

IN THE SUPREME COURT, STATE OF WYOMING

CLIFFORD C. BAIN,)
)
 Petitioner (Plaintiff),)
)
 v.)
)
 CITY OF CHEYENNE, a Wyoming)
 municipality and EDWARD)
 BROOKMAN,)
)
 Respondents(Defendants))

Case No.: S-24-0225

**RESPONDENTS’ RESPONSE OPPOSING WYOMING TRIAL LAWYERS
ASSOCIATION’S MOTION FOR LEAVE TO FILE AMICUS BRIEF**

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Respondents (Defendants) City of Cheyenne (the “City”) and Edward Brookman, (“Brookman”) by and through their undersigned attorney, submit this opposition to the motion for leave to file an amicus brief (the “*Motion*”), filed by the Wyoming Trial Lawyers Association (“WTLA”). Respondents oppose the *Motion* because the factors that favor allowing the proposed amicus are not present here and the motion should be denied on the grounds set forth below.

ARGUMENT

1. A motion to file an amicus brief must state:
 - (1) the movant’s interest in the issue raised in the case;
 - (2) the reasons an amicus brief is appropriate and desirable;
 - (3) the view of the movant with respect to whether a party is not represented competently or is not represented at all.
 - (4) the interest of the amicus in some other case that may be affected by the decision in this case before the court; and
 - (5) any unique information or perspective the amicus has that can be of assistance to the court beyond that of the lawyers for both parties to provide.

W.R.A.P. 7.12(b).

2. While WTLA’s motion contains sections addressing each of the topics set out in the rule, the substance of the motion shows WTLA is effectively seeking to file a brief as an amicus of the Petitioner and not of the court. Further, WTLA offers no unique

information or perspective to the case or to the issues presented and WTLA's proposed brief is not justified.

3. WTLA's purported reason for seeking to file an amicus brief is that "the parties have not raised certain legal principles, chiefly, the distinction between the municipal immunity of counties, cities, and other local governmental entities as distinguished from the sovereign immunity of the State of Wyoming." *Motion*, p. 3. This misrepresents the arguments of the parties below and in this proceeding. The Wyoming Attorney General addressed the distinction between sovereign and governmental immunity in the proceedings before the District Court. TR-180 - 184. Petitioner also noted the distinction in its briefing to the District Court and in this proceeding as well. TR-94 – 95; TR-268; *Petitioner's Brief*, p. 9. In fact, the Petitioner in summarizing his argument in his opening brief stated "Finally, Petitioner asserts that the present action is not one against the State and is therefore an additional basis for the inapplicability of Article 1, § 8." *Petitioner's Brief*, p. 9.

4. This Court has stated that the appropriate purpose of an *amicus curiae* "is to aid the court on questions of law" by calling attention to facts, laws or circumstances **"pertaining to the issues the court may overlook."** *Wyoming Coal. v. Wyoming Game & Fish Comm'n*, 875 P.2d 729, 734 (Wyo. 1994)(emphasis in original). "The orthodox view of *amicus curiae* was, and is, that of an impartial friend of the court – not an adversary party in interest in the litigation." *United States v. Michigan*, 940 F.2d 143, 164-65 (6th Cir. 1991)(italics in original). Instead, "the vast majority of *amicus curiae* briefs are filed by

allies of litigants and duplicate the arguments in the litigant’s briefs, in effect merely extending the length of the litigant’s brief.” Petitioner argued the issue of whether the distinction between governmental and sovereign immunity both below and in his opening brief. It is improper to allow an amicus to then extend Petitioner’s brief with nearly fifteen pages of additional argument on the topic.

5. Even if WTLA believes the Petitioner failed to raise the distinction between governmental immunity and sovereign immunity, this still does not provide a sound basis for allowing WTLA’s participation as an amicus curiae. While an amicus “may present facts or arguments in a different context from those presented by the parties . . . the presentation of entirely novel issues is not justified” and “raising new issues is beyond the scope of participation by an amicus curiae.” *Wyoming Coal.*, 875 P.2d at 734. (citations omitted). *See also Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 19 n.4 (1st Cir. 2016)(stating “It is ... clear beyond hope of contradiction that amici cannot interject into a case issues which the litigants, whatever their reasons might be, have chosen to ignore.”)(internal marks and citations omitted); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 721 (2014) (declining to consider amici's argument because the Court does not “generally entertain arguments that were not raised below and are not advanced in this Court by any party”); *MeadWestvaco Corp. ex rel. Mead Corp. v. Ill. Dep't of Revenue*, 553 U.S. 16, 31, (2008) (declining to address amici's issue because the question they “call upon us to answer was neither raised nor passed upon in the state courts”); *Simko v. U.S. Steel Corp.*, 992 F.3d 198, 206 (3d Cir. 2021) (“We have held that the role of

an amicus brief is to elaborate issues properly presented by the parties, not inject new issues into an appeal. Thus, an amicus normally cannot expand the scope of an appeal with issues not presented by the parties on appeal, at least not in cases where the parties are competently represented by counsel.” (internal marks and citations omitted)); *M.E. v. T.J.*, 854 S.E.2d 74, 114 (N.C. Ct. App. 2020) (stating “[i]n view of the rule that an amicus curiae must accept the case before the court with issues as made by the parties, a new question raised only in a brief filed by an amicus curiae, by leave of court, will not be considered.”) (internal marks and citations omitted).

6. Finally, WTLA contends that it will provide unique information and perspective because its members have turned down cases where anticipated medical liens and case expenses exceed the WGCA liability. *Motion*, p. 3. There is nothing unique about this and it is, instead, the exact contention the Petitioner makes here. *Petitioner’s Brief*, p. 3. WTLA has not shown why the parties’ attorneys cannot adequately provide information or perspective about this issue in this case. To the contrary, WTLA asserts that the parties are competently represented. *Motion*, p.3.

An amicus brief should normally be allowed when a party is not represented competently or is not represented at all, when the amicus has an interest in some other case that may be affected by the decision in the present case ... or when the amicus has unique information or perspective that can help the court beyond the help that lawyers for the parties are able to provide. Otherwise, leave to file an amicus brief should be denied.

Id. Ryan v. Commodity Futures Trading Com'n, 125 F.3d 1062, 1063 (7th Cir.1997)

(Posner, J). As Judge Posner also explained in *Voices for Choice v. Ill. Bell Tel. Co.*,

The reasons for the policy [of denying or limiting *amicus* status] are several: judges have heavy caseloads and therefore need to minimize extraneous reading; *amicus* briefs, often solicited by parties, may be used to make an end run around court-imposed limitations on the length of parties' briefs; the time and other resources required for the preparation and study of, and response to, *amicus* briefs drive up the cost of litigation; and the filing of an *amicus* brief is often an attempt to inject interest group politics into the federal appeals process.

339 F.3d 542, 544 (7th Cir.2003). Where, as here, the parties are competently represented and the proposed *amicus* offers no new perspective or information, granting WTLA's motion and allowing the proposed brief runs counter to the purpose of an *amicus*. *See also Wildearth Guardians v. Lane*, No. CIV 12-118 LFG/KBM, 2012 WL 10028647, at *2 (D.N.M. June 20, 2012)(declining to grant *amicus* status and allow brief for "what its worth" in part because of the burden and costs of responding to an *amicus* brief imposed on other litigating parties).

CONCLUSION

7. For the reasons presented above, the Court should deny the WTLA's motion to file an *amicus* brief. Petitioner is ably represented by counsel who recognized and raised the issue on which the movant seeks to offer argument, and the movant brings no unique information or perspective to the case. As a result, WTLA's motion should be denied.

DATED this 19th day of December 2024.

DAVIS & CANNON, LLP

/s/ J. Mark Stewart

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing *RESPONDENTS' RESPONSE OPPOSING WYOMING TRIAL LAWYERS ASSOCIATION'S MOTION FOR LEAVE TO FILE AMICUS BRIEF* was served electronically via the Wyoming Supreme Court C-Track Electronic Filing system on this 19th day of December 2024, on the following:

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The original plus six copies of the foregoing will be hand delivered to the Wyoming Supreme Court on December 19th, 2024.

I have accepted the terms for e-filing and this document is an exact copy of the written document filed with the Clerk. All privacy redactions have been made and this document is free of viruses.

s/ J. Mark Stewart

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