ORIGINAL

THE SUPREME COURT
STATE OF FLORIDA

CHRYSLER CORPORATION,

Petitioner/Appellant,

vs.

SPIRO PITSIRELOS,

Respondent/Appellee.

Fourth DCA Case Nos.
96-00514 and 96-00215

Circuit Court Case No.
90-384-CA-17

Supreme Court Case No. 90,533

FILED
SID J. WHITE
MAY 16 1997
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

PETITIONER/APPELLANT'S BRIEF ON JURISDICTION

GREGORY A. ANDERSON
Florida Bar No.: 398853
JOHN J. GLENN
Florida Bar No.: 957860
ANDERSON LAW OFFICES
333 N. New River Drive East
Suite 2000
Ft. Lauderdale, FL 33301
(954) 761-9255
Attorneys for Petitioner/
Appellant Chrysler Corporation

TABLE OF CONTENTS

TABLE OF AUTHORITIES

681, Florida Statues. In particular, Chrysler challenges the District Court's affirmance of the Circuit Court's finding that Chrysler was to bear the burden of proof in an action by "trial de novo" pursuant to Chapter 681, Florida Statutes, and the Circuit Court's award of "continuing damages" under §681.1095(13), Florida Statutes.

During the trial of the matter, Chrysler timely objected to having the burden of proof in light of the fact that Chapter 681, Florida Statutes, mandates a "trial de novo" as Chrysler never sought any affirmative relief. (T. at 485-486).

After a jury verdict in favor of Pitsirelos, the Trial Court entered a Final Judgment in favor of Pitsirelos on December 21, 1995 over Chrysler' objections on constitutional grounds and evidentiary issues (R. pp. 1506-1708; 1720-1722).

STATEMENT OF THE FACTS

The Circuit Court entered a Judgment of over $270,000.00 in favor of Pitsirelos for his complaint that his 1989 Dodge Daytona had a one-quarter inch (1/4") gap in the driver's side window.

Chrysler filed a petition for trial de novo with the Circuit Court challenging an adverse decision by the Florida New Motor Vehicle Arbitration Board (R., pp. 1-4). After grappling with the issue of whether this case should be handled as a "standard" appeal or a "trial de novo" (which took almost a year), the trial court found that the case should be heard in the Circuit Court's trial division and that the burden of proof rested with Chrysler. (R.,

pp. 231-242, 248-249, 374, 708-712, 789-796, 818-824 and 834-836; T. at 485-486).

At trial, the jury found in favor of the Respondent (R., p. 1527). Thereafter, the Trial Court heard argument by the parties on Pitsirelos' Motion for Entry of Final Judgment. At that hearing, Chrysler objected to any award or judgment predicated upon Chapter 681, Florida Statutes. Specifically, Chrysler moved to strike Pitsirelos' claim for continuing liquidated damages under §681.1095(13) on the grounds that such an award is unconstitutional as a violation of the equal protection, privileges and immunities and due process clauses of the Florida State and United States Constitutions. Chrysler also argued that the lemon law, as applied by the Court, was unconstitutional.

SUMMARY OF ARGUMENT

The $25 per day continuing damage award under the Lemon Law is unconstitutional. Pitsirelos provided no evidence to sustain the award nor is the award logically tied to any compensatory damage. Any actual damages sustained by Pitsirelos were ascertainable and awarded. Thus, the continuing damage award is a punitive damage or penalty for taking an appeal. This violates the equal protection, privileges and immunities and due process clauses of the Florida State and United States Constitutions.

The decision rendered by the Board has no due process protections justifying a shift of the burden of proof from the consumer to manufacturer in a "trial de novo" under the lemon law. The Board was promulgated as an informal dispute resolution

mechanism. Actions challenging a Board decision are to be by "trial de novo". The composition of the Board and the Board's rules regarding procedure and evidence fail to meet the basic elements of due process sufficient to treat a Board decision as "precedent".

Absent consideration by this Court, if either consumer or manufacturer disagrees with a decision of the lemon law board, a true trial de novo is not available, despite the clear wording of the statute.

QUESTIONS PRESENTED

I. Whether the Supreme Court should grant jurisdiction to decide whether the $25 per day continuing liquidated damage provision of the Lemon Law is an impermissible punitive damage and/or penalty that violates the equal protection, privileges and immunities and due process clauses of the Florida State and United States Constitutions.

II. Whether the Supreme Court should grant jurisdiction to decide whether the decision of the Florida New Motor Vehicle Arbitration Board is "clothed" with sufficient constitutional protection to result in a shift in the burden of proof from the consumer to the manufacturer in an action by "trial de novo" under Chapter 681, Florida Statutes.

ARGUMENT

Chrysler invokes the discretionary jurisdiction of this Court pursuant to 9.030(a)(2)(A)(i) because the Fourth District Court of Appeal expressly declared the provisions of Chapter 681, Florida Statutes, constitutional, and in doing so mandated an unconstitutional result.

QUESTION I

Chrysler requests this Court to grant jurisdiction to determine the constitutionality of the $25.00 per day punitive damage imposed by §681.1095(13), Florida Statues. This case warrants this Court's jurisdiction because the statutory scheme of Chapter 681, Florida Statutes, restricts a manufacturer's right of access to Florida courts by providing for cumulative penalties that mount each day in severity and increase with, and because of, the time required for the very exercise of the right of judicial review. This violates both state, Smith v. Dept. of Ins., 507 So.2d 1080 (Fla. 1987); and federal, Ex Parte Young, 209 U.S. 123 (1908) constitutional requirements.

Chrysler submits that the Circuit Court's continuing damage award of $70,046.00[1] to Pitsirelos pursuant to §681.1095(13) is a penalty that violates the due process clause of the Florida State

---

[1]This figure represents the continuing damage award through December 21, 1995. Under the Statute, if Pitsirelos prevails at this level, he will be entitled to an additional sum calculated at $25.00 per day from December 21, 1995. This amount is in addition to the Court-awarded purchase price of the vehicle plus interest ($29,111.13) and attorney's fees and costs ($171,182.93). Chrysler submits that there is no good faith argument to counter the conclusion that this award constitutes anything other than an unwarranted punitive damage or penalty.

and United States Constitutions. Further, the District Court's decision is in conflict with the United States Supreme Court case of Missouri Pac R. Co. v. Tucker, 230 U.S. 340 (1913).[2]

First, there was no evidence presented by Pitsirelos which would sustain such an award. The Fourth D.C.A. apparently believed that the jury found the $25.00 per day damages. See, App. at 1. It is wrong. The jury made no such finding (R., pp. 1522-1527). Second, the damages sustained by Pitsirelos as a result of his claim against Chrysler were readily ascertainable. Missouri Pac. R Co., supra. Essentially, the imposition of a $70,046.00 award that continues to accrue has no relationship to Pitsirelos' possible actual damages, but is instead designed to punish manufacturers for having the audacity to question a ruling by the Board.

In order to avoid the $25 per day penalty, the District Court suggests that the manufacturer, "[pay] the consumer the sums due, and then [challenge] the law by seeking declaratory relief." (App. at 1, p. 2). What if the manufacturer, horror of horrors, actually wins the appeal? How is the manufacturer to get the "sums due" back from the consumer? This does not make sense. How many consumers are going to hold the money while the manufacturer challenges the decision? Presumably, if consumers are well enough

---

[2] Decisions relied upon by the District Court are distinguishable because Pitsirelos' damages are/were readily ascertainable, the statutory awards were either capped or the legislature gave the alleged offending litigant an option to mitigate the effect of the award. See, Harris v. Beneficial Fin. Co. of Jacksonville, 338 So.2d 196 (Fla. 1976); Ford Motor Co. v. Barrett, 800 P.2d 367 (Wash. 1990).

off to hold the money, then there is no need to "level the playing field" with the punitive $25 per day provision. Petitioner would like some logic applied to this case.

Contrary to the District Court's opinion, there is no evidence in the legislative history of the Lemon Law establishing that this continuing damage award is tied to a compensatory damage. Additionally, this legislature, unlike others, did not provide the manufacturer with an alternative to incurring this continuing award.[3]

The $25 per day damage serves no purpose other than penalizing a manufacturer for challenging the Arbitration Board decision. Petitioner requests this Court grant jurisdiction to consider whether this punishment is constitutional.

QUESTION II

The statute mandates a trial "de novo". A decision rendered by the Board is not legal precedent such that all later proceedings must seek to overturn its decision, rather than consider evidence anew. The legislature intended that a challenge to a Board decision would be by "trial de novo" in the appropriate Circuit

---

[3] In Ford Motor Company v. Barrett, 800 P.2d 367 (Wash. 1990), the Washington Supreme Court upheld the constitutionality of a section of the Washington Lemon Law, providing for a $25 per day damage in the event the manufacturer failed to provide a loaner motor vehicle pending appeal (emphasis added). Florida's Lemon Law does not give the manufacturer the option of providing the consumer with a replacement loaner during the pendency of an appeal. The Florida Legislature considered such a provision, but abandoned the same without reason. See, Senate Staff Analysis and Economic Impact Statement, Bill No. CS/CS/SB 556, issued May 3, 1988 at p. 3, (Legislature proposes giving the manufacturer the option of providing the consumer with a loaner vehicle during a manufacturer's challenge to a Board decision).

Court. Notwithstanding, the District Courts have ignored the plain and unavoidable definition of a "trial de novo", instead treating a challenged decision as an appeal. The result is that the District Courts have effectively "written out" the term "trial de novo" from the Statute.

A comparison of the plain meaning of the statute and the rules enacted thereunder with the basic requirements of due process of law confirms that the legislature never intended for Lemon Law Board decisions to be granted precedential value. A review of the make up of the Board[4] and the procedural operation of the Board during hearings makes clear that it is not intended to render a decision with the same authority as a court of law and, thus, to be relied upon as precedent.

The administrative proceedings for the operation of the Board are set forth under 2-32, Florida Administrative Code. They are remarkably dissimilar from the Florida Rules of Procedure and Evidence governing civil trials and are in fact much less stringent than the requirements set forth under Chapter 120, Florida Statutes, governing administrative boards.[5] [6]

---

[4] Board members are not required to have a background, training or experience in the legal profession.

[5] Only under the broadest decisional authority can the Board be construed as "quasi judicial". See, Scholastic Systems, Inc. v. LeLoup, 307 So.2d 166 (Fla. 1974). However, a close examination of the criteria specified for the operation of the Board is more illuminating. The legislature specified that the Chapter 681 Board is exempt from the procedural requirements of Chapter 120, the "Administrative Procedure Act". §681.1095(11), Florida Statutes. Chapter 120 governs all administrative agencies with the exceptions of the legislature, §120.50(1); the courts, §120.50(2); and the Lemon Law Arbitration Boards,

The Lemon Law was never designed or intended to serve as a substitute for trial. There is nothing in the statute, nor the administrative rules which requires the arbitration to meet the basic requirements of the burdens of proof and persuasion as is the case under Chapter 120, Florida Statutes. In reviewing administrative orders under Chapter 120, the Court's are charged with determining whether the evidence was "competent and substantial". American Ins. Ass'n v. Dept. of Ins., 518 So.2d 1342 (Fla. 1st DCA 1987). Thus, because the Board is not even required to meet this very basic procedural safeguard, it may be inferred that the legislature did not intend that the Board be held to the same standard as other administrative boards. Board hearings are merely to serve as an informal means of dispute resolution.

Chrysler submits that justice is not served for either party to an unfavorable Board decision if the courts continue to grant judicial authority to an informal, untrained and procedurally unconstrained system of dispute resolution.

---

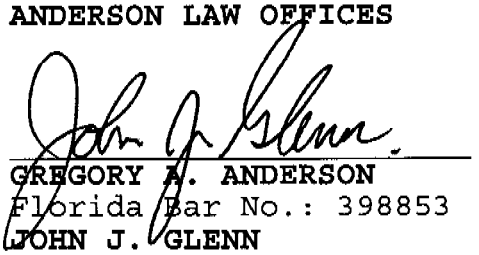
§681.1095(11). Note that Chapter 120 has much more stringent rules and procedures in evidence than in §681.1094 and the rules of the Department of Legal Affairs as enacted in the Florida Administrative code. Compare §120.57 with §681.1094 and rule 2-32.032, et. seq.

[6] Chrysler would note that the Department of Legal Affairs has recently seen fit to disregard the legislature's specific exemption of Chapter 681 from the provisions of Chapter 120 by specifically adopting a new rule, F.A.C. 2-32.0035, under the Florida Administrative Code which provides for the opposite of §681.1095(11).

CONCLUSION

This is the Court of last resort for a Petitioner in the position of Chrysler. This Court is the final, and usually only, limitation on consumer-oriented positivism. The overriding principle reflected in the concept of equal protection and due process is fairness. It is not fair to penalize a litigant for questioning a decision by a non-judicial body. Chrysler asks this Court to accept jurisdiction so it can be heard on whether the lemon law is fair.

ANDERSON LAW OFFICES



GREGORY A. ANDERSON
Florida Bar No.: 398853
JOHN J. GLENN
Florida Bar No.: 957860
333 N. New River Drive East
Suite 2000
Ft. Lauderdale, FL 33301
(954) 761-9255
Attorneys for Petitioner/
Appellant Chrysler Corporation

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to **JACK GALE, ESQUIRE**, 541 S.W. Port St. Lucie Blvd., Port St. Lucie, Florida 34984, **RUSSELL BOHN, ESQUIRE**, Suite 3A/Barristers Bldg., 1615 Forum Place, West Palm Beach, Florida 33401, Janet L. Smith, Esq., The Capitol, PL-01, Tallahassee, Florida 32399-1050, and **GEORGE N. MEROS, JR., ESQUIRE**, P.O. Box 10507, Tallahassee, Florida 32302; **VIA U.S. MAIL** this 15th day of May, 1997.

ATTORNEY