IN THE SUPREME COURT
OF THE STATE OF FLORIDA

ROBERT C. MOSHER and
MARGARET M. MOSHER,

Appellants,

vs. Appeal No. 85,745

SPEEDSTAR DIVISION OF AMCA
INTERNATIONAL, INC. previously
known as SPEEDSTAR DIVISION OF
KOEHRING COMPANY, and
KOEHRING COMPANY, a Delaware
corporation,

Appellees.
_____/

CERTIFIED QUESTIONS FROM THE UNITED STATES COURT OF APPEALS
IN AND FOR THE ELEVENTH CIRCUIT
MOSHER V. SPEEDSTAR DIVISION OF AMCA INTERNATIONAL, INC.
CASE NO: 93-3555

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APPELLEES' ANSWER BRIEF

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RICHARD R. GARLAND
DICKINSON & GIBBONS, P.A.
Post Office Box 3979
Sarasota, Florida 34230
(813) 366-4680
Attorneys for Appellees

TABLE OF CONTENTS

TABLE OF CITATIONS

Federal Cases:

Florida Statutes:

PREFACE

For purposes of this brief, appellants, ROBERT C. MOSHER and MARGARET M. MOSHER, will be referred to as plaintiff or by name. The appellee, SPEEDSTAR, will be referred to as defendant or by name.

References to the record on appeal will refer to volume, document and page numbers, respectively, as in the record forwarded by the Eleventh Circuit, and will be in the form of (R1-1-1).

STATEMENT OF THE CASE

Speedstar accepts the Statement of the Case submitted by Mosher.

STATEMENT OF THE FACTS

In clarification and supplementation of Plaintiffs' statement of facts, Speedstar offers its separate statement, which includes the undisputed history of the Florida court's interpretation of the statute of repose.

The relevant facts are undisputed: The product at issue was delivered to its original purchaser in January 1973. (R3-89-Exhibit C). Robert Mosher was injured on July 9, 1984. (R1-1-1). The statute of repose expired in January, 1985. Mosher filed suit on June 17, 1988. (R1-1-1).

From its enactment in 1975 to its repeal in 1986, and even thereafter, the statute of repose generated numerous conflicting opinions dealing with its application. Until this Court's decision in Firestone Tire & Rubber Co. v. Acosta, 612 So. 2d 1361 (Fla. 1992), the statute's application was often questionable. Acosta clearly defined the application of the statute of repose and is dispositive of the certified questions before this Court.

As enacted in 1975, the statute of repose barred products liability claims that were instituted more than twelve years from the date of the product's delivery to its original purchaser. This bar applied regardless of when the plaintiff's injury actually occurred. Thus, the statute could operate to extinguish a cause of

action before it ever arose in situations where a potential plaintiff was injured after the expiration of the twelve-year period. See Lamb v. Volkswagenwerk Aktiengesellschaft, 631 F. Supp. 1144 (S.D. Fla. 1986), affirmed, Eddings v. Volkswagenwerk, 835 F.2d 1369 (11th Cir.), cert. denied, 488 U.S. 822 (1988).

However, this blanket application changed temporarily when, in 1984, the Florida Supreme Court issued a one-page opinion in Battilla v. Allis Chalmers Mfg. Co., 392 So. 2d 874 (Fla. 1980), that declared the statute unconstitutional "as applied to this case." The factual basis for this "as applied" holding can be determined by a review of the supporting citations in Battilla to earlier Florida cases. One of these cases was a Florida Supreme Court decision, Overland Construction Co. v. Sirmons, 369 So. 2d 572 (Fla. 1979), that disapproved of applying a limitations statute to cases where the cause of action did not arise until after the limitations period had already expired.

Battilla also cited to another Florida Supreme Court holding, Purk v. Federal Press Co., 387 So. 2d 354, 357 (Fla. 1980). In Purk, this Court held that the statute of repose was correctly applied because it did not abolish the plaintiff's cause of action before it arose, but merely shortened the time in which suit could be brought (emphasis added). Thus, Battilla's "as applied" holding that the statute was unconstitutional applied only to situations where, as in Sirmons, the statute of repose would have extinguished a plaintiff's cause of action before it accrued. See Pullum v. Cincinnati, Inc., 476 So. 2d 657, 659 (Fla. 1985); Eddings v. Volkswagenwerk, 835 F.2d 1369, 1374 (11th Cir.), cert. denied, 488

U.S. 822 (1988). The statute remained in full force and effect in situations where, like Purk, it merely shortened the time in which a plaintiff could file suit. Eddings, at 1374; Frazier v. Baker Material Handling Corp., 559 So. 2d 1091, 1093 (Fla. 1990) (McDonald, J., dissenting). Battilla remained in effect until 1985.

In 1985, this Court receded from Battilla in Pullum v. Cincinnati, Inc., 476 So. 2d 657 (Fla. 1985). The plaintiff in Pullum claimed that the holding in Battilla violated the equal protection clause by arbitrarily discriminating in favor of plaintiffs who were injured after the twelve-year period. Pullum argued that a plaintiff whose cause of action accrued after the repose period expired could bring suit under Battilla, the only time constraint being the normal four-year tort statute of limitations; however, the statute barred his claim because he was injured during the repose period but filed suit (like Mosher) after the twelve years had expired, albeit within four years from the date of injury. Thus, Pullum contended that the statute, as applied under Battilla, protected an arbitrary and accidentally chosen group of plaintiffs, namely, those whose causes of action accrued after the repose period lapsed. Pullum, at 659.

The Florida Supreme Court answered Pullum's challenge by receding from its holding in Battilla. By removing the distinction between classes of plaintiffs altogether, the Court re-affirmed that the statute also applied to claims that accrued after the twelve-year period expired. Pullum, at 660.

The state legislature repealed the statute of repose in 1986. After the repeal, this Court ruled that causes of action previously

barred under the statute could not be "resurrected" due to the statute's repeal. Melendez v. Dreis & Krump Mfg. Co., 515 So. 2d 735, 736 (Fla. 1987). The plaintiff in Melendez had attempted to bring suit during the time Battilla was in effect, for a cause of action that accrued after the repose period lapsed. The plaintiff claimed that the Pullum decision should not apply retrospectively to bar his claim, and that he should be able to proceed under the Battilla holding. This Court rejected his argument, stating that the statute still applied to claims arising after the Battilla decision but before the Pullum decision: Pullum therefore barred the plaintiff's claim.

Based upon the holdings in Pullum and Melendez, Speedstar first moved for summary judgment in September 1989. In response, Mosher filed the affidavit of his attorney, Donald Pervis. This affidavit stated that Mosher originally contacted him about the accident in November, 1984, before the repose period expired, but that he (Pervis) delayed filing suit until 1988. The affidavit states in a conclusory fashion that the decision to delay filing suit from 1984 to 1988 was made in detrimental reliance upon the Battilla and Ellison[1] decisions, which had found the statute of repose unconstitutional as applied. Thus, the affidavit states, Pervis believed the only applicable time constraint was Florida's four-year statute of limitations.

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[1] Ellison v. Northwest Engineering Co., 521 F. Supp. 199 (S.D. Fla. 1981), was a diversity case in which the court applied controlling Florida law, which at the time was Battilla.

Pervis further stated in his affidavit that he had advised Mr. Mosher accordingly and that Mosher relied on his assurances about the time restraints; however, Mosher denied under oath that he had any knowledge of a limitations period. (R2-54-Deposition of Robert Mosher). The Pervis affidavit does not discuss why he believed the limited constitutional findings in Battilla and Ellison applied to the very different facts of Mosher's case, nor does it address the patent illogic of relying on a decision for three years after it had been overruled.

The Pervis affidavit tracked generally the then-recent holding of Frazier v. Baker Material Handling Corp., 559 So. 2d 1091 (Fla. 1990). A four-three decision, Frazier recognized a limited "reliance" exception to application of the statute of repose. Frazier stated generally that the statute would not apply where a plaintiff purposefully did not file his claim within the twelve-year deadline based upon a belief that the deadline did not apply per the holding in Battilla. This exception to application of the statute of repose purportedly stemmed from the 1944 holding in Florida Forest & Park Service v. Strickland, 154 Fla. 472, 18 So. 2d 251 (1944).

In Strickland, this Court addressed a workers' compensation plaintiff who, in accordance with the law in effect at the time of his claim, appealed an administrative decision determining benefits to circuit court. He brought the appeal in an effort to enforce his contractual right to compensation. While his claim was pending on appeal, the supreme court issued a decision requiring other procedures to be followed before a claimant could appeal to circuit

court. If applied retrospectively, the decision would have cut off any avenue of relief for the plaintiff in Strickland, since he had not followed the newly enacted procedures and the time for doing so had long since expired.

In ruling that the new decision would not apply retrospectively, the Court in Strickland stated that where a party acquires and relies upon a contractual or property right under a statute, a decision that overrules the construction of the statute operates prospectively only. The Frazier court cited Strickland favorably in extending this "reliance" doctrine. Frazier, at 1093. The majority in Frazier, however, failed to note that Battilla had not invalidated the statute of repose for all purposes, and could not therefore have been relied on by a plaintiff (such as Mosher) who was injured during the twelve-year period. Frazier, at 1093 (McDonald, J. dissenting); see also, Pullum v. Cincinnati, 476 So. 2d 657, 659 (Fla. 1985) (Battilla applied to instances where the statute of repose barred a right of action before it ever existed).[2] Based on Frazier, the trial court initially denied Speedstar's motion for summary judgment. At a subsequent trial, the jury returned a verdict for Speedstar and Mosher appealed to the Eleventh Circuit.

The factual anomaly in Frazier appears to have been corrected in Firestone Tire & Rubber Co. v. Acosta, 612 So. 2d 1361, 1364

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[2] The Eleventh Circuit Court of Appeals had previously recognized that Battilla did not invalidate the statute for all purposes, and that it continued to bar claims factually distinguishable from Battilla. Eddings v. Volkswagenwerk, 835 F.2d 1369 (11th Cir.), cert. denied, 488 U.S. 822 (1988)

(Fla. 1992), where three of the majority justices in Frazier expressly acknowledged in their dissent that Battilla had declared the statute unconstitutional only "as applied to instances where the cause of action had not accrued until after the 12-year repose period had lapsed." (footnote omitted). Acosta was decided while Mosher's case was on appeal to the Eleventh Circuit Court of Appeals, which ultimately reversed the case due to faulty jury instructions. Mosher v. Speedstar Division of AMCA International, 979 F.2d 823 (11th Cir. 1992).

The primary focus of Acosta was the Court's determination that the statute of repose gave manufacturers a vested right not to be sued once the twelve-year repose period expired, as long as the period had expired (as in this case) before the 1986 repeal.

The plaintiff in Acosta attempted to bring suit for causes of action that accrued after the repose period expired and after the statute's 1986 repeal. In confirming that the plaintiff's claim was barred by the statute of repose, the Florida Supreme Court emphasized that the repose period at issue had expired before the statute's repeal. Once the time period had completely run, the Court ruled that the manufacturer of the product possessed a vested right not to be sued. Acosta, at 1364. Thus, under Acosta, the only relevant inquiry for determining whether the vested right exists is whether the twelve-year period expired before the statute's 1986 repeal.

Based on the Acosta decision, Speedstar once again moved for summary judgment on the post-appeal remand. Mosher's counsel acknowledged that on its face, the Acosta decision squarely

precluded Mosher's action. (R1-99-28, 29). Nonetheless, counsel argued that the Court should not enter summary judgment based upon the "reliance" exception. At oral argument, counsel for Mosher contended that whether reliance actually occurred was a disputed issue of fact that should be presented to the jury (presumably with Mr. Pervis becoming a witness in his own case and testifying as to how precisely he "relied"). (R1-99-31 through 33). Speedstar countered by stating that Acosta moots any consideration of reliance, and that in any event, the Pervis affidavit did not establish reliance as a matter of law. (R1-99-40 through 42).

After considering the arguments of counsel, the Honorable Franklin T. Dupree entered a nine-page opinion, detailing the history of Florida law on the statute of repose, and finally concluding that Florida law did bar Mosher's claim. (R3-95-1 through 9).

ISSUES ON APPEAL

The issues certified by the Eleventh Circuit Court of Appeals (Mosher v. Speedstar Division of AMCA International, 52 F.3d 913 (1995)) are as follows:

I.

AFTER THE FLORIDA SUPREME COURT'S DECISION IN FIRESTONE TIRE & RUBBER CO. v. ACOSTA, 612 So. 2d 1361 (Fla. 1992), DOES THE "RELIANCE EXCEPTION" RECOGNIZED IN FRAZIER v. BAKER MATERIAL HANDLING, INC., 559 So. 2d 1091 (Fla. 1990), STILL OPERATE TO PRESERVE PRODUCTS LIABILITY CLAIMS THAT ACCRUED DURING THE STATUTE OF REPOSE'S PERIOD OF UNCONSTITUTIONALITY?

II.

IF THE "RELIANCE EXCEPTION" IS STILL VIABLE, COULD MOSHER HAVE JUSTIFIABLY RELIED ON THE FLORIDA SUPREME COURT'S DECISION IN BATTILLA v. ALLIS CHALMERS MFG. CO., 392 So. 2d 874 (Fla. 1980)?

SUMMARY OF ARGUMENT

The answer to both certified questions is "No."

As to the first question, this Court's decision in Acosta moots any consideration of the tenuous "reliance" exception through its recognition that the former statute of repose conferred a vested right upon manufacturers. This vested right absolutely ensures that manufacturers may not be sued in products liability once the repose period expires. By definition, it cannot be subject to an "exception." As the undisputed facts show, the twelve-year repose period in this case lapsed in January, 1985. Because this date occurred before the 1986 repeal of the statute of repose, Acosta mandates dismissal of the present case and the plaintiff cannot avoid this result by claiming detrimental reliance. Because Acosta moots the "reliance" exception in Frazier, the answer to the first certified question is "No."

As to the second question, it is clear that even if Frazier were good law today, it would not save Mosher's cause of action. That decision, which was an ill-conceived extension of the Strickland doctrine, cannot benefit Mosher because he could not have relied upon the Battilla decision as a matter of law for several reasons. First, Mosher's counsel does not attempt in his affidavit to explain his "reliance" on a decision that had no factual application to this case. Contrary to Mosher's assertion, the Battilla court did not hold the statute of repose facially unconstitutional in its entirety, but limited its holding to instances where the statute extinguished a plaintiff's cause of

action before it ever accrued, not to situations such as the present case, where the plaintiff was injured before the repose period expired. Moreover, attorney Pervis fails to explain, or even mention, why he presumably relied on Battilla until 1988, three years after it had been overruled. Finally, Mosher himself contradicted the affidavit by stating under oath that he had no knowledge of any limitations period. Mosher contends that this conflict in sworn testimony between him and his attorney should be resolved by a jury. (R1-99-31 through 33). However, a party cannot self-create issues of fact to defeat a summary judgment. Ellison v. Anderson, 74 So. 2d 680 (Fla. 1954). Therefore, the answer to the second certified question is clearly "No."

ARGUMENT

I.

The Acosta decision moots any consideration of detrimental reliance.

In discussing the application of Florida law to the present case, only four dates are relevant: 1) The product at issue was delivered to its original purchaser in January, 1973 (R1-28-Affidavit of Guest); 2) Mosher sustained his injury on July 9, 1984 (R1-1-1); 3) the statute of repose period expired in January, 1985 (§ 95.031, Fla. Stat. (1975)); and 4) Mosher filed suit on June 17, 1988. (R1-1-1). Since the repose period expired prior to Mosher's filing suit, the statute bars his claim.

This statute provided that certain time limitations applied to products liability claims:

> Actions for products liability...must be begun within the period prescribed in this chapter...but in any event within 12 years after the date of delivery of the completed product to its original purchaser...regardless of the date the defect in the product...was or should have been discovered.

This section was in effect from 1975 until its repeal in 1986. See § 95.031(2), Fla. Stat. (1986 Supp.). This Court has held that the repeal has no effect on causes of action that expired under the statute's terms before the 1986 repeal. Thus, the repeal did not "revive" claims that had already expired. Melendez v. Dreis & Krump Mfg. Co., 515 So. 2d 735 (Fla. 1987). Melendez also held that the statute still operates to bar claims (such as Mosher's) arising after Battilla but before Pullum. More recently, this Court

stated that the statute in fact conferred a vested right upon manufacturers not to be sued once the repose period expired. Firestone Tire & Rubber Co. v. Acosta, 612 So. 2d 1361, 1364 (Fla. 1992).

The Court's choice of the phrase "vested right" cannot be underestimated. In choosing this particular verbiage, the Court settled once and for all any disputes as to how and when the statute of repose applies. The answer merely requires the court to determine the date the repose period expired: if the expiration occurred before the 1986 repeal, the right of the manufacturer vested, thereby barring any claim for products liability. Thus, since Speedstar's right under the statute vested in 1985, neither the 1986 repeal nor the Frazier decision divested it of that right. See Division of Workers' Compensation v. Brevda, 420 So. 2d 887, 891 (Fla. 1st DCA 1982) (vested right is fixed and not subject to change).

This finding of a vested right moots any consideration of the Frazier "reliance" exception. The Frazier decision, which temporarily extended a doctrine previously reserved for contractual and statutory rights, is no longer valid in light of the Acosta decision, which declares that manufacturers possess a vested right. Nowhere in Acosta does the Court make allowances or exceptions for "reliance," and the Court's explicit instruction on the correct application of the statute omits any consideration of detrimental reliance. If indeed a vested right truly exists, it cannot be subject to a catch-all exception that would eviscerate the right for all practical purposes. As stated in Wiley v. Roof, 641 So. 2d

66 (Fla. 1994), an immunity from suit that arises by operation of a statute must be given full effect. This Court cited favorably to Acosta in Wiley and upheld the application of a statute of limitations where the limitations period had expired before suit was filed, just as in the present case.

Moreover, while Mosher portrays the Frazier decision as applicable because it encompasses a "well-recognized" judicial doctrine, in fact the doctrine of detrimental reliance in cases such as Strickland dealt with plaintiffs who had acquired statutory contractual or property rights that were adversely affected by subsequent court opinions interpreting the statute. Strickland, at 253. They did not involve plaintiffs such as Mosher who did not acquire a property or contract right, but merely wished to bring a tort suit. It is well settled that a person has no general "property right" by virtue of a particular court decision, such as Battilla. Eddings v. Volkswagenwerk, 835 F.2d 1369, 1374 (11th Cir.), cert. denied, 488 U.S. 822 (1988) (a person has no property interest in any rule of common law).[3] Actually, it was Speedstar, rather than Mosher, who acquired a vested property right under the statute of repose. Acosta, at 1364; see also Wiley v. Roof, 641 So. 2d 66, 68 (Fla. 1994).

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[3] Cases cited by the plaintiff such as Florida Elks Children's Hospital v. Stanley, 610 So. 2d 538 (Fla. 5th DCA 1992), and Department of Revenue v. Anderson, 389 So. 2d 1034 (Fla. 1st DCA 1980), likewise dealt with plaintiffs who actually acquired protectible contract and property rights, unlike Mosher.

In any event, even if it is assumed that the Frazier doctrine is still valid despite Acosta, it is clear that Mosher could not have justifiably relied on Battilla.

II.

Even if the Frazier "reliance" doctrine were still valid, it would not preserve Mosher's claim.

Mosher rests his "reliance" argument on the affidavit of Donald Pervis. This affidavit gives a brief chronology of Pervis' representation of the Moshers and discusses the statute of repose as follows:

> I was aware of F.S. 95.031(2) and its content and I was also aware of the cases of Battilla v. Allis Chalmers Mfg. Co. and Ellison v. Northwest Engineering Co. [citations omitted].
>
> I discussed the facts of the case with my clients at that time. They inquired as to how soon the suit would be filed. In reliance on Battilla and Ellison and my understanding and firm belief that the statute of repose was unconstitutional, I advised my clients that we had four years from the date of occurrence (July 9, 1984) in which to file suit....
>
> ...
>
> On numerous occasions prior to the filing of the suit my clients were in verbal communication with me. On many occasions they inquired about the filing of the lawsuit. Each time I assured them in my reliance on Battilla and Ellison. I know they relied upon my advice and assurances to them.

(R1-32-Affidavit of Pervis).

The affidavit does not elaborate upon Mr. Pervis' knowledge of the facts of the Battilla and Ellison cases, nor does it address the patent illogic of continuing this reliance for three years

after this Court overruled Battilla in 1985.[4] Moreover, the affidavit omits any explanation as to how the "as applied" constitutional holding of Battilla could have possibly applied to Mosher's case, or even how Pervis believed it applied.

In fact, Battilla's limited holding had no application to Mosher's claim. An "as applied" finding of unconstitutionality, such as Battilla, does not void a statute for all purposes. See State v. Ecker, 311 So. 2d 104, 110 (Fla. 1975) (while an ordinance might be unconstitutional as applied to certain circumstances, such is insufficient to render it facially unconstitutional); Trushin v. State, 425 So. 2d 1126, 1129-30 (Fla. 1983) (discussing the different standards for evaluating "as applied" constitutional challenges and facial challenges); Antuna v. Dawson, 459 So. 2d 1114, 1117 (Fla. 4th DCA 1984) (statute that was not facially invalid may still be unconstitutional "as applied").

Even if the Court assumes that a Frazier "reliance on Battilla" doctrine still exists, such a doctrine would presuppose that Battilla actually applied to the facts of the case. Without dispute, the "as applied" holding in Battilla did not apply to Mosher's claim because Battilla only invalidated the statute in instances where a plaintiff was injured after the twelve-year period, unlike Mosher. (See Statement of Facts, supra.) Therefore, reliance on Battilla for general purposes was a factual impossibility and, as a matter of law, Mosher cannot use the

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[4] Likewise, since the Ellison case was a 1981 diversity action applying then-existing Florida law, it had no precedential value once Battilla was overruled.

reliance doctrine to avoid the application of the statute of repose. The Pervis affidavit, which contains the unjustified legal conclusion that he "relied" upon Battilla, is likewise wholly insufficient to defeat summary judgment. See, e.g., Freeman v. Equilease Corp., 346 So. 2d 619 (Fla. 3d DCA 1977) (affidavit containing conclusions of law insufficient to defeat summary judgment).

Aside from the affidavit's failure to demonstrate legally justifiable reliance, it also fails to address Pervis' continued inaction in light of this Court's 1985 decision overruling Battilla. The affidavit merely states that Mosher initially contacted Pervis in November, 1984, and that Pervis "relied" upon Battilla and Ellison for nearly four years before filing suit in June, 1988. There is no explanation of why Pervis was unaware of the 1985 Pullum decision, or even the 1987 Melendez decision, which applied Pullum retroactively. There is only the allegation that he relied. Such a bare, illogical assertion does not demonstrate reliance under the rationale of Frazier.[5]

Mosher himself actually refuted reliance. In sworn deposition testimony, Mosher testified that he knew nothing of the statute of repose:

> Q: Okay. Are you familiar with the statute of repose, Mr. Mosher?
>
> A: No, I'm not.

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[5] Mosher erroneously states in his initial brief that Speedstar has never challenged the substance of the Pervis affidavit. In fact, at oral argument, counsel for Speedstar argued that the affidavit was legally and factually insufficient to demonstrate reliance. (R1-99-40 through 42).

Q: Did you know that there was any period of time limitations to file your lawsuit?

At this point in the record, counsel for Mosher objected to the line of questioning. Mosher ultimately responded "No" when asked if he was familiar with the time limitations for filing suit. (R2-54-Deposition of Robert Mosher).

The above testimony directly contradicts the Pervis affidavit. The plaintiff suggests that this factual conflict may be used to defeat summary judgment. However, it is well settled that a party cannot create factual conflicts in order to prevent the entry of summary judgment. E.g., Ellison v. Anderson, 74 So. 2d 680 (Fla. 1954). The fact that Mosher's testimony conflicts with that of his agent does not create a "genuine issue of material fact" because there is no issue of fact at all if the only question to be answered is whether Mosher or his agent have testified correctly. E.g., Barwick v. Celotex Corp., 736 F.2d 946, 960 (4th Cir. 1984).

In light of the facts that 1) Battilla did not factually apply to this case; 2) a person cannot justifiably rely on a case for three years after it has been overruled; and 3) the plaintiff denied any knowledge that a time limitation existed, the second certified question must be answered in the negative.

CONCLUSION

For all the foregoing reasons, Speedstar respectfully requests that this Court answer both certified questions in the negative.

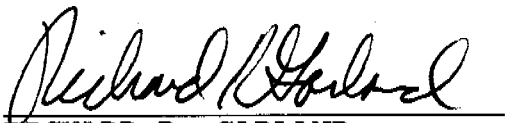
Respectfully submitted,

DICKINSON & GIBBONS, P.A.
1750 Ringling Boulevard
Post Office Box 3979
Sarasota, Florida 34230
(813) 366-4680
Attorneys for Appellees

By: 
RICHARD R. GARLAND
Florida Bar No. 350532

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument has been furnished by mail to: **DONALD E. PERVIS, Esq., 3900 Clark Road, Suite P5, Sarasota, Florida 34233,** this 1st day of September, 1995.

By: 
RICHARD R. GARLAND
Florida Bar No. 350532