

**ESTEE MOORE, Plaintiff and Appellant, v. COUNTY OF
LOS ANGELES et al., Defendants and Respondents.**

B189274

**COURT OF APPEAL OF CALIFORNIA, SECOND
APPELLATE DISTRICT, DIVISION THREE**

2008 Cal. App. Unpub. LEXIS 581

January 24, 2008, Filed

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PRIOR HISTORY: [*1]

APPEAL from a judgment of the Superior Court of Los Angeles County, No. BC305526. James R. Dunn, Judge.

DISPOSITION: Affirmed.

COUNSEL: Law Offices of Gloria Dredd Haney and Gloria Dredd Haney for Plaintiff and Appellant.

Greines, Martin, Stein & Richland, Martin Stein, Carolyn Oill, Lillie Hsu; Law Offices of David J. Weiss, David J. Weiss, Amir Nayebdadash and Peter Shahriari for Defendants and Respondents County of Los Angeles, Charles Grob, Jane McCord and Imelda Allen.

Peterson & Bradford, George E. Peterson, Michael A. Vacchi; Pollak, Vida & Fisher and Daniel P. Barer for Defendant and Respondent Raymond Johnson.

JUDGES: KLEIN, P.J.; CROSKEY, J., KITCHING, J. concurred.

OPINION BY: KLEIN

OPINION

Estee Moore appeals a judgment entered following a jury trial that resulted in a verdict in her favor on causes of action against a co-worker, Raymond Johnson, but in favor of the defense on Moore's causes of action against her employer, the County of Los Angeles, and Moore's supervisor, Jane McCord, Ph.D. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

1. Overview.

Moore, a clerk/typist employed by the Department of Mental Health (DMH) of the County of Los Angeles (the County), sued the County and numerous County employees on various [*2] work-related causes of action. The case went to the jury against the County, Moore's supervisor Jane McCord, Ph.D., and Moore's co-worker Raymond Johnson, on causes of action alleging hostile workplace, intentional infliction of emotional distress, negligence and violation of the Fair Employment and Housing Act for the County's failure to accommodate Moore's multiple sclerosis (M.S.). The jury returned a special verdict in favor of the County and McCord but found in favor of Moore against Johnson and awarded \$ 60,000 in non-economic damages. At a punitive damages phase, the jury found Johnson acted with malice but awarded no punitive damages.

The trial lasted 21 court days from October 3, 2005, through November 4, 2005. However, Moore's notice of appeal designated a reporter's transcript that included only seven days of trial and only four of the designated days included the testimony of witnesses. Although 22 witnesses testified at trial, the record on appeal contains testimony from only six witnesses and not all of the testimony of these witnesses is included. Moore testified over six trial days but the record on appeal contains only the first day of her testimony. The record on appeal [*3] does not include the opening statements and closing arguments of the parties, the cross-examination of Moore or any testimony presented by the defendants. Moore's appendix contains only 12 of the 63 exhibits admitted at trial.

The factual summary that follows is based on the available record.

2. Evidence adduced at trial.

Moore commenced working for the County in 1985 and in 1998 was working in the Child and Adolescence Psychiatry Clinic when Johnson moved into an office across the hall from Moore. Johnson immediately began to stare at Moore inappropriately. In February of 1999, Moore was diagnosed with M.S. and she took time off work. During this time, Johnson telephoned Moore at home and said their supervisor, McCord, had asked Johnson to call Moore to find out how to input certain data into the computer. During this conversation, Johnson said he was available to visit Moore at home to "cut [her] cake" while Moore's husband was out of town. Moore was shocked. When Moore returned from medical leave, Johnson made inappropriate remarks to Moore on a regular basis.

On August 3, 1999, McCord held a meeting attended by some members of the clinic's staff to address complaints regarding Johnson. [*4] Moore arrived late for the meeting and did not get a chance to speak. As a result, Moore filed a written complaint against Johnson on August 6, 1999, in which she described the telephone call from Johnson and Johnson's unwelcome comments about Moore's appearance. Moore also indicated Johnson swore at her, pinched her and slapped her on the forehead with papers. Moore again complained in writing on April 13, 2000, that Johnson tripped Moore in front of witnesses. Moore indicated this incident, as well as Johnson's previously reported conduct, made her uncomfortable working around Johnson. On April 17, 2000, McCord

gave Moore a memo stating Johnson had been instructed not to speak directly with, or leave voice mail messages for, Moore. In April of 2002, Moore filed a written complaint that asserted Johnson had confronted Moore angrily in the mailroom.

McCord testified she supervised Moore from 1998 until the fall of 2001. As a result of Moore's first written complaint in August of 1999, Johnson was instructed to have no further contact with Moore and was directed to give completed referrals to McCord, rather than Moore. This ruling was not reduced to writing because it was the first complaint [*5] regarding sexual harassment that had been made as to Johnson. As a result of Moore's complaint in April of 2000, human resources was contacted and an investigation was initiated. McCord admitted she asked Johnson to telephone Moore at home while Moore was off work to get Moore's help inputting data into a computer. Johnson later told McCord that Moore had been displeased about being contacted at home.

Lizzie Price, an administrative assistant who supervised Moore after 2001, testified that, as a result of a grievance Moore filed with her union, interim restrictions dated December 4, 2002, were put into place to limit the amount of contact Moore would have with Johnson. Moore was to park to the north of the building and enter on the north; Johnson on the south. Johnson was also directed to avoid certain areas of the office and he was to access the copy machines by going directly from his office into the reception area. Johnson complained of difficulty adhering to these restrictions because of his limited vision. On December 10, 2002, Moore complained that Johnson had been seen in the restricted area. Price and McCord went over the restrictions with Johnson and clarified them. McCord [*6] concluded the written restrictions differed from what previously had been discussed with Johnson. In February of 2003, Johnson was reassigned to another DMH facility.

Johnson testified he tried to avoid Moore after her initial complaint in 1999. Johnson denied he ever made comments about Moore's appearance or that he pinched Moore. Johnson also denied that he tripped Moore in April of 2000. Johnson was upset by Moore's complaints.

Charles Grob, a director of DMH, testified he discussed restrictions with Johnson on two occasions, once in August of 1999 and again in April of 2002. On both occasions, Johnson denied Moore's complaints.

3. The special verdict.

The case went to the jury on a 13-page special verdict form that contained questions about the County, McCord and Johnson on five separate causes of actions. In response to these questions, the jury found Moore was subjected to a hostile work environment by Johnson, but not McCord and, although the County had reason to know of the conduct, it did not fail to take immediate and appropriate corrective action. The jury also found the County did not fail to provide reasonable accommodations for Moore's M.S. The jury found the County was not [*7] negligent but Johnson and McCord were. However, only Johnson's negligence was a substantial factor in causing Moore harm. With respect to the count of intentional infliction of emotional distress, the jury found Johnson's conduct was outrageous but that the conduct of McCord and the County was not. With respect to vicarious liability, the jury found Johnson was not acting within the course and scope of

his employment when he harassed Moore but that McCord was. With respect to damages, the jury awarded Moore \$ 35,000 for past non-economic loss and \$ 25,000 for future non-economic loss.

4. *Polling of the jurors.*

When the court clerk polled the jury with respect to the special verdict, the trial court noted the questions posed to the jurors were confusing. The trial court instructed the clerk to ask the jurors whether they voted yes or no on each question. At several points during the polling, one or another of the jurors conferred with the juror being polled. Counsel for Johnson objected that jurors must respond for themselves. Shortly thereafter, counsel for Johnson again objected that the question being posed to the juror, "is this your verdict," was ambiguous because each question on [*8] the special verdict had been answered yes or no.

The trial court conducted a side bar conference at which it noted Juror No. 8 had become confused. The trial court suggested the jury retire to the jury room to permit Juror No. 8 to look at her notes to determine what her verdict had been. Johnson's counsel noted the jurors surrounding the confused juror were attempting to coach her and asked that the jury be admonished, when they returned from the jury room, not to coach the juror. Moore's counsel stated: "I don't think that they're trying to coach her. I think they're trying to remind her she changed her mind."

The trial court then directed the jury to return to the jury room to permit Juror No. 8 to review her notes. The trial court indicated the juror had to decide the issue for herself. The trial court told the jury to take as long as it needed to obtain each juror's "considered judgment on this question." The matter then resumed with Juror No. 8 indicating she found McCord was negligent.¹

1 The record indicates the reading of the verdict commenced at 1:47 p.m. The polling of the jury followed the reading of the verdict and the jury went back to the jury room at 2:26 p.m. and returned [*9] at 2:44 p.m. The polling process ended at 3:09 p.m.

5. *Punitive damages phase of the trial.*

The punitive damages phase consisted of the testimony of Johnson, who indicated he now was totally disabled, he pays child support of \$ 600 per month and his only source of income is a VA disability of \$ 1,619 per month. Johnson has \$ 40,000 in a 401k plan but would have to pay a 30 percent penalty if he withdrew the money before age 62, and he was 54 at the time of trial.

The jury found Johnson acted with malice but awarded no punitive damages. When the trial court thanked the jurors for their service, two jurors cried. Juror No. 2 (the foreperson) indicated the jury was not unsympathetic to Moore but the deliberations had been "difficult and emotional."

6. *Moore's motion for new trial.*

In support of her motion for new trial, Moore submitted declarations from three jurors and one alternate juror.²

2 The trial court excluded the entire declaration of the alternate juror from evidence on the ground the alternate juror did not deliberate and thus had no firsthand knowledge of what happened during the deliberations. We agree the alternate juror's declaration is not relevant to Moore's motion for new [*10] trial and omit the contents of the declaration from this factual summary.

a. *Declaration of Juror No. 9.*

Juror No. 9, Mattie J., stated the foreperson, Juan F., Juror No. 2, "unduly influenced those jurors who were confused about the meaning of words within the verdict form and who did not understand the verdict form." Juror No. 9 indicated the foreperson "caused much confusion when he explained the word 'substantial,' " which appeared in the negligence instructions "meant that Ms. Moore [had to have been] severely injured." Juror No. 9 indicated the jury found McCord's negligence was not a substantial factor in causing Moore's injury based on the foreperson's "undue influence and out of confusion and frustration"

Juror No. 9 averred that, after the trial court answered a question from the jury regarding the use of the law and/or the policy of the County, the foreperson told the jury to rely on the law, not the County policy, and the jury did as it was instructed by the foreperson.³ Juror No. 9 further averred that juror Caesar N. was biased and made reference during deliberations to the fact that his wife and her employer had been sued for discrimination and his wife had gone [*11] through the same thing the individual defendants in this case had gone through. Although Caesar N. mentioned this lawsuit in voir dire, he did not inform the trial court of his bias. Juror No. 9 told Caesar N. it was inappropriate for him to attempt to influence the jury by comparing his wife's lawsuit to this one, but Caesar N. remained biased throughout the deliberations.

3 Moore asserts that, during deliberations, the jury asked the trial court whether the jury should apply the law or the County's policy. The trial court responded: "You must decide the case based on California law. That California law is contained solely in the instructions the court has read to you. You have copies of those instructions with you in the jury room. You must decide each cause of action by determining whether the elements set forth in the instructions have been proved. In making those determinations you must consider all the evidence in the case, including evidence of any County policy relevant to an issue in the case, and any testimony regarding such policy, including its operation and implementation."

Juror No. 9 further asserted one of the jurors who was fluent in Spanish had to translate for another [*12] juror. Also, on Friday, November 4, 2005, the last day of deliberations, there was pressure to end deliberations because some jurors threatened not to return after the weekend because they would no longer be paid by their employers and Juror Joel S. mentioned vacation plans.

b. *Declaration of Juror No. 12.*

The declaration of Juror No. 12, Carol S., states the foreperson unduly influenced the Mexican American jurors who did not understand the verdict form and some of the words used on it. Juror No. 12 stated the foreperson told these jurors how to vote, including Juror Nos. 1, 3 and 8. The foreperson also told the jurors they could not use the County policy, only the law. Juror No. 12 stated Juror Caesar N. prejudged the evidence because his wife had been a defendant in a similar lawsuit. Although the jurors agreed McCord was negligent, they could not agree whether her negligence had been a substantial factor in causing Moore injury because they did not understand the meaning of the word "substantial" as it was used in the instructions. The foreperson would not allow the jury to ask the court to explain the word and said substantial meant that Moore had to be severely injured by McCord. [*13] The jury eventually applied the meaning ascribed by the foreperson. The jurors decided the County would not be held liable because the foreperson and Caesar N. said Moore only wanted money and Moore would recover from the County because of her M.S. in any event. There was also a threat that one juror would not return if deliberations were not concluded on Friday. Juror No. 12 claimed several of the jurors knew they had made the wrong decision and stayed after trial to discuss how they had been coerced into voting the way the foreperson suggested. Juror No. 12 concluded Moore did not have a fair trial because of undue influence of the foreperson, confusion with the verdict form, bias on the part of some jurors and pressure to return a verdict before they lost a juror.

c. Declaration of Juror No. 4.

Juror No. 4, Itzen S., declared the foreperson unduly influenced jurors who were confused by the verdict form. The foreperson immediately expressed bias against Moore by stating she must have lied on the stand because her testimony conflicted with McCord's testimony. With respect to whether McCord was negligent, the foreperson asserted that, in order for McCord to have been a substantial factor [*14] in causing Moore injury, Moore had to have suffered severe injury. Although the jurors agreed McCord harmed Moore, they did not understand the meaning of the word "substantial" and applied the foreperson's meaning of the word. The jurors became frustrated with the foreperson's overbearing nature and eventually voted the way he told them to vote. The foreperson also told the jury he saw Moore laughing when Johnson cried on the stand in the punitive damages phase. Juror No. 4 became so upset with the foreperson's negative impact on the jurors that she moved from the jury table at one point because she did not want to take part in the sabotage of the deliberations. In addition to Caesar N.'s comments about his wife's lawsuit, Juror Joel S. indicated Moore should be accused of charges. Juror No. 4 believed these jurors did not deliberate in good faith and made their minds up before deliberations began. Juror No. 4 had to translate from time to time for another juror. After the foreperson sent a note to the trial court regarding the use of the law or the policy of the County, the foreperson said they had to rely on the law and could not refer to the policy. Also, there was pressure to end [*15] the deliberations because some jurors would not be paid after Friday, November 4, 2005, and Juror Joel S. had a planned vacation. The jurors decided, out of frustration, to vote as the foreperson told them.

7. Opposition to Moore's motion for new trial.

In opposition to the motion for new trial, the defense submitted a declaration from Juror No. 5, Joel S., in which he averred the foreperson did not influence him or his

decision and he did not witness the foreperson pressuring anyone to reach a verdict. Juror No. 5 further indicated he was not confused by any words in the verdict form and he believes the other jurors also understood the form. Juror No. 5 disavowed any bias against Moore and did not observe any bias in the foreperson. Juror No. 5 denied he threatened not to continue deliberations if the jury had to return the following Monday.

8. *The trial court's ruling.*

The trial court denied Moore's motion for new trial. The trial court sustained objections to the declarations of juror nos. 9 and 12 except to overrule objections to the statement by Caesar N. that Moore wanted money and Caesar N.'s wife had gone through a similar lawsuit and the observation that Caesar N. appeared angry. [*16] The trial court found "most of the [juror] declarations [submitted in support of the motion for new trial] are inadmissible" under *Evidence Code section 1150, subdivision (a)*, and "to the extent they are admissible they do not show misconduct."

With respect to the claim the jury was confused by the verdict form, the trial court noted the parties approved the verdict form and the trial court had taken great pains to poll the jury in order to ensure that the jurors understood the verdict.

CONTENTIONS

Moore contends the jury committed numerous instances of misconduct, irregularities in the proceedings require reversal, the trial court erroneously excluded evidence favorable to Moore and the jury awarded inadequate damages.

The defendants contend Moore has waived her appellate claims by designating a record on appeal that does not include a reporter's transcript of all the testimony adduced at trial and failing to state in the notice of appeal the points to be raised on appeal.

DISCUSSION

1. *The issues raised by Moore are not cognizable on appeal due to the inadequacy of her notice of appeal.*

Moore's notice of appeal designated only a small portion of the testimony produced during the jury trial. [*17] Additionally, Moore failed to identify in the notice of appeal the issues she intended to raise on appeal. Where an appellant designates only a partial reporter's transcript, 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." (*Cal. Rules of Court, rule 8.130(a)(2)*; *James G. Freeman & Associates, Inc. v. Tanner (1976) 56 Cal.App.3d 1, 8, fn. 6.*)

In the reply brief, Moore responds that she appealed from the judgment and the order denying her motion for new trial. Moore claims that because the issues raised in the motion for new trial have been reiterated on appeal, the reporter's transcript included in the record is adequate to address Moore's appellate issues which were presented by way of motion for new trial.

Moore's response has some merit if limited to her claims of juror misconduct. However, even in that context, the absence of a complete record of the proceedings below

prevents this court from determining whether the result of the trial might have been different had the jurors not engaged in the alleged misconduct. Where relevant, the discussion that follows notes [*18] our inability to address the merits of Moore's claims.

2. *Moore fails to demonstrate jury misconduct.*

a. *Moore's contentions.*

Moore contends the declarations of the jurors showed juror misconduct in the form of undue influence by the foreperson, failure to understand the verdict form, receipt of outside information, concealment of bias and speculation about the amount of compensation Moore would receive from the County. Moore argues the statements contained in the juror declarations are not hearsay because they are not offered for the truth of the matter asserted. Further, to the extent the declarations relate to occurrences during trial and deliberations, they are admissible.

b. *Relevant legal principles.*

Where a party seeks a new trial based upon jury misconduct, the court must undertake a three-step inquiry. First, the court must determine whether the evidence presented for its consideration is admissible. Once the court finds the evidence is admissible, it must then consider whether the facts establish misconduct. Finally, if misconduct is found to have occurred, the court must determine whether the misconduct was prejudicial. (*People v. Duran* (1996) 50 Cal.App.4th 103, 112-113.) [*19] We review an order denying a motion for new trial based on juror misconduct de novo. (*People v. Nesler* (1997) 16 Cal.App.4th 561, 582, fn. 5.)

Evidence Code section 1150, subdivision (a), addresses the admissibility of juror declarations offered in support of a motion for new trial. It provides: "Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined."

Thus, juror declarations may be used to impeach a verdict, but only as to "overt acts, objectively ascertainable" that are "open to sight, hearing and the other senses and thus subject to corroboration." (*Hasson v. Ford Motor Co.* (1982) 32 Cal.3d 388, 413.) However, declarations of jurors are inadmissible to prove " 'the subjective reasoning process[]' " of the jury. (*Mesecher v. County of San Diego* (1992) 9 Cal.App.4th 1677, 1683.) [*20] "Likewise, evidence about a jury's 'subjective *collective* mental process purporting to show *how* the verdict was reached' is inadmissible to impeach a jury verdict. [Citation.] Thus, juror declarations are inadmissible where . . . they 'at most suggest "deliberative error" in the jury's collective mental process - confusion, misunderstanding, and misinterpretation of the law.' [Citations.]" (*Id.* at p. 1683.)

With these principles in mind, we turn to Moore's contentions.

c. *Application here.*

(1) *Undue influence by foreperson; failure to understand the verdict form.*

Moore claims the declarations of the jurors demonstrate the foreperson exerted undue influence over the jury in that the foreperson urged the jury to disregard the instructions, he convinced the jury to accept his definition of the word substantial thereby causing the jury to conclude McCord's conduct was not a factor in Moore's injury and the foreperson told the jury to rely on the law and not the County policy. Moore relies on an extended quotation of the reporter's transcript of the proceedings in which the jury was polled to demonstrate the influence of the foreperson on the other jurors. Moore notes the foreperson assisted [*21] the individual jurors to recall their vote on various questions. Moore claims the quoted passage demonstrates "the aggressive attempt to influence the jurors in how to respond to the questions set forth in the special verdict form." Moore also claims one juror translated portions of the special verdict for another juror.

Moore's claim of undue influence by the foreperson and her related assertions all relate to the manner in which the jury interpreted and applied the instructions. The declarations setting forth these assertions therefore fall within the proscription of *Evidence Code section 1150, subdivision (a)*, and are inadmissible to impeach the verdict. (*Mesecher v. County of San Diego, supra, 9 Cal.App.4th at p. 1684.*)

With respect to the polling of the jurors, the portion of the reporter's transcript quoted in Moore's opening brief demonstrates the jurors were attempting to assist each other to recall how they voted. Moore's counsel stated, "I don't think that they're trying to coach her. I think they're trying to remind her she changed her mind." Thus, nothing in the quoted passage supports Moore's claim the foreperson unduly influenced the jury.

With respect to Moore's claim the [*22] jury deferred to the foreperson's definition of a substantial factor rather than seeking help from the trial court, the respondents' appendix reveals the jury was instructed on the definition of a substantial factor as follows: "A substantial factor in causing harm is a factor that a reasonable person would consider to have contributed to the harm. It must be more than a remote or trivial factor. It does not have to be the only cause of the harm." Thus, there was no need for the jury to request a definition of the word substantial from the trial court. Also, the jury asked questions of the trial court during deliberations and therefore was aware of this option but chose not to exercise it.

(2) *Refusal to deliberate.*

Moore claims the jury reached a verdict only because one juror indicated he would not return to deliberate the following Monday. This claim is refuted by the declaration of the juror in question and by the polling of the jurors. As the trial court observed in denying Moore's motion for new trial, the trial court went to great lengths to ensure the validity of the verdict and that each of the jurors had voted as reflected on the special verdict form.

(3) *Receipt of outside [*23] information.*

Moore asserts the declarations of the jurors reveal that Juror Caesar N. told the jurors his wife was involved in a similar lawsuit. Moore contends this violates the rule against receipt of information from sources outside the evidence in the case. (*McDonald v. Southern Pacific Transportation Co. (1999) 71 Cal.App.4th 256, 263.*)

In *McDonald*, a juror related to the jury what amounted to an expert opinion that opposed the opinion offered by an expert who testified at trial. Further, the juror's opinion "rebutted a significant element of plaintiff's proof, which was otherwise undisputed." (*McDonald v. Southern Pacific Transportation Co.*, *supra*, 71 Cal.App.4th at p. 264.) Nothing similar occurred here. Caesar N. related only information drawn from his life experiences, not specialized knowledge. As noted in *McDonald*, "Jurors' views of the evidence . . . are necessarily informed by their life experiences . . ." (*Id.* at p. 263.) Moreover, Moore concedes that Caesar N. disclosed his wife's prior lawsuit during voir dire.

(4) *Speculation about compensation from the County.*

Moore contends the jurors inappropriately engaged in speculation about the compensation Moore would receive [*24] from the County and how any award against the County would harm the County. (*Krouse v. Graham* (1977) 19 Cal.3d 59, 81.)

In *Krouse*, the jury inflated the award of damages in order to offset the plaintiff's attorneys fees. *Krouse* vacated the order denying a new trial and remanded the matter to the trial court with directions to reconsider the motion. (*Krouse v. Graham*, *supra*, 19 Cal.3d at pp 81-83.)

On the present record, the remarks of the foreperson that Moore would recover from the County for her M.S. do not appear to amount to misconduct. There was no indication the jurors agreed Moore should not be awarded compensation for the County's failure to accommodate her M.S. Further, because there is no record on appeal related to the manner in which the County accommodated Moore's M.S., it is impossible for this court to determine whether it is reasonably probable the alleged juror misconduct affected the damages awarded in this case. (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 574.)

(5) *Concealment of bias.*

Moore asserts the statements by Juan F., Caesar N. and Joel S. during deliberations contrast with their assurances during voir dire that they would judge this case fairly and impartially and [*25] suggest these jurors gave false answers during the voir dire examination. (*In re Hitchings* (1993) 6 Cal.4th 97, 110-111.) Moore contends these jurors concealed bias in favor of the County and against Moore based on the portions of the juror declarations related to Caesar N.'s statement his wife's employer had been sued for workplace conditions, the indication by the foreperson that Moore would recover from the County for her M.S. regardless of the verdict, the foreperson's comment the jury should credit McCord's testimony because she had a Ph.D., the foreperson's comment that Moore laughed during Johnson's testimony and Joel S.'s comment that if anyone should be accused of anything, it should be Moore. Moore claims that, where the record reveals actual bias, the strength of the trial evidence is irrelevant in that the trial has been shown to be unfair. Because bias has been shown, prejudice must be presumed. (*People v. Nesler*, *supra*, 16 Cal.4th at p. 581.)

As previously noted, the statements by Caesar N. with respect to his wife's lawsuit, and the statements by the foreperson related to Moore's receipt of compensation from the County for her M.S. do not demonstrate misconduct. The additional [*26] comments cited by Moore are consistent with determinations of credibility made by the jury during

trial. These statements appear to be nothing more than a verbal reflection of the juror's mental processes. Consideration of such statements as evidence of the mental process of the jury is barred by *Evidence Code section 1150*. (*Mesecher v. County of San Diego, supra, 9 Cal.App.4th at p. 1684.*)

d. *Conclusion.*

For all the foregoing reasons, Moore's claims of juror misconduct fail.

3. *Moore fails to demonstrate the jury returned an inconsistent verdict.*

Moore notes the jury's verdict was inconsistent in two respects. First, the jury found McCord's negligence was not a substantial factor in causing Moore harm. However, the jury unanimously found McCord was acting in the course and scope of her employment when she harmed Moore. Moore claims this is an irreconcilable inconsistency. Second, although the jury found Johnson's conduct was outrageous and he acted with malice, it awarded no punitive damages. Moore concludes these inconsistencies warrant a new trial. (*Shaw v. Hughes Aircraft Co. (2000) 83 Cal.App.4th 1336, 1344.*)

The record reveals the claimed inconsistency with respect to McCord was [*27] the result of the inexact wording of the special verdict form. The special verdict form addressed negligence in section 4 and vicarious liability in section 6. At the start of section on vicarious liability, the jury was instructed to determine whether Johnson and/or McCord had acted within the scope of their employment when they harmed Moore if, as relevant here, the jury previously had answered "Yes" to the first question on the cause of action for negligence. The first question of the negligence cause of action asked if the named defendant was negligent; the second question asked if the conduct of the named defendant was a substantial factor in causing Moore harm.

The special verdict 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 cause of action. Because the jury already had found McCord was not a substantial cause of Moore's injury in response to question 2 of the negligence cause of action, the jury had no occasion to consider whether the County should be held vicariously liable for McCord's negligence. Had the special verdict form been worded properly, the jury would not have [*28] reached the issue of McCord's vicarious liability. Thus, the inconsistency in the verdict is attributable solely to the improper wording of the special verdict form. Because all parties agreed to the verdict form before it was submitted to the jury and Moore did not object to the special verdict form or submit an alternate, she cannot now complain on appeal. (*Mayes v. Bryan (2006) 139 Cal.App.4th 1075, 1090-1091.*)

With respect to Moore's claim of inconsistency in the failure to award punitive damages despite the jury's finding that Johnson acted with malice, it is apparent the jury found either that Johnson's conduct was not sufficiently egregious to warrant an award of punitive damages or that the non-economic damages awarded in the first phase of the trial were sufficient to redress the harm caused by Johnson. No inconsistency appears.

4. *Exclusion of evidence favorable to Moore.*

Moore claims the trial court erroneously excluded from evidence a "Letter of Determination" dated March 11, 2003, a memo dated August 27, 2003 to Price and a memo dated February 10, 2004, demoting McCord. We address these items in turn.

a. *The Letter of Determination.*

During McCord's testimony, she indicated [*29] that in 2003, McCord was advised of the outcome of the County's investigation. At this point in the proceedings, the trial court addressed the admissibility of the so-called "Letter of Determination" dated March 11, 2003, from Denise Scates, acting personnel officer of DMH, to Moore which refers to an employment discrimination complaint Moore filed. The letter states: "Your complaint has been substantiated. The investigation revealed that the subject of the investigation exhibited inappropriate behavior of a sexual nature. As a result, we've taken corrective action that we believe to be sufficient to prevent any further harassment"

The trial court indicated it was aware there had been further administrative proceedings, which the trial court did not have before it, that "reached another result." Thus, even if the letter had probative value, it should be excluded under *Evidence Code section 352*. The trial court indicated it was willing to revisit the issue as the trial unfolded. However, at that point in the proceedings, the trial court instructed Moore's counsel to avoid reference to the Letter of Determination.

Later in the trial, the trial court indicated it had considered [*30] the admissibility of the Letter of Determination throughout the proceedings and found its probative value was outweighed by the probability its admission would create a substantial danger of undue prejudice, confuse the issues and mislead the jury. The trial court indicated it had admitted all of the "me too" evidence offered by Moore, "as well as other evidence, including the testimony of the plaintiff herself." "That puts before the jury the allegations supporting the causes of action. This Letter of Determination only detracts from the duty of the jury to determine [for] themselves whether there was sufficient evidence to support the plaintiff's claims." The trial court also noted it was unclear from the Letter of Determination what incident or complaint it related to. Thus, there was great potential that admission of the Letter of Determination would expand the trial and result in an "undue consumption of time." The trial court further noted it had permitted Moore's counsel to inquire whether Moore was advised in March of 2003 that the County was taking corrective action and that the County intended to act immediately.

Moore contends the Letter of Determination should have been [*31] admitted at trial because, other than the restrictions placed on Johnson, the jury was not given any evidence about the County's actions after it had notice of Moore's complaints. Moore claims the Letter of Determination was an admission by the County that would have informed the jury how long it took the County to investigate Moore's complaint and take reasonable and necessary steps to end the harassment. Moore notes the jurors found the workplace hostile to Moore but, because there was no evidence of the County's failure to act in a timely manner, they were influenced to find the County not liable.

Moore asserts any privilege associated with the Letter of Determination was waived because the County offered evidence of its equal opportunity compliance to prove nondiscrimination. (*Coates v. Johnson & Johnson (7th Cir. 1985) 756 F.2d 524, 551*; *Cloud v. Superior Court (1996) 50 Cal.App.4th 1552, 1558-1559*)

Our review of the record discloses the trial court acted well within its discretion in excluding the Letter of Determination under *Evidence Code section 352* because it would detract from the jury's obligation to determine whether Moore had proved her causes of

action and its probative [*32] value was outweighed by the amount of court time required to give the jury a complete understanding of the matters addressed in the Letter of Determination. (*In re Ryan N.* (2001) 92 Cal.App.4th 1359, 1385.) Consequently, this claim of error fails.

b. *The memos dated August 27, 2003 and February 10, 2004.*

At trial, Moore offered into evidence a memorandum dated August 27, 2003, from the deputy director of DMH, Milton H. Miller, M.D., warning Price for her failure to take "immediate and appropriate corrective action" concerning sexual harassment of an unidentified female employee by an unidentified male employee between 1999 and 2002. Moore also offered a letter from the Director of DMH, Marvin J. Southard, D.S.W., dated February 10, 2004, demoting McCord for her failure to take appropriate action to stop Johnson's misbehavior with respect to various employees, including Moore.

Moore contends this evidence was relevant to show the County found McCord failed to carry out her supervisory duties in dealing with Johnson's harassment of Moore. Moore claims that, had the jury been aware the County held McCord responsible for what happened to Moore, it would not have been confused about how to [*33] treat McCord and would not have been influenced by the foreperson's comment that McCord was more credible than Moore because McCord had a Ph.D. The jury also was not informed the County reprimanded Price for failing to carry out the policies of the County in a timely manner. Without this evidence, the jurors were easily persuaded by the foreperson to ignore the law and the instructions. Moore asserts the jury would have reached a different verdict if it had received this evidence.

The record on appeal does not include a reporter's transcript of the proceedings at which Moore offered the Price and McCord memos into evidence, the purpose for which they were offered, or the trial court's reasoning for refusing to admit them. Consequently, we are unable to address the merits of her contention. (*Pringle v. La Chapelle* (1999) 73 Cal.App.4th 1000, 1003.)

Nonetheless, it appears the same reasoning the trial court applied to the Letter of Determination would apply to each of these memorandums. Thus, we find no reversible error in the exclusion of these documents from evidence.

5. *Admission of evidence related to the prison term being served by Moore's husband.*

Moore contends trial court permitted [*34] the jury to hear evidence of her husband's criminal record and instructed the jury to limit this information to the effect it had on Moore. Moore asserts she was given no notice the County would offer evidence indicating her husband was serving a life sentence under the Three Strikes law for a crime that did not involve violence. Moore asserts this evidence was irrelevant to any issue in the case and the defendants never produced it until they offered it at trial.

Moore does not disclose the circumstances under which the evidence was offered, the grounds on which she objected to the evidence, whether the defense was under an obligation to produce the evidence before trial and what effect production of the evidence earlier may have had on its admissibility. Without an adequate record on appeal, this court is unable to evaluate issues requiring a factual analysis. (*Pringle v. La Chapelle*, *supra*, 73 Cal.App.4th at p. 1003.)

In any event, it appears the trial court properly could admit this evidence to explain the circumstances surrounding Johnson's telephone call to Moore in 1999. As such, it showed that Johnson inappropriately took advantage of Moore's personal circumstances. Such evidence [*35] cannot be seen as requiring reversal.

6. *Inadequate damages.*

Moore contends the damages awarded by the jury were "significantly low and not supported by the evidence." Moore asserts she should be compensated for the County's failure to respond in a timely manner to her complaints and for the vicarious liability found by the jury with respect to McCord. Moore further asserts a new trial is required because three jurors refused to follow the trial court's instructions and the jury inappropriately relied on the representation that Moore would be compensated by the County for her M.S. in any event. Moore concludes that when the issue of liability is sharply contested, and the damages awarded are inadequate, it is reasonable to conclude the jury reached a compromise verdict and a new trial is required. (*Shaw v. Hughes Aircraft Co.*, *supra*, 83 Cal.App.4th at p. 1346.)

Moore is foreclosed from complaining on appeal that the jury awarded inadequate damages because she failed to seek a new trial on that ground. (*Diemer v. Eric F. Anderson, Inc.* (1966) 242 Cal.App.2d 503, 508.) In an event, the only damages sought by Moore at trial were non-economic damages. The trial court instructed the jury: [*36] There is "[n]o fixed standard for deciding the amount of these damages. You must use your judgment to decide a reasonable amount based on the evidence and your common sense." Moore has not demonstrated the jury's award to have been inconsistent with this instruction.

In the case cited by Moore with respect to her assertion the damages awarded were inadequate, *Shaw v. Hughes Aircraft Co.*, the plaintiff's economist testified the wrongful termination of the plaintiff resulted in a minimum loss of \$ 200,000. The jury in *Shaw* found the plaintiff wrongfully had been terminated but awarded no damages. *Shaw* held this error. Here, Moore presented no evidence of special damages and the only damages requested were non economic damages, which the jury awarded. No inadequacy has been shown.

DISPOSITION

The judgment is affirmed; Moore to bear costs on appeal.

KLEIN, P.J.

We concur:

CROSKEY, J.

KITCHING, J.