

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

FILED

JUN 13 2001

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

FRANCHISE TAX BOARD OF THE STATE
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THE EIGHTH JUDICIAL DISTRICT COURT
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No. 36390

ORDER GRANTING PETITION (DOCKET NO. 36390) AND
DISMISSING PETITION (DOCKET NO. 35549)

Franchise Tax Board petitions this court for a writ of mandamus and/or prohibition in Docket No. 35549, arguing that the district court erred in determining that certain documents were not protected by the attorney-client, work product and/or deliberative process privileges and subsequently ordering those documents released. Franchise Tax Board separately petitions this court for a writ of mandamus

*This order was vacated by
order filed 4/4/02 - LC*

01-09900

in Docket No. 36390, arguing that the district court erred in denying its motion for summary judgment because the doctrine of comity precludes the district court's exercise of jurisdiction over the claims since Franchise Tax Board is immune from liability under California law.

We conclude that the district court did err in denying Franchise Tax Board's motion for summary judgment, albeit on grounds other than those alleged in the petition. Thus, we grant the petition for a writ of mandamus in Docket No. 36390 and direct the district court to conduct further proceedings consistent with this order. Because our resolution of Docket No. 36390 renders the petition in Docket No. 35549 moot, we deny that petition.

A writ of mandamus may be issued to compel the performance of an act that the law requires as a duty resulting from an office, or to control an arbitrary or capricious exercise of discretion.¹ This extraordinary remedy is available only when there is no plain, speedy and adequate remedy at law, and it is entirely within this court's discretion whether to issue a writ.² Even though a writ of mandamus is the appropriate remedy to review the denial of a motion for summary judgment because the order is otherwise unappealable, this court has limited the exercise of this extraordinary remedy to instances when judicial economy or the need to clarify important issues require our intervention.³

¹NRS 34.160; Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 637 P.2d 534 (1981).

²NRS 34.170; Smith v. District Court, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991).

³Sorenson v. Pavlikowski, 94 Nev. 440, 442, 581 P.2d 851, 853 (1978); Smith v. District Court, 113 Nev. 1343, 950 P.2d 280 (1997); State v. Babayan, 106 Nev. 155, 787 P.2d 805 (1990); cf. State ex rel. Dep't Transp. v. Thompson, 99 Nev. 358, 361, 662 P.2d 1338, 1340 (1983).

Because this case implicates the principles of Full Faith and Credit and comity, which are of great importance with respect to interpreting each state's sovereign responsibilities and rights, we elect to exercise our extraordinary writ powers.

According to the United States Supreme Court case of Nevada v. Hall⁴ and the Nevada case of Mianecki v. District Court,⁵ the crucial inquiry in determining whether to afford deference to another state's laws under the doctrines of Full Faith and Credit or comity is whether the sister state's laws conflict with or contravene the forum state's laws or policies. In this case, our inquiry rests in determining whether Nevada law, which grants immunity to state agencies only for discretionary acts,⁶ is affronted by recognizing California law, which grants Franchise Tax Board immunity for intentional torts, as well as discretionary and operational acts.⁷

Although the parties addressed only the issue of comity in Docket No. 36390, our review of the record to determine whether comity or Full Faith and Credit should be applied revealed that there is no probative evidence to support Hyatt's claims. Thus, because Hyatt failed to meet his burden of providing probative evidence to generate genuine issues of material fact on each of his claims, the district court erred in denying Franchise Tax Board's motion for summary judgment. We, therefore, grant the petition for a writ of mandamus.

⁴440 U.S. 410, 422, 424 n.24 (1979).

⁵99 Nev. 93, 96, 658 P.2d 422, 424 (1983).

⁶NRS 41.032(2); cf. NRS 41.031; Prell Hotel Corp. v. Antonacci, 86 Nev. 390, 391, 469 P.2d 399, 400 (1970).

⁷Cal Gov't Code § 860.2; see Mitchell v. Franchise Tax Board, 228 Cal. Rptr. 750 (Ct. App. 1986).

In the context of a summary judgment motion, Franchise Tax Board, as the moving party, has the burden of establishing the non-existence of genuine issues of material fact.⁸ But this burden is sustained if Franchise Tax Board demonstrates a lack of probative evidence of at least one element of Hyatt's prima facie case.⁹ Hyatt then has the burden of demonstrating specific evidence indicating a genuine dispute of fact.¹⁰ Mere allegations are insufficient to sustain this burden; specific facts must be produced to show a genuine dispute that justifies the denial of a motion for summary judgment.¹¹

Upon our review of the record, we conclude that Hyatt failed, as a matter of law, to meet his burden to produce sufficient facts,¹² indicating a genuine dispute, that Franchise Tax Board's acts during its investigation constituted intentional torts.¹³ There is no evidence, aside

⁸NRCP 56(c); NGA #2 Ltd. Liab. Co. v. Rains, 113 Nev. 1151, 1156, 946 P.2d 163, 166-67 (1997).

⁹Rains, 113 Nev. at 1156, 946 P.2d at 167 (citing Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986)).

¹⁰Id. at 1157, 946 P.2d at 167.

¹¹NRCP 56(e); see Bird v. Casa Royale West, 97 Nev. 67, 70-71, 624 P.2d 17, 19 (1981); see also Garvey v. Clark County, 91 Nev. 127, 130, 532 P.2d 269, 271 (1975).

¹²Franchise Tax Board has met its burden that at least one element of Hyatt's claims has not been shown by demonstrating undisputed facts that Franchise Tax Board (1) never produced false statements, (2) never publicized its investigation or findings outside the scope of the investigation, (3) complied with its internal operating procedures with regard to contacting individuals, and (4) merely visited Hyatt's house and conducted its investigation through phone calls and letters.

¹³See, e.g., Barmettler v. Reno Air, Inc., 114 Nev. 441, 447-49, 956 P.2d 1382, 1386-87 (1998) (negligent misrepresentation and outrage), limited by Olivero v. Lowe, 116 Nev. 395, 995 P.2d 1023 (2000); PETA v. Bobby Berolini, Ltd., 111 Nev. 615, 628-36, 895 P.2d 1269, 1278-83 (1995) (invasion of privacy claims); Posadas v. City of Reno, 109 Nev. 448, 457, 851 P.2d 444-45 (1993) (abuse of process); M & R Investment Co. v. Mandarino, 103 Nev. 711, 718-19, 748 P.2d

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from Hyatt's own conclusory allegations, that Franchise Tax Board's investigation unreasonably intruded into his private life or seclusion, published false information about him, or published information to third parties that was not of a legitimate public concern. The myriad depositions and documents submitted to this court are undisputed and indicate that Franchise Tax Board's investigative acts were in line with a standard investigation to determine residency status for taxation pursuant to its statutory authority. Merely because a state agency is performing an investigation in the course of its duties does not automatically render its acts an invasion of privacy or otherwise intentionally tortious absent evidence of unreasonableness or falsity of statements. No such evidence has been presented in this case.

There is also insufficient evidence of Hyatt's remaining claim of negligent misrepresentation.¹⁴ As with Hyatt's claims for intentional torts, there is no evidence that Franchise Tax Board supplied any false information regarding confidentiality or business relations.

In light of the lack of evidence supporting Hyatt's claims for intentional torts and negligent misrepresentation, we conclude that it was error for the district court to deny the motion for summary judgment.¹⁵ Because we conclude that it was error to deny Franchise Tax Board's motion for summary judgment, and Hyatt's claims should have been dismissed, we

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488, 493 (1987) (invasion of privacy claims); Star v. Rabello, 97 Nev. 124, 125-26, 625 P.2d 90, 92 (1981) (outrage).

¹⁴See Barmettler, 114 Nev. at 447-49, 956 P.2d at 1386-87.

¹⁵Although neither party addressed this issue in the petitions to this court, the record indicates that the issue of the absence of probative evidence was presented to the district court on the initial motion.

need not address the issues raised in Docket No. 35549 regarding purportedly privileged materials.

Consistent with our discussion above, we therefore

GRANT the petition in Docket No. 36390 AND DIRECT THE CLERK OF THIS COURT TO ISSUE A WRIT OF MANDAMUS instructing the district court to grant Franchise Tax Board's motion for summary judgment in light of the lack of evidence presented.¹⁶ We DISMISS AS MOOT the petition in Docket No. 35549.

Maupin, C.J.
Maupin

Young, J.
Young

Shearing, J.
Shearing

Agosti, J.
Agosti

Rose, J.
Rose

Leavitt, J.
Leavitt

cc: Hon. Nancy M. Saitta, District Judge
California Attorney General
McDonald Carano Wilson McCune Bergin Francovich & Hicks
Bernhard & Leslie
Hutchison & Steffen
Thomas K. Bourke
Riordan & McKenzie
Marquis & Aurbach
Clark County Clerk

¹⁶The Honorable Nancy Becker, Justice, voluntarily recused herself from participation in the decision of this matter.