12-8

IN THE SUPREME COURT OF FLORIDA

JACKSONVILLE ELECTRIC AUTHORITY,

Petitioner,

vs. CASE NO. 73,25

DRAPER'S EGG AND POULTRY CO., INC., a Florida Corporation,

Respondent.

FILED
SID J. WHITE
NOV 13 1989
CLERK, SUPREME COURT
By
Deputy Clerk

ON CERTIORARI FROM THE DISTRICT COURT OF APPEAL
THE FIRST DISTRICT OF FLORIDA

PETITIONER'S INITIAL BRIEF

JAMES L. HARRISON
GENERAL COUNSEL

STEVEN E. ROHAN
ASSISTANT COUNSEL

715 Towncentre
421 West Church Street
Jacksonville, Florida 32202
(904) 630-4900

ATTORNEYS FOR PETITIONER
JACKSONVILLE ELECTRIC AUTHORITY

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PRELIMINARY STATEMENT

All references to the Petitioner, Jacksonville Electric Authority, will be made by referring to it as JEA.

The Respondent, Draper's Egg and Poultry Co., Inc., a Florida Corporation, will be referred to as Draper.

STATEMENT OF THE CASE

On March 31, 1986, Draper filed a Complaint for Declaratory Relief raising the issues which are the subject of this action. On April 21, 1986, the JEA filed a Counterclaim that sought judgment for $297,303.85 for unbilled but consumed water and sewage services. On May 15, 1987, trial was held. On July 8, 1987, the Trial Court entered its Final Judgment for Draper. The case was appealed to the First District Court of Appeal and on September 13, 1988, an opinion was entered reversing the Trial Court on the issue of estoppel but affirming the Trial Court on the issue of accord and satisfaction. The parties filed Petitions for Rehearing and on October 4, 1988, said petitions were denied.

On October 31, 1988, JEA filed its Notice to Invoke the Jurisdiction of the Florida Supreme Court.

STATEMENT OF THE FACTS

This case involves a water and sewer billing error made by the public provider and biller of services, the JEA, which negatively impacted the customer, Draper. (JEA is responsible for the billing of all City of Jacksonville (City) water and sewer services). There was no issue at trial as to whether the services of the JEA were used. The only issues were the legal defenses of accord and satisfaction and estoppel.

The facts can be simply summarized by stating that the JEA uncovered a 17 month continuing billing error in April of 1985, and has demanded

payment for the sewer services provided. Draper denied recovery on the basis of accord and satisfaction and estoppel.

A recitation of the pertinent facts follows:

Draper operated an egg and poultry business which utilized a great deal of well and city water. Draper paid the **JEA** for the City water it used and also for sewage. Sewage billing was based on water usage that was expected to return to the sewer.

Draper had seven water meters: two sewer surcharge meters (calculating well water usage that applied in a determination of the sewage charge), four sewer deduct meters (calculating City water credits to Draper that applied in a determination of the sewage charge), and one water meter (calculating City water usage that applied in a determination of the sewage charge). A **"deduct"** water meter measured water consumption that did not result in a charge for sewage (e.g., water used for ice that was not put in sewer).

Draper was billed for three accounts by the **JEA.** Two of the accounts were for the two sewer surcharge meters on the two pumps on Draper's well. The third account on the bill was for the use of City water.

The December 1984 Billing Inquiry

In January of **1985,** Mr. William E. Draper, Jr., owner/operator, inquired about a seemingly high bill on one of his accounts. A customer service representative with JEA advised Mr. Draper that the billing transpired over a hundred and fifty-seven day period and that is why it seemed unusually high. Draper had replaced the meter and the account had not been billed for five months. **A** letter was written to Mr. Draper advising him of the time period it covered and that **JEA** considered the matter concluded.

Another customer service representative received a call from Mr. Draper asking for the balances on all his accounts and asking that a credit balance on one account be transferred to another account with a debit balance. A supervisor approved the transfer. Subsequently, a letter was sent advising Mr. Draper that the requested transfer had been performed.

The Draper December 1984 inquiry resulted in no compromise, but rather a shifting of credits and debits. Draper made a payment of $21,253.16, which constituted substantial payment in full of all sums known to be owed at that time by a check marked "payment in full through February 19, 1985, for all water and sewer charge for Draper's Egg and Poultry Company, Inc., 2400 McCoy Boulevard, Jacksonville, Florida". This payment was made two months before the 1983-1985 logging error was uncovered.

The 1983-1985 Logging Error

In April of 1985, the JEA discovered, in one of its three accounts with Draper, a meter reading logging error that had existed since November of 1983. The other accounts were satisfactorily billed and paid. It was discovered that a new sewer "deduct" meter had been mislogged by a meter reader as a sewer "charge" meter and vice versa. The resulting miscalculations from this error caused underbillings of $297,303.85.

Since actual consumption of the meters was correctly read, the billing was recalculated after April of 1985, using the correct meter readings on the correct meters. The actual rebilling was not sent to Draper until November of 1985, and it covered the period from December 1983 through April 1985, when the error was discovered, as well as the period from April 1985 through October 1985, when final calculations and investigations were being made. Due to the

size of the rebilling, JEA took considerable time in verifying the new findings and the recalculation.

The recalculations resulted in a bill due and owing (over what had been previously paid) to Draper of $297,303.85. Draper refused to pay this sum.

SUMMARY OF ARGUMENT

Between December 1984 and March 1985, Draper questioned and eventually paid a JEA bill for water and sewage. The accounts were never altered through compromise. Draper's check to the JEA for the December 1984 billing stated "payment in full . . ." but there was never a dispute.

In April 1985, the JEA uncovered a major logging error which occurred between November of 1983 and October of 1985 resulting in a sum due as of November of 1985 of $297,303.85. Draper refused to pay and raised the legal defense of accord and satisfaction and estoppel. The Trial Court concurred and entered judgment for Draper and the First District Court of Appeal affirmed on the issue of accord and satisfaction.

The decision of the First District Court of Appeal is in direct conflict with the case of **Corporation De Gestion Ste-Foy, Inc. v. Florida Power and Light Company,** 385 So.2d 124 (Fla. 3rd DCA 1980), which stated:

> "Applying these principles to the precise situation involved in this case, three well-reasoned decisions from other jurisdictions have squarely held that a customer of a public utility ***simply has no defense*** -- either of estoppel or ***of accord and satisfaction*** -- to charges for services which were actually furnished but which had previously been negligently underbilled."
>
> **Corporation De Gestion Ste-Foy, Inc. v. Florida Power and Light Company,** (emphasis added) 385 So.2d 124,126 (Fla. 3rd DCA 1980).

There were two distinct and separate "disputes" involved in this case. By ignoring this, the First District Court opinion below conflicts with **Jobear, Inc. v. Dewind Machinery Company, 402 So.2d 1357** (Fla. 4th DCA **1981). Jobear** stands for the proposition that when one resolves a claim that is wholly unrelated to a subsequent claim, no accord and satisfaction can be reached. Both conflicts were quite clearly addressed by Judge Ervin in his dissent below.

ARGUMENT

POINT I

THE FIRST DISTRICT COURT OF APPEAL'S DECISION IS IN CONFLICT WITH CORPORATION DE GESTION STE-FOY V. FLORIDA POWER & LIGHT.

De Gestion stands for the proposition that a public utility (here the JEA) is required to collect undercharges even when they result from its own negligence, or contractual provisions to the contrary.

The majority below attempted to distinguish **De Gestion** when it stated at pages **3** and 4 of its opinion:

> "However, **De Gestion** did not involve any identified dispute or negotiated settlement at the time of payment. We do not consider a public utility's settlement of a disputed bill to be an undue preference **or** advantage, **or** to contravene public policy. We therefore decline to extend **De Gestion** to the circumstances of the present case."

But **De Gestion** clearly prohibits the defense of accord and satisfaction in **all** public utility service cases:

> ". . . three well-reasoned decisions from other jurisdictions have squarely held that a customer of a public utility *simply* has no defense--either of estoppel or of accord *and* satisfaction-- to charges for services

> which were actually furnished but which had previously been negligently underbilled."
>
> **Corporation De Gestion Ste-Foy, Inc. v. Florida Power and Light Company,** (emphasis added) 385 So.2d 124,126 (Fla. 3rd DCA 1980).

Judge Ervin in his dissenting opinion below, noted the explicit conflict with **De Gestion:**

> "Alternatively, even if it can be reasonably concluded that JEA's acceptance of the two checks in the amount of $21,967.57 reflected an agreement by it that such amount was payment in full through the meter reading of February 19, 1985, for all water and sewer services theretofore used at Draper's business, the Third District Court of Appeal's opinion in ***Corporation De Gestion Ste-Foy, Inc. v. Florida Power and Light Company,*** 385 So.2d 124,126 (Fla. 3rd DCA 1980), clearly holds that a customer's defense of accord and satisfaction, as applied to a public utility's negligent billing errors for services that were actually received by the customer, is barred by overriding public policy interests: ..."
>
> ***
>
> "The majority's holding, approving the lower court's order barring the JEA from recovering accrued undercharges through the February 19, 1985, meter readings, is, in my judgment, not only ***in conflict*** with a substantial body of out-of-state case law authority, but in conflict as well with the rule announced by the Third District Court of Appeal in ***De Gestion.*** I would therefore reverse the order entered below in its entirety." (emphasis added).

In **De Gestion,** Florida Power and Light Company misread the master electric meter at its premises for three (3) years resulting in a subsequent $99,000 charge to the customer. As in the case ***sub judice,*** the complaining party there did not allege that they had not actually consumed the electricity. It raised defenses like Draper herein of estoppel and accord and satisfaction.

In **De Gestion,** it was the payment of monthly bills that was the basis for the alleged accord and satisfaction. In the case ***sub judice*** it was the mere

endorsement of "payment in full" which constituted the alleged accord and satisfaction. But **De Gestion,** expressly conflicting with the decision below, stated:

> "A customer of a public utility simply has no defense ... or accord and satisfaction to charges for services which were actually furnished but which had previously been negligently underbilled."

De Gestion, 385 So.2d at **126.**

This is a patent conflict which should be addressed by this Honorable Court. Either accord and satisfaction is allowed as a defense in public utility service case or it is not. The question has statewide and national public policy implications and should be resolved by this Honorable Court.

POINT II

THE FIRST DISTRICT COURT OF APPEAL'S DECISION IS IN CONFLICT WITH THE FOURTH DISTRICT COURT OF APPEALS ON THE ISSUE OF ACCORD AND SATISFACTION AND SEPARATE DISPUTES.

In the case ***sub judice,*** there is no question that there were two separate "disputes" between Draper and the JEA. The December **1984** Draper **"inquiry"** resulted in the payment of a check to the JEA for **$21,967.57** and a follow up payment of **$714.42.** These checks were indisputably forwarded to the JEA as payment for the December **1984** billing, which was payment in full for all sums that all parties believed to be in dispute at that time. It was not until **two** months later that the **1983-1985** logging errors became apparent. It is undisputed that there was no meeting of the minds regarding the **1983-85** billing errors when the checks for **$21,967.57** and **$714.42** were received in February and March of **1985.** Nobody knew of the logging errors.

The majority below is in conflict with **Jobear, Inc. v.** Dewind Machinery **Company, 402** So.2d **1357** (Fla. 4th DCA **1981),** which also involved separate claims. **In** that case the Court stated that there could be **no** accord and satisfaction when separate claims are involved:

> "Appellant first contends that appellee's acceptance of the check which expressly said that its endorsement would constitute a full and complete release of appellant acted as an accord and satisfaction as to all claims of appellee against appellant. ...
>
> "Contrary to the cases relied upon by appellant, ***sub judice*** there were two separate and distinct claims -- one for rent and the other for parts and labor. The claims were pled in separate counts; the check in question says nothing of the rental indebtedness; and the language of the restrictive endorsement sustains the interpretation that the release applied to the indebtedness for parts and labor. We therefore conclude that appellant's argument fails." (emphasis added) Id. at **1358.**

Rent versus parts and labor in **Jobear** represents **no** more a separate claim than does a billing inquiry versus the uncovering of a substantial logging and billing mistake in the case ***sub judice.*** Judge Ervin in his dissent below recognized the conflict when he stated at pages **8** and 9 of the opinion:

> "Clearly there can be **no** accord and satisfaction if all claims are not incorporated within the agreement of the parties. **See** Jobear, ***Inc. v. DeWind Machinery Co.,*** 402 So.2d **1357, 1358** (Fla.4th DCA **1981).**
>
> * * *
>
> "Nevertheless, at the time the accord was reached in March **1985,** there was clearly **no** dispute regarding billing errors uncovered.. .thereafter."

Thus, the Fourth and First Districts have adopted different standards **on** what constitutes separate and distinct claims for purposes of negating the defense of accord and satisfaction. This conflict should be resolved by this Honorable Court.

CONCLUSION

For the reasons stated herein, the Jacksonville Electric Authority prays that this Honorable Court will grant certiorari and permit briefing on the merits. The issues raise statewide and national issues of public policy regarding public utilities. Accepting certiorari will also permit this Honorable Court an opportunity to clarify the application

Respectfully submitted,

JAMES L. HARRISON
GENERAL COUNSEL

STEVEN E. ROHAN
ASSISTANT COUNSEL
Florida Bar ID No. 138839

Office of General Counsel
715 Towncentre
421 West Church Street
Jacksonville, Florida 32202
(904) 630-4900

ATTORNEYS FOR PETITIONER,
Jacksonville Electric Authority

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Brief on Jurisdiction has been furnished to GARY B. TULLIS, ESQUIRE, 500 North Ocean Street, Jacksonville, FL 32201, Jacksonville, FL 32202, Attorney for the Respondent, by mail, this 14th day of November, 1988.

Attorney