2017 IL App (2d) 151167-U
No. 2-15-1167
Order filed March 27, 2017
Modified Upon Denial of Rehearing June 1, 2017

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

ANGEL ESTRADA, Plaintiff-Appellee/Cross-Appellant, v. HOSPIRA, INC. and MARWAN FATHALLAH, Defendants (Hospira, Inc., Defendant-Appellant/Cross-Appellee).	)	Appeal from the Circuit Court of Lake County. No. 12-L-492 Honorable Jorge L. Ortiz, Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Hutchinson and Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's denial of defendant's motion for judgment *n.o.v.* with respect to plaintiff's claim of retaliatory discharge was affirmed where plaintiff established a clearly mandated public policy. The trial court's denial of defendant's motion for judgment *n.o.v.* with respect to plaintiff's claim for defamation *per se* was reversed where the statement that "more heads will roll" was not defamatory *per se* as a matter of law. The trial court's denial of defendant's motion for a new trial on plaintiff's defamation *per se* claim was reversed where the court erred in allowing plaintiff to amend the pleadings after the close of evidence to include a second statement that was purportedly defamatory *per se*. The defamation *per se* claim was accordingly remanded to the trial court to enter judgment in favor of

> defendant on that claim. The trial court did not err in instructing the jury on the issue of punitive damages with respect to the retaliatory discharge claim, and, therefore, the court's denial of defendant's motion for judgment *n.o.v.* with respect to that issue was affirmed. The retaliatory discharge claim was remanded to the trial court for a new trial on damages.

¶ 2 Plaintiff, Angel Estrada, filed a complaint against defendant, Hospira, Inc., for retaliatory discharge and defamation *per se*.[1] Following trial, the jury returned a verdict for plaintiff and awarded damages. On the retaliatory discharge claim, the jury awarded plaintiff $2.23 million in compensatory damages and $2 million in punitive damages. On the defamation *per se* claim, the jury awarded plaintiff $750,000 in presumed damages and $5 million in punitive damages. The trial court denied Hospira's posttrial motions but granted its request for remittitur of compensatory and punitive damages on both verdicts. Plaintiff accepted the trial court's remittitur.

¶ 3 On appeal, Hospira argues that the trial court erred in denying its posttrial motions because (1) plaintiff failed to establish a clearly mandated public policy to support the tort of retaliatory discharge; (2) the statement that "more heads will roll" was not defamatory *per se* as a matter of law; (3) the trial court erred in allowing plaintiff to amend the pleadings after the close of evidence to include a second statement that was purportedly defamatory *per se*; (4) damages were not appropriately remitted; (5) the trial court erroneously instructed the jury on punitive damages for both claims; and (6) the jury's punitive damages awards were unconstitutionally excessive. Plaintiff cross appeals and contends that the trial court erred in remitting damages and that the jury verdicts should be reinstated.

[1] Plaintiff also brought suit against Marwan Fathallah, an employee of Hospira, for defamation *per se*. The trial court granted Fathallah's motion for directed verdict during trial, and he is not a party to this appeal.

¶ 4 For the following reasons, we affirm in part, reverse in part with instructions, vacate the damages awards, and remand for a new trial on damages with respect to the retaliatory discharge claim.

¶ 5 I. BACKGROUND

¶ 6 On June 27, 2012, plaintiff filed his original complaint against Hospira, his former employer. On August 30, 2013, plaintiff filed his third amended complaint, which alleged as follows. In September 2010, plaintiff was hired by Hospira as Vice President of Quality Systems and Compliance. In August 2011, plaintiff made reports to Hospira about safety issues associated with Hospira's Plum A+ Infusion Pump (Plum Pump), a medical device developed and manufactured by Hospira that delivered medication intravenously to patients. When no action was taken on his reports, plaintiff sent an email to Hospira's Chief Executive Officer (CEO). Plaintiff was fired three days later. As to Count I, retaliatory discharge, plaintiff alleged that his reports were protected by the clearly mandated public policy espoused in Title 21, section 803 of the Code of Federal Regulations (21 C.F.R. § 803), which was enacted to protect "citizens' health and safety." Plaintiff alleged that Hospira fired him in retaliation for his protected reports, but its pretextual reason for termination was plaintiff's failure to investigate a subordinate's conduct during a regulatory audit.

¶ 7 As to Count II for defamation *per se*, plaintiff alleged that, on September 28, 2011, his supervisor, Frans Dubois, Senior Vice President of Quality, announced to plaintiff's department that two employees were being terminated for a code of conduct violation associated with a regulatory audit and that "more heads will roll as a result." Also, "on September 30, 2011, Hospira informed [plaintiff's] colleagues that [plaintiff] was terminated for violating company

policy. It intentionally created the impression that [plaintiff] had engaged in conduct to falsify an audited record." Plaintiff alleged that "Hospira" made the statements with actual malice.

¶ 8 A jury trial commenced on October 27, 2014, and lasted six days. Below is a summary of the evidence that was adduced at trial. The evidence is largely undisputed. To the extent that there were discrepancies in the evidence, we will note them accordingly.

¶ 9 A. Hospira

¶ 10 Hospira is a global company with its headquarters in Lake Forest, Illinois. It develops, manufactures, and markets medication delivery systems, such as medical infusion pumps. On September 29, 2010, Hospira hired plaintiff as its Vice President of Quality Systems and Compliance. Plaintiff was hired at a yearly salary of $235,000, and he received a $20,000 signing bonus, non-guaranteed incentive bonuses, and a grant of approximately $30,000 worth of stock that would vest on December 31, 2013. Plaintiff had six employees who reported directly to him (direct reports), but a total of 40 employees under his direction.

¶ 11 Hospira trained every employee on its Code of Business Conduct (COBC), which was its rulebook that set forth the basic expectations to which all employees were required to adhere. Relevant to this appeal, Principle 4 of the COBC, titled "Assure Integrity of Books and Records," provided: "Accurate information and reporting is essential for good decision-making. All of Hospira's books and records must be accurate, full, fair and honest and comply with Hospira policies and procedures." Principle 4 also provided: "You should not destroy, alter, delete or throw away documents or records that have been requested or required by any government agency or are the subject of litigation or instructions from legal."

¶ 12 B. June 2011 Growth Summit

¶ 13 In June 2011, plaintiff attended Hospira's Growth Summit, a conference for Hospira's senior leadership. The purpose of the Growth Summit was to explore ways to make the "company better." At the end of the Summit, the CEO gave each employee in attendance an assignment to visit two of Hospira's customers and then email him by September 30, 2011, to tell him "who you have seen and what you've learned as a result."

¶ 14 C. Plum Pump

¶ 15 Plaintiff scheduled a personal vacation to Spain in July 2011. Hospira employees in Spain helped plaintiff arrange a visit to a local Spanish hospital as part of his Growth Summit assignment. Plaintiff had no familiarity with the hospital before his visit.

¶ 16 Plaintiff visited the hospital on July 8, 2011. Before and during his trip, plaintiff learned that the hospital attempted to implement the Plum Pump into its Pediatric Neonatal Intensive Care Unit. Doctors at the hospital noticed that air bubbles formed in the pumps after 12 hours of continuous flow, but the alarm failed to sound. The air-in-line issue posed a risk of harm to patients, and the hospital refused to utilize the pumps as a result. The hospital reported this issue to Hospira in June 2010, and, as of July 2011, Hospira had not provided a response. Plaintiff testified that the hospital was "adamant" that Hospira had to recall the pumps because they were unsafe for "babies."

¶ 17 After his return from Spain, plaintiff reviewed documentation prepared by Hospira in response to the hospital's reports. Plaintiff first reviewed a "MedWatch" report that Hospira sent to the U.S. Food and Drug Administration (FDA) in 2010 notifying it of the Plum Pump air-in-line issue.[2] The MedWatch report stated that Hospira was investigating the issue and would send

[2] It is unclear when exactly Hospira sent the MedWatch report to the FDA, but plaintiff testified that the report was sent before he began working at Hospira.

a follow-up report to the FDA when the investigation was complete. Plaintiff also reviewed an October 2010 Risk Assessment report. The risk analysis therein noted that the severity of the issue was "critical," because undetected air in the line could cause permanent impairment or life-threatening injury, particularly to children and neonates. The probability of occurrence of the issue, however, was rated as low, based on data from the pump's collective use on adults, children, and neonates. Therefore, Hospira determined that the risk associated with the Plum Pump's air-in-line issue was "acceptable with justification." Plaintiff disagreed with the findings of the Risk Assessment report, and he testified that the MedWatch report that was sent to the FDA was not accurate.

¶ 18 On August 4, 2011, plaintiff sent an email about the Plum Pump to various Hospira employees. In that email, plaintiff stated that Hospira owed a response to the hospital, and the hospital believed that it should have itself reported the issue to regulatory authorities. Plaintiff also noted that Hospira's sales team had no direction on how to proceed. He ended the email by stating: "Regardless of this particular issue, we definitely need to improve this process as we are not meeting our customer needs." Plaintiff testified that his email was addressing the hospital's concern that Hospira needed to issue a recall.

¶ 19 On August 10, 2011, plaintiff sent an email to two Hospira employees titled "Feedback on visit to Hospira Team in Spain." He copied Frans Dubois, his supervisor. In the email, plaintiff summarized his visit to the hospital and stated that he "elevated" the air-in-line issue to the "team" at Lake Forest. Plaintiff asserted that he and the "team" agreed to "some actions" to respond to the hospital. Plaintiff also stated: "the fact that the customer issue has been opened [*sic*] since June, 2010, and we haven't been able to provide a credible response is clearly unacceptable."

¶ 20 On August 15, 2011, plaintiff sent another internal email, in which he asked when a "decision" was going to be made about the Plum Pump issue. He noted that the "team" had a communication that was to be sent to the hospital about Hospira's "position" regarding the issue. Plaintiff testified that he was telling the Hospira employees in this email that they needed to issue a recall.

¶ 21 Plaintiff also asked his direct report, Marsha Nelson, Director of Quality Operations, to analyze the data and reports concerning the Plum Pump. On August 18, 2011, Nelson sent her findings to plaintiff and others, explaining her opinion that the Plum Pump's risk level should have been characterized as "unacceptable." Nelson testified that the report incorrectly pooled the data from the Plum Pump's use on adults, children, and neonates to determine the probable occurrence of harm, when it should have looked solely to its use on neonates. Plaintiff forwarded Nelson's email to Dubois on August 18, 2011. In the forwarded email, plaintiff stated: "This is a clear example of our lack of decision making. *** I have met with everyone that has any opinion on this *** and I asked them repeatedly to make a decision. Someone needs to own and be accountable for this entire process as obviously nobody is today. This is what I refer to when I am talking about leadership for the complaint handling function. We owe this to our customers." Plaintiff testified that he was stating in this email that Hospira needed to do a "field action," otherwise known as a recall.

¶ 22 On August 30, 2011, a draft response from Hospira to the Spanish hospital was prepared. Plaintiff was given a draft of the response and an opportunity to respond; he did not raise any concerns.

¶ 23 On September 26, 2011, plaintiff emailed Hospira's CEO and copied Dubois. The email, titled "Feedback on Customer Visits," began with plaintiff's statement that he had "been

fortunate to enjoy the opportunity of visiting customers on both sides of the Atlantic." He explained that the Spanish hospital had experienced air-in-line issues while using the Plum Pump in their pediatric intensive care unit. The hospital was concerned about the issue and Hospira's response to it. Plaintiff noted that at the time of his visit, the issue was unresolved, and, "as a Hospira quality representative," he apologized to the hospital and assured it that Hospira would provide an immediate response to their concerns. Plaintiff continued:

> "The fact that after more than nine months, this customer did not have a response to their concerns was clearly unacceptable to me and I came back to [headquarters] ready to discuss with our GPSC, operations QA, commercial QA and medical affairs team how we could answer the customer concerns.
>
> Our team finally agreed on a communication to be sent by our EMEA QA team to our marketing team in Spain. The communication is now in the hands of our local team and our team is committed to provide faster and better responses in the future.
>
> For me this is a clear example of how our customer complaint process is not effective enough to support growth. As of today, fixing this process is one of our key quality transformation initiatives which I champion together with Kees Groenhout with the goal of creating a process that would provide an expedited and meaningful response to our customer concerns.
>
> [Summarizes visit to second customer]
>
> Thanks again for the opportunity to learn and to share my experiences with you and I look forward to continuing with these visits in the future."

¶ 24 Plaintiff testified that he took "advantage" of his assignment from the Growth Summit to make a written report to the CEO about the Plum Pump air-in-line issue. He acknowledged that

he did not use the words "patient safety issue" or "recall" in any of his emails. Nevertheless, plaintiff explained: "[w]hen you read those e-mails and you're a medical professional in the quality assurance department or you have management responsibility, that is the message in that e-mail. You don't need to use that word. Everybody in the industry understands what it means." He also testified that he did not know whether the CEO or Dubois read his September 26, 2011, email before he was fired three days later. Plaintiff testified that he was fired for raising concerns about the Plum Pump and pushing for its recall.

¶ 25 D. Symbiq Pump Investigation

¶ 26 Hospira also manufactured a Symbiq Infusion Pump (Symbiq) that delivered medication intravenously to patients. For the Symbiq pump, Hospira opened a Corrective and Preventive Action (CAPA), which is a reporting tool used to document a quality investigation and the outcome of the investigation. The Symbiq CAPA was opened to investigate a "white screen" issue that would occur when the electronic display screen of the pump would turn blank or white while the pump was in use. As of August 2011, the Symbiq CAPA investigation was ongoing, and George Bowman, a Hospira engineer, was assigned "ownership" of that particular CAPA. (The "owner" of the CAPA was the Hospira employee who had the electronic access and authority to add or modify the documentation compiled and used in that particular investigation).

¶ 27 Nelson (plaintiff's direct report) was the quality assurance representative assigned to the Symbiq CAPA, and she was one of the persons responsible for reviewing the CAPA before it could be fully approved. On August 26, 2011, Nelson refused to approve the Symbiq CAPA. She requested that Bowman include a flow chart in the CAPA to help explain how Hospira had found the root cause of the Symbiq white screen issue, and she objected to certain documents in the CAPA.

¶ 28 E. Regulatory Audit

¶ 29 On September 1, 2011, the National Standards Authority of Ireland (NSAI) conducted a regulatory audit at Hospira's headquarters in Lake Forest. The NSAI is a quasi-governmental agency hired by companies to obtain certification to sell products in Canada and Europe. As part of the certification process, the NSAI conducts on-site audits and ensures that Hospira's products meet European and Canadian regulatory requirements.

¶ 30 Plaintiff was responsible for managing all external audits at Hospira. Stephanie Garcia, plaintiff's direct report, managed the NSAI audit on September 1, 2011. Nelson and Mark Jones, a director in the Research & Development department, also participated in the audit; they were responsible for reviewing and providing information requested by the auditor.

¶ 31 During the NSAI audit, the auditor asked to review the ongoing Symbiq white screen CAPA. The CAPA report that was printed out for the auditor on September 1 was identical in content to the report that Nelson refused to approve a week earlier on August 26, 2011. Nelson and Jones decided not to present the CAPA with the rejected information still attached. Nelson contacted Bowman and obtained an electronic transfer of ownership of the CAPA to enable her team to remove information and attachments from the CAPA. Nelson then directed her subordinate, Dena Starostovic, to remove material. Jones presented the altered Symbiq CAPA to the NSAI auditor. Later that day, Nelson prepared a memorandum explaining her actions. She requested that Bowman sign it, but he refused.

¶ 32 Garcia disagreed with the decision to alter the Symbiq CAPA after it was requested by the NSAI auditor. Garcia informed Nelson and Jones that their actions were "noncompliant." Immediately after Jones gave the altered Symbiq CAPA to the auditor, and while the audit was still ongoing, Garcia and two other employees sought out plaintiff and interrupted a meeting that

he was attending. Garcia told plaintiff and his peer, Ileana Quinones, Vice President of Quality Assurance, that Nelson, Jones, and Starostovic altered the "open" (incomplete) Symbiq CAPA after the auditor requested it. Plaintiff thanked the group and told them that he would look into the matter. Plaintiff did not notify the NSAI auditor about the altered CAPA or otherwise take any action before the audit ended at the end of the day.

¶ 33 Over the next few days, plaintiff spoke to Nelson and others about her decision. Plaintiff told a vice president in the Research & Development department that Nelson was protecting the company when she removed the information from the Symbiq CAPA. He also informed Dubois about the incident. At some point, plaintiff directed Nelson to open a different CAPA investigation concerning the NSAI audit incident.

¶ 34 F. Office of Ethics and Compliance Investigation

¶ 35 The Office of Ethics and Compliance (OEC) is an independent department within Hospira's corporate structure that is primarily responsible for enforcing the COBC worldwide, as well as investigating matters brought to the department's attention. On September 6, 2011, an anonymous complaint was filed with the OEC, alleging that, on September 1, 2011, a record was falsified with the intent to defraud the NSAI – a regulatory agency. Kristine Rapp, Vice President of Ethics and Compliance, assigned Frank Taber, Director of Ethics and Compliance, to investigate the complaint.

¶ 36 Taber commenced the investigation and interviewed a total of nine people, including plaintiff, Nelson, and Jones. While the anonymous complaint named Ileana Quinones, Taber did not interview her because she was not responsible for the external audit process. Taber's first interview with plaintiff was for the sole purpose of determining what Hospira was going to do with the deleted information from the Symbiq CAPA. Taber testified that he was disappointed

and surprised to learn that plaintiff had not taken any action in the 10 days after the audit to ensure that the deleted material was given to the NSAI. During a second interview, plaintiff stated that he wanted to open a CAPA investigation to determine how the material was deleted.

¶ 37 Taber testified that he asked each person he interviewed to provide a written statement memorializing what was discussed in the interview or otherwise explaining the events precipitating the investigation. Only three people provided written statements. Nelson testified that she provided Taber with a complete timeline of events and an explanation for her actions, but Taber denied that Nelson provided any documentation. Taber also testified that he took handwritten notes during each interview, which he shredded at the end of the investigation. He testified that his accepted practice was to shred his handwritten notes after he drafted a summary of an investigation, because the notes were indecipherable and contained personal shorthand. (Here, Taber did not create a summary of the investigation until almost one month after the investigation was complete and personnel were terminated).

¶ 38 The OEC investigation concluded near the end of September 2011. On September 26, 2011, Rapp and Taber met with Dubois to provide a comprehensive summary of the investigation findings. The OEC determined that Principle 4 of the COBC was violated during the NSAI audit when a record was altered after it was requested but before it was given to the auditors. At the September 26 meeting, Rapp recommended that Dubois terminate Nelson, Jones, and plaintiff. Dubois, however, initially suggested issuing a final written warning to plaintiff. By the end of the meeting, Dubois had not made a decision on whether to fire plaintiff.

¶ 39 Dubois, Rapp, and Taber reconvened early the next morning. Dubois testified that, after further consideration, he agreed that morning with OEC's recommendation to terminate plaintiff. While plaintiff was not directly involved in the alteration of the Symbiq CAPA, Dubois testified

that plaintiff was responsible for the NSAI audit, he did not appreciate the severity of the COBC violation at hand, and he failed to provide the right leadership in responding to the incident. Rapp testified that she was concerned about plaintiff remaining in his position because he would have future interactions with the NSAI and other agencies; given his response to the NSAI audit, he could not be entrusted with responsibility for future audits or investigations.

¶ 40 G. Termination and the Allegedly Defamatory Statements

¶ 41 On September 29, 2011, Dubois terminated Nelson. Dubois then held a meeting with plaintiff and his five direct reports, where he stated that Nelson was terminated for a violation of the COBC in connection with the NSAI audit and that "more heads will roll" as a result. (Dubois testified that he "definitely did not" say that "more heads will roll.") Plaintiff testified that, at the time of the statement, he had no reason to believe that Dubois was talking about him. Instead, he testified that he "didn't believe anything. Nobody ever told me anything about myself."

¶ 42 On September 30, 2011, Dubois terminated plaintiff. Dubois testified that plaintiff's termination was for violating the COBC and not providing the right leadership in the NSAI audit incident. Dubois testified that plaintiff's emails concerning the Plum Pump did not "even cross [his] mind" at the time he made his decision to terminate.

¶ 43 After firing plaintiff, Dubois made an announcement to his own six direct reports, all vice presidents and plaintiff's peers. Dubois testified that he was "very careful" to explain that plaintiff was terminated for violating the COBC in connection with the NSAI audit incident and that he was no longer a colleague.

¶ 44 H. Post-Termination

¶ 45 Plaintiff testified that he was unemployed for six months. During that time, he was "catatonic." He testified that he could not wake up in the mornings, get out of bed, or leave the house; he was completely depressed. He testified that he did not shave or bathe. Plaintiff's wife testified that she had to feed plaintiff and help him shave. Plaintiff testified that he sought professional help and received "some medicine" that helped him feel better after a "couple of months."

¶ 46 Plaintiff also testified that his reputation was damaged. He explained that he could not obtain a job in the quality profession in Illinois because he was fired for an ethics violation. Plaintiff testified that former colleagues and recruiters would not return his phone calls. His wife testified that, before he was terminated, plaintiff was so highly sought after in the industry that recruiters would call her and their teenage children's cell phones. His wife also testified that a lady approached her at a fitness center and said that plaintiff had been terminated for "doing something illegal."

¶ 47 During his six months of unemployment, plaintiff performed consulting work and earned $21,800. He also took exams to be admitted as a Ph.D. candidate. Plaintiff testified that he took a $50,000 loan from his 401(k) account while he was unemployed.

¶ 48 In April 2012, Plaintiff was hired as the Vice President of Quality and Regulatory at Zimmer Surgical in Dover, Ohio. He testified that the job at Zimmer Surgical was "open for like a year and a half because nobody wanted to move there[.]" He testified that he had to live more than 60 miles away from Zimmer Surgical because it was located next to a chemical plant that was "full of EPA issues." Plaintiff also testified that his children were "devastated" by the move, especially his oldest teenage son who was unable to play sports because of an Ohio law.

¶ 49 Plaintiff's starting salary at Zimmer Surgical was $220,000. In April 2014, plaintiff's yearly salary was raised to $233,000, and at the time of trial, his yearly salary was $245,000. Plaintiff testified that he received non-guaranteed bonuses of $43,927.74 from Zimmer Surgical in 2012 and $95,906.77 in 2013.

¶ 50 I. Jury Verdict and Posttrial Motions

¶ 51 The jury returned verdicts in favor of plaintiff on both claims. As to retaliatory discharge, the jury awarded plaintiff $200,000 in back pay; $30,000 in lost value of stock; $2 million in emotional damages; and $2 million in punitive damages. As to defamation *per se*, the jury awarded plaintiff $750,000 in presumed damages and $5 million in punitive damages.

¶ 52 On January 9, 2015, Hospira filed its posttrial motion seeking judgment notwithstanding the verdict (judgment *n.o.v.*) or a new trial on both claims. Hospira also asked the court to vacate or reduce the damage awards. The court denied Hospira's posttrial motion but granted its request for a remittitur of damages. The court reduced the damages for retaliatory discharge to $123,400 in back pay; $0 in lost value of stock; $345,000 in emotional damages; and $1.75 million in punitive damages. The court reduced the damages for defamation *per se* to $632,400 in presumed damages and $2.6 million in punitive damages. To avoid double recovery, the court further reduced the total amount that plaintiff recovered on both counts to $123,400 in back pay; $520,000 in emotional and reputational damages; and $2.6 million in punitive damages.

¶ 53 Hospira filed a timely notice of appeal and plaintiff cross-appealed.

¶ 54 II. ANALYSIS

¶ 55 On appeal, Hospira argues that the trial court erred by (1) denying its motion for judgment *n.o.v.* on the defamation *per se* claim; (2) denying its motion for a new trial on the defamation *per se* claim; (3) denying its motion for judgment *n.o.v.* on the retaliatory discharge

claim; and (4) failing to appropriately remit plaintiff's damages. In his cross-appeal, plaintiff argues that the trial court erred in remitting damages for both claims.

¶ 56 A. Standards of Review

¶ 57 A motion for judgment *n.o.v.* is appropriate when all of the evidence, viewed in a light most favorable to the nonmovant, so overwhelmingly favors the movant that no contrary verdict based on that evidence could stand. *Lawlor v. North American Corp. of Illinois*, 2012 IL 112530, ¶ 37. A court does not weigh the evidence or concern itself with the credibility of witnesses. *Maple v. Gustafson*, 151 Ill. 2d 445, 453 (1992). Rather, a judgment *n.o.v.* presents a question of law as to whether, when all of the evidence is considered together with all reasonable inferences, there is a total lack of evidence to prove any necessary element of the plaintiff's case. *Lawlor*, 2012 IL 112530, ¶ 37. We review the denial of a motion for judgment *n.o.v. de novo*. *Lawlor*, 2012 IL 112530, ¶ 37.

¶ 58 In ruling on a motion for a new trial, the trial court weighs the evidence and orders a new trial if the verdict is against the manifest weight of the evidence. *Lawlor*, 2012 IL 112530, ¶ 38. A verdict is against the manifest weight of the evidence where the opposite result is clearly evident or where the jury's findings are unreasonable, arbitrary, and not based on any of the evidence. *Lawlor*, 2012 IL 112530, ¶ 38. We will not reverse the trial court's ruling on a motion for a new trial unless the trial court abused its discretion. *Lawlor*, 2012 IL 112530, ¶ 38.

¶ 59 B. Retaliatory Discharge

¶ 60 Hospira argues that the trial court erred, as a matter of law, in finding the existence of a clearly mandated public policy that was violated by plaintiff's termination. It argues that plaintiff's purported public policy was too broad and too general to constitute a clearly mandated public policy.

¶ 61 Generally, a "noncontracted employee" serves at the employer's will and may be discharged for any reason or no reason. *Turner v. Memorial Medical Center*, 233 Ill. 2d 494, 500 (2009). The tort of retaliatory discharge, however, is a "limited and narrow" exception to the general rule of at-will employment. *Turner*, 233 Ill. 2d at 500. To prove retaliatory discharge, the employee must establish that (1) the employer discharged the employee, (2) in retaliation for the employee's activities, and (3) that the discharge violates a clear mandate of public policy. *Turner*, 233 Ill. 2d at 500.

¶ 62 While there is no precise definition of the term "clearly mandated public policy," it "concerns what is right and just and what affects the citizens of the State collectively. It is to be found in the State's constitution and statutes and, when they are silent, in its judicial decisions." *Turner*, 233 Ill. 2d at 500. To constitute a public policy, the "matter must strike at the heart of a citizen's social rights, duties, and responsibilities." *Turner*, 233 Ill. 2d at 501. Furthermore, the plaintiff must identify a clear and specific mandate of public policy; broad, general, or vague statements of public policy are inadequate. *Turner*, 233 Ill. 2d at 503. The issues of whether a public policy exists, and whether that policy is undermined by the employee's discharge, are questions of law. *Turner*, 233 Ill. 2d at 501.

¶ 63 Here, plaintiff alleged in his third amended complaint that his reports concerning the Plum Pump were protected by the clearly mandated public policy of protecting "citizens' health and safety," which was codified in the Code of Federal Regulations at 21 C.F.R. §§ 803 and 806. At trial, plaintiff contended that "Hospira violated FDA regulations and placed pediatric and neonatal patients in Illinois and throughout the world at risk of serious harm."

¶ 64 Hospira relies on *Turner* for the proposition that plaintiff's purported public policy of citizens' health and safety is too general and too vague. In *Turner*, the plaintiff, a respiratory

therapist, alleged that his hospital employer fired him in retaliation for informing the Joint Commission on Accreditation of Healthcare Organizations, an independent regulatory entity, that the hospital was not charting patient files immediately after delivering care. *Turner*, 233 Ill. 2d at 498. The plaintiff further alleged that his discharge violated "public policy that encourages employees to report actions that jeopardize patient health and safety." *Turner*, 233 Ill. 2d at 498. Citing the Joint Commission's standards, as well as the Medical Patient Rights Act (410 ILCS 50/0.01, *et seq.* (West 2006)), the plaintiff alleged that the hospital's failure to immediately chart patient records "was not consistent with sound medical practices and jeopardized the safety of patients." *Turner*, 233 Ill. 2d at 498.

¶ 65 Our supreme court affirmed the trial court's dismissal of the complaint, holding that the plaintiff failed to sufficiently plead the existence of a clearly mandated public policy. *Turner*, 233 Ill. 2d at 508. The court reasoned that the general concept of "patient safety" is in itself inadequate to justify an exception to the general rule of at-will employment. *Turner*, 233 Ill. 2d at 508. While the plaintiff identified the Joint Commission standards as a source of the public policy, he failed to "recite or even refer to a specific Joint Commission standard" that required immediate charting. *Turner*, 233 Ill. 2d at 505. Additionally, the cited statutory provision was "only concerned with record confidentiality, rather than record timeliness." *Turner*, 233 Ill. 2d at 506. Thus, the statute did not speak to the particular recordkeeping practice about which the plaintiff had complained. *Turner*, 233 Ill. 2d at 505-06.

¶ 66 Unlike the plaintiff in *Turner* who failed to cite violations of specific standards or regulations, plaintiff here sufficiently alleged and established the clearly mandated public policy of protecting citizens' health and safety. The federal regulations that plaintiff cited relate directly to the reporting requirements that he alleged Hospira had violated. See *Carty v. Suter*

Company, Inc., 371 Ill. App. 3d 784, 787 (2007) ("Public policy can also be found in federal laws that are national in scope and affect citizens collectively."). Those regulations establish the narrow public policy that medical device manufacturers, like Hospira, must maintain records and report any product defects that may cause injury or death to individuals. See 21 C.F.R. § 803.1(a) ("These reports help us to protect the public health by helping to ensure that devices are not adulterated or misbranded and are safe and effective for their intended use."). Nelson and plaintiff both testified at trial that Hospira was required to follow FDA regulations; Hospira does not dispute that it was required to follow the sections at issue.

¶ 67 *Carty* is instructive. There, a discharged employee alleged that he saw his employer, a food manufacturing company, use expired ingredients in its food products and mislabel certain products. *Carty*, 371 Ill. App. 3d at 785. In his retaliatory discharge claim, the employee alleged that the employer's practices were "unlawful according to various federal laws and regulations," that he was discharged in retaliation for reporting his concerns to the manager, and that his discharge violated public policy. *Carty*, 371 Ill. App. 3d at 785-86. This court reversed the trial court's grant of summary judgment in favor of the defendant, noting that the primary purpose of the Federal Food, Drug, and Cosmetic Act (Act) (21 U.S.C. §§ 342 and 343 (2000)) is the protection of public health. *Carty*, 371 Ill. App. 3d at 789. We also explained that no public policy is "more important or more fundamental than the one favoring the effective protection of the lives and property of citizens." *Carty*, 371 Ill. App. 3d at 789 (citing *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, 132 (1981)). We thus held that, "to protect the public from the dangers associated with the use of spoiled food products and the mislabeling of food products, employees of manufacturers of food products must be able to freely report their concerns, as plaintiff attempted to do." *Carty*, 371 Ill. App. 3d at 789.

¶ 68 Like the provisions of the Act in *Carty*, sections 803 and 806 of Title 21 of the Code of Federal Regulations implement portions of the Act and create a comprehensive scheme relating to public health and safety. See, *e.g.*, 21 C.F.R. § 806.1(a) ("This part implements the provisions of section 519(g) of the [Act] requiring device manufacturers and importers to report promptly to the [FDA] certain actions concerning device corrections and removals[.]"). As this court previously explained, the primary purpose of the Act is "the protection of public health." *Carty*, 371 Ill. App. 3d at 789. To protect the public from dangers associated with unsafe medical devices, employees must be able to freely report their concerns that corrective action is necessary.

¶ 69 Hospira contends that plaintiff's actions with respect to the Plum Pump were not covered by sections 803 or 806 of Title 21 of the Code of Federal Regulations, because the public policy implicated by those sections relates solely to reporting obligations and record maintenance. It notes that, at trial, plaintiff claimed that he was pushing for a recall of the Plum Pump, but did not point to any FDA regulation that Hospira violated by not issuing a recall. We disagree.

¶ 70 As Hospira notes, plaintiff testified that he was urging Hospira to issue a recall of the Plum Pump. While neither section 803 nor 806 pertains directly to recalls, section 803 required Hospira to report (1) serious injuries or deaths that a product may have caused or contributed, (2) device malfunctions, and (3) "specified followup." 21 C.F.R. § 803.1(a). Section 806 required Hospira to report corrections or removals that were initiated to reduce a risk to health posed by the device. 21 C.F.R. § 806.10(a)(1). In that vein, plaintiff testified that, while Hospira did report the air-in-line issue to the FDA in 2010, the information contained in the MedWatch report was incorrect and Hospira failed to report the investigation that was completed in late 2010. Although plaintiff acknowledged that Hospira sent its Plum Pump Risk Assessment report

to the FDA in September 2011, he and Nelson both testified that they disagreed with Hospira's classification of the risk as "acceptable with justification." They testified that Hospira incorrectly pooled data from the pump's use on adults, children, and neonates, when it should have assessed the risk as "unacceptable" based solely on the pump's use on neonates. Plaintiff testified that a recall or change to the pump's operating manual was therefore necessary (he testified that a change to the manual is considered a recall) and that he reported this matter to his peers and supervisors. Thus, the evidence showed that Hospira was required to correct the air-in-line issue by either recalling the product or changing the operating manual, and it had a duty to report those actions pursuant to section 806. The jury could have reasonably found that Hospira violated the regulations when it failed to take necessary action, and its discharge of plaintiff in retaliation for his reports violated the public policy of protecting the citizens' health and safety from defects in medical devices.

¶ 71 Hospira further contends that plaintiff's actions with respect to the Plum Pump merely reflected a private, personal dispute with Hospira over its customer complaint process. Plaintiff acknowledged that none of his emails concerning the Plum Pump explicitly stated that it posed a safety risk or that a recall was necessary. Nevertheless, plaintiff testified that, per his training at Hospira, he was not allowed to use such language in emails. He also testified that his demand for a recall was clearly evident in the emails he sent and that a professional in the industry would understand that message. Garcia directly contradicted the testimony about Hospira's training regarding email content, and Dubois contradicted the testimony that the "message" of a recall was contained in plaintiff's emails. We do not, however, weigh the evidence or concern ourselves with the credibility of witnesses. *Maple*, 151 Ill. 2d at 453. The jury heard the testimony and viewed plaintiff's emails, and it apparently believed plaintiff's testimony that he

was pushing for a recall of the Plum Pump. Thus, we cannot say that plaintiff's actions were related solely to a private dispute over the customer complaint process.

¶ 72 We hold that the trial court did not err in finding, as a matter of law, that plaintiff articulated a clearly mandated public policy that was violated by his discharge. Accordingly, the trial court did not err in denying Hospira's motion for judgment *n.o.v.* as to that issue.

¶ 73 C. Defamation *Per Se*

¶ 74 Two statements went to the jury on plaintiff's defamation *per se* claim: (1) Dubois' statement that "more heads will roll" after explaining that Nelson was terminated for violating the COBC during the NSAI audit, and (2) Dubois' statement on September 30, 2011, to his own direct reports (plaintiff's peers) that plaintiff was fired for violating Hospira's COBC. We will first recite the standards that apply to defamation; we will then address each statement in turn.

¶ 75 A statement is defamatory if it harms a person's reputation to the extent that it lowers the person in the eyes of the community or deters the community from associating with that person. *Solaia Technology, LLC v. Specialty Publishing Co.*, 221 Ill. 2d 558, 579 (2006). Defamatory statements may be actionable *per se* or actionable *per quod*. *Schaffer v. Zekman*, 196 Ill. App. 3d 727, 731 (1990). A statement is defamatory *per se* if its harm is obvious and apparent on its face. *Solaia*, 221 Ill. 2d at 579. A statement is actionable *per quod* if the defamatory character is not apparent on its face and, instead, requires the plaintiff to resort to extrinsic facts to explain the defamatory meaning. *Bryson v. News America Publications, Inc.*, 174 Ill. 2d 77, 103 (1996).

¶ 76 Here, plaintiff proceeded to trial on the theory of defamation *per se*. Illinois law recognizes five categories of statements that are considered defamatory *per se*, only two of which are implicated here: (1) words that impute a person is unable to perform or lacks integrity

in performing his or her employment duties; and (2) words that impute a person lacks ability or otherwise prejudices that person in his or her profession. *Solaia*, 221 Ill. 2d at 579-80.

¶ 77 1. More Heads Will Roll

¶ 78 Hospira contends that Dubois' statement that "more heads will roll" is insufficient as a matter of law to constitute defamation *per se*, because extrinsic facts are needed to connect the statement to plaintiff and construct a defamatory meaning. Plaintiff responds that the statement must be considered in context and that courts are "required to *** evaluate extrinsic facts." He also contends that the statement reasonably suggests that Hospira would terminate "other employees for a COBC violation" and that it is "nonsensical to argue" that the statement applied to anyone other than plaintiff.

¶ 79 "The preliminary construction of an allegedly defamatory statement is a question of law, and our review therefore is *de novo*." *Green v. Rogers*, 234 Ill. 2d 478, 492 (2009).

¶ 80 Plaintiff testified that Dubois held a meeting with plaintiff and his direct reports to announce Nelson's termination. He testified that Dubois informed them that Nelson was going to be terminated for a violation of company policy in connection with the NSAI audit and that "more heads will roll." Dubois denied making that statement, and testified that he said that others would be "impacted." Nevertheless, plaintiff testified that, at the time he heard the statement, he had no reason to believe that Dubois was talking about him. He testified that he "didn't believe anything. Nobody ever told [him] anything about [himself]."

¶ 81 Where a statement "does not name the plaintiff, it should appear on the face of the complaint that persons other than the plaintiff and the defendant must have reasonably understood that the article was about the plaintiff and that the allegedly libelous expression related to her." *Bryson*, 174 Ill. 2d at 96-97. Here, Dubois' statement that "more heads will roll"

does not mention plaintiff. At most, the statement indirectly identified plaintiff as part of the larger group of Hospira employees who were implicated in the NSAI audit incident. Thus, an employee who heard the "more heads will roll" statement may have reasonably understood that Dubois was referring to any one of Jones, Starostovic, plaintiff, Bowman, Garcia, or Karen Griffin, among others. Indeed, the *only* evidence adduced at trial about this statement was plaintiff's testimony that he had no reason to believe that Dubois was referring to him. Even plaintiff repeatedly acknowledges on appeal that the import of the statement was that Hospira would terminate "*other* employees" for violating the COBC (emphasis added).

¶ 82 We disagree with plaintiff's conclusion that it is "nonsensical" to argue that the statement applied to anyone other than himself. The OEC interviewed nine people in connection with the NSAI audit incident, and the incident was the subject of gossip at Hospira. Nelson, Jones, and plaintiff were terminated; Starostovic received a final written warning. Certain evidence suggests that Jones was terminated on the same day as Nelson, but no evidence indicates when he was terminated in relation to Dubois' statement or whether plaintiff's direct reports knew that Jones was terminated. Also, no evidence indicates when Starostovic received her written warning. Therefore, it is reasonable to infer that persons who heard Dubois' statement understood that others more directly involved in altering the Symbiq CAPA during the audit (Jones or Starostovic) were the subjects of the statement. The only way to show that the statement referred to plaintiff is to rely on extrinsic facts; *i.e.*, to show that it was plaintiff who was subsequently terminated. Accordingly, the statement was not *per se* defamatory. See also *Barry Harlem Corp. v. Kraff*, 273 Ill. App. 3d 388, 390 (1995) ("The commentary did not expressly name plaintiff nor did it indirectly identify it. Because plaintiff relies on facts outside the commentary to show that it refers to plaintiff, the commentary is not defamatory *per se*.").

¶ 83 A more fundamental problem with the "more heads will roll" statement is that the harm to plaintiff was not obvious or apparent on the face of the statement. *Schaffer* is instructive. There, the plaintiff was the chief toxicologist employed by the Cook County Medical Examiner. *Schaffer*, 196 Ill. App. 3d at 728. The plaintiff alleged that a news station defamed him in a February 1985 broadcast when it referred to a serious of reports previously aired on the station that described "how evidence was mishandled by the Medical Examiner's Office." *Schaffer*, 196 Ill. App. 3d at 729. Nine months earlier, in May 1984, that same news station reported that toxicologists in the medical examiner's office made mistakes while handling evidence in certain murder cases. *Schaffer*, 196 Ill. App. 3d at 729. The May 1984 report also identified the plaintiff as the medical examiner's chief toxicologist and indicated that he would not agree to an interview, although he defended his lab's actions. *Schaffer*, 196 Ill. App. 3d at 729. In the February 1985 broadcast, the reporter expressed concern that Cook County had not attempted to correct the "scandal" in the medical examiner's office. *Schaffer*, 196 Ill. App. 3d at 729-30. In the course of the second broadcast, the reporter did not mention the plaintiff by name or the position of "toxicologist." *Schaffer*, 196 Ill. App. 3d at 730.

¶ 84 The appellate court held that the statement in the February 1985 broadcast that "evidence was mishandled by the Medical Examiner's Office" was not defamatory *per se* as to the plaintiff. *Schaffer*, 196 Ill. App. 3d at 732. Because the statement did not mention the plaintiff by name, it could not be injurious to him on its face. *Schaffer*, 196 Ill. App. 3d at 732. The court reasoned that, at most, the statement referred to a "group of which [the plaintiff] is a member, the Cook County Medical Examiner's Office. Without more, the statement is not so obviously and naturally harmful to [the plaintiff] that a showing of special damages is unnecessary." *Schaffer*, 196 Ill. App. 3d at 732. The court noted that even the plaintiff himself did not rely on the

February 1985 broadcast alone, but looked "outside the complete text of the editorial" by referring to the May 1984 reports. *Schaffer,* 196 Ill. App. 3d at 732. The plaintiff's use of extrinsic facts to explain how the statement referred to him rendered the statement not actionable *per se*. *Schaffer,* 196 Ill. App. 3d at 732.

¶ 85 As in *Schaffer,* the "more heads will roll" statement did not mention plaintiff by name and was not injurious to him on its face. At most, it referred to a group of which plaintiff was a member: the Hospira employees implicated in the NSAI audit incident. Furthermore, like in *Schaffer*, plaintiff resorted to extrinsic facts to tie the statement to himself and construct a defamatory meaning. To attempt to find a defamatory meaning, plaintiff presented a plethora of extrinsic evidence: the Plum Pump posed an unacceptable risk of harm to neonates; he reported to Hospira that the Plum Pump needed to be recalled; peers and supervisors ignored plaintiff's reports; his termination was the result of his reports concerning the Plum Pump; the information contained in the Symbiq CAPA was incorrect; Nelson and Jones acted appropriately in removing the information from the Symbiq CAPA during the NSAI audit; plaintiff responded appropriately to the NSAI audit incident; the OEC investigation of the NSAI audit incident was merely a sham as it related to plaintiff; his termination in response to the NSAI audit incident was pretextual; the COBC was Hospira's "ethical compass;" a violation of the COBC automatically constituted an ethics violation; and plaintiff was fired after Dubois' statement. Thus, Dubois' statement does not meet the requirements of defamation *per se*.

¶ 86 Nevertheless, plaintiff argues that *Bryson* controls and that we are required to evaluate the statement in context and to evaluate extrinsic facts in determining whether a statement is defamatory *per se*. We reject outright plaintiff's assertion that we are required to evaluate extrinsic facts in defamation *per se* actions. Such a claim is a basic misunderstanding of the law

of defamation, and it conflates the causes of action for defamation *per se* and defamation *per quod*. Our supreme court in *Bryson* explained: "a *per quod* claim is appropriate where the defamatory character of the statement is not apparent on its face, and resort to extrinsic circumstances is necessary to demonstrate its injurious meaning. To pursue a *per quod* action in such circumstances, a plaintiff must plead and prove extrinsic facts to explain the defamatory meaning of the statement." *Bryson*, 174 Ill. 2d at 103. Plaintiff chose to proceed to trial on the theory of defamation *per se*, not defamation *per quod*. Hence, the defamatory nature of Dubois' statement that "more heads will roll" had to be apparent on its face, without the resort to extrinsic facts to explain the defamatory nature of the statement. See also *Dubinsky v. United Airlines Master Executive Council*, 303 Ill. App. 3d 317, 327 (1999) (assertion that the allegedly defamatory article should be read in conjunction with a separate report "would preclude the publication from being considered defamatory *per se*, as only statements that are defamatory *per quod* may rely on extrinsic facts.").

¶ 87 Additionally, *Bryson* is factually inapposite. In *Bryson*, an author published a fictional article in which the main character was referred to as a "slut" and had the same last name as the plaintiff. *Bryson*, 174 Ill. 2d at 84-85. In rejecting the claim that the article must be innocently construed as referring to someone other than the plaintiff, our supreme court reasoned: "the fact that the author used the plaintiff's actual name makes it reasonable that third persons would interpret the story as referring to the plaintiff, despite the fictional label." *Bryson*, 174 Ill. 2d at 97. The court further noted that "the setting of the story, the events described therein, and the identification of the writer as a native of southern Illinois all lead to a reasonable conclusion that third persons familiar with both the plaintiff and the defendant would understand the story as referring to the plaintiff." *Bryson*, 174 Ill. 2d at 97-98.

¶ 88 Unlike in *Bryson*, where the article used the plaintiff's actual name and directly insinuated that she engaged in "false acts of fornication," Dubois' statement did not identify plaintiff and was not injurious to him on its face. Extrinsic facts and circumstances were necessary to explain the defamatory meaning of the statement.

¶ 89 Moreover, the court in *Bryson* applied the innocent construction rule, which provides that courts must consider the statement in context, giving the words and their implications the natural and obvious meaning. *Bryson*, 174 Ill. 2d at 90. The innocent construction rule, however, only applies if a statement falls into one of the five recognized categories of words that are actionable *per se*. *Bryson*, 174 Ill. 2d at 90. Here, because extrinsic facts are necessary to demonstrate the injurious meaning, the statement does not fall into one of the enumerated categories of defamation *per se*. Therefore, the innocent construction rule has no application here, and *Bryson* is distinguishable. See also *Tuite v. Corbitt*, 224 Ill. 2d 490, 509 (2006) ("[T]he innocent construction rule applies only to *per se* actions.").

¶ 90 Even considering Dubois' statement in context, it is not defamatory *per se*. Dubois' words and their implications suggest that other Hospira employees involved in the NSAI audit incident would be terminated. The statement may reasonably be interpreted as referring to someone other than plaintiff. Facts outside the context of the statement are required to tie it to plaintiff. Plaintiff has not provided any case law, nor has our independent research uncovered any, that suggests that courts can evaluate extrinsic facts outside of the context of the statement itself to render it defamatory and actionable *per se*. See, *e.g.*, *Barry Harlem Corp.*, 273 Ill. App. 3d at 391 ("A reviewing court must consider all parts of the publication to ascertain the true meaning of the words and must adopt a nondefamatory interpretation if that interpretation is reasonable."); *Tuite*, 224 Ill. 2d at 512 ("[T]he innocent construction rule requires a writing 'to

be read as a whole.' In this case, we must consider the entire book in determining the context of the allegedly defamatory statements.").

¶ 91 Dubois' statement that "more heads will roll" was not actionable *per se*, and the trial court erred in allowing the statement to serve as a basis for plaintiff's defamation *per se* claim. Accordingly, the trial court erred in denying Hospira's motion for judgment *n.o.v.* as to that issue.

¶ 92 2. Dubois' Statement that Plaintiff Violated the COBC

¶ 93 Hospira also argues that the trial court erred in denying its motion for a new trial on plaintiff's defamation *per se* claim. Specifically, it contends that the trial court erred in allowing Dubois' statement that plaintiff had been terminated for violating the COBC to go to the jury. The circumstances underlying this particular argument require additional factual background.

¶ 94 Plaintiff's third amended complaint contained a single count of defamation *per se* against Hospira. Paragraph 62 of the complaint alleged that Dubois made the statement that "more heads will roll." Paragraph 63 of the complaint then alleged that "On September 30, 2011, Hospira informed [plaintiff's] colleagues that [plaintiff] was terminated for violating company policy. It intentionally created the impression that [plaintiff] had engaged in conduct to falsify an audited record."

¶ 95 Before trial, Hospira filed its motion *in limine* #2 "To Limit Plaintiff's Defamation Claims to the Three Specific Statements Alleged in Plaintiff's Third Amended Complaint." Two of the statements concerned Fathallah, who obtained a directed verdict during trial, and the third statement was Dubois' "more heads will roll" comment. At the pretrial hearing, Hospira argued that it would be unfair for plaintiff to use paragraph 63 of the third amended complaint as a

"catchall" to introduce "other so-called announcements" made by unidentified Hospira employees. It argued that paragraph 63 was not pled with sufficient particularity and specificity.

¶ 96 In responding to the motion *in limine*, plaintiff argued that paragraph 63 included "a number of announcements which were made on September 30 by Hospira management." He did not, however, identify who made what statement to whom. The following colloquy then occurred:

"The Court: Well, if, if and to the extent that plaintiff may be seeking to utilize paragraph 63 of the third amended complaint as a basis to bring in now some other allegedly defamatory statements. I'm going to preclude that.

[Plaintiff's Counsel]: I just want to clarity [*sic*] because we're bringing in statements that establish that paragraph 63 is accurate. Paragraph 63 survived the motion to dismiss. It is specific. It says the specific date the announcements were made.

The Court: It doesn't say what the statements were.

[Plaintiff's Counsel]: It does.

The Court: [reads paragraph 63 out loud] Who made the statement to whom? What was the statement?

[Plaintiff's Counsel]: Hospira's leadership.

The Court: It doesn't say that. I don't know that.

[Plaintiff's Counsel]: When it uses the word Hospira.

The Court: I mean, who said what to whom and what? What was the statement?

[Plaintiff's Counsel]: The statement was that he --

The Court: This is just a broad, vague allegation so to use that as a basis for now bringing in some allegedly defamatory statements, other allegedly defamatory statements,

> I don't believe is appropriate. I'm not going to allow that. If that's what you intended to do and if this is exactly what you're seeking to bar then I'm going to grant [Hospira's motion *in limine*] No. 2."

¶ 97 At trial, Dubois' statement that plaintiff was fired for violating the COBC was first mentioned during his testimony as an adverse witness for plaintiff; Hospira did not object. Dubois again mentioned the statement in response to questioning by Hospira during its case-in-chief. Hospira did not ask for a limiting instruction. After the close of evidence, plaintiff moved to amend the pleadings to conform to the proof by adding a "specific allegation" regarding Dubois' statement on September 30, 2011. Hospira objected on the basis that the motion *in limine* limited the defamation claim to Dubois' "more heads will roll" statement.

¶ 98 The trial court granted plaintiff's motion to amend the pleadings, noting that there had been extensive testimony about the COBC statement without objection. The court also noted that its ruling on the motion *in limine* was interlocutory. It then stated: "Actually, I'm not sure you even need to amend frankly because I think the proof does conform to the pleading." The court also stated that, to the extent that Hospira was arguing that there was a violation of motion *in limine* #2, the court was "overruling that." Dubois' COBC statement then served as one of the two statements that went to the jury on plaintiff's defamation *per se* claim.

¶ 99 On appeal, Hospira argues that the trial court erred in allowing the statement to serve as a basis for plaintiff's defamation *per se* claim under the "nonspecific allegation" of paragraph 63. It contends that plaintiff's motion to amend was untimely, it did not receive proper notice, and it was prejudiced by the amendment.

¶ 100 Plaintiff responds that the trial court properly allowed it to amend the pleadings, and also in finding that paragraph 63 was sufficient to encompass Dubois' statement. He also states:

"Regardless, the COBC statement is simply a confirmation of Mr. Dubois's 'more heads will roll' statement."

¶ 101 The parties analyze the trial court's ruling in the context of a motion to amend a pleading. We will do the same.

¶ 102 Illinois courts are encouraged to freely and liberally allow the amendment of pleadings, but a party's right to amend is not absolute and unlimited. *Lee v. Chicago Transit Authority*, 152 Ill. 2d 432, 467 (1992). The factors to be considered in deciding whether to permit an amendment to the pleadings are: whether the amendment would cure a defect in the pleadings; whether the other party would be prejudiced or surprised by the proposed amendment; the timeliness of the proposed amendment; and whether there were previous opportunities to amend. *Lee*, 152 Ill. 2d at 467-68. Whether to grant leave to amend a pleading rests within the sound discretion of the trial court; that decision will not be disturbed absent an abuse of discretion. *Lee*, 152 Ill. 2d at 467.

¶ 103 Plaintiff argues that his amendment was timely because Hospira was "on notice of the allegations." Amendments may be allowed at any time before the entry of a final judgment. *Lee*, 152 Ill. 2d at 468 ("[B]ecause amendments may be allowed at any time before the entry of a final judgment, the timeliness of plaintiff's amendment is not at issue."). Once a trial has begun, however, an amendment should not be permitted to set up matters of which the plaintiff had full knowledge at the time of interposing the original pleading, and the plaintiff presents no excuse for not putting its substance in the original pleading. *Lee*, 152 Ill. 2d at 469. This is particularly true where the amendment is prejudicial or alters the nature and quality of the proof required to defend. *Lee*, 152 Ill. 2d at 469. Where prejudice is not likely to result, however, the trial court may permit the amendment. *Lee*, 152 Ill. 2d at 469.

¶ 104 Here, plaintiff knew about Dubois' statement more than a year before trial, as Dubois testified to the statement during his deposition. The record shows that plaintiff did not identify Dubois' particular statement as a basis for his defamation *per se* claim when responding to Hospira's motion for summary judgment or to Hospira's motion *in limine* #2. Plaintiff also elicited testimony from Dubois about the statement during his case-in-chief and did not move to amend the complaint at that time. We also note that, on July 26, 2013, plaintiff moved for leave to file its third amended complaint with a specific count for defamation *per se* against Dubois in regard to "certain statements" he made related to plaintiff's "employment and termination." In that count, plaintiff did not identify Dubois' September 30, 2011, statement as the basis for the defamation *per se* claim. On August 28, 2013, the trial court denied plaintiff's motion for leave to add a count against Dubois. Thus, plaintiff had ample opportunity to identify Dubois' statement, he was previously denied an opportunity to add a count against Dubois, and he provides no excuse for not setting forth the statement in the original pleading or at *any* point before the close of evidence. In essence, the "amendment" at trial was simply a way to relitigate the trial court's August 28, 2013, ruling prohibiting the addition of a count against Dubois, and to introduce the statement as a basis for liability under the "broad, vague allegation" in paragraph 63.

¶ 105 Moreover, plaintiff's amendment prejudiced Hospira and altered the nature and quality of the proof required to defend against the claim. The trial court's ruling on Hospira's motion *in limine* #2 was clear: paragraph 63 of the third amended complaint was insufficient as a matter of law to constitute a properly pleaded defamation *per se* statement. Hospira reasonably relied on that ruling in proceeding to trial with the understanding that paragraph 63 would not be a basis for relying on allegedly defamatory statements that were not specifically pleaded. Nevertheless,

when the trial court reversed its ruling after the close of evidence, it added an additional basis of liability on the defamation *per se* claim based on what it had previously said was a "broad, vague allegation" contained in paragraph 63. See *Cianci v. Pettibone Corp.*, 298 Ill. App. 3d 419, 430 (1998) (circuit court denied the plaintiff's motion to amend complaint after close of evidence to add additional defamatory statements because "each unpled allegedly defamatory statement constituted an additional cause of action of which defendants had no notice and no opportunity to prepare a defense."). As the "amendment" was allowed after the close of evidence, Hospira did not have the opportunity to conduct discovery regarding the defamatory nature of the statement or present a defense as to that issue.

¶ 106 Plaintiff claims that Hospira forfeited any potential defense of qualified privilege at trial when it agreed to remove the defense from the jury instructions. We disagree. Plaintiff never identified the statement as a basis for his claim until after the close of evidence. Hence, Hospira had no opportunity to conduct discovery on the defense, let alone present evidence of it.

¶ 107 In denying the posttrial motion, the trial court found that its ruling on Hospira's motion *in limine* was interlocutory, and Hospira waived its argument with respect to the COBC statement by failing to object at trial or ask for a limiting instruction. We acknowledge that orders *in limine* are interlocutory and remain subject to reconsideration during trial, and, after a motion *in limine* is granted, the movant must be "vigilant and object when evidence is presented which may violate the order." *Cunningham v. Millers General Insurance Co.*, 227 Ill. App. 3d 201, 205-06 (1992). Here, however, Hospira did not waive its arguments. Hospira reasonably relied on the court's ruling in proceeding to trial with the understanding that only Dubois' "more heads will roll" statement was at issue for defamation *per se*. That being said, Hospira also had to defend against plaintiff's claim for retaliatory discharge. As Hospira notes, Dubois' statement

that plaintiff was fired for violating the COBC was the basis of its defense to the retaliatory discharge claim. See *Lucas v. County of Cook*, 2013 IL App (1st) 113052, ¶ 32 ("If the employer has a valid, non-pretextual basis for discharging the employee, the element of causation is not met."). Hospira could not be expected to object to evidence that established its purported non-pretextual basis for discharging plaintiff. Additionally, given (1) the court's ruling at the pretrial hearing, (2) plaintiff's failure to *ever* identify Dubois' COBC statement before the close of evidence, and (3) the nonspecific and legally insufficient pleading in paragraph 63, [3] Hospira's need to ask for a limiting instruction as to the statement was far from apparent.

¶ 108 Based on the foregoing, the trial court abused its discretion in granting plaintiff's motion to amend the complaint and allowing the COBC statement to serve as a basis for plaintiff's defamation *per se* claim. Accordingly, the trial court erred in denying Hospira's motion for a new trial on the defamation *per se* claim.

¶ 109 Normally, we would remand for a new trial on the defamation *per se* claim. However, we have ruled that the trial court erred in denying Hospira's motion for judgment *n.o.v.* on the defamation *per se* claim with respect to the "more heads will roll" statement. Therefore, based

[3] Paragraph 63, as it was alleged, failed to set forth the statement with sufficient detail and particularity, as it did not identify the speaker, to whom the statement was made, or the specific "company policy" that plaintiff was alleged to have violated; instead, paragraph 63 was simply a "generic charge" that plaintiff violated some unspecified company policy. See *Green*, 234 Ill. 2d at 492-494 (statements that the plaintiff "exhibited a long pattern of misconduct with children" and "abused players, coaches, and umpires" was held not to be pleaded with sufficient particularity for defamation *per se*; the statements were simply "generic" charges of abuse that provided no basis for a court to assess whether the words were defamatory *per se*.).

on our rulings, there are no longer any allegedly defamatory statements that may serve as a basis of liability on the defamation *per se* claim on remand. Accordingly, we remand the defamation *per se* claim to the trial court with directions to enter judgment in favor of Hospira on that claim.

¶ 110 D. Punitive Damages

¶ 111 Hospira also argues that the court erroneously denied its motion for judgment *n.o.v.* with respect to the issue of punitive damages. According to Hospira, the trial court erred in instructing the jury on punitive damages, because plaintiff failed to present evidence above and beyond that which was necessary to establish liability on the retaliatory discharge claim.[4]

¶ 112 Before a jury can consider the issue of punitive damages, the trial court must make a preliminary determination as to whether the facts of the case justify submitting the issue to the jury. *Holland v. Schwan's Home Service, Inc.*, 2013 IL App (5th) 110560, ¶ 227. Once a court determines that punitive damages are, as a matter of law, appropriate, the court's decision to submit the issue to the jury will not be reversed absent an abuse of discretion. *Holland*, 2013 IL App (5th) 110560, ¶ 227.

¶ 113 In its petition for rehearing, Hospira, relying on *Koehler v. Packer Group, Inc.*, 2016 IL App (1st) 142767, ¶ 86, argues that the correct standard of review is *de novo*. But, as noted in its petition for rehearing, Hospira explicitly advised this court in its appellant's brief that the standard of review was abuse of discretion. Hospira did not argue that an alternative standard of review applied in any of its later briefs. It nevertheless contends in its petition for rehearing that it argued at oral argument that the correct standard of review was *de novo*. We note that

[4] Because we have remanded the defamation *per se* claim to the trial court to enter judgment in favor of Hospira, we need not address its argument concerning punitive damages as to that claim.

Hospira's counsel only suggested that the standard of review was *de novo* in response to a question concerning how a plaintiff proves, at trial, conduct that warrants the imposition of punitive damages. Moreover, Supreme Court Rule 341(h)(7) (eff. Jan. 1, 2016) provides that "points not argued are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing."

¶ 114 Additionally, Hospira's argument in its petition for rehearing is barred by the invited-error doctrine. The doctrine of invited error is a procedural default sometimes described as estoppel. *In re Detention of Swope*, 213 Ill. 2d 210, 217 (2004). "Simply stated, a party cannot complain of error which that party induced the court to make or to which the party consented. The rationale behind this well-established rule is that it would be manifestly unfair to allow a party a second trial upon the basis of error which that party injected into the proceedings." *In re Detention of Swope*, 213 Ill. 2d at 217. Hospira explicitly advised this court in its appellant's brief that the standard of review for this issue was abuse of discretion. To allow Hospira second review of the issue when it "injected" the alleged error into these proceedings would be manifestly unfair. Indeed, the case that Hospira relies on as the basis of its petition for rehearing, *Koehler* 2016 IL App (1st) 142767, was decided before Hospira's appellant's brief was filed. Moreover, Hospira concedes in its petition for rehearing that both parties cited *Koehler* in later briefs, albeit for different reasons than the present argument. Accordingly, Hospira invited any error concerning the applicable standard of review.

¶ 115 As to the merits, punitive damages may be properly awarded in a claim for retaliatory discharge. *Holland*, 2013 IL App (5th) 110560, ¶ 228. They are not compensation, but serve instead to punish the offender and deter that party and others from committing similar acts of wrongdoing in the future. *Slovinski v. Elliot*, 237 Ill. 2d 51, 57-58 (2010). "Punitive damages

may be awarded where retaliatory discharge has been committed with fraud, actual malice, deliberate violence or oppression, or when the defendant has acted willfully, or with such gross negligence as to indicate a wanton disregard of the rights of others." *Holland*, 2013 IL App (5th) 110560, ¶ 228. The trial court may submit the issue of punitive damages to the jury only if the plaintiff made a *prima facie* case for such damages. *Holland*, 2013 IL App (5th) 110560, ¶ 228. But punitive damages require proof of misconduct beyond that needed for the basic action. *Kritzen v. Flender Corp.*, 226 Ill. App. 3d 541, 554-55 (1992); see also *Petty v. Chrysler Corp.*, 343 Ill. App. 3d 815, 828 (2003) ("Punitive damages should not be awarded if the defendant's misconduct is not above and beyond the conduct needed for the basis of the underlying cause of action.").

¶ 116 Hospira argues that plaintiff only established a *prima facie* case of retaliatory discharge. It notes that no evidence established that Hospira engaged in a course of sustained misconduct directed against plaintiff; all events were temporally related; and plaintiff's discharge was made by Dubois after the OEC investigation and with consultation from the OEC.

¶ 117 Hospira contends that *Kritzen* is analogous. In *Kritzen*, three employees brought retaliatory discharge claims alleging that they had been discharged for filing workers' compensation claims. *Kritzen*, 226 Ill. App. 3d at 545. The appellate court held that the issue of punitive damages should not have gone to the jury. *Kritzen*, 226 Ill. App. 3d at 555. The court reasoned that the plaintiffs' recovery was based on evidence of a "causal connection" between their filing of workers' compensation benefits and their discharge. *Kritzen*, 226 Ill. App. 3d at 555. The evidence at trial, however, was not sufficient for a jury to find willful or wanton conduct necessary to support an award of punitive damages. *Kritzen*, 226 Ill. App. 3d at 555. Instead, the evidence suggested that the company relied on the advice of counsel in creating a

policy to discharge any worker who was absent from work for 26 weeks and to discharge each of the plaintiffs. *Kritzen*, 226 Ill. App. 3d at 555.

¶ 118 Hospira further contends that the present case is in sharp contrast to *Holland*, where the employer engaged in a course of conduct aimed at punishing the plaintiff for filing a workers' compensation claim, including refusing to honor medical restrictions, refusing to authorize physical therapy, contacting the plaintiff's doctor to obtain a release for full-duty work, and performing the plaintiff's annual evaluation early and in a cursory fashion. *Holland*, 2013 IL App (5th) 110560, ¶¶ 229-245. Hospira also argues that the case is distinguishable from *Blount v. Stroud*, 395 Ill. App. 3d 8 (2009), where the defendant acted willfully and wantonly in retaliating against the plaintiff for testifying against the company in a federal agency's investigation. *Blount*, 395 Ill. App. 3d at 21. In *Blount*, the defendant employer used his wealth, power, and connections to tell the plaintiff that she did not know who she was "fucking with;" he attempted to criminally prosecute the plaintiff to make her "suffer" the same consequences that he had to in defending the lawsuit; and he repeatedly threatened that he could make the plaintiff "cease to exist." *Blount*, 395 Ill. App. 3d at 21.

¶ 119 Here, we agree that Hospira's conduct does not rise to the level of the willful and wanton conduct exhibited in *Holland* or *Blount*. Hospira did not threaten plaintiff or otherwise engage in a course of conduct aimed at plaintiff during the two months that he made reports about the Plum Pump. Also, like *Kritzen*, plaintiff's recovery for retaliatory discharge was based largely on evidence of a "causal connection" between plaintiff's email to Hospira's CEO and his discharge three days later. Moreover, Dubois testified that he was complimentary of plaintiff's work in every way except for the audit; Dubois testified that plaintiff's emails about the Plum Pump did not influence his decision to terminate; the OEC recommended termination in connection with

the NSAI audit after a month-long investigation; the OEC was not involved in the Plum Pump issue; and no evidence suggested that the CEO took any action in response to plaintiff's September 26, 2011, email.

¶ 120 Nevertheless, we hold that the trial court did not abuse its discretion in instructing the jury on the issue of punitive damages. Other facts distinguish this case from *Kritzen*. Plaintiff presented evidence that Nelson's and Jones's actions during the NSAI audit were justified, because they were attempting to remove inaccurate information. While plaintiff did not immediately provide the deleted material to the NSAI auditor, neither did Dubois until after he was instructed to do so by Hospira's legal team. Additionally, plaintiff presented evidence that the OEC investigation was flawed. Taber shredded his handwritten notes from his investigation, and he delayed entering information into the permanent record. While Hospira argues that these facts constituted mere negligence, we cannot say that the trial court abused its discretion in finding otherwise. The OEC investigation report did not include a finding that plaintiff violated the COBC, and the report contained little information that would warrant plaintiff's termination. Plaintiff also presented evidence that Dubois made his decision to terminate shortly after receiving plaintiff's September 26, 2011, email, and he later made an announcement to his direct reports that plaintiff was terminated for violating the COBC.

¶ 121 Accordingly, the trial court did not err in instructing the jury on the issue of punitive damages with respect to the retaliatory discharge claim, and it properly denied Hospira's motion for judgment *n.o.v.* as to that issue.

¶ 122 E. Remittitur of Damages

¶ 123 Hospira argues that the trial court erred in not appropriately remitting damages. In his cross-appeal, plaintiff argues that the trial court erred in remitting damages and that the jury verdicts should be reinstated.

¶ 124 The determination of damages is a question for the trier of fact, and a reviewing court will not lightly substitute its opinion for the judgment rendered in the trial court. *Richardson v. Chapman*, 175 Ill. 2d 98, 113 (1997). An award of damages will be found excessive if it falls outside the range of fair and reasonable compensation, it results from passion or prejudice, or it is so large that it shocks the judicial conscience. *Richardson*, 175 Ill. 2d at 113. We review a trial court's ruling on a motion for a remittitur for an abuse of discretion. *Leyshon v. Diehl Controls North America, Inc.*, 407 Ill. App. 3d 1, 10 (2010).

¶ 125 Here, in remitting the damage awards, the trial court found that plaintiff did not establish distinct injuries between his claims for retaliatory discharge and defamation *per se*. The court also found that "the jury instructions in this case offered no basis for distinguishing the economic and emotional damages recoverable for defamation *per se* and retaliatory discharge." Therefore, the court found that "based on the evidence in this case, there is simply no way to identify unique economic and emotional damages that may be attributed separately to each claim." Moreover, the court reasoned that the award for retaliatory discharge "is large," because "the jury awarded a far smaller amount for emotional damages on the plaintiff's defamation *per se* claim." The court then stated that the "award of emotional damages for retaliatory discharge is likely in excess of four times the amount awarded as emotional damages for defamation *per se*." It therefore reduced the award of damages for emotional harm resulting from retaliatory discharge to $345,000, the amount that it determined that the jury awarded for emotional harm on the defamation *per se* claim.

¶ 126 Similarly, in analyzing the amount awarded in punitive damages for the retaliatory discharge claim, the court explicitly stated that "Hospira's due process arguments have been fully considered in the previous section of this order," which analyzed Hospira's arguments about the punitive damages award on the defamation *per se* claim. The court then reduced the punitive damages award for retaliatory discharge to $1.75 million to comport with a 4:1 ratio with compensatory damages. The court further found that "the fact that the analysis concerning punitive damages for defamation *per se* and retaliatory discharge overlaps in so many respects suggests that the separate awards of punitive damages provide something in the nature of a double recovery." The court thus combined the compensatory and punitive damage awards for both counts into one single award and reduced the total punitive damages awarded to plaintiff to $2.6 million.

¶ 127 We note that, based on our rulings above, the basis for Hospira's liability has been altered. Although the trial court engaged in a detailed and thorough analysis of damages, we cannot meaningfully determine whether the trial court abused its discretion, because it explicitly based its remittitur of the retaliatory discharge award on the amounts awarded for the defamation *per se* claim.

¶ 128 It would thus be prejudicial to plaintiff to analyze the court's remitted amount of the retaliatory discharge award, because the entire basis for the court's remittitur was a comparison of both claims. If the award for defamation *per se* was not before the trial court, it might have arrived at a different result in deciding whether and how to remit the retaliatory discharge award. It would also be prejudicial to Hospira to merely analyze (or "reinstate") the jury's award for retaliatory discharge under these circumstances. The "reinstated" jury award for retaliatory

discharge is twice as much as the *total* award that plaintiff accepted on the trial court's remittitur of *both* claims.

¶ 129 Accordingly, the proper remedy, under these unique circumstances, is to order a new trial on damages with respect to plaintiff's retaliatory discharge claim. A new trial on damages may be ordered where (1) the jury's verdict on liability is amply supported by the evidence; (2) the questions of damages and liability are so separate and distinct that a trial limited to damages is not unfair to the defendant; and (3) the record suggests neither that the jury reached a compromise verdict, nor that the error which resulted in the jury's awarding inadequate damages also affected its verdict on the question of liability. *Merrill v. Hill*, 335 Ill. App. 3d 1001, 1006-07 (2002).

¶ 130 Here, the jury's verdict on liability for retaliatory discharge was sufficiently supported by the evidence. Also, Hospira repeatedly requests a new trial on damages, and the record shows that the evidence related to damages is distinct from the evidence related to liability. Finally, no evidence suggests that the jury reached a compromise verdict. Accordingly, we vacate the jury's award of damages with respect to both claims and remand for a new trial on damages with respect to the retaliatory discharge claim.

¶ 131 III. CONCLUSION

¶ 132 For the reasons stated, we affirm in part, reverse in part, remand the defamation *per se* claim with instructions to enter judgment for Hospira, vacate the damages award with respect to both claims, and remand for a new trial on damages on the claim for retaliatory discharge.

¶ 133 Affirmed in part, reversed in part, vacated in part, remanded with instructions, and remanded for a new trial on damages.