OA 11-5-97

THE SUPREME COURT
STATE OF FLORIDA

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

CHRYSLER CORPORATION,

Circuit Court Case No.
90-384 CA 17

Petitioner/Appellant,

vs.

Supreme Court Case No.
90,533

SPIRO PITSIRELOS,

Respondent/Appellee.

PETITIONER/APPELLANT'S REPLY BRIEF

GREGORY A. ANDERSON
Florida Bar No.: 398853
JOHN J. GLENN
Florida Bar No.: 957860
ANDERSON LAW OFFICES
225 Water Street
Suite 2100
Jacksonville, FL 32202
(904) 633-9402
Attorneys for Chrysler Corporation

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

STATUTES: **PAGE**

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 _____". Spiro Pitsirelos' ("Pitsirelos") Answer Brief shall be referenced as "PAB at _____". The Attorney General's Answer Brief shall be referenced as "AGAB at _____".

SUMMARY OF THE ARGUMENT

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 the consumer or the 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 readily ascertainable. 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 Constitution of the State of Florida and the United States.

ARGUMENT

Introduction

In addition to Chrysler Corporation's ("Chrysler") argument set forth below, Chrysler hereby adopts the arguments set forth by Amicus, American Automobile Manufacturer's Association ("AAMA") and Association of International Automobile Manufacturers ("AIAM"), in their Initial Brief and Reply Brief in support of Chrysler's appeal.

Despite Pitsirelos' colorful embellishment of the facts set forth in his Answer Brief, the simple truth of the matter is that the complaints made by him stem from a one-quarter inch (1/4") gap in the vehicle's window created by the dealer's efforts to accommodate a condition (i.e., his installment of "after-market" window tint) which was caused by Pitsirelos. (T. at 400; R., pp. 1323-1330). The case has been litigated to this level because Pitsirelos refused to allow Chrysler a final opportunity to repair the vehicle and then capitalized on a decidedly "pro-consumer" Board Decision. (T. at 201-206; 235-239). Pitsirelos was not concerned about getting the car fixed, he was concerned about "building his case"[1] (R., pp. 1323-1330). These facts, coupled

[1] As noted, Pitsirelos had already sought the advice of an attorney at the time Chrysler tried to perform the final repair attempt. (T. at 201-206; 235-239)

with the fact that the jury was not allowed to see[2] the vehicle in the "flesh" and the fact that Chrysler was improperly shouldered with the burden to prove that the vehicle was not a lemon, caused the jury to render an erroneous verdict. (R., pp.1522-1527).

Further, in his version of the Statement of the Case and Facts, Pitsirelos alleges that Chrysler did not raise its defense relating to Pitsirelos' after-market modification until it filed its action in circuit court. This inference is false in light of the fact that John Mielke, the non-lawyer corporate representative that represented Chrysler at the Board hearing, testified that the crux of his argument, which was accepted by the Board at the hearing, was that the window tint was outside the scope of the Chrysler warranty (T. at 380).

Ultimately, Pitsirelos received a windfall award for an alleged defect caused by Pitsirelos that was "easily remediable" (T. at 270). It defies logic to conclude that the legislature's intent behind the Lemon Law was to allow consumers an award under the statute when the alleged defect was something caused by the

---

[2] If the jury had seen the vehicle, it is likely that they would have determined that Pitsirelos' complaints were frivolous. The vehicle was in excellent shape, without defect (R., p.1278). Yet, despite an affidavit from counsel for Chrysler, John J. Glenn, establishing that Mr. Risdon and Mr. Gomes did no destructive testing or repairs to the vehicle, and that the inspection was conducted simply for the purpose of preparing a response to Pitsirelos' expert's opinion (R., pp.1542-1544), the court decided that the jury did not need to see the vehicle in order to render their decision. The decision was made without an effort by the court to view the videotape or the car. If a substantial defect really existed, why would Pitsirelos' counsel oppose a jury view? One must ask: Was the alleged defect so ridiculous that Pitsirelos said and did anything to prevent the jury from seeing the car?

consumer and could be easily remedied by the manufacturer if given the chance.

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

A. Burden of Proof in a Trial de Novo

The District Court of Appeals', Pitsirelos' and the Attorney General's interpretation of the mechanics of a "Trial de Novo" under Chapter 681, Florida Statutes, thwarts the plain meaning of the statute. In re McCollam, 612 So.2d 572 (Fla. 1993); Aetna Cas & Sur. v. Huntington Nat. Bank, 609 So.2d 1315 (Fla. 1992).

When interpreting a statute, it must be assumed that the legislature knows the meaning of the words used in the statute and has expressed its intent by the use of the words found in the statute. Aetna, supra, at 1317. Further, the court's task is to interpret and apply the statutes as written, insofar as it is possible to do so, and not as one party or the other would like to have them written. Karell v. Miami Airport Hilton/Miami Hilton Corp., 668 So.2d 227 (Fla. 1st D.C.A. 1996). Accordingly, the court should not go beyond the plain and ordinary meaning of words used in a statute unless an unreasonable or ridiculous conclusion would result from the failure to do so. In re McCollam, supra at 573.

Chrysler submits that the interpretation of a "Trial de Novo" under Chapter 681, Florida Statutes, by the District Courts of

Appeals, Pitsirelos and the Attorney General, renders the statute unconstitutional, If this Court finds that the burden of proof in an action by Trial de Novo under Chapter 681, Florida Statutes, properly remains with the consumer, whether or not he/she/it is the appellant, the mechanism for arbitration passes constitutional muster. Chrysler does not request a re-write of the statute. Chrysler requests only that the Court employ the common understanding of an action by "Trial de Novo". To do so does not lead to an unreasonable or ridiculous conclusion. Id. It is obvious that the legislature meant for a review of a Lemon Law Board Decision in the circuit court to be heard as a new matter. However, the District Courts of Appeals have caused the common understanding of a Trial de Novo to be written out of the statute. It is the consumer who wants a new car and/or his or her money back. In a de novo proceeding, the consumer must prove the case "anew", since it is the consumer who requests relief.

The Florida cases relied upon by the District Court of Appeals, Pitsirelos and the Attorney General have been either misinterpreted or are distinguishable from the instant matter.

First, contrary to Pitsirelos' inferences, in the City of Ormond Beach v. State ex rel. Del Marco, 426 So.2d 1029 (Fla. 5th D.C.A. 1983), the "aggrieved party" was the original "claimant or "plaintiff". The court did not address which party would have the burden of demonstrating that a hardship exists where the petitioning party was not the initiating "claimant" or "plaintiff". Thus, no conclusion can be drawn as to whether the "petitioning"

party had the burden of demonstrating hardship where the petitioning party did not initiate the action in the first instance. Further, former 5163.250, Florida Statutes, allowed the "appellant" to chose a "Trial de Novo", which was to be governed by the Florida Rules of Civil Procedure, or a Petition for Writ of Certiorari, which **was** to be governed by the Florida Rules of Appellate Procedure. Id. at n.1. Notwithstanding, the Citv of Ormond Beach clearly establishes that a "Trial de Novo" signifies that the circuit court is to 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 in order to grant such relief as the board of adjustment could grant, if a proper showing is made. Id. at 1032.

Second, in Young v. Department of Legal Affairs, 625 So.2d 831 (Fla. 1993), the statute at issue called for a "traditional appellate process". See, Chief Justice Barkett's specially concurring opinion at 836. The statute did not specifically call for a "Trial de Novo", as is the case in an action under Chapter 681, Florida Statutes. As such, the decision should be limited to decisions involving §§380.07(2), and (3), Florida Statutes.

Third, the case of Bystromv. Equitable Life Assur. Co. of the United States, **416** So.2d **1133** (Fla. 3d D.C.A. 1982) is distinguishable and should be limited solely to actions involving assessments under §§194.011, et seq., Florida Statutes. Unlike the lemon law, the statute at issue in Bvstrom specifically placed the burden of proof upon the initiator of the appeal. Id. at 1140-

1141. The court noted that placing the burden upon the challenger to the property appraiser's assessment effectively deters litigation over minor disputes in valuation, and keeps the courts out of the business of property valuations. See, Judge Pearson's concurring opinion. Id. at 1146.

Pitsirelos and the Attorney General claim that the District Court of Appeals' interpretation of Chapter 681, Florida Statutes, recognizes the imbalance of power between a consumer and a manufacturer by shifting the burden of proof to the manufacturer when it requests a Trial de Novo in the circuit courts. The "balance of power" argument ignores the fact that first, not all manufacturers are the size of Chrysler, Ford and GM, and second, that under the district court's interpretation of the law, even corporations can be consumers. See, Results Real Estate, Inc. v. Lazy Days R.V. Center, Inc., 505 So.2d 587 (Fla. 2d D.C.A. 1987). Petitioner would ask this court to note that small, closely held companies which specialize in van conversions, chassis manufacturing and R.V. manufacturing are also within the definition of "manufacturer" under the Lemon Law. Beyond this, why is it necessary to "level the playing field" at the expense of due process here, and not in all other areas of law, say, perhaps, the area of insurance law?

Further, the cases relied upon by Chrysler are a more appropriate guide for determining who has the burden of proof in a Trial de Novo. See, Security Engineers, Inc. v. Department of Industrial Relations, 414 So.2d 955 (Ala. Ct. App. 1982);

D'Agostino v. Amarante, 375 So.2d 1013 (Conn. 1977); Sheppard v. Mississippi State Highway Patrol, 693 So.2d 1326 (Miss. 1997); Knight Broadcastins of New Hampshire v. Kane, 258 A.2d 355 (N.H. 1969) ; Pagen v. Ford Motor Co., 1984 W.L. 14155 (Ohio Ct. of App. 1984) ; Shelton v. Lambert, 399 P.2d 467 (Okla. 1965); Blizzard v. Miller, 412 S.E. 2d 406, 407 (S.C. 1991); Box v. Talley, 338 S.E. 2d 349 (Va. Ct. App. 1986). In fact, in some of those cases, the "plaintiffs" or "claimants" brought actions against "defendants" that were presumably in a position of power similar to a manufacturer in a Lemon Law case, e.g., an employee versus an employer in a worker's compensation case. Knight Broadcasting of New Hampshire, supra; Pagan, supra. In those cases, the burden of proof still remained upon the employee in an "appeal" by "Trial de Novo " regardless of whether or not he/she prevailed in the proceeding below'.

The legislature intended Chapter 681, Florida Statutes, to be an alternative dispute resolution mechanism. As such, the failure to shift the burden of proof in an action by Trial de Novo does not lead to an absurd result, If this action was to be considered a true "appeal" whereby the burden of proof was to rest with the appealing party, why allow the court to consider evidence beyond the record established at the Board hearing? See, Altchiler v. State Department of Prof. Reg., 442 So.2d 349 (Fla. 1st D.C.A.

---

[3] As a reminder, the appellate division of the circuit court in this case was of the opinion that there is no provision in the Florida Rules of Appellate Procedure for an appellate court to hear a matter by "trial de novo". (App. at 10).

1983) ("An 'appeal' has never been an evidentiary proceeding; it is a proceeding to review a judgment or order of a lower tribunal based upon the record made before the lower tribunal, and thus an appellate court will not consider evidence that was not presented to the lower tribunal"). The legislature deemed it appropriate to grant the Trial de Novo because it recognized the constitutional infirmities that exist in vesting the Board with the authority to render a "binding" decision.

Pitsirelos and the Attorney General suggest that if this court interprets Chapter 681, Florida Statutes, to not allow for a shift in the burden of proof, the manufacturer will most likely "bide its time" at the Board level so as to require consumers to litigate their claims in circuit court. This argument is illogical because first, it assumes that manufacturers are intent on harassing their own customers at great expense to themselves (not a good marketing strategy), Second, this argument suggests that the circuit court and appellate courts of Florida are incapable of performing their job and that the Board is better equipped to render a just decision. The purpose of allowing administrative bodies to hear some disputes was to ease the case load of the courts, not make it easier for a given Plaintiff to win its case. See, generally, West Flasler Amusement Co. v. State Racing Corn., 165 So.64 (1935). The bottom line is that the legislature intended that the Board function as an alternative dispute resolution mechanism that allows a consumer and a manufacturer to attempt to negotiate a settlement between one another by exposing the strengths and weaknesses of

each of their cases. The respective parties' cases are allowed a "trial run" before litigating **an** action in the circuit court. By enacting Chapter 681, Florida Statutes, the legislature intended to help ease the case load of the state court's already crowded dockets. The Lemon Law was not enacted to "ensure" that consumers get a new car regardless of the merits of their case.

B. Separatian of Powers and Due Process

Pitsirelos and the Attorney General cite to the Lemon Laws of other states as support for their position that Florida's Lemon Law is constitutional. However, in their comparison they fail to note that the procedural and substantive safeguards employed in the other states differ from those employed in Florida's Lemon Law.

Further, Pitsirelos and the Attorney General argue that the fact that the Board arbitrates disputes between private parties does not take it outside the realm of constitutional permissibility. They cite to other statutes that provide for resolution of disputes between private parties. what they fail to note is that these statutes involve decisions rendered by a qualified "judge" or that the decisions rendered by the individuals under the various statutes are non-binding.

In a Lemon Law case, the Board members are drawn from the general population. Board members are not required to have any background, training, or experience in the legal profession. They are not required to have a basic understanding of due process of law. Yet, under the District Court of Appeals' decision, the Board renders binding decisions. Is it fair that the manufacturer be

placed in a position of having to overcome a Board Decision, even at a "preponderance of evidence" level of scrutiny, where the decision to be reviewed was rendered by legally untrained individuals? If so, isn't it arguable that these same individuals should qualify to hold a position as a judge in our state and federal courts?

The statute becomes discriminatory, arbitrary, and oppressive because the burden of proof is shifted to the manufacturers, based upon a decision rendered by an unqualified "judge".[4] It is unreasonable to allow "non-lawyers" to render a binding decision in the context of a Lemon Law hearing.

II. WHETHER TEE $25 PER DAY LIQUIDATED DAMAGE PROVISION OF THE LEMON LAW IS AN IMPERMISSIBLE PUNITIVE DAMAGE AND/OR PENALTY TEAT VIOLATES THE EQUAL PROTECTION, PRIVILEGES AND IMMUNITIES, AND DUE PROCESS CLAUSES OF THE CONSTITUTIONS OF FLORIDA AND THE UNITED STATES.

The $25 per day continuing damage award provided for under §681.1095(13), Florida Statutes, is an impermissible penalty or punitive damage that violates the Constitutions of Florida and the United States.[5] See, Missouri Pacific Railway v. Tucker, 230 U.S.

---

[4] The notion that a manufacturer receives a like benefit from the shift of the burden of proof if the manufacturer prevails at a Board hearing doesn't make sense. The individual/entity seeking affirmative relief is the person that should appropriately shoulder the burden of proof. Chrysler defended itself against erroneous allegations made by Pitsirelos. Because the burden of proof was incorrectly shifted to Chrysler at the circuit court level, Pitsirelos was able to prevail in this matter.

[5] If the legislature had perhaps capped the maximum award at a reasonable amount or provided for some alternative to the award as in Ford Motor Company v. Barret, 800 P.2d 367 (wash. 1990), maybe the statutory provision would have passed constitutional muster.

340 (1913).

Consider the Fourth District Court of Appeal's decision in Chrysler v. Pitsirelos, 689 So.2d 32 (4th D.C.A. 1997). The court stresses that the $25 per day provision helps encourage a "prompt resolution" in a dispute between a consumer and a manufacturer. The court's rationale implies that the manufacturer is always wrong. Further, the court suggests that the manufacturer should settle with the consumer regardless of the validity of the consumer's complaints. From this, it is obvious that the $25 per day provision is designed to serve as a penalty to pressure the manufacturer to settle a case instead of seeking a Trial de Novo.

Pitsirelos, the Attorney General and the Fourth District Court of Appeal also rationalize that the $25 per day provision is fair in light of the "hard to quantify" damages sustained by the consumer. If the court accepts this rationale, why not establish such a figure for all causes of action asserted by individuals and/or entities? How hard is it to determine the rental value of a vehicle? Chrysler submits it takes a two minute phone call to a rental agency.

Compare a negligence action involving an automobile accident. In such a case, a doctor gives the plaintiff. a percentage of impairment for bodily injury sustained. Based upon the doctor's testimony regarding that impairment percentage, a jury is left to determine a monetary value for damages sustained as a result of the defendant's negligence. If, in that context, the determination of damages is left to the trier of fact, wouldn't it be logical to

allow the trier of fact to determine the damages sustained by a consumer that has purchased a true "lemon"? Or, can it be reasonably stated that the damages sustained by a consumer in that context are more difficult to quantify than damages sustained by an individual that has suffered a physical injury from an automobile negligence action? Chrysler submits that if a jury can determine the appropriate damages for an individual in an automobile negligence action, then a manufacturer is entitled to a jury determination of a consumer's damages in a lemon law action. The $25 per day award is nothing more than a penalty designed to discourage access to the courts.

Pitsirelos and the Attorney General further argue that $25 a day continuing damage award is fair because a consumer's damages in a Trial de Novo are limited to those allowed by §681.104(2), Florida Statutes. In making this argument, they attempt to deny any applicability of §681.112, Florida Statutes. Nothing in the act specifies that §§681.104(2) or 681.1095(13) should be read independent from §681.112. This is another effort by Pitsirelos and the Attorney General to mold the wording of the statute to fit their needs. There is no support for the proposition that in enacting §681.1095(13), Florida Statutes, the legislature recognized that the consumer would be stuck holding on to the allegedly defective vehicle during the pendency of an action.

These provisions should be read in pari materia. B.M.W. v. Sinsh, 684 So.2d 266, 269 (Fla. 5th D.C.A. 1995) citing to Mehl v. State, 632 So.2d 593, 594-95 (Fla. 1993). The manufacturer under

all circumstances only has 30 days to appeal a Board Decision, but a consumer has one year to bring an action pursuant to 8681.112, Florida Statutes- If a consumer does not appeal a Board Decision under 681.1095(10), Florida Statutes, he/she/it can wait to file a separate complaint in the circuit court. There the consumer can also assert "cumulative" remedies under, for instance, §§672.313, 672.314, 672.315 or the Magnuson Moss Warranty Act, 15 U.S.C. 82301 et seq. Thus, the consumer has two "bites at the apple".

The Attorney General's argument that the one year statute of limitations in §681.112, Florida Statutes, clearly indicates that an action under that section is for a violation unrelated to the Board Decisions is not true. Nothing in that section limits the consumer's remedy. The section specifically states them to be "cumulative". An action by Trial de Novo is the only response for a manufacturer.

In this case, it is not the Petitioner's fault that the Respondent did not seek additional pecuniary damages under 681.112. Because he did not seek such damages at trial, he must now argue that §§681.1095(13) and 681.112, Florida Statutes, are mutually exclusive.[6] It is not an "either/or" choice for Pitsirelos. If Pitsirelos wanted additional pecuniary damages apart from a refund of his purchase price, he was obligated to ask for them at the appropriate time or be deemed to have waived them. As such,

[6] Pitsirelos did allege additional causes of action and damages early in the case. (R., pp. 19-72; 108-165). However, he abandoned the counterclaims (R., pp. 925-927) and failed to present any evidence to support his allegations for additional damages.

8681.1095, Florida Statutes, amounts to a punitive damage under a statute that provides for more than adequate relief to a prevailing consumer.

Further, reliance upon Life and Casualty Inc. Co. of Tennessee v. McCray, 291 U.S. 566 (1934) is also misplaced. The "surcharge damage" in that case was capped at a specified percentage based upon payments due under the insurance contract.' The "continuing damage" award under Chapter 681, Florida Statutes is open ended and can exceed, as is here, more than five times the value of the vehicle.

Finally, Pitsirelos and the Attorney General infer that Chrysler's choice to seek a Trial de Novo was meritless. (PAB at 40; AGAB at 26). There was no such finding by the circuit court. Challenging an arbitration board decision on these facts is required if a manufacturer has an interest in seeing justice served.

CONCLUSION

The Fourth District Court of Appeal's decision placing the burden of proof on Chrysler in its action by Trial de Novo should be reversed and remanded with directions for a new trial placing the burden of proof upon Pitsirelos in the circuit court action. Further, the Fourth District Court of Appeal's affirmation of the circuit court's continuing damage award in favor of Pitsirelos should be reversed and that portion of §681.1095(13), Florida Statutes, should be declared unconstitutional.

ANDERSON LAW'OFFICES

GREGORY A. ANDERSON
Florida Bar No.: 398853
JOHN J. GLENN
Florida Bar No.: 957860
225 Water Street
Suite 2100
Jacksonville, FL 32202
(904) 633-9402
Attorneys for Petitioner/
Appellant Chrysler Corporation

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. **Meros, Jr., Esq.,** P.O. BOX 10507, Tallahassee, Florida 32302 via U.S. Mail this 10th day of October, 1997.

ANDERSON LAW OFFICES

GREGORY A. ANDERSON
Florida Bar No.: 398853
JOHN J. GLENN
Florida Bar No.: 957860
225 Water Street
Suite 2100
Jacksonville, FL 32202
(904) 633-9402
Attorneys for Petitioner/
Appellant Chrysler Corporation