

IN THE SUPREME COURT OF MISSOURI

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Supreme Court No. 90032

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**MICHELLE FLESHNER,  
Plaintiff-Respondent,**

vs.

**PEPOSE VISION INSTITUTE, P.C.,  
Defendant-Appellant.**

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**BRIEF OF THE ST. LOUIS AND KANSAS CITY CHAPTERS OF THE  
NATIONAL EMPLOYMENT LAWYERS ASSOCIATION AS AMICI  
CURIAE IN SUPPORT OF RESPONDENT FLESHNER**

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## **STATEMENT OF INTEREST**

Amici Curiae, the St. Louis and Kansas City Chapters of the National Employment Lawyers Association, are voluntary membership organizations of approximately 100 lawyers who represent employees in labor, employment and civil rights disputes in the state of Missouri. The Chapters are affiliates of the National Employment Lawyers Association (NELA) which consists of more than 3,000 attorneys who specialize in representing individuals in controversies arising out of the workplace. As part of its advocacy efforts, NELA has filed numerous amicus curiae briefs in state and federal courts across the country regarding the proper interpretation and application of employment law to ensure that such law is fully enforced and that the rights of workers are fully protected. Members of the St. Louis and Kansas City Chapters of NELA regularly represent victims of unlawful retaliatory discharge.

## **STATEMENT OF FACTS**

Plaintiff Michelle Fleshner brought this lawsuit against her former employer, Defendant Pepose Vision Institute, P.C., alleging a tort claim of wrongful discharge in violation of public policy. She alleged that Defendant summarily fired her the day after she cooperated with an investigation by the Department of Labor into whether Defendant was failing to pay its employees overtime in

violation of wage laws. Following a trial, a jury agreed with Ms. Fleshner's claim of unlawful retaliation and awarded her compensatory and punitive damages.

On appeal, the Court of Appeals vacated the jury verdict in favor of Ms. Fleshner. According to the Court, the verdict director instruction was defective because it did not require Ms. Fleshner to prove that her protected activity was the exclusive cause of her termination from employment. Ms. Fleshner filed an application for transfer of the case to the Supreme Court, which was granted.

## **POINTS RELIED ON**

### **I. The Exclusive Causation Standard Must Be Rejected in Cases Involving the Public Policy Tort Because it is Inconsistent With Missouri Case Law, General Tort Law, and the Goals of the Tort.**

*Smith v. Arthur C. Baue Funeral Home*, 370 S.W.2d 249 (Mo. banc 1963)

*Brenneke v. Dept., Veterans of Foreign Wars*, 984 S.W.2d 134 (Mo. App. 1998)

### **II. The Exclusive Causation Standard Has Been Rejected By the Overwhelming Majority of Jurisdictions Outside Missouri in Cases Involving the Public Policy Tort.**

*Teachout v. Forest City Comm. Sch. Dist.*, 584 N.W.2d 296 (Iowa 1998)

*Anderson v. Standard Register Co.*, 857 S.W.2d 555 (Tenn. 1993)

## ARGUMENT

This case raises an important question: what is the proper standard of causation in common law tort claims of retaliatory discharge in violation of public policy? The Court of Appeals held that plaintiffs who bring such claims must prove that their protected activity, usually reporting or disclosing the unlawful conduct of their employers, was the “exclusive” reason they were discharged from their jobs. This ruling clashes with Missouri case law, the traditional standard of causation under the common law of torts, the underlying purposes of the public policy tort, and case law from other jurisdictions. As a result, it cannot be allowed to stand.

### **I. The Exclusive Causation Standard Must Be Rejected in Cases Involving the Public Policy Tort Because it is Inconsistent With Missouri Case Law, General Tort Law, and the Goals of the Tort.**

It is fundamental to tort law that the plaintiff is not required to prove that the defendant’s conduct was the sole cause of her injury; it need only be a “contributing cause.” Tort law rejects exclusive causation because it is inconsistent with its compensatory and deterrent purposes. If the defendant’s wrongdoing was a cause of the plaintiff’s harm, in the sense that the harm would not have happened without it, then it does not matter if the defendant’s wrongdoing was not the one and only cause of the harm. *See Callahan v. Cardinal Glennon*

*Hospital*, 863 S.W.2d 852, 862-863 (Mo. banc 1993) (applying “but for” test of causation in tort cases). The plaintiff has suffered an injury for which she should be compensated, and the defendant has inflicted an injury for which it should be held accountable. The “contributing cause” standard of causation is essential in tort law because, without it, wrongful activity that produces harm would go unremedied and undeterred.

These principles are deeply rooted in Missouri case law. They can be traced back more than one hundred years to this Court’s decision in *Newcomb v. N.Y. Central & Hudson River R.R. Co.*, 169 Mo. 409, 69 S.W. 348 (Mo. 1902). There, the Court held that “a defendant may be liable even if the accident was not caused by his *sole* negligence . . . It is not possible in jurisprudence, nor would it be just, to limit one’s responsibility for harm inflicted on another through his acts, to the particular injuries whereof those acts are the sole cause. Indeed, a sole cause is a thing seldom found in our complicated world . . . Therefore, the rule of law is, that a person contributing to a tort, whether his fellow-contributors are men, natural or other forces, or things, is responsible for the whole the same as though he had done all without help.” *Newcomb*, 169 Mo. at 422, 426-27; 69 S.W. at 352-353 (emphasis in the original).

Since *Newcomb* was decided, over a century ago, the contributing cause standard of tort causation has been repeated so often in Missouri case law it has

attained the stature of platitude. Consider these four passages from four representative cases, all of which reject exclusive causation:

The general rule is that if a defendant is negligent and his negligence combines with that of another, or with any other independent, intervening cause, he is liable, although his negligence was not the sole negligence or the sole proximate cause.

\* \* \*

It is only necessary that the defendant's negligence be a cause or a contributing cause to the injury, not the exclusive cause.

\* \* \*

The negligence of the defendant need not be the sole cause of the injury, as long as it is one of the efficient causes thereof without which injury would not have resulted.

\* \* \*

The defendant's negligence need not be the sole cause of the plaintiff's injury, but simply a cause or contributing cause.

See *Carlson v. K-Mart Corp.*, 979 S.W.2d 145, 147 (Mo. banc 1998) (first quote); *Sill v. Burlington Northern R.R.*, 87 S.W.3d 386, 393 (Mo. App 2002) (second quote); *United Mo. Bank v. Grandview*, 105 S.W.3d 890, 896 (Mo. App. 2003) (third quote); *Nisbet v. Bucher*, 949 S.W.2d 111, 115 (Mo. App. 1997) (fourth quote).

It is only a small step from these common law negligence cases, where the contributing cause standard was applied, to common law retaliatory discharge cases, where it should also be applied. Indeed, it is a step this Court took many years ago in *Smith v. Arthur C. Baue Funeral Home*, 370 S.W.2d 249 (Mo. banc 1963). There, the plaintiff alleged that he was fired from his job by the defendant in retaliation for his union activity. A provision of the Missouri Constitution states that “employees shall have the right to organize and to bargain collectively through representatives of their own choosing.” See Article I, Section 29. Although the plaintiff was an at-will employee, and the provision of the Missouri Constitution does not authorize a private cause of action, the Supreme Court held that the plaintiff was entitled to bring suit against the defendant for retaliatory discharge. *Smith*, 370 S.W.2d at 254. *Smith* is widely regarded as the first case in Missouri to recognize the public policy exception to the employment-at-will doctrine. See, e.g., *Clark v. Beverly Enterprises-Missouri*, 872 S.W.2d 522, 525

(Mo. App. 1994); *Faust v. Ryder Comm. Leasing and Services*, 954 S.W.2d 383, 389 (Mo. App. 1997); *Beasley v. Affiliated Hosp. Products*, 713 S.W.2d 557, 560-61 (Mo. App. 1986); *Boyle v. Vista Eyewear, Inc.*, 700 S.W. 2d 859, 875 (Mo. App. 1985).

Significantly, the Supreme Court in *Smith* did not require the plaintiff to prove that his protected activity was the sole cause of his termination from employment. All it required was that it was one reason which, even if it was not the only reason, nevertheless influenced the outcome of the employer's decision. "For the purposes of this opinion we will assume that [plaintiff] was discharged for the reason (*at least in part*) that he had signed the aforementioned paper authorizing the union to represent him in bargaining with his employers." *Smith*, 370 S.W.2d at 252 (emphasis added). Fidelity to precedent requires the Supreme Court to follow its prior decision in *Smith* in holding that the contributing cause standard, rather than the exclusive cause standard, governs common law claims of wrongful discharge in violation of public policy.

The principle of tort law that the plaintiff can recover for the harm she has suffered so long as the defendant's conduct was a contributing, as opposed to the exclusive cause of it, is not unique to Missouri. It is the prevailing view across the country. See, e.g., *2715 Lemoine Ave. Corp. v. Finco*. 640 A.2d 346, 351-52 (N.J. Super. Ct. 1994) ("the test of proximate cause is satisfied where . . . conduct is a

substantial contributing factor in causing [a] loss”); *Martinelli v. Hopkins*, 787 A.2d 1158, 1170 (R.I. 2001) (“the plaintiff was not required to prove that the town’s negligence was *the* proximate cause for his injuries and damages, but only that it was *a* proximate cause”) (emphasis in the original). Indeed, the leading treatise on tort law teaches that “instructions to the jury that they must find the defendant’s conduct to be ‘the sole cause,’ or ‘the dominant cause,’ or ‘the proximate cause’ of the injury are rightly condemned as misleading error.” W. Page Keeton, Prosser and Keeton on the Law of Torts § 41 at 266 (5<sup>th</sup> ed. 1984).

The drafters of the Missouri Approved Jury Instructions have recognized this reality. They have expressly adopted the “contributing cause” standard in tort cases. MAI 19.01 asks the jury whether the defendant’s conduct “directly caused or directly contributed to cause damage to plaintiff.” See MAI 19.01 captioned “Verdict Directing Modification – Multiple Causes.”

A similar standard, the “contributing factor” standard, applies to statutory claims under the Missouri Human Rights Act (MHRA). MAI 31.24 asks the jury whether the plaintiff’s sex, race, age or other protected characteristic was a “contributing factor” in the challenged employment action. See MAI 31.24 captioned “Verdict Directing – Employment Discrimination – Missouri Human Rights Act.” With appropriate modification, MAI 31.24 would serve as a useful verdict director in cases of wrongful discharge in violation of public policy, since

it is already conveniently worded in terms of an employment claim and it is fully consistent with tort principles.<sup>1</sup>

Plaintiff Fleshner alleges that she was fired by Defendant Pepose Vision Institute in retaliation for providing information to the authorities about its violations of the wage laws. This is a whistleblower claim and, like all such claims, arises under the common law of torts. See, e.g., Brenneke v. Dept., Veterans of Foreign Wars, 984 S.W.2d 134, 138 (Mo. App. 1998); *Boyle v. Vista*

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<sup>1</sup> Although MHRA claims are not identical to intentional tort claims, they are analogous to them. *State ex rel. Diehl v. O'Malley*, 95 S.W.3d 82, 87-88, 91 (Mo. banc 2003). One similarity is that neither requires proof of an injury caused by the defendant's conduct. Regardless of whether she has suffered any compensable harm, the plaintiff can recover nominal damages, which will support an award of punitive damages, if the defendant has intentionally violated her legal rights. See Daugherty v. Maryland Heights, 231 S.W.3d 814, 819 (Mo. banc 2007) (emphasizing that the MHRA forbids “any unfair treatment” based on a protected characteristic) (emphasis in the original); *Clark*, 872 S.W.2d at 526-527 (authorizing nominal damages and punitive damages in tort cases of retaliatory discharge).

*Eyewear*, 700 S.W.2d 859, 878 (Mo. App. 1985). One might have thought it obvious that a tort standard of causation, especially one as uncontroversial as the contributing cause standard, would apply to a tort cause of action. But that is not what happened here. The Court of Appeals set aside the jury verdict in favor of Ms. Fleshner because the verdict director did not require her to prove that her protected activity was the exclusive cause of her discharge from employment. *Fleshner*, 2009 Mo. App. LEXIS 27 at \*10-13.

In reaching this conclusion, the lower appellate court relied on a line of decisions by the Courts of Appeals, best exemplified by *Lynch v. Blanke Baer & Bowen Krimko*, 901 S.W.2d 147, 151-52 (Mo. App. 1995), which held, or more often assumed, that a plaintiff who brings a common law tort claim of retaliatory discharge in violation of public policy must prove exclusive causation. The *Lynch* line of cases in turn relied on two decisions by the Supreme Court, *Hansome v. Northwestern Cooperage Co.*, 679 S.W.2d 273, 275 (Mo. banc 1984) and *Crabtree v. Bugby*, 967 S.W.2d 66, 72 (Mo. banc 1998), which held that exclusive causation is required under Section 287.780 R.S.Mo., the statute that forbids retaliation against employees who file workers' compensation claims.

As a threshold matter, it is apparent that *Hansome* and *Crabtree* were wrongly decided. The Court did not focus on the text of Section 287.780 which contains no hint of an exclusive causation requirement. It provides as follows:

No employee 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.

The plain language of the statute says that an employee cannot be terminated “for” filing a workers’ compensation claim -- not “solely” for filing it or “exclusively” for filing it. The Court in *Hansome* and *Crabtree* effectively rewrote Section 287.780 to insert an exclusive causation requirement that is nowhere to be found in it.

The Court also seemed to ignore the underlying purpose of Section 287.780. It is inconceivable that the state legislature wanted to allow an employer who has fired an employee for seeking workers’ compensation benefits to be immune from liability just because it might have had another reason for firing her. The other reason may have been insufficient by itself to cause the discharge. Indeed, it may have been a trivial reason which, under *Hansome* and *Crabtree*, would nevertheless allow the employer to evade responsibility for its retaliatory misconduct.

The Court suggested that an exclusive causation standard allows employers to terminate “marginally incompetent employees” without liability, which is a

good thing. *Crabtree*, 967 S.W.2d at 72. In fact, it is a bad thing if these employees would not have been terminated but for their protected activity. Employers cannot be permitted to get rid of marginal employees who have filed claims for workers' compensation benefits and, at the same time, keep marginal employees who have not filed such claims. Yet that is what the Court in *Hansome* and *Crabtree* authorized with its exclusive causation requirement. Employers are empowered to fire "marginally incompetent employees" who have filed workers' compensation claims even when they would not have fired them had they not engaged in protected activity -- even when they retain marginal employees who have not filed workers' compensation claims. This double standard has no possible justification. "An employer doesn't have to retain marginal employees, or for that matter superior ones; but he cannot use race to differentiate between those he retains and those he fires." *Boyd v. Illinois State Police*, 384 F.3d 888, 901 (7<sup>th</sup> Cir. 2004) (Posner, J., concurring).

A further objection to *Hansome* and *Crabtree* is that they are not supported by any pertinent legal authority. The Court did not cite a single case requiring exclusive causation in any context, common law or statutory, in any jurisdiction, Missouri or elsewhere. Judge White was correct when he wrote in dissent that the exclusive causation requirement "appears to have been plucked out of thin air." *Crabtree*, 967 S.W.2d at 74 (White, J., dissenting).

It has been said that the law is not settled until it is settled right. So unreasoned and unprincipled are *Hansome* and *Crabtree* that this Court should critically re-examine them and overrule them. Stare decisis does not prevent the repudiation of prior decisions when they are “clearly erroneous and manifestly wrong,” which is an apt description of *Hansome* and *Crabtree*. See *Southwestern Bell v. Dir. of Revenue*, 94 S.W.3d 388, 390-91 (Mo. banc 2002).

Even if this Court does not overrule these cases, however, Ms. Fleshner must still prevail in this appeal because her claim of retaliatory discharge arises under the common law of torts and, as such, must be governed by common law tort standards, in particular the contributing cause standard. *Hansome* and *Crabtree* were construing a statute not the common law; the two are not the same. See, e.g., *Koehler v. Burlington Northern*, 573 S.W.2d 938, 943 (Mo. App. 1978). To say that exclusive causation is required by Section 287.780 as a matter of legislative intent is a far cry from saying that it is required by the common law of torts, which has shunned it. There is no suggestion that the Court in *Hansome* or *Crabtree* meant to sweep aside over one hundred years of tort precedent without analyzing or even mentioning it. It left the conventional standard of tort causation intact and undisturbed.

Nevertheless, the Courts of Appeal in the *Lynch* line of cases did not apply the common law contributing cause standard to the retaliatory discharge claims

before them, even though they arose in tort. It is not hard to figure out why. It was not that these Courts wanted to subvert or contradict the venerable contributing cause standard; they simply were not thinking about it or not thinking about it carefully, as shown by the fact that they did not even mention it in their decisions. Instead, they fell under the spell of *Hansome* and *Crabtree*, mistakenly believing that they were bound by these cases to apply an exclusive causation standard when in fact they were not, since *Hansome* and *Crabtree* arose in the context of a statutory claim, not a common law tort claim. Thus has error infiltrated Missouri case law and persisted over time as one lower appellate court cites another in a lengthening chain of misguided decisions, including the decision under review here.

To its credit, a panel of the Western District Court of Appeals has delivered a sensible critique of the *Lynch* line of cases. In *Brenneke, supra*, the plaintiff alleged that she was fired for reporting that her supervisor was stealing money. Judge Stith, writing for the Court, rejected the idea that the plaintiff had to show that her firing was motivated solely and exclusively by her whistleblowing. She wrote:

It appears that [the Lynch line of cases] borrowed the exclusive causation requirement from *statutory actions* for retaliatory discharge due to filing a workers'

compensation claim . . . Those cases require proof of exclusive causation. 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 rule arises under the common law of torts. In part for this reason, some of the 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 (emphasis in the original). Although Judge Stith's reasoning is technically dicta, because the defendant did not preserve the exclusive causation issue for appellate review, it is nevertheless persuasive and should be elevated to a holding in this case.

Such a holding would find support in a decision of the Supreme Court of Virginia. See *Shaw v. Titan Corp.*, 498 S.E.2d 696 (Vir. 1998). In *Shaw*, a state statute prohibited employers from discharging an employee "solely because the

employee intends to file or has filed” a workers’ compensation claim. See Code § 65.2-308. The question before the Court was whether the same standard of exclusive causation should apply to a tort claim of retaliatory discharge in violation of public policy. The answer was no. The Supreme Court held that imposing an exclusive causation requirement would be improper because it “pertains to the statutory cause of action under Code §65.2-308, not to a common law claim of wrongful termination.” *Shaw*, 498 S.E.2d at 700.

In addition to overlooking the contributing cause standard, the Court of Appeals did not confront the undesirable consequences of the exclusive causation standard. One of them is that it reverses the normal distinction between negligent torts and intentional torts. Although the same legal standard governs both kinds of torts -- the contributing cause standard -- it is applied more leniently in cases of intentional tort. Causation requirements are relaxed, not tightened, when the defendant acts with an intent to injure the plaintiff, as an employer does when it fires an employee for calling attention to its illegal practices. “For an intentional injury, the law is astute to discover even remote causation.” W. Page Keeton, Prosser and Keeton on Torts, §43 at 293 n.6; see also *Envirotech v. Thomas*, 259 S.W.3d 577, 588 (Mo. App. 2008). Yet the Court of Appeals’ decision means that a more stringent standard of causation will apply to the intentional tort of retaliatory discharge (sole and exclusive) and a less stringent standard to negligent

torts (contributing cause), exactly the opposite of what tort law ordinarily contemplates.<sup>2</sup>

A deeper criticism of the exclusive causation standard is that undermines the remedial and deterrent goals of the public policy tort. Suppose an employee is fired in part for reporting violations of the law, and in part for another reason, but her whistleblowing made a difference in the employer's decision. It would not have happened, in other words, without it. Then the employee has been deprived of her job for acting in furtherance of public policy by bringing wrongdoing to light and ought to be compensated for it. At the same time, the employer has acted in contravention of public policy by firing the employee, since such conduct casts a chill on the willingness of other employees to come forward to report its wrongdoing. They will view it as a job-terminating move. So the employee ought to be allowed to seek punitive damages, in addition to compensatory damages, to

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<sup>2</sup> It is not a good response to say, as the lower appellate court did, that the public policy tort is "narrow." See *Fleshner*, 2009 Mo. App. LEXIS at \*9. It is not narrow and, even if it were, it is not so narrow that it cannot accommodate the ruling principles of tort law. Tort rules, including the contributing cause standard, should apply in tort cases.

deter and discourage the employer from engaging in similar vengeful conduct in the future.

Despite all this, the Court of Appeals would deny recovery to the employee. It would dismiss her claim on the ground that the employer's retaliatory motive, although the "but for" cause of the challenged discharge, was not the "exclusive cause" of it. Such a result is indefensible because it frustrates rather than effectuates the core purposes of the public policy tort.

A final problem with the exclusive causation standard is that it creates dysfunctional incentives for employees and employers. Marginal employees, such as those who have missed a lot of work for health reasons, would be discouraged from reporting the illegal practices of their employers because, if they do and are fired, they would have no legal redress. At the same time, employers would be encouraged to direct marginal employees to carry out illegal practices because they would be unlikely to resist such commands, given that they have no job protection, and, even if they do resist and are fired, they could not seek or obtain damages against the employers. Adopting the exclusive causation standard would mean a decline in socially beneficial whistleblowing by employees and a rise in socially harmful retaliation by employers. This reinforces the need to reject it.

## **II. The Exclusive Causation Standard Has Been Rejected By the Overwhelming Majority of Jurisdictions Outside Missouri in Cases Involving the Public Policy Tort.**

A canvass of case law from jurisdictions outside Missouri reveals a broad consensus in favor of applying a tort standard of causation to common law claims of wrongful discharge in violation of public policy. In particular, it reveals a decided aversion to the exclusive causation standard which is an anomalous departure from traditional tort law.

The exclusive causation requirement adopted by the *Lynch* line of cases in Missouri has been relegated to an outright rejected rule or, at best, is not even acknowledged in the overwhelming majority of the jurisdictions where, like Missouri, a common law tort claim of wrongful discharge in violation of public policy has been recognized. See, e.g., *Kulch v. Structural Fibers, Inc.*, 78 Ohio St.3d 134, 677 N.E.2d 308 (1996) (finding common law cause of action where plaintiff's dismissal was motivated by conduct related to public policy); *Riesen v. Irwin Indus. Tool Co.*, 717 N.W.2d 907, 915 (Neb. 2006) (causal link required to exist between protected activity and discharge under common law action); *Guy v. Mutual of Omaha Ins. Co.*, 79 S.W.3d 528, 535 (Tenn. 2002) (common law causal requirement is substantial factor motivating the discharge); *Teachout v. Forest City Comm. Sch. Dist.*, 584 N.W.2d 296, 302 (Iowa 1998) (determinative factor;

“reason that ‘tips the scales decisively one way or the other,’ even if it is not the predominant reason behind the employer’s decision.”); *Ryan v. Dan’s Food Stores, Inc.*, 972 P.2d 395, 405 (Utah 1998) (employee’s protected conduct must be a substantial factor in employer’s motivation discharging employee); *Gardner v. Loomis Armored, Inc.*, 913 P.2d 377 (Wash. 1996) (adopting substantial motivating factor test from *Wilmot v. Kaiser Alum. and Chem. Corp.*, 821 P.2d 18 (Wash. 1991)); *Cardwell v. American Linen Supply*, 843 P.2d 596, 600 (Wyo. 1992) (employee must show that discharge was significantly motivated by retaliation); *Burk v. K-Mart Corporation*, 770 P.2d 24 (Okla. 1989) (recognizing wrongful discharge in violation of public policy as arising in tort and finding liability where employee’s discharge is motivated by conduct in violation of public policy); *Riesler v. Humane Soc. of Grand Forks*, 480 N.W.2d 429, 431 (N.D. 1992) (causal connection between protected activity and discharge required under statute or common law claim); *Clemons v. Mechanical Devices Co.*, 704 N.E.2d 403, 406 (Ill. 1998) (applying “traditional tort analysis” to causation in common law cause of action); *Nelson v. Productive Alternatives, Inc.*, 715 N.W.2d 452 (Minn. 2006) (causal connection required under common law and statute); *Garrity v. Overland Sheepskin Co.*, 121 N.M. 710, 917 P.2d 1382 (N.M. 1996) (employee must show “a causal connection” between employee’s actions and retaliatory discharge in tort action for wrongful discharge in violation of public policy);

*Shockey v. City of Portland*, 837 P.2d 505, 509-10 (Ore. 1992) (causal connection); *Palmer v. Brown*, 242 Kan. 893, 752 P.2d 685 (1988) (causal connection between protected activity and discharge required under common law).<sup>3</sup>

In *Brenneke*, *supra*, 984 S.W.2d at 134 n.4, the Missouri appellate court cited with approval cases from Wisconsin, Minnesota, Michigan, California, South Carolina, New York and New Jersey that have consistently applied a tort causation analysis to claims of retaliatory discharge. See *Winkleman v. Beloit Mem. Hosp.*, 483 N.W.2d 211 (Wis. 1992); *Phipps v. Clark Oil & Ref. Corp.*, 408 N.W.2d 569 (Minn. 1987); *Melchi v. Burns Int'l.*, 597 F. Supp. 575 (E.D. Mich. 1984); *Freed v. Manchester*, 331 P.2d 689 (Cal. 1958); *Smith v. Citizens and Southern National Bank of S.C.*, 128 S.E.2d 112 (S.C. 1962); *Special Even Entertainment v. Rockefeller Center, Inc.*, 458 F. Supp. 72 (S.D.N.Y. 1978); *Jamison v. Rockaway*,

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<sup>3</sup> It is worth noting that other jurisdictions have enacted statutes where exclusive causation is not required. See, e.g. *Donofry v. Autotote Systems, Inc.*, 795 A.2d 260 (N.J. Ct. App. 2001) (substantial motivating factor must be shown under state statute, following federal statutory burden shifting analysis); *Shallal v. Catholic Soc. Svcs. of Wayne County*, 566 N.W.2d 571, 574 (Mich. 1997) (causal connection between protected activity and discharge required under state statute).

577 A.2d 177 (N.J. 1990). *Brenneke* also pointed out that the *Boyle* case, often cited as one of the leading cases in Missouri on the public policy tort, did not mention, let alone impose, any requirement that the plaintiff prove that her protected conduct was the exclusive, as opposed to the contributing, cause of the challenged discharge. *Brenneke*, 984 S.W.2d at 139-40; *Boyle*, 700 S.W.2d at 878.

Any argument advanced by employers that an exclusive causation requirement is necessary to prevent the employment at will rule from being swallowed by the public policy tort would flunk the test of reality. It has not proven persuasive or accurate in the great number of other jurisdictions that have used tort causation standards in retaliatory discharge cases. For example, the Tennessee Supreme Court noted that Tennessee was one of the first jurisdictions to recognize the employment at will doctrine in 1884, and pointed out that the employer's prerogative to discharge at-will employees under the doctrine has been tempered by the public policy exception. Nonetheless, all that Tennessee courts require the plaintiff to prove in a common law whistleblower case is that her protected activity was a substantial factor, not the sole or exclusive factor, in the employer's decision to discharge her. *Anderson v. Standard Register Co.*, 857 S.W.2d 555, 558-59 (Tenn. 1993). The robust consensus of authority from other states that have followed the initial path of the Missouri Supreme Court in *Smith*, *supra*, in rejecting an exclusive causation requirement in retaliatory discharge

cases demonstrates that the public policy exception does not swallow the employment at will rule based simply upon the use of ordinary tort standards of causation.

It bears emphasis that any conditions or constraints a state legislature might impose on a statutory claim of retaliatory discharge do not apply to common law claims of retaliatory discharge. This was recently made clear by the Western District Court of Appeals in *Hamid v. Kansas City Club*, \_\_S.W.3d \_\_ (Mo. App. Sept. 22, 2009). There, the plaintiff was fired in retaliation for the fact that he became subject to an income withholding order for child support. The Court noted that the plaintiff could not seek relief under Mo. Rev. Stat. §454.505.10, which forbids such retaliation by employers, because it does not authorize a private cause of action. Nevertheless, the Court went on to hold that the plaintiff could seek relief under the common law tort of wrongful discharge in violation of public policy. Slip Op. at pp. 4-5. Notably, the Court held that “because we find that Mr. Hamid has stated a common law claim for wrongful discharge in violation of public policy, rather than a private cause of action to enforce section 454.505.10, the procedures and presumptions of section 454.505.10 do not apply to Mr. Hamid’s common law claim.” Slip Op. at p. 8 n. 4.

The same reasoning applies here. Even assuming that an exclusive causation standard applies to statutory claims of retaliatory discharge in the

workers' compensation context, as *Hansome* and *Crabtree* held, it does not apply to common law tort claims of retaliatory discharge in other contexts. As the Illinois Supreme Court has observed, "we do not believe there is anything unique about the tort of retaliatory discharge that requires a deviation from the traditional tort approach to the allocation of proof." *Clemons*, 704 N.E.2d at 406.

Even in states where the legislature has enacted whistleblower-protection statutes the traditional standard of tort causation governs the common law claims of wrongful discharge in violation of public policy that survive such statutes. See, e.g., *Wilmot v. Kaiser Aluminum and Chemical Corp.*, 821 P.2d at 21 (finding common law cause of action for wrongful discharge exists even outside of statutory cause of action and applying tort standard of causation to it); *Riesler*, 480 N.W.2d at 431 (same).

The surest proof that a legal rule is unsound or unwise is its rejection by many courts in many jurisdictions over many years. There is no warrant for accepting the exclusive causation standard in common law cases of retaliatory discharge when it has been decisively rejected by the overwhelming majority of courts around the country and by the Missouri Supreme Court in the *Smith* case.

## CONCLUSION

All relevant considerations, including Missouri precedent, the general law of torts, logic and policy, and case law from other jurisdictions, point to the same

conclusion. This Court should reaffirm that the contributing cause standard, rather than the exclusive cause standard, governs retaliatory discharge cases. For the reasons discussed, the decision by the lower appellate court should be reversed and the jury verdict in favor of Plaintiff Fleshner reinstated.

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### **Certificate of Compliance**

The undersigned hereby certifies that the foregoing brief complies with the requirements of Rule 55.03. It also complies with the limitations contained in Rule 84.06(b); the brief contains 6,434 words. The undersigned further certifies that the labeled disk, simultaneously filed with the hard copies of the brief, has been scanned for viruses and is virus-free.

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John D. Lynn

### **Certificate of Service**

The undersigned hereby certifies that on the 12<sup>th</sup> day of October 2009 one true and correct copy of the foregoing brief, and one disk containing the foregoing brief, was mailed, postage prepaid, to each attorney of record and to the other amicus in this appeal.

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John D. Lynn