ARIZONA SUPREME COURT
ORAL ARGUMENT CASE SUMMARY

BMO HARRIS BANK v. WILDWOOD CREEK RANCH, LLC
CV-14-0101-PR

PARTIES:

Petitioners/Defendants: Wildwood Creek Ranch, LLC ("Wildwood"), and Shaun F. Rudgear and Kristina B. Rudgear ("the Rudgears")

Respondent/Plaintiff: BMO Harris Bank N.A., as successor to M&I Marshall & Ilsley Bank ("BMO")

FACTS:

Overview. This appeal arises out of BMO's lawsuit against Wildwood and the Rudgears to obtain a deficiency judgment on the unpaid balance on a loan secured by property sold at a trustee sale. At issue is whether Arizona's anti-deficiency statute, A.R.S. § 33-814(G), protects an otherwise eligible borrower if the borrower intended to build and occupy a residence on the property but did not start construction before defaulting on the underlying loan. The superior court ruled that the statute protects a borrower in this situation, and the Court of Appeals reversed, ruling that irrespective of a borrower's intent, the statute does not apply if the property subject to a deed of trust is vacant and unimproved land.

Statute at Issue: This case concerns the proper interpretation of the phrase "trust property . . . which is . . . utilized for . . . [a] dwelling" as it appears in Arizona's anti-deficiency statute, which provides more generally as follows:

> If *trust property* of two and one-half acres or less *which is* limited to and *utilized for* either a single one-family or a single two-family *dwelling* is sold pursuant to a trustee's power of sale, no action may be maintained to recover any difference between the amount obtained by sale and the amount of the indebtedness and any interest, costs, and expenses.

A.R.S. § 33-814(G) (West 2014) (emphasis added).

Factual Background. Wildwood is a limited liability company that is owned solely by the Rudgears. In 2006, Wildwood purchased a large unimproved property, which it broke up into five lots. Wildwood obtained a $296,000 loan ("the Loan") through BMO's predecessor, secured by a deed of trust on one of the unimproved lots ("the Property"). The Rudgears also personally guaranteed the Loan. Ultimately, the other four lots were sold, leaving Wildwood and the Rudgears with only this single lot.

The Loan was renewed in 2009, extending its maturity date to 2011 ("the Renewal Loan"). In April 2011, Wildwood and the Rudgears defaulted on the Renewal Loan, and BMO sold the

Property at a trustee's sale for about $31,000. From 2006 through the trustee's sale, the Property remained unimproved—no construction of any kind was initiated or completed on the parcel.

After the trustee's sale, BMO sued Wildwood and the Rudgears to obtain a deficiency judgment for the unpaid balance of the loan. Both sides moved for partial summary judgment on liability. The Rudgears contended that they had no liability for the deficiency under A.R.S. § 33-814(G) because they intended to build a single one-family dwelling on the Property. In contrast, BMO argued that the Rudgears could not avoid liability under the statute because, among other reasons, no dwelling was ever constructed on the Property and genuine issues of material fact existed about whether they actually intended to reside on the Property.

The superior court granted summary judgment for Wildwood and the Rudgears, and denied BMO's motion. Relying on the Court of Appeals decision in *M&I Marshall & Ilsley Bank v. Mueller*, 228 Ariz. 478, 268 P.3d 1135 (App. 2011) ("*Mueller*"), it ruled that the "[k]ey to this analysis" was "whether the Defendants ever had the requisite subjective intent to build and occupy" a dwelling on the Property. It went on to rule that the affidavits the Rudgears submitted in support of their motion substantiated that they had the required intent, and that summary judgment was warranted in their favor because, in the court's view, BMO failed to offer any evidence to contradict them. BMO then appealed to the Court of Appeals.

The Court of Appeals' Ruling. The Court of Appeals reversed and remanded to the superior court for entry of partial summary judgment in BMO's favor. The court indicated that the only relevant issue was "whether the Property was limited to and utilized for a one- or two-family dwelling within the meaning of A.R.S. § 33-814(G)." It ruled that this requirement was not met here because "[i]n looking at the plain language of the statute . . . the protection for 'dwellings' . . . does not apply to vacant land."

The court relied on several past Arizona appellate decisions that defined "dwelling" variously as "a shelter . . . in which people live" or as a "structure . . . wholly or partially occupied by persons lodging therein at night or *intended* for such use." Given those cases, it concluded that "it is clear that unimproved, vacant land cannot be properly characterized as a 'dwelling.'" It also distinguished the Court of Appeals' decision in *Mueller*, noting that unlike here, "construction of a dwelling had commenced on a lot." As such, *Mueller* was "not applicable to the facts of this case" and "the Rudgears' professed intent to construct a home on the Property [was] irrelevant."

ISSUE:

The petitioners describe the issue as follows: "Under *Mueller*, once a lender elects to hold a trustee's sale of secured real property, Arizona's Anti-Deficiency Statute prohibits a deficiency action against obligors who intended to build a house on the property and live in it—even if the house was never built. Here, the uncontroverted evidence shows the Rudgears intended to build a house for their family to dwell in, but later abandoned those plans and defaulted. Is BMO's deficiency action barred by the Anti-Deficiency Statute?"