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Franchise Tax Board of the State of California v. Hyatt, 130 Nev. Adv. Op. 71 (Sept. 18, 2014)¹

COMITY: RECOGNIZING FOREIGN STATE'S IMMUNITY
TORTS: PUBLICITY IN A FALSE LIGHT & PROOF OF INTENTIONAL
INFLECTION OF EMOTIONAL DISTRESS

Summary

The Court (1) affirmed the intentional tort and bad faith exceptions to discretionary-function immunity under NRS 41.032; (2) recognized the common law tort of publicity in a false light; (3) adopted the sliding-scale approach to proving a claim of intentional infliction of emotional distress; (4) determined comity does not demand granting immunity from suit to foreign state government agencies if immunity would be available under that state's laws, but not under Nevada law; and (5) determined comity does not require extending statutory caps to foreign state government agencies even if provided by law to Nevada government agencies.

Background

*California proceedings**

A tax auditor for the California Franchise Tax Board (FTB) decided to review Hyatt's 1991 state income tax return after reading a newspaper article in 1993 regarding Hyatt's lucrative computer-chip patent. Based on this review, the FTB notified Hyatt he was being audited. The FTB required Hyatt to provide information concerning his connections to California and Nevada and the facts surrounding his move to Nevada, and promised to treat him with respect, keep his confidential information private, and provide a speedy resolution to his case. The FTB sent over 100 letters and demands for information to third parties, many of which contained his home address, social security number, or both.

Hyatt claimed that he had moved to Nevada in 1991. However, upon completing the audit, FTB determined Hyatt had not moved to Las Vegas until April 1992 as opposed to the September 1991 date indicated on this tax return. Based on this, the FTB determined that Hyatt owed California an additional \$1.8 million in state income taxes, \$1.4 million in penalties, and \$1.2 million in interest. The FTB then began an audit of Hyatt's 1992 California state taxes. Maintaining he had already moved to Nevada, Hyatt did not file a California tax return for 1992. Based largely on the 1991 audit conclusion about the timing of Hyatt's move and a single request for information, the FTB determined that Hyatt owed over \$6 million in state taxes for 1992, plus penalties and interest.

Hyatt formally challenged the audit conclusions by filing two protests that were handled concurrently. The protests lasted over 11 years and involved three different auditors. Hyatt challenged the audits in the California courts after they were upheld by the FTB.²

¹ By *Patrick Phippen, †Jaymes Orr, ‡Jenn Odell, #Stacy Newman.

² At the time of the Nevada appeal, Hyatt was still challenging the audit conclusions in California courts.

*Nevada litigation**

Hyatt filed the Nevada lawsuit now being considered by the Court in 1998, seeking declaratory relief regarding the timing of his move to Nevada. His complaint also included a claim for negligence and seven intentional tort causes of action arising from the 1991 and 1992 audits: invasion of privacy–intrusion upon seclusion, invasion of privacy–publicity of private facts, invasion of privacy–publicity in a false light, intentional infliction of emotional distress, fraud, breach of confidential relationship, and abuse of process. The district court granted FTB partial summary judgment on the declaratory relief claim, but allowed the parties to litigate Hyatt’s tort claims under the restraint that any determinations as to the audits’ accuracy were not part of Hyatt’s tort claims and the jury would not make any findings about the timing of his move to Nevada or the correctness of the audits’ findings. The district court also granted FTB partial summary judgment to preclude Hyatt from seeking alleged economic damages after concluding that he had offered no admissible evidence to support his theorized chain of events leading to the end of his patent-licensing business in Japan.

The FTB previously sought dismissal of the entire Nevada lawsuit, arguing it was entitled to the full immunity it enjoyed under California law based on sovereign immunity, the Full Faith and Credit Clause, and comity. The Court had disagreed however, and its refusal to dismiss the case was upheld by the U.S. Supreme Court.³

After a jury trial lasting four months, Hyatt prevailed on all intentional tort causes of action and was awarded \$85 million for emotional distress, \$52 million for invasion of privacy, \$1.1 million for fraud, and \$250 million in punitive damages. Following the trial, Hyatt was also awarded \$2.5 million in costs. FTB appealed from the district court’s final judgment and the post-judgment award of costs. Hyatt cross-appealed the district court’s partial summary judgment ruling that he could not seek economic damages for the alleged destruction of his patent-licensing business in Japan.

Discussion

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[†]

The Court determined FTB was not entitled to immunity under principles of comity. Although Nevada has waived traditional sovereign immunity from tort liability, with some exceptions, the Legislature has placed a limit on its waiver by adopting discretionary-function immunity. Discretionary-function immunity provides that no action can be brought against the state or its employee based on the exercise, performance, or failure to exercise or perform a discretionary function or duty on the part of the state, whether or not the discretion involved in abused.⁴

FTB argued that it was immune from Hyatt’s intentional tort claims based on discretionary-function immunity and comity, but the Court disagreed. The principle of comity allows for a forum state to give effect to the laws of another state based on deference and respect

³ *Franchise Tax Bd. of Cal. v. Hyatt*, 538 U.S. 488, 499 (2003).

⁴ NEV. REV. STAT. 41.032(2) (2013).

to the other state. The Court indicated that Nevada will consider extending immunity under comity, only if doing so is not a violation of Nevada public policy.

Discretionary-function immunity in Nevada[†]

Abrogating the usage of previously utilized tests, Nevada adopted the federal *Berkowitz-Gaubert* two-part test for determining if discretionary-function immunity will apply to the government action at issue.⁵ Under the two-part test discretionary-function immunity applies to government action that “(1) involve an element of individual judgment or choice and (2) [are] based on considerations of social, economic or political policy.” If an employee has no option but to follow the policy, no individual choice is available and the first step of the test cannot be satisfied. Likewise if the employee is free to make discretionary decisions, the test considers whether the choice is consistent with underlying regulatory policy. When a discretionary choice is not consistent with the policy, discretionary-function immunity will not shield the government from suit.

Next the Court addressed an exception to discretionary-function immunity for intentional torts and bad-faith conduct. In *Falline v. GNLV Corp.*,⁶ the Court held that in cases of bad-faith misconduct, government action would not qualify for discretionary-function immunity. In light of the Court’s adoption of the federal two-part test FTB claimed that bad-faith exception was impliedly overruled. Conversely Hyatt claimed that the exception remained unaltered. The Court noted that other jurisdictions had reached contrasting decisions. Some have held that allegations of intentional torts or bad-faith misconduct are not relevant and that the employee’s subjective intent should not be considered at all. Other courts have disagreed and examined whether the employee’s subjective action was intended to further some policy.

Courts that decline to recognize bad-faith conduct that calls for an inquiry into an employee’s subjective intent[†]

Applying the same federal test adopted in Nevada, the Tenth Circuit has held that discretionary-function immunity “attaches to bar claims that depend on an employee’s state of mind in performing facially authorized acts.” Consequently, the immunity could not effectively function if the actions in question were considered subjectively.⁷ Recognizing the danger of creating an irrebuttable presumption that government employees always use discretion in good faith, the Tenth Circuit determined the need for employees to perform their duties without fear of litigation was more important.

⁵ *Martinez v. Maruszczak*, 123 Nev. 433, 444-47, 168 P.3d 720,727-29 (2007); *see also* *Berkovitz v. United States*, 486 U.S. 531 (1988); *United States v. Gaubert*, 499 U.S. 315 (1991).

⁶ 107 Nev. 1004, 823 P.2d 888 (1991) (plurality).

⁷ *Franklin Savings Corp. v. United States*, 180 F.3d 1124, 1140-41 (1999).

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

The Second Circuit applied a narrower view of the federal test and concluded that a complaint alleging a nondiscretionary decision that caused the harm was not supported by public policy.⁸ The court reasoned that bad-faith acts are “unrelated to any plausible policy objectives.”⁹

The Court found the Second Circuit’s reasoning more persuasive, noting the Second Circuit’s analysis was similar to the Court’s holding in *Falline*. By doing so, the Court reaffirmed the *Falline* exception that government employees are not protected when acting in bad-faith such that the action is outside the employee’s discretion. This exception to discretionary-function immunity is still applicable following the Court’s adoption of the federal two-part test in *Martinez*.

Turning briefly to the issue of comity, the Court observed that a government employee in Nevada would not be protected by discretionary-function immunity if that employee acted in bad-faith. The Court determined that awarding FTB immunity for an action that a Nevada government employee would not enjoy would be contrary to the policy of the state of Nevada. Therefore, the Court held, FTB could not claim immunity based on the comity principles.

Hyatt's intentional tort causes of action[‡]

Next the Court addressed FTB’s appeal of jury decisions in favor of Hyatt on seven intentional torts: intrusion upon seclusion, publicity of private facts, publicity in a false light, breach of confidential relationship, abuse of process, fraud, and intentional infliction of emotion distress.

Invasion of privacy causes of action[‡]

Invasion of privacy¹⁰ encompasses four separate torts, three of which Hyatt brought against FTB: unreasonable intrusion upon the seclusion of another, unreasonable publicity given to the other’s private life (referred to by the Court as “disclosure”), and publicity that places another in a false light before the public. In the lower court, the jury ruled in Hyatt’s favor on all three claims for invasion of privacy, awarding him \$52 million in damages.

Intrusion upon seclusion and public disclosure of private facts[‡]

The Court combined Hyatt’s claim for intrusion upon seclusion and public disclosure of private facts and reversed the jury verdict for both. Hyatt claimed that FTB invaded his privacy when FTB disclosed Hyatt’s name, address, and social security number to various individuals and entities during the investigation. However, FTB asserted that this information was already public record, and Hyatt could have no viable expectation of privacy, and no invasion of privacy claim under the “public records defense¹¹.” Although Hyatt publicly disclosed this information himself, as when he applied for business licenses, he argued that because these disclosures were

⁸ Colthurst v. United States, 214 F.3d 106, 111 (2000).

⁹ *Id.*

¹⁰ Restatement (Second) of Torts § 652A (1977).

¹¹ Restatement (Second) of Torts § 652D cmt. b (1977).

from many years ago, they should not be considered. However, citing *Montesano v. Donrey Media Group*¹², the Court noted that it had never relied on length of time between public disclosure and alleged invasion of privacy in limiting the public records defense. Finding Hyatt lacked an objective expectation of privacy, the Court reversed the district court's decision on the seclusion and public disclosure of private fact causes of action.

False light invasion of privacy[‡]

Before ruling on the false light claim, the Court needed to first decide whether to formally adopt the false light cause of action in Nevada. The Court noted that it had previously “only impliedly recognized the false light invasion of privacy tort,” and further observed the tort of false light is similar to the tort of defamation.

Adopting the false light invasion of privacy tort[‡]

After discussing differing approaches to publicity in a false light, the Court officially adopted the tort. Citing the Restatement (Second) of Torts, the Court indicated an action for false light arises when “[o]ne who gives publicity to a matter concerning another that places the other before the public in a false light...if (a) the false light in which the other was placed would be highly offensive to a reasonable person, and (b) the actor had knowledge of or acted in reckless disregard as to the falsity of publicized matter and the false light in which the other would be placed.”¹³

The Court noted that jurisdictions are split between either recognizing the tort, or considering it subsumed under defamation. The Court observed that a majority of Courts have chosen to recognize the false light cause of action noting that defamation law seeks “to protect an objective interest in one’s reputation,” whereas false light invasion of privacy seeks to protect “one’s subjective interest in freedom from injury to the person’s right to be left alone.” The Court noted several examples of highly offensive speech that would be actionable under the false light, but not defamation.¹⁴ Next the Court discussed decisions by other courts to reject the tort of false light. These courts expressed concern at overly inhibit free speech, ultimately deciding that the availability of a defamation suit provided enough protection for privacy.

The Court agreed with the majority of jurisdictions and officially recognized the separate privacy tort of false light. Particularly persuasive to the Court was the fact that situations arise where a person is placed in an offensive false light that does not constitute defamation. Defamation alone would have left these individuals without a remedy.

Hyatt’s false light claim[‡]

After finding that FTB did not act unreasonably in conducting its audit investigation, the Court reversed the district court’s judgment on the false light claim. In his false light invasion of privacy claim, Hyatt relied on the fact that FTB included Hyatt’s name on its litigation roster,

¹² *Montesano v. Donrey Media Grp.*, 94 Nev. 644, 668 P.2d 1081 (1983).

¹³ Restatement (Second) of Torts § 652E (1977).

¹⁴ The Court cited situations considered by courts that adopted the false light tort, including 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.

“suggest[ing] he was a ‘tax cheat,’ and therefore, portray[ing] him in a false light.” FTB’s roster was a publicly available, monthly list of audit cases that identified cases in which the protest appeal process was completed, and those that were being litigated in court. Hyatt argued that he should not have been included on the roster because his protests had not yet been completed. However, because Hyatt was involved in litigation with FTB, the Court ruled that the litigation roster did not contain false information. Further the Court determined that despite Hyatt’s claim otherwise, FTB’s contacting of third parties was not highly offensive to a reasonable person, as FTB was conducting a routine audit investigation.

Breach of confidential relationship[‡]

The Court, reversing the district court’s decision in Hyatt’s favor, found that Hyatt did not demonstrate a breach of a confidential relationship. In his claim for breach of confidentiality, Hyatt attempted to rely on *Perry v. Jordan*, which held that a breach of confidentiality arises “by reason of kinship or professional, business, or social relationships between the parties¹⁵.” Hyatt argued that his claim falls under *Perry* because FTB’s position over Hyatt throughout the investigation is the type of relationship *Perry* identifies. However, FTB argued that it not a confidential relationship, and Hyatt’s claim could not prevail as a matter of law, citing to *Johnson v. Sawyer*¹⁶, a Fifth Circuit case which held that two parties which clearly stand in an adversarial relationship do not have the sort of relationship that could give rise to such a breach.

Hyatt contended that although in some respects he was in an adversarial relationship with FTB, FTB breached its duty to keep his information confidential. However, the Court disagreed, pointing out that 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 interests.” Therefore, the Court found that Hyatt’s relationship claim for breach of confidentiality failed as a matter of law, and reversed the district court’s judgment in Hyatt’s favor.

Abuse of process[‡]

The Court found that FTB was entitled to judgment as a matter of law on the abuse of process claim, reversing the district court’s decision. Abuse of process arises when a defendant uses the legal process to achieve an ulterior motive other than resolving a legal dispute. Here, FTB did not use any legal enforcement process, and therefore Hyatt did not fulfill the required elements of an abuse of process claim. The court reversed the district court’s judgment, finding FTB was entitled to judgment as a matter of law.

Fraud[‡]

Unlike the previously discussed claims, the Court upheld the jury’s finding of fraud, having found substantial evidence to rule in favor of Hyatt. To establish a fraud cause of action, Hyatt needed to show (1) that FTB made a false representation that FTB knew or believed was false, (2) that FTB intended to persuade Hyatt to act or not act based on the representation, and (3) that he suffered damages. Hyatt claimed that FTB’s documents stating that Hyatt could

¹⁵ *Perry v. Jordan*, 111 Nev. 943, 947, 900 P.2d 335, 337 (1995).

¹⁶ *Johnson v. Sawyer*, 47 F.3d 716 (5th Cir. 1995).

expect FTB to treat him with courtesy, and that they would timely resolve the audit were made without any intention of following through, that he relied on those representations, and that as a result he was subject to \$8,000 of interest each day on his outstanding taxes owed to California throughout FTB's 11 year investigation. The Court agreed that FTB made specific representations which likely caused Hyatt to act in ways he might not have otherwise, resulting in damages. The Court found substantial evidence supporting Hyatt's fraud claim, and held that FTB was not entitled to judgment as a matter of law on the fraud cause of action.

Fraud Damages[†]

The Court declined to apply the principles of comity to limit FTB's liability as doing so would violate Nevada policy. FTB argued, under the principles of comity, that it was entitled to statutory caps of the amount of damages recoverable to the same extent that a Nevada government agency would receive. Recoverable damages from Nevada agencies are statutorily capped under NRS 41.035. FTB claimed that it is entitled to limit its liability as the law does not conflict with Nevada policy. Inversely Hyatt claimed that the application of statutory caps to agencies from other states did violate Nevada policy in that the protection offered Nevada residents would be limited. Likewise Nevada residents have more control over Nevada agencies through the democratic process and legislative action.

The Court was persuaded by Hyatt's argument. Nevada has a policy interest in providing adequate redress to its citizens. Nevada government agencies are accountable to the public and violations thereof may be addressed through the democratic process. Nevada residents enjoy no such control of other states' agencies. Because the application of statutory caps to the damages awarded to a government agency outside of Nevada violates state policy, the Court was not moved to apply the principles of comity. As FTB only raised this issue in regard to the special damages under the fraud claim, the prejudgment interest awarded was vacated and remanded based on the damages of fraud that were upheld.

Intentional infliction of emotional distress[#]

The Court determined the jury's finding for Hyatt on his IIED claim was supported by substantial evidence (nevertheless, the Court remanded for a new trial for reasons stated below). To prove a claim for intentional infliction of emotional distress (IIED) in Nevada, a plaintiff must prove (1) a defendant's extreme and outrageous conduct; (2) intent to cause emotional distress or reckless disregard for causing emotional distress; (3) plaintiff actually suffered severe or extreme emotional distress; and (4) causation.¹⁷ To prove the third element, a plaintiff must use an objective standard of indicia.¹⁸

After a brief discussion the Court rejected FTB's assertion that Hyatt's IIED claim necessarily failed because he refused to provide objective indicia of his emotional distress, i.e., medical records. The Court clarified that medical records are not per se necessary to prove IIED and officially adopted the sliding scale approach from the Restatement (Second) of Torts.¹⁹ Under the sliding scale approach, the more extreme the defendant's alleged conduct is, the less proof is necessary. The Court held FTB's disparaging remarks about Hyatt's religion and FTB's

¹⁷ Miller v. Jones, 114 Nev. 1291, 1299–1300, 970 P.2d 571, 577 (1998).

¹⁸ Miller, 114 Nev. At 1300, 970 P.2d at 577.

¹⁹ Restatement (Second) of Torts § 46 cmt. j & k.

determination to impose tax assessments were extreme enough that Hyatt was not required to present medical records. The Court further determined testimony about Hyatt's changes in mood, drinking habits, onset of migraines, stomach problems and obsession with the lawsuit were enough to prove he actually suffered extreme emotional distress. Although the Court affirmed the FTB's liability for IIED, ultimately the Court reversed and remanded for a new trial on damages only based on the below.

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

Next, the Court reviewed the admissibility of evidence and propriety of jury instructions under an abuse of discretion standard. On prior motion, the district court determined it lacked jurisdiction to determine in any way if the audits' conclusions were accurate (the accuracy and appropriateness of the audits in question were still under review in California). Based on that ruling FTB argued the district court subsequently erred by allowing evidence and a jury instruction that addressed whether the audits were properly determined.

Evidence improperly permitted challenging audits' conclusions[#]

The Court determined the district court abused its discretion by allowing evidence implicating whether or not FTB's audits were correct or appropriate. FTB argued that through certain testimony, the jury was using information to determine whether or not Hyatt owed the taxes and whether audits were appropriate. FTB pointed to a number of witnesses testifying as to whether Hyatt refuted the taxes, lifestyle testimony about Hyatt's income level, and challenges against the results of the audits. In particular, the lifestyle evidence violated the prohibition because the testimony was designed to prove FTB was wrong about why Hyatt decided to live in a low-income apartment complex and challenged whether FTB made the right decisions regarding the audit.

Jury instructions permitting consideration of audits' determinations[#]

The Court also held the district court abused its discretion by allowing jury instructions implicating whether or not FTB's audits were appropriate or correct. Specifically, Jury Instruction No. 24 was altered after the trial began. Important language from the modified jury instruction stated, "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 FTB." Because the court lacked the jurisdiction to determine whether the audits were correct or appropriate, the court abused its discretion by allowing the jury to consider the appropriateness and accuracy of the audits by its jury instructions.

Exclusion of evidence to rebut adverse inference[#]

Next, the Court determined the district court abused its discretion by excluding evidence that FTB offered to rebut a permissible adverse inference. During the litigation, FTB switched e-mail servers, and overwrote tapes containing e-mails. Hyatt requested discovery of back-up tapes, but FTB had already deleted them. Under NRS 47.240(3), a district court can impose a rebuttable presumption when evidence is willfully destroyed, or impose a permissible adverse

inference when the evidence is negligently destroyed.²⁰ The district court determined the destruction was negligent, imposed the permissibility of an adverse inference, but did not allow FTB to present any evidence to rebut the inference.

The court held the lower court erred and FTB should be afforded an opportunity to demonstrate none of the destroyed e-mails were damaging. FTB could use such evidence to explain why nothing harmful was destroyed without rearguing any spoliation issues. The Court reversed the exclusion of evidence as an abuse of discretion.

Other evidentiary errors[#]

The Court also determined the district court abused its discretion by incorrectly applying NRS 48.045(1). During trial, FTB wanted to introduce evidence regarding the validity of Hyatt's patent and federal IRS audits to show other events may have contributed to Hyatt's IIED damages. The district court excluded the evidence under NRS 48.035(1) which states evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice.²¹ The Court held that although FTB's evidence would be prejudicial, it would not be unfairly so, and the probative value of the evidence was more probative than prejudicial, and the court abused its discretion.

Evidentiary and jury instruction errors warrant reversal and remand for a new trial on damages only on the IIED claim[#]

The Court held the above evidentiary and jury instruction errors significantly affected the jury's determination of appropriate damages, and were therefore prejudicial. Although the district court abused its discretion on the above matters, the Court must decide if such errors were harmless or if they warrant reversal.²² The Court can reverse an error in a jury instruction if, but for the error, a different result may have been reached.²³

The Court held the errors were prejudicial because they allowed the jury to consider matters over which the district court lacked jurisdiction. In particular, Hyatt's evidence arguing FTB trumped up their tax claims and refusal to correct a mathematical error was impermissible because the evidence necessarily contested the audits' appropriateness and accuracy, matters over which the court lacked jurisdiction. A combination of this evidence, the lack of opportunity for FTB to rebut the adverse inference of destroyed e-mails, and the jury instruction allowing them to consider the audits determinations all warranted a reversal and new trial as to Hyatt's IIED damages.

Recoverable damages on remand[#]

The Court again emphasized that FTB was not subject to Nevada's statutory cap on damages for government entities because Nevada has a policy interest in providing adequate

²⁰ NEV. REV. STAT. § 47.240(3) (2013).

²¹ NEV. REV. STAT. § 48.035(1) (2013).

²² Cook v. Sunrise Hosp. & Med. Ctr., L.L.C., 124 Nev. 997, 1006, 194 P.3d 1214, 1219 (2008).

²³ Id.

recourse its citizens. Thus, the Court determined comity did not require Nevada to enforce the statutory cap.²⁴

*Punitive damages**

Taking guidance from the principle of comity, the Court held punitive damages were not available against the FTB. Punitive damages are intended to punish conduct rather than compensate plaintiffs.²⁵ However, they are not allowed against a government agency “unless expressly authorized by statute.”²⁶ In Nevada, tort damages against a government agency “may not include any amount as exemplary or punitive.”²⁷ Since punitive damages would not be available in Nevada against a Nevada government agency, under comity the FTB is immune from punitive damages in Nevada.

*Costs**

Having reversed several of the judgments in favor of Hyatt, the Court vacated the district court’s costs award to Hyatt. Vacating an award of costs is required when the underlying judgment is reversed.²⁸ The Court instructed the district court that on remand, it should consider the proper amount of costs to award, including allocating costs to each cause of action. Recovery is only permitted for the successful causes of action.²⁹ The Court rejected the FTB’s contention that Hyatt was improperly allowed to submit his post-trial costs memorandum. The Court further determined that the FTB must be allowed to file its objections before entering a costs award if the district court decides Hyatt is still entitled to costs.

*Hyatt’s cross-appeal**

The Court affirmed the district court’s grant of partial summary judgment preventing Hyatt from seeking economic damages for the alleged destruction of his patent-licensing business in Japan because he did not properly support his claim. Hyatt argued the district court erroneously concluded he had to provide direct evidence, not merely circumstantial evidence and speculation, to support his damages claim. However, multiple inferences in a chain of events was not sufficient; each fact had to be separately proven.

²⁴ *Faulkner v. Univ. of Tenn.*, 627 So. 2d 362, 366 (Ala. 1992).

²⁵ *Bongiovi v. Sullivan*, 122 Nev. 556, 580, 138 P.3d 433, 450 (2006). *See also* NEV. REV. STAT. § 42.005(1) (allowing punitive damages when a defendant “has been guilty of oppression, fraud or malice, express or implied”).

²⁶ *Long v. City of Charlotte*, 293 S.E.2d 101, 114 (N.C. 1982).

²⁷ NEV. REV. STAT. § 41.035(1) (2013). California similarly provides immunity from punitive damages for its government agencies. Cal. Gov’t Code § 818 (West 2012).

²⁸ *Bower v. Harrah’s Laughlin, Inc.*, 125 Nev. 470, 495 – 95, 215 P.3d 709, 726 (2009).

²⁹ *Cf. Mayfield v. Koroghli*, 124 Nev. 343, 353, 184 P.3d 362, 369 (2008); *Bergmann v. Boyce*, 109 Nev. 670, 675 – 76, 856 P.2d 560, 563 (1993).

Conclusion

The Court affirmed that discretionary-function immunity did not provide immunity for intentional torts or acts constituting bad faith. Accordingly, the Court dismissed Hyatt's unintentional tort claims but allowed his intentional tort causes of action to go forward.

The Court reversed the district court's judgment in favor of Hyatt on his invasion of privacy torts. After discussing the four types of "invasion of privacy" torts, the Court officially recognized "publicity in a false light" as a viable cause of action. However, the Court found Hyatt's proof was insufficient to support a jury verdict for his claims of intrusion upon seclusion, public disclosure of private facts, and publicity in a false light. Accordingly, the Court reversed the district court's judgment in favor of Hyatt.

The Court also reversed the district court's judgment in favor of Hyatt on his claims for breach of confidential relationship and abuse of process. The Court determined the tax auditor-tax payer relationship did not involve the sort of "special trust" that gives rise to a fiduciary-like duty to act with due regard for the interests of the other. The Court also determined that FTB never utilized the judicial process improperly. Accordingly, the Court held Hyatt's breach of confidential relationship and abuse of process claims failed as a matter of law.

However, the Court upheld the jury's verdict for Hyatt on his claim of fraud. The Court found substantial evidence supported the jury's verdict for Hyatt. In affirming the jury's award of damages under the fraud claim, the Court held that comity did not require it to extend statutory caps protecting Nevada government agencies to FTB and the Court declined to do so.

The Court also upheld the jury's verdict for Hyatt on his claim of intentional infliction of emotional distress. In so doing, the Court adopted the sliding-scale approach to proving a claim for intentional infliction of emotional distress. Under this approach, the Court held that medical evidence was not necessary to Hyatt's claim because he had shown FTB's actions were sufficiently extreme. Nevertheless, the Court noted evidentiary and jury instruction errors and remanded for a new trial as to damages for Hyatt's IIED claim. The Court noted that damages on retrial would not be subject to any statutory cap.