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 REPLY BRIEF

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

Respectfully submitted,

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PREFACE

Petitioner in this Reply 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 Petitioner's Reply Brief will be noted by the symbol "ARP" followed by the appropriate page number and/or paragraph number when applicable.

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

ARGUMENT I – THE THIRD DISTRICT COURT'S OPINION REWRITES THE ESCROW AGREEMENT IN FAVOR OF ONE PARTY OVER THE OTHER

On or about August 20, 2004, Rankin and Van Vorgue entered into an escrow agreement ("Escrow Agreement") for the purpose of facilitating the closing of their jointly owned home (the "Meridian Property") and maintaining the status quo between the parties. The Escrow Agreement defines the "Deposit" or "Escrow Deposit" as "the **total** Sellers proceeds in the amount of $753,232.12" (the "Funds" or "Escrow Funds"). [Emphasis Added.] (AP 2 D).

The holding of the Funds in escrow is not the equivalent of a bond against future damages, rather it is the consensual restriction upon the Funds pursuant to the Escrow Agreement. However, even if it were a bond, the bond would not rise to the level of an injunction as the lower tribunal did not order Rankin to place the Funds in escrow. The Escrow Agreement cannot be defined as a judicial restraint upon the use of assets because it is a voluntary agreement entered into for the parties' mutual benefit; that is, it allowed for the parties to comply with their contractual obligation to close on the sale of the Meridian Property.

The lower tribunal did not require Rankin to deposit the Funds and an injunction by its very definition is a court-ordered mandate, which would have forced Rankin to commit the affirmative act of placing the Funds either in escrow or into the court registry. *See Rosasco v. Rosasco,* 641 So.2d 493 (Fla. 1st DCA

1994). Rather, the court's Transfer Order merely sustained the Escrow Agreement pending the resolution of the parties' claims. (AP 5 at Exhibit B).

The Escrow Agreement required that the escrow agent hold the funds for three weeks as the parties endeavored to reach an amicable settlement. In the event that a settlement was not reached, the Escrow Agreement authorized the escrow agent to deposit the Funds in the court registry. In no event does the Escrow Agreement grant the escrow agent authority to release the funds without either the agreement of the parties or a court order (including the completion of all appeals and the expiration of all time limits to appeal). (AP 2 D).

After the three-week period contemplated in the Escrow Agreement (when no amicable settlement was reached), Rankin filed a motion to transfer the Funds into an interest-bearing account. The lower tribunal granted the motion and the escrow agent then attempted to deposit the Funds in such an account. However, the institution who was to be the custodian of the interest-bearing account required that only one social security number be identified with the account. Thus, Rankin moved for an order compelling compliance with the lower tribunal's prior order transferring the Funds to an interest-bearing account. The lower tribunal entered an order ("Order Compelling Compliance") which mandated that Rankin's social security number be used and specifically noted that:

> This does not grant [Rankin] any greater interest in the joint interest bearing account and remains subject to the Escrow Agreement and the Court's December 1, 2004 *[sic]* Order. Neither party shall withdraw any funds from the account without the other party's consent and only with prior court approval.

(ARB 1).

Rankin did not challenge the deposit of the Funds in escrow until some two years later when on the eve of trial, Rankin moved for disbursement of 50% of the Funds. In accordance with the Escrow Agreement and the fact that trial was about to begin, the lower tribunal rejected Rankin's argument that Van Vorgue has delayed the case and denied Rankin's motion to disburse 50% of the Funds.

Rankin now asserts that the amendment of the complaint changed the circumstances, that Van Vorgue's claims were somehow different because of the amendment and that such a change essentially allows for violation of the Escrow Agreement. This is simply not the case. The amendment(s) to the complaint refine the legal theories under which the original claims are based; this called for the addition of new counts, but the claims remain based upon the same transaction and occurrence as the claims in the original complaint. They are not "unrelated" as Rankin would have the Court believe. Moreover, contrary to Rankin's assertions the term "claims" is not expressly defined in the Escrow Agreement. (AP 2 D). The only terms that *are* defined in the Escrow Agreement are in quotations and

those terms include such essential terms as: "Agreement", "Escrow", "Escrow Agent", "Escrow Deposit", and "Deposit". (AP 2 D). Given the fact that the Order Transferring the Escrow Funds was drafted by Rankin's counsel, it is disingenuous to now (nearly five (5) years later) attempt to redefine the term claims as the Respondent's Answer Brief does.

Neither the motion to transfer nor the Rankin's initial brief before the Third District Court argue that any of the amendments of the complaint were a basis for disbursement of 50% of the Funds. The first mention of this specious claim is a passing mention in the bottom of page five and top of page six of Rankin's Reply Brief before the Third District Court. In fact, this argument is not even made in the context of deviation from or modification of the Escrow Agreement.

As the motion to amend the complaint was granted on the same date as the Order Transferring the Escrow Funds, Rankin was on notice of the new counts, having had a copy of the proposed amended complaint, but took no action. Rather, Rankin, whose counsel drafted the Order Transferring the Escrow Funds, allowed the entry of the order transferring 100% of the Escrow Funds without objection. Notably there was also NO request to the court to include language in the order to either restrict the Escrow Agreement to the original claims or to allow for the immediate disbursement of 50% of the Funds. Rankin did not do this for the most obvious of reasons, at that time Rankin was honoring the terms of the Escrow

Agreement which called for the escrow of all of the Escrow Funds until agreement of the parties or the final resolution of the claims between the parties. Rankin did not appeal the Order Transferring the Escrow Funds or even move for rehearing at the time based on the amendment to the complaint. In fact, the amendments were a non-issue from the time Rankin filed the motion to transfer escrow funds up until the eve of trial.

The Order Transferring the Escrow Funds does not provide that Rankin is legally entitled to 50% of the Funds as Rankin would have this Court believe. (AP 5 at Exhibit B). As a matter of fact, neither Rankin nor Van Vorgue's entitlement to any portion of the Funds has been determined since no trial has taken place and the escrow is jointly owned. If Rankin truly believed that she was legally entitled to 50% of the Funds, Rankin would have moved for disbursement at the time that the Order Transferring the Escrow Funds was entered. Instead, Rankin moved to transfer the Funds to an interest-bearing escrow account, which maintained the status quo pending resolution of the case as was the true intent of the Escrow Agreement.

Rankin readily admits that the purpose of the Escrow Agreement was to facilitate the closing of the Meridian property and the four corners of the Escrow Agreement reveal that such was its intent. (RAB 5, 18) and (AP 2 D). Rankin has received the benefit of the Escrow Agreement as the Escrow Agreement's intent

was met, i.e. the closing was completed and breach of the residential sales contract was avoided. In the Respondent's Answer Brief, Rankin admits that: "the Escrow Agreement is incapable of being rescinded because it successfully effectuated the closing of the Meridian Property." (RAB 23). What remains is a determination by the trier of fact of entitlement and apportionment of the funds (upon which the escrow is conditioned). However, now that Rankin has received the benefit, she wants to escape her obligations under the Escrow Agreement and bypass the trial by unilaterally revoking 50% of the escrowed Funds.

ARGUMENT II – THIS COURT PROPERLY EXERCISED CONFLICT JURISDICTION IN HEARING THIS APPEAL

The Supreme Court of Florida has jurisdiction to hear this appeal because the Third District's opinion announces a rule of law that expressly and directly conflicts with an expression of law from the Supreme Court and other appellate courts. Although "[c]onflict 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), "[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 found 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."** [Emphasis added.] *Rankin v. Van Vorgue*, *994 So.2d 463 (Fla. 3rd DCA 2008).* However, despite this finding, the district court incorrectly concluded that "[t]o order retention of 100% of the escrowed money until the parties resolve the other claims would be, essentially, an improper injunction." *Rankin v. Van Vorgue*, *994 So.2d 463 (Fla. 3rd DCA 2008).* This opinion constitutes the pronouncement of a 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. This new rule is conflicts with expressions of law from the Supreme Court and other appellate courts in this state that the clear expression of the meaning of a contract may not be modified by court interpretation.

The Third District Court of Appeals' decision conflicts with the long-standing *Pafford v. Standard Life Ins. Co.,* 52 So.2d 910 (Fla. 1951) decision wherein this Court held that "[t]he clear expression of the meaning of a contract may not be modified by court interpretation". The *Pafford* opinion was echoed in the 1992 holding of *Federal Home Loan Mortgage Corp. v. Molko,* 602 So.2d 983 (Fla. 3rd DCA 1992) and then again in 1999 in the holding of *Security Ins. Co. of Hartford v. Puig,* 728 So.2d 292 (Fla. 3rd DCA 1999), both cases involving

settlement agreements. The learned *Pafford* court made no caveat or exception wherein a court may rewrite a private contract and impose injunctive standards to private (escrow) agreements. Yet, The Third District's opinion in this case carves out just such a caveat by rewriting the Escrow Agreement under the guise that the agreement is an injunction (despite the fact that a private agreement can never be an injunction).

In *State ex rel, Dos Amigos v. Lehman,* 131 So.2d 533 (Fla. 1931), this Court 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." The Third District's opinion in this case shatters this steadfast rule of law founded and protected by both the United States Constitution and the Florida Constitution.

The Third District's opinion also conflicts with the Forth District Court of Appeals' decision in *Slizyk v. Smilack,* 825 So.2d 428 (Fla. 4th DCA 2002), holding that "[a] court of equity will not assist in extricating a party from his or her own wrongful and fraudulent conduct". This holding is well settled and is a firmly established staple of the law in Florida applied by the Second District in *Steele v. Lannon,* 355 So.2d. 190 (Fla. 2nd DCA 1978) and by the Florida Supreme Court in *Scott v. Sites,* 41 So.2d 444 (Fla. 1949). The Third District's holding does just the opposite of what the *Slizyk* rule requires; it allows Rankin to escape the Escrow Agreement, which agreement was a product of her own volition.

Despite Rankin's assertion in her brief that the Escrow Agreement cannot be rescinded, Rankin seemingly *wants* to rescind the Escrow Agreement on the basis that she did not anticipate that the litigation would be "delayed"[1]. The Third District's opinion assists her in rescinding the Escrow Agreement by applying injunctive standards to a private agreement.

The Petitioner respectfully submits that the matter of jurisdiction has already been argued in the jurisdictional briefs and this Honorable Court has appropriately granted jurisdiction.

ARGUMENT III – RANKIN'S CLAIM TO 50% OF THE ESCROWED FUNDS REMAINS IN DISPUTE

It is a central theme of Rankin's argument that her alleged entitlement to 50% of the Funds is "undisputed" and that she is "entitled" to it. Such is not the case, as the trier of fact (a jury) has not made a determination as to what percentage of the Funds each party is entitled to receive (given the potential for offsets and restitution). Furthermore, neither the Escrow Agreement, the Order Transferring the Escrow Funds, nor the Order Compelling Compliance provide that Rankin is legally "entitled" to any portion of the Funds as Rankin would have this court

[1] Rankin's actions over the past five years (since the Escrow Agreement was entered) do not indicate a rush on her part to get the case to trial. Rankin has filed numerous motions and she did not oppose Petitioner's Motion for Continuance. Rankin has also delayed the litigation herself by filing a motion for continuance of trial and by filing the appeal to the Third DCA on the eve of trial. It is disingenuous for Rankin to now allege that a delay was unanticipated as her own lack of effort to progress the litigation has further delayed trial and ultimately the final resolution of this case.

believe. To the contrary, the Escrow Agreement specifically states that "the owner of the Funds so deposited shall be 'Mara M. Rankin and Vannessa Van Vorgue' " and the Order Compelling Compliance maintains this ownership designation. (AP 2 D) (ARB 1). The account being jointly owned, Rankin has not plead a claim for partition thereof. Thus, the undisputed fact remains that neither Rankin's nor Van Vorgue's rights to any portion of the Funds has been determined because the trial has not taken place.

Although a restraint upon a party's unrestricted assets by judicial mandate may be improper, the escrow Funds are, by their very definition, restricted and their use is subject to the agreement of the parties or a final determination by court order. It goes without saying that control of the funds (or the res of the escrow) is intended to pass beyond the parties' control. The Escrow Agreement (like all escrow agreements) requires that the parties surrender control of the escrowed Funds and that said surrender of control be irrevocable. *See generally, Fla. Jur. 2d Escrow, §§5, 6.*

The Third District's Opinion has far-reaching implications, namely its potentially negative impact on security agreements (which are akin to escrow agreements). A typical escrow agreement, for example, requires that certain property (typically cash funds) be held in escrow pending the occurrence of an event, which will trigger the release of the property. A real-world example might

be one where a mortgage places a lien (restriction) on property to secure the payment of a debt. If a lender gives a borrower a loan secured by two lots, it would not be proper for a court to release one lot prior to the full payment of the debt. If the a court were to release one lot prior to the full payment of the debt, the court would be rewriting the mortgage agreement on the basis that the other lot happens to have enough equity to satisfy the full debt. The holding of the Third District Court of Appeals in the present case effectively does just that; it releases one half of the Funds, contrary to the terms of the underlying Escrow Agreement, the Order Transferring the Escrow Funds, the Order Compelling Compliance, and even the opinion of the Third District Court which found that 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 v. Van Vorgue*, *994 So.2d 463 (Fla. 3rd DCA 2008).*

A mortgage, like a bond, may be inappropriate if judicially mandated, but is entirely appropriate and common by agreement between private citizens and is essential in the stream of commerce.

The opinion of the Third District Court is already adversely impacting escrow agreements. For example, in the case of *Kostandinos Georgariou, et al v. Terra-ADI International, Case No. 08-15458 CA 08*, the Court entered a partial summary judgment for the Release of Portion of Escrow Deposit in Excess of 15%

of the Purchase Price on the basis of the *Rankin v. Van Vorgue, 994 So.2d 463 (Fla. 3rd DCA 2008)*; which partial summary judgment has already been appealed to the Third District Court of Appeals under Case No. 09-2290. (ARB 3-6)

ARGUMENT IV – THIRD DISTRICT COURT DID NOT HAVE JURISDICTION TO HEAR RANKIN'S APPEAL

It is clear from the Escrow Agreement, the Order Transferring the Escrow Funds, and the Order Compelling Compliance that the funds are titled in both Rankin and Van Vorgue equally. There has been no determination in the lower tribunal of entitlement to any portion of the Funds. The Third District granted jurisdiction based upon immediate right to possession of property, which was the subject of the Escrow Agreement, and for which there had been no determination of entitlement by the trial court. To allow jurisdiction on such a basis would be to allow immediate appeals in all cases involving disputes over ownership of or rights to property prior to a determination of such ownership on the merits. The granting of jurisdiction on this basis effectively allows district courts to circumvent the jurisdiction of lower tribunals as triers of fact.

The Third District court of Appeal mischaracterized the lower tribunal's order denying the release of escrow Funds as an injunction when it relied on a line of cases with differing material facts. Namely, *Konover Realty Associates, Ltd. v. Mladen, 511 So.2d 705 (Fla. 3d DCA 1987), Pianeta Miami, Inc. v. Lieberman,*

949 So.2d 215 (Fla. 3d DCA 2006), and Rosaco v. Rosaco, 641 So.2d 493 (Fla. 1st DCA 1994). The courts, in the above-referenced cases, effectively forced the party to accomplish the affirmative act of depositing Funds that were otherwise unrestricted at the time of the deposit. These cases are patently distinguishable from the case at bar where both parties agreed to deposit the Funds in escrow without judicial influence or compulsion.

Here, there was no judicial action requiring either party to escrow the Funds. The district court is simply applying injunctive standards to a voluntary agreement, which by its very definition is not an injunction. The parties' actions (or omissions) over the five years following their mutual assent to the Escrow Agreement indicates that the Funds had always been intended to remain in escrow until all claims were resolved. During that time, neither party moved to modify or rescind the Escrow Agreement and it was not until the eve of trial that Rankin moved for release of the escrow Funds.

Apparently in an effort to couch the desire for disbursement of the Funds into a "change of circumstance", Rankin alleges that the filing of an amended complaint containing what she characterizes as "unrelated" claims that are not governed by the Escrow Agreement. However, it is disingenuous to imply that Rankin was suddenly caught by surprise by the new counts in the amended complaint. Despite having prior notice and a copy of the proposed amended

complaint, Rankin chose to take no action until some two (2) years thereafter; and without benefit of pleading any cause of action in support, such as rescission or partition. Now, Rankin ostensibly wants relief for a claim not asserted and said unplead relief cannot be granted under the law. *See Henrion v. New Era Realty IV, Inc., 586 So.2d 1295* (Fla. 4th DCA 1991); *and Arky, Freed, Sterns, Greer, Weaver & Harris, P.A. v. Bowmar Instrument, Corp.,* 537 So.2d 561 (Fla. 1988).

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.

____
By: ALBERT D. REY, ESQUIRE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this Petitioner's Reply Brief has been furnished by United States Mail, this 9th day of September 2009 to:

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