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 19 OF 42**

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Chronological Index

Doc No.	Description	Date	Vo1.	Bates Range	
1	Order of Remand	8/5/2019	1	AA000001	AA000002
2	Notice of Hearing	8/13/2019	1	AA000003	AA000004
3	Court Minutes re: case remanded, dated September 3, 2019	9/3/2019	1	AA000005	AA000005
4	Recorder's Transcript of Pending Motions	9/25/2019	1	AA000006	AA000019
5	FTB's Briefing re the Requirement of Entry of Judgment in FTB's Favor and Determination that FTB is Prevailing Party	10/15/2019	1	AA000020	AA000040
6	Appendix of Exhibits in Support of FTB's Briefing re the Requirement of Entry of Judgment in FTB's Favor and Determination that FTB is Prevailing Party — Volume 1	10/15/2019	1, 2	AA000041	AA000282
7	Appendix of Exhibits in Support of FTB's Briefing re the Requirement of Entry of Judgment in FTB's Favor and Determination that FTB is Prevailing Party — Volume 2	10/15/2019	2,3	AA000283	AA000535
8	Appendix of Exhibits in Support of FTB's Briefing re the Requirement of Entry of Judgment in FTB's Favor and Determination that FTB is Prevailing Party — Volume 3	10/15/2019	3,4	AA000536	AA000707

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
10	Exhibits 14-34 to Plaintiff Gilbert P. Hyatt's Brief in Support of Proposed Form of Judgment That Finds No Prevailing Party in the Litigation and No Award of Attorneys' Fees or Costs to Either Party, filed October 15, 2019	10/15/2019	7-11	AA001593	AA002438
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12	Exhibits 67-82 to Plaintiff Gilbert P. Hyatt's Brief in Support of Proposed Form of Judgment That Finds No Prevailing Party in the Litigation and No Award of Attorneys' Fees or Costs to Either Party, filed October 15, 2019	10/15/2019	15-19	AA003431	AA004403

13	Exhibits 83-94 to Plaintiff Gilbert P. Hyatt's Brief in Support of Proposed Form of Judgment That Finds No Prevailing Party in the Litigation and No Award of Attorneys' Fees or Costs to Either Party, filed October 15, 2019	10/15/2019	19-21	AA004404	AA004733
14	Correspondence re: 1991 state income tax balance, dated December 23, 2019	12/23/2019	21	AA004734	AA004738
15	Judgment	2/21/2020	21	AA004739	AA004748
16	Notice of Entry of Judgment	2/26/2020	21	AA004749	AA004760
17	FTB's Verified Memorandum of Costs	2/26/2020	21	AA004761	AA004772
18	Appendix to FTB's Verified Memorandum of Costs — Volume 1	2/26/2020	21, 22	AA004773	AA004977
19	Appendix to FTB's Verified Memorandum of Costs — Volume 2	2/26/2020	22, 23	AA004978	AA005234
20	Appendix to FTB's Verified Memorandum of Costs — Volume 3	2/26/2020	23, 24	AA005235	AA005596
21	Appendix to FTB's Verified Memorandum of Costs — Volume 4	2/26/2020	24, 25	AA005597	AA005802
22	Appendix to FTB's Verified Memorandum of Costs — Volume 5	2/26/2020	25, 26	AA005803	AA006001
23	Appendix to FTB's Verified Memorandum of Costs — Volume 6	2/26/2020	26, 27	AA006002	AA006250

24	Appendix to FTB's Verified Memorandum of Costs — Volume 7	2/26/2020	27, 28	AA006251	AA006500
25	Appendix to FTB's Verified Memorandum of Costs — Volume 8	2/26/2020	28, 29	AA006501	AA006750
26	Appendix to FTB's Verified Memorandum of Costs — Volume 9	2/26/2020	29, 30	AA006751	AA006997
27	Appendix to FTB's Verified Memorandum of Costs — Volume 10	2/26/2020	30, 31	AA006998	AA007262
28	Appendix to FTB's Verified Memorandum of Costs — Volume 11	2/26/2020	31-33	AA007263	AA007526
29	Appendix to FTB's Verified Memorandum of Costs — Volume 12	2/26/2020	33, 34	AA007527	AA007777
30	Appendix to FTB's Verified Memorandum of Costs — Volume 13	2/26/2020	34, 35	AA007778	AA008032
31	Appendix to FTB's Verified Memorandum of Costs — Volume 14	2/26/2020	35, 36	AA008033	AA008312
32	Appendix to FTB's Verified Memorandum of Costs — Volume 15	2/26/2020	36	AA008313	AA008399
33	Appendix to FTB's Verified Memorandum of Costs — Volume 16	2/26/2020	36, 37	AA008400	AA008591
34	Appendix to FTB's Verified Memorandum of Costs — Volume 17	2/26/2020	37	AA008592	AA008694

35	Plaintiff Gilbert P. Hyatt's Motion to Strike, Motion to Retax, and Alternatively, Motion for Extension of Time to Provide Additional Basis to Retax Costs	3/2/2020	37, 38	AA008695	AA008705
36	FTB's Motion for Attorney's Fees Pursuant to NRCP 68	3/13/2020	38	AA008706	AA008732
37	Appendix to FTB's Motion for Attorney's Fees Pursuant to NRCP 68	3/13/2020	38	AA008733	AA008909
38	FTB's Opposition to Plaintiff Gilbert Hyatt's Motion to Strike, Motion to Retax and, Alternatively, Motion for Extension of Time to Provide Additional Basis to Retax Costs	3/16/2020	38, 39	AA008910	AA008936
40	FTB's Notice of Appeal of Judgment	3/20/2020	39	AA008937	AA008949
41	Plaintiff Gilbert P Hyatt's Opposition to FTB's Motion for Attorney's Fees Pursuant to NRCP 68	3/27/2020	39	AA008950	AA008974
42	Reply in Support of Plaintiff Gilbert P. P Hyatt's Motion to Strike, Motion to Retax and, Alternatively, Motion for Extension of Time to Provide Additional Basis to Retax Costs	4/1/2020	39	AA008975	AA008980
43	Court Minutes	4/9/2020	39	AA008981	AA008982
44	FTB's Reply in Support of Motion for Attorney's Fees	4/14/2020	39	AA008983	AA009012

45	Court Minutes re: motion for attorney fees and costs	4/23/2020	39	AA009013	AA009014
46	Recorder's Transcript of Pending Motions	4/27/2020	39	AA009015	AA009053
47	Order Denying FTB's Motion for Attorney's Fees Pursuant to NRCP 68	6/8/2020	39	AA009054	AA009057
48	Notice of Entry of Order Denying FTB's Motion for Attorney's Fees Pursuant to NRCP 68	6/8/2020	39	AA009058	AA009064
49	FTB's Supplemental Notice of Appeal	7/2/2020	39	AA009065	AA009074
50	Order Affirming in Part, Reversing in Part and Remanding	4/23/2021	39	AA009075	AA009083
51	Remittitur	6/7/2021	39	AA009084	AA009085
52	Hyatt Supplemental Memo in Support of Motion to Retax Costs and Supplemental Appendix	9/29/2021	39, 40	AA009086	AA009283
53	Appendix Of Exhibits In Support Of FTBs Supplemental Brief Vol. 1	12/2/2021	40, 41	AA009284	AA009486
54	Appendix Of Exhibits In Support Of FTBs Supplemental Brief Vol. 2	12/2/2021	41, 42	AA009487	AA009689
55	FTB's Supplemental Brief re Hyatt's Motion to Retax Costs	12/3/2021	42	AA009690	AA009710

56	Minute Order re Motion to Strike Motion to Retax Alternatively Motion for Extension of Time to Provide Additional Basis to Retax Costs	3/10/2022	42	AA009711	AA009712
57	Order Denying Mtn to Strike Mtn to Retax Mtn for Ext of Time	4/6/2022	42	AA009713	AA009720
58	Hyatt Case Appeal Statement	5/6/2022	42	AA009721	AA009725
59	Hyatt Notice of Appeal	5/6/2022	42	AA009726	AA009728
60	Recorder's Transcript of Motion to Retax	1/25/2022	42	AA009729	AA009774
61	Recorder's Transcript Continued Motion to Retax	1/27/2022	42	AA009775	AA009795

Alphabetical Index

Doc No.	Description	Date	Vol.	Bates Range	
6	Appendix of Exhibits in Support of FTB's Briefing re the Requirement of Entry of Judgment in FTB's Favor and Determination that FTB is Prevailing Party — Volume 1	10/15/2019	1, 2	AA000041	AA000282
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53	Appendix Of Exhibits In Support Of FTBs Supplemental Brief Vol. 1	12/2/2021	40, 41	AA009284	AA009486
54	Appendix Of Exhibits In Support Of FTBs Supplemental Brief Vol. 2	12/2/2021	41, 42	AA009487	AA009689
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18	Appendix to FTB's Verified Memorandum of Costs — Volume 1	2/26/2020	21, 22	AA004773	AA004977
27	Appendix to FTB's Verified Memorandum of Costs — Volume 10	2/26/2020	30, 31	AA006998	AA007262
28	Appendix to FTB's Verified Memorandum of Costs — Volume 11	2/26/2020	31-33	AA007263	AA007526
29	Appendix to FTB's Verified Memorandum of Costs — Volume 12	2/26/2020	33, 34	AA007527	AA007777
30	Appendix to FTB's Verified Memorandum of Costs — Volume 13	2/26/2020	34, 35	AA007777	AA008032
31	Appendix to FTB's Verified Memorandum of Costs — Volume 14	2/26/2020	35, 36	AA008033	AA008312

32	Appendix to FTB's Verified Memorandum of Costs — Volume 15	2/26/2020	36	AA008313	AA008399
33	Appendix to FTB's Verified Memorandum of Costs — Volume 16	2/26/2020	36, 37	AA008399	AA008591
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19	Appendix to FTB's Verified Memorandum of Costs — Volume 2	2/26/2020	22, 23	AA004978	AA005234
20	Appendix to FTB's Verified Memorandum of Costs — Volume 3	2/26/2020	23, 24	AA005235	AA005596
21	Appendix to FTB's Verified Memorandum of Costs — Volume 4	2/26/2020	24, 25	AA005597	AA005802
22	Appendix to FTB's Verified Memorandum of Costs — Volume 5	2/26/2020	25, 26	AA005803	AA006001
23	Appendix to FTB's Verified Memorandum of Costs — Volume 6	2/26/2020	26, 27	AA006002	AA006250
24	Appendix to FTB's Verified Memorandum of Costs — Volume 7	2/26/2020	27, 28	AA006251	AA006500
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44	FTB's Reply in Support of Motion for Attorney's Fees	4/14/2020	39	AA008983	AA009012
55	FTB's Supplemental Brief re Hyatt's Motion to Retax Costs	12/3/2021	42	AA009690	AA009710
49	FTB's Supplemental Notice of Appeal	7/2/2020	39	AA009065	AA009074
17	FTB's Verified Memorandum of Costs	2/26/2020	21	AA004761	AA004772
58	Hyatt Case Appeal Statement	5/6/2022	42	AA009721	AA009725
59	Hyatt Notice of Appeal	5/6/2022	42	AA009726	AA009728

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48	Notice of Entry of Order Denying FTB's Motion for Attorney's Fees Pursuant to NRCP 68	6/8/2020	39	AA009058	AA009064
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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 19 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

immunity from suit, 'except as altered by the plan of the Convention or certain constitutional amendments.'" *Va. Office for Prot. & Advocacy v. Stewart*, 131 S. Ct. 1632, 1637-38 (2011) (quoting *Alden*, 527 U.S. at 713). As such, in determining "the scope of the States' constitutional immunity from suit," the Court looks to "'history and experience, and the established order of things,'" which "reveal the original understanding of the States' constitutional immunity from suit." *Alden*, 527 U.S. at 726-27. The reasoning of these decisions not only thoroughly undermines the foundation of *Hall*, but also supplies the "federal rule of law implicit in the Constitution" that *Hall* believed missing.

Hyatt barely acknowledges these precedents. When he does, he contends only that they "address[ed] quite different questions about the States' immunity in federal tribunals and their own courts." Hyatt Br.35. But suits in federal courts and suits in another State's courts are similar in the relevant respects. In both cases, States enjoyed immunity from comparable suits before ratification. In both cases, States cannot rely on their power over their own state courts to ensure that their sovereign immunity is protected. And in both cases, States are not reduced to the only means of enforcement available in other courts pre-ratification (*i.e.*, via comity and diplomacy), but have an enforceable immunity of constitutional dimension (*i.e.*, via the "federal rule" deemed both critical and absent in *Hall*).

Hyatt maintains that none of the Court's more recent decisions "discussed, let alone disavowed, the principles of *Schooner Exchange*." *Id.* at 12. Just so.

But that only underscores that *Schooner Exchange* is irrelevant to the question at hand. Indeed, even *Hall* recognized that it need not "disavow[]" *Schooner Exchange* (which governed relationships between independent sovereigns) if it identified a "federal rule of law implicit in the Constitution" to govern the sovereign immunity of the States of the new Union. That rule—that States enjoy their pre-existing sovereign immunity as an enforceable federal constitutional right that cannot be displaced even by a federal statute, unless the immunity is inconsistent with a specific constitutional provision or the plan of the Convention—is what these more recent cases provide, in spades.

The Court's more recent decisions also answer Hyatt's complaint (at 34) that FTB's evidence and arguments mirror those in Justice Rehnquist's *Hall* dissent. The same could be said for virtually every one of this Court's post-*Hall* sovereign immunity decisions.

Hyatt effectively concedes that his position would result in multiple doctrinal anomalies. First, it would undercut *Alden*, which held that States are shielded from federal-law suits in their own courts by sovereign immunity of a constitutional dimension that Congress cannot abrogate via Article I powers. Under Hyatt's theory, the plaintiffs' mistake in *Alden* was suing Maine in Maine state court. If only they had sued Maine in New Hampshire state court, Maine would have no federally enforceable immunity to invoke. Second, even if Maine were somehow immune from such a federal-law suit in New Hampshire court, it would nonetheless be subject to suit under New

Hampshire law in New Hampshire court. Thus, a State cannot be bound by supreme federal law, but can be bound by a sister State's law. That is a "tremendous anomaly," as Justice Breyer rightly observed during the *Hyatt I* oral argument. *See* J.A.182. Third, as Justice Kennedy noted in that same argument, it is "very odd," to say the least, to conclude that a State "can't be sued in its own courts and it can't be sued in a federal court, but it can be sued" in a sister State's courts, which have "the least interest in maintaining the dignity of" the defendant State. J.A.180-181; *see also* FTB Br.49-50 (noting scholars' similar views). Fourth, as Hyatt does not dispute, preserving *Hall* would mean that Indian tribes enjoy broader immunity than States, despite the "qualified nature of Indian sovereignty." *Bay Mills*, 134 S. Ct. at 2030-31; FTB Br.48.

C. Hyatt's Remaining Arguments Do Not Save *Hall*.

Hyatt claims, remarkably, that despite exposing sovereign States to suit without their consent and threatening them with crushing liability, *Hall* "is of little importance to effective operation of state governments." Hyatt Br.36. At least 45 States beg to differ. *See* States' Br.21-31; S.C. Br.2-4, 17-20; *see also* Br. of Council of State Governments *et al.*16-20. While this suit is an especially egregious example, suits against non-consenting sovereign States in sister States' courts are nowhere near as "rare" as Hyatt imagines. *See, e.g.*, States' Br.23-26. All of these suits threaten the dignity and respect of the sovereign State and seek either money from the State treasury or changes to State policy, dictated by out-of-state juries

and judges.[6] Indeed, multiple suits have recently been filed against FTB in other States. *See* FTB Br.52. State taxing authorities like FTB are a particularly easy target for lawsuits, given their inherent unpopularity. It is not difficult for a disgruntled taxpayer to obtain local jurisdiction over an out-of-state taxing authority. Multistate Tax Comm'n Br.6-8. Yet, as Hyatt's own case demonstrates, such suits have an especially pernicious impact on the fundamentally sovereign function of tax collection, and they disrupt the multistate cooperation that is essential to enforcement of state taxes. *Id.* at 8-21.

Hyatt also insists that the "doctrine of comity" provides sufficient protection to States, pointing to the fact that the Nevada Supreme Court did grant *some* protections to FTB. Hyatt Br.35; *see also id.* at 15, 37, 47-48. But this only underscores the utter arbitrariness and unpredictability the States must endure under *Hall*. Make no mistake, Hyatt's position is that the modicum of sovereign immunity afforded by Nevada was entirely a matter of grace. It was neither an entitlement dictated by the scope of Nevada's waiver of sovereign immunity for its own state agencies, nor predictable based on the contours of that waiver or anything else. And FTB needed to spend sixteen years in litigation—expending untold

[6] Even suits that do not proceed to final judgment have these undesirable consequences. For example, Nevada recently settled a suit against it in the California courts by agreeing to pay $400,000 and to alter state policy. *See* FTB Br.55; Janie Har, *San Francisco OKs Patient-Dumping Lawsuit Settlement*, Associated Press, Oct. 27, 2015, http://perma.cc/7uy4-xc8y.

amounts of time, effort, and taxpayer money—just to secure that small measure of protection.

Hyatt further contends that there is no need to overturn *Hall* because States could "enter into bilateral or multilateral agreements to provide immunity in each others' courts" or petition Congress to resolve the problem. *Id.* at 37-41. But the States already entered into a multilateral agreement to provide federally-enforceable rights to immunity—namely, the United States Constitution. There is no need for them to meet again to protect sovereign immunity that pre-existed the Constitution and was not altered by that document, but only confirmed by both the unamended Constitution and the Eleventh Amendment.

While Hyatt is correct that there is room under our Constitution for States to negotiate over the circumstances in which they are subject to suit in each others' courts, he gets the default rule exactly backwards. There is a long tradition of sovereigns agreeing to waive their sovereign immunity in their own courts or in each others' courts as a matter of mutual consent. There is no comparable tradition of assuming that the States have waived their pre-existing sovereign immunity by entering the Union and forcing them to recapture that immunity through a new multistate compact.

Hyatt mistakenly suggests that overruling *Hall* would leave individuals "without any redress" against States. Hyatt Br.40; Professors' Br.13-14. But the Court has heard similar complaints before and has found the possibility insufficient to trump sovereign immunity preserved and guaranteed by the

Constitution. If the need for a remedy could not overcome the constitutional basis for immunity when it comes to suits in the defendant State's own courts or the neutral federal courts, it should not suffice to create remedies in *another* State's courts, which have "the least interest in maintaining the dignity of" the defendant State. J.A.180-181.

Moreover, as a practical matter, Hyatt possesses, and is pursuing, avenues for judicial recourse in the California courts. While FTB has understandably not opened itself up to tort suits like this, Hyatt is challenging FTB's audits and assessments in administrative proceedings and will have the opportunity to challenge them in California courts. *See* FTB Br.5 & n.3. California law also provides a cause of action in the California courts against FTB for the alleged breaches of confidentiality and privacy underlying his suit. *See, e.g.*, Cal. Civ. Code §1798.45. It further provides a cause of action against "any officer or employee" of FTB who "recklessly disregards board published procedures." Cal. Rev. & Tax Code §21021(a). Those partial waivers of sovereign immunity are a product of legislative judgment, not judicial whim, and they make clear that Hyatt is not without a remedy in California court.

Hyatt does quite emphatically lack a remedy in Nevada court. Like Chisholm before him, Hyatt cannot hale an unconsenting sovereign into court against its will. Indeed, not even Chisholm thought the appropriate reaction to the Eleventh Amendment was to sue Georgia in South Carolina court. That *Hall* would have permitted Chisholm's state-law suit is a testament that it was incorrect the day it was decided.

Stare decisis is not an inexorable command, and the relevant considerations cannot save *Hall*. There are no meaningful reliance interests on *Hall*, and subsequent decisions have undermined its foundations and have proved the decision anomalous, unworkable, and plainly erroneous. If ever there were a "special justification" for overturning a precedent, it is present here. The issue at hand is too important to our basic constitutional structure to leave *Hall*'s manifest error uncorrected.

CONCLUSION

The Court should reverse the decision below.

Respectfully submitted,

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November 23, 2015

EXHIBIT 78

136 S.Ct. 1277
Supreme Court of the United States

FRANCHISE TAX BOARD
OF CALIFORNIA, Petitioner
v.
Gilbert P. HYATT.

No. 14–1175.
|
Argued Dec. 7, 2015.
|
Decided April 19, 2016.

Synopsis

Background: Nevada taxpayer brought action against Franchise Tax Board of California, alleging intentional torts and bad-faith conduct during audits. The Nevada Supreme Court denied in part Board's petition for writ of mandamus, ordering Clark County District Court to dismiss negligence claim for lack of jurisdiction but finding that intentional tort claims could proceed to trial. Certiorari was granted. The United States Supreme Court, 538 U.S. 488, 123 S.Ct. 1683, 155 L.Ed.2d 702, affirmed. Following remand, 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. The Supreme Court of Nevada, Hardesty, J., —— Nev. ——, 335 P.3d 125,affirmed in part, reversed in part, and remanded. Certiorari was granted.

Holdings: The Supreme Court, Justice Breyer, held that:

[1] for an equally divided court, Nevada courts had jurisdiction over Board, and

[2] Nevada court applied special and discriminatory rule, and thus violated Full Faith and Credit Clause, by awarding one million dollars in damages to taxpayer.

Vacated and remanded.

Justice Alito concurred in judgment.

Chief Justice Roberts dissented and filed opinion in which Justice Thomas joined.

West Headnotes (5)

[1] States
Tax matters
360 States
360VI Actions
360k191 Liability and Consent of State to Be Sued in General
360k191.9 Particular Actions
360k191.9(6) Tax matters

Nevada courts had jurisdiction over Franchise Tax Board of California in Nevada taxpayer's suit against Board, alleging abusive audit and investigation practices, despite lack of California's consent. (Per Justice Breyer for an equally-divided court.)

Cases that cite this headnote

[2] 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

In Nevada taxpayer's suit against Franchise Tax Board of California related to allegedly abusive audit and investigation practices, Nevada court applied special and discriminatory rule, and thus violated Full Faith and Credit Clause, by awarding one million dollars in damages to taxpayer under Nevada law, which amount exceeded maximum that could have been awarded in similar circumstances against Nevada agencies, where Nevada's Supreme Court ignored both Nevada's typical rules of immunity, which capped damages against Nevada agencies at $50,000, and California's immunity-related statutes, which were consistent with Nevada law by prohibiting monetary recovery greater than amount of maximum recovery under Nevada law in similar circumstances. U.S.C.A. Const. Art. 4, § 1;

West's Cal.Gov.Code § 860.2; West's NRSA 41.035(1).

6 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

Statute is a "public act" within the meaning of the Full Faith and Credit Clause. U.S.C.A. Const. Art. 4, § 1; 28 U.S.C.A. § 1738.

5 Cases that cite this headnote

[4] 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

Full Faith and Credit Clause does not require a state to substitute for its own statute, applicable to persons and events within it, the statute of another state reflecting a conflicting and opposed policy. U.S.C.A. Const. Art. 4, § 1.

6 Cases that cite this headnote

[5] 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

Under the Full Faith and Credit Clause, a state need not substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate. U.S.C.A. Const. Art. 4, § 1.

6 Cases that cite this headnote

***1278** *Syllabus* [*]

[*] The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

Respondent Hyatt claims that he moved from California to Nevada in 1991, but petitioner Franchise Tax Board of California, a state agency, claims that he actually moved in 1992 and thus owes California millions in taxes, penalties, and interest. Hyatt filed suit in Nevada state court, which had jurisdiction over California under *Nevada v. Hall,* 440 U.S. 410, 99 S.Ct. 1182, 59 L.Ed.2d 416, seeking damages for California's alleged abusive audit and investigation practices. After this Court affirmed the Nevada Supreme Court's ruling that Nevada courts, as a matter of comity, would immunize California to the same extent that Nevada law would immunize its own agencies and officials, see *Franchise Tax Bd. of Cal. v. Hyatt,* 538 U.S. 488, 499, 123 S.Ct. 1683, 155 L.Ed.2d 702, the case went to trial, where Hyatt was awarded almost $500 million in damages and fees. On appeal, California argued that the Constitution's Full Faith and Credit Clause, Art. IV, § 1, required Nevada to limit damages to $50,000, the maximum that Nevada law would permit in a similar suit against its own officials. The Nevada Supreme Court, however, affirmed $1 million of the award and ordered a retrial on another damages issue, stating that the $50,000 maximum would not apply on remand.

Held :

1. The Court is equally divided on the question whether *Nevada v. Hall* should be overruled and thus affirms the Nevada courts' exercise of jurisdiction over California's state agency. P. 1280.

2. The Constitution does not permit Nevada to apply a rule of Nevada law that awards damages against California that are greater than it could award against Nevada in similar circumstances. This conclusion is consistent with this Court's precedents. A statute is a "public Act" within the meaning of the Full Faith and Credit Clause. While a State is not required "to substitute for its own statute ... the statute of another State reflecting a conflicting and opposed policy," *Carroll v. Lanza,* 349 U.S. 408, 412, 75 S.Ct. 804, 99 L.Ed. 1183, a State's decision to decline to apply another State's statute on this ground must not embody a "policy of hostility to the public Acts" of that other State, *id.,* at 413, 75 S.Ct. 804. Using this approach, the Court found no violation of the Clause in *Carroll v. Lanza* or in *Franchise Tax Bd.* the first time this litigation was considered. By contrast, the rule of unlimited damages applied here is not only "opposed" to California's law of complete immunity; it is also inconsistent with the general principles of Nevada immunity law, which limit damages awards to $50,000. Nevada explained its departure from those general principles by describing California's own system of controlling its agencies as an inadequate remedy for Nevada's citizens. A State that disregards its own ordinary legal principles on this ground employs a constitutionally impermissible " 'policy of hostility to the public Acts' of a sister State." 538 U.S., at 499, 123 S.Ct. 1683. The Nevada Supreme Court's decision thereby lacks the "healthy ***1279** regard for California's sovereign status" that was the hallmark of its earlier decision. *Ibid.* This holding does not indicate a return to a complex "balancing-of-interests approach to conflicts of law under the Full Faith and Credit Clause." *Id.,* at 496, 123 S.Ct. 1683. Rather, Nevada's hostility toward California is clearly evident in its decision to devise a special, discriminatory damages rule that applies only to a sister State. Pp. 1280 – 1283.

130 Nev. ——, 335 P.3d 125, vacated and remanded.

BREYER, J., delivered the opinion of the Court, in which KENNEDY, GINSBURG, SOTOMAYOR, and KAGAN, JJ., joined. ALITO, J., concurred in the judgment. ROBERTS, C.J., filed a dissenting opinion, in which THOMAS, J., joined.

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Opinion

Justice BREYER delivered the opinion of the Court.

[1] In *Nevada v. Hall,* 440 U.S. 410, 99 S.Ct. 1182, 59 L.Ed.2d 416 (1979), this Court held that one State (here, Nevada) can open the doors of its courts to a private citizen's lawsuit against another State (here, California) without the other State's consent. In this case, a private citizen, a resident of Nevada, has brought a suit in Nevada's courts against the Franchise Tax Board of California, an agency of the State of California. The board has asked us to overrule *Hall* and hold that the Nevada courts lack jurisdiction to hear this lawsuit. The Court is equally divided on this question, and we consequently affirm the Nevada courts' exercise of jurisdiction over California. See, *e.g., Exxon Shipping Co. v. Baker,* 554 U.S. 471, 484, 128 S.Ct. 2605, 171 L.Ed.2d 570 (2008) (citing *Durant v. Essex Co.,* 7 Wall. 107, 112, 19 L.Ed. 154 (1869)).

California also asks us to reverse the Nevada court's decision insofar as it awards the private citizen greater damages than Nevada law would permit a private citizen to obtain in a similar suit against Nevada's own agencies. We agree that Nevada's application of its damages law in this case reflects a special, and constitutionally forbidden, " 'policy of hostility to the public Acts' of a sister State," namely, California. U.S. Const., Art. IV, § 1 (Full Faith and Credit Clause); *Franchise Tax Bd. of Cal. v. Hyatt,* 538 U.S. 488, 499, 123 S.Ct. 1683, 155 L.Ed.2d 702 (2003) (quoting *Carroll v. Lanza,* 349 U.S. 408, 413, 75 S.Ct. 804, 99 L.Ed. 1183 (1955)). We set aside the Nevada Supreme Court's decision accordingly.

I

Gilbert P. Hyatt, the respondent here, moved from California to Nevada in the early 1990's. He says that he moved to Nevada in September 1991. California's Franchise Tax Board, however, after an investigation and tax audit, claimed that Hyatt moved to Nevada later, in April 1992, and that he

consequently owed California ***1280** more than $10 million in taxes, associated penalties, and interest.

Hyatt filed this lawsuit in Nevada state court against California's Franchise Tax Board, a California state agency. Hyatt sought damages for what he considered the board's abusive audit and investigation practices, including rifling through his private mail, combing through his garbage, and examining private activities at his place of worship. See App. 213–245, 267–268.

California recognized that, under *Hall,* the Constitution permits Nevada's courts to assert jurisdiction over California despite California's lack of consent. California nonetheless asked the Nevada courts to dismiss the case on other constitutional grounds. California law, it pointed out, provided state agencies with immunity from lawsuits based upon actions taken during the course of collecting taxes. Cal. Govt.Code Ann. § 860.2 (West 1995); see also § 860.2 (West 2012). It argued that the Constitution's Full Faith and Credit Clause required Nevada to apply California's sovereign immunity law to Hyatt's case. Nevada's Supreme Court, however, rejected California's claim. It held that Nevada's courts, as a matter of comity, would immunize California where Nevada law would similarly immunize its own agencies and officials (*e.g.,* for actions taken in the performance of a "discretionary" function), but they would not immunize California where Nevada law permitted actions against Nevada agencies, say, for acts taken in bad faith or for intentional torts. App. to Pet. for Cert. in *Franchise Tax Bd. of Cal. v. Hyatt,* O.T. 2002, No. 42, p. 12. We reviewed that decision, and we affirmed. *Franchise Tax Bd., supra,* at 499, 123 S.Ct. 1683.

On remand, the case went to trial. A jury found in Hyatt's favor and awarded him close to $500 million in damages (both compensatory and punitive) and fees (including attorney's fees). California appealed. It argued that the trial court had not properly followed the Nevada Supreme Court's earlier decision. California explained that in a similar suit against similar Nevada officials, Nevada statutory law would limit damages to $50,000, and it argued that the Constitution's Full Faith and Credit Clause required Nevada to limit damages similarly here.

The Nevada Supreme Court accepted the premise that Nevada statutes would impose a $50,000 limit in a similar suit against its own officials. See 130 Nev. ——, ——, 335 P.3d 125, 145–146 (2014); see also Nev.Rev.Stat. § 41.035(1) (1995). But the court rejected California's conclusion. Instead, while setting aside much of the damages award, it nonetheless affirmed $1 million of the award (earmarked as compensation for fraud), and it remanded for a retrial on the question of damages for intentional infliction of emotional distress. In doing so, it stated that "damages awarded on remand ... are not subject to any statutory cap." 130 Nev., at ——, 335 P.3d, at 153. The Nevada Supreme Court explained its holding by stating that California's efforts to control the actions of its own agencies were inadequate as applied to Nevada's own citizens. Hence, Nevada's "policy interest in providing adequate redress to Nevada's citizens [wa]s paramount to providing [California] a statutory cap on damages under comity." *Id.,* at ——, 335 P.3d, at 147.

California petitioned for certiorari. We agreed to decide two questions. First, whether to overrule *Hall*. And, second, if we did not do so, whether the Constitution permits Nevada to award Hyatt damages against a California state agency that are greater than those that Nevada would award in a similar suit against its own state agencies.

***1281** II

[2] In light of our 4–to–4 affirmance of Nevada's exercise of jurisdiction over California's state agency, we must consider the second question: Whether the Constitution permits Nevada to award damages against California agencies under Nevada law that are greater than it could award against Nevada agencies in similar circumstances. We conclude that it does not. The Nevada Supreme Court has ignored both Nevada's typical rules of immunity and California's immunity-related statutes (insofar as California's statutes would prohibit a monetary recovery that is greater in amount than the maximum recovery that Nevada law would permit in similar circumstances). Instead, it has applied a special rule of law that evinces a " 'policy of hostility' " toward California. *Franchise Tax Bd., supra,* at 499, 123 S.Ct. 1683 (quoting *Carroll v. Lanza, supra,* at 413, 75 S.Ct. 804). Doing so violates the Constitution's requirement that "Full Faith and Credit shall be given in each State to the public Acts, Records and judicial Proceedings of every other State." Art. IV, § 1.

[3] **[4]** The Court's precedents strongly support this conclusion. A statute is a "public Act" within the meaning of the Full Faith and Credit Clause. See, *e.g., Carroll v. Lanza, supra,* at 411, 75 S.Ct. 804; see also 28 U.S.C. § 1738 (referring to "[t]he Acts of the legislature" in the full faith and

credit context). We have said that the Clause "does not require a State to substitute for its own statute, applicable to persons and events within it, the statute of another State reflecting a conflicting and opposed policy." *Carroll v. Lanza,* 349 U.S., at 412, 75 S.Ct. 804. But when affirming a State's decision to decline to apply another State's statute on this ground, we have consistently emphasized that the State had "not adopt[ed] any policy of hostility to the public Acts" of that other State. *Id.,* at 413, 75 S.Ct. 804.

In *Carroll v. Lanza,* the Court considered a negligence action brought by a Missouri worker in Arkansas' courts. We held that the Arkansas courts need not apply a time limitation contained in Missouri's (but not in Arkansas') workman's compensation law. *Id.*, at 413–414, 75 S.Ct. 804. In doing so, we emphasized both that (1) Missouri law (compared with Arkansas law) embodied "a conflicting and opposed policy," and (2) Arkansas law did not embody "any policy of hostility to the public Acts of Missouri." *Id.,* at 412–413, 75 S.Ct. 804. This second requirement was well established in earlier law. See, *e.g., Broderick v. Rosner,* 294 U.S. 629, 642–643, 55 S.Ct. 589, 79 L.Ed. 1100 (1935) (New Jersey may not enforce a jurisdictional statute that would permit enforcement of certain claims under New Jersey law but "deny the enforcement" of similar, valid claims under New York law); *Hughes v. Fetter,* 341 U.S. 609, 611–612, 71 S.Ct. 980, 95 L.Ed. 1212 (1951) (invalidating a Wisconsin statute that "close[d] the doors of its courts" to an Illinois cause of action while permitting adjudication of similar Wisconsin claims).

We followed this same approach when we considered the litigation now before us for the first time. See *Franchise Tax Bd.,* 538 U.S., at 498–499, 123 S.Ct. 1683. Nevada had permitted Hyatt to sue California in Nevada courts. See *id.,* at 497, 123 S.Ct. 1683 (citing *Hall,* 440 U.S., at 414–421, 99 S.Ct. 1182). Nevada's courts recognized that California's law of complete immunity would prevent any recovery in this case. The Nevada Supreme Court consequently did not apply California law. It applied Nevada law instead. We upheld that decision as consistent with the Full Faith and Credit Clause. But in doing so, we emphasized both that (1) the Clause ***1282** does not require one State to apply another State's law that violates its "own legitimate public policy," *Franchise Tax Bd., supra,* at 497–498, 123 S.Ct. 1683 (citing *Hall, supra,* at 424, 99 S.Ct. 1182), and (2) Nevada's choice of law did not "exhibi[t] a 'policy of hostility to the public Acts' of a sister State." *Franchise Tax Bd., supra,* at 499, 123 S.Ct. 1683 (quoting *Carroll v. Lanza, supra,* at 413, 75 S.Ct. 804). Rather, Nevada had evinced "a healthy regard for California's sovereign status," we said, by "relying on the contours of Nevada's own sovereign immunity from suit as a benchmark for its analysis." *Franchise Tax Bd., supra,* at 499, 123 S.Ct. 1683.

The Nevada decision before us embodies a critical departure from its earlier approach. Nevada has not applied the principles of Nevada law ordinarily applicable to suits against Nevada's own agencies. Rather, it has applied a special rule of law applicable only in lawsuits against its sister States, such as California. With respect to damages awards greater than $50,000, the ordinary principles of Nevada law do not "conflic[t]" with California law, for both laws would grant immunity. *Carroll v. Lanza,* 349 U.S., at 412, 75 S.Ct. 804. Similarly, in respect to such amounts, the "polic [ies]" underlying California law and Nevada's usual approach are not "opposed"; they are consistent. *Id.,* at 412–413, 75 S.Ct. 804.

But that is not so in respect to Nevada's special rule. That rule, allowing damages awards greater than $50,000, is not only "opposed" to California law, *ibid.*; it is also inconsistent with the general principles of Nevada immunity law, see *Franchise Tax Bd., supra,* at 499, 123 S.Ct. 1683. The Nevada Supreme Court explained its departure from those general principles by describing California's system of controlling its own agencies as failing to provide "adequate" recourse to Nevada's citizens. 130 Nev., at ——, 335 P.3d, at 147. It expressed concerns about the fact that California's agencies " 'operat[e] outside' " the systems of " 'legislative control, administrative oversight, and public accountability' " that Nevada applies to its own agencies. *Ibid.* (quoting *Faulkner v. University of Tenn.,* 627 So.2d 362 (Ala.1992)). Such an explanation, which amounts to little more than a conclusory statement disparaging California's own legislative, judicial, and administrative controls, cannot justify the application of a special and discriminatory rule. Rather, viewed through a full faith and credit lens, a State that disregards its own ordinary legal principles on this ground *is* hostile to another State. A constitutional rule that would permit this kind of discriminatory hostility is likely to cause chaotic interference by some States into the internal, legislative affairs of others. Imagine, for example, that many or all States enacted such discriminatory, special laws, and justified them on the sole basis that (in their view) a sister State's law provided inadequate protection to their citizens. Would each affected sister State have to change its own laws? Entirely? Piece-by-piece, in order to respond to the new special laws enacted by

every other State? It is difficult to reconcile such a system of special and discriminatory rules with the Constitution's vision of 50 individual and equally dignified States. In light of the "constitutional equality" among the States, *Coyle v. Smith,* 221 U.S. 559, 580, 31 S.Ct. 688, 55 L.Ed. 853 (1911), Nevada has not offered "sufficient policy considerations" to justify the application of a special rule of Nevada law that discriminates against its sister States, *Carroll v. Lanza, supra,* at 413, 75 S.Ct. 804. In our view, Nevada's rule lacks the "healthy regard for California's sovereign status" that was the hallmark of its earlier decision, and it reflects a constitutionally impermissible " 'policy of hostility ***1283** to the public Acts' of a sister State." *Franchise Tax Bd., supra,* at 499, 123 S.Ct. 1683 (quoting *Carroll v. Lanza, supra,* at 413, 75 S.Ct. 804).

[5] In so holding we need not, and do not, intend to return to a complex "balancing-of-interests approach to conflicts of law under the Full Faith and Credit Clause." *Franchise Tax Bd.,* 538 U.S., at 496, 123 S.Ct. 1683. Long ago this Court's efforts to apply that kind of analysis led to results that seemed to differ depending, for example, upon whether the case involved commercial law, a shareholders' action, insurance claims, or workman's compensation statutes. See, *e.g., Bradford Elec. Light Co. v. Clapper,* 286 U.S. 145, 157–159, 52 S.Ct. 571, 76 L.Ed. 1026 (1932); *Carroll v. Lanza, supra,* at 414–420, 75 S.Ct. 804 (Frankfurter, J., dissenting) (listing, and trying to classify, nearly 50 cases). We have since abandoned that approach, and we continue to recognize that a State need not " 'substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.' " *Franchise Tax Bd., supra,* at 496, 123 S.Ct. 1683 (quoting *Pacific Employers Ins. Co. v. Industrial Accident Comm'n,* 306 U.S. 493, 501, 59 S.Ct. 629, 83 L.Ed. 940 (1939)). But here, we can safely conclude that, in devising a special—and hostile—rule for California, Nevada has not "sensitively applied principles of comity with a healthy regard for California's sovereign status." *Franchise Tax Bd., supra,* at 499, 123 S.Ct. 1683; see *Thomas v. Washington Gas Light Co.,* 448 U.S. 261, 272, 100 S.Ct. 2647, 65 L.Ed.2d 757 (1980) (plurality opinion) (Clause seeks to prevent "parochial entrenchment on the interests of other States"); *Allstate Ins. Co. v. Hague,* 449 U.S. 302, 323, and n. 10, 101 S.Ct. 633, 66 L.Ed.2d 521 (1981) (Stevens, J., concurring in judgment) (Clause is properly brought to bear when a State's choice of law "threatens the federal interest in national unity by unjustifiably infringing upon the legitimate interests of another State"); cf. *Supreme Court of N.H. v. Piper,* 470 U.S. 274, 288, 105 S.Ct. 1272, 84 L.Ed.2d 205 (1985) (Privileges and Immunities Clause prevents the New Hampshire Supreme Court from promulgating a rule that limits bar admission to state residents, discriminating against out-of-state lawyers); *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.,* 486 U.S. 888, 894, 108 S.Ct. 2218, 100 L.Ed.2d 896 (1988) (Commerce Clause invalidates a statute of limitations that "imposes a greater burden on out-of-state companies than it does on [in-state] companies").

For these reasons, insofar as the Nevada Supreme Court has declined to apply California law in favor of a special rule of Nevada law that is hostile to its sister States, we find its decision unconstitutional. We vacate its judgment and remand the case for further proceedings not inconsistent with this opinion.

It is so ordered.

Justice ALITO concurs in the judgment.

Chief Justice ROBERTS, with whom Justice THOMAS joins, dissenting.

Petitioner Franchise Tax Board is the California agency that collects California's state income tax. Respondent Gilbert Hyatt, a resident of Nevada, filed suit in Nevada state court against the Board, alleging that it had committed numerous torts in the course of auditing his California tax returns. The Board is immune from such a suit in California courts. The last time this case was before us, we held that the Nevada Supreme Court could apply Nevada law to resolve the Board's claim that it was immune from suit in Nevada as well. Following our decision, the Nevada Supreme Court upheld a $1 million jury award against the Board after ***1284** concluding that the Board did not enjoy immunity under Nevada law.

Today the Court shifts course. It now holds that the Full Faith and Credit Clause requires the Nevada Supreme Court to afford the Board immunity to the extent Nevada agencies are entitled to immunity under Nevada law. Because damages in a similar suit against Nevada agencies are capped at $50,000 by Nevada law, the Court concludes that damages against the Board must be capped at that level as well.

That seems fair. But, for better or worse, the word "fair" does not appear in the Full Faith and Credit Clause. The Court's decision is contrary to our precedent holding that the Clause

does not block a State from applying its own law to redress an injury within its own borders. The opinion also departs from the text of the Clause, which—when it applies—requires a State to give *full* faith and credit to another State's laws. The Court instead permits partial credit: To comply with the Full Faith and Credit Clause, the Nevada Supreme Court need only afford the Board the same limited immunity that Nevada agencies enjoy.

I respectfully dissent.

I

In 1991 Gilbert Hyatt sold his house in California and rented an apartment, registered to vote, and opened a bank account in Nevada. When he filed his 1991 and 1992 tax returns, he claimed Nevada as his place of residence. Unlike California, Nevada has no state income tax, and the move saved Hyatt millions of dollars in California taxes. California's Franchise Tax Board was suspicious, and it initiated an audit.

In the course of the audit, employees of the Board traveled to Nevada and allegedly peered through Hyatt's windows, rummaged around in his garbage, contacted his estranged family members, and shared his personal information not only with newspapers but also with his business contacts and even his place of worship. Hyatt claims that one employee in particular had it in for him, referring to him in antisemitic terms and taking "trophy-like pictures" in front of his home after the audit. Brief for Respondent 3. As a result of the audit, the Board determined that Hyatt was a resident of California for 1991 and part of 1992, and that he accordingly owed over $10 million in unpaid state income taxes, penalties, and interest.

Hyatt protested the audit before the Board, which upheld the audit following an 11–year administrative proceeding. Hyatt is still challenging the audit in California court. In 1998, Hyatt also filed suit against the Board in Nevada state court. In that suit, which is the subject of this case, Hyatt claimed that the Board committed a variety of torts, including fraud, intentional infliction of emotional distress, and invasion of privacy. The Board is immune from suit under California law, and it argued that Nevada was required under the Full Faith and Credit Clause to enforce California's immunity law.

When the case reached the Nevada Supreme Court, that court held, applying general principles of comity under Nevada law, that the Board was entitled to immunity for its negligent but not intentional torts—the same immunity afforded Nevada state agencies. Not satisfied, the Board pursued its claim of complete immunity to this Court, but we affirmed. We ruled that the Full Faith and Credit Clause did not prohibit Nevada from applying its own immunity law to the dispute. *Franchise Tax Bd. of Cal. v. Hyatt,* 538 U.S. 488, 498–499, 123 S.Ct. 1683, 155 L.Ed.2d 702 (2003).

***1285** On remand, the trial court conducted a four-month jury trial. The jury found for Hyatt, awarding him $1 million for fraud, $52 million for invasion of privacy, $85 million for emotional distress, and $250 million in punitive damages. On appeal, the Nevada Supreme Court significantly reduced the award, concluding that the invasion of privacy claims failed as a matter of law. Applying principles of comity, the Nevada Supreme Court also held that because Nevada state agencies are not subject to punitive damages, the Board was not liable for the $250 million punitive damages award. The court did hold the Board responsible for the $1 million fraud judgment, however, and it remanded for a new trial on damages for the emotional distress claim. Although tort liability for Nevada state agencies was capped at $50,000 under Nevada law, the court held that it was against Nevada's public policy to apply that cap to the Board's liability for the fraud and emotional distress claims. The Board sought review by this Court, and we again granted certiorari. 576 U.S. ——, 135 S.Ct. 2940, 192 L.Ed.2d 975 (2015).

II

A

The Full Faith and Credit Clause provides that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." U.S. Const., Art. IV, § 1. The purpose of the Clause "was to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation." *Milwaukee County v. M.E. White Co.,* 296 U.S. 268, 276–277, 56 S.Ct. 229, 80 L.Ed. 220 (1935).

The Full Faith and Credit Clause applies in a straightforward fashion to state court judgments: "A judgment entered in one State must be respected in another provided that the first State had jurisdiction over the parties and the subject matter." *Nevada v. Hall,* 440 U.S. 410, 421, 99 S.Ct. 1182, 59 L.Ed.2d

416 (1979). The Clause is more difficult to apply to "public Acts," which include the laws of other States. See *Carroll v. Lanza,* 349 U.S. 408, 411, 75 S.Ct. 804, 99 L.Ed. 1183 (1955). State courts must give full faith and credit to those laws. But what does that mean in practice?

It is clear that state courts are not always required to apply the laws of other States. State laws frequently conflict, and a "rigid and literal enforcement of the full faith and credit clause, without regard to the statute of the forum, would lead to the absurd result that, wherever the conflict arises, the statute of each state must be enforced in the courts of the other, but cannot be in its own." *Alaska Packers Assn. v. Industrial Accident Comm'n of Cal.,* 294 U.S. 532, 547, 55 S.Ct. 518, 79 L.Ed. 1044 (1935). Accordingly, this Court has treated the Full Faith and Credit Clause as a "conflicts of law" provision that dictates when a State must apply the laws of another State rather than its own. *Franchise Tax Bd.,* 538 U.S., at 496, 123 S.Ct. 1683; see also *Hall,* 440 U.S., at 424, 99 S.Ct. 1182 (California court is not required to apply Nevada law).

Under the Full Faith and Credit Clause, "it is frequently the case" that "a court can lawfully apply either the law of one State or the contrary law of another." *Franchise Tax Bd.,* 538 U.S., at 496, 123 S.Ct. 1683 (internal quotation marks omitted). As we have explained,

> "the very nature of the federal union of states, to which are reserved some of the attributes of sovereignty, precludes ***1286** resort to the full faith and credit clause as the means for compelling a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate." *Pacific Employers Ins. Co. v. Industrial Accident Comm'n,* 306 U.S. 493, 501, 59 S.Ct. 629, 83 L.Ed. 940 (1939).

This Court has generally held that when a State chooses "to apply its own rule of law to give affirmative relief for an action arising within its borders," the Full Faith and Credit Clause is satisfied. *Carroll,* 349 U.S., at 413, 75 S.Ct. 804; see *Hall,* 440 U.S., at 424, 99 S.Ct. 1182 (California court may apply California law consistent with the State's interest in "providing full protection to those who are injured on its highways" (internal quotation marks omitted)).

A State may not apply its own law, however, if doing so reflects a "policy of hostility to the public Acts" of another State. *Carroll,* 349 U.S., at 413, 75 S.Ct. 804. A State is considered to have adopted such a policy if it has "no sufficient policy considerations to warrant" its refusal to apply the other State's laws. *Ibid.* For example, when a State "seeks to exclude from its courts actions arising under a foreign statute" but permits similar actions under its own laws, the State has adopted a policy of hostility to the "public Acts" of another State. *Ibid.*; see *Hughes v. Fetter,* 341 U.S. 609, 611–613, 71 S.Ct. 980, 95 L.Ed. 1212 (1951). In such cases, this Court has held that the forum State must open its doors and permit the plaintiff to seek relief under another State's laws. See, *e.g., id.,* at 611, 71 S.Ct. 980 ("Wisconsin cannot escape [its] constitutional obligation to enforce the rights and duties validly created under the laws of other states by the simple device of removing jurisdiction from courts otherwise competent").

B

According to the Court, the Nevada Supreme Court violated the Full Faith and Credit Clause by applying "a special rule of law that evinces a policy of hostility toward California." *Ante,* at 1280 (internal quotation marks omitted). As long as Nevada provides immunity to its state agencies for awards above $50,000, the majority reasons, the State has no legitimate policy rationale for refusing to give similar immunity to the agencies of other States. The Court concludes that the Nevada Supreme Court is accordingly required to rewrite Nevada law to afford the Board the same immunity to which Nevada agencies are entitled. In the majority's view, that result is "strongly" supported by this Court's precedents. *Ibid.* I disagree.

Carroll explains that the Full Faith and Credit Clause prohibits a State from adopting a "policy of hostility to the public Acts" of another State. 349 U.S., at 413, 75 S.Ct. 804. But it does not stop there. *Carroll* goes on to describe what adopting a "policy of hostility" means: A State may not refuse to apply another State's law where there are "*no* sufficient policy considerations to warrant such refusal." *Ibid.* (emphasis added). Where a State chooses a different rule from a sister State in order "to give affirmative relief for an action arising within its borders," the State has a sufficient policy reason for applying its own law, and the Full Faith and Credit Clause is satisfied. *Ibid.*

In this case, the Nevada Supreme Court applied Nevada rather than California immunity law in order to uphold the "state's policy interest in providing adequate redress to Nevada citizens." 130 Nev. ——, ——, 335 P.3d 125, 147 (2014). This Court has long recognized that "[f]ew matters could be

deemed more appropriately the ***1287** concern of the state in which the injury occurs or more completely within its power" than "the bodily safety and economic protection" of people injured within its borders. *Pacific Employers Ins. Co.,* 306 U.S., at 503, 59 S.Ct. 629; see *Hall,* 440 U.S., at 424, 99 S.Ct. 1182. Hyatt alleges that the Board committed multiple torts, including fraud and intentional infliction of emotional distress. See 130 Nev., at ——, 335 P.3d, at 130. Under *Pacific Employers Insurance* and *Carroll,* there is no doubt that Nevada has a "sufficient" policy interest in protecting Nevada residents from such injuries.

The majority, however, does not regard that policy interest as sufficient justification for denying the Board immunity. Despite this Court's decision to get out of the business of "appraising and balancing state interests under the Full Faith and Credit Clause," *Franchise Tax Bd.,* 538 U.S., at 498, 123 S.Ct. 1683 the majority concludes that Nevada cannot *really* have a state policy to protect its citizens from the kinds of torts alleged here, because the State capped its own liability at $50,000 in similar situations. See *ante,* at 1281 – 1283. But that fails to credit the Nevada Supreme Court's explanation for why a damages cap for Nevada state agencies is fully consistent with the State's policy of protecting its citizens.

According to the Nevada Supreme Court, Nevada law treats its own agencies differently from the agencies of other States because Nevada agencies are "subject to legislative control, administrative oversight, and public accountability" in Nevada. 130 Nev., at ——, 335 P.3d, at 147 (internal quotation marks omitted). The same is not true of other litigants, such as the Board, who operate "outside such controls." *Ibid.* (internal quotation marks omitted). The majority may think that Nevada is being unfair, but it cannot be said that the State failed to articulate a sufficient policy explanation for its decision to apply a damages cap to Nevada state agencies, but not to the agencies of other States.

As the Court points out, the Constitution certainly has a "vision of 50 individual and equally dignified States," *ante,* at 1282, which is why California remains free to adopt a policy similar to that of Nevada, should it wish to do so. See *Coyle v. Smith,* 221 U.S. 559, 567, 31 S.Ct. 688, 55 L.Ed. 853 (1911) (The Union "was and is a union of States, equal in power, dignity and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself"). Nevada is not, however, required to treat its sister State as equally committed to the protection of Nevada citizens.

It is true that this Court in the prior iteration of this case found no Full Faith and Credit Clause violation in part because the "Nevada Supreme Court sensitively applied principles of comity with a healthy regard for California's sovereign status, relying on the contours of Nevada's own sovereign immunity from suit as a benchmark for its analysis." *Franchise Tax Bd.,* 538 U.S., at 499, 123 S.Ct. 1683. But the Nevada court adhered to its policy of sensitivity to comity concerns this time around as well. In deference to the Board's sovereignty, the court threw out a $250 million punitive damages award, on top of its previous decision that the Board was not liable at all for its negligent acts. That is more than a "healthy regard" for California's sovereign status.

Even if the Court is correct that Nevada violated the Full Faith and Credit Clause, however, it is wrong about the remedy. The majority concludes that in the sovereign immunity context, the Full Faith and Credit Clause is not a choice of law provision, but a create-your-own-law provision: ***1288** The Court does not require the Nevada Supreme Court to apply either Nevada law (no immunity for the Board) or California law (complete immunity for the Board), but instead requires a new hybrid rule, under which the Board enjoys partial immunity.

The majority's approach is nowhere to be found in the Full Faith and Credit Clause. Where the Clause applies, it expressly requires a State to give *full* faith and credit to another State's laws. If the majority is correct that Nevada has no sufficient policy justification for applying Nevada immunity law, then California law applies. And under California law, the Board is entitled to *full* immunity. Or, if Nevada has a sufficient policy reason to apply its own law, then Nevada law applies, and the Board is subject to *full* liability.

I respectfully dissent.

All Citations

136 S.Ct. 1277, 194 L.Ed.2d 431, 84 USLW 4210, 14 Cal. Daily Op. Serv. 4077, 2016 Daily Journal D.A.R. 3700, 26 Fla. L. Weekly Fed. S 90

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EXHIBIT 79

IN THE SUPREME COURT OF THE STATE OF NEVADA

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,
Appellant/Cross-Respondent,
vs.
GILBERT P. HYATT,
Respondent/Cross-Appellant.

No. 53264

ORDER DIRECTING SUPPLEMENTAL BRIEFING

Appellant/cross-respondent Franchise Tax Board has filed a motion requesting leave to file a motion for supplemental briefing with excess pages. A response and reply have been filed. We grant the motion and direct the clerk of this court to file the proposed motion for supplemental briefing received in this court on May 23, 2016. Further, we grant the motion for supplemental briefing. *See* NRAP 27(b) (noting that this court may grant a procedural motion without waiting for a response). As part of the supplemental briefs, the parties shall address the scope of the United States Supreme Court's opinion concerning what portions of this court's prior opinion should be reconsidered on remand from the Supreme Court.

Franchise Tax Board shall have 30 days from the date of this order to file and serve an opening supplemental brief. Gilbert Hyatt shall have 30 days from service of the supplemental opening brief to file and serve a supplemental answering brief. Franchise Tax Board shall then

have 15 days following service of the supplemental answering brief to file and serve any supplemental reply brief.

It is so ORDERED.

_____, A.C.J.

cc: McDonald Carano Wilson LLP/Reno
Lemons, Grundy & Eisenberg
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EXHIBIT 80

IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 53264

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,

Appellant/Cross-Respondent,

v.

GILBERT P. HYATT,

Respondent/Cross-Appellant

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

APPELLANT'S SUPPLEMENTAL OPENING BRIEF FOLLOWING MANDATE FROM THE SUPREME COURT OF THE UNITED STATES

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

I. INTRODUCTION.

In 2002, this Court held that it would grant immunity to Appellant Franchise Tax Board of the State of California ("FTB") against Respondent Gilbert Hyatt's tort claims to the same extent a Nevada government agency would be similarly protected. In 2003, the United States Supreme Court approved of this approach, finding that "[t]he Nevada Supreme Court sensitively applied principles of comity with a healthy regard for California's sovereign status, relying on the contours of Nevada's own sovereign immunity from suit as a benchmark for its analysis." *Franchise Tax Bd. of Calif. v. Hyatt* ("*Hyatt I*"), 538 U.S. 488, 499 (2003).

In 2014, this Court did not live up to its commitment of equal treatment to a sister State. *See Franchise Tax Bd. of Calif. v. Hyatt* ("2014 Opinion"), 130 Nev. Adv. Op. 71, 335 P.3d 125 (2014). On April 19, 2016, the Supreme Court of the United States issued an opinion that deemed the 2014 Opinion of this Court unconstitutional because it was based on "a special rule of Nevada law that is hostile to its sister States." *Franchise Tax Bd. of Calif. v. Hyatt ("Hyatt II")*, 136 S.Ct. 1277, 1283 (U.S. 2016). The Supreme Court vacated the judgment of this Court and remanded the case "for further proceedings not inconsistent" with the Supreme Court's opinion. The mandate from the Supreme Court issued on May 23, 2016.

Read in conjunction, *Hyatt I* and *Hyatt II* unequivocally outline a constitutional duty to treat FTB, a California government agency, no differently than this Court would treat a Nevada government agency. The Full Faith and Credit Clause commands this Court to evaluate Hyatt's claims against FTB—liability, damages, and defenses—no worse than if FTB were a home-state government agency. The Court did not do so in its 2014 Opinion.

For example, in the 2014 Opinion, this Court reaffirmed its previous decision in *Falline v. GNLV*, 107 Nev. 1004, 823 P.2d 888 (1991), which expressly held that a claim for intentional infliction of emotional distress was not available against Nevada government agencies. *Id.* at 1013, 823 P.2d at 894. As this Court explained, "this particular tort would, at least in many instances, embrace conduct that would support a claim for punitive damages and we have held that such damages are unavailable in the type of action presented by the instant case[.]" *Id.* Yet, against a multitude of admitted legal and evidentiary errors, this Court upheld a finding of liability against FTB on Hyatt's claim for intentional infliction of emotional distress ("IIED").

In addition, this Court upheld a finding of fraud against FTB based upon standard representations contained in a statutorily required notice of audit sent to Hyatt, nearly identical to those issued by Nevada's own taxing authorities. The Court did so even though no opinion of this Court has ever allowed a fraud claim

to advance against any Nevada government agency. This Court also affirmed the fraud verdict without examination of the evidence under a clear and convincing standard and without requiring Hyatt to overcome the presumption of good faith afforded to Nevada government agencies in the performance of statutorily required actions. Finally, in determining whether to grant discretionary function immunity, require exhaustion of administrative remedies, or evaluate whether the district court's multitude of legal and evidentiary errors were prejudicial or harmless, this Court needed to imagine FTB as Nevada's taxing authority. But the Court did not.

FTB respectfully submits that numerous aspects of this Court's 2014 Opinion were tainted by the sister-state hostility that the Supreme Court struck down as unconstitutional. Recognizing that the same constitutional defect may have pervaded all of this Court's findings and conclusions as to liability, defenses and damages, the Supreme Court vacated the 2014 Opinion in its entirety so that it carries no further legal force or effect. The Supreme Court's remand, therefore, requires this Court to review the record through a full faith and credit lens to ensure that it treats FTB the same as a Nevada agency. In so doing, FTB submits, this Court can reach no other conclusion than that, as a matter of law, FTB cannot be liable for fraud or IIED and should dismiss those claims.

II. JURISDICTIONAL STATEMENT

This Court has been re-vested with jurisdiction over this case following remand from the Supreme Court of the United States. The Supreme Court's mandate issued on May 23, 2016.

III. ROUTING STATEMENT

This case involves as a principal issue Nevada's compliance with the Full Faith and Credit Clause of the United States Constitution. The Supreme Court of the United States remanded the case to this Court. For that reason, retention of the case by this Court is required.

IV. STATEMENT OF THE ISSUES

- The Supreme Court vacated the 2014 Opinion because this Court violated the United States Constitution's Full Faith and Credit Clause by discriminating against a sister state. To comply with the Supreme Court's mandate and ensure constitutional compliance, must this Court revisit every discriminatory aspect of its previous decision against FTB and conclude that FTB is entitled to judgment as a matter of law on all of Hyatt's claims?
- Where, as a matter of law, FTB cannot be liable to Hyatt on any claims because no Nevada agency could be similarly liable, must all monetary awards to Hyatt, including damages, fees, costs and interest, be vacated?

V. STATEMENT OF THE CASE.

A. The California Administrative Proceedings.

Hyatt is a former California resident who received hundreds of millions of dollars in licensing fees on certain technology patents he purported to own. *Hyatt I*, 538 U.S. at 490-91. FTB conducted residency audits of Hyatt for the 1991 and 1992 tax years and concluded that Hyatt did not move from California to Nevada before October 1991, as he had claimed, but remained a California resident until April 1992. Hyatt protested the 1991 and 1992 audits through an administrative procedure internal to FTB. The protests were resolved against Hyatt. In December 2008, Hyatt filed for administrative review of those protests with the California State Board of Equalization. *See* 92 AA 22939-45. That administrative review is ongoing and has not been resolved.

B. Hyatt I from USSC.

Just after the administrative proceedings began in California, Hyatt filed suit against FTB in the Eighth Judicial District Court of Nevada seeking declaratory relief concerning his residency and alleging various tort claims concerning FTB's residency audits.

On the tort claims, FTB moved the district court for summary judgment on the ground that it was entitled to complete immunity from suit as it would be in California. 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 grant FTB that complete immunity. *Hyatt I*, 538 U.S. at 491-92.

The district court denied the motion, and FTB petitioned this Court for a writ of mandamus to order dismissal of the case. *Id.* at 492. Ultimately, this Court acknowledged, under comity, that "FTB should be granted partial immunity **equal to the immunity a Nevada government agency would receive[.]**" 2014 Opinion, 335 P.3d at 133 (emphasis added). The Court ordered the district court to dismiss Hyatt's claim for negligent misrepresentation but allowed his intentional tort claims to proceed.

FTB filed a petition for certiorari in the United States Supreme Court, arguing that the Full Faith and Credit Clause required Nevada to apply the California statute granting FTB complete immunity. The Supreme Court granted certiorari and affirmed. The Supreme Court acknowledged, however, that "States' sovereignty interests are not foreign to the full faith and credit command." *Hyatt I*, 538 U.S. at 499. The Full Faith and Credit Clause prohibits "a State [from] exhibit[ing] a 'policy of hostility to the public Acts' of a sister State." *Id.* (*quoting*

Carroll v. Lanza, 349 U.S. 408, 413 (1955)). Because this Court had held it would grant FTB the same protections that a Nevada agency would enjoy under similar circumstances—thereby placing FTB on an equal footing with Nevada government agencies—the Supreme Court concluded that full faith and credit was afforded California under this Court's proposed approach. *Id.* Relying on the representations made in this Court's 2002 holding, the Supreme Court considered this Court to have "sensitively applied principles of comity" by "relying on the contours of Nevada's own sovereign immunity from suit." *Id.*

C. Trial.

Following the Supreme Court's decision in *Hyatt I*, the case returned to the district court. After lengthy discovery, pretrial proceedings and trial involving a multitude of errors, as acknowledged by this Court, the 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. The district court 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.

D. Appeal and 2014 Opinion from NSC.

FTB appealed the district court's numerous errors, including that FTB should have been afforded discretionary function immunity; Hyatt's tort claims

failed as a matter of law; the district court made prejudicial evidentiary and instructional errors; and other errors. In an opinion entered on September 18, 2014, this Court affirmed in part and reversed in part. *See* 2014 Opinion, 335 P.3d at 157.

1. Discretionary function immunity.

In the 2014 Opinion, the Court concluded that FTB was not entitled to the discretionary function immunity analysis that Nevada had expressly adopted in *Martinez v. Maruszczak*, 123 Nev. 433, 446, 168 P.3d 720, 729 (2007) and its progeny, on the basis that "[d]iscretionary-function immunity does not apply to intentional and bad-faith tort claims." 2014 Opinion, 335 P.3d at 157 (citing and affirming *Falline*, 107 Nev. at 1009 & n. 3, 823 P.2d at 892 & n. 3).

2. Tort claims.

The Court held that Hyatt's claims for invasion of privacy, abuse of process, and breach of a confidential relationship failed as a matter of law. However, the Court affirmed the jury's verdict that found FTB liable for IIED and fraud. Although the Court embraced *Falline* for the proposition that there is no discretionary function immunity for intentional or bad-faith conduct, the Court did not apply to FTB the language in *Falline* that prohibited, as a matter of law, an IIED claim against a Nevada government agency. As the *Falline* court emphasized, "this particular tort would, at least in many instances, embrace

conduct that would support a claim for punitive damages and we have held that such damages are unavailable in the type of action presented by the instant case[.]" 107 Nev. at 1012, 823 P.2d at 894.

Even though no Nevada decision has ever found fraud against a Nevada government agency, this Court also concluded that there was sufficient evidence for the jury to find fraud based on a document that FTB provided Hyatt at the outset of his audit explaining what Hyatt should expect from the process. Notably, this Court did not evaluate the sufficiency of the evidence under the required clear and convincing standard. *Clark Sanitation v. Sun Valley Disposal,* 87 Nev. 338, 341, 487 P.2d. 337, 339 (1971). The document that the Court held contained the representations giving rise to the fraud claim, FTB Form 1015, was developed by FTB pursuant to the legislative directive found in Cal. Revenue & Tax. Code §21007. Form 1015 informed Hyatt that he could 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." 54 AA 13401. Even though Hyatt offered no evidence concerning creation or issuance of that form document required by California statute, 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]." 2014 Opinion, 335 P.3d at 144.

3. Damages.

Having affirmed the IIED and fraud verdicts, the Court refused to apply to FTB the statutory damages cap applicable to a Nevada government entity. At the same time, however, the Court held that "[b]ecause punitive damages would not be available against a Nevada government entity," FTB was immune from punitive damages. *Id.* at 154. The Court therefore struck the punitive damages award but upheld the more than $1 million in damages against FTB for fraud (before prejudgment interest) and remanded for retrial on IIED damages, citing evidentiary and jury-instruction errors. *Id.* at 157.

E. Hyatt II from USSC.

After issuance of the 2014 Opinion, FTB petitioned the United States Supreme Court for certiorari. The Supreme Court granted certiorari and vacated this Court's judgment as unconstitutionally discriminatory against a sister State. *Hyatt II*, 136 S.Ct. at 1283. The Supreme Court held,

> The Nevada Supreme Court has ignored both Nevada's typical rules of immunity and California's immunity-related statutes … Instead, it has applied a special rule of law that evinces a 'policy of hostility' toward California … Doing so violates the Constitution's requirement that 'Full Faith and Credit shall be given in each State to the public Acts, Records and judicial Proceedings of every other State.' *Id.* at 1281, quoting *Hyatt I*, 538 U.S. at 499 and U.S. Const. Art. IV §1.

As noted by the Supreme Court when describing *Hyatt I*:

> Nevada had permitted Hyatt to sue California in Nevada courts… Nevada's courts recognized that California's law of complete

> immunity would prevent any recovery in this case. The Nevada Supreme Court consequently did not apply California law. It applied Nevada law instead. We upheld that decision as consistent with the Full Faith and Credit Clause. *Id.* at 1281 (internal citations omitted).

The Supreme Court rejected the 2014 Opinion, however, as "a critical departure from [the Nevada Supreme Court's] earlier approach." *Id.* at 1282.

> Nevada has not applied the principles of Nevada law ordinarily applicable to suits against Nevada's own agencies. Rather, it has applied a special rule of law applicable only in lawsuits against its sister states, such as California. *Id.*

The Supreme Court took particular issue with this Court's stated rationale for its "discriminatory hostility" against a sister State:

> Such an explanation, which amounts to little more than a conclusory statement disparaging California's own legislative, judicial, and administrative controls, cannot justify the application of a special and discriminatory rule. Rather, viewed through a full faith and credit lens, a State that disregards its own ordinary legal principles on this ground *is* hostile to another state. *Id.* at 1282 (emphasis in the original).

Because this Court discriminated against California when failing to apply Nevada's own rules, the Supreme Court vacated the judgment and remanded the case "for further proceedings not inconsistent with this opinion." *Id.* at 1283. FTB submits that this Court's "discriminatory hostility" towards California pervaded the entire 2014 Opinion. This supplemental opening brief is filed pursuant to this Court's Order Directing Supplemental Briefing issued on June 24, 2016.

VI. STATEMENT OF FACTS

Because the underlying facts were addressed in the previous briefs, in the interest of brevity, FTB simply incorporates those here by reference.

VII. SUMMARY OF THE ARGUMENT

In *Hyatt II*, the Supreme Court held that this Court's rule of law targeted specifically at California violated the Constitution because it demonstrated hostility to a sister state. To comply with the Full Faith and Credit Clause, the Supreme Court instructed this Court to treat FTB no differently than it would a Nevada agency. In other words, this Court needed to view the actions of FTB through a home-state lens, reviewing the facts and applying the law as if FTB were Nevada's taxing authority.

The Supreme Court did not confine the application of this holding to any particular conduct by this Court. To the contrary, the Supreme Court made the sweeping statement that "**insofar as the Nevada Supreme Court has declined to apply California law in favor of a special rule of Nevada law that is hostile to its sister States**, we find its decision unconstitutional." *Hyatt II*, 136 S.Ct. at 1283 (emphasis added). Similarly, the Supreme Court did not vacate only specific parts of the 2014 Opinion. Instead, it vacated this Court's judgment in its entirety such that, as to those aspects of the 2014 Opinion adverse to FTB, this Court's judgment no longer has any legal effect.

Based on the Supreme Court's general vacatur and broad remand instructions, this Court must now take a fresh look at every aspect of its previous decision against FTB to ensure constitutional compliance. In concluding that FTB can be liable for fraud and IIED, the Court did not hold FTB to the same legal standards as FTB's Nevada counterparts. The Court also did not apply its precedents in the same manner it has to Nevada agencies. And this Court did not review the entire record as if FTB were an arm of Nevada government.

FTB respectfully submits that when the Court follows the Supreme Court's directive, it can come to no other conclusion than that FTB is entitled to judgment as a matter of law on all of Hyatt's claims.

VIII. ARGUMENT

A. The Scope of the Supreme Court's Opinion Requires This Court to Reconsider its Denial of Judgment as a Matter of Law on Hyatt's Fraud and IIED Claims.

1. The Supreme Court's Remand Order Should Be Read to Encompass Any Part of the 2014 Opinion That Might Be Tainted by Sister-State Hostility.

Where the Supreme Court intended that no unconstitutional aspect of the 2014 Opinion survive remand, this Court should revisit those findings and conclusions that are inconsistent with the manner in which this Court would treat a Nevada agency. "[A] lower court is bound to respect the mandate of an appellate tribunal and cannot reconsider questions which the mandate has laid at rest." *Fed.*

Commc'ns Comm'n v. Pottsville Broad. Co., 309 U.S. 134, 140 (1940). On remand, the lower court must tailor its new judgment to conform to any matter that the Supreme Court has disposed of either expressly or impliedly. *See Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 169 (1939); *Kashner Davidson Sec. Corp. v. Mscisz*, 601 F.3d 19, 24 (1st Cir. 2010). The lower court "must follow both the specific dictates of the remand order as well as the broader spirit of the mandate." *In re Coudert Bros. LLP*, 809 F.3d 94, 99 (2d Cir. 2015) (internal quotations and citations omitted).

Interpretation of this appellate mandate does not take place in a vacuum; it must be harmonized with all previous appellate opinions that continue to have legal effect. *See Exxon Chem. Patents, Inc. v. Lubrizol Corp.*, 137 F.3d 1475, 1483 (Fed. Cir. 1998). Thus, to comply with the Supreme Court's mandate, this Court should read *Hyatt II* in light of the principles embedded in *Hyatt I*. *See Exxon Chem.*, 137 F.3d at 1483; *United States v. Shipp*, 644 F.3d 1126, 1129 (10th Cir. 2011).

Reading *Hyatt I* and *Hyatt II* together, it is clear that the Supreme Court's mandate requires more than simply a reduction in the damages award to Nevada's statutory cap. The Court likewise must revisit its liability determinations against FTB that were equally impermissible under the Full Faith and Credit Clause.

Hyatt I established the judicial baseline in this case, in which the Supreme Court commanded this Court to avoid hostility to California and to sensitively apply principles of comity by "relying on the contours of Nevada's own sovereign immunity from suit as a benchmark for its analysis." 538 U.S. at 499. In other words, the Supreme Court held, treat FTB no differently than a similarly situated Nevada agency. *Hyatt II* simply reaffirms this approach by rejecting this Court's "special rule of Nevada law that discriminates against its sister States." 136 S.Ct. at 1282. The letter and the spirit of *Hyatt I* and *Hyatt II* require that this Court analyze every previous determination against FTB to ensure that its findings and conclusions are free from sister-state hostility. No amount of disparate treatment for a California agency is allowed.

2. The Supreme Court's Vacatur of the 2014 Opinion Requires This Court to Revisit Its Previous Legal Conclusions Against FTB to Ensure Constitutional Compliance.

Because the Supreme Court vacated the 2014 Opinion in its entirety, the Court should now enter a new judgment that complies with the Full Faith and Credit mandate in all respects. Wholesale vacatur of a judgment "divest[s] the lower court's judgment of its binding effect." *United States v. M.C.C. of Florida, Inc.*, 967 F.2d 1559, 1561-62 (11th Cir. 1992) (citing *Johnson v. Bd. of Educ.*, 457 U.S. 52, 53-54 (1982)). The lower court to whom the case is remanded after a general vacatur may only adopt those parts of the vacated judgment that are

"unaffected" by the Supreme Court's decision. *Id.* at 1562. "The critical limiting factor [in determining whether parts of a vacated judgment can survive after vacatur and remand] is of course that the error or defect must not have infected the merits of the very determination sought to be reinstated." *Hill v. W. Elec. Co.*, 672 F.2d 381, 388 (4th Cir. 1982).

After describing how this Court's special rule of law for California was unconstitutional, the Supreme Court vacated the 2014 Opinion in its entirety:

> [I]nsofar as the Nevada Supreme Court has declined to apply California law in favor of a special rule of Nevada law that is hostile to its sister States, we find its decision unconstitutional. **We vacate its judgment and remand the case for further proceedings not inconsistent with this opinion**.

Hyatt II, 136 S.Ct. at 1283 (emphasis added). The Supreme Court did not simply vacate the damages award. *See id.* It also did not simply state that the damages award was unconstitutional. *See id.* Instead, it employed sweeping language directed at every aspect of the 2014 Opinion that may have been infected by this Court's sister-state hostility. *See id.*

3. *Hyatt I and II* Bar All of the Anti-California Hostility Embodied in the 2014 Opinion.

The Supreme Court held that this Court cannot establish specific laws directed solely at a sister state but rather must treat a sister-state agency and a Nevada agency as co-equals under the law. *Hyatt I*, 538 U.S. at 499; *Hyatt II*, 136

S.Ct. at 1281-82. This rule, as enunciated in *Hyatt I and II*, has universal applicability and is not limited in scope.

The 2014 Opinion is fraught with violations of this equal treatment mandate because, in multiple respects, this Court established a special rule of law for FTB that differed from the standard rules applied to Nevada agencies. First, the Court concluded that FTB could be liable for IIED when its precedent directs that, like punitive damages, an IIED claim will not lie against a Nevada government actor. *See Falline*, 107 Nev. at 1013, 823 P.2d at 894. Second, the Court upheld the jury's fraud finding based on legislatively mandated statements found in FTB's audit notice to Hyatt, when (a) the Court has held that courts cannot make "determinations of fact-based legal issues under the tax statutes" but must instead defer to the state's Department of Taxation and (b) Nevada's equivalent statements, found in the Taxpayers' Bill of Rights, cannot form the basis of fraud-based claims. *See Int'l Game Tech., Inc. v. Second Jud. Dist. Ct.*, 122 Nev. 132, 157-59, 127 P.3d 1088, 1106 (2006).

Third, the Court did not apply discretionary function immunity to FTB as it has to a Nevada agency or afford FTB the immunity given to Nevada's taxing authority. *See, e.g., City of Boulder City v. Boulder Excavating, Inc.*, 124 Nev. 749, 752, 191 P.3d 1175, 1177 (2008); NRS 372.670, NRS 375B.370. Fourth, the Court did not require Hyatt to exhaust his administrative remedies as a plaintiff

who seeks to challenge Nevada governmental action must first do before commencing legal proceedings. *See Malecon Tobacco v. State, Dep't of Taxation*, 118 Nev. 837, 839, 59 P.3d 474, 475-76 (2002). Based on these examples, which are discussed in more detail below, FTB respectfully contends the sister-state hostility disallowed by the Supreme Court infected the entirety of the 2014 Opinion and must be rectified.

B. The Court Did Not Apply *Falline* to Dismiss Hyatt's IIED Claim as a Matter of Law, a Right That a Nevada Government Agency Would Have Enjoyed.

On appeal, FTB contended that *Falline* had been implicitly overruled by *Martinez* and its progeny. *See* Appellant's Opening Brief ("AOB") at 35:2-4 and 52:12-55:18. This Court rejected that contention and re-affirmed *Falline*. 2014 Opinion, 335 P.3d at 139. To the extent the Court embraced *Falline*, it had a constitutional obligation to apply the *Falline* case to FTB in the same manner it did to a Nevada government agency. *See Hyatt II*, 136 S.Ct. at 1282-83.

In *Falline*, the Court summarily dismissed the IIED claim because no such claim could be brought against a government agency:

> [T]his particular tort would, at least in many instances, embrace conduct that would support a claim for punitive damages and we have held that such damages are unavailable in the type of action presented by the instant case. Moreover, recognizing a cause of action for emotional distress in [an administrative] context raises the specter of "almost every emotion-based case turning up as some kind of tort suit."

Id. at 1013, 823 P.2d at 894, *quoting* The Law of Workmen's Compensation § 68.34(a) at 13–116 (1987 & Supp.1990).

There is no reason why this general principle would not apply to FTB. *See id.* Yet as to FTB, the Court not only declined to dismiss Hyatt's IIED claim as a matter of law, but it held that FTB's admittedly routine audit procedures constituted extreme and outrageous conduct. *See* 2014 Opinion, 335 P.3d at 148-49. The Court's failure to apply *Falline in toto* to FTB constituted disparate treatment that the Supreme Court confirmed is constitutionally prohibited. *See Hyatt II*, 136 S.Ct. at 1282-83.

C. The Evidence That the Court Deemed Sufficient to Support Hyatt's Fraud Claim Against FTB Would Not Have Sufficed to Demonstrate Fraud Against a Nevada Government Agency.

There is no precedent in Nevada to hold a Nevada government agency liable for fraud. What's more, there is no precedent in Nevada to hold a Nevada government agency liable for any tort based upon the statements that the State Legislature requires a Nevada government agency to make. Yet, as another example of anti-California hostility, that is precisely the basis on which this Court affirmed the jury's fraud verdict.

In his operative complaint, Hyatt alleged that FTB represented to him that it would conduct an unbiased, good-faith audit and maintain the confidentiality of the information he disclosed to FTB. 2014 Opinion, 335 P.3d at 131. At trial, Hyatt

relied upon a mission statement as the source of FTB's alleged misrepresentation, but he reversed course before this Court when FTB demonstrated he never actually received FTB's mission statement. 3 AA 569, 573; 28 AA 6854; 38 AA 9300 (3-5); 93 AA 23181

Hyatt then pointed to a 1991 notice of audit. In the 2014 Opinion, this Court embraced the 1991 notice of audit to Hyatt as being the source of FTB's alleged fraudulent misrepresentations. 2014 Opinion, 335 P.3d at 145. The audit notice is mandated by California's Legislature. Calif. Revenue & Tax. Code §21007. Having been developed and distributed to taxpayers by legislative mandate, the FTB employee who provided Hyatt with the notice of audit was merely performing an act required by California's Legislature and cannot be deemed to have intended to defraud Hyatt by sending the mandatory notice. *See Bartmettler v. Reno Air, Inc.*, 114 Nev. 441, 446-47, 956 P.2d 1382, 1386 (1998) (requiring as an essential element of a fraud claim, which must be proved by clear and convincing evidence, that the defendant knew or believed that his or her representation was false or had insufficient information to make the representation).

Like California, Nevada's Legislature has set certain standards by which the Department of Taxation must treat taxpayers. *See* NRS 360.291. This is known as the Taxpayers' Bill of Rights. *See* NRS 360.2905. Included within the Taxpayers' Bill of Rights is the requirement that "officers and employees of the Department

[treat the taxpayer] with courtesy, fairness, uniformity, consistency and common sense." NRS 360.291(1)(a). This is precisely the type of representation that the Court deemed sufficient to support the jury's fraud verdict against FTB. *See* 2014 Opinion, 335 P.3d at 144-45.

There is no authority that would make the Nevada Department of Taxation liable for fraud based on the statements contained in the Taxpayers' Bill of Rights. Indeed, in Nevada and elsewhere, courts have long held that government actors are presumed to be acting in good faith in the performance of their required acts. *See*. *e.g.*, *In re Lietz Constr.*, 47 P.3d 1275, 1289 (Kansas 2002); *Whitehead v. Nevada Com'n on Judicial Discipline*, 110 Nev. 874, 921, 878 P.2d 913, 942 (1994); *Niklaus v. Miller*, 66 N.W.2d 824, 828 (Neb. 1954); *State Civil Serv. Com'n v. Hoag*, 293 P. 338, 342 (Colo. 1930). Pursuant to *Hyatt I* and *II*, California government agents should be afforded the same presumption when they are sued in Nevada, and Hyatt made no showing to rebut that presumption.

D. This Court Did Not Give FTB the Immunity That Would be Afforded Nevada's Taxing Authority.

1. The Court's Analysis of Discretionary Function Immunity Differed Against FTB Than Against Nevada Government Agencies.

In every single case since *Martinez* but this one, this Court has looked past the labels a plaintiff assigned to his or her claims to examine the actual conduct of the defendant government agency within the paradigm of the *Berkovitz-Gaubert*

test. *See City of Boulder City*, 124 Nev. at 752, 191 P.3d at 1177 (after liability for intentional tort claims was established at trial, Nevada Supreme Court analyzed facts of government conduct to find discretionary function immunity applied); *Ransdell v. Clark County*, 124 Nev. 847, 854-58, 192 P.3d 756, 761-64 (2008) (analyzing immunity on summary judgment by requiring plaintiff to produce evidence of non-immune conduct even though intentional torts had been alleged); *ASAP Storage, Inc. v. City of Sparks*, 123 Nev. 639, 656, 173 P.3d 734, 745 (2007) (deciding discretionary function immunity issue in context of summary judgment motion after intentional torts were alleged); *Seiffert v. City of Reno*, unpublished disposition, Case No. 60046, 2014 WL 605863 at *1 (Feb. 13, 2014)[1] (evaluating discretionary function immunity within the context of summary judgment to conclude that plaintiff failed to show disputed issue of material fact as to whether defendant's "conduct was entitled to immunity under the *Martinez* test"); *Gonzalez v. Las Vegas Metro. Police Dep't*, unpublished disposition, Case No. 61120, 2013 WL 7158415 at *2-3 (Nov. 21, 2013) (holding that the subjective intent of the government actor does not matter when evaluating governmental immunity and applying discretionary function immunity on summary judgment, despite allegations of an intentional tort in complaint); *Warner v. City of Reno*,

[1] Although recent amendments to NRAP 36 allow citations to unpublished decisions issued on or after January 1, 2016 for "their persuasive value," FTB cites to unpublished decisions before that date simply to show the Court's disparate treatment of FTB, not as precedent.

unpublished disposition, Case No. 52728, 126 Nev. 767 at *2, 367 P.3d 832 (Sept. 28, 2010) (applying discretionary function immunity in the context of a summary judgment motion after intentional torts were alleged in complaint). Unlike its disparate treatment of FTB, as to Nevada government agencies, this Court has found discretionary function immunity even when the plaintiff pleaded intentional torts and even when a judge or jury found liability for intentional torts after trial.

For example, *City of Boulder City v. Boulder Excavating, Inc.* involved claims against a Nevada public entity for defamation, intentional/malicious interference with contractual relationships, and conspiracy—all intentional torts. 124 Nev. at 752, 191 P.3d at 1177. At trial, the district court expressly found that the government employee had intentionally interfered with a contract, violated Nevada statutes, and violated the plaintiff's due process rights. The trial judge "found an intentional tort," and this Court observed that the assertion of liability "was entirely based upon the alleged intentional, arbitrary, and capricious conduct of [the employee]." *Id.* at 757, 191 P.3d at 1180. Nonetheless, this Court found that the defendant government entity was entitled to discretionary function immunity. *Id.* at 755-60, 191 P.3d at 1180-82.

The *Boulder City* court applied the *Berkovitz-Gaubert* test to evaluate the City's conduct, notwithstanding that all of the plaintiff's claims were based upon "alleged intentional, arbitrary, and capricious conduct." 124 Nev. at 752, 191 P.3d

at 1180. Although the plaintiff pleaded and proved at trial the claim of "intentional interference with contractual relationship" against the Nevada government entity, this Court concluded under the *Berkovitz-Gaubert* test that the City was entitled to discretionary function immunity because the acts at issue were discretionary and based upon policy determinations. *Id.* at 1181-82.

Similarly, in *Ransdell*, the plaintiff's complaint included claims against a Nevada public entity for trespass to property, conversion, nuisance, and violations of his constitutional rights. Although these claims are "intentional" torts, this Court nevertheless evaluated immunity based on the facts of the case, not the label of "intentional" given the claims by plaintiff's counsel. 124 Nev. at 854-58, 192 P.3d 761-64. In resolving the appeal of the summary judgment order, this Court applied the *Berkovitz-Gaubert* test to hold that the defendants were entitled to discretionary function immunity, despite the intentional nature of the torts alleged in the complaint. *Id.* at 761-762. The Court applied the test to all of the government conduct complained of, irrespective of causes of action pled, to conclude that Clark County was entitled to complete discretionary function immunity for all claims, including the intentional tort causes of action. *Id.* at 764.

As these cases show, the *Berkovitz-Gaubert* test, as adopted in *Martinez*, requires this Court to analyze the facts of any given case within the law of discretionary function immunity, no matter what stage in the proceedings the case

below reached. The Court has also taken this same approach for other types of governmental immunity in claims against Nevada government entities. *See Palmieri v. Clark County*, 131 Nev. Adv. Op. 102, 367 P.3d 442 (2015) ("in the qualified immunity context, bare allegations of malice are insufficient to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery") (internal quotation omitted); *see also Fox v. State*, unpublished disposition, Case No. 54137, 2011 WL 2225000 at *2 (Jan. 18, 2011) (citing *Butler v. Bayer*, 123 Nev. 450, 466, 168 P.3d 1055, 1066 (2007) and *Martinez* to dismiss an intentional tort claim based on qualified immunity after looking to the undisputed facts in a motion for summary judgment – not the allegations of the complaint).

In Hyatt's operative complaint each of his intentional torts had a common allegation: FTB allegedly trumped up its audit conclusions to extort a settlement from him. Every claim Hyatt alleged was premised on that common allegation. *See* 14AA 3257-3300. It is that allegation that allowed Hyatt to survive a motion to dismiss by invoking *Falline*. At trial, however, Hyatt presented no evidence of extortion, and Hyatt's own experts admitted they found no evidence of either extortion or trumped-up audit conclusions. *See, e.g.*, 44 AA 10846 (130), 33 AA 8060 (67), 33 AA 8060 (69) – 8061 (73). Indeed, Hyatt's attorneys also conceded at trial that they were not pursuing a bad faith claim, that their case was not a bad-

faith case, and that no element of any claim required a showing of bad faith. *See* 51 AA 12502 (79), 12507 (99) (100), 12511 (110-111). At their urging, the district court did not give any jury instructions for bad faith. 53 AA 13218-50; 54 AA 251-87.

On appeal, FTB urged the Court to utilize the same analysis used in *City of Boulder* and *Ransdell*; that is, in reviewing for discretionary function immunity for FTB, the Court should apply the same analysis applied to Nevada government entities to look past the labels and examine the actual evidence presented at trial and the admissions made by Hyatt's counsel and expert witnesses. AOB at 52:19-53:3. Although this Court did that in *City of Boulder*, *Ransdell*, and other decisions involving Nevada government agencies, as to FTB the Court did not, thereby depriving FTB of any genuine evaluation of discretionary function immunity protections. In other words, the Court treated California differently than Nevada's home-state agencies.

2. The Evidentiary and Instructional Errors This Court Deemed Harmless as to FTB Would Have Entitled Nevada's Taxing Authorities to Immunity.

Because the Nevada Department of Taxation is immune from suit for audits, according to *Hyatt I* and *II*, so too is FTB. Yet the district court allowed Hyatt to try FTB's audit process and conclusions to a Nevada jury. Among its duties, the Nevada Department of Taxation has the general power to conduct audits. NRS

360.232. With respect to out-of-state audits, the Nevada legislature has provided the Tax Department specific statutory authority to ensure that Nevada taxes are collected:

> Persons employed by the Department may be assigned to stations, offices or locations selected by the Executive Director both within the state and in other states where in the judgment of the Executive Director it is necessary to maintain personnel to protect, investigate and collect revenues to which the State is entitled. NRS 360.140(3) (emphasis added).

In order to fully exercise this authority, the Nevada Legislature has extended immunity to the Nevada Department Taxation when it conducts an audit:

> **No** injunction, writ of mandate or other **legal or equitable process** may issue **in any suit**, action or proceeding in any court **against this state or against any officer of the state** to prevent or enjoin the collection under this chapter of any tax or any amount of tax required to be collected. NRS 372.670 (emphasis added); *see also* NRS 375B.370.

By this statute, the Nevada Legislature cloaks the state's Department of Taxation with immunity against interference with Nevada's tax process, even expecting that immunity would be respected in the courts of other states. *See id.* This is consistent with federal law, by which "... no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person..." 26 U.S.C. §7421(a).

Nearly a century before the enactment of NRS 372.670, this Court recognized the general common law rule that the tax process is shielded by each respective sovereign's immunity:

> It is upon taxation that the several states chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible. Any delay in the proceedings of the officers, upon whom the duty is devolved of collecting the taxes, may derange the operations of government, and thereby cause serious detriment to the public. *Wells Fargo and Co. v. Dayton*, 11 Nev. 161, 168 (1876), *citing Dows vs. The City of Chicago*, 78 U.S. 108, 110 (1870).

In the 2014 Opinion, even when this Court recognized that the district court impermissibly allowed Hyatt to try the tax audit to the jury and instructed the jury that it could "consider[ ] the appropriateness or correctness of the analysis conducted by the FTB employees in reaching its residency determination and conclusion," it did not extend the same immunity to FTB that Nevada law grants to Nevada's own taxing authorities. 2014 Opinion, 335 P.3d at 151. Similarly, this Court noted numerous instances in which Hyatt made assertions to the jury that could not be made "without contesting the audits' conclusions and determining that they were incorrect, which Hyatt was precluded from doing." *Id.* at 153. Where the immunity afforded Nevada's Department of Taxation would have rendered these errors prejudicial, so too should the Court conclude that Nevada law

immunized FTB from any liability to Hyatt. *See Wells Fargo*, 11 Nev. at 168; NRS 372.670.

Similarly, the protective order that Hyatt obtained in this litigation ("Nevada Protective Order") obstructed FTB from carrying out its statutorily-mandated duties to review Hyatt's protest and caused delays in the process. *See* AOB 23:3-27:9 and record citations therein. In the 2014 Opinion, this Court cited the "delayed resolution of Hyatt's protests for 11 years" as evidence to support its conclusion that "Hyatt suffered extreme treatment from FTB." 2014 Opinion, 335 P.3d at 148. Yet at trial, the district court prohibited FTB from giving examples of how or why Hyatt's responses to document requests in the protest proceedings were defective, thereby preventing FTB from fully defending against Hyatt's charge of undue delay. 27 AA 6509-10 (order granting motion to exclude after-acquired evidence). Under Nevada law, Hyatt's interference with FTB's tax collection and enforcement procedures was prohibited. *See Wells Fargo*, 11 Nev. at 168.

Rather than recognize FTB's immunity from Hyatt's collateral attack on the state's administrative process, as it would FTB's Nevada counterpart, this Court allowed the Hyatt-caused delays in that administrative process to serve as the basis for IIED liability. 2014 Opinion, 335 P.3d at 148. According to *Hyatt I* and *Hyatt II*, this Court could not reach that conclusion. Where the immunity afforded

Nevada's Department of Taxation would have rendered the district court's errors prejudicial as to any liability finding, so too should this Court conclude that Nevada law immunized FTB from any liability to Hyatt.

E. By Allowing Hyatt to Try the Audit Conclusions as Intentional Torts and Deeming the District Court's Errors "Harmless," this Court Deprived FTB of the Deference Afforded Nevada Government Agencies.

To the extent this Court continues to hold steadfast that Hyatt's intentional tort labels preclude total immunity for FTB (notwithstanding that Hyatt simply hid behind those labels to challenge FTB's audit and protest procedures and conclusions), at a minimum, the Full Faith and Credit Clause required this Court to give FTB the same deference that it gives Nevada agencies.

> [S]tate law entrusts the primary responsibility for making factual evaluations under, and legal interpretations of, the revenue statutes to the expertise of Nevada's Department of Taxation.
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> * * *
>
> [T]he determinations of fact-based legal issues under the tax statutes should not be made by the courts; rather, those determinations are "best left to the Department of Taxation, which can utilize its specialized skill and knowledge to inquire into the facts of the case." Further, we have repeatedly recognized the authority of agencies, like the tax department and Tax Commission, to interpret the language of a statute that they are charged with administering; as long as that interpretation is reasonably consistent with the language of the statute, it is entitled to deference in the courts.

Int'l Game Tech., 122 Nev. at 138, 157-58, 127 P.3d at 1093, 1106 (quoting *Meridian Gold v. State, Dep't of Taxation*, 119 Nev. 630, 636–37, 81 P.3d 516,

520 (2003) and *Malecon Tobacco*, 118 Nev. at 841 & 842 n.15, 59 P.3d at 477 & n.15. Indeed, in *Malecon*, the Court recognized that, in light of the fact-based constitutional questions raised by the taxpayers' lawsuit, should this Court "address the Taxpayers' claims without the benefit of the Department of Taxation's expertise, we would usurp the Department's role as well as contravene the Supreme Court's directive to give deference to an agency's reasonable interpretation of the law and facts at issue." 118 Nev. at 841 & 842 n.15, 59 P.3d at 477 & n.15. Deference, not the jury's second guessing, should have been afforded to FTB.

1. Deference to FTB Would Have Rendered the District Court's Evidentiary Errors Prejudicial

In this case, this Court correctly recognized multiple instances of improperly admitted evidence that the jury heard and saw on the topic of whether FTB came to the right conclusion concerning FTB's audits of Hyatt and the amount of tax and penalties he owed to California. 2014 Opinion, 335 P.3d at 150. This included: (1) "evidence challenging whether FTB made a mathematical error [$24 million] in the amount of income that it taxed"; (2) "whether an auditor improperly gave credibility to certain interviews of estranged family members"; (3) whether an auditor "appropriately determined that certain information was not credible or not relevant"; and (4) other evidence identified by the opinion that "challenged various aspects of the fraud penalties." *Id.* From the opening statement to closing

argument at trial, Hyatt's counsel claimed it was the jury's job to review FTB's conclusion and act as a "check and balance" against FTB's audit determinations made against Hyatt. 52 AA 12837 (90).

On this same inadmissible topic, this Court held that the district court erred by improperly admitting Hyatt's expert testimony, **which "went to the audits' determinations and had no utility in showing any intentional torts** …." 2014 Opinion, 335 P.3d at 150. (emphasis added). The jury heard nearly two full days of testimony from Hyatt's expert Malcolm Jumelet, who expressed expert opinions critical of how FTB analyzed and weighed information obtained in the audits. *Id.* at 150; 44 AA 10814-10946. Hyatt's trial attorneys then relied heavily on Jumelet's testimony in their closing arguments.

In his initial closing argument, Hyatt's counsel referred the jury dozens of times to Jumelet's testimony that FTB had reached the wrong result concerning Hyatt's tax liability. *See, e.g.*, 52 AA 12835-36, 12853, 12893, 12894, 12901, 12905, 12910, 12912, 12915, 12923. Hyatt's counsel expressly asked the jury to tie Jumelet's testimony to the IIED claim. 52 AA 12894(28-29) (counsel discusses Jumelet's testimony, immediately followed by: "The FTB certainly knew how to inflict the emotional distress on Mr. Hyatt.") In the rebuttal closing argument, Hyatt's counsel again referred the jury to Jumelet's testimony numerous times. *See, e.g.*, 53 AA 13166-67, 13169, 13172, 13176.

The inadmissible expert testimony from Malcolm Jumelet "is precisely what this case was not allowed to address." 2014 Opinion, 335 P.3d at 150. As a result, the Court held that the district court abused its discretion by admitting this evidence. *Id.* at 157 n.14. Although this improper evidence might readily have impacted jury deliberations on the first two essential elements of IIED (whether FTB's conduct was extreme and outrageous, and whether FTB employees intended to cause emotional distress), the Court's 2014 Opinion deemed it harmless error. 2014 Opinion, 335 P.3d at 157. This result violated the full faith and credit mandate of *Hyatt I* and *II* because it affirmed liability determinations made by a Las Vegas jury, not the agency statutorily charged with making factual findings and legal conclusions as to Hyatt's tax liability, as required by Nevada law. *See Int'l Game Tech*, 122 Nev. at 138, 157-58, 127 P.3d at 1093, 1106. Had this Court treated FTB the same as a Nevada agency, it would not have deemed these errors harmless. *See id.*; *Malecon*, 118 Nev. at 841 & 842 n.15, 59 P.3d at 477 & n.15.

Other district court errors likewise failed to afford FTB the deference due a Nevada agency:

a. The district court prohibited FTB from explaining to the jury the delay in Hyatt's protest (caused by Hyatt himself). 27 AA 6509-10;

b. The district court prohibited FTB from offering evidence to rebut the spoliation inference regarding FTB's email system. 50 AA 12398 (133)-

12403 (150); 53 AA 13131 (97) – 13133 (105); *see* AOB 98:20-100:18 and citations therein.

c. The district court improperly excluded evidence related to Hyatt's residency that proved he had not established Nevada residency in September or October of 1991, as he claimed. 27 AA 6509-10. Worse, the jury was not provided California statutory, regulatory, and case law required to determine, if in fact, FTB properly analyzed and weighed the evidence consistent with that jurisprudence. 46 AA 11297 (79) – 11299 (87); 53 AA 13218-50; 54 AA 13251-87. Allowing the jury to second guess FTB's discretionary conduct is hostile to a sister state in and of itself, but to permit the jury to do this without the benefit of all the evidence or any of the law applicable to these actions was severely prejudicial to FTB.

d. Hyatt asserted that FTB erred in calculating his 1992 taxable income by improperly including $24 million in its calculation, and that FTB's failure to correct that error was tortious. 21 AA 5081-5082. FTB determined that no such error occurred. 93 AA 23182-23231. The district court allowed the jury to take on the role of an appellate court regarding this tax-calculation issue. 35 AA 08567 (99-101); 44 AA 10830 (69) – 32 (75); 52 AA 12890 (11-13). The question of whether

> FTB committed any error in calculating Hyatt's tax assessments, or in weighing the evidence associated with this issue, went to the heart of the propriety of FTB's tax determinations. Not only was this issue outside the jurisdiction of Nevada's courts (2 AA 420-421), but it is one further example of this Court's failure to afford FTB's fact finding the same deference owed to a Nevada agency.

By affirming the jury's second guessing of FTB's audit procedures and conclusions, this Court ran afoul of the full faith and credit mandate of *Hyatt I* and *Hyatt II*.

2. Deference to FTB Would Have Rendered the District Court's Instructional Errors Prejudicial.

In addition to holding that the district court committed numerous evidentiary errors, this Court also held that the district court erred by giving a jury instruction that improperly allowed the jury to consider the "appropriateness and correctness of the analysis conducted by the FTB employees in reaching its residency determination and conclusion." 2014 Opinion, 335 P.3d at 151. As the Court noted, this instruction "violated the jurisdictional limit that the district court imposed in this case." *Id.*

In his rebuttal closing argument, Hyatt's counsel specifically drew this prohibited instruction to the jury's attention. 53 AA 13166(21)-13167(23). Hyatt's counsel quoted both of the two sentences that this Court highlighted as

erroneous. *Id.* at (22-23). After reading the erroneous instruction, Hyatt's counsel immediately followed with: **"And, Ladies and Gentlemen, that's exactly what we've been talking about through the entire trial."** *Id.* at (23) (emphasis added).

This Court appropriately held that Hyatt's focus on the audit conclusion—which included expert testimony, and which culminated in the erroneous jury instruction and closing argument—was error. 2014 Opinion, 335 P.3d at 149-50. Yet the Court deemed this error harmless, thereby affording FTB none of the deference it would have extended to a Nevada government agency. *See Int'l Game Tech*, 122 Nev. at 138, 157-58, 127 P.3d at 1093, 1106. If, under Nevada law, the state's taxing authority has "primary responsibility for making factual evaluations under, and legal interpretations of, the revenue statutes," the errors identified in the 2014 Opinion could not be harmless. *Id.*

This Court has never allowed a taxpayer to launch a collateral attack on the Nevada Department of Taxation's fact finding and legal conclusions by instituting a tort action. Such an action would lead to economic chaos in Nevada's tax-collecting functions. In light of the deference owed to FTB, the district court's instructional and evidentiary errors that allowed Hyatt to convert his trial into an attack on the audit findings can be nothing other than prejudicial. *See id.* As the Supreme Court made clear in *Hyatt I* and *Hyatt II*, this Court needed to treat FTB

as one of its own and give FTB the same deference that would be afforded a Nevada agency.

F. This Court Discriminated Against FTB Relative to Similarly Situated Nevada Government Agencies When It Allowed Hyatt to Pursue This Case Before Exhausting His Administrative Remedies in California.

The Court's disparate treatment of FTB is also demonstrated by the Court allowing Hyatt to pursue his Nevada action before exhausting his administrative remedies in California. For many years, the Court has vindicated the doctrine of administrative exhaustion by applying it to cases that involve the Nevada Department of Taxation. *See Malecon*, 118 Nev. at 839, 59 P.3d at 475-76 (2002) ("Ordinarily, before availing oneself of district court relief from an agency decision, one must first exhaust available administrative remedies."); *see also State Dep't of Taxation v. Masco Builder*, 129 Nev. Adv. Op. 83, 312 P.3d 475, 478 (2013) ("[T]he exhaustion doctrine provides that, before seeking judicial relief, a petitioner must exhaust any and all available administrative remedies, so as to give the administrative agency an opportunity to correct mistakes and perhaps avoid judicial intervention altogether."); *County of Washoe v. Golden Road Motor Inn, Inc.*, 105 Nev. 402, 404, 777 P.2d 358 (1989) ("If a statutory procedure exists either for recovery of taxes collected erroneously or for disputing an excessive assessment, that procedure must be followed.").

Indeed, on the very day that the Court issued its 2014 Opinion, it recognized that Nevada courts grant considerable deference to the Nevada Department of Taxation in evaluating exhaustion of administrative remedies:

> While facial constitutional challenges may bypass the administrative exhaustion requirement, we have held that as-applied constitutional challenges hinging on factual determinations cannot. In making that determination, we reasoned that given an agency's expertise in the area of the dispute, it is in the best position to make the factual determinations necessary to resolve that dispute.

Deja Vu Showgirls v. State, Dep't of Taxation, 130 Nev. Adv. Op. 73, 334 P.3d 392, 397 (2014). The Court dismissed the *Deja Vu* plaintiff's as-applied challenge to a Nevada statute because the company failed to exhaust its administrative remedies. In other words, the Court confirmed that a plaintiff must overcome this substantial hurdle before it can sue a Nevada agency in a Nevada state court. *See id.*

Less than a year later, in the case of *Benson v. State Engineer*, the Court reaffirmed the importance of applying the exhaustion doctrine to protect Nevada agencies. 130 Nev. Adv. Op. 78, 358 P.3d 221 (2015). In that case, the Court declined to hear a challenge to the State Engineer's decision to cancel a water permit because the petitioner failed to exhaust her administrative remedies and could not otherwise prove that administrative review would provide her "no relief at all." *Id.* at 226. The Court correctly noted that the exhaustion doctrine serves vital policy purposes for both Nevada agencies and courts alike:

> [T]his stricter standard [that the administrative review would provide no relief at all] will provide the district court with a fully developed record and administrative decision, including factual findings by an administrative body with expertise in water appropriation. This will place the district court in a better position, acting in an appellate capacity, to determine issues such as whether a party has proved adequate grounds for having a permit restored with its original appropriation date. Lastly, the stricter standard will provide the State Engineer with the opportunity to correct its mistakes and protect judicial resources.

Id.; *see also Mesagate Homeowner's Ass'n v. City of Fernley*, 124 Nev. 1092, 1099, 194 P.3d 1248, 1252-53 (2008) (explaining that the exhaustion doctrine's purpose is to permit agencies to correct their mistakes and conserve judicial resources).

Reading the cases in harmony, it is clear that the Court has historically granted considerable deference to Nevada agencies when applying the doctrine of administrative exhaustion. The Court did not give FTB this same deference. By failing to hold Hyatt to the same exhaustion standards, the Court acted with hostility to its sister State.

During briefing before this Court, FTB argued that the exhaustion doctrine was a jurisdictional limit prohibiting Hyatt from introducing evidence about "any issues that were the subject matter of the administrative tax proceedings between FTB and Hyatt in California." AOB at 58:6-7. FTB noted the district court inappropriately considered Hyatt's claims and empaneled a jury to act as an appellate review body while the California Board of Equalization ("BOE") was

conducting administrative proceedings regarding Hyatt's claims. *See id.* at 58:15-28. Indeed, FTB's evidence collection methods during Hyatt's tax audit and the analysis flowing from that collection are the very issues that the BOE is reviewing administratively. *See id.* at 59:3-10. Thus FTB argued that the district court inappropriately considered these issues, many of which went to the very core of Hyatt's tort claims in this case. *See id.* at 59:10-12.

Despite the Court's consistent application of the exhaustion doctrine to cases involving Nevada government agencies, the Court failed to apply the doctrine here as a jurisdictional limit that benefits FTB. Instead, the Court characterized FTB's argument as evidentiary, subject to an abuse of discretion standard. *See* 2014 Opinion, 335 P.3d at 149. Although there may be tangential benefits to FTB from the exclusion of evidence, characterizing FTB's argument as evidentiary and not as a jurisdictional limit misses the importance of the exhaustion doctrine. By declining to apply the exhaustion doctrine as it has to a Nevada government agency, the Court put FTB in a position that the Nevada Department of Taxation has never occupied.

To treat FTB the same as the Court has historically treated the Nevada Department of Taxation and other Nevada government agencies, and to comply with the Supreme Court's prohibition against discriminatory treatment of a sister

State, the Court should stay or dismiss Hyatt's case until such time as he has exhausted his administrative remedies in California.

IX. CONCLUSION.

FTB respectfully contends that this Court's hostility towards a sister State, which the Supreme Court deemed unconstitutional, infected the entirety of the 2014 Opinion. Essentially, the Supreme Court agreed when it vacated the entirety of this Court's 2014 Opinion. In affirming the fraud and IIED verdicts and analyzing the immunity and exhaustion doctrines, this Court did not treat FTB as it would FTB's Nevada counterpart. To correct the disparate treatment towards FTB that pervades the now-vacated 2014 Opinion, the Court should do more than apply the damages cap of NRS 41.035; it must review the jury's verdict from the perspective that FTB is a Nevada government agency. To ensure compliance with the Supreme Court's remand instructions, FTB respectfully requests that the Court grant FTB judgment as a matter of law on Hyatt's fraud and IIED claims.

Dated this 22nd day of August, 2016.

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AFFIRMATION

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

Dated this 22nd day of August, 2016.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type-style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point font, Times New Roman style. I further certify that this brief complies with the type-volume limitation of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it contains 9679 words.

Pursuant to NRAP 28.2, I hereby certify that I have read this brief, 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 regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that this brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 22nd day of August, 2016.

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of McDonald Carano Wilson LLP and on the 22nd day of August, 2016, I certify that I electronically filed the foregoing with the Clerk of the Court by using the ECF system which served the following parties electronically:

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EXHIBIT 81

IN THE SUPREME COURT OF THE STATE OF NEVADA

STATE OF CALIFORNIA, Appellant/Cross-respondent, v. GILBERT P. HYATT, Respondent/Cross-appellant.	)	Supreme Court 53264 District Case No. A3829999

APPEAL

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

RESPONDENT GILBERT P. HYATT'S SUPPLEMENTAL ANSWERING BRIEF FOLLOWING MANDATE FROM THE SUPREME COURT OF THE UNITED STATES

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NRAP 26.1 DISCLOSURE

I certify that the following are persons and entities described in NRAP 26.1, that must be disclosed:

Gilbert P. Hyatt is an individual.

The attorneys who have appeared on behalf of respondent Hyatt in this Court and in district court are:

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These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

DATED this 24 day of October, 2016.

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TABLE OF CONTENTS

AUTHORITIES CITED
RULES AND STATUTES

CASE LAW

SUPPLEMENTAL ANSWERING BRIEF FOLLOWING MANDATE FROM THE SUPREME COURT OF THE UNITED STATES

Pursuant to this Court's order of June 24, 2016, Respondent Gilbert P. Hyatt ("Respondent" or "Hyatt") submits this Supplemental Answering Brief in response to Appellant Franchise Tax Board of the State of California's ("Appellant" or "FTB") Supplemental Opening Brief Following Mandate From the Supreme Court of the United States.

I. Introduction.

The U.S. Supreme Court in *Hyatt II*[1] accepted review and ruled on only two issues: (I) whether to reverse *Nevada v. Hall*, 440 U.S. 410 (1979) and (ii) whether the amount of damages affirmed by this Court violated the prior U.S. Supreme Court decision in this case. The U.S. Supreme Court did not reverse *Nevada v. Hall* but did reverse this Court's *2014 Opinion*[2] on the single issue of the amount of damages that may be awarded against Appellant FTB, an agency of the State of

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[1] *Franchise Tax Board of California v. Hyatt*, __U.S. __, 136 S.Ct. 1277 (2016)("*Hyatt II*"). For the Court's convenience given the substantial procedural history in this case, Hyatt has submitted herewith a Supplemental Appendix (Volume 1) of Prior United States Supreme Court and Nevada Supreme Court Opinions in This Case ("Supp. Append Vol. 1"). *Hyatt II* is attached to Supp. Append. Vol. 1, at Tab 5.

[2] *Franchise Tax Board of California v. Hyatt*, 335 P.3d 125 (Nev. 2014)(the "*2014 Opinion*"). *2014 Opinion* is attached to Supp. Append. Vol 1, at Tab 3.

California. All that is left now for this Court to do is to re-issue its *2014 Opinion* modifying the amount of damages awarded in accord with *Hyatt II* and prior FTB argument in this appeal that damages are limited to $75,000 per claim. That is all that is intended by the U.S. Supreme Court's decision and all that is procedurally proper.

No other issue from this Court's *2014 Opinion* is implicated by *Hyatt II*. In suggesting otherwise, FTB disregards constitutional law and procedural rules. Indeed, *Hyatt II* did not create any new law, it merely reinforced the first U.S. Supreme Court decision in this case from 2003, *Hyatt I*.[3] FTB argued in *Hyatt II* that this Court failed to follow *Hyatt I* by affirming damages to Hyatt in excess of what would be allowed against a Nevada state agency. The U.S. Supreme Court agreed and enforced the holding of *Hyatt I*.

FTB did not argue in its appeal before this Court or to the U.S. Supreme Court that this Court's *2014 Opinion* violated *Hyatt I* in any other way. Yet, now citing *Hyatt II,* FTB seeks reconsideration of the unrelated issues on which it lost in the *2014 Opinion*. It is too late for FTB to make such arguments, and in any event FTB already lost on the merits of the unrelated issues it now attempts to re-

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

raise.

Despite the myriad of issues addressed and decided by this Court in its *2014 Opinion*, the U.S. Supreme Court accepted review only on the two narrow and focused issues described above. The Court ruled in favor of FTB only on this second issue and concluded by stating, "We vacate [the Nevada Supreme Court's] judgment and remand the case for further proceedings not inconsistent with this opinion."[4]

FTB nonetheless now argues all issues decided and resolved by this Court in its *2014 Opinion* are fair game in light of *Hyatt II*. How can that be? *Hyatt II* held only that this Court's damage award violated *Hyatt I*. If FTB asserts that any other issue addressed in this Court's *2014 Opinion* violated *Hyatt I*, it should have made those arguments to this Court in its appeal from the judgment and then sought review of those issues from the U.S. Supreme Court. FTB did not. It has therefore waived any right for review of the issues it now raises, and in some cases re-raises.

Indeed, most if not all of the issues FTB now raises are also barred by the law-of-the-case doctrine. This Court already determined in its *2014 Opinion* and,

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[4] *Hyatt II*, at 1283.

in some cases, in its *2002 Opinion*,[5] each point FTB now raises. FTB is asking for nothing short of reconsideration of these issues under the guise of the limited holding from *Hyatt II*. While this Court may have discretion to revisit and review issues unrelated to the *Hyatt II* damages issue, there is no reason to do so here. It would also be bad public and judicial policy to set a precedent that long resolved issues can be revisited by this Court after a case is reviewed by the U.S. Supreme Court on an unrelated issue.

Specifically, FTB now attempts to reargue the following issues. First, in seeking to avoid the liability findings against it in regard to the fraud and IIED claims, FTB blatantly re-argues the discretionary function immunity issue despite no new law or facts. FTB lost this issue in the *2014 Opinion*, and the U.S. Supreme Court specifically refused to review this issue. FTB therefore asks this Court to revisit the discretionary function immunity issue based on *Hyatt II* even though FTB was denied review of this very issue by the U.S. Supreme Court.[6]

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[5]April 4, 2002 Order Granting Petition For Rehearing, Vacating Previous Order, Granting Petition for Writ of Mandamus In Part In Docket No. 36390, And Granting Petition For A Writ Of Prohibition In Part In Docket No. 35549 (the "*2002 Opinion*"). The *2002 Opinion is* attached to Supp. Append. Vol. 1, at Tab 1.

[6] *Franchise Tax Board of the State of California v. Hyatt*, United States Supreme Court Case No. 14-1175, Petition for Writ of Certiorari, at 15-20, filed March 23, 2015 ("FTB Cert. Pet."); *Franchise Tax Board of California v. Hyatt*, 576 U.S. __, Order List at 13 (Jun. 30, 2015)(granting review of Questions 2 and 3 but denying

Discretionary function immunity is therefore an issue FTB cannot in good faith argue was implicated by *Hyatt II*.

Further, in seeking reconsideration of the liability findings made against it, FTB grossly misstates this Court's holding in *Falline v. GNLV Corp.*, 107 Nev. 1004, 823 P.2d 888 (1991), even substituting words in a quote from that decision to falsely portray the holding as supporting FTB's new IIED argument. As is clear from the decision, *Falline* did not hold that IIED claims cannot be brought against Nevada state agencies. *Falline* was a worker's compensation case. It held that an emotional distress claim cannot be brought in worker's compensation cases. The decision did not address whether IIED claims can be brought against state agencies. Case law in fact confirms that state agencies can be sued for IIED.

Moreover, FTB never argued below that IIED claims cannot be brought against Nevada state agencies. FTB has therefore waived this argument. Indeed, the law of the case is the exact opposite of what FTB now argues. In this Court's *2002 Opinion*, Hyatt argued specifically that intentional torts, including IIED as described in detail in his briefing, could be brought against state agencies. This

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review of Question 1 which sought review of the discretionary function immunity issue), attached to Supp. Append. Vol. 1, at Tab 4.

Court so found in its *2002 Opinion*, and that has been the law of the case since that time for both the IIED and fraud claims.

As to Hyatt's fraud claim, FTB now also argues for the first time that no precedent allows such a claim – while citing no case to support its position. FTB conveniently forgets this Court's *2002 Opinion*, which found that intentional torts including fraud can be pursued against state agencies in accord with *Falline*. The law-of-the-case doctrine holds that Hyatt can bring such claim. *Hyatt II* does not change this. And case law in other jurisdictions is consistent with this Court's ruling that fraud claims can be brought against state agencies.

Further as to the fraud claim, FTB re-asserts the same arguments it previously made in attacking the judgment as to the sufficiency of the evidence. This Court rejected those arguments in its *2014 Opinion*. Nothing in *Hyatt II* provides a basis for reconsideration of this issue. Similarly, FTB re-argues whether the evidentiary errors were harmless as to the liability findings for the IIED and fraud claims. Nothing in *Hyatt II* provides a basis for this Court to revisit that issue.

Finally, FTB's argument on exhaustion of administrative remedies is also barred by the law-of-the-case doctrine in accord with this Court's *2002 Opinion*. This issue is in no way implicated by *Hyatt II*. FTB again misconstrues the cases

it cites for exhaustion of administrative remedies because those cases involved attempts to stop or circumvent an administrative process. In this case, the Nevada courts have kept strictly separate this tort case and the still ongoing California administrative process. This case does not stop or interfere with the California administrative process. The two matters have always been and remain two different trains traveling on separate tracks.

In sum, this Court previously reviewed lengthy briefing and heard oral arguments on two occasions before issuing the *2014 Opinion*. Nothing warrants revisiting that decision now except to modify the damage award in accord with *Hyatt II*. FTB's request now for reconsideration of unrelated claims should be denied. This Court should therefore re-issue its *2014 Opinion* with a modified damages amount for the fraud claim to conform with Nevada's statutory damages cap, which FTB's prior briefing in this case specified is $75,000 per claim. In addition, for the IIED claim the Court should either (I) allow Hyatt to re-try the claim in the district court as ordered in the *2014 Opinion* or (ii) direct the district court to enter judgment on the IIED claim in favor of Hyatt for the $75,000 statutory maximum as previously argued by FTB, thereby allowing a final judgment to be entered with no further proceedings before the district court (other than entry of the judgment and as necessary to enforce judgment).

II. Statement of the issues.

1. In light of *Hyatt II*, is current review limited to modifying the damages awarded to Hyatt?

2. Is FTB barred by waiver from arguing that this Court's *2014 Opinion* violated *Hyatt I* other than as to the damages awarded?

3. Is FTB barred by the law-of-the-case doctrine from arguing that Hyatt may not bring a fraud or IIED claim against the FTB?

4. Under Nevada substantive law as already decided by this Court, is there any bar to bringing a fraud or IIED claim against a state agency?

III. Statement of the case.

This Court issued a decision in this case on April 4, 2002 (the "*2002 Opinion*"), affirming the ruling of the district court that the FTB was not entitled to immunity under California law for the bad faith conduct and intentional torts at issue in this Nevada tort action. The U.S. Supreme Court then granted the FTB's petition for certiorari, but then unanimously affirmed this Court's decision in *Hyatt I*.

This Court issued a decision in this case on September 18, 2014 (the "*2014 Opinion*") that affirmed in part and reversed in part the judgment entered by the

district court. This Court's *2014 Opinion* addressed and resolved the following issues:

Discretionary function immunity

This Court determined that "FTB was 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."[7] Indeed, the Court spent multiple pages discussing how a Nevada agency would be treated. This Court then applied the holding from *Hyatt I* and determined that because tort claims as alleged and proven by Hyatt could be brought against a Nevada government agency, FTB could be sued by Hyatt for intentional torts. It therefore ruled in its *2014 Opinion* entirely consistently with *Hyatt I*. *Hyatt II* therefore provides no basis for reconsideration of this issue.

Invasion of privacy causes of action

This Court found that Hyatt did not establish the elements of his invasion of privacy claims. The Court therefore reversed the judgment as to these causes of action.[8] *Hyatt II* provides no basis for reconsideration of this issue.

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[7] *2014 Opinion*, at 134-39.
[8] *2014 Opinion*, at 139-42.

Breach of confidential relationship claim

This Court found that Hyatt cannot as a matter of law establish the type of confidential relationship with FTB that is needed to sustain this claim. It therefore reversed the judgment as to this cause of action.[9] *Hyatt II* provides no basis for reconsideration of this issue.

Abuse of process claim

This Court found that Hyatt did not establish the elements of abuse of process. It therefore reversed the judgment as to this cause of action.[10] *Hyatt II* provides no basis for reconsideration of this issue.

Fraud claim - liability

After discussion of the necessary elements under Nevada law and the evidence presented by Hyatt, this Court affirmed the jury verdict that Hyatt established all necessary elements of this cause of action.[11] *Hyatt II* provides no basis for reconsideration of this issue.

Fraud claim - damages

This is the issue, and the only issue, upon which the U.S. Supreme Court reversed this Court's *2014 Opinion.*

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[9] *2014 Opinion*, at 142-43.
[10] *2014 Opinion*, at 143-44.
[11] *2014 Opinion*, at 144-45.

The *2014 Opinion* addressed the FTB's argument that Nevada's damages cap for state agencies (NRS 41.035) limited Hyatt's damages to $75,000 per claim. This Court decided that it need not apply Nevada's damages cap on the basis that Nevada had a paramount interest in providing adequate redress for Nevada citizens. This Court therefore denied FTB's request for comity to FTB on this issue, *i.e.* for application of the holding in *Hyatt I*.[12] The U.S. Supreme Court disagreed and reversed the *2014 Opinion* on this single point.

The *2014 Opinion* must therefore be modified in accord with the prior FTB argument in this appeal that Nevada's statutory damages cap limits Hyatt's recovery to $75,000 per claim (NRS 41.035), or in this Court's discretion the current cap of $100,000. That is all that is necessary to conform the *2014 Opinion* to the holdings in *Hyatt I* and *Hyatt II*.

Intentional infliction of emotional distress claim - liability

After discussion of the necessary elements under Nevada law and the evidence presented by Hyatt, this Court affirmed the jury verdict that Hyatt established all necessary elements of this cause of action.[13] *Hyatt II* provides no basis for reconsideration of the liability issue for this cause of action.

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[12] *2014 Opinion*, at 146-47.
[13] *2014 Opinion*, at 147-49.

As addressed below, this Court went on to find that evidentiary errors required a new trial on damages only for this cause of action.

Evidentiary and jury instruction errors warrant new trial on damages only for the IIED claim

This Court addressed multiple evidentiary errors by the district court at trial. These included certain evidence the district court improperly admitted, as well as other evidence the district court excluded which FTB had sought to introduce on the basis that it may have been an alternative cause of Hyatt's emotional distress.[14] The Court concluded "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, therefore, these errors were prejudicial and require reversal and remand for a new trial as to damages."[15] *Hyatt II* provides no basis for reconsidering this issue.

Recoverable damages on remand for IIED

This Court referenced its discussion of fraud damages and similarly determined that it would not apply Nevada's damages cap for retrial of the amount

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[14] *2014 Opinion*, at 149-53.
[15] *2014 Opinion*, at 153.

of damages for the IIED claim.[16] *Hyatt II* therefore also reversed on the amount of recoverable damages for Hyatt's IIED claim.

The *2014 Opinion* must therefore be modified on this point in accord with the prior FTB argument in this appeal that Nevada's statutory damages cap limits Hyatt's recover to $75,000 per claim. This modification would conform the *2014 Opinion* to the holdings in *Hyatt I* and *Hyatt II*. As a result, if the total amount awarded by a jury in the re-trial exceeds $75,000, the Court should direct that the amount of the recoverable damages be limited to $75,000.

Alternatively, and to bring this long-running case to the most efficient resolution possible, the Court has discretion to rule that more than sufficient admissible evidence was introduced to establish that Hyatt suffered emotional distress damages of at least $75,000. Indeed, the fact that Hyatt suffered emotional distress damages was affirmed by this Court in finding that Hyatt established all elements of the IIED claim.[17] $75,000 damages, in light of the damages cap, would be an efficient conclusion to this claim.

This case has been hotly-contested from its inception, and the costs and fees of any retrial of the IIED claim will easily exceed the maximum $75,000 recovery.

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[16] *2014 Opinion*, at 153.
[17] *2014 Opinion*, at 147-49.

When the additional time and resources of the district court are taken into consideration, a retrial is simply inefficient to determine the amount of IIED damages, which were previously determined to be $52 million but would now be capped at $75,000. Even accounting for the evidentiary errors found by this Court, more than sufficient admissible evidence was adduced at trial to support IIED damages in excess of $75,000.[18]

As a result, in lieu of a re-trial on damages for the IIED, the Court can alternatively modify its *2014 Opinion* to direct that judgment be entered in favor of Hyatt on both the fraud and IIED claims and each in the amount of the $75,000, for a total of $150,000. This will save the Nevada courts and the parties valuable time and resources, and moot a re-trial and possible appeal on the amount of IIED damages that Hyatt should recover.

Punitive damages

This Court determined that Hyatt could not be awarded punitive damages from FTB because Nevada does not allow such damage against its own government agencies. In short, the Court granted comity to FTB on this issue, in

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[18] *See* NRCP 1 and discussion of sufficient fraud and IIED liability evidence, *infra*, at 30-31.

accord with *Hyatt I* and its corollary *Hyatt II.*[19] *Hyatt II* provides no basis for reconsideration of this issue.

Costs

This Court reversed the cost award, finding the district court should determine after entry of a new judgment whether Hyatt is still entitled to costs, and if so, what costs are recoverable.[20] *Hyatt II* provides no basis for reconsideration of this issue.

Hyatt's cross-appeal

This Court affirmed the district court's dismissal of Hyatt's claim for economic damages, finding Hyatt did not present sufficient evidence at summary judgment to support such a claim.[21] *Hyatt II* provides no basis for reconsideration of this issue.

IV. Statement of facts.

This Court is no doubt familiar with the facts of this case. FTB's Supp. Brief referenced its statement of facts from prior briefing. Hyatt also references here but does not repeat his Statement of Facts that can be found at pages 9 to 51 of Respondent Hyatt's Answering Brief ("RAB").

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[19] *2014 Opinion*, at 153-54.
[20] *2014 Opinion*, at 154-55.
[21] *2014 Opinion* , at 155-56.

V. Summary of argument.

FTB's attempt to re-argue and seek reconsideration of virtually every issue on which it lost in the *2014 Opinion* is procedurally improper and not supported by the U. S. Supreme Court decision in *Hyatt II.* FTB mischaracterizes the decision in *Hyatt II*, this Court's *2014 Opinion*, and particularly this Court's key precedent, *Falline.*

FTB raises no issue for which this Court should amend or correct the *2014 Opinion* other than modifying the amount of damages Hyatt may recover for his fraud and IIED claims. The amount of damages which Hyatt may recover for each of his fraud and IIED claims is $75,000 for each claim, as FTB previously argued in this appeal.[22] This Court should reissue its *2014 Opinion* with corrected damages and direct the district court to enter a judgment in favor of Hyatt for $150,000 plus costs as determined by the district court.

VI. Argument.

A. In light of *Hyatt II*, this Court should re-issue its *2014 Opinion* in its entirety after correcting the amount of damages awarded for each the fraud and IIED claims.

Hyatt II provides no basis for this Court to revisit every issue on which it ruled against the FTB in the *2014 Opinion.* FTB's petition for U.S. Supreme

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[22] *See* discussion of prior FTB briefing, *infra* at 16-17.

Court review, FTB's merits briefing submitted to the U.S. Supreme Court, its oral argument in support thereof, and the decision in *Hyatt II* related only to the award of damages against FTB for Hyatt's fraud and IIED claims. The Court has already considered the issues now raised by FTB, and rejected FTB's arguments, or FTB failed to previously make such arguments.

1. Prior FTB briefing in this appeal arguing violation of *Hyatt I* was limited to the damages cap issue.

The only argument FTB raised in its briefing before this Court in regard to the district court violating *Hyatt I* was that the award of compensatory damages to Hyatt was in excess of the statutory damages cap under NRS 41.035 that can be awarded against a Nevada state agency.[23] Specifically, on pages 100 to 102 of FTB's opening brief and pages 109 to 115 of its reply brief in this Appeal FTB argued the damages awarded against it violated *Hyatt I*.[24] FTB did not argue as to any other issue that the district court had failed to abide by *Hyatt I,* and certainly did not make the circular argument it now offers in regard to the effect of *Hyatt II* on the liability findings for the fraud and IIED claims. FTB has not previously argued that a Nevada citizen cannot sue Nevada agencies for those specific torts (a conclusion which Hyatt rebuts below).

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[23] *See* Appellant's Opening Brief ("AOB") and Appellant's Reply Brief ("ARB").
[24] *Id.*

Indeed, *Hyatt I*, affirming this Court's *2002 Opinion*, held that Hyatt could pursue fraud and IIED claims on the very rationale argued by FTB above. Yet, in the most circular of arguments, FTB now argues that *Hyatt II*, which simply enforced *Hyatt I*, requires that this Court not allow Hyatt to pursue his fraud and IIED claims against FTB.

2. Review of this Court's *2014 Opinion* by the U.S. Supreme Court in *Hyatt II* was limited to the amount of damages awarded in violation of *Hyatt I*.

There were two discreet issues reviewed by the U.S. Supreme Court in *Hyatt II*: (I) whether the Court should affirm or overturn its prior decision *Nevada v. Hall* and (ii) whether the *2014 Opinion* in accord with *Hyatt I* must apply the statutory damages cap as to the FTB.

Starting with FTB's petition for certiorari filed with the U.S. Supreme Court, through its briefing on the merits and then oral argument, the second issue was laser-focused on the Nevada damages cap. FTB's petition for certiorari argued:

> 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.[25]

FTB's briefing to the U.S. Supreme Court similarly argued and focused on the amount of damages awarded by the Nevada court as a violation of *Hyatt I*. In the opening two paragraphs of its merits brief FTB stated that Hyatt claimed "*hundreds of millions of dollars in damages*" and the Nevada jury returned a verdict that "dramatically demonstrates the dangers of having a sovereign State haled into another State's courts against its will: The jury found for Hyatt on every one of his claims and awarded him *nearly half a billion dollars in damages,*" and that after appellate review this Court "*still awarded a million dollars in damages* while denying FTB the benefit of the damages cap Nevada extends to its own government entities."[26]

The U.S. Supreme Court ruled in favor of FTB on the damages cap issue, finding *Hyatt I* required Nevada to apply the cap here. But now FTB seeks to expand that limited and narrow review and reversal of this Court's *2014 Opinion*

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[25] FTB's Cert. Pet., p. 23 (emphasis added).

[26] *Franchise Tax Board of the State of California v. Hyatt*, United States Supreme Court Case No. 14-1175, Brief for Petitioner, at 1(emphasis added), filed September 3, 2015.

to a review of virtually every ruling that has been made in this case, even wrongly arguing its Supplemental Opening Brief that the U.S. Supreme Court "vacated the *2014 Opinion* in its entirety so that it carries no further legal force or effect."[27] That is not what the U.S. Supreme Court did in *Hyatt II*. Rather, it concluded its opinion with the same language it uses in virtually every case: "We vacate the judgment and remand the case for further proceedings not inconsistent with this opinion."[28]

Similar to the language used by this Court when returning a matter to a lower court instructing it to proceed "consistent with" the opinion issued, such language by the U.S. Supreme Court does not open up all issues thus far decided in the case.[29] It is clear on the face of the U.S. Supreme Court's opinion, as well as the briefing, that the U.S. Supreme Court intended that this Court modify its *2014 Opinion* to reduce the damages awarded consistent with the Nevada law applicable to Nevada government agencies. That is all.

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[27] FTB Supp. Brief, at ix.
[28] *Hyatt II*, at 1283.
[29] The cases cited by FTB on pages 9-10 of its Supplemental Brief in which FTB argues *Hyatt II* requires this Court reconsider all issues addressed in the *2014 Opinion* are not on point. The cases address the general proposition of appellate law that require lower courts to follow the decision of the reviewing court. None of the cited cases support the expansive re-review of unrelated issues now sought by FTB.

Further, as addressed below, the issues now asserted by FTB have all been previously addressed and adjudicated by this Court and/or have been waived by FTB and are in no way implicated by *Hyatt II*. FTB is blatantly seeking second and third bites on issues that have been definitively decided in this case. FTB is not entitled to this disguised petition for re-hearing on fully adjudicated and decided issues.

3. *Hyatt I's* comity holding, as affirmed in *Hyatt II*, does not provide a basis to review all issues on which FTB lost in the *2014 Opinion*.

FTB argues that the Court should reconsider any part of the *2014 Opinion* "that might be tainted by Sister-State Hostility."[30] There is no other part of the *2014 Opinion* that fails to treat the FTB as a Nevada state agency would be treated. But even if there were, FTB does not set forth the correct standard as articulated in *Hyatt II*, nor does it address the case law upon which Hyatt relies in interpreting the Full Faith and Credit clause in this context. Despite FTB's protestations, a state need not treat a sister state agency exactly the same as it would treat its own agencies in every instance. In *Hyatt II* the U.S. Supreme found that "Nevada has not offered 'sufficient policy considerations' to justify the application of a special rule . . ." *Hyatt II*, at 1282 (quoting *Carroll v. Lanza*, 349

[30] FTB Supp. Brief, at 9.

U.S. 408, 413, 75 S.Ct. 804 (1955)).

As the dissent emphasized, the determinative issue in *Hyatt II* was whether "Nevada has a 'sufficient' policy interest in protecting Nevada residents from such injuries" to justify not applying Nevada's damages cap to FTB in this case. *Hyatt II*, at 1287. The majority found the policy interest expressed by Nevada to be insufficient to deviate from Nevada's damages cap in this case. This analysis and conclusion does not address or apply to the myriad of other issues upon which FTB now seeks to apply the holding from Hyatt II.

Indeed, FTB merely argues there is an "Anti-California Hostility" in the *2014 Opinion* and thereby concludes all issues can and should be reconsidered.[31] To support its assertion of a hostility toward California, FTB misquotes decisions from this Court (as discussed below) and unapologetically reargues points on which it lost which have no relation to the holding in *Hyatt II* (also discussed below). The absurdity of FTB's position is seen from its attempt to re-argue every issue in the *2014 Opinion* without application of the actual standard set forth in *Hyatt II*.

For example, FTB brazenly re-argues discretionary function immunity, asserting the same arguments and citing the same cases it did in losing the issue in

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[31] FTB Supp. Brief, at 12, *et seq.*

the *2014 Opinion*.[32] FTB's current brief does not even make a subtle attempt to argue that *Hyatt II* has resulted in some change in law that requires a reconsideration of this Court's discretionary function immunity ruling in the *2014 Opinion*. Indeed, FTB previously viewed this issue as wholly unrelated to the damages cap issue addressed in *Hyatt II,* as FTB sought separate review of the discretionary function immunity issue from the U.S. Supreme Court but was denied review.[33] *Hyatt II* therefore provides no basis to re-review the issue in light of this record.

Similarly, FTB's attempts to reargue the issues of exhaustion of administrative remedies and sufficiency of the evidence for the fraud claim, each of which are also unrelated to the issues addressed in *Hyatt II*. Again, *Hyatt II* provides no basis to review these issues.

4. The only correction to the *2014 Opinion* that should be made is to the amount of damages recoverable by Hyatt for each of the two claims on which he prevailed.

FTB's opening and reply briefs for this appeal, on the precise point on which it ultimately prevailed in the U.S. Supreme Court, sought that the damages

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[32] *See* FTB Supp. Brief, at 17-22, compared to AOB, at 34-52.

[33] FTB's Cert. Pet., p. 23 (emphasis added),; *Franchise Tax Board of California v. Hyatt*, 576 U.S. ___, Order List at 13 (Jun. 30, 2015), attached to Supp. Append. Vol. 1, at Tab 4.

awarded Hyatt should be capped at $75,000 per claim in accord with NRS 41.035.

FTB's Opening brief

> The district court denied FTB's request to apply comity and to limit compensatory damages to $75,000 per claim, which would be the limit for a Nevada government entity. 92 AA 22965; NRS 41.035(1). . . . Nevada's statute allows damages against a government entity up to $75,000; (3) California's immunity statute must be applied, to the same extent that a Nevada entity would receive immunity, and as such Hyatt's damages are capped at $75,000. . .[34]

FTB's Reply brief:

> For the reasons articulated at pages 100-101 of the opening brief, all compensatory damages should have been capped at $75,000 per claim. . . . . Regarding compensatory damages California allows no recovery against FTB, but Nevada allows tort plaintiffs to recover up to $75,000 per claim against government entities. See NRS 41.035(1). Therefore, California's complete immunity statute for FTB would only offend Nevada's policy to the extent that plaintiffs are deprived of the ability to recover up to $75,000 per claim. . . . Accordingly, the

[34] AOB, at 100-02.

compensatory damages award against FTB, if allowed to stand at all, should be capped at $75,000 per claim.[35]

FTB's repeated argument for a cap of $75,000 per claim under NRS 41.035 recognizes Hyatt's claim for bad faith delay of the protests did fully accrue until late 2007 when the case was on the eve of trial. This Court in its *2014 Opinion* cited the 11 year bad faith delay in the protest process as part of the significant evidence in affirming the fraud claim and IIED claim on liability in Hyatt's favor.[36] This issue, however, but did not become a part of the case until the discovery commissioner cited the long delay and approved discovery on the issue in 2005.[37] Discovery was then taken including depositions of the protest officers in 2005 and 2006 that confirmed an intentional hold was put on the protests as referenced in internal FTB documents.[38] Most significantly, not until late in 2007 did FTB issue a final decision in the protest process essentially rubber stamping the audit decisions from eleven years earlier.[39] At that point, the 11 year delay in

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[35] ARB, at 110-11, 115-116.
[36] *2014 Opinion*, at 144-46, 148-49.
[37] 14 RA 00 3262-3276.
[38] 76 AA 18980, 18992; 85 RA 021224, 021240; RT June 17, 91:1 - 92:5 (as discussed in RAB, at 45-46); *see also* RT June 16, 72:9-13; 56:14 - 57:3, 58:7 - 60:4, 61:14-25, 75:18 - 77:6.
[39] 54 AA 13330, 13404-13406, 88 RA 021826 (as discussed in RAB, at 42).

deciding the protests ended. At that time, the damages cap was $75,000 per claim.[40]

FTB also acknowledged in its prior briefing that where, as here, there are separate causes of action that can be separately maintained against the government entity, NRS 41.035 provides for recovery by the plaintiff on each claim up to the statutory cap. *See State of Nevada, ex rel., Department of Transportation v. Hill*, 114 Nev. 810, 818, 963 P. 2d 480 (1998)("The *Webster* court reasoned that 'the term 'action' [as used in NRS 41.035] is the wrong done, not the measure of compensation or the character of the relief sought[.]'")(*quoting State v. Webster*, 88 Nev. 690, 695 , 504 P. 2d. 1316, 1320 (1972)).

Here, this Court confirmed in the *2014 Opinion* that separate damages were to be awarded for the fraud and IIED claims, affirming the jury's separate award of damages for fraud and ordering retrial for the amount of the separate IIED damages.[41] There can be no dispute, therefore, that Hyatt is entitled to a separate award of damages for each claim up to the statutory damages cap.

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[40] The current damages cap under NRS 41.035 is $100,000 per claim. The Court should consider using its considered discretion to impose the higher cap given the long-running nature of this case.

[41] *2014 Opinion*, at 145-47, 149-50.

Hyatt II therefore requires only that this Court's *2014 Opinion* be modified so that the damages are limited to $75,000 per claim.[42] Specifically, the fourth paragraph of the *2014 Opinion* (on page 131 of the Pacific Reporter version) that starts with "In connection with . . ." must be stricken and replaced with a discussion that based on *Hyatt II* the jury's award of $1,085,282.56 in damages for the fraud claim must be capped at the Nevada statutory damage limit of $75,000, and that upon re-trial of the damages issue for the IIED claim, the damages award must be similarly capped at $75,000 even if the jury in a new trial awards an amount in excess of $75,000.

As noted above, the Court should consider directing judgment in Hyatt's favor on the IIED claim in the statutory maximum amount of $75,000. Just as sufficient evidence from the prior trial supports the liability finding for the IIED claim, and notwithstanding the evidentiary errors noted by this Court in the *2014 Opinion* that required the $52 million damage award be vacated, sufficient evidence supports an award of at least $75,000 (or even the current cap of

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[42] To the extent the Court views application of the damages cap per claim as anything beyond a mechanical application to the two claims on which Hyatt prevailed, Hyatt requests that the Court order additional briefing on this issue or return the matter to the district court for a determination and application of the damages cap issue.

$100,000) for the IIED claim. Such an award is also in the interests of justice and efficiency.[43]

The following sections of the *2014 Opinion* must also be so modified: the entire discussion under the heading "Fraud damages" (on pages 145-47 of the Pacific Reporter version); the entire discussion under the heading "Recoverable damages on remand" (page 153 of the Pacific Reporter version); and the two sentences under heading "Conclusion" (page 157 of the Pacific Report version) that start "We uphold the amount of damages awarded . . ." and "Any damages awarded on remand . . ."

No other correction of the *2014 Opinion* was intended by the U.S. Supreme Court's decision in *Hyatt II*, nor is any other correction needed or warranted.

B. FTB waived any right to argue any additional portions of the *2014 Opinion* violated *Hyatt I.*

"[P]arties may not raise a new theory for the first time on appeal, which is inconsistent with or different from the one raised below." *Schuck v. Signature Flight Support of Nevada, Inc.*, 126 Nev. 434, 437, 245 P.3d 542 (2010) (affirming grant of summary judgment and ruling that appellant waived factual

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[43] Hyatt refers the Court to pages 147-49 of the *2014 Opinion* that discuss the evidence from trial that supported Hyatt's IIED claim. *See also* discussion, *infra., at* 22-25.

and legal arguments in opposition to summary judgment that were not raised below; comma error in original); *Tupper v. Kroc.*, 88 Nev. 146, 150, 494 P.2d 1275 (1972) (ruling that appellant waived argument that the respondent was required to prove that the sale of appellant's partnership interest was necessary before a sale could be ordered; "Upon the rule . . . that a party on appeal cannot assume and [sic] attitude or accept a theory inconsistent with or different from that at the hearing below, we will not consider that issue.") (internal citations omitted); *see also Valley Health Sys., LLC v. Eighth Judicial Dist. Court of State ex rel. Cty. of Clark*, 127 Nev. 167, 172, 252 P.3d 676 (2011) ("[a] point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal."); *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P2d 981 (1981) (same).

In a similar vein, this Court will not consider arguments raised for the first time in a party's reply papers. *See State Dep't of Taxation v. Kawahara*, 131 Nev. Adv. Op. 42, 351 P.3d 746, 748 (2015) ("[T]he Department did not argue priority based on this statute and, indeed, did not mention the statute until the reply brief. We therefore decline to consider any argument regarding the statute."); *Edelstein v. Bank of New York Mellon*, 128 Nev. Adv. Op. 48, n. 13, 286 P.3d 249, 261 (2012) ("[Edelstein] does not make this argument in his opening brief thus, we do

not consider it."); *Bongiovi v. Sullivan*, 122 Nev. 556, 569, n.5, 138 P.3d 433, 443 (2006) (declining to consider argument raised for the first time in an appellant brief.).

In the context of this case, the same principal must be applied when a case returns after review by the U.S. Supreme Court. If FTB failed to make an argument in its appeal before this Court, it should not be allowed to do so now where it is not related to or implicated by the decision of the U.S. Supreme Court.

The U.S. Supreme Court's opinion in *Hyatt II* was limited to amount of damages. There is no reason for this Court to read more into the opinion than is there. In analogous situations, this Court would not expect or want a trial court doing what the FTB advocates here in terms of re-arguing and re-deciding unrelated issues fully addressed and resolved by this Court. *See, e.g., Wheeler Springs Plaza, LLC v. Beemon*, 119 Nev. 260, 263–64, 71 P.3d 1258 (2003) ("When a reviewing court determines the issues on appeal and reverses the judgment specifically directing the lower court with respect to particular issues, the trial court has no discretion to interpret the reviewing court's order; rather, it is bound to specifically carry out the reviewing court's instructions."); *see also Cooney v. Goldberg*, 124 Nev. 1459, 238 P.3d 803 (2008) ("[T]he trial court has no discretion to interpret the reviewing court's order; rather, it is bound to

specifically carry out the reviewing court's instructions.") (alterations in original) (quoting *Wheeler Springs Plaza, LLC,* 119 Nev. at 263–64).

As a result, FTB's attempt to now argue the comity issue addressed in *Hyatt I* and affirmed in *Hyatt II* – outside the issue of the application of Nevada's statutory damages cap – should not be considered by this Court. Specifically, FTB's prior (and extensive) briefing to this Court limited its argument that the *2014 Opinion* violated *Hyatt I* to the issue of Nevada's statutory damages cap.[44]

At no point did FTB argue that under *Hyatt I* and its application of comity and the Full Faith and Credit clause that this Court erred in its *2014 Opinion* in allowing Hyatt to pursue his fraud and IIED claims, or in finding Hyatt adduced sufficient evidence to establish his fraud claim, or in rejecting FTB's failure to exhaust administrative remedies, or any other argument FTB now makes. FTB made arguments on different grounds for the fraud and IIED claims.[45] Nor did FTB make the exhaustion of administrative remedies argument it now makes. Instead, FTB argued the district court violated that prior ruling that allowed the intentional tort claims to proceed.[46] FTB therefore waived its right to now argue *Hyatt II* provides some basis for this Court to review these issues at this time.

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[44] AOB, at 100-102; ARB, at 109-11.
[45] AOB, at 33-52, 70-71, and 93-95.
[46] AOB, at 54-60.

C. Under the law-of-the-case doctrine, FTB is precluded from rearguing whether Hyatt may pursue the fraud and IIED claims against the FTB.

1. The law-of-the-case doctrine is well established under Nevada law.[47]

"[T]he law of a first appeal is the law of the case on all subsequent appeals in which the facts are substantially the same." *Clem v. State*, 119 Nev. 615, 620, 81 P.3d 521 (2003); *Geissel v. Galbraith*, 105 Nev. 101, 103 (1989) (holding modified by *Willerton v. Bassham, by Welfare Div., State, Dep't of Human Res.*, 111 Nev. 10, 889 P.2d 823 (1995) ("[W]here an appellate court states a principal or rule of law in deciding a case, that rule becomes the law of the case and is controlling both in the lower courts and on subsequent appeals, so long as the facts remain substantially the same.")).

In order for the law-of-the-case doctrine to apply to an issue, the "appellate court must [have] actually address[ed] and decide[d] the issue explicitly *or by necessary implication*." *Dictor v. Creative Management Services, LLC*, 126 Nev. 41, 44, 1223 P.3d 332, 334 (2010) (emphasis added); *see also, Fergason v. LVMPD*, 131 Nev. ___, 364 P.3d 592, 597 (Adv. Op. 94, December 24, 2015) ("Application of the doctrine requires that the appellate court actually address and

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[47] FTB is well familiar with the law-of-the-case doctrine having argued it in its appeal to this Court. *See* AOB, at 54-60.

decide the issue explicitly or by necessary implication.") (internal quotation marks and citations omitted).

This Court has repeatedly observed that the law-of-the-case doctrine prevents further litigation of this issue and "cannot be avoided by a more detailed and precisely focused argument." *See Hall v. State*, 91 Nev. 314, 316, 535 P.2d 797 (1975); *see also*, *State v. Haberstroh*, 119 Nev. 173, 188–89, 69 P.3d 676, 686 (2003) ("The law of a first appeal is the law of the case in all later appeals in which the facts are substantially the same, and that law cannot be avoided by more detailed and precisely focused argument made after reflecting upon previous proceedings.") (internal citations omitted).

This Court "will depart from [its] prior holdings only where [it] determine[s] that they are so clearly erroneous that continued adherence to them would work a manifest injustice." *See Clem*, 199 Nev. at 620; *see also*, *Hsu v. Cty of Clark*, 123 Nev. 625, 630–31, 173 P.3d 724 (2007) ("Nevertheless, as the U.S. Supreme Court has noted, absent those extraordinary circumstances, a court should be loath to revisit its prior decisions.") (internal citations and quotation marks omitted). Alternatively, the law of the case doctrine does not apply when there is a change of law that occurs during the pendency of the appeal. *See Hsu*, 123 Nev. at 632 ("[T]he 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."). (emphasis added). Neither circumstance exists here.

2. This Court has already determined, twice, that fraud and IIED claims can be asserted against FTB because intentional torts may be pursued against a Nevada government agency.

The procedural history of this case in this Court is telling and contradicts the relief now sought by FTB. In this Court's *2002 Opinion*, after several rounds of briefing and after issuing and vacating its own initial decision, this Court unambiguously held that Nevada government agencies do not have immunity for "intentional torts committed within the course and scope of employment" citing *Falline v. GNLV Corp*, 107 Nev. 1004, 1009 (1991), and other cases.[48]

It is indisputable that Hyatt's fraud and IIED claims were encompassed within this Court's *2002 Opinion* that Hyatt could pursue intentional tort claims. Hyatt's briefing before the Court set forth intentional torts he had alleged and even outlined the evidence gathered to that date to support the claims asserted. Fraud was a focus of the briefing on that point, while much the same evidence discussed

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[48] *2002 Opinion*, at 5 and 8.

also supported the outrage claim, *i.e.,* IIED.[49] FTB's briefing argued against these claims on the grounds Hyatt did not set forth sufficient evidence.[50] Notably, FTB did not argue at that time, or later, that these two claims could not be brought against Nevada government agencies.[51]

Similarly, when FTB raised and briefed issues for this appeal it did not argue or assert that fraud and IIED claims could not be brought against a Nevada government agency. Instead, FTB argued for clarity on discretionary function immunity and sought to overturn *Falline*.[52] This Court rejected FTB's arguments and reaffirmed *Falline*, holding that FTB could be sued for intentional torts.[53] In its decision, this Court explicitly discussed Hyatt's fraud and IIED claims against FTB, upholding the liability finding in favor of Hyatt and against FTB as to both.[54]

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[49] Hyatt Petition For Rehearing from 2001, at 6-10, attached to Supp. Append. Vol. 2, at Tab 1. For the Court's convenience Hyatt has also submitted herewith a Supplemental Appendix (Volume 2) of select prior briefing from this Court's first consideration of this case ("Supp. Append Vol. 2").

[50] FTB Response to Petition for Rehearing, at 6, attached Supp. Append. Vol. 2, at Tab 3.

[51] *Id.*

[52] AOB, at 34-52, 70-77, and 93-96.

[53] *2014 Opinion*, at 134-39.

[54] *2014 Opinion*, at 144-45, 147-49.

On two occasions in this case, therefore, this Court has considered and decided that fraud and IIED claims can be pursued against FTB because Nevada state agencies are not immune from intentional torts.

3. FTB's discretionary function immunity argument was not addressed or altered by *Hyatt II.*

The first issue addressed and decided by this Court in its *2014 Opinion* was rejection of FTB's discretionary function immunity argument. The specific finding of this Court was that "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."[55] This Court then explained its decision in a detailed, five page discussion of the issue.[56]

FTB's petition for certiorari to the U.S. Supreme Court sought review of this issue.[57] But the Court denied that portion of the petition, declining to review this Court's ruling that FTB does not have discretionary function immunity in regard to Hyatt's fraud and IIED claims.[58]

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[55] *2014 Opinion,* at 134.
[56] *Id.*, at 134-39.
[57] FTB's Cert. Pet., at 15-20.
[58] *Franchise Tax Board of California v. Hyatt*, 576 U.S. __, Order List at 13 (Jun. 30, 2015)(granting review of Questions 2 and 3 but denying review of Question 1 which sought review of the discretionary function immunity issue), attached to Supp. Append. Vol. 1, at Tab 4.

With no new law, and no new facts, FTB nonetheless now begs this Court to again address the issue as applied to this case and specifically Hyatt's fraud and IIED claims. FTB's arguments in its supplemental brief are remarkably similar to its prior briefing. As a matter of procedure the Court should not re-visit this issue. As also discussed below, substantively, there is no basis for the Court to reverse its prior, well-reasoned decision in this case on discretionary function immunity.

As a result, the procedural history of this case prohibits FTB from now re-arguing the same issue this Court has decided twice in this case.

4. Falline does not bar IIED claims against Nevada government agencies, nor does any other authority.

The cornerstone of FTB's argument seeking that the Court reconsider its prior ruling on discretionary function immunity is FTB's complete misstatement of the holding in *Falline*.[59] *Falline* indisputably arose out of the workers

[59] Hyatt extensively briefed the discretionary function immunity issue in his Answering Brief. While FTB repeats much of its prior briefing on this issue, Hyatt will not repeat his briefing but instead directs the Court to Hyatt's Answering Brief to the extent the Court determines it is necessary to review Hyatt's prior briefing. (RAB, at 54-67.) It is clear that the Court understood (and accepted) Hyatt's prior briefing and arguments as the Court stated in its *2014 Opinion* addressing the discretionary function immunity issue: "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." (*2014 Opinion*, at 135.) *Martinez* refers to *Martinez v. Maruszczak*, 123 Nev. 433, 168 P.3d 720 (2007), which the Court also extensively discussed in the *2014 Opinion*, at pp. 134-139.

compensation context and bars a plaintiff in that context from making an IIED claim:

> Moreover, recognizing a cause of action for emotional distress in the workmen's compensation context raises the specter of "almost every emotion-based case turning up as some kind of tort suit."

Falline, at 1013 (citation omitted).

FTB nonetheless makes repeated misstatements about this holding in *Falline* and then punctuates its inaccuracy by intentionally misstating the above quoted language from the decision. Specifically, FTB misstates on pages 4 and 13 of its Supp. Brief that *Falline* holds that an IIED claims "is prohibited by law" and "will not lie" against a Nevada government actor." (FTB Supp. Brief, at 4, 13.) FTB then recasts the above quote from *Falline* out of context and substitutes the words "[an administrative]" context for the actual words "the workmen's compensation" context. Indeed, FTB prefaces its erroneous quote with a false description of the *Falline* holding. According to FTB:

> In *Falline*, the Court summarily dismissed the IIED claim because no such claim could be brought against a government agency:
>
> Moreover, recognizing a cause of action for emotional distress in *[an administrative]* context raises the specter OF "almost every emotion-

based case turning up as some kind of tort suit."[60]

Neither in the *Falline* opinion itself, nor in the Court's decisions in this case discussing *Falline,* has this Court held or intended to convey that *Falline* bars IIED claims against government actors. To the contrary, this Court has approvingly cited *Falline* in twice finding that Hyatt's IIED claim is not barred by either FTB's claimed immunity under California law or this Court's application of Nevada's discretionary function immunity for government actors.

In the *2002 Opinion*, this Court cited *Falline* and other cases in holding that Nevada does not provide immunity to its state agencies for acts taken in bad faith or for intentional torts.[61] In its *2014 Opinion*, this Court extensively discussed *Falline* in addressing the discretionary function immunity argument of FTB. The Court rejected FTB's argument in affirming *Falline*: "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."[62]

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[60] FTB Supp. Brief, at 14 (emphasis added).

[61] *2002 Opinion*, at 5.

[62] *2014 Opinion*, at 139.

The Court then went on and approved the liability finding against FTB on the IIED claim.[63] There is no basis for FTB's wishful but erroneous interpretation and assertion of the holding from *Falline.* An IIED claim can be sustained against a Nevada government agency when, as here, the conduct at issue constituted an intentional tort or was carried out in bad faith. Here, both qualifications were met as FTB committed an intentional tort and acted in bad faith in so doing.[64]

5. Other case law reaffirms that IIED claims may be brought against Nevada government agencies.

Pre-*Martinez* this Court's rulings demonstrated that IIED claims could be brought against government agencies. *See Posadas v. City of Reno*, 109 Nev. 448, 450, 851 P.2d 438, 440 (1993)(reversing grant of summary judgment for city for various causes of actions by plaintiff, including IIED, thereby allowing the claims to proceed to trial and holding specifically that factual issues precluded summary judgment on the IIED claim); *see also Nunez v. City of N. Las Vegas*, 116 Nev. 535, 541, 1 P.3d 959, 963 (2000) (reversing dismissal of IIED claim against the city "to allow discovery on these claims to proceed. The merits of the emotional distress claims may be revisited thereafter either by pre-trial motion or at trial."); *Plaza v. City of Reno*, 111 Nev. 814, 815, 898 P.2d 114 (1995) (reversing grant of

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[63] *2014 Opinion*, at 147-49.
[64] *2014 Opinion*, at 147-49.

summary judgment in favor of city for claims including IIED because "there are still genuine issue of material fact, and summary judgment was therefore inappropriate.")

California similarly allows IIED claims against its state agencies and officials. *See Catsouras v. Dept. of California Highway Patrol*, 181 Cal. App. 4th 856, 875 (2010); *Asgari v. City of Los Angeles*, 15 Cal. 4th 744, 760 (1997).

As a result, IIED claims against Nevada government agencies are not barred by *Falline*, *Martinez* or any other case. This is entirely consistent with the law of this case as already determined by this Court. FTB has no basis to now re-argue to the contrary.

6. Case law also affirmatively supports that a fraud claim can be brought against government agencies.

FTB suggests there is also no precedent for allowing a fraud claim against a Nevada government agency. Again, not true. Beyond and in addition to the *2014 Opinion* and *Falline*, case law in other jurisdictions supports holding government agencies liable for fraud. *See Doe ex rel. Christina H. v. Medford Sch. Dist. 549C*, No. 10-3113-CL, 2011 WL 1002166, at *9 (D. Or. Feb. 22, 2011), report and recommendation adopted, No. CIV. 10-3113-CL, 2011 WL 976463 (D. Or. Mar. 18, 2011) (Oregon) (denying school district's motion to dismiss state law claims

including fraud claim); *Del Vecchio By Del Vecchio v. Nassau Cty.*, 118 A.D.2d 615, 617, 499 N.Y.S.2d 765, 767 (1986) (New York) (allowing misrepresentation claims against city to proceed); *Burr v. Bd. of Cty. Comm'rs of Stark Cty.*, 23 Ohio St. 3d 69, 78, 491 N.E.2d 1101, 1109 (1986) (Ohio) (affirming judgment for fraud against county); *see also Canyon del Rio Inv'rs, L.L.C. v. City of Flagstaff*, 227 Ariz. 336, 344, 258 P.3d 154, 162 (Ct. App. 2011) (Arizona) (affirming dismissal of misrepresentation claim on the basis of failure to file notice of claim as required by statute, not because of governmental immunity.); *Benedict Realty Co. v. City of New York*, 45 A.D.3d 713, 714, 846 N.Y.S.2d 294, 295 (2007) (New York) (affirming summary judgment on fraud claim in favor of City because Plaintiff failed to raise triable issue of fact—not because of governmental immunity).

D. Even if the Court entertains FTB's attempt to reargue the sufficiency of the fraud evidence, more than sufficient evidence was presented at trial to sustain the jury's verdict on the fraud claim.

Again, there is no basis for this Court to reconsider its prior ruling affirming the jury's finding that the FTB committed fraud directed at Hyatt. In finding sufficient evidence in the record to support Hyatt's fraud claim, this Court held in its *2014 Opinion* that FTB falsely promised to protect Hyatt's confidential information and treat him courteously and cited the following evidence in support of the jury's finding of fraud:

- *Massive disclosure of confidential information:* "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."[65]
- *Bad faith delay of protests. "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."*[66]
- *Auditor's Anti-Semitic remarks: "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 . . ."*[67]
- *FTB intent on assessing: "Cox essentially was intent on imposing an*

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[65] *2014 Opinion*, at 144-45; *see also* RAB, at 35-42.
[66] *2014 Opinion*, at 145; *see also* RAB, at 43-51.
[67] *2014 Opinion*, at 145; *see also* RAB, at 15-17.

assessment against Hyatt, and that FTB promoted a culture in which tax assessments were the end goal whenever an audit was undertaken."[68]

Hyatt II does not alter any of the analysis used by the Court to affirm the jury's finding that FTB committed fraud.[69] The singular issue in *Hyatt II* was the amount of damages this Court affirmed in favor of Hyatt. The reduction of the amount of damages Hyatt can recover on his fraud claim from the $1,085,281.56 to $75,000 as argued by FTB does not provide a basis for FTB to reargue the liability finding made against it on the fraud claim. There is no reason for the Court to reconsider and essentially re-weigh the fraud evidence.

E. FTB is also precluded from rearguing exhaustion of administrative remedies, which argument in any event fails as this tort case is wholly separate from the California administrative tax process.

Again, nothing in *Hyatt II* relates or provides a basis to re-argue FTB's failure to exhaust administrative remedy defense. More fundamentally, FTB now tries to re-argue the very exhaustion of administrative remedy argument it lost on in the *2002 Opinion*. In sum, as first decided by then Judge Saitta (now former Justice Saitta), this tort action is separate from the California administrative

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[68] *2014 Opinion*, at 145; *see also* RAB, at 32-35.

[69] This Court cited much of the same evidence in affirming the liability finding for the IIED claim. (*2014 Opinion*, at 147-49.)

process that will decide the tax dispute.[70] This tort case will not decide the tax case, nor will resolution of the tax case address and resolve the issues put forth in this tort case. This Court affirmed this ruling and the separateness of the two proceedings in its *2002 Opinion*:

> Preliminary, we reject Franchise Tax Board's arguments that the doctrines of sovereign immunity, full faith and credit, choice of law, or *administrative exhaustion* deprive the district court of subject matter jurisdiction over Hyatt's tort claims. . . . Hyatt's tort claims, although arising from the audit, are separate from the administrative proceeding, and the exhaustion doctrine does not apply.[71]

Indeed, the separateness of the two proceeding was the basis of some of the evidentiary errors found by this Court to have been committed by the district court during the trial. This Court found that certain evidence should not have been admitted because it went only to the issue of whether taxes were owed, not whether a tort was committed.[72]

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[70] 2 AA 357-419, 420-421.
[71] *2002 Opinion*, at 6 (emphasis added).
[72] *2014 Opinion*, at 149-50 (evidence challenging audit conclusions as improper), 150-51 (evidence of audit determinations).

FTB now attempts to reargue that there should not even have been a tort action. But the cases cited by FTB are inapposite. They all involve an attempt by the plaintiff to stop or alter an administrative proceedings. The descriptions of the cases discussed by FTB on pages 33-35 of its Supp. Brief establish this very point. FTB does not cite a case involving a tort claim separate from the administrative proceeding.

FTB's retread of its administrative exhaustion argument must again be rejected by the Court. The Court has ruled on this, and it is the law of this case. Further, the issue is in no way implicated by *Hyatt II*.

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VII. Conclusion.

For all of the foregoing reasons, the relief sought by FTB should be denied. The Court should re-issue its *2014 Opinion* after correcting the amount of damages awarded to the $75,000 maximum per claim as FTB argued in its prior briefing in this appeal.

DATED: October 24, 2016.

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ATTORNEY'S CERTIFICATE

1. I certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because it has been prepared in a proportionally spaced typeface using WordPerfect X4 in 14 point Times New Roman font.

2. I further certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains10,539 words.

3. Finally, I certify that I have read this appellate brief, 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)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event the

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accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

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CERTIFICATE OF SERVICE

I certify that I am an employee of HUTCHISON & STEFFEN, LLC and that on this date **RESPONDENT GILBERT P. HYATT'S SUPPLEMENTAL ANSWERING BRIEF FOLLOWING MANDATE FROM THE SUPREME COURT OF THE UNITED STATES** was filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the master service list as follows:

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EXHIBIT 82

IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 53264

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,

Appellant/Cross-Respondent
v.

GILBERT P. HYATT
Respondent/Cross-Appellant

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

APPELLANT'S SUPPLEMENTAL REPLY BRIEF FOLLOWING MANDATE FROM THE SUPREME COURT OF THE UNITED STATES

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

I. INTRODUCTION

In its 2014 Opinion this Court fashioned a special judge-made rule of law that held FTB to a different standard than a Nevada agency. *See Franchise Tax Bd. of Calif. v. Hyatt* ("2014 Opinion"), 130 Nev. Adv. Op. 71, 335 P.3d 125, 147 (2014). The United States Supreme Court rejected this sister-state hostility and vacated the 2014 Opinion as unconstitutional. *Franchise Tax Bd. of Cal. v. Hyatt*, 136 S.Ct. 1277, 1282 (2016) ("*Hyatt II*"). According to FTB's research, just a handful of times in history, absent some intervening new law, has a Nevada Supreme Court decision been thrown out by the country's highest court.[1] Given this rare circumstance, the Supreme Court's mandate to comply with the Full Faith and Credit Clause should not be taken lightly. Rather, the Court must issue a new judgment that is free from sister-state hostility in all respects.

The Court justified the 2014 Opinion's anti-California discrimination with its belief that California's system to control its own agencies did not provide "adequate" recourse to Nevada's citizens. 335 P.3d at 147. According to the 2014 Opinion, California's agencies purportedly "operate[] outside" the systems of "legislative control, administrative oversight, and public accountability" that

[1] *See Powell v. Nevada*, 511 U.S. 79, 85 (1994) (vacating and remanding "for further proceedings not inconsistent with this opinion"); *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1058 (1991) (reversing without remanding); *Brooks v. Dewar*, 313 U.S. 354, 362 (1941) (reversing and remanding with instructions); *Crandall v. Nevada*, 73 U.S. 35 (1867) (reversing and remanding with instructions).

Nevada has for its own agencies. *Id.* (quoting *Faulkner v. Univ. of Tenn.*, 627 So.2d 362, 366 (Ala.1992)).

Hyatt II repudiated this rationale, declaring that this Court's explanation for its sister-state hostility "amount[ed] to little more than a conclusory statement disparaging California's own legislative, judicial, and administrative controls." 136 S.Ct. at 1282. Such disparagement "cannot justify the application of a special and discriminatory rule." *Id.*

Notwithstanding this language, Hyatt contends that *Hyatt II* still allows Nevada to discriminate against FTB so long as it can articulate a constitutionally allowable policy for doing so. (Suppl. AB 21-22). But the only policy reason articulated by this Court was the disparagement of California's legislative, judicial and administrative controls that the Supreme Court deemed unconstitutional. *Hyatt II*, 136 S.Ct. at 1282, quoting 2014 Opinion, 335 P.3d at 147. Nowhere in the 2014 Opinion did the Court otherwise justify its failure to treat FTB the same as Nevada's Department of Taxation, and Hyatt offers no additional policy reasons for the Court's consideration.

As to the numerous instances of sister-state hostility that FTB identifies, Hyatt provides only a procedural, rather than substantive, response. Hyatt makes the internally contradictory arguments that FTB is allegedly relitigating issues, yet purportedly waived those same issues by not raising them earlier. Having argued

all along for comity, FTB preserved its right to request that this Court's new judgment comply with the Full Faith and Credit Clause in all respects. And where the Supreme Court agreed with FTB that the 2014 Opinion contained unjustified discriminatory animus towards California, FTB is not seeking to relitigate closed issues.

Hyatt does not address – and therefore does not dispute – dispositive arguments made in FTB's supplemental opening brief. For example, Hyatt provides no response to the cases and statutes cited by FTB that give deference to the Nevada Department of Taxation's fact finding and legal conclusions and immunity for its audit work. Therefore, FTB was entitled to that same immunity and deference. Likewise, Hyatt does not dispute that intent to defraud cannot be proven by statements the legislature requires the Nevada Department of Taxation to make through the Taxpayers' Bill of Rights. Therefore, FTB could not be found to possess fraudulent intent in sending a legislatively mandated notice to Hyatt. Hyatt's silence confirms the merits of FTB's arguments.

Where this Court failed to articulate a constitutionally allowable policy for treating FTB differently than a Nevada agency, the Court cannot simply "modify or correct" the 2014 Opinion with the elementary interlineations offered by Hyatt. (Suppl. AB 27-28). The Court must comply with the letter and spirit of the Supreme Court's mandate and cannot look elsewhere to determine its next steps.

Reviewing the facts and applying the law as if FTB were Nevada's Department of Taxation, the Court should conclude that FTB cannot be liable to Hyatt.

II. ARGUMENT

A. Hyatt Asks This Court To Disregard The Supreme Court's Mandate And Enter A New Judgment That Is Unconstitutional.

1. To Comply With The Mandate, The Court's New Judgment Must Be Free Of Sister-State Hostility.

Hyatt improperly asks this Court to ignore language from the Supreme Court's mandate that bars any anti-California discrimination. "After the appeal had been taken, the power of the court below over its own decree was gone. **All it could do after that was to obey [the Supreme Court's] mandate when it was sent down**." *Durant v. Essex Co.*, 101 U.S. 555, 556-57 (1879) (emphasis added).

Here, the Supreme Court's mandate broadly attacked every unconstitutional aspect of the 2014 Opinion:

> **[I]nsofar as the Nevada Supreme Court has declined to apply California law in favor of a special rule of Nevada law that is hostile to its sister States, we find its decision unconstitutional.** We vacate its judgment and remand the case for further proceedings not inconsistent with this opinion.

Hyatt II, 136 S.Ct. at 1283 (emphasis added). Hyatt's supplemental answering brief ignores this bolded language. (Suppl. AB 3, 20).

The only judgment that would be consistent with the Supreme Court's mandate is one that is free of sister-state hostility in all respects. Therefore, the

Court cannot, as Hyatt argues, simply reissue the 2014 Opinion with the damages cap inserted. (Suppl. AB 16). If this Court were to enter a new judgment that retains any of the 2014 Opinion's anti-California hostility, that new judgment would be "inconsistent" with *Hyatt II* and therefore in violation of the Full Faith and Credit command. *Hyatt II*, 136 S.Ct. at 1283.

To the extent this Court failed to treat FTB as it would Nevada's taxing authority – whether by allowing IIED and fraud verdicts based on California's legislatively mandated statements and FTB's discretionary audit decisions; failing to cloak FTB with the same immunities that would protect Nevada's Department of Taxation; failing to defer to FTB's fact finding and legal conclusions; and permitting Hyatt to sidestep the California administrative process – the 2014 Opinion violated the Full Faith and Credit clause.

2. The Court Must Look At The Supreme Court's Mandate, Not Simply The Issues Presented, To Determine The Scope Of Its Authority On Remand.

Contrary to Hyatt's assertion (Suppl. AB 1-2), this Court can look only to the mandate itself, not the issues presented to the Supreme Court, to guide its post-remand decision making. "[W]here the directions contained in the mandate are precise and unambiguous, it is the duty of the subordinate court to carry it into execution, ***and not to look elsewhere to change its meaning***." *Cook v. Burnley*, 78 U.S. 672, 674 (1870) (emphasis added). The Supreme Court's "power to decide is

not limited by the precise terms of the question presented." *Procunier v. Navarette*, 434 U.S. 555, 559 n.6 (1978). Rather, the Supreme Court has discretion to issue a mandate that is broader in reach than the issues presented. *See City of Sherrill, N.Y. v. Oneida Indian Nation of N.Y.*, 544 U.S. 197, 214 n.8 (2005); *see also Haynes v. United States*, 390 U.S. 85, 101 (1968) (holding that the Supreme Court has "plenary authority under 28 U.S.C. §2106 to make such disposition of the case as may be just under the circumstances") (internal quotation omitted).

In light of these authorities, this Court cannot second guess the breadth of the Supreme Court's mandate by looking at the scope of FTB's arguments to the Supreme Court. *See Cook*, 78 U.S. at 674. If the Supreme Court wanted this Court to simply apply the statutory cap, it could have said so in its mandate and vacated the damages award only. *See* 28 U.S.C. §2106. It did not. *See Hyatt II*, 136 S.Ct. at 1283. It also did not identify the damages award as the sole reason why the 2014 Opinion was unconstitutional. *See id.* Instead, the mandate clearly specified that **any aspect** of the 2014 Opinion that was hostile to a sister state was unconstitutional. *See id.* at 1282-83.

3. This Court Must Rectify All Of The Sister-State Hostility Expressly And Impliedly Rejected By The Supreme Court's Mandate.

On remand, a lower court must tailor its new judgment to conform to any matter that the Supreme Court has disposed of either expressly or impliedly. *See*

Kashner Davidson Sec. Corp. v. Mscisz, 601 F.3d 19, 24 (1st Cir. 2010). "[T]he power of a [lower] court to act in any litigation after the issuance of a mandate on appeal is limited by an obligation to ***do nothing contrary to either the letter or the spirit of the mandate***, as explained or elucidated by the opinion." *Goldwyn Pictures Corp. v. Howells Sales Co.*, 287 F. 100, 102 (2d Cir. 1923) (emphasis added); *see also Quern v. Jordan*, 440 U.S. 332, 347 n.18 (1979) (looking to whether post-mandate conduct of lower court was consistent "with either the spirit or the express terms of our decision"); *In re Coudert Bros. LLP*, 809 F.3d 94, 99 (2d Cir. 2015) (holding that the lower court "must follow both the specific dictates of the remand order as well as the broader spirit of the mandate") (internal quotations and citations omitted). Hyatt summarily brushed aside this proposition and the supporting legal authorities cited by FTB. (Suppl. AB 20, n.29).

Embodied in the *Hyatt II* opinion is an extensive discussion of the Full Faith and Credit requirements. 136 S.Ct. at 1280-83. As the Supreme Court emphasized, a state may not "adopt any policy of hostility to the public Acts of that other State." *Id.* at 1281, *quoting Carroll v. Lanza*, 349 U.S. 408, 413 (1955). The Supreme Court expounded at length regarding why this Court's discriminatory conduct was unconstitutional:

> Nevada has not applied the principles of Nevada law ordinarily applicable to suits against Nevada's own agencies. Rather, it has applied a special rule of law applicable only in lawsuits against its sister States, such as California… [A] State that disregards its own

> ordinary legal principles [based on the presumption that the sister state's legislative, judicial and administrative controls will be ineffective] *is* hostile to another State. A constitutional rule that would permit this kind of discriminatory hostility is likely to cause chaotic interference by some States into the internal, legislative affairs of others. Imagine, for example, that many or all States enacted such discriminatory, special laws, and justified them on the sole basis that (in their view) a sister State's law provided inadequate protection to their citizens. Would each affected sister State have to change its own laws? Entirely? Piece-by-piece, in order to respond to the new special laws enacted by every other State? It is difficult to reconcile such a system of special and discriminatory rules with the Constitution's vision of 50 individual and equally dignified States. In light of the constitutional equality among the States, … Nevada has not offered sufficient policy considerations to justify the application of a special rule of Nevada law that discriminates against its sister States. *Id.* at 1282 (internal quotations omitted).

This language broadly admonished the Court that no sister-state hostility of any kind can persist in a new judgment. *See id.*, *citing* 2014 Opinion, 335 P.3d at 145.

B. Hyatt's Supplemental Answering Brief Fails To Offer Justification For The Numerous Examples Of Sister State Hostility Identified By FTB.

Rather than address the multiple instances of anti-California discrimination identified by FTB, Hyatt makes the unfounded assertion that "[t]here is no other part of the 2014 Opinion [other than failure to apply the damages cap] that fails to treat FTB as a Nevada state agency would be treated." (Suppl. AB 21). Hyatt's contention is wrong, and by resting on this bald assertion without analysis, Hyatt concedes the merits of FTB's arguments.

1. Hyatt Does Not Dispute That The Court Did Not Give FTB The Deference It Gives To The Nevada Department Of Taxation's Fact Finding And Legal Conclusions.

Hyatt does not dispute a dispositive argument advanced by FTB: the Court would defer to the Nevada Department of Taxation's fact finding and legal conclusions. (*See* Suppl. OB 26-36 and cases cited therein).

> [S]tate law entrusts the primary responsibility for making factual evaluations under, and legal interpretations of, the revenue statutes to the expertise of Nevada's Department of Taxation.
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> * * *
>
> [T]he determinations of fact-based legal issues under the tax statutes should not be made by the courts; rather, those determinations are best left to the Department of Taxation, which can utilize its specialized skill and knowledge to inquire into the facts of the case. Further, we have repeatedly recognized the authority of agencies, like the tax department and Tax Commission, to interpret the language of a statute that they are charged with administering; as long as that interpretation is reasonably consistent with the language of the statute, it is entitled to deference in the courts.

See Int'l Game Tech., Inc. v. Second Jud. Dist. Ct., 122 Nev. 132, 157-58, 127 P.3d 1088, 1093, 1106 (2006) (internal quotation omitted). Hyatt makes no effort to distinguish this case or justify how the Nevada tort case could proceed without giving deference to FTB's audit findings and conclusions.

2. Hyatt Does Not Dispute That The Nevada Department of Taxation Would Be Immune From Hyatt's Attack On The Administrative Process.

Hyatt's supplemental answering brief is also silent and therefore concedes that Hyatt's tort case would have never proceeded against the Nevada Department of Taxation because Nevada affords its revenue agencies special immunities (beyond discretionary function immunity) that other agencies do not share. *See* NRS 360.140(3); NRS 372.670; NRS 375B.370; *see also Wells Fargo and Co. v. Dayton*, 11 Nev. 161, 168 (1876). The underlying purpose of this immunity is to prevent interference with the tax collecting process:

> It is upon taxation that the several states chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible. Any delay in the proceedings of the officers, upon whom the duty is devolved of collecting the taxes, may derange the operations of government, and thereby cause serious detriment to the public. *Wells Fargo*, 11 Nev. at 168, *citing Dows vs. The City of Chicago*, 78 U.S. 108, 110 (1870).

By failing to cloak FTB with Nevada's statutory immunities, the 2014 Opinion did not treat FTB the same way Nevada treats its own Department of Taxation.

3. Hyatt Presents No Cogent Argument Why *Falline's* Prohibition On IIED Claims In the Workers' Compensation Context Would Not Apply In All Administrative Proceedings.

Hyatt's attempt to limit *Falline*'s bar on IIED claims to just workers' compensation proceedings is nonsensical. *Falline* held that, like punitive damages,

an IIED claim could not lie against a self-insured employer and plan administrator for delay in payment of workers' compensation benefits. *Falline v. GNLV Corp.*, 107 Nev. 1004, 1013, 823 P.2d 888, 894 (1991). As explained by the Court, the IIED tort "would, at least in many instances, embrace conduct that would support a claim for punitive damages and we have held that such damages are unavailable in the type of action presented by the instant case." *Id.* In other words, the defendants' immunity from an IIED claim in *Falline* derived from a Nevada agency's immunity from punitive damages. *See id.*

Contrary to Hyatt's assertion, FTB made no "misstatement" regarding the *Falline* decision. (Suppl. AB 38). *Falline's* analytical underpinning was that a public entity is exempt from punitive damages that are otherwise allowed under NRS 42.005. *See Falline*, 107 Nev. at 1013, 823 P.2d at 894. The fact that *Falline* arose in the workers' compensation context is immaterial to that analysis. *See id.* In the 2014 Opinion, the Court granted FTB immunity from punitive damages because punitive damages are unavailable against Nevada's public agencies. 335 P.3d at 154. Just as the Court held that *Falline*'s bad-faith exception to discretionary function immunity applied outside the workers' compensation context, to enforce *Falline* in a non-discriminatory manner, it must also conclude that FTB cannot be subject to an IIED claim. *See id.*

The pre-*Martinez* cases cited by Hyatt do not alter this conclusion. (Suppl. AB 40-41 and citations therein). None of the defendants in those cases appear to have raised an immunity defense, and the Court provided no analysis on this issue. In contrast, *Falline* expressly points to a public agency's exemption from NRS 42.005 as the basis for granting immunity from the plaintiff's IIED claim. *See* 107 Nev. at 1013, 823 P.2d at 894.

The California cases cited by Hyatt also are not persuasive because it is undisputed that FTB would have complete immunity from liability in California's courts. *See* Cal. Govt. Code Ann. § 860.2. Moreover, the *Asgari* case allowed a new trial on punitive damages, which as this Court recognized in the 2014 Opinion, clearly are not allowed against a Nevada agency or FTB. *Compare Asgari v. City of Los Angeles*, 937 P.2d 273 (Cal. 1997), as modified on denial of reh'g (Mar. 17, 1997) *with* 2014 Opinion, 335 P.3d at 154.

4. Hyatt Does Not Identify Any Nevada Precedent That Allows A Fraud Claim Against A Nevada Agency.

The cases from other jurisdictions cited by Hyatt confirm there is no Nevada precedent for a fraud claim against a public entity and, to the extent the Court wants to make new law now, they constitute a shaky foundation for doing so. (Suppl. AB 41). The leading case on which Hyatt relies is an unpublished disposition from a federal court in Oregon adopting a magistrate judge's report and recommendation. *Doe ex rel. Christina H. v. Medford Sch. Dist. 549C*, No. 10-

3113-CL, 2011 WL 1002166, at *9 (D. Or. Feb. 22, 2011), report and recommendation adopted, No. CIV. 10-3113-CL, 2011 WL 976463 (D. Or. Mar. 18, 2011). The court's decision was based on an "aiding and assisting theory" that the public entity could be liable for the intentional torts of individual employees. *Id.* at *9, appearing to refer to *7.[2] Hyatt advanced no such theory.

Moreover, not a single case that Hyatt cites involves a fraud claim that depends on statements made in a legislatively mandated form document to prove intent to defraud. For the fraud verdict against FTB to survive the *Hyatt II* mandate, the Court must establish new Nevada law that the Nevada Department of Taxation can be liable for fraud based on the Taxpayer Bill of Rights. *See* NRS 360.291(1)(a). No such precedent exists or should exist.

C. Hyatt's Use Of The Nevada Jury Verdict To Manipulate The California Administrative Process Underscores The Dangers Of Sister-State Hostility.

1. Hyatt's Contention That His California Administrative Appeal And Nevada Tort Case Are Separate Is Wholly Disingenuous As The Record Is Clear He Tried His Tax Case To The Las Vegas Jury.

Rather than address FTB's substantive arguments, Hyatt deceitfully contends that his Nevada tort case and California administrative appeal are distinct. (Suppl. AB 7). Hyatt cannot sidestep the 2014 Opinion's failure to grant FTB the

[2] The *Christina H* court's discussion mixed its analysis of the fraud and false imprisonment claims, further confirming that it provides shaky authority to support Hyatt. 2011 WL 976463 at *9.

protections of Nevada's exhaustion, immunity and deference doctrines by misrepresenting what his trial was all about: a collateral attack on the California administrative process.

The record is clear that Hyatt tried his tax case to the Nevada jury (AOB 23-27 and citations therein), thereby exceeding the jurisdictional limitations established by the Supreme Court. *See Franchise Tax Bd. of Calif. v. Hyatt* ("*Hyatt I*"), 538 U.S. 488, 499 (2003). From start to finish, Hyatt's counsel specifically told the jury it was their job to act as a "check and balance" on California's legislative and executive functions. 32 AA 07974 (131); 52 AA 12837 (90). The jury heard nearly two full days of testimony from Hyatt's expert Malcolm Jumelet, who expressed expert opinions critical of how FTB analyzed and weighed information obtained in the audits. 2014 Opinion, 335 P.3d at 150; 44 AA 10814-10946. Hyatt's trial attorneys then relied heavily on Jumelet's testimony in both their initial and rebuttal closing arguments.

For example, Hyatt's counsel referred the jury dozens of times to Jumelet's testimony that FTB had reached the wrong result concerning Hyatt's tax liability. *See, e.g.*, 52 AA 12835-36, 12853, 12893, 12894, 12901, 12905, 12910, 12912, 12915, 12923. In fact, Hyatt's counsel expressly asked the jury to tie Jumelet's testimony to the IIED claim. 52 AA 12894(28-29) (counsel discusses Jumelet's testimony, immediately followed by: "The FTB certainly knew how to inflict the

emotional distress on Mr. Hyatt."); *see also* 53 AA 13166-67, 13169, 13172, 13176.

The 2014 Opinion clearly recognized that Hyatt's trial strategy was to get a Las Vegas jury to review FTB's audit. 2014 Opinion, 335 P.3d at 150. As stated by this Court, the inadmissible expert testimony from Malcolm Jumelet "is precisely what this case was not allowed to address" because it "went to the audits' determinations and had no utility in showing any intentional torts …." *Id.* Given these acknowledgements, it is clear the 2014 Opinion violated the Full Faith and Credit mandate of *Hyatt I* and *II* insofar as it affirmed liability determinations made by a Las Vegas jury that second-guessed the agency statutorily charged with making factual findings and legal conclusions as to Hyatt's tax liability. *See Int'l Game Tech.*, 122 Nev. at 157-59, 127 P.3d at 1093, 1106.

2. Hyatt Misused A Nevada Discovery Order To Conceal From The California Protest Hearing Officer Documents That Undermined His Protests.

Hyatt does not dispute FTB's argument that the protective order Hyatt obtained from the district court ("Nevada Protective Order") interfered with FTB's administrative review of Hyatt's protest. (Suppl. OB 25). Shielded by the Nevada Protective Order, Hyatt abused the Nevada litigation process to hide key documents from FTB's auditors and hearing officer, including contracts, royalty schedules and wire transfer documents that showed he received $56 million of

income in 1991 instead of 1992, as Hyatt had represented to FTB. (AOB 20-21, 23-37 and record citations therein).

FTB's Nevada litigation attorneys learned of these hidden documents, but because of the Nevada Protective Order that prohibited them from sharing that information with others within FTB, the hearing officer who presided over Hyatt's protests did not. (*Id.*). Hyatt not only asked that his protest hearing be delayed, but because of Hyatt's litigation tactics, the protest hearing officer could not proceed until Hyatt provided all documents that had been requested in the administrative proceeding. (*Id.*). Yet the district court precluded FTB from presenting this evidence to the jury, and this Court then used the Hyatt-caused delay as a basis to affirm the jury's IIED verdict. 2014 Opinion, 335 P.3d at 148-49.

In light of this evidence in the record, Hyatt's contention that the Nevada tort case and the California administrative proceedings are purportedly "two different trains traveling on separate tracks" is entirely disingenuous. (Suppl. AB 7). Hyatt's trial tactic was to attack every discretionary decision made by FTB in Hyatt's audit. Then, based on one-sided evidence and manipulation of the California administrative process through overreaching Nevada discovery and evidentiary orders, the Nevada jury determined that FTB's routine audit procedures constituted fraud and IIED. *See* 2014 Opinion, 335 P.3d at 148; AOB 23:3-27:9

and record citations therein. This is precisely the "derange[d]" intrusion into a sovereign's tax collection that this Court long ago prohibited. *Wells Fargo,* 11 Nev. at 168. It likewise exhibits the "chaotic interference" into a state's taxing functions that the Supreme Court deemed unconstitutional. *Hyatt II*, 136 S.Ct. at 1282.

3. Hyatt Continues to Misuse The Nevada Jury Verdict To Manipulate His Administrative Appeal in California.

Should this Court question whether Hyatt has intertwined this case and the administrative appeal, it need look no further than Hyatt's actions in California. Buoyed by his success in his Nevada tort case, Hyatt now parades the Nevada jury verdict in his ongoing California administrative appeal before the California State Board of Equalization ("BOE") to argue that the tax liability issues have already been litigated in his favor. (*See* documents attached to Request for Judicial Notice).[3]

In his submissions to BOE, Hyatt made the following statements with specific citations to the 2014 Opinion and evidence presented at his Nevada trial:

- "It has been ***conclusively determined*** that FTB committed fraud, intentionally inflicted emotional distress and acted in bad faith in its

[3] FTB requests that the Court take judicial notice of these documents and concurrently files a separate motion to that effect. *See* NRS 47.130.

audits and protests of Mr. Hyatt." RJN 053:2-13, RJN 089:23-090:3, RJN221 (emphasis added).

- "A Nevada jury found that FTB engaged in gross misconduct and fraud, including bad faith acts, referring to Mr. Hyatt in derogatory terms, and much more. FTB's bad faith continues in these appeals." RJN 018:15-17; *see also* RJN 053:12-13 ("Nowhere in its briefing [to the BOE] has FTB addressed the fraud, intentional infliction of emotional distress, and bad faith ***found by the Nevada jury***") (emphasis added); RJN 090:10-11; RJN260.
- "***The Nevada Supreme Court found that FTB committed fraud and intentional infliction of emotional distress in part because of its delays***… In upholding the Nevada jury finding that FTB personnel committed fraud in Mr. Hyatt's audits and protests, the Nevada Supreme Court expressly highlighted FTB's extreme delay in processing Mr. Hyatt's two protests." RJN 216:1-8 (emphasis added).
- Hyatt asked for interest abatement based on "[t]he Nevada Supreme Court [finding] that FTB committed fraud and intentional infliction of emotional distress in part because of its delays." RJN 037:15-18.
- "The Nevada Supreme Court upheld the Nevada jury findings that FTB committed fraud in connection with his audits and protests. The

jury found that FTB made specific representations to Mr. Hyatt that it intended Mr. Hyatt to rely upon, but which FTB did not intend to fully meet." RJN221 (citing the same findings from the 2014 Opinion that Hyatt referenced at Suppl. AB 43).

- "The Nevada Supreme Court upheld the Nevada jury findings that FTB intentionally inflicted emotional distress against Mr. Hyatt." RJN222 (citing 2014 Opinion's findings regarding FTB's audit procedures); *see also* RJN236.

Hyatt's manipulation of his administrative appeal using the jury's verdict and this Court's 2014 Opinion underscores the dangers of sister-state hostility. The Court allowed Hyatt to circumvent the exhaustion requirement; declined to grant deference to FTB's fact finding and legal conclusions; and deprived FTB of the immunity that protects Nevada's Department of Taxation. Had Hyatt sued Nevada's Department of Taxation, the Court would have granted immunity to the agency. *See* NRS 372.670; NRS 375B.370. At a minimum, the Court would have required Hyatt to finish the administrative process and, thereafter, would have afforded deference to the agency's findings and conclusions. *See Int'l Game Tech.*, 122 Nev. at 157-59, 127 P.3d at 1093, 1106. Hyatt could not then substitute a Nevada jury verdict for the agency's own decision-making process, as the Court allowed him to do with FTB. *See id.*

D. The Court Has No Authority To Simply Enter Judgment Against FTB At The Statutory Cap Because The Jury In A New Trial May Award No Damages.

1. The 2014 Opinion Held That FTB Has The Constitutional Right To A New Trial On Damages.

The Court cannot, based on the "efficiency" argument advanced by Hyatt (Suppl. AB 13-14, 27-28), summarily enter judgment against FTB in the amount of the statutory cap. The presumptuousness of Hyatt's request is staggering, and Hyatt identifies no legal process to justify taking away what the 2014 Opinion recognized as FTB's constitutional right to a new trial. *See* Nev. Const. Art. I, § 3 (securing right to jury trial); 2014 Opinion, 335 P.3d at 149. The 2014 Opinion remanded for a new trial on emotional distress damages, and nothing in the *Hyatt II* mandate alters that decision in favor of FTB. 335 P.3d at 131. The jury at the new trial may very well award no damages to Hyatt, and FTB is entitled to a trial that could lead to this favorable result.

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2. Hyatt's Maximum Damages Recovery Is $50,000 Per Claim, Not $75,000.

Contrary to Hyatt's assertion (Suppl. AB 24-26), the applicable statutory cap at the time of Hyatt's alleged injuries was $50,000 per claim, not $75,000.[4] For actions accruing before 2007, the cap was set at $50,000. *See* 1995 Nev. Stat. 1071, 1073.4. 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. A tort claim accrues at the time of the plaintiff's alleged injuries. *See LVMPD v. Yeghiazarian*, 129 Nev. Adv. Op. 81, 312 P.3d 503, 509 (2013).

Hyatt's alleged injuries occurred prior to the filing of his complaint in 1999, at which time the statutory cap was $50,000. *See* 1995 Nev. Stat. 1071, 1073.4. The law does not give this Court discretion to impose a higher cap. *See* NRS 41.035(1). As a result, under no circumstance could the Court enter a judgment

[4] FTB's opening and reply briefs stated that the applicable statutory cap was $75,000. (AOB 100, 102; ARB 110-11, 115-16). This was incorrect because the applicable version of NRS 41.035(1) at the time of Hyatt's alleged injuries (i.e. prior to Hyatt's 1999 filing of the complaint) was $50,000. 1995 Nev. Stat. 1071, 1073.4. FTB corrected the error in its briefing to the Supreme Court, in which it argued that $50,000 was the applicable statutory cap. (SCOTUS Brief of Petitioner at 9, FTB's Suppl. App. ASA 021). Hyatt did not contest FTB's assertion of the corrected amount, instead arguing that the damages cap only applied to Nevada agencies, not FTB. (SCOTUS Brief of Respondent at 14, FTB's Suppl. App. ASA 100). The additional briefing requested by Hyatt is neither warranted nor justified. (Suppl. AB 27 n.42).

against FTB for more than $50,000 on Hyatt's remaining claims, which is what the Supreme Court concluded in *Hyatt II*. *See* 136 S.Ct. at 1282.

3. There Is Insufficient Evidence To Support The Fraud Verdict.

The "evidence" cited on page 42 of Hyatt's supplemental answering brief does not, as a matter of law, satisfy the essential elements of a fraud claim and therefore could not support the Court summarily entering judgment in the amount of the statutory cap. To establish fraud, the plaintiff must prove by clear and convincing evidence that the defendant knew or believed that his or her representation was false or had insufficient information to make the representation. *Bartmettler v. Reno Air, Inc.*, 114 Nev. 441, 446-47, 956 P.2d 1382, 1386 (1998). The only alleged "representation" referenced by Hyatt is the 1991 notice of audit that California's Legislature required FTB to send to taxpayers who are being audited. Calif. Revenue & Tax. Code §21007.

As explained by FTB (Suppl. OB 16-17), just as Nevada's Taxpayer Bill of Rights would not show intent to defraud, the notice of audit that the California Legislature required FTB to send likewise cannot. *Compare* NRS 360.291(1)(a) *to* Calif. Revenue & Tax. Code §21007. The California Legislature's intent – not the intent of any FTB employee – is all that can be discerned from the notice of audit. *See id* Hyatt's supplemental answering brief is silent on this point.

The FTB employee who sent out the legislatively mandated notice of audit could not know what FTB's auditors would or would not do in the course of the audit in relation to the statements in the notice. Indeed, the 2014 Opinion does not even identify the employee who sent the notice or discuss any facts relating to what that employee did or did not know. Absent the requisite intent, the fraud claim fails as a matter of law. *See Reno Air, Inc.*, 114 Nev. at 446-47, 956 P.2d at 1386.

FTB does not ask the Court to "re-weigh the fraud evidence" as Hyatt contends. (Suppl. AB 44). It simply asserts that: (1) no evidence in the record can satisfy the intent element of fraud and (2) the Court has never and would never make the Nevada Department of Taxation liable for fraud based upon statements in the Taxpayers' Bill of Rights. *See* NRS 360.291(1)(a). By affirming the fraud verdict based upon statements in the 1991 notice of audit, the Court has engaged in the precise sister-state discrimination that the Supreme Court held unconstitutional. *See Hyatt II*, 136 S.Ct. at 1282-83.

4. There Is Insufficient Evidence To Support The IIED Verdict.

Additionally, in the 2014 Opinion, the Court allowed FTB's routine audit procedures, which the Court expressly held should have been outside the province of the jury, to serve as evidence of "extreme and outrageous conduct." 335 P.3d at 148-49. That same evidence, the Court acknowledged, was tainted by evidentiary

and instructional errors that were prejudicial to FTB. *Id.* at 150-153, 157. Concurrently, the Court held that FTB's audit procedures were insufficient to prove Hyatt's privacy-based tort claims. *Id.* at 140, 142. As a result, contrary to Hyatt's assertion (Suppl. AB 28 n.43), had the Court viewed FTB as Nevada's taxing authority, it would have concluded that Hyatt did not satisfy the elements of his IIED claim. *See Int'l Game Tech.*, 122 Nev. at 138, 157-58, 127 P.3d at 1093, 1106.

E. Hyatt's Procedural Arguments Are Not Supported By The Law Or The Record.

1. The 2014 Opinion Is Not "Law Of The Case" Because It Was Vacated By The Supreme Court

Because of the intervening *Hyatt II* decision, the 2014 Opinion it is not "law of the case." As even Hyatt recognizes (Suppl. AB 32-33), "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." *Hsu v. Cty. of Clark*, 123 Nev. 625, 632, 173 P.3d 724, 730 (2007) (quotation omitted). "[A]n exception to the law of the case doctrine occurs when … an intervening change in the controlling law dictates a different result, or the appellate decision is clearly erroneous and, if implemented, would work a manifest injustice." *Wheeler Springs Plaza, LLC v. Beemon*, 119 Nev. 260, 264 n.3, 71 P.3d 1258, 1260 n.3 (2003) (internal quotation omitted).

The *Hyatt II* mandate, not the 2014 Opinion, is the law that this Court must follow because *Hyatt II* constitutes intervening law that dismantled the precedential effect of any part of the 2014 Opinion adverse to FTB. *See Durant*, 101 U.S. at 556-57. The "rule of mandate presents a specific and more binding variant of the law of the case doctrine…." *Ischay v. Barnhart*, 383 F. Supp. 2d 1199, 1214 (C.D. Cal. 2005) (internal quotation omitted). Moreover, to retain an unconstitutional decision would "work a manifest injustice" against FTB. *See id.*

Even if any portion of the 2014 Opinion adverse to FTB could be deemed to remain intact (which FTB disputes), the law of the case doctrine "merely expresses the [general] practice of the courts" and is "not a jurisdictional rule … or a limit to the[courts'] power." *Hsu*, 123 Nev. at 630, 173 P.3d at 728. Hyatt concedes that, at a minimum, this Court has "discretion to revisit and review issues unrelated to the *Hyatt II* damages issue." (Suppl. AB 4). The Court should exercise that discretion to ensure that its new judgment complies with its Full Faith and Credit responsibility in all respects.

2. FTB Adequately Preserved All Of The Arguments It Now Presents To The Court.

Hyatt erroneously argues throughout his supplemental answering brief that FTB's only argument that the district court violated *Hyatt I* concerned the award of

compensatory damages in excess of Nevada's statutory cap. (Suppl. AB 17, 28-31). This is simply untrue and is contradicted by the record in this case.[5]

FTB's opening brief was premised on the argument that the district court "failed to provide FTB with any of the protections and limitations to which a similarly situated Nevada government agency would have been afforded." (AOB 2, 34). FTB argued that Hyatt's tort case was an improper attack on the California administrative process, which Hyatt should have exhausted prior to seeking judicial review. (AOB 2, 34-51, 55-58). As FTB emphasized, the district court impermissibly allowed a Las Vegas jury to review and second guess the discretionary decisions made by FTB in its audit process. (AOB 2-3, 34-51). The district court's errors, FTB argued, were of constitutional magnitude, "exhibiting hostility toward FTB and the State of California." (AOB 4, 33).

Moreover, in its opening brief, FTB argued that the district court had violated the immunity statutes and exceeded the jurisdictional scope authorized by the *Hyatt I* decision. (AOB 58-60, n.53 and n.55 and citations therein). On remand from *Hyatt I*, the district court allowed Hyatt to morph his case into an attack

[5] Hyatt is not in a legitimate position to raise a waiver argument where he argued to the district court repeatedly that "this is not a bad faith case" (*see* 51 AA 12502 (79), 12507 (99) (100), 12511 (110-111)) yet then, in defense of the jury verdict, argued on appeal that a bad-faith exception to discretionary function immunity should be applied to FTB (RAB 57-60) and now makes approximately 2,000 "bad-faith" accusations throughout his BOE appeal. (*See* Request for Judicial Notice, Ex. 6).

against California's tax laws and process. 14 AA 3257-3300; 32 AA 07974 (131); 52 AA 12837 (90). Through its affirmative defenses, trial memorandum and proposed jury instructions, FTB labored to keep the case within the jurisdictional confines authorized by *Hyatt I*. 14 AA 3437; 24 AA 5804-6000; 25 AA 6001-6145.

The district court disregarded those efforts, and in the 2014 Opinion, this Court deemed the district court's extra-jurisdictional conduct to be erroneous as to the jury's liability determinations but then, inexplicably, found those errors to be harmless.[6] 2014 Opinion, 335 P.3d at 146 n.14, 152-53. The waiver doctrine does not apply to jurisdictional issues, which can be raised any time. *Vaile v. Eighth Jud. Dist. Ct.*, 118 Nev. 262, 276, 44 P.3d 506, 516 (2002). In light of *Hyatt II's* mandate that Nevada treat FTB as Nevada treats its own tax collectors, FTB's arguments that Hyatt's fraud and IIED claims must be dismissed are simply in furtherance of the jurisdictional argument FTB has asserted all along.

[6] The gravity of the Court's "harmless error" finding is particularly acute in the context of Hyatt's administrative appeals to BOE. In his briefs to the BOE, Hyatt has already signaled a harbinger of what is to come by making approximately 2,000 allegations of "bad faith" conduct by FTB in the course of the BOE appeal. (Request for Judicial Notice, Ex. 6). Having successfully circumvented the audit and protest process in California through his Nevada tort case, Hyatt appears to be planning a second Nevada trial to challenge FTB's discretionary decisions in the SBE appeal. Because *Hyatt II* prohibits the Court from facilitating Hyatt's collateral attack on a sister-state's administrative process, should the Court remand, it should do so with instructions that Hyatt may not further supplement the pleadings.

In addition, in its earlier briefing to this Court, FTB focused on the argument that the then-new *Martinez* decision, which adopted the federal *Berkowitz-Gaubert* test for discretionary function immunity, rendered *Falline* obsolete. (AOB 34-36, *citing Martinez v. Maruszczak*, 123 Nev. 433, 168 P.3d 720 (2007)). To the extent FTB was immune from being sued in tort, Hyatt's IIED and fraud claims necessarily failed, as a matter of law. (AOB 38-52). The Court rejected FTB's argument and embraced *Falline* as continuing to be good law.[7] 2014 Opinion, 335 P.3d at 138-39. FTB could not have anticipated that in retaining *Falline*'s "bad faith" carve out, this Court would then stray from *Hyatt I*'s equal treatment mandate and apply *Falline* in a discriminatory fashion. *See* 2014 Opinion, 335 P.3d at 147-49.

Because FTB simply submits that the 2014 Opinion has numerous constitutional defects, the arguments in FTB's supplemental opening brief are consistent with all arguments that FTB made previously. *See Powers v. Powers*, 105 Nev. 514, 516, 779 P.2d 91, 92 (1989) (barring only theories raised on appeal that are inconsistent with arguments raised below); *see also Brown v. E. Side Nat. Bank of Wichita*, 411 P.2d 605, 609 (Kan. 1966) (holding that a party can "challenge a judgment on consistent alternative grounds without being charged

[7] FTB petitioned for certiorari on the issue of whether this Court properly interpreted the *Berkowitz-Gaubert* test. The Supreme Court's decision to deny certiorari on that issue did not address whether this Court applied the holding of *Falline* to FTB in a non-discriminatory manner.

with estoppel by admission or acquiescence"). The errors that FTB contests are of jurisdictional and constitutional dimension, which may be reviewed *sua sponte* whether or not they were preserved in earlier proceedings. *See Sterling v. State*, 108 Nev. 391, 394, 834 P.2d 400, 402 (1992) (*citing Emmons v. State*, 107 Nev. 53, 61, 807 P.2d 718, 723 (1991)). Once the 2014 Opinion was vacated as unconstitutional for its failure to afford FTB the protections of Nevada's damages cap, all similarly unconstitutional sister-state hostility became subject to challenge on remand and must now be rectified. *See Hyatt II*, 136 S.Ct. at 1282-83.

III. CONCLUSION.

Hyatt's answering brief does not dispute FTB's numerous examples of sister-state hostility in the 2014 Opinion. Instead, Hyatt urges this Court to ignore the Supreme Court's wide-reaching mandate and to enter a new judgment that would be inconsistent with the *Hyatt II* opinion. This is not permitted. Viewing this case as if FTB were Nevada's Department of Taxation, Hyatt's fraud and IIED claims should be dismissed as a matter of law.

AFFIRMATION

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

Dated this 2nd day of December, 2016.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type-style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point font, Times New Roman style. I further certify that this brief complies with the type-volume limitation of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it contains 6,993 words.

Pursuant to NRAP 28.2, I hereby certify that I have read this brief, 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 regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that this brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 2nd day of December, 2016.

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of McDonald Carano Wilson LLP and on the 2nd day of December, 2016, I certify that I electronically filed the foregoing with the Clerk of the Court by using the ECF system which served the following parties electronically:

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Daniel Polsenberg
Bruce J. Fort
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I further certify that on this date I served a copy, postage prepaid, by U.S. Mail to:

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DISTRICT COURT

CLARK COUNTY, NEVADA

GILBERT P. HYATT,

Plaintiff,

v.

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, and DOES 1-100 inclusive,

Defendants.

Case No. A382999
Dept. No. X

EXHIBITS 83 - 94 TO PLAINTIFF GILBERT P. HYATT'S BRIEF IN SUPPORT OF PROPOSED FORM OF JUDGMENT THAT FINDS NO PREVAILING PARTY IN THE LITIGATION AND NO AWARD OF ATTORNEYS' FEES OR COSTS TO EITHER PARTY

Plaintiff Gilbert P. Hyatt hereby submits Exhibits 83 to 94 to Plaintiff Gilbert P. Hyatt's

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Brief in Support of Proposed Form of Judgment That Finds No Prevailing Party in the Litigation and No Award of Attorneys' Fees or Costs to Either Party.

Dated this 15th day of October, 2019.

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EXHIBIT 83

133 Nev. 826
Supreme Court of Nevada.

FRANCHISE TAX BOARD OF the STATE OF CALIFORNIA, Appellant/Cross–Respondent,
v.
Gilbert P. HYATT, Respondent/Cross–Appellant.

No. 53264
|
FILED DECEMBER 26, 2017

Synopsis

Background: Taxpayer brought action against out-of-state Franchise Tax Board, alleging intentional torts and bad-faith conduct during audits. After years of litigation, including an appeal to the United States Supreme Court, 538 U.S. 488, 123 S.Ct. 1683, 155 L.Ed.2d 702, the Eighth Judicial District Court, Clark County, Jessie Elizabeth Walsh, J., entered judgment on a jury's verdict in favor of taxpayer and awarded damages. Board appealed and taxpayer cross-appealed. The Supreme Court, 335 P.3d 125, affirmed in part and reversed in part. Certiorari was granted, and the United States Supreme Court, 136 S.Ct. 1277, 194 L.Ed.2d 431, vacated and remanded.

Holdings: On remand, the Supreme Court, Hardesty, J., held that:

[1] Board was not entitled, under principles of comity, to discretionary-function immunity;

[2] taxpayer did not have objective expectation of privacy, as required to recover on invasion of privacy claims;

[3] no evidence supported jury's conclusion that Board portrayed taxpayer in false light;

[4] parties did not have type of relationship required to support claim for breach of confidential relationship;

[5] Board did not use any legal enforcement process, as required for an abuse of process claim;

[6] substantial evidence supported jury's conclusion that Board committed fraud; and

[7] Board was not completely immune from liability for fraud, but was entitled to statutory cap on damages.

Affirmed in part, reversed in part, and remanded.

West Headnotes (57)

[1] States
Relations Among States Under Constitution of United States

States
Torts

360 States
360I Political Status and Relations
360I(A) In General
360k5 Relations Among States Under Constitution of United States
360k5(1) In general
360 States
360III Property, Contracts, and Liabilities
360k112 Torts
360k112(1) In general

Out-of-state's Franchise Tax Board was not entitled, under principles of comity, to discretionary-function immunity from taxpayer's action alleging intentional torts and bad-faith conduct during audits; discretionary-function immunity under state law did not include intentional torts and bad-faith conduct, in-state government agency would not have received immunity, and thus extension of immunity to Board would have been contrary to policy. Cal. Gov't Code § 860.2; Nev. Rev. St. § 41.032(2).

1 Cases that cite this headnote

[2] 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

[3] 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

[4] 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.

Cases that cite this headnote

[5] 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 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. Nev. Rev. St. § 41.032(2).

1 Cases that cite this headnote

[6] 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

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-function exception to the waiver of sovereign immunity does not apply to the employee's action because the employee is not acting with individual judgment or choice. Nev. Rev. St. § 41.032(2).

Cases that cite this headnote

[7] Municipal Corporations
Discretionary powers and duties

Public Employment
Discretionary function immunity

268 Municipal Corporations
268XII Torts
268XII(A) Exercise of Governmental and Corporate Powers in General
268k728 Discretionary powers and duties
316P Public Employment
316PXI Liabilities
316PXI(A) In General
316Pk896 Privilege or Immunity; Good Faith
316Pk901 Discretionary function immunity

If a government employee is free to make discretionary decisions when executing the directives of a statute, regulation, or policy, the test for the discretionary-function exception to the waiver of sovereign immunity requires the court to examine the nature of the actions taken and whether they are susceptible to policy analysis; even assuming the challenged conduct involves an element of judgment or choice, the court is required to determine whether that judgment or choice is of the kind that the discretionary function exception was designed to shield. Nev. Rev. St. § 41.032(2).

Cases that cite this headnote

[8] 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

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. Nev. Rev. St. § 41.032(2).

Cases that cite this headnote

[9] 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

Whether the government actions are based on considerations of social, economic, or political policy, as an element of the test for discretionary-function immunity, focuses on whether the conduct undertaken is a policy-making decision regardless of the government employee's subjective intent when he or she acted. Nev. Rev. St. § 41.032(2).

1 Cases that cite this headnote

[10] 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 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. Nev. Rev. St. § 41.032(2).

3 Cases that cite this headnote

[11] 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))

Questions of law are reviewed de novo.

Cases that cite this headnote

[12] Appeal and Error
Substantial Evidence

30 Appeal and Error
30XVI Review
30XVI(D) Scope and Extent of Review
30XVI(D)10 Sufficiency of Evidence
30k3459 Substantial Evidence
30k3460 In general
(Formerly 30k1001(1))

A jury's verdict will be upheld if it is supported by substantial evidence.

Cases that cite this headnote

[13] Appeal and Error
Correctness or Error

30 Appeal and Error
30XVI Review
30XVI(F) Presumptions and Burdens on Review
30XVI(F)1 In General
30k3862 Correctness or Error
30k3863 In general

(Formerly 30k901)

An order or judgment will not be reversed unless error is affirmatively shown.

Cases that cite this headnote

[14] 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: (a) unreasonable intrusion upon the seclusion of another, (b) appropriation of the other's name or likeness, (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.

2 Cases that cite this headnote

[15] Torts

Particular cases in general

Torts

Public interest, record, figures

Torts

Miscellaneous particular cases

Torts

Matters of Public Interest or Public Record; Newsworthiness

379 Torts
379IV Privacy and Publicity
379IV(B) Privacy
379IV(B)2 Intrusion
379k341 Particular cases in general
379 Torts
379IV Privacy and Publicity
379IV(B) Privacy
379IV(B)2 Intrusion
379k343 Public interest, record, figures
379 Torts
379IV Privacy and Publicity
379IV(B) Privacy
379IV(B)3 Publications or Communications in General
379k351 Miscellaneous particular cases
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

Taxpayer did not have objective expectation of privacy in name, address, and social security number, as required to recover on causes of action for intrusion upon seclusion and public disclosure of private facts against out-of-state Franchise Tax Board; information had been publicly disclosed on several occasions, before Board's disclosures occurred, in old court documents from taxpayer's divorce proceedings and in probate case, and taxpayer disclosed information himself when he made information available in various business license applications. Restatement (Second) of Torts §§ 652B, 652D.

Cases that cite this headnote

[16] Torts

Intrusion

Torts

Publications or Communications in General

379 Torts
379IV Privacy and Publicity
379IV(B) Privacy
379IV(B)2 Intrusion
379k340 In general
379 Torts
379IV Privacy and Publicity
379IV(B) Privacy
379IV(B)3 Publications or Communications in General
379k350 In general

Intrusion upon seclusion and public disclosure of private facts are torts grounded in a plaintiff's objective expectation of privacy. Restatement (Second) of Torts §§ 652B, 652D.

1 Cases that cite this headnote

[17] 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.

Cases that cite this headnote

[18] Torts
Particular cases in general

Torts
Miscellaneous particular cases

379 Torts
379IV Privacy and Publicity
379IV(B) Privacy
379IV(B)2 Intrusion
379k341 Particular cases in general
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 and his licensing contracts, as required to recover on causes of action for intrusion upon seclusion and public disclosure of private facts against out-of-state Franchise Tax Board; information was only disclosed to one or two third parties that already had information in their possession from prior dealings with taxpayer. Restatement (Second) of Torts §§ 652B, 652D.

1 Cases that cite this headnote

[19] Appeal and Error
Defects, objections, and amendments

30 Appeal and Error
30XII Briefs
30k766 Defects, objections, and amendments

Supreme Court would not consider whether out-of-state Franchise Tax Board violated taxpayer's privacy rights by looking through trash, looking at package on doorstep, or speaking with neighbors, postal carrier, and trash collector, where taxpayer did not provide any authority to support his assertion that he had a legally recognized objective expectation of privacy with regard to Board's conduct.

Cases that cite this headnote

[20] 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

False light invasion of privacy is a valid cause of action.

1 Cases that cite this headnote

[21] 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

No evidence supported jury's conclusion that out-of-state Franchise Tax Board portrayed taxpayer in false light, as required to recover on false light invasion of privacy claim, despite contention that Board's letters, neighborhood visits, and inclusion of case on Board's litigation roster suggested that taxpayer was a "tax cheat;" Board's contacts with third parties were not highly offensive to reasonable person, did not falsely portray taxpayer as "tax cheat," and were done to conduct its routine audit investigation.

1 Cases that cite this headnote

[22] States

Nature of Act or Claim

360 States
360III Property, Contracts, and Liabilities
360k112 Torts
360k112.2 Nature of Act or Claim
360k112.2(1) In general

Taxpayer and out-of-state Franchise Tax Board auditing him did not have type of relationship required to support claim for breach of confidential relationship; Board was not required to act with taxpayer's interests in mind in conducting audits, but rather had duty to proceed on behalf of state's interest, and relationship was not akin to family or business relationship.

Cases that cite this headnote

[23] 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

[24] Process

Improper, ulterior, collateral, or unlawful purpose

Process

Overt act

313 Process
313IV Abuse of Process
313IV(A) In General
313k178 Improper, ulterior, collateral, or unlawful purpose
313 Process
313IV Abuse of Process
313IV(A) In General
313k180 Overt act

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.

Cases that cite this headnote

[25] Process

Nature and elements in general

313 Process
313IV Abuse of Process
313IV(A) In General
313k173 Nature and elements in general

A plaintiff claiming abuse of process must show that the defendant willfully and improperly used the legal process to accomplish an ulterior purpose other than resolving a legal dispute.

Cases that cite this headnote

[26] Process

Particular cases

313 Process
313IV Abuse of Process
313IV(A) In General
313k192 Particular cases

Out-of-state Franchise Tax Board did not use any legal enforcement process, such as filing court action, in relation to its demands for information or otherwise during audits of taxpayer, and therefore taxpayer could not meet requirements for establishing an abuse of process claim against Board.

Cases that cite this headnote

[27] 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.

2 Cases that cite this headnote

[28] 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

[29] 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," which will allow an appellate court to uphold a jury's verdict, is defined as evidence that a reasonable mind might accept as adequate to support a conclusion.

1 Cases that cite this headnote

[30] States

Nature of Act or Claim

360 States
360III Property, Contracts, and Liabilities
360k112 Torts
360k112.2 Nature of Act or Claim
360k112.2(1) In general

Substantial evidence supported jury's conclusion that out-of-state Franchise Tax Board committed fraud against taxpayer by representing that Board would provide courteous treatment and keep information confidential; Board disclosed taxpayer's social security number, home address, and fact that he was being audited to numerous people, former auditor testified that main auditor made disparaging comments and was intent on imposing assessment, and taxpayer testified that he would not have hired professionals to assist in audits had he known how he would be treated.

Cases that cite this headnote

[31] Appeal and Error

Evidence in General

Appeal and Error

Negligence and torts in general

30 Appeal and Error
30XVII Harmless and Reversible Error
30XVII(B) Particular Errors
30XVII(B)5 Evidence in General
30k4291 In general
(Formerly 30k1026)
30 Appeal and Error
30XVII Harmless and Reversible Error
30XVII(B) Particular Errors
30XVII(B)11 Instructions
30k4437 Particular Cases or Issues, Instructions Relating to
30k4439 Negligence and torts in general
(Formerly 30k1026)

Trial court's erroneous evidentiary rulings and jury instruction were harmless as to taxpayer's fraud claim against out-of-state Franchise Tax Board, where sufficient evidence of fraud existed for jury to find in taxpayer's favor on each required element for fraud.

Cases that cite this headnote

[32] States

Full faith and credit in each state to the public acts, records, etc. of other states

States

Judgment and relief

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
360 States
360VI Actions
360k212 Judgment and relief

Out-of-state Franchise Tax Board was not completely immune from liability for taxpayer's

fraud action, but rather Board was entitled to statutory cap on damages of $50,000; complete immunity under out-of-state law was inconsistent with in-state law, but states' laws were consistent with regard to damages awards greater than $50,000. Cal. Gov't Code § 860.2; Nev. Rev. St. § 41.035(1) (1987).

Cases that cite this headnote

[33] Appeal and Error

Amount of recovery or extent of relief

30 Appeal and Error
30XVI Review
30XVI(L) Subsequent Review
30k4126 Determination on Prior Review, Effect on Subsequent Review
30k4130 Questions Concluded by Prior Determination
30k4130(9) Amount of recovery or extent of relief
(Formerly 30k1097(1))

Law-of-the-case doctrine did not apply to require statutory cap on fraud damages and immunity from punitive damages, based on Supreme Court's conclusions in earlier proceedings, where Court did not previously address issues and issues were different.

Cases that cite this headnote

[34] Municipal Corporations

Damages

States

Judgment and relief

268 Municipal Corporations
268XII Torts
268XII(A) Exercise of Governmental and Corporate Powers in General
268k743 Damages
360 States
360VI Actions
360k212 Judgment and relief

Statutory cap on liability damages in tort actions against a present or former officer of employee of the state or any political subdivision applies to prejudgment interest on damages. Nev. Rev. St. § 41.035(1).

Cases that cite this headnote

[35] Municipal Corporations

Damages

States

Costs

268 Municipal Corporations
268XII Torts
268XII(A) Exercise of Governmental and Corporate Powers in General
268k743 Damages
360 States
360VI Actions
360k215 Costs

The statutory cap on liability damages in tort actions against a present or former officer or employee of the state or any political subdivision does not include awards for attorney fees and costs. Nev. Rev. St. § 41.035(1).

Cases that cite this headnote

[36] Damages

Government; criminal justice

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
115k57.25 Particular Cases
115k57.25(2) Government; criminal justice

Evidence was sufficient for jury to determine that taxpayer suffered severe emotional distress during out-of-state Franchise Tax Board's audit, and thus evidence supported recovery on claim for intentional infliction of emotional distress; even though taxpayer did not present medical evidence of distress, Board's conduct in disclosing confidential information and delaying resolution, which cost taxpayer $8,000 per day in interest, was at more extreme end of sliding scale and required less evidence of physical injury, and taxpayer presented testimony from three people as to how Board's treatment physically affected him. Restatement (Second) of Torts § 46.

Cases that cite this headnote

[37] 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.

1 Cases that cite this headnote

[38] Damages

Mental suffering and emotional distress

115 Damages
115IX Evidence
115k183 Weight and Sufficiency
115k192 Mental suffering and emotional distress

To recover on a claim for intentional infliction of emotional distress, a plaintiff must set forth objectively verifiable indicia to establish that the plaintiff actually suffered extreme or severe emotional distress.

1 Cases that cite this headnote

[39] Damages

Mental suffering and emotional distress

115 Damages
115IX Evidence
115k183 Weight and Sufficiency
115k192 Mental suffering and emotional distress

Under the sliding-scale approach to proving a claim for intentional infliction of emotional distress, while medical evidence is one acceptable manner in establishing that severe emotional distress was suffered, 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. Restatement (Second) of Torts § 46.

1 Cases that cite this headnote

[40] Appeal and Error

Instructions

Appeal and Error

Evidence and Witnesses in General

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
30k3361 In general
(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))

The admissibility of evidence and the propriety of jury instructions are reviewed for an abuse of discretion.

Cases that cite this headnote

[41] Damages

Mental suffering and emotional distress

115 Damages
115IX Evidence
115k164 Admissibility
115k178 Mental suffering and emotional distress

Evidence challenging various aspects of fraud penalties assessed by out-of-state Franchise Tax Board violated restriction against considering audits' conclusions, and thus evidence was inadmissible in taxpayer's action against Board for intentional infliction of emotional distress; testimony went to audits' determinations and had no utility in showing any intentional torts unless it was first concluded that audits' determinations were incorrect.

Cases that cite this headnote

[42] Trial
Exclusion of evidence from consideration

Trial
Nature of action or issue in general

388 Trial
388VII Instructions to Jury
388VII(B) Necessity and Subject-Matter
388k208 Exclusion of evidence from consideration
388 Trial
388VII Instructions to Jury
388VII(D) Applicability to Pleadings and Evidence
388k253 Instructions Excluding or Ignoring Issues, Defenses, or Evidence
388k253(6) Excluding or Ignoring Facts or Evidence
388k253(8) Nature of action or issue in general

Jury instruction that allowed jury to consider "appropriateness or correctness of the analysis conducted by" out-of-state Franchise Tax Board employees in reaching its conclusion on taxpayer's audits improperly violated jurisdictional limit that district court imposed on case that precluded consideration of audits' determinations, even though court instructed jury before trial and at various times during trial that jury was not to consider whether audits' conclusions were correct.

Cases that cite this headnote

[43] Evidence
Suppression or spoliation of evidence

Trial
In general; grounds for admission

157 Evidence
157II Presumptions
157k74 Evidence Withheld or Falsified
157k78 Suppression or spoliation of evidence
388 Trial
388IV Reception of Evidence
388IV(B) Order of Proof, Rebuttal, and Reopening Case
388k62 Evidence in Rebuttal
388k62(1) In general; grounds for admission

Out-of-state Franchise Tax Board should have been permitted, in taxpayer's action for intentional infliction of emotional distress, to explain steps that it took to collect relevant emails to demonstrate that none of the destroyed information was damaging, despite contention that Board's evidence was actually attempt to reargue spoliation issue that led to trial court giving adverse inference jury instruction; court had concluded that Board's conduct was negligent, and court excluded evidence Board sought to admit to rebut adverse inference, which could have been used to explain why nothing harmful was destroyed.

Cases that cite this headnote

[44] Evidence
Suppression or spoliation of evidence

157 Evidence
157II Presumptions
157k74 Evidence Withheld or Falsified
157k78 Suppression or spoliation of evidence

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.

Cases that cite this headnote

[45] Evidence
Suppression or spoliation of evidence

Evidence
Rebuttal of presumptions of fact

157 Evidence
157II Presumptions
157k74 Evidence Withheld or Falsified
157k78 Suppression or spoliation of evidence
157 Evidence
157II Presumptions

157k89 Rebuttal of presumptions of fact

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; 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. Nev. Rev. St. § 47.250(3).

Cases that cite this headnote

[46] 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 to the spoliating party is permissible; the lesser inference merely allows the fact-finder to determine, based on other evidence, that a fact exists. Nev. Rev. St. § 47.250(3).

Cases that cite this headnote

[47] Evidence

Tendency to mislead or confuse

157 Evidence
157IV Admissibility in General
157IV(D) Materiality
157k146 Tendency to mislead or confuse

Probative value of evidence regarding taxpayer's loss of patent and his federal tax audit was not substantially outweighed by danger of unfair prejudice in taxpayer's action against out-of-state Franchise Tax Board for intentional infliction of emotional distress during audit; even though evidence may have been prejudicial, probative value of evidence as to taxpayer's claim, in particular in regard to damages caused by Board as opposed to other events in his life, was more probative than unfairly prejudicial. Nev. Rev. St. § 48.035(1).

Cases that cite this headnote

[48] Appeal and Error

Evidence in General

Appeal and Error

Negligence and torts in general

Appeal and Error

Damages and amount of recovery

30 Appeal and Error
30XVII Harmless and Reversible Error
30XVII(B) Particular Errors
30XVII(B)5 Evidence in General
30k4291 In general
(Formerly 30k1047(1))
30 Appeal and Error
30XVII Harmless and Reversible Error
30XVII(B) Particular Errors
30XVII(B)11 Instructions
30k4437 Particular Cases or Issues, Instructions Relating to
30k4439 Negligence and torts in general
(Formerly 30k1064.1(8))
30 Appeal and Error
30XVII Harmless and Reversible Error
30XVII(B) Particular Errors
30XVII(B)11 Instructions
30k4452 Relation Between Error and Final Outcome or Result
30k4455 Damages and amount of recovery
(Formerly 30k1047(1))

Trial court's erroneous evidentiary decisions and jury instruction were harmless as to taxpayer's claim for intentional infliction of emotional distress against out-of-state Franchise Tax Board; Board's conduct in disclosing confidential information and delaying resolution, which cost $8,000 per day in interest, was at more extreme end of sliding scale and required less evidence to prove claim, and facts supported damages award up to statutory damages cap. Nev. Rev. St. § 41.035(1).

Cases that cite this headnote

[49] States

Costs

360 States
360VI Actions
360k215 Costs

Out-of-state Franchise Tax Board was immune, under principles of comity, from punitive damages in taxpayer's action alleging intentional torts and bad-faith conduct during audits; in-

state and out-of-state statutes precluded punitive damages for their respective government entities, and in-state statute generally allowing punitive damages did not explicitly authorize such damages against government entities. Cal. Gov't Code § 818; Nev. Rev. St. §§ 41.035(1), 42.005.

Cases that cite this headnote

[50] 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

[51] 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

[52] States

Costs

360 States
360VI Actions
360k215 Costs

Taxpayer, following jury verdict in his tort action against out-of-state Franchise Tax Board, was allowed to supplement his request for costs to provide additional documentation, despite five-day time limit for filing memorandum for costs, where time limit was not jurisdictional, and statute specifically allowed for further time as allowed. Nev. Rev. St. § 18.110.

Cases that cite this headnote

[53] Costs

Objections and exceptions

States

Judgment and relief

102 Costs
102IX Taxation
102k219 Objections and exceptions
360 States
360VI Actions
360k212 Judgment and relief

Out-of-state Franchise Tax Board should have been allowed to challenge special master's recommendation on taxpayer's claim for costs, after jury verdict for taxpayer in his tort action against Board; even though there was jury trial, costs issue was not placed before jury, and thus any party was allowed to serve written objections to master's report. Nev. R. Civ. P. 53(e)(2, 3).

Cases that cite this headnote

[54] Damages

Weight and Sufficiency

Evidence

Damages

115 Damages
115IX Evidence
115k183 Weight and Sufficiency
115k184 In general
157 Evidence
157XII Opinion Evidence
157XII(F) Effect of Opinion Evidence
157k569 Testimony of Experts
157k571 Nature of Subject
157k571(10) Damages

Evidence was too speculative to support claim to economic damages, resulting from out-of-state Franchise Tax Board contacting foreign companies that allegedly led to other foreign companies refusing to do business with taxpayer because of investigation; expert testimony detailed what might have happened based on foreign business culture, but no evidence established that any hypothetical steps actually

occurred or that other businesses were contacted regarding investigation.

1 Cases that cite this headnote

[55] 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.

Cases that cite this headnote

[56] 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.

Cases that cite this headnote

[57] Evidence
Grounds
157 Evidence
157II Presumptions
157k54 Grounds
A party cannot use one inference to support another inference, but rather, only the ultimate fact can be presumed based on actual proof of the other facts in the chain of proof; thus, a complete chain of circumstances must be proven, and not left to inference, from which the ultimate fact may be presumed.

Cases that cite this headnote

****723** 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.

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BEFORE THE COURT EN BANC.

OPINION

By the Court, HARDESTY, J.:

****724** ***828** This matter is before us on remand from the United States Supreme Court. We previously issued an opinion in this matter concluding, in part, that appellant Franchise Tax Board of the State of California (FTB) was not entitled to the statutory cap on damages a similarly situated Nevada agency would be entitled to under similar circumstances. *Franchise Tax Bd. of Cal. v. Hyatt*, 130 Nev. ——, 335 P.3d 125, 131 (2014), *vacated,* —— U.S. ——, 136 S.Ct. 1277, 194 L.Ed.2d 431 (2016). FTB petitioned the United States Supreme Court for certiorari. *Franchise Tax Bd. of Cal. v. Hyatt (Hyatt II),* —— U.S. ——, 136 S.Ct. 1277, 1280, 194 L.Ed.2d 431 (2016). The Court agreed to decide two questions. *Id.* The first question was whether to overrule *Nevada v. Hall*, 440 U.S. 410, 99 S.Ct. 1182, 59 L.Ed.2d 416 (1979), and its holding, "that one State ... can open the doors of its courts to a private citizen's lawsuit against another State ... without the other State's consent." *Hyatt II,* —— U.S. ——, 136 S.Ct. at 1279–80. The Court split 4–4 on the *Hall* question and thus affirmed our "exercise of jurisdiction over California's state agency." *Id.* at ——, 136 S.Ct. at 1281.

The second question was "[w]hether the Constitution permits Nevada to award damages against California agencies under Nevada law that are greater than it could award against Nevada agencies in similar circumstances." *Id.* The Court held that it does not and that this court's "special rule of law" that FTB was not entitled to a damages cap that a Nevada agency would be entitled to "violates the Constitution's requirement that Full Faith and Credit shall be given in each State to the public Acts, Records and judicial Proceedings of every other State." *Id.* (internal quotation marks omitted). The Court thus granted FTB's certiorari petition, vacated our decision, and remanded the case back to us for further consideration in light of its decision. *Id.* at ——, 136 S.Ct. at 1283. In light of the Court's ruling, we reissue our vacated opinion except as to the damages portions addressed by the Supreme Court and apply the statutory damages caps FTB is entitled to under *Hyatt II.* [1]

[1] We previously issued an opinion on September 14, 2017, but withdrew that opinion on rehearing to correct an error regarding the availability of prejudgment interest under the statutory damages cap.

In 1998, inventor Gilbert P. Hyatt sued 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 ***829** 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 ****725** 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 and an award of damages up to the amount of Nevada's statutory cap.

In connection with these causes of action, and in light of the Supreme Court's opinion in *Hyatt II,* we must address FTB's entitlement to the 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, in accordance with *Hyatt II,* FTB is entitled to the $50,000 statutory cap on damages a similarly situated Nevada agency would be entitled to in similar circumstances. *See* NRS 41.035(1) (1987).[2] We therefore reverse the $85 million of damages awarded to Hyatt on the fraud claim and the $1,085,281.56 of special damages awarded to Hyatt on the intentional infliction of emotional distress claim and conclude that FTB is entitled to the $50,000 statutory cap on Hyatt's fraud claim and intentional infliction of emotional distress claim.

2 The version of the statute in effect at the time Hyatt incurred his damages provided a statutory cap on damages awarded in a tort action against a state agency "not [to] exceed the sum of $50,000." *See* NRS 41.035(1) (1987).

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 ***830** 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 with instructions.

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 ***831** companies that held licenses to ****726** 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, ***832** 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, the protests upheld the audits, and Hyatt went on to challenge them in the California courts. [3]

3 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 Hyatt were intended "to ****727** 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. [4] 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.

4 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 ***833** 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, 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 ****728** under ***834** 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. Hyatt was also awarded prejudgment interest on the awarded damages for emotional distress, invasion of privacy, and fraud. Following the trial, Hyatt 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. [5]

5 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 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.

***835** *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*

[1] 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 of discretionary-function immunity and comity as recognized in Nevada.

****729** **[2]** **[3]** **[4]** 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); *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 ***836** 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

[5] 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 *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. Cty. 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)).

***837** FTB contends that when this court adopted the federal test in *Martinez*, it impliedly overruled the *Falline* exception to discretionary-function ****730** 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 worker's 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 worker's 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 worker's 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 worker's 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 ***838** circumference of authority granted" to the actor. *Id.* Thus, the *Falline* court viewed the exception to discretionary immunity broadly.

[6] **[7]** **[8]** **[9]** 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 ****731** 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 is a policy-making 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 policy-making 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 ***839** 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).[6] 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.

6 *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 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 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 ***840** [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 ****732** 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.

***841** 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.*

[10] The difference in the *Franklin Savings* and *Coulthurst* approaches emanates from how broadly those courts apply the ****733** 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* 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 ***842** 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.[7] 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.

7 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.

[11] **[12]** **[13]** 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

[14] 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 ***843** 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

[15] On appeal, Hyatt focuses his invasion of privacy claims on FTB's disclosures of his name, address, and social security number ****734** 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.

[16] **[17]** 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 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 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.

[18] 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 ***844** 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. [8]

8 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.

[19] 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. [9]

9 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).

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 ****735** 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
>
> ***845** (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. [10] *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) (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.

10 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, ***846** 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.

[20] 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 ****736** 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

[21] 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 ***847** 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. [11]

11 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

[22] **[23]** 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 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. [12]

12 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. ****737** *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 ***848** 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) 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. ***849** *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.[13] 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 ****738** court judgment in Hyatt's favor on this claim is reversed.

13 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.,* 298 Or. 706, 696 P.2d 527, 533–35 (1985).

Abuse of process

[24] **[25]** 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).

[26] 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 LLC v. Ultimate Distribs., Inc.,* 682 F.Supp.2d 1003, 1020 (N.D. Cal. 2010). On this cause of action, then, FTB is ***850** entitled to judgment as a matter of law, and we reverse the district court's judgment.

Fraud

[27] **[28]** **[29]** 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).

[30] 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 ****739** 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 ***851** 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.

[31] 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. [14] 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. [15]

14 FTB's argument concerning government agents making representations beyond the scope of law is without merit.

15 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., LLC,* 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).

***852** *Fraud damages*

[32] **[33]** 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. [16] In doing so, we address FTB's entitlement to statutory caps on the amount of damages recoverable to the same extent that a Nevada government agency would receive statutory caps ****740** under principles of comity. [17]

16 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.

17 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).

NRS 41.035 (1987) 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." At the time Hyatt suffered his injuries in 1993, the applicable statutory cap pursuant to NRS 41.035(1) was $50,000. *See Las Vegas Metro. Police Dep't v. Yeghiazarian,* 129 Nev. 760, 768, 312 P.3d 503, 509 (2013) (noting that a tort claim accrues at the time of the plaintiff's injuries). The parties agree that NRS 41.035 applies on a per-claim basis.

The Supreme Court disagreed with our determination that FTB was not entitled to the statutory damages cap on Hyatt's fraud claim. *Franchise Tax Bd. of Cal. v. Hyatt (Hyatt II),* —— U.S. ——, 136 S.Ct. 1277, 1281, 194 L.Ed.2d 431 (2016). In reviewing our prior decision, the Court noted that we "explained [our] holding by stating that California's efforts to control the actions of its own agencies were inadequate as applied to Nevada's own citizens. Hence, Nevada's policy interest in providing adequate redress to Nevada's citizens [wa]s paramount to providing [FTB] a statutory cap on damages under comity." *Id.* at ——, 136 S.Ct. at 1280 (second alteration in original) (internal quotation marks omitted). The Court determined that this explanation "cannot justify the application of a special and discriminatory rule" that would deprive FTB of the benefit of the statutory damages cap. *Id.* at ——, 136 S.Ct. at 1282. The Court held that "[w]ith respect to damages awards greater than $50,000, the ordinary principles of Nevada law do not conflict with California law, for both laws would grant immunity. Similarly, in respect to such amounts, the policies underlying California law and Nevada's ***853** usual approach are not opposed; they are consistent." *Id.* (internal quotation marks and citation omitted).

[34] Accordingly, although immunity with respect to damages against FTB in an amount greater than $50,000 is consistent with both Nevada and California law, California's law of *complete* immunity from recovery is inconsistent with Nevada law. *See id.* at ——, 136 S.Ct. at 1281. We thus conclude that, while FTB is not immune such that any recovery is barred in this case, FTB is entitled to the $50,000 statutory cap on damages a Nevada agency would be entitled to in similar circumstances. *See* NRS 41.035 (1987). We thus reverse the damages award for fraud and instruct the district court to enter a damages award for fraud in the amount of $50,000. Because the statutory cap also applies to prejudgment interest on damages, we reverse the award for prejudgment interest and conclude that Hyatt is not entitled to prejudgment interest on the fraud claim because it would cause the total award to exceed $50,000. NRS 41.035(1) ("An award for damages ... may not exceed the sum of $50,000, exclusive of interest computed from the date of judgment...."); *Arnesano v. State, Dep't of Transp.*, 113 Nev. 815, 822, 942 P.2d 139, 144 (1997) ("[C]laims for prejudgment interest are only valid when the interest award does not cause the total individual award, exclusive of post-judgment interest, attorney fees and costs, to exceed $50,000."), *abrogated on other grounds by Martinez v. Maruszczak,* 123 Nev. 433, 168 P.3d 720 (2007).

[35] The statutory cap does not include awards for attorney fees and costs. *See Yeghiazarian,* 129 Nev. at 769, 312 P.3d at 509 (allowing recovery of attorney fees in addition to damages subject to NRS 41.035's cap). Therefore, a determination by the district court with respect to fees and costs must be made on remand.

Intentional infliction of emotional distress

[36] 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 **741 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.

[37] [38] 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 *854 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); *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 *855 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. **742 *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.*

[39] 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.

***856** In support of his IIED claim, Hyatt presented testimony from three different people as to 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. [18]

18 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.

Trial errors at district court

FTB also claims that the jury's award should be reversed based on numerous evidentiary and jury instruction errors committed by the trial court.

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.

[40] 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 ****743** 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

[41] FTB argues that the district court violated its jurisdictional restriction governing this case, because by allowing Hyatt's claims to ***857** 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 ***858** 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

[42] FTB also argues that the district court wrongly instructed the jury. Specifically, ****744** 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 they were 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 ***859** 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.

****745** *Exclusion of evidence to rebut adverse inference*

[43] **[44]** 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 email 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 emails to its employees, before the change, requesting that they print or otherwise save any emails related to Hyatt's case. Backup ***860** tapes containing several weeks' worth of emails 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 email 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 emails 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 emails did not contain anything harmful.

[45] **[46]** 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 ***861** emails in an effort to demonstrate that none of the destroyed information contained in the emails 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 emails 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

[47] FTB additionally challenges the district court's exclusion of evidence regarding ****746** 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 do not warrant reversal

[48] Because the district court abused its discretion in making the evidentiary and jury instruction rulings outlined above, we must determine 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 Cook v. Sunrise Hosp. & Med. Ctr., LLC,* 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 ***862** reversal and remand). Based on the sliding-scale approach we adopt today, the increased severity of a defendant's conduct will require less in the way of proof of emotional distress to establish an IIED claim. As noted earlier, the facts of this case are at the more extreme end of the scale. Thus, we conclude that FTB has failed to show that, but for the trial errors, a different result might have been reached, at least as to liability. On the issue of damages, we conclude that a different result would have been reached but for the trial errors. However, as with our determination on FTB's liability on Hyatt's IIED claim, we conclude that the evidence in connection with the severe treatment experienced by Hyatt supports a damages award up to the NRS 41.035(1) $50,000 damages cap. We will not compel the parties to incur the expense of a new trial. *Cf. Newman v. Kane,* 9 Nev. 234, 236 (1874) (holding that "[w]hen ... the court has all the facts before it upon which

it can render the proper judgment, it will not impose upon the parties the expense of a new trial"). We therefore reverse the award of damages on the IIED claim and remand this matter to the district court with instructions to enter a damages award on Hyatt's IIED claim in the amount of $50,000. *Cf. Nev. Indep. Broad. Corp. v. Allen,* 99 Nev. 404, 419, 664 P.2d 337, 347 (1983) (concluding that jury award of damages was excessive as a matter of law and reducing damages to "the maximum amount that could be reasonably awarded under the[ ] circumstances"). Because this damages award on the IIED claim is the maximum allowed by NRS 41.035(1), Hyatt is not entitled to prejudgment interest.[19] *See Arnesano v. State, Dep't of Transp.,* 113 Nev. 815, 822, 942 P.2d 139, 143–44 (1997), *abrogated on other grounds by Martinez v. Maruszczak,* 123 Nev. 433, 168 P.3d 720 (2007).

19 As noted above, the statutory cap on damages does not apply to awards for attorney fees and costs.

Punitive damages

[49] 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 ****747** to go to the jury, and the jury found in Hyatt's favor and awarded him $250 million.

[50] **[51]** 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. *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 ***863** 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 their 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.[20]

20 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.

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.

***864** *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 ****748** 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 multiple defendants, unless it is "rendered impracticable by the interrelationship of the 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).

[52] 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.

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 ***865** 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.

[53] 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 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

[54] 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 ****749** 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 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.

[55] **[56]** **[57]** Damages "cannot be based solely upon possibilities and speculative testimony." ***866** *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." *Morgan 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. *Morgan,* 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.*

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 ***867** 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 ****750** 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 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 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. However, we reverse the amount of damages awarded, as we have determined that FTB is entitled to NRS 41.035(1)'s $50,000 statutory cap on damages under comity principles. In regard to the IIED claim, we affirm the judgment in favor of Hyatt as to liability. We also conclude that sufficient evidence supports a damages award up to NRS 41.035(1)'s $50,000 statutory cap and thus determine that the district court should award Hyatt damages in that amount for his IIED claims. We conclude that Hyatt is not entitled to prejudgment interest on these damages awards because an award of prejudgment interest would impermissibly exceed NRS 41.035(1)'s $50,000 statutory cap. We further 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 reverse the costs awards and ***868** remand to the district court for a new determination with respect to attorney fees and costs 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, nor do we consider FTB's second request that this court take judicial notice of certain publicly available documents.

We concur:

Cherry, C.J.

Douglas, J.

Gibbons, J.

Pickering, J.

Parraguirre, J.

Stiglich, J.

All Citations

133 Nev. 826, 407 P.3d 717

EXHIBIT 84

No. 17-

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 A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEVADA

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether *Nevada* v. *Hall*, 440 U.S. 410 (1979), which permits a sovereign State to be haled into another State's courts without its consent, should be overruled.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

DOCKETED CASES

CONSTITUTIONAL AND STATUTORY PROVISIONS

TABLE OF AUTHORITIES—Continued

Page(s)

OTHER AUTHORITIES

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEVADA

PETITION FOR A WRIT OF CERTIORARI

The Franchise Tax Board of the State of California (FTB) respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Nevada in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Nevada (App. 1a-66a) is reported at 407 P.3d 717. An earlier version of that opinion (App. 67a-131a), which was withdrawn on rehearing, was reported at 401 P.3d 1110. The order of the Nevada Supreme Court granting the petition for rehearing (App. 135a-136a) is unreported. The relevant orders of the Nevada District Court (App. 133a-134a, 153a-154a) are unreported. A prior decision of the Nevada Supreme Court is reported at 335 P.3d 125. Another prior decision of the Nevada Supreme Court (App.

139a-152a) is unreported but is noted at 106 P.3d 1220 (Table).

JURISDICTION

The Supreme Court of Nevada entered judgment on rehearing on December 26, 2017. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1257.

STATEMENT

A. Hyatt's Tax Dispute

Respondent Gilbert Hyatt is a former 23-year resident of California who earned hundreds of millions of dollars in licensing fees on technology patents he once owned and developed in California. App. 5a; *Franchise Tax Bd. of Cal.* v. *Hyatt* (*Hyatt I*), 538 U.S. 488, 490-491 (2003). In 1992, Hyatt filed a California tax return stating that he had ceased to be a California resident, and had become a Nevada resident, on October 1, 1991. *Hyatt I*, 538 U.S. at 490.

The Franchise Tax Board—the agency responsible for collecting personal income tax in California—became aware of circumstances suggesting that Hyatt had not actually moved to Nevada in October 1991, as he claimed. App. 5a. Accordingly, the FTB commenced an audit of Hyatt's 1991 return. *Id.* The audit concluded that Hyatt did not move to Nevada until April 1992, and that he had remained a California resident until that time. App. 7a. The FTB accordingly determined that Hyatt owed approximately $1.8 million in unpaid California income taxes for 1991, plus penalties and interest. *Id.* Because it determined that Hyatt had resided in California for part of 1992 yet paid no California taxes, the FTB also opened an audit for that year, which concluded that Hyatt owed an additional $6 mil-

lion in taxes and interest, plus further penalties. App. 7a-8a.

Disputes between Hyatt and the FTB over the validity of those audit determinations have consumed two decades. The California State Board of Equalization, which hears appeals from the FTB's determinations, denied Hyatt's appeal as to the issues of California-sourced income and interest abatement, affirming the FTB's assessment of taxes for the 1991 tax year, and sustained Hyatt's appeals as to tax fraud and as to California residency for 1992. Administrative proceedings in California are ongoing. The Court of Appeals for the Ninth Circuit also recently affirmed the dismissal of another lawsuit that Hyatt brought against the members of the FTB and Board of Equalization, which sought to enjoin further administrative proceedings. *Hyatt* v. *Yee*, 871 F.3d 1067 (9th Cir. 2017).

B. The Nevada Litigation

In January 1998, as California's administrative review of the FTB's deficiency assessment was just beginning, Hyatt brought this suit against the FTB in Nevada state court. He alleged that the FTB had committed several torts in the course of auditing his tax returns—negligent misrepresentation, intentional infliction of emotional distress, fraud, invasion of privacy, abuse of process, and breach of a confidential relationship. App. 8a. He sought compensatory and punitive damages, as well as a declaratory judgment that he resided in Nevada during the periods relevant to the FTB's audits. *Id.*

The FTB moved for summary judgment, arguing that it was entitled to immunity from suit in Nevada, as it would be in California. App. 142a. Under California

law, no public entity may be held liable for "instituting any judicial or administrative proceeding or action for or incidental to the assessment or collection of a tax," or for any "act or omission in the interpretation or application of any law relating to a tax." Cal. Gov't Code § 860.2. The FTB argued that the Full Faith and Credit Clause, together with principles of sovereign immunity and comity, required the Nevada courts to grant the FTB the same immunity. *Hyatt I*, 538 U.S. at 491-492.

The trial court denied that motion, and the FTB petitioned the Nevada Supreme Court for a writ of mandamus, arguing that the FTB was immune from suit in the Nevada courts. *Hyatt I*, 538 U.S. at 492. The Nevada Supreme Court rejected the FTB's claim of complete immunity, noting that in *Nevada* v. *Hall*, 440 U.S. 410 (1979), this Court held that the Constitution does not grant the States sovereign immunity from suit in the courts of other States. App. 144a & n.12. The court then ruled that the "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. 10a. The Nevada Supreme Court therefore allowed Hyatt's intentional tort claims to proceed.

C. *Hyatt I*

The FTB petitioned for certiorari, arguing that the Full Faith and Credit Clause required Nevada courts to afford it the same immunity that the FTB would receive in California courts. This Court granted certiorari and affirmed, holding that the Full Faith and Credit Clause did not require Nevada to grant the FTB the full immunity that it would have under California law. *Hyatt I*, 538 U.S. at 496.

The Court also noted that in *Nevada* v. *Hall*, it had held that "the Constitution does not confer sovereign immunity on States in the courts of sister States." 538 U.S. at 497. Nineteen States and Puerto Rico filed an amicus brief in *Hyatt I*, urging the Court to overrule *Hall* as inconsistent with its other decisions on state sovereign immunity. States Amici Br. 17, No. 02-42 (U.S. Dec. 9, 2002). But because the FTB had not asked for *Hall* to be overruled, the Court declined to consider whether to do so. *Hyatt I*, 538 U.S. at 497.[1]

D. Trial and Appeal

After this Court's decision in *Hyatt I*, the parties engaged in extensive discovery and pretrial proceedings in state court. Finally, in 2008—more than ten years after Hyatt filed suit—the case proceeded to a jury trial that lasted approximately four months. App. 11a. The Nevada jury found for Hyatt on all claims that were tried and awarded him more than $1 million on his fraud claim, $52 million for invasion of privacy, $85 million for emotional distress, and $250 million in punitive damages. *Id.* The trial court added more than $2.5 million in costs and $102 million in prejudgment interest, for a total judgment exceeding $490 million. App. 11a-12a.

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[1] The Court's decision in *Hall*, which involved a traffic accident, left open the possibility that a different result might obtain in a case where one State's exercise of jurisdiction over another State would "interfere with [the defendant State's] capacity to fulfill its own sovereign responsibilities." 440 U.S. at 424 n.24. In *Hyatt I*, the Court declined to adopt this suggestion in *Hall*, and in ruling against the FTB, refused to distinguish among state interests in determining whether one State could subject another State to suit in its courts. *See* 538 U.S. at 497-499 (discussing Full Faith and Credit Clause).

The Nevada Supreme Court affirmed in part and reversed in part. *Franchise Tax Bd. of Cal.* v. *Hyatt*, 335 P.3d 125 (Nev. 2014). The court held that Hyatt's claims for invasion of privacy, abuse of process, and breach of a confidential relationship failed as a matter of law, but affirmed the FTB's liability for fraud and intentional infliction of emotional distress. *Id.* at 130-131. The court also rejected the FTB's argument that it was entitled to the same $50,000 statutory damages cap that Nevada courts apply to Nevada governmental entities, and thus affirmed the fraud damages that the jury had awarded. *Id.* at 145-147. Because of several evidentiary errors committed by the trial court, the court remanded for a new trial on the amount of emotional distress damages. *Id.* at 149-153. The court rejected the FTB's contention that it was entitled to the same immunity or protections as a Nevada agency. *Id.* at 145-147. The court did, however, conclude that as a matter of comity the FTB was immune from punitive damages (as Nevada agencies would be). *Id.* at 154.

E. *Hyatt II*

This Court again granted certiorari, agreeing to consider two questions: whether the Nevada Supreme Court erred by failing to apply to the FTB the statutory immunities available to Nevada agencies, and whether *Nevada* v. *Hall* should be overruled. *Franchise Tax Bd. of Cal.* v. *Hyatt* (*Hyatt II*), 136 S. Ct. 1277, 1280 (2016). Several States filed amicus briefs at both the petition stage and merits stage in support of overruling *Nevada* v. *Hall*.

The Court divided equally on whether *Hall* should be overruled. *Hyatt II*, 136 S. Ct. at 1279. On the second question, the Court held that the Full Faith and Credit Clause does not "permit[] Nevada to award

damages against California agencies under Nevada law that are greater than it could award against Nevada agencies in similar circumstances." *Id.* at 1281. "In light of the 'constitutional equality' among the States," the Court explained, "Nevada has not offered 'sufficient policy considerations' to justify the application of a special rule of Nevada law that discriminates against its sister States." *Id.* at 1282.

F. Post-Remand Proceedings

On remand from this Court, and after supplemental briefing in which the FTB raised concerns about continuing hostile and discriminatory treatment, the Nevada Supreme Court issued a new opinion. It held that the FTB is entitled to the benefit of Nevada's statutory damages cap. App. 70a. The court therefore instructed the trial court to enter a damages award for fraud within the cap of $50,000. App. 107a. In an about-face, the court then held that a new trial was unnecessary on Hyatt's intentional infliction of emotional distress claim because the evidence at trial supported a damages award on that claim at the $50,000 cap. App. 121a-122a. The court thus denied the FTB a jury trial on emotional distress damages by deeming evidence it previously determined to be prejudicial as "harmless." *Id.* The court also remanded for consideration of costs and attorneys' fees. App. 124a. The court subsequently issued a new opinion on rehearing, reaffirming those holdings, App. 4a, 41a, 56a, 59a, and clarifying that the statutory damages cap covers prejudgment interest, App. 3a n.1, 41a.

As a result of the Nevada Supreme Court's judgment, nothing remains for the trial court to do except enter judgment against the FTB, determine which par-

ty, if any, is the prevailing party, and entertain any requests for costs and attorney's fees. App. 65a-66a.

REASONS FOR GRANTING THE PETITION

This petition presents the Court with the opportunity to answer the question that it agreed to decide in *Hyatt II*: whether *Nevada* v. *Hall*, 440 U.S. 410 (1979), should be overruled. *Hall* was wrong when it was decided and has become only more clearly wrong in the intervening years. As four Justices have already recognized, *Hall* cannot be squared with the Nation's constitutional structure. This Court should therefore grant certiorari and hold that, under our federal system, an agency of one State may not (absent its consent) be sued in the courts of another State.

I. AS FOUR MEMBERS OF THIS COURT HAVE ALREADY AGREED, *NEVADA* V. *HALL* SHOULD BE OVERRULED

Hall conflicts with the Founding-era understanding of state sovereign immunity and with numerous better reasoned precedents of this Court, which have recognized that the principle of state sovereign immunity is inherent in the federal structure of the Union and is intended to protect the dignity interests of the States and the right of the people of the several States to govern themselves. There are no compelling reasons to preserve *Hall* in the name of stare decisis. It should therefore be overruled.

1.a. In *Hall*, California residents injured in an automobile accident with a University of Nevada employee filed suit in California against the State of Nevada. 440 U.S. at 411-412. A California jury found the state employee negligent and awarded more than $1,000,000 in damages. *Id.* at 413. This Court granted certiorari and held that constitutional principles of sovereign immunity

do not preclude one State from being haled into the courts of another State against its will. *See id.* at 426-427.

In so holding, the Court acknowledged that sovereign immunity "[u]nquestionably … was a matter of importance in the early days of independence." *Hall*, 440 U.S. at 418. The Court recognized that, at the Framing, one State would have possessed sovereign immunity in the courts of another. *Id.* at 417. And it observed that the debates over ratification of the Constitution, and later decisions of this Court, reflected "widespread acceptance of the view that a sovereign state is never amenable to suit without its consent." *Id.* at 419-420 & n.20.

The Court nonetheless dismissed this "widespread" Framing-era view as irrelevant to the constitutional question whether States are immune from suit in the courts of their fellow sovereigns. The Court recognized that, at the time of the Framing, the States were "vitally interested" in whether they could be subjected to suit in the *federal* courts authorized by the Constitution. *Hall*, 440 U.S. at 418. But, the Court stated, it did not follow that the Framers intended to enshrine any principle of interstate sovereign immunity in the Constitution—perhaps because the notion of one State being sued in the courts of another was too outlandish to contemplate. The Court reasoned that, since the "need for constitutional protection against" the "contingency" of a state defendant being sued in a court of a sister State was "not discussed" during the constitutional debates, it "was apparently not a matter of concern when the new Constitution was being drafted and ratified." *Id.* at 418-419.

The Court then ruled that nothing in the Constitution provides "any basis, explicit or implicit," for affording sovereign immunity to a State haled into another State's courts against its will. *Hall*, 440 U.S. at 421. The Court refused to "infer[] from the structure of our Constitution" any protection for sovereign immunity beyond the explicit limits on federal-court jurisdiction set forth in Article III and the Eleventh Amendment. *Id.* at 421, 426. And it determined 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, the Court explained, a State's only recourse is to hope that, as "a matter of comity" and "wise policy," a sister State will make the "voluntary decision" to exempt it from suit. *Id.* at 416, 425-426.

b. Justice Blackmun dissented, joined by Chief Justice Burger and then-Justice Rehnquist. Those Justices would have held that the Constitution embodies a "doctrine of interstate sovereign immunity" that is "an essential component of federalism." *Hall*, 440 U.S. at 430 (Blackmun, J., dissenting). The "only reason why this immunity did not receive specific mention" during ratification, Justice Blackmun wrote, is that it was "too obvious to deserve mention." *Id.* at 431.

Justice Blackmun also pointed to the swift adoption of the Eleventh Amendment after *Chisholm* v. *Georgia*, 2 U.S. (2 Dall.) 419 (1793), which had held that citizens of one State could sue another State in federal court without the defendant State's consent. "If the Framers were indeed concerned lest the States be haled before the federal courts," he observed, "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). He explained

that the "concept of sovereign immunity" that "prevailed at the time of the Constitutional Convention" was "sufficiently fundamental to our federal structure to have implicit constitutional dimension." *Id.*

Justice Rehnquist filed a separate dissent, 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." *Hall*, 440 U.S. at 432-433 (Rehnquist, J., dissenting). The "States that ratified the Eleventh Amendment," Justice Rehnquist emphasized, "thought that they were putting an end to the possibility of individual States as unconsenting defendants in foreign jurisdictions." *Id.* at 437. Otherwise, they had "perversely foreclosed the neutral federal forums only to be left to defend suits in the courts of other States." *Id.* In Justice Rehnquist's view, *Hall* "destroys the logic of the Framers' careful allocation of responsibility among the state and federal judiciaries, and makes nonsense of the effort embodied in the Eleventh Amendment to preserve the doctrine of sovereign immunity." *Id.* at 441.

2. *Hall* stands in sharp conflict with the Founding-era understanding of state sovereign immunity. Before the adoption of the Constitution, it was widely accepted that the States enjoyed sovereign immunity from suit in each other's courts. In *Nathan* v. *Virginia*, 1 U.S. (1 Dall.) 77 (Pa. Ct. Com. Pl. 1781), for example, a Pennsylvania citizen brought suit in the Pennsylvania courts to attach property belonging to Virginia. The case "raised such concerns throughout the States that the Virginia delegation to the Confederation Congress sought the suppression of the attachment order," *Hall*, 440 U.S. at 435 (Rehnquist, J., dissenting), claiming

that it was "a violation of the laws of nations," *Nathan*, 1 U.S. at 78. Pennsylvania's attorney general, William Bradford, urged that the case be dismissed on the grounds that each State is a sovereign, and that "every kind of process, issued against a sovereign, is a violation of the laws of nations; and is in itself null and void." *Id.* The Pennsylvania court agreed and dismissed the case. *Id.* at 80; *see also Moitez* v. *The South Carolina*, 17 F. Cas. 574 (Pa. Adm. Ct. 1781) (No. 9697).

The ratification of the Constitution did not abrogate this conception of state sovereignty. The Framing-era debates focused on the question whether States would be subject to suit in federal court. But those debates over the meaning of Article III *assumed* the unquestioned proposition that States would remain immune from suit in the courts of other States. In other words, "Article III was enacted against a background assumption that the states could not entertain suits against one another." Woolhandler, *Interstate Sovereign Immunity*, 2006 Sup. Ct. Rev. 249, 263; *see also id.* at 253 (interstate sovereign immunity was the "foundation on which all sides of the framing era debates" premised their arguments regarding the reach of Article III); Federalist No. 81, at 487 (Hamilton) (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 omitted)). 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 force of the Founding-era conception of interstate sovereign immunity became clear after this Court held in *Chisholm* that States could be sued in federal court, without their consent, by citizens of another