22-934

No.

In the

Supreme Court of the United States

DALE SUNDBY, TRUSTEE,

Petitioner,

v.

MARQUEE FUNDING GROUP, INC., ET AL.,

Respondents.

On Petition For Writ of Certiorari
To the United States Court of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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Petitioner, Pro Se

QUESTIONS PRESENTED

This case concerns a revocable family trust represented by a non-lawyer trustee, which prevailed on the merits in the district court. Neither the district court nor Respondents ever challenged the trustee's standing to represent the trust. On appeal Respondents challenged the trustee's right to represent the trust, but only as to the appeal. A divided court of appeal sua sponte refused to decide the fully-briefed appeal, instead vacated the judgment and remanded "to afford the trust an opportunity to obtain legal representation." The three questions presented are:

1. Can the court of appeal ignore its own precedential rulings that "there would be no sound ground upon which to declare the judgment in this case void inasmuch as the party so represented was the successful litigant" and "once a panel resolves an issue in a precedential opinion, the matter is deemed resolved, unless overruled by the court itself sitting en banc, or by the Supreme Court"?

2. Can the court of appeal ignore the principle of party presentation to sua sponte vacate a judgment earned on merit, and by doing so prejudice the *unrepresented trust beneficiaries* the court states it wants to "safeguard"?

3. Is vacating a judgment without deciding an appeal an unconstitutional depravation of the awarded property without due-process of law?

PARTIES TO THE PROCEEDING

The petitioner is Dale Sundby, Trustee.

Respondents are Marquee Funding Group, Inc.; Salomon Benzimra, Trustee; Stanley Kesselman, Trustee; Jeffrey Myers; Kathleen Myers; Andres Salsido, Trustee; Benning Management Group 401(k) Profit Sharing Plan; Christopher Myers; Vickie McCarty; Dolores Thompson; Kimberly Gill Rabinoff; Steven M. Cobin, Trustee; Susan L. Cobin, Trustee; Equity Trust Company, Custodian FBO Steven M. Cobin Traditional IRA; Todd B. Cobin, Trustee; Barbara A. Cobin, Trustee; and Fasack Investments LLC.

LIST OF PROCEEDINGS

United States Court of Appeals, Ninth Circuit

No. 21-55504

Dale Sundby, Trustee, *Plaintiff-Appellant*, v. Marquee Funding Group, Inc.; et al., *Defendants-Appellees*.

No. 21-55582

Dale Sundby, Trustee, *Plaintiff-Appellee*, v. Marquee Funding Group, Inc.; et al., *Defendants-Appellants*.

Date of Memorandum: October 3, 2022

United States District Court, Southern District of California

Case No. 3:19-cv-00390-GPC-AHG

Dale Sundby, Trustee, *Plaintiff*, v. Marquee Funding Group, Inc.; et al., *Defendants*.

Date of Final Judgment Order: April 22, 2021

Date of Summary Judgment Order: September 15, 2020

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PETITION FOR A WRIT OF CERTIORARI

Appellant Dale Sundby, Trustee petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The Ninth Circuit's memorandum is reproduced at Appendix A (App., *infra*, 2a-7a), as is the district court final judgment order at Appendix B (App., *infra*, 8a-35a) and summary judgment order at Appendix C (App., *infra*, 36a-118a).

JURISDICTION

The memorandum of the court of appeals was entered on October 3, 2022 (App., *infra*, 2a). The order denying a petition for rehearing on November 10, 2022 is reproduced at Appendix D (App., *infra*, 119a-120a). On January 17, 2022, Justice Kagan extended the time for filing this petition to April 7, 2023 (Application No. 22A644). The Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

This case involves interpretation of the Fifth Amendment to the United States Constitution, which is reproduced at Appendix E (App., *infra*, 121a).

STATEMENT

After petitioner Dale Sundby, Trustee (Dale), a non-lawyer representing his family trust, prevailed on merit in the district court, Respondents on appeal made an *unauthorized-practice-of-law* argument only as to the appeal itself that had never been raised in the district court. A divided court of appeals panel refused to decide the appeal on its merits, instead vacating and remanding "to *afford* the trust *an opportunity* to obtain legal representation."

A. In the first instance

The May 2019 first amended complaint included two claims; for Truth in Lending Act (TILA) civil damages, and declaratory judgment (8 ER 1831)[1]; "specifically the Court make a finding and issue appropriate orders stating:

a. That the 2017 Altered Deed was void ab initio and has no affect.

b. That the 2017 Altered Note was void ab initio and has no affect."

The complaint included (8 ER 1815 ¶ 26):

> Plaintiff is Trustee of the Declaration of Trust, Trust No. 1989-1 dated January 26, 1989 ('Family Trust'). Paragraph 5.1.1 of the Family Trust states; "With respect to

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[1] "ER" references are to the 8-volume excerpts of record.

> community property transferred to this trust, while both settlors are serving as trustee, either settlor (as trustee) has the power to act alone and have those actions binding on both trustees and the trust assets." The titled property defined in paragraph 28 was transferred to the Family Trust prior to 2016, and both settlors have served as trustees since inception.

In November 2019 and prior to discovery, Dale's wife, the only other settlor, trustee and beneficiary of the family trust, served and filed a declaration (Docket Entry No. 69 at 30)[2], which included:

> I am, and at all times relevant to the matters involved in this litigation, Sundby v. Marquee Funding Group, Inc. et al, Case No. 3:19-cv-00390-GPC-AHG, was the wife of the plaintiff, Dale Sundby. I am a co-trustee of the Declaration of Trust, Trust No. 1989-1 dated January 26, 1989. The other co-trustee is the plaintiff, Dale Sundby. I am not a party in this action. The action was commenced by Dale Sundby with my knowledge and consent, but without requiring my joinder pursuant to Section 5.1.1 of the Trust instrument, which gives either Trustee the right and power to act alone and have those actions binding on both trustees and the trust assets. All Trust assets

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[2] "Docket Entry" references are to the appellate docket.

> are community property, including our primary residence at 7740 Eads Avenue, La Jolla, CA 92037.
>
> One of the reasons I elected not to be a party in the action is that I have serious health conditions that require treatment in several locations around the country and my presence at any time and place cannot be assured.
>
> To the extent it may be required for any reason, Dale Sundby has my complete and unconditional consent and authorization to file, amend, or respond to any pleadings in this action; to settle all or any portion of the action including, without limitation, the right to deal with assets of the Trust as he sees fit, to hire counsel, to make any representations to the Court, and to take any other action he deems necessary or proper in respect to this litigation.

At no time did the district court or Respondents challenge Dale's representation of the trust. Nor did they seek information about the trust.

B. The district court found for the trust

In its final judgment order, the district court found that the trust was entitled to TILA damages against the investor defendants in the exact amount sought and, as prayed for, found that the altered loan documents were void. (App., *infra*, 34a.)

The court did not find that the trust was entitled to the TILA damages sought against the loan originator. And the court also found *sua sponte* (defendants never argued for it) that the original loan documents were valid (*Id.*), even though they had been statutorily "revoked" under California Civil Code Section 1587(c) because the proposed "Lender" failed to make the proposed loan.

C. A tailored notice of appeal

With the trust prevailing on merit as to the primary claims in the complaint, Dale precisely described "only part of" the summary and final judgment orders in the notice of appeal (8 ER 1835), thus limiting its scope under Fed. R. App. P. 3(c)(6) to the only two findings not in the trust's favor; minor TILA damages as to the loan originator, and the district court's *sua sponte* order to record the proposed, unfunded, and statutorily *revoked* original loan documents.

D. Respondents ask the court of appeal to "reject" the entire appeal

Presenting no evidence, Respondents made an *unauthorized-practice-of-law* argument in their appellate opposition brief (Docket Entry No. 51 at 52) under the heading:

> APPELLANT SUNDBY'S ATTEMPT TO PROSECUTE THIS APPEAL AS PRO SE COUNSEL FOR THE TRUST VIOLATES WELL-ESTABLISHED CALIFORNIA LAW AGAINST THE UNAUTHORIZED PRACTICE OF LAW

They did not seek to relitigate the underlying action, instead arguing that the "entire appeal and arguments in opposition to the Cross-Appeal should be rejected by this Court as being an unauthorized practice of law" (*Id.* at 53).

At the time they filed their opposition brief, Respondents knew that the trust had transferred all interest in the subject property out of trust to Dale and his wife as community property (Docket Entry No. 69 at 26).[3]

E. The court of appeal *sua sponte* vacated and remanded

Even though there was no request to vacate the district court judgment, a divided court of appeals panel refused to decide the appeal on its merits,

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[3] The appeal was *continued by the original party* under Federal Rule of Civil Procedure 25(c).

The estate planning transfer likely spurred Respondents to tack on the three representation paragraphs to 25 pages of opposition arguments. Dale replied (Docket Entry No. 54-1 at 23):

> DEFENDANTS "UNLAWFUL PRACTICE OF LAW" HAIL MARY
>
> Having failed to even challenge Plaintiff's summary judgement motion, which only leaves them to quote the district court's arguments on their behalf, and having failed to appeal anything other than TILA damages (but then not doing so), Defendants place their hopes that this Court will ignore facts and law in favor of a *preferential* decision.

instead vacating and remanding "to *afford* the trust *an opportunity* to obtain legal representation" (App. 5a).

The panel majority expressed concern that; "the interests of other trust beneficiaries may be adversely affected by a layperson's *spurious* legal *musings*." The dissenting justice saw it differently (App., *infra*, 7a; emphasis added):

> It is true that plain error can be raised for the first time on appeal even if not preserved below, but that requires a showing that the rights of the Johnny-come-lately were substantially affected. *Rosales-Mireles v. U.S.*, 138 S.Ct.1897 (2018).
>
> In our case, the defendant has not even mentioned the plain error doctrine, much less alleged that it has been prejudiced in any way by the plaintiff's pro se representation. That's not surprising: **The general rule requiring a trust to be represented by counsel is to protect the trust's beneficiaries, not a defendant accused of cheating them.** Nor is there any explanation for why this issue wasn't raised before, or why this failure should be excused.

REASONS FOR GRANTING THE PETITION

The court of appeal's opinion has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's

supervisory power. Supreme Court Rule 10(a). It also violates the U.S. Constitution.

A. The court of appeal ignored several of its own precedents

The court of appeals opinion violated several of its own precedential rulings, including:

> [T]here would be "no sound ground upon which to declare the judgment in this case void inasmuch as the party so represented [by an unlicensed practitioner of law] was the successful litigant."

Alexander v. Robertson, 882 F.2d 421, 425 (9th Cir. 1989).

> Once a panel resolves an issue in a precedential opinion, the matter is deemed resolved, unless overruled by the court itself sitting en banc, or by the Supreme Court.

Hart v. Massanari, 266 F.3d 1155, 1171 (9th Cir. 2001).

Further:

> When a case "has been tried in federal court," "considerations of finality, efficiency, and economy become overwhelming," [*Caterpillar Inc. v.*] *Lewis*, 519 U.S. [61] at 75, 117 S.Ct. 467, and in those circumstances, the Supreme Court has refused to "wipe out the adjudication postjudgment" so long as there was jurisdiction when the district court

> entered judgment, id. at 77, 117 S.Ct. 467; see also *Grubbs v. Gen. Elec. Credit Corp.*, 405 U.S. 699, 702, 92 S.Ct. 1344, 31 L.Ed.2d 612 (1972).

City of Oakland v. BP plc, 969 F.3d 895, 909 (9th Cir. 2020).

Just last year, one of the panel's majority justices wrote; "In general, we do not 'review an issue not raised below unless necessary to prevent manifest injustice.'" *United States v. Wells*, 29 F.4th 580 (9th Cir. 2022). The court of appeal did not and cannot assert that there is manifest injustice in Dale's successful representation of the trust.

B. The court of appeal "should not sally forth looking for a wrong to right"

The Ninth Circuit should not create issues or make arguments that the parties themselves have not presented to the court, as it previously did in *U.S. v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020) (emphases added):

> In our adversarial system of adjudication, we follow the principle of party presentation. As this Court stated in *Greenlaw v. United States*, 554 U. S. 237 (2008), "in both civil and criminal cases, in the first instance and on appeal . . ., we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present." Id., at 243 ... our system "is designed

> around the premise that [parties represented by competent counsel] know what is best for them, and are responsible for advancing the facts and argument entitling them to relief." Id., at 386 ... In short: "[C]ourts are essentially passive instruments of government." *United States v. Samuels*, 808 F. 2d 1298, 1301 (CA8 1987) []). They "do not, or should not, sally forth each day looking for wrongs to right."[4]

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[4] The central issue in the appeal is the district court's own *sallying forth* to protect defendants' counsel from their representation errors (Docket Entry No. 30-1 at 19-20). After the court *argued* at length for defendants in its tentative ruling (they never raised any of the issues), Dale stated at the summary judgment hearing (Docket Entry No. 31-3 at 237:13-19):

> They did not argue at all... directly against any of plaintiff's 35 paragraphs and separate statement facts. They did not even address the plaintiff under the arguments section and, as such, concede. So, the reason I cited [*Sineneng-Smith*] is that... the Court should not be in a position, as it said to plaintiff earlier, to protect them against themselves.

And (*Id.* at 253:7-13):

> There's no claim for equitable relief before the Court. Plaintiff intentionally pled law-only claims. Defendants did not seek any equitable relief required as a Federal Rule Civil Procedure 13(a) compulsory counterclaim when answering the complaint. The Ninth Circuit is clear that "if a party fails to plead a compulsory counterclaim, it is held to waive it." And

In its opinion, the court of appeal states; "the rule that artificial entities must have licensed counsel protects the integrity and functioning of the federal courts" and "the rule safeguards the interests of unrepresented trust beneficiaries." But it is not this "layperson's spurious legal musings" that will dishonor the courts or prejudice trust beneficiaries. That can only occur if officers of the appellate court are permitted to *sally forth* to protect an officer of the district court who *sallied forth* to protect officers of the court from their own representation errors.

C. Prejudice to beneficiaries

It would be highly prejudicial to the trust beneficiaries, whose interest the panel majority claims to care for, to ignore additional Ninth Circuit precedential findings that standing is a waivable legal issue:

> Whether a party lacks standing is a legal issue.

Fleck and Associates v. Phoenix, City, 471 F.3d 1100, 1103 (9th Cir. 2006).

> [Defendants were] afforded a full and fair opportunity to pursue the issue of [standing] in the district court. Specifically, I believe that [Defendants], in response to [Plaintiff]'s

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that's the *Local U.* [*Number 11, International Brothers of Electrical Workers v. V.G. Thompson Electrical*, 363 F.2d 181, (9th Cir. 2020)] case.

> summary judgment motion, waived the right to present evidence of [standing]. Moreover, **there is no reason why [Defendants] should now receive a second bite at the apple.**

U.S.A. Petroleum Co. v. Atl. Richfield Co., 13 F.3d 1276, 1280 (9th Cir. 1994). Emphasis added.

D. Vacating a judgment without deciding an appeal is an unconstitutional depravation of the awarded property without due-process

After the trust fairly prevailed on its claims, the judgment award is trust property. The court of appeal cannot deprive the trust of its property without due process of law. U.S. Const., Amdt. 5. In this context, due process requires an appellate decision on its merits.

CONCLUSION

For the foregoing reasons, the Court should grant a writ of certiorari.

March 22, 2023. Respectfully submitted,

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