**IN THE SUPREME COURT OF THE STATE OF FLORIDA**

JOHN DESYLVESTER,
Petitioner,

vs.

**CASE NO.: SC17-1312**

L.T. NOS.: 2D15-5053;
2014-CA-6378

THE BANK OF NEW YORK MELLON
F/K/A THE BANK OF NEW YORK, AS
TRUSTEE, et. al
Respondent.
_____/

## PETITIONER'S STATEMENT OF CAUSE

Petitioner, John Desylvester ("Desylvester") hereby files this statement of cause pursuant to this Court's order dated October 17, 2017. In its order, this Court sought a statement from Desylvester regarding why this court should not decline jurisdiction in light of the decision in *Bollettieri Resort Villas Condominium Assoc., Inc. v. The Bank of New York Mellon*, SC16-1680.

In *Bollettieri*, this Court accepted jurisdiction based upon a certified conflict, however, based upon recent decisions on the issue, specifically *Klebanoff v. Bank of New York Mellon*, 42 Fla. L. Weekly D1480, 2017 WL 2818078 (Fla. 5th DCA June 30, 2017), opined the certified conflict had been resolved. Rightfully, this Court did not overrule the holding in *Hicks v. Wells Fargo Bank, N.A.*, 178 So. 3d 957 (Fla. 5th DCA 2015).

Desylvester believes this Court should accept jurisdiction because there is still a certified conflict with *Hicks*. Although in both cases the plaintiff alleged a continuing state of default, *Hicks* has been distinguished from *Bollettieri* by the portion of the opinion which states, "Because trial counsel for the parties stipulated to the court that the facts were undisputed, with Bank's counsel additionally confirming that the sole determinative issue to resolve at trial was one of law, the court erred when it failed to dismiss the foreclosure complaint with prejudice based on a default that occurred out-side of the five-year statute of limitations period." Id at 959.

In *Desylvester*, the final judgment, presented by plaintiff's counsel, confirmed by the trial witness, and ultimately signed by the judge, included calculations of interest from the same default date alleged in the complaint which was outside the statute of limitations. Consistent with *Hicks*, plaintiff in Desylvester obtained judgment based upon a default outside the statute of limitations. However, the Second District Court of Appeal has taken the conflicting position that Desylvester's case was not barred by the statute of limitations because, "the Bank alleged that the borrowers were in a continuing state of default up to the time of the filing of the complaint." The Second District Court of Appeal has failed to take into account the actions at trial, consistent with *Hicks*, where the plaintiff sought judgment based upon a default outside the statute of limitations.

This Court should invoke its discretionary jurisdiction to resolve this issue because there is conflict in the reasoning and decisions of the two appellate courts. The Second District Court of Appeal is of the opinion that allegations of continuing state of default are sufficient to plead around the statute of limitations. However, the Fifth District Court of Appeal is of the opinion that even if the complaint alleges a continuing state of default, the relief sought at trial is determinative. This Court should resolve this conflict because the allegations of "*and all subsequent payments*" has been required by the Supreme Court in Form 1.944 from the Florida Rules of Civil Procedure for all foreclosure cases since at least January 1, 2001. See *Amendments to the Fla. R. Civ. Pro.*, 773 So.2d 1098, 1145 (Fla. 2000).

It is established law that, "it cannot be doubted that courts may not by rule of practice either by statutory or inherent rule making authority, amend or abrogate a right resting in either substantive or adjective law." *Lundstrom v. Lyon*, 86 So.2d 771, 772 (Fla. 1956). This Court has previously held that statutes of limitations create substantive rights that cannot be abrogated by rules of procedure. *R.J.A. v. Foster*, 603 So.2d 1167, 1172 (Fla. 1992)(Barkett, J., dissenting). The reasoning of the Second District Court of appeal is improper that allegations of "*and all subsequent payments*" is sufficient to plead around the statute of limitations because it would place this Court in the position of setting forth forms in the Civil Rules of Procedure which abrogate statute of limitation rights of all Floridians. The sound

reasoning of the Fifth District Court of Appeal in *Hicks* and *Klebanoff* is proper because they recognize that the standard language should not be determinative in a statute of limitations analysis. Florida Courts, at least in a mortgage foreclosure setting, should look to the relief sought at trial.

WHEREFORE, Desylvester requests that this Court accept jurisdiction to resolve this important issue as to whether plaintiff's can invoke standard language accepted by this Court to plead around the statute of limitations, or whether Courts should determine the basis of the applicability of the statute of limitations based upon the relief sought at trial.

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__/s/ David W. Smith____
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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing was furnished this 6th day of November 2017, by email, to Bank of New York Mellon c/o Weitz & Schwartz, P.A. 900 S.E. 3rd Avenue, Suite 204, Ft. Lauderdale, FL 33316, at:

*sarahweitz@weitzschwartz.com*;
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__/s/ David W. Smith____
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