IN THE SUPREME COURT OF THE STATE OF NEVADA

WYNN LAS VEGAS, LLC, d/b/a WYNN LAS VEGAS, a Nevada Limited Liability Company, Appellant, vs. YVONNE O'CONNELL, an individual, Respondent.	Supreme Court Case No.: 70583

Appeal from Judgment on Jury Verdict entered December 15, 2015,
District Court Case No. A-12-671221-C, Eighth Judicial District of Nevada

RESPONDENT YVONNE O'CONNELL'S OPPOSITION TO MOTION TO RECONSIDER AND REVIEW ACTION OF A SINGLE JUSTICE

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NRAP 26.1 DISCLOSURE

The law firm representing Respondent Yvonne O'Connell in the District Court, in the Court of Appeals, and in the Nevada Supreme Court is NETTLES | MORRIS.

Dated this 10th day of April, 2019.

NETTLES | MORRIS

/s/ Christian M. Morris

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I. ARGUMENT

Caesars's Motion To Reconsider appears to lack even the superficial semblance of a valid basis. Caesars seeks reconsideration on the basis that Justice Cadish denied its Motion without waiting for Caesars to file a Reply brief. *Motion*, 1. Of course, the Nevada Rules of Appellate Procedure expressly provide that this Court may act on a Motion without waiting even for a *response*, let alone a Reply brief. *See* Nev. R. App. P. 27(b).

On that flawed basis, Caesars attempts to argue as to what it would have accomplished with such a Reply brief. *Motion*, 1-5. However, Caesars's visions of its hypothetical Reply brief are either irrelevant or factually incorrect. The *Ryan* decision cited in Plaintiff's Opposition is not "old, inapplicable law," and it has not been "roundly criticized and rejected by other federal judges." In fact, the relevant portion of *Ryan* has been cited at least 92 times in state and federal court—and exactly *one* of those 92 citations treated *Ryan* negatively.

In addition, Caesars's panoply of slip-and-fall cases does not render its proposed *amicus* brief useful—as Caesars comes from precisely the same perspective as Defendant Wynn. Caesars's statement that it "is one of many companies in the hotel/casino industry in Nevada[,]" and that it often must defend against slip and fall litigation similar to this case, does not militate in favor of

permitting its *amicus* brief—as Defendant Wynn is another of those "many companies."[1]

Justice Cadish was correct to deny Caesars's Motion For Leave, as nothing Caesars could have presented in a Reply brief would have overcome the fatal flaws of that Motion. Caesars brings nothing to the table that is not already brought by Defendant Wynn Las Vegas LLC ("Defendant Wynn").[2]

A. CONTRARY TO CAESARS'S ASSERTIONS, JUDGE POSNER'S DECISION IN *RYAN* IS NOT "OLD, INAPPLICABLE LAW," AND IT HAS NOT BEEN "ROUNDLY CRITICIZED AND REJECTED BY OTHER FEDERAL JUDGES."

Caesars asserts that Plaintiff's argument, based on Seventh Circuit Judge Richard Posner's decision in *Ryan v. Commodity Futures Trading Commission*, 125 F.3d 1062 (7th Cir. 1997), was "based on old, inapplicable law." *Motion*, 1-2. Caesars cites two purported bases for this assertion: (1) that *Ryan* was an opinion "in chambers" by a single Circuit Judge; and (2) that its "strict attitude against

[1] Caesars also claims that "[Plaintiff]'s [O]pposition contended that Caesars did not make a sufficient showing on this fact." *Motion*, 4. However, Plaintiff's Opposition made no such contention, instead correctly noting that <u>no showing</u> regarding this "factor" could render Caesars's proposed *amicus* brief useful, as it would simply repeat the arguments made by Defendant Wynn. *Opposition*, 6-8.

[2] Pursuant to NRAP 28(d), to promote clarity, the parties are referred to herein by their respective designations in the District Court, *i.e.*, "Plaintiff" and "Defendant."

amicus participation has been roundly criticized and rejected by other federal appellate judges." *Opposition*, 2.

The first assertion is irrelevant, as *Ryan* is not binding on this Court and therefore was cited solely as persuasive authority. In addition, while *Ryan* was indeed written solely by Judge Posner and therefore did not reflect the views of the Seventh Circuit, it was later cited by a three-judge panel of the Seventh Circuit (led by Judge Posner) that adopted its reasoning. *Nat'l Org. for Women, Inc. v. Scheidler*, 223 F.3d 615, 616-17 (7th Cir. 2000).

The second assertion is factually incorrect, as *Ryan* has been cited many, many times for its reasoning regarding the acceptance or prohibition of *amicus* briefs, and those citations—with only *one* exception—are positive in their treatment of *Ryan*.

While Westlaw summaries of Citing References are of course by no means authoritative, it is worth noting that the specific Headnote 3 in *Ryan* discussing when *amicus* briefs should be allowed or prohibited has been cited *90 times* by various federal courts—including the Third Circuit (1 citation), the Fifth Circuit (1), and the Seventh Circuit (2). *See Figure 1, below.*

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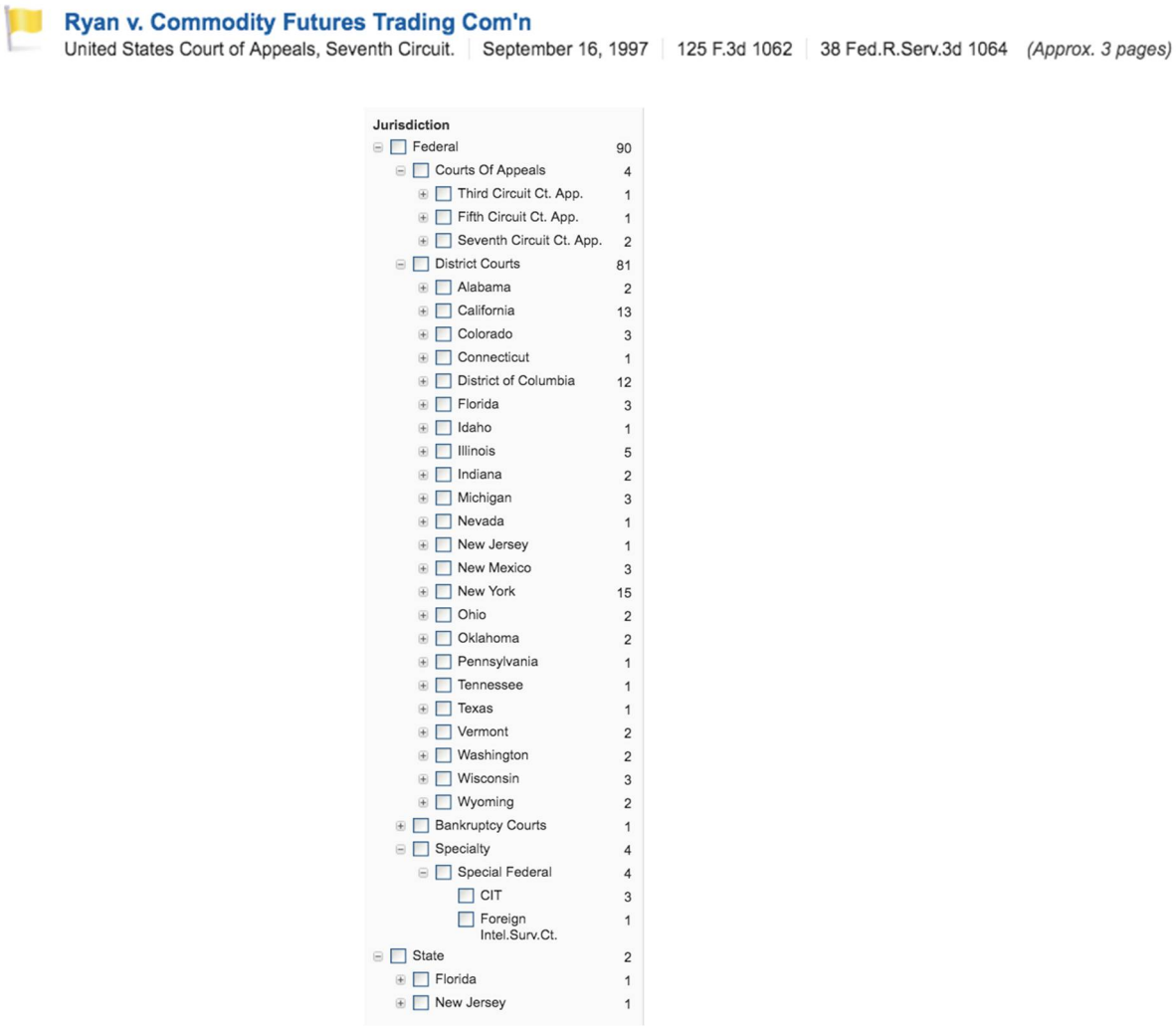
In addition, *Ryan* has been cited 81 times by District Courts in no fewer than 22 states and the District of Columbia, 4 times by federal "specialty" courts, and twice by state courts. *Id.*



Notably, of these 92 citations, exactly *one* has been negative toward *Ryan*—the *Neonatology Associates* decision discussed at length by Caesars. *Motion*, 2-3 (citing *Neonatology Assocs. v. CIR*, 293 F.3d 128 (3d Cir. 2002)).

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Presumably, the unique status of *Neontology Associates* in treating *Ryan* negatively explains why Caesars spends two pages (of six) discussing that decision and references *not one single other case giving* Ryan *negative treatment*—despite Caesars's baseless and unsourced claim that *Ryan* "has been roundly criticized and rejected by other federal appellate judges." *Id.* at 2. To wit, *there **is** no other case featuring negative treatment* of this portion of *Ryan*. To the contrary, *Ryan* represents widely accepted reasoning regarding the acceptance or prohibition of *amicus* briefs.

B. CAESARS'S EXPOSURE TO SLIP-AND-FALL CASES DOES NOT CREATE VALUE FOR ITS PROPOSED *AMICUS* BRIEF.

Caesars claims that its Reply brief would have provided current examples of its slip-and-fall cases involving issues of constructive notice, thereby "mak[ing] a sufficient showing on this factor." *Opposition*, 4. However, all the slip-and-fall cases in the world would not add value to Caesars's proposed brief that was not already presented by Defendant Wynn.

As Justice Cadish correctly noted, "Caesars does not explain how it has unique information or a perspective unique from [Defendant Wynn]'s, and it does not appear that Caesars'[s] proposed brief 'adds something distinctive to the presentation of the issues.'" *Order Denying Motion*, 2 (citing 16AA Charles Alan Wright *et al.*, FEDERAL PRACTICE & PROCEDURE § 3975, at 313 (4th ed. 2008)).

II. CONCLUSION

Justice Cadish was authorized by the Nevada Rules of Appellate Procedure to act on Caesars's Motion For Leave before briefing was completed—especially because Caesars's Motion lacked any merit whatsoever, and certainly could not have been salvaged by the addition of a Reply brief.

Caesars's Motion To Reconsider adds nothing to this equation. Its claims that the *Ryan* decision cited in Plaintiff's Opposition is "old, inapplicable law" and that *Ryan* "has been roundly criticized and rejected by other federal appellate judges[ ]" are factually incorrect. In fact, *Ryan* has been widely cited and relied upon, with 91 of 92 citations (98.9%) treating it positively, and with the sole negative treatment (1.1%) forming the *entire basis* for Caesars's assertion that *Ryan* is universally disfavored and "inapplicable."

Caesars's proposed *amicus* brief would add nothing of value to Defendant Wynn's own brief, and its acceptance would unfairly prejudice Plaintiff, as the admission of this additional brief would effectively serve as a supplemental brief in support of Defendant Wynn.

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Justice Cadish was absolutely right to deny Caesars's original Motion For Leave, and Caesars's Motion To Reconsider raises no argument that remotely casts doubt on the correctness of that denial. Plaintiff therefore respectfully requests that Caesars's Motion To Reconsider be denied.

Dated this 10th day of April, 2019.

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III. CERTIFICATE OF COMPLIANCE PER NRAP 28.2

1. I hereby certify that this brief complies with the formatting requirements, the typeface requirements, and the type style requirements of NRAP 32 because this brief has been prepared in a proportionally-spaced typeface using Microsoft Word For Mac v. 15.34 (2017), in 14-point Times New Roman type. It complies with the length requirements of NRAP 32(d)(2) because it does not exceed 10 pages.

2. I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found.

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3. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 9th day of April, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of April, 2019, I served the foregoing, **RESPONDENT YVONNE O'CONNELL'S OPPOSITION TO MOTION TO RECONSIDER AND REVIEW ACTION OF A SINGLE JUSTICE**, on counsel by this Court's electronic filing system, to the persons and at the addresses listed below:

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