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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

DAVID CUTLER, Plaintiff and Respondent, v. ANTHONY C. DIKE et al., Defendants and Appellants.	B210624 (Los Angeles County Super. Ct. No. BC354592)

APPEAL from a judgment of the Superior Court of Los Angeles County, Elizabeth Allen White, Judge. Affirmed in part and reversed in part.

George E. Omoko for Defendants and Appellants.

Schonbrun, DeSimone, Seplow, Harris & Hoffman, Wilmer J. Harris and Sami N. Khadder for Plaintiff and Respondent.

Defendants and appellants Anthony C. Dike, M.D., InterCare DX, Inc., and Meridian Holdings, Inc., appeal from a judgment following a jury trial in favor of former employee David Cutler in this action for breach of a written employment contract and wrongful termination. Appellants contend: 1) the complaint failed to state a cause of action for breach of written contract, because it alleged that the contract expired prior to Cutler's termination and did not attach the contract or set forth verbatim; 2) there was no substantial evidence to support the jury's finding that Cutler's written employment contract was in effect on the date of his termination; 3) there was no substantial evidence to support the finding that Dike discharged Cutler without cause; 4) the verdict failed to account for Cutler's duty to mitigate his damages; 5) they are not liable for wrongful termination in violation of public policy, because they were not covered entities under the Health Insurance Portability and Accountability Act of 1996 (42 U.S.C. § 1320d et seq.) (HIPAA) and there was no evidence of any violation of HIPAA or Labor Code section 1102.5; 6) the punitive damage awards against Meridian Holdings and InterCare constituted a double recovery, because the jury found them to be a single employer; 7) the amounts of the punitive damage awards were excessive; and 8) in connection with Cutler's motion to amend the judgment to add Dike as a judgment debtor, there was no substantial evidence to support the trial court's finding that Dike is the alter ego of Meridian Holdings or InterCare.

We conclude the parties tried the case on the assumption that the contract expiration date was an issue for the jury to determine, and therefore, under the "theory of trial" doctrine, appellants cannot change this theory for purposes of review on appeal. In addition, we hold the jury's findings are supported by substantial evidence, and the punitive damage awards do not constitute double recovery. However, we conclude that there is no substantial evidence to support the trial court's determination that Dike is the alter ego of the corporations. Therefore, we reverse the judgment as to Dike, but affirm as to InterCare and Meridian Holdings.

FACTS

Dike is a medical doctor. His private practice is Meridian Medical Group, P.C., which has its own bank account. The Medical Group was also doing business as Capnet, Inc. Capnet processed claims for an independent physician association (IPA) of approximately 50 doctors who contracted with Capnet. Capnet's bank account was in the name "Meridian Medical Group, P.C., DBA Capnet IPA."

Meridian Holdings is a publicly traded company. Meridian Holdings acquired Capnet from the Medical Group, including Capnet's bank account. The name on the Capnet account was not changed. Dike was Capnet's chief executive officer. Capnet had patient names and addresses on its computers for the claims program, but no patient medical records. Meridian Holdings, doing business as Capnet, performed management services, such as adjudicating claims for patients.

Meridian Holdings also owns and funds InterCare's operations. InterCare is a publicly traded software development company. Dike is InterCare's chief executive officer. InterCare is developing electronic medical records system software called InterCare Clinical Explorer (ICE). Meridian Holdings provides network support, management services, and personnel and payroll services to InterCare through a contract. Meridian Holdings, InterCare, and Capnet all operate from the same office location.

Cutler is a citizen of Great Britain. He obtained a visa to come to the United States as a student in 2000 and received a master's degree in information systems from California State University, Los Angeles in 2004. A professor recommended Cutler to Dike. Cutler's visa expiration date was in May 2005.)

On October 27, 2004, Cutler executed an employment agreement with InterCare. Dike signed the agreement in his capacity as InterCare's chief executive officer. Two individuals signed the agreement indicating approval of InterCare's board of directors.

The agreement provided that Cutler would serve as InterCare's product manager/privacy officer and report directly to InterCare's vice-president of software development. The job duties specified in the agreement in addition to software

development included performing network management, firewall monitoring, and "other internal routines for creating a HIPAA [c]ompliant work environment." Although the agreement stated that InterCare was Cutler's employer, Dike testified at trial that he wanted a privacy officer because the information maintained by Capnet was protected by HIPAA and Cutler was the privacy officer for Meridian Holdings and Capnet.

The agreement provided for the following base salary: "For all services to be rendered by the Employee under this Agreement from the Effective Date through April 30, 2005, the Company agree[s] to pay an annual salary of $45,005, payable bi-monthly rate in accordance with the general payroll practice of the Company." InterCare would re-evaluate Cutler's performance in six months. In addition to the base salary, the agreement provided for Cutler to be issued "50,000 shares of Common Stock of InterCare . . . , as an additional form of compensation accrued and payable in full upon completion of the first year of this agreement, or [prorated] for the period served. The Employee shall also be entitled to annual bonus payment as determined as well as participate in the Company's Incentive Stock Option Program as approved from time to time by the Board of Directors of the Company." Upon termination of employment, Cutler would receive "compensation for all accrued benefits, including stock and stock-options prorated to the actual days the employee worked for the company."

Dike testified at trial that Cutler was not responsible for patient medical records, but the duties under HIPAA with respect to medical records applied to Cutler. Dike also testified that the contract contemplated an employment period longer than six months, depending on Cutler's visa status and Dike's satisfaction with his work. Cutler agreed that the agreement applied beyond April 30, 2005. The agreement contained an attorney fee provision allowing recovery of attorney fees by the prevailing party in any dispute under the employment agreement.

The claims processing for the IPA was awarded to Tenet Health Systems, which was another management company. Meridian Holdings transferred claims processing and patient files to Tenet. Meridian Holdings ceased all claims processing activities for Capnet in December 2004.

Cutler performed computer maintenance for Meridian Holdings and InterCare. On March 11, 2005, Cutler received 50,000 shares of InterCare in advance of the date specified in his employment agreement.

In April 2005, Dike, in his capacity as Meridian Holdings' president and chief executive officer, signed an H1-B1 petition for a non-immigrant worker requesting an extension of Cutler's visa based on new employment. InterCare had too few employees and too little income to sponsor Cutler. The immigration form stated the position was computer systems analyst, the dates of intended employment were from May 1, 2005, to May 1, 2008, and the annual salary was $45,011. In addition, Dike wrote a letter in his capacity as Meridian Holdings' president and chief executive officer stating that Meridian Holdings' personnel had reviewed Cutler's credentials and found him highly qualified for the position offered. On behalf of Meridian Holdings, Dike authorized payment for the legal services and fees associated with Cutler's visa application from the Capnet bank account, which was owned by Meridian Holdings. Meridian Holdings received approval for Cutler's visa, but unknown to Cutler, did not complete the application process.

In the first week of June, Dike told Cutler that if the board approved, Cutler would be promoted to president of InterCare. Dike promised to discuss the promotion with the board. During this time, InterCare's office moved from downtown Los Angeles to a building in Fox Hills. As a result of the additional burdens on the exchange server in the Fox Hills office, the computer network was slow and crashed regularly. Cutler complained to Dike that the computer infrastructure was inadequate and required additional memory. He requested additional resources. Dike disagreed. Memory was borrowed from other machines in the office. Cutler wrote an e-mail to Dike explaining that the machine with the components to manage the firewall had been misplaced in the move, and as a result, the firewall had not been installed.

While Dike was on a business trip in Saudi Arabia, he could not access InterCare's computer system to make a presentation to potential clients. The office manager was

frustrated because programs were not working that she needed to use. Dike returned from his trip. One of the servers crashed, data was lost, and Dike blamed Cutler.

Dike hired a computer consultant named Sommai Sanapany to repair the e-mail server. Sanapany found the server had been completely corrupted, the data on it could not be recovered, and there was no backup. He told Dike that the lack of memory could have caused the crash. Sanapany generated an operating system, obtained an exchange server, and configured it. He suggested putting in a second network interface card, but Cutler objected to this solution on security grounds. Cutler knew there was no working firewall, but Dike believed that a firewall was working. Sanapany could not tell if the firewall was working, because he could not log in. However, he said the server would be protected behind the firewall. Cutler was not convinced. Sanapany complained to Dike that Cutler was not allowing him to do his work. A heated argument ensued and Dike approved Sanapany's solution to install a second card.

At 10:24 a.m. on June 27, 2005, Cutler sent an e-mail message to Dike stating that he assumed HIPAA regulations covered the ICE database. He included the text of HIPAA provisions related to data integrity, data access, and the mechanisms for handling data, as well as the penalties for violating the regulations. He added, "Are we sure we comply if the machine that holds the records has a partial direct connection with the Internet? [¶] At the very least, we need a firewall in front of the NIC that is a direct contact with the Internet, or the sensitive data in the ICE database might be too exposed."

At 11:29 p.m. on June 27, 2005, Dike responded to Cutler that he did not understand Cutler's objections. He recommended that Cutler turn in a letter of resignation immediately or risk being fired "since you have chosen to be very negative about issues in the organization. We have requested that some one more experienced than you help us with the network and you[r] attitude has changed." Dike accused Cutler of making "unnecessary," "irrelevant" comments that exposed Cutler's ignorance of the subject matter. Dike stated that he was fully aware of HIPAA regulations, as he had helped draft and reviewed part of the HIPAA proposal. Dike told Cutler to turn over all company property in his possession the following morning.

On Tuesday, June 28, Cutler wrote an e-mail to Dike asking him to reconsider his decision. He stated, "I am aware that I do not know a lot about the legislation that surrounds the health businesses, but I was genuinely worried about how our patient information systems might look in the eyes of the regulators. I am sorry if my actions were misinterpreted, but I am genuinely keen to support you and the company to the best of my ability. I [apologize] unreservedly if I have caused you any grief." Dike did not respond.

On June 29, 2005, Cutler sent an e-mail to Dike with copies to other Meridian Holdings employees noting that one of the duties listed in his employment contract was security officer. "As that officer I assumed one of my duties was to bring to your attention anything that I thought was a risk to the security of the data in our systems. I believe the system we are now installing could indeed constitute an exposure of our sensitive data to hackers, and I researched it to see if I was right. [The manufacturer of the VPN] confirmed my fears when I described the new topology to him, and so did the network engineer you employed, if you had let him speak. I did not instigate that argument you had with him. He was trying to show the same worries as I have repeatedly tried, and failed, to express." Cutler noted that the HIPAA text was directly from the legislation and his recommendation was that they were coming close to violating it. He asked, "What else is a security officer to do, other than be aware of legislation that crucially affects[] the smooth running of the company? You simply weren't allowing me to complete a sentence when we spoke, and that left me no alternative than to write you on the subject. [¶] If I am wrong then no damage is done except for embarrassment on my part, but if I am right, then the situation is a lot more serious than getting a red face. [¶] In fact, I think it would have been delinquent of me *not* to tell you, even if I was wrong. If I am wrong, then just tell me and no damage is done except a hurting of my pride, and I will learn from it. If I am right then we do indeed have big problems and if I *hadn't* told you, it would indeed be a firing offense as it's a core responsibility of a security officer."

Cutler's W-2 tax statements for 2004 and 2005 stated that Meridian Holdings was his employer. Cutler submitted job applications to several companies and had multiple interviews. In approximately March 2006, he was hired by a company that makes medical management software similar to InterCare's software. He attempted to transfer or obtain an extension of his visa. In December 2006, he received contradictory information about his immigration status. He is not receiving a salary until his immigration status is resolved.

PROCEDURAL BACKGROUND

On September 11, 2007, Cutler filed the operative third amended complaint in the instant case against Dike, InterCare, Meridian Holdings, Meridian Holdings, P.C. DBA Capnet IPA, and the Medical Group. The allegations of the complaint included a cause of action for breach of contract against InterCare, a cause of action for defamation against Dike, and causes of action for wrongful termination in violation of public policy and intentional infliction of emotional distress against all of the defendants. The complaint alleged that Cutler's employment contract expired on April 30, 2005, but also that the contract would be renewed after April 30, 2005, unless terminated for cause, and Cutler's employment continued under the contract after April 30, 2005.

A jury trial commenced on July 10, 2008. At the conclusion of Cutler's case-in-chief, defendants moved for nonsuit on the cause of action for breach of contract on the ground that the contract ended April 30, 2005, as a matter of law. The trial court found that the contract was ambiguous. For example, the provision stating that Cutler's performance would be evaluated after 6 months was not equivalent to providing that Cutler's employment would terminate unless his immigration status was resolved. The court noted that the ambiguities in the employment agreement should be resolved against defendants who drafted the contract. In addition, the jury could reasonably find that Cutler was continuously employed for eight months based on the evidence, rather than finding that he worked six months for InterCare and two months for Meridian Holdings.

Therefore, the court concluded that the breach of contract issues should be decided by the jury.

The trial court granted a motion for nonsuit as to the Medical Group. The court determined that the checks drawn on the Capnet bank account to pay fees related to Cutler's immigration application were insufficient evidence as a matter of law to support finding an employment relationship between the Medical Group and Cutler. Defendants noted that no alter ego claim had been made. The court granted a motion for nonsuit on the causes of action for defamation and intentional infliction of emotional distress as against Dike. The following day, the court found that under the circumstances of the case, Dike could not be held individually liable in the sole remaining cause of action against him for wrongful termination. The court granted a motion for a directed verdict in favor of Dike.

The jury found that the written contract between Cutler and InterCare was in effect after April 30, 2005, and until Cutler was terminated. Moreover, InterCare and Meridian Holdings constitute a "single employer." InterCare and Meridian Holdings breached the contract by terminating Cutler on June 27, 2005. Cutler's past economic damages through May 1, 2008, were $60,000.

In addition, Cutler's report of possible HIPAA violations was a motivating reason in the decision to discharge him and the wrongful termination caused Cutler damages. However, because the jury had awarded the same economic damages for breach of contract, it did not award any economic damages for wrongful termination. The jury awarded past non-economic damages of $2,500. They found InterCare and Meridian Holdings acted with malice, oppression, or fraud in terminating Cutler.

The parties presented evidence to the jury relevant to punitive damages. As of March 31, 2006, Meridian Holdings' total assets were $4,472,605 and total liabilities were $876,200. As of September 30, 2007, InterCare's total assets, separate from Meridian Holdings, were $294,141 and total liabilities were $47,967. InterCare's total net income for the first nine months of 2007 was $395,398. Dike testified that at the time of trial, InterCare's liabilities totaled $123,000 and the company had no income in 2008.

In addition, he testified that Meridian Holdings had lost all of its contracts as of February 2007 and had no income after July 2007. The jury awarded punitive damages of $2,500 against InterCare and $5,000 against Meridian Holdings. The trial court entered judgment against InterCare and Meridian Holdings on August 25, 2008. InterCare and Meridian Holdings filed a timely notice of appeal on September 5, 2008.

On September 26, 2008, Cutler filed a motion to pierce the corporate veil and add Dike as a judgment debtor. Cutler argued that the evidence at trial showed the entities shared employees, equipment and offices, and that Dike routinely disregarded the separate corporate entities. Dike opposed the motion on several grounds, including that Meridian Holdings is a publicly traded company, Dike successfully defended against individual liability, and it was unfair to subject him to individual liability under an alter ego theory that could have been alleged at trial.

On October 22, 2008, Cutler filed a motion for an award of attorney fees based on the written employment contract. Cutler requested a lodestar amount of $309,525 with a multiplier of two. On November 17, 2008, the trial court amended the August 25, 2008 judgment nunc pro tunc to add Dike as a judgment debtor and award costs to Cutler of $16,156.36. A hearing was held on the motion for an award of attorney fees on November 26, 2008, but none of the defendants appeared. The court awarded attorney fees of $309,525 to Cutler. On December 10, 2008, Dike filed a timely notice of appeal from the judgment.

DISCUSSION

Standard of Review

"[F]actual findings made by the trier of fact are generally reviewed for substantial evidence. [Citations.] Factual issues may be reviewed de novo when the facts are uncontroverted and only one deduction or inference may reasonably be drawn. [Citations.]" (*Ermoian v. Desert Hospital* (2007) 152 Cal.App.4th 475, 500-501.)

"Under the substantial evidence standard of review, our review begins and ends with the determination as to whether, on the entire record, there is substantial evidence, contradicted or uncontradicted, which will support the trial court's factual determinations. [Citations.]" (*Id*. at p. 501)

The standard of review for the motion to amend the judgment to add Dike as an alter ego is also reviewed for substantial evidence to support the trial court's conclusion. (*Wollersheim v. Church of Scientology* (1999) 69 Cal.App.4th 1012, 1014-1015.)

Breach of Contract Allegations in the Complaint

Appellants contend for the first time on appeal that the operative complaint failed to state a cause of action for breach of a written contract, because the allegations of the complaint admitted the written contract expired on April 30, 2005, and the written contract was not attached to the complaint or set forth verbatim. However, we conclude that appellants presented the issue of the contract's expiration date for a jury determination, and therefore, under the "theory of trial" doctrine, they cannot change their theory on appeal.

"The doctrine of waiver ordinarily prevents a party from arguing for the first time on appeal questions that were not presented to the trial court. [Citations.] The doctrine of invited error prevents a party from asserting an alleged error as grounds for reversal when the party through its own conduct induced the commission of the error. [Citations.]" (*County of Los Angeles v. Southern Cal. Edison Co.* (2003) 112 Cal.App.4th 1108, 1118.) The "theory of trial" doctrine is a related rule of appellate practice: "Where the parties try the case on the assumption that a cause of action is stated, that certain issues are raised by the pleadings, that a particular issue is controlling, or that other steps affecting the course of the trial are correct, neither party can change this theory for purposes of review on appeal." (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 407, p. 466; see also *County of Los Angeles v. Southern Cal. Edison Co., supra*, at p. 1118; *Hilliard v. A. H. Robins Co.* (1983) 148 Cal.App.3d 374, 392.)

"The most common application of the theory of trial doctrine is to curable defects of pleadings that were ignored at the trial. Thus, the case may be tried on the theory that a complaint states a cause of action or an answer states a good defense." (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 409, p. 468; see also *Nelson v. Dept. Alcoholic Bev. Control* (1959) 166 Cal.App.2d 783, 788.) "The case may be tried on the theory that a particular issue is raised by the pleadings, in which case there can be no objection on appeal that evidence was admitted on that issue (variance), or that instructions were given on it." (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 410, p. 469.)

"[P]arties are not permitted to '"adopt a new and different theory on appeal. To permit [them] to do so would not only be unfair to the trial court, but manifestly unjust to the opposing litigant." [Citations.]' [Citations.] Only when the issue presented involves purely a legal question, on an *uncontroverted record and requires no factual determinations*, is it appropriate to address new theories. [Citations.]" (*Mattco Forge, Inc. v. Arthur Young & Co.* (1997) 52 Cal.App.4th 820, 847.)

The instant case was tried on the theory that the pleadings raised whether the written employment agreement ended on April 30, 2005, or the date of Cutler's termination. The trial court found that the contract was ambiguous as to its expiration date, and therefore, the issue was presented to the jury to make factual determinations from conflicting evidence. The jury found the written employment contract was in effect at the time of Cutler's termination. Under the "theory of the trial" doctrine, appellants cannot adopt a new theory on appeal that the complaint failed to state a cause of action based on a judicial admission that the complaint had expired or because the written contract was not attached or set forth verbatim.

In addition, reading the general allegations of the complaint and the breach of contract allegations together, there is no admission that the written contract expired on April 30, 2005. Instead, the complaint alleges that the contract expired on April 30, 2005, but would be renewed at that time unless for cause, and in fact, Cutler's employment continued under the contract after April 30, 2005.

Evidence of Employment Contract

Appellants contend there is no evidence to support the jury's finding that the written employment contract was in effect on the date of Cutler's termination. This is incorrect.

The contract language supported the jury's finding that the agreement was in effect on the date of Cutler's termination. For example, the contract stated that Cutler would be issued certain shares of InterCare stock upon the completion of the first year of the agreement. A logical inference from this provision is that the term of the agreement extended at least a year. The stock provision would be meaningless if the contract expired and was inapplicable after six months.

In addition, Dike admitted the contract contemplated an employment period longer than six months, which would depend on Cutler's visa status and performance evaluation as of April 30, 2005. Cutler also testified that the agreement was in effect beyond April 30, 2005, as well.

As a result of our conclusion that there is substantial evidence to support the finding that the written contract was in effect at the time of Cutler's termination, there is no need to address appellants' additional contention on appeal that Cutler's employment was terminable at will in the absence of an agreement of the parties under Labor Code section 2922.

Appellants also contend that the jury erroneously found the H-1B visa application was evidence of an employment contract, because the jury awarded damages through May 1, 2008. This is completely incorrect. As noted above, there was substantial evidence to support the jury's finding that the written employment contract extended through the date of Cutler's termination. The verdict form asked the jury to award damages through May 1, 2008. The jury's award of $60,000 for economic damages was far less than Cutler's total salary through May 1, 2008. There is no support for appellants' contention.

Breach of Employment Agreement

Appellants contend there is no substantial evidence to support finding Dike breached the employment agreement by terminating Cutler without cause. We disagree.

The evidence showed that Cutler's performance was exemplary. He received shares of InterCare stock several months before the accrual date provided in the employment contract. A few weeks prior to his termination, Dike informed Cutler that he intended to approach InterCare's board of directors to request a promotion for Cutler to president of InterCare. The evidence was that the server crashed due to lack of memory and resources for the computer systems, not as a result of Cutler's performance. A reasonable trier of fact could disbelieve Dike's claim that 10 years of data was lost as a result of the system crash and lack of back-up for the data, because user complaints were continually addressed in revised versions of the software. Cutler objected to a computer consultant's proposed solution of the issues with the network and stated his concerns in writing that the proposed solution could lead to a violation of patient privacy laws. A reasonable trier of fact could conclude that no good cause was demonstrated for Dike's termination of Cutler following Cutler's notice of potential HIPAA violations as required under Cutler's job description as privacy officer. The jury's finding is supported by substantial evidence.

Amount of Economic Damages

Appellants contend that the jury's findings failed to account for Cutler's duty to mitigate his damages. "[T]he question whether an injured party acted reasonably to mitigate damages is a matter to be determined by the trier of fact and that the scope of review on appeal is circumscribed by the 'any substantial evidence rule.' [Citations.]" (*Green v. Smith* (1968) 261 Cal.App.2d 392, 397, fn. omitted.) The jury was properly instructed on Cutler's duty to mitigate his damages. The amount awarded by the jury for economic damages was not the full amount of Cutler's salary from the date of his

termination to the date of trial. Appellants have failed to demonstrate on appeal that the jury did not take Cutler's reasonable effects to mitigate his damages into account in awarding economic damages.

Wrongful Termination in Violation of Public Policy

Appellants contend they are not liable for wrongful termination in violation of public policy, because there is no evidence to support a finding they breached any duties under HIPAA or violated Labor Code section 1102.5. We disagree.

Under HIPAA, "covered entities" must "[e]nsure the confidentiality, integrity, and availability of all electronic protected health information the covered entity creates, receives, maintains, or transmits" and "protect against any reasonably anticipated threats or hazards to the security or integrity of such information." (45 C.F.R. §§ 164.306(a)(1)-(a)(2).) Covered entities must also "[i]dentify the security official who is responsible for the development and implementation of the policies and procedures required by this subpart for the entity." (45 C.F.R. § 164.308(a)(2).)

Labor Code section 1102.5, subdivision (c) provides that "[a]n employer may not retaliate against an employee for refusing to participate in an activity that would result in a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation."

An employee who alleges retaliatory termination under Labor Code section 1102.5 "need not prove an actual violation of law; it suffices if the employer fired him for reporting his 'reasonably based suspicions' of illegal activity. [Citation.]" (*Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 87.) To constitute a protected activity, the employee must have an actual belief that the employer's actions were unlawful, and that belief, even if mistaken, must be reasonable. (*Carter v. Escondido Union High School Dist.* (2007) 148 Cal.App.4th 922, 933-934.)

"[A]t-will employees may recover tort damages from their employers if they can show they were discharged in contravention of fundamental public policy. (*Tameny [v.*

Atlantic Richfield Co. (1980) 27 Cal.3d 167, 177 (*Tameny*)].)" (*Green v. Ralee Engineering Co.*, *supra*, 19 Cal.4th at p. 71.) "[E]mployees who assert *Tameny* claims must show that the important public interests they seek to protect are 'tethered to fundamental policies that are delineated in constitutional or statutory provisions.' [Citation.]" (*Green v. Ralee Engineering Co.*, *supra*, at p. 71.) "[A]lleged violations of internal practices that affect only the employer's or employee's interest, and not the general public's interest, will not give rise to tort damages. [Citation.]" (*Id.* at p. 75.)

The evidence in this case showed there was no working firewall to protect confidential patient information from exposure on the internet if a second network interface card was installed as recommended by the computer consultant. Cutler reasonably believed from his job description in his contract that his job duties included acting as privacy officer. He also reasonably believed the database used to test the ICE software contained confidential patient information which would be exposed in violation of HIPAA, because Dike had told him it was patient information. Moreover, it was reasonable to believe confidential patient data would be used in the future as the program was implemented. Cutler refused to participate and voiced his objections to configuring the computer system in a way that he reasonably suspected would violate HIPAA rules and regulations. The protection of confidential patient information is clearly the type of general public interest that supports a cause of action for wrongful termination in violation of public policy. Substantial evidence supports the jury's finding that appellants are liable for wrongful termination in violation of public policy.

On appeal, appellants contend for the first time that they are not "covered entities" subject to liability under HIPAA. This argument has been waived for failure to raise it at trial. (*County of Los Angeles v. Southern Cal. Edison Co.*, *supra*, 112 Cal.App.4th at p. 1118.) Moreover, Dike admitted at trial that Cutler's job duties were subject to the rules and regulations of HIPAA.

Punitive Damages

A. Effect of Single Employer Finding

Appellants contend the punitive damage awards assessed separately against Meridian Holdings and InterCare amounted to a double recovery in light of the jury's finding that they were a single employer. This is incorrect.

Two corporations, such as a parent corporation and its subsidiary, may be treated as a single employer for the purposes of liability if a four-factor "integrated enterprise" test is met, namely "interrelation of operations, common management, centralized control of labor relations, and common ownership or financial control." (*Laird v. Capital Cities/ABC, Inc.* (1998) 68 Cal.App.4th 727, 737.)

Finding two corporations to be a single employer for the purpose of holding both corporations liable for the plaintiff's damages is not equivalent to finding the two corporations to be a single entity. The jury could properly assess punitive damages against each corporation.

B. Amount of Punitive Damages

Appellants contend the amounts awarded were excessive. We disagree.

"Civil Code section 3294, subdivision (a) permits an award of punitive damages 'for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice.' We review the trial court's award of punitive damages for substantial evidence. [Citation.] 'An award of punitive damages hinges on three factors: the reprehensibility of the defendant's conduct; the reasonableness of the relationship between the award and the plaintiff's harm; and, in view of the defendant's financial condition, the amount necessary to punish him or her and discourage future wrongful conduct. [Citations.]'

[Citation.] Only the third factor is at issue in this case." (*Baxter v. Peterson* (2007) 150 Cal.App.4th 673, 679.)

"'[O]bviously, the function of deterrence . . . will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort. [Citations.] By the same token, of course, the function of punitive damages is not served by an award which, in light of the defendant's wealth . . . exceeds the level necessary to properly punish and deter.' [Citation.] A punitive damage award 'can be so disproportionate to the defendant's ability to pay that the award is excessive for that reason alone.' [Citations.] Accordingly, 'an award of punitive damages cannot be sustained on appeal unless the trial record contains meaningful evidence of the defendant's financial condition.' [Citation.] 'Without such evidence, a reviewing court can only speculate as to whether the award is appropriate or excessive.' [Citation.] Plaintiff bears the burden of proof. [Citation.]" (*Baxter v. Peterson, supra,* 150 Cal.App.4th at p. 680.)

"The court in *Adams* [*v. Murakami* (1991) 54 Cal.3d 105, 116, footnote 7] declined 'to prescribe any rigid standard for measuring a defendant's ability to pay.' Net worth is the most common measure, but not the exclusive measure. (*Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 621, 624-625 [evidence that defendant was 'a wealthy man, with prospects to gain more wealth in the future']; see *Zaxis Wireless Communications, Inc. v. Motor Sound Corp.* (2001) 89 Cal.App.4th 577, 582-583 ['Net worth is too easily subject to manipulation to be the sole standard for measuring a defendant's ability to pay'].) In most cases, evidence of earnings or profit alone are not sufficient 'without examining the liabilities side of the balance sheet.' [Citations.] 'What is required is evidence of the defendant's ability to pay the damage award.' [Citation.] Thus, there should be some evidence of the defendant's actual wealth. Normally, evidence of liabilities should accompany evidence of assets, and evidence of expenses should accompany evidence of income." (*Baxter v. Peterson, supra,* 150 Cal.App.4th at p. 680.)

Cutler presented audited financial information showing that as of March 31, 2006, Meridian Holdings' total assets were $4,472,605 and its total liabilities were $876,200. As of September 30, 2007, InterCare's total assets, which were separate from Meridian

Holdings' assets, were $294,141, total liabilities were $47,967, and total net income for the first nine months of 2007 was $395,398. The jury was entitled to disregard Dike's self-serving testimony that the companies had a negative net worth at the time of trial. The punitive damage awards of $2,500 against InterCare and $5,000 against Meridian Holdings were not excessive in light of the evidence of the companies' financial conditions.

Alter Ego

Appellants contend the trial court's finding that Dike is the alter ego of Meridian Holdings and InterCare is not supported by substantial evidence. We agree.

A. Additional Evidence

In addition to the evidence at trial, Cutler submitted three forms in support of the motion to amend the judgment that had been filed with the Security and Exchange Commission. A SEC form 10QSB for Meridian Holdings, prepared in May 2006, showed that one of the corporation's long-term liabilities was a loan from the majority shareholder/officer in the amount of $60,607. The loan amount had not changed between December 31, 2005, and March 31, 2006. In addition, the corporation's cash flow statement listed the corporation had borrowed $31,459 from the majority shareholder in the first quarter of 2005 but had not borrowed any money from the majority shareholder in the first quarter of 2006.

The SEC form 10QSB for InterCare prepared in April 2007, showed that Dike exercised an option to acquire one million shares of common stock at $0.002 per share on March 10, 2006. In addition, the balance statement prepared December 31, 2006, stated that the corporation's current liability for "advances from officer" was $26,500 in 2005 but totaled only $7,549 at the end of 2006. The cash flow statement for the year ending

December 31, 2006, reflected that reimbursement payments of $18,951 had been made to the officer.

The SEC form 10QSB for InterCare prepared in November 2007 included its balance sheet showing that the liability for "advances from officer" had increased from $7,549 at the end of 2006 to $42,273 as of September 2007.

B. Applicable Law

"Ordinarily, a corporation is regarded as a legal entity, separate and distinct from its stockholders, officers and directors, with separate and distinct liabilities and obligations." (*Sonora Diamond Corp. v. Superior Court* (2000) 83 Cal.App.4th 523, 538.) However, " '[a]s the separate personality of the corporation is a statutory privilege, it must be used for legitimate business purposes and must not be perverted. . . .' [Citation.]" (*Mesler v. Bragg Management Co.* (1985) 39 Cal.3d 290, 300.) "A corporate identity may be disregarded—the 'corporate veil' pierced—where an abuse of the corporate privilege justifies holding the equitable ownership of a corporation liable for the actions of the corporation. [Citation.] Under the alter ego doctrine, then, when the corporate form is used to perpetrate a fraud, circumvent a statute, or accomplish some other wrongful or inequitable purpose, the courts will ignore the corporate entity and deem the corporation's acts to be those of the persons or organizations actually controlling the corporation, in most instances the equitable owners. [Citations.] The alter ego doctrine prevents individuals or other corporations from misusing the corporate laws by the device of a sham corporate entity formed for the purpose of committing fraud or other misdeeds. [Citation.]" (*Sonora Diamond Corp. v. Superior Court, supra*, at p. 538.)

"Under [Code of Civil Procedure] section 187, the court has the authority to amend a judgment to add additional judgment debtors. [Citation.] [¶] Judgments are often amended to add additional judgment debtors on the grounds that a person or entity is the alter ego of the original judgment debtor. [Citations.] This is an equitable

procedure based on the theory that the court is not amending the judgment to add a new defendant but is merely inserting the correct name of the real defendant. [Citations.] 'Such a procedure is an appropriate and complete method by which to bind new individual appellants where it can be demonstrated that in their capacity as alter ego of the corporation they in fact had control of the previous litigation, and thus were virtually represented in the lawsuit.' [Citation.]" (*NEC Electronics Inc. v. Hurt* (1989) 208 Cal.App.3d 772, 778.)

Two general requirements must be met before the alter ego doctrine will be invoked: (1) there must be such unity of interest and ownership that the separate personalities of the corporation and the shareholder do not in reality exist, and (2) the result will be inequitable if the acts are treated as those of the corporation alone. (*Sonora Diamond Corp. v. Superior Court, supra,* 83 Cal.App.4th at p. 538.)

Among the factors to be considered in applying the doctrine are: "the commingling of funds and other assets; the failure to segregate funds of the individual and the corporation; the unauthorized diversion of corporate funds to other than corporate purposes; the treatment by an individual of corporate assets as his own; the failure to seek authority to issue stock or issue stock under existing authorization; the representation by an individual that he is personally liable for corporate debts; the failure to maintain adequate corporate minutes or records; the intermingling of the individual and corporate records; the ownership of all the stock by a single individual or family; the domination or control of the corporation by the stockholders; the use of a single address for the individual and the corporation; the inadequacy of the corporation's capitalization; the use of the corporation as a mere conduit for an individual's business; the concealment of the ownership of the corporation; the disregard of formalities and the failure to maintain arm's-length transactions with the corporation; and the attempts to segregate liabilities to the corporation." (*Mid-Century Ins. Co. v. Gardner* (1992) 9 Cal.App.4th 1205, 1213 & fn. 3.) "No one characteristic governs, but the courts must look at all the circumstances to determine whether the doctrine should be applied." (*Sonora Diamond Corp. v. Superior Court, supra,* 83 Cal.App.4th at p. 539.) "The courts have cautioned against

relying too heavily in isolation on the factors of inadequate capitalization or concentration of ownership and control." (*Mid-Century Ins. Co. v. Gardner, supra*, at p. 1213.)

"Alter ego is an extreme remedy, sparingly used." (*Sonora Diamond Corp. v. Superior Court, supra,* 83 Cal.App.4th at p. 539.) "In almost every instance where a plaintiff has attempted to invoke the doctrine he is an unsatisfied creditor. The purpose of the doctrine is not to protect every unsatisfied creditor, but rather to afford him protection, where some conduct amounting to bad faith makes it inequitable, under the applicable rule above cited, for the equitable owner of a corporation to hide behind its corporate veil." (*Associated Vendors, Inc. v. Oakland Meat Co.* (1962) 210 Cal.App.2d 825, 842.)

C. Trial Court Finding

The trial court's finding that Dike is the alter ego of Meridian Holdings and InterCare is not supported by substantial evidence. There is no evidence that Dike commingled his personal funds with those of the corporations. To the contrary, the evidence showed that Dike's shareholder loans were well-documented. There is no evidence that Dike diverted corporate funds for other than corporate purposes. There is no evidence that he treated corporate assets in any manner other than as his positions in the corporations allowed. There is no evidence that he failed to seek authority to issue stock. There is no evidence that he represented he would be personally liable for any of the corporations' debts. There is no evidence that the corporations failed to maintain adequate records or minutes, or mingled his personal records with corporate records. In fact, the evidence showed extensive filings were submitted to the SEC and corporate formalities were maintained. There is no evidence that Dike and his family are the sole owners of the stock in the corporations. Other shareholders are listed in the SEC filings. There is no evidence that the corporations were undercapitalized at the time of their formation. In addition to Dike's signature on Cutler's employment agreement, the signatures of two

InterCare board members were obtained. When Dike intended to promote Cutler to president of InterCare, he told Cutler that he would need to speak to the board and make the recommendation. After the presentation of Cutler's evidence at trial, the court found there was no basis for individual liability against Dike. Although Meridian Holdings and InterCare were found to be a single enterprise, there is no evidence from which to find that Dike disregarded the separate corporate existence of the enterprise and can be held liable as the alter ego of Meridian Holdings or InterCare. The nunc pro tunc amendment to the judgment adding Dike as a judgment debtor must be reversed.

DISPOSITION

The judgment against Anthony C. Dike, M.D., is reversed. Costs on appeal are awarded to Anthony C. Dike, M.D. In all other respects, the judgment is affirmed. Costs on appeal are awarded to David Cutler against Meridian Holdings, Inc. and InterCare DX, Inc.

KRIEGLER, J.

We concur:

ARMSTRONG, Acting P. J.

MOSK, J.