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THE SUPREME COURT
STATE OF FLORIDA

Fourth D.C.A. Case Nos.
96-00514 and 96-00215

Circuit Court Case No.
90-384 CA 17

Supreme Court Case No.
90,533

FILED

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CLERK, SUPREME COURT

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CHRYSLER CORPORATION,

Petitioner/Appellant,

vs.

SPIRO PITSIRELOS,

Respondent/Appellee.

PETITIONER/APPELLANT'S BRIEF ON THE MERITS

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PREFACE

References to all documents reflected in the "Record on Appeal" shall be made as follows: "R., p. ______". The "Trial Transcript" shall be referenced as "T. at ______". The "Appendix" shall be referenced as "App. at ______"

STATEMENT OF THE CASE

In addition to Chrysler Corporation's ("Chrysler") argument set forth below, Chrysler adopts all arguments set forth by Amicus Curaie, American Automobile Manufacturers Association, ("AAMA"), in its brief in support of Chrysler's appeal, should the Court grant AAMA's Motion to Appear as Amicus Curaie.

Chrysler was the original Defendant before the Florida New Motor Vehicle Arbitration Board ("Board"), the Petitioner before the Circuit Court for St. Lucie County, Florida and the Appellant before the Fourth District Court of Appeal. Spiro Pitsirelos ("Pitsirelos") was the original Plaintiff before the Board, the Respondent before the Circuit Court, and the Appellee before the Fourth District Court of Appeal.

On March 23, 1990, Chrysler filed a Petition for Trial de Novo with the Circuit Court for St. Lucie County, Florida challenging an adverse decision (App. at 1) rendered in favor of Pitsirelos by the Board pursuant to the "Motor vehicle Warranty Enforcement Act", Chapter 681, Florida Statutes ("Lemon Law") (R., pp.1-4). The case was tried before a jury July 24-26, 1995. (T. at 20, et. Seq.). During the trial of the matter, Chrysler timely objected to bearing the burden of proof in light of the fact that Chapter 681, Florida Statutes, mandates a "trial de novo". (T. at 485-486). The Trial

Court Judge overruled Chrysler's objection. Id. On July 26, 1995, the jury rendered a verdict in favor of Pitsirelos (R., pp.1522-1526).

The Trial Court issued a Final Judgment in favor of Pitsirelos on December 21, 1995, over Chrysler's objection on constitutional grounds and evidentiary issues (R., pp.1706-1708; 1720-1722). On January 18, 1996, Chrysler appealed the Final Judgment, inter alia, entered by the circuit court to the Fourth District Court of Appeal On February 26, 1997, the Fourth District Court of Appeal affirmed the circuit court's decision. Chrysler Corp. v. Pitsirelos, 689 So.2d 1132 (Fla. 4th D.C.A. 1997) (App. at 2). Motion for Rehearing, Rehearing En Banc, and Certification was denied on April 10, 1997. Chrysler's notice to invoke this Court's discretionary jurisdiction was filed on May 6, 1997. Chrysler filed its Brief on Jurisdiction on May 15, 1997. This Court accepted jurisdiction of this case on July 28, 1997.

This Court has jurisdiction of this matter because the Fourth District Court of Appeal decided the constitutionality of Chapter 681, Florida Statutes. 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.

STATEMENT OF THE FACTS

On or about August 9, 1989, Pitsirelos purchased a 1989 Dodge Daytona ("vehicle") from Charlie's Dodge in Ft. Pierce, Florida (T. at 424). On August 10, 1989, Pitsirelos had window tint installed on the vehicle by an "after-market" company called Solar Window Tint (R. pp.1146-1148, T. at 182, et. seq.; 428). Thereafter, Pitsirelos allegedly began experiencing problems with the vehicle (T. at 429, et. seq.). Pitsirelos claimed that he encountered the following problems with the vehicle: (1) a one-quarter inch (1/4") gap in the driver's side window; (2) a loose door panel; (3) vibration at 65 miles per hour and above; and (4) a seat belt that did not retract properly (T. at 408-457). Pitsirelos' main complaint centered around the one-quarter inch (1/4") gap in the window (T. at 445).

Pitsirelos testified that the gap was in the window at the time he purchased the vehicle and that the gap caused water and wind intrusion into the vehicle (T. at 423-457). According to Pitsirelos, he brought the vehicle in "many times" to Charlie's Dodge to have the window repaired (T. at 430). However, neither Pitsirelos nor Chrysler could locate more than one (1) repair order for this problem (T. at 325-326). Notwithstanding, Pitsirelos testified that Charlie's Dodge was unable to repair the window problem (T. at 431).

Contrarily, witnesses for Chrysler testified that Pitsirelos' complaint regarding the gap in the vehicle's window was a result of their attempt to accommodate Pitsirelos' after-market window tint

that Pitsirelos had installed on the vehicle (e.g., T. at 196-234). According to Charlie's Dodge employees, Pitsirelos was concerned about the fact that the tint on his vehicle's windows was getting scratched [1] Id.

The vehicle is a "T-top" vehicle (T. at 305) . Each of the door windows are held in place by two stabilizers or stops which press against the windows, holding them in place (T. at 310-315). The effect of the stabilizers against the windows caused the window tint to scratch. Id., (T. at 198). Charlie's Dodge resolved the scratching problem by loosening the stabilizers which, in turn, caused the windows to become loose and rattle (T. at 198-202). Pitsirelos testified that the windows were rattling and, under certain conditions, would leak (T. at 423 et. seq.) . Charlie's Dodge again tightened the stabilizers (T. at 198-202). The window tint was again scratched. Id. Charlie's Dodge loosened the stabilizers again. Id. once again, the windows allegedly rattled. Id.

Pitsirelos testified that the vehicle had a "substantial defect" and, as a result of the improper repair by Charlie's Dodge, the vehicle leaked, the windows rattled, and the door panel eventually came loose (T. at 408-443). In addition, as noted, Pitsirelos also complained that the vehicle vibrated at 65 miles per hour and above, and that the seat belt would not retract after

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[1] Pitsirelos confirmed this complaint via his Motor Vehicle Defect Notification that he filed with the Board wherein he noted "windows don't close completely and scratches film..." (R., p.1151) (App. at 3).

use. Id.

Accordingly, on or about November 30, 1989, Pitsirelos sent written notification to Chrysler in Detroit, Michigan, in order to provide Chrysler with a final opportunity to repair the vehicle (R., p.1151;1161-1163). Because Pitsirelos sent the Motor Vehicle Defect Notification to Detroit instead of Florida, as required by the warranty materials, Chrysler's response to the notice was delayed (T. at 326-328).

After receiving notice, Chrysler sent representatives from Charlie's Dodge to repair the vehicle (T. at 201-206; 235-239). On the advice of his attorney, Pitsirelos refused to allow them to repair the vehicle. Id.

Shortly thereafter, Pitsirelos applied for arbitration proceedings pursuant to Chapter 681, Florida Statutes, and alleged his dissatisfaction with the vehicle (R., pp.1152-1160). At the arbitration hearing, the Board concluded that the vehicle's alleged vibration/seatbelt problems did not substantially impair the use, value, or safety of the vehicle and, accordingly, did not constitute a non-conformity within the meaning of the Florida Lemon Law (R., pp.323-330) (App. at 2). However, the Board concluded that the window problems constituted a non-conformity within the meaning of the Florida Lemon Law. Id.

As noted, on March 23, 1990, Chrysler filed a Petition for Trial de Novo with the circuit court, challenging the adverse decision rendered by the Board in favor of Pitsirelos (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"[2], the circuit court found that the case should be heard in the circuit court's trial division and 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) (App. at 4, 5, 6, 7, 8, 9, and 10).

On July 26, 1995, the case was submitted to the jury (T. at 595, et. seq.). Over Chrysler's objection, the jury was instructed that Chrysler had the burden to prove that Pitsirelos' vehicle was not a "lemon" (T. at 468; 489; 597).[3] The issue of Pitsirelos' damages was left to be determined by the circuit court judge (T. at 609).

Thereafter, on December 21, 1995, the circuit 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. (R., pp 1706-1708; 1720-1722) (T. at vol. 10) 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 constitutions of Florida and the United States. Id. Chrysler also argued that the Lemon Law, as

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[2] The Circuit Court grappled with this issue for almost one year. Meanwhile, the $25 per day continuing damage award continued to mount against Chrysler.

[3] The jury was also precluded from viewing Pitsirelos' car despite Chrysler's timely proffer of a videotape of the car, its Motion for Jury View and the jury's specific request to "see" same (T. at 298-299; 462).

applied by the court, was unconstitutional. Id.

SUMMARY OF ARGUMENT

The Fourth District Court of Appeal's interpretation of §681.1095(12) is incorrect. Its interpretation renders Chapter 681 unconstitutional. Chapter 681 clearly mandates that an action in the circuit court challenging a Board decision i's to be by "trial de novo". The circuit court is to consider the case as if it had been brought there in the first place. Notwithstanding, the Board is an executively administered entity promulgated by the legislature to render decisions that the district courts have now given the weight of judicial precedent. The interplay between these branches of the government violates the doctrine of separation of powers.

Further, a decision rendered by the Board has no due process protection justifying a shift of the burden of proof from the consumer to the 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 a consumer or a 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.

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 provision is a barrier for manufacturers that have considered challenging a Board decision. Accordingly, the provision violates the equal protection, privileges and immunities, and due process clauses of the constitutions of Florida and the United States.

QUESTIONS PRESENTED

I. WHETHER THE FLORIDA NEW MOTOR VEHICLE ARBITRATION BOARD IS VESTED WITH SUFFICIENT CONSTITUTIONAL PROTECTION TO RESULT IN A SHIFT IN THE BURDEN OF PROOF FROM THE CONSTJMER TO THE MANUFACTURER IN AN ACTION BY "TRIAL DE NOVO" UNDER CHAPTER 681, FLORIDA STATUTES.

II. 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 CONSTITUTIONS OF FLORIDA AND THE UNITED STATES.

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

I. WHETHER THE FLORIDA NEW MOTOR VEHICLE ARBITRATION BOARD IS VESTED WITH SUFFICIENT CONSTITUTIONAL PROTECTION TO RESULT IN A SHIFT IN THE BURDEN OF PROOF FROM THE

CONSTJMER TO THE MANUFACTURER IN AN ACTION BY "TRIAL DE NOVO" UNDER CHAPTER 681, FLORIDA STATUTES.

A. Introduction

The issue of which party should bear the burden of proof in an "appeal" by "trial de novo" of a decision rendered by the Board in favor of Pitsirelos was one of the issues decided by the Fourth District Court of Appeal. On this issue, the Fourth District Court of Appeal. followed the Fifth District Court of Appeal decision of Mason v. Porsche Cars of North America, 621 So.2d 719 (Fla. 5th D.C.A.)[4], and the Third District Court of Appeal decision of Aquiar v. Ford Motor Co., 683 So.2d 1158 (Fla. 3rd D.C.A. 1996), by holding that the burden of proof in a manufacturer's "appeal" by "trial de novo" is upon the manufacturer, or Chrysler in this case. In support of its decision, the Fourth District Court of Appeal reasoned as follows:

> [T]he legislature has deemed the circuit court action as an "appeal" from an adverse arbitration decision. As in any appeal, it is the appellant's burden to demonstrate any error or abuse of discretion to the reviewing tribunal. No other interpretation of this statutory scheme is reasonable.

Chrysler submits that the Fourth District Court of Appeal's opinion, like the opinions of the Fifth District Court of Appeal and the Third District Court of Appeal, misapprehends the purpose and effect of §681.1095(10) and (12), Florida Statutes, and creates

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[4] The Fifth D.C.A. followed its Mason decision in Sheehan v. Winnebaso Industries, Inc. 635 So.2d 1067 (Fla. 5th D.C.A. 1994) finding that the trial court erred by failing to require Winnebago to carry the burden of proof and by not affording the Board's decision a presumption of validity where the consumer prevailed before the Board,

further confusion with regard to the procedures for "appealing" a Board decision.

§681.1095(10) (1993), Florida Statutes, provides for judicial review of a Board's decision, and reads, in pertinent part, as follows:

> A decision is final unless appealed by either party. A petition to the circuit court to appeal a decision must be made within 30 days after receipt of the decision. within 7 days after the petition has been filed, the appealing party must send a copy of the petition to the Department of Legal Affairs. If the department does not receive notice of such petition within 40 days after the manufacturer's receipt of a decision in favor of a consumer, and the manufacturer has neither complied with, nor has petitioned to appeal such decision, the Department of Legal of Affairs may apply to the circuit court to seek imposition of a fine of up to $1,000.00 per day against the manufacturer until the amount stands at twice the purchase price of the motor vehicle, unless the manufacturer provides clear and convincing evidence that the delay or failure was beyond its control or was acceptable to the consumer as evidenced by a written statement signed by the consumer. If the manufacturer fails to provide such evidence or fails to pay the fine, the Department of Legal Affairs shall initiate proceeding against the manufacturer for failure to pay such fine...

§681.1095(12), Florida Statutes, (1993), 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 for appeal. [emphasis added].

As noted within §681.1095(12), Florida Statutes, the "appeal" must be by "trial de novo". **The Fourth District Court** of **Appeal's** opinion in the case at bar, has effectively categorized the circuit court action as a standard "appeal".

In interpreting the aforementioned statutory provisions, consider the ordinary definitions of the term "appeal" and the phrase "trial de novo":

> Appeal-resort to a superior (i.e., appellant) court to review the decision of an inferior (i.e., trial) court or administrative agency. [emphasis added]. Black's Law Dictionary, 88 (5th edition 1979).

> Trial de novo-trying a matter anew; the same as if it had not been heard before and as if no decision had been previously rendered. Black's Law Dictionary, 392 (5th edition 1979).

As defined above, the function of a standard appeal is for a superior court to conduct a review of a decision of a lower court. Conversely, an action by trial de novo precludes that scenario since the case is to be considered "as if no decision had been previously rendered". Id. In an appeal by trial de novo, there is not a review on appeal, but in fact another trial. See generally, Colten v. Commonwealth of Kentucky, 92 S.Ct. 1953 (1972); Security Engineers, Inc. v. Department of Industrial Relations, 414 So.2d 975 (Ala. Ct. App. 1982). "In its review, the circuit court does not affirm or reverse the decision of the Board, but instead renders a new, distinct and independent judgment as **may** be required by the merits shown on the trial." Security Engineers, at 976.

The Fourth District Court of Appeal previously addressed the procedure to be applied in an "appeal" by trial de novo of a decision of the Board in General Motors Corp. v. Neu, 417 So.2d 406 (Fla. 4th D.C.A. 1993). In Neu, the Court held that an appeal from an arbitration decision had to be by trial de novo in circuit court rather than a standard appeal to the circuit court's appellate division. Id. at 408. In support of its decision, the court considered City of Ormond Beach v. State Ex rel. Del Marco, 426 So.2d 1029 (Fla. 5th D.C.A. 1983).

In City of Ormond Beach, the court interpreted the former Florida Statute, §163.250, which was part of the Land Development Act. That statute provides as follows:

> Judicial review of decisions of board of adjustment. ---Any person or persons, jointly or severely, aggrieved by any decision of the board, of adjustment, or any officer, department, board commission, or bureau of the governing body, may apply to the circuit court in the judicial circuit where the board of adjustment is located for judicial relief within the thirty days after rendition of the decision by the board of adjustment. Review in the circuit court shall be either by a trial de novo, which shall be governed by the Florida Rules of Civil Procedure, or by petition for writ of certiorari, which shall by governed by the Florida Awwellate Rules. Id at.1030 [emphasis added]

In construing the above statute, the court stated that the "primary guide to statutory interpretation is the determination of the legislative intent." Id. at 1031. The court went on to say that "a statute is to be construed in such manner as to ascertain and give effect to the evident interpretation of the Legislature as set forth in the statute, and where ambiguity in the meaning or context

of a statute exists, this must yield to the legislative intent". Id. The court interpreted the intent of the Legislature when it referenced "trial de novo" in the above statute. The court stated as follows:

> [A] "trial de novo" then must signify the legislative intent that the circuit court review involve something more than a mere examination of the record of the board of adjustment. The "trial de novo" signifies to us the legislative intent that the circuit court take new evidence and conduct a new proceeding, not for the purpose of reviewing the action of the board of adjustment, but for the purpose of acting as the board of adjustment to review the original action of the administrative official, and to grant such relief as the board of adjustment could grant, if a proper showing is made...

Id. at 1032. See also, Sporl v. Lowrey, 431 So.2d 245 (Fla. 1st D.C.A. 1983).

Thus, in considering City of Ormond Beach, the Fourth District court of Appeal previously recognized that the traditional understanding of an "appeal" could not be used to "revise or modify the express, clear provisions of the statute" which mandates a trial de novo where a Board decision is appealed to the circuit court. Neu at 408.

Categorizing the instant matter as an appeal, whereby the appealing party is to bear the burden of proof at an undefined level of scrutiny, creates the potential for further conflict in the circuit courts as to the procedure to be followed in an action brought pursuant to Chapter 681, Florida Statutes. If the case is to be treated as a "standard appeal", circuit courts may in the future look to the Pitsirelos decision for the proposition that an

appeal of a Board decision should be treated strictly as a standard appeal without consideration of the case proceeding by "trial de novo".

Evidence of the confusion that can result in such an interpretation was established in the Record in the Circuit Court in this case (R., at 231-242, 248-249, 374, 708-712, 789-796, 818-824 and 834-836) (App. at 4, 5, 6, 7, 8, 9, and 10). These portions of the Record indicate that the parties and the Court grappled with the issue of whether this action should proceed as a standard "appeal" or whether the action should be considered a "trial de novo" (which took almost a year) as mandated by the statute.[5] During that time, the circuit court transferred the case from its trial court division to its appellate panel and back to its trial court division in an attempt to decipher the true meaning of the statute. In the Circuit Court's "Sua Sponte Order Transferring Case to Circuit Trial Court for Trial De Novo and Order Granting Preliminary Ruling on Subject Matter Jurisdiction for Appellate Division to Hear Appeal", Administrative Appellate Judge John E. Pennelly ordered, in pertinent part, as follows:

> ...this Circuit Court Appellate Division sua sponte finds it does not have jurisdiction to hear this kind of appeal as a trial de novo. The Appellate Division functions strictly as an appellate reviewing court, similar to the District Courts of Appeal, under which those appellate procedures provided under the

[5] Before the Court ordered the case to be heard before the Circuit Court's trial division, it ordered that the standard of review to be applied in determining whether the decision of the Board was in error was whether the decision "departed from the essential requirements of law." (R., p. 248), (App. at 5).

> Florida Rules of Appellate Procedure are followed. There is no provision under those rules for this Court to hear a matter by trial de novo. (R., at 835).

With this ruling, the Circuit Court appellate division correctly concluded that a Florida appellate court did not have the authority to hear a matter by trial de novo.

Notwithstanding, the Fourth District Court of Appeal's opinion glosses over the trial de novo mandate, rendering it meaningless. Important in considering this mandate is the fact that the burden of proof in a traditional trial de novo is upon the claimant or the party seeking affirmative relief.[6] Courts of other jurisdictions have consistently held that the individual and/or entity seeking affirmative relief has the affirmative duty of going forward with the evidence and the burden of proof where an appeal is in the nature of a trial de novo, notwithstanding that he/she/it may have prevailed in the case below. See generallv, Security Engineers, Inc. v. Department of Industrial Relations, supra; ("Although employer brought action to the circuit court by way of 'appeal', the judicial proceedings were de novo and claimant, plaintiff

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[6] The United States Supreme Court, in the context of a criminal proceeding, has interpreted the meaning of an "appeal" by "trial de novo" in Colten v. Commonwealth of Kentucky, supra:

> Prosecution and defense begin anew. By the same token neither the judge nor the jury that determines guilt or fixes a penalty in the trial de novo is in any way bound by the inferior court's findings or judgment. The case is to be regarded exactly as if it had been brought there in the first instance. Id. at 1958.

below, had burden of proving that he left employment for good cause"); D'Agostino v. Amarante, 375 A.2d 1013 (Conn. 1977) ("Since there is a trial de novo on appeal to superior court, the proponent of a will has the burden of proof on statutory issues of execution and testamentary capacity exactly as he had in probate court"); Sheppard v. Mississippi State Highway Patrol, 693 So.2d 1326 (Miss. 1997) (Driver's license suspension hearing was to be conducted as a trial de novo, so driver should not have been required to present his case first or to carry the burden of proof, even though driver petitioned for review of administrative hearing); Knight Broadcasting of New Hampshire v. Kane, 258 A.2d 355 (N.H. 1969) ("On employer's appeal from ruling of labor commissioner's decision that claimant was entitled to worker's compensation, burden of proof in trial de novo was upon claimant not employer"); Pagen v. Ford Motor Co., 1984 W.L. 14155 (Ohio Ct, App. 1984) (In an appeal by trial de novo, the claimant has the affirmative duty of going forward with the evidence and the burden of proof whether or not he is the appellant); Shelton v. Lambert, 399 P.2d 467 (Okla. 1965) ("On trial de novo of protest to initiative petition in Supreme Court burden of proof remains on protestants, precisely as in lower tribunal and such burden does not shift even through lower tribunal's decision declared petition insufficient"); Blizzard v. Miller, 412 S.E. 2d 406, 407 (S.C. 1991) ("A trial de novo is one in which 'the whole case is tried as if no trial whatsoever had been had in the first instance'"); Box v. Talley, 338 S.E.2d 349 (Va. Ct. App. 1986) (The burden of proof remained upon the party

with whom it rested in the juvenile court in an appeal to the state's circuit court). In the case at bar, although Chrysler "appealed" the Board Decision, it could never be considered a "claimant" because it never sought affirmative relief.

The Fourth District Court of Appeal further demonstrated its misapprehension of Chrysler's posture in this case by adopting the following quote from Mason v. Porche Cars of North America, 621 So.2d 719 (Fla. 5th D.C.A. 1993):

> The benefits and importance of the compulsory arbitration process would be minimized if a simple filing of a petition would force the successful party in arbitration to seek affirmative relief in the circuit court [emphasis added].

Chrysler could not be deemed to have asked for "affirmative relief" in this case. Affirmative relief has been defined as "relief for which a defendant might maintain an action independently of plaintiff's claim and on which he might proceed to recovery, although plaintiff abandoned his cause of action or failed to establish it." Black's Law Dictionary, at 56 (5th ed. 1979); Heineken v. Heineken, 683 So.2d 194 (Fla. 1st D.C.A. 1996). At no point in time, has Chrysler sought affirmative relief in this action. Yet the Fourth District Court of Appeal, as well as the circuit court, have considered it appropriate to place Chrysler in the position of having to seek affirmative relief in the "trial de novo", despite the fact that it had not instituted a claim independent of Pitsirelos' .

So long as Chapter 681, Florida Statutes, contains the mandate requiring an appeal by trial de novo, it is not appropriate to place the burden of proof upon a party that has not sought affirmative relief. If a different result is desired, it is up to the legislature to make the change. As noted in **Paqen** v. Ford Motor Co., **supra**, in an appeal by trial de novo, the burden of proof must remain upon the claimant whether or not he is the "appellant". [emphasis added].

B. The burden of proof in an action by trial de novo in the circuit court cannot shift to a manufacturer based upon a decision rendered by the Board in favor of a consumer because Chapter 681, Florida Statutes, violates the doctrine of the separation of powers and the due process clause of the constitutions of Florida and the United States.

The district court's misapprehension of the trial de novo mandate is further exemplified when considering the creation and function of the Board,

1. **Separation of Powers**

The Florida New Motor vehicle Arbitration Board is a legislatively created dispute arbitration mechanism under the auspices of the Department of Legal Affairs, otherwise known as the Office of the Attorney General, State of Florida. See, §681.1095, Florida Statutes, Florida New Motor Vehicle Arbitration; creation and function. The specific enabling section provides, in pertinent part, as follows:

> (1) There is established within the Department of Legal Affairs, the Florida New Motor Vehicle Arbitration Board, consisting of members appointed by the Attorney General for an initial term of 1 year... Each board member

> is accountable to the Attorney General for the performance of the member's duties and is exempt from civil liability for any act or omission which occurs while acting in the member's official capacity. §681.1095(1) [emphasis added]

At the essence of Chrysler's argument is Article II, §3, Florida Constitution, and the fundamental prohibition that "no branch may encroach upon the powers of another." Childs v. Children A, B, C, D, E, and F, 589 So.2d 260, 264 (Fla. 1991). To achieve the constitutional goal of separation of governmental powers, the courts of Florida are charged with diligently safeguarding the powers vested in one branch from encroaching on another. Pepper v. Pepper, 66 So.2d 280 (Fla. 1953).

The Attorney General's office is part of the executive branch of the government of the state of Florida. Article IV, §4, Florida Constitution. The attorney general functions as the chief state legal officer. Id. The issue thus becomes whether the attorney general may set up a mandatory arbitration proceeding for manufacturers. §681.1095(5), Florida Statutes.[7] The act is not

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[7] The legislature is not vested with the authority to create a new court, Article V, §1, Florida Constitution. The legislature's creation of the Board exceeds its constitutional authority.

Pitsirelos and the Attorney General will argue that the proceedings before the Board are no different than the formal hearings conducted under §120.50 et seq., of the Administrative Procedures Act. Chrysler submits otherwise. In any §120.57 hearing, one of the parties is typically a state agency. Furthermore, except for actions against certain licensed professionals, the state agency is almost always the respondent. The chapter is essentially a self governing measure designed to give state agencies an opportunity to correct arbitrary and capricious agency decisions before matters end up in the courts.

compulsory to consumers with warranty related claims. See, §681.112(3), Florida Statutes, ("This chapter does not prohibit a consumer from pursuing other rights or remedies under any other law."). However, if a consumer elects arbitration, the manufacturer is mandated to participate. §681.1095(5), Florida Statutes.

In the event the manufacturer disagrees with a Board decision and elects the right to a trial de novo, as set forth under subpart (12) of §681.1095, Florida Statutes, the manufacturer is automatically subject to the $25 per day continuing damages provision. §681.1095(13). As noted below, this provision places a

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Chapter 120 does not give any state agency the authority to compel a private party to defend itself against the charges of another private party while the agency sits as judge and jury over the dispute. §§681.109 and 681.1095, which purport to create the Board, do precisely this.

The Administrative Procedures Act seeks to limit the power of the administrative agencies within the executive branch. In Chapter 120, Florida Statutes, proceedings, the quasi-judicial power wielded always relates to "matters connected with the functions of their offices", as allowed under the Constitution. For example, the Department of Health and Rehabilitative Services only hears and rules on matters relating to its executive functions; the Department of Business and Professional Regulation only hears and rules on matters relating to its executive function, the regulation of businesses and professionals, and so on. It is essentially, a self policing mechanism.

Here, the Board is under the supervision of the Department of Legal Affairs and is expressly exempted from the provisions of Chapter 120. §681.1095(1) and (11), Florida Statutes. It is difficult to envision how an arbitration proceeding between two private parties, a consumer and automobile manufacturer, is "connected with the functions" of the attorney general's office. Further, the disputes being arbitrated do not arise out of any action or function of the attorney general's office. Thus, the "quasi-judicial" power granted to the Board is an unconstitutional violation of the separation of powers.

burden upon a manufacturer's right of access to a trial by jury.

Chrysler notes that constitutional challenges to variations of the model Lemon Law have been raised in other jurisdictions. Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State, 550 N.E.2d 919 (N.Y. 1990). Also see, e.g., Automobile Importers of America, Inc. v. State of Minn., 681 F.Supp. 1374 (D.Minn. 1988); Chrysler Corp. v. Texas Motor Vehicle Commission, 755 F.2d 1192 (5th Cir. 1985); Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. O'Neil, 561 A.2d 917 (Conn. 1989); State by Abrhams v. Ford Motor Co., 548 N.E.2d 906 (N.Y. 1989).

In one decision of interest, Motor Vehicle Manufacturers Association of U.S., Inc. v. State, supra, the New York Court of Appeals found that the referral of Lemon Law disputes to private arbitrators does not unconstitutionally abridge the powers of the judiciary or violate the fundamental concept of the separation of powers or accountability. Noting that the Lemon Law is remedial in nature, the court applied a liberal interpretation and found that since one of the remedies is equitable in nature, i.e., replacement of the vehicle, it was not subject to a jury trial under common law, and further argued that the New York constitution gives the legislature the "power to alter and regulate the jurisdiction and proceedings in law and in equity." Id. (Florida law is distinguishable as revocation of acceptance is subject to jury trial on issues of liability and the amount of damages. Parsons v. Motor Homes of America, Inc., 465 So.2d 1285 (Fla. 1st D.C.A. 1985.)) The Court summed up the opinion by stating that, "[i]n

enacting the statute, the legislature has merely created a new cause of action and, as it has done before, awarded one of the litigants the option of choosing arbitration or judicial proceedings in the first instance. Id. at 474. Although the type of adjudication differs when a consumer elects arbitration, the statute does not withhold or abridge the court's general original jurisdiction.

Chrysler submits that the majority opinion in Motor Vehicle Manufacturers of U.S., Inc v. State, supra, as well as other decisions rendered in other jurisdictions, minimize the importance of maintaining the integrity of this country's checks and balances to the tripartite government.

For the purposes of Chrysler's challenge, the dissent by Judge Titone in the case of Motor Vehicle Manufacturers of U.S., Inc. v. State is particularity compelling. Id. at 926, et seq. Titone's dissent can be summarized in the following excerpts:

> ...it cannot be denied that the gist of the legislative effort was to remove this class of disputes from the court and to place the responsibility for the resolution in the hands of undoubtedly more efficient, and less costly, private dispute resolution professionals acting under the supervision of state administrators. As one commentator has observed, this obviously well intended consumer oriented legislation rests on the premise that "an entirely and compulsory judicial structure can be erected. by an elected official to solve certain types of disputes"... Whether this breathtaking concept passes constitutional muster is a troubling question worthy of close scrutiny. Id.

Judge Titone goes on to state that:

> ...the legislature took what was formerly a traditional negotiable breach of warranty cause of action and, after making certain minor and incidental alterations, made that virtually unchanged cause of action subject to arbitration, rather than judicial resolution, at the behest of the claimant.

Judge Titone's conclusion is that,

> ...I have grave doubts as to whether this legislation is consistent with the basic tenants of the separation of powers doctrine [citation omitted]... However, when examined from a broader, practical, perspective it is apparent that the legislature has sought to accomplish precisely what the separation of powers doctrine forbids,.. If the legislature may authorize disputants to bypass the judiciary and choose an adjudicative forum supervised by the executive branch each time it is dissatisfied with the manner in which a judicial branch is handling a particular class of disputes there would be little left to insulate the judiciary from legislative incursion. Id. at 929.

Inasmuch as there has never been a challenge to the constitutionality of Florida's Lemon Law, prior to Chrysler's, there is no case law to directly aid this Court's interpretation. However, there are cases that provide guidance. one such decision is Smith v. Department of Insurance, 507 So.2d 1080 (Fla. 1987). The Smith decision dealt with the issue of judicial encroachment.

There, the Florida Supreme Court adopted the trial court's order rejecting the argument challenging the constitutionality of sections of the 1986 Florida Tort Reform Act relating to the optional provision for settlement conferences. The order is significant in this part:

> Plaintiffs correctly argue that §54 [providing an optional provision for settlement conferences] deals with practice and

> procedure. If this provision were mandatory, Plaintiffs constitutional argument that §54 unlawfully encroaches upon the prerogatives of the Florida Supreme Court would be well taken. However, the legislature made this provision entirely optional with the courts. Unless the court be so minded it will not hold a settlement conference. This court agrees that §54 is no more than an expression by the legislature of its desire that cases be settled rather than be litigated. Id. at 1092 n.10

The Court's decision makes clear that if the settlement conference is not optional, then there would be an unconstitutional infringement upon the prerogatives of the Florida Supreme Court. Id.

There is no provision under Florida Common Law for mandatory pre-suit arbitration for certain select litigants with certain select types of cases.[8] Contrarily, the provisions of Chapter 681, Florida Statutes, are mandatory as to the manufacturer.[9]

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[8] As noted, supra at f.n. 5., Chapter 120 does not give state agencies the authority to compel a private party to defend itself against the charges of another private party while the agency sits as judge and jury over the dispute.

[9] In another Florida case, Walker v. Bentley, 660 So.2d 313 (Fla. 2d D.C.A. 1995), the Second D.C.A. recently found that the legislature's attempt to use the word "shall" in a provision of Florida law limiting the judiciary's authority to use civil contempt proceedings for enforcement of domestic violence injunctions, constituted a violation of the doctrine of separation of powers as set forth in Article II, §3, Florida Constitution. The Court found that:

> Such a restriction, if given mandatory effect, would constitute an unconstitutional infringement on the Court's inherent power, historically rooted in our Constitution, to carry out the judicial function of punishing by direct criminal contempt an individual who has intentionally violated an order of the Court.

The contrary argument will be that the Florida New Motor Vehicle Arbitration Board is constitutional because of its "quasi judicial" character. Chrysler submits that this argument is erroneous because the Board fails to meet the premium requirements for the adjudication of a manufacturer's legal rights, duties, privileges and/or immunities. State Desartment of Administration v. Stephens, 344 So.2d 290 (Fla. 2d D.C.A. 1977).

Article V, §1, Florida Constitution, provides that judicial powers shall be vested in the Supreme Court, district courts of appeal, circuit courts and county courts, but, in addition, states:

> Commissions established by law or administrative officers or bodies may be granted quasi-judicial power in matters connected with the functions of their offices... [emphasis added]

In State Department of Administration v. Stephens, supra, the court found that a hearing officer's determination of whether a state employee should be laid off was such an administrative function as allowable under the Florida Constitution. The court found that a board or administrative officer exercising quasi-judicial functions is not 'part of the judicial branch of government. As long as the minimum requirements for the adjudication' of any party's legal rights, duties, privileges, or immunities by state agencies are inviolate, the Board passes constitutional muster.

Stephens, however, is distinguishable because it focused on the due process protection provided for under Chapter 120, Florida

Statutes, the Florida Administrative Law Act, which does not, incidentally, provide any penalties in the event of an appeal to the circuit courts or district courts of appeal. The court found that the appellate procedure set forth in Chapter 120, Florida Statutes, (which is also adopted by the Florida Supreme Court In re Amendments the Florida Rules of Appellate Procedure, 609 So.2d 516 (Fla. 1992)), was sufficient to protect the rights of litigants and, therefore, was not unconstitutional as a violation of the separation of powers. The Lemon Law is specifically exempt from the provisions of Chapter 120, Florida Statutes, §681.1095(11).

In contrast to Chapter 120, Florida Statutes, the Lemon Law provides for the prepayment of the consumer's attorney's fees §681.1095(14) and a $25 per day continuing penalty for taking an appeal to the circuit court and the district court of appeal. It requires the manufacturer to participate in the process at its own expense while allowing the consumers the option of either bringing the case before the county or circuit court or availing themselves of the executively administered Lemon Law.

The legislature did not have and does not have the authority to separate a well-established common law cause of action and vest a certain class of citizens with rights which it does not provide to the remainder of citizens, and in doing so, limit the power of one class to obtain its rights to a trial by jury. A classic example of this scenario is the manufacturer and the consumer in a Lemon Law case pursuant to Chapter 681, Florida Statutes.

2. Due Process

As noted above, the Mason, Aquiar and Pitsirelos decisions have held that once the Board renders a decision in favor of the consumer, the burden of proof should shift to the manufacturer if the manufacturer petitions for trial de novo pursuant to Chapter 681, Florida Statutes. The procedure adopted in these cases contemplates appellate review, not the separate and distinct concept of a trial de novo, which is required by §681.1095(12), Florida Statutes. More precisely, these decisions imply that the decisions of the Board be vested with precedential value, such that all later proceedings must seek to overturn the Board's decision, rather than consider the evidence anew. Not only is this position contrary to the plain meaning of the statute, it is contrary to the underlying principles of common law and due process of law.

It is fundamental to Florida law and the law in this country that the burden of proof, or the risk of non-persuasion, remain upon the party who affirmatively seeks relief throughout the proceedings. See, inter alia, In re Carpenter's Estate, 253 So.2d 697, 703 (Fla. 1971). Only strong consideration of public policy as enacted in explicit statutory language can reverse this fundamental principle. In re Estate v. Davis, 462 So.2d 12 (Fla. 4th D.C.A. 1984); Matter of Smith, 572 N.E.2d 1280 (I.N.D. 1991); Contev v. Board of Civil Service Commissioners of City of Los Angeles, 461 P.2d 617 (Cal. 1969); People v. Rios, 191 N.W.2d 297 (Mich. 1971).

Clearly, the party from whom relief is sought is not required to come forth and make proof that it is not guilty of wrong doing or, in this case, not guilty of producing a defective vehicle. The general term of art employed for these circumstances is asking a manufacturer to "prove a negative", i.e., that a defect does not exist or that the vehicle was not brought in for an unreasonable number of repair attempts. The law abhors this concept since it is akin to making a defendant prove his or her innocence in a criminal proceeding. Id. To agree with the District Courts of Appeals' interpretation, this Court must find that the decision of the Florida New Motor Vehicle Arbitration Board is sufficiently clothed with the constitutional protection to raise a finding therefrom to the level of decisional law. A comparison of the plain meaning of the statute and the rules enacted thereunder with the basic requirements of common law, confirms that the Legislature never intended for Lemon Law Arbitration Boards to be granted this much authority.

Initially, it should be noted that the Legislative history regarding the objectives behind the creation of the arbitration boards is noticeably silent as to specific intent. See, Senate Staff Analysis and Economic Impact Statement, Bill No. CS-CS-SB 556, issued May 3, 1988 (App. at 11). In the introduction to Chapter 681, Florida Statutes, the Legislature stated the intent of the statute was 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 provisions provided for in this statute." §681.101, Florida Statutes. However, a review of the makeup of the Board 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.

at the time of the Board hearing in this case, the administrative proceedings for the operation of the Boards were set forth under Rule 2-32, Florida Administrative Code. (App. at 12) .[10] These rules are remarkably dissimilar from the Rules of Procedure and Evidence governing civil trials and are in fact, much less stringent than the requirements of Chapter 120, Florida Statutes, governing administrative boards.[11]

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[10] 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, FAC, 2-32.0035, under the Florida Administrative Code which provides for the opposite of §681.1095(11). (App. at 13).

[11] Only under the broadest judicial 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 for the Board is more illuminating. Legislature specified that the Chapter 681 Board is exempt from the procedural requirements of Chapter 120, "Florida 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 Lemon Law Arbitration Boards, §681.1095(11). Note that Chapter 120 has much more stringent rules of procedure and evidence than §681.109(4) 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.

First, the basic elements of due process require an opportunity to confront a witness in open court. State v. Phillipe, 402 So.2d 33 (Fla. 3rd D.C.A. 1981); State v. Reynolds, 238 So.2d 598 (Fla. 1970). under Rule 2-32.032(10)(e), the Board may receive and consider evidence of witnesses not present at the hearing by affidavit.

Second, it is essential to the proper conduct of a trial, and for that matter an administrative hearing, that a proper transcription of the proceeding be made via certified stenographer. Weinstein v. State, 348 So.2d 1194 (Fla. 3rd D.C.A. 1977). Nonetheless, under Rule 2-32.032(14), the proceedings are "mechanically" recorded by the Board and the office of Attorney General, Lemon Law Division, maintains control of the cassette tapes unless a party requests a copy of same. The "official" transcript of the proceeding is transcribed by the Office of the Attorney General which is, incidentally, the amicus curiae for the consumer in this case.[12]

Third, the basic requirements of due process require an opportunity to discover and inspect the evidence. Duval County School Board v. Armstrong, 336 So.2d 1219 (Fla. 1st D.C.A. 1976); State v. Phillipe, supra. Under Rule 2-32.032(10)(b), there is no mandatory provision requiring the Board to inspect the vehicle to confirm whether the alleged defects exist, even where the consumer

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[12] Note that the Attorney General's office has appeared repeatedly as amicus curiae on behalf of a consumer in appeals of Lemon Law Board decisions in the past. However, the Attorney General's office has never appeared as amicus curiae on behalf of a manufacturer under any circumstance.

or manufacturer requests an inspection. The language regarding an inspection of a vehicle is permissive.

Finally; the composition of the Board itself is instructive. The statute is silent as to the requirements for the composition of the Board and the members themselves; other than one of its members must be "a person with expertise in motor vehicle mechanics". §681.1095(3), Florida Statutes. There are no requirements that the other Board members have any background, training, or experience with automobiles or in the legal profession. Further, because the Florida Rules of Evidence do not apply to Board proceedings, Board members are not trained accordingly. Rule 2-32.032(10)(a).[13]

Thus, the Board, while almost certainly accomplishing the goal of offering an informal means of dispute resolution was never designed or intended to serve as a substitute for trial with full constitutional protection before the circuit court. As such, Board decisions cannot be vested with decisional weight.

Moreover, there is nothing in the statute, nor the administrative rules which even require that the case and the consumer meet the very basic requirements of the burden of proof and burden of persuasion. As noted above, the Legislature has exempted the Board from the provisions of Chapter 120, Florida Statutes. In reviewing administrative orders under Chapter 120, the courts are charged with determining whether the evidence was

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[13] Notably, each Board is assisted and may consult a legal advisor to the Board who is provided by and is a member of the Attorney General's office. Rule 2-32.006(2), F.A.C. This is further evidence to support Chrysler's earlier argument that Chapter 681 violates the doctrine of separation of powers.

"competent and substantial". American Ins. Ass'n v. Department of Insurance, 518 So.2d 1342 (Fla. 1st D.C.A. 1987). It is also the law of the state that although the evidence may be sufficient to support the "competent and substantial" test, the same evidence does not rise to the level necessary to meet the burden of proof in judicial proceedings. As noted in American Ins. Ass'n, supra, "[t]he competent and substantial evidence test may be met and that evidence may still wholly fail to constitute a preponderance of the evidence." Id. at 1346. Because the Board is not even required to meet this basic procedural safeguard, it may be inferred that the Legislature did not intend that the Board be held to the same standards as other administrative boards. A fortiori, the decisions of the Board do not rise to the level necessary to meet the burden of proof in a judicial proceeding. Consequently, how can it be said that the Board's decision is of sufficient authority to vest the considerable impact of the reversal of the burden of proof? To due so brushes aside the essential requirements of due process in the face of express, statutory language contravening that construction.

The lack of constitutional protections in combination with the specific language of §681.1095(12), Florida Statutes, requiring a trial de novo, can only lead to the conclusion that a decision from the Board is an informal means of attempting to resolve the suit prior to invoking the jurisdiction of the courts.[14] As such, it

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[14] The argument that this interpretation minimizes the effect of Chapter 681 is false because the parties to a Lemon Law dispute receive the benefit of having their dispute reviewed by a

should not, and cannot be held as sufficient basis to reverse the burden of proof.

Since additional constitutional safeguards are severely lacking and the legislature specifically refrains from a statutory shifting of the burden of proof, the Mason, **Aquiar** and Pitsirelos decisions are wrong, Chrysler asks that this Court reach a different conclusion.

Chrysler submits that justice is not served by 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. Thus, the decision of the lower courts should be reversed and a decision should be rendered which orders that this case be remanded to the Circuit Court for a new trial where the burden of proof is to remain upon Pitsirelos.

QUESTION II

II. WHETHER THE $25 PER DAY 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 CONSTITUTIONS OF FLORIDA AND THE UNITED STATES.

The Florida Lemon Law at §681.1095(13), Florida Statutes, provides as follows:

> 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, attorney's fees incurred in obtaining confirmation of the award, and all

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third party (i.e., the Board) with the advantage that the Board's decision is admissible in evidence in any civil action §681.1095(9), Florida Statutes.

> 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.

The section goes on to provide that, in addition:

> If the court determines that the manufacturer acted in bad faith in bringing the appeal or brought the appeal solely for the purpose of harassment or in complete absence of justiciable issue of law or fact, the court shall double and may triple, the amount of the total award.

This statutory scheme 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. Evidence of why this becomes a restriction has been established in this case through the Circuit Court's continuing damage award of $70,046.00.[15] to Pitsirelos. Chrysler submits that this award is an impermissible punitive damage and/or penalty and otherwise violates the due process clause of the constitutions of Florida and the United States.

First, "no claim for punitive damages shall be permitted unless there is a reasonable showing by evidence in the record or proffered by the claimant which would provide a reasonable basis

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[15] 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 per day from December 21, 1995. This amount is in addition to the <u>Court awarded</u> 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.

for recovery of such damages". 5768.72, Florida Statutes. under Florida Law, something more than gross negligence is needed to justify the imposition of punitive damages. White Construction Company, Inc. v. Dupont, 455 So.2d 1026 (Fla. 1984).

> The character of negligence necessary to sustain an award of punitive damages must be of "gross and flagrant character, evincing reckless disregard of human life, or of the safety of persons exposed to its dangerous effects, or there is that entire want of care which would raise the presumption of conscious indifference to consequences, or which shows wantonness or recklessness, or a grossly careless disregard of the safety and welfare of the public or that reckless indifference to the rights of others which is equivalent to an intentional violation of them". Id. at 1029.

Punitive damages for breach of contract, without a separate, independent tort, are not recoverable. G.M. Brod & Co., Inc. v. U.S. Home Corp., 759 F.2d 1526 (11th Cir. 1985) (Applying Florida law).

Second, when it is doubtful as to whether a contract provision constitutes a penalty or liquidated damages, the court will construe any such provisions for payment of arbitrary sums as a penalty rather than liquidated damages. T.A.S. Heavy Equipment, Inc. v. Delint, Inc., 532 So.2d 23 (Fla. 4th D.C.A. 1988). The test is whether damages flowing from a breach are readily ascertainable at the time the contract was executed. Id.; Humana Medical Plan v. Jacobson, 614 So.2d 520 (Fla. 3rd D.C.A. 1992). The same test holds true where a liquidated damage clause is awarded automatically by statute. Missouri Pac R. Co. v. Tucker, 230 U.S. 340 (1913).

The Missouri Pac R. Co., supra, is directive. In Missouri Pac R. Co., the United States Supreme Court considered a Kansas statute regulating common carrier rates. The statute provided that if a carrier charged more than a fixed rate, the aggrieved party could recover liquidated damages of $500.00 and reasonable attorney's fees to be fixed by the court. The Court held that where actual damages are readily ascertainable, such a liquidated damage provision violated due process.

In support of its decision, the Supreme Court relied upon its opinion in Ex parte Young, 209 U.S. 123, 177 (1908). The Court opined that the penalties imposed by the Kansas statute bring it within the controlling principles of the Young decision, supra, Id. at 964. The Court concluded that the imposition of $500.00 as liquidated damages is not only grossly out of proportion to the possible actual damages, but is so arbitrary and oppressive that its enforcement would be nothing short of the taking of property without due process of law, and therefore in contravention of the Fourteenth Amendment. Id.

Pursuant to Chapter 681, Florida Statutes, the Board Decision and the Final Judgment in this matter, Pitsirelos was awarded by the court a refund of the purchase price of the vehicle ($15,643.16 plus $13,467.97 in interest for a total of $29,111.13, plus attorney's fees and costs of $171,182.93). (R., p.1720-1722). Beyond that, the Court included in its final judgment an award to Pitsirelos of $70,046.00 pursuant to the $25 per day continuing damage award provision under §681.1095(13), Florida Statutes. This

continuing damage award under the Lemon Law is not in any way tied to any compensatory damage but is rather designed to punish or penalize a manufacturer for taking an appeal. The amount of damages sustained by a consumer as a result of. a manufacturer's appeal are readily ascertainable.[16] In fact, the courts have the authority to award a prevailing consumer the amount of any pecuniary loss incurred. 681.112(1), Florida Statutes.

In the case at bar, there was no evidence presented, nor is there any evidence in the Record that would entitle Pitsirelos to punitive damages. Further, Pitsirelos failed to present any evidence of his "pecuniary losses", apart from the purchase price of the vehicle, even though nothing precluded him from presenting such evidence. Id. Thus, the failure to provide Chrysler an opportunity to a jury determination of such damages rather than imposing a $25 per day arbitrary[17] figure renders the statute

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[16] Florida law has long set forth the damages for loss of use of a chattel. See, inter alia, Wayjay Bakery, Inc. v. Carolina Freight Cors 177 So.2d 544 (Fla. 3rd D.C.A. 1965); Airtech Service, Inc.';. McDonald Construction Co., 150 So.2d 465 (Fla. 3rd D.C.A. 1963); Traveler's Indemnity Co. v. Parkman, 300 So.2d 284, 285 (Fla. 4th D.C.A. 1974) ("It is well established that in an action sounding in tort, one may recover damages for loss of use of personal property as an element of damages proximately flowing from the wrong"). Measure of damages is the fair market rental value of the chattel at the time and place of the damage or loss. Northamerican Van Lines, Inc. v. Ropper, 429 So.2d 750, 752 (Fla. 1st D.C.A.).

[17] Neither Chapter 681, the rules promulgated thereunder, nor legislative history shed light on the basis for an award of a $25 per day. If the award is to compensate the consumer for a rental car (as may be argued by Pitsirelos or the Attorney General's office) during the pendency of an appeal, it fails to consider the consumer's duty under the law to mitigate his/her damages. Graphics Associates, Inc. v. Riviana Restaurant Corp., 461 So.2d 1011 (Fla. 4th D.C.A. 1984); Banks v. Salina, 413 So.2d

inviolate of due process. See, Calderon v. Witvoet, 999 F.2d 1101 (7th Cir. 1993). Additionally, this Legislature, unlike others, did not provide the manufacturer with an alternative to incurring this continuing award.[18]

The decisions relied upon by the Fourth District Court of Appeal are distinguishable because Pitsirelos' damages relative to his purchase of the vehicle are/were readily ascertainable, the statutory awards in those cases were either capped or the Legislature gave the alleged offending litigant an option to mitigate the effect of the award.[19] See, Harris v. Beneficial

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851 (Fla. 4th D.C.A. 1982); Jenkins v. Graham, 237 So.2d 330 (Fla. 4th D.C.A. 1970). Notwithstanding, it is undisputable that at some point in the process, the award becomes an impermissible punitive damage or penalty.

[18] The $25 per day liquidated damages standard has been the subject of constitutional attack under another state's version of the Lemon Law. 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 19.118.100, RCWA, providing for a $25 per day damage in the event the manufacturer failed to provide a loaner motor vehicle pending appeal. (emphasis added).

The distinguishing factor from the case at -bar is the fact that in drafting the liquidated damage provision, the Washington Legislature provided the manufacturer with the option of providing the consumer with a replacement loaner vehicle while an appeal is pending whereas Florida's law does not. Interestingly enough, the Florida Legislature considered such a provision, but abandoned same without reason. See, Senate staff Analysis and Economic Impact Statement Bill No. CS/CS/SB 556, issued May 3, 1988 at page 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). (App. at 11).

[19] Further, the only conduct Chapter 681, Florida Statutes, attempts to dissuade is an appeal by the manufacturer. An appeal, as a matter of right, cannot be categorized as inappropriate conduct,

Finance Company of Jacksonville, 338 So.2d 196 (Fla. 1976); Ford Motor Company v. Barrett, supra.

The Fourth District Court of Appeal's suggestion to "[pay] the consumer the sums due and then [challenge] the law by seeking declaratory relief" is not logical. Pitsirelos at 1134. 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 off enough to hold the money there is no need to "even the playing field" with the punitive $25 per day provisions. Id. Petitioner would like some logic applied to this case.

The ultimate purpose of the $25 per day continuing damage award is to impermissibly deny access to the manufacturer to the courts in violation of the constitutions of Florida and the United States. Amendment VII, United States Constitution, §22 of Article I, Florida State Constitution; Smith v. Department Of Insurance, supra. As such, the continuing damage award to Pitsirelos cannot stand.

CONCLUSION

In an "appeal" by "trial de novo" of a Board decision, the burden of proof must remain upon the consumer, whether or not the consumer is the "appellant". The District Court of Appeals' decision to the contrary is wrong. Notwithstanding, the attorney general's involvement in the statutory arbitration mechanism

violates the doctrine of separation of powers. Further, the composition of the Board and its procedural' operation lacks sufficient constitutional protection to warrant a shift in the burden of proof. Thus, the Fourth District Court of Appeal's decision should be reversed and this case should be remanded to the trial court for a new trial where the burden of proof is to remain on Pitsirelos.

Even without considering which party is to bear the burden of proof in an action by trial de novo, the $25 per day continuing damage award to Pitsirelos is an unwarranted punitive damage or penalty. The prospect of such an award, unconstitutionally restricts a manufacturer's constitutional right of access to Florida's courts, It is not fair to penalize a litigant for questioning a decision by a non-judicial body.

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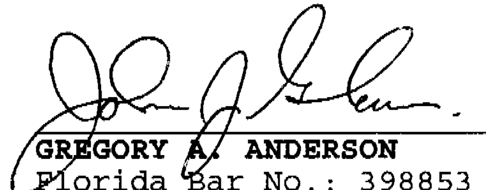

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to **Jack Gale, Esq.,** 541 S.W. Port St. Lucie Blvd., Port St. Lucie, Florida 34984, **Russell Bohn, Esq.,** 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. **Yeros,** Jr., **Esq.,** P.O. Box 10507, Tallahassee, Florida 32302 via U.S. Mail this 22nd day of August, 1997.

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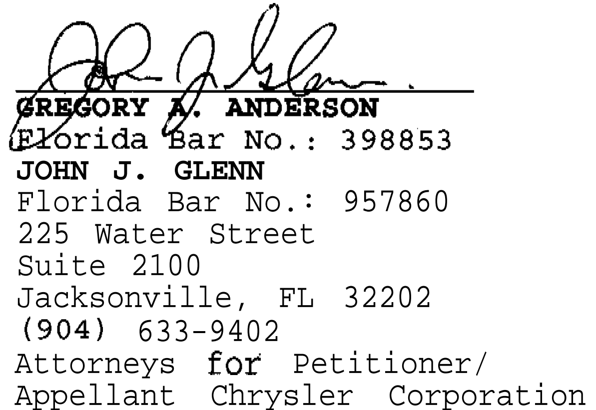

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