IN THE SUPREME COURT OF FLORIDA

CASE NO. SC12-75

NORTH CARILLON, LLC,

Appellant,

vs.

CRC 603, LLC, and
CRC 1103, LLC,

Appellees.
_____/

L.T. Case Nos.:
3D10-2230 & 3D10-2231

ON MANDATORY REVIEW OF A DECISION OF
THE THIRD DISTRICT COURT OF APPEAL
DECLARING INVALID A STATE STATUTE

INITIAL BRIEF OF APPELLANT, NORTH CARILLON, LLC

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STATEMENT OF THE CASE AND FACTS

This is an appeal from a decision of the Third District interpreting a Florida statute governing real estate development and refusing to apply an amended statute retroactively. The Appellant, North Carillon, LLC, developed condominium buildings in Miami Beach. Appellees CRC 603, LLC, and CRC 1103, LLC ("CRC") are real-estate speculators—Nevada investment vehicles that signed contracts to purchase two luxury condos, each for over $1 million, during the real-estate boom. CRC paid only deposits, promising to pay the remainder upon completion. It speculated that the real-estate market would continue to rise, and that the condo units, when completed, could be flipped at a profit. But the contract did not guarantee that condo prices would continue to rise. By signing each contract, CRC took the risk that prices would fall by the time of completion, just as the North Carillon accepted a discounted, pre-construction price and gave up the right to sell the units later, at higher prices, if the market kept rising.

Neither the contracts nor the law allows CRC to speculate risk-free, but the Third DCA's decision does just that, letting CRC back out of its deal based on the most technical of violations of a statute that CRC did not even allege until this case was nearly two years old. And CRC does not allege any harm from that technical violation. It simply wants its deposits back.

Indeed, when the real-estate bubble burst, instead of closing on the condos, CRC sued to recover its deposits, on the bare allegation that North Carillon failed to provide a property report before the contracts were signed. Nineteen months later, a federal court construed section 718.202(2), Florida Statutes, to require developers to keep purchase deposits in two escrow accounts instead of one—one account for deposits up to 10% and the other for deposits above 10%. Within days, CRC amended its complaint to allege a new claim demanding return of its deposits based on North Carillon's alleged failure to hold deposits in two separate accounts. Four months later, the Legislature clarified that the statute does not require two accounts. The trial court agreed and dismissed the claim. The Third DCA reversed. *CRC 603, LLC v. N. Carillon, LLC*, 77 So. 3d 655 (Fla. 3d DCA 2011).

The plain text of the statute, however, does not require separate accounts, and the statutory history and clarifying amendment also show they are not required. Notwithstanding the Legislature's clarification that separate accounts are not required, the Third DCA's decision could allow buyers to void thousands of contracts and expose Florida developers to potentially enormous liability. If the decision is affirmed and a developer does not have two separate accounts, speculative purchasers will be able to void their contracts—even if the developer accounts for deposits separately and constructs the condominium in reliance on

purchasers' promises to pay for their units at closing—without having suffered any damages.

A. Nature of the Case and Course of Proceedings

The Plaintiffs are "single-asset, Nevada limited liability companies formed to buy and hold the condominium units in 'North Carillon Beach,' a luxury condominium development on Collins Avenue in Miami Beach." *CRC 603*, 77 So. 3d at 657. In May 2006, CRC purchased two units from North Carillon, each "in excess of $1,000,000, and the deposit for each unit exceeded $176,000." *Id.* North Carillon placed the deposits in escrow with a title insurance company as provided in the purchase agreement (*CRC 603* R. 147; *CRC 1103* R. 10).[1]

Two years later—like many "prospective condominium buyers [] attempting to void the purchase contracts they signed in what hindsight now discloses was an irrationally exuberant real estate market," CRC refused to close. *CRC 603*, 77 So. 3d at 657. Instead, CRC sued to avoid its contracts under the Interstate Land Sales Full Disclosure Act (the "ILSFDA") (*CRC 603* R. 4-24; *CRC 1103* R. 5-23). CRC's entire complaint was that it should recover its deposits because North Carillon allegedly did not provide a property report before the contracts were signed (*CRC 603* R. 4-24; *CRC 1103* R. 5-23). CRC later amended its Complaint

[1] Because this Court has not received the record on appeal, North Carillion will cite to the records in the Third DCA, as "*CRC 603* R. __" and "*CRC 1103* R. __."

to allege that North Carillon's failure to provide a property report also violated the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA") (*CRC 603* R. 43-65; *CRC 1103* R. 44-64). In January 2009, North Carillon moved to dismiss the Amended Complaint (*CRC 603* R. 67-69; *CRC 1103* R. 103-105). That motion was denied (*CRC 603* R. 106; *CRC 1103* R. 106). North Carillon served its answer, affirmative defenses and counterclaim, and the parties began discovery (*CRC 603* R. 111-133; *CRC 1103* R. 111-131). For the first 19 months of this case, CRC never claimed any rights under section 718.202.

Then, in December 2009, in an unrelated case, the United States District Court for the Southern District of Florida construed section 718.202(2), Florida Statutes, which provides that "all payments which are in excess of the 10 percent of the sale price . . . shall be held in a special escrow account." § 718.202(2), Fla. Stat. (2006). The court interpreted the statute to require a developer to establish separate accounts for purchasers' pre-construction deposits, and ruled that the failure to do so rendered purchase agreements voidable. *Double AA Int'l Inv. Group, Inc. v. Swire Pac. Holdings, Inc.*, 674 F. Supp. 2d 1344 (S.D. Fla. 2009).

Also "[i]n December 2009, only days after *Double AA* was issued," CRC amended its complaints to add a "count to void the purchase contracts for failing to utilize two separate escrow accounts for . . . buyers' deposits." *CRC 603*, 77 So. 3d at 659. CRC also alleged that its original Complaint—which never

mentioned section 718.202 or alleged mismanagement of escrow accounts—was notice to North Carillon that it had opted to void the purchase contracts. *Id*. CRC demanded the return of both deposits, with interest and other relief. *Id*.

North Carillon moved to dismiss the Second Amended Complaint, and the trial court dismissed the new Count III, but not Counts I and II, and granted CRC leave to amend (*CRC 603* R. 232, 236-37; *CRC 1103* R. 149). Rather than amend, however, and rather than pursue Counts I and II, which CRC and North Carillon had been litigating since 2008, CRC voluntarily dismissed those claims and moved the trial court to enter final judgment against it on its new section 718.202 claim (*CRC 603* R. 238-39; *CRC 1103* R. 150-51).

In response to *Double AA*, effective July 1, 2010, the Legislature enacted section 718.202(11), which made clear that:

> All funds deposited into escrow pursuant to subsection (1) or subsection (2) may be held in one or more escrow accounts by the escrow agent . . . . Separate accounting by the escrow agent of the escrow funds constitutes compliance with this section even if the funds are held by the escrow agent in a single escrow account. It is the intent of this subsection to clarify existing law.

§ 718.202(11), Fla. Stat. (2010).

B. Disposition in the Third DCA

The Third DCA ignored the Legislature's mandate, instead adopting the reasoning of *Double AA* and construing section 718.202 to require two separate

escrow accounts. *CRC 603*, 77 So. 3d at 660. The court acknowledged that "the Legislature expressed an intention that the 2010 amendment be applied retroactively," but held that "retroactive application must be rejected as it impairs a vested contractual right." *Id.* (citation omitted). The Third DCA reversed the dismissal of Count III and remanded to the trial court for further proceedings. *Id.* at 661. North Carillon invoked this Court's mandatory jurisdiction (because the Third DCA had expressly declared the amended statute partially invalid). This Court denied CRC's motion to dismiss for lack of jurisdiction.

The Third DCA acknowledged the implications of its holding, noting that "one consequence of the current real estate recession in South Florida is that many prospective condominium buyers"—like the speculators here—"are attempting to void the purchase contracts they signed in what hindsight now discloses was an irrationally exuberant real estate market." *CRC 603*, 77 So. 3d at 657. Indeed, the Third DCA's decision will have profound effects on the Florida real-estate market, potentially requiring developers to return hundreds of millions of dollars in escrow deposits and interest. Developers who are forced to return millions of dollars in deposits, and guarantors of the developers' construction loans, may be forced out of business, into bankruptcy, and permanently ruined.

C. Standard of Review

The issue on appeal is the Third DCA's interpretation of section 718.202, Florida Statutes. Statutory interpretation is subject to *de novo* review. *Murray v. Mariner Health*, 994 So. 2d 1051, 1056 (Fla. 2008). The Third DCA's invalidation of a portion of section 718.202(11) is also subject to *de novo* review. *See Lawnwood Med. Ctr., Inc. v. Seeger*, 990 So. 2d 503, 508 (Fla. 2008).

SUMMARY OF THE ARGUMENT

The Third DCA construed section 718.202(2) to require separate escrow accounts where purchase deposits exceed 10% percent of the purchase price of a condominium. But the Third DCA based that holding on the presence of the word "special." Express terms requiring "two" or "separate" escrow accounts do not appear in the statute. As Judge Ramirez observed, concurring in the result, the majority "redrafted the statute," which is contrary to fundamental principles of statutory construction that courts must not replace or modify statutory language.

Because the statute is clear, the Court need not review statutory history. But that history confirms that the statute does not require separate accounts. Indeed, from 1974 to 1984, the statute required an escrow agent to hold deposits up to 10%, but required the developer to hold deposits in excess of 10%. Thus, the result of the statutory scheme as of 1984 was that, if deposits exceeded 10%, there were separate accounts: one held by an escrow agent, the other by the developer.

Therefore, on projects pending in 1984, deposits in excess of 10% were being held in separate accounts, because the statute provided that they were to be held by different parties. In 1984, however, new subsection (8) required, for the first time, that all purchaser deposits must be held by an independent escrow agent. Thus, separate accounts were no longer necessary, because the statute now required all deposits to be held by an independent agent. Moreover, four months after the federal decision in *Double AA*, the Legislature passed section 718.202 subsection (11), to clarify that the statute does not require separate accounts. As this Court has held, such timely amendments are strong signals of legislative intent.

If the Court finds that the 2010 amendment marked a change in the law, subsection (11) clearly was intended to be retroactive and should be so applied. The Third DCA acknowledged that the amendment expresses clear legislative intent that it be applied retroactively, and doing so does not impair substantive rights. Indeed, CRC claims a purely procedural right, namely its desire to have its deposits accounted for in separate accounts.

ARGUMENT

I. THE PLAIN LANGUAGE OF SECTION 718.202, AS WELL AS THE LEGISLATIVE HISTORY AND THE LEGISLATURE'S SUBSEQUENT CLARIFICATION, DEMONSTRATE THAT IT DOES NOT REQUIRE TWO SEPARATE ESCROW ACCOUNTS

As shown below, A) section 718.202 does not require developers to maintain separate escrow accounts for pre-construction deposits, but only to separately

account for them; B) the legislative history also shows that the statute does not require separate accounts; C) immediately after a federal court misconstrued the statute, the Legislature clarified that section 718.202 does not require separate accounts; D) the agency that enforces the statute also has opined that separate accounts are not required; and E) because a statutory violation is a third-degree felony, any ambiguity should be construed in North Carillon's favor.

A. The Plain Terms of Section 718.202 Do Not Require Separate Accounts

Statutory interpretation "must begin with the actual language in the statute 'because legislative intent is determined primarily from the statute's text.'" *Bennett v. St. Vincent's Med. Ctr, Inc.*, 71 So. 3d 828, 837 (Fla. 2011) (citation and internal quotation marks omitted). Section 718.202 requires pre-construction purchase deposits to be held in escrow. § 718.202, Fla. Stat. (2006). Subsection (1) provides that the "developer shall pay into an escrow account all payments up to 10 percent of the sale price." Subsection (2) provides that payments "in excess of the 10 percent of the sale price described in subsection (1) . . . shall be held in a special escrow account established as provided in subsection (1)." Nowhere does section 718.202 require that deposits be held in "two" or "separate" accounts. Neither word even appears in the statute. Thus, the plain language of the statute requires only one account, established by the method provided in subsection (1).

The Third DCA rejected this plain reading. Although acknowledging that it was not bound by the decision in *Double AA International Investment Group, Inc. v. Swire Pacific Holdings, Inc.*, 674 F. Supp. 2d 1344 (S.D. Fla. 2009), *aff'd in part, vacated in part*, 637 F.3d 1169 (11th Cir. 2011), the court adopted its reasoning, holding that section 718.202 requires separate accounts when buyers deposit more than 10% percent of the purchase price. *CRC 603*, 77 So. 3d at 659.

Although the Third DCA wrote that it would "adopt [*Double AA*] as our own," the court's construction of 718.202 was limited to its analysis that "'special account' and 'special escrow account' are terms mandating separate accounts for deposits under section 718.202(1) and (2) . . . . [T]he issue is the mandatory separateness of the escrow accounts for the two *types* of deposits made under subsections (1) and (2) of the statute." *Id.* at 660 (italics in original). The statute, however, does not say "separate accounts" or "two accounts." The majority wrote those terms into the statute. Indeed, Judge Ramirez, concurring in the result, described the issue as "whether the statute calls for 'a special escrow account,' as the language of the statute requires, or 'a special <u>separate</u> escrow bank account,' as the majority has <u>redrafted</u> the statute." *Id*. at 661 (emphasis supplied).

The Third DCA's construction of the statute—to include terms not found in it—violates the bedrock principle of statutory construction that courts are "not at liberty to extend or modify the express and unambiguous terms" of a statute with

terms "that do not appear" there. *See Tasker v. State*, 48 So. 3d 798, 805 (Fla. 2010); *see also Rinker Materials Corp. v. City of N. Miami*, 286 So. 2d 552, 553 (Fla. 1973) (courts "may not insert words or phrases . . . in order to express intentions which do not appear"); *Platt v. Lanier*, 127 So. 2d 912, 913 (Fla. 1961) ("[I]t is not within the province of the court . . . to assume that the legislature meant something which does not appear upon the face of the statute."); *Stroemel v. Columbia Cnty.*, 930 So. 2d 742, 745 (Fla. 1st DCA 2006) (rejecting interpretation that "amounts to a rewriting of the Code's text").

This Court should reject the Third DCA's rewriting of the statute. *See Bennett*, 71 So. 3d at 841 (rejecting a construction of "neurological injury" that "erroneously injected the term 'manifest' into the statutory definition when no such term occurs"); *Valdes v. State*, 3 So. 3d 1067, 1075 (Fla. 2009) (rejecting a "judicial gloss" on double-jeopardy statute because courts had "added words that were not written by the Legislature"); *Knowles v. Beverly Enters.-Fla., Inc.*, 898 So. 2d 1, 7 (Fla. 2004) (rejecting a construction that would require the court "to add words to the statute stating that the cause of [decedent's] death is irrelevant").

B. The Legislative History of Section 718.202 Confirms that the Statute Does Not Require Separate Accounts

Because section 718.202 is clear, this Court need not analyze its legislative history. Even where statutes are clear, however, this Court looks to legislative

history when it "confirms" the plain meaning. *Florida Dep't of Envtl. Prot. v. ContractPoint Fla. Parks, LLC,* 986 So. 2d 1260, 1266 (Fla. 2008); *May v. Ill. Nat'l Ins. Co.*, 771 So. 2d 1143, 1161 n.16 (Fla. 2000) (finding that legislative history "confirms" the statute's "plain meaning"). *See also V.P. v. State*, 72 So. 3d 788, 791-792 (Fla. 4th DCA 2011) (although "we need not look behind the language to determine legislative intent[, t]he legislative history and structure of the statute, as it has evolved over the years, supports our reading"); *Quincy Corp. v. Aguilar*, 704 So. 2d 1055, 1060 n.7 (Fla. 1st DCA 1997) (the "judicial function" is to interpret a statute "in the light of its history, purpose and context").

Section 718.202 is part of a statute that has been extensively revised and amended, but the history of its requirement of deposits is straightforward. That history makes it even clearer that the statute does not require two or separate escrow accounts for initial 10% deposits and deposits in excess of 10%.

The predecessor to section 718.202 required a developer to maintain only <u>one</u> escrow account for purchase deposits, to hold a buyer's initial deposit. § 711.25(1), Fla. Stat. (Supp. 1970). The statute required that the deposit be held in a "special account <u>by the seller</u> or his . . . agent and shall not be commingled with the funds of the seller . . . prior to the filing of the notice of commencement." *Id.* (emphasis supplied). Thus, "special" in the original statute merely differentiated the deposit account—held by the <u>developer</u>—from the developer's

own funds. It did not mean "two separate escrow accounts"—it could not have meant that because the original statute required only one account.

In 1974, the statute was amended to require an escrow agent for the initial deposit. Subsection (1) was completely rewritten to require, as to 5% of the initial deposit, that the "developer shall establish an escrow with a bank or trust company," and that the "escrowed funds may be deposited in separate accounts, or in common escrow or trust accounts." § 711.67(1), Fla. Stat. (Supp. 1974). New subsection (2) required a developer to hold deposits in excess of 5% and limited their use. § 711.67(2), Fla. Stat. (Supp. 1974). Thus, deposits in excess of 5% would be held separately from deposits up to 5% because that is what the statute required. Under new subsection (2), excess deposits were held by the developer, not by any bank or escrow agent. Indeed, new subsection (2) was created by making minor changes to old subsection (1). Replacing "seller" with "developer," new subsection (2) required that deposits in excess of 5% "shall be held in a special account by the developer or his . . . agent." *Id*. Thus, "special account" in new subsection (2) is a holdover from original subsection (1), and it connotes "separate" only in the sense that, at this stage of the statute's history, the statute required initial and excess deposits to be held by different parties.

In 1976, the Legislature amended the statute again, and increased the amount of an initial deposit that must be held in escrow by a bank or trust company from

5% to 10%. § 718.202(1), Fla. Stat. (Supp. 1976). Subsection (1) continued to provide that the "escrowed funds may be deposited in separate accounts or in common escrow or trust accounts." *Id.* Subsection (2) continued to provide that deposits in excess of the initial deposit "shall be held in a special escrow account by the developer or his agent." § 718.202(2), Fla. Stat. (Supp. 1976). The word "escrow" was inserted into the phrase "special account" in that subsection, but the legislative history does not explain that insertion, and it did not change who was to hold that account. In 1976 as in 1974, whether it was termed "special account" or "special escrow account," the account identified in subsection (2) was an excess-deposits account to be held by the <u>developer</u>, not by any bank or escrow agent.[2]

In 1984, section 718.202 was amended again. *See* Ch. 84-368, § 9, at 819, Laws of Fla. The only changes to subsection (1) were the deletion of a clause requiring the escrow account for the initial deposit to be maintained, for example, with a "bank or trust company having trust powers," and two sentences providing that escrowed funds "may be deposited in separate accounts or in common escrow or trust accounts," and that escrowed amounts may be invested in "securities of the United States . . . or in savings or time deposits." § 718.202(1), Fla. Stat. (Supp. 1984). Those provisions were no longer necessary because the Legislature enacted new subsection (8), which applies to both subsections (1) and (2).

[2] The revisions to section 718.202 in 1979, 1980 and 1981 are not relevant here.

New subsection (8) provides that "escrow accounts required by this section" must be established with an "escrow agent" who "shall be independent of the developer." § 718.202(8), Fla. Stat. (Supp. 1984). Therefore, the only change to subsection (2) was the deletion of the clause "by the developer or his agent"—because the developer would no longer hold the excess deposit—and the addition of the clause "established as provided in subsection (1) and controlled by an escrow agent," to provide the method by which excess deposits were now to be held. § 718.202(2), Fla. Stat. (Supp. 1984). Subsection (2) continued to refer to a "special escrow account"—the same term that had appeared in subsection (2) since 1976. The retention of that term, rather than connote "separate," merely acknowledged the reality that, since 1976, the statute had required developers to hold excess deposits separate from initial deposits in a "special escrow account." The 1984 revision changed that, but it did not force developers to combine existing deposits held separately into one account. Rather, going forward, the 1984 revision of section 718.202 required—for the first time—that escrow accounts for excess deposits must be held by an independent escrow agent, not by the developer. Other than providing that escrowed funds could be invested only in securities of the United States or in insured accounts, new subsection (8) does not dictate <u>how</u> an independent escrow agent is to maintain escrow accounts, nor would such a requirement be necessary where, as here, the agent is independent.

Thus, the legislative history of section 718.202 shows that, from 1974 to 1984, the statute required initial deposits to be held by an escrow agent, but required deposits greater than 10% to be held in escrow by the developer. Under those provisions, separate escrow accounts, although not mandated, were the practical result. In 1984, however, when subsection (8) began to require that escrowed amounts under both subsections (1) and (2) must be held by an independent escrow agent, separate accounts were no longer necessary because the statute now required an independent agent to hold all deposit amounts. The 1984 amendment allowed excess deposits to be held in separate accounts—for projects existing at the time of the amendment, initial and excess deposits were being held in separate accounts because the statute required them to be held by different parties—but it did not require separate accounts.

C. After *Double AA*, the Legislature Immediately Clarified That Section 718.202 Does Not Require Two Separate Escrow Accounts

After *Double AA* was decided, the Legislature amended section 718.202 to add subsection (11), providing that all escrowed funds under "subsection (1) or subsection (2) may be held in one or more escrow accounts by the escrow agent." § 718.202(11), Fla. Stat. (2010). The new subsection also provides that "[s]eparate accounting by the escrow agent of the escrow funds constitutes compliance with

this section even if the funds are held by the escrow agent in a single escrow account. It is the intent of this subsection to clarify existing law." *Id.*

The Third DCA dismissed the Legislature's clarification because "we have repeatedly held that gaps of a decade or two between the enactment of a statute and a clarifying amendment may preclude retroactive effect." *CRC 603*, 77 So. 3d at 660 (quotation marks omitted). But the Third DCA ignored this Court's decision in *Lowry v. Parole & Probation Comm'n*, 473 So. 2d 1248, 1250 (Fla. 1985), in which the Court held that, when "an amendment to a statute is enacted soon after controversies as to the interpretation of the original act arise, a court may consider that amendment as a legislative interpretation of the original law and not as a substantive change thereof." Applying that principle, *Lowry* held that a 1985 amendment to a 1973 statute was a proper clarification of legislative intent because the Legislature passed the amendment four months after the attorney general issued an opinion misconstruing an existing statute. *Id.* at 1249-50.

That is precisely what happened here. The Legislature passed section 718.202(11) in April 2010 (signed by the Governor on June 1). *See CS/CS/CS/SB 1196—Community Associations*, FLORIDA HOUSE OF REP., http://www.myfloridahouse.gov/Sections/Bills/billsdetail.aspx?BillId=43082 (last visited March 30, 2012). As in *Lowry*, that was only four months after the decision in *Double AA*, which construed section 718.202 contrary to both legislative intent

and decades of industry practice. Thus, *Lowry* dictates that this Court accept subsection (11) as clarifying the Legislature's intention that 718.202 does not require preconstruction deposits to be held in separate accounts.

D. The Agency That Enforces Section 718.202 Also Has Opined That Two Separate Escrow Accounts Are Not Required

In 1999, the Department of Business and Professional Regulation ("DBPR") issued an Informal Legal Opinion ("ILO") stating that section 718.202 does not require two separate escrow accounts and permits separate accounting within a single account. *CRC 603*, 77 So. 3d at 660. The Third DCA rejected the ILO simply because *Double AA* did. *Id.* at 661. CRC has argued that chapter 718 is administered not by DBPR but by the Division of Condominiums, Timeshares, and Mobile Homes ("DCTMH"). *See* Appellant's Reply Br. at 15 (Apr. 22, 2011). But the DCTMH is a division of the DBPR. *See* § 20.165(2), Fla. Stat. (2011). It was error not to defer to its findings. *See BellSouth Telecomm., Inc. v. Johnson*, 708 So. 2d 594, 596 (Fla. 1998) (finding that an "agency's interpretation of a statute that it is charged with enforcing is entitled to great deference and will be approved by [the Court] unless it is clearly erroneous."); *see also D.A.B. Constructors, Inc. v. State Dep't of Transp.*, 656 So. 2d 940, 944 (Fla. 1st DCA 1995) ("The agency's interpretation need not be the sole possible interpretation or

even the most desirable one; it need only be within the range of possible interpretations.").

E. Even if the Statute Is Not Clear, the Rule of Lenity Dictates That It Be Construed in North Carillon's Favor

Section 718.202(7) provides that "[a]ny developer who willfully fails to comply with the provisions of this section concerning establishment of an escrow account, deposits of funds into escrow, and withdrawal of funds from escrow is guilty of a felony of the third degree." § 718.202(7), Fla. Stat. (2011). Such a felony is punishable by imprisonment up to five years and a fine up to $5,000. §§ 775.082(3)(d), 775.083(1)(c), Fla. Stat. (2011).

Where a statute provides for criminal liability, it "shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused." § 775.021(1), Fla. Stat. (2011). This rule of lenity applies to all offenses in the Florida Statutes, § 775.021(2), Fla. Stat, and the rule is a "statutory directive" to ensure that "everyone [is] given sufficient notice of those matters that may result in a deprivation of life, liberty, or property." *Kasischke v. State*, 991 So. 2d 803, 814 (Fla. 2008) (citation omitted). *See also United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 517–518 and n. 10 (1992) (resolving an ambiguity in a tax statute in favor of the taxpayer in a civil case because the statute had criminal applications that triggered the rule of lenity) (plurality opinion).

Based on the rule of lenity, if this Court finds that section 718.202(2) is ambiguous, it must construe it in North Carillon's favor. Indeed, under the Third DCA's opinion, North Carillon could be held criminally liable for a technical accounting violation. Therefore, the rule of lenity dictates that this Court construe section 718.202(2) as not requiring two separate escrow accounts.

II. APPLYING NEW SECTION 718.202(11) RETROACTIVELY DOES NOT AFFECT SUBSTANTIVE RIGHTS AND THEREFORE IS CONSTITUTIONAL

If the Court finds that section 718.202(11) marked a change in the law, that section clearly was intended to be retroactive and should be applied retroactively. To evaluate retroactivity, courts must determine: (A) whether the statute expresses an intent that it apply retroactively; and, if so, (B) whether retroactive application is constitutional. *Metro. Dade Cnty. v. Chase Fed. Hous. Corp.*, 737 So. 2d 494, 503 (Fla. 1999). As we show below, subsection (11) satisfies both requirements.

A. Section 718.202(11) Expressly Applies Retroactively

Subsection (11) provides that "[s]eparate accounting by the escrow agent of the escrow funds constitutes compliance with this section even if the funds are held by the escrow agent in a single escrow account. It is the intent of this subsection to clarify existing law." § 718.202(11), Fla. Stat. (2011) (emphasis added). The underscored language plainly shows an intent that the section apply retroactively. *See D & T Props., Inc. v. Marina Grande Assocs. Ltd.*, 985 So. 2d 43, 47 (Fla. 4th

DCA 2008) (finding a legislative intent that a statute apply retroactively when the Legislature provided that the amendment was to "clarify existing law"). Ruling otherwise would nullify the last sentence of subsection (11)—"It is the intent of this subsection to clarify existing law"—which would be contrary to the basic principle of statutory construction that words must not be "construed as mere surplusage." *Hechtman v. Nations Title Ins. of N.Y.*, 840 So. 2d 993, 996 (Fla. 2003). Indeed, even the Third DCA acknowledged that the "Legislature expressed an intention that the 2010 amendment be applied retroactively." *CRC 603*, 77 So. 3d at 660.

B. Section 718.202(11) Is Constitutional Because It Affects Only Procedural Rights

Although recognizing that the Legislature intended that section 718.202(11) apply retroactively, the Third DCA concluded that "retroactive application must be rejected as it impairs a vested contractual right." *CRC*, 77 So. 3d at 660. The Third DCA construed CRC's "right" as a "legally sufficient, fully-accrued cause of action to void the purchase contracts and obtain a refund of their deposits." *Id.* At 660. But that finding makes a substantive right out of a purchaser's desire—asserted for the first time nearly two years after the Complaint was filed—to have his or her deposits accounted for in two accounts instead of one.

Substantive statutes either "create[] or impose [] a new obligation or duty," or "impair or destroy existing rights." *See Gupton v. Village Key & Saw Shop, Inc.*, 656 So. 2d 475, 477 (Fla. 1995); *Alamo Rent-A-Car, Inc. v. Mancusi*, 632 So. 2d 1352, 1358 (Fla. 1994). Procedural statutes "concern[] the means and methods to apply and enforce those duties and rights," *Alamo*, 632 So. 2d at 1358, and "no one has a vested interest in any given mode of procedure." *State v. Kelley*, 588 So. 2d 595, 597 (Fla. 1st DCA 1991). The substantive purpose of section 718.202 "is to protect purchasers under preconstruction condominium contracts from loss of their deposits should the developer fail to perform." *First Sarasota Serv. Corp. v. Miller*, 450 So. 2d 875, 878 (Fla. 2d DCA 1984). The requirement that deposits must be held by independent escrow agents serves that purpose by preventing the developer from improperly appropriating a buyer's deposit.

By contrast, whether a buyer's deposits are maintained in two accounts, as opposed to a single escrow account that separately accounts for both, is entirely procedural, concerning only the "means and methods to apply and enforce" a purchaser's right to the benefits of an independent escrow agent. *See Alamo*, 632 So. 2d at 1358. No substantive difference exists between separately accounting for purchase deposits in one account, or keeping them in two accounts. In either case, the "basic contract rights of the parties" are preserved because, as the statute requires, the deposits are maintained by an independent escrow agent. *See First*

Sarasota, 450 So. 2d at 877 (finding that "we must apply [section 718.202] in a realistic, common sense manner that will preserve the basic contract rights of the parties while affording the purchasers the protection the legislature intended").

Therefore, section 718.202(11) is procedural and should apply retroactively. *See Village of El Portal v. City of Miami Shores*, 362 So. 2d 275, 278 (Fla. 1978) ("Remedial or procedural statutes do not fall within the constitutional prohibition against retroactive legislation."); *D & T Props., Inc. v. Marina Grande Assocs., Ltd.*, 985 So. 2d 43, 48 (Fla. 4th DCA 2008) (applying statute retroactively where it "clarified an ambiguity in earlier legislation"). *See also City of Lakeland v. Catinella*, 129 So. 2d 133, 136 (Fla. 1961) ("Remedial statutes or statutes relating to remedies or modes of procedure, which do not create new or take away vested rights, but only operate in . . . confirmation of rights already existing, do not come within . . . the general rule against retrospective operation of statutes.").

CONCLUSION

This Court should reverse the Third DCA and hold that section 718.202 does not require the creation of two separate escrow accounts when a buyer makes a deposit in excess of 10% of the purchase price of a condominium unit. In the alternative, the Court should hold that section 718.202(11) applies retroactively.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with the font requirement of Fla. R. App. P. 9.210(a)(2) and is submitted in Times New Roman 14-point font.

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