish a defendant's wrongful conduct rather than to compensate a plaintiff for his or her injuries. ***154** *Bongiovi v. Sullivan,* 122 Nev. 556, 580, 138 P.3d 433, 450 (2006). But "[t]he general rule is that no punitive damages are allowed against a [government entity] unless *expressly* authorized by statute." *Long v. City of Charlotte,* 306 N.C. 187, 293 S.E.2d 101, 114 (1982) (emphasis added). In Nevada, NRS 41.035(1) provides that "[a]n award for damages [against a government entity] in an action sounding in tort ... may not include any amount as exemplary or punitive." Thus, Nevada has not waived its sovereign immunity from suit for such damages.

FTB argues that it is entitled to immunity from punitive damages based on comity because, like Nevada, California law has expressly waived such damages against its government entities. California law provides full immunity from punitive damages for its government agencies. Cal. Gov't Code § 818 (West 2012). Hyatt maintains that punitive damages are available against an out-of-state government entity, if provided for by statute, and Nevada has a statute authorizing such damages —NRS 42.005. [19]

19 Hyatt also argues that punitive damages are proper because the IRS is subject to punitive damages for conduct similar to that alleged here under the IRS code, 26 U.S.C. § 7431(c)(1)(B)(ii) (2012), which allows for punitive damages for intentional or

> grossly negligent disclosure of a private taxpayer's information. Thus, Hyatt maintains that it is reasonable to impose punitive damages against FTB when the federal law permits punitive damages against the IRS for similar conduct. *Id.* But as FTB points out, this argument fails because there is a statute that expressly allows punitive damages against the IRS, and such a statute does not exist here.

NRS 42.005(1) provides that punitive damages may be awarded when a defendant "has been guilty of oppression, fraud or malice, express or implied." Hyatt acknowledges that punitive damages under NRS 42.005 are not applicable to a Nevada government entity based on NRS 41.035(1), but he contends that because FTB is not a Nevada government agency, the protection against punitive damages for Nevada agencies under NRS 41.035(1) does not apply, and thus, FTB comes within NRS 42.005's purview. FTB counters by citing a federal district court holding, *Georgia v. City of East Ridge, Tennessee,* 949 F.Supp. 1571, 1581 (N.D.Ga.1996), in which the court concluded that a Tennessee government entity could not be held liable for punitive damages under Georgia state law (which applied to the case) because, even though Georgia law had a statute allowing punitive damages, Georgia did not allow such damages against government entities. Therefore, the court gave the Tennessee government entity the protection of this law. *Id.*

The broad allowance for punitive damages under NRS 42.005 does not authorize punitive damages against a government entity. Further, under comity principles, we afford FTB the protections of California immunity to the same degree as we would provide immunity to a Nevada government entity as outlined in NRS 41.035(1). Thus, Hyatt's argument that Nevada law provides for the award of punitive damages against FTB is unpersuasive. Because punitive damages would not be available against a Nevada government entity, we hold that under comity principles FTB is immune from punitive damages. We therefore reverse the portion of the district court's judgment awarding punitive damages against FTB.

Costs

Since we reverse Hyatt's judgments on several of his tort causes of action, we must reverse the district court's costs award and remand the costs issue for the district court to determine which party, if any, is the prevailing party based on our rulings. *See Bower v. Harrah's Laughlin, Inc.,* 125 Nev. 470, 494–95, 215 P.3d 709, 726 (2009) (stating that the reversal of costs award is required when this court reverses the underlying judgment); *Glenbrook Homeowners Ass'n v. Glenbrook Co.,* 111 Nev. 909, 922, 901 P.2d 132, 141 (1995) (upholding the district court's determination that neither party was a prevailing party because each party won some issues and lost some issues). On remand, if costs are awarded, the district court should consider the proper amount of costs to award, including allocation of costs as to each cause of action and recovery for only the successful causes of action, if possible. *Cf. Mayfield v. Koroghli,* 124 Nev. 343, 353, 184 P.3d 362, 369 (2008) (holding that the district court should apportion costs award when there are ***155** multiple defendants, unless it is "rendered impracticable by the interrelationship of the claims"); *Bergmann v. Boyce,* 109 Nev. 670, 675–76, 856 P.2d 560, 563 (1993) (holding that the district court should apportion attorney fees between causes of action that were colorable and those that were groundless and award attorney fees for the groundless claims).

Because this issue is remanded to the district court, we also address FTB's challenges on appeal to the procedure used by the district court in awarding costs. Hyatt moved for costs after trial, which FTB opposed. FTB's opposition revolved in part around its contention that Hyatt failed to properly support his request for costs with necessary documentation as to the costs incurred. The district court assigned the costs issue to a special master. During the process, Hyatt supplemented his request for costs on more than one occasion to provide additional documentation to support his claimed costs. After approximately 15 months of discovery, the special master issued a recommendation to award Hyatt approximately $2.5 million in costs. FTB sought to challenge the special master's recommendation, but the district court concluded that FTB could not challenge the recommendation under the process used, and the court ultimately adopted the special master's recommendation.

[42] FTB argues that Hyatt was improperly allowed to submit, under NRS 18.110, documentation to support the costs he sought after the deadline. This court has previously held that the five-day time limit established for filing a memorandum for costs is not jurisdictional because the statute specifically allows for "such further time as the court or judge may grant" to file the costs memorandum. *Eberle v. State ex rel. Nell J. Redfield Trust,* 108 Nev. 587, 590, 836 P.2d 67, 69 (1992). In *Eberle,* this

court stated that even if no extension of time was granted by the district court, the fact that it favorably awarded the costs requested demonstrated that it impliedly granted additional time. *Id.* The *Eberle* court ruled that this was within the district court's discretion and would not be disturbed on appeal. *Id.* Based on the *Eberle* holding, we reject FTB's contention that Hyatt was improperly allowed to supplement his costs memorandum.

FTB also contends that the district court erred when it refused to let FTB file an objection to the master's report and recommendation. The district court concluded that, under NRCP 53(e)(3), no challenge was permitted because there was a jury trial. While the district court could refer the matter to a special master, the district court erroneously determined that FTB was not entitled to file an objection to the special master's recommendation. Although this case was a jury trial, the costs issue was not placed before the jury. Therefore, NRCP 53(e)(2) applied to the costs issue, not NRCP 53(e)(3). NRCP 53(e)(2) specifically provides that "any party may serve written objections" to the master's report. Accordingly, the district court erred when it precluded FTB from filing its objections. On remand, if the district court concludes that Hyatt is still entitled to costs, the court must allow FTB to file its objections to the report before the court enters a cost award. Based on our reversal and remand of the costs award, and our ruling in this appeal, we do not address FTB's specific challenges to the costs awarded to Hyatt, as those issues should be addressed by the district court, if necessary, in the first instance.

Hyatt's cross-appeal

[43] The final issues that we must resolve concern Hyatt's cross-appeal. In his cross-appeal, Hyatt challenges the district court's summary judgment ruling that prevented him from seeking economic damages as part of his recovery for his intentional tort claims.

As background, during the first audit, FTB sent letters to two Japanese companies with whom Hyatt had patent-licensing agreements asking the companies for specific dates when any payments were sent to Hyatt. Both companies responded to the letters and provided the requested information. In the district court, Hyatt argued that sending these letters to the Japanese companies was improper because they revealed that Hyatt was being audited by FTB and that he had disclosed the licensing agreements to FTB. Hyatt theorized that he suffered economic ***156** damages by losing millions of dollars of potential licensing revenue because he alleges that the Japanese market effectively abandoned him based on the disclosures. FTB moved the district court for summary judgment to preclude Hyatt from seeking economic loss damages, arguing that Hyatt did not have sufficient evidence to present this claim for damages to the jury. The district court agreed and granted FTB summary judgment.

[44] **[45]** Damages "cannot be based solely upon possibilities and speculative testimony." *United Exposition Serv. Co. v. State Indus. Ins. Sys.,* 109 Nev. 421, 424, 851 P.2d 423, 425 (1993). This is true regardless of " 'whether the testimony comes from the mouth of a lay witness or an expert.' " *Gramanz v. T–Shirts & Souvenirs, Inc.,* 111 Nev. 478, 485, 894 P.2d 342, 347 (1995) (quoting *Advent Sys. Ltd. v. Unisys Corp.,* 925 F.2d 670, 682 (3d Cir.1991)). When circumstantial evidence is used to prove a fact, "the circumstances must be proved, and not themselves be presumed." *Horgan v. Indart,* 41 Nev. 228, 231, 168 P. 953, 953 (1917); *see also Frantz v. Johnson,* 116 Nev. 455, 468, 999 P.2d 351, 359 (2000). A party cannot use one inference to support another inference; only the ultimate fact can be presumed based on actual proof of the other facts in the chain of proof. *Horgan,* 41 Nev. at 231, 168 P. at 953. Thus, "a complete chain of circumstances must be proven, and not left to inference, from which the ultimate fact may be presumed." *Id.*

Here, Hyatt argued that as a result of FTB sending letters to the two Japanese companies inquiring about licensing payments, the companies in turn would have notified the Japanese government about FTB investigating Hyatt. Hyatt theorized that the Japanese government would then notify other Japanese businesses about Hyatt being under investigation, with the end result being that the companies would not conduct any further licensing business with Hyatt. Hyatt's evidence to support this alleged chain of events consisted of the two letters FTB sent to the two companies and the fact that the companies responded to the letters, the fact that his licensing business did not obtain any other licensing agreements after the letters were sent, and expert testimony regarding Japanese business culture that was proffered to establish this potential series of events.

Hyatt claims that the district court erroneously ruled that he had to present direct evidence to support his

claim for damages, *e.g.,* evidence that the alleged chain of events actually occurred and that other companies in fact refused to do business with Hyatt as a result. Hyatt insists that he had sufficient circumstantial evidence to support his damages, and in any case, asserts that circumstantial evidence alone is sufficient and that causation requirements are less stringent and can be met through expert testimony under the circumstances at issue here. FTB responds that the district court did not rule that direct evidence was required, but instead concluded that Hyatt's evidence was speculative and insufficient. FTB does not contest that damages can be proven through circumstantial evidence, but argues that Hyatt did not provide such evidence. It also argues that there is no different causation standard under the facts of this case.

The issue we must decide is whether Hyatt set forth sufficient circumstantial evidence to support his economic damages claim, or if the evidence he presented was instead either too speculative or failed to create a sufficient question of material fact as to his economic damages. To begin with, we reject Hyatt's contention that reversal is necessary because the district court improperly ruled that direct evidence was mandatory. Hyatt's limited view of the district court's ruling is unavailing.

The ultimate fact that Hyatt seeks to establish through circumstantial evidence, that the downfall of his licensing business in Japan resulted from FTB contacting the two Japanese companies, however, cannot be proven through reliance on multiple inferences—the other facts in the chain must be proven. Here, Hyatt only set forth expert testimony detailing what his experts believed would happen based on the Japanese business culture. No evidence established that any of the hypothetical steps actually occurred. Hyatt provided no proof that the ***157** two businesses that received FTB's letters contacted the Japanese government, nor did Hyatt prove that the Japanese government in turn contacted other businesses regarding the investigation of Hyatt. Therefore, Hyatt did not properly support his claim for economic damages with circumstantial evidence. *Wood v. Safeway, Inc.,* 121 Nev. 724, 731, 121 P.3d 1026, 1030–31 (2005) (recognizing that to avoid summary judgment once the movant has properly supported the summary judgment motion, the nonmoving party may not rest upon general allegations and conclusions, but must instead set forth by affidavit or otherwise specific facts demonstrating the existence of a genuine issue of material fact for trial); *see* NRCP 56(e). Accordingly, summary judgment was proper and we affirm the district court's summary judgment on this issue.

CONCLUSION

Discretionary-function immunity does not apply to intentional and bad-faith tort claims. But while FTB is not entitled to immunity, it is entitled to judgment as a matter of law on each of Hyatt's causes of action except for his fraud and IIED claims. As to the fraud claim, we affirm the district court's judgment in Hyatt's favor, and we conclude that the district court's evidentiary and jury instruction errors were harmless. We also uphold the amount of damages awarded, as we have determined that FTB is not entitled to a statutory cap on damages under comity principles because this state's interest in providing adequate relief to its citizens outweighs providing FTB with the benefit of a damage cap under comity. In regard to the IIED claim, we affirm the judgment in favor of Hyatt as to liability, but conclude that evidentiary and jury instruction errors require a new trial as to damages. Any damages awarded on remand are not subject to a statutory cap under comity. We nevertheless hold that Hyatt is precluded from recovering punitive damages against FTB. The district court's judgment is therefore affirmed in part and reversed and remanded in part. We also remand the prejudgment interest and the costs awards to the district court for a new determination in light of this opinion. Finally, we affirm the district court's prior summary judgment as to Hyatt's claim for economic damages on Hyatt's cross-appeal. Given our resolution of this appeal, we do not need to address the remaining arguments raised by the parties on appeal or cross-appeal.

We concur: GIBBONS, C.J., PICKERING, PARRAGUIRRE, DOUGLAS and CHERRY, JJ.

All Citations

335 P.3d 125, 130 Nev. Adv. Op. 71

(ORDER LIST: 576 U.S.)

TUESDAY, JUNE 30, 2015

CERTIORARI -- SUMMARY DISPOSITIONS

14-460 HICKENLOOPER, GOV. OF CO V. KERR, ANDY, ET AL.

The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Tenth Circuit for further consideration in light of *Arizona State Legislature* v. *Arizona Independent Redistricting Comm'n*, 576 U. S. ___ (2015).

14-8768 PEOPLES, SOL S. V. UNITED STATES

14-9487 HORNYAK, CHRISTOPHER M. V. UNITED STATES

The motion of petitioners for leave to proceed *in forma pauperis* and the petitions for writs of certiorari are granted. The judgments are vacated, and the cases are remanded to the United States Court of Appeals for the Fifth Circuit for further consideration in light of *Johnson* v. *United States*, 576 U. S. ___ (2015).

13-8407 BROWN, WENDELL T. V. UNITED STATES

14-7280 HOWARD, JAMES J. V. UNITED STATES

14-7653 ROLFER, GARY V. UNITED STATES

14-8427 WALKER, JAMES M. V. UNITED STATES

14-8530 LANGSTON, RONNIE V. UNITED STATES

The motions of petitioners for leave to proceed *in forma pauperis* and the petitions for writs of certiorari are granted. The judgments are vacated, and the cases are remanded to the United States Court of Appeals for the Eighth Circuit for further consideration in light of *Johnson* v. *United States*, 576 U. S.

___ (2015).

Justice Alito concurring in the decision to grant, vacate, and remand in these cases: Following the recommendation of the Solicitor General, the Court has held these petitions in these and many other cases pending the decision in *Johnson* v. *United States*, 576 U. S. ____ (2015). In holding these petitions and now in vacating and remanding the decisions below in these cases, the Court has not differentiated between cases in which the petitioners would be entitled to relief if the Court held (as it now has) that the residual clause of the Armed Career Criminal Act of 1984, 18 U. S. C. Sec. 924(e)(2)(B)(ii), is void for vagueness and cases in which relief would not be warranted for a procedural reason. On remand, the Court of Appeals should understand that the Court's disposition of these petitions does not reflect any view regarding petitioners' entitlement to relief.

14-282 CHANDLER, TAVARES V. UNITED STATES

The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Ninth Circuit for further consideration in light of *Johnson* v. *United States*, 576 U. S. ___ (2015).

Justice Alito concurring in the decision to grant, vacate, and remand in this case: Following the recommendation of the Solicitor General, the Court has held the petition in this and many other cases pending the decision in *Johnson* v. *United States*, 576 U. S. ____ (2015). In holding this petition and now in vacating and remanding the decision below in this case, the Court has not differentiated between cases in which

the petitioner would be entitled to relief if the Court held (as it now has) that the residual clause of the Armed Career Criminal Act of 1984, 18 U. S. C. Sec. 924(e)(2)(B)(ii), is void for vagueness and cases in which relief would not be warranted for a procedural reason. On remand, the Court of Appeals should understand that the Court's disposition of this petition does not reflect any view regarding petitioner's entitlement to relief.

14-5227 ARROYO, DANIEL V. UNITED STATES

14-7347 VINALES, ENRIQUE V. UNITED STATES

14-7832 DENSON, TONY E. V. UNITED STATES

14-8464 SMITH, FLORNOY V. UNITED STATES

14-8884 COOPER, ANTHONY L. V. UNITED STATES

14-9049 AIKEN, IAN O. V. PASTRANA, WARDEN

14-9227 KIRK, DANIEL C. V. UNITED STATES

14-9229 LYNCH, PAUL V. UNITED STATES

14-9335 DRIVER, TAIWAN L. V. UNITED STATES

14-9338 CONEY, JIMMY L. V. PASTRANA, WARDEN

14-9750 NIPPER, DONNIE W. V. PASTRANA, WARDEN

The motions of petitioners for leave to proceed *in forma pauperis* and the petitions for writs of certiorari are granted. The judgments are vacated, and the cases are remanded to the United States Court of Appeals for the Eleventh Circuit for further consideration in light of *Johnson* v. *United States*, 576 U. S. ___ (2015).

Justice Alito concurring in the decision to grant, vacate, and remand in these cases: Following the recommendation of the Solicitor General, the Court has held these petitions in these and many other cases pending the decision in *Johnson* v.

United States, 576 U. S. ____ (2015). In holding these petitions and now in vacating and remanding the decisions below in these cases, the Court has not differentiated between cases in which the petitioners would be entitled to relief if the Court held (as it now has) that the residual clause of the Armed Career Criminal Act of 1984, 18 U. S. C. Sec. 924(e)(2)(B)(ii), is void for vagueness and cases in which relief would not be warranted for a procedural reason. On remand, the Court of Appeals should understand that the Court's disposition of these petitions does not reflect any view regarding petitioners' entitlement to relief.

14-5229 ANDERSON, ROBERT V. UNITED STATES

The motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the First Circuit for further consideration in light of *Johnson* v. *United States*, 576 U. S. ___ (2015).

Justice Alito concurring in the decision to grant, vacate, and remand in this case: Following the recommendation of the Solicitor General, the Court has held the petition in this and many other cases pending the decision in *Johnson* v. *United States*, 576 U. S. ____ (2015). In holding this petition and now in vacating and remanding the decision below in this case, the Court has not differentiated between cases in which the petitioner would be entitled to relief if the Court held (as it now has) that the residual clause of the Armed Career Criminal Act of 1984, 18 U. S. C. Sec. 924(e)(2)(B)(ii), is void for vagueness and cases in which relief would not be warranted

for a procedural reason. On remand, the Court of Appeals should understand that the Court's disposition of this petition does not reflect any view regarding petitioner's entitlement to relief.

14-6510 MELVIN, MAURICE L. V. UNITED STATES

14-8848 TASTE, ANTONIO V. UNITED STATES

The motions of petitioners for leave to proceed *in forma pauperis* and the petitions for writs of certiorari are granted. The judgments are vacated, and the cases are remanded to the United States Court of Appeals for the Fourth Circuit for further consideration in light of *Johnson* v. *United States*, 576 U. S. ___ (2015).

Justice Alito concurring in the decision to grant, vacate, and remand in these cases: Following the recommendation of the Solicitor General, the Court has held these petitions in these and many other cases pending the decision in *Johnson* v. *United States*, 576 U. S. ____ (2015). In holding these petitions and now in vacating and remanding the decisions below in these cases, the Court has not differentiated between cases in which the petitioners would be entitled to relief if the Court held (as it now has) that the residual clause of the Armed Career Criminal Act of 1984, 18 U. S. C. Sec. 924(e)(2)(B)(ii), is void for vagueness and cases in which relief would not be warranted for a procedural reason. On remand, the Court of Appeals should understand that the Court's disposition of these petitions does not reflect any view regarding petitioners' entitlement to relief.

14-7445 MALDONADO, SAMUEL V. UNITED STATES

The motion of petitioner for leave to proceed *in forma*

pauperis and the petition for a writ of certiorari are granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Second Circuit for further consideration in light of *Johnson* v. *United States*, 576 U. S. ___ (2015).

Justice Alito concurring in the decision to grant, vacate, and remand in this case: Following the recommendation of the Solicitor General, the Court has held the petition in this and many other cases pending the decision in *Johnson* v. *United States*, 576 U. S. ____ (2015). In holding this petition and now in vacating and remanding the decision below in this case, the Court has not differentiated between cases in which the petitioner would be entitled to relief if the Court held (as it now has) that the residual clause of the Armed Career Criminal Act of 1984, 18 U. S. C. Sec. 924(e)(2)(B)(ii), is void for vagueness and cases in which relief would not be warranted for a procedural reason. On remand, the Court of Appeals should understand that the Court's disposition of this petition does not reflect any view regarding petitioner's entitlement to relief.

14-7569 DE LA CRUZ, FRANCISCO V. UNITED STATES

14-8333 DAVIS, MICHAEL W. V. UNITED STATES

The motions of petitioners for leave to proceed *in forma pauperis* and the petitions for writs of certiorari are granted. The judgments are vacated, and the cases are remanded to the United States Court of Appeals for the Fifth Circuit for further consideration in light of *Johnson* v. *United States*, 576 U. S. ___ (2015).

Justice Alito concurring in the decision to grant, vacate,

and remand in these cases: Following the recommendation of the Solicitor General, the Court has held these petitions in these and many other cases pending the decision in *Johnson* v. *United States*, 576 U. S. ____ (2015). In holding these petitions and now in vacating and remanding the decisions below in these cases, the Court has not differentiated between cases in which the petitioners would be entitled to relief if the Court held (as it now has) that the residual clause of the Armed Career Criminal Act of 1984, 18 U. S. C. Sec. 924(e)(2)(B)(ii), is void for vagueness and cases in which relief would not be warranted for a procedural reason. On remand, the Court of Appeals should understand that the Court's disposition of these petitions does not reflect any view regarding petitioners' entitlement to relief.

14-7587 SMITH, ARTHUR C. V. UNITED STATES

14-8151 BERNARDINI, EUGENE V. UNITED STATES

14-8258 BALL, DERRICK M. V. UNITED STATES

14-8359 BELL, TERRENCE V. UNITED STATES

14-9062 HOLDER, ODELL A. V. UNITED STATES

14-9108 CASTLE, JASON V. UNITED STATES

14-9659 FALLINS, CARLOS V. UNITED STATES

The motions of petitioners for leave to proceed *in forma pauperis* and the petitions for writs of certiorari are granted. The judgments are vacated, and the cases are remanded to the United States Court of Appeals for the Sixth Circuit for further consideration in light of *Johnson* v. *United States*, 576 U. S. ___ (2015).

Justice Alito concurring in the decision to grant, vacate, and remand in these cases: Following the recommendation of the

Solicitor General, the Court has held these petitions in these and many other cases pending the decision in *Johnson* v. *United States*, 576 U. S. ____ (2015). In holding these petitions and now in vacating and remanding the decisions below in these cases, the Court has not differentiated between cases in which the petitioners would be entitled to relief if the Court held (as it now has) that the residual clause of the Armed Career Criminal Act of 1984, 18 U. S. C. Sec. 924(e)(2)(B)(ii), is void for vagueness and cases in which relief would not be warranted for a procedural reason. On remand, the Court of Appeals should understand that the Court's disposition of these petitions does not reflect any view regarding petitioners' entitlement to relief.

14-8196 CISNEROS, JORGE A. V. UNITED STATES

14-8569 PRINCE, BYRON C. V. UNITED STATES

14-8680 TALMORE, GERRIELL E. V. UNITED STATES

14-8903 JONES, LORENZO L. V. UNITED STATES

14-8989 MARTINEZ, MICHAEL A. V. UNITED STATES

The motions of petitioners for leave to proceed *in forma pauperis* and the petitions for writs of certiorari are granted. The judgments are vacated, and the cases are remanded to the United States Court of Appeals for the Ninth Circuit for further consideration in light of *Johnson* v. *United States*, 576 U. S. ___ (2015).

Justice Alito concurring in the decision to grant, vacate, and remand in these cases: Following the recommendation of the Solicitor General, the Court has held these petitions in these and many other cases pending the decision in *Johnson* v. *United States*, 576 U. S. ____ (2015). In holding these petitions and

now in vacating and remanding the decisions below in these cases, the Court has not differentiated between cases in which the petitioners would be entitled to relief if the Court held (as it now has) that the residual clause of the Armed Career Criminal Act of 1984, 18 U. S. C. Sec. 924(e)(2)(B)(ii), is void for vagueness and cases in which relief would not be warranted for a procedural reason. On remand, the Court of Appeals should understand that the Court's disposition of these petitions does not reflect any view regarding petitioners' entitlement to relief.

14-9574 JONES, ALFREDERICK V. UNITED STATES

The motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Third Circuit for further consideration in light of *Johnson* v. *United States*, 576 U. S. ___ (2015).

Justice Alito concurring in the decision to grant, vacate, and remand in this case: Following the recommendation of the Solicitor General, the Court has held the petition in this and many other cases pending the decision in *Johnson* v. *United States*, 576 U. S. ____ (2015). In holding this petition and now in vacating and remanding the decision below in this case, the Court has not differentiated between cases in which the petitioner would be entitled to relief if the Court held (as it now has) that the residual clause of the Armed Career Criminal Act of 1984, 18 U. S. C. Sec. 924(e)(2)(B)(ii), is void for vagueness and cases in which relief would not be warranted for a procedural reason. On remand, the Court of Appeals should

understand that the Court's disposition of this petition does not reflect any view regarding petitioner's entitlement to relief.

14-7390 BECKLES, TRAVIS V. UNITED STATES

The motion of petitioner for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Eleventh Circuit for further consideration in light of *Johnson* v. *United States*, 576 U. S. ___ (2015). Justice Kagan took no part in the consideration or decision of this motion and this petition.

Justice Alito concurring in the decision to grant, vacate, and remand in this case: Following the recommendation of the Solicitor General, the Court has held the petition in this and many other cases pending the decision in *Johnson* v. *United States*, 576 U. S. ____ (2015). In holding this petition and now in vacating and remanding the decision below in this case, the Court has not differentiated between cases in which the petitioner would be entitled to relief if the Court held (as it now has) that the residual clause of the Armed Career Criminal Act of 1984, 18 U. S. C. Sec. 924(e)(2)(B)(ii), is void for vagueness and cases in which relief would not be warranted for a procedural reason. On remand, the Court of Appeals should understand that the Court's disposition of this petition does not reflect any view regarding petitioner's entitlement to relief.

14-7975 GOODEN, HOPETON F. V. UNITED STATES

The motion of petitioner for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted.

The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Fourth Circuit for further consideration in light of *Johnson* v. *United States*, 576 U. S. ___ (2015). Justice Kagan took no part in the consideration or decision of this motion and this petition.

Justice Alito concurring in the decision to grant, vacate, and remand in this case: Following the recommendation of the Solicitor General, the Court has held the petition in this and many other cases pending the decision in *Johnson* v. *United States*, 576 U. S. ____ (2015). In holding this petition and now in vacating and remanding the decision below in this case, the Court has not differentiated between cases in which the petitioner would be entitled to relief if the Court held (as it now has) that the residual clause of the Armed Career Criminal Act of 1984, 18 U. S. C. Sec. 924(e)(2)(B)(ii), is void for vagueness and cases in which relief would not be warranted for a procedural reason. On remand, the Court of Appeals should understand that the Court's disposition of this petition does not reflect any view regarding petitioner's entitlement to relief.

14-9326 MAYER, CASEY D. V. UNITED STATES

The motion of petitioner for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Ninth Circuit for further consideration in light of *Johnson* v. *United States*, 576 U. S. ___ (2015). Justice Kagan took no part in the consideration or decision of this motion and this petition.

Justice Alito concurring in the decision to grant, vacate,

and remand in this case: Following the recommendation of the Solicitor General, the Court has held the petition in this and many other cases pending the decision in *Johnson* v. *United States*, 576 U. S. ____ (2015). In holding this petition and now in vacating and remanding the decision below in this case, the Court has not differentiated between cases in which the petitioner would be entitled to relief if the Court held (as it now has) that the residual clause of the Armed Career Criminal Act of 1984, 18 U. S. C. Sec. 924(e)(2)(B)(ii), is void for vagueness and cases in which relief would not be warranted for a procedural reason. On remand, the Court of Appeals should understand that the Court's disposition of this petition does not reflect any view regarding petitioner's entitlement to relief.

14-9634 WYNN, ANTONIO V. UNITED STATES

The motion of petitioner for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Sixth Circuit for further consideration in light of *Johnson* v. *United States*, 576 U. S. ___ (2015). Justice Kagan took no part in the consideration or decision of this motion and this petition.

Justice Alito concurring in the decision to grant, vacate, and remand in this case: Following the recommendation of the Solicitor General, the Court has held the petition in this and many other cases pending the decision in *Johnson* v. *United States*, 576 U. S. ____ (2015). In holding this petition and now in vacating and remanding the decision below in this case, the Court has not differentiated between cases in which

the petitioner would be entitled to relief if the Court held (as it now has) that the residual clause of the Armed Career Criminal Act of 1984, 18 U. S. C. Sec. 924(e)(2)(B)(ii), is void for vagueness and cases in which relief would not be warranted for a procedural reason. On remand, the Court of Appeals should understand that the Court's disposition of this petition does not reflect any view regarding petitioner's entitlement to relief.

JURISDICTION NOTED

14-232 HARRIS, WESLEY W., ET AL. V. AZ INDEP. COMMISSION, ET AL.

In this case probable jurisdiction is noted.

CERTIORARI GRANTED

14-510 MENOMINEE INDIAN TRIBE OF WI V. UNITED STATES, ET AL.

The petition for a writ of certiorari is granted limited to the following question: Whether the D. C. Circuit misapplied this Court's *Holland* decision when it ruled that the Tribe was not entitled to equitable tolling of the statute of limitations for filing of Indian Self-Determination Act claims under the Contract Disputes Act?

14-915 FRIEDRICHS, REBECCA, ET AL. V. CA TEACHERS ASSOC., ET AL.

The petition for a writ of certiorari is granted.

14-1132 MERRILL LYNCH, ET AL. V. MANNING, GREG, ET AL.

The motion of Securities Industry and Financial Markets Association for leave to file a brief as *amici curiae* is granted. The petition for a writ of certiorari is granted.

14-1175 CALIFORNIA FRANCHISE TAX BOARD V. HYATT, GILBERT P.

The petition for a writ of certiorari is granted limited to Questions 2 and 3 presented by the petition.

CERTIORARI DENIED

14-765) OTTER, GOV. OF ID, ET AL. V. LATTA, SUSAN, ET AL.
)
14-788) IDAHO V. LATTA, SUSAN, ET AL.

14-1073 NEVADA, ET AL. V. SUPERIOR COURT OF CA, ET AL.

14-9223 ZINK, DAVID, ET AL. V. LOMBARDI, DIR., MO DOC, ET AL.

The petitions for writs of certiorari are denied.

14-823 BERGER, PHIL, ET AL. V. FISHER-BORNE, MARCIE, ET AL.

The petition for a writ of certiorari before judgment is denied.

136 S.Ct. 1277
Supreme Court of the United States

FRANCHISE TAX BOARD
OF CALIFORNIA, Petitioner
v.
Gilbert P. HYATT.

No. 14–1175.
|
Argued Dec. 7, 2015.
|
Decided April 19, 2016.

Synopsis

Background: Nevada taxpayer brought action against Franchise Tax Board of California, alleging intentional torts and bad-faith conduct during audits. The Nevada Supreme Court denied in part Board's petition for writ of mandamus, ordering Clark County District Court to dismiss negligence claim for lack of jurisdiction but finding that intentional tort claims could proceed to trial. Certiorari was granted. The United States Supreme Court, 538 U.S. 488, 123 S.Ct. 1683, 155 L.Ed.2d 702, affirmed. Following remand, and jury trial on remaining claims, the District Court, Clark County, Jessie Elizabeth Walsh, J., entered judgment in favor of taxpayer and awarded damages, Board appealed. The Supreme Court of Nevada, Hardesty, J., —— Nev. ——, 335 P.3d 125,affirmed in part, reversed in part, and remanded. Certiorari was granted.

Holdings: The Supreme Court, Justice Breyer, held that:

[1] for an equally divided court, Nevada courts had jurisdiction over Board, and

[2] Nevada court applied special and discriminatory rule, and thus violated Full Faith and Credit Clause, by awarding one million dollars in damages to taxpayer.

Vacated and remanded.

Justice Alito concurred in judgment.

Chief Justice Roberts dissented and filed opinion in which Justice Thomas joined.

West Headnotes (5)

[1] States
Tax matters
360 States
360VI Actions
360k191 Liability and Consent of State to Be Sued in General
360k191.9 Particular Actions
360k191.9(6) Tax matters
Nevada courts had jurisdiction over Franchise Tax Board of California in Nevada taxpayer's suit against Board, alleging abusive audit and investigation practices, despite lack of California's consent. (Per Justice Breyer for an equally-divided court.)

Cases that cite this headnote

[2] States
Full faith and credit in each state to the public acts, records, etc. of other states
360 States
360I Political Status and Relations
360I(A) In General
360k5 Relations Among States Under Constitution of United States
360k5(2) Full faith and credit in each state to the public acts, records, etc. of other states
In Nevada taxpayer's suit against Franchise Tax Board of California related to allegedly abusive audit and investigation practices, Nevada court applied special and discriminatory rule, and thus violated Full Faith and Credit Clause, by awarding one million dollars in damages to taxpayer under Nevada law, which amount exceeded maximum that could have been awarded in similar circumstances against Nevada agencies, where Nevada's Supreme Court ignored both Nevada's typical rules of immunity, which capped damages against Nevada agencies at $50,000, and California's immunity-related statutes, which were consistent with Nevada law by prohibiting monetary recovery greater than amount of

maximum recovery under Nevada law in similar circumstances. U.S.C.A. Const. Art. 4, § 1; West's Cal.Gov.Code § 860.2; West's NRSA 41.035(1).

Cases that cite this headnote

[3] States

Full faith and credit in each state to the public acts, records, etc. of other states

360 States
360I Political Status and Relations
360I(A) In General
360k5 Relations Among States Under Constitution of United States
360k5(2) Full faith and credit in each state to the public acts, records, etc. of other states

Statute is a "public act" within the meaning of the Full Faith and Credit Clause. U.S.C.A. Const. Art. 4, § 1; 28 U.S.C.A. § 1738.

Cases that cite this headnote

[4] States

Full faith and credit in each state to the public acts, records, etc. of other states

360 States
360I Political Status and Relations
360I(A) In General
360k5 Relations Among States Under Constitution of United States
360k5(2) Full faith and credit in each state to the public acts, records, etc. of other states

Full Faith and Credit Clause does not require a state to substitute for its own statute, applicable to persons and events within it, the statute of another state reflecting a conflicting and opposed policy. U.S.C.A. Const. Art. 4, § 1.

Cases that cite this headnote

[5] States

Full faith and credit in each state to the public acts, records, etc. of other states

360 States
360I Political Status and Relations
360I(A) In General
360k5 Relations Among States Under Constitution of United States
360k5(2) Full faith and credit in each state to the public acts, records, etc. of other states

Under the Full Faith and Credit Clause, a state need not substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate. U.S.C.A. Const. Art. 4, § 1.

Cases that cite this headnote

***1278** *Syllabus* [*]

[*] The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

Respondent Hyatt claims that he moved from California to Nevada in 1991, but petitioner Franchise Tax Board of California, a state agency, claims that he actually moved in 1992 and thus owes California millions in taxes, penalties, and interest. Hyatt filed suit in Nevada state court, which had jurisdiction over California under *Nevada v. Hall*, 440 U.S. 410, 99 S.Ct. 1182, 59 L.Ed.2d 416, seeking damages for California's alleged abusive audit and investigation practices. After this Court affirmed the Nevada Supreme Court's ruling that Nevada courts, as a matter of comity, would immunize California to the same extent that Nevada law would immunize its own agencies and officials, see *Franchise Tax Bd. of Cal. v. Hyatt*, 538 U.S. 488, 499, 123 S.Ct. 1683, 155 L.Ed.2d 702, the case went to trial, where Hyatt was awarded almost $500 million in damages and fees. On appeal, California argued that the Constitution's Full Faith and Credit Clause, Art. IV, § 1, required Nevada to limit damages to $50,000, the maximum that Nevada law would permit in a similar suit against its own officials. The Nevada Supreme Court, however, affirmed $1 million of the award and ordered a retrial on another damages issue, stating that the $50,000 maximum would not apply on remand.

Held :

1. The Court is equally divided on the question whether *Nevada v. Hall* should be overruled and thus affirms the Nevada courts' exercise of jurisdiction over California's state agency. P. 1280.

2. The Constitution does not permit Nevada to apply a rule of Nevada law that awards damages against California that are greater than it could award against Nevada in similar circumstances. This conclusion is consistent with this Court's precedents. A statute is a "public Act" within the meaning of the Full Faith and Credit Clause. While a State is not required "to substitute for its own statute ... the statute of another State reflecting a conflicting and opposed policy," *Carroll v. Lanza,* 349 U.S. 408, 412, 75 S.Ct. 804, 99 L.Ed. 1183, a State's decision to decline to apply another State's statute on this ground must not embody a "policy of hostility to the public Acts" of that other State, *id.,* at 413, 75 S.Ct. 804. Using this approach, the Court found no violation of the Clause in *Carroll v. Lanza* or in *Franchise Tax Bd.* the first time this litigation was considered. By contrast, the rule of unlimited damages applied here is not only "opposed" to California's law of complete immunity; it is also inconsistent with the general principles of Nevada immunity law, which limit damages awards to $50,000. Nevada explained its departure from those general principles by describing California's own system of controlling its agencies as an inadequate remedy for Nevada's citizens. A State that disregards its own ordinary legal principles on this ground employs a constitutionally impermissible " 'policy of hostility to the public Acts' of a sister State." 538 U.S., at 499, 123 S.Ct. 1683. The Nevada Supreme Court's decision thereby lacks the "healthy ***1279** regard for California's sovereign status" that was the hallmark of its earlier decision. *Ibid.* This holding does not indicate a return to a complex "balancing-of-interests approach to conflicts of law under the Full Faith and Credit Clause." *Id.,* at 496, 123 S.Ct. 1683. Rather, Nevada's hostility toward California is clearly evident in its decision to devise a special, discriminatory damages rule that applies only to a sister State. Pp. 1280 – 1283.

130 Nev. ——, 335 P.3d 125, vacated and remanded.

BREYER, J., delivered the opinion of the Court, in which KENNEDY, GINSBURG, SOTOMAYOR, and KAGAN, JJ., joined. ALITO, J., concurred in the judgment. ROBERTS, C.J., filed a dissenting opinion, in which THOMAS, J., joined.

Attorneys and Law Firms

Paul D. Clement, Washington, DC, for Petitioner.

H. Bartow Farr, Washington, DC, for Respondent.

Scott W. DePeel, Franchise Tax, Board of the State of California, Sacramento, CA, Pat Lundvall, Debbie Leonard, McDonald Carano, Wilson, LLP, Las Vegas, NV, Paul D. Clement, George W. Hicks, Jr., Stephen V. Potenza, Michael D. Lieberman, Bancroft PLLC, Washington, DC, for petitioner.

Opinion

Justice BREYER delivered the opinion of the Court.

[1] In *Nevada v. Hall,* 440 U.S. 410, 99 S.Ct. 1182, 59 L.Ed.2d 416 (1979), this Court held that one State (here, Nevada) can open the doors of its courts to a private citizen's lawsuit against another State (here, California) without the other State's consent. In this case, a private citizen, a resident of Nevada, has brought a suit in Nevada's courts against the Franchise Tax Board of California, an agency of the State of California. The board has asked us to overrule *Hall* and hold that the Nevada courts lack jurisdiction to hear this lawsuit. The Court is equally divided on this question, and we consequently affirm the Nevada courts' exercise of jurisdiction over California. See, *e.g., Exxon Shipping Co. v. Baker,* 554 U.S. 471, 484, 128 S.Ct. 2605, 171 L.Ed.2d 570 (2008) (citing *Durant v. Essex Co.,* 7 Wall. 107, 112, 19 L.Ed. 154 (1869)).

California also asks us to reverse the Nevada court's decision insofar as it awards the private citizen greater damages than Nevada law would permit a private citizen to obtain in a similar suit against Nevada's own agencies. We agree that Nevada's application of its damages law in this case reflects a special, and constitutionally forbidden, " 'policy of hostility to the public Acts' of a sister State," namely, California. U.S. Const., Art. IV, § 1 (Full Faith and Credit Clause); *Franchise Tax Bd. of Cal. v. Hyatt,* 538 U.S. 488, 499, 123 S.Ct. 1683, 155 L.Ed.2d 702 (2003) (quoting *Carroll v. Lanza,* 349 U.S. 408, 413, 75 S.Ct. 804, 99 L.Ed. 1183 (1955)). We set aside the Nevada Supreme Court's decision accordingly.

I

Gilbert P. Hyatt, the respondent here, moved from California to Nevada in the early 1990's. He says that he moved to Nevada in September 1991. California's Franchise Tax Board, however, after an investigation and tax audit, claimed that Hyatt moved to Nevada later, in April 1992, and that he consequently owed California ***1280** more than $10 million in taxes, associated penalties, and interest.

Hyatt filed this lawsuit in Nevada state court against California's Franchise Tax Board, a California state agency. Hyatt sought damages for what he considered the board's abusive audit and investigation practices, including rifling through his private mail, combing through his garbage, and examining private activities at his place of worship. See App. 213–245, 267–268.

California recognized that, under *Hall,* the Constitution permits Nevada's courts to assert jurisdiction over California despite California's lack of consent. California nonetheless asked the Nevada courts to dismiss the case on other constitutional grounds. California law, it pointed out, provided state agencies with immunity from lawsuits based upon actions taken during the course of collecting taxes. Cal. Govt.Code Ann. § 860.2 (West 1995); see also § 860.2 (West 2012). It argued that the Constitution's Full Faith and Credit Clause required Nevada to apply California's sovereign immunity law to Hyatt's case. Nevada's Supreme Court, however, rejected California's claim. It held that Nevada's courts, as a matter of comity, would immunize California where Nevada law would similarly immunize its own agencies and officials (*e.g.,* for actions taken in the performance of a "discretionary" function), but they would not immunize California where Nevada law permitted actions against Nevada agencies, say, for acts taken in bad faith or for intentional torts. App. to Pet. for Cert. in *Franchise Tax Bd. of Cal. v. Hyatt,* O.T. 2002, No. 42, p. 12. We reviewed that decision, and we affirmed. *Franchise Tax Bd., supra,* at 499, 123 S.Ct. 1683.

On remand, the case went to trial. A jury found in Hyatt's favor and awarded him close to $500 million in damages (both compensatory and punitive) and fees (including attorney's fees). California appealed. It argued that the trial court had not properly followed the Nevada Supreme Court's earlier decision. California explained that in a similar suit against similar Nevada officials, Nevada statutory law would limit damages to $50,000, and it argued that the Constitution's Full Faith and Credit Clause required Nevada to limit damages similarly here.

The Nevada Supreme Court accepted the premise that Nevada statutes would impose a $50,000 limit in a similar suit against its own officials. See 130 Nev. ——, ——, 335 P.3d 125, 145–146 (2014); see also Nev.Rev.Stat. § 41.035(1) (1995). But the court rejected California's conclusion. Instead, while setting aside much of the damages award, it nonetheless affirmed $1 million of the award (earmarked as compensation for fraud), and it remanded for a retrial on the question of damages for intentional infliction of emotional distress. In doing so, it stated that "damages awarded on remand ... are not subject to any statutory cap." 130 Nev., at ——, 335 P.3d, at 153. The Nevada Supreme Court explained its holding by stating that California's efforts to control the actions of its own agencies were inadequate as applied to Nevada's own citizens. Hence, Nevada's "policy interest in providing adequate redress to Nevada's citizens [wa]s paramount to providing [California] a statutory cap on damages under comity." *Id.,* at ——, 335 P.3d, at 147.

California petitioned for certiorari. We agreed to decide two questions. First, whether to overrule *Hall*. And, second, if we did not do so, whether the Constitution permits Nevada to award Hyatt damages against a California state agency that are greater than those that Nevada would award in a similar suit against its own state agencies.

***1281** II

[2] In light of our 4–to–4 affirmance of Nevada's exercise of jurisdiction over California's state agency, we must consider the second question: Whether the Constitution permits Nevada to award damages against California agencies under Nevada law that are greater than it could award against Nevada agencies in similar circumstances. We conclude that it does not. The Nevada Supreme Court has ignored both Nevada's typical rules of immunity and California's immunity-related statutes (insofar as California's statutes would prohibit a monetary recovery that is greater in amount than the maximum recovery that Nevada law would permit in similar circumstances).

Instead, it has applied a special rule of law that evinces a " 'policy of hostility' " toward California. *Franchise Tax Bd., supra,* at 499, 123 S.Ct. 1683 (quoting *Carroll v. Lanza, supra,* at 413, 75 S.Ct. 804). 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." Art. IV, § 1.

[3] **[4]** The Court's precedents strongly support this conclusion. A statute is a "public Act" within the meaning of the Full Faith and Credit Clause. See, *e.g., Carroll v. Lanza, supra,* at 411, 75 S.Ct. 804; see also 28 U.S.C. § 1738 (referring to "[t]he Acts of the legislature" in the full faith and credit context). We have said that the Clause "does not require a State to substitute for its own statute, applicable to persons and events within it, the statute of another State reflecting a conflicting and opposed policy." *Carroll v. Lanza,* 349 U.S., at 412, 75 S.Ct. 804. But when affirming a State's decision to decline to apply another State's statute on this ground, we have consistently emphasized that the State had "not adopt[ed] any policy of hostility to the public Acts" of that other State. *Id.,* at 413, 75 S.Ct. 804.

In *Carroll v. Lanza,* the Court considered a negligence action brought by a Missouri worker in Arkansas' courts. We held that the Arkansas courts need not apply a time limitation contained in Missouri's (but not in Arkansas') workman's compensation law. *Id.*, at 413–414, 75 S.Ct. 804. In doing so, we emphasized both that (1) Missouri law (compared with Arkansas law) embodied "a conflicting and opposed policy," and (2) Arkansas law did not embody "any policy of hostility to the public Acts of Missouri." *Id.,* at 412–413, 75 S.Ct. 804. This second requirement was well established in earlier law. See, *e.g., Broderick v. Rosner,* 294 U.S. 629, 642–643, 55 S.Ct. 589, 79 L.Ed. 1100 (1935) (New Jersey may not enforce a jurisdictional statute that would permit enforcement of certain claims under New Jersey law but "deny the enforcement" of similar, valid claims under New York law); *Hughes v. Fetter,* 341 U.S. 609, 611–612, 71 S.Ct. 980, 95 L.Ed. 1212 (1951) (invalidating a Wisconsin statute that "close[d] the doors of its courts" to an Illinois cause of action while permitting adjudication of similar Wisconsin claims).

We followed this same approach when we considered the litigation now before us for the first time. See *Franchise Tax Bd.,* 538 U.S., at 498–499, 123 S.Ct. 1683. Nevada had permitted Hyatt to sue California in Nevada courts. See *id.,* at 497, 123 S.Ct. 1683 (citing *Hall,* 440 U.S., at 414–421, 99 S.Ct. 1182). 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. But in doing so, we emphasized both that (1) the Clause ***1282** does not require one State to apply another State's law that violates its "own legitimate public policy," *Franchise Tax Bd., supra,* at 497–498, 123 S.Ct. 1683 (citing *Hall, supra,* at 424, 99 S.Ct. 1182), and (2) Nevada's choice of law did not "exhibi[t] a 'policy of hostility to the public Acts' of a sister State." *Franchise Tax Bd., supra,* at 499, 123 S.Ct. 1683 (quoting *Carroll v. Lanza, supra,* at 413, 75 S.Ct. 804). Rather, Nevada had evinced "a healthy regard for California's sovereign status," we said, by "relying on the contours of Nevada's own sovereign immunity from suit as a benchmark for its analysis." *Franchise Tax Bd., supra,* at 499, 123 S.Ct. 1683.

The Nevada decision before us embodies a critical departure from its earlier approach. 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. With respect to damages awards greater than $50,000, the ordinary principles of Nevada law do not "conflic[t]" with California law, for both laws would grant immunity. *Carroll v. Lanza,* 349 U.S., at 412, 75 S.Ct. 804. Similarly, in respect to such amounts, the "polic [ies]" underlying California law and Nevada's usual approach are not "opposed"; they are consistent. *Id.,* at 412–413, 75 S.Ct. 804.

But that is not so in respect to Nevada's special rule. That rule, allowing damages awards greater than $50,000, is not only "opposed" to California law, *ibid.*; it is also inconsistent with the general principles of Nevada immunity law, see *Franchise Tax Bd., supra,* at 499, 123 S.Ct. 1683. The Nevada Supreme Court explained its departure from those general principles by describing California's system of controlling its own agencies as failing to provide "adequate" recourse to Nevada's citizens. 130 Nev., at ——, 335 P.3d, at 147. It expressed concerns about the fact that California's agencies " 'operat[e] outside' " the systems of " 'legislative control,

administrative oversight, and public accountability' " that Nevada applies to its own agencies. *Ibid.* (quoting *Faulkner v. University of Tenn.,* 627 So.2d 362 (Ala.1992)). 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. A constitutional rule that would permit this kind of discriminatory hostility is likely to cause chaotic interference by some States into the internal, legislative affairs of others. Imagine, for example, that many or all States enacted such discriminatory, special laws, and justified them on the sole basis that (in their view) a sister State's law provided inadequate protection to their citizens. Would each affected sister State have to change its own laws? Entirely? Piece-by-piece, in order to respond to the new special laws enacted by every other State? It is difficult to reconcile such a system of special and discriminatory rules with the Constitution's vision of 50 individual and equally dignified States. In light of the "constitutional equality" among the States, *Coyle v. Smith,* 221 U.S. 559, 580, 31 S.Ct. 688, 55 L.Ed. 853 (1911), Nevada has not offered "sufficient policy considerations" to justify the application of a special rule of Nevada law that discriminates against its sister States, *Carroll v. Lanza, supra,* at 413, 75 S.Ct. 804. In our view, Nevada's rule lacks the "healthy regard for California's sovereign status" that was the hallmark of its earlier decision, and it reflects a constitutionally impermissible " 'policy of hostility ***1283** to the public Acts' of a sister State." *Franchise Tax Bd., supra,* at 499, 123 S.Ct. 1683 (quoting *Carroll v. Lanza, supra,* at 413, 75 S.Ct. 804).

[5] In so holding we need not, and do not, intend to return to a complex "balancing-of-interests approach to conflicts of law under the Full Faith and Credit Clause." *Franchise Tax Bd.,* 538 U.S., at 496, 123 S.Ct. 1683. Long ago this Court's efforts to apply that kind of analysis led to results that seemed to differ depending, for example, upon whether the case involved commercial law, a shareholders' action, insurance claims, or workman's compensation statutes. See, *e.g., Bradford Elec. Light Co. v. Clapper,* 286 U.S. 145, 157–159, 52 S.Ct. 571, 76 L.Ed. 1026 (1932); *Carroll v. Lanza, supra,* at 414–420, 75 S.Ct. 804 (Frankfurter, J., dissenting) (listing, and trying to classify, nearly 50 cases). We have since abandoned that approach, and we continue to recognize that a State need not " 'substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.' " *Franchise Tax Bd., supra,* at 496, 123 S.Ct. 1683 (quoting *Pacific Employers Ins. Co. v. Industrial Accident Comm'n,* 306 U.S. 493, 501, 59 S.Ct. 629, 83 L.Ed. 940 (1939)). But here, we can safely conclude that, in devising a special—and hostile—rule for California, Nevada has not "sensitively applied principles of comity with a healthy regard for California's sovereign status." *Franchise Tax Bd., supra,* at 499, 123 S.Ct. 1683; see *Thomas v. Washington Gas Light Co.,* 448 U.S. 261, 272, 100 S.Ct. 2647, 65 L.Ed.2d 757 (1980) (plurality opinion) (Clause seeks to prevent "parochial entrenchment on the interests of other States"); *Allstate Ins. Co. v. Hague,* 449 U.S. 302, 323, and n. 10, 101 S.Ct. 633, 66 L.Ed.2d 521 (1981) (Stevens, J., concurring in judgment) (Clause is properly brought to bear when a State's choice of law "threatens the federal interest in national unity by unjustifiably infringing upon the legitimate interests of another State"); cf. *Supreme Court of N.H. v. Piper,* 470 U.S. 274, 288, 105 S.Ct. 1272, 84 L.Ed.2d 205 (1985) (Privileges and Immunities Clause prevents the New Hampshire Supreme Court from promulgating a rule that limits bar admission to state residents, discriminating against out-of-state lawyers); *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.,* 486 U.S. 888, 894, 108 S.Ct. 2218, 100 L.Ed.2d 896 (1988) (Commerce Clause invalidates a statute of limitations that "imposes a greater burden on out-of-state companies than it does on [in-state] companies").

For these reasons, insofar as the Nevada Supreme Court has declined to apply California law in favor of a special rule of Nevada law that is hostile to its sister States, we find its decision unconstitutional. We vacate its judgment and remand the case for further proceedings not inconsistent with this opinion.

It is so ordered.

Justice ALITO concurs in the judgment.

Chief Justice ROBERTS, with whom Justice THOMAS joins, dissenting.

Petitioner Franchise Tax Board is the California agency that collects California's state income tax. Respondent

Gilbert Hyatt, a resident of Nevada, filed suit in Nevada state court against the Board, alleging that it had committed numerous torts in the course of auditing his California tax returns. The Board is immune from such a suit in California courts. The last time this case was before us, we held that the Nevada Supreme Court could apply Nevada law to resolve the Board's claim that it was immune from suit in Nevada as well. Following our decision, the Nevada Supreme Court upheld a $1 million jury award against the Board after ***1284** concluding that the Board did not enjoy immunity under Nevada law.

Today the Court shifts course. It now holds that the Full Faith and Credit Clause requires the Nevada Supreme Court to afford the Board immunity to the extent Nevada agencies are entitled to immunity under Nevada law. Because damages in a similar suit against Nevada agencies are capped at $50,000 by Nevada law, the Court concludes that damages against the Board must be capped at that level as well.

That seems fair. But, for better or worse, the word "fair" does not appear in the Full Faith and Credit Clause. The Court's decision is contrary to our precedent holding that the Clause does not block a State from applying its own law to redress an injury within its own borders. The opinion also departs from the text of the Clause, which —when it applies—requires a State to give *full* faith and credit to another State's laws. The Court instead permits partial credit: To comply with the Full Faith and Credit Clause, the Nevada Supreme Court need only afford the Board the same limited immunity that Nevada agencies enjoy.

I respectfully dissent.

I

In 1991 Gilbert Hyatt sold his house in California and rented an apartment, registered to vote, and opened a bank account in Nevada. When he filed his 1991 and 1992 tax returns, he claimed Nevada as his place of residence. Unlike California, Nevada has no state income tax, and the move saved Hyatt millions of dollars in California taxes. California's Franchise Tax Board was suspicious, and it initiated an audit.

In the course of the audit, employees of the Board traveled to Nevada and allegedly peered through Hyatt's windows, rummaged around in his garbage, contacted his estranged family members, and shared his personal information not only with newspapers but also with his business contacts and even his place of worship. Hyatt claims that one employee in particular had it in for him, referring to him in antisemitic terms and taking "trophy-like pictures" in front of his home after the audit. Brief for Respondent 3. As a result of the audit, the Board determined that Hyatt was a resident of California for 1991 and part of 1992, and that he accordingly owed over $10 million in unpaid state income taxes, penalties, and interest.

Hyatt protested the audit before the Board, which upheld the audit following an 11–year administrative proceeding. Hyatt is still challenging the audit in California court. In 1998, Hyatt also filed suit against the Board in Nevada state court. In that suit, which is the subject of this case, Hyatt claimed that the Board committed a variety of torts, including fraud, intentional infliction of emotional distress, and invasion of privacy. The Board is immune from suit under California law, and it argued that Nevada was required under the Full Faith and Credit Clause to enforce California's immunity law.

When the case reached the Nevada Supreme Court, that court held, applying general principles of comity under Nevada law, that the Board was entitled to immunity for its negligent but not intentional torts—the same immunity afforded Nevada state agencies. Not satisfied, the Board pursued its claim of complete immunity to this Court, but we affirmed. We ruled that the Full Faith and Credit Clause did not prohibit Nevada from applying its own immunity law to the dispute. *Franchise Tax Bd. of Cal. v. Hyatt,* 538 U.S. 488, 498–499, 123 S.Ct. 1683, 155 L.Ed.2d 702 (2003).

***1285** On remand, the trial court conducted a four-month jury trial. The jury found for Hyatt, awarding him $1 million for fraud, $52 million for invasion of privacy, $85 million for emotional distress, and $250 million in punitive damages. On appeal, the Nevada Supreme Court significantly reduced the award, concluding that the invasion of privacy claims failed as a matter of law. Applying principles of comity, the Nevada Supreme Court also held that because Nevada state agencies are not subject to punitive damages, the Board was not liable for the $250 million punitive damages award. The court

did hold the Board responsible for the $1 million fraud judgment, however, and it remanded for a new trial on damages for the emotional distress claim. Although tort liability for Nevada state agencies was capped at $50,000 under Nevada law, the court held that it was against Nevada's public policy to apply that cap to the Board's liability for the fraud and emotional distress claims. The Board sought review by this Court, and we again granted certiorari. 576 U.S. ——, 135 S.Ct. 2940, 192 L.Ed.2d 975 (2015).

II

A

The Full Faith and Credit Clause provides that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." U.S. Const., Art. IV, § 1. The purpose of the Clause "was to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation." *Milwaukee County v. M.E. White Co.,* 296 U.S. 268, 276–277, 56 S.Ct. 229, 80 L.Ed. 220 (1935).

The Full Faith and Credit Clause applies in a straightforward fashion to state court judgments: "A judgment entered in one State must be respected in another provided that the first State had jurisdiction over the parties and the subject matter." *Nevada v. Hall,* 440 U.S. 410, 421, 99 S.Ct. 1182, 59 L.Ed.2d 416 (1979). The Clause is more difficult to apply to "public Acts," which include the laws of other States. See *Carroll v. Lanza,* 349 U.S. 408, 411, 75 S.Ct. 804, 99 L.Ed. 1183 (1955). State courts must give full faith and credit to those laws. But what does that mean in practice?

It is clear that state courts are not always required to apply the laws of other States. State laws frequently conflict, and a "rigid and literal enforcement of the full faith and credit clause, without regard to the statute of the forum, would lead to the absurd result that, wherever the conflict arises, the statute of each state must be enforced in the courts of the other, but cannot be in its own." *Alaska Packers Assn. v. Industrial Accident Comm'n of Cal.,* 294 U.S. 532, 547, 55 S.Ct. 518, 79 L.Ed. 1044 (1935). Accordingly, this Court has treated the Full Faith and Credit Clause as a "conflicts of law" provision that dictates when a State must apply the laws of another State rather than its own. *Franchise Tax Bd.,* 538 U.S., at 496, 123 S.Ct. 1683; see also *Hall,* 440 U.S., at 424, 99 S.Ct. 1182 (California court is not required to apply Nevada law).

Under the Full Faith and Credit Clause, "it is frequently the case" that "a court can lawfully apply either the law of one State or the contrary law of another." *Franchise Tax Bd.,* 538 U.S., at 496, 123 S.Ct. 1683 (internal quotation marks omitted). As we have explained,

> "the very nature of the federal union of states, to which are reserved some of the attributes of sovereignty, precludes ***1286** resort to the full faith and credit clause as the means for compelling a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate." *Pacific Employers Ins. Co. v. Industrial Accident Comm'n,* 306 U.S. 493, 501, 59 S.Ct. 629, 83 L.Ed. 940 (1939).

This Court has generally held that when a State chooses "to apply its own rule of law to give affirmative relief for an action arising within its borders," the Full Faith and Credit Clause is satisfied. *Carroll,* 349 U.S., at 413, 75 S.Ct. 804; see *Hall,* 440 U.S., at 424, 99 S.Ct. 1182 (California court may apply California law consistent with the State's interest in "providing full protection to those who are injured on its highways" (internal quotation marks omitted)).

A State may not apply its own law, however, if doing so reflects a "policy of hostility to the public Acts" of another State. *Carroll,* 349 U.S., at 413, 75 S.Ct. 804. A State is considered to have adopted such a policy if it has "no sufficient policy considerations to warrant" its refusal to apply the other State's laws. *Ibid.* For example, when a State "seeks to exclude from its courts actions arising under a foreign statute" but permits similar actions under its own laws, the State has adopted a policy of hostility to the "public Acts" of another State. *Ibid.*; see *Hughes v. Fetter,* 341 U.S. 609, 611–613, 71 S.Ct. 980, 95 L.Ed. 1212 (1951). In such cases, this Court has held that the forum State must open its doors and permit the plaintiff to seek relief under another State's laws. See, *e.g., id.,* at 611, 71 S.Ct. 980 ("Wisconsin cannot escape [its] constitutional obligation to enforce the rights and duties validly created under the laws of other states by the simple device of removing jurisdiction from courts otherwise competent").

B

According to the Court, the Nevada Supreme Court violated the Full Faith and Credit Clause by applying "a special rule of law that evinces a policy of hostility toward California." *Ante,* at 1280 (internal quotation marks omitted). As long as Nevada provides immunity to its state agencies for awards above $50,000, the majority reasons, the State has no legitimate policy rationale for refusing to give similar immunity to the agencies of other States. The Court concludes that the Nevada Supreme Court is accordingly required to rewrite Nevada law to afford the Board the same immunity to which Nevada agencies are entitled. In the majority's view, that result is "strongly" supported by this Court's precedents. *Ibid.* I disagree.

Carroll explains that the Full Faith and Credit Clause prohibits a State from adopting a "policy of hostility to the public Acts" of another State. 349 U.S., at 413, 75 S.Ct. 804. But it does not stop there. *Carroll* goes on to describe what adopting a "policy of hostility" means: A State may not refuse to apply another State's law where there are "*no* sufficient policy considerations to warrant such refusal." *Ibid.* (emphasis added). Where a State chooses a different rule from a sister State in order "to give affirmative relief for an action arising within its borders," the State has a sufficient policy reason for applying its own law, and the Full Faith and Credit Clause is satisfied. *Ibid.*

In this case, the Nevada Supreme Court applied Nevada rather than California immunity law in order to uphold the "state's policy interest in providing adequate redress to Nevada citizens." 130 Nev. ——, ——, 335 P.3d 125, 147 (2014). This Court has long recognized that "[f]ew matters could be deemed more appropriately the ***1287** concern of the state in which the injury occurs or more completely within its power" than "the bodily safety and economic protection" of people injured within its borders. *Pacific Employers Ins. Co.,* 306 U.S., at 503, 59 S.Ct. 629; see *Hall,* 440 U.S., at 424, 99 S.Ct. 1182. Hyatt alleges that the Board committed multiple torts, including fraud and intentional infliction of emotional distress. See 130 Nev., at ——, 335 P.3d, at 130. Under *Pacific Employers Insurance* and *Carroll,* there is no doubt that Nevada has a "sufficient" policy interest in protecting Nevada residents from such injuries.

The majority, however, does not regard that policy interest as sufficient justification for denying the Board immunity. Despite this Court's decision to get out of the business of "appraising and balancing state interests under the Full Faith and Credit Clause," *Franchise Tax Bd.,* 538 U.S., at 498, 123 S.Ct. 1683 the majority concludes that Nevada cannot *really* have a state policy to protect its citizens from the kinds of torts alleged here, because the State capped its own liability at $50,000 in similar situations. See *ante,* at 1281 – 1283. But that fails to credit the Nevada Supreme Court's explanation for why a damages cap for Nevada state agencies is fully consistent with the State's policy of protecting its citizens.

According to the Nevada Supreme Court, Nevada law treats its own agencies differently from the agencies of other States because Nevada agencies are "subject to legislative control, administrative oversight, and public accountability" in Nevada. 130 Nev., at ——, 335 P.3d, at 147 (internal quotation marks omitted). The same is not true of other litigants, such as the Board, who operate "outside such controls." *Ibid.* (internal quotation marks omitted). The majority may think that Nevada is being unfair, but it cannot be said that the State failed to articulate a sufficient policy explanation for its decision to apply a damages cap to Nevada state agencies, but not to the agencies of other States.

As the Court points out, the Constitution certainly has a "vision of 50 individual and equally dignified States," *ante,* at 1282, which is why California remains free to adopt a policy similar to that of Nevada, should it wish to do so. See *Coyle v. Smith,* 221 U.S. 559, 567, 31 S.Ct. 688, 55 L.Ed. 853 (1911) (The Union "was and is a union of States, equal in power, dignity and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself"). Nevada is not, however, required to treat its sister State as equally committed to the protection of Nevada citizens.

It is true that this Court in the prior iteration of this case found no Full Faith and Credit Clause violation in part because the "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.,* 538 U.S., at 499, 123 S.Ct. 1683. But the Nevada court adhered to its policy

of sensitivity to comity concerns this time around as well. In deference to the Board's sovereignty, the court threw out a $250 million punitive damages award, on top of its previous decision that the Board was not liable at all for its negligent acts. That is more than a "healthy regard" for California's sovereign status.

Even if the Court is correct that Nevada violated the Full Faith and Credit Clause, however, it is wrong about the remedy. The majority concludes that in the sovereign immunity context, the Full Faith and Credit Clause is not a choice of law provision, but a create-your-own-law provision: ***1288** The Court does not require the Nevada Supreme Court to apply either Nevada law (no immunity for the Board) or California law (complete immunity for the Board), but instead requires a new hybrid rule, under which the Board enjoys partial immunity.

The majority's approach is nowhere to be found in the Full Faith and Credit Clause. Where the Clause applies, it expressly requires a State to give *full* faith and credit to another State's laws. If the majority is correct that Nevada has no sufficient policy justification for applying Nevada immunity law, then California law applies. And under California law, the Board is entitled to *full* immunity. Or, if Nevada has a sufficient policy reason to apply its own law, then Nevada law applies, and the Board is subject to *full* liability.

I respectfully dissent.

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