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12
13 SUPREME COURT OF THE STATE OF NEVADA

14 J.A. Jones Construction Co.,

15 Appellant,

16 v.

Case No.: 39235

17 Lehrer McGovern Bovis, Inc.,
National Fire Insurance Co.
18 of Hartford,

19 Respondents,
20

21 MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE
22 AMERICAN SUBCONTRACTORS ASSOCIATION
IN SUPPORT OF APPELLANT

23 Pursuant to Rule 29 of the Nevada Rules of Appellate Procedure, the American
24 Subcontractors Association ("ASA") respectfully moves this Court for an order allowing ASA to
25 file an amicus curiae brief in support of the Appellant in the appeal of the above-captioned matter.
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1 The reasons in support of this Motion are more particularly set forth in the
2 accompanying Memorandum..

3 Respectfully submitted,

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17 **MEMORANDUM IN SUPPORT**

18 The American Subcontractors Association, Inc. ("ASA") is seeking leave of this court to file
19 amicus curiae brief in order to assist the court as to the potential nationwide ramifications of its
20 decision impacting protections currently afforded to subcontractors through common law exceptions
21 to no damage for delay clauses across the country. ASA is a national organization representing the
22 interests of approximately 5,000 member businesses who provide labor and materials on construction
23 projects throughout the United States of America, including businesses in Nevada.

24 ASA's primary focus is the equitable treatment of subcontractors in the construction industry.
25 ASA has acted in the interest of all subcontractors by promoting legislative action and by intervening
26 in significant legal actions that affect the industry at large. Because of this unique perspective as an
27 influential representative of an important segment of the construction industry, ASA's applications
28 for leave to submit amicus curiae briefs have been approved in many jurisdictions. See West-Fair
Electric Contractors v. The Aetna Cas. & Sur. Co., 87 N.Y.2d 148 (1995) (on certified questions

from Second Circuit Court of Appeals, 49 F.3d 48) and Blandford Land Clearing Comp v National
2 Union Fire Ins. Co. of Pittsburgh, Pa., 260 A.D.2d 86 (N.Y.A.D. 1999); Koch v. Construction
3 Technology, 924 S.W.2d 68 (Tenn. 1996) (held that pay-if-paid clause must be clearly expressed);
4 Department of the Army v. Blue Fox Inc., 119 U.S. S.Ct. 687 (1999) (held that sovereign immunity
5 barred subcontractor from enforcing lien against government); Wm. R. Clarke Corp. v. Safeco Ins.
6 Co. of America, 78 Cal. App. 4th (Cal. App. 2d 2000) (held that pay-if-paid clauses in California
7 were void); Barton-Malow v. Grunau, et al., Case No. 2D01-3347 (2nd D.C. App. Fla.), Nov. 15,
8 2002 decision (reversed trial court and held there can be no duty to defend if there is no duty to
9 indemnify); Chrysler Corp v. Merrell & Garaguso Inc., 796 A.2d 648 (Del. 2002) (application of
10 anti-indemnification statute to "additional insured" requirements). In the instant case, ASA has a
11 unique perspective that may not be articulated by the parties herein, who may be more focused on
12 the specific facts of this case, rather than on the global public policy that is at the heart of this
13 conflict.

14 An issue of particular concern for subcontractors is balancing the power of parties to a
15 construction project so that the risks inherent in such projects are fairly distributed. Judicially
16 recognized exceptions to the enforcement of "no damage for delay" clauses, for example, avoid
17 unfairly shifting the burden of delays to subcontractors. By strictly adhering to such clauses and
18 offering no possible exceptions, a subcontractor is turned into a "fortune teller" and is forced to up
19 is bid-potentially losing the business-to cover every possible contingency delay. Moreover,
20 overly strict enforcement of "no damage for delay" provisions would give such clauses an unduly
21 favored position in the law over other contract provisions, which are generally subject to mutual
22 obligations to cooperate and perform in good faith. For example, conditions precedent are generally
23 not enforced where the party seeking enforcement acted to prevent the occurrence of the condition.
24 Arnsworth, Contracts at § 8.6, Third Edition (Aspen 1999). Similarly, "no damage for delay"
25 clauses are not generally enforced where delay was caused by the active interference of the party
26 seeking to avoid liability for delay. Gatlin, "Contractual Limitations on the Right to Recover Delay
27 Damages and Judicial Enforcement of Those Limitations," The Construction Lawyer (American Bar
28 Association, Fall 2002).

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1 Parties to this appeal are expected to ask this Court to address whether subcontractors are
2 without any protection from these types of costly delays. The lower court denied Appellant J.A.
3 ones' jury instruction as to exceptions to no damage for delay clauses. Whether such exceptions
4 exist is a question for the jury and it is error for the jury not to be so instructed. Therefore, it is the
5 position of the ASA that the lower court erred in that decision as exceptions to no damage for delay
6 clauses are widely applied in several other western states, including California, Arizona, Colorado
7 and Washington, and should likewise be applied in Nevada.

8 WHEREFORE, ASA respectfully prays that this motion to submit the proposed amicus
9 curiae brief be granted.'

10 Respectfully submitted,

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29 Pursuant to NRAP 29, ASA has filed its brief of amicus curiae, on a conditional basis, together with this
30 motion.

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1 CERTIFICATE OF SERVICE BY MAIL

2 I, the undersigned, hereby certify that I am employed in the County of Clark, State of Nevada,
3 am over the age of 18 years and not a party to this action. My business address is that of Jolley, Urga,
4 Wirth & Woodbury, 3800 Howard Hughes Parkway, Suite 1600, Las Vegas, Nevada 89109.

5 On December 2002, I served the within MOTION FOR LEAVE TO FILE
6 BRIEF OF AMICUS CURIAE AMERICAN SUBCONTRACTORS ASSOCIATION IN
7 SUPPORT OF APPELLANT on the parties in said action or proceeding by placing a true copy
8 hereof enclosed in a sealed envelope, addressed as follows;

9 Dennis R. Haney, Esq.
10 Wade B. Gochnour, Esq.
11 301 E. Clark Avenue, Suite 700
12 Las Vegas, Nevada 89 101
13 Attorneys for Appellant

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15 Herman Braude, Esq.
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National Fire Insurance Company of Hartford

29 I am placing the envelope in the mail bin at the firm's office.

30 I am readily familiar with the firm's practice of collection and processing correspondence for
31 mailing. Under that practice it is deposited with the U. S. Postal Service on the same day it is placed
32 in the mail bin, with postage thereon fully prepaid at Las Vegas, Nevada, in the ordinary course of
33 business.

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1 I certify under penalty of perjury that the foregoing is true and correct, and that this
2 Certificate of Service by Mail was executed by me on December 1, 2002, at Las Vegas, Nevada.

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5 An Employee of JOLLEY, URGAL, WIRTH
& WOODBURY
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