IN THE SUPREME COURT OF FLORIDA

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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

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**PETITIONER'S AMENDED JURISDICTIONAL BRIEF**

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

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## STATEMENT OF THE CASE AND FACTS

The parties (who enjoyed a confidential personal relationship for 26 years) jointly purchased, mortgaged and owned residential real property ("Property") and held title as joint tenants with right of survivorship. The parties entered into a contract for the sale of the Property in 2004 to a third party in an arms-length transaction ("Sale Contract"), which Property had equity for the parties' benefit totaling $753,232.12. Thereafter, and before the closing of the Sale Contract, Mara Rankin ("Rankin") informed Vannessa Van Vorgue ("Van Vorgue") that she wanted a trial separation of their long-standing relationship and that she would be moving to California alone. Rankin then lured Van Vorgue to their mutual accountant's office under the guise that the parties would be executing documents for the purpose of transferring registration of their respective automobiles; unbeknownst to Van Vorgue she was actually signing a quit claim deed to their jointly owned Property, which at the time was subject to the Sale Contract, and signing other documents transferring Van Vorgue's stock in a corporation.

In an effort to facilitate the closing of the Sale Contract, and avoid being in breach thereof, the parties executed an escrow agreement ("Agreement") whereby the entire (100%) sale proceeds (the "Funds") would be held in escrow pending final resolution of the parties' claims. The Agreement contemplated that the Funds be held in escrow by the title company for an initial period of three weeks so that

the parties could attempt to amicably resolve their dispute by agreement; and absent such resolution, the title company was then authorized to deposit the Funds into the court registry in the pending action, with the Funds to remain in escrow pending final resolution of the parties' claims, including all appeals.

Having not resolved the parties' dispute by agreement, Rankin filed a motion to transfer the Funds to an interest-bearing account with the same title company acting as escrow agent; and the trial court entered an order ("Transfer Order", drafted by Rankin) granting said motion and reiterating the fact that the escrow agent would hold the Funds, "in the amount of $753,232.12, pending resolution of the claims between the parties" as set forth in the Agreement. At that time Rankin did not seek the release of the Funds, nor any portion thereof.

All of the Funds remained in escrow pursuant to the Agreement and thereafter the Transfer Order for over two years without any objection by Rankin, until exactly one week before the matter was set for jury trial, when Rankin filed a Motion to Release Escrow Funds (the "Escrow Motion") [notwithstanding the Agreement and the fact that there was no count to reform the Agreement pending before the trial court]. At the time the Escrow Motion was filed by Rankin, Van Vorgue's complaint against Rankin included counts for fraud in the inducement, fraudulent misrepresentation, civil theft, and civil conspiracy, among others.

Thereafter, by agreed order, the trial was continued until the March 2007 trial calendar. The litigation today remains pending and the claims between the parties have not been resolved.

The trial court denied the Escrow Motion (as the matter was set for trial and the dispute would be resolved in short order), and rather than proceed with trial to bring the dispute to a final resolution, Rankin appealed the trial court's order to the Third District Court of Appeal. The district court reversed the trial court's order in an opinion that expressly and directly contradicts rulings of the Florida Supreme Court and rulings of other district courts in this state, which preclude the courts from assisting in extricating a party from his or her own wrongful and fraudulent conduct and from modifying the clear expression of the meaning of a contract. Therefore, Van Vorgue hereby seeks the Florida Supreme Court's review of the conflict between the Third District Court of Appeal's opinion, the opinions of its sister district courts and the opinion of the Florida Supreme Court.

## SUMMARY OF ARGUMENT

In this case, the Third District Court of Appeal's opinion found that Van Vorgue and Rankin "entered into an escrow agreement requiring the proceeds form the sale to remain in escrow until the claims of the suit were resolved." However, in the holding of the opinion, the Third District Court of Appeals rewrites the Agreement by finding that holding 100% of the proceeds (which was the amount

agreed by the parties to be held in escrow pursuant to the agreement) constituted an improper injunction. 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 decision of the Third District Court of Appeal cannot be reconciled with the previous decision of the Fourth District Court of Appeal in *Slizyk v. Smilack*, 825 So.2d 428 (Fla. 4th DCA 2002), wherein the court held that "[a] court of equity will not assist in extricating a party from his or her own wrongful and fraudulent conduct"; that of the Florida Supreme Court in *Pafford v. Standard Life Ins. Co.*, 52 So.2d 910 (Fla. 1951), where the Court held that "[t]he clear expression of the meaning of a contract may not be modified by court interpretation"; and the underlying basis for these decisions which is most simply set forth in *State ex rel. Dos Amigos v. Lehman, 131 So. 533 (Fla. 1931)*, 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." Thus, the decision of the Third District Court of Appeal expressly and directly conflicts with previous decisions of district courts of appeal and the Florida Supreme Court.

## JURISDICTIONAL STATEMENT

The Florida Supreme Court has discretionary jurisdiction to review a decision of a district court of appeal that expressly and directly conflicts with a decision of the Supreme Court or another district court of appeal on the same point of law. Art. V, § 3(b)(3) Fla. Const. (1980); Fla.R.App.P. 9.030(a)(2)(A)(iv).

## ARGUMENT

"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." 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. However, despite this holding, 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

opinion constitutes the pronouncement of a new rule of law that: a court must apply injunctive standards to and rewrite a private contract when said contract is an agreement to hold funds in escrow pending resolution of the parties' claims. It is clear on the face of the opinion that this new rule 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.

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*.

The Third District Court's decision expressly and directly conflicts with the *Slizyk (Supra)* decision: "[a] court of equity will not assist in extricating a party from his or her own wrongful and fraudulent conduct"; and the *Pafford (Supra)* decision: "[t]he clear expression of the meaning of a contract may not be modified by court interpretation". By violating the Agreement of the parties, the Third District Court's opinion also expressly and directly conflicts with the *Dos Amigos (Supra)* 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."

In ruling that the withholding of Funds is an improper injunction, the Third District Court of Appeal relies on 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 also makes two fundamental errors: (1) 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 Rankin; and (2) it overlooks the fact that the trial court did not order retention of 100% of the Funds (rather, it denied Rankin'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.

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, were 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 in 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.

The far-reaching effects can also affect 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 or 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 escrow agreement.

Van Vorgue faces substantial prejudice if the opinion of the Third District Court of Appeals is allowed to stand. Van Vorgue 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 Rankin an unfair, inequitable and significant financial advantage in this dispute, which violates the heart of the Agreement – the preservation of the status quo.

## CONCLUSION

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) accept jurisdiction; (2) establish a briefing schedule on the merits; and (3) reverse the Decision of the District Court of Appeal, Third District.

## 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.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this Amended Jurisdictional Brief has been furnished by United States Mail, this 29th day of December 2008 to:

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# APPENDIX

1. Third District Court of Appeal's Opinion Dated November 5, 2008.