IN THE SUPREME COURT OF FLORIDA

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
No. 92-2334
USDC No. 91-150-CIV-FTM-15D

ANSWER BRIEF OF APPELLEES

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STATEMENT OF THE CASE AND FACTS

Appellees accept Appellants' statement of the facts and of the case to the extent they are not argumentative. Appellees do note that almost all of the facts set forth have no relevance to the certified question before this Court. The United States District Court, Middle District of Florida, ordered Appellees to pay 60% of the punitive damage award into the Court's registry awaiting the ultimate resolution of this matter. The monies still remain there to this date. Appellees also note that Appellants had the opportunity to petition the arbitration panel for clarification of its award, but failed to do so.

The Eleventh Circuit certified the question "Does Florida Statute Section 768.73 apply to arbitration awards?" The relevant issue, however, deals only with subsection (2) of that statute.

SUMMARY OF ARGUMENT

Section 768.73(2), Florida Statutes, applies to arbitrated matters by its plain language and inasmuch as the court system must be utilized to enforce any arbitration award. Once an arbitration award is enforced by utilization of the judicial system, the mandate set forth in Section 768.73(2) comes into play. Section 768.73(2) is constitutional.

ARGUMENT

SECTION 768.73(2) APPLIES TO THE MIELES' ARBITRATION AWARD.

Section 768.73(2), Florida Statutes, applies to arbitration awards and to the civil actions necessary to confirm such awards[1]. Appellants' argument is misplaced given that the language of the statute and the broad definition of "civil action" clearly support the district court's decision to apply the statute to the confirmation judgment. The cases cited by Appellants for their proposition are distinguishable and of little or no precedential value to the issue at hand. This issue truly is a question of first impression in Florida.

A. The Statutory Language Clearly Mandates Applicability to Arbitrated Matters

During the relevant time, Section 768.73(2) provided:

> (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 created in Section 409.2662; otherwise, 60 percent of the award shall be payable to the General Revenue fund (emphasis added).

There is nothing unclear about the language of Section 768.73(2). Appellants misconstrue the term "civil action" as being narrow and

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[1]Although the Eleventh Circuit's question was facially broader by encompassing all of Section 768.73, only subsection (2) of that statute is relevant here. This brief is limited to argument relative to subsection (2).

limited in scope when, in fact, the exact opposite is true. "Civil action" is a broad term used to characterize a wide range of legal actions. For example, Black's Law Dictionary defines "civil Action" as follows:

> Action brought to enforce, redress or protect private rights. In general, all types of actions other than criminal proceedings. The term includes all actions, both those formerly known as legal actions, or, in other phraseology, both suits in equity and actions at law. [e.s.]

Black's Law Dictionary (abridged 5th ed, 1983), p.127. "Civil action" therefore encompasses all actions except criminal actions. This broad definition is likewise embraced by the Florida Rules of Civil Procedure, as well as the Federal Rules of Civil Procedure. Both Rule 2, Fed.R.Civ.P. and Rule 1.040, Fla.R.Civ.P., provide:

> One Form of Action: There shall be one form of action to be known as "civil action".

Thus, contrary to Appellants' contention, "civil action" is not subject to narrow interpretation, but is a term which is all encompassing except for matters criminal in nature. See generally, Winkelman v. General Motors Corporation, 488 F.Supp. 490 (D.C.N.Y. 1942); Gillson v. Vendome Petroleum Corporation, 35 F.Supp. 815 (D.C.La. 1940).

The plain language of the statute clearly contemplates arbitration awards as being subject to the mandates of Section 768.73(2). Beyond the plain language, the purpose and intent behind Section 768.73(2) also suggests its applicability to arbitration awards. Appellants attempt to limit the meaning of, and intent

behind, Section 768.73(2) in order to fashion a colorable argument. Again, they have missed the broad scope of the tort reform legislation. For example, Section 768.71(1), Florida Statutes, provides:

> Except as otherwise specifically provided, this part [including Section 768.72] applies to any action for damages, whether in tort or in contract (emphasis added)[2].

They are correct that the reform was a product of the concern regarding increased awards and their effects on liability insurance. The concern was not for the "cost of litigation", but more appropriately the rise in the frequency and amount of punitive damage awards. Arbitration proceedings allow such punitive damages awards, as evidenced by the instant case. To limit the statute so to not apply to arbitration proceedings would be to exclude a large area of dispute resolution which involves the very dangers which the legislation was meant to address. In sum, the legislative intent and purpose behind Section 768.73(2), and the tort reform legislation, embrace the concern for higher punitive damage claims and applies to arbitration awards the same as other actions.

Appellants incorrectly place great reliance upon Dean Witter Reynolds, Inc. v. Duncan, No. 92-1309, slip op. (Fla. Cir. Ct. 13th Jud. Dist. July 16, 1992) and Allstate Insurance Co. v. Collier, 428 So.2d 379 (Fla. 4th DCA 1983). Notwithstanding the

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[2]This statute, referencing "any action...whether in tort or in contract", also points out the fallacy of Appellants' argument that since arbitration is "contractually based", Section 768.73(2) does not apply.

fact it is of no precedential value, Dean Witter is clearly distinguishable given it did not involve a confirmation proceeding, rather an interpleader action seeking to join a non-party rather than reduce the award to judgment. Further, Collier is distinguishable given it involved a statute in derogation of established common law principles which therefore required strict construction on the part of the court. Also, Collier was a 1983 case whereas the very statute in question did not come into effect until July 1, 1986. More importantly, the statute in question was not applicable because the claims brought by the plaintiff were not brought or alleged under Section 627.737, Florida Statutes, a condition precedent to the applicability of the statute. The fact that an arbitration was involved was irrelevant given that the same result would have been reached if the plaintiff had filed suit in court and failed to make claim pursuant to Section 627.737.

The district court was correct in applying Section 768.73(2) to the instant case. The language of the statute and its purpose support the conclusion that the statute is applicable to arbitration proceedings and the confirmation proceedings thereon.

B. Award Confirmation Proceedings Are Civil Actions

Not only are arbitration proceedings civil actions[3], but in this case, as with most arbitrations, in order to reduce the arbitration award to an enforceable judgment the award must be

[3]See, for example, Rule 1.800, et. seq., Fla.R.Civ.P., which sets forth rules of civil procedure for arbitrations.

confirmed by a court of competent jurisdiction. See Sections 682.12 and 682.15, Florida Statutes; 9 U.S.C. Section 9. Such a confirmation proceeding is clearly a "civil action". Appellants cite to Rule 1.050, Fla.R.Civ.P., for the proposition that all "civil actions" are commenced by the filing of a complaint. This is incorrect. That rule clearly provides that "actions of a civil nature" shall commence by filing a complaint, petition, writ or pleading[4]. Thus, the filing of a complaint is not a prerequisite to a "civil action" under the Florida rules. Any action commenced by pleading or petition (such as a petition or motion to confirm, vacate, etc., an arbitration award) constitutes an "action of a civil nature". Accordingly, notwithstanding all other arguments, once a court is brought into the fray, a "civil action" has begun and substantive law such as Section 768.73(2) comes into play.

C. Other Subsections of Section 768.73 have No Applicability to This Matter

Appellants' arguments with respect to other subsections of Section 768.73 are wholly misplaced. Appellants attempt to creatively read parts of Section 768.73 other than subsection (2) in order to construct an argument. Subsection (2) only applies to "who gets the punitive damages". Subsections (3) and (4) modify

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[4]Rule 1.050 provides:

> Every action of a civil nature shall be deemed commenced when the complaint or petition is filed except that ancillary proceedings shall be deemed commenced when the writ is issued or the pleading setting forth the claim of the party initiating the action is filed (emphasis added).

subsection (2) if certain stated contingencies arise. Subsection (1) only has to do with "limitations" on punitive damages. Further, subsections (1)(a) and (b) make specific reference to the "trier of fact". The trier of fact in a civil action can be a jury, trial judge, magistrate or, like in this case, a panel of arbitrators. Appellants contend that the use of the word "jury" in subsection (5) somehow excludes arbitration proceedings from the statute's purview. Appellants fail to note that subsection (5) is only applicable to a matter which involves a jury, i.e., the propriety of a jury instruction. This shows that the legislature intended each subsection to stand on its own.

Appellants raise the argument that Section 768.73(1)(a) contains limiting language referring to particular types of causes of actions, and somehow this restricts the applicability of subsection (2). That argument fails for three reasons. First, subsection (2) has no such limiting language. Second, a negligence claim was also made in the Statement of Claim. Third, the Appellants' claims below were based generally upon Appellees alleged improper conduct associated with the management of Appellants' security investments. Such allegations constitute "misconduct in commercial transactions". Appellants' claims, other than negligence, directly relate to alleged misconduct in a commercial transaction.

The plain language of the other subsections of 768.73 shows they have nothing to do with the issue at bar. Assuming arguendo

somehow they do have some relevance, then the instant action also falls within the limitations of the statute.

D. Section 768.73(2) is Constitutional

Generally, Appellees respond to Appellants' arguments with respect to constitutionality by reference to this Court's recent decision in Gordon v. State of Florida, 608 So.2d 800 (Fla. 1992). Appellants are merely rearguing matters already ruled upon in that case. This Court has long held that the right to have punitive damages assessed is not property and as such, it is impossible to impair such non-existent property rights. Ross v. Gore, 48 So.2d 412, 414 (Fla. 1950). Since there is no contract right to punitive damages, punitive damages could not have been within the contemplation of parties when the contract was entered into. Accordingly, there can be no unconstitutional interference with any property rights.

CONCLUSION

Section 768.73(2), Florida Statutes, squarely applies to arbitrations, arbitration awards and the arbitration enforcement process. The certified question of "Does Fla. Stat. Section 768.73 apply to arbitration awards?" as limited to subsection (2) should be answered "yes".

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail, this date, to Thomas R. Gravy, Esquire, Gravy & Associates, L.P.A., 3411 Tamiami Trail, North, Suite 200, Naples, Florida 33940, and to Bridget L. Ryan, Assistant General Counsel, Office of the Comptroller, The Capitol, Suite 1302, Tallahassee, Florida 32399-0350.

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Dated: May 26, 1993