

O/A a. 6. 89

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.

6-30
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RESPONDENT'S BRIEF ON THE MERITS
AND APPENDIX

On Discretionary Review from the District Court of Appeal,
First District of Florida

✓ Gary B. Tullis
GARY B. TULLIS, P.A.
Florida Bar No. 0082494
500 North Ocean Street
Jacksonville, Florida 32202
Telephone: (904) 353-8295

Attorney for Defendant,
Appellee, and Respondent,
DRAPER'S EGG AND POULTRY CO., INC.

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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."

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 Petitioner/JEA's exhibits will be referred to as "Px"; and all references to 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 Brief on the Merits.

STATEMENT OF THE FACTS

The Statement of the Facts by JEA is argumentative and has material omissions and inaccuracies. Accordingly, Draper 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, 1985, 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).

Terry L. Bennett, a customer service supervisor at the JEA, testified concerning the discovery and investigation of the \$297,303.85 billing errors. She testified as follows:

Q. Now, in order to -- on April the 11th, apparently you were aware of that error. What did you do on that day to determine the extent of this problem or the extent of this billing error?

A. I compared the readings in our meter book and the consumptions on each of the meters involved, and that's when I saw that it was a tremendous amount of difference in consumption.

Q. Tremendous amount of difference in consumption, you knew that on April 11th, didn't you, 1985?

A. *Yes*, sir.

(TR-51)

She did not advise Draper until November 6, 1985, that the liability for back billing would be approximately \$297,000.00 (Tr-52-53). Although she said that she had conversations with a representative of Draper in which they discussed that it appeared that there would be a substantial difference in billing of \$10,000.00 to \$15,000.00 a month, she also testified that she did not put this in writing or document this conversation in her

notes (Tr. 52-55). She also testified that they had a computer, microfiche and other records. They made the computations in April of 1985 and knew, at that time, what the overcharge was going to be from December of 1983 (Tr-56). Ms. Bennett said that the error had been in existence on the meter reader's book from at least December of 1983 and could have been discovered in December of 1983, in 1984, or before March of 1985 (Tr-63).

Clarence L. Hammontree, Jr., a field service foreman at the JEA, said that based on his investigation and the information he gave Ms. Bennett in April of 1985, she had enough information at that time to go back to December of 1983 and recalculate the mistake in the water bills (Tr-83). He also testified that he did not know why Draper was not notified of the underbilling prior to November 6, 1985, at least for the period from December, 1983 through April of 1985 (Tr-83-84).

Between March, 1985 and November, 1985, Mr. Draper was on the premises on a daily basis (Tr-103). Mr. Draper testified that Mr. Henderson from the JEA was familiar with the meters at his plant in 1983, 1984 and 1985 (Tr-104). Whenever meters were changed at the premises, Mr. Henderson was aware of those changes (Tr-105). The meter readers came to his premises monthly (Tr-105). Mr. Draper did not recall whether a meter was changed in 1983 (Tr-108). The extent of the Draper employees' involvement in reading the meters is to accompany the meter reader to the meter and point out its location (Tr-112).

Mr. Draper testified that in November, 1985, he first became

aware that the JEA was going to bill him for \$297,303.00 for a period from December of 1983 through October of 1985 (Tr-103, 106). He received a letter dated November 6, 1985, advising him of the underbilling in the amount of \$297,303.85 (Tr-105-106; Px-6). Mr. Henderson had never mentioned to him the discrepancies in the water bills (Tr-107). Mr. Draper explained that if he had been notified in April of 1985, he would have taken action with respect to that knowledge at that time (Tr-106). He would have first determined if there was any way they could have conserved water. With the lower billings, they did not feel that a water cleanup system would pay for itself (Tr-107). Since learning of the underbilling, they have taken steps to conserve water (Tr-107).

By letter dated November 25, 1985, Draper advised the JEA that it did not owe that money and that Draper could not continue to operate if it had to pay such a bill (Tr-107-108; Px-7). That letter indicates that he had previously discussed his billings with Ms. Bennett at the JEA, but she did not advise him about the \$297,303.85 underbilling until November 6, 1985 (Tr-108). The JEA and Draper exchanged additional correspondence (Tr-99-110, Px-8 and 9). Mr. Draper received a letter dated January 2, 1986 from the JEA seeking to resolve the disputed bill of \$297,303.85 (Tr-110, Px-10) .

Mr. Draper has questioned the JEA as to how they arrived at its figures (Tr-112). He did not agree or disagree with the computation of the amount of the error (Tr-113-114).

SUMMARY OF ARGUMENT

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

As 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.

As to the estoppel defense, the record shows unconscionable conduct by the JEA in failing to impart the knowledge of the underbillings to Draper, which conduct was relied on by Draper in losing the opportunity to mitigate the detrimental effects of the JEA's billing error.

Under the facts of this case, both of these defenses are available to Draper, as a matter of law. When a public utility seeks to recover underbilled amounts, the defense of accord and satisfaction can apply where it is based on a dispute. Also, an estoppel may arise from the utility's egregious conduct in failing to notify the customer after it knew of the negligent

underbilling. This differs from an estoppel merely from the negligent underbilling.

The JEA is asking this Court to re-evaluate the weight of the evidence and credibility of the witnesses and then asking this Court to rely on case law which is not applicable to the facts.

The First District majority decision upholding the trial court's finding of a valid accord and satisfaction defense should be affirmed. The First District's decision reversing the trial court's finding of estoppel should be reversed.

ISSUES ON APPEAL

Point I

THE RECORD CONTAINS SUFFICIENT EVIDENCE TO SUPPORT THE TRIAL COURT'S AS WELL AS **THE** DISTRICT COURT'S FINDING **OF** AN ACCORD AND SATISFACTION.

Point II

THE HOLDING **OF** De GESTION **STE-FOY**, INC. v. FLORIDA POWER AND LIGHT COMPANY, 385 So.2d 124 (Fla. 3rd DCA 1980) DOES NOT APPLY TO THE FACTS **OF** THE INSTANT CASE.

Point III

THERE IS SUFFICIENT EVIDENCE IN **THE** RECORD TO SUPPORT **THE** TRIAL COURT'S FINDING **OF** ESTOPPEL.

ARGUMENT

Point I

THE RECORD CONTAINS SUFFICIENT EVIDENCE TO SUPPORT THE TRIAL COURT'S AS WELL AS THE DISTRICT COURT'S FINDING OF AN ACCORD AND SATISFACTION

Sufficient evidence supports the trial court's finding as well as the District Court's holding of an accord and satisfaction. Petitioner's argument defies the basic precepts of appellate review. The weight of the evidence and the credibility of the witnesses are questions to be determined by the trier of fact, and it is improper for the reviewing court to substitute its judgment for that rendered below in respect to such matters. 3 Fla.Jur.2d, Appellate Review, § 343. Furthermore, the conclusions of the trial court come before the appellate courts clothed with the presumption of correctness and, in testing the accuracy of such conclusions, the appellate courts should interpret the evidence and all reasonable inferences and deductions capable of being drawn therefrom in the light most favorable to sustain those conclusions. 3 Fla.Jur.2d, Appellate Review, § 344.

The trial court concluded, "after considering all of the evidence and the inferences to be drawn therefrom," that an accord and satisfaction occurred on or before March 19, 1985, between Draper and the JEA, precluding collection of the under-billing from December 16, 1983, through February 19, 1985 (Final

Judgment, page 7; Appendix A-7). The record supports these conclusions.

Specifically, in paragraphs 5 and 6 of the Final Judgment, the trial court found that a dispute arose between the JEA and Draper over the water billings (Final Judgment; page 2, A-2) and that the parties attempted to resolve that dispute by a series of correspondence and telephone calls concerning Draper's three water accounts (Final Judgment, pages 2-3; Appendix A-2, 3). The trial court reached these conclusions from the testimony and exhibits and the inferences to be drawn therefrom. (See Statement of Facts, supra).

In paragraph 6, the Court also found that Mr. Draper's March 7, 1985, telephone call to the JEA was to obtain the balances on the three accounts after several months of haggling back and forth with the JEA. Furthermore, the Court concluded that, as a result of that telephone call, the JEA sent a letter dated March 7, 1985, to Draper setting forth the balances due on Draper's three water accounts. The letter stated that once the sum of \$21,967.57 was paid, Draper would be paid in full through the February 19, 1985, meter readings. That amount was paid and accepted by the JEA.

In paragraph 7 of the Final Judgment, the Court found that the JEA witnesses acknowledged that a literal reading of the March 7, 1985, letter would indicate that once Draper made the payments called for in the letter, Draper's accounts with respect to its water billings would be paid in full through the February

19, 1985, meter readings. These findings are also supported in the record. (See Statement of Facts, supra.)

In paragraph 10 of the Final Judgment, the Court concluded that in March of 1985, the JEA knew or, in the exercise of reasonable care, should have known of the error when it accepted Draper's check in full settlement of the Draper's accounts as of February 19, 1985. The JEA's knowledge of the actual amount of services consumed by Draper is a reasonable inference from the evidence of the tremendous difference in consumption noted on the actual billings and the testimony of Ms. Bennett and Mr. Hammon-tree concerning the availability of information to the JEA (Final Judgment, page 4; Appendix A-4).

In its brief, the JEA is asking this Court to ignore the testimony and exhibits and to reweigh the evidence and reassess the credibility of the witnesses.

In its brief, petitioner totally ignores the existence of a genuine dispute that arose between Draper and JEA. The record is replete with evidence that a genuine dispute occurred. Draper, from the outset, disputed the amount of the bill on all three meters. Further, JEA characterizes the underbillings as undiscovered and unknown. Again, the evidence in the record reveals that the error discovered by the JEA in April of 1985 had been in existence in the computers and should have been known to the JEA from at least December of 1983 and could have been discovered in December of 1983, in 1984, or any time before March of 1985. (See Statement of Facts, supra.)

Petitioner's reliance on the case of Rock Springs Land Company v. West, 281 So.2d 555 (Fla. 4th DCA 1973), is misguided. Petitioner fails to point out to this Court that in the Rock Springs Land Company case, the Court concluded that there had never been any dispute or disagreement with the buyers as to the balance due, nor was the mistake a result of inexcusable lack of due care, nor was the mistake one upon which the buyers had relied to their detriment. Just the opposite is true in the instant case. There was a genuine dispute between Draper and JEA which ultimately led to the payment in full for all billings through February of 1985. The fact that the JEA failed to discover the correct balances was the result of inexcusable lack of due care on its part, and obviously, Draper relied on the figures given it in February of 1985 to pay the balances in full as of that date.

JEA attempts to attach significance to the fact that Draper sent two checks to pay the balance of its account to JEA. The fact is that Draper, through oversight, failed to send the total amount due in its first check but remitted the balance after being notified of that fact by the JEA. This fact does not vitiate the doctrine of accord and satisfaction reached between Draper and JEA. It is apparent from the evidence that JEA and Draper, having had a dispute over the amount of the water and sewer bills, reached a mutual settlement of an existing dispute. The fact that JEA, through its own inexcusable neglect and incompetence, failed to discover its mistake should not render

meaningless the accord and satisfaction that was reached.

Petitioner relies on the case of Jobear, Inc. v. Dewind Machinery Co., 402 So.2d 1357 (Fla. 4th DCA 1981). Jobear 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 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." (Emphasis added.) 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 a letter stating that once the sum of \$21,967.57 was posted to Draper's account, Draper 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. Ac-

cordingly, the Jobear case lends no support to the JEA's argument.

JEA attempts to characterize the disputes between Draper and JEA as two separate disputes, one occurring in March of 1985, and the second in November of 1985. Again, JEA overlooks the fact that the underbilling was known or should have been known to JEA in March of 1985 when it entered into the accord and satisfaction. The claims for water and sewer were not separated by time as JEA would suggest, but rather were known to the JEA at the time it entered into the accord and satisfaction in March of 1985. JEA further attempts to classify the underbillings into separate accounts. Again, it overlooks the fact that the water bill that was paid in full by Draper included all three accounts by number (Tr-100, Px-3). The March 7, 1985, letter and the quotation on the back of Draper's check dated March 19, 1985, indicated an intention to settle all accounts for water and sewer services prior to February 19, 1985. These communications clearly establish that the dispute involved all water and sewer services through February 19, 1985, and not just one numbered account. The trial court, after hearing all of the evidence, concluded that the discussions and correspondence with the JEA concerning the billing discrepancy referred to in the March 7, 1985, letter and the \$297,303.85 underbilling were essentially the same dispute. The record supports this conclusion, because the same water and sewer service consumption by Draper and the same accounts were involved. The above communications are

evidence of a meeting of the minds of the parties concerning the accord and satisfaction. In determining whether there is a meeting of the minds, the manifestation of the intention of mutual assent controls rather than any unexpressed intention. It is not the intention existing in the minds of the parties which governs, but the intention as expressed by the language used. 11 Fla.Jur.2d, Contracts, § 13, In addition to other evidence in the record, the March 7, 1985, letter and the check dated March 19, 1985, clearly express an intention to settle all accounts for water and sewer services prior to February 19, 1985. The elements of an accord and satisfaction were complied with. As set forth in Lovorn v. Iron Wood Products Corp., 362 So.2d 196 (Miss. 1978), and 1 Am.Jur.2d, Accord and Satisfaction, § 1, something of value, \$21,967.57, was given to the JEA in full satisfaction of its demand for payment for water and sewer services through February 19, 1985; the JEA's March 7, 1985, correspondence indicated that if that amount were paid, it would be accepted in satisfaction for all water and sewer services consumed prior to February 19, 1985; the notation on the back of Draper's check, when considered with the correspondence and other surrounding circumstances, was bound to induce an understanding by the JEA that if it accepted the check, it accepted it subject to the condition of accord and satisfaction; and the JEA accepted the \$21,967.57 payment.

The trial court, after listening to the testimony, observing the demeanor of the witnesses and reviewing the documents, con-

cluded that the JEA knew or at least in the exercise of reasonable care, should have known of the billing errors at the time of the accord and satisfaction. As noted above, the evidence supports the finding that the JEA knew of the underbilling at the time of the accord and satisfaction. However, even if the JEA did not have such knowledge but should have had such knowledge, the accord and satisfaction is not defeated. It is not grounds to defeat an accord and satisfaction which is entered into in ignorance of the facts surrounding the transaction where such facts could have been ascertained by the use of due diligence. 1 Am.Jur.2d, Accord and Satisfaction, § 24. The record shows that the JEA, at the very least, should have ascertained the consumption of water and sewer services in the exercise of due diligence.

The evidence and testimony presented and the inferences to be drawn therefrom, when considered with the above-cited legal authorities, support the trial court's finding and the District Court of Appeal's affirmance of such finding with respect to the validity of the defense of accord and satisfaction present in this case.

Point II

**THE HOLDING OF CORPORATION De GESTION
STE-FOY, INC. v. FLORIDA POWER AND LIGHT COMPANY,
385 So.2d 124 (Fla. 3rd DCA 1980)
DOES NOT APPLY TO THE FACTS OF THE INSTANT CASE,**

Petitioner relies on the case of Corporation De Gestion Ste-Foy, Inc. v. Florida Power and Light Company, supra, as well as

other cases cited in its brief, which cases stand for the general proposition that a customer of a public utility has no defense of accord and satisfaction and estoppel.

De Gestion 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; A-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.

None of the other cases cited by the JEA involves a claim arising from billing errors by a public utility where a defense

of accord and satisfaction was based on a dispute such as in the present case.

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. Here, the JEA is attempting to accumulate underbilled amounts to the point that it would force the consumer to discontinue business.

The JEA suggests that underbilled amounts must always be collected. A public utility's ability to negligently underbill, however, is not without limits. In fact, the municipal code which governs the JEA explicitly limits back charges for meter error to a three-month period. Section 750.609, Jacksonville Municipal Code (Tr-17, Dx-2). That section states:

[T]he City has the right to back-charge an applicant upon an adjustment basis for the previous three-month period when the meter at his service location is tested and found to be slower than two percent of one hundred percent accuracy, which adjustment shall not include the two percent allowed for inherent inaccuracy.

Furthermore, the Florida Public Service Commission which governs certain public utilities limits back-billing to a twelve-month period for electric service underbilling as a result of the utility's mistake. Ch. 366, Florida Statutes (1985); § 25-6.106, Florida Administrative Code.

Accordingly, considering the limitations of its holding and its distinguishing factual characteristics, the De Gestion case offers no support for the JEA's position. The trial court and the First District Court of Appeal correctly ruled that an accord and satisfaction precludes collection by the JEA of its under-billing for Draper's water and sewer services from December 16, 1983, through February 19, 1985.

Point III

**THERE IS SUFFICIENT EVIDENCE IN THE
RECORD TO SUPPORT THE TRIAL COURT'S FINDING
OF ESTOPPEL**

The First District Court of Appeal held that the evidence did not show any detrimental reliance by Draper and held that absence of such proof, the doctrine of estoppel would not apply. The record supports the trial court's finding of estoppel for underbillings through October 17, 1985.

The trial court found that the JEA knew or, in the exercise of reasonable care, should have known of the billing error in March of 1985. It also found that on April 11, 1985, the JEA definitely knew of the billing errors but did not notify Draper of the errors and the substantial potential liability until seven months later on November 6, 1985. As a result, Draper was denied the opportunity during that period to make adjustments with respect to water conservation and other measures to reduce its water bills in the operation of its business. The trial court determined that the JEA did not present any satisfactory reason for its failure to provide such timely notification. The court

concluded, based on the evidence presented, giving due considerations to the inferences to be drawn therefrom and the credibility of the witnesses, that the JEA's conduct was unconscionable. Sufficient evidence supports these findings and conclusions.

The record contains facts showing all of the elements of estoppel. The JEA argued below that Draper failed to show a representation of a material fact that is contrary to a later asserted position. An estoppel, however, may arise from conduct, acts, and acquiescence as well as from a misrepresentation. 22 Fla.Jur., Estoppel, § 31. In fact, one of the cases cited by the JEA below explicitly acknowledges that estoppel may arise from actions or conduct or silence which causes a person to believe in the existence of a certain state of things. See, Taylor v. Kenco Chemical and Manufacturing Corp., 465 So.2d 581, 586 (Fla. 1st DCA 1985). The JEA's unexcusable failure to notify Draper of the amount of its potential liability as soon as it was able to calculate such amount constitutes such conduct.

The JEA argued that it advised Draper of a possible \$10,000.00 to \$15,000.00 exposure some time prior to November of 1985. Mr. Draper, however, testified that he first became aware in November that the JEA was going to bill him the \$297,303.85. The trial court resolved the conflict in the evidence on this point in favor of Draper.

Also, Mr. Draper testified that he would have taken action upon notification and could have applied \$83,000.00 to the

installation of a water cleanup system if he had known of the billing error in 1983. The trial court inferred from this testimony that, as late as 1985, he still would have taken corrective action as soon as he was notified of the billing error. Accordingly, sufficient evidence exists of a change in position detrimental to the party claiming estoppel caused by the wrongful conduct and reliance thereon.

The failure of JEA to notify Draper of these undercharges until November 6, 1985, was unconscionable conduct which should estop the JEA from collecting the subsequent undercharges after February 19, 1985, through October 17, 1985.

Enderby v. City of Sunrise, 376 So.2d 444 (Fla. 4th DCA 1979), cited by the JEA in the First District Court of Appeal does not apply here. That case involved an alleged estoppel based on an unnoticed error. Here, Draper asserts an estoppel based on a noticed error which constitutes a higher degree of wrongful conduct. Furthermore, the JEA attempts to argue that a lower level JEA representative's action could not estop the JEA. However, Enderby involved an error committed by a clerk. The record shows numerous instances of involvement by supervisory JEA personnel in dealing with the billing error in April of 1985,

United Sanitation Services, Inc. v. City of Tampa, 302 So.2d 435 (Fla. 2d DCA 1974), also cited by the JEA, is also distinguishable. That case involved the unauthorized agreement by city officials to the non-enforcement of a city ordinance.

Here, there is no evidence that the conduct amounting to the estoppel; i.e., the failure to advise Draper immediately of the billing error, was unauthorized conduct. As noted above, several supervisory JEA employees were involved in the matter. Also, the estoppel here does not involve any unlawful agreement as in the United Sanitation Services case.

Corporation De Gestion Ste-Foy, Inc. v. Florida Power and Light Company, supra, does not preclude estoppel against the JEA under these circumstances. That case involved an alleged estoppel merely from negligent underbilling. Here, the estoppel arises from the failure to notify the customer after discovery of the negligent underbilling, a factor which changes the public policy considerations which were pertinent to the estoppel issue in the De Gestion case. It is well recognized that equitable estoppel may be invoked against a municipality as if it were an individual. Hollywood Beach Hotel Company v. City of Hollywood, 329 So.2d 10 (Fla. 1976).

Goddard v. Public Service Company of Colorado, 599 P.2d 278 (Colo. App. 1979), cited by the JEA below involved an alleged estoppel based merely on underbilling. It did not involve a delay in notification of the error once it was discovered, the unconscionable conduct found here. Goddard involved the interpretation of the Colorado Public Utilities Law and did not address the same estoppel issue presented here. This is not an estoppel based on negligence or mistake in billing or quoting rates. It is based on wrongful conduct in failing to notify the

customer once such errors are discovered. Goddard and similar cases denying estoppel are based on public policy considerations concerning mere negligent underbilling. The public policy considerations are changed dramatically when a public utility is not encouraged to resolve billing errors as **soon** as they are discovered.

Accordingly, estoppel is available to Draper and the record contains sufficient evidence of the elements of this defense.

Therefore, this Honorable Court should reverse the First District Court of Appeal and hold that the doctrine of equitable estoppel should apply to the facts of this case and prevent the JEA from collecting underbillings subsequent to February, 1985.

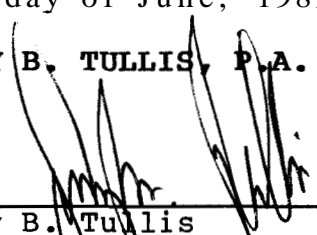
CONCLUSION

Based on the facts and law cited above, Draper urges this Court to affirm the First District Court's holding with respect to the validity of the defense of accord and satisfaction against the JEA.

Further, with respect to the issue of estoppel, Draper would respectfully request this Court to reverse the First District Court and hold that the doctrine of equitable estoppel should apply against the JEA and prevent the JEA from collecting underbillings from Draper subsequent to February, 1985.

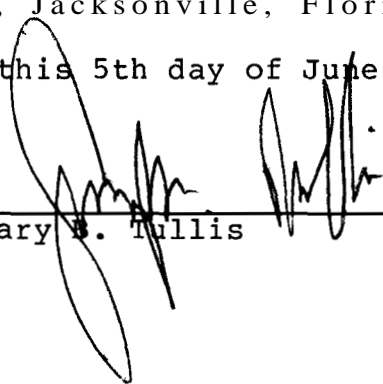
Respectfully submitted, this 5th day of June, 1989.

GARY B. TULLIS, P.A.

By: 
Gary B. Tullis
Florida Bar No. 0082494
500 North Ocean Street
Jacksonville, Florida 32202
Telephone: (904) 353-8295
Attorney for Respondent

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, and LEONARD S. MAGID, Assistant Counsel, Office of General Counsel, 715 Towncentre, 421 West Church Street, Jacksonville, Florida 32202, Attorneys for Petitioner, by mail, this 5th day of June, 1989.


Gary B. Tullis