11-9

IN THE
SUPREME COURT OF FLORIDA

CASE NO. 71,073

KISSIMMEE UTILITY AUTHORITY,

Petitioner,

vs.

BETTER PLASTICS, INC.,

Respondent.

ON REVIEW FROM THE
FIFTH DISTRICT COURT OF APPEAL
DAYTONA BEACH, FLORIDA

ANSWER BRIEF OF BETTER PLASTICS, INC. ON THE MERITS

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INTRODUCTION

This case addresses the following question, certified as a question of great public interest by the Fifth District Court of Appeal:

> Is a regulated public utility in Florida liable to customers for prejudgment interest on overcharge refunds?

In this brief, respondent, Better Plastics, argues that the certified question should be answered in the affirmative.

Throughout this brief, petitioner, Kissimmee Utility Authority, is referred to as "KUA," and respondent, Better Plastics, Inc., is referred to as "Better Plastics." KUA's initial brief will be referred to as "KUA Br." and "A." will refer to the appendix filed with KUA's initial brief.

STATEMENT OF THE CASE AND THE FACTS

This case was presented to the trial court and the Fifth District Court of Appeal on stipulated facts which were accurately set forth in KUA's initial brief.

SUMMARY OF THE ARGUMENT

The Fifth District Court of Appeal was correct when it ruled that consumers should have the right to recover prejudgment interest when they are the victim of overcharges by their utility company. A fair reading of Public Service Commission ("PSC") Rule 25-6.106 reveals that the PSC intended to fully compensate consumers who were overcharged by utility companies. Under Argonaut Insurance Co. v. May Plumbing Co., 474 So.2d 212 (Fla. 1985), this Court has reaffirmed that prejudgment interest is not considered a penalty but rather is an inseparable part of the loss suffered by the plaintiff. To deny the consumer the right to recover prejudgment interest would deny consumers full compensation for their losses as defined by Argonaut. KUA's restrictive reading of Rule 25-6.106, which would deny full compensation to consumers, ignores Argonaut and violates the statutory maxim that utility statutes and rules be liberally construed for the public benefit.

To prevail, KUA must do more than just convince this Court that PSC rules should be interpreted to exclude the recovery of interest. KUA must argue that the PSC rule prohibits a consumer from seeking to recover interest damages in circuit court. However, the cases are clear that PSC rules may not limit a consumer's right of access to the courts. If a remedy is not provided by the PSC, then the consumer must be provided the right to seek compensation for that injury from the Florida courts.

The certified question posed by the Fifth District Court of Appeal should be answered in the affirmative.

ARGUMENT

I. PSC RULE 25-6.106, WHICH REQUIRES UTILITIES TO PROVIDE REFUNDS TO CUSTOMERS WHO ARE OVER-BILLED, SHOULD BE CONSTRUED TO REQUIRE THE UTILITY TO PAY PREJUDGMENT INTEREST TO OVER-BILLED CUSTOMERS.

It is stipulated by the parties that, over a 14-year period, KUA overcharged Better Plastics a total of $107,674.17 for electrical service. Although KUA has refunded this $107,674.17, the utility refuses to compensate Better Plastics for the free use it had of Better Plastics' money during the 14-year overcharge. KUA justifies its refusal to pay interest damages by arguing that the PSC rule regarding overcharge refunds, PSC Rule 25-6.106(2), and the statutory source of the PSC's power, Chapter 366, Florida Statutes, do not specifically provide for the payment of interest on utility overcharges.

KUA's argument proves nothing. Although the rule does not specifically refer to interest, neither is there any evidence in the rules or the statutes that the legislature or the PSC intended to prohibit the payment of interest by utilities on customer overcharges. Thus, the question is, in the absence of specific language, whether Rule 25-6.106 should be interpreted to require the utility to compensate customers for the loss of the use of their money during an overcharge period. The Fifth District Court of Appeal was correct to rule that prejudgment interest was required.

PSC Rule 25-6.106 provides:

> (2) In the event of other overbillings not provided for in Rule 25-6.103, the utility shall refund the overcharge to the customer for the period during which the overcharge occurred based on available records. If commencement of the overcharging cannot be fixed, then a reasonable estimate of the overcharge shall be made and refunded to the customer. The amount and period of the adjustment shall be based on the available records. The refund shall not include any part of a minimum charge.

The obvious intent of the overcharge rule is to compensate the consumer fully for any damage suffered as a result of utility overcharges. The rule is written in broad, fully inclusive terms. The consumer is to be fully compensated regardless of whether any portion of the claim may be barred by the statute of limitations or whether there is a specific record of the amount of the overcharge.

In direct contrast to the broad language establishing the right to a refund, only one narrow limitation is placed on the utility's duty to rectify the overcharge. According to the rule, the refund does not include any minimum charge that the customer would have been required to pay in any event. Had the PSC wished to place other limitations upon the right to a refund, such as the exclusion of interest, it could have done so. The fact that it did not should be conclusive. See Biddle v. State Beverage Department, 187 So.2d 65 (Fla.), cert. dismissed, 194 So.2d 623 (1966) (express exceptions in a statute give rise to a strong inference that no other exceptions were intended); Williams v. American Surety Co., 99 So.2d 877 (Fla. 2d DCA 1958) (same).

If the customer is not allowed to collect prejudgment interest, the customer will not have been fully compensated in accordance with the intent of the statute. This Court, in Argonaut Insurance Co. v. May Plumbing Co., 474 So.2d 212 (Fla. 1985), conclusively determined that in business or property loss cases, full compensation must include damages suffered from the loss of the use of money. In its opinion, this Court reaffirmed the principle, adhered to at least since the turn of the century in Florida, that prejudgment interest is merely another element of pecuniary damage in a property loss case. The court rejected cases holding that prejudgment interest is a "penalty" for a defendant's wrongful act in disputing a claim to be found just and owing. Id. at 214-15. Rather, the court justified such awards based on a "loss theory," noting that the loss of the use of the money itself is a wrongful deprivation by the defendant of the plaintiff's property. The plaintiff should be made whole from the date of the loss once the fact finder has determined liability and the amount of damages. Id.

In light of the long-standing rule confirmed by Argonaut that interest is merely an element of damages, it is not surprising that Rule 25-6.106 does not specifically refer to interest as part of the overcharge refund due to the customer. Such specificity is entirely unnecessary. According to Argonaut, prejudgment interest should be added automatically once the damages are determined. The plaintiff need not specifically ask for prejudgment interest and the jury need not specifically award it. Id. at 215. It is purely a ministerial duty of the trial

judge or clerk of the court to add the appropriate amount of the interest to the principal amount of the damages awarded in the verdict (or, as here, by stipulation). Id. Thus, it was unnecessary for the PSC to specifically refer to interest in order to assure that the utility customer would be fully compensated. Under Argonaut and its predecessor cases, interest should be an unstated but automatic part of the overcharge.

In light of Argonaut, to prevail in its interpretation of the rule, KUA must convince this Court that the PSC did not intend the consumer to be fully compensated. There is nothing in the statute to support such an argument. To the contrary, the entire legislative scheme is designed to promote the public welfare and is to be "liberally construed for the accomplishment of that purpose." § 366.01, Fla. Stat. (1985). Thus, the PSC has been provided broad powers to ensure that utilities deal fairly with their customers. To that end, the PSC may prescribe "all rules and regulations reasonably necessary and appropriate for the administration and enforcement of this chapter." § 366.05, Fla. Stat. (1985).

Interpreting the statute to provide full compensation to consumers overcharged by utilities comports with the public policy concerns evidenced by Sections 366.01 and 366.05. Were the law otherwise, a utility would be free to overcharge its customers with impunity knowing that, in the event the overcharge was discovered, the utility would be required to give back only the amount of the overcharge without being required to pay for the use of the customer's money. If the overcharge were never

discovered, the utility would benefit from the extra funds. If the overcharge were later discovered, the utility would need only to return the amount of the overcharge without paying interest obtaining, in essence, a "free loan" at the expense of the customers. It would be absurd to read a statute designed to protect the consumer in a way that could encourage overbilling practices by utilities.[1]

Indeed, in other parts of the PSC rules, the PSC demonstrates its intention that utilities not obtain the free use of customers funds. Rule 25-6.97 requires a utility to pay interest on customer funds held for deposit. It would be incongruous for the PSC to require utilities to pay interest on monies justifiably collected from utility consumers while at the same time depriving utility consumers of the right to recover interest on funds improperly collected. The Fifth District Court of Appeal was correct to reject this incongruous interpretation of the statute and to adopt instead a construction fully protecting the public welfare.

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[1] KUA argues that a rule granting consumers the right to recover interest would actually be counterproductive because this Court would then have to interpret the rule to permit utilities to recover interest on undercharges (KUA Br. 7). However, there is nothing inconsistent about providing an interest remedy to consumers but withholding such a remedy from the utility. The purpose of the statute is to prevent consumers from being penalized by the mistakes of a utility. Thus, when a consumer is overbilled it has the right to full compensation. When the consumer is underbilled through the mistake of the utility company, the statute protects the consumer by limiting the amount of the undercharge that must be paid back. KUA should hardly be entitled to complain that it may not recover interest on undercharges when any such undercharges almost certainly will be a result of its own mistake.

KUA's only response is to argue that it would be "an intolerable burden" on a utilities' administrative staff to calculate interest (KUA Br. 7). If it is a burden, it is a burden for which the utility has only itself to blame. It easily can eliminate this burden by ensuring that it does not adopt careless billing practices that result in overcharges. It is simply ridiculous to argue that the basic arithmetical calculations required to determine simple interest represent a justification for depriving a utility customer of perhaps hundreds of thousands of dollars in damages specifically recognized as compensable by this Court in Argonaut. Such a construction would hardly comport with the PSC's duty to protect the public welfare.

II. THE PSC RULE GOVERNING OVERCHARGES CANNOT CONSTITUTIONALLY BE INTERPRETED TO LIMIT AN OVERBILLED CUSTOMER'S ACCESS TO THE COURTS TO OBTAIN FULL COMPENSATION FOR THE INJURY CAUSED BY THE OVERBILLING.

Even if KUA were to convince this Court that Rule 25-6.106 should be construed so as to limit overcharge refunds under the rule to exclude interest, it would avail KUA nothing. KUA must then convince this Court that the PSC's silence on the interest issue acts to prevent a customer who suffered overcharges from filing an action in circuit court to recover full compensation.

Silence in a PSC rule cannot deprive utility consumers of a rightful cause of action. Indeed, even if the rule or the statute affirmatively prohibited the PSC from ordering the payment of interest on overcharges, this prohibition could not be read to limit the consumer's right of action to recover interest damages in circuit court. The Florida Constitution guarantees every

citizen of Florida the right of access to the courts to redress any injury. Article I, Section 21, Florida Constitution. As was discussed above, prejudgment interest is compensation for the injury caused by the loss of the use of funds. Argonaut, 474 So.2d at 214-15. Thus, if the PSC rule were interpreted so as to exclude a PSC remedy for interest on overcharges, the Florida constitution would then require that the consumer be provided access to the courts to recover the damages caused by this injury.

The leading case is Cooper v. Tampa Electric, 17 So.2d 785 (Fla. 1944). In Cooper, plaintiff alleged that it was damaged by discriminatory rates charged by a private utility. The question before this Court was whether plaintiff had the right to recover such damages through an action in circuit court. This Court, in language that could just as easily be applied to this case, held that the plaintiff could not be denied access to the courts to seek compensation for the injury done to him:

> There must be a tribunal for those aggrieved to take their controversies and we think that in view of the legislature having failed to provide recourse as authorized by Section 30 of Article XVI, they must have relief under Section 4 of the Declaration of Rights. Any other holding would be an admission that the government is powerless to or has failed to provide recourse where a ground for it is alleged.

17 So.2d at 787.[2]

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[2] Article XVI, Section 30 gave the legislature power to regulate common carriers under the constitution of 1885. Section 4 of Article I guaranteed access to the courts in language similar to Article I, Section 21 of the 1967 constitution.

Since Cooper, numerous Florida courts have examined the jurisdictional relationship between matters controlled by the PSC and those reserved to the courts. In each of these cases, courts have confirmed that statutes and rules governing public utilities cannot eliminate or limit the right to sue for damages. For example, in Southern Bell Telephone & Telegraph Co. v. Mobile American Corporation, Inc., 291 So.2d 199 (Fla. 1974), this Court addressed a situation where plaintiff sued Southern Bell for failure to comply with the statutory duty to provide efficient telephone service. The trial court dismissed the cause of action stating that the PSC had exclusive jurisdiction. This Court disagreed holding that plaintiff's remedy was clearly a damage action in circuit court. The key was the fact that the PSC had no authority to award money damages. Since damages were unavailable from the PSC, the plaintiff had the right to seek such damages from the courts:

> Nowhere in Chapter 304 is the PSC granted authority to enter award of money damages (if indicated) for past failures to provide telephone service meeting the statutory standards; this is a judicial function within the jurisdiction of the circuit court.

291 So.2d at 202. See also Deltona Corp. v. Mayo, 342 So.2d 510, 512 (Fla. 1977) (if a utility commits fraud it is a matter for the courts).

The most closely analogous case is Cohee v. Crestridge Utilities Corp., 324 So.2d 155 (Fla. 2d DCA 1975). In Cohee, the utility entered into a contract to provide service to a customer at five dollars per month. Later the utility attempted to raise its rates in spite of its agreement with the customer. The

Second District Court of Appeal held that the plaintiff had a right to sue the utility for breach of contract in circuit court.

Better Plastics is faced with a similar breach of contract. KUA agreed to provide electricity at certain rates. KUA now has stipulated that it inadvertently charged Better Plastics over $100,000 more than the agreed upon rates. Cohee confirms that Better Plastics may utilize the courts when the PSC has not provided a remedy.

This same theme runs through all of the cases cited above. If the PSC cannot provide a full and adequate remedy to a consumer damaged by a utility's actions, the consumer cannot be deprived of the right to seek recovery of those damages in circuit court. See State ex rel. McKenzie v. Willis, 310 So.2d 1 (Fla. 1975). These cases prove that KUA's argument is self-defeating. Once KUA argues that the PSC does not have authority to order complete refunds, then KUA necessarily must concede that the consumer does not have a full and complete remedy before the PSC. In such a case, the caselaw is clear that the consumer has the right to seek a complete remedy in the circuit court. To put it simply, the PSC does not have the right to pass a rule, either explicitly or implicitly, barring a plaintiff's right of access to the courts.

Although KUA does not discuss any of these cases in its brief, it impliedly recognizes that the power to award prejudgment interest may reside in the court if not covered by PSC rule. KUA argues that if Better Plastics' remedy is outside the PSC rules, Better Plastics should not recover because its action for

interest would be barred by the statute of limitations. KUA did not plead the statute of limitations. It did not argue the statute of limitations in the context of the motions for summary judgment argued in the trial court. Nor did KUA raise the statute of limitations as a defense on appeal to the Fifth District Court of Appeal. Its failure to plead or to argue the statute of limitations below bars it from raising the argument for the first time in its initial brief on the merits in this Court. Dober v. Worrell, 401 So.2d 1322 (Fla. 1981) (failure to raise an affirmative defense before the trial court precludes raising that issue for the first time on appeal).

Moreover, even if the statute of limitations could be asserted at this late stage in the proceedings, the defense would be without merit. There is nothing in the record to indicate that KUA was aware of the overcharge four or more years prior to the time it brought its action. Creviston v. General Motors Corp., 225 So.2d 331 (Fla. 1969) (accrual of cause of action coincides with aggrieved party's discovery or duty to discover act constituting invasion of legal rights); Lund v. Cook, 354 So.2d 940 (Fla. 1st DCA), cert. denied, 360 So.2d 1247 (1978) (same). KUA could hardly assert a statute of limitations defense in the absence of any record on this critical point.[3]

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[3] At most, the statute of limitations defense would be only a partial bar to Better Plastics' recovery of interest. Even if the statute were considered to have run as to the first years of the overcharge, Better Plastics would be entitled to recover for overcharges incurred during the limitations period.

Better Plastics properly brought its action in circuit court once KUA refused to pay full compensation for Better Plastics' loss. KUA asserted no defenses other than its erroneous interpretation of the PSC rule. In light of Argonaut's holding that prejudgment interest automatically follows from a determination of liability (here by stipulation) Better Plastics was entitled to judgment in the amount of its interest damages. The Fifth District Court of Appeal's ruling should be affirmed.

CONCLUSION

For all the foregoing reasons, the question certified by the Fifth District Court of Appeal should be answered in the affirmative. Consumers overcharged by utilities should have the right to recover prejudgment interest on that overcharge.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail, postage pre-paid to Edward Brinson, Esquire, Brinson, Smith & Smith, P.A., 1201 W. Emmett Street, Post Office Box 1549, Kissimmee, Florida 32742, on this 15th day of October, 1987.

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