DAVID JAMES KNIGHT, ESQ.

Thank you for your interest in my work.

This is an initial brief that I wrote for the plaintiff's counsel in a successful challenge to a trial court's entry of summary judgment. It was heard by a Florida District Court of Appeal, which reversed and remanded.

Names, locations, dates, and other details have been redacted or changed to protect confidentiality. For the sake of brevity, I have also omitted all tables, certificates, and citations to the record.

— David James Knight

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David James Knight is a 2008 graduate of Washington and Lee School of Law. He began his career litigating civil cases at both the trial and appellate levels, while also serving part-time as a Judge Advocate in the Army National Guard. Based in Portland, Oregon, he now focuses exclusively on appellate support in New York, Florida, and federal courts.

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In the District Court of Appeal of Florida, [redacted] District

Appellate Case No. [redacted]

[Jane Doe],

Appellant,

v.

School Board of [redacted] County, Florida,

Appellee.

Initial Brief of the Appellant

Attorneys for Appellant:

[redacted]

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Statement of the Case

It could be a movie:

Accountant Jane Doe moves from the big city to small-town Florida to work for the local School Board. After uncovering a scheme to defraud the district involving multiple School Board employees—including the superintendent himself—she blows the whistle to state auditors. A massive scandal ensues, and the superintendent is prosecuted. While the State Attorney calls Ms. Doe a hero, the School Board, stung by negative press, quickly turns on her. Publicly harassed, intimidated, and marginalized, she is given an ultimatum: quietly retire or be terminated.

This is not, however, the first act of a legal thriller—these are the underlying facts of the case. And the story did not have a happy ending in the lower court; Ms. Doe brought claims against the School Board for breach of her employment contract and violation of the Florida Whistleblower's Act, but the court granted summary judgment for the defense on the grounds that she had "voluntarily" retired.

This was reversible error. The facts this Court needs in order to reach that same conclusion are as follows:

Timeline

2007–2009	Plaintiff-Appellant Jane Doe works for the School Board as a staff accountant.
May 2011	After two years in the private sector, Ms. Doe returns to her staff accountant position with the School Board.
Jan. 2014	Ms. Doe is promoted to the position of "Director of Finance." In her first month as Director, she uncovers a scheme by a popular teacher to defraud the school district. She reports it, but the School Board's superintendent, Juan Perez, declines to pursue a fraud investigation out of "political necessity."
Oct. 2016	Ms. Doe discovers that the superintendent's wife, who also works for the School Board, has used her employee purchase card to purchase airline tickets for her family. Ms. Doe confronts the superintendent about his wife's improper purchase. Mr. Perez assures her it will never happen again, and reimburses the School Board for the tickets (in the past,

	employees had been allowed to reimburse the administration for improper purchases).
Nov. 2016	Ms. Doe discovers that a second set of airline tickets were charged on Mrs. Perez's card, but concludes that the charges were made before she confronted the superintendent.
Jan. 2018	Ms. Doe and her staff uncover another fraudulent scheme by a School Board employee and report it to the State Attorney's Office. The employee pleads guilty.
Feb. 5, 2018	One of Ms. Doe's subordinates discovers yet another improper charge on Mrs. Perez's purchase card. Ms. Doe instructs her staff to cancel the card and audit of all of Mrs. Perez's purchases from the beginning of the 2008 fiscal year.
Feb. 12, 2018	Ms. Doe confronts the superintendent with the results of the audit—a 43-page document listing all of his wife's improper purchases. She tells him to report his wife to the authorities.
Mar. 2, 2018	After the superintendent attempts a cover-up, Ms. Doe reports Mrs. Perez's purchases to the School Board's financial auditors, who instruct her to fax her findings

directly to the main audit office in Tallahassee. The main office then instructs her to inform the School Board, which she does.

Mar. 6, 2018 Ms. Doe reports the fraud to the State Attorney's Office. That same day, a School Board member complains to her that the scandal has brought the Board "too much negative publicity in the newspapers."

Mar. 20, 2018 Several School Board members tell Ms. Doe there is a rumor going around that Mr. Perez is not going to renew her annual employment contract.

May 14, 2018 At a public meeting, Ms. Doe speaks to reporters about the administrative failures within the School Board that led to the Perez scandal.

May 16, 2018 The School Board retains Hans Anwalt, a white-collar crime attorney and former prosecutor, to investigate Ms. Doe.

May 28, 2018 The School Board releases a report criticizing Ms. Doe's handling of purchase card policies and procedures.

June 10, 2018 Ms. Doe testifies against Mr. Perez before a grand jury

June 11, 2018	Mr. Perez is arrested for fraud and obstruction of justice. *Id*. That same day, Mr. Anwalt tells the media that Ms. Doe could be fired for "incompetence."
June 18, 2018	A School Board member approaches Ms. Doe and threatens to recommend that she be fired at the next board meeting.
June 23, 2018	Ms. Doe attends a School Board meeting at which she is told she must fire two of her employees (though no other departments are told to cut staff). Mr. Anwalt and Board members then openly discuss whether to terminate her.
June 24, 2018	The School Board renews Ms. Doe's annual employment contract through June 30, 2010.
June 30, 2018	Ms. Doe attends a School Board meeting, at which Mr. Anwalt again publicly calls her "incompetent."
July 2018	Mr. Anwalt interviews Ms. Doe for the first time for his investigation. He phrases his questions so as to deflect blame for the Perez scandal off of the School Board and onto her.
Aug. 6, 2018	At the advice of her doctor, Ms. Doe takes leave to recover from the stress of being under investigation and having to

testify at the Perez trial. While she is on leave, the School Board appoints a new superintendent, Dr. John Smith.

Aug. 18, 2018 The School Board holds a televised meeting, at which a Board member publicly criticizes Ms. Doe's handling of the scandal and recommends that she be terminated.

Aug. 25, 2018 Ms. Doe testifies as the State's primary witness at Mr. Perez's trial.

Aug. 28, 2018 Juan Perez is convicted of obstruction of justice.

Aug. 31, 2018 Ms. Doe returns to work. That same day, Mr. Anwalt issues a "forensic report" criticizing Ms. Doe for "substantial financial oversight failure."

Sep. 2, 2018 Around noon, Ms. Doe is called into the School Board's legal office and told that Dr. Smith, only three days into his tenure as superintendent, has decided to terminate her for cause. Ms. Doe is not informed of her rights, including the right to judicial review if she is terminated. The School Board's Director of Human Resources, Cheryl Allen, gives her the option to resign in lieu of termination, but demands

	that she make a decision by 3:00 p.m. She asks for more time; Ms. Allen gives her until noon the following day. She then asks if she has the option to retire early; Ms. Allen responds that retirement *might* be possible. She leaves the meeting believing she has been "fired."
Sep. 3, 2018	Ms. Allen calls Ms. Doe first thing in the morning and asks "Have you decided what you are going to do? Because if I don't hear from you by noon, I am going to start the paperwork to have you terminated for cause." As noon approaches, "survival set[s] in" and Ms. Doe quickly decides to retire. When she fills out her retirement paperwork, she writes that she is retiring "under duress," but Dr. Smith demands that she remove those words if she wants to work until the end of September.
Feb. 26, 2019	Ms. Doe files suit against the School Board for violation of the Florida Whistleblower's Act and breach of contract.
Sep. 27, 2022	The School Board moves for summary judgment. On the Whistleblower's Act claim, the School Board argues in relevant part that Ms. Doe "did not suffer an adverse

	employment action." On the breach of contract claim, the School Board argues that Ms. Doe "chose to voluntarily retire and failed to avail herself of the administrative remedies available to challenge a termination."
Dec. 4, 2022	The lower court denies the School Board's motion for summary judgment, finding "that there are undisputed issues of fact that preclude summary judgment." The case is subsequently reassigned to another judge.
July 16, 2024	The School Board moves for reconsideration.
Sep. 4, 2024	The new trial judge reconsiders his predecessor's order, and grants the School Board's motion for summary judgment, holding that Ms. Doe had "voluntarily" retired and therefore both claims fail "as a matter of law."
	This appeal follows.

Summary of the Argument

The lower court granted summary judgment against Ms. Doe on the grounds that she had "voluntarily decided to retire" and therefore her breach of contract and Whistleblower's Act claims both failed "as a matter of law."

This was reversible error, as it confused two distinct analyses. Whether Ms. Doe "voluntarily" resigned was only relevant to her breach of contract claim, which requires a due process analysis (indeed, the court cites only to due process cases in its order). Under a Whistleblower's Act analysis, by contrast, the dispositive issue is whether the School Board took an "adverse personnel action" against Ms. Doe. The record shows that the School Board harassed, intimidated, marginalized, and forced retirement upon Ms. Doe, actions that reasonable minds could certainly find to be "adverse personnel actions" within the meaning of the Whistleblower's Act.

The record also casts doubt on the lower court's finding that Mrs. Doe's resignation was "voluntary" under a *Hargray* analysis because, in its view, the School Board had cause to believe that grounds for termination existed. Whether the School Board had good cause for termination was a question of fact for the jury—*not* the lower court—to decide.

Standard of Review

An entry of summary judgment is reviewed *de novo*. *Carestio v. School Bd. of Broward County*, 866 So.2d 754 (Fla. 4th DCA 2004). The party moving for summary judgment must conclusively show the absence of any genuine issue of material fact, and the court must draw every possible inference in favor of the party against whom summary judgment is sought. *Wills v. Sears Roebuck and Company*, 351 So.2d 29 (Fla. 1969). Further, the facts must be so "crystallized" that only questions of law remain. *Shaffran v. Holness*, 93 So.2d (Fla. 1957). When the facts are such that different minds might reasonably draw different conclusions, the trial court *must* submit the issue to the jury to be decided as a question of fact. *See Cobb v. Twitchell*, 91 Fla. 539 (1925). The trial court cannot weigh the facts itself. *Burroughs Corp. v. American Druggists' Insurance Co*., 450 So.2d 540, 544 (Fla. 2d DCA 1984).

* * *

Argument

I. Issues of fact remain as to whether the School Board took "adverse personnel actions" against Ms. Doe.

a. The lower court misapplied *Hargray* and *Stone*.

The lower court granted summary judgment as to Ms. Doe's Whistleblower's Act claim on the grounds that she had "voluntarily decided to retire" and therefore the School Board "took no adverse employment action against her" for purposes of the Act. The court found *Hargray v. City of Hallandale*, 57 F.3d 1560 (11th Cir. 1995), "highly persuasive in this regard," and relied almost entirely on *Hargray* in its order. (The court's only other citation was to *Stone v. University of Maryland Medical System Corp*., 855 F.2d 167 (4th Cir. 1988), from which *Hargray* descends. *Id*.)

However, neither *Hargray* nor *Stone* had anything to do with the Florida Whistleblower's Act. To the contrary, they were wrongful discharge cases grounded in the Due Process Clause. As such, they are easily distinguished, both factually and legally, and it was reversible error for the lower court to rely on them here.

Unlike Ms. Doe, the plaintiff in *Hargray* was not forced to resign for reporting public corruption. Rather, Hargray was a former employee of the

City of Hallandale who had been caught stealing City property. 57 F.3d at 1564. Given the choice to either resign or face criminal charges, Hargray chose to resign. *Id*. He then brought suit *not* under the Florida Whistleblower's Act, but under the federal Civil Rights Act of 1871 (42 U.S.C. § 1983), alleging that, by forcing him to choose between two disagreeable outcomes, the City had violated his property interest in continued employment without due process. *Id*. at 1563.

The *Stone* case likewise had nothing to do with whistleblowing. In *Stone*, the plaintiff was a surgeon who had committed serious ethical violations while supervising residents at the University of Maryland Hospital. 855 F.2d at 169, 170. Given the choice to either resign or face dismissal and suspension of his clinical privileges, Dr. Stone chose to resign. *Id*. He, too, brought a claim against his former employer under 42 U.S.C. § 1983.

The *only* issue on appeal in those cases was whether the defendant had coerced or misled the plaintiff into resigning, thus depriving him of a protected property interest within the meaning of the Due Process Clause. *See Hargray*, 57 F.3d at 1567 ("The only issue on appeal is whether the City had deprived Hargray of that interest without due process"); *Stone*, 855 F.2d at 172 ("Because it is the core issue ... we discuss only the first: Whether Stone was deprived of a constitutionally protected property interest by the

defendants' conduct leading to his resignation"). That question, in turn, required the *Hargray* and *Stone* courts to determine whether the plaintiff had voluntarily resigned, in which case there could be no "deprivation" for purposes of due process. *Id*.

While it was proper for the lower court to consider the voluntariness of Ms. Doe's decision to retire in the context of her breach of contract claim (which is grounded in due process), it was reversible error to also apply that analysis to her Whistleblower's Act claim. The *correct* analysis under the Act was not whether she had been voluntarily retired, but whether she had suffered an "adverse personnel action."

b. Drawing all inferences in favor of Ms. Doe, the undisputed facts show that the School Board took *many* "adverse personnel actions" against her before ultimately forcing her to retire.

The Whistleblower's Act is a remedial statute designed to protect public employees like Ms. Doe from "adverse personnel actions" by their employers in retaliation for exposing public corruption. *See* Fla. Stat. § 112.3187(2) (2015). As a remedial statute, it must be construed liberally in favor of granting access to the remedy, so as not to frustrate its legislative purpose. *Caldwell v. Fla. Dep't of Elder Affairs* (Fla. 1st DCA 2013).

The Act thus defines the term "adverse personnel action" broadly to mean "the discharge, suspension, transfer, or demotion of any employee *or* the withholding of bonuses, the reduction in salary or benefits*, or any other adverse action* taken against an employee within the terms and conditions of employment by an agency or independent contractor." Fla. Stat. § 112.3187(3)(c) (emphases added).

The courts have further expanded this already broad definition. Florida applies federal Title VII case law to the Whistleblower's Act. *Rice-Lamar v. City of Ft. Lauderdale*, 853 So.2d 1125, 1132 (Fla. 4th DCA 2003). For purposes of Title VII, an "adverse action" is *any* action that "a reasonable employee would have found ... materially adverse," meaning it "might have dissuaded a reasonable employee from" engaging in protected speech (in this context, blowing the whistle). *Burlington Northern & Santa Fe Ry. Co. v. White,* 548 U.S. 53, 68 (2006) (internal citations omitted). Thus, examples of adverse actions include not only involuntary termination, but also "denial of promotion, refusal to hire, denial of job benefits, demotion, suspension, ... threats, reprimands, negative evaluations, harassment, [and] other adverse treatment, ... [such as s]uspending or limiting access to an internal grievance procedure[.]" *Donovan v. Broward County Bd. of Com'rs*, 974 So.2d 458, 459–60 (Fla. 4th DCA 2008) (finding "adverse action" where public

employer refused to give plaintiff access to internal review process because plaintiff had filed complaint with outside agency).

Here, the undisputed facts show that between March 6, 2009 (when Ms. Doe reported the Perezes to the State Attorney's Office) and September 3, 2009 (when she was forced to retire), School Board members, contractors, and employees:

i. tried to intimidate her by spreading rumors that her annual employment contract was not going to be renewed;

ii. threatened to vote against renewing her employment contract;

iii. forced her to endure meetings where School Board members openly debated whether to fire her;

iv. forced her to fire members of her own staff at a time when no other department was required to cut employees;

v. hired a former prosecutor experienced in white collar crime to investigate her, in an effort to shift negative publicity away from the School Board;

vi. told reporters and the public that Ms. Doe was "incompetent;"

vii. publicly criticized Ms. Doe during a televised meeting, and stated that she should be fired, suspended, or demoted; and

viii. circulated not one, but *two* internal reports that questioned Ms. Doe's professional competence, essentially blaming *her* for the Perez scandal.

A reasonable person could easily find that the above actions were "materially adverse" to Ms. Doe, and that being subjected to just *one* of them would have been enough to dissuade her from ever blowing the whistle again. But taken together, and drawing all inferences in her favor as the non-moving party, there is no doubt that the School Board took precisely the sort of retaliatory actions against Ms. Doe that the Whistleblower's Act was intended to prevent. Thus, instead of its impermissibly narrow view of what constitutes an "adverse action," the lower court should have construed the Act liberally in favor of a remedy for Ms. Doe.

The fact that Ms. Doe was eventually forced into early retirement, where she would never again be in the position to embarrass the School Board, further supports the narrative that she was scapegoated. In fact, the day after Ms. Doe resigned, the local newspaper—apparently tipped off by a School Board member—ran an article about her with the headline "Heads Roll in School Scandal." In an even clearer sign that the School Board offered Ms. Doe up as a public scapegoat, one School Board member *literally testified*

three times in his deposition that she was a "scapegoat." These facts were on the record before the lower court, but completely ignored.

Reasonable minds, viewing all of the above in the light most favorable to Ms. Doe, could find that many of the School Board's actions—up to and including its ultimatum to either quit or be fired—were "adverse personnel actions." Thus, it was reversible error for the lower court to grant summary judgment on the Whistleblower's Act claim.

II. Issues of fact remain as to whether Ms. Doe's resignation was voluntary under the *Hargray* rule.

a. Drawing all inferences in favor of Ms. Doe, reasonable minds could find that the School Board lacked good cause to believe that grounds for termination existed.

The lower court cites *Hargray* and *Stone* for the proposition that an employee's forced resignation can be "voluntary" for purposes of due process, even when the only alternative is to be fired, or worse. But while Ms. Doe does not dispute this general rule, there is a critical exception that the lower court glossed over: a forced resignation is not voluntary "where the employer actually lacked good cause to believe that grounds for the termination ... existed." *Id*. (*quoting Stone*, 885 F.2d at 174).

In a brief aside, the lower court held that "this exception [was] inapplicable to the case at bar. The findings and recommendations in the forensic reports provided Superintendent Perez with good cause to believe that grounds for termination existed." However, the weight of all evidence on the record says otherwise.

While the forensic report criticized Ms. Doe for not implementing effective policies and procedures to prevent abuse of purchase cards and cash receipts, it also *praised* her for confronting Mr. Perez about his wife's purchases, cooperating with the State Attorney's prosecution, refusing to sign a state audit certification that would have covered up Mrs. Perez's improper charges, auditing the cash receipt program, and uncovering two prior incidents where employees were defrauding the district. The report further noted that there were "[no] instances wherein a supervisor identified areas of unsatisfactory performance or any performance that needed improvement" in her past performance reviews.

Further, at her deposition, Ms. Doe disputed the forensic investigator's findings and methodologies, and testified at length as to the steps she had taken to correct administrative deficiencies, including problems with the purchase card and cash receipt programs.

Reasonable minds, viewing all of the above in the light most favorable to Ms. Doe, could certainly find that the School Board did not have good cause to believe that grounds for termination existed. Thus, whether Ms. Doe's resignation was voluntary under the exception to the rule in *Hargray* was a question of fact for the jury to decide. By weighing the facts itself, the lower court committed reversible error.

Conclusion

Because Jane Doe suffered numerous "adverse personnel actions" within the meaning of the Whistleblower's Act, and the School Board lacked good cause to believe that her termination would have been justified (such that her resignation cannot be deemed "voluntary" under *Hargray*), the appellant respectfully asks this Honorable Court to *reverse* the trial court's order granting final summary judgment.

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