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No. 73833-0-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

JOHN E. & SHELLEY A. ERICKSON,

Appellants

v.

DEUTSCHE BANK NATIONAL TRUST CO., et al.

Respondents.

RESPONDENT'S APPELLATE BRIEF

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Respondent Deutsche Bank National Trust Company, as Trustee for Long Beach Mortgage Loan Trust 2006-4 ("Deutsche Bank") submits this appellate brief in opposition to the Ericksons' appeal. The Ericksons' appeal should be denied.

I. ARGUMENT

A. Relevant Facts

In March 2006, the Ericksons obtained a loan from Long Beach Mortgage Company ("Long Beach") and gave a note in the principal sum of $476,000 (the "Note"). CP 235.[1] The Ericksons secured the loan with a deed of trust encumbering certain real property located in King County, Washington (the "Deed of Trust"). CP 235. Deutsche Bank is the current holder of the Note and Deed of Trust.[2] The Ericksons failed to make the

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[1] As noted in Deutsche Bank's summary judgment motion (CP 215 at p. 3), Deutsche Bank relied upon the original note and deed of trust, which Deutsche Bank submitted at the summary judgment hearing. Verbatim Report of Proceedings ("VRP") at 5-7.

[2] As addressed herein, the Ericksons' various arguments relating to Deutsche Bank as a party to this case and the prior federal district court case are without merit. Deutsche Bank appeared in both cases in its capacity as trustee. Deutsche Bank is a national banking association organized under the laws of the United States to carry on the business of a limited purpose trust company. CP 470 (Supp. Eidson Decl. Ex. A.) As such, the Trustee may do business in all 50 states in the United States without having to be registered as a foreign corporation or otherwise be registered or licensed in any individual state in order to conduct business in the state.

monthly payment due in July 2009, and have made no payments since that date.[3]

In August 2010, the Ericksons sued Long Beach, Washington Mutual Bank, Deutsche Bank National Trust Company, and Chase Bank in King County Superior Court. CP 470 (Supp. Eidson Decl. Exs. B, C); *Erickson v. Long Beach Mortg. Co.* (*Long Beach*), No. 10-1423 MJP, 2011 WL 830727, at *2 (W.D. Wash. Mar. 2, 2011), *aff'd*, 473 F. App'x 746 (9th Cir. 2012) (the "2010 District Court Case").[4] Among other things, the Ericksons asserted quiet title and injunction claims against foreclosure on the basis that the defendants were not the original creditors and could not produce the Ericksons' original Note and therefore lacked standing to foreclose. *Id.*

Deutsche Bank filed a summary judgment motion and submitted a supporting declaration establishing that the Ericksons' Note and Deed of Trust had been transferred to a mortgage trust, that Deutsche Bank was the trustee for the mortgage trust, and that it held the Ericksons' original Note.

> Plaintiff's [the Ericksons'] loan was subsequently sold into a securitized pool of loans known as the Long Beach Mortgage Loan Trust 2006-4 ("Trust"), with Defendant

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[3] CP 1. As discussed *infra*, a party submitting an original note establishes a presumption of non-payment of the note. Payment is an affirmative defense to be pled and proven by the borrower. The Ericksons did not assert or demonstrate payment in their answer or in their response to the summary judgment motion.

[4] The case was removed to federal court.

> Deutsche Bank National Trust Company ("DB") acting as Trustee.

CP 446 (Thomas Reardon declaration).

In March 2011, the federal district court rejected the Ericksons' argument that Deutsche Bank and its servicer lacked standing to foreclose because they were not the original creditors and could not produce the original Note, finding that "[m]ore importantly, [Deutsche Bank and its servicer] provide[d] evidence demonstrating their ownership of the note, which the Ericksons do not credibly challenge." CP 470; Long Beach, 2011 WL 830727, at *1, 3. *Id.* The federal district court granted Deutsche Bank's motion for summary judgment, denied the Ericksons' motion for summary judgment, and dismissed the Ericksons' lawsuit. *Id.*

B. Procedural Background

Deutsche Bank filed the present lawsuit in King County Superior Court in 2014 to foreclose on the Note and Deed of Trust. CP 1.

Deutsche Bank filed a summary judgment motion to dismiss the Ericksons' affirmative defenses and counterclaims and to obtain a decree of foreclosure. CP 215. At the hearing on the summary judgment motion, Deutsche Bank produced the original Note and Deed of Trust. VRP at 5-7. The trial court at the first summary judgment hearing gave the Ericksons a change to have an expert examine the note. VRP at 41. At the subsequent hearing, the Ericksons made no argument that the note was

not the original. VRP at 45-46. After the second hearing and some supplemental briefing by the parties, Deutsche Bank's summary judgment motion was granted. CP 539. A final judgment of foreclosure was subsequently entered. CP 680. This appeal followed.

C. Summary of the Argument

Deutsche Bank established that it held the Ericksons' original Note in the 2010 District Court Case and the Ericksons submitted no contrary evidence. Deutsche Bank then produced the original Note at the summary judgment hearing in this case. The Ericksons provided no contrary evidence.

Despite failing in two opportunities to provide evidence to a court supporting their assertions, much of the Ericksons' time and attention on this appeal are devoted to arguments about Deutsche Bank's possession of the Ericksons' original Note at the time Deutsche Bank filed this foreclosure action, and lengthy ruminations on speculative hypothetical scenarios related thereto.

The Ericksons' position and arguments are without merit and this appeal should be rejected. Because the Ericksons were parties to the 2010 District Court Case, collateral estoppel bars the Ericksons' claims, as does Deutsche Bank's submission of the original Note at summary judgment in this case. Washington recognizes that collateral estoppel can be used

offensively by even a nonparty (Deutsche Bank was a party) to bar litigious parties from repetitious litigation. The Ericksons lack standing to make many of their arguments, and their many pages of speculation and conjecture about Deutsche Bank, or its servicers or agents, or about transfers of assignments of the Ericksons' Note and Deed of Trust, provide no defense to summary judgment.

The Ericksons' arguments also contradict a number of basic rules governing the enforcement of original notes, the self-authentication of notes and deeds of trust, the transfer of notes endorsed in blank (as here) and the Mary's Little Lamb Rule (a deed of trust securing a note transfers by operation of law with the transfer of the note).

Deutsche Bank demonstrated that it had standing to enforce the Note and Deed of Trust under Washington law and made a prima facie case for enforcement by submitting the original Note. The Ericksons argue to add a new procedural requirement to the standing requirement, namely, that a party prove it possesses the note on the date it files its complaint to foreclose. While Washington law does not contain this requirement, the evidence before the trial court showed that Deutsche Bank possessed the Note before filing its complaint.

The Ericksons were sued by the party holding their Note because they had not made payments in years. Foreclosure is the remedy to which

the Ericksons agreed. Final judgment was entered in this case in favor of the party holding the Ericksons' Note. There is no risk of double payment by the Ericksons. Rather, endless delay and re-litigation of this case based upon the Ericksons' speculation should be brought to a close.

D. The Basic Rules Governing the Transfer of Notes and Deeds of Trust Defeat the Ericksons' Claims

The Ericksons' arguments are defeated by well-established and basic legal rules governing notes and deeds of trusts. These rules are set forth in the sections below.

1. Production of the Original Note Establishes a Prima Facie Case for Enforcement

Deutsche Bank produced the Ericksons' original Note, endorsed in blank, at the summary judgment hearing. VRP at 5-7. An original note and deed of trust are self-authenticating, admissible documents and, standing alone, establish a prima facie case for enforcement.

"Mere production of a note establishes prima facie authenticity and is sufficient to make a promissory note admissible." *United States v. Varner,* 13 F.3d 1503, 1509 (11th Cir. 1994) (citing *United States v. Carriger,* 592 F.2d 312, 316-17 (6th Cir. 1979)). As stated in White & Summers, "merely by producing a properly indorsed or issued instrument the plaintiff proves that he is entitled to enforce it as a holder." 2 James J. White & Robert S. Summers, *Uniform Commercial Code* § 16:4 (5th ed.

2008); *Tuttle v. Rose*, 430 N.E.2d 356, 358 (Ill. App. Ct. 1981) ("[W]hen the signatures on a note are admitted or established, production of the instrument entitles a holder to recover unless the defendant establishes a defense. . . . This means that once the holder produces the instrument, he is entitled to recover in the absence of any further evidence. The defendant has the burden of establishing any defense, including payment, by a preponderance of the evidence." (emphasis added; citation omitted)).

2. The Ericksons Failed to Challenge Their Original Note Signatures in Their Answer

The Ericksons' argument that various copies of the Ericksons' Note exist raises no cognizable defense to enforcement when the original is produced as it was here. Undoubtedly, copies of a note can be made, and copies may bear marginalia or other non-material marks. What is relevant in establishing the originality of the Note is the Ericksons' original signatures on the document, a material fact unaffected by the existence of copies of the Note.[5]

This defense was not raised in the Ericksons' answer, as specifically required under RCW 62A.3-308(a), which provides that the signatures on a note must be "specifically denied in the pleadings" and are

[5] Notably, the Ericksons have not identified any other alleged holder or owner of the Note, or identified any risk of double payment, and have presented no evidence suggesting the original is not the original. But the Ericksons must identify a genuine issue of material fact, not the hypothetical possibility that the original Note is not the original.

in any event presumed "authentic and authorized." A general denial is not sufficient to raise the defense.[6]

> 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 and authorized unless the action is to enforce the liability of the purported signer and the signer is dead or incompetent at the time of trial of the issue of validity of the signature.

RCW 62A.3-308(a). Because the Ericksons neither specifically denied their signatures nor presented evidence that the signatures on the Note are not theirs, Deutsche Bank is not required to submit any additional evidence and is entitled to enforce the Note. The U.C.C. § 3-308, Official Comment 1, explains:

> The question of the burden of establishing the signature arises only when it has been put in issue by specific denial. "Burden of establishing" is defined in Section 1-201. The burden is on the party claiming under the signature, but the signature is presumed to be authentic and authorized except as stated in the second sentence of

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[6] *See, e.g., Wesla Fed. Credit Union v. Henderson,* 655 So. 2d 691, 693 (La. Ct. App. 1995) (determining that general denial of paragraphs is insufficient to constitute a specific denial of the authenticity of the signature); *Dryden v. Dryden*, 621 N.E.2d 1216, 1219 (Ohio Ct. App. 1993) (defining specific denial as "'a statement that denies a particular fact and then states what actually occurred'" and ruling that general denial without more is insufficient (citation omitted)); *Bank of New England, N.A. v. Greer,* 1991 Mass. App. Div. 202 (1991) (holding general denials in defendants' answer were insufficient to put the genuineness of signatures on the note into controversy); *Coupounas v. Madden,* 514 N.E.2d 1316, 1320 (Mass. 1987) (defendant disputing validity of notes "had to do more than 'call into question' the 'integrity' of the notes").

> subsection (a). "Presumed" is defined in Section 1-201 and means that until some evidence is introduced which would support a finding that the signature is forged or unauthorized, the plaintiff is not required to prove that it is valid. The presumption rests upon the fact that in ordinary experience forged or unauthorized signatures are very uncommon, and normally any evidence is within the control of, or more accessible to, the defendant. The defendant is therefore required to make some sufficient showing of the grounds for the denial before the plaintiff is required to introduce evidence. The defendant's evidence need not be sufficient to require a directed verdict, but it must be enough to support the denial by permitting a finding in the defendant's favor. Until introduction of such evidence the presumption requires a finding for the plaintiff.

In other words, "[t]he defendant is . . . required to make some sufficient showing of the grounds for the denial before the plaintiff is required to introduce evidence." *Id.*; *see* 6B David Frisch, *Lawrence's Anderson on the Uniform Commercial Code* § 3-308:9R, Westlaw (database updated June 2016); *In re Bass*, 738 S.E.2d 173 (N.C. 2013). The Ericksons offered no evidence that their signatures were not their original signatures. Arguments over copies of the Note provide no evidence that the original note before the trial court is either forged or unauthorized. Deutsche Bank had no obligation or need to submit additional evidence beyond the original Note and "the presumption requires a finding for [Deutsche Bank]."

Likewise, the Ericksons cannot attack the endorsement because, like the Ericksons' signatures, it is also subject to the UCC rule that "each signature on the instrument is admitted unless specifically denied in the pleadings." The Ericksons did not "specifically deny" the endorsement signature in their answer, and therefore have admitted the signature is valid.

> Without unambiguous evidence to the contrary, a signature that "is not qualified in any way and appears in the place normally used for indorsements . . . may be an indorsement" even if the signer intended the signature to be something else. The UCC drafters' strong presumption in favor of the legitimacy of indorsements protects the transfer of negotiable instruments by giving force to the information presented on the face of the instrument.

Bass, 738 S.E.2d at 176-78 (citations omitted; emphases added; ellipsis in original).

3. The Original Note and Deed of Trust Are Self-Authenticating, Relevant, and Admissible

The Ericksons' attack on the declaration of Deutsche Bank's attorney, Will Eidson, as failing to lay a proper foundation for the admission of the original Note is a red herring. The original Note submitted by Deutsche Bank and Deed of Trust are self-authenticating, relevant, and admissible. No foundation witness is required to admit these documents.

The Ericksons' Note and Deed of Trust are what the law designates as "verbal acts," which are by definition non-hearsay. *See Kepner-Tregoe, Inc. v. Leadership Software, Inc.*, 12 F.3d 527, 540 (5th Cir. 1994) ("'Signed instruments such as wills, contracts, and promissory notes are writings that have independent legal significance, and are non-hearsay.'") (quoting Thomas A. Mauet, *Fundamentals of Trial Techniques* 180 (1988)). "A contract, for example, is a form of verbal act to which the law attaches duties and liabilities and therefore is not hearsay." *Mueller v. Abdnor*, 972 F.2d 931, 937 (8th Cir. 1992).[7] The Note and Deed of Trust are non-hearsay.

The original Note and Deed of Trust are self-authenticating documents. No witness is required to authenticate a note and deed of trust. ER 902 governs self-authenticating documents. Two provisions of ER 902 cover the Ericksons' Note and Deed of Trust:[8]

> ER 902(i) Commercial Paper and Related Documents. Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law.

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[7] "Verbal acts, however, are not hearsay because they are not assertions and not adduced to prove the truth of the matter. *See* 2 John W. Strong et al., *McCormick on Evidence* § 249 at 101 (4th ed. 1992); 6 John H. Wigmore, *Evidence* § 1770 at 259 (James H. Chadbourn rev. ed. 1976). "The Federal Rules of Evidence 'exclude from hearsay the entire category of "verbal acts" and "verbal parts of an act," in which the statement itself affects the legal rights of the parties or is a circumstance bearing on conduct affecting their rights.'" *Mueller*, 972 F.2d at 937 (citation omitted).

[8] Both apply to the Deed of Trust. ER 902(i) applies to the Note.

> ER 902(h) Acknowledged Documents. Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments.

Because authentication is covered by ER 902, Deutsche Bank was not required to produce a witness to authenticate the original Note or Deed of Trust:

> Appellants mistake the legal standard governing the admission of a self-authenticating document into evidence. Deutsche Bank was not required to present a witness to authenticate the note. Rather, the note was admissible as a self-authenticating document without the need for further evidence in support of its authenticity. Under the Federal Rules of Evidence, signed commercial paper is "self-authenticating," meaning that it "require[s] no extrinsic evidence of authenticity in order to be admitted." A signed promissory note falls into this category of evidence.

Miller v. Deutsche Bank Nat'l Tr. Co., No. 12-cv-03279-PAB, 2013 U.S. Dist. LEXIS 126888, at *27-28 (D. Colo. Sept. 4, 2013) (emphasis added; citations omitted).

4. A Note Endorsed in Blank Is Enforceable by the Holder

The original Note that Deutsche Bank produced was endorsed in blank. An instrument endorsed in blank is "bearer" paper. Therefore, the Trust is the holder and owner of the Ericksons' Note because it holds the original Note:

> Under Washington law an instrument endorsed in blank becomes payable to the bearer and may be negotiated. RCW 62A.3-205(b). The holder of a negotiable instrument

> is the person in possession and is entitled to enforce it. RCW 62A.3-301; 62A.1-201(20).
>
> Here, Plaintiff does not contest that Chase is in physical possession of the note and that it is endorsed in blank. Therefore, Chase is the holder of the note as a matter of law.

Zalac v. CTX Mortg. Corp., No. C12-01474, 2013 U.S. Dist. LEXIS 20269, at *8-9 (W.D. Wash. Feb. 14, 2013); *Deutsche Bank Nat'l Trust Co. v. Slotke*, 192 Wn. App. 166, 367 P.3d 600 (2016); *Brown v. Dep't of Commerce,* 184 Wn.2d 509, 359 P.3d 771 (2015); RCW 62A.3-301 (the holder of the note includes any party who takes possession of the note, endorsed in blank, by transfer); RCW 61.24.005(2) (beneficiary is the "holder of the [promissory note] secured by the deed of trust"); *Bain v. Metro. Mortg. Grp., Inc.,* 175 Wn.2d 83, 103-04, 285 P.3d 34 (2012) ("[A] beneficiary must either actually possess the promissory note or be the payee.").[9] The fact that Deutsche Bank holds the Note through an agent is

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[9] *Brown*, 184 Wn.2d at 525 ("Washington's UCC defines a 'holder' to be the 'person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession.' RCW 62A.1–201(21)(A); *accord Black's Law Dictionary* 848 (10th ed. 2014) (defining 'holder' to be a person 'who has legal possession of a negotiable instrument and is entitled to receive payment on it'). The statute's definition of 'holder' does not turn on ownership. That is unsurprising, given that the statute expressly provides that '[a] person may be a person entitled to enforce the instrument ... even though the person is not the owner of the instrument.' RCW 62A.3–301 (emphasis added). A leading treatise on article 3 of the UCC confirms that a holder 'may sue in his or her own name to enforce payment even though he or she is not the owner of the instrument.' 6B Anderson on the Uniform Commercial Code § 3–301:4R at 267 (Lary Lawrence ed., 3d ed., 2003 rev.). This rule focuses on the party who possesses the note in order to protect the

irrelevant. A holder can possess a note "directly or through an agent." RCW 62A.3-201 cmt. 1.

5. The Deed of Trust Follows the Transfer of the Note by Operation of Law

Because the Ericksons' Note was transferred to Deutsche Bank, the Ericksons' Deed of Trust was also transferred with it by operation of law (the Mary's Little Lamb Rule). It is black letter law in Washington – as well as elsewhere – that a deed of trust follows the transfer of a debt:

> The statute merely codifies the longstanding common law rule that the deed follows the debt: "Transfer of the note carries with it the security, without any formal assignment or delivery, or even mention of the latter." *In re Jacobson*, 402 B.R. 359, 367 (noting that "this principle is neither new nor unique to Washington") (quoting *Carpenter v. Longan*, 83 U.S. 271, 275, 21 L. Ed. 313 (1872)); *see also Fidelity & Deposit Co. of Maryland v. Ticor Title Ins. Co.*, 88 Wn. App. 64, 68-69, 943 P.2d 710 (1997) (noting "the maxim that the mortgage follows the debt"). Flagstar, as the Note-holder and beneficiary, properly appointed MTC.

Myers v. MERS, No. 11-cv-05582, 2012 U.S. Dist. LEXIS 30891, at *11 (W.D. Wash. Feb. 24, 2012).

> As it is well-established that the "security instrument will follow the note," CitiMortgage's possession of the original Note imparts the authority to enforce the terms of the Deed of Trust. Thus, Plaintiffs' argument that CitiMortgage lacks standing to enforce the Deed as a valid contract between the parties is unavailing.

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borrower from being sued fraudulently or by multiple parties on the same note. 5A Anderson on the Uniform Commercial Code § 3–207:7, at 449 (3d ed. 1994 rev.) ('The purpose of requiring that the plaintiff have possession of the paper is to protect the defendant from multiple liability.').").

Johnson v. CitiMortgage, No. 2:13-cv-00037, 2013 U.S. Dist. LEXIS 177065, at *10-11 (W.D. Wash. Dec. 17, 2013) (citations omitted).

> This rule, however, is merely the codification of the longstanding principle that "the deed follows the debt." *See* Restatement (Third) of Property (Mortgages) § 5.4(a) ("A transfer in full of the obligation automatically transfers the mortgage as well . . . ."); *see also Carpenter v. Longan*, 83 U.S. 271, 21 L. Ed. 313 (1872) ("The transfer of the note carries with it the security, without any formal assignment or delivery, or even mention of the latter."). The Washington Supreme Court reiterated this principle in *Bain*, stating "Washington's deed of trust act contemplates that the security instrument will follow the note, not the other way around." In sum, possession of the note makes U.S. Bank the beneficiary; the assignment merely publicly records that fact. Because U.S. Bank is the proper beneficiary, it is empowered to initiate foreclosure following Plaintiff's default.

Lynott v. MERS, No. 12-cv-5572-RBL, 2012 U.S. Dist. LEXIS 170607, at *5-6 (W.D. Wash. Nov. 30, 2012) (citation omitted).

6. An Assignment of the Deed of Trust Is Not Required or Necessary

Because the Mary's Little Lamb Rule applies, an assignment of the Ericksons' Deed of Trust is not required to transfer the Note, and is not relevant to the question of authority to enforce a note or deed of trust. *In re Butler*, 512 B.R. 643, 656 (Bankr. W.D. Wash. 2014) ("[A]ny assignment of the Deed of Trust from MERS to One West had no legal effect on the ownership or possession of the Note and was irrelevant for purposes of the disputes at issue here."); *Myers*, 2012 U.S. Dist. LEXIS

30891, at *11 ("Even if MERS had improperly assigned the Deed, Flagstar is empowered as the beneficiary to appoint the trustee because it holds [plaintiff's] Note, not because of the assignment."); *Lynott*, 2012 U.S. Dist. LEXIS 170607, at *5 ("U.S. Bank is the beneficiary of the Deed because it holds Plaintiff's Note, not because MERS assigned it the Deed."); *Johnson*, 2013 U.S. Dist. LEXIS 177065, at *8-10; *McPherson v. Homeward Residential*, No. C12-5920, 2014 WL 442378, at *5 (W.D. Wash. Feb. 4, 2014).

> This is consistent with Washington law, as the sole purpose of recording assignments of deeds of trust is to provide notice to third parties of the security interest, not to provide notice to the borrower. *Corales v. Flagstar Bank, FSB*, 822 F. Supp. 2d 1102, 1109 (W.D. Wash. 2011); *In re United Home Loans*, 71 B.R. at 891 ("Recording of the assignments is for the benefit of third parties.") . . . . No Washington statute requires parties to record transfers of promissory notes by endorsement to enforce rights under transferred notes. The "assignment of a deed of trust and note is valid between the parties whether or not the assignment is ever recorded." *In re United Home Loans*, 71 B.R. 885, 891 (W.D. Wash. 1987).

McPherson, 2014 U.S. Dist. LEXIS 15123, at *5 (citations omitted).

7. The Ericksons Lack Standing to Challenge Prior Assignments or Raise Claims Related to the Securitization of the Note and Deed of Trust

Washington courts have also held that borrowers lack standing to challenge assignments of the deed of trust or allege issues with the securitization of the note and deed of trust. *See Borowski v. BNC Mortg.,*

Inc., No. C12-5867, 2013 WL 4522253, at *5 (W.D. Wash. Aug. 27, 2013) ("[B]orrowers, as third parties to the assignment of their mortgage (and securitization process), cannot mount a challenge to the chain of assignments."); *Andrews v. Countrywide Bank, NA*, No. C15-0428-JLR, 2015 U.S. Dist. LEXIS 43555, at *8 (W.D. Wash. April 1, 2015) ("[A] borrower generally lacks standing to challenge the assignment of its loan documents unless the borrower shows that it is at a genuine risk of paying the same debt twice."); *Zhong v. Quality Loan Serv. Corp.*, No. C13–0814-JLR, 2013 WL 5530583, at *3 (W.D. Wash. Oct. 7, 2013) ("[Plaintiff], as a borrower and third party to the transactions, lacks standing to challenge the Assignment."); *Ukpoma v. U.S. Bank Nat'l Ass'n,* No. 12-CV-0184-TOR, 2013 WL 1934172 (E.D. Wash. May 9, 2013) (stating "[e]ven assuming for the sake of argument that the assignments in question were fraudulently executed, Plaintiff, as a third party, lacks standing to challenge them"); *Brodie v. Nw. Tr. Servs., Inc.,* No. 12-CV-0469-TOR, 2012 WL 6192723, at *2-3 (E.D. Wash. Dec. 12, 2012) (dismissing claims based on borrower's challenge to deed of trust assignment for lack of standing).

Likewise, the Ericksons are not parties to the PSA (pooling and servicing agreement), or any other contract between the trustee and its loan servicers. And courts across the country have repeatedly rejected

challenges by borrowers to such agreements. *See Deutsche Bank Nat'l Trust Co. v. Slotke*, 192 Wn. App. 166, 367 P.3d 600 (2016); *Cagle v. Abacus Mortg., Inc.*, No. 2:13–cv–02157–RSM, 2014 WL 4402136, at *4 (W.D. Wash. Sept. 5, 2014) ("Plaintiff lacks standing to bring claims based on the PSA, to which she was not a party."); *Frazer v. Deutsche Bank Nat'l Tr. Co.*, No. 11-cv-5454, 2012 WL 1821386, at *2 (W.D. Wash. May 18, 2012) ("Plaintiffs are not parties to the pooling and servicing agreement and present no authority suggesting standing to challenge it."); *Alexander v. Wells Fargo Bank, N.A.*, No. C15-459-RAJ, 2015 WL 5123922, at *3 (W.D. Wash. Sept. 1, 2015) ("[T]he majority of Ninth Circuit courts have held that 'plaintiffs lack standing to challenge noncompliance with a PSA in securitization unless they are parties to the PSA or third party beneficiaries of the PSA.'" (citation omitted)); *Mohlman v. Long Beach Mortg.*, No. 12-10120, 2013 WL 490112, at *5 (E.D. Mich. Feb. 8, 2013) ("[V]iolating the REMIC rules does not establish a defect in ownership of the mortgage.").

In sum, Deutsche Bank presented the original Note and established a prima facie case for enforcement. The Ericksons presented no contrary facts. The trial court correctly granted summary judgment.

E. Collateral Estoppel Bars Reconsideration of Issues Resolved Between the Parties in the Federal Lawsuit

In the 2010 District Court Case, the Ericksons claimed that Deutsche Bank lacked standing to enforce the Note and Deed of Trust. Deutsche Bank proved it held the Ericksons' Note and summary judgment was entered against the Ericksons' claims based on this fact. That ruling is now collateral estoppel against the Ericksons here, and the Ericksons have no basis or grounds to re-litigate their standing arguments.

"The doctrine of collateral estoppel is well-known to Washington law as a means of preventing the endless re-litigation of issues already actually litigated by the parties and decided by a competent tribunal. Collateral estoppel promotes judicial economy and prevents inconvenience, and even harassment, of parties." *Reninger v. Dep't of Corr.*, 134 Wn.2d 437, 449, 951 P.2d 782 (1998) (citing *Hanson v. City of Snohomish*, 121 Wn.2d 552, 561, 852 P.2d 295 (1993)).

The party seeking collateral estoppel must show four basic elements:

> (1) the issue decided in the prior adjudication must be identical with the one presented in the second; (2) the prior adjudication must have ended in a final judgment on the merits; (3) the party against whom the plea of collateral estoppel is asserted must have been a party or in privity with a party to the prior litigation; and (4) application of the doctrine must not work an injustice.

State v. Mullin-Coston, 152 Wn.2d 107, 114, 95 P.3d 321 (2004) (citation and emphasis omitted).

Collateral estoppel applies here because the Ericksons were a party to the 2010 District Court Case. The Ericksons mistakenly argue that Deutsche Bank was not a party to the 2010 District Court Case, and that therefore collateral estoppel cannot be applied in this case. Deutsche Bank was, in fact, a party to the 2010 District Court Case, but that fact is not relevant to the application of collateral estoppel in this case because Washington recognizes non-party offensive collateral estoppel. "[A] nonparty to prior adjudication may invoke collateral estoppel defensively against a party to the earlier action." *Dunlap v. Wild,* 22 Wn. App. 583, 589, 591 P.2d 834 (1979). Washington courts "apply non-mutual collateral estoppel so long as the party against whom preclusion is sought was a party [the Ericksons] or in privity with a party to the prior litigation and had a full and fair opportunity to litigate the issue in question." *Mullin-Coston,* 152 Wn.2d at 13-14.

However, it is clear that Deutsche Bank, the same party in this case, was a defendant in the 2010 District Court Case. The court in the 2010 District Court Case recognized that Deutsche Bank was acting in its capacity as Trustee on behalf of the mortgage loan trust, the same capacity in which it filed and prosecuted this foreclosure action to enforce that

same Note and Deed of Trust. Deutsche Bank submitted the declaration of Thomas Reardon in the 2010 District Court Case, which stated that "Plaintiff's [the Ericksons'] loan was subsequently sold into a securitized pool of loans known as the Long Beach Mortgage Loan Trust 2006-4 ('Trust'), with Defendant Deutsche Bank National Trust Company ('DB') acting as Trustee." CP 446.

The Ericksons' arguments (*see* Ericksons' Brief at 34-36) based upon other cases where the court distinguished between Deutsche Bank in its individual or trustee capacity have no application here because the district court in the 2010 District Court Case made it clear that it was addressing Deutsche Bank in its trustee capacity, the same capacity in which Deutsche Bank appears in this case.

The Ericksons claimed in the 2010 District Court Case that Deutsche Bank did not own or possess the original Note and therefore lacked standing to enforce the original Note and Deed of Trust through foreclosure. That issue was adjudicated in favor of Deutsche Bank by the district court. *Long Beach*, 2011 WL 830727, at *5-6. The district court found that Deutsche Bank was the trustee for the mortgage trust that held the Ericksons' Note and in that capacity, was the owner of the Note.

The district court stated in its opinion that "[t]he [Ericksons'] loan was then sold into a pool of loans held in trust by Defendant Deutsche

Bank National Trust ('DB')" (*id.* at *1), and that "[m]ore importantly, [Deutsche Bank and its servicer] provide[d] evidence demonstrating their ownership of the note, which the Ericksons do not credibly challenge" (*id.* at *3). Ownership was established in Deutsche Bank in its trustee capacity. The Ericksons provided no contrary evidence in the 2010 District Court Case or here.

These facts were central to resolving the Ericksons' claims in the 2010 District Court Case that Deutsche Bank lacked standing to enforce their Note and foreclose the Deed of Trust securing the Note and are central to the Ericksons' standing and other arguments against enforcement and foreclosure here.

Now the Ericksons seek to re-litigate the identical issue by asserting before this Court that Deutsche Bank does not own or hold the Note, is not the beneficiary of the Deed of Trust, and lacks standing to foreclose. This is the identical issue decided by the *Long Beach* court, and as a consequence collateral estoppel bars the Ericksons from re-litigating these claims in this case. As such, collateral estoppel "prevents a second litigation of issues between the parties, even though a different claim or cause of action is asserted." *Christensen v. Grant Cty. Hosp. Dist. No. 1*,

152 Wn.2d 299, 306, 96 P.3d 957 (2004) (internal quotation marks and citations omitted).[10]

Second, the 2010 District Court Case ended with a judgment on the merits. Orders granting summary judgment are final judgments for purposes of collateral estoppel. It is not necessary that the issue was previously determined in a trial. "[A] grant of summary judgment constitutes a final judgment on the merits and has the same preclusive effect as a full trial of the issue." *Nat'l Union Fire Ins. Co. of Pittsburgh v. Nw. Youth Servs.*, 97 Wn. App. 226, 233, 983 P.2d 1144 (1999); *see, e.g.*, *Brownfield v. City of Yakima*, 178 Wn. App. 850, 870, 316 P.3d 520 (2014); *Lee v. Ferryman*, 88 Wn. App. 613, 622, 945 P.2d 1159 (1997); *Cunningham v. State*, 61 Wn. App. 562, 566, 811 P.2d 225 (1991).

There is no injustice in applying collateral estoppel here. The Ericksons were the Plaintiffs who filed the 2010 District Court Case lawsuit, and therefore had a full and fair opportunity to litigate the issues they raised. Collateral estoppel bars the Ericksons from re-litigating issues they litigated and lost in the 2010 District Court Case.

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[10] *Ross v. Johnson*, 171 Wash. 658, 19 P.2d 101 (1933), is inapposite. Ericksons' Brief at 33. *Ross* deals with a different issue, namely, the authority of an agent to receive payment on behalf of a principal. That is not an issue in this case.

F. Collateral Estoppel and the Ericksons' Lack of Standing Bar the Ericksons' Speculative Arguments Regarding Prior Transfers of the Note

The Ericksons also engage in several pages of supposition and conjecture about prior transfers of their Note. Ericksons' Brief at 26-28. None of these arguments have any merit.

Deutsche Bank produced the original Note in this case, and thereby established its prima facie case to enforce it. The possession of an original note endorsed in blank entitles the holder to enforce it. *Zalac, supra;* RCW 62A.3-301. The Ericksons' speculation about the history of transfers of the Note is irrelevant. The maker of the note cannot defend by questioning or speculating about the history of its transfers.[11] And as established above, the Ericksons have no standing to challenge prior assignments or make claims related to the securitization of the Note and Deed of Trust.[12]

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[11] "The defending party does not carry its burden by merely identifying some documentary lacuna in the chain of title that might give rise to the possibility that a party other than the foreclosing party owns the debt. . . . To rebut the presumption that the holder of a note endorsed specifically or to bearer is the rightful owner of the debt, the defending party must prove that another party is the owner of the note and debt. . . . Without such proof, the foreclosing party may rest its standing to foreclose the mortgage on its status as the holder of the note." (Citations omitted; emphasis in original.)" *JPMorgan Chase Bank, National Assn. v. Simoulidis* 126 A.3d 1098, 1106 (Conn. 2015).

[12] *See Kukuk v. HSBC Bank USA, National Association*, No. 310616, 2014 Mich. App. LEXIS 42 at *12 (Mich. App. Jan. 14, 2014) ("And to the extent Kukuk challenges the validity of the assignment, she lacks standing to do so where the parties to the assignment do not contest its validity and she does not contest the assignee's ownership of the indebtedness. As discussed in 6A CJS

Moreover, collateral estoppel bars the Ericksons from rearguing these facts. The time to have made such arguments, assuming they had any supporting facts, was in the 2010 District Court Case.

Likewise, the Ericksons' speculation about how the Note was transferred by and between agents of Deutsche Bank as trustee for the mortgage trust is simply irrelevant. The Note can be physically possessed by Deutsche Bank through an agent, whether that agent is an attorney for Deutsche Bank or a servicer, or by a servicer or other custodian of the servicer. A holder can possess a note "directly or through an agent." RCW 62A.3-201 cmt. 1.

Notably, even though the Ericksons have been in default since 2009, no other party has claimed to be the owner of the Ericksons' Note and Deed of Trust, or has asserted claims to enforce the Note and Deed of Trust against the Ericksons. The only party in 2010, and now, who claims to own and hold the Erickson's Note is Deutsche Bank. As the courts have recognized, the borrower must make a real showing that he is at risk for making double payments in order to raise challenges to contracts to

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Assignments § 132, pp 524-525 (2013), a debtor may challenge its creditor's assignments to avoid having to pay the same debt twice, but a debtor cannot challenge defects that would merely render the assignments void at the election of the creditor or the creditor's assignees. *See also Warth v Seldin*, 422 U.S. 490, 499; 95 S. Ct. 2197; 45 LE.2d 343 (1975) (stating that "the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties").

which they are not parties. Otherwise, borrowers "[do] not have standing . . . to inspect each and every contract or agreement between any predecessor and successor mortgagee, searching for 'irregularities' and noncompliance." *Kiefer v. ABN AMRO,* No. 12-10051, 2012 WL 3600351, at *4 (E.D. Mich. June 12, 2012) (brackets in original). In particular, where the lender produces the original note, as here, there is no risk of double payment and the borrower has no standing. *Livonia Props. Holdings, LLC v. 12840-12976 Farmington Rd. Holdings, LLC,* 399 F. App'x 97, 102 (6th Cir. 2010); *Bridge v. Ocwen Fed. Bank FSB,* No. 1:07-CV-2739, 2013 U.S. Dist. LEXIS 127588, at *17 (N.D. Ohio Sept. 6, 2013) ("Where, as here and in Livonia, the foreclosing party produces the original note, the obligor 'cannot credibly claim to have standing to challenge' the assignments and other agreements to which they were not a party." (emphasis added; citation omitted)); *see Moran v. GMAC Mortg.,* No. 5:13-CV-04981, 2014 U.S. Dist. LEXIS 84411, at *11-12 (N.D. Cal. June 18, 2014):

> "Third-party borrowers lack standing to assert problems in the assignment of the loan" because the borrowers have not suffered an injury in fact. *Flores v. GMAC Mortg., LLC,* 2013 U.S. Dist. LEXIS 68606, 2013 WL 2049388, at *3 (N.D. Cal. May 14, 2013); *see also Jenkins v. JP Morgan Bank, N.A.*, 216 Cal. App. 4th 497, 513-14, 156 Cal. Rptr. 3d 912 (2013); *Fontenot v. Wells Fargo Bank, N.A.*, 198 Cal. App. 4th 256, 129 Cal. Rptr. 3d 467 (2011). Assignment defects do not injure borrowers because

> "[e]ven if there were some defect in the [subsequent] assignment of the deed of trust, that assignment would not have changed plaintiff's payment obligations." *Simmons v. Aurora Bank, FSB*, 2013 U.S. Dist. LEXIS 142917, 2013 WL 5508136, at *2 (N.D. Cal. Sept. 30, 2013); *see Siliga v. Mortg. Elec. Registration Sys., Inc.*, 219 Cal. App. 4th 75, 85, 161 Cal. Rptr. 3d 500 (2013) ("The assignment of the deed of trust and the note did not change [Plaintiffs'] obligations under the note, and there is no reason to believe that . . . the original lender would have refrained from foreclosure in these circumstances."); *Apostol v. CitiMortgage, Inc.*, 2013 U.S. Dist. LEXIS 167308, 2013 WL 6328256, at *7-8 (N.D. Cal. Nov. 21, 2013).

(citations omitted; emphasis added); *see also Ryan v. Nationstar Mortg., LLC*, No. 2:14-cv-02067-GEB-DAD, 2015 U.S. Dist. LEXIS 14101, at *6 (E.D. Cal. Feb. 4, 2015). The Ericksons' conjecture about supposed lacunae of prior transfers is not sufficient to defend a summary judgment motion.

G. Deutsche Bank Held the Ericksons' Note When it Filed this Lawsuit

Washington law is clear that the party with standing to enforce a note is the holder of the note. *Bain,* 175 Wn.2d 83; *Brown,* 184 Wn.2d 509. Deutsche Bank holds the Ericksons' original Note. As such, under well-established Washington law, Deutsche Bank is the party entitled to enforce the Note, and the Deed of Trust securing the Note. *See* Sections D (1), (4), *supra.*

Plainly, Deutsche Bank has standing to enforce the Note. The Ericksons have not made monthly payments for years on the Note.

Standing is a party's right to make a legal claim or seek judicial enforcement of a duty or right. *State v. Link*, 136 Wn. App. 685, 692, 150 P.3d 610, *rev. denied*, 160 Wn.2d 1025 (2007).[13] The doctrine of standing prohibits a party from asserting another's legal right. *West v. Thurston County*, 144 Wn. App. 573, 578, 183 P.3d 346 (2008). The rule ensures that courts render a final judgment on an actual dispute between opposing parties that have a genuine stake in resolving the dispute. *Lakewood Racquet Club, Inc. v. Jensen*, 156 Wn. App. 215, 223, 232 P.3d 1147 (2010). Deutsche Bank's submission of the Note at summary judgment assured the trial court that Deutsche Bank was the proper party entitled to obtain a final judgment on the Note obligation and to enforce the security for the Note through foreclosure. The Ericksons face no risk of double payment.

The Ericksons, however, seek to impose an additional procedural requirement, namely, that the holder of the borrower's note must also affirmatively show that it held the note on the date it filed this lawsuit. The Ericksons submit no Washington authority for this supposed

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[13] Deutsche Bank is also the real party in interest. "The concepts of standing and CR 17(a) real party in interest are often interchanged by our courts. Standing refers to the demonstrated existence of 'an injury to a legally protected right. . . . The real party in interest is the person who possesses the right sought to be enforced.'" *Riverview Cmty. Grp. v. Spencer & Livingston*, 173 Wn. App. 568, 576, 295 P.3d 258 (2013) (citations and footnote omitted).

requirement. *Deutsche Bank Nat'l Trust Co. v. Slotke*, 192 Wn. App. 166, 367 P.3d 600 (2016).

Deutsche Bank pled in its complaint that it held the Note, an assertion that the Ericksons denied. Deutsche Bank then filed a summary judgment motion to dismiss all of the Ericksons' affirmative defenses, including the standing defense. In response, the Ericksons produced no evidence to support their denial at summary judgment. Instead, even after failing to submit any evidence, they insist they can raise this proposed additional procedural requirement of showing possession on the date of filing on appeal.

There is no such requirement found in Washington law. Indeed, by producing the original Note at summary judgment, there can be no question that the only party entitled to judgment on the Note was Deutsche Bank. Retroactively imposing a new requirement that Deutsche Bank show it held the Note on the date of filing, particularly when Deutsch Bank produced the original Note in support of summary judgment, and when no contrary evidence was provided by the Ericksons, serves no purpose. Here, the argument, raised without supporting evidence, previously raised and rejected in the 2010 District Court Case, is nothing more than an attempt to further delay foreclosure.

Nevertheless, the record in this case shows that Deutsche Bank held the Note on the date of filing. Deutsche Bank proved it held the Ericksons' Note in the 2010 District Court Case. Deutsche Bank submitted the original Note at summary judgment in this case. The Ericksons produced no contrary evidence showing that the Note had somehow left Deutsche Bank's possession between the 2010 District Court Case and the filing of the instant action in 2014. These facts establish that Deutsche Bank possessed the Note when it filed this lawsuit, or, at a minimum, put the burden on the Ericksons to provide contrary evidence.

Faced with a summary judgment motion to dismiss their affirmative defenses, including their standing defense, and the knowledge that Deutsche Bank had proven it possessed the Note in the 2010 District Court Case, the Ericksons nevertheless produced no evidence to support their allegation. This failed to satisfy the Ericksons' summary judgment burden. The nonmoving party may not rely on speculation, argumentative assertions that unresolved factual issues remain, or its own affidavits, considered at face value. *Herman v. Safeco Ins. Co. of Am.*, 104 Wn. App. 783, 787-88, 17 P.3d 631 (2001); *see* CR 56(c). If the moving party demonstrates that there is an absence of any material fact, the nonmoving party must identify a material fact creating a genuine issue for trial. *See*

Young v. Key Pharm., Inc., 112 Wn.2d 216, 770 P.2d 182 (1989); CR 56(e) ("[A]n adverse party ... must set forth specific facts showing that there is a genuine issue for trial."). Thus, under standard summary judgment rules, the Ericksons' failure to produce contrary evidence at summary judgment defeats their argument.

Thus, even if there were a requirement that Deutsche Bank prove that it held the Note when it filed this lawsuit, Deutsche Bank met that requirement. [14]

Moreover, it is questionable whether this issue can be argued on appeal when the Ericksons have failed to establish any trial court record upon which to make such an argument. *See Trinity Universal Ins. Co. of Kan. v. Ohio Cas. Ins. Co.*, 176 Wn. App. 185, 198-99, 312 P.3d 976 (2013); *see also Ullery v. Fulleton,* 162 Wn. App. 596, 604-05, 256 P.3d

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[14] Should the Court consider this argument and conclude that this rule should be applied in Washington, and if, despite the record, the Court has concerns that Deutsche Bank was not the holder on the date the complaint was filed, then the Court should consider obtaining a supplemental declaration from Deutsche Bank on appeal under RAP 9.11 rather than sending the case back to the trial court. Applying this new rule retroactively would be unfair and pointless. *See In re Estate of Burns,* 131 Wn.2d 104, 110, 928 P.2d 1094 (1997) ("Courts disfavor retroactivity because of the unfairness of impairing a vested right or creating a new obligation with respect to past transactions."); *Landgraf v. USI Film Prods.*, 511 U.S. 244, 271, 280 (1994) (stating that a statute has a genuinely retroactive effect if it impairs the rights a party possessed when he acted, increases his liability for past conduct, or imposes new duties with respect to completed transactions). The appellate court may also waive the requirements of RAP 9.11 if the new evidence would serve the ends of justice. RAP 1.2(c); *Wash. Fed'n of State Emps., Council 28 v. State*, 99 Wn.2d 878, 884-85, 665 P.2d 1337 (1983).

406, *rev. denied*, 173 Wn.2d 1003 (2011). The loose usage of the term "standing" has been noted by the courts.[15]

H. The Trust is Entitled to a Decree of Foreclosure; the Ericksons Failed to Raise the Defense of Payment

The Ericksons did not made payments on their home loan for years. Unpaid interest alone totals approximately $239,063.65. The Ericksons, therefore, were in default under their Note and Deed of Trust, and Deutsche Bank was entitled to its remedies, which include judicial foreclosure of its Deed of Trust against its collateral.

The statutory prerequisites to judicial foreclosure are (1) a default has occurred in the performance of any term or condition contained in the deed of trust; and (2) the beneficiary is not seeking foreclosure concurrently with any other action for the same debt that is secured by the deed of trust. RCW 61.12.040, 61.12.120. The Ericksons defaulted years ago and Deutsche Bank is entitled to foreclose judicially. Indeed, a deed of trust may be foreclosed either non-judicially or judicially as a mortgage. *See Helbling Bros. v. Turner,* 14 Wn. App. 494, 496-97, 542 P.2d 1257

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[15] *See Trinity*, 176 Wn. App. at 199 n.7 ("Ohio cites a footnote from a 2002 Washington Supreme Court opinion that says, "[S]tanding is a jurisdictional issue that can be raised for the first time on appeal." *Int'l Ass'n of Firefighters, Local 1789 v. Spokane Airports*, 146 Wn.2d 207, 212 n.3, 45 P.3d 186, 50 P.3d 618 (2002). This is the type of "'drive-by jurisdictional ruling'" we recently declined to rely on in Cole. 163 Wn. App. at 208 (internal quotation marks omitted) (quoting *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 510-11, 126 S. Ct. 1235, 163 L. Ed.2d 1097 (2006)).")

(1975); RCW 61.24.100(8) ("This chapter does not preclude a beneficiary from foreclosing a deed of trust in the same manner as a real property mortgage and this section does not apply to such a foreclosure.").

Deutsche Bank was entitled, as a matter of law, to a judgment and decree of foreclosure of its Deed of Trust. The Ericksons dispute the amount awarded in the final judgment to Deutsche Bank. Ericksons' Brief at 39-40. However, payment is a defense that must be raised and proven by the borrower, and the Ericksons failed to raise or prove the defense. *U.S. Bank Nat'l Ass'n v. Whitney*, 119 Wn. App. 339, 347, 81 P.3d 135 (2003); *W. Coast Credit Corp. v. Pedersen,* 64 Wn.2d 33, 35-36, 390 P.2d 551 (1964).[16] Under Washington's court rules, payment is an affirmative defense that must be affirmatively pled. CR 8(c). The Ericksons' answer in this case, although it set forth a number of affirmative defenses, did not plead payment as an affirmative defense, and did not prove payment resulting in a different delinquent amount. Payment is an affirmative defense that must be pled and proven by the defendant; this is widely established in Washington and elsewhere.

> [I]t is a rule of almost universal application that a claim for a greater amount necessarily includes the lesser. For

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[16] "The general rule, therefore, which we find to be in accord with reason and justice, is that failure to pay must be alleged if it is an essential element of the claim for relief, as in this case, where the breach of the contract consists of nonpayment; but the burden rests upon the defendant to prove payment." *W. Coast Credit Corp.*, 64 Wn.2d at 35-36 (emphasis added).

> example: In an action upon a promissory note, or any other contract, where it is alleged that the whole amount thereof is due, the plaintiff will be permitted to recover the amount actually due, notwithstanding he willfully alleges and testifies that the whole thereof is due, when in truth only a small part is due. The defense of payment in such cases is an affirmative defense, and must be proved as such.

Frick v. Wash. Water Power Co., 76 Wash. 12, 13-14, 135 P. 470 (1913) (emphasis added).

> [U]nder our common law, when a holder of a promissory note is in possession of the promissory note, possession of the promissory note "raises a rebuttable presumption that a note was not paid." Once the holder of the promissory note introduces the promissory note into evidence, the borrower may then claim he or she made more payments on the promissory note. In an action on a promissory note, we recognize this claim by the borrower as the defense of payment. The defense of payment in an action is an affirmative defense. The burden is on the borrower to prove his or her defense of payment. In an action on a promissory note, where the holder of the promissory note claims less than the total amount is due and owing on the promissory note, the rebuttable presumption of nonpayment only applies to the amount the holder claims is still due and owing.

Iowa Mortg. Ctr., L.L.C. v. Baccam, 841 N.W.2d 107, 112 (Iowa 2013) (emphases added; citations omitted). "Once the holder of a promissory note produces the note, he is entitled to the face amount on the note. Payment is an affirmative defense to a suit on a promissory note, and the burden is on the defendant to prove payment." *Gulf Coast Bank & Tr. Co. v. Donnaud's Inc.*, 759 So. 2d 268, 272 (La. Ct. App. 2000) (emphasis added).

II. CONCLUSION

The Ericksons' appeal is barred by collateral estoppel. Deutsche Bank held the Ericksons' Note in 2010, and held it and produced it for the trial court in this case, thereby establishing a prima facie case for enforcement. The Ericksons submitted no contrary evidence. The Court is respectfully requested to deny the Ericksons' appeal.

DATED: July 13, 2016.

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CERTIFICATE OF SERVICE

I certify that I caused a true and correct copy of the foregoing document to be served upon the following parties in the manner indicated by: Email/PDF and U.S. Mail:

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STOEL RIVES

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