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Donald R. Mello and Jack Lund Schofield  
6

7  
8 IN THE SUPREME COURT OF THE STATE OF NEVADA

9 DANIEL BALDONADO and JOSEPH )  
10 CESARZ, )  
11 Appellants, ) No.: 48831  
12 vs. )  
13 WYNN LAS VEGAS, LLC., )  
14 Respondent. )  
15

16 MOTION OF PROPOSED AMICUS CURIAE  
17 DONALD R. MELLO AND JACK LUND SCHOFIELD  
18 FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF  
IN SUPPORT OF THE APPELLANTS

19 The proposed amicus curiae, Donald R. Mello and Jack Lund  
20 Schofield, through their attorney, Alda Anderson, hereby submit this  
21 motion for an Order granting them leave to file a brief of amicus  
22 curiae in support of the appellants in this case.

23  
24 The proposed amicus curiae brief of movants is submitted and  
25 served with this motion.

26  
27 This motion is based upon the annexed memorandum of points and  
28 authorities of counsel and declarations of the proposed amicus  
curiae.

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 PRELIMINARY STATEMENT

3 This memorandum of points and authorities is submitted in  
4 support of the motion of proposed amicus curiae Donald R. Mello and  
5 Jack Lund Schofield for leave to file an amicus curiae brief with  
6 the Court.

7 ARGUMENT

8 As detailed in their supporting declarations (Ex. "A" and "B"),  
9 the proposed amicus curiae are two former Nevada legislators who  
10 were sponsors of (and in the case of proposed amicus Donald R. Mello  
11 the originator of) the 1971 revisions to N.R.S. § 608.160. Those  
12 revisions are of great significance to this appeal as one of the  
13 major claims made by appellants, and rejected by the Court below, is  
14 based upon how those 1971 legislative revisions should be  
15 interpreted.

16 In compliance with Nev. R.A.P. Rule 29 a proposed amicus curiae  
17 must "identify the interest of the applicant and state the reasons  
18 why a brief of an amicus curiae is desirable." It is submitted that  
19 the proposed amicus curiae have done so through their declarations.  
20 As the legislators who initiated and sponsored the 1971 revisions to  
21 N.R.S. § 608.160 they have an interest in this Court interpreting  
22 those revisions as they were intended.

23 It is also desirable that the Court consider the views of the  
24 proposed amicus curiae who are two of the very few individuals able  
25 to speak with authority about the Nevada legislature's intent in  
26 enacting the 1971 revisions to N.R.S. § 608.160. As is typical for  
27 legislation enacted during that time period in Nevada, very little

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13  
14 DECLARATION OF PROPOSED AMICUS CURIAE DONALD R. MELLO

15 Donald R. Mello hereby affirms, under the penalties of perjury,  
16 that:

17 1. I am a retired member of the Nevada Assembly and the Nevada  
18 Senate and served 27 years in the Nevada legislature. I have read  
19 the proposed brief of amicus curiae Donald R. Mello and Jack Lund  
20 Schofield (the "proposed amicus curiae") and offer this declaration  
21 in support of the motion of the proposed amicus curiae to have such  
22 brief filed with this Court.

23 2. I was a member of the Nevada Assembly during the 1971  
24 legislative session. In that capacity I requested that the  
25 legislative counsel bureau initially draft the legislation that  
26 became A.B. 353. I was both the initiator and main sponsor of the  
27 same. That bill made certain revisions to N.R.S. § 608.160  
28 ("608.160") which are at issue in this appeal.

3. In my capacity as a member of the Nevada Assembly during

1 the 1971 session, I was heavily involved in the legislative hearings  
2 on A.B. 353 and in securing the passage of that bill in its final  
3 form. As a result of that experience, I am intimately familiar with  
4 the purpose of the 1971 revisions to 608.160 and how the Nevada  
5 legislature intended for those revisions to be construed.

6 4. The proposed brief being submitted with this declaration  
7 accurately sets forth the intent of the Nevada legislature in  
8 adopting the 1971 revisions to 608.160 and how the Nevada  
9 legislature believed those revisions should be construed by the  
10 Court.

11 5. I am interested in having the Court consider the proposed  
12 brief because of the important public issues presented by this  
13 appeal. I believe the court below's interpretation of 608.160 is  
14 incorrect and results in the very evil (the appropriation of  
15 employee tips by an employer) that the Nevada legislature was  
16 outlawing when it adopted the 1971 revisions to 608.160. The  
17 proposed amicus curiae are two of the very few remaining individuals  
18 with intimate knowledge of the Nevada legislature's purpose and  
19 intent in adopting the 1971 revisions to 608.160. I believe the  
20 Court will benefit from the submission of the proposed brief by  
21 gaining a better understanding of such purpose and intent and, based  
22 upon that understanding, it will reverse the court below.

23 6. I have read the foregoing and affirm it is true and  
24 correct.

25 Dated this day of May, 2007

26 \_\_\_\_\_  
27 Donald R. Mello  
28

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8 **Attorney for Amicus Curiae**  
9 **Donald R. Mello and Jack Lund Schofield**

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DECLARATION OF PROPOSED AMICUS CURIAE JACK LUND SCHOFIELD

Jack Lund Schofield hereby affirms, under the penalties of perjury, that:

1. I am a retired member of the Nevada Assembly and the Nevada Senate and served eight years in the Nevada legislature. I have read the proposed brief of amicus curiae Donald R. Mello and Jack Lund Schofield (the "proposed amicus curiae") and offer this declaration in support of the motion of the proposed amicus curiae to have such brief filed with this Court.

2. I was a member of the Nevada Assembly during the 1971 legislative session. In that capacity I was a sponsor of A.B. 353. That bill made certain revisions to N.R.S. § 608.160 ("608.160") which are at issue in this appeal.

3. In my capacity as a member of the Nevada Assembly during the 1971 session, I was heavily involved in the legislative hearings

1 on A.B. 353 and in securing the passage of that bill in its final  
2 form. As a result of that experience, I am intimately familiar with  
3 the purpose of the 1971 revisions to 608.160 and how the Nevada  
4 legislature intended for those revisions to be construed.

5 4. The proposed brief being submitted with this declaration  
6 accurately sets forth the intent of the Nevada legislature in  
7 adopting the 1971 revisions to 608.160 and how the Nevada  
8 legislature believed those revisions should be construed by the  
9 Court.

10 5. I am interested in having the Court consider the proposed  
11 brief because of the important public issues presented by this  
12 appeal. I believe the court below's interpretation of 608.160 is  
13 incorrect and results in the very evil (the appropriation of  
14 employee tips by an employer) that the Nevada legislature was  
15 outlawing when it adopted the 1971 revisions to 608.160. The  
16 proposed amicus curiae are two of the very few remaining individuals  
17 with intimate knowledge of the Nevada legislature's purpose and  
18 intent in adopting the 1971 revisions to 608.160. I believe the  
19 Court will benefit from the submission of the proposed brief by  
20 gaining a better understanding of such purpose and intent and, based  
21 upon that understanding, it will reverse the court below.

22 6. I have read the foregoing and affirm it is true and  
23 correct.

24

25 Dated this day of May, 2007

26

Jack Lund Schofield

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Respondent. )

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No.: 48831

BRIEF OF AMICUS CURIAE DONALD R. MELLO  
AND JACK LUND SCHOFIELD IN SUPPORT  
OF APPELLANTS

Submitted By:

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PRELIMINARY STATEMENT OF AMICUS

This brief is submitted by amicus Nevada State Senator Donald Mello (retired) and University of Nevada Regent Jack Lund Schofield ("the Amicus"). Amicus were two of the Nevada Assembly members who sponsored A.B. 353 which revised N.R.S. § 608.160 ("608.160") in 1971 and submit that they can authoritatively advise the Court of the purpose and intent behind those revisions. Then assemblyman Mello requested that the legislative counsel bureau draft the legislation that became the 1971 revisions to 608.160. Then assemblyman Schofield was a co-sponsor of the legislation. Amicus file this brief to advise the Court that the holding of the court below, and the holding of Moen v. Las Vegas International Hotel, Inc., 402 F. Supp 157 (D. Nev. 1975), *aff'd mem.*, 554 F.2d 1069 (9<sup>th</sup> Cir. 1977), are contrary to the intent and purpose of 608.160, as revised in 1971.

**ARGUMENT**

**I. THE PURPOSE OF THE 1971 REVISIONS TO N.R.S. § 608.160 WAS TO PREVENT AN EMPLOYER FROM TAKING EMPLOYEE TIPS OR MAKING ANY USE OF TIPS THAT EMPLOYEES AGREED AMONG THEMSELVES TO SHARE**

The 1971 amendment to 608.160 was intended to A) Prevent employers from using employee tips as a credit against their minimum wage obligations (which is not an issue in this case) and B) Prevent employers from taking employee tips or using the tips that employees agreed to share among themselves.

The impetuous for the enactment of the 1971 revisions to 608.160 was the seizure of employee tips by employers. Prior to the 1971 revisions 608.160 only required employers to post a notice that they were taking employee tips. It was widely felt in the Nevada

1 legislature that allowing employers to take employee tips was  
2 improper. As a result, 608.160 was revised to prevent employers  
3 from taking employee tips. The language adopted by the legislature  
4 for that purpose is quite clear, and 608.160(1) states that: "It is  
5 unlawful for any person to: (a) Take all or part of any tips or  
6 gratuities bestowed upon his employees."

7 When enacting the 1971 amendments to 608.160, the legislature  
8 was also aware that tip sharing agreements were common among certain  
9 groups of tipped employees. In recognition of that fact, and out of  
10 a desire to not interfere with such longstanding customs, the  
11 legislature also provided in 608.160(2) that "Nothing contained in  
12 this section shall be construed to prevent such employees from  
13 entering into an agreement to divide such tips or gratuities among  
14 themselves."

15 The purpose of 608.160(2) was to insure that when the 1971  
16 amendments became law tip sharing agreements among employees would  
17 not be deemed a "taking" of tips by an employer. Without 608.160(2)  
18 a problem could arise when a new employee was hired by an employer  
19 having a pre-existing employee tip sharing agreement. The newly  
20 hired employee, as a condition of employment, would be required to  
21 share tips with other employees under the pre-existing agreement.  
22 Pursuant to the language of 608.160(1)(a) this requirement would  
23 constitute a tip "taking" by the employer. The legislature enacted  
24 608.160(2) to provide an exception to the unconditional language of  
25 608.160(1)(a) that would otherwise prevent the imposition of such a  
26 requirement.

27 The intent of 608.160(2) was to protect tip pooling agreements  
28

1 where tipped employees agreed to share tips among themselves. Those  
2 agreements were perpetuated by allowing an employer to compel a  
3 newly hired employee to participate in a pre-existing tip pooling  
4 agreement. How tips were divided under the agreements covered by  
5 608.160(2) was to be determined solely by the tipped employees.  
6 This was reflected in the language of 608.160(2), which states that  
7 608.160(1)(a) does not prevent "such employees", meaning the  
8 employees receiving tips, "from entering into an agreement to divide  
9 such tips or gratuities among themselves", the term "themselves"  
10 meaning the same group of tipped employees (the "such employees").

11 It is a gross violation of 608.160's purpose, and the language  
12 of 608.160(2), to hold, as urged by respondent, that an employer can  
13 force a group of tipped employees to share tips with a group of  
14 management employees (or for that matter with any group of different  
15 employees). This is exactly the sort of "taking" of employee tips  
16 that 608.160(1)(a) was enacted to prevent. That the employer takes  
17 the tips from one group of employees and gives them to a different  
18 group of employees is of no consequence. This is still a taking of  
19 tips by an employer prohibited by 608.160(1)(a) and unauthorized by  
20 608.160(2) because the tips are not being shared among only the  
21 tipped employees "themselves."

22 **II. THE DECISION IN MOEN IS IN ERROR ON BOTH THE**  
23 **INTENT AND PROPER APPLICATION OF N.R.S § 608.160**

24 In Moen the Court held that the 1971 revisions to 608.160 were  
25 not intended to protect tipped workers. It found the revisions were  
26 intended protect the public against the "fraud" of an employer  
27 taking an employee's tips without the customer's knowledge. 402 F.  
28 Supp at 160. It also determined that 608.160's pre-1971 requirement

1 that employers post a notice they were taking employee tips was  
2 "insufficient" to stop such "fraud." Id. For this reason, and this  
3 reason alone according to Moen, 608.160 was revised in 1971 to  
4 completely bar employers from taking employee tips. Id. Nothing  
5 could be further from the truth.

6 The 1971 revisions to 608.160 did not arise from complaints  
7 that customers were being misled and not advised that employers were  
8 seizing employee tips. Nor was the legislature concerned with  
9 protecting the public from such deception. The only reason for the  
10 revisions was to protect tipped employees and expand their rights.

11 Moen also interprets the language of 608.160(2) in a wholly  
12 inappropriate manner that permits exactly the sort of employer  
13 seizure of employee tips that 608.160(1) was enacted to prevent.  
14 Instead of recognizing that the legislature used the terms "such  
15 employees" and "themselves" in 608.160(2) to strictly narrow the  
16 scope of a permissible tip pool, Moen ignores those terms and  
17 interprets 608.160(2) to mean that "Nothing contained in this  
18 section shall be construed to prevent such employees from entering  
19 into an agreement with the employer or with other employees to  
20 divide such tips or gratuities among the employees." Id.

21 There is nothing in common between the actual language of  
22 608.160(2) and the way Moen interpreted it. The actual language of  
23 608.160(2) permitted tip pooling only among such employees who  
24 themselves received the tips at issue and agreed to share those tips  
25 among themselves. Yet Moen allows employers to require employees to  
26 share tips with any "other employees" without limitation.

27 When enacting 608.160(2) the Nevada Legislature was not  
28

1 granting employers the power to seize employee tips (which was  
2 expressly prohibited by 608.160(1)(a)) as long as they gave those  
3 tips to some other employee. The only tip pooling agreements  
4 approved of under 608.160(2), and that comply with 608.160(1)(a),  
5 are those where the tips are distributed to "such employees" who  
6 "themselves" received the tips at issue in the first instance. Moen  
7 and the Court below are in error for holding otherwise.

8 **III. WHEN ENACTING N.R.S § 608.160 THE LEGISLATURE INTENDED**  
9 **TO PRESERVE CUSTOMARY TIP POOLING AGREEMENTS SUCH AS**  
10 **THOSE BETWEEN BUS PERSONS AND TABLE SERVERS BUT IT NEVER**  
11 **INTENDED TO ALLOW MANDATORY TIP POOLING AGREEMENTS**  
12 **BETWEEN "ALL EMPLOYEES" WHO ARE PART OF A "SERVICE LINE"**

13 Moen, in holding that 608.160(2) allowed mandatory tip sharing  
14 among different sorts of employees (not just "such employees" who  
15 received the tips in the first instance), examined something it  
16 called the "service line." Id. It reasoned that a broad group of  
17 employees (cashiers, boxmen, and floormen) provide services to a  
18 casino's customers. Based upon their common status as members of  
19 the casino "service line" it was proper, according to Moen, to  
20 require dealers to share their tips with all of their fellow  
21 "service line" workers. It analogizing this situation to that of  
22 the waitress and busboy who share a diner's tip.

23 This reasoning by Moen conflicts with the purpose and intent of  
24 608.160. The legislature, in its 1971 revisions to 608.160, did not  
25 discuss such broad "service line" tip pooling and never intended to  
26 allow it. Tip pooling among table servers and bus persons is  
27 customary and 608.160(2) was intended to preserve that custom. Such  
28 employees perform numerous overlapping and interchangeable functions  
(the only function not traditionally performed by a busboy and

1 performed only by a waitress is the taking of the customer's food  
2 order). This means a waitress and busboy are properly considered a  
3 single group of "such employees" contemplated by 608.160(2).

4 The analogy that Moen draws from the waitress/busboy situation,  
5 and applies to a broad casino "service line" that includes  
6 management personnel, is completely inappropriate. The workers in  
7 Moen's service line perform completely different functions (they are  
8 not properly a single group of "such employees") and some are  
9 managers (employer representatives) who do not traditionally receive  
10 tips. The legislature, in allowing tip pooling under 608.160(2),  
11 and in protecting traditional table server/bus person tip pools, was  
12 not authorizing employers to take employee tips so they could  
13 distribute them to other, different, customer service workers.  
14 Moen, and the Court below, by allowing such a practice, is making a  
15 mockery of the 1971 revisions to 608.160 and the vital protections  
16 the Nevada legislature was granting to tipped workers through such  
17 revisions.

18 **CONCLUSION**

19 Wherefore, for all of the foregoing reasons, the order and  
20 judgment of the Court below should be reversed in its entirety.

21 Dated this 11th day of May, 2007

22 Respectfully submitted,

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Attorney for Amicus Curiae  
Donald R. Mello and  
Jack Lund Schofield

1 ATTORNEY'S CERTIFICATION IN COMPLIANCE WITH  
2 RULE 28(A) OF THE NEVADA RULES OF APPELLATE PROCEDURE

3 Alda Anderson, the attorney for the amicus curiae Donald R.  
4 Mello and Jack Lund Schofield, by signing below hereby certifies in  
5 compliance with Rule 28(A) of the Nevada Rules of Appellate  
6 Procedure, that:

- 7 1. I am an active member of the bar of the State of Nevada.  
8 2. I have read this appellate brief, and to the best of my  
9 knowledge, information, and belief, it is not frivolous or  
10 interposed for any improper purpose. I further certify that this  
11 brief complies with all applicable Nevada Rules of Appellate  
12 Procedure, in particular N.R.A.P. 28(e), which requires every  
13 assertion in the brief regarding matters in the record to be  
14 supported by a reference to the page of the transcript or appendix  
15 where the matter relied on is to be found. I understand that I may  
16 be subject to sanctions in the event that the accompanying brief is  
17 not in conformity with the requirements of the Nevada Rules of  
18 Appellate Procedure.

19 Dated this day of May, 2007  
20

21 Alda Anderson, Esq.  
22 Nevada Bar No.: 8746  
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