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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

INITIAL BRIEF OF PETITIONER, BASKERVILLE-DONOVAN ENGINEERS, 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."

References to the Record on Appeal appear as "[R.]," with citation to the appropriate page in the Record.

References to the Appendix, which contains copies of the primary case authorities cited by Baskerville-Donovan, appear as "[A.]," with citation to the appropriate page in the Appendix.

STATEMENT OF THE FACTS AND CASE

This case arises out of the conversion of an apartment complex into condominium units under Part VI of chapter 718, Florida Statutes (1981). Among the regulations governing the conversion of existing improvements into residential condominiums, section 718.616, Florida Statutes, and Rule 7D-24.004, Florida Administrative Code, require that prospective unit purchasers be provided with information regarding the structure's major components, such as their age, estimated remaining useful life, estimated current replacement cost and structural soundness. [R.106-107] This information must be substantiated by a certificate under seal of a registered architect or engineer. [R.106]

In 1981, Executive House, Inc., the owner of an apartment complex in Pensacola, Florida, hired Baskerville-Donovan to prepare a report complying with these regulations. [R.97-98] The report (hereinafter "Engineering Report" or "Report") expressly states that it is

> [w]ritten in compliance with Part VI of Chapter 718, Florida Statutes. Its purpose is to evaluate the general mechanical, structural and electrical condition of the Executive House Apartments, which are proposed for conversion to a condominium complex.

[R.98] The Association acknowledges that the Engineering Report was prepared for purposes of complying with those regulations. [R.56] The engineer in charge of the project for Baskerville-Donovan, Mr. Frank Fabre, confirmed that the Engineering Report was prepared with both the knowledge and intent that it would be provided to prospective purchasers of the condominium units, pursuant to section 718.616 and Rule 7D-24.004. [R.95-96]

On June 3, 1983, a group of unit owners and directors of the Association filed a complaint with the Bureau of Condominiums against Executive House, Inc. and Baskerville-Donovan. [R.63-64; 76-77] The complaint stated that the Report was part of

the condominium documents and that the individual unit purchasers relied upon it. [R.112] The complaint specifically alleged that the Engineering Report was improperly prepared; that the Report misrepresented the actual condition of the roof; and that the roof had been in poor condition since July of 1982. [R.65-66] On August 10, 1983, the Bureau declared these allegations to be outside its jurisdiction. [R.72-73] The Association did not file suit in circuit court against Baskerville-Donovan until April 30, 1986. [R.1][1] The Association alleges in this case that Baskerville-Donovan inadequately examined the roof and "inaccurately prepared" the Engineering Report, causing damage to the Association and its members. [R.3]

Baskerville-Donovan subsequently moved for summary judgment on the grounds that the lawsuit was barred under the two-year statute of limitations for professional malpractice, section 95.11(4)(a). [R.58] That statute contains the following language:

> (4) Within Two Years:
>
> (a) An action for professional malpractice, other than medical malpractice, whether founded on contract or tort; provided that the period of limitations shall run from the time the cause of action is discovered or should have been discovered with the exercise of due diligence. However, the limitation of actions herein for professional malpractice shall be limited to persons in privity with the professional.

The trial court granted summary judgment in favor of Baskerville-Donovan upon the authority of Cristich v. Allen Engineering, Inc., 458 So.2d 76 (Fla. 5th DCA 1984). [R.141] [A.20] In Cristich, the Fifth District Court of Appeal held that a known and intended third-party beneficiary of a professional's services was subject to the limitations period set forth in section 95.11(4)(a). The Cristich court relied, in part, on this Court's decision in First

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[1] The Association brought the lawsuit under Rule 1.221, Florida Rules of Civil Procedure, as a class action on behalf of its members. [R.2]

American Title Insurance Co. v. First Title Service Co. of the Florida Keys, 457 So.2d 467 (Fla. 1984) [A.26], in reaching that conclusion. 458 So.2d at 79.

On appeal by the Association, the First District Court of Appeal rejected the holding of Cristich and found that section 95.11(4)(a) applied only where "direct contractual privity" exists between the parties. Pensacola Executive House Condominium Association v. Baskerville-Donovan Engineers, Inc., 566 So.2d 850, 853 (Fla. 1st DCA 1990) [A.55]. The court reversed the final summary judgment on that basis, finding section 95.11(4)(a) inapplicable to these facts. Id. On the other issues raised below, the court ruled that the Association failed to timely challenge the constitutionality of section 95.11(4)(a) and rejected the Association's argument that an engineer is not a "professional" for purposes of applying that statute. Id. at 851.

Baskerville-Donovan timely sought to invoke the discretionary jurisdiction of this Court based on the express and direct conflict between the lower court's decision and Cristich. On January 18, 1991, this Court rendered its Order accepting jurisdiction over this case.

SUMMARY OF ARGUMENT

The court below erred in its application of section 95.11(4)(a). First, the court failed to recognize that sound legal precedent establishing the status of known and intended third-party beneficiaries compels the application of the statute to those persons. Florida law has long adhered to the principles that known and intended third-party beneficiaries can acquire no greater rights than the parties to a contract and that they are bound by the statute of limitations applicable to those parties. The Fifth District in Cristich ruled consistent with those principles, noting the incongruity which would result if different limitations periods applied to one who deals directly with a professional and one who does not, but for whom the agreement is made. In this context, the rights of a known and intended third-party beneficiary are derived from the party in privity with the professional and it is consistent with both the statute and common-law to apply section 95.11(4)(a) to those persons. The decision of the court below unreasonably restricts section 95.11(4)(a) to persons in direct contractual privity with the professional and should not be allowed to stand.

Second, this Court should adopt a realistic approach to the privity requirement of section 95.11(4)(a) and reject the strict contractual approach of the court below. "Privity" is a concept which signifies a particular nexus or degree of affinity between parties. Persuasive authority exists analyzing privity as a limitation on the scope of liability, which this Court can draw upon in applying that concept under section 95.11(4)(a). Those authorities support the position that privity is satisfied where certain strict requirements are met, even in the absence of a formal contractual relationship. The evidence in this case supports the necessary relationship: The Engineering Report was knowingly prepared by Baskerville-Donovan for the primary use and benefit of unit purchasers. Any benefit to the developer was purely incidental, satisfying its statutory duty to provide such

a report. Use of and reliance on the Engineering Report by the unit owners was the end and aim of the transaction between Baskerville-Donovan and the developer. Under these circumstances, sufficient nexus exists between Baskerville-Donovan and the Association's members to establish privity between them.

For these reasons, the decision of the court below should be reversed and this case remanded to reinstate the final summary judgment in favor of Baskerville-Donovan.

ARGUMENT

I. AS KNOWN AND INTENDED BENEFICIARIES OF BASKERVILLE-DONOVAN'S ENGINEERING REPORT, MEMBERS OF THE ASSOCIATION ARE SUBJECT TO THE APPLICATION OF SECTION 95.11(4)(a)

This Court should adopt the decision in Cristich as the law of Florida. That decision recognizes established legal principles governing the rights and status of known and intended third-party beneficiaries, and applies those principles under section 95.11(4)(a). As a matter of law, known and intended third-party beneficiaries are subject to the same statute of limitations applicable in an action between the parties to the underlying agreement, and that principle should be applied to those beneficiaries of a professional's services.

A known and intended third-party beneficiary's rights are purely derivative; they are dependant upon and measured by the rights of the parties to the underlying agreement. 17 Am. Jur. 2d Contracts § 315 (1964). Thus, in First American Title Insurance Co. v. First Title Service Co. of the Florida Keys, 457 So.2d 467 (Fla. 1984), this Court held that a known third-party user of a title abstract:

> is owed the same duty and is entitled to the same remedy as the one who ordered the abstract.

Id. at 473 (emphasis supplied). See also, Zac Smith & Co. v. Moonspinner Condominium Association, 472 So.2d 1324 (Fla. 1st DCA 1985) (*condominium association bound* by arbitration clause in construction contract between developer and general contractor). The corollary to that rule is that the third-party beneficiary's rights are also subject to all defenses which are available between those parties. 17 Am. Jur. 2d Contracts § 315.

Florida courts have held that a third-party beneficiary is bound by the statute of limitations which applies in an action between the parties to the underlying agreement. In Paltuco Caribbean of Florida, Inc. v. Percy Wilson Mortgage & Finance Corp., 419

So.2d 343 (Fla. 3d DCA 1982), review denied, 430 So.2d 452 (Fla. 1983) [A.52], the Third District held that the intended third-party beneficiary of a mortgage loan commitment was subject to the five-year statute of limitation applicable to an action on that document. Id. at 344. The court rejected the argument that a different statute should be applied based upon the defendant's relationship with the third-party beneficiary/plaintiff. Id. Similarly, in Harper v. Continental Can Co., 411 So.2d 1002 (Fla. 5th DCA 1982) [A.49], the Fifth District held that employees who were third-party beneficiaries of a master collective bargaining agreement had the same rights, with the same limitations, as the union which was a party to the agreement. Id. at 1003. In an action by the employees to vacate an arbitration award, the court held that the suit was time-barred under chapter 682. Id. The court considered and rejected the employees' argument that a longer statute should apply because they, and not the union, were suing on the written instrument. Id.

The Fifth District's ruling in Cristich is consistent with these principles. In Cristich, the owners of an apartment complex hired a surveyor, who prepared a survey of the complex and certified it as being accurate. 458 So.2d at 77. Five months later, the owners contracted to sell the complex and provided the purchasers with a copy of the survey. Id. During the interim period, the owners filed the survey with the Florida Division of Condominiums as part of condominium documents, id. at 79 n.2, for the apparent purpose of converting the complex into condominiums. The purchasers claimed that they relied on the survey in deciding to buy the property and subsequently discovered discrepancies regarding the dimensions, size and volume of the apartment units. Id. at 77. The purchasers ultimately filed suit against the surveying firm more that two years after they discovered the errors in the survey. Id.

On these facts, the Fifth District upheld the trial court's ruling that the action was barred by the two-year statute of limitation for professional malpractice. After noting that

the survey was "undoubtedly" prepared with the knowledge and intent that it would be relied upon by purchasers of the property, the court held that:

> Appellants, as intended and known beneficiaries of the surveying contract, stand in the shoes of the party contracting for them and can have no greater right than a party to the contract. It would be incongruous to hold that one who deals directly with the professional is limited to two years within which to institute suit while the one who does not, but for whom the agreement is made, can assert a cause of action against the professional within four years. We hold that the court correctly applied the two year statute of limitations.

Id. at 79. In reaching its conclusion, the court relied, in part, on this Court's decision in First American Title Insurance Co., 457 So.2d 467. Id.

The decision in Cristich harmonizes the application of section 95.11(4)(a) to known and intended third-party beneficiaries in accordance with existing law. A third-party beneficiary has rights derivative of the parties to the underlying agreement and is subject to the same limitations period applicable to those parties. Cristich places that known and intended beneficiary of a professional's services in the same position as a person, however nominal, who may actually contract for a those services. Where the beneficiary is the known and intended recipient of professional services and the agreement therefor is primarily or solely made for his benefit, a logical and fair application of the law requires that both persons be accorded the same treatment. The decision of the court below, on the other hand, is not only inconsistent with the principles observed in Harper and Paltuco, but also leads to the unreasonable result identified in Cristich: one who deals directly with the professional is limited to two years in which to file suit while one who does not, but for whom the agreement is made, has four years.

The First District, in the decision appealed from, disagreed with the conclusion in Cristich because of the limitation contained in the last sentence of section 95.11(4)(a). 566 So.2d at 852. The First District construed that language to be limited to persons in

"direct contractual privity" with the professional. See id. at 852-53. However, the appellate court failed to consider the interaction of the statute with the principles of law governing the rights and status of third-party beneficiaries. When applied in that context, the language of section 95.11(4)(a) does not compel the lower court's restrictive application of the statute.

Section 95.11(4)(a) should not be deemed to supersede the established principles of law that a known and intended third-party beneficiary has the same rights and is subject to the same limitations period as the parties to the underlying agreement. The statute should be construed in such a way as to harmonize it with these common-law principles. See generally Law Offices of Harold Silver, P.A. v. Farmers Bank & Trust Co. of Kentucky, 498 So.2d 984, 985 (Fla. 1st DCA 1986). It is consistent with the language of section 95.11(4)(a) to hold that a party whose rights are derivative of a party in privity with a professional is also subject to application of the statute. This interpretation recognizes the true relationship between the third-party beneficiary and the professional and does not expand the statute beyond those persons having the same legal status as persons in privity with the professional. The trial court in this case reached this result.

The evidence supports the application of section 95.11(4)(a) in this case. Members of the Association were the known and intended beneficiaries of Baskerville-Donovan's preparation of the Engineering Report. The affidavit of Mr. Frank Fabre demonstrates that the Engineering Report was prepared by Baskerville-Donovan with the knowledge and intent that it would be provided to prospective unit purchasers. The regulations governing the contents and dissemination of the Engineering Report, with which Baskerville-Donovan knowingly complied, state that:

> Disclosure of building condition is required in order that prospective purchasers be informed as to the scope and magnitude of the financial responsibility that condominium

> ownership entails. Section 718.616, Florida Statutes (Supp. 1980), sets forth the information that shall be disclosed and components for which disclosure of conditions is made. Disclosure of condition is required for all property and each of the components listed by the statute to the extent that the improvements include any of the components.

Rule 7D-24.004(1)(a), Fla. Admin. Code (emphasis supplied). Members of the Association admitted that the Report was part of the condominium documents and that they relied upon it. Under these circumstances, the members of the Association were known and intended beneficiaries of Baskerville-Donovan's services and the trial court correctly ruled that their claim was time-barred under section 95.11(4)(a).

This Court should recognize the consistency of the Cristich decision with established common-law principles governing the status of third-party beneficiaries and, accordingly, reverse the decision of the court below. The undisputed facts in this case fully support the final summary judgment entered in favor of Baskerville-Donovan.

II. THE RELATIONSHIP BETWEEN BASKERVILLE-DONOVAN AND MEMBERS OF THE ASSOCIATION SATISFIES THE PRIVITY REQUIREMENT OF SECTION 95.11(4)(a)

Independent of the result compelled by application of third-party beneficiary principles, the privity requirement of section 95.11(4)(a) is satisfied by the relationship between Baskerville-Donovan and members of the Association. The concept of "privity" has been thoroughly analyzed as a limitation on the scope of liability and this Court should borrow from that analysis in interpreting section 95.11(4)(a). The strict contractual approach relied upon by the court below is but one manifestation of privity; the necessary relationship may exist even in the absence of a formal contract between the parties. The entire relationship at issue in this case satisfies the nexus which lies at the heart of privity.

Privity is, of course, a concept historically associated with the law of contracts rather than the law of torts. The notion of privity as a limitation on the scope of tort

liability is generally traced back to the case of Winterbottom v. Wright, 10 M & W 109, 152 Eng. Rep. 402 (1842) [A.83]. In that case, the court adopted a rule prohibiting liability to persons outside a contractual relationship, in part because of the uncertain consequences which might result if the scope of duty were extended further. Id. at 405. In its early formulation, the privity analysis was strictly a question of whether a formal contractual relationship existed between the parties. See id.

In the early twentieth century, the privity rule came under increased scrutiny because of the harsh results it often produced. Beginning in products liability cases, e.g., MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (N.Y. 1916), and later in professional services cases, e.g., Ultramares Corp. v. Touche, 255 N.Y. 170, 174 N.E. 441 (N.Y. 1931) [A.59], courts began to dilute the strict contractual confines of the common-law privity rule. These developments led to this Court's declaration in 1973 that:

> Privity is a theoretical device of the common law that recognizes limitation 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 strictures. 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.'

A.R. Moyer, Inc. v. Graham, 285 So.2d at 397, 399 (Fla. 1973) [A.1] (emphasis supplied). Section 95.11(4)(a) was first enacted in the following year, 1974. Ch. 74-382, § 7, Laws of Fla.

The Court should not follow the strict common-law approach to privity which the court below adopted. See, e.g., Pierce v. AALL Insurance, Inc., 531 So.2d 84, 86-87 (Fla. 1988) (in determining meaning of "professional" under section 95.11(4)(a), Court not bound by common law definition of that term). The statute should be liberally construed

to effectuate its remedial purpose. E.g., Sheils v. Jack Eckerd Corp., 560 So.2d 361, 363 (Fla. 2d DCA 1990). A strict concept of privity is too narrow and rigid in the context of modern professional services transactions, where persons other than the contracting party may be the intended beneficiaries of those services.

The term "privity" in section 95.11(4)(a) does not require interpretation as "privity of contract." The Legislature has, in other contexts, expressly used the phrase "privity of contract," cf. sections 517.021(20) (sale of securities) and 704.06(4) (conservation easements), Florida Statutes (1989), but failed to employ that more specific term in this statute. Moreover, this Court has not restricted "privity" in the construction lien statute to a technical, contractual meaning, but has interpreted that term to mean a "special knowledge showing active consent or concurrence." Foley Lumber Co. v. Koester, 61 So.2d 634, 639 (Fla. 1952) (quotation omitted). A more flexible application to privity is required under section 95.11(4)(a) as well.

A series of cases from New York's highest court have developed a theoretical framework for analyzing privity which should be applied under section 95.11(4)(a).[2] These cases establish the principle that a sufficient nexus or relationship between the parties can establish the existence of privity. This approach is consistent with the generally accepted definition of privity as being a "[d]erivative interest founded on, or growing out of, contract, connection or bond of union between parties." Black's Law Dictionary 1199 (6th ed. 1990) (emphasis supplied). By defining privity in the disjunctive, it is apparent that more than just "privity of contract" is contemplated.

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[2] This Court has discussed, conceptually, these New York cases in its previous opinions regarding the scope of duty owed by title abstractors, First American Title, 457 So. 2d 467, and accountants, First Florida Bank, N.A. v. Max Mitchell & Co., 558 So. 2d 9 (Fla. 1990). [A.34]

In Glanzer v. Shepard, 233 N.Y. 236, 135 N.E. 275 (N.Y. 1922) [A.42], a seller of goods hired a firm of public weighers to weigh the goods and provide that information, upon which the price was to be determined, to both the seller and buyer. The weighers were paid by the seller for their services and provided a copy of their certificate to the buyer, who relied on the certificate in purchasing the goods. Id. at 238, 135 N.E. at 275. The buyer later found the certificate to be overstated and sued the weighers to recover its loss. Id. The weighers defended on the ground that no contract existed with the buyer. Id.

The Court of Appeals, through Justice Cardozo, found that the weighers' duty of care extended to the buyer under these circumstances. The court's analysis of the relationship between those parties is instructive:

> The plaintiffs' use of the certificates was not an indirect or collateral consequence of the action of the weighers. It was a consequence which, to the weighers' knowledge, was the end and aim of the transaction.

Id. at 238-39, 135 N.E. at 275. The court acknowledged that it was possible to rationalize its holding based upon the contract and

> treat the defendants' promise as embracing the rendition of a service, which, though ordered and paid for by one, was either wholly or in part for the benefit of another.

Id. at 241, 135 N.E. at 277.

The decision in Glanzer is significant, not so much on its own merits, but for its subsequent treatment by the Court of Appeals in Ultramares. In Ultramares, an accounting firm was retained by a corporation to prepare and certify a balance sheet of its assets and liabilities. The corporation required extensive credit in order to conduct its business, a fact known to the accountants. Id. at 173, 174 N.E. at 442. The accountants also knew that, in the normal course of business, the balance sheet would be used by

the corporation in dealing with lenders, creditors, stockholders, and others, as the occasion warranted. Therefore, the accountants provided the corporation with thirty-two certified copies of the balance sheet, although they did not know the context in which those copies would be used. Id. at 175, 174 N.E. at 442.

In reliance upon the certified balance sheet, the lender made several loans to the corporation. After the corporation defaulted on the loans, the lender sued the accounting firm to recover losses suffered in reliance on the balance sheet. Id. at 176, 174 N.E. at 443. The Court of Appeals, after an extensive review of the law, held that the accountants could not be liable for negligence to persons with whom they had no contract. Id. at 189, 174 N.E. at 448.

The court considered the effect of its previous decision in Glanzer and distinguished it as

> a case where the transmission of the certificate to another was not merely one possibility among many, but the "end and aim of the transaction," . . . certain and immediate and deliberately willed.

Id. at 182, 174 N.E. at 445. The court, again through Justice Cardozo, characterized Glanzer in terms of a privity relationship, based upon the strong link between the parties:

> The intimacy of the resulting nexus is attested by the fact that, after stating the case in terms of legal duty, we went on to point out that viewing it as a phase or extension of Lawrence v. Fox (supra) or Seaver v. Ransom (supra) we could reach the same result by stating it in terms of contract. The bond was so close as to approach that of privity, if not completely one with it. . . . [T]he service rendered by the defendant in Glanzer v. Shepard was primarily for the information of a third person, in effect, if not in name, a party to the contract, and only incidentally for that of the formal promisee.

Id. at 182-83, 174 N.E. at 445-46 (emphasis supplied) (citations omitted). Thus, the court acknowledged that, under appropriate circumstances, the relationship between two

parties could be sufficient to establish virtual privity even in the absence of a formal contract between them.

The New York court recently synthesized its opinions in Glanzer and Ultramares in developing a framework for analyzing the scope of duty owed by accountants. Credit Alliance Corp. v. Arthur Andersen & Co., 65 N.Y.2d 536, 483 N.E.2d 110, 493 N.Y.S.2d 435 (N.Y. 1985) [A.9]. In developing its test for "a contractual relationship or its equivalent," id. at 550, 483 N.E. 2d at 117, 493 N.Y.S.2d at 443 (quotation omitted) (emphasis supplied), the court identified the following criteria as satisfying that requirement:

> (1) the accountants must have been aware that the financial reports were to be used for a particular purpose or purposes; (2) in the furtherance of which a known party or parties was intended to rely; and (3) there must have been some conduct on the part of the accountants linking them to that party or parties, which evinces the accountants' understanding of that party or parties' reliance.

Id. at 551, 483 N.E.2d at 118, 493 N.Y.S.2d at 443. The court emphasized that, while these criteria would permit some flexibility in applying the privity doctrine, they were intended to preserve the principles set forth in Ultramares and Glanzer, and not to represent a departure from them. Id.

This Court should adopt the basic principles the Credit Alliance Corp. test as the measure of "privity" for purposes of applying section 95.11(4)(a).[3] This test represents a distillation of principles recognized by the courts for many years; namely, that a relationship of "privity" is not confined to a formal contract between parties. While the test

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[3] Although the Court declined to adopt the Credit Alliance Corp. test as the measure of accountants' liability in Max Mitchell, 558 So. 2d at 14-15, that decision does not prohibit the Court from adopting the basic principles of that test in the context of section 95.11(4)(a). In Max Mitchell, the Court did not follow Credit Alliance Corp. because it opted for a broader scope of accountants' liability, and not because the Court questioned the soundness of that decision. Id. at 12 and 15.

was originally formulated for purposes of determining privity as a limitation on the scope of liability, the factors identified represent the essence of privity and should be applicable to section 95.11(4)(a). The test confirms this Court's recognition in A.R. Moyer, Inc. that privity is not a rigid concept, while providing adequate limitations to prevent the dilution of its meaning. Those limitations are well-articulated in Credit Alliance Corp. and would free Florida courts to recognize the essence of that relationship. The substance of "privity" should be the rule, not its form.

The basic elements of the Credit Alliance Corp. test are met in this case. First, Baskerville-Donovan knew that the Engineering Report was to be used as part of the condominium documents for the specific purpose of advising unit purchasers of the condition of certain components of the complex. The Engineering Report itself specifically recites that it was prepared in compliance with Part VI of chapter 718, Florida Statutes, for the purpose of evaluating the general mechanical, structural and electrical condition of the Executive House Apartments, which were proposed for conversion to a condominium complex. Mr. Frank Fabre, Baskerville-Donovan's engineer in charge of the project, confirmed that the purpose of the Engineering Report was to advise unit purchasers of those conditions, and that Baskerville-Donovan knew of and intended that use of the Report.

Second, the evidence shows that a known class of parties, i.e., unit purchasers, were intended by Baskerville-Donovan to rely on the Engineering Report. While the record does not reveal that Baskerville-Donovan knew the identity of each specific purchaser who would rely on the Report, such specificity is not required. In Guildhall Insurance Co. v. Silberman, 688 F. Supp. 910, 914 (S.D. N.Y. 1988), the court held that the second prong of the test was met where the defendant knew that "an" insurance company would rely on his appraisal to issue "a" policy, although he did not know

precisely which company would do so. Because Baskerville-Donovan knew that the known class of unit purchasers would receive, and presumably rely, on the Engineering Report in acquiring their units, sufficient identity exists to satisfy this element of the test.

Third, the recitation in the Engineering Report of its purpose and Mr. Fabre's statement confirming that purpose show conduct on the part of Baskerville-Donovan linking them to the unit purchasers and evincing an understanding of their intended reliance. Providing the Engineering Report to unit purchasers was the "end and aim" of the transaction between Baskerville-Donovan and the developer. Under the statutory scheme and regulations developed to govern the conversion of apartments into residential condominiums, the information contained in the Engineering Report was primarily for the benefit of those purchasers. The developer received only the incidental benefit of fulfilling its statutory obligation and acted as a mere conduit between Baskerville-Donovan and the purchasers. Under these circumstances, Baskerville-Donovan should be deemed to be in privity with the members of the Association for purposes of section 95.11(4)(a), and their claim barred as a matter of law.

CONCLUSION

The claim brought by the Association against Baskerville-Donovan should be time-barred under section 95.11(4)(a), Florida Statutes. First, as known and intended beneficiaries of the Engineering Report, members of the Association can acquire no greater rights than the developer against Baskerville-Donovan. Thus, their claim is barred by the same limitations period which would apply to the developer. Second, under the doctrine of privity as it has evolved from its common law roots, the members must be deemed to be in privity with Baskerville-Donovan for purposes of applying that statute.

For these reasons, this Court should reverse the opinion of the court below and remand for affirmance of the final summary judgment entered by the trial court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Ronald Ritchie, Esquire, 4400 Bayou Boulevard, Suite 20, Pensacola, Florida 32503, on this 11th day of February, 1991.

Mark E. Holcomb
ATTORNEY

APPENDIX