

FRAUDULENT MISREPRESENTATION

By Ted Babbitt

A recent Supreme Court opinion explains what is and is not required to sustain a cause of action for fraudulent misrepresentation.

Butler v. Yusem had a long history of appellate review ending with the opinion of Butler v. Yusem, 35 Fla. L. Weekly S493 (2010). The case resulted in two opinions from the Fourth DCA and two from the Supreme Court.

The case arose from a business partnership gone awry which resulted in a suit by Butler claiming fraudulent and negligent misrepresentation. The trial court denied both claims based on what it called “lack of due diligence” on Butler’s part in failing to follow up on certain contract provisions as well as “ask the right questions” to a bank about his partner’s solvency.

The Fourth DCA concluded that the trial court had misapplied the term “lack of due diligence” for what was really “justifiable reliance” and on the basis of the tipsy coachman doctrine affirmed the trial court’s denial of relief on both fraudulent and negligent misrepresentation.

The tipsy coachman principle permits an appellate court to affirm a trial court’s inappropriate reliance on a judicial theory so long as the record reflects ample evidence to support the finding on an alternate principle under the theory that the right result was reached for the wrong reasons.

A unanimous Supreme Court reversed the Fourth DCA with instructions to review each cause of action separately to determine if justifiable reliance really applied to each count.

The Fourth DCA, upon remand, did not obtain additional briefing and merely entered a revised opinion stating it had indeed applied the tipsy coachman principle to each cause of action and again affirmed the trial court.

Upon review of the Fourth DCA's second opinion, the Supreme Court reversed, explaining that the Fourth DCA had misconstrued its mandate by not analyzing whether justifiable reliance applied to either fraudulent or negligent misrepresentation.

The Supreme Court held that justifiable reliance is not an element of fraudulent misrepresentation. At S494, the Court concluded:

Justifiable reliance is not a necessary element of fraudulent misrepresentation. As we have stated, there are four elements of fraudulent misrepresentation: "(1) a false statement concerning a material fact; (2) the representor's knowledge that the representation is false; (3) an intention that the representation induce another to act on it; and (4) consequent injury by the party acting in *reliance* on the representation." *Johnson*, 480 So. 2d at 627 (emphasis added). This is consistent with our prior opinion in *Besett*, 389 So. 2d at 998, holding that in an action involving fraudulent misrepresentation, the buyers did not need to allege that they had investigated the truth of the misrepresentations because for this claim, "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." As we have explained, "the policy behind our holding in *Besett* is to prohibit one who purposely uses false information to induce another into a transaction from profiting from such wrongdoing." *Gilchrist Timber Co. v.*

ITT Rayonier, Inc., 696 So. 2d 334, 336 – 37 (Fla. 1997).

Thus in the case of fraudulent misrepresentation the level of sophistication of the plaintiff is irrelevant as well as any purported negligence in failing to investigate the representations. Unless there exists actual knowledge on the part of the recipient of the lack of truth of the representations, no amount of negligence on the recipient's part is relevant.

The same is not true with regard to the theory of negligent misrepresentation. At S494, the Court holds:

The same reasoning does not apply, however, when a party transmits false information but is not aware of the falsehood, giving rise to a negligent misrepresentation claim. *See Gilchrist*, 696 So. 2d at 337. As to negligent misrepresentation claims, although justifiable reliance on the misrepresentation is required as an element of the claim, justifiable reliance on a representation is not the same thing as failure to exercise due diligence. One does not necessarily translate into the other. In fact, in *Gilchrist*, the Court held that principles of comparative negligence would apply to negligent misrepresentation claims. *Id.* at 339. The Court recognized that while a recipient of information will not have to investigate every piece of information furnished, he or she is responsible for "investigating information that a reasonable person in the position of the recipient would be expected to investigate." *Id.* Thus, a recipient of an erroneous representation cannot "hide behind the unintentional negligence of the misrepresenter when the recipient is likewise negligent in failing to discover the error." *Id.*

This opinion separates the distinction between fraudulent and negligent misrepresentation and establishes that justifiable reliance is not a necessary element of the former but that comparative negligence applies to the latter.

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