

**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,  
DISTRICT 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.

Case No. 83306

Electronically Filed  
Oct 19 2021 05:23 p.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

**REPLY IN SUPPORT OF NJA'S MOTION TO FILE AMICUS BRIEF**

## **I. LEGAL ARGUMENT**

### **A. GENERAL PRINCIPLES FOR *AMICUS* BRIEFING WEIGH IN FAVOR OF GRANTING THE MOTION.**

When an *amicus* submission “will assist the judges by presenting ideas, arguments, theories, insights, facts, or data that are not found in the briefs of the parties,” it should be admitted. *Prairie Rivers Network v. Dynegey Midwest Generation, LLC*, 976 F.3d 761, 763 (7th Cir. 2020) (internal citation omitted). The Seventh Circuit reiterated that “an *amicus* brief should be additive- it should strive to offer something different, new, and important.” *Id.* (citing *National Organization for Women, Inc. v. Scheidler*, 223 F.3d 615, 617 (7th Cir. 2000)). This Court specifically allows *amicus* briefs as outlined in NRAP 29.

The Third Circuit has also declared that “it is preferable to err on the side of granting leave” for parties to submit *amicus* briefs. *Neonatology Associates, P.A. v. C.I.R.*, 293 F.3d 128, 133 (3rd Cir. 2002). The Third Circuit pointed out that it will be relatively easy for a court to disregard unhelpful or poor-quality briefs because they are easy to spot, but “if a good brief is rejected, the [court] will be deprived of a resource that might have been of assistance.” *Id.* Therefore, the Third Circuit concluded that courts “would be well advised to grant motions for leave to file *amicus* briefs” unless the briefs are blatantly pointless, and the Circuit Court further emphasized that this is “the *predominant* practice in the [Federal Circuit] [C]ourts of [A]ppeals.” *Id.* (emphasis added and internal citations omitted). In sum, *amici* parties are freely granted leave to file their briefs and general principles behind them weigh in favor of their submissions.

**B. AN *AMICUS* BRIEF IS WARRANTED IN THE CASE AT BAR.**

Defendants cite to *Ryan v. Commodity Futures Trading Com’n*, 125 F.3d 1062 (7th Cir. 1997) to suggest that NJA should not be allowed to submit an *amicus* brief. First, Defendants submit that because Petitioners (collectively “Plaintiffs”) are represented by competent legal counsel, NJA should be barred from submitting a brief. The *Ryan* court’s exact language regarding this prong states: “An *amicus* brief should normally be allowed when a party is not represented competently or is not represented at all.” *Id.* at 1063 (emphasis added). That language says absolutely nothing about NJA being prohibited from submitting an *amicus* brief just because Plaintiffs are well-represented. Moreover, the Third Circuit in *Neonatology Associates* noted that “[e]ven when a party is very well represented, an *amicus* may provide important assistance to the court.” *Neonatology Associates*, 293 F.3d at 132. Citing to Rule 29 of the Federal Rules of Appellate Procedure, the Third Circuit, thus, affirmatively disagreed that an *amicus* brief is only permitted when a party is unrepresented or inadequately represented. *Id.*

Second, Defendants point to the *Ryan* court’s second prong: “[W]hen the *amicus* has an interest in some other case that may be affected by the decision in the present case,” its brief should be admitted. *Ryan*, 125 F.3d at 1063. All parties are well-aware that the Nevada Justice Association “is an organization of independent lawyers who represent consumers and share the common goal of improving the civil justice system.” *Our Mission*, NEVADA JUSTICE ASSOCIATION (last visited Oct. 12, 2021), <https://www.nevadajustice.org/>

index.cfm?pg=mission. NJA is a non-profit educational organization which strives to improve this state's civil justice system, ensure the people's access to courts, and tirelessly fight for people's rights. As this Court is aware, NJA has submitted many *amicus* briefs in the past on many important cases and legal issues facing Nevada. The case at bar is concerned with extremely important and disputed legal issues regarding medical malpractice, professional negligence, torts, and healthcare in general that affect the entire state and its people. Therefore, NJA has an exceptional interest in this case, as well as other cases, that addresses several important issues of statewide public importance.

Finally, the *Ryan* court notes that an “amicus [should have] 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 (internal citation omitted). In the case at bar, Defendants erroneously claim that NJA “merely agrees with arguments in the petition” and the “proposed brief primarily rephrases the petition's arguments.” Opp. at 4. Indeed, Defendants go so far as to contend that NJA's *amicus* brief is duplicative of the *writ* petition that is already on file. Interestingly, however, Defendants simultaneously argue in their opposition and joinder that NJA's *amicus* brief raises new issues.

Indeed, NJA has offered not only supplemental authorities beyond the parties' briefing, but it has also offered a fresh perspective to this Court on how the decision of the presented issues will affect similarly-situated parties who are not parties to this litigation. NJA's *amicus* brief clearly contains unique information and perspective on issues

presented that will greatly assist this Honorable Court.

Defendants further contend that NJA is not permitted to support Plaintiffs' position in this original proceeding. For this contention, Defendants cite to foreign authority, while ignoring the plain language of NRAP 29(d), which requires the amicus brief to identify which party it supports. Thus, Defendants' contention on this point is without merit.

In sum, under any case law, NJA's proposed *amicus* brief is clearly warranted in the case at bar.

**C. THE *AMICUS* BRIEF WILL NOT UNFAIRLY PREJUDICE ANYONE.**

NJA has established that its *amicus* brief will definitively assist this Court in determining the outcome of the present dispute. Thus, Defendants' claim that NJA's brief will unfairly prejudice them is simply without merit. Defendants suggest that with the submission of the brief, Plaintiffs "will essentially be given two bites at the apple." Opp. at 5. But, such a generalized argument, if accepted, would undercut the entire purpose of NRAP 29. Indeed, the true motivation behind Defendants' opposition appears to be that since they have no amicus support for their own position, somehow Plaintiffs should be deprived of amicus support that is specifically authorized by NRAP 29. Accordingly, the Court should reject Defendants' "prejudice" argument.

**D. NJA'S *AMICUS* BRIEF DOES NOT RAISE NEW CONTENTIONS.**

Defendants cite to *Potter v. Potter*, 121 Nev. 613, 119 P.3d 1246 (2005) to argue that NJA's brief should not be accepted. Opp. at 5. In that case, in a footnote, the *Potter*

court declined to address issues that two *amici* parties raised in their briefs which were not raised in the original appeal. *Potter*, 121 Nev. at 619 n.16, 119 P.3d at 1250 n.16. In the case at bar, Defendants complain that the proposed *amicus* brief discusses NRCP Rule 8 too elaborately and in too much detail. However, they clearly concede that the *writ* petition does mention and discuss Rule 8. As a result, Defendants' argument is misplaced.

Finally, respondents complain about NJA discussing the wrongful death statute and wrongful death pleading requirements because they were allegedly not considered in the writ petition. Opp. at 6. However, one of the major questions to be answered in the writ petition is whether different causes of action, including a cause of action for wrongful death, should or should not be "subsumed" into a single cause of action for professional negligence. NJA's discussion about this topic, or any other topic in its brief, raises no new issue that prevents its *amicus* brief from being accepted by this Court.

## **II. CONCLUSION**

For the foregoing reasons, NJA respectfully requests that this Court grant leave to file NJA's proposed *amicus* brief.

DATED this 19th day of October 2021.

CLAGGETT & SYKES LAW FIRM

/s/ Micah S. Echols

Micah S. Echols, Esq.

Nevada Bar No. 8437

*Attorneys for Amicus Curiae*

*Nevada Justice Association*

## **CERTIFICATE OF SERVICE**

I hereby certify that the foregoing **REPLY IN SUPPORT OF NJA'S MOTION TO FILE AMICUS BRIEF** was filed electronically with the Nevada Supreme Court on the 19th day of October 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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Laura J. Ginnett (Hall Prangle & Schoonveld, LLC/Chicago)

Ian M. Houston (Hall Prangle & Schoonveld, LLC/Las Vegas)

Zachary J. Thompson (Hall Prangle & Schoonveld, LLC/Las Vegas)

Sean M. Kelly (McBride Hall)

Robert C McBride (McBride Hall)

I further certify that the foregoing document was emailed to the following:

The Honorable Susan H. Johnson, District Judge  
Eighth Judicial District Court, Department 22  
200 Lewis Avenue Las Vegas, Nevada 89101  
[Dept22LC@clarkcountycourts.us](mailto:Dept22LC@clarkcountycourts.us)

The Honorable Veronica Barisich, District Judge  
Eighth Judicial District Court, Department 5  
330 South 3rd Street, Las Vegas, Nevada 89101  
[Dept05LC@clarkcountycourts.us](mailto:Dept05LC@clarkcountycourts.us)

/s/ Anna Gresl

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Anna Gresl, an employee of  
CLAGGETT & SYKES LAW FIRM