

IN THE SUPREME COURT  
OF FLORIDA

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**CASE NO. SC10-1356**

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**PAYLESS FLEA MARKET, INC.,**  
**a Florida corporation,**

Petitioner,

vs.

**ILENE RICHMOND,**

Respondent.

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On petition for discretionary conflict review of  
a decision of the Fourth District Court of Appeal

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**RESPONDENT’S BRIEF ON JURISDICTION**

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## **CONSTITUTIONAL PROVISIONS, STATUTES AND RULES**

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## **STATEMENT OF THE CASE**

This dispute over the enforceability of a 2003 commercial lease went to a jury trial in Broward County. The lease was found to be enforceable, and the tenant, Payless Flea Market, was awarded damages for a breach by the landlord, S&I Investments. On appeal, the Fourth District Court of Appeal reversed the judgment in favor of Payless, finding the lease to be “void from its inception” (Pet. App. pp. 2, 8) because it lacked two subscribing witnesses, as required by section 689.01, Florida Statutes.<sup>1</sup>

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<sup>1</sup> **Section 689.01, Fla. Stat. (How real estate conveyed)**, provides, in pertinent part:

No estate or interest of freehold, or for a term of more than 1 year, or any uncertain interest of, in or out of any messuages, lands, tenements or hereditaments shall be created, made, granted, transferred or released in any other manner than by instrument in writing, *signed in the presence of two subscribing witnesses* by the party creating, making, granting, conveying, transferring or releasing such estate, interest, or term of more than 1 year, or by the party's lawfully authorized agent . . . . ; and no estate or interest, either of freehold, or of term of more than 1 year, or any uncertain interest of, in, to, or out of any messuages, lands, tenements or hereditaments, shall be assigned or surrendered unless it be by instrument signed *in the presence of two subscribing witnesses* by the party so assigning or surrendering, or by the party's lawfully authorized agent, or by the act and operation of law . . . .

(emphasis supplied).

Thus, the District Court directed that judgment be entered in favor of Ilene Richmond, a partner in S&I Investments and the only remaining appellant at the time of the decision.<sup>2</sup> The District Court stated that “[t]o the extent this opinion is in conflict with *Taylor v. Rosman*, [312 So. 2d 239 (Fla. 3d DCA 1975)], we certify such conflict.” (Pet. App. p. 10).

Payless Flea Market has timely sought discretionary review, asserting that this Court has jurisdiction under article V, § 3(b)(3), Florida Constitution, which gives this Court discretionary jurisdiction to review a decision of a district court that “expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law.” In addition to the certified conflict with *Taylor v. Rosman*, Payless asserts that jurisdiction also exists to review the decision below because of express and direct conflict with this Court’s decision in *Gill v. Livingston*, 29 So. 2d 631 (Fla. 1947). Both of those cases applied the doctrine of estoppel to enforce a lease that was signed without compliance with the “two subscribing witnesses” requirement of section 689.01.

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<sup>2</sup> S&I Investments and the other general partner, Stephanie Richmond, settled with Payless prior to the decision below, satisfying the damages judgment, but not fully satisfying the related attorney’s fee judgment. See Pet. App., p. 1, n. 1. After the decision in this case reversing the judgment in favor of Payless, the Fourth District also set aside the related attorney’s fee judgment. See *S&I Investments v. Payless Flea Market, Inc.*, \_\_\_ So. 3d \_\_\_, 35 Fla. L. Weekly D1451 (Fla. 4th DCA June 30, 2010) (No. 4D08-4257). Were it not for Payless’s pursuit of the balance of that fee judgment from Ilene Richmond, this case would be moot.

## **STATEMENT OF THE FACTS**

Petitioner's Statement of the Facts is improperly argumentative, and violates this Court's requirement that only the facts contained within the four corners of the opinion below are pertinent to the issue of conflict jurisdiction. *See Hardee v. State*, 534 So. 2d 706, 708 n. 1 (Fla. 1988) ("for purposes of determining conflict jurisdiction, this Court is limited to the facts which appear on the face of the opinion."). *Reaves v. State*, 485 So. 2d 829 (Fla. 1986), explained the "four corners" rule, and aptly illustrates the flaws in Petitioners' Jurisdictional Brief, which is replete with record citations and facts not found within the opinion below:

The only facts relevant to our decision to accept or reject such petitions are those facts contained within the four corners of the decisions allegedly in conflict. . . [W]e are not permitted to base our conflict jurisdiction on a review of the record or on facts recited only in dissenting opinions. Thus, it is pointless and misleading to include a comprehensive recitation of facts not appearing in the decision below, with citations to the record, as petitioner provided here.

*Reaves*, 485 So. 2d at 830.

The pertinent facts are that in 2003, after executing a 10-year commercial lease with Payless Flea Market on behalf of the lessor, S&I Investments, and before the effective date of the lease, Ilene Richmond sought to cancel the lease, in part because she contended it had been conditioned upon her sister's approval, and in part because it lacked two subscribing witnesses. Payless treated the lease as valid, remained on the premises, and paid rent into the registry of the court while

the parties litigated their dispute. S&I sued for eviction, contending that the 2003 lease was invalid, and Payless countersued for damages. The trial court found that the lease was a renewal, not subject to the two subscribing witness requirement of section 689.01, Florida Statutes; the jury found the lease to be valid, and that Payless was entitled to damages.

On appeal, the Fourth District did not reach the issue of whether the 2003 lease was a new lease or a renewal, finding that the section 689.01 two subscribing witness requirement applied in either case. *See* Pet. App. at 5-6 (“a lease that has only one subscribing witness is unenforceable”). The court also declined to find that S&I was estopped to deny the enforceability of the lease, because Payless did not change position, and because S&I did not accept benefits under the 2003 lease, instead placing all rent payments into the court registry. Finding the lease “void from its inception” because it lacked two subscribing witnesses (*see* § 689.01, Fla. Stat.), the Fourth District reversed the judgment for damages and directed that judgment be entered in favor of Ilene Richmond.

Payless Flea Market now seeks discretionary conflict review. We show below why this court lacks jurisdiction.

## **SUMMARY OF ARGUMENT**

The Fourth District's decision below reversed a judgment in favor of lessee Payless Flea Market because the lease failed to comply with the statutory requirement that there be two subscribing witnesses to the signatures on the lease. *See* § 689.01, Fla. Stat. The lessor had denied the validity of the lease on this ground prior to the effective date, and never accepted the benefits of the lease, placing all rents in the court registry during the litigation.

Despite the certified conflict with *Taylor v. Rosman*, 312 So. 2d 239 (Fla. 3d DCA 1975), on the issue of whether or not section 689.01 applies to a "renewal" lease, a careful reading of that case reveals that no express and direct conflict exists, as required under Article V, section 3(b)(3), Florida Constitution. Although the Fourth District concluded that the statute applies to both new *and* renewal leases, *Taylor* never ruled to the contrary. In fact, *Taylor* was decided on estoppel grounds, holding that a lessee who had accepted the benefits of a lease could not thereafter deny its validity based on its lack of two subscribing witnesses. Moreover, the Third District has more recently made clear that the two-witness provision of section 689.01 must be enforced, unless an express statutory exception applies, or unless the facts support an estoppel. *See Skylake Ins. Agency, Inc. v. NMB Plaza, LLC*, 23 So. 3d 175 (Fla. 3d DCA 2009).



Here, the facts do not support an estoppel, because Payless did not change its position, and the lessor, S&I Investments, did not accept the benefits of the lease. Thus, this case does not expressly and directly conflict with *Taylor v. Rosman*, or with *Gill v. Livingston*, 29 So. 2d 631 (Fla. 1947), where estoppel applied because the lessor accepted the benefits of the lease and “in all respects” treated it as valid, despite the lack of two subscribing witnesses. *Id.* at 579. The cases are in accord on estoppel principles; the different facts simply led to different results.

## **ARGUMENT**

### **I.**

#### **THE DECISION BELOW DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH TAYLOR V. ROSMAN ON THE SAME QUESTION OF LAW**

##### **A. Taylor Did Not Decide Whether § 689.01 Applies to a Renewal Lease**

Petitioner misreads *Taylor v. Rosman*, 312 So. 2d 239 (Fla. 3d DCA 1975), by concluding that the Third District “expressly rejected the application of Fla. Stat. § 689.01 to the renewal lease.” (Pet. Jurisdictional Brief, p. 6). *Taylor* did conclude that the second of two rental agreements that were “substantially the same form contracts” was not a new lease, but rather a renewal lease, 312 So. 2d at 240, but in concluding that the motion to dismiss should not have been granted, the court did *not* address whether that “renewal lease” conclusion exempted the lease from the requirements of section 689.01, Florida Statutes. Instead, the *ratio*

*decidendi* in *Taylor* was that “the appellee is *estopped* to defeat the second lease agreement by asserting Section 689.01 because she and her deceased husband occupied the apartment for almost two years under the similar first rental agreement, making rental payments thereunder.” (emphasis supplied).

The Fourth District’s disagreement with *Taylor* read something into *Taylor* that was not there, when stating that “[t]o the extent *Taylor* suggests that a renewal lease would not have to meet the two-witness requirement under section 689.01, we disagree with the opinion in *Taylor*.” (Pet. App., p. 6) (emphasis supplied). *Taylor* did not “suggest” anything at all about the application of the statute to a renewal lease, because the case was decided solely on estoppel grounds. 312 So. 2d at 241. Therefore, Petitioner’s assertion of “direct conflict” on the issue of whether the statute applies to a renewal lease is incorrect, and the lack of conflict on this question of law means this Court has no jurisdiction to review the decision below.

**B. Material Factual Differences with *Taylor* Mean There is  
No Express and Direct Conflict on the Applicability of Estoppel**

*Taylor v. Rosman* reversed the dismissal of a lessor’s complaint that sought relief from lessee under both an extant rental agreement and under a prior, “almost identical prior rental agreement.” 312 So. 2d at 240. The lessee, who had failed to pay rent under the second lease, but continued to live on the premises, moved to

dismiss the complaint, arguing that the absence of two subscribing witnesses on the lease made it invalid and unenforceable under section 689.01, Florida Statutes. *Id.*, 312 So. 2d at 240. As noted above, the Third District held that the lessee was estopped to deny the validity of the lease, because she had occupied the apartment and paid rent under the prior similar rental agreement.

Here, in contrast, S&I (the lessor) did not seek any relief under the parties' prior lease (which had been signed by Ilene Richmond's father in 1995), and disclaimed the validity of the 2003 lease *prior to its effective date*, never accepting rent during the disputed term of that lease, but rather depositing the rent into the court registry. *See* Pet. App. pp. 3, 7; *id.* at 8 (Ilene Richmond "went to great lengths so as not to accept benefits under the October 2003 lease."). Thus, the lessor's efforts not to accept any benefits under the disputed lease distinguishes this case from *Taylor v. Rosman*, and foreclosed Payless's estoppel defense.

More recently, in *Skylake Insurance Agency, Inc. v. NMB Plaza, LLC*, 223 So. 3d 175 (Fla. 3d DCA 2009), the Third District has confirmed its intention to give effect to the statutory two subscribing witness requirement, refusing to recognize any exceptions other than those expressly contained in the statute. The Fourth District found *Skylake Insurance* instructive, because the Third District there had declined to impose an estoppel where the party seeking to utilize that defense had not changed position in more than an insubstantial way. *See Skylake*

*Ins.*, 23 So. 3d at 178 (“In the decided estoppel cases involving leases, the tenant took possession and the landlord *accepted the rent*.”) (emphasis supplied). *Skylake* cited *Taylor v. Rosman* as an example of cases where the facts did support an estoppel, and reiterated that “the bare failure of the landlord to have his signature witnessed does not give rise to an estoppel, because to so hold would in effect render section 689.01 unenforceable. For an estoppel to operate, the tenant must have changed position in more than an insubstantial way.” 23 So. 3d at 178.

The Fourth District’s decision in this case is not in conflict with *Taylor v. Rosman*’s application of estoppel, because here “Payless, did not ‘change[] position in more than an insubstantial way’ . . . .” (Pet. App. 7). Thus, unlike *Taylor*, in this case the facts did not support the estoppel defense.

## II.

### **THE DECISION BELOW DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH *GILL V.* *LIVINGSTON* ON THE SAME QUESTION OF LAW**

Petitioner also contends that the decision below expressly and directly conflicts with *Gill v. Livingston*, 29 So. 2d 631 (Fla. 1947), despite the fact that the Fourth District found *Gill* “instructive.” (Pet. App., pp. 7-8). That was so because this Court found in *Gill* that the lessor, who *accepted benefits under the lease*, was

estopped from denying its enforceability simply because it did not have two subscribing witnesses:

*They have accepted benefits under the lease, have placed the lessee in possession, have negotiated to convey the lands subject to the lease, and in all respects have recognized it as being an effective conveyance, and in equity they ought not to be permitted to disavow it now.*

*Gill*, 29 So. 2d at 579 (emphasis supplied).

In stark contrast, the facts of this case are that S&I *never* accepted rent under the lease, a situation diametrically opposed to that in *Gill*. Petitioner focuses on the facts that the parties could have (but did not) witnessed each other's signatures, that Ilene Richmond's attorney was present, and that S&I Investments had accepted rents under the prior lease. *See* Pet. Jurisdictional Brief, p. 10. But absent acceptance of benefits under the disputed lease, one cannot fairly say that the decision below conflicts with *Gill*, where the lessor accepted the benefits and "in all respects" treated the lease as valid. Here, where S&I never accepted the benefits, the Fourth District simply applied *Gill's* legal principles to disparate facts. Petitioner has failed to demonstrate express and direct conflict with *Gill* on the same question of law.

### **CONCLUSION**

For the foregoing reasons, the Court lacks conflict jurisdiction and discretionary review should be denied.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Brief on Jurisdiction has been furnished by U.S. Mail on this 27th day of July, 2010, to the following counsel:

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BEVERLY A. POHL

**CERTIFICATE OF COMPLIANCE**

I HEREBY CERTIFY that this Brief complies with FLA.R.APP.P. 9.210 and is prepared in Times New Roman 14-point font.

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BEVERLY A. POHL