STATE OF WISCONSIN
SUPREME COURT

Appeal No. 15AP175

DEUTSCHE BANK NATIONAL TRUST COMPANY,

Plaintiff-Respondent-Petitioner,

v.

THOMAS P. WUENSCH,

Defendant-Appellant,

HEIDI WUENSCH,

Appellant.

APPEAL FROM THE FINAL ORDER OF THE LA CROSSE COUNTY CIRCUIT COURT, CASE NUMBER 09-CV-752, THE HONORABLE TODD W. BJERKE PRESIDING

BRIEF OF DEFENDANT-APPELLANT THOMAS P. WUENSCH

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July 21, 2017

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I. MAY A PLAINTIFF FORECLOSE ON AN ADJUSTABLE RATE NOTE WITHOUT ANY EVIDENTIARY FACTS ESTABLISHING IT AS THE HOLDER OF THE NOTE, BASED SOLELY ON THE SELF-AUTHENTICATION PROVISIONS FOR COMMERCIAL PAPER IN WIS. STAT. § 909.02(9)?

Answered by the circuit court: Yes

Answered by the Court of Appeals: No.

II. IS REMAND TO CIRCUIT COURT NECESSARY WHERE AN APPELLATE COURT DETERMINES A PLAINTIFF HAS NOT MET ITS BURDEN TO OBTAIN FORECLOSURE?

Answered by the circuit court: Not addressed.

Answered by the Court of Appeals: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION OF OPINION

Oral argument has already been scheduled and is appropriate. As an opinion of the Supreme Court of Wisconsin and to clarify evidentiary requirements for mortgage foreclosures, the opinion should be published.

STATEMENT OF THE CASE

Plaintiff-Respondent-Petitioner Deutsche Bank National Trust Company ("Deutsche Bank")[1] appeals the reversal of a mortgage foreclosure where it neglected to produce any evidence at trial that it held or possessed the Note at issue. This was not the first procedural abnormality associated with this case: as the trial court found, Defendant-Appellant Thomas Wuensch ("Wuensch") was current on his payments when, in August 2007, the mortgagee at the time misapplied the property tax portion of the payment, and, in February 2008, notified him he was in default despite being paid up. Questions common to the foreclosure crisis of 2007 and 2008 also emerged, including whether the Note was improperly or fraudulently assigned.

Despite this, and after five years of litigation, the court admitted a copy of the Note into evidence without an authenticating witness or anything beyond the unsworn statements of Deutsche Bank's counsel that he had displayed the original, wet-ink Note to the court, endorsed in blank. Counsel for Wuensch objected, and the Court of Appeals reversed

[1] The full name of 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 Mortgage Servicing, Inc., its attorney-in-fact." (R.1.)

due to Deutsche Bank's failure to prove it actually possessed the Note and was entitled to foreclose.

Now, Deutsche Bank urges this Court to affirm its evidentiary shortcut and permit a purportedly self-authenticating Note to stand in for admissible evidence that it possesses the Note it is attempting to enforce. The extreme remedy of foreclosure and use of the courts to take private property requires more. The Court of Appeals properly found that Deutsche Bank had failed to meet its burden to prove it held the Note, and this Court should affirm.

Pre-Trial Proceedings

On August 11, 2009, a complaint was filed initiating foreclosure proceedings on Wuensch's home in Onalaska, Wisconsin. (R.1.) The named Plaintiff 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 Mortgage Servicing, Inc., its attorney-in-fact." (R.1.:App.33)[2]

[2] For the sake of brevity, this brief refers to the plaintiff as "Deutsche Bank," though it is unclear whether plaintiff is a bank, trust, or company, what its actual corporate form is, or whether it even exists as an entity. (*See* R.96 at 7:App.21;App.021;R.91 at 3-11,R.101 Exs. 38-40.)

Attached to the complaint was a copy of a Note naming Wuensch as the borrower and HLB Mortgage as the lender. (R.1:App.40-46.) The Note had two endorsements in it, one from HLB Mortgage to "American Home Mortgage" and the other endorsement was from American Home Mortgage and endorsed in blank. (R.1.) Deutsche Bank was not named in the Note. (R.1:App.46.)

Paragraph 3 of the complaint stated, "That plaintiff is the lawful holder of said Note and mortgage and an assignment or mortgage has been or will be recorded in the office of the Register of Deeds for this county." (R.1:App.33.) Wuensch denied that Deutsche Bank was the holder of the Note and mortgage. (R.2,p.1.) He also counterclaimed for fraud. (R.16,p.2.;R-App.114)

This was the second foreclosure action filed against Wuensch on the property. American Home Mortgage Servicing, Inc. ("AHMSI") filed the first on June 12, 2008. (R.96:App.19,App.10.) (*See also* R.101:Ex.30.) That case was dismissed on February 23, 2009, because of a discrepancy over possession of the same Note. (R.101:Ex.30.)

Court Trial

After nearly five years of pre-trial proceedings and discovery, a court trial was held on May 19, 2014 and June 25, 2014. Deutsche Bank

called one witness, Rashad Blanchard, a corporate representative of Ocwen Loan Servicing, LLC ("Ocwen"). (R.103:36-118.) In December 2012, Ocwen took over servicing of the Loan when Ocwen acquired Homeward Residential, Inc. ("Homeward"). (R.103:48:15-20.) Homeward was formally known as AHMSI. (R.103:49:4-10;App.30.) Blanchard's testimony consisted largely of authenticating records in Ocwen's possession, though none were the Note attached to the complaint. Two documents were admitted based on his testimony. (R.101:Exs.9-10, R.App.92-112) Neither mentions Deutsche Bank.

Blanchard did not mention Deutsche Bank's name in his testimony. (*See* R.103:36-118.) He did not produce any documentation showing a contractual relationship between AHMSI, Homeward, or Ocwen and Deutsche Bank. Nor did he produce a power of attorney showing AHMSI, Homeward, or Ocwen were attorneys-in-fact for Deutsche Bank. Blanchard did not produce any evidence that the named Plaintiff existed. Blanchard also did not produce or authenticate the original Note. (*Id.*)

Prior to any witness testifying, Attorney Russell Karnes, identifying himself as appearing for Deutsche Bank, produced a document that he claimed was the original Note and showed it to the court. (R.103 at 4:6-7, 14:8-17:16.) No evidence was presented showing how Deutsche Bank's

counsel came into possession of the Note. No evidence was presented showing that Deutsche Bank's counsel was retained by the trust mentioned in the case caption. Over the objection of Wuensch's attorney, the court concluded that the Note presented was the original Note ("Note"). (R.103:15:10-15.) A copy of this Note was then admitted into evidence (R.101:Ex.1.)

A certified copy of the mortgage was also introduced into evidence. (R.101:Ex. 2;App.158-180). The named mortgagor was Wuensch, and the mortgagee was Mortgage Electronic Registration Systems, Inc. "acting solely as nominee for Lender and Lender's successors and assigns." (R.101:Ex.2.) HLB Mortgage was the named lender. (R.101:Ex.2.) Deutsche Bank was not named in the mortgage. (R.101:Ex.2.)

Wuensch attempted to have assignments of mortgage admitted into evidence, but the court refused to admit them on relevance of grounds, based on its finding that "plaintiff is the holder in due course of a Note endorsed in blank." (R.103 at 18:13-20:11, 25:10-28:22, 124:15-125:22; R.96:App.22.) Wuensch also attempted to call Jane Lewis, an expert in handwriting, to address problems with assignment indorsements. (R.103:24:4-25:19, R-App.050-051.) The court did not allow this evidence, due chiefly to its determination that it was not relevant, along with

disputes about whether the witness was timely named. (R.103:24:4-25:19, 22:6-13, 125:24-132:16;R-App.049-63.)

Wuensch submitted into evidence an unsigned Pooling and Servicing Agreement ("PSA"), one of the few documents of record that mentions Deutsche Bank. (R.101:Ex.21.) The signature pages of the PSA do not contain signatures above the names of named parties to the Trust. (R:101:Ex.21, p.798.) The pages for notarization are not notarized and do not indicate the respective signatures were notarized. (R.101:Ex.21, pp.799-802;R-App.083-090.) Deutsche Bank did not present any evidence that the PSA was signed, notarized, and consummated. Deutsche Bank had also previously stated in discovery that it shipped the original Note to AHMSI in 2011. (R.106, Ex. 7, p. 2; R-App.119.)

Wuensch testified that he did not initially default, but that AHMSI misapplied his tax payments in the summer of 2007, leading to imposition of penalties he should not have owed and an allegation of default. (R.103 at 135:20-138:19, 140:8-141:7;R-App.064-069; *see also* R.96 at 4; App.18.) When Wuensch attempted to contact AHMSI, they were unresponsive and inconsistent in responding to his efforts to address the issue. (R.103 at 141:8-142:15; R.104:35:15-40:1.) AHMSI claimed it did not receive his February 2008 mortgage payment (R.79:Ex.6.) One representative told

Wuensch to not make any payments until the issues were resolved and the payee was made clear, since AHMSI had by that time gone into bankruptcy. (App.025.)

Wuensch further testified that he did not believe the purported original Note was the one he signed, due to the lack of visible indentations under the signatures. (R.103:160:11-163:17.) Wuensch also testified that there were abnormalities in the mortgage documents, including delayed recordings, a signature that occurred months after Deutsche Bank filed its complaint and backdated to before the filing, and potentially fraudulent signatures. (R.104:6:4-7, 28:22:-33:8;R-App.075-081.)

Trial Court Judgment

The trial court issued Findings of Fact, Conclusions of Law, Judgement and Order ("Judgment") on December 10, 2014. (R.96:App.15-32.) The court found the Deutsche Bank held the original Note. (R.96 at 1, 6:App.15, 20.) Based on this finding, the court determined Deutsche Bank had standing to foreclose on the mortgage, rejecting Wuensch's arguments that Deutsche Bank had not shown itself to be a going corporate concern capable of enforcing the Note. (R.96 at 9-10.)

The court also acknowledged irregularities in how the Note came to be in the possession of Deutsche Bank, and that 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 seemingly 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.96:pp.11-12; App.25-26.)

The court concluded, "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.96:p12; App.26) (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.96:App.12-13; App.26-27.)

Based on these findings, the court fashioned a remedy it believed was equitable. The court stayed its judgment for 45 days to allow Wuensch to pay off the Note. (R.96:p.13; App.27.) The Judgment specifically denied Deutsche Bank accrued interest, late charges, or Deutsche Bank's attorney fees. (R.96:p.13; App.27.) If Wuensch paid the remaining amount of $347,826.03 within 45 days, the court would quiet the Deutsche Bank's lien on the property and not enter judgment. (R.96:p.13; App.27.) If Wuensch did not, the foreclosure judgment would be entered as the full amount of $455,641.85 requested by the Deutsche Bank. (R.96:p.13; App.27.)

The trial court also dismissed Wuensch's counterclaim for fraud as unproven, but it acknowledged "Wuensch was hampered in his presentation of evidence by the Court's rulings" to exclude the assignments and other documents in the foreclosure claim. (R.96 at 10; App.024.)

Court of Appeals

Wuensch appealed to the Court of Appeals, seeking reversal of the judgment of foreclosure and the trial court's dismissal of Wuensch's counterclaims. (R.98.) Wuensch specifically contended that the trial court erred by finding Deutsche Bank possessed the Note, by admitting the Note into evidence, and by allowing Deutsche Bank an equitable remedy in spite of its predecessor's unclean hands. (Wuensch's Ct. App. Br.) The Court of Appeals agreed with Wuensch that the trial court erred by finding Deutsche Bank established possession of the Note, and summarily reversed the trial court's Judgment. (App.001-008.)

The Court held that after Wuensch "unambiguously demanded proof at trial that the plaintiff *possessed* the original Note at issue, the plaintiff failed to offer any evidence on the possession issue at trial." (App.001.) The Court also observed "where the plaintiff's counsel did not take an oath and did not lay a foundation to establish personal knowledge about possession of the original Note, the plaintiff's counsel was not acting as a witness on whose statements or implied statements the circuit court could rely to prove possession." (App.005.) Given Wuensch's unambiguous objections at trial, "sworn testimony from someone with personal knowledge was necessary," but no evidence was provided "from

which a reasonable inference of current possession could arise." (App.006-007.) The Court concluded that there is "no shortcut in the law to the admission of necessary evidence at trial." (App.008.)

Deutsche Bank filed a motion to "clarify" the Court of Appeals' order, asking the Court to remand the case to permit Deutsche Bank to provide sworn testimony that it is the current holder of the Note. (App.205.) The Court of Appeals denied the motion, noting that the evidence was closed in this case and expressing "no opinion about the viability of any new foreclosure action that the respondent might pursue." (App.008.)

STANDARD OF REVIEW

Statutory interpretation presents a question of law that an appellate court reviews de novo. *State v. Johnson*, 2007 WI 107, ¶ 27, 304 Wis.2d 318, 332, 735 N.W.2d 505, 512. The application of statute to a particular set of facts and is also a question of law requiring de novo review. *Matthies v. Positive Safety Mfg. Co.*, 2001 WI 82, ¶ 15, 244 Wis.2d 720, 734, 628 N.W.2d 842, 850.

Decisions whether to admit or exclude evidence are typically within the circuit court's discretion, but not "'if an evidentiary issue requires construction or application of a statute to a set of facts'." *State v. Jensen*,

2007 WI App 256, ¶ 9, 306 Wis.2d 572, 743 N.W.2d 468 (quoting *State v. St. George*, 2002 WI 50, ¶ 16, 252 Wis.2d 499, 643 N.W.2d 777). In such a case, the court is faced with a question of law that is reviewed de novo.

Evidentiary rulings can only be upheld if "'there is evidence in the record that discretion was in fact exercised and the basis of that exercise [is] set forth'." *State v. Pharr*, 115 Wis.2d 334, 342, 340 N.W.2d 489, 501 (1983) (quoting *State v. Hutnik*, 39 Wis.2d 754, 764, 159 N.W.2d 733 (1968)). An appellate court will only affirm if the circuit court examined the relevant facts, applied a proper standard of law, used a demonstrated rational process, and reached a conclusion that a reasonable judge could reach. *State v. Walters*, 2004 WI 18, ¶¶ 13-14, 269 Wis.2d 142, 151, 675 N.W.2d 778, 782.

A trial court's findings of fact are reviewed for clear error. *Royster-Clark, Inc. v. Olsen's Mill, Inc.*, 2006 WI 46, ¶ 11, 290 Wis.2d 264, 271, 714 N.W.2d 530, 534. Under this standard, they will be set aside if unsupported by the record or against the great weight and clear preponderance of the evidence. *Id.* at ¶¶ 11-12.

A trial court's application of equitable remedies is reviewed for erroneous exercise of discretion. *Anderson v. Onsager*, 155 Wis.2d 504, 513, 455 N.W.2d 885, 889 (1990).

ARGUMENT

I. Deutsche Bank Could Not Foreclose on the Note Because it Failed to Show it Possessed the Note, Regardless of Whether it was Self-Authenticating.

Deutsche Bank had the burden to prove it possessed the Note at issue and, therefore, standing to foreclose on the mortgage. Deutsche Bank did not meet its burden by virtue of an attorney appearing at trial, purportedly on its behalf, producing what he claimed—through unsworn statements—was the Note with an endorsement in blank. Not only was this insufficient under the law, but disputes about Deutsche Bank's possession also precluded self-authentication of the Note. The circuit court erred in granting the drastic remedy of foreclosure on this record. The Court of Appeals should be affirmed.

A. *Deutsche Bank Failed to Demonstrate Possession of the Note*

A basic prerequisite of enforcing a Note is showing possession of the Note. Deutsche Bank failed to make that showing here.

1. Only a "Holder" of a Note May Enforce it, Which Requires Proof of Possession.

A "holder" of a negotiable instrument is entitled to enforce it. Wis. Stat. § 403.301. "Holder" is defined as the person in possession of the instrument. Wis. Stat. § 401.201(2)(km)1. Where, the instrument is endorsed in blank, it is payable to the "bearer," meaning the person "in

possession of [the] instrument." Wis. Stat. §§ 403.205(2), 401.201(2)(cm). Physical possession of the original is thus an indispensable requirement to a plaintiff's enforcement of a Note, even one endorsed in blank.

Possession is typically demonstrated like any evidentiary fact, through sworn testimony of a witness with knowledge that the plaintiff is holder of the Note. *See* Wis. Stat. §§ 909.01, 909.015(1). For example, in *PNC Bank, N.A. v. Bierbrauer*, the plaintiff submitted an affidavit from a loan servicer who had inspected the relevant records and averred that PNC was the current holder of the Note and mortgage. 2013 WI App 11, ¶ 3, 346 Wis.2d 1, 827 N.W.2d 124; *see also Dow Family, LLC v. PHH Mortg. Corp.*, 2013 WI App 114, ¶ 21, 350 Wis.2d 411, 838 N.W.2d 119 (noting a witness with knowledge is one means of authenticating evidence).

Additional facts may "militate against a finding" that a plaintiff is a holder of or possesses a Note. In *Dow Family*, the court noted confusion as to the original Note's whereabouts prior to the litigation, disputes about the plaintiff's role as loan servicer or owner, and failure to attach an endorsed copy of the Note to the complaint as facts that called into question whether plaintiff was actually the holder of a version later produced in court. 350 Wis.2d 411, ¶ 23.

Indeed, a majority of jurisdictions have held that a party attempting to enforce a Note must have possessed it when all actions leading up to a valid foreclosure—including the filing of the complaint—took place, not just at the time of trial.[3] The Court may look to these jurisdictions in interpreting Wisconsin's Uniform Commercial Code, Wis. Stat. chs. 401-411, to promote uniformity in interpreting the Uniform Commercial Code

[3] *See, e.g.*, *Country Place Cmty. Ass'n, Inc. v. J.P. Morgan Mortg. Acquisition Corp.*, 51 So.3d 1176, 1179 (Fla. Dist. Ct. App. 2010) (finding no evidence that the plaintiff possessed the Note when it filed its lawsuit and lacked standing); *Bank of N.Y. v. Raftogianis*, 418 N.J. Super. 323, 362–63, 13 A.3d 435, 459 (Ch. Div. 2010) (dismissing foreclosure complaint without prejudice because plaintiff could not prove it had possession of the Note on the date it filed the complaint); *HSBC Bank USA, Nat. Ass'n v. Miller*, 26 Misc.3d 407, 411–12, 889 N.Y.S.2d 430, 432–33 (Sup. Ct. 2009) (dismissing foreclosure because the plaintiff failed to show that the Note was transferred to it before filing the foreclosure action); *U.S. Bank, Nat. Ass'n v. Moore*, 2012 OK 32, ¶¶ 12-13, 278 P.3d 596, 599–600 (finding that the plaintiff could not prove that it had possession of the Note at the time the complaint was filed); *In re Veal*, 450 B.R. 897, 917–18 (B.A.P. 9th Cir. 2011) (holding that party seeking to lift failed to show that it or its agent had actual possession of the Note and, therefore, could not be a person entitled to enforce the Note); *HSBC Bank USA v. Hernandez*, 92 A.D.3d 843, 844, 939 N.Y.S.2d 120, 122 (2012) (servicer's summary judgment affidavit could not support standing because failed to give any factual details of a physical delivery of the Note prior to commencement of action); *U.S. Bank v. Coley*, No. CV076001426, 2011 WL 2734603, at *3 (Conn. Super. Ct. June 10, 2011) (current possession of Note does not establish standing, as plaintiff must proffer evidence of possession of Note when the complaint was filed); *Deutsche Bank Nat. Trust Co. v. Haller*, 100 A.D.3d 680, 682, 954 N.Y.S.2d 551, 553 (2012) (evidence failed to establish whether physical delivery and indorsement of Note took place prior to commencement of foreclosure action); *Deutsche Bank Nat. Trust Co. v. Barnett*, 88 A.D.3d 636, 637–38, 931 N.Y.S.2d 630, 631–32 (2011) (evidence of two undated allonges, "affidavits did not state any factual details concerning when the plaintiff received physical possession of the Note, and thus, failed to establish that the plaintiff had physical possession of the Note prior to commencing this action"); *Deutsche Bank Nat. Trust v. Brumbaugh*, 2012 OK 3, ¶ 9, 270 P.3d 151, 153–54 (foreclosing party failed to prove that it acquired Note endorsed in blank before it filed foreclosure action); *Deutsche Bank Nat. Trust Co. v. Richardson*, 2012 OK 15, ¶ 9, 273 P.3d 50, 53–54 (summary judgment for lender reversed where record did not establish that lender had acquired Note before commencing judicial foreclosure action).

nation-wide. Wis. Stat. § 401.103(1)(c); *Nat'l Operating, L.P. v. Mut. Life Ins. Co. of N.Y.*, 2001 WI 87, ¶ 30, 244 Wis.2d 839, 855–56, 630 N.W.2d 116, 124.

Further, in a mortgage foreclosure action, possession of the Note when the action is commenced is required to maintain a plaintiff's standing. *Deutsche Bank Nat. Trust Co. v. Haller*, 100 A.D.3d 680, 682, 954 N.Y.S.2d 551 (2012); s*ee also, e.g.*, *HSBC Bank USA v. Hernandez*, 92 A.D.3d 843, 844, 939 N.Y.S.2d 120, 122 (2012); *Country Place Cmty. Ass'n, Inc. v. J.P. Morgan Mortg. Acquisition Corp.*, 51 So.3d 1176, 1179 (Fla. Dist. Ct. App. 2010); *U.S. Bank v. Coley*, No. CV076001426, 2011 WL 2734603, at *3 (Conn. Super. Ct. June 10, 2011). Proof of possession was required, before Deutsche Bank could enforce the Note.

2. Deutsche Bank Did Not Submit Any Evidence to Support it was the Holder of the Note, Despite Notice that Possession was Disputed.

Deutsche Bank presented no proof of possession of the Note despite the clear law and Wuensch's objections, and thus did not meet its burden for foreclosure.

Deutsche Bank did not take the simple step of calling a witness with knowledge to testify to possession, from Deutsche Bank National Trust Company or elsewhere. The only witness that Deutsche Bank called did not even mention the Deutsche Bank by name, or provide any

documentation showing that Ocwen had a relationship with Deutsche Bank or was attorney-in-fact for the Trust. The witness did not testify that Ocwen possessed the Note for the Deutsche Bank. Nor did he testify as to any transfers of the Note. Deutsche Bank failed to show any connection between the Note and its "possession" and thus failed to show it was a "holder" under Wis. Stat. § 401.201(2)(km)1.; *see also* Wis. Stat. §§ 403.205(2), 301.

Deutsche Bank failed to submit proof of possession despite having ample notice that this fact was disputed. Even before any witness testified at trial, Wuensch declined to stipulate that Deutsche Bank possessed the original Note. (R.47:15:5-16:16.). Deutsche Bank was fully aware of the infirmities of its case in that regard, given that the Note was indorsed, undated, in blank, and did not name Deutsche Bank. It knew Wuensch had challenged the assignments, and that the only document in which it was identified—the pooling and service agreement—was unsigned. It knew there was a muddled record of possession in discovery. It knew Wuensch challenged its very existence as an entity able to enforce a mortgage. (R.2;R.101:Ex.38;R.16;R-App.001-007, 091, 113-117.)

Finally, Deutsche Bank was fully aware that the law required it to provide evidence of its possession throughout its prior attempts to enforce

the Note and prior case law. Notably, just one year before trial, the Court of Appeals decided *PNC Bank*, which indicated witness testimony could should possession. 346 Wis. 2d 1, ¶ 3.

Not only did Deutsche Bank not meet its burden of possession, but its failure to do so should have resulted in an inference that it ***could not*** meet its burden.

> The failure to bring before the tribunal some circumstance, document, or witness, when either the party himself of his opponent claims that the 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) (emphasis added); *see also* Wis. JI-Civil 410.

The Court of Appeals properly found that Deutsche Bank did not prove possession of the Note or that it was entitled to enforce it.

3. Self-Authentication is not Equivalent to a Showing of Possession.

Deutsche Bank claims the Note was self-authenticating commercial paper and was properly admitted. Assuming without agreeing that this is the case, the fact that the Note is ***self-authenticating*** does not establish

Deutsche Bank's ***possession***. (DB Br. at 15-17.) Deutsche Bank's attempt to conflate these two concepts should be rejected.

Self-authentication is simply a matter of conditional relevancy, established "by evidence sufficient to support a finding that the matter in question is what its proponent claims." Wis. Stat. §§ 909.01, 901.04(2).

> Authentication is not equivalent to establishing that the contract is in fact genuine…To have the judge determine that the contract was genuine would narrow the broad definition of relevancy and reserve to the judicial function the determinations of fact that are properly those of the trier of the facts.

Wis. Stat. § 909.01 (Judicial Council Cmte. Note). In other words, a self-authenticating document is its own proponent only as to its contents. Wis. Stat. § 909.02. "What it purports to be" is what is contained in the document itself.

By contrast, possession is a component of Deutsche Bank's standing that must be proved. As a result, even if a Note is authentic, its self-authentication has nothing to do with possession, because the Note does not (and cannot) describe its own possession. As the Court of Appeals correctly found, "self-authentication is not the issue here," and "merely establishing self-authentication of a purported original Note endorsed in blank" could not "stand as proof as to *what person or entity currently possessed* the original Note." (App.6, original emphasis.) In this case, the

Note does not mention Deutsche Bank and proves nothing about its possession, and neither did any witness. Self-authentication does not help Deutsche Bank.

Deutsche Bank cites *Dow Family* to argue that a copy of a n***ote*** can "claim[] to be…'a true and correct copy of an original note *in Plaintiff's possession*'" (Br. at 16-17, emphasis in original.) *Dow Family* says nothing of the sort. That case actually looked for evidence that the Note was what the ***plaintiff***, not the Note, claimed that the Note was—a note in plaintiff's possession. *Dow Family, LLC v. PHH Mortg. Corp.*, 2013 WI App 114, ¶¶ 20-21, 350 Wis.2d 411, 422, 838 N.W.2d 119, 125. This distinction is crucial. The *Dow* court reviewed witness affidavit testimony in vain for these matters and found plaintiff did not meet its burden. *Id.* ¶ 21 ("PHH did not submit the affidavit of any witness who claimed to have personal knowledge that PHH was in possession of the original note or that the copy of the Note PHH submitted was a true and correct copy of the original."). Even if a Note is self-authenticating as to being the note at issue in a case (which it was not in *Dow Family*), nothing in that decision states that self-authentication applies to the issue of possession as well.

The unpublished cases Deutsche Bank cites do not help its position.[4] First, Deutsche Bank relies on *Minkov*'s "suggest[ion]" that possession can be established "by the document itself" as support for its argument that the Note itself can establish possession. (Br. at 23.) In fact, *Minkov* hurts, rather than helps, this argument. First, the *Minkov* court undertook a rigorous examination of evidence of possession, rejecting a mere assertion of "holder" status as a legal conclusion unsupported by relevant facts. *Bank of Am. N.A. v. Minkov*, 2013 WI App 115, ¶¶ 15-21, 350 Wis.2d 507, 838 N.W.2d 137 (unpublished opinion). (App.245-248.) In finding that the plaintiff had failed to even make a *prima facie* case for possession, the court did not suggest that producing an original note at trial instead of a copy would have established possession. *Id.*

[4] Deutsche Bank's reference *to Bank of N.Y. Mellon v. Harrop*, 2016 WI App 34, 369 Wis.2d 71, 879 N.W.2d 808 (unpublished per curiam opinion) violates Wis. Stat. § 809.23 (3) and should be disregarded since the Bank clearly seeks to wring some persuasive authority from the case. (DB Br. at 24-25.) None would be found even if this reference were lawful. The possession issue was merely one of seven raised by the defendant and, unlike here, neither the defendant nor the court (in rejecting the defendant's argument) presented any authority on the issue. Deutsche Bank raises the case again on page 30 of its brief, again for no plausibly allowable reason under Wis. Stat. § 809.23 (3). Deutsche Bank implies that *Mellon*'s outcome shows appellate court disarray on how possession is demonstrated in a foreclosure action, but the weight of authority in both published and unpublished cases—in addition to statutory requirements for evidence and admissibility—show Deutsche Bank should have submitted evidence of possession in the trial court.

Importantly, the *Minkov* court reinforced that self-authentication applies only to the content of the Note.

> Assuming without deciding that a copy of a Note attached to a complaint is self-authenticating under § 909.02(9), the copy of the Note is *self-authenticating only as to what the document purports to be*. *See* Wis. Stat. § 909.02. Nothing in the document demonstrates that [the plaintiff] has possession of the original Note.

Id. ¶ 17, App.246 (emphasis added).

Deutsche Bank also cites to *BAC Home Loans Servicing LP v. Thompson*, 2014 WI App 24, 352 Wis.2d 754, 843 N.W.2d 710 (unpublished opinion) for exactly the same reason that it cites *Minkov*. (DB Br. at 23-24.) This opinion fails Plaintiff for exactly the same reasons as in *Minkov*: even assuming the court could admit the Note as self-authenticating, these "evidentiary arguments do not address what BAC sought to prove—possession of the original Note." *Id.* ¶ 24 (App.272).

Just as in *Minkov* and *BAC*, the Note here says nothing about Deutsche Bank, much less that it possessed the Note. Self-authentication does not help Deutsche Bank show possession.

4. Deutsche Bank may not rely on a "presumption of possession."

Deutsche Bank argues that it may rely on a vague "presumption of possession" to compensate for its failures to present any evidence on the topic. (DB Resp. Br. at 17-18.) It may not.

Deutsche Bank fails to present authority supporting its supposed "presumption." It cites inapposite cases that long predate the modern U.C.C. era and a lone more recent decision from North Carolina. (Br. at 17-18.) The latter is both out of step with the law and, at any rate, distinguishable from this case because in it "there was no dispute that petitioner was in possession of the Note." *In re Foreclosure of a Deed of Trust Executed By Rawls*, 777 S.E.2d 796, 800–01 (N.C. Ct. App. 2015).

Other courts have found evidence of possession insufficient even when the plaintiff, presented some evidence of possession. For instance, in *Deutsche Bank Nat. Trust Co. v. Barnett*, the plaintiff presented affidavit testimony from both the vice president of the plaintiff's servicing agent and the plaintiff's counsel affirming that the original Note was in its possession, in addition to two undated allonges. 88 A.D.3d 637–38. However, the absence of factual details concerning when the plaintiff received physical possession of the Note was fatal to plaintiff's ability to prove possession. *Id.*

After citing inapposite cases on "presumption of possession," Deutsche Bank repeats the uncontroversial rule that a holder of a negotiable instrument is entitled to enforce it, then leaps to the conclusion that "the record establishes that Deutsche Bank is the holder of the Note"

and that the Note "was endorsed in blank and held by Deutsche Bank." (DB Br. at 20.) But its only citation to the record for this statement is page 77 of the Appendix, which is merely argument from its own attorney on his motion in limine to exclude evidence of assignments. (*Id*.) This argument is not evidence and does not prove Deutsche Bank holds the Note, much less that it "possesses" or is entitled to any presumption.

Deutsche Bank's attempt to leapfrog the requirements of the rules of evidence by "presumption" should be rejected.

5. Presentation of the Note by Unsworn Counsel Was Insufficient.

Deutsche Bank seems to recognize that nothing in the Note itself showed possession, which is why it urges that "presentment" of the original Note should be sufficient. (DB Resp. Br. at 21) But presentment how? In place of introduction of the Note by a sworn witness with personal knowledge, Deutsche Bank claims "presentment" by its attorney was sufficient. It is not.

a. Karnes did not address the issue of possession.

As an initial matter, Deutsche Bank argues that it established possession by its attorney simply offering the Note into evidence at trial. (Br. at 20-21.) It did not. Karnes did not testify. Neither did Karnes make ***any*** statement as to how the Note came into his or the plaintiff's

possession. His only statements about the Note contended that it was the original Note. (R.103 at 14:12-17:16, App.073-076.) The fact of possession was not addressed by Karnes.

b. A trial attorney's agency does not convert his physical possession into his client's status as bearer.

Unable to rely on any sworn testimony that Deutsche Bank itself possessed the Note, Deutsche Bank attempts to rely on Karnes' handling of the Note at trial. The law permits no such reliance.

Deutsche Bank attempts to cram itself into Karnes' shoes by relying on *Marten Transp. Ltd. v. Hartford Specialty Co.* for the proposition that an "attorney is the agent of their client." (Br. at 21.) However, *Marten Transp.* did not involve whether an attorney's action could be imputed to his client, but rather whether an attorney should be disqualified from a case based on an alleged conflict of interest. *Marten Transp.*, 194 Wis.2d 1, 8-9, 533 N.W.2d 452, 453 (1995). The court defined "agency" as "the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." *Id.* at 13-14; *see also Journal/Sentinel, Inc. v. Sch. Bd. of Sch. Dist. of Shorewood*, 186 Wis.2d 443, 453, 521 N.W.2d 165, 170 (Ct. App. 1994) ("A lawyer retained by a client is the client's agent ***for the***

purposes of the retention agreement."). Here, whether Deutsche Bank consented to Karnes prosecuting a foreclosure action is irrelevant to whether Deutsche Bank had physical possession of the Note at any point in the foreclosure process.[5]

Moreover, this case comes under a crucial ***exception*** to the rule stated in Marten on which Deutsche Bank relies. The Court stated: "Attorneys are agents of their clients, although as to their physical activities they are independent contractors." *Id.* at 14, n. 4 (citing Restatement (Second) of Agency § 1, cmt. e on sub. (3) (1958)). Unlike with other agents, employers are not responsible for the physical acts of their independent contractors. *Id.* Possession is one such ***physical*** act. Furthermore, the only reasonable inference that can be drawn from the record is that Deutsche Bank engaged Karnes for the purpose of litigating a foreclosure action, not for maintaining Deutsche Bank's volume of records.

[5] Here, notably, the complaint was signed by neither Karnes nor an attorney of his firm. (App. 35.) Karnes' firm did sign AHMSI's 2008 foreclosure complaint against Wuensch, suggesting a logical inference that Karnes physically possessed the Note long before Plaintiff or that Plaintiff never possessed it at all. (R.101:Ex.30,p.3; R-App.008-010.)

Therefore, Karnes' agency for Deutsche Bank—assuming it exists—did not translate his possession of the Note at trial into Deutsche Bank's possession of the Note at any point in time.

c. Karnes was not a sworn witness and presented no admissible evidence.

Even if Karnes had made factual statements related to possession—and to any extent that he produced the Note at trial —such statements or conduct are not admissible evidence under law.

First, a "witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." Wis. Stat. § 906.02. No evidence was ever introduced that Karnes had any personal knowledge of the delivery of the Note to Deutsche Bank or of Deutsche Bank's physical possession of the Note.

Second, a witness is required to make an oath or affirmation before testifying. Wis. Stat. § 906.03. Karnes did not do so, nor was he offered for cross-examination on his statements. As the Court of Appeals observed in this case, "unsworn statements" have "no proper place" as substitutes for evidence at trial. *Nelson v. State*, 35 Wis.2d 797, 812, 151 N.W.2d 694, 701 (1967).

Third, the court could not permit Karnes to serve as both advocate and witness.

> At the motion hearing, the circuit court questioned Attorney Lehner, counsel for the Nelsons, regarding his personal knowledge of Green Lake, specifically relating to whether Beyer's Cove is used for boat access. * * * Attorney Lehner's testimony, however, does not constitute evidence and therefore should not have been relied upon in support of the circuit court's order. Pursuant to Wisconsin Supreme Court Rule 20:3.7, a lawyer is generally not permitted to serve dual roles as advocate and witness. Comment (2) explains:
>
> > The tribunal has proper objection when the trier of fact may be confused or misled by a lawyer serving as both advocate and witness. The opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others.

Konneker v. Romano, 2010 WI 65, ¶ 32, n. 12, 326 Wis.2d 268, 291, 785 N.W.2d 432, 444; *see also* Wis. Stat. § SCR 20:3.7. Permitting an attorney's unsworn statements, not subject to cross-examination, to stand in for evidence introduces unreliable yet virtually unrebuttable testimony at odds with the adversary process. It was prejudicial to Wuensch and sets poor precedent in the areas of evidence and attorney ethics.

Although a trial court is afforded discretion in making factual findings, that discretion does not extend to cases where, as here, there is ***no*** evidentiary support for the finding.

6. Deutsche Bank fails to shift the burden onto Wuensch without producing some evidence.

Deutsche Bank attempts to shift its burdens onto Wuensch, faulting him for offering "no evidence at trial that anyone other than Deutsche Bank holds the Note." (Br. at 26.)

First, it would be absurd to assign home mortgagors the burden of proving the negative fact that some entity other than the plaintiff financial institution possessed the Note. The law places the burden of proving possession on the party seeking to enforce a Note; it does ***not*** require a defendant to prove possession by some ***other*** party. *PNC Bank*, 346 Wis.2d 1, ¶ 10. Deutsche Bank, in relying on *PNC Bank*, fails to acknowledge it was "undisputed that [the foreclosing bank] [i]s the bearer of the Note" based on an unrebutted, sworn affidavit attesting to the bank's possession based on personal knowledge. *Id.* ¶¶ 10, 12. Deutsche Bank put in no such evidence for Wuensch to rebut.

Second, Wuensch nonetheless ***did*** present evidence of lack of possession in the form of the scant, inconsistent, and suspicious documentation of chain of title and delivery of the Note and other mortgage documents and even questioned the existence of Deutsche Bank as a going concern. (R.101:Ex.21; R.103:18:13-20:11, 25:10-28:22, 124:15-125:22; R.96, App.13; R.103:160:11-163:17; R.104:6:4-7, 28:22:-33:8; R-

App.46-48,51-56,70-81,83-90.) Notably, the court excluded much of Wuensch's evidence based on the motions and objections of Attorney Karnes. Deutsche Bank cannot claim on appeal that Wuensch should have put in evidence, having sought to exclude that same evidence at trial.

There is no reason to depart from the rules of evidence in this case or to excuse Deutsche Bank from its burden of proving that it possessed, and therefore was the holder, of the Note it sought to enforce. The Court of Appeals should be affirmed.

B. *The Note Should Not Have Been Admitted As Self-Authenticating.*

Assuming, *arguendo*, that Deutsche Bank proved possession of the Note, the circuit court still should have been reversed because it erred when it admitted the Note as self-authenticating. The circuit court failed to recognize the limitations on self-authentication as applied in this case. Moreover, the court did not give Wuensch sufficient opportunity to contest authenticity and, it follows, admissibility of the Note. (DB Br. at 15-17.)

1. The Note did not meet the requirements for self-authentications under the Uniform Commercial Code.

Contrary to Deutsche Bank's claims (DB Br. at 15-17), the Note should not have been admitted because it was not self-authenticating. Wuensch specifically and consistently denied the authenticity of the Note

and its signatures in the pleadings. (R.2, R.16, R.48.) Wis. Stat. § 403.308(1).

Documents generally must be authenticated to be admissible, such as through "testimony of a witness with knowledge that a matter is what it is claimed to be." Wis. Stat. §§ 909.01, 909.015. "Extrinsic evidence of authenticity as a condition precedent to admissibility" is not required for certain categories of documents, Wis. Stat. § 909.02, including:

> (9) COMMERCIAL PAPER AND RELATED DOCUMENTS. Commercial paper, signatures thereon, and documents relating thereto to the extent provided by chs. 401 to 411.

Wis. Stat. § 909.02(9). Wis. Stat. chs. 401 to 411 are Wisconsin's Uniform Commercial Code. "Commercial paper" refers to "negotiable instruments" described in Wis. Stat. ch. 403. *See Crown Life Ins. Co. v. LaBonte*, 111 Wis.2d 26, 39, 330 N.W.2d 201, 207 (1983); *see also* Black's Law Dictionary at 271 (6th ed. 1990) (defining "commercial paper").

Wis. Stat. § 403.308(1) contains a limitation to authentication of instruments where the signatures have been contested:

> In an action with respect to an instrument, the authenticity of, and authority to make, each signature on the instrument is admitted unless specifically denied in the pleadings. If the validity of a signature is denied in the pleadings, the burden of establishing validity is on the person claiming validity, but the signature is presumed to be authentic . . . .

Wis. Stat. § 403.308(1). This section has been described as conferring a "rebuttable presumption of authenticity," which an opposing party may

overcome. *Ocwen Loan Servicing, LLC v. Thompson*, Case No. 13-CV-487-JPS, 2014 WL 51236 (E.D.Wis. Jan. 7, 2014) (R-App.120-132) (finding presumption overcome and rejecting admission of allonge to adjustable rate note); *see also Cobb State Bank v. Nelson*, 141 Wis.2d 1, 6-7, 413 N.W.2d 644, 646 (Ct. App. 1987) (noting code "anticipates conflicting evidence").

The court failed to allow Wuensch to introduce contrary evidence and rebut the presumption of authenticity. Attorney Karnes offered the Note as an exhibit, before the circuit court took any testimony or evidence. (R.103 at 15:10, App.074. Counsel for Wuensch strongly objected to admission of the Note under both Wis. Stat. §909.02(9) and Wis. Stat. chs. 401-411. (R.103 at 15:20-16:16, App.075 ("Mr. Wuensch has… denied that the copy of this Note is the original in their pleadings"). Mr. Karnes responded that the Note was a "negotiable instrument," that the signatures were presumed valid, and that Mr. and Mrs. Wuensch were not in the courtroom to challenge their signatures. (R.103 at 16:19-17:14, App.075-076.) Before anything more could be said, the circuit court admitted a copy of the purported original Note as Exhibit 1. (*Id*.) The circuit court stated the basis for its ruling was that it "looks like original ink on signatures" on the purported original (R.103 at 15:10-15, App.074.)

When the case actually opened for evidence, Wuensch attempted to introduce evidence to challenge the signature on the Note:

> Q. Is your original sweating [sic] signature on that document that you were just shown?
> A. No.
> . . . .
> Q. Why do you believe that is not an original document?
> A. There is no indentation in any of the signatures, whether it was mine or Andrew Valentine's or Pedro Valdez's.
> Q. Were there indentations on the initials?
> A. No, not on any of the pages.
> ….
> Q. Mr. Wuensch, in your experience, when you sign a document, does it make an impression on the opposite side of a piece of paper where you signed?
> A. Yes.

(R.103 at 159:6-163:17; App.135-139.) Mr. Karnes objected, "The Court has already accepted the original Note into evidence" and noted a handwriting expert Wuensch had named "was excluded." (*See id.*) The court agreed: "I found that it's original ink based on my observations, that's all I'm going to find." (R.163:1-3, App.139.) In other words, the Court refused to consider evidence from Wuensch contesting authenticity of the signatures and Note. This was an erroneous exercise of discretion.

a. The Note Was Not a "Negotiable Instrument" and Therefore Not "Commercial Paper" Entitled to Self-Authentication.

Further, the Note could not be authenticated as commercial paper because it was not a "negotiable instrument." "Commercial paper" under Wis. Stat. ch. 403 only applies to "[n]egotiable instruments." Wis. Stat. §

403.102. "Negotiable instruments" means "an unconditional promise or order to pay **a fixed amount of money**, with or without interest or other charges described in the promise or order," if certain conditions are met. Wis. Stat. § 403.104 (emphasis added).[6] Instruments that are non-negotiable are, hence, not entitled to self-authentication under Wis. Stat. § 909.02(9). *See* Fed. R. Evid. 902(9), Advisory Committee Note (interpreting similar provision of federal law and noting provisions of the U.C.C. for self-authentication purposes are those dealing with "third-party documents, **signatures on negotiable instruments**, protests, and statements of dishonor") (emphasis added).

The Note at issue is an unfixed, payment option adjustable rate mortgage ("Option ARM"). Option ARMS are not "negotiable instruments," because the payment amount is never "fixed." *See* Wis. Stat. § 403.102.[7] In this case, the initial interest rate of 2.625% lasted less than a month, replaced by a 9.133% rate that was replaced by a fluctuating rate

[6] Other jurisdictions interpreting similar language have suggested that "interest and other charges" are limited to fixed fees, such as late charges. *Madura v. BAC Home Loans Servicing, LP*, 593 F.Appx. 834, 845 (11th Cir. 2014).

[7] See also Elizabeth Renuart, Uneasy Intersections: The Right to Foreclose and the U.C.C., 48 Wake Forest L. Rev. 1205, 1230-31 (2013) (describing option ARMS as offering an initial, low "teaser" interest rate, soon replaced by a higher, index-based rate; when capped monthly payments are insufficient to cover the interest earned for that payment period, "negative amortization" results, wherein "the earned and unpaid interest is added to the principal," so "[t]he actual principal is never certain, rendering the Note nonnegotiable.").

after February 1, 2017. (R.1:Ex.1; App.040-41.) Monthly payment amounts are capped, which the Note explicitly acknowledges could lead to negative amortization and increases to the principal amount. (*Id*. App.042.)[8] The trial court confirmed these escalating principal amounts. (R.96 at 12, App.026.)

Mr. Karnes was mistaken in arguing that the Note was authentic and admissible as a "negotiable instrument" (R. at 16:19-17:14, App.075-076). The Note was a promise to pay an **unfixed**, fluctuating amount of money. *See* Wis. Stat. § 403.104. Deutsche Bank could not properly claim that the Note was self-authenticating commercial paper, and the circuit court's decision to admit it was wrong as a matter of law.

II. The Court should not remand this case to allow Deutsche Bank to retry its case on the issue of possession.

Deutsche Bank argues that the case should be remanded to the trial court to give it another chance to demonstrate it possessed the Note because "[f]airness requires" it. (Br. at 27.) In fact, fairness militates ***against*** allowing such a do-over.

[8] The principal amount is eventually capped at 110% of the original principal amount, but the monthly payment cap is also eliminated. *See* Renaurt, 48 Wake Forest L. Rev. at 1230.

A. *The Court of Appeals Was Correct to Issue a Summary Disposition Reversing the Foreclosure Judgment.*

The Court of Appeals appropriately reversed the foreclosure judgment under its own motion for summary disposition, as allowed under Wis. Stat. § 809.21(1). This procedure produces an expedited decision, carrying no less weight than any other. Wis. Ct. App. IOP-VI[9]; *see also Christ v. Exxon Mobil Corp.*, 2015 WI 58, ¶¶ 71-74, 362 Wis.2d 668, 698–99, 866 N.W.2d 602, 616–17. It was based on full consideration of the case, including a supplemental round of briefing on the court's request. (App.1, 4, 11-14.) The decision indicates the court's unanimous opinion that this was a clear-cut case. *See* Wis. Ct. App. IOP-VI.

Deutsche Bank is wrong that the court's decision "elevates form over substance." (DB Br. at 28.) When this court has previously refused to "elevate form over substance," it was upholding applications of statute in order to prevent the ***purpose*** of the statutes from being contravened. *E.g.*,

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[9] The court's rules provide:

> A case may be disposed of summarily by order if the panel unanimously agrees on the decision; unanimously agrees the issues involve no more than the application of well-settled rules of law or the issues are decided on the basis of unquestioned and controlling precedent or the issues relate to sufficiency of evidence or trial court discretion and the record clearly shows sufficient evidence or no abuse of discretion; and the issues may be resolved by merely stating the reasons for the decision without a detailed analysis.

Wis. Ct. App. IOP-VI.

In re Elijah W.L., 2010 WI 55, ¶ 48, 325 Wis.2d 524, 549, 785 N.W.2d 369, 381; *State v. Saunders*, 2002 WI 107, ¶ 39, 255 Wis.2d 589, 610, 649 N.W.2d 263, 273. By contrast, here Deutsche Bank requests that the Court contravene the statutes ***themselves*** by refusing to apply them at all.

As described above, a party's standing to enforce a Note as its holder depends on evidence of possession. Wis. Stat. §§ 401.201(2)(cm), 401.201(2)(km)1, 403.205(2), 403.301, and 403.308(1).

Neither the procedure under Wis. Stat. § 809.21(1), the U.C.C., nor Wisconsin's rules of evidence allow a plaintiff a do-over after he has failed to make his case. Further, nothing could create a more inefficient result than for this Court to signal that compliance with statutorily-required proofs is optional at trial and that plaintiffs may try again on remand. Summary reversal of the trial court's grant of foreclosure was both appropriate and lawful.

B. *Deutsche Bank had notice of its burden to prove possession and had every opportunity to do so.*

Incredibly, Deutsche Bank claims the Court of Appeals' decision was a "surprise," and it "had no reason to believe that it needed to offer testimony evidence regarding possession" at trial. (DB Br. at 29-30.) The argument lacks a factual or legal basis.

As discussed above, Deutsche Bank was plainly on notice that possession of the Note—a matter of its own standing—was an issue in this case, and had ample opportunity to put on evidence on that subject. It also was aware that possession is an issue in other states following the U.C.C., having suffered the consequences of inadequate proof of possession in many previous published cases. *See, e.g.*, *Deutsche Bank Nat. Trust Co. v. Haller*, 100 A.D.3d 680; *Deutsche Bank Nat. Trust Co. v. Barnett*, 88 A.D.3d 636; *Deutsche Bank Nat. Trust v. Brumbaugh*, 2012 OK 3; *Deutsche Bank Nat. Trust Co. v. Richardson*, 2012 OK 15; *Raftogianis*, 418 N.J. Super. 323, 339, 13 A.3d 435, 444 (Ch. Div. 2010)[10].

If Deutsche Bank had been willing to present evidence of possession at trial, it might have obviated all the appellate litigation that has followed. The court erred in accepting Deutsche Bank's argument that further evidence was not necessary. Because the error was of Deutsche Bank's own creation, Deutsche Bank should not be allowed to profit by it.

The cases Deutsche Bank relies on, wherein "circuit courts err in admitting or excluding evidence relating to an element of a cause of action," are not analogous. *See, e.g., Nischke v. Farmers & Merchants Bank &*

[10] In *Raftogianis*, Deutsche Bank was not the named plaintiff but was the "Custodian for the Indenture Trustee."

Trust, 187 Wis.2d 96, 109, 522 N.W.2d 542, 547–48 (Ct. App. 1994) (judgment for a plaintiff reversed and remanded after the trial court admitted inadmissible evidence that was highly prejudicial against the defendant); *Martindale*, a. *Martindale v. Ripp*, 2001 WI 113, ¶ 73, 246 Wis.2d 67, 108, 629 N.W.2d 698, 716 (judgment for a defendant reversed and remanded after the trial court erroneously excluded the plaintiff's expert evidence on causation). In each case, because the parties sought to correct an erroneous evidentiary ruling *excluding* admissible evidence, remand was appropriate. Both fairness and judicial economy weigh ***against*** allowing Deutsche Bank a second bite at the apple.

C. *Deutsche Bank's offer of proof does not support remand or the limited remand it seeks.*

Deutsche Bank promises to deliver testimony on possession "if given the opportunity" on remand. (Br. at 30.) While this is not a basis for remand, it also demonstrates that the remand order Deutsche Bank seeks is too narrow. (DB Br. at 33-34.)

Deutsche Bank seeks a remand based on, essentially, an improper offer of proof made for the first time in the Supreme Court. Wis. Stat. § 901.03; *Broadhead v. State Farm Mut. Ins. Co.*, 217 Wis.2d 231, 241, 579 N.W.2d 761, 764 (offer of proof must be made "in the trial court").

Furthermore, its promise of testimony only begs the question why Deutsche Bank failed to offer such testimony in the circuit court.

Deutsche Bank offers no reasonable assurance that it actually can produce possession testimony, even if that mattered. Deutsche Bank names only two witnesses that it could have offered on the issue. Both of them—Crystal Kearse and Rashad Blanchard—are employees of Ocwen, not Deutsche Bank. No evidence was produced at trial of Ocwen's relationship to Deutsche Bank, and no evidence was produced that either employee has personal knowledge of Deutsche Bank's possessions. As such, they are significantly more disconnected from the matter than was the employee ***of the plaintiff*** whose affidavit was rejected as possession evidence in *Minkov*. *See* 2013 WI App 115, ¶ 7.

The Kearse affidavit is additionally questionable, on its face a "fill-in-the-blank" affidavit with space for the affiant's stamped name, title, county, and the sum of the amounts owed, and contained a conclusory statement that "Plaintiff is the holder of the Note." (App.225-228.) This, too, mirrors the rejected employee affidavit in *Minkov*. 2013 WI App 115, ¶ 16 (rejecting assertion that a party is a "holder" without making relevant assertions of fact addressing the issue of possession); *PNC Bank*, 346 Wis.2d 1, ¶ 3. Indeed, Wuensch contested every paragraph of the affidavit

in his response to Deutsche Bank's summary judgment motion, which the affidavit was intended to support. (R.43, App.225; R.49 at 24-26.)[11] Remand cannot be permitted just for Deutsche Bank to offer inadmissible pro forma testimony or legal conclusions. Wis. Stat. § 904.01; *Bilda v. Milwaukee Cnty.*, 2006 WI App 159, ¶ 48, 295 Wis.2d 673, 722 N.W.2d 116.

As for Blanchard, Deutsche Bank claims that there is a "reasonable inference" he could have testified that Deutsche Bank possessed the Note. If it were that simple, he would have offered that testimony the first time. Deutsche Bank remains unable to demonstrate how it would produce testimony on possession now, seven years after it filed its complaint.

Further, even if the Court grants a remand, it should not limit remand to admit only Deutsche Bank's requested testimony, as it requests. (Br. at 33-34.) As the disputes about the proffered Kearse and Blanchard testimony show, any remand cannot be limited to Deutsche Bank's narrow benefit. Wuensch must have the opportunity to cross-examine any witnesses and submit contrary evidence, such as prior discovery responses showing that Deutsche Bank gave the Note to AHMSI in 2011. (R.106, Ex. 5, pp. 1-2, Ex. 7, p. 2.) *See Gen. Elec. Co. v. Wis. Emp't Rels. Bd.*, 3 Wis. 2d

[11] The motion was not ruled on; shortly after it was brief, Deutsche Bank substituted counsel and the court permitted additional discovery. (R.58, R.59.)

227, 247, 88 N.W.2d 691, 703 (1958) (remanding disputed claim for full hearing).

Wuesnch should also be permitted to submit evidence related to his counterclaims and defenses, including unclean hands. The Court of Appeals did not reach these issues due to its resolution of the case on evidentiary grounds. (See App.002 & n.3.)

D. *Deutsche Bank had unclean hands, and the trial court abused its discretion by allowing it an equitable remedy.*

Another factor militating against Deutsche Bank's desire for a remand is that it has unclean hands.

Foreclosure of a mortgage is an equitable action. *Frick v. Howard*, 23 Wis.2d 86, 96, 126 N.W.2d 619, 625 (1964). "[O]ne of the fundamental principles upon which equity jurisprudence is founded" is that a party with unclean hands is barred from an equitable remedy. *Keystone Driller Co. v. Gen. Excavator Co.*, 290 U.S. 240, 244–45, 54 S.Ct. 146, 147, 78 L. Ed. 293 (1933). Wisconsin courts recognize this doctrine. *S & M Rotogravure Serv., Inc. v. Baer*, 77 Wis.2d 454, 472, 252 N.W.2d 913, 921 (1977). Unclean hands is also a defense to a simple contract, and therefore a bar to recovery under the U.C.C. Wis. Stat. § 403.305(1)(b). *See also Sec. Pac. Nat. Bank v. Ginkowski*, 140 Wis.2d 332, 340, 410 N.W.2d 589, 593 (Ct. App. 1987).

Unclean hands are marked by substantial misconduct in the form of fraud, injustice, unfairness, or bad faith. *Id.* at 766-67. For relief to be denied a plaintiff in equity under the unclean hands doctrine, the alleged conduct constituting the unclean hands must have caused the harm from which the plaintiff seeks relief. *Ginkowski*, 140 Wis.2d at 339.

The trial court found that AHMSI had unclean hands:

> 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.17.) The trial court found Wuensch's testimony on his problems with AHMSI to be credible, specifically that:

- AHMSI failed to apply payments to Wuensch's loan.
- AHMSI told Wuensch that he was in default when in fact he was not.
- After AHMSI incorrectly informed Wuensch that he was in default, AHMSI failed to answer his questions or provide him any assistance in figuring out how to cure the claimed default.
- AHMSI gave Wuensch conflicting answers regarding the amount he owed.
- One AHMSI employee told him to stop making payments until the problem was solved.
- Before Wuensch could resolve the disputed default, AHMSI filed a foreclosure action.

(R.41.). Based on these facts, the court properly found that AHMSI had unclean hands.

The trial court erred, however, in differentiating AHMSI from Deutsche Bank as the "prior holder of the Note." As discussed above, there is no evidence if or when Deutsche Bank became holder of the Note.

Neither was any evidence submitted identifying the Noteholder when AHMSI acted with unclean hands. Regardless, under any scenario under which Deutsche Bank became Noteholder, it is liable for AHMSI's actions.

For example, if AHMSI serviced the loan for Deutsche Bank when it acted with unclean hands, then AHMSI was a necessary part of the Trust and was acting in its role as servicer. (R.46:Ex.21.) In such a scenario, Deutsche Bank is vicariously liable for AHMSI's behavior under the master-servant rule. *Kerl v. Dennis Rasmussen, Inc.*, 2004 WI 86, ¶ 19, 273 Wis.2d 106, 117, 682 N.W.2d 328, 334.

Second, if Deutsche Bank was not the Noteholder when AHMSI acted with unclean hands, the Note was negotiated to Deutsche Bank when there were overdue payments. The circuit court found that AHMSI's unclean hands caused Wuensch to stop making payments. (R.41; App. 17.)

Third, for an assignee to be free of a defense such as unclean hands against its assignor, the assignee must be a "holder in due course." Wis. Stat. § 403.305 (2). The status of "holder in due course" is different from status of being simply the "holder" of a Note. *Cf.* Wis. Stats. §§ 403.302 and 401.201(km). For a party to be a "party in due course," it must meet several conditions. Wis. Stat. § 403.302(1). One of these is that it took the

instrument "for value." Wis. Stat. § 403.302(1)(b)1. Another is that it took the instrument without notice that the instrument is overdue or dishonored or that there is an uncured default on it. Wis. Stat. § 403.302(1)(b)3.

Here, Deutsche Bank presented no evidence that it took the Note for value.[12] Moreover, the evidence showed that Deutsche Bank had notice of the overdue payments. AHMSI's foreclosure action on the same property was filed on June 12, 2008 and dismissed on February 23, 2009. (R.96:App. 10; R.101:Ex.30.) This case was filed on August 11, 2009. (R.96.) Deutsche Bank's name in the caption lists AHMSI as its "attorney in fact." Deutsche Bank did not argue at trial that it was the holder in due course, and the evidence does not allow such a designation now.

The trial court specifically found that prior Noteholders had unclean hands and crafted a remedy based on these findings. (R.96:App. 17.) However, it failed to recognize that Deutsche Bank was fully liable for the prior Noteholders' unclean hands because it was not a holder in due course. This Court defers to the trial court's findings of fact where, as here, they are not based on clear error. As such, the Court should recognize that

[12] The trial court's statement that Deutsche Bank "presumably did not acquire the Note for free" (R.41:App. 18) is without an evidentiary basis, not only as to the Deutsche Bank's acquisition of the Note, but also as to the Plaintiff acquiring the Note for free.

the proper application of the law to those findings is not to allow Deutsche Bank another chance to obtain an equitable remedy that it is not entitled to in the first place.

To allow a remand would allow a Noteholder to act with unclean hands and then transfer the Note to deny the obligor a remedy for its bad acts. This Court should not endorse such poor policy through Deutsche Bank's requested relief.

E. *Remand is not necessary to prevent Wuensch from gaining a windfall.*

Deutsche Bank argues that not remanding to the trial court would give Wuensch "an undeserved windfall." (Br. at 27.) It would not.

The Court of Appeals stated that its order conveyed "no opinion about the viability of any new foreclosure action that the respondent might pursue." (App.008.)

The Note can be enforced by a party who can properly establish itself as the holder (or who can establish that it has the rights of a holder). Therefore, the danger lies in the potential for the Note to be enforced ***more*** than once against Wuensch. A borrower's payment to a person who is not entitled to enforce the instrument does not satisfy the borrower's obligation. Wis. Stat. § 403.602 (1). *See also, e.g., Adams v. Madison Realty &*

Dev., Inc., 853 F.2d 163, 168 (3d Cir. 1988); *In re Veal*, 450 B.R. 897, 910 (B.A.P. 9th Cir. 2011).

As a result, a relaxed standard for the showing of possession, would expose a borrower as Wuensch to the risk of double payment, or at least to the expense of litigation to prevent duplicative satisfaction of the instrument. *See id.* The possibility of windfall thus belongs to financial institutions such as Deutsche Bank.

F. *Equitable reasons weigh against letting Deutsche Bank try the issue again.*

States increasingly recognize policy reasons to ensure foreclosure actions are credibly and rigorously prosecuted. *See, e.g.*, *Adams*, 853 F.2d at 168. Parties seeking to enforce Notes typically have a tremendous advantage in resources, in sophistication, and in the ability to determine and establish the factual chain of title. To present basic evidence of these facts is a very light burden to place on these entities.

By contrast, the burgeoning confusion over Notes and lenders since the financial crisis underscores the burden placed on homeowners and society in general when creditors are ***not*** held to these reasonable standards. Strictly enforcing a requirement for proof of possession ensures not only that families are not erroneously uprooted from their homes, but that the wrong creditor is not unjustly enriched and that courts will be

spared multiple litigations and appeals over the same foreclosure. Proper evidentiary standards in court will also incentivize lenders to maintain better organization of mortgage records without the need for more heavy-handed regulation.

In sum, denial of remand ultimately advances judicial, financial, and societal efficiency and sound public policy. The Court of Appeals should be affirmed.

CONCLUSION

For the reasons stated above, this Court should affirm the Court of Appeals. Should it reverse the Court of Appeals and remand the matter for further consideration, remand should include the opportunity for Wuensch to contest Deutsche Bank's possession and authenticity of the Note and introduce evidence material to his defenses and counter-claims.

Respectfully submitted this 21st day of July, 2017.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 10,923 words.

I also certify that I have submitted an electronic copy of this brief, excluding the appendix, which complies with the requirements of § 809.19(12). I further certify that the text of the electronic copy of the brief is identical in content and format to the printed copy of the brief filed this date.

A copy of this certificate has been served with the paper copies of this brief filed with the Court by hand delivery and served on opposing counsel by U.S. Mail.

Dated this 21st day of July, 2017.

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