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August 13, 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:

I write to reply to the letter brief of Deutsche Bank ("Plaintiff"). Plaintiff's argument regarding why the note introduced at trial shows possession by Plaintiff amounts to this: "Introduction of the original Note at trial was sufficient to prove Plaintiffs possession, despite Defendant's objection. This is because the Wisconsin Rules of Evidence provide that an original promissory note is self-authenticating as commercial paper. Wis. Stat. § 909.02(9)." As an initial matter, Wis. Stat. § 909.02(9) does not provide that a promissory note is self-authenticating as commercial paper. Wis. Stat. § 909.02(9) states,

> **Self–authentication.** Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to any of the following:
>
> (9) COMMERCIAL PAPER AND RELATED DOCUMENTS. Commercial paper, signatures thereon, and documents relating thereto *to the extent provided by chs. 401 to 411.*

(Emphasis added.) Plaintiff has not pointed to any provision in chs. 401 to 411 that says a note is self-authenticating. The argument is undeveloped and must be rejected. Undeveloped arguments and arguments that are not supported by legal authority are not considered on appeal. *Riley v. Town of Hamilton*, 153 Wis. 2d 582, 588, 451 N.W.2d 454, 456 (Ct. App. 1989).

The balance of the arguments herein will assume, without admitting, that the note was self-authenticating and admissible.

Plaintiff has not developed an argument showing introduction of a note by a party's counsel proves possession by the party. Plaintiff argues *Dow Family* supports its position. *Dow Family* does not support its position. It supports Defendant's position. In *Dow Family*, the bank submitted an affidavit in support of a summary judgment motion that averred the bank was in possession of the original note, but did not produce the original note. The court remanded with directions for the bank to produce the original note. The affidavit provided *evidentiary facts* of possession. In the present case, Plaintiff failed to produce evidentiary facts at trial showing Plaintiff possessed the note prior to it being sent to Plaintiff's counsel or at any other time.

Plaintiff has not argued that there is a presumption of possession because the original note was produced at trial by counsel. It cannot.

> **Presumptions in general.** Except as provided by statute, a presumption recognized at common law or created by statute, including statutory provisions that certain basic facts are prima facie evidence of other facts, imposes on the party relying on the presumption the burden of proving the basic facts, but once the basic facts are found to exist the presumption imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence.

Wis. Stat. § 903.01. There is no statutory or common law presumption that states a party is presumed to be in possession of a note if counsel for the party produces the original note at trial.

Furthermore, such a presumption would create situations at trial that are contrary to public policy, namely the need for the other party to call the attorney to the witness stand to attempt to disprove possession.

Plaintiff does not argue that circumstantial evidence allows a trier of fact to find possession by Plaintiff. Absent evidence of possession or a chain of title, the admission of an original note into evidence does not create circumstantial evidence of possession. Rather, the existence of the fact is left in the impermissible field of speculation and doubt. *Quass v. Milwaukee G. L. Co.*, 168 Wis. 575, 170 N.W. 942 (1919). *See also Bruins v. Brandon Canning Co.*, 216 Wis. 387, 402, 257 N.W. 35 (1934); *Rumary v. Livestock Mortg. Credit Corp.*, 234 Wis. 145, 290 N.W. 611, 612 (1940).

Proof of possession was left in the field of speculation and doubt at trial in this case. One witness was called. He did not mention Plaintiff in his testimony and the documents he produced that were admitted into evidence did not mention Plaintiff. *See App.Br. p.8-9.* Plaintiff admits this. "Unrefuted arguments are deemed admitted." *State v. Chu*, 2002 WI App 98 ¶10, 643 N.W.2d 878. There is no evidence that ties the note produced at trial to the Plaintiff.

Sincerely,

Reed J. Peterson

Enclosure (9 copies)

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