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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Appeal No. 15AP175

DEUTSCHE BANK NATIONAL TRUST COMPANY,

Plaintiff-Respondent,

vs.

THOMAS P. WUENSCH,

Defendant-Appellant,

HEIDI WUENSCH,

Appellant.

APPELLANT'S BRIEF WITH APPENDIX

APPEAL FROM THE DECISION OF THE CIRCUIT COURT OF LA CROSSE COUNTY, JUDGE TODD W. BJERKE, PRESIDING
CASE NO. 2009CV752

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I. STATEMENT OF THE ISSUES

ISSUE NO. 1: WHETHER PLAINTIFF PRODUCED EVIDENTIARY FACTS THAT PROVED PLAINTIFF WAS IN POSSESSION OF THE NOTE.

Circuit Court: Plaintiff is in possession of the note and is the holder of the note.

This Brief: Plaintiff did not produce any evidence that showed it was in possession of the note. There was no evidence Plaintiff existed.

ISSUE NO. 2: WHETHER PLAINTIFF WAS LIABLE FOR THE UNCLEAN HANDS OF AHMSI, A PRIOR SERVICER OF THE NOTE.

Circuit Court: The court did not specifically find that Plaintiff is liable for AHMSI's unclean hands, although the court crafted a remedy that negatively impacted the remedy Plaintiff sought.

This Brief: Plaintiff is liable for AHMSI's unclean hands. Because Plaintiff is liable for AHMSI's unclean hands, Plaintiff is remediless under the unclean hands doctrine.

ISSUE NO. 3: WHETHER THE CIRCUIT COURT ERRED IN CRAFTING AN EQUITABLE REMEDY BASED ON THE HISTORY OF UNCLEAN HANDS.

Circuit Court: The court crafted a remedy it believed was equitable.

This Brief: The court erred in crafting a remedy that was inconsistent with the unclean hands doctrine, that did not put Wuensch in the same position he was in prior to AHMSI acting with unclean hands, and that was not based on evidence of Wuensch's ability to fulfill the requirements of the equitable remedy.

II. STATEMENT ON ORAL ARGUMENT AND PUBLISHING

Oral argument is not necessary. Publication is not appropriate.

III. STANDARD OF REVIEW

The standard of review for a court trial is whether the findings of fact were clearly erroneous, with deference to the trial courts determinations on witness credibility. *303, LLC v. Born*, 2012 WI App 115 ¶ 18, 344 Wis.2d 364, 823 N.W.2d 269.

The application of facts to a legal standard is a question of law subject to de novo review. *State v. Wills*, 193 Wis. 2d 273, 277, 533 N.W.2d 165 (1995).

IV. STATEMENT OF THE CASE

A. Pre-Trial Proceedings

A complaint was filed on August 11, 2009. (R.1) The Plaintiff named in the complaint was "Deutsche Bank, National Trust Company as Trustee for American Home Mortgage Assets Trust 2007-2 Mortgage-Backed Pass-Through Certificates, Series 2007-2 by American Home Mortgage Servicing, Inc., its attorney-in-fact."[1] (Id.) Plaintiff brought a claim for foreclosure against Wuensch. (Id.)

The complaint alleged

> That the plaintiff, DEUTSCHE BANK NATIONAL TRUST COMPANY as Trustee for American Home Mortgage Assets Trust 2007-2 Mortgage-Backed Pass-Through Certificates, Series 2007-2, is the mortgagee and is the trustee for the certificateholders under the pooling and servicing agreement, acting through its attorney-in-fact American Home Mortgage Servicing Inc. whose offices are located at 2727 North Harwood, Dallas TX 75201-1515

(Id. ¶ 1) Paragraph 3 of the complaint stated, "That plaintiff is the lawful holder of said note and mortgage and an assignment of mortgage has been

[1] "Deutsche Bank, National Trust Company as Trustee for American Home Mortgage Assets Trust 2007-2 Mortgage-Backed Pass-Through Certificates, Series 2007-2 by American Home Mortgage Servicing, Inc.", the name of the Plaintiff as stated in the complaint, is referred to herein as "Plaintiff" or "Trust". This is not an acknowledgement that there is such a trust. Similarly, references are made to Plaintiff's counsel. There was no evidence the attorneys who have appeared as Plaintiff's counsel have actually been retained by Plaintiff or have had any contact with Plaintiff. Certain actions described in this brief are attributed to Plaintiff or Plaintiff's counsel; however, the actions, for example signing discovery responses, were not performed by Plaintiff. (*See R.46:Ex. 22)* They were signed by others who claimed to sign on behalf of Plaintiff, but there has not been any documentation produced that shows Plaintiff exists or Plaintiff had a contractual relationship with those who purported to sign on Plaintiff's behalf.

For the purpose of reference, and for that purpose alone, Appellant's brief uses the terms "Plaintiff" and "Plaintiff's counsel". It is acknowledged that this may be inconsistent with Wis. Stat. § 809.19(1)(i). However, there is no evidence that the Trust named as the Plaintiff in the caption of the complaint actually exists.

or will be recorded in the office of the Register of Deeds for this county." (Id.) Wuensch denied Plaintiff was the holder of the note and mortgage. (R.2)

In the nearly five years in which the case was pending before trial, there was litigation over discovery, summary judgment motions, and other issues. These pre-trial issues are not discussed herein because they are not the subject of this appeal.

B. Court Trial

A court trial was held on May 19, 2014, and continued on June 25, 2014. At trial, a document was produced that the Court concluded was the original note ("Note"). (R.47:15:10-15) A copy of the Note was admitted into evidence. (R.46:Ex.1.) The lender named in the Note was HLB Mortgage and the named borrower was Thomas P Wuensch. The Note had two endorsements on it. One endorsement was from HLB Mortgage to "American Home Mortgage" and the other endorsement was from American Home Mortgage and was endorsed in blank. Plaintiff was not named in the note.

A certified copy of the mortgage was introduced into evidence. (R.46:Ex.2.) The named mortgagor was Thomas P Wuensch. The mortgagee was Mortgage Electronic Registration Systems, Inc. "acting solely as nominee for Lender and Lender's successors and assigns". HLB Mortgage was the named lender. Plaintiff was not named in the mortgage.

No assignments of mortgage were admitted into evidence.[2]

In December 2012, Ocwen Loan Servicing, LLC ("Ocwen") took over servicing of the Loan when Ocwen acquired Homeward Residential, Inc. ("Homeward"). (R.47:48:15-20) Homeward was formerly known as American Home Mortgage Servicing, Inc. ("AHMSI") (R.47:49:4-10;App.30)

Plaintiff called Rashad Blanchard, a corporate representative of Ocwen, as a witness. (R.47:36-118) His testimony consisted largely of authenticating records in Ocwen's possession. Five documents were admitted into evidence based on Blanchard's testimony. (R.6-10) Not one of these records mentions Plaintiff.

Blanchard did not mention the Plaintiff's name once in his testimony. Blanchard did not produce any documentation showing a contractual relationship between AHMSI, Homeward or Ocwen and Plaintiff. Blanchard did not produce a power of attorney showing AHMSI, Homeward, or Ocwen were attorneys-in-fact for Plaintiff. Blanchard did not produce any evidence that the Plaintiff existed. Blanchard did not produce the original note.

[2] The Exhibit List (R.45) incorrectly indicates assignments of mortgage were offered and received. Wuensch sought to admit assignments of mortgage into evidence; however the court ruled they were irrelevant. (R.47:25:10-28:22.) Later, the Court confirmed the assignments of mortgage were excluded. (R.47:124:15-125:22.) In its Judgment, the court acknowledged the assignments of mortgage were not admitted: "[T]he Court ruled that Wuensch's evidence regarding the assignments of his mortgage…was irrelevant." (R.41;App.13)

Plaintiff's counsel showed the original note to the court. No evidence was presented showing how Plaintiff's counsel came into possession of the Note. No evidence was presented showing Plaintiff's counsel was retained by the Trust.

Wuensch submitted into evidence an unsigned Pooling and Servicing Agreement ("PSA"). (R.46:Ex.21) The PSA was provided to Wuensch in discovery by Plaintiff's counsel. (R.47:151:12-21.) Notations at the bottom of each page show this document was printed from the SEC's public website, EDGAR, on 10/5/2011. (R.46:Ex.21) The user who obtained the PSA was Chad Kowalewski. (Id. p.730)[3] Kowalewski represented he was Plaintiff's counsel previously in the case. (*See* R.46:Exs.20&22) The signature pages of the PSA do not contain signatures above the names of named parties to the Trust. (R.46:Ex.21, p.798.) The pages for notarization are not notarized and do not indicate the respective signatures were notarized. (R.46:Ex.21, pp.799-802.) Plaintiff did not present any evidence that the PSA was signed, notarized, and consummated.

[33] References to page numbers in the PSA are to the Bates numbering in the bottom right corner of the pages.

C. Trial Court Judgment

The trial court issued Findings of Fact, Conclusions of Law, Judgment and Order on December 10, 2014. ("Judgment") (R.41) In its Judgment, the court found,

> The Plaintiff , Deutsche National Bank Trust Company [sic] as Trustee for American Home Mortgage Assets Trust 2007-2 Mortgage-backed Pass-through Certificates, Series 2007-2, by American Home Mortgage Servicing, Inc., it attorney in fact, (hereafter "the Plaintiff") holds the original Note.

(R.41;App.7)

The trial court found AHMSI acted with unclean hands:

> Even if the Plaintiff is without blame for the problems with Wuensch's mortgage, the same cannot be said about the preceding holders of his Note. Although the question of whether Wuensch's Note was fraudulently passed between creditors before it came into the Plaintiff's possession is beyond the scope of this case, the Court is convinced that the seemingly unregulated transferring of mortgages during the housing bubble and crash contributed to Wuensch finding himself in this position.
>
> AHMSI may have misapplied one or more of Wuensch's payments. He was told that he was in default when he was not. He had difficulty getting any kind of answers from AHMSI after he was notified in February of 2008 that they believed he was in default. The Court found his testimony to be credible, at least in regard to the difficulty he had in communicating with AHMSI. There was no employee of AHMSI able to give him any kind of answers to his questions or provide him any assistance to cure the claimed default. When he did get answers, they were inconsistent regarding the amount he owed. One AHMSI employee purportedly told him to stop making payments while they sorted out the problem. Before he could get any significant answers from AHMSI, he was served with foreclosure papers in the 2008 foreclosure case.
>
> These problems do not appear to be the fault of the current holder of Wuensch's Note, the Plaintiff, but the Court cannot completely ignore the fact that the Plaintiff was passed the Note by the unclean hands of the preceding holders.

(R.41;App.16-17) The court stated, "Since [Wuensch] willingly accepted the terms of the Note *but was not responsible for the default*, he should be

held responsible at least up to the time of the default." (R.41;App.17)(emphasis added) The court further stated,

> Under the strict letter of the law, the Plaintiff is entitled to a judgment of foreclosure as the holder of Wuensch's Note, but it is not fair to Wuensch that the Plaintiff benefit from the potential misdeeds of the preceding holders of the Note. *** To allow [Wuensch] to walk away with a free and clear title would be just as unfair to the Plaintiff, who presumably did not acquire the Note for free.

(R.41;App.17-18)

The court fashioned a remedy that the court believed was equitable. The court stayed its judgment for 45 days to allow Wuensch to pay off the Note. (R.41;App.18) This provision of the Judgment specifically denied Plaintiff accrued interest, late charges, or Plaintiff's attorney fees. (Id.) If Wuensch paid this amount within 45 days, the court would quiet the Plaintiff's lien on the property and not enter judgment. (Id.) If Wuensch did not pay $347,826.03 within 45 days, the foreclosure judgment would be entered for the full amount requested by Plaintiff. The full amount requested by Plaintiff totalled $455,641.85. (Id.)

V. ARGUMENT

A. The Trial Court Erred In Finding Plaintiff Was the Holder of the Note, Because There Was No Evidence Plaintiff Possessed the Note.

The named Plaintiff is "Deutsche Bank, National Trust Company as Trustee for American Home Mortgage Assets Trust 2007-2 Mortgage-Backed Pass-Through Certificates, Series 2007-2 by American Home Mortgage Servicing, Inc., its attorney-in-fact." There was no evidence

showing the Plaintiff exists. Wuensch submitted evidence showing the PSA for the Trust was never signed or notarized. (R.46:Ex.21) Plaintiff's counsel did not produce any evidence the PSA was signed and notarized or that any action was taken in conformity with the PSA.

Blanchard, the witness called in Plaintiff's case-in-chief, did not mention the Trust once in his testimony. He stated Ocwen was the loan servicer. (R.47:98:11-13;App.32) He never stated the Trust existed or that Ocwen serviced the loan on behalf of the Trust. He did not produce any documents with Plaintiff's name on them. He did not produce any documentation showing a contractual relationship between Ocwen and the Trust. He did not testify there was a contractual relationship between Ocwen and the Trust.[4]

There was no evidence Plaintiff possessed the original note. Blanchard did not testify Ocwen possessed the note for Plaintiff. Plaintiff's counsel did not testify he received the note from Plaintiff. There was no evidence showing who possessed the note prior to it coming into Plaintiff's counsel's possession.

Plaintiff's counsel's failure to bring forth material evidence permits the inference that the evidence is unfavorable to Plaintiff.

> The failure to bring before the tribunal some circumstance, document, or witness, when either the party himself or his opponent claims that the

[4] Blanchard was asked, "Ocwen was not a party to this note, correct?" He replied, "Party to the note? We represent the entity that is currently the owner, so we service this on behalf of the –" He never stated the name of the owner. (R.47:97:25-98:3;App.31-32)

> facts would thereby be elucidated, serves to indicate, as the most natural inference, that the party fears to do so, and this fear is some evidence that the circumstance or document or witness, if brought, would have exposed facts unfavorable to the party. … The non-production of evidence that would naturally have been produced by an honest and therefore fearless claimant permits the inference that its tenor is unfavorable to the party's cause.

Booth v. Frankenstein, 209 Wis. 362, 245 N.W. 191, 193-94 (1932) (quoting Wigmore on Evidence, vol. 1, § 285).

> If a party fails to call a material witness within (his) (her) control, or whom it would be more natural for that party to call than the opposing party, and the party fails to give a satisfactory explanation for not calling the witness, you may infer that the evidence which the witness would give would be unfavorable to the party who failed to call the witness.

Wis. JI-Civil 410. This principle is well-established. *See* Id., COMMENT.

Plaintiff's counsel did not call a witness from Deutsche Bank National Trust Company. He did not call a witness from the Trust. The only witness called by Plaintiff's counsel did not even mention the Trust and he did not provide any documentation showing Ocwen had a relationship with the Trust or was attorney-in-fact for the Trust. There was no evidence to prove the existence of the Trust and possession of the Note by the Trust. There was no evidence to prove AHMSI or Ocwen was attorney-in-fact for the Trust.

The court found "the Plaintiff has in its possession the original ink Note. The Plaintiff produced the original ink Note at trial and the Court examined it." The circuit court abused its discretion in so finding.

A circuit court properly exercises its discretion if the facts support the circuit court's decision and the circuit court applied a correct legal

standard. *Hartung v. Hartung*, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981). An exercise of discretion is not the equivalent of unfettered decision-making but must reflect the circuit court's "reasoned application of the appropriate legal standard to the relevant facts in the case." *Hedtcke v. Sentry Ins. Co.*, 109 Wis. 2d 461, 471, 326 N.W.2d 727 (1982).

There was no evidence Plaintiff was in possession of the original note or that it produced the note at trial.[5] Attorney Russell Karnes provided the original note to the trial court for inspection and the contents of the original note were introduced into evidence by way of a copy. Karnes did not testify.

AHMSI filed a foreclosure action against Wuensch on June 12, 2008, La Crosse County case number 08CV555. (R.41;App.10)(*See also* R.46:Ex.30) That case was dismissed on February 23, 2009, because of a discrepancy over possession of the note. (Id.) Blanchard did not offer any testimony as to transfers of the note. Blanchard did not produce any evidence showing the existence of the Trust. He did not produce a power of attorney between Ocwen and the Trust. He did not produce a servicing contract between Ocwen and the Trust. There was no evidence of possession of the note. Attorney Karnes did not testify about how the note came into his possession.

[5] As noted *supra*, there was no evidence Plaintiff exists. Plaintiff's name was not on the note, was not on the mortgage, and was not on the documents submitted by Plaintiff and received into evidence.

The court's finding that Plaintiff was in possession of the original note was not supported by the evidence. The court's finding of possession by the Trust was error.

The remaining arguments in this brief assume, arguendo, that the trial court correctly found that Plaintiff was the holder of the note.

B. The Trial Court Correctly Found that AHMSI Had Unclean Hands, But Erred In Not Attributing the Behavior of AHMSI to Plaintiff.

The court found Wuensch's testimony on the problems he had with AHMSI to be credible. (R.41;App.16) The court found:

- AHMSI failed to apply payments to Wuensch's loan.
- AHMSI told Wuensch he was in default when he was not.
- Wuensch had difficulty getting any kind of answers from AHMSI after AHMSI notified him he was in default when he was not.
- AHMSI was unable to give Wuensch any kind of answers to his questions or provide him any assistance to cure the claimed default.
- Wuensch received conflicting answers from AHMSI regarding the amount he owed.
- One AHMSI employee told him to stop making payments until the problem was resolved.
- Before Wuensch could resolve the disputed default, AHMSI filed a foreclosure action.

(Id.) Based on the facts before it, the court properly found that AHMSI had unclean hands.

The doctrine of unclean hands bars a party with unclean hands from an equitable remedy:

> 'It is one of the fundamental principles upon which equity jurisprudence is founded, that before a complainant can have a standing in court he must first show that not only has he a good and meritorious cause of action, but he must come into court with clean hands. He must be frank and fair with the court, nothing about the case under consideration should be guarded, but everything that tends to a full and fair determination of the matters in controversy should be placed before the court.' Story's Equity Jurisprudence (14th Ed.) § 98. The governing principle is 'that whenever a party who, as actor, seeks to set the judicial machinery in motion and obtain some remedy, has violated conscience, or good faith, or other equitable principle, in his prior conduct, then the doors of the court will be shut against him *in limine*; the court will refuse to interfere on his behalf, to acknowledge his right, or to award him any remedy.' Pomeroy, Equity Jurisprudence (4th Ed.) § 397. This court has declared: 'It is a principle in chancery, that he who asks relief must have acted in good faith. The equitable powers of this court can never be exerted in behalf of one who has acted fraudulently, or who by deceit or any unfair means has gained an advantage. To aid a party in such a case would make this court the abetter of iniquity.' *Bein v. Heath*, 6 How. 228, 247, 12 L.Ed. 416. And again: 'A court of equity acts only when and as conscience commands; and, if the conduct of the plaintiff be offensive to the dictates of natural justice, then, whatever may be the rights he possesses, and whatever use he may make of them in a court of law, he will be held remediless in a court of equity.' *Deweese v. Reinhard*, 165 U.S. 386, 390, 17 S.Ct. 340, 341, 41 L.Ed. 757.

Keystone Driller Co. v. General Excavator Co. and Keystone Driller Co. v. Osgood Co., 290 U.S. 240, 244-45, 54 S.Ct. 146, 78 L.Ed. 293 (1933).

Wisconsin courts recognize the doctrine of clean hands. *S & M Rotogravure Service, Inc. v. Baer*, 77 Wis.2d 454, 466, 252 N.W.2d 913 (1977). Substantial misconduct constituting fraud, injustice, unfairness or bad faith constitutes "unclean hands". *Id*. at 766-67. Foreclosure of a mortgage is an equitable action. *Frick v. Howard*, 23 Wis. 2d 86, 96, 126

N.W.2d 619 (1964). A court will not entertain a claim in equity from a plaintiff who does not have clean hands. *Id*. at 767.

The trial court clearly found AHMSI had unclean hands. (R.41;App.16) The court found,

> [t]hese problems do not appear to be the fault of the current holder of Wuench's Note, the Plaintiff, but the Court cannot completely ignore the fact that *the Plaintiff was passed the Note by the unclean hands of the preceding holders.*

(R.41;App.17)(emphasis added)

The court's differentiation between Plaintiff and preceding noteholders was error. No evidence was submitted about the holder of the note when AHMSI acted with unclean hands. Plaintiff may have been the noteholder at the time. A party other than Plaintiff may have been the noteholder at the time. However, under every possible scenario of who the noteholder was at the time, Plaintiff is liable for AHMSI's actions.

1. If AHMSI Serviced the Note On Behalf of Plaintiff the Trust, Plaintiff Is Bound By AHMSI's Actions.

One possible scenario is AHMSI serviced the loan for the Trust when it acted with unclean hands. If AHMSI was servicing the loan for the Trust, Plaintiff is vicariously liable for AHMSI's behavior under the master-servant rule.

> "[A] servant is one employed to perform service for another in his affairs and who, with respect to his physical conduct in the performance of the service, is subject to the other's control or right to control."

Kerl v. Dennis Rasmussen, Inc., 2004 WI 86 ¶ 4, 273 Wis.2d 106, 682 N.W.2d 328 (quoting *Heims v. Hanke*, 5 Wis. 2d 465, 468, 93 N.W.2d 455

(1958) (citing Restatement (Second) of Agency § 220) (partially overruled on other grounds by *Butzow v. Wausau Mem'l Hosp.*, 51 Wis. 2d 281, 290, 187 N.W.2d 349 (1971)) and Wis—JI Civil 4030).

If AHMSI was the servicer for the Trust pursuant to a PSA consistent with the unsigned PSA admitted into evidence (R.46:Ex.21), then AHMSI was a necessary part of the Trust and was acting in its role as servicer for the Trust. As such, the Trust is liable for AHMSI's actions, as AHMSI's actions are the Trust's actions.

Under these scenarios in which the Trust was the noteholder at the time of AHMSI's acts of unclean hands, Plaintiff is liable for AHMSI's unclean hands.

2. If Plaintiff Became the Noteholder After AHMSI Acted With Unclean Hands, Plaintiff Is Bound by AHMSI's Actions.

Another possible scenario is Plaintiff was not the noteholder when AHMSI acted with unclean hands.

It is beyond dispute that if Plaintiff was not the noteholder when AHMSI acted with unclean hands,[6] the note was negotiated to Plaintiff when there were overdue payments. The circuit court found that AHMSI's unclean hands caused Wuensch to stop making payments. (R.41;App.17)

[6] The Plaintiff is "Deutsche Bank, National Trust Company as Trustee for American Home Mortgage Assets Trust 2007-2 Mortgage-Backed Pass-Through Certificates, Series 2007-2 by American Home Mortgage Servicing, Inc., its attorney-in-fact."

There was no evidence showing Plaintiff is a "holder in due course". A "holder in due course" is different from a "holder" of a note. *Cf.* Wis. Stats. §§ 403.302 and 401.201(km). A party is a holder in due course if all of the following apply:

> (a) The instrument when issued or negotiated to the holder does not bear such apparent evidence of forgery or alteration or is not otherwise so irregular or incomplete as to call into question its authenticity.
>
> (b) The holder took the instrument:
>
> 1. For value;
>
> 2. In good faith;
>
> 3. Without notice that the instrument is overdue or has been dishonored or that there is an uncured default with respect to payment of another instrument issued as part of the same series;
>
> 4. Without notice that the instrument contains an unauthorized signature or has been altered;
>
> 5. Without notice of any claim to the instrument described in s. 403.306; and
>
> 6. Without notice that any party has a defense or claim in recoupment described in s. 403.305 (1).

Wis. Stat. § 403.302(1).

Plaintiff did not present evidence it took the note for value.[7] Plaintiff did not present evidence it took the note without notice that payment was overdue.

The evidence showed Plaintiff had notice of the overdue payments. AHMSI filed a foreclosure action, Rock County Case No. 08CV555, on June 12, 2008. (R.41;App.10)(*See also* R.46:Ex.30) The case was dismissed on February 23, 2009. (R.41) This case was filed on August 11,

[7] The trial court's statement that Plaintiff "presumably did not acquire the Note for free" (R.41;App.18) is without an evidentiary basis, not only as to the Trust's acquisition of the note, but also as to the Plaintiff acquiring the note for value. There was no evidence Plaintiff took the note for value or suggestion Plaintiff took the note for value.

2009. (R.41) Plaintiff's name in the caption of the complaint lists AHMSI as "attorney in fact." Plaintiff did not produce any evidence, nor did it argue, that it was a holder in due course.

The right to enforce the note is subject to defenses of the borrower. Wis. Stat. § 403.305(1). A holder in due course is not subject to certain of these defenses:

> The right of a holder in due course to enforce the obligation of a party to pay the instrument is subject to defenses of the obligor stated in sub. (1)(a), but is not subject to defenses of the obligor stated in sub. (1)(b) or claims in recoupment stated in sub. (1)(c) against a person other than the holder.

Wis. Stat. § 403.305(2). A holder that is not a holder in due course is subject to the defenses in sub. (1)(b). Sub. (1)(b) states the right to enforce a note is subject to "[a] defense of the obligor stated in another section of this chapter or a defense of the obligor that would be available if the person entitled to enforce the instrument were enforcing a right to payment under a simple contract." Unclean hands is a defense to a simple contract.

The trial court specifically found prior noteholders had unclean hands. (R.41;App.17) The court crafted a remedy based on its findings that prior noteholders had unclean hands. (R.41;App.17)

The court failed to recognize that Plaintiff was fully liable for the prior noteholders' unclean hands because Plaintiff was not a holder in due course. This was an error of law.

3. It Is Good Policy To Not Allow a Noteholder With Unclean Hands to "Cleanse" the Note Simply By Transferring It.

Consistent with statute, it is good policy to hold a subsequent noteholder liable for the bad acts of a prior noteholder. If transfer of a note can cleanse a note of the bad acts of a noteholder, a noteholder would be able to act with unclean hands and then transfer the note to deny the obligor a remedy for its bad acts.

This case is a case in point. AHMSI misapplied payments, told Wuensch he was in default when he was not, refused to provide answers to clear up the problem, provided inconsistent answers, told him to stop making payments, and filed a foreclosure action against Wuensch before the issue was resolved. Then, under one possible scenario, AHMSI transferred the note to the Trust and was the attorney-in-fact for the Trust. The trial court found that AHMSI's behavior was to blame for the problems with Wuensch's mortgage: "Even if the Plaintiff is without blame for the problems with Wuensch's mortgage, *the same cannot be said about the preceding holders of his Note.*" (R.41;App.16)(emphasis added)

If a transfer of a note relieves a subsequent noteholder of liability for a prior noteholder's bad acts, then noteholders can act with impunity and transfer a note to cleanse the note. That is contrary to public policy. It is contrary to the requirements to be, and to receive the benefits of being, a holder in due course.

C. The Trial Court Erred When It Crafted a Remedy That Was Inconsistent With the Unclean Hands Doctrine.

The court erred in finding Plaintiff had diminished liability for the prior noteholders' actions. Plaintiff is liable for AHMSI's actions. *See supra*. It was error for the circuit court to craft a remedy that was inconsistent with the unclean hands doctrine.

A court will not entertain a claim in equity from a plaintiff who has unclean hands. *Id.* at 767. Foreclosure of a mortgage is an equitable action. *Frick v. Howard*, 23 Wis. 2d 86, 96, 126 N.W.2d 619 (1964). "For relief to be denied a plaintiff in equity under the "clean hands" doctrine, it must be shown that the alleged conduct constituting 'unclean hands' caused the harm from which the plaintiff seeks relief." *Security Pacific Nat. Bank v. Ginkowski*, 140 Wis.2d 332, 339, 410 N.W.2d 589 (Ct. App. 1987).

Under the longstanding unclean hands doctrine, a party with unclean hands is without a remedy. AHMSI's unclean hands left the noteholder and subsequent noteholder's remediless for the natural consequences of AHMSI's unclean hands. Upon a finding that AHMSI had unclean hands, the only remedy available to the court was to dismiss Plaintiff's case. Instead, the court crafted a remedy that was inconsistent with the unclean hands doctrine.

The only action permitted after finding unclean hands was to close the doors of the court, refuse to interfere on Plaintiff's behalf, and to refuse to award Plaintiff any remedy. *Keystone Driller Co.*, 290 U.S. at 244-45.

D. If the Court Properly Used Its Discretion by Not Refusing to Award Plaintiff a Remedy, It Abused Its Discretion In Crafting the Remedy It Provided.

Assuming, arguendo, that the circuit court could craft a remedy, it erred in crafting the remedy it made because it was not based upon facts needed to create an equitable remedy.

The court's remedy for AHMSI's unclean hands was to give Wuensch 45 days to pay off his loan. There was no evidence that just prior to AHMSI acting with unclean hands that AHMSI or the noteholder could call the note. At the time AHMSI acted with unclean hands, Wuensch was entitled to pay on the note for the life of the note. He did not have to payoff the note.

There was no evidence it was possible for Wuensch to pay the note in full, less the amounts the court refused to award Plaintiff. Wuensch had been facing foreclosure for years. There was no evidence his credit score would allow him to obtain a loan to pay over $347,826.03. There was no evidence Wuensch had the resources to pay the amount within 45 days.

A circuit court properly exercises its discretion if the facts support the circuit court's decision and the circuit court applied a correct legal standard. *Hartung v. Hartung*, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981).

As argued previously, the trial court did not properly apply the law regarding the consequence of having unclean hands. The trial court also did not properly apply facts to its remedy, because the evidence showed Wuensch was entitled to continue paying on the loan prior to AHMSI acting with unclean hands and there was no evidence Wuensch had the ability to pay off the amount stated by the trial court within 45 days of judgment.

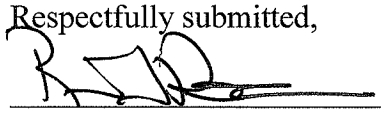
VI. CONCLUSION

Wuensch requests the following relief:

1. Reversal of the judgment and remand to the trial court with directions to enter findings that Plaintiff failed to prove its existence and Plaintiff failed to prove possession of the note; directions to dismiss Plaintiff's claim with prejudice; and directions to reinstate Wuensch's fraud claim based on Plaintiff's failure to prove its existence or failure to prove possession of the original note and to conduct further proceedings consistent with the Court's order.
2. In the alternative, reversal of the judgment and remand to the trial court with directions to dismiss Plaintiff's foreclosure claim with prejudice because Plaintiff and/or prior noteholders did not have clean hands and Plaintiff is remediless.

Dated: September 2, 2015.

Respectfully submitted,



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FORM AND LENGTH CERTIFICATION

I certify that this brief conforms to the rules contained in Wis. Stat. §§ 809.19(8)(b) and (c) for a brief produced using a proportional serif font. The length of this brief is 5,894 words. This was calculated using the word count feature of Microsoft Word.

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of the brief filed with the court and served on all opposing parties.

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