

**IN THE SUPREME COURT OF FLORIDA**

KAREN IRVEN,

Plaintiff/Petitioner,

v.

DEPARTMENT OF HEALTH AND  
REHABILITATIVE SERVICES,

Defendant/Respondent.

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Supreme Court Case No.  
94,926

Second DCA Case No.  
97-05373

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**AMENDED  
INITIAL BRIEF OF PETITIONER  
KAREN IRVEN**

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On Review from the District Court of Appeal,  
Second District, State of Florida

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## PRELIMINARY STATEMENT

Petitioner/Plaintiff, Karen Irven, will be referred to as “Mrs. Irven.” Respondent/Defendant, the Florida Department of Health and Rehabilitative Services, will be referred to as “HRS.” The Florida Whistle-Blower’s Act, sections 112.3187-112.31895, Florida Statutes (1997), is referred to as “the Act.”

The appellate record is contained in eight (8) volumes. References to the record for volumes 1 - 6 and volume 8 are indicated as “Rx y-z,” with “x” representing the volume number and “y-z” representing the page number(s).

Volume 7 of the record is a box containing the sixty (60) Plaintiff’s exhibits and the fifty-nine (59) Defendant’s exhibits that were marked for identification as evidence and either admitted, proffered, or withdrawn by the parties at trial. References to the trial exhibits are indicated as either “R7 Pl. Ex. x at y-z,” (Plaintiff’s exhibits) or either “R7 Def. Ex. x at y-z,” (Defendant’s exhibits) with “x” representing the exhibit number and “y-z” representing the page number(s).

The trial transcript for the proceedings held on November 3-12, 1997, is contained in twelve (12) volumes. References to the trial transcript will be designated as “Tx y-z,” with “x” representing the transcript volume number and “y-z” representing the page number(s).

All emphasis in quotations from referenced authorities has been added unless otherwise indicated.

## STATEMENT OF THE CASE

The petitioner, Mrs. Karen Irven (“Mrs. Irven”), filed an action against HRS under Florida’s Whistle-Blower’s Act, sections 112.3187-112.31895, Florida Statutes (1997). R1 64-85 (App. B)<sup>1</sup>. Mrs. Irven asserted that HRS illegally fired her in retaliation for her disclosure of suspected wrongdoing by HRS employees in a child abuse case (the “SS” case). See id. After a seven-day trial, the jury found HRS violated the Whistle-Blower’s Act and awarded Mrs. Irven back pay and related damages. R6 at 1126-27. The trial court denied all post-trial motions by HRS. R6 1128, 1129. HRS filed a timely Notice of Appeal. R6 1133-35.

On appeal, the Second District concluded that, although Mrs. Irven was fired in retaliation for her disclosures concerning the SS case, her communications “[did] not fall within the specifics of the disclosure of information sought to be protected by the ‘Whistle-Blower’s Act.’” Department of Health and Rehabilitative Servs. v. Irven, 724 So. 2d 698, 704 (Fla. 2d DCA 1999) (App. A).

The court ruled that, because the Whistle-Blower’s Act waives sovereign immunity, the waiver “must be strictly construed and applied.” Id. at 699. The Second District further ruled that Mrs. Irven’s disclosures were not protected because, in the court’s after-the-fact view, Mrs. Irven incorrectly interpreted the Florida rules concerning venue transfers in child dependency proceedings. See id. at 704. The Second District reversed the final judgment entered below, and instructed the trial court to enter a directed verdict in favor of HRS. See id.

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<sup>1</sup> The opinion on review and other record documents referred to herein have been separately included in an appendix to this brief, and are referred to herein by both the record cite and by “App.” followed by the appropriate appendix tab letter.

Mrs. Irven petitioned this Court for a discretionary review of the Second District's reversal, asserting the district court's decision expressly and directly conflicts with Martin County v. Edenfield, 609 So. 2d 27 (Fla. 1992). In Martin County, this Court held the Whistle-Blower's Act "should be construed liberally in favor of granting access to the remedy." Id. at 29. This Court granted Mrs. Irven's petition for discretionary review.

### **STATEMENT OF THE FACTS**

The facts of this cases are set forth in the light most favorable to Mrs. Irven because she was the prevailing party at trial and because the district court instructed the trial court to enter a directed verdict in favor of HRS.

#### **A. Overview**

Mrs. Irven began to work for the Florida Department of Health and Rehabilitative Services ("HRS") as a Child Protection Investigator in August 1990. T3 400-01. Beginning in February 1994, Mrs. Irven sent a series of written communications to HRS regarding the manner in which it was handling a child abuse case (the "SS" case). In those communications, Mrs. Irven identified specific acts of suspected wrongdoing by HRS employees, and voiced her concerns about the effect that this wrongdoing had upon the child abuse victim. R1 73-85.

Before Mrs. Irven reported her suspicions of wrongdoing by HRS employees in the SS case, she consistently received superior or favorable ratings as an HRS employee. In her six performance evaluations between August 1990 to February 1994, Mrs. Irven earned an overall "exceeds" or "achieves," with superior or favorable ratings in 42 of the 43 individual categories in the evaluations. R7 Pl. Ex.



5 (App. F-5); see also T2 284. Mrs. Irven’s supervisor described her work as “exceed[ing] performance standards,” identifying her as “a valuable employee of Child Protective Investigations” whose “performance reflects her determination and disciplined approach to evaluating abuse/neglect referrals and planning for service interventions.” R7 Pl. Ex. 5 (1/1/94) (App. F-5).

After Mrs. Irven reported the suspected wrongdoing by HRS in the SS case, she received, for the very first time, unfavorable employee reports, which raised complaints of “excessive overtime” and “excessive use of sick leave” that the jury later found to be unfounded. R7 Pl. Ex. 5 (6/10/94) (App. F-5). Three days after the second unfavorable report, HRS fired Mrs. Irven. R7 Pl. Ex. 21A (App. F-21).

**B. The “SS” Case**

In August 1993, four-year-old “SS” went to live with her maternal grandmother in Fernandina Beach, Florida, because the mother had no permanent place to live. R7 Pl. Ex. 10 (App. F-10). The mother had previously changed residences eighteen times in four years, between Fernandina Beach, Kissimmee, and Orlando. See id. Shortly after SS went to live with the grandmother, the grandmother initiated a child abuse report to HRS. SS had told her grandmother that she had been sexually molested by one of her mother’s boyfriends. R7 Pl. Ex. 49 (App. F-49).

Nassau County HRS Child Protection Investigator Cynthia Halla (“Ms. Halla”) and Fernandina Beach Police Detective Rhonda Saunderson initiated a child abuse investigation. R7 Pl. Ex. 49 (App. F-49). Ms. Halla interviewed SS and confirmed SS had been sexually abused more than once by her mother’s boyfriend,

Glenn Essigman. R7 Pl. Ex. 49 (App. F-49). SS provided Ms. Halla with details of the digital penetration of her “privates,” and indicated that the mother was present in the room during one of these sexual abuse incidents. R7 Pl. Ex. 49 (App. F-49). A subsequent medical examination by Judith Fitzgerald, D.O., disclosed that SS had genital trauma consistent with the sexual abuse allegations made by SS. R7 Pl. Ex. 49 (App. F-49); see also R7 Pl. Ex. 7 (App. F-7); Irven, 724 So. 2d at 720 (App. A). SS also told Ms. Halla she had observed Mr. Essigman beat her mother, adding the mother had been beaten a number of times by other men. R7 Pl. Ex. 49 (App. F-49). HRS employee Susan Oliver found evidence that the mother threatened harm to SS if she revealed the physical and/or sexual abuse by Mr. Essigman to anyone. See id.

On October 20, 1993, HRS filed a detention petition on behalf of SS in the Circuit Court in Nassau County, signed under oath by Ms. Halla and certified by HRS attorney Margaret Yarborough. R7 Pl. Ex. 7 (App. F-7). The court placed SS in the temporary legal custody of the grandmother, and specifically ordered that the child’s mother “shall have only supervised contact with said child.” Id. Further investigation by HRS disclosed that the mother had a history of addiction to crack cocaine, R7 Pl. Ex. 49 (App. F-49), and that SS had previously been placed under protective supervision and sheltered with the grandmother from December 1990 until December 1991--based on a finding of fact in the earlier dependency hearing that SS’s older sister was sexually abused by another of the mother’s boyfriends, Josiah Mixon. R7 Pl. Ex. 49 (App. F-49); see also T10 1481.

Ms. Halla filed an affidavit under the Uniform Child Custody Jurisdiction Act

indicating that, a month after HRS filed the detention petition, the mother moved to Polk County to live with her then paramour, Josiah Mixon. R7 Pl. Ex.\_10 (App. F-10). Mr. Mixon, who was released from prison in October 1993, was the same man who was found to have sexually abused SS's older sister in 1991. R7 Pl. Ex. 49 (App. F-49); see also T10 1481.

On December 16, 1993, HRS filed a dependency petition, again signed by Ms. Halla and certified by attorney Yarborough, asserting that SS was the victim of sexual molestation, and that the mother "failed to provide a stable and nurturing home environment, exposing the child to known felons, drugs, excessive drinking and has made numerous temporary moves, unable to provide the child with a stable address." R7 Pl. Ex 8 (App. F-8). The petition expressly asserted SS resided in Fernandina Beach, in Nassau County. See id. HRS also petitioned the court to appoint a guardian ad litem to represent SS's interests in this cause. See id. at 2.

On January 14, 1994, the mother made a motion for a change of venue, asserting Polk County was the most appropriate venue for this case because "[m]other and child are usual residents of Polk County," and "all witnesses and evidence are there located or are located nearby." R7 Pl. Ex. 11A (App. F-11). However, according to the sworn affidavit filed by Ms. Halla in support of the dependency petition, SS never lived in Polk County. R7 Pl. Ex. 10. Indeed, Ms. Halla testified in two sworn petitions that SS resided in Nassau County, not Polk County. R7 Pl. Ex. 7 (App. F-7); R7 Pl. Ex. 8 (App. F-8). Furthermore, most of the witnesses in the dependency action--the child, the grandmother, the HRS doctor who discovered evidence of sexual molestation, and the HRS and law enforcement

employees who conducted the child abuse investigation--were located in Nassau County, not Polk County. R7 Pl. Ex. 10 (App. F-10); R7 Pl. Ex. 49 (App. F-49); see also R1 74. The only witness who lived in Polk County was the mother--who moved there after the trial court entered the detention petition--to live with her convicted-felon-and-accused-child-molester paramour, Mr. Mixon. R7 Pl. Ex. 10 (App. F-10).

Astonishingly, HRS did not object to the mother's change of venue motion, agreeing in its response that the child's "usual" residence was in Polk County, even though SS had been placed in the custody of her grandmother in Nassau County. R7 Pl. Ex. 11B (App. F-11). HRS attorney Yarborough, who had earlier certified the pleadings asserting that SS resided in Nassau County, now asserted, without any explanation to the court, that the child's "usual" residence was instead in Polk County. See id.

On an agreed motion by HRS, the Nassau County circuit judge transferred the SS case to Polk County. R7 Pl. Ex. 11C (App. F-11); Pl. Ex. 12 (App. F-12). Because the court never appointed a guardian ad litem to represent SS pursuant to HRS's earlier petition, neither SS nor her temporary legal guardian (the grandmother) were present or represented at the change of venue hearing.

After the change of venue hearing but before HRS transferred the SS case to Polk County, Ms. Halla expressed concern, in writing, that she may have put SS at risk when she placed the child in the custody of the grandmother. R7 Pl. Ex. 49. Ms. Halla updated the SS file with the following observation<sup>2</sup>:

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<sup>2</sup> The original HRS report includes the abbreviations "Cx" for child, "Mx" for mother, and "Gx" for grandmother.

At this time there is concern for the child in the grandmother's care as it was found out the day of court that during the time the child was under [protective services supervision from] Flagler County, the grandmother left the child with the mother and the child was placed at risk several times when [law enforcement] attempted to arrest Josiah Mixon at the mother's home. The grandmother also told this CPI that she was no longer going to testify or her husband would 'beat the hell out of me.' . . . . She [indicated] that the child needed to go with the mother and has allowed the mother unsupervised visitation with the child in the past, visits lasting for weeks at a time.

R7 Pl. Ex. 49 (App. F-49).

HRS then reassigned the SS case to Mrs. Irven, a Child Protective Investigator based in Polk County. R1 74 (App. B); T2 286. Accordingly, Mrs. Irven became the HRS employee who was primarily responsible for insuring the health, safety, and welfare of a sexually abused 4-year-old child who was living in Nassau County--250 miles away from Polk County.

**C. HRS Wrongdoing and Retaliation**

Immediately after the transfer of the SS case from Nassau County to Polk County, Mrs. Irven expressed concerns, in writing, that she could not responsibly oversee from Polk County the health, safety, or welfare of a sexually abused child living in Nassau County, nor could she prosecute a dependency action with the abused child and the fact witnesses located in Nassau County. R1 74 (App. B). Over the next several months, Mrs. Irven sent four written communications to HRS supervisors, HRS attorneys, and the HRS District Administrator, identifying wrongful actions by HRS employees that Mrs. Irven believed impacted the health,

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safety and welfare of “SS.” R1 73-85 (App. B).

First, on February 7, 1994, Mrs. Irven sent a memo to her supervisor, Ms. Patricia Lawler (“Lawler”), and to two HRS attorneys, Roland Reis (“Reis”) and Maria Mezzarella. R1 73-74 (App. B). Mrs. Irven reported that the HRS response to the venue transfer motion in the SS case incorrectly asserted that SS lived in Polk County when, in fact, the record demonstrated SS actually lived in Nassau County. See id.; R7 Pl. Ex. 7 (App. F-7); Pl. Ex. 8 (App. F-8); Pl. Ex. 10 (App. F-10). Mrs. Irven believed that HRS failed to comply with Florida Rule of Juvenile Procedure 8.530<sup>3</sup>, when it consented to the transfer of the SS case. R1 73-74.

In addition to the procedural deficiencies associated with the change of venue, Mrs. Irven asserted that she could not adequately investigate this case because most of the witnesses were located outside of Polk County and the child abuse victim was living hundreds of miles away in Nassau County. R1 73-74 (App. B). Mrs. Irven was particularly concerned with Ms. Halla’s observation that she may have put SS at risk when she placed the child in the custody of the grandmother. Ms. Irven stated in her memo:

[t]here appears to be a question as to whether the child should have been sheltered and a petition brought. The child was placed in shelter in Nassau County. To not file a petition now, would create a liability question which I don’t feel I, nor Polk County, should have to bear.

R1 75 (App. B).

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<sup>3</sup> As Mrs. Irven indicated in her complaint, see R1 66 (App. B), former rule 8.530 was renumbered as rule 8.205, Fla. R. Juv. P. See In Re Petition of the Florida Bar to Amend the Florida Rules of Juvenile Procedure, 589 So. 2d 818, 837 (Fla. 1991) (effective July 1, 1991).

Shortly after Mrs. Irven sent the February 7, 1994, memo to Ms. Lawler, HRS promoted Ms. Lawler and Ms. Linda Fuchs became Mrs. Irven's new supervisor. T10 1458. On February 20, 1994, Mrs. Irven sent a follow-up memo to Ms. Fuchs, with copies to Ms. Sue Gray, Ms. Harriet Powell, and Ms. Lawler, explaining in greater detail the problems she identified in her earlier memo:

The Abuse Report printed on 1/31/94 by John Chabott, CPIS, states that Ms. Halla is concerned for the child's safety in the grandmother's care. . . . It appears HRS Polk County has prematurely accepted this case in which a child has been placed at risk by Nassau County's poor placement of the child and their failure to rectify the situation. . . . I can not defend or support Ms. [Halla's] petition in court. I have no first hand evidence, only hearsay from Ms. Halla which is not admissible in court. I can not adequately investigate this case with all of the witnesses located out of the county. I can not [assess] the safety, risk, or well-being of the child, located in Nassau [County], or act as the case manager.

R1 at 75 (App. B).

Rather than commending Mrs. Irven for having the courage to raise her good faith concerns over the HRS mishandling of this child abuse case, HRS instead chastised Mrs. Irven for putting her concerns in writing. On March 4, 1999, HRS Program Administrator Ann Hipson responded in writing to Mrs. Irven, declaring that her February 20th memo to Ms. Fuchs was "not an effective way, nor a professional way to deal with what you obviously found to be a distressful situation. . . . It detracts from your credibility as a professional." R7 Pl. Ex. 16 (App. F-16). Ms. Hipson concluded by warning "[i]t is not wise for you to jeopardize your reputation . . . over the way you choose to handle conflict." Id.

Shortly after Mr. Reis and Ms. Fuchs informed Mrs. Irven that the SS case

was not going to be transferred back to Nassau County, they directed her to file an amended dependency petition in the SS case. T2 322-325; R1 at 68, 82 (App. B). Ms. Fuchs told Mrs. Irven that the original petition filed by Ms. Halla “is not going to fly.” R7 Pl. Ex. 14 (App. F-14). Mrs. Irven explained to both Mr. Reis and Ms. Fuchs that, because she had no personal knowledge of the facts that needed to be alleged in the amended petition, it would be “inappropriate, misleading, and potentially fraudulent to represent in the petition that she had the requisite knowledge.” R1 at 82 (App. B).

From that time forward, HRS treated Mrs. Irven very differently. At trial, Mrs. Irven testified to numerous instances of retaliation by HRS directed solely at her. For example, unlike other CPIs, Mrs. Irven--and only Mrs. Irven--was required to obtain permission to leave her work station. T3 358-60; see also R7 Pl. Ex. 17 (App. F-17). Whereas other CPI’s routinely worked from their homes, Mrs. Irven was told she could not do so. T3 364-65. And, unlike any other CPI, Mrs. Irven was required to support any request for sick leave with a doctor’s note. T3 366, 411; R7 Pl. Ex. 23 (App. F-23). These new unwritten “policies,” implemented by Ms. Fuchs, applied solely to Mrs. Irven; no other Polk County CPI was required to conform to these new rules. T3 364-66; R7 Pl. Ex. 17 (App. F-17).

On April 18, 1994, Mrs. Irven filed an HRS employee grievance, describing the recent negative treatment she had been receiving as a result of her communications concerning the SS case. R1 76 (App. B); R7 Pl. Ex. 18 (App. F-18). The grievance report also identified new and additional misfeasance by HRS in the form of Ms. Fuchs’s unfair treatment of Mrs. Irven, which began after Mrs.



Irven raised her concerns about HRS's handling of the SS abuse case. See id. Mrs. Irven stated "I have heard rumors that I have been 'targeted' by the administration. I feel I have been reprimanded for doing my job in the best way possible. I feel I would have been disciplined for not responding to that last assigned case if anything would have happened to the children." Id.

Just before the grievance hearing, Mrs. Irven's attorney, Adrienne Fechter, wrote to the HRS District Director and the members of the grievance committee recapping the problems reported to HRS by Mrs. Irven in the SS case. R1 81 (App. B); R7 Pl. Ex. 47. Ms. Fechter disclosed new and additional wrongdoing by HRS employees arising from the continuing pressure that Mr. Reis and Ms. Fuchs placed on Mrs. Irven to sign, under penalty of perjury, an amended petition in the SS case-- even though Mrs. Irven repeatedly told them she did not have the required first-hand knowledge needed to sign such a petition under oath. T2 322-25; R1 82 (App. B). In spite of Mrs. Irven's understandable concerns with committing perjury, Mr. Reis lodged a written complaint against Mrs. Irven, R7 Def. Ex. 27; R1 82 at n.3 (App. B), characterizing her refusal to sign an amended petition in the SS case as "defiant and uncooperative," in spite of the fact that the petition would necessarily contain facts to which she had no personal knowledge.

In her amended complaint, Mrs. Irven identified her grievance report as her third whistle-blower document, R1 69 (App. B), and the Fechter letter as her fourth whistle-blower document. R1 76 (App. B).

On June 10, 1994, almost two months after Mrs. Irven filed her grievance, Ms. Fuchs gave Mrs. Irven her first ever negative employee appraisal, stating "Mrs.

Irven has failed to properly prepare for, and work with, the legal staff in preparing the SS case for trial.” R7 Pl. Ex. 5 (6-10-94) (App. F-5). Among her other criticisms, Ms. Fuchs described Mrs. Irven as “not conscientious in dealing with co-workers and supervisory staff,” and complained Mrs. Irven had taken “excessive sick leave.” Id. In fact, as Mrs. Irven demonstrated at trial, not only had she accrued 250 hours of unused sick leave time, she had actually taken less sick leave than most of her co-workers. T3 410; see R7 Pl. Ex. 23A (App. F-23).

Mrs. Irven’s grievance hearing took place on June 23, 1994. R7 Pl. Ex. 19 (App. F-19). On July 8, the grievance panel issued a written opinion that Ms. Fuchs “was ill-prepared to assume the role of supervisor without supervisory training and on-going support from her P.O.A.” R7 Pl. Ex. 19 (App. F-19) at 2. The panel recommended that, based on apparently irreconcilable differences, “a change in work assignments be addressed between Karen [Irven] and Linda [Fuchs].” Id.

Instead of responding in a constructive way to the panel’s concerns over Ms. Fuchs’s supervisory capabilities and its recommendation that Mrs. Irven be transferred to a different supervisor, Ms. Lawler directed Tom Snyder, a co-worker at HRS, to put in writing for Mrs. Irven’s personnel file a description of several negative events and issues that arose many months earlier between him and Mrs. Irven. T7 1045-46. Accordingly, on July 11, 1994, Mr. Snyder wrote several memos confirming discussions he had with Mrs. Irven in February regarding the “SS” case. R7 Pl. Ex 35 (App. F-35). Mr. Snyder admitted in a deposition that was read into evidence at trial that, in retrospect, these matters were not particularly important and did not merit a memo at the time of the event. T7 1045-50; see also

R7 Pl. Ex. 35 (App. F-35); T4 522-23.

On July 15, 1994, Harriett Powell, the HRS District Program Director, sent a memo to Mrs. Irven, stating she had reviewed the recommendations of the grievance committee. R7 Pl. Ex. 20 (App. F-20). Ms. Powell advised Mrs. Irven that the “recommendations concerning the conflict you and your supervisor are experiencing will be addressed by operations and program office supervisors. It is my sincere desire that the conflicts can be resolved.” R7 Pl. Ex. 20 (App. F-20). Instead, Ms. Powell fired Mrs. Irven a mere two weeks later, advising Mrs. Irven by certified letter that her termination would be effective on August 25, 1994. R7 Pl. Ex. 21 (App. F-21).

Thus, rather than seek to resolve the conflict, as the grievance panel had recommended, HRS accepted Ms. Fuchs’s recommendation that Mrs. Irven be fired. R7 Pl. Ex. 21A (App. F-21); see also R7 Pl. Ex. 5 (8-8-94) (App. F-5) at 3. As justification for her recommendation, Ms. Fuchs stated “Ms. Irven’s use of leave continues to interfere/prevent her from performing assigned and otherwise indicated casework duties.” R7 Pl. Ex. 5 (8-8-94) (App. F-5) at 1.

Once again, however, as Mrs. Irven demonstrated at trial, these complaints were wholly unfounded. In fact, Mrs. Irven planned a cruise vacation during this time period, and HRS had approved her leave request several months earlier. R1 84; T3 367. Ms. Fuchs subsequently tried, at one time, to have Mrs. Irven’s leave request retroactively denied, but Ms. Lawler overruled her decision. See id.

Nevertheless, in the ultimate act of retaliation, HRS fired Mrs. Irven.

**D. Mrs. Irven’s Whistle-Blower Action**

On September 16, 1994, Mrs. Irven filed a complaint of retaliation with the Office of the Public Counsel, as required by sections 112.3187(7) and (8)(a). R7 Def. Ex. 53. Mrs. Irven then filed an action against HRS under the Whistle-Blower's Act. R1 64-85 (App. B).

Over the course of a seven-day trial, the jury heard extensive testimony from Mrs. Irven, Ms. Halla, Mr. Reis, and from several other HRS employees. Mrs. Irven and HRS each offered numerous letters, memos, reports, and other documents into evidence, including a total 119 exhibits (of which 27 were composite exhibits). See R7.

Importantly, at trial, HRS attorney Reis conceded, see T9 1301, that HRS did, in fact, incorrectly state in its response to the mother's transfer of venue motion that SS was a "usual" resident of Polk County. Mr. Reis also conceded HRS violated Florida's juvenile procedure rules because it failed to file the SS dependency petition within the time required by law. T9 1325. Nevertheless, Mr. Reis elected not to correct the record and seek to have the SS case transferred back to Nassau County because he "did not want us to look like the Department did not know what they were doing." T9 1304-05. Mr. Reis also conceded SS was subsequently adjudicated dependent, put under protective services supervision, and the case was ultimately remanded back to Nassau County, just as Mrs. Irven had originally sought. T9 1336.

Mrs. Irven offered into evidence dozens of additional contemporaneous written communications to HRS employees, identifying wrongdoing and retaliation by HRS--beyond the four original whistle-blower documents she relied on in the

amended complaint. For example, on February 10, 1994, Mrs. Irven sent a follow-up memo to HRS attorney Reis explaining why the SS case should be transferred back to Nassau County. R7 Pl. Ex. 6C (App. F-6). On March 3, 1994, Mrs. Irven sent a memo to HRS Protective Services Counselor Joe Kanzlemeyer identifying the need for HRS in Nassau County to provide therapy and day care services to SS. R7 Pl. Ex. 9 (App. F-9); T3 301. On March 16, 1994, Mrs. Irven sent a memo to Ms. Halla, detailing her lack of assistance in the SS case. R7 Pl. Ex. 9 (App. F-9); T3 302-03.

Mrs. Irven also offered into evidence at trial a list of the various Florida Statutes violated by HRS which required her to “blow the whistle.” R7 Pl. Ex. 38 (App. F-38). This list and each of the documents identified above were offered into evidence without any objection from HRS. T4 548-49; T2 293; T2 297.

After considering the extensive testimony and documentary evidence, the jury concluded HRS violated the Whistle-Blower’s Act and illegally fired Mrs. Irven in retaliation for her disclosures in the SS case. R6 1118 (App. C). The jury awarded Mrs. Irven back pay and related damages. See id. Consistent with the jury’s verdict, the trial court entered final judgment for Mrs. Irven, and ordered HRS to reinstate Mrs. Irven to her former position. R6 1126-27 (App. D).

#### **E. The Second District Reverses the Jury’s Verdict**

HRS raised three issues on appeal: (1) whether the Florida Whistle-Blower’s Act waives sovereign immunity; (2) whether Mrs. Irven’s internal memoranda constituted whistle-blowing; and (3) whether Mrs. Irven’s complaint was foreclosed by election of remedies. See Irven, 724 So. 2d at 698 (App. A).

The Second District concluded the election of remedies issue had not been preserved by HRS for review. See Irven, 724 So. 2d at 699 (App. A). The appellate court accepted the jury's finding that HRS fired Mrs. Irven in reprisal for her communications about the SS case, but nevertheless reversed the jury's verdict that this violated the Whistle-Blower's Act. See id. The court ruled that, because the Act waives sovereign immunity, "the waiver must be strictly construed and applied." See id. Consistent with its strict construction of the Whistle-Blower's Act, the Second District proceeded to itself examine the first two communications that led to HRS's firing of Mrs. Irven. See id. at 700-01 (App. A).

Although the Second District acknowledged that Mrs. Irven's complaint identified four communications in which she "blew the whistle," the court concluded that her second two whistle-blowing communications "grew out of and [were] premised upon" her first and second communications. See id. at 700 (App. A). On that basis, the district court declined to address the additional protected "whistle-blower" disclosures contained in the last two communications identified in Mrs. Irven's complaint. See id.

The court concluded that because, in its view, Mrs. Irven had incorrectly interpreted the Florida rules with respect to venue, the two communications the court considered "[did] not fall within the specifics of the disclosure of information sought to be protected by the 'Whistle-Blower's Act.'" See id. at 704 (App. A). The court declared that, since Mrs. Irven's written communications were not protected as a matter of law, "it does not matter that she was discharged in reprisal for them." See id. at 699 (App. A).

We conclude that intradepartmental complaints regarding the progress or process of a matter subject to judicial supervision and determination cannot equate to “whistle-blower” acts absent evidence of fraudulent or dishonest behavior in the proceedings.

Irven, 724 So. 2d at 704 (App. A).

Accordingly, the Second District reversed the final judgment, and instructed the trial court to enter a directed verdict for HRS. See id.

## SUMMARY OF ARGUMENT

The Second District ruled below that the Whistle-Blower’s Act must be strictly construed because it waives sovereign immunity. That decision expressly and directly conflicts with this Court’s earlier determination that the Whistle-Blower’s Act “should be construed liberally in favor of granting access to the remedy.” The legislature intended the Act to encourage public sector employees to report illegal, wrongful, or wasteful conduct in government by assuring these employees that they would not be fired for reporting suspected improper government acts to the proper authorities. The Second District’s decision eviscerates that legislative safe-harbor, and discourages public sector employees from reporting suspicions of improper conduct by public officials.

Florida’s legislature intended to provide public sector employees with the broadest possible protection in connection with disclosing wrongful acts by public officials. Under the statute, protected disclosures include suspected violations of law and suspected acts of misfeasance. The statute does not limit that protection to the disclosure of acts that are determined after-the-fact by a court to be actual violations or actual misfeasance. Yet that is exactly what the Second District has required here.

The Second District disregarded the jury’s verdict, concluding Mrs. Irven’s “chief complaint” was about venue and that she misconstrued the venue rules. But, read as a whole, Mrs. Irven’s disclosures addressed far more than just improper venue. Mrs. Irven identified numerous improper or questionable acts by HRS that affected the health, safety, and welfare of an abused child under its care.



Yet even if venue were Mrs. Irven's chief complaint, a directed verdict was still improper because HRS, in fact, admitted at trial it violated the venue rules. Furthermore, even if HRS had not violated the venue rules, Mrs. Irven's disclosures were still protected because her reasonable belief that HRS's actions were improper qualifies as "suspected misfeasance" under the Act.

The Second District also erred by rejecting, out-of-hand, Mrs. Irven's second two whistle-blower communications. At a minimum, these communications identified new and additional misfeasance by HRS, not addressed in the initial memos, including the disclosure of Ms. Fuchs's unfair treatment of Mrs. Irven and the disclosure that HRS improperly pressured Mrs. Irven to sign, under penalty of perjury, an amended petition in the SS case--even though Mrs. Irven did not have the required knowledge to sign such a petition under oath.

Finally, because Mrs. Irven's suspicions that HRS committed wrongful acts were reasonable under the circumstances, when viewing the evidence in the light most favorable to her, it was wrong for the Second District to order entry of a directed verdict for HRS.

## ARGUMENT

### **I. AN HRS EMPLOYEE’S WRITTEN COMMUNICATIONS TO HRS OFFICIALS, IDENTIFYING SUSPECTED VIOLATIONS OF LAW AND ACTS OF MISFEASANCE BY HRS IN A CHILD ABUSE CASE, ARE PROTECTED DISCLOSURES UNDER FLORIDA’S WHISTLE-BLOWER’S ACT.**

#### **A. Florida’s Whistle-Blower Act Must Be Construed Liberally To Give Access to a Remedy to Government Employees Who are Fired for Reporting Suspected Illegal or Improper Acts by Government Officials**

The Second District held below that, because the Whistle-Blower’s Act waives sovereign immunity, “the waiver must be strictly construed and applied.” Irven, 724 So. 2d at 699. However, this Court has held exactly to the contrary, declaring that the Whistle-Blower’s Act “should be construed liberally in favor of granting access to the remedy.” Martin County v. Edenfield, 609 So. 2d 27, 29 (Fla. 1992). The Second District’s decision below simply cannot exist side-by-side with this Court’s Martin County decision. It is impossible to limit the scope of the Whistle-Blower’s Act based on a strict construction of the waiver of sovereign immunity, as the Second District has now held, while at the same time “liberally” construing that same statute “in favor of granting access to the remedy,” as this Court held in Martin County. See 609 So. 2d at 29.

The public policy favoring access to this remedy is plain: the Florida Legislature enacted the public sector Whistle-Blower’s Act “to encourage the elimination of public corruption by protecting public employees who ‘blow the whistle.’” Martin County, 609 So. 2d at 29. Whistle-blowers, like Mrs. Irven, are everyday government employees who encounter a potential wrong or a harm against the public, and simply tell the truth about suspected wrongful acts by their employer.

Like all whistle-blowers, Mrs. Irven was faced with a dilemma—if she “blows the whistle,” she may be fired. Yet, if she fails to report the suspected illegal or improper conduct by HRS employees, a four-year-old child abuse victim may become subjected to even more physical or emotional harm.

To Mrs. Irven, the course was clear, and she chose to report her concerns of improper acts by HRS. But by disclosing these concerns, Mrs. Irven risked her job and the welfare of her own family--solely for the benefit of an abused child and not for any personal or professional gain. That is precisely the type of disclosure the legislature sought to encourage and protect by enacting the Whistle-Blower’s Act.

For many years, employees like Mrs. Irven were completely without protection if they “blew the whistle” on their employers’ illegal or improper acts. See DeMarco v. Publix Super Markets, Inc., 384 So. 2d 1253, 1254 (Fla. 1980) (under Florida’s at-will employment doctrine, an employer may terminate an employee for any reason at any time). As one Florida federal judge explained, “Florida’s at-will employment doctrine may be ‘cold-hearted, draconian and out-dated,’ but it is the law of Florida.” Zombori v. Digital Equipment Corp., 878 F. Supp. 207, 209 (N.D. Fla. 1995).

In order to protect government workers in Florida from retaliation arising from their report of improper government conduct, the legislature enacted the Whistle-Blower’s Act in 1986. The Act precludes any government entity from taking an “adverse personnel action” against an employee because that employee discloses information concerning actual or suspected improper conduct by a government agency or public official. See §§112.3187(4)(a), (5), Fla. Stat.

The Second District’s decision below eviscerates that legislative safe-harbor, and discourages public sector employees from reporting suspicions of improper conduct by public officials. In the decision below, the district court “strictly construed” the Whistle-Blower Act to preclude a remedy solely based on an after-the-fact determination by the Second District that Mrs. Irven was wrong and no actual violation occurred. See Irven, 724 So. 2d at 704. That decision flies in the face of decisions by this and other Florida courts, and is contrary to the plain language of the statute.

If the standard announced by the Second District were to remain the benchmark, then government employees would have no whistle-blower protection at all. The Second District’s decision would effectively require public sector employees to call their personal lawyers every time they even consider reporting governmental wrongdoing, or risk being fired if their concerns turn out to be wrong. That, of course, is contrary to the holding in Martin County, where this Court “liberally construed” the Act to provide a remedy to a reporting employee. See Martin County, 609 So. 2d at 29; Hutchison v. Prudential Ins. Co. of America, Inc., 645 So. 2d 1047, 1050 (Fla. 3d DCA 1994) (the Whistle-Blower’s Act is a remedial statute that “must be liberally interpreted in order to accomplish its intended purpose”). See also Lindamood v. Office of the State Attorney, Florida Ninth Judicial Circuit, 731 So. 2d 829, 833 (Fla. 5th DCA 1999) (stating the Act should be liberally interpreted).

In Martin County, this Court declared that the Whistle-Blower’s Act “should be construed liberally in favor of granting access to the remedy.” 609 So. 2d at 29.

In that case, an assistant road superintendent was instructed by his supervisor to use a county truck to deliver sod to the supervisor's private residence. See id. at 28. When subsequently contacted by a county commissioner about the incident, the county employee admitted his involvement and implicated his supervisor. See id. After being given a lesser job at lower pay, the employee sought relief under Florida's public sector Whistle-Blower's Act. See id.

Liberally construing the Whistle-Blower's Act in favor of granting access to the remedy, this Court concluded that even a government employee who actually participated in corrupt acts should not be precluded from seeking relief under the statute. See Martin County, 609 So. 2d at 29 ("the statute should be construed liberally . . . . We so construe it here.") (internal citation omitted).

Implicit in this Court's Martin County decision is the obvious conclusion that the Whistle-Blower's Act completely waives sovereign immunity. That case could not have been decided in favor of the public sector employee if Martin County had been immune from a lawsuit. Once a waiver is granted by the legislature, the sovereign immunity issue is resolved. However, here, the Second District engrafted judicial limits on the Whistle-Blower Act that this Court has never recognized and that the legislature simply did not intend or imply. As the trial judge, Judge Curry, correctly observed when he denied HRS's motion for a directed verdict on the sovereign immunity issue:

I have never seen a more express waiver of sovereign immunity in my life than the Statute that defines the people protected as employees of State agencies. It defines agency as the person the suit can be brought against as any State, regional, County, local, or municipal government entity. And then lays out the specific

remedies they're opening themselves up to. If it gets any more express than that, I don't know.

T11 1704.

Consistent with this Court's Martin County decision, the Third District also ruled the Whistle-Blower's Act "must be liberally interpreted in order to accomplish its intended purpose." Hutchison, 645 So. 2d at 1050. In Hutchison, an insurance company entered into a payroll deduction agreement with a government agency and sold insurance policies to the agency's employees which could be paid for through payroll deductions. See id. at 1048. The court concluded "[w]e need not explore the precise boundaries of the statute. Suffice it to say that plaintiff's allegation that life insurance policies being misrepresented as 'retirement plans' to members of the Monroe County Sheriff's Department falls within the scope of the statute." Id. at 1049.

Importantly, the Third District analyzed the relevant whistle-blower letter in Hutchison pursuant to §112.3187(5)(a), Florida Statutes (1991), which protects the disclosure of a violation of a "law, rule, or regulation . . . that creates and presents a substantial and specific danger to the public's health, safety, or welfare." See Hutchison, 645 So. 2d at 1049. Prudential argued on appeal that an allegation of systematic misrepresentation in the sale of insurance policies to government employees was not sufficiently serious to create a "substantial and specific danger to the public welfare." See id. The appellate court disagreed, stating:

[If] the only violation which would qualify would be one which threatens the health, safety, or welfare of the public at large . . . it would defeat the remedial purpose since there would be few, if any, situations to which the statute would apply. We do not think that the legislature

intended any such interpretation.

See Hutchison, 645 So. 2d at 1049 n.4.

As Martin County, Hutchison, and other Florida cases make clear, the Whistle-Blower's Act was enacted to encourage public sector employees to report illegal, wrongful, or wasteful conduct in government by assuring these employees that they would not be fired or otherwise retaliated against for reporting their suspicions of improper government acts to the proper authorities. In Martin County, the Act protected disclosures of a government employee who reported corrupt acts--even though the reporting employee himself participated in those corrupt acts. See Martin County, 609 So. 2d at 29-30. In Hutchison, the Act applied to an employee of a non-government independent contractor reporting issues concerning employee life insurance. See Hutchison, 645 So. 2d at 1048. It simply cannot be said that the liberal remedy provided by the Act protects the employees in Martin County and Hutchison, but does not protect Mrs. Irven. If a disclosure regarding employee life insurance policies is protected, see Hutchison, there is no reason why Mrs. Irven's disclosures in a child abuse case would not likewise be protected.

The Second District should have followed this Court's directive in Martin County, and read the statute in a manner which effectuates rather than frustrates the major purpose of the legislature--that is, to grant access to the remedy. See Lowry v. Parole and Probation Comm'n, 473 So. 2d 1248, 1249 (Fla. 1985) (where reasonable differences arise as to the meaning or application of a statute, the legislative intent must be the polestar of judicial construction); see generally Daniel R. Levine, Baiton v. Carnival Cruise Lines: Important decision in the evolution of

Florida's Whistle-Blower's Act, 70 Fla. B.J. 59, 61 n.11 (May 1996). The Second District's decision to instead "strictly" construe this Act cannot be reconciled with prior decisions of this and other Florida courts, or with the plain language of the Act.

**B. Florida's Legislature Provided Public Employees The Broadest Possible Protection When It Defined Protected Disclosures in the Whistle-Blower's Act**

1. Florida's Public Sector Whistle-Blower Act

Examining the plain language of the Whistle-Blower's Act, it becomes clear that the legislature intended to provide public sector employees with the broadest possible protection when disclosing wrongful acts by public officials. Florida's Whistle-Blower's Act provides protection to government employees who disclose:

(a) Any violation **or suspected violation** of any federal, state, or local law, rule, or regulation committed by an employee or agent of an agency or independent contractor which creates and presents a substantial and specific danger to the public's health, safety, or welfare.

(b) Any act **or suspected act** of gross mismanagement, **malfesance, misfesance**, gross waste of public funds, or gross neglect of duty committed by an employee or agent of an agency or independent contractor.

§112.3187(5), Fla. Stat. Under the statute, protected disclosures include, among others, suspected violations of law and suspected acts of misfesance. See id. It does not require actual knowledge that a law is being violated. Nor does it require actual knowledge of specific acts of misfesance.

No Florida appellate court has examined the precise boundaries of the types of disclosures the legislature intended to protect when it defined covered whistle-blower disclosures to include suspected acts of misfesance. Nevertheless, when



words in common usage are employed in a statute, they should be construed in their plain and ordinary sense. See Zuckerman v. Alter, 615 So. 2d 661, 663 (Fla. 1993). Applying the plain meaning to the terms “suspected” and “misfeasance,” it is clear the legislature could only have intended the public sector Whistle-Blower Act to provide the widest possible scope of protection.

In order to determine the plain and ordinary meaning that the legislature intended to ascribe to the terms used in this statute, it is appropriate to refer to a dictionary. See L.B. v. State, 700 So. 2d 370, 372 (Fla. 1997). “Misfeasance” is defined as “the performance of a lawful action in an illegal or improper manner.” Webster’s Ninth New Collegiate Dictionary 758 (1987). See also Black’s Law Dictionary, 956 (6th ed. 1990) (“[t]he improper performance of some act which a person may lawfully do”). Furthermore, to “suspect,” in this context, means “to imagine to exist or be true, likely or probable.” Webster’s Ninth New Collegiate Dictionary 758 (1987). Indeed, according to Black’s Law Dictionary, 1446 (6th ed. 1990), it means “[t]o have a slight or even vague idea concerning; not necessarily involving knowledge or belief or likelihood.”

Thus, the Florida Legislature did not choose to limit whistle-blower protection to only disclosures of actual misfeasance (that is, legal actions subsequently proved to have been performed improperly), but instead chose to include additional protection for public employees, like Mrs. Irven, who disclose suspected misfeasance (legal acts performed properly, but which an employee reasonably believes were performed improperly). It is difficult to imagine a broader definition for protected disclosures than the one set forth in Florida’s public sector

Whistle-Blower's Act.

2. Florida's Private Sector Whistle-Blower Act

That Florida's legislature intended to provide broad whistle-blower protection for government employees is further demonstrated by the fact that it enacted a different whistle-blower statute that employs narrower standards for private sector employees.<sup>4</sup> See §§ 448.102 to .105, Fla. Stat. (1997) (Florida's private sector whistle-blower act). Whereas the public sector act provides protection for a public employee's disclosure of suspected misfeasance, the private sector act provides no such protection. Under section 448.102, a private employer in Florida may not retaliate against an employee because an employee has:

- (1) Disclosed, or threatened to disclose, to any appropriate governmental agency, under oath, in writing, an activity, policy, or practice of the employer that is in violation of a law, rule, or regulation . . . .
- (2) Provided information to, or testified before, any appropriate governmental agency, person, or entity conducting an investigation, hearing, or inquiry into an alleged violation of a law, rule, or regulation by the employer.
- (3) Objected to, or refused to participate in, any activity, policy, or practice of the employer which is in violation of a law, rule, or regulation.

Hence, unlike Florida's public sector Act, the private sector act does not

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<sup>4</sup> Although many states provide whistle-blower protection to both public and private sector employees, only four states (including Florida) have enacted different whistle-blower statutes for public and private sector employees. See Ariz. Rev. Stat. Ann. § 38-532 (West 1996) (public) and Ariz. Rev. Stat. Ann. § 23-1501 (Supp. 1998) (private); Cal. Gov't Code § 12653 (West 1992 & Supp. 1999) (public) and Cal. Lab. Code § 1102.5 (West 1989) (private); and N.Y. Civ. Serv. Law § 75-b (McKinney 1983 & Supp. 1999) (public); N.Y. Lab. Law § 740 (McKinney 1988) (private).

provide any protection for disclosures of either: (1) suspected violations of a law, rule, or regulation, or (2) acts or suspected acts of gross mismanagement, malfeasance, misfeasance, gross waste of public funds, or gross neglect of duty. These additional protections for governmental employees in Florida must be given force and effect, which the Second District failed to do.

### 3. Whistle-Blower Statutes in Other Jurisdictions

As recently as twenty-five years ago, most states did not recognize the legitimacy of whistle-blowing at all. See Robert G. Vaughn, State Whistleblower Statutes and the Future of Whistleblower Protection, 51 Admin. L. Rev. 581, 581 (1999) (hereafter referred to as the “Vaughn Article”). Today, as is obvious from the chart on the next two pages, almost every state has enacted some form of a general application whistle-blower statute for public and/or private sector employees.

General Purpose State Whistle-Blower Statutes  
(from Vaughn Article at 582 n.3)

Alaska Stat. §§ 39.90.100 to .150 (Lexis 1998) (public)  
Ariz. Rev. Stat. Ann. § 38-532 (West 1996) (public)  
Ariz. Rev. Stat. Ann. § 23-1501 (Supp. 1998) (private)  
Cal. Gov't Code § 12653 (West 1992 & Supp. 1999) (public)  
Cal. Lab. Code § 1102.5 (West 1989) (private)  
Colo. Rev. Stat. §§ 24-50.5-102 to -105 (1998) (public)  
Conn. Gen. Stat. Ann. 31-51m (West 1997) (public and private)  
Del. Code Ann. tit. 29, § 5115 (1997) (public)  
D.C. Code Ann. §§ 1-616.1 to .3 (Supp. 1998) (public)  
Fla. Stat. Ann. §§ 112.3187 to .31895 (West 1992 & Supp. 1999) (public)  
Fla. Stat. Ann. §§ 448.102 to .105 (West 1995 & Supp. 1997) (private)  
Ga. Code Ann. § 45-1-4 (Supp. 1998) (public)  
Haw. Rev. Stat. §§ 378-61 to -69 (Supp. 1992) (public and private)  
Idaho Code §§ 6-2101 to -2109 (1998) (public)  
Ind. Code Ann. § 4-15-10-4 (Michie 1996) (public employees)  
Ind. Code Ann. § 36-1-8-8 (Michie 1993) (public)  
Iowa Code Ann. § 70A.28 (West Supp. 1998) (public)  
Ky. Rev. Stat. Ann. §§ 61.101 to .103 (Banks-Baldwin 1997) (public)  
La. Rev. Stat. Ann. § 42:1169 (West Supp. 1999) (public)  
La. Rev. Stat. Ann. § 23:967 (West 1998) (private)  
Me. Rev. Stat. Ann. tit. 26, §§ 831-836 (West 1988 & Supp. 1998) (public/private)  
Md. Code Ann., State Pers. & Pens. §§ 5-301 to -313 (1997) (public)  
Mass. Gen. Laws Ann. ch. 149 § 185 (West 1996 & Supp. 1998) (public)  
Mich. Comp. Laws Ann. §§ 15.361 to .369 (West 1994) (public and private)  
Minn. Stat. Ann. §§ 181.931 to .935 (West 1993 & Supp. 1999) (public/private)  
Miss. Code Ann. § 25-9-171 to -177 (1972) (public)  
Mo. Ann. Stat. § 105.055 (West 1997) (public)  
Mont. Code Ann. §§ 39-2-901 to -915 (1997) (private)  
Neb. Rev. Stat. §§ 81-2701 to -2710 (1994) (public)  
Nev. Rev. Stat. §§ 281.611 to .671 (1997) (public)  
N.H. Rev. Stat. Ann. §§ 275-E:1 to E:7 (Supp. 1998) (public and private)  
N.J. Stat. Ann. §§ 34:19-1 to -8 (West 1998 & Supp. 1998) (public and private)  
N.Y. Civ. Serv. Law § 75-b (McKinney 1983 & Supp. 1999) (public)  
N.Y. Lab. Law § 740 (McKinney 1988) (private)  
N.C. Gen. Stat. § 126-84 to -88 (1995 & Supp. 1996) (public)  
N.D. Cent. Code 34-11.1-04 to -08 (1987 & Supp. 1997) (public)  
Ohio Rev. Code Ann. § 4113.51 to .53 (Anderson 1998) (public and private)  
Okla. Stat. Ann. tit. 74, § 840-2.5 (West 1995 & Supp. 1999) (public)  
Or. Rev. Stat. §§ 659.505 to .545 (1997) (public)  
43 Pa. Cons. Stat. Ann. §§ 1421-1428 (West 1991 & Supp. 1998) (public)  
R.I. Gen. Laws §§ 28-50-1 to -9 (1995) (public and private)

However, very few of these states have incorporated the broad protection in their whistle-blower statutes that the Florida Legislature has provided for public sector employees in its Act. While the overwhelming majority of the states protect actual violations of law, see Vaughn Article at 588, only four states explicitly provide protection for suspected violations of law.<sup>5</sup> Because the Florida Legislature has explicitly drafted a public sector whistle-blower act that provides broader protection, on its face, than most whistle-blower statutes in other jurisdictions, it is clear it intended for this statute to be broadly construed to protect and encourage government employees in Florida who report suspicions of wrongdoing by government agencies or government officials. Yet the court below effectively limits the Act's protections to instances where actual wrongdoing is actually proven after-the-fact, not just reasonably suspected by the employee at the time of the disclosure.

As such, employees are now at risk that they can be fired for reporting concerns of suspected misfeasance, if an appellate court later rules there was no actual misfeasance. Simply put, the Second District's announced view of the Whistle-Blower's Act requires government employees to gamble that their suspicions will be proven correct in an after-the-fact inquiry. That is not, however,

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<sup>5</sup> See Vaughn Article at 603 n.72; see also Conn. Gen. Stat. Ann. 31-51m (West 1997); Del. Code Ann. tit. 29, § 5115 (1997); §§ 112.3187 to .31895, Fla. Stat. (1997); and Utah Code Ann. §§ 67-21-1 to -9 (1996). Furthermore, some states' statutes that appear to only protect disclosures of actual violations of law have nevertheless been broadly interpreted by the courts to encompass suspected violations as well. See, e.g., Cucchi v. New York City Off-Track Betting Corp., 818 F. Supp. 647, 656 (S.D.N.Y. 1993) (finding "the employee need not be right that a violation has in fact occurred but is protected if the employee reasonably believed that a violation had occurred").

what the legislature has provided in protecting public employees from retaliation for disclosing suspected wrongdoing.

**C. The Second District Erred When It Ruled, As A Matter Of Law, That Mrs. Irven’s First Two Communications Were Not Whistle-Blower Acts**

In taking away the jury’s verdict for Mrs. Irven under the Act, the Second District portrays Mrs. Irven’s “chief complaint” as a “transfer of venue” matter, and concludes that a “complaint about a legally appropriate court approved venue transfer” is not protected by the Act. See Irven, 724 So. 2d at 704. However, the court’s rationale for disregarding the jury’s verdict is misplaced for three reasons: first, Mrs. Irven’s “chief complaint” was not about venue, it was about concerns for the welfare of SS, for whose safety she was responsible; second, even if the venue issue were Mrs. Irven’s “chief” complaint, the court’s directed verdict was improper because HRS did, indeed, both misstate the county of SS’s “usual” residence and violate the venue rules, as Mr. Reis conceded at trial; and third, even if HRS did not violate the venue rules, Mrs. Irven’s disclosures are still protected because her reasonable belief that HRS’s actions were improper qualifies as “suspected misfeasance.” As shown below, each of these reasons provided an ample basis for the jury’s finding that HRS violated the Act.

At the outset, it must be emphasized that the Act does not merely apply to protect an employee from being fired because of the “chief complaint” voiced by the employee. It protects an employee from being fired because the employee raised concerns over any suspected misfeasance by the governmental employer. That is exactly what happened here.

Quite apart from this, when one considers Mrs. Irven's whistle-blowing memos read as a whole, and considers all of the record facts surrounding these memos in the light most favorable to her, it is clear her "chief complaint" did not concern venue. It concerned the health, safety, and welfare of a sexually abused four-year-old child under the care of HRS. HRS assigned Mrs. Irven with the responsibility for overseeing this child abuse case even though SS lived 250 miles away! There was no way Mrs. Irven could visit this child; no way she could confirm whether the child was receiving the government services she was entitled to receive, such as proper medical and dental care; and no way she could determine whether the grandmother was an adequate guardian. In short, there was no way Mrs. Irven could properly do her job under these circumstances. This was the core of the concerns Mrs. Irven expressed in her whistleblower memos.

The legitimacy of her concerns is highlighted by one simple but undisputed fact. When Mrs. Irven received the SS case file, the last entry by Ms. Halla indicated she had "concern for the child in the grandmother's care." R7 Pl. Ex. 49. Mrs. Halla questioned the suitability of HRS's placement of SS with the grandmother after Ms. Halla had learned the grandmother had, in the past, placed SS at risk by allowing SS to have extended unsupervised visits with the mother--sometimes as long as several weeks--even though the court ordered the mother could have only supervised visits with SS. R7 Pl. Ex. 49.

Because SS was living with her grandmother in Nassau County whereas Mrs. Irven was based hundreds of miles away, Mrs. Irven could not adequately investigate the risk raised by Ms. Halla. It must be remembered that Ms. Halla

worked for HRS in Nassau County, the county where SS lived and where the court placed SS in custody of the grandmother; whereas Mrs. Irven worked for HRS in Polk County, where the mother moved after the court removed SS from her custody.

Second, even if Mrs. Irven's disclosures did chiefly address the issue of the transfer of venue from the county where the child herself was in custody to the county where the mother from whom she had been removed lived, her point was well taken. Rule 8.205(b), Florida Rule of Juvenile Procedure, provides, in relevant part,

The court may transfer any case . . . before adjudication where witnesses are available in another jurisdiction, to the circuit court for the county in which is located the domicile or usual residence of the child or such other circuit as the court may determine to be for the best interest of the child and to promote the efficient administration of justice.

In this case, SS was in the temporary legal custody of the grandmother in Nassau County, not the mother in Polk County. Indeed, at the insistence and recommendation of HRS in its emergency shelter petition, the court did not allow SS to even visit the mother in Polk County without third-party supervision present at all times. Although both the mother and HRS took the absurd position in their respective venue transfer motions that SS's "usual" residence nevertheless was in Polk County, neither party offered any authority or explanation to support such an allegation. In fact, the undisputed record disclosed that SS had never lived in Polk County in her entire life, and was legally precluded by court order from living in Polk County with her mother.

Furthermore, HRS attorney Reis admitted at trial that HRS made a mistake



when they alleged SS “usually” resided in Polk County, T9 1301, and admitted HRS had not complied with the rules of juvenile procedure. T9 1325. Attorney Reis also conceded he did not correct the record because he did not want to admit that HRS had made a mistake. T9 1304-05.

Ultimately, of course, venue was transferred back to Nassau County, where SS was living, exactly as Mrs. Irven had urged should be done. Yet, even though HRS admitted at trial that Mrs. Irven’s memos disclosed actual violations of the procedure rules and actual misfeasance by HRS, the Second District nevertheless concluded it was appropriate for HRS to fire Mrs. Irven for disclosing the violations and misfeasance.

Finally, and in all events, even if the Second District’s after-the-fact, detailed legal analysis of the venue rules is entirely correct, and Mrs. Irven’s venue concerns were entirely misplaced, her disclosures are still protected under the Act--if Mrs. Irven reasonably suspected HRS employees committed acts of misfeasance (that is, improperly performed a lawful act), as the jury found to be the case. The issue is not, as the Second District would have it, whether Mrs. Irven was right or wrong in her concerns that venue was improper in Polk County because the child did not live there. As has been clearly demonstrated herein, her disclosures were still protected, as a matter of law, under the express terms of the Act--if Mrs. Irven reasonably believed HRS violated a law, rule, or regulation, and Mrs. Irven reasonably believed the violation would create “a substantial and specific danger to the public’s health, safety, or welfare.” Given the facts present in this case, Mrs. Irven’s belief that HRS violated the procedure rules was entirely reasonable and the jury was entitled

to so find.

In sum, the jury's verdict was quite proper and should not have been disturbed. Instead, in the face of the legislature's clear and unambiguous waiver of sovereign immunity in the Whistle-Blower's Act, the Second District held the waiver had to be "strictly construed," and that Mrs. Irven could be fired in retaliation for raising her concerns about HRS's handling of this child abuse case. That decision and its implications completely eviscerates the Whistle-Blower's Act. It will inevitably cause public sector employees to hesitate to report actual or suspected violations of law or other improper acts by public officials, for fear that they might lose their jobs because of those reports—exactly as happened to Karen Irven in this case. The decision must be reversed and the jury's finding of a violation of the Act must be reinstated.

**D. The Second District Erred, as a Matter of Law, By Refusing To Consider Mrs. Irven’s Second Two Whistle-Blower Communications In Its Analysis**

The Second District rejected out-of-hand, without any discussion or explanation whatsoever, Mrs. Irven’s second two whistle-blower communications, that were properly alleged in the complaint, stating:

It is clear, however, that all of her alleged “whistle-blowing” activity grew out of and was premised upon what she alleges were her first and second acts of “whistle-blowing.” If those two actions do not fall within the statutory definition of “whistle-blowing,” none of her acts do.

Irven, 724 So. 2d at 700. That ruling has no basis in fact or law.

Mrs. Irven’s third whistle-blower communication, an HRS employee grievance, identified new and additional misfeasance by HRS in the form of Ms. Fuchs’s unfair treatment of Mrs. Irven. R1 76. This unfair treatment, which began after Mrs. Irven raised her concerns about HRS’s handling of the SS abuse case, included an allegation that Mrs. Irven had been ‘targeted’ by HRS administration. R1 80. Mrs. Irven’s fourth whistle-blower communication, a letter from Mrs. Irven’s attorney, Adrienne Fechter, to the HRS District Director also disclosed new and additional wrongdoing by HRS, disclosing that Mr. Reis and Ms. Fuchs pressured Mrs. Irven to sign, under penalty of perjury, an amended petition in the SS case. R1 82. Mrs. Irven repeatedly told them she did not have the required first-hand knowledge needed to sign such a petition under oath. See id.; see also T2 320-21. Nevertheless, Mr. Reis criticized Mrs. Irven for refusing to perjure herself by signing an amended petition under oath, characterizing her attitude as “defiant and uncooperative.” R1 82 n.3; see also T4 643; R7 Def. Ex. 27.

At a minimum these two writings disclose, on their face, allegations of suspected misfeasance that are completely separate and distinct from the wrongdoing identified in Mrs. Irven's first two whistle-blowing memoranda. In particular, the Fechter letter plainly rose to the level of whistle-blowing because it identified HRS's improper pressure on Mrs. Irven to commit perjury by signing, under oath, an amended petition in the SS case.

Firing someone for refusing to commit perjury has been recognized in Florida as stating a claim under the Private Sector Whistle-blower Statute. See Baiton v. Carnival Cruise Lines, Inc., 661 So. 2d 313, 316 (Fla. 3d DCA 1995). Baiton, a seaman employed by Carnival, agreed to testify as a witness for a fellow seaman who filed a lawsuit against Carnival. See id. at 314. Baiton alleged that Carnival tried to force him to give an untrue statement in the fellow seaman's case and, when Baiton refused, Carnival discharged him. See id. The court held that Baiton's whistle-blower action under section 448.102(3), Florida Statutes (1993), stated a claim for wrongful discharge, observing that "allowing retaliation against an employee for . . . refusing to give false testimony strikes at the heart of the adjudicatory process." Id. at 315.

Like Mr. Baiton and Mrs. Irven, most lay people take very seriously any representations they make to a court. And quite properly so, particularly in a case where the welfare of a young child is at stake. For HRS to attempt to coerce Mrs. Irven to make sworn representations to a trial court, knowing these representations were not consistent with the facts as she believed them to be, and then to fire her because she would not "cooperate" and do that, is outrageous. At a minimum, it is

certainly the type of retaliatory conduct the legislature intended to prohibit.

Because Mrs. Irven's grievance form and the Fechter letter both identified wrongdoing by HRS that was wholly separate from the wrongdoing identified in Mrs. Irven's first two whistle-blower memos, it was error for the Second District to simply reject these communications as a matter of law. The jury properly considered all of the evidence and found that HRS violated the Act in retaliation for Mrs. Irven's disclosures to HRS. Because the jury was entitled to so find, the decision of the Second District must be reversed and the jury's finding of a violation of the Act must be reinstated.

## **II. THE QUESTION OF WHETHER MRS. IRVEN REASONABLY BELIEVED SHE WAS DISCLOSING SUSPECTED VIOLATIONS OF LAW OR ACTS OF MISFEASANCE WAS PROPERLY RESOLVED BY THE JURY**

Even under a strict construction of the Whistle-Blower Act, the Second District erred by directing a verdict for HRS because the Act, on its face, protects an employee's reasonable disclosure of suspected wrongful conduct. As this court has stated, "[i]f the evidence raises any issue of material fact, if it is conflicting, if it will permit different reasonable inferences, or if it tends to prove the issues, it should be submitted to the jury as a question of fact to be determined by it." Moore v. Morris, 475 So. 2d 666, 668 (Fla. 1985). In this case, viewing all reasonable inferences in the light most favorable to Mrs. Irven, the question of whether Mrs. Irven's suspicion that HRS committed wrongful acts was reasonable implicated fact questions that simply could not be resolved by the appellate court as a matter of law. These fact questions were properly resolved by the jury in this case.

At a minimum, there was ample evidence to support Mrs. Irven's reasonable belief that HRS committed acts of misfeasance, that is, legal acts performed properly performed by HRS, but which Mrs. Irven reasonably believed were performed improperly. First, HRS originally filed sworn pleadings and affidavits in the SS case that were completely contradicted by its later allegation that SS's "usual residence" was in Polk County. Second, HRS attorney Reis admitted HRS was wrong when it stated in a memo to the court in Nassau County that SS resided in Polk County and admitted HRS violated the juvenile procedure rules. Third, Mr. Reis admitted he did not seek to have the SS case returned to Nassau County solely because he did not want HRS to look bad. And finally, the SS case was ultimately returned to Nassau County, just as Mrs. Irven had originally requested. Viewing those facts and all reasonable inferences in Mrs. Irven's favor, the Second District could not say, as a matter of law, that Mrs. Irven could not have reasonably suspected misfeasance on the part of HRS in the handling of the SS case.

It bears emphasis once again that it is irrelevant whether any HRS employee actually violated any law or performed any improper acts. It matters only that Mrs. Irven reasonably believed that HRS employees may have violated a law or may have performed a legal act improperly. Nevertheless, the Second District fashioned a test to determine whether Mrs. Irven's whistle-blowing communications were protected by the Act that cannot be supported by either this Court's decisions or the plain language of the statute:

We conclude that intradepartmental complaints regarding the progress or process of a matter subject to judicial supervision and determination cannot equate to "whistle-blower" acts absent evidence of fraudulent or dishonest

behavior in the proceedings.

Irven, 724 So. 2d at 704.

In the end, it was wrong for the Second District to order the entry of a directed verdict in favor of HRS even under the standard it announced. In this case, as demonstrated herein, there was evidence of dishonest behavior in the proceedings. There were contradictory sworn pleadings and affidavits presented by HRS; and HRS attorney Reis admitted HRS was wrong when it stated in a memo to the court in Nassau County that SS resided in Polk County. Even under the Second District's erroneous standard, there were fact issues for the jury which were inappropriate for resolution by directed verdict.

### CONCLUSION

This Court should vacate the decision below, and remand this case with instructions to reinstate the jury's verdict and the Final Judgment of the trial court.

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing Amended Initial Brief has been furnished by U.S. Mail to David H. McClain, McClain & Associates, P.A., 1000 North Ashley Drive, Suite 105, Tampa, FL 33602 on this 13th day of October, 1999.

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**CERTIFICATE OF TYPE SIZE AND STYLE**

I HEREBY CERTIFY that the type size and style used throughout this Amended Initial Brief of Petitioner Karen Irven was the 14 Point Times New Roman Proportionally-Spaced Font.

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