

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
NO. 14-1754

Johanna Beth McDonough,

Plaintiff-Appellant,

v.

Anoka County, et al.,

Defendants-Appellees.

On Appeal From the United States District Court
for the Northern District of Minnesota

**APPELLEES CITIES OF APPLE VALLEY, BLOOMINGTON,
BROOKLYN CENTER, BROOKLYN PARK, BURNSVILLE, COON
RAPIDS, EAGAN, ELK RIVER, EVELETH, FERGUS FALLS, GOLDEN
VALLEY, HANCOCK, HOPKINS, ISANTI, MAPLE GROVE,
MINNETONKA, MOUND, MOUNDS VIEW, NEW BRIGHTON, NEW
HOPE, NEW PRAGUE, NORTHFIELD, OWATONNA, REDWOOD
FALLS, RICHFIELD, ROCHESTER, ROSEVILLE, SOUTH SAINT PAUL,
ST. ANTHONY AND WAYZATA AND THE DAKOTA COUNTY
COMMUNICATIONS CENTER AND SOUTH LAKE MINNETONKA
POLICE DEPARTMENT'S MEMORANDUM IN OPPOSITION TO
MOTION OF ELECTRONIC PRIVACY INFORMATION CENTER FOR
LEAVE TO FILE AMICUS CURIAE**

INTRODUCTION

The Electronic Privacy Information Center (“EPIC”) moved this Court pursuant to Fed. R. App. P. 29(b) for leave to file an *amicus curiae* brief in the above-captioned matter. EPIC’s motion should be denied because their brief addresses matters irrelevant to this case, their arguments are duplicative, and Appellant is adequately represented by counsel. EPIC is not a disinterested entity and their brief fails to provide any unique information or perspective that can assist the Court. Accordingly, EPIC’s motion for leave to file an *amicus curiae* brief should be denied.

STANDARD

An *amicus curiae* is granted leave to file a brief if they have an interest and their brief is “desirable” and “the matters asserted are relevant to the disposition of the case.” Fed. R. App. P. 29(b). There is no useful purpose in permitting an *amicus curiae* brief if the issues addressed were raised in the moving party’s brief. *See Williams v. Armontrout*, 912 F.2d 924, 941 (8th Cir. 1990) (citing Order denying Motion for Leave to File *Amicus Curiae* brief.) The Court should not consider issues raised by the *amici* and not by the parties. *Solis v. Summit Contractors, Inc.*, 558 F.3d 815, 827, n. 6 (8th Cir. 2009) (citing *United States v. United Foods, Inc.*, 533 U.S. 405, 417, 121 S.Ct. 2334, 150 L.Ed.2d 438 (2001)). This Court also considers whether “the parties are represented by competent

counsel, [as] the need of assistance cannot be assumed.” *N. Sec. Co. v. United States*, 191 U.S. 555, 556 (1903).

ARGUMENT

I. THE ARGUMENTS PRESENTED BY EPIC ARE DUPLICATIVE AND IRRELEVANT.

EPIC’s *amicus* brief only reiterates the same arguments of Appellant. Like Appellant, EPIC urges this Court to apply the “discovery rule” as opposed to the four year statute of limitations for federal statutory claims under 28 U.S.C. § 1658(a) (2012). They do not, however, cite any new authority or arguments in support of their position. Instead, EPIC cites the same cases as Appellant and offers only conclusory remarks about what rule they believe furthers the purpose of the Driver’s Privacy Protection Act (“DPPA”).

EPIC spends the majority of their brief describing risks individuals have for identity theft as a result of the “highly restricted personal information” collected by State Departments of Motor Vehicles (“DMVs”). There are no facts alleged in this case to suggest that Appellant’s “highly restricted personal information” such as social security number, or medical information were accessed or used. Appellant’s Complaint only alleges she provided personal information to the Department of Public Safety including her address, color photograph, date of birth, weight, height, and eye color for the purpose of acquiring and utilizing a State of Minnesota

driver's license. A30 ¶ 217. Additionally, the Complaint lacks any allegations her information was used or caused any identity theft concerns.

EPIC argues the discovery rule should apply because identity theft may not be discovered for years and is latent because “drivers will never have sufficient information to adjudicate claims prior to learning that their records have been accessed.” *EPIC Br.* p. 25. Not only is this irrelevant because Appellant did not plead identity theft, it is a misapplication of the law. The Supreme Court extended the discovery rule to claims for “latent disease,” not every potential latent injury. *See TRW Inc. v. Andrews*, 534 U.S. 19, 28 (2001) (citing *Rotella v. Wood*, 528 U.S. 548, 555 (2000)).

Additionally, the United States Supreme Court directed the relevant considerations in determining whether the discovery rule applies are the “text and structure of the particular statute.” *TRW Inc. v. Andrews*, 534 U.S. 19, 28 (2001). Identify theft has no relevance to the text and structure of the DPPA statute. Therefore, EPIC's discussion on identity theft, including what other states are doing to combat identity theft, is irrelevant.

In advocating for the discovery rule, EPIC also claims a “lack [of] symmetrical information.” *EPIC Br.* p. 26. They identify the drivers and DMVs as individuals with asymmetrical information. *Id.* The DPPA, however, prohibits suits against the State and its agencies. *See* 18 U.S.C. § 2725(2) (excluding “State

or agency thereof' from definition of a person). Therefore, this argument is irrelevant to these City Appellees. EPIC also seeks the addition of a breach notification system, which currently does not exist under the DPPA. *See EPIC Br.* p. 31. EPIC's suggested remedial measure is a policy consideration for Congress, not the judiciary.

EPIC's brief offers nothing relevant to assist this Court and therefore, their motion to appear as *amicus curiae* in this case should be denied.

II. THE PARTIES ARE ADEQUATELY REPRESENTED.

Although Appellant consented to the filing of the *amicus* brief, she is adequately represented by four attorneys. Appellant's counsel addressed all of the relevant issues in their briefing. Therefore, Appellant is not in need of assistance from an *amicus*. *See N. Sec. Co.*, 191 U.S. at 556 (the need of assistance cannot be assumed when the party is represented by counsel.) Because Appellant is adequately represented by counsel who addressed the same issues raised by EPIC, the addition of the *amicus* brief will not benefit the Court and their motion should be denied.

CONCLUSION

Given the large volume of briefing already in this particular case, and an *amicus* brief which merely repeats Appellant's arguments without adding further insight into the law, EPIC's Motion for Leave to File an *Amicus* Brief should be

denied. The role of an *amicus curiae* is to assist this Court in determining relevant legal issues. The admittance of EPIC's *amicus curiae* brief would not further this purpose. Accordingly, these Appellees respectfully request this Court deny EPIC's Motion for Leave to File an *Amicus* Brief.

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Dated: June 12, 2014

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