IN THE SUPREME COURT OF THE STATE OF NEVADA
Case No. 80884

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA

Appellant

v.

GILBERT P. HYATT

Respondent

On Appeal from the Eighth Judicial District Court, Clark County
Case No. A382999
THE HONORABLE TIERRA JONES, District Judge, Department X

APPENDIX TO RESPONDENT'S BRIEF ON BEHALF OF GILBERT P. HYATT - VOLUME 13 OF 17

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5	Exhibits 67-82 to Plaintiff Gilbert P. Hyatt's Brief in Support of Proposed Form of Judgment That Finds No Prevailing Party in the Litigation and No Award of Attorneys' Fees or Costs to Either Party, filed October 15, 2019	12, 13, 14, 15, 16	RA002725-RA003697
6	Exhibits 83-94 to Plaintiff Gilbert P. Hyatt's Brief in Support of Proposed Form of Judgment That Finds No Prevailing Party in the Litigation and No Award of Attorneys' Fees or Costs to Either Party, filed October 15, 2019	16, 17	RA003698-RA004027

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I certify that I am an employee of HUTCHISON & STEFFEN, PLLC, and that on this 1st day of October, 2020, I caused the above and foregoing document entitled **APPENDIX TO RESPONDENT'S BRIEF ON BEHALF OF GILBERT P. HYATT - VOLUME 13 OF 17** to be served by the method(s) indicated below:

_____ via U.S. mail, postage prepaid;

_____X_____ via Federal Express;

_____ via hand-delivery;

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- From credit card and travel documents, FTB learned that in January 1992, Hyatt travelled on business in and out of LAX, (62 AA 15485) right before making a deposit into a California bank. 70 AA 17395. Hyatt also had multiple doctor appointments in California throughout January and February 1992, before being hospitalized in California for an extended period; this information was learned directly from the doctors and the hospital. 62 AA 15443; 65 AA 16010.

- From a review of newspaper articles, FTB learned that once Hyatt was released from the hospital in February 1992, he issued press releases from California. 69 AA 17022.

- From his credit card statements, FTB learned that in March 1992, Hyatt incurred many charges in California after returning to LAX from a vacation in Colorado. 67 AA 16586; 72 AA 17772, 17797.

- From documents obtained from Clark County Business License Department, FTB learned that even though Hyatt claimed to be conducting business in Nevada, he did not apply for a business license until late 1992. 67 AA 16557; 78 AA 19426. During the disputed period, Hyatt offered no evidence of meetings, photocopier use or services, fax or telephone use, etc., and of all the business contacts he gave to FTB for verification, none of them were able to support his claim of Nevada residency. 62 AA 15429-33. From interviews and a review of checks drawn on his California bank account, FTB learned that across that same period, Hyatt was paying for California secretarial services (66 AA 16458), photocopier services, and employing a handyman to make repairs and modifications to his California home for business uses (69 AA 17017; 65 AA 16149). From an interview with the handyman, FTB learned that Hyatt was physically in the California home during those repairs/modifications. Id

- From the Clark County Recorder's office, FTB learned that on April 3, 1992, Hyatt purchased a home in Las Vegas. 62 AA 15426. The auditor noted evidence of "nesting" or moving into that home beginning then, 42 AA 10287 (62-63) (sundry household purchases from Sam's Club); 70 AA 17354, 17355 (2 beds purchased). FTB, therefore, determined that April 3, 1992, was a reasonable change in residency date for Hyatt. 72 AA 17862-95.

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- Notably, the evidence from the 1991/1992 timeframe that would have conclusively shown Hyatt's whereabouts -- his telephone records -- were never produced by Hyatt. 34 AA 8416 (103); 44 AA 10771 (183). He claimed he had destroyed them. Id.

A further review of FTB's comprehensive reports reveals that the three affidavits played a minor role in audit's recommendations.[12] See 66 AA 16388-427, 62 AA 15423-87; 72 AA 17862-95.

On appeal, Hyatt claims that FTB never assessed fraud penalties in residency cases, but he was singled out for adverse treatment. RAB 25:2-6. Hyatt is wrong. In fact, Hyatt's case is remarkably similar to Appeal of Robert F. and Helen R. Adickes, 90-SBE-012, (1990), a case in which fraud penalties in a residency case were upheld by the State Board of Equalization, just a short time before Hyatt's audit began. As to the FTB's fraud analysis, Hyatt materially misrepresents the foundation for its conclusions. Compare RAB 25-26 with 62 AA 15462-87.

FTB opened an audit for the 1992 tax year based upon the determination that Hyatt remained a California resident until April 3, 1992. 48 AA 11922 (181)-1192 (182). The 1992 audit was significantly abbreviated since most of the evidence had been gathered during the 1991 audit.[13] 72 AA 17963-70; 72 AA 17862-95. The only thing lacking was discovery of the amount of income earned by Hyatt in 1992 and when it was earned. 72 AA 17977. FTB requested that information from Hyatt. Id. Like it did for the 1991 audit, FTB sent Hyatt a detailed notice, and invited Hyatt to rebut FTB's tentative findings. 73 AA

[12]Beth Hyatt, Hyatt's daughter, printed on her affidavit "except that I cannot be sued or have recourse taken for my statement." 68 AA 16912. At trial she testified she placed that language there to prevent someone from suing her for telling the truth and to keep the information confidential. 46 AA 11493 (209).

[13]Hyatt is critical of the fact that FTB used the same evidence gathered during its investigation of tax year 1991, for its audit of tax year 1992. RAB 30-31. Hyatt's criticism is unfounded. At the core of FTB's audit is a seven month disputed period of time that overlaps two calendar years, i.e. September, 1991 to April, 1992. 41 AA 10219 (135)-(137), 10233 (192); 62 AA 15477-78, 87. Under California authority applicable to FTB, since there were virtually no facts that were relevant to one calendar year, but not the other, FTB was well within its rights to use the 1991 audit facts for its 1992 audit. 41 AA 10219 (134).

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18015-31. And once again, after ample opportunity for Hyatt to refute FTB's recommendation, FTB weighed and analyzed all available evidence to finalize its audit recommendations for tax year 1992. 73 AA 18092-97. And once again, an internal report was prepared outlining audit's factual findings and legal authorities supporting audit's recommendations. 72 AA 17862-95. As before, those findings were based on far more than three affidavits from Hyatt's family members. Id. Recall also that FTB collected tens of thousands of documents more from Hyatt and third-parties during the protest, which FTB believed confirmed, and further established, the correctness of its initial audit recommendations. 49 AA 12155 (159)-(160).

E. FTB Policies and Practices, and FTB's Compliance Therewith

Response to Hyatt's misleading presentations about FTB's compliance with its standard policies and practices during Hyatt's audit is made largely in the specific sections relevant to that compliance. A few noteworthy corrections immediately follow.

A common theme runs through Hyatt's statement of facts. He contends that FTB should have asked him first for the information needed to conduct its audit, and only failing receipt of the requested information from him, was FTB permitted to ask third-parties. See, e.g. RAB 37:11-15. Hyatt even contends that during his audits, which were conducted from 1993 to 1995, "the California Information Practices Act stated that the FTB should seek information needed for the audit 'to the greatest extent practicable directly from the individual[,]" and that FTB "violated this policy with impunity, knowing of Hyatt's heightened and extreme sensitivity for privacy and confidentiality." RAB 37:13-19. This is a misrepresentation. At the time FTB audited Hyatt (1993-1995), FTB was permitted to contact and request that third-parties provide any relevant information without first notifying the taxpayer.[14] See Cal. Rev. & Tax Code §§ 19254, 26423 (1993).

Hyatt claims "FTB audited Hyatt upon learning how much money he made." RAB

[14]In determining the appropriateness of FTB's conduct, the court must look to the statutes that were in effect at the time his audit was proceeding. See Runion v. State, 116 Nev. 1041, 1049, 13 P.3d 52 (2000) (court improperly used prior version of statute rather than statute in effect at the time of the offense).

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14:8. To the contrary, FTB initial auditor, Marc Shayer, testified "[Hyatt's] wealth had nothing to do with opening the audit...The audit was opened up because of the way the tax return was prepared." 45 AA 11219 (152). Shayer "was more interested in making sure that [Hyatt] reported his income correctly to California." 45 AA 11225 (177); 45 AA 11231 (200). For the specific reasons described at AOB 5:1-9, FTB opened Hyatt's audit (9 month presumption, sourcing issues, no moving expenses claimed in 1991).

Hyatt claims the third auditor "intentionally avoided formally documenting exculpatory statements from neighbors, who point blank told her that Hyatt moved to Nevada during the very timeframe Hyatt claimed." RAB 18:13-16. In truth, Hyatt learned of all the neighbor interviews and what they told FTB because, pursuant to policy, they all were memorialized in the audit file. 68 AA 16796-800, 16804-05, 16984-85. FTB went to Hyatt's neighborhoods in both California and Nevada, interviewing available neighbors. 68 AA 16796-800; 16804-05; 16984-85. Generally, FTB learned, as Hyatt has described himself, that he was a recluse and he did not interact much with his neighbors, and therefore the information they supplied varied greatly. 62 AA 15438; 68 AA 16796-800, 16804-05, 16984-85. For example: information mentioned at RAB 18:16-18, from the neighbor who suggested Hyatt had moved six months after receiving his patent, did not make sense since he received the patent in 1990 and she had him moving in 1990. 68 AA 16804. Other neighbors, in contrast, were less helpful to Hyatt, some placing him at his California home as late as 1994. 68 AA 16804-05. Because of the varying information from the neighbors, FTB did not place great weight on their information, and instead FTB looked to more objective evidence informing their conclusions. 62 AA 15438 (briefly noting statements from neighbors); 62 AA 15438-46 (examining other criteria such as home ownership, bank accounts, safe deposit boxes, use of professionals, etc.).

Hyatt criticizes FTB for not trying to interview him during the audit. RAB 20:3-5. It is FTB practice that once the taxpayer under audit, retains a representative, they only communicate with the representative. 40 AA 9882 (61)-9883 (62). In Hyatt's circumstance,

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he retained both an attorney and an accountant. 40 AA 9883 (62). If Hyatt's representatives wanted Hyatt to be interviewed, that choice was theirs. 40 AA 9883 (62).

Hyatt suggests FTB "mislead" his representatives. RAB 22-23. However, FTB auditors are trained to collect all information and to present their questions or conclusions through tentative determination letters. 41 AA 10142 (90-91).

Hyatt suggests FTB ignored evidence from "real estate agents, escrow officers, insurance agents, a home inspector, a security provider." RAB 20:7-9. To the contrary, FTB gathered and analyzed information from them concluding it supported a move date in April 1992 when he purchased the Tara house, not in September 1991. 72 AA 17894.

Hyatt next complains about the "Embry memo." RAB 26-28. Leave it to Hyatt to find fault in something favorable to him. FTB taxes its residents under multiple legal theories, and individuals employed by FTB develop expertise in these different theories. 89 AA 22142. Those with an expertise in "sourcing" met and evaluated the preliminary information they had received from Hyatt, concluding that theory did not apply in early June 1995. 89 AA 22138-41. The specific purpose of their meeting was to evaluate sourcing as a theory, not a physical residency theory. Id. They resolved the sourcing issue in Hyatt's favor at that time. Id. Thereafter, FTB gathered a significant amount of physical residency evidence (72 AA 17867-87), weighed and evaluated that evidence (72 AA 17887-95), informed Hyatt of their preliminary conclusions, (73 AA 18078-82) and then gave Hyatt an opportunity to respond and rebut those preliminary conclusions (72 AA 17901-04). When his rebuttal offered additional evidence which was actually supportive of a move date in April 1992, FTB's auditor closed her file and transferred it to Sacramento for review by her supervisors and reviewers. 72 AA 17909, 17969.

Hyatt claims its auditors were trained to use fraud penalties as bargaining chips for settlement. RAB 26:1-12. In truth, FTB forbids its auditors or protest hearing officers from attempting to settle cases. 33 AA 8172 (138). FTB has a Settlement Bureau that handles settlement opportunities. FTB Notice 92-3, 92-8, 97-3, 98-11, 99-7, 2000-06, 2001-03, 2003-2, 2006-2. The process is only invoked when a taxpayer requests it. Id.

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As to Hyatt's CBR discussion and Kurt Sjoberg's testimony (RAB 32-35), at trial Sjoberg made clear that his criticism of FTB only extended to its legislative use of CBR. 33 AA 8172 (138). Moreover, Sjoberg testified that he conducted audits of FTB between 1993 and 1997, the years of Hyatt's proceedings. 33 AA 8060 (69). When auditing FTB, Sjoberg indicated that he reviewed tax assessments and audits conducted by FTB. 33 AA 8060 (69) – 8061 (73). Sjoberg specifically testified that he saw "**no instances**" in which "**auditors artificially inflated assessments, fabricated assessments, made bogus or phony assessments**." 33 AA 8161 (95-96) (emphasis added).

Hyatt also complains about FTB's lead residency reviewer, Carol Ford. RAB 28-29. There was testimony at trial that it was Ms. Ford's style to review an auditor's file in the style of "the Devil's advocate." 48 AA 11889 (47-48). She would then take her observations and review them with her supervisors.[15] 48 AA 11889 (47). She applied that same style to Hyatt's audit. 48 AA 11893 (63) – 11894 (67). After conferring with her supervisor, both agreed to issue Hyatt's Notices of Proposed Assessments. 48 AA 11893 (64-65), 11918 (165). In fact, contrary to Hyatt's suggestion, Ms. Ford (the lead reviewer) believed that the auditors had reached the right conclusions, and it was Ms. Ford that instructed that the 1992 audit should open because they had concluded Hyatt did not sever his California residency until April 1992, when he purchased the house in Las Vegas and evidence demonstrated he began moving in. 41 AA 10146 (106); 48 AA 11922 (181)-11923 (182).

Hyatt contends that the "jury determined that the FTB unsuccessfully sought to extort a settlement from Hyatt" (RAB 9:22-73), and suggests that finding was based upon Hyatt's representatives believing they had been "threatened" by Anna Jovanovich (RAB:40-41). In truth, even Hyatt's lead expert admitted he found no evidence of extortion. 44 AA 10846 (130). As to the conversation between Hyatt's representative (Eugene Cowan) and Ms. Jovanovich, Mr. Cowan testified that he did not construe this conversation, in which he

[15]It is standard FTB policy that reviewers' notes are not released to taxpayers since they are reflective of FTB's deliberative process. 48 AA 11891 (57)-11892 (58); 11921 (174-175).

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asked many questions about FTB's process since this was his first audit, as a threat. 35 AA 8581 (155). Moreover, if Hyatt had invoked FTB's Settlement Program, any settlement reached would have been a matter of public record requiring disclosure of Hyatt's name, total amount in dispute, amount of settlement, explanation why settlement was in best interest of State of California, and an opinion from California Attorney General as to reasonableness of settlement. Cal. Rev. & Tax Code § 19442.

These are but a few of Hyatt's mischaracterizations. The balance of those relevant to this appeal were discussed in the opening brief and discussed in the appropriate legal sections herein.

F. Hyatt's Abuse of the Nevada Protective Order and How That Contributed to the Amount of Time it Took to Finalize the Protest

In response to FTB's presentation concerning the reasons for the length of time needed to resolve Hyatt's protest, Hyatt claims that "what the FTB actually attempted to do, and what the District Court would not allow, was to misrepresent the terms of the protective order to the jury by seeking to present and argue its tortured interpretation of the protective order to the jury." RAB 48:7-9. In truth, Hyatt's own legal expert who testified at trial agreed with FTB's interpretation of the Nevada Protective Order ("NPO"). 36 AA 8899 (97). After the expert agreed with FTB, Hyatt began his re-direct by arguing with his own expert. 36 AA 8899 (96-97). Thereafter, a dispute ensued, and rather than resolve the parties' differing interpretations, the district court refused to resolve the dispute and instead forbade either party from mentioning the NPO again. 36 AA 8899 (96)-8901 (102).

At trial, FTB did not try to "blame the District Court for issuing the protective order in this case," as falsely claimed by Hyatt. RAB 48:3-4. Instead, FTB primarily blamed Hyatt's brazen abuse of the NPO. AOB 23-25. Recall that Hyatt sought and received the NPO which prevented the Protest Hearing Officer ("PHO"), without Hyatt's consent, from obtaining or viewing any documents Hyatt designated as off-limits or confidential in the litigation. 94 AA 23166-77. After the NPO was entered, Hyatt designated nearly every piece of discovery in the litigation as confidential. 50 AA 12315 (146-47). At the same

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time, Hyatt continued to produce certain information in response to the PHO's multiple requests for information – but he produced different information than what FTB uncovered in the Nevada litigation! To comply with the NPO, yet ensure that both sides of FTB (the litigation attorneys and the PHOs) were getting the same information from Hyatt, FTB put in place an internal, one-way system of communication. 76 AA 18880-83. Dunn, FTB's in-house counsel working with FTB's trial counsel, was tasked with reviewing the responses provided by Hyatt in the Protest Proceedings and comparing them to Hyatt's litigation responses. 50 AA 12369 (14-16). If they were deficient, Dunn was merely permitted to say that they were deficient, but not describe how or why they were deficient, without violating the NPO. Id. For example: In June of 2000, Hyatt provided two boxes of documents to the PHO in response to a request made six months earlier. 54 AA 13443-543. Dunn reviewed Hyatt's documents and discovered that they were grossly incomplete, based upon the information that Hyatt had previously disclosed in the Nevada litigation. 50 AA 12380 (58) – 12381 (62). To comply with the NPO, Dunn could only tell the PHO that Hyatt's responses were inadequate, but not how or why. 50 AA 12369 (14-16). This drill happened numerous times and consumed significant time. 50 AA 12307 (116) – 50 AA 12311 (132). However, given the district court's multiple orders, FTB was prohibited from giving the jury examples of how Hyatt failed to disclose to the PHO the same thing FTB learned in the litigation. 27 AA 6509-10 (order granting motion to exclude after acquired evidence).

What resulted were two different versions of Hyatt's residency: One version based upon evidence uncovered in the Nevada litigation and another version based upon selective information revealed by Hyatt to the PHO. But because of the NPO, the FTB litigation attorneys could not share the information they had gathered with the PHO, or even advise her how to request such information through the use of administrative subpoenas to third parties because of the limitation imposed by the NPO. 50 AA 12369 (14-16). FTB suspected Hyatt had two purposes for this brazen strategy: First to trap FTB into violating the NPO, and second to mislead the PHO. FTB finally established a way to get information from the litigation attorneys to the PHO. FTB issued an administrative subpoena to Hyatt

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directly to force his hand. 77 AA 18892-93; 19025-28; 76 AA 18894-97. Via administrative subpoena to Hyatt, FTB requested that Hyatt share all discovery gathered to date from the litigation with the PHO. 76 AA 18894-97. Of course, Hyatt resisted FTB's California administrative subpoena first at the district court level and then on appeal, and it took years for the California courts to sort out FTB's entitlement to sharing the same information that had been accumulated between the litigation attorneys and the PHO. State Franchise Tax Bd. v. Hyatt, C043627, 2003 WL 23100266 (Cal. Ct. App. Dec. 31, 2003) (unpublished opinion). Notably, even after the decision from the California appellate court allowing FTB's litigation attorneys to share Hyatt's information with the PHO, Hyatt resisted twice more FTB's updated administrative subpoenas, further delaying resolution of his protests.[16] 77 AA 19028-47; 50 AA 12398 (130-132). These activities were the primary reason for the delay in resolving Hyatt's protests. There were others, as outlined below.

For example: Hyatt argues that there was a 14-month delay in issuing the notice of proposed assessment ("NPA") for the 1992 tax year. RAB 35. He incorrectly asserts that the audit was "closed" on June 17, 1996. (RAB 47) Rather, on or about June 18, 1996, FTB's auditor, Sheila Cox, recommended closure of the audit for the 1992 tax year.[17] 37 AA

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[16]Hyatt claims he "promptly" responded to FTB's second and third administrative subpoenas. RAB 50:12. He promptly responded "no." 77 AA 19028.

[17]At the conclusion of FTB's audit for 1991, just prior to Hyatt receiving his NPA for the 1991 tax year, Hyatt (through his tax attorney Eugene Cowan) asked FTB to delay processing the protest until the ongoing 1992 audit could be consolidated with the 1991 protest. 44 ARA 10785. Combining audit years is a common request where the same audit issues cross over two or more calendar years under audit, especially in residency cases. 46 AA 11313 (145) – 11314 (147). At about this same time, mid-1996, unbeknownst to FTB, Hyatt began consulting with his Riorden & McKenzie litigation attorney Donald Kula. Months later, before the 1992 NPA was issued, Hyatt's tax attorney Eugene Cowan contacted FTB's protest hearing officer and said that Hyatt had changed his mind, he now wanted the 1991 protest worked as soon as possible. 44 ARA 10784. FTB's protest hearing officer carefully memorialized this request and many other conversations with Cowan, taking time to carefully explain the protest process, the time it would require, and her intention to begin work on the file just as soon as workloads would permit. 44 ARA 10776-10785. While this dialogue between Cowan and FTB's protest hearing officer was ongoing, Hyatt received the 1992 NPA and filed a timely protest on October 10, 1997. 54 AA 13404-

Continued . . .

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9164(67-68); 72 AA 17967. After review by her supervisor in Los Angeles, the case was sent to FTB's Central Office in Sacramento on June 21, 1996 for final review. 72 AA 17967. Upon review by audit division supervisors, the case was reassigned to a Sacramento auditor, Jeff McKenney, to determine whether the fraud penalty should be applied to the 1992 tax year. 73 AA 18194. The reassignment was made in August 1996 because Cox (just assigned to FTB special investigations) was no longer available to work on the audit. 41 AA 10154 (140). After reviewing the audit file and conducting further research, Mr. McKenney determined that the fraud penalty was warranted on the 1992 tax year. 73 AA 18199. On November 25, 1996, he submitted that recommendation for supervisorial review. 72 AA 17968. On December 12, 1996, after approval, the case was forwarded to FTB's Technical Review Section for further review. 72 AA 17968. At this point Hyatt had not been notified about the pending fraud penalty. See 72 AA 17901-04. As was FTB practice, the case was returned to audit to inform Hyatt of the findings in support of the penalty. 72 AA 17968. Cox had returned to audit by early 1997. Id. 72 AA 17969. Because Cox was the

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07. Then, just 86 days later, on January 6, 1998, Hyatt sued FTB in Nevada. 1 AA 1-16. Hyatt's innovative Nevada lawsuit, among other things, asked the Nevada court to apply California tax law and find that Hyatt was a nonresident of California for income tax purposes. 14 AA 3257-300.

On March 17, 1998, unknown to FTB at the time, Hyatt's strategy in the protest was set forth in a fax communication authored by Hyatt's tax lawyer in California, Eugene Cowan. 31 ARA 7697. Cowan's memo was sent to Hyatt, Mark Hutchison and Thomas Steffen, Hyatt's lead Nevada counsel. Cowan states that Hyatt and his team, as a deliberate strategy, should consider making FTB work harder to obtain information from Hyatt:

> "Attached is a copy of the subpoena duces tecum to be issued to Cal Fed bank by the FTB regarding the taxpayer's 1991 and 1992 Cal Fed bank account information. We have until Friday to file a motion to quash if we so desire. **While there are no "pure" tax reasons to quash the motion, there may be tactical reasons to do so (such as making the FTB work for its requests for [sic] now on or taking this opportunity to file the motion in the Nevada courts or otherwise).**"

Id. (emphasis added). For Hyatt and his attorneys to contend that they did not contribute the length of the protest is astounding, in light of this fax. Bear in mind that during that time, Hyatt had not paid any amount of the proposed tax, interest or penalty. 45 AA 11153 (81). In fact, to date, Hyatt had not paid any such sums.

most logical choice to complete the audit she was reassigned the case on April 4, 1997. 48 AA 11899 (87-88). On April 10, 1997, Cox wrote a letter to Hyatt's representative explaining the determination to impose the fraud penalty on the 1992 tax year and gave him 30 days to respond. 72 AA 17901-04. Hyatt failed to respond within the 30-day period. 72 AA 17909; 73 AA 18099-18101. On May 12, 1997, Cox sent a follow up letter to Hyatt's representative explaining that the case was closed and was being sent to Sacramento for issuance of the 1992 Notice of Proposed Assessment. 72 AA 17909. In that letter, Cox explained that if Hyatt disagreed with the NPA, he must now send a written response to FTB's Central Office in Sacramento. 72 AA 17909. Cox forwarded the audit file to her supervisor for review on May 12, 1997. 72 AA 17969. Once approved by her supervisor, the case was sent to Sacramento for final review. 72 AA 17969. In a letter dated July 17, 1997, (approximately three months after FTB's April 10, 1997 letter offering Hyatt a chance to rebut) Hyatt's representative disputed the imposition of the fraud penalty. 73 AA 18099-18101. By this time the case was in Sacramento proceeding through its final review. 72 AA 17969. The Sacramento reviewer determined that the fraud penalty issue should be resolved at protest. 43 AA 10686 (164). The finalization of the audit for the 1992 tax year was approved by management on August 12, 1997. 72 AA 17969. After the clerical process of finalizing the assessment was complete, FTB issued the NPA for the 1992 tax year on August 12, 1997. 50 AA 12367 (8-9).

Next, Hyatt argues that FTB "intentionally placed a hold" on his protest for both tax years that lasted six and seven years for the 1992 and 1991 tax years, respectively. RAB 45-46. The "hold" that Hyatt refers to is, in fact, a short deferral in processing the protest, directed by FTB management and was caused by Hyatt's actions. 50 AA 12323 (180-181). Hyatt implies that the hold lasted for six and seven years and implies that FTB made a determination to not work on the protest for those periods. That argument is directly contradicted by FTB's records which clearly show that FTB employees spent vast amounts of time on Hyatt's protest throughout the time period. 76 AA 18920-19011. Thus, Hyatt's claimed "hold" for six and seven years is false.

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Hyatt argues that he was informed at his protest hearing, held on September 27, 2000 and October 4, 2000 that a protest determination would be made within six months. RAB 45-46. Hyatt refers to an entry in FTB's computerized event log made by George McLaughlin dated April 3, 2000. 76 AA 18939. Mr. McLaughlin's comment that he expected the protest to be closed by March 31, 2001, (76 AA 18939) was based on the premise that FTB would have obtained sufficient information to make a determination by that date. At the time he made this comment, McLaughlin did not foresee the impending significant deferral period caused by Hyatt's use of the NPO to keep information from the protest hearing officer (information actually requested by FTB auditors years earlier), the decisions of the Nevada court to stay that order, Hyatt's direct refusal to produce information, and Hyatt's resistance to and litigation of FTB subpoenas. 49 AA 12236 (116)-(117).

Hyatt also refers to a computerized event log entry from FTB's protest hearing officer, Cody Cinnamon, to her supervisor, George McLaughlin, dated February 20, 2002 (76 AA 18980), which indicates Hyatt's representative called Ms. Cinnamon and inquired as to the status of the case. 76 AA 18980. Ms. Cinnamon replied that she was instructed not to work on the case due to pending Nevada litigation. 76 AA 18980. What Hyatt does not mention here is that by this date he had placed a significant amount of highly relevant information under the NPO, thus preventing its consideration by FTB's protest hearing officer. 76 AA 18966, 18969. This information related to the issues of residency, income timing, business situs and fraud, among other things. 76 AA 18966, 18969. This court had subsequently issued an order (3 AA 00655-56) staying the litigation. Following advice of its attorney in the Nevada litigation, FTB complied with the stay and awaited this court's decision before acting to acquire the information for the PHO. 76 AA 18982. When the stay was lifted (April 2002), FTB immediately invoked the provision contained in the NPO and requested that Hyatt produce the information voluntarily. 77 AA 19025-28. He refused. 49 AA 12073 (110-111).

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Finally, for the 1992 tax year, Hyatt implies that FTB chose to ignore an allegedly blatant $24,000,000 income error made in calculating the tax on the 1992 NPA. RAB 30-31. Hyatt's argument appears to be that his alleged error is indisputable. Not only is Hyatt incorrect, the genesis of this issue is illustrative of Hyatt's consistent failure to cooperate during the entire audit and protest process. In calculating the amount of tax owed by Hyatt for 1992, FTB's auditor, reviewing supervisor and Sacramento reviewers, relied on documentation that shows Hyatt receiving a large amount of income in January 1992. 72 AA 17862-95. Long after the 1992 NPA amounts were proposed and sent to Hyatt by FTB auditors, FTB received correspondence from Hyatt objecting to the calculation, contending that the large number was made up of smaller amounts of income received periodically during the 1992 tax year. 64 AA 13405-06. In support, Hyatt provided some documentation that shows various 1992 deposits into his personal accounts. Id. However, because the documentation was factually and legally insufficient to prove earned income, it was rejected, and Hyatt failed to follow up with any actual proof of the receipt and timing of his 1992 income. 85 RA 021126-28. In other words, the alleged $24,000,000 "error" Hyatt claims was bad faith continues to be part of the tax dispute in this matter.

As before, FTB remains perplexed how these issues arriving from discovery in this case and orders from this court were to be resolved by the jury without guidance or direction from the district court, who refused to give any.

III. LEGAL ARGUMENT

A. Standard Of Review

Hyatt argues that this is a "substantial evidence" appeal. RAB 51-53. Hyatt is wrong. Except as to certain discreet elements of certain causes of action, FTB is not making sufficiency-of-evidence contentions. Rather, FTB's opening brief consistently argues that Hyatt's various claims failed as a matter of law, even accepting Hyatt's evidence as true.

Hyatt also argues that FTB's statement of facts is deficient and therefore FTB waived any challenge to the sufficiency of the evidence. RAB 53-54. Citing only one case from another jurisdiction, Hyatt argues that an appellant who does not "fairly summarize" all of

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the facts in an appeal waives any challenge to the sufficiency of the evidence. RAB 53. This court has never adopted such a doctrine. Moreover, the case on which Hyatt relies, Foreman & Clark Corp. v. Fallon, 479 P.2d 362 (Cal. 1971), held that an appellant cannot merely recite its own evidence, ignoring contrary evidence in the record. Id. at 366. In the present case, FTB's opening brief did not merely rely on its own evidence, ignoring Hyatt's evidence. FTB frequently cited to Hyatt's witnesses and exhibits, even citing to testimony by Hyatt himself and his experts.[18]

B. Nevada's Recent Jurisprudence Examining Discretionary Function Immunity Applies To FTB And This Case

FTB's opening brief explained that, as a matter of comity, Nevada's new test for discretionary function immunity, the Berkovitz-Gaubert test, applied to FTB's actions at issue in this case (AOB 34-55) because (1) the actions at issue are discretionary; and (2) the actions were based upon considerations of social, economic, and political policy. Martinez v. Maruszczak, 123 Nev. 433, 168 P.3d 720 (2007). FTB also asserted that under this new test, allegations of bad faith and/or intentional misconduct no longer preclude the application of immunity to disputed governmental conduct. AOB 52-55. Finally, FTB asserted that even if bad faith or intentional misconduct exceptions to Berkovitz-Gaubert would be recognized by this court, at trial, Hyatt only presented acts of negligence from which no inference of bad faith or intentional misconduct is permitted, and the jury did not find bad faith. AOB 55-57.

Hyatt's answering brief does not dispute that Nevada's new test for discretionary function immunity applies to FTB's sovereign immunity statute as a matter of comity.[19]

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[18]The trial in this case lasted four months, with dozens of witnesses and thousands of pages of exhibits. No appellate rule or case required FTB to summarize the testimony of every witness or to describe every exhibit. See NRAP 28(j) (briefs must be free of irrelevant and immaterial matters).

[19]Hyatt's brief does not contest that the "law of the case" requires the application of comity to FTB's sovereign immunity statute to the extent the immunity contained in that provision aligns with Nevada's new test for discretionary function immunity. Instead, Hyatt claims that the "'law of the case' is entirely consistent with the current state of the law" in Nevada. RAB 54.

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Instead, Hyatt argues that the application of this new test makes no difference to the scope of the immunities that must be extended to FTB pursuant to this court's 2002 decision. See RAB 54-69. According to Hyatt, this court's recent jurisprudence "reaffirmed, not changed or contradicted" this court's previous determination that FTB did not have immunity from "discretionary acts taken in bad faith, or for intentional torts." RAB 54-55. Hyatt is wrong.

1. Standard of Review Regarding Discretionary Function Immunity

Hyatt contends that FTB is wrong by asserting that the immunity issues in this appeal should be reviewed *de novo* and instead claims they present mixed questions of law and fact. RAB 52. Yet Hyatt identifies no question of fact requiring resolution regarding FTB's claimed immunity.

In Ransdell v. Clark County, 124 Nev.____, 192 P.3d 756 (2008) and Martinez v. Maruszczak, 123 Nev. 433, 168 P.3d 720 (2007), this court did indicate issues of sovereign immunity can involve mixed questions of law and fact. Nevertheless, this court applied *de novo* review to questions involving Nevada's immunity law, including questions regarding the scope of immunity statutes and whether exceptions were available. Ransdell, 192 P.3d at 761; Martinez, 123 Nev. at 438. In each case this court applied *de novo* review on the question of whether the government agency's conduct satisfied the two-prong Berkovitz-Gaubert test. Ransdell, 192 P.3d at 762-64 (court decided whether County's actions involved "an element of judgment or choice," and whether the actions were based on considerations of social, economic and political policy); Martinez, 123 Nev. at 447-48 (court determined Berkovitz-Gaubert immunity issue as matter of law).

Here, FTB is not asking this court to overturn factual determinations made by the jury or to evaluate the sufficiency of evidence regarding immunity. In fact, the jury made no such findings and the district judge refused to evaluate this issue. Rather, FTB is arguing that immunity under the Berkovitz-Gaubert test applies as a matter of law, even accepting Hyatt's evidence as true. Therefore, *de novo* review should apply.

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2. The *Berkovitz-Gaubert* Test Adopted in *Martinez* Does Not Apply Solely To Negligence Claims As Argued by Hyatt

Hyatt's first argument contends that the Berkovitz-Gaubert test does not apply to intentional torts, but only applies to negligence claims. RAB 55-56; 60. Hyatt cites to the court's decision in Martinez v. Maruszczak to support this contention. See id. Hyatt's argument is entirely rebutted by subsequent Nevada case law, relying upon Martinez, which applied the Berkovitz-Gaubert test to intentional tort claims.

In Ransdell v. Clark County, this court applied the Berkovitz-Gaubert test to actions taken by government agents that the plaintiff alleged constituted intentional tort claims. 192 P.3d at 756. Clark County inspectors abated Ransdell's property, seizing various items from the property which the inspectors determined were a nuisance. Id. In response to Clark County's abatement activities, Ransdell filed a civil complaint alleging several causes of action, including intentional tort claims, such as: (1) trespass to land; (2) trespass to chattels; and (3) conversion. Id. at 760. In resolving the appeal, this court applied the Berkovitz-Gaubert test to the conduct of the Clark County inspectors. Id. at 761-762. This court did not distinguish between Ransdell's intentional tort or negligence based claims. Id. at 762-764. Rather, the court applied the test to all of the complained of government conduct, irrespective of causes of action pled, to determine if the acts were protected by discretionary function immunity. Id. Ultimately, the court determined that Clark County was entitled to complete discretionary function immunity – **for all claims, including the intentional tort causes of action**. Id. at 764.

In City of Boulder City v. Boulder Excavation, the court applied Berkovitz-Gaubert to the City's conduct, despite the fact that all of the plaintiff's claims were based upon "alleged intentional, arbitrary, and capricious conduct." 124 Nev. ___, 191 P.3d 1175, 1180 (2008). Specifically, the plaintiff pled the claim of "intentional interference with contractual relationship" against the government agency. Id. At trial, the district court found the plaintiff's favor on the intentional tort claim. Id. at 1178. This court, however, applied the Berkovitz-Gaubert test to the actions taken by the City and concluded that it was entitled to discretionary function immunity because the acts at issue were discretionary and

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based upon policy determinations. Id. at 1181-82. Here again, the labels (intentional tort vs. negligence) placed on the City's conduct by the plaintiff were not determinative of whether the new test applied. See also, Reynolds v. United States, 549 F.3d 1108, 1112 (7th Cir. 2008) (label of "bad faith" has no bearing on the analysis required pursuant to Berkovitz-Gaubert test).

Pursuant to the Berkovitz-Gaubert test, government actions are entitled to discretionary function immunity when the requisite two elements are satisfied. Ransdell, 192 P.3d at 762. The reviewing court does not consider the names or labels placed on the government's conduct by the parties. See Ransdell, 192 P.3d at 764. The court reviews each action taken by the government, objectively, to determine whether or not the conduct is entitled to immunity. See Terbush v. United States, 516 F.3d 1125, 1129 (9th Cir. 2008). In other words, it is the nature of the conduct that is at issue, not the names of the claims or the characterizations drawn by the plaintiff in describing the conduct. Reynolds, 549 F.3d at 1112.

This rule makes sense from a public policy perspective. If the names or "labels" placed on the government's actions by plaintiffs were determinative of whether the conduct would be entitled to immunity, plaintiffs would always be able to sidestep the application of discretionary function immunity by merely pleading their claims as intentional torts. This would entirely defeat the purpose of discretionary function immunity and likely eviscerate any instance in which immunity would be applicable. If the creativity of a plaintiff's counsel in pleading intentional torts were all that is sufficient to sidestep these basic principles, "immunity doctrines cannot function." Franklin Sav. Corp. v. United States, 180 F.3d 1124, 1136 (10th Cir. 1999). Under Hyatt's view, immunity would never apply if an intentional tort were pled in a complaint. In fact, this is exactly what happened in this litigation. By merely pleading intentional torts, Hyatt was able to avoid dismissal of this case at the early stages of this litigation – in spite of the fact that when the conduct Hyatt complains of is examined, it is apparent that all conduct entailed discretionary acts taken by FTB. See pages 39-43, below. This litigation has proceeded for over twelve years. See 1 AA

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1-16. During this time period, the parties have expended millions of dollars litigating this case, hundreds of depositions were taken, thousands of documents were exchanged, mountains of motions were filed, multiple writs have been filed, and extremely excessive damages were awarded against FTB. See AOB 26, n. 22. In addition, countless hours of employee time were spent addressing the issues presented in this litigation. In other words, all of the dangers the Berkovitz-Gaubert test protects against have come to pass.

3. There Is Not A Bad Faith Or Intentional Torts Exception To Discretionary Function Immunity As Argued by Hyatt

FTB's opening brief explained in detail that mere allegations of government bad faith are insufficient to avoid application of the Berkovitz-Gaubert test. AOB 52-55. In order to avoid dismissal of his claims on this basis, Hyatt argues that the court's adoption of the Berkovitz-Gaubert test did not alter or change the fact that bad faith conduct is not entitled to discretionary function immunity. RAB 55-58. Hyatt is, once again, mistaken.

a. *Falline* And Its Progeny Were Overruled With The Adoption Of The *Berkovitz-Gaubert* Test in *Martinez*

Hyatt's primary basis for claiming that a bad faith exception survived the adoption of the new test is his reliance upon Falline v. GNLV Corp., 107 Nev. 1004, 823 P.2d 888 (1991), the case that adopted the so-called "bad faith exception" in Nevada.[20] RAB 56-57. Hyatt claims that Falline was neither distinguished nor overruled by Martinez. Id.

As a starting point, contrary to Hyatt's arguments, the adoption of the Berkowitz-Gaubert test entirely changed the existing law in Nevada related to discretionary function immunity. In Martinez, this court expressly overruled and abandoned **all** of the previous tests applied under Nevada law for the application of discretionary function immunity pursuant to NRS 41.032(2), because those tests lead to inconsistent results. 168 P.3d at 727-29. As a result, each and every case that relied upon, or applied, these old tests are no longer good law. Id. at 726 n. 28.

[20]Falline created a distinction between an abuse of discretion which is entitled to immunity (NRS 41.032) and bad faith conduct – a distinction that was unsupported by any legal authority and was discussed largely in a footnote. 107 Nev. at 1009 n.3.

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Although Martinez did not specifically reference Falline, the court did expressly overrule the "operational-versus-planning test" that was relied upon and referenced in Falline in adopting the bad faith exception. See Martinez, 168 P.3d at 727. On this basis alone, it appears that Falline, as it relates to the so-called bad faith exception, has now been overruled. Even if Falline was not expressly overruled by Martinez, its holding that "discretionary acts taken in bad faith" are outside the scope of Nevada's discretionary function immunity is called into serious question and, at a minimum, implicitly overruled. The new Nevada jurisprudence in this area has made it abundantly clear that courts are **not** to consider the "**subjective intent**" of the particular government actor – a point entirely ignored by Hyatt's brief. Martinez, 168 P.3d at 728; Butler ex rel. Biller v. Bayer, 123 Nev. 450, 168 P.3d 1055, 1066 (2007). The only question is whether **objectively** the conduct at issue is susceptible to a policy analysis and thus satisfies the two elements of the new test. Id.; Franklin, 180 F.3d at 1135; Rogers v. United States, 187 F.Supp.2d 626, 631 (N.D. Miss. 2001).

A review of Falline reveals that the analysis of whether an act was conducted in bad faith depends entirely upon the subjective intent of the individual government agent. Falline defines bad faith as "the absence of a reasonable basis for denying benefits . . . and the defendant's **knowledge** or **reckless disregard** of the lack of a reasonable basis for denying the claim." Falline, 107 Nev. at 1009 (emphasis added). The opinion further explains that bad faith is "an implemented **attitude** that completely transcends the circumference of authority . . .". Id. at 1009 n.3 (emphasis added). As an illustration, the Falline court provides an example of bad faith as occurring when "an administrator decides to delay or deny a claimant's benefits because of a **personal dislike** for the claimant." Id. (emphasis added).

It is apparent that pursuant to Falline and its progeny, bad faith is determined entirely by looking to the subjective intent or attitudes of the government agent, which is now expressly prohibited. Martinez, 168 P.3d at 728; Butler, 168 P.3d at 1067. Therefore, contrary to Hyatt's assertions, Falline's bad faith exception to discretionary function

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immunity did not survive the adoption of the Berkovitz-Gaubert test.

b. Post-*Martinez* Cases Do Not Change This Result

Hyatt argues that subsequent Nevada cases cite to Falline, thus showing the bad faith exception to discretionary function immunity survived the adoption of the Berkovitz-Gaubert test. RAB 57-60. However, none of these decisions were required to pass on the issue of whether the bad faith exception survived the adoption of the new discretionary function immunity test. Moreover, the references to the bad faith exception in these cases are found in dicta.

Hyatt claims that this court's decision in City of Boulder City v. Boulder Excavation, Inc. supports the conclusion that bad faith remains an exception to discretionary function immunity. RAB 56-57. This opinion did cite to Falline and referenced the bad faith exception. Boulder City, 191 P.3d at 1182. But the reference to Falline was made in passing in dicta and is not the holding of the case. See id. "A statement in a case is dictum when it is unnecessary to a determination of the questions involved." Argentina Consol. Min. Co. v. Jolly Urga Wirth Woodbury & Standish, 125 Nev. ___, 216 P.3d 779, 785 (2009) (internal citations and quotations omitted). Dicta is not controlling authority. Id. More importantly, however, in Boulder City, this court was not asked to consider the question of whether the bad faith exception survived the adoption of Berkovitz-Gaubert. Boulder City, 191 P.3d at 1182. Rather, the parties and the court merely assumed that Falline was still good law, without actually analyzing the impact of the adoption of Berkovitz-Gaubert test. See id.

Hyatt's citation to ASAP Storage, Inc. v. City of Sparks, 123 Nev. 639, 173 P.3d 734 (2007) also does not support his conclusion. In ASAP, this court was required to determine whether a government agency was entitled to immunity pursuant to NRS 414.110, a specific statute that relates expressly to governmental immunities in the context of emergency response activities. Id. at 742-43. This statute expressly exempts willful misconduct, gross negligence, and other acts from immunity. Id. In ASAP, the district court never analyzed or considered the application of discretionary function immunity to the city's conduct. Rather, the court remanded this issue to the district court – without any further discussion. Id. at

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745-46. Although the court noted that the city could be vicariously liable for the "willful misconduct of its employees," the court did not consider whether the bad faith exception survived the adoption of the Berkovitz-Gaubert test. Id. Therefore, ASAP, like Boulder City, does not support Hyatt's conclusion that the bad faith exception survived the adoption of the new test since these courts were never asked to consider, nor did they consider, this issue.[21]

c. Hyatt's Reliance On Out-of-State Authorities Is Misplaced Since None Utilize the *Berkovitz-Gaubert* Test

In an effort to convince the court that bad faith remains an exception to discretionary function immunity, Hyatt cites to cases from other jurisdictions. See RAB 60-61. These cases, however, apply to specific state laws of certain individual states – none of which apply the Berkovitz-Gaubert test to their state's version of discretionary function immunity. In fact, none of these decisions reference, or analyze the Berkovitz-Gaubert test. See Matter of Sheffield, 465 So. 2d 350 (Ala. 1984) (no reference to the Berkovitz-Gaubert test); McCray v. City of Dothan, 169 F.Supp. 2d 1260 (M.D. Ala. 2001) (same); Hawkins v. Holloway, 316 F.3d 777 (8th Cir. 2003) (same – applying Missouri law); Catalina v. Crawford, 483 N.E.2d 486 (Ohio Ct. App. 1984) (applying Ohio law before adoption of Berkovitz-Gaubert test by federal courts); Tobias v. Phelps, 375 N.W.2d 365 (Mich. Ct. App. 1985) (same – applying Michigan law).[22]

In addition, Hyatt's brief fails to mention that several of these cases were decided **before** the United States Supreme Court even adopted the Berkovitz-Gaubert test in 1988

[21]Hyatt's citation and reliance upon Jordon v. State ex. rel. DMV & Pub. Safety, 121 Nev. 44, 110 P.3d 30 (2005) [RAB 59] has no bearing on this case or this issue. Jordon was decided over two years before this court decided Martinez and therein adopted the Berkovitz-Gaubert test; Jordon applied the prior tests for discretionary function immunity which have since been abandoned. Similarly, Hyatt's reliance on Davis v. City of Las Vegas, 478 F.3d 1048 (9th Cir. 2007) [RAB 56-57] is unavailing. Davis, like Jordon, was decided before Martinez and before this court adopted the Berkovitz-Gaubert Test.

[22]Hyatt also cites to The Libertatia Assoc., Inc. v. U.S., 46 Fed. Cl. 702 (2000). RAB 60. This case has absolutely nothing to do with the application of discretionary function immunity or governmental torts assessed under the Federal Torts Claim Act. Rather, the case involves a contract action between the United States government and a private company and whether the government terminated the contract in "bad faith." Id.

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and 1991. See Tobias, 375 N.W.2d at 365; Catalina, 483 N.E.2d at 486. Thus, the fact that these jurisdictions recognize, or more accurately recognized, a bad faith exception to discretionary function immunity prior to the adoption of Berkovitz-Gaubert has absolutely no bearing on whether such an exception applies in jurisdictions, like Nevada, that have since adopted the Berkovitz-Gaubert test.

Hyatt also fails to cite any case applying the Berkovitz-Gaubert test recognizing a bad faith exception. FTB has conducted an extensive search and has been unable to locate any such case. Thus, the case law from other jurisdictions does not support Hyatt's argument that bad faith remains an exception to discretionary function immunity under the Berkovitz-Gaubert test.

FTB's opening brief cited cases applying the Berkovitz-Gaubert test expressly rejecting a bad faith exception in Federal Tort Claims Act suits.[23] AOB 52-55. Hyatt's brief attempts to distinguish these cases by incorrectly stating that "the plaintiff[s] [in these cases were] suing for recovery of damages stemming from a discretionary decision of the government, typically a regulatory action." RAB 67. Hyatt's characterization of these cases is completely inaccurate. All of these cases, like the case at bar, were lawsuits alleging intentional or bad faith torts against the government seeking money damages. See Franklin, 180 F.3d at 1124; Rogers, 187 F.Supp.2d at 626; Matter of TPI Int'l Airways, Inc., 141 B.R. 512 (Bankr. S.D. Ga. 1992); Bolen v. Dengel, CIV.A. 00-783, 2004 WL 2984330 (E.D. La. Dec. 16, 2004). None of these cases were based upon administrative challenges to governmental decision making. Id.

For example, in Franklin, the plaintiffs brought civil tort claims based upon the government's alleged improper acts as the conservator of a business. 180 F.3d at 1127. Like Hyatt, the plaintiffs claimed that the acts constituted bad faith or intentional misconduct and were therefore not immune. Id. In Rogers., a case highly analogous to this case, the

[23]Federal jurisprudence is useful in analyzing Nevada immunity claims. Butler, 123 Nev. at 466 n.50.

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plaintiffs filed tort claims against the government for damages they allegedly sustained from improper government "field audits" that plaintiffs alleged were "targeted" in order to "make an example" out of them and to "allay political pressure." 187 F. Supp. 2d at 629. Likewise, in TPI International, the plaintiffs in a bankruptcy adversary proceeding alleged a tort claim of "intentional misrepresentation" or "fraud" as well as other intentional tort claims against a government agency. 141 B.R. at 514-15. All plaintiffs, like Hyatt, attempted to avoid the application of discretionary function immunity by alleging the government engaged in bad faith or intentional misconduct. Franklin, 180 F.3d at 1125; Rogers, 187 F. Supp. 2d at 629; TPI, 141 B.R. at 514-15. Yet, all of courts properly rejected the plaintiffs' attempts to avoid application of immunity based upon allegations of bad faith or intentional misconduct. Franklin, 180 F.3d at 1140; Rogers, 187 F. Supp. 2d at 631-33; TPI, 141 B.R. at 519-20. The courts held that the subjective intent of the government agent was irrelevant, and reviewed the conduct of the government entities only through the prism of the Berkovitz-Gaubert test to determine whether, objectively, the government was entitled to immunity. Franklin, 180 F.3d at 1140; Rogers, 187 F.Supp.2d at 630-31; TPI, 141 B.R. at 519-20.

d. Government Conduct Remains Subject to Scrutiny

FTB is not contending that the lack of a bad faith exception means that government agents can engage in any type of egregious conduct and still be entitled to immunity. That is not FTB's position, nor does it conform to the application of Berkovitz-Gaubert. For example, if a government agent engaged in torture (i.e. thumb screws) to obtain information from a citizen, this would not fall within the confines of the discretionary function immunity. This is so because such activities would violate clear legal mandates – such as constitutional protections – that expressly prohibit such actions. See Franklin Sav. Corp. v. United States, 180 F.3d 1124 (10th Cir. 1999) (discretionary function exception will not apply when a federal statute, regulation or policy specifically prescribes a course of action for the agent to follow); Limone v. U.S., 497 F.Supp.2d 143, 203-4 (D. Mass. 2007) (no discretion to violate constitutional provisions).

It is important to underscore that Hyatt offered no evidence that FTB violated clear,

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legal mandates or policies, and there were NO allegations in this case that FTB suborned perjury, used any type of physical violence to coerce testimony, fabricated evidence, engaged in torture or any other type of egregious conduct that would be clearly unlawful and unconstitutional. At worst, Hyatt claims FTB conducted an investigation which it was lawfully authorized to do but did so incorrectly – i.e., it gathered the wrong evidence, it analyzed the evidence wrong, it was "biased" in favor of FTB in its determinations, it improperly utilized cost-benefit ratios to determine its budgets, it published a "Litigation Roster," FTB spoke to Hyatt's relatives that did not like him, it went "after wealthy taxpayers," etc. See, e.g., RAB 18-35, 41-42, 54-69. As previously explained, these types of "bad faith" allegations are exactly the types of claims that cannot be reviewed under the discretionary function immunity test. Reviewing these claims necessarily requires this court to decide whether FTB, the government agency with the expertise in tax audit investigations, did its job "correctly" by the standards decided by the Nevada district court, or, in this case, the lay Nevada jury with no expertise in California tax law, audit procedures, or the like. This is exactly the type of judicial second-guessing into the subjective intent of government agents that the Berkovitz-Gaubert test is intended to prohibit. See Franklin Sav. Corp. v. United States, 180 F.3d 1124 (10th Cir. 1999).

4. There Was No Bad Faith Finding In This Case And It Is Impermissible to Infer Such a Finding

Hyatt's unfounded claim that the jury made a finding of "bad faith" permeates every aspect of his answering brief. See, e.g., RAB 4 ("The jury determined that the FTB abused its enormous power in bad faith...."); RAB 14 ("The jury heard and accepted substantial evidence of...bad faith conduct by the FTB"). Yet, as mentioned above, the jury made no finding of bad faith. Bad faith was neither a claim, nor an element of any claim, presented to the jury. Any such claim by Hyatt is wholly without merit. See pages 5-8.

The following claims were presented to the jury: (1) intrusion upon seclusion; (2) publicity of private facts; (3) false light; (4) abuse of process; (5) intentional infliction of emotional distress; (6) fraud; and (7) breach of confidential relationships. 14 AA 3257-3300. The jury instructions reveal that none of these claims contained an essential element

of bad faith. See 53 AA 13218-50; 54 AA 13251-87. The jury verdict form did not seek or request the jury to make any factual findings regarding bad faith. See 54 AA 13308-09. The verdict form merely asked the jury to determine whether Hyatt or FTB prevailed on each claim in a conclusory fashion. Id. "Bad faith" was not pleaded separately as an independent cause of action. 14 AA 3257-3300. Hyatt's counsel admitted that they had not pled as a separate claim bad faith. 50 AA 12500 (70). Hyatt's counsel also admitted that "bad faith" was "not an element of any of the cases of action." See 51 AA 12509 (108). Contrary to Hyatt's claims, there was no specific "finding" of bad faith made in this case, nor is there any inference that can be drawn from the jury's verdict and, therefore, even if bad faith remains an exception to discretionary function immunity, no such finding was made in this case.

5. Based Upon The Application Of Discretionary Function Immunity, Each Of Hyatt's Claims, As Tried To The Jury, Must Be Dismissed

Finally, Hyatt argues that, even if the two-part Berkovitz-Gaubert test were applied to FTB's conduct, it is not entitled to discretionary function immunity. See RAB 61-64. Hyatt's arguments on these points are flawed.

a. Part One of *Berkovitz-Gaubert*: All Of FTB's Alleged Improper Conduct Was Discretionary

The opening brief explained that all of FTB's actions were discretionary acts entitled to immunity. AOB 40-49. In fact, this point was made through Hyatt's own examinations at trial. See AOB 40-41. Hyatt now, however, contends that FTB's investigative conduct was not discretionary, "it ha[d] no discretion to conduct the investigation in an unfair and partial manner or to unlawfully disclose confidential information given to it during the investigation." RAB 61-62.

An act is discretionary if it involves "an element of judgment or choice." Martinez, 168 P.3d at 728; Butler, 168 P.3d at 1066. On the other hand, as Hyatt points out, an act is not discretionary if it involves the mandatory compliance with a specific statute, regulation, or policy. Berkovitz by Berkovitz v. United States, 486 U.S. 531, 536 (1988). Hyatt contends that none of FTB's conduct was discretionary because FTB was required to: (1)

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treat him fairly and impartially; and (2) maintain the confidentiality of his personal information. RAB 61-62.

In order for an act or decision to be non-discretionary pursuant to the Berkovitz-Gaubert test, the statute or policy must direct a mandatory and specific course of conduct for the government actor. Terbush v. United States, 516 F.3d 1125, 1129 (9th Cir. 2008). The cases cited by Hyatt's brief clarify this requirement. For example, in Bolt v. United States, the Ninth Circuit determined that removal of snow and ice from a parking lot was not discretionary because a written policy mandated specific times when snow and ice were to be removed. 509 F.3d 1028, 1032 (9th Cir. 2007).

Hyatt cites no statute, regulation or FTB policy that imposed a specific course of conduct on how FTB was to be fair and impartial. RAB 61. Rather, Hyatt merely cites to other pages of his own brief. See RAB 61 n. 241 (referring reader to various other sections of the brief). When these other sections are reviewed, however, Hyatt still has not identified any specific statute, policy, regulation or directive that FTB allegedly failed to follow or that mandated a specific course of conduct for FTB.

If the statute, regulation or policy does not mandate a specific course of conduct, the agency retains discretion to make its own decisions on how to fulfill the agency's policy. See Ransdell, 192 P.3d at 762-63 (Nevada statutes did not specify how Clark County inspectors reached conclusion that area constituted a "dangerous condition"). In order for a governmental policy to be deemed non-discretionary, the policy must be a specific and mandatory directive. Id. Here, the aspirational goal to treat taxpayers fairly and impartially was not such a specific and mandatory directive. See Kelly v. United States, 241 F.3d 755, 760 (9th Cir. 2001). Rather, it was nothing more than a "gratuitous and unsolicited statement[s] of policy or of intention," which was neither an enforceable promise nor a specific and mandatory directive of policy to FTB's employees. See Bogley's Estate v. United States, 514 F.2d 1027, 1032-33 (Ct. Cl. Apr. 16, 1975); cf. Minehan v. United States, 75 Fed. Cl. 249, 260-262 (2007) (no actionable promise where IRS's mission to "provide America's taxpayers top quality service by helping them understand and meet their

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tax responsibilities and by applying the tax law with integrity and fairness to all;" deemed policy aspirational only).

Here, any internal goal to treat taxpayers fairly and impartially was no different from the similar goal in the IRS's mission statement in Minehan. This broad goal did not specify any particular course of conduct for FTB's employees. A general regulation or policy does not remove discretion from governmental agencies "unless it specifically prescribes a course of conduct." Kelly, 241 F.3d at 761. For example, in Blackburn v. United States, the Ninth Circuit rejected assertions that general policy goals regarding warning signs removed discretion from government employees, because this general policy did not specify **how** the government agency was supposed to meet these goals or how or when to warn the public. 100 F.3d 1426, 1431 (9th Cir. 1996). See also, Tippett v. United States, 108 F.3d 1194 (10th Cir. 1997) (park safety policy that protecting human life takes precedence over all other considerations in national park did not remove discretion to determine how to implement this policy.)

Here, there was no specific policy or regulation that dictated the way FTB employees must conduct audits in order to satisfy the aspirational goal of fairness and impartiality. There was no specific requirement directing how FTB should gather evidence, when FTB could send third-party demands, what evidence FTB could consider, or how FTB should analyze the evidence. See AOB 38-40. A goal to be fair and impartial cannot be deemed a mandatory directive because it would be impossible to determine whether the goal was fulfilled. Fairness and impartiality, like beauty, differ dependent upon the eye of the beholder, and are therefore, entirely subjective concepts. Under Berkovitz-Gaubert, there must be some objective means to determine whether the directive was fulfilled. See Bolt, 509 F.3d at 1032. Whether a government employee acted fairly or impartially is simply too subjective to be amendable to specific quantifications. See Bulbman, Inc. v. Nevada Bell, 108 Nev. 105, 111, 825 P.2d 588 (1992) (vague promises that a phone system would be good for a particular business deemed only "commentary sales talk" and mere "puffery," not an enforceable promise that could be quantified).

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Hyatt next argues that FTB did not have discretion to disclose his identity information, based upon California and federal laws. RAB 61-62. Hyatt then cites to pages 35-36 of his own brief, but again he does not identify what statute, policy, or regulation prohibited these actions. There is, in fact, no statute, regulation, or policy that prohibited FTB from sending necessary disclosures of Hyatt's identity information when making third-party requests for information. Specifically, the California Information Practices Act ("IPA") did not prohibit FTB from disclosing Hyatt's identity information in order to ensure that the information it received from third parties was specific to Hyatt.

> No agency may disclose any personal information in a manner that would link the information disclosed to the individual to whom it pertains **unless the information is disclosed, as follows**:
>
> (p) To another person or governmental organization **to the extent necessary** to obtain information from the person or governmental organization as necessary **for an investigation by the agency of a failure to comply with a specific state law that the agency is responsible for enforcing**.

Cal. Civ. Code § 1798.24(p) (emphasis added). The IPA did not prohibit FTB from making necessary disclosures of Hyatt's identity information to third parties because each disclosure was made to obtain information that was necessary for FTB's investigation of Hyatt's failure to comply with state tax laws.[24]

FTB's own internal policies and training manuals also refute Hyatt's argument. FTB policy allowed FTB to make disclosures of identity information in order to obtain relevant information related to an audit. See 48 AA 11902 (99)–(100); 47 AA 11738 (191)–(192); 42 AA 10307 (142)–(144) (FTB could reveal personal information if necessary to collect or assess personal income tax.) FTB's Security and Disclosures Manual specifically indicates that personal information including social security numbers, can be disclosed if the disclosure was authorized by law. See 60 AA 14976; 61 AA 15034. Contrary to Hyatt's repeated contention that FTB made massive and illegal disclosures of his identity information, a review of FTB's communications reveals that FTB employees narrowly and

[24]In addition, no federal laws prohibited FTB from disclosing Hyatt's personal information when conducting its audit investigation. The Federal Privacy Act has absolutely no application to FTB's audit conduct. See 5 U.S.C. § 552a.

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specifically tailored each communication to obtain only information which would reasonably be expected to be in the possession of the specific recipient – consistent with the IPA and FTB's manuals and policies. Therefore, FTB did not violate any statute, regulation, or internal policy by making these limited disclosures, therefore, this conduct remains "discretionary" within the Berkovitz-Gaubert test.

For example, FTB sent a letter to the Nevada DMV. 62 AA 15615-16. This letter provided necessary identifying information such as Hyatt's name, social security number, date of birth, and post office box address – all of which was already in the possession of the DMV. Id. The letter sent to the Clark County Assessor only sought information regarding Hyatt's Nevada house – 7335 Tara Avenue. 63 AA 15724. This letter asked for information regarding who the present owner was, who the previous owner was, and the date the property was transferred. Id. Likewise, the letters sent to the power companies Southwest Gas Corp. (65 AA 16099-100; 16154-55) and Southern California Edison (63 AA 15731-32)) asked only for information related to the power bills at Hyatt's California and Nevada houses. This was the identical case with letters sent to water companies, cable companies, trash collectors and all other third-parties. See 63 AA 15733-35; 65 AA 16095-96; 16233-243; 65 AA 16097-98; 16143-146. Despite Hyatt's unsubstantiated assertion that FTB made massive illegal disclosures of his confidential information, see, e.g., RAB 9, 57, 58, there is no statute, regulation or policy that prohibited FTB or its employees from making these necessary disclosures for the purpose of facilitating the audit. Rather, such disclosures were left to the discretion, judgment and choice of the auditor.[25]

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[25]Hyatt does claim that FTB attempted to extort a settlement from him because it sent him, along with thousands and thousands of other taxpayers, a form notifying him of the California Legislature's decision to offer a tax amnesty program. FTB **did not** create the Tax Amnesty legislation, did not decide who was eligible for the program, or what the penalties would be for eligible taxpayers who failed to participate. See 89 AA 22051-67. Thus, Hyatt's claim (which is unsupported by any record citation) that FTB "imposed" an amnesty penalty of "nearly $10 million" on Hyatt is blatantly false. See RAB 67. It remains unclear how FTB attempted to "extort" a settlement from Hyatt by sending him a form related to this program mandated by California's Legislature. Imagine if FTB had not sent

Continued . . .

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b. Part Two Of *Berkovitz-Gaubert*: All Of FTB's Actions Were Based Upon Policy Determinations

FTB's opening brief established that each of FTB's discretionary acts was taken to further the economic policy of imposing personal income tax on all California residents. AOB 50-49-52. In response, Hyatt argues that the second element of the Berkovitz-Gaubert test cannot be satisfied because "not every purportedly discretionary act of FTB . . . is automatically in furtherance of a plausible policy objective." RAB 62. Hyatt makes no attempt to explain what actions were not based upon economic objectives. Rather, Hyatt merely claims actions taken by FTB in bad faith or "outside the circumference of the authority granted to FTB are not protected by any form of immunity" and "fall outside the ambit of a plausible policy objective." Id. These arguments fail for several reasons.

Hyatt misstates this second element of the Berkovitz-Gaubert test, which requires the court to determine if the judgment is the kind that the discretionary function exception was designed to shield i.e., actions based on considerations of social, economic, or political policy. Butler, 168 P.3d at 1066. As explained in FTB's opening brief, see AOB 50-52, the focus of the second element is not on the government employee's "subjective intent in exercising the discretion conferred . . . but on the nature of the actions taken and on whether they are susceptible to a policy analysis." Id. Hyatt's brief entirely ignores this key aspect of the policy element.

Hyatt also fails to rebut the presumption that FTB's conduct was based upon economic policy considerations because it was charged with administrating and enforcing California's tax laws. See AOB 50-51. "If a regulation allows the employee discretion, the very existence of the regulation creates a strong presumption that a discretionary act authorized by the regulation involves considerations of the same policies which led to the promulgation of the regulations." United States v. Gaubert, 499 U.S. 315, 323 (1991). It is

Hyatt the Tax Amnesty Form: He would surely be arguing that FTB treated him different from other taxpayers, he was deprived of an opportunity for amnesty, and this would have been evidence of FTB's alleged bad faith or nefarious conduct.

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the policy of California to collect personal income tax from its residents. See AOB 50-51. FTB enforces this policy. A legitimate purpose of Hyatt's audit was to determine the correctness of his tax returns, i.e., whether his alleged date of California non-residence – October 1, 1991 – was correct. See, e.g., 46 AA 11300 (91)-(92) (describing purpose of residency audit). Based on the unrebutted presumption, all of FTB's actions – as claimed by Hyatt and tried to the jury – were in furtherance of the economic policies of tax collection. Gaubert, 499 U.S. at 323.

Hyatt cites a few cases suggesting they support his claim that bad faith overcomes any policy basis for FTB's conduct. See RAB 62-64. However, these cases do not support Hyatt's argument. First, Hyatt cites Coulthurst v. United States, 214 F.3d 106 (2d Cir. 2000). There is no reference in Coulthrust to bad faith or intentional misconduct on the part of the government employees. Next, Hyatt relies upon Limone v. U.S., 497 F.Supp.2d 143 (D.Mass. 2007). The Limone court determined that the government agents' conduct in framing innocent men and suborning perjury were not discretionary acts. Id. at 203-204. The government's conduct at issue was prohibited by the U.S. Constitution and other specific and direct legal requirements placed on law enforcement agents. Id. As these acts were not discretionary in the first instance, the court did not reach the second Berkovitz-Gaubert element.

In sum, Hyatt failed to establish that the Berkovitz-Gaubert test is not satisfied in this case. He has failed to establish that any of FTB's conduct was "non-discretionary" or that FTB violated any express constitutional provision, statute, regulation or directive when it: (1) gathered evidence; (2) analyzed evidence; (3) conducted its administrative protests; or (4) engaged in other organizational conduct. Hyatt has also failed to rebut the fact that all of FTB's discretionary conduct was taken for an important economic policy purpose -- i.e., to administer California's tax laws. Consequently, discretionary function immunity applies to all of FTB's conduct. As such, the judgment must be reversed and Hyatt's entire case must be dismissed. With the dismissal of this case on these grounds, this court need not consider any other issues or go any further with its review.

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C. Contrary To Hyatt's Arguments, District Judge Walsh Allowed Trial To Exceed The Jurisdictional Scope Of This Case

FTB's opening brief explained that even if this court's April 4, 2002 order was left entirely undisturbed by this court's recent case law related to discretionary function immunity, Hyatt's case, as tried to the jury, must still be dismissed because all of FTB's conduct at issue was nothing more than alleged negligence. See AOB 55-57. As a result, the trial exceeded the jurisdictional scope placed by the court's 2002 order which expressly dismissed Hyatt's negligence claim pursuant to discretionary function immunity. On this alternative basis, this entire case must be dismissed. In an effort to avoid this result, Hyatt asserts that evidence of negligence was admissible at trial; the negligence evidence constituted substantial evidence to support his intentional tort claims; and the inclusion of this evidence conformed to the prior rulings of this court. RAB 69-75.

FTB is not asserting that the district court made an evidentiary error by admitting the negligence evidence at trial. See AOB 55-57. To the contrary, FTB's argument is simply that evidence of mere negligence cannot be sufficient as a matter of law to support liability for intentional tort claims and the only evidence of alleged wrongdoing by FTB was mere negligence, as admitted by Hyatt's own expert. Id. Thus, even if this court assumes that all of the negligence evidence presented by Hyatt was true, this evidence alone cannot establish FTB's liability for intentional misconduct, as a matter of law.

1. Hyatt's Arguments Illustrate That All Of FTB's Conduct At Issue Was Nothing More Than Mere Negligence, Which Was Immune Under the Court's 2002 Decision

Hyatt's brief does not cite to any record evidence that supports his contention that FTB engaged in intentional conduct. RAB 70-71. Although Hyatt claims FTB "labels" the trial evidence as negligence, it is really Hyatt who is using his own labels to assert that evidence of negligence alone can be transmuted into intentional conduct based upon the quantity of the so-called negligence. Id. at 70-72.

For example, Hyatt claims (without a record citation) that FTB engaged in intentional conduct because FTB discounted evidence in favor of Hyatt's residency claim. Id. at 70. The conduct Hyatt complains of was FTB not doing its job properly, according to

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Hyatt. See AOB 55-57. Hyatt's argument in response to FTB's Rule 50(a) motion summarized the evidence Hyatt claimed equated to intentional misconduct. See 45 AA 11190 (35) – 11203 (86). When each act described by Hyatt's counsel is analyzed, one concludes it is nothing more than mere negligence – i.e., FTB improperly gathered evidence, improperly weighed evidence, and improperly engaged in organizational conduct and the like. See 45 AA 11190(35) – 11203 (86) (Hyatt's counsel arguing in opposition to FTB's Rule 50(a) motion that Hyatt presented no evidence of intent to defraud). Hyatt's primary expert witness testified that what FTB and its employees did wrong was not adhere to "reasonable professional standards" while conducting the audit. See 44 AA 10754 (114)-10778 (212); 10814(3)-34 (84); 10938 (144)-45 (170) (Jumelet's direct examination). Failing to adhere to "reasonable professional standards" is a negligence standard.

Hyatt then argues that cumulative acts of negligence can be submitted to the jury as evidence of intentional wrongdoing. RAB 71-72. The truth is that cumulative acts of negligence, and nothing more, *cannot* support a finding of liability for an *intentional* tort. AOB 57. Hyatt's brief appears to acknowledge this point when he admits that case law holds that "**repeated acts of negligence are insufficient in themselves to prove intentional conduct . . .**." RAB 71 (emphasis added). Yet Hyatt goes on to argue, in the same sentence, that "multiple acts of negligence can be evidence of deliberate or intentional acts." Id. Hyatt's brief does not cite any legal authority to support the proposition that evidence of negligence only can support a liability finding against a party for an intentional tort, especially in the absence of any evidence actually proving intentional misconduct. See RAB at 69-72.

FTB specifically moved to dismiss Hyatt's case in its motions for judgment as a matter of law on this very basis -- all of Hyatt's evidence proved nothing more than negligence and was therefore outside the jurisdictional limitations of this case. 45 AA 11181(2)-192(35). Although Hyatt's counsel did not present any evidence that FTB engaged in intentional misconduct, (see 45 AA 11192(35)-11203(86)), the court denied FTB's motion during trial and post-trial (45 AA 11206(101)-207(102)), adopting instead

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Hyatt's theory that intentional misconduct could be "inferred" from multiple negligent acts.[26]

On this basis alone, Hyatt's case, as tried to the jury, clearly exceeded the jurisdictional scope of this court's 2002 order which dismissed Hyatt's negligence-based claims as immune. Once again, on this basis alone this case requires dismissal and the court need go no further with its review.

D. No Matter What Labels Hyatt May Use, Hyatt's Entire Case Tried To The Jury Concerned Whether FTB's Residency, Tax, And Fraud Assessments Conclusions Were Correct

In addition to allowing Hyatt's negligence-based claims to be presented to the jury, the trial judge also exceeded jurisdictional boundaries that prohibited the jury from deciding the propriety of FTB's administrative determinations. See AOB 58-67. FTB's opening brief explained that the manner in which Hyatt was allowed to present this case – which was nothing more than a collateral attack upon FTB's underlying administrative conclusions – impermissibly exceeded the scope of the jurisdictional limitations created by Judge Saitta's 1999 order dismissing Hyatt's declaratory relief claim. Id.

Although Hyatt does not dispute that the propriety of FTB's administrative decisions were squarely outside of the jurisdictional scope of this case, Hyatt asserts that the jury was never asked to decide the tax and residency issues. RAB 75-80. In fact, Hyatt expressly concedes "[t]he law of the case prohibited Hyatt from trying the residency issue and tax case." RAB 5:2-4. Against this concession, Hyatt goes on to claim the jury was not asked to act as a reviewing court for FTB's administrative determinations. Id. Hyatt then claims that

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[26]The district court's failure to properly review these additional issues was error, and does not insulate the jury's verdict that exceeded the jurisdictional scope of this case. See Dictor v. Creative Management Services, LLC, 126 Nev. ___, 223 P.3d 332 (2010) (court's ruling in first appeal, allowing case to proceed on one ground, did not preclude summary judgment on other grounds after first remand). Thus, like Dictor, the mere fact that this court allowed Hyatt's intentional tort claims as alleged in his complaint to proceed in 2002, does not mean that the district court properly refused to dismiss these claims in 2008 based upon alternate theories, and given the district court's obligation to ensure that this court's 2002 order was properly adhered to throughout this litigation.

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because the jury was not asked to decide the residency case, the district court did not err in excluding extensive evidence that rebutted Hyatt's claims that FTB improperly determined his residency or improperly assessed taxes or fraud penalties. RAB 79-80. Hyatt's arguments are contradicted by the evidence, his own brief and contradictory jury instructions provided to the jury.

1. In Order To Rule In Hyatt's Favor, The Jury Was Necessarily Required To Determine That FTB Improperly Reached The Wrong Result In Its Administrative Conclusions

The evidence Hyatt presented at trial related almost exclusively to his general claim that FTB improperly determined he remained a resident of California until April 1992 and then improperly imposed fraud penalties against him. For example: A key finding to FTB's fraud determination was that Hyatt did not cooperate during the audits, which is an indicia of fraud under California law. See 66 AA 16425-27. The only topic Edwin Antolin testified to was his opinion that Hyatt did cooperate with FTB. 36 AA 8787 (9); see also, 36 AA 8786 (2)-8821 (143); 8910 (140)-8919 (176) (Antolin's entire direct examination). Hyatt also presented the testimony of Paul Schervish, a professor at Boston College, who testified that "wealth holders," like Hyatt, do not necessarily live opulent lifestyles. 43 AA 10658 (53) – 10659 (54); see 43 AA 10654(35)-62(63) (Schervish's entire direct examination). This evidence was intended to negate FTB's determination that Hyatt engaged in implausible behavior -- another indicia of fraud under California law. Id. Hyatt's primary expert, Malcolm Jumelet, was permitted to testify that FTB improperly weighed and analyzed the evidence it gathered when reaching its residency and fraud penalty conclusions. 44 AA 10943 (165); see also, 44 AA 10754(114) – 78 (212), 10814(3)-34(84), 10938(144)-45(170) (Jumelet's direct examination). Nearly every witness Hyatt presented critiqued the administrative conclusions reached by FTB. See, e.g., Eugene Cowan (35 AA 8542, 8558-61, 8570-71, 8576-78, 8629); Candace Les (33 AA 8228-29); Michael Kern (34 AA 8346-52, 8353-540); Gilbert Hyatt (37 AA 9005-21, 9079-87, 9094-105, 9150-59, 9163-65, 9172). Although Hyatt claims that this evidence was admitted to prove FTB's "fraud claim," there is no question that in order for the jury to agree that FTB failed to act

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fairly and impartially during the audit, the jury necessarily had to determine that FTB reached the wrong administrative conclusions. Finally, recall that during Hyatt's closing argument he described California's Legislature enacting tax laws, with FTB enforcing those laws, and the Las Vegas jury being empowered to act as a "check and balance" on the exercise of those California powers. 52 AA 12837 (90). As such, Hyatt's contention that the jury was not asked to review the propriety of FTB's administrative decisions is wrong. See AOB 55-67.

Hyatt's brief is replete with statements that he is, and has always been, challenging FTB's ultimate conclusions related to his residency and the tax and fraud penalty assessments. For example, Hyatt's brief repeatedly states that he was challenging the "one-sided" and "predetermined" audit conclusions finding that he was a resident of California until April 1992 and assessing him taxes and fraud penalties. See, e.g., RAB 7, 18, 20, 22, 24, 40, 64, 77, n. 292, 166 n.610, 181. There is no way to prove that the audit itself was "one-sided" or "predetermined" without explicitly or, at a minimum, implicitly concluding that FTB's ultimate residency and tax assessment conclusions were wrong. Hyatt's brief repeatedly indicates that FTB "trumped up a tax case". See, e.g., RAB 62, 73, 80 n.301, 90. Once again, in order to accept that FTB "trumped up a tax case" against Hyatt, the jury was required to accept that FTB had no basis to determine that he was resident of California until April 1992 – i.e., its residency and subsequent tax assessments were wrong. Since the jury was permitted -- even encouraged to do so -- FTB at minimum should have been permitted to put all evidence before the jurors and they should have been instructed on California law applicable to tax determinations.

The jury simply could not have accepted that Hyatt was a tax cheat who did not move to Nevada when he claimed he did, but at the same time conclude that FTB treated him unfairly and impartially when it concluded he only pretended to move to Nevada in 1991 and subsequently assessed him taxes and fraud penalties. To accept Hyatt's fraud theory, the jury necessarily had to determine that FTB's administrative determinations were wrong. As a result, Hyatt's attempts to claim that the jury was not asked to review the

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priority of the tax and residency determinations is rebutted by the evidence and Hyatt's own arguments on appeal.[27]

2. The District Court's Corrective Jury Instruction 24 Informed The Jury That It Was Permitted To Determine The Correctness Of FTB's Administrative Conclusions And Hyatt Argued They Reached the Wrong Conclusion

As noted in the introduction, Hyatt materially misstates what happened at trial concerning jury instruction 24, and he ignores any discussion of **corrected** jury instruction 24. Compare 53 AA 13013 (28-29); 13053 (20)-13054 (22) with RAB 75-80.

Corrected instruction 24, which was given over FTB's vehement objection, entirely negated any jurisdictional limits that may have been placed on the jury on this issue. Id.

> There is nothing in corrected instruction 24 that would prevent you during your deliberations from considering the inappropriateness or correctness of the analysis conducted by FTB employees in reaching its residency determinations and conclusions. There is nothing in corrected instruction 24 that would prevent Malcolm Jumelet [Hyatt's expert witness] from rendering an opinion about the appropriateness or correctness of the analysis conducted by FTB employees in reaching its residency determinations and conclusions.

53 AA 13054 (22). It could not be more plain from this instruction that Judge Walsh permitted – actually *invited* – the jury to evaluate "the appropriateness or correctness" of FTB's conclusions regarding residency, tax assessments and Hyatt's fraud, despite Judge Saitta's earlier order to the contrary. Id. The instruction also improperly highlighted testimony by Hyatt's expert regarding the "appropriateness or correctness" of FTB's residency determinations and conclusion. Hyatt's counsel used this instruction to argue that FTB came to the wrong conclusions when it evaluated the evidence gathered during the audit and the protest. 52 AA 12827 (51). Regardless of any other instructions that were given to the jury, corrected instruction 24 told the jury to evaluate the appropriateness or correctness of FTB's administrative conclusions. There can be no serious debate that the

[27]Hyatt's brief claims that his counsel did not argue to the jury that the protest hearing officer simply rubberstamped the audit recommendations. RAB 79. The record reveals otherwise. 52 AA 12834 (80-81).

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jury was impermissibly allowed to act as a reviewing court regarding FTB's administrative conclusions.

As explained in FTB's opening brief, this violated Judge Saitta's unchallenged 1999 order, which was predicated upon the fact that FTB's administrative determinations were not within the subject matter jurisdiction of the district court. See AOB 59-60. The administrative tax proceedings between Hyatt and FTB remain ongoing in California. Therefore, allowing the jury to review FTB's administrative decisions was a blatant violation of the exhaustion-of-remedies doctrine. Id.; Allstate Ins. Co. v. Thorpe, 123 Nev. 565, 170 P.3d 989, 993-95 (2007) (describing purpose of exhaustion of administrative remedies); Mesgate Homeowners' Ass'n v. City of Fernley, 124 Nev. ___, 194 P.3d 1248 (2008).

In addition, as various courts that apply Berkovitz-Gaubert have concluded, "when the sole complaint is addressed, as here, **to the quality of the investigation as judged by its outcome,** the discretionary function immunity should ... and does apply. Congress [and the State of Nevada] did not intend to provide for **judicial review** of the quality of investigative efforts." Pooler v. United States, 787 F.2d 868, 871 (3d Cir. 1986) (emphasis added); see also, Flax v. United States, 847 F.Supp. 1183, 1189-90 (D.N.J. 1994).

3. To Compound Her Error, The District Court Permitted Only A One-Sided Presentation Of The Facts Underlying FTB's Administrative Conclusions

Hyatt's brief claims that FTB "wants it both" ways on this issue. RAB 80. Hyatt claims that FTB alleges that, although the propriety and correctness of FTB's residency and tax assessment determinations should not have been tried to the jury, FTB still wants this court to determine FTB's residency evidence should have been admitted at trial. See RAB 80. Hyatt is confused. Simply put, it is FTB's contention that its administrative determinations were outside the jurisdictional scope of this case. AOB 63. Nevertheless, if this court finds that Hyatt was properly permitted to open the door at trial and to attack the appropriateness and correctness of FTB's administrative determinations, then it was prejudicial error for the district court to exclude the substantial evidence that **supported**

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FTB's administrative conclusions and applicable California legal principles guiding FTB's auditors. See AOB 63-67.

Hyatt's brief argues that the district court's exclusion of evidence was proper because the evidence only related to Hyatt's residency determinations. RAB 79-80. However, as already noted, once Hyatt was allowed to present his residency evidence to the jury and offer his experts' opinions addressing the propriety of FTB's administrative conclusions, FTB had the right to rebut his theories with its evidence refuting Hyatt's contentions. For example, Hyatt (over FTB's objection) presented expert and lay witnesses testimony that he cooperated during the audits, to rebut FTB's fraud determination. See, e.g., 34 AA 8333 (108); 8338 (128), 8349 (173); 35 AA 8509 (185)-(186); 36 AA 8787 (9). Yet FTB was precluded from presenting evidence that Hyatt **did not** cooperate during the audit. See AOB 64. For example, the district court prevented FTB from introducing evidence of Hyatt's IRS audit and the fact that they experienced similar lack of cooperation. 33 AA 8047 (14)-8049 (22). In addition, evidence related to where Hyatt maintained his residence in Nevada between September 1991 and November 1991 was relevant to rebut Hyatt's testimony that he became a resident of Nevada in September 1991. AOB 63-67. The district court improperly excluded evidence of Hyatt's ridiculous Continental Hotel story (AOB 65-66), evidence related to Hyatt's travel arrangements out of LAX not McCarran during the disputed timeframe, evidence of Hyatt's back-dated deed on his California home, and an entire host of additional evidence. See AOB 63-67. Suffice it to say, it is **Hyatt** who cannot have it both ways in this regard. Equally important, if Hyatt was properly permitted to challenge the propriety or the correctness of FTB's administrative conclusions, then evidence of the legal principles guiding FTB's determinations should have been admitted, but Judge Walsh declared them inadmissible. 24 AA 5794.

In sum, the district court incorrectly permitted the jury to review the factual bases for FTB's conclusions, to second-guess FTB's analysis for reaching those conclusions, and to substitute its own judgment for FTB's determinations, but with a one-sided version of the evidence and no legal guideposts. This eviscerated the jurisdictional boundaries that were

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placed on this litigation from the inception.

This case must be dismissed in its entirety based upon the district court's failure to adhere to the jurisdictional limitations in this case. All of the evidence Hyatt presented at trial was based exclusively upon alleged negligence by FTB and related to FTB's administrative conclusions. Even under this court's previous standard for discretionary function immunity, and without considering the Berkovitz-Gaubert test, FTB could not be held liable for its negligence or its administrative conclusions. With such a ruling, the court need not consider any of FTB's additional arguments and contentions.

E. Common Law Claims

1. Hyatt Misrepresents The Scope Of This Court's 2002 Decision Concerning His Common Law Claims And The Standard of Review

Hyatt's brief consistently misinterprets this court's April 4, 2002 order. He argues that the order upheld the denial of summary judgment on his common law claims "based on genuine issues as to material facts." RAB 83, lines 16-17. He argues that the order effectively determined the question of "whether there was sufficient evidence to create a material issue of fact for each claim asserted." RAB 83, lines 21-22. He also argues that the factual and legal legitimacy of each common law cause of action was reviewed and given the stamp of approval by this court in 2002, falsely suggesting that this court's April 2002 order was based on a review of evidence rather than a review of the allegations in Hyatt's complaint. RAB 95, lines 11-12; RAB 86, lines 10-11; RAB 74, lines 3-4.

Hyatt made similar arguments in the district court, contending that this court's April 2002 order resolved the validity of common law causes of action, thereby precluding FTB's various motions attacking these causes of action. See AOB 68-69. Judge Walsh agreed. 22 AA 5491. Because Hyatt's argument in the district court and in this court mischaracterized the nature, scope and impact of the April 4, 2002 order, FTB will set the record straight.

a. The Petition and This Court's June 13, 2001 Order; Rehearing Proceedings

After the district court denied a motion for summary judgment that was based on multiple grounds, including lack of jurisdiction, FTB filed a petition for a writ. This court

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issued a dispositional order on June 13, 2001, noting that FTB's petition presented a jurisdictional issue based upon comity. 5 AA 1063. Although the court noted the existence of this comity issue, the court did not decide that issue because the court perceived another independent basis for dismissal of Hyatt's claims, i.e., the absence of probative evidence on each claim. 5 AA 1065. In doing so, the court expressly recognized that its decision to grant the petition was based "on grounds other than those alleged in the petition." 5 AA 1063.

Hyatt petitioned for rehearing. He pointed out that "the Court decided the Writ Petition on issues not raised, briefed or argued" in the writ petition, and that FTB's writ petition did not challenge the sufficiency of evidence regarding the summary judgment rulings. 5 AA 1072. He argued: "First, the Court's order violates Hyatt's due process rights by denying Hyatt his day in court without even a hearing before this Court on an issue never raised in the FTB's writ petition." 5 AA 1081. Next he argued that this court did not follow the correct standard of review in evaluating evidence on the summary judgment motion. Id. Finally, he argued that summary judgment was premature because discovery was not yet complete. Id. As part of the rehearing process, Hyatt moved for permission to file extra pages; he argued that this court's June 13, 2001 order was "based upon grounds that were neither raised in the Writ Petition nor addressed by Hyatt." 5 AA 1089, 1103.

b. The April 4, 2002 Decision

Hyatt's petition for rehearing convinced this court that the June 13, 2001 order was wrong, and on April 4, 2002, the court granted rehearing and vacated the order. 5 AA 1183-1193. The court did not identify which of Hyatt's grounds was the basis for granting rehearing. The court merely recited the factual background and concluded:

> 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 the denial of the summary judgment motion. . . . 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.

5 AA 1184. The court then decided the writ petition on the ground actually raised in the

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petition, i.e., the jurisdictional ground based on comity. 5 AA 1184-90.

In summary, this court's June 13, 2001 order granted a writ based on a review of the evidence on Hyatt's common law claims; Hyatt petitioned for rehearing on the ground that the issue of insufficient evidence had not been raised in the writ petition; and this court granted rehearing, vacated the June 13, 2001 order, and decided the case based on the ground raised in the petition (comity). Although Hyatt's petition for rehearing asserted the alternative ground that his evidence was sufficient to survive summary judgment, it is obvious that this was not the ground on which rehearing was granted. There was not a single word in the April 4, 2002 order indicating that the court was determining the sufficiency of Hyatt's evidence on his common law claims, that the court was evaluating whether Hyatt satisfied all mandatory elements of each cause of action, or that the court was deciding the propriety of FTB's legal defenses to those claims. In fact, the April 4, 2002, order vacated the June 13, 2001, order, and the new order was completely silent on the sufficiency of evidence on Hyatt's common law claims. If the April 4, 2002 order was intended as this court's evaluation of evidence on Hyatt's common law claims, surely this court would have included an analysis of the evidence, just as the court had previously done in the June 13, 2001 order. 5 AA 1066-68. Even as to Hyatt's intentional tort theories, which this court allowed to survive the comity challenge, the court's analysis in the April 4, 2002 order was not based on a review of Hyatt's evidence. Rather, the court's analysis was based solely on allegations in Hyatt's complaint. 5 AA 1190 ("Hyatt's complaint alleges" bad faith and intentional torts).

Accordingly, Hyatt is wrong in his assertions that the April 4, 2002 order was based on this court's evaluation of the sufficiency of evidence and the viability of his common law causes of action.

c. The Legal Effect of the April 4, 2002 Decision

The April 4, 2002 order dealt with one issue -- comity. The order did not approve the common law claims, disapprove FTB's defenses, or otherwise preclude subsequent review of the claims. Because the order did not deal with these other issues, the order simply had

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no impact on these issues when the case was remanded for further district court proceedings. The law of the case doctrine, which precludes re-litigation of an issue after an appellate court's ruling in the same case, only applies if the appellate court actually addressed and decided the issue explicitly or by necessary implication. Dictor v. Creative Mgmt. Services, LLC, 126 Nev. __, 223 P.3d 332, 334 (2010). Here, the April 4, 2002 order did not explicitly decide any issue other than comity (and other jurisdictional issues mentioned only summarily, such as full faith and credit, 5 AA 1188). Also, there is certainly no "necessary implication" that the court evaluated Hyatt's evidence or FTB's defenses on each of the common law claims, or that the court precluded subsequent legal challenges to the claims.

Here, FTB's motions for summary judgment after the 2002 remand were based on legal contentions and evidence different from those previously raised in FTB's motion for summary judgment that led to the April 4, 2002 order. Compare 2 AA 464-500; 3 AA 501 12 with 14 AA 3440-58; 14 AA 3462-75; 15 AA 3504-63; 15 AA 3581-49; 17 AA 4021-48; 17 AA 4049-83. Masonry & Tile Contractors Ass'n of S. Nevada v. Jolley, Urga & Wirth, Ltd., 113 Nev. 737, 741, 941 P.2d 486 (1997) (trial court can reconsider denial of summary judgment if different evidence is introduced or first decision was clearly erroneous); Bartmettler v. Reno Air, Inc., 114 Nev. 441, 446, 956 P.2d 1382 (1998) (trial court can reconsider summary judgment denial at any time, particularly if case has been more fully developed). Contrary to Hyatt's contention, the mere fact that this court allowed Hyatt's intentional tort claims to proceed in 2002 does not automatically mean that the district court properly refused to dismiss these claims later. Nor does the April 4, 2002 order preclude FTB from raising, or this court from considering, appellate legal attacks on Hyatt's common law claims.

2. The Applicable Standard of Review

Hyatt observes that many of FTB's legal arguments on appeal were raised in motions for summary judgment. Hyatt states that FTB "suggests that Judge Walsh erred in denying the FTB's numerous summary judgment motions because Hyatt failed to establish facts supporting one or more elements of each claim." RAB 82:10-12. Hyatt then contends

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that appellate courts should not "step back in time" to review pretrial summary judgment denials, and "it makes no sense whatsoever" to reverse a judgment on a jury verdict due to an erroneous pretrial denial of summary judgment. RAB 82-83.

Hyatt ignores the fact that all of FTB's motions for summary judgment were based on *legal* grounds establishing that the various causes of action were barred as a matter of law. We contended that even if Hyatt's evidence was accepted, there were legal impediments to his recovery on each cause of action. Contrary to Hyatt's assertion that appellate review of a pretrial denial of summary judgment "makes no sense whatsoever" in this context, this court has itself reviewed the propriety of pretrial summary judgment denials that were followed by trials and verdicts, particularly when the summary judgment motions were based on purely legal grounds. See, e.g. Mainor v. Nault, 120 Nev. 750, 762-65, 101 P.3d 308, 316-18 (2004) (summary judgment denied, followed by jury trial; verdict for plaintiff; summary judgment denial reviewed de novo on appeal from judgment; judgment for plaintiff reversed); Univ. of Nevada, Reno v. Stacey, 116 Nev. 428, 430-31, 435, 997 P.2d 812 (2000) (appeal from judgment on jury verdict; sole issue on appeal was whether district court erred by denying defendant's pretrial motion for summary judgment; judgment on jury verdict reversed because district court erred in denying the motion for summary judgment).

FTB's arguments for reversal do not rely solely on the district court's errors in denying the numerous motions for summary judgment. These motions illustrate just one of many contexts in which FTB made and preserved its legal arguments in the district court – in pretrial motions for summary judgment; in motions for judgment as a matter of law after Hyatt's case in chief; in motions for judgment as a matter of law at the close of evidence; and in post-trial motions.

Finally, contrary to Hyatt's claims, the proper standard of review related to these claims is *de novo*. As indicated in the opening brief, FTB contends that each of Hyatt's claims failed as a matter of law. AOB 68-96. With limited exception, as to each such claim FTB presented purely legal arguments defeating the claim. AOB 70-93. Almost all of FTB's

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attacks on Hyatt's causes of action involved purely legal challenges, not challenges based upon sufficiency of evidence. As to all of these legal challenges, *de novo* review is appropriate. E.g. Morris v. Bank of Am. Nevada, 110 Nev. 1274, 1276-78, 886 P.2d 454 (1994) (court made independent *de novo* determination of whether defendant's alleged statements could constitute fraud or bad faith).

3. Hyatt's Fraud Claim Fails As A Matter Of Law

Hyatt's fraud claim was predicated upon two alleged promises: (1) to treat Hyatt "fairly and impartially"; and (2) to keep certain information confidential. 14 AA 03286-93; 45 AA 11200 (76). FTB's opening brief explained that Hyatt's fraud claim failed, as a matter of law. AOB 70-78. FTB established that the district court erred when it failed to dismiss the fraud claim prior to submission to the jury. Hyatt's answering brief has not responded to or rebutted these arguments. Rather, Hyatt attempts to sidestep FTB's arguments.

a. Hyatt's Contention That The Elements Of Common Law Fraud Are Less Exacting When A Government Agency Is Accused Is Unsupported In The Law And Without Merit

Hyatt asserts that some lesser standard applies to his fraud claim because FTB is a government agency. RAB 86-88. Hyatt claims that every government investigation carries with it an implicit promise of fairness and impartiality, and that this implied promise is sufficient to support a fraud claim. Id. Hyatt argues that "[e]very citizen would understand" that a government agency always impliedly promises to be fair and impartial when conducting an investigation. Id. Based on this position, Hyatt argues that a plaintiff should be able to base an actionable fraud claim against a government agency on such a vague, ambiguous implied promise simply because the defendant is a government agency. Id. Hyatt cites no Nevada case law to support his contention. Indeed, the weight of authority points to the opposite conclusion. While this court has never explicitly held that ordinary tort elements apply in actions against government agencies or officials, it has confirmed such a result in a litany of cases. See, e.g., Clark County School Dist. v. Virtual Educ. Software, ___Nev.___, 213 P.3d 496, 503-4 (2009) (applying ordinary common law elements of

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business disparagement against school district); Butler, 168 P.3d at 1067 (applying ordinary elements of negligence to determine liability against state); State v. Eighth Judicial Dist. Court ex rel. County of Clark, 118 Nev. 140, 148, 42 P.3d 233, 239 (2002) (applying ordinary common law elements of defamation and privilege against state); Posadas v. City of Reno, 109 Nev. 448, 851 P.2d 438 (1993) (applying ordinary common law elements of defamation, intentional infliction of emotional distress and abuse of process to suit against city government).

Other courts agree. See Hess v. United States, 361 U.S. 314, 319 n. 7, (1960) (under the Federal Tort Claims Act, the law of the state where the action accrued shall govern "in the same manner and to the same extent as a private individual under like circumstances"). Maryland Environmental Trust v. Gaynor, 803 A.2d 512, 517 (Md. 2002) (court squarely rejected the plaintiffs' argument that some higher duty was owed to the landowners by a governmental agency in the context of a fraud claim); Reata Const. Corp. v. City of Dallas, 197 S.W.3d 371 (Tex. 2006) (once the city waives its sovereign immunity, it "must participate in the litigation process as an ordinary litigant"); Madajski v. Bay County Dep't of Public Works, 297 N.W.2d 642 (Mich. Ct. App. 1980) (applying ordinary elements of nuisance claim to suit against county road commission).

Hyatt relies heavily on SEC v. ESM Gov't Sec., Inc., 645 F.2d 310 (5th Cir. 1981), a case that addresses vastly different legal principles and public policies from those at issue here. See RAB 88. Unlike this case, SEC involved an application by the SEC to a federal court to enforce an administrative subpoena. SEC did not involve a civil cause of action for an intentional tort. Rather, the standards discussed in SEC apply only where the government forces a private citizen to provide access to materials that would not otherwise be constitutionally permissible, and then attempts to use those materials to support criminal or administrative charges. This is far different from the present case, where a private citizen sued a government agency, alleging that the agency represented that he would be treated courteously, and then allegedly failed to do so.

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This court should reject Hyatt's assertion that there should be some *per se* rule that a promise of fairness and impartiality can be implied in every government investigation, and that such a promise can form the basis for a fraud claim. Regardless of Hyatt's speculation as to what "[e]very citizen would understand," and regardless of whether the claim involves allegations of the government's bad faith, when the government is a defendant in a common law tort claim, the plaintiff must still prove the same common law elements of that tort .

b. Implied Promises Are Legally Insufficient To Support A Fraud Claim

FTB's opening brief established that implied promises to treat a person fairly and impartially are not actionable representations for purposes of fraud. AOB 70-73. FTB's opening brief also established that alleged promises of confidentiality to Hyatt were also not actionable because FTB never made an express promise to maintain the confidentiality of Hyatt's name, address or social security number. AOB 73-76. Hyatt's brief contends that FTB did not raise these issues in the district court. RAB 84. Hyatt is wrong. 45 AA 11186 (20-21); 45 AA 11187 (22). Hyatt's brief also concludes, without a citation to the record or legal authority, that "[t]here was nothing implied or uncertain about FTB's representations in this case." RAB 86. Once again, he is wrong.

i. FTB Did Not Explicitly Or Implicitly Promise Hyatt It Would Treat Him Fairly And Impartially

Hyatt's brief contains an internal inconsistency. At one point he acknowledges he is relying upon an implied promise (RAB 14:2-4), and at another he contends he is relying upon express promise (RAB:89). As discussed in detail in the FTB's opening brief, the **ONLY** evidence Hyatt presented at trial to establish that FTB "promised" him that it would treat him fairly and impartially during the audit, was a copy of a standardized, widely distributed privacy notice that indicated "what you [the taxpayer] should expect from the Franchise Tax Board" during the course of the audit. See 1 SAA 00001-5. This notice indicated that a taxpayer can expect "courteous treatment by the FTB employees." See id. At trial, Hyatt argued from that promise of courtesy there was implied a promise of fairness and impartiality. ABB 70-71. Hyatt's brief does not identify any evidence that supports his

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contention that FTB **explicitly** promised him it would treat him fairly and impartially during the audit. See RAB 89-90. In fact, at RAB 14:2-4, Hyatt acknowledges he was relying upon an implied promise: "the initial privacy notice states that FTB will treat the taxpayer with courtesy, and this was intended to convey to Hyatt that the FTB would conduct a fair and unbiased audit." Such an inference or implied promise is insufficient as a matter of law to support the jury's verdict for fraud, which must be proven by clear and convincing evidence. Bulbman, 108 Nev.at 110-111. Evidence that FTB sent Hyatt a form notification that indicated that it would treat Hyatt with courtesy is not clear and convincing evidence to support Hyatt's claim that FTB promised – either implicitly or explicitly – to treat him fairly and impartially during the audit.

To support his new argument that FTB made an express promise of fairness and impartiality, Hyatt relies on the testimony of Marc Shayer, who was the first auditor assigned to Hyatt's case, and who sent the privacy notice described above. RAB 89. However, Shayer's testimony does not support Hyatt's contention. See id. Rather, Shayer merely testified that the statements to treat Hyatt with courtesy, as contained in the privacy notice, were generally things that auditors "were supposed to do when performing an audit." See 45 AA 11221 (159:6-11). Shayer never testified that he expressly promised or intended to promise that FTB would treat Hyatt fairly and impartially by sending out its privacy notice. Id. Shayer's testimony reveals that these statements were little more than aspirational goals – as contained in FTB's Mission Statement – that FTB employees were supposed to strive to achieve. Id.[28] As explained in FTB's opening brief, it is well-settled that aspirational goals found in standardized and widely distributed handbooks, manuals, or policy statements are insufficiently vague to form the factual predicate for a fraud claim. See AOB 73.

[28]The meaning of courteousness and impartiality are matters upon which individual judgments can be expected to differ, and are therefore improper statements on which to base a fraud claim. See Restatement (Second) of Torts §538A (1977).

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Hyatt's brief claims there was additional evidence to support this promise. RAB 89-90. For example, Hyatt claims that "FTB holds itself out to taxpayers in its Privacy Notice, Mission Statement, Strategic Plan, manuals, and in communications with the public to be fair and impartial and that 'FTB's internal Audit Standards require that auditors act with objectivity and in a fair and unbiased manner.'" RAB 13. Hyatt's brief fails to point to any evidence that Hyatt actually saw or received any of these publications at the beginning of the audit. Hyatt's brief fails to establish or explain how any of these statements in these various publications are evidence that any FTB employee **expressly promised Hyatt** to treat him fairly and impartially. Hyatt also claims that "[e]very FTB audit witness at trial testified he or she must act in a fair and impartial manner." RAB at 14; see also, 90. But here again, **none of these witnesses testified they promised Hyatt, spoke to Hyatt, or otherwise communicated to Hyatt or his representatives** – either implicitly or explicitly – that they would treat Hyatt fairly and impartially during the audit.

ii. FTB Did Not Promise Hyatt To Keep His Name, Address, Social Security Number Or The Fact He Was Under Audit Confidential

Here again, FTB's brief established that Hyatt's fraud claim also fails, to the extent it is predicated upon FTB's alleged promises to maintain the confidentiality of his name, address and social security, because FTB never promised it would keep this information confidential. AOB 73-75. In response, Hyatt attempts to broaden the nature of the confidentiality promise by referencing various documents wherein FTB and Hyatt did discuss the confidentiality of certain information. RAB 91. However, these documents do not establish that FTB **specifically promised** Hyatt it would maintain his name, address and social security number confidential.

As previously explained by FTB, the representations of confidentiality were made in the context of the parties' discussions of a very narrow group of Hyatt's business documents and patent-related information. See AOB 74. Hyatt attempts to tie disclosures regarding his name, address and social security number to the promises made with respect to his business documents. See RAB 91. Because there were no broad promises of confidentiality

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concerning his name, address and social security number, and because FTB did not violate the promises of confidentiality with respect to Hyatt's business documents, there was no fraud.

c. There Was No Fraudulent Intent, Nor Could Such Be Legally Inferred

As discussed at length in the FTB's opening brief, Hyatt presented absolutely **no evidence** at trial that FTB had the requisite intent; i.e. that it knew its statements were false **at the time they were made** and deliberately intended to induce Hyatt to act or refrain from acting. AOB 76-77. Where a plaintiff bases his claim for fraud on a statement of future intentions, the plaintiff must provide evidence that, at the time the statement was made, the defendant never intended to honor or act on his statement; evidence that the promisor failed to fulfill a promise is insufficient, by itself, to show that the promisor had the requisite fraudulent intent. Tallman v. First Nat. Bank of Nev., 66 Nev. 248, 261, 208 P.2d 302, 308 (1949). Fraudulent intent may not be inferred from a subsequent failure to perform a promise. Id.; Bulbman, 108 Nev. at 112.

Throughout his answering brief, Hyatt attempts to avoid the absence of fraudulent intent by making conclusory statements that FTB acted in bad faith. See RAB 91-92. He goes so far as to suggest that the intent element of fraud can be established by simply accepting his factual and legal conclusion that the FTB acted in bad faith. See RAB 91-92. Notably, Hyatt offers no authority to support this claimed legal principle. Id.

Hyatt's argument to support the intent element of his fraud claim is based entirely on FTB's alleged **subsequent** failure to perform on its alleged promises of fairness and confidentiality. See, e.g., RAB 15-37 (detailing evidence of so-called "bad faith" based upon conduct of third FTB auditor to work on Hyatt's case over a year and a half after the audit was initiated and alleged promises were made). Hyatt baldly asserts, without citing to anything in the record, that the FTB "conducted a goal-oriented audit" and later assessed a fraud penalty against Hyatt "to better bargain for and position the case to settle." See RAB

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91.[29] With these broad and unsupported statements, Hyatt attempts to equate fraudulent intent with various events that occurred well after the alleged promises of fairness and impartiality in 1993. To the extent Hyatt's "bad faith" term of art refers to his allegations that Anna Javonovich threatened him to force a settlement in 1995, see RAB 40-41, Hyatt has not shown how or why this allegation bears any relationship to Marc Shayer's alleged promises in 1993. To the extent Hyatt is referring to his characterizations of FTB's amnesty program, see RAB 51, Hyatt has not shown how or why this program originated in 2004 relates to Marc Shayer's alleged promises in 1993. Finally, to the extent that Hyatt is referring to his allegations that Shelia Cox made an anti-Semitic remark in 1995, see RAB 15-16, or a boast to Hyatt's ex-wife in 1995, see RAB 15-16, or a boast to Hyatt's ex-wife in 1995, see RAB 92:3-4, he has not shown how or why this allegation bears any relationship, temporal or otherwise, to Marc Shayer's alleged promises made in 1993.

Even accepting Hyatt's allegations and gross mischaracterizations as true, all of FTB's alleged bad faith actions took place well after the alleged promises of future conduct made in 1993. Because Hyatt has failed to present anything other than FTB's alleged subsequent failure to perform on its promises, as a matter of law, he cannot establish the requisite intent element of his fraud claim.

d. There Was No Justifiable Reliance

To establish justifiable or reasonable reliance, this court requires the following:

> The false representation must have played a material and substantial part in leading the plaintiff to adopt his particular course; and **when he was unaware of it at the time that he acted, or it is clear that he was not in any way influenced by it, and would have done the same thing without it or for other reasons, his loss is not attributed to the defendant.**

Lubbe v. Barba, 91 Nev. 596, 600, 540 P.2d 115, 118 (1975) (emphasis added). Lack of justifiable reliance bars recovery in an action for fraud. Pac. Maxon, Inc. v. Wilson, 96 Nev. 867, 870, 619 P.2d 816, 818 (1980). Where the defendant's alleged misrepresentations could not have been material to the plaintiff's decision to act, no justifiable reliance exists.

[29]The court should also note that Hyatt does not contest that the events he says prove fraudulent intent all occurred after 1993. RAB 91-92.

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See Clark Sanitation, Inc. v. Sun Valley Disposal Co., 87 Nev. 338, 342, 487 P.2d 337, 339 (1971). Here, contrary to Hyatt's assertions, he could not and did not justifiably rely to his detriment on any of FTB's alleged promises.

Regardless of any representations or promises FTB made, Hyatt was required by law to comply with the audit. Indeed, the very same letter in which he claims FTB made the promises (FTB will treat you with courtesy and will comply with California's Information Practices Act and Federal Privacy Act) which induced him to cooperate contains the following language:

> It is ***mandatory*** to furnish all information requested when you are required to file a return or statement. If you do not file a return, or do not provide the information we ask for, or provide fraudulent information, the law says you may be charged with penalties and interest and, in certain cases, you may be subject to criminal prosecution. We also may disallow claimed exemptions, exclusions, credits, deductions or adjustments. This could make the tax higher or delay or reduce any refund.

See 1 SAA 00003 (emphasis added). Hyatt's contention that his only reason for cooperating with the audit was based on his belief that the FTB would treat him courteously and keep his information private (RAB 92:13-16) is disingenuous because he knew his failure to cooperate would result in severe financial or criminal penalties. See id.

In addition, Hyatt contends that his reliance is proven by the alleged special damages (professional fees he incurred during the audit) he sustained. RAB 92-93. For the reasons discussed above, he would have incurred those sums anyway.

4. Hyatt's Invasion of Privacy Claims Fail As A Matter Of Law

Hyatt's brief erroneously contends that FTB's various invasion of privacy arguments must be rejected because there was substantial evidence presented to the jury to support these claims. RAB 97; 104-107. Hyatt misses the point. This is not a substantial evidence issue. Rather, FTB contends that **none** of Hyatt's invasion of privacy claims should have been submitted to the jury because these claims should have been dismissed as a matter of law. AOB 78-79.

a. FTB's Disclosures Of Hyatt's Identity Information Was Made Strictly In The Context Of FTB's Investigation

Throughout his brief, Hyatt claims that FTB made "massive disclosures of his

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personal information." See, e.g., RAB 37, 95, 102, 107, 124. Hyatt claims that these "mass disseminations" were "unprecedented" disclosures of his personal information – i.e., his name, social security number, address ("the Tara address"),[30] credit card information, and "other personal information."[31] Id. at 37-38, 133, 181:8.

i. Credit Card Number

In truth, there was only 1 disclosure of Hyatt's credit card number and that was to a third-party who already possessed the number.

NAME OF RECIPIENT	RECORD CITES
Federal Express	66 AA 16279-80

In reviewing Hyatt's credit card statements, FTB discovered that Hyatt used his card for payment to Federal Express, 42 AA 10384 (115)-(117), and FTB requested information about origination and drop-off of his packages. 66 AA 16279-80. FTB provided Hyatt's credit card number, which Hyatt himself had already given to Federal Express to pay for these shipments. Id.

ii. Tara Address

In truth, only 11 letters referenced Hyatt's Tara address.

NAME OF RECIPIENT	RECORD CITES
Allstate Sand and Gravel	65 AA 16174
CG Eggers	64 AA 15997-98
Clark County Recorder	64 AA 15879
Clark County Treasurer	63 AA 15717
Harold Pryor	64 AA 15995-96

[30]Hyatt's challenged disclosure of his address was limited to his Las Vegas Home on Tara Avenue. See 14 AA 03281. Thus, when FTB refers to the disclosures of Hyatt's address, it is referring only to FTB's disclosure of the Tara address.

[31]Hyatt does not identify what "other personal information" FTB allegedly disclosed other than the information listed. FTB cannot and will not attempt to address this new unsubstantiated category of "other personal information" in this reply brief.

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KB Plumbing	64 AA 15999
Las Vegas Sun	66 AA 16382-83
LV Valley Water Dist.	65 AA 16095-96
Orange County Treasurer/Tax Collector	63 AA 15697
Silver State Disposal	65 AA 16097-98
Southwest Gas Co.	65 AA 16099-100

Every recipient was already in possession of his address. Over half were sent to government agencies or public utilities, already in possession of the information. (Clark County Recorder) 64 AA 15879; (Clark County Treasurer) 63 AA 15717; (Las Vegas Valley Water District) 65 AA 16095-96; (Orange County Treasurer/Tax Collector) 63 AA 15697; (Silver State Disposal) 65 AA 16097-98; (Southwest Gas Company) 65 AA 16099-100.

Of the 5 remaining contacts: two were sent to Hyatt's neighbors – each of whom lived on the same street as Hyatt and were clearly aware of the Tara address, (CG Eggers) 64 AA 15997-98; (Harold Pryor) 64 AA 15995-96; two were sent to companies that had performed work and/or services at the Tara address, and obviously had the address, (Allstate Land and Gravel) 65 AA 16174; (KB Plumbing) 64 AA 15999; and one was sent to the subscription department of the newspaper to determine whether the newspaper was being delivered to Hyatt's home, 66 AA 16382-83.[32]

Of the third-party disclosures that used Hyatt's Tara address, only 6 referenced Hyatt's name somewhere on the correspondence in conjunction with the address. In other words, although FTB may have disclosed the Tara address, FTB did not connect Hyatt's name to that address in such way that it would reveal Hyatt lived there. (Allstate Sand and Gravel) 65 AA 16174; (Clark County Assessor) 63 AA 15723; (Las Vegas Sun) 66 AA

[32]An individual "must expect the more or less casual observation of his neighbors and the passing public as to what he is and does and thus there is no liability for publicizing that he has returned home from a visit, or gone camping in the woods, or given a party at his house for his friends." Johnson v. Sawyer, 47 F.3d 716, 733 (5th Cir. 1995) citing Restatement (Second) of Torts, § 652 D, comment b.

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16382-83; (Las Vegas Valley Water District) 65 AA 16095-96; (Silver State Disposal) 65 AA 16097-98; (Southwest Gas Company) 65 AA 16099-100.

Thus, FTB's so-called "massive disclosures" of Hyatt's Tara address were in reality 11 third-party contacts, over half of which did not reference Hyatt's name, and all of which were sent to individuals or entities that already had the Tara address in their possession at the time of the disclosure.

iii. Social Security Number

Hyatt also claims that FTB made "massive disclosures" of his social security number to third parties. RAB 37-38, 133, 188. In this instance, 43 of the contacts contained Hyatt's social security number which was used as an identifier, common at the time, to ensure that they were requesting and receiving information about the right Gilbert Hyatt.

NAME OF RECIPIENT	AA CITES
Association of Computing Machinery	64 AA 15900-01
Bizmart	64 AA 15941-42
Block, Plant & Eiser	65 AA 16127-28
City Water Service -- La Palma	63 AA 15734-35
Clark County Assessor	63 AA 15723
Clark County Department Election	63 AA 15668
Clark County Department Elections	65 AA 16109
Commerce Bank	64 AA 15971-972
Congregation Ner Tamid	65 AA 16080-81
Copley Colony	65 AA 16023-24
Dale Fiola	65 AA 16123-24
Great Expectations	64 AA 15906-09
Greg Roth	65 AA 16139-40
Institute Electrical & Electronic Engineers	64 AA 15902-03
Las Vegas Sun	65 AA 16093-94
Las Vegas Sun	66 AA 16382-83
Las Vegas Valley Water District	65 AA 16095-96
Lesley Anne Andrus	65 AA 16141-42
Licensing Executives Society	64 AA 15898-99
Loeb and Loeb	65 AA 16121-22
Nevada Development Authority	64 AA 15910-11
Nevada DMV	63 AA 15615
Orange County Register	66 AA 16386-87

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Orange County Times	66 AA 16384-85
Orange County Treasurer/Tax Collector	63 AA 15701-02
Orange County Treasurer/Tax Collector	63 AA 15697
Orange County Voter Registration	63 AA 15694
Personal Computer Users Group	64 AA 15912-13
Post Office Cerritos	63 AA 15673
Roger McCaffrey	65 AA 16125-26
Sam's Club	64 AA 15943-44
Sam's Club	64 AA 15973-74
Silver State Disposal	65 AA 16097-98
Southern California Edison	63 AA 15731-32
Southwest Co. Club	65 AA 16024-26
Southwest Gas Co.	65 AA 16099-100
Sports Authority	64 AA 15904-05
Sports Authority	64 AA 15939-40
Temple Beth Am	64 AA 15896-97
Temple Beth Am	64 AA 15945-46
US Postmaster -- CA	65 AA 16078
US Postmaster -- CA	65 AA 16077
Wagon Trails Apartment Complex	64 AA 15990-94

In fact there were two Gilbert Hyatts that resided in Las Vegas at the time of FTB's audits. 39 AA 09716 (75)-(76).

At trial, it was undisputed that one's social security number was the most commonly and regularly used identifier in the mid-1990's. See 39 AA 09726 (117) – 27 (119), 9728 (125-26) (testimony of Hyatt's privacy expert, Daniel Solove); 48 AA 11801 (96-97), 11802 (99), 11817 (160) - 11818 (164) (testimony of FTB's privacy expert, Deidre Mulligan). For example, during that timeframe, social security numbers were used as driver's license numbers in Nevada. 1996 Nev. Op. Att'y Gen. No. 26 (Sept. 13, 1996); NRS 483.345 (1996).[33] Colleges and universities in Nevada used social security numbers as

[33]At trial, several examples were discussed concerning the use of a driver's license as identification. E.g. Before ATM's, when one paid for groceries with a check, the cashier would ask to see the payor's driver's license and note the social security number on the

Continued . . .

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student identification numbers. 48 AA 11800 (90). Social security numbers were required on voter registration forms--like Hyatt's--which are public documents. 77 AA 19098 – 19102. Hyatt, himself, freely disclosed his social security number to many government agencies, individuals and business without requesting confidentiality. 47 AA 11626 (75) – 11628 (85); 77 AA 19100 – 02; 78 AA 19429. Hyatt also placed his social security number into the public record in numerous litigations ongoing at the time of FTB's audit. 78 AA 19346-48; 19369-78, 19393, 19405, 19425.

iv. Hyatt's Name Only

To begin, Hyatt offers no argument or case law explaining how disclosure of simply his name invaded his privacy. Moreover, can one imagine conducting any government investigation without ever disclosing the identity of these individual under investigation?

The letters that Hyatt complains of were sent to Hyatt's own professionals, business contacts or government agencies.[34] Many of the entities and individuals were provided by Hyatt as his own Nevada contacts.[35] Others were either friends or knew of Hyatt.[36] Both Chris Woodward and Jerry Hicks had interviewed Hyatt for newspaper articles. 66 AA 16281-2. All of these individuals clearly knew Hyatt's name when they received FTB's

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check. 30 AA 7437 (192)-(193); 48 AA 11800 (90); 11801 (94)-(95). Grades at colleges and universities were publicly posted using social security numbers. Id.

[34](Association of Colo-Rectal Surgery) 65 AA 16022; (Dr. Edgar Hamer) 64 AA 15957; (Dr. Gerald Isenberg) 64 AA 15967; (Dr. Steven Hall) 64 AA 15968; (Dr. William Peloquin) 64 AA 15969; (Las Alamitos Imaging) 64 AA 15965-66; (University Medical Center) 64 AA 15970; (Association of Colo-Rectal Surgery) 65 AA 16022; (Clark County School District) 65 AA 16108; (Dr. Edgar Hamer) 64 AA 15957; (Dr. Eric Shapiro) 64 AA 15958; (Dr. Gerald Isenberg) 64 AA 15967; (Dr. Melvin Shapiro) 64 AA 15959; (Dr. Nathan Shapiro) 64 AA 15960; (Dr. Norman Shapiro) 64 AA 15961; (Dr. Richard Shapiro) 64 AA 15962; (Dr. Shapiro) 64 AA 15964; (Fujitsu) 65 AA 16187-88; (Gov. Robert Miller) 65 AA 16191; (Helene Schlindwein) 65 AA 16169-173; (LA Times, Chris Woodyard) 66 AA 16282; (LA Times, Jerry Hicks) 66 AA 16281; (Las Alamitos Imaging) 64 AA 15965-66; (Linda Wetsch) 66 AA 16362-65; (Matsushita) 65 AA 16189-90; (Sen. Richard Bryan) 65 AA 16192; (University Medical Center) 64 AA 15970.

[35](Clark County School District) 65 AA 16108; (Gov. Robert Miller) 65 AA 16191; (Sen. Richard Bryan) 65 AA 16192.

[36]38 AA 9339 (159) (Helene Schlindwien).

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correspondence.

v. Purpose Of The Third-Party Contacts

In addition to creating an impression of "massive" disclosures, Hyatt's brief also attempts to create the impression that FTB had no legitimate business purpose for sending the correspondence. See generally RAB 37-40. This, too, is false.

As explained in FTB's opening brief, each of its third-party contacts was sent for the purpose of investigating Hyatt's claim that he severed his California residency, which also included verifying information that Hyatt had provided FTB to support this claim[37]. See AOB 6-16. The undisputed testimony at trial established unequivocally that all of these documents were sent for the purpose of conducting a legitimate residency audit of Hyatt and for no other purpose. 42 AA 10313 (167)-10320 (196); 10363 (32)-10394 (156). This same undisputed evidence, explained in detail in FTB's brief, reveals that each third-party contact was individually tailored to each recipient in order to receive only the specific information believed to be in the possession of that entity or person. Id.; see AOB 9-12.

With each of these documents FTB was attempting to determine, objectively, the state in which Hyatt maintained the closest connections – such as where he maintained his bank accounts; where he belonged to professional groups and organizations; where he saw a doctor or dentist; where he got his daily newspaper; where he was registered to vote; where he owned property; where he purchased groceries, filled prescriptions, got his hair cut;

[37]California law defines a "resident" as an individual who is in California for other than a temporary or transitory purpose or who is domiciled in California but who is outside the state for a temporary or transitory purpose. Cal Rev. & Tax. Code § 17014(a). This is determined by examining the objective facts surrounding the taxpayer's residency – not the taxpayer's subjective intent. In the Matter of the Appeal of Constance L. Maples, 2009 WL 532503 at *5 (Cal. St. Bd. Eq. Jan. 21, 2009). Where an individual has significant contacts with more than one state, the state in which the individual maintains the closest connections during the taxable year is deemed to be the state of residence. Id. To determine which state has the closest connections, FTB must consider objective factors and connections that a taxpayer may have with a specific state – such as the location of the taxpayer's real property, telephone records, the number of days the taxpayer spent in California versus the number of days spent in other states during the disputed time period, and other like information. Maples, 2009 WL 532503 at *4-5.

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where he maintained utilities; etc. 42 AA 10313 (167)-10320 (196); 10363 (32)-10394 (156). FTB did not just send out third-party correspondence randomly. Rather, it sent requests to those government agencies, public utilities, companies, individuals, and neighbors, which either knew, or should have known, information related to Hyatt's connections in either California or Nevada during the disputed time period. See id.

b. Nevada Does Not Recognize A Common Law Claim For Breach of Information Privacy; Such Claims Have Been Created By Legislatures or Congress

As previously argued in FTB's opening brief, Nevada does not recognize a cause of action for breach of informational privacy. See AOB 79-81. Nevada has made clear that it will not create a new common law claim when a statutory remedy already exists. [38]See, e.g. Sands Regent v. Valgardson, 105 Nev. 436, 440, 777 P.2d 898 (1989). Hyatt's primary response is that this issue was addressed by this court's 2002 order. RAB 95-96. As already indicated at pages 54-57, this court's 2002 order did not address this issue.

In this case, Hyatt relied principally upon alleged violations of California's Information Privacy Act and the Federal Privacy Act in support of his invasion of privacy claims. 52 AA 12824 (39)-(40); 12896 (37)-12897 (41). Both those statutes have comprehensive remedies for violations thereof. Cal. Civ. Code § 1798 et. seq.; 5 U.S.C. § 522a et. seq. Under Nevada law, Hyatt cannot create a new common law claim, instead of invoking those available statutory remedies. Hyatt baldly claims that the cases cited by FTB on this issue have no application to this case. See RAB 96. To the contrary, and on this issue FTB's point is best described by the court in Johnson v. Sawyer, 47 F.3d 716 (5th Cir. 1995), a case with remarkably similar facts:

> Even apart from the foregoing, there is no showing that Texas would create a common law cause of action for violation of section 6103(a)(1), inasmuch as section 7217 provided for a comprehensive private cause of action for any such violation. While Texas generally recognizes the doctrine of negligence *per se*, no Texas decision has been found applying the doctrine

[38]Nevada's Legislature did not recognize any protection for information privacy until 2005. See NRS 239B.030; NRS 239B.040.

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> to create a common law cause of action for a statutory violation *where* there is a comprehensive and express statutory private cause of action for the statutory violation. Moreover, in this instance both the statute violated and the statute creating the cause of action for that violation are federal. We can think of no reason for a Texas court to create a common law cause of action for the statutory violation in such a circumstance. We have long followed the principle that we will not create "innovative theories of recovery or defense" under local law, but will rather merely apply it "as it currently exists." As there is currently no Texas law creating a common law cause of action for a statutory violation for which violation there is an express and comprehensive statutory cause of action, we will not undertake to ourselves create such a Texas common law cause of action.

Id. at 729 (citations and footnotes omitted).

c. There Was No Objective Expectation Of Privacy In The Information Disclosed By FTB As Part Of Its Audit

Hyatt's brief seems to ignore the requirement that he must have a reasonable expectation of privacy in the challenged disclosures. Hyatt has confused this requirement throughout this litigation – as he does now on appeal. Hyatt suggests it was appropriate for his invasion of privacy claims to be submitted to the jury merely because he had a "subjective expectation of privacy" in his name, home address and social security number. RAB 104-105. To this end, Hyatt claims that there is no relevance to whether he was a "public figure";[39] whether he hired a publicist and sought out and received substantial publicity; or whether the claimed "confidential" information was already a matter of public record when it was disclosed. See generally RAB 105-106. These arguments, however, are legally incorrect.

With an invasion of privacy claim there are two required expectations: (1) subjective expectation of privacy, and (2) this expectation must be objectively reasonable under the circumstances of the case. People for the Ethical Treatment of Animals v. Berosini, 111

[39]FTB is asserting that given Hyatt's public persona, the substantial publicity he personally generated for himself during the time the audit was being conducted (including conducting dozens of press interviews in his California home and having news organizations photograph his Tara address), Hyatt's objective expectation of privacy in his personal information was seriously, if not completely, diminished under the circumstances.

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Nev. 615, 632-33, 895 P.2d 1269 (1995); see also, Peters v. Vinatieri, 9 P.3d 909, 914-15 (Wash. Ct. App. 2000).

Whether an objective expectation of privacy exists in a particular context is a question of law for the court to decide. See, e.g., PETA v. Berosini, 111 Nev. at 633 n.20; Greywolf v. Carroll, 151 P.3d 1234, 1246 (Alaska 2007); Peters, 9 P.3d at 914-15. The issue here is not whether there was substantial evidence for the jury to determine that an objective expectation of privacy existed in this information, but whether the court should have permitted these claims to proceed to the jury in the first instance.

When objectively evaluating the scope of a privacy interest, the court must consider the circumstances surrounding the alleged invasion of privacy. PETA v. Berosini, 111 Nev. at 634; Ortiz v. Los Angeles Police Relief Ass'n, 120 Cal. Rptr. 2d 670, 679-80 (Cal. Ct. App. 2002) ("reasonable' expectation of privacy is an objective entitlement founded on broadly based and widely accepted community norms...."). Community norms are determined by evaluating the customs of the time and place, the occupation of the plaintiff and the habits of his neighbors and fellow citizens. Restatement (Second) Torts § 652D, cmt. c. (1965). The customs, practices, and physical settings surrounding particular activities has effected whether a reasonable expectation of privacy may be present under certain circumstances. See, e.g., Whalen v. Roe, 429 U.S. 589, 602 (1977) (reporting of drug prescriptions to government was supported by established law and "not meaningfully distinguishable from a host of other unpleasant invasions of privacy that are associated with many facets of health care"); Fraternal Order of Police, Lodge No. 5 v. City of Philadelphia, 812 F.2d 105, 114 (3d Cir. 1987) (no invasion of privacy in requirement that applicants for promotion to special police unit disclose medical and financial information in part because of applicant awareness that such disclosure "has historically been required by those in similar positions").

Whether Hyatt had a protectable, objective expectation of privacy in his name, address, or social security number, must be determined in light of the facts and circumstances that surround this case as well as the customs and norms in Nevada between

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1993 to 1995 – the period of time when FTB allegedly invaded his privacy. Runion v. State, 116 Nev. 1041, 1049, 13 P.3d 52 (2000). This requires the court to consider: the context of the disclosures, the nature and extent of the disclosures, Hyatt's own publicity, Hyatt's own disclosures of information, and the like. See PETA, 111 Nev. at 633 n.20; Ortiz, 98 Cal. App. 4th at 1304-05. When these factors are considered objectively, there is no question that Hyatt did not have an objectively reasonable expectation of privacy in the information disclosed.

The undisputed evidence revealed that all of the challenged disclosures of Hyatt's identity information were made during the course of a lawful audit investigation regarding Hyatt's residency. 42 AA 10313 (167)-10320 (196); 10363 (32)-10394 (156). As explained in FTB's brief, an expectation of privacy is diminished when someone is under investigation. AOB 84. Hyatt claims that the cases relied upon by FTB for this proposition do not apply to this case "because the government initiated the investigation of its own purposes." RAB 105-106. It is unclear what Hyatt means with argument. There is, however, no distinguishing these cases. Hyatt, like the plaintiffs in the cases relied upon by FTB, made a claim to a third-party about a fact pertaining to him. For example, in each of these cases, the plaintiffs made claims to their insurance companies or employers that they were entitled to worker's compensation or filed personal injury claims. See, for example, Schlatter v. Eighth Judicial Dist. Court In & For Clark County, 93 Nev. 189, 561 P.2d 1342 (1977); McLain v. Boise Cascade Corp., 533 P.2d 343, 346 (Or. 1975); Forster v. Manchester, 189 A.2d 147, 150 (Pa. 1963). In this case, Hyatt claimed to FTB that he was no longer a resident of California as of October 1, 1991 – shortly before he received 40 millions of dollar in taxable income. 63 AA 15528-29. FTB, like the investigating agencies in the above cases, investigated the accuracy of Hyatt's claim. 63 AA 15605. The context of these disclosures – during a lawful investigation – diminished, if not eliminated, Hyatt's expectation of privacy in this information.

Second, the nature and extent of the disclosures during the investigation further undermines any objectively reasonable expectation of privacy in this information. As

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explained above, virtually all of the challenged disclosures were made to businesses, government entities, Hyatt's own professionals, or entities and persons that Hyatt identified as possessing knowledge about his residency. See pages 66-68 above. Obviously, disclosures of information to someone that already has the information cannot be an invasion of privacy. Moreover, the vast majority of the disclosures were made to businesses or government entities. Id. As explained in FTB's opening brief, there is no expectation of privacy in business records. Couch v. United States, 409 U.S. 322, 335-36 (1973); United States v. Miller, 425 U.S. 435 (1976). In addition, it is a well accepted point that the disclosure of one's home address and name is not an invasion of privacy. See McNutt v. New Mexico State Tribune Co., 538 P.2d 804, 808 (N.M. Ct. App. 1975) (publication of names and addresses of police officers and wives was not an invasion of privacy); see also, 62A Am. Jur.2d Privacy § 172.

Third, contrary to Hyatt's claim that he is a private person who has actively sought privacy in his life, Hyatt enjoyed widespread publicity throughout the time FTB was allegedly disclosing his identity information – in particular his name. In fact, Hyatt was the subject of hundreds of newspaper and magazine articles. 40 ARA 9977–10002; 41 ARA 10188; 44 ARA 10751; 89 AA 22070-137. And, it was Hyatt who engaged the publicist that generated this very publicity. 48 AA 11986 (107)-11989 (121). Hyatt offered no argument in response to FTB's claim of prejudicial error by Judge Walsh's refusal to admit the massive publicity surrounding Hyatt. See RAB 97. If, as Hyatt contends, it was an issue for the jury concerning the reasonableness of his privacy expectation, then surely the jury was entitled to review all the relevant evidence. 48 AA 11984 (99)-1192 (133). By engaging in this type of publicity, Hyatt regularly and personally disclosed his name and significant information about his personal life to the public at large – without any concern for his personal privacy. Moreover, Hyatt was freely disclosing his social security number, Tara address and other information to various vendors and others without seeking any promises of confidentiality – at the exact same time that FTB was using the same identity information to ensure it was getting information about the correct Gilbert Hyatt. 38 ARA 9430 – 39

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ARA 9559; 79 AA 19732 – 80 AA 19753. These disclosures by Hyatt were made to such entities as piano delivery men, Sam's Club, Sears, a Toyota dealership, Allstate Sand and Gravel, State Farm, an air conditioning company, an appliance repair company, construction companies and others. Id.

Fourth, Hyatt's name, social security number and address were a matter of public record during the same period that FTB allegedly disclosed this information. See pages 79-80 below. Therefore, Hyatt's own actions and behaviors reveal that there could hardly be an objective expectation of privacy in his name, Tara address, and social security number between 1993 and 1995 when FTB used his identity information.

Finally, the undisputed evidence at trial revealed that in Nevada between 1993 and 1995 this identity information was routinely and widely disclosed.[40] See 1996 Nev. Op. Att'y Gen. No. 26 (Sept. 13, 1996); NRS 483.345 (1996); 48 AA 11801 (94-97); 47 AA 11614 (27), 11623 (64). The customs and practices in Nevada between 1993 and 1995 reveal that Hyatt's name, address and social security number were not considered highly confidential information at that time. See Johnson v. Sawyer, 47 F.3d at 736 n. 40.

Taking all of these facts and issues into consideration, Hyatt had no objective expectation of privacy in his identity information during FTB's audit investigation. The disclosures were made during a lawful investigation; they were narrowly tailored to third parties that were expected to have information related to Hyatt's residency; the disclosures were made to entities and individuals that either had, or were likely to have, the information disclosed; Hyatt received significant publicity, based upon his own efforts, during the time of the audit; Hyatt regularly disclosed this same information during the timeframe; the information disclosed was already a matter of public record; and the customs and actions in Nevada during the relevant timeframe did not support a finding of privacy in this

[40]The court cannot review FTB's conduct under today's standards. Rather, the court must consider the customs and practices related to the disclosure of this information between 1993 and 1995 – when the disclosures were actually made. See, Ortiz, 98 Cal. App. 4th at 1304-05; Restatement (Second) Torts § 652D, cmt. c. (1965).

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information.[41] Based upon all of these facts, the district court erred when it did not determine, as a matter of law, that there was no objective expectation of privacy in the matters disclosed.

d. Since All Information Disclosed Was A Public Record, Hyatt's Claims Were Precluded By The Public Records Defense

Hyatt's brief did not provide any legal or evidentiary basis to overcome the fact that the identity information disclosed by FTB was a matter of public record at the time it was disclosed during the audit. In fact, Hyatt does not dispute that his name, address and social security number (the claimed "personal" or identity information alleged to have been impermissively disclosed by FTB) were a matter of public record at the time of the disclosures. See RAB 97-103. Contrary to Hyatt's advocacy, the question here is whether liability under an invasion of privacy theory can be imposed for the disclosure of identity information, including social security numbers, when that information is already found in public records.

This court, the United States Supreme Court and the Restatement of Torts have answered this question by unequivocally holding that information contained in public records, including old public records, cannot form the basis for liability for common law invasion of privacy claims. Montesano v. Donrey Media Group, 99 Nev. 644, 649, 668 P.2d 1081 (1983); Cox Broad. Corp. v. Cohn, 420 U.S. 469 (1975); Restatement (Second) of Torts 652D cmt. b (1977). In fact, comment b of the restatement specifically notes that, "[t]here is no liability when the defendant merely gives further publicity to information about the plaintiff that is already public . . . [including] facts about the plaintiff's life that are matters of public record, such as the date of his birth, the facts of his marriage, . . . or the

[41]Under each of the invasion of privacy torts, the plaintiff must establish that the alleged invasion of privacy would be highly offensive to a reasonable person. PETA, 111 Nev. at 634. The factors that are applied to determine whether conduct is highly offensive are analogous to the factors that are used to determine whether the expectation of privacy is objectively reasonable. Id.; See also, Taus v. Loftus, 151 P.3d 1185, 1222, (Cal. 2007) (considering same factors to conclude that both reasonable expectation of privacy and highly offensive intrusion existed).

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pleadings that he has filed in a lawsuit."

Hyatt attempts to sidestep this clear, binding authority by arguing that Montesano and Cox are not controlling and are distinguishable from this case. Hyatt argues that Montesano does not apply because the public records at issue in that case are different from the public records at issue here since the information disclosed was "never private" and never "intended to be private." RAB 101. Montesano makes no such distinction. Montesano, 99 Nev. at 649. Rather, Montesano, like Cox before it, held that disclosing information that is already available to the public or is a matter of public record cannot provide the basis for common law invasion of privacy claims in Nevada. Id. Hyatt also argues that information contained in "isolated and stale" public records is not subject to the public records defense or the holding of Montesano. RAB 97, 98. Montesano expressly rejected Hyatt's argument. This court held that information relating to an arrest of the plaintiff which occurred in 1955, when plaintiff was a minor, and which was contained in a public record could not form the basis of an invasion of privacy claim following the republication of this information 24 years later in 1979. Montesanto, 99 Nev. at 649. As this court stated, courts have "universally recognized" that "materials properly contained in a court's official records are public facts." Id. Thus, regardless of Hyatt's attempts to distinguish Montesano, Nevada law is clear – information that is a matter of public record cannot form the basis for an invasion of privacy claim in this State. Id. [42]

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[42]Several cases cited by Hyatt have no application to the question of whether disclosure of information such as a person's name, address, or social security number, that is already a matter of public record, can ever provide the basis for a common law invasion of privacy claim. For example, some citations only address the issue of whether lists of certain people, which include this type of information, should be disclosed under Freedom of Information Act requests. Heights Cmty. Cong. v. Veterans Admin., 732 F.2d 526 (6th Cir. 1984). Other cases cited by Hyatt address liability for federal constitutional violations – not under common law claims in Nevada. See, Sheets v. Salt Lake County, 45 F.3d 1383 (10th Cir. 1995) (constitutional claims). Others address core privacy interests related to procreation and medical records. Multimedia WMAZ, Inc. v. Kubach, 443 S.E.2d 491 (Ga. Ct. App. 1994) (disclosure of HIV status); Y.G. v. Jewish Hosp. of St. Louis, 795 S.W.2d 488 (Mo. Ct. App. 1990 (right to privacy in procreation). Incidentally, neither of these cases involved the disclosure of information that was already contained in the public record. In other instances, Hyatt's citations highlight the public nature of the very facts Hyatt claims are contained in obscure and stale public records. For example, Greidinger v. Davis, 988 F.2d

Continued . . .

Also, Hyatt's contention is also factually inaccurate. Contrary to Hyatt's arguments, his name, social security number and Tara address were disclosed in various public records that were created or given publicity during the exact same time frame that FTB used this information. Hyatt's social security number appeared in public documents related to Hyatt's divorce proceedings. 80 AA 19811-38; 82 AA 20308-83, 20564; 83 AA 20599-693. These re-opened proceedings were ongoing in the early 1990s when FTB began its audit, and were the subject of newspaper articles during this timeframe. 83 AA 20565-78; 43 ARA 10623-10632. Hyatt's name and social security number were listed in Hyatt's voter's registration forms, which were filled out and filed in Nevada in 1991 and 1995, respectively. 77 AA 19087-118. Hyatt's social security number was voluntarily disclosed on his business license form that was filed in 1992. 78 AA 19429; 78 AA 19426-28. In 1993 and 1994, Hyatt paid the property taxes on the Tara address, which created a public record of Hyatt's connection to the Tara address. 47 AA 11626(76) – 628(85).

Finally, Hyatt argues that Montesano and Cox Broadcasting are limited to media defendants. RAB 101. However, nothing in those decisions creates such a limitation. And other courts have expressly rejected Hyatt's contention, noting that Cox Broadcasting was not limited to media publications and nor was it the rationale of that opinion. Johnson v. Sawyer, 47 F.3d at 732 n. 33. FTB is not asserting a First Amendment defense. Rather, FTB is asserting that, as a matter of Nevada law, Hyatt's claims for invasion of privacy were precluded because all of the information disclosed was a matter of public record at the time of the disclosure. Therefore, the district court erred, as a matter of law, when it failed to dismiss Hyatt's invasion of privacy claims pretrial based upon the clear application of the public records defense. Montesano, 99 Nev. at 649.

1344 (4th Cir. 1993), which is not premised on invasion of privacy claims, highlights the public nature of voter registration forms. Recall, Hyatt's name and social security were listed on Hyatt's voter registrations, which, as noted by Greidinger, are public documents. Thus, Hyatt's out-of-state authority does not advance his argument that this court should ignore controlling Nevada authority related to this issue.

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e. There Was No Evidence Presented to Support The False Light Claim

As explained in FTB's opening brief, in order to prevail on his false light claim, Hyatt was required to prove that FTB's statements were false. AOB 85-86. In order to establish the falsity, Hyatt was required to establish that FTB made at least an implicit false statement of objective fact. Restatement (Second) of Torts § 652E(b) (1977) (referencing the "falsity of the publicized matter"); Flowers v. Carville, 310 F.3d 1118, 1132 (9th Cir. 2002) (applying Nevada law).[43] As the restatement clarifies, "it is essential to the rule stated in this Section that the matter published concerning the plaintiff is not true." Restatement (Second) Torts § 652E cmt. a (1977). The very name of the tort "false light" indicates that the matter publicized must be false before it becomes actionable.

Hyatt claims that he presented substantial evidence to support this element. RAB 106-107. Hyatt does not dispute that he presented no evidence that any third-party who received FTB's demands construed them as implying Hyatt was a tax cheat, but he claims that the jury could simply draw the inferences from the evidence that FTB portrayed Hyatt as a "tax cheat for 10 years." RAB 106-107. Hyatt presented absolutely no evidence – not one witness, not one document –establishing that any person or entity either construed FTB's communications as implying he was a tax cheat or believed Hyatt was a tax cheat after receiving one of FTB's third-party contacts or reviewing FTB's Litigation Roster.

The undisputed evidence reveals that FTB made no false statements of fact or inferences related to Hyatt during the audit investigations or at any time thereafter. Clearly FTB's third-party correspondence did not state or infer that Hyatt was a tax cheat. See, e.g.,

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[43]Hyatt claims FTB published false statements that implied he was a "tax cheat." RAB 107. In order for the jury to determine that FTB had made the "false" statement that Hyatt was a "tax cheat," the jury was necessarily required to determine the propriety of the underlying tax and fraud penalty assessments. Yet Hyatt alleges they were repeatedly told they could not do so and were not asked to do. RAB 75-79. Now Hyatt takes a contrary view admitting that in order for Hyatt to prove that FTB's implied statement was false, he was necessarily required to prove that he was **not** a tax cheat – which required the jury to review and determine whether the tax and fraud assessments were correct.

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63 AA 15723; 65 AA 16099-100; 64 AA 15910-11. Rather, this correspondence, at most, inferred that Hyatt was under investigation. See id. This was undeniably true.

As to the Litigation Roster, FTB made no false statement of fact or inference related to Hyatt. FTB merely listed this litigation, a general description of the dispute between the parties, and the amount in controversy. 83 AA 20694-22050. Hyatt contends that FTB created a false inference that Hyatt was a tax cheat because the amount of the tax assessments and fraud penalties were listed on the Litigation Roster. RAB 107. This inference is illogical and unreasonable. All of the cases on the Litigation Roster were cases in which the taxpayers and FTB were currently litigating (i.e., disputing) tax assessments made by FTB. 83 AA 20694-22050. The only reasonable inference that could be drawn from the Litigation Roster and the listing of the tax assessments was that Hyatt disputed these amounts and he was litigating these conclusions with FTB. 54 AA 13626-29; 54 AA 13398-403. Therefore, the inference was not false. No matter how this issue is reviewed, it is plain that FTB never published any false statement or inference related to Hyatt either during the audits or with the publication of the Litigation Rosters. This is fatal to Hyatt's false light claim.

f. FTB's Litigation Rosters Were Privileged

i. Litigation Privilege

Hyatt contends that the litigation privilege applies only to communications between counsel in the course of judicial proceedings, and he argues that, because the Litigation Rosters allegedly did not "function as a necessary or useful step in the litigation process," they are not protected by the litigation privilege. See RAB 108. Hyatt's attempt to narrow the scope of the litigation privilege is clearly contrary to Nevada law as recently articulated by this court in Clark County Sch. Dist. v. Virtual Educ. Software Inc., 126 Nev.___, 213 P.3d 496, 502 (2009).[44] The "scope of the absolute [litigation] privilege is broad," and "a

[44]Hyatt does not cite to Virtual in the section in his answering brief that discusses the litigation privilege, even though that opinion was published nearly five months before Hyatt

Continued . . .

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court determining whether the privilege applies should resolve any doubt in favor of a broad application." Virtual, 213 P.3d at 502 (citing Fink v. Oshins, 118 Nev. 428, 432, 49 P.3d 640, 643 (2002)). This court held that the litigation privilege applies even to communications made by a party even before any litigation has commenced. Id.

Here, the Litigation Rosters were published by FTB in response to the litigation filed against FTB, during the course of the litigation, by a party to the litigation, FTB. See 50 AA 12297 (76-77). As noted in FTB's opening brief, communications are "related to" the litigation where they have "some bearing on the subject matter of the proceeding." See AOB 87. Hyatt attempts to narrow the scope of the privilege by citing inapplicable case law from other jurisdictions. See RAB 108. He then formulates his own test, stating that the communications at issue must be "a necessary or useful step in the litigation process." See id. As this court recognized in Virtual, however, the litigation privilege is broad, and it extends even to letters written by parties outside the course of any judicial proceeding. See Virtual, 213 P.3d at 503. Indeed, so long as communication is "connected with, or relevant or material to, the cause in hand or subject of inquiry," the communication is absolutely privileged, and "no action will lie therefore, however false or malicious [it] may in fact be." See Sahara Gaming Corp. v. Culinary Workers Union Local 226, 115 Nev. 212, 218, 984 P.2d 164, 168 (1999) (citations omitted). Here, the Litigation Rosters were simply summaries of the lawsuit Hyatt filed against the FTB in Nevada—much like judicial dockets-- and as such, they bear a direct relationship not only to the subject matter of this proceeding, but to the actual proceeding itself. See 83 AA 20694- 89 AA 22050 (Complete Copies Of All Litigation Rosters).

ii. Fair Report Privilege

Hyatt contends that the fair report privilege only protects "[q]uoting from a court file," and that the Litigation Rosters are not protected because they somehow implied that Hyatt was a tax cheat or that he was guilty of tax fraud. RAB 109. From that, Hyatt argues

filed his answering brief, see RAB 108, and even though Hyatt was well aware of Virtual. RAB 52 n. 206.

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FTB's inclusion of the amount of the tax assessments on the Litigation Roster, between April 1998 to March 2000 (when the amount of the tax assessments was placed in the case file by Hyatt himself), was not a "fair report" of the litigation because this information was not related to the litigation at that time. See RAB 108-109. Hyatt's arguments are factually inaccurate, and he attempts to narrow the scope of the fair report privilege in a manner that is inconsistent with Nevada law.

Contrary to Hyatt's assertions, against the allegation of his complaint, the amount of the tax assessments *was* at issue from the onset of this litigation. Hyatt filed his Complaint in 1998, which included his First Cause of Action for "Declaratory Relief." 1 AA 1-16. Hyatt sought a determination that he terminated his California residency on September 26, 1991. Id. As such, Hyatt challenged FTB's determination regarding his residency, and he sought to invalidate the tax assessments and penalties. See id. Although his claim was dismissed in April 1998, Hyatt re-pled this claim in his First Amended Complaint, filed in June 1998, 1 AA 114-43, as well as his Second Amended Complaint filed in April 2006, expressly stating he was doing so to preserve the issue for appeal. 14 AA 3257-3300. Therefore, Hyatt's contention that his tax assessments were not at issue in this litigation is simply not supported by his own pleadings. Moreover, by placing the propriety of the tax assessments at issue, Hyatt waived any right to confidentiality or privacy in the information contained on the Litigation Roster. Schlatter, 93 Nev. at 192 (when a litigant places an issue before the court he cannot claim privilege surrounding that issue).

Hyatt does not contend that the amounts of proposed assessments listed on the Litigation Roster were inaccurate. It is, therefore, unclear how the inclusion of these specific figures, which are undisputedly accurate, makes the Litigation Roster an "unfair" report. Contrary to Hyatt's brief (RAB 109, n. 402), the record in this case reveals that these amounts were placed in the court file in March 2000, by Hyatt, when his own attorney, Eugene Cowan, submitted an affidavit in support of one of Hyatt's own filings. See 3 RA 593, 595. This occurred long before this case was appealed to the United States Supreme

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Court. In addition, the Litigation Roster was not published on FTB's website until 2000. See 50 AA 12296(70)-12297(74).

Nevada law does not require the information reported to be specifically included in a court file at all in order for this privilege to apply. Wynn v. Smith, 117 Nev. 6, 14, 16 P.3d 424 (2001); Lubin v. Kunin, 117 Nev. 107, 17 P.3d 422 (2001). In fact, contrary to Hyatt's arguments, Nevada law does not even require 100 percent accuracy in order for this privilege to apply. Id. Rather, the report need only be a "fair abridgment of the occurrence reported" or an otherwise "fair and accurate" report. Id. at 14 (citing Restatement (Second) Torts § 611 (1965)). Even if more accurate information is included in the report than is present in the court file, it is baffling for Hyatt to claim that such a report is "inaccurate" and not subject to this privilege.

Here, the Litigation Rosters presented a fair and accurate report of the judicial proceeding in Nevada initiated by Hyatt. 85 AA 21178-79. The rosters accurately noted the existence of the litigation, the issues involved, and the amount in controversy between the parties, i.e., the amounts of Hyatt's tax assessments. Id. Hyatt speculates from these simple statements that the general public would somehow understand these statements to imply that he was a tax cheat or that he "had been found guilty of fraud." See RAB 109. As before, Hyatt offered no evidence in support of his speculation. Hyatt's speculation is therefore baseless and cannot defeat the fair report privilege.

g. Without the Litigation Rosters, There Was No Evidence of the Required Element of Publicity for the Invasion of Privacy Claims

In arguing that the invasion of privacy claims were supported by substantial evidence, Hyatt relies heavily on the Litigation Rosters. E.g., RAB 106 (publication of Litigation Roster allowed inference that Hyatt was portrayed in false light to third parties); 107 (FTB "falsely broadcasted on its internet website that Hyatt wad committed tax fraud") Without the Litigation Rosters he has no other evidence satisfying the essential element of "publicity," for purposes of his invasion of privacy claims.

Publicity, which is a required element for Hyatt's claims alleging false light and publication of private facts, requires that "the matter is made public, by communicating it to

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the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of *public knowledge*." Restatement (Second) of Torts § 652D cmt. a (1977) (emphasis added). The publicity standard is far greater than the publication requirement associated with defamation, which requires simply that the matter be communicated to a third person. See id. Rather, to establish publicity under Hyatt's two claims, the information or statement must actually be disseminated to the public at large or to a large number of persons so as to make the statement either widely known to the public or likely to become known. Id.; see, e.g., Virgil v. Time, Inc., 527 F.2d 1122, 1126 (9th Cir. 1975) (indicating that the difference between "publication" and "publicity" is not the means of communication, but rather the difference is to whom the communication reaches); Marleau v. Truck Ins. Exch., 37 P.3d 148, 154 (Or. 2001); Fernandez-Wells v. Beauvais, 983 P.2d 1006, 1008 (N.M. 1999). Without the Litigation Roster, Hyatt cannot establish the necessary element of publicity because none of FTB's other alleged disclosures of identity information and the so-called false statements were publicized to the *public at large* or to so many persons that the matter of FTB's audit would be considered *public knowledge*.

h. The Breach Of Confidential Relationship Claim Failed As A Matter Of Law

Hyatt confuses the issue by arguing two separate torts (one recognized in Nevada and one not) should be melded together to form a new tort that Hyatt has termed "breach of confidentiality." See RAB 111. Specifically, Hyatt cites authority from a limited number of jurisdictions that recognize the tort of "breach of confidentiality," and argues that the alleged disclosure of confidential information by a government agency fits within Perry v. Jordan. RAB 111-112. The torts of breach of confidentiality and breach of confidential relationship are entirely separate theories. Nevada law has never recognized a tort for "breach of confidentiality."

The tort recognized in Nevada, breach of confidential relationship, requires the plaintiff to prove that "a confidential or fiduciary relationship" exists between the parties. Perry v. Jordan, 111 Nev. 943, 947, 900 P.2d 335, 337 (1995). While this relationship does not necessarily equate to a fiduciary relationship, it "exists when one party gains the

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confidence of the other and purports to act or advise with the other's interests in mind." Id. at 947. "When such a special 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."[45] Id.

Hyatt suggests that a confidential or special relationship existed between him and FTB. RAB 111-114. As noted in FTB's opening brief (AOB 90), an actionable special relationship cannot exist as a matter of law between a government agency and a private citizen, especially where the government agency is conducting an investigation of that citizen. Other jurisdictions unanimously have reached this conclusion. See, for example, Johnson v. Sawyer, 760 F. Supp. 1216, 1233 (S.D. Tex. 1991), issue upheld on appeal, 47 F.3d 716 (5th Cir. 1995). Maryland Envtl. Trust v. Gaynor, 803 A.2d 512, 517 (Md. 2002).

Indeed, "a taxpayer knows that the relationship between the taxpayer and the IRS is inherently an adversarial one." United States v. Mitchell, 763 F. Supp. 1262, 1267 (D. Vt. 1991) rev'd on other grounds in 966 F.2d 92 (2nd Cir. 1992). As a result of this adversarial relationship, "the taxpayer is well aware that in dealing with the IRS and its agents, he or she is well-advised to have the assistance of an accountant or a tax lawyer." Id. FTB is aware of no case holding that a "special relationship" exists between a citizen and a governmental taxing agency in the context of the tort of breach of confidential relationship as articulated in Perry v. Jordan, or even under the breach of confidentiality tort recognized by a few jurisdictions. Hyatt's brief, likewise, cites to no such case. Because no special

[45]Hyatt argues that a jury instruction on Perry was offered by FTB, and "FTB therefore cannot allege the [district] Court erred in instructing the jury." RAB 110. FTB always contended that there were legal obstacles barring Hyatt's "breach of confidentiality" claim. E.g. 13 AA 3073-77 (opposing amended to complaint); 14 AA 3461 (motion for summary judgment). When the district court allowed the claim to go to the jury, FTB wanted to make sure the instruction on the claim was accurate. FTB therefore offered an instruction correctly setting forth the Perry requirements; and the judge gave the instruction. 51 AA 12560-62; 52 AA 12751. FTB's contention on appeal, however, is not that the district court gave an erroneously phrased instruction. Our contention is the same as it has always been, i.e., that the claim should have never gone to the jury because the claim did not fit within the Perry framework or any other recognized Nevada theory. AOB 88-90.

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relationship exists between a citizen and a government taxing agency, particularly where a taxing authority has commenced an adversarial audit investigation against that citizen, Hyatt's claim for breach of confidential relationship fails as a matter of law.

5. Hyatt's Abuse of Process Claim Fails As A Matter of Law

Hyatt had to prove two essential elements for his abuse of process claim: (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. LaMantia v. Redisi, 118 Nev. 27, 30, 38 P.3d 877, 879 (2002). Hyatt argues that his claim is based solely on FTB's alleged "improper and illegal use of administrative subpoenas." RAB 115.

a. The Demand Letters Were Neither Improper Nor Illegal

FTB filed a motion in limine seeking a ruling that:

(1) FTB was statutorily authorized to conduct investigations inside Nevada;
(2) It was not illegal or improper for FTB to conduct its investigations in Nevada;
(3) There is no Nevada law that prohibits FTB from conducting its investigations in Nevada;
(4) FTB was authorized to issue "Demands to Furnish Information";
(5) These "Demands to Furnish Information" were not subpoenas and were not unlawful; and
(6) FTB was not required by Nevada law to obtain permission from any Nevada state court or agency prior to sending its "Demands to Furnish Information" into Nevada.

19 AA 4556-79 (emphasis added). The district court granted FTB's motion. 27 AA 6533-34. There should not have been, therefore, any issue at trial as to whether the Demand Letters were subpoenas or unlawful. Nevertheless, over FTB's objection, Hyatt continued to argue at trial that the Demand Letters were unlawful or inappropriate. 45 AA 11199 (73) (Hyatt's counsel stating that the FTB was "not entitled to... demand that information from any non-California resident or entity"). Before this court, Hyatt continues to argue that the Demand Letters were subpoenas, illegal and improper. RAB 115-118. Hyatt's arguments are both contrary to the law of the case, and fundamentally inaccurate.

FTB has statutory authority to conduct investigations and to "require by demand" information relevant to the investigation. Cal. Rev. & Tax Code § 19504(a). At the time FTB audited Hyatt, FTB was permitted to contact third parties without first notifying the

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taxpayer. See Cal. Rev. & Tax Code §§ 19254; 26423 (1993).[46] All California state agencies, including FTB, have the power to conduct investigations outside of California. See Cal. Rev. & Tax. Code § 19504(d); see also, Cal. Gov't Code §§ 11185(d); 11187(c); 11189. Thus, FTB was within its statutory authority when it sent Demand Letters to Nevada residents seeking information relevant to its tax audit investigation of Hyatt.

b. FTB Did Not Issue Administrative Subpoenas During Its Audits

There is no basis for Hyatt's characterization of the Demand Letters as administrative subpoenas.[47] The Demand Letters were merely investigative tools accompanied by cover letters that stated they sought the "cooperation" of the recipient. See, e.g., 64 AA 15898-905. Administrative subpoenas typically are issued by an agency which is seeking information from an individual or entity which the agency regulates to confirm compliance with its regulations. See In re Subpoenas Duces Tecum Nos. A99-0001, A99-0002, A99-0003 and A99-0004, 51 F. Supp. 2d 726 (W.D. Va. 1999). A subpoena is a "writ commanding a person to appear before a court or tribunal, subject to a penalty for failing to comply." Black's Law Dictionary 1440 (7th ed. 1999).

There is a significant distinction between a subpoena and an FTB Demand Letter. Here, the FTB issued form letters, accompanied by demands seeking information. E.g. 64 AA 15898-99. The Demand Letters were not subpoenas and had none of the legal affects of such a tool.[48] Id. The word "subpoena" was not used anywhere in any of the Demand Letters. Id. Additionally, there was no indication by the language of these demands that the

[46]In determining the scope of FTB's investigative authority during Hyatt's residency audit, the court must look to the statutes that were in effect at the time his audit was proceeding. See Runion v. State, 116 Nev. at 1049 (court improperly used prior version of statute rather than statute in effect at the time of the offense).

[47]The only process Hyatt alleged was abused was FTB's Demand Letters. 14 AA 3262 -63.

[48]Hyatt's argument that the FTB called the Demands Letters "pocket subpoenas" is misleading. There was testimony that one person, a witness for Hyatt who previously worked at FTB, called these documents "pocket subpoenas." 44 AA 10777 (209); 44 AA 10815 (6). No other person who worked at FTB testified that the Demand Letters were called pocket subpoenas. And no one receiving the letters considered them as subpoenas. Nevertheless, whatever nickname was or was not given to the documents by one individual does not change their legal effect.

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recipient would be the subject of any repercussions or penalties for failing to respond. Id. And contrary to Hyatt's argument, no one receiving the Demand Letters construed them as subpoenas. E.g., 47 AA 11623 (64). The Demand Letters, in short, are not subpoenas at all.

c. An Abuse of Process Claim Cannot be Based on the Mere Issuance of a Subpoena

As explained in the opening brief, the tort of abuse of process requires *judicial* or *legal* process. AOB 90-91. Hyatt cites no precedent to the contrary. Instead, Hyatt cites to irrelevant case law in which courts found an abuse of process by a government agency that fraudulently issued administrative subpoenas and clearly invoked the judicial process by attempted enforcement of the same. RAB 115-16. These cases make clear that the mere *issuance* of an administrative subpoena cannot form the basis for an abuse of process claim. Only when those subpoenas are *enforced* by a court can a claim for abuse of process arise. The actions complained of by Hyatt—the mailing of Demand Letters by FTB—simply cannot, as a matter of law, be construed as invoking the judicial process.

Even if FTB had issued administrative subpoenas, which it did not, administrative subpoenas were not self-enforcing and therefore cannot be considered final until the issuing agency has sought and obtained *judicial enforcement*. See Shea v. Office of Thrift Supervision, 934 F.2d 41, 45 (3d Cir. 1991); see also, Stryker Corp. v. U.S. Dept. of Justice, CIV.A. 08-4111 (WJM), 2009 WL 424323 at *3 (D.N.J. Feb. 18, 2009). The Supreme Court has refused to consider pre-enforcement disputes arising out of agency subpoenas on the grounds that such claims are not yet ripe. See Reisman v. Caplin, 375 U.S. 440, 450 (1964) (declining to grant equitable relief to the recipient of an administrative summons that had not been judicially enforced).

An abuse of process claim arises only when an agency has turned to judicial enforcement of an administrative subpoena, because the purpose of the tort is to preserve the integrity of the court, the tort requires misuse of a *judicial process*. ComputerXpress Inc. v. Jackson, 113 Cal. Rptr. 2d 625, 644 (Cal. Ct. App. 2001). Abuse of process "refers to an abuse of judicial process, and **it is not until the government files an enforcement action that it has begun to use the court's process**." Stryker Corp., 2009 WL 424323 at *4

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(emphasis added); see also, Tuck Beckstoffer Wines LLC v. Ultimate Distributors, Inc., 682 F. Supp. 2d 1003 (N.D. Cal. 2010) (the mere issuance of subpoenas is not considered to be an abuse of process); SEC v. ESM Gov't Sec., Inc., 645 F.2d 310, 316-17 (5th Cir. 1981) (only when a government agency invokes the power of a court to enforce a misbegotten administrative subpoena can there can be an abuse of process). "Without having used the judicial process, [FTB] could not have abused it." See Stryker Corp., 2009 WL 424323 at *4.

Nevada is in accord with these jurisdictions. Abuse of process requires abuse of "legal process." LaMantia v. Redisi, 118 Nev. at 30. This court has characterized the requirement as hinging on misuse of "regularly issued process." Nevada Credit Rating Bureau, Inc. v. Williams, 88 Nev. 601, 606, 503 P.2d 9 (1972) (filing lawsuit in court and obtaining court-issued attachment); LaMantia, 118 Nev. at 30 (civil lawsuit filed in court); Posadas v. City of Reno, 109 Nev. 448, 851 P.2d 438 (1993) (criminal complaint filed in court); Kovacs v. Acosta, 106 Nev. 57, 787 P.2d 368 (1990) (partition suit filed in court); Bull v. McCuskey, 96 Nev. 706, 615 P.2d 957 (1980) (filing lawsuit in court and obtaining court-issued summons), overruled in part on other grounds in Ace Truck v. Kahn, 103 Nev. 503, 746 P.2d 132 (1987).

d. "Official Looking" Papers Are Not Enough For Abuse Of Process

Hyatt argues that his claim "is, and always has been, based on the FTB's improper use of administrative subpoenas." RAB 115. But after asserting that he is relying solely on "administrative subpoenas," Hyatt is then faced with the reality that FTB's demands were not actually administrative subpoenas. To deal with this reality, he is forced to argue that FTB's demands for information "appeared" to be subpoenas. RAB 116, lines 9-10 (demands "appeared" to be legal summons or subpoenas).

There is no basis for Hyatt's argument that a non-judicial paper can somehow be transmuted into forbidden judicial process, merely because the non-judicial paper might be "official looking." RAB 116, line 9. Hyatt cites no authority supporting such a contention. On the other hand, FTB's opening brief cited and discussed Liles v. Am. Corrective

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Counseling Services, Inc., 131 F. Supp. 2d 1114, 1117-18 (S.D. Iowa 2001) (AOB 91-92), where a private collection company processed claims from merchants who received unpaid checks. The company sent a notice to the plaintiff stating that it was an "Official Notice." It contained a seal with a "scales of justice" emblem; it falsely implied that it was from the county attorney's office; and it falsely implied that a criminal complaint had been generated and was being processed. There was nothing to indicate that the official looking notice was issued by a court, and in fact, the notice was not issued as part of any court case. The plaintiff sued the collection company for abuse of process. The court dismissed the claim, holding that the essential element of judicial process failed as a matter of law because the notice, despite its official appearance, did not actually result from any court process. "Without the involvement of a court, the threat of criminal prosecution is insufficient to constitute 'legal process' as required by this tort." Id. at 1117-18.

Hyatt's brief fails to cite, distinguish or even recognize the existence of Liles. And he cites no legal authority contrary to Liles or supporting his theory that a paper that was never issued in a judicial proceeding can constitute "legal process" merely because the paper is official looking. Hyatt's theory, if accepted by this court, would create an entirely new tort: "abuse of official-looking process."

Hyatt's brief states that there is "ample case law" supporting his position (RAB 115, line 6), but he primarily relies on only one case, United States v. Powell, 379 U.S. 48 (1964). RAB 115, lines 7-18. Hyatt proffers Powell as an abuse of process case involving administrative subpoenas, arguing that Powell would allow an abuse of process claim based on "the specter of enforcement" by a court, or the "threat of enforcement" of administrative subpoenas. Id. Powell says no such thing. The question before the United States Supreme Court was the standard the IRS had to meet to obtain judicial enforcement of a summons in a fraud investigation. Powell, 379 U.S. at 50-51. Powell was not an abuse of process tort case. The Court said nothing even remotely suggesting that an abuse of process claim could rely on an administrative summons for which no judicial enforcement was ever sought. Nor did the Court say a word about the "specter of enforcement" or the "threat of enforcement"

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in the context of an abuse of process claim (or in any other context, for that matter).[49]

Finally, FTB's opening brief established that none of the few Nevada recipients of demands for information perceived them as legal instruments, or that any recipient felt coerced or intimidated by a demand. AOB 92. Hyatt's only response is that "the jury did not accept that assertion," and that "the jury found" the demands to be illegal and unenforceable. RAB 118, lines 3-4. Once again, Hyatt relies on his perceived "specter of court enforcement" as a substitute for actual evidence of the effect of the demands for information. RAB 118, lines 7-10. The undeniable fact is that no Nevada recipient of a demand for information testified the paper was perceived as legal process, judicial process, coercive process, or anything other than a routine inquiry. See AA citations at AOB 92, lines 13-20. Moreover, the jury did not make the findings on which Hyatt relies.

Accordingly, Hyatt's abuse of process claim failed as a matter of law and should never have been submitted to the jury.

6. Hyatt's Intentional Infliction Of Emotional Distress Claim Fails As A Matter Of Law

Hyatt's claim for intentional infliction of emotional distress ("IIED") failed as a matter of law because: (1) as a discovery sanction, Hyatt was limited to "garden variety" emotional distress, precluding him from establishing IIED as a matter of law; (2) Hyatt's evidence did not establish that his emotional distress was sufficiently severe to support this claim; and (3) Hyatt had no physical manifestation or objectively verifiable evidence of severe emotional distress. AOB 93-96. Hyatt's responses are meritless.

a. The District Court's Sanction Limiting Hyatt To Garden Variety Emotional Distress Precluded Hyatt From Recovery For His IIED Claim

Hyatt argues that the district court's order limiting him to recovery for garden variety

[49]Hyatt cites three other cases at RAB 116, n. 427. None of those cases dealt with the abuse of process tort; none of the cases dealt with the judicial process prerequisite for the tort; and certainly none of the cases dealt with whether an administrative paper (such as a letter or a demand for information) can be characterized as legal process, for purposes of abuse of process tort liability, merely because the paper is official looking.

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emotional distress did not affect his ability to recover on his IIED claim. RAB 122-24. There is no dispute that the district court limited Hyatt to only garden variety emotional distress. 15 AA 3547. It is also undisputed that this sanction was imposed against Hyatt after he unilaterally refused to provide his medical records during discovery.[50] 15 AA 3544-47. By limiting Hyatt's evidence to only garden variety emotional distress, the district court effectively precluded Hyatt from being able to establish the necessary and essential element of his IIED claim – i.e., that he suffered "severe or extreme emotional distress." Therefore, the district court erred by failing to dismiss this claim.

A plaintiff claiming IIED must show that he or she "actually suffered **severe** or **extreme** emotional distress." Nelson v. City of Las Vegas, 99 Nev. 548, 555, 665 P.2d 1141, 1145 (1983) (emphasis added); see Miller v. Jones, 114 Nev. 1291, 1300, 970 P.2d 571 (1998). Garden variety emotional distress is distress that is not severe. See Ruhlmann v. Ulster County Dept. of Soc. Services, 194 F.R.D. 445, 449 (N.D.N.Y. 2000).

Other jurisdictions routinely hold that when a plaintiff asserts a claim for IIED but refuses to provide access to medical records, sanctions are appropriate,[51] including

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[50]Many of the medical records sought overlapped in time with the disputed timeframe in which Hyatt's residency was questioned. In addition to likely providing alternative causes of emotional distress, they may also have revealed representations from Hyatt concerning his address. Hyatt has never produced these records, even in redacted form.

[51]Hyatt argues that his alleged physical symptoms (e.g., sick to his stomach, sleeplessness, tightness in his chest) were sufficient to satisfy legal requirements for emotional distress recovery, despite his failure to seek treatment for these alleged ailments. RAB 125-28. Where emotional distress damages are not secondary to physical injuries, either a physical impact must have occurred, or there must be proof of serious emotional distress "causing physical injury or illness." Betsinger v. D.R. Horton, Inc., 126 Nev. ___, ___ P.3d ___ (Adv. Opn. 17, May 27, 2010) (quoting Bartmettler, 114 Nev. at 448). "We have previously required a plaintiff to demonstrate that he or she has suffered some physical manifestations of emotional distress in order to support an award of emotional [distress] damages." Id. Insomnia and general physical or emotional discomfort are insufficient to satisfy the physical impact requirement. Chowdhry v. NLVH, Inc., 109 Nev. 478, 483, 851 P.2d 459 (1993). Even contemplating suicide and seeking additional psychotherapy do not satisfy the requirement. Bartmettler, 114 Nev. at 443, 448. This court recognizes the need to impose safeguards against the "illusory recoveries" sought in Chowdhry and Bartmettler.

Continued . . .

dismissal. See, e.g., Ford v. Zalco Realty, Inc., CIV.A 1:08-CV-1318, 2010 WL 378521 at *6 (E.D. Va. Feb. 1, 2010) (plaintiff failed to supply requested documentation to support claim for emotional distress; court granted motion to strike emotional distress claim); Coffin v. Bridges, 72 F.3d 126 (4th Cir. 1995) (affirming dismissal of complaint because plaintiff refused to provide mental health care records); In re Consol. RNC Cases, 127, 2009 WL 130178 at *12 (S.D.N.Y. Jan. 8, 2009) (emotional distress claims dismissed where plaintiffs refused discovery of medical records); Zabin v. Picciotto, 896 N.E.2d 937 (Mass. App. Ct. 2008) (dismissal of claim for emotional distress for refusal to comply with order requiring release of medical records); Ellis v. SmithKline Beecham Corp., C07-5302RJB, 2008 WL 3166385 (W.D. Wash. Aug. 5, 2008) (plaintiff refused to provide medical records during discovery; summary judgment granted on claim for IIED); Lindstrom v. Hunt Enterprises, Inc., B189275, 2007 WL 4127191 (Cal. Ct. App. Nov. 21, 2007) (granting motion to dismiss or strike claims for emotional distress as sanction for failing to comply with order requiring release of medical records).[52]

Hyatt attempts to avoid the district court's sanction, claiming that the phrase "garden variety," does not actually mean "garden variety" as the term has been defined by numerous courts throughout the country, (RAB 122-24), even though the discovery commissioner expressly stated that Hyatt was limited to recovery of garden variety emotional distress "as many courts have referred to it." 15 AA 3547. Garden variety emotional distress claims are defined as "ordinary and commonplace" or "simple or usual." Jessamy v. Ehren, 153 F.

Betsinger, 126 Nev. at __ (quoting Olivero v. Lowe, 116 Nev. 395, 995 P.2d 1023 (2000)). One safeguard is the additional requirement of objectively verifiable indicia of severe emotional distress, such as seeking medical care. Miller, 114 Nev. at 1294. Here, Hyatt failed to seek treatment; his general complaints were not objectively verified; he experienced no physical impact or physical manifestation; and he presented no medical testimony that his alleged physical symptoms were caused by FTB's audit activities. Thus, he failed to establish recoverable emotional distress damages.

[52]This issue often arises in the context of discovery orders, which are generally not published as a matter of course. Therefore, these orders are generally contained in unpublished decisions.

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Supp. 2d 398, 401 (S.D.N.Y. 2001). Such claims do not require medical attention and are based on generalized allegations of insult, hurt feelings, and lingering resentment. Javeed v. Covenant Med. Ctr., Inc., 218 F.R.D. 178, 178-79 (N.D. Iowa 2001) (finding that claims including loss of self-respect, loss of self-esteem, medical anguish, grief, anxiety, dread, sorrow, and despondency are not garden variety emotional distress).

In contrast, seeking extensive damages and claiming severe injury pursuant to a claim for IIED "elevates a case **above** that of a garden variety emotional distress case." See Beightler v. Suntrust Banks, Inc., 2:07-CV-02532-DV, 2008 WL 1984508 at *3 (W.D. Tenn. Apr. 30, 2008) (emphasis added); see also, Pacheco v. Rogers & Breece, Inc., 579 S.E.2d 505, 507-08 (N.C. App. 2003) (plaintiff does not have a remedy for IIED where he only establishes garden variety anxiety or concern); E.E.O.C. v. California Psychiatric Transitions, 258 F.R.D. 391 (E.D. Cal. 2009) (garden variety emotional distress claim does not involve a separate claim of IIED). Koch v. Cox, 489 F.3d 384, 390 (D.C. Cir. 2007) (distinguishing garden variety emotional distress from "any specific psychiatric injury or disorder, or unusually severe distress"); Mugavero v. Arms Acres, Inc., 680 F. Supp. 2d 544, 578 (S.D.N.Y. 2010) (severe emotional distress claims "differ from the garden variety claims in that they are based on more substantial harm or more offensive conduct, are sometimes supported by medical testimony and evidence, evidence of treatment by a healthcare professional and/or medication, and testimony from other, corroborating witnesses"). Contrary to Hyatt's contentions, garden variety emotional distress is not a term of art without meaning, and it certainly was intended to have significance in this case.

By limiting Hyatt to solely garden variety distress, the discovery commissioner recognized the fundamental unfairness of allowing Hyatt to make a claim for severe emotional distress, but concurrently allowing him to shield vital medical records from FTB. 15 AA 3553-58; See also, E.E.O.C. v. California Psychiatric Transitions, 258 F.R.D. At 400 (E.D. Cal. 2009) (noting the fundamental unfairness of allowing a plaintiff to make a claim for emotional distress but shielding discovery of information related to that claim); Combe v. Cinemark USA, Inc, 1:08-CV-142 TS, 2009 WL 3584883 at *2 (D. Utah Oct. 26, 2009)

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("Medical records are also relevant to the preparation of defendant's defenses against the emotional distress claims because the records may reveal another sources of stress unrelated to defendant which may have affected a plaintiff's emotional distress"); Wooten v. Certainteed Corp., 08-2508-CM, 2009 WL 2407715 at *1 (D. Kan. Aug. 4, 2009) (medical records are relevant to defenses against emotional distress claims because records "may reveal stressors unrelated to Defendant that may have affected Plaintiff's emotional well being.").

If the court were to construe the sanction order as Hyatt claims, it would render the penalty meaningless and instead reward Hyatt for hiding his records from FTB. Garden variety distress is not severe distress, and cannot as a matter of law establish the severity element necessary for a claim of IIED.

b. Hyatt Asks This Court To Presume Severe Emotional Distress

Hyatt argues that severe emotional distress can be presumed under Nevada law. RAB 119-122. Nevada has never presumed the existence of severe distress, and Hyatt cites no Nevada cases in support of this unfounded proposition. RAB 119-121. Emotional distress is not presumed, even in cases involving intentional torts. See Betsinger v. D.R. Horton, Inc., 126 Nev. ___, ___ P.3d ___ (Adv. Opn. 17, May 27, 2010) (fraud and deceptive trade practices). A plaintiff must present affirmative and objective evidence of severe emotional distress to succeed on a claim for IIED. See, e.g., Miller, 114 Nev. at 1300 (a plaintiff must present "objectively verifiable indicia of the severity of his emotional distress"); Jordan v. State ex rel. Dep't. of Motor Vehicles & Pub. Safety, 121 Nev. 44, 110 P.3d 30 (2005) (plaintiff failed to state a claim for IIED where he did not allege that he suffered any severe emotional distress), overruled on other grounds by Buzz Stew, LLC v. City of N. Las Vegas, ___ Nev. ___, 181 P.3d 670 (2008).

Other courts have held that emotional distress may not be presumed and is not established simply by evidence of defendant's extreme or outrageous conduct. See, e.g., Doe v. Kaiser, CIVA 6:06-CV-1045DEP, 2007 WL 2027824 at *5 (N.D.N.Y. July 9, 2007) ("It should be noted that damages for emotional distress may not be presumed, and are not

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established simply by evidence of a defendant's egregious conduct"); Tanzini v. Marine Midland Bank, 978 F. Supp. 70, 78 (N.D.N.Y. 1997) (damages for emotional distress may not be presumed because of the nature of the defendant's actions alone); Turic v. Holland Hospitality, Inc., 85 F.3d 1211, 1215 (6th Cir. 1996) ("damages for mental and emotional distress will not be presumed, and must be proved by competent evidence").

Without his so-called presumption, Hyatt's evidence did not overcome Nevada's high burden to show that he "actually suffered **severe** or **extreme** emotional distress." Nelson v. City of Las Vegas, 99 Nev. at 555 (emphasis added). General emotional or physical discomfort such as anger, embarrassment, humiliation, or other similar symptoms, such as migraines and stress, are insufficient to establish severe emotional distress. Miller, 114 Nev. at 1300; Watson v. Las Vegas Valley Water Dist., 378 F. Supp. 2d 1269, 1279 (D. Nev. 2005) aff'd, 268 F. App'x. 624 (9th Cir. 2008). Ordinary emotions do not satisfy the rigorous "severe emotional distress" requirement needed to make a showing of IIED. See, e.g., Nelson, 99 Nev. at 548. Severe emotional distress is such that no reasonable person could be expected to endure it. Alam v. Reno Hilton Corp., 819 F. Supp. 905, 911 (D. Nev. 1993) (citing Restatement (Second) of Torts, § 46, cmt. j (1995) ("It is only where [emotional distress] is extreme that the liability arises. Complete emotional tranquility is seldom attainable in this world, and some degree of transient and trivial emotional distress is a part of the price of living among people. The law intervenes only where the distress inflicted is so severe that no reasonable man could be expected to endure it.").

Here, Hyatt claimed that he "suffered anger, anxiety, embarrassment, humiliation, and other related symptoms" due to FTB's audit. 15 AA 3521. He testified to humiliation, frustration, fear, and embarrassment 37 AA 9162 (59), 9172 (99-101), 9173 (105). Hyatt and his friends and family also testified to some related symptoms such as trouble sleeping, crying and headaches. 39 AA 9541 (23); 45 AA 11140 (26-27). General feelings of embarrassment, anger, or anxiety are not so severe that they were unendurable. See Miller, 114 Nev. at 1300. Thus, Hyatt did not meet his burden of establishing that he suffered stress so severe and of such intensity that no reasonable person could be expected to endure it.

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c. Nevada Law Requires Objectively Verifiable Indicia, But Hyatt Offered None

A plaintiff alleging IIED must present "objectively verifiable indicia of the severity of his emotional distress." Miller, 114 Nev. at 1294. Contrary to Hyatt's contention at RAB 127, when the plaintiff presents no objective evidence of "medical or psychiatric assistance arising from the alleging incidents," his IIED claim cannot survive. Id. (plaintiff who testified that he was depressed, but failed to seek any medical or psychiatric assistance, presented no objectively verifiable evidence); Watson, 378 F. Supp. 2d at 1279 (plaintiff failed to prove severe distress where he presented no medical or psychiatric evidence).[53]

Hyatt's own testimony that he suffered severe emotional distress is obviously not objective evidence. See, e.g., Vallinoto v. DiSandro, 688 A.2d 830, 839 (R.I. 1997) (self-serving uncorroborated statements of plaintiff were insufficient without supporting, medical evidence); Myers v. Bennett Law Offices, 238 F. Supp. 2d 1196, 1206 (D. Nev. 2002) ("[A] plaintiff must support a claim for damages based on emotional distress with something more than his or her own conclusory allegations").

Self-serving statements, corroborated only by a plaintiff's friends and family, are similarly not sufficient objective evidence of serious emotional distress. See Talley v. Family Dollar Stores of Ohio, Inc., 542 F.3d 1099 (6th Cir. 2008) (plaintiff must provide some evidence beyond his or her own testimony or the self-serving testimony of that person's family member; rejecting plaintiff's and plaintiff's sister's affidavits as sufficient evidence of serious emotional distress). The testimony of Hyatt's friends and family was also not based upon personal knowledge of the alleged conduct by FTB, or of Hyatt's distress, but rather, was based upon what Hyatt had told those friends and family members about his dispute with FTB and the alleged effect of that dispute. 39 AA 9541 (22) – 9543 (33); 45 AA 11140 (26-27); 45 AA 11144 (45) – 11145 (47). Therefore, such testimony

[53]The only Nevada case cited by Hyatt in support of his contention that medical evidence is unnecessary to establish IIED is Bartmettler, 114 Nev. at 448, which is not applicable, as that discussion related to the separate tort of negligent infliction of emotional distress.

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was based on Hyatt's self-serving account. Because Hyatt's perception of the source and extent of his emotional problems was entirely subjective, similarly, witness testimony that relied upon his subjective perception—in the absence of any medical records or other objective evidence—cannot meet Nevada's standard. Hay v. Shell Oil Co., 986 S.W.2d 772, 777 (Tex. App. 1999).

Hyatt cites no case for the position that the testimony of friends and family is objective verification of his emotional distress. Instead, he cites Kalantar v. Lufthansa German Airlines, suggesting that the court allowed the testimony of friends or family to support the claim. RAB 128. In that case, however, the court concluded that the plaintiff failed to offer a "sufficient evidentiary basis for him to reach a jury...on his allegations of severe emotional distress." 402 F.Supp.2d 130, 146 (D.D.C. 2005). In fact, one court interpreting Dixon held that the plaintiff's testimony—in conjunction with that of his father—could not, as a matter of law, satisfy the objectively verifiable standard. Veney v. Ojeda, 321 F. Supp. 2d 733, 748-49 (E.D. Va. 2004). Without objectively verifiable evidence of severe emotional distress, the IIED claim failed as a matter of law.

7. The District Court Erred In Her Treatment Of FTB's Statute Of Limitations Defense Both Before And During Trial

Hyatt's brief inaccurately states both the facts and the law related to the statute of limitations issues. RAB 137-144. FTB filed several motions for partial summary judgment on each of Hyatt's "non-fraud" claims,[54] based on the statute of limitations. See, e.g., 14 AA 3440; 15 AA 3581; 17 AA 4021. The district court denied these motions after concluding, at Hyatt's urging, that material issues of fact existed with respect to when the limitations period began to run. See, e.g., 15 AA 3717-22; 19 AA 4672-73 (Hyatt argues issues of fact related to discovery of cause of action is for jury to decide); 19 AA 4672-78; 4700 (court's pretrial rulings).

[54]There is no dispute that each of Hyatt's causes of action, with the exception of his fraud claim, is subject to a two-year limitations period. See NRS 11.190(4)(e).

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At trial FTB presented the exact same evidence to the jury related to the statute of limitations defense. See 66 AA 16388-427; 77 AA 19072-74, 19119-21. Inexplicably, however, the district court granted Hyatt's motion for judgment as a matter of law, dismissing FTB's statute of limitations defense, after concluding, again at Hyatt's urging, that the identical evidence did not create an issue of fact, and that the same evidence now showed as a matter of law that the limitations period had not expired. 55 AA 12489 (26).

The district court's inconsistent and diametrically opposite rulings were wrong. The opening brief presented two straightforward arguments. First, the district court erred when it accepted Hyatt's argument that material issues of fact existed, and when it denied FTB's pretrial motions for summary judgment, because the uncontroverted evidence established that the limitations period expired before Hyatt filed his claims in January 1998. AOB 96-98. Second, even if the district court did not err in denying the pretrial motions, the district court certainly erred at trial when it accepted Hyatt's changed argument that no material issues of fact existed, and that, as a matter of law, the identical evidence established that the limitations period had not expired. Id.

a. Hyatt's Legal Contentions Related To The Statute Of Limitations Are Inaccurate

Hyatt essentially claims that in order for the limitations period to be triggered, the plaintiff must: (1) be aware of every single fact related to a defendant's actions that may give rise to the plaintiff's claims; (2) know the specific causes of action that may be based upon those facts; and (3) know the full extent of the damages. See generally, RAB 138-144. Based upon these erroneous legal contentions, Hyatt claims the statute of limitations was not triggered until he received the complete audit file from FTB in September 1996. [55] Id.

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[55]Hyatt makes reference to the "continuing tort doctrine." See RAB 139. Although Hyatt never attempts to analyze or tie this doctrine to the facts, FTB is compelled to explain why the "continuing tort doctrine" has no application to this case. As a starting point, FTB has been unable to locate any Nevada Supreme Court case adopting this doctrine and, for this reason alone, it does not apply. However, even if this court recognized the doctrine, the continuing tort doctrine only applies "when a tort involves a continuing wrongful conduct." Flowers v. Carville, 310 F.3d at 1126. Thus, "the doctrine applies where there is 'no single incident' that can 'fairly or realistically be identified as the cause of significant harm." Id.

Continued . . .

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First, a cause of action accrues when the wrong occurs and the party sustains injury. Petersen v. Bruen, 106 Nev. 271, 274, 792 P.2d 18 (1990). An exception to this general rule is the discovery rule, where the limitations period is "tolled until the injured party discovers or reasonably should have discovered facts supporting a cause of action." Id.; see also, G & H Associates v. Ernest W. Hahn, Inc., 113 Nev. 265, 934 P.2d 229 (1997). Thus, the statute of limitations commences once a plaintiff has sufficient facts to put him on "inquiry notice" – or has constructive knowledge – of his claims. Massey v. Litton, 99 Nev. 723, 728, 669 P.2d 248 (1983). Once a plaintiff has inquiry notice, he must use due diligence to discover the facts related to the claim. Bemis v. Estate of Bemis, 114 Nev. 1021, 1025, 967 P.2d 437, 441 (1998).

The main focus of the discovery rule is on the injured party's "knowledge of or access to facts rather than on her discovery of legal theories." Massey, 99 Nev. at 727-28. Therefore, "[a]ccrual does not wait until the injured party has access to or constructive knowledge of all the facts required to support its claim. Nor is accrual deferred until the injured party has enough information to calculate its damages." Davel Communications, Inc. v. Qwest Corp., 460 F.3d 1075, 1092 (9th Cir. 2006) (internal quotations omitted).

Based upon the uncontroverted evidence, Hyatt knew of sufficient facts to put him on notice of his claims in spring of 1995 and no later than, August 1995 – more than two years before Hyatt filed his complaint in January 1998. Therefore, the district court erred in

(quoting Page v. United States, 729 F. 2d 818, 821-22 (D.C. Cir. 1984). When the continuing tort doctrine is applied, the statute of limitation begins to run only from time the tortious conduct ceases – or when the last act of the continuing tort occurs. Page, 729 F.2d at 821.

Here, Hyatt has not identified what, if any, continuing wrongful conduct existed that would trigger the application of this principle of law. Moreover, each of the torts that are subject to the two-year limitations period (i.e., privacy torts, abuse of process and the like) are based upon conduct that occurred between 1993 and 1995. For example: Hyatt claims FTB's inquiries to third parties for information about him invaded his privacy (3 different ways), breached a confidential relationship, constituted an abuse of process and was intended to cause him severe emotional distress. All such inquiries and audit activities occurred between 1993 and 1995. The only "continuing acts" alleged by Hyatt relate to his fraud claim, which was expressly acknowledged as timely. Thus, there is no basis for the application of the continuing tort doctrine to the claims subject to FTB's statue of limitation defense.

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denying FTB's pretrial motions based upon the statute of limitations.

b. The Uncontroverted Evidence Placed Hyatt On Notice Of His Claims in 1995

Hyatt does not dispute that in the Spring of 1995 he was aware that FTB was sending demand letters to various third parties that included his name, social security number, and the fact that he was under audit. See RAB 139-40; 77 AA 19072-74, 19119-21. In addition, Hyatt does not dispute that after discovering this information he sent a fax to his tax representatives telling them that "FTB appears to be sending out demand letters to many entities to whom I wrote checks in late 1991 and 1992." 77 AA 19119. This uncontroverted evidence demonstrates that Hyatt discovered FTB's alleged invasions of his privacy, and the like, in the spring of 1995 – two years and six months before he filed his complaint. Hyatt's only argument is that these facts were insufficient to put him on notice because these letters and demands were only sent to his California "bank and his attorneys" who "had independent obligations to safeguard and not disclose his confidential information." RAB 139. In addition, Hyatt contends that he did not know that demands were being sent to Nevada entities or that information was being sent to others until he received the complete audit file. See id. at 139-140. Hyatt misstates the evidence.

Hyatt's own fax indicated that he knew, as of the Spring of 1995, that FTB was sending demand letters to "many entities" to whom he sent checks in 1991 and 1992. 77 AA 19119. Therefore, by Hyatt's own statements, he knew that these demands (which he also knew contained his social security number and other identity information) were being sent to a multitude of individuals – not just his banks and attorneys. See 77 AA 19122-50. Checks written by Hyatt in late 1991 and early 1992 included checks to Nevada entities, including: the Nevada DMV, Congregation Ner Tamid, Centel Telephone, Wagon Trails Apartments, and Nevada Power Company. See 77 AA 19166-76.

The determination of whether a plaintiff knew or should have known facts supporting a cause of action is generally a question of fact. Nevada Power Co. v. Monsanto Co., 955 F.2d 1304, 1307 (9th Cir. 1992). However, such an issue may be decided as a matter of law when "uncontroverted evidence irrefutably demonstrates plaintiff discovered or should have

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discovered" the alleged wrongdoing. Id. Moreover, Hyatt was fully aware of virtually every fact necessary to support his case by August 1995, when FTB sent him the detailed, 39-page preliminary determination letter. 66 AA 16388-427. Hyatt's brief baldly claims that this letter "did not otherwise provide sufficient information to Hyatt to put things together and figure out that his privacy was violated" and the basis for his other claims. RAB 140.

Hyatt misrepresents the facts related to information in the letter – especially when that information is coupled with Hyatt's previous undisputed knowledge of FTB's use of Demand Letters to third parties. For example, Hyatt claims that the August 1995 letter did not disclose FTB's use of Demand Letters or the fact that his address and social security number were disclosed by those demands. See RAB 140-41. However, the August 1995 letter specifically indicated that FTB sent letters to numerous individuals and entities. 66 AA 16410-12. In March 1995, Hyatt knew FTB was contacting third parties using Demand Letters and he knew that at least some of these included his social security number. 77 AA 19119-21. In addition, contrary to Hyatt's contentions, the August 1995 letter provided Hyatt sufficient information of the scope of FTB's investigation. In fact, the August 1995 letter made Hyatt aware of virtually all of FTB's third-party contacts – more than a year before he received the audit file. 66 AA 16388-427. The letter repeatedly referenced information FTB obtained from third parties – located both in Nevada and California – related to Hyatt's audit. Id. Examples from this letter include the following verbatim statements:

- "**Information was obtained** from the bank that the taxpayer did have safe deposit boxes in California." 66 AA 16389. (emphasis added).
- "**Information obtained from** the Clark County Treasurer's Office showed that a parcel of land is in name of Kern Trust." 66 AA 16394. (emphasis added).
- "The Clark County Department of Elections **informed us** that taxpayer voted once . . . ." Id. (emphasis added).
- "**information obtained** from Nevada Department of Motor Vehicles . . . ." 66 AA 16406. (emphasis added).

The letter also explained in great detail that auditor Sheila Cox made a visit to Las Vegas, in

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March 1995; she visited the Wagon Trails Apartments, interviewed the property manager and reviewed his file. 66 AA 16393. The letter also explained that Cox visited Hyatt's home and spoke with his trash collector and the mailman, and spoke with the receptionist at his alleged place of business. 66 AA 16396-97. Of particular note, Hyatt was also put on notice of FTB's third-party contacts due to the letter's reference to specific information that Hyatt had not given to FTB. For example, the August 1995 letter referenced specific dates related to when Hyatt had obtained medical attention from certain physicians. 66 AA 16391. In particular, the letter referenced two dates Hyatt visited a "Dr. Shapiro," along with Dr. Shapiro's address. Id. However, Hyatt never told the auditor which Dr. Shapiro he saw or the dates services were provided. FTB could only have obtained this information by contacting the doctor directly. The letter specifically referenced the amounts and dates that wire transfers were made to Hyatt by Matsushita and Fujitsu. 66 AA 16392. During the audit, Hyatt never provided this information to FTB and, in fact, had told FTB he did not have any of this information because the wire transfers were made to his attorneys' trust account. 34 AA 08481 (72-73); 66 AA 16312-13. The letter also made clear that FTB obtained information related to Hyatt's home that could only have been obtained by disclosing his address to third parties – "Southwest Gas Corporation has provided information that Gilbert Hyatt is not the customer of record for 7335 Tara"; "The Las Vegas Valley Water District has provided information that the account for 7335 Tara was established on 4/1/92"; "Silver State Disposal Service in Las Vegas has provided information that the account at 7335 Tara was opened on 4/1/92 in the name of Michael Kern." 66 AA 16396.

In sum, it was FTB's August 1995 letter – not the audit file – that put Hyatt on notice of the extent of FTB's audit. The contents of this letter, coupled with Hyatt's previous knowledge of FTB's third-parties contacts, is undisputed and uncontroverted. This information gave notice to Hyatt that: (1) FTB contacted a variety of third parties, without his permission; (2) FTB sent Demand Letters to various entities to whom Hyatt wrote checks in 1991 and 1992; (3) these Demand Letters included Hyatt's social security number

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and the fact he was under audit; (4) FTB disclosed his address to third parties in an effort to obtain information; (5) these Demand Letters and other contacts were sent to entities in both California and Nevada, many of which had no independent obligation to maintain his privacy, and a variety of other information that Hyatt now claims he only learned through the receipt of the audit file in 1996. The district court erred by not dismissing the 2-year statute of limitation claims, or at very minimum, erred by not allowing FTB to argue the issue to the jury. If this court agrees with FTB that all non-fraud claims were barred by the statute of limitations, and that the fraud claim was insufficient as a matter of law, Hyatt's entire case must be dismissed, and this court therefore does not need to address any other issues in the appeal or the cross-appeal.

8. The District Court Erred By Effectively Creating An Irrebuttable Presumption Against FTB

The opening brief established that the district court erred by effectively creating an irrebuttable presumption related to alleged negligent spoliation of evidence. AOB 98-100. This stemmed from FTB's replacement of an antiquated email system (EMC) with a modern system in the late 1990s. FTB made an exhaustive effort to ensure that all emails were preserved and printed before the replacement occurred. 25 AA 6293-305. When EMC was removed from FTB's mainframe computer, emergency backup tapes were created; but these tapes were overwritten approximately three years later pursuant to FTB's standard policy. 25 AA 6300-01. Hyatt only requested the backup tapes after he discovered they were overwritten. 25 AA 6308.

The district court determined that FTB committed negligent spoliation regarding the tapes, and the district court instructed jurors that they could draw an inference that the tapes would have been unfavorable to FTB. 54 AA 13278. This permissible inference was based upon Bass-Davis v. Davis, 122 Nev. 442, 134 P.3d 103 (2006). But the district court then made rulings far beyond anything allowed by Bass-Davis, barring FTB from offering any evidence explaining the circumstances surrounding the tapes, and preventing defense counsel from using admitted exhibits to argue that the jury should not draw the inference.

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This had the effect of erroneously transmuting the permissible inference into an irrebuttable presumption against FTB.

FTB's opening brief noted that Bass-Davis itself relied on two cases holding that the inference is permissible; that the affected party can explain the circumstances; and that a jury is free to reject the inference if the jury believes the documents were destroyed accidentally or for an innocent reason. AOB 99-100. FTB also cited additional similar cases that were not relied upon in Bass-Davis, but standing for the same proposition. AOB 100. Hyatt's brief offers virtually no response. His sole effort to deal with these cases is the following: "The FTB's citations to certain other cases where a court provided other remedies for the spoliation have no application here." RAB 145. Hyatt fails to cite, or even mention any of the cases discussed in the opening brief, even the two cases on which this court relied in Bass-Davis. Hyatt completely ignores these cases because he has to – the cases are sound, applicable and show that the district court erred.

Hyatt also makes the following conclusory argument: "Under Bass-Davis and a wealth of consistent authority from other jurisdictions, once spoliation is found by the court, the court can order that the spoilating party is not allowed to reargue this issue to the jury." RAB 145, lines 8-10. Bass-Davis says no such thing, and Hyatt fails to identify a single case within the "wealth of consistent authority from other jurisdictions." Id. Instead, his only citation is to a few pages in one of his own district court papers. RAB 145, line 26, fn 538. Although his district court paper cited some cases from foreign jurisdictions dealing with other issues, none of those cases stand for the proposition asserted in his answering brief.[56] 39 RA 9744-49.

The effect of an adverse inference jury instruction can be outcome-determinative if the jury decides to draw an inference that the missing information would have been adverse to a party. In re NTL, Inc. Sec. Litig., 244 F.R.D. 179, 192 (S.D.N.Y. 2007) (an adverse

[56]Hyatt's reliance on his district court paper violates NRAP 28(e)(2), which prohibits a party from incorporating by reference or referring the supreme court to a memorandum of law submitted to the district court, for an argument on the merits of an appeal.

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inference instruction is a severe sanction "that often has the effect of ending litigation because it is too difficult a hurdle for the spoliator to overcome"). This is why a trial judge must use caution when considering such an instruction. See State v. Engesser, 661 N.W.2d 739, 755 (S.D. 2003) (adverse inference spoliation instruction should be applied with caution); Pure Power Boot Camp v. Warrior Fitness Boot Camp, 587 F. Supp. 2d 548, 567 (S.D.N.Y. 2008) (characterizing adverse inference instruction as "severe"); Jackson v. Harvard Univ., 900 F.2d 464, 469 (1st Cir. 1990) (characterizing adverse inference as a "grave step").

The party affected by the permissive adverse inference instruction must be able to offer evidence explaining the circumstances of the lost or destroyed evidence. This does two things. First, it gives the jury a complete picture with which to evaluate the party's culpability and to determine whether the inference should be drawn or rejected. Second, the explanation may itself be relevant to the jury's decision on whether the lost or destroyed evidence was probably adverse to the affected party. Hyatt ignores these principles; he ignores applicable case law; and he cites no law supporting the district court's ruling. This court has consistently held that it will not consider conclusory arguments lacking substantive citations to relevant legal authority. See State Indus. Ins. Sys. v. Buckley, 100 Nev. 376, 382, 682 P.2d 1387 (1984) (citing Smith v. Timm, 96 Nev. 197, 606 P.2d 530 (1980), Gilbert v. Warren, 95 Nev. 296, 594 P.2d 696 (1979) and Holland Livestock Ranch v. B & C Enterprises, 92 Nev. 473, 553 P.2d 950 (1976)). In the present case, the court should reject Hyatt's conclusory arguments, which lack any citation to relevant legal authority.

F. The Compensatory Damages Were Legally Improper

Compensatory damages in this case should have been capped at $75,000 per claim. Hyatt's answering brief fails to provide any legitimate arguments against imposition of the cap. If the damages are not capped, the damages are excessive as a matter of law. A verdict is excessive when the amount indicates prejudice or passion on the part of the jury, or when the amount is so clearly beyond reason as to shock the judicial conscience. Slack v.

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Schwartz, 63 Nev. 47, 58-59, 161 P.2d 345 (1945). In such a case this court "would not hesitate to disturb the judgment." Id. at 59. See also, Hazelwood v. Harrah's, 109 Nev. 1005, 1010, 862 P.2d 1189 (1993) overruled on other grounds by Vinci v. Las Vegas Sands, Inc., 115 Nev. 243, 984 P.2d 750 (1999) (new trial can be granted where verdict is "so flagrantly improper as to indicate passion, prejudice or corruption in the jury"). In the present case the jury awarded compensatory damages of $52 million for invasion of privacy and $85 million for emotional distress. The district court granted no relief from these astronomical awards. Hyatt's answering brief fails to provide any justification for the awards. They must be set aside.

1. Standard of Review Regarding Compensatory Damages

FTB contends that the district court erred by denying FTB's request to apply comity and to limit compensatory damages to $75,000 per claim. AOB 100-02. This is a purely legal issue, which this court should review *de novo*, just as this court reviewed the comity issue *de novo* in its April 2002 order. 5 AA 1183-93. FTB also contends that there was no evidence of invasion of privacy damages. AOB 102-103. On such an issue, this court conducts its own independent review of the record; if there is no evidence of damages, an award of damages by the jury is improper and must be set aside, as a matter of law. E.g., Mainor v. Nault, 120 Nev. 750, 773-76, 101 P.3d 308 (2004). Finally, FTB contends that the emotional distress damages cannot stand because the district court erred by refusing FTB's evidence of alternative causes of emotional distress, and because the $85 million award was excessive. These contentions raise legal issues that should be reviewed *de novo*. E.g., Miller v. Schnitzer, 78 Nev. 301, 307, 371 P.2d 824 (1962) (special damages reduced by Supreme Court).

2. All Compensatory Damages Should Have Been Statutorily Capped

For the reasons articulated at pages 100-101 of the opening brief, all compensatory damages should have been capped at $75,000 per claim. This court has already ruled that FTB's complete immunity statute should be applied to the extent that the statute does not offend a comparable Nevada policy. 5 AA 1189-90. Regarding compensatory damages,

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California allows no recovery against FTB, but Nevada allows tort plaintiffs to recover up to $75,000 per claim against government entities. See NRS 41.035(1). Therefore, California's complete immunity statute for FTB would only offend Nevada's policy to the extent that plaintiffs are deprived of the ability to recover up to $75,000 per claim. Denial of recovery beyond that limit offends no Nevada policy. The cap should therefore apply.

a. Hyatt's Arguments Against the Application of Comity Fail

i. Hyatt's General Arguments and His "Special Immunity" Argument

Hyatt argues that comity should be rejected because unlimited compensatory damages are necessary to protect Nevada citizens from out-of-state government tortfeasors. RAB 146-50. The Nevada Legislature has established a policy of protecting Nevada citizens from government tortfeasors by waiving sovereign immunity and allowing compensatory damages, but only up to $75,000. In its 2002 decision, this court held Nevada's statute applied to FTB. 5 AA 1189-90. Thus, Hyatt's argument ignores the fact that allowing recovery against FTB up to $75,000 would give Nevada citizens protection against out-of-state government tortfeasors, to the full extent that such protection is given to Nevada citizens who make claims against Nevada government entities.

Hyatt next argues that this court "is not obligated to grant special immunity to the FTB." RAB 147. We are not demanding "special" immunity. We are merely requesting that this court fully apply its April 2002 comity ruling to the present comity issue regarding the limit on compensatory damages. And we are merely requesting this court to do what the United States Supreme Court said in its 2003 opinion, i.e., "sensitively appl[y] principles of comity with a healthy regard for California's sovereign status, relying on the contours of Nevada's own sovereign immunity from suit as a benchmark for its analysis." Franchise Tax Bd. of California v. Hyatt, 538 U.S. 488, 499 (2003).[57]

[57]We do contend that the district court's refusal to recognize any immunity for compensatory and punitive damages violated FTB's constitutional rights under the Full Faith and Credit Clause, as explained at AOB 101, fn. 80.

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Hyatt argues that comity is a voluntary doctrine that should not be applied in this case, similar to the denial of comity in Mianecki v. Second Judicial Dist. Court, In & For Washoe County, 99 Nev. 93, 658 P.2d 422 (1983). RAB 148-49. Hyatt's argument ignores the fact that this court has already decided that issue in this very case. 5 AA 1189-90. In April 2002 this court rejected Hyatt's argument and decided that comity would be applied regarding FTB's immunity. Id. Indeed, this court ruled that application of comity was mandatory with regard to FTB's immunity, to the extent that such immunity did not offend Nevada policies; and the court issued a writ of mandamus commanding the district court to comply with its mandatory duty to apply immunity to the discretionary/negligence claims.

ii. Hyatt's Arguments Regarding Compensatory Damages Used for Deterrence and Punishment

Hyatt's next contention is that substantial compensatory damages are necessary "to sanction and deter" misconduct by government employees from other states. RAB 149, lines 10-11. Hyatt contends that the $75,000 limit on compensatory damages should not apply because Nevada needs a "means of deterring and punishing" government employees from other states. RAB 150, lines 11-12. Hyatt's argument blurs the distinction between compensatory and punitive damages. Compensatory damages are only intended to "compensate a wronged party" for damages actually suffered. Ainsworth v. Combined Ins. Co., 105 Nev. 237, 244, 774 P. 2d 1003 (1989), modified on other grounds in Powers v. United Servs. Auto. Ass'n, 114 Nev. 690, 706, 962 P. 2d 596 (1998). On the other hand, punitive damages are designed to punish and deter wrongful conduct. Id.; see also, Ace Truck & Equip. Rentals, Inc. v. Kahn, 103 Nev. 503, 506, 746 P. 2d 132 (1987) (although focus of punitive damages is on punishing and deterring culpable conduct, focus of compensatory damages is on "the injury suffered by the plaintiff"), abrogated on other grounds in Bongiovi v. Sullivan, 122 Nev. 556, 138 P.3d 433 (2006).

Hyatt contends that unlimited compensatory damages "provide a penalty for those [wrongful] actions and a strong dose of deterrence against repeated offenses." RAB 153, lines 8-9. Hyatt contends that deterrence is a "critical goal" of compensatory damages. Id. at lines 10-11. Hyatt's only citation for this contention is part of a sentence taken out of

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context from Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 306 (1986). RAB 153, fn 567. In Stachura the Supreme Court dealt with an unrelated issue regarding the measure of damages in a federal civil rights case. Despite the vague sentence in Stachura on which Hyatt relies, more recent Supreme Court pronouncements are to the contrary. In State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003), the Court recognized that although compensatory and punitive damages are usually awarded at the same time by the same decision-maker, compensatory and punitive damages "serve different purposes." Id. at 416. Specifically, compensatory damages are "intended to redress the concrete loss that the plaintiff has suffered...." Id. "By contrast, punitive damages serve a broader function; they are aimed at deterrence and retribution." Id. Furthermore, in Nevada punitive damages are awarded in addition to compensatory damages, for the purpose of punishing and deterring conduct. Those punishment and deterrent purposes are "unrelated to the compensatory entitlements of the injured party." Siggelkow v. Phoenix Ins. Co., 109 Nev. 42, 45, 846 P.2d 303 (1993); Ainsworth, 105 Nev. at 244; Ace Truck, 103 Nev. at 506.

Hyatt's arguments for refusing to apply this court's April 2002 comity holding are not persuasive. Hyatt has failed to provide any legitimate argument for rejecting a result that sensitively applies principles of comity with a healthy regard for California's sovereign status, relying on the contours of Nevada's own sovereign immunity as a benchmark for the analysis. Franchise Tax Board, 538 U.S. at 499.

iii. Hyatt's Argument Regarding Equal Treatment

In a five-page section of the answering brief, Hyatt attempts to rebut an argument that FTB never made. The first sentence of this section in Hyatt's brief states: "The FTB argues that the doctrine of comity has been understood to require complete equality among States." RAB 154, lines 12-13. Later in this section, Hyatt states that "FTB suggests" that comity requires "equal treatment between States under all circumstances." RAB 155, lines 16-17. Hyatt cites FTB's opening brief at pages 32-33 for his characterization of FTB's argument. RAB 154 fn. 570.

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FTB is not arguing that comity requires "complete equality" among states, or that comity requires "equal treatment between States under all circumstances." Rather, FTB has consistently argued that FTB, as a California government entity, should be treated no worse than a similarly situated Nevada government entity in a Nevada court case. AOB 101, lines 12-14 (FTB should be "treated no worse than a similarly situated Nevada government entity"); 102, lines 6-7 (same); 108, lines 20-21 (same). FTB's arguments were largely based upon this court's April 2002 holding that California's complete immunity statute for FTB should be applied under the doctrine of comity, but only to the extent that the immunity statute did not contravene Nevada policies. 5 AA 1189-90. Because the statutes in both states provided immunity from claims based on discretionary acts, those claims were mandatorily dismissed. 5 AA 1189-90. Yet other claims, which would have survived against a Nevada government entity in a Nevada court based on immunity law as it existed at that time, were allowed to proceed. In this result, FTB was treated no worse than a Nevada government agency would have been treated in a Nevada court, and Hyatt was treated no better than if he sued a Nevada government entity.

If anything, it is Hyatt who argued that states should be given "equal treatment." Hyatt made this argument attempting to convince the United States Supreme Court that this court's April 2002 decision was sound. Hyatt's brief in the Supreme Court argued that states can recognize the sovereign interests of other states, "using their own sovereign interests as a benchmark." 6 AA 1360. His brief also argued that in the present case the "reference point" for FTB's liability is "the liability *of the State [of Nevada] itself.*" 6 AA 1341 (italics emphasis in original). At oral argument at the Supreme Court, when asked by Justice Stevens whether states should treat each other "the way they would want to be treated themselves," Hyatt's counsel answered affirmatively, arguing that "we want to treat the other sovereign as we do treat ourselves," and further arguing: "We are treating the other sovereign [California] the way we treat ourselves." 6 AA 1480 (emphasis added). Thus, it was Hyatt who successfully argued to the Supreme Court that this court's April 2002 order should be affirmed because this court treated the two sovereigns equally.

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Hyatt relies on a municipal bond case, Dep't of Revenue of Ky v. Davis, 553 U.S. 328 (2008). RAB 154-155, n. 571. That case involved the Commerce Clause, with nothing to do with issue of comity. Hyatt also relies on property tax law, arguing that it is permissible for states to exempt their own property from taxes, while imposing taxes on in-state property owned by another state. RAB 155. Again, the cases on which Hyatt relies have nothing to do with whether comity should be applied in a tort case in which an out-of-state government entity has been sued in a Nevada court.

Finally, Hyatt argues that Nevada v. Hall, 440 U.S. 410 (1979) compels a denial of comity here. RAB 157. Hyatt notes that the State of Nevada was held liable for unlimited damages for a traffic accident in California, even though there was a cap on damages under Nevada law. Id. Hyatt argues that "if California were involved in an identical accident in Nevada, the FTB's theory would mean that California could claim the benefit of the Nevada statutory cap, thereby limiting its own out-of-state exposure to a modest level of damages." RAB 157, lines 10-13.

Hyatt entirely misconstrues FTB's comity argument. FTB does not contend that an out-of-state government defendant should enjoy *more* protection than the forum state would enjoy in the forum state's own courts. We merely contend that an out-of-state sovereign should be treated no *worse* than the forum state would be treated in its own courts. In Nevada v. Hall, the Nevada government entity that caused the accident in California was treated no worse than a similarly situated California agency would have been treated in that state; and the injured California citizens received no greater benefit against the Nevada government entity than they would have received in a lawsuit against their own state government if the accident had been caused by a California government employee. Hall, 440 U.S. at 424.

The comity analysis applied in this court's April 2002 order is the same analysis that FTB is seeking here. California has immunity laws. We are requesting this court to recognize and apply comity to those laws, to the extent that those laws do not offend important Nevada public policies. We are not asking this court to apply Nevada's immunity

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laws to any greater extent than the FTB would be entitled to immunity under California laws. Accordingly, the compensatory damages award against FTB, if allowed to stand at all, should be capped at $75,000 per claim.[58]

iv. Hyatt's Full Faith and Credit Argument

FTB's opening brief demonstrated that the Full Faith and Credit Clause places limits on the discretionary application of comity. AOB 67-68, fn 64. States cannot act with outright hostility to sister states by refusing to recognize laws that are not antagonistic to their own policies. Id.; AOB 101, fn 80. This court's April 2002 ruling survived a Full Faith and Credit Clause analysis because this court had given "healthy regard" for California's sovereign status, relying on Nevada's own sovereign immunity as a benchmark for this court's analysis.[59] Franchise Tax Board, 538 U.S. at 499.

In response, Hyatt argues that the judgment in this case, if affirmed, would not be unduly hostile to the sovereign State of California -- even if Nevada courts refuse to give any recognition to California's laws granting immunity to FTB for compensatory and punitive damages, and even if Nevada courts give no regard whatsoever to California's sovereign status or to the contours of Nevada's own sovereign immunity. RAB 147-49, 158-60. Hyatt's arguments ignore reality. Short of a military attack by one state against another, it is difficult to imagine an act more hostile than one state's courts imposing a half billion dollar judgment against another state, including $250 million in damages intended to punish the citizens of the other state, all in a case involving a solitary multimillionaire plaintiff who moved from a taxing state to a non-taxing state, and who did not like the

[58]As such, in Hyatt's hypothetical example in which a California government employee causes an accident in Nevada, if the California government agency did not have immunity or a cap on damages under California law, the agency would not be able to claim some type of Nevada statutory immunity or cap applicable to Nevada government entities. In the present case, however, FTB enjoys complete immunity under California law. We are only requesting this court to recognize FTB's immunity to the extent that it does not offend important Nevada public policies. Limiting FTB's damages to $75,000 per claim offends no such Nevada public policy.

[59]As originally noted, the continuing vitality of Nevada v. Hall, 440 U.S. 410 (1979) is extremely questionable in light of more recent Supreme Court opinions. AOB 101, fn 80.

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decisions of the taxing state. This Nevada judgment, if affirmed, will fall on the shoulders of California taxpayers, even though Hyatt's compensatory damages would have been capped and punitive damages would have been barred if he had sued a Nevada government entity. It is difficult to perceive a more hostile economic act by one sovereign state against another. This is precisely what the Full Faith and Credit Clause avoids.

v. Hyatt's Law of the Case Argument

Hyatt's brief claims that this court is not obligated to treat FTB the same as it would treat a similarly situated Nevada state agency as a matter of comity. RAB 146-62. This court already determined the manner and application of comity to California's sovereign immunity statute in this case. Therefore, the application of comity to California's sovereign immunity statute in this case is the law of the case. Hyatt argues, however, that the court's comity ruling is not the law of the case with respect to the issues related to compensatory and punitive damages. See RAB 158-60. He draws a narrow construction of the law of the case doctrine, claiming that this court must re-decide and re-review the application of comity to California's sovereign immunity statute on every issue that may arise in this case that requires the application of this rule of law. See RAB 160-61.

In Nevada, "when an appellate court decides a principle or rule of law, that decision governs the same issues in subsequent proceedings in the case." Dictor v. Creative Mgmt. Servs., LLC, 126 Nev. ___, 223 P.3d 332, 334 (2010); see also, Hsu v. County of Clark, 123 Nev. 625, 173 P.3d 724, 728 (2007). It is the "principle" or "rule of law" not its narrow application, that is the law of the case and must be applied to in all subsequent proceedings in this litigation. Hsu, 173 P.3d at 728.

Hyatt cites no case limiting the law of the case doctrine to only those specific factual contexts in which a particular principle or rule of law is announced in a previous appeal. To the contrary, by determining that the law of the case doctrine applies to either principles or rules of law, Nevada's legal authorities have determined the exact opposite – that the rule of law or principle determined by decision will be applied to different factual contexts that may arise in a case involving the same legal issues or principles. See Hsu, 173 P.3d at 728

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(describing that principle or rule of law must be applied in all subsequent proceedings).

Here, this court's 2002 decision determined two things. First, the doctrine of comity should be applied to FTB, out of deference and respect, and to promote harmonious interstate relations between Nevada and California. 5 AA 1189-1190. Second, California's complete immunity statute must be applied to the extent application of the immunities contained in that statute did not violate Nevada's policies or interests. Id. Based upon the application of this rule of law, this court determined that the district court erred in failing to: (1) apply the doctrine of comity in the manner described by the court's decision; and (2) dismiss Hyatt's negligence claim. Id. This court issued a writ of mandamus ordering the district court to apply the doctrine of comity. Id. This decision was affirmed by the United States Supreme Court. 6 AA 1486-92. As a result, the district court was required to apply comity, throughout all of the subsequent proceedings, to California's sovereign immunity statute in a manner consistent with this court's 2002 decision. Wickliffe v. Sunrise Hosp., Inc., 104 Nev. 777, 781, 766 P.2d 1322, 1325 (1988) (a trial court has no authority to deviate from the mandate issued by an appellate court).

Nothing in this court's 2002 decision limited the rule of law announced in that decision to only the specific factual context raised in the initial writ. In fact, such a limited application of the law of case doctrine makes no sense. The law of the case doctrine "is designed to ensure judicial consistency and to prevent the reconsideration, during the course of a single continuous lawsuit, of those decisions which are intended to put a particular matter to rest." Hsu, 173 P.3d at 728. If the law of the case doctrine applied in the narrow manner that Hyatt claims, every legal principle announced by the appellate court could be re-evaluated every time a new factual issue arose in the litigation that related to the particular issue. No legal issue could ever be settled because each new factual issue or scenario would require the reconsideration of the legal principles or rules of law already announced. This is exactly what the law of the case doctrine is intended to prohibit. Hsu, 173 P.3d at 728.

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Moreover, this narrow interpretation would allow district courts, like the district court in this case, to avoid the law of the case doctrine at their own whims. Simply by claiming that a new factual context is at issue, the district courts would be permitted to re-evaluate and consider what legal principle or rule of law to apply – in spite of previous mandates from the court expressly announcing the principle or rule of law at issue.

Finally, Hyatt's narrow interpretation of the law of the case doctrine is not supported by Dictor, *supra*, in which this court held the law of the case doctrine applies to any issue decided by the appellate court "explicitly or by necessary implication." See also, Bernhardt v. Los Angeles County, 339 F.3d 920, 924 (9th Cir. 2003) (noting that law of the case doctrine applies to explicit as well as implicit determinations by court); Williamsburg Wax Museum, Inc. v. Historic Figures, Inc., 810 F.2d 243, 249 (D.C. Cir. 1987) (same).

Therefore, contrary to Hyatt's arguments, the principle and rule of law previously announced by this court's 2002 decision is the law of the case and requires that the doctrine of comity be applied to California's sovereign immunity statute in the same manner previously announced by this court. Comity must be extended to California's sovereign immunity statute, requiring that FTB be treated no worse than a similarly situated Nevada state agency.

vi. Hyatt's Judicial Estoppel Argument

The judiciary's integrity is protected by the doctrine of judicial estoppel, which prevents a party from taking inconsistent positions in litigation. Marcuse v. Del Webb Communities, Inc., 123 Nev. 278, 163 P.3d 462 (2007). The doctrine applies when (1) the same party has taken two positions; (2) the positions were taken in a judicial proceeding; (3) the party was successful in asserting the first position (i.e., the court adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud or mistake. Id. In the present case, all of these requirements are satisfied.

Although Hyatt's brief provides quotations to some of his statements to the Supreme Court (RAB 162, fn 597), he ignores the statements on which judicial estoppel is based.

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This court's April 2002 order applied comity and treated FTB no worse than a Nevada government entity would be treated in Nevada courts. 5 AA 1189-90. This result left some claims against FTB intact. 5 AA 1190. FTB believed the entire case should have been dismissed; and when FTB challenged this court's decision in the United States Supreme Court, Hyatt's counsel argued for affirmance by attempting to show the Supreme Court that this court's decision gave appropriate constitutional respect to the sovereign State of California. 6 AA 1341, 1467. Hyatt's counsel recognized the need to convince the Supreme Court that California was being treated no worse than Nevada would be treated in its own courts. Hyatt's brief in the Supreme Court argued that states are capable of recognizing the sovereign interests of other states by "using their own sovereign interests as a benchmark." 6 AA 1360. Hyatt argued that the "reference point" for California's liability in this case is "the liability *of the State [of Nevada] itself.*" 6 AA 1341 (italics emphasis in original). Hyatt's brief relied upon case law in which forum courts looked to the scope of government immunity for their own states in determining the scope of a sister state's liability. 6 AA 1359. At oral argument, Hyatt again argued that states "look at their own immunity to see what kinds of suits could be brought against them," and states try to grant "the outside sovereign that same type of immunity." 6 AA 1467 (emphasis added). When Justice Stevens asked whether states should treat other sovereign states the way they would want to be treated themselves, Hyatt's counsel answered affirmatively, assuring the Supreme Court: "We are treating the other sovereign [California] the way we treat ourselves." 6 AA 1480.

Hyatt prevailed in the Supreme Court. Franchise Tax Bd., 538 U.S. at 499. Indeed, the Supreme Court expressly adopted Hyatt's catch-phrase "benchmark" argument, upholding this court's decision because 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." Franchise Tax Board, 538 U.S. at 499.

Now, of course, Hyatt pretends that he did not take this position in the Supreme Court. In truth he took his position in his written and oral arguments to the Supreme Court;

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his position at that time was successful in convincing the Supreme Court to affirm this court's April 2002 ruling; his position at that time is totally inconsistent with his present position that comity should be rejected and that a California agency can be treated far worse than a Nevada agency would be treated in a Nevada court; and his position was not taken as a result of ignorance, fraud or mistake. Consequently, every factor for judicial estoppel is satisfied in this case.

3. There Was No Evidence Of Invasion Of Privacy Damages

As pointed out in the opening brief, there was absolutely no evidence that in all the years since FTB's alleged disclosures of Hyatt's name, address and social security number, he had ever been targeted for identity theft, or industrial espionage or had he ever suffered any actual damage whatsoever as a result of the disclosures. AOB 102. Despite the lack of any actual damage from the alleged invasion of privacy, the jury awarded $52 million for such damages. 54 AA 13309. Coincidentally, the amount of Hyatt's tax liability at the time was approximately $52 million. 45 AA 11134 (2)-11135 (7); 11152 (74). Hyatt concedes that the $52 million for invasion of privacy damages was "different and separate from emotional distress damages." RAB 132, lines 17-19. Hyatt argues, on the other hand, that loss of privacy damages "compensate for the visceral loss of the privacy interest that is gone forever." Id. at lines 19-20. Hyatt's legal citations for this proposition (at RAB 132, fn 498) provide no support for his position. Indeed, legal research has revealed no reported case, from any state or federal jurisdiction, allowing compensation for a "visceral loss" of anything.[60]

[60]Hyatt cites to the Restatement (Second) of Torts §652H (1977). RAB 132, fn 498. This Restatement section provides no support for recovery of privacy damages to compensate for a visceral loss. The Restatement section only allows invasion of privacy damages for (a) the harm to the plaintiff's interest in privacy resulting from the invasion [here, Hyatt showed no actual harm, no incident in which someone attempted to use the information against him, no attempt to steal his identity, and no other actual harm resulting from the alleged disclosures]; (b) mental distress [this was awarded in the other portion of the verdict ($85 million)]; and (c) special damage caused by the invasion [here, Hyatt offered no evidence of any special damages caused by the disclosures].

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Hyatt argues that his astronomical award of invasion of privacy damages is justified because he "strives hard to maintain a private, low key, and unassuming lifestyle." RAB 134, line 1. This assertion is belied by the record, which shows that Hyatt and his retained publicist actively sought publicity for Hyatt regarding his computer chip patent. 48 AA 11984-92. Media went to his home and conducted extensive personal interviews, there were hundreds of newspaper and magazine articles published throughout the world, and Hyatt was even the subject of an episode of the nationally syndicated television show "Hard Copy." 39 AA 9726 (114); 79 AA 19732-38; 89 AA 22068-137; 28 AA 6993.

Hyatt argues that the huge invasion of privacy award can be justified because FTB allegedly "put Hyatt in front of his circle of friends, family members, business associates, and patent sub-licensees as a purported tax cheat and a fraud." RAB 134, lines 1-3. Hyatt provides no appendix citation for this statement. At trial, Hyatt was asked by *his own counsel* whether he knew of any people, businesses, associations or other entities that thought any less of him as a result of receiving notices that he was being audited. Hyatt's answer was: "No. I don't know for certain, but I'm very concerned that they would have." 37 AA 9172 (100). Thus, although he was "concerned" about possible harm from the disclosures, he had no knowledge of any such harm that may have actually occurred. Additionally, Hyatt failed to call a single witness who testified that he or she thought less of Hyatt as a result of FTB's disclosures.

Courts have not hesitated to reduce excessive compensatory damages in invasion of privacy cases. For example, in Geragos v. Borer, B208827, 2010 WL 60639 (Cal. Ct. App. Jan. 11, 2010), the defendant surreptitiously videotaped prominent attorneys and their famous client. The plaintiffs suffered distress, embarrassment, humiliation and paranoia for which they sought treatment from the invasion of their privacy; nevertheless, an award of $2.25 million for compensatory damages was reduced to $150,000. In Fotiades v. Hi-Tech Auto Collision Painting Services, Inc., E029854, 2001 WL 1239716 (Cal. Ct. App. Oct. 17, 2001), the plaintiff's supervisors at his workplace photographed the plaintiff while he was urinating in a restroom. They distributed the photograph of the plaintiff's penis to numerous

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employees and customers. The plaintiff suffered extreme humiliation and severe emotional distress, but his award of $1 million for invasion of privacy was reduced to $350,000.

In Zinda v. Louisiana-Pac. Corp., 409 N.W.2d 436 (Wis. Ct. App. 1987) aff'd in part, rev'd in part in 440 N.W.2d 548 (Wis. 1989), an employee was terminated due to alleged inconsistencies between his work application and his medical history. The director of personnel published a notice in a company newspaper, indicating that the employee was terminated for falsification of employment forms. The plaintiff sued for invasion of privacy. His evidence showed that the newspaper reached the business where his wife worked; he was embarrassed and humiliated; he wondered if his friends thought he was a liar; and he acted like he was "shot down." Id. at 442. The jury awarded him $50,000 for invasion of privacy, but the appellate court determined that the award was excessive and unsupported by the evidence. Among other things, the court noted that he suffered no "actual damages," with no medical treatment, no counseling, and no out-of-pocket losses (like Hyatt). Id.

In Peoples Bank & Trust Co. of Mountain Home v. Globe Int'l Pub., Inc., 978 F.2d 1065 (8th Cir. 1992), the plaintiff was a 97-year-old woman who was a "local legend" in her community. The defendant published the plaintiff's photograph on the cover of a tabloid magazine, with the headline "Pregnancy forces granny to quit work at age 101." Id. at 1067. A story inside the tabloid had a second photograph of the plaintiff, with a fictitious story about a woman who quit work at age 101 because she was pregnant as a result of an extramarital affair. The plaintiff sued for various theories, including invasion of privacy. The jury returned a verdict of $650,000 in compensatory damages. Id. Despite the trial court's findings that the defendant's conduct damaged the plaintiff's "very being" and that the photographs had the effect of burying the plaintiff in mock, mire and slime, the appellate court determined that the damages were so great as to shock the judicial conscience. Id. at 1071. The court noted that although the plaintiff was angry, upset, humiliated, embarrassed, depressed and disturbed, there was no evidence of significant adverse effects on her health,

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and no evidence of lost earnings, medical expenses and the like. Id. The case was remanded to the trial court for a "substantial" reduction of compensatory damages. Id.

It bears repeating that Hyatt's $52 million award for invasion of privacy was not based upon emotional distress he suffered due to the alleged disclosures of private information. The jury awarded emotional distress ($85 million) separately. 54 AA 13309. There was simply no evidence that Hyatt suffered any actual harm from the alleged invasion of privacy, and certainly no harm justifying the ridiculous $52 million award. Hyatt's brief fails to identify any standard of review under which this award could possibly be upheld. Nor does he cite any case from any jurisdiction approving such an astronomical award. The award has no evidentiary basis, it is shocking and unsupportable under any standard of review, and there was no rationale basis for the district court's refusal to grant relief from this ridiculous award.

4. The Emotional Distress Damages Cannot Stand

As noted above, a verdict is excessive as a matter of law when the amount is so clearly beyond reason as to shock the judicial conscience, or where the verdict indicates passion, prejudice or corruption in the jury. Slack v. Schwartz, 63 Nev. at 58-59; Hazelwood v. Harrah's, 109 Nev. at 1010. For example, in Hazelwood a retired law enforcement officer was awarded $425,000 for humiliation, disgrace, emotional distress and worry resulting from false imprisonment and defamation, after he was wrongfully arrested and falsely accused of fraud. The excessive award was reduced to $200,000, because the verdict was likely influenced by passion and prejudice. This was evidenced by the fact that the plaintiff was not physically injured in the incident, and by the fact that he was an individual facing a large corporate adversary. 109 Nev. at 1010-11. In the present case, the jury awarded $85 million for emotional distress compensatory damages, and the district court refused to grant any relief from this ludicrous award. Like the plaintiff in Hazelwood, Hyatt was not physically injured, and he was an individual facing an out-of-state government tax agency. The verdict was certainly influenced by passion and prejudice, as in Hazelwood.

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At trial, after explaining Hyatt's claimed emotional distress evidence in excruciating detail, Hyatt's counsel asked the jury to award approximately $19 million, admitting that even this was "a big number." 52 AA 12931 (176). In his argument to the jury, counsel also expressly conceded that an award of approximately $43 million would be "absurd." Id. Yet the jury awarded more than four times the amount counsel conceded was a "big number," and nearly double the amount counsel conceded was "absurd." Hyatt argues that there is no law prohibiting a jury from awarding more money than counsel referenced in closing argument. RAB 136, lines 17-18. This may be true, but there is no rational justification for a trial judge's refusal to reduce a verdict of nearly double an amount that the plaintiff's counsel has expressly conceded, in open court on the record, is "absurd."

a. Hyatt's Limited Garden Variety Emotional Distress Imposed As A Discovery Sanction Can Not Support An $85 Million Award

Having refused to disclose any medical records during discovery, and having made the choice to limit his damages to "garden variety" emotional distress, it is astonishing that Hyatt can now contend that the $85 million award was not excessive. It is even more astonishing that the trial judge, who approved the Discovery Commissioner's decision limiting the damages to "garden variety" emotional distress, did not grant any relief from the verdict.

FTB's opening brief provided an exhaustive analysis of case law in Nevada and other jurisdictions, clearly establishing that the jury's award is entirely unprecedented in Nevada and elsewhere. AOB 104-106. Hyatt fails to provide any analysis of these numerous cases. RAB 134-36. His only argument is based upon a novel mathematical approach involving three cases. Hyatt contends that he was subjected to 11 years of pressure and misconduct from FTB. RAB 135. He then argues that in Bartgis, this court did not disturb a compensatory damage award of $275,000 for emotional distress, where the defendant's conduct lasted only about six months. RAB 135. Hyatt conveniently ignores the fact that the plaintiff in Bartgis suffered documented bladder infections, upper-respiratory infections, and a dramatic weight loss as a result of her emotional distress. If the award in

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Bartgis for six months of infliction of emotional distress is calculated out to Hyatt's alleged eleven-year time frame, the Bartgis emotional distress award would equate to approximately $6 million.

Similarly, Hyatt argues that in Guar. Nat. Ins. Co. v. Potter, 112 Nev. 199, 912 P.2d 267 (1996), this court did not disturb a $150,000 compensatory award for emotional distress for the defendant's conduct lasting approximately 18 months. RAB 135. Once again, if the damages in Potter are calculated for an eleven-year time frame, the damages would total approximately $1.1 million.

Hyatt also relies on State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003). RAB 135. Hyatt argues that the United States Supreme Court did not question a $1 million compensatory award for a year and a half of emotional distress. Id. Yet once again, if the award in Campbell is calculated for an eleven-year time frame, the total compensatory damages would be $7 million, which is approximately twelve times less than Hyatt's award.

Actually, a case cited in the Hyatt's answering brief for another proposition provides strong support for FTB's contention that the emotional distress award in the present case was excessive. In the section of his brief dealing with immunity, Hyatt cites Limone v. United States, 497 F. Supp. 2d 143 (D. Mass. 2007). RAB 63, fn. 247. That case involved two FBI agents who wanted to protect a high-priority confidential informant in a mafia investigation on the 1960s. The informant committed a murder. To protect him, the FBI agents intentionally and knowingly framed four innocent men for the murder. The innocent men were convicted. Three were sentenced to die in the electric chair, but their sentences which were later reduced to life sentences when the death penalty was vacated; the fourth was given a life sentence. Knowing that the men were innocent and had been falsely and fraudulently convicted of the murder, the FBI agents spent years after the trial successfully supporting the convictions during post-conviction proceedings. Two of the innocent men eventually died in prison after serving 17 and 27 years, respectively; the other two spent 29 and 33 years in prison, respectively, until they were freed after the FBI agents' conduct was discovered.

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The innocent men and their estates and families sued on various theories, seeking damages resulting from loss of liberty and their pain, suffering and emotional distress caused by the FBI agents. The trial judge, sitting without a jury, observed the horrendous physical and emotional distress suffered by all the plaintiffs, which the judge characterized as "beyond imagining." Id. at 229. Three of the innocent men had spent years on death row before their sentences were reduced; two died in prison; the two who survived spent 29 and 33 years in prison; each of the four innocent men "literally lost a lifetime"; wives were deprived of their husbands; children were deprived of their fathers; and the innocent men and their families were devastated and destroyed. Id. at 229-50.

The judge carefully evaluated the damages necessary to provide full compensation for the unimaginable loss of liberty and destruction of lives; and the judge considered damages award amounts in other cases. Id. Taking everything into consideration, the judge awarded two of the innocent men $1 million per year for their loss of liberty and their physical and emotional damages; the other two were awarded less than $800,000 per year. Id. at 250. Wives were awarded less than $35,000 per year for their 30 years of damages. Id. And awards to children and other family members for 30 years of suffering were approximately $8,000 per year. Id. Hyatt measures his own alleged emotional suffering at 11 years, and he asks this court to find that $85 million—which equates to nearly $8 million per year—is a reasonable amount of compensation. RAB 135-36. Comparing this award to Limone, the verdict here was undeniably excessive.[61]

No amount of debating skill by Hyatt can establish that his $85 million emotional distress award was within a reasonable range for garden variety emotional distress. Even if

[61] In attempting to show that his case is worse than all others, thereby justifying $85 million in emotional distress damages, Hyatt tells this court: "Hyatt has located no case of 11 plus years of continual financial pressure and combined with and caused by outrageous bad faith governmental misconduct and the resulting severe emotional distress." RAB 135, lines 3-5. This is not true. Actually, his attorneys found just such a case, indeed, a case far worse—Limone—which involved more than 30 years of loss of liberty, loss of life, economic and personal destruction of the innocent victims of the FBI agents' outrageous misconduct, and resulting severe emotional distress. RAB 63, fn. 247. Hyatt ignores the damages awards in Limone, which were mere fractions of the jury's award in the present case.

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this court somehow discards the garden variety limitation imposed by the trial judge and the Discovery Commissioner, the award is still beyond all reason, shocking the judicial conscience and there is no logical explanation for the district court's approval of this absurd award. The award must therefore be vacated entirely, capped, or remitted to a reasonable amount.

b. The Trial Judge Erred By Prohibiting FTB From Introducing Evidence Of Alternative Causes Of Emotional Distress

Having barred FTB from obtaining Hyatt's medical records, which would have been fertile ground for information as to alternative causes of Hyatt's alleged emotional distress, the district court went much further, also barring FTB from introducing evidence of other known events that clearly could have caused emotional distress. AOB 106-108. FTB's opening brief pointed out that the district court excluded all evidence of Hyatt's involvement in a patent interference lawsuit, which stripped him of any ownership interest in his coveted patent that had earned him hundreds of millions of dollars, effectively taking away his very identity as an inventor. AOB 107. This patent decision occurred in March 1995, four years after he moved to Nevada to avoid California taxes, two years after FTB's audit was commenced, and at virtually the same time when Hyatt was dealing with the FTB's audit. See AOB 4-6. Before trial, Hyatt conceded that it was a jury question as to whether his alleged FTB-related emotional distress was actually caused by alternative events in his life. 18 AA 4457 (Hyatt's counsel states that patent dispute and FTB dispute "occurred about the same time," and that whether patent dispute caused distress was for "the jury to decide"). Yet during trial, Hyatt's counsel changed his position and convinced the judge to exclude evidence of the patent interference action. 52 AA 12759-66.

Hyatt's only response on appeal is a single sentence in his brief representing to this court that the patent litigation was "short-lived" and does not explain objectively-verified manifestations of FTB-related distress that occurred "many years after" the patent litigation. RAB 136, lines 23-26. Hyatt's representation to this court that the patent litigation was "short-lived" is false. The patent interference action was commenced in the U.S. Patent and Trademark Office in 1991. 69 AA 17098-102. The Board of Patent Appeals and

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Interferences rendered its decision against Hyatt in September 1995. Id. at 23127. Hyatt appealed to the United States Court of Appeals, Federal Circuit, which rendered its decision against him in June 1998. Hyatt v. Boone, 146 F.3d 1348 (Fed. Cir. 1998). Hyatt petitioned for review by the United States Supreme Court, which rendered its decision against him by denying his petition in February 1999. Hyatt v. Boone, 525 U.S. 1141 (1999). Thus, Hyatt's eight-year losing patent litigation was anything but "short-lived," as Hyatt tells this court.

Likewise, Hyatt's representation to this court that his emotional distress from dealings with FTB was "many years after" his patent litigation is also false. His counsel conceded in the district court that the two potential causes of Hyatt's emotional distress (i.e., the patent litigation and FTB's conduct) occurred "about the same time." 18 AA 4457, line 22. His concession was factually correct. The patent litigation took place from 1991 until 1999, during the very time of FTB's audits. 49 AA 12116(3)-12122(28). In fact, the patent litigation was still ongoing in federal courts when Hyatt filed his suit against FTB in January of 1998, and the patent litigation was not resolved until months later, while the Clark County suit was in full progress. Hyatt v. Boone, 146 F.3d 1348 (Fed. Cir. 1998); Hyatt v. Boone, 525 U.S. 1141 (1999). As Hyatt's counsel conceded in the district court, whether the patent litigation and the loss of his coveted patent was a cause of emotional distress was a question for the jury to decide. 18 AA 4457.

Hyatt also had serious trouble with the IRS, which also may have caused emotional distress. He was being audited by the IRS at virtually the same time as he was being audited by FTB, involving the same huge income he had earned from his patent. 34 AA 8467-69. Hyatt attempts to downplay the significance of the IRS audit, contending that the dispute merely involved an accounting interpretation, and contending that he negotiated a "favorable settlement" with the IRS. RAB 137. Hyatt's characterization of the IRS audit is misleading. Although the IRS audit was settled, Hyatt had to pay $5 million to the IRS. 34 AA 8467(14). In opening statement, Hyatt's counsel told the jury that Hyatt "paid every dime that was due to the federal government," falsely suggesting that he had never had a

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dispute with the IRS and that he paid all his federal taxes willingly and voluntarily. 32 AA 7945 (17). Fundamental fairness required FTB to be allowed to cross-examine Hyatt regarding his dealings with the IRS in the audit, and regarding the extent to which he became emotionally distressed as a result of the IRS audit and the $5 million payment, especially after Hyatt opened the door. Yet Hyatt now contends that the IRS audit does not explain his emotional distress. RAB 136, lines 23-24. He apparently wants this court to make the factual determination on his point by taking his word for it. But it was for the jury to decide whether the IRS audit and the multimillion dollar payment of additional federal taxes was an alternative source of emotional distress.

FTB's opening brief also noted Hyatt's involvement in a number of other lawsuits during the very time of FTB's audit. AOB 108. These litigation conflicts easily could have affected Hyatt's emotional state, yet the district court precluded the jury from hearing this evidence. Id. Hyatt's answering brief ignores FTB's contention regarding the exclusion of this evidence. RAB 136-37.

In sum, Hyatt was allowed to present a completely one-sided picture to the jury, leading the jury to believe that there were no other sources of emotional distress for Hyatt, other than FTB's audit activities. This picture was false, undeniably having a significant impact in the jury's decision to award $85 million in emotional distress damages.

G. The Punitive Damages Award Cannot Be Upheld.

FTB makes two contentions regarding punitive damages. First, such damages cannot be awarded against FTB, as a matter of law. This is a purely legal issue requiring *de novo* review. E.g., City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981). Second, FTB contends that the $250 million award was excessive as a matter of law. This court applies *de novo* review to such contentions. Bongiovi, 122 Nev. at 580-83 (*de novo* review of punitive damages standards).

1. Comity Requires The Punitive Damages Award To Be Vacated

The opening brief established that comity requires Nevada courts to apply California's laws to FTB, unless doing so would violate Nevada's interests and policies.

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AOB 29-34, 108-109. In other words, the California government agency should be treated no worse than a Nevada agency would be treated in similar circumstances. Hyatt's answering brief provides no meaningful response to the fundamental question in this punitive damages issue: What important Nevada public policy is violated by application of California's statute prohibiting awards of punitive damages against government entities? Cal. Gov't Code § 818. Hyatt identifies no such Nevada public policy. In fact, the interests and policies of both states are identical, because Nevada also prohibits punitive damages awards against government entities. NRS 41.035(1).

Instead, Hyatt proffers a red herring argument on this issue. He contends that comity should be denied because FTB needs to be deterred and punished, and the only mechanism for deterring and punishing out-of-state entities is through punitive damages.[62] He attempts to distinguish out-of-state government entities from Nevada entities, contending that punishment and deterrence are not necessary against Nevada government agencies because Nevada agencies are controlled by Nevada executive and legislative branches. Id.

Hyatt's argument naively assumes that out-of-state government agencies lack any motivation to act responsibly if they are not subject to punitive awards. Hyatt's assumption has been rejected by the United States Supreme Court. In City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981), the Supreme Court examined American history and public policies regarding punitive damages, to determine whether punitive damages against public entities should be allowed in federal civil rights claims. A jury had assessed punitive damages against a city and various city employees and officials, for their violation of the plaintiff's civil rights. The question for the Court was whether the punitive damages against the city were appropriate. The Court noted that the common law only allowed punishment against "the actual wrongdoers," i.e., a municipality's officers and agents, not the

[62] Hyatt's argument in this section runs counter to that presented in the compensatory award section in which he argued that the compensatory damages were supposed to punish and deter the out-of-state tax agency. Compare RAB 149 with RAB 163.

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municipality itself. Id. at 263. If punitive damages were to be allowed against a government entity, "innocent tax payers would be unfairly punished for the deeds of persons over whom they had neither knowledge nor control." Id. at 266. Punitive damages against a government agency would punish "only the taxpayers, who took no part in the commission of the tort." Id. at 267. Such awards are "in effect a windfall to a fully compensated plaintiff, and are likely accompanied by an increase in taxes or a reduction of public services for the citizens footing the bill." Id. "Neither reason nor justice suggests that such retribution should be visited upon the shoulders of blameless or unknowing taxpayers." Id.

With respect to the argument that punitive damages are needed to deter government entities from wrongful conduct (similar to Hyatt's argument here), the Court also held: "A municipality, however, can have no malice independent of the malice of its officials. Damages awarded for punitive purposes, therefore, are not sensibly assessed against the government entity itself."[63] Id.

Hyatt's deterrence argument assumes that if the innocent citizens of California are required to pay a huge punitive award, these citizens will somehow take action to prevent misconduct in the future. An analogous argument was rejected in City of Newport, where the court held that "it is far from clear that municipal officials, including those at the policymaking level, would be deterred from wrongdoing by the knowledge that large punitive awards could be assessed based on the wealth of their municipality." Id. Thus, the deterrent effect in this context "is at best uncertain." Id. at 269.

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[63]Nevada law also recognizes that an entity can have no malice independent of the malice of its officials, for purposes of punitive damages. For example, NRS 42.007(1) prohibits punitive damages against a corporation for the wrongful acts of an employee, unless there was personal involvement of a corporate officer, director or managing agent. See also, Nittinger v. Holman, 119 Nev. 192, 197-98, 69 P.3d 688 (2003) (security shift supervisor in charge of all hotel/casino security at time of incident observed misconduct by security guards but failed to stop it; punitive award against corporate entity reversed, because shift supervisor was not managerial agent within corporation). In the present case FTB requested a jury instruction regarding this limitation on punitive liability, because no officers, directors or managerial agents of FTB committed or ratified any misconduct that would have justified punitive damages, but the trial court refused the instruction. See 89 AA 22149-57; 89 AA 22186

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Hyatt's argument also assumes that out-of-state government entities will not take corrective action in the absence of punitive awards. The City of Newport Court rejected this cynical view of public officials. The Court held that there is no reason to suppose that corrective action will not occur unless punitive damages are awarded against the public entity. Id. To the contrary, the "more reasonable assumption is that responsible superiors are motivated not only by concern for the public fisc but also by concern for the Government's integrity." Id. These observations by the United States Supreme Court were made in a case in which a municipality was sued in federal court. These observations are no less applicable to the present case, where a state agency was sued in another state. The City of Newport Court rejected punitive damages against government entities for federal civil rights violations, holding that punitive damages awards against public entities impose a burden on the taxpayers for malicious conduct of individual government employees, and this burden "may create a serious risk to the financial integrity of these governmental entities." Id. at 270. Such reasoning is applicable in the present case.

Accordingly, Hyatt's argument—that comity should be denied because there is a distinction between deterring conduct of out-of-state government entities and Nevada entities—is based upon faulty reasoning. The argument should be rejected.

Moreover, if Hyatt's argument for the distinction had any validity, this court and the United States Supreme Court would have drawn the same distinction when the comity issue was first decided by these courts in 2002 and 2003. One question at that time was whether Nevada courts should grant comity to California regarding immunity for discretionary or negligence conduct of the California agency. If Hyatt's argument had validity, these courts would have held that Nevada can control the negligent and discretionary conduct of its own state employees through the Nevada executive branch and the legislature, but Nevada cannot exercise similar control over out-of-state government entities; thus, comity should be denied. Yet these courts drew no such distinction. Comity for FTB's immunity for discretionary or negligent conduct was granted to the full extent that immunity would have been available to a Nevada entity.

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Other courts have extended immunity from punitive damages to out-of-state foreign entities. For example, in State of Ga. v. City of E. Ridge, Tenn., 949 F. Supp. 1571 (N.D. Ga. 1996), a city in Tennessee allowed raw sewage to flow into a nearby city in Georgia. Georgia homeowners sued the Tennessee city in Georgia, seeking an award of punitive damages under state law claims. In rejecting punitive damages, the Georgia federal court noted that the defendant was a governmental entity and punitive damages are not available against governmental entities in Georgia. Id. at 1581. The plaintiffs argued that the defendant city and its taxpayers/citizens benefitted financially from the city's conduct, and that punitive damages were appropriate in light of the willful and malicious conduct perpetrated by the Tennessee city. The court rejected this argument, relying on City of Newport, and holding that punitive damages against the out-of-state governmental entity were inappropriate. Id. There was no showing that the taxpayers of the defendant Tennessee city played a role in the violations of the laws underlying the plaintiffs' causes of action, and equally important, the allegations of malicious conduct were more appropriately directed at city officials, not the city itself.

Here, Hyatt did not sue any of the individuals who committed the alleged torts against him. 14 AA 3257. Instead, he only sued the FTB, which is the government entity public employer of these individuals. Id. Punitive damages against the FTB, if upheld, will need to be paid by California taxpayers. There is no sound logical or public policy reason to conclude that punitive damages against the FTB, an out-of-state government agency, are necessary to deter tortuous acts in Nevada, when a Nevada agency itself would be immune from such punitive damages.[64]

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[64]Hyatt argues that an "important aspect" of City of Newport is the fact that the Supreme Court did not disturb an award of punitive damages under state law. RAB 165. Hyatt argues that the decision in City of Newport "does nothing to discredit" awards of punitive damages against government agencies authorized by state law. RAB 165. Hyatt's argument relies entirely on a single footnote in City of Newport, in which the Court noted the fact that the jury assessed 25 percent of the punitive damages award on a state-law claim. The Court merely noted the existence of this fact, with the following observation: "We do not address the propriety of the punitive damages awarded against petitioner under Rhode Island law." City of Newport, 453 U.S. at 253 n 6. In other words, the issue of

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2. Hyatt's Reference To Punitive Damages Against The IRS Is Irrelevant Since A Statute Permits Such An Award Against The IRS

Hyatt's brief notes that punitive damages may be imposed against the IRS for willful or grossly negligent disclosure of tax return information. RAB 166-67. The fact that Congress decided to waive sovereign immunity for a federal agency is irrelevant in this appeal. Here, the states of California and Nevada have both declined to waive sovereign immunity for punitive damages.

Hyatt relies on U.S. Code §7431(c)(1)(B)(ii). RAB 166. Importantly, two federal cases cited in the annotations to this statute are very helpful to FTB's position in this appeal. The first case, Barrett v. United States, 100 F.3d 35 (5th Cir. 1996), is quite similar to many of Hyatt's contentions the present case. In Barrett an IRS agent audited a doctor's personal and business tax returns. The agent sent a letter to 386 of the doctor's patients, disclosing the doctor's name and address, and informing the patients that the doctor was being investigated by the Criminal Investigation Division of the IRS. The agent requested information about the fees paid to the doctor, and the agent identified himself in the signature block as a Special Agent with the Criminal Investigation Division. Barrett, 100 F.3d at 37. The doctor sued for unlawful disclosure of his tax information, seeking more than $8 million in compensatory damages for income loss to his surgery practice, and seeking punitive damages pursuant to the federal statute on which Hyatt's answering brief relies.

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whether a Rhode Island government entity would be subject to punitive damages under state law that permitted such was simply not before the Court, and the Court expressed no opinion on the issue. This non-opinion certainly does not constitute a stamp of approval for punitive damages against government agencies, as Hyatt suggests.

Additionally, Hyatt cites Bowden v. Lincoln County Health Sys., 08-10855, 2009 WL 323082 (11th Cir. Feb. 10, 2009) for the proposition that states do not limit punitive damages imposed against a sister state because "that is the only manner in which a state may regulate and control the conduct of a sister state." RAB 166. The unpublished decision in Bowden says no such thing. Bowden was a slip opinion with a summary affirmance of a lower court ruling. There was no discussion of comity, no discussion of the rationale or basis for the decision, and no discussion whatsoever regarding the inability to regulate or control conduct of a sister state. In fact, the Bowden court specifically refused to address arguments based upon the Full Faith and Credit clause and the principles of comity, because these arguments were raised for the first time on appeal. Id. at fn. 1.

The trial court rejected the punitive damages claim, and the Fifth Circuit affirmed. The court noted that the doctor was obligated to prove that his patients thought he was a "tax cheat" because of the disclosure of the criminal investigation, but the doctor failed to meet this burden. Id. at 39-40. Additionally, the doctor never identified a single patient who stopped seeing the doctor as a result of privacy concerns; and the doctor did not offer the testimony of any other doctor who stopped referring patients to him. Id. at 40. Even the doctor's expert witness, a certified public accountant, failed to distinguish among different possible causes for the loss that the doctor allegedly suffered. Id. Moreover, the IRS agent admitted that he knew his letters to the doctor's patients would cause "embarrassment, humiliation, or emotional distress," and he was unable to explain his "complete failure" to obey the mandates of a handbook for IRS agents. Id. at 40-41. Nevertheless, as a matter of law, this evidence was "insufficient to support an award of punitive damages" (under the statute on which Hyatt relies in the present case). Id. at 40.

In the second case, Marre v. United States, 38 F.3d 823 (5th Cir. 1994), an IRS agent conducted a criminal investigation of a taxpayer for aiding and assisting with false tax returns related to tax shelters. The agent sent form letters to numerous investors and suppliers of the taxpayer, disclosing that the taxpayer was under investigation by the Criminal Investigation Division of the IRS for aiding and assisting with false tax returns. Id. at 824-25. An attachment with the form letters stated that the taxpayer had been dishonest with investors, and that any deductions taken for the tax shelters would be fraudulent. Id. at 825. The trial court found that the IRS agent made 215 unauthorized disclosures of tax information to people doing business with the taxpayer. The trial court described the agent's conduct as a "rampage through the IRS regulations." Id. at 826. Despite these facts, the trial court denied punitive damages, and the Fifth Circuit affirmed, holding that "the record does not support a punitive damage award" (under the same statute on which Hyatt relies here). Id. at 827.

Accordingly, the federal statute on which Hyatt relies provides no basis for affirming the award of punitive damages, and cases applying the statute support FTB's

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contention that the punitive award must be vacated.

3. Legal Excessiveness

The answering brief fails to establish that the $250 million award of punitive damages was consistent with constitutional standards adopted by the United States Supreme Court in State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003) and by this court in Bongiovi v. Sullivan, 122 Nev. 556, 138 P.3d 433 (2006). Three guideposts must be considered, as follows.

a. Degree of Reprehensibility

Campbell holds that the degree of reprehensibility of the defendant's conduct is the "most important indicium" of the reasonableness of a punitive damages award. Campbell, 538 U.S. at 419. Campbell instructed courts to evaluate certain considerations:

A. Whether the harm caused was physical as opposed to economic: As noted in the opening brief, Hyatt experienced no physical harm and as of yet, no financial harm from FTB's conduct. AOB 112-13. Hyatt's brief does not dispute this, except for an assertion that Hyatt's physical well-being "deteriorated" from stress caused by the FTB. RAB 169.

B. Whether the conduct showed indifference to or reckless disregard of the health or safety of others: This was not a class action case. Hyatt's brief does not contend that the FTB's conduct in Hyatt's audit was widespread or was directed toward any other taxpayers. RAB 168-71.

C. Whether the target of the conduct had financial vulnerability: Hyatt received hundreds of millions of dollars in income from his patent, and he does not suggest that he was in any way financially vulnerable. Id.

D. Whether the conduct involved repeated actions or was an isolated incident: On this point Hyatt does contend that the conduct was repeated and lasted more than a decade. RAB 168-69. Nevertheless, the FTB's activities all related to a single audit and a single question of whether Hyatt owed taxes on the hundreds of millions of dollars he earned from his patent. Moreover, although the protest proceedings took several years to resolve, the jury was never given the full explanation for the delay, because the judge

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excluded this important explanatory evidence (as discussed in detail above).

E. Whether the harm was a result of intentional malice, trickery or deceit: On this point Hyatt argues that one of the FTB's auditors acted maliciously and in bad faith. RAB 169. But Hyatt did not sue this auditor, and his award of $250 million in punitive damages is against the FTB, a government agency. Hyatt's complaints of trickery and deceit relate primarily to his so-called bad faith fraud claim, which in turn is based upon the alleged promise to treat him fairly and impartially. This is all explained in greater detail earlier in this brief. Any such "fraud" cannot be deemed the type of reprehensibility to support an award of $250 million in punitive damages.[65]

Based upon these considerations, FTB's reprehensibility, if any, simply cannot justify $250 million in punitive damages.

b. Ratio of Punitive Damages to Actual Harm

As pointed out in the opening brief, Bongiovi does not compare the punitive damages to the compensatory damages awarded by the jury. Rather, punitive damages are compared to the "actual harm inflicted on the plaintiff." AOB 113 (emphasis added), citing Bongiovi, 122 Nev. at 582. FTB argued that the jury's award of $138 million in compensatory damages does not reflect Hyatt's "actual harm," if any. AOB 113-14.

In response, Hyatt characterizes this argument as "strange" and "far-fetched." RAB 171, line 20, and 172, line 2. It is neither strange nor far-fetched to rely on the actual language in published appellate opinions. The phrase "actual harm inflicted on the plaintiff" is the exact language used by this court in Bongiovi and by the United States Supreme Court in BMW of North America, Inc. v. Gore, 517 U.S. 559, 580 (1996). These courts did not limit the punitive damages comparison merely to the award of compensatory damages.[66]

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[65]As noted in the opening brief, this court has held that multiple acts of intentional fraud are "toward the lower end of the spectrum of malevolence found in punitive damages cases." AOB 13, fn 86, citing Ace Truck, 103 Nev. at 511. Hyatt ignores this holding in Ace Truck on this point. RAB 169-70.

[66]The fact that FTB's argument is neither "strange" nor "far-fetched" is also shown by the existence of appellate decisions that have similarly accepted the argument. See Clear Channel Outdoor, Inc. v. Adver. Display Sys., A102492, 2004 WL 2181793 (Cal. Ct. App.

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Hyatt argues that the ratio in this case is "less than 2 to 1," and that this is "significantly less than the 3 to 1 ratio allowed under Nevada law." RAB 171, lines 14-15. The 3-to-1 ratio to which Hyatt refers is statutory. NRS 42.005(1). This ratio, however, is superseded by constitutional Due Process considerations. The United States Supreme Court has ruled that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." Campbell, 538 U.S. at 425. "When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." Id. In Campbell, the jury awarded $1 million in compensatory damages for a year and a half of emotional distress, and the Supreme Court characterized this award as "substantial" for purposes of the ratio comparison. Id. at 426. The compensatory damages award in the present case is 138 times larger than the award that the Supreme Court characterized as "substantial" in Campbell.[67]

Sept. 29, 2004) (actual harm suffered by the plaintiff "may not always be reflected in the amount of compensatory damages awarded"); Simon v. San Paolo U.S. Holding Co., Inc., B121917, 2001 WL 1380836 (Cal. Ct. App. 2001) (although the compensatory damage award is usually a convenient measure, "it may or may not reflect the actual harm suffered"), judgment vacated by San Paolo U.S. Holding Co., Inc. v. Simon, 538 U.S. 974 (2003) (judgment vacated for further consideration in light of subsequently decided Campbell decision). Although Clear Channel and Simon were unpublished decisions, and although Simon was vacated for reconsideration in light of the later Campbell opinion, Clear Channel and Simon show that appellate judges have also drawn a distinction between "actual damages" and "compensatory damages," for purposes of ration comparisons. Thus, FTB's argument is neither strange nor far-fetched.

[67]The Campbell court also acknowledged that the large compensatory damages award for emotional distress in that case likely included a punitive component. Id. at 426. Much of the emotional distress suffered by the plaintiffs in Campbell was caused by the outrage and humiliation resulting from the insurance company's actions; and the Court recognized that the jury's award of compensatory damages ($1 million) probably already contained a punitive element. Id. Similarly, the $138 million compensatory damages award in the present case most likely already included a punitive component. Hyatt essentially concedes this. In contending that Nevada's cap on compensatory damages should not apply to FTB, Hyatt argues that in a case involving alleged intentional torts by an out-of-state government entity, a "significant" compensatory damage award, such as the jury's award to Hyatt, is a necessary way of "deterring such behavior in the future." RAB 146, lines 19-20. Hyatt forgets that compensatory damages in Nevada are not intended to punish or deter conduct; this is the role of punitive damages. Ainsworth v. Combined Ins. Co., 105 Nev. at 244 (compensatory damages are intended to compensate plaintiff; punitive damages are solely designed to punish and deter wrongful conduct), modified on other grounds in Powers v. United Services Auto. Ass'n., 114 Nev. 690, 706, 962 P.2d 596 (1998).

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c. Comparison to Other Criminal and Civil Penalties

FTB's opening brief contained an extensive analysis of this important factor. AOB 114-15. We first showed that the criminal penalty for fraud, even with multiple victims, has a maximum fine of only $50,000. NRS 205.372. The punitive award against FTB was 5,000 times greater than the maximum criminal fine. Hyatt ignores this.

With respect to civil penalties, the opening brief provided 16 examples of this court's published opinions on punitive damages, showing that most punitive awards have been less than $100,000; some awards have been in six figures; and only a handful have been in excess of $1 million. AOB 114-15. We also pointed out that the highest punitive damage award this court has ever upheld in a published opinion was $6,050,000 for intentional misconduct involving an elderly couple's trust. Evans v. Dean Witter Reynolds, Inc., 116 Nev. 598, 615, 5 P.3d 1043 (2000). The award in the present case was more than 41 times larger than Evans.

With regard to this mandatory comparison guidepost in Bongiovi, Hyatt completely ignores this court's published opinions on punitive damages. RAB 174. Hyatt cites no Nevada case (or, for that matter, any case from any other jurisdiction) with which he can favorably compare a punitive award to his award. Instead, he offers the conclusory arguments that this court's prior cases "do not involve comparable conduct," and that the "jury has spoken in this case." RAB 174. These statements constitute no legitimate analysis of the mandatory comparison with other criminal and civil penalties. Cf. Zinda v. Louisiana-Pac. Corp., 409 N.W.2d 436 (Wis. Ct. App. 1987) aff'd in part, rev'd in part in 440 N.W.2d 439 (Wis. 1989) (extraordinarily large awards cannot be supported by conclusory contentions on appeal).

Accordingly, the three Bongiovi guideposts mandated by the Due Process Clause overwhelmingly require a conclusion that the punitive award was constitutionally excessive. For the reasons set forth above and in the opening brief, the punitive damages award must be vacated.

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H. No Prejudgment Interest Should Have Been Allowed

FTB's opening brief demonstrated that the award of more than $102 million in prejudgment interest must be vacated. Hyatt's response fails to provide legal and factual bases for the award.

1. It Is Impossible To Determine What Part Of The Verdict Represented Past Damages

The general verdict form did not distinguish between past and future damages. 54 AA 13308-09. When it is impossible to determine what part of the verdict represented past damages, a district court errs by awarding prejudgment interest. See Shuette v. Beazer Homes Holdings Corp., 121 Nev. 837, 865, 124 P.3d 530 (2005); Stickler v. Quilici, 98 Nev. 595, 597, 655 P.2d 527 (1982). Prejudgment interest is allowed only when there is "nothing in the record" to show that the verdict may have included future damages; where there is "no reference" to future damages; and where the record "does not indicate any reference to future damages in evidence." Bongiovi v. Sullivan, 122 Nev. at 579 (emphasis added).

Hyatt's primary argument is that "no future damages were sought or awarded in this case." RAB 175, line 2. This argument is contrary to the record. Hyatt's testimony consistently attempted to establish permanent emotional distress, with no suggestion that Hyatt's alleged problems would magically cease on the last day of trial. See, e.g. 37 AA 9171 (96-97); 37 AA 9172 (100); 37 AA 9173 (103); 37 AA 9174 (109). Thus, Hyatt's alleged permanent damages, if accepted by the jury, clearly would have continued after the trial and into the future.

For example, Hyatt testified at trial that as a result of FTB's conduct, he gets "tightness and breathing problems in my chest that I still have to this day." 37 AA 9171 (96) (emphasis added). He testified that there is "a whole range of problems that developed that I still have to this day." Id. (emphasis added). He also testified that his emotional distress causes teeth grinding, requiring him to use a night guard, "which I still use to this day." 37 AA 9174 (106) (emphasis added). When asked about the fraud penalty assessment, he testified: "It causes me deep depression and anger for what they've done to

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me, and for what they can do and what they are likely to do to me in the future." 37 AA 9174 (109) (emphasis added). Finally, when asked how the accrual of interest on the tax assessment affects Hyatt's everyday life, he testified: "I wake up every morning realizing [present tense] that there's about another $10,000 that is added to their assessments because of that interest." Id. This accrual of interest, of course, would also continue to exist after the trial and into the future. This could have allowed the jury to draw an inference that Hyatt's alleged distress caused by the accrual of interest would also continue into the future, thereby justifying future emotional distress damages.

Now, amazingly, Hyatt argues that there was no evidence of any future damages, he did not seek future damages, and the jury did not award future damages. RAB 174-75. His argument necessarily assumes that even if the jury accepted his testimony that he suffered permanent privacy damages and permanent emotional distress, with myriad physical and emotional problems lasting "to this day" (i.e., the time of trial), the jury nevertheless must have cut off all damages on the date the complaint was filed. The argument defies common sense and is belied by the record.[68]

2. There Is No Recovery For Prejudgment Interest For Damages Suffered After Service Of The Complaint

Hyatt's answering brief takes issue with FTB's contention that prejudgment interest was improper on damages suffered after the date of service of the complaint. RAB 176-79. FTB's contention relied on Las Vegas-Tonopah-Reno Stage Line, Inc. v. Gray Line Tours of S. Nevada, 106 Nev. 283, 289, 792 P.2d 386 (1990), which held that "interest should

[68]Hyatt argues that the present case is similar to Albios v. Horizon Communities, Inc., 122 Nev. 409, 132 P.3d 1022 (2006), which was a construction defect case where repair damages were considered past damages, even though the repairs had not yet been made by the time of trial. RAB 179. Albios relied on Shuette, which dealt with a unique form of damages recognized in construction defect cases as "abatement" damages. Shuette, 121 Nev. at 865-66. Abatement damages include expenses for repairs yet to be undertaken for existing construction defects in buildings (i.e., for building defect damage that already occurred before trial). Id. Nothing in Nevada construction defect jurisprudence suggests that the unique concept of "abatement" damages would be extended to other contexts, such as tort actions seeking damages for invasion of privacy and emotional distress.

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begin to accrue from the time damages actually occur if they are sustained after the complaint is served but before judgment, rather than from the date of serving the complaint or from the date of judgment." Id. The court held that to carry interest, "damages must be sustained and specifically quantified." Id. at 289-90. And the court concluded: "Thus, interest should be awarded on damages suffered after serving the complaint but prior to judgment once the time when incurred and the amount of these damages have been proven by a preponderance of the evidence." Id. at 290. See also, Keystone Realty v. Osterhus, 107 Nev. 173, 807 P.2d 1385 (1991); Powers v. United Services Auto. Ass'n., 114 Nev. 690, 962 P. 2d 596 (1998) (interest on damages not incurred until after complaint was served accrues as of date damages were actually sustained).

This interpretation is consistent with the purpose of prejudgment interest, which is to make the plaintiff whole by including the loss of use of money for the plaintiff's damages. Ramada Inns, Inc. v. Sharp, 101 Nev. 824, 826, 711 P.2d 1 (1985). Prejudgment interest is not designed as a penalty. Id. In short, awarding a plaintiff interest for damages before such damages were incurred does more than make a plaintiff whole, and thus equates with an inappropriate penalty.

Las Vegas-Tonopah was a tort case, as is Hyatt's case, and Las Vegas-Tonopah makes no distinction between different types of torts or damages. Hyatt offers no justification for a retreat from Las Vegas-Tonopah. Nonetheless, Hyatt argues that a burden to prove damages for different time frames is impossible in a case involving unliquidated damages such as pain and suffering or emotional distress. RAB 177. Hyatt contends that a plaintiff "cannot prove emotional distress or invasion of privacy damages on a month by month basis, even if one can prove the dates of specific events." RAB 117. To the contrary, jurors are capable of distinguishing damages during different time frames. In tort cases, such as personal injury cases, experienced plaintiffs' attorneys frequently make per diem arguments to juries based on daily assessments of pain and suffering. Juries are asked to award different amounts during different time frames, such as higher daily amounts of pain and suffering immediately after an accident or a surgery, and lower daily amounts for pain

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and suffering as recovery progresses. That such damages are unliquidated does not impose an impossible burden or justify changing the Las Vegas-Tonopah court's holding.

Hyatt relies on State v. Eaton, 101 Nev. 705, 710 P.2d 1370 (1985) overruled by State ex rel. Dept. of Transp. v. Hill, 114 Nev. 810, 963 P.2d 480 (1998)and Lee v. Ball, 121 Nev. 391, 116 P.3d 64 (2005). RAB 177-78. Neither case addressed how to calculate prejudgment interest according to when damages were actually incurred. Indeed, there is not a word in either case indicating that the Las Vegas-Tonopah issue was ever raised in the district court, ever briefed on appeal, or ever considered by the Eaton and Lee courts. Hyatt also relies on Bongiovi and Albios. Bongiovi contains no limitation on Las Vegas-Tonopah and contains no discussion of this issue.

Application of Las Vegas-Tonopah is particularly appropriate here. Hyatt concedes: "Events that happened during the time the matter was pending, from beginning of the audit until verdict, contributed to and increased Hyatt's emotional distress and loss of privacy. . ." RAB 177, lines 18-20. One of Hyatt's primary criticisms of FTB relates to the alleged delay in the protest proceedings. Hyatt complains that the protest started in 1996, "but the FTB did not decide and conclude the protest *for over 11 years* (closely approximating the time this case was pending before the trial)." RAB 13, lines 4-5 (italics and parenthesis in original). Hyatt filed his lawsuit in 1998. Thus, nine of the eleven years of the alleged delay damages occurred after Hyatt filed his complaint.[69]

Hyatt's attack on Las Vegas-Tonopah is addressed to the wrong forum. It has now been 20 years since the Las Vegas-Tonopah court issued its decision interpreting the interest statute, and the legislature has never amended the statute. This shows that the legislature does not disagree with the Las Vegas-Tonopah holding. If Hyatt wants a change in the

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[69]Hyatt's brief contains a heading: "Hyatt's emotional distress was severe and occurred over a long period of time." RAB 124, line 2. The next three pages catalog Hyatt's contentions regarding activities by FTB that allegedly caused emotional distress. RAB 124-26. The activities include listing this case in FTB's litigation roster, bringing Hyatt into California's tax amnesty program, and assessing taxes and penalties against him. Id. The vast majority of activities catalogued in Hyatt's brief occurred after he filed his complaint against FTB.

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statute, he should propose his change to the legislature, not this court.

In conclusion, Hyatt has failed to offer persuasive arguments based upon legal authority supporting the district court's award of more than $102 million in prejudgment interest. The award should be reversed.

IV. CONCLUSION ON APPEAL

Based upon the foregoing, and the arguments contained in its opening brief, FTB urges the court to set aside the judgment and dismiss this case.

CROSS-RESPONDENT'S ANSWERING BRIEF

I. INTRODUCTION TO ANSWERING BRIEF ON CROSS-APPEAL

Hyatt alleged that two letters sent by FTB to two of Hyatt's licensees in Japan caused the downfall of his entire patent licensing business. In opposing summary judgment, on his economic damage theory, Hyatt relied on rank speculation to support his allegations, claiming entitlement to over $1 billion. The district court correctly ruled that Hyatt's speculative evidence was inadmissible, and summary judgment was appropriate to dismiss his claim for economic damages.

II. STATEMENT OF FACTS ON CROSS-APPEAL

A. Background Facts

Hyatt obtained a patent for computer technology in July 1990, and he immediately began seeking agreements from companies that had made prior use of this technology. See 7 AA 1609. All but one of his licensees were Japanese companies, and the license agreements required lump sum payments as settlement for the past use of Hyatt's patents. See, e.g., 8 AA 1852-66. Hyatt represented to the FTB that he moved to Nevada on September 26, 1991, just before receiving millions of dollars in income under these agreements. See 7 AA 1668. FTB wanted to verify when Hyatt actually received the money, but Hyatt and his representatives did not provide the information. 7 AA 1742. Therefore,

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FTB sought information directly from two Japanese licensees, namely, Fujitsu and Matsushita. 8 AA 1761-70. FTB's two letters, which included identifying attachments that were already been in the possession of the Japanese companies, stated, in full, the following:

> Dear Sir:
>
> For the purpose of administering the California Personal Income Tax Law, and for that purpose only, the following information is requested under authorization of California's Personal Income Law Section 19254.
>
> Please indicate which dates wire transfers were made to Gilbert P. Hyatt. Please refer to copy of letter enclosed.
>
> For your own convenience, you may make marginal notations on this copy of this letter and return it in the enclosed envelope.

See 8 AA 1762, 1767. Representatives from both companies provided the dates of the wire transfers, which happened to be within six weeks after Hyatt allegedly moved to Nevada. 8 AA 1765 (Matsushita made wire transfer to Hyatt on November 15, 1991), 1770 (Fujitsu made wire transfer to Hyatt on October 31, 1991). The responses contained no other information. Id.

Hyatt provided discovery responses, contending that FTB's two letters caused Japanese companies to cease doing business with him. See 8 AA 1780-81. After review, FTB filed a motion for partial summary judgment on Hyatt's alleged economic damages, setting forth Hyatt's own chain of alleged facts constituting his causation theory on his claim for economic damages:

1. At the time of FTB's audit of him, Hyatt consummated license agreements with numerous Japanese companies, including Fujitsu and Matsushita.
2. As part of its audit and after Hyatt had failed to produce the dates of wire transfers of money from these licensees, FTB auditor Sheila Cox sent letters to Fujitsu and Matsushita requesting same.
3. Fujitsu and Matsushita allegedly notified the Japanese Department of Ministry of Finance of these contacts.
4. The Ministry of Finance allegedly spread the word that FTB was inquiring about Hyatt's licensing program.
5. Potential additional licensees, upon allegedly receiving the word of FTB's inquiries, allegedly refused to do business with Hyatt.

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6. As a result, Hyatt's license program allegedly fell apart–i.e. he lost existing licenses, failed to attract potential licensees, and his agency relationship with Philips terminated.

7 AA 1586-87; see also, 8 AA 1810-47. Hyatt did not dispute FTB's summarization of his chain of facts (thereby admitting that chain of facts). 8 AA 1909-26; DCR 13 (3).

The first two links in Hyatt's chain of facts were undisputed by FTB; the next four were pure speculation. When asked in his deposition how he knew that Fujitsu and Matsushita had contacted the Ministry of Finance (point 3 in the chain of facts), Hyatt replied: "From my knowledge of the Japanese business community. I've been working with them and observing them for almost 40 years now, and I have a good understanding of the Japanese business community." 8 AA 1830 (138:13-18). Similarly, his theory that other Japanese companies would have entered into license agreements but for the fact that they were allegedly being contacted by the Ministry of Finance (point 5 in the chain of facts) was also pure speculation: "[T]he last thing that the Japanese companies wanted was problems with the Franchise Tax Board, and Gil Hyatt, according to the letters, was going to cause them problems." 8 AA 1832 (140:13-16). Hyatt could not, and did not, name a single prospective licensee that was contacted regarding the auditor's inquiry (point 4 in the chain of facts). 8 AA 1834 (142:1-4).

Likewise, Gregory Roth, Hyatt's patent attorney, had no evidence proving the alleged causal relationship between FTB's letters and the demise of Hyatt's patent program. In his deposition testimony, Roth testified:

Q: Did the FTB audit have any effect on Mr. Hyatt's licensing program?

A: It appears to have.

Q: What information do you have about that effect?

A: The information I have is that approximately the time those two letters were sent to Japanese companies the licensing effectively ground to a halt and the inference of the timing would seem to suggest that they had an effect. In addition, I believe that the Japanese would have been particularly sensitive to such a letter based on their culture . . .

7 AA 1618-19 (299:25-300:10) (emphasis added). Roth conceded that he had no special knowledge of Japanese culture. 7 AA 1602 (68:10-15). FTB also offered evidence that

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Roth's testimony about the license business grinding to a halt was not accurate. 12 AA 2870-72.

Hyatt did not depose or get affidavits from witnesses who would have had personal knowledge of facts supporting his theory, such as people at Fujitsu, Matsushita, the Japanese government, or other companies in the Japanese business community that allegedly decided not to do business with him as a result of the FTB's letters, or from his agent in New York, Philips. Hyatt claimed that getting such testimony was "difficult," and he should be relieved of his burden of producing such evidence. See, e.g., 12 AA 2894 (44:5–15). Hyatt's argument was specious. See NRCP 28(b) (allowing litigant to take foreign country depositions). Hyatt had ample resources to pursue discovery in Japan. Two of his attorneys were partners in law firms that had offices in Japan; and one of his proposed experts resided in Japan and was licensed to practice law there. 9 AA 2226-27; 12 AA 2863-2864 (13:24–14:8). Nothing foreclosed Hyatt from obtaining evidence from Japanese witnesses. Moreover, the Philip's representatives, who would have possessed knowledge concerning Hyatt's allegation that his relationship with them terminated because of FTB's letter (point 6 in the chain of facts), were located in New York. 67 AA 16510; 10 AA 2381; 35 AA 8712 (14); 39 AA 9561 (104). Hyatt acknowledged in deposition that he spoke to and met with the Philips' representatives in New York on a regular basis. 7 AA 1747.

Hyatt admitted that he had no percipient witnesses in support of the final four elements of his causal chain of facts.[70] See 8 AA 1937-40. Hyatt claimed, however, that he intended to establish his causal chain of facts through experts who would opine that, based on their knowledge of Japanese culture, each of the elements in Hyatt's causal chain of facts **was likely to have occurred**. 8 AA 1919-21.

It was undisputed that neither Hyatt nor his experts had any personal knowledge of what actually happened regarding Hyatt's causal chain of facts; instead, Hyatt and his

[70]In his cross-appeal, Hyatt admits that he had "no direct evidence in the form of testimony of potential customers who refused to do business with him to support his theory of causation." RAB 190.

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experts were opining merely on what they understood of Japanese culture, and their assumptions as to what they believed probably happened as a result of FTB's two letters.

For example, witness Keegan testified:

> **In the context of the unique Japanese business culture, it is likely** that FTB's letters caused material concern among executives at Fujitsu and Matsushita . . . [and] a concern about Hyatt **would have** prompted executives at these two companies to share the information about the FTB's letters with the Ministry of Finance ("MF") or the Ministry of International Trade & Industry ("MITI"). When these agencies learned of the FTB's investigation, **it is reasonable to assume** that the MF or MITI **would have** communicated such information to the wider Japanese community in an effort to promote the best interests of Japanese industry.

8 AA 1941-42 (emphasis added). From these assumptions, Keegan also opined that the content of the letters and sharing of the content with other Japanese businesses "**would have had** an impact on the licensing of Hyatt's patents in Japan" and that the FTB letters **likely affected** Hyatt as a licensor. 8 AA 1942.

Witness Unkovic testified:

> [S]enior executives at Matsushita and Fujitsu **could reasonably have** experienced concerns that the FTB letters would result in charges being filed specifying that Matsushita and Fujitsu had violated U.S. tax laws. . . [I]nformation such as what was in the FTB letters **would be** shared not just within the corporations. . . Japanese companies **would be** reluctant for a variety of reasons to have an ongoing or future business relationship with Hyatt.

8 AA 1942-43 (emphasis added).

Witness Toyama testified:

> the License Program **would have been** well disseminated among the Japanese electronics, automotive and information technology companies. . . It is also my opinion that when the FTB's investigation was known to the potential licensees of Mr. Hyatt patents, they **would have** suspected that Mr. Hyatt had problems with the government and as a consequence his credibility **would have** been damaged.

8 AA 1944 (emphasis added).

Witness Woo-Cumings testified:

> Thus when the FTB letters were received, their contents **would have been** shared with officials in relevant government bureaus and other company officials. . . .The FTB letters **would have** raised red flags immediately . . . and the alleged bad news about Mr. Hyatt **would have** traveled around with the speed of light. . . . Japanese companies **would have** instantly jettisoned business relationships with Mr. Hyatt.

8 AA 1944-45 (emphasis added).

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Witnesses existed who would have had personal knowledge whether: (1) Fujitsu and Matsushita notified the Japanese Ministry of Finance of FTB's letters; (2) the Ministry of Finance spread the word that FTB was inquiring about Hyatt's licensing program; (3) potential additional licensees, upon learning of FTB's inquiries, refused to do business with Hyatt; and (4) as a result, Hyatt's patent program fell apart–i.e. he lost existing licenses, failed to attract potential licensees, and his agency relationship with Philips terminated. Hyatt did not try to get testimony from those witnesses, but instead suggested that his opinions and the experts' opinions constituted admissible circumstantial evidence of those facts. RAB 191-92.

B. The District Court's Ruling

The district court granted partial summary judgment, noting that the experts "have no actual knowledge of anything that occurred" and, "while it is true that plaintiff's counsel can argue circumstantial evidence that plaintiffs ought to have some witness or some evidence with direct knowledge of the economic damages." 12 AA 2905 (55:3–7). The district court stated that the motion was granted "because Plaintiff failed to come forward with admissible evidence to demonstrate Defendant's actions were a cause in fact of Plaintiff's alleged economic damages." 12 AA 3000-01.

Hyatt now tells this court that "[t]he District Court held that Hyatt cannot rely on circumstantial evidence, . . ." RAB 183 (without citing to appendix). This is absolutely false. In fact, the district court expressly stated that Hyatt could argue circumstantial evidence. 12 AA 2905. (judge observing on the record that "it is true that plaintiff's counsel can argue circumstantial evidence"). The district court simply concluded that Hyatt's "evidence" did not amount to circumstantial evidence because it was based on speculation. 13 ARA 3074.

C. District Court Explained A Second Time That Hyatt's Proffered Evidence Was Speculative

Hyatt attempted to circumvent the district court's ruling by seeking the admission of expert opinion trial testimony from attorney Dennis Unkovic. The FTB filed a motion in limine, arguing that the order granting partial summary judgment on the economic damages

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issue made such testimony irrelevant. 12 ARA 2928. After briefing and argument, the district court granted the FTB's motion in limine, stating that:

> In a previous hearing, this court granted partial summary judgment with respect to the economic-damage claim ***because the only evidence to substantiate that claim was based on speculation.*** It appears to the Court despite what counsel argues, that Mr. Unkovic would be called for the purposes of establishing economic damages. And based on the Court's previous ruling and all of the papers and pleadings and argument the Court's heard today, it would be appropriate for the Court to grant defendant's motion.

13 ARA 3074 (emphasis added).

D. The District Court Repeated Its Ruling A Third Time

Finally, in the context of Hyatt's motion to stay proceedings,[71] the district court reiterated the basis for the ruling:

> This Court granted defendant's motion for partial summary judgment with respect to the economic-damages claim ***because this Court viewed that claim to be speculative***. Petitioner argued in his writ to the Supreme Court that it ought to be able to argue to the jury circumstantial evidence. I would venture to say that ***there's a big difference between circumstantial evidence and speculative evidence***.

17 ARA 4027-28 (emphasis added).

III. LEGAL ARGUMENT ON CROSS-APPEAL

A. Standard of Review

1. Evidentiary Decisions Are Reviewed Under an Abuse of Discretion Standard

Hyatt identified the incorrect standard of review for this issue. RAB 189. The district court's decision was an evidentiary ruling: Hyatt's proffered evidence of causation was speculation, and therefore inadmissible to support his claim for economic damages. NRS 47.060 ("Preliminary questions concerning... the admissibility of evidence shall be determined by the judge"). As a result of that preliminary decision, the district court granted partial summary judgment because "Plaintiff failed to come forward with admissible evidence to demonstrate that Plaintiff's actions were a cause in fact of Plaintiff's

[71] Hyatt requested and received a stay of proceedings pending this court's determination of his petition for writ of mandamus. 21 RA 5134-39.

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alleged economic damages." 13 AA 3001. In evaluating that decision, this court must first review the district court's evidentiary ruling (pursuant to an abuse of discretion standard), then review whether the grant of summary judgment was proper in light of that evidentiary ruling (pursuant to a *de novo* standard).

The district court has discretion to determine the admissibility of expert testimony, and such decisions shall not be disturbed unless a clear abuse of the court's discretion is shown. See Higgs v. State, ___ Nev. ___, 222 P.3d 648, 658 (2010) (trial judges have "wide discretion" as gatekeepers regarding expert testimony); Hallmark v. Eldridge, 124 Nev. ___, 189 P.3d 646, 650 (2008) ("This court reviews a district court's decision to allow expert testimony for abuse of discretion."). Here, the district court found that there was no admissible expert evidence on Hyatt's claim for economic damages. 12 AA 3000-13 AA 3001. Thus, the abuse of discretion standard applies.

2. The District Court Properly Applied *Wood v. Safeway, Inc.*

Hyatt contends that the district court applied an incorrect view of Wood v. Safeway, Inc., 121 Nev. 724, 121 P.3d 1026 (2005). See RAB 185. Hyatt is incorrect. In Wood, this court confirmed that opposition to summary judgment cannot be built "on the gossamer threads of whimsy, speculation and conjecture." Wood, 121 Nev. at 732. To defeat summary judgment, the nonmoving party must offer "admissible evidence" to show a genuine issue of material fact. Id; see also, Torrealba v. Kesmetis, 124 Nev. __, 178 P.3d 716, 720 (2008).

B. The District Court Properly Found That Hyatt's Proffered Proof of Actual Causation Was Based Only Upon Speculation and Therefore Inadmissible

Hyatt mistakenly equates speculative opinions with circumstantial evidence. Nevada's Standard Jury Instruction 2.00, however, states that "Circumstantial evidence is indirect, that is, ***proof of a chain of facts*** from which you could find that another fact exists, even though it has not been proved directly." (Emphasis added). The key aspect of this instruction is that circumstantial evidence is proven through a chain of ***facts***, not a chain of inferences based upon inferences. FTB does not contend that circumstantial evidence can never be used to establish actual causation; nor did the district court make such a ruling.

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Hyatt offered up his own chain of facts in an effort to support his proposed inference that there was a connection between FTB's audit and the demise of his patent licensing program – but Hyatt had no proof of any individual fact in that chain of facts to reach that inference.

"It is a rule of law that when circumstantial evidence is relied upon to prove a fact, the circumstances must be proved, and not themselves be presumed." Horgan v. Indart, 41 Nev. 228, 168 P. 953 (1917). Every element in the chain of facts must be based on ***fact***, and not left to inference, in order to presume the ultimate fact. Id. at 953. Here, the ultimate fact Hyatt sought to prove was that FTB's audit caused the demise of Hyatt's patent licensing program. Hyatt himself offered the chain of facts he needed to prove for that inference. But the inference could not be based upon another inference or speculation; the inference could only be based upon actual fact. Id.; see also, Robbiano v. Bovet, 24 P.2d 466, 471 (Cal. 1933); Shutt v. State, 117 N.E.2d 892, 894 (Ind. 1954) ("an inference cannot be based upon evidence which is uncertain or speculative or which raises merely a conjecture or possibility"). The proven facts in the chain of facts relied upon cannot merely be consistent with a theory of causation; the conclusion must be the only one that can be reasonably deduced from the facts. Horgan, 168 P. at 954.

It was undisputed that the chain of facts from which Hyatt and his experts based their ultimate conclusion – i.e. letters from FTB to Fujitsu and Matsushita caused the "wider Japanese business communities" not to do business with Hyatt – were not actually proven. Hyatt admitted that he had no such proof. And his experts' opinions were merely assumptions that the circumstances or chain of facts occurred.

First, Hyatt's experts assumed that FTB's letters addressed to Fujitsu and Matsushita were forwarded by those companies to the Japanese government, because, as witness Keegan stated, "it is **likely"** to have occurred. 8 AA 1941-42 (emphasis added). There was no evidence that Fujitsu's or Matsushita's executives actually were concerned about FTB's inquiries, or that those companies had policies of sending information to the government. Thus, there was no evidence supporting Hyatt's assumed fact that Fujitsu and Matsushita actually sent the letters to the Japanese government.

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After assuming that FTB's letters were sent by Hyatt's licensees to the Japanese government, Hyatt's expert's then assumed that the letters were somehow communicated by the Japanese government to the "wider Japanese business community," based on the expert's statement that this "was **reasonable to assume** that the Ministry of Finance or the Ministry of International Trade and Industry **would have** communicated such information to the wider Japanese business community in an effort to promote the best interests of the Japanese industry." 8 AA 1941-42 (emphasis added). Keegan's premise for this assumption is the previous unsupported assumption that Fujitsu and Matsushita actually forwarded the letters to the Japanese government. There was simply no admissible evidence regarding the actual conduct of the Japanese government (i.e., their actual official policy on sharing information, who they share it with, under what circumstances they share it) from which anyone could find that this link in Hyatt's chain existed – that the Japanese government actually sent the letters to the broader Japanese business community.

After assuming that Hyatt's licensees forwarded FTB's letters to the Japanese government, and after assuming that the Japanese government forwarded the letters to the broader Japanese business community, Hyatt's experts then made yet another assumption. This time they assumed that the broader Japanese business community, after receiving the letters, made an affirmative decision to stop doing business with Hyatt because "the FTB letters **likely affected** the Japanese companies perception of Hyatt as a licensor," 8 AA 1942 (emphasis added), and because "Japanese companies **would be** reluctant for a variety of reasons to have an ongoing or future business relationship with Hyatt." 8 AA 1943 (emphasis added). Hyatt admits that he had no testimony from customers who stopped doing business with him. RAB 192. Thus, there was absolutely no proof of this link in Hyatt's chain of facts regarding the actual conduct of the "wider Japanese business community" (e.g., which companies received the communication; their internal policies regarding such information; what other information the companies already knew about Hyatt; whether the companies were contemplating business with Hyatt; and why the companies did not do business with Hyatt).

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It is clear that every link in Hyatt's alleged chain of facts was nothing but speculation. Hyatt argues, however, that expert testimony can prove causation, particularly where the connection between the injury and the alleged cause would not be obvious to a lay juror. RAB 194-96. Even though expert testimony might be allowed to prove causation in some cases, the testimony must still have a solid evidentiary foundation for admissibility. None of Hyatt's legal authorities at RAB 194-96 support the proposition that expert testimony on causation can be based on speculation or cumulative assumptions. Expert opinion testimony must be based on a reliable methodology and a reliable factual basis. Higgs, 222 P. 3d at ___. Hallmark, 189 P. 3d at ___. "[O]pinion testimony should not be received [into evidence] if shown to rest upon assumptions rather than facts. And, such expert opinion may not be the result of guesswork or conjecture." Wrenn v. State, 89 Nev. 71, 73, 506 P.2d 418 (1973) (internal citations omitted). This is particularly true regarding damages. An "award of compensation 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); see also, Morsicato v. Sav-On Drug Stores, Inc., 121 Nev. 153, 157, 111 P.3d 1112, 1115 (2005) (court rejected expert testimony that was "speculation and conjecture that failed to meet the requisite standard for expert testimony [set forth in NRS 50.275].").

C. Hyatt's Reliance on *Frantz v. Johnson* is Unavailing

Hyatt relies on Frantz v. Johnson, 116 Nev. 455, 467-68, 999 P.2d 351, 359 (2000) to support his contention that causation of damages may be shown by circumstantial evidence. RAB 190. While FTB does not dispute that causation can be established by circumstantial evidence, Frantz does not support Hyatt's suggestion that causation can be established by speculation. The issue in Frantz was whether a former employee of the plaintiff had misappropriated trade secrets. The employee claimed that there was insufficient evidence at the trial to support a finding that she misappropriated trade secrets. This court concluded that a finding of misappropriation need not be supported by direct evidence (i.e., testimony from customers), but could be supported by circumstantial

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evidence of the same. Frantz, 116 Nev. at 468.

The plaintiff employer in Frantz proved a solid chain of facts supporting a strong inference that the former employee and competitors misappropriated trade secrets. Pricing lists were discovered to be missing shortly after the employee left; the employee made admissions tending to prove that she misappropriated trade secrets; phone records showed hundreds of contacts with competitors, in violation of a temporary restraining order; and a purchasing agent testified that the employee contacted her directly about her business needs. Id. at 468. Other testimony confirmed that a competitor was working directly with the employee to solicit customers and to use information taken from the plaintiff. Id. at 469. In holding that there was sufficient circumstantial evidence of misappropriation, this court found that each element leading to the inferred fact was based upon actual proven fact, rather than a prior inference.

Hyatt's case is entirely different. There was only speculation and conjecture as to the steps in his chain of facts. This was insufficient to defeat summary judgment. None of Hyatt's other cited case law supports the proposition that speculation can substitute for real evidence in opposition to a motion for summary judgment.[72]

D. Causation Standards

Hyatt attempts to sidestep his lack of evidence by arguing that a lesser standard of causation applies to intentional torts. RAB 192-93. Nevada has never adopted a lower

[72]Hyatt's reliance on Jones v. United States, 9 F. Supp. 2d 1119 (D. Neb. 1998), at RAB 195, is also misplaced. In Jones, the plaintiff had direct evidence in the form of testimony from the plaintiff's business affiliates that they had refused to do business with the plaintiff because of the IRS' investigation. Id. at 1142. Moreover, the plaintiff presented an expert witness who had carefully studied the plaintiff's business and the related market; and, following accepted methodologies, the expert was able to rule out other potential causes for the plaintiff's decline in business. Id. Hyatt had no similar evidence. Particularly, Hyatt offered no expert analysis that the loss of his coveted patent in 1995 did not cause his claimed economic losses, (see Hyatt v. Boone 146 F.3d 1348 (Fed. Cir. 1998), cert. denied 525 U.S. 1141 (1991), or that his lawsuit against the U.S. Patent and Trademark Office (see Gilbert P. Hyatt v. U.S. Patent and Trademark Office, USDC-NV, Case No. CV-S-00-874-PMP), in which he alleges similar injuries arising from the same timeframe, did not cause his claimed economic losses. As such, Jones is not applicable here.

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standard for causation in intentional tort cases. In fact, this court has made clear that "[t]he doctrine of proximate cause, as a limit on liability, applies to ***every tort action***." Eaton, 101 Nev. at 714; see also, Johnson v. Am. Airlines, Inc., 834 F.2d 721, 724 (9th Cir. 1987). This court recently applied the stringent standard of causation required to provide economic damages in a business disparagement claim (an intentional tort). See Clark County Sch. Dist. v. Virtual, 213 P.3d at 504 (plaintiff required to show his pecuniary losses were actually and proximately caused by the defendant's alleged intentional tort).[73]

Moreover, contrary to Hyatt's argument that a relaxed standard of proximate causation should apply in a fraud case, this court has applied the same stringent standard of proximate causation to a claim for damages resulting from fraud. See, e.g. Nelson v. Heer, 123 Nev. 217, 225-26, 163 P.3d 420, 426 (2007) (stating "damages alleged must be proximately caused by reliance on the original misrepresentation or omission" and holding that where there was no evidence that damages were "reasonably connected" to the defendant's misrepresentation or omission, the plaintiff was not entitled to those damages); Foster v. Dingwall, 126 Nev. Adv. Op. 6, 227, P. 3d (Feb. 25, 2010) (rejecting plaintiffs' claim for intentional misrepresentation damages where plaintiffs did not present sufficient evidence to show claimed damages were caused by the alleged misrepresentations

Applying the correct standard of causation to the present case, the district court appropriately concluded that Hyatt failed, as a matter of law, to establish an essential element of his claim for economic damages, i.e. causation. Hyatt provided no admissible

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[73]In Virtual, this court discussed in detail the evidence required to show causation of economic damages, stating that "a plaintiff must prove specifically that the defendant's [actions] are the proximate cause of the economic loss." Virtual, 213 P.3d at 505 (emphasis added). Where the plaintiff cannot show the loss of specific sales attributable to the defendant's actions, and the plaintiff attempts to rely on a general decline of business, the plaintiff must show that the decline of business is the result of the defendant's actions only, and not other potential causes. Id. In Virtual, as in this case, the plaintiff had shown only that there was a temporal proximity of the two events: i.e. that its sales had declined after the alleged wrongful actions were taken. Id. This was insufficient to establish proximate causation in Virtual and it is insufficient in this case.

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evidence that FTB's letters were forwarded to the Japanese government, that the government then forwarded the letters to the Japanese business community in general, or that the business community declined to deal with Hyatt as a result of the letters. Nor did Hyatt rule out other real potential causes for the failure of Japanese companies to do business with him, such as the stagnation of the Japanese economy in the 1990s, or the revocation of his patent in 1995.[74]

IV. CONCLUSION ON CROSS-APPEAL

For the foregoing reasons, the district court did not err by granting partial summary judgment on Hyatt's claim for economic damages.

Dated this 1st of June, 2010

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[74] See Hyatt v. Boone, 146 F.3d 1348, 1357 (Fed. Cir. 1998).

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this reply brief and answering brief on cross-appeal, 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 brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirement of the Nevada Rules of Appellate Procedure.

Dated this 1st of June, 2010

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I hereby certify that I am an employee of McDonald Carano Wilson LLP and that on this date I served true copies of the foregoing Appellant's Reply Brief and Cross-Respondent's Answering Brief by depositing said copies with Federal Express for overnight delivery upon the following:

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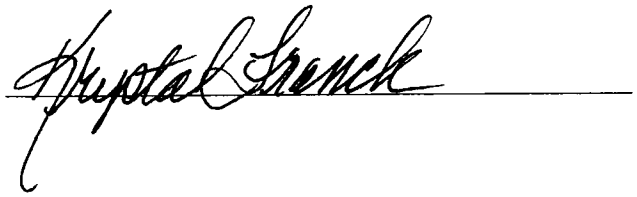

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EXHIBIT 69

5-7-12

Start Time 1:30:42 PM Speaker: Chief Justice Cherry
Notes: Case Called

CHIEF JUSTICE CHERRY: Please be seated. This is case number 53264, Franchise Tax Board vs. Hyatt. Justice Saitta is disqualified in this case, so it will only be the 6 of us hearing this case. And Ms. Lundvall, you're on.

Start Time 1:31:06 PM Speaker: Pat Lundvall
Notes: Counsel for the Appellant/Cross-Respondent

PAT LUNDVALL: Thank you, Your Honor. Pat Lundvall, along with Robert Eisenberg, here on behalf of the State of California's Franchise Tax Board…

CHIEF JUSTICE CHERRY: This is an hour argument folks, one hour.

PAT LUNDVALL: Thank you Your Honor. I would like to reserve 10 minutes then for rebuttal if I could. The court identified 8 issues for discussion today. There is a common denominator to those 8 issues. And that common denominator is a document comedy. This court, as well as the United States Supreme Court, permitted the FTB to be sued in the State of Nevada, but with an important condition. The FTB is a California State Agency was not to be treated worse than a Nevada State Agency in a similar case. As Mr. Hyatt himself argued to the U.S. Supreme Court, the reference point for the FTB's liability is not that of private individuals but a Nevada State Agencies themselves. If Judge Walsh had entered a $490 million judgment against a Nevada State Agency after refusing to apply the Martinez test analyzing for discretionary function immunity or extending other protections like the prohibition against punitive damages. This court would reverse such a judgment in a heartbeat. The fact that we are dealing with a California State agency should make no difference to that outcome. The judgment against the FTB should be reversed, and all claims should be dismissed.

Turning to the first issue the Court asked for discussion upon. Mr. Hyatt's claims as tried should be dismissed under the two-part test set forth in Martinez testing for discretionary function immunity. Our argument on this point may sound like it is taken directly Ramsdell vs. Clark County that was the public nuisance case in which a public official's weighing of evidence was questioned. Our argument is taken from that case, because that case and its analysis is on all fours with the facts before the Court.

Element Number 1 under Martinez asks us to determine whether or not that the acts that were tried, the acts that are at issue in this case, were the judgment or the choices so as to be the discretionary acts then of the FTB. Like in Ramsdell analysis here begins with a statute, a California statute, enacted by California's Legislature setting forth it's economic policies, that being that all residents of the State of California must pay personal income tax; and delegating, then, that determination to the FTB and the determination of a resident to the FTB.

The definition of a resident, like the definition of a dangerous condition in Ramsdell, is a very broad definition. And it is broad for a very simple reason. All of us lead different lifestyles, we all lead different indicia, different pieces of evidence of our choice of residence, and therefore, it

is left to the discretion then of the FTB to gather those pieces of evidence and to evaluate those pieces of evidence. Like in Ramsdell, the investigative acts are delegated then to the FTB for them to use their judgment and choice to gather those pieces of evidence. And like in Ramsdell, the evaluative conduct, in other words how you evaluate them, how you weigh that evidence, is also subject to the judgment and the choice of the government agency.

CHIEF JUSTICE CHERRY: How should we consider the allegations of fraud and bad faith in this context?

PAT LUNDVALL: From the context of actually getting into whether or not that there is such an exception to the two-part analysis. I think that that is analyzed then in the context of the second issue that the Court has asked us to take a look at, and that is whether or not that there is some type of intentional tort or bad faith exception. If we look at the Court's decisions in that particular area, the Court has ignored the labels that has been appended to the conduct and have looked at the objective acts then that are at issue to determine whether or not those objective acts meet the two-part test.

As to, in this particular case, turning back to the first prong, then, of the Martinez analysis. The FTB used its judgment, used its choice, to determine what evidence to gather, when to gather it, to make a determination as to when they had enough, and then how to weigh that evidence to determine if in fact Mr. Hyatt was liable for state income tax. For the Court's convenience, we identified four categories of conduct that were at issue in this case, that were tried to the jury.

The first was the gathering of the evidence, the second was the analysis of the evidence, and the third was the resolution of the protest or the internal appeals process. All three of those categories were the product of judgment and choices of the 42 employees that were involved with Mr. Hyatt's audit as well as his protest. There was various organizational conduct that was allowed to be put on trial. The California legislature's determination about how to deal with this budgetary crisis was the enactment of a tax rebate program, ...a tax amnesty program, excuse me,... that was allowed to be put on trial. Docket sheets that are similar to the litigation rosters that were used by FTB permitted to be put on trial. The cost/benefit ratios that were used by the FTB in determining their budget before the California legislature was determined to be put on trial. I note that there is no quarrel, or there was no quarrel in the briefs from Mr. Hyatt as to our categorization of that conduct. Also, there was no claim by Mr. Hyatt that there was some type of a dispute that warranted factual resolution as to the objective acts that were undertaken by the FTB. And notably Mr. Hyatt did not site, with one exception, to any statute that mandated a particular conduct by the FTB.

In the one exception that he did site was not even a statute at the time that the FTB did its audit. And so to the extent that there is no dispute as to the factual and objective acts by which the FTB undertook its discretionary acts. Instead, Mr. Hyatt exclusively attacks the mindset with which these employees performed their job. He attacks that mindset and labels it as bad faith. And when we get to the second element I'll discuss that in more detail.

Element Number 2, though, under Martinez requires us to determine whether or not these discretionary acts were based upon the type of policy determination the discretionary function and immunity it's designed to protect.

CHIEF JUSTICE CHERRY: Remove to that topic, Ms. Lundvall, I wonder if you care to comment on the import, if any, of the Court's citation to Coldhurst in the Martinez decision. As you know, the Second Circuit in that case recognized that in the context of an exception, inattentiveness or even laziness might fit within that exception that seems to run in conflict with an evaluation of subjective intent and yet our Court did refer to that case in citing the rule.

PAT LUNDVALL: I think that if you take a look at Martinez and its progeny, that there has been an evolution of the Court's analysis for discretionary function immunity. In Martinez, while that there was reference to Coldhurst as well as in Boulder City there was reference to Filine.

When we move though into the *ASAP Storage vs. City of Sparks* case. In that case there were intentional tort allegations as well as bad faith allegations, but this court remanded that case, notwithstanding those allegations, for the District Court to review under the two-part test set forth in Martinez. And in Ramsdell, there were intentional tort allegations as well and the Court ignored the labels which had been placed upon the claims that were at issue and looked at the objective acts without evaluating the subjective intent then of the employees to make its determination that the conduct at issue did meet the two-part test set forth in Martinez.

And as we go then to the second element under Martinez ...

CHIEF JUSTICE CHERRY: When we examine discretionary behavior by the actor or actors, what do you make of the allegations at trial that communications were sent to persons who may have knowledge about Mr. Hyatt's residency that included his social security number. Is that a matter that falls within the discretion of your employees to conduct?

PAT LUNDVALL: Yes, Your Honor. Especially when you look at this within the context of the time frame that was at issue. It was 1993. It was 1994 when the auditors were conducting their investigation of Mr. Hyatt. At that point in time social security numbers were common identifiers. If you went to Smiths, they drew you a little grid and they asked for your driver's license so that you could write out your check. What was the number that they put in that little grid from your driver's license? Your social security number. During that period of time that was at issue, the social security number was a common identifier and it was practice then for the FTB to ensure that they were getting information about the right individual that they had under audit.

CHIEF JUSTICE CHERRY: Then what, under the notice sent to Mr. Hyatt, which represented assurance of confidentiality, was confidential?

PAT LUNDVALL: From the perspective of...there was a notice that was sent to Mr. Hyatt identifying the Information Practices Act as well as the Federal Privacy Act. Under the Information Practices Act, which is a California statute, there is an exception that allows you to use information that is necessary then for purposes of your investigation.

But Mr. Hyatt didn't make those contentions as to the notice. His argument was more that, in working with the auditors, he had expressed concern that he was an inventor and he was worried about industrial espionage. And so therefore, any of the papers that he gave, in particular to his business, would be maintained as confidential. And all of that information was maintained as confidential. The testimony at trial was that the auditors maintained those in locked bags and locked cabinets and locked offices and afforded him the full protection that he had sought.

At trial, it morphed into something bigger and something broader and he tried to encompass not only his social security number, which was a matter of public record, his address which was a matter of public record, but also his name. His name, as claiming that that invaded his privacy, when in fact the auditors identified who it was that they were seeking information from.

JUSTICE HARDESTY: One of the things the Court struggled with in leading up to the Martinez decision was how do you fit law enforcement offices in the ambit of the immunity rule. If the Court were to conclude that Paileen is no longer law, how would you analyze the police officer that intentionally beats a suspect on the street under the first prong of Martinez?

PAT LUNDVALL: That would constitute a violation of the law. There is in fact a law that says you can't do that. And there would be a constitutional right deprivation in that context. And one of the things that has been made clear from Martinez, as well as in Butler, as well as in City of Boulder, and if you look at the Berkovitz case as well. If there is a statute that mandates, or it prescribes specific conduct then that could not be discretionary because the law enforcement officer in that context then cannot...you know without...just to be able to commit battery and assault then on a citizen...

JUSTICE HARDESTY: Even a regulation that might prohibit police officers' behavior would be covered then?

PAT LUNDVALL: I'm sorry

JUSTICE HARDESTY: Even a regulation that prohibits police officers' behavior in that regard would be covered and therefore the immunity would not apply?

PAT LUNDVALL: That's correct, Your Honor. From a regulation standpoint then if there is a regulation that proscribes the government actors' conduct then in fact the government actor is obligated to follow that prescription.

JUSTICE HARDESTY: Then in this case, what's your understanding of a regulation by which the audit was to be conducted that was not fulfilled?

PAT LUNDVALL: I don't believe that there was any regulation that was violated, that there was any regulation that was not fulfilled. And so to that extent then, it is impossible for me to answer that question. And one of the things...

JUSTICE HARDESTY and PAT LUNDVALL: spoke overlapping

JUSTICE HARDESTY: Go ahead…

PAT LUNDVALL: No you go

JUSTICE HARDESTY: The privacy requirements and notices, those wouldn't be considered regulations?

PAT LUNDVALL: The Information Privacy Act and the Federal Privacy Act? Yes they would be considered statutes of regulations.

JUSTICE HARDESTY: But you see no violation in this particular case?

PAT LUNDVALL: Absolutely not

JUSTICE HARDESTY: Ok

PAT LUNDVALL: And so we did that analysis within the brief on how the conduct then was not prescribed by the Information Practices Act it was not Prescribed by the Federal Privacy Act. As we get farther then…

FEMALE JUSTICE: So is it your position then that unless there is a statute or a regulation that the government actor violates, that the conduct is immune.

PAT LUNDVALL: What my position is, is this: is that unless there is a statute or rule or regulation that prescribes or prohibits certain behavior and the government actor is needing to use their discretion to perform their function and then you've got to go to the second step of the Martinez analysis and whether or not that discretion then was being exercised to further a policy objective whether it be a social, economic, or a political policy determination. The type that it was designed to be protected then by discretionary function immunity

FEMALE JUSTICE: Does that modify what was decided in 2002 by this Court and 2003 by the U.S. Supreme Court?

PAT LUNDVALL: Yes it does Your Honor.

FEMALE JUSTICE: It seems to narrow it substantially.

PAT LUNDVALL: Yes it does Your Honor. In the Martinez decision itself identified that the prior test had been employed by the Court gave inconsistent results. And so to the extent that this Court was trying to apply, or build-in consistency, similar to what the federal system has done into this discretionary function analysis. And one of the things, as we get to the second part then of the test, what we have to look at then is whether or not it's a type of policy decision that discretionary function immunity is designed to protect. I think a summary from the closing argument that was given by Mr. Hyatt's counsel at the time of trial really underscores this.

They presented to the jury, after summing up all this conduct that was at issue they said this:

> In sum, we have shown you that the FTB has acted as fact finder, prosecutor, judge, jury, and executioner. Ladies and Gentlemen you get to decide if that's fair. Ladies and Gentlemen you get to decide if they made fair decisions. Ladies and Gentlemen you get to decide if that's how your government should work.

It was not the jury's or judicial prerogative for them to decide how the legislature, as well as the administrative branch, the executive branch, administers then the decisions that have been made by the California legislature. I think that that illustrates then precisely that what the jury was allow4ed to do was to second guess the system that had been put in place by the California legislature and its administrative agency, the FTB. And to make that policy determination that what we do is we begin with the presumption that starts with Ramsdell and it states this: basically if there is a statute or a rule or regulation that offers discretion and in fact that the government actor is employing that discretion there is a strong presumption that in fact the government actor was acting in furtherance of the policy enacted by the legislature itself. And so if we employ that in this context what you can see then is that the FTB was implementing the decisions that had been made by the California legislature.

Turning to the second issue, and I think that this is actually the issue that is front and center in this particular appeal and that is this: whether or not there is an intentional tort exception or bad faith exception to the analysis set forth in Martinez. The Court's decisions in City of Boulder, in Ramsdell, and in ASAP Storage seems to have answered the issue very directly as to whether or not there is an intentional tort exception because all of those cases dealt with intentional torts. But the Court still put the objective conduct through the two-part test in Martinez. And in ASAP Storage there were even bad faith allegations and in that case the Court sent it back for analysis in accordance with Martinez.

And as to whether or not there was a bad faith exception. When you look at Filine, where in fact the bad faith exception was first recognized, it cannot be harmonized with Martinez. In Martinez we are told to not look to the subjective intent of the government actor. Yet in Filine to prove bad faith, the only thing you look at is the subjective intent of the government actor. So those two cannot co-exist, they cannot be intellectually harmonized, and therefore why we believe that in fact that Filine is no longer good law. In addition, the operation versus planning test was rejected in Filine and in fact this Court, frequently, in adopting a test or a rule or a regulation like the Court did from the Federal Court, employing the Federal tort's claim max review also adopts case law and that case law is uniform in expressly rejecting either an intentional tort or a bad faith exception.

I note that I am in to my rebuttal time. I have not addressed all of the arguments, but unless any of the Justices would have any questions, I'm going to reserve my time then for rebuttal.

MALE JUSTICE: On the punitive damage issue, NRS 42.005, I realize it's here for interpretations by each side here, but can you award punitive damages against a government entity?

PAT LUNDVALL: No, for two reasons. Number one, for the comedy analysis that is to be afforded to the FTB. California's public policy is identical to Nevada's public policy on that particular issue. There is no difference and therefore comedy would dictate that in fact California's government agency should be afforded the same treatment as Nevada's.

Second, is that as set forth in the Newport case, which was the U.S. Supreme Court decision that analyzed whether or not at common law that sovereigns could be subjected to punitive damages, the Court looked at all the policy and all of the reasoning and indicated that the answer to that was no. The sovereigns were immune from punitive damages and it set forth then its reasons why in that case.

MALE JUSTICE: Thank you.

MALE JUSTICE: This is for clarification, it's my understanding that at trial the FTB offered a jury instruction on bad faith that was contested by the Plaintiffs in that case...I'm just trying to understand how much of an issue bad faith was down below.

PAT LUNDVALL: Well, on this particular issue, I can reference quickly...what I am trying to do is to quickly as far as answer your question...we provided the various quotes that came from the trial court, the record, when settling jury instructions, when in fact Mr. Hyatt's counsel then indicated that bad faith was not an element of any of their causes of action. During my closing argument, what I did is I pointed out that there bad faith hook that they had alleged in 2002, which was extortion that they presented no evidence of extortion and their two experts had testified from the stand that they found no evidence of extortion. But in rebuttal, Mr. Hyatt's counsel stood up and said my argument was misleading because bad faith was not an element of any of the claims that the jury was supposed to evaluate. And so to the extent that their own counsel then identified that bad faith was not an essential element of any of their claims.

MALE JUSTICE: Thank you.

CHIEF JUSTICE CHERRY: Ms. Lundvall, before you take your seat as we examine the question of the intentional tort exception I wonder if under the second prong we should not consider that exception intentional towards do not appear to further considerations of social economic and political policy.

PAT LUNDVALL: What I would do is I would suggest that we look to as far as what the court did in the City of Boulder. In the City of Boulder there were intentional torts, not only alleged, but intentional towards tried and intentional toward fact. But the Court still went through the two-part test notwithstanding what the analysis tested. And in our briefs, even should the Court go so far as to believe such an exception exists, well we have identified four issues of law as to why none of the intentional torts were viable. But the more important thing though I think in this context is, it's not the labels that are to be applied to conduct, whether it be by Plaintiff's counsel or whether it be as a conclusion then of the trial. What it is the Court has looked to is the objective acts that are at issue to determine whether or not they meet the two-part test.

CHIEF JUSTICE CHERRY: Thank you Ms. Lundvall. Bernhard, on behalf of Mr. Hyatt.

Start Time 1:56:23 PM Speaker: Peter C. Bernhard
Notes: Counsel for the Respondent/Cross-Appellant

PETER BERNHARD: Mr. Chief Justice Cherry, Members of the Court, my name is Peter Bernhard, of the law firm Kaempfer Crowell on behalf of Respondent Gilbert P. Hyatt. I would like to reserve three minutes of our time for rebuttal based on the cross-appeal we have pending. Thank you, Your Honor.

May it please the Court, without exaggerating, this case presents the penultimate question: Why do we have government? The answer to that question is in our Nevada Constitution. I quote "for the protection, security, and benefit of the people" Article 1, Section 2. The State of Nevada has a constitutional duty to protect its citizens. And this goes directly to the comedy analysis. Comedy should not and must not be granted to the State of California if such a grant would impair Nevada's ability to so protect its citizens. Nevada cannot give up this essential element of sovereignty out of some desire to maintain harmonious relations with the sister state where the sister state has already disrupted the harmonious relations with Nevada at the expense of Nevada citizens.

We proved to a jury in this case a system wide process to get Mr. Hyatt's money whether he owed it or not and even today the FTB is still unrepentant for claiming not to understand what it did wrong. It believes it should be able to engage in the conduct it did against Mr. Hyatt. The FTB doesn't say it won't do it again. The FTB says they can do everything Mr. Hyatt alleged even if all of his allegations are true. Comedy should let us have free reign against Nevada residents.

I can run down the laundry list of egregious conduct that takes this away from discretion and ordinary investigative techniques: anti-Semitic aspects, taking on the cause of an ex-wife to try to remedy by going after Mr. Hyatt, personal promotions, meeting our numbers, using tax cases to meet numbers for a particular fiscal year. The auditor making a $24 million income error and adding a 75% fraud penalty on top of that and saying "oh, I'm sorry, we can't correct that until you take it all the way through the protest and let them look at it." Of course, eleven and a half years later we are still involved in the protest. There were internal doubts, and we believe the Affidavits of estranged ex-relatives? This is really a tough case from Carol Ford.

Penalty Training. Let's use fraud training as bargaining chips to get money from tax payers. Oh we don't care if the money is owed or not, if we can assess a fraud penalty that gives us great leverage to negotiate a settlement.

UNKNOWN MALE: Counselor, you are getting into very specifics, but if you talk in terms of the Martinez analysis

PETER BERNHARD: Sure, be happy to. I believe the opposite, of course, of what my learned counsel has said. Martinez and Filine mesh perfectly. Discretionary function immunity doctrine was clarified in Martinez, but both before and after Martinez, not every negligent or intentional act was entitled to immunity. Before and after Martinez no immunity exists for Nevada officers or California actors or agents who commit bad torts. The tests under Filine and Martinez are

very reasonable and very compatible balancing the duty to protect citizen rights with government interests to have discretion to exercise their policy functions. Filine recognizes a very simple concept that is still valid and viable and being applied in cases that we have cited in our supplemental authorities numerous times. State actors, including Nevada actors, have no discretion to commit a bad faith act.

So the Court has asked us to look at this question. Does the test in Martinez mean that as long as the act is discretionary it is immune? And I say that can't be nor should it be the law in our jurisprudence.

JUSTICE HARDESTY: You touched on bad faith which is part of this analysis, but yet bad faith seemed to be taken out of the equation with the jury instructions. Was that appropriate or was that not appropriate?

PETER BERNHARD: It was very appropriate and the bad faith inquiry has to be done as a threshold question before you get to the discretion because by definition a state actor cannot have discretion to commit an act in bad faith. Then you have to have a jury evaluate that conduct.

JUSTICE HARDESTY: But you opposed the request for an instruction on that ground and now on appeal it seems as though your brief alters the discussion.

PETER BERNHARD: I don't believe so, Your Honor.

JUSTICE HARDESTY: Aren't you taking inconsistent positions on the bad faith issue in this case?

PETER BERNHARD: Not at all, Justice Hardesty. I think the way we expressed it at trial and the way we expressed it here is that bad faith is an integral component of the elements of the torts. It's not in and of itself an element, it's not in and of itself a tort.

JUSTICE HARDESTY: Well then what is your position with regard to the rule in Martinez and several Federal Circuit Courts that have examined that rule since Gobert that says that one does not examine the subjective intent of the actor but rather the objective actions taken.

PETER BERNHARD: Well I think that there is a little bit of ...

JUSTICE HARDESTY: Don't all of the torts that you have, at least your...I think all seven causes of action but certainly six of them, require an examination of the subjective intent of the actor?

PETER BERNHARD: I believe that's very consistent with Gobert, Berkovitz, and Martinez. And even the FTB in their brief say "the focus of the second element is not on the government employee's subjective intent". That's a quote directly out of Berkovitz and Gobert. So the first element of discretion absolutely requires considering subjective intent. Because if you have bad faith at that level you don't even get to the issue of discretion which is test number one.

JUSTICE HARDESTY: But Berkovitz, Gobert, and Martinez were all negligence cases.

PETER BERNHARD: That's correct, Your Honor. And I believe, again, that that's a distinction, but the interesting part of that is that in Gobert there's even an indication that the Gobert Berkovitz discretionary immunity test doesn't apply to negligent acts. That the example they use in Gobert is the driver that's committing a negligent act while driving in the course and scope of employment. So if you had someone going out to interview someone to enforce tax policy runs a red light that is not going to be immune. So there is a negligent act that is not immune. And clearly Nevada, through Filine and through the cases that continue to cite Filine, has said we are going to hold our Nevada actors accountable and not allow them to commit intentional torts or commit acts of bad faith which become evidence of the elements of the torts we proved.

So I believe that it is absolutely consistent that Martinez and Filine have to apply because they deal with different situations. If in fact the purpose of the second test of the Berkovitz Filine Martinez test is to make sure that government actors have the ability to take care of policy, judgments, or decisions then I think subjective intent doesn't apply.

But what do we have here? If this court were to decide to grant immunity by applying that standard through comedy to the FTB actors in this case, then you have a threshold that no Nevada actor would ever be liable for acts of bad faith or intentional misconduct and your police officer example is a good one Justice Hardesty, and you'd have a situation…

JUSTICE HARDESTY: That's not entirely…maybe my example is a good one, but your point is not entirely correct because the rule does apply to circumstances in which the conduct is in violation of a rule, regulation, or statute and that becomes a limitation on the right to immunity, right?

PETER BERNHARD: Well I don't believe so. I think what the argument would be if there has to be a regulation or statute or policy then you would have to have something written in the California code and in the Nevada statute or regulation that says "Thou shalt not in bad faith go after someone to get his money when you know there isn't a case because you want to help the ex-wife and because you want to go forward and destroy a man". That would be the rule. You would have to write that down. If you look at the FTB's own manuals, every single page of their training manual says "if in doubt, don't disclose".

We talked about what was disclosed. And there was a comment by Ms. Lundvall that the inventions was all that was intended by the Privacy Act. Well no, it doesn't say "we will only keep information about your inventions private", in fact they didn't even do that. They sent letters to Fujitsu and Matsushita, the first licensees of Mr. Hyatt. And they included copies of the licensing agreement, in part, to send to these licensees. So they didn't even do that.

So when the question is asked well what does it mean when you pledge confidentiality, what does it mean when Mr. Hyatt specifically asks an auditor "because of the sensitivity of my materials, because of the danger of industrial espionage, I've got to be sure that if I give you these agreements they will be kept confidential." And your government says "Oh, absolutely".

Then without him knowing it, they send these letters with copies of those agreements to those licensees. Now, is that going to be exempt? Are we going to grant comedy to say the State of California and every other state in the country Nevada citizens are fair game. Go ahead, do whatever you want and you will not be accountable because we are going to be nice to our sister states.

JUSTICE HARDESTY: Well assuming, for the moment, that the Court agreed with you that there were some instances in which the promise of confidentiality was disregarded, aren't there other instances where the acts by the auditors were discretionary and protected immunity, and if so, should the court have bifurcated those which were protected and those which were not?

PETER BERNHARD: No, I don't believe you can because in this case, each and every act, which the FTB tries to cloak under the guise of discretionary acts, was intended to reach the predetermined conclusion. When they did not choose to interview Mr. Hyatt, or his neighbor, or Dan Hyatt, people with first-hand knowledge of what actually happened they made a discretionary decision because they knew that information might not fit with their case. Is that discretionary decision going to be allowed?

MALE JUSTICE: But counselor, you're making a, and I understand you are representing your client, but part of the underlying issue was when did he validly move to Nevada and that's kind of a moving date that we are looking at, or they were looking at in this question, in terms of any tax liability to California. So at some point I understand how you're phrasing this, but still, try to get to the issue that Justice Hardesty is talking about why not in telling the story if we are going to put it in true context could those issues not be separated?

PETER BERNHARD: Well because primarily this was a, based on what the jury found, based on the jury's verdict here. Permeating the entire process of the FTB and that's exactly what our jury system was supposed to do, and very early in this case this court in 2002 said "Do not look at the tax correctness. Do not look at when he moved. This is not a residency issue."

JUSTICE HARDESTY: If that be true then I come back to my initial question, then why was bad faith, the instruction you attempted to get in, not at least given to the jury for their consideration? If that's what we are focusing on.

PETER BERNHARD: Because we are focusing exactly on what the Martinez Berkovitz Gobert tests talk about and that is the conduct of your state actor under the circumstances. You are looking at conduct and that's what we examined at trial. What did they do? And did that violate Mr. Hyatt's privacy rights? Did it violate...

JUSTICE HARDESTY: Are we looking at objective or subjective?

PETER BERNHARD: It depends on the subjective intent before you get to Martinez's test on whether or not it was discretionary. You have got to look at that threshold question in order to fulfill the duty to protect citizens.

JUSTICE HARDESTY: Ok, let's examine that Mr. Bernard. Could you share with us your argument...I got the impression from your briefs that Mr. Hyatt's argument in this case is that a collection of what might be considered negligent behavior should be amalgamated into intentional misconduct. Is that your position? And if that is not your position, could you cite for me one example of an act which is an intentional tort or bad faith?

PETER BERNHARD: Alright, I think that the question deals with two separate aspects of the case. And I agree that there are acts that might be considered negligent that become intentional. For example: the auditor lied to Mr. Hyatt's tax representative. She flat out lied. She came to him, surveyed his parking lot, went to the office, he contacted her and said "well what were you here for". She said "I was just doing some investigating". That might be something that was negligence if she did it improperly. But then when he said do you have any questions, are there any issues that have come up? She said no, nothing. When the same week, and the week before, they had sent out over 100 demands for information from third parties without telling Mr. Hyatt. That is an intentional act. That's not negligence, that's not inadvertent, that's not happenstance.

JUSTICE HARDESTY: Has this Court or any court that you've located accumulated a series of negligent acts and converted them into intentional misconduct?

PETER BERNHARD: Again, I don't know of any cases Justice Hardesty, that say that but there are plenty of facts in this case that could be deemed either negligent or intentional and the jury has spoken and the jury has spoken. The jury decided they were intentional.

JUSTICE HARDESTY: Could you identify one of the acts that you consider to constitute and intentional misconduct supporting one of the seven causes of action, aside from her indicating she lied about who she interviewed.

PETER BERNHARD: We've already talked about the promise to keep his licensing agreements confidential. And those were sent out. That was intentional; there was nothing inadvertent about that, they knew they were attaching that to those letters.

JUSTICE HARDESTY: Let's assume that the State of California is not permitted immunity as a result of that act. Should the trial then deal with the damages associated with that improper disclosure?

PETER BERNHARD: In light of all the other acts that we alleged and proved? And that's what this Court said in 2002 and what the U.S. Supreme Court said in 2003, that it is up to the trier of fact to decide whether or not the proof, not the allegations, not the labels, whether the proof supports the elements of the cause of action. And that's exactly what we did. We alleged that prior to the 2002 opinion; we proved the case that we alleged, we proved the case we told this court we would prove, and the jury ruled in our favor. So that all of these acts, and we have a laundry list, and again I don't have a lot of time to go through all of them, but there were a lot of acts that the FTB committed. There were things like the anti-Semitic remarks. The things that Ms. Cox would say to her friend when she thought no one would tell what she said. It's the same argument. You do something when no one else is around, is a measure of character, it's a measure of

MALE JUSTICE: What were the anti-Semitic remarks?

PETER BERNHARD: Well, she said "We're going to get that Jew bastard" "Jews make all the money".

MALE JUSTICE: Ok

PETER BERNHARD: This is the type of thing she was talking to Candace Les who was her friend at that time. She goes after the audit, after the investigation and talks with Ms. Maystead, the estranged ex-wife, and says, according to Ms. Maystead now, this is nothing that we're presenting, Ms. Maystead testified:

"Yeah, she told me he was convicted."

"Was it because of evasion of taxes?"

"Yea, that's what it had to be I assumed that in a telephone call she told me that."

Now that's a personal vendetta that this auditor had against Mr. Hyatt. And the problem that we have with the FTB is that at every level of the system where protection should have been there by the state the system failed.

MALE JUSTICE: Can you identify any violations of law or regulation perhaps?

PETER BERNHARD: Well in addition to the Information Privacy Act and the Federal Privacy Law you also had all of the policy manuals and training manuals from the Franchise Tax Board that are supposed to govern this kind of conduct. And those all were part of the record, we had evidence of the training, for example, where the bargaining chips were used, where a training manual on penalties had a skull and crossbones on the cover. It indicates a pervasive attitude that we're going to get Nevadans. Another piece of evidence that came in, in their manuals, they tell their auditors "don't contact Washoe County Assessor because the Washoe County Assessor tells the taxpayer. And the taxpayer might be upset that we are doing this digging behind their back. We don't want Nevada to find out what we're doing. We think everybody leaves California to move to Nevada is doing it to evade taxes. So most or all of our cases we should impose a fraud penalty."

MALE JUSTICE: Mr. Bernard, my understanding is that the training manual with the skull and crossbones was in one single training event, not a pervasive distribution among all FTB personal. Was there in fact evidence in the trial that this manual showed up with respect to the auditors who did this audit?

PETER BERNHARD: A couple of important points on that. One is that it was dated August 31, 1993, that's when the audit began. The first letter was sent in June of 1993. Ms. Cox got on the case in October of 1994. In the penalty manual, and this was done for the Los Angeles district office, Ms. Cox was in the Burbank office, but they were all part of the same overall supervisory function within the entire Franchise Tax Board. And what the manual actually said, the training manual, was "by properly using the full force of the penalties written into our tax laws, we may better be able to get the taxpayers to be more cooperative". Let's use the threat of these penalties to bludgeon people like Mr. Hyatt into paying things that they don't think they owe. That was part of that training manual.

We have Anna Jovanovich, who was the first protest officer but prior to that she was actually the legal advisor for Ms. Cox, telling Ms. Cox how she should handle this. She actually wrote, or re-wrote, the fraud penalty portion of the 1995 Determination Letter. And in 1995, she told a training session that fraud should be assessed in many of our cases. That was the mindset. We don't care about facts. We don't care about the law. We don't care about proof. All we care about is using these fraud penalties. So again, that evidence is circumstantial, we don't know if Sheila Cox was there, in fact I think she testified that she was not there at that particular session, but that was the mindset of the Franchise Tax Board, that these fraud penalties are great bargaining chips for us to get money for the state from rich people as part of an exit tax, in effect. We are going to stop them from moving to Nevada because they know we are going to come after them. We are going to make them pay if they want to leave California. That's the type of activity that Mr. Hyatt was subjected to. And again, the Franchise Tax Board found a man who was not only wealthy, but also principled who was willing to fight them on these points all the way through. And there are a lot of other examples that we've got.

You've got Ms. Cox, and again she was a major player throughout this case. In 1996 she was transferred to a different assignment. She had told Mr. Hyatt's representatives that they would have a decision shortly. Well in April of 1997, she is brought back into the case and she finds the case is still sitting there. So she calls Carol Ford and says "Why is this case still sitting there? Is it because we have to make our numbers? Is it because we want this to fall into a different fiscal year?"

Also, the protest, I find out, was sitting on Terry Collins' desk for six months before it was even given to Anna Jovanovich. Sitting on a desk. So what does Carol Ford do with that information? She doesn't say "we really made a mistake." No, she writes this memo to Penny Bauche. In that memo, she entitles it with all caps "HEADS UP. SHEILA COX IS UPSET". She doesn't want to take the blame for the delay, for the fact that she didn't even impose a penalty for the 1992 audit, for the fact that there was a mistake in calculating the taxable income from Mr. Hyatt that was favorable to Mr. Hyatt, and they corrected that error because it would have meant more money for the State of California. Yet, when Mr. Hyatt's lawyer says "Oh, by the way, there was a $24 million auditor error in allocating income." Oh we can't correct that one because that would be in the taxpayer's favor. This is the type of thing Mr. Hyatt was facing throughout the time of the audit and after the audit that this state should come in and say "hey wait, we do not tolerate that kind of behavior from our government, from our officers."

The government makes a promise. The government says we are going to keep this information confidential. They put on the World Wide Web the litigation rosters which give not only the name of Mr. Hyatt, the amount of the tax he pays, and at one time they added the penalty amount. Even though every other case on the litigation roster was one that had already gone through the protest, had already gone through the decision and was being litigated in court under the California procedures. Where there had already been a determination by the final highest levels of the agency. They put this on the World Wide Web with that detail. And you will see in the evidence that the first time they put that on the World Wide Web it didn't include all the detail and somebody made a conscious decision, later, to add the amount. Somebody made a conscious decision later "Let's go ahead and make this guy even more upset. Let's tell people

that he's been imposed a penalty." And you calculate the penalty, and there is only one penalty, it's based on 75% of the taxable income. Fraud.

MALE JUSTICE: What was the date of the posting?

PETER BERNHARD: Of the posting?

MALE JUSTICE: Mmm hmm

PETER BERNHARD: The first posting was in April of 1998.

MALE JUSTICE: That was after the complaint in this case had been filed, correct?

PETER BERNHARD: It was filed in January, and again, it's a...

MALE JUSTICE: Was it the initial posting of your client's suit against the State of California?

PETER BERNHARD: That was the initial posting of our suit against the State of California. But it was not based on every other case in the litigation roster. In other words there was no duty to put that in the public record except that their further humiliation and embarrassment of Mr. Hyatt and further indication that they are going to go after him and he better not be fighting them. If you challenge us we are going to make your information public. We are going to let people know how much you owe in taxes which, again, it's easy to extrapolate how much money you make. If you fight us, this is what's going to happen to you. And this is not something that we are making up. As soon as Anna Jovanovich got the protest, she had a conversation with Mr. Collins, a tax representative, and she said "you know, most people settle cases" because first we are going to go after a lot of information from you. You think we've been doing a lot of inquiring now, wait until you see what we do this time. This is all going to become public. Most people don't want to face that. So we are going to go ahead...why don't you go ahead and let's see if we want to talk settlement. Again, in a vacuum, it sounds like it's appropriate, but when later they send this incredibly massive information document request, they follow through on their promise. The publicize it. They put it on the World Wide Web. They did exactly what they told him they would do. Is that a threat? Well, whether she intended it as a threat or not it was carried out. Should a government do that? Should a government use the power that it has...

MALE JUSTICE: This settlement offer you are referring to is that the one that is in response to the legislature's adoption of the amnesty program or was that separate?

PETER BERNHARD: No, that was separate and there was no settlement offer. It was a conversation from Ms. Jovanovich to Mr. Collins in which she said "most taxpayers settle to avoid us revealing all of their private information so if you want to talk settlement, let's talk". Well Mr. Hyatt said "No, I'm not going to be extorted. I have been taught by my father not to cave in even to the government when I think they are doing something wrong. I don't owe any money. And I'm not going to pay them millions of dollars that I don't believe I owe because they threaten to make my information public." And as a citizen he has every right to do that.

These are the types of things that we were fighting, Mr. Hyatt was fighting in trying to get information.

Another example: when Ms. Jovanovich was helping Ms. Cox prepare the fraud penalty, Ms. Cox actually drafted it and said "we have affidavits from your ex-wife, daughter, and brother". Ms. Jovanovich changed that and said "we have affidavits from three sources". So Mr. Hyatt didn't even know when he saw the report that these are the people that were actually making these allegations against him. He knew they had no first-hand knowledge he'd been divorced for 20 years...18 years. He knew that that was not anything that could be reliable because she had no first-hand knowledge of where he was. He knew they didn't talk to him. He knew they didn't talk to his son who helped him move.

Same time period, and I am running into my rebuttal time but very quickly, the supervisor for Ms. Cox, Paul Lou, in the hand-written investigative reports which normally don't become public but Mr. Hyatt was willing to do that through this case and through part of the discovery. This Court in 2002 said that these documents had to be revealed. Mr. Lou says "you've done your work just make sure you write it up stronger against Mr. Hyatt."

To me, this is government out of control and it's the obligation of this Court to protect Nevada citizens from that kind of conduct.

MALE JUSTICE: Also on the emotional distress issue, there was some evidence that was excluded as to a loss of I guess it was his patent around the same time?

PETER BERNHARD: That's correct

MALE JUSTICE: What is your position as exclusion of that since emotional distress was an issue?

PETER BERNHARD: That was our, at least in part, it relates to both our cross-appeal and their argument that there may be other reasons for the emotional distress that Mr. Hyatt suffered. And we believe no, that that evidence was properly excluded from the record in this case. There was no basis to bring in all sorts of other proceedings that were not directly related to the acts that the FTB was committing against him. That decision was a proper decision by the Court after Judge Walsh looked at each and every aspect of the presentation, heard vociferous arguments from both sides, it was well within her discretion to decide that evidence would be more prejudicial than probative.

MALE JUSTICE: Mr. Bernhard, hopefully, the Chief might give you a little extra time to answer the question, but on the punitive damage issue, you heard Ms. Lundvall's comment that basically you can't get it against a government entity and certainly we have read the briefs and the arguments and all, but why do you feel it's appropriate to get punitive damages against the government entity?

PETER BERNHARD: Well, it's essentially the same argument on the comedy that we made both for the statutory caps not applying and the prohibition against punitive damages not

applying. Nevada has redress against its own bad actors for things like a constituent, Mr. Hyatt could have complained to an elected official. Mr. Hyatt could have gone to the legislature, could have gone to the elective branch, there may have been executive branch actors who would have stopped this conduct from occurring when they learned what was going on. But Nevada has no power over California officials to do that. So Nevada must allow its citizens to bring lawsuits like this and have a meaningful lawsuit. So a $75,000 cap doesn't become a cost of doing business and the punitive damages, there's nothing about California being sovereign in this state, in the City of Newport case that Ms. Lundvall cited, there was an award of punitive damages against the city. The Supreme Court didn't consider that, that was an issue before them under 1983, but, in that case, there was an award in the lower court of punitive damages against the city. If that is the only way that a citizen of Nevada who fights City Hall like this can find redress through the judicial system, then there is no reason for Nevada to grant comedy to protect California and it's whatever at the expense of the Nevada citizen's rights. There are other remedies for Nevadans against Nevada bad actors, there are no other remedies. The caps expressly apply to Nevada, the Punitive Damage Prohibition expressly applies to Nevada in our statute, doesn't extend to another state, and another state under Nevada vs. Hall where California was on the other side the U.S. Supreme Court said that a sovereign loses sovereignty when it crosses state borders and it does not have those conditions of sovereignty when it gets into the other state. We have the power and should protect the rights of our citizens. Thank you.

CHIEF JUSTICE CHERRY: Thank you Mr. Bernhard. I'm going to give you your three minutes and Ms. Lundvall I'm going to give you an additional three minutes. You have 520, I will give you 820. Eight minutes twenty seconds and Mr. Bernhard will have three minutes in rebuttal.

Start Time 2:27:55 PM Speaker: Pat Lundvall
Notes: Counsel for the Appellant/Cross-Respondent

PAT LUNDVALL: Thank you, Your Honor. In light of that, I'm not going to raise the procedural issue that in fact that while they may be the Cross-Appellant, the issues for argument today were limited to only the issues then raised by our appeal. But I appreciate it as far as the additional time. According to the analysis that Mr. Bernhard presented to the court is that before you even get to the Martinez test, what the court needs to look at is what allegations have been made of bad faith or intentional tort conduct. It's his position that before you even get to the two-part analysis under Martinez you first have to look to see were there allegations of intentional torts or bad faith? That particular issue has been expressly rejected by every Federal Court that has looked at this issue. And the reason why is because what it would do is it would put the power of determining discretionary function immunity within Plaintiff's counsel. All they have to do is with a little bit of ingenuity or a little bit of creativity plead around that and so therefore we would never get to the Martinez test. And so to the extent that the Federal Courts particularly have said that is not an exception, and for good reason. Because looking at the objective acts of the government actor versus any kind of subjective intent is what is required then under determining whether or not the immunity should apply. And, in this particular case, I think it provides context to that particular rule as well.

One of the issues that is frequently raised is the anti-Semitic slur that has been used throughout this case pretty much for its shock value. There has never been any allegations that in fact Mr. Hyatt was chosen because of his religious preference. He never brought any claims against the individual auditor who he attributes these particular comments. In fact, she was one of 42 individuals, and she was third face, if you look at his audit and his protest as a totem pole, she's the third face up on that totem pole. There were other individuals who had chosen Mr. Hyatt for audit and, in fact, had begun the audit process. She simply was assigned to pick up their work and there were many, many, many others after her who revered her work. So to take Mr. Hyatt's argument at face value, what you would find would be this: is that all 42 employees could do everything right, every objective act they engaged in, they could do it right, and they could come to the right conclusion or the right decision, but if just one of those government actors harbored a bad thought then, in fact, bad faith could be alleged in all of the rigors of the suit that was at issue here could be evaluated.

MALE JUSTICE: But it sounds like this person, and I forgot the name, had a vendetta against Mr. Hyatt, maybe because of his ethnic background and all, and pursued certain action, didn't just shoot off her mouth, but she went and pursued a negative course of conduct against him, at least according to Mr. Bernhard and what he refers to.

PAT LUNDVALL: Well, according to Mr. Bernhard, and that's one of the issues that I can go through piece by piece by piece the examples we have painstakingly laid these out in our brief, but what I would like to do is to highlight a few of these if I could please.

Number one, he contends that when asks whether or not there is a rule or regulation or a statute violated he claims that the confidentiality protection for the purposes of his patents was violated. Why? Because there were letters sent to Fujitsu and Matsushita. Well, we asked Mr. Hyatt for the dates of the receipt of income from those two entities and he refused to give that to us. So we looked at the contract and the contract recognizes between Mr. Hyatt and Matsushita, Mr. Hyatt and Fujitsu, and there was express within the contracts themselves that if the government is looking for this information, the government is entitled to that information. We sent a very simple letter then, after he refused to give it to us, saying when did you send this income to Mr. Hyatt? And we received simple responses as to the date of those income. That's example number one.

Second example is he claims that the auditor lied to the accountant that had been hired by Mr. Hyatt. Once again, you've got to put that into context. She had been trained, that if in fact you get telephone calls from accountants or attorneys, that you are not to engage them in discourse. But whatever your questions or concerns are you are supposed to put those in your determination letters or put those in writing. So, when Mr. Kern called on Ms. Cox and said "Is there something that I can help you with? Are there questions that you have?" She said no, not at this time. That's placing it into context.

In addition, they claim that somehow the training manual dealing with penalties was some type of indicia of bad faith. What in furthering as far as the issue as to whether or not this particular auditor had some type of a personal vendetta. Ms. Cox wasn't even at that particular training session. In fact, the FTB has a settlement bureau. Auditors, protest hearing officers, everyone,

other than those involved in the settlement bureau, are permitted to engage in settlement. The conversation that he attributes to Anna Jovanovich is a conversation that she had with Eugene Cowan. Mr. Hyatt's attorney, he had never been through an audit or a protest with the FTB. He calls her up and said "What can I expect? What is going to happen?" and she relates to him then what the historical perspective is then with any of the cases that she has under protest.

Similar to the alleged $24 million error. He claims that in fact somehow the FTB made an error. The FTB has long contended it made no $24 million error but that the taxes that were attributed to that income was properly assessed against him. These are all issues that are on review before the Board of Equalization. These are all issues then from which Mr. Hyatt has an opportunity for judicial review in the State of California. But these are also examples of how Mr. Hyatt tried to allow the jury to second guess those decisions, and when in fact then you end up with a judicial inquiry and judicial second guessing. These are the classic examples then of why discretionary function immunity is supposed to analyze the objective acts.

Another point, there is one other issue that I wanted to identify and that was this: Mr. Hyatt has always taken issue with the litigation rosters because in fact he says that "my case was the only case that was treated in this fashion". Mr. Hyatt's case is the only case that has ever been alleged against the FTB, anywhere. It has litigation rosters where it keeps track and informs members of the public of the cases in which it is involved in. And so when Mr. Hyatt's name and as far as this litigation appeared, it appeared as a result of him filing this litigation. So the public information that was out there, or what is on the litigation rosters and he was not treated differently in the respect that FTB reported on the cases that were before it but because of the uniqueness of his case, sure he is the only person in that particular procedural position.

The last point that I would like to leave the court with and that is this: comedy does not simply promote harmonious relations.

CHIEF JUSTICE CHERRY: Finish your thought now

PAT LUNDVALL: Looking at and analyzing whether or not there is some type of hostility being directed toward the State of California is a function of the full faith and credit analysis which was directly related in the U.S. Supreme Court's decision here is that this court in 2002 did not demonstrate any hostility toward the State of California. Why? Because it treated FTB the same as it was treating its own government agencies and that's what we are asking this court to do as well.

CHIEF JUSTICE CHERRY: Thank you Ms. Lundvall. Mr. Bernhard, three minutes.

Start Time 2:37:13 PM Speaker: Peter C. Bernhard
Notes: Counsel for the Respondent/Cross-Appellant

PETER BERNHARD: Thank you, Your Honor. Just to clarify there is a bad faith jury instruction; I may have misunderstood the question. Instruction 25 is the definition of bad faith and that is part of every one of the jury's findings. Instruction 25, there was that instruction and that was implicit through the jury's verdicts in support of each cause of action.

Then we had a couple of comments "according to Mr. Bernhard". Well, it's really not according to me, its according to the jury. The jury heard four months of testimony in this case, and believe me, it was hotly contested. The FTB made every argument it could and we made every argument we could. The issue that we have here on our cross appeal is that we believe the court erred by saying that circumstantial evidence was not sufficient to prove a fact and that fact was whether or not the FTB's actions caused Mr. Hyatt's business to dry up completely. And the court said "No, I need direct evidence. I need somebody to say I stopped doing business with Mr. Hyatt". And we submit that under the jury instruction and the rule of law that has been prevalent in American Jurisprudence, not just this court, is that direct and circumstantial evidence can support each fact required to prove a cause of action. Now after the mistake, if it was a mistake, the FTB has characterized it as saying "Well no, she didn't really mean circumstantial evidence isn't sufficient to prove a fact. What she meant was speculative evidence is not sufficient to prove facts." And again, that may be a correct statement of law but the court made its decision not to allow us to pursue the economic damages part of Mr. Hyatt's case. So the amount of the award could have been very, very much higher if we had been able to prove and present evidence. Direct evidence that Mr. Hyatt had the business, he lost the business, that Mr. Hyatt had worked with the Japanese companies, that the Japanese government approval was required for contracts, and the licensing program like this. That's all direct evidence. The issue came up on whether it was circumstantial when we didn't have proof that people stopped doing business with him because of that. But we did have testimony from experts who would say under these circumstances the Japanese government and others in the Japanese industry would have spread the word about Mr. Hyatt and the tax investigation, the letter to Fujitsu and Matsushita attaching copies so we think we are entitled to that.

So we appreciate the time and the obvious effort the Court has taken in going through the record in this case. I submit that in April of 2002, this Court understood the facts, it understood the primacy of Nevada's interests in protecting its citizens. It understood the principals of law governing negligent and intentional conduct and it understood comedy. 2003 the U.S. Supreme Court agreed, this Court did it right. Now I submit more than 10 years since that decision this Court should do it right again. Rule of law is the same as it was back then. Outside the circumference of authority the personal vendetta gives rise to a cause of action, which, if proved to a jury, must be sustained on appeal. That's our system. That's the rule that we have. To protect Nevadans from intentional bad faith conduct both by Nevada actors and by out of state actors. Any rule to the contrary is going to mean that the Nevada duty to protect its citizens is going to be severely, severely restricted. Thank you very much for your time.

Start Time 2:41:06 PM Speaker: Chief Justice Cherry
Notes: End Argument, Case Submitted

CHIEF JUSTICE CHERRY: Quick thanks Ms. Lundvall and Mr. Bernhard for your excellent arguments. This is a very challenging appeal and the memos have been submitted.

6-18-12

COURT CLERK: The Honorable Chief Justice Cherry presiding.

CHIEF JUSTICE CHERRY: Good morning everybody. Please be seated. This is Case No. 53264 Franchise Tax Board vs. Hyatt. It says The State of California. Excuse me, Franchise Tax Board of The State of California vs. Hyatt. Ms. Lundvall for the appellant. Mr. Bernhard for the respondent. Ms. Lundvall.

PAT LUNDVALL: Thank you Your Honor. Pat Lundvall and Robert Isenberg on behalf of the State of California's the Franchise Tax Board. We intent to reserve 10 minutes for the issues that were identified in the Court's Order and we thank you for the opportunity for further argument on these issues.

I'm going to begin with the new issue that the Court added to the list and that is Issue Number 6, the Statute of Limitations issue. I intend to, or the reason why that I am going to start with that issue is for a few reasons.

Number one, the evidence upon which that that issue is based is uncontroverted. Also, the parties agree upon the law that should be applied to that uncontroverted evidence and, in fact, this Court recently reaffirmed that law in the Wynn vs. Sunrise Hospital decision. The only real dispute between the parties concerns the application of the law to those uncontroverted facts and that is the DeNovo Review then by this Court. Fourth, and finally, as he did in the District Court in the race to this Court, Mr. Hyatt mistakes the contents of the uncontroverted evidence and so, it therefore it appears that that evidence then warrants some discussion.

So let's talk about…

JUSTICE HARDESTY: Before you get into your argument, Ms. Lundvall, on this issue, I wonder if you could clarify something if you have it handy, and if you don't then I would request through the Chief that you supplement your argument with a direct citation to the record as to where Franchise Tax Board sought dismissal of the Intentional Infliction of Emotional Distress claim based upon the Statute of Limitations. Our review of the record doesn't disclose that, or at least I have not been able to locate it, but if it exists, it should be identified for us.

PAT LUNDVALL: I don't have that citation off the top of my head, …

JUSTICE HARDESTY: Right

PAT LUNDVALL: …Your Honor but we would be happy to supplement.

JUSTICE HARDESTY: It's kind of a small record so I assumed you would be able to point to it in a hurry, but I would make that request of you, and obviously if [Respondent's] Counsel wants to point out it's missing, let us know. Thank you.

PAT LUNDVALL: Let me return then as far as that uncontroverted evidence and see what Mr. Hyatt knew and when he knew it. I think it bares mention because this Court has in many of its Statute of Limitations decisions that the same law firm that represented Mr. Hyatt during the

audit also represented him in filing the Complaint in this action. And also, as underscored in the Wynn vs. Sunrise Hospital case, what we are looking for, is when Mr. Hyatt knew of facts that would lead an ordinarily prudent person to investigate the matter further. That's what we are looking for.

In the spring of 1995, Mr. Hyatt was actually given physical copies of the Demands for Information that were sent to various third parties. Those Demands that were actually given to him contained some of the information that he claimed was confidential in the form of which was the predicate to his Non-Fraud claims. Also in the spring of 1995, Mr. Hyatt authored and sent a memo along with a sample demand and some additional materials that he had gathered from third parties to his attorneys and his accountants and he noted in his memo that, in fact, the FTB was sending these demands to individuals and entities that he had written checks to in 1991 and 1992. Those checks included the Nevada DMV, his temple in Las Vegas, Centel Telephone in Nevada, Wagon Trails Apartments in Nevada, Nevada Power Company. So for Mr. Hyatt to suggest as he does in his brief that he was unaware that there were any demands being sent into Nevada or that he was unaware of the form of those demands is simply no true to the record facts. But he argues that he was unaware of the scope of the FTB's investigation.

So let's examine then what the record facts reveal. In August of 1995 a thirty-nine page letter that was sent by the FTB to Mr. Hyatt and his attorneys. This letter outlined the full scope, the full breadth, and the entirety of the FTB's investigation. It revealed nearly everyone and every entity sent a demand letter and the information that they had received back. It explained in great detail field visits the FTB auditors made both to Las Vegas as well to his neighborhood as well as to the businesses that he had frequented. They chronicled the conversations they had with individuals, everyone from his trash collector to his mailman to his apartment complex manager to a receptionist. The letter also revealed that every third party contact that he claimed could support then his Nevada residency had been contacted. Every medical facility had been contacted and that was revealed in the letter; attorneys, accountants, investment bankers...advisors, bankers, medical providers, the two Japanese companies, public agencies to whom his Las Vegas address had been disclosed. All of that was revealed in the August of 1995 letter. In other words, by August of 1995, the entirety of his Non-Fraud claims had been revealed to Mr. Hyatt. And in response to that letter, his attorneys sent back a reply that said that they had feared that Mr. Hyatt's confidentiality had been breached after a review of that letter. That sounds like an admission of the finding that is required by Wynn vs. Sunrise Hospital that would lead and ordinarily prudent person to investigate further. All of these facts were uncontroverted. We believe that the District Court erred by not dismissing the Non-Fraud claims, or at the very minimum, she erred by not allowing the FTB to argue the Affirmative Defense to the jury. The end result after a DeNovo Review that either six of his claims should be dismissed, or at the very minimum, there should be remand on those six claims for resolution on the Statue of Limitations Defense.

Turning, then, to the first issue Resolution...

JUSTICE PICKERING: Could you, before you do that, comment on the Continuing Wrong Doctrine and its applicability to your Statute of Limitations argument?

PAT LUNDVALL: Mr. Hyatt doesn't really discuss or apply the Continuing Wrong Doctrine, but he kind of throws it out there as applicable. When, in fact, though if you take a look at other portions of his brief it appears he applies that Continuing Wrong Doctrine to his Fraud claim. And we don't contend that his Fraud claim was subject to the Statute of Limitations. In other words, he cites the delay in the resolution of his protest. He cites additional information that he received regarding the analysis that was employed by the FTB as part of his fraud claim that he uncovered at a later point in time and it was ongoing. And so from that perspective that appears to go to his Fraud claim and not to his Non-Fraud claims.

JUSTICE PICKERING: Thank you.

PAT LUNDVALL: Turning to issue number one then and resolution of issue number one which deals with the intentional torts and the bad faith aspect actually serves a dual purpose. It resolves whether or not that Mr. Hyatt is entitled to the exception that he advocated to this Court during our first argument for Intentional Torts or Bad Faith. But it also resolves the issues as to whether or not that any of his Intentional Tort claims should have made it to the jury in the first place.

Let me start then with his Fraud claim. And, given the amount of time, I cannot raise each and every issue that we claimed was dispositive in our briefs. But what I would like to do is simply highlight the more obvious issues that demonstrate the legal defects that Mr. Hyatt claims for which dismissal via Summary Judgment should have occurred so that these claims never would have made it to trial.

Mr. Hyatt alleged two representations as his foundation for his Fraud claim. His first was an implied representation of treating him fairly and impartially. It is absurd to contend that any court would recognize a fairness and impartiality representation as sufficient foundation for a fraud claim. And it is notable that Mr. Hyatt cannot advance any argument or any case that in fact supports such a foundation. In fact, we brought to the Court's attention many, many cases that said it is insufficient. Why? Because it is too vague. Fairness, impartiality, are issues like beauty. They vary and they are dependent upon the eye of the beholder. So when you had an insufficiently vague representation it cannot serve then as the foundation for a fraud claim.

The second foundation...let me back up as far as to one issue then as well. He also never demonstrated any fraudulent intent that would have existed at the time that that purported representation was implied from the notice that was sent out. He would have had to prove and allege a policy and practice but he did neither and, in fact, his experts suggested to the contrary.

As to his Confidentiality representation. Once again, it is important to examine the record facts. The only representations of confidentiality that were proven by Mr. Hyatt concerned his business papers. His business licensing program for which that he feared industrial espionage. And there was no evidence that he supplied that any of that had been breached or had been violated or had been disclosed.

In the first argument before the Court, Mr. Hyatt contended that the disclosure, the letter that had been sent to Matsushita and Fujitsu was the proof of in fact that disclosure. But let's look at this in context. Mr. Hyatt had a contract with Matsushita. He was the one contracting party,

Matsushita was the other contracting party. We asked him for when Matsushita paid him under that contract and he refused to give us that information. We sent a letter to Matsushita enclosing a one page of that contract, in other words, we were sending to Matsushita a document that was already in their own files. Same with Fujitsu. And therefore, insufficient foundation for a fraud claim based upon any Breach of Confidentiality.

Let me then turn to his Invasion of Privacy claims. And I am going to examine these as a group because there is a common denominator to all three of his Invasion of Privacy claims as well as his claim that he characterizes as Breach of Confidentiality in an actuality it's also the second prong then of his Fraud claim that has this as a common denominator.

Mr. Hyatt alleged that in fact information privacy was at issue under these Invasion of Privacy claims. And the information that was at issue was set forth in Jury Instruction Number 43. Jury Instruction Number 43 made it clear that the only information that was at issue under these claims was his name, his address, and his social security number. So, the first issue that Mr. Hyatt has to prove under each and every one of those is that somehow he had an objective expectation of privacy in that information. And that is a legal issue under the Peter vs. Baroncini case for the court to resolve in the first instance. And the Montano case makes it abundantly clear that when you have information that is found in the public record, they become public facts and public facts cannot serve as the foundation for an Invasion of Privacy claim. Montano from this court, Cox from the U.S. Supreme Court and the restatement second on tort is uniform on this particular point that if the information is found in the public record it is an insufficient foundation then to serve for an Invasion of Privacy claim. Mr. Hyatt's name, his social security number, and his Nevada address were public records. They were found within public records and they were public facts.

Not only as far as to litigation had his social security number been found. His voter registration form asked for his address as well as his social security number and at that point in time, during the 1993 to 1995 time frame voter registrations were public documents you could receive and obtain access to all of them. His business license that he applied for within Clark County, social security number, address found within there as well. He paid property taxes as far as on his home. These were all public records and therefore an insufficient foundation for any Invasion of Privacy claim.

Turing to the Abuse of Process claim. This is a claim that is designed to protect the integrity of the court. Therefore it requires some form of judicial process. There was no judicial process that was employed by the FTB in resolving the audit against Mr. Hyatt and he pointed to that.

Last, his Intentional Infliction of Emotional Distress claim. As a discovery sanction for failure to turn over his medical records, Mr. Hyatt was limited to Garden Variety Emotional Distress. The order was expressed as made by the Discovery Commissioner as well as the District Court that in fact his recovery was limited to Garden Variety Emotional Distress. In the cases are uniform in holding that Garden Variety Emotional Distress is not severe emotional distress to serve as an adequate predicate. Moreover, in Bartmittler as well as in Vetsinger this Court had indicated when there is no physical impact that a party is obligated to come forward with objective evidence of their severe emotional distress and without his medical records he didn't have that.

And so therefore, each and every one of these claims were subject and should have been dismissed pretrial.

Let me turn then to the issue about Bad Faith. Before this court, Mr. Hyatt contends that he has not flip-flopped on this issue. So let's examine what the record reveals. When we settle jury instructions in this case, Mr. Hyatt argued, and I'm going to quote:

> Bad Faith is not an element of any cause of action.
> "We had the burden to prove the elements of our causes of action and Bad Faith is not one of those elements.

JUSTICE PARRAGUIRRE: There were actually two Bad Faith instructions given, weren't there?

PAT LUNDVALL: Yes there were. There were two definitional instructions. When we got to the issue though of who bore the burden of proof on Bad Faith, Mr. Hyatt took the position that it was the FTB that bore the burden of proving that in fact we had not acted in bad faith. And what the District Court did then is that she refused to give any jury instructions dealing with the burden of proof on bad faith. In other words, she agreed with each of his representations about how bad faith was not one of the essential elements for which that he bore the burden of proof.

Let me as far as discuss a little bit for his reversal on this particular point. All of his complaints, all of his pretrial activity, all of his advocacy before this court and the U.S. Supreme Court had allege extortion as the foundation then for his bad faith argument. When he got to trial, however, he didn't present any evidence of extortion to the jury. And two of his experts admitted that they found no extortion. So from an evidentiary standpoint he was in a bind. And he tried to get out of that bind then by removing bad faith as a proof or one of his burdens of proof in the essential elements of his claim. And the District Court agreed with him.

And so let's get to how he argued this issue then to the jury. His Complaint ultimately ended up being an exhibit at the time of trial. We went through and demonstrated to the jury how extortion was a common denominator to all seven of his Causes of Action and when you go through his complaint you will see that extortion is that common denominator. We pointed that out to the jury, pointed out to the jury also that he offered no proof of extortion and therefore failed in his burden of proof. In rebuttal, Mr. Hyatt's counsel took the position that my argument was misleading. That I wasn't the sheriff, that in fact it was Judge Walsh who told them what the law was and what they had to prove. And what they had to prove was the essential elements of their claims.

The verdict forms contained no finding of bad faith and contrary to the briefs there were express...it was expressed to this court that in fact those verdict forms did contain such a finding. And the jury was never instructed, as he also claims in his brief, that somehow that they were supposed to determine if the FTB had conducted the audits in bad faith.

Turning then to the next issue, and that is the Audit Conclusions. We submit that all of the claims should be dismissed by this court. However, if in fact that after going through either the

Discretionary Function Immunity Analysis or going through the Statute Of Limitations Analysis or going through the Legal Sufficiency Analysis that this court determines that in fact some of the claims still warrant a remand then back to the District Court, the court is going to need to give instructions to the District Court based upon some of the errors that were conducted by the District Court some of which turned out to be outcome determinative.

Let me turn first to the issue about the Audit Conclusions. And I think in this regard that it bears mention of what the damages indicate. The jury did not explain what their damages were, but the evidence offers the only plausible explanation. And that is this: $52,000,000 that was awarded for the Invasion of Privacy that was the amount of his tax liability to the State of California at the time. $85,000,000 in Emotional Distress damages, how you get that is to add the two fraud penalties from the '91 and the '92 audit determination and you measure those across 15 years as was argued the period of time that Mr. Hyatt was subjected then or had that hanging over his head. Neither sum have anything to do with his Common Law Claims but everything to do with in fact the audit conclusions. That Mr. Hyatt was putting on trial the audit conclusions was made abundantly clear during closing arguments, particularly during rebuttal. In response to my argument, in rebuttal, Mr. Hyatt's counsel stood up and said that I didn't argue the rightness or the correctness of the audit conclusions and therefore that was an admission by me that in fact those audit conclusions were wrong, that the audit conclusions were unfair.

If you also take a look then at the final jury instruction 24, the District Court informed the jury that it was ok to analyze and evaluate the correctness of those audit conclusions and it was ok for their expert to offer his opinion on those correctness. Prior to that instruction the judge only allowed evidence that only went to issues of the audit conclusions. She allowed an expert to testify on cooperation. Cooperation had nothing to do with the essential elements of his claims, but had everything to do with whether or not that the audit conclusions were right. She allowed an expert on how wealthy people live. Had nothing to do with the common law claims but it had everything to do then with the rightness of the audit conclusions.

And in closing, Mr. Hyatt argued that in fact that the jury in Nevada was permitted to be a check and balance upon the decisions that were being made by the executive branch and the legislative branch in the State of California.

Also, and I am going to run through this issue quickly, deals with the permissive imprints under Bass Davis. There was a negligence foliation finding that was made but in fact the District Court transmuted that finding into a mandatory presumption. In Bass Davis, as well as cases that were relied upon in Bass Davis it was made clear that when you have a permissive inference two things result. 1. Is that the jury is permitted to hear why it is that this evidence isn't in front of them to allow them then to decide whether or not they are going to apply the adverse inference or not. 2. Is that you can never ship the burden of proof then to the party that wasn't able on the essential elements. You can't shift that burden of proof, but that's what happened in both instances in this particular...at the time of trial.

Next there needs to be instruction concerning that the FTB is entitled to the statutory caps and that there should be no instructions on punitive damages. And the simplest and the quickest way to take a look at this is to analyze that California's immunity statutes are complete. Nevada's

immunity statutes end up with a segment then that is able to be permitted and to be tried, but only up to the caps of $75,000. And so under the law of this case, comedy requires that Nevada be treated no worse than a similar Nevada agency would be treated under similar circumstances.

JUSTICE DOUGLAS: Counsel, in California is there a specific statute 'cause looking at it California talks in terms of specific statutes of immunity?

PAT LUNDVALL: Yes there is, Your Honor. There are specific statutes that ...unintelligible...to the FTB not only for compensatory claims but also for punitive damage claims. And last, I suppose, there is no common law opportunity for instructions on punitive damages against a government agency.

JUSTICE HARDESTY: Ms. Lundvall, before you turn to that, I would like to follow up on Justice Douglas' comment, in Nevada vs. Hall, California didn't afford Nevada any extended immunity, I wonder if we should take from that the conclusion that California wouldn't grant similar immunity protections and therefore under authorities that address that issue refuse to apply our immunity here.

PAT LUNDVALL: We hope that this court applies the same analysis as Nevada v. Hall because in Nevada v. Hall the circumstances were that Nevada had limitations but California did not on the amount of damages. In fact, under the California Tort Claims Act, is that immunity has been waived on certain portions of that but there is no limit similar to what Nevada has. Nevada v. Hall went through the exact analysis as did this court, as well as the U.S. Supreme Court...

JUSTICE HARDESTY: You don't treat the decision in that case as an indication by California that it would reject our immunities here?

PAT LUNDVALL: No, Your Honor, I don't. As a classic example, if in fact my contention is that that analysis as applied would forbid any jury instruction on punitive damages. It's this analysis that's the same, the outcome is different because of the differing state policies that were at issue but the analysis that let to that conclusion is the same in all of those decisions.

JUSTICE HARDESTY: Would the analysis similarly result in the imposition of a $75,000 cap as opposed to the absence of any immunity if we disagreed with your position on the viability of the tort claims?

PAT LUNDVALL: If I understand the court's question, is that if in fact a case were brought from California what would be at issue then is taking a look at California's public policies as reflected in their own statutory scheme. As in Nevada v. Hall, that statutory scheme did not put any caps on the available claims for which immunity had been waived under its tort claims act. Whereas Nevada had. But when you run through the analysis that California is not supposed to make its public policies secondary then to another state no different than in this case Nevada didn't make its public policies secondary then to another state and so the analysis is identical because of the different public policies that are at issue in the states the outcome was different.

JUSTICE HARDESTY: Thank you.

CHIEF JUSTICE CHERRY: You have about 2 minutes and 45 seconds left. If you want to reserve some time, just let me know.

PAT LUNDVALL: I will reserve my time for rebuttal, thank you.

CHIEF JUSTICE CHERRY: Bernhard

UNKNOWN VOICE 1: Who's the respondent?

UNKNOWN VOICE 2: Mr. Hyatt

PETER BERNHARD: Mr. Chief Justice and Members of the Court, my name is Peter Bernhard of the law firm Kaempfer Crowell appearing this morning on behalf of Respondent Gil Hyatt, may it please the Court.

The court has asked us to address whether Mr. Hyatt adequately demonstrated and presented bad faith evidence. Unintelligible…in question was the jury instructed or did it make findings of bad faith. And the answer clearly, based on the record, is yes. Jury instruction 25 on bad faith reflects what came up at trial. Both sides tried this case based on whether the FTB committed bad faith or whether it had acted in good faith…

JUSTICE PARRAGUIRRE: Weren't there contrary indications throughout that they weren't pursuing bad faith as part of the claim and that the instructions were simply definition?

PETER BERNHARD: The issue is: what was the bad faith evidence used for and it was not used as an element of a claim, it was used as evidence to prove intent which is the element of the claim. How do you prove that a state agency acted intentionally? One way is to show bad faith…

JUSTICE PICKERING: Is there a jury instruction that says that? I mean the jury is given definitional instructions as to what bad faith is or isn't we have no jury finding on bad faith and I'm not sure where the jury was told by the court it should use the concept of bad faith.

PETER BERNHARD: Well I think, at least in part, that goes to the argument when the instructions were settled and that is: the Court said I'm not going to tell the jury what they can or can't do but I will let each side argue whether or not bad faith was presented and tie it to your elements from our perspective to show intent. And the FTB then argued for the converse, that the FTB acted in absolute good faith and conducted and ordinary audit.

JUSTICE HARDESTY: Well, that's an interesting ruling counsel, without an instruction that assigns the burden of proof to a party on that issue becomes rather difficult for the jury to arrive at that conclusion. And why is there no special verdict on bad faith if that's what everybody's going to try?

PETER BERNHARD: Well, I think the instruction itself made out what the test of bad faith was, and neither side quarreled with that test and that was evidence of a dishonest purpose or conscious wrongdoing. We argued to the Court, to the jury, that the evidence showed that and therefore you could find bad faith under that accepted definition and the jury could then use that to say the FTB had the intent to commit the intentional torts.

JUSTICE DOUGLAS: Mr. Bernhard, why was there not a special verdict form? Was a request for a special verdict form made as is?

PETER BERNHARD: Not by either side because the issue was not whether a special finding was required, the issue was whether the evidence of bad faith established the element of intent. And that's just like any other evidence. You don't ask a jury in each and every case, every time there is a disputed fact, to reach a special verdict.

JUSTICE HARDESTY: But why would the Franchise Tax Board ask for a special verdict form on bad faith when you have indicated or trial counsel has indicated that you're not pursing a claim for bad faith.

PETER BERNHARD: The difference again, Justice Hardesty, is that it's not a claim for bad faith. There is no instruction on a bad faith tort. The instruction is that in order to prove intent, we argued to the jury, as permitted by the court properly, that Mr. Hyatt could show bad faith of the FTB in the conduct of the investigation. And that is an adequate and perfectly appropriate conclusion for the jury, well within its province.

JUSTICE DOUGLAS: But as we sit here, you say it's not an element, then why do we need it?

PETER BERNHARD: How do you prove intent? Evidence, admissible evidence.

JUSTICE DOUGLAS: Well let's go back. Why do we even need it if you are saying it's not an element, it's not a part of what you're doing?

PETER BERNHARD: It is part of what we're doing, it's part of our...

JUSTICE DOUGLAS: If it is part of what you're doing, why don't we have a special verdict form? I guess it's kind of circular but that's what...

PETER BERNHARD: Because the special verdict does not have to decide or resolve each and every factual instance or dispute.

JUSTICE GIBBONS: Neither side requested special interrogatories or special verdicts so it's kind of a done deal as far as the appeal is concerned, so the question is, is that your only argument on bad faith was that it was one of the component to establish intent. Is that correct?

PETER BERNHARD: It was one of, and one of the major series of evidence, which I can go through to show that the intent was there not to conduct an ordinary audit. That was the key issue that the jury understood very well and had to have decided that the FTB did not conduct an

ordinary audit. The FTB had to have conducted a bad faith audit in order for the jury to reach the verdict it did. If the jury felt the FTB had acted in good faith, there would not have been any intent to support any of the intentional torts. And I think that was very clear from the instruction. And that was very appropriate in that we did establish there was a dishonest purpose, conscious wrongdoing, and the jury reached that verdict by having to get to that point and decide the bad faith issues. And they could have decided it either way. But it is impressed within their verdicts that they did find that here. And the irony, with respect to this bad faith issue, the FTB, during the audit, was expressing greater and greater concern and doubt about whether it even had a residency case. And as it was expressing these doubts, what did they do? They ratcheted up the stakes and called Mr. Hyatt a fraud. You would think if these reviewers decided that there were doubts about the case they would say "Oh, let's go back and make sure we have a tax case first." But no, they used penalties as bargaining chips. Let's add a fraud penalty here, 75% of the tax and see if this guy will pay us some money.

The fraud penalty is reserved, as the evidence showed, only for the very clearest of cases. The evidence showed all of the different things that the FTB was concerned about. First from the obsessions of the auditor, we talked about those last time. Where Ms. Cox created this fiction about Mr. Hyatt, that he had to live in a gated community, her anti-Semitic remarks, gloating with the estranged family members that they got him, investigating his garbage, looking at mail, lying, fear of kidnapping, these are all things that this auditor became obsessed with.

And then you had Ms. Jovanovich and her crusade to establish fraud penalties at this time in every residence case. You had administrators motivated by assessments, not supportable assessments, there budget was based on what they assessed. So the higher the assessment they didn't care how it turned out. They weren't concerned whether it was right or wrong. They weren't concerned whether they were abusing this individual.

Ms. Jovanovich had written Ms. Cox's fraud penalty. Ms. Cox consulted with her from day one. Mr. Shea consulted with her from day one. She was the lawyer advising them and who does the FTB choose to appoint as the first protest hearing officer? Anna Jovanovich. Is that conscious wrongdoing? Yes. They appointed a person who knew this case from the beginning and who had actually advised Ms. Cox and wrote her fraud penalty...portions of it. There was an audit reviewer who said "let's make the case stronger. You've written up a good report, Ms. Cox, but let's make it stronger in favor of the FTB." He didn't know anything about the facts. All he wanted to do was have a sustainable penalty that could be used to try to extort money from a man they either knew didn't owe it, or had grave doubts that he owed it.

They added $24,000,000 for 1992. That money was received after the date the FTB said he moved to Nevada. Then they added the 75% penalty on top of that. This was like the perfect storm. Where the person's directly responsible for this audit and investigation and those who were supposed to be independent evaluators, and this very impartial thing was not just some platitude, Mr. Shea testified at trial, that yes, he meant that, he believed that, that the FTB had an obligation to be fair and impartial and not to reach judgments based on whether they are meeting their numbers for a specific fiscal year. Is that a dishonest purpose? Is that conscious wrongdoing?

The FTB doesn't quarrel that a dishonest purpose or conscious wrongdoing is an appropriate test of bad faith. Instead they argue simply, well the jury should have believed us. The jury should have found that we acted in good faith that we conducted an ordinary audit, and that Mr. Hyatt simply is wrong. But that's not the providence of this court to decide whether the FTB presented a case that should have been believed by the jury. The jury heard this evidence after four, four and a half months and this court should not say 'had we been in the jury box we would have reached a different conclusion'.

This leads into the points that the court has asked us to address concerning the caps on compensatory damages, the prohibitions against punitive damages as a matter of comedy. As we discussed last time before this court, comedy comes into play if, and only if, it serves Nevada's public policy. It's a completely voluntary doctrine, and has to give due regard the rights of Nevada's citizens. And as this court said in its 2002 decision, in this case, this court has to consider whether granting comedy would contravene Nevada's policies or interest. And as I argued last time, the Nevada policy to protect its citizens is imbedded in our constitution. In 2002, this court said as to intentional torts we don't think state policy allows us to grant comedy to California and follow its law on complete immunity.

So we went to trial on the intentional torts. This Court drew the line on comedy at the inadvertent or negligent acts since even those inadvertent acts...even negligence can cause harm. But this court at that time said since these by hypothesis are truly unintended they are negligent, they are not deliberate. We will grant comedy in those instances in the State of California. Damage caps, punitive damages were not at issue then we were still discussing whether or not immunity would be granted. So neither this court nor the Supreme Court had occasion to look at whether or not Nevada's public policy would be furthered by granting comedy on the issue of statutory caps on damages. That's here before this court for the first time. So what the FTB is asking is that you impose a $75,000 cap on damages as a voluntary act of comedy for the most deliberate and despicable behaviors that the jury found that we had proven in this case. And I respectfully submit that is not compatible with Nevada's interests.

This court recognized in 2002 that intentional sister state misconduct is not as deserving of the respect that comedy embodies than negligence or inadvertent or unintended acts of a sister state actor. So denying full recourse to Nevada citizens who are intentionally harmed would simply strike the wrong balance. Should this court grant comedy to favor intentional, deliberate, despicable behavior of an out of state agency and by granting deference, or should this court protect its citizens as it's bound to do. Adopting the policy of limited compensation would leave Nevada with no effective way to deal with this intentional misconduct of officials of a sister state.

If a Nevada agent were to say "I want to go out and get this guy" for whatever reason, maybe I will be promoted, maybe my budget will be increased. He has to think, before he does anything wrong, "I could get fired if I go after this guy." It's a pre-wrongdoing deterrent that a Nevada agency can't take action to protect its citizens by not letting agent get out of hand and the right for Mr. Hyatt to petition the government for redress, to be able to go to the government and say "your Nevada actor is out of line here". That's a very important right and, again, that's imbedded in the Constitution, to go to the government and you can try to minimize, well maybe

the legislature would come in and change the law but the point is these are important rights that Nevada citizens have to protect themselves against rouge conduct by Nevada actors.

Now what about the California actor? He says "hey, I can go after this guy. I don't have to worry. California wants to get this guy. They are trying to prevent California people from moving to Nevada. They want to make sure that we tax them when they try to leave the state whether they owe it or not. So I might even get a promotion if I get this guy. I'm not going to get fired by the State of California. Nevada can't fire me, they have no jurisdiction, they're not my employer. And Nevada would protect me and my agency with a statutory cap of $75,000. It becomes the cost of doing business. So, why not? There is no pre-wrong doing deterrent."

JUSTICE DOUGLAS: Mr. Bernhard, as you are going into this, and as I am listening to this Council talked in terms of Nevada vs. Hall. What is your take on Nevada vs. Hall?

PETER BERNHARD: Well clearly, Nevada vs. Hall is the case that stands for that proposition that California did not extend comedy to Nevada.

JUSTICE DOUGLAS: I understand that, but analysis of it, not just the other hyperboil but the analysis…

PETER BERNHARD: No, that's the result …

JUSTICE DOUGLAS: as today…

PETER BERNHARD: That's the result of that case.

JUSTICE DOUGLAS: I understand that but she said if she will apply today would be different. Give us your take.

PETER BERNHARD: I'm sorry; I don't think she said if it were tested today the result would be different. I think the point of Nevada v. Hall is that first as to sovereign immunity California does not have the aspects of sovereignty when it comes to the State of Nevada, just as Nevada was not given the elements of sovereignty when it was in California, treated just like the other tort visor.

JUSTICE DOUGLAS: She seemed to imply that if we took the facts, weeded them as of today, and I understand what you are saying in principal, but just looking at it so I am asking for that analysis.

PETER BERNHARD: The Nevada v. Hall results and the Nevada v. Hall analysis means that this court is not bound by any constitutional premise or provision to give immunity or to recognize caps on damages. That Nevada makes that decision solely as a matter of comedy. And California did not grant comedy in that case because they wanted the unlimited damages that California law provided. In this case they are saying well now we do want Nevada to grant comedy, which I think it inconsistent, I think it's an appropriate fact in analyzing comedy to say,

would California or has California granted comedy to Nevada in similar circumstances? The answer is no.

JUSTICE DOUGLAS: Is it a request to look at a case-by-case analysis? Looking at what is going on partially what you are arguing today?

PETER BERNHARD: Absolutely. It's a policy analysis on what is the policy of Nevada and is it consistent with that policy for the court to grant comedy voluntarily to the State of California and I submit no on the statutory caps just as on intentional tort immunity. We argued against comedy on (unintelligible), but the court said "no, we think because it was inadvertent we will grant comedy." But I think the court probably drew the line at intentional acts and under those same concepts, because those acts are intentional, the cap should not be applied to limit damages.

And Mr. Hyatt testimony was compelling about those damages at a minimum the damage he has suffered should be the rule. Compensatory damages should compensate the Nevadan for the wrongdoing intentional acts of the out of state actor. We have seen how serious the professional humiliation can be, we are all aware of the HOA cases, I mean some people have even committed suicide over professional humiliation...

JUSTICE DOUGLAS: Counsel, that...I'm not sure that quite fits because the ones who did that were the alleged wrongdoers so...

PETER BERNHARD: well and that's what...

JUSTICE DOUGLAS: ...that fits in this case.

PETER BERNHARD: But that's why Mr. Hyatt was so...the distress was so great for him. His professional standing was affected with letters to these professional licensing agencies and the patent business to the licensees in Japan. And we were precluded from bringing in evidence, of course that's our cross-appeal, I know we're not to address that today, but there could have been hundreds of millions more in damages if we were allowed to present some substantial evidence.

JUSTICE DOUGLAS: Please don't go there because there is a lot of information there that I don't think we want to get into today.

PETER BERNHARD: Alright, well what we have though is intentional behaviors by the FTB, deliberately taken over a long period of time, they were not inadvertent, they were deliberate. There is no other way to protect Nevada citizens. For eleven years the FTB had the power to issue its final decision in the protest and allow Mr. Hyatt to have redress before a third party independent body, the Board of Equalization. The FTB kept saying "Oh, we need more information." But they have the power to say "You didn't give us enough information we are going to rule against you." But they held that back until the eve of trial. Is that conscious wrongdoing? Is there a dishonest purpose behind that? Keeping Mr. Hyatt, as we argued at trial, under the $8,000 a day interest accrual? Every time he gets up in the morning he knows the FTB claims that he owes $8,000 more based on their assessments.

JUSTICE GIBBONS: Mr. Bernhard, what about the damage calculation argument Ms. Lundvall made about calculation and varied type damages and how, at least her analysis, on how the jury came to that. What is your position as far as the damage calculation?

PETER BERNHARD: Well its pure speculation, for one thing, on what went on in that jury room. We don't have any idea about what went on in that room. We think that it was a conscientious jury, that looked at all of these issues, deliberated for a long time, listened attentively for four and a half months, and now to try to say that they suddenly were calculating damages based not on the court's instructions but based on some numbers the FTB came out and they sat there and I think the FTB, for frankly, was backed into that argument for this appeal. I don't even figure that out in my head if it's even true. I don't have any idea. But it's nothing that we or the FTB has any evidence whatsoever that this jury did something like that. We presented the damages, the evidence, and showed how egregious it was. And remember, in punitive damages, intentional infliction of emotional distress the extent of the bad conduct is a factor in the damages. And that's again, clearly established in the principal of law. The jury can consider the egregiousness of behavior...

JUSTICE PICKERING: Could you comment on Ms. Lundvall's point that emotional distress damages were restricted to so-called garden variety damages and $85,000,000 by anyone's account is not garden variety?

PETER BERNHARD: Sure, and the context again needs to be clarified, there was no discovery sanction relating to this at all. Mr. Hyatt made a deliberate decision after Commissioner Bigger gave him the option to say "would you like to reveal your personal medical records to the FTB in this case? If you do, then you will be able to argue those damages. But if you don't, then you will not be able to come into court at trial and submit evidenced of medical harm. You have to make that choice." And Mr. Hyatt made that choice, and under the circumstances I understand his choice. "I don't want my medical records begin produced in discovery."

JUSTICE PICKERING: He received an additional benefit, did he not, in that their argument in that there were other factors contributing to his emotional distress, those were kept from the jury as well, correct?

PETER BERNHARD: Well, that's correct on the surface, but what the fact is that those incidents occurred prior to the emotional distress that Mr. Hyatt claimed in this case. There was an IRS audit going on in '94 and '95 that was resolved. Mr. Hyatt satisfied his obligations to the Federal government. It wasn't until October of 1996 when he got the audit file that he recognized what these people had done to him, and he saw based on the decision of this court, after the FTB tried to withhold their internal notes, that they had gone after him.

JUSTICE PICKERING: Wasn't there also evidence of a contemporaneous loss of his business, his patent or his license and that was excluded?

PETER BERNHARD: Correct, because the dates didn't match. The date of that was in 1995.

JUSTICE PICKERING: Ok, so that was not tied in your analysis to his choice of garden variety emotional distress damages?

PETER BERNHARD: No.

JUSTICE PICKERING: Ok.

PETER BERNHARD: That was a conscious decision by Mr. Hyatt knowing that he would probably have a stronger damage case if he did open up his medical records. But he made that choice. It was not a sanction. There was no prohibition against him doing it. If he had wanted to produce medical records, he could have done that.

JUSTICE HARDESTY: But in the context if the Statute of Limitations defense, Mr. Bernard, it is my understanding of your argument that it was when the audit report was provided in '95 that his emotional distress occurred.

PETER BERNHARD: No, no, the audit report did not. If you recall from the testimony, at trial the FTB argued that this was a preliminary determination letter and Ms. Lundvall took Ms. Cox through that in direct exam, but this is just preliminary. So at trial, when the FTB was trying to prove it acted in good faith, that was a preliminary determination letter asking Mr. Hyatt's council to submit alternative information. That was not any sort of inquiry notice that would put him on guard that they had violated his privacy or were causing him distress. In fact, he believed them when Ms. Cox said let's submit other material, and we did submit other material in August and September and October of 1995. And…

JUSTICE HARDESTY: Emotional distress occurred when the determination letter arrived?

PETER BERNHARD: No, no, when the audit file arrived. The preliminary determination letter in August 1995 the FTB argued that they had not reached a final decision. We knew later, after looking at the file and the notes that this court ordered to be produced, that that was not true, that that really was the final decision they were going to make. But they call it a preliminary determination letter.

Now for Statute of Limitations purposes they say "even though we told you at the time it's preliminary it can be changed and not final, that put us on some sort of notice to start the statute running." Immediately after we got the preliminary determination letter in August of '95, Mr. Cowan, the tax attorney, called Ms. Cox, and it's noted in her file, her progress notes and her written report August 14, 1995, "Mr. Cowan called and asked me to give him the Affidavits that were anonymous in that determination letter...preliminary letter." Ms. Cox puts in her own handwriting and then in her own written report "I told him we're not going to give him anything until we close the case." So even if you argue that somehow he should be suspicious of FTB's bad faith and invasion of privacy at that time, we did inquire.

And we asked for the audit file even into 1996. And remember, the key date here is going to be January 7th of 1996. He didn't know until after that date all the claims are timely. In April of 1996 we asked for the audit file from Ms. Cox again and what did she say then? "Oh I don't

have it anymore. You have to go through channels and go find it at the disclosure office." It took them six months after that inquiry, which Mr. Cowan again asked for in the first part of May of '96, took them six months to get that information to him. Mr. Hyatt read that in October of '96 and that's when he realized both the content of the information that had been disseminated, remember that preliminary determination letter was only a summary of the investigation, it did not include the back-up documents that were sent. He had no idea that the newspaper was given his social security number. He had no idea that this dating service in Orange County, not only was given his social security information, but also sent back how unsuccessful Mr. Hyatt was because he couldn't get a date at a dating service.

JUSTICE DOUGLAS: Mr. Bernhard, since you are kind of in to that, that was going to be my question anyway, they discussed invasion of privacy and seemed to say it wasn't there. You've begun to touch upon it why it was there. A couple of examples from your standpoint as why the argument was present this morning doesn't work.

PETER BERNHARD: Sure. First of all, Ms. Lundvall referred to in that point to instruction 43 and argued to this court that the only thing the jury was told was that the name, address, and social security number were items subject to invasion of privacy. Here's what the instruction says:

> Mr. Hyatt alleges that FTB violated his right to information privacy by sending request for information to third parties which included information about Hyatt, including his name and address and social security number.

Does that mean the jury was instructed they couldn't look at the disclosures of his professional information? No. It says "including name, address, and social security number." So that was a part of the privacy tort, but everything they disclosed to third parties was part of the invasion of privacy which resulted in the damage to him.

JUSTICE PICKERING: You have only a short period of time, but could you address Ms. Lundvall's argument on the Statute of Limitations to the effect that, not that she deserve summary judgment as a matter of law on the statute of limitations, but rather that the District Court erred in determining as a matter of law the statute of limitations was not an issue in not giving it to the jury.

PETER BERNHARD: Right and I think that Ms. Lundvall conceded that there was no dispute on the facts of what notice was given. And under the Wynn case from May 31st, the court again restated the law that if evidence irrefutable demonstrates the accrual date, if the facts are uncontested then it is a matter of law. And we didn't know on the summary judgment phase whether or not the FTB would have other evidence of Mr. Hyatt's knowledge. But they didn't present anymore at trial so we moved up the close of the FTB's case, as appropriate, but they had not proven an affirmative defense because those facts were irrefutably demonstrating that until he got the audit file, and again, it is important to know, as Justice Hardesty indicated, they never raised the emotional distress tort in a Motion for Summary Judgment. I'm anxious to see if Ms. Lundvall can find that in the record that she…

JUSTICE PICKERING: On the statute of limitations issue, you are saying it was never tested?

PETER BERNHARD: Correct. It was never tested on the Partial Summary Judgment Motion for Emotional Distress, so I submit that because those facts were irrefutable demonstrating the date was October of 1996, all of those claims fall within the two-year statute. Emotional Distress clearly does because they have never raised it as a defense, now it's trying...the FTB lumps it together as the non-fraud torts. Well, you've got to look at each one separately. When did he know enough to put him on notice of the invasion of privacy torts, the breach of confidentiality torts, the abuse of process tort, and finally, emotional distress, and he did not have any clue how they had been out to get him until he saw the back-up information in that file. That's when the door opened and he saw what they had done to him, that's when he saw the scope and content of the invasion of privacy, that's when the puzzle came together "Why aren't they listening to me? Well because they were trying to use me to meet numbers. They were trying to use me, even though they had doubts whether I owed the taxes or not, as a bargaining chip with fraud penalties." That's when the cause of action accrued and not before. So all of the claims are timely and all of the claims should be resolved in Mr. Hyatt's favor.

Thank you very much for your time and attention.

CHIEF JUSTICE CHERRY: Thank you Mr. Bernhard. Ms. Lundvall. Let's round her off to three minutes please.

PAT LUNDVALL: Thank you, Your Honor. There was a number of issues that were raised so I am going to try to go through these as quickly as possible to try to bring some clarity to them.

Number one, as to the bad faith contention that was advanced by Mr. Bernhard, their argument is contradictory. They took the position in the District Court, time and time again in the settling of jury instructions that they did not bear the burden of proof on bad faith. And they repeated that over and over again. But now before you they come and they say "well, we were able to argue bad faith as proof of the intent element for which we bore the burden of proof." Well, wait a minute. On one hand you are saying "I don't bear the burden of proof on bad faith" and that's repeated as far as their representations, but on the other hand they say "well but we can use it to prove intent and we know that we bear the burden of proof on that." That required a bridge between those by which the District Court did not give that bridge then to the jury then so they could understand what any instruction in that regard was. Moreover, when you look at their application of that, it was their position that they only had to prove essential elements of their claims, nothing more.

Next, Mr. Bernhard argues that, in fact, that there should be no caps on the compensatory damages. In the principal argument, they advanced here today, as well as what he advanced in his brief, was this. Is that Hyatt, here in Nevada, could have gone to a Nevada legislature and to say "Hey, there is someone in one of Nevada's administrative agencies that is doing bad things. Protect me."

Well he had that same right in California and the record reveals that he exercised that right repeatedly. He had huge political clout that was demonstrated, as far as to the jury, in the State

of California and he exercised that political clout in the State of California. And so whatever, as far as the bad issue then, resolved, it does not resolve as to whether or not there should not be an application of comedy as per the law of the on this appeal. He also suggested that somehow that that there is a difference between caps on damages and the immunity issue that was previously decided. Well the caps on damages are part of our immunity statutes. The caps on damages are part of "we have waived immunity" up to a certain point. And so it's all part of the immunity analysis.

Next he contends that the sanction that was imposed against Mr. Hyatt for failing to turn over his medical records as proof of his severe emotional distress was limited. He claims before you, that in fact, the only thing that sanction required of him was that he couldn't use his medical records at the time of trial. To the contrary, Discovery Commissioner Bigger has echoed by the District Court said that he was limited to garden variety emotional distress. And garden variety emotional distress was not severe emotional distress under the litany of cases then that we brought to the court's attention.

In addition, and to answer the court's question then on the issue concerning the patent, Mr. Hyatt, it took him twenty years to get his patent. And it took him five years to lose it. And then for the next eight years after his loss he tried to regain it. This was something that went to his core and his identity. For which that he received hundreds of millions of dollars, and all of the loss of his patent and the litigation over the loss of his patent was contemporaneous with the FTB and pretrial Mr. Hyatt's attorneys took the position that this was an issue that should be presented, and it was only at trial that they flip-flopped again and convinced the then court that this evidence should be excluded. All of which could possibly have been found within medical records as to what the cause of his claimed emotional distress.

CHIEF JUSTICE CHERRY: Your time is up Ms. Lundvall.

PAT LUNDVALL: Thank you, Your Honor.

CHIEF JUSTICE CHERRY: Thank you Mr. Bernhard and Ms. Lundvall for your excellent arguments in this matter. This matter has been submitted. We will be in recess.

EXHIBIT 70

Exhibit 1

UNOFFICIAL TRANSCRIPT

JUNE 18, 2012

ORAL ARGUMENT BEFORE THE NEVADA SUPREME COURT

(Prepared from Video Record of Oral Argument)

COURT CLERK: The Honorable Chief Justice Cherry presiding.

CHIEF JUSTICE CHERRY: Good morning everybody. Please be seated. This is Case No. 53264 Franchise Tax Board vs. Hyatt. It says The State of California. Excuse me, Franchise Tax Board of The State of California vs. Hyatt. Ms. Lundvall for the appellant. Mr. Bernhard for the respondent. Ms. Lundvall.

PAT LUNDVALL: Thank you Your Honor. Pat Lundvall and Robert Isenberg on behalf of the State of California's the Franchise Tax Board. We intent to reserve 10 minutes for the issues that were identified in the Court's Order and we thank you for the opportunity for further argument on these issues.

I'm going to begin with the new issue that the Court added to the list and that is Issue Number 6, the Statute of Limitations issue. I intend to, or the reason why that I am going to start with that issue is for a few reasons.

Number one, the evidence upon which that that issue is based is uncontroverted. Also, the parties agree upon the law that should be applied to that uncontroverted evidence and, in fact, this Court recently reaffirmed that law in the Wynn vs. Sunrise Hospital decision. The only real dispute between the parties concerns the application of the law to those uncontroverted facts and that is the DeNovo Review then by this Court. Fourth, and finally, as he did in the District Court in the race to this Court, Mr. Hyatt mistakes the contents of the uncontroverted evidence and so, it therefore it appears that that evidence then warrants some discussion.

So let's talk about…

JUSTICE HARDESTY: Before you get into your argument, Ms. Lundvall, on this issue, I wonder if you could clarify something if you have it handy, and if you don't then I would request through the Chief that you supplement your argument with a direct citation to the record as to where Franchise Tax Board sought dismissal of the Intentional Infliction of Emotional Distress claim based upon the Statute of Limitations. Our review of the record doesn't disclose that, or at least I have not been able to locate it, but if it exists, it should be identified for us.

PAT LUNDVALL: I don't have that citation off the top of my head, …

JUSTICE HARDESTY: Right

PAT LUNDVALL: …Your Honor but we would be happy to supplement.

JUSTICE HARDESTY: It's kind of a small record so I assumed you would be able to point to it in a hurry, but I would make that request of you, and obviously if [Respondent's] Counsel wants to point out it's missing, let us know. Thank you.

PAT LUNDVALL: Let me return then as far as that uncontroverted evidence and see what Mr. Hyatt knew and when he knew it. I think it bares mention because this Court has in many of its Statute of Limitations decisions that the same law firm that represented Mr. Hyatt during the audit also represented him in filing the Complaint in this action. And also, as underscored in the Wynn vs. Sunrise Hospital case, what we are looking for, is when Mr. Hyatt knew of facts

that would lead an ordinarily prudent person to investigate the matter further. That's what we are looking for.

In the spring of 1995, Mr. Hyatt was actually given physical copies of the Demands for Information that were sent to various third parties. Those Demands that were actually given to him contained some of the information that he claimed was confidential in the form of which was the predicate to his Non-Fraud claims. Also in the spring of 1995, Mr. Hyatt authored and sent a memo along with a sample demand and some additional materials that he had gathered from third parties to his attorneys and his accountants and he noted in his memo that, in fact, the FTB was sending these demands to individuals and entities that he had written checks to in 1991 and 1992. Those checks included the Nevada DMV, his temple in Las Vegas, Centel Telephone in Nevada, Wagon Trails Apartments in Nevada, Nevada Power Company. So for Mr. Hyatt to suggest as he does in his brief that he was unaware that there were any demands being sent into Nevada or that he was unaware of the form of those demands is simply no true to the record facts. But he argues that he was unaware of the scope of the FTB's investigation.

So let's examine then what the record facts reveal. In August of 1995 a thirty-nine page letter that was sent by the FTB to Mr. Hyatt and his attorneys. This letter outlined the full scope, the full breadth, and the entirety of the FTB's investigation. It revealed nearly everyone and every entity sent a demand letter and the information that they had received back. It explained in great detail field visits the FTB auditors made both to Las Vegas as well to his neighborhood as well as to the businesses that he had frequented. They chronicled the conversations they had with individuals, everyone from his trash collector to his mailman to his apartment complex manager to a receptionist. The letter also revealed that every third party contact that he claimed could support then his Nevada residency had been contacted. Every medical facility had been contacted and that was revealed in the letter; attorneys, accountants, investment bankers...advisors, bankers, medical providers, the two Japanese companies, public agencies to whom his Las Vegas address had been disclosed. All of that was revealed in the August of 1995 letter. In other words, by August of 1995, the entirety of his Non-Fraud claims had been revealed to Mr. Hyatt. And in response to that letter, his attorneys sent back a reply that said that they had feared that Mr. Hyatt's confidentiality had been breached after a review of that letter. That sounds like an admission of the finding that is required by Wynn vs. Sunrise Hospital that would lead and ordinarily prudent person to investigate further. All of these facts were uncontroverted. We believe that the District Court erred by not dismissing the Non-Fraud claims, or at the very minimum, she erred by not allowing the FTB to argue the Affirmative Defense to the jury. The end result after a DeNovo Review that either six of his claims should be dismissed, or at the very minimum, there should be remand on those six claims for resolution on the Statue of Limitations Defense.

Turning, then, to the first issue Resolution...

JUSTICE PICKERING: Could you, before you do that, comment on the Continuing Wrong Doctrine and its applicability to your Statute of Limitations argument?

PAT LUNDVALL: Mr. Hyatt doesn't really discuss or apply the Continuing Wrong Doctrine, but he kind of throws it out there as applicable. When, in fact, though if you take a look at other portions of his brief it appears he applies that Continuing Wrong Doctrine to his Fraud claim. And we don't contend that his Fraud claim was subject to the Statute of Limitations. In other words, he cites the delay in the resolution of his protest. He cites additional information that he

received regarding the analysis that was employed by the FTB as part of his fraud claim that he uncovered at a later point in time and it was ongoing. And so from that perspective that appears to go to his Fraud claim and not to his Non-Fraud claims.

JUSTICE PICKERING: Thank you.

PAT LUNDVALL: Turning to issue number one then and resolution of issue number one which deals with the intentional torts and the bad faith aspect actually serves a dual purpose. It resolves whether or not that Mr. Hyatt is entitled to the exception that he advocated to this Court during our first argument for Intentional Torts or Bad Faith. But it also resolves the issues as to whether or not that any of his Intentional Tort claims should have made it to the jury in the first place.

Let me start then with his Fraud claim. And, given the amount of time, I cannot raise each and every issue that we claimed was dispositive in our briefs. But what I would like to do is simply highlight the more obvious issues that demonstrate the legal defects that Mr. Hyatt claims for which dismissal via Summary Judgment should have occurred so that these claims never would have made it to trial.

Mr. Hyatt alleged two representations as his foundation for his Fraud claim. His first was an implied representation of treating him fairly and impartially. It is absurd to contend that any court would recognize a fairness and impartiality representation as sufficient foundation for a fraud claim. And it is notable that Mr. Hyatt cannot advance any argument or any case that in fact supports such a foundation. In fact, we brought to the Court's attention many, many cases that said it is insufficient. Why? Because it is too vague. Fairness, impartiality, are issues like beauty. They vary and they are dependent upon the eye of the beholder. So when you had an insufficiently vague representation it cannot serve then as the foundation for a fraud claim.

The second foundation...let me back up as far as to one issue then as well. He also never demonstrated any fraudulent intent that would have existed at the time that that purported representation was implied from the notice that was sent out. He would have had to prove and allege a policy and practice but he did neither and, in fact, his experts suggested to the contrary.

As to his Confidentiality representation. Once again, it is important to examine the record facts. The only representations of confidentiality that were proven by Mr. Hyatt concerned his business papers. His business licensing program for which that he feared industrial espionage. And there was no evidence that he supplied that any of that had been breached or had been violated or had been disclosed.

In the first argument before the Court, Mr. Hyatt contended that the disclosure, the letter that had been sent to Matsushita and Fujitsu was the proof of in fact that disclosure. But let's look at this in context. Mr. Hyatt had a contract with Matsushita. He was the one contracting party, Matsushita was the other contracting party. We asked him for when Matsushita paid him under that contract and he refused to give us that information. We sent a letter to Matsushita enclosing a one page of that contract, in other words, we were sending to Matsushita a document that was already in their own files. Same with Fujitsu. And therefore, insufficient foundation for a fraud claim based upon any Breach of Confidentiality.

Let me then turn to his Invasion of Privacy claims. And I am going to examine these as a group because there is a common denominator to all three of his Invasion of Privacy claims as well as his claim that he characterizes as Breach of Confidentiality in an actuality it's also the second prong then of his Fraud claim that has this as a common denominator.

Mr. Hyatt alleged that in fact information privacy was at issue under these Invasion of Privacy claims. And the information that was at issue was set forth in Jury Instruction Number 43. Jury Instruction Number 43 made it clear that the only information that was at issue under these claims was his name, his address, and his social security number. So, the first issue that Mr. Hyatt has to prove under each and every one of those is that somehow he had an objective expectation of privacy in that information. And that is a legal issue under the Peter vs. Baroncini case for the court to resolve in the first instance. And the Montano case makes it abundantly clear that when you have information that is found in the public record, they become public facts and public facts cannot serve as the foundation for an Invasion of Privacy claim. Montano from this court, Cox from the U.S. Supreme Court and the restatement second on tort is uniform on this particular point that if the information is found in the public record it is an insufficient foundation then to serve for an Invasion of Privacy claim. Mr. Hyatt's name, his social security number, and his Nevada address were public records. They were found within public records and they were public facts.

Not only as far as to litigation had his social security number been found. His voter registration form asked for his address as well as his social security number and at that point in time, during the 1993 to 1995 time frame voter registrations were public documents you could receive and obtain access to all of them. His business license that he applied for within Clark County, social security number, address found within there as well. He paid property taxes as far as on his home. These were all public records and therefore an insufficient foundation for any Invasion of Privacy claim.

Turing to the Abuse of Process claim. This is a claim that is designed to protect the integrity of the court. Therefore it requires some form of judicial process. There was no judicial process that was employed by the FTB in resolving the audit against Mr. Hyatt and he pointed to that.

Last, his Intentional Infliction of Emotional Distress claim. As a discovery sanction for failure to turn over his medical records, Mr. Hyatt was limited to Garden Variety Emotional Distress. The order was expressed as made by the Discovery Commissioner as well as the District Court that in fact his recovery was limited to Garden Variety Emotional Distress. In the cases are uniform in holding that Garden Variety Emotional Distress is not severe emotional distress to serve as an adequate predicate. Moreover, in Bartmittler as well as in Vetsinger this Court had indicated when there is no physical impact that a party is obligated to come forward with objective evidence of their severe emotional distress and without his medical records he didn't have that. And so therefore, each and every one of these claims were subject and should have been dismissed pretrial.

Let me turn then to the issue about Bad Faith. Before this court, Mr. Hyatt contends that he has not flip-flopped on this issue. So let's examine what the record reveals. When we settle jury instructions in this case, Mr. Hyatt argued, and I'm going to quote:

> Bad Faith is not an element of any cause of action.

"We had the burden to prove the elements of our causes of action and Bad Faith is not one of those elements.

JUSTICE PARRAGUIRRE: There were actually two Bad Faith instructions given, weren't there?

PAT LUNDVALL: Yes there were. There were two definitional instructions. When we got to the issue though of who bore the burden of proof on Bad Faith, Mr. Hyatt took the position that it was the FTB that bore the burden of proving that in fact we had not acted in bad faith. And what the District Court did then is that she refused to give any jury instructions dealing with the burden of proof on bad faith. In other words, she agreed with each of his representations about how bad faith was not one of the essential elements for which that he bore the burden of proof.

Let me as far as discuss a little bit for his reversal on this particular point. All of his complaints, all of his pretrial activity, all of his advocacy before this court and the U.S. Supreme Court had allege extortion as the foundation then for his bad faith argument. When he got to trial, however, he didn't present any evidence of extortion to the jury. And two of his experts admitted that they found no extortion. So from an evidentiary standpoint he was in a bind. And he tried to get out of that bind then by removing bad faith as a proof or one of his burdens of proof in the essential elements of his claim. And the District Court agreed with him.

And so let's get to how he argued this issue then to the jury. His Complaint ultimately ended up being an exhibit at the time of trial. We went through and demonstrated to the jury how extortion was a common denominator to all seven of his Causes of Action and when you go through his complaint you will see that extortion is that common denominator. We pointed that out to the jury, pointed out to the jury also that he offered no proof of extortion and therefore failed in his burden of proof. In rebuttal, Mr. Hyatt's counsel took the position that my argument was misleading. That I wasn't the sheriff, that in fact it was Judge Walsh who told them what the law was and what they had to prove. And what they had to prove was the essential elements of their claims.

The verdict forms contained no finding of bad faith and contrary to the briefs there were express...it was expressed to this court that in fact those verdict forms did contain such a finding. And the jury was never instructed, as he also claims in his brief, that somehow that they were supposed to determine if the FTB had conducted the audits in bad faith.

Turning then to the next issue, and that is the Audit Conclusions. We submit that all of the claims should be dismissed by this court. However, if in fact that after going through either the Discretionary Function Immunity Analysis or going through the Statute Of Limitations Analysis or going through the Legal Sufficiency Analysis that this court determines that in fact some of the claims still warrant a remand then back to the District Court, the court is going to need to give instructions to the District Court based upon some of the errors that were conducted by the District Court some of which turned out to be outcome determinative.

Let me turn first to the issue about the Audit Conclusions. And I think in this regard that it bears mention of what the damages indicate. The jury did not explain what their damages were, but the evidence offers the only plausible explanation. And that is this: $52,000,000 that was awarded for the Invasion of Privacy that was the amount of his tax liability to the State of California at the time. $85,000,000 in Emotional Distress damages, how you get that is to add

the two fraud penalties from the '91 and the '92 audit determination and you measure those across 15 years as was argued the period of time that Mr. Hyatt was subjected then or had that hanging over his head. Neither sum have anything to do with his Common Law Claims but everything to do with in fact the audit conclusions. That Mr. Hyatt was putting on trial the audit conclusions was made abundantly clear during closing arguments, particularly during rebuttal. In response to my argument, in rebuttal, Mr. Hyatt's counsel stood up and said that I didn't argue the rightness or the correctness of the audit conclusions and therefore that was an admission by me that in fact those audit conclusions were wrong, that the audit conclusions were unfair.

If you also take a look then at the final jury instruction 24, the District Court informed the jury that it was ok to analyze and evaluate the correctness of those audit conclusions and it was ok for their expert to offer his opinion on those correctness. Prior to that instruction the judge only allowed evidence that only went to issues of the audit conclusions. She allowed an expert to testify on cooperation. Cooperation had nothing to do with the essential elements of his claims, but had everything to do with whether or not that the audit conclusions were right. She allowed an expert on how wealthy people live. Had nothing to do with the common law claims but it had everything to do then with the rightness of the audit conclusions.

And in closing, Mr. Hyatt argued that in fact that the jury in Nevada was permitted to be a check and balance upon the decisions that were being made by the executive branch and the legislative branch in the State of California.

Also, and I am going to run through this issue quickly, deals with the permissive imprints under Bass Davis. There was a negligence foliation finding that was made but in fact the District Court transmuted that finding into a mandatory presumption. In Bass Davis, as well as cases that were relied upon in Bass Davis it was made clear that when you have a permissive inference two things result. 1. Is that the jury is permitted to hear why it is that this evidence isn't in front of them to allow them then to decide whether or not they are going to apply the adverse inference or not. 2. Is that you can never ship the burden of proof then to the party that wasn't able on the essential elements. You can't shift that burden of proof, but that's what happened in both instances in this particular…at the time of trial.

Next there needs to be instruction concerning that the FTB is entitled to the statutory caps and that there should be no instructions on punitive damages. And the simplest and the quickest way to take a look at this is to analyze that California's immunity statutes are complete. Nevada's immunity statutes end up with a segment then that is able to be permitted and to be tried, but only up to the caps of $75,000. And so under the law of this case, comedy requires that Nevada be treated no worse than a similar Nevada agency would be treated under similar circumstances.

JUSTICE DOUGLAS: Counsel, in California is there a specific statute 'cause looking at it California talks in terms of specific statutes of immunity?

PAT LUNDVALL: Yes there is, Your Honor. There are specific statutes that …unintelligible…to the FTB not only for compensatory claims but also for punitive damage claims. And last, I suppose, there is no common law opportunity for instructions on punitive damages against a government agency.

JUSTICE HARDESTY: Ms. Lundvall, before you turn to that, I would like to follow up on Justice Douglas' comment, in Nevada vs. Hall, California didn't afford Nevada any extended immunity, I wonder if we should take from that the conclusion that California wouldn't grant similar immunity protections and therefore under authorities that address that issue refuse to apply our immunity here.

PAT LUNDVALL: We hope that this court applies the same analysis as Nevada v. Hall because in Nevada v. Hall the circumstances were that Nevada had limitations but California did not on the amount of damages. In fact, under the California Tort Claims Act, is that immunity has been waived on certain portions of that but there is no limit similar to what Nevada has. Nevada v. Hall went through the exact analysis as did this court, as well as the U.S. Supreme Court…

JUSTICE HARDESTY: You don't treat the decision in that case as an indication by California that it would reject our immunities here?

PAT LUNDVALL: No, Your Honor, I don't. As a classic example, if in fact my contention is that that analysis as applied would forbid any jury instruction on punitive damages. It's this analysis that's the same, the outcome is different because of the differing state policies that were at issue but the analysis that let to that conclusion is the same in all of those decisions.

JUSTICE HARDESTY: Would the analysis similarly result in the imposition of a $75,000 cap as opposed to the absence of any immunity if we disagreed with your position on the viability of the tort claims?

PAT LUNDVALL: If I understand the court's question, is that if in fact a case were brought from California what would be at issue then is taking a look at California's public policies as reflected in their own statutory scheme. As in Nevada v. Hall, that statutory scheme did not put any caps on the available claims for which immunity had been waived under its tort claims act. Whereas Nevada had. But when you run through the analysis that California is not supposed to make its public policies secondary then to another state no different than in this case Nevada didn't make its public policies secondary then to another state and so the analysis is identical because of the different public policies that are at issue in the states the outcome was different.

JUSTICE HARDESTY: Thank you.

CHIEF JUSTICE CHERRY: You have about 2 minutes and 45 seconds left. If you want to reserve some time, just let me know.

PAT LUNDVALL: I will reserve my time for rebuttal, thank you.

CHIEF JUSTICE CHERRY: Bernhard

UNKNOWN VOICE 1: Who's the respondent?

UNKNOWN VOICE 2: Mr. Hyatt

PETER BERNHARD: Mr. Chief Justice and Members of the Court, my name is Peter Bernhard of the law firm Kaempfer Crowell appearing this morning on behalf of Respondent Gil Hyatt, may it please the Court.

The court has asked us to address whether Mr. Hyatt adequately demonstrated and presented bad faith evidence. Unintelligible…in question was the jury instructed or did it make findings of bad faith. And the answer clearly, based on the record, is yes. Jury instruction 25 on bad faith reflects what came up at trial. Both sides tried this case based on whether the FTB committed bad faith or whether it had acted in good faith…

JUSTICE PARRAGUIRRE: Weren't there contrary indications throughout that they weren't pursuing bad faith as part of the claim and that the instructions were simply definition?

PETER BERNHARD: The issue is: what was the bad faith evidence used for and it was not used as an element of a claim, it was used as evidence to prove intent which is the element of the claim. How do you prove that a state agency acted intentionally? One way is to show bad faith…

JUSTICE PICKERING: Is there a jury instruction that says that? I mean the jury is given definitional instructions as to what bad faith is or isn't we have no jury finding on bad faith and I'm not sure where the jury was told by the court it should use the concept of bad faith.

PETER BERNHARD: Well I think, at least in part, that goes to the argument when the instructions were settled and that is: the Court said I'm not going to tell the jury what they can or can't do but I will let each side argue whether or not bad faith was presented and tie it to your elements from our perspective to show intent. And the FTB then argued for the converse, that the FTB acted in absolute good faith and conducted and ordinary audit.

JUSTICE HARDESTY: Well, that's an interesting ruling counsel, without an instruction that assigns the burden of proof to a party on that issue becomes rather difficult for the jury to arrive at that conclusion. And why is there no special verdict on bad faith if that's what everybody's going to try?

PETER BERNHARD: Well, I think the instruction itself made out what the test of bad faith was, and neither side quarreled with that test and that was evidence of a dishonest purpose or conscious wrongdoing. We argued to the Court, to the jury, that the evidence showed that and therefore you could find bad faith under that accepted definition and the jury could then use that to say the FTB had the intent to commit the intentional torts.

JUSTICE DOUGLAS: Mr. Bernhard, why was there not a special verdict form? Was a request for a special verdict form made as is?

PETER BERNHARD: Not by either side because the issue was not whether a special finding was required, the issue was whether the evidence of bad faith established the element of intent. And that's just like any other evidence. You don't ask a jury in each and every case, every time there is a disputed fact, to reach a special verdict.

JUSTICE HARDESTY: But why would the Franchise Tax Board ask for a special verdict form on bad faith when you have indicated or trial counsel has indicated that you're not pursing a claim for bad faith.

PETER BERNHARD: The difference again, Justice Hardesty, is that it's not a claim for bad faith. There is no instruction on a bad faith tort. The instruction is that in order to prove intent, we argued to the jury, as permitted by the court properly, that Mr. Hyatt could show bad faith of the FTB in the conduct of the investigation. And that is an adequate and perfectly appropriate conclusion for the jury, well within its province.

JUSTICE DOUGLAS: But as we sit here, you say it's not an element, then why do we need it?

PETER BERNHARD: How do you prove intent? Evidence, admissible evidence.

JUSTICE DOUGLAS: Well let's go back. Why do we even need it if you are saying it's not an element, it's not a part of what you're doing?

PETER BERNHARD: It is part of what we're doing, it's part of our...

JUSTICE DOUGLAS: If it is part of what you're doing, why don't we have a special verdict form? I guess it's kind of circular but that's what...

PETER BERNHARD: Because the special verdict does not have to decide or resolve each and every factual instance or dispute.

JUSTICE GIBBONS: Neither side requested special interrogatories or special verdicts so it's kind of a done deal as far as the appeal is concerned, so the question is, is that your only argument on bad faith was that it was one of the component to establish intent. Is that correct?

PETER BERNHARD: It was one of, and one of the major series of evidence, which I can go through to show that the intent was there not to conduct an ordinary audit. That was the key issue that the jury understood very well and had to have decided that the FTB did not conduct an ordinary audit. The FTB had to have conducted a bad faith audit in order for the jury to reach the verdict it did. If the jury felt the FTB had acted in good faith, there would not have been any intent to support any of the intentional torts. And I think that was very clear from the instruction. And that was very appropriate in that we did establish there was a dishonest purpose, conscious wrongdoing, and the jury reached that verdict by having to get to that point and decide the bad faith issues. And they could have decided it either way. But it is impressed within their verdicts that they did find that here. And the irony, with respect to this bad faith issue, the FTB, during the audit, was expressing greater and greater concern and doubt about whether it even had a residency case. And as it was expressing these doubts, what did they do? They ratcheted up the stakes and called Mr. Hyatt a fraud. You would think if these reviewers decided that there were doubts about the case they would say "Oh, let's go back and make sure we have a tax case first." But no, they used penalties as bargaining chips. Let's add a fraud penalty here, 75% of the tax and see if this guy will pay us some money.

The fraud penalty is reserved, as the evidence showed, only for the very clearest of cases. The evidence showed all of the different things that the FTB was concerned about. First from the obsessions of the auditor, we talked about those last time. Where Ms. Cox created this fiction

about Mr. Hyatt, that he had to live in a gated community, her anti-Semitic remarks, gloating with the estranged family members that they got him, investigating his garbage, looking at mail, lying, fear of kidnapping, these are all things that this auditor became obsessed with.

And then you had Ms. Jovanovich and her crusade to establish fraud penalties at this time in every residence case. You had administrators motivated by assessments, not supportable assessments, there budget was based on what they assessed. So the higher the assessment they didn't care how it turned out. They weren't concerned whether it was right or wrong. They weren't concerned whether they were abusing this individual.

Ms. Jovanovich had written Ms. Cox's fraud penalty. Ms. Cox consulted with her from day one. Mr. Shea consulted with her from day one. She was the lawyer advising them and who does the FTB choose to appoint as the first protest hearing officer? Anna Jovanovich. Is that conscious wrongdoing? Yes. They appointed a person who knew this case from the beginning and who had actually advised Ms. Cox and wrote her fraud penalty...portions of it. There was an audit reviewer who said "let's make the case stronger. You've written up a good report, Ms. Cox, but let's make it stronger in favor of the FTB." He didn't know anything about the facts. All he wanted to do was have a sustainable penalty that could be used to try to extort money from a man they either knew didn't owe it, or had grave doubts that he owed it.

They added $24,000,000 for 1992. That money was received after the date the FTB said he moved to Nevada. Then they added the 75% penalty on top of that. This was like the perfect storm. Where the person's directly responsible for this audit and investigation and those who were supposed to be independent evaluators, and this very impartial thing was not just some platitude, Mr. Shea testified at trial, that yes, he meant that, he believed that, that the FTB had an obligation to be fair and impartial and not to reach judgments based on whether they are meeting their numbers for a specific fiscal year. Is that a dishonest purpose? Is that conscious wrongdoing?

The FTB doesn't quarrel that a dishonest purpose or conscious wrongdoing is an appropriate test of bad faith. Instead they argue simply, well the jury should have believed us. The jury should have found that we acted in good faith that we conducted an ordinary audit, and that Mr. Hyatt simply is wrong. But that's not the providence of this court to decide whether the FTB presented a case that should have been believed by the jury. The jury heard this evidence after four, four and a half months and this court should not say 'had we been in the jury box we would have reached a different conclusion'.

This leads into the points that the court has asked us to address concerning the caps on compensatory damages, the prohibitions against punitive damages as a matter of comedy. As we discussed last time before this court, comedy comes into play if, and only if, it serves Nevada's public policy. It's a completely voluntary doctrine, and has to give due regard the rights of Nevada's citizens. And as this court said in its 2002 decision, in this case, this court has to consider whether granting comedy would contravene Nevada's policies or interest. And as I argued last time, the Nevada policy to protect its citizens is imbedded in our constitution. In 2002, this court said as to intentional torts we don't think state policy allows us to grant comedy to California and follow its law on complete immunity.

So we went to trial on the intentional torts. This Court drew the line on comedy at the inadvertent or negligent acts since even those inadvertent acts...even negligence can cause

harm. But this court at that time said since these by hypothesis are truly unintended they are negligent, they are not deliberate. We will grant comedy in those instances in the State of California. Damage caps, punitive damages were not at issue then we were still discussing whether or not immunity would be granted. So neither this court nor the Supreme Court had occasion to look at whether or not Nevada's public policy would be furthered by granting comedy on the issue of statutory caps on damages. That's here before this court for the first time. So what the FTB is asking is that you impose a $75,000 cap on damages as a voluntary act of comedy for the most deliberate and despicable behaviors that the jury found that we had proven in this case. And I respectfully submit that is not compatible with Nevada's interests.

This court recognized in 2002 that intentional sister state misconduct is not as deserving of the respect that comedy embodies than negligence or inadvertent or unintended acts of a sister state actor. So denying full recourse to Nevada citizens who are intentionally harmed would simply strike the wrong balance. Should this court grant comedy to favor intentional, deliberate, despicable behavior of an out of state agency and by granting deference, or should this court protect its citizens as it's bound to do. Adopting the policy of limited compensation would leave Nevada with no effective way to deal with this intentional misconduct of officials of a sister state.

If a Nevada agent were to say "I want to go out and get this guy" for whatever reason, maybe I will be promoted, maybe my budget will be increased. He has to think, before he does anything wrong, "I could get fired if I go after this guy." It's a pre-wrongdoing deterrent that a Nevada agency can't take action to protect its citizens by not letting agent get out of hand and the right for Mr. Hyatt to petition the government for redress, to be able to go to the government and say "your Nevada actor is out of line here". That's a very important right and, again, that's imbedded in the Constitution, to go to the government and you can try to minimize, well maybe the legislature would come in and change the law but the point is these are important rights that Nevada citizens have to protect themselves against rouge conduct by Nevada actors.

Now what about the California actor? He says "hey, I can go after this guy. I don't have to worry. California wants to get this guy. They are trying to prevent California people from moving to Nevada. They want to make sure that we tax them when they try to leave the state whether they owe it or not. So I might even get a promotion if I get this guy. I'm not going to get fired by the State of California. Nevada can't fire me, they have no jurisdiction, they're not my employer. And Nevada would protect me and my agency with a statutory cap of $75,000. It becomes the cost of doing business. So, why not? There is no pre-wrong doing deterrent."

JUSTICE DOUGLAS: Mr. Bernhard, as you are going into this, and as I am listening to this Council talked in terms of Nevada vs. Hall. What is your take on Nevada vs. Hall?

PETER BERNHARD: Well clearly, Nevada vs. Hall is the case that stands for that proposition that California did not extend comedy to Nevada.

JUSTICE DOUGLAS: I understand that, but analysis of it, not just the other hyperboil but the analysis...

PETER BERNHARD: No, that's the result ...

JUSTICE DOUGLAS: as today...

PETER BERNHARD: That's the result of that case.

JUSTICE DOUGLAS: I understand that but she said if she will apply today would be different. Give us your take.

PETER BERNHARD: I'm sorry; I don't think she said if it were tested today the result would be different. I think the point of Nevada v. Hall is that first as to sovereign immunity California does not have the aspects of sovereignty when it comes to the State of Nevada, just as Nevada was not given the elements of sovereignty when it was in California, treated just like the other tort visor.

JUSTICE DOUGLAS: She seemed to imply that if we took the facts, weeded them as of today, and I understand what you are saying in principal, but just looking at it so I am asking for that analysis.

PETER BERNHARD: The Nevada v. Hall results and the Nevada v. Hall analysis means that this court is not bound by any constitutional premise or provision to give immunity or to recognize caps on damages. That Nevada makes that decision solely as a matter of comedy. And California did not grant comedy in that case because they wanted the unlimited damages that California law provided. In this case they are saying well now we do want Nevada to grant comedy, which I think it inconsistent, I think it's an appropriate fact in analyzing comedy to say, would California or has California granted comedy to Nevada in similar circumstances? The answer is no.

JUSTICE DOUGLAS: Is it a request to look at a case-by-case analysis? Looking at what is going on partially what you are arguing today?

PETER BERNHARD: Absolutely. It's a policy analysis on what is the policy of Nevada and is it consistent with that policy for the court to grant comedy voluntarily to the State of California and I submit no on the statutory caps just as on intentional tort immunity. We argued against comedy on (unintelligible), but the court said "no, we think because it was inadvertent we will grant comedy." But I think the court probably drew the line at intentional acts and under those same concepts, because those acts are intentional, the cap should not be applied to limit damages.

And Mr. Hyatt testimony was compelling about those damages at a minimum the damage he has suffered should be the rule. Compensatory damages should compensate the Nevadan for the wrongdoing intentional acts of the out of state actor. We have seen how serious the professional humiliation can be, we are all aware of the HOA cases, I mean some people have even committed suicide over professional humiliation...

JUSTICE DOUGLAS: Counsel, that…I'm not sure that quite fits because the ones who did that were the alleged wrongdoers so…

PETER BERNHARD: well and that's what…

JUSTICE DOUGLAS: …that fits in this case.

PETER BERNHARD: But that's why Mr. Hyatt was so…the distress was so great for him. His professional standing was affected with letters to these professional licensing agencies and the patent business to the licensees in Japan. And we were precluded from bringing in evidence, of course that's our cross-appeal, I know we're not to address that today, but there could have been hundreds of millions more in damages if we were allowed to present some substantial evidence.

JUSTICE DOUGLAS: Please don't go there because there is a lot of information there that I don't think we want to get into today.

PETER BERNHARD: Alright, well what we have though is intentional behaviors by the FTB, deliberately taken over a long period of time, they were not inadvertent, they were deliberate. There is no other way to protect Nevada citizens. For eleven years the FTB had the power to issue its final decision in the protest and allow Mr. Hyatt to have redress before a third party independent body, the Board of Equalization. The FTB kept saying "Oh, we need more information." But they have the power to say "You didn't give us enough information we are going to rule against you." But they held that back until the eve of trial. Is that conscious wrongdoing? Is there a dishonest purpose behind that? Keeping Mr. Hyatt, as we argued at trial, under the $8,000 a day interest accrual? Every time he gets up in the morning he knows the FTB claims that he owes $8,000 more based on their assessments.

JUSTICE GIBBONS: Mr. Bernhard, what about the damage calculation argument Ms. Lundvall made about calculation and varied type damages and how, at least her analysis, on how the jury came to that. What is your position as far as the damage calculation?

PETER BERNHARD: Well its pure speculation, for one thing, on what went on in that jury room. We don't have any idea about what went on in that room. We think that it was a conscientious jury, that looked at all of these issues, deliberated for a long time, listened attentively for four and a half months, and now to try to say that they suddenly were calculating damages based not on the court's instructions but based on some numbers the FTB came out and they sat there and I think the FTB, for frankly, was backed into that argument for this appeal. I don't even figure that out in my head if it's even true. I don't have any idea. But it's nothing that we or the FTB has any evidence whatsoever that this jury did something like that. We presented the damages, the evidence, and showed how egregious it was. And remember, in punitive damages, intentional infliction of emotional distress the extent of the bad conduct is a factor in the damages. And that's again, clearly established in the principal of law. The jury can consider the egregiousness of behavior…

JUSTICE PICKERING: Could you comment on Ms. Lundvall's point that emotional distress damages were restricted to so-called garden variety damages and $85,000,000 by anyone's account is not garden variety?

PETER BERNHARD: Sure, and the context again needs to be clarified, there was no discovery sanction relating to this at all. Mr. Hyatt made a deliberate decision after Commissioner Bigger gave him the option to say "would you like to reveal your personal medical records to the FTB in this case? If you do, then you will be able to argue those damages. But if you don't, then you will not be able to come into court at trial and submit evidenced of medical harm. You have to make that choice." And Mr. Hyatt made that choice, and under the circumstances I understand his choice. "I don't want my medical records begin produced in discovery."

JUSTICE PICKERING: He received an additional benefit, did he not, in that their argument in that there were other factors contributing to his emotional distress, those were kept from the jury as well, correct?

PETER BERNHARD: Well, that's correct on the surface, but what the fact is that those incidents occurred prior to the emotional distress that Mr. Hyatt claimed in this case. There was an IRS audit going on in '94 and '95 that was resolved. Mr. Hyatt satisfied his obligations to the Federal government. It wasn't until October of 1996 when he got the audit file that he recognized what these people had done to him, and he saw based on the decision of this court, after the FTB tried to withhold their internal notes, that they had gone after him.

JUSTICE PICKERING: Wasn't there also evidence of a contemporaneous loss of his business, his patent or his license and that was excluded?

PETER BERNHARD: Correct, because the dates didn't match. The date of that was in 1995.

JUSTICE PICKERING: Ok, so that was not tied in your analysis to his choice of garden variety emotional distress damages?

PETER BERNHARD: No.

JUSTICE PICKERING: Ok.

PETER BERNHARD: That was a conscious decision by Mr. Hyatt knowing that he would probably have a stronger damage case if he did open up his medical records. But he made that choice. It was not a sanction. There was no prohibition against him doing it. If he had wanted to produce medical records, he could have done that.

JUSTICE HARDESTY: But in the context if the Statute of Limitations defense, Mr. Bernard, it is my understanding of your argument that it was when the audit report was provided in '95 that his emotional distress occurred.

PETER BERNHARD: No, no, the audit report did not. If you recall from the testimony, at trial the FTB argued that this was a preliminary determination letter and Ms. Lundvall took Ms. Cox through that in direct exam, but this is just preliminary. So at trial, when the FTB was trying to prove it acted in good faith, that was a preliminary determination letter asking Mr. Hyatt's council to submit alternative information. That was not any sort of inquiry notice that would put him on guard that they had violated his privacy or were causing him distress. In fact, he believed them when Ms. Cox said let's submit other material, and we did submit other material in August and September and October of 1995. And...

JUSTICE HARDESTY: Emotional distress occurred when the determination letter arrived?

PETER BERNHARD: No, no, when the audit file arrived. The preliminary determination letter in August 1995 the FTB argued that they had not reached a final decision. We knew later, after looking at the file and the notes that this court ordered to be produced, that that was not true, that that really was the final decision they were going to make. But they call it a preliminary determination letter.

Now for Statute of Limitations purposes they say "even though we told you at the time it's preliminary it can be changed and not final, that put us on some sort of notice to start the statute running." Immediately after we got the preliminary determination letter in August of '95, Mr. Cowan, the tax attorney, called Ms. Cox, and it's noted in her file, her progress notes and her written report August 14, 1995, "Mr. Cowan called and asked me to give him the Affidavits that were anonymous in that determination letter...preliminary letter." Ms. Cox puts in her own handwriting and then in her own written report "I told him we're not going to give him anything until we close the case." So even if you argue that somehow he should be suspicious of FTB's bad faith and invasion of privacy at that time, we did inquire.

And we asked for the audit file even into 1996. And remember, the key date here is going to be January 7th of 1996. He didn't know until after that date all the claims are timely. In April of 1996 we asked for the audit file from Ms. Cox again and what did she say then? "Oh I don't have it anymore. You have to go through channels and go find it at the disclosure office." It took them six months after that inquiry, which Mr. Cowan again asked for in the first part of May of '96, took them six months to get that information to him. Mr. Hyatt read that in October of '96 and that's when he realized both the content of the information that had been disseminated, remember that preliminary determination letter was only a summary of the investigation, it did not include the back-up documents that were sent. He had no idea that the newspaper was given his social security number. He had no idea that this dating service in Orange County, not only was given his social security information, but also sent back how unsuccessful Mr. Hyatt was because he couldn't get a date at a dating service.

JUSTICE DOUGLAS: Mr. Bernhard, since you are kind of in to that, that was going to be my question anyway, they discussed invasion of privacy and seemed to say it wasn't there. You've begun to touch upon it why it was there. A couple of examples from your standpoint as why the argument was present this morning doesn't work.

PETER BERNHARD: Sure. First of all, Ms. Lundvall referred to in that point to instruction 43 and argued to this court that the only thing the jury was told was that the name, address, and social security number were items subject to invasion of privacy. Here's what the instruction says:

> Mr. Hyatt alleges that FTB violated his right to information privacy by sending request for information to third parties which included information about Hyatt, including his name and address and social security number.

Does that mean the jury was instructed they couldn't look at the disclosures of his professional information? No. It says "including name, address, and social security number." So that was a part of the privacy tort, but everything they disclosed to third parties was part of the invasion of privacy which resulted in the damage to him.

JUSTICE PICKERING: You have only a short period of time, but could you address Ms. Lundvall's argument on the Statute of Limitations to the effect that, not that she deserve summary judgment as a matter of law on the statute of limitations, but rather that the District Court erred in determining as a matter of law the statute of limitations was not an issue in not giving it to the jury.

PETER BERNHARD: Right and I think that Ms. Lundvall conceded that there was no dispute on the facts of what notice was given. And under the Wynn case from May 31st, the court again restated the law that if evidence irrefutable demonstrates the accrual date, if the facts are uncontested then it is a matter of law. And we didn't know on the summary judgment phase whether or not the FTB would have other evidence of Mr. Hyatt's knowledge. But they didn't present anymore at trial so we moved up the close of the FTB's case, as appropriate, but they had not proven an affirmative defense because those facts were irrefutably demonstrating that until he got the audit file, and again, it is important to know, as Justice Hardesty indicated, they never raised the emotional distress tort in a Motion for Summary Judgment. I'm anxious to see if Ms. Lundvall can find that in the record that she…

JUSTICE PICKERING: On the statute of limitations issue, you are saying it was never tested?

PETER BERNHARD: Correct. It was never tested on the Partial Summary Judgment Motion for Emotional Distress, so I submit that because those facts were irrefutable demonstrating the date was October of 1996, all of those claims fall within the two-year statute. Emotional Distress clearly does because they have never raised it as a defense, now it's trying…the FTB lumps it together as the non-fraud torts. Well, you've got to look at each one separately. When did he know enough to put him on notice of the invasion of privacy torts, the breach of confidentiality torts, the abuse of process tort, and finally, emotional distress, and he did not have any clue how they had been out to get him until he saw the back-up information in that file. That's when the door opened and he saw what they had done to him, that's when he saw the scope and content of the invasion of privacy, that's when the puzzle came together "Why aren't they listening to me? Well because they were trying to use me to meet numbers. They were trying to use me, even though they had doubts whether I owed the taxes or not, as a bargaining chip with fraud penalties." That's when the cause of action accrued and not before. So all of the claims are timely and all of the claims should be resolved in Mr. Hyatt's favor.

Thank you very much for your time and attention.

CHIEF JUSTICE CHERRY: Thank you Mr. Bernhard. Ms. Lundvall. Let's round her off to three minutes please.

PAT LUNDVALL: Thank you, Your Honor. There was a number of issues that were raised so I am going to try to go through these as quickly as possible to try to bring some clarity to them.

Number one, as to the bad faith contention that was advanced by Mr. Bernhard, their argument is contradictory. They took the position in the District Court, time and time again in the settling of jury instructions that they did not bear the burden of proof on bad faith. And they repeated that over and over again. But now before you they come and they say "well, we were able to argue bad faith as proof of the intent element for which we bore the burden of proof." Well, wait a minute. On one hand you are saying "I don't bear the burden of proof on bad faith" and that's repeated as far as their representations, but on the other hand they say "well but we can use it to prove intent and we know that we bear the burden of proof on that." That required a bridge between those by which the District Court did not give that bridge then to the jury then so they could understand what any instruction in that regard was. Moreover, when you look at their application of that, it was their position that they only had to prove essential elements of their claims, nothing more.

Next, Mr. Bernhard argues that, in fact, that there should be no caps on the compensatory damages. In the principal argument, they advanced here today, as well as what he advanced in his brief, was this. Is that Hyatt, here in Nevada, could have gone to a Nevada legislature and to say "Hey, there is someone in one of Nevada's administrative agencies that is doing bad things. Protect me."

Well he had that same right in California and the record reveals that he exercised that right repeatedly. He had huge political clout that was demonstrated, as far as to the jury, in the State of California and he exercised that political clout in the State of California. And so whatever, as far as the bad issue then, resolved, it does not resolve as to whether or not there should not be an application of comedy as per the law of the on this appeal. He also suggested that somehow that that there is a difference between caps on damages and the immunity issue that was previously decided. Well the caps on damages are part of our immunity statutes. The caps on damages are part of "we have waived immunity" up to a certain point. And so it's all part of the immunity analysis.

Next he contends that the sanction that was imposed against Mr. Hyatt for failing to turn over his medical records as proof of his severe emotional distress was limited. He claims before you, that in fact, the only thing that sanction required of him was that he couldn't use his medical records at the time of trial. To the contrary, Discovery Commissioner Bigger has echoed by the District Court said that he was limited to garden variety emotional distress. And garden variety emotional distress was not severe emotional distress under the litany of cases then that we brought to the court's attention.

In addition, and to answer the court's question then on the issue concerning the patent, Mr. Hyatt, it took him twenty years to get his patent. And it took him five years to lose it. And then for the next eight years after his loss he tried to regain it. This was something that went to his core and his identity. For which that he received hundreds of millions of dollars, and all of the loss of his patent and the litigation over the loss of his patent was contemporaneous with the FTB and pretrial Mr. Hyatt's attorneys took the position that this was an issue that should be presented, and it was only at trial that they flip-flopped again and convinced the then court that this evidence should be excluded. All of which could possibly have been found within medical records as to what the cause of his claimed emotional distress.

CHIEF JUSTICE CHERRY: Your time is up Ms. Lundvall.

PAT LUNDVALL: Thank you, Your Honor.

CHIEF JUSTICE CHERRY: Thank you Mr. Bernhard and Ms. Lundvall for your excellent arguments in this matter. This matter has been submitted. We will be in recess.

EXHIBIT 71

130 Nev. 662
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.

3 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.

14 Cases that cite this headnote

[5] Appeal and Error

De novo review

30 Appeal and Error
30XVI Review
30XVI(D) Scope and Extent of Review
30XVI(D)1 In General
30k3137 De novo review
(Formerly 30k893(1))

The Supreme Court reviews questions of law de novo.

Cases that cite this headnote

[6] Appeal and Error

Jury as factfinder below

30 Appeal and Error
30XVI Review
30XVI(D) Scope and Extent of Review
30XVI(D)10 Sufficiency of Evidence
30k3459 Substantial Evidence
30k3461 Jury as factfinder below
(Formerly 30k1001(1))

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

Motions, hearings, and orders in general

Appeal and Error

Judgment in General

30 Appeal and Error
30XVI Review
30XVI(F) Presumptions and Burdens on Review
30XVI(F)2 Particular Matters and Rulings
30k3887 Motions, hearings, and orders in general
(Formerly 30k901)
30 Appeal and Error
30XVI Review
30XVI(F) Presumptions and Burdens on Review
30XVI(F)2 Particular Matters and Rulings
30k3946 Judgment in General
30k3947 In general
(Formerly 30k901)

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.

3 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.

1 Cases that cite this headnote

[22] Appeal and Error

Jury as factfinder below

30 Appeal and Error
30XVI Review
30XVI(D) Scope and Extent of Review
30XVI(D)10 Sufficiency of Evidence
30k3459 Substantial Evidence
30k3461 Jury as factfinder below
(Formerly 30k1001(1))

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

1 Cases that cite this headnote

[23] Appeal and Error

What constitutes substantial evidence

30 Appeal and Error
30XVI Review
30XVI(D) Scope and Extent of Review
30XVI(D)10 Sufficiency of Evidence
30k3459 Substantial Evidence
30k3463 What constitutes substantial evidence
(Formerly 30k1001(1))

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.

2 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.

2 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.

13 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.

10 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.

11 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
Instructions

Appeal and Error
Admission or exclusion of evidence in general

30 Appeal and Error
30XVI Review
30XVI(D) Scope and Extent of Review
30XVI(D)7 Trial
30k3348 Instructions
(Formerly 30k969)
30 Appeal and Error
30XVI Review
30XVI(D) Scope and Extent of Review
30XVI(D)8 Evidence and Witnesses in General
30k3364 Reception of Evidence
30k3366 Admission or exclusion of evidence in general
(Formerly 30k970(2))

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 Cases or Issues, Exclusion of Evidence Relating to

30 Appeal and Error
30XVII Harmless and Reversible Error
30XVII(B) Particular Errors
30XVII(B)8 Exclusion of Evidence
30k4363 Particular Cases or Issues, Exclusion of Evidence Relating to
30k4364 In general
(Formerly 30k1056.1(4.1))

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.:

***669** 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.

***670** 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 ***671** 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 ***672** 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 ***673** 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 ***674** 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 ***675** 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 ***676** 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 ***677** *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. ***678** 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 ***679** 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 ***680** 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 ***681** 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.*

***682** **[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.

***683** **[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 ***684** 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).

***685** *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) ***686** (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, ***687** 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 ***688** 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) ***689** 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 ***690** (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).

***691** 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.

***692** 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 ***693** 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 ***694** 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 ***695** 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 ***696** 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 ***697** 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 ***698** 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 ***699** 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 ***700** 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 ***701** 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 ***702** 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 ***703** 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* ***704** *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. ***705** *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.

***706** 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 *707 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 ***708** 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.*

***709** 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 ***710** 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.

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EXHIBIT 72

NO. _____

In the
Supreme Court of the United States

FRANCHISE TAX BOARD OF
THE STATE OF CALIFORNIA,
Petitioner,

v.

GILBERT P. HYATT,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Nevada

PETITION FOR WRIT OF CERTIORARI

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March 23, 2015

QUESTIONS PRESENTED

1. Whether the federal discretionary-function immunity rule, 28 U.S.C. §2680(a), is categorically inapplicable to intentional torts and bad-faith conduct.

2. Whether Nevada may refuse to extend to sister States haled into Nevada courts the same immunities Nevada enjoys in those courts.

3. Whether *Nevada v. Hall*, 440 U.S. 410 (1979), which permits a sovereign State to be haled into the courts of another State without its consent, should be overruled.

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APPENDIX