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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.

On Appeal from the La Crosse County Circuit Court
Case No. 09-cv-752
The Honorable Todd W. Bjerke, Presiding

PLAINTIFF-RESPONDENT-PETITIONER'S REPLY BRIEF

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ARGUMENT

This appeal involves the narrow issues of whether an original "wet-ink" Note was self-authenticating, and whether the circuit court, as the trier-of-fact, clearly erred in making the factual finding that Plaintiff Deutsche Bank established possession of the Note upon presentment and physical examination of it. In his Response, Defendant Thomas Wuensch ("Wuensch") injects numerous collateral issues neither preserved nor relevant to these basic issues in order to distract from this essential point: Circuit Court Judge Bjerke examined the original wet-ink Note handed to him by Deutsche Bank's counsel and reached the very reasonable conclusion that Deutsche Bank possessed the Note. In response, Wuensch cites no case contradicting the basic and common-sense proposition that the trier-of-fact can make a finding of possession by examining the original wet-ink Note the plaintiff presents at trial. This Court should reverse.

A. Rule 809.62 Limits Review to the Issues Raised in the Petition for Review.

In its order granting the Petition for Review ("Petition"), this Court ordered both parties to comply with Rule 809.62(6), which provides, in relevant part, that "[i]f a petition is granted, the parties cannot raise or argue issues not set forth in the petition unless ordered otherwise by the supreme

court." Wis. Stat. § 809.62(6). Wuensch's Response asserts numerous arguments that go far beyond the narrow issues set forth in the Petition.

First, Wuensch suggests Deutsche Bank lacked standing to foreclose when the foreclosure complaint was filed. (Response, p. 16.) The issue of standing is not before this Court, and should not be considered here. *United Concrete & Const., Inc. v. Red-D-Mix Concrete, Inc.*, 2013 WI 72, ¶ 18, 349 Wis. 2d 587, 602, 836 N.W.2d 807, 814. It also was not raised in the appellate court and is therefore waived. *State v. Van Camp*, 213 Wis. 2d 131, 144, 569 N.W.2d 577, 584 (1997). Finally, Deutsche Bank attached a copy of the Note to the complaint and then produced the original at trial. That is more than sufficient to establish standing.

Second, Wuensch argues the Note is not a negotiable instrument because it is an "Option ARM." (Response, p. 34.) That issue is also not before this Court and should not be considered. It also was not raised in the appellate court and is therefore waived. The argument is also meritless. *See Bank of New York v. Baldwin*, No. CV085019044, 2009 WL 2962445, at *3 (Conn. Super. Ct. Aug. 13, 2009).[1]

[1] "[T]he court finds that were the defendant's assertion [correct] that a fixed sum certain cannot exist in an 'option ARM,' then the only way that a

Third, Wuensch repeatedly raises arguments about Deutsche Bank's alleged "unclean hands." (Response, p. 43.) That issue is also beyond the scope of the Petition and should not be considered, particularly since it goes to the issue of remedy—and one that the trial court provided, but of which Wuensch did not avail himself.

B. The Original Wet-Ink Note is Self-Authenticating.

Wuensch admits that commercial paper is self-authenticating under Wis. Stat. § 909.02(9), but then argues—in another issue outside the scope of review—that Wis. Stat. § 403.308(1) limits the authentication of instruments where the signatures have been contested. (Response, p. 32) (*citing Cobb State Bank v. Nelson*, 141 Wis. 2d 1, 4, 413 N.W.2d 644, 645 (Ct. App. 1987); *Ocwen Loan Servicing, LLC v. Thompson*, No. 13-CV-487-JPS, 2014 WL 51236, at *5 (E.D. Wis. Jan. 7, 2014)).

Section 403.803, however, presumes the signature is "authentic and authorized" except only where the validity of the signature is "denied in the pleadings" or the "signer is dead or adjudicated incompetent." When he

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negotiable instrument would ever feasibly exist is when a borrower pays exactly the monthly instrument accrued, not a penny more or less, so as to keep the principal exactly the same from month to month, as any other payment amount would change the principal, and thus, create a variable sum. This is clearly an implausible result." *Id.* at *4.

responded to the foreclosure complaint eight years ago, Wuensch never denied the authenticity of his signature on the Note in the pleadings, and therefore admitted that it was his signature.[2] Moreover, *Cobb* does not address any issue under Section 403.308(1), and the *Thompson* court held that Section 403.308 was "plainly inapposite because that section pertains to disputes about the validity of a signature," which was not at issue in the case (the debtors argued there were "two materially different versions of the same negotiable instrument"). *Thompson*, 2014 WL 51236, at *5.

Wuensch also argues that the circuit court did not allow him to "introduce contrary evidence" about the authenticity of the Note, but then cites his trial testimony where he claimed that the original wet-ink Note presented to him was not an original because there were "no indentations on the initials." (Response, p. 34.) The circuit court considered that testimony and nevertheless concluded that it was the original Note. (App. 139.) Wuensch simply did not rebut Section 403.308's presumption of validity, and the trial court's finding that the Note was original was not

[2] Although Wuensch appears to make every other argument possible, Wuensch does not argue the other exceptions to Section 403.803.

clear error. Thus, Wuensch has provided no support for his claim that the Note was not self-authenticating under Wis. Stat. § 909.02(9).

C. Deutsche Bank Established Possession By Presenting the Original Wet-Ink Note at Trial.

This case is controlled by the factual findings of the trial court:

> 6. The Plaintiff is the holder of the original Note, endorsed in blank. The Court is satisfied that 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 Court is satisfied that it is the original Note executed by Wuensch on December 18, 2006. Exhibit 1 is a true and accurate copy of the original ink Note.

(App. 020.) Requiring testimony on possession when the fact of possession is demonstrated by presentment of the original Note at trial goes far beyond, as the Court of Appeals put it, "elevat[ing] form over substance." (App. 008). It elevates unnecessary testimonial proof over the obvious implication of the physical possession of the Note in the hands of the plaintiff and substitutes the Court of Appeals' review of a cold record over the trial court's physical examination of the original Note and its sound discretion in the admission of evidence.

Wuensch asserts that *Bank of Am. N.A. v. Minkov*, 2013 WI App 115, ¶ 40, 350 Wis. 2d 507, 838 N.W.2d 137, did not indicate possession of a note can be established by presenting the original note at trial, and that

Minkov "hurts" Deutsche Bank's case. (Response, p. 22.) In *Minkov*, Bank of America attached an uncertified copy of the note to the complaint, and subsequently moved for summary judgment. *Minkov*, 2013 WI App at ¶ 17. The court ruled the evidence was insufficient to establish the Bank possessed the note. *Id.* at ¶ 21. The court noted that "[n]othing *in the document* demonstrates that Bank of America has possession of the original note," nor did the Bank "identify any evidence in the record that it possesses the original note." *Id.* at ¶¶ 17-18 (emphasis added). Here, unlike the uncertified copy of the note in *Minkov*, the document presented at trial (the original wet-ink Note) demonstrated that Deutsche Bank possesses the original Note. Presentment of the document itself, which occurred at trial here, established possession. To deny that Deutsche Bank possessed the Note when its attorney presented the original wet-ink Note at trial defies simple common sense.

Wuensch also dismisses *BAC Home Loans Servicing LP v. Thompson*, 2014 WI App 24, ¶ 24, 352 Wis. 2d 754, 843 N.W.2d 710, which also indicated that possession of a note can be established by presenting the original note at trial. The *Thompson* court affirmed the circuit court's refusal to admit into evidence at trial a document purporting

to be a copy of the note. *Thompson*, 2014 WI App at ¶ 24. The original note was not presented at trial. *Id.* at ¶ 23. The court held that BAC failed to prove that it possessed the original note, stating that "[n]othing *in the document* or the evidence presented at trial demonstrates that BAC was in possession of the original note." *Id.* at ¶ 23 (emphasis added). Like *Minkov*, the *Thompson* ruling suggests there are two ways to establish possession, either by the document itself or some other evidence. Deutsche Bank's counsel, as its agent, presented the self-authenticating and originally-executed, wet-ink Note at trial that established Deutsche Bank's possession.

Wuensch relies on *PNC Bank, N.A. v. Bierbrauer*, 2013 WI App 11, ¶ 3, 346 Wis. 2d 1, 827 N.W.2d 124 in support of his argument that possession is typically demonstrated through sworn testimony of a witness with knowledge that a plaintiff holds a note. In *Bierbrauer*, PNC Bank moved for summary judgment and submitted an affidavit from a document control officer with the loan servicer, who averred that the servicer had "possession, control, and responsibility for the accounting and other mortgage loan records" relating to the loan and that PNC "is the current holder of said note and mortgage." *Bierbrauer*, 2013 WI App 11, ¶ 4. Even

though the affidavit did not expressly state that PNC actually possessed the note, the court held that PNC made a prima facie case that it was entitled to enforce the note. *Id.*, 2013 WI App at ¶¶ 8, 10. Here, Deutsche Bank did far more than what PNC did in *Bierbrauer* when it presented the original wet-ink Note at trial.

Wuensch also relies on a clearly distinguishable New York decision in *Deutsche Bank Nat'l Tr. Co. v. Barnett*, 88 A.D.3d 636, 637–38, 931 N.Y.S.2d 630, 631-32 (N.Y. App. Div. 2011). (Response, p. 24.) The lender in *Barnett* submitted copies of two different versions of an undated allonge which were purportedly affixed to the original note. *Id.* The allonges conflicted with the copy of the note submitted. *Id.* Here, Deutsche Bank presented the original endorsed wet-ink Note at trial. Different versions of the Note were not presented.[3]

Equally distinguishable is *Dow Family, LLC, v. PHH Mortgage Corp.*, 2013 WI App 114, at ¶¶ 20-21, 350 Wis.2d 411, 422-23, 838 N.W.2d 119, 125. In support of its motion for summary judgment, the

[3] Wuensch argues that the Note "did not name Deutsche Bank." (Response, p. 18, 21.) But the Note is endorsed in blank, and the fact Deutsche Bank is not referenced in the Note has no bearing on whether it can enforce the Note as the holder in possession. *See* Wis. Stat. § 403.205.

lender (PHH) only offered a copy of the note, and submitted an affidavit which averred that the affiant's office had received "what *appear* to be original note and mortgage." *Id.* In denying summary judgment, the court noted that the lender failed to submit evidence "sufficient to support a finding that the copy of the note is what PHH claims—namely, a true and correct copy of an original note in PHH's possession." *Id.* With regard to authenticating the note, the *Dow* court observed that the testimony of a witness "with knowledge that a matter is what it is claimed to be is ***one*** means of authenticating evidence." *Id.* (emphasis added). Deutsche Bank used another means of authenticating evidence—it presented the original wet-ink Note, which was self-authenticating, to the trial court.

Wuensch also claims that Deutsche Bank relies on "inapposite cases," including the recent decision in *In re Foreclosure of a Deed of Trust Executed by Rawls*, 777 S.E.2d 796, 799 (N.C. Ct. App. 2015). But the *Rawls* court held that the foreclosing party was in possession of the note when its attorney, just like in this case, presented the original note with a blank endorsement to the court. *Rawls*, 777 S.E.2d at 800. The court noted that the original note was proffered "for the trial court to review and compare to the copy in the court file." *Id.* at 798. The court held that

"petitioner's production of the original note indorsed in blank to be dispositive" on the issue of possession. *Id.* at 799. Precisely the same thing occurred in this case. As in *Rawls*, the production of the original wet-ink Note at trial by Deutsche Bank's counsel is dispositive on the issue of possession.

Finally, Wuensch argues that Deutsche Bank's alleged failure to meet it burden of possession "resulted in an inference that it could not meet its burden." (Response, p. 19.) Only Through the Looking Glass could the possession of the original wet-ink Note by Deutsche Bank's counsel at trial result in an inference that Deutsche Bank could not meet its burden to show possession. After the trial court examined the Note, found that it was the original, and accepted a copy into evidence, there was nothing else Deutsche Bank needed to do to meet its burden.

D. Deutsche Bank's Counsel Was Acting as Its Agent When He Presented the Original Wet-Ink Note at Trial.

Wuensch asserts that Deutsche Bank's counsel at trial was somehow not acting as Deutsche Bank's agent, and that possession was not proven because counsel did not take the stand and provide sworn testimony. Counsel did not have to "testify" to present the self-authenticating and original wet-ink Note to the trial court. Nor did he have to "make a

statement" as how the Note came into his possession. Inexplicably, Wuensch goes so far as to suggest that Deutsche Bank "never possessed it at all" since counsel did not sign the foreclosure complaint, or that counsel "physically possessed the Note long before Plaintiff." (Response, p. 27, n. 5.)[4] Wuensch's argument ignores the obvious fact that counsel was Deutsche Bank's attorney at trial, and that he was doing something that attorneys do all the time on behalf of their clients at trial—offering documents into evidence. Here, counsel offered the original Note into evidence. And the circuit court reviewed the original note, compared it to the copy in the court file, and made the factual finding that it was the original and that Deutsche Bank possessed it. Karnes was not an imposter in the courtroom. He was acting as Deutsche Bank's counsel.

Wuensch nevertheless argues that counsel was not an agent of Deutsche Bank based on *Marten Transp. Ltd. v. Hartford Specialty Co.*, 194 Wis. 2d 1, 13, 533 N.W.2d 452, 455 (1995), even though that court held that "[t]he relationship of attorney and client is one of agency."[5]

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[4] This argument was not raised in the appellate court and is waived. *Van Camp*, 213 Wis. 2d at 144.

[5] Wuensch's citation to footnote 4 in *Marten Transport*, which refers to the Restatement (Second) of Agency § 1, cmt. e ("Attorneys are agents

Wuensch also relies on the ruling in *Journal/Sentinel, Inc. v. Sch. Bd. of Sch. Dist. of Shorewood*, 186 Wis. 2d 443, 445, 521 N.W.2d 165, 167 (Ct. App. 1994), even though the court found that the attorney was acting as the client's agent, and cited to a number of decisions which support the fact that an attorney is an agent of his client. *Shorewood*, 186 Wis. 2d at 453-54. If counsel is not an agent of his or her client in court, then our adversarial system would break down.

E. Should this Court Not Reverse, Fairness Dictates that Deutsche Bank Be Allowed to Present Sworn Testimony on the Issue of Possession to Prevent Manifest Injustice.

On the issue of remand, Wuensch argues that "fairness militates against allowing a do-over." (Response, p. 36). Deutsche Bank is not asking for a "do-over." Because the trial court accepted Deutsche Bank's evidence and made a finding of possession, Deutsche Bank had no reason to elicit further evidence on the issue of possession. If remanded, Deutsche

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of their clients, although as to their physical activities they are independent contractors") is unexplained. Whatever this quote means, it cannot mean that an attorney acting for a client in court and offering a self-authenticating document into evidence is not acting as the client's agent. Also, Comment e states that an "agent" is "a person authorized by another to act on his account and under his control." *See* Restatement (Second) of Agency § 1, Comment e. Counsel entered an appearance on behalf of Deutsche Bank and obviously was authorized to act on behalf of Deutsche Bank in the case. Wuensch's suggestion otherwise is bizarre.

Bank would simply provide sworn testimony on this issue.[6] Deutsche Bank could quickly correct what the Court of Appeals described as a "highly inefficient result" that elevated "form over substance," which this Court disfavors. *See, e.g., In re Elijah W.L.*, 2010 WI 55, ¶ 48, 325 Wis. 2d 524, 549, 785 N.W.2d 369, 381. If the judgment is summarily reversed, Wuensch would surely argue that Deutsche Bank is barred from foreclosing on the property, despite his undisputed default more than eight years ago.

CONCLUSION

Plaintiff-Respondent-Petitioner Deutsche Bank National Trust Company respectfully requests that this Court reverse the August 23, 2016 Opinion of the Court of Appeals and affirm the judgment of foreclosure entered by the Circuit Court on December 14, 2016, or, in the alternative, remand the case to the circuit court with instructions to allow Deutsche Bank an opportunity to provide sworn testimony regarding possession of the Note.

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[6] Wuensch did not similarly rely on the trial court's admission of evidence and findings, and there is thus no reason for the scope of the remand to extend beyond the issue of possession.

August 7, 2017

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FORM AND LENGTH CERTIFICATION

I certify that this reply brief conforms to the rules contained in Wis. Stat. § 809.19(b) and (d) for a brief produced using a proportional serif font. The length of the reply brief is 2,916 words. This was calculated using the word count feature of Microsoft Word.

/s/ Robert W. Brunner
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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 Wis. Stat. § 809.19(12). I further certify that this electronic brief is identical in content and format 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 this brief filed with the court and served on all opposing parties.

/s/ Robert W. Brunner
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CERTIFICATE OF FILING AND SERVICE

I hereby certify that I have filed this Reply Brief with the Clerk of the Court in accordance with Wis. Stat. § 809.80(3)(b) by delivering 22 copies to a third party commercial carrier (Federal Express) on August 7, 2017 for delivery to the Clerk within three calendar days. I further certify that I served the following counsel of record by delivering three copies to a third-party commercial carrier (Federal Express) on August 7, 2017, for delivery within three calendar days:

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