

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. 17-000299
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APPEAL

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

**RESPONDENT GILBERT P. HYATT'S ANSWER TO APPELLANT'S
PETITION FOR REHEARING**

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

Pursuant to this Court's order of October 30, 2017, Respondent Gilbert P. Hyatt ("Respondent" or "Hyatt") submits this Answer to Appellant Franchise Tax Board of the State of California's ("Appellant" or "FTB") Petition for Rehearing.

I. Introduction.

In its never-ending appeal to this Court, Appellant FTB now seeks a "rehearing" on a point it never previously presented or argued to this Court. FTB therefore has waived its right to argue this point at the thirteenth hour via a petition for rehearing.

Specifically, FTB has had two opportunities to argue to this Court that an award of prejudgment interest in excess of the statutory damages cap (NRS 41.035) violates the United States Supreme Court rulings in this case, *i.e.*, *Hyatt I*¹ and *Hyatt II*.² On neither occasion did FTB assert this position and ask this Court for such relief. Indeed, in its original briefing submitted in 2009 attacking the judgment entered by the district court, FTB made very different and specific arguments against the award of prejudgment interest, but did not argue that an

¹ *Franchise Tax Board of California v. Hyatt*, 538 U.S. 488, 123 S.Ct. 1683 (2003) ("*Hyatt I*"). *Hyatt I* is attached to the Supp. Append. Vol. I, at Tab 1.

² *Franchise Tax Board of California v. Hyatt*, ___ U.S. ___, 136 S.Ct. 1277 (2016) ("*Hyatt II*"). *Hyatt II* is attached to Supp. Append. Vol. 1, at Tab 5.

award of prejudgment interest in excess of the damages cap violates *Hyatt I*.

More recently, in its supplemental briefing to this Court earlier this year, after *Hyatt II* was decided, FTB did not argue that *Hyatt II* required reconsideration of the award of prejudgment interest for any reason, let alone based on the statutory damages limitation. FTB did not even raise the issue of prejudgment interest in its supplemental briefing.

FTB could have and should have made its new argument on prejudgment interest in the multiple prior rounds of prior briefing in which FTB sought (i) relief from the judgment entered by the district court and then (ii) attacked the 2014 Opinion from this Court based on *Hyatt II*. FTB did not make any such argument on either occasion. It has therefore waived any right for review of this issue at this time.

In this regard, a Nevada state agency is required to follow this Court's procedural rules, and therefore so is FTB. Enforcing this Court's procedural rules against FTB, just as this Court would do against a Nevada agency or any private litigant, is not a hostile act against a sister state. Rather, it is treating the FTB just as a Nevada agency would be treated.³ This Court has enforced its waiver doctrine

³ Also, and contrary to FTB argument, *Hyatt II* does not require that in all instances a state treat a sister state as it would treat itself. There may be legitimate policy reasons to treat a sister state or its agencies differently. *Hyatt II*, at 1282, 1287. But that is not the determinative issue here given FTB's procedural failings and the limits of relief in a petition for rehearing.

against Nevada agencies, and it should do so here against FTB.

For these reasons FTB's petition for rehearing should be summarily denied.

II. Argument.

A. In Its Prior Voluminous Briefing, FTB Did Not Raise The Issue It Now Asserts.

- 1. FTB's 2009 Opening Brief and 2010 Reply Brief made a very different argument in regard to prejudgment interest, never asserting an award of prejudgment interest in excess of the statutory damages cap would violate *Hyatt I*.**

In the FTB's Opening Brief in this appeal submitted on July 7, 2009, FTB made specific arguments in regard to the award of prejudgment interest awarded by the district court. FTB argued that an award of prejudgment interest is only for past, not future damages. FTB then argued (erroneously) that Hyatt's damages were future damages, not past damages. (FTB Opening Brief, at 116-17.) FTB made no other argument against an award of prejudgment interest. Similarly, the FTB's 2010 Reply Brief in this appeal limited its argument against prejudgment interest to its assertion (erroneously) that Hyatt's damages were future damages not past damages. (FTB Reply Brief, at 141-45.)

At no point in its original briefing for this appeal did FTB seek relief from an award of prejudgment interest in the event compensatory damages were limited to the statutory damages cap. FTB did not argue that the statutory damages cap —

which FTB argued limited compensatory damages — limited an award of prejudgment interest. In short, FTB sought no relief from the award of prejudgment interest based on *Hyatt I* and thereby failed to make the argument it now asserts in its petition for rehearing.

2. FTB’s 2016 Supplemental Briefing post *Hyatt II* also did not raise or assert that an award of prejudgment interest in excess of the statutory damages cap would violate *Hyatt I* or *Hyatt II*.

Based on the holding from *Hyatt II*, the FTB’s August 22, 2016 Supplemental Opening Brief attempted to reargue numerous issues addressed in this Court’s September 18, 2014 Opinion. (*See, e.g.*, FTB Supp. Brief, Table of Contents, at i-ii.) But FTB did not argue that *Hyatt II* required that the Court revisit the issue of prejudgment interest. FTB did not even address the issue of prejudgment interest. FTB should have, and certainly could have, but did not raise the issue of prejudgment interest when it argued post *Hyatt II* for application of Nevada’s damages cap.

Even more glaring in regard to FTB’s waiver and failure to raise the issue it now asserts is that Hyatt argued in his October 25, 2016 Supplemental Reply Brief that the entirety of the Court’s September 18, 2014 Opinion should be re-issued, *except for application of the damages cap as required under Hyatt II*. (Hyatt Supp. Reply, at 16-27.) In response, even at that point, FTB made no argument in

regard to prejudgment interest as had been affirmed in this Court's September 18, 2014 Opinion. Rather, in its December 5, 2016 Supplemental Reply Brief FTB again *did not argue* in the alternative that if the wide relief it sought was not granted that the prejudgment interest award in the Court's September 18, 2014 Opinion should be stricken or revisited for any reason. (*See* FTB Supp. Reply Brief, at 1-34.)

The FTB's current petition for rehearing is therefore a blatant and procedurally improper third bite at the apple. The Court would give no party, whether a public entity or private litigant, relief from this lack of diligence.

B. FTB's Petition For Rehearing Improperly Raises A New Issue.

NRAP 40(c) limits a petition for rehearing to matters in which the Court has purportedly overlooked or misapprehended a material fact *in the record* or a material question of law *in the case*. “[N]o point may be raised for the first time on rehearing.” NRAP 40(c)(1). Further, a petition for rehearing must “be supported by a reference to the page of the transcript, appendix or record where the matter is to be found; any claim that the court has overlooked or misapprehended a material question of law or has overlooked, misapplied or failed to consider controlling authority shall be supported by a reference to the page of the brief where petitioner has raised the issue.” NRAP 40(a)(2).

FTB's Petition for Rehearing makes no reference to where it previously asserted the argument it now makes. And the FTB cannot make any such reference because it did not previously raised this issue. It has therefore waived any argument that the award of prejudgment interest is improper in this case.

The Court has imposed waiver where a party raised for the first time in a petition for rehearing an award of interest. In *Ainsworth v. Combined Ins. Co.*, 105 Nev. 237, 774 P.2d 1003 (1989), the appellant filed a petition for rehearing seeking, among other things, reconsideration of the denial of post-judgment interest. Although the issue of post-judgment interest had previously been briefed and decided, appellant's arguments on rehearing advanced new theories for recovery. The Court denied the petition, finding it raised improper arguments for the first time in the petition for rehearing. *Id.*, at 243-44; *see also City of N. Las Vegas v. 5th & Centennial, LLC*, 130 Nev. ___, 331 P.3d 896, 900 (Adv. Op. 66, 2014) (denying appellant City from arguing a statute of limitations defense for the first time in its petition for rehearing); *Stanfill v. State*, 99 Nev. 499, 501, 665 P.2d 1146 (1983) (denying the State's petition for rehearing because the State raised allegedly controlling case authority for the first time on rehearing); *Gordon v. Eighth Judicial Dist. Court*, 114 Nev. 744, 745-46, 961 P.2d 142, 143 (1998) (explaining the proper purpose for petitions for rehearing and that a litigant may not raise new legal points for the first time on rehearing) (*citing and quoting In re*

Herrmann, 100 Nev. 149, 151, 679 P.2d 246, 247 (1984)).

Having argued, and lost, in regard to how *Hyatt II* affects this Court's September 18, 2014 Opinion and what modifications need be made to that opinion, FTB now attempts to argue a new issue seeking further modification. But it is too late. FTB cannot make new arguments at this time. Its petition for rehearing should therefore be denied.

C. Enforcing The Waiver Doctrine Against FTB Here Is Consistent With The Manner In Which The Court Treats Nevada And Its Agencies.

FTB's petition for rehearing argues that as a California agency it must be treated like Nevada and its agencies under *Hyatt II*. That is precisely what the Court will be doing in enforcing the doctrine of waiver against FTB. There is nothing hostile in regard to the treatment of FTB in not allowing it to raise new arguments in a petition for rehearing. This Court has enforced the waiver doctrine against Nevada and its agencies. In the *City of N. Las Vegas* and *Stanfill* cases cited above, the Court enforced waiver against a city and the State, respectively, by not allowing arguments or points put forth for the first time in a petition for rehearing.

Moreover, waiver was enforced against a Nevada tax agency when it tried to make new arguments upon judicial review that it had failed to make during an administrative challenge. *State ex rel. State Bd. of Equalization v. Barta*, 124 Nev.

612, 621, 188 P.3d 1092, 1098 (2008) (finding waiver by the agency in regard to arguments first raised during an appeal in court of an administrative decision). Just as Nevada agencies must follow procedural rules and will be deemed to have waived points not raised in earlier proceedings, so must FTB. It cannot hide and excuse its failure to raise the new issue now asserted by claiming sister-state hostility.

Just as a Nevada agency would have to do, FTB should have raised the issue of prejudgment interest in its earlier briefing and in particular no later than its 2016 supplemental briefing. FTB's petition for rehearing should therefore be denied.

D. *Hyatt II* Does Not Automatically Require That FTB Be Treated Precisely As A Nevada Agency Would In Every Instance.

Contrary to FTB's argument, *Hyatt II* does not hold that a state must in every instance treat a sister state precisely as it would treat itself. Where a state can articulate a sufficient policy interest in regard to protecting its own citizens, a state can have justification for treating an agency from a sister state differently than it would treat its own agency. *Hyatt II*, at 1282, 1287. FTB provides no acknowledgement or analysis of this point in arguing FTB should be treated the same as a Nevada agency in regard to an award of prejudgment interest where damages are capped.

Nonetheless, FTB's petition does not turn on this point. FTB is not being

treated differently from a Nevada agency. A Nevada agency that fails to timely assert an argument or point is subject to the waiver doctrine, and therefore so is FTB. The Court therefore need not consider if some policy interest requires that FTB be treated differently from a Nevada agency in regard to the award of prejudgment interest.

III. Conclusion.

Contrary to FTB's argument, there is no hostility towards FTB and California in denying FTB's petition for rehearing. The petition improperly raises a new issue that was not part of FTB's prior briefing. FTB has therefore waived the right to assert this issue in a petition for rehearing. Its petition for rehearing should therefore be denied.

DATED: November 14, 2017.

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CERTIFICATE OF COMPLIANCE PURSUANT TO NRAP 40(b)(3)

I certify that pursuant to NRAP 40(b)(3), the attached RESPONDENT GILBERT P. HYATT'S ANSWER TO APPELLANT'S PETITION FOR REHEARING is proportionately spaced, has a typeface of 14 points or more and contains 2460 words as determined by the Word Count feature of the Microsoft Word software program used to create this document.

DATED this 14th day of November, 2017.

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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 ANSWER TO APPELLANT'S PETITION FOR REHEARING** was filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the master service list as follows:

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Pursuant to NRAP 25, I certify that I am an employee of HUTCHISON & STEFFEN, PLLC and that on November 14, 2017, I caused the above and foregoing document entitled **RESPONDENT GILBERT P. HYATT'S ANSWER TO APPELLANT'S PETITION FOR REHEARING** to be served upon the following person(s) and by the method(s) indicated below:

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