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

REPLY BRIEF OF APPELLANTS

Submitted by,
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REBUTTAL TO ARGUMENT PRESENTED IN THE ANSWER BRIEF

Appellant submits both certified questions posed by the 11th Circuit Court of Appeal must be answered in the affirmative, as follows:

> After the Florida Supreme Court's decision in Firestone Tire & Rubber Co. v. Acosta, 612 So. 2d 1361 (Fla.1992), the "reliance exception" recognized in Frazier v. Baker Material Handling, Inc., 559 So. 2d 1091 (Fla.1990), still operates to preserve products liability claims that accrued during the statute of repose's period of unconstitutionality; and
>
> Because the "reliance exception" is still viable, Appellant could have justifiably relied on the Florida Supreme Court's decision in Battilla v. Allis Chalmers Mfg. Co., 392 So. 2d 874 (Fla.1980).

In brief reiteration of the facts for purposes of rebuttal Appellant submits the following:

The drill rig which caused the injury in this case was delivered to Appellant's employer in January of 1973. See factual outline in Mosher v. Speedstar Div. of

AMCA Inern, Inc., 51 F.3d 913, 15 (11th Cir. 1995). On July 9, 1984, while operating the rig Appellant was injured. Id. In June of 1988 Appellant instituted his action against Appellee. Suit was instituted within Florida's four year period of limitations for torts, but fifteen (15) years after delivery of the drill rig to Appellant's employer. Under the limitations imposed by Florida's Statute of repose, absent the reliance exception, Appellant's claim would have been untimely, but under the four year period for tort actions, Appellant's claim was timely.

In Frazier v. Baker Material Handling Corp., 559 So. 2d 1091 (Fla. 1990), this Court 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.** Here Appellant both relied on a previous decision of the court, i.e., Battilla v. Allis Chalmers Mfg. Co., 392 So. 2d 874 (Fla. 1980), and it will work an injustice to apply the resurrected statute of repose. See Appellant's Initial Brief. Frazier applies to allow Appellant's claim, irrespective of this court's opinion in Firestone Tire & Rubber v. Acosta, 612 So. 2d 1316, 1362 (Fla. 1992).

Appellee has stated in their answer brief that it was an apparent oversight in in Frazier which appears to have been corrected by the court tin in Firestone Tire &

Rubber v. Acosta, 612 So. 2d 1316, 1362 (Fla. 1992). Answer brief p. 5, 6. The reminder of Appellee's argument is based on what has is styled as an **"apparent oversight"** by the court in Frazier and then what **"appears"** to be corrected in Acosta. Appellant submits Appellee has failed to demonstrate any oversight in Frazier or that the court corrected such oversight in Acosta. Appellant submits there was no oversight in Frazier and further that no correction was made in Acosta.

Appellant's position is supported by the lower Federal Court who, when reviewing the issue, observed it was difficult to resolve the question of reliance by Acosta's failure to mention the subject or the Strickland opinion, upon which the reliance exception was based. R. 95.

The court is aware that the reliance doctrine is not an oversight, but a doctrine embraced by the court in its opinion of Florida Forest and Park Serv. v. Strickland, 154 Fla. 472, 18 So.2d 251 (1944). Subsequent to Strickland the doctrine has been applied in various circumstances, including products liability claims where it's been stated the statute of repose **could not be retroactively applied to claimants who delay in bringing suit because of their reliance upon prior decisions the court**. See National Ins. Underwriters v. Cessna Aircraft Corp., 522 So.2d 53 (Fla. 5th DCA), rev. den. 631 So. 2d 1352 (Fla. 1988) and Lowell v. Singer Co., 528 So.2d 60 (Fla. 1st DCA 1988). There is no authority nor basis for receding from this rule now, even

under the court's opinion of Acosta. Contrary to Appellee's assertions in the Answer Brief, it does not appear the court receded from Strickland or the reliance doctrine in its Acosta opinion.

Strickland recognized that where a statute receives 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 a subsequent overruling decision a retrospective operation. Florida Forest and Park Serv. v. Strickland, 154 Fla. 472, 18 So.2d 251 (1944). See also Department of Revenue v. Anderson, 389 So.2d 1034 (Fla. 1st DCA 1980), review denied, 399 So.2d 1141 (Fla. 1981). This rule has not changed and Appellant is entitled to its application under the facts and circumstances of this case.

Appellant retained counsel on November 27, 1984, for representation concerning an injury which occurred on July 9, 1984. Appellant's counsel stated, by affidavit, he was aware of and relied upon Battilla v. Allis Chalmers Mfg.Co., 392 So.2d 874 (Fla. 1980) and Ellision v. Northwest Engineering Co., 521 So. 2d 199 (S.D. Fla. 1981), which held the statute of repose unconstitutional. R. 32. These facts must be taken as true as no trial court has addressed the veracity or credibility of the affidavit upon which these facts are based. Appellee cannot be heard to complain on appeal of issues that were not ruled on by any trial court, i.e., the facts as asserted in the affidavit. This

court is not the appropriate forum to conduct an evidentiary hearing on factual issues contained in the affidavit asserting reliance upon Battilla and Ellision. Cappadona v. Keith, 290 So. 2d 545 (Fla. 4th DCA 1974), affirmed at 306 So. 2d 515 (Fla. 1974); Froman v. Froman, 458 So. 2d 833 (Fla. 3d DCA 1984).

The fact of the matter is that from 1980 until 1985, when Battilla was the law in Florida, claimants were required to bring similar actions within the four year statute of limitations period for tort actions. R. 95. Individuals such as Appellant had a vested right to bring their cause of action within Florida's four year personal injury period of limitations, irrespective of the statute of repose's 12 year limitation. **Appellant did just that**. After Battilla was overruled by the Florida Supreme Court in Pullum, Florida court's allowed Plaintiffs who relied on Battilla to file their claims under the four year personal injury limitation period, citing the reliance doctrine as the basis for refusing to apply Pullum. There is nothing to suggest or infer that this rule has been modified, changed, etc., by Acosta, which never addressed, cited, nor referred to either Strickland or the reliance doctrine.

Florida has consistently refused to apply new decisional law which would bar a claim when a party has relied on the prior law and when a retroactive application of the subsequent ruling causes a hardship or injustice. See, e.g., Frazier v. Baker Material Handling Corp., 559 So. 2d 1091 (Fla. 1990); Melendez v. Dreis and Krump

Mfg. Co., 515 So. 2d 735 (Fla. 1987); Department of Revenue v. Anderson, 389 So. 2d 1034 (Fla. 1st DCA 1980); Florida Elks Children's Hospital v. Stanley, 610 So. 2d 538, 543 (Fla. 5th DCA 1992), all cited in Appellant's brief, none of which suggest or even come close to quashing the reliance doctrine as outlined by Appellant.

In Acosta the court held that the repeal of the statute of repose could not reestablish a cause of action previously extinguished. Id. 612 So. 2d at 1363. Acosta relied on Melendez, noting the Legislature's "clear manifestation of retroactive effect the subsequent elimination of the statute of repose [could not] save the ... suit" in that case. The major thrust of Acosta was that a party has 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). In this case under Battilla, Strickland, and the doctrine of detrimental reliance, the four year period of limitations had not run and Appellant is entitled to pursue the claim in court. Acosta did not modify, reverse, or otherwise recede from Strickland or the doctrine of detrimental reliance.

Firestone Tire & Rubber Co. v. Acosta, 612 So. 2d 1361 (Fla. 1992), does not operate to destroy products liability claims that accrued during the statue of repose's period of unconstitutionality.

The certified questiona submitted by the 11th Circuit Court of Appeal must be answered in the affirmative. Irrespective of the decision in Firestone Tire & Rubber Co. v. Acosta, 612 So. 2d 1361 (Fla.1992), the "reliance exception" as recognized in Frazier v. Baker Material Handling, Inc., 559 So. 2d 1091 (Fla.1990), still operates to preserve products liability claims that accrued during the statute of repose's period of unconstitutionality; and because the "reliance exception" is still viable, Appellant could have justifiably relied on the Florida Supreme Court's decision in Battilla v. Allis Chalmers Mfg. Co., 392 So. 2d 874 (Fla.1980).

CONCLUSION

For the reasons expressed in this brief and in Appellant's Initial Brief, the undersigned submits that the 11th Circuit Court of Appeals' certified questions must be answered as follows:

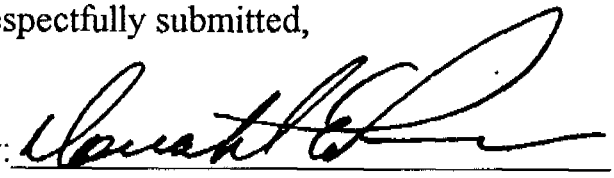
The "reliance exception"still operates, irrespective of this court's decision in Firestone Tire & Rubber Co. v. Acosta, 612 So. 2d 1361 (Fla.1992).

Appellant justifiably relied on the this Court's decision in Battilla v. Allis Chalmers Mfg. Co., 392 So. 2d 874 (Fla.1980).

The undersigned respectfully submits that this court should answer both certified

questions propounded by the 11th Circuit Court of Appeals in the affirmative.

Respectfully submitted,



By: _____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this Reply Brief has been furnished, by mail to Richard R. Garland, Esq., Dickinson & Gibbons, P.A., P. O. Box 3979, Sarasota, FL 34230 this 22 day of September, 1995.

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