



**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

PHILIP R. SHAWE and SHIRLEY SHAWE, )  
 )  
 Respondents-Below, Appellants, ) No. 423, 2016  
 )  
 v. ) Court Below: The Court of  
 ) Chancery of the State of  
 ELIZABETH ELTING, ) Delaware, C.A. Nos. 9686-CB,  
 ) 9700-CB and 10449-CB  
 )  
 Petitioner-Below, Appellee. )

**MOTION FOR REARGUMENT ON  
MOTION TO SUBMIT AMICUS BRIEF**

1. Citizens filed its motion to submit an amicus brief on October 6, attaching a proposed brief.
2. Appellee submitted her opposition on Friday, October 14. It references incorrect facts, misstates the law, and notably does not criticize any content of the proposed brief.
3. This Court denied the motion one business day later in a brief order without allowing Citizens a reply to correct Appellee's misstatements as permitted by Court rules. Supr. C. R. 30 ("Motions. . . . Within 7 days after service of an answer to the motion, the moving party may file a reply to the answer.").
4. Citizens respectfully submits that the decision misapplied prior caselaw and requests the Court consider this motion, and the record of this case, in light of the corrected facts and law set forth herein.

**I. Reargument Lies for Misstated Laws and Facts.**

5. Motions for reargument are appropriate where there are misapprehended facts, *Henke v. Trilithic Inc.*, 2005 WL 3578094 (Del. Ch. Dec. 20, 2005), or errors of law. *Copeland v. Beh*, 1991 WL 134997 (Del. 1991).

**II. The Amicus Brief Should Be Allowed.**

6. Amicus briefs are appropriate where the amicus is “assisting the court, by supplementing the efforts of the actual parties’ counsel, through the presentation of non-duplicative authoritative arguments.” *Turnbull for Turnbull v. Fink*, 644 A.2d 1322, 1324 (Del. 1994).

7. This Court freely grants motions to participate as amici. In 2016, for instance, the Court considered 12 amicus briefs – including three over objections – in appeals involving oral argument. By contrast, a “restrictive policy” concerning amicus briefs, in addition to predictably creating “instances of seemingly disparate treatment,” “may also convey an unfortunate message about the openness of the court.” *Neonatology Assocs., P.A. v. C.I.R.*, 293 F.3d 128, 133 (3d Cir. 2002) (Alito, J.).

8. Citizens should be given the same opportunity as other amici in Delaware. Citizens’ brief “supplement[s]” Appellant Philip Shawe’s brief by

expanding upon his argument for alternative relief.<sup>1</sup> It does so from the perspective not of an owner, but on behalf of thousands of employees, and from an organization that has a valuable academic perspective from advocating with the Delaware State Bar Association to change Delaware law concerning deadlocked corporations.

### **III. The Court’s Decision Misstated The Law.**

9. This Court denied Citizens’ motion because its interests and arguments are “adequately represented” by the other parties, citing *Giammalvo v. Sunshine Min. Co.*, 644 A.2d 407 (Del. 1994).

10. *Giammalvo* ruled that “*amicus curiae* are called upon” for “(3) assisting the court by supplementing the efforts of counsel, even when both sides are represented, in a case of general public interest” and “(4) drawing the court’s attention to broader legal or policy implications”. *Id.* at 409 (noting the modern trend to “permit more partisan advocacy” was consistent with Rule 28). The proposed amicus brief amply fulfils both purposes here.

11. *Giammalvo* held that movant, a member of the plaintiff class, was required to show “exceptional circumstances” because it could have intervened

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<sup>1</sup> Appellee criticized Citizens for seeking to “supplement” the arguments advanced in Shawe’s opening brief.” Opp. ¶ 5. But in doing so Appellee is criticizing the Court’s own description of the appropriate amicus role. *Turnbull*, 644 A.2d at 1324. Moreover, if the proposed brief did not “supplement” an argument made somewhere in the parties’ briefs, the Court would not entertain it. *Id.*

below but failed to do so.<sup>2</sup> *Id.* at 410. Citizens could not have intervened below as *it did not exist* – it was formed after the Court’s post-trial ruling. Opp. Ex. A(9). In any event Citizens is not another stockholder like and well-represented by Giammalvo; it is an association of employees with interests greatly differing from the Shawes and Elting. Thus Citizens’ brief should not be barred by the *Giammalvo* “exceptional circumstances” test.

12. It was error for the Court to prohibit the amicus brief unless the parties were not “adequately represented”. *Neonatology Assocs.*, 293 F.3d at 132 (similar federal rule does not expressly require showing inadequate representation, an undesirable test because it could “deprive the court of valuable assistance.”). It cannot be that the parties were inadequately represented in all of the other cases in which amicus briefs were considered this year.

#### **IV. The Opposition’s Submission Cited By The Court Misstated Facts.**

13. The brief order denied Citizens’ motion in the Court’s “discretion . . . [a]fter reviewing the parties’ submissions.” Citizens therefore addresses Appellee’s “submission”, which included numerous misstatements of fact that may have led to the Court’s decision.

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<sup>2</sup> *Giammalvo* does not cite a prior case applying such a test. Compare *Bd. of Comm’rs of Anne Arundel Cty. v. Buch*, 58 A.2d 672, 673 (Md. 1948) (considering amicus brief of the State Tax Commission even though it did not exercise its authority to intervene in the proceeding below).

14. Contrary to Appellee’s argument, Opp. ¶¶ 4-5, there has never been any coordination whatsoever between Appellants’ and Citizen’s counsel, directly or indirectly – either on the proposed amicus brief or the proposal to amend Delaware law.<sup>3</sup> As stated in Citizens’ motion, some persons involved in Citizens consider themselves closer to Appellee while others consider themselves closer to Appellant Philip Shawe.

15. Appellee states that TransPerfect’s founder Timothy Holland “works exclusively for Mr. Shawe.” Not true. One of Holland’s superiors is Mike Sank, who reports to both Appellee and Appellant Philip Shawe.

16. Appellee argues Appellants “cite the same cases addressed in CPBD’s proposed brief”. Opp. ¶ 6. Again, not true. The proposed brief cites five cases, as well as numerous other states’ statutes and four academic sources, not referenced by Appellants.

17. Appellee cites an email from a Citizens representative referencing a meeting with “[o]ne of the stockholders” (the “client” being “Citizens for a Pro Business Delaware,”) Opp. Ex. A(10), arguing (without any other support) that the email must have meant Philip Shawe. Opp. ¶ 4. That would not have made sense as the client was Citizens, not TransPerfect. The representative had just started

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<sup>3</sup> Citizens provided Philip Shawe’s counsel a draft of its brief a day before its submission, just as Citizens would have done if Appellee had asked. Counsel did not respond except to thank Citizens for the draft.

working for TransPerfect and was in fact referring to one of the principals of Citizens, *not* TransPerfect. He was not referring to either Appellant.

**V. Citizens Has A Free Speech Right To Publicly Disagree With A Court Decision.**

18. Citizens of this country have a right to freely criticize any branch of government, including the judicial branch. *Konigsberg v. State Bar of Cal.*, 353 U.S. 252, 269 (1957) (“Citizens have a right under our constitutional system to criticize government officials and agencies. Courts are not, and should not be, immune to such criticism.”). Appellee referenced comments by Professor Lawrence Hamermesh of Widener University Delaware Law School, who is entitled to express his views just as Citizens is. There is nothing wrong with exercising such a right, and it is improper for Appellee to cite such free speech to persuade this Court to reject the proposed amicus brief.

19. Appellee also cited a vice chancellor’s comments in an unrelated case. Opp. Ex. I. Citizens did not have the opportunity to provide any input before the court’s remarks. That judicial officer observed that “people have a right to free speech in this country”. *Id.* at 38-39. He ultimately declined to grant relief, ruling “I’m not going to forbid folks from communicating on this so long as they do it accurately”. *Id.* Those remarks had relevance to that case, but the Court should not consider them in this one.

*/s/ Evan O. Williford*

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