

No. _____

In The
Supreme Court of the United States

FRANCHISE TAX BOARD OF
THE STATE OF CALIFORNIA,

Petitioner,

v.

GILBERT P. HYATT AND EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,

Respondents.

On Petition For Writ Of Certiorari
To The Supreme Court Of The State Of Nevada

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

A long-time resident of California sued that State in a Nevada state court, alleging that California committed the torts of invasion of privacy, outrage, abuse of process, and fraud in the course of a personal income tax investigation concerning the timing of the individual's change of residence from California to Nevada. California Government Code section 860.2 reads: "Neither a public entity nor a public employee is liable for an injury caused by . . . (a) Instituting any judicial or administrative proceeding or action for or incidental to the assessment or collection of a tax."

In *Nevada v. Hall*, 440 U.S. 410 (1979) this Court ruled that, in a tort action against Nevada arising out of a traffic accident occurring in California, California need not give full faith and credit to Nevada's statutory limitation on liability for injuries caused by Nevada state employees. However, the Court also noted that its ruling was fact-based: "California's exercise of jurisdiction in this case poses no substantial threat to our constitutional system of cooperative federalism. Suits involving traffic accidents occurring outside of Nevada could hardly interfere with Nevada's capacity to fulfill its own sovereign responsibilities." 440 U.S. at 424 n.24. The question presented is:

Did the Nevada Supreme Court impermissibly interfere with California's capacity to fulfill its sovereign responsibilities, in derogation of article IV, section 1, by refusing to give full faith and credit to California Government Code section 860.2, in a suit brought against California for the torts of invasion of privacy, outrage, abuse of process, and fraud alleged to have occurred in the course of California's administrative efforts to determine a former resident's liability for California personal income tax?

LIST OF PARTIES

Petitioner Franchise Tax Board of the State of California

Respondent Gilbert P. Hyatt

**Respondent Eighth Judicial District Court of the State of
Nevada, in and for the County of Clark**

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OPINIONS BELOW

The written decision of the Nevada Supreme Court in Case Numbers 35549 and 36390, dated April 4, 2002 (Order Granting Petition for Rehearing, Vacating Previous Order, Granting Petition for a Writ of Mandamus in Part in Docket No. 36390, and Granting Petition for Writ of Prohibition in Part in Docket No. 35549), is printed in the Appendix, *infra*, at pp. 5-18. The written decision of the Nevada Supreme Court in Case Numbers 35549 and 36390, dated June 13, 2001 (Order Granting Petition (Docket No. 36390) and Dismissing Petition (Docket No. 35549)) is printed in the Appendix, *infra*, at pp. 38-44. The written decision of the Nevada Supreme Court in Case Numbers 39274 and 39312, dated April 4, 2002 (Order Denying Petition for a Writ of Mandamus or Prohibition and Dismissing Appeal), pertaining to the protective order, is printed in the Appendix, *infra*, at pp. 19-21. The Protective Order of the Eighth District Court of the State of Nevada Protective Order is printed in the Appendix, *infra*, at pp. 22-35.

JURISDICTION

On April 4, 2002, the Nevada Supreme Court issued its orders (1) denying and granting in part Petitioner's Petitions For Writ of Mandamus and Writ of Prohibition, and (2) denying Petitioner's Petition For Writ of Mandamus and Writ of Prohibition pertaining to the protective order. The jurisdiction of this Court rests on 28 U.S.C. § 1257(a) because the Nevada Supreme Court rejected

California's claim of right under Article IV, Section 1, of the Constitution, the "Full Faith and Credit Clause."

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**CONSTITUTIONAL PROVISIONS
AND STATUTES INVOLVED**

(Set forth verbatim in Appendix, *infra*, pp. 45-48.)

United States Constitution, Art. IV, § 1, The Full Faith and Credit Clause.

California Government Code § 860.2

California Government Code § 905.2

California Government Code § 911.2

California Government Code § 945.4

California Revenue and Taxation Code § 19041

California Revenue and Taxation Code § 21021

◆

STATEMENT OF THE CASE

Pursuant to its inherent sovereign powers, the State of California imposes a personal income tax upon the income of its residents. The Petitioner is the Franchise Tax Board of the State of California (hereinafter referred to as "FTB"). The FTB is the California state agency charged with the public duty of implementing and enforcing the California state personal income tax.

Respondent Gilbert P. Hyatt is a former long-time resident of the State of California who filed a return for 1991 with FTB asserting that he had terminated his California residency and moved to Nevada on September

26, 1991 just before certain companies paid him \$40 million cash in "patent licensing fees" for a patent he had obtained while a resident of California. Hyatt did not report the \$40 million as California income subject to the state personal income tax. The FTB conducted an audit investigation of his filing status and issued Notices of Proposed Assessment for the years 1991 and 1992 based upon its determination that Hyatt remained a California resident until April of 1992. In these Notices of Proposed Assessment the FTB also asserted a civil fraud penalty. Hyatt filed a protest¹ of these Notices of Proposed Assessment. That protest is still pending in California. After filing his protest, Hyatt filed a lawsuit for monetary damages against FTB in Respondent Nevada state court alleging the commission of fraud, abuse of process, invasion of privacy, outrage and negligence by the FTB in both California and Nevada. (Amended Complaint for Declaratory Relief and Tort Damages is printed in the Appendix, *infra*, at pp. 49-90)

The amended complaint sought declaratory relief that Hyatt was a Nevada resident and not subject to California personal income tax. In his action, Hyatt is seeking hundreds of millions of dollars in damages based upon allegations of the common law torts of: 1) unreasonable intrusion upon the seclusion of another; 2) unreasonable publicity given to private facts; 3) casting plaintiff in a false light; 4) outrage; 5) abuse of process; 6) fraud; and 7) negligent misrepresentation.

¹ A "protest" triggers an internal administrative review of the proposed assessments conducted by a hearing officer who is an employee of the FTB. Cal. Rev. & Tax Code § 19041. The hearing officer on the Hyatt protest is an attorney.

The request for declaratory relief was dismissed by Nevada state court on FTB's motion for judgment on the pleadings for lack of subject matter jurisdiction. But Hyatt was allowed to proceed with his tort claims. The Nevada courts also imposed a Protective Order that directs the FTB not to share information it acquired during the course of the lawsuit with the FTB employees conducting the ongoing administrative proceeding involving Hyatt's personal income tax obligations without first requesting Hyatt's permission to make the documents available. If Hyatt refuses permission, the Protective Order directs the FTB to attempt to obtain the documents through the administrative process. (Protective Order is printed in the Appendix, *infra*, at pp. 22-35) In addition, the Nevada district court ordered the FTB to produce certain documents that, under California evidentiary and administrative law, would be barred or precluded from disclosure. FTB filed its first writ petition with the Nevada Supreme Court in Case Number 35549 contesting these discovery orders.

While that first writ was pending before the Nevada Supreme Court, FTB filed a motion in the trial court seeking summary judgment on the remaining tort claims and dismissal for lack of jurisdiction. That motion was denied by the trial court, and FTB filed a second writ petition in the Nevada Supreme Court, Case Number 36390. On June 13, 2001, the Nevada Supreme Court granted that second writ petition, finding that Hyatt "failed to show any evidence of tortious conduct on the part of the Franchise Tax Board." The Nevada Supreme Court ordered the trial court to enter summary judgment in favor of FTB and dismissed the first writ petition as being moot.

After the Nevada Supreme Court entered its order granting the second writ petition, the FTB filed a motion with the trial court to vacate the Protective Order. That Protective Order had effectively served to prevent the FTB from sharing information it had acquired during the lawsuit with the administrative audit review that California was still conducting to determine whether Hyatt owed additional taxes and should be subjected to a civil fraud penalty for 1991 and 1992. This motion to vacate was denied, and another petition for writ and appeal was filed by the FTB with the Nevada Supreme Court on March 4, 2002.

On April 4, 2002, pursuant to Hyatt's petition for reconsideration, the Nevada Supreme Court issued two separate orders in this case. First, with certain exceptions, the court denied FTB's petitions for writ of mandamus and prohibition. With respect to the mandamus petition, the court refused to grant full faith and credit to California's immunity laws as barring Hyatt's Nevada suits based on the common-law intentional torts; however, the court did make allowance for California's statutory immunity for *negligent* acts, on the ground that such an allowance would not contravene any Nevada interests. With respect to the prohibition petition, the court generally ordered the disclosure and release of documents that are considered confidential and not subject to disclosure under California law; however, the court did bar the district court from requiring the FTB to release one particular document. (Appendix, *infra*, at pp. 3-4) Second, the court denied the FTB's petition for writ of mandamus or prohibition challenging the

district court's denial of the FTB's motion to vacate a protective discovery order.² (Appendix, *infra*, at pp. 19-21.)

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REASONS FOR GRANTING THE WRIT

I. NEVADA'S REFUSAL TO EXTEND FULL FAITH AND CREDIT TO CALIFORNIA'S TAX IMMUNITY LAW CRIPPLES CALIFORNIA'S ABILITY TO PERFORM ONE OF ITS CORE SOVEREIGN FUNCTIONS, IN THIS CASE ENFORCEMENT OF CALIFORNIA'S PERSONAL INCOME TAX LAW.

California taxes all of the income of its residents, whether earned within or outside California. In addition, it taxes the income received from California sources of non-residents. As part of its tax-enforcement procedures, a core sovereign function, FTB conducts "residency audits" of former California residents now living in other States, for the purpose of determining the existence and extent of any tax obligation owing for the period of California residency and to determine whether they had California source income. Residency audits necessarily involve official tax enforcement activities both within California and in other States.

Under California law, there are multiple jurisdictional bars to bringing a lawsuit based on an ongoing administrative tax investigation, such as a residency tax audit, yet the Nevada Supreme Court refused to extend full faith and credit to California's immunity laws. It is important

² The order also dismissed the FTB's appeal from the same order.

that this Court grant the writ in this case to protect California's – or indeed any State's – ability to undertake the exercise of a core sovereign function without exposing it to potentially *unlimited* tort liability to *private parties* in the courts of *sister States*. California has found it necessary to enact a broad immunity scheme, with no geographical restriction on its application, to protect its sovereign tax administration activities. In order to protect the balance inherent in our Constitution's federal system, it is important that this Court protect California's efforts by affirming that full faith and credit applies in such circumstances.

In *Nevada v. Hall*, 440 U.S. 410, 424 n.24, *reh'g denied*, 441 U.S. 917 (1979), this Court anticipated that there could be circumstances where even differing state policies would not justify denying full faith and credit to a sister State's body of law. It was suggested that such circumstances might arise where the refusal to extend full faith and credit poses a "substantial threat to our constitutional system of cooperative federalism[,]” such as where it interferes with a State's "capacity to fulfill its own sovereign responsibilities." 440 U.S. at 424 n.24. This Court explained that *Nevada v. Hall* was not such a case. The FTB believes, however, that this case is precisely what was anticipated by footnote 24.

Because the FTB's alleged torts in this case arose within the context of an administrative tax investigation, California Government Code § 860.2 specifically immunizes the FTB from Hyatt's claims:

“Neither a public entity nor a public employee is liable for an injury caused by:

“(a) Instituting any judicial or administrative proceeding or action for or incidental to the assessment or collection of a tax.

“(b) An act or omission in the interpretation or application of any law relating to a tax.”

California case law dealing with § 860.2 has given it a broad interpretation. For example, *Mitchell v. Franchise Tax Board*, 183 Cal.App.3d 1133, 1136, 228 Cal.Rptr. 750, 753 (1986), dismissed negligence, slander of title, interference with credit relations, and due process claims against the FTB based on § 860.2.³

As footnote 24 of *Nevada v. Hall* contemplated, it is vital to protect the States' ability to carry out their core sovereign functions, protected by their immunity laws, without the risk of having to defend themselves in the courts of sister States. Full faith and credit must require the Nevada courts to apply California's governmental immunity laws regarding tax administration to the entirety of FTB's conduct, including its conduct in Nevada. Here, Hyatt, a long-time California resident now allegedly living in Nevada, was the subject of a California residency audit. He has sued California in a Nevada state court under Nevada law alleging invasion of privacy, fraud, and

³ However, section 860.2 does not exist in a vacuum, but is part of a larger statutory scheme for dealing with claims that misconduct of some variety occurred during a tax investigation or proceeding. For example, California Revenue and Taxation Code § 21021 provides taxpayers with a cause of action whenever the tax agency fails to follow board published procedures. On the other hand, California's Tort Claims Act, Gov't Code §§ 911.2, 905.2, and 945.4, bars lawsuits for monetary damages against California or a state employee without first complying with the claims presentation requirements.

abuse of process during the residency audit. However, rather than applying California law, the Nevada Supreme Court has ruled that Hyatt may prosecute his claims against California in Nevada state courts for alleged tortious conduct that comprises the FTB's administrative audit activities notwithstanding California's immunity provisions against suit for tax enforcement activities. Thus, California was deprived in this case of reasonable reliance on an immunity statute that was specifically enacted to protect the core sovereign function of state tax enforcement. Refusal to apply California law here severely hampers California's ability to undertake this core sovereign function. More importantly, the widespread application of the rule set down by the Nevada Supreme Court could cripple the States' ability to conduct vital state programs and protect vital state interests that are necessary to enable them to carry out core state functions.

There should be no doubt in this case that FTB was carrying out core sovereign functions. "[T]axes are the life-blood of government. . . ." *Franchise Tax Board of California v. USPS*, 467 U.S. 512, 523 (1984), quoting *Bull v. United States*, 295 U.S. 247, 259 (1935). In another context, involving congressional limitation of federal court jurisdiction, this Court has recognized "the imperative need of a State to administer its own fiscal operations" and the congressional intent to limit interference with "so important a local concern as the collection of taxes." *Franchise Tax Board of Cal. v. Alcan Aluminium*, 493 U.S. 331, 338 (1990). The determination of residency is a foundational step in the collection of state personal income taxes. The FTB's acts were all performed as a part of the determination of residency, and thus were undertaken as

part of the State of California's inherent sovereign power to assess and collect taxes.

Allowing Hyatt to proceed notwithstanding the existence of California laws barring his action would seriously interfere with California's capacity to fulfill its sovereign responsibilities. California has the sovereign responsibility to administer California's tax laws. Hyatt's case seeks to punish the FTB for making minimal disclosure to others of identifying information about Hyatt for the purpose of determining his residency under these laws. Allowing Hyatt to litigate these acts further without applying California law would impede the FTB's entire residency audit program, as making even minimal inquiries and information disclosures out of state would expose the FTB to the threat of protracted, out-of-state tort litigation about its residency audit processes. This would necessarily interfere with the FTB's ability to administer California's tax laws, since consulting third party sources and making minimal information disclosures out of state are often required to investigate change of residency claims.

In addition, allowing Hyatt's case to proceed also exposes California to additional legal expenses and the threat of punishment for trying to obtain relevant information during residency audits. The FTB has incurred substantial additional litigation expenses before it has even finalized its proposed tax assessment against Hyatt. The FTB's administrative process could result in modification or withdrawal of the FTB's proposed assessments, yet the FTB already has been called to justify in Nevada courts virtually all of its audit actions and conclusions as if the final administrative result were set in stone. This is a subversion of California's tax administrative process.

Nevada's refusal to apply California's governmental immunity laws to Hyatt's case, which arises entirely from acts incident to California tax administration, violates the Full Faith and Credit Clause of the United States Constitution.

II. AS SHOWN BY THE ORDER OF THE NEVADA SUPREME COURT IN THIS CASE, AND CONTRASTING RESULTS IN OTHER STATES, THE STATES REQUIRE GUIDANCE IN THE INTERPRETATION AND APPLICATION OF THE FULL FAITH AND CREDIT ANALYSIS OF *NEVADA V. HALL*.

In *Nevada v. Hall*, a University of Nevada employee driving a State of Nevada car in California negligently caused an accident resulting in severe physical injury to California residents. At the time, Nevada law limited tort recoveries against the State of Nevada to \$25,000. The California courts declined to apply this limitation on Nevada's statutory waiver of its immunity from suit. *Nevada v. Hall*, 440 U.S. at 412-413. This Court affirmed, holding that the Full Faith and Credit Clause did not require California to apply Nevada's immunity laws to the California car accident. *Nevada v. Hall*, 440 U.S. at 424. The Court noted that California had an interest in providing full protection to those injured on its highways, and that requiring California to limit recovery based on Nevada law would have been obnoxious to California's policy of full recovery. *Ibid.* As noted above, however, the Court also stated that a different analysis might apply where one State's exercise of jurisdiction over a sister State could "interfere with [the sister State's] capacity to fulfill its own sovereign responsibilities":

California's exercise of jurisdiction in this case poses no substantial threat to our constitutional system of cooperative federalism. Suits involving traffic accidents occurring outside of Nevada could hardly interfere with Nevada's capacity to fulfill its own sovereign responsibilities. We have no occasion in this case, to consider whether different state policies, either of California or Nevada, might require different analysis or a different result. *Nevada v. Hall*, 440 U.S. at 424 n.24.

Numerous courts have recognized the *Nevada v. Hall* exception suggested in footnote 24, which the FTB asserts applies in this case. In fact, several state courts have applied it, and have dismissed lawsuits against sister States as a result. But in this case the Nevada courts did not believe that this suit was precluded by the exception anticipated in *Nevada v. Hall*.

For example, in *Guarini v. State of N.Y.*, 521 A.2d 1362 (N.J. Super. 1986), *aff'd*, 521 A.2d 1294, *cert. denied*, 484 U.S. 817 (1987), New Jersey claimed that the Statue of Liberty and the island on which it is located were under its jurisdiction and sovereignty. New York had exercised jurisdiction over the statue and the island for at least 150 years. New Jersey sued the State of New York in a New Jersey Court, but the New Jersey court dismissed the case under the exception to *Nevada v. Hall*. *Id.* at 1366-67. The *Guarini* court held that the "ruling [in *Nevada v. Hall*] did not mean that a State could be sued in another as a matter of course," *id.* at 1366, and dismissed the action based on its threat to the constitutional system of cooperative federalism, including a potential "cascade of lawsuits" by one State's citizens against neighboring States:

The present case requires a 'different analysis' and a 'different result.' . . . Plaintiff, if successful, would clearly interfere with New York's capacity to fulfill its own sovereign responsibility over those two islands in accordance with and as granted by the 1833 compact. Exercise of jurisdiction by this court would thereby pose a 'substantial threat to our constitutional system of cooperative federalism.' *Id.*

Xiomara Mejia-Cabral v. Eagleton School, 97-2715 (1999 Mass. Super. Lexis 353, September 15, 1999), involved another application of the *Nevada v. Hall* footnote 24 exception. The plaintiff sued a Massachusetts school in a Massachusetts state court for wrongful death caused by a juvenile delinquent attendee. The State of Connecticut was also joined as a third-party defendant under allegations that it was negligent in placing the juvenile at the school. The Massachusetts court contrasted *Nevada v. Hall* and dismissed the State of Connecticut as a defendant, noting that:

The prospect of one state's court deciding whether another state was negligent in selecting a particular rehabilitation program for a juvenile offender is profoundly troubling and this court's assertion of jurisdiction over such a claim against the state of Connecticut would pose a 'substantial threat to our constitutional system of cooperative federalism.' The State of Connecticut makes a compelling argument that this third-party complaint would, if allowed to proceed, 'interfere with [Connecticut's] capacity to fulfill its own sovereign obligations' and that recognition of its sovereign immunity is therefore mandatory. *Id.* (Internal citations omitted.)

The analyses, and indeed the results, in *Guarini* and *Xiomara Mejia-Cabral* are contrary to that of the Nevada Supreme Court in the present case. These contrasting views underscore the need to clarify the footnote 24 exception of *Nevada v. Hall*. In the final analysis, the Nevada Supreme Court's decision in this case is inconsistent with the interpretation and application of that decision by other States. Only this Court can speak authoritatively to the reach of its decision in *Nevada v. Hall*. Only this Court can fully resolve the proper application of the Full Faith and Credit Clause of the United States Constitution in the protection of the core sovereign functions of the several States.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully Submitted,

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IN THE SUPREME COURT OF THE
STATE OF NEVADA

FRANCHISE TAX BOARD OF THE
STATE OF CALIFORNIA,

No. 36390

Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NE-
VADA, IN AND FOR THE COUNTY
OF CLARK, AND THE HONOR-
ABLE NANCY M. SAITTA, DIS-
TRICT JUDGE,

Respondents,

and

GILBERT P. HYATT,
Real Party in Interest.

WRIT OF MANDAMUS

TO: The Honorable Nancy M. Saitta, Judge of the Eighth
Judicial District Court:

WHEREAS, this Court having made and filed its written
decision that a writ of mandamus issue,

NOW, THEREFORE, you are directed to grant Fran-
chise Tax Board's motion for summary judgment as to the
negligence claim, in the case entitled Hyatt vs. Franchise
Tax Board, Case No. A382999.

WITNESS The Honorables A. William Maupin, Chief
Justice, Cliff Young, Miriam Shearing, Deborah A. Agosti,
and Myron E. Leavitt, Associate Justices of the Supreme

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Court of the State of Nevada, and attested by my hand
and seal this 4th day of April, 2002.

[SEAL]

/s/ Bruce A. Herstmanshoff
Chief Assistant Clerk

IN THE SUPREME COURT OF THE
STATE OF NEVADA

FRANCHISE TAX BOARD OF THE
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COURT OF THE STATE OF NE-
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ABLE NANCY M. SAITTA, DIS-
TRICT JUDGE,

Respondents,

and

GILBERT P. HYATT,
Real Party in Interest.

No. 35549

WRIT OF PROHIBITION

TO: The Honorable Nancy M. Saitta, Judge of the Eighth
Judicial District Court:

WHEREAS, this Court having made and filed its
written decision that a writ of prohibition issue,

NOW, THEREFORE, you are prohibited from requir-
ing Franchise Tax Board to release document FTB No.
07381, in the case entitled Hyatt vs. Franchise Tax Board,
Case No. A382999.

WITNESS The Honorables A. William Maupin, Chief
Justice, Cliff Young, Miriam Shearing, Deborah A. Agosti,
and Myron E. Leavitt, Associate Justices of the Supreme

App. 4

Court of the State of Nevada, and attested by my hand
and seal this 4th day of April, 2002.

[SEAL]

/s/ Bruce A. Herstmanshoff
Chief Assistant Clerk

IN THE SUPREME COURT OF THE
STATE OF NEVADA

FRANCHISE TAX BOARD OF
THE STATE OF CALIFORNIA,

Petitioner,

vs.

THE EIGHTH JUDICIAL DIS-
TRICT COURT OF THE STATE
OF NEVADA, IN AND FOR THE
COUNTY OF CLARK, AND THE
HONORABLE NANCY M.
SAITTA, DISTRICT JUDGE,

Respondents,

and

GILBERT P. HYATT, Real Party in
Interest.

No. 35549

FRANCHISE TAX BOARD OF
THE STATE OF CALIFORNIA,

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THE EIGHTH JUDICIAL DIS-
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OF NEVADA, IN AND FOR THE
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HONORABLE NANCY M.
SAITTA, DISTRICT JUDGE,

Respondents,

and

GILBERT P. HYATT Real Party in
Interest.

No. 36390

**ORDER, GRANTING PETITION FOR
REHEARING, VACATING PREVIOUS ORDER,
GRANTING PETITION FOR A WRIT OF
MANDAMUS IN PART IN DOCKET NO. 36390,
AND GRANTING PETITION FOR A WRIT OF
PROHIBITION IN PART IN DOCKET NO. 35549**

(Filed April 4, 2002)

In Docket No. 35549, Franchise Tax Board petitioned this court for a writ of mandamus or prohibition, challenging the district court's determination that certain documents were not protected by attorney-client work product or deliberative process privileges, and its order directing Franchise Tax Board to release the documents to Gilbert Hyatt. In Docket No. 36390, Franchise Tax Board separately petitioned this court for a writ of mandamus, challenging the district court's denial of its motions for summary judgment or dismissal, and contending that the district court lacks subject matter jurisdiction over the underlying tort claims because Franchise Tax Board is immune from liability under California law. Alternatively, Franchise Tax Board sought a writ of prohibition or mandamus limiting the scope of the underlying case to its Nevada-related conduct.

On June 13, 2001, we granted the petition in Docket No. 36390 on the basis that Hyatt did not produce sufficient facts to establish the existence of a genuine dispute justifying denial of the summary judgment motion. Because our decision rendered the petition in Docket No. 35549 moot, we dismissed it. Hyatt petitioned for rehearing in Docket No. 36390 on July 5, 2001, and in response to our July 13, 2001 order, Franchise Tax Board answered on August 7, 2001. Having considered the parties' documents and the entire record before us, we grant Hyatt's

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petition for rehearing, vacate our June 13, 2001 order and issue this order in its place.

We conclude that the district court should have declined to exercise its jurisdiction over the underlying negligence claim under comity principles. Therefore, we grant the petition in Docket No. 36390 with respect to the negligence claim, and deny it with respect to the intentional tort claims. We also deny the alternative petition to limit the scope of trial. We further conclude that, except for document FTB No. 07381, which is protected by the attorney work-product privilege, the district court did not exceed its jurisdiction by ordering Franchise Tax Board to release the documents at issue because Franchise Tax Board has not demonstrated that they were privileged. Therefore, we grant the petition for a writ of prohibition¹ in Docket No. 35549 with respect to FTB No. 07381, and deny the petition with respect to all the other documents.

Background

The underlying tort action arises out of Franchise Tax Board's audit of Hyatt – a long-time California resident who moved to Clark County, Nevada – to determine whether Hyatt underpaid California state income taxes for 1991 and 1992. After the audit, Franchise Tax Board assessed substantial additional taxes and penalties against Hyatt. Hyatt formally protested the assessments in California through the state's administrative process, and sued Franchise Tax Board in Clark County District

¹ Prohibition is a more appropriate remedy than mandamus for the prevention of improper discovery. *Wardleigh v. District Court*, 111 Nev. 345, 350, 891 P.2d 1180, 1183 (1995).

Court for several intentional torts and one negligent act allegedly committed during the audit.

During discovery in the district court case, Hyatt sought the release of all the documents Franchise Tax Board had used in the audit, but subsequently redacted or withheld. Franchise Tax Board opposed Hyatt's motion to compel on the basis that many of the documents were privileged. The district court, acting on a discovery commissioner's recommendation, concluded that most of the documents were not privileged and ordered Franchise Tax Board to release those documents. The district court also entered a protective order governing the parties' disclosure of confidential information. The writ petition in Docket No. 35549 challenges those decisions.

Franchise Tax Board then moved for summary judgment, or dismissal under NRCP 12(h)(3), arguing that the district court lacked subject matter jurisdiction because principles of sovereign immunity, full faith and credit, choice of law, comity and administrative exhaustion all required the application of California law, and under California law Franchise Tax Board is immune from all tort liability. The district court denied the motion. The writ petition in Docket No. 36390 challenges that decision. The Multistate Tax Commission has filed an *amicus curiae* brief in support of Franchise Tax Board's comity argument.

Propriety of Writ Relief

We may issue an extraordinary writ at our discretion to compel the district court to perform a required act,² or to control discretion exercised arbitrarily or capriciously,³ or to arrest proceedings that exceed the court's jurisdiction.⁴ An extraordinary writ is not available if petitioner has a plain, speedy and adequate remedy in the ordinary course of law.⁵

A petition for a writ of prohibition may be used to challenge a discovery order requiring the disclosure of privileged information.⁶ A Petition for a writ of mandamus may be used to challenge an order denying summary judgment or dismissal; however, we generally decline to consider such petitions because so few of them warrant extraordinary relief.⁷ We may nevertheless choose to exercise our discretion and intervene, as we do here, to clarify an important issue of law and promote the interests of judicial economy.⁸

Docket No. 36390

Nevada and California have both generally waived their sovereign immunity from suit, but not their Eleventh Amendment immunity from suit in federal court, and have

² NRS 34.160 (mandamus).

³ *Round Hill Gen. Imp. Dist. v. Newman*, 97 Nev. 601, 637 P.2d 534 (1981) (mandamus).

⁴ NRS 34.320 (prohibition).

⁵ NRS 34.170; NRS 34.330.

⁶ *Wardleigh*, 111 Nev. at 350-51, 891 P.2d at 1183-84.

⁷ *Smith v. District Court*, 113 Nev. 1343, 950 P.2d 280 (1997).

⁸ *Id.*

law with respect to the district court's jurisdiction,¹⁴ while Nevada law is presumed to govern with respect to the underlying torts.¹⁵ Fourth, Hyatt's tort claims, although arising from the audit, are separate from the administrative proceeding, and the exhaustion doctrine does not apply. The district court has jurisdiction; however, we must decide whether it should decline to exercise its jurisdiction under the doctrine of comity.

Comity

The doctrine of comity, is an accommodation policy, under which the courts of one state voluntarily give effect to the laws and judicial decisions of another state out of deference and respect, to promote harmonious interstate relations.¹⁶ In deciding whether to respect California's grant of immunity to a California state agency, a Nevada court should give due regard to the duties, obligations, rights and convenience of Nevada's citizens and persons within the court's protection, and consider whether granting California's law comity would contravene Nevada's policies or interests.¹⁷ Here, we conclude that the district court should have refrained from exercising its jurisdiction over the negligence claim under the comity doctrine, but that it properly exercised its jurisdiction over the intentional tort claims.

¹⁴ *Id.* at 414-21.

¹⁵ *Motenko v. MGM Dist., Inc.*, 112 Nev. 1038, 1041, 921 P.2d 933, 935 (1996).

¹⁶ *Nevada v. Hall*, 440 U.S. at 424-27; *Mianecki v. District Court*, 99 Nev. 93, 98, 658 P.2d 422, 424-25 (1983).

¹⁷ *Mianecki*, 99 Nev. at 98, 658 P.2d at 425.

extended the waivers to their state agencies or public employees, except when state statutes expressly provide immunity.⁹ Nevada has expressly provided its state agencies with immunity for discretionary acts, unless the acts are taken in bad faith, but not for operational or ministerial acts, or for intentional torts committed within the course and scope of employment.¹⁰ California has expressly provided its state taxation agency, Franchise Tax Board, with complete immunity.¹¹ The fundamental question presented is which state's law applies, or should apply.

Jurisdiction

Preliminarily, 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. First, although California is immune from Hyatt's suit in federal courts under the Eleventh Amendment, it is not immune in Nevada courts.¹² Second, the Full Faith and Credit Clause does not require Nevada to apply California's law in violation of its own legitimate public policy.¹³ Third, the doctrines of sovereign immunity and full faith and credit determine the choice of

⁹ NRS 41.031; Cal. Const. Art. 3, § 5; Cal. Gov't Code § 820.

¹⁰ See NRS 41.032(2); *Foster v. Washoe County*, 114 Nev. 936, 941, 964 P.2d 788, 791 (1998); *State, Dep't Hum. Res. v. Jimenez*, 113 Nev. 356, 364, 935 P.2d 274, 278 (1997); *Falline v. GNLV Corp.*, 107 Nev. 1004, 1009, 823 P.2d 888, 892 (1991).

¹¹ See Cal. Gov't Code §860.2; *Mitchell v. Franchise Tax Board*, 228 Cal. Rptr. 750 (Ct. App. 1986).

¹² *Nevada v. Hall*, 440 U.S. 410, 414-21 (1979).

¹³ *Id.* at 421-24.

Negligent Acts

Although Nevada has not expressly granted its state agencies immunity for all negligent acts, California has granted the Franchise Tax Board such immunity.¹⁸ We conclude that affording Franchise Tax Board statutory immunity for negligent acts does not contravene any Nevada interest in this case. An investigation is generally considered to be a discretionary function,¹⁹ and Nevada provides its agencies with immunity for the performance of a discretionary function even if the discretion is abused.²⁰ Thus, Nevada's and California's interests are similar with respect to Hyatt's negligence claim.

Intentional Torts

In contrast, we conclude that affording Franchise Tax Board statutory immunity for intentional torts does contravene Nevada's policies and interests in this case. As previously stated, Nevada does not allow its agencies to claim immunity for discretionary acts taken in bad faith, or for intentional torts committed in the course and scope of employment. Hyatt's complaint alleges that Franchise Tax Board employees conducted the audit in bad faith, and committed intentional torts during their investigation. We believe that greater weight is to be accorded Nevada's interest in protecting its citizens from injurious intentional torts and bad faith acts committed by sister states' government employees, than California's policy favoring

¹⁸ Cal. Gov't Code § 860.2; see *Mitchell*, 228 Cal. Rptr. at 752.

¹⁹ *Foster*, 114 Nev. at 941-43, 964 P.2d at 792.

²⁰ NRS 41.032(2).

complete immunity for its taxation agency.²¹ Because we conclude that the district court properly exercised its jurisdiction over the intentional tort claims, we must decide whether our intervention is warranted to prevent the release of documents that Franchise Tax Board asserts are privileged.

Docket No. 35549

Franchise Tax Board invoked the deliberative process, attorney-client and work-product privileges as barriers to the discovery of various documents used or produced during its audit. The district court decided that most of the documents were not protected by these privileges, and ordered Franchise Tax Board to release them. With one exception, we conclude that the district court did not exceed its jurisdiction by ordering Franchise Tax Board to release the documents.

The deliberative process privilege does not apply because the documents at issue were not predecisional; that is, they were not precursors to the adoption of agency policy, but were instead related to the enforcement of already-adopted policies.²² And if the privilege were to apply, it would be overridden by Hyatt's demonstrated need for the documents based on his claims of fraud and government misconduct.²³

²¹ See *Mianecki*, 99 Nev. at 98, 658 P.2d at 425.

²² See *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 866-68 (D.C. Cir. 1980).

²³ See *In re Sealed Case*, 121 F.3d 729, 737-38 (D.C. Cir. 1997).

The attorney-client privilege does not apply because Franchise Tax Board did not demonstrate (1) that in-house-counsel Jovanovich was acting as an attorney, providing legal opinions, rather than as an employee participating in the audit process,²⁴ or (2) that the communications between Ms. Jovanovich and other Franchise Tax Board employees were kept confidential within the agency.²⁵

The work-product privilege does apply, however, to document FTB No. 07381. This memorandum documenting a telephone conversation between Franchise Tax Board attorneys Jovanovich and Gould should be protected from disclosure. When the memorandum was generated, Jovanovich was acting in her role as an attorney representing Franchise Tax Board, as was Gould. The memorandum expresses these attorneys' mental impressions and opinions regarding the possibility of legal action being taken by Franchise Tax Board or Hyatt. Thus, this one document is, protected by the attorney work-product privilege.²⁶

Finally, although Franchise Tax Board also challenges the district court's protective order, we decline to review the propriety of that discovery order in this writ proceeding. Although an extraordinary writ may be warranted to avoid the irreparable injury that would result from a

²⁴ See *Upjohn Co. v. United States*, 449 U.S. 383, 389-97 (1981); *United States v. Chen*, 99 F.3d 1495, 1501-02 (9th Cir. 1996); *United States v. Rowe*, 96 F.3d 1294, 1297 (9th Cir. 1996); *Texaco Puerto Rico v. Department of Consumer Aff.*, 60 F.3d 867, 884 (1st Cir. 1995).

²⁵ See *Coastal States*, 617 F.2d at 862-64.

²⁶ See *Wardleigh*, 111 Nev. at 357, 891 P.2d at 1188.

discovery order requiring disclosure of privileged information, extraordinary writs are not generally available to review discovery orders.²⁷ Franchise Tax Board has a plain, speedy and adequate remedy; it may challenge the order on appeal if it is aggrieved by the district court's final judgment.

Conclusion

We conclude that the district court should have declined to exercise jurisdiction over the negligence claim as a matter of comity. Accordingly, we grant the petition in Docket No. 36390 in part; the clerk of this court shall issue a writ of mandamus directing the district court to grant Franchise Tax Board's motion for summary judgment as to the negligence claim. We deny the petition in Docket No. 36390 with respect to the intentional tort claims, and we deny the alternative petition to limit the scope of trial.

We conclude that the district court exceeded its jurisdiction by ordering the release of one privileged document, but that Franchise Tax Board has not demonstrated that the district court exceeded its jurisdiction by ordering it to release any of the other discovery documents at issue. Accordingly, we grant the petition in Docket No. 35549 in part; the clerk of this court shall issue a writ of prohibition prohibiting the district court from requiring Franchise Tax Board to release document FTB No. 07381. We deny the writ petition in Docket No. 35549 with respect to all other documents.

²⁷ *Clark County Liquor v. Clark*, 102 Nev. 654, 659, 730 P.2d 443, 447 (1986).

ROSE, J., concurring in part and dissenting in part:

I would not grant comity to the petitioners in this case and would grant immunity only as given by the law of Nevada. In all other respects, I concur with the majority opinion.

In *Mianeki v. District Court*,¹ we were faced with a similar issue when the State of Wisconsin requested comity be granted by Nevada courts in order to recognize Wisconsin's sovereign immunity. In refusing to grant comity and recognize Wisconsin's sovereign immunity, we stated:

In general, comity is a principle whereby the courts of one jurisdiction may give effect to the laws and judicial decisions of another jurisdiction out of deference and respect. The principle is appropriately invoked according to the sound discretion of the court acting without obligation. "[I]n considering comity, there should be due regard by the court to the duties, obligations, rights and convenience of its own citizens and of persons who are within the protection of its jurisdiction." With this in mind, we believe greater weight is to be accorded Nevada's interest in protecting its citizens from injurious operational acts committed within its borders by employees of sister states, than Wisconsin's policy favoring governmental immunity. Therefore, we hold that the law of Wisconsin should not be granted

¹ 99 Nev. 93, 98, 658 P.2d 422, 424-25 (1983) (internal citations omitted).

comity where to do so would be contrary to the policies of this state.

Based on this very similar case, I would not grant comity to California, and I would extend immunity to the agents of California only to the extent that such immunity is given them by Nevada law. Denying a grant of comity is not uncommon, as California has denied comity to the state of Nevada in years past.²

/s/ Rose _____, J.
Rose

² *Nevada v. Hall*, 440 U.S. 410, 418 (1979).
