2d Civil No. B189274

IN THE COURT OF APPEAL
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT - DIVISION THREE

ESTEE MOORE,

Plaintiff and Appellant,

v.

COUNTY OF LOS ANGELES, et al.

Defendants and Respondents,

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Appeal from Los Angeles County Superior Court
The Honorable James R. Dunn
Los Angeles County Superior Court Case No. BC 305526

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# RESPONDENTS' BRIEF

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**Court of Appeal**
**State of California**
**Second Appellate District**

# CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Court of Appeal Case Number: B189274

Case Name: Moore v. County of Los Angeles, et al.

Please check the applicable box:

[ X ] There are no interested entities or parties to list in this Certificate per California Rules of Court, Rule 8.208.

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## INTRODUCTION

"With, at times, well-controlled exasperation appellate courts have pointed out that when an appellant claims error occurred in the trial court, he must present a record disclosing the error relied upon and enabling an appellate court to review and correct it. He has the burden of producing a record which overcomes the presumption of validity favoring a judgment or order." (*Weiss v. Brentwood Sav. & Loan Assn*. (1970) 4 Cal.App.3d 738, 746.) An appellant may not evade or shift her responsibility on appeal by challenging the respondents to prove the trial court was right, or by placing the burden of discovering any error on the appellate court. (*Paterno v. State of California* (1999) 74 Cal.App.4th 68, 102.) When the appellant fails to meet her burden, the court should affirm the judgment. (*Hernandez v. California Hospital Medical Center* (2000) 78 Cal.App.4th 498, 502.)

As we explain in greater detail in the pages that follow, plaintiff and appellant Estee Moore has provided less than an adequate record for the court to review her assignments of error, which are also improperly asserted in summary form, without adequate analysis, citations to the record or pertinent authority. Moreover, the partial record she has provided amply demonstrates that any error – which she has not shown – was harmless and, therefore, the judgment should be affirmed.

## STATEMENT OF THE CASE AND RELEVANT FACTS

Plaintiff Estee Moore contends she was sexually harassed by defendant Raymond Johnson while both were working for defendant County of Los Angeles. She sued Johnson, the County, and several other County employees – Jane McCord, Dr. Charles Grob, and Imelda Allen – for injuries allegedly resulting from the harassment. (Joint Respondents' Appendix ["RA"] 4.)[1]

The case went to trial in October 2005 on claims of harassment (hostile work environment), disability discrimination (failure to accommodate), negligence and intentional infliction of emotional distress. (RA 45, 143, 147, 149, 151.) Defendants Allen and Grob were dismissed on motions for a directed verdict, and plaintiff has not challenged those dismissals on appeal. (RA 80; 7 Reporter's Transcript ["RT"] 1554.)

On November 4, 2005, the jury returned a special verdict in plaintiff's favor against defendant Johnson for $60,000, and against plaintiff in favor of the defendants County and McCord. (RA 87-98.) As relevant to this appeal: (1) the County was not negligent; (2) McCord and Johnson were negligent; (3) Johnson's negligence was a legal cause of plaintiff's injury, and he was not acting in the scope of his employment at the time; and (4) McCord's negligence was not a legal cause of plaintiff's injury, although she was acting in the scope of her employment at the time. (Appellant's Appendix ["AA"] 141, 143-144.)

Plaintiff filed a motion for new trial before judgment was entered, on grounds of juror misconduct, inconsistent verdict, insufficiency of the evidence, and errors in admitting and excluding evidence, among other

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[1] A more complete statement of the events leading up to the lawsuit appears in Johnson's respondent's brief, which we adopt to the extent the additional facts are relevant to the issues addressed in this brief.

things. (AA 80.) She presented declarations from four jurors – Mattie Johnson, Carol Sellers, Itzen Small and Jill Person – and argued that they showed that several jurors were unduly influenced by the jury foreperson or other jurors; that jurors did not understand the instructions or special verdict form and, in particular, were confused about the meaning of the word "substantial"; that jurors concealed biases, failed to deliberate, failed to follow the law, and relied on outside information – i.e., one juror's statement that his wife had been involved in a similar lawsuit. (AA 60, 65, 69, 74, 91-97.) Plaintiff also challenged some of the trial court's evidentiary rulings – in particular, the exclusion of a letter dated March 3, 2003, from the County to plaintiff, indicating that her complaints of harassment were "substantiated" and assigning Johnson to another department (the so-called "letter of determination"), as well as the inclusion of plaintiff's husband's criminal conviction, for the purpose of showing its effect on plaintiff. (AA 99-102.)

Defendants opposed the motion and objected to each of the juror declarations on numerous grounds, including "impermissible use of a juror declaration to show 'confusion' regarding an instruction to the jury or relevant law to impeach a verdict [citation], impermissible use of a juror declaration to demonstrate the subjective mental processes of other jurors [citation], impermissible use of a juror declaration to demonstrate misunderstanding of the verdict form [citation], hearsay not subject to any exception [citation] and speculative and lacking foundation as to the understanding and thought processes of other jurors [citation]." (RA 189-190; see also, 191-205.) The trial court sustained most of the objections, leaving little more than a few innocuous sentences in three of the declarations: Basically, all that remained were statements that one of the jurors said that his wife had been involved in a similar situation and that all plaintiff wanted was money, and other statements that the jurors "all did

agree that Dr. McCord harmed Mrs. Moore within the scope of her employment." (AA 62 [ll. 6-7], 70 [ll. 16-17], 76 [ll. 3-4].) The court excluded the fourth declaration, Jill Person's, entirely, on the ground that, as an alternate juror who was never called to deliberate, Person had no first hand knowledge of what happened during deliberations. (AA 134.)

The trial court denied plaintiff's motion for new trial on January 13, 2006. (AA 129.) On January 27, 2006, the court entered judgment in favor of the County and McCord against plaintiff, and in favor of plaintiff against Johnson. (AA 158.) Plaintiff appealed on March 8, 2006. (AA 160.)

## LEGAL DISCUSSION

### I. THE JUDGMENT SHOULD BE SUMMARILY AFFIRMED BECAUSE PLAINTIFF HAS WAIVED ALL ISSUES ON APPEAL BY DESIGNATING A PARTIAL REPORTER'S TRANSCRIPT AND FAILING TO IDENTIFY IN HER NOTICE OF APPEAL THE ISSUES SHE INTENDED TO PURSUE ON APPEAL.

Rule 8.130(a)(6) of the California Rules of Court provides that, in designating a reporter's transcript, "[i]f the appellant designates less than all of the testimony, the notice [of appeal] must state the points to be raised on appeal; the appeal is then limited to those points unless, on motion, the reviewing court permits otherwise." Accordingly, where the appellant designates only a partial reporter's transcript, appellate courts have refused to review issues not specified in the notice of appeal. (*James G. Freeman & Associates, Inc. v. Tanner* (1976) 56 Cal.App.3d 1, 3, fn. 1; 8, fn. 6; 10; *Calhoun v. Davis* (1953) 121 Cal.App.2d 167, 171.)

Here, plaintiff filed a form notice of appeal from a "judgment after jury trial" and a "judgment after an order granting a summary judgment motion." (AA 147.) Without identifying her issues for appeal, as required by rule 8.130, plaintiff then designated only a small portion of the trial proceedings to be transcribed: Three days of pre-trial hearings; seven out of 22 trial days, three of which were jury selection days; and the hearing on plaintiff's motion for new trial. Although 19 witnesses testified at trial, plaintiff designated the testimony of only one, Liz Price, to be included in the record on appeal. (AA 166 [designation]; RA 45-100 [minute orders from trial, showing dates and witnesses].) That bits and pieces of the testimony of five other witnesses (Grob, McCord, Johnson, Moore, and

Hwang [1 RT indices behind p. C-85]) appear in the transcript on appeal appears to be fortuitous – perhaps because it occurred on days that plaintiff had designated to be transcribed for other reasons. (See AA 166, and RA 55-56 [10/11/05], 59-60 [10/14/05].) However, even with the additional transcriptions, the record does not come close to being complete: Ultimately, only portions of the testimony of only about one-third of the witnesses appear in the transcript. Excluded is most of the trial testimony (and, therefore, most of the evidence), as well as opening statements and closing arguments. (AA 166; RA 53-54, 80-84.) Yet, despite this very abbreviated record, plaintiff's notice of appeal does not identify a single issue she intended to raise on appeal, as required by rule 8.130. (AA 147.)

Respondents are not required to guess what issues might be raised on appeal, or to designate (and pay for) a full transcript on the chance that a particular argument *may* be raised. Here, plaintiff filed a form notice of appeal and checked two boxes to identify the "judgment or order" from which the appeal was taken: (1) "Judgment after jury trial" and (2) "Judgment after an order granting a summary judgment motion." (AA 147.) The court docket shows that a motion for summary adjudication was partially granted in November 2004. (AA 180.) However, plaintiff does not even mention the order in her opening brief. (See AOB 1-10.) Thus, until she filed her opening brief, respondents could not know which issues she intended to pursue on appeal and which she might have abandoned.

Plaintiff's failure to comply with rule 8.130 amounts to a waiver of any and all issues on appeal. For this reason, the judgment should be summarily affirmed.

## II. THE TRIAL COURT PROPERLY DENIED PLAINTIFF'S MOTION FOR NEW TRIAL BASED ON JUROR MISCONDUCT.

Evidence Code section 1150 permits the use of juror declarations to impeach a verdict, but only as to "overt acts, objectively ascertainable" – i.e., statements, conduct, conditions, or events "open to sight, hearing, and the other senses and thus subject to corroboration." (*Hasson v. Ford Motor Co.* (1982) 32 Cal.3d 388, 413; *Krouse v. Graham* (1977) 19 Cal.3d 59, 80.) Juror declarations are *inadmissible* to prove "the subjective reasoning process" of an individual juror or the jury as a whole. (*Mesecher v. County of San Diego* (1992) 9 Cal.App.4th 1677, 1682-1683; *Ferreira v. Quik Stop Markets* (1983) 141 Cal.App.3d 1023, 1033-1034.

This rule "serves a number of important policy goals" because it: (1) "excludes unreliable proof of jurors' thought processes and thereby preserves the stability of verdicts," (2) "deters the harassment of jurors by losing counsel eager to discover defects in the jurors' attentive and deliberative mental processes," (3) "reduces the risk of post-verdict jury tampering," and (4) "assures the privacy of jury deliberations by foreclosing intrusive inquiry into the sanctity of jurors' thought processes." (*Hasson v. Ford, supra,* 32 Cal.3d at p. 414; *People v. Steele* (2002) 27 Cal.4th 1230, 1261-1262.)

> In ruling on a request for a new trial based on jury misconduct, the trial court must undertake a three-step inquiry. First, it must determine whether the affidavits supporting the motion are admissible. If the evidence is admissible, the trial court must determine whether the facts establish misconduct. Lastly, assuming misconduct, the trial court must determine whether that misconduct was prejudicial.

(*Sierra View Local Health Care Dist. v. Sierra View Medical Plaza Associates, LP* (2005) 126 Cal.App.4th 478, 484 [citations omitted].) "A trial court has broad discretion in ruling on each of these issues, and its rulings will not be disturbed absent a clear abuse of discretion." (*Ibid*.) Thus, the reviewing court must "accept the trial court's credibility determinations if supported by substantial evidence." (*Enyart v. City of Los Angeles* (1999) 76 Cal.App.4th 499, 507.)

Plaintiff contends the trial court erred in denying her motion for new trial based on jury misconduct. She relies on four juror declarations submitted with her new trial motion. (AOB 11-22.) As we now explain, for procedural and substantive reasons, the judgment must be affirmed.

### A. Plaintiff Has Effectively Waived Any Error With Respect To The Juror Declarations By Failing To Challenge, or Adequately Challenge, The Trial Court's Rulings On Defense Objections.

On appeal, plaintiff relies heavily on the four declarations by jurors Johnson, Sellers, Small and Person that she submitted with her new trial motion. (AOB 11, 17-18, 21, 23, 24; AA 60-78.) The trial court sustained multiple defense objections to all four declarations, resulting in completely excluding one of the four and seriously gutting the other three. (AA 133-134; see RA 186, 189-205.)

Since the objections were made on multiple grounds, plaintiff cannot succeed on appeal unless she demonstrates that *no valid objection* was made, because any valid objection would be grounds for affirming the judgment. (*Warmington Old Town Associates v. Tustin Unified School Dist*. (2002) 101 Cal.App.4th 840, 864 [judgment must be affirmed on any

valid ground that appears on the record].) Plaintiff doesn't come close to meeting this burden.

For example, she makes repeated references to Person's declaration in her opening brief, but does not challenge the trial court's ruling excluding the entire declaration because Person had no knowledge of what happened during jury deliberations. (See AOB 18, 21, 24.) Plaintiff also cites the remaining declarations repeatedly, not distinguishing between portions that were admitted and portions that were excluded – and since most were excluded, this is particularly troublesome. (AOB 11, 17-18, 21, 23, 24.)

Curiously, plaintiff asserts that the trial court's order sustaining the objections "was confusing and made no sense." (AOB 25.) She points to the trial court's use of "the alphabet to identify which paragraphs were inadmissible," while the paragraphs in the juror declarations were numbered. (*Ibid*.) This is patently absurd. The trial court's order did not identify "which paragraphs were inadmissible" (*ibid*.), but rather, which *objections* were sustained. The defendants' objections were lettered, not numbered and, therefore, the reference to lettered paragraphs in the court's order clearly refers to the defendants' objections and not the paragraphs in the declarations themselves – something that should have been obvious to plaintiff if she had included the defense objections in her appellant's appendix. (AA 133-134; RA 189-196.)

Plaintiff refers to paragraphs in the declarations by number only, often without a citation to the record, and does not quote from the declarations at all. She merely asserts, in summary fashion, that the declarations (1) "do not fail as hearsay . . . as they are not offered 'to prove the truth of the matter[s] stated'" (AOB 24); (2) were "based upon personal knowledge, describing events to which each of the declarants was a percipient witness" (*ibid*.) and (3) "do not involve opinion testimony or lack

foundation" (*ibid*.). She makes no effort to explain how this applies to any statements in particular. This is insufficient on appeal to establish either error in or prejudice from the trial court's ruling. (*Cislaw v. Southland Corp*. (1992) 4 Cal.App.4th 1284, 1298 [failure to present argument operates as waiver of issue].)

This court is not required to take on the appellant's burden and to comb the record looking for error. (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246.) Points not argued or argued in summary fashion, or unsupported by citations to authority or the record are deemed waived. (*Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 979.) Since plaintiff has not met her burden of showing any error in the trial court's evidentiary rulings, she may not rely on the excluded statements on appeal.

### B. In Any Event, There Was No Error In The Trial Court's Evidentiary Rulings.

Evidence Code section 1150 prohibits "testimony concerning statements made by jurors in the course of their deliberations" if the statements are "simply a verbal reflection of the juror's mental processes." (*People v. Duran* (1996) 50 Cal.App.4th 103, 112-113.) As explained in *Mesecher v. County of San Diego*, *supra*, 9 Cal.App.4th at pp. 1683-1684, "the subjective quality of one juror's reasoning is not purged by the fact that another juror heard and remembers the verbalization of that reasoning." Thus, evidence of "statements made" by jurors, even during deliberations, is not admissible where it "implicate[s] the reasoning processes of jurors – e.g., what the juror making the statement meant and what the juror hearing it understood." (*In re Stankewitz* (1985) 40 Cal.3d 391, 398 [cited at AOB 11].)

Among other things, juror declarations are inadmissible to show:

- The reasons given by a juror for his or her vote. (*People v. Duran*, *supra*, 50 Cal.App.4th at p. 113.)
- What the juror or other jurors believed or "felt." (*Akers v. Kelley Co.* (1985) 173 Cal.App.3d 633, 657, disapproved on another ground in *People v. Nesler* (1997) 16 Cal.4th 561; *People v. Steele*, *supra*, 27 Cal.4th at p. 1261.)
- The jurors were confused, misinterpreted jury instructions, or misunderstood the verdict form. (*Akers v. Kelley Co.*, *supra*, 173 Cal.App.3d at p. 657; *Mesecher v. County of San Diego*, *supra*, 9 Cal.App.4th at pp. 1682-1683; *Bly-Magee v. Budget Rent-A-Car Corp.* (1994) 24 Cal.App.4th 318, 325.)
- The jurors failed to review all of the evidence. (*Akers v. Kelley Co.*, *supra*, 173 Cal.App.3d at p. 657.)
- Not all jurors agreed with the ultimate verdict. (*Ibid.*)

Here, plaintiff's juror declarations consisted almost entirely of such inadmissible evidence. The portions of the declarations stricken by the trial court stated essentially the following:

- Some jurors were confused because English was not their primary language. (AA 62.)
- The jurors were confused about the law and the special verdict form, so they accepted the foreperson's explanation of the form, the law, and the jury instructions, and they voted the way he told them to. (AA 61, 70-71, 75.)
- The jury found in favor of the County because some jurors believed that plaintiff simply wanted money and that she would probably get some money from the County regardless of the verdict. (AA 71.)

- During deliberations, the foreperson said that he had seen plaintiff laughing at Johnson when Johnson cried on the stand; even though no other juror made a similar statement, some jurors accepted this description of the testimony. (AA 76.)
- Juan Flores became the jury foreperson on his own initiative, without a vote. (AA 77.)
- One juror believed that the foreperson was biased against plaintiff because he said that she lied on the stand and was less credible than McCord because McCord had a Ph.D. (AA 75.)
- Some jurors believed that other jurors had their minds made up before the deliberations began. (AA 70, 76.)
- The jurors felt pressured to reach a verdict because they believed that some jurors might not be getting paid or might not be returning to continue deliberations the next day, so they voted the way the foreperson wanted them to vote. (AA 62, 71, 76-77.)
- Some of the jurors were frustrated with the outcome of the trial and believed that plaintiff had not received a fair trial. (AA 72, 78.)

These statements all contain inadmissible evidence because they purport to describe the reasons given by jurors for their votes; what the jurors believed or felt; that the jurors were confused, misinterpreted jury instructions or misunderstood the verdict form, and failed to review all of the evidence or did not all agree on the verdict. The trial court properly excluded them under Evidence Code section 1150. (RA 189-205; Evid.

Code §§ 702, 800, 1200, 350; *Eisenberg v. Alameda Newspaper Inc.* (1999) 74 Cal.App.4th 1359, 1375-1376.)[2]

### C. Plaintiff Is Not Entitled To A Presumption Of Prejudice; But Even If She Were, The Record Provided Shows That Any Error Was Not Prejudicial.

To succeed on appeal, an appellant must show that any error resulted in prejudice. (*Robbins v. Los Angeles Unified School Dist.* (1992) 3 Cal.App.4th 313, 318.) This is accomplished not merely by argument and citations to the record and pertinent legal authority, but also by providing an adequate record of the trial court proceedings to enable the appellate court to review the points raised. (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 574; *Nelson v. Anderson* (1999) 72 Cal.App.4th 111, 136.)

> [A] record is inadequate, and appellant defaults, if the appellant predicates error only on the part of the record he provides the trial [*sic*] court, but ignores or does not present to the appellate court portions of the proceedings below which may provide grounds upon which the decision of the trial court could be affirmed.

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[2] In her opening brief, plaintiff reproduces part of the reporter's transcript of the jury poll after the verdict was rendered, contending that it shows how the jury foreperson used undue influence on other jurors. (AOB 12-17, citing 7 RT 1816-1819, 1840-1842.) In fact, it shows no such thing. Moreover, a review of the entire record of the poll reveals a lot of confusion about how to answer the clerk's questions: i.e., did "yes" mean "I voted yes" or "I voted no"? (See, e.g., 7 RT 1821, 1828, 1846-1847.) At best, the passage cited by plaintiff demonstrates jurors attempting to assist their colleagues in recalling how they voted and nothing more. Indeed, plaintiff admitted as much on the record during polling. (7 RT 1843 [Ms. Haney: "I don't think that they're trying to coach her. I think they're trying to remind her she changed her mind"].)

(*Osgood v. Landon* (2005) 127 Cal.App.4th 425, 435, internal quotations omitted.) Where the record is silent, the reviewing court must presume that the judgment of the trial court is correct. (*Baker v. Children's Hospital Medical Center* (1989) 209 Cal.App.3d 1057, 1060.) The absence of an adequate record for review requires affirmance of the judgment. (*Weiss v. Brentwood Sav. & Loan Assn*. (1970) 4 Cal.App.3d 738, 746.)

Plaintiff contends she is not required to show prejudice in this appeal, at least with respect to jury misconduct, arguing that misconduct gives rise to a presumption of prejudice that respondents must rebut. (AOB 24.) Not necessarily. In *Ballard v. Uribe, supra,* 41 Cal.3d at p. 574, for example, the Supreme Court affirmed a judgment where the plaintiff challenged the trial court's order denying a new trial on grounds that jury misconduct resulted in an inadequate damage award, but failed to designate a transcript of the voir dire proceeding or the portion of the trial relating to damages that would permit the court to determine from the record whether any misconduct was prejudicial. Similarly in *Worthington Corp. v. El Chicote Ranch Properties, Ltd.* (1967) 255 Cal.App.2d 316, 318-320, the judgment was affirmed where the appellant asserted attorney misconduct during closing argument, but failed to include the arguments of counsel in the record on appeal. (Cf. *Osgood v. Landon, supra,* 127 Cal.App.4th at p. 435 [court found analysis of issues raised on appeal was "severely impair[ed]" by lack of a reporter's transcript of the relevant hearing].) As the Supreme Court explained in *Hasson v. Ford Motor Co., supra,* 32 Cal.3d at p. 416, "[t]he presumption of prejudice is an evidentiary aid to those parties who are able to establish *serious misconduct* of a type likely to have had an effect on the verdict . . ., yet who are *unable* to establish by a preponderance of the evidence that actual prejudice occurred." (Emphasis added.)

Plaintiff does not even attempt to show that she is "unable" to establish actual prejudice, which would require review of the entire record. Instead, citing *People v. Nesler*, *supra*, 16 Cal.4th 561 ("*Nesler*"), plaintiff argues that, in determining whether misconduct was prejudicial, the evidence at trial is "non-dispositive" and "moot." (AOB 23.) However, far from finding the trial evidence "moot" or even "non-dispositive," the Supreme Court in *Nesler* looked extensively at the trial evidence to determine whether the misconduct "was substantially related to important matters raised during trial." (16 Cal.4th at p. 585.)

The question there was whether a juror's receipt of extrajudicial information about the defendant – she overheard people in a bar talking about the defendant's drug use and poor mothering skills – which she then reported to the rest of the jury was "substantially related" to the evidence of plaintiff's sanity (the issue the jury was deciding when the misconduct occurred). In looking at the *entire record*, the court found that "the issues being debated by the jury when [the juror] interjected extrajudicial information were significant to the jury's evaluation of expert opinions about whether defendant was sane at the time she committed the offense." (*Ibid*.) One expert testified that he "needed to know" whether the defendant was using drugs over a regular period of time in order to assess whether a drug may have caused temporary psychosis on the day of the crime. (*Ibid*.) Another expert relied heavily on plaintiff's protective tendencies towards her children in determining whether she was capable of distinguishing between moral right and wrong. (*Id*. at p. 584.) What the juror overheard was relevant to both of these issues.

Moreover, *Nesler* was a criminal case which, unlike a civil case, requires a unanimous verdict. If there is a likelihood of actual bias by one of the 12 jurors, then there is a good chance that it may have affected the verdict. "'[A] conviction cannot stand if even a single juror has been

improperly influenced.'" (*Id*. at p. 578.) In a civil case, however, only nine jurors have to agree on the verdict. (*Glage v. Hawes Firearms Co.* (1990) 226 Cal.App.3d 314, 322.) If the vote is close, a single juror's actual bias may be enough to taint the verdict; but if the vote is not close, the verdict may not have been affected at all by one, two or even three biased jurors. (See *Watson v. Los Angeles Transit Lines* (1958) 157 Cal.App.2d 112, 116 [no prejudice from established misconduct where vote was 10-2 and offending juror was one of the two dissenting votes]; cf. *Lankster v. Alpha Beta Co.* (1993) 15 Cal.App.4th 678, 683-684 ("*Lankster*") [presumption of prejudice not rebutted where serious misconduct found (jurors conducted their own investigation) and vote was 9 to 3].)[3]

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[3] *Lankster*, *supra*, may have reached the right result, but its analysis is flawed in several ways. First, in concluding that the respondent bears the burden of establishing no prejudice as a result of any misconduct – including providing an adequate record for review – the court relied on two cases that did *not* involve the burden of establishing prejudice, but rather involved the burden of establishing an *alternate basis* for affirming a new trial order where the ground given by the trial court could not be upheld for procedural reasons. (*Tagney v. Hoy* (1968) 260 Cal.App.2d 372, 376-377; *Gaskill v. Pacific Hosp. of Long Beach* (1969) 272 Cal.App.2d 128, 130-131.) In both cases, the court properly put the burden on the moving party in the trial court to demonstrate a ground for affirming the new trial order – an issue not involved in *Lankster*; thus, the court's reliance on the two older cases was misplaced. Second, the court in *Lankster* found no difference between reviewing orders granting new trial motions and reviewing orders denying new trial motions – a conclusion with which the California Supreme Court does not agree at all. (*People v. Ault* (2004) 33 Cal.4th 1250, 1261-1262.) Third, the court in *Lankster* reasoned that it was logical to put the burden of establishing no prejudice from misconduct on the respondent because the respondent wants the judgment affirmed. (*Lankster*, *supra*, 15 Cal.App.4th at p. 683.) By this superficial reasoning, the respondent would *always* bear the burden of establishing no prejudice, regardless of the issues raised, because the respondent *always* wants the judgment affirmed. As explained above, this is not the general rule.

(continued...)

Here, the jury voted unanimously on most of the questions – and in particular, on the question of whether McCord's negligence was a "substantial factor" in causing plaintiff injury, voted 12 to 0 that it was not. (AA 141-142.) Plaintiff has not shown that even one juror was actually biased; but even if she had, it would not be enough to demonstrate that the verdict would likely have been affected by it. Indeed, the record, showing the unanimous vote, affirmatively establishes that plaintiff suffered no prejudice as a result of any juror bias.

Since plaintiff failed to meet her initial burden of demonstrating serious misconduct that was likely to have affected the verdict, she is not entitled to a presumption of prejudice. Moreover, since the record affirmatively demonstrates she was *not* prejudiced, the judgment must be affirmed.

## III. PLAINTIFF HAS NOT DEMONSTRATED ANY IRREGULARITY IN THE PROCEEDINGS OR ERROR IN LAW WARRANTING A NEW TRIAL.

Plaintiff contends a new trial is warranted for irregularity in the proceedings, error in law, and an inconsistent verdict. She asserts that the jury did not understand the meaning of the word "substantial," and that the verdict form was confusing, which resulted in the verdict being inconsistent and against the law. (AOB 20, 26-28, 32.) All these contentions must be rejected.

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[3] (...continued)
(*Robbins v. Los Angeles Unified School Dist*., *supra*, 3 Cal.App.4th at p. 318 ["'The burden is on the appellant, not alone to show error, but to show injury from the error'"].)

First, the record shows that the parties *agreed* on the verdict form before it was given to the jury. (7 RT 1895 ["The verdict form was approved by all parties"].) Plaintiff has not shown anything in the record to demonstrate that she objected to any portion of the form, or offered a different form. Accordingly, plaintiff cannot assert error in the verdict form itself. (*Mayes v. Bryan* (2006) 139 Cal.App.4th 1075, 1089-1090; *Correll v. Clark Equipment Co.* (1978) 76 Cal.App.3d 548, 553; *Smith v. Americania Motor Lodge* (1974) 39 Cal.App.3d 1, 7.)

Second, the jury was properly instructed on the definition of "substantial factor" (RA 121), so there was no need for the jury to ask the court for a definition. (See AOB 26.) The verdict form did not itself offer another definition of the phrase and, therefore, could not have confused the jury in this regard. Moreover, it is pure speculation to say the jury was in any way confused. The record shows the jury knew how to get answers: It took advantage of asking questions of the court and requesting readback of some of the testimony. (RA 85-86.)

Third, plaintiff contends that the verdict was inconsistent – even "incomprehensible" – because the jury purportedly found both that McCord had and had not harmed plaintiff. (AOB 1, 27-28.) She points to the jury's findings that: (1) McCord's conduct was not a substantial factor in causing plaintiff injury; and then (2) on the subject of "vicarious liability," that McCord "was acting within the scope of her employment *when she harmed Estee Moore*." (AA 141-144, emphasis added.) Plaintiff takes issue with the italicized phrase, arguing that the latter finding is the equivalent of a finding that McCord's conduct was, in fact, a substantial factor in causing harm to plaintiff, which completely contradicts the jury's earlier, specific finding that it was not. (AOB 27-28.) This strained interpretation of the verdict must be rejected.

The special verdict form was 13 pages long and contained questions about three defendants on five separate causes of action. (RA 143-155.) After completing the form for the five causes of action, the jury was then asked to determine whether the County should be held vicariously liable for the wrongful acts of its employees with respect to two of those causes of action. (RA 153.) The form instructed the jury to answer the vicarious liability question for Johnson and/or McCord if they "answered 'Yes' to Question No. 1 in the cause of action for Negligence and/or the cause of action for Intentional Infliction of Emotional Distress." (RA 153.)

If there was a flaw, it was in the verdict form, not in the jury's verdict. Question number 1, in either cause of action, asked only about the defendants' conduct: Were the defendants negligent and was their conduct outrageous? (RA 149, 151.) The jury answered "yes" to question 1 on the negligence claim for McCord, and so the jury answered the vicarious liability question for her, as they were instructed to do. (RA 153.) But finding McCord "negligent" was not enough to hold her or the County liable for her conduct because it does not answer the whole question – which also includes whether that negligence was a substantial factor in causing harm to the plaintiff. To be accurate, the form should have directed the jury to answer the vicarious liability question only if it answered "yes" to the first *two* questions of the negligence claim. The wording of the vicarious liability question supports this position, because it *assumed* that the jury had already found both negligence *and causation* before moving on to that question. The question was clearly intended to address only McCord's status *at the time plaintiff was injured*, and only if the jury determined that her conduct was a substantial factor in bringing about the harm. If the form had been worded correctly, the jury never would have reached the question of vicarious liability for McCord since it had already

answered the second question on the negligence claim "no." (RA 149.) Thus, the jury's answer for McCord on vicarious liability was superfluous.

Finally, any error in the verdict form – even if it was not waived by plaintiff's approval of the form – was completely harmless. The jury answered a question that it would not have answered at all if the form had given them proper directions. Thus, the superfluous answer was properly disregarded by the trial court. (*People v. Allen* (1974) 41 Cal.App.3d 821, 826 ["the jury's finding was beyond the scope of its duties and should be disregarded"].)[4]

Plaintiff cites a handful of cases for the general proposition that an inconsistent verdict should be reversed, but she does not discuss any of the cases or even attempt to explain how they compel reversal of the judgment. (AOB 20.) They do not. Plaintiff has not met her burden on appeal.[5]

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[4] Moreover, even if the vicarious liability question could be read to include a finding that McCord "harmed" plaintiff, it would not create an inconsistent verdict. An act may be a cause *in fact* of plaintiff's injury, but not a *legal* cause. (See *Sagadin v. Ripper* (1985) 175 Cal.App.3d 1141, 1160 ["Once it has been established the defendant's conduct has been a cause in fact of the injury, there remains the question of whether it was also the proximate or legal cause"].) The jury had already found that McCord's conduct was not a *substantial* factor, and arguably the vicarious liability question – which only used the word "harmed" without "substantial" – was broad enough to include cause in fact that was not a legal cause. Thus, the verdict could be interpreted to mean that the jury found McCord's conduct, though *a* factor in plaintiff's injury, was not a *substantial* factor warranting imposition of liability.

[5] Plaintiff also argues, without analysis or explanation, that the parties agreed to determine "percentages" after the verdict, but failed to do so "because of the confusion regarding the verdict form *and just plain forgetting*." (AOB 28, emphasis added.) Whatever this is supposed to mean, it clearly is not a proper ground for reversing the judgment. This court reviews trial court errors, and does not cure things that the parties simply "forgot" to do. (*Richaud v. Jennings* (1993) 16 Cal.App.4th 81, 91

(continued...)

## IV. PLAINTIFF HAS NOT SHOWN INSUFFICIENT EVIDENCE TO SUPPORT THE VERDICT.

Under the title "Insufficiency of the Evidence," plaintiff argues both that the jury "did not consider the evidence" and that the "evidence relied on by the jury was insufficient." (AOB 28.) Neither argument is fully developed; nor does plaintiff explain how this court is to determine whether there was insufficient evidence to support the verdict without reviewing the evidence adduced at trial, which has largely been excluded from the record on appeal.

Plaintiff seems to fault one or more of the jurors for believing McCord rather than plaintiff. (AOB 28.) But this is not error. In fact, it is the jury's function to determine credibility of witnesses. (See *People v. Hunter* (1989) 49 Cal.3d 957, 977.) There can be no error as a result of the jury doing its job.[6]

## V. THE TRIAL COURT PROPERLY EXCLUDED THE COUNTY'S "LETTER OF DETERMINATION."

In a section entitled "Error in the Law," plaintiff contends that the trial court improperly excluded from evidence the County's "Letter of Determination." (AOB 29; AA 15.) In this March 11, 2003, letter to

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[5] (...continued)
[a trial judge "cannot be faulted for failing to do what he wasn't asked to do"].)

[6] Plaintiff also argues that the jury may have reached a different verdict if additional evidence had been admitted. (AOB 28.) But this does not make the verdict unsupported by the evidence. Rather, it appears to be a challenge of the trial court's evidentiary rulings, which we address in the next section.

plaintiff, the "Acting Personnel Officer" for the County states that plaintiff's complaint of harassment "has been substantiated" and that "corrective action" had been taken, though it does not specify what complaint is referenced. (AA 15.) Plaintiff argues the letter demonstrates "just how long it took for County to finally investigate and reach a conclusion" and that, without this information, the jury was "forced not to consider any liability on the part of County." (AOB 29.) She also contends the letter was an admission on the part of the County, relevant "for the purpose of showing to what degree the County enforced its own policy." (AOB 29-30.) However, plaintiff has made no attempt to explain what all this means. Indeed, plaintiff has not even shown where in the record the letter was offered into evidence and for what purpose, or what the trial court's reasoning was for refusing to admit it.

In fact, the record shows that the court took considerable time in deciding whether to admit the letter, and eventually excluded it because "its probative value is outweighed by the probability that its admission will create a substantial danger of undue prejudice, confusing the issues and misleading the jury." (7 RT 1598.) In reaching its conclusion, the court considered that the conclusion reached in the letter was "made under [an] entirely different standard of evaluation and burden of proof," and that it included hearsay not subject to cross-examination. (1 RT C-80.)

"The trial court is vested with wide discretion in determining the admissibility of evidence" (*People v. Karis* (1988) 46 Cal.3d 612, 637), and its determination that probative value is outweighed by potential prejudice "'will not be disturbed except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice'" (*People v. Celis* (2006) 141 Cal.App.4th 466, 476). Plaintiff makes no such showing in her opening brief.

Plaintiff contends the County took no steps, or no adequate steps, to deter future harassment (AOB 30), but she does not cite to the record or to any evidence to support her factual assertions. Thus, the court may disregard them. (*Pringle v. La Chapelle* (1999) 73 Cal.App.4th 1000, 1003 ["No reporter's transcript or other items pertinent to these issues have been provided. There are insufficient citations to the record to enable us to verify the facts asserted. . . . Without the proper record, we cannot evaluate issues requiring a factual analysis"].) Moreover, without a complete record of the evidence presented at trial, there is no way to substantiate her claims that the County presented "no evidence" on any particular subject.

Plaintiff contends she made "repeated objections and requests for a limiting instruction" (AOB 29) with respect to the letter of determination, but, she does not cite to the record, explain what her objections were, or what the proposed limiting instruction was. Her summary conclusion that, if the letter had been admitted, the jury may have reached a different conclusion does not in any way establish the admissibility of the document, or demonstrate an abuse of discretion by the court in excluding the evidence because of undue prejudice, confusion and consumption of time. Plaintiff contends any privilege associated with the letter has been waived (AOB 31), but, again, she doesn't cite to any place in the record where a privilege was asserted – and the record shows that it was not excluded on the basis of any privilege. (See 7 RT 1598.)

Plaintiff further contends that the evidence on both sides should have been "equal" – i.e., that the court should have permitted the letter of determination as "negative" evidence against McCord because it admitted so-called "negative" evidence against plaintiff, which was her husband's criminal record. (AOB 28.) This is not a ground for reversal. The jury was properly instructed that it must decide the case based on the facts, not based on the number of witnesses or exhibits, and plaintiff has introduced no

evidence that the jury disregarded this instruction. (RA 109; see *Glage v. Hawes Firearms Co.*, *supra*, 226 Cal.App.3d at p. 326 [improper for jury to list and count witnesses and then vote in favor of party with the most witnesses].) Plaintiff cites no cases that require a court to admit and exclude evidence evenly as to both sides or all parties.

Plaintiff's assertion that the jury "still should have reached a different conclusion" even without the letter of determination is completely unsupported: She merely avers, without discussion or analysis, that a review of "the entire record" – which she has not provided to the court, in any event – reveals that "the jury clearly should have reached a different verdict on all causes of action." (AOB 29.) However, she completely fails to explain how this is so.

Finally, even if plaintiff could establish that the letter was improperly excluded, the meager record she has provided this court, which includes barely one-third of the trial testimony, does not afford this court a basis for determining whether any error was prejudicial. (*Weiss v. Brentwood Sav. & Loan Assn.*, *supra*, 4 Cal.App.3d at p. 746.) Accordingly, the judgment must be affirmed.

## VI. PLAINTIFF HAS NOT DEMONSTRATED REVERSIBLE ERROR IN THE TRIAL COURT'S DECISION TO ADMIT EVIDENCE REGARDING PLAINTIFF'S HUSBAND'S CRIMINAL RECORD.

Plaintiff contends the trial court erroneously admitted her husband's criminal record into evidence and claims she was "surprised" because the defense allegedly "never produced the evidence until it was presented at trial." (AOB 32.) What she fails to do is explain: (1) when, how and why the evidence was offered at trial; (2) whether and on what grounds plaintiff

objected to the evidence in the trial court; (3) that the defense was under any obligation to produce the evidence before trial; or (4) what effect producing the evidence earlier may or may not have had on the admissibility of the evidence at trial. For this reason, the issue must be considered waived.

Although she has not demonstrated any error in admitting the criminal record, plaintiff goes on to argue the evidence was "most prejudicial" because it "had nothing to do with whether or not Johnson harassed her." (AOB 32.) First, this court does not even reach the prejudice issue unless and until the appellant demonstrates error – and she has not. Second, plaintiff admits the evidence was not offered to prove she was or was not harassed; rather, it was admitted for the sole purpose of establishing plaintiff's mental state when she alleges she suffered emotional distress as a result of the defendants' actions, and the jury was given a proper limiting instruction to this effect. (AOB 31.) Thus, it doesn't matter if the evidence was unrelated to the harassment issue. And to the extent it is plaintiff's argument that the trial court abused its discretion in determining that the probative value of the evidence outweighed any prejudicial risk, plaintiff's "conclusionary assertions are wholly inadequate to tender a basis for relief on appeal." (*Osgood v. Landon, supra*, 127 Cal.App.4th at p. 435.)

## CONCLUSION

Plaintiff has not met her burden on appeal. She failed to comply with rule 8.130 of the California Rules of Court, and she has not provided an adequate record to show either error or prejudice from any error. This alone is enough to warrant affirming the judgment, but coupled with her failure to provide adequate legal analysis or proper citations to the record and relevant authority, demands that the judgment be affirmed.

Moreover, the partial record plaintiff has provided this court amply demonstrates that either that there was no error, or that any possible error by the trial court was harmless. For this reason as well, the judgment should be affirmed.

Dated: June 13, 2007

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.204 (c)(1), I certify that this Respondents' Brief is proportionately spaced, has a typeface of 13 points and contains 7,219 words not including the Certificate of Interested Entities or Persons, tables of contents and authorities, caption page, signature blocks, or this Certificate of Compliance.

Dated: June 13, 2007

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By_____
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