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IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA

CHRYSLER CORPORATION,

Petitioner,

vs. CASE NO. 90,533

SPIRO PITSIRELOS,

Respondent.

______________________________/

RESPONDENT'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

The opinion of the District Court of Appeal was filed in this case on February 26, 1997. CHRYSLER CORP. v. PITSIRELOS, 22 Fla.L.Weekly D536 (Fla. 4th DCA February 26, 1997) (A1-2). In this discretionary review proceeding, the only relevant facts and issues are those addressed in the Fourth District Court of Appeal's opinion, and the only proper document in the appendix is that opinion. REAVES v. STATE, 485 So.2d 829, 830 n. 3 (Fla. 1986). Therefore, certain statements in Chrysler's Statement of the Case and Statement of the Facts and the copy of the arbitration board decision in its appendix should not be considered here. The Court should particularly disregard Chrysler's statement that the only problem with the car was a one-quarter inch gap in the driver's side window, a matter not addressed in the Fourth District's opinion, and which without further explanation is extremely misleading.

SUMMARY OF ARGUMENT

Chrysler's challenges under Issue I to the constitutionality of the Lemon Law do not merit further review because they were given full review in the Fourth District Court of Appeal, and the scheme of the Lemon Law, including the $25 a day provision, easily satisfies the applicable standard of reasonable relation to a permissible legislative objective. Under Issue II, Chrysler's argument ignores the fact that the statute specifies that the trial de novo is an appeal, and as such Chrysler as Appellant appropriately bore the burden of proof.

ARGUMENT

ISSUE I

A. Introduction Review in this Court pursuant to Fla.R.App.P. 9.030(a)(2)(A)(i), when a district court of appeal has expressly declared valid a state statute, is discretionary. Because of the requirement of "express declaration," only matters explicitly discussed in the district court's opinion are at issue in this discretionary review proceeding. See JENKINS v. STATE, 385 So.2d 1356 (Fla. 1981). Further, the district courts of appeal are courts of final, not intermediate, appeal. ANSIN v. THURSTON, 101 So.2d 808, 810 (Fla. 1958). Thus, this Court should not accept jurisdiction in a case such as this unless there is some inaccuracy or inadequacy apparent on the face of the district court opinion.

A claim of unconstitutionality is subject to certain well-established rules of statutory construction and judicial restraint. Courts will treat statutes as presumptively valid, WRIGHT v. BOARD OF PUBLIC INSTRUCTION, 48 So.2d 912, 914 (Fla. 1950), and all doubt will be resolved in favor of the constitutionality of the statute. BONVENTO v. BOARD OF PUBLIC INSTRUCTION OF PALM BEACH COUNTY, 194 So.2d 605 (Fla. 1967). In testing the constitutionality of the statute, the court should take into consideration the whole of the act, and may consider 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).

B. Background In 1988, the Legislature substantially revised Chapter 681, Fla. Stat. (Supp. 1988), Florida's "Lemon Law," to create state-administered mandatory arbitration to resolve motor vehicle warranty disputes arising between consumers and manufacturers. Ch. 88-95, Laws of Fla. The law was again amended in 1992. Ch.92-88, Laws of Fla. The Legislative intent is set forth in §681.101, Fla. Stat. (1989) as follows:

> 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 the 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.

The statute requires that, if a manufacturer cannot conform the vehicle to the warranty by correcting a nonconformity, which is defined in §681.102(15), Fla. Stat., as a "defect or condition that substantially impairs the use, value or safety of the motor vehicle..." within a reasonable number of attempts, the consumer is entitled to be returned to the status quo ante by virtue of receipt of a full refund or replacement vehicle, with an offset to the manufacturer for the consumer's use of the vehicle. §681.104(2),

Fla. Stat. If the manufacturer fails to provide the required remedy, the consumer must request arbitration by the New Motor Vehicle Arbitration Board as a precondition to filing a civil action for the remedy. §§681.109, 681.1095, Fla. Stat. Decisions of the Arbitration Board are final and binding on the parties unless appealed to the circuit court. § 681.1095(10), Fla. Stat. The appeal to the circuit court is by trial de novo, and is invoked by the appealing party filing a petition "stating the action requested and the grounds relied upon for appeal." §681.1095(12), Fla. Stat. The decision of the Arbitration Board is admissible in evidence in the circuit court proceeding. §681.1095(9), Fla. Stat.

If a manufacturer appeals a decision of the Arbitration Board to the circuit court and the board's decision is upheld, §681.1095(13), Fla. Stat. provides:

> If a decision of the board in favor of the consumer is upheld by the court, recovery by the consumer shall include the pecuniary value of the award, attorneys fees incurred in obtaining confirmation of the award, and all costs and **continuing damages in the amount of $25 per day for each day beyond the 40-day period following the manufacturer's receipt of the board's decision.**

C. Access to Courts Chrysler argues that the $25 per day continuing damages provision of Section 681.1095(13) unconstitutionally restricts a manufacturer's access to court and that it is in the nature of a punitive damage award. (CB17).

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 continuing damages provision at issue 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 cannot legitimately argue that Section 681.1095(13) abolishes any preexisting right to bring an offensive action against a consumer. See KLUGER v. WHITE, 281 So.2d 1, 4 (Fla. 1973) ("[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....")

As the Fourth District held, 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. It 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).

D. Due Process The Legislature is free to choose the remedy it believes will protect the interests involved, provided its choice is not unreasonable or arbitrary and satisfies the constitutional requirements of reasonable notice and opportunity to be heard. This Court has described the test as "whether the statute bears a reasonable relation to a permissible legislative objective and is not discriminatory, arbitrary or oppressive." LASKY v. STATE FARM INSURANCE CO., 296 So.2d 9, 15 (Fla. 1974).

Chrysler argues that the continuing damages provision bears no rational relation to Respondents' actual damages which are readily ascertainable, and that Chrysler had some constitutional right to a jury determination of those damages. Below and now here, Chrysler cites MISSOURI PACIFIC RAILWAY CO. v. TUCKER, 230 U.S. 340, 33 S.Ct. 961 (1913), as support for its argument that the continuing damages provision denies due process. In that case, a statute imposed a liability of $500 for every charge by a common carrier in excess of the fixed rates for transporting oil. The fixed rate was $.12, but Missouri Pacific charged $3.02 more than the fixed rate. The Court found that the actual damages sustained as a result of the overcharge were readily ascertainable and the imposition of $500 for each overcharge was so grossly out of proportion to the actual damages as to constitute a taking of property without due process. Chrysler's reliance on this case is misplaced.

The Fourth District correctly decided that §681.1095(13) is a valid legislative estimation of such costs as rental of alternate transportation and hard-to-quantify damages such as inconvenience and hardship endured by a consumer during the pendency of a

manufacturer's appeal of an arbitration award to the circuit court. The financial burdens of such litigation are not even remotely similar to the statutory rates so easily calculated in MISSOURI PACIFIC, supra. A similar due process challenge was rejected by the Washington Supreme Court, which found that any deterrent effect of the continuing damages provision upon manufacturers was outweighed by the state's interest in protecting consumers from continuing injury. FORD MOTOR CO. v. BARRETT, 800 P.2d 367, 375 (Wash. 1990). That the continuing damages provision also serves as a disincentive to meritless manufacturer appeals does no damage to its constitutionality, because the effect is not so egregious as to constitute a taking of property without due process.

The reasoning by this Court in HARRIS v. BENEFICIAL FINANCE CO. OF JACKSONVILLE, 338 So.2d 196 (Fla. 1976), fits this case as well. Beneficial challenged the statutory minimum damage provision of the Consumer Collection Practices Act, arguing that it was an unconstitutional denial of due process. In rejecting the challenge, the Court held:

> The instant statute is sustainable as providing for liquidated damages in an area of the law in which ascertainment of the dollar amount of actual damages sustained in most instances will be extremely difficult, if not impossible, to achieve--a classic situation for application of liquidated damages.
>
> * * * *
>
> In the exercise of its police powers the Legislature chose this method of deterring wilful violations of the protective legislation it had enacted. The fact that the Act also

> authorizes a punitive damage recovery for the traditional case involving malice does not alter characterization of the $500 minimum award as punitive.
>
> * * * *
>
> In short, the minimum award afforded by the statute exhibits aspects of both liquidated and punitive damages. It clearly appears to have been the intent of the Legislature to provide a remedy for a class of injury where damages are difficult to prove and at the same time provide a penalty to dissuade parties such as Beneficial from engaging in collection practices which may have been heretofore tolerated industrywide. Neither objective is without the purview of proper legislative action.

338 So.2d at 200.

In sum, the remedial scheme established by §681.1095, Fla. Stat., bears a reasonable relation to the permissible legislative objective of neutralizing the inherent imbalance that exists between consumers and motor vehicle manufacturers in warranty disputes. "A regulatory scheme concerning procedures for pursuing grievances by consumers against automakers is entirely consistent with the state's broad interest concerning the ownership and operation of motor vehicles." LYETH v. CHRYSLER CORP., 734 F.Supp. 86, 91 (W.D.N.Y. 1990).[1]

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[1]/Chrysler's footnote number 1 is based on figures which do not appear in the Fourth District's opinion. Further, the refunded cost of the car (plus fees and costs) alone fails to reimburse the consumer for the cost of lost transportation.

ISSUE II

Chrysler argues that the mechanism of a trial de novo in §681.1095(13), Fla. Stat. (1989), was not meant to be an appeal, and that the statute impermissibly shifts the burden of proof to the manufacturer if the consumer prevails at arbitration. Chrysler ignores the Legislature's use of the word "appeal" in §681.1095(13) [now §681.1095(12), Fla. Stat. (1995)]. Chrysler also fails to mention that the issue raised here was previously rejected by the Fifth District in MASON v. PORSCHE CARS OF N. AMERICA, 621 So.2d 719 (Fla. 5th DCA) rev. denied, 629 So.2d 134 (Fla. 1993), whose reasoning was incorporated by the Fourth District. The obvious policy of the Lemon Law is to give benefits to the consumer which did not exist previously at common law or in statute in order to equalize the economic disparity between unevenly matched litigants. Chrysler's argument would lead to absurd results. A consumer is permitted to cross-appeal or counterclaim in an appeal by trial de novo initiated by the manufacturer. The construction urged by Chrysler would lead to the absurd result of the consumer having the burden of proof on both the counterclaim challenging the arbitration award and on the manufacturer's appeal challenging the manufacturer award, as pointed out by the Fifth District in MASON, supra at 723. Further, the Fourth District here and the Fifth District in MASON both pointed out that the "benefits and importance of the compulsory arbitration process would be minimized if the simple filing of a petition would force the successful party in arbitration to seek affirmative relief in the circuit court." 22 Fla.L.Weekly at D537; 621 So.2d at 721. Chrysler's reasoning would relegate the

arbitration process to simply an additional procedural step to a de novo action in the circuit court.

Moreover, the presumption in favor of the arbitration board decision is consistent with the nature of an appeal, which by its nature 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).

The mechanism of an appeal by trial de novo is beneficial to the appealing manufacturer, because unlike in a regular appeal, because it is a "de novo" proceeding, the appealing manufacturer is permitted to fully relitigate the issues, and is not limited to the evidence presented before the arbitration board. In sum, there is no need for further review of these issues other than that provided by the Fourth District in this case and by the Fifth District in MASON.

CONCLUSION

Based on the foregoing argument, Respondent respectfully requests that this Court decline to grant further review in this case.

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 9th day of June, 1997.

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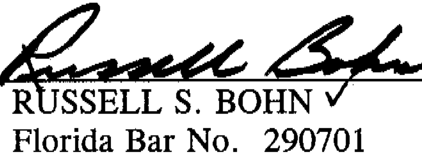
By: 
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