COURT OF APPEALS
DECISION
DATED AND FILED

July 2, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP1091 **Cir. Ct. No. 2012CV739**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

WELLS FARGO BANK, NA,

PLAINTIFF-COUNTER DEFENDANT-RESPONDENT,

V.

ESTATE OF OWEN E. BIZZELL, JR.,

DEFENDANT,

BROCK O. BIZZELL AND PAMELA BIZZELL,

DEFENDANTS-COUNTER CLAIMANTS-APPELLANTS,

MIDLAND FUNDING, LLC AND CAPITAL ONE BANK (USA) NATIONAL ASSOCIATION,

INVOLUNTARY-DEFENDANTS.

APPEAL from an order of the circuit court for Sheboygan County: JAMES J. BOLGERT, Judge. *Affirmed in part, reversed in part, and cause remanded for further proceedings consistent with this opinion*.

Before Blanchard, P.J., Sherman, and Kloppenburg, JJ.

¶1 BLANCHARD, P.J. In 2003, in order to obtain financing for the purchase of real property, Owen Bizzell executed a note in favor of Wells Fargo Bank, NA, secured by a mortgage on the property he was purchasing. In 2009, Owen refinanced the 2003 debt, again through Wells Fargo, securing the new note with a new mortgage on the property, and receiving a discharge of all debt under the 2003 note. After Owen died in 2010, his son, Brock Bizzell, then a joint tenant on the property, defaulted on the 2009 note. Wells Fargo initiated this foreclosure action on the 2009 mortgage, and the circuit court granted summary judgment of foreclosure to Wells Fargo.

¶2 Brock and his wife, Pamela, appeal the summary judgment of foreclosure.[1] The Bizzells argue that the circuit court erroneously exercised its discretion in permitting Wells Fargo to amend its pleadings to allege a right to foreclose on the 2009 mortgage on the ground of equitable subrogation and in denying the Bizzells' motion to sanction Wells Fargo for failing to timely supplement responses to the Bizzells' discovery requests. The Bizzells also argue that the court should not have granted Wells Fargo summary judgment on the ground of equitable subrogation, which entitled Wells Fargo to foreclose on the

[1] Given the shared surname, we refer to Owen Bizzell by his first name. We generally refer to Brock and Pamela Bizzell jointly as the Bizzells.

2009 mortgage based on its rights and Brock's obligations under the 2003 mortgage, because genuine issues of material fact remain.

¶3 For the following reasons, we conclude that the court did not erroneously exercise its discretion in permitting Wells Fargo to amend its pleadings to include equitable subrogation and in denying the Bizzells' sanctions motion. However, we agree with the Bizzells that at least one genuine issue of material fact precludes summary judgment based on the summary judgment record as it currently exists and the arguments of the parties raised to date. We therefore reverse the circuit court's grant of summary judgment to Wells Fargo.

BACKGROUND

¶4 In November 2003, Owen purchased a house and accompanying real property. Owen applied for financing from Wells Fargo for this purchase. On November 14, 2003, the sellers executed a warranty deed that on its face transferred the property to Owen and Brock "as joint tenants with the right of survivorship." However, at some point prior to November 26, 2003, the date on which the warranty deed was recorded, someone wrote on the deed, purporting to modify it by crossing out Brock's name, leaving Owen identified as the sole grantee of the seller. Thus, on the recorded deed, Brock's name and the phrase "as joint tenants with the right of survivorship" were crossed out, leaving Owen as the sole grantee under the terms of the deed. What appears to be "O.B." is written above this modification.

¶5 After the warranty deed was executed but before it was recorded, Owen alone executed a note in favor of Wells Fargo secured by a mortgage on the property on November 24, 2003. In affidavits presented on summary judgment, Brock avers that he was not aware that there was ever any mortgage on the

property, including the 2003 mortgage, until after Owen's death in 2010, although Brock avers that Owen told Brock at the time Owen purchased the property in 2003 that Owen "needed a small loan to assist in the purchase of the property." The 2003 mortgage was recorded on November 26, 2003.

¶6 On December 31, 2003, Owen executed a quit claim deed transferring his ownership of the property to himself and Brock, as joint tenants with the right of survivorship. This deed was recorded on January 5, 2004.

¶7 On October 30, 2009, Owen refinanced his 2003 debt to Wells Fargo with another loan from Wells Fargo, the proceeds of which were used to pay off the 2003 debt. This entailed Owen executing a new note to Wells Fargo, secured by a new mortgage on the property. In addition, Owen signed an affidavit in which he averred that "[e]veryone who owns an interest in the Property being refinanced is listed on page one of the Deed of Trust, and is listed as a Mortgagor/Trustor/Borrower above." Only Owen was listed on the Deed of Trust and as a mortgagor. Brock did not sign the new mortgage that Owen executed to Wells Fargo for the 2009 refinance transaction, and as stated above Brock avers that he was unaware of the 2009 mortgage when it was executed.

¶8 Owen died in August 2010, leaving Brock as the sole owner of the property. Brock avers that he learned of the 2009 mortgage only in sorting through his father's financial papers after his death. After learning of the 2009 mortgage, Brock began making mortgage payments on the property, as he avers he was instructed to do by a Wells Fargo employee.

¶9 Around July 2011, Brock ceased making mortgage payments on the property. On August 21, 2012, Wells Fargo commenced this foreclosure action against the Bizzells.

¶10 In answering Wells Fargo's complaint, the Bizzells asserted that Brock became a joint owner of the property through the December 31, 2003 quit claim deed that Owen executed, conveying the property to Owen and Brock as joint tenants. Based on this factual allegation, the Bizzells asserted affirmative defenses and counterclaims that included the following. As an affirmative defense, the Bizzells alleged that the 2009 mortgage is void because it violates the statute of frauds, specifically because it is not signed by both Owen and Brock, who were joint tenants on the property at the time Owen executed the 2009 refinance transaction. As a counterclaim, the Bizzells requested a declaratory judgment that the 2009 mortgage is void and that "the lien" on the property is "eliminate[ed]," on the ground that Brock did not "permit, authorize or consent to the execution of" the 2009 mortgage encumbering the property.

¶11 Wells Fargo moved to dismiss the Bizzells' counterclaim for failure to state a claim, on the grounds that WIS. STAT. § 700.24 (2013-14),[2] "expressly contradicts [the Bizzells'] assertion that a mortgage is invalid when granted by only one of two joint tenants with right of survivorship." The circuit court denied Wells Fargo's motion to dismiss. Wells Fargo subsequently filed an answer to the Bizzells' counterclaim, asserting that the Bizzells' allegation that the 2009 mortgage was "invalid and void" because the Bizzells had not consented to or authorized the execution of the 2009 mortgage was "a legal conclusion to which an answer is not required" and alternatively denying the allegation.

[2] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

¶12 During discovery, the Bizzells demanded that Wells Fargo produce the loan file relating to any loan between Wells Fargo and Owen since January 1, 2000. Wells Fargo objected to the demand in part on the grounds that it was "irrelevant, and not reasonably calculated to lead to the discovery of admissible evidence." After communications between the parties on this discovery issue, the Bizzells filed motions to compel. At a hearing held on June 10, 2013, the circuit court denied the Bizzells' motions to compel.

¶13 On May 21, 2013, Wells Fargo moved for summary judgment on the foreclosure claim. Wells Fargo argued in part that the Bizzells' counterclaim based on Brock owning the property as a joint tenant and not authorizing any mortgage should be dismissed on the ground that, pursuant to WIS. STAT. § 700.24, a joint tenant can unilaterally (that is, without the consent of or any action by the other tenant) execute a mortgage that encumbers the first tenant's interest in jointly owned property.

¶14 For reasons not pertinent to any argument raised on appeal, the circuit court directed Wells Fargo to file a revised motion for summary judgment, which it did on September 3, 2013. In this motion, Wells Fargo advanced a new argument for summary judgment, relying on the doctrine of equitable subrogation. Under this theory, Wells Fargo would be entitled to foreclose on the 2009 mortgage based on the rights Wells Fargo obtained under the 2003 mortgage. Specifically, Wells Fargo argued that, because the 2003 mortgage pre-dated the quit claim deed Owen used to grant Brock a joint interest in the property, Brock took his joint interest from Owen subject to the 2003 mortgage, and, because the 2009 mortgage discharged the debt of the 2003 mortgage, Wells Fargo has all rights under the 2009 mortgage that it had under the 2003 mortgage.

¶15 The Bizzells filed a motion to strike Wells Fargo's equitable subrogation claim, on the grounds that Wells Fargo had "failed to plead equitable subrogation as a defense to the Bizzells' counterclaim" and had consistently argued that any evidence of events prior to 2009 was irrelevant, while Wells Fargo's new equitable subrogation theory depended on events that occurred in 2003.

¶16 On November 25, 2013, Wells Fargo produced the loan file for Owen's 2003 note and mortgage. At the time of this production, Wells Fargo expressed to the Bizzells in a letter its willingness to submit a joint request asking the court not to proceed to consideration of summary judgment, and instead the parties could engage in additional discovery. The record does not reflect any response to this suggestion from the Bizzells at that time.

¶17 On December 5, 2013, the circuit court held a hearing on Wells Fargo's motion for summary judgment and on the Bizzells' motion to strike Wells Fargo's equitable subrogation claim. Counsel for the Bizzells argued that the case was "ripe for summary judgment." At the close of the hearing, the circuit court denied the Bizzells' motion to strike, explaining that

> The motion to strike [is] denied because I see this, essentially, as a modification of the pleadings, which I would allow. I would also … give [counsel for the Bizzells] more time to do investigation, but [counsel for the Bizzells] wanted the matter brought to a head now, and I think it's right. I think the essential facts are not in dispute.

The court granted Wells Fargo's motion for summary judgment, finding that "[t]here is no unjust enrichment to the bank" and concluding that "the equitable [subrogation] theory applies on all points."

¶18 The Bizzells filed a motion for reconsideration, including on grounds of "newly discovered evidence" contained in the 2003 loan file that Wells Fargo had produced on November 25. One piece of allegedly new evidence was a commitment of title insurance provided by a title insurance company to Wells Fargo on November 17, 2003, listing Owen and Brock as joint tenants of the property.

¶19 Wells Fargo opposed the Bizzells' motion for reconsideration on multiple grounds, including that the November 17 commitment of title insurance had been in the Bizzells' possession for at least a year, and could have been included in the Bizzells' summary judgment submissions but was not.

¶20 The circuit court denied the Bizzells' motion for reconsideration. In doing so, the court did not explicitly refer to the commitment of title insurance. The court explained its view that neither the title company, the bank, nor the sellers would have delivered the deed to Owen with intent to convey title to Owen and Brock before the mortgage was recorded. On this basis, the court rejected the Bizzells' theory that one reasonable inference from the fact that the deed was modified to list Owen as the sole grantee was that the deed had been delivered to Owen prior to modification with the intent to convey title and therefore, when it was delivered, it conveyed the property to both Owen and Brock. The circuit court entered judgment of foreclosure. The Bizzells now appeal.

DISCUSSION

¶21 The Bizzells make two sets of arguments on appeal. First, the Bizzells argue that the circuit court erroneously exercised its discretion in permitting Wells Fargo to assert equitable subrogation at the summary judgment stage, and in denying the Bizzells' motion to sanction Wells Fargo for failing to

timely produce discovery relating to its equitable subrogation claim by striking this claim and awarding attorneys' fees and costs to the Bizzells.

¶22 Second, the Bizzells argue that Wells Fargo is not entitled to summary judgment on the basis of equitable subrogation. As we explain further below, this argument is premised on the Bizzells' assertion that at least one genuine issue of material fact remains for determination at trial. The contested fact would be the reasonable inference that, in 2003, the unrecorded warranty deed purporting to grant title to Owen and Brock as joint tenants was delivered to Owen with intent to convey title to both Owen and Brock prior to modification of the deed, and, therefore, both Owen and Brock had legal interests in the property when Owen and Wells Fargo entered into the mortgage agreement.

¶23 For the following reasons, we reject the Bizzells' first set of arguments, but we agree with their second.

I. ERRONEOUS EXERCISE OF DISCRETION IN ALLOWING WELLS FARGO TO PURSUE EQUITABLE SUBROGATION

A. Amendment of the Pleadings

¶24 The Bizzells contend that the circuit court erroneously exercised its discretion in allowing Wells Fargo to amend its pleadings at the summary judgment stage to include an equitable subrogation claim, which is based on Wells Fargo's alleged rights under the 2003 note and mortgage. This was improper, the Bizzells argue, because the court failed to recognize that Wells Fargo "waived its right to argue equitable subrogation by failing to plead" equitable subrogation as an affirmative defense in its answer.

¶25 As the Bizzells acknowledge, a circuit court has broad discretion to allow a party to amend its pleadings, and we will overturn a court's decision in

this regard only if the court has erroneously exercised that discretion. *See* WIS. STAT. § 802.09(1) (leave to amend pleadings "shall be given freely at any stage of the action when justice so requires"); ***Stanhope v. Brown Cnty.***, 90 Wis. 2d 823, 834, 280 N.W.2d 711 (1979) (whether to amend the pleadings is a discretionary decision). This court will search the record for reasons to sustain the circuit court's exercise of discretion. ***Keller v. Keller***, 2002 WI App 161, ¶6, 256 Wis. 2d 401, 647 N.W.2d 426. An amendment of the pleadings "cannot unfairly deprive the adverse party of the opportunity to contest the issues raised by the amendment." ***Soczka v. Rechner***, 73 Wis. 2d 157, 162, 242 N.W.2d 910 (1976).

¶26 We will assume without deciding for purposes of this appeal that equitable subrogation is an affirmative defense that Wells Fargo was required to plead in its answer. With that assumption, we now explain why we reject the Bizzells' argument that the circuit court erroneously exercised its discretion in permitting Wells Fargo to amend its pleadings to include equitable subrogation as a defense.

¶27 The Bizzells argue that the court erroneously exercised its discretion in permitting Wells Fargo to amend its pleadings because (1) Wells Fargo did not file a motion seeking amendment, and (2) the circuit court "failed to provide any basis for allowing such a late amendment to Wells Fargo's pleadings."

¶28 We agree with the Bizzells that the record does not show that Wells Fargo filed a motion to amend its pleadings. However, we disagree that this failure is dispositive. As Wells Fargo points out, a court may exercise its discretion in permitting an amendment to pleadings at the summary judgment stage of a proceeding, and may do so even when a separate motion to amend has not been filed. *See* ***Bank of New Glarus v. Swartwood***, 2006 WI App 224, ¶¶40-

41, 297 Wis. 2d 458, 725 N.W.2d 944 (request to amend included as part of a summary judgment brief is sufficient to entitle party to a decision on that request). As part of its response to the Bizzells' motion to prevent Wells Fargo from relying on equitable subrogation, Wells Fargo argued that the circuit court has broad authority to permit amendment of the pleadings to include equitable subrogation as a grounds for summary judgment. This sufficiently raised the issue of amendment of the pleadings before the circuit court.

¶29 Turning to the Bizzells' second argument, we conclude that the record illustrates sufficient reasons to uphold the court's discretionary decision to permit amendment. *See* ***Keller***, 256 Wis. 2d 401, ¶6. Of particular significance, the Bizzells rejected multiple opportunities to take additional time to investigate Wells Fargo's equitable subrogation claim, and elected to proceed with the scheduled summary judgment hearing despite having the opportunity to request postponement of the proceedings. During the summary judgment hearing, the Bizzells asserted that the action was "ripe for summary judgment." In its decision to allow amendment, the court explained that it would have given the Bizzells additional time to investigate the equitable subrogation claim, but the Bizzells chose to invite the court to decide summary judgment. Furthermore, Wells Fargo asserts that the recorded warranty deed and the 2003 mortgage, the pieces of evidence relevant to its equitable subrogation claim, were already in the Bizzells' possession or were publicly available throughout the summary judgment proceedings, and the Bizzells do not dispute this assertion.

¶30 For these reasons, we conclude that the circuit court did not erroneously exercise its discretion in permitting Wells Fargo to amend its pleadings to include equitable subrogation as a basis for summary judgment.

B. Sanctions for Wells Fargo's Litigation Conduct

¶31 The Bizzells argue that the circuit court erroneously exercised its discretion in denying their motion to sanction Wells Fargo for failing to timely supplement discovery production in light of Wells Fargo's late-asserted equitable subrogation argument. The Bizzells' argument is premised on the assertion that, throughout discovery in this action, Wells Fargo repeatedly asserted that the only materials relevant to its foreclosure claim were documents relating to the 2009 note and mortgage, not those relating to earlier events, and that Wells Fargo had refused to comply with discovery requests for documents in Wells Fargo's possession relating to any pre-2009 loans made to Owen Bizzell. Yet, the Bizzells point out, when Wells Fargo filed its September 3, 2013 motion for summary judgment, Wells Fargo relied on the 2003 mortgage in arguing equitable subrogation. Based on Wells Fargo's failure to more promptly supplement discovery production to include documents related to the 2003 mortgage after asserting its equitable subrogation argument, the Bizzells argue that the court should have imposed two sanctions: barred Wells Fargo from relying on equitable subrogation and awarded attorney fees and costs to the Bizzells as sanctions.

¶32 The Bizzells rely on WIS. STAT. § 804.01(5) to argue that Wells Fargo was obligated to produce to the Bizzells documents related to the 2003 note and mortgage when it filed its September 3, 2013 motion for summary judgment arguing equitable subrogation. Section 804.01(5)(b) provides:

> A party is under a duty seasonably to amend a prior response if the party obtains information upon the basis of which 1. the party knows that the response was incorrect when made, or 2. the party knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

The Bizzells further assert, quoting WIS. STAT. § 804.12(4), that when a party fails to supplement its discovery responses, a court "may make such orders in regard to the failure as are just," and

> [i]n lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising the party or both to pay the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

See § 804.12(4). From this, the Bizzells argue that the court erroneously exercised its discretion in denying their motion to bar Wells Fargo from offering an equitable subrogation defense. The Bizzells further argue that, even if the court did not erroneously exercise its discretion in denying their motion to prevent this defense, the court was required to award reasonable attorney fees and costs to the Bizzells.

¶33 A fatal flaw with the Bizzells' argument is that they do not explain why we should conclude that their rights were substantially affected by Wells Fargo's failure to produce the 2003 loan file between September 3, 2013 (when Wells Fargo filed its motion for summary judgment arguing equitable subrogation as a defense) and November 25, 2013 (when Wells Fargo produced the 2003 loan file). The Bizzells assert that "[i]f Wells Fargo had raised the defense of equitable subrogation at the outset of the lawsuit … the Bizzells would have taken a significantly different approach to litigating this case," and that Wells Fargo's belated raising of this argument "caused the Bizzells to incur thousands of dollars in attorneys' fees and costs." Assuming without deciding that this is true, it does not explain how *delay in production of the 2003 loan file* harmed the Bizzells. If the Bizzells mean to argue that Wells Fargo should have been sanctioned for belatedly raising their subrogation defense, rather than for failing to timely

supplement their discovery production pursuant to WIS. STAT. §§ 804.01(5) and 804.12(4) in light of this new defense, they do not develop an argument to this effect with citation to legal authority.

¶34 Furthermore, from the arguments presented on appeal and our review of the record, we question how delay in production of the 2003 loan file in itself could have harmed the Bizzells. As we have already explained, the Bizzells explicitly passed on the offer of additional time to investigate the 2003 loan file once Wells Fargo produced it. And, again, the Bizzells do not dispute Wells Fargo's assertion that the pertinent documents in the 2003 loan file, namely, the recorded warranty deed and the 2003 mortgage, that Wells Fargo eventually produced were either already in the Bizzells' possession well prior to the summary judgment hearing or were available as public records.

II. APPLICATION OF THE DOCTRINE OF EQUITABLE SUBROGATION

¶35 Wells Fargo argues that it is entitled to summary judgment of foreclosure on the 2009 mortgage under the doctrine of equitable subrogation. Wells Fargo's argument is premised on the following facts, which it asserts are undisputed: Owen, alone, entered into the 2003 mortgage agreement with Wells Fargo; Wells Fargo recorded the mortgage on November 26, 2003; Brock received an interest in the property via quit claim deed from Owen in December 2003, which was not recorded until January 5, 2004, over a month after the mortgage was recorded. Based on these facts, and pursuant to Wisconsin's race notice statute, WIS. STAT. § 706.08(1)(a), Wells Fargo argues that "[t]he undisputed facts prove that the Bizzells' interests in the Property were subject to the 2003 Mortgage, so they were also subject to the 2009 Mortgage" under the doctrine of equitable subrogation.

¶36 In response, the Bizzells argue that there is a factual dispute precluding summary judgment on this issue, namely, whether the warranty deed granting title to Owen and Brock as joint tenants was delivered to Owen with intent to convey title to Owen and Brock prior to modification of the deed.[3] The Bizzells' argument proceeds as follows. One reasonable inference from the summary judgment record is that the unrecorded warranty deed was delivered to Owen, with the intent of passing title in the property to Owen and Brock as joint tenants, *prior to* someone modifying the deed by crossing out Brock's name to leave Owen as the sole grantee. The deed conveyed title to Owen and Brock as joint tenants upon delivery, and any post-delivery modification of the deed cannot divest Brock of his legal interest. *See* ***Herzing v. Hess***, 263 Wis. 617, 623, 58 N.W.2d 430 (1953) (a deed conveys title when it is delivered by the seller with intent to pass title); ***Wheeler v. Single***, 62 Wis. 380, 386-87, 22 N.W. 569 (1885) (post-delivery modification of deed is ineffective). A further reasonable inference from the summary judgment record is that Wells Fargo had notice of the delivery of the deed and Brock's resulting interest in the property. If Brock had an interest in the property that Wells Fargo was aware of, but Wells Fargo did not obtain Brock's signature on the mortgage, then the Bizzells are not subject to the 2003 mortgage. On this basis, the Bizzells contend, any equitable subrogation argument based on Wells Fargo's rights under the 2003 mortgage goes nowhere. As we now explain, we agree with the Bizzells that at least one genuine issue of material fact precludes summary judgment.

[3] The Bizzells argue in the alternative that they are entitled to summary judgment based on the undisputed facts. However, as we explain in the text of this opinion, we conclude that on the current summary judgment record there remain factual disputes material to the issues raised by the parties. We reject the Bizzells' argument that they are entitled to summary judgment.

¶37 We review a circuit court's grant of summary judgment de novo, independently of the circuit court, applying the same methodology. ***AccuWeb, Inc. v. Foley & Lardner***, 2008 WI 24, ¶16, 308 Wis. 2d 258, 746 N.W.2d 447. Summary judgment is appropriate only "if there are no genuine issues of material fact, and the moving party, having established a prima facie case, is entitled to judgment as a matter of law." ***Id.***; WIS. STAT. § 802.08(2). "Summary judgment materials, including pleadings, depositions, answers to interrogatories, and admissions on file are viewed in the light most favorable to the nonmoving party." ***AccuWeb, Inc.***, 308 Wis. 2d 258, ¶16. "We draw all reasonable inferences from the evidence in favor of the nonmoving party." ***H & R. Block E. Enters., Inc. v. Swenson***, 2008 WI App 3, ¶11, 307 Wis. 2d 390, 745 N.W.2d 421. "Whether an inference is reasonable and whether more than one reasonable inference may be drawn are questions of law" that this court decides de novo. ***Id.***

¶38 The parties appear to agree that resolution of this issue turns on application of the race notice statute, WIS. STAT. § 706.08. This statute provides that "every conveyance that is not recorded as provided by law shall be void as against any subsequent purchaser, in good faith and for a valuable consideration, of the same real estate or any portion of the same real estate whose conveyance is recorded first." WIS. STAT. § 706.08(1)(a); *see also* ***Bank of New Glarus***, 297 Wis. 2d 458, ¶¶15-16, 23-24 ("'[A] purchaser or mortgagor in good faith is one without notice of existing rights in land.'") (quoting ***Grosskopf Oil, Inc. v. Winter***, 156 Wis. 2d 575, 584, 457 N.W.2d 514 (Ct. App. 1990)). The parties disagree on whether (1) the deed was delivered to Owen conveying title to Owen and Brock as joint tenants, and (2) Wells Fargo had notice of this delivery and conveyance of title.

¶39 To support their argument that one reasonable inference from the summary judgment record is that the deed was delivered to Owen conveying title to Owen and Brock as joint tenants, the Bizzells point to: (1) a copy of an unrecorded, unmodified deed purporting to grant title to Owen and Brock as joint tenants; and (2) a copy of the recorded, modified deed.

¶40 Wells Fargo responds that the copy of the unrecorded warranty deed is inadmissible because it has not been authenticated. Even if we assume without deciding for purposes of this appeal that the copy of the deed is inadmissible, we conclude that the recorded deed with the modification is sufficient to create a factual question regarding whether the deed was delivered prior to modification, vesting title in both Owen and Brock as joint tenants. At least one reasonable inference from the face of the recorded deed, showing what appears to be Owen's initials above the crossed-out text, is that Owen crossed out Brock's name and initialed this change, and that Owen made this modification after the deed was delivered to him.

¶41 Wells Fargo argues that this is not a reasonable inference from the face of the recorded deed because, in the normal course of a real estate transaction, the deed would have been transferred from the sellers to an escrow agent, who would not have delivered the deed to Owen until after payment of the purchase price had occurred, which, in this case, required prior execution of the 2003 mortgage. *See* ***West Fed. Sav. & Loan Ass'n v. Interstate Inv., Inc.***, 57 Wis. 2d 690, 694, 205 N.W.2d 361 (1973) ("An escrow, as a general rule, is created when the grantor parts with all dominion and control of a deed by delivering it to a third person or a depository with instructions to deliver the same to the named grantee upon the happening of certain conditions."). Further, Wells Fargo argues that even if a deed held in escrow is delivered to a grantee, if that occurs before the

grantor's required conditions for passing of title are met, "it is generally held that no valid deed passes." ***Id.*** From this, Wells Fargo argues that there is no reasonable inference from evidence in the summary judgment record that Owen modified the deed to cross out Brock's name after the deed was delivered to Owen, which Wells Fargo contends could only have occurred after Owen had fulfilled the conditions required for passing title, namely, after Owen had executed the 2003 mortgage loan.

¶42 However, the recorded warranty deed creates a reasonable inference that the normal course of business was not followed here. So far as the evidence submitted on summary judgment reveals, Owen could have modified the deed to cross out Brock's name after the deed was delivered to him with intent to convey title to Owen and Brock. The markings on this deed support a number of inferences, one of which is that an escrow agent was not used, and that the sellers delivered the deed to Owen, who then modified it post-delivery. Wells Fargo fails to point to any evidence in the summary judgment record to show that an escrow agent was in fact used here. The closest Wells Fargo comes is to assert that "the record suggests that an escrow agent was used for the closing of the 2003 transaction." However, it is not apparent how the portion of record to which Wells Fargo directs us supports this assertion, and Wells Fargo provides no explanation. Further, a second reasonable inference is that the deed was unmodified when Owen, alone, entered into the 2003 mortgage agreement with Wells Fargo, and that Owen modified it after execution of the mortgage.[4]

[4] In its supplemental briefing, Wells Fargo argues, for the first time, that even if the deed was unmodified at the time Owen entered into the mortgage agreement with Wells Fargo, the mortgage could still be valid as to both Owen and Brock's interest in the property because the mortgage was a purchase money mortgage. As far as our review of the record reveals, this (continued)

¶43 Turning to whether there is evidence that could support a reasonable inference that Wells Fargo had notice of this delivery, the Bizzells point again to the recorded warranty deed, as well as to a commitment of title insurance that the title insurance company sent to Wells Fargo on November 17, 2003, prior to the execution and recording of the 2003 mortgage, naming Owen and Brock as joint tenant grantees of the property. In response, Wells Fargo points out that the commitment of title insurance was not part of the summary judgment record before the circuit court, but, rather, was submitted to the court only in connection with the Bizzells' motion for reconsideration. Wells Fargo argues that our review of the circuit court's decision to deny the Bizzells' motion for reconsideration in light of the title commitment is for erroneous exercise of discretion, and that we should conclude that the court did not erroneously exercise its discretion here. *See* ***Koepsell's Olde Popcorn Wagons, Inc. v. Koepsell's Festival Popcorn Wagons, Ltd.***, 2004 WI App 129, ¶6, 275 Wis. 2d 397, 685 N.W.2d 853 (a circuit court's decision on a motion for reconsideration is reviewed under the erroneous exercise of discretion standard).

¶44 We need not decide any issues pertinent to the commitment of title insurance, because we conclude that one reasonable inference from the recorded warranty deed is that Wells Fargo had notice that Brock had an interest in the property before the 2003 mortgage was recorded. It is undisputed that Owen executed the mortgage to Wells Fargo on November 24, 2003, and that the modified warranty deed was not recorded until November 26, 2003. As explained

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argument was not raised before the circuit court. Further, Wells Fargo fails to cite any precedential authority to support this argument. We reject this argument for purposes of this appeal on those grounds.

above, one reasonable inference is that when Owen entered into the mortgage agreement with Wells Fargo, the deed had not yet been modified to cross out Brock's name. This is sufficient to create a factual dispute regarding whether Wells Fargo had notice of Brock's interest in the property.

¶45 In sum, we agree with the Bizzells that the recorded warranty deed creates a factual dispute as to whether the deed was delivered to Owen conveying title to Owen and Brock prior to modification, and whether Wells Fargo had notice of this delivery and Brock's interest in the property. Therefore, we reverse summary judgment and remand for further proceedings consistent with this opinion. In doing so, we emphasize that this opinion is limited to our review of the summary judgment record and the arguments made by the parties based on that record to date.

III. OTHER ARGUMENTS

¶46 The parties make a number of additional arguments that we do not decide. For example, the Bizzells argue that even if Brock did not have an interest in the property as a joint tenant at the time Owen executed the mortgage, equitable subrogation is inapplicable on the facts here because Wells Fargo had unclean hands and acted negligently. The parties also argue about whether, if Brock had an interest in the property as a joint tenant at the time that Owen executed the mortgage, the mortgage is entirely void or encumbers only Owen's one-half interest in the property. Because resolution of these issues turns on resolution of at least the factual dispute highlighted above, we conclude that it would not likely assist the parties or the circuit court for us to address these issues based on the current state of the record, and we do not do so.

CONCLUSION

¶47 For the foregoing reasons, we affirm the circuit court's decision to allow Wells Fargo to amend its pleadings to include the doctrine of equitable subrogation and to deny the Bizzells' motion for sanctions. We reverse the decision of the circuit court granting summary judgment of foreclosure to Wells Fargo and remand for further proceedings consistent with this opinion.

By the Court.—Order affirmed in part, reversed in part, and cause remanded for further proceedings consistent with this opinion.

Not recommended for publication in the official reports.