STATE OF FLORIDA
DISTRICT COURT OF APPEAL
FIRST DISTRICT

CASE NO. 1D24-0647
L.T. NO. 2019 CA 531

NATASHA NUNLEY and BRANDON SMITH,

***Plaintiffs/Appellants*,**

v.

TLC FIFTY-THREE, LLC,

***Defendant/Appellee*.**

APPELLANTS' INITIAL BRIEF

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TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Statutory Provisions

STATEMENT OF THE CASE

Plaintiffs/Appellants, Natasha Nunley and Brandon Smith, filed a Complaint against Defendant/Appellee, TLC FIFTY-THREE, LLC, on March 5, 2019 [R. 12-27] and an "Initial" Complaint on September 4, 2019. [R. 39-57]. Appellants filed the operative complaint, the Third Amended Complaint, on October 19, 2022. [R. 276-317]. Appellee filed an Answer on October 31, 2022 [R. 327-336]. Appellee then moved for summary judgement on July 25, 2023 [R. 345-438], and amended that motion on July 26, 2023 [R. 463-557]. Appellants filed an opposition on November 7, 2023. [R. 1638-1701]. Appellee filed a Reply to Appellant's Response on November 22, 2023 [R. 3578-3598]. The trial court issued an order granting the Appellee's Motion for Final Summary Judgement and Final Judgement on January 5, 2024. [R. 3606-3612].

Appellants filed a Motion for Reconsideration and Rehearing on January 22, 2024. [R. 3629-3643]. Appellee filed a Response on January 29, 2024. [R.3644-3650]. The trial court issued an Order denying Appellants' Motion for Reconsideration and Rehearing on February 16, 2024. [R. 3651-3652]. Appellants then timely appealed both orders. [R. 3653-3665].

STATEMENT OF THE FACTS

Nunley, female, was recruited by SPH, parent company of Appellee, to be a General Manager ("GM") for SPH's newest restaurant at Sugarloaf Parkway in August 2014. [R. 1813-1828, 1860-1861, 1882-1883, 1999].

Prior to working for Appellee and its parent company, Nunley had many years of experience in the restaurant and hospitality industry, including operating a food truck on Florida State University's campus, and working as a General Manager for Hojeij Brand Foods, during which time, Nunley assisted in opening the Bud Bar at Hartsfield-Jackson Atlanta International Airport. [R. 1813-1828, 1860-1861, 1882-1883].

While working at the airport, Nunley was approached by Brent McGhee, Director of Openings for SPH, who offered Nunley the position of GM for his newest location, Sugarloaf Parkway. [R. 1813-1828, 1860-1861, 1882-1883]. SPH is owned by Michael Evertsen, Chris Hadermann, and John Piemonte. [R. 2012-2014, 2018, 2033-2034, 2068, 2090-2092, 2120, 2181-2183, 2200-2201, 2254-2257].

Six weeks into her training, SPH informed Nunley that she would be transferred to the lowest volume restaurant in the company, the Emory Point location. [R. 1813-1828, 1889-1920, 2332-34]. SPH's agents told Nunley that she had to go to the Emory Point location because they were hiring a new

General Manager, Damon DeLapotaire, a male, to be assigned to SPH's most profitable restaurant, the Perimeter location, and reassigning the GM for Perimeter, another female, to the Sugarloaf Parkway location. [R. 1813-1828, 1889-1920, 2332-2334].

Between approximately September 29, 2014, through July 2015, Nunley operated the Emory Point location, but did not earn a bonus because of the known lack of sales for the location. [R. 1813-1828, 1889-1920].

Shortly after taking over the Emory Point location, Nunley discovered that the staff was distributing a video of a female manager engaged in sexual contact with a female employee to elicit a response from a third employee. [R. 1813-1828, 1889-1920]. There was also another sexual relationship between a manager and an employee which caused further problems at this location. [R. 1813-1828]. When Nunley reported the sexual relationships and conflicts to SPH's Personnel and Training Director, Colleen Spahr, Spahr directed Nunley to investigate, rather than a HR employee. [R. 1813-1828, 1889-1920].

Upon taking over the Emory Point location, SPH's CEO, Tory Bartlett, told Nunley that if she could make the location break even, it would be a win for her, and that he would recommend her and grant her an interview to become GM of SPH's flagship restaurant Downtown. [R. 1813-1828, 1889-

1920]. While Nunley was the Emory Point location's GM, the location did earn a small profit, although Nunley was never paid a bonus for her achievement. [R. 1813-1828, 1889-1920].

While at the Emory Point location, Nunley heard that the GM of the Kennesaw location, Aaron Hobbs, male, falsified social media reviews in order to boost his GM score; Yelp actually reported the falsified reviews to the media, and the situation was well publicized. [R. 904-917, 923-941, 1813-1828, 1920-1934, 2457-2464, 2576-2586, 2627-2628]. Hobbs told Nunley that he was directed to falsify the reviews by Area Director Scott Black and provided documentation showing Black's instructions to him regarding the reviews. [R. 904-917, 923-941, 1813-1828, 1920-1934, 2457-2464, 2576-2586, 2627-2628]. The instructions originated from Bartlett and were forwarded to Hobbs by Black. [Id.]. After learning the nature of the falsification, Nunley reported the matter to her Area Director, Ben Parks, but Parks did not investigate. [R. 1813-1828]. Hobbs was not disciplined for falsifying the reviews; instead, he was issued his bonus in buckets of coins for getting caught falsifying the reviews. [R. 904-917, 923-411813-1828, 1920-1934, 2457-2464, 2576-2586, 2627-2628].

Despite Bartlett's promise to interview and to recommend Nunley to become GM of the Downtown location, SPH failed to even interview Nunley

for the position. [R. 1813-1828, 1920-1934]. Instead, SPH gave the position to Mike Vecchio, a male employee, who was an Assistant Manager and who had less volume experience than Nunley; Vecchio only lasted in the position for about 3 months before he quit because the volume at the Downtown location was too much for him to manage. [R. 1813-1828, 1920-1934].

When Nunley asked why SPH failed to promote her, she was told that she had not proven herself yet and was asked by Bartlett in front of two of SPH's Area Directors, if she "knew the definition of the word accountable." [R. 1813-1828, 1920-1934].

When she opposed this failure to promote, SPH condescendingly told Nunley that the company had "bigger plans" for her. [R. 1813-1828].

After Bartlett asked Nunley about being accountable, Nunley asked Bartlett if accountability stretched to falsifying Yelp reviews and informed SPH's agents that she was aware Hobbs had falsified the reviews at the direction of Bartlett and Black. [R. 1813-1828, 1920-1934, 2457-2464].

Once Nunley disclosed to Bartlett that she was aware that the directions to Hobbs to falsify the Yelp reviews originated from him and from Black, Bartlett called a meeting of all of the GMs in which he discussed the matter; as a result of the meeting, the GM for the Buckhead location quit his employment with SPH. [R. 1813-1828, 1920-1934, 2457-2464].

Instead of promoting Nunley, SPH assigned Nunley to the Buckhead location, another underperforming location with a myriad of managerial problems. [R. 1813-1828, 1920-34]. Once again, Nunley did not earn any bonuses while assigned to the Buckhead location. [R. 1813-1828, 1920-34]. Nunley did earn GM of the year during the time that she managed the Buckhead location because she was able to fix the managerial problems and to make the location profitable. [R. 1813-1828, 1920-34].

During Nunley's stint as GM of the Buckhead location, she learned that SPH's agents did not allow the location to sell cognac to keep the restaurant from attracting a "dark crowd." [R. 1813-1828]. Furthermore, at this location a playlist that included only southern rock and country music was played when the owners believed the crowd was "getting too dark." [R. 1813-1828]. In fact, witnesses testified that most locations were not allowed to sell cognac except for the Grant Park location. [R. 2667-68, 2701].

After Nunley transferred to the Buckhead location, Black was demoted from Area Director to GM after he wrongfully terminated a female employee for absences that were excused due to medical reasons stemming from Sickle Cell Anemia. [R. 1813-1828, 1920-34, 2457-64, 2698-99].

On or around May 6, 2016, Nunley took over Black's position as Area Director, based on her GM score card and her performance at the Buckhead

location; Black was assigned as GM of the Buckhead location. [R. 1813-1828, 1920-34]. Although Nunley was Area Director of the Buckhead location, Black did not report to Nunley as other GMs reported to their assigned Area Directors; instead, Black reported to Damon DeLapotaire, Regional Director and Nunley's direct supervisor. [R. 1813-1828, 1920-34].

Nunley also supervised the Downtown location where she discovered that the GM had been stealing from SPH by reopening and "comping" cash tabs that was previously closed out by servers to keep the money for himself. [R. 1813-1828]. Nunley immediately notified SPH's agents of the thievery, and furthermore convinced the GM to admit fault. [R. 1813-1828]. SPH's agents commended Nunley on her excellent managerial skills, and the Downtown location became one of SPH's most successful stores under Nunley's leadership. [R. 1813-1828].

On or around May 26, 2016, Nunley emailed regarding the pay increase for her new responsibilities. [R. 1813-1828, 1920-34, 2506-07, 2721]. Appellee never replied, and Nunley only received the pay increase when the Corporate Finance Officer incorrectly distributed the pay schedules for the entire company. [R. 1813-1828, 1920-34]. This schedule showed that women as well as minorities were paid substantially less while being required to perform the same duties. [R. 1813-1828, 1895-96, 2457-64].

On or around October 26, 2016, SPH emailed Nunley and congratulated her for outperforming her male peers on a partner presentation. [R. 1813-1828, 2731-36]. Although she outperformed her male peers, Nunley continued to earn less than male Area Directors, as well as Black who was earning more than Nunley, although he was demoted to a GM. [R. 1813-1828, 1895-96, 2457-65, 2731-36].

Nunley was both the only female Area Director in the company, as well as the lowest paid Area Director in the company. [R. 1813-1828, 1895-96, 2457-65, 2731-36].

Scott Black, who was demoted from Nunley's position as Area Director, made more money in his demoted position than did Nunley. [R. 1813-1828, 1895-96, 2457-65, 2731-36].

In addition, male GMs were paid more than Nunley when she was a GM, although Nunley had the same and/or more experience as GM. [R. 1813-1828, 1895-96, 2457-65, 2731-36].

While employed with SPH, Nunley rejected sexual advances from Damon DeLapotaire, and reported the incidents to SPH's HR Director, Colleen Spahr; Spahr did not investigate Nunley's reports. [R. 1813-1828, 1958-62, 2351-86, 2731-36]. DeLapotaire told Spahr that he wanted to share a hotel room with Nunley during a GM retreat, although both Nunley and

DeLapotaire were married at the time of the retreat. [R. 1813-1828, 1958-62, 2351-86, 2731-36]. DeLapotaire informed Nunley that his marriage was unhappy and asked the state of Nunley's marriage to which Nunley replied that her marriage was very happy. [R. 1813-1828, 1958-62, 2351-86, 2731-36]. Nevertheless, DeLapotaire persisted in making sexual comments to Nunley, including repeating a statement that Bartlett said he had a "boner" while counseling employees who were the subject of a video showing them having sex in the bathroom of a restaurant. [R. 1813-1828, 1958-62, 2351-86, 2731-36, 2768-70]. DeLapotaire told Nunley repeatedly that she reminded him of his favorite ex-wife. [R. 1813-1828, 1958-62, 2351-86, 2731-36]. During a GM retreat, DeLapotaire swam in the pool underwater and pressed his face to Nunley's buttocks. [R. 1813-1828, 1958-62, 2351-86, 2731-36]. DeLapotaire also told Evertsen that Nunley was unstable, after Nunley rejected his sexual advances. [R. 1813-1828, 1958-62, 2351-86, 2731-36].

After Nunley repeatedly rejected DeLapotaire's sexual advances, he became cold and distant to Nunley where he had previously been overly friendly and flirty with her, and he issued Nunley discipline for her rejections. [R. 1813-1828, 1958-62, 2351-86, 2731-36].

On or around November 3, 2016, as part of her Area Director duty, Nunley was instructed to terminate GM Jessica Moore, the only female GM at the time, for a subpar health inspection, although Moore was not present in the restaurant at the time of the inspection. [R. 1813-1828, 1951, 136-138, 2366-72, 2731-36]. In contrast, SPH did not discipline the male Kitchen Manager, Juan Baez, who was also responsible for the incident. [R. 1813-1828, 1951, 2366-72, 2731-36].

Nunley opposed the disparate treatment of GM Moore, and addressed the matter with Regional Director DeLapotaire, as well as with Bartlett. [R. 1813-1828, 1951, 2366-72, 2731-36]. SPH retaliated against and punished Nunley for her opposition of this disparate treatment when Delapotaire gave Nunley a "Behavior Improvement Plan" three weeks later. [R. 1813-1828, 1951, 2366-72, 2731-36, 2779].

SPH has a culture of sexual harassment of its female employees. [R. 1813-1828, 1949-51, 2351-86, 2731-36, 2574-75, 2597-99].

Delapotaire issued a mandate that photographs be attached to female potential hires' applications and that hiring managers search for the female potential hires' social media accounts to determine their level of attractiveness. [R. 1813-1828, 1949-51, 2351-86, 2781]. Nunley and other employees of SPH were instructed not to hire specific individuals because

they did not have the right look for SPH. [R. 1813-1828, 1949-51, 2570-71, 2819-21, 2756-57, 2842].

In addition, Nunley was instructed by agents of SPH not to hire males to work as Front of House staff (i.e., servers and/or bartenders); no more than one (1) or two (2) males at a time are typically employed as Appellee's Front of House staff. [R. 1813-1828, 1949-51]. If a male is begrudgingly granted Front of House staff employment, Appellee's employees make sure that the males have very little interaction with Appellee's male owners. [R. 1813-1828, 1949-51].

Delapotaire informed Nunley and others that the ideal GM was a young male without a family. [R. 1813-1828, 2351-86]. Delapotaire also stated that babies were bad for business. [R. 1813-1828, 2375-76].

SPH fired marketing director Jessica Myler while she was on maternity leave. [R. 1813-1828, 2476-77, 2731-37, 2625, 2802-03, 2896-97, 2950].

SPH withdrew an offer to promote a female bartender who became pregnant. [R. 2757-67].

Another female employee who called out of work while pregnant was demoted for not reporting to work on time, despite presenting a doctor's note requiring her to take medical leave. [R. 2793-2806].

Yet another female employee had her position threatened because she was pregnant and required maternity leave and was transferred to another location after her return from FMLA leave. [R. 2961-64].

SPH discussed with Nunley on or about April 14, 2017, becoming a "Managing Partner," a position which held a right to a percentage of profits, for a potential new restaurant in Tallahassee, Florida. [R. 1813-1828, 1955, 2323-24, 2731-37].

During the meeting to discuss the particulars of Nunley becoming managing partner of the Tallahassee location, SPH's agents made this partnership contingent upon Nunley's agreement to wait two (2) football seasons before getting pregnant; while the owners of SPH stated that they knew they could not write this contingency into the contract, they made Nunley verbally agree that she would not get pregnant for two (2) football seasons. [R. 1813-1828, 1963-65, 2404-05, 2731-37].

SPH entered into an agreement with Nunley as to the terms of this Promissory Note on June 6, 2017. [R. 1813-1828, 1987-88, 2325-30, 896-902].

Nunley relied on this agreement and moved from Atlanta, Georgia to Tallahassee, Florida on June 26, 2017. [R. 1813-1828, 1987-88, 2325-30, 2731-37, 896-902].

Nunley purchased a home on or about June 11, 2017, with assurances from SPH and SPH prepared a disclosure to Nunley's mortgage lender on May, 6, 2017 restating Nunley's title, base salary, and that Nunley was entitled a percentage of profits of the restaurant located in Tallahassee, Florida. [R. 1813-1828, 2324-25, 919].

Once Nunley became managing partner of the Tallahassee location, she received her salary from TLC Forty-One, which was the subsidiary encompassing the Buckhead location. [R. 1813-1828, 3017-18]. Nunley continued to report to SPH's CEO, Bartlett, although Black, Area Director for SPH, oversaw the inventory for the Tallahassee location. [R. 1813-1828, 1958-60]. In addition, SPH chose the vendors for the Tallahassee location, and installed all software used by the Tallahassee location. [R. 1813-1828, 2523-31, 3047-53].

Appellee, along with multiple subsidiaries, including TLC Forty-One, is insured under the same policy as that of SPH. [R. 3166].

SPH never disclosed the existence of silent business partners to Nunley. [R. 1813-1828, 1992-93, 2346-47, 3166].

Nunley discovered other investors after the opening of the restaurant located in Tallahassee, Florida by those investors coming into the opened

restaurant and declaring they were owners. [R. 1813-1828, 2731-37, 3168, 3170].

Appellee never disbursed a percentage of profits according to the terms in the Promissory Note and delineated in the Appellee's disclosure to Nunley's mortgage lender, and when Nunley asked about the disbursement, she was told that the silent investors had priority to the profits. [R. 1813-1828, 2346-47, 3172, 3455-56, Email, 6/27/18]. Appellee now claims that such a priority never existed, and yet, Appellee's agents testified that the silent investors did have priority on profit disbursements until such time as their initial investments were recouped. [R. 3473-74, 3539-40, 2017].

Under the terms of the agreement, Nunley was to invest $25,000.00, and she would be entitled to 10% of the profit for the Tallahassee location. [R. 896-902]. Nunley invested $18,750.00 before she learned that she was not going to receive her agreed upon percentage of profits until the silent investors were paid back in full. [R. 3019-22].

When Nunley learned that she would not receive a percentage of profits until such time as the silent investors' monies were repaid, Nunley sought legal advice, and Attorney Joseph Grant sent a demand letter to Appellee for Nunley to obtain her share of the profits as listed within the agreement. [R. 1813-1828, 3452-53, 3172]. Upon receiving Attorney Grant's

demand letter, Appellee's agent, owner Michael Evertsen, told Nunley that he would not negotiate with her through her attorney and threatened Nunley if she continued seeking legal advice. [R. 1813-1828, 3028-29]. To receive the agreed upon payments, Nunley did not consult with Attorney Grant further because of the threats made to her, but instead, renegotiated the terms of the agreement with Evertsen. [R. 1813-1828]. Nunley signed a release with Evertsen that included Nunley receiving $12,498.95, less than the amount that Nunley paid in under the original agreement, and less than the amount of profit disbursements owed to Nunley which totaled approximately $45,576.70. [R. 1813-1828, 3452-53, 896-902]. When Appellee's agents sent Nunley the $12, 498.95, Evertsen informed Nunley that she was entitled to the money, regardless of whether she signed the release and new agreement. [R. 3333].

Appellee, as part of SPH, continued to condone and encourage sexual harassment of female employees in the workplace. [R. 1813-1828, 2477-79, 3224-27]. In or around November 2017, Nunley was informed that Area Director Black took a photo of female employee Sophia Pack's buttocks without her knowledge; Black then showed other employees this photo of Pack's buttocks. [R. 1813-1828, 2477-79, 3224-27].

In or around November 2017, Appellee's silent investor Larry Smith verbally assaulted Nunley and threatened to fire her because she followed protocol and did not allow a customer to be served alcohol without verifying their age; Smith also verbally assaulted Appellee's male employee, Security Guard Mike Walker. [R. 1813-1828 ¶ 78, 2388-90, 3200-06, 3243-47].

Appellee forced Smith to apologize for this verbal assault to Walker; however, Appellee did not force Smith to apologize to Nunley. [R. 1813-1828, 2411-16, 3200-06, 3243-47]. From on or around February 2018 until on around June 2018, Appellee asked Nunley approximately three times about her timeline to have children. [R. 1813-1828, 2731-37].

Nunley and her husband, Smith, became pregnant around October 2018, but unfortunately, Nunley suffered a miscarriage in or around November 2018. [R. 1813-1828, 2411-16]. At the time Nunley suffered this miscarriage, she was working approximately sixty to seventy hours per week for Appellee and under extreme stress due to Appellee's mistreatment of her. [R. 1813-1828, 2411-16, 2731-37].

While Nunley was healing from her miscarriage and ill with a sinus infection, Appellee's agent, Black, called Nunley and asked her when she was coming back to work; Appellee was unsympathetic and annoyed when

Nunley told Appellee about her miscarriage. [R. 1813-1828, 2411-16, 2731-37].

On or around January 9, 2019, Appellee gave an award entitled “The Savage Leadership Award” to male employee Brian Stanley, who was recently accused of touching a female server’s bra strap and forcing a female bartender to rub against him because he would not move from a doorway. [R. 1813-1828, 3007, 2731-37, 2629-34]. Stanley also had called a male employee “queer” in front of the entire staff for attending flight school. [R. 1813-1828, 2731-37, 2629-34, 3262]. “The Savage Leadership Award” was created by Appellee to reward managers who were extremely aggressive and unapologetic for their brash leadership style. [R. 1813-1828, 2634].

On or around January 9, 2019, Nunley informed Appellee that she was pregnant. [R. 1813-1828, 2419-20, 2731-37].

Appellee’s mistreatment of Nunley continued and became abruptly worse after she announced her pregnancy. [R. 1813-1828, 2731-37].

Appellee transferred Nunley’s Kitchen Manager, called off her needed training support, and was told she would have to “figure it out.” [R. 1813-1828, 2390-95, 2419-20, 2485-86, 3264-66]. Appellee’s systems had been breaking down since December of 2018 and without Appellee’s training

support, the breakdowns continued to get worse. [R. 1813-1828, 2390-95, 2419-20, 2485-86, 2743, 3264-66, 3268].

Furthermore, Appellee's Area Director Scott Black had been at Nunley's location helping her manage the store, but after she announced her pregnancy, Black did not return to Nunley's location to offer support. [R. 1813-1828, 3268, Email, 2/18/18]. Before she announced her pregnancy and subsequent miscarriage in the fall, Nunley's location was being operated by four managers. [R. 1813-1828, 2390-95, 2419-20, 2485-86, 2743]. After she announced her pregnancy and miscarriage, putting Appellee on notice that she was actively trying to have children, Appellee required Nunley's location to maintain full operations with only two managers. [R. 1813-1828, 2390-95, 2419-20, 2485-86, 2743].

Appellee's agents sent numerous harassing emails to Nunley starting as early as 1:00 a.m., demanding updates on the restaurant, but because Nunley's location was the only location with no office space, Nunley had to work from a home office to perform certain duties. [R. 1813-1828, 1962-65, 3264-66]. Nunley would start work at home at or around 6:00 a.m., arrive at the restaurant at or around 9:00 a.m., and not leave until at or around seven 7:00pm. [R. 1813-1828, 2449-51, 2499-2505]. When she was at the restaurant, she would perform the work of two general managers and one

kitchen manager. [R. 1813-1828, 2449-51, 2499-2505, 3264-66]. Nunley's husband, Nunley Smith, who was the only other manager, would work until the restaurant closed. [R. 1813-1828, 2449-51, 2499-2505].

Because Appellee's treatment of her changed so abruptly, Nunley asked Appellee on or around January 20, 2019, if Appellee was trying to force her to quit; Appellee did not reply. [R. 1813-1828, 2485-86, 921].

Appellee terminated both Appellants on February 11, 2019, four (4) weeks after Nunley announced her pregnancy. [R. 1813-1828, 2430-35, 2537-38, 3189-95, 3270, 1811]. Appellee gave no reason for Appellants' terminations. [R. 1813-1828, 2430-35, 3189-95].

Appellee's termination letter stated that Appellants would receive instructions regarding Cobra insurance coverage because they would be dropped from Appellee's insurance coverage on or around February 18, 2019. [R. 1813-1828, 1811, 3270].

However, Appellee never sent the Cobra information to Appellants, and further blocked Appellants' email accounts so they could not contact Appellee's Human Resources Department or anyone with a company email to get insurance information. [R. 1813-1828, 2421]. At a time when Appellants needed medical attention desperately, they were denied

insurance coverage and continued to have no insurance coverage for years. [R. 1813-1828, 2457].

Appellee's agents testified that Nunley Brandon Smith was never terminated by Appellee or by SPH, despite the termination letter given to him on February 11, 2019. [R. 3290-91, 2021-22, 1811].

After Appellants began the above captioned proceedings, Appellee's agents now purport to have specific reasons for which Appellants were terminated, including:

(a) Nunley was terminated as she was deemed uncoachable, unruly, and underperforming.

(b) Nunley was also terminated as the aforementioned Tin Lizzy's Cantina was subject to negative media and internet reviews.

(c) Nunley was also terminated for having high food costs and high turnover.

(d) Nunley was also terminated for having bad health inspection reports.

(e) Nunley was also terminated for suspected theft in that her inventory reports were manipulated which in turn increased the size of her bonus.[R. 345-438].

However, prior to her termination, owner Michael Evertsen and other agents for Appellee and for SPH told Nunley that she was a strong manager, and Evertsen offered her the role of CEO for SPH. [R. 1813-1828, 2352-55, 3331, 3333, 3335, 3337]. At no time prior to her termination did any agent for Appellee or for SPH tell Nunley that she had performance deficiencies. [R. 1813-1828, 2497-98]. Appellee purports to have a bullet point list of issues that was issued to Nunley to correct, but the list is not executed; Nunley has the same list with additional items on the list that was executed and shows that the list was in no way a disciplinary or counseling matter; Appellee submitted a false and doctored list to make it appear that Nunley was experiencing performance deficiencies. [R. 1813-1828, 1971-72, 2512-14, 3339, 3341]. In addition, Appellee submitted multiple undated and unexecuted "letters" addressed "To Whom It May Concern" from Colleen Spahr Morrow to support Nunley's alleged poor performance, but once again, at no time did Appellee or SPH or any of their agents address the alleged deficiencies with Nunley prior to Appellants' terminations. [R. 1813-1828; R.].

Moreover, as previously described, Aaron Hobbs, male, was not terminated for negative social media and/or internet reviews, but instead,

was encouraged to falsify positive reviews for the Kennesaw location. [R. 1813-1828, 1927-31, 2457-63, 2576-86, 2626-27, 904-17, 923-41].

As to high food costs and turnover, Appellee ignores the fact that when the Tallahassee location was established, SPH attempted to model it after its other restaurants in Georgia, without taking into consideration the location of the Tallahassee restaurant, as well as Florida codes, Florida statutes, and the nature of the location being dependent on FSU's schedule. [R. 1813-1828, 2525-30, 2996, 3343]. In addition, Appellee and SPH budgeted the minimum wage rate for servers to that of Georgia, without recognizing that the Florida minimum wage rate was almost double that of Georgia. [R. 1813-1828, 2402-03]. Appellee and SPH required that Nunley only use specific vendors, but those vendors did not always carry all ingredients necessary for the recipes in the Tallahassee restaurant, forcing Nunley to purchase items at local grocery stores, and causing food prices to be higher than if Nunley were able to use different vendors. [R. 1813-1828, 2526-30, 3345, 3347]. In addition, because Appellee and SPH were not always timely paying the vendors, Nunley would have vendors refusing to fulfill orders for the Tallahassee location. [R. 1813-1828, 2526-30].

As to bad health inspections, Nunley disputes that the Tallahassee location ever failed a health inspection; once again, Appellee and SPH are

attempting to conflate the Georgia codes with that of Florida. [R. 1813-1828, 2507, 3349-51].

As to the inventory reports, Nunley repeatedly informed Area Director Black that there were glitches in the inventory system, and that she had variances with limes because the system rated them as cases rather than as individual fruits and that she had variances with pineapple juice because the system was calculating the juice at $2300/quart; Black assured Nunley that the inventory issues would be fixed, but then, Black failed to correct the problems. [R. 1813-1828, 2489-91, 3353, 3355, 3345, 3357]. Black had final approval of the inventory but received no discipline for his failure to correct the errors. [R. 1813-1828, 2491]. Male managers experienced similar mistakes with the inventory system, including mistakes with citrus fruit, and yet, no male employee was disciplined, let alone fired, for the issues. [R. 1383-85, 2707-11]. At no time did Nunley intentionally report false inventory numbers to manipulate the profit for the Tallahassee location. [R. 1813-1828].

Appellee also alleges that Nunley did not report to the Tallahassee location by 8:00 a.m. on February 11, 2019, and therefore, she committed a terminable offense. However, Nunley was a salaried employee who was given approval to complete office tasks from home because the Tallahassee

location did not have an office space in which she could perform administrative tasks. [R. 1813-1828, 2449-2451]. In addition, Nunley Smith, another salaried manager, reported to the Tallahassee location at around 7:00 a.m., covering for Nunley, his wife, knowing that she was ill; when Appellee's and SPH's agents reported to the location, Nunley was in the area, parking her vehicle and arrived soon after. [R. 1813-1828, 3189-92].

Nunley was replaced by John Markowsky, male, as GM for Tallahassee; Markowsky was previously one of the two salaried managers poached from the Tallahassee location and assigned to the Augusta, GA location, against procedure. [R. 1813-1828, 2390-95]. At the time of Appellants' terminations, the Tallahassee location was scoring first or second in all categories, while the Augusta, GA location, managed by Markowsky, was scoring last or second to last in all categories. [R. 1813-1828, 2997-98, 3404].

Since Nunley's termination, she has suffered severe depression and has failed to provide companionship or assistance to Nunley Smith, often refusing to leave the house to socialize. [R. 3217-22].

Nunley filed a charge of discrimination with the Florida Commission on Human Relations on May 6, 2019, and indicated that the charge should be dual filed with the Equal Employment Opportunity Commission in which

Nunley described years of ongoing discrimination against her and other female employees. [R. 3406-07]. Nunley amended her original charge on August 15, 2019, in which she more specifically described the acts of ongoing discrimination that she had suffered for years prior to her termination. [R. 3409-11]. Nunley amended her original charge a second time on January 2, 2020, to also allege that she was retaliated against by Appellee. [R. 3413].

Appellee failed to produce requested documents to Appellants, including emails, claiming that the documents were destroyed upon Appellants' terminations when Appellants' email accounts were closed. [R. 3415-3450]. However, William Ashe, SPH's former IT manager testified that email accounts were not deleted and that emails were always accessible even after a termination, and that Appellee and SPH utilized a commercial SPH utilized a commercial Gmail account with ample storage to retain emails. [R. 3074-77].

STANDARD OF REVIEW

The applicable standard of review for a trial court's order granting summary judgment is de novo. Volusia County v. Aberdeen at Ormond Beach, L.P., 760 So. 2d 126, 130 (Fla. 2000).

SUMMARY OF ARGUMENT

The trial court erred by finding a valid release between the parties and entering summary judgment on Nunley's claims of Breach of Contract, Promissory Estoppel, Fraud in the Inducement, Fraudulent Misrepresentation, Negligent Misrepresentation, Conversion, Equitable Lien-Equitable Estoppel, Equitable Lien-Unjust Enrichment and Civil Theft. The trial court also erred by finding Nunley failed to state a *prima facie* case of discrimination, hostile work environment and retaliation and entering summary judgment on those claims, including finding that there was no spoliation issue. Finally, the trial court erred by entering summary judgment in favor of Appellee on Smith's consortium claim. For the reasons set forth fully herein, this Court should reverse the trial court's order granting summary judgment and remand for further proceedings.

ARGUMENT

A plaintiff will always survive summary judgment if he presents circumstantial evidence that creates a triable issue concerning the employer's discriminatory intent. Smith v. Lockheed-Martin Corporation, 644 F.3d 1321, 1328 (11th Cir. 2011). Further, and critically unchanged by the adoption of the federal summary judgment standard, the Florida Legislature has specifically declared that discrimination laws "shall be liberally construed

to further the general purposes stated in this section." Woodham v. Blue Cross & Blue Shield of Florida, Inc., 829 So. 2d 891, 894 (Fla. 2002) (quoting § 760.01(3), Fla. Stat.); Joshua v. City of Gainesville, 768 So. 2d 432 (Fla. 2000). Here, the record below contained disputed issues of material fact, that under either standard, must be resolved by the jury. Summary judgment was granted in error, and this Court should reverse the trial court's order.

I. THE COURT ERRED WHEN IT FOUND THERE WAS NO GENUINE MATERIAL DISPUTE ABOUT THE VALIDITY OF THE PROMISSORY NOTE AND RELEASE

The trial court found that Appellee and Southern Proper Hospitality Group were a single or joint employer as of April 5, 2017, when Appellee's corporation was formed. The promissory note was executed on June 6, 2017. Thus, at the time the promissory note was executed, the entities were a single and/or joint employer.[1] Similarly, Nunley signed a release on July 20, 2018, after Appellee's corporation was formed.[2] Thus, at the time the release was executed, the entities were a single and/or joint employer.[3]

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[1] Nunley does not concede that the Promissory Note is valid. As discussed further below, Nunley challenges the validity of the Promissory Note.

[2] Nunley does not concede that the Release is valid. As discussed further below, Nunley challenges the validity of the Release.

[3] Nunley agrees that the trial court correctly considered Appellee and Southern Proper Hospitality Group to be a single or joint employer for the time period after April 5, 2017, insofar as its evaluation of the Promissory Note/Release issues. However, Nunley does not concede that the trial court

A. The Release fails for want of consideration.

The trial court held that "consideration for the release was legally sufficient, including but not limited to the pay increase that Plaintiff received." This holding is contrary to the facts and the law: a promise, to be enforceable, must be supported by consideration. Kaufman v. Harder, 354 So.2d 109, 109 (Fla. 3d DCA 1978).

Summary judgment is also not appropriate, where, as here, there is a contention by the plaintiff that the release failed for lack of consideration. See e.g. Scherer v. DSK-OPH, Inc., 665 So.2d 1147 (Fla. 4th DCA 1996) (error to grant summary judgment were there were issues of material fact concerning whether there was both a lack of consideration and a failure of consideration for the release based upon a collapse of the overall agreement which gave rise to the release); Lambert v. Weeks, 559 So.2d 1163 (Fla. 4th DCA 1989).

The fact that the release is clear and unambiguous is irrelevant and not dispositive, and will not prohibit parole evidence. Id. Parole evidence is permissible to show lack of consideration regarding the release. Wagner v. Bonucelli, 239 So.2d 619 (Fla. 4th DCA 1970); See also Scherer v.

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correctly determined that Southern Proper Hospitality Group and Appellee were not a single or joint employer as to the employment discrimination issues.

Kamelhair, 665 So.2d 1147 (Fla. 4th DCA 1996) (holding that the trial court erred in entering partial summary judgment against the plaintiff based on a written release that the parties executed some years prior to the commencement of the action where the plaintiff argued that the release was invalid and ineffective to bar the claims against the defendant for number a of reasons, including a failure of consideration).

The alleged "release" signed by Nunley lacked consideration. The amount paid to Nunley was less than the amount that she paid as part of the original buy-in agreement, and it was significantly less than she was entitled to as a disbursement of profits. Moreover, Evertsen, himself, told Nunley that he would cut her the check regardless of whether she signed the agreement. The payment was not contingent on Nunley releasing Appellee from all claims that she had against it. As such, Nunley did not receive consideration in exchange for releasing Appellee, SPH or their agents from civil liability for breaching the terms of the original agreement that Nunley signed with them in June, 2017, and the release is not valid.

Additionally, summary judgment in favor of moving party is improper if the court does not consider extrinsic evidence in support of the defenses of lack of consideration, release, waiver, or estoppel. Bassato v. Denicola, 80 So.2d 353 (Fla.1955). Thus, because Nunley offered extrinsic evidence

which was not considered by the trial court, summary judgment holding sufficient consideration was improper and is due to be reversed.

B. Nunley proffered sufficient evidence of fraud in the Release to create a genuine issue of material fact.

Similarly, the trial court found that Nunley did not proffer sufficient evidence to nullify the release, apparently because "[t]he law favors releases, and there would need to be stronger evidence to nullify or void a written release." However, the law only favors a release when the release is entered in the absence of evidence of fraud.

A release may be reformed if there is a unilateral mistake with inequitable conduct, a mutual mistake, or fraud. See Edwards v. Norman, 780 So.2d 162 (Fla. 2nd DCA 2001); Payco-General American Credit v. Coster, 573 So.2d 192 (Fla. 3d DCA 1991); Ayr v. Chance, 372 So.2d at 1000 (Fla. 4th DCA 1979); Milford v. Metropolitan Dade County, 430 So.2d 951 (Fla. 3d DCA 1983); Gonzalez v. Travelers Indemnity, 408 So.2d 741 (Fla. 3d DCA 1982).

Additionally, there exists a material issue of fact when a plaintiff provides evidence that a release was ineffective because the release was fraudulently induced. See Henson v. James M. Barker Co., 555 So.2d 901 (Fla. 1st DCA), rev. denied, 564 So.2d 487 (Fla.1990). Although normally evidence of an oral agreement may not be used to alter the terms of a written

agreement, it can be introduced to show that the written argument was obtained by fraudulent means. Edwards v. Norman, 780 So.2d 162 (Fla. 2d DCA 2001) (reversal based on the lower court's failure to consider such parole evidence); see also Abernethy v. Nat'l Union Fire Ins. Co., 717 So.2d 196, 198 (Fla. 5th DCA 1998); Ayr, 372 So.2d at 1000; Bagnasco vs. Smith, 382 So.2d 401 (Fla. 4th DCA 1980).

There is no question that Appellee fraudulently induced Nunley into signing the Release. Nunley was forced to sign the release under duress and without the benefit of legal counsel. Evertsen threatened Nunley if she continued seeking legal counsel as it related to the money owed to her under the original agreement.

Because Nunley was denied consideration and because Nunley only signed the release under duress, based on fraudulent representations by Appellee's agents, it is not a valid contract. The trial court thus erred, and the Order is due to be reversed and remanded for further proceedings.

II. THE TRIAL COURT ERRED BY GRANTING SUMMARY JUDGMENT ON NUNLEY'S DISCRIMINATION CLAIMS.

The trial court held that there were "no similarly situated employees as required for claims of discrimination and retaliation, and any claimed similarly situated employees were not employed by Defendant" and, consequently, granted summary judgment on each of Nunley's employment claims: sexual

harassment, pregnancy discrimination. and retaliation. As shown below, the court erred.

A. Nunley proffered evidence that Appellee and SPH were a single employer or a joint employer for purposes of her discrimination claim.

Though the Court found that Appellee and SPH were a single employer for purposes of the contract claims after Appellee was incorporated on April 5, 2017, for the purposes of the employment discrimination claim, Appellee and SPH should be considered a single employer or joint employers for the entirely of Nunley's employment history with SPH and its subsidiaries, including Appellee.

1. Appellee and SPH were a single employer.

To determine whether two or more entities are a single employer, the Eleventh Circuit uses the integrated-enterprise test which requires: (1) common management; (2) interrelation between operations; (3) centralized control over labor relations; and (4) common ownership. Torres- Lyes v. City of Riviera Beach, Fla., 166 F.3d 1332, 1341 (11th Cir. 1999), judgment entered, 169 F.3d 1322 (11th Cir. 1999). However, the Eleventh Circuit has also cautioned that not all factors need to be present to determine that multiple entities are a single employer, although greater weight is given to the labor relations factor in Title VII claims because the relevant issue is

employment decisions. Labovitz v. Springville Pediatrics, LLC, 2:18-CV-01918-RDP, 2020 WL 1953826, at *13 (N.D. Ala. Apr. 23, 2020).

In this matter, there is no question that Appellee and SPH are a single employer. The CEO of SPH, Bartlett, supervised Nunley in all aspects, and when Bartlett left, Nunley reported to SPH's Area Director Black. SPH's management structure stood as upper management for Defendant.

SPH owned and operated multiple Tin Lizzy's restaurants throughout Georgia and other states, and Appellee's Tallahassee location was modeled on the other restaurants owned by SPH and SPH's other subsidiaries. All Tin Lizzy's restaurants were subject to the same reporting requirements, completed the same forms, used the same software.

SPH retained centralized control over labor relations for the Tallahassee location. While Nunley hired servers and other lower-level employees, SPH required that Nunley provide photographs of her prospective hires, and SPH retained control to transfer employees from the Tallahassee location to SPH's other restaurants.

SPH is owned by Michael Evertsen, Chris Hadermann and John Piemonte. SPH is the majority owner of Appellee, and therefore, both SPH and Defendant have common ownership.

Based on the above, SPH and Appellee are single employers, and all discrimination and retaliation committed by employees of SPH, as well as comparators in the male GMs and Area Directors of SPH, are attributable to Appellee.

2. Alternatively, Appellee and SPH were joint employers.

In the alternative, Appellee and SPH were Nunley's joint employers, and Nunley may use the differential treatment she suffered as compared to males within the global SPH enterprise to advance her claims of discrimination and retaliation. To the extent the trial court isolated its analysis to employees of Appellee singularly and from the time of Appellee's formation in April 2017, the trial court committed reversible error.

To determine whether an employment relationship and, by extension, a joint employer relationship exists, the Eleventh Circuit uses an "economic realities" test that considers the degree of actual and potential control of the employer over the employee. See Villarreal v. Woodham, 113 F.3d 202, 205 (11th Cir. 1997). The U.S. Supreme Court has given the term "employer" an expansive definition. See Nationwide Mutual Insurance Co. v. Darden, 503 U.S. 318, 326 (1992). The Eleventh Circuit uses an eight-factor test to determine economic realities and whether the employee is "economically dependent" on the employer. See Layton v. DHL Express (USA), Inc., 686

F.3d 1172, 1175 (11th Cir. 2012); see also Aimable v. Long and Scott Farms, 20 F.3d 434, 439 (11th Cir. 1994). "[N]o factor is dispositive; and the comparative weight of each factor depends on the facts of the case." Aarras v. Doral, 169 F. Supp. 3d 1337, 1339 (S.D. Fla. 2016), citing Antenor v. D & S Farms, 88 F.3d 925, 932–33 (11th Cir. 1996). The eight factors are: (1) the nature and degree of control of the workers; (2) the degree of supervision, direct or indirect, of the work; (3) the power to determine the pay rates or the methods of payment of the workers; (4) the right, directly or indirectly, to hire, fire, or modify the employment conditions of the workers; (5) preparation of payroll and the payment of wages; (6) ownership of the facilities where work occurred; (7) performance of a specialty job integral to the business; (8) investment in equipment and facilities. Layton, 686 F.3d at 1176 (11th Cir. 2012) (internal citations omitted).

Nature and Degree of Control

SPH had control over Nunley, as well as Bartlett, Spahr, DeLapotaire Black and other individuals who sexually harassed Nunley, discriminated against and retaliated against Nunley because of her gender, her pregnancies and her opposition to unlawful employment actions.

Nunley had schedules approved by SPH officers and had the Tallahassee location's inventory regulated by Black, an SPH agent.

Additionally, SPH removed managers from the Tallahassee location and transferred them to other locations in Georgia.

An alleged employer has control over the employee "when it decides such things as (1) for whom and how many employees to hire; (2) how to design the employees' management structure; (3) when work begins each day; (4) when the laborers shall start and stop their work throughout the day; and (5) whether a laborer should be disciplined or retained." Martinez-Mendoza v. Champion Int'l Corp., 340 F.3d 1200, 1209-10 (11th Cir. 2003).

Here, because SPH maintained control over Appellee, Appellee was a mere instrumentality of SPH.

Degree of Supervision

In this matter, there is no question that SPH had total supervision of Appellee, and in fact, SPH's agents scrutinized Nunley's work performance, finding fault with her staffing and scheduling, and refusing to correct glitches in the software which Nunley reported to SPH.

The Power to Determine Pay Rates or Methods of Payment of Workers

Nunley was paid not by Appellee but by a different subsidiary to SPH, TLC Forty-One which encompassed the Buckhead location.

The Right to Hire, Fire or Modify Conditions

There can be no question that SPH had the right to hire, fire and change employment conditions for Nunley and other employees of the Tallahassee location because it did so. It was SPH employees who terminated Nunley, and it was SPH employees who transferred the salaried managers from the Tallahassee location and assigned them to Georgia restaurants.

Ownership of Facilities

SPH was a majority owner of Appellee, and as such, owned the facility where Nunley worked, when she became Managing Partner of the Tallahassee location.

Performance of a Specialty Job

SPH assigned Nunley as the Managing Partner for the Tallahassee location. In addition, SPH transferred other employees from the Tallahassee location, assigned the Area Director to the Tallahassee location, and left Nunley open to discrimination and retaliation through the assignment of the managers who supervised Nunley.

Investment in Equipment and Facilities

Again, SPH invested in the facility and equipment for the Tallahassee location, provided the software and maintenance used by Appellee and the Tallahassee location.

Based on the above, SPH had control over Defendant, making it, Nunley and all employees of Defendant economically dependent on SPH. Therefore, Defendant and SPH were Nunley's joint employers and are responsible for the harassment, discrimination and retaliation to which Nunley was subjected throughout her employment with SPH and its subsidiaries, including Defendant.

B. Nunley proffered sufficient evidence to establish a *prima facie* case of discrimination.

Florida courts analyze the FCRA in the same manner as Title VII. Castleberry v. Chadbourne, Inc., 810 So.2d 1028, 1030 (Fla. 1st DCA 2002). "Title VII prohibits an employer from 'discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.'" Schoenfeld v. Babbit, 168 F.3d 1257, 1266 (11th Cir. 1999) (quoting 42 U.S.C. § 2000e-2(a) (1)). Moreover, the Pregnancy Discrimination Act amended Title VII to provide that discrimination on the basis of sex includes discrimination "on the basis of pregnancy, childbirth or

related medical conditions." Id. §2000e(k). "The analysis for a pregnancy discrimination claim is the same type of analysis used in other Title VII sex discrimination suits." Armindo v. Padlocker, Inc., 209 F.3d 1319, 1320 (11th Cir. 2000).

The trial court, like Appellee, improperly limited its analysis of Nunley's *prima facie* case to the rigid comparator standards enunciated in McDonnell Douglas standards, and, erroneously granted summary judgment after improperly determining Nunley had no comparators. See McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). The failure of the trial court to consider discrimination holistically, including via the convincing mosaic standard, is sufficient error alone to reverse the trial court.

1. Comparators were treated more favorably.

The Eleventh Circuit, in Lewis v. City of Union City, Georgia, 918 F.3d 1213 (11th Cir. 2019), held that "a plaintiff must show that she and her comparators are 'similarly situated in all material respects.'" Id. at 1224. (citations omitted). In rejecting the "nearly identical" standard, the Lewis Court further explained that "[a]lthough we must take care not to venture too far from the form—'apples should be compared to apples'—we must also remember that '[e]xact correlation is neither likely nor necessary.'" Id. at 1226. Moreover, as shown above, a plaintiff may establish a claim of

discrimination through a convincing mosaic "by pointing to evidence that demonstrates, among other things, (1) suspicious timing, ambiguous statements, or other information from which discriminatory intent may be inferred, (2) "systematically better treatment of similarly situated employees," and (3) pretext." Jenkins v. Nell, 26 F.4th 1243, 1250 (11th Cir. 2022) (citing Lewis v. City of Union City, Georgia, 934 F.3d 1169, 1185 (11th Cir. 2019)).

Here, the trial court found that there were no similarly situated employees employed by Appellee. This finding is contrary to the record. Nunley proffered sufficient evidence of several similarly situated individuals in SPH's enterprises, including other male GMs who were all purportedly subject to the same standards, rules, and regulations as Nunley, but who were not disciplined, let alone fired, for inventory glitches. This evidence is even more jarring when viewed against the testimony of multiple males that they experienced similar problems to that of Nunley and that it was an "easy fix" completed by the Area Director. Nunley's Area Director, Scott Black, did not fix the inventory issue, but received no discipline for his failure while terminating Nunley for his own deficiencies.

No male GM had managers transferred from their location without following the proper procedures established by SPH, and yet, the Tallahassee location lost two salaried managers within months, neither of

which was replaced, leaving Appellants to manage the restaurant with half the managerial staff for an extended period, something no male GM had to experience.

No male GM was disciplined over poor internet reviews. In fact, Aaron Hobbs was encouraged by SPH's agents to falsify positive reviews to combat the negative reviews against his Kennesaw location. When the falsified reviews were discovered and publicized, Hobbs suffered no discipline, and the only consequence he experienced was to be paid his bonus in coins. Moreover, Bartlett and Black, both male, who encouraged the falsification of the reviews, suffered no discipline for their roles in the scandal.

Similarly, in contrast to the males, Nunley was denied assignments to locations she was promised to place male GMs in the more favorable locations. The evidence is more than adequate to create a genuine issue of material fact in support of Nunley's alleged comparators and, thus, whether Nunley stated a *prima facie* case of discrimination. The trial court thus erred, and summary judgment is due to be reversed.

2. The record contains evidence of a "convincing mosaic" of discrimination.

The trial court and Appellee did not respond to Nunley's convincing mosaic argument, which failure alone justifies reversal. Contrary to the analysis of the trial court, Nunley a lack of comparators does not doom her

claim. See Smith v. Lockheed-Martin Corporation, 644 F.3d 1321, 1328 (11th Cir. 2011).

If the plaintiff cannot produce a comparator, she "will always survive summary judgment if she presents circumstantial evidence that creates a triable issue concerning the discriminatory intent." Lockheed-Martin, 644 F.3d at 1328 (citing Holifield v. Reno, 115 F.3d 1555, 1562 (11th Cir. 1997)). The circumstantial evidence creates a triable issue if it, "viewed in a light most favorable to the plaintiff, presents 'a convincing mosaic of circumstantial evidence that would allow a jury to infer intentional discrimination by the decisionmaker.'" Id. at 1328 (quoting Silverman v. Bd. Of Educ., 637 F.3d 729, 734 (7th Cir. 2011)); see also Rioux v. City of Atlanta, 520 F.3d 1269, 1277 (11th Cir. 2008) (holding that plaintiff submitted sufficient circumstantial evidence of discrimination to meet elements of prima facie case even though no comparator produced); Holland v. Gee, 677 F.3d 1047, 1062 (11th Cir. 2012) (holding plaintiff submitted sufficient circumstantial evidence for jury to find termination motivated by discrimination).

The relevance and probative value of a certain type of evidence in a given case is "determined in the context of the facts and arguments in a

particular case, and thus [is] generally not amenable to broad *per se* rules." Sprint/United Mgmt. Co. v. Mendelsohn, 552 U.S. 379, 387 (2008).

In this matter, there is no question that Nunley was treated differently because of her gender, and more specifically, because of her attempts to become pregnant. Generally, Nunley presented testimony that the female employees were treated differently, were subjected to unwanted sexual harassment, were disciplined, demoted, denied promotions and/or fired after experiencing pregnancies, were denied preferential locations in favor of male employees.

Specifically, Nunley presented evidence that SPH's agents made it a verbal requirement that Nunley not attempt to become pregnant for two football seasons after moving to Tallahassee. Nunley disclosed to Black that she was pregnant, but lost the pregnancy at the start of the second football season. SPH has a history of penalizing female employees that get pregnant. Jessica Myler was fired while using FMLA as maternity leave. Lauren Lenoir was demoted after experiencing medical issues related to a pregnancy. A female employee was promised a promotion, but the offer was withdrawn after she announced her pregnancy. Damon DeLapotaire voiced the sentiment for SPH when he said that babies were bad for business.

When taken together, this testimony was sufficient to create a genuine issue of material fact in support of a "convincing mosaic" that Defendant's and SPH's agents discriminated against Nunley. See Jenkins, 26 F.4th at 1250–51 (holding that Jenkins presented a convincing mosaic by showing black employees retained employment even while violating the same policy, that the supervisor mistreated other white employees, that numerous white employees retired, resigned or transferred when Nell took over as supervisor, and that Nell had a close relationship with HR, among other things). Thus, summary judgment was in error and the case is due to be reversed and remanded.

C. Nunley established a *prima facie* case of hostile work environment discrimination.

The trial court granted summary judgment on Nunley's hostile work environment claim finding that the sexual harassment claims as to Nunley were not sufficiently severe or pervasive and that Nunley suffered no damages. These findings are contradicted by the record.

To establish a hostile work environment, Nunley must show: (1) that she belongs to a protected group; (2) that the employee has been subject to unwelcome harassment; (3) that the harassment must have been based on the protected characteristic of the employee; (4) that the harassment was sufficiently severe or pervasive to alter the terms and conditions of

employment and create a discriminatorily abusive working environment; and (5) a basis for holding the employer liable. See Miller v. Kenworth of Dothan, Inc., 277 F.3d 1269, 1275 (11th Cir. 2002).

Ostensibly, the trial court found (and Nunley agrees) that Nunley belongs to a protected group, that she was subject to unwelcome harassment, that the harassment was based on the protected characteristic and that there was a basis for holding the employer liable.[4] However, Nunley disputes that the harassment was not sufficiently severe or pervasive to state a *prima facie* case and/or that she did not proffer evidence of damages.

To be actionable, the harassing conduct must be sufficiently severe or pervasive "to alter an employee's terms or conditions of employment." Reeves v. C.H. Robinson Worldwide, Inc., 594 F.3d 798, 809 (11th Cir. 2010). The severity or pervasiveness are examined from both the plaintiff's subjective view as well as an objective perspective, that "of a

[4] Because the Order granting summary judgment limited its findings to an alleged lack of a severe and pervasive hostile work environment and the absence of damages, Nunley has not briefed each of the elements of hostile work environment, including whether Defendant may be held liable for the harassment. Nunley does not abandon its position that there is a basis for holding Appellee liable for the hostile work environment and does not waive its right to address that argument on appeal should Appellee make that assertion.

reasonable person in the plaintiff's position, considering all the circumstances." Id.

In examining the objective component, four considerations exist: "(1) the frequency of the conduct; (2) the severity of the conduct; (3) whether the conduct is physically threatening or humiliating, or a mere offensive utterance; and (4) whether the conduct unreasonably interferes with the employee's job performance." Mendoza, 195 F.3d at 1246.

As Freytes-Torres notes, the factors are to assist the Court in examining the objective component, but the plaintiff does not need to meet each one. See Freytes-Torres v. City of Sanford, 270 Fed. Appx. 885, 890-91 (11th Cir. 2008) (reversing summary judgment where plaintiff met three of the four factors cited in Mendoza). Further, even one act can be severe enough to meet the "severe or pervasive" hostile work environment prong. E.E.O.C. v. Dillard's, Inc., 2009 WL 789976 at *8 (M.D. Fla. March 23, 2009). Isolated incidents that are sufficiently severe, humiliating, or physically threatening can satisfy the "totality of circumstances" test that courts employ to determine whether conduct is sufficiently severe or pervasive. Id.

Here, DeLapotaire and other agents for Appellee and for SPH subjected Plaintiff to verbal abuse and harassment, undue scrutiny and discipline. Appellee's and SPH's agents ignored Nunley's reports of

harassment, reports that she required assistance at the Tallahassee location, and actually sabotaged her work at the Tallahassee location by removing her managers and refusing to correct IT and equipment failures. Nunley reported the conduct to Appellee's agents, including Spahr, the HR Director, but rather than correct the abusive treatment, it was escalated.

The totality of the circumstances to which Nunley was subjected, including not only DeLapotaire's conduct but also the fact that Nunley repeated pleas for help from Appellee were met with silence, is sufficient to satisfy the objective severe and pervasive standard.

Likewise, it is undisputed that actions on the part of DeLapotaire and Appellee's refusal to stop DeLapotaire even after Nunley complained terrified Nunley for her personal safety, which is sufficient to satisfy the subjective standard. Consequently, Nunley proffered sufficient evidence to create a genuine issue of material fact in support of allegation of severe and pervasive sexual harassment creating a hostile work environment.

Inexplicably, the trial court found that Nunley suffered no damages as a result of the hostile work environment. The evidence in the record says otherwise. The trial court erred when it, in essence, found that the hostile work environment should not have damaged Nunley It did damage Nunley and Nunley proffered evidence to create a genuine issue of material fact in

support of damages. Thus, the trial court erred by granting summary judgment in favor of defendant on the hostile work environment claim and the order is due to be reversed and remanded.

D. Nunley established a *prima facie* case of retaliation.

Without any elaboration, the trial court simply stated that Nunley cannot establish a claim for retaliation as there were legitimate, non-discriminatory reasons for termination which Nunley did not rebut. [R. 3611]. Pretext is addressed below, however, were this Court to evaluate the merits of Nunley's retaliation claim, it should conclude that she established a *prima facie* case. Briefly, to establish a prima facie case of retaliation in violation of the FCRA, a plaintiff must show that: (1) she engaged in statutorily protected expression; (2) she suffered an adverse employment action; and (3) a causal relationship between the two events. Brochu v. City of Riviera Beach, 304 F.3d 1144, 1155 (11th Cir. 2002).

There can be no legitimate dispute that Nunley engaged in protected speech and was subject to adverse actions. She complained multiple times to SPH's agents, including owner Michael Evertson, Bartlett, and HR Director Spahr, that she was being treated differently than male GMs and that she was being sexually harassed by DeLapotaire. This is sufficient to engage in protected activity. Sitar v. Indiana DOT, 344 F.3d 720, 727 (7th Cir. 2003)

(employee need not use "magic word" such as "sex" or "gender discrimination" to invoke anti-retaliation protections); Garcia-Paz v. Swift Textiles, Inc., 873 F.Supp. 547, 559-60 (D. Kan. 1995), *affirmed* 213 F.3d 1344 (11th Cir. 2000).

Nunley also established that she suffered an adverse action. Generally, an adverse action must be "materially adverse as viewed by a reasonable person in the circumstances." Davis v. Town of Lake Park, 245 F.3d 1232, 1239 (11th Cir. 2001). This standard is even more relaxed in the retaliation context. See also, Gates v. Gadsden Cnty. Sch. Bd., 45 So. 3d 39, 40 (Fla. 1st DCA 2010) (reversing summary judgment in a retaliation case, finding that the plaintiff "met the very low burden to survive summary judgment by demonstrating a dispute of material fact regarding whether the School Board took 'materially adverse employment action' against her" by denying her the opportunity post-employment to continue working as a volunteer). As Keith set forth in his response below, he need only show that retaliation produced an objective injury or harm, such that it "might have dissuaded a reasonable worker from making or supporting a charge of discrimination." Edgerton v. City of Plantation, 682 F. App'x 748, 750 (11th Cir. 2017) (quoting Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 77 (2006)); Gowski v. Peake, 682 F.3d 1299, 1312 (11th Cir. 2012)

(recognizing a cause of action for a retaliatory hostile work environment). Particularly important here, retaliatory conduct is not limited to the workplace. Donovan v. Broward Cnty. Bd. of Comm'rs, 974 So. 2d 458, 460 (Fla. 4th DCA 2008).

Here, Nunley was subjected to harassment, verbal abuse, discipline and termination. When Nunley attempted to report the treatment to Defendant's and SPH's agents, she was stonewalled. Appellee and SPH refused to even look into Nunley's complaints or to question her.

Instead, Appellee and SPH set Nunley up for failure, by dramatically increasing her workload, removing two salaried managers from the Tallahassee location and refusing to replace them, leaving Appellants to switch off shifts, by refusing to fix equipment and software, even by refusing to pay invoices of vendors who, in turn, refused to deliver needed supplies to the Tallahassee location.

Nunley was humiliated, subjected to verbal abuse, sexually harassed, disciplined and terminated from a job that she loved, all in retaliation for opposing unlawful employment practices. These are adverse actions. Webb-Edwards v. Orange County Sheriff's Office, 523 F.3d 1013, 1031 (11th Cir. 2008) (internal citations omitted) (a "significant change in employment status such as hiring, firing, failing to promote, reassignment, with significantly

different responsibilities or a decision causing a significant change in benefits"); Hinson v. Clinch County, Ga. Bd. of Educ., 231 F.3d 821, 829 (11th Cir. 2000) (a change in status may be an adverse employment action if it "involves a reduction in pay, prestige, or responsibility"). T

Finally, to establish a causal connection, a plaintiff must show that the protected activity and the adverse action "are not completely unrelated." Wideman v. Wal-Mart Stores, Inc., 141 F. 3d 1453, 1457 (11th Cir. 1998). In determining whether a plaintiff has produced *prima facie* evidence of causation, the courts have generally focused on two indicia: timing and evidence of ongoing antagonism. See id. The causal connection is not "the sort of logical connection that would justify a prescription that the protected participation in fact prompted the adverse action" that would "rise to the level of direct evidence of discrimination." Simmons v. Camden County Bd. Of Educ., 757 F.2d 1187, 1189 (11th Cir. 1985). Rather, the Eleventh Circuit "construe[s] the causal link element broadly so that 'a plaintiff merely has to prove that the protected activity and the negative employment action are not completely unrelated.'" Goldsmith v. Bagby Elevator Co., Inc., 513 F.3d 1261, 1278 (11th Cir. 2008) (quoting Olmsted v. Taco Bell Corp., 141 F.3d 1457, 1460 (11th Cir. 1998)).

The plaintiff must establish a connection between her protected activity and adverse employment action that could "reasonably support [a] jury's determination." Olmsted v. Taco Bell Corp., 141 F.3d 1457, 1460 (11th Cir. 1998). Decisions of the Eleventh Circuit seem to point to a time frame of less than three months, without other intervening factors, as the outlier amount of time in which to demonstrate a nexus between protected conduct and adverse employment action. See e.g., Wideman v. Wal-Mart Stores, Inc., 141 F. 3d 1453, 1457 (11th Cir. 1998) (one month sufficient to establish nexus); Embry v. Callahan Eye Found. Hosp., 147 Fed.Appx. 819, 831 (11th Cir. 2005) (two months between filing charge of discrimination and suspension sufficient to satisfy nexus); but see Thomas v. Cooper Lighting, Inc., 506 F.3d 1361, 1364 (11th Cir. 2007) (three to four months insufficient to satisfy causal connection); Higdon v. Jackson, 393 F.3d 1211, 1221 (11th Cir. 2004) (three months too long for causal connection inference); Maniccia v. Brown, 171 F.3d 1364, 1370 (11th Cir. 1999) (fifteen months too long to establish nexus).

Here, Nunley filed multiple complaints that she was being sexually harassed by DeLapotaire and suffered adverse actions within the temporal proximity accepted by the Eleventh Circuit to establish causation.

Furthermore, even if the evidence were to point to temporal gaps between Nunley's protected activity and the adverse actions in excess of the range normally utilized by the Eleventh Circuit in support of causation, those gaps can be viewed as Appellee's "first opportunity" to exact revenge, accounting for any lapse in time between Nunley's protected conduct and the adverse action, a finding which would satisfy the causation prong even in the absence of temporal proximity. See Price v. Thompson, 380 F.3d 209, 213 (4th Cir. 2004) (holding that plaintiff made prima facie case despite lapse in time in that jury could reasonably conclude failure to hire was the first opportunity to retaliate); Porter v. California Dep't of Corr., 419 F.3d 885, 895 (9th Cir. 2005) (temporal delay due to fact that harasser unable to exact retaliation until promotion to supervisory position); Kachmar v. Sungard Data Sys., Inc., 109 F.3d 173, 178 (3d Cir. 1997) (stating that temporal gap may be explained through "valid reasons" that do not disprove causation.)

Nunley repeatedly filed complaints that she was treated differently than male GMs and male Area Directors, and that other females within Appellee and SPH were subjected to sexual harassment and discrimination, but no one within Appellee or SPH took any steps to investigate the claims. Instead, Nunley was left open to escalated harassment, scrutiny and sabotage which ultimately led to her termination within a temporal proximity sufficient to

create a genuine issue of material fact in support of causation either via the direct temporal and/or the first opportunity relationship. Therefore, Nunley proffered sufficient evidence to create a genuine issue of material fact in support of a *prima facie* case of retaliation and the summary judgment order must be reversed and remanded.

E. Appellee's actions were a pretext for illegal workplace conduct.

The trial court found that Appellee proffered evidence of legitimate, non-discriminatory reasons for Nunley's termination which Nunley failed to rebut. The evidence demonstrates that Plaintiff created a genuine issue of material fact that the reasons were pretextual and the real reasons for the adverse actions were discrimination and retaliation.

To show pretext, Nunley must "demonstrate that the proffered reason was not the true reason for the employment decision… [Plaintiff] may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." Burdine, 450 U.S. at 256.

The court must then evaluate whether the plaintiff has demonstrated "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action

that a reasonable factfinder could find them unworthy of credence." Combs v. Plantation Patterns, 106 F.3d 1519, 1538 (11th Cir.1997). The trier of fact is permitted to consider the evidence establishing a plaintiff's *prima facie* case and inferences drawn therefrom on the issue of whether the defendant's proffered reason is pretextual. See Reeves v. Sanderson Plumbing Prod., Inc., 530 U.S. 133, 143 (2000).

It is well established that a plaintiff can demonstrate that the defense is pretextual if she submits evidence that (1) she did not engage in the work rule or particular poor performance; or (2) if she did violate the rule or engage in that poor performance, other employees outside her protected class engaged in similar acts but were treated differently. See Damon v. Fleming Supermarkets of Florida, Inc., 196 F.3d 1354, 1363 (11th Cir. 1999); Berg v. Fla. Dep't of Labor and Employment Sec., Div. of Vocational Rehab., 163 F. 3d 1251, 1255 (11th Cir. 1998) (inconsistent application of policies may be evidence of discrimination).

Appellee claimed, and with the exception of the allegations that Nunley was underperforming and suspected of theft of limes, the trial court found several allegedly legitimate, non-pretextual reasons for Nunley's termination, including (a) Nunley was uncoachable, unruly, and underperforming; (b) the Tin Lizzy's Cantina Nunley managed was subject to negative media and

internet reviews; (c) high food costs and high turnover; (d) bad health inspection reports; and (e) suspected theft in that her inventory reports were manipulated which in turn increased the size of her bonus.

In response, Nunley presented evidence that these reasons were pretext, including:

(a) Michael Evertsen, owner of SPH and Appellee, as well as other agents for Appellee and for SPH told Nunley that she was a strong manager, and Evertsen offered her the role of CEO for SPH. Moreover, no one told Nunley that her work performance was somehow deficient prior to her termination, or even during her termination when the only reason provided for the termination was "a change of leadership." In addition, Appellee submitted false exhibits to demonstrate Nunley's alleged deficiencies;

(b) Aaron Hobbs, Scott Black and Tory Bartlett males, were not terminated or even disciplined for negative social media and/or internet reviews, but instead, encouraged and/or participated in creating falsify positive reviews for the Kennesaw location;

(c) Appellee based its costs accounting on its Georgia location without accounting for costs, codes and statutes in Florida. Appellee also purposely inflated the costs of the Tallahassee location to Nunley's detriments by requiring use specific vendors who did not carry products the

Tallahassee location needed, causing Nunley to have to shop at local grocery stores to procure the necessary items. Appellee and SPH budgeted the minimum wage rate for servers to that of Georgia, without recognizing that the Florida minimum wage rate was almost double that of Georgia;

(d) Nunley disputed that the Tallahassee location ever failed a health inspection as alleged by Appellee;

(e) As to the inventory reports, Nunley repeatedly informed Area Director Black that there were glitches in the inventory system, and that she had variances with limes because the system rated them as cases rather than as individual fruits and that she had variances with pineapple juice because the system was calculating the juice at $2300/quart; Black assured Nunley that the inventory issues would be fixed, but then, Black failed to correct the problems. Black had final approval of the inventory but received no discipline for his failure to correct the errors. In addition, male managers experienced similar mistakes with the inventory system, including mistakes with citrus fruit, and yet, no male GM was disciplined, let alone fired, for the issues;

(f) Appellee also alleges that Nunley did not report to the Tallahassee location by 8:00 a.m. on February 11, 2019, and therefore, she committed a terminable offense. However, Nunley was a salaried employee

who was given approval to complete office tasks from home because the Tallahassee location did not have an office space in which she could perform administrative tasks. Smith, another salaried manager, reported to the Tallahassee location at around 7:00 a.m., covering for Nunley, his wife, knowing that she was ill; when Appellee's and SPH's agents reported to the location, Nunley was in the area, parking her vehicle and arrived soon after.

These inconsistencies smack of pretext. A change of position, in and of itself, constitutes evidence of pretext sufficient to avoid summary judgment. See Norris v. City and County of San Francisco, 900 F.2d 1326, 1331 (9th Cir. 1990) (". . . the fact that a defendant's rationale has shifted over time would seem likely to generate serious adverse inferences as to the pretextual nature of its explanations"). See also Edwards v. U.S. Postal Service, 909 F.2d 320, 324 (8th Cir. 1990) ("In light of this record, filled with changing and inconsistent explanations, we can find no legitimate non-discriminatory basis for the challenged action that is not mere pretension").

Moreover, given the evidence that Appellee did not even allege performance deficiencies as the reason for termination until after Nunley initiated litigation, summary judgment based on those newly created reasons in inappropriate. See Stallworth v. E-Z Serve Convenience Stores, 199 F.R.D. 366, 370 (M.D. Ala. 2001) (denying summary judgment where

defendant did not produce paperwork the plaintiff allegedly failed to complete and offered a complimentary reason to its previously-asserted reasons for firing plaintiff).

A reasonable jury could certainly find that these excuses were crafted as pretext for Appellee's discriminatory and retaliatory conduct, especially given that Appellee only decided it terminated Nunley because of performance deficiencies *after* she filed suit. See Tidwell v. Carter Products, 135 F.3d 1422, 1428 (11th Cir. 1998) (observing that identification of inconsistencies can be evidence of pretext); see also EEOC v. Ethan Allen, Inc., 44 F.3d 116, 120 (2d Cir. 1994) (where there were discrepancies in the defendant's explanations for the plaintiff's layoff, a reasonable juror could infer that the explanations were pretextual, *post hoc*, rationalizations to combat evidence of discrimination); Metzler v. Fed. Home Loan Bank of Topeka, 464 F. 3d 1164, 1177 (10th Cir. 2006) (citing cases for the proposition that "suspicious timing… of documentation - after the fact and in anticipation of litigation - reasonably gave rise to an inference of pretext").

Moreover, a jury could view Appellee's attempts to mitigate the inference of discrimination through its legitimate, non-discriminatory reason as suspect. See Harris v. Warehouse Services, Inc., 77 F.Supp.2d 1240, 1249 (M.D. Ala. 1999). Plaintiff has established the inconsistent application

of policies as circumstantial evidence of discrimination as well as pretext. See Berg, 163 F. 3d at 1255 (11th Cir. 1998); see also, Robertson v. Jefferson County Rehabilitation and Health Center, 201 F. Supp.2d 1172, 1178 (N.D. Ala. 2002) (where employees were subject to the same disciplinary rules and the defendant repeatedly disciplined Plaintiff but not other employees for conduct that was very similar to or worse than that committed by the plaintiff, genuine issue of fact existed precluding summary judgment).

Given the evidence proffered by Nunley, it was error for the trial court to find that she failed to rebut the reasons proffered by Appellee for her termination and failed to show those alleged reasons were pretextual. Consequently, summary judgment was not proper, and the case should be reversed and remanded.

III. NUNLEY PROFFERED SUFFICIENT EVIDENCE OF SPOLIATION.

Objective evidence in this case includes the many emails sent to, from and about Appellants, including Nunley's reports of harassment and disparate treatment as compared to male GMs and Area Directors for SPH, were never produced. Without citing any legal authority, the trial court held that Appellants could not claim spoliation because they did not file a motion to compel.

In Florida, spoliation is defined as "[t]he intentional destruction of evidence and when it is established, fact finder may draw inference that evidence destroyed was unfavorable to party responsible for its spoliation....The destruction, or the significant and meaningful alteration of a document or instrument." Aldrich v. Roche Biomedical Lab, 737 So.2d 1124, 1125 (Fla. 5th DCA 1999) (citations omitted). "While the intentional destruction of evidence is usually met with the most severe sanction, the inadvertent destruction of evidence generally calls for a lesser sanction, unless the opposing party demonstrates that its case is fatally prejudiced by its inability to examine the lost evidence." Id.

Florida recognizes spoliation based on both intentional acts and negligence. To establish the negligent destruction (spoliation) of evidence, one must show: "(1) the existence of a potential civil action, (2) a legal or contractual duty to preserve evidence which is relevant to the potential civil action, (3) destruction of that evidence, (4) significant impairment in the ability to prove the lawsuit, (5) a causal relationship between the evidence destruction and the inability to prove the lawsuit, and (6) damages." Continental Ins. Co. v. Herman, 576 So.2d 313, 315 (Fla. 3d DCA 1990). If the destruction of evidence is deemed willful or malicious, it is an intentional

act that is almost always sanctionable. See Metropolitan Dade County v. Bermuda, 648 So.2d 197, 200 (Fla. 1st DCA 1994).

Here, Appellee's agents claimed that all emails were destroyed when Appellants' email accounts were deleted upon their termination. However, SPH's IT manager, William Ashe, testified that email accounts were not deleted and that emails could be retrieved. The missing emails could provide objective evidence, showing that Appellee's agents failed to provide Nunley adequate support to perform her duties, failed to respond to Nunley's reports of sexual harassment, sabotage, discrimination or retaliation and/or that Appellee's agents were intentionally setting Nunley up to fail To provide an excuse to get rid of her.

Allowing Appellee to ignore spoliation sanctions, including an inference in favor of Appellants, simply because they did not file a motion to compel shifts the burden to an innocent party and incentivizes discovery abuses. Appellee knew it had these emails. Appellee knew the emails were relevant and subject to discovery requests. Requiring Appellants to expend the resources necessary to file a motion to compel To be able to seek spoliation sanctions is the discovery equivalent of letting the fox watch the henhouse.

Where, as here, there is simply no excuse for Appellee's misrepresentation about the existence of the emails and failure to produce

responsive emails, it is grossly inequitable to require Appellants to engage in motion practice to get that to which they are already entitled while Defendant suffers no consequences from its discovery abuses. The Court should soundly reject this gamesmanship, reverse the spoliation finding by the trial court and remand for further consideration.

IV. THE TRIAL COURT ERRED BY DISMISSING SMITH'S CONSORTIUM CLAIM.

The trial court entered summary judgment on Smith's consortium claim based solely on the failure of Nunley's claim. Because the order granting summary judgment in favor of Appellee on Nunley's claim is due to be reversed and remanded, the order reversing judgment in favor of Appellee on Smith's claim must also be reversed and remanded.

CONCLUSION

The trial court weighed the evidence, ignored evidence, and viewed the evidence it did accept in a light most favorable to Appellees. As further set forth herein, the trial court erred by granting summary judgment on Keith's claims. This Court should thus reverse the trial court's order granting summary judgment.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent via electronic filing to all parties of record on this 14th day of June 2024.

/s/ Ashley N. Richardson
Ashley N. Richardson