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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

ALISSIA MYERS, Plaintiff and Appellant, v. TRENDWEST RESORTS, INC., Defendant and Respondent.	C058411 (Super. Ct. No. 04AS01598)

APPEAL from a judgment of the Superior Court of Sacramento County, Brian R. Van Camp, Judge. Affirmed.

Law Offices of Stephan Williams and Stephan C. Williams; Law Offices of Daniel Bartley and Daniel R. Bartley for Plaintiff and Appellant.

Curiale Hirschfeld Kraemer, John F. Baum and Felicia R. Reid for Defendant and Respondent.

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* Pursuant to California Rules of Court, rule 8.1110, this opinion is certified for publication with the exception of parts III through VIII, inclusive, of the DISCUSSION.

This is the second appeal by plaintiff Alissia Myers in an action against defendant Trendwest Resorts, Inc. (Trendwest) for sexual harassment in employment under the Fair Employment and Housing Act (Gov. Code, § 12940 et seq. (FEHA)). In the prior appeal, we reversed the summary judgment in favor of Trendwest on Myers's FEHA causes of action well as her claim for punitive damages. We affirmed the dismissal of Myers's common law causes of action relating to her allegations of sexual harassment. (*Myers v. Trendwest Resorts, Inc.* (2007) 148 Cal.App.4th 1403, 1439 (*Myers I*).)

After remand, the case proceeded to jury trial on the FEHA claims for sexual harassment (Gov. Code, § 12940, subd. (j)(1)), and failure to take all reasonable steps to prevent harassment (Gov. Code, § 12940, subd. (k)). The jury found that Myers had not been subjected to unwanted harassment.

On appeal, Myers contends the trial court erred by (1) failing to grant judgment notwithstanding the verdict (JNOV) because Trendwest's statement of undisputed facts – made for purposes of summary judgment – admitted she had "suffered severe sex harassment," (2) failing to grant JNOV based on insufficiency of the evidence in support of the verdict, (3) disallowing her expert witnesses from testifying after she filed a tardy expert witness disclosure list, (4) excluding testimony from her treating physician about the cause of her mental distress, (5) excluding the testimony of her human resources expert to bolster Myers's credibility, (6) excluding testimony

from Myers's mother and friend about her mental state shortly after her first hospitalization, (7) excluding evidence of other sexual harassment lawsuits against Trendwest, (8) denying Myers's mid-trial motion to amend the complaint to state a claim for disability discrimination under FEHA (Gov. Code, § 12940, subd. (k)), and (9) denying her motion for new trial based on jury misconduct.

In the published portion of the opinion, we explain why a statement in Trendwest's statement of undisputed facts, submitted in its summary judgment motion, cannot be used against Trendwest at trial as an admission. We also explain why Myers has waived her claim that no substantial evidence supports the defense verdict. We also commend the trial judge, the Honorable Brian R. Van Camp.

In the unpublished portion of the opinion, we reject Myers's remaining contentions of prejudicial error.

We shall therefore affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

A

In every appeal, "the appellant has the duty to fairly summarize all of the facts in the light most favorable to the judgment. (*Foreman & Clark Corp. v. Fallon* [(1971)] 3 Cal.3d [875,] 881.) Further, the burden to provide a fair summary of the evidence 'grows with the complexity of the record. [Citation.]' (*Western Aggregates, Inc. v. County of Yuba* (2002)

101 Cal.App.4th 278, 290.)" (*Boeken v. Philip Morris Inc.* (2005) 127 Cal.App.4th 1640, 1658, italics added.)

Myers's statement of facts gives the impression that little else occurred at trial other than her direct examination during her case-in-chief. Trendwest asserts, "The statement of facts in Appellant's Opening Brief . . . focuses exclusively on the evidence Myers submitted at trial in support of her claims. It ignores completely the evidence favorable to Trendwest, including evidence that directly contradicted Myers's evidence." Having perused the lengthy record in this appeal, we agree with Trendwest's characterization of Myers's factual recitation. In setting forth the facts, we shall highlight a few of the most glaring omissions from Myers's statement of facts.

Evidence Presented at Trial

Myers was the victim of sexual abuse while growing up.

In 2001, Trendwest hired Myers to work in its Walnut Creek office selling vacation timeshares. She was about 20 years old at the time. Ayman Damlakhi was her immediate manager until he was transferred to Trendwest's Roseville office. In August 2002, Myers also began working at the Roseville office.

Myers's statement of facts fails to discuss the following additional testimony at trial: At age six or seven, she was sexually molested by a group of older boys who lived in the neighborhood. When Myers was 13 years old, she left California to live with her friend's family in Arkansas. Over the course

of 12 to 18 months, she was sexually molested by her foster father and physically abused by her foster mother.

After her experiences with the foster family in Arkansas, Myers experienced panic attacks and took anti-anxiety medications. Her treating psychiatrist, Dr. Michael Wright, testified that she probably developed post-traumatic stress syndrome and borderline personality disorder during her teenage years. Expert testimony explained that the hallmarks of a borderline personality disorder are: recounting only the facts in favor of the person's story, exaggeration, denial of personal responsibility, and manipulative behaviors.

When Myers began working at Trendwest, Damlakhi served as a mentor. She enjoyed working and joking with him. When Damlakhi became manager of Trendwest's Roseville office, Myers begged to be transferred to that location.

The River Rock Bar Incident

Myers testified that she joined a group of employees at the River Rock Bar in late November 2002. Myers stated that, in the presence of the other employees, Damlakhi told her that she had nice breasts and that he tried to grope her when the employees later went dancing. According to Myers, Damlakhi asked her for a lap dance, which offended her.

Myers's recitation of the facts fails to mention the following additional evidence about the River Rock incident: Myers chose to sit next to Damlakhi and had two or three glasses of wine. She tried to hand feed him from a plate of food she

got for him. Damlakhi denied commenting on her breasts or making any other sexual comments to her. Damlakhi reluctantly went along to the dance club, which Myers had recommended. Myers caught a ride with Damlakhi, who stopped at his house to change. They then went to Myers's apartment so that she too could change her clothes.

Myers and Damlakhi then drove to the club together where they danced with several other Trendwest employees. Myers continued to drink. Myers pulled Damlakhi away from the others and started "dirty dancing." Damlakhi found it embarrassing and announced that he was going to leave since his friend refused to show up at the dance club. Damlakhi never asked Myers for a lap dance.

One of the Trendwest employees who was at the dance club with them testified that Myers did not give the impression that she was uncomfortable around Damlakhi that night. To the contrary, Myers danced with him in a provocative and flirty manner while Damlakhi "danced like Pee Wee Herman, kind of goofy."

Damlakhi stated that Myers later grabbed his fingers and began sucking on them. Myers told him, "I'll rock your world." Damlakhi pulled away, and Myers responded, "You don't know what you're missing."

A Trendwest employee who had not been to the dance club testified that Myers told him the next day that she "had a good time" at the club.

Invitation to Las Vegas

Myers testified that she felt harassed by Damlakhi's frequent telephone calls and dinner invitations after the dance club incident. Myers stated she felt especially uncomfortable about Damlakhi's offer to give her $50,000 to let him take her to Las Vegas for the weekend.

Myers's statement of facts fails to mention evidence unfavorable to her characterization of the Las Vegas invitation. On cross-examination, Myers acknowledged agreeing, at least momentarily, to accompany him because she wanted to use the money as a down payment on a house.

Damlakhi denied ever offering to take Myers to Las Vegas. Instead, he invited his coworker, Rob Tyler, to go with him. Myers spoke up and said that she wanted to go with him. Damlakhi stated she would have to sleep on the suite's sofa while he got the bed. He said that he did not want a sexual harassment lawsuit. Myers jokingly replied, "I need someone to sue." Damlakhi and Myers never went to Las Vegas together.

Driving for Dollars

"Driving for dollars" referred to a tactic in which sales representatives accompanied potential buyers back to their homes to retrieve the initial payment on a timeshare. Myers claimed she suffered two sexual assaults while she and Damlakhi were driving for dollars.

Myers testified that Damlakhi accompanied her in following a customer home in March 2003. Myers stated that Damlakhi

insisted on going with her even after she strongly objected. After Myers and Damlakhi received the customer's payment, he started questioning her about her sex life. She testified that Damlakhi told her he could satisfy her sexually. He pulled the car off the road, kissed her neck, and fondled her legs. She testified that he succeeded in putting his hand down her pants and groping her breasts despite efforts to fend him off. After she convinced him to drive her back to the office, Damlakhi put her hands in his groin "to tell [her] how hard he was and how much he wanted [her]." When they arrived at the office, Damlakhi apologized and said he was "a little lonely right now."

Myers testified that the second sexual assault by Damlakhi occurred in May 2003, when he again insisted on accompanying her in driving for dollars. After securing payment from the customer, Damlakhi drove Myers back to his house. He pulled the car into the garage and shut the garage door by remote control. Damlakhi then put his hand up her dress and tried to kiss her. When she got out of the car, he pushed against her to simulate sexual intercourse while undoing her bra and groping her breasts. Myers broke free and ran out the side door. Damlakhi ran after her, apologized, and drove her home.

Myers's recitation of the facts fails to mention the following additional evidence about the "driving for dollars" incidents: Damlakhi denied ever asking about Myers's sex life. Although Damlakhi admitted he went "driving for dollars" with Myers in March 2003, he denied touching her or making any detour

on the way back to the office from the customer's house. Being close to midnight when Myers secured the payment, Damlakhi wanted to get back to the office where other employees were waiting to complete the paperwork.

As to the incident in May 2003, Damlakhi denied taking Myers to his house or touching her on the way back to the office.

Myers admitted that she never told anyone at Trendwest about the assaults while she was employed there. She testified that she told her coworker, Daniel Henry, that she was "scared" of Damlakhi and asked Henry to accompany her and Damlakhi during the March 2003 drive. Henry testified he was asked to accompany them, but recalled that Myers did not want to drive for dollars because everyone hated the sales tactic and the hour was late. Henry never saw Damlakhi engage in any inappropriate conduct with Myers.

Myers' First Hospitalization

In June 2003, Myers was hospitalized for two weeks at Sutter Psychiatric Hospital. At trial and on appeal, Myers claims she suffered an emotional and mental collapse due to Damlakhi's sexual harassment.

However, Myers fails to acknowledge important additional evidence. Myers's admission chart indicated a host of factors as precipitating her nervous breakdown including being molested as a child by neighborhood boys, being abused by her foster father and brothers, her belief that her mother was trying to

kill her, relationship difficulties with her boyfriend, and her "feeling" that she was being sexually harassed by Damlakhi. The progress notes indicated that Myers's main goal upon discharge was to separate from the boyfriend with whom she lived.

The June 2003 hospitalization records indicate that she was feeling anxious and suicidal without knowing the cause. Although the records of her hospitalization and subsequent therapy indicated abuse by her childhood attackers as well as her foster father and brothers, no mention is found of sexual assault by Damlakhi.

Myers fails to note that the trial court expressly found that her hundreds of pages of medical records "were devoid of any reference by her to" sexual assaults by Damlakhi.

Christine McGowan, Trendwest's Roseville officer manager, testified that she and Damlakhi visited Myers in the hospital. Myers jumped out of bed and told Damlakhi she was glad he had come to visit. She further testified Myers gave both of them big hugs, saying, "she missed being at work and couldn't wait to get back." She had already talked to someone about buying a timeshare and was excited to get back to work. During the visit, Myers asked Damlakhi for money so that she could move out of the apartment she shared with her boyfriend. Damlakhi ended up advancing her $1,500.

Lake Tahoe Ski Trip

In November 2003, Myers returned to work. That month, some of the sales representatives from the Roseville office went on

an annual skiing trip to Lake Tahoe. Myers testified that shortly after arriving at the slopes, Damlakhi grabbed her arm and smacked her on the buttocks. She exclaimed, "Don't touch me. Don't touch me. You said you weren't going to touch me." Myers ran to tell her friend, Felicia Torrez. Myers also told Torrez that Damlakhi had tried to get her to go to the hotel room with him.

Myers's factual recount fails to acknowledge the following additional evidence regarding the Tahoe incidents: Myers testified that she also told coworkers Steve Wilcox and Al Catlin about being smacked on the buttocks as soon as she got to the top of the ski slope. Both Wilcox and Catlin testified that Myers never told them about the incident or any other sexual harassment by Damlakhi. Moreover, neither saw Damlakhi inappropriately touch Myers at any time. Damlakhi denied ever smacking Myers on the buttocks. He explained that he had playfully pushed Myers's back because everyone was playing and falling in the snow when they arrived at Lake Tahoe.

Myers's claim that Damlakhi invited her to the hotel room refers to her testimony that Damlakhi was cold and wanted to leave the ski slopes because he was not a good skier. When Myers refused to leave, Damlakhi asked for the keys to the car so he could return to the hotel room. Damlakhi did not have his own room, but slept on the sofa of the suite in which all of the employees were staying. In the suite, Myers and Torrez shared their own room. Catlin – whom Myers acknowledged to be honest –

testified that he observed Myers the next morning climb on top of a sleeping Damlakhi and stick her tongue in his ear to wake him up. This visibly upset Damlakhi.

Myers's Second Hospitalization

In December 2003, Myers was hospitalized after she cut her wrists and burned herself. Myers told a coworker from Trendwest that her hospitalization was due to childhood abuse. The discharge summary indicates that Myers claimed symptoms of depression and suicidal thoughts "following sexual harassment at work." The documents for the hospitalization indicate that she reported "her supervisor has been sexually harassing her at work, has been physically very inappropriate."

Also in December 2003, Trendwest terminated Myers's employment due to the length of her medical leave. In January 2004, Myers learned of Trendwest's "Integrity Hotline" and called to complain about (1) being dismissed when she had only been on medical leave for four months, and (2) sexual harassment by Damlakhi. Myers was assured that the complaints would be investigated and she would be informed of the outcome within a few days. Two weeks later, Myers again called the Integrity Hotline and was told that there was no record of her prior call.

B

Any impartial reader who approaches Myers's briefs unfamiliar with the testimony at trial must come away with a sense of bafflement as to why the jury and trial court did not decide in her favor – especially given the seemingly

uncontradicted testimony regarding the sexual assaults leading to her mental distress.

Only upon perusing the record does it become clear that the trial court found Myers's credibility to be problematic. The trial court, in ruling on her motion for JNOV, considered testimony that she flirted with Damlakhi, "dirty danc[ed]" with him, agreed to go to Las Vegas with him, woke him during the ski trip by climbing on top of him and sticking her tongue in his ear, and the fact that her hundreds of pages of medical records fail to contain a single mention of sexual assault by Damlakhi. Myers offers no discussion of these facts unfavorable to her arguments.

Professional ethics and considerations of credibility in advocacy require that appellants support their arguments with fair and accurate representations of trial court proceedings. (Cal. Rules of Court, rule 8.204(a)(2); Rules of Prof. Conduct, rule 5-200.) As we have previously explained, "it behooves counsel to comply with the rules in order to be better advocates for their clients. We are a busy court which 'cannot be expected to search through a voluminous record to discover evidence on a point raised by [a party] when his brief makes no reference to the pages where the evidence on the point can be found in the record.'" (*Lewis v. County of Sacramento* (2001) 93 Cal.App.4th 107, 113, disapproved on another ground as recognized in *Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2005) 133 Cal.App.4th 26, 41-42, quoting

Metzenbaum v. Metzenbaum (1950) 96 Cal.App.2d 197, 199.) Myers's opening and reply briefs fall far short of complying with the rules regarding statements and discussions of evidence adduced at trial.

C

Procedural History

In February 2005, Myers filed her third amended complaint against Damlakhi and Trendwest to allege causes of action for sexual harassment arising under FEHA and common law. The trial court granted summary judgment in favor of Trendwest. Myers appealed, and we reversed as to the FEHA and punitive damages claims. (*Myers I*, *supra*, 148 Cal.App.4th at p. 1439.)

After remand, the case proceeded against Damlakhi and Trendwest. At the start of trial, Myers announced that she had settled with Damlakhi. Trial ended with the jury's verdict that Myers had not been "subject to unwanted harassing conduct because she was a woman[.]" The court polled the jury, revealing a 10 to two vote in favor of the verdict. Judgment was entered in favor of Trendwest.

Myers filed motions for JNOV and for new trial, which the trial court denied.

DISCUSSION

I

Estoppel Based on the Statement of Undisputed Facts Accompanying a Motion for Summary Judgment

Myers argues the trial court erroneously denied JNOV on the issue of liability because Trendwest was estopped from denying Damlakhi sexually harassed her. Myers relies on Trendwest's statement of undisputed facts accompanying the motion for summary judgment as a judicial admission of the facts contained therein. The argument is without merit.

Judicial admissions may be made in a pleading, by stipulation during trial, or by response to request for admission. (4 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 452, p. 585; *Brigante v. Huang* (1993) 20 Cal.App.4th 1569, 1578, disapproved on other grounds in *Wilcox v. Birtwhistle* (1999) 21 Cal.4th 973, 977, 983, fn. 12.) Facts established by pleadings as judicial admissions "'are conclusive concessions of the truth of those matters, are effectively removed as issues from the litigation, and may not be contradicted by the party whose pleadings are used against him or her.' (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2002) ¶ 10:147, p. 10-49; *Foxborough v. Van Atta* (1994) 26 Cal.App.4th 217, 222, fn. 3; *Brown v. City of Fremont* (1977) 75 Cal.App.3d 141, 146.) '"[A] pleader cannot blow hot and cold as to the facts positively stated."' (*Brown v. City of Fremont, supra*, at p. 146.)" (*St. Paul Mercury Ins. Co. v. Frontier*

Pacific Ins. Co. (2003) 111 Cal.App.4th 1234, 1248 (*St. Paul Mercury*), first italics omitted, second italics added.)

Not every document filed by a party constitutes a pleading from which a judicial admission may be extracted. Code of Civil Procedure section 420 explains that pleadings serve the function of setting forth "the formal allegations by the parties of their respective claims and defenses, for the judgment of the Court." (Code Civ. Proc., § 420.) "The pleadings allowed in civil actions are complaints, demurrers, answers, and cross-complaints." (Code Civ. Proc., § 422.10.) When these pleadings contain allegations of fact in support of a claim or defense, the opposing party may rely on the factual statements as judicial admissions. (*St. Paul Mercury, supra,* 111 Cal.App.4th at p. 1248.)

In moving for summary judgment, a party may rely on the doctrine of judicial admission by utilizing allegations in the opposing party's pleadings to eliminate triable issues of material fact. (*St. Paul Mercury, supra,* 111 Cal.App.4th at p. 1248.) However, neither a motion for summary judgment nor its accompanying statement of undisputed facts constitutes pleadings within the meaning of Code of Civil Procedure section 422.10. Motions for summary judgment do not serve the same purpose as pleadings in setting forth factual allegations. To the contrary, motions for summary judgment by defendants seek to show that they are entitled to dismissal as a matter of law.

(Code Civ. Proc., § 437c; *Myers I*, *supra*, 148 Cal.App.4th at p. 1409.)

Trendwest's motion for summary judgment argued that it was entitled to dismissal of Myers's case even if her allegations regarding Damlakhi's conduct were true. In our prior decision, we noted: "Trendwest accepted as undisputed fact *for summary judgment purposes* that Damlakhi made sexual advances to plaintiff on two 'driving for dollars' trips in March and May 2003." (*Myers I*, *supra*, 148 Cal.App.4th at p. 1412, italics added.) Trendwest's summary judgment motion gave every indication that the factual admissions concerning Damlakhi's conduct toward Myers were made solely for the purpose of seeking a dismissal as a matter of law.

That Myers focuses on facts set forth in the statement of undisputed facts rather than in the memorandum of points and authorities makes no difference. As a leading treatise explains, "The agreement in the separate statement that a fact is 'undisputed' is a concession only for purposes of the summary judgment motion. It is not evidence (because not under oath or verified); nor is it a judicial admission." (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2008) ¶ 10:194, p. 10-71, citing *Wright v. Stang Manufacturing Co.* (1997) 54 Cal.App.4th 1218, 1224 (*Wright*).)

In *Wright*, defendants sought to defeat a product liability claim by making "a great deal out of the fact that plaintiffs responded 'Undisputed' to [a] separate statement of fact

. . . ." (*Wright, supra*, 54 Cal.App.4th at p. 1224, fn. 2.) On appeal, defendants argued that plaintiffs' failure to contest a statement of undisputed fact amounted to a judicial admission that the product was not defective. (*Id.* at p. 1225.) The Court of Appeal rejected defendant's argument, holding that defendants "fail[ed] to establish that plaintiffs' response to their separate statement of undisputed facts [should have been] accorded the same effect as a judicial admission in a pleading." (*Ibid.*) The *Wright* court held that separate statements of undisputed facts in support of a motion for summary judgment or adjudication make no binding judicial admissions. (*Ibid.*; Code Civ. Proc., § 422.10.)

Myers's cited cases do not hold to the contrary. *Valerio v. Andrew Youngquist Construction* (2002) 103 Cal.App.4th 1264, at page 1271, does hold that admissions in pleadings conclusively bind the pleader – as Myers contends. However, that case involved admissions made in an actual pleading: an answer to a cross-complaint. (*Ibid.*; Code Civ. Proc., § 422.10.) *Valerio* offers no support for holding that summary judgment motions constitute pleadings for purposes of judicial admissions. (*Valerio, supra*, at p. 1271.)

The remainder of Myers's cited cases considered the impact of admissions and failures to dispute facts at the summary judgment stage. (*Leep v. American Ship Management* (2005) 126 Cal.App.4th 1028, 1039 [reversing summary judgment when issue of material fact existed regarding actual period of employment of

seamen by vessel's owner]; *Collins v. Hertz Corp.* (2006) 144 Cal.App.4th 64, 71-73 [affirming summary judgment after the trial court properly exercised its discretion to strike portions of plaintiffs' separate statement that did not conform to the Code of Civil Procedure]; *Stanton Road Associates v. Pacific Employers Ins. Co.* (1995) 36 Cal.App.4th 333, 345 [affirming summary judgment in favor of insurers because contamination manifested after the policies had lapsed]; *People ex rel Dept. of Transportation v. Ad Way Signs, Inc.* (1993) 14 Cal.App.4th 187, 200-201 [reversing summary judgment because issue of material fact existed as to whether a permit for roadside billboard had been revoked].) None of these cases considered whether admissions or failures to contest facts at the summary judgment stage later estopped a party from presenting contrary evidence at trial.

Accepting Myers's argument would require us to force defendants to play a risky game of roulette whenever moving for summary judgment. To secure dismissals for lack of triable issues of material fact, defendants would have to conclusively surrender the chance to contest facts they might believe themselves able to disprove. Unsuccessful summary judgment motions would leave defendants bound by judicial admissions regarding facts only because they sought judgment as a matter of law. Motions for summary adjudication of less than all causes of action would necessarily be unwise because a defendant would be certain to face trial on at least one cause of action while

bound by all facts deemed undisputed in moving for summary adjudication.

Summary judgment provides "courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843.) We will not undermine the value of this procedural vehicle for ascertaining whether triable issues of fact exist by holding that the separate statements of undisputed fact can haunt unsuccessful movants if the case goes to trial.

There is no merit to Myers's contention that Trendwest's statement of undisputed facts made for purposes of summary judgment constituted judicial admission of facts contained therein.

II

Insufficiency of the Evidence

Myers contends the trial court erred in denying her motion for JNOV.

Myers argues no substantial evidence supports the defense verdict. However, this claim is waived because, as we have recounted at length above, Myers has failed to set out all the evidence that supports the defense verdict. "[I]f . . . 'some particular issue of fact is not sustained, they are required to set forth in their brief *all* the material evidence on the point and *not merely their own evidence*. Unless this is done the

error is deemed to be waived.'" (*Foreman & Clark Corp. v. Fallon, supra,* 3 Cal.3d at p. 881.)

By failing to recount much defense evidence, plaintiff Myers has waived her claim of lack of substantial evidence to support the verdict.[1] The trial court did not err in denying her motion for JNOV.

III

Exclusion of Expert Witness Testimony

Myers contends the trial court committed reversible error by excluding testimony from her treating psychiatrist, Dr. Wright, and her retained human resources expert, Rhoma Young. Myers acknowledges she was tardy in disclosing her expert witnesses, but nonetheless contends the trial court abused its discretion by denying her motion for permission to file a late expert witness disclosure list. Although Dr. Wright did testify in his capacity as Myers's treating psychiatrist, she complains that the trial court improperly prevented him from testifying that sexual harassment at Trendwest caused her distress. Myers also assigns error to the trial court's exclusion of Young's testimony concerning Trendwest's lack of compliance with anti-harassment laws. We reject her contentions.

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[1] We say Myers "waived" her claim because that is the terminology used in 1971 in *Foreman & Clark.* Modern usage would say Myers has "forfeited" her claim. (See, e.g., *Keener v. Jeld-Wen, Inc.* (2009) 46 Cal.4th 247, 264-265; *People v. Stowell* (2003) 31 Cal.4th 1107, 1114.)

A

To secure reversal of a judgment, an appellant must demonstrate more than that error occurred. An appellant must also "show that the error was prejudicial (Code Civ. Proc., § 475) and resulted in a 'miscarriage of justice' (Cal. Const., art. VI, § 13). [Citation.] '"[A] 'miscarriage of justice' should be declared only when the court, 'after an examination of the entire cause, including the evidence,' is of the 'opinion' that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error."' (*Seaman's Direct Buying Service, Inc. v. Standard Oil Co.* (1984) 36 Cal.3d 752, 770.)" (*Pool v. City of Oakland* (1986) 42 Cal.3d 1051, 1069.)

B

Myers sought to introduce testimony from Dr. Wright regarding "the *causation* for plaintiff's emotional breakdown which led to her be [*sic*] hospitalized on three separate occasions . . . ." Trendwest counters that Dr. Wright's testimony was not admissible to establish that Damlakhi engaged in the conduct alleged by Myers. We agree that Myers impermissibly sought to establish the historical fact of harassment via the opinion testimony of Dr. Wright.

The inadmissibility of a psychiatrist's testimony to prove that a certain person caused injuries by sexual abuse was explained in *In re Cheryl H.* (1984) 153 Cal.App.3d 1098 at pages, 1120-1121, disapproved of on other grounds in *People v.*

Brown (1994) 8 Cal.4th 746 at page 763. In *Cheryl H.*, the victim's child psychiatrist, Dr. Powell, testified she believed the child's father sexually abused her. (*Id.* at p. 1109-1110.) The *Cheryl H.* court declared inadmissible Dr. Powell's testimony about the identity of the person she believed to have committed the abuse. (*Ibid.*) "The statement could not be used to establish who caused the injury nor to support an opinion that a certain individual was responsible." (*Id.* at p. 1120.) While treating psychiatrists may testify about the nature of distress suffered, their psychiatric expertise cannot elevate their beliefs or recounted hearsay into admissible evidence regarding who caused the injury. (*Ibid.*)

Here, Dr. Wright was allowed to testify about the mental distress and personality disorders suffered by Myers. He even recounted hearsay statements made by Myers about Damlakhi causing her mental breakdown by harassing her. Dr. Wright was properly precluded from testifying that Damlakhi committed sexual misconduct. As a leading treatise notes, "Expert testimony is not admissible . . . on the ultimate issue whether harassment occurred; e.g., whether a workplace was a 'hostile' environment. Such legal conclusions are within the province of the jury . . . ." (Chin et al., Cal. Practice Guide: Employment Litigation (The Rutter Group 2008) ¶ 19:1091.10, p. 19-136.)

In arguing that Dr. Wright should have been allowed to testify that Damlakhi caused her mental distress, Myers relies on inapposite authority. She places great emphasis on the case

of *Fatica v. Superior Court* (2002) 99 Cal.App.4th 350. *Fatica* explains that a treating physician may testify about the nature of plaintiff's injuries without the need for prior submission of the expert witness declaration required for retained experts. (*Id.* at pp. 352-353.) In *Fatica*, plaintiff sought to introduce testimony of his orthopedic surgeon regarding his injuries after a car accident. The car accident's occurrence was undisputed. (*Id.* at p. 351.) Also undisputed was the identity of the driver who caused the accident. (See *id.* at p. 351.) Thus, the plaintiff in *Fatica* did not seek to establish the existence of wrongful conduct by medical testimony nor did he attempt to address the issue of the tortfeasor's identity by testimony from a surgeon. (*Id.* at pp. 351-352.) *Fatica* does not aid Myers in her attempt to have Dr. Wright establish Damlakhi as the cause of her injuries.

In *Schreiber v. Estate of Kiser* (1999) 22 Cal.4th 31, at page 35, the California Supreme Court similarly held that a treating physician is not a witness who must be disclosed in the same manner as a retained medical expert. *Schreiber* does not support Myers in seeking to employ medical expert testimony to establish the identity of the person responsible for injuries. (See *ibid.*)

Myers also misplaces her reliance on *Plunkett v. Spaulding* (1997) 52 Cal.App.4th 114, overruled on other grounds in *Schreiber v. Estate of Kiser*, *supra*, 22 Cal.4th 31, 39-40 & fn. 6.) In *Plunkett v. Spaulding*, the Court of Appeal held that

trial counsel had demonstrated excusable neglect in submitting a tardy expert witness declaration for a retained medical expert. (*Id.* at p. 135-136.) The case does not hold that a plaintiff may use a treating physician's hearsay testimony to establish who caused the injuries sustained. (See *id.* at p. 120 [undisputed identity of physician being sued for medical malpractice].)

Even if we concluded that the trial court erroneously excluded Dr. Wright's testimony about causation, we would be compelled to conclude that no prejudice resulted. As Trendwest points out, a plaintiff must first prove that a defendant committed a wrongful act or omission before causation becomes a question for the trier of fact to resolve. We agree that the jury's finding that Myers was not subjected to unwanted harassing conduct at Trendwest renders the issue of the cause of her injuries moot.

The requirement that a plaintiff prove wrongful conduct before asserting evidentiary error regarding causation was articulated in *Gallo v. Peninsula Hospital* (1985) 164 Cal.App.3d 899 (*Gallo*). In *Gallo*, "[t]he jury returned verdicts for defendant hospital on the medical negligence and wrongful death actions. The jury found no negligence on the hospital's part . . . ." (*Id.* at p. 901.) In the absence of wrongful conduct, the *Gallo* court held that "a finding on the proximate cause issue was therefore unnecessary." (*Ibid.*) The court therefore

concluded that the erroneous admission of testimony regarding causation was harmless. (*Ibid*.)

Here, the error ascribed to the trial court concerns the exclusion rather than inclusion of testimony concerning causation. The difference does not affect the applicability of the *Gallo* court's analysis of prejudice. If a defendant's conduct was not wrongful, causation becomes moot because plaintiff cannot recover damages for non-wrongful conduct. (*Gallo, supra*, 164 Cal.App.3d at p. 901; see also 6 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 1193, p. 568.)

The trial court did not err in precluding Dr. Wright from testifying that he believed Damlakhi caused Myers's mental distress.

C

Myers next contends the trial court should have allowed Young to "offer opinions on the policies, practices and procedures of Trendwest to deal with and prevent and respond to issues of harassment and discrimination . . . ." As Myers stated in the trial court, this expert testimony was intended to address her second cause of action for failure of Trendwest to take all reasonable steps to prevent harassment as required by Government Code section 12940, subdivision (k).[2] The trial court

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[2] Government Code section 12940 provides, in relevant part: "It shall be an unlawful employment practice, unless based upon a bona fide occupational qualification, or, except where based upon applicable security regulations established by the United

did not err, and even if it did, Myers would be unable to establish prejudice.

As with the testimony of Dr. Wright, Myers sought to introduce the evidence of her human resources expert to prove that Myers was harassed by Damlakhi. Myers's opening brief contends that "the lack of expert testimony crippled plaintiff's case – including the issue so vital in a finding on the first cause of action, i.e., *whether sexual harassment ever occurred*." (Italics added.) Young, however, was not present to observe any interactions between Myers and Damlakhi. Thus, Young's testimony could not have been probative on the issue of whether Damlakhi sexually harassed Myers.

Whether Damlakhi groped Myers in March and May 2003, as she contends, was an issue on which the jury needed no expert guidance. (Evid. Code, § 801 [limiting expert testimony to matters beyond common experience]; *Kotla v. Regents of University of California* (2004) 115 Cal.App.4th 283, 291.) In *Kotla*, the Court of Appeal reversed a judgment after a human resources expert, Dr. Finkelman, testified that several of defendant's personnel policies "indicated" plaintiff was fired in retaliation for her reporting of sexual harassment. (*Id.* at p. 291.) The *Kotla* court held "that testimony created an

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States or the State of California: [¶] . . . [¶] (k) For an employer, labor organization, employment agency, apprenticeship training program, or any training program leading to employment, to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring."

unacceptable risk that the jury paid unwarranted deference to Dr. Finkelman's purported expertise when in reality he was in no better position than they were to evaluate the evidence concerning retaliation." (*Id.* at p. 293.) As in *Kotla*, Myers sought to introduce the testimony of a human resources expert to indicate that she had been harassed. The expert testimony, however, was not admissible to establish facts regarding Damlakhi's conduct.

Myers alternately asserts that that the expert testimony would have impeached credibility of other Trendwest employees by refuting their assertions of adequate company practices. In support of this claim, Myers fails to provide any citation to the 1,800 page reporter's transcript, which encompassed the testimony of 15 witnesses. Nor does Myers identify which Trendwest employees' testimony would have been impeached by her human resources expert. Although we would be justified in deeming her contention forfeited for failure to adequately cite to the record (*Del Real v. City of Riverside* (2002) 95 Cal.App.4th 761, 768), we address the argument on the merits.

Three witnesses testified for Trendwest concerning its personnel practices regarding prevention and reporting of sexual harassment: Michael Meic (Trendwest's director of human resources for Northern California), Kent Koeppel (human resources executive for Trendwest's parent company), and John Duncan (Trendwest's in-house counsel during the period relevant

to this case). These were the Trendwest employees who testified regarding the company's personnel policies.

These were not the Trendwest employees who provided the damaging testimony regarding Myers's "dirty dancing" with Damlakhi (McGowan), her statement the next day that she had a good time at the dance club (Catlin), or her flirtatious waking of Damlakhi on the ski trip (Catlin). Nor was it the Trendwest human resources executives who established that Myers agreed, at least momentarily, to accompany Damlakhi to Las Vegas in exchange for $50,000. As a consequence, Young's testimony would not have provided probative evidence on the issue of whether Myers was subjected to unwanted sexual harassment by Damlakhi.

Even if the trial court had erred in excluding Young's testimony, we would nonetheless affirm for lack of prejudice. The jury's finding that Myers did not sustain unwanted sexual harassment precluded her from establishing her cause of action under Government Code section 12940 – even if she had been able to prove that Trendwest's personnel practices and procedures failed to comply with FEHA requirements.

Trujillo v. North County Transit Dist. (1998) 63 Cal.App.4th 280 (*Trujillo*) held that a cause of action for failure to take all reasonable steps necessary to prevent harassment from occurring requires plaintiffs to show that they themselves suffered such wrongful conduct. As the *Trujillo* court explained, "Employers should not be held liable to employees for failure to take necessary steps to prevent such

conduct, except where the actions took place and were not prevented." (*Id.* at p. 289.) Here, the jury found that Myers had not suffered unwanted sexual harassment. As a consequence, the lack of expert testimony regarding Trendwest's policies at the time could not have been prejudicial. (*Ibid.*)

Our conclusion that Myers has failed to establish error or prejudice in the exclusion of Dr. Wright's and Young's testimony eliminates our need to consider Myers's additional contention that the trial court abused its discretion by disallowing her to late file an expert witness disclosure list naming these two witnesses.

IV

Exclusion of Hearsay Testimony by Myers's Mother & Friend

Myers contends the trial court abused its discretion in excluding hearsay testimony by Myers's mother and friend[3] regarding statements made by Myers after her first hospitalization. Myers sought to introduce these statements to prove that Damlakhi committed sexual assaults against her. Recognizing that the testimony constituted hearsay, Myers argues that the testimony should have been admitted as a statement of

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[3] Myers fails to identify the "close friend" whose hearsay testimony she sought to introduce. We assume that Myers refers to her friend, Torrez, who testified at trial regarding her friendship with and observations of Myers. In any event, the identity of Myers's friend does not affect the analysis of error or prejudice.

mental state and as a spontaneous statement. We find no error in the trial court's evidentiary ruling.

A

In the trial court, Myers argued that her mother and friend should have been allowed to recount hearsay statements made by Myers in order to prove Damlakhi sexually harassed her. On this issue, the following colloquy occurred:

"THE COURT: [Y]ou're not bringing this in to show why Ms. Myers did something. You want it to prove – help prove that Damlakhi did these things to her.

"[Appellant's counsel]: *Yes*, because the exception to the hearsay rule says that you can do it if she's – the qualification is –

"THE COURT: That's not true, Mr. Williams. Read the sentence you just gave me. Two, the evidence is offered to prove or explain acts or conduct of the declarant, Ms. Myers.

"[Appellant's counsel]: She's explaining why she's crying, why she's upset." (Italics added.)

Although the trial court disallowed the hearsay recounts of Myers's statements, it did allow Myers's mother and Torrez to testify. Her mother told the jury about a statement made by McGowan to the effect that Damlakhi would not contact her at the hospital. Torrez testified about the change in Myers's demeanor during the time leading up to her first hospitalization.

B

Myers acknowledges that the statements she sought to introduce constituted hearsay. Hearsay "is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code, § 1200, subd. (a).) Myers sought to introduce hearsay to prove the truth of the matters asserted, i.e., that Damlakhi sexually harassed her. Myers characterizes such hearsay as necessary because "the testimony of the victim most often has to be supported by secondary evidence – most commonly by the admissions of hearsay statements of persons that the victim confided in shortly after the fact."

Unless an exception to the rule against hearsay applies, such testimony must be excluded. (Evid. Code, § 1200, subd. (b).) Myers argues that exceptions for statements regarding contemporaneous mental state and for spontaneous statements apply.

The exception for hearsay descriptions of contemporaneous mental state is set forth in subdivision (a) of Evidence Code section 1250. Subdivision (a) provides, in relevant part, that "evidence of a statement of the declarant's then existing state of mind, emotion, or physical sensation (including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health) is not made inadmissible by the hearsay rule when: [¶] (1) The evidence is offered to prove the declarant's state of mind, emotion, or physical sensation at that time or at any

other time when it is itself an issue in the action; or [¶] (2) The evidence is offered to prove or explain acts or conduct of the declarant."

Contrary to Myers's assertions, this exception does not apply. Myers did not seek to introduce the testimony at issue to explain her own conduct or mental distress suffered at the time. Instead, she sought to introduce the hearsay statements to prove that *Damlakhi* harassed her.

Myers also argues the "hearsay statements were also admissible under Evidence Code § 1241 as 'contemporaneous statements'" because she was upset and tearful at the time she discussed the harassment with her mother and friend. Evidence Code section 1241 provides: "Evidence of a statement is not made inadmissible by the hearsay rule if the statement: [¶] (a) Is offered to explain, qualify, or make understandable conduct of the declarant; and [¶] (b) Was made while the declarant was engaged in such conduct."

Ordinarily, spontaneous statements must be made soon after a traumatic or exciting event in order to qualify for this exception to the rule against hearsay. (*People v. Poggi* (1988) 45 Cal.3d 306, 318.) For example, the California Supreme Court held that a half-hour delay between a vicious attack and a statement regarding the attacker was not too long a time for an admissible spontaneous statement by the victim while still bleeding profusely from multiple stab wounds from which she would die within a few hours. (*Id.* at p. 315-316, 319.)

As Trendwest points out, Myers made the statements she sought to introduce as spontaneous statements more than a month after the second assault by Damlakhi would have occurred. Although that month was undoubtedly a difficult time for Myers, it also encompassed periods in which she was restless due to lack of activity and during which time she expressed an interest in returning to Trendwest because she calculated she could still join the President's Club by selling 100 time shares that calendar year.

Myers's intervening periods of reflection and planning preclude her subsequent statements, even if made in a tearful and stressed state, from being admissible as spontaneous statements nearly five weeks after the events described. (*People v. Poggi*, *supra*, 45 Cal.3d at p. 318.)

Even if the proffered hearsay had been erroneously excluded, we perceive no prejudice from the evidentiary ruling. To the extent that Myers sought to introduce the hearsay to establish her mental distress, the evidence was cumulative to hundreds of pages of hospital documents and her own testimony about her distress. The evidence adduced at trial convincingly showed that Myers suffered tremendous anxiety and stress at the time of her first hospitalization. And, as we have already noted, Torrez also testified about observing Myers's distress at the time. The jury, however, found that Myers had not been the victim of unwanted sexual harassment, and therefore redundant testimony about distress would not have bolstered her case.

Moreover, the proffered testimony would have been no more than self-corroborating and cumulative to her trial testimony. The jury still had substantial evidence from McGowan and Catlin that she was observed to be flirtatious with Damlakhi. The jury also had the documentation of her hospitalization and out-care patient treatment documents, which failed to mention sexual assault by Damlakhi. It is not reasonably probable that the exclusion of the hearsay statements she sought to introduce via testimony of her mother and friend affected the outcome of trial.

V

Exclusion of Evidence of Discrimination Complaints Against Other Managers at Trendwest

Myers argues the trial court erroneously excluded a consent decree in a class action against Trendwest by other female employees who claimed gender discrimination. Myers also contends evidence of additional lawsuits against Trendwest should have been admitted to show Trendwest's personnel policies did not comply with FEHA requirements. We shall deem the argument forfeited for failure to provide adequate citation to the lengthy record in this case.

A

Especially when the appellate record contains thousands of pages, "it is counsel's duty to point out portions of the record that support the position taken on appeal. The appellate court is not required to search the record on its own seeking error."

(*Del Real v. City of Riverside*, *supra*, 95 Cal.App.4th at p. 768.) Here, we must guess at what evidence Myers believes was erroneously excluded because her argument on this issue provides only a single citation to the record. That citation refers to a portion of the closing argument by Trendwest's counsel, and fails to identify the excluded evidence at issue here. Myers's reply brief entirely fails to discuss this issue.

A footnote in Myers's opening brief explains that "Exhibit 28A contained the restraining order by which Trendwest agreed not to engage in conduct that was in violation of the sex discrimination laws, rules and regulations." However, Myers does not give us a page citation for Exhibit 28A. The index to the clerk's transcript indicates that numerous exhibits were copied into the record, but we find no Exhibit 28 or 28A for the plaintiff or defendant listed. Moreover, the reporter's transcript indicates that plaintiff's exhibits 16 through 30 were not admitted into evidence.[4] For lack of a citation, the exhibit eludes us.

Myers also refers to a lawsuit filed by witness Marlene Martin. We have reviewed Martin's testimony in its entirety. She testified that she complained to Trendwest human resources personnel that Damlakhi was "a lawsuit waiting to happen" due to his mistreatment of female employees. Myers, however, fails to

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[4] Defendant's exhibits began with number 100 and proceeded sequentially.

point out where she made an offer of proof regarding the lawsuit she wished Martin to testify about. An offer of proof, however, is necessary to preserve a claim for appeal because it allows us to consider the content of the evidence sought to be admitted. (Evid. Code, § 354, subd. (a); *People v.* Morrison (2004) 34 Cal.4th 698, 711; *People v. Eid* (1994) 31 Cal.App.4th 114, 126.) Myers's failure to cite to the record to show that she made an offer of proof compels us to deem the assignment of error with respect to Martin's testimony to be forfeited. (*Morrison, supra,* 34 Cal.4th at p. 712.) And her lack of citation to the consent decree further supports our conclusion that the claim must be deemed forfeited. (*Del Real v. City of Riverside*, *supra*, 95 Cal.App.4th at p. 768.)

B

Even if not forfeited, Myers's argument would nonetheless fail for lack of prejudice. Myers contends the evidence of other lawsuits should have been admitted to address "whether Trendwest was meeting its duty of preventing discrimination under FEHA. (See Govt. Code § 12940(k))." However, as we have already explained, Myers's failure to prove she suffered unwanted sexual harassment precluded her from establishing the cause of action under Government Code section 12940, subdivision (k). (*Trujillo, supra*, 63 Cal.App.4th at p. 289.) Any wrongful exclusion of evidence regarding whether the environment was hostile would have been harmless because Myers was unable to convince the jury that she was sexually harassed. (*Ibid.*)

In sum, Myers's argument on this issue would fail even if we were not compelled to declare that her lack of citation to the record and her failure to make an offer of proof forfeited her claim.

VI

Denial of Leave to Amend to Add Claim for Disability Discrimination

Myers contends the trial court erred by denying her mid-trial motion to amend her complaint to add a claim for disability discrimination "to conform to proof." Myers admits she deliberately delayed in moving to amend the complaint in order to secure an earlier trial. We shall conclude the trial court did not abuse its discretion in denying her motion.

A

The disability discrimination claim was not a late-discovered issue. Myers received the letter terminating her employment at Trendwest for excessive medical leave in December 2003. Myers presented a claim for disability discrimination in her April 2004 administrative complaint to the Department of Fair Employment and Housing. In October 2007, Myers's counsel questioned Damlakhi about Trendwest's medical leave and termination of employment policies. That same month, Trendwest's attorney wrote to Myers's counsel to demand that any motion to amend the complaint be filed immediately to allow Trendwest to conduct discovery and seek summary judgment on the new claim.

Myers chose not to move to amend the complaint until two court days before trial in order to avoid postponing its commencement. The trial court denied the motion and granted Trendwest's in limine motion to exclude evidence of Trendwest's policy regarding termination for medical leave in excess of six months. Evidence regarding Trendwest's medical leave policy was excluded at trial. Even so, Myers moved to amend the complaint to conform to proof during trial. The trial court denied her motion.

B

"[T]here exists a liberal policy toward permitting amendments at any time under Code of Civil Procedure section 473, but when the trial court denies the request, its decision will be upheld on appeal unless a clear abuse of discretion is established. [Citations.] In denying leave to amend, the trial court may properly consider whether the subject matter of the amendment is objectionable, the conduct of the moving party, *and the belated presentation of the amendment*." (*Del Mar Beach Club Owners Assn. v. Imperial Contracting Co.* (1981) 123 Cal.App.3d 898, 914, italics added.) Inexcusable delay by plaintiff and probable prejudice to the defendant support the denial of leave to amend a complaint. (*Magpali v. Farmers Group, Inc.* (1996) 48 Cal.App.4th 471, 487.)

Here, Myers admits that she "*chose* . . . to seek the trial court's permission to file the amendment before the start of trial" to avoid delaying its commencement by an estimated six

months. (Italics added.) Myers fails to acknowledge the delay would have been attributable to Trendwest's need to engage in discovery as to the facts regarding the discrimination claim.

As Trendwest points out, a disability discrimination claim would have raised new factual issues concerning Myers's ability to perform the essential duties of her job with a reasonable accommodation. The California Supreme Court has explained that Government Code "section 12940 makes it clear that drawing distinctions on the basis of physical or mental disability is not forbidden discrimination *in itself*. Rather, drawing these distinctions is prohibited *only if* the adverse employment action occurs because of a disability *and* the disability would not prevent the employee from performing the essential duties of the job, at least not with reasonable accommodation. Therefore, in order to establish that a defendant employer has discriminated on the basis of disability in violation of the FEHA, the plaintiff employee bears the burden of proving he or she was able to do the job, with or without reasonable accommodation." (*Green v. State* (2007) 42 Cal.4th 254, 262.)

Trendwest was entitled to conduct discovery to defend against the disability discrimination claim. (*Magpali v. Farmers Group, Inc.*, *supra*, 48 Cal.App.4th at p. 487.) Myers's tactical decision to file the motion to amend the complaint immediately before trial would have prejudiced Trendwest's ability to investigate the facts and formulate a defense. Having decided to engage in delay, Myers cannot complain that

the trial court exercised its discretion to rule that she was too late in filing her motion to amend. (*Ibid*.)

VII

Juror Misconduct

Myers contends the trial court erred in denying her motion for new trial based on misconduct by juror, Matthew Molina. She claims Molina wrongfully called for a vote at the outset of deliberations and refused thereafter to deliberate with other jurors. We shall reject the argument, again finding that her factual recount differs significantly from the evidence in the record when viewed in the light most favorable to the trial court's ruling.

A

To warrant a new trial based on juror misconduct, a moving party must establish that misconduct occurred and was prejudicial. (Code Civ. Proc., § 657, subd. (2); *People v. Duran* (1996) 50 Cal.App.4th 103, 113.)

Resolution of conflicts in the evidence provided by juror declarations lies uniquely within the province of the trial court. (*Bardessono v. Michels* (1970) 3 Cal.3d 780, 795.) In the absence of express findings by the trial court or a demonstration that the trial court's findings are unsupported by substantial evidence, we presume that the trial court resolved the conflicts in favor of the prevailing party. (*Ibid*.)

Stated in the light most favorable to the trial court's denial of Myers's motion for new trial, the jurors' declarations establish that deliberations began at 8:30 a.m. on December 18, 2007. At the outset, a juror suggested they look at the special verdict form to ascertain the questions they would have to answer. The foreperson read the first question aloud, which asked whether Myers had been subjected to unwanted sexual harassment. Another juror (who might have been Molina) said, "Let's vote on it." Ten jurors preliminarily voted "No," and two voted "Yes." The foreperson noted the special verdict form instructed them not to answer any other questions if they found Myers had not been subjected to unwanted sexual harassment.

The foreperson then told the other jurors "it was important to make sure whether voting no was what they really wanted to do, and that it was important they all have time to express themselves about what they thought about the case and why they decided to vote the way they did." All of the jurors spoke, including Molina. Molina expressed his views at length. As a group, the jury discussed issues concerning harassment, the testimony of some witnesses, several exhibits, and jury instructions.

At 11:00 a.m., the jury took another vote with the result that five jurors "firmly" voted "No" on the first question, five were "on the fence but leaning toward" a "No" vote, and two jurors "firmly" voted "Yes." The jury continued to deliberate until it recessed for lunch.

After lunch, deliberations resumed with the suggestion by a juror that they take a "hypothetical vote on Question #2 on the verdict form . . . ." Molina objected to having a hypothetical vote, wishing to confine the vote to the first question. Molina moved away from the jury table, and began to read the newspaper. Molina continued to pay attention and made comments during the ensuing discussion. Molina also participated in the "hypothetical" vote, which indicated 11 jurors against and one in favor of finding "the harassment [was] so severe, widespread, or persistent that a reasonable woman in Alissia Myers' circumstances would have considered the work environment to be hostile or abusive." The jury returned to the first question, and Molina continued to participate.

When the vote again was 10 "No" and two "Yes," the foreperson noted that no one had changed and asked whether this was each juror's final vote. All jurors stated they would not change their minds. No one called for further discussion, and the jury ended its deliberation.

B

Myers asserts that Molina committed misconduct in demanding a vote at the beginning of deliberations. She reasons that the preliminary vote caused jurors to become "wedded" to their initial opinions. We find no misconduct in either the call for or the taking of an immediate vote.

Jurors are not compelled to deliberate at any length prior to taking a vote. "Code of Civil Procedure section 613 states:

'When the case is finally submitted to the jury, *they may decide in Court* or retire for deliberation.' (Italics added.) On its face, the statute - permitting the jury to decide the case in court - suggests there is nothing impermissible in simply taking a vote and rendering a verdict if the jury chooses to do so." (*Vomaska v. City of San Diego* (1997) 55 Cal.App.4th 905, 910 (*Vomaska*).)

In *Vomaska*, the jury returned a defense verdict within 10 to 15 minutes because a straw vote revealed 10 jurors agreed the public property maintained by the defendant was not in a dangerous condition. (55 Cal.App.4th at p. 909.) The Court of Appeal rejected a challenge to the legitimacy of the verdict due to the rapidity of the vote. The *Vomaska* court explained the straw vote was "a type of 'deliberations,' in that each juror - having considered the evidence and arguments independently - is setting forth his or her opinion, albeit without accompanying reasons or explanations." (*Id.* at p. 912.) Jurors' failure to discuss their individual views before rendering the verdict did not undermine the result. (*Id.* at pp. 912-913.)

Here, the jury took a straw poll as in *Vomaska*. Had the jury chosen, it could have simply rendered a verdict based on the 10 to two vote against finding that Myers had suffered unwanted sexual harassment. (*Vomaska*, *supra*, 55 Cal.App.4th at p. 912.) Instead, the jury continued to deliberate with each juror expressing his or her views. Moreover, the jury discussed the testimony of some witnesses and even examined exhibits. The

verdict in this case was clearly the product of a deliberate and conscientious process by the jurors.

Myers also attacks Molina's moving away from the rest of the jurors in order to read the newspaper. She argues that his refusal to deliberate constituted prejudicial misconduct. Resolving the conflicts in favor of the trial court's denial of the new trial motion, we must credit the competing declaration of the jury foreperson who explained that Molina remained nearby, continued to deliberate, participated in a "hypothetical" vote on the second question of the special verdict form, and then again in the final vote. On this basis, Myers's claim that Molina refused to deliberate must fail.

The trial court did not err in denying the motion for new trial based on Myers's allegation of juror misconduct.

VIII

Cumulative prejudice

Finally, Myers contends the errors she raises on appeal cumulatively establish prejudice. Having found no merit in any of Myers's assignments of error, no prejudice exists to warrant reversal. (*People v. Jablonski* (2006) 37 Cal.4th 774, 832.)

IX

Commendation of Trial Judge

We commend the trial judge, the Honorable Brian R. Van Camp, for doing an exemplary job on a case presenting some difficult legal issues.

DISPOSITION

The judgment is affirmed. Trendwest shall recover its costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1) & (2).)

SIMS, Acting P. J.

We concur:

ROBIE, J.

CANTIL-SAKAUYE, J.