

**STATE OF WISCONSIN  
COURT OF APPEALS  
DISTRICT IV**

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**CLERK OF COURT OF APPEALS  
OF WISCONSIN**

**Appeal No. 15AP175**

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**DEUTSCHE BANK NATIONAL TRUST COMPANY,**

**Plaintiff-Respondent,**

**vs.**

**THOMAS P. WUENSCH,**

**Defendant-Appellant,**

**HEIDI WUENSCH,**

**Appellant.**

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**APPELLANT'S REPLY BRIEF**

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**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. PLAINTIFF FAILS TO POINT TO EVIDENCE  
SHOWING DEUTSCHE BANK WAS IN POSSESSION  
OF THE ORIGINAL NOTE**

Plaintiff<sup>1</sup> argues it produced evidence the original Note was in Deutsche Bank's possession. Its argument fails because it is unable to point to any evidence to support its position.

Plaintiff argues Wuensch's "argument [that Plaintiff failed to prove Deutsche Bank possessed the original Note] is contradicted by the record because Deutsche Bank produced the original Note, which is endorsed in blank, at trial. (Rec. 103:16, R. Supp. App. 116)."<sup>2</sup> (Reply Br., p. 8 and 11.) This citation is to page 16 of the trial transcript and reads, in its entirety, as follows:

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<sup>1</sup> For the reasons stated in fn.1 of Appellant's Brief, the respondent is referred to as "Plaintiff" herein. The term "Deutsche Bank" is used to refer to the entity Plaintiff makes arguments about in its Response Brief.

<sup>2</sup> The citation to "Rec. 103:16" is not supported by the Record. There is no item in the record numbered 103. Presumably this is a reference to the transcript from the court trial on May 19, 2014, which is found in the supplemental appendix at R. Supp. App. 116.

[continuing from p. 15, MR. KARNES:] non-hearsay instrument. It's not hearsay because it's being offered for its legal significance, not to prove the truth of the matter asserted. So, I think the Court can admit the note into evidence at this time.

THE COURT: Mr. Peterson.

MR. PETERSON: I object to that, Your Honor. There's no foundation for this document. If the Court were to consider whether 909.02 sub 9 applies, as far as authentication of this document, 909.02 sub 9 says commercial papers, signatures thereon and documents related thereto, to the extent provided by Chapters 401 to 411, and I'm not aware of what cite or what statute under 401 - 411 plaintiff is relying on for authenticity. Mr. Wuensch has, and Mrs. Wuensch, have denied that the copy of this note is the original in their pleadings.

MR. KARNES: Your Honor, can I respond?

THE COURT: Go ahead.

MR. KARNES: Well, Your Honor. The note is a negotiable instrument. It's amount -- or its an instrument that's payable to the bearer. It's endorsed in blank, so it falls within 909.02 sub 9 which is 401 through 411, so I think the law on that is clear. A note is a negotiable instrument, it's self authenticating, and Mr. Peterson did not address the [continuing on p.17] fact that it's non-hearsay, so I think that point is conceded, so it could be admissible on those grounds, as well.

This discussion between the Court and counsel is void of evidence. It contains arguments regarding whether the Note is self-authenticating. It is void of evidence of possession. Plaintiff has not, and cannot, point to anything in

the trial record that established Deutsche Bank was in possession of the original Note.

Plaintiff argues, “All that is required to prove standing in a foreclosure action is possession of the original Note when the instrument is endorsed in blank.” (R.Br. 9) It further argues,

A note may be enforced by its holder, a non holder in possession with the rights of a holder, or a person not in possession entitled to enforce the note. *See* Wis. Stat. § 403.301. A servicer representative with personal knowledge may testify that an investor is the holder of a note. *See, PNC Bank, N.A. v. Bierbrauer*, 2013 WI App 11, ¶ 10.

(R.Br. 9)

The Appellant’s Brief argued Rashad Blanchard, an employee of Ocwen, did not testify Deutsche Bank was in possession of the Note, did not mention Deutsche Bank in his testimony, and did not admit any documents into evidence that mentioned Deutsche Bank. (App.Br. 5) Plaintiff has not pointed to anything in the record to refute this. “[U]nrefuted facts are deemed admitted”, *State v. Bean*, 2011 WI App 129

fn. 5, 337 Wis.2d 406, 804 N.W.2d 696 (citing *Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.*, 90 Wis.2d 97, 109, 279 N.W.2d 493 (Ct.App. 1979)).

**II. DEUTSCHE BANK IS NOT ENTITLED TO A  
FORECLOSURE JUDGMENT BASED ON PRIOR  
SERVICERS' OR NOTEHOLDERS' UNCLEAR  
HANDS**

“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[;]‘it must clearly appear that the things from which the plaintiff seeks relief are the fruit of its own wrongful or unlawful course of conduct.’”

(Res.Br. 19)(citations omitted)

It cannot be disputed that the trial court found the prior servicer of the Note had unclean hands: “[T]he 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) Plaintiff does not dispute Wuensch’s argument that the trial court made this finding. “Unrefuted

arguments are deemed admitted.” *State v. Chu*, 2002 WI App 98 ¶10, 643 N.W.2d 878.

Plaintiff instead tries to minimize the consequence of prior servicers’ or noteholders’ unclean hands. “[T]he circuit court recognized the prior loan servicer’s potential contribution to the circumstances, and crafted its equitable remedy accordingly.” (Res.Br. 20) The trial court improperly crafted an equitable remedy, because the remedy for unclean hands is to close the doors of equity to the wrongdoer. (*See* App.Br. Secs. V.B., V.C. and V.D.) The remedy available to the trial court was to deny Plaintiff an equitable remedy, namely a foreclosure judgment.

Plaintiff argues, “The holder in due course defense is a creditor’s defense that can be asserted between commercial parties.” (Res.Br. 22) Presumably Plaintiff is arguing Wuensch is not a commercial party and therefore does not have standing to assert Plaintiff is not a holder in due course.

Plaintiff does not provide any authority for such an assertion. Nor does Plaintiff argue it is a holder in due course. Undeveloped arguments and arguments that are not supported by legal authority are not considered on appeal. *Riley v. Town of Hamilton*, 153 Wis. 2d 582, 588, 451 N.W.2d 454, 456 (Ct. App. 1989).

Plaintiff argues Wuensch did not assert holder in due course as a defense. (Res.Br. 22) Whether a note holder is a holder in due course is not a defense, it is a status. The status of being or not being a holder in due course can impact a note holder's liability for behavior of prior note holders. Being a holder in due course can be a *noteholder's* defense to counterclaims and defenses: "It [the holder in due course rule] protects the purchaser of a debt from common-law defenses, including conversion, as long as the statutory requirements are met." (Res.Br. 22)(citing *United Catholic Par. Sch. of Beaver Dam Educ. Ass'n v. Card Servs. Ctr.*,



2001 WI App 229 ¶¶ 9-11, 248 Wis. 2d 463, 636 N.W.2d 206..

There is no proof Plaintiff is a holder in due course and therefore not subject to counterclaims and defenses raised by Wuensch. The trial court correctly held that Plaintiff was subject to the doctrine of unclean hands.

**III. OTHER DISPUTES BETWEEN WUENSCH AND PLAINTIFF ARE FULLY BRIEFED**

Other disputes between the parties are fully briefed. Additional argument would simply reiterate arguments already made and will not be addressed in this reply brief.

Dated: December 21, 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 1,203 words. This was calculated using the word count feature of Microsoft Word.

Dated: December 21, 2015.

  
\_\_\_\_\_  
Reed J. Peterson

**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.

Dated: December 21, 2015.

  
\_\_\_\_\_  
Reed J. Peterson