In the Missouri Court of Appeals
Eastern District

DIVISION FIVE

DANIEL MARGIOTTA, Appellant, v. CHRISTIAN HOSPITAL NORTHEAST NORTHWEST d/b/a CHRISTIAN HOSPITAL and BJC HEALTH SYSTEM, Respondents.	)	No. ED91466 Appeal from the Circuit Court of St. Louis County Honorable Mark D. Seigel No. 07CC-001441 FILED: June 30, 2009

Introduction

Daniel J. Margiotta, the appellant, filed a whistleblower action against the respondents, Christian Hospital Northeast Northwest (Christian Hospital) and BJC Health System, alleging he was terminated from Christian Hospital because he reported unsafe patient practices. The circuit court of St. Louis County entered summary judgment in respondents' favor, and the appellant now appeals. We would reverse the judgment; however, in light of the general interest and importance of the issues involved, we transfer the case to the Missouri Supreme Court, pursuant to Supreme Court Rule 83.02.

Facts

On April 22, 2005, the appellant began working for Christian Hospital as a Medical Imaging Technician in the CT Scan department. He was terminated on December 9, 2005 and

filed the instant action on April 5, 2007. He alleged he was terminated from Christian Hospital after he reported unsafe practices which violated public policy, citing 190 CSR 30-20.021(3)(K)(2)[1] and 42 C.F.R. 482.13(c)[2].

The appellant claims he was terminated because on five occasions, he raised the following patient care issues: (1) A co-worker had scanned a pregnant woman. (2) Patients were left unattended in the hallway outside the CT scan area. (3) He did not receive assistance in transferring patients to the CT table. (4) He overheard that a co-worker dropped a patient while transferring the patient to the CT table.

On the first occasion, the appellant raised the issue of scanning a pregnant woman to the employee who performed the scan. He did not report the incident to his supervisors. On the second occasion, the appellant met with the manager of his department, Bill Lundack, and raised the issues of unattended patients, inadequate help in transferring patients, and the proper procedure to ensure pregnant women were not scanned. On the third occasion, he told Tim Cuff, his direct supervisor, that patients were still being left in the halls. On the fourth occasion, the appellant called Cuff at home to tell him a patient was left unattended in the hallway. On the fifth occasion, the appellant overheard a co-worker tell Cuff about a patient being dropped during a transfer, and the appellant told Cuff, "Tim, we've talked about this before."

The respondents claim the appellant was not terminated because he informed his supervisors of unsafe hospital practices. Instead, they argue that on December 8, 2005, the appellant had a "violent outburst" while at work. The respondents claim the appellant threw a

[1] This section was repealed in February 2008. Previously, it stated "Each hospital shall develop a mechanism for the identification and abatement of occupant safety hazards in their facilities. Any safety hazard or threat to the general safety of patients, staff or the public shall be corrected." Section 190 CSR 30-20.021 is entitled, "Organization and Management of Hospitals."

[2] 42 C.F.R. 482.13(c)(2) states, "The patient has the right to receive care in a safe setting."

pillow across the room, which struck a canister on the wall, causing it to fall to the ground. At the same time, the appellant was allegedly yelling at a co-worker, David Moutria, and also threw a chuck[3] to the floor. The respondents also allege that the appellant had a second outburst, again yelling at Moutria and throwing a piece of paper to the ground. On the next day, December 9, 2005, the appellant was terminated from Christian Hospital. In his deposition, the appellant claims these allegations are unfounded.

The respondents filed a motion for summary judgment, arguing (1) that the appellant will be unable to prove an exclusive causal connection between his discharge and reporting violations to his superiors, and (2) that the patient care issues that the appellant raised are insufficient to support a whistleblower action because they do not constitute violations of clear mandates of public policy. The trial court granted summary judgment in favor of the respondents, without stating its reasons.

Standard of Review

Whether a motion for summary judgment should be granted is a question of law and our review is essentially de novo. *ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993). Summary judgment is proper where the movant establishes the absence of any genuine issue of material fact and a legal right to judgment. *Id.* at 378. We will review the record in the light most favorable to the party against whom judgment has been entered. Facts set forth by affidavit or otherwise in support are taken as true unless contradicted by the non-moving party's response. *Id.* at 376. We will affirm the trial court's judgment if is sustainable on any theory. *Citibrook II, L.L.C. v. Morgan's Foods of Missouri, Inc.*, 239 S.W.3d 631 (Mo. App. E.D. 2007). When a defending party moves for summary judgment, it does not need to disprove every element of the claimant's cause of action, but needs

[3] A chuck, or "chux," is a fabric device used to support patients on a table or stretcher.

to show facts that negate one of claimant's elements. *ITT Commercial Finance Corp.*, 854 S.W.2d at 381. A defending party will also prevail on its motion for summary judgment if it shows that the claimant, after an adequate period of discovery, will be unable to produce evidence sufficient to establish any one of the claimant's elements. *Id.*

Points on Appeal

The appellant raises five points on appeal. In his first point, the appellant claims the trial court erred when it entered summary judgment for the respondents because exclusive causation should not be an element of a whistleblower action. In his second point, the appellant argues that the respondents' motion for summary judgment failed to comply with Rule 74.04(c)(1). In his third point on appeal, the appellant argues that summary judgment was improper because there were contested issues of material facts as to the exclusive causation element. In his fourth point, the appellant claims that the trial court erred in denying his motion for extension of time. In his final point, the appellant asserts that summary judgment was improper because, contrary to the respondents' arguments, the appellant did report serious misconduct that constitutes a violation of well established and clearly mandated public policy.

Discussion

I. Exclusive Causation

The appellant claims the trial court erred in granting summary judgment because exclusive causation should not be a part of a whistleblower claim. As a general rule, Missouri is an employment-at-will state, where an employee without a contract maybe discharged at any time, with or without cause, and the employer will not be liable. *Dunn v. Enterprise Rent-A-Car Co.*, 170 S.W.3d 1, 6 (Mo. App. E.D. 2005). However, as an exception to this rule, an employee who has been terminated in clear violation of a mandate of public policy will have a cause of

action against the employer for wrongful discharge. *Id.* Missouri courts have recognized four public policy wrongful discharge actions, where an employee will have a cause of action if he or she was terminated for "(1) refusing to perform an illegal act or an act contrary to a strong mandate of public policy; (2) reporting wrongdoing or violations of law or public policy by the employer or fellow employees to superiors or third parties; (3) acting in a manner public policy would encourage . . . ; or (4) filing a workers' compensation claim." *Id.* The fourth exception derives from statute,[4] while the others arise from the common law of torts.

An action under the second public policy exception, a whistleblower action, was first recognized in *Boyle v. Vista Eyeweaer, Inc*, 700 S.W.2d 859 (Mo. App. W.D. 1985). In his first point on appeal, the appellant asks this court to decide whether the employee must prove that the reporting of wrongdoing was the exclusive cause of the termination. The *Boyle* court did not list the elements of this cause of action and did not specifically require exclusive causation. *Id.* at 876-77. See also *Brenneke v. Department of Missouri, Veterans of Foreign Wars of the United States of America*, 984 S.W.2d 134, 139-40 (Mo. App. W.D. 1998). *Boyle* used a direct, rather than exclusive, causation analysis. *Brenneke*, 984 S.W.2d at 140.

Since *Boyle* was decided, appellate courts have adopted the exclusive causation requirement from Missouri Supreme Court cases interpreting statutory actions for retaliatory discharge due to filing a workers' compensation claim. *Brenneke*, 984 S.W.2d at 140. See *Bell v. Dynamite Foods*, 969 S.W.2d 847 (Mo. App. E.D. 1998); *Lynch v. Vlanke & Bowy Krimko, Inc.*, 901 S.W.2d 147 (Mo. App. E.D. 1995); *Loomstein v. Medicare Pharmacies, Inc.*, 750 S.W.2d

[4] Section 287.780 RSMo (2000) states: "No employer or agent shall discharge or in any way discriminate against any employee for exercising any of his rights under this chapter. Any employee who has been discharged or discriminated against shall have a civil action for damages against his employer."

106 (Mo. App. E.D. 1988).[5] The court in *Brenneke* explained the difference between workers' compensation retaliatory discharge causes and the other wrongful discharge torts:

> There is a key distinction between whistleblower cases and workers' compensation retaliatory discharge cases. While workers' compensation claims are statutory, the whistleblower exception to the employee-at-will doctrine arises under the common law of torts. In part for this reason, some of the other jurisdictions which, like Missouri, treat these public policy claims as arising in tort, do not require proof of exclusive causation, but rather require the employee to prove by a preponderance of the evidence that the discharge was for an impermissible reason.
> *Brenneke*, 984 S.W.2d at 140.

However, we need not decide this issue as the appellant has failed to preserve the issue on appeal. The appellant did not file a memorandum in opposition to the respondents' motion for summary judgment. Further, the record contains no evidence that this argument was raised below. Arguments not raised before the trial court cannot be raised on appeal to oppose a grant of summary judgment. *Schwartz v. Custom Printing Co.*, 926 S.W.2d 490 (Mo. App. E.D. 1996). Therefore, we would deny Point I.

II. Summary Judgment

We will address the appellant's remaining points out of order, beginning with his fifth and third points. In both of these points, the appellant challenges independent grounds supporting the trial court's grant of summary judgment. The respondents, as the defending party, are not required to controvert every element of the appellant's whistleblower claim to be entitled to summary judgment. *ITT Commercial Finance Corp.*, 854 S.W.2d at 381. The respondents need to show "facts that negate *any one* of the claimant's element's facts." *ITT Commercial*

[5] Recently, in *Fleshner v. Pepose Vision Institute, P.C.*, ED 90853, 2009 WL 113867 (Mo. App. E.D. 20, Jan 2009)(application for transfer granted on May 5, 2009) this court adopted exclusive causation as an element of a whistleblower action, citing the Missouri Supreme Court case affirming exclusive causation as an element of a workers' compensation retaliatory discharge action. The dissent cites to *Fleshner* as announcing the standard as to exclusive causation. However, the Supreme Court has granted transfer in *Fleshner*. Thus, *Fleshner* has no precedential effect. "The decision of the court of appeals in a case subsequently transferred is of no precedential effect." *Gerlach v. Missouri Com'n on Human Rights*, 980 S.W.2d 589, 594 (Mo.App. E.D. 1998) (citing *Philmon v. Baum*, 865 S.W.2d 771, 774 (Mo. App. W.D.1993)).

Finance Corp., 854 S.W.2d at 381 (emphasis in original). The elements the appellant must prove in a whistle-blower action are (1) the employee reported violations of law and of well-established and clearly mandated public policy, (2) the employer terminated the employee and (3) the termination was exclusively caused by the employee's reporting. *Bell v. Dynamite Foods*, 969 S.W.2d 847 (Mo. App. E.D. 1998).

In their motion for summary judgment, the respondents asserted summary judgment was proper because the appellant could not prove the first element of a whistleblower action, namely that the appellant reported a violation of law or public policy. In his fifth point on appeal, the appellant claims that the patient care issues he reported were serious misconduct that constituted violations of well established and clearly mandated public policy.

In a whistleblower action, the employee must prove that he reported a violation of "a constitutional provision, a statute, *a regulation* or other clear mandate of public policy." *Porter v. Reardon Mach. Co.*, 962 S.W2d 932, 938 (Mo. App. W.D. 1998) (emphasis added). In this case, the appellant has cited both a state and a federal regulation which sets forth a clear mandate that hospitals adopt procedures to ensure their patients' safety. These regulations have significant public policy implications because patients have relinquished control over their safety and care to the hospital and its employees. Patients are at a heightened level of vulnerability. The appellant reported violations of safety regulations which constitute clear mandates of public policy, and therefore, respondents have failed to negate the first element of a whistleblower action. We would grant Point V.

In his third point on appeal, the appellant claims that summary judgment was improper because there were contested issues of material fact as to exclusive causation. Not having reached the issue of whether the appellant must prove exclusive causation, we will assume

exclusive causation is an element of a whistleblower action. Proof of a legitimate reason for termination will not defeat the exclusive causation requirement and entitle the employer to summary judgment. *Kummer v. Royal Gate Dodge, Inc*., 983 S.W.2d 568, 572 (Mo. App. E.D. 1998); *Lynch, v. Blanke Baer & Bowey Krimko, Inc.*, 901 S.W.2d 147, 152 (Mo. App. E.D. 1995); *Wiedower v. ACF Industries, Inc.*, 715 S.W.2d 303, 307 (Mo. App. E.D. 1986). Once the employee has produced sufficient evidence to show exclusive causation, the burden shifts to the employer to rebut the employee's evidence by showing a legitimate reason for the discharge. *Wiedower*, 715 S.W.2d at 307. "Even though an employer produces evidence of a legitimate reason for the discharge, the plaintiff who is able to persuade the jury that the employer's reason is pretextual and not causal is entitled to a verdict." *Id.* The question is one for a jury. *Kummer*, 983 S.W.2d at 572.

Similarly, the Missouri Supreme Court found that "[s]ummary judgment should seldom be used in employment discrimination cases, because such cases are inherently fact-based and often depend on inferences rather than on direct evidence." *Daugherty v. City of Maryland Heights*, 231 S.W.3d 814, 818 (Mo. banc 2007). Whistleblower actions and the other public policy wrongful discharge cases are also inherently fact-based and depend on inferences rather than direct evidence. In both types of cases, summary judgment is appropriate where evidence could not support any reasonable inference for the employee. *Id*.; See *Kummer*, 983 S.W.2d at 572; *Wiedower*, 715 S.W.2d at 307.

We must determine whether the record shows plausible, but contradictory accounts of the essential facts and whether the genuine issue in the case is real, not merely argumentative, imaginary or frivolous. *Daugherty*, 231 S.W.3d at 820. In this case, the record contains evidence that would support a finding of exclusive causation as well as evidence that would

support a finding that respondents had a valid, non-pretextual reason to fire the appellant. This is the genuine issue in this case, and it is not argumentative, imaginary or frivolous. The facts surrounding the appellant's discharge are disputed. We would grant Point III.

Summary judgment was improper because the appellant reported a violation of law and public policy and a genuine issue of material fact exists as to whether the appellant's whistleblowing exclusively caused his termination. As these points would be dispositive, we would not to address the appellants remaining points.

Conclusion

We would reverse the judgment; however, in light of the general interest and importance of the issues involved, we transfer the case to the Missouri Supreme Court, pursuant to Supreme Court Rule 83.02.

_____

Nannette A. Baker, Chief Judge

Patricia L. Cohen, J., concurs. Kenneth M. Romines, J., dissents in separate opinion.

In the Missouri Court of Appeals
Eastern District

DIVISION FIVE

DANIEL MARGIOTTA,	)	No. ED91466
	)	
Appellant,	)	Appeal from the Circuit Court of
	)	St. Louis County
v.	)	
	)	
CHRISTIAN HOSPITAL NORTHEAST NORTHWEST d/b/a CHRISTIAN HOSPITAL and BJC HEALTH SYSTEM,	)	
	)	
Respondents.	)	Filed: June 30, 2009

DISSENT

I dissent. Given that exclusive causation is the standard,[6] on this record, Appellant cannot overcome the motion for summary judgment. Likewise I am opposed to transfer.

_____

Kenneth M. Romines, Judge

[6] *Fleshner v. Pepose Vision Institute, P.C.*, --- S.W.3d ---, 2009 WL 113867 (Mo. App. E.D. 20 Jan 2009).