

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

FILED
NOV 1987

CLERK

By

REPLY BRIEF OF PETITIONER

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INTRODUCTION

Throughout this Reply Brief, Petitioner, KISSIMMEE UTILITY AUTHORITY, is referred to as "KUA"; Respondent, BETTER PLASTICS, INC., is referred to as "BETTER PLASTICS"; the Fifth District Court of Appeals is referred to as "5th DCA"; and the Public Service Commission is referred to as "PSC". The following symbols will be used: "R-" for the Record, and "A-" for the Appendix.

SUMMARY OF ARGUMENT

The Public Service Commission Rule 25-6.106 is silent on the matter of the payment of interest on overbillings, but specifically details directions to the utility as to the method of calculation of overbillings. The Rule, though, by its silence, cannot require payment of interest on a mutual mistake, i.e., overbillings to the customer. Argonaut Insurance Company v. May Plumbing, 474 So.2d 212 (Fla. 1985) is not controlling in the face of the clear direction given in PSC Rule 25-6.106(2). The consumer is not denied full compensation in this case since the consumer has been allowed recovery of claim otherwise barred by reason of the Rule.

ARGUMENT I

Better Plastics, in its attempt to read interest into PSC Rule 25-6.106(2), in the absence of specific language, takes the inconsistent position that the Rule contains broad

language to establish the right to the refund but is narrow in its limitation on the utility's duty to rectify the overbillings. Better Plastics relies on the inference that no other exceptions were intended and cites Biddle v. State Beverage Department, 187 So.2d 65 (Fla. 4th DCA 1966), cert. dismissed, 194 So.2d 623 (1966). Limitations are not placed by silence. They are placed by language. In the case before this Court, there is no language dealing with rectifying the overbilling and ample language addressing the refund.

Better Plastics' reasoning is completely unjustified based upon a "loss theory". It is inconceivable that a utility could long endure by meeting its fiscal needs by over-billing their customers.

Better Plastics asserts incongruous positions between PSC Rule 25-6.97 dealing with interest on deposits and PSC Rule 25-6.103 dealing with overbillings. The Court will note that in the case of interest on deposits, the PSC specifically provides therefore, and in the case of interest on customer overbillings, the PSC is silent.

The "free loan" theory nor the "incongruous" theory should not overcome the clear directions of the PSC Rule 25-6.106(2).

ARGUMENT II

Better Plastics' fall-back position, in the event that the Rule should be read as KUA contends, attempts to

convince this Court that the PSC's silence on the interest issue acts to prevent a customer who suffers overbillings from filing an action in Circuit Court to recover full compensation. Better Plastics' attempts to overcome KUA's argument that the method that the PSC set forth establishing the right to refund and method of determining the refund is not subject to the affirmative defense of Statute of Limitation.

The KUA relying on PSC Rule 25-6.106, followed the procedure outlined for refunds of overbillings and therefore did not raise the Affirmative Defense of Statute of Limitations. Better Plastics is correct that the Statute of Limitation was not raised at the trial level since KUA refunded according to the Rule, which directs refund without regard to any Statute of Limitations.

If this Court should find that the PSC Rule is inadequate, this matter should be returned to the Trial Court for hearing under the direction set forth in Argonaut, supra. At this time, there is no testimony in the record of the reason for the overbillings or of the applicability of the Affirmative Defense of Statute of Limitations.

CONCLUSION

PSC Rule 25-6.106 should prevail, the Trial Court's judgment should be upheld, and the District Court's opinion reversed.

In the alternative, if the Rule is found to be unconstitutional, or otherwise inadequate, then this matter should be referred back to the Trial Court and tried under the guidance as set forth in Argonaut, supra.

Respectfully Submitted,

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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 1288, Tampa, Florida 33601, by U. S. Mail this 30 day of October, 1987.

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