

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * *

WYNN LAS VEGAS, LLC d/b/a WYNN LAS VEGAS,

Appellant,

vs.

YVONNE O'CONNELL,

Respondent.

Electronically Filed
Mar 07 2019 02:12 p.m.
Elizabeth A. Brown
Clerk of Supreme Court
NO. 70583

MOTION FOR LEAVE TO FILE AMICUS BRIEF

Pursuant to NRAP 29(c), Caesars Entertainment Corporation (hereinafter, occasionally, "Caesars") hereby moves for leave to file an amicus curiae brief in support of appellant Wynn Las Vegas, LLC.

Moving party's interest [NRAP 29(c)(1)]

Caesars Entertainment Corporation is primarily a holding company with no independent operations of its own. Indirect subsidiaries of Caesars Entertainment Corporation own and/or operate thirteen hotel/casino properties in Nevada, commonly known by the following names: Bally's Las Vegas, Caesars Palace Las Vegas, The Cromwell, Flamingo Las Vegas, Harrah's Las Vegas, Harrah's Lake Tahoe, Harrah's Laughlin, Harrah's Reno, Harveys Lake Tahoe, The LINQ Hotel & Casino, Paris Las Vegas, Planet Hollywood Resort & Casino, and Rio All-Suites Hotel & Casino.

These hotel/casino resorts have millions of square feet of property accessible to the public (including casinos, restaurants, hotel guest rooms, entertainment venues, shops, convention facilities, common areas, and other resort areas). The resorts serve hundreds of thousands of guests each year.

Collectively, indirect subsidiaries of Caesars Entertainment Corporation receive literally hundreds of premises liability personal injury claims each year, dozens of which end up in litigation. Many of these claims are slip-and-fall cases, such as the present case involving appellant Wynn and respondent O'Connell. In most of these premises liability claims, the necessary requirement of fault—i.e., whether the owner/operator of the resort breached a duty owed to a guest-claimant-plaintiff—is a function of whether the owner/operator of the property had constructive notice of the allegedly dangerous, accident-causing condition that the guest encountered. Thus, Caesars is keenly interested in Nevada case law dealing with premises liability and constructive notice. Caesars and its counsel believe the present appeal is a good case in which this Court can provide clarification of standards relating to those topics, and we believe we can provide the Court with valuable insight from an amicus standpoint.

Reasons why an amicus brief is desirable [NRAP 29(c)(2)]

Constructive notice of a dangerous condition involves an evaluation of the circumstances of each case, with consideration of various factors, including,

potentially, the length of time in which the alleged dangerous condition existed on the property, and whether the owner/operator of the property conducted reasonable and adequate inspections of the property. Presently, many cases are decided by juries that are given no expert guidance whatsoever regarding the applicable standards—thereby leaving the juries to engage in rank speculation regarding reasonableness of the frequency and quality of inspections by property owner/operators.

Unfortunately, Nevada appellate opinions have not provided clear guidance regarding the fact that a plaintiff needs to present actual **evidence** proving constructive notice, and regarding the type and quality of proof needed for constructive notice. The lack of clarity on this point is illustrated by the fact that the Nevada Court of Appeals rendered a split decision on the constructive notice issue in this case. With this Court having granted review of the Court of Appeals decision, this appeal now presents the Court with a good opportunity to provide clarification on proof requirements for constructive notice.

Caesars is one of many companies in the hotel/casino industry in Nevada. These businesses need to know the legal framework in which they operate. Guidance from the Court will have statewide impact. Indeed, the impact of this Court's decision will have an impact for virtually all commercial properties open to the public—not just hotel/casino resorts.

Considering the number of hotel/casino resorts that indirect subsidiaries of Caesars entities own and/or operate—and the number of premises liability claims that they must handle through litigation—we believe Caesars can provide the Court with an important amicus perspective in the analysis of constructive notice. Accordingly, an amicus brief from the standpoint of a holding company such as Caesars, whose indirect subsidiaries own and/or operate on significant pieces of property, is desirable and will be helpful in assisting the Court with its effort to formulate its opinion in this case.

Timeliness of this motion [NRAP 29(f)]

As a general rule, an amicus motion is made during the briefing stage of an appeal. Under NRAP 29(f), an amicus brief should be filed no later than seven days after the brief of the party being supported by the amicus brief. However, Rule 29(f) expressly allows the Court to “grant leave for later filing.” Caesars respectfully contends that good cause exists for filing the amicus brief.

In the present case, there were two appeal dockets arising out of the district court case. No. 70583 was an appeal from the judgment, and No. 71789 was an appeal from a post-trial award of attorneys’ fees. The dockets were consolidated, and briefs on the merits were filed by the parties during the normal briefing stage of the appeals. The appeals were then transferred to the Court of Appeals. That Court deconsolidated the appeals and issued a published opinion in No. 71789, dealing

with the award of attorneys' fees (2018 Adv. Op. 67), and a separate unpublished Order of Affirmance in No. 70583, dealing with constructive notice and other issues relating to the judgment. The published opinion dealing with attorneys' fees contained a footnote (Op. at 2, fn. 1) mentioning the docket in this appeal, without mentioning constructive notice or any of the other appellate issues in this docket.

On January 25, 2019, this Court issued its order granting review of the unpublished decision of the Court of Appeals in this docket. Caesars and the undersigned counsel became aware of the order shortly thereafter. Upon learning that this Court granted review under NRAP 40B, appellate counsel for Caesars obtained copies of the briefs and the Rule 40B papers filed by the parties, then evaluated these materials to determine whether to request permission for an amicus brief. Once that determination was made, we have worked diligently to prepare the brief as soon as possible, and it is being presented with this motion approximately six weeks after the Court granted the petition for review.

The present motion is being made during Supreme Court review of the Court of Appeals decision. Such review is a relatively new process, and there are few available precedents involving amicus participation during this somewhat late stage of appellate proceedings. Nonetheless, research reveals that this Court has allowed amicus participation during the Court's NRAP 40B review of a Court of Appeals disposition. *E.g.*, *Dezzani v. Kern & Associates, Ltd.*, 134 Nev. Adv. Op. 9, 412

P.3d 56 (2018) (opinion on Supreme Court review of Court of Appeals decision; opinion identifies amicus; Supreme Court's online docket shows that amicus brief was filed after other briefing, during the time for proceedings on Supreme Court review of Court of Appeals disposition).

Additionally, this Court has allowed amicus participation during post-briefing and post-disposition stages of appeals involving en banc review of panel decisions. *E.g.*, *Stone Hollow Avenue Trust v. Bank of America, NA*, 2016 WL 8613879 (December 21, 2016; No. 64955; unpublished order) (Court granted amicus motion during en banc reconsideration stage of appeal); *In re Cay Clubs*, 130 Nev. 920, 924 fn. 2, 340 P.3d 563, 566 fn. 2 (2014) (Court allowed amicus brief during en banc reconsideration stage of appeal).

This Court has also allowed amicus participation during post-briefing and post-disposition rehearing stages of appeals. *E.g.*, *Lioce v. Cohen*, 124 Nev. 1, 174 P.3d 970 (2008) (opinion identifies amici; Supreme Court's online docket shows that Court requested amicus briefs from two organizations during rehearing stage of appeal); *Fullerton v. State*, 116 Nev. 906, 908 fn. 1, 8 P.3d 848, 849 fn. 1 (2000) (Court allowed filing of amicus brief during rehearing stage of appeal, after Court had already issued an opinion); *Labastida v. State*, 115 Nev. 298, 299 fn. 1, 986 P.2d 443 (1999) (Court granted motion for filing amicus brief on rehearing, after Court had already issued an opinion); *Powers v. United Services Auto. Assn.*, 115 Nev. 38,

40-41, 979 P.2d 1286, 1287-88 (1999) (Court allowed a “multitude of entities” to file amicus briefs on rehearing, after Court had issued published opinion).

This Court has granted post-briefing amicus participation in other contexts as well. *E.g.*, *Sharpe v. State*, 131 Nev. Adv. Op. 32, 350 P.3d 388, 389 (2015) (Court ordered amicus briefs after oral argument); *Jenkins v. District Court*, 109 Nev. 337, 339 fn. 2, 849 P.2d 1055, 1056 fn. 2 (1993) (Court granted amicus motion filed more than four months after writ petition had been filed).

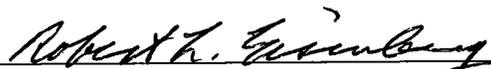
These precedents demonstrate that the NRAP 29(f) time-limit for filing amicus briefs is liberally construed to promote and encourage amicus participation, including cases where amicus entities were presumably unaware of the pending cases until after the appellate courts issued their dispositions. Even though the amicus entities in such cases are attempting to provide their input after the appeals have been fully briefed, such participation is particularly helpful in cases involving issues of first impression and issues with important statewide precedential value.

In the present case, the split decision (2–1) of the Court of Appeals in the Order of Affirmance demonstrates that Nevada case law needs to be clarified regarding the concept of constructive notice in premises liability cases. This Court’s opinion on the issue could have a huge impact on commercial businesses throughout Nevada, with a significant impact on countless personal injury cases arising out of

accidents at hotel/casino properties and other commercial properties to which the public is invited. Amicus participation will help the Court reach the correct result.

Accordingly, under these circumstances, Caesars respectfully contends that the Court should “grant leave for later filing” under NRAP 29(f).

Dated: March 7, 2019


Robert L. Eisenberg (SBN 956)
Lemons, Grundy & Eisenberg
6005 Plumas Street, Third Floor
Reno NV 89519
775-786-6868

COUNSEL FOR AMICUS
CAESARS ENTERTAINMENT

CERTIFICATE OF SERVICE

I certify that I am an employee of Lemons, Grundy & Eisenberg and that on this date a Motion for Leave to File Amicus Brief was filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the master service list as follows:

Brian Nettles
Jarrod Rickard
Christian Morris
Christopher Kircher
Lawrence Semenza

DATED: 3/7/19

Christi Shiga