

IN THE SUPREME COURT OF FLORIDA

Case No. 73,259

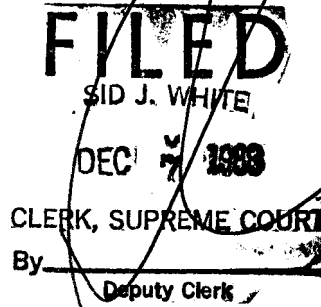
JACKSONVILLE ELECTIC AUTHORITY,

Plaintiff, Appellant,
and Petitioner,

vs ■

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

Defendant, Appellee,
and Respondent.



RESPONDENT'S BRIEF ON JURISDICTION

On Certiorari from the District Court of Appeal
First District of Florida

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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's."

All references to the record on appeal will be referred to as "R"; all references to the transcript will be referred to as "Tr"; all references to Plaintiff/JEA's exhibits will be referred to as "Px"; and all references to Defendant/Draper's exhibits will be referred to as "Dx."

STATEMENT OF THE CASE

Draper's would adopt the Statement of the Case set forth in Petitioner's Jurisdictional Brief.

STATEMENT OF THE FACTS

The Statement of Facts by JEA is argumentative and has material omissions and inaccuracies. Accordingly, Draper's submits the following statement of the facts:

The JEA is responsible for the proper reading of water meters of citizens and businesses in Duval County, Florida, and for billing for water and sewer usage based upon proper meter readings (R-66, Pretrial Stipulation). The JEA is seeking to recover \$297,303.85 for unbilled water and sewer services as a result of claimed meter reading errors during a seventeen-month period beginning in November of 1983. Draper's position is that an accord and satisfaction as well as an estoppel preclude re-

covery of that amount.

William E. Draper, Jr., is the owner/operator of Draper's Egg and Poultry Company in Jacksonville, Florida (Tr-90). Mr. Draper is billed for three accounts by the JEA (Tr-94, Px-3). In December of 1984, he had a dispute with the JEA concerning his billings (Tr-95). Prior to that time, he had not had any problems of any major consequence with the JEA with respect to meter readings or discrepancies in bills (Tr-95). In late 1984, he received a bill on one of his accounts that was considerably larger than it had been before. He called the JEA to state that he did not feel that this was a correct billing. He talked with the JEA by telephone several times and at least three times in one week asking the JEA to check on it and get back to him (Tr-95-96, 115).

Mr. Draper received a letter dated January 14, 1985, from Peggy McCullough at the JEA concerning his inquiry (Tr-96, Px-1). Mr. Draper testified that after that letter, they had some correspondence and they were not arriving at any settlement. He wrote a letter to Ms. McCullough in February stating the manner in which he would pay the dispute (Tr-97-98, Px-2). He then testified that after he received another bill, he did not feel that it looked proper. Mr. Draper had challenged the amount of money due on the December bill and could not get any satisfaction from the JEA on this issue. He felt like the best thing he could do was to pay it but to have an understanding that there would not be any more charges after that (Tr-115). He told the JEA

that he did not think that the bill was correct and that the amount was wrong (Tr-118). He asked several people at the JEA to explain it to him and they could not. Finally, he said that if the JEA would write him a letter stating that on payment of that bill, that any and all water and sewer bills for 2400 McCoy Boulevard would be paid in full through February 19, 1985, he would send them a check. He received such a letter and sent them such a check (Tr-99-100).

The letter from the JEA dated March 7, 1985, stated:

Our records reflect these balances for your three (3) Water accounts:

61760-02400-0000-7-00-W	\$25,886.64
61760-02400-0001-6-00-W	4,633.49-
61760-02400-0002-5-00-W	714.42

We are transferring the credit balance of \$4,633.49, per your request, on the account located at 2400 McCoy Bv. #1 to your account listed at 2400 McCoy Bv. The transferring of this credit will reduce the current balance of \$25,886.64 to \$21,253.15.

Enclosed for your convenience are duplicate bills for the two accounts with debit balances, for a total due of \$21,967.57. Once these payments and the transfer of the credit balance has [sic] been posted to your account they will be paid in full through the February 19, 1985 meter readings.

We hope that this information and duplicate bills are of assistance to you. Should you need more information please feel free to contact us at 633-5000.

(Tr-100, Px-3)

Mr. Draper testified that it was his understanding from his dealings with the JEA that this letter from the JEA covered all of the liability for all of the meters (Tr-120).

Mr. Draper sent a check to the JEA dated March 19, 1985, in the amount of \$21,253.15. On the back of the check, Mr. Draper typed the following:

Payment in full through February 19, 1985 for all water and sewer charge for Draper's Egg and Poultry Co., Inc. 2400 McCoy Blvd., Jacksonville, Florida.

(Tr-101, Px-4).

He then received a letter dated March 22, 1985 requesting the balance of \$714.42, which he subsequently paid (Tr-102, Px-5). This amount made up the difference between the check of March 19, 1985, and the amount set forth in the March 7, 1985, letter. After that check was mailed to the JEA, as far as Mr. Draper was concerned, all of his water billing accounts were paid in full through February 19, 1985 (Tr-102-103).

Mrs. Renee Foster, an employee of the JEA, testified that her supervisor, Mrs. Sanders, wrote the March 7, 1985, letter and told Mrs. Foster to sign it (Tr-127). She also testified that the letter was to explain to Mr. Draper what the JEA was doing (Tr-128). Mr. Draper asked for the balances on all three of his accounts (Tr-129). She, as well as Ms. Sanders, acknowledged that the letter tells Mr. Draper that when he pays the balances noted that his account at the JEA would be paid in full through the February 19, 1985, meter readings (Tr-129, 136). Mrs. Foster said she had the authority to sign the March 7, 1985, letter because her supervisor asked her to sign it (Tr-132).

Judy Wallace, a JEA division chief, testified that the JEA has a procedure to reduce a disputed water bill (Tr-142). Mrs.

Wallace also testified that the March 7, 1987, letter tells Mr. Draper that if he pays the sums set forth that his account would be paid in full through the February 19, 1985, meter readings (Tr-146). She also said that the JEA has the authority to agree with a customer on what it takes to pay in full as of a certain meter reading date (Tr-146).

SUMMARY OF ARGUMENT

The record contains sufficient evidence of the elements of accord and satisfaction to the JEA's attempt to recover unbilled water and sewer charges.

With respect to the accord and satisfaction defense, the record shows a dispute pertaining to all three of Mr. Draper's water and sewer accounts with two communications between the JEA and Mr. Draper. The March 7, 1985, letter and the notation on the March 19, 1985, check clearly manifests the parties' mutual assent to resolve all of Draper's water and sewer charges through February 19, 1985. Furthermore, the evidence, testimony, and inferences therefrom show that the JEA knew or should have known of the unbilled amounts at that time. When a public utility seeks to recover underbilled amounts, the defense of accord and satisfaction can apply where it is based on a dispute.

ARGUMENT

POINT I

THE DECISION OF THE DISTRICT COURT OF APPEAL,
FIRST DISTRICT, DOES NOT CONFLICT WITH THE
HOLDING OF CORPORATION De GESTION STE-FOY,
INC. v. FLORIDA POWER AND LIGHT COMPANY

The holding of Corporation De Gestion Ste-Foy, Inc. v. Florida Power and Light Company, 385 So.2d 124 (Fla. 3rd DCA 1980), is distinguishable from the instant case, and therefore does not apply. In De Gestion, the public utility customer sought to avoid underbilled electric charges on two grounds, neither of which has been raised in the instant case. First, the customer argued that the power company was estopped from collecting amounts it had negligently underbilled. Second, it argued that an accord and satisfaction had been effected by the payment of the power company's successive monthly billings in the interim. The De Gestion court's rationale for rejecting the accord and satisfaction defense as expressed in footnote 2 of the opinion was that mere payment of an erroneous monthly bill does not constitute an accord because no claim was either unliquidated or in dispute. In the instant case, the accord and satisfaction was based on the trial court's finding of a dispute. As the trial court explained:

In the instant case, JEA is seeking an amount representing erroneous underbillings for a period between December 16, 1983, and October 17, 1985. However, unlike De Gestion or the cases cited therein, the facts in the case now before this Court reveal that in the latter part of 1984, Draper's questioned and disputed its water billings, and finally after correspondence and discussions on March 19, 1985, the JEA accepted a substantial sum of money from Draper's in full satisfaction of Draper's water billings for all three accounts through the February 19, 1985, meter readings. During the dispute with Draper's over the water bills and upon accepting Draper's check in full satisfaction of said water bills, JEA knew, or in the exercise of reasonable care, should have known at that time of the erroneous

underbillings. JEA accepted Draper's payment in March of 1985 in full satisfaction of Draper's accounts through the February, 1985 meter readings.

(Final Judgment, page 6)

The cases cited in De Gestion merely preclude an accord and satisfaction based solely on the payment of a public utility's successive monthly billings without an intervening dispute. The court in De Gestion, by its reasoning in footnote 2, suggests that the existence of such a dispute is determinative of the validity of the defense of accord and satisfaction in this situation.

In West Penn Power Co. v. Nationwide Mutual Insurance Co., 209 Pa.Super. 509, 228 A.2d 218 (1967), the court explicitly limited its holding to the facts of that case. The court stated:

The fact that the erroneous monthly statements were paid by checks endorsed 'Your endorsement hereon constitutes a receipt and relief in full for all accounts and claims mentioned in the attached statement' does not constitute, under the facts in this case, an accord and satisfaction. The dispute arose as a result of rebilling at the end of the thirty-one month period. There was no dispute during the period that the utility was accepting and endorsing the checks for the account as billed. A dispute is an essential element of accord and satisfaction. (Emphasis supplied.)

228 A.2d, at 220.

Permitting an accord and satisfaction following a dispute over negligent underbilling raises different policy considerations from excusing the negligent underbilling initially. Public policy would be served by encouraging public utilities once an

issue is raised as to consumption of service to diligently discover the facts and resolve any billing errors at the earliest time .

In its opinion in this case, the District Court of Appeal, First District, held that a dispute did in fact occur between Draper's and JEA. The District Court found that after an exchange of telephone calls and correspondence and receiving another bill which Draper's questioned, Draper's offered to pay the outstanding balance upon an understanding that its account would then be paid in full. JEA advised Draper's as to the amount due for payment in full through the February 19, 1985, meter readings. Draper's then sent JEA a check containing a notation reflecting such payment in full. The Court went on to note that in De Gestion, the customer asserted that its payment of erroneous monthly bills effected an accord and satisfaction and estopped the public utility from collecting for accrued undercharges. This contention was rejected in light of the public policy espoused by Section 366.03, Florida Statutes, which provides that public utility shall not give any undue or unreasonable preference for or advantage to any person. In concluding, the First District Court of Appeal held that De Gestion did not involve any identified dispute or negotiated settlement at the time of payment, and went on to state that it did not consider a public utility settlement of a disputed bill to be an undue preference or advantage or to contravene public policy and according-

ly declined to extend De Gestion to the circumstances of the instant case.

POINT II

THE DISTRICT COURT OF APPEAL, FIRST DISTRICT'S
DECISION IS NOT IN CONFLICT WITH THE CASE OF
JOBEAR, INC. v. DEWIND MACHINERY COMPANY.

Jobear, Inc. v. Dewind Machinery Co., 402 So.2d 1357 (Fla. 4th DCA 1981), cited by the JEA, is distinguishable from the present case. In that case, the court held that the plaintiff's acceptance of a check in payment of a claim for parts and labor which expressly said that its endorsement would constitute a full and complete release of the defendant did not act as an accord and satisfaction as to a rental claim of the plaintiff against the defendant. Here, we do not have claims for two separate types of items, such as parts and labor versus rental. The discussions, correspondence and consequent check from Draper's pertain to the same water and sewer services which are the subject of the underbilling and this lawsuit.

In Jobear, the endorsement did not refer to the rental claim in question. In the present case, Draper's check endorsement referred to "payment in full through February 19, 1985, for all water and sewer charge for Draper's Egg and Poultry Co., Inc., 2400 McCoy Blvd., Jacksonville, Florida." (Emphasis supplied.) Furthermore, the Jobear court noted that the endorsement on the check was not accompanied by any explanatory letter as in other cases finding an accord and satisfaction. Here, the JEA wrote Draper's a letter stating that once the sum of \$21,967.57 was

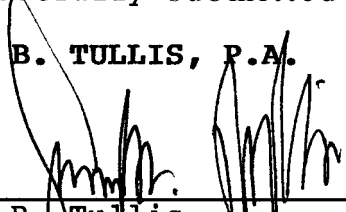
posted to Draper's account, Draper's would be paid in full through the February 19, 1985, meter readings. This March 7, 1985, letter explicitly referred to the balances for all three of Draper's accounts. Accordingly, the Jobear case lends no support to the JEA's argument.

CONCLUSION

For the reasons stated herein, Draper's would submit that the decision under review of the District Court of Appeal, First District, in no way conflicts with the cases DeGestion, supra, and Jobear, supra, and respectfully requests this Honorable Court to deny discretionary jurisdiction on the basis of conflicts with other cases.

Respectfully submitted,

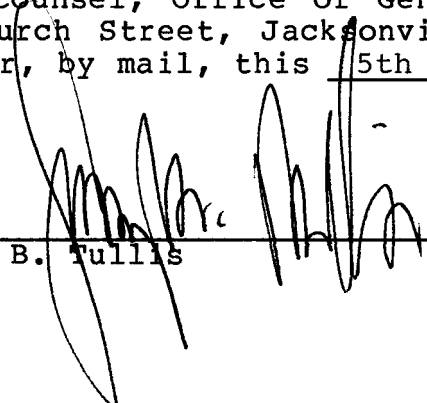
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CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a copy of the foregoing has been furnished to JAMES L. HARRISON, GENERAL COUNSEL, in care of STEVEN E. ROHAN, ESQUIRE, Assistant Counsel, Office of General Counsel, 715 Towncentre, 420 West Church Street, Jacksonville, Florida 32202, Attorneys for Petitioner, by mail, this 15th day of December, 1988.



Gary B. Tullis