10-18

THE SUPREME COURT

FOR THE STATE OF FLORIDA

KISSIMMEE UTILITY AUTHORITY,

Petitioner,

vs.

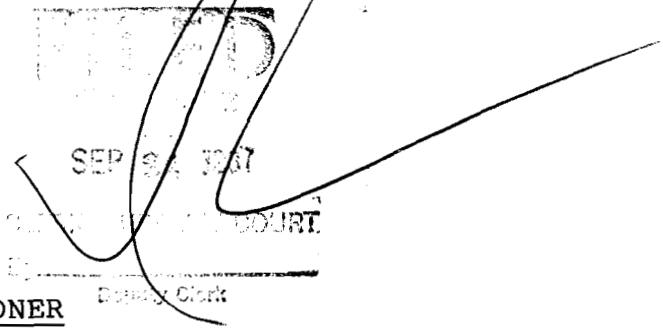
BETTER PLASTICS, INC.,

Respondent.

_____/

CASE NO: 71,073

FIFTH DISTRICT COURT OF APPEALS CASE NO: 86-2044



INITIAL BRIEF OF PETITIONER
ON THE MERITS

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INTRODUCTION

Throughout this Brief, Petitioner, KISSIMMEE UTILITY AUTHORITY, is referred to as "KUA", and Respondent, BETTER PLASTICS, INC., is referred to as "BETTER PLASTICS". The following symbols will be used: "R-" for the Record, and "A-" for the Appendix.

STATEMENT OF THE CASE AND THE FACTS

The facts in this case are stipulated. They are as follows:

1. For the period of 1972 through 1985, KUA and its predecessor in interest, provided electrical service to BETTER PLASTICS.

During that period, KUA and its predecessor in interest, overcharged BETTER PLASTICS by using a multiplier of eighty (80) when the proper multiplier for the electric service should have been sixty (60). The result was an overcharge to BETTER PLASTICS for the period in question of One Hundred Seven Thousand, Six Hundred Seventy Four and 17/100 ($107,674.17).

The overcharge for the years in question was as follows:

1972	$2,448.02
1973	$2,319.87
1974	$2,944.62
1975	$5,109.19
1976	$8,721.12

1977 $9,904.92

1978 $11,901.63

1979 $12,073.25

1980 $7,169.20

1981 $9,961.83

1982 $8,486.21

1983 $7,445.34

1984 $10,936.59

1985 $8,252.39

TOTAL: $107,674.17

On February 27, 1986, KUA recognized the overcharge to BETTER PLASTICS and issued its check to BETTER PLASTICS, INC., in the amount of $107,674.17 (R-4-5).

On March 5, 1986, BETTER PLASTICS, INC. sued KUA asserting that KUA was liable to BETTER PLASTICS for interest on the utility charge of $107,674.17 (R-1-2). KUA answered, denying any indebtedness to BETTER PLASTICS for interest on the overcharge and asserting that as a public utility, KUA is governed by the Florida Administrative Code Rule 25-6.106, which does not permit or authorize the payment of interest to a customer as a result of overbilling of energy (R-3).

On June 9, 1986, the parties entered into a stipulation in which it was admitted that KUA had overcharged BETTER PLASTICS for the years 1972 through 1985, and acknowledged

that KUA had issued its check to BETTER PLASTICS in the amount of $107,674.17, which represented the amount of the overcharge (R-4-5).

Thereafter both parties moved for summary judgment, each asserting that there was no disputed issue of fact, and that it was entitled to summary judgment as a matter of law (R-6-12, 13-15).

On October 20, 1986, a Court granted final summary judgment for KUA (R-18-19).

On November 19, 1986, BETTER PLASTICS filed its Notice of Appeal from that final Summary Judgment to the District Court of Appeals of the State of Florida, Fifth District (R-20).

Appropriate briefs were filed before the District Court by BETTER PLASTICS and KUA, followed by oral argument before the Fifth District Court of Appeals. Opinion was rendered by the District Court of Appeals for the State of Florida, Fifth District, July term, 1987, on July 30, 1987 (A-1), and on August 20, 1987, Order Denying the Motion for Rehearing was entered by the District Court. Mandate was forwarded to the Trial Court September 8, 1987.

The District Court's opinion certified the following question of great public interest:

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

Notice to Invoke Discretionary Jurisdiction was filed by KUA on August 28, 1987 to the Supreme Court of Florida.

Petition for Review filed in the District Court of Appeals, Fifth District, on August 31, 1987 was accepted for review by the Supreme Court of Florida on September 4, 1987.

SUMMARY OF ARGUMENT

1. The District Court of Appeal, Fifth District, reversed the trial Court's Summary Judgment which was granted in favor of KUA. The effect of this reversal was to require a regulated public utility in Florida to pay pre-judgment interest on overcharge refunds. That Court erroneously reasoned that

> "In the absence of a clear and lawful limitation a regulated public utility has all rights granted by, and duties imposed by, general law and, specifically, has the legal obligation to pay prejudgment interest on overcharge refunds". (Emphasis added)

The decision of the District Court completely ignores Florida Administrative Code Rule 25-6.106, in that said Rule is silent concerning prejudgment interest on overcharge utilities.

2. Florida Administrative Code Rule 25-6.106 clearly guides a public utility in case of refunds on overcharge utility bills and does not require judicial construction. Argonaut Insurance Company v. May Plumbing Company, 474 So.2d 212 (Fla. 1985), does not control as to prejudgment interest in face of the Florida Administrative Code Rule.

POINT I

THE DISTRICT COURT COMPLETELY IGNORED FLORIDA ADMINISTRATIVE CODE RULE 25-6.106 DUE TO THE RULE'S SILENCE ON PREJUDGMENT INTEREST AND ERRED BY REQUIRING A REGULATED PUBLIC UTILITY IN FLORIDA TO PAY CUSTOMERS PREJUDGMENT INTEREST ON OVERCHARGE REFUNDS BECAUSE THE REGULATED PUBLIC UTILITY HAS ALL RIGHTS GRANTED BY AND DUTIES IMPOSED BY GENERAL LAW AND BECAUSE THERE IS NO CLEAR AND LAWFUL LIMITATION IMPOSED IN SUCH AREA

-OR-

FLORIDA ADMINISTRATIVE CODE RULE 25-6.106 DOES NOT PERMIT A PUBLIC UTILITY TO PAY PREJUDGMENT INTEREST ON OVERCHARGE REFUNDS

The District Court of Appeals, Fifth District, erroneously reversed the Trial Court's Summary Judgment which was granted in favor of KUA, by finding that since the regulated public utility has the rights granted by the general law and there being no clear and lawful limitation on the payment of prejudgment interest, that the regulated public utility must pay prejudgment interest. This erroneous reasoning of the District Court fails to find that Florida Administrative Code Rule 25-6.106 is that clear and lawful limitation on the regulated public utility. A reading of the Florida Administrative Code Rule, which deals with underbillings and overbillings of energy, clearly details the public utilities' duty to the customer when an overbilling of energy situation is confronted. In such cases the utility

shall refund the overcharge to the customer for the period during which the overbilling occurred based on available records. If commencement of the overcharge cannot be fixed, then a reasonable estimate of the overcharge should 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 the minimum charge, Florida Administrative Code Rule 25-6.106(2). Nowhere in the reading of the aforesaid Rule does it address the question of prejudgment interest. It is difficult for one to conclude that because the Rule is silent on prejudgment interest, that the Public Service Commission intended that the public utility pay prejudgment interest on overcharges.

One must understand the purpose of the public service mandate under the enabling Statute pertaining to Florida Administrative Code Rule 25-6.106, as found in Section 366.05, Florida Statutes (1985). Florida Administrative Code Rule 25-6.002 sets forth the premise that such Rules are intended to establish the rights and responsibilities of both the utility and the customer. No deviation from these rules shall be permitted unless authorized in writing by the Commission. In the pertinent parts, the Statute gives the Public Service Commission the authority to prescribe all rules and regulations reasonably necessary and appropriate for the administrative enforcement of Chapter 366. The

rules prescribed by the Public Service Commission are mandatory rules to guide clerical staff and clerks in dealing with the utility customer, many times at a desk in a public area when the customer comes to the utility complaining of an overbilling. It would place an intolerable burden on an administrative staff to calculate or even know that the general law of Florida requires payment of prejudgment interest in such situations. It seems that the better rule would be that administrative staff could rely on the clear wording of the Rule and follow the Rule. In the case of an overbilling, the clerk will check the available records both of the customer and the utility and refund the overcharge for whatever period the overcharge can be documented. It is respectfully urged that the clearly written Florida Administrative Code Rule is that clear and lawful limitation on the public utility which is the governing law to guide both the customer and the utility.

The history of this case shows that the overcharge by KUA occurred over the period of time between 1972 and 1985. KUA and BETTER PLASTICS agreed that the overcharge during this period was $107,674.17. The suit that generated these two appeals was over the prejudgment interest question. A review of the pleadings clearly shows that KUA did not defend on the basis of Statute of Limitations but on the basis that the Rule was clear (R-3). Certainly the KUA was aware that

if the law of Florida required payment of prejudgment interest on overcharges, regardless of when the debt or overcharge occurred, then much of the claim would have been barred by the Statute of Limitations, Section 95.11, Fla. Stat. (Supp. 1986). If the decision of the District Court stands, then BETTER PLASTICS has used a rule of general law as outlined in Argonaut Insurance Company v. May Plumbing Company, 474 So.2d 212 (Fla. 1985), both as a sword and shield. They collect an overcharge that is clearly barred by the Statute of Limitations and then are allowed to collect prejudgment interest not only on the portion of the debt that is not barred by Statute of Limitations but also prejudgment interest on that portion that is barred by the Statute of Limitations. The fact that a regulated public utility has all rights granted by and duties imposed by general law, should not allow a customer of that utility to get around the age of the debt and collect prejudgment interest on the total debt.

The District Court must be reversed. The Trial Court's judgment in favor of KUA should be upheld by finding that the Florida Administrative Code Rule is clear and is a lawful limitation on the regulated public utility.

POINT II

FLORIDA ADMINISTRATIVE CODE RULE 25-6.106 IS CLEAR GUIDANCE TO THE PUBLIC UTILITY IN CASE OF REFUNDS OF OVERCHARGE ON UTILITY BILLS AND TO CONSTRUE PREJUDGMENT INTEREST IS A CLEAR CASE OF JUDICIAL INTERPRETATION BECOMING LEGISLATIVE.

Since the facts were stipulated by the parties before the Trial Court, this case was decided clearly between the wording of Florida Administrative Code Rule 25-6.106 and Argonaut Insurance Company v. May Plumbing Company, 474 So.2d 212 (Fla. 1985).

There is no issue that KUA, as a regulated public utility, has the rights granted by and the duties imposed by general law as well as a duty to follow the Public Service rules as mandated by Section 366.05, Florida Statutes (1985). Both at the Trial Court level and the District Court level, both parties spent time in briefing and oral argument, the applicability of the general law and the Public Service Commission Rule. Polk County v. Florida Public Service Commission, 460 So.2d 370, (Fla. 1984). However, due to the basis of the District Court decision, no argument is needed in this area.

Clearly the issue is whether, due to the silence of the Rule on prejudgment interest, such silence constitutes a clear and lawful limitation.

Due to the sizable amount of prejudgment interest, this matter came through the Trial Court, the District Court and

is now before the Supreme Court. However, the relevency of the amount is not an issue. It is the principle involved. Even a cursory reading of the Rule clearly shows that the Rule is silent on the question of prejudgment interest. Does the mere silence of the Rule impose upon the regulated public utility the duty to pay prejudgment interest? It is respectfully submitted that when the District Court places the requirement of prejudgment interest on the utility because the Rule is silent on the subject, the Court is clearly legislating rather than interpreting the Rule.

To allow prejudgment interest on overcharges in a case where the Rule is silent, places the Court in the position of the legislature - in violation of the Constitutional separation of powers. Article II §3, Fla. Const. (1968). The Rule is clear and does not require judicial interpretation. As previously indicated, the Rule governs the regulated public utility in the area of overbilling. For the level at which overbillings are normally handled, the Rule says what it means. The Courts cannot be allowed to control a public utility because the Rule is silent. The result arrived at by the District Court places the regulated public utilities in a state of chaos as to the procedure for handling overbillings, and suggests that interest should be charged to the customer in the case of underbillings.

It is respectfully submitted that the answer to the

certified question of great public importance to this Court:

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

should be NO. The Public Service Commission, or the Legislature, should decide the question in the future and not the Courts.

CONCLUSION

The opinion of the District Court should be reversed and the Summary Judgment in favor of KUA by the Trial Court should be sustained.

Respectfully Submitted,

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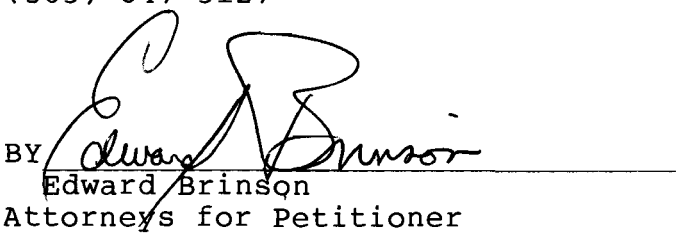
BY 
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Jeffrey R. Jontz, HOLLAND & KNIGHT, P. O. Box 1526, Orlando, Florida 32802, by U. S. Mail this 23 day of September, 1987.

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