IN THE SUPREME COURT OF FLORIDA

Case No. SC08-2255
3d DCA Case No. 3D07-378

VANNESSA VAN VORGUE,

Petitioner,

vs.

MARA RANKIN,

Respondent.
_____ /

RESPONDENT'S ANSWER BRIEF

On Discretionary Review From The
District Court Of Appeal, Third District

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STATEMENT OF THE CASE AND FACTS[1]

Rankin and Van Vorgue were former domestic partners in a 23-year lesbian relationship (A1. at 70, 73, 87; A2. at ¶9, A3. at ¶2).[2] According to Van Vorgue, she agreed to stop working to become a stay-at-home partner for Rankin and to accompany her on business trips while Rankin would be responsible for the "financial aspects" of the relationship. Van Vorgue alleges that, as a result of this verbal agreement, they each were to be "equal partners" in the assets Rankin acquired during the relationship (A1. at 74-75, 173, 268; A2. at 116-9).[3]

In December, 1993, Rankin formed Van Vorgue Enterprises, Inc. (the "Corporation") to facilitate her continued employment in the television and radio industry due to prior non-competition restrictions (A2 at ¶20; A3. at 118). The Corporation was capitalized solely from Rankin's earnings and from contracts she obtained solely through her own efforts (A1. at 230; A3. at ¶8). Van Vorgue did

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[1] Rankin presents her own Statement of the Case and Facts because she disputes the accuracy of Van Vorgue's Statement in her Initial Brief.

[2] References to "A" are to the Appendix to Appellant's Initial Brief filed below with the Third District Court of Appeal.

[3] This alleged life "partnership" is clearly a misnomer for the parties' actual relationship. Since Florida law does not recognize same-sex marriages, courts cannot enforce such a non-marital, nuptial-like agreement for support between gay partners unless it is in writing. *See Posik v. Layton*, 695 So. 2d 759, 761 (Fla. 5th DCA 1997), *citing Lowry v. Lowry*, 512 So. 2d 1142 (Fla. 5th DCA 1987). Rankin appealed the trial court's order denying Rankin's motion for summary judgment on Van Vorgue's claim to half of Rankin's assets as a result of this "oral agreement" to be "equal partners" for life. The Third District did not address this issue substantively because it ruled that the order denying summary judgment was not an appealable, non-final order. *See Rankin*, 994 So. 2d 463 (Fla. 3d DCA 2008).

not contribute any income or money to the Corporation independent of Rankin's earnings; she was never in contact with the clients; she did not provide support services; and she was neither involved in nor had any knowledge as to how the Corporation was run (A1. at 231-32, 265; A3. at ¶9).

In January, 1996, Rankin drafted her will. She was concerned that her family, who would inherit her estate, would not provide for Van Vorgue following her demise (A3. at ¶11). Her attorney recommended that Rankin include Van Vorgue as a joint tenant on the title to her home located at 8 Farrey Lane, Miami Beach, Florida (the "Farrey Lane Property") and Rankin did so (*id*.).

As part of her estate planning, Rankin also provided a portion of her income to Van Vorgue *via* a "salary" through the Corporation to help Van Vorgue open a retirement account (A3. at ¶12).[4] Rankin also named her as an officer of the Corporation (A1. at 36-38).[5] Other than benefiting from Rankin's salary, Van Vorgue did not have any outside sources of income (A1. at 265). Thus, Van Vorgue did not contribute any of her own money to the parties' joint accounts nor did Rankin intend to give Van Vorgue a present interest in her assets (A3. at ¶12).

[4] As a result of Rankin's forethought, Van Vorgue accumulated $36,000 in an IRA (A3. at ¶12).

[5] Van Vorgue's "employment" with the Corporation was limited to faxing papers to Rankin's clients or customers and making deposits at the bank at Rankin's request (A1. at 36-37).

The Meridian Property

On or about January 29, 1997, Rankin sold the Farrey Lane Property and purchased property located at 2335 Meridian Avenue, Miami Beach, Florida (the "Meridian Property") (*id*. at ¶13). Consistent with Rankin's estate planning, title to the Meridian Property was held by Rankin and Van Vorgue as joint tenants with right of survivorship (*id*.). Van Vorgue did not contribute any money to purchase the Meridian Property and did not pay for any of its expenses (A1. at 32-33, 34; A3. at 113). Rankin paid the entire down payment, made each and every mortgage and insurance payment, and paid for applicable taxes, repairs and improvements (A3. at 1113).

The Break Up

In or around April, 2004, Rankin was transferred to California and she moved out of the Meridian Property (A1. at 261; A3. at 114). According to Rankin, she terminated the relationship and told Van Vorgue that she was unhappy and that she wanted to use that opportunity to go on with her life (A3. at 114). According to Van Vorgue, Rankin did not break up with Van Vorgue until July, 2004, explaining that she was "tormented" about their relationship and "needed to be alone" (A1. at 164-65, 261). On July 1, 2004, the parties entered into a Residential Sale and Purchase Contract to sell the Meridian Property to Renee Sebastian (A1. at 141; A2. at 134).

Signing of the Instruments

On July 21, 2004, the parties went to the offices of Juan A. Figueroa, P.A., C.P.A., in Coral Gables, Florida (the "Firm") (A1. at 131). The Firm had been the parties' accountant for many years, and Van Vorgue had previously dealt personally with Juan A. Figueroa and his secretary when filing her individual tax returns (*id.* at 115-16; 119-20).

While at the Firm that day, Van Vorgue executed (1) a Quit Claim Deed transferring to Rankin her interest in the Meridian Property; and (2) an Assignment of Stock Certificate No. 2 of Van Vorgue Enterprises, Inc. ("Assignment of Stock") transferring to Rankin her interest in the Corporation (A2. at ¶50; A3. at ¶16, and attached exhibits). Van Vorgue acknowledged her signature on each document (A1. at 135, 148).

Van Vorgue is a licensed Florida realtor (A1. at 52, 165). Thus, although Van Vorgue claims she did not read the documents, she knew she was signing a Quit Claim Deed transferring to Rankin her interest in the Meridian Property (A1. at 132, 134, 137-41). No one prevented Van Vorgue from reviewing the documents or prevented her from asking questions about them before signing *(id.* at 133, 137).

In consideration for the termination of their long-term relationship, Rankin gave Van Vorgue an automobile, paid for her car and health insurance through December, 2004, and gave her at least $10,000 in cash (A1. at 149-50, 261; A3.

at ¶20).[6] Van Vorgue also received numerous items of furniture and office equipment from the Meridian Property (A4. at ¶21).

The Complaint

Immediately prior to the closing of the Meridian Property sale, Van Vorgue filed a simple, 3-page Complaint seeking an "Equitable Mortgage" (Count I) and Cancellation of Instruments (Count II). The Complaint had two paragraphs of "operative facts" setting forth the description of the Meridian Property and the fact that Van Vorgue "may have executed documents" that "may be deemed to adversely affect [her] interest in the Property." The Complaint sought the maximum amount which Van Vorgue could possibly claim from the sale of the Meridian Property – an **"Equitable Mortgage . . . in the amount of Fifty Percent of the gross sales price for the benefit of Plaintiff.**" It sought no damages or any other relief except 50% of the proceeds of the Meridian Property sale. The Complaint had no factual allegations in connection with Van Vorgue's purported interest in the Corporation and Rankin's other personal assets.

The Escrow Agreement

On August 20, 2004, the parties agreed to place all the sale proceeds ($753,232.12) in escrow with Chicago Title Insurance Company (the "Escrow Agent") "[i]n order to clear title and allow the closing transaction to be completed" (A5. at Exhibit A, ¶2). The parties also agreed to "endeavor to reach an agreement

[6] According to Rankin, it was $20,000 in cash (A3. at ¶20).

as to the disbursement of said funds" during the following three weeks (*id.* at ¶2(A)). The Escrow Agreement expressly defined Van Vorgue's "claims" as follows:

> The claim of Vannessa Van Vorgue includes a request for cancellation of a (disputed) Quit Claim Deed filed of record whereby Vannessa Van Vorgue appears to have released her interest in the property to Rankin, . . . and a claim to her portion of the proceeds from the sale of the property as a co-owner.

(*id*. at ¶1). The defined claims are entirely consistent with Van Vorgue's claims in the initial Complaint in which she sought an equitable mortgage in the amount of half of the sale proceeds.

The Escrow Agreement required the Escrow Agent to "hold the funds for a period of approximately three (3) weeks, until September 10, 2004," and upon the expiration of the three weeks, "authorized" the Escrow Agent to place the funds in the Registry of the Clerk of the Court . . . pursuant to Case No. 2004-17520 (CA 10)" (*id*. at ¶¶2(A), 2(B)).

Moreover, the Escrow Agreement provided that disbursement "shall" be done either (1) "upon written authorization and instruction to disburse" by the parties, or (2) "upon receipt of a Court Order instructing and authorizing Escrow Agent to disburse the funds" (*id*. at ¶2(B)). The disbursements were **not** contingent on whether Van Vorgue had any claims with respect to Rankin's rightful share to at least 50% of the sale proceeds.

Rankin's Motion to Transfer Escrow Funds to Interest Bearing Account.

After the closing, the parties were unable to reach agreement as to Van Vorgue's claim to 50% of the sale proceeds. Because the sale proceeds were not earning interest, and would not earn interest in the court registry, on October 13, 2004, Rankin filed a Motion to Transfer Escrow Funds to Interest Bearing Account (CITE). As set forth in the Escrow Agreement and the Complaint, **the only claim then pending was Van Vorgue's claim for an "Equitable Mortgage . . . in the amount of Fifty Percent of the gross sales price for the benefit of Plaintiff."**

On December 1, 2004, the Court entered the Order Granting Rankin's Motion to Transfer Escrow Funds to Interest Bearing Account (the "Order Transferring Funds") (A5, Exhibit B). Consistent with the Escrow Agreement, the Order Transferring Funds "authorized" the Escrow Agent to "continue holding the proceeds" from the sale of the Meridian Property "pending resolution of the claims between the parties" (*id*.), and allowed the funds to be disbursed "pursuant to further Order of th[e] Court" (*id*.).

Van Vorgue Amends Complaint to Add Four New Counts and Additional Damages Claims

On December 1, 2004, the trial court granted Van Vorgue leave to file an 88-paragraph Amended Complaint[7] to assert various new causes of action in

[7] The factual allegations alone comprise 52 paragraphs, 50 paragraphs more than the initial Complaint.

connection with the Meridian Property, the Corporation and other personal assets of Rankin: Accounting and Dissolution of Partnership (Count 1); Establishment of an Equitable Lien (Count 2); Cancellation of Instrument (Count 3); Partition (Count 4); Restitution (Count 5); and Accounting, Receivership and Dissolution of Corporation/Partnership (Count 6). However, in the Amended Complaint, Van Vorgue continued to claim only a 50% interest in the Meridian Property, whether because she was a Rankin's joint tenant, or, alternatively, by virtue of an "oral partnership agreement" between the parties to be "equal partners" for life (SA. 281-324).[8]

Van Vorgue Amends Complaint Again to Assert Three Additional Counts and Treble Damages

On July 25, 2006, almost two years after executing the Escrow Agreement, Van Vorgue amended her pleading again to include additional claims for Fraud in the Inducement, Fraudulent Misrepresentation, and Civil Theft (A2). The Second Amended Complaint (incorrectly titled as "First Amended Complaint") now comprises 153 paragraphs, 10 separate counts, and treble damages for civil theft (*id*.).

Rankin's Motion to Release Escrow Funds in Connection with Her Undisputed Share of the Sale Proceeds.

On November 13, 2006, Rankin filed a Motion to Release Escrow Funds (A5). Rankin requested the Court, pursuant to the Order Transferring Funds, to

[8] "SA" refers to the Supplemental Appendix to Appellee's Answer Brief.

order the disbursement to her of 50% of the Meridian Property's sale proceeds because Van Vorgue was only claiming entitlement to, and could lawfully only recover, 50% of those funds based on her "claims" that she was a "co-owner" of the Property (*id*.).

The trial court denied the Motion to Release Escrow Funds (A.5) on the basis that Van Vorgue had several other claims pending in her Second Amended Complaint, notwithstanding that the "other claims" were unrelated and not governed by the Escrow Agreement which was executed almost 2 years before the pleading was filed.[9]

The Third District Decision

Rankin sought review of the trial court's order refusing to disburse Rankin's undisputed 50% share of the Meridian Property sale proceeds pursuant to the Escrow Agreement as an appealable, non-final order. *See* Fla. R. App. P. 9.130(a)(3)(C)(ii); *Morton & Oxley, Ltd. V. Charles S. Eby, M.D., P.A.*, 916 So. 2d 820 (Fla. 2d DCA 2005). The Third District Court of Appeal reversed the trial court's order, holding that, "[t]o order retention of 100% of the escrowed money until the parties resolve the **other claims** would be, essentially, an improper injunction" (emphasis added), citing *Konover Realty Assocs., Ltd. v. Mladen*, 511 So. 2d 705, 706 (Fla. 3d DCA 1987); *Pianeta Miami, Inc. v. Lieberman*, 949

[9] The trial court also denied Rankin's motion for summary judgment seeking enforcement of the instruments conveying to Rankin Van Vorgue's purported 50% interests in the Meridian Property and the Corporation (A6).

So. 2d 215 (Fla. 3d DCA 2006); *Rosasco v. Rosasco*, 641 So. 2d 493 (Fla. 1st DCA 1994).

Van Vorgue filed a motion for rehearing, clarification, certification of jurisdictional conflict, and certification of issue of great public importance (R. 131-59). The Third District denied rehearing and certification, but issued a new opinion to clarify the procedural history of the case. *See Rankin v. Van Vorgue*, 994 So. 2d 463 (Fla. 3d DCA 2008). Van Vorgue filed a Motion to Stay Mandate and a Notice to Invoke the Discretionary Jurisdiction of this Court based on an alleged jurisdictional conflict between the Third District's decision and *Slizyk v. Smilack*, 825 So. 2d 428 (Fla. 4th DCA 2002); *Pafford v. Standard Life Ins. Co. of Ind.*, 52 So. 2d 910 (Fla. 1951); and *State v. Lehman*, 131 So. 533 (Fla. 1930) (R. 166-73).

The Court accepted review based on inter-district conflict. *See* Art. V, § 3(b)(3), Fla. Const. (1980); Fla. R. App. P. 9.030(a)(2)(A)(iv). This appeal followed.

SUMMARY OF ARGUMENT

Although this Court accepted conflict jurisdiction, such jurisdiction was improvidently granted. Van Vorgue has never shown, in any filing with this Court or the Third District, how the purportedly conflicting cases are factually similar to this case, much less have "substantially the same controlling facts," a requirement to establish a genuine conflict. Nowhere in the Third District's decision is there any mention, even by implication, that the Third District is rejecting any of the general rules of law pronounced in those cases. Clearly, Van Vorgue merely disagrees with the Third District's conclusion that the Escrow Agreement's language does not prevent Rankin from seeking the return of her rightful, undisputed share of the escrowed funds. Her attempt to obtain additional *de novo* review of that decision in this Court is improper.

For more than 5 years, following the break-up of their 23-year personal relationship, the parties have been litigating over their interests in certain property**.** Van Vorgue's basis for alleged conflict jurisdiction is that the Third District "rewrote" the Escrow Agreement by ordering disbursement to Rankin of her undisputed 50% share of escrowed funds because the "contract" states that the funds are to be held "until the resolution of the parties' claims." Nowhere in the Escrow Agreement is that language found. The language is taken from the Order Transferring Funds that merely transferred the funds to an interest-bearing account.

In that order, the trial court retained authority over the funds by stating that the funds could be disbursed "pursuant to further Order of th[e] Court."

Moreover, the term “claims” is expressly defined in the Escrow Agreement as only Van Vorgue’s claims in the initial Complaint: (1) her claim to cancel the Quit Claim Deed and (2) her claim to recover “her portion of the proceeds from the sale of the property as a co-owner.” The Escrow Agreement does not govern any other claims, much less future unidentified claims. Thus, the phrase “pending resolution of **the** claims of the parties” can only refer to the “claims” as defined in the Escrow Agreement, which were the only ones pending at the time. Contrary to Van Vorgue’s wishes, the language in the Order Transferring Funds does not say “pending [**final**] resolution of [**all**] claims of the parties.

Thus, the Third District did not "rewrite" language in the Escrow Agreement. It merely construed language in the trial court order expressly allowing such disbursement. Indeed, even a strict interpretation of the Order Transferring Funds entitled Rankin to receive her 50% share of the proceeds. At the time Rankin filed her Motion to Release Escrow Funds, Rankin's entitlement to 50% of the funds was fully "resolved." Van Vorgue concedes that she only claims entitlement to 50% of the escrowed funds based on her alleged joint ownership of the Meridian Property. Thus, she has no legal claim to Rankin's 50% share.

Without a legal claim, Van Vorgue cannot freeze those funds as security for any other damages that may be awarded to her.

Van Vorgue attempts to support her arguments by calling herself a "victim" and Rankin a "wrongdoer," and accuses Rankin of wrongfully delaying this case in an effort to gain sympathy from the Court. Such name calling to show that a party "deserves what she gets" is improper character assassination which has no place in this civil appeal. This approach adds nothing to assist the Court in its deliberations and underscores the weakness of Van Vorgue's legal and factual position.

Rankin is being deprived of the immediate right to possession of her funds and will be unduly prejudiced if the Court does not return her undisputed share of the proceeds. The Court should decline to exercise jurisdiction or, alternatively, affirm the Third District's decision in *Rankin v. Van Vorgue,* 994 So. 2d 463 (Fla. 3d DCA 2008).

ARGUMENT

I. THE THIRD DISTRICT'S DECISION THAT VAN VORGUE CANNOT USE RANKIN'S FUNDS AS A BOND AGAINST FUTURE DAMAGES DOES NOT IMPERMISSIBLY MODIFY THE ESCROW AGREEMENT; IT COMPLIES WITH IT.

The Third District's holding that Van Vorgue cannot freeze Rankin's undisputed share of the Meridian Property sale proceeds to secure future damages sought in the Second Amended Complaint is logically and legally sound. Nowhere in the Initial Brief, nor in any of her pleadings, does Van Vorgue claim any legal entitlement to Rankin's 50% share of the Meridian Property sale proceeds.[10] As a result, there is no a legal basis to preclude Rankin from receiving her rightful share of the sale proceeds. As the Third District correctly held:

> To order retention of 100% of the escrowed money until the parties resolve the **other** claims would be, essentially, an improper injunction. *See Konover Realty Assocs., Ltd. v. Mladen,* 511 So. 2d 705, 706 (Fla. 3d DCA 1987) ("It is entirely settled by a long and unbroken line of Florida cases that in an action at law for money damages, there is simply no judicial authority for . . . any restraint upon the use of a defendant's unrestricted assets prior to the entry of judgment"); *see also Pianeta Miami, Inc. v. Lieberman*, 949 So. 2d 215 (Fla. 3d DCA 2006) (finding that trial court's non-final order denying motion to release funds in escrow was an improper restraint on party's unrestricted use of assets); *Rosasco v. Rosasco*, 641 So. 2d 493 (Fla. 1st DCA 1994) (holding that a movant's assertion of right to a certain amount of money is not sufficient to justify a restraint on those funds).

See Rankin, 994 So. 2d 463, 464 (emphasis added).

[10] Van Vorgue conceded to the Third District that "**Rankin had every right** to refuse to hold the money in escrow at the inception of the dispute. . . ." (R. 134).

Nonetheless, Van Vorgue argues that she is entitled to freeze Rankin's funds as security for damages she seeks in the Second Amended Complaint because Rankin "stipulated" to the entry of the Order Transferring Funds which "required" that 100% of the sale proceeds would be escrowed "pending resolution of the claims of the parties" (Initial Brief at 17-18). According to Van Vorgue, no court can relieve Rankin from this "stipulation" without unconstitutionally modifying that "contract" (Initial Br. at 14, 19-20). She cites myriad cases for the proposition that the United States and Florida Constitutions guarantee a party's right to enter into "private contracts" (Initial Br. at 14, 19-20). The argument is not only factually and legally inaccurate, it makes no sense.

First, the language -- "pending resolution of the claims of the parties" -- comes from the Order Transferring Funds, not the Escrow Agreement. A trial court order is neither a "stipulation" nor a "private contract" incapable of being modified by a judge. Judges have the inherent authority to modify or reconsider prior rulings any time before the entry of final judgment. *See Wasa Intern. Ins. Co. v. Hurtado*, 749 So. 2d 579 (Fla. 3d DCA 2000); *Bettez v. City of Miami*, 510 So. 2d 1242, 1242-43 (Fla. 3d DCA 1987). Of course, none of the cases cited by Van Vorgue (Initial Br. at 19-21) involves the application or interpretation of a trial court order.

Second, both the Order Transferring Funds and the Escrow Agreement do not "require" (Initial Br. at 17) that the funds be held in escrow until resolution of the case. Both documents are consistent in their terms by stating that the Escrow

Agent is "**authorized**" to hold the funds. The only time the Escrow Agreement required that the funds be frozen was during the initial three-week period when the parties were trying to settle Van Vorgue's claims to 50% of the proceeds. That is why the Order Transferring Funds and the Escrow Agreement specifically "authorize" the Escrow Agent to disburse the funds upon receipt of a court order.

Third, the term "claims" is expressly defined in the Escrow Agreement as only Van Vorgue's claims in the initial Complaint: (1) her claim to cancel the Quit Claim Deed and (2) her claim to recover "her portion of the proceeds from the sale of the property as a co-owner." The Escrow Agreement does not govern any other claims, much less future unidentified claims.[11] Thus, the phrase "pending resolution of **the** claims of the parties" can only refer to the "claims" as defined in the Escrow Agreement, which were the only ones pending at the time. Contrary to Van Vorgue's wishes, the language in the Order Transferring Funds does not say "pending [**final**] resolution of [**all**] claims of the parties."[12]

Van Vorgue argues that because the Order Transferring Funds and the Order granting Van Vorgue leave to file her Amended Complaint were entered on the

[11] It is ironic that it is Van Vorgue who seeks to impermissibly modify the Escrow Agreement by expanding its limited definition of "claims" to include all future claims that Van Vorgue may have brought, even wholly unrelated claims, such as claims to joint bank accounts, personal property, and corporate assets.

[12] Indeed, throughout the Initial Brief, Van Vorgue improperly adds the word "final" before the word "resolution" and adds the word "all" before the word "claims" when neither the Escrow Agreement nor the Order Transferring Funds includes those words (Initial Br. at 18, 21, 25).

same day, Rankin must have "intended" that the term "claims" as set forth in the Order Transferring Funds included all the claims raised in the Amended Complaint (Initial Br. at 9). Nowhere in the Order Transferring Funds, or any other document or order, is there any language permitting the modification of "claims" set forth in the Escrow Agreement to include all future claims that may have been asserted by Van Vorgue. Nor is there any record support indicating that Rankin would have agreed to such a modification.

The fact that the trial court performed the ministerial act of entering the Order Transferring Funds does not establish Rankin's intentions to do anything contrary to the express terms of the Escrow Agreement. The argument also completely ignores that Van Vorgue is seeking to freeze Rankin's funds as security for damages under the **Second** Amended Complaint, which was filed 18 months after the trial court entered its Order Transferring Funds.

Regardless, the timing of events does not change the outcome of this case. Even in the Second Amended Complaint, Van Vorgue claims that she is legally entitled to only 50% of the escrowed funds based on (1) an alleged oral agreement to be "equal partners" for life; and (2) her alleged joint tenancy in the Meridian Property (A2. at 13, 15, 16, 17 and 18). She does not claim entitlement to 100% of the sale proceeds. Based on those allegations, and without even reaching the merits of those arguments, Rankin's "claims" to her 50% share of the sale proceeds has been fully "resolved" as provided in the Order Transferring Funds.

For the same reasons, there was no need, as Van Vorgue claims, for Rankin to file a counterclaim for reformation or rescission of the Escrow Agreement in order to obtain her funds (Initial Br. at 22, 29-30). To do so would have made no sense. Rankin is not seeking to rescind the Escrow Agreement, but is seeking an order to enforce it. Neither is Rankin "dissatisfied" with its terms nor regretful of her decision to enter into the Escrow Agreement (Initial Br. at 22). The express purpose of the Escrow Agreement was to facilitate the closing of the Meridian Property – its purpose was never to hold Rankin's undisputed share as a bond for future alleged damages that were not defined in the Escrow Agreement.

The Third District's decision to release Rankin's funds to her is legally and logically sound. There is no basis to preclude Rankin from receiving her rightful share of the sale proceeds. The Third District did not "rewrite" language in the Escrow Agreement; it merely construed and applied language in the Escrow Agreement and Order Transferring Funds that expressly authorized release of the funds by court order.

II. REVIEW WAS IMPROVIDENTLY GRANTED BECAUSE THE THIRD DISTRICT'S DECISION DOES NOT CONFLICT WITH *LEHMAN, SLIZYK* OR *PAFFORD.*

The Court should dismiss this appeal for lack of jurisdiction because review was improvidently granted. The alleged basis for jurisdiction was an "express" and "direct" conflict between the Third District decision and *State v. Lehman,* 131 So. 533 (Fla. 1930); *Slizyk v. Smilack,* 825 So. 2d 428 (Fla. 4th DCA 2002); and

Pafford v. Standard Life Ins. Co. of Ind., 52 So. 2d 910 (Fla. 1951).[13] There is clearly no conflict to warrant discretionary review.

To constitute such a conflict, the Third District decision must either (1) announce a rule of law that conflicts with an expression of law from another court; or (2) apply a rule of law to produce a different result in a case involving substantially the same controlling facts as a prior case. *See City of Jacksonville*, 339 So. 2d at 633. The conflict must appear "within the four corners of the decision." *See Reaves v. State*, 485 So. 2d 829, 830 (Fla. 1986).

With respect to *Lehman*, there is clearly no conflict. The issue in that case, an 80-year-old decision, related to a court's equity powers to impose taxes on a community in order to satisfy a judgment obtained against a governmental entity without it vitiating the legislature's authority to tax its citizens. 131 So. 533. Although the Court discussed the general rights of individuals to contract, the facts and issues in that case are too dissimilar to the controlling facts in this case to warrant any reasonable comparison.

In *Slizyk*, the issue related to an assignment by a first husband, who was in possession of original notes, to a second husband to foreclose a mortgage despite the second husband's inability to produce the original note and mortgage. 825 So. 2d 428. In that case, the court affirmed the lower court's finding of a fraudulent assignment and noted the general proposition that a "court of equity will not assist

[13] *See* Art. V, § 3(b)(3), Fla. Const. (1980); Fla. R. App. P. 9.030(a)(2)(A)(iv).

in extricating a party from his or her own wrongful and fraudulent conduct." *Id.* Neither the controlling facts nor the issues in *Slizyk* have any relationship to the facts here.

Pafford involved the interpretation of terms in an insurance policy to determine whether a policyholder was participating in "aviation" or "aeronautics" within the exclusion clause of a double indemnity provision in a life insurance policy. 52 So. 2d 910. The district court recited the general proposition that a court cannot rewrite a private contract between parties. First, *Pafford* is distinguishable because it did not involve an escrow agreement, but the determination of whether a particular act was covered under an insurance policy. Second, the Third District did not unlawfully modify a private contract – it correctly interpreted and enforced the terms of the Escrow Agreement and the Order Transferring Funds, both of which "authorized" the Escrow Agent to disburse the funds "pursuant to further Order of th[e] Court" (*id*.). Van Vorgue's argument that the Escrow Agreement "requires" the escrowed funds to be held "until this lawsuit [pursuant to the Second Amended Complaint] is concluded" (Initial Br. at 9), is specious. As previously discussed, no such language is found in the Escrow Agreement or the Order Transferring Funds, and Rankin never agreed to such an unreasonable term.

Van Vorgue has never shown, in any filing with this Court or the Third District, how either *Lehman, Slizyk* or *Pafford* are similar, much less have "substantially the same controlling facts" as this case, a requirement to establish a

genuine conflict. Moreover, nowhere in the Third District's opinion is there any mention, even by implication, that the Third District is rejecting the general rules of law pronounced in any of these cases. *See City of Jacksonville*, 339 So. 2d at 633 (holding that decision must expressly "announce a rule of law" contrary to other decisions to establish a genuine conflict).

Van Vorgue merely disagrees with the Third District's conclusion that the Escrow Agreement's language does not prevent Rankin from seeking the return of her rightful, undisputed share of the funds. Her attempt to obtain additional *de novo* review of that decision in this Court is improper. As the Court aptly held:

> The absence of a jurisdictional foundation for our review . . . is not a mere technicality. It is a matter of constitutional significance. In this case, the First District Court of Appeal did a thorough and thoughtful job of analyzing Florida case law in order to apply it to the facts of a particular controversy before it. This is precisely what the framers of Article V and the people of Florida expect district court judges to do.

City of Jacksonville, 339 So. 2d at 634.

Both the Escrow Agreement and the Order Transferring Funds allow Rankin to seek a court order allowing the disbursement of her undisputed "portion" of the escrowed funds. Van Vorgue has no "claim," and has never claimed any legal entitlement to, those funds. Rankin's funds have now been held in escrow for more than **five** years in an account bearing minimal interest. At no time did Rankin anticipate, at the time she entered into the Escrow Agreement and agreed, in good faith, to escrow her share, that this action would be so delayed (A5 at ¶7).

III. THE ARGUMENT THAT RANKIN SHOULD BE PRECLUDED FROM OBTAINING HER RIGHTFUL SHARE OF THE SALE PROCEEDS BECAUSE SHE IS AN ALLEGED WRONGDOER IS UNSUPPORTED BY THE LAW OR FACTS.

Van Vorgue argues extensively that Rankin should be equitably foreclosed, *i.e.*, punished, from exercising her legal right to obtain her undisputed share of the funds because she is the "wrongdoer" and Van Vorgue is the purported "victim" in connection with alleged acts unrelated to enforcing the Escrow Agreement (Initial Br. at 20, 22, 25). Such name calling to show that a party "deserves what he gets" are improper character assassinations and has no place in this civil appeal. *See Jacobs v. Westgate*, 766 So. 2d 1175 (Fla. 3d DCA 2000); *La Reina Pharmacy, Inc. v. Lopez*, 453 So. 2d 882 (Fla. 3D DCA 1984).

Consistent with her "bad person" theme, Van Vorgue accuses Rankin of delaying the litigation by "filing numerous motions" (Initial Br. at 21), by **not** objecting to Van Vorgue's request to continue the trial (*id.*); and by exercising her right to an interlocutory appeal of the subject order which allegedly prevented Van Vorgue from "the opportunity to present her case to the jury" (*id.* at 23). These arguments should be likewise rejected. *See Jacobs*, 766 So. 2d 1175 (Fla. 3d DCA 2000); *La Reina Pharmacy*, 453 So. 2d 882.

The fact that Rankin "no longer resides within the State of Florida" or that she may have allegedly "moved other jointly owned assets outside the jurisdictional reach of Florida Courts"[14] (*id*. at 22) is not a lawful basis to hold money in Florida as a bond against a potential damage award. As the Third District correctly ruled, **any** restraint upon the use of a defendant's unrestricted assets prior to the entry of judgment is improper. *Konover Realty Associates, Ltd. v. Mladen*, 511 So. 2d 705, 706 (Fla. 3d DCA 1987). This well-established rule of law is not affected by a "claim that recovery upon any subsequently-entered judgment may be made difficult by the dissipation or unreachability of the debtor's assets." *Id*.

The remaining arguments raised by Van Vorgue that she has the right to have Rankin's money held as a bond are confusing and somewhat unintelligible. For example, while Van Vorgue argues that Rankin should have "negotiated" to only escrow half the proceeds, in the same sentence Van Vorgue concedes that she would not have agreed to such a request (*id*.). Then she argues that Rankin should have filed a counterclaim to rescind the Escrow Agreement when the amended pleadings asserted additional claims (*id*. at 22-23, 29-30), even though the Escrow Agreement was incapable of being rescinded because it successfully effectuated the closing of the Meridian Property. Finally, Van Vorgue argues that the Escrow Agreement "provided for the preservation of the status quo as to both parties" (*id*.

[14] There is no record support for the accusation that Rankin is unlawfully dissipating jointly-held assets. The parties merely ended their personal relationship and went their separate ways (A3. at 114).

at 8, 26, 31), yet she is the one that deviated from the "status quo" by turning the simple three-page Complaint into a massive 88-paragraph, 10-count Second Amended Complaint setting forth new "claims" not within the definition of the "claims" subject to the Escrow Agreement.

Finally, there are no "far-reaching implications" or any constitutional violation in this case as a result of the Third District's decision (Initial Br. at 20, 24). The Third District was merely doing its "thorough and thoughtful job of analyzing Florida case law in order to apply it to the facts of a particular controversy before it." *City of Jacksonville*, 339 So. 2d at 634.

IV. THE THIRD DISTRICT HAD JURISDICTION TO REVIEW THE APPEALABLE, NON-FINAL ORDER DENYING RANKIN'S MOTION TO RELEASE ESCROW FUNDS.

The Third District clearly had jurisdiction to review the Order Denying Rankin's Motion to Release Escrow Funds (the "Escrow Order") (A7). The determination of rights to escrowed proceeds from the sale of real property is clearly appealable as an order determining the right to the immediate possession of property. *See* Fla. R. App. P. 9.130(a)(3)(C)(ii). *See also Morton & Oxley, Ltd. v. Charles S. Eby, M.D., P.A.*, 916 So. 2d 820, 821 (Fla. 2d DCA 2005).

Van Vorgue incorrectly argues that the Third District accepted jurisdiction based on the cases it relied upon to support its holding that freezing 100% of the escrowed money "until the parties resolve the other claims would be, essentially, an improper injunction," citing *Konover Realty Assocs., Ltd. v. Mladen*, 511 So. 2d

705, 706 (Fla. 3d DCA 1987); *Pianeta Miami, Inc. v. Lieberman*, 949 So. 2d 215 (Fla. 3d DCA 2006); *Rosasco v. Rosasco*, 641 So. 2d 493 (Fla. 1st DCA 1994).

However, the Third District accepted jurisdiction to review the Escrow Order based on Fla. R. App. P. 9.130(a)(3)(C)(ii), not on those cases. *See Rankin*, 994 So. 2d at 464. The Third District relied on those cases to decide the merits of the case, not jurisdiction. For the same reasons, the argument that the Escrow Order is based on the release of voluntarily placed escrowed funds, instead of "the affirmative act of placing certain funds in either the court registry or an escrow account" (Initial Br. at 27) is misplaced. That distinction does not affect jurisdiction. *See Morton & Oxley*, 916 So. 2d 820, 821 (Fla. 2d DCA 2005) (accepting jurisdiction to review an order relating to a motion to release money held in the court registry).

Rankin is being deprived of the immediate right to possession of her funds and will be unduly prejudiced if the Court does not return her undisputed share of the proceeds. *See id.*

CONCLUSION

For these reasons, the Court should decline to exercise jurisdiction or, alternatively, affirm the Third District's decision in *Rankin v. Van Vorgue*, 994 So. 2d 463 (Fla. 3d DCA 2008).

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CERTIFICATE OF SERVICE

I CERTIFY that a copy of Respondent's Initial Brief was e-mailed and mailed by overnight delivery to Petitioner's counsel, Albert D. Rey, Esquire, Albert D. Rey, P.A., 7240 NW 12th Street, Miami, Florida 33152-6164 on July 22, 2009.

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CERTIFICATE OF COMPLIANCE

I CERTIFY that this Initial Brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2), and is prepared in Times New Roman 14-point font.

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