

IN THE SUPREME COURT OF FLORIDA

CYNTHIA L. JACKSON and
THOMAS JACKSON,

Appellants/Petitioners,

vs.

Sup. Ct. Case No.: SC18-357

HOUSEHOLD FINANCE CORP III;
HOUSEHOLD FINANCE CORPORATION III;
THE DRAIN TEAM, INC.; NORTH STAR
CAPITAL ACQUISITION LLC AS ASSIGNEE
OF WELLS FARGO; and CAPITAL ONE
BANK (USA) NA., A CORPORATION,

Appellees/Respondents.

**ON PETITION FOR REVIEW FROM A DECISION OF THE
SECOND DISTRICT COURT OF APPEAL, STATE OF FLORIDA
CASE NO. 2D15-2038**

PETITIONERS' BRIEF ON JURISDICTION

NICOLE M. ZIEGLER, ESQ.
Fla. Bar No. 068495
Keane, Reese, Vesely & Gerdes, P.A.
770 Second Avenue South
St. Petersburg, FL 33701
Tel: (727) 823-5000
Fax: (727) 894-1023
Attorneys for Appellants/Petitioners

RECEIVED, 03/12/2018 04:28:26 PM, Clerk, Supreme Court

TABLE OF CONTENTS

Table of Contents	i
Table of Authorities	ii
Statement of the Case and Jurisdictional Facts.....	1-3
Summary of the Argument.....	4
Argument	
<u>I. The Second District Certified 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).</u>	4-8
Conclusion.....	9
Certificate of Service.....	9-10
Certificate of Compliance	10

TABLE OF AUTHORITIES

<u>CASE</u>	<u>PAGE</u>
<i>Hidden Ridge Condo. Homeowners Assoc., Inc. v. OneWest Bank, N.A.</i> , 183 So. 3d 1266 (Fla. 5th DCA 2016).....	7
<i>Lindsey v. Cadence Bank, N.A.</i> , 135 So. 3d 1164 (Fla. 1st DCA 2014).	8
<i>Maslak v. Wells Fargo Bank, N.A.</i> , 190 So. 3d 656 (Fla. 4th DCA 2016).....	<i>passim</i>
<i>Wells Fargo Bank, N.A. v. Balkissoon</i> , 183 So. 3d 1272 (Fla. 4th DCA 2016).....	8

<u>OTHER AUTHORITIES</u>	<u>PAGE</u>
FLA. CONST. ART. V, §3(b)(3).....	9
Fla. R. Ev. 90.803(6).....	4

STATEMENT OF THE CASE AND JURISDICTIONAL FACTS

This Petition seeks review of the Second District Court of Appeal's decision affirming a final judgment of foreclosure. A copy of the opinion is attached as an Appendix. "App. #" refers to the page number of the Appendix.

The facts set forth herein are taken from the Second District's opinion. The Petitioners, Cynthia Jackson and Thomas Jackson ("the Jacksons") executed a mortgage in favor of Household Finance Corp III, the originating lender and Plaintiff below. (App. 6) Household was a wholly-owned subsidiary of HSBC. (*Id.*) At trial, Household sought to admit "business records establishing the Jackson's default" into evidence under the business records exception. (*Id.*)

Household relied on the testimony of David Birsh to lay the predicate foundation for admission. (*Id.*) Mr. Birsh testified that he is an Assistant Vice President of HSBC. (*Id.*) Mr. Birsh further testified 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, payment, communications, escrow account activity disbursements, events and analysis with respect to the mortgage loan account?

A. Yes, it is.

Q. And are these business practices 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.

(App. 6-7) On cross-examination, Mr. Birsh described his review of the documents and testified:

Q. And you testified that you're familiar and I forget the exact language, with the recordkeeping procedures of HSBC. How did you gain that 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 really familiar with a lot of the different questions. Like cross-training and what have you.

(App. 7)

The Jacksons argued that Mr. Birsh's testimony did not lay the predicate for the business records exception because (1) it merely affirmed the statutory language of the business records exception, and (2) did not explain how Mr. Birsh acquired personal knowledge of HSBC's record keeping system or otherwise demonstrate his qualification to lay the predicate for admission of the records. (App. 9) The trial court disagreed and admitted the records. (App. 5)

On appeal, the Second District affirmed, holding:

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

(App. 12)

In so holding, the Second District certified that its decision conflicts 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). (App. 5, 12)

The Jacksons timely filed their Notice to Invoke Discretionary Jurisdiction to the Florida Supreme Court.

SUMMARY OF THE ARGUMENT

This Court should exercise its discretionary jurisdiction to review the District Court's decision below because it is certified 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) on the legal question of whether a proper foundation has been laid justifying the admission of records under the business records exception pursuant to Florida Rule of Evidence 90.803(6).

ARGUMENT

I. The Second District Certified Conflict With the Fourth District's Decision in *Maslak v. Wells Fargo Bank, N.A.*, 190 So. 3d 656 (Fla. 4th DCA 2016).

The appellate decision below is **certified** to be in direct conflict with the Fourth District's decision in *Maslak v. Wells Fargo Bank, N.A.* In *Maslak*, Wells Fargo filed suit to foreclose three promissory notes. 190 So. 3d at 658. Chase Bank was the servicer of the loans. *Id.* At trial, Wells Fargo sought to admit a payment history into evidence under the business records exception. *Id.* Wells Fargo's witness was a "home loan research officer" employed by Chase, whose job entailed: (1) reviewing loans which are the subject of litigation and finding ways to resolve those loans; (2) testifying at trials, hearings, and depositions; and (3) appearing at mediations. *Id.* Regarding the records, the witness testified:

- She is familiar with Chase's practices for loan servicing.
- She reviewed the loan's payment history, note, mortgage, servicing notes and records, and acquisition documents.
- All of the documents were created and kept in the regular course of business.
-
- [t]he payment history was made at or near the time that payments, credits, or other transactions would have been received.
- The information was transmitted by persons with knowledge and was kept in the course of Chase's regularly conducted business.

Id.

"Beyond parroting the four elements contained in the business records exception" the witness also testified that:

- (1) she is familiar with Chase's practices for loan servicing and Chase keeps detailed records in reference to the loans that it services;
- (2) the payment processing department is responsible for the payment history;
- (3) she never worked in that department;
- (4) she reviewed the payment history because it is part of Chase's business records;
- (5) she printed the payment history and sent it electronically to outside counsel; and
- (6) outside counsel brought the copy of the history to court.

Id. at 660.

The borrower argued that “the witness was unqualified to lay the predicate for admission because the witness “simply ‘regurgitated the magic words,’ but was unfamiliar with, and had no knowledge of, how the records were created and kept.”

Id. at 658-59. The Fourth District agreed, holding:

Wells Fargo correctly asserts that its witness testified as to each element of the business records exception for admission of the payment history. However, “[t]he fact that a witness employed all the ‘magic words’ of the exception does not necessarily mean that the document is admissible as a business record”.

Id. at 659 (citation omitted). More specifically, the Fourth District found that the witness “failed to testify about how payments were received and processed, Chase’s procedures for inputting payment information, or the computer system Chase utilizes.” *Id.* at 660.

As set forth in its opinion, the Second District’s decision cannot be squared with the Fourth District’s decision:

Although the *Maslak* court determined that the employee merely recited the “magic words” of the business records exception, nothing her testimony suggested she lacked personal knowledge of Chase’s recordkeeping system. Thus, **in our view, the employee’s direct testimony satisfied the proponent’s initial burden of laying the foundation for the business records exception. At that point, the burden should have been shifted to the opposing party, Maslak, to establish that the employee did not have personal knowledge of Chase’s recordkeeping system or was otherwise unqualified to testify as records custodian. Instead, the Fourth District concluded that the proponent needed to make further inquiries to lay a satisfactory predicate for the business records exception.**

(App. 10-11) (Emphasis supplied)

Stated succinctly, as to whether “magic words” testimony alone lays the proper foundation such that the burden shifts to the objecting party to establish that the witness did not have personal knowledge of the records-keeping system or was otherwise unqualified to lay the foundation, the Second District answered “Yes” and the Fourth District answered “No”.

The Second District’s decision also conflicts with the Fourth District’s decision because beyond “parroting” the statutory elements of the business records exception, Household’s witness failed to testify about how payments were received and processed, HSBC’s procedures for inputting payment information, or the computer system HSBC utilizes. *Compare Maslak*, 190 So. 3d at 660.

While the Second District only certified conflict with *Maslak*, a survey of other decisions reflects conflict and uncertainty throughout Florida as to the degree of detail required to lay a proper predicate under the business records exception. *See Hidden Ridge Condo. Homeowners Assoc., Inc. v. OneWest Bank, N.A.*, 183 So. 3d 1266 (Fla. 5th DCA 2016)(holding that the mortgagor failed to lay proper foundation through certified business records affidavit where the affidavit failed to “demonstrate familiarity with the recordkeeping system of [the] business that prepared the document(s) and knowledge of how the data was uploaded into the

system”); *Lindsey v. Cadence Bank, N.A.*, 135 So. 3d 1164 (Fla. 1st DCA 2014)(holding that the bank established the necessary foundation for the business records exception where affiant demonstrated sufficient familiarity with how the bank’s computerized loan processing system worked, including how the system maintained account balances, how payments were entered into the system, and when loan records were updated); *Wells Fargo Bank, N.A. v. Balkissoon*, 183 So. 3d 1272 (Fla. 4th DCA 2016)(holding that the bank established the necessary foundation for the business records exception where witness demonstrated sufficient familiarity with the bank’s practices and procedures in creating the payment history by testifying “in detail how payments are received and processed by the payment center through the use of the AS400 system”).

Further, although the opinion below and *Maslak* arose out of foreclosure matters, neither Court limited the application of its opinion to foreclosure cases. The opinions have broad application as the same issue can arise in any case, civil or criminal, in which a records proponent seeks to admit records under the business records exception. Under the current state of the law, litigants and the courts are left uncertain as to the testimony necessary to lay a proper predicate under the business records exception. Accordingly, this Court should exercise its jurisdiction to resolve this uncertainty.

CONCLUSION

For all the foregoing reasons, Petitioners respectfully invoke this Court's jurisdiction under Article V, §3(b)(3) of the Florida Constitution and request the Court to: (1) accept jurisdiction; (2) establish a briefing schedule on the merits; and (3) quash the decision of the Second District Court of Appeal.

Dated: 3/12/2018

Respectfully submitted,

/s/ Nicole M. Ziegler
NICOLE M. ZIEGLER, ESQ.
Fla. Bar No. 068495
Keane, Reese, Vesely & Gerdes, P.A.
770 Second Avenue South
St. Petersburg, FL 33701
Tel: (727) 823-5000
Fax: (727) 894-1023
Primary email: nziegler@krvglaw.com
Secondary email: efiling@krv-lawfirm.com
Attorneys for Appellants/Petitioners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 12th day of March, 2018, I electronically filed the foregoing with the Clerk of the Court through Florida Court's E-filing Portal (www.myflcourtaaccess.com) by using the E-Service Option, which will send a Notice of Electronic Filing, in compliance with the Florida Rules of Judicial Administration Rule 2.516 to the following:

Matthew A. Ciccio and Steven C. Rubino, Esq.
Aldridge Pite, LLP
1615 S. Congress Avenue, Suite 200
Delray Beach, Florida 33445
McIccio@aldridgepite.com
efiling@aldridgepite.com

CourtXpress@firmsolutions.us
Attorneys for Appellee/Respondent

Household Finance Corporation III
c/o Kathryn Madison, President
961 Weigel Drive
Elmhurst, IL 60126

The Drain Team, Inc.
c/o Neil G. Corella, Registered Agent
1862 East Lake Woodlands Parkway
Oldsmar, FL 34677

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

/s/Nicole M. Ziegler
NICOLE M. ZIEGLER, ESQ.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Brief on Jurisdiction uses Times New Roman
14-point font and complies with all font requirements of Fla. R. App. P. 9.210.

/s/ Nicole M. Ziegler
NICOLE M. ZIEGLER, ESQ.