

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

ERRYS DEE DAVIS, A MINOR,  
THROUGH HER PARENTS TRACI  
PARKS AND ERRICK DAVIS; THOMAS  
ZIEGLER; FREDERICK BICKHAM;  
AND JANE NELSON,

Petitioners,

vs.

THE EIGHTH JUDICIAL DISTRICT  
COURT OF THE STATE OF NEVADA  
IN AND FOR THE COUNTY OF  
CLARK; THE HONORABLE SUSAN  
JOHNSON, DISRICT JUDGE; AND  
THE HONORABLE VERONICA  
BARISICH, DISTRICT JUDGE,

Respondents,

and

STEPHANIE A. JONES, D.O.; DANIEL  
M. KIRGAN, M.D.; IRA MICHAEL  
SCHNEIER, M.D.; MUHAMMAD  
SAEED SABIR, M.D.; AND JAYSON  
AGATON, APRN,

Real Parties in Interest.

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Oct 12 2021 07:27 a.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

**No. 83306**

**OPPOSITION OF REAL PARTIES IN INTEREST TO NJA'S MOTION TO  
FILE AMICUS BRIEF**

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Real parties in interest hereby oppose the Nevada Justice Association's (NJA) motion to file an *amicus* brief supporting the petitioners.

## ARGUMENT

### **A. General principles for *amicus* weigh against granting the motion.**

Principles governing participation as *amicus curiae* are clear. “There is no inherent right to file an *amicus curiae* brief with the Court.” *Long v. Coast Resorts, Inc.*, 49 F.Supp.2d 1177, 1178 (D. Nev. 1999). Rather, a court has broad discretion to either permit or reject the appearance of *amicus curiae*. *Hazlin v. Botanical Laboratories, Inc.*, 2015 WL 11237634 (S.D. Cal., 2015), citing *Gerritsen v. de la Madrid Hurtado*, 819 F.2d 1511, 1514 n.3 (9th Cir. 1987). “The vast majority of *amicus curiae* briefs are filed by allies of litigants and duplicate the arguments made in the litigant’s briefs, in effect merely extending the length of the litigant’s brief. Such *amicus* briefs should not be allowed. They are an abuse.” *Ryan v. Commodity Futures Trading Com’n*, 125 F.3d 1062, 1063 (7th Cir. 1997).

Unnecessary *amicus* briefs are a “real burden on the court system” because they require a court to study the unnecessary brief, and require a response by the opposing party. See *National Organization for Women, Inc. v. Scheidler*, 223 F.3d 615, 616-17 (7th Cir. 2000). An unnecessary *amicus* brief can also be used to circumvent page limitations on the brief of the party supported by the *amicus* brief. *Id.*

An *amicus* brief should only be allowed by the court when (1) a party is not represented competently by counsel, or not represented at all; (2) when the *amicus* has an interest in some other case that may be affected by the decision in the present one; or (3) 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. *Ryan*, 125 F.3d at 1063; *Re2con, LLC v. Telfer Oil Co.*, 2012 WL 6570902 at \*1 (E.D. Cal. 2012).

**B. An *amicus* brief is unwarranted here.**

**1. Petitioners are represented by competent counsel.**

Petitioners are represented by competent legal counsel who has done a thorough job presenting arguments supporting the petition. The NJA does not argue otherwise.

**2. The NJA has not demonstrated an interest affected by this writ proceeding.**

Neither the motion nor the proposed brief identifies any other pending case that may be affected by the decision in this writ proceeding. The motion only makes a conclusory statement that this case “will reach far beyond the parties,” and that defendants in medical malpractice cases are “repeatedly” taking certain positions. Motion at 2. But the motion fails to identify any example of such a case, and the motion provides no support for its conclusory argument. Such vague hypothetical

arguments should be deemed insufficient in a motion seeking leave to file an *amicus* brief.

**3. The proposed brief merely agrees with the petition.**

The NJA's proposed brief, for the most part, merely agrees with arguments in the petition (except as otherwise discussed below). The proposed brief primarily just rephrases the petition's arguments. Argument by an *amicus* that merely echoes a party's analysis of the law is of no use to a court. *See Ryan*, 125 F.3d at 1063; *see also Long*, 49 F.Supp.2d at 1178 (noting an *amicus* is to be "a friend of the court, not friend of a party").

Further, the NJA has not shown that it possesses unique insight that is unavailable to petitioners' counsel and will affect the outcome of the dispute. Even if petitioners' counsel was not competent or had not already addressed various arguments, the proposed *amicus* brief would not fill this gap. To the contrary, the proposed brief, despite its length, boils down to little more than regurgitating the petition's arguments, with some rephrasing of the arguments (except as discussed below).

**C. The *amicus* brief will unfairly prejudice real parties in interest.**

Where an *amicus* brief does not assist the court in determining the outcome of the present dispute, it does little more than extend the length of a party's brief. *See Gabriel Technologies Corp. v. Qualcomm Inc.*, 2012 WL

849167, at \*4 (S.D. Cal., 2012) (“An *amicus* brief is meant to assist the court and not merely extend the length of the litigant's brief”). If the NJA’s motion is granted, the petitioners will essentially be given two bites at the apple. The petition itself consists of 26 pages. The proposed *amicus* brief is 19 pages in length, essentially giving petitioners approximately 50 percent more for their briefing of the issues. This would effectively expand the arguments in favor of petitioners, to the prejudice of real parties in interest.<sup>1</sup>

**D. The brief improperly raises new contentions.**

An appellate court will decline to consider *amicus* arguments that were not raised by the parties on appeal. In *Potter v. Potter*, 121 Nev. 613, 119 P.3d 1246 (2005), the Nevada Legislature and the Family Law Section of the State Bar of Nevada filed *amicus* briefs, as requested by this court. The Family Law Section’s brief, however, raised new issues that were not raised in the context of the appeal. Therefore, the *Potter* court refused to review the new *amicus* issues. *Id.* at 619, n.16, 119 P.3d at 1250, n.16.

Here, the writ petition barely mentions NRCP 8. The petition provides quotation snippets from the rule in six lines on only one page. Pet. 13. The petition

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<sup>1</sup> If the court grants the motion and allows the brief to be filed, real parties in interest will seek permission to file a supplemental answer in opposition to the brief’s arguments.

contains no analysis of the rule and no attempt to apply the rule to the issues in the petition.

On the other hand, the proposed *amicus* brief discusses Rule 8 numerous times on at least six different pages. The brief cites Rule 8 so many times that the table of authorities has the word *passim* instead of page numbers. The brief attempts to provide analyses of the rule that were never provided in the petition. In essence, the *amicus* brief attempts to beef up the petition's minimalist arguments regarding Rule 8 by greatly expanding arguments far beyond anything contemplated in the petition. This court should not allow such appellate gamesmanship.

The *amicus* brief also contains a separate section with three pages of arguments dealing with wrongful death pleading requirements in medical malpractice cases. NJA Br. at 16-18. The brief provides extensive discussion of the wrongful death statute, NRS 41.085. None of the four lawsuits in this writ petition are wrongful death cases. And the writ petition itself does not cite or discuss the wrongful death statute or wrongful death pleading requirements. Thus, the *amicus* brief is seeking an advisory opinion on an irrelevant issue that was never raised in the petition. Even if this court grants the motion and allows the NJA to file an *amicus* brief, this court should strike the section dealing with wrongful death pleading and the wrongful death statute.

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## CONCLUSION

The NJA's *amicus* motion fails to establish good cause for filing the brief.

The motion should be denied.

Dated: Oct. 11, 2021

/s/ Robert L. Eisenberg  
ROBERT L. EISENBERG (SBN 950)  
Lemons, Grundy & Eisenberg

*Attorneys for real parties in  
interest Jones, Kirgan, Schneier, and Sabir*

### **CERTIFICATE OF SERVICE**

I certify that I am an employee of LEMONS, GRUNDY & EISENBERG and that on this date the foregoing document 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:

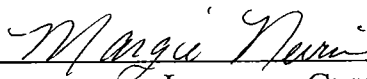
Breeden & Associates, PLLC  
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I further certify that on this date I served copies of the foregoing, postage prepaid, by U.S. mail to:

Hon. Veronica Barisich  
Department 5  
Eighth Judicial District Court  
200 Lewis Avenue  
Las Vegas, NV 89155

Hon. Susan Johnson  
Department 22  
Eighth Judicial District Court  
200 Lewis Avenue  
Las Vegas, NV 89155

DATED this 11<sup>th</sup> day of October, 2021.

  
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EMPLOYEE OF LEMONS, GRUNDY & EISENBERG