IN THE SUPREME COURT OF FLORIDA

VANNESSA VAN VORGUE,

Petitioner/Appellee,

vs.

MARA RANKIN,

Respondent/Appellant,

SUPREME COURT NO. SC08-2255

APPELLATE CASE NO. 3D 07-378

LOCAL CASE NO. 04-17520 CA 10

PETITIONER'S INITIAL BRIEF

On Review from the District Court of Appeal, Third District
State of Florida

_____

Respectfully submitted,

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TABLE OF CONTENTS

TABLE OF CITATIONS

Florida District Courts of Appeal Cases *PAGE*

Constitutional Provisions

Florida Rules of Appellate Procedure

Other Sources

PREFACE

Petitioner in this Initial Brief shall be referred to as Petitioner, Appellee, or Van Vorgue. Respondent in this Initial Brief shall be referred to as "Respondent", "Appellant" or "Rankin".

All references to the Appendix To Appellant's Initial Brief will be noted by the symbol "AP" followed by the Tab Number, followed by the Tab Letter, if any, and then the appropriate page number and/or paragraph number when applicable.

All references to the Appendix To Appellant's Reply Brief will be noted by the symbol "ARP" followed by the Tab Number, followed by the Tab Letter, if any, and then the appropriate page number and/or paragraph number when applicable.

All references to the Appendix To Appellee's Answer Brief will be noted by the symbol "VAP" followed by the appropriate page number and/or paragraph number when applicable.

This Court has for review the Third District Court of Appeal's Opinion in *Rankin v. Van Vorgue, 994 So.2d 463 (Fla. 3rd DCA 2008)* based on express and direct conflicts with the Florida Supreme Court's decision in *Pafford v. Standard Life Ins. Co., 52 So. 2d 910 (Fla. 1951):* "[t]he clear expression of the meaning of a contract may not be modified by court interpretation"; the Florida Supreme Court's decision in *State ex rel. Dos Amigos v. Lehman, 131 So. 533 (Fla. 1931):* "[t]o both the citizen and his government the right to contract is the most valuable right

known to the law. The Constitution guarantees its inviolability"; and the Fourth District Court's decision in *Slizyk v. Smilack, 825 So.2d 428 (Fla. 4th DCA 2002):* "[a] court of equity will not assist in extricating a party from his or her own wrongful and fraudulent conduct". Stated differently, it is settled law in this state that a court of equity will not assist in extricating a party from a situation or circumstances which that party has created. *See, Scott v. Sites, 41 So.2d 444 (Fla. 1949); Hill v. Lummus, 123 So.2d 365 (Fla. 3rd DCA 1960); Steele v. Lannon, 355 So.2d 190 (Fla. 2nd DCA 1978); and Marshall v. Marshall, 386 So.2d 11 (Fla. 5th DCA 1980).*

STATEMENT OF THE CASE AND FACTS

The Petitioner and the Respondent enjoyed a confidential, intimate, personal and professional relationship for over 23 years. (AP 1 Pages 70, 73-74.) Petitioner and Respondent engaged in several business transactions and ventures together and the Petitioner relied heavily upon (and often deferred to) Respondent in making financial and tax-related decisions. (AP 1 Pages 74-76, 173, 181, AP 2 Page 7 ¶ 47 and VAP 3.) Their mutual accountant was often employed by Respondent to assist with many of their business dealings (including without limitations the creation of business entities, administration of payroll, and the transfer of real and personal property). (VAP 31 and VAP 228.)

In furtherance of the partnership's primary business, in 1993 Petitioner incorporated Van Vorgue Enterprises, Inc. (hereinafter "VVE" or "Corporation"). (VAP 67.) At the time VVE was formed, Respondent was under a non-compete covenant with her prior employer and was unable to seek business contracts concerning media, advertising, Radio and/or Television. (AP 5 ¶ 8 and VAP 13.) Petitioner, initially was the sole owner of VVE. At the inception of VVE, Petitioner was also the president, vice president, treasurer, secretary and chief executive officer and director of VVE. (VAP 29.) Beginning in about 1993, all of the assets of Petitioner and Respondent (excluding chattels of a personal nature which were of insignificant monetary value) were jointly owned, Petitioner owning 50% and Respondent owning 50%. (VAP 273.) Upon the non-compete restrictions expiring, on or about January 1995, the ownership of VVE was transferred to Petitioner and Respondent in equal shares (50%/50%) as joint tenants with rights of survivorship. (VAP 29 and AP 3 C.)

From at least 1995 forward until shortly before this action was filed, VVE paid by separate checks payable to Respondent and Petitioner, salary and profits of approximately equal amounts to each. (AP 2 Page 4 ¶ 24.) These checks from VVE were deposited into the joint bank account of the parties (hereinafter "Joint Bank Account"). (VAP 26.)

On or about January 1997, Petitioner and Respondent purchased a property (hereinafter "Property") located at 2335 Meridian Avenue, Miami Beach, Florida. The Property was purchased by Petitioner and Respondent as Joint Tenants with Rights of Surviorship. (AP 2, Page 4 ¶¶ 26 and 27.)

The deposits made on the contract for the purchase of the Property were made from the Joint Bank Account, via Check Nos. 1040 and 1048, one signed by Petitioner and one signed by Respondent. (VAP 113.) The Cash to Close on the purchase of the Property came from the Joint Bank Account via Check 1074. (VAP 119.) The Mortgage given to finance the purchase of the Property was from both Petitioner and Respondent. (VAP 65-A – 65-H.) Additionally, the mortgage payments were made from the joint checking account. See for example, (VAP 186-217.)

In April 2004, Respondent was required to temporarily move to California in order to service a new client, in the Media / Advertising / Radio and/or Television broadcasting market. (AP 2 Page 5 ¶ 31.)

On or about June 29, 2004, Respondent and Petitioner entered into a purchase and sale agreement, to sell the Property to Renee Sebastian for the sum of $1,050,000.00. (AP 2 B.)

Shortly after arriving in Miami, on or about July 17, 2004, Respondent advised the Petitioner that she would need to remain in California for a longer

period of time than they previously expected. (AP 2 Page 5 ¶ 37.) Respondent also advised the Petitioner that she was confused and needed to spend some time alone and apart from the Petitioner. (AP 2 Page 5 ¶ 37.) Petitioner was surprised and disbelieving of the statement made by Respondent; as Petitioner and respondent had shared a personal, intimate, confidential and trusting relationship, of over 23 years. (AP 2 Page 6 ¶ 38, and AP 1 Pages 70, 73-74.)

Premised on facilitating the closing of the purchase and sale agreement and the simplification of matters concerning Petitioner's car (the title to which was then held by their jointly-owned corporation), on July 21, 2004, Respondent then asked Petitioner to accompany her to their mutual accountant's office, Juan A. Figueroa, P.A., (hereinafter "Accountant"). (AP 2 Page 6 ¶ 40.) The Petitioner was lured to the office of their Accountant under the pretext that the documents being executed were for the transfer of their respective cars. (AP 2 Page 6 ¶ 41.) The Accountant represented Respondent, Petitioner, and their corporation ("Corporation"). (VAP 31 and VAP 228.) (AP 2 Page 6 ¶ 40.) When Petitioner noticed that one of the documents contained the Property address, Respondent advised Petitioner that the document was being prepared in anticipation of the closing of the Property's sale and in order to facilitate the closing and for tax planning purposes. (VAP 271 ¶ 2.)

That same day (July 21, 2004) at the Accountant's office, Petitioner executed several un-witnessed document(s), which may include one or more Quit Claim Deeds (one of which, purports to convey the Property to Respondent) and a Certificate No. 2 for 1,000 Shares of stock (hereinafter "Corporate Stock Certificate") in the Corporation, which purported to transfer her interest in the Corporation to Respondent. (AP 2 Page 7 ¶ 50 and 51.) On the same day that these instruments were executed, Petitioner continued to believe that the Respondent and Petitioner continued to maintain a confidential and trusting relationship. (VAP 272 ¶ 4.) The Petitioner never agreed to covey any property or waive any right to any asset or property owned by Petitioner or in which Petitioner had an interest, excepting only the purchase and sale agreement concerning the sale of the Property to Renee Sebastian for the approximate sum of $1,050,000.00. (AP 2 Page 7 ¶ 46; and VAP 273 ¶ 13.) Had Petitioner been told on July 21, 2004 that the purpose for her signing the Quit Claim Deed was to relinquish all of Petitioner's rights, interests and ownership in the Property to Respondent, Petitioner would have never signed the Quit Claim Deed. (VAP 273 ¶ 14.)

The Petitioner's execution of the Instruments occurred under the undue stress caused by the announcement a few days before by Respondent that Respondent was "confused and needed to spend some time alone and apart", and under indications, both express and implied, made by Respondent that if the

Petitioner continued to support the partnership, and did not confront or question Respondent on these types of legal and accounting issues which Respondent usually handled for the partnership, that the partnership may be preserved. (AP 2 Page 7 ¶ 47.)

Petitioner denies receiving any consideration for her execution of the instruments in question, and there is no evidence whatsoever to show that the Respondent paid the Petitioner any consideration for such execution, much less any evidence that she paid Petitioner with Respondent's own separate funds.

On or about early August 2004, based upon Respondent's behavior and desire to exclude Petitioner from knowledge of the ongoing events with regard to the sale of the Property, the Petitioner came to the conclusion that the "temporary separation" between the Petitioner and Respondent was in fact an attempt by Respondent to dissolve the partnership.

In order to protect her interests in the Property and the other partnership assets, and in order to preserve the status quo between the parties, the Petitioner filed this action, initially as a simple complaint seeking to cancel the Instruments executed in mid July 2004 and recorded a Lis Pendens on the Property. (AP 2 Page 10 ¶¶ 73-74.)[1]

[1] The First Amended Complaint now contains ten interrelated counts, arising from the same, or a related series, of transactions and occurrences. (AP 2.) All of the counts remain pending as none of them have been disposed of yet.

Upon discovering the true nature and legal effect of the un-witnessed document(s), this lawsuit ensued. Petitioner filed a simple complaint and recorded a Lis Pendens on the Property. It was later uncovered (through discovery) that Respondent, in conjunction with the Accountant, had conspired to vest Respondent with sole possession and control of the partnership assets. For example, the June, 2004 total balance for the five joint bank accounts was $87,456.78. By July 15, 2004, Respondent had transferred significant amounts of the funds from the five joint bank accounts, out of the joint accounts, leaving a total remaining balance of only $15,439.47 in one account. (VAP 130-181.) This action was an unknown precursor to the events that occurred in the Accountant's office.

On or about August 20, 2004, Respondent and Petitioner entered into an escrow agreement, in order to facilitate the sale of the Property, and to preserve the status quo between the parties until resolution of the case. (AP 2 D.) Subsequent to the execution of the escrow agreement, the closing for the Property occurred and 100% of the net proceeds from the sale of Property amounted to $753,332.12, which sum is being held in escrow. (AP 2 Pages 10-11 ¶ 75.)

Because the parties were unable to agree as to the issue of how the funds would be placed into an interest bearing account, a matter not addressed directly by the Escrow Agreement, the Respondent filed a motion and the Court entered an Order on December 1, 2004 granting Respondent's request that the funds be

transferred to an interest-bearing account pending resolution of the suit. (AP 5 at Exhibit B.) The funds remain and are currently being held in said interest-bearing account, until the resolution of the parties claims, pursuant the parties' escrow Agreement and the lower Court's December 1, 2004-Order. (An order that was prepared/drafted by Respondent's current counsel.) (AP 5 at Exhibits A and B.)

It is clear from the conduct of the parties that the Agreement between the parties and intent of the escrow agreement, was to hold the funds in Escrow until this lawsuit was concluded to finality. To wit:

(a) the parties entered into the escrow agreement (AP 2 D.);

(b) when no prompt resolution was reached as to final distribution of the sale proceeds, the Respondent moved the lower court for an order transferring the funds to an interest bearing account (AP 5 at Exhibit B.) (Clearly there would have been no reason or benefit to placing the funds in an interest bearing escrow account unless the funds were likely to be held for a prolonged period.);

(c) the lower court granted the motion and entered the order that Respondent drafted, which mandates that the funds be held in escrow "pending the resolution of the claims between the parties" (AP 5 at Exhibit B.);

(d) Respondent did not appeal the order transferring the funds to an interest bearing account; (VAP 274-280)

(e) For the ensuing two years and until the eve of trial, Respondent conducted the litigation in a manner consistent with the Agreement that the funds would be held in escrow pending resolution of the claims between the parties. (VAP 275-280)

Notwithstanding the clear intent of the parties and the conduct of the parties consistent with the Agreement, two years after the entry of the December 1, 2004-order and just before trial was scheduled, Respondent filed a Motion to Release Escrow. The trial court denied the Motion to Release Escrow, and Respondent appealed the court's order based upon *Fla. R. App. Pro. 9.130(a)(3)(C)(ii)*, generally allowing review of non-final orders that determine the right to immediate possession of property (i.e. the funds). However, for the reasons stated herein, the Third District Court erred in accepting jurisdiction of the appeal and mandating disbursal of 50% of the funds to Respondent, contrary to the Agreement between them.

In its Opinion, the Third District Court of Appeals held that the parties "entered into an escrow agreement requiring the proceeds from the sale to remain in escrow until the claims of the suit were resolved." *Rankin [Supra at 463.]* However, despite this holding, the district court incorrectly held that retention of 100% of the escrowed money until the parties resolve the other claims amounted to an improper injunction. *Rankin [Supra at 464.]* Through its Opinion, the Third

District applied injunctive standards to and rewrote the private contract of the parties. It is clear on the face of the Opinion that the application of injunctive standards to a private contract or stipulation is in stark contrast to the prevailing case law in this state that the clear expression of the meaning of a contract may not be modified by court interpretation. To that end, the Constitution provides strict protections for the right to contract. If the lower Opinion stands, all future escrow agreements in Florida would then be subject to court interpretation and the constitutionally protected freedom to contract would be illusory.

STATEMENT OF JURISDICTION

"Conflict between decisions must be express and direct, i.e., it must appear within the four corners of the majority decision." *Reaves v. State of Florida, 485 So.2d 829 (Fla. 1986)*. However, "[i]t is not necessary that a district court explicitly identify conflicting district court or supreme court decisions in its opinion in order to create an 'express' conflict under section 3(b)(3)." *Ford Motor Company v. Kikis, 401 So.2d 1341 (Fla. 1981)*.

In the instant case, the Third District Court of Appeal held that the parties "entered into an escrow agreement requiring the proceeds from the sale to remain in escrow until the claims of the suit were resolved." *Rankin [Supra.]* Therefore, there is no dispute that: (1) there was an Agreement, (2) the Agreement is binding; and (3) the terms of the Agreement are that the Funds are to be held in escrow

pending resolution of the parties' claims. There is also no dispute that Respondent was not ordered to surrender the funds to Escrow; rather, the funds were deposited in escrow voluntarily by agreement between the parties. Nevertheless, the district court incorrectly opined that "[t]o order retention of 100% of the escrowed money until the parties resolve the other claims would be, essentially, an improper injunction." This constitutes the pronouncement of a new rule of law that: a court must apply injunctive standards to and rewrite a voluntary, private contract when said contract is an agreement to hold funds in escrow pending resolution of the parties' claims.

The Third District Court's Opinion expressly and directly conflicts with the *Pafford v. Standard Life Ins. Co., 52 So.2d 910 (Fla. 1951)* decision, that: "When the meaning of a contract is well settled the court is not at liberty to modify it". By violating the Agreement of the parties, the Third District Court's Opinion also expressly and directly conflicts with the *State ex rel. Dos Amigos v. Lehman, 131 So. 533 (Fla. 1931)* decision: "To both the citizen and his government the right to contract is the most valuable right known to the law. The Constitution guarantees its inviolability" and the *Slizyk (Supra)* decision: "[a] court of equity will not assist in extricating a party from his or her own wrongful and fraudulent conduct".

By ordering that 50% of the Funds be released to Respondent, the Opinion of the Third District Court of Appeals clearly, directly and expressly rewrites the

clear terms of the Agreement which required 100% of the Funds to remain in escrow. The Opinion of the Third District Court of Appeals also expressly and directly violates Petitioner's right to contract found in both the Florida Constitution and the United States Constitution.

In addition to the foregoing, the Third District Court of Appeal should never have accepted jurisdiction of the lower appeal. Respondent's premise that her appeal was brought pursuant to *Fla. R. App. Pro. 9.130(a)(3)(C)(ii)*, is misguided as the case law cited herein shows that this rule applies when a party is required to make an affirmative act of surrendering property, not (as here) where the property is surrendered voluntarily. Accordingly, this Court should reverse the Opinion of the Third District Court on the merits. Alternatively, this Court should hold that the Third District Court improperly granted jurisdiction and should quash the Third District Court's Opinion, and remand with instruction to dismiss the appeal for lack of jurisdiction.

SUMMARY OF ARGUMENT

The trial court was correct in denying Rankin's motion to release escrow funds and the Third District Court of Appeals erred in reversing the trial court's order. Pursuant to Florida law, courts cannot modify the terms of a private contract. The clear intent of the Agreement is to hold the proceeds of the sale of

the Property pending resolution of the parties' claims. Thus, given this intent, the trial court correctly denied Rankin's motion to release escrow funds.

However, the Third District Court of Appeals, despite finding that the Agreement between the parties required all of the proceeds to be held in escrow until the claims between the parties were resolved, believed that the denial of the motion to release escrow constituted an injunction, and reversed the trial court. This reliance on the injunctive standards applied by the Third District in its Opinion is reversible error, as injunctive standards cannot be applied to private agreements unless there is fraud, duress or undue influence (none of which are alleged here). In any case, the Third District Court of Appeals improperly applied injunctive standards where neither party was compelled to do the affirmative act of depositing money in escrow. Rather, the parties in this case voluntarily entered into the Agreement on their own without recommendation or influence from the trial court.

The United States Constitution and the Florida Constitution guaranty the inviolability of the right to contact. These tenets of the law hold true in part because there must be certainty with regard to contracts in order for them to be effectual. To allow courts to modify our private contracts would be to undermine this constitutional right and would render all contracts nothing more than ink on paper; a mere suggestion of behavior with no requirements, obligations or

consequences for violation of their terms. This right is so fundamental to American jurisprudence that the framers saw fit to enumerate the right of individuals to freely enter into contracts in our Constitutions.

Given the constitutional protections outlined herein, it is axiomatic that contracts entered into freely, voluntarily, without duress and undue influence (so long as they are not for an illegal purpose and they do not violate public policy) cannot be amended without agreement of the parties. The law does not allow the courts to assist one in extricating herself from a contract when she later realizes that the contract perhaps wasn't the best bargain. By allowing the Third District Court of Appeals' Opinion to stand, Florida courts will now have authority to re-write agreements that one party regrets entering into. In short, the Opinion of the Third District Court of Appeals violates public policy against allowing courts to re-write private contracts.

The Third District Court of Appeals should have never even granted jurisdiction to hear the lower appeal as the basis of the appeal does not qualify as a *Fla. R. App. Pro. 9.130(a)(3)(C)(ii)* appeal. In order for an appellate court to have jurisdiction, on the basis that the order determined the right to immediate possession of property, the Respondent must show that the trial court ordered the deposit of funds in escrow. Such is not the case here where both parties deposited the Funds in escrow by agreement. Moreover, Respondent did not plead rescission

or modification of the Agreement. In Florida, a court cannot grant relief on a claim that was never pled. In any case, the rule allowing the appeal of non-final orders should be narrowly and strictly construed as the very purpose of the rule is to restrict the number of appealable non-final orders. The reason for this is that appellate review of non-final judgments serves to waste court resources and delays final judgment needlessly.

ARGUMENTS

ARGUMENT I

THE THIRD DISTRICT COURT OF APPEALS ERRED IN REVERSING THE TRIAL COURT'S ORDER DENYING RANKIN'S MOTION TO RELEASE ESCROW FUNDS, FOR THE FOLLOWING REASONS:

A. COURTS CANNOT MODIFY THE TERMS OF A PRIVATE CONTRACT

B. BOTH THE UNITED STATES CONSTITUTION AND THE FLORIDA CONSTITUTION GUARANTY THE INVIOLABILITY OF THE RIGHT TO CONTACT

C. THE COURT IN EQUITY CANNOT ASSIST IN EXTRICATING A PARTY FROM HIS OR HER OWN WRONGFUL AND FRAUDULENT CONDUCT

D. THE OPINION OF THE THIRD DISTRICT COURT OF APPEAL RUNS COUNTER TO PUBLIC POLICY

The Third District Court of Appeal's holding makes a key fundamental error: it contradicts itself by on the one hand acknowledging the existence of a valid and binding Agreement, while in the same breath rewriting the terms of the Agreement in a manner that is more favorable to Respondent.

By ordering that 50% of the Funds be released to Rankin, the Opinion of the Third District Court of Appeals clearly, directly and expressly rewrites the clear terms of the Agreement which required 100% of the Funds to remain in escrow. The Opinion of the Third District Court of Appeals also expressly and directly violates Van Vorgue's right to contract found in both the Florida Constitution and the United States Constitution.

Respondent contends that the escrow Agreement was limited in duration for three weeks. This assertion is inaccurate and misleading. Although the Agreement contemplates an initial three-week period, it provides for the escrow agent to deposit the funds into the court registry after such time and for the funds to so remain until there is an agreement between the parties and written authorization there under, or through the finality of all appeals if by court order. (AP 2 D).

Moreover, the Respondent affirmed the terms of the Agreement when Respondent moved the lower court pursuant to the escrow Agreement for the transfer of the disputed funds to an interest bearing escrow account "**pending the resolution of the claims between the parties**." [Emphasis Added.] (ARP 2 and ARP 3, Page 1, ¶2). The terms of the Agreement were ratified by the trial court, when the order was entered upon Respondent's motion, (which order was drafted and prepared by Respondent's counsel) and was never appealed by Respondent. (AP 5 Exhibit B).

Looked at from a different perspective, the Agreement to hold the disputed funds in escrow pending resolution of the claims between the parties can be likened to a stipulation between the parties. Both the parties and the court are bound by the terms of the stipulation. "[A] stipulation properly entered into and relating to a matter upon which it is appropriate to stipulate is binding upon the parties and upon the Court." *Gunn Plumbing v. Dania Bank, 252 So.2d 1 (Fla. 1971).* It is the policy of the law to encourage and uphold stipulations, such as the Agreement between the parties, since they minimize litigation and expedite the resolution of disputes. *Broche v. Cohn, 987 So.2d 124 (Fla. 4th DCA 2008), citing, Spitzer v. Bartlett Bros. Roofing, 437 So.2d 758, 760 (Fla. 1st DCA 1983).*

The Petitioner successfully argued to the trial court that the Agreement required the funds to be held until the final resolution of the claims between the parties and that the request was a last minute attempt by Respondent to circumvent and end-run the Agreement. The trial court's Order properly denied the release of escrow funds.

Respondent has not made any factual allegations, which would permit the lower court (or this Court) to vitiate the Agreement of the parties. Respondent did not present any case law, on point, which would leave room for the trial court to make any ruling other than to deny Respondent's Escrow Motion as the lower

court did on January 10, 2007. (AP 5) As outlined below, there is substantial case law, which supports the trial court's ruling.

Another factor upon which the lower court rendered its decision (which the lower court pointed out at the hearing on Respondent's Escrow Motion), is that these funds have been held in escrow for two years now; to begin releasing part of the funds at this point in the litigation (at the eleventh hour), when this case is already set on the Court's Trial Calendar, does not make sense. This rationale alone is sufficient to deny the Motion to Release the Funds, as it is well-established in Florida that "trial courts… have broad discretion in the procedural conduct of trials." *Terry Jerome Rock v. State of Florida, 638 So.2d 933 (Fla. 1994).*

A. COURTS CANNOT MODIFY THE TERMS OF A PRIVATE CONTRACT

The Third District Court's Opinion, which acknowledges the existence of a valid and binding Agreement, and then rewrites the terms of the Agreement in a manner that is more favorable to Respondent expressly and directly conflicts with the *Pafford* (Supra) decision.

The Third District Court of Appeals was prohibited, as a matter of law, from amending the terms of the Agreement pursuant to the Respondent's request. The well-established case law in Florida mandates that when the meaning of an agreement is well settled, it may not be modified by the court. *Pafford v. Standard*

Life Ins. Co., 52 So. 2d 910 (Fla. 1951), See also, Federal Home Loan Mortgage Corporation v. Molko, 602 So.2d 983 (Fla. 3rd DCA 1992).

B. BOTH THE UNITED STATES CONSTITUTION AND THE FLORIDA CONSTITUTION GUARANTY THE INVIOLABILITY OF THE RIGHT TO CONTACT

The Third District Court's Opinion also expressly and directly conflicts with *State ex rel. Dos Amigos v. Lehman, 131 So. 533 (Fla. 1931)* decision, which held that "To both the citizen and his government the right to contract is the most valuable right known to the law. The Constitution guarantees its inviolability." By rewriting the terms of the Agreement in a manner that is more favorable to Respondent, the Third District Court violated the contract rights protected by *Article 1§ 10 of both the United States Constitution and the Florida Constitution*.

C. THE COURT IN EQUITY CANNOT ASSIST IN EXTRICATING A PARTY FROM HIS OR HER OWN WRONGFUL AND FRAUDULENT CONDUCT

The Opinion of the Third District Court fails to honor the settled law in this state "that a court of equity will not assist one in extricating himself from circumstances which he has created" and therefore is thereby expressly and directly in conflict with *Slizyk (Supra).*

In essence, Respondent wants to rescind the Agreement on the basis that she did not anticipate that this litigation would be "delayed". However,

Respondent's actions over the past two years (since the Agreement was entered) do not indicate any rush on her part to get the case to trial as she has filed numerous motions. In fact, at the Calendar Call held on November 9, 2006, Respondent did not oppose Petitioner's Motion for Continuance. Respondent herself has also delayed the litigation by filing her own motion for continuance of trial and by filing this appeal when this case was already set for trial. For Respondent to now allege that a delay was unanticipated is inconsistent with her own lack of effort to progress the litigation and with Respondent's filing of the appeal to the Third District Court of Appeals, which further delayed trial.

Upon entering into the Agreement the Respondent could have stipulated or negotiated that only half of the proceeds be deposited in the escrow account. Respondent failed to request such a concession and such a concession would not have been agreeable to Petitioner. Respondent now wants to modify the terms of the Agreement after having received the benefit of said Agreement by having completed the closing of the purchase and sale of the Property.

The Petitioner gave up her right to possession of her homestead by agreeing to enter into the Agreement in order to close on the purchase and sale of the Property. Petitioner agreed to the Agreement because it provides for all of the funds to be held in escrow pending final resolution of the claims between the parties. It would be unjust and inequitable to allow Respondent (the "alleged

wrongdoer") to benefit from the proceeds of the sale, while keeping the Petitioner (the "alleged victim") from enjoying the same benefit. Furthermore, the Petitioner would be twice damaged, because, the Respondent no longer resides within the State of Florida, and has already moved other jointly owned assets outside the jurisdictional reach of Florida Courts.

The Respondent is not entitled to relief from this Court simply because she is now dissatisfied with the Agreement she entered into and regrets her decision. When a party executes an agreement and later realizes that the agreement was not in her best interest and/or will hinder access to disputed funds, neither law nor equity will operate to undo the agreement to the detriment of the other party, simply due to her own error. "If one's mistake is due to his own negligence and lack of foresight and there is absence of fraud or imposition, equity will not relieve him."; *Bridges v. Thomas, 118 So.2d 549, 553 (Fla. 2d DCA 1960);* see also *Graham v. Clyde, 61 So.2d 656, 657 (Fla. 1952).*

Additionally, when the Complaint was amended (to include additional counts) Respondent could have filed a counter-claim seeking reformation or rescission of the Agreement; however, Respondent chose not to. For the reasons discussed in this brief, this failure to plead a reformation or rescission is fatal to the relief Respondent now seeks. *Arky, Freed, Sterns, Watson, Greer, Weaver & Harris, P.A. v. Bowmar Instrument, Corp., 537 So.2d 561 (Fla. 1988*).

"[I]t is settled law in this state that a court of equity will not assist one in extricating himself from circumstances which he has created." *Hill v. Lummus, 123 So.2d 365 (Fla. 3rd DCA 1960).*

The above being the legal standard in Florida, the trial court made a proper ruling in denying Respondent's Escrow Motion, which sought to essentially rescind the Agreement (relief which was never pleaded) to which Respondent voluntarily acquiesced and from, which Respondent reaped the benefit of being able to close on the purchase and sale contract with Rene Sebastian.

By filing an appeal, Respondent has caused a delay in resolving the claims between the parties and therefore delayed the right to possession of the property in accordance with the Agreement. The appeal was not intended to expedite the return of property, instead its motive was to circumvent the Agreement and avoid trial. That is, the reason Respondent filed the appeal was not because of any delay, but because Respondent fears the potential outcome if this case is presented to a jury of her peers.

Respondent is using this appeal to argue the legal sufficiency of some of the core issues of this case without affording Petitioner the opportunity to present her case to a jury. The merits of the case should be presented to a jury so that a determination of the facts can be made.

D. THE OPINION OF THE THIRD DISTRICT COURT OF APPEAL RUNS COUNTER TO PUBLIC POLICY

The Third District Court's holding applies the standards for a court ordered injunction to a private escrow Agreement. This holding has a devastating impact on real property transactions in this state, where escrow agreements routinely play an important role. By extension, this holding can also have a devastating impact on litigation and other trade or business regarding both intrastate and interstate commerce. Pursuant to this Opinion, every escrow agreement in Florida, which does not meet the stringent standards for injunctive relief can be violated.

There are strong policy and constitutional grounds for the prohibition on the modification of contracts by the judicial interpretation. The Third District Court of Appeals was prohibited, as a matter of law, from amending the terms of the Agreement, and the Opinion amending the terms of the Agreement calls into question the very foundation of the stability of contracts in commerce and of stipulations in all areas of dispute resolution. If agreements and stipulations can be freely rewritten by the courts, the uncertainty will greatly increase the number of cases presented to the courts for resolution. Anyone subject to a contract or stipulation which is not then beneficial would likely be motivated to bring same to the court for revision, in the hopes of the rewrite being more favorable. This

uncertainty would greatly increase risk and costs in commerce, particularly interstate commerce.

The Petitioner gave up her right to possession of her homestead because the Agreement provided for all of the funds to be held in escrow pending final resolution of the claims between the parties, thereby preserving the status quo. It would be unjust and inequitable to allow Respondent (the "alleged wrongdoer") to benefit from the proceeds of the sale, while keeping the Petitioner (the "alleged victim") from enjoying the same benefit, in violation of the Agreement.

Pursuant to settled law in this state, courts of equity will not assist one in extricating himself from circumstances which he has created. *Hill v. Lummus, 123 So.2d 365 (Fla. 3rd DCA 1960).* Likewise, dissatisfaction, regret or lack of foresight does not provide a basis for relief from the Agreement, which Respondent voluntarily entered into and has benefited from.

The Opinion of the Third District has far-reaching implications, including its potential impact on security agreements, which by their terms are similar to escrow agreements. For example, a typical escrow agreement requires that certain property, funds or documents be held in escrow pending the occurrence of an event, by which the release of the property, funds or documents is then triggered. Similarly, a mortgage places a lien (restriction) on property to secure the payment of a debt. Thus, if a borrower and lender enter into a mortgage agreement (the

lender holding a mortgage on two lots to secure a debt), it would not be proper for a court to release one lot prior to the full payment of the debt (thereby rewriting the mortgage agreement) simply because the other lot happens to have enough equity to satisfy the full debt. This would be impermissible because the parties agreed that both lots be burdened by the mortgage agreement until the borrower paid in full. However, the holding of the Third District Court of Appeals in present case effectively releases one half of the assets, contrary to the terms of the underlying Agreement.

Petitioner faces substantial prejudice if the Opinion of the Third District Court of Appeals is allowed to stand. Petitioner entered into the Agreement, which provided for the preservation of the status quo as to both parties, such that neither of the parties would be able to obtain financial benefit or leverage over the other by means of the Funds subject to the Agreement. The Opinion grants Respondent an unfair, inequitable and significant financial advantage in this dispute, which violates the heart of the Agreement – the preservation of the status quo. By contrast, Respondent has alleged no real prejudice.

ARGUMENT II

THE THIRD DISTRICT COURT OF APPEALS ERRED IN ACCEPTING JURISDICTION UNDER RULE 9.130(A)(3)(C)(ii), OF THE FLORIDA RULES OF APPELLATE PROCEDURE

The lower tribunal's order denying the release of escrow funds is not an appealable non-final order. The Respondent failed to meet the threshold outlined in *Rule 9.130(a)(3)(C)(ii) of the Florida Rules of Appellate Procedure*, which allows for review of non-final orders which determine the right to immediate possession of property.

The Third District Court of Appeal, improperly accepted jurisdiction on the basis of *Rule 9.130(a)(3)(C)(ii) of the Florida Rules of Appellate Procedure*, by categorizing the lower tribunal's order denying the release of escrow funds as an improper injunction, and incorrectly relied on the following three cases: *Konover Realty Associates, Ltd. v. Mladen, 511 So.2d 705, 706 (Fla. 3rd DCA 1987), Pianeta Miami, Inc. v. Lieberman, 949 So.2d 215 (Fla. 3rd DCA 2006), and Rosaco v. Rosaco, 641 So.2d 493 (Fla. 1st DCA 1994)*. The district court's reliance on these cases is misguided due to a key distinguishing fact; in these cases the trial courts ordered the deposit of funds in escrow. That is, the courts required one party to accomplish the affirmative act of placing certain funds in either the court registry or an escrow account. In the present case, both parties deposited the Funds in escrow by agreement, through the exercise of their own free volition. There was no judicial action requiring either party to escrow the Funds and the parties were in no way obligated to escrow the Funds. The district court is simply applying the injunction rule to a voluntary agreement, which by its very definition is not an

injunction. An injunction is defined as: "A court order commanding or preventing an action." *BLACK'S LAW DICTIONARY 800 (8th ed. 2004).* The definition goes on to state that,

> In a general sense, every order of a court which commands or forbids is an injunction; but in its accepted legal sense, an injunction is a judicial process or mandate operating in personam by which, upon certain established principles of equity, a party is required to do or refrain from doing a particular thing.

BLACK'S LAW DICTIONARY 800 (8th ed. 2004), citing 1 Howard C. Joyce, A Treatise on the Law Relating to Injunctions § 1, at 2-3 (1909).

The holding makes a fundamental error in overlooking the fact that the trial court did not order retention of 100% of the Funds (rather, it denied Respondent's request that the trial court rewrite the Agreement). Moreover, even if the enforcement of the Agreement were to be deemed an injunction or a bond (which Van Vorgue maintains it is not), any such injunction or bond would be voluntarily self-imposed by the parties (not by court order). The Agreement was not entered into by either recommendation or order of the trial court, rather the parties, freely and voluntarily entered into the Agreement at a time when both parties were represented by counsel. There was no objection to nor any action to remove the fund from escrow, taken by either party for over two years. There has been no allegation by Respondent of any undue influence or duress, and then on the eve of trial Respondent filed the Motion to Release Escrow.

Moreover the trial court was correct in affirming the Agreement as it is in essence a stipulation between the parties with regard to the Funds and Respondent had not plead reformation or rescission and had not met its legal burden for relief from the Agreement. Florida law is clear:

> In order to obtain relief from a stipulation, a party must make a reasonable motion to withdraw the stipulation supported by an affidavit showing good cause. No relief will be given where it appears that the stipulation was voluntarily undertaken and there is no indication that the agreement was obtained by fraud, misrepresentation, or mistake of fact.

Henrion v. New Era Realty IV, Inc., 586 So.2d 1295 (Fla. 4th DCA 1991). In the present case, no affidavit of good cause was proffered to the trial court nor was there any allegation of fraud, misrepresentation, or mistake of fact on the part of Petitioner such that Respondent should have been relieved of her Agreement.

At best Respondent's claim can be viewed as an allegation of a change in circumstance; that the First Amended Complaint sets forth new causes of action. However, this alone will not relieve Respondent from the Agreement. This is because Respondent did not plead the relief she seeks. Respondent had an opportunity to file a counterclaim for reformation or rescission of the Agreement at the time that the First Amended Complaint was filed and she did not.

Respondent's failure to plead precludes the relief herein sought, as it is well settled in this state that a court cannot grant relief on a claim that was never pled even if said claim is proven. *Arky, Freed, Sterns, Watson, Greer, Weaver & Harris, P.A. v. Bowmar Instrument, Corp., 537 So.2d 561 (Fla. 1988)*. Furthermore, Respondent does not have an appropriate basis to plead for such relief, since the claims by Petitioner in her First Amended Complaint, which contains ten interrelated counts, all arising from the same, or a related series, of transactions and occurrences involving the funds held in escrow. Respondent's negligence or lack of forethought is not a basis for the relief sought. *See, Bridges v. Thomas (Supra).*

The most basic reason the Third District Court of Appeal, improperly accepted jurisdiction on the basis of *Rule 9.130(a)(3)(C)(ii) of the Florida Rules of Appellate Procedure*, is that using the standard employed, a huge number of non-final orders would be subject to appellate jurisdiction. The Respondent has sought, and the Third District's Opinion has granted what amounts to an end run around the claims subject of this litigation as framed by the pleadings. Using the same logic, an order which denied a Mortgagee-Plaintiff's "motion for payment into the court registry of the mortgage payments by the Mortgagor during the pendency of a foreclosure action or for possession of the premises" would also be deemed an appealable non-final order.

Rule 9.130(a)(3)(C)(ii) of the Florida Rules of Appellate Procedure, should be narrowly and strictly construed. "The thrust of rule 9.130 is to restrict the number of appealable non-final orders. The theory underlying the more restrictive rule is that appellate review of non-final judgments serves to waste court resources and needlessly delays final judgment." *Travelers Ins. Co. v. Bruns, 443 So.2d 959 (Fla. 1984).*

CONCLUSION

The Opinion of the Third District Court of Appeals grants Rankin an unfair, inequitable and significant financial advantage in this dispute, which violates the heart of the Agreement – the preservation of the status quo. The Opinion is in direct conflict with well-established Florida law, and sound public policy. Furthermore, the Third District Court of Appeals erred in accepting jurisdiction to hear this non-final order.

For all of the foregoing reasons, Van Vorgue respectfully invokes this Court's jurisdiction under *Fla. Const. Art V, §3(b)(3)* and requests the Court to (1) reverse the Opinion of the Third District Court on the merits; or alternatively (2) hold that the Third District Court improperly granted jurisdiction and should quash the Third District Court's Opinion, and remand with instruction to dismiss the appeal for lack of jurisdiction.

CERTIFICATE OF COMPLIANCE

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

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By: ALBERT D. REY, ESQUIRE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this Jurisdictional Brief has been furnished by United States Mail, this 18th day of May 2009 to:

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