

IN THE SUPREME COURT
STATE OF GEORGIA

CASE NO. S18C0517

FIRST ACCEPTANCE INSURANCE COMPANY OF GEORGIA, INC.,

Petitioner,

v.

ROBERT W. HUGHES, JR., as Administrator
of the Estate of Ronald Nathaniel Jackson

Respondent.

AMICUS CURIAE THE GEORGIA DEFENSE LAWYERS ASSOCIATION'S
RESPONSE TO RESPONDENT'S MOTION TO STRIKE

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I. STATEMENT OF INTEREST

The Georgia Defense Lawyers Association (“GDLA”) is an association of approximately 900 Georgia lawyers, including sole practitioners and lawyers in law firms of all sizes, who engage in litigation, primarily for defendants in civil litigation, and represent insurance companies, individuals, and self-insured corporations. The GDLA is dedicated to, among other purposes, supporting and improving the civil defense bar, improving the adversary system of jurisprudence in our courts, eliminating court congestion and delay in litigation, and otherwise improving the administration of justice.

The GDLA and its members are interested in ensuring that basic principles of insurance law, contract law, and tort law are clearly defined and uniformly applied. It is axiomatic that legal systems are intended to provide a level of certainty and predictability so that individuals and businesses can shape their conduct appropriately.

The GDLA submitted its amicus brief out of concern that the opinion below converts issues, which Georgia law treats as questions of law, into questions of fact. As demonstrated in the GDLA’s amicus brief, the Court of Appeals’ decision in this case ignores well-established Georgia precedent that (1) interpretation of a settlement offer – like any contract – is a question of law, and (2) whether a legal duty exists is a question of law. Further, as explained in the GDLA’s amicus brief,

treating interpretation of a settlement offer and the existence of a legal duty as questions of fact conflicts with case law from this Court as well as the Court of Appeals, and treating these issues as questions of fact, which require jury trials, will increase court congestion, delay litigation, and increase the expense of litigation.

II. SUMMARY OF ARGUMENT

Respondent, Robert W. Hughes, Jr., as Administrator of the Estate of Ronald Nathan Jackson, has now moved to strike the GDLA's amicus curiae brief based on his argument that the GDLA "seeks to interject additional legal issues into this proceeding that were not raised by Petitioner, First Acceptance Insurance Company, in its *Petition for Writ of Certiorari*." (Mot. to Strike at ¶ 1.)

According to Respondent, this Court cannot consider issues raised by amicus curiae which were not raised in Petitioner's enumerations of error. (*Id.* at ¶ 3.)

However, as explained below, Respondent's argument misses the mark both factually and legally. Factually, the issues raised in the GDLA's amicus curiae brief are not new legal issues, but simply a different way to argue the issues raised by Petitioner. Thus, there is no reason for the GDLA's amicus curiae brief to be struck. Legally, Respondent's argument is based on an apparent misunderstanding of this Court's Rules and/or the appellate process at this stage. Accordingly, the

GDLA, as amicus curiae, respectfully submits that Respondent's Motion to Strike should be denied.

III. ARGUMENT AND CITATION OF AUTHORITY

Perhaps misunderstanding this Court's Rules and/or the appellate process at this stage, Respondent moves to strike the GDLA's amicus curiae brief, contending that the brief seeks to interject additional legal issues that were not raised by Petitioner and claiming that "this Court cannot consider issues . . . which were not raised in the [P]etitioner's enumerations of error." (Mot. to Strike at ¶¶ 1, 3.)

There are three fundamental flaws with Respondent's argument.

First, there is simply no requirement for a party seeking certiorari review, such as Petitioner, to file enumerations of error. Indeed, by statute and court rule, enumerations of error are not required to be filed in this Court until the appellant's brief is filed. See O.C.G.A. § 5-6-40 and Supreme Court R. 19. The appellant's brief, however, is not due unless and until this Court grants certiorari. See Supreme Court R. 46 ("The briefing schedule set forth in Rule 10 shall be followed, counting from the date of the order granting certiorari."); id. at R. 10 (providing that appellant's brief is due within 20 days after case is docketed). Indeed, this Court has confirmed that, pursuant to its Rules, "enumerations of error must be filed as part of [an appellant's brief], and "an appellant's brief [must] be

filed within 20 days after the case is docketed.” Dallow v. Dallow, 299 Ga. 762, 779 (2016). See also Willis v. Willis, 288 Ga. 577, 582 (2010) (same).

This Court has made clear that “the only rules of procedure for reviewing a decision of the Court of Appeals by writ of certiorari are Rules 38 through 45 of this Court.” In re Stroh, 272 Ga. 894, 895 (2000). The requirement for filing enumerations of error, however, is found in Rule 19, which clearly is not within Rules 38 through 45 of this Court. Because Petitioner was not required to file any enumerations of error as part of its petition for certiorari, Respondent’s argument (and case law) regarding the GDLA raising issues not raised in Petitioner’s enumerations of error is simply wrong and does not support striking the GDLA’s amicus curiae brief.

Respondent’s argument appears to be based on the Georgia Court of Appeals’ Rule regarding amicus curiae briefs, which is materially different from this Court’s Rule regarding amicus curiae briefs. Specifically, the Court of Appeals’ Rule specifically provides that amicus curiae briefs must be “limited to issues properly raised by the parties.” Ga. Ct. App. R. 26. On the other hand, this Court’s Rule regarding amicus curiae briefs does not contain the same limitation.

See Supreme Court R. 23.¹ And, as explained below, the material difference between this Court’s Rule and the Court of Appeals’ Rule regarding amicus curiae briefs makes sense given the nature of the appellate process. Because this Court’s Rule regarding amicus curiae briefs does not contain the limitation contained in the Court of Appeals’ Rule, there is no basis for the Respondent’s argument that the GDLA’s amicus brief should be struck.²

Second, and contrary to Respondent’s arguments, the petition for certiorari process inherently is not limited to enumerations of error raised by the parties. See Supreme Court R. 45 (providing that this Court’s order granting certiorari will include the question or questions the Court wants addressed). See also Cheeley v. Henderson, 261 Ga. 498, 499 n.2 (1991) (Hunt, J., dissenting) (noting that the questions posed in the grant of certiorari were “entirely separate” from the issues raised by the parties, and presuming that “the writ was granted by the majority because answers to these questions would have shaped the body of law in the expanding area of professional malpractice and would have been of benefit to the

¹ The only limitation in this Court’s Rule regarding amicus curiae briefs is that “[a]mici do not have standing to file motions for reconsideration, but may submit briefs in support of a motion made by a party.” Supreme Court R. 23. This limitation makes sense since amici have “no control over the litigation and no right to institute any proceedings therein.” Fulton County v. Bartenfeld, 257 Ga. 766, 771 (1988).

² The material distinction between this Court’s Rule and the Court of Appeals’ Rule regarding amicus curiae briefs make all of the cases from the Court of Appeals cited by Respondent inapposite. (See Mot. to Strike at ¶¶ 3, 6.)

bench and bar”). The whole point of certiorari review by this Court is not to correct errors of law for the benefit of the parties to the case, but to address issues “of gravity or great public importance.” Ga. Const. Art. VI, § VI, ¶ V; Supreme Court R. 40. See also Atlanta Coca-Cola Bottling Co. v. Jones, 236 Ga. 448, 452-55 (1976) (Hall, J., dissenting) (explaining the different purposes between review by the Court of Appeals and review by this Court by certiorari). As Justice Hall aptly explained,

[review by the Court of Appeals] is done primarily for the benefit of the parties to the appeal. Discretionary review in the highest court should be basically for the benefit of the public, to reconcile different holdings of the panel court and to declare the law on matters of gravity and public policy – this is called institutional review which is only incidentally for the benefit of the parties litigant.

Jones, 236 Ga. at 453 (Hall, J., dissenting).

For example, in WMW, Inc. v. American Honda Motor Co., 291 Ga. 683 (2012), this Court refused to dismiss a case as moot based on one of the parties’ voluntary cessation of activity. In so refusing, this Court explained that “the legal issue presented is important, and not only for these parties; that is why we granted certiorari to decide it. See Supreme Court Rule 40.” Id. at 685-86. This Court even noted, with respect to the importance of the legal issue, that amicus curiae briefs had been filed by two different organizations. Id. at 686 n.2.

Similarly, this Court has “absolute discretion to address any portion or all of the case before [it].” Cheeley, 261 Ga. at 500. As this Court has made clear, “[h]aving the case before us, in its discretion, this [C]ourt can consider any matter presented to or decided by the Court of Appeals. On certiorari, the case comes before us, not an isolated issue in the case.” Id. at 500-01 (emphasis in original). See also Christopher J. McFadden, et al., Georgia Appellate Practice § 18:3 (2009-2010 ed.) (“The power of the Supreme Court on a grant of certiorari is plenary. The Supreme Court is not confined by the issues referenced in the grant or by the issues reached by the Court of Appeals.”). An example of this discretion and authority is found in Security Life Insurance Company of America v. St. Paul Fire & Marine Insurance Co., 278 Ga. 800, 801-02 (2004), where this Court denied the appellee’s motion to strike portions of the appellant’s brief on issues outside the scope of the grant of certiorari. Among other reasons, this Court explained that “the posing of questions in no way limits this Court in its decision-making authority. ‘Having the case before us, in its discretion, this [C]ourt can consider any matter presented to or decided by the Court of Appeals. On certiorari, the case comes before us, not an isolated issue in the case.’” Id.

Amicus curiae briefs are considered especially useful in light of this Court’s authority on appeal and the nature and purpose of certiorari review. See, e.g., Michael B. Terry, Georgia Appeals § 18:2 (2014 ed.) (noting that “[p]aradigmatic

uses of amicus briefs include alerting the appellate court to potential unintended or unexplained consequences of a position,” including “proposing alternative resolutions with a broader application,” and citing Thornton v. Nat’l Am. Ins. Co., 269 Ga. 518, 519 (1998) (“The State Bar, as amicus urges the adoption of a bright-line rule that reasonable notice be construed as 24-hours notice, or at a minimum, two business hours.”); McFadden, supra, at § 18:3 (“Well-presented Amicus briefs are welcomed by the Supreme Court because the amici tend to be more dispassionate than the parties; they ‘appraise the Court of the significance of a particular rule and typically do so with less heat and more reason.’”); Smith v. Miller, 261 Ga. 560, 561 (1991) (“The assistance of [amicus curiae] is appreciated. As amici correctly note, this case involves questions of considerable public importance.”).

Legal scholars have noted that “[t]he classic role of an amicus curiae is to assist in a case of general public interest, to supplement the efforts of counsel, and to draw the court’s attention to law that might otherwise escape consideration.” 21-329 Moore’s Federal Practice – Civil § 329.11. See also Helen A. Anderson, Frenemies of the Court: The Many Faces of Amicus Curiae, 49 U. Rich. L. Rev. 361, 361 (Jan. 2015) (“Amicus briefs provide additional information or perspective to assist courts in deciding issues of public importance.”); 19-207 Moore’s Federal Practice – Civil § 207.50 (“[T]he most effective amicus brief will expand on, but

not repeat, the legal arguments made by the litigant.”); Id. (noting that amicus curiae can “explain the broad implications of the court’s ruling on individuals and organizations not before the court.”).

The usefulness of amicus curiae at this stage of the appellate process is evident by two decisions from the United States Supreme Court. In Mapp v. Ohio, 367 U.S. 643 (1961), the Court noted the value of an amicus curiae raising an issue, which the parties had not raised, that was the basis for the Court’s ultimate decision. See id. at 646 n.3. Likewise, in Teague v. Lane, 489 U.S. 288, 299-300 (1989), the Court addressed the important issue of the retroactive effect of court decisions, which was only raised by amicus curiae. In sum, the nature of the appellate process at the petition for certiorari stage and this Court’s authority over cases in front of it do not support Respondent’s argument that this Court should strike the GDLA’s amicus curiae brief. Instead, as demonstrated by the foregoing, the GDLA’s amicus curiae brief serves the very function of such briefs and should be considered by this Court.

Third, contrary to Respondent’s argument, the issues raised in the GDLA’s amicus curiae brief are not new legal issues, but simply different theories of the issues raised by Petitioner. As Respondent acknowledges, the entire argument in the petition for certiorari focused “on whether the ‘opportunity to settle’ presented by the June 2, 2009 letters was ‘legitimate’ and sufficient to trigger extra-

contractual liability.” (Mot. to Strike at ¶ 5.) The GDLA’s amicus curiae brief set forth legal arguments that were subtle variations on the Petitioner’s arguments regarding why the Court of Appeals’ erred, the broad implications of the Court of Appeals’ error on parties not before this Court, and why the errors are important to the public. While the GDLA’s amicus curiae brief may have framed the argument in a slightly different way than Petitioner, the GDLA is raising an argument regarding an issue raised in the petition for certiorari—whether petitioner may be held liable for failing to respond to the letters sent by Respondent’s counsel. In Moseley v. Sentence Review Panel, 280 Ga. 646, 649 (2006), this Court explained that “[t]he correct rule with respect to the legal sufficiency of an enumeration of error is that it need be only sufficient to point out the error complained of. The subject matter need be indicated only in the most general way.” This Court concluded that the petitioner’s standing to seek injunctive relief against enforcement of an allegedly unconstitutional statute was “obviously within the ambit of his enumeration of error,” which asserted “the trial court erred in granting the Panel’s motion to dismiss and denying [petitioner’s] petition for mandamus and *injunctive relief*.” Id. (emphasis in original).

Contrary to Respondent’s argument, the GDLA’s amicus curiae brief does not seek to inject new issues into the case. Instead, the GDLA simply seeks to supplement the Petitioner’s arguments by showing the significance of the Court of

Appeals' erroneous decision and by proposing a slightly different theory (or an "alternative resolution[] with a broader application") of the issues raised by Petitioner. Legal scholars have noted that raising different theories is one of the most useful functions of amicus curiae briefs. See, e.g., 21-329 Moore's Federal Practice – Civil § 329.11 ("The classic role of an amicus curiae is to assist in a case of general public interest, to supplement the efforts of counsel, and to draw the court's attention to law that might otherwise escape consideration."); Linda Sandstrom Simard, An Empirical Study of Amici Curiae in Federal Court: A Fine Balance of Access, Efficiency, and Adversarialism, 27 Rev. Litig. 669, 682 (Summer 2008) (noting that amicus briefs are helpful because they supplement the arguments of the parties by providing information not found in the parties' briefs, such as legal argument from another perspective and/or policy consequences of particular legal interpretations); id. at 690 (explaining that federal court judges find amicus curiae briefs helpful in offering new legal arguments that are absent from the parties' briefs); id. at 691 n.95 (noting that amicus curiae can perform a valuable role by introducing subtle variations of the basic argument). This Court has also noted this same function for amicus curiae. See, e.g., Bartenfeld, 257 Ga. at 771 ("The function of an amicus curiae is to call the court's attention to law or facts or circumstances in a matter then before it that may otherwise escape its consideration.").

An appellate court in Florida addressed an almost identical situation in Keating v. State, 157 So.2d 567 (Fla. Dist. Ct. App. 1963). In Keating, the appellee filed a motion to strike an amicus curiae brief on the ground that the brief attempted to inject new issues into the appeal beyond those raised by the appellant. Id. at 568-69. The court, however, denied the motion, finding that the “issues” raised by the amicus curiae were within the appellant’s assignment of error:

A significant distinction is apparent as between “issues” and “theories” in support of a particular issue. We agree with [appellee] that amicus is not at liberty to inject new issues in a proceeding; however, amicus is not confined solely to arguing the parties’ theories in support of a particular issue. To so confine amicus would be to place him in a position of parroting “me too” which would result in his not being able to contribute anything to the court by his participation in the cause.

Id. at 569.

Here, like the appellee in Keating, Respondent appears to miss the distinction between “issues” and “theories” in support of issues. Like the amicus curiae in Keating, the GDLA’s amicus curiae brief raises arguments (or “theories”) in support of the issues raised by Petitioner. As explained in the GDLA’s amicus curiae brief, the “theories” raised in support of the “issues” in Petitioner’s petition for certiorari demonstrate that the Court of Appeals committed significant error in its decision in this case, and those errors are issues of “great concern, gravity, or importance to the public.” Supreme Court R. 40. (See generally The GDLA’s

Amicus Curiae Br.) Further, the theories raised by the GDLA are within the issues raised by the petition for certiorari³, they were “raised below,”⁴ and they “involve[] question[s] of law that would be dispositive of the case and [are] important to the public.” Norfolk S. Ry. v. Zeagler, 293 Ga. 582, 597 n.10 (2013) (explaining that Court included a particular issue in its grant of certiorari, “thereby ensuring that it would be fully briefed,” because “the issue was properly raised below and involves a question of law that would be dispositive of the case and is important to the public and the railroad industry”). As such, this Court should not strike the GDLA’s amicus curiae brief.

In sum, the GDLA respectfully submits that Respondent’s Motion to Strike the GDLA’s amicus curiae brief should be denied. It appears that Respondent believes that an amicus curiae is limited to simply “parroting” the arguments made by a party. However, such a limitation is not supported by any applicable authority nor does it make any sense logically.

CONCLUSION

For the foregoing reasons, the GDLA, as *amicus curiae*, respectfully submits that this Court should deny Respondent’s Motion to Strike. Further, for the

³ (See Pet. for a Writ of Cert. at 13-15, 19, 22-25; see Reply Br. Supporting Pet. for a Writ of Cert. at 5, 8-10.)

⁴ See Pet’r’s Br. in Court of Appeals, 2017 Ga. App. Ct. Briefs LEXIS 19, *13-24, 26-29; Resp’t’s Reply Br. in Court of Appeals, 2017 Ga. App. Ct. Briefs LEXIS 172, *9-10, 13.

reasons in the GDLA's Amicus Curiae Brief, the GDLA respectfully submits that this Court should grant certiorari.

Respectfully submitted this 5th day of March, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing **AMICUS CURIAE THE GEORGIA DEFENSE LAWYERS ASSOCIATION'S RESPONSE TO RESPONDENT'S MOTION TO STRIKE ASSOCIATION** upon all counsel of record by depositing a copy of the same in the United States Mail, postage pre-paid, addressed as follows:

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