IN THE DISTRICT COURT OF APPEAL, OF THE STATE OF FLORIDA
SECOND DISTRICT, POST OFFICE BOX 327,
LAKELAND, FLORIDA 33802-0327

ROBERT S. TRIPKA,

Defendant/Appellant, **CASE NO. 2D16-3185**

v. **LT No. 2009CA014776XXCICI**

WACHOVIA MORTGAGE, F.S.B.,
F/K/A WORLD SAVINGS BANK, F.S.B,

Plaintiff/Appellee.

MOTIONS for a WRITTEN OPINION, and for REHEARING, and/or REHEARING EN BANC, and for CERTIFICATION to the FLORIDA SUPREME COURT

1. The Appellant Robert S. Tripka, by and through his undersigned attorney, files this Motion for a Written Opinion, Motion for Rehearing and/or Rehearing En Banc, and Motion for Certification to the Supreme Court of Florida, pursuant to Rules 9.330-9.330 of the Florida Rules of Appellate Procedure.

2. Appellant will hereinafter refer generally to each motion collectively, but inclusively, simply as his "Motion for Rehearing, etc.", specifying uniquely differentiated facets of the law or rules for each subpart only where appropriate.

FIRST ISSUE REQUIRING WRITTEN OPINION and/or MOTION FOR REHEARING, ETC: WAIVER OF OBJECTIONS TO EVIDENCE OF JURISDICTION, OR ANY OTHER "AQUIESCENCE" TO JURISDICTION, IS IMPOSSIBLE UNDER FLORIDA LAW

3. All of Appellee Wachovia's arguments in favor of upholding it's standing are misdirected evidentiary arguments based on the false premise that failure to object to evidence of standing constitutes waiver of objection to standing. But, in

mortgage foreclosure cases, standing and subject matter jurisdiction arise from one and the same source: proof of ownership and rights provided by promissory notes, and jurisdictional is absolutely unwaivable. Thus, all of Wachovia's arguments in appeal are inapposite and misdirected.

4. For the initial District Court of Appeal panel in this case to affirm "per curiam" amounted to a monstrous error based on the false premise that jurisdiction can be conferred "by any accidental act or omission". The panel decision MUST be reopened and on rehearing, this Court must truly reexamine Wachovia's evidence of standing "***de novo***".

5. Standing is Jurisdictional and, for this reason, objections to evidence in support of standing cannot be waived, since objections to jurisdiction can be waived for the first time on appeal or even, under Rule 1.540(b), after an appeal:

> "[**s]ubject matter** jurisdiction cannot be created by **waiver**, acquiescence or agreement of the parties, or by error or inadvertence of the parties or their counsel, or by the exercise of power by the court; it is a power that arises solely by virtue of law." *Id.* (alteration in original) (quoting ***Fla. Exp. Tobacco Co. v. Dep't of Revenue,*** 510 So.2d 936, 943 (Fla. 1st DCA 1987)). This court held that the lack of jurisdiction can be raised for the first time on appeal. *Id.*

Dandar v. Church of Scientology Flag Service Organization, Inc., 190 So.3d 1100 at 1102 (Fla.App. 2 Dist. 2016)(also [first *Id.* in quotation block] citing ***84 Lumber Co. v. Cooper,*** 656 So.2d 1297, 1298 (Fla. 2d DCA 1994)).

6. Florida provides that only actual ownership of a promissory note related to a mortgage transaction confers lawful standing on any claimant to initiate a mortgage foreclosure in Florida. Wachovia acknowledges this point several times through its "Corrected Answer Brief" in this case.

7. The question of the jurisdictional essence of the meaning of "standing", however, has gotten totally confused in Florida, and this is a point of MAJOR PUBLIC importance to Florida jurisprudence which this Court must address on rehearing: ***Have the Florida Courts created a sub-jurisprudence of "standing" applicable only to mortgage foreclosure cases, wherein "standing" is not jurisdiction, even though "standing" is required to INVOKE THE POWER OF THE COURT to decide a complaint for foreclosure?***

8. If so, this is a manifest error and permits massive abuse, fraud, and denial of due process in the Florida Courts.

9. ***Lack of Clarity, and apparent conflict among the district courts, as to how to prove note ownership or "derivative rights" to standing, in the absence of note possession constitute the basis and center of Robert S. Tripka's Motion for Rehearing, etc..***

10. The Circuit Court, and apparently this District Court's initial panel, ignore a critical question which affects the analysis of evidence based on "timely objection" or not: is proof of standing "jurisdictional" in Florida?

11. Robert S. Tripka submits and contends that proof of standing by ownership of a promissory note IS jurisdictional in Florida (with regard to subject matter---Tripka does not contest "personal jurisdiction").

12. No party can ever finally "waive" an objection to proof of standing, because proof of standing goes to the core and heart of any court's authority to decide a foreclosure case, or any case, at all.

13. The initial panel of this Second District Court entered a per curiam affirmance on Friday, September 15, 2017, in the above-entitled-and-numbered cause, affirming the judgment and order of the 6th Judicial Circuit Court.

14. Affirmance per curiam in this case was manifestly unfair and unjust to Robert S. Tripka as the Appellant/homeowner, because to affirm the judgment in this case constitutes a derogation and deviation from all dominant Florida law.

SECOND ISSUE REQUIRING MOTION FOR REARING, ETC:
And specifically---
NEED FOR WRITTEN OPINION BY THIS COURT:
SUMMARY JUDGMENT CANNOT STAND WHERE A JUDGE FINDS
"NO CREDIBLE EVIDENCE TO THE CONTRARY"

15. The initial Second District Court of Appeals panel's "PC Affirmace" has also overlooked or misapprehended, within the meaning and purpose of Rule 9.330, the monstrous irregularities in summary judgment procedure and the inadequacy of Plaintiff/Appellee Wachovia's evidence presented to Judge W. Douglas Baird of the Sixth Judicial Circuit in Pinellas County.

16. The trial court facially granted summary judgment, but in fact ruled as though after a full-evidentiary trial, deciding Wachovia had standing because Judge Baird found **"NO CREDIBLE EVIDENCE TO THE CONTRARY."**

17. In the "per curiam" absence of an original panel opinion, a losing appellant seeking a written opinion, rehearing and/or rehearing en banc, and certification to the Supreme Court has little choice but to look to his opponent appellee's "winning" brief, in this case "Appellee's Corrected Answer Brief" served on May 9, 2017 by Linda Spaulding White on behalf of Wachovia Mortgage, F.S.B., f/k/a World Savings Bank, F.S.B., et al..

18. Appellant identifies all issues requiring clarification, accordingly, from that same "Appellee's Corrected Answer Brief" ("ACAB").

ADMISSIBILITY & CREDIBILITY OF THE CONFLICTING EVIDENCE

19. Since this case was decided on cross-motions for summary judgment, only evidence of facts was admissible. The ACAB focuses only on the possible defects in Robert S. Tripka's "hearsay" objections and lack of "routinely kept" business records in the summary judgment record.

20. Nowhere does Appellee Wachovia consider whether evidentiary questions which do not address fundamental jurisdictional questions are properly applied to matters of standing based on note ownership or derivative authority. Robert S. Tripka contends, again, that since objections to jurisdiction can never be waived, even AFTER appeal, likewise objections to the evidence supporting jurisdictionally essential elements of standing can never be waived.

21. But Appellee's challenge to questions of how to characterization, offer, and object to evidence pale in comparison with what Judge Baird did with the internally doubtful or inconsistent evidence: on cross motions for summary judgment, Judge Baird impermissibly resolved those differences, thereby making a mockery of the very concept of summary judgment.

22. Thus, Robert S. Tripka submits that the very first issue which requires clarification by written order or rehearing appears in Wachovia's ACAB on pages 9 and 13-22. Appellee Wachovia in these pages focuses on all the internal ambiguities, contradictions, and insufficiencies in the evidence, and then says that Judge Baird properly granted Summary Judgment to Wachovia.

23. Judge Baird's critical and reversible error and admission came at the conclusion of the third and final summary judgment hearing on June 21, 2016 (R. 1543-1608), when the trial court improperly ruled:

> THE COURT: Okay. Well, the Court finds that the plaintiff clearly owned the instrument at the time they filed this action and therefore, they have standing to file it. . . . I find that there's no evidence to the contrary. No credible evidence to the contrary, and I'll grant the summary judgment.

ACAB at bottom of page 9.

24. **Because Judge Baird wrote "I find that there's…. No credible evidence to the contrary", Judge Baird's grant of summary judgment must be summarily reversed and this case remanded to the Sixth Judicial Circuit.**

25. Here alone, without any notice to the parties that the court had converted their Motions for Summary Judgment into a full-blown trial, the sixth circuit court committed reversible error by evaluating the "credibility" of conflicting evidence:

> In matters of summary judgment… [a] trial court is [not justified in weight facts and meting out justice according to the conclusion reached. The procedure cannot be followed unless the facts are so crystallized that nought remains but a question of law.

Yost v. Miami Transit Co., 66 So.2d 214, 216 (Florida 1953).

> The court may not encroach on the province of the trier of fact by electing to weigh the evidence or adjudging the credibility of the witnesses.

Deakter v. Menendez, 830 So.2d 124, 127 (Florida 3rd DCA 2002).

26. The Circuit (Trial Court's) task on the parties' cross-motions for summary judgment was limited to determining whether Robert S. Tripka had demonstrated that the Wachovia could not prevail upon his claims as a matter of law on the one

hand, or that Wachovia had already and definitively proved ***each and every element of its case on the record, without need for trial or further proof***. It is well settled that a party seeking summary judgment bears the heavy burden of demonstrating "conclusively the absence of any genuine issue of material fact...." ***Moore v. Morris***, 475 So.2d 666, 668 (Fla. 1985).

27. In assessing a movant's efforts to carry this heavy burden, a trial court "must draw every possible inference in favor of the party against whom a summary judgment is sought," *id*., and "the record must be read in a light most favorable to the nonmoving party." ***Kaufman v. Mutual of Omaha Ins. Co.*,** 681 So.2d 747, 751 (Fla. 3d DCA 1996) (citing *id*.).

28. If more than one reasonable inference may be drawn from the evidence, it is the job of the jury (or judge after initiating a formal trial with live testimonial evidence and cross-examination) to determine which inference to draw and it is error to enter a summary judgment. ***Gonzalez v. B&B Cash Grocery Stores***, 692 So.2d 297, 299 (Fla. 4th DCA 1997) (citation omitted).

> If the record reflects the existence of any genuine issue of material fact or the possibility of any issue, or if the record raises even the slightest doubt that an issue might exist, summary judgment is improper.

***Munoz Hnos, S.A. v. Editorial Televisa Intern., S.A.*,** 121 So.3d 100, 103 (Fla. 3d DCA 2013)(citation omitted).

> [T]he burden of proving the absence of a genuine issue of material fact is upon the moving party. Until it is determined that the movant has successfully met this burden, the opposing party is under no obligation to show that issues do remain to be tried.

Holl v. Talcott, 191 So.2d 40, 43 (Fla. 1966) (citations omitted).

> This means that before it becomes necessary to determine the legal sufficiency of the … evidence submitted by the party moved against, it must first be determined that the movant has successfully met his burden of proving a negative, i.e., the non-existence of a genuine issue of material fact. He must prove this negative conclusively. The proof must be such as to overcome all reasonable inferences which may be drawn in favor of the opposing party.

Id. (citations omitted).

29. In considering a motion for summary judgment, "[t]he question is not whether the plaintiff has evidence to prove her case at a given point in the litigation...." ***Fiedler v. James***, 971 So.2d 256, 258 (Fla. 2d DCA 2008). The question is whether the defendant has conclusively established that the plaintiff cannot prove his or her claims. ***Jennaro v. Bonita-Fort Myers Corp.*,** 752 So.2d 82, 83 (Fla. 2d DCA 2000).

30. As recently summarized by the Third District,

> [w]hen a defendant moves for summary judgment, it is not for the trial court to determine whether the plaintiff can prove her case, but only whether the record evidence establishes conclusively that the plaintiff cannot prove her case. If the record evidence raises even the slightest doubt, summary judgment is not appropriate. ***Williams v. Fla. Realty & Mgmt. Co***., 272 So.2d 176 (Fla. 3d DCA 1973). Stated another way, the function of the trial court on a motion for summary judgment is to determine whether there exist any genuine issues of material fact, not to adjudicate those genuine issues of material fact. ***Trs. Of Internal Improvement Fund of Fla. v. Sutton***, 206 So.2d 272 (Fla. 3d DCA 1968).

***Pena v. Design-Build Interamerican, Inc.*,** 132 So.3d 1179, 1185 n.6 (Fla. 3d DCA 2014).

THE SUMMARY JUDGMENT AGAINST TRIPKA MUST BE REVERSED

31. In the present case of *Wachovia v. Tripka,* the Court utterly derogated from, disregarded and violated all these norms and standards of summary judgment jurisprudence. Judge W. Douglas Baird plainly balanced the weight and credibility of the evidence and chose between contradictory interpretations of the evidence. ***He thus conducted a trial without telling anyone.***

32. Carefully examined, and properly viewed (actually, even casually reviewed) the evidence Appellee Wachovia presented in and surrounding its "winning" lost note count (as Plaintiff) and the lack of detailed testimony concerning the history of the loss of the note has more holes than Swiss cheese and raise at the very least "the slight doubts;" genuine issues of material fact remained for trial (in the words of ***Pena v. Design-Build, supra***).

33. Carefully reading the ACAB reveals that many doubts and ambiguities permeated the record and that Judge Baird simply made a judgment call. While this may be a "normal" thing for a judge to do---it is utterly improper given the procedural context of a Motion for Summary Judgment.

34. Reviewing the history of this case, even as described in the Plaintiff's ACAB, a reasonably impartial observer might well conclude that Wachovia Mortgage has serious "pulled a fast one" on the court---this is otherwise known as "fraud on the court" and may well justify Robert S. Tripka filing an Independent Action or Complaint for Equitable Bill of Review under Florida Rule 1.540(b), if this Second District Court of Appeal fails to reverse and remand this case to the Circuit Court, as summary judgment jurisprudence plainly requires and mandates.

35. Since the trial court, by its own clear statement and admission, quoted and endorsed by the Appellee (ACAB at 9, above), plainly violated these maxims, this very plain and essential tenets of summary judgment law, the initial panel of this Second District Court of Appeal should have reversed and remanded. If this Second District Court of Appeal saw something else going on that justified the Trial Court's entry of Summary Judgment, the initial panel should have written and entered a formal opinion in this case.

36. On rehearing, this Court should either allow more argument and supplementation of the record, leading to a complete and truly "de novo" reevaluation of the grounds asserted and used for summary judgment, or else simply reverse the initial panel hearing and remand this case to the Sixth Judicial Circuit Court.

FRAP RULE 9.330 CERTIFICATION OF FIRST AND SECOND ISSUES:

37. I, the undersigned attorney and counselor for Appellant Robert S. Tripka, express my belief, based upon my reasoned and studied professional judgment, that a written opinion on the first and second issues or questions presented in this Motion for Rehearing, standing by themselves---

38. First: of whether a party can effectively waive objections to jurisdiction by waiving [at any stage] objections to evidence necessary to prove jurisdictional standing and

39. Second: whether a Circuit Judge's admission that he has balanced and weighed the evidence and made a "credibility call" mandates automatic reversal--- will provide a legitimate basis for Supreme Court review. Judge Baird's treatment

of Robert S. Tripka appears to conform more to a norm of sloppy, slovenly trial court procedure, utterly derogatory of the rules of civil procedure, practiced in mortgage foreclosure cases in Florida.

40. Owing to the mass of mortgage foreclosures in this state over the past decade, judicial standards for summary judgment, as applied in mortgage foreclosure cases, have been consistently, improperly, asserted and misapplied by foreclosure plaintiffs, anxious to uphold "no doc" (lost note, lost chain of title, unendorsed) claims to "legal" debt-collection and enforcement.

41. The misapplication or disregard of the rules by "white shoe attorneys" for foreclosure plaintiffs has become so common that many Florida circuit court judges have also forgotten, confuse, or else found it convenient and expeditious to ignore, the most basic rules of civil procedure and due process jurisprudence.

42. No rule of civil procedure is more critical to due process of law than that a judge must never make "ANY credibility calls or balancing of the weight of evidence on summary judgment." Where the evidence is not internally consistent, regardless of who offers the evidence, and where any doubts about the consistency of evidence exist, material issues for trial exist.

43. Robert S. Tripka submits that the evidence as described by Wachovia in its ACAB creates more than a slight doubt in the mind of any reasonable person, and accordingly, that Judge W. Douglas Baird should have denied summary judgment and allowed this case to proceed to trial.

44. Florida circuit court judges, who are still faced with an overwhelming volume of such cases. Uniformity in the application of laws and rules relating to

admissibility of evidence and the use of evidence by judges on motions for summary judgment in foreclosure cases must be maintained. And where the rules have, by mass application, lost their uniformity, it is critical for the courts to standardize court procedure in the application of rules of evidence and admissibility, construction and use in summary judgment.

45. Such standardization and uniformity constitutes a matter of critical public importance for the maintenance of justice and equity to the hundreds of thousands of Florida residents subject to loss of their property to illegal claimants who lack standing as genuine creditors or even lawful collection servicers, nominees, or agents of legitimate creditors.

THIRD ISSUE REQUIRING REHEARING but specifically REQUIRING REHEARING EN BANC and/or CERTIFICATION--- A SPLIT IN THE DISTRICT COURTS OF APPEAL: 3rd District *DEAKTER & GUERRERO* COMPARED WITH 2nd DISTRICT *BLITCH*, *CORREA*, & *SORRELL*

46. Wachovia's ACAB, at 32-29, asserts that Judge Baird correctly found that Wachovia "established its entitlement to enforce the lost note."

47. Of course, this is precisely the question upon which Judge Baird found "no credible evidence to the contrary" as discussed above.

48. But in this portion of Robert S. Tripka's Motion pursuant to Rules 9.330-9.331 of the Florida Rules of Civil Procedure, the Appellant brings to the Court's attention a radical split between the Second and Third District Courts of Appeal in regard to the legal analysis of the evidence and levels of specificity required by a claimant proposing to foreclose based on a "lost note."

49. Florida's Third District held in ***Deakter v. Menendez***, 830 So.2d 124 (Fla.App. 3 Dist. 2002) that a claimant (1) need not know whether a note was lost or destroyed, and that "there is no requirement that [the lost note proponent] prove exactly *how* he lost possession of the note, (2) need not have possession of the note when the loss occurred, (3) that no more than an oath of a single witness is necessary to prove a lack of transfer, and (4) that a proponent need not have possession of a note in order to assign it, such that a transfer which occurs after loss or destruction of a note is still valid.

50. Wachovia's ACAB cites ***Deakter v. Menendez*** , 830 So.2d 124, 127-128 (Fla.App. 3 Dist 2002) at pages 36 and 39. Curiously, Wachovia's ACAB cites ONLY two Florida state cases on the pre-requisites to reestablishing "lost notes" in this section, and very few other cases (all of which relate to waiver of evidence of non-jurisdictional issues) in its entire analysis and argument on pages 32-39 of the ACAB.

51. In addition to ***Deakter***, on page 34, Wachovia cites ***Correa v. U.S. National Bank Association***, 118 So.2d 952 (Fla.App. 2 Dist. 2013), but in doing so completely misrepresents the holdings of former Chief Judge Silberman's opinion in that critical and seminal case.

52. Wachovia's argument, starting on ACAB page 32, focuses again on trying to prove that borrower has waived its objections to inadmissible evidence without reference to the fact that waivers to defects in jurisdiction, including the evidence offered to support subject-matter jurisdiction, are utterly beyond the power of any party to waive.

53. But this argument is purely an intentional distraction, a ploy to decoy and divert the Court's attention from the real problems in Wachovia's application of the law to the facts of this case.

54. Wachovia, in fact, only cites ***Correa*** as a context or frame within which to recite the indisputable terms of §673.3091(1)-(2), Florida Statutes. ACAB at 34.

NO WAIVER OF OBJECTION TO EVIDENCE IN CORREA

55. First, and most radically contrary to both ***Deakter*** and the Circuit Court's decision in the present case (and Wachovia's argument in its ACAB, at 32-29) Judge Silberman's opinion in ***Correa*** found that Appellant/Homeowner and alleged mortgage debtor "Correa has not waived review of the sufficiency of the evidence by failing to make an objection on this exact basis at the bench trial." 118 So.3d at 954, citing Fla R. Civ. P. 1.530(e).

56. If a party has not waived an objection to sufficiency of the evidence underlying standing and jurisdiction by failure to object in a full-blown trial, to disallow such an objection or to treat standing/jurisdiction as "waived" or "established by acquiescence" after cross-motions for summary judgment on the inextricably intertwined issues of standing and jurisdiction defies logic and common sense.

57. Such a disparate treatment of the "limited and restricted" written context of summary judgment proceedings as subject to a higher standard for preservation of objection vs. a significantly lower standard (as articulated by Judge Silberman in ***Correa***) for the "open and oral" framework of a full-blown live trial would create an unconstitutionally incoherence amounting to a state of the law on preservation

of error which would be "void for vagueness" because it would cause a plain denial of due process.

58. It is simply impossible, because it would be manifestly unjust that a stricter standard for avoiding waiver would apply to summary judgments, decided entirely on the papers and record, than to a full-blown live trial.

59. This one single aspect and element of this District Court's August 2013 decision in ***Correa*** utterly eviscerates 80% of the argument contained in Wachovia's ACAB.

MICHELLE THOMAS's TESTIMONY OFFERED NO PROOF THAT LOSS OF POSSESSION OF TRIPKA'S NOTE WAS NOT THE RESULT OF TRANSFER

60. At pages 35-38 of the ACAB, Wachovia valiantly advocates that the testimony of two people, Angela Deanna Lacsamana-Keller ("one of [Wachovia's] vice-presidents of loan documentation") and Michelle Thomas (a "loan verification analyst who had been employed by Lender for almost 18 years and had worked for Lender when it was World Savings Bank, N.A.") supports the legitimacy of Wachovia's "Lost Note" theory of standing to foreclosure/jurisdiction of the foreclosure court over the controversy.

61. Neither of these ladies testified to EVER HAVING SEEN ROBERT S. TRIPKA'S NOTE or to having had any direct or personal knowledge concerning his note WHATSOEVER. Their testimony constitutes the entire basis for "Lost Note" standing in ***Wachovia v. Tripka***, and it is disgracefully inadequate.

62. Lacsamana-Keller and Thomas based their OPINIONS and CONCLUSIONS about Robert S. Tripka's note WITHOUT ANY BASIS IN

DIRECT KNOWLEDGE BASED ON PERSONAL OBSERVATION OF OR CONTACT WITH TRIPKA'S NOTE, OR (in fact) ANY NOTES WHATSOEVER. Their testimony at best might qualify as "expert witness" testimony, but they are not fact witnesses to any real transactions or occurrences giving rise to this lawsuit.

63. Without regard to whether their testimony was admissible or not, without regard to whether Robert S. Tripka preserved his objections or (impossibly) waived them, these witnesses' total lack of personal knowledge REGARDING THE BASIS FOR THE CIRCUIT COURT'S JURISDICTION should cause a reasonable and significant doubt in the mind of both Sixth Circuit Judge W. Douglas Baird in Pinellas County and the initial panel reviewing this case on appeal here in this Second District Court of Appeal.

64. Exactly like the witness for U.S. Bank, N.A., in ***Correa***, a certain Mr. Alex Gomez, the two witnesses for Wachovia in this case "had no idea how or when the note was lost, and … did not know if the loss occurred while One West was in possession of it." 118 So.3d at 954-955 (One West was alleged to have assigned the note to U.S. Bank in the ***Correa*** case).

65. From the pages of ACAB 6-7, 11, 15, and 36-38 any reasonably attentive reader can readily discern that Michelle Thomas had only evidence as to her own investigation, which revealed nothing specific about the history of Tripka's loan or note whatsoever, and that Angela Deanna Lacsamana-Keller knew even less about the transactional history of the note in question than Michelle Thomas.

66. Robert S. Tripka stated his opinion and conclusion, above, that attorneys for mortgage foreclosure plaintiffs often twist the law to suit their own purposes.

67. Nowhere does the ACAB shout out such a twist as at ACAB page 37, wherein Wachovia's attorneys cite a case, ***Wells Fargo v. Ayers***, 219 So.3d 89 (Fla.App. 4 Dist. 2017)[1], to prove that "bank's [a "loan verification analyst," exactly Michelle Thomas' title] unrebutted routine evidence that it contact its prior law firm to search for the note was sufficient to make a prima facie case".

68. Wachovia asserts, rather proudly: "the affidavit in ***Ayers*** is identical to the affidavit in this case as it relates to Lenders' due diligence search for the lost note." ACAB, *id.,* at 37.

69. What is somewhat hilarious and laughable about Wachovia's citation of the ***Ayers*** case is that the Fourth District Court only found that this story about delivery to an precluded involuntary dismissal, and actually remanded, requiring a trial of the issues, NOT finding that this story established a valid excuse for a lost note. The District Court in ***Ayers*** found that the Circuit Court erred only insofar as "We have repeatedly held that a trial court may not involuntarily dismiss an action before the Plaintiff has rested its case." ***Ayers*** 219 So.3d at 92, (quoting ***Fisher v. Fisher***, 195 So.3d 1170, 1172 (Fla. 4th DCA 2016).

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[1] The full case citation appears in the table of context only to a 2017 WL (Westlaw) number, but not in the text of ACAB, perhaps because the case had not been published as of Wachovia's service of its ACAB on May 9, 2017.

[2] Judge Silberman also cited a pair of twenty-five year old cases from the 2nd DCA, including ***Carlough v. Nationwide Mutual Fire Ins. Co.***, 609 So.2d 770-771-772 (Fla. 2nd DCA 1992) in which the Second District denied a losing party the chance "to present evidence which it failed to produce at the scheduled evidentiary hearing", along with a Fourth District Court case ***Teco. Inc., v. WM-TAB, Inc.,*** 726 So.2d 828, 830 (Fla. 4th DCA 1999), all these cases preceding ***Deakter*** which preceded ***Correa***, thus confirming a long-standing split in the District Courts.

70. ***Ayers*** most emphatically does NOT stand for the proposition that a routine practice of delivering a promissory note to an attorney for collection provides sufficient evidence to support either standing or jurisdiction, merely that a claim of such delivery, effectively PRECLUDES SUMMARY JUDGMENT AND CREATES A TRIABLE, ALBEIT AMBIGUOUS, GENUINE ISSUE OR QUESTION OF MATERIAL FACT.

WACHOVIA NEVER HAD THE ORIGINAL NOTE IN 2009: THE 12,000 POUND AFRICAN BULL ELEPHANT IN THE ROOM

71. In a single small paragraph at the bottom of ACAB page 37 and the top of ACAB page 38, Wachovia effectively admits, again to the reasonably awake and perceptive reader, that Appellee NEVER EVER POSSESSED AN ORIGINAL NOTE AT THE TIME OF FILING THE COMPLAINT AGAINST TRIPKA.

72. Wachovia's counsel frame the issue as follows:

> …Thomas' deposition testimony confirms and provides additional evidence as to Lender's loss of possession of the original Note. Thomas testified that her investigation and review of lender's business records reflected that lender sent the original Note to their foreclosure counsel, Kass Shuler, on August 5, 2009, and confirmed Kass Shuler's receipt of and their obligation to file the original Note in the action. (R. 1119-32, 1136-44). Thomas further stated that although Kass Shuler purportedly filed the original Note in June 2010, and Lender believed the original Note to be filed, Borrower---several years later---claimed that it was a copy. ***Id.*** Thereafter, Lender and its counsel confirmed this claim after reviewing the Note in the court file. (R. 1143). Thomas knew that the original Note had been lost after Lender sent it to Kass Shuler, but she did not know the specific circumstances surrounding the loss.

ACAB at 37-38.

71. This paragraph alone avers doubtful evidence regarding which Judge W. Douglas Baird clearly made a credibility call (although Robert S. Tripka would submit that first the Circuit Court Judge's decision to endorse and then the Second District Court initial Panel's to affirm this story and take Wachovia's side in this debate was and remains nothing short of "incredible").

72. While Wachovia, understandably, in its ACAB does everything it can to refer to the "Copy" of the Note submitted by Kass Shuler, another way of describing this "Copy" is that it was a counterfeit note submitted with fraudulent intent to imitate an "original" note which had in fact been sold and transferred.

73. And that is why chain of title/chain of custody is so critical to be established in this and every foreclosure case, so long as Florida continues to adhere to the policies and programs established by the Uniform Commercial Code in regard to negotiable instruments:

> Because a promissory note is a negotiable instrument, a plaintiff seeking to foreclose on a defendant *must produce the original note* (or provide satisfactory explanation of the failure to produce) *and surrender it to the court* or court clerk *before* the issuance of a final judgment in order to take it out of commerce.

Deutsche Bank National Trust Company v. Huber, 137 So.3d 562 at 564 (Fla.App. 4 Dist 2014).

74. If Judge Baird had allowed this case to go to trial, or if this Court were to reverse and remand, as it clearly must, under the circumstances, upon a full-and-fair rehearing or rehearing en banc, the following objections could have been or could be made at trial. First among these:

> …Thomas' deposition testimony confirms and provides additional evidence as to Lender's loss of possession of the original Note. Thomas testified that her investigation and review of lender's business records reflected that lender sent the original Note to their foreclosure counsel, Kass Shuler, on August 5, 2009, and confirmed Kass Shuler's receipt of and their obligation to file the original Note in the action. (R. 1119-32, 1136-44). Thomas further stated that although Kass Shuler purportedly filed the original Note in June 2010, and Lender believed the original Note to be filed, ……

75. Objections (ignoring "hearsay" and whether the records consulted were really "kept in the ordinary course of business" for the moment): **"As to each of these three sentences quoted above, Plaintiff's witness' testimony presupposes facts not otherwise in evidence,**" in that NO evidence provided by Thomas or Lacsamana-Keller indicates that the "Note" in the possession of Wachovia prior to transmission to Kass Shuler on August 5, 2009, was actually the Original Note.

76. Unless Wachovia could establish a continuous chain of title and chain of possession and custody from the moment Tripka signed an original note until August 5, 2009, only evidence of an actual examination of the note on or about August 5, 2009, either at the Wachovia (sending) end or the Kass Shuler (receiving) end could establish that the Original Note, rather than a copy, was transmitted on that date.

77. The only facts ACTUALLY established by this testimony as summarized are that (1) Wachovia contends that it possessed the original Note, (2) Thomas reviewed the "lender's" business records and reported what these records said, (3) the "lender" gave its attorney Kass Shuler instructions to follow Florida law by

filing original Note, (4) Kass Shuler claimed to file the original Note, and (5) the "lender believed the original Note to be filed,…."

78. Taking these facts as true does NOT establish that Wachovia possessed the original note AT ANY TIME DURING 2009, or that Robert S. Tripka's original note had not been lost or transferred, for example, by securitization, many years before August 5, 2009.

THE PLOT THICKENS---HOW DID TRIPKA GUESS IT RIGHT?

79. Sometimes litigation seems like an absurd ballet. This is one of those occasions. It is absurd because common sense and intuitive likelihoods regarding truth seem to play little or no part in the process. The balance of the paragraph overlapping ACAB pages 37-38 states as follows:

> Borrower – several years later – claimed that it was a copy. *Id.* Thereafter, Lender and its counsel confirmed this claim after reviewing the Note in the court file. (R. 1143). Thomas knew that the original Note had been lost after Lender sent it to Kass Shuler, but she did not know the specific circumstances surrounding the loss. (R. 1119-32, 1136-44).

80. "Thomas knew that the original Note had been lost after Lender sent it to Kass Shuler." Oh really? And how did she know that if she had no evidence that it was the original note that was SENT to Kass Schuler?

81. "But she did not know the specific circumstances surrounding the loss."

CONCLUSION OF THIRD ISSUE REQUIRING REHEARING EN BANC OR CERTIFICATION: DEAKTER v. CORREA SPLIT GOVERNS THIS CASE

82. Now the ***Deakter-Correa*** 2nd-3rd District split really gets interesting.

83. An apparent split between the 2nd and 3rd District Courts of Appeal in Florida justifies a rehearing en banc or certification the Supreme Court of Florida.

84. "Lost Mortgage Note" cases have proliferated the Florida Courts for some imprecisely understood reason over the past ten years.

85. This "Lost Note" phenomenon may reflect some "extrinsic factors", even a widespread extrinsic fraud on the Courts and people, which may need to be resolved in another case, perhaps even arising from the facts of this case as a Independent Action or Complaint for Equitable Bill of Review under Florida Civil Rule 1.540(b).

86. But for the present moment, there is a split in the Courts between the Third District Court of Appeals' decision in ***Deakter v. Menendez***, on which Plaintiff/Appellee Wachovia relies in this case, and the Second District's opinion in ***Correa v. U.S. Bank*** and its progeny including ***Eagles Master Association, Inc., v. Bank of America, et al.***, 198 So.3d 12 (Fla.App. 2 Dist. 2015) ***Blitch v. Freedom Mortgage Corporation***, 185 So.3d 645 (Fla.App. 2 Dist. 2016) and ***Michael Sorrell v. U.S. Bank National Association***, 198 So.3d 845 (Fla.App. 2 Dist. 2016).

87. Judge Silberman in ***Correa*** cites ***Deakter,*** only for the proposition that "the plaintiff [in ***Deakter***] met the requirements of section 673.3091(1)(b) by averring under oath that the original note was lost and he did not transfer it." (The Plaintiff in Deakter plainly had personal knowledge, because it was a family business and individual-to-individual transaction.)

88. After this citation, Judge Silberman then refers to and paraphrases Alex Gomez, in the line recited above, "Gomez admitted that he had no idea how or when the note was lost, and he did not know if the loss occurred while OneWest was in possession of it." ***Correa***, 118 So.3d at 955.

89. Judge Silberman, in ***Correa***, goes on to hammer U.S. Bank, N.A., by entering an involuntary dismissal of the complaint, with prejudice to amending or re-filing its case, handing ***Correa*** an unqualified victory annulling U.S. Bank's attempted foreclosure. 118 So.3d at 957. Silberman cited another 3rd District case, ***Guerrero v. Chase Home Fin., LLC***, 83 So.3d 970 (Fla.3d DCA 2012) in which a "lender" allowed to amend pleadings after a late attempt at adding "lost note" amended pleadings was denied in Circuit Court.

90. In ***Correa***, as in *Wachovia v. Tripka*, the Plaintiff had known about its "Lost Note" long before ***Correa's*** trial/***Tripka's*** hearing on cross-motions for summary judgment, and so the Plaintiff in ***Correa*** did not get "a second bite at the apple[2]."

91. Of course, one way to reconcile ***Correa*** with ***Deakter*** is to compare and contrast the nature of the loans and the parties.

92. ***Deakter*** was an arms-length "hard money" loan among individuals and family members who knew each other. 830 So.2d 124, 127-128.

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[2] Judge Silberman also cited a pair of twenty-five year old cases from the 2nd DCA, including ***Carlough v. Nationwide Mutual Fire Ins. Co.***, 609 So.2d 770-771-772 (Fla. 2nd DCA 1992) in which the Second District denied a losing party the chance "to present evidence which it failed to produce at the scheduled evidentiary hearing", along with a Fourth District Court case ***Teco. Inc., v. WM-TAB, Inc.,*** 726 So.2d 828, 830 (Fla. 4th DCA 1999), all these cases preceding ***Deakter*** which preceded ***Correa***, thus confirming a long-standing split in the District Courts. Judge Silberman also cites ***Beaumont v. Bank of N.Y. Mellon***, 81 So.3d 553 (Fla.App. 5 DCA 2012), an earlier case where a lost note claim was dismissed.

93. Despite the fact that the Plaintiff in ***Deakter*** had no personal knowledge of exactly how the promissory note in that case was lost or destroyed, the individuals who were involved in the creation and processing of the note were all available to testify and provide strong circumstantial and chronological evidence of the exact placement and repository of the note, and the circumstances (a divorce involving the original lender's daughter) leading to the loss or destruction of the note (loss or destruction of property and papers being a fairly commonplace event in divorces).

94. So even when the Third Circuit allowed the Plaintiff in ***Deakter*** to re-establish the note based purely on testimony, it was the testimony of the original and factually involved legal parties in interest which led to

95. How radically different from the family "hard-money loan" in ***Deakter*** is the situation in ***Beaumont, Correa, Blitch, and Sorrell***, all of which involved Banks lending to individuals!?!

96. Defendant/Appellant Robert S. Tripka submits that the differences between ***Deakter*** and ***Correa*** can be explained in this way, but the Third District's decision in ***Guerrero*** suggests that there may indeed be a solid "Third District" line of cases setting a lower standard of the proof required for reestablishment of a lost note.

97. Unfortunately for Robert S. Tripka, Judge W. Douglas Baird (although he presided over a 6th Circuit in Pinellas County located within the Second District) followed the Third District Court of Appeals policy line rather than the well-established hard line requiring substantial proof of the requirements for lost notes in the Second, Fourth, and Fifth District Courts of Appeal.

98. For example, particularly, supportive of the Correa-Blitch-Sorrell line of cases in the Second Circuit is Judge Warner's opinion in ***Robelto*** from Florida's Fourth District Court of Appeal reviewing a Broward County case:

> A finding that a lost note is reestablished under §673.3091, Florida Statutes, is reversible upon the appellate court determination of a failure of proof." ***Sidler v. Wells Fargo Bank, N.A.*** 179. So.3d 416, 417, (Fla.1st DCA 2015).
> * * * * * *
> No evidence explained… whether [Wells Fargo] was a holder or non-holder with rights of a holder. If Wells Fargo was a servicer, no testimony explained for whom Wells Fargo was servicing the loan.
> The representative stated that the [plaintiff] had possession of the note when the case was filed, but she only "believed" that because the complaint was filed. She had no personal knowledge of this, and thus her testimony is solely based upon any business records which might show possession.

Robelto v. U.S. Bank Trust, N.A., 194 So.3d 429 at 432 (Fla.App. 4 Dist. May 4, 2016).

99. Judge Warner emphasized that a foreclosure plaintiff must have and offer competent proof of entitlement to foreclose on the day that such a plaintiff executes and files its foreclosure complaint.

CERTIFICATION PURSUANT TO F.R.A.P. Rule 9.331

100. I, the undersigned attorney and counselor for Appellant Homeowner Robert S. Tripka, express my belief, based on a reasoned and studied professional judgment, that the three issues presented and outlined above, are of exceptional importance to the jurisprudence, economy and people of Florida.

101. In particular, I submit that the question of whether standing to foreclose amounts to a jurisdictional question, is a question of critical importance in this state, plagued as it is with judicial foreclosures numbering in the tens of thousands even now, ten years after the crisis began.

102. I submit that a defendant must have the right to challenge standing as a jurisdictional matter at any and every stage of the judicial process, and that the capacity to challenge standing as inextricably intertwined with jurisdiction includes the power to challenge and question all evidence supporting the assertions of standing and other jurisdictional facts, whether "preserved" as other elements of proof must be preserved on appeal, or not.

103. Waiver of challenges to "Original Note" standing should simply be defined as legally and equitably impossible, just as it has long been held that parties cannot create jurisdiction by agreement, acquiescence, or waiver.

104. Further, I express my additional belief, based on a reasoned and studied professional judgment, that the panel per curiam decision in *Wachovia v. Tripka* is contrary to the following decision(s) of this court and other courts in Florida, and that a consideration by the full court, and/or certification to the Supreme Court, is necessary to maintain uniformity of decisions in this court:

105. The panel per curiam decision entered by the initial Second District panel in this case (*Wachovia v. Tripka*) on Friday September 15, 2017, plainly derogated from the Second District's recent line of "Lost Note" decisions beginning at least with ***Correa v. U.S. Bank, N.A.***, 118 So.3d 952 (Fla.App. 2 Dist. 2013), ***Eagles Master Association v. Bank of America, N.A.***, 198 SO.3d 12 (Fla.App. 2 Dist. 2015) ***Blitch v. Freedom Mortgage Corporation***, 185 So.3d 645 (Fla.App. 2 Dist. 2016), ***Sorrell v. U.S. Bank National Association***, 845 (Fla.App. 2 Dist. 2016), ***Peters v. Bank of New York Mellon***, ___ So.3d ____, 2017 WL 2304263 (Fla.App. 2 Dist. 2017).

106. The panel decision also plainly deviated from the Fourth District's related line of "Lost Note" decisions exemplified by ***Robelto v. U.S. Bank Trust, N.A.***, 194 So.3d 429 (Fla.App. 4 Dist. 2016).

107. Judge Warner in ***Robelto*** specifically held, with great relevance and significance to this case of *Wachovia v. Tripka* that "A finding that a lost promissory note is reestablished under Article 3 of the Uniform Commercial Code (UCC) is reversible upon appellate court determination of a failure of proof." It should be noted that ***Robelto***, like ***Correa***, was a final reversal without remand, an overwhelming defeat for the claimant to "lender" status, and a victory for the Florida homeowner.

108. Another important and consistent case from the Fourth District Court of Appeal is the case of ***Deutsche Bank National Trust Company v. Huber***, 137 So.3d 562 (Fla.App. 4 Dist. 2014) which establishes important procedural parameters including the procedural relationship between motions for summary judgment, directed verdict, and involuntary dismissal as different aspects of summary disposition without full trial.

109. The panel decision also plainly deviated from the Fifth District Court of Appeal's (comparable to the Second District as this state's longest) series of decisions on lost mortgage notes, beginning with ***Beaumont v. Bank of N.Y. Mellon***, 81 So.3d 553 (Fla.App. 5 DCA 2012), ***Delia v. GMAC Mortgage Corporation***, 161 So.3d 554 (Fla.App. 5 Dist. 2014), ***Figueroa v. Federal National Mortgage Asssociation***, 180 So.3d 1110 (Fla.App. 5 DCA 2015)--- another dramatically worded opinion, like ***Correa*** and ***Robelto***, in a case which

resulted in a reversal based on failure to reestablish a note, with order of remand only for the purpose of involuntary dismissal with prejudice, ***Home Outlet, L.L.C., v U.S Bank National Association***, 194 So.3d 1075 (Fla.App. 5 Dist. 2016), and a case decided just last week, on October 20, 2017, namely ***Wisman v. Nationstar Mortgage, LLC***, ____ So.3d ____, 2017 WL 4699718 (Fla.App. 5 Dist. 2017).

110. The initial panel's decision in *Wachovia v. Tripka* is clearly inconsistent with at least one case from Florida's First District Court of Appeal, namely ***Seidler v. Wells Fargo Bank, N.A.,*** 179 So.3d 416 (Fla.App. 1 Dist. 2015).

111. DISTRICT SPLIT: By way of a clearly evident split among the Florida District Courts of Appeal, the initial panel's decision in this case is at least arguably consistent with the two Third District Court of Appeals' Decisions in ***Deakter v. Menendez*** , 830 SO.3d 124 (Fla.App. 3 Dist. 2002) and ***Guerrero v. Chase Home Finance, LLC***, 83 So.3d 970 (Fla.App. 3 Dist. 2012).

CONCLUSIONS:
IS ROBERT S. TRIPKA'S CASE REALLY AN "OUTLIER?"

112. Robert S. Tripka files this Motion for Written Order, Motion for Rehearing and/or Rehearing en Banc, and/or Motion for Certification of issues to the Florida Supreme Court, because the initial Second Circuit Panel, in deciding against Robert S. Tripka in this case, has deviated from the norm of Florida jurisprudence in FOUR out of FIVE of the Florida District Courts of appeal.

113. If this Court should refuse to amend or alter its judgment of per curiam affirmance, this Court should justify its decision by entering a written opinion including a detailed analytical outline and summary of the case to explain why

Robert S. Tripka's lost note was so conclusively established at trial as to be worthy of a per curiam affirmance in the first place.

114. Robert S. Tripka submits that this decision will stand out, all but totally unique among Florida Lost Note cases of recent vintage as a per curiam affirmance of a wildly incorrect and inaccurate circuit court decision on summary judgment.

115. The conflict suggested by Deakter and Guerrero against all the other District Courts of Appeal cases cited above concerning a matter of great public importance provides a solid ground for a Written Opinion, Motion for Rehearing en Banc, and/or Certification to the Florida Supreme Court prior to filing a Petition for Discretionary Review to the Florida Supreme Court under the following provisions of Rule 9.030(a)(2)(A):

> (iv) expressly and directly conflict with a decision of another district court of appeal or of the supreme court on the same question of law;
> (v) pass upon a question certified to be of great public importance;

116. Judge W. Douglas Baird's handling of the summary judgment evidence leading up to his order of judgment in favor of Wachovia against Robert S. Tripka's in this foreclosure stands almost alone against all other lost note cases appealed in Florida, and such circumstances warrant an opinion without any doubt at all. Appellant, accordingly, now submits his present motion for a Written Opinion, Rehearing, Rehearing en Banc, and/or for Certification.

CERTIFICATE OF SERVICE

I certify that I have served a copy of the above-and-foregoing Motion for Written Order and Opinion, Motion for Rehearing and/or Rehearing en Banc, and/or Motion for Certification to the Florida Supreme Court on appellee's last known counsel of record, to wit:

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PRAYER FOR RELIEF

Wherefore, Appellant Robert S. Tripka moves and prays that this Court will either grant his Motion for a Written Order, his Motion for Rehearing and/or Rehearing en Banc, and/or his Motion for Certification of all three issues outlined above to the Supreme Court of the State of Florida.

SUBMISSION

Signed and submitted on this Tuesday 24th day of October, 2017, to the Florida 2nd District Court of Appeals with copy to counsel for the appellee and other interested parties at the above-noted addresses.

Respectfully submitted,

/s/Steve Bartlett, Esq.

_____

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CERTIFICATE OF COMPLIANCE

Although neither Motions in general nor Motions in particular under FRAP Rules 9.330-9.331 are not specifically mentioned in Rule 9.210 of the Florida Rules of Appellate Procedure, I certify that this, Robert S. Tripka's Combined Motion for Written Order or Opinion, Motion for Rehearing and/or Rehearing en Banc, and/or Motion for Certification to the Florida Supreme Court, is prepared in Times New Roman 14 -point print.

/s/Steve Bartlett, Esq.

_____

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