

IN THE SUPREME COURT OF FLORIDA

CYNTHIA L. JACKSON and
THOMAS JACKSON,

Appellants/Petitioners,
vs.

Case No.: SC18-357

HOUSEHOLD FINANCE
CORPORATION III, ET AL.

Appellees/Respondents.
_____ /

**ON PETITION FOR REVIEW FROM THE
SECOND DISTRICT COURT OF APPEAL, STATE OF FLORIDA**

Lower Tribunal Case(s):
2D15-2038
412014CA0003217CAAXMA

RESPONDENT'S BRIEF ON JURISDICTION

MATTHEW CICCIO, ESQ.
ALDRIDGE PITE, LLP
Counsel for Respondent
1615 S. Congress Ave., Suite 200
Delray Beach, Florida 33445
Telephone: (561) 288-8941
Facsimile: (561) 392-6965
Servicemail@aldridgepite.com
MCiccio@aldridgepite.com

/s/ Matthew Ciccio
Matthew Ciccio, Esq.
Florida Bar Number: 103517

RECEIVED, 04/23/2018 11:43:29 AM, Clerk, Supreme Court

TABLE OF CONTENTS

| | <u>Page(s)</u> |
|---|----------------|
| Table of Contents..... | i. |
| Table of Citations..... | ii. |
| Preface..... | iii. |
| Statement of Case and Facts | 1 |
| Summary of Argument..... | 3 |
| Argument..... | 4 |
| A. The Second District’s opinion in <i>Jackson v. Household Fin. Corp. III</i> , 2018 Fla. App. LEXIS 1251, 43 Fla. L. Weekly D261b (Fla. 2d DCA Jan. 31, 2018) does not expressly and directly conflict with the Fourth District’s decision in <i>Maslak v. Wells Fargo Bank, N.A.</i> , 190 So. 3d 656 (Fla. 4th DCA 2016) or the other cases cited by Petitioners..... | 4 |
| 1. The Opinion does not Expressly and Directly Conflict with the Fourth District’s Decision in <i>Maslak v. Wells Fargo Bank, N.A.</i> , 190 So. 3d 656 (Fla. 4th DCA 2016)..... | 5 |
| 2. The Remaining Cases Cited by the Petitioners Do not Expressly and Directly Conflict with the Opinion..... | 9 |
| 3. There is No Other Basis for Jurisdiction..... | 10 |
| Conclusion..... | 10 |
| Certificate of Compliance..... | 11 |
| Certificate of Service..... | 12 |

TABLE OF CITATIONS

| <u>Case References:</u> | <u>Page(s)</u> |
|---|-----------------------|
| <i>Dodi Publishing Co. v. Editorial America, S.A.</i> 385 So. 2d 1369 (Fla. 1980)..... | 5 |
| <i>The Florida Star v. B.J.F.</i> 539 So. 2d 286 (Fla. 1988)..... | 5 |
| <i>Hidden Ridge Condo. Homeowners Ass’n v. OneWest Bank, N.A.</i> 183 So. 3d 1266 (Fla. 5th DCA 2016)..... | 9 |
| <i>Jenkins v. State</i> 385 So. 2d 1356 (Fla. 1980)..... | 5 |
| <i>Lindsey v. Cadence Bank, N.A.</i> 135 So. 3d 1164 (Fla. 1st DCA 2014)..... | 9 |
| <i>Love v. Garcia</i> 634 So. 2d 158 (Fla. 1994)..... | 6 |
| <i>Maslak v. Wells Fargo Bank, N.A.</i> 190 So. 3d 656 (Fla. 4th DCA 2016)..... | 1, 3, 4, 5, 6, 7, 8 |
| <i>Wells Fargo Bank, N.A. v. Balkissoon</i> 183 So. 3d 1272 (Fla. 4th DCA 2016)..... | 10 |
| <u>Statute and Other References:</u> | |
| §90.803(6), Fla. Stat..... | 1, 2, 5, 6, 7, 8, 9 |
| §90.608, Fla. Stat..... | 7 |
| Article V, §3(b)(3), Fla. Const..... | 4 |
| Fla. R. App. P. 9.030(a)..... | 10 |

PREFACE

In this response brief, respondent, HOUSEHOLD FINANCE CORP. III will use the following shorthand references:

“Household” will refer to Respondent, Household Finance Corp. III.

“Petitioners” will refer to the Petitioners, Cynthia L. Jackson and Thomas Jackson.

“Petition” will refer to the Petitioners’ Jurisdictional Brief. Citations to the Petition will be in the form of “(P.B. page number)”.

“Appendix” will refer to the Petitioners’ Appendix. Citations to the Appendix will be in the form of (Pet. Appx. page number)”.

“Opinion” will refer to the Second District Court of Appeal’s written decision in *Jackson v. Household Fin. Corp. III*, 2018 Fla. App. LEXIS 1251, 43 Fla. L. Weekly D261b (Fla. 2d DCA Jan. 31, 2018).

STATEMENT OF CASE AND FACTS

The Petition stems from an opinion by the Second District Court of Appeal where the Petitioners challenged whether business records of Household were properly admitted in a mortgage foreclosure action, pursuant to § 90.803(6), Fla. Stat. (2014), to establish the Petitioners' default. The Petition seeks to invoke the discretionary jurisdiction of this Court to review the Second District's opinion. The opinion was certified by the Second District to be in conflict with the Fourth District Court of Appeal's decision in *Maslak v. Wells Fargo Bank, N.A.*, 190 So. 3d 656 (Fla. 4th DCA 2016). (Pet. App. 5, 12).

At a non-jury trial in the trial court action, Household called Mr. David Birsch, Assistant Vice President of HSBC, as its witness. Household was a wholly owned subsidiary of HSBC. Household relied upon David Birsch's testimony to establish a foundation for the admission of Household's business records establishing the Petitioners' default. In doing so, six questions were asked on direct examination by Household's counsel, as follows:

Q. So are you familiar with the business practice of HSBC?

A. Yes, I am.

Q. And is it the regular business practice of HSBC to record acts, transactions, payments, communications, escrow account activity disbursements, events and analysis with respect to the mortgage loan account?

A. Yes, it is.

Q. And are these business records prepared by persons with knowledge of or from information transmitted by persons with knowledge of the acts,

transactions, payments, communications, escrow account activity, disbursements and analyses?

A. Yes.

Q. And are all records made at or near the time the acts, transactions, payments, communications, escrow account activity, disbursements, events, and analyses occur?

A. Yes.

Q. And are these records maintained by HSBC in the ordinary course of its regular business activity of the mortgage, lending, banking and service activity?

A. Yes, they are[.]

Q. Did HSBC prepare and maintain these records with respect to the subject loan?

A. Yes.

(P.B. 1-2). (Pet. Appx. 6-7).

Only these six questions were asked on direct. On cross examination, counsel for the Petitioners elicited the following testimony from David Birsch, asking only one question about Birsch's knowledge of HSBC's recordkeeping system:

Q. And you testified that you're familiar, and I forget the exact language, with the recordkeeping procedures of HSBC. How did you gain familiarity?

A. Well, I've been there for 25 years. So I've been in the various departments, managed various departments. So I've basically become very familiar with a lot of different questions. Like cross-training and what have you.

(P.B. 2). (Pet. Appx. 7).

The Petitioners argued that David Birsch's testimony was insufficient to satisfy the business records exception to hearsay as found in § 90.803(6), Fla. Stat. (2014). The Trial Court disagreed. The Second District affirmed, holding:

In summary, the testimony of HSBC's Assistant Vice President David Birsch was sufficient to satisfy Household's initial burden to lay the predicate for the business records exception. Once that burden was met, the [Petitioners] did not show that Birsch lacked requisite knowledge to testify as the records custodian. Thus, they failed to meet their burden of proving that the records were untrustworthy or inadmissible.

(Pet. App. 12).

Although the testimony in *Maslak* was more extensive than the case *sub judice*, the Second District certified that its opinion conflicts with the Fourth District's decision in *Maslak v. Wells Fargo Bank, N.A.*, 190 So. 3d 656 (Fla. 4th DCA 2016). (Pet. App. 5, 12). On March 1, 2018, the Petitioners filed their Notice to Invoke Discretionary Jurisdiction to the Florida Supreme Court. The Petitioners state that the Second District has certified its opinion in *Jackson* to be in direct conflict with the Fourth District's decision in *Maslak*. Additionally, the Petitioners allege the opinion expressly and directly conflicts with multiple decisions of other district courts of appeal on the same question of law.

SUMMARY OF ARGUMENT

This Court should deny the Petitioners' request for this Court to exercise its discretionary review of this matter. No express and direct conflict exists between this opinion and the decision by the Fourth District in *Maslak v. Wells Fargo Bank, N.A.*, 190 So. 3d 656 (Fla. 4th DCA 2016). The testimony provided, and highlighted by each court in their respective decision, is distinguishable. In determining whether there is an express and direct conflict, this Court must look only within the four

corners of the opinion. In the present case, the opinion is distinguishable from *Maslak* and the other cases cited by the Petitioners. With no certainty of express and direct conflict, this Court should deny Petitioners' request for this Court to exercise its discretionary review of this matter.

ARGUMENT

- A. **The Second District's opinion in *Jackson v. Household Fin. Corp. III*, 2018 Fla. App. LEXIS 1251, 43 Fla. L. Weekly D261b (Fla. 2d DCA Jan. 31, 2018) does not expressly and directly conflict with the Fourth District's decision in *Maslak v. Wells Fargo Bank, N.A.*, 190 So. 3d 656 (Fla. 4th DCA 2016) or the other cases cited by Petitioners.**

The issue before this Court is whether the opinion issued by the Second District is in direct conflict with *Maslak v. Wells Fargo Bank, N.A.*, 190 So. 3d 656 (Fla. 4th DCA 2016) and the other cases cited by Petitioners. This Court should decline to exercise jurisdiction over this case. First, the statute that leads to the alleged conflict is clear and unambiguous, which will allow for any alleged issue to resolve itself over time. Second, *Jackson* and *Maslak* are distinguishable because of the elicited testimony that is highlighted in each decision. The distinct testimony removes this matter from any direct and express conflict that is required for this Court to accept jurisdiction.

Pursuant to Article V, §3(b)(3), *Fla. Const.*, this Court may only exercise its discretionary jurisdiction when an appellate decision “expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law.” Art. V, §3(b)(3), *Fla. Const.* An express and direct conflict on the

same point of law must exist on the face of the two different opinions before jurisdiction may arise. *See Jenkins v. State*, 385 So. 2d 1356 (Fla. 1980); *Dodi Publishing Co. v. Editorial America, S.A.*, 385 So. 2d 1369 (Fla. 1980). Jurisdiction should be declined when an opinion establishes no point of law contrary to a decision of this Court or another district court. *The Florida Star v. B.J.F.*, 539 So. 2d 286, 289 (Fla. 1988). For the following reasons, the two decisions do not expressly and directly conflict and the Petition should be denied.

1. The Opinion does not Expressly and Directly Conflict with the Fourth District’s Decision in *Maslak v. Wells Fargo Bank, N.A.*, 190 So. 3d 656 (Fla. 4th DCA 2016).

By alleging direct conflict on an issue of law, the Petitioners presuppose that the Fourth District in *Maslak* was overreaching and seeking to add elements to § 90.803(6), Fla. Stat. Both *Jackson* and *Maslak* identically recite the elements of the business records exception that allow a party to introduce evidence ordinarily considered inadmissible hearsay. In pertinent part, the statute reads and requires: “(1) the record was made at or near the time of the event; (2) was made by or from information transmitted by a person with knowledge; (3) was kept in the ordinary course of a regularly conducted business activity; and (4) it was a regular practice of that business to make such a record.” *Maslak v. Wells Fargo Bank, N.A.*, 190 So. 3d 656, 659 (Fla. 4th DCA 2016); *Jackson v. Household Fin. Corp. III*, 2018 Fla. App. LEXIS 1251, 43 Fla. L. Weekly D261b (Fla. 2d DCA Jan. 31, 2018).

In both cases, each witness for the proponent answered the four questions in the affirmative. The Second District held that this was sufficient to lay the foundation for the business records exception. In holding this way, the *Jackson* court cited to this Court, holding that once the proponent lays this predicate, the burden shifts to the opposing party to prove that the records are untrustworthy. *Jackson v. Household Fin. Corp. III*, 2018 Fla. App. LEXIS 1251, 43 Fla. L. Weekly D261b (Fla. 2d DCA Jan. 31, 2018) (citing *Love v. Garcia*, 634 So. 2d 158, 160 (Fla. 1994)).

Unlike *Jackson*, the Fourth District in *Maslak* held that the business record was inadmissible despite the proponent testifying affirmatively to the four elements found in § 90.803(6), Fla. Stat. This result, however, was not necessarily because the proponent's testimony was insufficient to satisfy the initial burden, but in doing so, she raised issues of her credibility and the reliability of the record(s).

The *Maslak* opinion emphasizes additional testimony from the proponent outside of the standard testimony required pursuant to 90.803(6). Specifically, beyond answering yes to those elements, the proponent in *Maslak* testified that a separate department is responsible for the payment history, that she never worked in that department, and outside counsel brought the copy of the payment history to court. *Maslak*, 190 So. 3d at 660. Further, the Fourth District highlighted that “[t]he witness did not know whether someone at outside counsel’s office changed or modified the document in any way.” *Id.* at 660. This additional testimony offered by

the proponent in *Maslak* is a far cry from the succinct testimony offered in *Jackson*. Less can be more.

The *Maslak* decision does not reference whether or not this additional testimony was elicited on direct-examination, voir dire, or cross-examination. Considering the nature of the responses, one would assume it was on cross-examination or voir dire. If it was, then *Maslak* does square with *Jackson*. As was held in *Jackson*, once the four questions are answered in the affirmative, the burden switches to the opposing party to prove that the records are untrustworthy. After all, similar language is found in § 90.803(6), Fla. Stat., which reads that the exception applies “unless the sources of information or other circumstances show lack of trustworthiness.” § 90.803(6), Fla. Stat. (2014).

If the testimony highlighted in *Maslak* happened to be elicited on direct examination, a similar rationale would still apply. The proponent went too far and called into question their own witnesses’ credibility and reliability of the record(s). Pursuant to § 90.608, any party, including the party calling the witness, may attack the credibility of a witness. § 90.803(6), Fla. Stat. (2015). In *Maslak*, the proponent may very well have unintentionally discredited their own foundation leading the Fourth District to believe that the sources of information or other circumstances reflected a lack of trustworthiness. *See* § 90.803(6), Fla. Stat. (2014).

Unlike *Maslak*, the testimony in *Jackson* was concise and favorable for the proponent. The proponent simply answered six questions, all using language directly

from § 90.803(6), Fla. Stat. No other testimony on direct is highlighted in the *Jackson* opinion. On cross-examination, the testimony elicited actually bolstered Birsch's testimony on direct. On cross, the Petitioners asked how Birsch gained familiarity with HSBC's record-keeping systems. Birsch answered as follows: "[w]ell, I've been there for 25 years. So I've been in the various departments, managed various departments. So I've basically become very familiar with a lot of different questions. Like cross-training and what have you." (P.B. 2). (Pet. Appx. 7). This is dissimilar to *Maslak*, where the Fourth District pointed out that the Chase witness "began working for Chase in 2011, long after the loan was entered into and the borrower defaulted." *Maslak*, 190 So. 3d at 658. The *Maslak* decision does not state whether that testimony was elicited on direct or cross. The testimony elicited in *Jackson* and *Maslak* is vastly different.

In sum, because of the differing testimony between the two cases, there is no certainty of direct conflict. Although the *Maslak* court does not mention the shifting burden of proof applicable to the business records exception, it does not mean the Fourth District did not consider or employ it. Even if they didn't, judging by the testimony highlighted in *Maslak*, it is possible that the proponent's credibility and the reliability of the records were damaged on direct, leading to their inadmissibility.

Based on the dissimilar testimony between *Jackson* and *Maslak*, coupled with the uncertainty surrounding the *Maslak* decision, there is no express and direct conflict between the two cases and this Court should deny jurisdiction.

2. The Remaining Cases Cited by the Petitioners do not Expressly and Directly Conflict with the Opinion.

The remaining cases cited by Petitioners are also distinguishable and do not rise to the level of a direct and express conflict warranting this Court's review. First, the Petitioners cite to *Hidden Ridge Condo. Homeowners Ass'n v. OneWest Bank, N.A.*, 183 So. 3d 1266 (Fla. 5th DCA 2016). (P.B. 7). Unlike *Jackson*, *Hidden Ridge* did not involve live testimony and also involved records from prior servicers.

Second, the Petitioners cite to *Lindsey v. Cadence Bank, N.A.*, 135 So. 3d 1164 (Fla. 1st DCA 2014). (P.B. 8). The posture of *Lindsey* is not akin to *Jackson*. In *Lindsey*, there was no live testimony and summary judgment in favor of the bank was challenged. *Id.* at 1165. The *Lindsey* court held that the bank established a proper foundation for the business records exception by way of an affidavit setting forth the necessary elements. *Id.* at 1166. The affiant had been previously deposed by the defendants. *Id.* In holding that the proper foundation had been laid, the First District noted that the affiant was familiar with how the bank's computerized system worked by virtue of her position at the bank. *Id.* at 1168. Despite the differences in posture, this analysis squares with *Jackson*. The proponent filed an affidavit consistent with § 90.803(6), Fla. Stat. The opponent had the opportunity to challenge the affiant's credibility and the reliability of the record at a deposition. The Court held that the proponent overcame any challenge. This is similar to *Jackson*, where the opponent

had the opportunity to cross examine David Birsch at trial. The opponent, however, bolstered Birsch's testimony as opposed to discrediting it.

Finally, the Petitioners cite to another decision from the Fourth District in *Wells Fargo Bank, N.A. v. Balkissoon*, 183 So. 3d 1272 (Fla. 4th DCA 2016). In *Balkissoon*, the Fourth District reversed the trial court's ruling and held that the bank's payment history should have been admitted. *Id.* at 1277. Unlike *Jackson*, however, there was detrimental voir-dire elicited by the opponent, as detailed in the *Balkissoon* decision. *Id.* at 1274. Unlike *Balkissoon*, the cross-examination in *Jackson* was helpful to the proponent. These additional cases cited to by the Petitioners do not espouse a point of law that conflicts with *Jackson*.

3. There is No Other Basis for Jurisdiction.

The Petitioners also argue that although the *Jackson* opinion arose out of a foreclosure action, neither District Court limited the application of its opinion to foreclosure cases, thus leaving uncertainty in any type of case, civil or criminal. This is merely a discussion on the impact of the alleged conflict and is not a separate basis for this court to grant jurisdiction pursuant to Rule 9.030(a), Florida Rules of Appellate Procedure.

CONCLUSION

Based on the above, this Court should not exercise its discretionary jurisdiction as no direct and express conflict exists between the opinions before this Court.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of
Florida Rule of Appellate Procedure 9.210(a)(2).

/s/ Matthew Ciccio
MATTHEW CICCIO, ESQ.
ALDRIDGE PITE, LLP
Attorney for the Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was provided via E-Mail or Regular U.S. Mail to the parties listed on the service list on this 23rd day of April, 2018.

ALDRIDGE | PITE, LLP

Matthew Ciccio, Esq.

Attorney for Respondent

1615 South Congress Avenue

Suite 200

Delray Beach, FL 33445

Telephone: (561) 392-6391

Facsimile: (561) 392-6965

By: /s/ Matthew Ciccio

Matthew Ciccio, Esq.

FBN: 103517

Primary E-mail:

servicemail@aldridgepite.com

Service List:

By E-Mail:

Nicole M. Ziegler, Esq.
Keane, Reese, Vesely & Gerdes, P.A.
770 Second Avenue South
St. Petersburg, FL 33701
Primary e-mail: nziegler@krvglaw.com
Secondary e-mail: efiling@krv-lawfirm.com

By US Mail:

The Drain Team, Inc.
c/o Kathryn Madison, President
961 Weigel Drive
Elmhurst, IL 60126

North Star Capital Acquisition, LLC, as Assignee for Wells Fargo
c/o LHR, Inc.
56 Main Street
Hamburg, NY 14075

Capital One Bank (USA) NA
c/o Capital One Bank (USA), National Association
1111 East Main Street
Richmond, VA 23219