

IN THE SUPREME COURT OF OHIO

ORIGINAL

CORA ERWIN, Administratrix of the  
Estate of Russell Erwin

Appellee,

v.

JOSEPH E. BRYAN M.D., et al.

Appellants.

Case No. 2009-0580

Appeal from the Tuscarawas County  
Court of Appeals,  
Fifth Appellate District,  
Case No. 08-CA-28

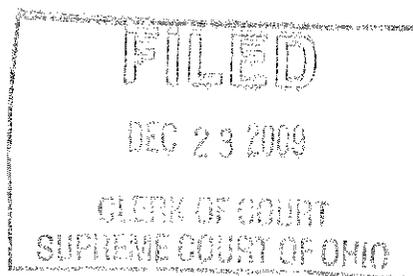
**AMICI CURIAE, OHIO STATE MEDICAL ASSOCIATION, OHIO HOSPITAL  
ASSOCIATION, AND OHIO OSTEOPATHIC ASSOCIATION'S  
RESPONSE TO PLAINTIFF-APPELLEE'S MOTION TO STRIKE**

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## MEMORANDUM

Amici curiae, the Ohio State Medical Association (“OSMA”), the Ohio Hospital Association (“OHA”), and the Ohio Osteopathic Association (collectively, “Amici”) file this Response to Appellee’s Motion to Strike.

The purpose of Amici’s Reply Brief was to respond to Appellee’s attempt to use the medical community’s nonappearance in this appeal to its advantage. In exploiting Amici’s nonappearance in this fashion, Appellee misrepresented the medical community’s position. Amici filed their Reply Brief believing it to be in the best interest of the Court, and of fairness and justice for this misrepresentation to be corrected.

First, contrary to Appellee’s assertion, Rule VI, Section 6(B) of the Supreme Court Rules of Practice, does not prohibit an amicus curiae from filing a reply brief responding to issues raised in an Appellee Merit Brief.<sup>1</sup> While it may not be the norm for an amicus curiae to file a reply brief without having filed a merit brief, this practice is not and should not be prohibited. Certainly if a matter is raised for the first time in Appellee’s Merit Brief – as it was here<sup>2</sup> – it is appropriate for an amicus to file a reply brief.

Second, in response to Appellee’s assertion that Amici will improperly have the “last word” in its Reply Brief, this is also true for any amicus curiae appearing on the merits. That is,

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<sup>1</sup> The Court has specifically permitted amicus curiae in past cases to file a reply brief where no amicus brief was filed on the merits. See, e.g., *State v. Walls* (2002), 94 Ohio St.3d 1481, 763 N.E.2d 611 (permitting the Office of the Public Defender to file a reply brief as an amicus without having first participated on the merits); *State ex rel. DaimlerChrysler Corp. v. Indus. Comm.*, 120 Ohio St.3d 1442, 2008-Ohio-6465 (permitting amici the Ohio Chamber of Commerce, Ohio Self-Insurers Association, and National Federation of Independent Business to file a reply brief when they did not participate as amici on the merits).

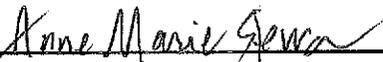
<sup>2</sup> See Plaintiff-Appellee’s Motion to Strike, reflecting that the matter at issue was raised in Appellee’s Merit Brief.

any amicus curiae appearing on the merits in support of an appellant is permitted to have the "last word" and the appellee is not given the opportunity to respond in writing.

Third, Amici did not intend to interject new arguments to be considered on the merits. Amici merely responded to the Appellee's assertion that their previous nonappearance means they do not support Defendant-Appellant's position. In any event, Amici are confident that the Court will not improperly consider new arguments on the merits if it believes any were asserted.

Simply put, Amici filed its Reply Brief for the sole purpose of correcting any misimpression as to its position that was created by Appellee's Merit Brief. As such, Amici respectfully request that Appellee's Motion to Strike be denied.

Respectfully submitted,

  
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**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing Amici Curiae, Ohio State Medical Association, Ohio Hospital Association, and Ohio Osteopathic Association's Response to Plaintiff-Appellee's Motion to Strike was sent via regular U.S. mail, postage prepaid this 23<sup>rd</sup> day of December 2009, to the following:

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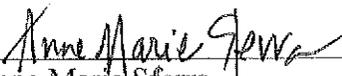
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