D.A. 5-9-91 047

IN THE SUPREME COURT OF FLORIDA
CASE NO. 76,755

BASKERVILLE-DONOVAN ENGINEERS, INC.,

Petitioner,

vs.

PENSACOLA EXECUTIVE HOUSE CONDOMINIUM ASSOCIATION, INC.,

Respondent.

PROCEEDING FROM THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, FOR DISCRETIONARY REVIEW BY THE SUPREME COURT

AMENDED ANSWER BRIEF OF RESPONDENT PENSACOLA EXECUTIVE HOUSE CONDOMINIUM ASSOCIATION, INC.

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INTRODUCTION

Petitioner, BASKERVILLE-DONOVAN ENGINEERS, INC., Defendant in the Trial Court and Appellee in the court below, is referred to herein as "Baskerville-Donovan". Respondent, PENSACOLA EXECUTIVE HOUSE CONDOMINIUM ASSOCIATION, INC., Plaintiff in the Trial Court and Appellant in the court below, is referred to herein as "Association".

STATEMENT OF THE FACTS AND CASE

The Association accepts the Statement of the Facts and Case as presented by Baskerville-Donovan.

SUMMARY OF ARGUMENT

The Court below, in the decision appealed, correctly concluded that the parties hereto are not in privity for purposes of applying the Statute of Limitations contained in Fla. Stat., §95.11(4)(a).

Second, there is no compelling reason to expand the definition of "privity" to encompass transactions where parties are not in privity, as Baskerville-Donovan has requested.

ARGUMENT

I. THE ASSOCIATION IS NOT SUBJECT TO THE APPLICATION OF SECTION 95.11(4)(a).

Neither the Association nor all condominium unit owners for whom it brought this action are in privity with Baskerville-Donovan for purposes of applying Florida's two-year Statute of Limitations for actions based on professional malpractice. Fla. Stat., 95.11(4)(a).

As a prerequisite to apply the shorter, professional malpractice Statute of Limitations contained in Fla. Stat., §95.11(4)(a), there must, upon Motion for Summary Judgment, be a conclusive finding that the Plaintiff is in privity with the professional since the statute provides that "the limitation of actions herein for professional malpractice shall be limited to persons in privity with the professional". Fla. Stat., §95.11(4)(a).

In granting its Final Summary Judgment, the Trial Court relied not only on the two-year Statute of Limitations, but also, in order to establish the privity requirement, relied on Cristich v. Allen Engineering, Inc., 458 So. 2d 76 (Fla. 5th DCA 1984).

The Cristich case involved a seller of an apartment building who contracted with a surveyor to survey certain premises. The buyer of the apartment building thereafter accepted the survey for use in preparing condominium documents to be given to ultimate purchasers of condominium units. When errors were found in the survey and the surveyor was sued by the apartment building

purchaser, the court in Cristich ruled that the apartment building buyer was in privity with the surveyor because he was a known and intended beneficiary of the contract entered into between the previous owner and the surveyor.

The Cristich case, upon which the Trial Court specifically relied, therefore stands for the principle that a buyer of an apartment complex who intends to utilize a survey prepared by a prior owner for condominium conversion purposes may maintain a suit against the surveyor employed by the previous owner/seller because he is in privity with that surveyor.

Was the Association (and the individual condominium unit owners whom it represented in this action) in privity with the engineer who prepared the report that led to this suit, and has Baskerville-Donovan established that privity, such that, as a matter of law, it is entitled to summary judgment?

As indicated earlier in this brief, the Association brought this action as a representative of the owners under F.R.C.P. 1.221, which allows the Association to institute actions "in its name on behalf of all unit owners concerning matters of common interest, including, but not limited to, the common elements; the roof and structural components of a building..." (emphasis added). Thus the Association, for procedural purposes, is the class action nominee to bring this suit, but it is brought on behalf of all owners. The roof, by statute, is a "common element", which is owned by the individual unit owners in undivided shares. Fla. Stat., §718.06, 718.108. Each owner has an undivided ownership

interest in the roof, and the Association acts only as a representative for purposes of bringing the litigation.

Upon submitting a Motion for Summary Judgment, it becomes the moving party's duty to show, as a matter of law, that the record, before the Trial Court in this case, conclusively demonstrates that all such owners were in privity with Baskerville-Donovan in order for the trial court to employ Cristich as a basis for ruling that privity exists between the owners and Baskerville-Donovan, thus permitting application of the two-year Statute of Limitations.

The Association's argument thus becomes two-fold: (1) that no such showing of privity is contained in the record, and (2) that the owners are not in privity with Baskerville-Donovan in any event.

Privity, for purposes of Florida cases involving alleged professional malpractice, has departed substantially from the general definition of privity. (Privity of contract is that connection or relationship which exists between two or more contracting parties. Black's Law Dictionary, p. 1362, Rev. 4th Edition 1968). Privity is, of course, a concept applicable to contract law, not tort law, and has no application to the case at bar which is based on professional malpractice (negligence) except that Fla. Stat., §95.11(4)(a) says that the statute's application is limited to barring claims after two years if the parties are in privity, whether the case is brought in contract or tort. Why the legislature imposed the necessity for analyzing whether the parties are in privity in an action found on

negligence is anyone's guess, but probably relates back to when the legislature thought it was addressing professional malpractice in terms of doctors and lawyers, where typically there would be no express contract between professional and patient/client. Also, in the days when the concept of professional malpractice was limited to those common law professions of medicine, law, and theology, there was a higher duty owed by such professionals to their clients, so that "professional malpractice" would only occur if you were in privity, and hence you owed a higher duty to an injured party because of that.

In many earlier cases, the charged professional would attempt to avoid the finding of privity because without privity he could not be found liable at all for the act complained of. See, e.g., Manheim v. Ford Motor Co., 201 So. 2d 440 (Fla. 1967); A. R. Moyer, Inc. v. Graham, 285 So. 2d 397 (Fla. 1973); Matthews v. Lawnlite Co., 88 So. 2d 299 (Fla. 1956).

But upon passage of Fla. Stat., §95.11(4)(a) and the court's subsequent willingness to broaden the definition of professional, the professional now wants to be in privity in order to cut the Statute of Limitations for making claims against him in half. See, e.g., Pierce v. AALL Insurance, Inc., 531 So. 2d 84 (Fla. 1988).

In Moyer, the Court said,

"Privity is a theoretical device of the common law that recognizes limitations of liability commensurate with compensation for contractual acceptance of risk. The

sharpness of its contours blurs when brought into contact with modern concepts of tort liability. MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916) is heralded not so much for its decision on the facts as for its precedential value: a case relaxing privity's strictness. In Matthews v. Lawnlite Co., supra, the court recognized MacPherson as humane and accepted its principle as being 'more in line with reason and justice'." Moyer, at 399.

But even with the relaxation of privity contours, can these parties be held in privity? Firstly and as an aside, it is clear that an action such as the one brought in the instant case can be brought without making privity an element of the cause of action. Navajo Circle, Inc. v. Development Concepts Corporation, 373 So. 2d 689 (Fla. 2nd DCA 1979). In that case, a condominium association sued the architect, who allegedly negligently supervised construction and repairs of the roofs of condominium buildings. It also sued the contractor, which negligently constructed the roof, causing damage to it, damage to the exterior and interior walls, and loss of rental receipts. The Trial Court in Navajo Circle granted the Defendant's Motion to Dismiss, but the Appellate Court reversed, holding that privity is an element of a contract cause of action, it is not of tort. Further, that the absence of contractual privity between Plaintiff and Defendant does not affect Plaintiff's tort claim, provided Plaintiff can establish the existence of a duty between the parties and Defendant's breach of such duty, with the

proximate result that Plaintiff suffered the damages of which it complains. Navajo Circle, supra at 691.

Thus, in order for Plaintiff's complaint to stand here, privity is not required, except and unless it can be utilized to invoke the shorter Statute of Limitations contained in Fla. Stat., §95.11(4)(a).

The Association asserts that no privity exists between the parties hereto and certainly that even if such privity exists, it was not presented and contained in the matters placed before the trial court on Motion for Summary Judgment. As noted, the Plaintiff is the nominee Association. Nothing in the record establishes the identity of the unit owners, nor establishes whether they are first, second, third, or later generation purchasers of units.

Who would be in privity with Baskerville-Donovan in the instant case? Under Cristich, which was relied on by the Trial Court, the party held in privity, although not in direct contractual contact, was the purchaser of the entire apartment building, who knew that the Seller was having a survey of the premises made and who needed that survey for his own use in preparing condominium documents for filing with the State agency and for providing to prospective purchasers. If he had not utilized the Seller's survey, he would had to have contracted to have his own survey prepared. In Cristich, the court declared that the Purchasers/Appellants were "known and intended" beneficiaries of the survey contract (and) stood in the shoes of the party contracting for them, and can have no greater rights

than a party to a contract. Cristich at 79. At the precise point at which Cristich rules on the privity issue, it cites First American Title Ins. Co. v. First Title Services Co., 457 So. 2d 467 (Fla. 1984), which involved the scope of persons to whom a title abstractor could be liable.

But the First American case specifically limits the extent of an abstractor's duty to those directly in privity with the abstractor, and those involved in the transaction through their relationship to the person who ordered the abstract, i.e., lenders, title insurers, etc. First American, supra at 473. Thus First American, despite the fact that it expands, not contracts, the definition of privity and expands the definition of the persons who would be considered as being in privity, still limts that scope to those persons directly involved in the transaction for which the professional service was rendered, and those who are so closely intertwined with that particular transaction as to be considered part of it.

Even Cristich does not go beyond that scope, holding only that when a survey of property is made, and the buyer will be obligated to either use that survey or secure one of his own that, to the extent he uses it, he is to be held as being in privity under the surveying contract.

There is no comparable party in the instant case to the apartment building purchaser as in Cristich. The unit owners here did not rely on the engineering report to develop and sell condominium units. Rather they purchased them from the seller/developer or its assigns.

It is a distinct leap of faith to take Cristich and First American and conclude that all subsequent purchasers of condominium units, whether purchasing from the developer directly, or as second, third, fourth, or even later generation purchasers, stand n the shoes of the apartment building buyer in Cristich.

In the instant case, there was nothing presented to the Trial Court that showed the individual unit owners represented by the Association per F.R.C.P. 1.221, or the Association itself, to be in privity with Baskerville-Donovan, particularly since it is not even a requisite element of the cause of action under the Navajo Circle case.

It is, or course, the moving party's burden to show the absence of any disputed material issue of law in order to be entitled to summary judgment. In regard to the privity issue, the case of Carr-Smith & Associates, Inc. v. Fence Masters, Inc., 572 So. 2d 1027 (Fla. 3rd DCA 1987) is a case on point. In yet another survey case, the court held that summary judgment was improperly granted because material issues of disputed fact existed as to whether the vendor's surveyor had requisite knowledge of the purchaser's intention to rely upon the survey; and whether a tenancy relationship existed between the purchaser and his lessee at the time of purchase transaction. Those issues precluded summary judgment as to whether the surveyor owed a duty to the purchaser or the lessee when the lessee, relying on the survey, engaged in construction which encroached upon adjoining property.

The Association here cannot be held to be in privity since it is merely the nominee Plaintiff under F.R.C.P. 1.221. Privity must exist, and be shown to exist, between Baskerville-Donovan and the current owners of the individual units since they are the ones who have been injured by the defective engineering inspection and report. Nothing in the record presented to the Trial Court establishes the underlying Plaintiffs as being third party beneficiaries of the contract; at best they are remote recipients of copies of it when they purchased their units. They derived no benefit from the engineering inspection and report performed by Baskerville-Donovan, certainly not in the sense that the parties in Cristich and Carr-Smith benefitted from receiving cost-free surveys that they utilized for their own economic benefit. These parties are not in privity, and the Final Summary Judgment entered herein should have been reversed, and the decision of the First District Court of Appeals should be affirmed.

Baskerville-Donovan has strayed from the clear reading and meaning of the statute to be interpreted. The legislature has clearly provided that the shorter Statute of Limitations is to be applied only in cases where the parties are in privity. It does not provide that the statute should be applied in every case wherein the courts have created a cause of action on behalf of an injured Plaintiff, irrespective of privity.

The courts, in the cases cited by Baskerville-Donovan, are cases where the court has expanded the scope of potential claimants to parties other than those in privity because they

deem the professional's duty to extend beyond those with whom he is in privity. First American, Paltuco Carribean, Harper v. Continental Car and indeed MacPherson v. Buick Motor Co. are not roadways to find the outer edges of an expanded definition of privity; rather they are pronouncements that, in spite of a lack of privity, certain causes of action exist against parties whom the courts believe should be responsible for their acts to those not in privity with them.

While, as was said in MacPherson, "The sharpness of its (privity's) contours blurs when brought into contact with modern concepts of tort liability", Baskerville-Donovan would have us thicken the blur into a fog. The court below saw through that fog, the court in Cristich did not.

The court's decision in First Florida Bank, N.A. v. Max Mitchell Company, 558 So. 2d (Fla. 1990) is the appropriate guide for establishing the liability of Baskerville-Donovan. The certified question passed upon presupposed a lack of privity between the negligent accountant and the injured parties. This court, cited with approval and adopted Section 552, Restatement (second) of Torts (1976), which clearly distinguishes between those persons in privity, near privity, and those not in privity. Yet it still provides a remedy for those not in privity.

Our task here is not so complex. We need only to separate those in privity from those not. This the court below has fairly done.

II. THE RELATIONSHIP BETWEEN BASKERVILLE-DONOVAN AND MEMBERS OF THE ASSOCIATION DOES NOT SATISFY THE PRIVITY REQUIREMENT OF SECTION 95.11(4)(a).

The Association reads Argument II of Baskerville-Donovan's Initial Brief as a plea for a ruling by this court that even if privity does not exist, as that term has been defined and understood for years, that a new definition should be adopted. That new proposed definition should encompass presumably any relationship between two parties wherein one performs an act of service and the other, in some manner, benefits by it or relies on it.

While it is the Association's position that Cristich is wrong in its conclusion as to the existence of privity, even that factual scenario is easily distinguishable from the one at hand. In the Cristich case, and indeed in the First American case upon which it relied, the parties found to have a cause of action against the professional were inextricably linked economically to the professional sued, in that the injured party was relying on the sued professional to perform a service, which in the absence of his performance, the injured party would have to expend its own money to replace. The Cristich apartment complex buyer could not convert to condominium without the requisite survey. The lender, title insurance companies, et al, in First American could not presumably satisfy their requirements without the abstract that was prepared.

The Association does not have such a "derivative interest founded on, or growing out of, contract, connection or bond of

union" as Baskerville-Donovan's citation to the definition by Black's Law Dictionary provides.

The Association's members here more closely parallel the recipients of weighing certificates as described in Glanzer v. Shepard, 233 N.Y. 236, 135 N.E. 275 (N.Y. 1922), and cited by Baskerville-Donovan in its brief. While the Court found liability to exist, Justice Cardozo was clear as to why: "We state th^ Defendants' obligation, therefore, in terms not of contract merely, but of duty." Glanzer at 241. As Glanzer also notes: "The surgeon who unskillfully sets the wounded arm of a child is liable for his negligence, though the father pays the bill." Id, at 239.

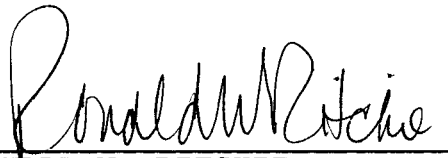
It is clear that there is no compelling reason to expand the definition of privity to encompass every affected person of every commercial undertaking. The Condominium Statute (Fla. Stat., Chapter 718) imposes a duty on a developer to provide certain information to prospective purchasers. The receipt of that information no more puts them in privity than walking through a negligently constructed building that collapses and kills a passerby puts the passerby in privity with the architect and contractor who designed and built it.

CONCLUSION

The Association is not in privity with Baskerville-Donovan and was not shown by the record to be so in any event. Further, there is no basis upon which to expand the definition of "privity" as it is used in Fla. Stat., §95.11(4)(a).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Amended Answer Brief of Respondent has been furnished to DAVID H. BURNS, ESQ. and MARK E. HOLCOMB, ESQ. of Huey, Guilday, Kuersteiner & Tucker, P.A., Post Office Box 1794, Tallahassee, Florida 32302, by United States Mail, on this 13th day of March, 1991.



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