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.

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ANSWER BRIEF OF RESPONDENT, DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES

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

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STATEMENT OF SIZE AND STYLE OF TYPE

This is to certify that the size and style of type used throughout Appellant's Initial Brief is Courier 12 point type, a font that is not proportionately spaced.

INTRODUCTION

This Answer Brief is respectfully submitted by Respondent, State of Florida, Department of HRS, the defendant below, hereinafter referred to as "HRS" or "respondent." Petitioner, Mrs. Karen Irven, was the plaintiff below and will be referred to as "Mrs. Irven" or "petitioner." The Florida "Whistle-Blower's Act," Sections 112.3187-112.31895, Florida Statutes (1993), 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fifty-nine (59) Defendant's exhibits that were marked for identification as evidence and either admitted, proffered, or withdrawn by the parties at trial.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 "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 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).

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 and page number where necessary.

STATEMENT OF THE CASE

This cause of action was brought by Mrs. Irven to determine whether her dismissal from HRS was retaliation against her for her alleged "whistle-blowing."

On October 31, 1995, Mrs. Irven filed her complaint in the instant action alleging as "whistle-blowing" events four documents: (1) an interoffice memorandum of February 7, 1994, (2) a letter to her new immediate supervisor, Ms. Fuchs, of February 20, 1994, (3) an employee grievance of April 18, 1994 regarding a counseling memorandum, and (4) a June 21, 1994, letter from her attorney in support of the same grievance. R1 1-20. Mrs. Irven filed an amended complaint on July 31, 1996. R1 64-85 (App. B). HRS answered September 13, 1996. R1 86-88.

On April 10, 1997, HRS filed a Motion for Summary Judgment, arguing that Mrs. Irven's memoranda do not reach whistle-blower status, and election of remedies. R2 215-216. A memorandum in support of this motion was filed April 24, 1997. R4 611-662. The motion was denied on September 26, 1997. R6 968.

Trial was begun on November 3, 1997, and on the same day, HRS moved in limine to prevent the consideration of any matters that had already been resolved pursuant to Section 112.3187(11), Florida Statutes (1993), Election of Remedies. T1 29-32. The motion was denied. T1 33.

On November 7, 1997, HRS moved for a directed verdict arguing sovereign immunity, and election of remedies. T8 1098-1101. The election of remedies issue was discussed extensively by Mrs. Irven's counsel and the court. T8 1112-1125. The motion for directed verdict was denied. T8 1126. A jury verdict for Mrs. Irven was returned November 12, 1997. T12 1883.

HRS moved for a new trial and renewed its motion for a directed verdict on November 18, 1997, R6 1123-1125, arguing: (1) that Mrs. Irven had already unsuccessfully grieved her "below" appraisals, (2) that Mrs. Irven's memoranda did not reach to the level of "whistle-blowing," and (3) that the "Whistle-Blower's Act" did not expressly and explicitly waive sovereign immunity. The court denied these motions December 2, 1997. R6 1128, 1129.

Final judgment in favor of Mrs. Irven was entered November 25, 1997. R6 1126-1127.

In its appeal to the Second District Court of Appeal, HRS raised three issues: (1) that the "Whistle-Blower's Act" did not waive sovereign immunity under the

Florida Constitution, (2) that Mrs. Irven's memoranda did not reach whistle-blower status, and (3) that Mrs. Irven's election of remedies foreclosed her complaint for and evidence of "whistle-blowing." See, Department of Health and Rehabilitative Servs. v. Irven, 724 So.2d 698 (Fla. 2d DCA 1999) (App. A).

The Second District held that Mrs. Irven's complaint about a "legally appropriate court-approved venue transfer in a child dependency proceeding did not fall within specifics of disclosure of information sought to be protected by the 'Whistle-Blower's Act.'" Id.

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.

As to the third issue, election of remedies, the Second District was unconvinced that the issue had been preserved for review. Id. at 699.

Regarding sovereign immunity, the Court held that the statute clearly and unequivocally waived sovereign immunity. The Second District further noted that this waiver must be limited to acts or conduct clearly and unequivocally prohibited or protected against, and that there must be no implication of protection for acts not clearly delineated as prohibited or protected. Id.

Mrs. Irven petitioned this Court for review of the Second District's opinion asserting conflict with Martin County v. Edenfield, 609 So.2d 27 (Fla. 1992),

wherein this Court held that 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 review August 26, 1999.

STATEMENT OF THE FACTS

Mrs. Irven was employed by the Department of HRS in August of 1990, T2 246, and was terminated on August 25, 1994, as a Child Protective Investigator (CPI) with the Department of HRS, after receiving two "below" appraisal ratings of June 8, 1994, and August 8, 1994. R7 Def. Ex. 38 at 36 and 70 (App. G-38L, Q).

Before her final two "below" appraisals, Mrs. Irven received six employee appraisals. R7 Def. Ex. 38 at 15-26 (App. G-38D-H). Ms. Pat Lawler was Mrs. Irven's rater for the fourth, fifth, and sixth appraisals for which she rated Mrs. Irven "achieves," "exceeds," and "exceeds." R7 Def. Ex. 38 at 15-26 (App. G-38D-H). Ms. Lawler signed her final "exceeds" appraisal of Mrs. Irven as her rater on February 17, 1994, ten days after Mrs. Irven wrote her first alleged 'whistle-blowing" memorandum of February 7, 1994. R7 Def. Ex. 38 at 25 (App. 38H).

Further, Ms. Linda Fuchs, who rated Mrs. Irven "below" on two appraisals, June 8, 1994 and August 8, 1994, did not become Mrs. Irven's supervisor until February 11, 1994, after the February 7, 1994 memorandum. T10 1458. The first "below" appraisal was not rendered until four months after the first memorandum.

After her termination on August 25, 1994, Mrs. Irven, on September 16, 1994, filed a complaint of retaliation with the Office of Public Counsel pursuant to Section 112.3187, Florida Statutes, the "Whistle-Blower's Act." See, R7 Def. Ex.

38 at 2 (App. G-38). The Office of Attorney General, Department of Legal Affairs investigated the complaint, considering only the August appraisal and the termination. R7 Def. Ex. 38 at 4-5 (App. G-38 at 4-5). The Department of Legal Affairs published its "Informal Fact Finding Report," on Mrs. Irven's retaliation complaint on April 24, 1995, R7 Def. Ex. 38 at 2-6 (App. G-38 at 2-6), stating that (1) "The complainant, Ms. Irven, elected to utilize the grievance procedure concerning the counseling memorandum, the appraisal dated June 8, 1994, and the written reprimand. Accordingly, she is precluded from utilizing the whistle-blower procedure as it relates to these same allegations," and (2) that it was unable to conclude either that the August "below" appraisal or the termination were retaliation in violation of the "Whistle-Blower's Act."

Mrs. Irven's alleged "whistle-blowing" writings evolved from a child abuse case referred to as the S.S. case. This case was initiated on or about October 12, 1993, pursuant to a petition for dependency in Nassau County, R7 Pl. Ex. 7 (App. F-7), and was transferred to Polk County per the order of Circuit Court Judge Robert Williams on January 21, 1994. R7 Pl. Ex. 12 (App. F-12) Both the mother of S.S., while represented by counsel, and HRS had petitioned to transfer the case to Polk County based upon Fla.R.Juv.P. 8.205(b) - Transfer of Cases. R7 Pl. Ex. 11A-C (App. F-11A-C). Upon receipt of the case by Polk County HRS, Mrs. Irven and

Ms. Vicky Richmond contacted Mr. Roland Reis, an attorney in the Polk County HRS legal department, because they had questions regarding venue in Polk County. T9 1285.

Mr. Reis then contacted Mr. Jim Vandewalker, the judicial assistant of Judge Davis in Polk County, regarding venue in the S.S. case. T9 1287. Mr. Reis concluded after talking with Mr. Vandewalker that the case would be kept in Polk County. T9 1288-89, and that Judge Davis was not inclined to "bounce the case back." T9 1301.

On February 7, 1994, Mrs. Irven wrote the first memorandum which she later referred to as a "whistle-blowing" memorandum. This memorandum raises the legal issue of whether HRS Polk County "prematurely accepted" jurisdiction. She further raised a question regarding the sheltering of the child. R7 Def. Ex. 38 at 7-8 (App. G-38A).

On February 10, 1994, Mrs. Irven requested, through interoffice memorandum, that Mr. Reis either move the court for a change of venue or request the court to not accept the case. She cited that witnesses were in other counties, S.S. was living in Nassau County, the detective was in Nassau County, and the doctor was in Duval County. R7 Pl. Ex. 6C (App. F-6C).

On February 11, 1994, Ms. Fuchs' first day as supervisor, Mrs. Irven approached Ms. Fuchs about the S.S. case and asked Ms. Fuchs to call the judge's office to see if it had indeed been transferred. Ms. Fuchs called and spoke with Mr. Jim Vandewalker, Judge Davis' judicial assistant, who informed her that he had already informed the HRS legal department that this was their case, that Judge Davis had accepted the case and was not going to send it back. T10 1459.

On February 20, 1994, Mrs. Irven wrote the second "whistle-blowing" document, a letter to her new supervisor, Ms. Fuchs. This letter is essentially a summary and chronology of events in the S.S. case and how Mrs. Irven believes the case should be handled. R7 Def. Ex. 38 at 9 (App. G-38B).

Neither of these two documents was referred to as "whistle-blowing" until Mrs. Irven's attorney, Ms. Adrienne Fechter, wrote a letter, dated June 21, 1994, supporting Mrs. Irven's pending grievance regarding an April 7, 1994, counseling memorandum and Mrs. Irven's allegations of retaliation. R7 Def. Ex. 38 at 10-14 (App. G-38C).

Mrs. Irven had received the April 7, 1994, counseling memorandum from her supervisor, Ms. Fuchs, documenting counseling on overtime, work hours, and leaving her work station. R7 Def. Ex. 38 at 28-29 (App. G-38J). Mrs. Irven filed a career service grievance over the counseling memorandum on April 18, 1994. R7

Def. Ex 38 at 30-34 (App. G-38J). A hearing was held by the grievance committee on June 6, 1994 and a record was published on July 8, 1994. R7 Def. Ex 38 at 61-65 (App. G-38N). In the record, it was the opinion of the committee that Mrs. Irven was testing her new supervisor and had ignored protocol in the handling of a case. R7 Def. Ex 38 at 61-65 (App. G-38N). Further, the record criticized Ms. Fuchs stating she was ill prepared to assume the role of supervisor absent further training and support. R7 Def. Ex 38 at 61-65 (App. G-38N).

On April 15, 1994, HRS attorney, Mr. Reis, wrote a memorandum to Mrs. Irven's supervisor, Ms. Fuchs, accusing Mrs. Irven of "dragging her feet" in the S.S. case, "being defiant and uncooperative," and commenting that "her attitude and non-responsiveness has put this case in serious jeopardy." R7 Def. Ex. 38 at 35 (App. G-38K).

On July 1, 1994, Mrs. Irven received a written reprimand from Ms. Fuchs for being absent without authorized leave on June 29, 1994. R7 Def. Ex. 38 at 54 (App. G-38M). Mrs. Irven filed a collective bargaining grievance on August 5, 1994. A hearing was held August 31, 1994, and the written reprimand was changed to an oral reprimand. R7 Def. Ex. 38 at 55-60 (App. G-38M).

On June 8, 1994, Mrs. Irven received a "below" rating on a special appraisal by Ms. Fuchs. Reference was made to Mrs. Irven's excessive use of sick leave,

poor management skills in handling certain cases, improper and untimely submission of leave and attendance forms, failure to prepare for, and work with the legal staff in preparing the S.S. case for trial, and her poor dealings with co-workers and supervisory staff. R7 Def. Ex. 38 at 36-52 (App. G-38L). Mrs. Irven filed a grievance over this appeal which was investigated and heard by Mr. David Wilson, Human and Labor Relations Administrator for the Department of HRS. Mr. Wilson issued the results of his review October 24, 1994, wherein he stated, "After discussing the employee's performance with the supervisor and conducting a thorough review of the documentation, it is our determination that the employee's substandard performance warranted the subject appraisal." The appeal was then denied. R7 Def. Ex. 38 at 82-83 (App. G-38X).

On August 8, 1994, Mrs. Irven received a second "below" rating on a special appraisal by Ms. Fuchs. R7 Def. Ex. 38 at 70-71 (App. G-38Q). Ms. Fuchs identified numerous justifications for the "below" rating and, in her Rater's Summary, indicated that Mrs. Irven had not met the requirements for satisfactory performance. Ms. Fuchs commented that a demotion or transfer would not be appropriate, and recommended dismissal. R7 Def. Ex. 38 at 70-71 (App. G-38Q). Ms. Pat Lawler, Mrs. Irven's supervisor before Ms. Fuchs, concurred with the evaluation as the reviewer. R7 Def. Ex. 38 at 70-71 (App. G-38Q).

Mrs. Irven filed a union grievance regarding this appraisal. The appeal was not processed, however, because the appeal was untimely. Pursuant to the Master Contract, she had 14 days in which to file the appeal and it was not submitted until 18 days. R7 Def. Ex. 38 at 80-81 (App. G-38W).

On August 11, 1994, Ms. Harriet Powell, the HRS District Program Manager, sent Mrs. Irven a letter indicating HRS's intention to dismiss her from HRS employment effective August 25, 1994. R7 Def. Ex. 38 at 72-73 (App. G-38R). She was informed that the grounds for this dismissal were based on her failure to meet minimum standards. The letter cited the two special performance appraisals wherein she received "below" ratings and informed Mrs. Irven of her privilege, within five (5) days of receipt of the letter, of requesting a conference to refute or explain charges made against her. R7 Def. Ex. 38 at 72-73 (App. G-38R). Mrs. Irven responded by letter to Ms. Powell on August, 19, 1994, alleging the actions were reprisals "for notifying the Department of wrongdoings." R7 Def. Ex. 38 at 74 (App. G-38S).

On August 25, 1994, Ms. Powell notified Mrs. Irven that she had been dismissed from her employment as a protective investigator, effective this date. Ms. Powell stated that her decision to dismiss was based upon Mrs. Irven's substandard performance. R7 Def. Ex. 38 at 75-76 (App. G-38T).

On August 18, 1994, Mrs. Irven filed a career service appeal with the Public Employees Relations Commission (PERC). See, R7 Def. Ex. 38 at 84, 85 (App. G-38Y); see also T5 715. On or about November 21, 1994, Mrs. Irven moved to withdraw her PERC appeal. R7 Def. Ex. 38 at 84-85 (App. 38Y); see also T5 724. A Final Order dismissing Mrs. Irven's PERC appeal was rendered November 22, 1994. R7 Def. Ex. 38 at 85 (App. 38Y).

On September 6, 1994, Mrs. Irven filed a union grievance regarding her dismissal. However, because she had already filed the pending career service appeal (PERC), the union grievance was returned without action on September 20, 1994. R7 Def. Ex. 38 at 78-79 (App. G-38V).

On September 16, 1994, Mrs. Irven filed her "whistle-blowing" grievance with the Office of Public Counsel. See, R7 Def. Ex. 38 at 2 (App. G-38 at 2); see also, T5 770. This was filed over one month before Mrs. Irven withdrew her career service appeal (PERC), and four days before her union grievance was returned. Mrs. Irven, in fact, had a PERC appeal, a union grievance, and a whistle-blower complaint all pending at the same time over her termination. The Informal Fact Finding Report on her "whistle-blowing" complaint was submitted to the Office of Public Counsel on April 24, 1995. R7 Def. Ex. 38 at 1 (App. G-38 at 1).

QUESTIONS PRESENTED

The Petitioner, Mrs. Karen Irven, has stated issues presented for decision as follows:

I. WHETHER 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.

II. WHETHER 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.

The Respondent, HRS, prefers to restate the questions presented more concisely as follows:

I. WHETHER THE SECOND DISTRICT COURT OF APPEAL WAS CORRECT IN ITS CONSTRUCTION AND APPLICATION OF THE "WHISTLE-BLOWER'S ACT."

II. WHETHER MRS. IRVEN'S INTERNAL MEMORANDA, AS A MATTER OF LAW, DID NOT CONSTITUTE WHISTLE-BLOWING UNDER SECTION 112.3187, FLORIDA STATUTES.

SUMMARY OF ARGUMENTS

The Second District Court of Appeal was correct in its application of precedent to the "Whistle-Blower's Act." The Second District determined that because the Act waived sovereign immunity, such waiver must be strictly construed and applied. This follows well-established principle that waiver statutes are to be strictly construed. The Court then applied a plain language standard when it stated it would not imply "protection against acts not clearly delineated as prohibited or protected." This plain language standard has been applied to waiver statutes such as Section 768.28, Florida Statutes, Waiver of sovereign immunity in tort actions; and, in fact, was applied in the Martin County case with which, petitioner argues, the instant case is in conflict. The plain language parameters applied by the Second District did not lessen any protection provided by the "Act," but rather determined only that the specific acts which petitioner alleged as "whistle-blower" acts were not protected by the "Whistle-Blower's Act."

Petitioners's four communications listed in her amended complaint did not, as a matter of law, constitute "whistle-blowing." Petitioner's complaints regarding the underlying S.S. dependency case, are founded on the transfer of venue. Her first two communications address this issue directly. Her third and fourth communications, suggest only retaliation for allegations contained in the original

two documents. If her first two communications are not considered "whistle-blowing" documents, none of her documents is.

Petitioner contends in her Initial Brief that her communications were not about venue, that she alleged HRS mishandled the transfer of venue from Nassau County to Polk County, that she alleged her supervisors pressured her to sign an amended petition and, thereby, commit perjury; and, that even if her allegations were false, she harbored a suspicion of wrong doing on the part of HRS.

The plain language of both of petitioner's first two documents patently demonstrates that their purposes were to raise an issue about venue. Petitioner, however, never, in any of the four documents, made any allegation about the conduct of HRS in the transfer. At best, petitioner alleged "premature acceptance" of the case in Polk County. The case was "accepted" by Judge Davis' office which then instructed Polk County HRS that they would handle the case.

Petitioner argues on appeal that HRS committed error by alleging the "usual residence" of S.S. as Polk County. Mrs. Irven, however, never made any such allegation in any of her "whistle-blowing" documents. Mrs. Irven only commented, in support of her venue contention in her first memorandum, that the mother's motion to dismiss may have untruthfully stated the usual residence as Polk County. Mrs. Halla, the Nassau County CPI testified she believed the usual residence was

Polk County considering the mother's frequent moves, the sworn testimony of the mother, and the legal custody of S.S. continuing with the mother.

Petitioner suggests that in a letter supporting one of her grievances, her attorney alleges HRS "pressured" her to commit perjury by signing an amended petition in the dependency proceeding. However, the letter does not allege any "pressure," but merely explains why Mrs. Irven would not sign such a petition. Testimony, at trial, in fact, demonstrated that the need for an amended petition never arose. Further, petitions in dependency proceedings are based on good faith and belief, which in turn can be based on witnesses, police reports, doctor's reports, and trust in co-workers.

Petitioner also suggests that her suspicions of wrongful conduct on the part of HRS is sufficient under the Act for "whistle-blowing" status. A necessary element in the "suspicions" concept, however, is that she must still allege wrongful conduct which is delineated as prohibited or protected. Suspecting such conduct, by itself, is insufficient. It must still be alleged. Further, suspicion of conduct which is not delineated or protected is, likewise, insufficient. Any suspicion of wrongful conduct must, necessarily, be reasonable. Both of Mrs. Irven's memorandums about venue came about after she had been informed that the court had accepted the S.S. case

and that HRS Polk County would be handling it. To continue to contend "premature acceptance" by HRS Polk County was unreasonable.

ARGUMENTS

I. THE SECOND DISTRICT COURT OF APPEAL WAS CORRECT IN ITS CONSTRUCTION AND APPLICATION OF THE "WHISTLE-BLOWER'S ACT."

Petitioner argues aggressively that the Second District was in error because after determining that the "Whistle-Blower's Act" did waive sovereign immunity, it held that,

> [B]ecause any waiver of sovereign immunity must be clear and unequivocal (see Spangler v. Florida State Turnpike Authority, 106 So.2d 421 (Fla. 1958)), the waiver must be limited to the acts or conduct clearly and unequivocally prohibited or protected against. Therefore, the waiver must be strictly construed and applied. A protection against acts not clearly delineated as prohibited or protected must not be implied.
> Irven, 724 So.2d at 699.

Petitioner argues that this holding conflicts with the holding in Martin County, where this Court held that because the "Whistle-Blower's Act" is a remedial act, "the statute should be construed liberally in favor of granting access to the remedy." (emphasis added) Martin County, 609 So.2d at 29.

HRS submits, however, that Second District merely restates established legal principle that a statutory waiver of sovereign immunity must be strictly construed. HRS further submits that this principle does not conflict with the holding in Martin County.

Martin County involved an assistant road superintendent for Martin County, Florida, Willie Edenfield, who used county trucks to deliver sod to his supervisor's residence. The sod was billed to and paid for by Martin County. Edenfield was later contacted about the incident and subsequently admitted his involvement and implicated his supervisor. Martin County, 609 So.2d at 28.

Edenfield was then moved into an inferior job. He complained of the disparate treatment he received and afterwards brought suit against the county under the "Whistle-Blower's Act." Martin County moved for and was granted a summary judgment which was overturned by the district court on the grounds that "the statute does not create an exception for whistle-blowers who are in pari delicto with the wrongdoers whose malfeasance they have revealed." Id.

The issue on appeal to the Florida Supreme Court was whether complainants, such as Edenfield, are protected by the Act when they, themselves, had participated in the wrongdoing about which they blew the whistle. Id.

In deciding for Edenfield, the Court construed the statute liberally to grant Edenfield access to the whistle-blowing remedy. This was the only issue therein, and the Court approved the result reached by the district court, that the statute did not create an exception for whistle-blowers who participated in the wrong doing,

themselves. No constitutional issues were raised, either as to waiver of sovereign immunity or interpretation.

In Irven, the Second District addressed a constitutional waiver issue and determined, in fact, that the Act clearly and unequivocally waived sovereign immunity. The district court held further that because the Act was in derogation of sovereign immunity, it must be strictly construed and applied. The court defined its parameters of construction and application by stating that it would not imply a protection against acts not clearly delineated as prohibited or protected. Irven, 724 So.2d at 699. This holding in no way changes or conflicts with the holding in Martin County granting liberal access to the remedy. Rather, it is consistent with established principles regarding the interpretation of legislative waivers. "Waiver of immunity statutes' are to be strictly construed. This is so for the obvious reason that the immunity of the sovereign is a part of the public policy of the state." Spangler, 106 So.2d at 424.

This principle of strict construction of legislative waivers of sovereign immunity is most pronounced in cases involving Section 768.28, Florida Statutes, Waiver of sovereign immunity in tort actions.

In Metropolitan Dade County v. Reyes, 688 So.2d 311, (Fla. 1996), a deliveryman was injured in a slip and fall at a county jail. Joining his claim for

injuries, his wife brought a derivative claim for consortium against the county. While the injured husband had provided the formal notice of intent to proceed required by Section 768.28(6), Florida Statutes (1989), the wife did not provide her own notice. The trial court, therein, entered a directed verdict against the wife for her failure to provide such notice. The Third District reversed, concluding that the wife was not required to give separate notice of her derivative claim. Id., at 312.

The Florida Supreme Court, while interpreting Section 768.28(6) to resolve this issue, stated:

> In interpreting legislative waivers of sovereign immunity, we have repeatedly stated that we must strictly construe such waivers. (citations omitted) The plain language of section 768.28(6)(a) clearly indicates that each claimant must give the proper notice. (emphasis added)

Id., at 313.

This case was not one of whether there was a waiver of sovereign immunity, there was. The issue, rather, involved a substantive element of the statute, itself. As in the instant "whistle-blowing" case, the substantive element was strictly construed.

Section 768.28, Florida Statutes, was again strictly construed in Levine v. Dade County School Board, 442 So.2d 210 (Fla. 1983), where an injured student brought claim against the school board after he was severely beaten by other students. He claimed that school board employees failed to maintain order and

supervise the activities of the students. Prior to initiating his suit, he provided written notice of his claim to the school board, but not to the State Department of Insurance within the time frame required by Section 768.28(6), Florida Statutes (1977). Id., at 211.

The trial court dismissed the complaint with prejudice because the plaintiff would not have been able to amend his complaint to allege that the notice had been timely given. In opposition to the dismissal, the plaintiff filed an amended complaint with an attached affidavit of an official of the Department of Insurance explaining the departments minimal role in claims against school districts. On appeal, the district court, while recognizing some merit in the plaintiff's argument that the notice requirement should not be deemed a strict condition precedent, affirmed the trial court, holding that the notice requirements were conditions precedent to maintaining a suit. Id.

The issue presented to the Supreme Court was whether notification to the Department of Insurance, pursuant to Section 768.28(6), Florida Statutes (1977), was necessary under the circumstances of the case.

In considering the language of the statute, the Court "speculated" as to the role the Department may have in lawsuits against departments and agencies of the executive branch of state government, and further speculated about whether a failure

to except county school districts from the statutory notice may have been inadvertent. Id., at 212. The Court then commented:

> Such speculation, however does not authorize us to ignore the plain language of the statute. . . . Because this subsection is part of the statutory waiver of sovereign immunity, it must be strictly construed. (citations omitted) (emphasis added)

Id.

The Second District's decision in the instant case follows these same principles of interpretation. It held that because it must strictly construe and apply the statute, it cannot imply any protections "against acts not clearly delineated as prohibited or protected." Irven, 724 So.2d at 699. This is a plain language standard. Oddly, the converse of this principle of strict construction, the one espoused by petitioner, would be that the Courts may imply protections not delineated in this waiver statute.

Significantly, this Court in Martin County used the same plain language standard used in both the Metropolitan Dade County and Levine cases: "Although Martin County urges us to find ambiguity in the statute, we believe the language is plain and supports the conclusions reached by the district court." (emphasis added) Martin County, 609 So.2d at 29. The Court, essentially, did not read elements into the Act which were not delineated.

The implications (consequences) of a liberal interpretation of the substantive elements of the "Whistle-Blower's Act" are demonstrated in the instant case. Above and beyond the four documents alleged in her Amended Complaint, Mrs. Irven, in her Answer Brief to the Second District, argued "whistle-blowing" status for four <u>additional documents</u>. (App. H)

In injecting these additional documents as "whistle-blowing" documents, Mrs. Irven argued:

> Here, the numerous letters and memos that Irven sent to persons above her immediate supervisor plainly constituted disclosures protected by the Act.
>
> * * *
>
> Significantly, Irven's memos go well beyond the memoranda referenced by HRS in its brief (February 7, 1994 memo to Reis and February 20, 1994 letter to Fuchs). . .
>
> * * *
>
> In summary, the Act protected numerous written documents presented to the jury. Because the jury's verdict could have been based on any one (or more) of these documents, the verdict must be sustained, even if - - as HRS incorrectly contends - - some of the documents were not legally sufficient to come within the Act.

(App. H)

Only an unfettered interpretation of the Act permits such a contention. These additional "whistle-blowing" documents are the February 10, 1994 memorandum to Mr. Reis asking for the SS case to be transferred, a March 4, 1994, letter to HRS Protective Services, a March 16, 1994, memorandum to the Nassau County CPI,

and an April 18, 1994, grievance in response to a counseling memorandum. (App. H)

Petitioner, in her Initial Brief at page 18, continues to maintain the argument that these same documents establish whistle-blowing.

The February 10, 1994 memorandum to Mr. Reis, in fact, only requests HRS attorney Reis to request transfer of the S.S. case, and states Mrs. Irven's reasons for the request. R7 Pl. Ex. 6C (App. F-6C). There is absolutely no statement, no assertion, and no allegation of any nature in this memorandum of a "whistle-blowing" nature. The memorandum is only what it purports to be, an interoffice memorandum without allegations of wrongful conduct on the part of HRS.

The March 4, 1994, memorandum to HRS Protective Services, <u>in its entirety</u>, states: "'S' needs to be in therapy & have a Psy Eval. She also needs to be placed in day care. Thanks." R7 Pl. Ex. 9A (App. F-9A). Again, this is simply a memorandum without <u>any</u> "whistle-blowing," whatsoever.

The March 16, 1994, letter to Ms. Cynthia Halla, of Nassau County, discusses the S.S. case, but only in the context of what has been done and what needs to be done. R7 Pl. Ex. 9C (App. F-9C). The only "complaint" Mrs. Irven raises in this letter is that she has had trouble contacting Ms. Halla. Once again,

however, there is not one mention of any incident, or any allegation that even approaches "whistle-blowing."

The April 18, 1994, grievance was prepared by Mrs. Irven in response to an April 7, 1994, counseling memorandum from Ms. Fuchs regarding Mrs. Irven's overtime, work hours, and work station. Mrs. Irven's grievance addresses only those issues. There is, again, no "whistle-blowing." She merely grieves the counseling memorandum. R7 Def. Ex. 38 at 28-34 (App. G-38J).

These documents are patently not "whistle-blowing" documents, yet Mrs. Irven contends that, under a liberal interpretation of the Act, they are "whistle-blowing." These documents, as written, evidence no more than the everyday activity of give and take within any agency. To accept them as "whistle-blowing" would make any and every disagreement within an agency the potential basis of a "whistle-blower" action.

The Second District was correct in not implying any protections "against acts not clearly delineated as prohibited or protected." Applying this plain language standard, the district court concluded that Mrs. Irven's communications were not "whistle-blower" acts protected by the "Whistle-Blower's Act." Irven, 724 So.2d at 699.

II. MRS. IRVEN'S INTERNAL MEMORANDA, AS A MATTER OF LAW, DID NOT CONSTITUTE WHISTLE-BLOWING UNDER SECTION 112.3187, FLORIDA STATUTES.

HRS contends that because Mrs. Irven's communications, as a matter of law, did not constitute "whistle-blowing," this cause of action should never have been presented to a jury. Petitioner, however, at trial, in her answer brief to the Second District, and in her initial brief to this Court, attempts to misdirect the issues by denouncing HRS for allegedly mishandling the S.S. case. The issue, here, however, is not about how well HRS may have handled the S.S. case, but about whether Mrs. Irven "blew the whistle" pursuant to Section 112.3187, Florida Statutes (1993).

In her amended complaint, Mrs. Irven lists four documents which she alleges "blew the whistle" on HRS. Of these four documents, the first two, the February 7, 1994, memorandum to Attorney Reis, and the February 20, 1994, letter to Ms. Fuchs are, in fact, the genesis of this action. While these documents definitely demonstrate her reluctance to handle the S.S. case they do not, however, allege any conduct on the part of HRS that even remotely meets the "whistle-blowing" standards.

The other two documents which Mrs. Irven considers "whistle-blowing" are her grievance of April 18, 1994, in response to a counseling memorandum she received, and her attorney's letter of June 21, 1994, in support of the same

grievance. This June 21, 1994 letter, in fact, mentions "whistle-blowing" for the first time, but only in the context of the original two documents and then to allege retaliation for those documents. In their own context, the grievance and the June 21 letter, however, do not "whistle-blow" themselves, but rather reference the two February documents and allege retaliation therefrom. The grievance, in fact, does not even make reference to the S.S. case. In it, Mrs. Irven only contends in a generic sense that she has been "singled out" and "targeted."

All of the information which Mrs. Irven "disclosed" in her two February 1994, communications was available to the courts as well as the opposing parties, 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. Under these circumstances, her disclosures can not be "whistle-blowing" under the Act.

Petitioner, in her Initial Brief makes four primary arguments which she contends evidence her "whistle-blowing." First, she argues that her chief complaint did not involve venue, but rather involved the safety of S.S. Second, she argues that HRS erroneously moved for a change in venue to Polk County based on the usual residence of the mother and child in Polk County. Third, she argues that HRS "pressured" her to sign an amended petition, thereby asking her to commit perjury. Fourth, she argues that her suspicions of misfeasance by HRS were sufficient under

the Act. She argues secondarily that the legitimacy of her misgiving is demonstrated by the concerns raised by Ms. Halla, the Nassau County CPI, about the placement of S.S. with the grandmother.

A. As to her first argument, that the issue was not one of venue, her own documents demonstrate otherwise. In her February 7 memorandum to Mr. Reis, she begins: "Polk County has no jurisdiction in the S.S. case for the following reasons," and continues in paragraph number 1, "It appears HRS Polk County has prematurely accepted a case which didn't happen in Polk County." (emphasis added) She then describes other reasons to substantiate her "no jurisdiction" contention. In her February 20 letter to Ms. Fuchs, Mrs. Irven comments: "I was informed on 2/11/94, by you, that the S.S. case was accepted by the Tenth Judicial Circuir (sic) Court of Polk County, Fl." Curiously, she further comments that "[i]t appears HRS Polk County has prematurely accepted this case . . ." (emphasis added) This entire "whistle-blowing" action, as it involves Mrs. Irven, began as an issue about venue.

The mother of S.S., while the dependency case was in Nassau County and while she was represented by counsel, filed a Motion to Dismiss for Lack of Jurisdiction or, in the Alternative, to Change Venue pursuant to Fla.R.Juv.P. 8.205(b),[1] stating the usual residence of mother and child as Polk County. R7 Pl.

[1] Petitioner, in her February 7 document, cites Fla.R.Juv.P. 8.205(b) - Transfer of Cases Within the State of

Ex. 11A (App. F-11A). HRS also filed its own motion to transfer pursuant to the same rule, stating that the child was at that time detained with the maternal grandmother, resides in Loughman, Florida, and that both the mother and child are usual residents of Polk County. R7 Pl. Ex. 11C (App. F-11C). Judge Robert E. Williams ordered the S.S. case transferred to Polk County on January 21, 1994. R7 Pl. Ex. 12 (App. F-12).[2]

Mrs. Irven was assigned the S.S. case on February 1, 1994. On February 2, 1994, Mrs. Irven and Ms. Vicky Richmond, a supervisor on the case before Ms. Fuchs, approached HRS attorney Reis regarding the issue of venue in Polk County. Mr. Reis called Judge Davis' office and talked to Mr. Jim Vandewalker, Judge Davis' judicial assistant to determine whether the case had in fact been transferred and whether the judge would consider transferring the case back to Nassau County. T9 1285-88. Mr. Reis concluded, after his discussions with Mr. Vandewalker, that the case was to remain in Polk County, T9 1289, and that Judge Davis was not inclined to

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Florida, as one of the reasons why Polk County "has no jurisdiction." In paragraph 8, she references the requirement of transfer within five days and comments that this case "doesn't appear transferred within 5 days." This rule, however, places the responsibility to transfer within five days with the clerk of the court and not HRS. In her Initial Brief (page 10) petitioner states in her facts that "Mrs. Irven believed HRS failed to comply" with this rule when it consented to the transfer. Mrs. Irven never raised any compliance issue other than the "five day transfer rule." Petitioner also misstated at trial that the February 7 memorandum raised an issue as to the timeliness of filing the petition within seven days, T9 1325, and continues this misrepresentation in the Initial Brief at page 40. Again, the only allegation in any of the four documents as to timeliness involved the "five day transfer rule."

[2] The Second District also recognized the applicability of Section 47.122, Florida Statutes (1993), which provides: "For the convenience of the parties or witnesses or in the interest of justice, any court of record may transfer any civil action to any other court of record in which it might have been brought." Irven, 724 So.2d at 703.

"bounce the case back." T9 1301. Mr. Reis explained this and the law to Mrs. Irven, but she unreasonably continued to dispute Mr. Reis on the law and the handling of the case. T9 1315.

Mrs. Irven's dissatisfaction with Mr. Reis' conclusions gave rise to the February 7, 1994, memorandum which she later considered her first "whistle-blowing" memorandum.

On February 11, 1994, Ms. Fuchs became Mrs. Irven's supervisor and she became aware of the S.S. case that same day when Mrs. Irven came to her office to review the case. Ms. Fuchs testified that Mrs. Irven had the belief that they should not have the case. T10 1458-9. Mrs. Irven, although she was aware that Mr. Reis had talked with Judge Davis' office, failed to inform Ms. Fuchs of this fact, and asked her to call Judge Davis' office to see if the case had indeed been transferred. Ms. Fuchs did make the call and talked to Mr. Vandewalker who indicated that he had already talked to HRS' legal department in Polk County and told them that the case belonged to them, that Judge Davis had accepted it, and was not going to send it back as a matter of judicial courtesy. T10 1458-9.

Mrs. Irven then sent her second alleged "whistle-blowing" document to Ms. Fuchs on February 20, 1994, where she recognizes that the case has been accepted by the Polk County Circuit Court, yet continues to maintain that HRS Polk County "has prematurely accepted the case."

Remarkably, while it was Judge Davis who had "accepted" the case, a point which Mrs. Irven recognized, she continued to contend "premature acceptance" by HRS.

B. As to the second of her primary arguments, that HRS committed error by alleging the usual residence of the mother and child to be in Polk County, Mrs. Irven never raised this issue of error by HRS. Mrs. Irven, in her February 7 memorandum, and in support of her "no jurisdiction" contention, makes reference only to the mother's motion to dismiss and that the mother's contention of residence in Polk County "appears to be untrue." There is absolutely no allegation in any of her four alleged "whistle-blowing" documents that HRS, itself, acted in a wrongful manner. Petitioner's argument, here, is an example of her misdirection of the issues toward HRS' handling of the S.S. case, as opposed to the question of law about whether her communications alleged any wrongful conduct on the part of HRS.3

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[3] Petitioner states that Mr. Reis "conceded" that HRS did incorrectly state that S.S. was a "usual" resident of Polk County and that Mr. Reis "elected" not to 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." Petitioner's Initial Brief at 17-18.

Petitioner uses these statements out of context and misrepresents the totality of Mr. Reis' testimony. For example, Mr. Reis also testified that the Court was aware of the residency question, that it was not material at the time, and that legal custody was still with the mother in Polk County. T9 1301-1303.

As to "electing" not to seek transfer, Mr. Reis explained that HRS had stipulated with the mother's Nassau County attorney to a transfer to Polk County. After discussion with the mother's Polk County attorney regarding a transfer back, the attorney

In any event, Mrs. Halla, the CPI for the S.S. case in Nassau County, addressed the residence issue in her trial testimony. On direct questioning by the HRS counsel, she was asked:

> Q. Where had S.S. been prior to the abuse report coming in do you know?
>
> A. It was my understanding that they had resided down here in Polk County in the general area where the mother resided. She moved frequently. But her residence apparently was in Polk County.
> T8 1133.
>
> * * *
>
> Q. Okay. When she was in court did she represent where she lived to the Court?
>
> A. Yes sir. She said she lived here in Polk County.
> T8 1159.

On cross examination by Mrs. Irven's counsel, Mrs. Halla was asked:

> Q. Okay. You said a few minutes ago in your testimony that your understanding that at some point in time S.S. lived in Polk County.
>
> A. Yes sir.
>
> Q. Okay. Where in that affidavit - - and that is, just to speed up our process, that is an affidavit of where S.S. has lived in her life is it not?
>
> A. Pretty much, yes sir.
>
> Q. Yeah. Where in - - where - - which location there is in Polk County?
>
> A. My understanding of this area is that the Kissimmee address is in Loughman, Florida, and some additional addresses we received after the fact, because the mother did not have exact locations. But she testified in court under oath that her primary residence was Polk County and her present address at that time of that arraignment hearing in Nassau County was Polk County.
>
> Q. Okay. But I'm not - - I'm not asking about her residence. I'm asking - - you said earlier that you believe the child at some point had lived in Polk County. And you have listed three. Let me just ask you Fernandina Beach that's not in Polk County is it?
>
> A. That's the grandmother's address.
>
> Q. Okay. Right. That's what you - - you were listing - - you were listing where the child was residing. And the next address is Loughman, Florida. Is that in Polk County?
>
> A. I don't know, sir.
>
> Q. If I were to tell you that were (sic) not in Polk County you would not have any reason to doubt that would you?
>
> A. The best - -
>
> THE COURT: Counsel, approach, please.
> Loughman is in Polk County. The Court's going to take judicial notice of that fact.
> MR. CAREY: Okay. Let me - - let me withdraw that question, Your Honor.
>
> Q. How about Kissimmee? Did you know where Kissimmee is?
>
> A. I know where it is now, yes sir?

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indicated the mother would not stipulate to such. Further, there was no material basis to ask the court for such a transfer. T9 1305-1306.

T8 1196-1197.

* * *

Q. Okay. Doesn't that Motion address representation regarding the usual residence of the child?

A. Yes, it's paragraph 4. It says pursuant to juvenile rule, the Court may transfer the case before adjudication to the Circuit Court for the County in which is located the usual residence of the child. And the mother testified that her usual residence for the child within her custody was Polk County.

Q. And the child was not in her custody at that time was she?

A. The child was in her custody up until October 19.

Q. Where - - at the date that Motion was filed - -

A. The child remained - - excuse me. Let me clarify.

Q. I'm asking the question.

* * *

A. The mother had not had custody removed. She had had physical custody but the Courts had not adjudicated that child dependent. That child still required the mother's parental right to - - for any State intervention. She had not been adjudicated a dependent child. And so technically, regardless of the fact that she was staying with her grandmother as a shelter, she was still under her mother's custody.

Q. Yeah, I understand that legally.

A. So in saying her residence, her legal residence was with the mother. Her legal residence technically is Polk County till such time as that child is adjudicated and disposed of.

T8 1204-1206.

Mrs. Halla was the CPI for the S.S. case and handled it until its transfer from Nassau County to Polk County. Her testimony demonstrates that she believed the usual residence was in Polk County based on the frequency of the mother's moves, the mother's legal custody, and the mother's sworn testimony of residency in Polk County.

C. As to Mrs. Irven's argument that HRS "pressured" her to sign an amended petition, thereby asking her to commit perjury, Mrs. Irven never complained of "pressure" to commit perjury. The only reference in the four documents to a request to file an amended complaint is contained in the alleged fourth "whistle-blowing" document, the June 21, 1994, letter by Attorney Adrienne Fechter in support of Mrs. Irven's grievance over a counseling memorandum. In this letter, she states:

> At or about this same time [referring to the February time frame], Ms. Irven was directed by Mr. Reis and Ms. Fuchs to file an amended petition in this case. The original petition had been prepared by an HRS employee in another county. Because Ms. Irven did not have personal knowledge of the facts that needed to be recited in the amended petition, she explained to Mr. Reis and Ms. Fuchs that it would be inappropriate, misleading and potentially fraudulent to represent in the amended petition that she had the requisite knowledge. Ms. Irven understandably was concerned with committing perjury.
>
> R7 Def. Ex. 38 at 11 (App. G-38C).

There is absolutely no allegation of any pressure for Mrs. Irven to file an amended petition. By its plain language, this paragraph merely explains why Mrs. Irven believes she should not sign an amended petition. Stating that Mr. Reis and Ms. Fuchs may have directed Mrs. Irven to file an amended petition is a far cry from alleging "pressure" to commit perjury. While Mrs. Irven may now explain that she felt "pressured," this document makes no such allegation.

Additionally, Ms. Fechter, in this same letter, makes reference in footnote 3 to an April 15, 1994 memorandum by Mr. Reis describing Mrs. Irven as "defiant and uncooperative." In this memorandum to Ms. Fuchs, Mr. Reis uses the terms "defiant and

uncooperative" to describe Mrs. Irven's <u>overall handling</u> of the S.S. case, and he describes the circumstances justifying this description. Mr. Reis makes two references to Mrs. Irven in connection to the filing of an amended petition. He notes that at an initial staffing it was discussed that an amended petition might need to be filed upon receipt of psychological evaluations and that Mrs. Irven never disagreed with this. Mr. Reis later comments in this memorandum that Mrs. Irven has stated a couple of times "that she will refuse to sign an amended petition <u>if necessary</u>." (emphasis added) R7 Def. Ex. 38 at 35 (App. G-38K). By its plain language, the document demonstrates that an amended petition was not yet necessary and Mrs. Irven could not have been "pressured" to file one. When asked in direct examination at trial whether he had ever asked Mrs. Irven to amend the petition, Mr. Reis stated that "we never got the basis for amending the petition." T9 1295-1296.

Further, petitions in cases such as the S.S. case are signed based on a "good faith belief" in the facts stated therein. As Mrs. Halla testified during trial, if she trusted the people she worked with and her peers and counterparts, then she has good faith. T8 1199. With respect to this good faith belief, she testified that she used police reports, doctor's reports, and witnesses. Even though she, herself, did not observe what happened, she can use this information in the petitions in good faith. T8 1236.

D. As to Mrs. Irven's argument that her suspicions of misfeasance by HRS were sufficient under the Act, it was still necessary that she make those allegations of wrongful conduct in her "whistle-blowing" documents. If the information actually provided by Mrs. Irven in her purported "whistle-blowing" documents does not constitute "whistle-blowing," then believing, i.e., having a suspicion, in the truth of those very same allegations cannot constitute "whistle-blowing."

While Mrs. Irven may have had suspicions that HRS was committing some form of misfeasance or wrongdoing as specified in the Act, it was necessarily incumbent upon her to allege <u>that</u> particular wrongful conduct in her "whistle-blowing" documents. HRS has argued, herein, that the information contained in the alleged "whistle-blowing" documents does not disclose any activity or wrongdoing specified by the Act. The documents, themselves, evidence this by their plain language. Petitioner's suggestion of suspicions of that same conduct does not change their status. Suspicion of conduct which is not wrongful under the Act, is not protected.

Furthermore, there necessarily must be a <u>reasonable</u> basis for any suspicions. The genesis of this cause of action was Mrs. Irven's belief that venue should not have been "accepted" in Polk County. This is the essence of her alleged "whistle-blowing" documents (February 7, memorandum to Attorney Reis, and February 20, letter to Ms. Fuchs). The case was transferred to Polk County, however, by court order, R7 Pl. Ex. 12 (App. F-12), and the transfer was discussed with Judge Davis' office in Polk County. T9 1285-1288. This issue and the law was explained to Mrs. Irven by HRS attorney Reis. T9 1314-1315. In any event, the "acceptance" of the case by the court in Polk County and how to handle it were legal decisions made by Judge Davis' office and the HRS legal department. Mrs. Irven's dissatisfaction with Mr. Reis' legal conclusions and legal decisions gave rise to her memorandums and demonstrates a patently unreasonable basis for her suspicions.

Mrs. Irven's general attitude with the circumstances of the S.S. case is demonstrated by one of her "responses" in her grievance to her June 8, 1994 "below" appraisal where she states, "<u>I have disagreed with the legal staff on the S.S. case. I am the case manager and</u>

it is suppose (sic) to be my decision as to how the case is handled and what I recommend, not legal's." (emphasis added) R7 Def. Ex. 38 at 44 (App. G-38L at 9).

Mrs. Irven's disagreement with the legal department, however, did not make her memorandum "whistle-blowing" within the meaning of Section 112.3187, Florida Statutes, (1993). Polk County HRS did nothing wrong in the handling of the S.S. dependency action, and Mrs. Irven's communications did not raise issue to any incident that "creates and presents a substantial and specific danger to the public's health, safety or welfare," or anything amounting to "gross mismanagement, malfeasance, misfeasance, gross waste of public funds, or gross neglect of duty committed by an employee…." Section 112.3187(5), Florida Statutes. The fact that Mrs. Irven memorialized her disagreement in these documents does not create "whistle-blower" status. To accept Mrs. Irven's documents as such would make any and every disagreement within an agency the potential basis of a "whistle-blower" action.

Mrs. Irven's difficulty with co-workers was not new and had been chronicled less than two years earlier in her special performance appraisal of April 10, 1992, wherein the Rater's Summary included:

> Mrs. Irven's transfer is based on a mutual agreement based on her difficulty in handling Court cases. Some of the problems encountered are that she depends too much on other persons to "fill her in" on case activities. She has not seen the necessity to make home visits or frequent contacts with clients and she has not visited with shelter children or attended visitations as required. Mrs. Irven is very demanding and generates hostility among clients, co-workers and other professionals. She has been more focused on her personal liability than on adequately discharging her responsibilities and duties as a Child Protective Investigator. (emphasis added)
> R7 Def. Ex. 38 at 17 (App. G-38E).

The Performance Improvement Plan within the same performance appraisal included: "Mrs. Irven has been difficult to supervise because she has not demonstrated flexibility and has not accepted constructive criticism or direction well." R7 Def. Ex. 38 at 17 (App. G-38E).

E. Mrs. Irven has argued, secondarily, that the legitimacy of her misgivings in the S.S. case are demonstrated by the concerns raised by Ms. Halla, the Nassau County CPI, about the placement of S.S. with the grandmother. Again, while Mrs. Irven may have had a concern based upon the placement of S.S., this is not an allegation, but rather an explanation. Further, Mrs. Irven only made comments regarding another CPI's observations of a situation which had already been remedied by that CPI. In any event, Mrs. Irven only notes, in her "second" "whistle-blowing" document, the February 20, 1994, letter to Ms. Fuchs, that "Mrs. Halla apparently feels that the grandmother, Mrs. [name stricken] is not an appropriate placement for the child." (emphasis added) R7 Def. Ex. 38 at 9 (App. G-38B) This is hardly a definitive concern.

At trial, Mrs. Halla was questioned extensively about this issue and testified that it was documented because when she received the case from Flagler County, she became aware that the grandmother had allowed unsupervised visitations by the mother. Mrs. Halla stated the grandmother did not understand the intent of supervised visitation because no one had explained it to her. When Mrs. Halla became involved in the case she explained the situation to her. T8 1168-1170. While Mrs. Halla's note reflected some concern on her part, T8 1128, she further testified that she did not feel the child was at risk with the grandmother, T8 1174, and that there was no question that this placement was appropriate. T8 1227-1228.

The matter of the dependency of S.S. was heard in May and July 1994, in Polk County by Judge Davis, and in October 1994, he ordered S.S. placed in the legal custody of the maternal grandparents. R7 Def. Ex. 33 (App. G-33) The case was then transferred to Nassau County, not "as Mrs. Irven had originally urged," but, rather, because the dependency action had been concluded and the grandparents now had legal custody.

Within Mrs. Irven's four "whistle-blowing" documents, the only allegation directed at the conduct of HRS that even remotely suggests error is her allegation of "premature acceptance" of jurisdiction in her first two documents.

As recognized by the Second District, all of her "whistle-blowing" activity grew out of and was premised upon what she alleges were her first and second acts of "whistle-blowing." If the first two communications do not constitute "whistle-blowing," then none of her acts does. Irven, 724 So.2d at 700.

HRS had argued, and the district court concluded that the acts alleged by Mrs. Irven were not protected by the "Whistle-Blower's Act." "To decide otherwise in the circumstances of this case would open every disagreement by an agency employee with the handling of a matter subject to judicial supervision and control to a 'whistle-blower' action." Irven, 724 So.2d at 703.

This "whistle-blower" claim does not raise new issues regarding the protection of state employees, nor does the Second District opinion lessen any protection intended by the Act. The protection continues to exist as the legislature intended. By its plain language, the "Whistle-Blower's Act" establishes in clear and unequivocal terms the circumstances under which an employee is protected. The decision of the Second District in not implying "protection against acts not clearly delineated as prohibited or protected" in no way lessens that protection. The decision determines only that Mrs. Irven's communications were not "whistle-blowing," and are, therefore, not covered under the Act.

CONCLUSION

Accordingly, based upon the foregoing arguments, Respondent, HRS, respectfully requests the Court to affirm the decision of the Second District below which reversed the final judgment for Mrs. Irven and instructed that a directed verdict be entered for HRS.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U. S. Mail this 5th day of November 1999, to Peter J. Winders, Esquire and J. Kevin Carey, Esquire, Post Office Box 3239, Tampa, Florida 33601-3239; and Sylvia H. Walbolt, Esquire, Robert E. Biasotti, Esquire, and Joseph H. Lang, Jr., Esquire, P.O. Box 2861, St. Petersburg, Florida 33731-2861.

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