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IN THE SUPREME COURT OF FLORIDA

JACKSONVILLE ELECTRIC AUTHORITY,

Petitioner,

vs.

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

Respondent.

CASE NO. 73,259

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL
THE FIRST DISTRICT OF FLORIDA

PETITIONER'S BRIEF ON THE MERITS AND APPENDIX

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PRELIMINARY STATEMENT

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

The Appellee, 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 as follows: (R-).

All references to the Transcript of Testimony will be as follows: (Tr-).

All references to documentary evidence will be referred to, for example, follows: (Pl.Ex.1)(Plaintiff's Exhibit 1).

Plaintiff's Exhibits 1-6 in evidence can be found in the Appendix to this brief.

STATEMENT OF THE CASE

On March 31, 1986, Draper's filed a Complaint for Declaratory Relief. The Complaint sought a determination of whether Draper's was liable for accrued undercharges for public utility services (R-1). On April 21, 1986, the JEA filed an Answer and a Counterclaim (R-26). The counterclaim sought judgment for $297,303.85 for unbilled but consumed sewage services. On May 15, 1987, trial was held. On July 8, 1987, the Trial Court entered its Final Judgment for Draper's (R-70). The Court found the Draper's defenses of accord and satisfaction and estoppel were well founded and the JEA should recover nothing.

This cause was appealed to the District Court of Appeal where in a unanimous decision the Court reversed the finding of an estoppel and allowed the JEA to recover a portion of the accrued undercharges; and in a 2-1 decision upheld the Trial Court's finding of a valid accord and satisfaction defense. Discretionary review was sought in this Court which was granted on February 22, 1989.

STATEMENT OF THE FACTS

The JEA is a public utility that provides water and sewer services to the public. Draper's is an egg and poultry business using a great deal of water in its operations. Some of this water is provided by JEA and some is obtained from well water (Tr-92). Draper's pays the JEA for JEA-provided water and all sewage service. Sewage billing is based on water usage that is discharged into the sewer system (Tr-15, 16).

JEA bills Draper's for water and sewer use in three accounts (Tr-92-94). One account is for the billing of water and sewage usage arising from the use of JEA water Account #61760-02400-*0001-6-00*-W (hereinafter Account "6"). This account utilizes five (5) meters. One of the five meters calculates the total flow of JEA water (Tr-94). The other four are sewer "deduct" meters calculating JEA water that Draper's does not discharge into the sewer.[1] When credited against total water flow, the correct charge for sewage is determined.

The remaining two accounts, Account #61760-02400-*0002-5-00-W* (hereinafter Account "5") and Account #61760-02400-*0000-7-00*-W (hereinafter Account "7"), bill sewer charges based on the amount of water pumped by separate pumps from Draper's well that flows into the sewer (Tr-94). Two meters measure the amount of water that is pumped out of a well and into the sewer from two separate pumps so that the appropriate charge can be made to Draper's for the water discharged into the sewer system (Tr-92-94).[2]

After receiving the December 1984 monthly water and sewer bills, Draper's questioned the amount charged in Account "7" (Pl.Ex.l). In

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1 Water that is not charged for sewage, for example, is water for the making of ice that leaves the plant without returning to the sewer (Tr-12).

2 There is no water charge for well water (Tr-13).

January 1985, Draper's called JEA to ask about its bill, and Ms. Peggy McCullough, a Customer Representative of JEA, advised Draper's that the billing transpired over a hundred and fifty seven day period and that is why it seemed unusually high (Tr-137). JEA's treatment of Draper's communication as well as the account questioned, was documented in JEA's letter to Draper's dated January 14, 1985:

> Re: Water Service acct. 61760-02400-0000-7-00-W
>
> Your *inquiry* regarding the 12/7/84 billing has been referred to me by Mr. Rigdon of our Meter Reading Department.
>
> * * *
>
> I have placed a non pay hold on your account to allow time for this ***billing inquiry*** response to reach you. If you need to discuss the ***billing*** **or** request an extension of time to make *your* payment, the service will not be in danger of being discontinued. Please contact me if I can be of any further assistance, 633-4913. (emphasis added)

(Pl.Ex. 1)

Draper's had replaced a meter and the account had not been billed for five months (Pl.Ex. 1). Draper's then requested that a credit balance from Account "6" be transferred to Account "7" (Tr-98,99, Pl.Ex.2). Draper's also asked for a letter stating the total balance owed (Tr-124). On March 7, 1985, JEA forwarded a letter to Draper's reflecting this transfer and the balances of record on all three accounts. The letter 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, Pl.Ex. **3)**

Draper's then sent a check to the JEA dated March **19, 1985,** in the amount of **$21,253.15 (Tr-101-102);** not the total due of **$21,967.57** stated in the letter but rather the amount due on Accounts **"6"** and **"7"** of **$21,253.15.** Draper's had typed the following words on the back of the check:

> "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, Pl.Ex. **4)** JEA disregarded the notation, and forwarded another letter, dated March **22, 1985,** requesting the balance in Account **"5"** of **$714.42** which Draper's had failed to include in the previous payment. This letter stated:

> In reviewing our records, we noted your water account, **#61760-02400-*0002-5-00*-W** located at **2400** McCoys Boulevard **#2** has a balance due of **$714.42.** ***Accounts must be*** kept ***current*** in order for us to continue service to our customers.
>
> We appreciate your cooperation in this matter and are looking forward to your payment in full by April **9, 1985 so** that no further action will be necessary by us.
>
> Please use the enclosed envelope sending your check, as it will expidite (sic) posting to your account.

> Should you have any questins (sic) concerning this matter, please call Commercial Accounts at 633-4040. (emphasis added)

(Pl.Ex. 5). Thereafter, Draper's sent JEA a check for the $714.42 (Tr-102). This check did not contain any notation on its endorsement side.

One month after these payments, in April of 1985 (Tr-19), the JEA discovered, in Account "5", the unquestioned account which required the payment of the $714.42 (See Pl.Exs. 3 & 6), a meter reading logging error that had existed since November of 1983. This had resulted in billing mistakes from November of 1983 through March of 1985 (Pl.Ex. 6). It was discovered that a new sewer "charge" meter for Account "5" had been mislogged by a meter reader as a sewer "deduct" meter for Account "6" and vice versa (Pl.Ex.6). This resulted in significant monthly underbillings to Draper's. Once the meter number was written on the wrong page, each month the meter reader merely went back to the meter number that was on the page and matched it to the meter and recorded the reading (Tr-48). Although the meter may have been read by a different person each month, the error was not readily apparent (Tr-79).

Actual consumption, however, had been recorded off the meter (Tr-86). The billing for Account "5" was recalculated after April of 1985 using the correct meter sequence. The rebilling was sent to Draper's in 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 (Pl.Ex.6). Due to the size of the rebilling, JEA took considerable time in verifying the new findings and the recalculations (Tr-52). During the time period from April 1985 until October 1985, Ms. Terry Bennett, a JEA Customer Service Supervisor, spoke several times with Mr. Jim Hudson, a representative of Draper's, as

the details of the rebilling were being worked out (Tr-52).

Draper's did not dispute that the charged services claimed were furnished to it. The resulting miscalculations from this error caused underbillings of $297,303.85 (Tr-47, 77). Draper's, nevertheless, refused to pay for the undercharges and the litigation resulted.

SUMMARY OP ARGUMENT

In December of 1984 Draper's received a bill in Account "7", one of its three accounts, that was unusually large because the account had not been billed for five months. Draper's questioned the bill, the bill was explained and the indebtedness was paid in March of 1985.

In April of 1985 a meter logging error was uncovered in Account "5", a separate account with Draper's, and a corrected bill was issued in November of 1985. Draper's raised the defense of accord and satisfaction because of a restrictive endorsement clause placed on a check delivered to the JEA. Both the Trial Court and a majority of the District Court of Appeal agreed.

A finding of accord and satisfaction is not supported by the evidence or the law for six reasons. First, Draper's check to the JEA was but payment on a known indebtedness. The common law states that mere payment cannot form the basis for an accord and satisfaction.

Second, an accord requires a meeting of the minds. There is no evidence that the parties intended to compromise undiscovered indebtedness.

Third, the December 1984 questioning of that bill did not constitute a dispute, one of the elements of an accord. A mere refusal to pay cannot create a dispute that does not exist in fact. Here, there was not even a refusal to pay, but rather just the questioning of the accuracy of the bill. Since there was no dispute, there could be no accord.

Fourth, an accord is a substitute contract supported by consideration. The record is devoid of any evidence of consideration in this case. A bill was issued and was paid. No further consideration for the relinquishment of indebtedness was given.

Fifth and sixth, even if the 1984 inquiry resulted in an accord, the April 1985 billing discovery resulted in a dispute that was separate in both time (six months) and subject matter (different accounts). The law in Florida states that there can be no accord where the disputes are so separated.

Even if an accord and satisfaction can be deduced from the facts, ***Corporation De Gestion Ste-Foy, Inc. v. Florida Power and Light Company,*** 385 So.2d **124** (Fla. 3rd DCA 1980), pronounces the universally accepted principle that public policy prohibits a customer from using such a defense against a public utility. ***Corporation*** and its progeny govern the case ***sub judice.***

The First District majority decision should be reversed. The dissent of Judge Ervin is supported by the facts and law and should be adopted.

ISSUES ON APPEAL

POINT I

CAN FULL PAYMENT OF A BILLING CONSTITUTE AN ACCORD AND SATISFACTION PRECLUDING RECOVERY FOR SUBSEQUENTLY DISCOVERED UNDERBILLINGS?

POINT 11

CAN AN ACCORD AND SATISFACTION BE FOUND WITHOUT A LEGITIMATE DISPUTE OR CONSIDERATION?

POINT 111

CAN AN ACCORD AND SATISFACTION BE REACHED WHERE ALLEGED DISPUTES ARE SEPARATED BY TIME AND DISTINGUISHED BY SUBJECT MATTER?

POINT IV

IS AN ACCORD AND SATISFACTION A VALID DEFENSE TO COLLECTION OF CHARGES FOR PUBLIC UTILITY SERVICES AS A MATTER OF PUBLIC POLICY?

POINT I

FULL PAYMENT OF A BILLING DOES NOT CONSTITUTE AN ACCORD AND SATISFACTION PRECLUDING RECOVERY FOR SUBSEQUENTLY DISCOVERED UNDERBILLINGS.

The Legal Concept of "Payment" vs. "Accord and Satisfaction"

A

"Payment" is the Performance of an Obligation

An **accord and satisfaction** is generally the acceptance of something different from, and often less than, what may be legally enforced. *Chappell v. Nalle,* 119 Fla. 701, 160 *So.* 867 (1935). An accord and satisfaction discharges an existing contract by performance of terms other than those originally agreed upon. (A new contract). *State* Road *Department v. Houdaille Industries, Znc,* 237 So.2d 270 (Fla. 1st DCA 1970). **Payment,** on the other hand, is the performance of an existing contract in accordance with its terms. *Zn Re Thourez' Estate,* 166 So.2d 476, 478 (Fla. 2d DCA 1964). Therefore, payment differs from an accord and satisfaction, in that payment is the fulfillment of an obligation without the creation of a new agreement.3

The First District Court below made no attempt to distinguish a payment from an accord. Rather, the Court stated simply:

> By negotiating payment in full the parties effected an accord and satisfaction of the water and sewer charges as of February 19, 1985.

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3 *Bassett v. Bassett,* 297 **N.Y.S.** 2d 292, 293 (N.Y. Sup.Ct. 1969)(". . . it is familiar law that payment of an admitted liability is not payment of or consideration for an alleged accord and satisfaction . . ."). *Del Serrone v. Avon Township,* 257 N.W. 2d 667, 668 (Mich. App. 1977)("The mere payment of an undisputed claim does not establish an accord and satisfaction.") Same *see Blaylock v. Akins,* 619 S.W.2d 207,210 (Tex. Cir. App. 1981).

Jacksonville Electric Authority v. Draper's, 531 So.2d 373, 374 (Fla. 1st DCA 1988), hereinafter *Jacksonville Electric.*[4] This statement does not correctly set forth the law, is subject to misinterpretation by trial and appellate courts alike, and should be overturned.

Corporation De Gestion Ste-Foy, Inc. v. Florida Power and Light Company, 385 So.2d 124 (Fla. 3rd DCA 1980), hereinafter ***"Corporation",*** and ***Rock Springs Land Company v. West*** 281 So.2d 555 (Pla. 4th DCA 1973), are classic "payment" cases holding that the full payment of a known (but mistaken) balance does not produce an accord and satisfaction which will prohibit the collection of the correct indebtedness.

In ***Rock Springs Land Company, supra,*** the defendant asked the plaintiff to furnish the amount necessary to pay the balance due on an installment contract for the sale of real property. The plaintiff then advised

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[4] The First District Court of Appeal relied on two cases to support its majority conclusion of accord and satisfaction as to water and sewer charges not billed. The first case is easily distinguished on its facts. In *McGehee, v. Mata,* 330 So.2d 248 (Fla. 3rd DCA 1976), the Plaintiff demanded $7,888.15 from the defendant. The defendant tendered a compromise, a check for $3,000.00 with the express condition that a release be returned. The plaintiff cashed the check, refused to execute a release, and commenced suit. Accordingly, the Court properly found an accord and satisfaction as an appropriate defense because of the acceptance of a partial payment of an amount believed to be owed, forwarded with the debtor's express intent to extinguish any remaining obligation. In the present case, however, there is no indication that Draper's tender was given either to compromise known billings or to discharge unknown underbillings. In fact, at the moment of tender of payment, both parties believed incorrectly that full payment had been made.

The second case cited by the First District Court was ***Pino. v. Lopez,*** 361 So.2d 192 (Fla. 3rd DCA 1978). The Fourth District Court of Appeal, commenting on ***Pino,*** properly announced it could not be determined from the reported decision whether the case was even decided on the merits or because of a procedural defect. *Jobear, Inc. v. Dewind Machinery Co.,* 402 So.2d 1357, 1358 Note 1 (Fla. 4th DCA 1981). Hence, the Pino decision does not support a legal position for finding an accord and satisfaction in the present cause.

defendant of the amount due. The defendant paid this amount with a check marked "paid in full." Several months later, the plaintiff discovered an error in the amount given, leaving further sums due. The plaintiff demanded the sum due and the defendant refused.

In ***Rock Springs Land Company,*** the wrong figure given was the result of a unilateral mistake. At trial, the plaintiff's president testified how he had looked at the wrong sheet of an amortization schedule in making the error. The Fourth District Court reasoned that there was no basis in evidence to conclude the lesser amount was intended to be accepted as a satisfaction in full, irrespective of what the true balance might be.

Similarly, in the case at bar, JEA furnished water and sewer service to Draper's. Draper's complained about a November **1984** billing statements, requested a transfer of a credit and debit on its accounts and asked for a current balance. JEA stated the amount due (prior to the April **1985** discovery of the underbillings). Draper's then paid in full the amount of record. This performance by Draper's did not seek to create a new agreement to compromise any debt, either known or unknown. The payments at issue were only intended to fulfill the existing obligation, a **"payment".**

As in ***Rock Springs*** Land ***Company,*** there is no proof of an intent to compromise the balance due to any figure other than that which was mathematically correct and consistent with services provided. **In** both cases, the

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5 This inquiry concerned Account #**61760-02400-0000-7-00-W** (Account **"7")** whereas the subsequently discovered underbillings were found in Account #61760-02400-*0002-5-00*-W (Account **"5").** The significance of this will be discussed in Point III B *infra.* However, for the purposes of this argument the distinction is irrelevant.

"payment in full" endorsements merely signified, a recognition of a payment of the known obligations and were not legal "accords".

In ***Corporation, supra,*** the Third District Court of Appeal held that the payment of an individual monthly utility bill does not constitute an accord and satisfaction preventing the collection of services erroneously not billed. The facts in ***Corporation*** are squarely on point even though the First District Court of Appeal held that ***Corporation*** should not be extended to the case at bar.[6] In ***Corporation,*** as in the case ***sub judice,*** the utility misread meters, negligently underbilled, and there was no dispute that the services were provided. The fact that the ***Corporation*** bills were paid without an inquiry is a distinction without substance and is addressed in Point II A.

In summary, Draper's fulfilled a known obligation in March of 1985. It did not enter into a new and superceding contract intended to satisfy unknown charges for services. A **payment** occurred, not an accord and satisfaction.

B

An Accord and Satisfaction Requires the Intent to Discharge an Existing Obligation with the Intent to Create a New Contract

In order for a court to find an accord and satisfaction the court must find that the parties mutually intended to effect a settlement of an existing dispute by entering into a superseding or substitution agreement. ***Goslin v. Racal Data Communications, Inc.,*** 468 So.2d 390 (Fla. 3rd DCA 1985). ***Rudick v. Rudick,*** 403 So.2d 1091 (Fla. 3rd DCA 1981).

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[6] In the fourth argument of this brief, the JEA specifically deals with the application of ***Corporation*** to the law affecting public utilities.

The majority opinion of the First District Court of Appeal inferred that after Draper's made payment in full of the known existing debt in March of 1985, a new agreement between JEA and Draper's arose to replace the former obligation. This suggests that the "new" meeting of the minds encompassed the settlement of billings not yet discovered. The Trial Court and the District Court of Appeal accepted Draper's after the fact proposition that the tender payment for the known charges was conditioned on the release of undiscovered debt.

This scenario is legally unacceptable when viewed in the context of the surrounding facts and circumstances of the entire transaction. The conclusion that Draper's checks were intended as "payments" only, is supported by the documentary and testimonial evidence at trial.

> In JEA's March 7, 1985, letter to Draper's the JEA stated:
>
> 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 have been posted to your account they will be paid in full through the February 19, 1985 meter readings.

(Pl.Ex. 3). Draper's then forwarded to JEA a check for $21,253.15 (less than the known total) with the notation, "Payment in full through February 19, 1985 for all water and sewer charges for Draper's Egg and Poultry Co., Inc."

Significantly, during the entire episode, JEA always insisted on full payment of the known bill. Consequently, JEA sent a letter, on March 22, 1985, to Draper's stating that an additional amount was due, because Draper's had failed to make full payment on the known balances:

> In reviewing our records, we noted your water account, #61760-02400-0002-5-00-W located at 2400 McCoys Boulevard #2 has a balance due of $714.42. *Accounts must be kept current* in order for us to continue service to our customers.

> We appreciate your cooperation in this matter and are *looking* ***forward to your payment*** in ***full*** by April 9, 1985 so that no further action will be necessary by **us.** (emphasis added)

(Pl.Ex. 5). Thereafter, Draper's sent the additional amount in order to perform fully its known obligation. This second check did not contain any notation. The Draper's inquiry resulted in full payment for all charges the parties believed to be due at the time.

Furthermore, Mr. Draper himself testified that it was his intent simply to make full payment of the monthly bills:

> My position was that we were billed every month since we've been in business. We paid the bills as they were submitted or if any adjustments, as we said, were necessary once or twice, ***and we considered that was our obligation*** and we didn't owe any more than that. . . .

(Tr–114)

The conclusion that JEA accepted tender of full payment of the known balance with a meeting of the minds that it would release undiscovered and unknown charges is not supported. The record fails to demonstrate even a scintilla of evidence showing a meeting of minds to reach a superseding agreement to compromise known debt or to discharge unknown debt. Any suggestion that Draper's conditioned full payment of known charges as an express "prerequisite" for satisfaction of underbillings would imply that Draper's knew of the billing errors. This would contradict the Trial Court's and First District Court of Appeal's findings and all parties' understanding that discovery of the underbillings took place later.8 Therefore, neither party could have

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8 See *Holm v.* ***Hansen,*** **248 N.W.** 2d 503, 508 (Iowa 1976)(". . . the pertinent, relevant and material facts, and the intentions and contentions of each party must be known and understood by the other, in order to make the settlement valid.")

considered payment at the time of tender an accord and satisfaction.

This Honorable Court should reverse the First District Court of Appeal, since there has been no proof of a meeting of the minds to reach an accord and satisfaction.

POINT II

AN ACCORD AND SATISFACTION CANNOT BE FOUND WITHOUT A LEGITIMATE DISPUTE OR CONSIDERATION.

A

An Accord and Satisfaction Requires a Legally Sufficient "Dispute"

The only difference in the case at bar and ***Corporation, supra,*** is that Draper's questioned the amount charged before paying in full the outstanding known balance.[9] The Trial Court and the First District Court of Appeal gave undue import to Draper's inquiry. The Courts raised Draper's complaint about a billing statement to the equivalent of a significant "dispute" thereby distinguishing ***Corporation.***

A dispute is required before the principles of accord and satisfaction can apply.[10] In ***Black's Law Dictionary,*** Fifth Edition, **"dispute"** is defined as an

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9 The significance of the separate account numbers will be discussed in Point III B *infra.*

10 ***Mobil Oil Corporation v. Prive,*** 406 A.2d 400, 401 (Vt.1979)("The requisite as a ground for compromise is a claim urged in good faith and with color of right.") ***Dyke Industries, Inc. v. Waldrop,*** 697 S.W. 2d 936, 937 (Ark.App.1985)(". . . appellee acknowledged that he had "no reason to doubt" that the amount appellant claimed was owing on the account was accurate. Hence, there was no dispute concerning the amount of the debt.") ***Newport West Condominium Association v. Veniar,*** 350 N.W. 2d 818, 823 (Mich.App.1984)("The correct amount of assessments was not the subject of a genuine dispute.") ***Hagerty Oil Company v. Chester,*** 375 A.2d 186, 187 (Pa.Super. 1977)("There must be an honest dispute and a person cannot create a dispute sufficient for the purpose of an accord and satisfaction by a mere refusal to pay a claim undisputed in fact.") ***Gitre v. Kessler Products Co.,*** 198 N.W. 2d 405,408 (Mich.1972)("Here there was no dispute. . . Defendants merely paid what both sides acknowledged was due.") ***Acton Construction*** Co., ***Inc. v. State,*** 363 N.W. 2d 130, 134 (Minn.App. 1985)("The retention of an undisputed amount does not constitute and accord and satisfaction. . . mere retention . . . of money to which he is absolutely entitled will not amount to an accord and satisfaction.) ***Nowicki Construction Co., Inc. v. Panar Corp.,*** 492 A.2d 36,40 (Pa.Super.1985)(". . . a person cannot create a dispute sufficient for the purpose of an accord and satisfaction by a mere refusal to pay a claim undisputed in fact.") ***Blaylock v. Akin,*** 679 S.W. 2d 207, 210 (Tex.Civ.App.1981)("The fact that at one time the parties did not know or remember the exact amount of that debt would not render it disputed and unliquidated.")

assertion of a right, claim, or demand on one side met by contrary claims or allegations on the other.[11]

There is no evidence in this case that would justify classifying the 1984 billing inquiry as a dispute. The parties' positions were simply never in conflict. The position of JEA was to always insist upon full payment of known billings. This is evidenced by the fact that JEA demanded Draper's pay all accounts in full after receipt of the first check. The notation "payment in full" on this check was met with the March 22nd letter stating, ". . . we noted your water account . . . has a balance due. Accounts must be kept current." Moreover, Draper's always intended to pay the correct balances on all its accounts. In response to the March 22nd letter, Draper's sent a second check, without any notation, to cover the unpaid balance, thereby evidencing its intent to make full payment.

Draper's never challenged the calculations or the meter readings. JEA's billing was accepted, though transfers were made from one account to another. Draper's 1984 inquiry was ultimately resolved by the parties with Draper's full payment of all known charges without any manifestation to also release any debt. There being no "dispute" over the 1984 billing inquiry, one of the essential elements of an accord and satisfaction is missing and Draper's defense should have been rejected.

B

An Accord and Satisfaction Requires Consideration

Neither the Trial Court nor the First District Court of Appeal

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11 *Black's* Law *Dictionary,* Fifth Edition, has been cited with approval by this Honorable Court in The *Florida Star v. B.J.F.,* 530 So.2d 286, 288 (Fla. 1988).

recognized any consideration which would support the finding of a new agreement between the parties to discharge any debt owed. None existed. Under contract law, the payment of a preexisting debt does not constitute consideration necessary to support a new contract. ***City of Miami Beach v. Fryd Construction Corp.,*** 264 So.2d 13 (Fla. 3rd DCA 1972). This rule acquires added significance when contracts affecting the public are involved. Id. In ***Casa Marina Hotel Company v. Barnes,*** 105 So.2d 204 (Fla. 3rd DCA 1958), the Court held that the acceptance of a lesser sum than that admittedly then due was not consideration to support an accord and satisfaction of the entire indebtedness without some gain to the creditor or inconvenience to the debtor.

In the instant case, Draper's payment in full of known billings was a preexisting obligation. The evidence does not reveal any benefit to JEA nor any detriment to Draper's for reaching a "superseding" agreement to compromise any debt.[12] The opposite occurred. Draper's received a financial windfall, albeit mistakenly, at the expense of JEA.[13] The payment in March 1985 did not constitute sufficient legal consideration to support the finding of a new agreement barring future collection of undiscovered underbillings. Thus, Draper's defense should be rejected because yet another of the elements required to support an accord and satisfaction is missing.

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12 ***See Clark Leasing Corporation v. White Sands Forest Products,*** 535 P.2d 1077, 1079 (N.M. 1975)("An accord is nothing more nor less than a contract of a specialized type. It is a new contract and must be supported by a new consideration. In the case of a liquidated claim or demand, some consideration for the asserted release of the unpaid balance, apart from the payment of a lesser sum, must be found to support an alleged accord.")

13 In effect, the underbillings amounted to an interest free loan of $297,303.85 through November of 1985 for Draper's.

POINT III

AN ACCORD AND SATISFACTION CANNOT BE REACHED WHERE ALLEGED DISPUTES ARE SEPARATED BY TIME AND DISTINGUISHED BY SUBJECT MATTER.

A

Draper's Two "Disputes" Occurred at Separate Times

The argument and legal analysis in Points I and II assumes that the admitted facts surrounding the 1984 billing inquiry do not satisfy the requirements of an accord and satisfaction. Even if it is assumed *arguendo* that an accord and satisfaction can be ascribed to the 1984 billing inquiry, Judge Ervin's dissent reaches the proper conclusion that the March 1985 "accord" cannot prohibit collection of the underbilling discovered in April of 1985.

Assuming the existence of disputes, Judge Ervin's conclusion that there were two separate "disputes" is appropriate:

> It is clear from the record that there were two different amounts in dispute between the parties and that the accord reached by the parties in March 1985 did not and could not affect the later disputed amount which did not come into existence until after the parties' agreement. ***See Hannah v. James A. Ryder Corporation,*** 380 So.2d 507, 509 (Fla. 3d DCA 1980)('The defense of accord and satisfaction essentially involves the issue of whether the parties mutually intended to effect a settlement of an ***existing*** dispute by entering into a superseding agreement.') ...
>
> Obviously, in the case at bar, there were ***two*** separate disputes between Draper's and JEA: the first occurring in December 1984 when Mr. Draper initiated the inquiry resulting in the agreement of in March 1985, and the second in November 1985, originating with JEA by its letter to Draper's advising of recently discovered underbillings. Clearly there can be no accord and satisfaction if all claims are not incorporated within the agreement of the parties ... (italics in the original)(bold added)

Jacksonville Electric, supra, at 375.

Judge Ervin cited Jobear, Inc., *v.* Dewind Machinery Co., 402 So.2d 1357 (Fla.4th DCA 1981). Jobear stands for the proposition that an accord and satisfaction of one claim will not preclude collection of separate and distinct claims. In Jobear the check endorsement at issue stated:

> Endorsement of this check ... constitutes and acknowledges payment in full ... for all labor, materials, supplies or services ... and shall further constitute a full and complete release.

Id. at 1357. Notwithstanding the restrictive language, the Court stated:

> 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.

Id. at 1358. Thus, the separate claim concept was adopted because the "accord" did not pertain to the subject matter of the dispute.[14]

In Jobear, Inc., the separate disputes concept dealt with separate subject matter. (See B below) Judge Ervin's analysis correctly applies Jobear *Inc.*, to claims separated by time. Judge Ervin's analysis speaks for itself and requires no further argument. It provides another valid reason for reversing the First District Court and rejecting the suggestion that an accord took place in this cause.

B

Draper's Alleged Accord Occurred in a Different Account

Judge Ervin found that no accord could have been reached because of the distinctly different times in which the "disputes" were raised. The "separate dispute" concept is further buttressed in the case at bar by the fact that the "disputes" also involved distinctly different accounts. The 1984 inquiry concerned Account "7":

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[14] The separate claim concept is a natural outgrowth of the "meeting of the minds" element of accord and satisfaction which may be applied when an accord may prevent the collection of some entitlements but not all entitlements.

> Re: Water Service acct. **61760-02400-0000-7-00-W**
>
> Your ***inquiry*** regarding the **12/7/84** billing has been referred to me by Mr. Rigdon of our Meter Reading Department ....

(Pl.Ex. 1)

The later discovered underbillings were found in Account **"5"**[15], a separate account from the one questioned in December **1984.** Significantly, in attempting to conclude the **1984** inquiry, Draper's payment by check with the notation "Payment in full", did not include the **$714.42** amount due in Account **"5".** The amount due in this separate account was only paid after the JEA sent its letter of March **22, 1985,** expressly stating:

> In reviewing our records, we noted your water account, **#61760-02400-*0002-5-00*-W** located at **2400** McCoys Boulevard **#2** has a balance due of **$714.42.** ***Accounts must be*** kept ***current*** in order for us to continue service to our customers .... (emphasis added)

(Pl.Ex. 5) Draper's promptly paid the **$714.42** due without either a restrictive endorsement or any manifestation to reach a legal accord on this account. Therefore, assuming arguendo that an accord had been reached in the **1984** billing matter, it is absolutely clear that the **1984** inquiry dealt with Account **"7",** while the April **1985** underbilling discovery was found in Account **"5".** There can be no accord and satisfaction where the **"disputes"** involve separate subject matters. *Jobear*, ***supra.***

The Trial Court and the majority opinion of the First District Court addressed neither the timing nor the subject matter issues raised by Judge Ervin below. The lower court opinions cannot withstand critical scrutiny and the positions of Judge Ervin below and the JEA herein should be adopted by this Honorable Court.

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15 Plaintiff's Exhibit **8** in evidence.

POINT IV

AS A MATTER OF PUBLIC POLICY, AN ACCORD AND SATISFACTION IS NOT A DEFENSE TO COLLECTION OF CHARGES FOR PUBLIC UTILITY SERVICES.

Even if this Court concluded that the parties, upon full payment of the known debt, reached an accord and satisfaction as to the undiscovered underbillings, accord and satisfaction would still not be a valid defense to the recovery of charges for public utility services and a reversal is required.

The Third District Court of Appeal, in ***Corporation De Gestion Ste-Foy, Inc. v. Florida Power and Light Company (Corporation), supra,*** specifically addressed the issues pertinent to the validity of the defense of accord and satisfaction against a public utility. Following the holdings of many other jurisdictions, the Third District Court of Appeal declared that the defense of accord and satisfaction is not permitted even if the accord results from the utility's own negligence or a contractual agreement to pay a lesser charge:

> 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 accord and satisfaction — to charges for services which were actually furnished but which had previously been negligently underbilled. West Penn Power Co. v. Nationwide Mutual Ins. Co.,*** 209 Pa. Super. 509, 228 A.2d 218 (1967); ***Chesapeake and Potomac Telephone Company of Virginia V. Bles,*** 218 Va. 1010, 243 S.E.2d 473 (1978); ***Wisconsin P. & L. Co. v. Berlin Tanning & Mfg. Co.,*** 275 Wis. 554, 83 N.W.2d 147 (1957). We entirely agree with and endorse these decisions. (Footnotes omitted.)(emphasis added)

Corporation, supra, 385 So.2d 124, 126 (Fla. 3rd DCA 1980). The holding of the Court was explicit, **"... a customer of a public utility** has **no defense - - either of estoppel or accord and satisfaction to charges for services which were actually furnished ..."** ***Id.***

The majority of the First District Court of Appeal in the case *sub judice* did not apply the principles of ***Corporation.*** Despite the First District Court of Appeal's contention that it was merely not extending ***Corporation,*** the reasonable inference from the result below is that the Court rejected the principles of ***Corporation.***

In fact, Judge Ervin, in his dissenting decision, recognized the majority's apparent disapproval of the ***Corporation*** doctrine:

> 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.

Jacksonville Electric, supra, at *377.*

The First District Court of Appeal's failure to follow ***Corporation*** resulted from needlessly distinguishing the facts in ***Corporation*** from the facts at bar. The ***Corporation*** Court rejected a finding of accord and satisfaction on the grounds that full payment of monthly billings do not demonstrate an intent to compromise undiscovered debt. The First District Court of Appeal differentiated the cases by raising Draper's inquiry to a legally sufficient "dispute". (This is previously discussed in detail in Points I and II.) Even if the First District Court was correct in its analysis of Draper's inquiry, the fact that a "dispute" occurred merely established the presence of an essential element of an accord and satisfaction. The conclusion that a dispute existed cannot justify a rejection of ***Corporation's*** holding that an accord and satisfaction defense is not valid against a public utility.

The First District Court's majority opinion suggests that an accord and satisfaction is not a valid defense against a public utility unless an accord and satisfaction can be proven. This result renders the policy considerations behind ***Corporation*** and its progeny meaningless. The Court failed to squarely address the Third District Court's contrary holding that an accord and satisfaction is simply not available to the customer of a public utility for services provided.

The policy considerations supporting ***Corporation's*** prohibition of the accord and satisfaction defense are substantial and applicable to the case ***sub judice.***

JEA's collection of underbillings from Draper's are required by law. Section **366.03** of the Florida Statutes states in pertinent part:

> **366.03** General duties of public utility
>
> **No** public utility shall make **or** give any undue **or** unreasonable preference or advantage to any person **or** locality, **or** subject the same to any undue **or** unreasonable prejudice or disadvantage in any respect.

In ***Corporation,*** the Third District Court of Appeal held that this statute would preclude a public utility and a customer from entering into a superseding agreement whereby indebtedness is compromised:

> The public policy embodied in this and similar statutory provisions precludes a business whose rates are governmentally regulated from granting a rebate or other preferential treatment to any particular individual. Accordingly, it is universally held that a public utility or common carrier is not only permitted but is required to collect undercharges from established rates, whether they result from its own negligence **or** even from a specific contractual undertaking to charm a lower amount. (emphasis added.)

Corporation at 126.[17]

In accordance with the ***Corporation*** ruling, if JEA and Draper's had reached an accord and satisfaction resulting in the release of underbillings, then this new agreement would be unenforceable. Judge Ervin observed in his dissenting decision that barring JEA's collection of the services not charged would violate the expressed public policy declarations of both the Florida Statutes and the Jacksonville Ordinance Code. ***Jacksonville Electric, supra,*** at 377.

The defense of accord and satisfaction is forbidden by these legislative enactments prohibiting an undue preference or advantage to any customer. Thus, the majority opinion of the First District Court of Appeal upholding an accord and satisfaction against JEA is in direct contravention of the expressed legislative purpose. Significantly, the First District Court did not merely determine the parties reached a contractual agreement to charge a lower amount, their conclusion even went further. It found that JEA and Draper's

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[17]Note that the City of Jacksonville Ordinance Code contains a provision similar to Section 366.03:

> 750.222 free service prohibited. No free sewerage or water service shall be furnished or rendered to a person or to the City, State or a public agency or instrumentality. Every user of the City's water and sewerage system shall be subject to the equal and uniform rates and charges provided in this chapter for the class of user within which the user falls, without reduction or other discrimination. An ordinance or resolution in conflict with this section is repealed to the extent of the conflict. (D.Ex.2)

effectuated a superseding agreement to entirely forgive approximately $180,00018 of services used. Accordingly, such an arrangement would clearly be an undue preference and advantage which the legislature and the Courts around the country have sought to prevent.

A survey of other jurisdictions reveals that they have overwhelmingly held that a customer of a public utility simply has no defense of accord and satisfaction and estoppel for similar policy considerations.[19] In fact, the ***Corporation*** decision has been relied upon as authority in at least three other

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[18] November 1983 through February 1985

[19] ***See generally: Reid v. Overland Machined Products,*** 359 P.2d 251 (Calif.1961)(The Supreme Court of California held that a claim will not be discharged when the purported accord and satisfaction violates State law. The case involved a claim for wages); ***Town of North Bonneville v. Bencor Corporation,*** 646 P.2d 161 (Wash.App.1982)(The Court of Appeals of Washington decided that no accord and satisfaction was possible unless governmental officials are specifically authorized to compromise or release taxes); ***Cheasapeake & Potomac Telephone Company of Virginia v. Bles,*** 243 S.E. 2d 473 (Va.1978)(The Supreme Court of Virginia ruled the State law did not permit any customer from receiving preferential treatment as to cost of telephone service); ***Chicago and North Western Transportation Company v. Thoreson Food Products, Inc.,*** 71 Wis. 2d 143 (Wis.1976)(The Supreme Court of Wisconsin held that the defense of accord and satisfaction is invalid against an interstate carrier seeking to recover freight charges set by federal law. This, in order to secure equality of rates and to destroy favortism); In ***West Penn Power Company v. Nationwide Mutual Insurance Company,*** 228 A.2d 218 (Pa.Super.1967), the Superior Court of Pennsylvania found that a utility, in an action to collect 31 months of undercharges, was not subject to the defenses of accord and satisfaction, payment, estoppel, or breach of contract, as the only justiciable issue was whether the customer had paid in full for the services furnished.)

jurisdictions.[20] See: ***Consolidated Edison Company of New York, Inc. v. Jet Asphalt Corporation,*** 132 A.D. 2d 296, 522 N.Y.S. 2d 124, 128 (A.D.1 Dept.1987); ***Iowa Elec. Light & Power Co. v. Weadling Quarries, Inc.,*** 389 N.W. 2d 847, 849 (Iowa 1986); ***Memphis Light, Gas & Water v. Auburndale School System,*** 705 S.W. 2d 652, 653 (Tenn. 1986).

The New York Supreme Court, Appellate Division, in ***Consolidated Edison, supra,*** concluded that the universally held and statutorily declared public policy of equal treatment among customers is paramount:

> A public service corporation is franchised by the State to serve the public, and it 'is not permitted to choose its customers or to discriminate between customers by extending unreasonable conditions and preferences to some, but must serve all on the basis of fairness and equality.' ***Brewer v. Brooklyn Union Gas Company,*** 33 Misc. 2d 1015, 1019, 228 N.Y.S.2d 177. This statutory obligation of uniformity of rates, which is standard in state and federal statutes regulating energy and transportation corporations, is predicated on a very strong public policy of protecting the public from possible fraud, corruption or discrimination in rate charges. ***See Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company v. Fink,*** 250 U.S. 577, 581-582, 40 S.Ct. 27, 28, 63 L.Ed.1151; ***Sigal v. City of Detroit,*** 140 Mich.App. 39, 362 N.W. 2d 886, 888-889.

Consolidated, supra, at 127-128.

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[20] It should be noted, in ***Pan American World Airways, Inc. v. Florida Public Service Commission,*** 427 So.2d 716 (Fla.1983), this Honorable Court examined the ***Corporation*** holding. This Court concluded that ***Corporation*** was inapplicable to the case then under review. Nonetheless, this Court stated:

> The Appellant had sought a declaratory judgment that the power company was estopped from collecting amounts it had negligently underbilled. The district court held merely that public utilities were not only permitted, but required, to collect undercharges from established rates.

Pan American, supra, 427 So.2d 716, 719, n. 1.

In ***Byer v. Peoples Natural Gas Company,*** 380 A.2d 383 (Pa.Super.1977), the Superior Court of Pennsylvania determined that it was **"well-settled"** law that a public utility does not have the authority to enter into special contracts with any customer. Furthermore, the state public utility law supplants any agreement between the customer and a utility involving rates.

In ***Sigal v. City of Detroit,*** 362 N.W. 2d 886, 888-889 (Mich.App.1985), the Court of Appeals of Michigan further articulated the reasoning behind the above policy considerations:

> The city must charge consumers within each rate classification according to an equal rate. Plaintiffs' view, if accepted, might lead to increased fraud and corruption, and 'would result in discrimination that for the protection of the public generally is forbidden by law'. ***Robert McDaniel Trucking Co., Inc. v. Oak Construction Co.,*** 359 Mich. 494, 501, 102 N.W.2d 575 (1960). **To put it plainly, no one may avoid payment of a water bill merely because the city did not read the meter.** (emphasis added)

Id. at 888-889.

In ***Goddard v. Public Service Company of Colorado,*** 599 P.2d 278, 279-280 (Col.App.1979), the Colorado Court of Appeals warned against the dangerous precedent in developing novel legal theories in contravention of this legislative policy, citing the Colorado Supreme Court, in ***Denver & Rio Grande Western R.R. v. Marty,*** 353 P.2d 1095 (1960):

> [A]s we read the statute, it prohibits rebates regardless of the legal theory upon which they are based. To hold that the statute affects contract claims only and is not applicable to demands growing out of the rate misquotation which arise on a tort theory would effectually nullify this statute and the policy set forth therein. **Thus the strong policy of the statute would become meaningless if it could be circumvented by merely developing a different legal theory.** (Emphasis Added)

Id. at 280.

In conclusion, the First District Court majority, in fashioning an exception to the universally accepted case law affecting collection of public utility fees, has undermined the strong policy considerations behind its creation. The Trial Court and the majority opinion of the First District Court failed to squarely address the ***Corporation*** doctrine and other authorities which hold that a customer of a public utility cannot even raise the defense of accord and satisfaction the collection of undercharges. **As** Judge Ervin opined in his dissent, the lower court opinions cannot be reconciled with the substantial case law to the contrary. Therefore, this Honorable Court should reverse the First District Court of Appeal and adopt Judge Ervin's dissent thereby approving the ***Corporation*** principle.

CONCLUSION

For the reasons stated herein, the Jacksonville Electric Authority prays that this Honorable Court will reverse the First District Court of Appeal majority and the Trial Court below on the issue of accord and satisfaction and direct the Trial Court below to enter judgment in favor of the Jacksonville Electric Authority on all issues.

Respectfully submitted,

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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 10 day of April, **1989.**

Attorney