

IN THE SUPREME COURT OF FLORIDA

ELIZABETH S. CORSO, ET. AL.,

Petitioner(s),

v.

CASE NO.: SC03-1216

Lower Tribunal No.: 5D03-166

UTILITIES, INC. OF FLORIDA,

Respondent(s).

_____ /

AMENDED JURISDICTIONAL BRIEF OF

ELIZABETH S. CORSO, ET. AL.

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ISSUE PRESENTED

Pursuant to FLA. R. APP. PRO. § 9.120(d) the sole issue presented in this brief is the discretionary jurisdiction of the Supreme Court of Florida to review the case at hand. This issue is within the Supreme Court’s Discretionary Jurisdiction as stated in FLA. R. APP. PRO. § 9.030(a)(2)(A)(iv) which pertains to a “...decision of a district court of appeal that . . . expressly and directly conflicts with a decision of another district court of appeal or of the Supreme Court on the same question of law. ...”

STATEMENT OF CASE AND FACTS

Elizabeth Corso, et. al. (hereafter “Corso, et. al.”) are the beneficiaries of the trust of their deceased father, A.K. Shoemaker. Mr. Shoemaker and Mid State Utility, the predecessor of Utilities, Inc. entered into a contract in 1961 whereby Mr. Shoemaker paid \$22,000 and deeded portions of Lots 37, 38, 39, 40, 47, and 48 to reserve utility service at a cost of \$500 per lot for his planned future development. In 2002 when Corso, et. al. sought to develop a portion of the property, Utilities, Inc. refused to provide such service at the contracted rate. Corso, et. al. sued for declaratory judgment in the Circuit Court of Seminole County, Florida on the issue

of whether Utilities, Inc. had breached the 1961 contract, and what damages or remedies were afforded to Corso, et. al.

Utilities, Inc. moved to dismiss the suit, claiming that the suit was actually a dispute over the rates to be charged, and therefore within the exclusive jurisdiction of the Florida Public Service Commission. Utilities, Inc.'s motion to dismiss and motion for rehearing were denied in the circuit court. Utilities, Inc. then filed a Petition for Writ of Prohibition with the Court of Appeals for the Fifth District. The Fifth District Court of Appeals issued an order to show cause on January 27, 2003, directing Corso, et. al. to show cause why the petition should not be granted. On April 25, 2003, the Fifth District granted Utilities, Inc.'s Writ of Prohibition (Appendix "A"). Corso, et. al. filed a Motion for Rehearing, which was denied by the Fifth District Court of Appeals on June 6, 2003. (Appendix "B")

SUMMARY OF ARGUMENT

Corso, et al. petition this Court for an appeal of the Final Order denying Rehearing (June 6, 2003) and the order of April 25, 2003, based on the jurisdictional grounds set forth in FLA. R. APP. PRO. § 9.030 (a)(2)(A)(iv). Corso, et. al. submit that there exists a conflict between the Fifth District Court of Appeals decision in this case, and the Second District Court of Appeals decision in *Cohee v. Crestridge Utilities Corp.*, 324 So.2d 155 (Fla. 2d DCA 1975). Corso, et. al. further submit the Fifth District Court of Appeals failed to properly apply and

therefore created a conflict with this Court's decision in *H. Miller & Sons, Inc. v. Hawkins*, 373 So.2d 913 (Fla. 1979). Corso et. al. also submit that the Fifth District Court of Appeals decision conflicts with this Court's rulings in *Arrow Air, Inc., v. Walsh*, 645 So. 2d 422 (Fla. 1994), and *Young v. Altenhaus*, 472 So. 2d 1152 (Fla. 1977).

ARGUMENT AND AUTHORITIES

Corso, et. al. petition this Court for an appeal of the Final Order denying Rehearing (June 6, 2003) and the order of April 25, 2003, based on the jurisdictional grounds set forth in FLA. R. APP. PRO. § 9.030 (a)(2)(A)(iv). This level of jurisdiction was designed specifically to address issues where a district court of appeal decision expressly and directly conflicts with a decision of another district court of appeal on the same question of law. The term "expressly" has been defined as "to represent in words;" "to give expression to." *Jenkins v. State of Florida*, 385 So. 2d 1356, 1359 (Fla. 1980), where it was held that this jurisdiction applies only to conflict of decisions, not conflict of opinions or reasons. *Id.*

The Fifth District's decision of April 25, 2003 states, "...We perceive the issue here to be a dispute between the parties relating to the rates and charges for water and wastewater utility services which dispute is within the exclusive jurisdiction of the PSC. ..." (Appendix "A"). Corso, et. al. submit, however, that

the suit was not seeking to set utility rates, but rather declaratory relief in the circuit court to determine if there was a breach of contract. At paragraph 18 (b), (d) and (e) of the Complaint filed with the Circuit Court, Seminole County, Corso, et. al. asked the court to determine if there has a been a breach of an agreement and what damages, if any, there were.

Since the case actually involves a claim for breach of contract and damages, the decision of the Fifth District Court of Appeals regarding the circuit court's jurisdiction is in direct conflict with the Second District Court of Appeals decision in *Cohee v. Crestridge Utilities Corp.*, 324 So.2d 155 (Fla. 2d DCA 1975) and the Fifth District Court of Appeals own decisions in *Sandpiper Homeowners Association, Inc., v. Lake Yale Corp.*, 667 So. 2d 921 (Fla. 5th DCA 1996). In *Cohee v. Crestridge Utilities Corp.*, *supra*, the Second District Court of Appeals court stated "...However, the question we must decide is whether the trial court had jurisdiction to determine whether Crestridge breached its contract when it raised the rates. ...". *Id.* at p. 158. The Second District held, "...The plaintiffs are entitled to an adjudication of whether Crestridge breached its contract by going to the higher rates. This can only be accomplished in a court of law. ..." *Id.*

in *Sandpiper Homeowners Association, Inc., v. Lake Yale Corp.*, *supra*, the Fifth District Court of Appeals considered the holding in *Cohee v. Crestridge Utilities Corp.*, *supra*. and likewise held that even where the Public Service

Commission may have the exclusive power to approve utility rates, that circuit courts still have jurisdiction to determine whether there was a breach of contract. Further, the Fifth District also held in *Winter Springs Development Corp. v. Florida Power Corp.*, 402 So. 2d 1225 (Fla. 5th DCA 1981), that the circuit court had the power to determine if there was a breach of contract. In that case the Fifth District stated that although the PSC has exclusive jurisdiction to entertain actions involving utility rates and service, it is not empowered to award money damages for breach of contract, and this jurisdiction is vested with jurisdiction to hear matters outside of that realm. ... *Id* at p. 925-926.

Corso, et. al. submit that the Fifth District's present decision that the Public Service Commission has exclusive jurisdiction on the issue at hand is in direct and express conflict with *Cohee v. Crestridge Utilities Corp.*, *supra*, and its own two decisions.

In the present decision, the Fifth District Court of Appeals cited this Court's decision in *H. Miller & Sons, Inc. v. Hawkins*, 373 So.2d 913 (Fla. 1979) for support of its holding that the Public Service Commission has exclusive jurisdiction to consider this case. Corso, et. al. submit that the Fifth District Court of Appeals decision does not accurately interpret the holding in *H. Miller & Sons, Inc. v. Hawkins*, *supra* and therefore conflicts with this Court's decision in that case. In *H. Miller & Sons, Inc. v. Hawkins*, *supra*, this Court held that the Public Service

Commission had the authority to set utility rates, and that the Public Service Commission action serves to modify or supersede a contracted rate between a utility and its consumer. However, in that case this Court was faced with a petition for writ of certiorari from a Public Service Commission ruling, not a suit for determination of a breach of contract and damages. Further, in *H. Miller & Sons, Inc. v. Hawkins, supra*, this Court did not address or state that the Public Service Commission has the authority to consider claims for breach of contract and what damages the consumer is entitled to recover from the utility when it breaches the contract. In the Fifth District's present decision the court has before it a specific claim for breach of contract and damages, not a request to determine if the utility rates are reasonable.

Additionally, in the Fifth District's decision granting the Writ of Prohibition it failed to address the retroactive applicability of the utility rates statutes, Chapter 367, Florida Statutes, (1971), but which the Fifth District applied to this contract which was entered into in 1961. Corso, et. al. submit that this creates a direct conflict with this Court's holding in *Arrow Air, Inc., v. Walsh*, 645 So. 2d 422 (Fla. 1994), which states, "... in absence of clear legislative intent to the contrary, a law affecting substantive rights is presumed to apply prospectively. ..." *Id.* at p. 424. The present decision also conflicts with this Court's holding in *Young v. Altenhaus*, 472 So. 2d 1152 (Fla. 1977) where this Court stated: "...The

presumption against retroactive application of a law that affects substantive rights, liabilities, or duties as well is a well established rule of statutory construction. ...". *Id.*, at p. 1154. In the district court, Utilities, Inc. argued that the utility rate statutes found in FLA. STAT. § 367.011(2) and 367.081 were in effect when service was requested by Corso, et. al. in 2002, and therefore the critical time at issue was when the additional connections were sought, thus these statutes are controlling of the present issue. Apparently the Fifth District Court of Appeals adopted this argument for it made no mention of the statutes applicability and whether it was being applied retroactively. Although apparently relying on *H. Miller & Sons, Inc. v. Hawkins, supra*, to support its decision on this issue, the facts actually show that in *H. Miller & Sons, Inc. v. Hawkins, supra*, this Court did not address the issue of retroactivity of Chapter 367 because it had been in effect a year before the utility and the consumer in that case entered their contract for guaranteed utility rates (1972). *Id.*, at p. 914.

CONCLUSION

If the Fifth District Court of Appeals decision is allowed to stand there will not only exist a conflict in decisions in the State of Florida, but, Corso, et. al. submit that the effect of the decision will allow utilities to perpetually commit fraud against consumers. Utilities, Inc.'s predecessor utility promised consideration in the form of reduced rates if paid \$22,000 and deeded several lots. Utilities, Inc.

has knowingly broken that promise, and it claims it can do so without any ramifications. Utilities, Inc. contends that the Public Service Commission has exclusive jurisdiction to set the utility rates, but it does not offer whether the Public Service Commission can order Utilities, Inc. to return Corso, et. al. their \$22,000, plus interest and the deeded lots. The Fifth District decision appears to support this. Therefore, if the Public Service Commission doesn't have jurisdiction to consider a breach of contract claim and order payment of damages or grant rescission, and the Fifth District decision is upheld, then the question is, "Who has the jurisdiction and power to rectify this breach of contract?" Without a clarification of this issue by this Court, it appears that Utilities, Inc. and other utilities will have a tool to make any fraudulent promise to consumers, obtain their money and property, and then be free of responsibility for their actions.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above document has been furnished by U.S. Mail Delivery to Martin S. Friedman, Esq., Rose, Sundstrom & Bentley, LLP, 600 North Lake Boulevard, Suite 160, Altamonte Springs, Florida 32701, and Gregory G. Costas, Esq., Florida Department of Transportation, Haydon Burns Building, MS-58, 605 Suwanne Street, Tallahassee, Florida 32399-00458, this _____ day of October, 2003.

CERTIFICATE OF COMPLIANCE

The above counsel certifies in accordance with Rule 9.210, Rules of Appellate Procedure that this brief complies with the font requirement of Rule 9.210 and that this brief has been computer generated in Times New Roman 14-point font.

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