IN THE SUPREME COURT OF FLORIDA

Case No. 81,467

DOM MIELE and SHIRLEY MIELE,
Petitioners/Appellants

v.

PRUDENTIAL-BACHE, ET AL.,
Respondents/Appellees.

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

AMICUS CURIAE BRIEF
OF THE DEPARTMENT OF BANKING AND FINANCE
IN SUPPORT OF PRUDENTIAL-BACHE

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SUMMARY OF ARGUMENT

Section 768.73(2), Florida Statutes, is part of the 1986 Tort Reform and Insurance Act which was created in response to the widespread lack of available and affordable commercial liability insurance. The legislative intent in enacting Section 768.73(2) was to discourage punitive damages claims by making them less renumerative and allotting a portion of the punitive damages to the public in order to deter future harm to the public. The legislative intent logically encompasses arbitration proceedings as well as circuit court actions; otherwise, more claimants will pursue punitive damages actions in arbitration proceedings to avoid compliance with Section 768.73(2). Moreover, the courts have interpreted language similar to the provisions of Section 768.73(2) to include arbitration proceedings.

ARGUMENT

I. WHETHER THE TERM "CIVIL ACTION" AS PROVIDED IN SECTION 768.73(2), FLORIDA STATUTES (1989), INCLUDES AN ARBITRATION PROCEEDING IN WHICH THE CLAIMANT IS AWARDED PUNITIVE DAMAGES.

a) Public Policy Supports the Application of Section 768.73(2), Florida Statutes, to Arbitration Proceedings

At issue in this case is whether Section 768.73(2), Florida Statutes (1989), applies to an arbitration proceeding in which a claimant was awarded punitive damages. Section 768.73(2) is part of the 1986 Tort Reform and Insurance Act, Chapter 86-160, Laws of Florida (hereinafter "the Act"), which was enacted in response to widespread difficulty in the availability and affordability of commercial liability insurance. Deciphering the legislative intent must be the polestar of judicial construction. Lowry v. Parole and Probation Commission, 473 So. 2d 1248 (Fla. 1985). In Smith v. Department of Insurance, 507 So. 2d 1080 (Fla. 1987), this Court closely examined the legislative history and purpose of the Act, including the following provisions of the preamble:

> (1) that there is in Florida a financial crisis in the liability insurance industry, causing a serious lack of availability of many lines of commercial liability insurance
> (2) that professionals, businesses, and governmental entities are faced with dramatic increases in the cost of insurance coverage
> (3) the absence of insurance is seriously adverse to many sectors of Florida's economy
> (4) that if the present crisis is not abated, many persons who are subject to civil actions will be unable to purchase liability insurance, and many injured persons will therefore be unable to recover damages for either their economic losses or their noneconomic losses.

Id. at 1084. In its conclusion of Smith, this Court pronounced:

> The legislature was presented with the public concern that commercial liability insurance had become too expensive and, in some instances, unavailable. The legislature determined that a major problem existed and determined that, if a solution was not found, claimants would be unduly restricted in their recovery of damages because there would be only limited insurance available to spread the risk of loss.

Id. at 1095.

More specifically, this Court recently addressed the constitutionality of Section 768.73(2), Florida Statutes (Supp. 1986), in Gordon v. State of Florida, 608 So.2d 800 (Fla. 1992). While examining the due process claim alleged by the appellant in Gordon, this Court stated that the legitimate legislative objective underlying Section 768.73(2) was to allot to the public a portion of the damages in order to deter future harm to the public. Id. at 802. Additionally, this Court reasoned that Section 768.73(2) was created to discourage punitive damages claims by making them less renumerative to the claimant and the claimant's attorney. Id. at 802.

The legislative intent and objective in creating Section 768.73(2), Florida Statutes, appear equally applicable to actions litigated in a trial court as well as an arbitration proceeding. After a review of the legislative history and purpose of the Act, and more specifically Section 768.73(2), no logical reason supports a delineation between a circuit court action and an arbitration proceeding. Statutes should not be interpreted in a manner that yields an absurd result. Williams v. State, 492 So. 2d 1051 (Fla. 1986). If arbitration awards are excluded from the purview of Section 768.73(2), claimants in arbitration proceedings will not be discouraged from pursuing punitive damages' claims, thus thwarting the legislative intent. Additionally, the legislative objective of allotting a portion of the punitive damages to the public to

prevent future harm would be circumvented by excluding arbitration from Section 768.73(2). Neither the language of Section 768.73(2), nor the legislative intent appears to exclude arbitration awards from this objective. As applied to this case, it seems likely the legislature would be interested in preventing the type of harm that occurred in this case regardless of whether the case was litigated in circuit court or in an arbitration.

Moreover, if arbitration proceedings are excluded from the realm of Section 768.73(2), Florida Statutes, claimant's will be encouraged to avoid complying with Section 768.73(2) merely by choosing arbitration. This Court addressed a similar issue in the case of Insurance Co. of North America v. Acousti Engineering Co. of Florida, 579 So. 2d 77 (Fla. 1991). In Acousti, this Court determined the issue of whether attorney's fees recoverable under Section 627.428, Florida Statutes (1987), included attorney's fees incurred during arbitration proceedings. Section 627.428(1), Florida Statutes (1987), provides as follows:

> Upon the rendition of a judgment or decree by any of the courts of this state against an insurer and in favor of any named or omnibus insured or the named beneficiary under a policy or contract executed by the insurer, the trial court or, in the event of an appeal in which the insured or beneficiary prevails, the appellate court shall adjudge or decree against the insurer and in favor of the insured or beneficiary a reasonable sum as fees or compensation for the insured's beneficiary's attorney prosecuting the suit in which the recovery is had.

The court in Acousti adopted the opinion rendered by the District Court of Appeal, Second District, in the case of Fewox v. McMerit Construction Co., 556 So. 2d 419 (Fla. 2d DCA 1989), aff'd, 579 So.2d 77 (Fla. 1991). The court in Fewox held that Section 627.428, Florida Statutes (1987), applied to arbitration proceedings. In

reaching this determination, the court stated as follows:

> The court in [Zac Smith & Co., Inc.] also explained that the policy underlying section 627.428 is to discourage the contesting of coverage by insurers and to reimburse successful policy holders when they are compelled to sue to enforce their policies.
>
> We agree with the First District Court of Appeal and adopt its position. The legislative policy underlying section 627.428 is served by requiring insurers to pay attorney's fees to a prevailing insured or beneficiary, regardless of whether the insurers contest coverage through arbitration or the trial courts. To hold otherwise would be to allow insurers to avoid paying attorney's fees in contested coverage cases merely by choosing arbitration.

Id. at 423-424. Similarly, the policy behind Section 768.73(2), Florida Statutes, is to deter punitive damages claims and to prevent future harm to the public by allocating a portion of the punitive damages to the public. To exclude arbitration proceedings from the purview of Section 768.73(2) would encourage claimant's to circumvent the statute by pursuing an arbitration proceeding.

b) The Courts Interpret Language Similar to the Provisions of Section 768.73(2), Florida Statutes, to Include Arbitration Proceedings to Effectuate the Legislative Intent of the Law

The determination of this case rests upon the interpretation of Section 768.73(2), Florida Statutes (1989), which provides as follows:

> (2) In any civil action an award of punitive damages shall be payable as follows:
> (a) Forty percent of the award shall be payable to the claimant.
> (b) If the cause of action was based on personal injury or wrongful death, 60 percent of the award shall be payable to the Public Medical Assistance Trust Fund; otherwise, 60 percent shall be payable to the General Revenue Fund.

Chapter 768, Florida Statutes, does not include a definition for the term "civil action" and the courts do not appear to have provided an interpretation for the term "civil action." However, Black's Law Dictionary provides the following definition for

civil action:

> Action brought to enforce, redress, or protect private rights. In general, all types of action other than criminal proceedings.

Black's Law Dictionary 222 (6th ed. 1990). Accordingly, it appears the definition of civil action includes an arbitration proceeding because an arbitration proceeding is not a criminal action.

Although the Florida courts have not specifically addressed the issue of whether the definition of civil action includes an arbitration proceeding, the courts have resolved similar issues. An arbitration proceeding is deemed an "action" in order to effectuate the remedial purpose of the Employee Retirement Income Security Act (hereinafter "ERISA"). Consolidated Labor Union Trust v. Clark, 498 So. 2d 547 (Fla. 3d DCA 1986). In Clark, the Plaintiff contended that Section 1132(g)(1) of ERISA permitted her to recover attorney's fees for her attorney's services incurred during the arbitration proceeding. 29 U.S.C. § 1132(g)(1) (1982). Section 1132(g)(1) provides "[i]n any action under this subchapter...by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of the action to either party." 29 U.S.C. § 1132(g)(1) (1982). In reaching its conclusion, the court in Clark reasoned that other courts have broadly construed ERISA in order to effectuate the remedial purpose of ERISA: to enable participants to obtain competent counsel in order to remove procedural obstacles which in the past have hampered the enforcement of ERISA. Id. at 548. Consistent with the announced purpose of ERISA, the court held that "action" included an arbitration proceeding. Id. at 548.

Also the term "suit" was deemed to encompass an arbitration proceeding in an

action to recover attorney's fees. Fewox v. McMerit Construction Co., 556 So. 2d at 423, aff'd, 579 So. 2d 77 (Fla. 1991). As discussed previously, the court in Fewox addressed the issue of whether Section 627.428, Florida Statutes (1987), permits a claimant to recover attorneys fees incurred during an arbitration proceeding. Section 627.428 provides that the court shall award reasonable attorney's fees for the claimant's "attorney prosecuting the suit in which the recovery is had." §627.428(1), Fla. Stat. (1987). The court held that the legislative policy underlying Section 627.428 is served by awarding attorney's fees to a prevailing party, regardless of whether the action was contested through arbitration or in the trial courts. Id. at 423.

Similarly, the legislative policy underlying Section 768.73(2), Florida Statutes, is served by including arbitration proceedings within the definition of "civil action." By including arbitration within the purview of Section 768.73(2), claimants will be discouraged from seeking punitive damages claims in arbitration proceedings and a portion of the punitive damages awarded during arbitration will be allotted to the public to deter future harm to the public.

Further, an arbitration proceeding constitutes a "prior litigation"; therefore, the doctrine of collateral estoppel bars a future action involving the same issues resolved previously during arbitration. City of Gainesville v. Island Creek Coal Sales Co., 618 F. Supp. 513 (N.D. Fla. 1984), aff'd, 771 F.2d 1495 (11th Cir. 1985). The court, in reviewing the doctrine of collateral estoppel, reasoned that the prerequisites to the application of a collateral estoppel defense include that the issue at stake be identical

and actually litigated during the "prior litigation." Id. at 517. The court held that a valid arbitration decision is considered a "prior litigation"; consequently, arbitration proceedings are accorded res judicata and collateral estoppel effect. Id. at 517.

In jurisdictions outside of Florida, a federal court has ruled that a proceeding to confirm an award of an arbitrator is a "civil action" within the federal statute providing for removal of cases to the federal District Court. Minkoff v. Scranton Frocks, Inc., 172 F. Supp. 870 (S.D.N.Y. 1959) The same court held that a proceeding to compel arbitration pursuant to a state statute also amounted to a "civil action" subject to removal under the federal statute. Lummus Co. v. Commonwealth Oil Refining Co., Inc., 195 F. Supp. 47 (S.D.N.Y. 1961).

CONCLUSION

The legislative intent underlying Section 768.73(2), Florida Statutes, mandates that arbitration proceedings be included within the definition of a "civil action" and subject to the provisions of Section 768.73(2).

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing Amicus Curiae Brief of the Department of Banking and Finance was sent by U.S. Mail to Thomas R. Grady, Grady & Associates, 3411 Tamiami Trail, North, Suite 200, Naples, Florida 33940 and John D. Boykin, Boose, Casey, Ciklin, Lubitz, Martens, McBane & O'Connell, Northbridge Tower, 19th Floor, 515 North Flagler Drive, West Palm Beach, Florida 33401 this 27th of May, 1993.

Bridget L. Ryan