IN THE SUPREME COURT OF FLORIDA

KAREN IRVEN,

Plaintiff/Petitioner,

v.

Supreme Court Case No. 94,926

DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES,

Second DCA Case No. 97-05373

Defendant/Respondent.
_____/

REPLY BRIEF OF PETITIONER KAREN IRVEN

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

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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. HRS Fails To State All Relevant Facts And Inferences In The Light Most Favorable To Mrs. Irven.

As a threshold matter, Mrs. Irven disputes HRS's characterization of many of the "facts" it relies on in its answer brief. HRS ignores the fact that the jury and the Second District both determined that HRS fired Mrs. Irven for her disclosures in the S.S. case, and not for any of the pretextual reasons HRS offered at trial and rehashed both in its answer brief here and on appeal in the Second District. The jury--six citizens of Polk County--determined that Mrs. Irven "was dismissed . . . as a reprisal for disclosing information under the Whistle-Blower's Act," R6 1126-27 (App. C), and the Second District accepted that finding. See Department of Health And Rehabilitative Servs. v. Irven, 724 So. 2d 698, 699 (Fla. 2d DCA 1999). Accordingly, HRS must construe all facts and all reasonable inferences arising from those facts in the light most favorable to Mrs. Irven. See Teare v. Local Union No. 295, 98 So. 2d 79 (Fla. 1957); Hunzinger Const. Corp. v. Quarles & Brady General Partnership, 735 So. 2d 589, 597 (Fla. 4th DCA 1999).

HRS also recites several pages of facts supporting its contention below that

Mrs. Irven's claims were barred by election of remedies. See AB at 9-12. However, the trial court rejected the election of remedies argument below, and the Second District affirmed, finding the issue was not preserved for review. See Irven, 724 So. at 699. HRS failed to raise election of remedies as an argument in its brief and certainly has not demonstrated any error in the Second District's holding that HRS did not properly preserve the issue for review. Hence, HRS has waived its election of remedies argument.

B. The Whistle-Blower's Act Cannot Be Both Strictly Construed As A Waiver Of Sovereign Immunity And Liberally Construed To Provide Employees An Access To A Remedy.

The Second District concluded that the Whistle-Blower's Act ("the Act"), as a waiver of sovereign immunity, must be strictly construed and applied, and therefore Mrs. Irven's written disclosures regarding HRS misconduct in the S.S. case "cannot equate to 'whistle-blower' acts absent evidence of fraudulent or dishonest behavior in the proceedings." Id. at 704. This narrow view of the Act taken by the Second District completely ignores the clear language of the statute which expressly protects "suspected" wrongdoing, see §§ 112.3187(4), (5), and fails to implement the legislature's stated intent--to protect public sector employees from retaliation by their employers for reporting suspected wrongdoing in government. As this Court explicitly held in Martin County, the Act--as a remedial

statute--must be liberally construed to give employees access to a remedy. See Martin County v. Edenfield, 609 So. 2d 27, 29 (Fla. 1992).

HRS asserts the Second District's holding that "[a] protection against acts not clearly delineated as prohibited or protected must not be implied," Irven, 724 So. 2d at 699, in no way conflicts with this Court's holding in Martin County. See AB at 19. Nothing could be further from the truth. In the first place, protection against retaliatory discharge for whistle-blowing is clearly delineated as prohibited by the Act. Moreover, in order to provide public employees with a liberal access to this remedy, the Martin County Court actually granted whistle-blower relief to a plaintiff for acts that were not clearly delineated as protected.

The plaintiff in Martin County, a government worker who was instructed by his supervisor to use a county truck to deliver sod to the supervisor's private residence, admitted his involvement in the wrongdoing and implicated his supervisor. See Martin County, 609 So. 2d at 29. After being given a lesser job, the employee sought relief under the Act. See id. 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 id.

Obviously, the statute did not "clearly delineate" protection for employees who disclose wrongful acts in which they actually participate. Indeed, after the

Martin County case was decided, the legislature amended the statute to eliminate protection for employees who participate in the wrongdoing they disclose. See Ch. 92-316, §7 at 3019, Laws of Fla. Nevertheless, this Court in Martin County held exactly opposite to the Second District's decision below, granting relief to an employee for acts not clearly delineated as protected, and declaring that the Act "should be construed liberally in favor of granting access to the remedy." Martin County, 609 So. 2d at 29.

In point of fact, HRS cannot reconcile this Court's "liberal construction" standard in Martin County with the Second District's "strict construction" standard here, because the two are simply irreconcilable. It is not possible to carry out the legislature's intent to provide broad whistle-blower protection to all government employees, while strictly construing the waiver of sovereign immunity for whistle-blower claims. The Second District's decision guts the Act, a point made clear by several courts in other jurisdictions.

For example, in Texas Department of Human Services v. Green, 855 S.W.2d 136 (Tex. App. 1993), the court identified whistle-blower statutes as remedial statutes that should be liberally construed "to effectuate the true legislative purpose." Id. at 142. In discussing whether sovereign immunity bars whistle-blower actions, the court stated that when the legislature has chosen to protect

public sector employees from retaliatory firing, "[t]he judiciary cannot, without hypocrisy, defer to the legislature the decision to protect whistleblowers, only to later eviscerate the legislature's effort to do so." Id. at 143.

Similarly, in Southern California Rapid Transit District v. Superior Court of Los Angeles County, 30 Cal. App. 4th 713 (Cal. App. 1994), the court held that to recognize a discharge in violation of a whistleblower statute as a discretionary act to which immunity applies would "emasculate" the whistleblower statute and contravene its language and purpose. See id. at 726. See also Janklow v. Minnesota Bd. of Exam'rs for Nursing Home Adm'rs, 552 N.W.2d 711, 718 (Minn. 1996) (the state cannot claim the protection of statutory immunity to protect it from claims under a whistle-blower act because "to do so would contravene the legislature's decision to include the state in the list of employers who must abide by the Act's provisions").

These cases are entirely consistent with this Court's Martin County imperative that the Act must be liberally construed in order to effectuate the intent of Florida's legislature. It simply makes no sense to expect a government employee to step forward and report suspected wrongdoing in government, as Mrs. Irven did here, and then to slam the courthouse door shut when that employee seeks a legitimate remedy under the law for retaliatory discharge. The Florida Legislature

has demonstrated a strong commitment to protect the rights of all citizens by encouraging government employees to step forward and report wrongdoing. "Society can never eradicate wrongdoing, but it can shield from retaliation those citizens who, urged on by their integrity and social responsibility, speak out to protect its well-being." Winters v. Houston Chronicle Publishing Co., 795 S.W.2d 723, 730 (Tex. 1990) (Doggett, J., concurring). Although this Court's decision in Martin County firmly reinforced the shield from retaliation provided by the legislature to protect Florida's governmental employees, the Second District's decision below effectively removes that shield and eliminates that protection.

In sum, HRS's attempts to harmonize this Court's Martin County decision with the Irven decision below, see AB at 18-19, simply fail. When you strictly construe a statute after finding a waiver of sovereign immunity, as the Second District holds must be done in this case, you are not granting liberal access to a remedy, as this Court requires here under Martin County.

C. HRS's Reliance On Section 768.28 Is Misplaced.

HRS attempts to bolster the Second District's decision that waivers of sovereign immunity must be strictly construed by relying on cases interpreting Florida's statutory waiver of sovereign immunity for tort actions under section 768.28, Florida Statutes. See AB at 19-20. However, section 768.28 and the Act

are two entirely different types of sovereign immunity waiver. Section 768.28 waives sovereign immunity for all common law causes of action—but only under the limited circumstances expressly defined in the statute. In contrast, the Act expressly creates a new statutory cause of action for retaliatory employment actions taken by public agencies, and waives sovereign immunity for that new cause of action.

Furthermore, the Act expressly prohibits the retaliatory firing of a government employee who reports suspected wrongdoing--an action that had previously been permitted under Florida law. By the plain language of the statute, the legislature's stated objective was to uncover corruption and sloth in government. HRS would have this Court view the firing of Mrs. Irven as simply a "discretionary act" to which sovereign immunity applies, even though the discharge was incontestably in retaliation for Mrs. Irven's written disclosures concerning the S.S. case. That view completely emasculates the entire effect and purpose of the Act, which the legislature intended to supercede the judicially-created doctrine of at-will employment.

It bears noting that, had S.S. actually been abused as a result of the HRS wrongdoing that Mrs. Irven had disclosed, S.S. would have had a cause of action under section 768.28 against HRS for its negligent conduct --even under the strict

construction of that statute. See State of Florida, Dept. of Health and Rehabilitative Servs. v. Yamuni, 529 So. 2d 258 (Fla. 1988) (finding Florida waived sovereign immunity under section 768.28 for liability arising out of the negligent conduct of an HRS case worker). Mrs. Irven disclosed suspected wrongdoing by HRS in order to prevent any further harm to S.S. Yet, instead of trying to address those issues, HRS sought to use the shield of sovereign immunity to protect its retaliatory discharge of Mrs. Irven and to protect the wrongful acts of HRS employees--employees whose actions put S.S. at risk in the first instance.

HRS would have this Court affirm a strange result indeed: one that would invoke sovereign immunity to deny whistle-blower protection to Mrs. Irven for reporting wrongful acts by HRS workers--before any abuse occurs, but then waive sovereign immunity for a claim ultimately brought by the abused child against the HRS for the negligence of its workers. The Second District's decision requiring strict construction of the Act simply cannot stand together with this Court's requirement in Martin County that public employees be granted liberal access to this statutory remedy against retaliatory discharge for whistle-blowing.

D. Florida's Whistle-Blower's Act Does Not Protect Every Minor Employee Disagreement, But Does Protect Disclosures Of Suspected Wrongdoing In Government.

HRS asserts this Court must deny Mrs. Irven protection under the Act, as a

matter of law, because "[t]o accept [her memos] as 'whistle-blowing' would make any and every disagreement within an agency the potential basis of a whistle-blower action." AB at 24. HRS is simply wrong. Not every "disagreement" comes within the statute--but the reporting of concerns of suspected wrongdoing clearly does. That is what is at issue here.

HRS continually tries to trivialize Mrs. Irven's concerns by characterizing her disclosures as a technical disagreement over "venue." Plainly, her core concern was not about venue, but was about protecting a sexually abused 4-year-old child. Mrs. Irven had been assigned to handle this child sex abuse case, even though the previous HRS case worker explicitly recorded in the HRS file that she had "concern for the child in the grandmother's care." R7 Pl. Ex. 49 (App. F-49). Mrs. Irven told HRS she could not investigate those concerns because the child was physically located in a county that was 250 miles away. As her second whistle-blower memo clearly states:

> 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 asses (sic) the safety, risk, or well-being of the child, located in Nassau [County], or act as the case manager.

R1 at 75 (App. B).

Mrs. Irven, like most government employees, is not a lawyer. She should not

be deemed to lack protection under the Act simply because she may not have as clearly identified her concerns as a lawyer might have done. The question here is: did Mrs. Irven's written memos put HRS on notice of a suspected wrongdoing that needed to be addressed, and the answer is she incontestably did so.

Mrs. Irven, a Child Protective Investigator, had been assigned by HRS to oversee this case involving a child that had previously been sheltered, but who lived with her grandmother half a state away. Mrs. Irven believed she could neither protect this child nor investigate this case--which were her jobs as the assigned HRS child protective investigator. Consequently, she wrote a memo to her supervisor and to the HRS in-house counsel, providing written notice to HRS that she had concerns that: (1) HRS made false representations to the court in its motion to transfer in the S.S. case, (2) HRS violated a rule of juvenile procedure, and (3) as a result of the actions of HRS, a four-year-old child sex abuse victim had been put at risk of inadequate protection by HRS against further abuse.

At trial here, HRS attorney Reis admitted HRS made false representations to the court and violated a rule of juvenile procedure. T9 1301, 1325. If that's not sufficient to state a claim for whistle-blowing, then no government employee will ever report any suspected wrongdoing for fear they will be afforded no protection from retaliation.

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.

A. Mrs. Irven's Whistle-Blower Memos Identify Specific Acts of Suspected Wrongdoing By HRS.

HRS claims "[t]here is absolutely no allegation in any of [Mrs. Irven's] four alleged 'whistle-blowing' documents that HRS, itself, acted in a wrongful manner." AB at 30. That contention is demonstrated to be wrong by simply reading the memos themselves, as explained in our initial brief. See IB at 37-41. Those memos allege false statements made in a judicial proceeding involving a child victim of sex abuse--false statements which HRS later admitted it made to the court. That is, by any view, alleging that HRS acted in a wrongful manner.

Beyond that, however, when Mrs. Irven's memos are considered in the context in which they were written, and viewed in the light most favorable to her, it is plain that she was expressing legitimate concerns that HRS's actions were jeopardizing the safety of S.S. For example, Mrs. Irven disclosed in her first memo that she could not adequately protect S.S. and investigate the case because "the child resides in Nassau County." R1 74 (App. B). At trial, several other HRS Child Protective Investigators testified, without contradiction, that they agreed that a Nassau County CPI was necessary to assure the safety of a child abuse victim

residing in Nassau County, and that a Polk County CPI could not adequately assure the victim's safety. See T6 862-63 (Leasure); T7 965-66 (Hall); T8 1084-85 (Webb).

HRS also alleges Mrs. Irven never complained of any "pressure" by HRS to have her sign an amended petition containing false information in the S.S. case, even though Mrs. Irven did not have a good faith belief of the facts they expected her to attest to under oath. Instead, HRS contends she complained only that Mr. Reis and Ms. Fuchs "directed" her to sign such a petition. Besides the obvious fact that being "directed" to sign a false statement under oath by one's superiors in a work environment is by itself pressure, there was testimony at trial by one of Mrs. Irven's HRS co-workers that Ms. Fuchs pressured Mrs. Irven to sign the petition in a heated argument. See T8 1083.

B. Mrs. Irven's Reasonable Belief That HRS Committed Wrongdoing Is Confirmed By HRS's Own Admissions.

HRS also contends Mrs. Irven's initial brief "took out of context" Mr. Reis's admissions that (1) HRS incorrectly stated in its motion to transfer that S.S. was a "usual" resident of Polk County, and (2) that Reis nevertheless did not seek to have the case transferred back to Nassau County because he "did not want us to look like the Department did not know what they were doing." See AB at 30 n.3. Mr. Reis's own testimony, especially when viewed in the light most favorable to Mrs.

Irven, demonstrates that Mrs. Irven correctly recited his admission:

> Q. . . . you know that the S.S. court file contained an incorrect fact that S.S. usually--usually resided in Polk County don't you.
>
> A. Yes.

T9 at 1300.

It bears emphasis, however, that even though Mr. Reis admits HRS relied on false information in its motion to transfer, the question here is not whether HRS actually misled the courts in Nassau and Polk Counties. The question is whether Mrs. Irven reasonably suspected that HRS misled the courts by HRS's admitted misstatements and, as a result, whether Mrs. Irven reasonably suspected those misstatements by HRS placed the health, safety, and welfare of S.S. at risk.

Here, there is simply no doubt that is the case. The jury heard the evidence and determined HRS fired Mrs. Irven for reporting suspected wrongdoing by HRS in the S.S. case. HRS expressly admitted at trial it did, in fact, commit such wrongdoing in the S.S. case. HRS's assertion that Mrs. Irven's suspicions of HRS wrongdoing were "patently unreasonable," AB at 36, is not supported by the record before this Court.

C. HRS's Actions In Seeking To Transfer The S.S. Case To Polk County Were Not Discretionary Because Lawyers Have No Discretion To Make False Representations To A Court.

HRS contends that the information Mrs. Irven disclosed in her first two whistle-blowing memos "was subject to the discretion and direction of the HRS attorneys handling the matter before the courts, and ultimately was subject to the discretion of the courts," and therefore "her disclosures cannot be 'whistle-blowing' under the Act." AB at 26. That one outrageous statement demonstrates the primary flaw in HRS's argument and the flaw in the Second District's decision.

The HRS attorneys did not have the discretion to seek to transfer the S.S. case based on a sworn affidavit by HRS that the "usual" residence of S.S. was in Polk County--when HRS knew that statement was false and highly misleading. At a minimum, the HRS attorneys had an obligation to disclose to the court in its motion the additional facts that (1) S.S. had been removed by court order from the mother in Polk County, and (2) she had been temporarily placed with the grandmother in Nassau County. The court could then determine whether these facts were material to its discretionary decision on whether to transfer the case.

Lawyers, as officers of the court, do not have the discretion to present the court with "partial" facts. Indeed, the Rules of Professional Conduct of The Florida Bar "require an attorney to provide full information to the trial court such that the court has all necessary information to determine the issue presented to it." Garcia v. Manning, 717 So. 2d 59, 60 (Fla. 3d DCA 1998) (citing Dilallo By and Through

Dilallo v. Riding Safely, Inc., 687 So. 2d 353, 355 (Fla. 4th DCA 1997)).

As Mr. Reis admitted at trial, that was not done here. To the contrary, the record conclusively demonstrates that the trial court in Nassau County did not make its determination based on the presentation of full and accurate facts because, as Mr. Reis admitted at trial, HRS's motion to the court to transfer the S.S. case to Polk County was based, in part, on the false assertion that S.S. "usually" resided in Polk County. Furthermore, after Mrs. Irven disclosed the error to Mr. Reis, he still did not inform the court of the error because he "did not want us to look like the Department did not know what they were doing." T9 1304-05.

HRS continues to argue here, without citing any authority, that a sheltered minor child's "usual" residence is the county where the mother resides, and not the county where the child actually resides—even though the child is now precluded by court order from living with the mother. Even if that technically were true, HRS had an obligation to fully inform the Court about the circumstances of S.S.'s residence, so the Court could make a fully informed decision.

CONCLUSION

For the reasons stated herein and in the Petitioner's Initial Brief, 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.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply 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 30th day of November, 1999.

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CERTIFICATE OF TYPE SIZE AND STYLE

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

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