

IN THE SUPREME COURT OF THE STATE OF NEVADA

MAIDE, L.L.C. D/B/A GENTLE SPRING
CARE HOME; SOKHENA K. HUCH;
MIKI N. TON,

Appellants,

v.

CORINNE R. DILEO AS SPECIAL
ADMINISTRATOR FOR THE ESTATE
OF THOMAS DILEO; THOMAS DILEO,
JR., AS STATUTORY HEIR TO
THOMAS DILEO; AND CINDY DILEO,
AS STATUTORY HEIR TO THOMAS
DILEO,

Appellees,

Supreme Court No.: 81804

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APPELLANTS' RESPONSE TO THE NEVADA JUSTICE ASSOCIATION'S
MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Appellants, MAIDE, L.L.C. D/B/A GENTLE SPRING CARE HOME;
SOKHENA K. HUCH; and MIKI N. TON by and through their attorneys of
record, LEWIS BRISBOIS BISGAARD & SMITH LLP, file their Opposition to
THE NEVADA JUSTICE ASSOCIATION'S MOTION FOR LEAVE TO FILE
AMICUS CURIAE BRIEF. This Response is made and based upon the papers and
pleadings on file herein, the following Memorandum of Points and Authorities, and
any oral argument allowed by the Court during a hearing of this matter.

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POINTS AND AUTHORITIES

I. INTRODUCTION

The Nevada Justice Association (“NJA”) should not be allowed to intervene in this appeal. Its proposed amicus brief adds nothing of substance that has not already been addressed by Plaintiffs in their Answering Brief. NJA’s briefing only regurgitates and drills further down into the points that Plaintiffs have already addressed. NJA’s briefing functions only to protract this appeal. It does not offer any unique information or context to this issues presented to this Court. Moreover, NJA presents arguments on whether non-signatory heirs can be bound to an arbitration agreement. That issue is not part of this appeal. Defendants did not make this issue part of the appeal or discuss it in their briefing. Based on this, NJA’s intervention in this appeal serves no purpose other than to prolong the appeal and provide Plaintiffs with a second bite at the apple. For these reasons, NJA should be precluded from intervening in this appeal.

II. LEGAL ARGUMENT

A. NJA Proposes to Argue Issues Either Not Before the Court or Already Sufficiently Briefed by Respondents

NRAP 29 governs the filing of amicus briefs. Except in circumstances not at issue here, an amicus curiae must seek leave of court to file its brief. NRAP 29(a). The proposed amicus curiae must file a motion for leave to file an amicus brief that sets forth “the movant’s interest . . . and the reasons why an amicus brief is

desirable.” NRAP 29(c). “The vast majority of amicus curiae briefs are filed by allies of litigants and duplicate the arguments made in the litigants' briefs, in effect merely extending the length of the litigant's brief. Such amicus briefs should not be allowed.” *Ryan v. Commodity Futures Trading Comm’n*, 125 F.3d 1062, 1063 (7th Cir. 1997). Amicus briefing should be allowed “when a party is not represented competently or is not represented at all [or] when the amicus has an interest in some other case that may be affected by the decision in the present case..” *Id.* Such briefing should otherwise only be allowed when the amicus “has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide.” *See id.*

In this case, NJA’s proposed briefing does not add any unique perspective or information to the Court. It only places a finer point or otherwise echoes the arguments already made by Plaintiffs. NJA suggests that it has interest to this case because the issues raised in Defendants’ appeal implicate the right to a jury trial under the Nevada constitution. This is not an interest specific to NJA, and it makes no showing it has more than a vague, generalized interest in this appeal. Such a general interest that affects literally every citizen and organization in Nevada is not sufficient by itself to merit amicus intervention, especially here where NJA does nothing more than rely on the right to a jury trial as a pretext to regurgitate or amplify the same arguments made in Plaintiffs’ Answering Brief.

Other than making a hollow nod toward the Nevada constitution, NJA offers no broader context to Plaintiffs' arguments. In fact, it spends the bulk of its brief discussing the minutiae relative to the interpretation of NRS 597.995 and whether this statute may be satisfied by strict or substantial compliance. These were the exact issues raised in Plaintiffs' Answering Brief. NJA's briefing, therefore, is merely duplicative and does nothing more than protract this appeal and waste the parties' and Court's time and resources. Amici should be permitted to offer unique information or perspective, not to provide the parties whom they support a second bite at the apple to raise arguments that could or should have been raised in the parties' briefing. But that is precisely what NJA does. For these reasons, NJA's proposed briefing serves no real purpose in this appeal. NJA, therefore, should be precluded from intervening.

NJA's intervention should also be prevented because it seeks to brief issues that are not part of this appeal. It is axiomatic that this Court cannot consider matters not before it on appeal. *See Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n. 3, 252 P.3d 668, 672 n. 3 (2011) ("Issues not raised in an appellant's opening brief are deemed waived."). An exception exists for issues of constitutional dimension, which the Court can consider *sua sponte*. *Palmieri v. Clark Cnty.*, 131 Nev. 1028, 1047 n. 14, 367 P.3d 442, 455 n. 14 (Ct. App. 2015). Here, no weighty issues of constitutional import are implicated. Absent any such

issues, no matter *not* before the Court on appeal in this matter should be considered here.

NJA defies this notion and presumes to instruct the Court as to an issue not raised by Appellants in their Opening Brief and, thus, not before the Court for its consideration. Namely, NJA assures the Court that “it can assist this Court in issues relating to whether heirs in wrongful death, medical malpractice nursing home cases are bound by the signature of the decedent to arbitrate” Motion at p. 3. These same principles apply to Amicus Curiae briefing. “Absent exceptional circumstances, amicus curiae cannot expand the scope of an appeal to implicate issues not presented by the parties or seek relief beyond that sought by the parties.” C.J.S. Amicus Curiae § 17 (2013).

Amicus Curiae must accept the issues made and [the] propositions urged by the appealing parties, and any additional questions presented in a brief filed by an amicus curiae will not be considered. [Citations omitted.] Otherwise, amicus curiae, rather than the parties themselves, would control the issues litigated. It would also be inappropriate for amicus curiae unilaterally to augment the scope and thus the cost of litigation to the opposing party.

Lance Camper Manufacturing Corp. v. Republic Indemnity Co., 109 Cal. Rptr. 2d 515, 522 n. 6 (Cal. Ct. App. 2001).

Defendants did not raise the issue of whether heirs in wrongful death, medical malpractice nursing home cases are bound by the signature of the decedent

to arbitrate in their Opening Brief. NJA should not be permitted to discuss that subject as they propose in the instant Motion. Such gratuitous opinions are irrelevant to this matter and so would not assist the court. Instead, it would merely give the NJA an opportunity to express unsolicited opinions on matters this court has not been asked to decide.

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III. CONCLUSION

NJA has not shown that there is an appropriate basis to intervene in this appeal. Its proposed briefing does nothing more than discuss issues already briefed by Plaintiffs and otherwise protracts this appeal. Therefore, Defendant respectfully request this Court deny NJA's Motion to file an Amicus Curiae Brief.

Dated this 10th day of May, 2021.

LEWIS BRISBOIS BISGAARD & SMITH LLP

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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of May, 2021, the foregoing APPELLANTS' RESPONSE TO THE NEVADA JUSTICE ASSOCIATION'S MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF was filed electronically with the Nevada Supreme Court. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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/s/ *Roya Rokni*

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