

IN THE SUPREME COURT OF THE STATE OF NEVADA

DAISY TRUST

Appellant,

vs.

WELLS FARGO BANK NA, MTC
FINANCIAL, INC., dba TRUSTEE
CORPS,

Respondents.

Case No. 63611

District Court #A-13-079085-6

Electronically Filed
Mar 06 2014 03:16 p.m.
Tracie K. Lindeman
Clerk of Supreme Court

APPEAL

**From the Eighth Judicial District Court
The Honorable Stefany Miley, District Judge**

**REQUEST FOR APPEAL CONFERENCE
PURSUANT TO NRAP 33**

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I. Introduction

Wells Fargo Bank, Respondent in above-captioned matter, hereby requests a conference pursuant to Rule 33 of the Nevada Rules of Appellate Procedure. The purpose of the requested conference is to discuss an efficient and orderly method of coordinating not only the present matter – which is now fully briefed – but also other representative cases that will present the Court with the full analysis of the legal issues and theories presented in the statewide homeowners’ association (“HOA”) super-priority lien litigation now filling the dockets of both this Court and the various District Courts throughout Nevada. The Supreme Court has scheduled its first oral argument in a case concerning a HOA super-priority lien issue in the case of *Villa Palms Court 102 Trust v. Riley*, Case No. 62528. Oral argument has been scheduled for May 7, 2014.

The HOA superpriority issues are of statewide significance. They need resolution urgently. While the *Villa Palms* appeal presents one matter of first impression under Nevada law, both Appellant’s and Respondent’s counsel in this appeal believe it is important for the Supreme Court to address comprehensively, at one time, the many issues relating to the HOA super-priority lien. These issues go beyond mere statutory construction, which are the bases on which some of the lower courts have disposed of cases concerning HOA super-priority liens. For this reason, many of the plaintiff and defense firms handling a large number of the

HOA super-priority cases – representing a large number of the litigants and stakeholders affected by the conflict within Nevada law over these issues – agree that the Supreme Court should establish some method of coordinating resolution of this mass of cases. Thus, they hope, this Court’s first pronouncement on the HOA super-priority lien issue would provide comprehensive guidance to the large community of affected parties, and would not merely respond to the narrower subset of issues presented in the *Villa Palms* appeal – which focuses almost exclusively on the single issue of statutory construction.

Here, Wells Fargo believes that an efficient method of case coordination would be to set oral argument of the pending *Daisy Trust* Appeal (and perhaps a small number of other cases representing all common issues presented in these matters) concurrently with the *Villa Palms* appeal. The *Daisy Trust* appeal presents additional issues based on commercial reasonableness and bona fide purchaser status as well as fundamental constitutional issues of due process and takings. These issues are not adequately addressed in the *Villa Palms* case. Thus, hearing argument in the *Daisy Trust* appeal (and perhaps other representative cases) concurrently with *Villa Palms* would promote efficiency and ensure that the Court considers all relevant arguments when deciding this important matter of first impression. The parties welcome an opportunity to discuss their proposal for case

coordination with the Supreme Court pursuant to NRAP 33 at the Court's earliest convenience.

II. Relevant Background

Villa Palms, Daisy Trust (and many other HOA super-priority appeals) involve the purchase of interests in real property via a HOA foreclosure sale. Plaintiffs in the underlying cases argue that their acquisition of the HOA's interest extinguished the lenders' prior deeds of trust on the properties in question. Following the HOA foreclosure sale, Appellants in these matters each brought suit to quiet title and seeking declaratory relief, arguing that their lien has a "super-priority" under NRS 116.3116, the foreclosure of which extinguishes the lenders' interests as a matter of law. Not surprisingly, the lenders take a different position, arguing that the foreclosure of an HOA super-priority lien does not extinguish the lender's deed of trust. Rather, the super-priority lien establishes a priority to payment only, not title.

At their core, all of the appeals in cases about HOA super-priority liens center around one common legal issue: whether an HOA lien foreclosure extinguishes the lenders' first in time deed of trust. As noted above, this Court has ordered that *Villa Palms* be set for oral argument on May 7, 2014. That scheduling – and discussions affected parties have had with each other, and with district courts as well – lead the parties in this case to propose that the *Daisy Trust* appeal (and

perhaps other representative appeals) be heard concurrently with *Villa Palms* on the Court's May calendar or on the soonest later date convenient to the Court when the cases can all be argued.

III. Discussion

Under Rule 33, this Court “may direct the attorneys for the parties to appear before the court or a justice thereof for a conference to address any matter that may aid in disposing of the proceedings, including simplifying the issues. The court or justice may, as a result of the conference, enter an order controlling the course of the proceedings.” Wells Fargo requests a conference concerning the course of the *Daisy Trust* proceedings, and potentially other similar representative appeals, that could efficiently and effectively be heard along with *Daisy Trust*, and concurrently with the *Villa Palms* matter.

A. Hearing the Appeals Together Will Promote Judicial Economy And Precedential Uniformity.

Because *Villa Palms*, *Daisy Trust*, and other similar representative cases raise a common core issue, but varying additional issues concerning the HOA super-priority lien statute, hearing the appeals together would promote efficiency for both the Court and the parties, and reduce the risk of inconsistent rulings. *See Goelz & Watts, Rutter Group Practice Guide: Federal Ninth Circuit Civil Appellate Practice* 9:59 (The Rutter Group 2012) (“Certain areas of jurisprudence tend to generate a number of cases presenting similar issues . . . The court tries to

cluster these cases for argument and hearing, to promote uniformity in its precedent.”).

In these appeals, the Supreme Court is called upon to decide an issue of first impression: whether and how an HOA foreclosure under NRS 116.3116 affects a first priority deed of trust already on the property. Importantly, the *Daisy Trust* appeal raises issues and arguments not raised in *Villa Palms* that will affect the adjudication of the core issue, and which could have a bearing on any decision in other HOA lien litigation matters. If *Villa Palms* were to be decided in isolation, without consideration of the legal arguments raised in *Daisy Trust* and other similar cases, the Court will not have the benefit of a more complete airing of the issues, or the benefit of putting their many moving parts together in one comprehensive opinion. Also importantly, failure to hear and address all the issues related to the HOA super-priority litigation comprehensively, and at one time, would not resolve fully the logjam that currently exists both in this Court and in the district courts. Regardless of how the Court construes NRS 116.3116, the issues of commercial reasonableness and constitutionality require separate legal evaluations and are independently dispositive of the question of lien extinguishment. This reason, more than any other, compels case coordination and concurrent hearings so as to avoid the potential for incomplete or inconsistent rulings.

B. The Cases May Be Heard Together Without Delay or Prejudice to Any Party.

The procedural posture of the appeals also weighs in favor of hearing them together. The cases are like one large ocean-wave of litigation spawned by the earthquake of the novel legal questions they presented. They – including *Villa Palms*, *Daisy Trust*, and other cases – are thus at virtually the same stage, having swamped the lower courts roughly at once, with their many sets of fully-completed briefs now lapping at this Court’s doors in advance of their oral argument settings.

C. Opposing Counsel In *Daisy Trust* Concurs.

Counsel for Appellant in *Daisy Trust* concurs with Wells Fargo’s request to have *Daisy Trust* heard at the same time as *Villa Palms*. Moreover, counsel has discussed the possibility of concurrent hearings with other plaintiff and defense counsel who have similar representative cases, and all are in agreement that concurrent oral argument of certain select cases would be appropriate and beneficial in this particular circumstance.

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IV. Conclusion

For the reasons stated above, Wells Fargo respectfully requests that this Court conduct a conference under NRAP 33 to discuss case coordination of the pending matter as well as the parties' request to concurrently hear the *Daisy Trust* appeal (and perhaps other representative appeals) at the same time, and before the same panel, as *Villa Palms*.

DATED: March 6, 2014.

SNELL & WILMER L.L.P.

By: /s/ Richard C. Gordon

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CERTIFICATE OF COMPLIANCE

I hereby certify that the **REQUEST . . .** complies with the typeface and type style requirements of NRAP 32(a)(4)-(6), because this brief has been prepared in a proportionally spaced typeface using a Microsoft Word 2010 processing program in 14-point Times New Roman type style.

Finally, I hereby certify that I have read the **REQUEST FOR APPEAL CONFERENCE PURSUANT TO NRAP 33**, 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)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada

Rules of Appellate Procedure.

Dated March 6, 2014.

SNELL & WILMER L.L.P.

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I electronically filed the foregoing REQUEST FOR APPEAL CONFERENCE PURSUANT TO NRAP 33 with the Clerk of Court for the Supreme Court of Nevada by using the appellate E-Flex system on March 6, 2014.

I further certify that all participants in this case are registered users and that service will be accomplished by the E-Flex system.

/s/ *Julia Melnar*
An employee of Snell & Wilmer L.L.P.

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