IN THE SECOND DISTRICT COURT OF APPEAL
IN AND FOR THE STATE OF FLORIDA

DEBORAH E. FOCHT,

Appellant,

v.

Case No.: 2D11-4511
*consolidated with* 2D11-4980

WELLS FARGO BANK, N.A., *et. al.*,

L.T. No.: 2008-CA-791

Appellee.
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**MOTION FOR REHEARING AND REHEARING *EN BANC***

Appellant, Deborah E. Focht ("Focht"), by and through her undersigned counsel and pursuant to Fla.R.App.Pro. 9.330 and 9.331, moves this court for rehearing and rehearing *en banc* of its September 25, 2013 written opinion in this case, and would show:

**OVERVIEW AND RELIEF REQUESTED**

1. On September 25, 2013, this Court appropriately reversed the lower court's Final Judgment of Foreclosure via written opinion based on the absence of any evidence that Appellee, Wells Fargo Bank, N.A. ("Wells Fargo") had standing at the inception of the underlying foreclosure lawsuit. That portion of the Court's ruling was correct and Focht does not ask it to be changed in any way.

2. That said, Focht respectfully submits that portion of the opinion which certified the issue of "standing at inception" as a question of great public

importance was misplaced, as was Judge Altenbernd's concurring opinion. Hence, for the reasons set forth herein, Focht respectfully requests rehearing and a revised opinion which eliminates the certified question.

## ANALYSIS

3. In the case at bar, this Court certified the long-standing obligation of a foreclosure plaintiff to prove standing at the inception of a lawsuit as a question of great public importance. The majority does not elaborate on the reasons for so ruling, but Judge Altenbernd's concurring opinion strongly indicates the Court's decision is based partly if not entirely on a desire to adjudicate foreclosure lawsuits more expeditiously.

4. It is a bedrock principle of law that expediency takes a back seat to justice. In 1939, the Florida Supreme Court explained why:

> [T]he question of expediency is for legislative, not judicial, consideration. When expediency is allowed to control judicial conclusions we shall have abandoned government by rule of law in favor of government by rule of men and our legal foundations will be as shifting as the sands and as changing as is the trend of public opinion.

Kilgore Groves, Inc. v. Mayo, 139 Fla. 874 (Fla. 1939).

5. Following Kilgore, many Florida cases in a variety of legal contexts have emphasized the need for exalting justice over expediency.[1] In fact, this very

[1] See Heart of Adoptions, Inc. v. J.A., 963 So. 2d 189 (Fla. 2007) ("Of course, expediency can never come at the expense of justice."); N.S.H. v. Fla. Dep't of

Court has rebuked the role of expediency in judicial determinations, explaining:

> it is axiomatic that judicial decision prompted by temporary expediency tends to make bad law.

In re Estate of Lubbe, 142 So. 2d 130 (Fla. 2d DCA 1962).

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Children & Family Servs., 843 So. 2d 898 (Fla. 2003) ("we must thoroughly recognize that there are higher values in a system which professes to do justice … than mere speed of operation and speed for the purpose of expediency."); State v. Bamber, 630 So. 2d 1048 (Fla. 1994) (rejecting expediency in context of requiring lawful search and seizure); United Tel. Co. v. Beard, 611 So. 2d 1240 (Fla. 1993) ("Nor can there be any "compromise on the footing of convenience or expediency . . . when the minimal requirement of a fair hearing has been neglected or ignored."); Sturiano v. Brooks, 523 So. 2d 1126 (Fla. 1988) ("We will not … promote injustice for the sake of expediency …"); Kritzman v. State, 520 So. 2d 568 (Fla. 1988) ("The fundamental right to a fair trial can never be overridden by the convenience and expediency that a joint trial may produce."); Fla. Gas Co. v. Hawkins, 372 So. 2d 1118 (Fla. 1979) ("There can be no compromise on the footing of convenience or expediency, or because of a natural desire to avoid delay, when the minimal requirement of a fair hearing has been neglected or ignored."); The Florida Bar v. Teitelman, 261 So. 2d 140 (Fla. 1972) ("The profession's image and standing are more important than the expediency which supposedly demands mass production procedures."); Covey v. Eppes, 153 So. 2d 3 (Fla. 1963) ("…the difficulty of determining factual issues does not justify a rule of expediency."); Wenshaw v. Smith, 151 So. 2d 3 (Fla. 1963) ("It is urged that the requirements of the Hardy case with reference to adequate findings, and similar cases which have followed it, place a great burden on already overburdened deputy commissioners. Expediency, however great, cannot justify a circumvention of such a basic concept in the review of actions of administrative agencies."); McCauslin v. O'Conner, 985 So. 2d 558 (Fla. 5th DCA 2008) ("We cannot and must not sacrifice the integrity of the jury process in the name of expediency."); Connor v. State, 944 So. 2d 488 (Fla. 5th DCA 2006) ("While the trial judge may have intended to expedite his docket by ending his judicial labor once his self-imposed deadline had expired, I believe that the rights of crime victims far outweigh the limited benefit of judicial expediency."); King v. State, 461 So. 2d 1370 (Fla. 4th DCA 1985) ("we do not believe that expediency should form the basis of a procedure which effectively deprives a litigant from selecting a jury panel as a whole and deprives him of the free exercise of his peremptory challenges.").

6. Unfortunately, this Court overlooked this entire concept in its written opinion, failing to cite a single authority in support of its view that well-established law should be changed in the name of judicial expediency. In fact, this Court purports to exalt expediency over established law without even mentioning the doctrine of *stare decisis*. See Rotemi Realty, Inc. v. Act Realty Co., 911 So. 2d 1181 (Fla. 2005) (applying the doctrine of *stare decisis* because it "provides stability to the law and to the society governed by that law"). For that reason alone, rehearing is appropriate.

7. This Court appears to feel strongly about changing the law regarding "standing at inception" for expediency's sake. It seems equity is playing a part in that view. Regardless, changing the law for expediency's sake is not within the purview of this Court – or any court. As Kilgore explained, only the legislature can elevate expediency to such a level. 139 Fla. at 894.

8. In situations such as this, courts often know the legislature must decide an issue but are left to speculate what the legislature thinks. Fortunately, there is no doubt here. Effective July 1, 2013, the legislature now requires all foreclosure plaintiffs to plead certain facts in their original complaint, including facts establishing the plaintiff's standing to foreclose at the inception of the lawsuit.[2] See Fla. Stat. 702.015. As such, there is no way to reconcile this Court's

[2] By definition, these facts must establish the plaintiff's standing at inception, as

certified question with Kilgore or the legislature's enactment of Fla. Stat. 702.015. In other words, this Court cannot justify certifying "standing at inception" as a question of great public importance – as if it were a bona-fide question – when the legislature already requires facts showing "standing at inception" via a recently-enacted bill (consistent with years of established precedent from Florida courts). Quite simply, there is no "question" to decide – the legislature has already spoken.

9. In this same vein, there is no way to reconcile this Court's certified question with the Florida Supreme Court's verification requirement in Rule 1.110(b). After all, requiring a foreclosure plaintiff to "verify" a complaint (to include the requisite "owner and holder" allegations), yet allowing that same plaintiff to become the owner and holder after filing suit would completely emasculate the requirements of Rule 1.110(b). See In re. Amendments, 51 So. 3d 1140 (Fla. 2010). What would a plaintiff verify? "Plaintiff is not the holder but intends to be"? "Plaintiff is not the holder but will acquire the Note in the future"? "Plaintiff is the holder [even though it isn't]"? Any such verification would be absurd, false, unenforceable, or all three.[3]

10. The Court's creation of Rule 1.110(b) marked the first time in the history of Florida jurisprudence that the Florida Supreme Court created a rule of

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they are required to be included in the original Complaint.

[3] Verification aside, it is difficult to see how any such plaintiff or its counsel could bring file such a complaint consistent with the requirements of Fla. Stat. 57.105(1).

procedure that heightened the pleading requirements for a particular type of plaintiff given widespread fraud in the industry. See id. With that backdrop, it is misguided for this Court to loosen the standard for a foreclosure plaintiff to prevail – or even suggest that a different court should consider doing so.[4] See id.

11. Accepting this Court's certified question as one of "great public importance" necessarily means that many foreclosure lawsuits have turned on this issue. Clearly, in many cases, foreclosure plaintiffs have been unable to obtain a final judgment of foreclosure because they were unable to prove standing upon filing suit.

12. Respectfully, how pitiful! If that sounds harsh, this Court should think about the dynamics at play and the low bar necessary for a foreclosure

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[4] If a foreclosure plaintiff can show up at trial with the original Note for the first time, having acquired it just that morning, meaningful discovery would cease to exist. This would be particularly problematic because notes are often self-authenticating under the UCC, meaning plaintiffs need not even prove authentication as a prerequisite for admissibility.

Talk about a recipe for fraud! Following this Court's certified question, anyone could stamp an endorsement on a Note on the morning of trial and effectively prohibit inquiry into the circumstances thereof. Worse yet, sophisticated plaintiffs with expensive color copiers can re-create an "original" note at the back offices of LPS or DocX and effectively avoid inquiry on subpoena or cross-examination. If this Court thinks this does not happen, it should look at the criminal prosecution of Lorraine Brown and view a sampling of endorsed notes in foreclosure lawsuits – most such endorsements are not original, wet-ink signatures, but stamps.

Discovery is authorized and appropriate in any case, including foreclosure. See Osorto v. Deutsche Bank Nat'l Trust Co., 88 So. 3d 261 (Fla. 4th DCA 2012). This Court should not effectively eliminate meaningful discovery by allowing a foreclosure plaintiff to obtain the requisite standing right before trial.

plaintiff to prevail.

13. In recent years, the requirements for proving standing in a foreclosure case have been eliminated to the point that they barely exist. Many recent decisions have clarified that a foreclosure plaintiff need only prove it was the "holder," i.e. in possession of an original, endorsed Note, or that it obtained an assignment of the Note. See e.g. BAC Funding Consortium, Inc. ISAOA/ATIMA v. Jean-Jacques, 28 So. 3d 936 (Fla. 2d DCA 2012). Lessening the proof needed to foreclose even further, the Third District has ruled that homeowners lack standing to challenge whether a note was properly conveyed into a securitized trust, completely eliminating that potential defense on the circuit court level, Castillo v. Deutsche Bank Nat'l Trust Co., 89 So. 3d 1069 (Fla. 3d DCA 2012), even as other states recognize that as a viable defense. As a result, foreclosure plaintiffs throughout Florida obtain judgments on a daily basis by doing little more than showing up at trial with a single witness (often an individual who does nothing but testify in these cases), reading the amounts due from a proposed final judgment prepared by counsel, and introducing an original, endorsed (and self-authenticating) Note into evidence.[5]

14. With so little evidence required to take someone's home, is it really

[5] The relative lack of viable defenses for so many homeowners is part of the reason the undersigned pushes the issue of paragraph 22 in such cases, an appeal regarding which is pending before two of the judges on the panel in this case.

much to ask that a foreclosure plaintiff introduce some evidence that it possessed that Note before filing suit? Or that an assignment took place before filing suit? By certifying the question in this case, this Court seems to be saying "yes," that is an onerous task, one worthy of certifying a question of great public importance.

15. Really? A bank's inability to introduce a single business record or a single sentence of testimony showing it possessed the original, endorsed Note is a question of great public importance, worthy of Florida Supreme Court consideration? With all due respect, when in history has this Court ever changed the law (or suggested another court do so), in the face of *stare decisis*, because one particular type of plaintiff in one particular type of case was systematically unable to meet its burden of proof, particularly where the requisite proof was so simple?

16. Focht is mindful of the concerns raised by Judge Altenbernd. The undersigned is equally mindful of the frustration and fatigue this Court may feel at seeing the same issue – standing at inception – over and over again in these cases (particularly here, where the issue was inartfully raised by a *pro se* litigant along with several other arguments that are non-starters). These concerns, however, simply cannot carry the day.

17. To illustrate, can this Court imagine making this ruling in any other context? Suppose, for instance, an economic downturn led not to an increase in foreclosures but to an outbreak of crime, burdening the criminal justice system. If

police officers stopped reading suspects their *Miranda* rights and systematically engaged in warrantless searches and seizures, would this Court contemplate changing the law with an eye towards expediency? The concept of overruling Miranda v. Arizona, 384 U.S. 436 (1966), might sound bizarre, but that's precisely the point.

18. In no context, other than foreclosure, would any court ever contemplate such a ruling (or suggest that another court do so). In fact, earlier this year the First District all but said as much:

> Trial courts are under constant pressure to move cases through the criminal justice system. All judges are fully aware that unless cases are efficiently processed, the burden of backlog begins to choke, and unwanted delays multiply exponentially. One of our primary functions, however, is to make sure that trials are fair. We cannot lose sight of that laudable goal in the name of expediency.

Madison v. State, 38 Fla. L. Weekly D 531 (Fla. 1st DCA 2013).

19. This provision in Madison could be cut and pasted into the decision in this case, yet it is not. Instead, this Court does precisely the opposite. Why? Because this is a foreclosure case? The rules cannot be different for foreclosure lawsuits, and the inability to apply this Court's rationale in this case to any other context is why this Court explained, back in 1962, "judicial decision prompted by temporary expediency tends to make bad law." Lubbe, 142 So. 2d at 130.

20. If this Court changes the law in this manner for foreclosure plaintiffs, who will be next? When there's a crisis in the insurance industry, will those

litigants request the law be changed in the name of expediency? Or will those litigants avoid even asking, knowing that if they clog the judicial system badly enough that the judiciary will come to their rescue by changing the law? What type of message does this send to the public? "Clog the system and we will change the law in your favor so as to unclog it." "Systematically fail to prove your case and we will change the law to make it easier for you." Or, worse yet, will the public see the law was changed for the benefit of behemoth financial institutions? See Teitelman, 261 So. 2d at 140 ("The profession's image and standing are more important than the expediency which supposedly demands mass production procedures.").

21. This Court might intend to only apply this exception in the foreclosure context, but why should foreclosure cases be treated any differently? One of the leading cases regarding "standing at inception" emanated not in the foreclosure context, but in an insurance case. Progressive Express Ins. Co. v. McGrath Community Chiropractic, 913 So. 2d 1281 (Fla. 2d DCA 2005). Is this Court truly prepared to say that substantive law should be different in the foreclosure context compared to other types of cases? Why? Because they are foreclosure suits? Because this Court inherently assumes the defendants in these cases are going to be foreclosed, so expediency should carry the day?

22. The dangers inherent in that line of thinking are no different than the

problems that would arise from ignoring *Miranda* or allowing warrantless searches and seizures in the name of expediency. As the cases set forth in footnote 1 show, justice requires more – regardless of the type of case. Basic notions of due process require more.

23. Focht recognizes the other reasons for this Court's ruling. Respectfully, though, those concerns cannot carry the day, particularly where there are other, easier ways to resolve them.

24. For instance, Judge Altenbernd laments the $22,213.35 advanced by Wells Fargo during the pendency of the suit, yet ignores that Wells Fargo inexplicably took three years to litigate the case to conclusion against a *pro se* homeowner. Particularly now, with the new "show cause" provisions in Fla. Stat. 702.10, there is no reason to sympathize with a plaintiff that fails to diligently prosecute its case.

25. Though Judge Altenbernd dislikes how Focht collected rents from the property in question while the lawsuit was pending, that concern is also misplaced. At any point in the three years this lawsuit was pending, Wells Fargo could have exercised its rights under the assignment of rents provision that exists in virtually all Fannie Mae mortgages by filing a motion and setting a hearing.[6] Respectfully, where foreclosure plaintiffs systematically fail to avail themselves of the remedies

[6] At one point, it seemed Wells Fargo did file such a motion and set such a hearing, but the motion was denied without prejudice given insufficient notice to Focht.

available to them under their own contracts, this Court should not go overboard to change the law in their favor. That is particularly so where, as here, the recently-enacted provisions of Fla. Stat. 702.10 are designed to streamline a foreclosure plaintiff's ability to recoup rents while a case is pending.

26. This critique might sound harsh, but some perspective is necessary. The undersigned has litigated many hundreds of foreclosure lawsuits throughout Florida over the past five years. Nonetheless, not once has the undersigned ever had a residential foreclosure plaintiff set a hearing to recoup rents pursuant to an assignment of rents provision. Not once! This Court might find Focht's collection of these rents inequitable, and Wells Fargo's failure to act to protect its interests might be lazy, foolish, or even stupid. Regardless, where plaintiffs are not taking action to protect themselves, why should this Court bend over backwards to help them by certifying a question to the Florida Supreme Court?

27. Judge Altenbernd also laments how the courts have "erroneously transformed what should be a defendant's affirmative defense" into a "jurisdictional prerequisite." Twice, in fact, Judge Altenbernd used the term "jurisdictional prerequisite."

28. While Focht and the undersigned certainly understand the point Judge Altenbernd is trying to make, that statement, made without any case citations, is a clear misstatement of Florida law. Standing, or lack thereof, is not jurisdictional in

Florida state court. The absence of standing does not render a judgment void or subject to relief under Rule 1.540. See Everhome Mortg. Co. v. Janssen, 100 So. 3d 1239 (Fla. 2d DCA 2012); Dage v. Deutsche Bank Nat'l Trust Co., 95 So. 3d 1021 (Fla. 2d DCA 2012). This is why the issue of standing only comes up when a homeowner defends the case and pleads the issue, not in the many thousands of foreclosure cases throughout Florida where the defense is not raised at all or for the first time post-judgment. See id.

29. This distinction is important because it shows that "standing at inception" is not as big of an issue as Judge Altenbernd makes it out to be.[7] The issue is not jurisdictional, so it does not exist in uncontested cases. Rather, it only exists in those cases where the homeowner defends and raises the issue.

30. Respectfully, isn't that how the law should operate? Where a plaintiff files suit and the homeowner chooses not to defend, then fine – the plaintiff can and should obtain judgment, irrespective of whether the plaintiff actually had standing when the suit was filed. But where the homeowner challenges the plaintiff's standing, shouldn't the plaintiff have to clear the extremely low bar of proving possession of an original, endorsed Note – or an assignment – at the time

[7] Standing at inception is a significant issue for Focht and many of the undersigned's clients, who sometimes defend on this basis. However, it is untrue to say that the issue of "standing at inception" clogs the judicial system, as if foreclosure plaintiffs were required to prove it in every case. After all, where the homeowner is not even defending, as happens in the overwhelming majority of cases, standing at inception need not be proven. See Everhome and Dage, supra.

suit was filed? See cases, supra.

31. Candidly, if proving standing were a high jump competition, the bar would be set only two feet off the ground. Sure, a little effort is required, but virtually anyone can exceed that bar with minimal effort. Under controlling precedent, and given the dynamics at play, there is simply no reason for this Court to lower that bar even further.

32. In light hereof, this Court should grant rehearing and rehearing *en banc* and eliminate the certified question from its opinion. Additionally, Judge Alternbernd should reconsider his concurring opinion in its entirety.

## CERTIFICATION UNDER RULE 9.331

I express a belief, based on a reasoned and studied professional judgment, that the panel decision in this case is of exceptional importance.[8]

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via email to Jeffrey S. Lapin, Lapin & Leichtling, LLP, 255 Alhambra Circle, Suie 1250, Coral Gables, FL 33134, JLapin@LL-lawfirm.com and eservice@LL-lawfirm.com; and Ronnie J. Bitman, Pearson Bitman LLP, 1770 Fennell St., Suite 150, Maitland, FL 32751, rbitman@pearsonbitman.com; on this

[8] This Court's certification of the question as one of "great public importance" may not create an *ipso facto* entitlement to rehearing *en banc*, but Focht respectfully submits this entire Court should consider the issue at bar before asking the Florida Supreme Court to do so.

2nd day of October, 2013.

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