IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Appellant,

vs.

YVONNE O'CONNELL,

Respondent.

NO. 70583

MOTION TO RECONSIDER AND REVIEW ACTION OF A SINGLE JUSTICE

Pursuant to NRAP 27(b) and (c)(2), Caesars Entertainment Corporation (Caesars) moves for reconsideration and review of the order of a single justice, which denied Caesars' motion for leave to file an amicus curiae brief. Respondent filed opposition to Caesars' motion on March 28, 2019. Under NRAP 27(a)(4), Caesars had seven days in which to file a reply. Without waiting to see if Caesars would file a reply on or before the April 4, 2019 deadline, Justice Cadish issued an order on April 1, 2019, denying Caesars' motion.

Under NRAP 27(b), a party adversely affected by a procedural order may file a motion to reconsider the order. Further, under NRAP 27(c)(2), the court may review the action of a single justice.

Caesars respectfully contends that if the single justice had not issued the order before Caesars had an opportunity to file a reply, the reply would have demonstrated that the arguments in respondent's opposition—which the one-justice order

essentially adopted—were based upon old, inapplicable law. The reply would have also demonstrated that Caesars satisfied the purported, non-precedential standards for an amicus brief cited by respondent.

If the single justice had not ruled before the time expired for Caesars' reply, the reply would have shown that respondent's reliance on *Ryan v. Commodity Futures Trading Comm'n,* 125 F.3d 1062 (7th Cir. 1997) was misplaced, as was reliance on that case in this court's one-justice order. *Ryan* was **not** the opinion of the Seventh Circuit. It was merely an opinion "in chambers" by one circuit judge. No other judge of the Seventh Circuit signed it or endorsed its view. The *Ryan* judge's strict attitude against amicus participation has been roundly criticized and rejected by other federal appellate judges.

For example, in *Neonatology Associates v. CIR,* 293 F.3d 128 (3d Cir. 2002), authored by now United States Supreme Court Justice Alito, the court rejected *Ryan*'s attitude against amicus participation. The court cited *Ryan* as an example of a case within "a small body of judicial opinions that look with disfavor on motions for leave to file amicus briefs." *Id.* at 130. The court rejected the argument that an amicus must be impartial and disinterested, holding that this limited role of amicus "became outdated long ago." *Id.* at 131.

The *Neonatology* court's opinion by Justice Alito also rejected the argument that an amicus seeking leave to file a brief must show that the party to be supported

is either unrepresented or inadequately represented. The court held that "such a requirement is most undesireable." *Id.* at 132. "Even when a party is very well represented, an amicus may provide important assistance to the court." *Id.* Denying amicus motions whenever the party supported is adequately represented by counsel would in some cases "deprive the court of valuable assistance." *Id.*

Neonatology also urged a broad reading of amicus rules, noting that "it is preferable to err on the side of granting leave." *Id.* at 133. If an amicus brief turns out to be unhelpful, the appellate court can make its determination by disregarding arguments in the brief. But on the other hand, if a good brief is rejected, the court "will be deprived of a resource that might have been of assistance." *Id.* The *Neonatology* court noted that a restrictive policy on amicus briefs "may also convey an unfortunate message about the openness of the court."[1] *Id.*

If Caesars had been allowed to file its reply before the single justice issued the April 1, 2019 order, the reply would have also established that Caesars has an

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[1] This court's one-justice order relied upon and quoted from the discredited and outdated "in chambers" *Ryan* decision. The only other case cited in this court's order was *Miller-Wohl Co. v. Comm'r of Labor & Indus.*, 694 F.2d 203 (9th Cir. 1982). That case, however, did not involve a motion for leave to file an amicus brief. Instead, the opinion only dealt with a motion by amicus for an award of attorneys' fees from the unsuccessful appellant. The court denied the motion because an amicus curiae is not a party to litigation, and is therefore not entitled to an award of attorneys' fees. In dicta, the court mentioned the classic role of amicus curiae, without any analysis of that role. *Id.* at 204.

interest in other cases that may be affected by the decision in this case. As this court's one-justice order recognizes, an interest in some other case creates an appropriate circumstance for participation by amicus curiae.[2]

Caesars' motion established that Caesars receives hundreds of premises liability personal injury claims each year, dozens of which end up in litigation, and most of which involve issues of constructive notice of the allegedly dangerous, accident-causing condition that the guest encountered. Despite the motion's showing about many other similar cases, respondent's opposition contended that Caesars did not make a sufficient showing on this factor. Caesars' reply would have provided the court with specific examples of currently-pending personal injury cases against Caesars and/or its indirect affiliates, in which constructive notice is or is likely to be at issue. For example:

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[2] NRAP 29 contains procedural requirements for an amicus motion, and the rule requires the moving party to show that "an amicus brief is desirable." Other than the vague "desirable" showing, the rule provides no guidance for amicus counsel who is preparing a motion for leave to file a brief. Nor has Caesars' appellate counsel been able to locate any Nevada opinions providing guidelines or factors for an amicus motion. And counsel's Westlaw search found no published or even unpublished Nevada case that adopts the *Ryan* factors discussed in the April 1, 2019 one-justice order. When Caesars' counsel prepared the motion in the present case, he was unaware that this court would be applying factors from the outdated *Ryan* decision and other non-binding sources. Consequently, he did not discuss those factors, but he would have done so in the reply, if the court had not ruled on the motion before the reply time expired.

Muckridge v. Harrah's Las Vegas, Clark County No. A-16-748256-C[3]

Clopot v. Desert Palace, LLC; Clark County No. A-18-773078-C

Ansara v. Caesars Ent. Corp.; Clark County No. A-18-779035-C

Estate of Hartman v. Harrah's Las Vegas; Clark County No. A-18-783099-C

Williams v. Paris Las Vegas; Nevada Supreme Court No. 77788

Caesars' reply would have also drawn attention to the opposition's argument that "Courts across the country (**including this Court**) have uniformly held that amicus briefing is improper where such briefing would simply supplement the briefing of a party competently represented by counsel...." (Opp. 1; emphasis added). Despite its assertion about holdings by "**this Court,**" respondent's entire nine-page opposition failed to cite a single Nevada opinion on any point, let alone on the argument against amicus briefs supplementing the briefing of a party competently represented by counsel. The opposition's only citation on this point is to *Ryan.* As noted above, *Ryan's* view on this point has been rejected by Justice Alito's opinion in *Neonatology*, which reflects the modern view of amicus.

Finally, Caesars' motion explained that it has an important perspective on the constructive notice issue, because Caesars owns and/or operates 13 hotel/casino properties in Nevada, with millions of square feet of property accessible to the public, and with hundreds of thousands of guests each year. Caesars also explained

[3] Harrah's Las Vegas is preparing to file its notice of appeal in this case.

that it has literally hundreds of premises liability personal injury claims each year, many of which are slip-and-fall cases involving constructive notice of the allegedly dangerous condition involved in the case. With multiple hotel/casino properties throughout all of Nevada, Caesars has an important perspective of the constructive notice issue, a recurring issue in litigation against Caesars and/or its indirect affiliates. Caesars' brief will provide the court with valuable insight on the constructive notice issue, specifically in terms of issues that neither party fully-briefed.[4]

Accordingly, for the reasons expressed above, Caesars requests the court to reconsider and review the action of the single justice in denying Caesars' motion for leave to file an amicus brief, granting it leave to file the previously-proposed amicus.

Dated: April 3, 2019

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[4] In this case, as Caesars would have described in its brief, this court has issued four decisions on the issue of constructive notice; and Caesars contends that the arguments of the parties are not entirely supported by those decisions. Even though Caesars believes a clarification of the law is necessary, and that clarifying the law would necessarily benefit one party in this litigation, Caesars' intent in asking for leave to file an amicus was "to supplement the efforts of counsel by drawing the court's attention to law that might have escaped consideration[,]" which necessarily means it would have added "'something distinctive to the presentation of the issues.'" Order Denying Mot. 2 (alteration in brackets) (citations omitted).

CERTIFICATE OF SERVICE

I certify that I am an employee of Lemons, Grundy & Eisenberg and that on this date the foregoing 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: 4/3/19