Case No. 81129

IN THE SUPREME COURT OF NEVADA

U.S. BANK, N.A., AS TRUSTEE FOR THE SPECIALITY UNDERWRITING AND RESIDENTIAL FINANCE TRUST AND MORTAGE LOAN ASSET-BACKED CERTIFICATES SERIES 2006-BC4

Plaintiff-Appellant,

vs.

THUNDER PROPERTIES, INC. AND WESTLAND REAL ESTATE DEVELOPMENT AND INVESTMENTS,

Defendant-Respondents.

BRIEF OF AMICUS CURIAE SFR INVESTMENTS POOL 1, LLC, IN SUPPORT RESPONDENT'S PETITION FOR REHEARING

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NRAP 26.1 DISCLOSURE

The undersigned counsel to amicus SFR Investments Pool 1, LLC ("SFR") certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made so the judges of this court may evaluate possible disqualification or recusal.

SFR is a privately held Nevada limited liability company and there is no publicly held company that owns 10% or more of SFR Investments Pool 1, LLC's stock.

Amicus SFR is represented by Karen L. Hanks, Esq. of Hanks Law Group.

DATED this 29th day of March, 2022.

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INTEREST OF THE AMICUS CURIAE

SFR Investments Pool 1, LLC ("SFR") has purchased properties at association non-judicial foreclosure sales. *See SFR Investments Pool 1, LLC v. U.S. Bank, N.A.*, 130 Nev. 742, 743, 334 P.3d 408, 409-10 (2014). Many of these properties are the subject of lawsuits in Nevada's state and federal courts.

DATED this 29th day of March, 2022.

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INTRODUCTION

Rehearing under NRAP 40(c)(2) is appropriate because this Court (1) misapplied *Berberich*,[1] and in so doing misapprehended the fact the foreclosure sale itself is the affirmative action that calls into question a lender's security interest; (2) ignored *Clark*,[2] and (3) ignored NRS 116.31166, *SFR*[3] and *Shadow Wood*.[4] **First**, this Court misconstrued *Berberich*. Nothing in *Berberich* held after a party is dispossessed or loses title (both of which are triggers for NRS 11.070 and 11.080) something more must happen before the timeline is really triggered. **Second**, in putting the onus on a purchaser to trigger the statute of limitations (exactly how remains a mystery), this Court ignored its prior precedent holding "[a] cause of action 'accrues' when a suit may be maintained thereon."[5] **Third**, this Court's decision ignores that the sale vests property rights in the purchaser (or at least it is supposed to), and thus requiring the purchaser to do more to ensure these rights vest

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[1] *Berberich v. Bank of America, N.A.*, 136 Nev. 93, 460 P.3d 440 (2020).
[2] *Clark v. Robison*, 113 Nev. 949, 951, 944 P.2d 788, 789 (1997).
[3] *SFR*, 130 Nev. 742, 743, 334 P.3d 408, 409-10.
[4] *Shadow Wood Homeowners Association v. New York Community Bancorp, Inc.*, 132 Nev. 49, 366 P.3d 1105 (2016).
[5] *Clark,* 113 Nev. at 951, 944 P.2d at 789 citing Black's Law Dictionary at 19 (5th ed. 1979).

at a date certain, flies in the face of legislation and common law. Most importantly, it unfairly applies retroactively.

ARGUMENT

A. This Court Misapplied *Berberich*.

On the one hand, this Court acknowledged *Berberich* did not directly control this matter, but then distorted *Berberich's* discussion and found an additional affirmative act beyond the sale, on the purchaser's part no less, is required to trigger the statute of limitations on a claim only the Bank would bring. This misapprehension is so key it bears repeating: this Court put the onus on the purchaser to trigger another party's cause of action. The discussion in *Berberich* which noted "mere notice of an adverse claim is not enough" and "notice of disturbed possession" triggers the running of the statute of limitations ignores the context in which *Berberich* was decided. In *Berberich*, the bank claimed the purchaser's quiet title action was time barred (oddly enough using the HOA foreclosure sale as the trigger date) under NRS 11.070 or NRS 11.080.

But as the *Berberich* Court discussed at length, both of these statutes deal with the *recovery* of property (either possession or title) and therefore presuppose either possession or title was taken.[6] As the *Berberich* Court aptly noted, "[a] person does

[6] *Berberich*, 136 Nev. at 97.

not need to recover something unless it has first been taken away."[7] This was the crux of the issue at play in *Berberich*: because the purchaser had neither its title stripped nor its possession stripped, the five years never triggered. It is also why the Court found the period is not triggered until the plaintiff is ejected or his title is called into question.

But then this Court took that whole discussion and twisted it to the point where it created this extra imposition on the buyer to take some affirmative act to trigger the bank's claim. There is not a single statute of limitations that functions this way. Not a single statute of limitations requires the party who would be sued to trigger the timeline on another party's claim.

B. This Court Ignored its Own Precedent Which Holds a Claim Accrues From the Date Suit Can be Maintained.

The entire premise of this Court's reasoning on the trigger date is the notion a bank is not reinstating its lien or redeeming its lien[8] because while a foreclosure sale *can* extinguish the deed of trust, it does not always.[9] But this is a distinction without a difference. Publicly speaking the lien is foreclosed; i.e. not intact. Put another way, after an HOA foreclosure sale, the public records only show a valid

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[7] *Id.*
[8] Decision, p. 10.
[9] Decision, at p. 12 (emphasis in original)

HOA foreclosure sale, and a valid HOA foreclosure sale extinguishes all deeds of trusts.[10]

Thus, to publicly reinstate its lien the bank must file a claim challenging the sale and then depending on the challenge, i.e. tender, futility of tender, noticing, sales price, just to name a few, prove specific elements.[11] But every single challenge ever brought by a bank to these sales was publicly *unknown*. Simply because a bank **might** be able to show the sale did not foreclose out the lien, at some later date, has nothing to do with when that claim to challenge the sale is triggered. This is contrary to this Court's prior precedent, which holds "[a] cause of action 'accrues' when suit may be maintained thereon."[12]

Under *Clark*, this means the trigger date, at the latest is the sale because this is the latest point a bank or even a homeowner can maintain a claim. If the challenge is tender related, then the claim can be maintained even earlier i.e. at the date of rejection. But public reinstatement, via a lawsuit, is not a foregone conclusion. SFR has won countless cases where the bank was not able to prove the elements of the

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[10] *SFR*

[11] This fact also cuts against the dicta by this Court that a challenge based on tender or tender futility requires no claim. It ignores there are specific elements for both of these claims that this very Court has found a bank has not always proven.

[12] *Clark v. Robison*, 113 Nev. at 951, 944 P.2d at 789 citing Black's Law Dictionary at 19 (5th ed. 1979).

challenge raised including, most recently, when this Court affirmed a trial court's finding the bank failed to prove it delivered its tender.[13]

Regardless, the mere fact a sale might not ultimately have the effect it otherwise publicly appeared to have had, does not change the fact the sale is what the bank is challenging and thus the sale date (or some date before depending on the challenge) is the date the bank could maintain its claim/action and thus when the statute of limitation begins to run.

C. This Court's Decision Flies in the Face of a Purchaser's Property Vestment Rights and Cannot Apply Retroactively.

This Court's decision ignores NRS 116.31166, *SFR* and *Shadow Wood*. In holding "[t]he HOA sale, standing alone, is not sufficient to trigger the period,"[14] this Court ignored NRS 116.31166 which states the HOA sale "vests in the purchaser the title of the unit's owner without equity…" Additionally, finding the foreclosure sale puts the bank on notice that a "purchaser will raise an adverse claim that the lien has been extinguished"[15] ignores the entire construct of NRS 116.3116(2) which this Court interpreted as giving "an HOA a true superpriority lien, proper foreclosure of

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[13] *U.S. Bank v. SFR Investments Pool 1, LLC*, Case No. 79235 (affirming trial court's finding U.S. Bank failed to prove delivery of tender) (Feb. 18, 2022).
[14] Decision, at p. 12.
[15] *Id.*

which will extinguish a first deed of trust."[16] Then, this Court ignored its own precedent in *Shadow Wood*, which despite the statutory language of "without equity" created an avenue in equity where a bank could challenge an HOA foreclosure sale.

Essentially, this Court has made it so a purchaser's fee simple property rights (all of them, not just some of them) never vest, despite both statutory and common law providing otherwise. This is nothing short of a judicial taking.[17] This Court's decision creates an extra step, on the part of a purchaser or HOA (in cases where no party bids above the credit bid) before all of his/her fee simple property rights can vest. But the key problem is this Court only now, in 2022, just created this extra step, and thus to apply it retroactively, violates principles of fairness. In analyzing whether a law applies retroactively, this Court has noted, "[t]he presumption against retroactively is typically explained by reference to fairness."[18]

Specifically, quoting a U.S. Supreme Court case, this Court stated, we are instructed "[e]lementary considerations of fairness dictate that individuals should

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[16] *SFR,* 130 Nev. at 743, 334 P.3d at 409-10.

[17] *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, 560 U.S. 702, 715, 130 S.Ct. 2592, 2602 (2010) ("If a legislature or a court declares that that what was once an established right of private property no longer exists, it has taken that property, not less than if the State had physically appropriated it or destroyed its value by regulation.")

[18] *Sandpointe Apts. v. Eighth Jud. Dist. Ct.*, 129 Nev. 813, 820, 313 P.3d 849, 853-54 (2013).

have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted."[19] Additionally, "[i]n a free, dynamic society, creativity in both commercial and artistic endeavors is fostered by a rule of law that gives people confidence about the legal consequences of their actions."[20] Finally, a law has retroactive effect "when it 'takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past.' "[21]

Here, this Court has impaired SFR's vested fee simple property rights. The Legislature intended HOA foreclosure sales to be final, and for other types of foreclosure sales, severely limited the time-period in which challenges could be brought or the interest redeemed. Now, this Court has created a new obligation on the part of a purchaser in connection with an HOA foreclosure, one that appears nowhere in NRS Chapter 116 to repudiate (whatever that means) the lien at some point (who knows when) in order to trigger a bank's action to challenge the sale.

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[19] *Id.* quoting *Landgraf v. USI Film Products*, 511 U.S. 244, 265, 114 S.Ct. 1483, 1483 (1994).
[20] *Id.* quoting *Langdorf* at 265–66.
[21] *Id.* quoting *Public Employee's Benefits Program v. Las Vegas Metro Police Dept.*, 124 Nev. 138, 155, 179 P.3d 542, 553–54 (2008) (alteration in original) (quoting *I.N.S. v. St. Cyr.*, 533 U.S. 289, 321, 121 S.Ct. 2271) (2001) (quoting *Landgraf*, 511 U.S. at 269, 114 S.Ct. 1483).

Essentially unless and until this happens, any purchaser's property rights have not vested. SFR, as well as countless other purchasers, could not have known, after 10 years of when it first started purchasing properties at HOA foreclosure sales, such a new obligation would be imposed upon them, and now for countless cases that are already in litigation. Now, SFR intends to argue it repudiated any and all bank liens long before it purchased any property because it was publicly and readily known SFR took the position that all HOA foreclosure sales extinguished the deed of trust, but to the extent banks argue the repudiation must have occurred after the sale, then this Court has undoubtedly created a law that cannot, in fairness, be applied retroactively.

CONCLUSION

This Court should grant rehearing and find the following: a lienholder's claim challenging an HOA foreclosure sale triggers at the latest on the date of the sale, but in no event later than when the lienholder could maintain an action.

DATED this 29th day of March, 2022.

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CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type-style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word with 14 point, double-spaced Times New Roman font.
2. I further certify that this brief contains 1,896 words, which includes interest of amicus statement.
3. I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found.

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4. I understand that I may be subject to sanction in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 29th day of March, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 29th day of March, 2022. Electronic service of the foregoing **Brief of Amicus Curiae SFR Investments Pool 1, LLC, in Support of Petition for Rehearing** was made pursuant to the Master Service List.

Dated this 29th day of March, 2022.

/s/ Candi Fay
an employee of Hanks Law Group