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

REPLY BRIEF OF APPELLANT, NORTH CARILLON, LLC

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ARGUMENT

I. SECTION 718.202 DOES NOT REQUIRE DEVELOPERS TO ESTABLISH TWO SEPARATE ESCROW ACCOUNTS

As shown below, nothing in CRC's answer brief disturbs North Carillon's showing that: 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 statutory 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. Section 718.202 Does Not Require Two or Separate Accounts

CRC's entire argument is founded on the proposition that the word "special" in section 718.202 means "two" and "separate," but CRC does not dispute that those words do not appear anywhere in the statute. Instead, CRC cites and recites language from nine cases, arguing that interpreting the statute to require only a single escrow account "because the statute did not use the words 'two' or 'separate' is contrary to *every published opinion* addressing this issue during the last 27 years" (br. at 5) (CRC's italics).

CRC misstates the law. Six of its nine cases are various iterations of *Double AA International Investment Group, Inc. v. Swire Pacific Holdings, Inc.*, 674 F. Supp. 2d 1344 (S.D. Fla. 2009) ["*Double AA*"], or cases that, like the Third DCA here, simply followed *Double AA* (br. at 5-7, citing *Double AA*; *Double AA Int'l Inv. Group, Inc. v. Swire Pac. Holdings, Inc.*, 2010 U.S. Dist. LEXIS 30931 (S.D. Fla. Mar. 30, 2010); *Chusid v. Swire Pac. Holdings, Inc.*, Case No. 09-23368-CIV (S.D. Fla. Sept. 30, 2010); *Kaufman v. Swire Pac. Holdings, Inc.*, 836 F. Supp. 2d 1320 (S.D. Fla. 2011); *In re Harbour E. Dev., Ltd.*, 2011 Bankr. LEXIS 2509 (Bankr. S.D. Fla. June 20, 2011); *In re Mona Lisa at Celebration, LLC*, __ B.R. __, 2012 WL 2308550 (Bankr. M.D. Fla. May 16, 2012)).[1]

CRC's claim that the statute has been interpreted "for the last 27 years" to require multiple escrow accounts is based on one Florida case, *Barrack v. State*, 462 So. 2d 1196 (Fla. 4th DCA 1985). But *Barrack* did not construe the provision at issue here. Rather, the court decided whether section 718.202 violated a criminal defendant's right to due process. *Id*. at 1197. Nor did the bankruptcy court decide the issue in *In re Viking I, Inc.*, 95 B.R. 225 (Bankr. M.D. Fla. 1989),

[1] Some of these cases rely on the Third DCA's decision in *this* case, which is the only "state appellate decision interpreting F.S. § 718.202 dealing with the two separate escrow accounts issue and the 2010 amendment." *See Kaufman*, 836 F. Supp. 2d at 1326. CRC also cites *McKissack v. Swire Pacific Holdings, Inc.*, 2010 U.S. Dist. LEXIS 96615, at *7 (S.D. Fla. Sept. 15, 2010), but *McKissack* only decided whether the statute of limitations barred a section 718.202 claim.

where the court found that the developer failed to keep a deposit in *any* escrow account and considered whether the funds were property of the developer's estate. *Id.* at 227. *Double AA* itself notes that "[t]here are no reported decisions by Florida state or federal courts as to whether a failure to establish two separate escrow accounts . . . violates section 718.202." *Double AA*, 674 F. Supp. 2d at 1348.

Although the Third DCA in this case was the first Florida appellate court to consider this issue, several circuit courts have held that 718.202(2) does *not* require separate escrow accounts. *See Trujillo v. TRG-500 Brickell Two, Ltd.*, 2011 WL 2559968, at *1 (Fla. 11th Cir. Ct. June 24, 2011) (holding that section 718.202 "did not require that a purchaser's 20% deposit be kept by the escrow agent in physically separate bank accounts"); *1106744 Ontario, Inc. v. BCRE Brickell, LLC*, 2011 WL 2559969, at *1 (Fla. 11th Cir. Ct. Feb. 4, 2011) (same); *BCRE Brickell, LLC v. Woodfield Trading Corp.*, 2011 WL 601698, at *1 (Fla. 11th Cir. Ct. Jan. 25, 2011) (same). Indeed, those courts consider section 718.202 "unambiguous" and hold that it only "require[s] the escrow agent to separately account for the first 10% of the deposit versus the second 10% of the deposit." *Trujillo*, 2011 WL 2559968, at *1; *1106744 Ontario*, 2011 WL 2559969, at *1; *Woodfield Trading Corp.*, 2011 WL 601698, at *1.

CRC argues that North Carillon "ignore[s]" the word "special" (br. at 7), but CRC ignores North Carillon's showing, as Judge Ramirez observed, that the Third

DCA majority "redrafted the statute" when it construed "special escrow account" to mean "special *separate* escrow account" (initial br. at 10). CRC's position—that "[t]his Court . . . simply cannot ignore the legislature's use of the term 'special escrow account'" in section 718.202—is based on the argument that "Florida law has long-recognized [sic] a distinction between a 'general account' and a 'special account'" (br. at 8). CRC then discusses at length the banking-law distinctions between "special" and "general" accounts, and argues that "no Florida lawyer can dispute that he or she is required to maintain a separate trust account – separate from the operating account – which may hold money belonging to multiple clients." *Id.* at 8-11. But lawyers' obligations to maintain trust accounts are not at issue here, and "special account" and "general account" are not terms of art in Florida condominium law. CRC concedes that the condominium law "does not define 'special escrow account,'" and none of CRC's cases (br. at 8-9) discussing the banking law of "special" and "general" accounts discusses any provision of condominium law. *See Collins v. State*, 15 So. 214, 217-18 (Fla. 1894); *Belford Trucking Co. v. Zagar*, 243 So. 2d 646, 648 (Fla. 4th DCA 1970); *Bank of W. Orange v. Assocs. Discount Corp.*, 197 So. 2d 858, 861 (Fla. 4th DCA 1967)).

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

CRC argues that *Double AA* "undertook a scholarly and painstaking" analysis of section 718.202 and its legislative history (br. at 11), but *Double AA*'s construction of the statute depends almost entirely on "the modifier 'special'" (initial br. at 10). *Double AA*, 674 F. Supp. 2d at 1349. Indeed, adverting to the statute's "use of the modifier 'special,'" *Double AA* repeatedly *departs* from the statute's actual language, concluding that the "statute requires the establishment of *two separate* escrow accounts"; that the statute "clearly contemplate[s] *two separate* escrow accounts"; that the "statute, as written, . . . calls for *separate* accounts for the *separate* levels of deposits"; that the "statute requires a developer to establish *two separate* escrow accounts"; and that the defendant's "failure to establish *two separate* escrow accounts" violated the statute. *Double AA*, 674 F. Supp. 2d at 1348-50 (emphasis added). But nowhere does the statute provide that there must be "two" escrow accounts or "separate" escrow accounts.

Although CRC concedes that section 718.202 "does not define 'special' account," it nevertheless argues that the "initial version of the statute . . . makes clear that the legislature meant 'special account' to be a separate account for a specific purpose" (br. at 12). CRC also argues that the "1970 legislature required two separate accounts"—concededly "without using the words two or separate"—by "requiring preconstruction deposits be kept in a *special* account and not

commingled with the developer's other funds." *Id.* at 13 (CRC's emphasis). But the "special account" required in the original statute merely differentiated the deposit account—which the developer held—from the developer's own funds (initial br. at 12-13). "Special account" could not have meant "two, separate accounts for purchaser deposits," because the statute originally required only *one* account for purchaser deposits. *Id.*

CRC recites some of the statute's legislative history and necessarily concedes that, of the "two separate accounts" the 1970 version required, only one was for purchaser deposits (br. at 13). Thus, CRC argues that, in 1970, "special" meant one *purchaser* deposit account and one *developer* account. *Id.* Yet the entire basis of CRC's claim is that, from 1984 on, "special" means one *initial purchaser deposit* account and one *excess purchaser deposit* account. *Id.* at 14-15. Those are very different constructions of "special," but CRC argues that the "term 'special' always had the same meaning and intent—keeping some or all of purchasers' deposits in a separate account from other deposits. Thus, all versions of the statute always required 'two' or 'separate' accounts, without ever needing to use those words." *Id.* at 15. CRC essentially argues that the statute should be construed to contain words that do not appear in it, and CRC's conjectured meaning of "special"—"keeping some or all of purchasers' deposits in a separate

account from other deposits"—is so broad that it would be impossible for developers to know what to comply with.

CRC is arguing that, although the legislature said "special," it really meant "two" or "separate." But if the legislature had intended to say "two" or "separate," it would have done so; that it did not is powerful evidence that the legislature did not intend to require "two separate escrow accounts." *See Fla. Convalescent Ctrs. v. Somberg*, 840 So. 2d 998, 1001 (Fla. 2003) ("Logically, if the Legislature had intended for the Nursing Home Act to be limited by the Wrongful Death Act, it would have said so . . . ."); *Aldana v. Holub*, 381 So. 2d 231, 235 (Fla. 1980) ("[T]he legislature . . . easily could have included a provision for time extensions in the medical mediation statute. The absence of such language in the act bolsters our conclusion that no extensions were contemplated."); *H.J.M. v. B.R.C.*, 603 So. 2d 1331, 1334 (Fla. 1st DCA 1992) (finding that "the legislature knew how to create such an absolute privilege if it so intended" and "had the legislature intended [to create a privilege], then surely that is what it would have said") (citation and internal quotation marks omitted).

C. The Legislature Has Clarified That Section 718.202 Does Not Require Two Separate Accounts

CRC does not dispute that, just after *Double AA* was decided, the legislature amended section 718.202 to clarify that maintenance of a single escrow account

complies with the statute (br. at 16). And CRC concedes that this Court in "*Lowry* [*v. Parole & Probation Comm'n*, 473 So. 2d 1248 (Fla. 1985)] 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.'" *Id*. CRC argues that *Lowry* is "simply inapplicable to this case," because "courts began interpreting §718.202 as requiring 'two' or 'separate' accounts *25 years* before the 2010 amendment." *Id*. at 16 (CRC's emphasis). This is another reference to *Barrack*, 462 So. 2d 1196. As shown above, that case decided a due-process issue, not whether the statute requires two escrow accounts, and even *Double AA* notes that, when *Double AA* was decided, "[t]here are no reported decisions by Florida state or federal courts as to whether a failure to establish two separate escrow accounts . . . violates section 718.202." 674 F. Supp. 2d at 1348. Because the 2010 amendment was passed just four months after *Double AA*, the clarification is entirely consistent with *Lowry*, 473 So. 2d at 1249-50, which upheld a clarifying amendment passed 12 years after the original statute.

CRC also argues (br. at 17) that *Lowry* "has been limited by this Court in analogous circumstances" (citing *State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So. 2d 55 (Fla. 1995)). In *Laforet*, however, this Court refused to enforce a "clarifying" statute because it "significantly alters the language used to determine

damages" in a statutory bad faith action, allowing the legislature to "nullify [the statute] retroactively." *Laforet*, 658 So. 2d at 61-62. Those circumstances cannot be analogized to the 2010 amendment, which merely clarified that maintaining one escrow account complied with the statute.

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

CRC does not dispute that the DBPR issued an ILO stating that separate accounting in a single escrow account satisfies section 718.202(2) (br. at 18). CRC argues that the ILO should be ignored because "Chapter 718 is not administered directly by the DBPR" but by the DCTMH. But CRC concedes that DCTMH is a "Division . . . established under DBPR" (br. at 19); and divisions within DBPR are subordinate to the department itself. *See* § 20.165(3), Fla. Stat. (2011) ("The [DBPR] secretary shall appoint a director for each division established within this section. Each division director . . . shall be responsible to the secretary.").

CRC also argues (br. at 20) that this Court should not defer to the ILO because "every published opinion . . . has concluded that two separate accounts are required." As shown above, that statement is wrong. CRC also argues that the ILO should be ignored because the DBPR's policy that section 718.202 requires only one escrow account has not been consistent. *Id*. at 21-22 (citing *McKenzie Check Advance of Fla., LLC v. Betts*, 928 So. 2d 1204, 1215 (Fla. 2006) (Cantero,

J., dissenting)). But North Carillon has never argued that the ILO is evidence of a "consistent policy or interpretation." It has simply argued that the only agency opinion addressing the issue confirms that the statute does not require two escrow accounts. CRC does not identify any agency opinion to the contrary, and *McKenzie* does not hold that an agency must decide an issue repeatedly before its opinion is entitled to deference.

E. The Rule of Lenity Dictates That the Statute Be Construed in North Carillon's Favor

CRC does not dispute that section 718.202 imposes strict criminal liability for violations, or that statutes imposing criminal liability should be strictly construed (initial br. at 19).

CRC instead argues that this Court should ignore the rule of lenity because this is a civil, not a criminal, case, or because any prosecution of North Carillon, at least as to CRC, would be barred by the statute of limitations (br. at 26). But "[b]ecause we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context, the rule of lenity applies." *Leocal v. Ashcroft*, 543 U.S. 1, 12 n.8 (2004). *See also Lockheed Martin Corp. v. Speed*, 2006 WL 2683058, at *7 (M.D. Fla. Aug. 1, 2006) ("The fact that this Court now addresses the CFAA in a civil context does not withdraw the necessity of applying

the rule of lenity."). CRC cites *Florida Bar v. St. Louis*, 967 So. 2d 108 (Fla. 2007), but that case interpreted a Florida Bar rule, not a criminal statute.

CRC also argues (br. at 26) that the rule of lenity should not apply because section 718.202 "is not susceptible to differing constructions." We agree that the statute clearly does not require developers to maintain two separate escrow accounts. But if the Court construes the statute as "susceptible to differing constructions"—as did the divided Third DCA below, and as is shown by the divided court rulings construing the statute—the rule of lenity must apply because there is no question that section 718.202 imposes strict criminal liability for any violation (initial br. at 19-20).

II. APPLYING SECTION 718.202(11) RETROACTIVELY IS CONSTITUTIONAL

As shown below, CRC's answer brief does nothing to disturb the conclusions that (A) the statute expresses an intent that it apply retroactively; and (B) retroactive application of the statute is constitutional (initial br. at 20-23).

A. Section 718.202(11) Expressly Applies Retroactively

CRC does not dispute that section 718.202(11) expressly states that it is the Legislature's intent "to clarify existing law" (initial br. at 20). Although it relies on the case elsewhere, CRC does not address the holding of *D & T Properties, Inc. v. Marina Grande Associates, Ltd.*, 985 So. 2d 43, 47 (Fla. 4th DCA 2008), that an

amendment passed expressly to "clarify existing law" shows a legislative intent that a statute apply retroactively (initial br. at 20-21). And CRC acknowledges that the Third DCA itself found that the 2010 amendment was intended to apply retroactively (br. at 27). *See also CRC 603 LLC v. N. Carillon, LLC*, 77 So. 3d 655, 660 (Fla. 3d DCA 2011).

CRC simply argues (br. at 29) that retroactive statutes are "generally disfavored in the law," urging the Court to ignore the Legislature's statement that the purpose of the 2010 amendment is "to clarify existing law." But construing that language as surplusage would violate the principle of statutory interpretation that CRC purports to follow. *Id*. at 26; *see Heart of Adoptions, Inc. v. J.A.*, 963 So. 2d 189, 198-99 (Fla. 2007) ("A basic rule of statutory construction provides that the Legislature does not intend to enact useless provisions, and courts should avoid readings that would render part of a statute meaningless.") (citations and internal quotation marks omitted).

CRC also repeats its argument that the Court is not bound by a "'clarification' [ ] made *decades after*" the statute was amended to require that initial and excess deposits be held in escrow (br. at 30). As shown above, however, the 2010 amendment was passed just four months after *Double AA* decided a "case of first impression." *See* 674 F. Supp. 2d at 1348. CRC's other authorities are inapposite (br. at 31-32). *See State v. Knowles*, 402 So. 2d 1155,

1157 (Fla. 1981) (refusing to enforce a statute that was "clearly not of th[e] genre" of a clarifying amendment," where it retroactively created immunity for state employees from personal negligence claims); *McKenzie*, 928 So. 2d at 1210 (refusing to find an amendment as clarifying where it addressed a subject matter that was "nowhere within the original version of the Code"); *Ramcharitar v. Derosins*, 35 So. 3d 94, 99 (Fla. 3d DCA 2010) (rejecting an amendment attempting to "clarify" a statute 20 years after this Court interpreted it).

B. Section 718.202(11) Does Not Impair Any Substantive Rights

CRC does not dispute that the Legislature may retroactively impair procedural rights (br. at 33). It argues that North Carillon "errs in characterizing § 718.202 as procedural," because the "2010 amendment effectively eliminated a developer's *duty* and obligation to establish and maintain two separate escrow accounts." *Id.* (CRC's italics). But that argument incorrectly assumes that the statute imposed that duty in the first place, and that mistaken assumption is the entire basis of CRC's argument that the 2010 amendment impairs vested rights. Indeed, CRC argues (br. at 35-36) that, "*[a]ssuming* the version of §718.202 in effect prior to 2010 required two separate escrow accounts, then there can be no dispute" that the amendment "impairs vested rights" (emphasis supplied). Without that mistaken assumption, CRC's argument collapses.

In fact, Florida courts have held that the legislature *does* have the power to modify section 718.202 retroactively. *See Platinum Bridge Corp. v. TRG Brickell Point NE, Inc.*, 2011 WL 3584399, at *1 (Fla. Cir. Ct. Aug. 5, 2011). Florida courts have also held that "Plaintiff never had a right [under section 718.202] to rescind for failure of the escrow agent to maintain physically separate accounts and, therefore, the 2010 amendment to the Statute did not adversely affect Plaintiff's vested rights." *Trujillo*, 2011 WL 2559968, at *1. *See also 1106744 Ontario*, 2011 WL 2559969, at *1 (same); *Woodfield Trading Corp.*, 2011 WL 601698, at *1 (same).

CRC argues (br. at 36) that *Knowles*, 402 So. 2d 1155, "is dispositive of this issue." But that case bears no resemblance to the facts here. This Court refused to enforce a statute that was "clearly not of th[e] genre" of a clarifying amendment" because it retroactively immunized state employees from personal negligence claims. *Id.* at 1157.

Finally, CRC argues (br. at 39-43) that a statutory scheme requiring two separate escrow accounts has many benefits. But nothing in the record supports those alleged benefits, many of which are pure argument. Moreover, although CRC claims (br. at 39) that the "legislature understood that requiring separate accounts provided great consumer protection," there is nothing to suggest that the Legislature considered any of the alleged benefits of two separate escrow accounts.

CONCLUSION

For the reasons stated above and in North Carillon's initial brief, this Court should quash the Third DCA and hold that section 718.202 does not require 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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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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