

IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 53264

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA

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Elizabeth A. Brown
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Appellant/Cross-Respondent
v.

GILBERT P. HYATT
Respondent/Cross-Appellant

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

APPELLANT’S PETITION FOR REHEARING

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I. INTRODUCTION

In its 2014 Opinion, this Court fashioned a special judge-made rule of law that held FTB to a different standard than a Nevada agency. *See Franchise Tax Bd. of Calif. v. Hyatt* (“2014 Opinion”), 130 Nev. Adv. Op. 71, 335 P.3d 125, 147 (2014). The United States Supreme Court rejected this sister-state hostility and vacated the 2014 Opinion as unconstitutional. *Franchise Tax Bd. of Cal. v. Hyatt*, 136 S.Ct. 1277, 1282 (2016) (“*Hyatt I*”). On remand, this Court reissued its vacated opinion “except as to the damages portions addressed by the Supreme Court and appl[ied] the statutory damages caps FTB is entitled to under *Hyatt II*.” *Franchise Tax Bd. of Calif. v. Hyatt* (“Reissued Opinion”), 133 Nev. Adv. Op. 57, __ P.3d __, 2017 WL 4079069 (Sept. 14, 2017).

Although the Court concluded that FTB is entitled to NRS 41.035’s cap on damages, the Court incorrectly “note[d],” in direct contrast to its precedent, “that the cap does not apply to awards for prejudgment interest.” *Id.* at *18; *see id.* at *24, n.18; *compare Arnesano v. State ex rel. Dep’t of Transp.*, 113 Nev. 815, 822, 942 P.2d 139, 143-44 (1997), *abrogated on other grounds by Martinez v. Maruszczak*, 123 Nev. 433, 168 P.3d 720 (2007). To reach this erroneous conclusion, the Court referenced the language in NRS 41.035(1) that “[a]n award of damages ... may not exceed the sum of \$50,000, exclusive of interest computed

from the date of judgment.” Reissued Opinion, 2017 WL 407969 at *18. Yet this language says nothing about prejudgment interest. *See* NRS 41.035(1).

The Court then remanded for the district court to determine prejudgment interest, fees and costs. Reissued Opinion, 2017 WL 407969 at *18 and *24, n.18. FTB submits that based on this Court’s precedent and the plain language of NRS 41.035(1), this Court’s remand for a prejudgment interest award misapplied, and failed to consider, controlling legal authority. The Reissued Opinion applies a different rule of law to FTB than to Nevada agencies. Should the Court’s Reissued Opinion stand, therefore, it will embrace the very same sister-state hostility that the Supreme Court deemed unconstitutional.

II. ARGUMENT

A. Legal Standard for Rehearing

A petition for rehearing may be granted when the Court has overlooked or misapprehended a material fact in the record or a material question of law in the case or misapplied or failed to consider controlling authority. NRAP 40(a)(2); *Lavi v. Eighth Jud. Dist. Ct.*, 130 Nev. Adv. Op. 38, 325 P.3d 1265, 1266 (2014), *superseded on other grounds by statute as stated in Bank of Nev. v. Petersen*, 132 Nev. Adv. Op. 64, 380 P.3d 854 (2016).

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B. The Court Misapplied the Law Regarding Hyatt’s Ability to Recover Prejudgment Interest

The Court’s Reissued Opinion is directly contrary to both the language of NRS 41.035(1) and the Court’s precedent. NRS 41.035(1) provides that “[a]n award of damages ... may not exceed the sum of \$50,000, exclusive of interest **computed from the date of judgment.**” (Emphasis added). As this language indicates, the damages cap only excludes post-judgment interest. *See id.* Damages and prejudgment interest together may not exceed the damages cap. *See id.*

Indeed, in *Arnesano v. Dep’t of Transp.*, the Court previously reached this exact conclusion:

Unlike attorney fees and costs, prejudgment interest is derived from damages. The legislature addressed interest on damages in NRS 41.035(1), which specifies that an award for damages “may not exceed the sum of \$50,000, exclusive of interest computed from the date of judgment.” **The legislature clearly intended to preclude prejudgment interest on damages from exceeding the statutory cap, but to allow post-judgment interest to exceed the statutory cap.** Further, the legislature has repeatedly failed to include prejudgment interest in the category of recoverable interest in excess of the statutory cap under NRS 41.035(1) since the enactment in 1979 of NRS 17.130(2), the Nevada prejudgment interest statute.

Arnesano, 113 Nev. at 822, 942 P.2d at 143-44 (emphasis added). Accordingly, in *Arnesano*, the Court concluded that the district court’s award of prejudgment interest was only valid “when the interest award does not cause the total individual award, exclusive of post-judgment interest, attorney fees and costs, to exceed \$50,000.” *Id.* at 82, 942 P.2d at 144.

Here, as to Hyatt's fraud and IIED claims, the Court's Reissued Opinion awarded Hyatt \$50,000 per claim, acknowledging that based upon when Hyatt's claims accrued, \$50,000 was the statutory cap. Reissued Opinion, 2017 WL 407969 at *18. Yet contrary to the controlling authority announced by *Arnesano*, the Court remanded for the district court to add prejudgment interest on top of the \$50,000 maximum allowed by the legislature.¹ Compare *id.* to *Arnesano*, 113 Nev. at 822, 942 P.2d at 143-44. According to *Arnesano* where, as here, the damages cap applies, the district court may not award Hyatt damages and prejudgment interest in a total amount in excess of \$50,000. 113 Nev. at 822, 942 P.2d at 143-44. By remanding with instructions to the district court that it may add prejudgment interest to the \$50,000 cap on Hyatt's fraud and IIED claims, the Court misapplied the law, which warrants rehearing. See NRAP 40(a)(2).

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¹ That Hyatt can recover no more than the damages cap was argued in FTB's Supplemental Opening Brief at p.35 and Supplemental Reply Brief at pp 26-27. Because this Court's precedent clearly states that prejudgment interest derives from damages and cannot be awarded above the statutory cap, FTB could not anticipate that, on remand from the Supreme Court with direction to treat FTB no differently than a Nevada agency, this Court would apply a different rule of law to FTB as to prejudgment interest. See *Arnesano*, 113 Nev. at 822, 942 P.2d at 143-44.

III. CONCLUSION

Because the Reissued Opinion misapplied NRS 41.035 and failed to consider the controlling authority set forth in *Arnesano*, FTB respectfully submits that rehearing is warranted. *See* 113 Nev. at 822, 942 P.2d at 143-44. Remand to the district court should be with instructions that no prejudgment interest can be added to the \$50,000 damages award for each of the fraud and IIED claims. Otherwise, the Reissued Opinion is infected with the same sister-state hostility that the Supreme Court held in *Hyatt II* was unconstitutional.

AFFIRMATION

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

Dated this 2nd day of October, 2017.

McDONALD CARANO LLP

By: /s/

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CERTIFICATE OF COMPLIANCE

I hereby certify that this petition for rehearing complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type-style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point font, Times New Roman style. I further certify that this petition for rehearing complies with the type-volume limitation of NRAP 40(b)(3) because it contains 1,034 words.

Pursuant to NRAP 28.2, I hereby certify that I have read this petition, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this petition complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that this brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 2nd day of October, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of McDonald Carano LLP; that on or about October 2, 2017, the foregoing was electronically filed with the Clerk of the Court for the Nevada Supreme Court by using the Nevada Supreme Court's E-Filing system (Eflex). Participants in the case who are registered with Eflex as users will be served by the Eflex system as follows:

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