

Case No. 76457

IN THE SUPREME COURT OF NEVADA

KENNETH BERBERICH,

Appellant,

vs.

BANK OF AMERICA, N.A.; and
MORTGAGE ELECTRONIC
REGISTRATIONS SYSTEMS, INC.,

Respondents.

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**REPLY IN SUPPORT OF MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF
IN SUPPORT OF APPELLANT'S OPENING BRIEF**

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I. SFR IS AN AMICUS CURIAE.

In their Opposition, Bank of America, N.A. (“BANA”) and Mortgage Electronic Registration Systems, Inc. (“MERS”) prove beyond doubt that SFR is an amicus curiae. As BANA and MERS note, SFR is not a party to this appeal. Likewise, SFR does not have an interest in the property that is the subject of the appeal. Instead, SFR’s interest lies in the issues presented by the case. This is the epitome of an amicus curiae. As this Court is well aware, an amicus curiae is someone who is not a party to a case, but who has an interest in the subject matter of the case, and who offers information or insight into the issues in the case. *See Black’s Law Dictionary*, at 102 (10th ed. 2014). What is more, unlike parties to the case who are limited to the record and arguments made below, where a case may have broader implications, like here, amicus curiae can submit briefs to articulate those points so that the court is aware of the possible legal effect its decision might have beyond the confines of the case at hand. Eugene Gressman, Kenneth S. Geller, Stephen M. Shapiro, Timothy S. Bishop & Edward A. Hartnett, *Supreme Court Practice*, 741-42 (9th ed. 2007).

This is exactly what SFR seeks to do by way of its amicus curiae brief. Because this case deals with statute of limitations in the context of “quiet title” actions, this case has broad implication and this Court’s decision could affect a large number of SFR’s cases. Ironically, this is the exact situation that the court recognized

in *Ryan v. Commodity Futures Trading Comm.*, 125 F.3d 1062, 1063 (7th Cir. 1997), which permitted an amicus. In *Ryan*, the court recognized that “[a]n amicus brief should normally be allowed...when the amicus has an interest in some other case that may be affected by the decision in the present case (though not enough affected to entitle the amicus to intervene and become a party in the present case)....” *Id.* at 1063. This fits SFR to a T. As indicated in its Motion, SFR has cases that were impacted by the interpretation of NRS 11.070 and 11.080. Some to SFR’s favor, and some not to SFR’s favor. All told, SFR is an amicus curiae, and this Court should permit SFR to file its amicus curiae brief.

II. THE RULE REQUIRES AN INTEREST, NOT THAT SFR BE DISINTERESTED.

It would appear as if BANA and MERS are asserting an amicus curiae must be completely disinterested, but of course, this defies NRAP 29(c)(1), which requires that a movant show its interest. Nothing requires that an amicus be totally disinterested. *Funbus Systems*, 801 F.2d at 1125 (citing *Hoptowit v. Ray*, 682 F.2d 1237, 1260 (9th Cir. 1982), *overruled on other grounds by Sandin v. Conner*, 515 U.S. 472, 115 S.Ct. 2293, 132 L.Ed. 2d 418 (1995)). Even parties with a ‘pecuniary’ interest in the outcome of a case may appear as amici. *Neonatology Assoc., P.A. v. Comm’r of Internal Revenue*, 293 F.3d 128, 131-32 (3d Cir. 2002 (citing a number of United States Supreme Court cases, internal citations omitted) (*cited with favor in Federal National Mortgage Association v. SFR Investments Pool 1, LLC*, Case

No. 72519, Doc. 18-04376 (Nev. Feb. 1, 2018)(Order Denying Motion to Strike)); *see also Stone Hollow Ave. Trust v. Bank of America, N.A.*, Case No. 64955, Doc. 16-31805 (Nev. Oct. 12, 2016)(order granting in pertinent part, SFR’s motion for leave to file amicus brief).

Again, SFR has shown by way of its Motion its interest in the subject-matter of this appeal. Contrary to BANA and MERS’ contentions, SFR’s motion does not seek to duplicate Berberich’s arguments. Instead, as indicated in the Motion, SFR seeks to address both the rules of statutory interpretation that neither *Gray Eagle*¹ nor *Weeping Hollow*² did and how NRS 11.070 and/or 11.080 can never apply to a bank, who as a lienholder, challenges an NRS 116 sale. In that regard, SFR’s brief touches upon broader implications raised by the issues in the case, and therefore, SFR’s brief is not constrained to the arguments made by the parties.

Finally, SFR does not know what to make of BANA and MERS’ comment that this Court “has already heard plenty from SFR.” SFR is a citizen of this state, and its Motion more than establishes its status as an amicus curiae such that this Court should agree to hear from SFR again. The fact that this Court has already

¹ *Saticoy Bay LLC Series 2021 Gray Eagle Way v. JP Morgan Chase Bank, N.A.*, 133 Nev. Adv. Op. 3, 388 P.3d 226 (Jan. 26, 2017).

² *Weeping Hollow Ave., Trust v. Spencer*, 831 F.3d 1110, 1114 (9th Cir. 2016).

recognized SFR as an amicus curiae in three other cases, shows the same should hold true here.

CONCLUSION

Based on the foregoing, SFR respectfully requests this Court grant it permission to file its amicus brief.

Respectfully submitted this 4th day of January, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 4th day of January, 2019. Electronic service of the foregoing **REPLY IN SUPPORT OF MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANT’S OPENING BRIEF** was made pursuant to the Master Service List.

Dated this 4th day of January, 2019.

/s/ Karen L. Hanks
An employee of KIM GILBERT EBRON