ORIGINAL

In the

Supreme Court of the United States

UNIVERSITY OF NEVADA, ET AL.,	)	
	)	
PETITIONERS,	)	
	)	
V.	)	
	)	
JOHN MICHAEL HALL, ET AL.,	)	No. 77-1337
	)	
RESPONDENTS.	)	
	)	

Washington, D. C.
November 7, 1978

Pages 1 thru 44

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IN THE SUPREME COURT OF THE UNITED STATES

UNIVERSITY OF NEVADA, ET AL., Petitioners,	:	
v.	:	No. 77-1337
JOHN MICHAEL HALL, ET AL., Respondents.	:	

Washington, D. C.
Tuesday, November 7, 1978

The above-entitled matter came on for argument at 2:00 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM BRENNAN, Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

MICHAEL W. DYER, ESQ., Deputy Attorney General, State of Nevada, Capitol Complex, Carson City, Nevada 89710, on behalf of the Petitioners

EVERETT P. ROWE, ESQ., Bostwick and Rowe, Inc., Suite 420, Community Bank Building, San Jose, California 95113, on behalf of the Respondents.

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 77-1337, University of Nevada against Hall.

Mr. Dyer, you may proceed.

ORAL ARGUMENT OF MICHAEL W. DYER, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. DYER: Mr. Chief Justice, and may it please the Court:

The case at bar results from an automobile accident which occurred in the State of California. The driver of the automobile was an employee of the State of Nevada whose presence in California resulted from his employment with the University of Nevada. Neither his status as an employee of the State of Nevada nor his status as being in the course of his employment were contested. They have never been an issue in the case.

When the action was initially filed, the State of Nevada moved to quash service of process, on the basis of immunity from suit. The trial court granted that motion. It was upheld by the California Court of Appeals. The California Supreme Court, in a 1973 decision, reported as Hall v. University of Nevada, reversed the California Court of Appeals, remanded the matter to the trial court, holding that sister states who engage in activity in the State of California have no immunity from suit. The State of Nevada requested certiorari. That request was denied and the matter was returned to the Superior

Court for Alameda County, California.

At the beginning of the trial, the State of Nevada requested an order limiting any damages which resulted to the statutory limitation contained in Nevada's waiver of sovereign immunity, that limitation being $25,000 per individual or per claimant, or in the context of this action $50,000. That motion was denied and the jury returned the verdict of $1,150,000 as against the State of Nevada, as a named defendant in this negligence action.

The State of Nevada appealed to the California Court of Appeals. The California Court of Appeals sustained the trial court verdict and the jury verdict. The California Supreme Court denied hearing. Certiorari was requested and certiorari issued to the California Court of Appeals.

In a capsule, the position of the State of Nevada is that unconsenting states may not be sued in any court in this nation, and that where consent is given the terms, conditions and limitations contained in that consent must be adhered to and that any action tried must proceed according to the terms and limitations of the consent.

The holding of the California Court of Appeals is simply that sister states have no immunity from suit in the State of California.

QUESTION: As I was reading the briefs in this case, the question that kept recurring to me is: What is the Federal

issue here? What is the Federal question?

California has decided that, as a matter of its state law, that a State of the Union does not have sovereign immunity in the California courts. Why constitutionally?

MR. DYER: I would initially respond by first pointing out that this is not a conflicts case, despite urgings of Petitioners.

QUESTION: Why isn't it just a matter of state law?

MR. DYER: The basic constitutional issue that this Court must reach is: Does one state have the right to determine the sovereign status of its sister states, regardless --

QUESTION: What in the Constitution would prevent it from doing it? That's my question.

MR. DYER: The question, may it please the Court, is: What in the Constitution would enable it?

QUESTION: A state can decide as a matter of state law, or its courts can decide or its legislature can decide, that it does not have sovereign immunity, insofar as suits in its state courts go against it. Why can't it make the same sort of decision with respect to another state, when sued in its courts?

MR. DYER: The States of the Union would be free to do so. They would be free to make that determination if they are free to treat each other as independent nations.

We urge that by entering the Constitution, by forming

a union, a sisterhood of states, the states gave away their ability to treat each other as independent nations, and agreed to treat each other as sister states, at all times acknowledging the status of their sisters as sovereign.

That limitation is found in the Full Faith and Credit Clause and the decisions of this Court, which have held that the Full Faith and Credit Clause, apart from requiring full faith and credit be given to judgments, stood for the additional principle -- and I think, perhaps, more important principle -- of unifying the States of the Union.

QUESTION: Ordinarily, the full faith and credit relates to acts and events which have occurred within the state which is asking full faith and credit be given to its laws. This is an extraterritorial effect that you are asking for, it would appear, of the Nevada law.

MR. DYER: We are not asking for an extraterritorial effect in Nevada law. Our position, in a nutshell, is that any state must acknowledge the status of her sister states as a sovereign.

QUESTION: What particular provision of the Constitution -- I think Mr. Justice Stewart was probing for that. What particular provision of the Constitution tells us that?

MR. DYER: The Constitution -- I am trying to answer the question, Mr. Chief Justice. I am not trying to

sidestep. I want to address this question, because I think it is, perhaps, the most important --

QUESTION: Is there some other than the Full Faith and Credit Clause that you are relying on?

MR. DYER: I think what the Court must keep in mind is that the Constitution is a document by which the states granted limited powers to the Federal Government, and agreed upon their relationships with their sister states. The Tenth Amendment to the Constitution provided that all powers not granted were surrendered and the Constitution would be retained to the states.

QUESTION: One of them wasn't immunity from Federal suit, was it?

MR. DYER: The Founding Fathers thought that it was. The Court in Chisholm v. Georgia felt that it wasn't.

QUESTION: No, I mean immunity from suit by the United States.

MR. DYER: One of the specific powers granted in the Constitution was the -- or one of the attributes of sovereignty surrendered was the ability of a state to be sued in the original jurisdiction of this Court. That consent is specified in the Constitution. There is nothing in the Constitution that says the states agree to be sued in the trial courts -- in negligence actions in the trial courts of their sister states.

At the time of the formation of the Constitution, all the Founding Fathers felt that the states had the power to be immune from suit. As a matter of fact, a case that had been decided recently before that, in 1 U.S., was the case of Nathan v. Bedford, I believe is the correct citation. That case involved the State of Pennsylvania attempting to assert jurisdiction over a sister state. This was some two-three months before the Constitutional Convention, and the case was dismissed on the holding that no state may assert jurisdiction over any other state.

QUESTION: Putting to one side the possible arguments you may make by implication from cases like that, why can't California rely on the Tenth Amendment here, just as well or perhaps better than Nevada, saying that all powers not delegated somewhere else are reserved to it. It didn't give up the power to adjudicate claims over other states when it entered the Union, so that it has reserved that.

MR. DYER: It did not give up the authority to adjudicate claims over other states, if in fact it has the rights to treat other states as independent nations. It did give up the right to treat other states as independent nations.

Nowhere in the Constitution does it say that the State of California may not sue United States Government, if one of their employees is involved in a motor vehicle accident. And yet, the tort claims immunity or the immunity of the

Federal Government, I think, would go unquestioned. There is nothing in the Constitution that says the states have the right to do that.

QUESTION: Isn't it treated by removal, basically -- the authority of Congress over the Federal courts and the right to remove when a Federal officer is named a defendant in a state court?

QUESTION: Against the background of the Supremacy Clause.

MR. DYER: That would be correct, but the point I am trying to make is that there is nothing in the Constitution that says that a state has authority to call her sister states to bar.

In the very words of this Court -- and I am quoting from Cunningham v. Macon & Brunswick Railroad, 109 U.S. 446: "It may be accepted as a point of departure unquestioned that neither a state nor the United States can be sued as defendant in any court in this country without their consent."

This position has been consistently followed. It was earlier enunciated -- the axiom that a sovereign -- and the Court has consistently used the term, "a sovereign" -- may not be sued in any court has been consistently followed. It was initially stated in the case of Beers v. Arkansas in 1857. It has been followed in Hans v. Louisiana; Ex Parte Young; Parden v. Terminal Railroad; Edelman v. Jordan even alludes to

the immunity of states from suit.

QUESTION: Mr. Dyer, may I ask you another question about your theory?

Supposing, instead of this being a tort action, it was a contract action. Say your state agents had gone over to California and bought half a million dollars worth of television sets to use in the University. Then they went back to Nevada and just decided they wouldn't pay. Could they be sued?

MR. DYER: If the contract initially --

QUESTION: It was negotiated in California. They had sent people out with authority issued by the Governor and the State Legislature, which said, "Go to California and buy a lot of television sets." And they did it in California and they just refused to pay.

MR. DYER: Yes, I think they could be sued in that context. And I think they could be sued, perhaps, even under the Full Faith and Credit Clause, because we are then dealing with rights and obligations created under laws of another state, which the state knowingly entered into and intentionally entered into. The State of Nevada, at that point, would have intentionally and knowingly entered into an agreement in California, a contractual relationship.

I think it is important to emphasize that perhaps there may be a distinction, as the Court has noted, between

tort actions of a negligence character, non-intentional torts, and other forms of action.

For instance, many of the cases cited by the California Supreme Court dealt with the question of the ownership of land in one state and the attempt to claim -- one state owning land in a sister state -- and the land-owning state trying to claim that they were exempt from taxation laws. The holding of that entire line of cases is, of course, that when a state leaves the area which is normally the operation of a state and enters into other functions, at that point they agree to be bound by the terms of the area which they have entered. That is, when they enter into a proprietary situation, they agree to be bound as any other proprietary.

QUESTION: Aren't there cases that say you don't infer the casting aside of sovereign immunity, which are rather specific on it?

MR. DYER: Perhaps the most leading case in that is Kennecott Copper. It held, in language very analogous to Nevada's statutory waiver, that when a state had stated that "We waive our immunity and agree to be sued in any court," that any court did not mean any court. Specifically, it did not mean Federal court. It meant any court of that state.

As the Court has pointed out, it is absolutely necessary that any waiver of immunity be made specifically.

I would urge that it also be made knowingly. And that is perhaps the distinction, because -- and I know this Court hears this more than they wish, but --

QUESTION: You said just by sending the man over there would be enough. You certainly don't mean that now, do you?

MR. DYER: I believe the Court has misinterpreted my statement, because what I meant -- you are talking about my response to Mr. Justice Stevens' question -- when a state enters into an area, that is, if a state engages in interstate commerce as a common carrier, where authority to regulate has been specifically delegated in entering into a proprietary function, then perhaps they enter that knowingly --

QUESTION: You say that the state didn't have anything to do with this car going out, except to own it. Is that your position?

MR. DYER: No, our position is that Mr. Bohm, the driver of the car, was routinely engaged in the performance of his duties with the Unitersity of Nevada, that in the course of those duties he was requested to go to the State of California to pick up some television parts for the University of Nevada, and that he was involved in an automobile accident.

Now, based upon that, the California courts have held that the State of Nevada consented to be sued in unlimited

liability. If the State of Nevada consented to be sued in any manner, we urge that we consented by our statutory waiver of sovereign immunity, that when we waived immunity by NRS Chapter 41 and said, "We agree to have our liability adjudicated in the same manner as private parties."

QUESTION: Are you saying, Mr. Dyer, that the only -- after all, what the Full Faith and Credit Clause says shall be given is to the public acts, records and judicial proceedings -- the only public act of Nevada that you urge has been denied full faith and credit is your waiver of sovereign immunity statute with a $25,000 limitation?

MR. DYER: I think that would be a fair statement of our position.

QUESTION: That's the only one?

MR. DYER: I believe that's the only Nevada statute drawn in issue.

QUESTION: And that's the only extent to which you rely on the Full Faith and Credit Clause?

MR. DYER: No, that's not correct. We also rely upon the Full Faith and Credit Clause, as I stated earlier, because it is our understanding of the Full Faith and Credit Clause that that clause, in addition to requiring that judgments acquired in one state be given effect in another, unified the states and substituted a command for the principles of comity. That is, the clause abrogated the states' rights to

treat each other as independent nations.

QUESTION: At least in words, full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state. That's the hold of the clause, isn't it?

MR. DYER: That is the entire language of the clause.

QUESTION: How do we read into it what you have just said?

MR. DYER: This Court has repeatedly held that the very purpose of the Full Faith and Credit Clause was to alter the statute of the individual states as independent foreign sovereignties, each free to ignore the rights and proceedings of the others and to make each an integral part of a single nation.

Some of the cases along those lines are Sherrer v. Sherrer, Order of United Commercial Travelers --

QUESTION: Yes, but always in the context of whether or not what we are dealing with are public acts, records and judicial proceedings of the other state, isn't it?

MR. DYER: I think an additional and important concept that we are dealing with is union, sisterhood. Union can only work among individual states who, under the Tenth Amendment, have retained all their rights which they had at the time of --

QUESTION: So, even if you didn't have your

Sovereign Immunity Limitation Act, you would be making the argument of the Full Faith and Credit Clause?

MR. DYER: If we didn't have our immunity limitation, we would mostly likely be asserting that we could not be sued under the doctrine of sovereign immunity, in and of itself, because of the Full Faith and Credit Clause.

QUESTION: That's simply because the Nevada courts have held their sovereign immunity, isn't it?

MR. DYER: Sovereign immunity, as we know it in the English system of jurisprudence, does not require a holding by the courts that it exists. It cannot be conveyed by the citizens to the sovereign. It arises from the very nature of sovereignty.

QUESTION: Supposing that the Supreme Court of Nevada had said there is no longer any sovereign immunity in Nevada. You would not then be able to go into California and say, "Even though you can recover a $1 million judgment against the State of Nevada in the Nevada courts, you can't sue us in California," would you?

MR. DYER: That is correct. We would not be able to make that argument, but --

QUESTION: If the fact is you can make it, it doesn't make any difference whether it's a statute or a decisional law in Nevada, does it?

MR. DYER: It doesn't make any difference whether it

was declared to be invalid by judicial interpretation or whether the legislature waived it, except one, and that is that when the legislature waived sovereign immunity, they placed a condition on it. And, under the decisions of this Court, if there is a condition placed upon the waiver, that condition has to be given effect.

In essence, our argument is, if California attained jurisdiction over us by our own waiver, they must apply the limitation contained in that waiver. If, in fact, we had totally abrogated sovereign immunity. If, in fact, the Nevada Supreme Court had held that the doctrine had no viability for the State of Nevada, we could not argue that California could not obtain jurisdiction over us as any other tort feaser, but at that point it would have been the Nevada Supreme Court or the Nevada Legislature that made that determination.

QUESTION: And it could have been simply, I take it, if there had been no waiver of sovereign immunity even pro-tonto as there has been by the Nevada, but the Nevada Supreme Court had held that Nevada continue to adhere to the rule of sovereign immunity, you would urge that as a full faith and credit principle that had to apply in California, too.

MR. DYER: If I understand your question, Mr. Justice, it is: Assuming that Nevada Supreme Court had upheld the principle of sovereign immunity in total and there had been

no waiver by the Legislature, we would at that time urge that the State of California must acknowledge our status as a sovereign and our determination that as a sovereign we still retain sovereign immunity.

It is the status question that, I think, is very important in this case. I think the Court should be aware that there -- at least in our mind -- is a great distinction between the status of a state as a sovereign and the ability to exercise sovereign power. We are not contending that we have the right to legislate for California citizens. We are not contending that we have the right to say that our laws have to be given extraterritorial effect. What we are saying is that California, as any state, must recognize our status as a sovereign, that is that we have a sovereign status and that one of the attributes of that status is immunity. And once they recognize our status, they must recognize our immunity. If they obtain jurisdiction over it, it must be pursuant to our consent, which in this case could have only been given by our statutory waiver of sovereign immunity.

And if that is the case, then they have got to give effect to the limitation contained in the statutory waiver.

QUESTION: What if there is judgment entered against the state? How would California collect it?

MR. DYER: In this particular case, California would collect it by executing on our tax accounts which we maintain

in the State of California.

QUESTION: So, you've got money in California, property in California. Otherwise, you could just protect yourself in your own courts, I take it.

MR. DYER: That's exactly right. The only reason that we have property in the State of California -- I think this is important. Actually, there are two reasons. One is because we are a small state. The State of Nevada has 600,000 people. Most of our major businesses are headquartered in our neighboring State of California. Those businesses don't even maintain large bank accounts in Nevada. Rather, they desire to collect their sales tax as it comes in, and when they have to pay on a quarterly basis they pay it on a bank draft out of the State of California.

So, because of the size of the State of Nevada, because of our dependence in the modern business world upon tax revenues coming in from accounts that our businesses wish to maintain in another state, the other state has the ability to execute against those accounts, and we don't have the ability to rely upon our own courts to protect us.

But, I might point out to the Court that if, in fact, Respondents' position is correct, it wouldn't make any difference whether we had the right to protect ourselves, because under Respondents' version of the case, we can be sued as any other person in the State of California. And when we are sued,

we are subject to unlimited liability.

And, under their theory, we would be required to give full faith and credit to the California judgment, notwithstanding the fact that its unalterably opposed to our state policy.

QUESTION: Not if you decided that by your own law they had no jurisdiction.

MR. DYER: Your Honor, I would agree with that statement, but I am saying I think Respondents' error is the opposite.

Again, we are back to the key issue in the case, and that is consent. Does one state have to consent to be sued by her sister states, or can the states simply treat each other in any manner which they choose? If they were independent nations, under the recent developments in the law of independent nations, they could do just that.

QUESTION: Mr. Dyer, I asked you before about a contract action, and you said that would be different. Supposing this were a willful and wanton malicious tort, would you take the same position?

MR. DYER: Initially, I would say, Mr. Justice, that if this were a willful, wanton and malicious tort, it would not be in the course of the employee's employment. I can't conceive of any such tort in which the State of Nevada could be sued as defendant under the doctrine of respondents'

superior, on that basis. But, if in fact, it were a willful, wanton, malicious tort, I don't think that fact should be determinative. If, in fact, the State of Nevada could be sued --

QUESTION: If the State of Nevada sent its state militia in to take over a part of somebody's private property in the other state, they would be immune under your theory. They would rely on the dignity of the sovereign not to do anything like that, of course.

MR. DYER: That would be correct, but I might also point out that,speaking of state militia, each year when the State of Nevada National Guard goes to summer camp -- we don't have any Army basis in our state -- our National Guard has to go out to other states, to Washington, to California. We take all of our heavy equipment, our tanks, everything else.

QUESTION: They can chop down all the trees and dig up the roads and be immune from liability, is that right? Is that your view, that they could?

MR. DYER: I think the answer to your question, Mr. Justice, is that if we sent our militia -- the State of Nevada sent our militia, our National Guard, into the State of California to seize property, that that would be an act against a State of the Union, albeit immediately affecting a private landowner, it would be an act against the sovereignty of a sister state. And it would, first of all, be cognizable

in this Court, under the original jurisdiction. It would, in fact, be a --

QUESTION: I mean harmed individuals, not the other state. You go in and chop down a lot of trees and haul away the wood, or something like that.

MR. DYER: If, in fact, we directed our employees to go in and commit an intentional tort and we have not waived sovereignty, it would be our position that California would be required to recognize our sovereignty, that any rights that they might have would have to be taken by the State of California under the parens patre doctrine on behalf of their citizens against us in this Court.

With the Court's permission, I will reserve the remainder of my time.

QUESTION: I would like to ask you a question, so I can understand it, before you sit down, Mr. Dyer.

How far does your argument go today? That there couldn't be a suit at all, that any suit would have had to have been brought by the California Plaintiff in Ormsby County, Nevada, since that was the extent of the waiver of sovereign immunity? Do you take that position?

MR. DYER: The essence of our position today is that at the time of this action our waiver was intended to be limited to courts of the State of Nevada. But, if the Court should construe otherwise, as a result of the --

QUESTION: I am not asking you what the Court might hold, what the Court's position might be. I am asking you your position.

MR. DYER: Our initial position is that our statutory waiver, under the Kennecott decision, did not constitute jurisdiction -- excuse me, a waiver of immunity in other states, but simply in our own courts.

QUESTION: In Ormsby County, Nevada, for a limit of $25,000, period.

MR. DYER: That would be correct.

QUESTION: Is that it? That's your position?

MR. DYER: Yes, sir.

QUESTION: Quite apart from the alleged waiver in the California court?

MR. DYER: Quite apart from that. That's our initial position.

MR. CHIEF JUSTICE BURGER: Mr. Rowe.

ORAL ARGUMENT OF EVERETT P. ROWE, ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. ROWE: Mr. Chief Justice, and may it please the Court:

I have a little difficulty in understanding Petitioners' position, but I thought what I should do at the outset of my argument is to go through what I think is not involved in this particular case, and then get to what I think

are really the issues that are involved.

I think, first of all --

QUESTION: Let me ask you, just before you get launched into it, because it may be relevant: Could you have got jurisdiction of the State of Nevada or its instruments except by their consent in their waiver?

MR. ROWE: I think, in this particular case, we could have, by reason of this fact, and this is one of the theories that we have set forth in the brief. We feel that a sovereignty of a state, its sovereign powers are coextensive with the geographical limitations of that state. And then when that state goes outside of its state and entertains and engages in activities in another sovereign state -- in this case California, where the California sovereignty is supreme -- that they do not bring with them the prerogatives of a sovereign, that Nevada, when they come in under those circumstances, operate an automobile on the California highways, that they do not have the prerogatives of a sovereign. Therefore, they do not have this attribute, as he quotes, the attribute of immunity.

QUESTION: Your friend tells us that when Nevada consented, waived, you took the bitter with the sweet, that is, you took the jurisdiction with the limitation which Nevada has prescribed.

MR. ROWE: That's his argument. We don't accept

that argument, but we feel that if the argument has any basis at all that our state courts would still have their constitutional power of choice of law, similar to the Pearson case which he cited as authority, which is really directly opposite to his view. In the Pearson case, the New York case, they discussed that a state has a constitutional right of choice of law, and that they may choose certain portions of a statute and reject others. In that case, they rejected the Massachusetts limitation of $15,000 on recovery for death action, and they took other portions of the statute.

That is our position here, that the constitutional right of choice of law of the State of California would allow them to reject -- if you accepted his argument, except this is required -- would allow California to reject the monetary limitation.

QUESTION: Your client couldn't have sued the State of Nevada in the United States District Court for the Eastern District of California, could he?

MR. ROWE: No, I think that under the present law, as I've been reading these law reviews on both sides and I have been following the argument, which is a very important constitutional debate that is going on before this Court now, with reference to the Eleventh Amendment and Article 4 of the Constitution, it would appear that the Federal court would be precluded from taking jurisdiction.

QUESTION: Do you see any anomaly there, in a Federal union that the courts of the union are not allowed to assert jurisdiction over the State of Nevada in this situation, but the courts of a sister state, like California, are?

MR. ROWE: Well, I think it is a problem that has arisen by reason of the passage of the Eleventh Amendment and the problems that the courts have had in dealing with the Eleventh Amendment. But here, we are not seeking the Federal jurisdiction. Here, I think, it is a different case, because this State of Nevada is coming into California, outside of its own sovereign jurisdiction, and is operating an automobile, picking up television parts.

QUESTION: But, presumably, it is in the Federal jurisdiction, whether it is in Nevada or in California.

MR. ROWE: It could be, absent any restrictions in the Constitution to entertain jurisdiction.

QUESTION: Do you contend at all that they were not performing a sovereign function, when they came into the State of California?

MR. ROWE: Of course, picking up television parts --

QUESTION: For what purpose?

MR. ROWE: For a purpose of a school -- I think most cases have held that -- I won't call it a sovereign activity. It could be a governmental function. Usually, education has been deemed to be -- educational function is governmental in

nature.

QUESTION: How do you distinguish governmental from sovereign function?

MR. ROWE: I would make the distinction because I don't think that when Nevada is in California, when it is outside of that area where there is a relationship between governed and governor, that they actually are in the nature of a sovereign.

QUESTION: In other words, they drop their cloak when they cross the border?

MR. ROWE: Correct. There are, of course, precedent for that in other aspects of cases, mainly not dealing with motor vehicle accident cases, but dealing with property exemption from taxation. There is the Minnesota case that I cited, State v. Hudson, where the state -- and this was a governmental function. There was a toll bridge which was being operated for the highway system, which certainly could be a governmental function. And they claimed that they should be exempt from taxation because it was a governmental function. However, that relief was denied. They say that when that state came into the other state and was present there, then they are no longer -- they lose the cloak of sovereignty and they are to be treated as any other person within that state.

So, I think -- That is our analysis of the situation.

QUESTION: Mr. Rowe, there aren't very many cases

involving fact situations of this type, are there?

MR. ROWE: I could find none.

QUESTION: Are you relying on the Pollis (?) case, in any way, the North Dakota case of some years ago, that the California court cited, but you don't cite it in your brief?

MR. ROWE: The District Court of Appeals cited it against me, but I always thought that the case actually was in my favor, because it actually gave the right of choice of law in that particular case. That dealt with, I think, a Workmen's Compensation claim. The District Court of Appeals took great delight in citing that case against me, even though I didn't have a chance to argue against it at the time because it was really submitted without too much oral argument, and the court didn't even ask me about the case at the time. I think the Pollis case is indicative of the line of argument that I have regarding the constitutional right of the State of California in its choice of law.

QUESTION: It seems to me to come as close, factually, as any case there is, but you can't rely on it very much. You don't cite it.

MR. ROWE: I didn't think it was entirely on point, because it is one of those cases involving Workmen's Compensation laws, and you have the Alaska Packers case and others.

QUESTION: Of course, your opponent doesn't cite it either.

MR. ROWE: No, he doesn't. No, I don't think he would, although the court relied on it in the Court of Appeals and that's why I had to petition for a hearing in the Supreme Court of the State of California.

Another point that I would like to make --

QUESTION: Your theory is that this Respondent who was Plaintiff below can get more money in the California court from Nevada than Nevada would give them in Nevada?

MR. ROWE: Correct.

QUESTION: Doesn't it strike you funny?

MR. ROWE: No, I don't think it really does, because I can see --

QUESTION: Can you imagine anything like it?

MR. ROWE: Pardon?

QUESTION: Can you imagine anything like it?

MR. ROWE: If the accident had happened in Nevada and that we had California residents --

QUESTION: No, no. I said if the accident happened in California and you sued Nevada in Nevada.

MR. ROWE: Right.

QUESTION: You would get $25,000. And if you sue in California, you get the moon.

MR. ROWE: I wouldn't characterize it as the moon because this young boy suffered severe brain damage and is retarded for the rest of his life.

QUESTION: I am not talking about damage, I am talking about the amount. To me it is the moon.

MR. ROWE: I am not even sure that -- today what Nevada's position is.

QUESTION: As I understand their position, it is that if you want them to give up their sovereignty they give it up on their terms, and their terms is $25,000.

MR. ROWE: But I would like to refer to the case that -- I mailed a letter to the Court about the Turner v. Staggs case, and if one can really see any implicit basic policy that the State of Nevada now has, it seems that they interpreted their statute to have a purpose of putting governmental tort feasers and nongovernmental tort feasers on the same footing, in the language of the Supreme Court of Nevada. They threw out their claim statute. They didn't throw out specifically the limitation on damages, but they threw out the claim statute, the requirement of filing a claim. And the basis of the Supreme Court of Nevada doing that was they said it is not a reasonable classification to make a distinction between Government tort feasers and nongovernment tort feasers, to make a distinction between victims of government torts and victims of nongovernment torts.

Now, that's their policy. And in a brief filed with the Supreme Court of the United States, in that case of Turner, the attorney for the -- representing the interests

of the political subdivision of the State of Nevada, in his brief in his petition for certiorari -- that was 73-489, where this Court denied certiorari -- they argued, from page 8 of the petition for certiorari in that case, writing of the Turner case.

More importantly, however, the constitutional rationale employed below, that is, the Supreme Court of the State of Nevada, draws into serious question the constitutionality of the related statutes aimed "limiting actions against a state and its political subdivisions. Should private and governmental tort feasers be unconditionally placed on equal footing, as determined by the court" -- by the Supreme Court of Nevada -- "statutes setting recovery limits prohibiting punitive damage or exempting from liability actions by the state militia, would for the same reason necessarily be found to be repugnant to the Equal Protection Clause."

QUESTION: Of course, that isn't the reason relied on by the Supreme Court of California, is it? that Nevada itself had abandoned sovereign immunity?

MR. ROWE: No, I think the basis of their opinion is the basis that I am arguing here.

QUESTION: Mr. Rowe, did I understand you to say you had written a letter to the Court about some case?

MR. ROWE: That I was going to use that particular case in oral argument, yes. I relied upon it and they were

supposed to have sent it. I can cite it to you again. I sent a copy to counsel. Turner v. Staggs, 510 Pacific 2d 879. Certiorari denied, 414 U.S. 1079.

That case held that the stated object of the Nevada legislation, which was 43031 -- that's their basic liability tort claim section -- was to put governmental units on an equal footing with private tort feasers. The Supreme Court of Nevada,adopting language from Wright v. State Highway Department, a Michigan case, stated that"this diverse treatment of members of a class, along the lines of governmental or private tort feasers, bears no reasonable relationship under today's circumstances to the recognized purposes of the Act."

QUESTION: This lawsuit was originally filed in Placer County, wasn't it?

MR. ROWE: Well, actually, it started in San Francisco, with the Administrator being appointed in San Francisco, of the deceased employee. Then they raised questions concerning the Administrator, so it was then in Placer County. And, under the Nevada statute, their venue statute says that the action may be commenced in the county where the accident occurred --

QUESTION: Under the Nevada venue statute?

MR. ROWE: Yes.

QUESTION: That would be Ormsby County, wouldn't it?

MR. ROWE: No, there is a Subdivision 2. It is in

the Appendix, Your Honor. The Nevada statute says that the action has to be instituted in the county in which the accident happened, not in --

QUESTION: Even though it is against the state?

MR. ROWE: Even though it is against the state, it is their own provision.

QUESTION: Were you found bound, suing in California and going against their principle of sovereign immunity, to nonetheless follow the Nevada venue provision?

MR. ROWE: We were not bound by it, but the case was in the county in which the accident happened until we got a change of venue, based upon the convenience of witnesses to Alameda County.

QUESTION: Which is Oakland. I suppose verdicts tend to be higher in Oakland then they do in Placerville?

MR. ROWE: I don't know that there has been any statistical study of that.

QUESTION: Would you need one?

MR. ROWE: The basis for the move, and it was very well documented, was by reason of convenience of witnesses. Because all of the doctors and witnesses treating this brain-damaged child were in the Bay Area. For that reason, rather than have them all come from Oakland and San Francisco and that area to Placer County, Auburn, the court thought the venue change should be granted.

There is another question concerning --

Oh, I was going to start at my very beginning before -- to try to talk about what is not involved. I don't feel that there is any real constitutional issue involved in this case. We don't have the legislative power of Congress to impose suability against states involved here, which has been a question before this Court and which has caused a great deal of law review articles and interest throughout the nation. And we don't have the question of the amenability of the Federal Government to suits by states that was raised as a specter by Petitioner, saying that California, if this case was upheld, would then be suing the United States Government, because we do have a Supremacy Clause of the United States Constitution, Article 6, Sections 1 and 2. And I don't think we are involved here, and it is not involved in this case, the question of the judicial power of the Federal courts, vis-a-vis the Eleventh Amendment, and the many cases that this Court has dealt with which surround that particular issue.

What we think is involved is basically a full faith and credit question, at most, as raised by the other side, but I think if you even assume that to be an issue the place of the tort was State of California, the law of the forum was California. So we don't have the problem of selecting between the forum and the place of the tort because they are one and

the same.

We don't see any -- State of California, we feel, has the constitutional power, as I pointed out, to develop their own conflict of laws doctrine. And that was cited in the Pearson case which was relied on by Counsel for Petitioner. I think what he did was, he read the old opinion that was later then reversed and then Judge Kaufman wrote, with, I think, five other judges assenting with him, a new opinion, but, I think, (inaudible) misquoted the case, saying that we could not base the obligation upon a foreign statute and then only take parts of it, because that was precisely the holding in Pearson. They said the state, under its constitutional power of choice of law, has a right to reject the Massachusetts limitation of damages, which was $15,000.

So we think that refusal to apply the limitation on recovery is an exercise of that constitutional right. As I have discussed before, I don't think there is any compelling state interest demonstrated by Nevada to require California to apply its laws, because one of the Turner v. Staggs case, which certainly puts a serious question on the policy of the State of Nevada with regard to treatment of governmental tort feasers and victims of governmental torts.

Also, the Nevada Constitution, Article 4, Section 22, does waive the immunity. It authorizes the legislature to enact laws to allow them to be sued. So, I don't think

that he can really argue the fact of this problem of sovereign immunity because of the waiver in the Constitution.

QUESTION: We could decide the case in your favor by saying that there is no constitutional limitation on the right of California to assert jurisdiction in situations like this. But, if we were to conclude along the lines that you have just stated, that maybe Nevada public policy isn't all that different from the Supreme Court of California, we couldn't affirm the judgment of the Supreme Court of California for the reasons it gave, could we? Because it didn't purport to consider Nevada public policy.

MR. ROWE: I don't know what the basis of affirming -- I think that the Supreme Court of California did not discuss Nevada policy. You are correct. It based its opinion upon the fact, the theory that the territory, that the action of Nevada outside of its own territory, involved in a motor vehicle accident, driving a motor vehicle on the California state highway, gave the California court sufficient jurisdiction, under their long-arm statute.

And there are other cases, of course, that have held that. With reference to these statutes, which, of course, this Court is familiar with, which say that the state certainly has that under its police power, the right to enact such a statute.

I think one of the questions of the justices was:

Did this man knowingly come in? He was directed to drive into California; Nevada knew of the statutes of California, which operation of a motor vehicle on their highways constituted an appointment of Secretary of State as being a person who could be served with process against the Defendant.

QUESTION: Mr. Rowe, suppose Nevada had just stayed pat and not waived any of its immunity? You couldn't have sued at all, could you?

MR. ROWE: I think we could have, because of my theory -- and the theory of the Supreme Court of the State of California -- that when Nevada came into California and conducted operations in the State of California, they were no longer under the protection or the status of a sovereign. And without the status of a sovereign, they could not then raise the concept of sovereign immunity, since only a sovereign --

QUESTION: How would they come in as a sovereign, with a crown on, or something? We are talking about today.

MR. ROWE: We are talking about today, and I think that the cases that I've cited in the brief, which --

QUESTION: You are talking about they haven't waived their sovereignty by statute or anything.

MR. ROWE: Right, and they drive into California.

My theory --

QUESTION: Your theory that Nevada drove in, that's

not their theory. We will go with your theory, that Nevada drove the car.

MR. ROWE: They came into California, and once they came into California --

QUESTION: They waived their sovereign immunity.

MR. ROWE: They didn't even have a status of a sovereign, and therefore --

QUESTION: As soon as you say State of Nevada, you say sovereignty, don't you?

MR. ROWE: They have a description.

QUESTION: Isn't the state a sovereign?

MR. ROWE: The state is a sovereign in the vest --

QUESTION: You sue a sovereignty, don't you?

MR. ROWE: Well, we sue a political entity.

QUESTION: Your point, I think, is that Nevada is a sovereign within its own and over its own territory, period.

MR. ROWE: It has a right to have its constitution. It has a right to either waive or not waive immunity. It has a right to set up its statutory scheme of waiver, but that's a relationship between the governed and the governor.

QUESTION: If they waive sovereign immunity, isn't it generally understood that you waive it on your own terms?

MR. ROWE: I would accept that, within the State of Nevada only. Outside of Nevada, I think, that the general

rules of choice of law of the state and its constitutional right of choice of law would apply, because it is not the same situation --

QUESTION: I understand. Your point is they could sue without the statute. They could sue Nevada without the statute, that's your position.

MR. ROWE: They certainly could.

QUESTION: Would you limit California's right or your client's right to sue Nevada to what would have been the case if you had sued California? Does Nevada have less sovereign immunity than the State of California?

MR. ROWE: No. It would be the same. California has the same amount of sovereignty that Nevada has, but the question is where the action happened.

QUESTION: Could California say Nevada has no sovereign immunity in this state, although the State of California does?

MR. ROWE: There is a concept in the law that California has the supreme sovereignty when Nevada is engaging in activities within its state, and that any power of the State of Nevada would be --

QUESTION: What if in the California courts you could sue California only for an amount up to $10,000? Let's assume that.

MR. ROWE: For an accident happening in California?

QUESTION: In California.

Now, could Nevada be sued in the California courts for more than that? Or could California decide that, yes, it could have an unlimited liability?

MR. ROWE: It is an interesting question. We don't have it before us.

QUESTION: Didn't the California court say it shouldn't be any better off in the State of California?

MR. ROWE: Right.

QUESTION: So, I wonder what is the rule that California indicated?

MR. ROWE: Well, California, of course, has no limitation. I really don't know the answer to what might happen under those circumstances, but I -- and I don't want to hazard a guess, because it is not really before us.

QUESTION: Do you entertain suits by Nevada in the California courts?

MR. ROWE: I don't know whether we do or not. I would certainly think with the attitude of the Supreme Court of California, that they would have to --

QUESTION: Do they entertain suits to collect taxes by the State of Nevada in the California courts?

MR. ROWE: I don't know, Your Honor.

QUESTION: Has this kind of a case ever arisen in Nevada. Has California ever been sued in Nevada?

MR. ROWE: We have searched all of the cases. It seems to be, and it is a very strange thing that this is a case of first impression, this type of an automobile accident case. I think there are a lot of historical things I could go into, why it didn't originate in early history, but --

QUESTION: Apart from automobiles, you do have Pollis.

MR. ROWE: That's correct.

QUESTION: You sue the University of Nevada, I take it?

MR. ROWE: Yes.

QUESTION: Is there some policy in Nevada that -- by which state agencies pay the judgments for their negligent employees, or do you know?

MR. ROWE: There is a section that they have cited in their -- that requires indemnification by the state of negligent acts of employees.

QUESTION: What was your problem, then -- There wasn't any problem of collectibility then?

MR. ROWE: I don't think there would be a question of collectibility.

QUESTION: No, but I mean if you had just sued the employee.

MR. ROWE: We could have, perhaps, done that, but I don't know what --

QUESTION: That's what people normally do, because they think sovereigns are immune. Why didn't you just -- Did you sue the employee, too?

MR. ROWE: I don't think -- Yes, we sued. What happened is that the employee died as a result of the accident. An estate was commenced within the State of California, the place of his death. We filed a claim against the Administrator and a complaint against the Administrator of the estate. Judgment was rendered against him which they, even though they never defended him, never appealed, and which is final.

QUESTION: Under the Nevada law, wouldn't Nevada have paid that judgment?

MR. ROWE: I am not sure their indemnification provision was in effect at the time the accident happened. It is in their 1977 Amendments, which they have. I don't know whether that would have a retroactive effect --

QUESTION: You must have had some reason for suing the University, other than bringing a case of first impression.

MR. ROWE: We have the practice of suing -- The state owned the automobile. The driver was an employee of the University of Nevada. So, on the side of caution and through years of being exposed to having sued the wrong defendant, we sued all of the defendants.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Dyer, do you have anything further?

REBUTTAL ORAL ARGUMENT OF MICHAEL W. DYER, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. DYER: Just a few comments, Mr. Chief Justice.

First of all, our indemnification clause was added by the 1977 Legislature. Prior to that, the only amount of indemnification that would have been received would have been under a special act of the Legislature. Even under our present indemnification, it is limited to our liability limitation.

I think the reason that the State of Nevada was sued is obvious. It is because of the deep-pocket theory.

With respect to Pollis, we did not cite Pollis because we do not view this case as a conflicts case. We feel it becomes a conflicts case only if you first determine that we can be sued without our consent. Because if you determine that we have to have consented to suit, then it must go off on our limitation. If we can be sued without our consent, at that time it becomes a balancing of governmental interests. But I would point out to the Court that even in that situation we have provided for California's interests to be protected by allowing recovery up to a specified limitation. And I might also add that there was insurance on the

automobile that was being driven in California.

I think a judgment has already been satisfied to the extent of $110,000, or something like that.

Turner v. Staggs, which was cited by Respondents, stands for the proposition of overrule requirement in Nevada that one had to first file a claim with the Nevada Secretary of State, within six months of the action in order to maintain a proceeding against the State of Nevada. It overruled NRS 41039, which is one of nine specific statutory sections dealing with our statutory limitation. It simply stands for the proposition that you cannot have a situation where private tort feasers can sue without filing a claim and public tort feasers or people who are torted by the public, by the Government, must file a claim within six months after the accident happens.

Who knows what the answer would have been in the statute of limitations had been the time for filing the claim? But Turner v. Staggs did not reach a question about limitation on liability and does not stand for a public policy that all tort victims should be treated the same. In fact, that has been reiterated in the case of Calio (?) v. State, which I do not have a citation for. I apologize. Calio v. State is a 1977 case that came down prior to this decision.

I thank the Court for your time.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 3:00 o'clock, p.m., the case in the above-entitled matter was submitted.)