

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

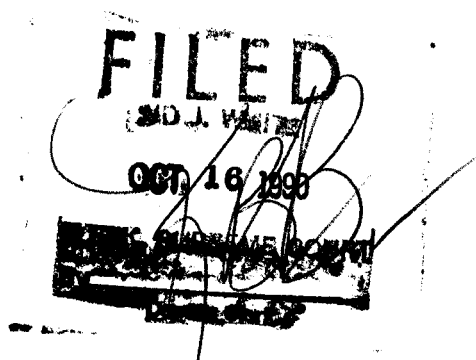
BASKERVILLE-DONOVAN ENGINEERS, INC.,

Defendant/Petitioner,

vs.

PENSACOLA EXECUTIVE HOUSE CONDOMINIUM
ASSOCIATION, INC.,

Plaintiff/Respondent.



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

BRIEF ON JURISDICTION OF PETITIONER,
BASKERVILLE-DONOVAN ENGINEERS, INC.

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STATEMENT OF THE FACTS AND CASE

This proceeding seeks to invoke this Court's discretionary review of the decision of the First District Court of Appeal in Pensacola Executive House Condominium Ass'n, Inc. v. Baskerville-Donovan Engineers, Inc., 15 F.L.W. 2173 (Fla. 1st DCA August 30, 1990), which expressly and directly conflicts with a decision of another district court of appeal on the same question of law. Art. V, § 3(b)(3), Fla. Const. That question of law is whether the professional malpractice statute of limitations, section 95.11(4)(a), Florida Statutes, which expressly applies to persons in "privity" with the professional, includes persons who are the known and intended beneficiaries of the professional's services. Petitioner, Baskerville-Donovan Engineers, Inc. ("Baskerville-Donovan"), will briefly set forth the facts necessary to this Court's determination of jurisdiction.

In May 1981, Baskerville-Donovan prepared an Engineering Report for the owner of an apartment complex. (A-1)¹ The Report was prepared pursuant to part VI of chapter 718, Florida Statutes, to evaluate certain components of the complex for purposes of converting the apartments into condominiums. The evidence is undisputed that the Report was prepared by Baskerville-Donovan with the knowledge and intent that it would be provided by the owner to prospective purchasers of the condominium units. (A-2)

Respondent, Pensacola Executive House Condominium Association, Inc. ("Association"), filed suit on behalf of the unit owners against Baskerville-Donovan alleging that the Report was improperly prepared. Baskerville-Donovan moved for summary judgment on the grounds that the action was barred under section 95.11(4)(a). (A-2)

¹ References to the Appendix, containing a conformed copy of the decision of the court below, will be designated (A-___), with citation to the appropriate page of the Appendix.

That statute provides a two-year limitations period for professional malpractice (other than medical) actions, with the following provision:

However, the limitation of actions herein for professional malpractice shall be limited to persons in privity with the professional.

(A-3, 4) The trial court granted the motion and entered final summary judgment in favor of Baskerville-Donovan, finding section 95.11(4)(a) applicable in reliance upon the decision in Cristich v. Allen Engineering, Inc., 458 So. 2d 76 (Fla. 5th DCA 1984). (A-3)

In Cristich, the Fifth District Court of Appeal interpreted the term "privity" in section 95.11(4)(a) to include persons who were known and intended beneficiaries of the professional's services, relying on this Court's decision in First American Title Insurance Co. v. First Title Service Company of the Florida Keys, Inc., 457 So. 2d 467 (Fla. 1984).

(A-5) In this case, the First District Court of Appeal rejected that interpretation and strictly construed section 95.11(4)(a) to apply only where "direct contractual privity" exists. (A-8)

After reviewing the facts and holding of Cristich, the court below stated:

For the following reasons, we are compelled to disagree with the Fifth District's conclusion in Cristich. Section 95.11(4)(a) is specifically limited in application "to persons in privity with the professional." The decision by the supreme court in First American Title Ins. Co. v. First Title Service Co., and its more recent decision in First Florida Bank, N.A. v. Max Mitchell & Co., 558 So. 2d 9 (Fla. 1990), do not expand that limitation.

(A-5) The court below reversed the final summary judgment, finding section 95.11(4)(a) inapplicable. (A-8)

From this decision, Baskerville-Donovan seeks to invoke the discretionary jurisdiction of this Court based upon the express and direct conflict between the decision of the court below and the decision of the Fifth District Court of Appeal in Cristich on the meaning of the term "privity" contained in section 95.11(4)(a), Florida Statutes.

SUMMARY OF ARGUMENT

The decision of the court below expressly and directly conflicts with the Fifth District Court of Appeals' decision in Cristich v. Allen Engineering, Inc., 458 So. 2d 76 (Fla. 5th DCA 1984), on the interpretation of the term "privity" contained in the professional malpractice statute of limitations, section 95.11(4)(a), Florida Statutes. While acknowledging the Fifth District's contrary conclusion in Cristich that known and intended beneficiaries of a professional's services are in privity with the professional for purposes of applying the limitations period, the First District Court of Appeal expressly rejected that reasoning and limited application of the statute to persons in direct contractual privity with the professional.

This Court should accept jurisdiction under Art. V, § 3(b)(3), Fla. Const., to resolve this conflict. The interpretation of the professional malpractice statute of limitations substantially affects the rights of both the professionals who render services and those persons who directly benefit from their services. With the recent expansion of certain professions' liability beyond strict contractual privity, e.g., First Florida Bank, N.A. v. Max Mitchell & Co., 558 So. 2d 9 (Fla. 1990) (accountants), and First American Title Insurance Co. v. First Title Service Co. of the Florida Keys, Inc., 457 So. 2d 467 (Fla. 1984) (title abstracters), this Court should clearly determine how the professional malpractice statute of limitations will be applied consistent with that expanded liability. It is apparent from the conflict between Cristich and the decision of the court below that some confusion exists among the lower courts in that regard.

For these reasons, Baskerville-Donovan respectfully urges the Court to accept jurisdiction in this cause.

ARGUMENT

THE DECISION OF THE COURT BELOW EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF ANOTHER DISTRICT COURT OF APPEAL ON THE INTERPRETATION OF THE TERM "PRIVITY" CONTAINED IN SECTION 95.11(4)(a), FLORIDA STATUTES

The First and Fifth District Courts of Appeal have reached inapposite conclusions on the meaning of the term "privity" contained in section 95.11(4)(a), Florida Statutes. The First District, in the decision under review, expressly rejected the conclusion previously reached by the Fifth District on that issue. Express and direct conflict exists between these decisions and this Court should accept jurisdiction to decide this important question.

The state constitution limits this Court's 'conflict' jurisdiction to a decision of a district court of appeal which expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law. Art. V, § 3(b)(3), Fla. Const; see generally, The Florida Star v. B.J.F., 530 So. 2d 286, 287 n.1 (Fla. 1988). In Jenkins v. State, 385 So. 2d 1356 (Fla. 1980), this Court reviewed the history and intent of this provision, and consequent narrowing of the grounds to invoke 'conflict' jurisdiction. Id. at 1357-59. The Court looked to the dictionary definition of the term "express" and found it to mean "to represent in words"; "to give expression to"; and "expressly" to mean "in an express manner." Id. at 1359. The Court found no ambiguity in this phraseology, stating that "[t]he pertinent language of section 3(b)(3), as amended April 1, 1980, leaves no room for doubt." Id.

This case presents a clear example of express and direct conflict under section 3(b)(3). Direct conflict with Cristich v. Allen Engineering, Inc., 458 So. 2d 76 (Fla. 5th DCA 1984), is apparent from the opposite conclusions reached by the two courts where the

plaintiffs in each case were known and intended beneficiaries of the professional services. Moreover, the First District expressly recognized that conflict:

For the following reasons, we are compelled to disagree with the Fifth District's conclusion in Cristich.

(A-5) While Cristich analyzed section 95.11(4)(a) to apply to plaintiffs who were the known and intended beneficiaries of the professional services, 458 So. 2d at 79, the court below rejected that analysis in favor of a strict interpretation limiting the statute to persons in direct contractual privity with the professional. (A-8) Notably, the First District rejected the legal principle in Cristich and did not attempt to distinguish that case on its facts.

The conflict presented by the court below compels a resolution by this Court. A decision from this Court would clarify the current state of the law, consistent with the Court's responsibility to preserve uniformity of principle and practice in the courts of this state. See, Jenkins v. State, 385 So. 2d at 1357-58 (quoting Ansin v. Thurston, 101 So. 2d 808 (Fla. 1958)). Application of the professional malpractice statute of limitations will affect the thousands of professionals determined by this Court in Pierce v. AALL Insurance, Inc., 531 So. 2d 84 (Fla. 1988) to be subject to the statute, as well as the countless recipients of their services. In conjunction with this Court's recent decisions in First Florida Bank, N.A. v. Max Mitchell & Co., 558 So. 2d 9 (Fla. 1990) (extending accountant liability beyond persons in direct contractual privity) and First American Title Insurance Co., (extending title abstracter liability beyond persons in direct contractual privity), a decision from this Court is necessary to address the limitations period applicable to those persons who fall outside strict contractual privity with a professional, but are the known and intended beneficiaries of the professional's services. This clarification can only come from the Court.

The failure of the First District to certify its decision to be in direct conflict with Cristich, although requested to do so by Baskerville-Donovan, should have no bearing on this Court's analysis of the jurisdictional issue. Jurisdiction is sought under a provision wholly separate from the authority upon which Baskerville-Donovan requested certification. In Ford Motor Co. v. Kikis, 401 So. 2d 1341 (Fla. 1981), this Court held that the failure of a district court of appeal to identify in its opinion a direct conflict of decisions did not preclude a finding of express and direct conflict by this Court under section 3(b)(3). Id. at 1342. While not precisely on point, Ford Motor Co. is instructive in illustrating the independent nature of this Court's jurisdictional analysis. In this case, the failure of the district court to certify direct conflict under section 3(b)(4) should not be detrimental to a finding of express and direct conflict by this Court under section 3(b)(3).

This is particularly true where the failure of the court below to certify a direct conflict may be attributable to factors which have no bearing on the existence of such a conflict. For example, the court may have been reluctant to certify a conflict under section 3(b)(4), where grounds to invoke jurisdiction under section 3(b)(3) are apparent on the face of its opinion.

In all candor, Baskerville-Donovan sought certification of direct conflict under section 3(b)(4), rather than pursue express and direct conflict under section 3(b)(3), for two reasons. First, since no jurisdictional brief is required where direct conflict is certified, Fla. R. App. P. 9.120(d), it is less expensive to pursue jurisdiction on that ground. Second, it is believed that the Supreme Court is more likely to accept jurisdiction where a question has been certified by a district court of appeal, with the 'imprimatur' of conflict which attaches to that certification, than where the parties themselves argue the issue. The failure of the district court to certify conflict in this case does not detract from the existence of that conflict or the importance of the underlying issue.

CONCLUSION

Jurisdiction should be accepted by this Court to resolve the express and direct conflict between the First and Fifth District Courts of Appeal. A decision from this Court will have broad implications beyond the case at hand. Important aspects of professional-client relations and the scope of professional undertakings will be affected by a firm decision on how the professional malpractice statute of limitations will be applied. Baskerville-Donovan respectfully urges this Court to accept jurisdiction in this case to provide guidance on this point of law.

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 16th day of October, 1990.

Mark E. Holcomb
ATTORNEY

APPENDIX

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Conformed Copy of Pensacola Executive
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