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In The
Supreme Court of Florida

95,411

FOLIAGE FOREST, INC.,

Appellant,

v.

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

Appellees.

CASTLETON GARDENS, INC.,

Appellant,

v.

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

Appellees.

COUNTRY JOE'S NURSERY, INC.,

Appellant,

v.

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

Appellees.

PALM BEACH GREENERY, INC.,

Appellant,

v.

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

Appellees.

MORNINGSTAR NURSERY, INC.,

Appellant,

v.

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

Appellees.

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

INITIAL BRIEF OF APPELLANTS

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CERTIFICATE OF TYPE SIZE AND STYLE

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STATEMENT OF THE CASE AND FACTS

A. Introduction

Plaintiffs/Appellants Foliage Forest, Inc., Country Joe's Nursery, Inc., Castleton Gardens, Inc., Palm Beach Greenery, Inc., and Morningstar Nursery, Inc. hereby respectfully submit their statement of the case and facts in these consolidated appeals which appear before this Court on questions certified by the United States Eleventh Circuit Court of Appeals pursuant to §25.031, Fla. Stat. and Fla.R.App.P. 9.150. (A. 1-7).[1]

The appeals were taken from final orders of the U.S. District Court for the Southern District of Florida which dismissed with prejudice suits brought by the Plaintiffs/Appellants against Defendants/Appellees E.I. DuPont de Nemours and Company ("DuPont") and Crawford & Company for fraud in the inducement of certain settlement agreements. (A. 1-7). The questions which have been certified to this Court by the Eleventh Circuit are:

> 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 fraudulently procured?
>
> If Florida law applies, does the release in these settlement agreements bar plaintiffs' fraudulent inducement claims?

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[1]A copy of the Eleventh Circuit's opinion is attached hereto as an appendix and will be referenced as (A. 1-7). The decision also appears at *Foliage Forest, Inc., et al. v. E. I. DuPont de Nemours and Co.*, 172 F.3d 1284 (11th Cir. 1999).

(A. 7). Two additional cases against DuPont arising from similar but not identical facts were previously certified to this Court on the same questions and are pending before the Court, now fully briefed, under the consolidated case style *Mazzoni Farms, Inc. v. E. I. DuPont de Nemours and Company, et al.* and *Jack Martin Greenhouses, Inc. v. E. I. DuPont de Nemours and Company, et al.*, Case No. 94,846.

B. Nature of the case

The Plaintiffs/Appellants in these consolidated appeals are Florida plant nurseries - growers of ornamental trees and shrubs. (R1-1-9-10; R2-1-9-10; R3-1-9-10; R4-1-9-10; R5-1-9-10).[2] The plant nurseries filed these suits against Defendants/Appellees DuPont and its agent Crawford and Company alleging that they defrauded the nurseries into settling claims they had against DuPont for damage caused to their trees and plants by DuPont's Benlate fungicide.(R1-1-9-17; R2-1-9-16; R3-1-9-17; R4-1-9-16; R5-1-9-16).

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[2]The Plaintiffs/Appellants' lawsuits were filed separately in Florida state court, when DuPont removed the cases to the U.S. District Court for the Southern District of Florida, they were assigned separate case numbers. Although the cases were all transferred to the same district judge, but each retained its own case number. On appeal, the Eleventh Circuit consolidated these five cases, and the consolidated appeal has one, five volume record, which has been transferred to this Court at the direction of the Eleventh Circuit. Each volume of the record on appeal contains the pleadings and orders from one of the five cases. Since these appeals were certified to this Court from the Eleventh Circuit and at the suggestion of the Clerk, Plaintiffs/Appellants' record references are made in accordance with 11th CIR. R. 28-2(i).

C. Course of proceedings

The Plaintiff nurseries filed their suits against DuPont in Florida state court, and DuPont removed them to the U.S. District Court for the Southern District of Florida based on the parties' diversity of citizenship. (R1-1-1-6; R2-1-1-6; R3-1-1-6; R4-1-1-6; R5-1-1-6). DuPont then filed motions to dismiss the nurseries' complaints on grounds that the suits were: (1) barred by the releases DuPont had obtained from the nurseries in the settlements of their claims against DuPont for plant damage, and (2) barred by the economic loss rule. (R1-8-1-3; R2-11-1-3; R3-7-1-3; R4-8-1-3; R5-8-1-3).

The Plaintiff nurseries opposed DuPont's motions to dismiss contending that their suits should not be barred by the very releases which had been obtained by DuPont through fraud. (R1-19-1-11; R2-22-1-11; R3-18-1-11; R4-19-1-11; R5-19-1-11). DuPont replied by arguing that the releases, rather than any fraud through which they were obtained, should have legal significance. (R1-26-1-33; R2-1- 30-1-31; R3-26-1-34; R4-27-1-32; R5-27-1-32).

The district judge ruled that the Plaintiff nurseries' claims should be dismissed because the nurseries had not sought rescission and thus had elected to stand on their settlements and releases (R1-30-1-6; R2-33-1-6; R3-29-1-6; R4-30-1-6; R5-30-1-6), entered orders of dismissal, and directed the Clerk of the Court to close the cases. (R1-30-6; R2-33-6; R3-29-6, R4-30-6, R5-30-6).

The Plaintiff nurseries moved for reconsideration of the orders of dismissal, and also sought leave to file amended complaints to cure the district court's perceived deficiencies in the initial complaints. (R1-31-1-28; R2-34-1-20; R3-30-1-28; R4-31-1-21; R5-31-1-21). In support of their requests for leave to amend, the Plaintiffs attached proposed amended complaints to their motions. (R1-31-4, 11-28; R2-34-4, 9-20; R3-30-4, 11-28; R4-31-4, 10-21; R5-31-4, 10-21). In their proposed amended complaints, the Plaintiff nurseries revised their damages allegations with respect to their fraud counts, added alternative prayers for rescission, and two of the Plaintiffs also added claims for spoliation of evidence and violations of Florida's civil RICO statute. (R1-31-11-28; R2-34-9-20; R3-30-11-28; R4-31-10-21; R5-31-10-21).[3]

The district court denied the Plaintiffs' motion for reconsideration, and also denied their requests for leave to amend on grounds that any amendments would be futile. (R1-36-7, R2-38-6, R3-36-7, R4-36-6, R5-36-6). With respect to the Plaintiff nurseries' fraud claims, the district judge reaffirmed her initial ruling that the nurseries had elected to stand on the settlement contracts and were thus barred by the releases. (R1-36-4; R2-38-4; R3-36-4; R4-36-4; R5-36-4). The judge also ruled that the releases

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[3]The proposed amended complaints which contained the claims for spoliation of evidence and violations of Florida's civil RICO statute were filed by Plaintiffs/Appellants Foliage Forest, Inc. and Country Joe's Nursery, Inc. (R1-31-11-28; R2-34-9-20).

barred the two new claims the Plaintiffs asserted - i.e., claims for spoliation of evidence and RICO. (R1-36-6-7; R3-36-6-7). And, as to the Plaintiffs' claims for rescission, the district judge found that Plaintiffs had failed to plead that they would return the settlement monies they had received. (R1-36-4-6; R2-38-4-6; R3-36-4-6; R4-36-4-6; R5-36-4-6). Thus, concluded the district court, granting the Plaintiff nurseries leave to amend would be futile. (R1-36-7; R2-38-6; R3-36-7; R4-36-6; R5-36-6).

The Plaintiff nurseries appealed from the district court's final orders of dismissal, and the appellate proceedings before the Eleventh Circuit ensued. (R1-38, R2-40, R3-38, R4-38, R5-38). After briefing and argument, the Eleventh Circuit issued an opinion on April 19, 1999 holding that the questions set out above would be certified to this Court. *Foliage Forest, Inc., et al. v. E. I. DuPont de Nemours and Company,* 172 F.3d 1284 (11th Cir. 1999).

D. Statement of the facts

1. Facts giving rise to the Plaintiffs' claim

Because these suits were dismissed on the complaints, the only facts of record are those alleged in the complaints - facts which must be accepted as true for purposes of this appeal.[4] We do

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[4]*See, e.g., Lincoln Tower Corp. v. Dunhall's-Florida, Inc.*, 61 So. 2d 474 (Fla. 1952); *Provence v. Palm Beach Towers, Inc.*, 676 So. 2d 1022 (Fla. 4th DCA 1996). The same principle was also true for purposes of the Eleventh Circuit's appellate review. *See, e.g., Scheur v. Rhodes*, 416 U.S. 232, 236 (1974); *In re: Southeast*

not recite here the allegations of the complaints in their entirety, but rather provide an overview of the facts supporting the claims the Plaintiff nurseries asserted and sought leave to assert.

The Plaintiffs were and are growers of ornamental trees with tree nurseries and farms throughout South Florida whose trees began suffering from stunted growth, diseased root systems, plant deformities, and dying root mass in the mid to late 1980's and early 1990's. (R1-1-9-17; R1-31-11-28; R2-1-9-16; R2-34-9-20; R3-1-9-17; R3-30-11-28; R4-1-9-16; R4-31-10-21; R5-1-9-16; R5-31-10-21). In checking for possible causes, the growers inquired of DuPont as to whether its fungicide Benlate, which they had been using on their plants, might be responsible for the plant damage. (R1-1-9-17; R1-31-11-28; R2-1-9-16; R2-34-9-20; R3-1-9-17; R3-30-11-28; R4-1-9-16; R4-31-10-21; R5-1-9-16; R5-31-10-21). DuPont and its agents responded to the growers with calculated lies, affirmatively and falsely representing that the growers' plant damage problems were in no way linked to Benlate use, and that DuPont had in fact conducted extensive testing which had shown that Benlate *could* not cause the types of problems with trees and plants that the growers were experiencing. (R1-1-9-17; R1-31-11-28; R2-1-9-16; R2-34-9-20; R3-1-9-17; R3-30-11-28; R4-1-9-16; R4-31-10-21; R5-1-9-16; R5-31-10-21).

Banking Corp., 93 F.2d 750, 751 (11th Cir. 1996).

In fact, however, DuPont *knew* that the Benlate was responsible for the destruction to the growers' plants and trees, and also knew that DuPont both had, and had destroyed, material evidence proving it. (R1-1-9-17; R1-31-11-28; R2-1-9-16; R2-34-9-20; R3-1-9-17; R3-30-11-28; R4-1-9-16; R4-31-10-21; R5-1-9-16; R5-31-10-21). For example, in September of 1992 and unbeknownst to the Plaintiffs, DuPont conducted field tests in Costa Rica to determine for itself the effects of Benlate on ornamental plants. (R1-1-9-17; R1-31-11-28; R2-1-9-16; R2-34-9-20; R3-1-9-17; R3-30-11-28; R4-1-9-16; R4-31-10-21; R5-1-9-16; R5-31-10-21). The Costa Rican field tests were directed by and conducted under the supervision of DuPont's lawyers at Cabaniss & Burke, P.A.[5] (R1-1-9-17; R1-31-11-28; R2-1-9-16; R2-34-9-20; R3-1-9-17; R3-30-11-28; R4-1-9-16; R4-31-10-21; R5-1-9-16; R5-31-10-21). Rather than reporting the results of its tests – which were conducted under highly secretive conditions – DuPont destroyed the test plants and fields and required all of the participants in the testing process to sign confidentiality pacts never to discuss the testing again. (R1-1-9-17; R1-31-11-28; R2-1-9-16; R2-34-9-20; R3-1-9-17; R3-30-11-28; R4-1-9-16; R4-31-10-21; R5-1-9-16; R5-31-10-21).[6]

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[5]Plaintiffs' motions for leave to file amended complaints sought to add the lawyers as defendants. (R1-31-11-28; R2-34-9-20; R3-30-11-28; R4-31-10-21; R5-31-10-21).

[6]DuPont's covert Costa Rica testing is believed to have yielded evidence demonstrating how Benlate becomes phytotoxic to ornamental plants in hot and humid climates. (R1-1-9-17; R1-31-11-

In furtherance of its efforts to leave growers with the false impression that Benlate was *not* a source of their plant damage, DuPont hired an insurance claims handling company – Defendant/Appellee Crawford & Company – to initiate 'inspection' trips to the growers' tree nurseries and farms where they viewed the plant damage and 'confirmed' that the damage was not of a type that could be caused by Benlate. (R1-1-9-17; R1-31-11-28; R2-1-9-16; R2-34-9-20; R3-1-9-17; R3-30-11-28; R4-1-9-16; R4-31-10-21; R5-1-9-16; R5-31-10-21). At some later point in time, DuPont and its agents would then tell the growers that although Benlate was not and could not be a culprit for the plant damage blight, as a gesture of 'good faith' DuPont would make *de minimus* payments to the growers in return for releases. (R1-1-9-17; R1-31-11-28; R2-1-9-16; R2-34-9-20; R3-1-9-17; R3-30-11-28; R4-1-9-16; R4-31-10-21; R5-1-9-16; R5-31-10-21). DuPont then told these growers ***not to get attorneys involved*** or DuPont would pay them nothing. (R1-1-15-16; R2-1-15; R3-1-15-16; R4-1-15; R5-1-15).

DuPont's course of affirmative misrepresentations and deliberately misleading activities caused the Plaintiff growers to settle their claims under terms that left the growers out of pocket for substantial amounts of losses caused by DuPont's Benlate, and at significantly less than their actual settlement value. (R1-1-9-

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28; R2-1-9-16; R2-34-9-20; R3-1-9-17; R3-30-11-28; R4-1-9-16; R4-31-10-21; R5-1-9-16; R5-31-10-21).

17; R1-31-11-28; R2-1-9-16; R2-34-9-20; R3-1-9-17; R3-30-11-28; R4-1-9-16; R4-31-10-21; R5-1-9-16; R5-31-10-21).

Plaintiffs alleged that as part of the fraudulently induced settlements, Plaintiffs signed releases prepared by DuPont. (R1-1-18-23; R2-12-26-28; R3-1-18-23; R4-1-17-19; R5-1-17-18). Contained in the releases signed by Foliage Forest and Castleton Gardens — but not in those signed by Country Joe's, Morningstar Nursery, and Palm Beach Greenery — was a choice-of-law provision stating that the release "would be governed and construed in accordance with the laws of the State of Delaware without giving effect to the conflict of laws or choice of laws provisions thereof." (R1-1-22; R3-1-22).

E. The Eleventh Circuit's certified questions

The Eleventh Circuit's opinion certifying the above-cited questions to this Court indicated concern about what law should apply to resolution of the merits of the appeals as to Foliage Forest and Castleton Gardens, concluding that there is "no definitive Florida precedent for the choice-of-law issue." (A. 3). As to all five of the appeals, the Eleventh Circuit also certified the question on the merits; i.e., whether under Florida law a release procured by fraud bars a claim for its fraudulent procurement. (A. 6-7).

SUMMARY OF ARGUMENT

The first question certified to this Court by the Eleventh Circuit is: "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 fraudulently procured?" Plaintiffs/Appellants submit that this question is not presented in this case because Plaintiffs have alleged that the entire agreement was procured through fraud so that none of its provisions should be enforced, and because the choice-of-law provision *was* itself procured through fraud.

If this first question *is* deemed to have been raised by the facts in the Foliage Forest and Castleton Gardens cases, it should be answered in the negative. Under Florida's choice-of-law rules, foreign law will not be applied in Florida if it works a result that contravenes Florida public policy. Florida public policy does not allow parties to contract against liability for their own frauds and other intentional torts.

The second question certified to this Court by the Eleventh Circuit is: "If Florida law applies, does the release in these settlement agreements bar Plaintiffs' fraudulent inducement claims?" That question should be answered in the negative. As a general proposition, Florida law quite clearly permits defrauded parties to sue for damages caused by fraud in the inducement of a settlement without holding that the very release that was fraudulently procured acts as a bar to the courthouse doors. The

releases in question, moreover, by their terms do not preclude these Plaintiffs' fraud in the inducement claims.

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 FRAUDULENTLY PROCURED?

The Eleventh Circuit certified the choice-of-law question to this Court because Florida has not specifically determined the issue of whether a choice-of-law provision in a contract or settlement procured through fraud will be given effect. As set forth below, we submit that established Florida choice-of-law principles dictate that the question be answered in the negative if giving effect to the choice of law provision would itself assist the fraud.

As this Court is aware, Florida applies the Restatement's "significant relationships" test in determining choice-of-law questions in tort cases, *Bishop v. Florida Specialty Paint Co.*, 389 So. 2d 999 (Fla. 1980), and applies the doctrine of *lex loci contractus* in contract actions. *Sturiano v. Brooks*, 523 So. 2d 1126 (Fla. 1988). The Plaintiffs' claims in this action are tort claims for fraud in the inducement,[7] but contract law is also implicated because the precise question is whether the choice-of-law provision in a release will be given effect when the release

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[7] *See, e.g., Location 100, Inc. v. Gould S.E.L. Computer Systems, Inc.*, 517 So. 2d 700, 706 (Fla. 4th DCA 1987) ("an action to recover for fraud in the inducement is based not on the contract, but on the tort").

was procured through fraud. Ultimately, however, whether a tort issue or a contract issue is involved, we submit that Florida choice-of-law principles would disallow enforcement of the choice-of-law provision in this release on public policy grounds.

Under Florida's choice-of-law rules, foreign law will not be applied in Florida to work a result that contravenes the public policy of this state. *See, e.g., Gillen v. United Services Automobile Ass'n*, 300 So.2d 3 (Fla. 1974); *Cerniglia v. C. & D. Farms, Inc.*, 203 So. 2d 1 (Fla. 1967); *Lloyd v. Cooper Corporation*, 134 So. 562 (Fla. 1931); *Temporarily Yours-Temporary Help Services, Inc. v. Manpower, Inc.*, 377 So. 2d 825 (Fla. 1st DCA 1979). And it is well established that Florida public policy does not allow parties to contract against liability for their own fraud or other intentional torts. *See, 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); *Mankap Enterprises, Inc. v. Wells Fargo Alarm Services*, 427 So. 2d 332 (Fla. 3d DCA 1983); *Goyings v. The Jack and Ruth Eckerd Foundation*, 403 So. 2d 1144 (Fla. 2d DCA 1981); *Zuckerman v. Vernon Corporation v. Rosen*, 361 So. 2d 804 (Fla. 4th DCA 1978).

> 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, 427 So. 2d at 334.

The only purpose behind DuPont's urging throughout this case that the Delaware choice-of-law provision in the release

should be enforced was so that DuPont could make an argument that under Delaware law the release bars the Plaintiffs' claims notwithstanding the fact that the release was procured through fraud. Plaintiffs do not agree that Delaware law would have that effect, and, in fact, the main case on which DuPont has been placing its reliance — *Matsuura v. E.I. DuPont de Nemours & Co.*, Civil No. CV-96-01180 DAE Order Granting Judgment on the Pleading (D. Ha. June 12, 1997) — was quite recently *reversed* by the United States Ninth Circuit Court of Appeals. *Matsuura v. E.I. DuPont de Nemours & Co.*, 166 F.3d 1006 (9th Cir. 1999). The Ninth Circuit held that under Delaware law DuPont-drafted releases substantively identical to the releases involved here do *not* bar defrauded growers fraud in the inducement claims against DuPont.

DuPont has never identified any Delaware law upon which it relies other than the *Matsuura* decision,[8] so it may be that no conflict is even presented. However, insofar as DuPont's purpose in obtaining, and attempting to enforce, its choice-of-law provision was to use Delaware law to avoid liability for its own intentional fraud, we submit that the cited cases disallow enforcement of the provision.

If this Court needs to expand prior Florida law on this point to meet the exact circumstances presented here, we urge the Court to continue to include in Florida's choice-of-law rules the

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[8]DuPont apparently no longer considers *Matsuura* as an accurate depiction of Delaware law.

principle that foreign law will not be applied in Florida to work a result that contravenes Florida public policy.

We further submit that the question posed by the Eleventh Circuit is not truly presented on the facts of these cases. The Eleventh Circuit's question is: "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 fraudulently procured?*" While it is true that the Plaintiffs' complaints did not go through the releases clause by clause, and sentence by sentence, alleging that *each* one was procured by fraud, Plaintiffs allegations are that the entire settlement was procured through fraud so that none of its provisions should be enforced against the Plaintiffs. And, as just discussed, if DuPont's reason for including the choice-of-law provision was a belief that Delaware law would protect it from the consequences of its own fraud should Plaintiffs ever discover that fraud, then it cannot fairly be said that the choice-of-law provision was not also procured through fraud. For this reason, the principles of the Restatement of the Law Second, Conflict of Laws §201, even if adopted by this Court, would dictate no different result here because the choice-of-law provision itself was procured by fraud.[9]

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[9]Section 201 of the Restatement provides: "The effect of misrepresentation, undue influence and mistake upon a contract is determined by the law selected by the application of the rules of §§187-188." The Comment to §188 states: "A choice-of-law provision, like any other contractual provision, will not be given effect if the consent of one of the parties to its inclusion in the

In sum, we respectfully submit that the Eleventh Circuit's first certified question is not presented in this case because the Plaintiffs are claiming that all of the provisions of the settlement were obtained through fraud, including any choice-of-law provision intended to protect DuPont from the consequences of its own fraud.

If the question is to be answered, we respectfully submit that Florida has no reason to interpret its choice-of-law rules, or create new ones, with an intended result of helping a Delaware corporation to escape liability for perpetrating frauds on Florida citizens. The answer to the first question posed by the Eleventh Circuit should be that a choice-of-law provision will not be enforced to apply foreign law that contravenes Florida public policy by divesting Florida citizens of recourse for frauds worked upon them.

CERTIFIED QUESTION II

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

Although the Plaintiff nurseries agree with the Eleventh Circuit Court of Appeals that there is no case in Florida which is precisely on all fours in every particular with the instant cases, it is nonetheless clear that under existing Florida law this question must be answered in the negative: the release in

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contract was obtained by improper means, such as by misrepresentation[.]"

settlement agreements does not bar the Plaintiffs' fraud in the inducement claims.

DuPont's position throughout these proceedings has been that the courts and the law should help DuPont to avoid liability for perpetrating fraud on Florida citizens by ruling that the DuPont-drafted settlement documents are an impenetrable defense to any attempts to ask DuPont to answer for its intentional wrongdoing. But fraud is abhorrent to Florida law, and as a matter of public policy Florida will not enforce parties' contractual attempts to exempt themselves from liability for their own fraud. *See Oceanic Villas, supra; Kellums, supra; Mankap, supra; Goyings, supra; Zuckerman, supra.*

This Court's decision in *HTP, Ltd. v. Lineas Aereas Costarricenses*, 685 So. 2d 1238 (Fla. 1996) is illustrative of Florida courts' aversion to fraud. In *HTP*, this Court determined that fraud in the inducement of a settlement agreement is a tort independent of the contract, not barred by any of the economic loss rule concerns that arise in purely contractual litigation. In so holding, this Court quoted with approval the portion of Judge Altenbernd's dissent in *Woodson v. Martin*, 663 So. 2d 1327 (Fla. 2d DCA 1995) which recognized the important societal interest:

> ***[T]he 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, 685 So. 2d at 1240 (*quoting Woodson*, 663 So. 2d at 1330 Altenbernd, J., dissenting).

In keeping with its history of refusing to countenance fraud, Florida law has long provided Florida litigants access to the courts to have their fraud claims determined by a trier of fact — including in those cases where a release is alleged to bar the claims. *See, e.g., Florida East Coast Railway Co. v. Thompson,* 111 So. 525 (Fla. 1927); *Winter Park Telephone Co. v. Strong,* 179 So. 289 (Fla. 1938); *Defigueiredo v. Publix Super Markets, Inc.*, 648 So. 2d 1256 (Fla. 4th DCA 1995); *Estate of Gimbert, et al. v. Lamb,* 601 So. 2d 230 (Fla. 2d DCA 1992); *Buchanan v. Clinton,* 293 So. 2d 120 (Fla. 1st DCA 1974).

In *Florida East Coast Railway,* this Court set forth the legal principle which governs the effect of releases alleged to have been obtained by fraud:

> ***A contract procured through fraud is never binding upon an innocent party thereto. As to him, such contract is voidable; as to the wrongdoer, it is void. If a party to a written release of liability for personal injuries was induced to sign it by false and fraudulent representations,*** either as to the nature or extent of his injuries or as to the contents, import, or legal effect of the release, and he himself innocently and justifiably relied upon such representations to his detriment and was guilty of no negligence in failing to ascertain the true facts, ***he is not bound by such release.***

Florida East Coast Railway, 111 So. at 527.[10] Since a party will not be bound by a fraudulently obtained release, it necessarily follows that the trier of fact must determine whether there was fraud in procuring the release before giving effect to the release terms. If the release *is* found to have been procured by fraud, then the release terms do not bar the plaintiff's damages claims. *See, e.g., Winter Park Telephone, supra* (affirming jury's determination that release was procured by fraud and consequent award of damages).[11]

In short, Florida law in no way supports DuPont's position that a fraudulently procured release should itself shut the courthouse doors to any redress for the fraud. On the contrary, Florida law provides a spectrum of remedies to avoid the effects of fraudulently procured releases. Parties defrauded into

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[10]*See also, e.g., Jacksonville Terminal Co. v. Misak*, 102 So. 2d 295 (Fla. 1958) (binding effect of a release is brought into question by allegations that release was obtained by fraud); *Florida Power & Light Co. v. Horn*, 131 So. 219 (Fla. 1930) (where there is evidence of fraud, the binding effect of a release is a question for the jury); *Braemer Isle Condominium Assoc., Inc. v. Boca Hi, Inc.*, 632 So. 2d 707 (Fla. 4th DCA 1994) (release enforced as written in absence of allegations of fraud, coercion, or undue influence); *Pan-American Life Insurance Co. v. Fuentes*, 258 So. 2d 8 (Fla. 4th DCA 1971) (where there is no allegation of fraud, an unambiguous release will be upheld); *Biscoe v. Evans*, 181 So. 2d 564 (Fla. 1st DCA 1966) (in order to avoid terms of release, plaintiff had to allege release was obtained through fraud).

[11]*See also, e.g., Defigueiredo* and *Buchanan, supra*, reversing summary judgments in favor of defendants since plaintiffs had come forward with facts sufficient to create questions of fact for the jury on whether the releases had been obtained through fraud. If the evidence does *not* establish fraud, on the other hand, then the release *will* be given effect. *Florida East Coast Railway, supra* (reversing the jury's determination that release was procured by fraud based on insufficiency of the evidence).

settling and providing releases are permitted to rescind a settlement altogether, leaving them free to sue on their original claims. *See, e.g., T.D. McCurley v. Auto-Owners Insurance Co.*, 356 So. 2d 68 (Fla. 1st DCA 1978); *Greene v. Kolpac Builders, Inc.*, 549 So. 2d 1150 (Fla. 3d DCA 1989). Parties may also simply sue directly on their original claims and avoid the defense of release on grounds of fraud. *See, e.g., McGill v. Henderson*, 98 So. 2d 791 (Fla. 1957); *Winter Park Telephone, supra; Florida East Coast Railway, supra; Levine v. Levine*, 648 So. 2d 1228 (Fla. 4th DCA 1995); *Defigueiredo, supra; Ford v. Coleman*, 462 So. 2d 834 (Fla. 5th DCA 1984), *rev. denied*, 475 So. 2d 694 (Fla. 1985); *Buchanan, supra*. And, in specific answer to the Eleventh Circuit's question and DuPont's argument to the contrary, parties may sue for damages caused by fraud in the inducement of a release without, of course, being barred by the release. *See, e.g., HTP, supra*[12]; *Estate of Gimbert, et al. v. Lamb*, 601 So. 2d 230 (Fla. 2d DCA 1992); *Iowa National Mutual Insurance Co. v. Worthy*, 447 So. 2d 998 (Fla. 5th DCA 1984).[13]

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[12]The Florida Third District's decision in *HTP*, found at 661 So. 2d 1221 (Fla. 3d DCA 1995), shows that damages were being sought for the fraud. This Court's decision approved the Third District's decision in full.

[13]These Plaintiffs' releases would not bar the fraud claims in any event. The releases of Morningstar Nursery (R5-1-17), Palm Beach Greenery (R4-1-17), and Country Joe's Nursery (R2-12-26) say they are releasing claims the Plaintiffs had "by reason of the use or application of DuPont Benomyl products," and the Foliage Forest (R1-1-18) and Castleton Gardens (R3-1-18) releases have specific whereas clauses regarding their claims related to the "purchase or use of Benlate fungicide", like those in *Matsuura, supra*. Neither set of releases by its terms releases fraud in the inducement claims.

DuPont has taken the position throughout these proceedings that a party who does not seek rescission of a fraudulently induced release has elected to stand on the release. And, under DuPont's reasoning, if the release is thus 'left to stand', it bars any suit for damages for the fraud. Florida law, however, is directly contrary to DuPont's position. 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 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).

And, Florida is in line with the majority view in allowing parties who have been defrauded into settlements an election of remedies. *See, e.g., Matsuura, supra.* The *Matsuura* court compared the majority and minority lines of cases, and pointed out that the latter — which limit defrauded tort plaintiffs to the remedy of rescission — are based on flawed reasoning:

> We agree with *DiSabatino*[14] 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 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 defrauded tort plaintiffs an election of remedies.*** *See Slotkin v. Citizens Casualty Co.*, 614 F.2d 301, 312-14 (2d Cir. 1979); *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, 115 (1913).

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[14]*DiSabatino v. United States Fidelity & Guarantee Co.*, 635 F. Supp. 350 (Dist. Del. 1986).

> *& Guarantee Corp. Ltd., of London,* 153 Wis. 196, 140 N.W. 112, 115 (1913).

Matsuura, supra, 166 F.3d at 1008, n. 4. As another state supreme court has recently noted in following the majority rule, i.e., that the election of remedies doctrine applies to settlement agreements permitting a defrauded party to elect between rescission and an independent action for damages:

> We find the majority view persuasive. First, a rule which restricts plaintiffs to a claim for rescission may result in prejudice due to the delay that may result in pursuing the claims. *See Matsuura,* ___ F.3d ___ n. 4 (citing *DiSabatino v. United States Fidelity & Guarantee Co.*, 635 F. Supp. 350, 354 (D. Del. 1996)). Second, damages for fraud are conceptually different from the underlying tort claim and are capable of calculation. *Id.* Third, absent an action for fraud, many plaintiffs who have been fraudulently induced to enter into a settlement agreement would have no other practical remedy. *Id.* Finally, a rule which limits the remedy to rescission may do little to discourage fraud. *Id.*

Phipps v. Winneshiek County, 1999 WL 249732 (Iowa 1999). *See also, e.g., Slotkin v. Citizens Casualty Co.*, 614 F. 2d 301, 312-314 (2d Cir. 1979), *cert. denied,* 449 U.S. 981 (1980); *DiSabatino v. United States Fidelity & Guarantee Co.*, 635 F. Supp. 350 (D. Del. 1986); *Bilotti v. Accurate Forming Corp.*, 188 A.2d 24, 30-35 (N.J. 1963).

Florida law is in keeping with the well-reasoned majority view, and under that law the answer to the second question certified by the Eleventh Circuit is *no*, the release in these settlement agreements does not bar Plaintiffs' fraudulent inducement claims.

CONCLUSION

Based on the foregoing facts and authorities, Plaintiffs/Appellants Foliate Forest, Inc., Country Joe's Nursery, Inc., Castleton Gardens, Inc., Palm Beach Greenery, Inc., and Morningstar Nursery, Inc. hereby respectfully submit that the first question certified to this Court by the United States Eleventh 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,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the Initial Brief of Appellants was mailed this 10th day of June, 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.

Elizabeth Russo

Appendix

PUBLISH

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 97-5696

D.C. Docket No. 97-59-CV-JAL

FOLIAGE FOREST, INC., a Florida Corporation,

Plaintiff-Appellant,

versus

E.I. DUPONT DE NEMOURS AND COMPANY, a Delaware Corporation d.b.a Dupont, CRAWFORD & COMPANY, a Georgia Corporation,

Defendants-Appellees.

No. 97-5697

D.C. Docket No. 97-60-CV-JAL

COUNTRY JOE'S NURSERY, INC.,

Plaintiff-Appellant,

versus

E.I. DUPONT DE NEMOURS AND COMPANY, a Delaware Corporation d.b.a. Dupont, CRAWFORD & COMPANY,

Defendants-Appellees.

No. 97-5698

D.C. Docket No. 97-61-CV-JAL

CASTLETON GARDENS, INC., a Florida Corporation,

Plaintiff-Appellant,

versus

E.I. DUPONT DE NEMOURS AND COMPANY, a Delaware Corporation d.b.a. Dupont, CRAWFORD & COMPANY, a Georgia Corporation,

Defendants-Appellees.

No. 97-5699

D.C. Docket No. 97-64-CV-JAL

PALM BEACH GREENERY, INC., a Florida Corporation,

Plaintiff-Appellant,

versus

E.I. DUPONT DE NEMOURS AND COMPANY, a Delaware Corporation d.b.a. Dupont, CRAWFORD & COMPANY, a Georgia Corporation,

Defendants-Appellees.

No. 97-5700

D.C. Docket No. 97-65-CV-JAL

MORNINGSTAR NURSERY, INC., a
Florida Corporation,

Plaintiff-Appellant,

versus

E.I. DUPONT DE NEMOURS AND COMPANY,
a Delaware Corporation d.b.a. Dupont, CRAWFORD
& COMPANY, Georgia Corporation,

Defendants-Appellees.

Appeals from the United States District Court
for the Southern District of Florida

(April 19, 1999)

Before HATCHETT, Chief Judge, BARKETT, Circuit Judge, and RONEY, Senior Circuit Judge.

PER CURIAM:

These consolidated cases present similar issues that a panel of this court confronted in Mazzoni Farms, Inc. v. E.I. Dupont De Nemours & Co., 166 F.3d 1162 (11th Cir. 1999). The principal issue is whether a release in a settlement agreement bars a claim that appellee E.I. Dupont De Nemours (Dupont) fraudulently induced appellants to settle. As an initial matter,

however, we must decide whether a choice-of-law provision in the settlement agreements that appellants Foliage Forest and Castleton Gardens executed applies to the fraudulent inducement claim. The Mazzoni Farms court certified questions to the Florida Supreme Court regarding the choice-of-law provision and, if the Florida Supreme Court decided that Florida law applies, it also certified the merits question. We consolidate these cases with Mazzoni Farms and certify questions to the Florida Supreme Court. As we have nothing to add to the discussion presented in Mazzoni Farms, we provide a brief set of facts concerning the parties in the case at bar.

FACTS

Appellants are commercial plant nurseries who alleged that Dupont's Benlate fungicide damaged their plants. Foliage Forest and Castleton Gardens entered into a settlement agreement in May 1994, which provided:

> 1. In consideration of Du Pont's payment of the amount set forth . . . Grower hereby releases Du Pont, et al., from any and all causes of action, claims, demands, actions, obligations, damages, or liability, whether known or unknown, that Grower ever had, now has, or may hereafter have against Du Pont, et al., by reason of any fact of matter whatsoever, existing, or occurring at any time up to and including the date this Release is signed, including the claim presently being asserted.
>
> . . . .
>
> 3. Grower covenants that Grower will not commence, prosecute, or permit to be commenced or prosecuted against Du Pont, et al., any action or other proceedings based upon or in any way related to any causes of action, claims, demands, actions, obligations, damages, or liabilities which are the subject of this Release.
>
> . . . .
>
> 14. This release shall be governed and construed in accordance with the laws of the State of Delaware without giving effect to the conflict of laws or choice of law provisions thereof.

Appellants Country Joe's Nursery, Palm Beach Greenery and Morningstar Nursery, however, executed settlement agreements that did not contain the Delaware choice-of-law provision that stated:

> Undersigned . . . does acknowledge and agree . . . to release, acquit and forever discharge E.I. Du Pont de NeMours and Company (Du Pont) . . . from any and all claims, actions, causes of action, including consequential damages, demands, rights, damages, costs, losses, and any other liability or expense of whatsoever kind, which the undersigned or said firm has or may or shall have by reason of the use of or application of DU PONT BENOMYL products . . . .

After entering into this settlement agreement, appellants learned through similar lawsuits involving Dupont and Benlate that Dupont allegedly knew that Benlate had the propensity to destroy plants before the parties executed the settlement agreement. Appellants thereafter sued Dupont in Florida state court, alleging that Dupont fraudulently induced them to settle and claiming that they relied upon Dupont's representations "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 was experiencing" in the settlement of their claims. Dupont removed these cases to the federal district court on the basis of diversity of citizenship and then moved for dismissal.

The district court, relying upon Florida law, dismissed appellants claims, stating that the releases in the settlement agreement barred appellants' claims. The district court held that Florida law requires a party bringing a fraudulent inducement claim to choose between an equitable or legal remedy. The district court further held that because appellants elected the legal remedy for damages instead of the equitable remedy of recission (which would have required

appellants to tender back the settlement proceeds), appellants ratified the settlement agreement which released all claims against Dupont and therefore barred the action. Appellants sought leave to amend their complaints to include a claim for recission, and the district court ruled that their right of appeal had terminated pursuant to Federal Rule of Civil Procedure 15(a) because the district court's dismissal was with prejudice.

CERTIFICATION FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT TO THE SUPREME COURT OF FLORIDA, PURSUANT TO SECTION 25.031, FLORIDA STATUTES, AND RULE 9.150, FLORIDA RULES OF APPELLATE PROCEDURE.

TO THE SUPREME COURT OF FLORIDA AND THE HONORABLE JUSTICES THEREOF:

The United States Court of Appeals for the Eleventh Circuit concludes that these cases involve determinative questions of state law for which no clear, controlling precedents in the decisions of the Supreme Court of Florida appear to exist. A panel of this court in Mazzoni Farms, Inc. v. E.I. Dupont Denemours & Co., 166 F.3d 1162 (11th Cir. 1999), confronted these issues and certified questions to the Supreme Court of Florida. This court therefore consolidates these cases with Mazzoni Farms and certifies these questions to the Supreme Court of Florida for instructions based upon the facts of these cases.

Style of the cases: (1) Foliage Forest, Inc., a Florida corporation, Plaintiff/Appellant, v. E.I .Dupont De Nemours & Co., a Delaware corporation, d.b.a. Dupont, and Crawford & Co., a Georgia corporation, Defendants/Appellees, Case No. 97-5696; (2) Country Joe's Nursery, Inc., a Florida corporation, Plaintiff/Appellant, v. E.I. Dupont De Nemours & Co., a Delaware corporation, d.b.a. Dupont, and Crawford & Co., Defendants/Appellees, No. 97-5697; Castleton

Gardens, Inc., a Florida corporation, Plaintiff/Appellant, v. E.I. Dupont De Nemours & Co., a Delaware corporation, d.b.a. Dupont, and Crawford & Co., Defendants/Appellees, No. 97-5698; (3); (4) Palm Beach Greenery, Inc., a Florida corporation, Plaintiff/Appellant, v. E.I. Dupont De Nemours & Co., a Delaware corporation, d.b.a. Dupont, and Crawford & Co., Defendants/Appellees, No. 97-5699; and (5) Morningstar Nursery, Inc., a Florida corporation, Plaintiff/Appellant, v. E.I. Dupont De Nemours & Co., a Delaware corporation, d.b.a. Dupont, and Crawford & Co., Defendants/Appellees, No. 97-5700.

Movant: Dupont is the movant for purposes of the choice-of-law question, plaintiffs/appellants are the movants for purposes of the substantive question. See Fla. R. App. P. 9.150(d).

Statement of Facts: We incorporate our statement of facts.

Questions to be Certified to the Supreme Court of Florida:

(1) 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 FRAUDULENTLY PROCURED?

(2) UNDER FLORIDA LAW, DOES THE RELEASE IN THESE SETTLEMENT AGREEMENTS BAR PLAINTIFFS' FRAUDULENT INDUCEMENT CLAIMS?

As usual, our sterile phrasing of the issues need not preclude the Florida Supreme Court from inquiring into the specifics of these cases. See Dorse v. Armstrong World Ind., Inc., 798 F.2d 1372, 1377-78 (11th Cir. 1986). We direct the clerk to send the entire record of these cases with this certificate.

QUESTIONS CERTIFIED.