

**IN THE SUPREME COURT OF FLORIDA**

ELAINE DIAL,

Petitioner,

vs.

Case No.: SC21-43

L.T. Case No.: 2D18-4339

CALUSA PALMS MASTER  
ASSOCIATION, INC.,

Respondent.

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**PETITIONER'S RESPONSE IN OPPOSITION TO MOTION FOR  
LEAVE TO APPEAR AS AMICUS CURIAE**

Petitioner, Elaine Dial, requests this Court deny the Opposed Motion for Leave to Appear as Amicus Curiae filed by Associated Industries of Florida and Florida Retail Federation (collectively the "Proposed Amici") and in support states:

**I. THE PROPOSED AMICI SEEK TO FILE A BRIEF ON AN ISSUE NOT PROPERLY BEFORE THIS COURT.**

Arguments that are not made by the parties themselves are not properly before this Court when presented in a brief filed by amicus curiae. *See National Commission On Egg Nutrition v. Federal Trade Commission*, 570 F.2d 157, 160 n.3 (7th Cir. 1977) (hereinafter "NCOEN") (citing *American Meat Institute v. Environmental Protection*

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*Agency*, 526 F. 2d 442, 449 (7th Cir. 1975)); see also *Prairie Rivers Network v. Dynergy Midwest Generation, LLC*, 976 F. 3d 761, 763 (7th Cir. 2020) (“a true friend of the court will seek to add value to our evaluation of the issues *presented on appeal*.”) (emphasis added). Indeed, well-established Florida law renders arguments not raised by the parties waived. *E.g. D.H. v. Adept Community Services, Inc.*, 271 So. 3d 870, 880 (Fla. 2018).

This Court accepted jurisdiction to resolve the following certified question of great public importance:

DOES THE HOLDING IN JOERG V. STATE FARM MUTUAL AUTOMOBILE INSURANCE CO., 176 So. 3D 1247 (FLA. 2015), PROHIBITING THE INTRODUCTION OF MEDICARE BENEFITS IN A PERSONAL INJURY CASE FOR PURPOSES OF A JURY’S CONSIDERATION OF FUTURE MEDICAL EXPENSES ALSO APPLY TO PAST MEDICAL EXPENSES.

*Dial v. Calusa Palms Master Assn., Inc.*, 308 So. 3d 690, 692 (Fla. 2d DCA 2020). The Proposed Amici do not want to add to the evaluation of this issue. Instead the Proposed Amici want to address:

why this Court should recede from the holding in *Joerg v. State Farm Mut. Auto. Ins. Co.*, 176 So. 3d 1247 (Fla. 2015), and permit introduction of past *and* future Medicare benefits for the jury’s consideration in order to avoid unjust windfalls.

Mot. Leave to Appear Amicus Curiae at pg. 3.

The Proposed Amici seek to shift the Court's attention to arguments that are not properly before the Court. *Compare Dial*, 308 So. 3d at 690 (district court opinion discussing arguments raised by the parties below); *and* Initial Br. (Mrs. Dial's initial brief does not ask this Court to recede from *Joerg*); *and* Answer Br. (same for Calusa Palms's Answer Brief); *with* Mot. Leave to Appear Amicus Curiae (Proposed Amici's motion for leave to appear which raises new argument asking the Court to recede from *Joerg*); *see NCOEN*, 570 F. 2d at 160 n.3.

The United States Court of Appeals for the Seventh Circuit addressed a similar circumstance in *NCOEN*. *NCOEN*, 570 F. 2d at 160 n.3. In that case an administrative law judge, at the request of the Federal Trade Commission (hereinafter "FTC"), entered an order prohibiting the National Commission On Egg Nutrition (hereinafter "NCOEN") from making statements in advertisements "that there is no scientific evidence that eating eggs increases the risk of...heart (and circulatory) disease...." *NCOEN*, 570 F. 2d at 159.

On appeal the NCOEN argued: 1) the statement was true; 2) even if the statement is misleading, the order infringed upon NCOEN's First Amendment rights; and 3) even if the finding of a

violation were upheld, the remedy was unconstitutionally vague and overbroad. *Id.* at 160. Appearing as amicus curiae, the Association of National Advertisers, Inc., filed a brief arguing that “the FTC’s hearing procedures violated the First Amendment standards set forth in *Blount v. Rizzi*, 400 U.S. 410, 417 (1971)....” *Id.* at 160 n.3 (parallel citation omitted).

The FTC objected to the court ruling on the issue, pointing out that the issue was not properly before the court. *Id.* The Seventh Circuit agreed, pointing out that the argument was not made before the FTC (in the administrative hearing) or even by the petitioners in the Seventh Circuit itself. *Id.* The court then proceeded to disregard the argument as it had not been properly raised by a party. *Id.* Similarly, this Court should deny the Proposed Amici’s motion as they seek to inject arguments not raised by either party.

**II. THE STATED INTERESTS OF THE PROPOSED AMICI ARE ADEQUATELY REPRESENTED BY PARTIES ALREADY GRANTED LEAVE TO APPEAR AS AMICUS CURIAE.**

The Doctor’s Company, the Florida Defense Lawyers Association, the Florida Trucking Association, the Florida Chamber of Commerce, the American Property and Casualty Insurance Association, the Florida Justice Association, and the Florida Justice

Reform Institute have all been granted leave to appear as amicus curiae in this matter.

Many of the previously listed organizations, like the Proposed Amici, represent the interests of Florida businesses. In particular, the Florida Chamber of Commerce's statement of interest in this case is nearly identical to that of the Associated Industries of Florida.

Thus, the interests of the Proposed Amici have already been adequately represented by Calusa Palms and the current amici. Denying the instant motion would help prevent a "show of hands on what interest groups are rooting for what outcomes." *Prairie Rivers Network*, 976 F. 3d at 761; see *Sierra Club, Inc. v. Environmental Protection Agency*, 358 F. 3d 516, 518 (7th Cir. 2004) ("Courts value submissions not to see how the interest groups line up, but to learn about facts and legal perspectives that the litigants have not adequately developed.").

### **CONCLUSION**

Mrs. Dial requests that this Court deny the motion of the Proposed Amici. The interests of the Proposed Amici are adequately represented by Calusa Palms and the current amici. Further, the Proposed Amici seek to raise an issue that is not properly before the

Court and would distract the Court and the parties from the issues that have already been briefed and ruled upon by the Second District.

WHEREFORE, for the reasons stated above, Petitioner, Elaine Dial, respectfully requests this Court deny the motion for leave to appear as amicus curiae filed by the Associated Industries of Florida and the Florida Retail Federation.

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished to the parties on below service list and all counsel of

record through the Court's e-filing portal pursuant to Florida Rule of Judicial Administration 2.516(b)(1) on September 24, 2021:

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