COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

JULIET HERRERA,	§	
		No. 08-17-00254-CV
Appellant,	§	
		Appeal from the
v.	§	
		County Court at Law Number 3
PAUL RESIGNATO and PAUL J. RESIGNATO, DPM, PA,	§	of El Paso County, Texas
	§	
Appellees.		(TC# 2016DCV0274)
	§	

O P I N I O N

We issued our original opinion on May 6, 2020, in which we agreed with the trial court and affirmed summary judgment in favor of Appellees Paul Resignato and Paul J. Resignato, DPM, PA., dismissing Appellant Juliet Herrera's *Sabine Pilot* claims against them. We found, in that opinion, she had failed to produce sufficient evidence supporting her claims of wrongful termination solely because she was instructed by her employer to act unlawfully, which she refused.

Appellant filed a motion for rehearing, arguing this Court did not properly apply the summary judgment standard to the facts of the case, which require us to view the summary judgment evidence in the light most favorable to Appellant, the non-movant. Appellant also claimed we erred in applying *Ed Rachal Foundation v. D'Unger*, 207 S.W.3d 330 (Tex. 2006), to

this case. Appellees responded, noting our previous opinion applied the correct standard of review and did not ignore or omit facts that would raise a genuine issue of material fact. Appellees also assert despite factual differences, the legal principles established in *D'Unger* still apply to the instant case.

We grant the motion for rehearing, withdraw our prior opinion and judgment issued May 6, 2020, and substitute the following opinion. We affirm the trial court's judgment dismissing Appellant's claims against Dr. Resignato, individually. We reverse the trial court's judgment dismissing Appellant's claims against Resignato PA and remand the case to the trial court for further action consistent with this ruling.

Appellant filed this appeal after the trial court granted summary judgment in favor of her former employer, Appellee Paul J. Resignato, DPM, PA (hereafter, Resignato PA), and her supervisor, Appellee Paul Resignato (hereafter, Dr. Resignato). We concluded the trial court properly dismissed her claims against Dr. Resignato because she failed to produce any evidence Dr. Resignato, as an individual, employed her. We concluded the trial court erred when it dismissed her claims against Resignato PA because Appellant provided more than a scintilla of evidence on each element of her *Sabine Pilot* claim against it, sufficient to create a genuine issue of material fact and thus preclude summary judgment. We therefore affirm the portion of the trial court's judgment in favor of Dr. Resignato, individually, and reverse and remand the trial court's judgment granting summary judgment in favor of Resignato PA.

BACKGROUND

Factual Background

We present the following recitation of facts in the light most favorable to Appellant, the nonmovant. *See Scripps NP Operating, LLC v. Carter*, 573 S.W.3d 781, 790 (Tex. 2019).

Appellant worked as a receptionist at Dr. Resignato's podiatry practice.[1] Dr. Resignato's son, Aaron Rosas, also worked in the office. Prior to the events giving rise to Appellant's claim, Rosas was convicted on multiple occasions for theft and receipt of stolen property.

On January 30, 2015, Appellant's phone sat charging at her workstation next to Appellant. Rosas then sat next to Appellant and began charging his phone next to hers. Appellant left her workstation momentarily to get a patient chart and, when she returned, Rosas and both phones were gone. Appellant located Rosas, asked him whether he had taken her phone, and asked him to return it if he had done so. Rosas "checked himself with his hands" and told Appellant he did not have her phone.

Appellant told Dr. Resignato her phone was missing and asked to discuss the matter with her coworkers to see if anyone knew anything. She also told Dr. Resignato she would "make a police report and prosecute whoever had stolen it" if she did not recover it. When Appellant was unable to locate her phone, she filed a police report the same morning. In the report, she named Rosas as the person she suspected took her phone.

Almost two weeks later, on February 11, 2015, a coworker told Appellant she saw Rosas with two cell phones, and that she thought one of them belonged to Appellant. When Appellant confronted Rosas, she "immediately recognized" one of the phones in his possession as hers and saw him texting from it. Appellant told Rosas that the phone was hers and repossessed it. She then immediately called the detective assigned to her case and told him she recovered the phone from Rosas. The detective told Appellant to hold on to the phone because it was evidence of a crime, and to come to the police station to make a report.

[1] Appellant does not concede her employment was with either Resignato PA or Dr. Resignato. Resignato PA admitted to employing Appellant.

After the call and on her way back to her workstation, Dr. Resignato confronted Appellant. Dr. Resignato ordered her to give the phone back to Rosas, who had claimed it was his. Appellant refused. Dr. Resignato then told Appellant to give the phone to him. She refused again. Resignato then told Appellant to bring proof the phone belonged to her. Appellant left the office and retrieved the phone's original packaging and receipt, which showed the phone's serial number. She returned to the office to show Dr. Resignato the items. When she arrived back at the doctor's office, Dr. Resignato and Rosas were in Dr. Resignato's vehicle. Appellant parked in the space right next to his vehicle. Dr. Resignato then looked at Appellant and pulled away in his car.

When it was time for lunch, Appellant called Dr. Resignato to let him know she was leaving for her lunch break. While off the clock at lunch, Appellant went to the police station and gave her statement to the detective. The detective told Appellant she had to leave the phone with him since it was evidence in an ongoing investigation. Appellant left the phone with the detective and returned to the office to finish her workday.

At the end of the day, Dr. Resignato asked Appellant for proof of the phone's ownership. Appellant informed him she left the phone with the detective and gave Dr. Resignato his business card. She informed Dr. Resignato the detective told her to inform the doctor to call the detective if he wanted proof of the phone's ownership. Dr. Resignato then physically confronted Appellant by yelling in her face that he wanted the phone and told Appellant to get out of his office. Appellant complied.

When Appellant reported for work the following morning, Dr. Resignato called her into his office and demanded proof of the phone's ownership. She informed him of her attempt to show him proof the day before, but that he left without allowing her to show it to him. She then told him

a second time the police had the phone, and he could contact them for proof. He told Appellant to get the proof herself. When she left to contact the detective about how to prove ownership to Dr. Resignato, the doctor called her back into his office and told her it would be best if she resigned. When she refused to resign, he fired her.

Procedural Background

Appellant sued Dr. Resignato for wrongful termination. Her lawsuit brought claims against Appellees under *Sabine Pilot*, alleging she was fired "solely because [she] refused to act as an aider or abettor in [Appellees'] intended crime of tampering with evidence."

Appellees filed a motion for summary judgment on traditional and no-evidence grounds. In the no-evidence portion, Appellees claim Appellant offered no evidence that she was asked to and refused to perform an illegal act, or that her termination was solely for refusal to perform an illegal act. Dr. Resignato also asserted there was no evidence he, individually, employed Appellant.

In his traditional summary judgment motion, Appellees assert Appellant "cannot prove" she refused to perform an illegal act at Dr. Resignato's request and there is "no evidence" her employment was terminated solely because of such refusal. These grounds are incongruent with the applicable traditional summary judgment standard. *See* TEX.R.CIV.P. 166a(c)(movant must conclusively establish entitlement to judgment). Nevertheless, because Resignato also challenged the "refusal to perform an illegal act" and the "sole reason for termination" elements in the no-evidence motion, whether the evidence raises a genuine issue of fact on those elements is properly before us.

The trial court granted Appellees' motion for summary judgment without specifying the grounds for doing so. Appellant's motion for new trial was overruled by operation of law, and she timely filed this appeal.

DISCUSSION

Appellant raises the following three issues on appeal: (1) whether the trial court erred in ruling, *sub silencio*, that Plaintiff had the burden to disprove Dr. Resignato's affirmative defense that he was not liable in the capacity in which he had been sued; (2) whether the trial court erred in holding, *sub silencio*, that Plaintiff produced no evidence of refusal to commit an illegal act or that her employer terminated her solely for refusing to commit an illegal act; and (3) whether the trial court erred in holding, *sub silencio*, that (a) Plaintiff failed to prove she refused to commit an illegal act, (b) there was no indication she was asked to participate in a criminal act, and (c) she produced no evidence of sole cause.

Standard of Review

We review *de novo* a trial court's granting of a motion for summary judgment. *Merriman v. XTO Energy, Inc.*, 407 S.W.3d 244, 248 (Tex. 2013). A motion for summary judgment must state specific grounds upon which it is based. *See* TEX.R.CIV.P. 166a(c), (i). When, as here, the trial court does not specify the grounds for its ruling, a summary judgment must be affirmed if any of the grounds on which judgment was sought are meritorious. *Merriman*, 407 S.W.3d at 248. All grounds raised at the trial court level and preserved on appeal are reviewed by the appellate court in the interest of judicial economy. *Neely v. Wilson,* 418 S.W.3d 52, 60 (Tex. 2013).

The movant's burden differs depending on the type of summary judgment motion it files. *See* TEX.R.CIV.P. 166a(c), (i). In a traditional motion for summary judgment, summary judgment

is appropriate when the movant shows there is no genuine issue of material fact and it is entitled to judgment as a matter of law. TEX.R.CIV.P. 166a. In deciding whether a genuine issue precludes summary judgment, we must treat all evidence favorable to the non-movant as true and indulge every reasonable inference and resolve all doubts in its favor. *Sw. Elec. Power Co. v. Grant*, 73 S.W.3d 211, 215 (Tex. 2002). When a defendant conclusively negates at least one element of the plaintiff's cause of action or conclusively establishes all elements of an affirmative defense, the defendant is entitled to summary judgment. *SmithKline Beecham Corp. v. Doe*, 903 S.W.2d 347, 355 (Tex. 1995). Upon such showing, the non-movant bears the burden to present evidence raising an issue of material fact as to each of the elements challenged. *Rodriguez v. Cemex, Inc.*, 579 S.W.3d 152, 160 (Tex.App.—El Paso 2019, no pet.). The nonmoving party is not required to marshal all its proof in response to a summary judgment motion but must present evidence that raises a genuine issue of material fact on each of the challenged elements. *Stierwalt v. FFE Transp. Services, Inc.*, 499 S.W.3d 181, 194 (Tex.App.—El Paso 2016, no pet.). If a plaintiff fails to raise a genuine issue of material fact as to any challenged element, the trial court must grant the motion. *See Stierwalt*, 499 S.W.3d at 194.

By contrast, in a no-evidence motion, the movant claims the non-movant lacks any evidence to prove one or more essential elements of its cause of action. *See* TEX.R.CIV.P. 166a(i). Summary judgment is proper when the non-movant fails to produce sufficient evidence to raise an issue of fact on each element challenged on which it has the burden of proof. *See Hamilton v. Wilson*, 249 S.W.3d 425, 426 (Tex. 2008)(per curium). A fact issue presents itself where the nonmovant offers more than a scintilla of probative evidence in support of the challenged element(s). *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 751 (Tex. 2003). "[E]vidence that

would enable reasonable and fair-minded jurors to differ in their conclusions" constitutes more than a scintilla. *Hamilton*, 249 S.W.3d at 426.

Here, Appellees filed a hybrid motion, asserting both no-evidence and traditional grounds. Both parties offered evidence in support of their respective positions. Furthermore, the trial court did not specify upon which theory its judgment was based. Accordingly, for purposes of our analysis, "the ultimate issue [this Court must determine] is whether a fact issue exists." *Neely*, 418 S.W.3d at 59.

Applicable Law

When for an indefinite term, employment in Texas is generally at will, and terminable at any time by either employer or employee, without cause. *See Sabine Pilot Service, Inc. v. Hauck*, 687 S.W.2d 733, 734 (Tex. 1985). In *Sabine Pilot*, the Texas Supreme Court carved out an exception to the general at-will employment doctrine in Texas to protect employees whose employers ask them to act illegally, and when their refusal to do so results in their termination. *See id.* at 735.

To succeed on a *Sabine Pilot* claim, a plaintiff must prove she refused her employer's request to perform an illegal act, and her refusal was the sole cause of her termination. *See D'Unger*, 207 S.W.3d at 332, (citing *Sabine Pilot*, 687 S.W.2d at 735); *see also Safeshred, Inc. v. Martinez*, 365 S.W.3d 655, 660 (Tex. 2012).

Analysis

Issue One: Whether the trial court committed error granting summary judgment in favor of Dr. Resignato.

In her first issue, Appellant argues the trial court erred in granting no-evidence summary judgment in favor of Dr. Resignato because the affirmative defense of lack of capacity is

Dr. Resignato's burden to prove.

Lack of capacity—that is, a defendant's contention that he is not liable in the capacity in which he is sued—is an affirmative defense which must be raised in the pleadings and verified. *See* TEX.R.CIV.P. 93(2). Appellant correctly states the burden of proof on a properly raised affirmative defense lies with the party who raised it and may not be shifted to the opposing party via a no-evidence motion for summary judgment. *See Battista v. City of Alpine*, 345 S.W.3d 769, 775 (Tex.App.—El Paso 2011, no pet.). Appellant goes on to discuss, at some length, the impropriety of moving for no-evidence summary judgment on any issue in which the movant carries the burden of proof.

However, in this case, as Appellees point out, part of Appellant's claim, for which *she* carries the burden of proof, requires proving she is an employee of the parties she is suing. *See D'Unger*, 207 S.W.3d at 332; *see also Safeshred*, 365 S.W.3d at 660 ("*Sabine Pilot* claims…provid[e] a remedy when an employee refuses to comply with an employer's directive to violate the law and is subsequently fired for that refusal."). A *Sabine Pilot* claim must be made against the terminated employee's employer because "[t]he employment relationship is the source of the duty[.]" *See Physio GP, Inc. v. Naifeh*, 306 S.W.3d 886, 888-89 (Tex.App.—Houston [14th Dist.] 2010, no pet.). When an employee of a company—even an owner or supervisor within the company—terminates another employee, he or she acts at the behest of the employer and exercises power on its behalf, not as an individual. *Id.* at 888. Employees cannot be individually liable to another employee for wrongfully terminating her unless there is a finding of alter ego.[2] *See id*. at 888-89. Accordingly, Appellant is required to produce some evidence in support of her contention

[2] Appellant did not assert alter ego in her lawsuit against Appellees.

that she was an employee of Dr. Resignato, individually, since she brought claims against him allegedly as her employer, and Dr. Resignato challenges that alleged fact. The same would be required of her if she were making her case at trial, since she is required to prove who employs her to prove who allegedly instructed her to violate the law. *Id.* at 888-89.

Appellant, in her response to Appellees' motion, disputes that she must prove she was an at-will employee of either Dr. Resignato, individually, or Resignato PA, and disagrees with Appellees' position that *D'Unger* requires her to do so. She may be correct, insofar as the "at-will" requirement is concerned. However, as our sister court in Houston observed in *Niafeh*, "only an employer can wrongfully terminate the employment relationship," and thus, a plaintiff in a *Sabine Pilot* claim must provide evidence of who employed her before she can prove that person or entity wrongfully terminated her. *See Niafeh*, 306 S.W.3d at 889. Since Dr. Resignato challenged the allegation that she was his employee, rather than Resignato PA's employee, under a no-evidence summary judgment standard, the burden shifted to Appellant to provide evidence of her employment with Dr. Resignato. *See* TEX.R.CIV.P. 166a(i). She did not do so.

Moreover, although we need no further basis on which to affirm the trial court's judgment in favor of Dr. Resignato, the undisputed summary judgment evidence proves Resignato PA employed Appellant. In his affidavit, which Appellees attached as evidence in their motion, Resignato PA's clinical manager, Juan Meza, testified Appellant was employed by Resignato PA. Appellant provided no evidence contradicting Mr. Meza's testimony. Thus, it appears Dr. Resignato disproved an essential element of Appellant's claim under a traditional summary judgment standard, as well.

We find merit in the trial court's decision granting summary judgment in favor of

Dr. Resignato, on these bases. *See Merriman*, 407 S.W.3d at 248 (holding a summary judgment must be affirmed if any of the grounds on which judgment was sought are meritorious). Accordingly, we affirm the summary judgment as to Dr. Resignato, individually, and overrule Appellant's first issue.

Issues Two and Three: Whether the trial court committed error by granting summary judgment in favor of Resignato PA.

In her second issue, Appellant claims the trial court erred in granting Appellees' no-evidence motion for summary judgment because Appellant produced more than a scintilla of evidence regarding whether she was asked to and refused to commit an illegal act. In her third issue, Appellant posits the trial court committed error when it granted Appellees' traditional motion for summary judgment because a genuine issue of material fact exists regarding whether Appellant was asked to and refused to commit an illegal act, or whether her refusal was the sole cause of her termination.

Since we must ultimately determine whether a fact issue exists as to each element[3] of Appellant's *Sabine Pilot* claim against Resignato PA, *see Neely*, 418 S.W.3d at 59, we consider Appellant's second and third issues in tandem. Additionally, having already determined Appellant did not produce any evidence of an essential element of her cause of action against Dr. Resignato—specifically, that she was his employee—we consider only the propriety of the trial court's judgment in favor of Resignato PA.

To succeed on a *Sabine Pilot* claim, a plaintiff-employee must prove her employer asked her to perform an illegal act, which she refused, and as a result was terminated by her employer.

[3] In their motion for summary judgment and brief on appeal, Appellees concede Resignato PA employed Appellant prior to her termination.

See D'Unger, 207 S.W.3d at 332. As Appellees note in their brief, the doctrine applies when the employee must choose between potential criminal prosecution or termination from her employment. *See Winters v. Houston Chronicle Pub. Co.*, 795 S.W.2d 723, 724 (Tex. 1990).

In her petition, Appellant alleges she refused to turn over the telephone to Dr. Resignato because she believed doing so would amount to aiding and abetting tampering with evidence.[4] Accordingly, we must determine whether more than a scintilla of evidence indicates (a) her compliance with Resignato PA's request would have constituted aiding and abetting tampering with evidence, and whether she refused to comply with its request, and (b) whether her refusal was the sole cause of her termination.

Request and refusal to perform an illegal act

Evidence tampering occurs when a person, "knowing that an investigation or official proceeding is pending or in progress, . . . alters, destroys, or conceals any . . . thing with intent to impair its . . . availability as evidence in the investigation or official proceeding[.]" TEX.PENAL CODE ANN. § 37.09(a)(1). Additionally, a person commits the offense of evidence tampering when the person, "knowing that an offense has been committed, alters, destroys, or conceals any . . . thing with intent to impair its . . . availability as evidence in any subsequent investigation of or official proceeding related to the offense[.]" *Id*. at § 37.09(d)(1). When a person, "acting with intent to promote or assist the commission of the offense, . . . aids, or attempts to aid the other person to commit the offense," the person is criminally responsible as having aided and abetted the action. TEX.PENAL CODE ANN. § 7.02(a)(2).

[4] Herrera also listed "obstruction of justice" as a potential criminal act she sought to avoid. However, as neither party discusses obstruction of justice as a potential offense at issue in the summary judgment, we likewise decline to address it in this appeal.

In their motion, Appellees assert there is no evidence of Appellant being asked to or refusing to commit an illegal act. Specifically, Appellees argue Dr. Resignato only requested that Appellant provide proof of ownership of the phone, and not the phone itself, which is not proof of Resignato PA's attempt to elicit illegal action from Appellant. Additionally, Appellees claim Dr. Resignato was unaware Appellant opened an investigation with the police into her missing phone, and thus could not have "know[n] that an investigation . . . is pending or in progress," as the Texas Penal Code requires to prove evidence tampering. TEX.PENAL CODE ANN. § 37.09(a).

Appellant urges that the summary judgment evidence demonstrates an issue of material fact on this point. In doing so, she stresses the standard of review which requires us to credit favorable evidence to her, the nonmovant, and disregard unfavorable evidence to Appellees, unless a reasonable juror would be unable to do so.

Immediately following the alleged theft of her phone, Appellant made Dr. Resignato aware of her phone's disappearance and her intent to make a police report if it was not recovered. Appellees argue that the subsequent recovery of her phone, almost two weeks later, eliminated any knowledge Dr. Resignato might have had regarding an ongoing investigation, because Appellant told him she would go to the police if the phone remained at large. We are not persuaded by this argument. By Appellees' logic, any period could have elapsed between the phone's disappearance and its eventual recovery without Dr. Resignato having any reason to believe Appellant would file a police report regarding it. We might be more inclined to agree with Dr. Resignato if the phone was missing for only a few hours, or even a day or two. However, the phone disappeared on January 30, 2015. Appellant recovered it from Rosas on February 11, 2015. Twelve days elapsed between the phone's disappearance and its recovery. We think a reasonable juror would believe

Dr. Resignato knew or had reason to believe Appellant made a report to police during that time frame. At the very least, it is an issue of material fact which should be resolved by the fact finder.

Appellant also claims that in the time between when she obtained the phone from Rosas and when she turned it in to the police a few hours later, Dr. Resignato told her to give the phone back to Rosas at Rosas' request. Appellant refused to do so. Dr. Resignato then told her to give the phone to him, which Appellant also refused. Appellees allege, because Dr. Resignato allegedly did not ask for the phone again after Appellant told him the police were involved—which is, itself, a contested fact—there is no evidence he knew about an ongoing investigation when he asked for the phone. While a fact finder may believe Appellees' contention (a task we are not permitted to undertake in this appeal), it does not preclude implication of the other type of evidence tampering, which involves concealing or destroying evidence knowing an offense has been committed. *See* TEX.PENAL CODE ANN. § 37.09(d)(1). Here, we believe there is more than a scintilla of evidence tending to show Dr. Resignato sought possession of the phone knowing it was allegedly stolen from Appellant.[5] We further believe that, when we consider the evidence in the light most favorable to Appellant, reasonable jurors could hold differing opinions regarding Dr. Resignato's intent in involving himself in the dispute between Rosas and Appellant, particularly considering Rosas' undisputed criminal history and the fact that Rosas is Dr. Resignato's son.

Dr. Resignato's intent is not the only person whose intent we must consider. For Appellant to aid and abet in tampering with evidence, *she* must have intended to aid or assist in the

[5] Appellees point out the contradicting evidence between Appellant's affidavit, on which she relied as summary judgment evidence, and her statement to the Texas Workforce Commission, wherein she states Dr. Resignato did not ask her for the phone itself, but rather for proof of ownership. However, in his deposition, which Appellees also rely upon as summary judgment evidence, Dr. Resignato testified he asked Appellant to give him the phone. Whether and how much weight to lend to the testimony of witnesses is a function of the fact finder and not this Court. *See Canutillo Indep. School Dist. v. Olivares*, 917 S.W.2d 494, 499-500 (Tex.App.—El Paso 1996, no writ). At the very least, the contradictory evidence creates a fact issue which precludes summary judgment.

commission of the crime. *D'Unger* illustrates the requisite intent needed to be criminally liable for the acts of another. *D'Unger*, 207 S.W.3d at 332. Like the appellant in *D'Unger*, since Appellant never intended to assist Dr. Resignato in his attempts to tamper with evidence related to the theft of her phone, she could never be criminally responsible as an accomplice even if she complied with Dr. Resignato's demands to turn the phone over to him.

The basis of a *Sabine Pilot* claim is the plaintiff's refusal to commit a criminal act, thereby illustrating the claimant's lack of intent to act illegally. If we followed that reasoning, the *Sabine Pilot* exception would be all but eliminated from our jurisprudence because no plaintiff would be able to show he possessed the requisite criminal intent since he refused to act criminally, and thusly was fired.

Here, there is no doubt Appellant did not intend to assist Dr. Resignato in tampering with evidence, and, in fact, worked diligently to ensure the evidence was not tampered with by turning it over to police. However, the evidence tending to show Dr. Resignato's criminal intent, and Appellant's reasonable inference of his intent, creates a material fact issue.

Unlike the plaintiff in *D'Unger*, Appellant's employer asked her to affirmatively act, not refrain from doing something. *D'Unger*, 207 S.W.3d at 332. We find the facts in *D'Unger* distinguishable since, as the Supreme Court stated there, "*Sabine Pilot* protects employees who are asked to *commit* a crime, not those who are asked not to *report* one." *Id.* [Emphasis in orig.]. In contrast, *Hill v. State*, 883 S.W.2d 765, 771 (Tex.App.—Amarillo 1994, pet. ref'd), upon which Appellant relies in her motion for rehearing, states, "appellant is criminally responsible for the offense committed by [codefendant] only if the evidence shows that she *knew [codefendant's] unlawful intent* when she acted to promote or assist in his conduct. *Id*. [Emphasis in orig.].

Appellant argues she produced more than a scintilla of evidence regarding Dr. Resignato's unlawful intent, and it is her knowledge of his intent which, had she complied with his request, imputes criminal liability to her. We agree.

It cannot be said Appellant failed to produce evidence that she "refused" to comply with Dr. Resignato's request because she allegedly lacked the ability to perform the act given the phone was in police custody. However, there is at least some evidence Dr. Resignato asked her to give him the phone at least once when it was in her possession, which she refused to do.

In short, the summary judgment evidence indicates Dr. Resignato knew Appellant believed his son stole Appellant's phone. A reasonable inference from his repeated demands for the phone was his intent to alter, destroy, or conceal evidence of the alleged theft, which is a crime in and of itself. If she had complied with his requests, she would have knowingly assisted in the commission of Dr. Resignato's crime, and could be criminally liable, however reluctant her assistance might have been. For that reason, we believe sufficient evidence exists to create a fact issue on Appellant's intent, and thus whether she was asked to and refused to act illegally.

We find a material issue of fact exists regarding whether Dr. Resignato, on behalf of Resignato PA, asked Appellant to perform an illegal act and whether she refused to comply with his request.

Refusal as sole cause for termination

Appellant provided the following evidence supporting her contention that she was terminated solely for refusing to turn the phone over to Dr. Resignato:

- The day before Dr. Resignato fired Appellant, he "got right in [her] face and yelled at the top of his voice, 'I want the phone!'" before telling the Appellant to leave the office.

- Dr. Resignato insisted on viewing proof of ownership of the phone, which, according to his deposition testimony, included the phone itself, and Appellant refused to provide it.

- Dr. Resignato stated the final incident which led to Appellant being fired was her refusal to give him the phone.

- Dr. Resignato provided a statement which said Appellant was insubordinate because she repeatedly refused to give him her phone. His statement also included the following admission: "I repeatedly tried to explain to her that since she did not surrender the phone to me and that I have not had the phone in my possession, she consequently did not follow my instruction."

Dr. Resignato's testimony is ample to defeat his summary judgment motion regarding the question of whether her termination was based solely on her refusal to comply with his commands.

Dr. Resignato testified regarding other purported instances of insubordination which bolstered his need to terminate Appellant following the phone incident, which he also provided via written statement to the Texas Workforce Commission. Appellees did not provide any written documentation supporting the alleged prior incidents because, according to Dr. Resignato's testimony, any such documentation was lost. Regardless, Appellant need only have produced more than a scintilla of evidence that she was terminated solely because of her refusal to give Dr. Resignato her phone. She has satisfied her burden.

We find the summary judgment evidence, viewed in the light most favorable to Appellant, demonstrates the existence of a material issue of fact regarding the reason for Appellant's termination.

Appellant's second and third issues are sustained.

CONCLUSION

Having overruled Appellant's first issue we affirm the trial court's judgment dismissing Appellant's claims against Dr. Resignato, individually. Having sustained Appellant's second and

third issues, we reverse the trial court's judgment dismissing Appellant's claims against Resignato PA and remand the case to the trial court for further action consistent with this ruling.

March 26, 2021

YVONNE T. RODRIGUEZ, Chief Justice

Before Rodriguez, C.J., Palafox, J., and Larsen, Senior Judge
Palafox, J., Dissenting
Larsen, Senior Judge (Sitting by assignment)