IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

STANLEY BRAND, M.D.,	)	
	)	
Appellant-Respondent,	)	
	)	
v.	)	WD71061 (Consolidated with WD71078)
	)	
KANSAS CITY GASTROENTEROLOGY AND HEPATOLOGY, et al.,	)	Filed: January 18, 2010
	)	
	)	
Respondent-Appellants,	)	

APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
The Honorable Ann Mesle, Judge

Before Division Two: Joseph M. Ellis, Presiding Judge, Alok Ahuja, Judge and Karen King Mitchell, Judge

Stanley N. Brand, M.D. appeals from a judgment entered in the Circuit Court of Jackson County in his action against Bradley L. Freilich, M.D. and Kansas City Gastroenterology & Hepatology, LLC ("KCG") for disability discrimination, wrongful discharge, and negligence *per se*. Freilich and KCG cross-appeal.

Brand is a medical doctor specializing in gastroenterology and liver disease. Freilich is a medical doctor specializing in gastroenterology and hepatology and was the sole owner and director of Bradley L. Freilich, M.D. LLC, which is now KCG.[1]

[1] Although KCG was called "Bradley L. Freilich, M.D. LLC" at the time Brand was hired, during his employment, it was changed to KCG. Accordingly, we refer to the business as KCG throughout this opinion.

In July 2003, Freilich approached Brand about joining KCG. Brand, who had a heart condition and previously suffered a heart attack, informed Freilich of his heart condition and the fact that he was receiving blood-cleansing treatments that were both time-consuming and expensive. As a condition of his employment, Brand asked for and was given assurances that he would be eligible to participate in KCG's group health insurance, including coverage for his treatments. Brand was hired and began his employment on September 1, 2003.

On February 8, 2006, Freilich demanded that Brand sign an independent contractor agreement rather than remain an employee of KCG. In large part, the independent contractor agreement contained the same provisions as Brand's original employment contract, including an exclusivity provision. Under the independent contractor agreement, however, Brand was to be denied participation in KCG's benefits, including its group health insurance. Ultimately, after Brand rejected the independent contractor arrangement, Freilich fired him on September 14, 2006.

Subsequently, Brand filed a timely charge of discrimination with the Missouri Commission on Human Rights and received notice of his right to sue following an investigation. On July 26, 2007, Brand filed a six count petition for damages in Jackson County Circuit Court. The petition asserted claims for disability discrimination in Count I, wrongful discharge in Count II, breach of the implied covenant of good faith and fair dealing in Count III, wrongful failure to renew contract in Count IV, civil conspiracy in Count V, and negligence *per se* in Count VI. Each count sought compensatory and punitive damages.

During the trial, Brand voluntarily dismissed Counts IV and V. At trial, at the close of Brand's evidence, Freilich and KCG moved for a directed verdict on all of Brand's claims and on Brand's request for punitive damages. The trial court denied the motion regarding Brand's substantive claims generally but granted a directed verdict in Respondents favor on the issue of punitive damages as to each remaining Count. Freilich and KCG filed another motion for directed verdict at the close of all of the evidence. The trial court granted Freilich and KCG a directed verdict as to Count III but denied the motion as to the remaining Counts. The jury found in favor of Freilich and KCG on Brand's claim of disability discrimination (Count I) but found in favor of Brand on his claim of wrongful discharge (Count II) and negligence *per se* (Count VI). The jury awarded Brand $406,074 in damages on the wrongful discharge claim and $300,000 on the negligence *per se* claim. Brand filed a motion requesting the trial court enter a judgment of $706,074, the sum of the two verdicts. On March 5, 2009, the trial court entered judgment in that amount.

On March 13, 2009, Freilich and KCG filed a motion for judgment notwithstanding the verdict (JNOV), and Brand filed his motion for a new trial on his discrimination claim and his request for punitive damages. The trial court eventually denied the parties' motions with the exception of Freilich and KCG's request for remittitur. On that issue, the trial court remitted the amount awarded on Brand's negligence *per se* claim from $300,000 to $24,672 and entered a final judgment for $430,746.

On appeal, Brand challenges (1) the trial court's order of remittitur; (2) the trial court's instructions regarding his disability claim; and (3) the trial court's decision to grant Respondents' motion for directed verdict on Brand's punitive damages claims. Respondents cross-appeal, asserting error in (1) the trial court's denial of their motion for directed verdict on Brand's claim of wrongful discharge; (2) the trial court's denial of their motion for directed verdict on Brand's claim of negligence *per se*; and (3) the trial court's granting Brand's post-trial motion to enter judgment for the sum of the jury's verdicts.

We first examine the issues raised in the Respondents' cross-appeal, particularly those regarding the trial court's denial of the Respondents' motions for directed verdict and JNOV, since the resolution of these issues will affect our treatment of the trial court's judgment regarding damages and remittitur.

Wrongful Discharge Claim

In their cross-appeal, Respondents first contend that the trial court erred in denying their motions for directed verdict and JNOV regarding Brand's wrongful discharge claim. They argue that the evidence did not establish that Brand refused to commit an illegal act and that such evidence was necessary to support the verdict.[2]

[2] Brand claims that Freilich's and KCG's argument is not preserved for appeal because Freilich and KCG raised this issue in their motion for directed verdict but not in their JNOV motion. It is true that "issues not raised in a motion for directed verdict, but raised in the motion for JNOV, are not preserved for appellate review of the motion for JNOV." ***Wagner v. Mortg. Info. Servs., Inc.***, 261 S.W.3d 625, 639 n.13. However, Freilich and KCG clearly stated, in their JNOV motion, that they incorporated their motion for directed verdict. "A motion for [JNOV] is a motion to have judgment entered according to the motion for directed verdict." ***Carter v. St. John's Reg'l Med. Ctr.***, 88 S.W.3d 1, 11 (Mo. App. S.D. 2002). Therefore, because this issue was raised in Freilich's and KCG's motion for directed verdict and was incorporated in their JNOV motion, it is preserved for appeal.

The standard of review for a denial of a JNOV motion is essentially the same as for review of the denial of a motion for directed verdict. ***Giddens v. Kansas City S. Ry. Co***., 29 S.W.3d 813, 818 (Mo. banc 2000). We view the evidence in the light most favorable to the result reached by the jury in determining whether there was sufficient evidence to support the jury's verdict. ***Id.*** We reverse the jury's verdict for insufficient evidence only when there is complete absence of probative fact to support the jury's conclusion. ***Id.***

Count II of Brand's petition alleged that Brand was wrongfully terminated because he was an employee of KCG who was terminated for refusing to engage in or conspire with the Respondents to violate the public policy of Missouri, including the policy stated in § 376.421, when he refused to accept KCG's agreement denying him the ability to participate in group health insurance while he was an employee. On appeal, the Respondents argue that the jury's verdict in favor of Brand on Count II must be reversed because Brand failed to establish that he refused to commit an illegal act.

Missouri has adopted the at-will employment doctrine. ***Dake v. Tuell***, 687 S.W.2d 191, 192-93 (Mo. banc 1985). Pursuant to the employment-at-will doctrine, an employer can discharge an employee-at-will at any time with or without cause. ***Kelly v. Bass Pro Outdoor World, LLC***, 245 S.W.3d 841, 847 (Mo. App. E.D. 2007). An exception to this doctrine is the public-policy exception, which has been recognized in all three districts of the Missouri Court of Appeals for more than twenty-five years, but was only recently expressly adopted by our Supreme Court.

> [T]his Court expressly adopts the following as the public-policy exception to the at-will employment doctrine: An at-will employee may not be terminated (1) for refusing to violate the law or any well-established and clear mandate of public policy as expressed in the constitution, statutes, regulations promulgated pursuant to statute, or rules created by a governmental body or (2) for reporting wrongdoing or violations of law to superiors or public authorities. If an employer terminates an employee for either reason, then the employee has a cause of action in tort for wrongful discharge based on the public-policy exception.

Fleshner v. Pepose Vision Inst., P.C., 304 S.W.3d 81, 92 (Mo. banc 2010) (internal citations omitted). Discussing application of the exception, the Court went on to state:

> [P]ublic policy must be found in a constitutional provision, a statute, regulation promulgated pursuant to statute, or a rule created by a governmental body. But . . . a plaintiff need not rely on an employer's *direct* violation of a statute or regulation. Instead, the public policy must be *reflected by* a constitutional provision, statute, regulation promulgated pursuant to statute, or a rule created by a governmental body.

Id. at 96 (internal citations omitted).

Preliminarily, we observe that Brand's wrongful discharge claim was predicated on violation of § 376.421, which prohibits, among other things, the delivery of a group health insurance policy in the State of Missouri unless all employees of the employer are eligible for insurance under the policy.[3] Freilich and KCG do not argue that § 376.421 cannot, as a matter of law, support a wrongful termination claim under the public-policy exception. Rather, they make a series of factual arguments attempting to demonstrate that Brand failed to prove that they offered employment to Brand under terms and conditions that would have excluded Brand from participation in a group health insurance policy available to all other employees. Consequently, we do not

[3] All statutory citations are to RSMo 2000, as updated through the 2009 Cumulative Supplement, unless otherwise indicated.

address the former issue, but limit our review to the specific claims asserted by Respondents. ***Friend v. Yokohama Tier Corp.***, 904 S.W.2d 575, 579 (Mo. App. S.D. 1995).

Specifically, Freilich and KCG argue: (1) that Brand did not contend that Freilich and KCG acted wrongfully by proposing an independent contractor arrangement; (2) that KCG had cause to terminate Brand's employment, but elected instead to propose an independent contractor arrangement in an attempt to "salvage the relationship in a way that would have been profitable for both KCGH and Brand"; and (3) that Freilich and KCG never intended for Brand to continue as an employee under the independent contractor agreement, but that the agreement actually tendered to Brand inadvertently retained provisions which indicated a continuing employer-employee relationship due to an oversight of counsel.

As noted *supra*, under our standard of review, we must view the evidence in the light most favorable to the jury's verdict, and we must disregard all evidence and inferences that conflict with the verdict. ***Giddens***, 29 S.W.3d at 818. Freilich and KCG's arguments concerning Brand's wrongful termination claim essentially ask us to turn this standard of review on its head, and to view the evidence in the light most favorable to them. This we cannot do.

In support of their contentions, Freilich and KCG point to evidence suggesting that Brand's job performance was deficient and that this could have constituted cause for his termination. This evidence came from defendant's witnesses, however, and the jury was entitled to disbelieve it. ***Meyers v. Southern Builders, Inc.***, 7 S.W.3d 507,

514 (Mo. App. S.D. 1999) ("[A] jury may believe all of the testimony of any witness or none of it, or may accept it in part and reject it in part."). Similarly, although Freilich and KCG's counsel both claimed that the document forwarded by Freilich to Brand was *intended* to create an independent contractor arrangement but inadvertently failed to do so, the jury was entitled to believe that the agreement Freilich transmitted to Brand accurately reflected Freilich's intention to retain Brand as an employee, but without the benefits – including group health insurance – which other employees received. Indeed, the verdict directing instruction specifically required the jury to find that Brand would continue as an employee under the agreement Freilich offered him, and Freilich and KCG's reply brief admits that, "[d]ue to an 'oversight' by legal counsel, the proposal mistakenly contained language that would have rendered Brand an employee, not an independent contractor." Finally, while Brand may have testified that he had no objection to the *concept* of assuming an independent contractor role, he also testified that the independent contractor agreement Freilich sent him was unacceptable; he made no admission that the form of agreement Freilich tendered was not objectionable.

Thus, none of the fact-driven arguments proffered by Freilich and KCG on the wrongful discharge claim can be sustained under our standard of review. Accordingly, the trial court did not err in denying Freilich and KCG's motions for directed verdict and JNOV as to that issue. Point denied.

Negligence *Per Se* Claim

In another point on cross-appeal, the Respondents argue that the trial court erred

in denying their motions for directed verdict and JNOV regarding Brand's negligence *per se* claim because Brand failed to prove a violation of a statute.

A negligence *per se* claim is based on a statutory declaration of what the conduct of a reasonable person must be, without regard to whether similar conduct would be required by common law. ***Lowdermilk v. Vescovo Bldg. & Realty Co.***, 91 S.W.3d 617, 628 (Mo. App. E.D. 2002). That standard of care is then used "to define the standard of conduct of [a] reasonable person." ***Id.*** "Negligence per se 'is a form of ordinary negligence that results from the violation of a statute.' As a result, the jury is instructed on the statutory standard of care rather than the care of the reasonable person." ***Id.*** (quoting 57A AM.JUR. 2d *Negligence* § 727 (1989)). There are four requirements to a negligence *per se* claim:

> (1) a violation of a statute or ordinance; (2) the injured party must be within the class of persons intended to be protected by the statute or ordinance; (3) the injury is of the type that the statute or ordinance was designed to protect; and (4) the violation of the statute or ordinance is the proximate cause of the injury.

Steele v. Evenflo Co., 178 S.W.3d 715, 718 (Mo. App. E.D. 2005).

Brand's negligence *per se* claim was based on violation § 376.421, discussed *supra*. Here also, Respondents do not contend that a negligence *per se* claim cannot be based on this statute. *See e.g.,* ***Lowdermilk***, 91 S.W.3d at 629 ("The test to determine whether a violation of a statute may constitute negligence per se depends on legislative intent."). Rather, they limit their argument to the issue of whether Brand proved a violation of the statute. Accordingly, we limit our review to the contention presented by Respondents. ***Friend,*** 904 S.W.2d at 579.

Respondents argue first that § 376.421 was not violated because there was no evidence that a group health insurance policy that failed to comply with § 376.421 was "delivered" to or by KCG. Brand asserts that this contention was not made in the trial court, is being raised for the first time on appeal, and therefore is not preserved for review. ***City of Kansas City v. Chung Hoe Ku***, 282 S.W.3d 23, 28 (Mo. App. W.D. 2009).

In the Respondents' motions for directed verdict filed at the close of Brand's evidence and at the close of all of the evidence, the Respondents argued that Brand continuously received group health insurance throughout his employment with KCG. However, Respondents never raised any contention that the failure to ***deliver*** a health insurance policy in violation of § 376.421 prohibited Brand from proving a violation of § 376.421. Likewise, in KCG's motion for JNOV, no mention is made of the delivery requirement of § 376.421. KCG's failure to raise the delivery issue as grounds for its motions for directed verdict precludes KCG from obtaining a JNOV on that ground and also precludes KCG from obtaining appellate review from this Court of the trial court's failure to enter JNOV on this ground. ***Goede v. Aerojet Gen. Corp.***, 143 S.W.3d 14, 18 (Mo. App. E.D. 2004).

Respondents next contend that Brand failed to prove a violation of the statute because he was insured the entire time he was employed. They are correct in this assertion. There was no evidence presented by Brand from which the jury could reasonably find that KCG failed to provide group health insurance to Brand or any other

employee. To the contrary, during the time Brand was employed, he was provided group health insurance by Respondents.

Brand, nonetheless, argues that Respondents violated § 376.421 by presenting Brand with the agreement that would have deprived him of group health insurance. He contends that by offering him a position as an employee, but excluding him from group health coverage, and then terminating him when he refused to sign the agreement, Respondents violated the statute. We cannot agree. It is clear Respondents wanted to violate the statute, and if Brand would have signed the agreement and continued working, Respondents clearly would have violated the statute. But that is not what happened. Rather, Brand refused to sign the agreement and was terminated, and this was the conduct that gave rise to his successful claim for wrongful discharge. But it was an either/or proposition. Under the unique facts of this case, based on Respondents' course of conduct, they were going to be liable for wrongful discharge or negligence *per se* but they couldn't be liable for both. Accordingly, the trial court erred in denying Respondents' motions for directed verdict and for JNOV as to Brand's negligence *per se* claim. Point granted.

Damages, Remittitur and Additur

On appeal, Brand and the Respondents both contest the trial court's treatment of damages. Most of these assertions are resolved by our determination that Brand did not make a submissible case as to negligence *per se*. However, to the extent the issues need to be discussed, we address them together.

Brand complains of the trial court's decision to remit the jury verdict on his negligence *per se* claim. Respondents argue that the trial court erred in entering judgment for the combined verdicts of the wrongful discharge and negligence *per se* claims. Both of these contentions are resolved by our finding that the negligence *per se* claim was not supported by the evidence. Since the trial court should have granted Respondents motions for directed verdict and/or JNOV as to the negligence *per se* claim, there was nothing for the trial court to remit, and, of necessity, there could not be duplicative damages. At this point, there is a single verdict in favor of Brand for damages on his wrongful discharge claim in the amount $406,074.00.

In his brief, Brand recognizes the possibility that this court might find in Respondents' favor on the negligence *per se* issue. Thus, he included a request for additur in the event we did reach that result, asserting that he proved economic losses of $612,702.00, as well as non-economic damages, and that the jury clearly intended to award him over $700,000.00 in damages based on the two verdicts rendered. He therefore asks, without citation to any authority other than the additur/remittitur statute, § 537.068, that we grant additur of $300,000.00 to the $406.074.00 verdict on his wrongful discharge claim, for a total verdict of $706,074.00.

"To grant additur, the trial court must find that a new trial is required 'unless the defendant consents to increasing the judgment.'" ***Morgan Publ'ns, Inc. v. Squire Publishers, Inc.***, 26 S.W.3d 164, 176 (Mo. App. W.D. 2000) (quoting ***Tucci v. Moore***, 875 S.W.2d 115, 116 (Mo. banc 1994)). Neither the trial court nor this Court has or is

granting a new trial under conditions to trigger the grant of additur. Accordingly, Brand's request for additur is denied.

Disability Discrimination Claim

Brand also contends that the trial court erred in instructing the jury regarding his disability discrimination claim. Brand argues that Instruction 8 was plainly erroneous because it improperly defined the term "disability."

Brand requests plain error review on appeal because he did not object to the instruction below and, in fact, was the party that submitted the instruction to the trial court. "Where specific objections to jury instructions are not made prior to submission of the case, the matter is not preserved for review except for plain error under Rule 84.13." ***Martha's Hands, LLC v. Starrs***, 208 S.W.3d 309, 315 (Mo. App. E.D. 2006) (internal quotation omitted). "[P]lain errors affecting substantial rights may be considered on appeal, in the discretion of the court, though not raised or preserved, when the court finds that manifest injustice or miscarriage of justice has resulted therefrom." ***Rule 84.13(c)***.[4]

"Plain error review is rarely applied in civil cases, and may not be invoked to cure the mere failure to make proper and timely objections." ***Atkinson v. Corson***, 289 S.W.3d 269, 276 (Mo. App. W.D. 2009) (internal quotation omitted). "We will reverse for plain error in civil cases only in those situations when the injustice of the error is so egregious as to weaken the very foundation of the process and seriously undermine confidence in the outcome of the case." ***Id.*** at 276-77 (internal quotation omitted). "To

[4] All rule citations are to the Missouri Rules of Civil Procedure (2010), unless otherwise indicated.

establish that an instructional error rose to the level of plain error, appellant must demonstrate that the trial court so misdirected or failed to instruct the jury that it is evident that the instructional error affected the jury's verdict." ***Hensley v. Jackson Cnty.***, 227 S.W.3d 491, 497-98 (Mo. banc 2007) (internal quotation omitted).

With regard to Brand's claim that he was discriminated against based upon a disability, Instruction 9 stated:

> Your verdict must be for Plaintiff if you believe:
>
> First, Defendants KCG and Freilich altered the terms, conditions, and privileges of Plaintiff's employment; and
>
> Second, Plaintiff's disability was a contributing factor in Defendants KCG's and Freilich's decision to alter the terms, conditions, and privileges of Plaintiff's employment; and
>
> Third, as a direct result of such conduct, Plaintiff sustained damage.

Instruction 8 informed the jury that "[t]he phrase 'disability' as used in these instructions means that Defendants KCG and Freilich believed that [Brand]'s heart disease made him unemployable as an employee." Both of these instructions were submitted to the trial court by Brand. Brand argues that the trial court committed plain error in granting his request that Instruction 8 be given to the jury and that the jury should have instead been instructed to find a disability if Freilich and KCG believed that the cost of group health insurance attributable to Brand made him unemployable and that it was plain error to instruct them otherwise.

Based on Brand's arguments, it appears his real contention is that during instruction conferences, the trial court refused to submit an instruction he proffered

defining "disability" in the manner he now asserts was proper, and that he was thereby forced to acquiesce in Instruction 8 as submitted. The record on appeal, however, does not include any of the instruction conferences, so we have no record of the discussion, argument and rulings. "It is the appellant's burden to file a record on appeal that is sufficient to permit the appellate court to review the appellant's claims of error." ***City of Plattsburg v. Davison***, 176 S.W.3d 164, 169 (Mo. App. W.D. 2005). Likewise, on the record before us, it is not evident that Instruction 8 affected the jury's verdict. Moreover, given that Brand requested the instruction, we certainly do not perceive of any manifest injustice or miscarriage of justice having resulted from its submission. Point denied.

Punitive Damages

Finally, Brand contends that the trial court erred in granting Freilich's and KCG's motion for a directed verdict on his punitive damages claim. Brand contends that he made a submissible claim for punitive damages and was entitled to punitive damages under his discrimination, wrongful discharge, and negligence *per se* claims.

We review the trial court's granting of the defendant's motion for a directed verdict to determine whether Brand made a submissible case. ***Investors' Title Co., v. Hammonds***, 217 S.W.3d 288, 299 (Mo. banc 2007). "A case may not be submitted unless each and every fact essential to liability is predicated upon legal and substantial evidence." ***Id.*** To make a submissible case for punitive damages, a reasonable juror must be able to conclude, from the evidence and the inferences drawn therefrom, that the plaintiff established with convincing clarity that the defendant's conduct was outrageous because of evil motive or reckless indifference. ***City of Greenwood v.***

Martin Marietta Materials, Inc., 299 S.W.3d 606, 627-28 (Mo. App. W.D. 2009). Because punitive damages are an extraordinary and harsh punishment, "the evil motive or reckless indifference must be proven by clear and convincing evidence." ***Blue v. Harrah's N. Kansas City, LLC***, 170 S.W.3d 466, 477 (Mo. App. W.D. 2005). "When someone intentionally commits a wrong and knew that it was wrong at the time, an evil motive and wanton behavior is exhibited." ***Drury v. Mo. Youth Soccer Ass'n***, 259 S.W.3d 558, 573 (Mo. App. E.D. 2008). "An evil intent may also be inferred where a person recklessly disregards the rights and interests of another person." ***Id.***

Brand's request for a punitive damage submission on his disability discrimination and negligence *per se* claims must fail. "It is fundamental that a determination of liability is a prerequisite to a finding of damages, such that an award of damages cannot survive independent of the accompanying determination of liability." ***Giles v. Riverside Transp., Inc.***, 266 S.W.3d 290, 295-96 (Mo. App. W.D. 2008) (internal quotation omitted). "A plaintiff must prevail on his or her underlying claim to submit punitive damages to the jury." ***Id.*** at 296 (internal quotation omitted). Since Brand did not prevail on his disability discrimination claim, and we have held that Respondents were entitled to either a directed verdict or JNOV on his negligence *per se* claim, he was clearly not entitled to a punitive damages submission as to either of those counts.

We turn then to whether Brand was entitled to a punitive damages submission on his wrongful discharge claim. "Punitive damages are available for wrongful discharge claims brought under the public-policy exception at common law." ***Fleshner***, 304 S.W.3d at 96. Because Freilich was specifically warned by his attorney that Brand's

health could not be a factor with respect to whether he chose to keep Brand as an employee, Brand made a submissible case for punitive damages under his wrongful discharge claim.

In addition to all the other evidence at trial, Freilich's attorney, Thomas O'Donnell, testified that Freilich had told him he felt Brand's presence in the group health insurance policy was increasing the health insurance costs for KCG. O'Donnell testified that he told Freilich that Brand's health condition could not be a factor with respect to making a decision about whether to keep Brand as an employee. Likewise, Freilich testified that he recalled having a conversation with O'Donnell in which O'Donnell told him that he could not take Brand's health care condition into account when taking adverse action against Brand. Nonetheless, in his cover e-mail to Brand, with the independent contractor agreement attached, Freilich specifically states that "the main impetus for this change is the fact that our insurance costs have escalated dramatically. The practice will realize significant savings in health care and professional liability insurance by making this change." He then goes on to say that "**this change is not negotiable**" and requests that Brand "review and accept [the] contract through its execution in a timely manner." (Emphasis added.)

As noted *supra*, to make a submissible case for punitive damages, the evidence and inferences drawn therefrom must establish with convincing clarity that the defendant's conduct was outrageous because of evil motive or reckless indifference. ***City of Greenwood***, 299 S.W.3d at 627-28. "When someone intentionally commits a wrong and knew that it was wrong at the time, an evil motive and wanton behavior is

exhibited." ***Drury***, 259 S.W.3d at 573. "An evil intent may also be inferred where a person recklessly disregards the rights and interests of another person." ***Id.*** Given the evidence presented at trial, a reasonable jury could have inferred evil intent and found that Freilich recklessly disregarded the rights of Brand when Freilich terminated Brand's employment on the basis of Brand's impact on KCG's health insurance costs, while knowing full well that Brand's health could not be a factor in the termination decision. Therefore, the trial court erred in granting Freilich's and KCG's motion for directed verdict on Brand's punitive damages claim based on wrongful discharge. Accordingly, we remand the cause to the trial court for a new trial on punitive damages only on Brand's Count II for wrongful discharge.

Conclusion

The judgment in favor of Brand on his negligence *per se* claim is reversed. Of necessity, we likewise reverse the trial court's order of remittitur as to the negligence *per se* verdict. The cause is remanded to the trial court with directions to grant Respondents' motions for JNOV on Brand's negligence *per se* claim. We further reverse the trial court's grant of a directed verdict on Brand's punitive damages submission as to Count II for wrongful discharge, and remand the case for a new trial on the issue of punitive damages only. In all other respects, the judgment of the trial court is affirmed.

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Joseph M. Ellis, Judge

All concur.