IN THE SUPREME COURT OF FLORIDA

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GILCHRIST TIMBER COMPANY,
C.L. BRICE, L.A. BRICE,
ANDY M. BRICE, SAM BRICE,

Appellants,

v.

CASE NO.: 89,015
LOWER COURT CASE NO.: 88-10172-MMP

ITT RAYONIER, INC.,

Appellee,

_____/

ANSWER BRIEF OF APPELLEE RAYONIER

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF FLORIDA

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INTRODUCTION

In this brief, Appellee, Rayonier, Inc. (formerly known as ITT Rayonier, Inc.), will be referred to as "Rayonier" or "Appellee." Appellants, Gilchrist Timber Company, C.L. Brice, L.A. Brice, Andy M. Brice and Sam Brice will be referred to collectively as "Gilchrist Timber" or "Appellants." References to the Record on Appeal in the proceedings before the United States Court of Appeals will be reflected by the letter "R" followed by appropriate volume and page designations. References to the Appellants' Initial Brief will be reflected by the abbreviation, "Init. Br.," followed by the appropriate page designation.

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STATEMENT OF THE CASE AND FACTS

In its Initial Brief, Appellants simply repeat the factual statement submitted by the United States Court of Appeals for the Eleventh Circuit in its opinion of certification to this Court. Yet the Eleventh Circuit did not foreclose this Court's consideration of the entire record, or of other issues which may arise upon this Court's analysis of the record. See Gilchrist Timber Co. v. ITT Rayonier, Inc., 95 F.3d 1033, 1036 (11th Cir. 1996). Although the Eleventh Circuit correctly states the facts in its opinion on certification, the opinion also omits certain facts which are important in resolving the certified question, together with other relevant issues of the case. In accordance with Fla. R. Civ. P. 9.210, Rayonier submits such additional facts, as follows:

In 1984, Rayonier owned a large tract of land in an area of Gilchrist County, Florida, referred to as the Gilchrist Forest. Rayonier planned to sell certain assets, including timberlands (R9-156), and targeted the Gilchrist Forest tract as one of the timberlands to be sold. (R9-156; Plaintiff's Exhibit No. 109).

To prepare the property for sale, Rayonier requested an appraisal of the entire Gilchrist Forest tract, including both timber and land. (R9-158; Plaintiff's Exhibit No. 109). Rayonier requested the appraisals to verify the accuracy of its own internal evaluations of the timberlands, especially the value and volume of the timber itself. (R9-178; R11-21-23). Rayonier contracted with Tom Mastin, a consulting forester with Natural Resource Planning Services, Inc., to appraise the Gilchrist Forest tract. (R9-159-

160; Plaintiff's Exhibit No. 101; Plaintiff's Exhibit No. 65; R12-55). Andrew V. Santangini, Jr. agreed to appraise the real property, in association with Mastin's firm. (Plaintiff's Exhibit No. 101). The land was valued as of April 12, 1984; the timber was valued as of June 5, 1984. (Plaintiff's Exhibit No. 117). Mastin forwarded the land and timber appraisals to Rayonier in mid-June, 1984. (R12-56-57).

The land appraisal prepared by Santangini included a page entitled "Summary of Important Facts and Conclusions," which stated that the zoning of the tract was "[a]gricultural," and that the highest and best use of the tract was "[t]imberlands or recreational conservation." (Plaintiff's Exhibit No. 138, at 4). The appraisal report further explained:

> The subject property is zoned for agricultural use, according to the Gilchrist County zoning ordinance. This zoning classification permits a wide variety of agricultural uses including timber production. The subject parcels conform to the zoning classification.

(Plaintiff's Exhibit No. 138, at 16). According to the section of the report entitled "Highest and Best Use Analysis":

> The property is zoned for agricultural uses and conforms to this zoning classification. The property, while not totally suited for timber production throughout due to certain wet areas and unfavorable soil situations, is generally adaptable to timber production. Numerous logging roads have been constructed and maintained throughout the property which provide suitable access to the productive areas. Due to the agricultural nature of Gilchrist County as a whole, little development pressure has been exerted upon any of the lands located within the subject boundaries. **Consequently, there is little demand for the property other than for timber growing purposes.**

(Plaintiff's Exhibit No. 138, at 17-18) (emphasis added). The highest and best use analysis of the appraisal report concluded that

> the subject property has a highest and best use as a timber growing tract of land. An alternate highest and best use is also given consideration, that being of a conservation or recreational oriented tract.

(Plaintiff's Exhibit No. 138, at 18).

Santangini evaluated the property as one entire tract, and did not conduct a development appraisal of the property. (R12-9-10). His report included statements regarding zoning "not to present any type of use or specific use but, rather, simply to determine if in fact this . . . timber tract was in conformity" with the zoning classification. (R12-11).

Randy S. Johnston, Rayonier's Director of Forest Resources, and Kent B. Smith, Rayonier's Director of Forest Land Management, received the land and timber appraisals. (R9-161-163). Upon receipt of the appraisals, Smith accepted the accuracy of the appraisals of the timber and land (R9-163-164), including the statement in the land appraisal that the land was zoned agricultural. (R9-179).

Rayonier did not attempt to determine the zoning of the land. (R9-179-180; R10-225; R10-230; R11-30-31). Smith testified,

> [Rayonier] was just selling the land based on its value as timberland. The issue of zoning never came up in my mind.

(R9-179-180). William Berry, Senior Vice President for Rayonier, also explained:

> The issue of zoning didn't arise. I don't think we had an opinion as to what zoning was.
>
> . . . . .
>
> We knew that it allowed timbering, that was the issue.

(R11-31; see also R11-171-172).

In 1985, Jimmy Ray Mincy, a knowledgeable and experienced timber buyer, learned that Rayonier was interested in selling the south half of the Gilchrist Forest tract. (R9-181, 183). Mincy discussed the tract with Steve Worthington (then an acquisition manager with Rayonier) and, together with Worthington, visited the land. (R9-183-184). At that point, Mincy was interested only in purchasing the timber. (R9-184-185). However, after Worthington asked Mincy to make an offer on both the land and timber, Mincy told Worthington that he "could see the price around . . : $550 an acre." (R9-185-186; R9-201). Rayonier informed Mincy that "they couldn't agree to the $550 an acre . . . but they would be willing to come down and talk under the condition that the tract, if we bought the tract, it had to be closed in that quarter." (R9-186-187).

Following his conversation with Rayonier, Mincy discussed the possible purchase of the south half of the Gilchrist Forest tract with Carl Brice. (R9-187; R8-50; R8-137-138). Mincy had known Brice for years. (R9-182). Like Mincy, Brice was knowledgeable and experienced in timber and land development. (R8-45-48). Moreover, Brice was familiar with the Gilchrist Forest tract, and had even attempted to buy the tract in the late 1940's (R8-49-50; R9-187). Brice testified that he and Mincy looked at the land, and

that he "was quite surprised at the amount of roads that had been put in and the improvements that ITT had made on the tract, and . . . was impressed with the amount of timber on it. . . . [and] all of the road frontage from the lakes and so forth on it." (R8-51).

Mincy testified that after he and Brice visited the tract,

> I told Carl that I felt like the tract, with the land, timber and all, was well worth the $550 an acre that I had in my mind decided upon . . . .

(R9-188; R9-202). Brice told Mincy that "at his age he was not interested in getting into something that was going to run on for several years, but he liked the tract" (R9-188), and that he "wanted to get in and out." (R8-51; R9-188). The two discussed the value of the land (R8-138), and Brice asked Mincy to schedule an appointment with Rayonier to "see if we could get ana [sic] option on the land for around $550 an acre." (R8-51-52; R8-140; R9-188; R9-204-205). Brice and Mincy planned to offer Rayonier $550 an acre for the tract; Brice testified that if Rayonier instead offered $555 per acre, he would walk out. (R8-139-140).

Brice and Mincy first met with Rayonier in the Fernandina Beach office in the late spring or summer of 1985. (R8-136; R11-162-163). During the meeting, Brice expressed his interest in the property to Kent Smith (then Rayonier's Director of Forest Land Management), "provided we could get an option on it and it met with our expectations, [for] somewhere in the neighborhood of $550 an acre . . . ." (R8-53; R9-192; R11-163).

During their first or second meeting with Rayonier, either in the late spring or early summer of 1995, Brice and Mincy requested

copies of any available appraisals of the tract from Rayonier. (R8-53-56; R9-191). Rayonier gave Brice and Mincy copies of the land and timber appraisals (dated April 12, 1984 and June 5, 1984, respectively), without any discussion as to the contents of the appraisals. In fact, Brice and Mincy did not **ever** discuss the issue of zoning with Rayonier before purchasing the property. (R8-146-147; R9-210-211; R11-25; R11-140). Mincy admitted that he did not "remember any discussion about the zoning of this land other than what they [Rayonier] gave us in the document" (R9-210); instead, "[t]hey just gave us the documents and in the documents it had agricultural zoning in it." (R9-211).

Brice testified that he "made extensive use" of the land and timber appraisals and that he "studied . . . the appraisal of the land." (R8-57). Brice disagreed with several aspects of the appraisal, including the appraisal's recommended highest and best use (R8-156-157), the appraised value of the property (R8-144), and the comparable sales used in the appraisal (R8-144). However, Brice did not inform Rayonier of his disagreement with any aspects of the appraisal. (R8-156-158).

Brice and Mincy did not check the zoning of the property, but accepted the appraisal at face value. (R8-61; R8-153; R9-208). When asked whether the land appraisal included any statement regarding the zoning of the land, Mincy replied:

> The zoning in there, to be honest with you, I read and passed on over it, because it said the zoning in there was zoned for agricultural use and all uses for that. That was the normal zoning on the land. I had never heard of . . . preservation zoning . . . . I saw it in

there, but it was agricultural and that's what most timberlands were zoned at.

(R9-194).

Principal points for negotiation between the prospective purchasers and Rayonier included the determination of the final price, the method of financing, and the volume of timber on the land. (R8-64; R8-164; R9-227; R11-25, 163-164). At no time during the negotiations did Brice and Mincy ever inform Rayonier that they assumed the tract was zoned agricultural, or that the zoning of the tract was even important to their decision to purchase the timberlands. (R7-273-3; R7-273-5; R8-146-147; R9-210-211; R11-25; R11-140).

Rayonier agreed to finance either the land or the timber. (R9-195, 216, 218-219; R10-28; R11-25-26). Brice and Mincy originally requested that Rayonier finance the land; subsequently, however, they discovered that, due to the depressed timber market, they could finance the land more easily than the timber. (R9-217; R10-39-40). Rayonier thus agreed to finance only the timber. (R8-65; R9-217; R10-40; R11-26).

Brice and Mincy negotiated with Gainesville State Bank and Florida National Bank for the real property financing. (R8-68). In Brice's opinion, there was not enough timber on the project to pay both the Rayonier timber mortgage and the Florida National Bank loan on the land. (R8-75). Brice and Mincy testified that they planned to repay the Rayonier timber mortgage with sales of timber and to repay the Florida National Bank loan with sales of the land. (R8-75; R9-196-197).

Brice met with James Putnal, then a senior vice president with Florida National Bank, to discuss the land loan. (R8-74). Brice testified that he told Putnal that he planned

> to merchandise probably half of the land. . . . to merchandise and break it up into smaller pieces, with nothing less than 10 acres, and set it off in a retail fashion to pay off the land mortgage.
>
> And after I had paid off the land mortgage -- and I figured I could do this in five years -- then I would keep the rest of the land as a timber growing thing or we could sell it off.

(R8-74).

During the negotiations, Brice furnished Florida National Bank with a memorandum outlining the purchasers' plans for the timber and land. (R9-8-9; Defendant's Exhibit No. 306). Attached to this memorandum were projections for the timber for the next six years, which included a total annual cut of $2,659,849. (R9-5; Defendant's Exhibit No. 306). **The memorandum did not mention any plans for the subdivision and sale of small lots.** (R9-10).

Brice testified that he also gave copies of the land and timber appraisals to Putnal. (R8-73). According to Putnal, the zoning of the real property "played a key part in our decision," for the zoning "dictated the use that the land would be put to for a source of repayment." (R9-87). Putnal understood that the subdivision and sale of the real estate would be the principal source of repayment for the loan (R9-93), and testified that he would not have recommended that Florida National Bank make the loan for the purchase of the real property had he known that the property was zoned preservation. (R9-88).

On cross-examination, however, Putnal reviewed the memorandum to the loan committee (R-9-107; Defendant's Exhibit No. 311), which the loan officer, Lawrence (Larry) Newkirk, prepared with Putnal's assistance. (R9-89-91; R11-114). **Nothing in the loan memorandum outlined Gilchrist Timber Company's plans to subdivide and sell small parcels of the Gilchrist Forest tract.** (R9-112).[1]

Newkirk, a commercial property loan officer with Florida National Bank and the bank officer charged with preparing the loan for submission to the loan committee, testified that he understood that the bank was financing a timber business venture (R11-112), and that Gilchrist Timber Company would repay its loan through timber sales. (R11-115). Newkirk testified that, in deciding whether to underwrite the loan, he did not consider the subdivision and sale of the property into thousands of ten-acre lots. (R11-120-121).

On August 21, 1985, the parties entered into the Contract for Sale and Purchase of Real Property (Plaintiff's Exhibit No. 55) and the Agreement for Sale and Purchase of Timber (Plaintiff's Exhibit No. 141), which had been prepared by the parties' attorneys. (R8-77). The purchase and sales price of the real property and timber

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[1]Putnal also testified that the loan memorandum included a section entitled "NEGATIVE TRENDS," which advised the loan committee that the land was used almost exclusively for forest products (timber growth). (R9-109-110; Defendant's Exhibit No. 311). Putnal agreed that the NEGATIVE TRENDS section of the memorandum contradicted the plan to repay the Florida National Bank loan by subdividing and selling smaller parcels of property (R9-110), and concluded that Florida National Bank's approval of the loan was contingent upon Mr. Brice's ability to sell timber, and perhaps land. (R9-123).

totaled $12,452,550.00, or $550 an acre for the 22,641 acres. (Plaintiff's Exhibit No. 141; R8-140; R9-204).

In the Agreement for Sale and Purchase of Timber, Rayonier guaranteed the total volume of merchantable pine timber, as set forth in the timber appraisal prepared by James Mastin. (R9-213; Plaintiff's Exhibit No. 141, at 4-5). The Agreement allowed the purchasers to re-cruise the timber, with a corresponding adjustment to the sales price of the timber, if necessary. (R9-212-213; R9-230; Plaintiff's Exhibit No. 141, at 5). The Contract for Sale and Purchase of Real Property allowed the purchasers to verify Rayonier's computation of acreage, with a corresponding adjustment to the purchase price, if necessary. (R9-230; Plaintiff's Exhibit No. 55, at 4-5). The Contract for Sale and Purchase of Real Property did not include any representations regarding the zoning of the subject tract (R8-159), but incorporated the exclusions and exceptions of the title policy (including the exclusion for "building and zoning ordinances"). (R9-36-38).

In accordance with the terms of the Contract for Sale and Purchase of Real Property and the Agreement for Sale and Purchase of Timber, Rayonier conveyed title to 22,641 acres of Gilchrist Forest to C.L. Brice, as Trustee of Carl L. Brice 1977 Irrevocable Trust, and Jimmy R. Mincy on October 24, 1985. (R8-77-80; Plaintiff's Exhibit No. 47; Plaintiff's Exhibit No. 48). On October 25, 1985, Mincy and Brice, as Trustee of the Carl L. Brice 1977 Irrevocable Trust, conveyed title to Gilchrist Timber Company. (R8-79-80; Plaintiff's Exhibit No. 49; Plaintiff's Exhibit No. 50).

At closing, Gilchrist Timber Company paid $6,226,275.00 to Rayonier for the land. (R8-84). Florida National Bank financed Gilchrist Timber Company's purchase of the land, secured by a first mortgage on the land and the non-merchantable timber and a second mortgage on the merchantable timber. (R8-82; Plaintiff's Exhibit No. 144). Florida National Bank's loan agreement with Gilchrist Timber Company included provisions for the release of parcels of land, subject to the release of Rayonier's lien on the timber and payment of a percentage of the cash proceeds received from the sale of the property. (Plaintiff's Exhibit No. 144, at ¶ 9.14; R11-122-123). Rayonier secured the sale of the merchantable timber to Gilchrist Timber Company with a purchase money mortgage and security agreement (R8-81-82; Plaintiff's Exhibit No. 143).

SUMMARY OF ARGUMENT

Under Florida law, a party to a transaction, who transmits false information which that party did not know was false, may **not** be held liable for negligent misrepresentation when the recipient of the information relied on the information's truthfulness, despite the fact that an investigation by the recipient would have revealed the falsity of the information. See Gilchrist Timber Co. v. ITT Rayonier, Inc., 95 F.3d 1033, 1033 (11th Cir. 1996) (certifying question to Florida Supreme Court).

Contrary to the Appellants' assertions, the decision of this Court in Besett v. Basnett, 389 So. 2d 995 (Fla. 1980), does not control resolution of the question certified by the United States

Court of Appeals. The Besett opinion considers only the "justifiable reliance" required to establish a cause of action for **fraudulent** misrepresentation. And the facts of the Besett opinion are clearly distinguishable from the facts now before this Court. Unlike the sellers in Besett, Rayonier did not knowingly misrepresent the condition of the property, nor was its knowledge of the zoning superior to the purchasers' own knowledge. The Besett opinion does not allow the recipient of a negligent misrepresentation to rely blindly upon such information, regardless of whether the recipient could have discovered the falsity of the information through a reasonably diligent investigation.

The Florida Standard Jury Instructions -- together with established decisions of the Florida appellate courts -- further demonstrate that the Besett rule does not extend to recipients of negligent misrepresentations. Nor does "public policy" dictate such an expansion of the Besett opinion. Instead, because a cause of action for negligent misrepresentation arises in negligence, the "ordinary rules as to negligence liability apply." Restatement (Second) of Torts § 552A comment a. Such "ordinary rules" of negligence require consideration of the **reasonableness** of the recipient's justified reliance; that is, whether the recipient, in relying upon the alleged negligent misrepresentation, exercised "the standard of care, knowledge, intelligence and judgment of a reasonable man . . . ." Id. § 552A comment a; see also Fla. Stat. § 768.81. The "ordinary rules" of comparative negligence, as

adopted by § 552A of the Restatement, again compel this Court to find that a party to a transaction, who transmits false information which that party did not know was false, may **not** be held liable for negligent misrepresentation when the recipient of the information relied on the information's truthfulness, despite the fact that an investigation by the recipient would have revealed the falsity of the information.

Thus, Rayonier cannot be responsible for Gilchrist Timber's own negligent failure to investigate the zoning of the subject property. The undisputed evidence reveals that Gilchrist Timber did not make any independent effort to determine the property's zoning classification before closing. (See R7-273-5). Instead, Gilchrist Timber simply assumed that the Gilchrist Forest tract was zoned "agricultural." (R7-273-3-5). Because Gilchrist Timber did not reasonably and justifiably rely upon the appraisal report, its cause of action for negligent misrepresentation necessarily must fail.

In any event, the record evidence before this Court unequivocally demonstrates that Rayonier did not negligently misrepresent a material fact and did not intend to induce Gilchrist Timber's reliance on the appraisal report. The undisputed record evidence reveals that Rayonier simply handed the appraisal report to Brice and Mincy, without any discussion as to the zoning of the subject property, or the accuracy of the appraisal report. To impose liability upon Rayonier for its conduct essentially would

require sellers of commercial property to insure the truthfulness of all information. Such a requirement contradicts Florida law.

ARGUMENT

The United States Court of Appeals for the Eleventh Circuit certified the following question of Florida law to this Court:

> Whether a party to a transaction who transmits false information which that party did not know was false, may be held liable for negligent misrepresentation when the recipient of the information relied on the information's truthfulness, despite the fact that an investigation by the recipient would have revealed the falsity of the information.

Gilchrist Timber Co. v. ITT Rayonier, Inc., 95 F.3d 1033, 1033 (11th Cir. 1996). Rayonier respectfully submits that, under Florida law, this Court should answer no to the certified question.

I. THE FLORIDA SUPREME COURT'S OPINION IN BESETT V. BASNETT DOES NOT CONTROL RESOLUTION OF THE CERTIFIED QUESTION.

In its Initial Brief, Appellant argues that the "plain wording" of this Court's opinion in Besett v. Basnett, 389 So. 2d 995 (Fla. 1980), "answers the [certified] question in the affirmative." (Init. Br., at 7). Contrary to Appellant's argument, the Besett opinion does not resolve the issue raised by the Eleventh Circuit. Instead, Besett interprets only the "reliance" element of a cause of action for **fraudulent** misrepresentation.

In Besett this Court considered whether a complaint stated a claim for fraudulent misrepresentation "even though the plaintiffs failed to allege that they had investigated the truth of the defendants' misrepresentations." 389 So. 2d 995, 996. The Florida Supreme Court accepted jurisdiction on the basis of conflict between its 1955 opinion in Potakar v. Hurtak, 82 So. 2d 502 (Fla.

1955), and the more recent opinion of the Second District Court of Appeal (as written by Justice Grimes, then Chief Judge of the Second District Court of Appeal) in Upledger v. Vilanor, Inc., 369 So. 2d 427 (Fla. 2d DCA), cert. denied, 378 So. 2d 350 (Fla. 1979). Besett, 389 So. 2d at 996. The Besett Court chose to follow Justice Grimes' opinion in Upledger. See Basett, 389 So. 2d at 996, 998. The Upledger opinion had considered the divergent lines of authority, but concluded:

> [W]hen a specific false statement is knowingly made and reasonably relied upon, we choose to align ourselves with the growing body of authorities which hold that the representee is not precluded from recovery simply because he failed to make an independent investigation of the veracity of the statement. . . .

369 So. 2d at 430.

In adopting Upledger, the Besett court reasoned that "the petitioners in this case, as owners of the property being sold, had superior knowledge of its size, condition, and business income." 389 So. 2d at 998. Despite such superior knowledge, the owners **knowingly misrepresented** the size, condition and business income of the property, all in an effort to induce the sale of the property. Id. at 996. The Besett court concluded, then, that the respondents, as prospective purchasers,

> were justified in relying upon the representations that were made to them although they might have ascertained the falsity of the representations had they made an investigation.

Id. at 998. Only if the recipient "knows the representation to be false or its falsity is obvious to him" does a duty of investigation arise. Id.[2]

In so ruling, the Florida Supreme Court adopted §§ 540 and 541 of the Restatement (Second) of Torts (1976). Id. at 997. Section 540 of the Restatement, entitled "Duty to Investigate," provides that

> [t]he recipient of a fraudulent misrepresentation of fact is justified in relying upon its truth, although he might have ascertained the falsity of the representation had he made an investigation.

Restatement (Second) of Torts § 540. Section 541 of the Restatement, entitled "Representation Known to Be or Obviously False," limits such reliance, for

> [t]he recipient of a fraudulent misrepresentation is not justified in relying upon its truth if he knows that it is false or its falsity is obvious to him.

Restatement (Second) of Torts § 541.

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[2]Accord Sheen v. Jenkins, 629 So. 2d 1033 (Fla. 4th DCA 1993) (correcting erroneous jury instruction on fraud); Eastern Cement v. Halliburton Co., 600 So. 2d 469 (Fla. 4th DCA) (finding that "a misrepresentation as to the extent of past experience can be a foundation for an action for fraud, . . . especially as there is no duty to investigate its truth or falsity unless the recipient knows of its falsity"), rev. denied, 613 So. 2d 4 (Fla. 1992); Revitz v. Terrell, 572 So. 2d 996 (Fla. 3d DCA 1990) (trial court "misconstrued Florida law regarding fraudulent nondisclosure in the sale of real property"); Johnson v. Davis, 480 So. 2d 625 (Fla. 1985) (finding that sellers' statements to buyers constituted fraudulent misrepresentation); Gold v. Perry, 456 So. 2d 1197 (Fla. 4th DCA 1984) (trial court erred in its jury instructions on fraudulent misrepresentation; Besett applies in action for fraudulent misrepresentation when recipient undertakes an investigation, so long as falsity of representation has not been revealed by investigation).

The Besett court emphasized that "[a] person guilty of fraud should not be permitted to use the law as his shield." 389 So. 2d at 998. Because the recipient's negligence -- although not encouraged by the law -- is "less objectionable than fraud," "the law should not permit an inattentive person to suffer loss at the hands of a misrepresenter." Id. The doctrine of caveat emptor does not protect one guilty of fraudulent misrepresentations.

Appellants argue that "the plain wording of this Court's holding in Besett answers the [certified] question in the affirmative," and even suggest that the "issue as stated by the Eleventh Circuit . . . ignores the actual holding in Besett." (Init. Br., at 7). Yet nowhere in the Besett opinion does this Court consider the "justifiable reliance" necessary to prove a cause of action for negligent misrepresentation. Moreover, the Besett court emphasized that despite their superior knowledge, the sellers had **knowingly misrepresented** the size, condition, and business income of the property, in an effort to induce the plaintiffs' purchase of the lodge. See Besett, 389 So. 2d at 996, 998. Contrary to Appellants' contentions, the rule announced in Besett does not extend to recipients of **negligent** misrepresentations.

In any event, the facts of the case before this Court are clearly distinguishable from the facts of Besett. The trial court submitted only Gilchrist Timber's claim for negligent misrepresentation to the jury, finding "no evidence that the defendant, ITT Rayonier, committed any intentional fraud." (R13-111). Indeed, as the Eleventh Circuit emphasized in its opinion on

certification, Rayonier was "unaware that the zoning classification stated in the appraisal report was inaccurate." 95 F.3d at 1034; (see R7-273-4) (trial court found that "Rayonier was unaware of the zoning classification on the subject property until about one year after the closing"); (see also R9-179-180; R10-225; R10-230; R11-30-31; R11-171-172). The record before this Court is devoid of any evidence that Rayonier knowingly misrepresented the zoning of the Gilchrist Forest tract, in an effort to induce Gilchrist Timber's purchase of the property. (R8-146-147; R9-163-164; R9-168-180; R9-210-211; R11-25; R11-140); (see also R7-273-6) (trial court ruled that "ITT did not knowingly misrepresent the zoning classification of the subject property," and further found "a complete void of any evidence that would tend to establish that ITT intended to induce the plaintiffs to act on the representation").

Nor does the record evidence demonstrate that Rayonier's knowledge of the zoning was ever superior to the knowledge of Gilchrist Timber. See Besett, 389 So. 2d at 998 (emphasizing owners' superior knowledge of the facts knowingly misrepresented). Brice and Mincy were both knowledgeable timber buyers; indeed, Brice -- an experienced land developer -- had attempted to purchase the Gilchrist Forest tract in the 1940's, and was quite familiar with the property. (R8-45-50; R9-181-183; R9-187). The two men visited the property before ever meeting with Rayonier. (R8-51; R9-183-184). And upon receipt of the appraisal report, Brice and Mincy knew exactly what Rayonier knew: that, according to the appraisal, "[t]he subject property [was] zoned for agricultural

use." (Plaintiff's Exhibit No. 138, at 16). Unlike the facts of Besett, information as to the zoning of the Gilchrist Forest tract was equally available to both Gilchrist Timber and Rayonier. Despite the availability of such information, Brice and Mincy did not even attempt to investigate the zoning of the subject property, but instead merely assumed the tract was zoned "agricultural." (R7-273-3; see also R7-273-5) ("[t]he plaintiffs made no independent effort to ascertain the zoning classification of the subject property at any time prior to closing").

Clearly, then, the ruling and rationale of the Florida Supreme Court in Besett do not extend to a cause of action for negligent misrepresentation, including the cause of action before this Court. In an action for negligent misrepresentation, courts are not forced to choose between the fraud committed by a defendant in knowingly misrepresenting material facts and the plaintiff's negligent inattention to his business affairs. See Besett, 389 So. 2d at 998 (in action for fraudulent misrepresentation, negligence of plaintiff is "less objectionable" than defendant's fraud). Instead, "the action is founded solely upon negligence, and the ordinary rules as to negligence liability apply." Restatement (Second) of Torts § 552A comment a. And under the "ordinary rules" of negligence, Rayonier cannot be responsible for Gilchrist Timber's own negligent failure to investigate the zoning of the subject property.[3]

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[3](See R7-273-5) (trial court ruled, in its Order granting Rayonier's motion for directed verdict, that "[t]he plaintiffs

II. THE PLAINTIFF'S FAILURE TO EXERCISE REASONABLE CARE IN RELYING UPON A MISREPRESENTATION MUST BE CONSIDERED IN DECIDING A CAUSE OF ACTION FOR NEGLIGENT MISREPRESENTATION.

In deciding whether the recipient of a negligent misrepresentation reasonably and justifiably relies upon the alleged misrepresentation, "the ordinary rules as to negligence liability apply." Restatement (Second) of Torts § 552A comment a. Under the "ordinary rules" of negligence, the plaintiff's own failure to use due care in relying upon a misrepresentation may limit (or even bar) his recovery. Section 552A of the Restatement (Second) of Torts emphasizes that

> [t]he recipient of a negligent misrepresentation is barred from recovery for pecuniary loss suffered in reliance upon it if he is negligent in so relying.

Restatement (Second) of Torts § 552A. In other words, the recipient must be held to "the standard of care, knowledge, intelligence and judgment of a reasonable man . . . ." Id. § 552A comment a.

Apparently, no Florida court has yet considered whether comparative negligence provides a defense to a claim for negligent misrepresentation. See Cruise v. Graham, 622 So. 2d 37, 40 (Fla. 4th DCA 1993) (finding only that, because **fraudulent** misrepresentation is an intentional tort, comparative negligence is not a defense); Fla. Std. Jury Instr. MI8 comment 4 ("Pending further development of the law, the committee reserves the question of whether comparative negligence is a defense to a negligent

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made no independent effort to ascertain the zoning classification of the subject property at any time prior to closing").

misrepresentation claim and, if so, the effect of such defense.") (reported at 613 So. 2d 1316, 1319 (Fla. 1993)). Rayonier urges this Court to adopt the principle of law stated in § 552A of the Restatement (Second) of Torts, as modified by Florida's comparative negligence statute, § 768.81, Fla. Stat.

A majority of jurisdictions have adopted § 552A of the Restatement. See Sedco Internat'l v. Cory, 522 F. Supp. 254, 329 (S.D. Iowa 1981)(contributory negligence is defense to cause of action for negligent misrepresentation under Iowa law), aff'd, 683 F.2d 1201 (8th Cir.), cert. denied, 459 U.S. 1017 (1982); French Market Plaza Corp. v. Sequoia Ins. Co., 480 F. Supp. 821, 826 (E.D. La. 1979)(in determining whether plaintiffs justifiably relied upon misrepresentations, defendants may show that plaintiffs were contributorily negligent) (considering Louisiana law); Aztlan Lodge No. 1 v. Ruffner, 155 Ariz. 163, 745 P.2d 611, 612-13 (1987) (trial court erred in refusing to instruct jury on defense of contributory negligence; defense applies to claim for negligent misrepresentation); Robinson v. Poudre Valley Federal Credit Union, 654 P.2d 861, 862 (Colo. Ct. App. 1982) ("contributory negligence principles apply to the recipient of a negligent misrepresentation"), appeal after remand, 680 P.2d 241, 243 (Colo. Ct. App. 1984) (plaintiff barred from recovery for negligent misrepresentation "if he is himself found to be as negligent in relying on the information as the defendant was in giving it"); Steele v. Hartford Hospital, 1992 Conn. Super. LEXIS 2381 (Aug. 14, 1992) (contributory negligence constitutes valid defense to

negligent misrepresentation claim)(unreported decision of the Connecticut Superior Court); Florenzano v. Olson, 387 N.W.2d 168, 175-76 (Minn. 1986) (principles of comparative negligence apply to negligent misrepresentation); Forbes v. Par Ten Group, Inc., 99 N.C. App. 587, 394 S.E.2d 643, 649 (1990)(recognizing defense of contributory negligence in action for negligent misrepresentation), rev. denied, 328 N.C. 89, 402 S.E.2d 824 (1991); McElroy v. Boise Cascade Corp., 632 S.W.2d 127, 136 (Tenn. Ct. App. 1982) (cause of action based on negligent misrepresentation "is subject to all usual defenses of a negligence action, including contributory negligence"); Federal Land Bank Ass'n of Tyler v. Sloane, 793 S.W.2d 692, 696 n.4 (Tex. Ct. App. 1990) (contributory negligence is defense to cause of action for negligent misrepresentation), aff'd in part, rev'd in part on other grounds, 825 S.W.2d 439 (Tex. 1991); Silva v. Stevens, 156 Vt. 94, 589 A.2d 852, 860 n.7 (1991) (contributory negligence is defense to negligent misrepresentation); see also 2 Harper, James & Gray, Law of Torts § 7.6, at 414 (2d ed. 1986); W. Prosser, Law of Torts § 107, at 706 (4th ed. 1971) (there is "no apparent reason for distinguishing negligent misrepresentation from any other negligence in [the application of contributory or comparative negligence concepts"); Annotation, Applicability of Comparative Negligence Doctrine to Actions Based on Negligent Misrepresentation, 22 A.L.R.5th 464 §§ 2a & 3 (1996); but see Carroll v. Gava, 98 Cal. App. 3d 892, 897, 159 Cal. Rptr. 778, 781 (1981) (comparative fault analysis "has no place in the context of ordinary business transactions"); Wilson v.

Came, 116 N.H. 628, 366 A.2d 474, 476 (1976) (defendant who benefits from misrepresentation not allowed to raise defense of contributory negligence unless he suffers harm as a result of plaintiff's negligence); Estate of Braswell v. People's Credit Union, 602 A.2d 510, 514 (R.I. 1992) ("the application of comparative-fault principles would only create unnecessary confusion and complexity in business transactions").

In adopting the defense, most courts have relied upon one of two theories: first, whether the Restatement (Second) of Torts has already been accepted by the state's courts as a recognized authority, and second, whether comparative (or contributory) negligence is a defense to a negligence action generally. See Sedco Internat'l, 522 F. Supp. at 329 (contributory negligence -- although not a defense to intentional torts under Texas and Iowa law -- is a defense to a cause of action for negligent misrepresentation); French Market Plaza Corp., 480 F. Supp. at 823-24 (considering Louisiana's adoption of § 552 of the Restatement); Aztlan Lodge, 745 P.2d 612-13 ("Arizona courts will look to the Restatement in the absence of Arizona authority to the contrary"); Steele, 1992 Conn. Super. LEXIS 2381, *5 (principles of Restatement accepted as "influential authority"); Robinson, 654 P.2d at 862 (considering 1980 case adopting the definition of negligent misrepresentation found in § 552 of the Restatement, together with Colorado's comparative negligence statute, which applies to negligence resulting in pecuniary loss); Florenzano, 387 N.W.2d at 175-76 (applying Minnesota's Comparative Negligence Act); Forbes,

394 S.E.2d at 648-49 (considering § 552 of the Restatement, together with North Carolina's established contributory negligence defense); McElroy, 632 S.W.2d at 136 (under Tennessee law, contributory negligence is a complete bar to plaintiff's recovery under action sounding in tort, such as cause of action for negligent misrepresentation); Federal Land Bank Ass'n of Tyler, 793 S.W.2d at 695 (citing § 552 of the Restatement); Silva, 589 A.2d at 860 n.7 (citing Vermont's contributory negligence statute); see also Estate of Braswell, 602 A.2d at 512 (declining to adopt defense of comparative negligence in negligent misrepresentation action; nothing in Rhode Island's statute "mandates or suggests that the theory of contributory negligence should be applied to cases that involve pecuniary damages to an aggrieved party resulting from misrepresentation").

This Court may rely upon either theory in adopting § 552A of the Restatement. Not only does Florida's comparative negligence statute extend to economic losses, see Fla. Stat. § 768.81,[4] this Court has already recognized the authoritative principles of the

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[4]Section 768.81(1) defines "economic damages" as

> past lost income and future lost income reduced to present value; medical and funeral expenses; lost support and services; replacement value of lost personal property; loss of appraised fair market value of real property; cost of construction repairs, including labor, overhead and profit; and any other economic loss which would not have occurred but for the injury giving rise to the cause of action.

Fla. Stat. § 768.81(1).

Restatement (Second) of Torts, including the definition of negligent misrepresentation contained in § 552 of the Restatement.

A. FLORIDA'S COMPARATIVE NEGLIGENCE STATUTE COMPELS ADOPTION OF § 552A OF THE RESTATEMENT.

Under Florida's comparative negligence statute, Fla. Stat. § 768.81, a plaintiff's own failure to investigate a negligent misrepresentation may limit (or prohibit) recovery for the tort of negligent misrepresentation. Section 768.81, Fla. Stat., clearly contemplates that business and pecuniary losses may be diminished by the claimant's contributory fault. See § 768.81(2), Fla. Stat.[5] Indeed, the statute specifically includes "loss of appraised fair market value of real property" (the very losses sought by Gilchrist Timber in its action against Rayonier) in defining the "economic damages" subject to the comparative fault rule. § 768.81(1), (2), Fla. Stat. (1995).

Perhaps more importantly, Florida's comparative negligence statute applies to virtually all negligence cases, including

> civil actions for damages based upon theories of negligence, strict liability, products liability, professional malpractice whether couched in terms of contract or tort, or breach of warranty and like theories.

§ 768.81(4)(a), Fla. Stat. The statute specifically excludes only

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[5]Section 768.81(2), Fla. Stat., provides:

> In an action to which this section applies, any contributory fault chargeable to the claimant diminishes proportionately the amount awarded as economic and noneconomic damages for an injury attributable to the claimant's contributory fault, but does not bar recovery.

> action[s] brought by any person to recover actual economic damages resulting from pollution, . . . action[s] based upon an intentional tort, or . . . cause[s] of action as to which application of the doctrine of joint and several liability is specifically provided . . . .

Id. Thus, while comparative negligence is not a defense to the intentional tort of fraudulent misrepresentation, see Cruise, 622 So. 2d at 40, the statute clearly governs "civil actions for damages based upon theories of negligence," such as a cause of action for negligent misrepresentation. See § 768.81(4).[6]

B. FLORIDA COURTS RELY UPON THE RESTATEMENT (SECOND) OF TORTS AS AN IMPORTANT AND INFLUENTIAL AUTHORITY.

This Court has adopted numerous principles of law expressed in the Restatement (Second) of Torts, including not only the rules governing fraudulent misrepresentation (§§ 540 and 541), but also the rules establishing the liability of accountants (and other professionals) for negligent misrepresentations, as found in § 552. See First Florida Bank, N.A. v. Max Mitchell & Co., 558 So. 2d 9, 12 (Fla. 1990) (adopting § 552 of the Restatement, entitled "Information Negligently Supplied for the Guidance of Others"); Besett v. Basnett, 389 So. 2d 995, 997 (relying upon Restatement § 540, "Duty to Investigate," and Restatement § 541, "Representation

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[6]In its Answer and Affirmative Defenses to Gilchrist Timber's Amended Complaint, Rayonier specifically pled that, to the extent Gilchrist Timber alleged a cause of action arising in negligence:

> Plaintiffs' claim should be reduced by its comparative degree of fault in failing to ascertain the actual zoning of the subject real property, despite having equal access to such information as a matter of law.

(R4-101-7).

Known to Be or Obviously False"). In adopting § 552 of the Restatement, this Court has demonstrated its willingness to rely upon the Restatement in construing the law of negligent misrepresentation.

Section 552 provides:

> (1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance on the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.
>
> (2) Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to loss suffered
>
> > (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and
> >
> > (b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.

Restatement (Second) of Torts § 552 (1976). The First Florida Bank court adopted the rationale of § 552

> as setting forth the circumstances under which accountants may be held liable in negligence to persons who are not in contractual privity.

558 So. 2d at 14; see also Bay Garden Manor Condo. Ass'n v. James D. Marks Assocs., Inc., 576 So. 2d 744, 746 (Fla. 3d DCA 1991) (defining engineers as "professionals" subject to the requirements of § 552); First State Sav. Bank v. Albright & Assocs., Inc., 561 So. 2d 1326, 1329 (Fla. 5th DCA) (finding real estate appraisers subject to § 552), rev. denied, 576 So. 2d 284 (Fla. 1990).

Yet the First Florida Bank court did not extend liability to include all reliance upon a professional's representations. Id. at 15. The Court instead favored a rule "which limits liability to those persons or classes of persons whom an accountant 'knows' will rely on his opinion rather than those he 'should have known' would do so . . . ." Id. Although the accountant in First Florida Bank initially did not prepare the audits for the bank's reliance, the accountant personally delivered the financial statements to the bank while negotiating a loan for his client, with the knowledge that the bank would rely upon the audits. Id. at 16. Because the accountant "vouched for the integrity of the audits," his conduct "[met] the requirements of the rule . . . adopted in [the Court's] opinion." Id.

The First Florida Bank decision thus illustrates this Court's reliance upon the principles of law expressed in Chapter 22, Topic 3 of the Restatement (Second) of Torts, entitled "Negligent Misrepresentation." It is only logical, then, that this Court rely upon § 552A in considering whether the recipient has justifiably and reasonably relied on the alleged negligent misrepresentation; that is, whether the recipient has acted in accordance with "the standard of care, knowledge, intelligence and judgment of a reasonable man . . . ." Restatement (Second) of Torts § 552A comment a.

Again, Rayonier urges this Court to find that a party to a transaction, who transmits false information which that party did not know was false, may **not** be held liable for negligent

misrepresentation when the recipient of the information relied on the information's truthfulness, despite the fact that an investigation by the recipient would have revealed the falsity of the information. Under § 552A of the Restatement (Second) of Torts, the recipient of any negligent misrepresentation must exercise reasonable care in relying on any misrepresentation. Restatement (Second) of Torts § 552A comment a. It is undisputed, however, that Gilchrist Timber did not attempt to conduct any independent investigation as to the zoning of the subject property before closing, but instead merely assumed that the land was zoned for "agricultural" use. (R-7-273-3-5). Gilchrist Timber's negligent failure to investigate the year-old appraisal's representations as to zoning -- despite the the availability of the zoning records, and the sophistication and knowledge of the purchasers -- defeats its cause of action against Rayonier.

III. FLORIDA COURTS HAVE NOT APPLIED BESETT'S LOGIC TO CLAIMS FOR NEGLIGENT MISREPRESENTATION.

Appellants do not consider the comparative negligence principles of § 552A of the Restatement (Second) of Torts, but instead attempt to persuade this Court that the rule of Besett applies to claims for negligent misrepresentation. Appellants discuss each of the cases cited by the Eleventh Circuit in its opinion, and conclude that the "better reasoned opinions cited by the Eleventh Circuit Court of Appeals are those which have followed this Court's opinion in Besett." (Init. Br., at 15). Contrary to Appellants' conclusion, even the decisions following Besett (including the First District Court of Appeal's opinion in Lynch v.

Fanning) do not extend the logic of this Court's ruling to claims for negligent misrepresentation. Indeed, Florida's appellate courts have limited the effect of Besett, even in cases considering claims for fraudulent misrepresentation.

For example, in Lynch v. Fanning the First District Court of Appeal considered only whether a buyer's contractual right to secure a survey defeated his cause of action for breach of contract against the seller. 440 So. 2d 79, 79-80 (Fla. 1st DCA 1983). The plaintiff in Lynch allegedly relied upon a survey furnished by the seller, which survey represented that the property had 125 feet of water frontage. Id. at 79. A plat of the property and the real estate listing (from the Multiple Listing Service) also showed the property with 125 feet of water frontage. Id. Although Lynch inspected the road frontage of the property prior to closing, he did not inspect the water frontage. Id. at 79-80.

After the seller accepted Lynch's offer to purchase the property, the two entered into a purchase contract. Id. at 80. The contract did not include any reference to the water frontage, but gave Lynch the right to obtain a survey prior to closing. Id. Lynch chose not to exercise his right to a survey. Id.

Approximately thirteen months after the closing, Lynch obtained a survey which showed that the water frontage of the property was actually 96 feet. Id. He then sued the seller for breach of contract. Id. The trial court granted the seller's motion for summary judgment, ruling, as a matter of law, that

> Lynch had the **duty** to ensure that he was purchasing the property described in the legal description furnished .

> . . by the seller, Fanning, and . . . chose of his own volition not to take advantage of his contractual right to conduct his own survey.

440 So. 2d at 80. The trial court further found that the seller had not fraudulently misrepresented or concealed the actual water frontage, but believed that the subject property included 125 feet of water frontage. Id.

The First District Court of Appeal reversed the summary judgment, ruling that "Lynch's **contractual right** to secure a survey should not eliminate his cause of action." Id. (emphasis added). The Lynch court relied upon Held v. Trafford Realty Co., 414 So. 2d 631 (Fla. 5th DCA 1982), in which the Fifth District Court of Appeal found that the buyer's contractual right to conduct a survey did not eliminate his cause of action for rescission based upon an innocent misrepresentation of fact. Lynch, 440 So. 2d at 80.

Accordingly, neither Lynch nor Held eliminates a recipient's duty to exercise reasonable care in justifiably relying upon an alleged negligent misrepresentation. The two opinions consider only whether a buyer's contractual right to secure a survey should eliminate his cause of action. See Lynch, 440 So. 2d at 80; Held, 414 So. 2d at 633. Nowhere in the decisions do the courts announce, as a general rule, that the buyer's failure to exercise due care -- in other words, his failure to reasonably and justifiably rely upon the alleged misrepresentation -- should not be considered in an action for negligent misrepresentation. See

Lynch, 440 So. 2d at 80; Held, 414 So. 2d at 633.[7] Otherwise, the decisions would essentially obviate an important element of a negligent misrepresentation claim: "whether (claimant) reasonably relied on the false statement." Fla. Std. Jury Instr. MI8(c), 613 So. 2d at 1318. And even assuming arguendo that Lynch and Held adopt "Besett's logic to negligence claims," 95 F.3d at 1036, the decisions misinterpret Besett, and do not bind this Court in its resolution of the certified question.

The Florida appellate courts have already recognized the limited effect of the Besett rule, even in cases for fraudulent misrepresentation. For example, in Wasser v. Sasoni, the Third District Court of Appeal considered whether the buyer of commercial property could recover against the seller for his alleged misrepresentations as to the condition of the property. 652 So. 2d 411, 412 (Fla. 3d DCA 1995). The Third District Court of Appeal ruled that, even if the representations were false,

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[7]Nor do the other "better reasoned" opinions cited by Appellants extend the rule of Besett to claims for negligent misrepresentation. See Sheen v. Jenkins, 629 So. 2d 1033 (Fla. 4th DCA 1993) (correcting erroneous jury instruction on fraud); Eastern Cement v. Halliburton Co., 600 So. 2d 469 (Fla. 4th DCA) (finding that "a misrepresentation as to the extent of past experience can be a foundation for an action for fraud, . . . especially as there is no duty to investigate its truth or falsity unless the recipient knows of its falsity"), rev. denied, 613 So. 2d 4 (Fla. 1992); Revitz v. Terrell, 572 So. 2d 996 (Fla. 3d DCA 1990) (trial court "misconstrued Florida law regarding fraudulent nondisclosure in the sale of real property"); Johnson v. Davis, 480 So. 2d 625 (Fla. 1985) (finding that sellers' statements to buyers constituted fraudulent misrepresentation); Gold v. Perry, 456 So. 2d 1197 (Fla. 4th DCA 1984) (trial court erred in its jury instructions on fraudulent misrepresentation).

> a misrepresentation is not actionable where its truth might have been discovered by the exercise of ordinary diligence.

Id. (citing Steinberg v. Bay Terrace Apt. Hotel, 375 So. 2d 1089, 1091-92 (Fla. 3d DCA 1979).[8]

Appellants argue that the Wasser court "erroneously relied" on pre-Besett case law. (Init. Br., at 13-14). Yet the Wasser opinion specifically considers the effect of Besett. 652 So. 2d at 412-13. As the Wasser court explained,

> a negligent purchaser is not justified in relying upon a misrepresentation which is obviously false, and "**which would be patent to him if he had utilized his opportunity to make a cursory examination or investigation.**"

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[8]In Steinberg the Third District Court of Appeal considered whether a buyer could rescind his purchase of an apartment building, based upon the seller's alleged negligent misrepresentation that the apartment building included twenty-three rentable units (when, in fact, only ten of the apartments could be rented). 375 So. 2d 1089, 1091-92 (Fla. 3d DCA 1979). The Steinberg court concluded that

> a person to whom false representations have been made is not entitled to relief because of them if he might readily have ascertained the truth by ordinary care and attention, and his failure to do so was the result of his own negligence, and where the means of knowledge are at hand and are equally available to both parties, and the subject matter is equally open to their inspection.

Id. at 1092.

652 So. 2d at 413 (citing Besett, 389 So. 2d at 997).[9] The Third District Court of Appeal considered Besett the exception, rather than the general rule. Accordingly, when

> a sophisticated purchaser of commercial property . . . had agreed to an "as is" purchase contract, had ample opportunity to conduct inspections, and could have discovered an alleged defect through the exercise of ordinary diligence, [he] may be disgruntled, but does not have a cause of action for fraud.

652 So. 2d at 413. The Third District Court of Appeal further bolstered its decision by relying upon the doctrine of caveat emptor, which remains the "rule in the sale of commercial property." Id. at 412 (quoting Futura Realty v. Lone Star Bldg. Contractors (Eastern), Inc., 578 So. 2d 363, 364 (Fla. 3d DCA), rev. denied, 591 So. 2d 181 (Fla. 1991)).

Similarly, in David v. Davenport, the Third District Court of Appeal again emphasized the recipient's general duty to demonstrate his reasonable and ordinary diligence in relying upon the alleged misrepresentations. 656 So. 2d 952, 953 (Fla. 3d DCA 1995). In

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[9]In its opinion, the Florida Supreme Court quotes comment a of § 541 of the Restatement:

> Although the recipient of a fraudulent misrepresentation is not barred from recovery because he could have discovered its falsity if he had shown his distrust of the maker's honesty by investigating its truth, he is nonetheless required to use his senses, and cannot recover if he blindly relies upon a misrepresentation the falsity of which would be patent to him if he had utilized his opportunity to make a cursory examination or investigation.

Besett, 389 So. 2d at 997 (quoting Restatement (Second) of Torts § 541 comment a).

David the buyer of a used car (which was sold "as is") obtained an inspection of the car before its purchase, and "had ample opportunity to discover the defect." Id. at 953. The David court cited Wasser in concluding that "a misrepresentation is not actionable where its truth might have been discovered by the exercise of ordinary diligence." Id.

And perhaps no authority more clearly illustrates the limited effect of the Besett rule than Florida's standard jury instructions. The standard jury instructions for fraudulent misrepresentation include the following:

> b. Reliance - fraudulent misrepresentation:
>
> [On the claim for fraudulent misrepresentation]* The (claimant) may rely on a false statement, even though its falsity could have been discovered had (claimant) made an investigation. However, (claimant) may not rely on a false statement if [he][she] knew it was false or its falsity was obvious to [him][her].
>
> *The bracketed language should be used for clarity when there is also a claim for negligent misrepresentation.

Fla. Std. Jury Instr. MI8(b). The underlined comment emphasizes that the Besett instruction may be given only when the jury considers a claim for fraudulent misrepresentation. See id. MI8(b); see also MI8(c).

The instruction for negligent misrepresentation, however, does not include a similar explanation of the "reliance" element. See id. MI8(c). Instead, in a cause of action for negligent misrepresentation, the jury must consider "whether (claimant) **reasonably relied** on the false statement." Fla. Std. Jury Instr. MI8(c) (negligent misrepresentation) (emphasis added). It is not

enough that the claimant prove only that he relied on the false statement, without consideration of the **reasonableness** of such reliance. Compare Fla. Std. Jury Instr. MI8(c) (instructions for negligent misrepresentation), with Fla. Std. Jury Instr. MI8(a) (in cause of action for fraudulent misrepresentation, jury must consider "whether **(claimant) relied** on the false statement"). The justifiable reliance" required to establish a claim for negligent misrepresentation clearly differs from the reliance element of a fraudulent misrepresentation claim. See Gilchrist Timber Co., 95 F.3d at 1035-36 ("it may be that what constitutes 'justifiable reliance' for the two claims is different").

Appellants fail to demonstrate, then, that adoption of the Besett rule to a cause of action for negligent misrepresentation is the "better reasoned" approach. To the contrary, consideration of established decisions of the Florida appellate courts -- and Florida's standard jury instructions -- reveal that the recipient of a negligent misrepresentation must demonstrate his justifiable and **reasonable** reliance on the alleged misrepresentation. Once again, the rule announced in Besett does not control resolution of the question certified by the United States Court of Appeals.

IV. PUBLIC POLICY DOES NOT DICTATE EXPANSION OF THE BESETT RULE TO CAUSES OF ACTION FOR NEGLIGENT MISREPRESENTATION.

Appellants also advance a number of public policy arguments in an attempt to extend the rule of Besett to the "justifiable reliance" element of claims for negligent misrepresentation. (See Init. Br., at 9-13). As will be demonstrated in detail below,

Appellants fail to present any compelling justification for such an overly broad interpretation of the Besett rule.

A. THE INNOCENT DEFENDANT CANNOT ALWAYS BEAR THE RISK OF LOSS RESULTING FROM HIS ALLEGED NEGLIGENT MISREPRESENTATION.

Appellants first argue that

> [p]ublic policy dictates, and this Court should reaffirm, that the recipient of a representation must be allowed to rely on its truth whether the representation was made innocently or fraudulently.

(Init. Br., at 9). Otherwise, Appellants contend, recipients have no choice but to verify each and every representation. (Init. Br., at 9). Appellants conclude that the risk of falsity of any representation should be borne by the maker of the representation, rather than the recipient. (Init. Br., at 9). "Public policy dictates that any loss resulting from an innocent misrepresentation should fall upon the innocent defendant rather than the innocent plaintiff who has been misled, because the defendant ought to have known the matter represented or else ought not to have spoken." (Init. Br., at 9-10).

Appellants' argument ignores an important element of the tort of negligent misrepresentation. Under no circumstances is the recipient of a misrepresentation entitled "to blindly rely upon it in every case." Uvanile v. Denoff, 495 So. 2d 1177, 1180 (Fla. 4th DCA 1986), review dismissed, 504 So. 2d 766 (Fla. 1987); see also Restatement (Second) of Torts § 541 comment a (quoted in Besett, 389 So. 2d at 997). Instead, the reliance must be **justified and reasonable**. See Baggett v. Electricians Local 915 Credit Union, 620 So. 2d 784, 786 (Fla. 2d DCA 1993); Fla. Std. Jury Instr.

MI8(c). While a recipient is not required to verify every representation (see Init. Br., at 9), he must demonstrate nonetheless that his reliance is justified. See Baggett, 620 So. 2d at 786; see also Wasser, 652 So. 2d at 412-13.

Public policy does not dictate that any loss resulting from an innocent misrepresentation should always fall upon the innocent defendant, as Appellants suggest. (Init. Br., at 9-10). Again, because "the action is founded solely upon negligence, . . . the ordinary rules as to negligence liability apply." Restatement (Second) of Torts § 552A comment a. And the ordinary rules of negligence require consideration of the plaintiff's own negligent conduct. See § 768.81, Fla. Stat. (comparative negligence statute); Restatement (Second) of Torts § 552A.

B. APPELLANTS' ATTEMPT TO REQUIRE RAYONIER TO GUARANTEE THE TRUTH OF ANY INFORMATION CONTRADICTS FLORIDA LAW.

As an additional public policy argument, Appellants assert that "by making a representation, the representor induces the recipient of the representation to refrain from making his own investigation." (Init. Br., at 10). According to Appellants, recipients of representations should be allowed to refrain from conducting any independent investigation "without regard for the culpability of the representor." (Init. Br., at 10). Appellants cite The Law of Torts, which requires the speaker to **guarantee** the truth of the information. (Init. Br., at 10) (citing Harper & James, The Law of Torts § 7.7, p. 551 (1956 ed.)).

Once again, Appellants ignore the requirement of **justifiable reliance.** A representation -- even if fraudulently made -- should

not necessarily preclude the recipient's own investigation, particularly if the representation is obviously false, or the recipient knows the representation is false. See Besnett, 389 So. 2d at 998. Nor should negligent misrepresentations "induce[] the recipient . . . to refrain from making his own investigation." (Init. Br., at 10). A recipient cannot blindly rely on every representation; instead, he must demonstrate that his reliance was reasonable and justified. See Uvanile, 495 So. 2d at 1180. Florida law does not require that an individual **guarantee** the truth of any information shared with others. (See Init. Br., at 10) (citing The Law of Torts).[10] Such a presumptive guarantee contradicts established elements of the tort of negligent misrepresentation, which requires proof that the misrepresentation related to a material fact, that the representor intended to induce another to act on the misrepresentation, and that the recipient's reliance was, in fact, reasonable and justified. See Baggett, 620 So. 2d at 786; see also Fla. Std. Jury Instr. MI8(c).

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[10]The California case cited in The Law of Torts is inapposite. (Init. Br., at 10) (citing Lerner v. Riverside Citrus Ass'n, 115 Cal. App. 2d 544, 252 P.2d 744, 746 (1953)). In Lerner the California appellate court considered whether a defendant commits fraud when he "asserts that a thing is true within his personal knowledge, or makes a statement as of his own knowledge, or makes such an absolute, unqualified and positive statement as implies knowledge on his part." 252 P.2d at 746. The facts of the case before this Court, however, are devoid of any evidence that Rayonier ever made any representations as to the zoning of the Gilchrist Forest tract, other than simply handing the requested appraisal report to Brice and Mincy.

C. A NEGATIVE ANSWER TO THE CERTIFIED QUESTION WOULD NOT EXPAND THE DOCTRINE OF CAVEAT EMPTOR.

As a final public policy argument, Appellants assert:

> If this Court were to answer the issue certified by the Eleventh Circuit Court of Appeals in the negative, the effect would be an extension of the doctrine of caveat emptor to transactions in which misrepresentations are actually made. The result would be an expansion of the doctrine of caveat emptor rather than a restriction, contrary to the tendency of the recent cases acknowledged by this Court's opinion in Johnson.

(Init. Br., at 12).

Appellants' argument contradicts established Florida law. The doctrine of caveat emptor has been abolished only in **residential** real estate transactions. See Johnson v. Davis, 480 So. 2d 625, 628-29 (Fla. 1985); see also Wasser v. Sasoni, 652 So. 2d 411, 412 (Fla. 3d DCA 1995). The doctrine of caveat emptor remains the common law rule in sales of **commercial** property. Wasser, 652 So. 2d at 412. In sales of commercial property, "even an intentional nondisclosure of known facts materially affecting the value of commercial property . . . is not actionable under Florida law." Wasser, 652 So. 2d at 412.

Contrary to Appellants' suggestion, a negative answer to the certified question would not extend the doctrine of caveat emptor. (Init. Br., at 12). The doctrine of caveat emptor continues to apply to purchasers of commercial property, especially when, as in the case before this Court, the buyers are sophisticated and knowledgeable buyers, who agreed to the exclusions and exceptions of the Contract for Sale and Purchase of Real Property, including

the exclusion for "building and zoning ordinances." (R8-159; R9-36-38); see Wasser, 652 So. 2d at 413.

V. THE ELEVENTH CIRCUIT DID NOT FORECLOSE THIS COURT'S CONSIDERATION OF OTHER RELEVANT ISSUES.

In issuing the opinion on certification to this Court, the Eleventh Circuit did not intend to restrict this Court in its "consideration of the issues in its analysis of the record certified in this case." 95 F.3d at 1036. Rayonier respectfully submits that, upon analysis of the record in this case, no cause of action for negligent misrepresentation exists, even notwithstanding resolution of the issue certified to this Court. Without evidence of Rayonier's misrepresentation of material fact or evidence of its intent to induce Gilchrist Timber's reliance upon the appraisal report, the tort of negligent misrepresentation does not arise.

A. RAYONIER DID NOT MISREPRESENT A MATERIAL FACT.

First, the facts do not reveal that Rayonier ever made a misrepresentation of material fact to Gilchrist Timber. Rayonier simply handed the prospective buyers a copy of a year-old appraisal, without any discussion whatsoever as to the zoning of the Gilchrist Forest tract. (R8-53-56; R8-146-147; R9-191; R9-210-211; R11-25; R11-140). Surely, Florida law does not compel a finding of negligent misrepresentation without an affirmative act of negligence. In this case, Rayonier did not make **any** representation to Gilchrist Timber as to the zoning of the subject property, much less the requisite "misrepresentation of material fact."

A fact is material only "if, but for the alleged . . . misrepresentation, the complaining party would not have entered into the transaction." Atlantic Nat'l Bank v. Vest, 480 So. 2d 1328, 1332 (Fla. 2d DCA 1985), review denied, 491 So. 2d 281 (Fla. 1986). Yet the uncontroverted evidence in this case reveals that Brice and Mincy decided to offer $550 per acre even before the two purchasers received a copy of the appraisal report. (R8-53; R8-139-40; R9-192; R11-163). Brice and Mincy's decision to purchase the property, then, depended upon Rayonier's acceptance of the $550 per acre price, not the zoning of the timberlands. (See R8-139-40). And even if the zoning of the tract was material to Brice and Mincy (see R9-71-72), it is undisputed that the two purchasers never informed **Rayonier** of the importance of the agricultural zoning or of their plans to subdivide and develop the Gilchrist Forest tract. (R7-273-3; R7-273-5; R8-146-147; R9-210-211; R11-25; R11-140).[11]

A misstatement is negligently made only if, "in the exercise of reasonable care under the circumstances, [the] defendant should have known the statement was false." Fla. Std. Jury Instr. MI8(c). Rayonier did not fail to exercise reasonable care. Rayonier did not attempt to prepare its own appraisal report, but instead hired an appraisal firm, Natural Resource Planning Services, Inc. (R9-

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[11]For that matter, Brice and Mincy apparently did not inform Florida National Bank of any plans to subdivide and develop the tract. In a memorandum to the bank, Brice outlined plans for the timberlands, and included only projected profits from the cutting of timber. (R9-5; R9-10; Defendant's Exhibit No. 306).

159-160; Plaintiff's Exhibit No. 101). Natural Resource Planning Services prepared the timber appraisal, but contracted with Andrew V. Santangini to appraise the real property. (R9-160; Plaintiff's Exhibit No. 65; R12-55).

Rayonier used the appraisal report to determine the accuracy of its own calculations of the value of the timberlands and to confirm that the highest and best use of the property conformed to the required zoning. (R9-178-180; R10-20-21; R11-31). Upon receipt of the appraisal, Rayonier reasonably assumed that the report was accurate. (R9-164). Indeed, Rayonier had no reason to check the zoning information included in the appraisal; as Rayonier's Senior Vice-President, William Berry, explained:

> The issue of zoning didn't arise. I don't think we had an opinion as to what zoning was.
>
> . . . .
>
> **We knew that it allowed timbering, that was the issue.**

(R11-31) (emphasis added).

In the exercise of reasonable care under the circumstances, then, Rayonier should **not** have known that the zoning information was inaccurate. Not only did Rayonier have no way of knowing that Brice and Mincy had relied upon the zoning information within the appraisal report, Rayonier could not have known that the "agricultural" zoning of the property was even important to the two purchasers. Without knowledge of Gilchrist Timber's plans to use the tract for any purpose other than timberland, Rayonier had no duty to investigate whether the appraisal report correctly stated the zoning of the subject property.

To impose liability upon Rayonier for its conduct would require sellers of commercial property to guarantee the truthfulness of all information provided to a prospective purchaser, even when the seller did not prepare the information, had no knowledge of any inaccuracies, and could not have known whether such information was even material to the purchasers. Such a result clearly is not contemplated under Florida law, particularly the doctrine of caveat emptor. See, e.g., Wasser v. Sasoni, 652 So. 2d 411, 412-13 (Fla. 3d DCA 1995).

B. RAYONIER DID NOT INTEND TO INDUCE GILCHRIST TIMBER'S RELIANCE ON THE ZONING INFORMATION.

The record evidence further reveals that Rayonier did not intend to induce Gilchrist Timber's reliance on the appraisal report. In its opinion on certification, the United States Court of Appeals for the Eleventh Circuit notes that Rayonier "was itself unaware that the zoning classification stated in the appraisal report was inaccurate." 95 F.3d at 1034. This fact alone demonstrates that Rayonier could not have intended to induce Gilchrist Timber's reliance on the inaccurate zoning information.

Under Florida law, the defendant's knowledge of an alleged misrepresentation is important in determining whether the defendant intended to induce another to act on the representation. See Gomez v. Hawkins Concrete Constr. Co., 623 F. Supp. 194, 201 (N.D. Fla. 1985); Berg v. Newton, 537 So. 2d 165, 167 (Fla. 2d DCA 1989). For example, in Gomez the defendant signed a loan agreement, which misstated his status as a shareholder of the company. 623 F. Supp. at 197. In fact, the defendant did not own any stock in the

corporation, but was only an officer. Id. The defendant testified at trial that he did not know that the agreement included any misrepresentation as to his status; he relied on his attorney to prepare the loan agreement, and signed the agreement without even reading it (or otherwise learning of its contents). Id. at 201.

The Gomez court refused to hold the defendant liable for the misstatement contained in the loan agreement. The federal district court ruled that the plaintiff

> failed in his burden -- he has not established the statement was made by . . . [the defendant] with intention to induce plaintiff to act upon it.

Id.

Similarly, in Berg the parties entered into a contract for the sale and purchase of land. 537 So. 2d at 166. The original sales contract provided that the property would be conveyed by warranty deed "free and clear from all encumbrances . . . [and] zoning ordinances, which do not prohibit the property from being used for mobile home park use." Id. When the closing did not occur as scheduled, the parties entered into an agreement for deed, in which the seller "promised only to convey the property by a warranty deed 'subject to . . . restrictions, reservations and easements of record.'" Id. Based upon a letter from the zoning department, the seller informed the buyer that the property was zoned for mobile home park development. Id. at 167. In fact, the property -- although zoned for mobile home use -- lacked the necessary zoning for development of a mobile home park. Id. at 166-67.

The buyer sued the seller, claiming that the seller had fraudulently misrepresented the zoning classification to induce the buyer to sign the agreement for deed. Id. at 167. However, the trial court found (and the Second District Court of Appeal of Florida agreed) that "there is no material issue of fact regarding whether . . . [the seller] fraudulently induced . . . [the buyer] to enter into the agreement for deed by misrepresenting the property's zoning classification." Id. As the Berg court emphasized,

> [T]he only representation Newton [the seller] made was based on a letter from the zoning department, which indicated that the land was zoned for mobile home use. Berg [the buyer] testified that both he and Newton were unfamiliar with mobile home park development and did not realize that a zoning classification that permits mobile home use does not allow development of a mobile home park.

Id. at 167.

Florida law thus compels the conclusion that Rayonier did not intend to induce Gilchrist Timber to act on the alleged misrepresentation. The prospective purchasers requested the appraisal report to determine the amount and quality of timber on the tract -- not to determine the property's zoning. (R7-273-4 n.2; see also R9-205-207; R11-162-63; R11-166-67). Rayonier handed copies of the appraisal reports to the prospective purchasers without any comment as to the zoning of the property; as Mincy himself admitted, Rayonier "just gave us the documents and in the documents it had agricultural zoning in it." (R9-211; see also R8-148). The evidence is uncontroverted that Rayonier did not ever discuss the zoning of the tract with the prospective purchasers

(R8-146-48; R-9-210-211), and did not even know -- until more than a year after the closing -- that the appraisal report included inaccurate zoning information. (R9-163-64; R9-179-80); see also Gilchrist Timber Co., 95 F.3d at 1034.[12] The facts of this case -- like the facts before the Second District Court of Appeal in Berg -- reveal that "there is no material issue of fact regarding whether . . . [the seller] fraudulently induced . . . [the buyer] to enter into the agreement for deed by misrepresenting the property's zoning classification." 537 So. 2d at 167; see also Gomez, 623 F. Supp. at 201; (see also R7-273-6) (finding "a complete void of evidence that would tend to establish that ITT [Rayonier] intended to induce the plaintiffs to act on the representation").[13]

A cause of action for negligent misrepresentation arises only when the representor **knows** that the recipient will rely on the information, not merely when the representor "should have known" of the recipient's potential reliance. See First Florida Bank v. Max Mitchell & Co., 558 So. 2d 9, 15 (Fla. 1990) (adopting § 552 of the Restatement in considering accountant's liability to third party for negligently prepared financial statements). Again, Rayonier

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[12]Neither Rayonier nor Gilchrist Timber Company was familiar with preservation zoning. See Berg, 537 So. 2d at 167. Rayonier's only concern was that the highest and best use of the tract (timber growing and production) conformed to the zoning classification. (R9-179-180; R-11-31).

[13]As a practical matter, Rayonier's willingness to finance the purchase of the land clearly demonstrates the absence of any intent to defraud Gilchrist Timber Company. (R9-195, 216, 218-19; R10-28; R11-25-26).

did not know that Brice and Mincy intended to rely upon the zoning information contained in the appraisal report. In their negotiations with Rayonier, Brice and Mincy sought assurances as to the quantity of timber on the Gilchrist Forest tract and the financing of the purchase -- not the zoning of the subject property. (R7-273-4 n.2; R11-163-64; R11-166-67). It was in the context of such discussions that Rayonier handed copies of the appraisal report (together with copies of the timber appraisal and maps) to Brice and Mincy, without commenting on the zoning of the subject property, or the accuracy of the appraisal report. (R8-146-48; R9-192; R9-210-12; R11-25; R11-27; R11-140); (see also R8-64; R8-164; R9-227; R11-25; R11-163-64) (negotiations between Rayonier and the purchasers included the volume of timber on the land, the determination of the final price, and the method of financing).

Rayonier could not have known which aspects of the appraisal report would be important to the two purchasers. According to the purchasers' own testimony, they accepted certain aspects of the appraisal report (such as the zoning) without question, but disagreed with other information within the report. (R8-57; R-8-61; R8-144; R8-153; R8-156-157). Nonetheless, the purchasers never informed Rayonier of their reliance upon the "agricultural" zoning referenced in the appraisal report. (R7-273-5; R8-146-48; R9-210-211).

In sum, Rayonier did not "vouch[] for the integrity" of the appraisal report. See First Fla. Bank, 558 So. 2d at 16; (R9-211).

Because Rayonier did not know that Gilchrist Timber would rely upon the zoning information contained within the appraisal report -- and because Rayonier itself had no knowledge of the inaccuracies of the appraisal report -- no cause of action for negligent misrepresentation arises.

CONCLUSION

For all the foregoing reasons, Rayonier requests that this Court find, as a matter of law, that a party to a transaction, who transmits false information which that party did not know was false, may not be held liable for negligent misrepresentation when the recipient of the information relied on the information's truthfulness, despite the fact that an investigation by the recipient would have revealed the falsity of the information.

In the alternative, Rayonier requests that this Court find, as a matter of law, that a seller does not negligently misrepresent the condition of his property when he simply provides information, which has been prepared by a professional appraiser, without knowledge of the falsity of the information, and with no intent to induce the buyer's reliance on such information.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Leonard E. Ireland, Jr., Attorney for Appellants, PO Box 23939, 111 Southeast First Avenue, Gainesville, FL 32602; John F. Roscow, III, Attorney for Appellee, Natural Resource Planning Services, PO Box 23109, Gainesville, FL 32602; and Andrew V. Santangini, Jr., Appellee, 1109 N.W. 23rd Avenue, Gainesville, FL 32601, by U.S. Mail, this 19th day of December, 1996.

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