

BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF,           )  
   )  
D. HAGER and C. HAGER,                      ) OTA NO. 19075028  
   )  
                                APPELLANT.       )  
   )  
   )

## TRANSCRIPT OF VIRTUAL PROCEEDINGS

State of California

Wednesday, May 19, 2021

Reported by:  
ERNALYN M. ALONZO  
HEARING REPORTER

STATE OF CALIFORNIA OFFICE OF TAX APPEALS

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Transcript of Virtual Proceedings,  
taken in the State of California, commencing  
at 1:02 p.m. and concluding at 2:47 p.m. on  
Wednesday, May 19, 2021, reported by  
Ernalyn M. Alonzo, Hearing Reporter, in and  
for the State of California.

1 APPEARANCES:

2

3 Panel Lead: ALJ ANDREA LONG

4

5 Panel Members: ALJ JOSHUA LAMBERT  
ALJ MIKE LE

6 For the Appellant: CHRISTOPHER HAMILTON  
D. HAGER

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8 For the Respondent: STATE OF CALIFORNIA  
FRANCHISE TAX BOARD

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10 SONIA WOODRUFF  
DAVID HUNTER

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I N D E X

E X H I B I T S

(Appellant's Exhibits 1-11 were received at page 6.)  
(Appellant's Exhibits 4c, 4d, and 4f were received at  
page 8.)  
(Department's Exhibits A-H were received at page 6. )

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1 California; Wednesday, May 19, 2021

2 1:02 P.m.

3

4 JUDGE LONG: We are now ready to go on the  
5 record.

6 Good afternoon. Once again, I'm Andrea Long, the  
7 lead Administrative Law Judge for this is appeal.

8 We are here today for the Appeal of Hager, OTA  
9 Case Number 19075028. Today is Wednesday, May 19, 2021,  
10 and it's approximately 1:02 p.m. This hearing was noticed  
11 to be held virtually via Webex.

12 And we will begin with the parties stating their  
13 names and who they represent for the record, starting with  
14 Appellants.

15 MR. HAMILTON: Good afternoon, Your Honors.  
16 Chris Hamilton on behalf of Appellants Darren and Claudia  
17 Hager.

18 MS. WOODRUFF: And I'm Sonia Woodruff on behalf  
19 of the Franchise Tax Board.

20 MR. HUNTER: David Hunter, Respondent Franchise  
21 Tax Board.

22 JUDGE LONG: Thank you. This is Judge Long.  
23 With me today on the panel is Judge Josh Lambert and  
24 Judge Mike Le who is replacing Judge Teresa Stanley today.  
25 And the parties have stated that they have no objections

1 to Judge Le being on the panel.

2 The parties have agreed that the issues before us  
3 today is whether Appellant-husband's damage award is  
4 excluded from gross income pursuant to IRC Section  
5 104(a) (2).

6 With respect to the exhibits, pursuant to the  
7 April 28, 2021, minutes and orders, we admitted Exhibits 1  
8 through 11 for Appellant and Exhibits A through H for FTB,  
9 and these exhibits were admitted without objection.

10 (Appellant's Exhibits 1-11 were received  
11 in evidence by the Administrative Law Judge.)

12 (Department's Exhibits A-H were received in  
13 evidence by the Administrative Law Judge.)

14 Appellants provided a supplemental exhibit log  
15 that lists Exhibits 1 through 12, which is one more  
16 exhibit than listed on the minutes and orders. The  
17 supplemental exhibit lists Exhibit 12 as "Amended Judgment  
18 on Special Verdict, Los Angeles Superior Court."

19 Mr. Hamilton, is this the same document that's  
20 been admitted as FTB's Exhibit B?

21 MR. HAMILTON: Yes, Your Honor.

22 JUDGE LONG: Okay. So then we're not going to  
23 admit Exhibit 12. But, of course, you're more than  
24 welcome to rely on Respondent's Exhibit B or any documents  
25 that FTB has submitted.

1 MR. HAMILTON: Understood, Your Honor.

2 JUDGE LONG: Thank you.

3 We previously granted Appellants' request to seal  
4 Exhibits 6 and 11 without objection from FTB. Appellants'  
5 supplemental log also states that correspondence entitled  
6 "K. Findley to FTB," dated 8/18/2017, which we have listed  
7 as Exhibit 1, Tab 7, should also be sealed.

8 Is that correct, Mr. Hamilton?

9 MR. HAMILTON: Yes, Your Honor.

10 JUDGE LONG: Ms. Woodruff, do you have any  
11 objections to sealing this exhibit?

12 MS. WOODRUFF: I do not, Your Honor.

13 JUDGE LONG: Then Exhibit 1, Tab 7, will also be  
14 sealed.

15 Mr. Hamilton, in my minutes and orders I admitted  
16 Exhibit 4, excerpts from the trial transcript, which  
17 consisted of 22 pages. Your supplemental exhibit shows  
18 that additional excerpts from the trial transcript to the  
19 additional ones are 4c, testimony of Neal Tyler; 4d,  
20 testimony of Lawrence Gregg; and 4f, the closing arguments  
21 of Attorney Love, and now totals 96 pages.

22 Ms. Woodruff, do you have any objections to these  
23 additional excerpts?

24 MS. WOODRUFF: I do not.

25 JUDGE LONG: So these exhibits will also be

1 admitted as 4c, 4c, 4f as laid out in Mr. Hamilton's  
2 supplemental exhibit log.

3 (Appellant's Exhibits 4c, 4c, 4f were received  
4 in evidence by the Administrative Law Judge.)

5 And I will note that only the trial -- the  
6 excerpts from the trial transcript that we have admitted  
7 is part of the record, but the entire trial transcript  
8 that Appellant sent to us on September 17, 2020, has not  
9 been admitted.

10 And, Mr. Hamilton, have you brought any  
11 additional exhibits that you intend to submit into  
12 evidence?

13 MR. HAMILTON: Your Honor, not today. However,  
14 we would ask that since we provided the trial transcript  
15 in its entirety that it also be a part of these  
16 proceedings, though, we intend to limit our references  
17 today to those identified in the exhibit list.

18 JUDGE LONG: Well, the exhibit -- the trial  
19 transcript is quite lengthy, as we well know. So if we  
20 can limit it them to excerpts so we can follow along. Do  
21 you intend to other excerpts that you intend to refer to?

22 MR. HAMILTON: Not for purposes of this hearing,  
23 but I believe that for the purposes of OTA's analysis of  
24 this case, the entire transcript is relevant.

25 JUDGE LONG: Ms. Woodruff, do you have any



1 objections to admitting the entire transcript?

2 MS. WOODRUFF: I don't have any actual objections  
3 to admitting the trial transcript, but it does seem  
4 unnecessary if we have each already excerpted the portions  
5 that we intend to reference.

6 JUDGE LONG: Let's take a five-minute recess, and  
7 I'll confer with my co-panelist.

8 (There is a pause in the proceedings.)

9 JUDGE LONG: We're ready to go back on the  
10 record.

11 So we have conferred and discussed that the trial  
12 transcript will be admitted, but we'll mark that as  
13 Exhibit 12. Just for ease of reference, when you refer to  
14 Exhibit 4, we can just refer to the excerpts.

15 MR. HAMILTON: Your Honor, may I ask a question  
16 to clarify?

17 JUDGE LONG: Yes.

18 MR. HAMILTON: I want to confirm that you're  
19 indicating that the whole trial transcript is Exhibit 12,  
20 but when referring to the excerpts I'll refer to  
21 Exhibit 4.

22 JUDGE LONG: Correct.

23 MR. HAMILTON: Thank you, Your Honor.

24 MR. HUNTER: Your Honor, David Hunter here for  
25 FTB. I just want to -- in your prehearing orders, it

1 clearly stated that --

2 THE STENOGRAPHER: Mr. Hunter, I cannot hear you.

3 MR. HUNTER: How about now? Is that better?

4 THE STENOGRAPHER: Yes.

5 MR. HUNTER: Okay. I'm sorry. I just wanted to  
6 bring something up. I was referring to the prehearing  
7 conference ordered that stated that all exhibits must be  
8 in by May the 4th of this year or else they would not be  
9 admitted into evidence, unless the showing of good cause  
10 is made. So has that showing been made right now in order  
11 to enter the entire transcript and the underlying  
12 litigation into the matter of this case?

13 JUDGE LONG: Well, I think there might have been  
14 a miscommunication at the prehearing conference.  
15 Mr. Hamilton did say he was going to provide some  
16 excerpts, so there might -- it seems like we -- there are  
17 some miscommunication there. But since FTB has already  
18 had the entire transcript since, I think it was  
19 September 2020, this should not be new evidence. And we  
20 will give it the proper weight of the evidence for this  
21 appeal.

22 MR. HUNTER: Thank you, Judge Long.

23 JUDGE LONG: You're welcome.

24 And I also want to also mention that we received  
25 both parties' timely supplement briefs, which will also be

1 considered part of the record. And with that, I think  
2 we're ready to begin with opening statements.

3 Mr. Hamilton, you've indicated you'd like  
4 30 minutes, and you may begin whenever you are ready.

5 MR. HAMILTON: Thank you.

6

7 OPENING STATEMENT

8 MR. HAMILTON: Good afternoon, esteem Judges.

9 Today we're here to determine whether all or a  
10 portion of the two-and-a-half million dollars in damages  
11 that Darren Hager was awarded pursuant to his 2007 lawsuit  
12 against the law -- pardon me -- against the Los Angeles  
13 County Sheriff's Department for retaliatory conduct should  
14 be excluded from the Appellant's gross income per Internal  
15 Revenue Code Section 104(a)(2). In order for these  
16 damages to be excluded from Appellants' gross income, they  
17 must have been paid on account of physical injury.

18 Appellants contend that when Darren Hager filed  
19 his complaint against the Los Angeles Sheriff's Department  
20 for its retaliation against him for blowing the whistle on  
21 its employees who are involved in illegal activity, that  
22 Darren Hager was not simply suing for his termination and  
23 damage to reputation, but he was, in fact, also suing for  
24 his physical injuries which were directly caused by the  
25 retaliation of the Los Angeles Sheriff's Department, its

1 employees, all of which is attributable to the Los Angeles  
2 Sheriff's Department.

3 The facts behind the retaliatory conduct that  
4 caused Darren Hager's physical injury are summarized as  
5 follows:

6 In December of 1999, Darren Hager, who was an  
7 11-year veteran of the Los Angeles County Sheriff's  
8 Department, was sworn in as a detective in the Lancaster  
9 Station. Shortly after his stint at the station began  
10 Darren Hager became involved in a joint DEA and LASD task  
11 force. The task force was investigating the manufacture  
12 and distribution of methamphetamine in the Antelope Valley  
13 area. Due in part to information -- pardon me.

14 Due in part to information, personnel within that  
15 sheriff's station, were involved in the local  
16 methamphetamine trade and his willing to truthfully report  
17 such conduct. Over the course of approximately one year,  
18 the task force lawfully gathered evidence through wiretaps  
19 and the interviews of numerous independent and credible  
20 confidential informants. This evidence strongly supported  
21 the following allegations:

22 A local deputy, who will refer to as Deputy X,  
23 was known locally as a dirty cop. Deputy X had personal  
24 relationships with known producers of methamphetamine in  
25 the Antelope Valley area. Deputy X permitted his criminal

1 associates to make and traffic methamphetamine. Deputy X  
2 was known to steal narcotics seized from rival drug  
3 dealers in police operations and would otherwise steal  
4 chemicals used to produce methamphetamine from rival  
5 criminals. Deputy X himself owned or operated his own  
6 methamphetamine lab.

7 Other deputies working in the Antelope Valley  
8 area were also potentially involved with local criminal  
9 organizations who were also involved in the distribution  
10 of methamphetamine. A deputy who had disappeared over a  
11 year before was murdered because he stumbled onto a  
12 methamphetamine lab, and Deputy X was involved in the  
13 murder of that deputy who was known as Deputy Aujay.  
14 Finally, Deputy X had murdered persons whom he believed  
15 would report his illegal activity.

16 As part of his duties, Hager and the DEA task  
17 force were required to report their findings to the Los  
18 Angeles County Sheriff's Department in the Antelope  
19 Valley. When the Sheriff's Department learned that its  
20 own personnel may have been involved in the local  
21 methamphetamine trade and the murder of Deputy Aujay, they  
22 essentially refused to cooperate with reasonable requests  
23 of the task force. And, in fact, it appeared that the  
24 Sheriff's Department began to actively work against the  
25 task force by leaking information regarding ongoing task

1 force operations.

2 For example, in July of 2000, Hager learned that  
3 confidential information from his investigation was being  
4 leaked to Sheriff's Department personnel and then to  
5 members of criminal organizations involved in the  
6 production of methamphetamine to help them evade law  
7 enforcement. In October 20th of 2000, Hager learned from  
8 an informant that Deputy X had warned a major local drug  
9 dealer about a pending law enforcement operation to help  
10 him keep the narcotics operation concealed.

11 Once the task force had developed a substantial  
12 amount of credible independent information that pointed to  
13 Deputy X's involvement in a criminal methamphetamine  
14 enterprise and Deputy Aujay's murder, the task force  
15 reported this information to the LASD, in part to obtain  
16 warrants for a more thorough investigation of Deputy X.  
17 These warrants were denied without good reason. Instead  
18 the Sheriff's Department began a pattern of retaliation  
19 against Darren Hager that threatened his life and  
20 ultimately caused the physical injury that would  
21 effectively end his career as an active law enforcement  
22 officer.

23 As specifically relevant to Hager's physical  
24 injury, the Sheriff's Department retaliated in the  
25 following ways:

1               First, the Los Angeles County Sheriff's  
2     Department continued a pattern of facilitating links of  
3     confidential task force investigation information to LASD  
4     personnel, including Deputy X.   Second, due to those  
5     leaks, Darren Hager received death threats from his LASD  
6     coworkers, including Deputy X, who threatened to kill him  
7     or end his career as a law enforcement officer.

8               Third, and most specifically to the issue before  
9     us today, is that the Sheriff's Department retaliated by  
10    repeatedly and unnecessarily responding to Hager's calls  
11    for back-up by providing him with back-up from Deputy X or  
12    persons closely associated with him who are known to have  
13    threatened Darren Hager's life, or who had strong motive  
14    to silence or end his investigation.   As a result of this,  
15    it made Darren Hager's job as an undercover officer almost  
16    impossible.

17              As an undercover officer, he was not supposed to  
18    detain suspects in his undercover vehicle.   It was not  
19    equipped to safely detain persons.   In fact, it was policy  
20    that he would be required to call for a black and white  
21    who would properly detain the suspect in the rear seat of  
22    a vehicle that had what they described as a cage, which  
23    was safe and prevented escape.   It was safe for the  
24    suspect and safe for the officers involved.

25              In one instance, Darren Hager called the Palmdale

1 Station for back-up to protect a hazmat team who was  
2 cleaning up a disrupted methamphetamine lab that had been  
3 busted. The sergeant who responded to him laughed at him  
4 when he told he needed back-up. And when he asserted  
5 again that he needed back-up, he was told, "Sure. I'll  
6 send Deputy X." This is the person who had already  
7 threatened Darren Hager's life.

8 Hager explains to the sergeant that sending  
9 Deputy X created a serious safety issue and simply  
10 requested that another deputy be sent. The sergeant again  
11 laughed at Darren Hager, and told him he wouldn't send  
12 anyone other than Deputy X.

13 In another instance, Hager received information  
14 indicating that a suspect himself had information about  
15 Deputy X's illegal conduct. He also knew that Deputy X  
16 was aware of this suspect and that the suspect wanted to  
17 leak information about his illegal conduct. To protect  
18 the suspect and to preserve any evidence he may be able to  
19 provide, Hager track the suspect down before Deputy X got  
20 to him. When he found where he was, he called for back-up  
21 so that he can detain the suspect.

22 In this instance, the station responded by  
23 sending a deputy who was closely associated with Deputy X,  
24 who as soon as he arrived on scene, refused to allow  
25 Darren Hager to participate in the arrest or even be



1 present during the arrest, which was contrary to the  
2 normal practice. Because of the allegations about  
3 Deputy X and his associates within the department, Hager  
4 was concerned for the safety of the suspect and called the  
5 station back and asked them to send additional back-up.

6 During that time, the suspect barricaded himself  
7 in his location and ultimately would only leave the  
8 apartment or surrender to Darren Hager. Darren contends  
9 that had he not insisted on the additional back-up, the  
10 suspect would have been murdered. The fact that the  
11 suspect would only surrender to him support his safety  
12 concerns.

13 Due to these retaliatory that Hager received and  
14 the repeated dangerous back-up situations that the  
15 Sheriff's Department put him in, it is believed  
16 intentionally, it was clear to Mr. Hager that not only did  
17 the Sheriff's Department personnel want to kill him, but  
18 much of the Sheriff's Department's upper management was  
19 unconcerned about the threats or any of these events.

20 Directly as a result of this type of retaliation,  
21 Darren Hager suffered a physical injury that would  
22 effectively end his career. Specifically, shortly after  
23 these events, Darren Hager was seeking a suspect and  
24 apprehended the suspect. Normal procedure would call for  
25 him -- or would require him to call for a black and white

1 to secure the suspect in the back of the black and white.

2 Due to the incidents that we've just described,  
3 Hager feared that Deputy X or another of his associates  
4 would arrive and would make the situation more dangerous,  
5 either by, frankly, taking action against the suspect,  
6 taking action against Hager, or both. As a result, Darren  
7 Hager handcuffed the suspect and put him in the backseat  
8 of his car. Since the suspect was not properly secured in  
9 the back of a black and white, he was able to escape --  
10 pardon me. She was able to escape.

11 She slipped the cuffs, escaped from the vehicle,  
12 and this resulted in a pursuit. During the pursuit, Hager  
13 slipped, fell, and physically injured himself. The injury  
14 resulted in a herniated nucleus pulposus of the cervical  
15 spine, chondromalacia in the right knee, and an  
16 impingement of the right shoulder. All of which caused  
17 Hager a stiff and painful neck, numbness and tingling in  
18 the fingers of both hands, in his arms, tenderness and  
19 pain in his hand, intermittent loss of knee function and  
20 knee swelling that prevented him from performing his  
21 normal duties.

22 The injury was a direct result of the retaliation  
23 that he suffered at the hands of the Sheriff's Department  
24 for blowing the whistle. The Sheriff's Department did  
25 retaliate in other ways. They refused to take any action

1 in regard to the threats that were made to him by his  
2 coworkers. They refused to investigate the illegal  
3 conduct of Deputy X and others. Instead, they  
4 investigated Darren Hager. They disparaged Hager  
5 internally and to other law enforcement agencies. They  
6 leaked his confidential home and personal information to  
7 individuals within the Department who had threatened to  
8 kill him. The retaliation culminated in his termination  
9 on false pretenses.

10 That the termination was retaliatory was plain.  
11 Up until the time he was terminated, he'd received  
12 outstanding reviews with the Sheriff's Department during  
13 the same years that these incidents occurred in this  
14 investigation. He received awards from the Los Angeles  
15 County, The City of Lancaster, the California State Senate  
16 and California State Assembly for his exemplary service in  
17 the same investigation.

18 His investigation was supported by DEA task force  
19 members who were frustrated by the lack of action by the  
20 Sheriff's Department based on their investigations. His  
21 investigation was also corroborated by prior Sheriff's  
22 Department investigations into the disappearance of Deputy  
23 Aujay. Now, as we will explain later, when Hager sued the  
24 Los Angeles Sheriff's Department, the complaint was not a  
25 typical personal injury lawsuit. And it did not contain

1 in the caption a Cause of Action for his physical injury.

2           However, as we will discuss later, that isn't  
3 required for 104(a)(2) to apply. Further, it ignores the  
4 fact that the complaint does reference his physical  
5 injury. It also ignores that during the extensive trial  
6 on this issue or on the retaliation, a number of facts and  
7 significant evidence connecting the Sheriff's Department  
8 retaliation to Hager's physical injury, were put in front  
9 of a jury who considered them and the reasonable  
10 inferences from that evidence.

11           And we contend that it was a result of the  
12 evidence that was presented regarding this injury and  
13 regarding its relationship to the retaliation that the  
14 jury determined Mr. Hager was entitled to  
15 two-and-a-half-million dollars in general damages.

16           The Appellants contends that there was no reason  
17 to introduce all of the evidence of Hager's physical  
18 injury, the circumstances that caused it, and the detail  
19 with which it was presented, except to seek damages for  
20 this physical injury. Appellants intend to show you that  
21 they -- that according to the relevant applicable law, the  
22 complaint when considered with the evidence and the  
23 arguments before the jury and the jury verdict, did make  
24 the direct connection between Mr. Hager's physical injury  
25 and his damages.

1 Appellants contend that when determining whether  
2 damages awarded by a jury are received on account of  
3 physical injury, the inquiry must focus on all of the  
4 facts and circumstances of the trial, including the  
5 complaint, the argument made during the trial, and the  
6 evidence reviewed by the jury before rendering its  
7 verdict.

8 Appellants contend that the Franchise Tax Board's  
9 determination that the two-and-a-half-million dollars is  
10 taxable is based primarily on an analysis of the complaint  
11 and ignores the evidence introduced in trial that did tie  
12 Hager's physical injury to the Sheriff's Department's  
13 retaliatory conduct.

14 Remember, Darren Hager was injured chasing a  
15 suspect who was not properly detained because he did not  
16 have back-up. He did not have back-up because as part of  
17 the retaliation for his whistle blowing, the Sheriff's  
18 Department had a history of sending Deputy X, the very  
19 person who had threatened his life and to end his career,  
20 as his back-up. It was not safe for him to call for  
21 back-up. A substantial amount of evidence was produced on  
22 this issue during the trial.

23 Appellants contend that the analysis of the  
24 Franchise Tax Board is not supported by law, especially,  
25 after the 2012 changes to the regulations under 104(a)(2).

1 And that a more thorough analysis of the information  
2 presented at trial, that the jury received when the  
3 verdict was -- when they rendered the verdict is required.

4 Thank you.

5 JUDGE LONG: Thank you.

6 Ms. Woodruff, you requested five minutes for your  
7 opening statement. So please begin whenever you're ready.

8 MS. WOODRUFF: Thank you.

9

10 OPENING STATEMENT

11 MS. WOODRUFF: Good afternoon. And thank you,  
12 Panel, for your time today.

13 At issue today is whether a damage award based on  
14 wrongful termination and whistle blower retaliation may be  
15 excluded under IRC Section 104(a)(2). That section only  
16 excludes damages awarded on account of physical injury or  
17 physical sickness. Appellant did previously injure  
18 himself by tripping and falling while on the job, as we  
19 heard today. He did not, however, sue his former employer  
20 for the resulting neck injury. He received Worker's  
21 Compensation and medical disability payments for that  
22 accident before ever suing his employer.

23 His lawsuit did not seek any compensation for a  
24 physical injury or a physical sickness. He sued his  
25 employer for wrongful termination and whistle blower

1       retaliation. And because his claims against his employer  
2       had no direct and causal link to a physical injury or  
3       sickness, the damage award may not be excluded from  
4       income.

5               Thank you.

6               JUDGE LONG: Thank you.

7               Mr. Hamilton, you have an hour to present your  
8       argument. Please begin whenever you're ready.

9               MR. HAMILTON: Thank you, Judge.

10

11

PRESENTATION

12

13               MR. HAMILTON: Internal Revenue Code 104(a)(2)  
14       provides a gross income. It does not include the amount  
15       of any damages other than punitive damages received on  
16       account of physical injury or physical sickness. The  
17       statute, actually, has a fairly broad scope. It provides  
18       for a non-taxability regardless of whether the damages  
19       that were paid were awarded by a jury through a trial or  
20       by a private agreement between the parties.

21

22               Case law interpreting the statute simply requires  
23       that there's a demonstrated connection between a physical  
24       injury and the damages received. Case law further  
25       provides that when an ambiguity regarding the nature of a  
26       payment arises, the most important factor in determining  
27       an exclusion under 104(a)(2), is the intent of the pair

1       regarding the purpose in making the payment. And that  
2       reference was to Simpson v. Commissioner 141 Tax Court 331  
3       at 340.

4               Further, when payment arises through a complaint  
5       and a trial, the intent and the -- in making the payment  
6       may be determined or must be determined, rather, by  
7       examining all the facts and circumstances of the case,  
8       including the complaint that was filed and the details  
9       surrounding the litigation. When IRS amended -- when the  
10      IRS amended the Treasury Regulation 1.104-1(c)(2) in 2012,  
11      they modified this analysis that the change indicates the  
12      damages awarded may still be on account of physical  
13      injury, even if the statute being sued under does not  
14      provide for a broad range of remedies, and that the injury  
15      need not be defined as a tort under state law or arise  
16      from a personal injury complaint.

17              These changes were expressly intended to avoid a  
18      taxing agency determining the damages are taxable if they  
19      do not arise from personal injury complaint or claim,  
20      especially, when a plaintiff is claiming a statute --  
21      claiming damages under a statute that does not provide for  
22      a broad range of remedies. In this regard, Appellants  
23      argue that Darren Hager's whistle blower retaliation  
24      lawsuit were the employer's retaliation results in his  
25      physical injury is no different than an automobile



1 accident through which the defendant's conduct results in  
2 the plaintiff's personal injury.

3 When considering damages that are awarded by a  
4 jury after a trial, we must look to the complaint and all  
5 the facts and circumstances surrounding the trial that  
6 went before the jury who actually awarded the damages to  
7 the plaintiff. Appellants contend that when this body  
8 considers the complaint, the evidence produced to the jury  
9 at trial, the jury instructions, and the jury's verdict,  
10 these support the Appellants' position that all or a  
11 portion of the damages awarded were on account of Darren  
12 Hager's physical injury because they show the reasons why  
13 the jury awarded the damages.

14 First, Exhibit 2, Darren Hager's complaint does  
15 identify Darren Hager's physical injury. More  
16 importantly, it identifies this injury within the  
17 following context. During his employment with the  
18 Sheriff's Department, Darren Hager participated in  
19 investigations that revealed evidence supporting  
20 allegations that specific employees with the Sheriff's  
21 Department were involved in illegal conduct, including,  
22 but not limited to, murder, the manufacture and possession  
23 and distribution of controlled substances.

24 Darren Hager refused to participate in this  
25 activity. He protested it, and he attempted to correct

1     it. This is what subjected him to retaliation. Darren  
2     Hager's coworkers, who are allegedly involved in this  
3     illegal conduct and whose alleged illegal activity was  
4     reported, harbored spite, hatred, and ill will towards  
5     him. These same coworkers who harbored these feelings  
6     towards him intended to destroy his career as a law  
7     enforcement officer in retaliation for his whistle  
8     blowing. As a result of this, he feared for his safety to  
9     the point where he felt compelled to contact the FBI to  
10    make them aware of the facts and circumstances and the  
11    threats.

12           Certain of Hager's coworkers posed a danger to  
13    his personal safety. Hager was placed on medical  
14    disability due to physical injury he suffered on duty.  
15    Each of these things are identified in the complaint. For  
16    reference, they are also the same reference that are made  
17    in our recent briefing to the precise lines and pages of  
18    the complaint. Hager could not -- Mr. Hager could not  
19    expressly plead all of the facts surrounding the  
20    retaliation that resulted in his physical injury, because  
21    it would have provided the defendant with a potential  
22    defense to the retaliatory termination claim.

23           However, there's nothing in 104(a)(2) that  
24    requires this. To resolve this issue and to ensure that  
25    he was able to recover from damages for his physical

1 injury, Hager instead determined to introduce a  
2 substantial amount of evidence at the trial that directly  
3 connected his physical injury to the retaliation he was  
4 suing for. He presented this information to a jury, so  
5 that the jury would have a basis for awarding him damages  
6 on account of his physical injury. At trial the following  
7 evidence was produced regarding Darren Hager's physical  
8 injury and the circumstances through which it occurred.

9 First, there's Exhibit 4 where Hager provided  
10 testimony regarding the circumstances of his personal  
11 injury on the job, which resulted from detaining a suspect  
12 without proper back-up, pursuing that suspect, and  
13 tripping and falling during the pursuit. It also  
14 describes his physical injuries and resulting pain and  
15 discomfort. Additionally, Dr. Kreitenburg provided  
16 testimony during trial. So, again, this is also  
17 Exhibit 4, pages 2846 to 2853.

18 Dr. Kreitenberg's testimony referred to the  
19 circumstances through which the injury occurred. Again,  
20 contemporaneous and to the time of the jury and provided  
21 in the trial, and this testimony independently verified  
22 that as a result of this work-related injury,  
23 Hager suffered mult -- pardon me. Of this retaliation,  
24 Hager suffered multiple injuries to the neck and his wrist  
25 and his knee resulting in persistent neck pain.

1           Hager also introduced the LACERA records, and  
2   this is Exhibit 3, the LACERA physician's examination and  
3   findings, as an exhibit during the trial, which provide  
4   the report of Dr. Ron Pizitz, who summarizes the similar  
5   corroborating reports of Dr. Robert Schorr, Dr. Arthur  
6   Harris, and Dr. Scott Baden. This report, which consist  
7   of approximately 15 pages, identifies in detail the  
8   physical injury that Hager suffered or diagnosed as  
9   herniated nucleus pulposus of the cervical spine, carpal  
10   tunnel syndrome, chondromalacia in the right knee,  
11   impingement of the right shoulder, all of which caused  
12   Darren Hager significant neck pain, numbness, tingling in  
13   the fingers of both hands, numbness in his arms,  
14   tenderness, pain in his hand, intermittent loss of knee  
15   function, knee swelling and ultimately would cause an end  
16   to his active duty as a law enforcement officer.

17           Therefore, you really can't say there wasn't a  
18   lot of evidence of this injury before the jury. Further,  
19   during the trial, multiple witnesses provided testimony to  
20   the effect that Darren Hager's investigation revealed  
21   substantial illegal conduct of Deputy X, including the  
22   manufacture and sale of methamphetamine, the personal use  
23   of methamphetamine, stealing seized narcotics for personal  
24   use, the murder of another sheriff's deputy to cover up  
25   his involvement in a methamphetamine operation.

1           These witnesses and their testimony are  
2     summarized in Exhibit 4, pages 3925 to 3936. The  
3     testimony underlying -- or pardon me. The evidence  
4     underlying the testimony was supported by somewhere  
5     between 22 to 23 independent confidential informants.  
6     Hager also introduced Exhibit 6 at the trial, which showed  
7     Mr. Hager's reasonable fear for his safety if he were to  
8     call for back-up. First, sheriff personnel were alleged  
9     to be leaking confidential information about his  
10    confidential investigations to thwart Hager's  
11    investigation. That's Exhibit 6, page 5.

12           Deputy X was alleged to have murdered persons who  
13    were likely to uncover his alleged wrongful acts;  
14    Exhibit 6, pages 8 through 11. A very specific allegation  
15    that one of the officers who was allegedly involved in  
16    illegal activity was leaking information regarding Hager's  
17    investigation to violent criminals for the direct purpose  
18    of causing physical harm to Darren Hager; Exhibit 6,  
19    page 53. Sheriff deputy -- pardon me. Los Angeles County  
20    Sheriff's deputy personnel made threats of violence  
21    against Hager for reporting alleged wrongdoing by those  
22    deputies; Exhibit 6, page 83.

23           The Sheriff's Department personnel spread what  
24    should have been a confidential investigation. And  
25    information revealed in that investigation regarding the

1 misconduct of Sheriff's Department personnel to a  
2 significant number of individuals who were entitled to  
3 that information and were involved in the investigation.

4 Further, there was specific evidence introduced  
5 regarding the threat of danger to Mr. Hager and the  
6 suspects when he called for back-up in retaliation for his  
7 reporting. The best example being that when -- and it's  
8 located at Exhibit 6 pages 37 through 40. When Darren  
9 Hager called for back-up, local station sent a deputy  
10 friendly to Deputy X who attempted Hager -- Mr. Hager from  
11 contacting the suspect at all. To resolve the situation,  
12 Darren Hager was forced to call for additional back-up.  
13 The suspect barricaded himself in and refused to surrender  
14 to anyone else other than Darren Hager, supporting his  
15 concern that Deputy X and his friend intended to kill or  
16 otherwise make the suspect disappear.

17 In summary, the Appellants contend that during  
18 the trial Hager -- Mr. Hager, through his attorney,  
19 presented substantial evidence that the Sheriff's  
20 Department's retaliatory conduct included allowing  
21 Sheriff's Department personnel, including Deputy X, to  
22 make death threats against Darren Hager; that the persons  
23 who threatened him were allegedly involved in the murder  
24 of another sheriff's deputy to keep their illegal activity  
25 a secret; that Deputy X intended to kill Hager or

1 physically injure him to end his career, and that when  
2 he -- Deputy Hager requested back-up, the Sheriff's  
3 Department would endanger his life by sending either  
4 Deputy X or his compatriots as back-up.

5 As a result of the foregoing, Mr. Hager could not  
6 rely on back-up from the Sheriff's Department. Therefore,  
7 despite the fact that in his pleading Mr. Hager had to  
8 avoid an expressed Cause of Action in the caption of the  
9 complaint that tied his physical injury to the retaliation  
10 to prevail in his retaliatory discharge claim. Mr. Hager  
11 did put substantial evidence in the record showing that  
12 due to the retaliation of the Sheriff's Department, he  
13 could not call for back-up, and he was injured while  
14 attempting to detain a suspect when he did not have  
15 back-up.

16 There's no other reason for Darren Hager to have  
17 entered so much testimony and evidence for this  
18 work-related injury, other than to support a verdict that  
19 awarded him with damages on account of physical injury.  
20 After all of this evidence was presented to the jury, the  
21 judge told the jurors to consider all of the evidence and  
22 to decide what they thought occurred. The judge also told  
23 the jurors to decide the facts based on the evidence that  
24 made it to the trial. That can be found at Exhibit 4,  
25 page 3904.

1           Further, a California jury is required to make  
2     reasonable inferences that arise from the facts. And  
3     according to California law, those reasonable inferences  
4     are just as satisfactory as direct evidence of those  
5     facts. Appellants contend that the jury, after  
6     considering the evidence of Hager's injury, that it  
7     occurred because he was forced to detain a suspect without  
8     back-up; that Hager was unable to call for back-up because  
9     of the retaliation he experienced after his investigation  
10    was leaked; that the jury knew or reasonably inferred that  
11    his career-ending injury was directly a result of a  
12    retaliation that he was complaining of and the retaliation  
13    for which he was seeking damages.

14           Again, there was no reason to put this in front  
15    of the jury except to seek damages for that physical  
16    injury. Appellants contend the special verdict also  
17    supports this claim. The special verdict awards Darren  
18    Hager two-and-a-half-million dollars in general damages.  
19    Damages for physical injury are general damages.  
20    Appellants' claim is supported by additional credible  
21    evidence offered by declarations produced by law  
22    enforcement personnel after the trial. These are provided  
23    through Exhibits 7 through 10, and I won't go into great  
24    detail right now but encourage you to review them.

25           But I will highlight a few issues. Hager was



1 physically injured while chasing a suspect. Mr. Hager has  
2 been threatened that he will be shot by sheriff's deputies  
3 or LASD employees. Hager is afraid of being killed by his  
4 colleagues because he exposed them. By the way, these are  
5 all in Exhibit 7. Hager cannot go back to work because  
6 deputies are threatening to kill him.

7 Mr. Hager suffers from constant pain and  
8 stiffness of the neck. The cause of Hager's disability is  
9 the retaliation of the Sheriff's Department against him.  
10 The Appellants contend that this was more than adequate to  
11 show the direct connection between physical injury and the  
12 damages that were awarded. However, Appellants  
13 acknowledge that due to his pleading concerns combined  
14 with a verdict for general damages, the reporting of the  
15 payment, there's some ambiguity as to whether the general  
16 damages Hager received are entirely on account of physical  
17 injury.

18 Appellants contend that Tax Court case that has  
19 been previously briefed, Domeny versus Commissioner,  
20 that's Tax Court Memo 2010-9, which was also relevant to  
21 the Office of Tax Appeals decision in the Matter of the  
22 Appeal of Head and Feliciano, supports their position in  
23 this case. The Tax Court in Domeny analyzed a damage  
24 award from an employer to a former employee where no legal  
25 proceedings had been initiated. The matter was settled

1 through a settlement agreement, resulting in damages paid  
2 to the taxpayer.

3           There was no complaint and no evidence before a  
4 jury. The settlement agreement was ambiguous as to the  
5 nature of the damages claimed. The Tax Court analyzed the  
6 evidence that was available; the tax reporting of the  
7 employer in paying the settlement, and the fact that the  
8 employee had advised the employer of her physical injury  
9 before the settlement payment was made. The Tax Court  
10 reasons that since the pair was aware of the injury and  
11 since a portion of the settlement payment was paid in a  
12 manner consistent with damages for physical injury, it was  
13 reasonable to infer the defendant intended some portion of  
14 the payment to be made on account of physical injury, as  
15 required by 104(a)(2).

16           The only contemporaneous evidence of a physical  
17 injury was the fact that the plaintiff advised the  
18 defendant of her physical injury before she was terminated  
19 before the matter was settled. The Tax Court determined  
20 that based on those two facts alone, it was also  
21 reasonable to infer that the employer's attorney  
22 identified her physical injury during negotiations with  
23 the employer. Again, that was just an inference that's in  
24 holding that the damages were received on account of  
25 physical injury.

1           The Tax Court relied on a single factor relating  
2     to tax reporting, a single contemporaneous fact relating  
3     to the employee's physical injury, and two reasonable  
4     inferences based on those facts. The Appellants contend  
5     that this reasoning applies equally here even more so and  
6     should yield a similar result, especially, after the 2012  
7     changes to the 104(a)(2) regulations. Specifically,  
8     Hager's lawsuit did allege a physical injury. It is  
9     undisputed that the Sheriff's Department was aware of his  
10    work-related physical injury. The complaint allege that  
11    Mr. Hager feared for his safety due to retaliation by his  
12    coworkers and the Sheriff's Department.

13           At trial, the jury heard a significant amount of  
14    testimony regarding the retaliation that Mr. Hager  
15    suffered at the hands of the Sheriff's Department and its  
16    employees, including that certain Sheriff's Department  
17    deputies created a threat to Hager's safety if he called  
18    for back-up. At trial the jury learned that Hager was  
19    injured after these incidents while pursuing a suspect  
20    without back-up. The jury was instructed to make all  
21    reasonable inference from the evidence in their  
22    deliberation. The reasonable inference is that Mr. Hager  
23    did not call for back-up because he feared for his  
24    personal safety and the safety of the suspect.

25           The jury awarded Mr. Hager with noneconomic or

1     general damages.  Again, a class of damages that includes  
2     damages for physical injury.  The net payment made by the  
3     Sheriff's Department to Hager after the appeal did not  
4     include any withholding or any other indication  
5     inconsistent with the Appellants' contention that all or a  
6     portion of the award was made on account of physical  
7     injury.

8             The Appellants contend that based on the Tax  
9     Court's reasoning in Domeny and the Office of the Tax  
10    Appeal's decision in the Appeal of Head and Feliciano,  
11    that the complaint, the evidence of the injury discussed  
12    at trial, the verdict and the tax reporting of the payment  
13    by the Sheriff's Department sufficient to show that the  
14    jury connected Mr. Hager's physical injury to the  
15    defendant Sheriff's Department's retaliatory conduct, and  
16    the base on the foregoing.  The jury awarded Mr. Hager  
17    damages on account of his physical injury.

18            That is all.

19            JUDGE LONG:  Thank you.

20            I will turn to my panel members to see if they  
21    have any questions.  Judge Le.

22            JUDGE LE:  This is Judge Le.  I have no questions  
23    for Appellant at this time.

24            JUDGE LONG:  Judge Lambert?

25            JUDGE LAMBERT:  Hi.  This is Judge Lambert.  I

1     have a couple of questions, I think. I think you already  
2     kind of discussed this, but are you saying that the entire  
3     amount should be for physical injury or that there should  
4     be some sort of allocation?

5             MR. HAMILTON: Well, the Franchise Tax Board's  
6     determination was that no amount was on account of  
7     physical injury. So I would suggest at this point is  
8     that's not a reasonable determination.

9             JUDGE LAMBERT: If -- hypothetically, how would  
10    we determine, would you say, an allocation in this case?  
11    Or is there a way to say that the entire amount is  
12    physical injury? Or what basis would we go on to make an  
13    allocation?

14            MR. HAMILTON: Well, you know, because I don't  
15    understand that to be the issue before the panel  
16    currently. But I think that would be the result of a  
17    process occurring after this hearing to identify a  
18    reasonable and objective basis to determine how to  
19    apportion the damages, if there's a portion of the damages  
20    that is not on account of physical injury. I don't think  
21    we have the information in front of us right now to  
22    determine that.

23            JUDGE LAMBERT: Okay. Thanks. Yeah. I was just  
24    asking because sometimes settlement agreement will  
25    allocate the amounts. And sometimes when there's no

1 allocation going that's presented, it provides a question  
2 that has to be examined.

3 MR. HAMILTON: Judge, I understand, and I agree.

4 JUDGE LAMBERT: Thanks. And another question  
5 was -- this was addressed and kind of discussed during the  
6 protest where I believe FTB argued that Labor Code 3602  
7 may prevent remedy in this case because the individual  
8 already received payment through Workers' Compensation.  
9 Can you please address that point?

10 MR. HAMILTON: Sure. I would say that probably  
11 the best example would be the Simpson case -- I'll have to  
12 give you the cite momentarily -- which was a case where  
13 the taxpayer brought a complaint that alleged physical  
14 injuries that were deemed to be appropriate for Workman's  
15 Compensation but weren't brought within that regime, and  
16 the Tax Court still determined that the taxpayer's damages  
17 awarded were on account of physical injury under  
18 104(a)(2).

19 So I would suggest that because this wasn't  
20 within the context of a Worker's Compensation claim does  
21 not mean that the jury did not award Mr. Hager damages on  
22 account of his physical injury.

23 JUDGE LONG: Okay. Thanks. So I guess -- so if  
24 the physical injury was -- if he was awarded some  
25 damages -- I mean, some Worker's Compensation from the

1 physical injury prior to the trial, that you're stating  
2 that it's kind of this is a separate damage resulting from  
3 this retaliation?

4 MR. HAMILTON: Yes. In fact, that's the reason  
5 why Mr. Hager, through his counsel, sought to exclude  
6 evidence of the Worker's Compensation proceeding because  
7 he did not want the evidence of that proceeding to taint  
8 the jury's awarding of damages in this case.

9 JUDGE LAMBERT: Thanks. This is Judge Lambert,  
10 and just one more question. I appreciate it. Just to  
11 clarify what's causing what exactly in terms of what was  
12 argued at the trial. Was the physical injury something  
13 that you're stating was the rise from the retaliation, or  
14 is it all interconnected?

15 MR. HAMILTON: Well, I'm not sure if I understand  
16 the last part of that statement, Your Honor. But I would  
17 suggest that, yeah, the retaliation was threats against  
18 Mr. Hager. And in a -- under a wrongful retaliation  
19 claim, the acts of the employer or the employee are  
20 attributed to the employer, or the employer is responsible  
21 for them. So it was the environment that Mr. Hager was in  
22 where he could not call for back-up that caused him to  
23 retain or attempt to detain a suspect without back-up,  
24 which is what resulted in the injury.

25 JUDGE LAMBERT: Okay. Thanks. Yeah. What I was

1     trying to say was -- was the physical injury kind of one  
2     part of the entire complaint, and there are other parts of  
3     the complaint that were other types of retaliation. So  
4     it's basically the physical injury and then there's these  
5     other incidents that occurred? Or is the physical injury  
6     a focal point of the complaints?

7             MR. HAMILTON, I understand Your Honor. Thank you  
8     for clarifying. No. The physical injury was certainly  
9     not the sole focus of the complaint. It was an instance  
10    of retaliation amongst many other instances.

11            JUDGE LAMBERT: Okay. Thank you for clarifying.  
12    I appreciate it. I don't have any more questions.

13            JUDGE LONG: This is Judge Long. I will save my  
14    questions for after FTB's presentation. If you are ready,  
15    FTB, you may begin.

16            MS. WOODRUFF: Okay. Thank you, Judge Long.

17

18                                 PRESENTATION

19            MS. WOODRUFF: So as you already heard today  
20    Appellant worked as a deputy sheriff for the LASD until  
21    2003. During that time he investigated drug cartels in  
22    the Antelope Valley. He received information during that  
23    investigation that implicated another deputy sheriff in  
24    the disappearance of yet another deputy sheriff. And  
25    because he excused a colleague of involvement in a



1 potential murder, he claims his employer retaliated  
2 against him and fired him from his job.

3 Based on these claims, Appellant sued his  
4 employer for whistle blower retaliation and wrongful  
5 termination. In the same year that Appellant learned he  
6 was to lose his job, he also applied for and received a  
7 medical disability retirement based on back and neck  
8 injuries sustained in 2002 while on duty. He received  
9 those injuries, as you've heard, while chasing a suspect  
10 on foot, tripping, and sliding on the pavement. These  
11 physical injuries were not the basis of his lawsuit,  
12 however. In fact, they were not even described in his  
13 complaint for damages.

14 The physical injuries were also not present in  
15 the jury instructions or the jury verdict. All parties to  
16 the lawsuit acknowledged to the court, during the trial or  
17 in pretrial motions, that the physical injuries had  
18 nothing to do with Appellant's legal claims against his  
19 employer. Finally, even the California Court of Appeal  
20 reiterated in its opinion that Appellant's physical  
21 injuries had nothing to do with his claims for action in  
22 the lawsuit.

23 Now, under Appellants' argument, if a physical  
24 injury is mentioned in a trial, that is enough to exclude  
25 any award income from a taxpayer's gross income even if

1 the physical injury is not the harm for which the  
2 plaintiff seeks regress. Section 104(a)(2) plainly does  
3 not operate that way. Gross income includes all income  
4 from whatever source derived unless a specific statutory  
5 exclusion carves out that income from tax. Those  
6 statutory exclusions are to be construed narrowly, as  
7 stated in the O'Gilvie and Schleier cases cited in  
8 Respondent's opening brief.

9 IRC Section 104(a)(2) excludes from gross income  
10 damages received on account of personal -- physical injury  
11 or physical sickness. Meanwhile, taxpayers must include  
12 punitive damages and damages received for emotional  
13 distress in income. The language of IRC Section 104(a)(2)  
14 is so plain on its face that there really is no need to  
15 even look at the legislative history for the statute.  
16 Damage awards must be granted on account of physical  
17 injury or physical sickness in order to be excluded. But  
18 because Appellant has argued that the regulatory changes  
19 in 2012 support his position, I will address the legislative  
20 history of the statute.

21 Prior to 1996 Section 104(a)(2) did not limit the  
22 exclusion to only physical injury or physical illness. In  
23 1996 Congress amended the statute to require that the  
24 personal injury or illness must be physical in nature in  
25 order to be excluded. The Congressional Committee Report

1     for the amendments states that the intention of a  
2     legislative change was to include in taxable income all  
3     punitive damage awards, as well as recoveries for  
4     nonphysical injuries, and to provide a bright-line  
5     standard for the tax treatment of damage awards. Only if  
6     an action has its origin in a physical injury or physical  
7     sickness will all damages that flow from it be treated as  
8     payments received on account of physical injury or  
9     physical sickness.

10           In 2012 the IRS amended its regulation under  
11     Section 104 to remove the requirement that damages must be  
12     based upon a tort or a tort-type of right. The IRC  
13     explained in Treasury Decision 9573 that the prior  
14     language requiring a tort claim was no longer necessary  
15     because the 1996 statutory change now explicitly require  
16     damages to be based in physical injury in order to be  
17     excluded.

18           So this small regulatory change just allowed the  
19     regulations to keep pace with a shift in the trends in  
20     litigation away from common law tort claims and towards  
21     administrative statutory or no-fault remedies for personal  
22     injury. That regulatory change did not relax the  
23     requirement that damages must have its origin in a  
24     physical injury or physical illness in order to be  
25     excluded from income.

1 Appellant argues that if the jury heard any  
2 evidence of a physical injury, no matter how unrelated to  
3 the basis of the lawsuit, they could possibly have based  
4 their verdict on that physical injury. But all of the  
5 authority interpreting Section 104(a)(2) requires the  
6 damage award have a direct and causal link to the physical  
7 injury in order to exclude the income.

8 Now, courts consistently review all of the  
9 evidence surrounding a claim to see whether it is on  
10 account of physical injury or physical illness. However,  
11 courts place significant weight on the language of a claim  
12 for damages on jury instructions, jury verdicts, or the  
13 expressed terms of a settlement agreement in deciding  
14 whether the income is excludable. Here, all of the  
15 available evidence proves that Appellant's jury award was  
16 not on account of physical injury or sickness.

17 First, Appellant's complaint for damages fails to  
18 describe or mention any physical injuries other than one  
19 sentence stating that Appellant was, quote, "Placed on  
20 medical disability due to injuries previously suffered on  
21 duty," end quote. The complaint's lack of a factual  
22 allegation regarding Appellant's trip and fall is  
23 perfectly rational because the accident was not at issue  
24 in his claims against his employer. Neither the  
25 instructions to the jury nor the jury's verdict make

1     mention of physical injury or physical illness or  
2     allocation to either -- to any of those amounts.

3             Next, Appellant's own counsel sought to exclude  
4     all evidence of physical injury from the trial, arguing  
5     that it was totally irrelevant to his claims. The  
6     opposing counsel agreed the injury had nothing to do with  
7     the claims. However, he succeeded in having that evidence  
8     included because it reflected on the amount of loss of  
9     wages that Appellant could claim. So it's important to  
10    note that Appellant admits he wanted to exclude all of  
11    that evidence regarding the accident because he knew he  
12    had violated his Department's policy in engaging in the  
13    foot pursuit that led to his head and neck injury without  
14    calling for back-up.

15            And while this decision could be chalked up to  
16    mere legal strategy, it proves the point that the physical  
17    injury simply was not the basis for Appellant's claims or  
18    for the jury award. Appellant deliberately chose not to  
19    seek compensation for his head or neck injury, and the  
20    pleadings in the trial transcripts make that clear.

21            Finally, the California Court of Appeal  
22    overturned the damage award for lost wages and back pay.  
23    In its Opinion, the Court stated Hager's medical  
24    disability, that is injury to his neck and back, is  
25    unrelated to any wrongful conduct associated with Hager's

1     termination or damage to his reputation.   So Respondent  
2     does not deny that evidence was produced to the jury of  
3     Appellant's physical injury, but it was not introduced to  
4     seek compensation for that injury.

5             The physical disability evidence was admitted in  
6     the trial for the limited and narrow purpose of figuring  
7     the amount of Appellant's potential future loss wages.  
8     So, in other words, Appellant's employer argued that  
9     because Appellant was already on permanent medical  
10    disability when he was fired, he could not ask for lost  
11    wages or back pay.   And the evidence was admitted to show  
12    that he could not perform the duties of his job due to his  
13    prior neck injury.   Contrary to Appellant's argument, the  
14    fact that the jury heard some testimony about his neck  
15    injury is not sufficient to make the award excludable from  
16    income under Section 104(a)(2).   The award had to be on  
17    account of physical injury or illness, and that's clearly  
18    not the case here.

19            Finally, the OTA issued a recent precedential  
20    opinion in the Appeal of Head and Feliciano, which is  
21    directly on point and should be applied to the case at  
22    hand.   In that case, the taxpayer was a UCLA Medical  
23    School professor who sued his employer, the UC Regents,  
24    for numerous code violations, retaliation for whistle  
25    blowing, discrimination, harassment, defamation, and

1 emotional distress. The taxpayer sought compensation for  
2 these claims, and also stated that he had endured physical  
3 and emotional distress as a result of his employer's  
4 actions.

5           The taxpayer later settled his claims with the UC  
6 Regents, and the settlement agreement noted the taxpayer's  
7 claims for physical suffer, but it failed to allocate any  
8 amount of money to physical injury or illness. The OTA  
9 looked to both the settlement agreement and the complaint  
10 in order to find that the taxpayer's settlement award was  
11 not excludable under Section 104(a)(2). The settlement  
12 release was a broad and general release that made no  
13 allocation to physical injury. The complaint placed  
14 little emphasis on the taxpayer's claimed physical injury.  
15 And so the taxpayer had not established the direct and  
16 causal link required for exclusion under Section 104.

17           In the case at hand, the available evidence  
18 reflects even less emphasis on physical injury than in the  
19 Appeal of Head and Feliciano. Appellant makes no  
20 allegation of physical injury in his complaint. Physical  
21 injury is not named in the jury instructions or jury  
22 award. The trial transcript shows that the evidence of  
23 the Appellant's injury was admitted against his own  
24 attorney's objections and for the narrow purpose of  
25 defeating his claims for future loss wages, rather than

1 proving any grounds of the lawsuit.

2 This should be contrasted with the Tax Court  
3 Memorandum Decision in *Domeny v. Commissioner*, which  
4 Appellant places a great deal of emphasis on. In that  
5 case the taxpayer's main claim against her employer is  
6 that the employer had created a toxic work environment  
7 that exacerbated her symptoms of MS. Her working  
8 conditions caused her to have severe MS flare-ups, and she  
9 was physically unable to work for over a year due to her  
10 employer created hostile work environment.

11 Further, the settlement agreements segregated the  
12 payments into three distinct payments with differing tax  
13 and reporting treatments. The Tax Court found that under  
14 those facts, at least a part of the settlement award was  
15 to compensate the taxpayer for her physical injury.

16 The difference in *Domeny* is that the taxpayer's  
17 origin of her claim against her employer was rooted in a  
18 physical injury. The employer's actions in creating a  
19 hostile work environment directly caused her physical  
20 suffering. The settlement agreement memorialized that by  
21 segregating the proceeds into three payments and applying  
22 different reporting treatment.

23 Although Appellant now blames his former employer  
24 for his tripping and falling during the foot pursuit, this  
25 argument is a novel one that was not presented to the jury



1 as a basis for compensation. Appellant cannot show any  
2 direct and causal link between his jury award and physical  
3 injury because there was none. His damage award is not  
4 excludable under IRC Section 104(a)(2) or any other  
5 section. And, accordingly, he must include it in his  
6 taxable income for tax year 2015.

7 Thank you.

8 JUDGE LONG: This is Judge Long. Thank you.

9 Judge Le, do you have any questions for either  
10 party?

11 JUDGE LE: This is Judge Le. I do not have any  
12 questions.

13 JUDGE LONG: Judge Lambert, do you have any  
14 questions?

15 JUDGE LAMBERT: This is Judge Lambert. I don't  
16 have any questions. Thanks.

17 JUDGE LONG: This is Judge Long. I do have a  
18 couple of questions. Let me look through my notes real  
19 quickly.

20 Mr. Hamilton, can you clarify what your argument,  
21 about reasonable inferences, what -- can you restate what  
22 the jury -- what reasonable inferences the jury was making  
23 at the time of their decision?

24 MR. HAMILTON: Sure. The purpose of raising the  
25 instructions and the general rule of law in California to

1 a jury is required -- that a jury is required to make  
2 reasonable inferences is to support that even if you took  
3 the position that there wasn't a clear enough connection  
4 made based on the substantial evidence of the retaliation  
5 and the evidence of the injury that resulted from the  
6 retaliation, that language is included.

7 That argument is included to indicate the juror  
8 would have reasonably inferred that the reason why he --  
9 he reason why Mr. Hager didn't call for back-up, which  
10 resulted in his injury, was because of the retaliatory  
11 conduct. He feared that once again the Sheriff's  
12 Department was going to send the very same deputy who  
13 threatened to kill him to come and provide back-up to him.  
14 That's what I was referencing that law for.

15 JUDGE LONG: Understood. Thank you. So  
16 regarding Exhibit 7, Mr. Hamilton, is that something that  
17 was presented to the jury at the trial?

18 MR. HAMILTON: This was -- and I apologize if I  
19 indicated to the contrary. That was present in his  
20 Worker's Compensation case.

21 JUDGE LONG: Understood. Thank you. Okay. I  
22 think that's the last question I have for now.

23 I believe we are going to take about a  
24 five-minute recess to give everyone a break and our  
25 stenographer a break. So we will reconvene at about 2:25.

1 (There is a pause in the proceedings.)

2 JUDGE LONG: It looks like we're all back. I  
3 think we can continue with Appellants' rebuttal.

4 Would you like to still have a rebuttal,  
5 Mr. Hamilton?

6 MR. HAMILTON: Yes, Judge. Thank you.

7 JUDGE LONG: Okay. Please proceed.

8 MR. HAMILTON: Certainly.

9

10 REBUTTAL STATEMENT

11 MR. HAMILTON: You know, I have several things to  
12 say. The first is that, you know, I think that the  
13 Franchise Tax Board is mischaracterizing what is required  
14 to show the causal connection between damages and a  
15 physical injury. They acknowledge that the pleading rules  
16 for 104(a)(2) changed, but they really ignore the  
17 application, specifically, that you don't have to allege a  
18 tort, and you can have a physical injury in a case that  
19 doesn't involve a tort, and it was expressly to allow that  
20 to occur.

21 You know, to the extent their position relies on  
22 what isn't in the complaint, the Appellants contend that's  
23 not the relevant inquiry under 104(a)(2). It doesn't mean  
24 that the complaint isn't relevant. It's just one thing  
25 that is considered amongst all of the other things.

1 Appellants are arguing that the significant amount of  
2 evidence of retaliation that caused Mr. Hager to fear for  
3 his life, specifically in a situation where he would need  
4 back-up, tied to the fact that he was injured in a  
5 situation where he sustained an injury without back-up  
6 shows the causal connection.

7           The relevant inquiry is the reason why the  
8 payment was made. I think it's important to understand  
9 the -- you know, for damages to be awarded on account of  
10 physical injury, we don't even have to have a complaint.  
11 So to suggest then that the caption for the complaint must  
12 include a personal injury Cause of Action or a Cause of  
13 Action in tort for a physical injury, you know, it's  
14 fundamentally wrong. It's not what is required.

15           What is required is that in this instance, when  
16 the jury awards the damages, that we be aware of what the  
17 jury saw and heard and their instructions. We contend  
18 that what the jury saw and heard, and their instructions  
19 would have caused them to understand that in this  
20 circumstance the reason why there was so much time spent  
21 during the trial talking about Mr. Hager's injury was  
22 because he sought damages through this complaint for that  
23 injury.

24           I think also that the Domeny case has been  
25 misrepresented. That case was a retaliation case. It

1     just happens that in that case the retaliation exacerbated  
2     the injuries or the -- exacerbated the Plaintiff's  
3     condition, and that's what caused the physical injury. In  
4     fact, that's why we argue that it's applicable here  
5     because it shows how a situation where a person files a  
6     complaint for workforce retaliation can result in a  
7     claim -- or can result in damages being awarded on account  
8     of physical injury.

9             Obviously, there wasn't a complaint. But  
10    ultimately the matter was settled, and the Tax Court  
11    determined that a portion of the damages were awarded not  
12    account of physical injury. So to suggest that after that  
13    holding not having a Cause of Action in the caption  
14    tying -- making the connection between the complaint and  
15    the physical injury and damages is inaccurate. It's not  
16    what the law says. In fact, that's why Domeny is relevant  
17    here. That's why we think it has a lot of value in this  
18    situation. It shows that workforce retaliation can result  
19    in a physical injury.

20            I think there's another issue which is to the  
21    extent, you know, the Franchise Tax Board has taken this  
22    position that Mr. Hager, through his attorney, didn't want  
23    to talk about the injury misconstrues the nature of the  
24    motion and in limine. And I don't even know that it's  
25    relevant, given that it wasn't in front of the jury, and

1     it was the jury that determined the damages that were  
2     awarded to Mr. Hager.

3             But Mr. Hager's attorney sought to exclude that  
4     because it was evidence that he had received damages for  
5     his physical injury. He sought to exclude it under the  
6     collateral source rule because he didn't want it to  
7     prevent him from recovering in this case. So I would say  
8     that it actually supports Appellants' position here. It's  
9     saying this was excluded because we don't want it to taint  
10    the jury when they're looking at the evidence of the  
11    injury in relation to retaliation here.

12            I think that the reference to the appellate case,  
13    you know, I -- it really doesn't mean much. This occurred  
14    after the trial occurred. It was an appeal of the case  
15    not in any way related to the general damages that we're  
16    talking about here. It was an appeal of the economic  
17    damages. So a comment made by Mr. Hager's attorney in  
18    that regard doesn't -- shouldn't be given much weight, if  
19    any, about what this case was about because those comments  
20    were contemporaneous to the complaint.

21            They weren't presented in front of the jury. It  
22    was a discussion that was had in a trial about a different  
23    type of damages that was appealed. And so to use that as  
24    a basis to overturn or to suggest that the damages that  
25    the jury awarded after hearing all of this evidence of

1     this injury and the retaliation, I think, is a mistake.  
2     And it should be given little weight, if any. Certainly,  
3     it was not something that was in front of the jury when  
4     they were deciding to award damages.

5             I think, you know, I would summarize the  
6     Appellants' position with the idea that, you know, that we  
7     agree that the Appeal of Head and Feliciano applies. We  
8     agree that Domeny applies, and we think they support the  
9     Appellants' case here. Unlike the Appeal of Head, there  
10    was an allegation of physical injury in the complaint.  
11    And unlike the Appeal of Head, there was a significant  
12    amount of evidence about the injury and the circumstances  
13    under which it was caused, and the circumstances of the  
14    retaliation that Mr. Hager suffered that he contends  
15    resulted in his physical injury.

16            And I think that those distinctions speak to  
17    exactly what this panel was saying was missing from the  
18    Appeal of Head and Feliciano. I think that the Appellants  
19    in this case have shown that when looking at a complaint  
20    or a trial that occurs, to focus solely on the complaint  
21    or a hyper-technical analysis of specific issue without  
22    looking at the overall complaint, the balance of the  
23    evidence that was introduced at trial, that's what shows  
24    the intent of the person who paid the damages. That's  
25    what shows what the jury was intending to award when it

1       awarded Mr. Hager two-and-a-half-million dollars.

2               Oh, I would also add that, you know, based on the  
3       Simpson case, you know, the fact that there was a Worker's  
4       Compensation matter does not preclude Mr. Hager from  
5       seeking damages for work-related injury under a  
6       retaliatory conduct statute. And, in fact, it would  
7       suggest that the changes to 104(a)(2) that were expressly  
8       identified to apply to a complaint under a statute that  
9       doesn't have a broad range of remedies applies here. This  
10      case is one of the reasons why that amendment was made.

11             That's all, Your Honor.

12             JUDGE LONG: Thank you.

13             I'll ask my panel members again if they have any  
14      questions, starting with Judge Le.

15             JUDGE LE: This is Judge Le. I have one question  
16      for Respondent, and correct me if I am wrong. I think the  
17      jury instruction mentions emotional distress. So I guess  
18      my question becomes, is it possible that the jury award  
19      could have included emotional distress attributable to a  
20      physical injury?

21             MS. WOODRUFF: Yes, it's possible. However, it's  
22      important to note that the way the law responds to  
23      emotional distress from a physical injury is that only the  
24      medical costs are covered -- are going to be excludable.  
25      So it's really only the hard cost that an Appellant --



1       that a taxpayer incurs, such as medical care and direct  
2       cost that would be excludable.

3               JUDGE LE:   Okay.   Thank you.   No further  
4       questions.

5               JUDGE LONG:   Judge Lambert, do you have any  
6       questions?

7               JUDGE LAMBERT:   This is Judge Lambert.   I don't  
8       have any questions.   Thanks.

9               JUDGE LONG:   Thank you.   I have a couple of  
10       questions.   So regarding the physical injury -- so,  
11       Mr. Hamilton, is it without any testimony about the  
12       physical injury at the trial with -- is it your position  
13       that there would have been no general damages awarded?

14              MR. HAMILTON:   No, Your Honor.   I think that in  
15       light of the context of the many different allegations of  
16       retaliation that, ultimately, there would have been  
17       general damages awarded both in the form of Mr. Hager's  
18       distress, reputation damage, and his physical injury.

19              JUDGE LONG:   So based on that, how do -- how  
20       would we make an allocation if there was -- if it was  
21       based on physical injury and based on the distress and  
22       damage to reputation?

23              MR. HAMILTON:   Well, Your Honor, I agree that is,  
24       to me, the next challenge that has to overcome.   But I  
25       think that the parties should brief the issue.   I think

1       that there has to be a reasonable way of allocating those  
2       damages.

3               JUDGE LONG:   And then -- so Mr. Hamilton spoke  
4       about FTB's position about FTB's reliance on the  
5       complaints.   So I was wondering if Ms. Woodruff could  
6       expound upon that.   Is it FTB's position -- how much  
7       weight do you think we should be giving a complaint?   And  
8       could we, as Mr. Hamilton said, make a decision without a  
9       complaint?

10              MS. WOODRUFF:   Well, I think it's correct that we  
11       need to look at the evidence, and that's exactly what we  
12       did in this case.   The complaint, however, does provide a  
13       great deal of evidentiary value because that's where the  
14       Appellant, you know, the taxpayer states exactly what they  
15       are requesting and why and explains the basis for their  
16       claims against, you know, their employer or whoever else  
17       that they're suing.

18              And in this case there simply wasn't any physical  
19       injury or physical sickness explained or described or  
20       really mentioned in any way other than to, you know, one  
21       brief mention of saying that he was already placed on  
22       medical disability.   It simply wasn't the grounds for his  
23       relief.   And in order to make a claim under  
24       Section 104(a)(2), the award has to be -- has to have its  
25       origin in physical injury or physical sickness, and that's

1 not the case here.

2 JUDGE LONG: Thank you. And my last question,  
3 again, is for FTB. I was wondering if you can expound  
4 upon the Simpson case that Mr. Hamilton has been referring  
5 to or maybe just in general. Could there be a damages  
6 award if there was a Worker's Compensation case as well?

7 MS. WOODRUFF: Well, that's an issue that really  
8 has not been briefed or looked at in this case so far. So  
9 I would need to look closer at the Simpson case in order  
10 to answer that specific question. But I think the fact  
11 that the Appellant did not allege his physical injury  
12 because he was trying to avoid any kind of issue, you  
13 know, showing that he'd already been compensated for his  
14 physical injury, just goes -- it proves the point that it  
15 just wasn't the basis for his entire allegation, his  
16 entire complaint against his employer. He wasn't seeking  
17 redress or compensation for physical injury, and that's  
18 what Section 104(a)(2) requires.

19 JUDGE LONG: Thank you.

20 MR. HUNTER: Judge Long, Hunter here, if I could  
21 dovetail on what Ms. Woodruff had to say. If I understand  
22 it correctly, the Simpson stands for the proposition that  
23 if a plaintiff received compensation for physical injury  
24 under the Worker's Compensation statutes, they are still  
25 allowed to file a civil complaint against their employer

1     for personal injury. They are not foreclosed from doing  
2     so. They get compensated for physical injuries under the  
3     State Worker's Compensation Program, but that's not a bar  
4     to them filing a personal injury complaint for some other  
5     Cause of Action alleging damages due to physical injury  
6     down at the Superior Courthouse.

7             What we're saying is that's not what here. In  
8     the complaint, you should still look at it because when  
9     you settle a lawsuit or a jury awards damages, they're  
10    doing so because they filed a complaint. So in that  
11    complaint, you not only have the causes of action that  
12    spell out why the Plaintiff is requesting damages,  
13    monetary compensation, you also have the prayer that  
14    spells out specifically what they're asking for.

15            Here there's nothing in the prayer that says I'm  
16    asking for -- the taxpayer was requesting damages for  
17    compensation for physical injury. It simply is not there.  
18    So that's the way this panel should also look at this  
19    complaint as one piece in this body of evidence.

20            Thank you.

21            JUDGE LONG: Thank you.

22            MR. HAMILTON: Your Honor, if I may respond?

23            JUDGE LONG: Yes, I was going to give you --

24            MR. HAMILTON: Thank you.

25            The complaint does allege a physical injury. It

1 doesn't state a Cause of Action in the caption for damages  
2 for that physical injury. It does pray for relief  
3 according to proof. And while we agree that the complaint  
4 is an important form of evidence, it ignores the reality  
5 that during a trial when evidence is introduced and a jury  
6 is impaneled, the jury makes its decision based on the  
7 evidence produced at trial and the reasonable inferences  
8 from that evidence.

9 And we contend that when Mr. Hager asked for  
10 damages according to proof and then provided evidence of  
11 his physical injury, provided evidence of the retaliation  
12 that created it, he proved that he suffered physical  
13 damages and physical injury as a result of the retaliation  
14 that he was complaining of in the complaint.

15 JUDGE LONG: Thank you.

16 MR. HUNTER: One sentence?

17 JUDGE LONG: You may proceed.

18 All right. So I believe that will conclude our  
19 hearing, unless, Mr. Hamilton, you have anything else to  
20 add before we end our hearing today?

21 MR. HAMILTON: One moment, Your Honor. I think  
22 we're good, Your Honor. Thank you very much.

23 JUDGE LONG: Thank you.

24 So this -- my apologies. This concludes the  
25 hearing. The panel will meet and decide the case based on

1 the briefings, the arguments presented, and the exhibits  
2 admitted as evidence today. We will send both parties a  
3 written opinion no later than 100 days from today.

4 Thank you for your participation. This case is  
5 now submitted, and the record is closed.

6 (Proceedings adjourned at 2:47 p.m.)

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I further certify that I am in no way interested  
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I have hereunto subscribed my name this 9th day  
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