IN THE SUPREME COURT OF FLORIDA
CASE NO: SC12-75

NORTH CARILLON, LLC,
Appellant,

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

v.

CRC 603, LLC, and CRC 1103, LLC,
Appellees.
_____/

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

BRIEF OF THE REAL PROPERTY, PROBATE AND TRUST LAW SECTION OF THE FLORIDA BAR

AMICUS CURIAE

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STATEMENT OF IDENTITY OF AMICUS CURIAE

Your *amicus curiae* is the Real Property, Probate and Trust Law Section of The Florida Bar (the "Section"). We are a group of Florida lawyers who principally practice in the areas of real estate and trust and estates law and are dedicated to serving all Florida lawyers and the public in these fields of practice. We produce educational materials and seminars, assist the public *pro bono*, draft legislation, draft rules of procedure and occasionally befriend courts to assist on issues related to our fields of practice. Our Section has over 9,000 members.

Our entire Section membership is impacted by this case. We draft legislation to clarify statutes when a court's decision reveals a misinterpretation of a law warranting clarification, and we regularly befriend courts to assist them in clarifying case law, rules and statutes. Often, these efforts involve the clarification of laws related to pending matters. In some cases though, these efforts involve clarification of laws that apply retroactively to past transactions. *See, e.g.* section 689.07, Florida Statutes (2004), and *Raborn v. Menotte*, 974 So. 2d 328, 330 (Fla. 2008) ("In 2004, the Florida Legislature, however, added an amendment to section 689.07(1). Responding to *Raborn I* and a request by the Real Property, Probate and Trust Section of the Florida Bar, the Legislature amended the statute to add a fifth condition that would cause a conveyance to be in trust: language in the deed identifying the trust by either name or date. This 2004 bill expressly provided that

the amendment 'was intended to clarify existing law and shall apply retroactively.' Ch.2004-19, §2, Laws of Florida."); *MacIntyre v. Wedell*, 12 So. 3d 273 (Fla. 4th DCA 2009) and subsequent legislative action to clarify the law pertaining to contesting the validity of revocations of trusts at Chapter 2011-183, §9, Laws of Florida.

One implication of the district court of appeal's decision is that the clear intent of the Legislature in attempting to clarify a law will simply become irrelevant if, by happenstance, the law is not misinterpreted (revealing the need for clarification) during the relatively short window of time in which the adopters of the original legislation are still legislators. Hence, our interest in this case.[1]

Pursuant to Section bylaws, the Executive Council of the Section voted unanimously to appear in this case if permitted by the Court. The Executive Committee of the Board of Governors of the Florida Bar has approved the Section's involvement in this case.[2] Kenneth B. Bell, Robert W. Goldman, and

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[1] To the extent the Florida Rules of Appellate Procedure require that we align ourselves with a party, our position on the point addressed herein would align us with the Appellant.

[2] This brief was reviewed by the Executive Committee of the Board of Governors of The Florida Bar and approved on Wednesday, May 9, 2012, consistent with applicable standing board policies. It is tendered solely by the Real Property, Probate and Trust Law Section and is supported by the separate resources of this voluntary organization - - not in the name of The Florida Bar, and without implicating the mandatory membership fees paid by any Florida Bar licensee.

John W. Little, III, are three of the co-chairs of the *amicus* committee of the Section, which is charged with preparing *amicus* briefs for the Section.

SUMMARY OF ARGUMENT

All three branches of government engage in the behavior of clarifying law. Administrative agencies do it. The Legislature does it. Courts do it.

The decision of the district court of appeal is predicated in part on the thesis that the mere passage of time between the adoption of a law, and subsequent legislation intended to clarify that law, bars the Legislature from undertaking statutory clarification which would have retroactive effect.

That thesis does not stand up to reason or Florida law. It appears to be predicated on a current legislature being unable to discern what an earlier legislature intended when it enacted a law. The Legislature, however, repeals and re-enacts all existing general law each year and is presumed to know the law and judicial interpretations of that law. And, just as this Court does, the Legislature has access to legislative history.

Further, the Florida Constitution places certain limitations on the legislative process, but none involves a bar to the Legislature clarifying terms of a statute already in existence. And, that clarifying legislation, or clarifying court rulings for that matter, can be applied retroactively is beyond any doubt. So, what then is the genesis of the issue before this Court? There are, of course, times when courts

cannot discern with certainty whether the Legislature intended that a statutory amendment serve to clarify the law and apply retroactively. That uncertainty spawns rules of statutory construction to assist courts in discerning legislative intent. Where the law is clear and the legislative intent on this point is certain, however, these rules of statutory construction cannot be employed.

In this case, the Legislature's clarifying amendment was clear. The Legislature expressly stated in its amendment that the legislation was clarifying existing law and the terms added to the statute were unambiguous. Therefore, the application of rules of statutory construction by the district court of appeal to the amendment was inappropriate.

The only question in this case should be whether the purported clarification was in fact just that, or amounts to a substantive change in existing law. The mere passage of time between enactment of section 718.202 and the purported clarifying amendment to that law should have nothing to do with the Court's analysis and resolution of that issue.

ARGUMENT

THE LEGISLATURE SHOULD NOT BE ESTOPPED FROM CLARIFYING A LAW IT ENACTED SIMPLY BECAUSE TIME HAS PASSED BETWEEN A STATUTE'S ENACTMENT AND CLARIFICATION OF IT BY STATUTORY AMENDMENT

As noted above, the Section befriends the Court in this case to address the district court of appeal's holding that the mere passage of time precludes the Legislature from clarifying a previously adopted law by amending it and having that amendment apply retroactively.

In *Amos v. Conkling*, 99 Fla. 206, 126 So. 283, 288 (1930), this Court held that when interpreting a law:

> (I)t is proper to consider, not only acts passed at the same session of the Legislature, but also acts passed at prior or subsequent sessions, and even those which have been repealed.

In *Gay v. Canada Dry Bottling Co. of Florida,* 59 So. 2d 788, 790 (Fla. 1952), *quoting from, General Petroleum Corp. of Cal. v. Smith*, 62 Ariz. 239, 157 P.2d 356, 360 (1945), this Court held: " 'The rule seems well established the interpretation of a statute by the legislative department goes far to remove doubt as to the meaning of the law. The court has the right and the duty, in arriving at the correct meaning of a prior statute, to consider subsequent legislation.' "

This Court applied the rationale established in both of those rules in determining that a 1977 amendment to a statute was merely intended to clarify the

law in existence prior to the amendment. *Ivey v. Chicago Ins. Co.*, 410 So. 2d 494, 497 (Fla. 1982).

In *Lowry v. Parole and Probation Com'n*, 473 So. 2d 1248 (Fla. 1985), this Court addressed legislation that was unclear as to whether it was intended as a clarification of law and applied retroactively. Because of that uncertainty, this Court applied the following rule of statutory construction:

> When, as occurred here, 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.

473 So. 2d at 1250. That rule of statutory construction was subsequently followed in *Palma Del Mar Condominium Ass'n No. 5 of St. Petersburg, Inc. v. Commercial Laundries of West Fla., Inc.*, 586 So. 2d 315, 317 (Fla.1991) ("Consequently, it is appropriate for this Court to consider chapter 86-175, Laws of Florida, particularly since there had been a judicial interpretation after the original enactment of section 718.3025 which the legislature believed was contrary to its original intent."); *State v. Nuckolls*, 606 So. 2d 1205, 1207 (Fla. 5th DCA 1992); *State v. Sedia*, 614 So. 2d 533, 535 (Fla. 4th DCA 1993); *Brown v. MRS Mfg. Co.*, 617 So. 2d 758 (Fla. 4th DCA 1993); *Lincoln v. Florida Parole Com'n*, 643 So. 2d 668, 672 (Fla. 1st DCA 1994); *State v. Patterson*, 694 So. 2d 55, 58 (Fla. 5th DCA 1997); *Matthews v. State*, 760 So. 2d 1148, 1150 (Fla. 5th DCA 2000); *Burgos v. State*, 765 So. 2d 967, 968 (Fla. 4th DCA 2000) (all concluding that it is appropriate to determine

legislative intent by considering a subsequent clarifying amendment enacted shortly after a judicial interpretation of the existing statute).

Importantly, the rule announced by this Court in *Lowry* and the other cases cited above (the "*Lowry* rule") was designed to aid courts properly engaged in statutory construction. Statutory construction and its attendant rules, particularly the rules cited above, may be implicated in interpreting the meaning of an ambiguous law and, therefore, *might* be of use in discerning the meaning of section 718.202 as it existed before the 2010 amendment. Indeed, this Court's holding in *Gay*, quoted above, even suggests courts would have a duty to consider the 2010 amendment as they construe the pre-amended law. But, the intent of the Legislature in adopting the clarifying amendment to section 718.202 is refreshingly unambiguous and the use of statutory rules of construction to discern the intent of the amendment seems inappropriate. *See* section 718.202(11) Florida Statutes (2011); *Petty v. Florida Ins. Guar. Ass'n*, 80 So. 3d 313, 316 n.3 (Fla. 2012); *Kephart v. Hadi*, 932 So. 2d 1086, 1091 (Fla. 2006); *St. Petersburg Bank & Trust Co v. Hamm*, 414 So. 2d 1071, 1073 (Fla. 1982). Whether the Legislature achieved its goal of clarifying the law, or changed it, is another matter that we leave to the litigants in this dispute and to this Court.

Unfortunately, our jurisprudential sojourn does not end here. In *State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So.2d 55, 62 (Fla.1995), this Court seemed to

limit its well-reasoned *Lowry* rule of statutory construction by adding an additional rule of construction potentially amounting to legislative estoppel. The Court noted:

> It would be absurd, however, to consider legislation enacted more than ten years after the original act as a clarification of original intent; the membership of the 1992 legislature substantially differed from that of the 1982 legislature.

That limitation on the *Lowry* rule also appears in *McKenzie Check Advance of Florida LLC v. Betts*, 928 So. 2d 1204, 1210 (Fla. 2006), where the legislative time-bar for clarifying its laws was shortened from ten to seven years.

At first blush a time-limitation rule may have appeal and seem logical. But, it is inconsistent with the legislative process and well-worn legal presumptions involving the Legislature and its work. Under Florida law, general laws like section 718.202, are repealed and re-enacted by the Legislature each year. *See*, *e.g.* sections 11.2421, 11.2422, Florida Statutes (2011). Statutes used to be repealed and re-enacted every two years. *See*, *e.g.* Chapter 97-97, §2, Laws of Florida; *Dockery v. Hood*, 922 So. 2d 258, 261 (Fla. 1st DCA 2006); *State v. Rothauser*, 934 So. 2d 17, 19 (Fla. 2d DCA 2006) (discussing the statutory repeal and re-enactment process). Since the late 1800s, there was never a window of time

between the enactment of a law and a clarifying amendment that exceeded two years.[3]

The legislative action of repealing and re-adopting laws is as real as any other legislation, and should be accorded the presumptions that the Legislature knew what they were re-enacting and knew of prior judicial interpretations of the law they re-enacted. *See Dockery v. Hood*, 922 So. 2d at 262 (Legislature presumed to know existing law when it enacts a statute, including sections 11.2421 and 11.2422); *Woodgate Development Corp. v. Hamilton Inv. Trust*, 351 So. 2d 14, 16 (Fla. 1977) (Legislature, in re-enacting laws in accordance with section 11.2421, is presumed to know the law); *Mathis v. State*, 31 Fla. 291, 12 So. 681 (Fla. 1893) (the repeal and re-enactment of the general laws of Florida involves constitutional law making by the Legislature and is entitled to that deference). Just as constitutional defects are often cured by the repeal and re-enactment legislation in Chapter 11, Florida Statutes, so too is the *Laforet* time bar for clarifying legislation. *See State v. Rothauser*, 934 So. 2d at 19 ("It has long been established in Florida that this legislative act of statutory adoption or codification cures any constitutional defect concerning the title of a law.").

[3] To our knowledge, no case espousing "legislative estoppel" as a rule of statutory construction addressed the legislative process and how it actually works.

Your *Amicus* respectfully submits that the explanation as to why "legislative estoppel" should not occur can end here. Nonetheless, putting aside the legislative process and corresponding argument discussed above, we also note that when clarifying a law and legislative intent, it is common for this Court and the district courts of appeal to consider legislative history in order to understand the original intent of a law, even if the law was enacted years earlier. *See e.g. Universal Ins. Co. of North America v. Warfel*, 82 So. 3d 47, 63 (Fla. 2012) (interpreting legislative history of law enacted in 2005); *West Florida Regional Medical Center, Inc. v. See*, 79 So. 3d 1, 18 (Fla. 2012) (interpreting legislative history of 1986 federal legislation); *Johnson v. State*, 78 So. 3d 1305, 1312-13 (Fla. 2012) (interpreting legislative history from 2003); *Samples v. Florida Birth-Related Neurological*, 40 So. 3d 18, 23 (Fla. 5th DCA 2010) (interpreting 1989 legislative history).

In other words, courts are often called upon to look back over many years, even decades, to the initial history of a law to discern the legislative intent. How is it then that the very branch of government that created that history is time-barred from looking back in the same manner when enacting a clarifying amendment some years after the original enactment of the law? This question calls out all the more loudly where the clarifying amendment is in response to a recent judicial

interpretation of the law in question. We were unable to locate a sound reason to treat these two branches of government differently on this topic.

We also reviewed the Florida Constitution and found nothing in it that limits the time for the Legislature to clarify existing law. If no such limitation exists, then the Legislature's power cannot be so limited. *See Sun Ins. Office, Limited v. Clay*, 133 So. 2d 735, 742 (Fla.1961) ("Although the Federal Constitution bestows power only in specific grants and is a document of delegated powers, the Florida Constitution is a limitation on power as distinguished from a grant of power, particularly with regard to legislative power.") (quoting 6 Fla. Jur. *Constitutional Law*, § 37 (1956)); *Browning v. Fla. Hometown Democracy, Inc., PAC*, 29 So. 3d 1053, 1079 (Fla. 2010) (" 'The legislative branch looks to the [Florida] Constitution not for sources of power but for limitations upon power.' ").

To be sure, this Court may find in a particular, unusual case that the Legislature's purported clarification is really a substantive change to the law. But, that should have nothing to do with the passage of time and everything to do with the terms of the purported clarifying amendment juxtaposed with the prior version of the law.

CONCLUSION

For these reasons, as the Court navigates and resolves the issues presented by the litigants, we respectfully request that the Court clarify the proper judicial analysis of purported clarifying legislation and remove any suggestion that the mere passage of time between initial enactment and subsequent legislation is a bar to clarifying amendments and their retroactive application.

Respectfully submitted this ___ day of May, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been filed via e-file@flcourts.org, with the original and seven copies mailed to the Clerk, Florida Supreme Court, 500 South Duval Street, Tallahassee, Florida, 32399, and copies furnished via U.S. Mail on the ___ day of May, 2012, to the Offices of:

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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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