

IN THE SUPREME COURT OF THE STATE OF NEVADA

FRANCHISE TAX BOARD OF THE
STATE OF CALIFORNIA,
Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT
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

FILED

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[Signature]
JUDITH A. BROWN
CLERK OF THE COURT
DEPUTY CLERK

FRANCHISE TAX BOARD OF THE
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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

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 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 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.

¹Prohibition 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).

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

²NRS 34.160 (mandamus).

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

⁴NRS 34.320 (prohibition).

⁵NRS 34.170; NRS 34.330.

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

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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 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,

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

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

⁸Id.

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

¹⁰See 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).

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 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.

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

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

¹³Id. at 421-24.

¹⁴Id. at 414-21.

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

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.

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

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

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

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

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

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 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.

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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

²⁰NRS 41.032(2).

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

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

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

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

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

²⁴See 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).

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

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 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

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


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

to the intentional tort claims, and we deny the alternative petition to limit the scope of trial.

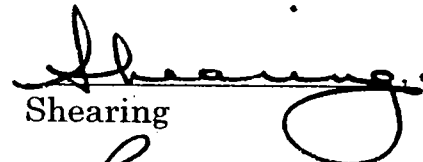
We conclude that the district court exceeded its jurisdiction by ordering the release of one privileged document, but that Franchise Tax Board has not demonstrated that the district court exceeded its jurisdiction by ordering it to release any of the other discovery documents at issue. Accordingly, we 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.

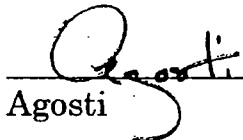
We vacate our stay of the district court proceedings.


It is so ORDERED.²⁸


_____, C.J.
Maupin


_____, J.
Young


_____, J.
Shearing


_____, J.
Agosti


_____, J.
Leavitt

²⁸The Honorable Nancy Becker, Justice, voluntarily recused herself from participation in the decision of this matter.

cc: Hon. Nancy M. Saitta, District Judge
California Attorney General
McDonald Carano Wilson McCune Bergin Frankovich & Hicks
LLP/Las Vegas
McDonald Carano Wilson McCune Bergin Frankovich & Hicks
LLP/Reno
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Hutchison & Steffen
Riordan & McKenzie
Thomas K. Bourke
Marquis & Aurbach
Clark County Clerk

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 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

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

grant of comity is not uncommon, as California has denied comity to the state of Nevada in years past.²


_____, J.
Rose

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