IN THE SUPREME COURT OF THE STATE OF FLORIDA

ROBERT C. MOSHER and
MARGARET M. MOSHER,

Appellants,

vs.

CASE NUMBER: 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 11TH CIRCUIT, MOSHER V. SPEEDSTAR DIV. OF AMCA INTERN., INC., CASE NO. 93-3555

BRIEF OF APPELLANTS

Submitted by,
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STATEMENT OF THE CASE

This is a personal injury/loss of consortium case based on principles of products liability, in which the United States Court of Appeal for the 11th Circuit has certified the following two questions to this court:

> (1) 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?
>
> (2) 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)?

Mosher v. Speedstar Div. Of Amca Intl., Inc., 52 F.3d 913 (11th Cir. 1995).

Plaintiff's complaint was originally filed in the United States District court for the Middle District of Florida on June 7, 1988. R. 1. From the earliest stages of the proceedings Appellees urged the claim was time barred. Appellees filed their first motion for summary judgment in that regard on September 29, 1989. R. 26, 26, 28. Appellee argued Appellant's claim was barred under Florida's statute of repose, § 95.031(2), Fla. Stat (1979). Id. The first motion on this issue was denied on December 20, 1989. R. 39. On January 2, 1989, Appellee moved for reconsideration of the December 20, 1989, order (R. 42), and on March 14, 1990, the

court denied that motion. R. 53.

Pretrial conference was held in the lower court on November 30, 1989 (R. 36), on December 7, 1989 pretrial statements were filed (R. 38); a continuance was requested and denied (R. 41, 43, 53); and the matter proceeded to trial on March 16, 1990. R. 75:1. The trial concluded on March 21, 1990. R. 78:101. Trial resulted in a verdict for Appellee. R. 66. Post trial motions were filed and denied. R. 76, 71.

Appellants first appealed to the 11th Circuit Court of appeals on March 21, 1991. R. 72. On December 21, 1992, the Eleventh Circuit Court of Appeal reversed and remanded for a "new trial" in Mosher v. Speedstar Div. of AMCA Intern. Inc., 979 F.2d 823 (11th Cir. 1991).

Subsequent to remand, on September 9, 1993, Appellee filed a second motion for summary judgment (R. 90), asserting the same grounds. R. 91. Appellee's second motion cited this court's then recent opinion of Firestone Tire & Rubber Company v. Acosta, 612 So2d 1361 (Fla. 1992). Appellant filed its response to Appellee's second motion for summary judgment. R. 93. On November 11, 1993, the Honorable F.T. Dupee, Jr., United States District Judge, entered a judgment granting Appellee's motion and dismissing's this action. R. 97. Appellants' filed their second appeal on December 15, 1993 (R. 97) to the 11th Circuit Court of Appeals, and on May 19, 1995, the 11th Circuit issued its opinion cited at Mosher v. Speedstar Div.

Of Amca Intl., Inc., 52 F.3d 913 (11th Cir. 1995).

Because the issues raised in Appellant's second appeal to the 11th Circuit involved substantive matters of Florida law surrounding Florida's statute of repose, § 95.031 (1975), the 11th Circuit has certified the following issues to this Court for resolution:

> (1) 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?
>
> (2) 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)?

STATEMENT OF THE FACTS

Robert C. Mosher, Appellant, was a water well driller by profession. R. 77:13. On July 9, 1984, Mosher was employed by Guest Well Drilling Company, and was engaged in drilling several water wells on the site of the Manatee Junior College South Campus in Sarasota County, Florida. R. 75-77. Mr. Mosher was operating a Model 135 drilling rig manufactured by Speedstar. R. 75. Mr. Mosher was aware of some danger posed by some local power lines, but did not fully check for their

presence as there had been no power lines in the vicinity of the other wells which Mosher had drilled on the campus site. There existed, however, a 7,200 volt distribution cable running almost directly over the drill site where Mr. Mosher was working. When he raised the drill derrick on the Model 135 rig, the rig came into contact with the power line. Mr. Mosher's foot slipped from the rig, he touched the ground and became the primary conductor of 7,200 volts of electricity. Mr. Mosher was seriously injured.

The Moshers filed suit against Speedstar, the rig's manufacturer, in June of 1988, (R. 1) suing under theories of strict products liability and negligent design. Id. Trial was had in the United States District Court for the Middle District of Florida on March 16, 1990. R. 49-54. Appellants' case at trial included arguments that the Model 135 rig was defective and that Appellee was negligent when they constructed the rig with insufficient insulation, inadequate grounding, lack of a proximity warning system, and by failing to place sufficient warning placards at the operator's location to alert operators to the danger of contacting high voltage power lines.

Appellee defended against Appellant's case on grounds that because Mr. Mosher was aware of the hazard posed by the power lines it was his negligence that brought the rig in contact with the high voltage wires, that Mr. Mosher's knowing misuse of the rig made him the sole cause of the accident, and that Mr. Mosher

assumed the risk of the injury because the danger was open and obvious.

The trial resulted in a verdict for Appellee, and Appellants appealed. On appeal Appellants argued that the district court misstated Florida law in instructions to the jury. The Eleventh Circuit Court of Appeal court agreed, reversed and remanded the case for a new trial.

On remand to the District Court Appellee filed a second motion for summary judgment. R. 89. The issues raised in the second motion for summary judgment were the same as in the first motion filed on September 29, 1989, (R. 6-27) with the exception of Appellee's citation to the recent case from this court in Firestone Tire & Rubber Co. v. Acosta, 612 So2d 1361 (Fla. 1992).

Appellee's second motion argued that Appellee's claim was timed barred by reason of Florida's Statute of Repose, § 95.031(2) Fla. Stat. (1985). Appellee argued that Florida's then-statute of repose required product liability claims be brought within twelve years of the date of the product's delivery to the original purchaser. Because the drill rig was delivered to Appellant's employer in January of 1973, and because Appellant's claim was not instituted until June of 1988, fifteen years after the date of delivery, Appellee argued Appellants' claim was time barred.

Appellant argued (R. 93) that the recent opinion of Firestone Tire & Rubber Co. v. Acosta, supra, did not apply to the case at bar because this court in Acosta did

not address the well established exception to the statute of repose rule, i.e., the "Reliance Doctrine" or the "Strickland Doctrine." Further, Appellant argued that this court had never overruled, modified or receded from such exception, and that under the facts of this case Appellant clearly fell within the exception.

On November 11, 1993, the United States District entered its memorandum decision and judgment granting Appellee's second motion for summary judgment ruling Appellants' action was time barred under Florida's statute of repose. R. 95, 96. Appellant filed its second notice of appeal to the 11th Circuit Court of Appeals on December 15, 1993.

Because the issues raised in Appellant's second appeal to the 11th Circuit involved substantive matters of Florida surrounding Florida's statute of repose, § 95.031 (1975), the 11th Circuit has certified the following issues to this Court for resolution:

> (1) 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?
>
> (2) 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 THE ARGUMENT

Appellee moved to dismiss Appellants' complaint in the Federal District Court asserting the claim was untimely under Florida's Statute of Repose. The lower court agreed and dismissed Appellants' case.

The statute of repose sub judice, § 95.031(2), Fla. Stat. (1979), was designed to bar a products liability claim brought more than twelve years after delivery of the product to the original purchaser. This Court, however, held the statute unconstitutional. Then, in an unusual action, the Court changed its mind and reversed itself, holding the same statute constitutional.

As a result of such action a window period was created where the statute of repose was unconstitutional, where claimants relied on such ruling and did not file their claims within the twelve year period, instead expected normal statutory periods of limitation to apply. For this case, a products liability claim, the period of limitation would be four years.

Appellants were among the group of individuals who relied on this court's ruling that held the statute of repose unconstitutional, and who filed their claim within the appropriate period of limitations, but outside the 12 year statute of repose period.

As a result of this Court's reversal of itself and finding the statute constitutional , may claimants themselves apparently barred through no fault of their

own, having simply relied on the first decision of the court, not knowing the court would reverse itself. In order to prevent an obvious injustice the Supreme Court applied to these Appellants a principle referred to as the "reliance doctrine". The reliance doctrine was codified in a 1944 opinion of the Florida Supreme Court creating the following rule:

> Where a statute has received a given construction by a court of supreme jurisdiction and property or contract rights have been acquired under and in accordance with such construction, such rights should not be destroyed by applying a subsequent overruling decision in a retrospective manner.

Florida Forest and Park v. Strickland, 154 Fla. 472, 18 So.2d 251 (1944).

Under this doctrine those who relied on the Court's first opinion were allowed to proceed with their claims. To this writer's knowledge, the reliance doctrine has never been reversed, canceled, receded from, or otherwise modified by this Court. The reliance doctrine is in force and effect when the United States District Court entered its final judgment in this case. Appellants specifically relied on the first opinion, they filed their claim within four years of the date of accident, and they fall under the reliance doctrine, and they timely filed their claim.

ARGUMENT / CERTIFIED QUESTIONS

> (1) 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?
>
> (2) 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)?

Appellant submits that the foregoing certified questions must both be answered in the affirmative. First, the "reliance exception" recognized in Frazier v. Baker Material Handling, Inc., 559 So. 2d 1091 (Fla.1990), still operates, irrespective of this court's decision in Firestone Tire & Rubber Co. v. Acosta, 612 So. 2d 1361 (Fla.1992), to preserve products liability claims that accrued during the statute of repose's period of unconstitutionality.

Second, under the facts and circumstances of this case, Appellant, under the reliance doctrine, could have justifiably relied on the Florida Supreme Court's decision in Battilla v. Allis Chalmers Mfg. Co., 392 So. 2d 874 (Fla.1980).

The issue at bar involves Florida's statute of repose which outlines a time

period for filing suit, this Court's decision holding that statute unconstitutional, then a second decision reversing the first decision, then legislative repeal of the statute of repose, and various decisions outlining how to apply the statute in its various stages of constitutionality, unconstitutionality, enactment, repeal, etc. Further complicating the matter are various court opinions outlining exceptions to application of the statue and the court decisions.

Florida's Statute of Repose, Section 95.031(2), Florida Statutes (1975), reads, in pertinent part as follows:

> Actions for products liability and fraud under subsection 95.11(3) must be begun within the period prescribed in this chapter, [i.e., four years from accrual] with the period running from the time the facts giving rise to the cause of action were discovered or should have been discovered with the exercise of due diligence, instead of running from any date prescribed elsewhere in subsection 95.11(3) **but in any event within 12 years after the date of delivery of the completed product to its original purchaser** or the date of the commission of the alleged fraud, **regardless of the date the defect in the product or the fraud was or should have been discovered.**

Id. (**emphasis** added).

In this case the product, i.e., the Speedstar Model SS-135 Drilling Machine, was manufactured in 1972 and delivered to the original purchaser, Appellant's Employer, in January of 1973. R. 28. Appellant's accident occurred on July 9, 1984,

eleven years after the drill rig was delivered to the original purchaser. R. 1, 28. **Appellant's law suit was instituted on June 17, 1988, three years and eleven months after the accident and fifteen (15) years after delivery of the product.** At first blush it would appear that Appellant's claim was instituted beyond the 12 year statute of repose limitation of § 95.031(2), supra, and is barred. On closer review, however, a different result must be reached.

Section 95.031.(2) has been significantly addressed by Florida's courts. This Court, in Battilla v. Allis Chalmers Mfg.Co., 392 So.2d 874 (Fla. 1980), invalidated the twelve-year products liability statute of repose as an unconstitutional deprivation of a claimant's access to the courts under Article I, section 21, Florida Constitution.

Subsequently, in Pullum v. Cincinnati, Inc., 476 So.2d 657 (Fla. 1985), appeal dismissed, 475 U.S. 1114, 106 S. Ct. 1626, 90 L. Ed. 2d 174 (1986), this Court receded from Batilla, and held that the products liability statute of repose was not unconstitutional.

After the Pullum decision was handed down the legislature repealed § 95.031(2) as to products liability actions effective July 1, 1986.

In 1987, this Court in Melendez v. Dreis and Krump Mfg. Co., 515 So.2d 735 (Fla. 1987), went on to hold that the 1986 abolition of the statute of repose in product liability actions did not operate retrospectively; but that its decision in Pullum bared

causes of action that accrued in the Battilla-Pullum interval.

Accordingly, the Melendez court followed the well known general rule that a decision of a court of last resort that overrules a prior decision is retrospective as well as prospective, unless declared by the opinion to be prospective only. Melendez, 515 So.2d at 736; and see Black v. Nesmith, 475 So.2d 963 (Fla. 1st DCA 1985). Given this rule alone, it would appear Appellants' claim would be time barred. However, because Appellants' fall into a recognized exception to the rule, as demonstrated below, it is further clear the instant claim is not time barred.

The exception to the rule is set forth in the Court's opinion of Florida Forest and Park Serv. v. Strickland, 154 Fla. 472, 18 So.2d 251 (1944), and provides that,

> *** there is a certain **well-recognized exception** that where a statute has received a given construction by a court of supreme jurisdiction and property or contract rights have been acquired under and in accordance with such construction, such rights should not be destroyed by giving to a subsequent overruling decision a retrospective operation.

Id. 18 So.2d at 253(**emphasis** added); and see Department of Revenue v. Anderson, 389 So.2d 1034 (Fla. 1st DCA 1980), review denied, 399 So.2d 1141 (Fla. 1981).

The Strickland exception has been consistently utilized by Florida Courts, especially in cases construing the statue of repose, i.e., § 95.031.(2), in issue here. It must be noted and reiterated that the Strickland exception has never been overruled,

modified, or otherwise receded from, by this Court, and was wholly ignored in the opinion of Firestone Tire and Rubber Co., supra.

In National Ins. Underwriters v. Cessna Aircraft Corp., 522 So.2d 53 (Fla. 5th DCA), rev. den. 631 So. 2d 1352 (Fla. 1988) and in Lowell v. Singer Co., 528 So.2d 60 (Fla. 1st DCA 1988) the Court specifically held that the products liability statute of repose, § 95.031.(2), was not to be retroactively applied to Appellants who delayed in bringing suit **because of a reliance upon prior decisions that the Statute was unconstitutional**. This is exactly Appellants' situation, and for this reason Appellant claim is not time barred and the 11th Circuit Court of Appeals Certified questions must be answered in the affirmative: Yes, the "reliance doctrine" still operates, and yes, Appellant could have relied upon such doctrine.

In National Ins. Underwriters and in Lowell the Appellants had relied on the Court's decision of Battilla v. Allis Chalmers Mfg.Co., supra, which invalidated the statute of repose. In reliance upon Battilla an Appellant would only have to bring his cause of action within the normal period of limitations for the particular claim, and under the reliance doctrine a claimant would be allowed to proceed if the claim was timely in regards to the statute of limitations. Here, Appellant relied on Battilla. Moreover, there is no basis to deny application of the Strickland exception, under the facts sub judice, to Appellants.

Note that on November 27, 1984, Appellants' retained attorney Donald E. Pervis, Sr., Esq., also Appellants attorney in this appeal. In Repose to Appellee's first motion for summary judgment, said attorney submitted his affidavit (R. 32) stating that at the time of being retained he was aware of Battilla and a similar Federal opinion, Ellision v. Northwest Engineering Co., 521 So2d 199 (S.D. Fla. 1981), which held the statute of repose to be unconstitutional. Attorney Pervis clearly states that he relied on Battilla and Ellision, and thus advised Appellants that they had four years (4 yrs.) from the date of the occurrence, or until July 9, 1988, in which to bring suit. Id. Because of his reliance upon Battilla, attorney Pervis did not conclude his investigation until April of 1988. R. 32. Two months later he filed suit. R. 32. Appellees never challenged or otherwise attacked the substance of the Pervis affidavit or these facts. Given this uncontested fact pattern there is absolutely no basis nor rationale to refuse application of Strickland to the case at bar.

The Strickland exception has been recognized and applied in numerous other factual situations to prevent retroactive application of decisions overruling prior decisions regarding constitutionality of a statutes. In these cases Florida courts have **consistently refused to apply new decisional law when the facts establish that a party has relied on prior precedent and acquired valuable property or contract rights as a result of a previous court decision, and where a retroactive**

application of the subsequent ruling would cause a hardship or injustice.

These principles were reiterated and reaffirmed in this Court's 1990 opinion of Frazier v. Baker Material Handling Corp., 559 So2d 1091 (Fla. 1990), which held that the decision resurrecting the statute of repose which would bar a cause of action accruing before expiration of statute of repose, **could not be applied retroactively when the claimant relied on previous decisions, and where applying the new decision would work an injustice.**

In Melendez v. Dreis and Krump Mfg. Co., 515 So. 2d 735 (Fla. 1987), it was held that the legislative amendment which abolished the statute of repose would not be applied retroactively where the claimant relied upon prior decisional law. And in Department of Revenue v. Anderson, 389 So. 2d 1034 (Fla. 1st DCA 1980), it was held that taxpayers who relied upon previous judicial interpretations of certain tax statutes would render them unaccountable for uncollected taxes during the questioned period and that the government would be estopped from collection of taxes for that period. Id., and see Florida Elks Children's Hospital v. Stanley, 610 So. 2d 538, 543 (Fla. 5th DCA 1992) where the court held the mortmain statute unconstitutional when applied retroactively.

Authorities supporting the position that Appellants fall within the Strickland Exception or the Reliance Doctrine is clear, and there is no reason to depart from this

rule. When a court decision is rendered that overrules a previous decision, the new decision will not be applied retroactively to a claimant who relied on the previous decision, and where such application would work an injustice.

Concerning the courts' opinion of Firestone Tire & Rubber Co. v. Acosta, 612 So2d 1361 (Fla. 1992), which generated Appellants second appeal and the certified questions herein, it must be noted that the court did not change or alter the reliance doctrine. Acosta never addressed, one way or another, anything that even comes close to the Strickland exception.

Firestone Tire & Rubber Co. v. Acosta was also a product liability/statute of repose case. The Firestone court dealt with the same 1986 amendment to section 95.031(2), which is in issue here. The Firestone court held that repeal of this statute of repose did not have the effect of reestablishing a cause of action previously extinguished by operation of law. Firestone, 612 So. 2d at 1363. The court in Firestone relied on Melendez, supra, where it previously held that absent the Legislature's "clear manifestation of retroactive effect the subsequent elimination of the statute of repose [could not] save the Appellant's suit." Id., citing Melendez, 515 So. 2d at 736. The Firestone court further went on to hold that a party had a "right to have the statute of limitations period become vested once it has 'completely run and barred [the] action." Firestone, 612 So. 2d at 1364; quoting Mazda Motors of

America, Inc. v. S.C. Henderson & Sons, Inc., 364 So. 2d 107, 108 (Fla. 1st DCA 1978), cert. denied, 378 So. 2d 348 (Fla. 1979).

The Firestone court, however, did not address, cite, or even alude to the opinion of Strickland or the Strickland exception set forth above. In no way did Firestone modify, reverse, or otherwise recede from the Strickland rule. Appellants relied on the opinion of Battilla and are entitled to application of the Strickland reliance rule to allow their claim to proceed. The 11th Circuit's Certified Questions must be answered in the affirmative.

Under the facts and circumstances of this case it is clear that Appellants are entitled to rely on the Court's Opinion of Battilla v. Allis Chammers Manufacturing Company, 392 So2d 874 (Fla. 1980), and its progeny, in accordance with the principles outlined in Florida Forest and Park Serv. v. Strickland, 154 Fla. 472, 18 So.2d 251 (1944), and are not time barred from bringing their claim. Moreover, it is equally clear that the Court's opinion of Firestone Tire & Rubber Co. v. Acosta, 612 So2d 1361 (Fla. 1992) does not modify, alter, or recede form the reliance doctrine as outlined in Strickland.

The certified questions submitted by the 11th Circuit Court of Appeal in Mosher v. Speedstar Div. Of Amca Intl., Inc., 52 F.3d 913 (11th Cir. 1995) must be answered in the affirmative.

CONCLUSION

For the reasons expressed in this brief the undersigned submits that the 11th Circuit Court of Appeals certified questions must be answered in the affirmative. First, the "reliance exception" recognized in Frazier v. Baker Material Handling, Inc., 559 So. 2d 1091 (Fla.1990), still operates, irrespective of this court's decision in Firestone Tire & Rubber Co. v. Acosta, 612 So. 2d 1361 (Fla.1992), to preserve products liability claims that accrued during the statute of repose's period of unconstitutionality; and second, under the facts and circumstances of this case, Appellant could have justifiably relied on the this Court's decision in Battilla v. Allis Chalmers Mfg. Co., 392 So. 2d 874 (Fla.1980).

Respectfully submitted,

By: _____
DONALD E. PERVIS, SR., Attorney for
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of this motion has been furnished, by mail, to Kimberly Carlton Bonner, Esq. and Richard R. Garland, Esq. ESQ., P. O. Box 3979, Sarasota, FL 34230 this 12 day of June, 1995.

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