REED PETERSON & ASSOCIATES, LLC

ATTORNEYS · ADVISORS · ADVOCATES

6441 Enterprise Lane, Suite 104
Madison, WI 53719

(608) 276-1000
Fax 888-385-4143
reed@reedpeterson.com

July 22, 2016

To the Honorable Judges Kloppenburg, Higginbotham and Blanchard
District IV, Wisconsin Court of Appeals
110 E. Main Street, Suite 215
Madison, WI 53701

Re: Deutsche Bank National Trust Co. v. Thomas P. Wuensch, et al.
Case Number: 15AP175

Your Honors:

This letter brief is submitted in response to the Court's Order dated July 8, 2016.

As an initial matter, the Order correctly states relevant facts and Wuensch's argument and position. There are two additional facts the Court should consider. First, there was not an agreement between the parties as to the authenticity of the Note[1] and possession of the Note, as is evident by Defendant's counsel's objections. Second, the parties were required to disclose trial witnesses. (R.25) Plaintiff's counsel was not listed as a witness on Plaintiff's witness list.[2]

The issue in this case is different than a summary judgment proceeding in which circuit courts have allowed plaintiffs to present notes to the court.[3] The producing of a note to the court is preceded by plaintiff filing a motion and supporting affidavit, invariably with a statement in the affidavit that the plaintiff is in possession of the original note. The presentation of the original note to the court at a hearing connects the dots. The situation in this case is analogous to a party not stating in the affidavit that it is in possession of the note. This would make summary judgment inappropriate, because the plaintiff would have failed to make a prima facie case.

At trial in this case, before a witness was called, Plaintiff's counsel approached the bench, handed the court the Note, stated it was the original, and asked the court to admit the Note as self-authenticating. This was improper. Counsel should have had a sworn witness identify the document. The statement "I also have the original here today" was not made under oath, was

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[1] The term "Note" is used herein to refer to the document the trial court concluded was the original note. Wuensch does not concede this finding was correct and does not concede the document was the original note.

[2] Plaintiff's witness list is attached. The parties had a terribly difficult time getting the complete Record sent on appeal and needed to file a motion to supplement the Record. Even after the Record was supplemented there was concern that the Record was incomplete. As is indicated in R.25, an affidavit by Plaintiff's counsel, Plaintiff filed a witness list on January 24, 2014. The attachment is the witness list. Wuensch asks the Court to supplement the Record to include this witness list.

[3] The courts appear to have carved out an exception to Wis. Stat. § 802.08(2), which does not provide for an evidentiary hearing before a court.

relevant to a material disputed issue in the case, and was not subject to cross examination. Furthermore, it was suggestive. Had counsel approached the bench and handed the court the Note, without commentary, and asked the court to find that the document was self-authenticating and the original, it is highly doubtful the court would have found it was the original Note without some evidence about the Note.

Plaintiff's counsel was a *de facto* witness at trial. His status as a *de facto* witness is analagous to a *de facto* officer. "As a general rule, all that is required to make an officer de facto is that the individual claiming the office be in possession of it, performing its duties, and claiming to be such officer under color of an election or appointment." *Joyce v. Town of Tainter*, 2000 WI App 15, ¶ 7, 232 Wis.2d 349, 606 N.W.2d 284. Put more plainly, if it walks like a duck, swims like a duck, and quacks like a duck, I call that bird a duck. Counsel's statements were intended to provide facts that were evidentiary in nature for the trial court to consider.

The trial judge did not make a determination as to counsel's qualifications as a witness. A judge is to make preliminary determinations on the qualifications of a person to be a witness. Wis. Stat. § 901.04. "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. Furthermore, a witness must take an oath before testifying. Wis. Stat. § 906.03(1). Counsel did not take an oath and did not lay a foundation of personal knowledge. Moreover, Plaintiff's counsel did not explain how he had personal knowledge that the Note was original.

Counsel's ethical obligations prohibited him from acting as counsel at trial because he was likely to be a necessary witness. "A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness[.]" SCR 20:3.7(a). Counsel could have avoided this ethical issue by having someone from his firm testify about how the firm came into possession of the note. *See* SCR 20:3.7(b). He could have elicited the testimony from Rashad Blanchard, Plaintiff's witness. Presumably, such testimony would not have been fact-intensive, if the witness had the necessary personal knowledge. For example, if Blanchard had personal knowledge, his testimony might have been:

Q: Let me hand you Exhibit 1. Can you please identify it for me?
A: Yes, this is the original note.
Q: How do you know it is the original note?
A: It was in our collateral file before we sent it to your law firm.
Q: And you possessed it on behalf of the plaintiff?
A: Yes.

Plaintiff's counsel chose to avoid establishing authenticity of and possession of the note through sworn evidentiary testimony that would allow cross examination. While Wuensch and the Court could speculate as to why this approach was used, it does not matter. Plaintiff chose not to present any evidence of authenticity or possession.

Plaintiff asked the trial court to engage in speculation and conjecture. There was no evidence of authenticity or possession presented at trial. It is well settled that a verdict based on conjecture cannot stand. *Quass v. Milwaukee Gaslight Co.*, 168 Wis. 575, 170 N.W. 942 (1919).

> "Preponderance of mere possibilities is, of course, not the equivalent of a preponderance of probabilities. Mere possibilities leave the solution of an issue of fact in the field of conjecture and speculation to such an extent as to afford no basis for inferences to a reasonable certainty, and in the absence of at least such inferences there is no sufficient basis for a finding of fact. It will not do to reach a conclusion in favor of the party on whom the burden of proof rests by merely theorizing and conjecturing. There must at least be ***sufficient evidence*** to remove the question from the realm of conjecture."

Reichert v. Rex Accessories Co., 228 Wis. 425, 279 N.W. 645, 652 (1938) (emphasis added) (quoting *Creamery Package Mfg. Company v. Industrial Commission*, 211 Wis. 326, 248 N.W. 140, 142 (1933))(also citing *Wm. Esser & Co. v. Industrial Commission*, 191 Wis. 473, 211 N.W. 150 (1926); *Holborn v. Coombs*, 209 Wis. 556, 245 N.W. 673 (1932); *Seligman v. Orth*, 205 Wis. 199, 236 N.W. 115 (1931); *Houg v. Girard Lumber Company*, 144 Wis. 337, 129 N.W. 633 (1911); *Chybowski v. Bucyrus Co.*, 127 Wis. 332, 337, 340, 106 N.W. 833 (1906); *Musbach v. Wis. Chair Co.*, 108 Wis. 57, 84 N.W. 36 (1900); *Employers Mutual Liability Ins. Co. v. Brower*, 224 Wis. 485, 490, 272 N.W. 359 (1937)).

Evidence provides possibilities for a trier of fact to consider. There was no evidence in this case of authenticity of the note or possession of the note by Plaintiff or anyone else. Counsel's handing of the note to the court was not evidence. Counsel's statements were not evidence.

> In order to recover against the defendants, plaintiff must produce evidence from which the jury is justified in [its] finding[.] This burden is not met by showing that it might have been the result of two or more causes[.] Verdicts must rest upon greater certainty. Where the proof discloses that a given result may have occurred by reason of more than one proximate cause, and that a jury can do no more than guess or conjecture as to which was in fact the efficient cause, the submission of such a choice to the jury has been consistently condemned by this court.

Matuschka v. Murphy, 173 Wis. 484, 180 N.W. 821, 822 (1921).

Plaintiff's counsel's decision to ask the court to find the Note self-authenticating and not produce any other evidence about the Note was a deliberate trial strategy. Under the strategic waiver doctrine, Plaintiff waived the right to produce evidence of possession. *See Upchurch v. State*, 64 Wis.2d 553, 560, 219 N.W.2d 363 (1974). Plaintiff's deliberate trial strategy failed to produce any evidentiary facts showing Plaintiff was in possession of the note. Plaintiff failed to meet its burden of proof. Therefore, the case must be dismissed with prejudice.

Sincerely,

Reed J. Peterson

Enclosure

cc: Attorney Russell Karnes (with three copies)
Thomas and Heidi Wuensch