AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

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Supplementary Material

Chapter 11: The Contemporary Era – Federalism

**Franchise Tax Board of the State of California v. Hyatt, 130 Nev. 71** (Nev., 2014)

*The inventor Gilbert Hyatt owned a lucrative patent on computer chips. A tax auditor for the California Franchise Tax Board (FTB) read a newspaper article about the patent and decided to launch an audit of Hyatt’s 1991 state income tax return. The auditor determined that Hyatt had severely underreported his income in that state before he relocated to Las Vegas, Nevada. After an exhaustive audit, California determined that Hyatt owed several million dollars in taxes, interest and penalties. Hyatt challenged the results of the audit within the FTB and eventually in the California courts. He also filed suit in the Nevada courts charging the FTB with invasion of privacy, fraud, intentional infliction of emotional distress, and abuse of process. The Nevada trial court granted a partial summary judgment in favor of the FTB, but the FTB also filed a petition with the Nevada Supreme Court arguing that it should have state sovereign immunity from Gilbert’s tort claims. The Nevada court initially decided that the FTB was not entitled to the full sovereign immunity that might be appropriate under California law but was entitled to partial immunity under Nevada law. On appeal, the U.S. Supreme Court determined that the FTB was not entitled to full immunity as a result of the federal Full Faith and Credit Clause. At trial, Hyatt was awarded over $300 million in damages plus court costs. The FTB appealed to the Nevada Supreme Court. In part, the FTB argued that the Nevada courts had changed the standard for sovereign immunity claims since its initial ruling. In particular, the FTB argued that it was entitled to immunity against suits based on intentional torts. A unanimous court decided Nevada doctrine would not provide immunity for state actors from intention-tort-based suits. Moreover, the court held that the California agency was not entitled to take advantage of the statutory cap on tort damages that Nevada law provided to Nevada governmental agencies because Nevada’s interest in insuring that its residents had legal redress against out-of-state actors took priority over comity considerations. In 2015, the U.S. Supreme Court agreed to review that decision.*

HARDESTY, JUSTICE.

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Like most states, Nevada has waived traditional sovereign immunity from tort liability, with some exceptions. The relevant exception at issue in this appeal is discretionary-function immunity, which provides that no action can brought against the state or its employees “based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of the State . . . or of any . . . employee . . . whether or not the discretion involved is abused.” By adopting discretionary-function immunity, our Legislature has placed a limit on its waiver of sovereign immunity. Discretionary-function immunity is grounded in separation of powers concerns and is designed to preclude the judicial branch from “second-guessing,” in a tort action, legislative and executive branch decisions that are based on “social, economic, and political theory.” FTB initially argues on appeal that immunity protects it from Hyatt’s intentional tort causes of action based on the application of discretionary-function immunity and comity as recognized in Nevada.

Comity is a legal principle whereby a forum state may give effect to the laws and judicial decisions of another state based in part on deference and respect for the other state, but only so long as the other state’s laws are not contrary to the policies of the forum state. . . . The purpose behind comity is to “foster cooperation, promote harmony, and build good will” between states. But whether to invoke comity is within the forum state’s discretion. Thus, when a lawsuit is filed against another state in Nevada, while Nevada is not required to extend immunity in its courts to the other state, Nevada will consider extending immunity under comity, so long as doing so does not violate Nevada’s public policies. In California, FTB enjoys full immunity from tort actions arising in the context of an audit. FTB contends that it should receive the immunity protection provided by California statutes to the extent that such immunity does not violate Nevada’s public policies under comity.

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In *Falline v. GNLV Corp*., 107 Nev. 1004 (Nev. 1991), this court ruled that the discretionary-function immunity . . . did not apply to bad-faith misconduct. . . .

. . . . The court determined that bad faith is different from an abuse of discretion, in that an abuse of discretion occurs when a person acts within his or her authority but the action lacks justification, while bad faith “involves an implemented attitude that completely transcends the circumference of authority granted” to the actor. Thus, the *Falline* court viewed the exception to discretionary immunity broadly.

Following *Falline*, this court adopted, in *Martinez v. Maruszczak*, 123 Nev. 433 (Nev. 2007), the federal test for determining whether discretionary-function immunity applies. Under the two-part federal test, the first step is to determine whether the government conduct involves judgment or choice. . . . “[E]ven assuming the challenged conduct involves an element of judgment [or choice],” the second step requires the court to determine “whether the judgment [or choice] is of the kind that the discretionary function exception was designed to shield.” . . . The second step focuses on whether the conduct undertaken is a policymaking decision regardless of the employee’s subjective intent when he or she acted.

FTB argues that the federal test abolished the *Falline* intentional tort or bad-faith misconduct exception to discretionary-function immunity because the federal test is objective, not subjective. Hyatt asserts that an intentional or bad-faith tort will not meet the two-part discretionary-immunity test because such conduct cannot be discretionary or policy-based.

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. . . . Our approach in *Falline* concerning immunity for bad faith conduct is consistent with the reasoning in *Coulthurst v. United States*, 214 F.3d 106 (2nd Cir., 2000) that intentional torts and bad-faith conduct are acts “unrelated to any plausible policy objective[]” and that such acts do not involve the kind of judgment that is intended to be shielded from “judicial second-guessing.” We therefore affirm our holding in *Falline* that [the Nevada statute] does not protect a government employee for intentional torts or bad-faith misconduct, as such misconduct, “by definition, [cannot] be within the actor’s discretion.”

In light of our conclusion, we must now determine whether to grant, under comity principles, FTB immunity from Hyatt’s claims. Because we conclude that discretionary-function immunity . . . does not include intentional torts and bad-faith conduct, a Nevada government agency would not receive immunity under these circumstances, and thus, we do not extend such immunity to FTB under comity principles, as to do so would be contrary to the policy of this state.

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. . . . [Nevada law] provides a statutory cap on liability damages in tort actions “against a present or former officer or employee of the State or any political subdivision.” FTB argues that because it is immune from liability under California law, and Nevada provides a statutory cap on liability damages, it is entitled to the statutory cap on its liability to the extent that the law does not conflict with Nevada policy. Hyatt asserts that applying the statutory caps would in fact violate Nevada policy because doing so would not sufficiently protect Nevada residents. According to Hyatt, limitless compensatory damages are necessary as a means to control non-Nevada government actions. Hyatt claims that statutory caps for Nevada government actions work because Nevada can control its government entities and employees through other means, such as dismissal or other discipline, that are not available to control an out-of-state government entity. . . .

. . . . Most courts appear to follow FTB’s argument regarding how comity applies and that a state should recognize another state’s laws to the extent that they do not conflict with its own. . . .

. . . . [Hyatt relies on an Alabama supreme court decision in *Faulkner v. University of Tennessee*, 627 So. 2d 362 (Ala., 1992).] Considering the policy of allowing residents legal redress, compared to the immunity policies that both states had, the *Faulkner* court observed that

[w]e cannot, absent some overriding policy, leave Alabama residents without redress within this State, relating to alleged acts of wrongdoing by an agency of another State. . . . We conclude that comity is not such an overriding policy in this instance.

. . . . We are persuaded by the *Faulkner* court’s reasoning.

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This state’s policy interest in providing adequate redress to Nevada citizens is paramount to providing FTB a statutory cap on damages under comity. Therefore, we conclude that allowing FTB a statutory cap would violate this state’s public policy in this area; comity does not require this court to grant FTB such relief. As this is the only argument FTB raised in regard to the special damages awarded under the fraud cause of action, we affirm the amount of damages awarded for fraud. . . .

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The broad allowance for punitive damages under [Nevada law] does not authorize punitive damages against a government entity. Further, under comity principles, we afford FTB the protections of California immunity to the same degree as we would provide immunity to a Nevada government entity. . . . Thus, Hyatt’s argument that Nevada law provides for an award of punitive damages against FTB [because no Nevada statute specifically grants immunity to the government entities of other states] is unpersuasive. Because punitive damages would not be available against a Nevada government entity, we hold that under comity principles FTB is immune from punitive damages. . . .

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Discretionary-function immunity does not apply to intentional and bad-faith tort claims. But while FTB is not entitled to immunity, it is entitled to judgment as a matter of law on each of Hyatt’s causes of action. . .

*Affirmed in part and reversed and remanded in part*. . . .

JUSTICE SAITTA did not participate in this decision.