IN THE SUPREME COURT OF THE STATE OF NEVADA

GILBERT P. HYATT, Appellants, v. FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, Respondents.	Docket No. 84707 **APPENDIX OF EXHIBITS TO APPELLANT'S OPENING BRIEF** **VOLUME 17 OF 42**

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9	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, filed October 15, 2019	10/15/2019	4-7	AA000708	AA001592
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CERTIFICATE OF SERVICE

I certify that I am an employee of HUTCHISON & STEFFEN, PLLC and that on this date the **APPENDIX OF EXHIBITS TO APPELLANT'S OPENING BRIEF VOLUME 17 OF 42** was filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the master service list.

DATED this 10th day of October, 2022.

/s/ Kaylee Conradi

_____

An employee of Hutchison & Steffen, PLLC

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.

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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]

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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).

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

[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

[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).

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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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.

10-18-12

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.

All Citations

130 Nev. 662, 335 P.3d 125, 130 Nev. Adv. Op. 71

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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PETITION FOR WRIT OF CERTIORARI

Over twenty years ago, petitioner Franchise Tax Board of the State of California (FTB), the California state agency charged with collecting California income taxes, audited respondent Gilbert P. Hyatt and determined that he had falsely disclaimed his California residency in order to avoid substantial state income taxes. Rather than simply exercise his right to challenge FTB's assessment via administrative review followed by suit in California state court, Hyatt also sued FTB in Nevada state court, alleging that FTB committed various intentional torts in conducting its audits. Hyatt's suit dragged California through ten years of litigation—including a previous trip to this Court—before it finally reached trial. There, a Nevada jury demonstrated the dangers of allowing a sovereign State to be haled into another State's court system against its will by finding for Hyatt on every one of his claims and awarding Hyatt $490 million in damages. Another six years passed before the Nevada Supreme Court, while trimming the award, affirmed that FTB is liable for fraud and intentional infliction of emotional distress and must pay Hyatt over a million dollars in damages, with potentially millions more to come. In the process, the Nevada Supreme Court deepened splits on important federal issues and expressly declined to extend to California the same immunities Nevada enjoys in its own courts.

This extraordinary case demands the Court's review for a second time because the judgment below contravenes sovereign immunity principles three times over. First, the Nevada Supreme Court held that the federal discretionary-function immunity rule,

28 U.S.C. §2680(a), which applies in Nevada courts, is categorically inapplicable to intentional torts and bad-faith conduct. That conclusion squarely conflicts with the decisions of numerous federal circuits holding that subjective intent is irrelevant to discretionary-function immunity and, therefore, such immunity can apply even to intentional torts and bad-faith conduct.

Second, the court ignored this Court's previous decision in this case by declining to extend to a sister sovereign the same immunities Nevada enjoys in its own courts. If the Court persists in the view that a sovereign State can be haled into the courts of another State against its will (but see *infra*), then it is imperative that the foreign sovereign receive the same immunities as the domestic sovereign, as this Court indicated in its earlier decision. Nonetheless, the Nevada Supreme Court refused to apply a statutory cap on compensatory damages applicable to Nevada agencies, on the remarkably candid ground that extending the rule to a California agency would undermine the interest in compensating Nevadans without any corresponding benefit to Nevada and its taxpayers. That determination denies California its dignity as a co-equal sovereign and cannot be squared with basic principles of sovereign immunity, cooperative federalism, or the Full Faith and Credit Clause.

Third, the proceedings in this case amply demonstrate that this Court took a wrong turn in *Nevada v. Hall*, 440 U.S. 410 (1979). Bedrock principles of sovereign immunity dating back to the Framing make clear that a sovereign State cannot be haled into a sister State's court system absent its

consent. Moreover, this Court's cases recognize that a State generally may not be haled into federal court absent its consent, and all the same justifications apply *a fortiori* in the sister State context. *Nevada v. Hall* was decided before many of the Court's modern sovereign immunity cases, and it is incompatible with those later, better reasoned cases. Indeed, this case amply demonstrates the problems with allowing one sovereign to be sued in the courts of a different sovereign absent consent. A Nevada jury with an opportunity to award damages to a Nevada citizen at the expense of a California governmental entity did so to the tune of half a billion dollars. Although the Nevada Supreme Court eventually trimmed that award back half a decade later, it expressly refused to apply the immunities available to a Nevada state agency. These facts illustrate exactly why sovereign immunity does not allow a sovereign State to be placed at the mercy of foreign juries and judges absent consent. In short, this case presents a perfect vehicle for this Court to correct two certworthy errors made by the court below or one of its own, *viz.*, *Nevada v. Hall*.

OPINIONS BELOW

The opinion of the Nevada Supreme Court is reported at 335 P.3d 125 and reproduced at App.1-73. The order of the Nevada Supreme Court denying rehearing is unreported and reproduced at App.74-75. The relevant orders of the state trial court are unreported, but reproduced at App.78-81.

JURISDICTION

The Nevada Supreme Court issued its opinion on September 18, 2014, and denied rehearing on November 25, 2014. On January 13, 2015, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including March 23, 2015. This Court has jurisdiction under 28 U.S.C. §1257(a). *See Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article IV, §1 of the United States Constitution and 28 U.S.C. §2680(a) are reproduced at App.82-83.

STATEMENT OF THE CASE

A. Factual Background

Hyatt is a former resident of the State of California who has earned hundreds of millions of dollars in licensing fees on certain technology patents he once owned. App.4; *Franchise Tax Bd. of Cal. v. Hyatt* (*Hyatt I*), 538 U.S. 488, 490-91 (2003). Hyatt filed a "part-year" resident income tax return in California for the year 1991, claiming that as of October 1, 1991, he had ceased to be a California resident and had become a resident of Nevada. *Hyatt I*, 538 U.S. at 490. Within days after that purported move, Hyatt received substantial patent licensing fees that he did not report on his California tax return. App.4. Although Hyatt represented that he had lived in California for three-quarters of 1991, he reported only 3.5% of his total taxable income on his California return. And despite his supposed change of residence,

Hyatt claimed no moving expenses on his California return. *Id.*

Based on these discrepancies, FTB opened an audit into Hyatt's 1991 California return. FTB concluded that Hyatt did not move from California to Nevada before October 1991, as he had claimed, but rather remained a California resident until April 1992. App.4-5. It determined that, "in an effort to avoid [California] state income tax liability on his patent licensing," Hyatt "had staged the earlier move to Nevada by renting an apartment, obtaining a driver's license, insurance, bank account, and registering to vote." App.6. It further determined that although Hyatt claimed he had sold his California home to his work assistant, the purported sale was a sham. *Id.* FTB provided a "detailed explanation" of its conclusions, complete with evidence. It determined that Hyatt owed California approximately $1.8 million in unpaid state income taxes from 1991, plus an additional $2.6 million in penalties and interest. *Id.* Because it determined that Hyatt resided in California for part of 1992 yet paid no California taxes at all, FTB opened a second audit into Hyatt's state income tax liability for that year. App.7. It concluded that Hyatt owed an additional $6 million in taxes and interest for 1992, along with further penalties. *Id.*

Hyatt challenged the tax audits by filing protests with FTB. *Id.* Those protests initiated an administrative review process under which both audits were examined again to ensure their accuracy. FTB upheld the audits after administrative review. *Id.* Hyatt is currently challenging that outcome in an administrative appeal to the California State Board of

Equalization.[1] Hyatt has also filed a federal lawsuit against FTB board members and other State officials alleging violations of his constitutional rights. *See Hyatt v. Chiang*, No. 14-849, 2015 WL 545993, at *6 (E.D. Cal. Feb. 10, 2015) (dismissing suit as barred by Tax Injunction Act), *appeal docketed*, No. 15-15296 (9th Cir. Feb. 19, 2015).

B. The Nevada Litigation

In January 1998, when the administrative review process was just beginning, Hyatt filed suit against FTB in Nevada state court. He asserted a variety of tort claims based on FTB's alleged conduct during its audits—specifically, negligent misrepresentation, intentional infliction of emotional distress, fraud, invasion of privacy, abuse of process, and breach of a confidential relationship. Hyatt sought compensatory and punitive damages. App.7-8, 11.

FTB moved for summary judgment on the ground that it was entitled to complete immunity from suit in Nevada just as it would be in California. App.10. Under California law, no public entity can be held liable for any injury caused by "instituting any judicial or administrative proceeding or action for or incidental to the assessment or collection of a tax," or by any "act or omission in the interpretation or application of any law relating to a tax." Cal. Gov't Code §860.2. FTB argued that the Full Faith and Credit Clause, along with principles of sovereign immunity and comity, required the Nevada courts to

[1] The decision below erroneously stated that Hyatt is challenging the audits' conclusions "in California courts." App.7 n.2.

grant FTB that same immunity. *Hyatt I*, 538 U.S. at 491-92.

The trial court denied the motion, and FTB sought review by petitioning the Nevada Supreme Court for a writ of mandamus ordering dismissal of the case. *Id.* at 492. The Nevada Supreme Court initially granted the petition and ordered judgment for FTB on all of Hyatt's claims. *Id.* Ten months later, however, it vacated its decision and instead granted the writ in part and denied it in part. It refused to extend complete immunity to FTB based on sovereign immunity, the Full Faith and Credit Clause, or comity, and held that "FTB should be granted partial immunity equal to the immunity a Nevada government agency would receive," which meant immunity for negligence-based torts but not for intentional torts. App.10. The Nevada Supreme Court therefore ordered the trial court to dismiss Hyatt's claim for negligent misrepresentation, but allowed his intentional tort claims to proceed.

C. *Hyatt I*

FTB filed a petition for certiorari, arguing that the Full Faith and Credit Clause required Nevada to apply the California statute granting FTB complete immunity. This Court granted certiorari and affirmed. It explained that the Full Faith and Credit Clause generally does not require one State to apply the law of another. *Hyatt I*, 538 U.S. at 496. Although recognizing that "the power to promulgate and enforce income tax laws is an essential attribute of sovereignty," it held that the Full Faith and Credit Clause did not require Nevada to respect that sovereign interest by giving FTB the complete

immunity that it would have under California law. *Id.* at 498-99.

In reaching that conclusion, the Court acknowledged that "States' sovereignty interests are not foreign to the full faith and credit command." *Id.* at 499. But it observed that it was "not presented here with a case in which a State has exhibited a 'policy of hostility to the public Acts' of a sister State." *Id.* (quoting *Carroll v. Lanza*, 349 U.S. 408, 413 (1955)). Noting that the Nevada Supreme Court had merely granted FTB the same immunity that a Nevada agency would enjoy under similar circumstances—thereby placing FTB on an equal footing with Nevada agencies—the Court commented that the Nevada Supreme Court had "sensitively applied principles of comity" by "relying on the contours of Nevada's own sovereign immunity from suit" to determine what immunity FTB was entitled to claim. *Id.*

The Court also emphasized that its ruling did *not* address a broader issue: whether the Constitution incorporates a principle of State sovereign immunity that protects a State from being sued in the courts of another State without its consent. *Id.* at 497. The Court had previously rejected that principle in *Nevada v. Hall*, 440 U.S. 410 (1979), holding that the Constitution did not "require[] all of the States to adhere to the sovereign-immunity doctrine as it prevailed when the Constitution was adopted." *Id.* at 418. Nineteen States and Puerto Rico filed an amicus brief in *Hyatt I* that urged the Court to revisit and overrule *Hall*, explaining that the case "cannot be reconciled with" the leading decisions on State sovereign immunity. Br. of Florida et al. as Amici

Curiae 17, *Hyatt I*, 538 U.S. 488 (No. 02-42), 2002 WL 32134149. But because FTB itself did not press the issue at that time, the Court declined to reach it. *Hyatt I*, 538 U.S. at 497.

D. Trial and Appeal

Following this Court's decision in *Hyatt I*, the case returned to the Nevada state trial court. The parties then engaged in lengthy discovery and pretrial proceedings. Finally, in 2008—over ten years after Hyatt filed suit—the case proceeded to a jury trial that lasted approximately four months. App.11. The Nevada jury found for Hyatt on all his claims, awarding him just over $1 million on his fraud claim, $52 million for invasion of privacy, $85 million for emotional distress, and $250 million in punitive damages. *Id*.

Nevada law imposes a statutory cap on tort damages against a Nevada government agency. Nev. Rev. Stat. §41.035(1). For actions accruing before 2007, that cap was set at $50,000—less than one one-thousandth of the compensatory damages awarded against FTB. *See* 1995 Nev. Stat. 1071, 1073.[2] The same Nevada law also prohibits punitive damages against Nevada government agencies. Nev. Rev. Stat. §41.035(1). The state trial court, however, declined to apply those limits to FTB. Instead, it added over $2.5 million in costs and $102 million in prejudgment interest to the jury verdict, for a total judgment against FTB of over $490 million. App.11, 72.

[2] That cap increased to $75,000 for actions accruing between Oct. 1, 2007 and Oct. 1, 2011, and to $100,000 for actions accruing after the latter date. 2007 Nev. Stat. 3015, 3024-25, 3027.

FTB appealed the numerous errors made by the trial court. First, it argued that under the federal discretionary-function immunity rule, 28 U.S.C. §2680(a), which the Nevada Supreme Court had adopted after *Hyatt I*, it could not be held liable for any claims arising from the inherently discretionary conduct underlying its audit of Hyatt's taxes—even intentionally tortious or bad-faith conduct. Second, it argued that Hyatt's intentional tort claims failed as a matter of law. Third, it argued that under principles of full faith and credit, cooperative federalism, sovereign immunity, and comity, the trial court should have treated FTB like a Nevada government entity by capping compensatory damages and precluding punitive damages. Finally, FTB preserved and pressed its argument that *Nevada v. Hall* was wrongly decided and should be overruled, and that FTB could not be haled into the Nevada courts absent its consent.

Six years after trial—over sixteen years after Hyatt filed suit—the Nevada Supreme Court affirmed in part and reversed in part. App.1-73. The court first held that FTB could not invoke the federal discretionary-function immunity rule to dispose of Hyatt's claims because, in its view, that rule is categorically inapplicable to "intentional torts and bad-faith misconduct." App.14. The court acknowledged that Nevada has "adopted … the federal test for determining whether discretionary-function immunity applies." App.17. Furthermore, it noted that under this Court's jurisprudence, "[t]he focus of the inquiry" under the federal test "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."

App.24 (quoting *United States v. Gaubert*, 499 U.S. 315, 325 (1991)). And it conceded that "[o]ther courts" have held that "allegations of intentional or bad-faith misconduct are not relevant to determining if" federal discretionary-function immunity applies. App.19 (citing *Reynolds v. United States*, 549 F.3d 1108, 1112 (7th Cir. 2008), and *Franklin Sav. Corp. v. United States*, 180 F.3d 1124, 1135, 1141 (10th Cir. 1999)). Nevertheless, relying heavily on a single Second Circuit decision, *see* App.22-24 (citing *Coulthurst v. United States*, 214 F.3d 106 (2d Cir. 2000)), the court adopted a categorical rule that "[d]iscretionary-function immunity does not apply to intentional and bad-faith tort claims," App.72.

The Nevada Supreme Court then turned to the merits of Hyatt's intentional tort claims. It held that Hyatt's claims for invasion of privacy, abuse of process, and breach of a confidential relationship failed as a matter of law, App.25-38; however, it affirmed the jury's verdict finding FTB liable for fraud and intentional infliction of emotional distress, App.38-41, 46-51. On those counts, the court pointed to evidence that FTB disclosed Hyatt's address and social security number to third parties when requesting information, revealed to third parties that he was being audited, and took eleven years to resolve his administrative appeals, and that one of the auditors assigned to his case purportedly made an isolated remark regarding Hyatt's religion and was "intent on imposing an assessment" against Hyatt. App.40. In the court's view, this was sufficient evidence for the jury to find FTB liable for intentional infliction of emotional distress. App.50. It was also sufficient for the jury to find fraud, the court

concluded, because FTB had provided Hyatt a document at the outset of his audit explaining that during the audit process, Hyatt should expect "[c]ourteous treatment by FTB employees," "[c]onfidential treatment of any personal and financial information," and "[c]ompletion of the audit within a reasonable amount of time." App.5, 39. In the court's view, a reasonable jury could conclude these were "fraudulent representations," FTB "knew [they] were false," and FTB "intended for Hyatt to rely on [them]." App.40-41.

Turning to damages, the Nevada Supreme Court refused to apply to FTB the statutory damages cap applicable to a Nevada government entity. It conceded that "[m]ost courts" in other States extend to out-of-state entities the same protections granted to in-state entities. App.44. It nevertheless concluded that Nevada's "policy interest in providing adequate redress to Nevada citizens is paramount to providing FTB a statutory cap on damages." App.45. Accordingly, it "reject[ed] FTB's argument that it should be entitled to Nevada's statutory cap on damages for government entities." App.62. It then held that "[b]ecause punitive damages would not be available against a Nevada government entity," FTB was immune from punitive damages. App.65. The court accordingly upheld the more than $1 million in damages against FTB for fraud (before prejudgment interest), and remanded for retrial on emotional distress damages due to evidentiary and jury-instruction errors. App.72.

REASONS FOR GRANTING THE PETITION

The decision below warrants this Court's review on three vitally important issues of sovereign immunity. *First*, certiorari is necessary to resolve the acknowledged split over the scope of the federal test for discretionary-function immunity under 28 U.S.C. §2680(a). As the Nevada Supreme Court conceded, numerous federal courts of appeals have held that subjective intent is irrelevant to determining whether §2680(a) applies. Siding with the minority view, however, the Nevada Supreme Court created a categorical exception to discretionary-function immunity that turns *entirely* on subjective intent, concluding that §2680(a) simply does not apply to intentional torts or bad-faith conduct. That holding deepens a conflict in the lower courts, cannot be reconciled with this Court's precedents, and eviscerates discretionary-function immunity in practice by allowing plaintiffs to challenge any government policy decision simply by alleging an intentional tort or bad faith.

Second, by refusing to extend to an out-of-state agency the same immunities that a Nevada state agency would receive, the Nevada Supreme Court violated this Court's command in *Hyatt I*. That decision explained that a State is not required to provide *greater* protection to an out-of-state agency than its own law provides to an in-state agency. But it cautioned that the Full Faith and Credit Clause and principles of sovereign immunity and cooperative federalism prohibit a State from exhibiting a "policy of hostility" for another State's sovereign status by departing from the "contours of [its] own sovereign

immunity from suit." 538 U.S. at 499. The Nevada Supreme Court blatantly transgressed these principles when it refused to extend to FTB, an out-of-state agency, the *same* sovereign immunity Nevada provides to in-state agencies. If this Court is going to retain the rule of *Nevada v. Hall*, it is imperative that it reaffirm the principle that a sister sovereign is entitled to the same immunities as the domestic sovereign.

Third, this case amply demonstrates that the better course would be to recognize that *Nevada v. Hall* is incompatible with both bedrock principles of sovereign immunity and later, better reasoned decisions of this Court and should be overruled. That decision departed from fundamental principles of sovereign immunity as understood at the Framing and as embodied in the structure of the Constitution. Subsequent decisions of this Court have developed those constitutional principles and recognized that the Eleventh Amendment is not a narrow principle applicable only in federal court, but a reflection of more fundamental constitutional principles equally applicable in state court. Those later decisions are better reasoned and incompatible with *Hall*. What is more, this case amply demonstrates the practical danger of allowing one State to be haled into the courts of a sister sovereign against its will. A Nevada jury needs little incentive to side with a Nevada citizen against another State's government, especially when the latter is involved in an inherently sovereign and inherently unpopular function like tax collection. And Nevada courts do not feel compelled to respect either the sister State's or Nevada's limitations on the waiver of sovereign immunity. In short, *Hall* has proven both

doctrinally and practically unworkable. This Court should take this opportunity to restore the dignity and residual sovereignty of the States. That sovereignty survived the formation of the national government and generally does not yield even in federal court. It should not yield to a mistaken decision that has proven unworkable in this very case.

I. This Court Should Grant Review To Determine Whether The Federal Discretionary-Function Immunity Rule Is Categorically Inapplicable To Intentional Torts And Bad-Faith Conduct.

In holding that the federal discretionary-function immunity rule categorically "does not apply to intentional and bad-faith tort claims," the Nevada Supreme Court concededly broke from the holdings of "[o]ther courts" that have held precisely the opposite. App.19, 72. Certiorari is necessary to resolve the acknowledged split on this important question.

The federal discretionary-function immunity rule provides that the waiver of sovereign immunity in the Federal Tort Claims Act (FTCA) does not apply to any claim "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty … whether or not the discretion involved be abused." 28 U.S.C. §2680(a). The rule "prevent[s] judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." *Berkovitz v. United States*, 486 U.S. 531, 536-37 (1988).

This Court has articulated a two-part test for determining whether a government defendant is

entitled to discretionary-function immunity. First, the conduct at issue must "involve[] an element of judgment or choice"; and second, the judgment must be "of the kind that the discretionary function exception was designed to shield," that is, "governmental actions and decisions based on considerations of public policy." *Berkovitz*, 486 U.S. at 536-37; *see Gaubert*, 499 U.S. at 322-23. The Nevada Supreme Court has expressly adopted the two-part federal test for discretionary-function immunity as its own, because the relevant state statute "mirrors the Federal Tort Claims Act." *Martinez v. Maruszczak*, 168 P.3d 720, 722 (Nev. 2007).[3]

In applying that test, "[t]he focus of the inquiry is not on the [defendant's] subjective intent … but on the nature of the actions taken and on whether they are susceptible to policy analysis." *Gaubert*, 499 U.S. at 325. Based on that reasoning, at least four federal courts of appeals have explicitly held that, in determining whether discretionary-function immunity applies, the defendant's subjective intent is irrelevant. *See, e.g.*, *Irving v. United States*, 162 F.3d 154, 167 (1st Cir. 1998) ("We know from *Gaubert* that the subjective intent of an agency actor is irrelevant to conducting a discretionary function analysis."); *Fisher*

[3] Other states have likewise adopted the federal test. *See, e.g.*, *Johnson v. Agency of Transp.*, 904 A.2d 1060, 1063 (Vt. 2006). Because the decision below relies on the federal discretionary-immunity rule and federal precedent to interpret the parallel Nevada rule, App.14-15, 17-24, this Court has jurisdiction to "review[] the federal question on which the state law determination [was] premised." *Three Affiliated Tribes v. Wold Eng'g*, 467 U.S. 138, 152 (1984); *see Michigan v. Long*, 463 U.S. 1032, 1042 (1983).

Bros. Sales v. United States, 46 F.3d 279, 286 (3d Cir. 1995) (*Gaubert* "ruled out any inquiry into an official's 'subjective intent'"); *Reynolds v. United States*, 549 F.3d 1108, 1112 (7th Cir. 2008) ("[S]ubjective intent is irrelevant to our analysis."); *Franklin Sav. Corp*, 180 F.3d at 1137 (*Gaubert* establishes "an affirmative bar to inquiry into officials' subjective intent"). Under the reasoning of these courts, performing a discretionary function in bad faith does not take that conduct outside the purview of the discretionary-function immunity rule.[4]

Along the same lines, at least three federal courts of appeals have expressly rejected the proposition that intentional torts fall outside the scope of the discretionary-function immunity rule. *See Medina v. United States*, 259 F.3d 220, 226 (4th Cir. 2001) ("[C]laims of intentional torts … must clear the §2680(a) discretionary function hurdle[.]"); *Gasho v. United States*, 39 F.3d 1420, 1435 (9th Cir. 1994) (where "the tortious conduct involves a 'discretionary function,' a plaintiff cannot maintain an FTCA claim, even if the discretionary act constitutes an intentional tort"); *Gray v. Bell*, 712 F.2d 490, 507 (D.C. Cir. 1983). Two others have implicitly rejected that proposition by

[4] Other circuits agree that *Gaubert* looks only to the objective nature of the decision at issue, not the extent to which the defendant subjectively weighed different policy priorities to make that decision. *See Indemnity Ins. Co. v. United States*, 569 F.3d 175, 181 (4th Cir. 2009); *Spotts v. United States*, 613 F.3d 559, 572 (5th Cir. 2010); *Rosebush v. United States*, 119 F.3d 438, 444 (6th Cir. 1997); *Demery v. U.S. Dep't of Interior*, 357 F.3d 830, 833 (8th Cir. 2004); *Miller v. United States*, 163 F.3d 591, 593 (9th Cir. 1998); *Cranford v. United States*, 466 F.3d 955, 958 (11th Cir. 2006).

dismissing intentional infliction of emotional distress claims on discretionary-function grounds. *See Pierce v. United States*, 804 F.2d 101, 102 (8th Cir. 1986); *Hart v. United States*, 894 F.2d 1539, 1543-46 (11th Cir. 1990).

The Nevada Supreme Court, however, declined to follow these decisions, and relied instead on the Second Circuit's position in *Coulthurst v. United States*, 214 F.3d 106 (2d Cir. 2000). App.22-24. In *Coulthurst*, the Second Circuit held that discretionary-function immunity did not apply where a prisoner alleged that a prison guard had failed to adequately inspect and maintain exercise equipment. The court concluded that if a decision not to inspect was "unrelated to any plausible policy objectives," then immunity would not be available. *Id.* at 111; *see also Triestman v. Fed. Bureau of Prisons*, 470 F.3d 471, 475-76 (2d Cir. 2006) (following *Coulthurst*). Under this approach, discretionary-function immunity depends on why the government official made the decision at issue; that is, it requires an inquiry into subjective intent that the other circuits have rejected. The Nevada Supreme Court then relied on that principle to hold that 28 U.S.C. §2680(a) contains a *categorical* "exception … for intentional torts and bad-faith conduct," on the theory that such actions are by definition "unrelated to any plausible policy objective." App.24; *see* App.72 ("Discretionary-function immunity does not apply to intentional and bad-faith tort claims.").

The Nevada Supreme Court's holding is plainly irreconcilable with the majority view. Instead of holding that subjective intent is irrelevant and

intentional torts do not fall outside the discretionary-function immunity rule, the Nevada Supreme Court's rule is that once a plaintiff alleges intentionally tortious or bad-faith conduct, the claim is *automatically* exempt from the discretionary-function immunity rule. The court adopted this rule despite acknowledging that many "[o]ther courts" have "reached differing results." App.19. This conceded split in the lower courts over this Court's precedent clearly warrants certiorari.

As reflected by the substantial wall of precedent from which it diverged, the Nevada Supreme Court's decision is plainly wrong. To begin with, it is foreclosed by this Court's decisions, which make clear that discretionary-function immunity attaches so long as the challenged conduct involves "an element of judgment or choice" and is "based on considerations of public policy." *Berkovitz*, 486 U.S. at 536-37. That test focuses on "the nature of the actions taken and on whether they are susceptible to policy analysis," and "not on the [defendant's] subjective intent" in carrying out the actions. *Gaubert*, 499 U.S. at 325. The Nevada Supreme Court's rule takes exactly the opposite approach: it focuses not on the actions taken but on the defendant's subjective intent in undertaking them. Its rule is also incompatible with the text and purpose of 28 U.S.C. §2680(a). "[T]he plain language" of that provision "states that the FTCA's general waiver of sovereign immunity is inapplicable to '*any* claim' based on a discretionary function." *Gray*, 712 F.2d at 507. The text admits no exceptions, much less the categorical exception created by the Nevada Supreme Court. Moreover, discretionary-function immunity exists to "prevent judicial 'second-guessing'" of policy

decisions entrusted to the other branches of government. *Gaubert*, 499 U.S. at 323. That is why it protects *all* discretionary decisions, "whether or not the discretion involved be abused." 28 U.S.C. §2680(a). It cannot serve that purpose if courts must second-guess the subjective intent behind those discretionary decisions in order to decide whether immunity is warranted.

Finally, the importance of this question confirms the need for certiorari. To begin with, proper construction of 28 U.S.C. §2680(a) would bring this misbegotten litigation—now in its seventeenth year—to a much-deserved end. Investigations conducted by governmental entities, like tax audits, are clearly discretionary functions under the *Gaubert* test. *See, e.g.*, *Sloan v. U.S. Dep't of Hous. & Urban Dev.*, 236 F.3d 756, 762 (D.C. Cir. 2001); *Johnson v. United States*, 680 F. Supp. 508, 514 (E.D.N.Y. 1987); *Foster v. Washoe Cnty.*, 964 P.2d 788, 792 (Nev. 1998). Therefore, absent the Nevada Supreme Court's misguided exception for intentionally tortious or bad-faith conduct, Hyatt's claims—all arising out of FTB's audit—cannot survive. More broadly, government agencies must know the metes and bounds of the federal discretionary-function rule. The wrong interpretation could—as here—drag a government through years of unwarranted litigation, imposing extraordinary institutional costs ultimately footed by taxpayers.

II. This Court Should Grant Review To Determine Whether A State May Refuse To Extend To Sister States Haled Into Its Courts The Same Immunities It Enjoys In Those Courts.

Certiorari is also warranted because, in refusing to treat a California agency as it would a Nevada agency, the Nevada Supreme Court flagrantly violated the principles of full faith and credit and cooperative federalism that this Court clearly set forth in *Hyatt I*. If this Court is to retain the rule of *Nevada v. Hall*, it is imperative that the Court reaffirm that a State haled into another State's court system against its will at least enjoys the same immunities as the host sovereign.

In *Hyatt I*, this Court held that the Full Faith and Credit Clause did not require Nevada to apply California law granting FTB full immunity from Hyatt's claims. Instead, Nevada could lawfully choose to provide FTB only the lesser protections of Nevada law. 538 U.S. at 498-99. Thus, the Court held, Nevada was not required to apply out-of-state law that would afford out-of-state agencies *greater* protections than in-state agencies. In reaching this conclusion, the Court relied on the critical premise—advanced by Hyatt himself—that Nevada sought only to treat an out-of-state agency *equal* to its own agencies. *See, e.g.*, Br. for Resp. at 8, 10, 38-39, *Hyatt I*, 538 U.S. 488 (No. 02-42), 2003 WL 181170; Tr. of Oral Argument at 46:19-20, *Hyatt I*, 538 U.S. 488 (No. 02-42) ("We are treating the other sovereign the way we treat ourselves.").

The Court took that equality premise seriously. In holding that Nevada was not required to treat an out-of-state agency better than an in-state agency, the Court was careful to note that "States' sovereignty interests are not foreign to the full faith and credit command." 538 U.S. at 499. And it signaled a different result should a State "exhibit[] a 'policy of hostility to the public Acts' of a sister State." *Id.* (quoting *Carroll*, 349 U.S. at 413). But by affording equal treatment to in-state and out-of-state government agencies, this Court concluded that the Nevada Supreme Court had "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 decision below eviscerates that premise and transgresses *Hyatt I*'s stated limitations. Instead of treating FTB *equal* to a Nevada agency, this time the Nevada Supreme Court treated FTB distinctly *worse* than a Nevada agency, denying FTB the compensatory damages cap that Nevada law provides for Nevada agencies. And it did so based on reasoning that only a host sovereign could embrace—namely, that there was no reason to subordinate Nevada's policy favoring full compensation for injured Nevadans to the interests of an out-of-state government. In every relevant respect, that determination squarely infringes on the "sovereignty interests" of California that *Hyatt I* preserved. *Id.*

First, the decision plainly demonstrates a "'policy of hostility to the public Acts'" of California. California law provides FTB absolute immunity, while Nevada

law provides its entities only a damages cap. Nev. Rev. Stat. §41.035(1). As *Hyatt I* establishes, it is one thing for Nevada to refuse FTB the absolute immunity it would enjoy under California law, but it is altogether different and impermissibly hostile for Nevada to refuse to apply the immunity granted by California *even to the extent consistent with Nevada law*—that is, to refuse FTB the same protection against unlimited damages that a Nevada entity would enjoy. If Nevada provides only a limited waiver of its own sovereign immunity, it cannot allow its citizens to hale sister sovereigns into court without providing those sovereigns at least as much protection as Nevada affords itself. If denying that equal treatment does not constitute "hostility," it is hard to imagine what does.

Second, the decision below fails to "sensitively appl[y] principles of comity." As the Nevada Supreme Court itself recognized, "[m]ost courts" hold that under comity, "a state should recognize another state's laws to the extent that they do not conflict with its own"—meaning that a State will not treat a sister State worse than itself. App.44 (citing *Solomon v. Supreme Court of Fla.*, 816 A.2d 788 (D.C. 2002); *Schoeberlein v. Purdue Univ.*, 544 N.E.2d 283 (Ill. 1989); *McDonnell v. Illinois*, 748 A.2d 1105 (N.J. 2000); *Sam v. Estate of Sam*, 134 P.3d 761 (N.M. 2006); *Hansen v. Scott*, 687 N.W.2d 247 (N.D. 2004)). Yet the Nevada Supreme Court disregarded these cases and declined to apply comity on the basis of a single decision, *Faulkner v. Univ. of Tenn.*, 627 So. 2d 362 (Ala. 1992)). App.44-45. But that reasoning is doubly flawed. First, *Faulkner* predates *Hyatt I* and its equality premise; more important, *Faulkner*

addressed a materially different claim. There, the out-of-state agency argued that it should receive the immunity its *home state* afforded, which is precisely the argument *Hyatt I* rejected. *See* 627 So. 2d at 366. Here, however, the out-of-state agency argues that it is entitled to the protections that *Nevada* provides to its *own* agencies, which is what *Hyatt I* and broader principles of sovereign immunity and cooperative federalism require.

Third, the decision below clearly failed to display a "healthy regard for California's sovereign status." *Hyatt I*, 538 U.S. at 499. To the contrary, in refusing to apply to California agencies the same damages cap it applies to Nevada agencies, the Nevada Supreme Court manifested a palpable *disregard* for California's sovereign status. Nevada's damages cap recognizes the intrusion upon State sovereignty and proper government administration occasioned by excessive damages awards. *See, e.g.*, *Cnty. of Clark ex rel. Univ. Med. Ctr. v. Upchurch*, 961 P.2d 754, 759 (Nev. 1998) (acknowledging that caps "protect taxpayers and public funds from potentially devastating judgments"). That intrusion is unquestionably present here; the decision below upheld compensatory damages against FTB of at least $1 million (pre-interest), with potentially millions more to come. The only difference is whether California or Nevada taxpayers will foot the bill. The Nevada Supreme Court's unwillingness to see the former as a comparably serious problem demonstrates at least a failure to fully respect a sister sovereign, and at most that the regime envisioned by *Hall* is simply unworkable.

Fourth, and most obviously, the Nevada Supreme Court failed to "rely[] on the contours of Nevada's own sovereign immunity from suit as a benchmark for its analysis." *Hyatt I*, 538 U.S. at 499. Quite the contrary, for if the court had relied on the contours of "Nevada's own sovereign immunity"—which limits the amounts recoverable from the State—it would have applied those principles to FTB. Instead, the Nevada Supreme Court created an *exception* to its own law, holding that whatever caps may apply to Nevada state agencies do not apply to California agencies. While Nevada may have a "policy interest in providing adequate redress to Nevada citizens," App.45, Nevada has already decided how to balance that interest against its competing interest in protecting government officials and the public fisc, and that balance is reflected in the contours of the damages caps that it provides its own agencies. Having set that balance one way for itself, it cannot reset that balance differently for sister States.

At bottom, if this Court is to retain the rule of *Hall*, then the equal-treatment principle embraced in *Hyatt I* must be strictly enforced. If States really can be haled into the courts of their sister States without consent, then the Full Faith and Credit Clause and basic principles of sovereign immunity and cooperative federalism demand that the involuntarily coerced State receive at least the same protections as the host State. Any other rule allows one State to compensate its citizens at the expense of another sovereign's treasury on terms that the first State is unwilling to live with itself. Such a regime, embodied by the decision below, demeans sovereign immunity and poses a "substantial threat to our constitutional

system of cooperative federalism." *Hyatt I*, 538 U.S. at 497. The better course may well be to recognize that *Hall* was a wrong turn—but if not, it is imperative for this Court to make clear that a State must respect other States' sovereign immunity to the same extent as its own.

III. This Court Should Grant Review To Overrule *Nevada v. Hall.*

In *Nevada v. Hall*, this Court held that a State can be sued without its consent in the courts of another State. That holding violates the core principle of sovereign immunity: that "the sovereign cannot be sued in its own courts, *or in any other*, without its consent and permission." *Beers v. Arkansas*, 61 U.S. (20 How.) 527, 529 (1858) (emphasis added). It runs contrary to the intent of the Framers, the structure of the Constitution, and the prior and subsequent, better reasoned sovereign immunity jurisprudence of this Court. And as the facts of this case demonstrate, it demeans the dignity of the States and seriously threatens interstate relations. This case perfectly demonstrates why *Hall* was wrongly decided, and why the Court should grant certiorari to reconsider and overrule that decision.[5]

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[5] FTB challenged the validity of *Hall* before the Nevada Supreme Court. Appellant's Opening Br. at 101 n.80, *Franchise Tax Bd. v. Hyatt*, 335 P.3d 125 (Nev. 2014) (No. 53264). Given that the Nevada Supreme Court was not free to overrule *Hall*, that was more than sufficient to preserve this issue for this Court's review. *See United States v. Williams*, 504 U.S. 36, 41 (1992) (noting that issue is adequately preserved when "pressed or passed upon below"); *cf. Pennhurst State Sch. & Hosp. v.*

In *Hall*, California residents injured in an automobile collision with a University of Nevada employee filed suit in California against the State of Nevada. 440 U.S. at 411-12. A California jury found negligence and awarded over a million dollars in damages. *Id.* at 413. This Court granted certiorari and held that principles of sovereign immunity do not preclude one State from being haled into the courts of another State. *See id.* at 426-27.

In so holding, the Court recognized that, at the Framing, common practice would have made sovereign immunity available to one State in the courts of another. *Id.* at 417. It likewise acknowledged that the debates over ratification of the Constitution, and later Supreme Court decisions, reflected "widespread acceptance of the view that a sovereign state is *never* amenable to suit without its consent." *Id.* at 415-20 (emphasis added). Nevertheless, the Court held that this "widespread" view was only relevant in the context of federal-court (not state-court) jurisdiction, and it refused to "infer[] from the structure of our Constitution" any protection for sovereign immunity beyond the limits on federal-court jurisdiction of Article III and the Eleventh Amendment. *Id.* at 421, 426. The Court therefore held that no "federal rule of law implicit in the Constitution … requires all of the States to adhere to the sovereign-immunity doctrine as it prevailed when the Constitution was adopted." *Id.* at 418. Instead, a State must simply hope that, as "a matter of comity"

Halderman, 465 U.S. 89, 99 n.8 (1984) (sovereign immunity "may be raised at any point").

and "wise policy," a sister State will not subject it to suit. *Id.* at 425-26.

Justice Blackmun dissented, joined by Chief Justice Burger and Justice Rehnquist. Unlike the majority, those Justices would have held that the Constitution implicitly embodied a "doctrine of interstate sovereign immunity" as an "essential component of federalism." *Id.* at 430 (Blackmun, J., dissenting). Justice Rehnquist also separately dissented, joined by Chief Justice Burger; he explained that the Court's decision "work[ed] a fundamental readjustment of interstate relationships which is impossible to reconcile … with express holdings of this Court and the logic of the constitutional plan itself." *Id.* at 432-33 (Rehnquist, J., dissenting).

Hall was mistaken when decided, and subsequent developments have undermined its doctrinal underpinnings. In particular, a whole line of this Court's subsequent precedents have rejected the *Hall* majority's conception of the Eleventh Amendment as concerned only about federal court jurisdiction, and have instead explained that the Eleventh Amendment reflected the Framers' original understanding in ways that have implications for proceedings in state courts, *see Alden v. Maine*, 527 U.S. 706, 712 (1999), and even federal administrative agencies, *Fed. Mar. Comm'n v. S.C. State Ports Auth.* (*FMC*), 535 U.S. 743, 747 (2002). In short, subsequent developments have vindicated the views of the *Hall* dissenters in ways that make *Hall*'s reconsideration long overdue.

To begin with, the rule of *Hall* cannot be reconciled with any fair reading of history. As the *Hall*

majority conceded, the Framers would clearly have acknowledged the sovereign immunity of one State in the courts of another. See 440 U.S. at 417, 420. Indeed, a prominent Pennsylvania case from 1781 determined that an individual could not use the state courts of Pennsylvania to attach property belonging to Virginia. *Nathan v. Virginia*, 1 U.S. (1 Dall.) 77 (Pa. Ct. C.P. 1781); *see Hall*, 440 U.S. at 435 (Rehnquist, J., dissenting). While the ratification debates focused (naturally enough) on sovereign immunity in the new federal courts, the language they used leaves no doubt that the same immunity was recognized in state courts. *See, e.g.*, The Federalist No. 81, at 487 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("It is *inherent in the nature of sovereignty* not to be amenable to the suit of an individual without its consent." (emphasis altered)); *see also* Ann Woolhandler, *Interstate Sovereign Immunity*, 2006 Sup. Ct. Rev. 249, 252-63. The "only reason" why interstate sovereign immunity was not specifically discussed during the ratification debates "is that it was too obvious to deserve mention." *Hall*, 440 U.S. at 431 (Blackmun, J., dissenting).

The Eleventh Amendment confirms the Framers' understanding. In *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), this Court held that a private citizen of one State could sue another State in federal court. The Eleventh Amendment was adopted as an immediate and outraged response, to restore to the States their "immunity from private suits." *Alden*, 527 U.S. at 724. While the Amendment does not explicitly address interstate sovereign immunity, it clearly shows that such immunity was assumed: "If the Framers were indeed concerned lest the States be

haled before the federal courts—as the courts of a 'higher sovereign'—how much more must they have reprehended the notion of a State's being haled before the courts of a sister State." *Hall*, 440 U.S. at 431 (Blackmun, J., dissenting) (citation omitted). After all, the federal courts were intended to be a neutral forum for interstate disputes. A State would surely *rather* be tried in that neutral federal forum than before a partisan jury and judge in another State's courts. By removing the option of suit in federal forum while leaving the worse option of suit in another State's courts, *Hall* "makes nonsense of the effort embodied in the Eleventh Amendment to preserve the doctrine of sovereign immunity." *Id.* at 441 (Rehnquist, J., dissenting).

Hall likewise conflicts with this Court's precedents from both before and after the decision. Before *Hall*, this Court repeatedly indicated that State sovereign immunity extended to "any court in this country." *Cunningham v. Macon & Brunswick R.R.*, 109 U.S. 446, 451 (1883); *Beers*, 61 U.S. (20 How.) at 529; *see also In re New York*, 256 U.S. 490, 497 (1921) (noting the "fundamental rule of jurisprudence" that "a state may not be sued without its consent").[6] And since *Hall*, this Court has rejected almost every premise that underlies that decision. *Hall* refused to recognize sovereign immunity as a basic assumption

[6] The only case on which *Hall* relied in holding otherwise was *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812). But even that case recognized "a class of cases in which every sovereign is understood" to grant immunity to foreign sovereigns, based on the principle that "[a] foreign sovereign is not understood as intending to subject [itself] to a jurisdiction incompatible with [its] dignity." *Id.* at 137.

of the Constitution, 440 U.S. at 426; subsequent decisions, by contrast, have repeatedly treated sovereign immunity as a "fundamental postulate[] implicit in the constitutional design," *Alden*, 527 U.S. at 729, and a "presupposition of our constitutional structure," *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779 (1991); *see also, e.g.*, *Va. Office for Protection & Advocacy v. Stewart*, 131 S. Ct. 1632, 1637-38 (2011); *FMC*, 535 U.S. at 751-53; *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996). *Hall* effectively limited sovereign immunity to the words of Article III and the Eleventh Amendment, 440 U.S. at 421, 424-27; subsequent cases, by contrast, have recognized that the Constitution implicitly protects principles of sovereign immunity that go beyond its literal text. *See, e.g.*, *FMC*, 535 U.S. at 753; *Alden*, 527 U.S. at 728-29; *Blatchford*, 501 U.S. at 779. *Hall* casually departed from the Framing-era view of sovereign immunity; subsequent cases have consistently relied on the Framing-era view, and have interpreted sovereign immunity to prohibit "any proceedings against the States that were 'anomalous and unheard of when the Constitution was adopted.'" *FMC*, 535 U.S. at 756 (quoting *Hans v. Louisiana*, 134 U.S. 1, 18 (1890)). In short, while *Hall* was wrong the day it was decided, a host of subsequent, better reasoned decisions have fatally undermined its doctrinal underpinnings.

To be sure, as this Court has refined its sovereign immunity jurisprudence, it has occasionally had the felt need to distinguish *Hall*. For example, in recognizing a State's immunity from suit in its own courts even for a federal cause of action, *Alden* rejected the federal government's extensive reliance on *Hall*

and found *Hall* distinguishable. But nothing in *Alden* suggests that *Hall* was correct. To the contrary, *Alden*'s understanding of the constitutional underpinnings of sovereign immunity is irreconcilable with the *Hall* majority's view of the Eleventh Amendment as divorced from broader sovereign immunity principles. Indeed, based on *Alden*'s understanding of sovereign immunity, not even the *Hall* majority could credibly argue that it is permissible for a State to be haled into the courts of another State absent consent.

Not only does *Hall* rest on flawed doctrinal premises that have been eliminated by subsequent precedent; it has proven practically unworkable as well. Indeed, this Court need look no further than the facts of this case to understand why *Hall* must go. From its filing to the first day of trial, Hyatt's suit dragged California through ten years of litigation—including a previous trip to this Court—and untold financial and administrative burdens. Once the case finally reached trial, the Nevada jury below was happy to find for a fellow Nevadan on his questionable tort claims against the California tax authorities. They were even happier to award their fellow Nevadan some $388 million in damages, which the Nevada trial court calmly raised to over $490 million after costs and interest. Since trial, California has spent another seven years fighting that verdict, and it faces the prospect of yet another trial on remand if this Court denies review.

Perhaps worst of all, this suit has encouraged other Nevada residents to file similar complaints, raising the prospect of similar litigation in endless

repetition. *See, e.g.*, Complaint, *Schroeder v. California*, No. 14-2613 (Dist. Ct. Nev. filed Dec. 18, 2014) (alleging "extreme and outrageously tortious conduct" by FTB). These suits are highly regrettable yet, given *Hall*, entirely unsurprising. Sovereign governments undertake a number of sovereign responsibilities that have been unpopular as long as there have been governments. Taxation is near the top of that list. Sovereign immunity allows the sovereign to undertake such activities without the constant threat of litigation. And while sovereigns are a tempting target for litigation in any circumstance, a jury might at least have some sense that a large verdict against the sovereign will ultimately be footed by taxpayers. Thus, a foreign sovereign stripped of sovereign immunity and haled into courts by citizens of a foreign State is a uniquely vulnerable target. What is more, an increasingly mobile citizenry creates ample opportunities for suits like this one. Indeed, this case has already been used to encourage California residents to move to Nevada for tax-avoidance purposes, since it "should temper the FTB's aggressiveness in pursuing cases against those disclaiming California residency." David M. Grant, *Moving From Gold to Silver: Becoming a Nevada Resident*, Nev. Law., Jan. 2015, at 22, 25 n.9.

And make no mistake, the threat here extends beyond the State's fiscal and dignity interests. If FTB can be found liable for fraud and intentional infliction of emotional distress arising out of its "power to … enforce income tax laws," *Hyatt I*, 538 U.S. at 498, it will undoubtedly be forced to alter how it conducts this "essential attribute of sovereignty." *Id.* But that is precisely why sovereign immunity has been extended

to States sued in their own courts and the federal courts. *See Alden*, 527 U.S. at 750-51 (observing that "[p]rivate suits against nonconsenting States" may "threaten the financial integrity of the States" and impose "substantial costs [upon] the autonomy, the decisionmaking ability, and the sovereign capacity of the States"). There is no principled reason why a State must endure these same burdens because it has been sued in another State's courts as opposed to its own courts or the federal courts.

In short, this case emphatically illustrates the "severe strains on our system of cooperative federalism" against which the *Hall* dissenters warned. *Hall*, 440 U.S. 429-30 (Blackmun, J., dissenting). If the Framers would have "reprehended the notion of a State's being haled before the courts of a sister State," *id.* at 431, a suit like this one would have left them aghast. This case firmly demonstrates the obvious flaws of *Hall* and the virtues of applying the sovereign immunity principles this Court has repeatedly recognized both before and after *Hall*.

But the Court need not take FTB's word for it: *Nevada itself* recently asked this Court to overrule *Hall* after being haled into the *California* courts against its will. *See* Petition for Writ of Certiorari 12 n.3, 17 n.8, 19, *Nevada v. City & Cnty. of S.F.*, 2015 WL 981686 (U.S. Mar. 4, 2015) (No. 14-1073). The spectacle of two States being sued in each other's courts—each unsuccessfully invoking sovereign immunity—confirms the *Hall* dissenters' prediction that discarding interstate sovereign immunity would substitute a race-to-the-bottom for cooperative federalism. *See* 440 U.S. at 429-30 (Blackmun, J.).

And it underscores the absurdity and perniciousness of *Hall* in practice.

Needless to say, this Court does not reconsider its precedents lightly. But virtually every *stare decisis* consideration militates against retaining *Hall*. *Hall* set no substantive rules that "serve as a guide to lawful behavior," *United States v. Gaudin*, 515 U.S. 506, 521 (1995), and *Hall* engenders no meaningful reliance interests. Most important, *stare decisis* cannot save a decision that is both practically unworkable and "has been proved manifestly erroneous, and its underpinnings eroded, by subsequent decisions of this Court." *Id.* At a bare minimum, the continuing validity of *Hall* is a question that merits this Court's plenary consideration.

* * *

Each of the questions presented in this petition independently warrants certiorari. But it bears emphasizing that they are interrelated as well: each concerns the extent to which one State is at the mercy of another State's courts. Under fundamental principles of sovereign immunity and cooperative federalism, FTB should have never been subjected to suit in the Nevada courts in the first place. To the extent *Hall* holds otherwise, it should be overruled. But if the Court will not revisit *Hall*, then it becomes that much more important to reaffirm that the discretionary-function standard is more than a pleading obstacle, and that States may not afford foreign sovereigns less immunity than they grant themselves.

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted,

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March 23, 2015

APPENDIX

TABLE OF APPENDICES

Appendix A

IN THE SUPREME COURT
OF THE STATE OF NEVADA

No. 53264

FRANCHISE TAX BOARD OF
THE STATE OF CALIFORNIA,

Appellant / Cross-Respondent,

v.

GILBERT P. HYATT,

Respondent / Cross-Appellant.

Filed: September 18, 2014

Appeal and cross-appeal from a district court judgment on a jury verdict in a tort action and from a post-judgment order awarding costs. Eighth Judicial District Court, Clark County; Jessie Elizabeth Walsh, Judge.

Affirmed in part, reversed in part, and remanded.

BEFORE THE COURT EN BANC.[1]

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

OPINION

By the Court, HARDESTY, J.:

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

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

a matter of law, and thus, the judgment in his favor on these claims is reversed.

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

In connection with these causes of action, we must address whether FTB is entitled to a statutory cap on the amount of damages that Hyatt may recover from FTB on the fraud and intentional infliction of emotional distress claims under comity. We conclude that Nevada's policy interest in providing adequate redress to its citizens outweighs providing FTB a statutory cap on damages under comity, and therefore, we affirm the $1,085,281.56 of special damages awarded to Hyatt on his fraud cause of action and conclude that there is no statutory cap on the amount of damages that may be awarded on remand on the intentional infliction of emotional distress claim.

We also take this opportunity to address as a matter of first impression whether, based on comity, it

is reasonable to provide FTB with the same protection of California law, to the extent that it does not conflict with Nevada law, to grant FTB immunity from punitive damages. Because punitive damages would not be available against a Nevada government entity, we hold, under comity principles, that FTB is immune from punitive damages. Thus, we reverse that portion of the district court's judgment awarding Hyatt punitive damages.

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

FACTS AND PROCEDURAL HISTORY

California proceedings

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

The 1991 audit began when Hyatt was sent notice that he was being audited. This notification included an information request form that required Hyatt to

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

The audit involved written communications and interviews. FTB sent over 100 letters and demands for information to third parties including banks, utility companies, newspapers (to learn if Hyatt had subscriptions), medical providers, Hyatt's attorneys, two Japanese companies that held licenses to Hyatt's patent (inquiring about payments to Hyatt), and other individuals and entities that Hyatt had identified as contacts. Many, but not all, of the letters and demands for information contained Hyatt's social security number or home address or both. FTB also requested information and documents directly from Hyatt. Interviews were conducted and signed statements were obtained from three of Hyatt's relatives—his ex-wife, his brother, and his daughter—all of whom were estranged from Hyatt during the relevant period in

question, except for a short time when Hyatt and his daughter attempted to reconcile their relationship. No relatives with whom Hyatt had good relations, including his son, were ever interviewed even though Hyatt had identified them as contacts. FTB sent auditors to Hyatt's neighborhood in California and to various locations in Las Vegas in search of information.

Upon completion of the 1991 audit, FTB concluded that Hyatt did not move from California to Las Vegas in September 1991, as he had stated, but rather, that Hyatt had moved in April 1992. FTB further concluded that Hyatt had staged the earlier move to Nevada by renting an apartment, obtaining a driver's license, insurance, bank account, and registering to vote, all in an effort to avoid state income tax liability on his patent licensing. FTB further determined that the sale of Hyatt's California home to his work assistant was a sham. A detailed explanation of what factors FTB considered in reaching its conclusions was provided, which in addition to the above, included comparing contacts between Nevada and California, banking activity in the two states, evidence of Hyatt's location in the two states during the relevant period, and professionals whom he employed in the two states. Based on these findings, FTB determined that Hyatt owed the state of California approximately $1.8 million in additional state income taxes and that penalties against Hyatt in the amount of $1.4 million were warranted. These amounts, coupled with $1.2 million in interest, resulted in a total assessment of $4.5 million.

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

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

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,

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

invasion of privacy—publicity of private facts, invasion of privacy—false light, intentional infliction of emotional distress, fraud, breach of confidential relationship, and abuse of process. Hyatt's lawsuit was grounded on his allegations that FTB conducted unfair audits that amounted to FTB "seeking to trump up a tax claim against him or attempt[ing] to extort him," that FTB's audits were "goal-oriented," that the audits were conducted to improve FTB's tax assessment numbers, and that the penalties FTB imposed against Hyatt were intended "to better bargain for and position the case to settle."

Early in the litigation, FTB filed a motion for partial summary judgment challenging the Nevada district court's jurisdiction over Hyatt's declaratory relief cause of action. The district court agreed on the basis that the timing of Hyatt's move from California to Nevada and whether FTB properly assessed taxes and penalties against Hyatt should be resolved in the ongoing California administrative process. Accordingly, the district 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.

FTB also moved the district court for partial summary judgment to preclude Hyatt from seeking

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

recovery for alleged economic damages. As part of its audit investigation, FTB sent letters to two Japanese companies that had licensing agreements with Hyatt requesting payment information between Hyatt and the companies. Included with the letters were copies of the licensing agreements between Hyatt and the Japanese companies. Hyatt asserted that those documents were confidential and that when FTB sent the documents to the companies, the companies were made aware that Hyatt was under investigation. Based on this disclosure, Hyatt theorized that the companies would have then notified the Japanese government, who would in turn notify other Japanese businesses that Hyatt was under investigation. Hyatt claimed that this ultimately ended Hyatt's patent-licensing business in Japan. Hyatt's evidence in support of these allegations included the fact that FTB sent the letters, that the two businesses sent responses, that Hyatt had no patent-licensing income after this occurred, and expert testimony that this chain of events would likely have occurred in the Japanese business culture. FTB argued that Hyatt's evidence was speculative and insufficient to adequately support his claim. Hyatt argued that he had sufficient circumstantial evidence to present the issue to the jury. The district court granted FTB's motion for partial summary judgment, concluding that Hyatt had offered no admissible evidence to support that the theorized chain of events actually occurred and, as a result, his evidence was too speculative to overcome the summary judgment motion.

One other relevant proceeding that bears discussion in this appeal concerns two original writ

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

This court's ruling in the writ petitions was appealed to and upheld by the United States Supreme Court. *Franchise Tax Bd. of Cal. v. Hyatt,* 538 U.S. 488 (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. The Court upheld this court's determination that Nevada was not required to give FTB full immunity *Id.* at 499. 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 four months. The jury found in favor of Hyatt on all intentional tort causes of action and returned special verdicts awarding him damages in the amount of $85 million for emotional distress, $52 million for invasion of privacy, $1,085,281.56 as special damages for fraud, and $250 million in punitive damages. Following the trial, Hyatt sought prejudgment interest and moved the district court for costs. The district court assigned the motion to a special master who, after 15 months of discovery and further motion practice, issued a recommendation that Hyatt be awarded approximately $2.5 million in costs. The district court adopted the master's recommendation.

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

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[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,

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 FTB 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

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Oklahoma, Tennessee, Vermont, Virginia, and Washington) to file amicus curiae briefs.

of the State ... or of any ... employee ..., whether or not the discretion involved is abused." NRS 41.032(2). By adopting discretionary-function immunity, our Legislature has placed a limit on its waiver of sovereign immunity. Discretionary-function immunity is grounded in separation of powers concerns and is designed to preclude the judicial branch from "second-guessing," in a tort action, legislative and executive branch decisions that are based on "social, economic, and political policy." *Martinez v. Maruszczak,* 123 Nev. 433, 446, 168 P.3d 720, 729 (2007) (internal quotations omitted); *see also Bailey v. United States,* 623 F.3d 855, 860 (9th Cir. 2010). FTB initially argues on appeal that immunity protects it from Hyatt's intentional tort causes of action based on the application of discretionary-function immunity and comity as recognized in Nevada.

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.,* 544 N.E.2d 283, 285 (Ill. 1989); *McDonnell v. Ill.,* 748 A.2d 1105, 1107 (N.J. 2000); *Sam v. Estate of Sam,* 134 P.3d 761, 764-66 (N.M. 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 (1988), and *United States v. Gaubert,* 499 U.S. 315 (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 case involved negligent processing of a workers' compensation claim. Falline injured his back at work and later required surgery. *Falline,* 107 Nev. at 1006, 823 P.2d at 890. Following the surgery, while rising from a seated position, Falline experienced severe lower-back pain. *Id.* at 1006-07, 823 P.2d at 890. Falline's doctor concluded that Falline's back pain was related to his work injury. *Id.* at 1007, 823 P.2d at 890. The self-insured employer, however, refused to provide workers' compensation benefits beyond those awarded for the work injury because it asserted that an intervening injury had occurred. *Id.* After exhausting his administrative remedies, it was determined that Falline was entitled to workers' compensation benefits for both injuries. *Id.* He was nevertheless denied benefits. *Id.* Falline brought suit against the employer for negligence and bad faith in the processing of his workers' compensation claims. *Id.* at 1006, 823 P.2d at 889-90. The district court dismissed his causes of action, and Falline appealed, arguing that dismissal was improper.

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

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

Following *Falline,* this court adopted, in *Martinez,* the federal test for determining whether discretionary-function immunity applies. 123 Nev. at 446, 168 P.3d at 729. Under the two-part federal test, the first step is to determine whether the government

conduct involves judgment or choice. *Id.* at 446-47, 168 P.3d at 729. If a statute, regulation, or policy requires the government employee to follow a specific course of action for which the employee has no option but to comply with the directive, and the employee fails to follow this directive, the discretionary-immunity exception does not apply to the employee's action because the employee is not acting with individual judgment or choice. *Gaubert,* 499 U.S. at 322. 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. "[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. 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. The second step focuses on whether the conduct undertaken is a policymaking decision regardless of the employee's subjective intent when he or she acted. *Martinez,* 123 Nev. at 445, 168 P.3d at 728.

FTB argues that the federal test abolished the *Falline* intentional tort or bad-faith misconduct exception to discretionary-function immunity because the federal test is objective, not subjective. Hyatt asserts that an 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

[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

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.

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

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

On appeal, the *Franklin Savings* court explained that plaintiffs did not dispute that the conservator had the authority and discretion to sell assets, but the argument was whether immunity for decisions that were discretionary could be avoided because plaintiffs alleged that the conduct was intentionally done to

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cites to *Palay* for other unrelated issues, it does not address its holding in connection with the holding in *Palay*.

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 state of mind in performing facially authorized acts," *id.* at 1140, and to conclude otherwise would mean that the immunity could not effectively function. *Id.* at 1140-41.

Notwithstanding its conclusion, the *Franklin Savings* court noted that such a holding had "one potentially troubling effect"; it created an "irrebuttable presumption" that government employees try to perform all discretionary functions in good faith and that the court's holding would preclude relief in cases where an official committed intentional or bad-faith conduct. *Id.* at 1141. Such a result was necessary, the court reasoned, because providing

immunity for employees, so that they do not have to live and act in constant fear of litigation in response to their decisions, outweighs providing relief in the few instances of intentionally wrongful conduct. *Id.* at 1141-42. Thus, the *Franklin Savings* court broadly applied the Supreme Court rule that an actor's subjective intent should not be considered. This broad application led the court to conclude that a bad-faith claim was not sufficient to overcome discretionary-function immunity's application.

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

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

In resolving the appeal, the Court of Appeals concluded that the complaint could be read to mean

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

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

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

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. *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* 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.

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

The tort of invasion of privacy embraces four different tort actions: "(a) unreasonable intrusion

[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.

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

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.

Intrusion upon seclusion and public disclosure of private facts are torts grounded in a plaintiff's objective expectation of privacy. *PETA,* 111 Nev. at 630, 631, 895 P.2d at 1279 (recognizing that the plaintiff must actually expect solitude or seclusion, and the plaintiffs expectation of privacy must be

objectively reasonable); *Montesano v. Donrey Media Grp.,* 99 Nev. 644, 649, 668 P.2d 1081, 1084 (1983) (stating that the public disclosure of a private fact must be "offensive and objectionable to a reasonable person of ordinary sensibilities"); *see also* Restatement (Second) of Torts § 652B, 652D (1977). One defense to invasion of privacy torts, referred to as the public records defense, arises when a defendant can show that the disclosed information is contained in a court's official records. *Montesano,* 99 Nev. at 649, 668 P.2d at 1085. Such materials are public facts, *id.,* and a defendant cannot be liable for disclosing information about a plaintiff that was already public. Restatement (Second) of Torts § 652D cmt. b (1977).

Here, the record shows that Hyatt's name, address, and social security number had been publicly disclosed on several occasions, before FTB's disclosures occurred, in old court documents from his divorce proceedings and in a probate case. Hyatt also disclosed the information himself when he made the information available in various business license applications completed by Hyatt. Hyatt maintains that these earlier public disclosures were from long ago, and that the disclosures were only in a limited number of documents, and therefore, the information should not be considered as part of the public domain. Hyatt asserts that this results in his objective expectation of privacy in the information being preserved.

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]

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]

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[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

[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

False light invasion of privacy

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 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.

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claims that are not cogently argued or supported by relevant authority).

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,* 866 N.E.2d 1051 (Ohio 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.,* 320 S.E.2d 70, 83 (W. Va. 1984) (internal quotations omitted). By contrast, false light invasion of privacy protects one's subjective interest in freedom from injury to the person's right to be left alone. *Id.* Therefore, according to these courts there are situations (being falsely portrayed as a victim of a crime, such as sexual assault, or being falsely identified as having a serious illness, or being portrayed as destitute) in which a person may be placed in a harmful false light even though it does not rise to the level of defamation. *Welling,* 866 N.E.2d at 1055-57; *West,* 53 S.W.3d at 646. Without recognizing the separate false light

[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)).

privacy tort, such an individual would be left without a remedy. *West,* 53 S.W.3d at 646.

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.,* 312 S.E.2d 405 (N.C. 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

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

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

because his audit cases had not reached the final challenge stage like other cases on the roster.

FTB's contacts with third parties' through letters, demands for information, or in person was not highly offensive to a reasonable person and did not falsely portray Hyatt as a "tax cheat." In contacting third parties, FTB was merely conducting its routine audit investigations.

The record before us reveals that no evidence presented by Hyatt in the underlying suit supported the jury's conclusion that FTB portrayed Hyatt in a false light. *See Prabhu,* 112 Nev. at 1543, 930 P.2d at 107. Because Hyatt has failed to establish a false light claim, we reverse the district court's judgment on this claim.[10]

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

A breach of confidential relationship cause of action arises "by reason of kinship or professional, business, or social relationships between the parties." *Perry v. Jordan,* 111 Nev. 943, 947, 900 P.2d 335, 337 (1995). On appeal, FTB contends that Hyatt could not prevail as a matter of law on his claim for breach of a confidential relationship because he cannot establish the requisite confidential relationship. In the underlying case, the district court denied FTB's

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

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]

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 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

[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*.

recognized a claim for breach of a confidential relationship. *Id.*

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

FTB contends that the relationship between a tax auditor and the person being audited does not create the necessary relationship articulated in *Perry* to establish a breach of confidential relationship cause of action. In support of this proposition, FTB cites to *Johnson v. Sawyer,* which was heard by the Fifth Circuit Court of Appeals. 47 F.3d 716 (5th Cir. 1995) (en banc). In *Johnson,* the plaintiff sought damages from press releases by the Internal Revenue Service (IRS) based on a conviction for filing a fraudulent tax return. *Id.* at 718. Johnson was criminally charged based on erroneous tax returns. *Id.* at 718-19. He eventually pleaded guilty to a reduced charge as part of a plea bargain. *Id.* at 718-20. Following the plea agreement, two press releases were issued that contained improper and private information about Johnson. *Id.* at 720-21. Johnson filed suit against the

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

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

But in conducting the audits, FTB was not required to act with Hyatt's interests in mind; rather, it had a duty to proceed on behalf of the state of California's interest. *Johnson,* 47 F.3d at 738 n.47. Moreover, the parties' relationship was not akin to a family or business relationship. *Perry,* 111 Nev. at 947, 900 P.2d at 337-38. Hyatt argues for a broad range of relationships that can meet the requirement under *Perry,* but we reject this contention. *Perry* does not provide for so expansive a relationship as Hyatt asks us to recognize as sufficient to establish a claim

for a breach of confidential relationship.[12] Thus, FTB and Hyatt's relationship cannot form the basis for a breach of a confidential relationship cause of action, and this cause of action fails as a matter of law. The district court judgment in Hyatt's favor on this claim is reversed.

Abuse of process

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.'" *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

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[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 (Or. 1985).

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,* 113 Cal. Rptr. 2d 625, 644 (Ct. App. 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

To prove a fraud claim, the plaintiff must show that the defendant made a false representation that the defendant knew or believed was false, that the defendant intended to persuade the plaintiff to act or not act based on the representation, and that the plaintiff had reason to rely on the representation and suffered damages. *Bulbman, Inc. v. Nev. Bell,* 108 Nev. 105, 111, 825 P.2d 588, 592 (1992). It is the jury's role to make findings on the factors necessary to establish a fraud claim. *Powers v. United Servs. Auto. Ass'n,* 114 Nev. 690, 697-98, 962 P.2d 596, 600-01 (1998). This court will generally not disturb a jury's verdict that is supported by substantial evidence.

Taylor v. Thunder, 116 Nev. 968, 974, 13 P.3d 43, 46 (2000). Substantial evidence is defined as "evidence that a reasonable mind might accept as adequate to support a conclusion." *Winchell v. Schiff,* 124 Nev. 938, 944, 193 P.3d 946, 950 (2008) (internal quotations omitted).

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

The record before us shows that a reasonable mind could conclude that FTB made specific representations to Hyatt that it intended for Hyatt to rely on, but which it did not intend to fully meet. FTB

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

The evidence presented sufficiently showed FTB's improper motives in conducting Hyatt's audits, and a reasonable mind could conclude that FTB made fraudulent representations, that it knew the

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

Fraud damages

Given our affirmance of the district court's judgment on the jury verdict in Hyatt's favor on his

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[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 claim, we turn to FTB's challenge as to the special damages awarded Hyatt on his fraud claim.[15] In doing so, we address whether FTB is entitled to statutory caps on the amount of damages recoverable to the same extent that a Nevada government agency would receive statutory caps under principles of comity.[16] NRS 41.035 provides a statutory cap on liability damages in tort actions "against a present or 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

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[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).

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.

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,* 134 P.3d 761 (N.M. 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 (1979), and *Franchise Tax Board of California v. Hyatt,* 538 U.S. 488 (2003). *Sam,* 134 P.3d at 765-66. The *Sam* court stated that "[b]oth these cases stand for the principle that a forum state is not required to extend immunity to other states sued in its courts, but the forum state should extend immunity as a matter of comity if doing so will not violate the forum state's public policies." *Id.* at 765. Based on this framework for comity, the *Sam* court concluded that Arizona should be entitled to the statute of limitations for government agencies that New Mexico would provide to its government agencies. Most courts appear to follow FTB's argument regarding how comity applies and that a state should recognize another state's laws to the extent that they do not conflict with its own. *See generally Solomon v. Supreme Court of Fla.,* 816 A.2d 788, 790 (D.C. 2002); *Schoeberlein v. Purdue Univ.,* 544 N.E.2d 283, 285 (Ill. 1989); *McDonnell v. Illinois,* 748 A.2d 1105, 1107 (N.J. 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 Alabama. We conclude that comity is not such an overriding policy in this instance.

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

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

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

This state's policy interest in providing adequate redress to Nevada citizens is paramount to providing FTB a statutory cap on damages under comity. Therefore, as we conclude that allowing FTB a statutory cap would violate this state's public policy in this area, comity does not require this court to grant

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

Intentional infliction of emotional distress

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

To recover on a claim for IIED, a plaintiff must prove "(1) extreme and outrageous conduct on the part of the defendant; (2) intent to cause emotional distress or reckless disregard for causing emotional distress;

(3) that the plaintiff actually suffered extreme or severe emotional distress; and (4) causation." *Miller v. Jones,* 114 Nev. 1291, 1299-1300, 970 P.2d 571, 577 (1998); *see also Barmettler v. Reno Air, Inc.,* 114 Nev. 441, 447, 956 P.2d 1382, 1386 (1998). A plaintiff must set forth "objectively verifiable indicia'" to establish that the plaintiff "actually suffered extreme or severe emotional distress." *Miller,* 114 Nev. at 1300, 970 P.2d at 577.

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

The Restatement (Second) of Torts § 46 (1977), in comments j and k, provide for a sliding-scale approach in which the increased 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); *Ruckman-Peirson v. Brannon,* 822 N.E.2d 830, 840-41 (Ohio Ct. App. 2004) (stating that medical evidence is not required, but also holding that something more than just the plaintiffs own testimony was necessary); *see also Dixon v. Denny's, Inc.,* 957 F. Supp. 792, 796 (E.D. Va. 1996) (stating that plaintiff failed to establish an IIED claim because plaintiff did not provide objective evidence, such as medical bills "or even the testimony of friends or family"). Additionally, in *Farmers Home Mutual Insurance Co. v. Fiscus,* 102 Nev. 371, 725 P.2d 234

(1986), this court upheld an award for mental and emotional distress even though the plaintiffs' evidence did not include medical evidence or testimony. *Id.* at 374-75, 725 P.2d at 236. While not specifically addressing an IIED claim, the *Fiscus* court addressed the recovery of damages for mental and emotional distress that arose from an insurance company's unfair settlement practices when the insurance company denied plaintiffs' insurance claim after their home had flooded. *Id.* at 373, 725 P.2d at 235. In support of the claim for emotional and mental distress damages, the husband plaintiff testified that he and his wife lost the majority of their personal possessions and that their house was uninhabitable, that because the claim had been rejected they lacked the money needed to repair their home and the house was condemned, and after meeting with the insurance company's representative the wife had an emotional breakdown. *Id.* at 374, 725 P.2d at 236. This court upheld the award of damages, concluding that the above evidence was sufficient to prove that plaintiffs had suffered mental and emotional distress. *Id.* at 374-75, 725 P.2d at 236. In so holding, this court rejected the insurance company's argument that there was insufficient proof of mental and emotional distress because there was no medical evidence or independent witness testimony. *Id.*

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.

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, and therefore less in the way of proof as to emotional distress suffered by Hyatt is necessary.

In support of his IIED claim, Hyatt presented testimony from three different people as to the how the treatment from FTB caused Hyatt emotional distress and physically affected him. This included testimony of how Hyatt's mood changed dramatically, that he became distant and much less involved in various activities, started drinking heavily, suffered severe migraines and had stomach problems, and became obsessed with the legal issues involving FTB. We conclude that this evidence, in connection with the severe treatment experienced by Hyatt, provided sufficient evidence from which a jury could reasonably determine that Hyatt suffered severe emotional

distress.[17] Accordingly, we affirm the judgment in favor of Hyatt on this claim as to liability. As discussed below, however, we reverse the award of damages on this claim and remand for a new trial as to damages on this claim only.

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

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.

On appeal, FTB argues that the district court erroneously allowed evidence and a jury instruction

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[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.

[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.

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

FTB argues that the district court violated its jurisdictional restriction governing this case, because by allowing Hyatt's claims to go forward based on the evidence presented at trial, the jury was in effect required to make findings on Hyatt's residency and whether he owed taxes. FTB points to the testimony of a number of Hyatt's witnesses that focused on whether the audits' results were correct: (1) Hyatt's tax accountant and tax attorney, who were his representatives during the audits, testified to their cooperation with FTB and that they did not attempt to intimidate the auditor to refute two bases for the imposition of penalties by FTB for lack of cooperation and intimidation; (2) an expert tax attorney witness testified about Hyatt's representatives' cooperation during the audits to refute the lack of cooperation allegation; (3) an expert witness testified as to the lifestyles of wealthy people to refute the allegation

that Hyatt's actions of living in a low-income apartment building in Las Vegas and having no security were "implausible behaviors"; 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 FTB is precisely what this case was not allowed to address. The testimony does not show wrongful intent or bad faith without first concluding that the decisions were wrong, unless it was proven that FTB knew wealthy individuals' tendencies, that they applied to all wealthy individuals, and that FTB ignored them. None of this was established, and thus, the testimony only went to the audits' correctness, which was not allowed. These are instances where the evidence went solely to challenging whether FTB made the right decisions in its audits. As such, it was an abuse of discretion for the district court to permit this evidence to be admitted. *Hansen,* 115 Nev. at 27, 974 P.2d at 1160.

Jury instruction permitting consideration of audits' determinations

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 instruction was read as Jury Instruction 24. To correct the error, the district court read a revised Jury Instruction 24:

> You have heard evidence during the course of this trial that may be related to the determinations and conclusions reached by FTB regarding Mr. Hyatt's residency and tax

assessments. You are not permitted to make any determinations regarding Mr. Hyatt's residency, such as when he became or did not become a resident of Nevada. Likewise, you are not permitted to make any determinations related to the propriety of the tax assessments issued by FTB against Mr. Hyatt, including but not limited to, the correctness or incorrectness of the amount of taxes assessed, or the determinations of FTB to assess Mr. Hyatt penalties and/or interest on those tax assessments.

The residency and tax assessment determinations, and all factual and legal issues related thereto, are the subject matter of a separate administrative process between Mr. Hyatt and FTB in the State of California and will be resolved in that administrative process. You are not to concern yourself with those issues.

Counsel for the FTB read and presented argument from the inaccurate Jury Instruction No. 24. To the extent FTB's counsel's arguments cited and relied on statements that are not contained in the correct Jury Instruction No. 24, they are stricken and you must disregard them. You are not to consider the stricken statements and arguments in your deliberations. *There is nothing in the correct Jury Instruction No. 24 that would prevent you during your deliberations from considering the appropriateness or correctness of the analysis*

> *conducted by the FTB employees in reaching its residency determination and conclusion. There is nothing in Jury Instruction No. 24 that would prevent Malcolm Jumulet from rendering an opinion about the appropriateness or correctness of the analysis conducted by FTB employees in reaching its residency determinations and conclusions.*

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

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

Exclusion of evidence to rebut adverse inference

FTB also challenges the district court's exclusion of evidence that it sought to introduce in an effort to rebut an adverse inference sanction for spoliation of evidence. The evidentiary spoliation arose when FTB changed its e-mail server in 1999, and it subsequently destroyed backup tapes from the old server. Because the server change occurred during the pendency of this litigation, FTB sent multiple e-mails to its employees, before the change, requesting that they print or otherwise save any e-mails related to Hyatt's case.

Backup tapes containing several weeks' worth of e-mails were made from the old system to be used in the event that FTB needed to recover the old system. FTB, at some point, overwrote these tapes, however, and Hyatt eventually discovered the change in e-mail servers and requested discovery of the backup tapes, which had already been deleted. Because FTB had deleted the backup tapes, Hyatt filed a pretrial motion requesting sanctions against FTB. The district court ruled in Hyatt's favor and determined that it would give an adverse inference jury instruction. An adverse inference allows, but does not require, the jury to infer that evidence negligently destroyed by a party would have been harmful to that party. *See, e.g., Bass-Davis v. Davis,* 122 Nev. 442, 446, 452, 134 P.3d 103, 106, 109 (2006).

At trial, FTB sought to introduce evidence explaining the steps it had taken to preserve any relevant e-mails before the server change. Hyatt challenged this evidence, arguing 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.

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

In the present case, the district court concluded that FTB's conduct was negligent, not willful, and therefore the lesser adverse inference applied, and the burden did not shift to FTB. But the district court nonetheless excluded the proposed evidence that FTB sought to admit to rebut the adverse inference. The district court should have permitted FTB to explain the steps that it took to collect the relevant emails 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

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.