IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA

CHRYSLER CORPORATION,

Petitioner,

vs. CASE NO. 90,533

SPIRO PITSIRELOS ,

Respondent.
_____/

RESPONDENT'S BRIEF ON THE MERITS

PHILLIPS GALE ZISKINDER P.A.
The Historic Boston House
239 South Indian River Dr.
Ft. Pierce, FL 34950
and
CARUSO, BURLINGTON,
BOHN & COMPIANI, P.A.
1615 Forum Place, Ste. 3A
West Palm Beach, FL 33401
(561) 686-8010
Attorneys for Respondent

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PREFACE

Chrysler Corporation ("Chrysler") was the Petitioner and Plaintiff Spiro Pitsirelos was the Respondent in a trial de novo in a Lemon Law case tried in the Circuit Court of the Nineteenth Judicial Circuit, St. Lucie County, Florida. In this brief the parties will be referred to as they appeared in the Circuit Court, or by proper name. All emphasis in this brief is supplied by Plaintiff, unless otherwise indicated. The following symbols will be used:

(R) - Record-on-Appeal

(T) - Trial Transcript

(SRC) - Chrysler's Supplemental Record

(SRR) - Appellee's Supplemental Record

(PB) - Brief of Petitioner on the Merits

(AGB) - Amicus Curiae Brief of the Attorney General of Florida

(MB) - Amicus Curiae Brief of the American Automobile Manufacturer's Association and the Association of International Automobile Manufacturers

(PX) - Petitioner's (Chrysler's) Exhibits

(RX) - Respondent's (Appellee's) Exhibits.

STATEMENT REGARDING ADOPTION OF BRIEF

The Attorney General appeared as amicus in the appeal in the Fourth District Court of Appeal, and appears as amicus again here. Because the Attorney General is entrusted with the administration of the Lemon Law in Florida, and because this case involves challenges to the constitutionality of that statute, in this case the Attorney General is no ordinary amicus. Therefore, in addition to the arguments raised in this brief, Plaintiff adopts the arguments presented in the Amicus Brief filed by the Attorney General in response to arguments raised both by Chrysler and in the Amicus Curiae Brief of the American Automobile Manufacturer's Association and the Association of International Automobile Manufacturers.

STATEMENT OF THE CASE AND FACTS

Plaintiff Spiro Pitsirelos accepts the Statement of the Case presented in the Brief on the merits of Chrysler Corporation ("Chrysler"). Its Statement of the Facts presents the basic scenario of the case, but omits important details and views the evidence in a light most favorable to reversing the verdict, instead of upholding it, as is required on appeal. Therefore, Plaintiff will provide the following additions and/or clarifications.

A proper understanding of the facts of this case requires an understanding of the basic premise of the Lemon Law Act, formally known as the Motor Vehicle Warranty Enforcement Act, 5681.10, Fla. Stat. (1989), et seq. Contrary to common misunderstanding, relief under the act does not require a finding that the vehicle is so defective that it absolutely cannot be driven. Rather, the criterion for relief is that there be "a defect or condition that substantially impairs the use, value, or safety of a motor vehicle, . , , " §681.102(15), Fla. Stat. 1989). Chrysler's Statement of the Facts creates the impression that Plaintiff's claim of an actionable defect was based simply on the fact that the tinting on the windows was being scratched, that the defective fit of the window was discovered only after he had had the tinting applied, and that it was caused by efforts to stop the tinting from being scratched. That gloss on the facts, proposed by Chrysler at trial, was rejected by the jury based upon the other testimony which was presented at trial by Plaintiff.

Plaintiff testified that he purchased a red Dodge Daytona with a T-top from Charlie's Dodge on August 9, 1989 (T174, 424). It was to be a second car for the

family, and both he and his wife Gladys were listed as the purchasers on the contract (PX8, R1180-81). [Mr. and Mrs. Pitsirelos had been divorced by the time of trial (T424)]. When Plaintiff first saw the vehicle at the time of purchase, he noticed that the driver's side window had a gap at the top about "that much open," and told the salesman about it. He was told to take the car out, look all around it, find the problems, make a list and then bring it back and the problems would be taken care of. He testified that he followed those instructions (T425-428). He took the car to have the windows tinted the next day (T428).

The problem was that the window did not close all the way up to the T-top. Wind would blow in the driver's ear, and on a rainy day water would "splash right in your face" (T429). Plaintiff first brought the car back to Charlie's Dodge one week after delivery (T428), and many times thereafter, but they were never able to fix the problem (T429-30). Each time he brought the car in to have the window repaired he dealt with Robert Gomes (T430), who was the body shop manager at Charlie's Dodge at the time (T196). Each time Plaintiff would tell Gomes about the trouble with the window (T430-43 1), but testified that the repair invoices did not always reflect that he was there for the window problem (T430). Plaintiff was shown repair invoices at trial that backed up his contention that he brought the car in about nine times, even though the window was not reported on all of the invoices (T441, 447-48).

Plaintiff testified that he was on good terms with the people at Charlie's Dodge, but that he had a major problem that he felt affected the use and safety of his car from

the very first day he owned it (T445-46). He stated that the scratches on the window tinting were not that important, were a separate problem, and he did not expect Chrysler's warranty to cover the window tinting (T452). His main concern was the fact that the window did not close completely (T45 1-52). Plaintiff eventually became upset with the vehicle sufficiently that he filed a Motor Vehicle Defect Notification (RXG, R1390-1391), pursuant to the Florida Lemon Law. The first statement on the notification was: "Windows don't close completely.. . ."

Gladys Pitsirelos testified that her then-husband purchased the car for her to drive (T409), and that she drove it 80% of the time (T412). When they first bought the car in August 1989 and took it out to drive, the wind was coming through the driver's side window, and when it rained the "water would come on to my face.. , ." (T410). The car also vibrated, and the seat belt did not retract properly (T410), but the problem that concerned her the most was that the car was dangerous to drive due to water hitting her in the face from the gap at the top of the window (T411, 415).

Mrs. Pitsirelos estimated that the car was taken into Charlie's Dodge six to eight times, sometimes by her, sometimes by her husband, and at times with their friend Anna Felkowski (T413). Each time they went in, the window problem was brought to the attention of Gomes, but she testified that they did not always get repair documentation that mentioned the window (T4 13-15). Mrs. Pitsirelos testified that the window tinting was put on the day after they picked up the car (T417). She acknowledged that when she spoke with Gomes she had complaints that the tinted windows were being scratched, but

she testified that the scratching was not the main point; the point was the rain "going on your face. I used to pick up the kids from school every day. I mean, you know, it is a danger for me, it's hazardous" (T420-421).

Anna Felkowski visited with the Pitsirelos for six weeks in 1989. She was aware of the trouble they were having with their car window, and estimated that there was a half-inch gap at the top of it (T386-7, 400). Like the Pitsireloses, she testified that rain came in on the driver's side, and would splash on the driver (T388). Felkowski testified that Mrs. Pitsirelos would get upset and nervous when she was driving the car due to the rain, and she could not concentrate on the road (T388-89). Felkowski also testified that Mrs. Pitsirelos drove the car most of the time. During the six weeks she was with the Pitsireloses, Felkowski often accompanied one or both of them to the dealership because of problems with the window (T390). Each time they dealt primarily with Bob Gomes (T391),[1] and each time there was no change. The same amount of leaking occurred in the vehicle after each visit (T399). By the time Felkowski left Florida in November, the problem was still not fixed (T401).

Gomes acknowledged that the first time Plaintiff brought the car in for service it was due to a narrow gap at the top of the left side window where it did not seat against the T-top, but maintained that, after an adjustment, all of Plaintiff's later complaints were

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[1]/Gomes testified that he recalled that an elderly lady, Anna Felkowski, accompanied the Pitsireloses on some of the occasions when they brought the car in for repair (T229).

about the scratching of the window tinting, and not about water leaks (T197, 201, 222). On cross-examination, Gomes was shown the repair order for August 16, 1989, the first time the car was brought in after its purchase the week before (T224), and a second repair order dated September 6, 1989 (T225). There were notations on both regarding the left door glass, but regarding the second invoice Gomes testified that while he made the notation, no repair was done (T226-227).[2] Gomes also claimed that when he inspected the car in January 1991 after the Arbitration Board hearing, there were no water leaks, either when the car was driven during a downpour, or when it was tested at the dealership in a stall with three shower heads (T207-208).

Gomes stated that applying window tint on a car does not require anything to be taken apart because the film is simply cut and glued to the glass (T222).[3] He also stated on cross-examination that the window tinting had nothing to do with the fact that the window was off line when it came in the first time for repair (T228).[4] He testified on

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[2]/John Mielke, whose duties included defending arbitration claims against Chrysler in Florida (T329), also testified that the repair invoice of September 6, 1989 definitely indicated warranty repair work on the left door glass (T325-326), and that the repair invoice from August 16, 1989 appeared to indicate it as well (T331-333).

[3]/Randy Kurpil, former service manager at Charlie's Dodge (T235-236) also testified that in order to install tinting it is not necessary to dismantle the door, but simply to apply the tinting, and then squeegee and trim it (T242).

[4]/Chrysler's expert Arthur Patstone, manager of vehicle dynamics for small-car platforms for Chrysler Corporation, testified that even with the adjustments which Chrysler claims it made to the interior mechanism of the door to alleviate the scratching of the window tinting, that "should not change the glass adjustment significantly," and (continued. . .)

deposition that from the time the car left the dealership after it was purchased until it was brought in for repair a week later, it had not been modified or altered (T220-221). Testimony by John Mielke, a warranty manager for Chrysler in Florida (T318) established that in the manufacturer's answer which Chrysler filed after the case had been approved for arbitration (T374), the section of the form that would indicate that the problem with the vehicle was the result of accident, abuse, negligence or unauthorized modification or alteration of the vehicle by persons other than the manufacturer was not checked (T376), nor was the line checked which asserts that the claim by the consumer was not filed in good faith (T376).

Charles Rizdon, owner of an automobile restyling business which includes the installation of sun roofs and T-tops (T254-256), was called as a witness by Chrysler. He testified that over 95% of his business is done for new car dealers, and includes handling original manufacturer problems stemming from the factory which a dealer may not be able to handle for lack of specialized technicians. He also does warranty repairs on sun roofs and T-tops (T258). He first saw the Pitsirelos vehicle in January 1995 when Chrysler's counsel asked him to inspect it (T262, 272). He stated that at that time the driver's side window was out of adjustment enough to allow wind and water intrusion (T267-268, 272). He explained that sometimes dealers do not have the technicians to fix this type of problem, and the cars are brought to him to fix (T273-4) because his

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[4](. . . continued)
regarding to possible gaps, "it should still be okay." (T313-15).

company has the technicians with the skill and training necessary to correct the problem, and that in fact they do it all the time (T272-73).

After the March 6, 1990 arbitration award (T289), Plaintiff stopped using the car on a regular basis. He kept it in his garage and used it only in emergencies (T288-289). However, each week he would back it out onto the driveway and start it up in order to make sure that it would run (T291). About two months before the trial, over five years after the arbitration, Rizdon accompanied Bob Gomes to Plaintiff's home to inspect the car again (T209). Gomes stated that they took the door panel off and "made a quick adjustment of the glass" (T210). However, Plaintiff testified that they did more than that. He said that Gomes and Rizdon worked on the car for at least 4 hours. Rizdon was telling Gomes what to do (T293). They took the door panel off and adjusted the window, with the result that Plaintiff said the car was in "much better shape" than it had been prior to that 1995 "inspection" (T293-295). Plaintiff stated that after they had fmished working on the car, they took a videotape of it (T294).[5]

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[5]/In a footnote (PB6 n. 3), Chrysler notes that its proffer of a videotape of the car and its motion for the jury to view the car were denied. Those denials were based on Rizdon's testimony about working on the car along with Bob Gomes in 1995, about two months before the trial (T209), Plaintiff's testimony about that incident (T288-295), and Bob Gomes' testimony that he and Rizdon adjusted the window in 1995, and his further statement that the car was not in the same condition when he inspected it in 1995 as it had been when he inspected it in 1991 (T209-210). Based on that testimony, Plaintiff's counsel argued against admission of the 1995 videotape or a view of the vehicle, stating:

> [T]he bottom line is in order to be able to have the jury view the vehicle, whether it's by video tape or in person, actually

(continued.. .)

Chrysler apparently blames Plaintiff for the fact that Charlie's Dodge did not have an opportunity to repair the car after the defect notice was sent (IB5-6). The statute provided that if three attempts have been made to repair the nonconformity, then the manufacturer has an additional seven days after receipt of a notification of defect to arrange for one more attempt to fix the car. §681.104(1), Fla. Stat. (1989) [period increased to 10 days now under §681.104(1)(a), Fla. Stat. (1995)]. Here, the defect notice was sent to Chrysler headquarters in Detroit (T336), where it sat beyond the time permitted by the statute for the manufacturer to arrange for a fmal repair attempt (T347-349), which waived both Chrysler's right to a final repair attempt (after nine previous tries) and its right to complain about not having had the final attempt. In fact, among the Arbitration Board's findings of fact was the following:

> 7. The Consumer sent written notification on November 30, 1989, received by the Manufacturer on December 2, 1989, providing the Manufacturer with a final opportunity to repair the vehicle. The Manufacturer admits that it did not respond to the Consumer because the defect notification form was placed into a "dead letter" file at the Manufacturer's Detroit, Michigan headquarters.

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[5](. . . continued)
seeing the car and looking at it, they have to relate that the vehicle is substantially in the same condition. Most certainly it is not. Two witnesses have testified in that regard, one of their witnesses and one of ours. That is my objection, Your Honor.

(T296). The court agreed, and denied the motion for the view and the motion to admit the videotape (T298-99).

(RX3, R1325).

By the end of the trial, the jury had a choice between two different versions of the facts. Plaintiff's contentions were that the main problem with the car was the gap in the window making it dangerous to drive in the rain, and that the car was brought in repeatedly to correct that problem, without success. Poised against those contentions was the testimony of Chrysler's witnesses to the effect that there was only one complaint about the gap in the window which was fixed (T197, 201), that only one or perhaps two of the invoices indicated that the front door glass needed to be aligned (T325, 332), that none of the warranty repair invoices indicated a problem with a water leak (T346), that Plaintiff's complaints were simply about scratches on the window tinting for which Chrysler was not responsible (T201-202, 227, 344), and that the first time the issue of a water leak was brought up was on the day of the arbitration hearing (T346).

The testimonial conflicts were resolved by the jury in the Verdict (R1527, T606-607), wherein it found (1) that Chrysler had violated the Lemon Law, (2) that the vehicle's use, value or safety had been substantially impaired, (3) that Plaintiff did not modify or alter the vehicle such that its condition was not Chrysler's responsibility, and (4) that Plaintiff had filed the Lemon Law arbitration complaint in good faith.

The result of the Verdict was the affirmance of the Arbitration Board's conclusion five years earlier "that the Customer's 1989 Dodge Daytona., .is a 'Lemon'. , . ." (R1323-1330).

ISSUES PRESENTED

POINT I

THE "TRIAL DE NOVO" MECHANISM FOR REVIEW FOLLOWING THE ARBITRATION BOARD DECISION IS CONSTITUTIONAL

POINT II

THE $25 PER DAY CONTINUING DAMAGES PROVISION DOES NOT VIOLATE EQUAL PROTECTION, DUE PROCESS OR ACCESS TO COURTS

SUMMARY OF ARGUMENT

POINT I - Chrysler's challenge to the constitutionality of the trial de novo mechanism for review following the arbitration board decision is without merit. Prior case law and the very clear language of the statute itself indicates that the trial de novo is intended to be an appeal, although in the form of a trial by jury. Thus, the appellant (Chrysler here) is properly required to carry the burden of persuasion, and consistent with the scenario of an appeal, the arbitration board's decision carries a presumption of validity. The whole point of the Lemon Law is a recognition of the imbalance of power between an automobile purchaser and an automobile manufacturer, and if Chrysler's argument is correct, the legislative intent to alleviate the hardship for the consumer created by a defective motor vehicle would be lessened if the manufacturer could totally undo the work of the arbitration board by filing an appeal in the circuit court.

The Lemon Law does not violate separation of powers principles because of the fact that the Attorney General is accorded the responsibility for setting up the arbitration structure and proceedings. As the Fourth District observed, executive branch quasi-judicial proceedings by administrative bodies or boards are permitted under the Florida Constitution, with examples such as dispute resolution between injured workers and their employers under the Workers' Compensation Act, resolution of disputes between condominium owners and associations in arbitration conducted by attorneys employed by the Department of Business and Professional Regulation, etc.

Chrysler's arguments that the Lemon Law violates due process is also without merit. Although testimony by affidavit can be accepted in the arbitration board proceeding, the board also has the authority to request that the attendance of witnesses be compelled. The provision for electronic recording to be later transcribed by the Attorney General's office does not create a constitutional infirmity. Under the Rules of Judicial Administration, live court reporters are only required at criminal and juvenile proceedings, and any other proceeding which requires reporting by law. In fact, court reporters are not required at any stage of the usual civil action brought in the circuit courts. Chrysler's court reporting argument does not indicate a constitutional infirmity in the statute.

Chrysler argues that a view of the vehicle should be mandatory. Instead, it is permissive, just as the matter of a jury view in a civil case is within the trial court's discretion, This issue does not involve an unconstitutional denial of access to evidence as Chrysler attempts to portray it, and no constitutional infirmity. Finally, the requirement that the board make findings implicitly requires that the board decide which evidence outweighs other evidence, which is the essence of a decision by the preponderance of the evidence.

POINT II - The $25 per day continuing damages provision does not violate the equal protection or due process provisions of the Florida or United States Constitutions or the right of access to court. As the Fourth District held, the continuing damage allowance is a valid legislative estimate of the damages which the consumer will suffer

because of lack of transportation. The Fourth District correctly concluded that this provision does not provide the consumer with an inherent advantage over a manufacturer in a warranty dispute and appeal process, but instead evens the playing field. Otherwise, the manufacturer could institute an appeal and require the consumer to buckle for lack of transportation during the appeal process,

ARGUMENT

POINT I

THE "TRIAL DE NOVO" MECHANISM FOR REVIEW FOLLOWING THE ARBITRATION BOARD DECISION IS CONSTITUTIONAL

A. Introduction--Trial De Novo

The intended purpose of the "Motor Vehicle Warranty Enforcement Act," Chapter 68 1, Fla. Stat. (1989) ,[6] commonly known as the "Lemon Law," was presented in the following, thorough statement of legislative intent:

> **Legislative intent -** The Legislature recognizes that a motor vehicle is a major consumer purchase and that a defective motor vehicle undoubtedly creates a hardship for the consumer. The Legislature further recognizes that a duly franchised motor vehicle dealer is an authorized service agent of the manufacturer. It is the intent of the Legislature that a good faith motor vehicle warranty complaint by a consumer be resolved by the manufacturer within a specified period of time. It is further the intent of the Legislature to provide the statutory procedures whereby a consumer may receive a replacement motor vehicle, or a full refund, for a motor vehicle which cannot be brought into conformity with the warranty provided for in this chapter. However, nothing in this chapter shall in any way limit or expand the rights or remedies which are otherwise available to a consumer under any other law.

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[6]/References to sections in Chapter 681 will be by the section numbers as they appeared in the 1989 version of the statute, at the time this case originated. Where section numbers have since changed, the new section number will be indicated along with the 1989 number.

9681.101, Fla. Stat. (1989).

The essence of the Lemon Law focuses on a non-conformity with the vehicle warranty which

> means a defect or condition that substantially impairs the use, value or safety of a motor vehicle, but does not include a defect or condition that results from an accident, abuse, neglect, modification, or alteration of the motor vehicle by persons other than the manufacturer or its authorized service agent.

§681.102(12), Fla. Stat. (1989) [now §681.102(15), Fla. Stat. (1995)]. A good description of the basic scheme of the Act was presented in a Florida Bar Journal article, as follows:

> The significance of the Motor Vehicle Warranty Enforcement Act lies in its legislative intent. The legislature has declared its recognition that a motor vehicle is a major consumer purchase. Furthermore. a defective motor vehicle creates such hardship that additional remedial legislation was required to give the average person a chance against the large and powerful manufacturers. The intent of the act, then, is to have its provisions liberally construed in favor of the consumer. The act creates the presumption that a motor vehicle is a lemon if it has been out of service by reason of repair of one or more nonconformities for a cumulative total of 30 or more days, or has been subject to repair by the manufacturer three times plus a final, fourth, failed attempt by the maker after receipt of written notice from the consumer. When either of these things occur, then the consumer has an unconditional right to choose either a refund or an acceptable replacement. The statute is mandatory in this respect when a motor vehicle is a lemon. The manufacturer "shall" issue a refund or replacement of the lemon.

R.G. Ingalsbe, "Florida's New Car Lemon Law An Effective Tool For The Consumer," Fla. Bar J., October 1990 at 61 (footnotes omitted),

> Contrary to common misunderstanding, relief under the Act does not require a defect as dramatic as a transmission failure or a blown engine. The act does not require that the vehicle absolutely cannot be driven. Rather, the criterion for relief is that the defect is such that it "substantially impairs the use, value or safety of a motor vehicle.. . ." §681.102(15), Although plaintiff's vehicle could be driven, both the arbitration board and the jury agreed with his contention that gap in the window made it dangerous to drive in the rain, and that the car was brought in nine times to correct that problem, without success. Thus, there was an impairment both of the vehicle's use and its safety,

Chrysler's constitutional challenge to the statute is made in the context of several well-established rules governing such challenges. First, statutes are presumed to be constitutional, and all doubts are resolved in favor of their constitutionality. FLORIDA LEAGUE OF CITIES, INC. v. ADMINISTRATION COMMISSION, 586 So.2d 397, 412 (Fla. 1st DCA 1991). In determining a statute's constitutionality, a court should consider the act as a whole, including its history, the evil to be corrected or the object to be obtained, and the intention of the legislature. SCARBOROUGH v. NEWSOME, 150 Fla. 220, 7 So.2d 321 (Fla. 1942). Whenever possible, a court must construe a statute so as not to conflict with the constitution. STATE v. GLOBE COMMUNICATIONS CORP., 648 So.2d 110, 113 (Fla. 1994).

Chrysler's first argument is that it should not have been made to bear the burden of proof in the appeal in the circuit court because the statute specifies that the appeal will be by a "trial de novo." The applicable section, §681.1095(13), Fla. Stat. (1989) [now §681.1095(12), Fla. Stat. (1995)] reads as follows:

> An appeal of a decision by the board to the circuit court by a consumer or a manufacturer shall be by trial de novo. In a written petition to appeal a decision by the board, the appealing party must state the action requested and the grounds relied upon.

As the Fourth District observed, the arbitration board decision is introduced in the trial de novo, and is presumed to be correct. CHRYSLER CORP. v. PITSIRELOS, 689 So.2d 1132, 1133 (Fla. 4th DCA 1997), citing AGUIAR v. FORD MOTOR CO., 683 So.2d 1158 (Fla. 3d DCA 1996). The Fourth District concluded that the only reasonable interpretation of the statutory scheme is that it is the appealing party's burden (Chrysler here) "to demonstrate any error or abuse of discretion to the reviewing tribunal." Id. at 1134.

In reaching its conclusion, the Fourth District relied on the prior decision by the Fifth District Court of Appeal in MASON v. PORSCHE CARS OF NORTH AMERICA, 621 So.2d 719 (Fla. 5th DCA), rev. denied, 629 So.2d 134 (Fla. 1993). The MASON decision is soundly based on three areas of analysis: the nature of an appeal, a survey of the review by trial de novo mechanism in other contexts, and the logic of the Lemon Law itself.

First, the court in MASON pointed out that §681.1095(13), Fla. Stat. (1989) [now §681.1095(12), Fla. Stat. (1995)], uses not only the term "trial de novo," but also uses the term "appeal," and observed that "it is generally the burden of the appellant to show that the lower tribunal erred." Id. at 72 1-722. The court reasoned as follows:

> The manufacturer states that "de novo" means to try a matter anew, as if the same had not been heard before and as if no decision had been previously rendered. However, section 681.1095(13), Florida Statutes [1991] does not only use the term "trial de novo" but also uses the term "appeal," which by its normal definition means a review of a lower tribunal's decision Admittedly, section 681.1095(13) is inartfully drafted but it should not be interpreted so as to lead to an absurd result.

Id. at 722. Thus, as to the burden of proof, the MASON court interpreted the statute as follows:

> Although the trial court characterizes section 681.1095, Florida Statutes (1991) as ambiguous, the statute is clear that once the arbitration board makes its findings, the aggrieved party may appeal to the circuit court. Although most appellate proceedings do not include a trial or evidentiary hearing, the statutory appellate procedure for Florida's lemon law authorized a trial de novo. Nevertheless, it is generally the burden of the appellant to show that the lower tribunal erred.

Id. at 721.

By its nature, an appeal is a proceeding in which a party "submits to the decision of a higher court a case that has been tried and decided in an inferior tribunal." 3 Fla. Jur.2d *Appellate Review* § 1 at 23-24 (1978). It is an elementary principle of appellate review that the burden of showing error rests on the party asserting it. PALM BEACH

SASH & DOOR CO. v. RICE, 1 So.2d 861, 863 (Fla. 1941). Those principles alone establish that in the proceeding in the circuit court, although by way of trial de novo, Chrysler was still an appellant, and therefore bore the burden of showing error.

Second, the Fifth District in MASON reasoned to the conclusion that the burden lies with the appealing party based on the logic of the law itself, stating:

> The benefits and importance of the compulsory arbitration process would be minimized if the simple filing of a petition could force the successful party in arbitration to seek affirmative relief in the circuit court. If the manufacturer prevailed before the Arbitration Board, surely the manufacturer would not argue that it had the burden on appeal to prove the correctness of the board's decision as the plaintiff in a trial de novo. Yet the manufacturer considers it appropriate to make the consumer seek affirmative relief in both the administrative and judicial forum, regardless of what transpires before the arbitration board.

621 So.2d at 721-22.

Third, the court in MASON surveyed other cases and contexts in which an appellate mechanism was provided for by way of a trial de novo to illustrate that the "de novo" nature of the proceeding does not mean that the petitioning party is relieved of the burden of persuasion, as in any other appeal. Id. at 722. In its brief, Chrysler cites another Fifth District case dealing with trials de novo, CITY OF ORMOND BEACH v. STATE EX REL DE MARCO, 426 So.2d 1029 (Fla. 5th DCA 1983). Chrysler quotes (PB13) a portion of that opinion which indicates that the court in the trial de novo does not act in a review capacity, but rather acts as the board of adjustment in the first instance. Chrysler suggests that that language means that any proceeding such as the

instant case wherein a trial de novo is employed is not a review proceeding, and therefore the petitioner in that proceeding does not bear the burden of persuasion. That is contrary to the Fifth District's own reading of DE MARCO in MASON, where it explained that DE MARCO meant that the circuit court in a trial de novo could take any action the board of adjustment could, and that the petitioning party has the burden of demonstrating hardship. 62 1 So.2d 722. Therefore, DE MARCO does not support Chrysler here. Moreover, courts have encountered appeals by trial de novo in other contexts, such as in zoning cases. See, e.g., DRAGE-GROTHE, LTD. v. LAKE JESSAMINE PROPERTY OWNERS ASS'N, 304 So.2d 504, 505 (Fla. 4th DCA 1974); METROPOLITAN DADE COUNTY v. REINENG CORP., 399 So.2d 379, 382 n. 5 (Fla. 3d DCA 1981).

Chrysler cites (PB14) as evidence of confusion that can result by interpreting the trial de novo mechanism as an appeal the events which took place early on in this case (PA4, 5, 6, 7, 8, 9, 10), which culminated in an order (PA10) directing that the trial de novo not take place in the appellate division of the circuit court. No such confusion should take place any longer in light of MASON and the Fourth District's opinion in this case, both of which were issued after the flurry of activity in this case regarding the proper forum was concluded. Further clarity was offered later by the Fourth District in GENERAL MOTORS CORP. PONTIAC MOTOR DIVISION v. NEU, 6 17 So.2d 406, 408 (Fla. 4th DCA 1993), where it held that the format of a trial de novo was the appeal provided for in §681.1095(11), Fla. Stat. (1989) [now §681.1095(10), Fla. Stat. (1995)].

Since the trial de novo is an appeal, the burden of showing error "rests on the party asserting it, " as in any other appeal. RICE, supra.

Chrysler's argument essentially asks this Court to ignore that when the legislature drafted §681.1095(13), it used the word "appeal." Plaintiff submits that the legislature knew how to use that word here, just as it did in the statute addressed by this Court in YOUNG v. DEPARTMENT OF COMMUNITY AFFAIRS, 625 So.2d 83 1 (Fla. 1993), which is discussed thoroughly in the Attorney General's brief. It is axiomatic that the touchstone for interpreting a statute is the Legislature's intent, and the best reflection of that intent is the language of the statute. CEPCOT CORP. v. DEPT. OF BUSINESS AND PROFESSIONAL REGULATION, 658 So.2d 1092, 1095 (Fla. 2d DCA 1995). The meaning of the statute here, considered as a whole, is clear. While the format of the proceeding is a trial de novo, it is still an appeal, Chrysler was the appellant, and therefore Chrysler was a proper party to bear the burden of persuasion,

Against this array of Florida precedent, Chrysler cites (PB 16) a number of cases (none of which were Lemon Law cases) from other states decided in other types of proceedings wherein the burdens placed upon the respective parties were the same in a trial de novo at an appellate stage as they were in the initial stage of the proceeding. See D'AGOSTINO v. AMARANTE, 172 Conn. 529, 375 A.2d 1013 (1977) (proceeding to probate will); SHEPPARD v. MISSISSIPPI STATE HIGHWAY PATROL, 693 So.2d 1326 (Miss. 1997) (proceeding for suspension of driver's license); KNIGHT BROADCASTING OF NEW HAMPSHIRE v. KANE, 109 N.H. 565, 258 A.2d 355

(1969) (workers' compensation proceeding); PAGAN v. FORD MOTOR CO., 1984 W.L. 14155 (Ohio App. 1984) (workers' compensation proceeding); SHELTON v. LAMBERT, 399 P.2d 471 (Okla. 1965) (proceeding challenging sufficiency of an initiative petition); BLIZZARD v. MILLER, 412 S.E.2d 406 (S.C. 1991) (automobile accident arbitration); BOX v. TALLEY, 338 S.E.2d 349 (Va. App. 1986) (child custody proceeding). While those cases are dispositive of the issue in the context of the type of proceedings in which they were decided in their respective states, they do not support Chrysler's argument here, because they cannot overcome the logic of Florida's Lemon Law.

The whole point of the law, as explained in the thorough statement of legislative intent in §68 1.101, is a recognition of the imbalance of power between an automobile purchaser and an automobile manufacturer, and the "hardship for the consumer" which a defective motor vehicle creates. As the Fourth and Fifth Districts recognized here and in MASON, the benefits of the entire scheme would be "minimized" if all the manufacturer had to do was to file an appeal in order to return to square one. That would perpetuate the "hardship for the consumer" who by the time the manufacturer's appeal is filed has already endured at least four unsuccessful attempts by the manufacturer to repair the vehicle as required under §681.104(3)(a), Fla. Stat. (1989), and then has persisted through the arbitration process. Starting over again upon an appeal by the manufacturer lengthens the process in a manner totally inconsistent with the legislative intent.

Further, the fact that a decision by the arbitration board is admissible in evidence in the trial de novo, §681.1095(10), Fla. Stat. (1989) [now §681.1095(9), Fla. Stat. (1995)], reflects the legislature's intention that the decision be accorded a presumption of validity against which the party challenging it logically bears the burden of proof in the circuit court action, MASON at 722. Because a consumer who prevailed at arbitration can still counterclaim in an appeal some aspect of the decision with which he disagrees, as the Fifth District in MASON observed, to accept an argument such as Chrysler's would require "the consumer to shoulder the burden of persuasion on both the appeal and cross-appeal [which] would lead to an inequitable and absurd result." Id. at 723. Statutes should not be construed in a manner which would lead to an absurd result. STATE v. WEBB, 398 So.2d 820, 824 (Fla. 1981).

Of course, there is a symmetry to the statute which Chrysler chooses to ignore. The provision in §681.1095(10) that the arbitration board decision is admissible in any appeal applies to both sides. That is, an unsuccessful consumer appealing from the arbitration decision must also face the task of overcoming the effect of the admission of an arbitration board decision adverse to him in the trial de novo, just as Chrysler had to here, As the MASON court observed: "If the manufacturer prevailed before the Arbitration Board, surely the manufacturer would not argue that it had the burden on appeal to prove the correctness of the board's decision as the plaintiff in a trial de novo." Id. at 721-22.

The presumption of validity accorded decisions of the arbitration board is a presumption affecting the burden of proof. Presumptions affecting the burden of proof initially developed at common law and are rooted in social policy. §90.304, Fla. Stat. (1995); Sponsor's Note to 90.304, Fla. Stat. (1979); Erhardt, ***Florida Evidence*** 8304.1 (1995). Florida's Lemon Law is social legislation, enacted to protect the public interest. A reading of the statement of legislative intent clearly shows that the law is rooted in strong social policy.

Accordingly, since the presumption of validity of the arbitration board's decision is one affecting the burden of proof, mere presentation of credible evidence to the contrary by the party against whom the presumption operates would not cause the presumption, or the arbitration board's decision, to disappear from the case. Pursuant to CALDWELL v. DIVISION OF RETIREMENT, FLA. DEPT. OF ADMINISTRATION, 372 So.2d 438 (Fla. 1979), when evidence rebutting the presumption is introduced, "the presumption does not disappear. It is not overcome until the trier of fact believes that the presumed fact has been overcome by whatever degree of persuasion is required by the substantive law of the case." Id. at 440. Accord PUBLIC HEALTH TRUST OF DADE COUNTY v. VALCIN, 507 So.2d 596,601 (Fla. 1987). In this case, the jury found the evidence presented by Chrysler was not sufficient to overcome the presumption and the decision of the arbitration board was confirmed.

The presumption of validity recognized by the Fourth District in this case and by the Fifth District in MASON is consistent with the presumption of validity recognized by

the courts in other contexts, For example, in MASON the Fifth District relied on BYSTROM v. EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, 416 So.2d 1133 (Fla. 3d DCA 1982), where an analogous de novo provision found in Chapter 194, Fla. Stat. (1977), was reviewed by the Third District Court of Appeal. The presumption of validity attached by the Third District to the decision of the tax appraiser in BYSTROM arose from the common law rule that "acts of public officials are presumptively valid and, in furtherance of the societal good, operate to place upon the challenging party the burden of proof concerning the nonexistence of presumed facts." Id. at 1141. See also HILLSBOROUGH COUNTY AVIATION AUTHORITY v. TALLER AND COOPER, INC., 245 So.2d 100, 102 (Fla. 2d DCA 1971); Erhardt, ***Florida Evidence 9304.1*** (1995). The presumptive validity of the acts of public officials is well established in administrative law and appellate decisions reviewing agency actions. CATARACT SURGERY CENTER v. HEALTH CARE, 581 So.2d 1359, 1360-61 (Fla. 1 st DCA 199 1); ORGANIZED FISHERMAN OF FLORIDA v. HODEL, 775 F.2d 1544, 1549, 1550 (11th Cir. 1985); STATE EX REL. SIEGENDORF v. STONE, 266 So.2d 345, 346 (Fla. 1972).

Additional support for this position lies in the fact that the New Motor Vehicle Arbitration Board was established by the Legislature within the Department of Legal Affairs and consists of members appointed by the Attorney General, a constitutional officer, §681.1095(1), Fla. Stat (1989). The arbitration board is the entity charged by the Legislature with the responsibility for construing and applying Chapter 681 and the

rules promulgated thereunder. §681.1097(3), Fla. Stat (1989). The arbitration board acts collectively in the capacity of a public official.

Finally, Chrysler quotes (PB17) from MASON, as quoted by the Fourth District in the instant case, to the effect that the benefits of the arbitration process would be minimized if the filing of an appeal "'would force the successful party in arbitration to seek affirmative relief in the circuit court.' " 689 So. 2d at 1133-1134. Chrysler contends (PB17) that this betrays misunderstanding by the Fourth District of its position because it "could not be deemed to have asked for 'affirmative relief' in this case." Contrary to its argument that the Fourth District's statement placed it in the position of having to seek affirmative relief in the trial de novo despite the fact that it had not instituted a claim, the Fourth District's statement meant simply that the benefit of arbitration would be lost if the party who prevailed in the arbitration was forced to start all over again from square one in the circuit court. The Fourth District's statement betrayed no misapprehension of Chrysler's position, but appropriately rejected it.

In sum, Plaintiff respectfully submits that Chrysler's argument that the trial de novo is not an appeal, and would require a consumer who prevailed in the arbitration process to start all over again, misreads the statute. For all of Chrysler's complaints about the procedure, it does accord the appealing party one very significant benefit not available in the regular type of appeal. That is, because it is "de novo," the appealing party is not bound by the record in the prior stage, and can present any evidence it

chooses in the trial de novo, regardless of whether that evidence had been presented below.

B. Burden of Proof

1. Separation of Powers

The Lemon Law provides that the Florida New Motor Vehicle Arbitration Board is established within the Department of Legal Affairs, with its members appointed by the Attorney General. §681.1095(1). Previously, the board was to consist of three permanent members and three alternates. §681.1095(3), Fla. Stat. (1989). The current statute requires six members for each board. §681.1095(3), Fla. Stat. (1995). At least one member of the board is required to have expertise in motor vehicle mechanics. §681.1095(3), Fla. Stat. (1995). [The 1989 version of this section stated that "[o]ne member shall be an automotive technical expert.. . ."]. The Attorney General is permitted to establish "as many boards as necessary to carry out the provisions of this chapter." §681.1095(1).

Chrysler contends that this mechanism violates the principles of separation of powers. It asserts that the issue is whether the Attorney General "may set up a mandatory arbitration proceeding for manufacturers." (PB19). In a footnote, it argues that the legislature is not vested with the authority to create a new court (PB19 n. 7). The Fourth District stated that it rejected "the contention that the Act violates separation of powers principles by permitting an executive branch arbitration board to exercise

judicial power." 689 So.2d at 1135. The court observed that executive branch quasi-judicial proceedings "by administrative bodies or boards are permitted under article V, section 1 of the Florida Constitution," Id. It pointed to a number of instances as examples of authorized exercises of that authority, and in his brief the Attorney General recites that those instances include resolution of disputes between injured workers and their employers under the Workers' Compensation Act, Chapter 440, Fla. Stat. (1997), resolution of disputes between condominium owners and associations in arbitration conducted by attorneys employed by the Department of Business and Professional Regulation, §7 18.125(4), Fla. Stat. (1997), the mediation of disputes between mobile home park residents and park owners pursuant to 9723.037, Fla. Stat. (1997), and the determination of birth-related neurological injury claims between patients and physicians or hospitals pursuant to $766.303, Fla. Stat. (1997). Those examples refute Chrysler's argument (PB19 n. 7) that the Act is unique and invalid because it compels "a private party to defend itself against the charges of another private party.. . ."

Moreover, Chrysler's statement that the issue is whether the Attorney General may set up mandatory arbitration proceedings for manufacturers misstates the issue. It is not the Attorney General who created the mechanism, but the Legislature. Further, Chrysler's argument that the Act is not compulsory for consumers with warranty-related claims, and that if a consumer elects arbitration the manufacturer is required to participate, presents no new issue. Under §681.112(3), Fla. Stat. (1989), the consumer's right to pursue an independent action in court would simply require the manufacturer to

respond, as any defendant must do in any other lawsuit. If the consumer instead chooses to avail himself of the remedial mechanism provided under Chapter 681 ,[7] the consumer thereby subjects himself to the possibility of penalties if the claim is brought in bad faith, §681.106, Fla. Stat. (1989), and the defendant manufacturer is required to respond, again as in any other lawsuit. Thus, the manufacturer suffers no special disadvantage unique to this legislation.

Finally, it is noteworthy that arguments similar to those raised here by Chrysler have been rejected elsewhere, as is demonstrated by Chrysler's discussion of some of those cases in its brief, and its reliance on the dissent in MOTOR VEHICLE MANUFACTURERS ASS'N OF U.S., INC. v. STATE, 550 N.E.2d 919 (N.Y. 1990). Chrysler's argument that if a manufacturer loses the arbitration, the $25 per day continuing damages provision in §681.1095(13)(14), Fla. Stat. (1989) [now §681.1095(13), Fla. Stat. (1995)] burdens his right of access to a trial by jury is without merit. As has already been established, the jury's involvement in the trial de novo is in the nature of an appeal, and the $25 per day liquidated damage provision no more

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[7]/He may do so only if the consumer is found eligible for arbitration after screening provided in §681.109(4-6), Fla. Stat. (1989) [now §681.109(5-7), Fla. Stat. (1995)]. See §681.1095(5), Fla. Stat. (1989).

burdens the manufacturer than does the requirement to post bond burden the losing party pending an appeal in any other context. [8]

2. Due Process

Chrysler raises a number of arguments here challenging what it considers to be due process deficiencies in the statute, and leading to its proposed conclusion (PB32) that the board decision is really meant only as an informal means of dispute resolution before the jurisdiction of the courts is invoked, without sufficient substance to require a shift in the burden of proof or persuasion. Chrysler first argues (PB28-29) that the makeup of the board indicates that its decision was not intended to have sufficient status that it would require being overturned in a later phase of the case. Board membership is governed by §681.1095(1 and 3), Fla. Stat. (1989), which does not specify prior credentials except to

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[8]/Chrysler mentions in passing (PB26) the provision for prepayment of the consumer's attorney's fees which the court, in its discretion, may require when the manufacturer appeals. §681.1095(15), Fla. Stat. (1989) [now §681.1095(14), Fla. Stat. (1995)]. That provision is not at issue here, because it was not employed by the trial court. Regardless, that section essentially establishes a bond as a precondition for a manufacturer to appeal from an adverse judgment in the trial de novo appeal. The statute is not mandatory, but even if it were, it would not be unconstitutional. A statute requiring an appeal bond is ordinarily held to be a valid exercise of legislative power, and such statutes do not violate constitutional provisions granting the right of appeal because they are considered as merely regulatory of the method for exercising the right. See AUSTIN v. TOWN OF OVIEDO, 92 So.2d 648, 650 (Fla. 1957). The reasoning of AUSTIN governs especially in a case like this, where the right of appeal is a creature of statute, and therefore properly subject to legislative regulation. Moreover, permitting the court in its discretion to require a bond at that stage of the proceeding is reasonable because the appeal from the circuit court is the third stage of the proceeding, and the second appeal.

require that one member have expertise in motor vehicle mechanics. The entire board is required to "be trained in the application of this chapter and any rules adopted under this chapter.. . . " Id. Plaintiffs submit that that is sufficient because the membership in most governmental boards or commissions is not limited to persons with certain credentials. An example is the Board of County Commissioners in any county, or members of city commissions. Plaintiffs respectfully submit that this argument is without merit.

Chrysler also argues (PB30) that the arbitration procedure lacks a basic element of due process, requiring an opportunity to confront a witness in open court, because the board is permitted to receive and consider evidence of witnesses by affidavit, and not necessarily by testimony at the hearing. However, Chrysler's authority for this argument are criminal cases, STATE v. PHILLIPE, 402 So.2d 33 (Fla. 3d DCA 1981), and STATE v. REYNOLDS, 238 So.2d 598 (Fla. 1970). U.S. Const. Amend. VI, wherein resides the Confrontation Clause and the right to compulsory process for obtaining witnesses, applies by its terms to "all criminal prosecutions," not to civil litigation. Nonetheless, compulsory attendance of witnesses is recognized as a component of a fair hearing for due process purposes in civil and administrative proceedings, DROGARIS v. MARTINE'S INC., 118 So.2d 95, 97 (Fla. 1st DCA 1960), and the Lemon Law provides a mechanism to compel the attendance of witnesses before the board. See §681.1095(7), Fla. Stat. (1989) [now §681.1095(6), Fla. Stat. (1995)].

Chrysler next argues that essential to the proper conduct of a trial or an administrative proceeding is a proper transcript of the proceeding made by a certified stenographer (PB30). Not so. The criminal case which Chrysler cites as its sole supporting authority, WEINSTEIN v. STATE, 348 So.2d 1194, 1195 (Fla. 3d DCA 1977), is inapposite. Court reporting services is governed by Rule 2.070 of the Rules of Judicial Administration. Fla.R.Jud.Admin. 2.070(b) reads in pertinent part as follows:

> **When Reporting Required.** All criminal and juvenile proceedings, and any other judicial proceedings required by law or court rule to be reported at public expense, shall be reported. Any proceeding; shall be reported on the request of any party. The parties so requesting shall pay the reporting fees, but this requirement shall not preclude the taxation of costs as authorized by law.

Because this is neither a criminal nor juvenile proceeding, and in the absence of any law requiring court reporting, there can be no due process defect from the fact that a live stenographer is not present to record board proceedings. Any attorney handling a civil case in the state courts knows that no court reporter will be present unless such arrangements have been made by either side. Chrysler's argument that there is a due process defect because of the lack of a live stenographer at board proceedings is therefore totally without merit.

As Fla.R. Jud.Admin. 2.070(b) explicitly states, a board proceeding can be reported by a live stenographer on the request of any party, such as Chrysler. It need not simply rely on the electronic tape recording which it states serves as the official transcript of the proceeding and is later transcribed by the Attorney General's office. Also, it is worthy

of note that Fla.R.Jud.Admin. 2.070(d) deals with "electronic reporting" and permits a chief judge to include a plan for that type of reporting "for any judicial proceedings, including depositions, required to be reported." Thus, Chrysler has no cause to complain in this regard, constitutionally or otherwise.

Chrysler's third argument is that the basic requirements of due process require an opportunity to discover and inspect evidence, a proposition which is supported by the case which it cites. DUVAL COUNTY SCHOOL BOARD v. ARMSTRONG, 336 So.2d 1219, 1220 (Fla. 1st DCA 1976). The problem is that its argument does not follow from that principle. The issue here is not the issue in the DUVAL COUNTY case, the denial of access to evidence. Rather, Chrysler attempts to apply that principle to whether there should be a mandatory provision requiring the arbitration board to inspect the vehicle at issue. As it states, the matter of a view of the vehicle is permissive under §68 1.1095(8), Fla. Stat. (1989) [now §681.1095(7), Fla. Stat. (1995)] ("The board may also inspect the vehicle if requested by a party or if the board deems such inspection appropriate."). Thus, the issue here is not discovery as a component of due process, but rather it is akin to the principle governing a jury view, which under Fla.R.Civ.P. 1.520 is a matter within the discretion of the trial court. FOUNTAINBLEAU HOTEL CORP. v. GODDARD, 177 So.2d 555 (Fla. 3d DCA 1965).

Chrysler argues (PB3 1-32) that the standard of proof before the arbitration board is insufficient. Its argument fails to acknowledge that before a case can go before the board, it must pass the requirements of §681.109(4-6), Fla. Stat. (1989) [now

§681.109(5-7), Fla. Stat. (1995)], and if it fails to do so, then the consumer is left to pursue an ordinary lawsuit, wherein the rejection of his or her case is admissible, just as is the determination by the board admissible in this case. Further, §681.1095(10), Fla. Stat. (1989) [now §681.1095(9), Fla. Stat. (1995)], which requires the board's decision to contain written findings of fact, obviously requires the board's decision to be by a preponderance of the evidence, which is implicit in the requirement that findings be made. The issue in AMERICAN INS. ASS'N v. DEPARTMENT OF INSURANCE, 518 So.2d 1342 (Fla. 1st DCA 1988), cited by Chrysler (PB32) was different. There, the Department of Insurance simply determined that the prior order had been supported by substantial competent evidence. The court aptly pointed out that the existence of such evidence does not mean that there was a preponderance of it. Id. at 1346. Here, the board does not simply state that there is evidence in support of a claim, but is required to make findings based on the evidence. In so doing, the board decides which evidence outweighs other evidence, which is the essence of a decision by the preponderance of the evidence.

POINT II

THE $25 PER DAY CONTINUING DAMAGES PROVISION DOES NOT VIOLATE EQUAL PROTECTION, DUE PROCESS OR ACCESS TO COURTS

Chrysler and the Amici argue that the $25 per day continuing damages provision of §681.1095(14), Fla. Stat. (1989) [now §681.1095(13), Fla. Stat. (1995)] unconstitutionally restricts a manufacturer's access to court, in contravention of Article 1, Section 21 of Florida's Constitution, because it is in the nature of a punitive damage award. (PB34-35).

Generally, a claim of denial of access to court arises under the Florida Constitution when a preexisting right to sue has been abolished by the Legislature or has been substantially burdened by the imposition of preconditions to bringing an action. The challenged continuing damages provision of §681.1095(14), is not a precondition to the bringing of any action by a manufacturer, but is awarded, as in this case, only after a manufacturer loses a meritless appeal. Chrysler and the Amici cannot legitimately argue that §681.1095(14) abolishes any preexisting right to bring an offensive action against a consumer.

In KLUGER v. WHITE, 281 So.2d 1 (Fla. 1973), The Supreme Court established the test for determining whether access to the courts has been unconstitutionally denied, and the circumstances under which the test should be applied:

> [w]here a right of access to the courts for redress for a particular injury has been provided by statutory law predating the adoption of the Declaration of Rights of the Constitution

> of the State of Florida, or where such right has become a part of the common law of the State.. .the Legislature is without power to abolish such a right without providing a reasonable alternative to protect the rights of the people of the State to redress for injuries, unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown.

Id. at 4. See also SMITH v. DEPARTMENT OF INSURANCE, 507 So.2d 1080, 1088 (Fla. 1987).

The Lemon Law represents the statutory creation of an additional remedy that did not predate the state Constitution and that was not cognizable at common law. Contrary to the assertion by the Amici, the Lemon Law is not a breach of warranty action; rather, like all state lemon laws, it is a new cause of action arising out of the Legislature's reaction to the inadequacies of existing causes of action for breach of warranty and contract to redress the grievances of persons acquiring new motor vehicles with intractable problems. "It is not seriously disputed that traditional means of redress available to disgruntled consumers, such as a lawsuit sounding in contract or warranty, was inadequate. " LYETH v. CHRYSLER CORP., 734 F.Supp. 86, 92 (W.D.N.Y. 1990).[9] The circumstances are not present for application of the KLUGER test.

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[9]/See, MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE U.S., INC. v. STATE OF NEW YORK et al., 550 N.E.2d 919,922 (N.Y. 1990). The court, upholding New York's Lemon Law, examined in detail the distinctions between Lemon Law remedies and remedies for breach of contract, breach of warranty and revocation of acceptance.

Therefore, Chrysler's and the Amici's challenge to the continuing damages provision as violative of Florida's constitutional right of access to the courts cannot be sustained.

A denial of access argument similar to that of Chrysler and the Amici was made in LIFE & CASUALTY INS. CO. v. McCRAY, 291 U.S. 566 (1934). At issue in that case was a statute that assessed attorney's fees and a 12% surcharge damage assessment against an insurer that failed to pay benefits. The insurer claimed that the statute unconstitutionally burdened its privilege of access to the courts. In upholding the statute, the Court held that the damage surcharge was not a penalty blocking access to court, but was valid both as a deterrent to stimulate the insurer to make a prompt settlement of just claims and as compensation to the insured for the trouble and expense of pursuing the claim. Upholding the statute, Justice Cardozo writing for the Court stated:

> [O]ne who refuses to pay when the law requires that he shall, acts at his peril, in the sense that he must be held to the acceptance of any lawful consequences attached to the refusal. It is no answer in such circumstances that he has acted in good faith. 'The law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. ' . . .The price of error may be so heavy as to erect an unfair barrier against the endeavor of an honest litigant to obtain the judgment of a court. In that event, the Constitution intervenes and keeps the courtroom open. . . .On the other hand, the penalty may be no more than the fair price of the adventure. . , .In that event, the litigant must pay for his experience, like others who have tried and lost.

291 U.S. at 574-575. (Citations omitted).

Chrysler's right to pursue its appeal of the arbitration award was not infringed. It tried its case and lost. Liability for continuing damages was "no more than the fair price of the adventure." It stretches the imagination to classify such deminimus economic exposure as oppressive. The continuing damages provision represents a reasonable effort by the Legislature to attempt to compensate consumers for the financial hardship of meritless manufacturer appeals and to promote the expeditious resolution of motor vehicle warranty disputes. It neither abolishes nor restricts access to the courts, and the Fourth District correctly upheld it.

Plaintiff will adopt and rely upon the other arguments raised by the Attorney General in his Amicus Brief under this point, except for the following observation. At the beginning of its argument under this point in its brief, Chrysler showcases the amount of continuing damages which was awarded by the circuit court, as well as the fact that under the statute the damages continue to accrue through the course of this proceeding as well (PB34 and n. 15). In the Fourth District, Plaintiff contended that if Chrysler's true intent in bringing the appeal was to challenge the law, rather than to make an example of the consumer, it could have minimized its exposure to continuing damages by taking back the vehicle, paying Plaintiff and launching its constitutional challenges via a declaratory judgment action. The Fourth District agreed with that observation near the conclusion of its opinion. 689 So.2d 1134. Quite obviously, Chrysler from the beginning intended to make this a test case. To this day the 1989 Dodge Daytona still sits in Plaintiff's garage, while Chrysler has chosen to let the continuing damages to pile

up in place of compliance with the arbitration award. See §681.1095(10), Fla. Stat. (1989) [now §681.1095(9), Fla. Stat. (1995)]. Thus, the fact that the continuing damages now amounts to more than the purchase price of the vehicle (PB34 n. 15) is by Chrysler's own choice in order to heighten the dramatic effect of its arguments before this Court.

CONCLUSION

Based on the foregoing argument, Respondent respectfully requests that the decision of the Fourth District Court of Appeal be approved.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true copy of the foregoing was furnished by mail to GREGORY A. ANDERSON, ESQ., 225 Water St., Ste. 2100, Jacksonville, FL 32202, JANET L. SMITH, ESQ., Assistant Attorney General, The Capitol, PL-01, Tallahassee, FL 32399-1050, and GEORGE N. MEROS, JR., ESQ., P.O. Box 10507, Tallahassee, FL 32302, this 16th day of September, 1997.

PHILLIPS GALE ZISKINDER P.A.
The Historic Boston House
239 South Indian River Dr.
Ft. Pierce, FL 34950
and
CARUSO, BURLINGTON,
BOHN & COMPIANI, P.A.
1615 Forum Place, Ste. 3A
West Palm Beach, FL 33401
(561) 686-8010
Attorneys for Appellee

By: Russell S. Bohn
RUSSELL S. BOHN
Florida Bar No. 290701

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