047 O.A. 5-9-91

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

REPLY BRIEF OF PETITIONER, BASKERVILLE-DONOVAN ENGINEERS, INC.

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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)

The Court should recognize that, as a necessary result of well-established law in this state, the claim of a known and intended beneficiary of a professional's services is subject to the limitations period provided in section 95.11(4)(a). That result is not contrary to either the language of the statute or any meaning of privity, as the Association suggests. (Amended Answer Brief, pp. 12-13.) The limitation in section 95.11(4)(a) to persons in privity with a professional does not prevent the statute from applying to others who stand in place of those persons, consistent with the law as it has been applied to other statutes of limitation. This conclusion may be reached whether or not "privity" is narrowly confined to a direct contractual relationship.

The Association argues that Cristich[1] is factually distinguishable and that privity does not exist between the parties in this case. These arguments are neither persuasive nor responsive to the issue before the Court.

The Association's attempts to factually limit and distinguish Cristich are not germane. (Amended Answer Brief, p. 5 and 9-10.) Cristich held that the claim of a known and intended beneficiary of a professional's services is subject to the limitations period in section 95.11(4)(a). 458 So.2d at 79. The court did not find the parties in that case to be in privity. Neither of the courts below found Cristich factually distinguishable. See, Pensacola Executive House Condominium Ass'n v. Baskerville-Donovan Engineers, Inc., 566 So.2d 850, 852-53 (Fla. 1st DCA 1990). The court below simply disagreed with

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[1] Cristich v. Allen Engineering, Inc., 458 So.2d 76 (Fla. 5th DCA 1984).

the rule of law recognized in Cristich, id. at 852, which formed the basis for this Court's assertion of conflict jurisdiction.

The facts in the record before the Court are not disputed and fully support the application of Cristich. The affidavit of Frank Fabre clearly shows that the Engineering Report was prepared by Baskerville-Donovan with the knowledge and intent that it would be provided to purchasers of the condominium units, as required under the Condominium Act. [R.95-96] The benefit conferred upon unit purchasers by such a report has expressly been recognized by statute and rule. The evidence also demonstrates that the Report was relied upon by purchasers of the units. [R.112] The Association offered no evidence to the contrary. Thus, the factual predicate for applying Cristich is firmly established.

All of the unit owners are subject to the application of section 95.11(4)(a), as a matter of law. The record shows that any damages occurred in 1982, when a claim was asserted by the unit owners against Baskerville-Donovan. [R. 110-112] The Association brings this case as class representative of the owners, pursuant to Rule 1.221, Florida Rules of Civil Procedure,[2] and any notice to the Association is binding upon the owners for purposes of commencing the statute of limitations. E.g., Naranja Lakes Condominium No. Two, Inc. v. Rizzo, 463 So.2d 378, 379 (Fla. 3d DCA 1985); see also, Conquistador Condominium VIII Ass'n, Inc. v. Conquistador Corp., 500 So.2d 346, 347 (Fla. 4th DCA 1987). That notice is established in the record to have occurred in 1982 to members and directors of the Association and bars any claim by the Association on behalf of the members.

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[2] Because the Association brings this action under Rule 1.221 as class representative of the owners, it is a nominee plaintiff only and has no distinct legal interest to be considered for purposes of applying section 95.11(4)(a). The Association appears to agree with that point. (Amended Answer Brief, pp. 5-6 and 12.)

This appeal does not involve a question of duty; thus, any contention that a claim theoretically could be asserted in the absence of privity (Amended Answer Brief, pp. 8-9 and 13) has no bearing on the issues. Section 95.11(4)(a) expressly governs actions for professional malpractice "whether founded on contract or tort," rendering unimportant the particular legal theory under which the Association is proceeding. Although not cited by the Association, the Third District's recent decision in Bay Garden Manor Condominium Ass'n v. James D. Marks Assocs., 16 F.L.W. 455 (Fla. 3d DCA Feb. 12, 1991), would not support its position. The issue in Bay Garden was solely whether an engineering firm owed a duty to purchasers of condominium units in the absence of a formal contractual relationship. Id. That case did not involve the application of section 95.11(4)(a) and does not affect this appeal.[3]

Finally, the Association relies on Carr-Smith & Assocs. v. Fence Masters, Inc., 512 So.2d 1027 (Fla. 3d DCA 1987), as a "case on point" regarding the issue of privity (Amended Answer Brief, p. 11). Carr-Smith did not involve section 95.11(4)(a) or even address the concept of privity. The case merely reversed a summary judgment on liability which had been entered in favor of the plaintiff, finding that disputed issues of material fact existed regarding whether the defendant/professional knew of the plaintiff's intention to rely on his services. Id. at 1028. Because Carr-Smith involved no more than a disputed question of fact regarding the professional's duty, it is plainly not a "case on point" or even applicable to the issues before the Court.

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[3] It is apparent from the arguments in Bay Garden that no contention was made that a relationship of privity existed between the parties. Thus, that decision also has no bearing on Argument II of this case.

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

The concept of "privity" contains inherent limitations which should not be confined to a formal contractual relationship. Baskerville-Donovan asks the Court to recognize that fact in applying section 95.11(4)(a). That contention does not "plea" for the adoption of a new or expanded definition of privity. (Amended Answer Brief, pp. 14 and 15.)

Baskerville-Donovan has provided the Court with substantial authority showing that privity for purposes of section 95.11(4)(a) need not be limited to a direct contractual relationship, as the court below held. For purposes of implementing an appropriate analytical framework under the statute, the principles in Credit Alliance Corp. v. Arthur Andersen & Co., 65 N.Y. 2d 536, 483 N.E. 2d 100, 493 N.Y.S. 2d 435 (N.Y. 1985), capture the essence of privity. Those principles embody strict and limited criteria for the determination of whether a relationship of privity or its equivalent exists, and should be adopted in this context. That test does not represent a new or expanded notion of privity and, in fact, is based upon historic application of that concept. The Credit Alliance test simply recognizes that other relationships may be legally indistinguishable from a traditional contract.

The Association's effort to distinguish Cristich and First American Title Ins. Co. v. First Title Serv. Co. of the Florida Keys, 457 So.2d 467 (Fla. 1984), is immaterial. (Amended Answer Brief, p. 14.) The Association suggests that, in each of those cases, the plaintiff was "inextricably linked economically" to the professional by relying on the professional's services where he would otherwise have had to expend his own money to replace those services. Here, reliance on the Engineering Report by the unit purchasers is established in the record. Although the Report was required by law to be provided to the unit purchasers, any distinction on that point from Cristich or First American is not

important. In both situations, a substantial factual and legal link exists between the parties.

The Association's assertion of parallels between this case and Glanzer v. Shepard, 233 N.Y. 236, 135 N.E. 275 (N.Y. 1922) (Amended Answer Brief, p. 15), supports the need for adapting the principles of the Credit Alliance test under section 95.11(4)(a). In Glanzer, the court found a duty of care to exist in the absence of a formal contract between the parties. While, as the Association notes, the court did not confine itself to a contract-based analysis, the court in Ultramares Corp. v. Touche, 255 N.Y. 170, 174 N.E. 441 (N.Y. 1931) subsequently characterized the relationship in Glanzer as "so close as to approach that of privity, if not completely one with it." Id. at 182-83, 174 N.E. at 445-46. Those decisions form the basis of the Credit Alliance test and establish rules easily adopted under section 95.11(4)(a).

As a final point, Baskerville-Donovan would note the fundamental differences between this case and the Association's analogy to a building collapse. (Amended Answer Brief, p. 15.) In this case, the undisputed evidence shows that the unit purchasers were the known and intended recipients of Baskerville-Donovan's Engineering Report. Baskerville-Donovan specifically undertook to perform those services pursuant to state law which required information regarding the condominiums to be provided for the use and benefit of unit purchasers. That specific link, both factual and legal, establishes the type of connection between the parties which should satisfy the privity requirement of section 95.11(4)(a). There is no similarity between our situation and the claim of a mere passerby against a contractor or architect for negligent construction or design of a building. While a passerby may, as a "foreseeable" plaintiff, have a cause of action against the contractor or architect, he is neither a factually nor legally intended beneficiary of their services and there is no link between them beyond mere fortuity. A

materially closer bond exists between the parties in this case which compels the application of the statute.

CONCLUSION

For the reasons set forth herein and in its Initial Brief, Baskerville-Donovan urges the Court to reverse the opinion of the First District Court of Appeal and remand this case 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, 2728 Fountain View Circle, #104, Naples, Florida 33942, on this 29th day of March, 1991.

Mark E. Holcomb
ATTORNEY