In The
Supreme Court of Florida

Case No. 94,846

MAZZONI FARMS, INC.,

Appellant,

v.

E.I. DuPONT DE NEMOURS AND COMPANY
and CRAWFORD & COMPANY,

Appellees.

JACK MARTIN GREENHOUSES, INC. and
PLANTAS LA PALOMA, INC.,

Appellants,

v.

E.I. DuPONT DE NEMOURS AND COMPANY
and CRAWFORD & COMPANY,

Appellees.

ON APPEAL FROM UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY BRIEF OF APPELLANTS

FERRARO & ASSOCIATES, P.A.
Suite 3800
200 South Biscayne Boulevard
Miami, Florida 33131
-and-

RUSSO APPELLATE FIRM, P.A.
Appellate Law Center
6101 Southwest 76th Street
Miami, Florida 33143
Telephone (305) 666-4660

Attorneys for Appellants

CERTIFICATE OF TYPE SIZE AND STYLE

Appellants Mazzoni Farms and Jack Martin Greenhouses are utilizing a twelve (12) point Courier font in this brief.

TABLE OF CONTENTS

Page

CERTIFICATE OF TYPE SIZE AND STYLE i

TABLE OF CITATIONS iii

REPLY TO APPELLEE DuPONT'S STATEMENT OF THE FACTS 1

REPLY TO APPELLEE DuPONT'S ARGUMENT 3

CERTIFIED QUESTION I 3

DOES A CHOICE OF LAW PROVISION IN A SETTLEMENT AGREEMENT CONTROL THE DISPOSITION OF A CLAIM THAT THE AGREEMENT WAS FRAUDULENTLY PROCURED, EVEN IF THERE IS NO ALLEGATION THAT THE CHOICE-OF-LAW PROVISION ITSELF WAS PROCURED? 3

CERTIFIED QUESTION II 11

IF FLORIDA LAW APPLIES, DOES THE RELEASE IN THESE SETTLEMENT AGREEMENTS BAR PLAINTIFFS' FRAUDULENT INDUCEMENT CLAIMS? 11

CONCLUSION 14

CERTIFICATE OF SERVICE 15

TABLE OF CITATIONS

Page

Adams v. Jankouskas
452 A.2d 148 (Del. 1982) 9

Aetna Casualty & Surety Co. v. Ciarrochi
573 So. 2d 990 (Fla. 3d DCA 1991) 3

Automobile Underwriters v. Rich
222 Ind. 384, 53 N.E.2d 775 (1944) 14

Bankers Trust Co. v. Specific Employers Insurance Co.
282 F.2d 106 (9th Cir. 1960),
cert. denied, 368 U.S. 822,
82 S.Ct. 41, 7 L.Ed.2d 27 (1961) 13

Bilotti v. Accurate Forming Corp.
39 N.J. 184, 188 A.2d 24 (N.J. 1963) 14

Brown v. Ocean Accident & Guarantee Corp. Ltd., of London
153 Wis. 196, 140 N.W. 112, 1155 (1913) 14

Continental Mortgage, Inc. v. Sailboat Key, Inc.
395 So. 2d 507 (Fla. 1981) 5, 6

Coral Gables Imported Motors Cars,
Inc. v. Fiat Motors of North America, Inc.
673 F.2d 1234, *opinion modified on*
rehearing, 680 F.2d 104 (11th Cir. 1982),
cert. denied, 459 U.S. 1104 (1983) 5

DiSabatino v. United States Fidelity & Guarantee Co.
635 F. Supp. 350 (Dist. Del. 1986) 13-14

Florida Evergreen Foliage, et al.
v. E.I. DuPont de Nemours & Co.,
U.S. Southern District of
Florida Case No. 98-2242-CIV-GOLD 10

Goyings v. The Jack and Ruth Eckerd Foundation
403 So. 2d 1144 (Fla. 2d DCA 1981) 7

Gustafson v. Jensen
515 So. 2d 1298 (Fla. 3d DCA 1987) 3

Hegarty v. American Commonwealths Power Corporation
163 A. 616 (Del. Ch. 1932) 9

HTP, Ltd. v. Lineas Aereas Costarricenses, S.A.
685 So. 2d 1238 (Fla. 1996) 4, 7, 12, 14

Huron Tool & Engineering Co. v.
Precision Consulting Services, Inc.
209 Mich.App. 365, 532 N.W.2d 541 (1995) 13

Kellums v. Freight Sales Centers, Inc.
467 So. 2d 816 (Fla. 5th DCA 1985) 7

Lincoln Tower Corp. v. Dunhalls
61 So.2d 474 (Fla. 1952) 1

Mankap Enterprises, Inc. v. Wells Fargo Alarm Services,
427 So. 2d 332, 334 (Fla. 3d DCA 1983) 7

Matsuura v. E.I. DuPont de Nemours & Company
Civil No. CV-96-01180 DAE Order
Granting Judgment on the Pleading
(District Hawaii June 12, 1997) 8-10, 12-14

Mlnazek v. Libera
83 Minn. 288, 86 N.W. 100(Minn. 1901) 14

Morgan Walton Properties, Inc. v.
International City Bank & Trust Co.
404 So. 2d 1059 (Fla. 1981) 6

Oceanic Villas, Inc. v. Godson
4 So. 2d 689 (Fla. 1941) 7, 8

Provence v. Palm Beach Towers, Inc.
676 So.2d 1022 (Fla. 4th DCA 1996) 1

Slotkin v. Citizens Casualty Co.
614 F.2d 301 (2d Cir. 1979) 14

Ware v. State Farm Mutual Automobile Insurance Co.
181 Kan. 291, 311 P.2d 316 (Kan. 1957) 14

Webster v. Palm Beach Ocean Realty Co.
139 A. 457 (Del. Ch. 1927) 10

Woodson v. Martin
663 So. 2d 1327 (Fla. 2d DCA 1995) 7

Zuckerman-Vernon Corp. v. Rosen
361 So. 2d 804 (Fla. 4th DCA 1978) 7

REPLY TO APPELLEE DuPONT'S STATEMENT OF THE FACTS

Defendant/Appellee E.I. DuPont de Nemours & Company (hereinafter "DuPont") has included an extended statement of 'facts' in its answer brief, to which we take exception. These appellate proceedings, certified to this Court by the Eleventh Circuit, arise from dismissals with prejudice of complaints filed against DuPont by the Plaintiffs/Appellants Mazzoni Farms, Inc. and Jack Martin Greenhouses, Inc. Given the procedural setting from which the appeals arose, the only facts which are pertinent are those alleged in the Plaintiff plant growers' complaints, and all of those allegations must be taken as true. *See, e.g., Lincoln Tower Corp. v. Dunhalls*, 61 So.2d 474 (Fla. 1952); *Provence v. Palm Beach Towers, Inc.*, 676 So.2d 1022 (Fla. 4th DCA 1996).

DuPont has nonetheless included other *dehors*-the-record recitals in its brief, presented as fact and presumably included for the purpose of making DuPont appear in a more favorable light.

We accordingly briefly reiterate the actual operative facts which may be considered by the Court and litigants in these appellate proceedings.

Appropriately taking all of the factual allegations in the Plaintiffs' complaints as true, the following facts are before this Court. The Plaintiffs/Appellants are Florida growers who operate nurseries of trees and ornamental plants. The nurseries sustained extensive destruction to plants and trees, which the growers believed to have been caused by DuPont's fungicide Benlate. (R1-8-2-8; R2-33-3-8). The growers accordingly brought suit against DuPont seeking to recover their losses and replant the nurseries' trees and plants. (R1-8; R2-33).

Despite its obligation to provide truthful responses and accurate information in responding to discovery requests during the course of the court proceedings initiated by the growers, DuPont instead deliberately provided false answers and concealed information which showed that Benlate in fact had caused the destruction to the Plaintiff growers' trees and plants. (R1-8-3-8; R2-33-4-8). DuPont affirmatively and deliberately misled the Plaintiff growers with false information intended to make it appear that the Plaintiffs' claims had little value. (R1-8-3-8; R2-33-4-8). DuPont's discovery misrepresentations included affirmative — and false — statements that "DuPont did not have any evidence that

Benlate was capable of causing the damage that Plaintiff alleged and that DuPont had conducted extensive testing which confirmed that Benlate was not contaminated and would not cause the conditions that Plaintiff[s] [were] experiencing." (R1-8-7; R2-33-7).

DuPont's misrepresentations about the knowledge and evidence DuPont actually had concerning the destructive properties its product Benlate were intended to, and did, cause the Plaintiffs to settle their claims for substantially less than their true settlement value. (R1-8-6-8; R2-33-6-8).

The Plaintiff plant and tree growers are Florida companies with their nurseries in Florida, and the releases obtained by DuPont when settling with these growers were executed in Florida. (R1-8-18; R2-33-17). DuPont is a Delaware corporation.

REPLY TO APPELLEE DuPONT'S ARGUMENT

CERTIFIED QUESTION I

DOES A CHOICE OF LAW PROVISION IN A SETTLEMENT AGREEMENT CONTROL THE DISPOSITION OF A CLAIM THAT THE AGREEMENT WAS FRAUDULENTLY PROCURED, EVEN IF THERE IS NO ALLEGATION THAT THE CHOICE-OF-LAW PROVISION ITSELF WAS PROCURED?

DuPont argues that the Delaware choice-of-law provision included in the releases it procured from the Plaintiffs should be enforced "for three separate reasons." (DuPont's Answer Brief, p. 13). The three reasons DuPont puts forth are: (1) that DuPont's expectations as a contracting party should be protected; (2) that Florida has no public policy that would prevent enforcement of the clause; and (3) that Plaintiffs should be held bound by the choice-of-law provision — and indeed by the entire release — because Plaintiffs did not sue for rescission.

Plaintiffs here respond by pointing out that not only is DuPont incorrect in its three arguments, but DuPont has provided no basis for this Court to even consider its Delaware choice-of-law argument. DuPont's answer brief contains not one word about what Delaware law ***is***, so there is no starting point at all for an evaluation of whether a Delaware choice of law provision should or should not be given effect. It is a fundamental principle of choice of law analysis that "where a party seeking to rely upon foreign law fails to demonstrate that the foreign law is different from the law in Florida, the law is the same as Florida." *Gustafson v.*

Jensen, 515 So. 2d 1298 (Fla. 3d DCA 1987). *See also, e.g., Aetna Casualty & Surety Co. v. Ciarrochi*, 573 So. 2d 990 (Fla. 3d DCA 1991). Plaintiffs submit that DuPont's failure to identify the Delaware law that was the subject of its 'expectations', and any differences between that law and Florida law, leaves only the legal presumption that Delaware law is the same as Florida law, and there is accordingly no basis presented to this Court for embarking on a choice of law analysis.

DuPont's present silence on this front is addressed below, but we initially note that the Delaware law versus Florida law questions, presents a 'false' conflict anyway which is ultimately meaningless. Resolution of the question will result in application of Florida law as a matter of public policy, as set out in our initial brief. This is so because there are only two possibilities as to the Delaware law on the pertinent topic, either: (1) Delaware law holds that a release procured through fraud protects the defrauding party from being sued for his fraud unless the release is rescinded; or (2) Delaware law holds, as Florida does, that there is also a cause of action for damages for fraud in the inducement of a settlement and release. *HTP, Ltd. v. Lineas Aereas Costarricenses, S.A.*, 685 So. 2d 1238 (Fla. 1996). If Delaware law is the same as Florida's, there is no conflict and Florida law will apply.

If Delaware law differs from that of Florida, the choice of law provision will not be enforced as a matter of public policy. Florida public policy does not condone contracts which seek to create immunity for fraud, unknown to the defrauded party at the time of contracting.

When DuPont urges that the Delaware choice of law provision should be given effect in order to protect DuPont's 'expectations' as a contracting party, DuPont does not state the 'expectations'. However, they can only have been that DuPont was expecting Delaware law to allow DuPont to get away with its fraud on these Florida citizens by holding the release a bar to their claims for fraud in the inducement. DuPont is saying, in effect, "I knew about my fraud, and the growers did not, and I knew that Delaware law[1] would allow me to get away with defrauding the growers if I could just fraudulently induce them to sign a release with a Delaware choice-of-law provision in it; and, since my expectation in entering the release was that I would get away with fraud because Delaware law would protect me, then Florida law should give effect to that choice of law provision." As also discussed in our initial brief, Florida law in no way supports such a proposition and none of the cases cited in DuPont's answer brief suggests otherwise.

[1]As discussed below, the authority DuPont was relying on as its Delaware law support has since been reversed.

DuPont's cited authorities instead support the firmly established choice of law principles that govern here and that we pointed out in our initial brief. The starting proposition is, as stated succinctly in DuPont's own cited case of *Coral Gables Imported Motors Cars, Inc. v. Fiat Motors of North America, Inc.*, 673 F.2d 1234, *opinion modified on rehearing*, 680 F.2d 104 (11th Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983): "[P]arties' agreements as to which law shall govern the construction of a contract [will] be recognized under Florida law, ***unless the chosen law contravenes the public policy of Florida.***" 673 F.2d at 1238. DuPont itself also cites this Court's decision in *Continental Mortgage, Inc. v. Sailboat Key, Inc.*, 395 So. 2d 507 (Fla. 1981), in which this Court recited the "truism" that "an agreement against public policy is unenforceable." 395 So. 2d at 509-510.

DuPont cannot seriously contest these basic choice of law principles, but says that the public policy exception applies only where a "strong" public policy is involved. DuPont then cites certain usury cases in which this Court determined that choice of law provisions giving effect to interest rates from other jurisdictions considered usurious in Florida would not be held unenforceable on public policy grounds. *See, e.g.*, *Morgan Walton Properties, Inc. v. International City Bank & Trust Co.*, 404 So. 2d 1059 (Fla. 1981); *Continental Mortgage, Inc. v. Sailboat Key, Inc.*,

395 So. 2d 507 (Fla. 1981). In so holding, this Court noted that because Florida's usury statute has no foundation in the common law or in equity, is fraught with exceptions, and is frequently amended to conform with commercial realities, the usury statute's interest rate does not represent any particularly strong public policy in Florida. *Continental Mortgage, supra*, 395 So. 2d at 509.

While DuPont does not explicitly complete the analogy, DuPont is, of course, proposing that Florida's public policy against contracting out of liability for fraud also be deemed 'not-very-strong'. DuPont has cited no legal authority to support this proposition, and that is the because Florida law is appropriately and adamantly to the contrary on the subject of fraud.

> The law is settled that a party cannot contract against liability for his own fraud in order to exempt him from liability for an intentional tort, and any such exculpatory clauses are void as against public policy.

Mankap Enterprises, Inc. v. Wells Fargo Alarm Services, 427 So. 2d 332, 334 (Fla. 3d DCA 1983). *See also, e.g., Oceanic Villas, Inc. v. Godson*, 4 So. 2d 689 (Fla. 1941); *Kellums v. Freight Sales Centers, Inc.*, 467 So. 2d 816 (Fla. 5th DCA 1985); *Goyings v. The Jack and Ruth Eckerd Foundation*, 403 So. 2d 1144 (Fla. 2d DCA 1981); *Zuckerman-Vernon Corp. v. Rosen*, 361 So. 2d 804 (Fla. 4th DCA 1978).

This Court recently refused to allow the economic loss rule to stand as a bar to a claim for fraud in the inducement of a

settlement precisely because Florida has such an aversion to fraud:

> The interest protected by fraud is society's need for true factual statements in important human relationships, primarily commercial or business relationships. More specifically, the interest protected by fraud is a plaintiff's right to justifiably rely on the truth of a defendant's factual representation in a situation where an intentional lie would result in loss to the plaintiff.

HTP, Ltd. v. Lineas Aereas Costarricenses, S.A., 685 So. 2d 1238, 1240 (Fla. 1996), *citing* Judge Altenbernd's dissent in *Woodson v. Martin*, 663 So. 2d 1327 (Fla. 2d DCA 1995).

DuPont then attempts to suggest that Florida's (self-evidently strong — notwithstanding DuPont's unsupported implications to the contrary) public policy against parties' attempts to contract away liability for their own frauds applies only to exculpatory clauses directed to *future* fraudulent conduct. Florida law itself, however, makes no such fine distinctions between past fraud and future fraud, as is made perfectly clear by the fact that agreements procured through fraud in the inducement are repugnant to Florida's public policy. As this Court stated, in *Oceanic Villas*, *supra*, a case involving a fraudulently induced lease:

> ***To hold that by the terms of a contract which is alleged to have been procured by fraud, the lessor could bind the lessee in such manner that lessee would be bound by the fraud of the lessor would be against the fundamental principles of law, equity, good morals, public policy and fair dealing. It is well settled that a party can not contract against liability for his own fraud.***

4 So. 2d at 690.[2]

Because DuPont has not cited any Delaware law here to provide this Court with a basis for engaging in a choice of law analysis, we have only been able to point out that *if* there were Delaware law that would allow DuPont to contract out of its liability for fraud in the inducement without the growers' knowledge, then the Delaware choice of law provision would be unenforceable under Florida's choice of law rules which refuse to give effect to agreements that are against Florida public policy.

DuPont's current silence on the subject of Delaware law came about because in the federal proceedings that led to the certified questions here DuPont was relying on the decision in *Matsuura v. E.I. DuPont de Nemours & Company*, Civil No. CV-96-01180 DAE Order Granting Judgment on the Pleading, D. Haw. June 12, 1997), in which a federal district court had held that under Delaware law Hawaiian plant growers' claims against DuPont were barred by substantively identical releases to those DuPont obtained from the Plaintiffs here. The U.S. Ninth Circuit Court of Appeals, however, has since reversed the district court's decision, 166 F.3d 1006 (9th Cir. 1999), and *Matsuura* has ceased to represent Delaware law as far as

---

[2]This Court's discussion in *Oceanic Villas* also dispenses with DuPont's suggestion that Plaintiffs' positions means that parties can never settle intentional tort cases as this Court pointed out, parties can settle anything they want to provided they ***know*** what they are settling. 4 So. 2d at 690.

DuPont is concerned.

The Ninth Circuit held that Delaware law would *not* rule the growers' claims barred by the releases fraudulently obtained by them from DuPont, pointing out that: "Under Delaware law, parties who have been fraudulently induced to enter into a contract have a choice of remedies: they may rescind the contract or they may affirm the contract and sue for fraud." 166 F.3d at 1007, *citing Hegarty v. American Commonwealths Power Corporation*, 163 A. 616, 619 (Del. Ch. 1932). The *Matsuura* Court went on to say that Delaware principles of contract construction would preclude the broad reading DuPont was urging be given the releases — the identical reading DuPont urges here[3] — because specific recitals restrict general language in a release, *citing Adams v. Jankouskas*, 452 A.2d 148 (Del. 1982).

The Ninth Circuit also pointed out that Delaware requires clear language for parties to relieve themselves of *negligence* liability, and *a fortiori* would also have such a requirement as to fraud:

> A release for fraudulent inducement of a settlement contract is analogous: ***like a release for future negligence, it relieves the defendant of liability for defendant's own wrongdoing when it is still within defendant's power to avoid the wrongdoing. A clear***

---

[3]The *Matsuura* releases are substantively identical to the releases DuPont procured from the Florida plant growers here. *See* note 6, *infra*.

statement rule is particularly appropriate where, as in this case, the claim is one that ordinarily would not be released knowingly.

166 F.3d at 1011. The Ninth Circuit said that countenancing DuPont's position would contravene this Delaware law, citing also *Webster v. Palm Beach Ocean Realty Co.*, 139 A. 457, 460 (Del. Ch. 1927) ("A perpetrator of fraud cannot close the lips of his innocent victim by getting him blindly to agree in advance not to complain against it."). The *Matsuura* Court concluded: "If a release of 'any and all claims' were held to bar this fraud action, DuPont, the alleged perpetrator of the fraud, would have successfully silenced its victims by fraudulently inducing them blindly to agree in advance not to complain." 166 F.3d at 1011.[4]

If the Ninth Circuit has accurately read and interpreted Delaware law, then Delaware law comports with Florida law on

[4]DuPont has just filed a Notice of Supplemental Authority citing a case in which the United States District Court for the Southern District of Florida has certified to the Supreme Court of Delaware the following question, also apparently about these identical releases DuPont has obtained from so many plant growers: "Under Delaware law, does the release in these settlement agreements bar plaintiffs' fraudulent inducement claims?". *Florida Evergreen Foliage, et al. v. E.I. DuPont de Nemours & Co.,* U.S. Southern District of Florida Case No. 98-2242-CIV-GOLD, dated May 7, 1999, and attached to DuPont's Notice of Supplemental Authority dated May 26, 1999. Again, and as set out in text, the Delaware law is ultimately irrelevant because even if the releases in these settlement agreements are held to bar the plaintiffs' fraudulent inducement claims under Delaware law, they will then be unenforceable against these Florida plant growers as a matter of Florida public policy.

fraudulent inducement of releases. There is no conflict, and no reason to give further consideration to the choice of law provision. But, as stated above, the issue is ultimately irrelevant here in any event because if Delaware law *would* allow DuPont to use fraudulently obtained releases to bar these Florida plant growers' claims against DuPont for fraud in the inducement, then the Delaware choice of law provision is unenforceable as against Florida public policy.

We respectfully submit that insofar the first question as phrased by the Eleventh Circuit is even presented in this case[5], the question should be answered in the negative.

CERTIFIED QUESTION II

IF FLORIDA LAW APPLIES, DOES THE RELEASE IN THESE SETTLEMENT AGREEMENTS BAR PLAINTIFFS' FRAUDULENT INDUCEMENT CLAIMS?

DuPont's argument under the second question certified by the Eleventh Circuit is based on its lynchpin reasoning that rescission is the only way to avoid a fraudulently obtained release. DuPont contends that all defrauded parties who do not or cannot seek

[5]We explain in our initial brief why we believe that the facts of the case do not present this question as certified by the Eleventh Circuit because Plaintiffs allege that the ***entire agreement*** was procured by fraud. Moreover, any attempt by DuPont to protect itself from later fraud suits by including a self-protective Delaware choice of law provision would also have been fraudulently obtained since the growers *did not know* that DuPont was engaging in fraudulent inducement.

rescission because they are unwilling or unable to tender back the consideration received in the fraudulently induced settlement have 'chosen' to 'affirm' the release they gave, and thus must be bound by all of its unfair terms. DuPont's argument in this regard runs directly counter to Florida law, including that established by this Court.

In making the argument, DuPont *says* that an election of remedies is available for a party claiming fraud in the inducement, i.e., between rescission and damages, but DuPont's actual reasoning makes it clear that in fact only rescission is available under DuPont's version of the law. This is illustrated by DuPont's description of the available 'election': "Thus, a party claiming fraudulent inducement must elect between the remedies of rescission — in which the party 'repudiates' the transaction — or damages — in which the contract is 'ratified'." (DuPont's Answer Brief, p. 30). 'Ratification' of the contract — or 'affirmance' of the contract, as DuPont also calls it — results in the party being bound by all of the terms of the contract, which, in the case of fraudulently induced releases, effectively eliminates the defrauded party's ability to 'elect' the remedy of suing for damages. His suit for damages will be barred by the release itself, which DuPont says he

has 'ratified' and 'affirmed'.[6] As DuPont puts it: "Because [the Plaintiff growers] elected to 'stand on the contract and sue for fraud,' they 'must also abide by the provisions of the agreement, including the general releases'." (DuPont's Answer Brief, p. 33, citing the federal district court's orders dismissing the Plaintiff growers' complaints with prejudice).

Florida law is directly contrary to DuPont's statement. As this Court has recently stated quite clearly in *HTP, supra*:

> ***[O]ne who has been fraudulently induced into a contract may elect to stand by that contract and sue for damages for the fraud.***

685 So. 2d at 1239, *citing Bankers Trust Co. v. Specific Employers Insurance Co.*, 282 F.2d 106, 110 (9th Cir. 1960), *cert. denied*, 368 U.S. 822, 82 S.Ct. 41, 7 L.Ed.2d 27 (1961). This Court ruled that claims for fraud in the inducement of a settlement are not barred by the economic loss rule because they present separate claims

---

[6]We disagree with DuPont that Florida law would hold the terms of these releases to bar the Plaintiff growers' claims on the basis of DuPont's 'general release' argument, even if DuPont were correct in its position that the Plaintiff growers have 'affirmed' the release and thus are bound by its terms. These releases, like the releases in *Matsuura*, state in the initial "whereas" recitals that the Plaintiffs filed suit against DuPont alleging "various claims relating to Plaintiff's purchase and/or use of Benlate fungicide" and state the Plaintiffs' desire "to terminate said litigation, to release and dispose of all claims against Defendant and all claims incident thereto against Defendant." (R1-8-13; R2-33-12). Under the most basic and universal of contract law principles, specific recitals restrict general language in an instrument.

based on independent torts, noting with approval the statement from *Bankers Trust, supra,* that: "The courts of many states have recognized the rule that a suit on a contract and a suit for fraud in inducing the contract are two different causes of action with separate ***and consistent*** remedies." 685 So. 2d at 1240.

> Fraud in the inducement presents a special situation where parties to a contract appear to negotiate freely — which normally would constitute grounds for invoking the economic loss doctrine — but where in fact the ability of one party to negotiate clear terms and make an informed decision is undermined by the other party's fraudulent behavior[.]

685 So. 2d at 1240, *quoting Huron Tool & Engineering Co. v. Precision Consulting Services, Inc.*, 209 Mich. App. 365, 532 N.W.2d 541 (1995).

As the Ninth Circuit pointed out in *Matsuura*, the cases which limit defrauded tort plaintiffs to the remedy of rescission are based on flawed reasoning:

> We agree with *DiSabatino*[7] that these arguments [made in support of allowing rescission only] are unpersuasive: (1) rescission is often an inadequate remedy for tort plaintiffs, because they may be prejudiced by delay in pursuing their claims, *DiSabatino*, 635 F. Supp. 353-54, and (2) damages for fraud are conceptually different from damages for the underlying tort claims and are not too speculative to calculate, *Id*. at 354-55. We also agree with *DiSabatino* that there is a compelling policy reason

---

[7]*DiSabatino v. United States Fidelity & Guarantee Co.*, 635 F. Supp. 350 (Dist. Del. 1986) — cited in our initial brief at p. 15, n. 10.

> to permit tort plaintiffs to stand by their settlement agreements and sue for fraud, because many tort victims otherwise would be left with no practical remedy. *Id.* at 355-56. We note that the weight of authority favors affording defrauding tort plaintiffs an election of remedies. *See Slotkin v. Citizens Casualty Co.*, 614 F.2d 301, 312-14 (2d Cir. 1979) [we cited *Slotkin* in our initial brief at p. 15, n. 10 as well]; *Automobile Underwriters v. Rich*, 222 Ind. 384, 53 N.E.2d 775, 777 (1944); *Ware v. State Farm Mutual Automobile Insurance Co.*, 181 Kan. 291, 311 P.2d 316, 320-32 (Kan. 1957); *Mlnazek v. Libera,* 83 Minn. 288, 86 N.W. 100, 101-102 (Minn. 1901); *Bilotti v. Accurate Forming Corp.*, 39 N.J. 184, 188 A.2d 24, 30-35 (N.J. 1963); *Brown v. Ocean Accident & Guarantee Corp. Ltd., of London,* 153 Wis. 196, 140 N.W. 112, 1155 (1913).

Matsuura, supra, 166 F.3d at 1008, n. 4.

DuPont concludes its brief by urging that public policy requires Florida to ensure that this foreign corporation's fraud on Florida citizens be left unredressed so that DuPont as the defrauding party may remain safely possessed of its ill-gotten gains. No public policy could possibly countenance such a result. This Court's decision in *HTP* should applied to respond to the Eleventh Circuit's second question that: "***No***, the release in these settlement agreements does not bar Plaintiffs' fraudulent inducement claims."

CONCLUSION

Based on the foregoing facts and authorities and those set forth in their initial brief, Plaintiffs/Appellants Mazzoni Farms, Inc. and Jack Martin Greenhouses, Inc. hereby respectfully submit

that the first question certified to this Court by the U.S. Circuit Court of Appeals, if answered at all, should be answered in the negative, and that the second question should be answered in the negative.

Respectfully submitted,

FERRARO & ASSOCIATES, P.A.
Suite 3800
200 South Biscayne Boulevard
Miami, Florida 33131
-and-
RUSSO APPELLATE FIRM, P.A.
Appellate Law Center
6101 Southwest 76th Street
Miami, Florida 33143
Telephone (305) 666-4660

Attorneys for Appellants

By:______________________________
ELIZABETH K. RUSSO
Florida Bar No. 260657

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the Reply Brief of Appellants was mailed this 28th day of May, 1999 to: James F. Bogan, III, Esquire, A. Stephens Clay, Esquire, and William Boice, Esquire, Counsel for Appellees, Kilpatrick Stockton LLP, 1100 Peachtree Street, Suite 2800, Atlanta, Georgia, 30309; and

Paul L. Nettleton, Esquire, Co-Counsel for Appellees, Carlton, Fields, et. al, 4000 NationsBank Tower, 100 Southeast Second Street, Miami, Florida 33131.

____