STATE OF FLORIDA
DISTRICT COURT OF APPEAL
FIRST DISTRICT

CASE NO. 1D23-2297
L.T. NO. 2018-CA-1813

CLINT SHANNON GESSNER,

***Plaintiff/Appellant*,**

v.

SOUTHERN COMPANY and GULF POWER COMPANY,

***Defendants/Appellees*.**

APPELLANT'S INITIAL BRIEF

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TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Statutory Provisions

STATEMENT OF THE CASE

Plaintiff/Appellant, Clint Shannon Gessner, filed his action below on November 16, 2018, setting forth a single cause of action for whistleblower retaliation in violation of § 448.2012, et seq., against his former employers, Defendants/Appellees, Gulf Power Company and Southern Company. [R. 16-26].

On March 31, 2023, Southern Company filed a Motion for Summary Judgment regarding joint employer liability [R. 441-449], along with documents in support of its Motion. [R. 450-982]. Appellees filed a Joint Motion for Partial Summary Judgment on Mitigation of Damages on April 3, 2023. [R. 983-997]. Gulf Power filed its own Motion for Summary Judgment on April 3, 2023. [R. 998-1038], along with exhibits in support of its Motion. [R. 1041-1998]. Southern Company joined that Motion that same day. [R. 1039-1040].

Gessner responded in opposition to Southern Company's motion regarding joint employer liability on May 12, 2023. [R. 2059-2073]. That same day, Gessner responded to Gulf Power's Motion, which Southern Company joined. [R. 2074-2087]. Gessner also submitted evidence and documents in support of his responses. [R. 2088-3757]. Appellees replied on May 31, 2023. [R. 3778-3784].

The trial court granted Appellees' Motions on July 6, 2023, electing not to address the partial motion on damages as it was rendered moot. [R. 3815-3820]. On July 21, 2023, Gessner filed a Motion for Rehearing [R. 3821-3831], which the trial court denied on August 2, 2023. [R. 3855]. Gessner then timely appealed both orders[1]. [R. 3856-3866].

STATEMENT OF THE FACTS

Gessner began his career at Southern Company in January 2008 as a Security Officer 1 at Southern Nuclear. [R. 2308-2310]. In September 2008, Gessner moved to the Gulf Power Crist Plant in the operations department and subsequently moved to maintenance three years later, as he wanted to be in the field more and work less in the control room. [Id.]. Maintenance is a hands-on, troubleshooting position similar to a mechanic. [Id.]. Gessner truly enjoyed his work as mechanic at a power plant. [Id.].

[1] The trial court did not address Appellees' partial motion for summary judgment on mitigation of damages, as it was rendered moot by the order granting summary judgment on the merits. [R. 3815-3816]. The trial court also did not analyze the law or facts associated with Appellees' motion for summary judgment as to the *prima facie* element of causation, nor did the court analyze pretext. [R. 3818]. Given that there is no order on these matters for this Court to review for error, Gessner has not included arguments on these points in this Initial Brief, and would ask that if this Court reverses the trial court's orders, the matter be remanded to the trial court for further analysis of the evidence and legal elements at issue.

Gessner believed that he was either employed by both Appellees or that Southern Company controlled Gulf Power and his employment. The only email address Gessner had while employed by defendants was a Southern Company email. [R. 2745]. The other employees, management, and leadership also had Southern Company email addresses. [R. 2745, 3385]. The Southern Company email was Gessner's only available work email to raise concerns and make objections to safety practices at the Crist Pant via email. [Id.].

Moreover, managers for both Gulf Power and Southern Company refer to "Southern Company Policies." [R. 2745]. During discovery below, when asked the names of people "who can testify with reasonable specificity about [Gessner's] claims in lawsuits as alleged in the complaint," Southern Company provided the names and addresses of many employees and former employees of entities other than Southern Company. [R. 3295-3301]. Southern Company did not limit its discovery to the employees of Southern Company itself. [Id.]. It readily included the employees and former employees of its subsidiary Gulf Power. [Id.].

In addition, in response to a question about whether his former employer, Gulf Power, was his joint employer with Southern Company, Jeffrey Clark, a former safety specialist at the Crist Plant, answered, "So, I

mean, Gulf Power was owned by Southern Company, so I guess it would roll up through the parent company. I don't know if that would be jointly employed by a single entity." [R. 2901].

Gessner was always concerned about safety while employed by Appellees, even serving as a safety advocate in 2013. [R. 2444]. He was very involved in trying to make the work environment safer. [R. 2356, 2735]. Throughout his employment, Gessner was more vocal about safety concerns and made objections more often than his coworkers. [R. 2405-2408, 2419, 2735, 2752, 2874, 3418-3443, 3451-3488, 3498-3556]. Other employees heard him raise a variety of objections and concerns. [Id.].

Gessner was not timid about bringing his objections and concerns to his chain of command, but was the only employee to do so. [R. 2408-2410, 2735]. The frequency with which he went to managers to object to unsafe practices that violated laws, regulations, or rules increased over time. [R. 2416, 2735]. As he increased his reporting and objecting frequency, he essentially became a "walking target" at the plant. [R. 2376-2378, 2735]. After his initial reports, his additional first-responder duties were removed.. [R. 2378-2379, 2736].

On a number of occasions, Gessner made his reports and objections to Keith Cuevas, a supervisor. [R. 2415-2417, 2736]. He also went to Nick

Bundy, also a supervisor, with objections to safety issues. [Id.]. Gessner repeatedly brought safety issues to the attention of the maintenance manager and the plant managers. [R. 2411-2412, 2736].

On March 3, 2017, Gessner sent an email to Kim Green, who he believed was Vice President of Generation for Southern Company, about setting up an in-person meeting to discuss safety concerns and objections, among other issues. [R. 2312, 2800-2801]. Green did not respond, so and Gessner followed up on April 21, 2017. [R. 2313, 2803-2804]. On or about April 28, 2017, Green left Gessner a voicemail message, but Gessner did not return her call because he wanted to speak to Green in person. [R. 2313-2315].

Gessner made plans to talk to Green in person, however, because of a verbal coaching and counseling given to him on April 20, 2017, Gessner was unable to attend the function at which he planned to talk to Green. [R. 2315-2316, 2806-2808]. Notably, after his initial email to Green, Gessner received the verbal coaching and counseling and was pulled off the rescue team, at which point it became obvious that he was a target for retaliation for his reports. [R. 2315-2316, 2377-2378, 2736, 2825-2826].

Nonetheless, shortly after Gessner emailed Green, Mike Burroughs, Vice President of Generation, spoke with the employees and told them that

he heard that they did not want their jobs. [R. 2400, 2736]. During that meeting, Burroughs looked at Gessner and said, “someone in here thinks they're smarter than I am, and I'm done with them”, and he gave a “throat slash”. [R. 2401, 2736]. In response, Gessner said, “Sir, I don't know who's telling you we don't want our jobs, but our team leaders, our group manager and our plant manager tells us we're fantastic; they sleep better at night and that we're the best thing since sliced bread. So wherever you're getting your information, it's bad information. Something is not jiving.” [Id.]

In addition to objections raised with specific managers and supervisors, Gessner contacted the toll-free concerns hotline for Southern Company. [R. 2413, 2736-2737, 2830-2831]. Gessner was advised that employees who wanted to report or object to workplace safety issues should use the Southern Company toll-free concerns line to make those objections and/or reports. [R. 2744-2745]. The Southern Company concerns line was answered “Southern Company” and was the only hotline for reporting and/or objecting to safety issues that was available to employees of Gulf Power and Southern Company. [Id.]. Gessner believed Southern Company was ultimately responsible for all Crist Plant safety issues because Southern Company owned Gulf Power. [Id.]. When Gessner called the Southern Company concerns line to raise issues, he spoke with people who identified

themselves as Southern Company employees. [Id.]. Reports and investigations triggered by calls to the Southern Company concerns line generated written reports on Southern Company letterhead, not Gulf Power. [R. 3253-3293].

An investigation followed one of the calls, and Rick Anderson called Gessner into his office and asked about the incident Gessner reported. [R. 2413-2415, 2736-2737]. Gessner did not feel comfortable discussing all of his safety concerns during the meeting with Anderson because he was afraid of the consequences for his employment. [R. 2414, 2736-2737]. Similarly, Gessner began to feel that he could not go to the team leaders because he feared for his continued employment. [R. 2417-2418, 2736-2737]. Working conditions deteriorated so significantly, including the culture and safety objections in maintenance, that Gessner requested to go back to operations. [R. 2423-2425, 2736-2737].

During Gessner's employment, he contacted OSHA two or three times about workplace safety issues related to Appellees, including one time in which he identified himself. [R. 2427, 2737, 2830]. OSHA came to the plant and performed at least one inspection because of the reported hydrogen leaks. [R. 2365, 2737, 2830, 2909, 2913-2914, 3753-3754]. Jason Clark, the

safety specialist, told Gessner that Appellees were issued a fine by OSHA because of the coal dust issues. [R. 2429, 2737].

Gessner's chain of command was able to determine that Gessner made the complaints to OSHA because of how vocal he was in raising safety objections. [R. 2526-2527, 2737]. Gessner complained to OSHA about the combustible dust, coal leaks, hydrogen leaks, and unsafe work practices, several times both anonymously and with his name attached. [R. 2532-2535]. Furthermore, at other times, management lied to the employees about safety issues, for example, employees were told that there was no hydrogen leak when, in fact, there was. [R. 2521-2522, 2737].

On March 3, 2018, Gessner made a whistleblowing complaint to Stan Connally, President and CEO, and Jeff Stone, Vice President and General Counsel, during a three hour long meeting. [R. 2317, 2737-2738, 2942]. During that meeting, Gessner told Connally and Stone, "we needed help, that we were having issues at the plant and could we please -- we needed help. It wasn't a good situation." [R. 2318, 2737-2738].

Gessner also conveyed that based on the ongoing safety issues he reported and the safety record that year, someone was "going to get hurt or [there would be a] catastrophic failure of equipment," and that there was a group of people who wanted to speak to Connally. [R. 2319-2320, 2737-

2738]. Gessner also highlighted to Connally and Stone that the percentage of people who indicated they were "happy" at work in the 2016 work culture survey taken at Plant Crist dropped twelve points to sixty-nine percent between 2014 and 2016. [R. 2326, 2737-2738, 2988-2989]. While discussing the Workplace Culture Surveys, Gessner also explained that, given the low participation rates in 2014, the happiness score on the work culture survey may not have changed much from 2014 through 2016, indicating that morale had been poor for years. [R. 2327, 2737-2738].

During the meeting with Connally and Stone, Gessner also discussed the safety violations and objections related to the coal-fired units 4, 5, 6, and 7, including that they were "on the ground the majority of the time" and it was one of the worst performance years in terms of having the units up and running. [R. 2328, 2737-2738]. He told Connally and Stone that it was not a good year from a safety standpoint, including that there were approximately four accidents with injuries. [R. 2329-2333, 2737-2738]. Gessner also reported that there were issues with hydrogen line repairs. [Id.].

Gessner also identified for Connally, Stone, and later Charlie Wiggins of Beggs & Lane, that there were a dozen or so other employees Gessner had organized who wanted to meet with Connally and he offered to help Connally and Stone with solutions to the safety problems and objections. [R.

2321, 2333, 2737-2738]. Gessner specifically offered to be their "eyes and ears" on the ground at the Plant. [R. 2942].

Connally responded by saying that Gessner had legitimate issues and valid objections and that they needed to investigate those issues. [R. 2331, 2738]. Although Gessner admits that he did not get into the "nitty," he did provide sufficient information for Connally to respond that Connally knew there was a problem and to send Gessner to meet with Wiggins at Beggs & Lane for a special investigation. [R. 2738]. Stone admitted that the morale issues were known and ongoing at the Plant. [R. 2950-2951]. Stone could not recall any specific other times when he referred any other employee to Wiggins, but believes he did so from "time to time." [R. 2956].

On March 12, 2018, Gessner met with Wiggins at Beggs & Lane as directed by Connally and repeated the objections and concerns he initially raised with Connally and Stone. [R. 2332-2334, 2738]. Gessner left the meeting with Wiggins under the impression that an investigation into his objections would commence, including meeting with the employees as a group, not as individuals, because many of the other employees were reluctant and fearful. [Id.].

Significantly, Gessner advised Connally, Stone, and Wiggins about his objections to unsafe work practices that violated laws, rules, and regulations.

[R. 2332-2334, 2738]. Gessner reported the following issues, which he believed violated laws, rules and regulations included:

- Four on-the-job accidents suffered by other employees. [R. 2334-2335, 2738-2739]. Gessner reported and objected to these accidents during his meeting with Connally, who already seemed aware of the incidents. [R. 2367, 2738-2739]

- Hydrogen line repairs on Unit 7, explaining that "Unit 7 is running, producing the generator, and if there's hydrogen leaks, best practice would be to take the unit offline and fix the leak. There are a lot of times that the unit wasn't taken offline, and we fixed a leak while the unit [was] running. We've got hydrogen. It's dangerous." [R. 2336, 2738-2739, 2991-2997]. There were several times throughout Gessner's tenure that he was called to perform repairs on the hydrogen line while Unit 7 was running. [R. 2337-2338]. While repairing the unit, Gessner had to fix broken couplings - again, while the unit was running - which is dangerous and could cause a spark and the unit to "go boom". [R. 2338-2239, 2738-2739, 2753, 3009-3011]. Gessner conveyed his objections to performing work in this unsafe manner to his supervisors, including Gary Golson [R. 2338-2339, 2738-2739]. Golson responded to Gessner's objections by saying, "It's what we do." [Id.].

- Natural gas lines were not purged properly on Unit 6. Gessner explained that:

> You've got gas lines for their starters, and we would have to take down the lines. There's a thing called double block and bleed. And I'm not sure if it existed. But you would have to take down these lines, and there would be residual, and occasionally flames would pop back out on the guys. That was just one of the issues that they were told, hey, we need to shut this unit down or put a new valve in to have the double block and bleed where you block it off and bleed it out.

[R. 2339-2340, 2738-2739, 2991]. Gessner testified that the entire system should have been purged from a given point with something else to make sure it is cleaned out properly and the gas is gone. [R. 2340, 2738-2739]. The failure to purge properly happened on multiple occasions. [Id.]. Failure to properly purge the lines caused fire to blowback into workers' faces. [R. 2340-2341, 2738-2739]. Gessner objected to the failure to purge the natural gas lines multiple times to his supervisors, Eddie Boston and Gary Golson. [R. 2342, 2738-2739]. The supervisors claimed that they would looked into this matter. [Id.]

- Coal dust in all the units, stating that there were ". . . a lot of leaks in the plant, both burned and raw coal, so some of it was raw coal laying there where you might be working, and other was just coal dust, which is also a combustible, and it was all over." [R. 2342, 2738-2739, 2991]. This

happened several times. [R. 2411, 2738-2739]. Gessner repeatedly reported the issue and his objections to his supervisors, including Keith Cuevas, Nick Bundy, and Rick Anderson, stating that the worksite was dirty with coal dust and needed a clean-up. [R. 2343-2345, 2738-2739, 3023]. In response, Appellees hired a third-party clean-up crew. [Id.].

- Coal mills online, open door washout, duct work leakage unit 7, unit 6, positive pressure. Gessner explained that:

> . . . coal mills that pulverize the coal, fine powder, and when the unit was online, like if something got caught in the mill and bounded up or something, we'd have to open a door and inspect it to see. Well, for the longest time whatever on the dampers, the hot air dampers, they weren't holding, and so basically as soon as you opened -- first of all, you had to pull the door slow. You had positive pressure coming at you, hot air. I don't know the temperature, but it was super-hot air. It was just one of those things that wasn't smart to be doing.

[R. 2345-2346, 2738-2739, 2991]. These issues occurred multiple times. [R. 2346, 2738-2739]. Gessner objected to the positive pressure and duct work issues to his supervisors multiple times. [R. 2346-2347, 2738-2739].

- Unit 7 ID fans stopping with wood, using as a friction break, testifying that:

> ID fan out in the fan yard. Don't quote me on the horsepower, but big number horsepower fan for circulation in the boiler. So they would start the fan, but I guess their control logic would have to make it

> like if they had to shut it down or didn't start properly, they would time out so it would coast down. It took a time for it to coast down and longer than they wanted sometimes, so they had a 4x4 piece of wood on each side of this fan that's as big as two of these rooms or bigger. They'd put guys on the pieces of wood against the coupling to slow it down as a friction brake.

[R. 2347, 2738-2739, 2991]. This happened multiple times and thus Gessner objected to the use of wood to stop the fans multiple times. [R. 2348, 2738-2739]. His managers, including Eddie Boston, responded the employees had to get it done. [R. 2349-2350, 2738-2739];

- Unit 6 ID, motor/fan removal replacement no trolley system, explaining:

> In the basement on unit 6 the pedestal is three, four foot tall maybe, and there's no trolley system for these big, huge motors, so we had to modify, with permission or approval from management, our forklifts, take the back rack off, which I believe is illegal. You're not supposed to do that. But it's the only way we could get these motors in up on their pedestal between the pipe being in there, and it was just -- these big 10,000-pound motors -- don't quote me on the size, but they're huge motors -- are teetering on a pedestal, and you're -- there's not a place to work safe. And we had asked for a trolley system that would help stabilize along that. It had been asked for a long time. It just never transpired.

[R. 2351-2352, 2738-2739, 2991, 3025-3026]. For several years, Appellees said this issue was on the “bucket list.” [R. 2351]. Supervisors were aware of

the issue and Gessner objected to the safety issues caused by the lack of the trolley system. [R. 2738-2739, 3025-3026];

- Gunite leak, contractors, Unit 4 and 5.

> There was a contractor working on reconditioning bottom ash on I believe it was unit 4 at the time. A hose broke. Gunite went everywhere. We were working on a job close by, I believe the Alfa Laval water coolers in the basement. It's approximately from here to the staircase, basically. It was in the air and dispersing.

[R. 2354, 2738-2739, 2991]. Gessner reported the gunite leak to both maintenance team leaders and maintenance manager, and objected to the ongoing issues. [Id.]. In response, management claimed that there were no issues working in that environment. [R. 2354-2355, 2738-2739].

- Duct work, flue gas leak or leakages. As to this issue, Gessner testified that:

> At times we were asked to go into the duct work, the big duct work to do repairs. And for whatever reason the unit could be off, and there was still a leak of some source that was -- I don't know the correct terminology but nauseous gases. Sometimes you had to go into a situation you had to put on -- you had a respirator to put on. Sometimes there were those situations where you didn't know, and if you walked into something then it wasn't a good situation.

[R. 2355, 2738-2739, 2991]. This happened on more than one occasion. [R. 2356-2358, 2738-2739]. Gessner objected to employees having to go into

the duct work while using the respirators they had and recommended a new respiratory canister to his “safety guy,” Jason Clark, which was approved. [R. 2356-2359, 2738-2739].

- Scheduled outage work under major demolition, explaining that:

> It means so the power -- the planners, managers, engineers schedule work during outages, and they get everything lined up on their spreadsheets, their timelines. Then if we're lucky they'll come to the employees. This is something we had pushed for that, hey, we need input in this. We might know something you don't know. They'd bring us the spreadsheet, and the very first thing you see -- and this is on an outage. I can't recall what time. It was roughly 2016, roughly. I'll find out for you. And the first line item is, guys -- I was one of the guys working on fans on unit 4 under major structural -- they were tearing down the structure, completely rebuilding the structure, major teardown. And it's like day one through seven, we need you here. But, sir, they've got people working above our heads, multi-metal being cut. It wasn't smart, wasn't feasible.

[R. 2359, 2738-2739, 2991]. During an outage, there were people working above Gessner on units 4 and 5. [R. 2360, 2738-2739]. Managers and/or team leaders William Powell, Eddi Boston, and Gary Golson were advised during a safety meeting that this was an unsafe and prohibited practice. [R. 2360-2361, 2738-2739]. After the objections were raised, the employees no longer performed work in that manner. [R. 2361-2362, 2738-2739].

- Unit 7 mills, unauthorized tool approval and usage, unreported injury, about which Gessner testified:

> It was one of the last outages I worked, and unit 7, it was getting pushed. There was a team assigned to millwork. Millwork, if you're not familiar, is heavy, it's big, heavy work. We call it bull work. . . They had a team of three people assigned. Two of the guys ended up -- one guy had to leave for his father's health reasons, then another guy had to leave because he was going on vacation, so other people were getting assigned to a job that -- a critical job where you need knowledge. I think I mentioned earlier where guys who had been assigned to a -- the guys who are normally assigned getting assigned to a job that -- a critical job where you need knowledge. I think I mentioned earlier where guys who had been assigned to a -- the guys who are normally assigned to mills weren't assigned to this job this time. They were trying to -- the idea was to spread the knowledge, I guess. So there were three people assigned initially. I don't know if there was a fourth. I can't recall. They reassigned three other people to fill in for two guys that left. There's pressure. Work safe, but there's pressure to get the job done. We need this done by this time. Things happen in this situation where a tool broke. You have to have a specific tool. And the request was made to modify a tool. The tool was modified per the team leader, Eddie Boston. From that point the employee was working on said equipment with said tool, modified tool. . . A guy named Cody White using a 20-pound hammer. And the tool broke and smashed his hand.

[R. 2362-2363, 2738-2739, 2991]. Gessner brought the issue up to Southern Company as a “concern” and objected to the modification of tools. [R. 2416,

2738-2739]. Gessner believed the modification of the tool was an OSHA violation and advised Appellees of such [R. 2368, 2738-2739].

- Forklift cage issue, about which Gessner spoke to the team leaders and objected to use of the forklift cages in that manner. [R. 2415]. Gessner believed the use of the forklift was an OSHA violation and advised Appellees of the matter. [R. 2368, 2738-2739].

Gessner objected to his supervisors and Southern Company about these safety issues and other safety objections because they were violations of laws, rules, and regulations, including, but not limited to, OSHA safe workplace regulations. [R. 2739]. As a result of his numerous and ongoing reports and objections, Appellees began a campaign of retaliation against him.

Appellees utilize both non-formal and formal disciplinary procedures. [R. 2739]. Non-formal discipline consists of coaching and counseling and is not technically "discipline." [R. 2378-2379, 2739]. Formal discipline consists of three stages, first, second, and third levels. [R. 2739]. Discipline should proceed through the levels, and not skip multiple levels at one time. [R. 2739, 3747-3751].

Between 2012 and 2012, Gessner consistently received written year-end reviews rating him as "meeting standards." [R. 3028-3077]. However,

that changed in 2017 after his first contact with and report to Green in March of that year. [R. 2739]. The ongoing retaliation escalated in tandem with his ongoing reports and objections throughout 2017 and 2018 until his termination on March 23, 2018. [Id.].

On March 8, 2017, Appellees reprimanded Gessner for ordering lunch for employees attending what he was told by Golson, his supervisor, was an all-day training event. [R. 2430-2432, 2739-2740]. Gessner previously served as a trainer and knew the procedures for ordering lunch, which was provided when a training session lasted the whole day. [Id.]. Accordingly, he had never experienced any issues or received any reprimands for ordering lunch. [Id.]. However, the training class turned out to be a half-day class, during which lunch would not normally be provided. [R. 2433, 2739-2740]. Gessner offered to pay for the lunches himself once he realized it was an issue. [R. 2434, 2739-2740].

On April 14, 2017, Gessner allegedly violated the photography policy because he took a selfie at work during his break and subsequently posted the photo on Facebook. [R. 2468-2474, 2740]. The photo and the caption indicate that Gessner was taking a break with his friend after working hard all day. [Id.]. Gessner had no idea that taking a selfie in the break room and posting that selfie on social media would violate any policy because he was

never provided with any policy that included those prohibitions, nor is there any posted policy in any of the common areas. [R. 2740]. Although there is a sign at the entrance to Crist Plant that states no photographs, that sign "welcomes" visitors to Crist Plant and includes directions for what visitors may and may not do, such as dimming the lights. [Id.]. Moreover, employees routinely take pictures in the plant for use in their work. [Id.].

Other employees who took photos and/or posted those photos on social media were not disciplined, including Melvin Brown and Rhonda Matthews. [R. 2425-2426, 2468-2474, 2740]. Melvin Brown posted pictures of the inside of the Plant Christ several times. [Id.]. Rhonda Matthews posted pictures from outside Plant Crist. [Id.]. Gessner removed the Facebook photo immediately after being asked to do so. [R. 2435-2436, 2468-2474, 2740]. However, on April 20, 2017, Gessner received a non-disciplinary Coaching and Counseling as a result of ordering lunches for the training session and taking a selfie during his break and posting it on social media. [R. 3079-2083].

During the weekend of May 20 and 21, 2017, Golson told Gessner that he was required to work extra hours. [R. 2476-2477, 2740-2741]. Due to a housing crisis, Gessner already had other urgent plans for that Saturday morning. [Id.]. Gessner advised Golson that he could not work Saturday

morning because he was dealing with an urgent housing issue and needed to tend to that on Saturday morning as previously planned. [Id.]. Gessner told Golson that he could come in Saturday afternoon or Sunday if they needed, but Golson told him that he was not needed. [Id.]. Golson never called him to work. [Id.].

Jeffrey Allan and Craig Nall were given time off that weekend. [R. 2420-2421, 2740-2741, 2777-2779]. Because Allan and Nall were both lower-ranked on the extra duty list, they should have been required to work before Gessner. [Id.]. However, on May 30, 2017, Appellees issued Gessner third-level discipline as a result of not working the extra shift he should not have been asked to work before Allan and Nall. [R. 2478, 2741, 3085-3089]. The May 30, 2017, third-level discipline specifically notes that Gessner was not on any lower level of discipline. [R. 3085-3089].

Critically, the third-level discipline skipped from the non-disciplinary Coaching and Counseling issued on April 20, 2017, to a third-level discipline without Gessner being issued any first-level or a second-level discipline. [R. 3085-3089]. This is contrary to policy. [R. 2741]. Appellees proffered no evidence of another similarly situated employee who skipped straight to a third-level disciplinary action. Additionally, other employees testified that no

other employee went first to a third-level discipline status. [R. 2831, 3747-3751].

The May 30, 2017, third-level discipline is focused on alleged attendance issues. [R. 3085-3089]. Gessner signed the discipline and specifically noted, "I understand that the next infraction of the Standards of Conduct Policy (Attendance) will result in immediate termination." [Id.]. Eddie Boston, Chris Johnson, and Floyd Proctor also signed the third-level discipline. [Id.]. Gessner was never advised that any infraction *other* than an attendance infraction could result in termination, and Boston, Johnson, and Proctor signed off on an employee plan specifically limited to attendance. [R. 3085-3089]. Gessner had no understanding that he could be terminated for alleged non-attendance infractions. [R. 2483, 2741].

The union subsequently grieved the May 30, 2017, third-level discipline for skipping the levels that should proceed it, and Appellees agreed to reduce the discipline to a second-level discipline. [R. 2484-2485, 3091-3104]. Gessner refused to accept that resolution because it still skipped over the required level-one disciplinary action step. [R. 2487, 2741]. Moreover, the discipline skipped all the required steps before the third-level because of Gessner's whistleblowing activity, including the email to Green and the subsequent investigation, safety objections to the toll-free hotline, reports

and objections made during meetings, whistleblowing to OSHA during its investigation, and whistleblowing to Connally and Wiggins. [R. 2398-2399, 2403, 2526, 2741-2742].

On February 15, 2018, Gessner received an unsatisfactory year-end evaluation for 2017, for the first time in his career. [R. 3106-3116]. The 2017 evaluation relies on the April 20, 2017, Coaching and Counseling about the lunches and the selfie, as well as the third-level discipline over the alleged attendance issue. [R. 2467-2468, 3106-3116]. It also notes counseling over mundane issues such as shoelaces, for which there is no evidence other people were ever counseled. [R. 2742, 2833-2834, 3106-3116]. Gessner disagreed with the 2017 evaluation. [R. 2481-2483, 2742]

On March 23, 2018, mere days after his meetings with Connally, Stone, and Wiggins about safety objections, Gessner was notified that his employment was terminated for allegedly inappropriate discriminatory conduct, specifically for referring to another employee as an “Asian sausage” during a meeting. [R. 2489-2491, 3118-3119]. However, the person to whom the comment was about, Nam Nguyen, has been emphatic since the comment was made that he was not offended by the conduct, that he knew it was a joke, that he did not consider the comment discriminatory, and that he did not think Gessner should be fired for the comment. [R. 2819-2822].

The day Gessner made the comment, everyone laughed. [R. 2742, 2819]. Powell, the supervisor, even fist-bumped Gessner after Gessner made the comment. [R. 2742, 2841]. Gessner thus grieved his termination. [R. 3742-3745].

The day after Gessner made the comment, Nguyen told Johnson, a supervisor, that the comment was no big deal and that he and Gessner joke with each like that all the time. [R. 2820]. Nguyen thus thought the matter was over. [R. 2821]. Nicknames are common in the workplace and he has been called an "Asian sausage" before. [R. 2824-2825]. Of critical significance, the comment did not violate and policies or procedures. [R. 3756-3757].

Golson, Burrough, and Anderson, all supervisors, were aware of Gessner's whistleblowing activity and actively involved in the termination decision. [R. 2742, 3220]. Stone, the in-house counsel, who is not usually involved in terminations was also aware of the whistleblowing activity before the termination. [Id.]. Even those who ultimately signed off on the termination, Adrianne Collins and Chris Johnson, were aware that Nguyen was not offended by the remark. [R. 3136, 3231].

Others who did not engage in protected whistleblowing were treated far more favorably than Gessner. Gessner was forced to take a welding test

to become a Level IV Welder. [R. 2389, 2742].. His test was administered with a certified welding instructor inspector watching him, but no one else had to have the certified welding instructor inspector watch their test. [R. 2389-2390, 2393, 2398]. For example, the instructor inspector did not watch Rick Harvel take the test. [R. 2391-2392, 2742, 2993]

Gessner lost a full bonus because of the alleged performance issues set forth in third-level discipline, but Nick Labach, Noel Arnold, and Scott Allen only lost partial bonuses. [R. 2396-2397]. Gessner was the most vocal of the four in bringing up safety objections. [R. 2396 R. 2742-2743]. The other men brought up fewer safety objections and either lost only part of their bonus, including Arnold and Allen, or, like Labach, were required to sign a non-disparagement agreement. [R. 2396-2397].

In 2017, Nam, Scott, Mike, Nick and Cody, all coworkers, received welding training in Mississippi, but Gessner did not. [R. 2421-2422, 2743]. Gessner asked Eddie Boston if he could attend the training, but Boston said no because Gessner requested to go back to operations and the training was full. [R. 2423, 2743].

Gessner was also treated differently than other employees in terms of receiving less assistance form management getting through earned progression. [R. 2541-2543, 2743]. For example, some other people did not

actually have to perform the skills necessary for earned progression; they just had to verbally describe it to the managers. [Id.].

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 granting summary judgment on Gessner's Florida Whistleblower Act ("FWA") retaliation claim, finding that Gessner did not establish that he is a protected whistleblower because he did not report or object to an actual violation of any law, rule or request. The trial court did not make any determinations or holdings as to the other elements of Gessner's *prima facie* proffer, stopping its analysis at the first element. It similarly did not analyze any facts or evidence related to pretext. The trial court further erred by finding that Appellee Southern Company was entitled to summary judgment because it was not Gessner's employer.

The trial court erred again, this time by denying Gessner's Motion for Rehearing. Thus, for the reasons set forth fully herein, this Court should reverse the trial court's orders granting summary judgment and denying rehearing.

ARGUMENT

To succeed on a motion for summary judgment, a defendant carries the heavy burden of proving the non-existence of any genuine issues. Holl v. Talcott, 191 So. 2d 40, 45 (Fla. 1966), cert. denied, 232 So. 2d 181 (Fla. 1969); Fla. R. Civ. P. 1.510. In Feizi v. Department of Management Services, the First District Court of Appeals stated:

> The law is well settled in Florida that a party moving for summary judgment must show conclusively the absence of any genuine issue of material fact and the court must draw every possible inference in favor of the party against whom a summary judgment is sought . . . . A summary judgment should not be granted unless the facts are so crystallized that nothing remains but questions of law...
>
> If the evidence raises any issue of material fact, if it is conflicting, if it will permit different reasonable inferences, or if it tends to prove the issues, it should be submitted to the jury as a question of fact to be determined by it.

988 So. 2d 1192, 1193 (Fla. 1st DCA 2008) (quoting Moore v. Morris, 475 So. 2d 666, 668 (Fla. 1985)). Trial courts are not to determine factual issues during the summary judgment phase, as these are the resolved by the jury. See Parker v. Bryce, 96 So. 2d 154, 155 (Fla. 1957). At the summary judgment phase, all questions of fact, even those raising the "slightest doubt," and favorable inferences therefrom are resolved in favor of the non-moving party. Pep Boys v. New World Communications of Tampa, 711 So.

2d 1325, 1328 (Fla. 2d DCA 1998); see also Harvey Building, Inc. v. Haley, 175 So. 2d 780 (Fla. 1965). Further, matters such as credibility must not be resolved on a motion for summary judgment. Williams v. Board of Public Instruction of Flagler County, 61 So. 2d 493 (Fla. 1952).

Importantly, this matter was decided following the May 1, 2021, adoption of the "federal standard" found in Fed. R. Civ. P. 56. In re Amendments to Florida Rule of Civil Procedure 1.510, 309 So. 3d 192 (Fla. 2020); In re Amendments to Florida Rule of Civil Procedure 1.510, 46 Fla. L. Weekly S95 (Fla. Apr. 29, 2021). As the Florida Supreme Court ordered, effective May 1, 2021, the amended rule 1.510, Fla. R. Civ. P., adopts the summary judgment standard articulated by the United States Supreme Court in Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) (together, the "federal summary judgment standard" or "Celotex trilogy"). In re Amendments to Florida Rule of Civil Procedure 1.510, 309 So. 3d 192 (Fla. 2020). However, this change to the rule does not present a dramatic shift in jurisprudence that would justify a grant of summary judgment on May 1 that was otherwise due to be denied on April 30. The standards are largely identical.

Critically, as a purely textual matter, the operative language of Florida's former summary judgment rule and the federal summary judgment rule are materially indistinguishable. Florida's Rule 1.510(c) requires summary judgment where the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Federal Rule of Civil Procedure 56(a), in turn, requires summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." In re Amendments to Florida Rule of Civil Procedure 1.510, 309 So. 3d 192 (Fla. 2020). At its core, the adoption of the federal standard should present no real change to the applicability and availability of summary judgment in Florida.

In its December 2020 opinion, the Florida Supreme Court explained that since its decision in Holl v. Talcott, 191 So. 2d 40 (Fla. 1966), Florida courts have required the moving party conclusively "to disprove the nonmovant's theory of the case in order to eliminate any issue of fact." In re Amendments to Florida Rule of Civil Procedure 1.510, 309 So. 3d at 193 (Fla. 2020) (citations omitted). In continued that, by contrast, the Supreme Court has held that there is "no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials negating the opponent's claim." Celotex, 477 U.S. at 323. Rather,

"the burden on the moving party may be discharged by 'showing'—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case." Id. at 325. The Supreme Court has held that summary judgment should be entered "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Id. at 322. In other words, under the federal summary judgment standard, "the extent of the moving party's burden varies depending on who bears the burden of persuasion at trial." Salo v. Tyler, 417 P. 3d 581, 587 (Utah 2018). While this understanding may shift the focus of the summary judgment analysis in some cases, it in no way eases the moving party's burden. A defendant must still show that there is an absence of material facts upon which a reasonable jury could find for the plaintiff.

The Florida Supreme Court continued that over the last half century, Florida courts have adopted an "expansive" understanding what constitutes a genuine or triable issue of material fact. In re Amendments to Florida Rule of Civil Procedure 1.510, 309 So. 3d at 193 (Fla. 2020). However, when read in conjunction, the two standards are quite similar, even if courts have applied them differently since Holl. The Court explained that the Florida standard could be summarized as "the existence of any competent evidence

creating an issue of fact, however credible or incredible, substantial or trivial, stops the inquiry and precludes summary judgment, so long as the 'slightest doubt' is raised." Id. (citations omitted). By contrast, the Supreme Court has described the federal test as whether "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson, 477 U.S. at 248. "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." Id. at 249-50 (citations omitted). A party opposing summary judgment "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita, 475 U.S. at 586. More recently, the Supreme Court explained that "[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, *so that no reasonable jury could believe it*, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." In re Amendments to Florida Rule of Civil Procedure 1.510, 309 So. 3d 192, 193 (Fla. 2020) (quoting Scott v. Harris, 550 U.S. 372, 380 (2007)) (emphasis added). Respectfully, despite what is perhaps generally accepted Florida wisdom that it is somehow "easier" to survive summary judgment in a Florida courtroom, the federal threshold of "no reasonable jury could believe it" is quite high. Moreover, where there are material facts in

dispute, as is the case here (and as this Court previously determined), summary judgment must still be denied.

To that end, the Florida Supreme Court held that by adopting the federal standard, it reaffirmed the "bedrock principle that summary judgment is **not** a substitute for the trial of disputed fact issues." In re Amendments to Florida Rule of Civil Procedure 1.510, 309 So. 3d at 194 (Fla. 2020) (emphasis added). As the Supreme Court emphasized, the summary judgment rule must be implemented "with due regard ... for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury." Celotex. 477 U.S. at 327. Thus, as noted in his dissent, because of its preclusive effect, a grant of summary judgment warrants great caution. Indeed, "[c]aution and discernment should go hand in hand where the power to enter summary judgment or decree is exercised, for such a power wields a dangerous potential which could have the effect of trespass against fundamental and traditional processes for determining the rights of litigants." In re Amendments to Florida Rule of Civil Procedure 1.510, 309 So. 3d at 195 (Fla. 2020) (Labarga, J., dissenting) (citing Humphrys v. Jarrell, 104 So. 2d 404, 408 (Fla. 2d DCA 1958). Vital to carrying out these fundamental and traditional processes is the jury which, in its role as finder of fact, hears

evidence presented at trial and decides questions of fact raised by a litigant's claim. Id.

Finally, 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). The evidence in this matter shows that there remain genuine disputes of material facts, such that a reasonable jury could find in James' favor. Those facts are material to James' claims and are in no way "blatantly contradicted by the record." 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.). In Joshua v. City of Gainesville, 768 So. 2d 432 (Fla. 2000), the Supreme Court explained:

> The statute's stated purpose and statutory construction directive are modeled after Title VII of the Civil Rights Act of 1964. Like Title VII, chapter 760 is remedial and requires a liberal construction to preserve and promote access to the remedy intended by the Legislature. Section 760.01(2) outlines the general purposes of the Act which include securing freedom from discrimination for all individuals and preserving the general welfare of all.

Id. at 435 (citations omitted).

Under either standard, the trial court should have denied summary judgment. 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 TRIAL COURT ERRED BY GRANTING SUMMARY JUDGMENT ON GESSNER'S WHISTLEBLOWER RETALIATION CLAIM, FINDING THAT HE DID NOT ENGAGE IN PROTECTED ACTIVITY.

At the outset, it bears repeating that the intent of the Florida Legislature in enacting the Whistleblower Act was to prevent the government from retaliating against employees who report any abuse or neglect of duty by a public employee. See Ujcic v. City of Apopka, 581 So. 2d 218, 219 (Fla. 5th DCA 1991). As noted above, the Florida Supreme Court made it clear that the Act should be interpreted liberally, holding that it is a "remedial statute designed to encourage the elimination of public corruption by protecting public employees who 'blow the whistle' ... the statute should be construed liberally in favor of granting access to the remedy." Irven v. Dep't of Health and Rehab. Serv., 790 So. 2d 403, 405-06 (Fla. 2001) (quoting Martin County v. Edenfield, 609 So. 2d 27, 29 (Fla. 1992)). In overturning the lower court's narrow interpretation of section 112.3187, the Court in *Irven* stated:

> [T]he Act provides that an employee may bring an action when the whistleblowing concerns '[a]ny . . . suspected violation of any ... law, rule, or regulation committed by an employee or agent of an agency,' or with respect to '[a]ny ...suspected act of ... misfeasance ... or gross neglect of duty committed by an employee or agent of an agency.' If the plain meaning of this section leaves any doubt as to the inclusiveness of this right of action and the broad protections afforded, the Legislature also provided that it is 'the intent of the Legislature to prevent agencies... from taking retaliatory action against any person who discloses information to an appropriate agency alleging improper use of governmental office ... or any other abuse ... on the part of an agency, public officer, or employee.' *The statute could not have been more broadly worded.*

Irven, 790 So. 2d at 406 (emphasis added) (internal citations omitted).

To prevail on a retaliatory discharge claim under § 448.102, Fla. Stat., Gessner must establish that: (1) he engaged in a statutorily protected activity; (2) an adverse employment action occurred; and (3) the adverse action was causally related to the employee's protected activity. See Ortega v. Engineering Systems Technology, Inc., 30 So. 3d 525, 528 (3d DCA 2010); Russell v. KSL Hotel Corp., 887 So. 2d 372, 379 (Fla. 3d DCA 2004); Drago v. Jenne, 453 F.3d 1301, 1307 (11th Cir. 2006); see also Aery v. Wallace Lincoln-Mercury, LLC, 118 So. 3d 904, 912-913 (Fla. 4th DCA 2013) (internal citations omitted) (explaining that retaliation claims under the FWA are analyzed in the same manner as Title VII retaliation claims). Once Plaintiff

establishes a *prima facie* case by proving the protected activity and the negative employment action are not completely unrelated, the burden then shifts to the employer to proffer a legitimate reason for the adverse employment action. See Ortega, 30 So. 2d at 529.

Below, there was no dispute that Gessner was terminated and that his termination was materially adverse. The trial court found only that Gessner failed to establish that he engaged in protected activity, finding both that he must have objected to or reported an *actual* violation of a law, rule, or regulation, and that he failed to do so. [R. 3818]. As shown herein, the trial court erred, and this Court should reverse the trial court's order granting summary judgment and remand for further proceedings.

A. Florida law does not require a whistleblower to report about or object to an "actual" violation of laws, rules, or regulations.

In its Order granting summary judgment, the trial court found that "the appropriate standard is that established in Kearns v. Farmer Acquisition Co., 157 So. 3d 458, 462-63 (Fla. 2d DCA 2015) . . . and requires an actual, not a suspected, violation of law, rule or regulation to qualify as protected activity under the FWA." [R. 3818]. This holding is contrary to current applicable Florida law, which requires only a good faith, reasonable belief that the reported conduct violated a law, rule, or regulation.

Section 448.102, states that an employer may not take any retaliatory personnel action against an employee who "[o]bjected to, or refused to participate in, any activity, policy, or practice of the employer which is in violation of a law, rule, or regulation." § 448.102(3), Fla. Stat. Here, Gessner reported: that the four on-the-job accidents causing injury to employees occurred because of unsafe working conditions; that there were dangerous hydrogen leaks that needed to be fixed; that fixing those leaks while the units were running was dangerous and could cause an explosion; that natural gas lines were not properly purged prior to performing maintenance tasks that could and did cause fire to rebound directly into the employees; and that there was accumulated coal dust in all the units, which was highly combustible and dangerous.

Nonetheless, even if the above were deemed not to have violated any actual law, rule, or regulation, the applicable standard is not whether there was an actual violation. Instead, Gessner need only have had a good faith, objectively reasonable belief that Appellees' conduct violated the law. "In meeting this standard [448.102 of the FWA], however, all that is required is that the 'employee have a good faith, objectively reasonable belief that h[is] activity is protected by the statute.'" Aery, 118 So. 3d at 916 (citing Luna v.

Walgreen Co., 575 F.Supp.2d 1326, 1343 (S.D. Fla. 2008)); see also Odom v. Citigroup, 62 F. Supp. 3d 1330, 1335 (N.D. Fla. 2014).

The decisions in Aery and Odom, as well as Hernandez v. Publix Super Markets, 11 F.Supp. 3d 1177, 1182-83 (S.D. Fla. 2014), clearly establish that Gessner need only show a good faith belief that he opposed or reported an illegal activity. See also Thomas v. Tyco Int'l Management Co., LLC, 262 F.Supp.3d 1328 (S.D. Fla. 2017); Bonnafant v. Chico's FAS, Inc., 17 F.Supp.3d 1196 (M.D. Fla. 2014). Gessner met this burden below, and the trial court erred by finding otherwise.

In Kearns, the Second District Court of Appeals noted its disagreement with the Fourth District decision in Aery, opining that "[b]ased on a plain reading of the FWA and the reasoning in White v. Purdue Farmer, 369 F.Supp.2d 1335 (M.D. Fla. 2005), we agree with the Employer that under section 448.102(3) Kearns must prove that he objected to an actual violation of law." Kearns, 157 So. 3d at 465. But Kearns makes reference to Aery only in dicta, and it provides no reasonable explanation for inferring legislative intent requires an actual violation. See Ritenour v. AmeriGas Propane, Inc., 2019 WL 2008675, at *7 (S.D. Fla. Mar. 15, 2019), reconsideration denied, 18-CV-80574, 2019 WL 5225247 (S.D. Fla. May 15, 2019); Rivera v. Spirit Airlines, Inc., 2020 WL 491454, at *2 (S.D. Fla. Jan. 30, 2020).

The Second District Court of Appeals made clear that its reversal of the trial court was based on the fact that "Kearns presented a prima facie case of an actual violation to withstand the motion for directed verdict," and unequivocally recognized that its opinion on the actual versus good faith violation issue was not necessary to such reversal. Kearns, 157 So. 3d at 465. As such, its disagreement with Aery is dicta. See, e.g., Tyler v. Cain, 533 U.S. 656, 668 (2001) (noting that a decision not determinative of the case before it is dictum); Hitchcock v. DOC, 745 F.3d 476, 490 fn. 6 (11th Cir. 2014) ("judicial decisions cannot make law beyond the facts of the cases in which those decisions are announced"); Edwards v. Prime, 602 F.3d 1276, 1298 (11th Cir. 2010).

In considering whether § 448.102(3), Fla. Stat., protects from retaliation an employee's errant objection to a violation based on his or her good faith objectively reasonable belief, Gessner points out that neither Appellees in their papers, the Kearns court, nor any other court, including the trial court below, has articulated a sensible reason for the legislature to have determined that whistleblower objections to actual violations should be protected from retaliation, but that whistleblower objections to violations that the whistleblower reasonably believed in good faith were actual violations should not to be protected. In fact, even those who would vote against

whistleblower protection in the first instance–believing that employees should object to their employers' actions at their peril–are hard pressed to understand the suggested distinction between actual violations and violations reasonably believed in good faith.

Clearly, establishing such a line would substantially chill whistleblower reporting. Most employees are not lawyers trained to know or at least advocate for a finding that a particular practice is a violation of law, rule or regulation. Employees would be forced to wager their careers on whether or not a court would subsequently agree that conduct which the employee reasonably and in good faith believed violated a law, rule or regulation did actually violate a law, rule or regulation. The trial court's interpretation of the statute would impose an undue and unnecessarily harsh burden on an employee simply trying to act in reasonable, good faith.

The balance of the equities and the purpose of the FWA does not support such a convoluted outcome. The risk of an employee ultimately being wrong that the reported conduct violates the law, rules, or a regulation is substantially less onerous to the purpose of the FWA than the risk that an employee sees workplace violations (e.g., a safety violation) that the employee reasonable believes in good faith are illegal but does not report those alleged violations because he does not have prior adjudication that the

specific conduct at issue is actually illegal. No doubt, the purpose of the FWA is to encourage whistleblowing when an employee reasonably believes the employer's conduct violates a rule, law or regulation, not to be a "gotcha" in the event an employee is ultimately wrong about what may be a very dense, difficult to understand law, rule or regulation. This Court should reject any effort to add permutations to a statute that do not exist for the sole purpose of disincentivizing the very activity the FWA seeks to encourage.

Because the dictum in Kearns cannot disturb or conflict with another decision, specifically that found in Aery in which the Court directly held that the "good faith" standard applies, this Court does not have discretion to apply Kearns. Further supporting that Aery is the law, the Fourth District Court of Appeal reaffirmed Aery in Barone v. Palm Beach Hotel, 262 So. 3d 767 (Fla. 4th DCA 2018). The Fourth District again addressed the issue as follows:

> Under our court's interpretation of the Whistleblower Act, *a plaintiff objecting to the employer's conduct need only have a "good faith, objectively reasonable belief" that the employer's activity was illegal*… By contrast, the Second District has disagreed with Aery in dicta and interpreted the Whistleblower Act as requiring a plaintiff to prove "that he objected to an *actual* violation of law or that he refused to participate in activity that would have been in *actual* violation of law." Kearns… In any event, the Association has not asked us to reconsider Aery in this appeal, *and it remains the law in this district*.

Id. at 769 (emphasis added).

The Honorable Mark Walker, United States District Judge, Northern District of Florida, said it best on this topic:

> The parties dispute whether the FWA requires Plaintiff to prove she reported an actual violation of law, or only that she had a good-faith belief she was reporting an actual violation of law irrespective of whether Defendant's conduct was actually illegal. The Supreme Court of Florida has instructed courts to construe the FWA broadly and to favor access to its remedy. Irven v. Dep't of Health and Rehab. Servs., 790 So. 2d 403, 406 (Fla. 2001); Martin Cty. v. City of Edenfield, 609 So. 2d 27, 29 (Fla. 1992). The Supreme Court of Florida has not, however, held either standard is the correct one to apply in FWA cases. Florida's Fourth District Court of Appeal has held the "good faith" standard is correct. Aery v. Wallace Lincoln-Mercury, LLC, 118 So. 3d 904, 916 (Fla. 4th DCA 2013). Florida's Second District Court of Appeal has disagreed in a dictum, Kearns v. Farmer Acquisition Co., 157 So. 3d 458, 465 (Fla. 2d DCA 2015), but this neither disturbs nor conflicts with the Fourth District's decision. This Court's duty is thus to follow Aery. See Winn-Dixie Stores, Inc. v. Dolgencorp, LLC, 746 F.3d 1008, 1021 (11th Cir. 2014) (explaining federal courts must follow the decisions of a state's intermediate appellate courts where the state supreme court has not ruled on the correct interpretation of the law).

O'Steen v. Fla. Sports Foundation, Inc., Case No. 4:19cv106-MW-MAF, Docket Number 48 (N.D. Fla., June 12, 2020).[2]

Following that same sound logic, several other Florida district courts within the Eleventh Circuit have adopted the good faith, objectively reasonable belief standard announced in Aery. See, e.g., Valdez v. Colony Shiny Staff, LLC, 2021 WL 244061, at *11 (S. D. Fla. Jan. 25, 2021); Buzzell v. Florida Keys Ambulance Service, Inc., 2020 WL 2071956, at *4, n.2 (S.D. Fla. Apr. 29, 2020); Nardella v. Atlantic TNG, LLC, 2020 WL 2331179, at *11 (M.D. Fla. May 11, 2020); Ritenour v. AmeriGas Propane, Inc., 2019 WL 2008675, at *6–7 (S.D. Fla. Mar. 15, 2019); Tillman v. Advanced Public Safety, Inc., 2016 WL 11501680, at *4 (S.D. Fla. Nov. 14, 2016) ("Aery remains the controlling law on the issue because the discussion concerning the actual violation standard in Kearns was only in dicta."); Thomas, 262 F.Supp.3d at 1340 (S.D. Fla. 2017); Villaman v. United Parcel Serv., Inc., 2019 WL 922704, at *6, n.2 (S.D. Fla. Feb. 8, 2019); Canalejo v. ADG, 2015

[2] Gessner acknowledges the Northern District's contrary, but prior, discussion in Obukwelu v. Tallahassee Memorial Healthcare, Inc., 2015 WL 11110552, *3 (N.D. Fla. June 25, 2015), in which the Court held that a "protected expression" under § 448.102(3) required objection to an actual violation of the law. However, Aery has not been reconsidered, Kearns remains dicta (although cited as "law" by other courts), and the court's 2020 analysis in O'Steen remains correct. It is notable that the Honorable Mark Walker was the Judge in the Obukwelu case and he reversed himself in O'Steen.

WL 4992000 (M.D. Fla. 2000); Burns v. Medtronic, 2016 WL 3769369, *5 (M.D. Fla. 2016) ("The Kearns court states that 'the issue of which standard applies is not determinative because we conclude Kearns presented evidence that, when viewed in the light most favorable to him, establishes an actual violation of the law'… Therefore, the Plaintiff's FWA claim need only be supported by a plausible allegation of what plaintiff, in good faith, *believes to be a violation* of a law, rule or regulation.).

Florida courts have consistently interpreted statutes on the basis that legislatures are presumed to have acted reasonably. See, e.g., City of St. Petersburg v. Siebold, 48 So. 2d 291, 294 (Fla. 1950) ("courts will not ascribe to the Legislature an intent to create absurd or harsh consequences, and so an interpretation avoiding absurdity is always preferred"); Opperman v. Nationwide Mutual, 515 So. 2d 263, 266 (Fla. 5th DCA 1987) ("It is true that literal interpretation of the language of the statute need not be adopted when to do so would achieve a result that is unreasonable" and "the courts are not compelled to assume that the legislature acted unreasonably"); Kerlin's Lessee v. Bull, 1 U.S. 175, 178 (1786) ("[w]here the intention of the Legislature, or the Law is doubtful, and not clear, the Judges ought to interpret the law to be, what is most consonant to equity and least inconvenient").

Adding even more support to the holding in Aery, Courts in other states interpreting similarly worded statutes have likewise interpreted whistleblower laws to only require a good faith belief that a violation occurred. See e.g., Fox v. Bowling Green, 668 N.E.2d 898, 901 (Ohio 1996) ("To require that an actual violation must occur for a whistleblower to gain protection leads to nonsensical results which are unjust, unreasonable, and contrary to the spirit of the statute and public policy"); Sullivan v. Massachusetts Mutual, 802 F.Supp. 716, 725 (D.Conn. 1992) ("a standard of reasonable belief encourages a whistleblower to come forward, rather than remain silent out of fear that he might be wrong"); Allum v. Valley Bank, 970 P.2d 1062, 1068 (Nev. 1998) ("A claim for tortious discharge should be available to an employee who was terminated for refusing to engage in conduct that he, in good faith, reasonably believed to be illegal"). This court should likewise conclude that the only interpretation of the statute passed by the Florida Legislature that would suggest reasonableness is the one made by the Fourth District in Aery.

B. Gessner had, at the very least, a good faith belief that his reports concerned violations of laws, rules, or regulations.

Below, the trial court found that there was "insufficient evidence from which a jury could reasonably conclude that [Gessner] object to or refused to participate in any policy, act, or practice of Gulf Power that constituted an

actual violation of a law, rule, or regulation." [R. 3818-3819]. This holding was based on its erroneous application of the law, set forth above.

However, the record before the trial court contained numerous examples of Gessner's protected reporting, about which he had a reasonable, good faith belief that his reports and objections involved violations of laws, rules, or regulations. As noted above, Gessner reported, among other issues, that the four on-the-job accidents causing injury to employees occurred because of unsafe working conditions; that there were dangerous hydrogen leaks that needed to be fixed; that fixing those leaks while the units were running was dangerous and could cause an explosion; that natural gas lines were not properly purged prior to performing maintenance tasks that could and did cause fire to rebound directly into the employees; and that there was accumulated coal dust in all the units, which was highly combustible and dangerous. In addition to his good faith belief, many of the above examples were, in fact, actual violations of laws, rules, or regulations, particularly the OSHA safe workplace guidelines.

Any one of the safety objections and reports - none of which were hypothetical but were instead actual, ongoing issues - raised by Gessner alone satisfied the statute. In fact, one witness testified at length about how a similar hydrogen leak in Georgia caused the unit to explode and blow

through the roof of the facility. [R. 3009-3011]. Other witnesses in addition to Gessner testified that leaks and coal dust could cause things to blow up and/or catch fire and kill people. [R. 2753, 2784-2785, 2912]. Without doubt, subjecting employees to a workplace that had the potential to explode is a hazard likely to lead to injury or death. Given the number of times Gessner objected to his supervisors and management about the ongoing safety violations, along with his efforts to report those violations to OSHA, there is more than sufficient evidence to create a genuine issue of material dispute and defeat summary judgment.

Following the binding precedent set forth in Aery, the trial court erred by concluding that Gessner did not engage in protected whistleblowing when he made the above-cited reports and objections. This Court should thus reverse the trial court's order granting summary judgment and remand for further proceedings.

II. THE TRIAL COURT ERRED BY FINDING THAT SOUTHERN COMPANY WAS NOT GESSNER'S EMPLOYER.

In its Order granting summary judgment, the trial court also found that Southern Company was not Gessner's employer. [R. 3819]. Specifically, the court found that Southern did not exercise sufficient control to serve as a joint employer, and that its status as the parent company and owner of the email addresses and hotline used by affiliate companies is not sufficient to

establish a joint employer relationship. [R. 3819]. As shown herein, the court erred.

In his Complaint, Gessner alleged that Southern Company and Gulf Power were his joint employers. Section 448.101(3), Fla. Stat., defines "Employer" as "any private individual, firm, partnership, institution, corporation, or association that employs ten or more persons." § 448.101(3), Fla. Stat. Below, Southern Company did not dispute that it was an “employer” under the statute; rather, it disputed that it was Gessner’s joint employer.

Determining whether an employer is a joint employer requires a review of the entire employment situation. Morrison v. Amway Corp., 336 F.Supp.2d 1193, 1197 (M.D. Fla. 2003). Factors include: (1) whether the employment took place on the alleged employer's premises; (2) how much control the alleged employer exerted on the employee; and (3) whether the alleged employer had the power to fire, hire, or modify the employment condition of the employee. Id. Additionally, the Department of Labor explained that separate entities can be found to be joint employers if: (1) the employers have an agreement to share or interchange an employee's services; (2) one employer acts directly or indirectly in the interests of the other employer; or (3) the employers are deemed to share control of the employee.” Morrison, 336 F. Supp. 2d at 1200; 29 C.F.R. § 825.106(a).

The fundamental aspect of the employment relationship that gave rise to Gessner's claim is his protected whistleblowing. "The FWA was enacted to protect private employees who report or refuse to assist employers who violate laws enacted to protect the public." Golf Channel v. Jenkins, 752 So. 2d 561, 562 (Fla. 2000). Gessner was terminated in retaliation for his whistleblowing activity, including his repeated use of the Southern Company toll-free concerns line and Southern Company's email system to report and object to the violations. Because the retaliation at issue is governed by the FWA, the Court must determine who is in control of the fundamental aspects of Gessner's employment activities under the FWA. Stated differently, the Court must determine whether Southern Company controlled enough fundamental aspects of Gessner's activities vis-à-vis the FWA to be a joint employer in this case. It did.

Gessner's protected activity under the FWA that involved Southern Company included calling OSHA to report Southern Company's violations and participating in an investigation of those reports, emailing management from his Southern Company email address to their Southern Company email address about safety issues, calling the Southern Company toll-free concerns line to report his objections to unsafe work conditions and meeting with Southern Company personnel about those safety concerns and

objections. This evidence is more than sufficient to create a genuine issue of material dispute regarding whether Southern Company is a joint employer.

Moreover, when Southern Company made the decision to operate the safety reporting hotline, it assumed control over the issues reported by its employees. This is consistent with DOL rules and Eleventh Circuit law. Under the DOL standards, Southern Company acted directly or indirectly in the interests of Gulf Power and its employees by serving as the recipient of safety objections raised by personnel working at Gulf Power, in line with the second method of establishing a joint employer relationship under the DOL factors. See 29 C.F.R. § 825.106(a).

Similarly, by establishing the hotline and Southern Company email addresses, it exerted total control over how Gulf Power employees could engage in whistleblower activity, and that control is sufficient to find Southern Company to be Gessner's joint employer. See Morrison, 336 F. Supp. 2d At 1200. Given that the FWA, like Title VII, is to be liberally construed given its remedial nature, there was, at the very least, a dispute of material fact as to Southern Company's status as a joint employer. See generally, Martinolich v. Golden Leaf Mgmt., Inc., 786 So. 2d 613, 616 (Fla. 3d DCA 2001). Summary judgment was thus granted in error, and this Court should reverse the trial court's order and remand for further proceedings.

III. THE TRIAL COURT ERRED BY DENYING GESSNER'S MOTION FOR REHEARING.

The trial court denied the Motion for Rehearing without written explanation. [R. 3855]. This was error.

In his Motion, Gessner argued that Aery controlled, not Kearns, and that the trial court thus misapplied and misapprehended the law applicable to Gessner's whistleblower retaliation claim. That argument is set forth above, at Section I.A. For the reasons set forth therein, the trial court erred by denying Gessner's Motion for Rehearing.

In addition, Gessner requested that the trial court enter an order containing findings of fact regarding the specific evidence of Gessner's reports and objections to violations of laws, rules, and regulations that the trial court found to be ""supposition, conclusory statements and hearsay," to further aid in the preparation of this appeal. [R. 3819]. The trial court declined to do so, and again erred by denying the Motion for Rehearing. This Court should accordingly reverse the trial court's order and remand for further proceedings.

CONCLUSION

The trial court weighed the evidence, ignored evidence, and viewed the evidence it did accept in a light most favorable to Appellee. Moreover, the trial court misapplied and misapprehended the law applicable to private sector whistleblower retaliation claims. As further set forth herein, the trial court erred by granting summary judgment on Gessner's claim. Thus, this Court should reverse the trial court's orders granting summary judgment and denying rehearing.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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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 28th day of December 2023, including:

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