IN THE SUPREME COURT OF FLORIDA

Case No. SC08-2255

VANNESSA VAN VORGUE,

Petitioner,

v. 3d DCA CASE NO. 07-378

MARA M. RANKIN,

Respondent.
_____/

PETITION FOR DISCRETIONARY REVIEW OF A DECISION OF THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

RESPONDENT'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS[1]

This case originated as an appeal to the Third District Court of Appeal from a non-final order denying Respondent's Motion to Release Escrow Funds. In the Motion, Respondent, Mara Rankin ("Rankin") requested the trial court to release her undisputed share of proceeds from the sale of real property that had been titled in the names of Rankin and Petitioner, Vannessa Van Vorgue ("Van Vorgue") because Van Vorgue is claiming entitlement to only half of those proceeds. *See Rankin v. Van Vorgue*, 994 So. 2d 463 (Fla 3d DCA 2008). The trial court denied the motion because Van Vorgue is also seeking damages in connection with other claims in the litigation. The Third District Court of Appeal reversed, holding that, "To order retention of 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). *See id.*

[1] As argued more fully herein, Rankin objects to the statement of facts outlined in Van Vorgue's Amended Jurisdictional Brief because the purported "facts" are not taken from the Third District opinion and are unsupported by the record. In addition, the brief argues the merits of the underlying case, is not limited to jurisdiction, and goes beyond the limited issues addressed in the appellate court decision. *See* Fla. R. App. P. 9.120(d).

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Van Vorgue then filed in the Third District a motion for rehearing, clarification, certification of jurisdictional conflict, and certification of issue of great public importance. 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*, 2008 WL 2663718 (Fla. 3d DCA July 9, 2008). Van Vorgue then filed a Motion to Stay Mandate and a Notice to Invoke the Discretionary Jurisdiction of this Court based on an alleged jurisdictional conflict. Rankin responded and filed a motion for sanctions against Van Vorgue and her counsel in connection with the Motion to Stay. As reflected on the docket, although the motion for sanctions was denied, senior Judge Alan R. Schwartz issued a dissenting opinion stating the he "would grant said motion under Florida Rule of Appellate Procedure 9.410 and remand to the trial court to fix amount."

SUMMARY OF ARGUMENT

Van Vorgue's Amended Jurisdictional Brief should be stricken because it states facts unsupported by the record, argues the merits of the underlying case, is not limited to jurisdiction, and goes beyond the limited issues addressed in the appellate court decision. *See* Fla. R. App. P. 9.120(d). This Court has already stricken Van Vorgue's first Jurisdictional Brief for violating Rule 9.120(d), and Van Vorgue has failed to correct the deficiencies.

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The Court lacks jurisdiction to hear Van Vorgue's petition. Clearly, no express or direct conflict exists between this case and the cases cited by Van Vorgue which stand for the widely-held, general proposition that a court may not rewrite a contract. Nowhere in the Third District Court of Appeal decision is there any mention, even by implication, that the Third District is rejecting this rule of law. Van Vorgue also fails to show how the cited cases have "substantially the same controlling facts" as this case, a requirement for establishing a genuine conflict.

Yet, according to Van Vorgue, the Third District Court of Appeal's decision that Rankin is entitled to 50% of the escrowed proceeds conflicts with her cited cases because it modifies the parties' Escrow Agreement which purportedly states that the funds are to be held until "the resolution of the parties' claims."

However, this language quoted by Van Vorgue **does not** come from the Escrow Agreement. Rather, Van Vorgue is quoting from, and takes out of context, a trial court order that merely transferred the funds to an interest-bearing account. Thus, the Third District did not "rewrite" language in a contract; it construed language in a court order.

Even if the funds were required to remain in escrow until "the resolution of the parties' claims," Rankin's entitlement to 50% of the funds is fully "resolved." Van Vorgue concedes that she is only claiming entitlement to 50% of the escrowed

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funds based on her alleged joint ownership of the real property. *See Rankin*, 994 So. 2d at 464. Accordingly, she has no legal claim to Rankin's 50% share. Van Vorgue wants the funds held as security for any other damages that may be awarded to her in the case below. However, as the Third District held, retaining 100% of the escrowed money until the parties resolve the other claims is an improper injunction and an unlawful bond against potential future damages.

ARGUMENT

Rankin presents the following argument in response to Van Vorgue's Amended Jurisdictional Brief.

I. The Amended Jurisdictional Brief violates Florida Rule of Appellate Procedure 9.120(d).

Van Vorgue's Amended Jurisdictional Brief violates Florida Rule of Appellate Procedure 9.120(d). It states facts unsupported by the record, argues the merits of the underlying case, and goes beyond the limited issues addressed in the appellate court decision. For example, the Introduction of the Amended Jurisdictional Brief contains the inflammatory and unsupported statement that Rankin "lured Van Vorgue to their mutual accountant's office under the guise that the parties would be executing documents . . . " (Amended Jurisdictional Brief at 5). As Rule 9.120 points out, "It is inappropriate to argue the merits of the substantive issues involved in the case or discuss any matters not relevant to the threshold jurisdictional issue." *See* Fla. R. App. P. 9.120, cmt. notes. (1977

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Amendment). This Court struck Van Vorgue's first Jurisdictional Brief for violating Rule 9.120(d), and the deficiencies remain in her second attempt. The Amended Jurisdictional Brief should be stricken and this appeal should be dismissed.

II. This Court Should Not Exercise Jurisdiction Because the District Court's Opinion Does Not Conflict with *Slizyk*, *Pafford*, and *Lehman*.

The alleged basis for jurisdiction is an "express" and "direct" conflict with decisions of this Court and other courts of appeal. *See* Art. V, § 3(b)(3), Fla. Const. (1980); Fla. R. App. P. 9.030(a)(2)(A)(iv). To constitute such a conflict, the opinion 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).

Clearly, no express or direct conflict exists between this case and those cases cited by Van Vorgue: *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); *State v. Lehman*, 131 So. 533 (Fla. 1930). These cases stand for the widely-held, general proposition that a court may not rewrite a contract. However, nowhere in the Third District's opinion is there any mention, even by implication, that the Third District

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is rejecting this rule of law. *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 also fails to show how *Slizyk, Pafford,* and *Lehman* have "substantially the same controlling facts" as this case, a requirement for establishing a genuine conflict. *See id.*

Van Vorgue merely disagrees with the Third District's conclusion and is attempting to obtain additional *de novo* review. Yet, according to Van Vorgue, the Third District Court of Appeal's decision that Rankin is entitled to receive her 50% share of escrowed proceeds before Van Vorgue's other damages claims are resolved conflicts with the holdings in *Slizyk*, *Pafford*, and *Lehman* because it modifies the parties' Escrow Agreement which purportedly states that the funds are to be held until "the resolution of the parties' claims."

This is clearly nothing more than a disagreement with the appellate court's holding; it is not a jurisdictional conflict. Moreover, the language that Van Vorgue quotes that the funds are to be held until "the resolution of the parties' claims" **does not** come from the Escrow Agreement, as she states. Van Vorgue is quoting from, and takes out of context, a trial court order that merely transferred the funds to an interest-bearing account. And in that order, the trial court stated that the funds

could be disbursed "pursuant to further Order of th[e] Court."[2] Thus, the Third District did not "rewrite" language in the Escrow Agreement; it merely construed and applied language in a court order that already authorized release of the funds.

Even a strict interpretation of the trial court order entitled Rankin to receive her 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 she is only entitled to 50% of the escrowed funds based on her alleged joint ownership of the real property. *See Rankin*, 994 So. 2d at 464. Thus, she has no legal claim to Rankin's 50% share. Rather, Van Vorgue wants the funds held as security for any other damages that may be awarded to her. This is not a legal basis to preclude Rankin from receiving her rightful share of the proceeds, and certainly does not approach vesting this Court with conflict-based jurisdiction. As the Third District 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

[2] Rankin is simultaneously filing a Motion to Vacate Stay and Motion for Sanctions against Van Vorgue and her counsel for making this misrepresentation to the Court. The Motion to Vacate Stay attaches the Escrow Agreement and the trial court order.

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> 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 at 464.

Van Vorgue failed to show a genuine conflict warranting discretionary review of the Third District's opinion. Moreover, the decision to return Rankin's funds to her is logically and legally sound.

CONCLUSION

For these reasons, the Third District's opinion does not conflict with *Slizyk*, *Pafford*, and *Lehman*, and this Court should decline to exercise jurisdiction.

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CERTIFICATE OF SERVICE

I CERTIFY that a copy of Respondent's Brief on Jurisdiction was sent by overnight mail to Petitioner's counsel, Albert D. Rey, Esquire, Albert D. Rey, P.A., 7240 N.W. 12th Street, Miami, Florida 33152-6164 on January 23, 2009.

_____

CERTIFICATE OF TYPE SIZE AND STYLE

The undersigned certifies that this brief was printed in proportionately spaced, 14-point Times New Roman type.

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