IN THE
SUPREME COURT OF FLORIDA

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

Plaintiffs/Appellants,

vs.

ITT RAYONIER INCORPORATED, a Delaware Corporation,

Defendants/Appellees,

vs.

NATURAL RESOURCE PLANNING SERVICES, INC., a Florida Corporation, and ANDREW V. SANTANGINI, JR., an individual,

Third-Party Defendants.

CASE NO. 89,015

(USDC NO. 88-10172-MMP

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INITIAL BRIEF OF PLAINTIFFS/APPELLANTS

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STATEMENT OF THE CASE AND OF THE FACTS

The United States Court of Appeals, Eleventh Circuit, certified the question of state law involved in this case to this Court seeking instructions concerning such question of law, "based on the facts recited herein:". Those facts, which Gilchrist Timber Company does not feel at liberty to alter, are as follows:

"II. FACTS

In this diversity action plaintiffs, Gilchrist Timber Company, C. L. Brice, L. A. Brice, Andy M. Brice, and Sam Brice,[1] alleged that defendant ITT Rayonier, Inc. (ITT) made a material false representation of the zoning of a large block of Florida timberland that it sold to plaintiffs, causing them economic injury. After a jury found in favor of plaintiffs the district court granted defendant judgment notwithstanding the verdict and plaintiffs appealed.

In 1985, Jimmy Ray Mincy, a timber broker, became interested in purchasing a tract of timberland (the timberland) from defendant. He solicited C. L. Brice, who was involved in timber, ranching and real estate, to

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[1] The original complaint named as plaintiff Gilchrist Timber Company. The amended complaint substituted as plaintiffs C. L. Brice, as trustee of the Carl L. Brice 1977 Irrevocable Trust, L. A. Brice, Andy M. Brice, and Sam Brice, individually and doing business as Gilchrist Timber Company, a Florida Partnership. Thereafter Carla Sutton (a/k/a Carla Brice) and David M. Miller, co trustees of the Carl L. Brice 1977 Irrevocable Trust, joined as plaintiffs.

join him in making the purchase. Brice and Mincy ultimately purchased the 22,641-acre tract. They presented evidence at trial that they planned to cut and sell the timber and then to sell a significant portion of the land in small tracts for farming or residential development.

Mincy and Brice met with ITT's representatives to discuss purchasing the timberland. Brice testified that at this first meeting Kent Smith, then ITT's Director of Forest Land Management, gave Brice and Mincy a copy of an April 1984 appraisal that ITT had obtained when it decided to sell various timberlands to raise cash. The document included a land appraisal by Andrew Santangini and a timber appraisal by Natural Resource Planning's Tom Mastin. The appraisal stated that the timberland was zoned for agriculture, which allows residential usage. Mincy and Brice testified they decided to buy the timberland only because the zoning allowed residential development. Uncontroverted evidence at trial indicated that the parties never discussed zoning, although the information contained in the timber appraisal - such as the quantity and quality of timber - was discussed at length.

Immediately after the closing, Brice and Mincy conveyed the land and timber to their partnership, Gilchrist Timber Company. More that a year after the purchase, when Gilchrist Timber had removed some timber and attempted to sell some acreage, plaintiffs learned that the vast majority of the timberland was actually zoned "preservation," a classification permitting no residential use.[2] Brice and Mincy attempted unsuccessfully to change the zoning. Plaintiffs asserted that they could not sell the land as planned and lost the benefit of their bargain. They brought this suit, alleging defendant misrepresented that the land was zoned agricultural.[3] The jury found in favor of plaintiffs and awarded damages of $1,676,500, but the district court granted defendant ITT's motion for judgment notwithstanding the verdict. As relevant to the question we submit the district court found that ITT was itself unaware that the zoning classification stated in the appraisal report was inaccurate, a finding the record

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[2] The record contains conflicting testimony on exactly how and when plaintiffs discovered the zoning problem.

[3] Defendant ITT brought in as third party defendants Andrew Santangini and Natural Resource Planning, who performed the land and timber appraisals, respectively, asserting a right of indemnity in the event ITT were held liable. Plaintiffs made no direct claims against the third party defendants. The jury found no liability against the third party defendants, and that determination is not part of the appeal to the Eleventh Circuit.

supports. Thus this case involved negligent misrepresentation."

Gilchrist Timber Co. v. ITT Rayonier, Inc. v. Natural Resource Planning Services, Inc., No. 94-3521, In the United States Court of Appeals, Eleventh Circuit, decided September 20, 1996.

This Court has discretionary jurisdiction pursuant to Section 25.031, Florida Statutes, and Rule 9.150, Florida Rules of Appellate Procedure.

SUMMARY OF ARGUMENT

It is clearly the law of Florida that 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 truthfulness of the information despite the fact that an investigation by the recipient would have revealed the falsity of the information. This Court held in Besett v. Basnett, 389 So.2d 995, 998 (Fla. 1980) that a recipient may rely on the truth of a representation, even though its falsity could have been ascertained had he made an investigation, unless he knows the representation to be false or its falsity is obvious to him. That holding could only be changed by this Court or the Florida Legislature. Neither has done so.

Each of the cases cited by the Eleventh Circuit Court of Appeals as questioning this Court's holding in Besett cite pre-Besett cases which were disapproved by this Court. The better reasoned opinions regarding this issue are those cited by the Eleventh Circuit Court of Appeals from the First, Third, Fourth and Fifth Florida District Courts of Appeal, which followed this Court's opinion in Besett.

Any uncertainty which the Eleventh Circuit Court of Appeals may have regarding the law of Florida on the issue which it certified to this Court is not well-founded. This Court's holding in Besett is clear. No distinction is made in that holding which

would allow an interpretation that a recipient of a representation may rely on the truth of a representation made by a fraudulent misrepresenter and not rely on the truth of a representation made by a negligent misrepresenter. In order for this Court to make such a distinction it must retreat from the public policy of this State which it pronounced in Besett and in Johnson v. Davis, 480 So.2d 625 (Fla. 1985). To do so would effectively eliminate any reliance on representations made during business transactions and expand the doctrine of caveat emptor to situations in which misrepresentations are made. This clearly is not and should not be the public policy of this State. Therefore the issue as stated by the Eleventh Circuit Court of Appeals must be answered in the affirmative.

ARGUMENT

ISSUE

The issue as stated by the United States Court of Appeals, Eleventh Circuit, is:

> 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.

Based on the precedent set by this Court, the question must be answered in the affirmative. To hold otherwise would require the recipient of any representation to verify the truth of such representation or act at his peril. To hold otherwise would be to retreat from the public policy of this state set by this Court in Besett, 389 So.2d 995 and Johnson, 480 So.2d 625. To hold otherwise would be to narrow this Court's holding in Besett, contrary to the trend in this and other states to expand the right of a recipient of a representation to rely on such representation as being the truth.

The issue as stated by the Eleventh Circuit Court of Appeals ignores the actual holding in Besett. The plain wording of this Court's holding in Besett answers the question in the affirmative. This Court stated in Besett: "We hold that a recipient may rely on the truth of a representation, even though its falsity could have

been ascertained had he made an investigation, unless he knows the representation to be false or its falsity is obvious to him." Besett at 998. The issue raised by the Eleventh Circuit Court of Appeals reads something into the opinion which isn't there. This Court made no distinction regarding the right of the recipient of a representation to rely on its truthfulness based on whether the representation is made negligently or intentionally. This Court did not distinguish between the right of a recipient to rely on a fraudulent representation or the right to rely on a negligent representation. The plain wording of this Court's holding in Besett makes no distinction such as that raised by the Eleventh Circuit Court of Appeals' issue.

The focus regarding this issue should not be on the culpability of the misrepresenter. The focus should be on the effect on the recipient of the misrepresentation and the recipient's right to rely. The Fifth District Court of Appeal of Florida in Held v. Trafford Realty Company, 414 So.2d 631, 632-633 (Fla. 5th DCA 1992) cited from this Court's opinion in Langley v. Irons Land & Development Co., 94 Fla. 1010, 114 So. 769 (Fla. 1927) as follows:

> *Innocent Misrepresentation of Fact.* According to the weight of authority, misrepresentation of material facts, although innocently made, if acted on by the other party to his detriment, will constitute a sufficient ground for recession and cancellation in equity. The real inquiry is not whether the party making the representation knew it to be false, but whether the other party believed it to be true and was misled by it in making the contract;

and, whether the misrepresentation is made innocently or knowingly, the effect is the same. (emphasis added).

Public 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. Otherwise, every recipient of a representation must assume that the representation is false and must verify each representation. It would be unconscionable for the recipient of a representation to be placed in a situation in which he must determine whether the representor: (1) is making a representation which is true, (2) is innocently making a misrepresentation which is false, or (3) is intentionally making a representation which is false. Such recipient would have no means of protecting himself other than by verifying every representation made.

The position which is urged herein by Gilchrist Timber Company would place no heavier burden on persons who choose to make representations than they deserve. There is no requirement that anyone make any representation. Therefore, the risk of falsity of any representation made should be on the one who makes such representation. The policy should be that the speaker ought to know, or else ought not to speak. 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.

An additional reason that there should be no difference between the right of the recipient to rely on information from either a fraudulent misrepresenter or a negligent misrepresenter is that by making a representation, the representor induces the recipient of the representation to refrain from making his own investigation. If no representation is made the recipient should make an independent inquiry on his own, but, being the recipient of a representation, he is more likely to rely on the representation and not conduct any further investigation. He should be allowed to do so without regard for the culpability of the representor.

Professors Harper and James, in The Law of Torts, First Edition (1956), § 7.7, page 551, state:

> Business ethics justify the other's reliance upon the accuracy of the information so imparted, that is, upon the certain existence of the facts so expressly or impliedly represented. So, too, does the law. The speaker speaks at his peril. The risk of falsity is his. He must guarantee the truth of the information which he gives.

In footnote 1 to § 7.7, they cite from Lerner v. Riverside Citrus Assn., 115 Cal. App.2d 544, 252 P.2d 744, 746 (1953), as follows:

> If, therefore, one 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, when in fact he has no knowledge whether his assertion is true or false, and his statement proves to be false, he is as culpable as if he had willfully asserted that to be true which he knew to be false and is equally guilty of fraud.

> The fraud consists in stating that the party knows the thing to exist when he does not know it to exist; and if he does not know it to exist, he must ordinarily be deemed to know that he does not.

Regarding the issue of justifiable reliance, Professors Harper and James state:

> Recent developments in the economic life of the nation, followed, as they have been, by current legislative trends directed toward the protection of the public in such transactions, bear witness to what actually happens. In an earlier era, the law laid greater stress upon the plaintiff's self-protective duty than upon the defendant's duty of honesty. Caveat emptor was a rule of wide application, embodying therein a general attitude of laissez-faire with regard to private business transactions. It was up to the plaintiff to look after himself and if he were overreached by his adversary, he was merely the loser in a business deal, and had only himself to blame for a bad bargain. A failure to exercise reasonable business caution was a defense in an action for deceit, and reliance upon the honesty of the adverse party to the transaction constituted a lack of ordinary business caution. One had to assume that his business adversary was or well might be dishonest.
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> The gradually narrowing area for the application of the maxim caveat emptor may be attributed to revised concepts of what the parties may justifiable expect from each other in the type of transaction in question. Because they may normally expect honesty in connection with a sale of land or goods, there is no universal duty, as against a fraudulent vendor, for the vendee to investigate the truth of the former's statement.

The Law of Torts, First Edition (1956), Section 7.7, pages 553, 554, 555.

In the conclusion to that section, Professors Harper and James state: "Caveat emptor has, in all these respects, given way to caveat vendor. Business mores and practice have led purchasers to

expect as much, and for this reason such expectations are justifiable." Supra at 559.

Although the doctrine of caveat emptor does not apply in cases such as this where a material misrepresentation is made, the policy considerations which caused this Court to reject the doctrine of caveat emptor in sales of residential property remain the same. See Johnson v. Davis, 480 So.2d 625, 628 (Fla. 1985). In that case, this Court stated:

> One should not be able to stand behind the impervious shield of caveat emptor and take advantage of another's ignorance. Our courts have taken great strides since the days when the judicial emphasis was on rigid rules and ancient precedents. Modern concepts of justice and fair dealing have given our courts the opportunity and latitude to change legal precepts in order to conform to society's needs. Thus, the tendency of the more recent cases has been to restrict rather than extend the doctrine of caveat emptor. The law appears to be working toward the ultimate conclusion that full disclosure of all material facts must be made whenever elementary fair conduct demands it.

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. Such an action would certainly sound a retreat from the ultimate conclusion that

full disclosure of all material facts must be made whenever elementary fair conduct demands it.

The cases which are cited by the Eleventh Circuit Court of Appeals to support defendant's contention that Florida courts have limited the holdings of Besett and Lynch do not support that conclusion.

Wasser v. Sasoni, 652 So.2d 411 (Fla. 3d DCA 1995), involved a contract which contained a standard inspection clause, and provided that the apartment building was being sold "as is". The contract also contained an integration clause which provided, in part, as follows:

> It is expressly understood and agreed that, unless otherwise provided for herein, premises are being sold in their present condition; that all agreements are merged herein; and that there are no other agreements, representations statements or warranties, express or implied, oral or written, of any kind on which the undersigned has relied unless reduced to writing and attached hereto as part hereof.

Id. at 412. The court found that the record revealed that Wasser (the buyer) failed to plead any actionable, specific misrepresentations of fact. And in fact, did not even meet with the seller until after the purchase contract had been negotiated and signed. Therefore, any statements the seller would have made would have been irrelevant. In that case, the Third District Court of Appeal erroneously relied on two pre-Besett cases; Steinberg v. Bay Terrace Apartment Hotel, Inc., 375 So.2d 1089 (Fla. 3d DCA 1979) and Welbourn v. Cohen, 104 So.2d 380 (Fla. 2d DCA 1958), for

the proposition that a misrepresentation is not actionable where its truth might have been discovered by the exercise of ordinary diligence. In Besett this Court disapproved all decisions inconsistent with its decision therein. Besett at p. 998. Clearly that portion of the Wasser opinion is in error for failure to follow Besett. However, in reality, that court's opinion is based on the following findings: "Wasser agreed to the 'as is' and integration clauses, which are recognized as valid defenses to claims of fraud, particularly where, as in the instant case, there are no allegations or evidence that the contract itself was induced by fraud." Wasser, 652 So.2d at 413.

David v. Davenport, 656 So.2d 952 (Fla. 3d DCA 1995), another Third District case, also involved a contract containing an "as is" clause. The facts of that case dictated the results. The court found that after the buyer of the car notified the seller that he had had the car inspected and that $13,000.00 worth of repairs would be required, the seller instructed the buyer to return the car and offered to return the purchase price or fix the car to the buyer's satisfaction. The buyer refused the offer, had the car repaired, and sued the seller for fraud and breach of warranty. The court found no evidence in the record that the seller made any fraudulent misrepresentations to the buyer to induce him to buy the car. Nothing in David indicates any deviation from this Court's opinion in Besett.

The sole authority to support the wording cited by the Eleventh Circuit Court of Appeals from Adams v. Prestressed Systems Industries, 625 So.2d 895 (Fla. 1st DCA 1993) (a case involving a worker's compensation claim) is two pre-Besett cases which were disapproved by Besett. This opinion is also obviously in error for failure to follow Besett.

The better reasoned opinions cited by the Eleventh Circuit Court of Appeals are those which have followed this Court's opinion in Besett: The First District Court of Appeal in Lynch v. Fanning, 440 So.2d 79 (Fla. 1st DCA 1983); the Third District Court of Appeal in Revitz v. Terrell, 572 So.2d 96 (Fla. 3d DCA 1990), the Fourth District Court of Appeal in Gold v. Perry, 456 So.2d 1197 (Fla. 4th DCA 1994), Sheen v. Jenkins, 629 So.2d 1033, 1035 (Fla. 4th DCA 1993) and Eastern Cement v. Halliburton Co., 600 So.2d 469 (Fla. 4th DCA 1992); and the Fifth District Court of Appeal in Held v. Trafford Realty Company, 414 So.2d 631 (Fla. 5th DCA 1982).

In Held, the Court confirmed that whether a misrepresentation is made innocently or knowingly, the effect is the same. The court then, citing Besett, stated the fact that the buyer of certain real property could have learned that the subject property was not oceanfront property had he secured a survey did not eliminate his cause of action.

Lynch involved a case in which there was no evidence of fraudulent misrepresentation or concealment. Both the buyer and

the seller believed the property to consist of 125 feet of water frontage. The court in Lynch cited Held for the principle that: "[A]n innocent misrepresentation of a material fact acted upon by the other party to a real estate contract, to such party's detriment, is basis for a cause of action." Lynch, 440 So.2d at 80. (emphasis added).

In Revitz, 572 So.2d at 998, the Court recognized that: "The law was settled even before *Johnson* that where there is no duty on the seller to divulge material facts, once a seller makes representations regarding a condition, he is under a duty to disclose the complete truth." The Court then cited Besett for the principle that "recipient may rely on truth of representation, even though its falsity could have been ascertained had he made investigation, unless he knows representation to be false or its falsity is obvious to him." Id. at 999.

The Court in Sheen v. Jenkins, 629 So.2d 1033, 1035 (Fla. 4th DCA 1993) reversed a judgment resulting from a verdict based in part on the following instructions:

> If, in the exercise of reasonable care, for the protection of her own interests, plaintiff could have ascertained the truth of the matter *by making a reasonable inquiry or investigation under the circumstances presented, but failed to do so,* it cannot be said that they justifiably relied upon such misrepresentations. (Emphases in original).

In doing so, the Court stated:

> At least since *Besett v. Basnett*, 389 So.2d 995 (Fla. 1980), an instruction such as the one given here is an incorrect statement of the law.

Eastern Cement v. Halliburton Co., 600 So.2d at 471, cited Besett with approval for the proposition 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, a situation not present here. (citation omitted)." A determination can not be made based on the facts set forth in that court's opinion, whether the misrepresentation was intentional or negligent. In any event, the court relied on Besett for the principle that the purchaser was entitled to rely on an agent's representation that flood insurance would cost only $400.00 annually, even though its falsity could have been ascertained had he made an investigation, unless he knows the representation to be false or its falsity is obvious to him.

The court in Gold v. Perry, 456 So.2d 1197 (Fla. 4th DCA 1984), relying on Besett, rejected a jury instruction allowing the jury to take into consideration the business experience and success of the parties in determining whether or not the parties justifiably relied on representation and business dealings to their detriment. In Gold, the purchaser had conducted an investigation of sorts but did not uncover the misrepresentation. The court stated:

> Logically, extrapolating from *Besett* and applying particularly the paragraph last quoted above, a negligent investigation should no more leave the representee to suffer loss at the hands of a misrepresenter than one who investigates not at all.

Id. at 1201.

None of these cases affect the clear holding in Besett. The Eleventh Circuit Court of Appeals correctly recognizes: "Obviously *Besett*, as a Florida Supreme Court case, would control if applicable. But we are uncertain whether the Court would apply the rule of *Besett* in a negligent misrepresentation case." Gilchrist Timber Co., v. ITT Rayonier, Inc. v. Natural Resource Planning Services, Inc., No. 94-3521, United States Court of Appeals, Eleventh Circuit (Sept, 20, 1996) at page 3595. There is no reason for that court's uncertainty. As shown above, this Court's holding in Besett is clear. No distinction is made in the holding in Besett which would allow an interpretation that a recipient may rely on the truth of a representation made by a fraudulent misrepresenter and not rely on the truth of a representation made by a negligent misrepresenter. This Court has shown no indication to retreat from Besett. All indications are that this Court will expand the rights of recipients of representations. Johnson v. Davis, 480 So.2d 625.

The Eleventh Circuit Court of Appeals' uncertainty should also be removed by the following wording from this Court's opinion in Besett, 389 So.2d at 998: "Though one should not be inattentive in

one's business affairs, the law should not permit an inattentive person to suffer loss at the hands of a misrepresenter." Again, no distinction is made between an intentional misrepresenter and a negligent misrepresenter. Obviously none was intended since the effect on the recipient is the same.

For a representation to be actionable under Florida law it may be made by a representor who either knew of the misrepresentation, made the misrepresentation without knowledge of its truth or falsity, as in this case, or should have known the representation was false. Baggett v. Electrician's Local 915 Credit Union, 620 So.2d 784, 786 (Fla. 2d DCA 1993). This Court obviously was aware of that principle when it made the following statement in the Besett case. "A person guilty of fraud should not be permitted to use the law as his shield. Nor should the law encourage negligence. However, when the choice is between the two - fraud and negligence - negligence is less objectionable than fraud." Besett at 998. Again, this Court made no distinction between fraud which results from a representation made by one who knew the representation to be false and fraud which results from a representation made by one who made the representation without knowledge of its truth or falsity. Both representations are actionable assuming the other elements of fraud are present. There is absolutely no distinction made by this Court in Besett related

to fraudulent misrepresentation or negligent misrepresentation as questioned by the Eleventh Circuit.

Therefore, 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.

CONCLUSION

As clearly set forth above, this Court's holding in Besett is controlling. The public policy of this State mandates that a recipient of information must be allowed to rely thereon without running the risk that the representation may have been made negligently rather than intentionally. Therefore, the issue certified to this Court by the Eleventh Circuit Court of Appeals should be answered in the affirmative.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true copies of the foregoing have been furnished to Thomas M. Baumer, Post Office Box 4788, Jacksonville, Florida 32201, John F. Roscow, III, Post Office Drawer C, Gainesville, Florida 32602, and Andrew V. Santangini, 1109 NW 23rd Avenue, Gainesville, Florida 32605, by U.S. Mail, this 31st day of October, 1996.

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