APPENDIX TABLE OF CONTENTS

App. 1

Court of Appeal, Second Appellate Division,
Division Two - No. B304749

S276705

IN THE SUPREME COURT OF CALIFORNIA

En Banc

CAROL PULLIAM, Plaintiff and Appellant,

v.

UNIVERSITY OF SOUTHERN CALIFORNIA,
Defendant and Respondent.

(Filed Nov. 16, 2022)

The petition for review is denied.

CANTIL-SAKAUYE
Chief Justice

App. 2

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT

DIVISION 2

CAROL PULLIAM,
Plaintiff and Appellant,
v.
USC VERDUGO HILLS HOSPITAL,
Defendant and Respondent.

B304749
Los Angeles County Super. Ct. No. BC654563

(Filed Sep. 8, 2022)

THE COURT:

Petition for rehearing is denied.

/s/ Lui
Lui, P.J.

/s/ Ashmann-Gerst
Ashmann-Gerst, J.

/s/ Chavez
Chavez, J.

**NOT TO BE PUBLISHED
IN THE OFFICIAL REPORTS**

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

CAROL PULLIAM, Plaintiff and Appellant, v. UNIVERSITY OF SOUTHERN CALIFORNIA, Defendant and Respondent.	B304749 (Los Angeles County Super. Ct. No. BC654563)

(Filed Aug. 23, 2022)

APPEAL from a judgment of the Superior Court of Los Angeles County, Elaine Lu, Judge. Affirmed.

Carol Pulliam, in pro. per.; Law Offices of Wole Akinyemi and Wole Akinyemi, for Plaintiff and Appellant. [*Retained*.]

Horvitz & Levy, Bradley S. Pauley, Mark A. Kressel, Lacey L. Estudillo; Peterson Bradford Burkwitz, Avi A. Burkwitz and Gil Y. Burkwitz, for Defendant and Respondent.

Plaintiff and appellant Carol Pulliam (Pulliam) appeals from a judgment entered in favor of defendant and respondent University of Southern California (USC)[1] following a jury trial on Pulliam's claims of wrongful termination in violation of public policy and intentional interference with an employment contract.

Because Pulliam has not met her burden on appeal, we affirm.

BACKGROUND

I. *Facts*[2]

A. Pulliam's employment by MSS Nurses Registry; assignment to USC Verdugo Hills Hospital

Pulliam was employed as a nurse by MSS Nurses Registry (MSS), which sent her to work at various hospitals. In October 2015, MSS assigned Pulliam to work at USC Verdugo Hills Hospital (the hospital) on an as-needed basis. Between October 2015 and January

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[1] USC was sued erroneously as USC Verdugo Hills Hospital.

[2] As Pulliam does not challenge the sufficiency of the evidence, we state the underlying facts adduced at trial only briefly in the light most favorable to the judgment. (See *People v. Camacho* (2009) 171 Cal.App.4th 1269, 1272, fn. 2.)

2016, Pulliam worked approximately 40 shifts at the hospital.

B. Missing medication

In January 2016, a routine weekly medication audit at the hospital revealed that a tablet of tramadol, a controlled pain medication, was missing from a Pyxis machine, a secured unit containing medications. Pyxis records indicated that Pulliam was potentially involved in the medication discrepancy.

The hospital's clinical director, Raffi Boghossian (Boghossian), called MSS to speak with Pulliam about the discrepancy. Boghossian left a message but did not receive a call back. He approached Pulliam during her next shift at the hospital. Pulliam claimed that "she didn't do anything wrong, and [that] she was busy." When Boghossian approached Pulliam again to "provide[ ] her an opportunity . . . to explain herself[,]" Pulliam said, 'I didn't do anything wrong. This report is wrong. This is wrong[.]' " Pulliam refused to speak with Boghossian further and walked away.

Boghossian spoke to his supervisor about the incident. Given concerns "that she may not be safe with . . . patients[,]" they agreed that Pulliam should not return to work at the hospital.

C. Do-not-send designation

Boghossian sent a personnel evaluation form to MSS stating that Pulliam accessed controlled medication

which was not administered to a patient. He stated that Pulliam " 'was provided with the opportunity to explain the situation but did not cooperate.' " Boghossian requested that MSS not send Pulliam to any department at the hospital.

Asked by MSS to respond to the medication discrepancy, Pulliam wrote that other nurses had miscounted the medication. She believed that it "was a set up[.]"

II. *Procedural History*

A. Pretrial proceedings

In March 2017, Pulliam filed a complaint in the Los Angeles County Superior Court, alleging causes of action against USC and MSS.[3] A month later, USC removed the case to the United States District Court for the Central District of California based on federal question jurisdiction. (28 U.S.C. §§ 1331, 1441(a).)

Pulliam filed the operative first amended complaint in federal court. She asserted causes of action for race discrimination, libel, and slander (against both USC and MSS); wrongful termination in violation of public policy and intentional interference with an employment contract (against USC only); and failure to prevent discrimination (against MSS only).

In April 2018, the federal district court granted summary adjudication in favor of USC and MSS as to

[3] MSS is not a party to this appeal.

Pulliam's race discrimination claim under title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.), and remanded the remaining claims to state court.

Following remand, the trial court granted MSS's motion for summary judgment. In January 2019, the court granted USC summary adjudication as to the causes of action for race discrimination under the Fair Housing and Employment Act, libel, and slander.

B. Trial

The case proceeded to a jury trial on two causes of action against USC—wrongful termination in violation of public policy and intentional interference with an employment contract.

The jury began its deliberations at 2:46 p.m. on December 11, 2019. The trial judge, Judge Elaine Lu, informed counsel that she planned to leave the courthouse early that afternoon to attend a youth outreach program. She explained that she had arranged for another judge to cover for her in the event that the jury reached a verdict or to help with any questions. She would also be available on her cell phone. In response, Pulliam's counsel replied, "That's great."

Before leaving, Judge Lu asked counsel to review the jury instructions and verdict form and to redact confidential information from the admitted trial exhibits. The redactions were completed at approximately 3:40 p.m. After final approval by counsel, the jury instructions, verdict, and exhibits were given to the jury.

At 4:05 p.m., the jury indicated that it had reached a verdict. Another judge presided as the verdict was read. The jury unanimously found in favor of USC on both causes of action.

On January 6, 2020, the trial court entered judgment in favor of USC.

C. Ex parte applications for juror information

In January 2020, Pulliam, proceeding in propria persona, sought ex parte "an order unsealing juror identifying information" under Code of Civil Procedure section 237, subdivision (b).[4] She requested the disclosure of the jurors' identities and contact information so that she could obtain affidavits from them regarding their deliberative process.[5] She argued that the information was necessary for her to prove jury misconduct in a motion for a new trial. In support, Pulliam submitted her own declaration, as well as a declaration from her former counsel who represented her at trial, Wole Akinyemi (Akinyemi).

Akinyemi stated in his declaration that, on December 11, 2019, it took him and defense counsel approximately 34 minutes to redact over 2,000 pages of

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[4] All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

[5] Pulliam filed three separate ex parte applications in January 2020, seeking the release of juror information. Because each sought the same information and each was denied based on a lack of a prima facie showing of good cause, we describe the last, most comprehensive, application and denial.

exhibits. The evidence binders, jury instructions, and verdict form were delivered to the jurors a few minutes before 4:00 p.m., and "shortly thereafter" the jury indicated that it had reached a verdict. Akinyemi "was totally stunned and shocked" that a verdict had been reached. He opined: "Clearly, the jurors did not review the evidence books and neither did they actually read the 22-page jury instructions that accompanied the evidence books because they reached their decision within five minutes after these documents were delivered to them by the courtroom assistant." After the jury was dismissed, Akinyemi spoke to jurors, who told him that they had concluded that Pulliam was not a USC employee, and, therefore, they did not review other evidence or the jury instructions.[6]

In denying Pulliam's request, the trial court concluded that Pulliam had failed to make a prima facie showing of good cause for the disclosure. The court explained that Pulliam had not "identif[ied] any information that may be gathered from jurors to support any claim of juror misconduct" and that the evidence she had submitted was "insufficient to suggest that any juror engaged in misconduct." The court found "no indication that the jurors, having been read the jury instructions in open court and having listened to the

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[6] In her declaration, Pulliam recounted what Akinyemi had told her about his conversations with jurors. The trial court sustained its own objections to Pulliam's declaration for lack of foundation and on hearsay grounds and noted that Pulliam's "characterization of what her former attorney . . . discussed with the jurors varie[d] significantly from Akinyemi's own declaration."

presentation of evidence throughout the trial, were not properly deliberating during the entire 'roughly 34 minutes or so' that [c]ounsel spent redacting the exhibit binders." The court also found that "Akinyemi's assertion that the jurors focused their attention on one particular area of evidentiary weakness in [Pulliam]'s case—the lack of evidence to show that [Pulliam] was an employee of USC—improperly delve[d] into the thought process of the jurors." Even if Pulliam were to uncover evidence from the jurors supporting Akinyemi's assertion, the evidence would "be immaterial and inadmissible."

D. Motion for new trial

On January 31, 2020, Pulliam moved for a new trial under section 657 on the grounds of irregularity in the proceedings, jury misconduct, accident or surprise, newly discovered evidence, and error in law.[7] In support, Pulliam submitted her own declaration, stating that the jury began deliberating without the evidence books and, once the redacted books were delivered to them, returned a verdict only 26 minutes later. With her reply, she submitted the same declaration of her former counsel that had been previously

[7] Pulliam's motion included the legal standard for a motion for judgment notwithstanding the verdict, but it offered no argument as to why Pulliam was entitled to it. The trial court later denied Pulliam's request for judgment notwithstanding the verdict on this basis.

filed in connection with her request for juror information.

On February 26, 2020, the trial court denied Pulliam's new trial motion. The court noted that Pulliam's declaration was not properly certified under penalty of perjury as required by section 2015.5, and that her former counsel's declaration was offered for the first time in her reply. As relevant here, the court rejected the contention that the jury failed to properly deliberate, citing a lack of admissible evidence to support the claim, as well as Pulliam's failure to show resulting prejudice.

E. Appeal

On March 4, 2020, Pulliam timely appealed from the judgment.

F. Recusal of trial judge

On August 3, 2020, Judge Lu recused herself from the case because "[a] close friend . . . was appointed as General Counsel of [USC] in or around June of 2020." On August 6, 2020, the case was reassigned to another judge for all further proceedings.

DISCUSSION

An appellate court presumes that the judgment is correct. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) We adopt all intendments and inferences to affirm the judgment unless the record expressly contradicts

them. (*Ibid*.) An appellant has the burden of overcoming the presumption of correctness, and we decline to consider issues raised in an opening brief that are not properly presented or sufficiently developed to be cognizable. (See *People v. Stanley* (1995) 10 Cal.4th 764, 793; *People v. Turner* (1994) 8 Cal.4th 137, 214, fn. 19 (*Turner*), abrogated in part on other grounds by *People v. Griffin* (2004) 33 Cal.4th 536, 555, fn. 5; *Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 852 (*Benach*).) "It is not our place to construct theories or arguments to undermine the judgment and defeat the presumption of correctness." (*Benach, supra*, 149 Cal.App.4th at p. 852.) A litigant's election to act in propria persona on appeal does not entitle her to leniency as to the rules of practice and procedure.[8] (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 984985.)

With that in mind, we discuss the following arguments made by Pulliam that "are sufficiently developed to be cognizable" (*Turner, supra*, 8 Cal.4th at p. 214, fn. 19): (1) The trial court erred by denying Pulliam's ex parte applications to disclose juror information; (2) the court erred by denying Pulliam's new trial motion based on juror misconduct and surprise; (3) the court failed to properly instruct the jury regarding deposition testimony read during trial; (4) the court erred by granting MSS's motion for summary

[8] Pulliam filed her appellate briefs in propria persona but was represented by counsel at oral argument. We only consider issues raised in Pulliam's briefs; "[w]e do not consider arguments that are raised for the first time at oral argument. [Citation.]" (*Haight Ashbury Free Clinics, Inc. v. Happening House Ventures* (2010) 184 Cal.App.4th 1539, 1554, fn. 9.)

judgment; and (5) all of the court's orders are void because the trial judge was disqualified when she made them. "To the extent [Pulliam] perfunctorily asserts other claims, without development and, indeed, without a clear indication that they are intended to be discrete contentions, they are not properly made, and are rejected on that basis." (*Turner, supra*, at p. 214, fn. 19.)

I. *Denial of Ex Parte Applications to Disclose Juror Information*

A. Relevant law

"[S]ection 237 requires that a petition seeking juror contact information 'shall be supported by a declaration that includes facts sufficient to establish good cause for the release of the juror's personal identifying information.' [Citation.] Good cause includes a showing that the party seeking disclosure has made a diligent effort to contact the jurors through other means. [Citations.]" (*Eng v. Brown* (2018) 21 Cal.App.5th 675, 710 (*Eng*).) Good cause also "requires 'a sufficient showing to support a reasonable belief that jury misconduct occurred . . . ' [Citations.] Good cause does not exist where the allegations of jury misconduct are speculative, conclusory, vague, or unsupported. [Citation.]" (*People v. Cook* (2015) 236 Cal.App.4th 341, 345-346.)

B. Standard of review

We review the denial of a request for disclosure of juror information under the abuse of discretion standard. (*Eng, supra*, 21 Cal.App.5th at p. 710.)

C. Analysis

Although Pulliam purported to seek the unsealing of juror information in her ex parte applications, the names of the jurors were not sealed. (Cf. § 237, subd. (a)(2) [requiring "the court's record of personal juror identifying information of trial jurors, . . . consisting of names, addresses, and telephone numbers," to be sealed "[u]pon the recording of a jury's verdict in a *criminal* jury proceeding" (italics added)].) During voir dire, all jurors stated their names and several stated their areas of residence. This information was readily available to Pulliam. Her ex parte applications, however, failed to show that, equipped with this information, she made any effort – let alone "a diligent effort" (*Eng, supra*, 21 Cal.App.5th at p. 710) – to contact the jurors through other means.

Diligence aside, Pulliam sought juror information to obtain affidavits concerning "whether or not some of the jurors were pressured by their pairs [sic] to go along with the decision of the few not to deliberate and agree[ ] that [Pulliam] was not an employee of USC and [that] no further deliberation [wa]s needed." Any such evidence discussing the internal thought processes of the jurors during deliberations would have been inadmissible and irrelevant for the purpose of a

new trial motion. (See *People v. Steele* (2002) 27 Cal.4th 1230, 1264 ["Because . . . the jurors' mental processes leading to the verdict are of no jural consequence, evidence of those mental processes is of no `consequence to the determination of the action' [citation] and hence is irrelevant"]; *Eng, supra*, 21 Cal.App.5th at pp. 710-711 [sought after juror statements discussing confusion about instructions and verdict form would have been inadmissible to impeach the verdict]; *Bell v. Bayerische Motoren Werke Aktiengesellschaft* (2010) 181 Cal.App.4th 1108, 1124 (*Bell*) ["Evidence of jurors' internal thought processes is inadmissible to impeach a verdict"].)

Under these circumstances, without any indication that the disclosure of juror information would lead to relevant, admissible evidence not otherwise attainable, the trial court did not abuse its discretion in denying Pulliam's ex parte applications. (*Eng, supra*, 21 Cal.App.5th at pp. 710-711 [no abuse of discretion in denying an ex parte request for juror information where the names of the jurors were available and the information sought from the jurors would have been inadmissible]; see also *Conservatorship of Scharles* (1991) 233 Cal.App.3d 1334, 1340 ["a reviewing court will only interfere with a trial court's exercise of discretion where it finds that under all the evidence, viewed most favorably in support of the trial court's action, no judge could have reasonably reached the challenged result"].)

II. *Denial of Motion for New Trial*[9]

A. Jury misconduct

1. *Relevant law*

A trial court may vacate a jury verdict and order a new trial based on "[m]isconduct of the jury[.]" (§ 657, subd. (2).) "A party moving for a new trial on the ground of juror misconduct must establish both that misconduct occurred and that the misconduct was prejudicial. [Citations.]" (*Ovando v. County of Los Angeles* (2008) 159 Cal.App.4th 42, 57.) "[A] jury verdict may not be impeached by hearsay affidavits" (*People v. Villagren* (1980) 106 Cal.App.3d 720, 729 (*Villagren*)) or "by assailing [the jurors'] subjective mental processes" (*People v. Elkins* (1981) 123 Cal.App.3d 632, 638 (*Elkins*)).

2. *Standard of review*

Where, as here, "the trial court provides a statement of reasons" for denying a motion for a new trial, "the appropriate standard of judicial review is one that defers to the trial court's resolution of conflicts in the evidence and inquires only whether the court's

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[9] Pulliam moved for a new trial based on the statutory grounds of irregularity in the proceedings, jury misconduct, accident or surprise, newly discovered evidence, and error in law. Her opening brief only raises proper challenges to the trial court's denial of her motion brought on the grounds of jury misconduct and surprise. Pulliam has therefore forfeited any argument that the court erred in denying her motion brought on any other ground. (See Cal. Rules of Court, rule 8.204(a)(1)(B); *Benach, supra*, 149 Cal.App.4th at p. 852.)

decision was an abuse of discretion." (*Oakland Raiders v. National Football League* (2007) 41 Cal.4th 624, 636.)

3. *Analysis*

Pulliam proffered no competent evidence to support her claim that the jury committed misconduct by failing to deliberate. She did not submit a declaration from any juror, and her former counsel's declaration regarding statements made to him by jurors constituted inadmissible hearsay. (See *Burns v. 20th Century Ins. Co.* (1992) 9 Cal.App.4th 1666, 1670 (*Burns*) [declarations from an "investigator concerning purported statements and thoughts of two jurors during their deliberations" were "inadmissible hearsay"]; *Villagren, supra*, 106 Cal.App.3d at p. 729; *People v. Manson* (1976) 61 Cal.App.3d 102, 216 [attorney's declaration concerning purported statements of jurors was "nothing more nor less than hearsay or double hearsay and [was] incompetent and insufficient to impeach the verdict"].)

More fundamentally, a trial court simply "cannot consider evidence of a juror's subjective reasoning process in deciding whether to grant a new trial based on purported juror misconduct. [Citation.]" (*People v. Allen and Johnson* (2011) 53 Cal.4th 60, 75; see also *Bell, supra*, 181 Cal.App.4th at p. 1124; *Elkins, supra*, 123 Cal.App.3d at p. 638.)

Pulliam provided no evidence to rebut the presumption that the jury followed the trial court's instructions

to "[p]ay careful attention to all the instructions"; "consider all the evidence"; "talk with [other jurors] in the jury room"; and "decide the case" after "consider[ing] the evidence with the other members of the jury." (See *People v. Merriman* (2014) 60 Cal.4th 1, 48-49 ["Absent some showing to the contrary, we presume the jury followed the court's instructions"].) Contrary to Pulliam's contention, the amount of time that the jury took to deliberate does not evidence a failure to deliberate. (See *People v. Leonard* (2007) 40 Cal.4th 1370, 1413 ["the brevity of the deliberations proves nothing"]; *Mendoza v. Club Car, Inc.* (2000) 81 Cal.App.4th 287, 310 ["short jury deliberations do not show a failure by a jury to fully consider a case"].)[10]

As "the record contains no admissible evidence to substantiate [Pulliam's] contentions of juror misconduct[,]" we find no abuse of the trial court's discretion in denying the new trial motion. (*Burns, supra*, 9 Cal.App.4th at p. 1672; see also *People v. Dykes* (2009) 46 Cal.4th 731, 810-811 ["a trial court does not abuse

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[10] At oral argument, Pulliam's counsel relied heavily on *People v. Hedgecock* (1990) 51 Cal.3d 395 (*Hedgecock*) to argue that the trial court should have allowed Pulliam to conduct a limited, in camera examination of jurors regarding their alleged misconduct. *Hedgecock* does not support this position. It held that "when a *criminal* defendant moves for a new trial based on allegations of jury misconduct, the trial court has discretion to conduct an evidentiary hearing to determine the truth of the allegations." (*Id.* at p. 415, italics added.) This is not a criminal case, and Pulliam is not a criminal defendant. Rather, "in civil cases a motion for a new trial based on allegations of jury misconduct must be presented solely by affidavit, without the testimony of witnesses." (*Id.* at p. 414.)

its discretion in denying a motion for new trial based upon juror misconduct when the evidence in support constitutes unsworn hearsay"].)

B. Surprise

"'Surprise' as a ground for a new trial denotes some condition or a situation in which a party to an action is unexpectedly placed to his detriment. The condition or situation must have been such that ordinary prudence on the part of the person claiming surprise could not have guarded against and prevented it. Such party must not have been negligent in the *circumstances*. [Citations.]" (Wade v. De Bernardi (1970) 4 Cal.App.3d 967, 971.) A new trial motion based on surprise "must be made upon affidavits[.]" (§ 658; see also § 657, subd. (3); *Linhart v. Nelson* (1976) 18 Cal.3d 641, 645; *Phipps v. Copeland Corporation LLC* (2021) 64 Cal.App.5th 319, 339 (*Phipps*).)

Pulliam did not submit any affidavit regarding the surprises she alleged in her new trial motion.[11] The declarations she submitted pertained to unrelated matters. "It is well established that the proceedings on a motion for new trial are strictly statutory, and the procedure for seeking relief must conform strictly to the statutory mandate. [Citations.]" (*Cembrook v.*

[11] In the motion, Pulliam contended, inter alia, that she was surprised that certain exhibits were presented by the defense during trial; that USC's counsel argued that Pulliam worked on a day that she did not; and that certain witnesses did not appear to testify.

Sterling Drug Inc. (1964) 231 Cal.App.2d 52, 66.) The failure to comply with the affidavit requirement to support her motion on the ground of surprise justified its denial.[12]

III. *Alleged Instructional Error*

Pulliam contends that the trial court failed to instruct the jury properly regarding the deposition testimony of Ruby De La Cruz Garma-Williams (Garma-Williams), which was read to the jury after Garma-Williams failed to appear at trial. According to Pulliam, "it was critical that the court explain the importance" of Garma-Williams's deposition testimony prior to it being read to them.[13] Pulliam cites no authority nor provides cogent argument for this proposition, thus forfeiting it. (See *In re Marriage of Falcone & Fyke* (2008) 164 Cal.App.4th 814, 830 ["The absence of cogent legal argument or citation to authority allows this court to treat the contentions as waived"].)

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[12] "'"We will affirm the trial court's ruling if it is correct on any theory of law applicable to the case, even if for reasons different than those given by the trial court.'" [Citations.]" (*Phipps, supra*, 64 Cal.App.5th at p. 339, fn. 9.)

[13] The day before Garma-Williams's testimony was read, the trial court instructed the jury under CACI No. 208 (Deposition as Substantive Evidence). Immediately prior to Pulliam's counsel reading Garma-Williams's deposition testimony, the trial court told the jury: "Ruby De La Cruz Garma-Williams was previously deposed, and counsel here is going to read to you excerpts of her deposition. [¶] I've already explained to you what a deposition is and how you should treat deposition testimony." And, the jury was again instructed with CACI No. 208 prior to deliberations.

In any event, Pulliam points to no evidence that the trial court abused its discretion with respect to the timing of the instructions or that she suffered prejudice. (See *Nungaray v. Pleasant Valley Lima Bean Growers & Warehouse Ass'n* (1956) 142 Cal.App.2d 653, 661-662 ["The sequence in which instructions are given is a matter in the sound discretion of the trial court, and a very strong showing of prejudice must be made before a reviewing court will hold its discretion abused"].) She also forfeited her argument by failing to object at the time Garma-Williams's deposition testimony was read. (See *id.* at p. 662.)

IV. *MSS's Motion for Summary Judgment*

Pulliam also argues that the trial court erred by granting MSS's motion for summary judgment. We lack jurisdiction to consider the argument because this appeal is from the judgment entered on January 6, 2020, in favor of USC only, and not from any judgment entered in favor of MSS.[14] (See *Sole Energy Co. v. Petrominerals Corp.* (2005) 128 Cal.App.4th 212, 239 ["A notice of appeal from a judgment alone does not encompass other judgments and separately appealable orders"].)

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[14] Neither the January 6, 2020, judgment nor Pulliam's notice of appeal refers to MSS.

V. *Disqualification of Trial Judge*

Pulliam asks us to "void all rulings entered by Judge Lu" between April 4, 2018, and August 3, 2020, positing that Judge Lu knew "that her close friend applied to USC for a position" but "failed to disclose this conflict" while presiding over the case. (Bolding omitted.) Pulliam relies on the propositions that "disqualification occurs when the facts creating disqualification arise, not when disqualification is established" (*Christie v. City of El Centro* (2006) 135 Cal.App.4th 767, 776), and that "[o]rders made by a disqualified judge are void" (*Rossco Holdings, Inc. v. Bank of America* (2007) 149 Cal.App.4th 1353, 1362). Thus, she contends, Judge Lu was disqualified even before her friend became USC's general counsel in June 2020, and all of her orders while she was disqualified are void.

We reject this argument, as it is entirely rooted in speculation. Judge Lu voluntarily recused herself upon belief that "her recusal would further the interests of justice." (§ 170.1, subd. (a)(6)(A)(i).) She explained that her close friend had been appointed USC's general counsel in or around June 2020. There is nothing in the record to support Pulliam's contention that grounds for disqualification arose earlier than June 2020, which was months after judgment was entered in this matter and months after Judge Lu ruled on Pulliam's new trial motion.

Without any showing of good cause, there is no basis to set aside Judge Lu's orders. (See § 170.3, subd. (b)(4) ["If grounds for disqualification are first learned

of or arise after the judge has made one or more rulings in a proceeding, but before the judge has completed judicial action in a proceeding, the judge shall, unless the disqualification be waived, disqualify himself or herself, but in the absence of good cause the rulings he or she has made up to that time shall not be set aside by the judge who replaces the disqualified judge"].)

DISPOSITION

The judgment is affirmed. USC is entitled to its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
LUI

_____, J.
CHAVEZ

SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES

STANLEY MOSK COURTHOUSE
DEPARTMENT 16

CAROL PULLIAM, Plaintiff, vs. USC VERDUGO HILLS HOSPITAL[redacted] et al., Defendant(s).	Case No.: BC654563 [redacted] **Order Denying Plaintiff's Motion to. Set Aside Notice of Entry of Judgment Filed 1/6/2020 Including The Summary Judgment Order Filed in Favor of Defendant MSS Nurses Registry, Inc. on 1/23/2019, and the Court's Denial of Plaintiff's Motion for New Trial. and Motion for Judgment Notwithstanding the Verdict** Date: December 11 2020

TO CAROL PULLIAM, WHO IS SELF-REPRESENTED, AND TO DEFENDANTS USC VERDUGO HILLS HOSPITAL, MSS NURSES REGISTRY, INC., AND THEIR ATTORNEYS OF RECORD;

The motion – four motions, actually as is denied. There is no proof of service of the motion on defendant MSS Nurses Registry, Inc.. The motion to set aside USC's notice of entry of judgment flied 1/6/2020 is denied. The motion to set aside the summary judgment order filed

in favor of defendant MSS Nurse's Registry, Inc. on 11/23/2019 is denied. The nature of this motion is that of a motion for reconsideration. The moving party has not complied with. California Code of Civil Procedure section 1008. The motion to set aside the court's denial of plaintiff's motion for new trial and motion for judgment notwithstanding the verdict filed 2/26/2020 are both denied. The nature of these motion is that of a motion for reconsideration. Plaintiff did not comply with California Code of Civil Procedure section 1008 for either the motion for new trial or for the motion for judgment notwithstanding the verdict.

It is so ordered.

Dated: December 11, 2020

LIA MARTIN
Hon. Lia Martin
Judge of the Superior Court

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(erroneously sued as "USC VERDUGO
HILLS HOSPITAL")

SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES

STANLEY MOSK COURTHOUSE
DEPARTMENT 16

CAROL PULLIAM, Plaintiff, vs. USC VERDUGO HILLS HOSPITAL, MSS NURSES REGISTRY, INC, and DOES 1 through 25, inclusive, Defendants.	Case No.: BC654563 Assigned to the Honorable: Elaine Lu, Dept. 26 **~~[PROPOSED]~~ JUDGMENT** Complaint Filed: March 17, 2017 Trial Date: December 2, 2019

TO THE COURT, PLAINTIFF AND HER ATTORNEY OF RECORD HEREIN:

This action came on regularly for trial on December 2, 2019, in Department 26 of the Los Angeles

Superior Court, Central District, the Honorable Elaine Lu, presiding. Plaintiff, Carol Pulliam, was represented by Wole Akinyemi, Esq. and Wendy Slavkin, Esq. Defendant, University of Southern California, was represented by Avi Burkwitz, Esq., and Gil Burkwitz, Esq.

A jury of 14 persons (12 Jurors and 2 alternates) was regularly impaneled and sworn. Witnesses were sworn and testified. After hearing the evidence and arguments of counsel, the jury was duly instructed by the Court and the case was submitted to the jury with directions to return a verdict. At the close of all evidence, the action was presented to the jury. The jury deliberated and thereafter returned into court with a defense verdict:

In the action, the jury found that Defendant, University of Southern California, was not liable to Plaintiff and found in favor of Defendant, University of Southern California. (Attached as Exhibit 4A is a copy of the General Verdict Form for this action, Case No. BC654563.)

It appearing by reason of said verdict, Defendant, University of Southern California, is entitled to have judgment entered in its favor and against Plaintiff, Carol Pulliam.

THEREFORE IT IS ORDERED AND ADJUDGED AND DECREED that Plaintiff Carol Pulliam take nothing from said Defendant, University of Southern California; and that Defendant, University of Southern California, is entitled to costs and disbursements from Plaintiff ~~in the amount of $_____ as~~

~~contained in Defendant, University of Southern California's~~ [per] Memorandum of Costs.

DATED: 01/06/2020 /s/ [SEAL] Elaine Lu
ELAINE LU Elaine Lu/
Judge
JUDGE OF THE
SUPERIOR COURT

Superior Court of California
County of Los Angeles
Department 26

Carol PULLIAM, Plaintiff, v. USC VERDUGO HILLS HOSPITAL, et al Defendants.	Case No. BC654563 Hearing Date: January 23, 2019 **[~~TENTATIVE~~] ORDER RE:** MOTION FOR SUMMARY JUDGMENT BY DEFENDANT MSS NURSES REGISTRY

BACKGROUND

On March 17, 2017, Plaintiff Carol Pulliam ("Plaintiff') commenced this against defendants University of Southern California ("USC") (erroneously sued as USC Verdugo Hills Hospital) and MSS Nurses Registry Inc ("MSS") alleging causes of action for race discrimination, wrongful termination and failure to prevent discrimination. On May 10, 2017, this action was removed to federal court. Plaintiff filed a first amended complaint ("FAC") in federal court alleging causes of action for (1) race discrimination [Title VII, ADA and Government Code section 12940(h)], (2) defamation – libel, (3) defamation – slander, (4) wrongful termination in violation of public policy, (5) intentional interference with employment contract and (6) failure to prevent discrimination [Government Code section 12960(k)]. The fourth and fifth causes of action are

solely alleged against USC, and the sixth cause of action is solely alleged against MSS.

The FAC alleges that Plaintiff is a registered nurse who was employed by MSS as an Agency Nurse for approximately 11 months, beginning September 7, 2015 (FAC 115.) As a part of the agency assignment, Plaintiff was sent to USC to work in the emergency room, intensive care unit and telemetry for approximately 3 months. (*Id.* ¶ 6.) On January 25, 2016, Cita Ayala, an intensive care unit charge nurse, requested that Plaintiff sign a blank incident report so that USC could fire another nurse named Yolanda who caused the death of a patient because she failed to hang a cardiac drip. (*Id.* ¶ 8.) Plaintiff refused to sign the incident report because she did not know the nurse (Yolanda) or the patient. (*Id.*) On January 26, 2016, Raffi Boghossian was waiting in the hospital lobby for Plaintiff to arrive at work and asked Plaintiff about the incident report that she had purportedly signed for Cita. (*Id.* ¶ 9.) Plaintiff responded that she did not sign any such report. (*Id.*)

Raffi Boghossian approached Plaintiff a second time on January 26, 2016, this time in the Emergency Room, to inform Plaintiff that she committed a medication error with Ultram ("Tramadol") approximately a week and a half before this. (*Id.* ¶ 10.) Plaintiff confronted the employee who had signed Plaintiff's name on the incident report and was told that "because you are an agency nurse and black, the nurse we want to

fire will not confront you."[1] (*Id.* ¶ 35.) Plaintiff was disturbed about this incident and told a friend who reported it to the Glendale police department. (*Id.* ¶ 36.) On or about January 27, 2016, Plaintiff was fired. (*Id.* ¶ 6.)

The basis of Plaintiff's termination was an untrue allegation that she made a medication error. (*Id.*) USC's claims that Plaintiff made a medication error are false and merely a pretext to fire Plaintiff because of her race and because she was a potential whistle blower that had knowledge of an illegal matter involving the death of a patient. (*Id.* ¶ 7.) On January 28, 2016, USC, through its agent published a document titled "nursing agency personnel evaluation," and Raffi Boghossian called MSS and told the personnel that Plaintiff committed a medication error and unexplained medication loss and that it was a Drug Enforcement Agency ("DEA") issue. (*Id.* ¶ 18-20.) As a result, MSS told Plaintiff that she would not be getting any more assignments. MSS also told California Hospital that Plaintiff was accused of a narcotic error and was being investigated by the DEA. (*Id.* ¶ 20.)

On April 4, 2018, the federal district Court granted USC's and MSS's motion for summary judgment as to Plaintiffs Title VII claim and remanded the remaining claims to this court.

MSS now moves for summary judgment or in the alternative summary adjudication as to Plaintiff's

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[1] Based on the FAC, it is unclear when this confrontation occurred.

FAC. On January 7, 2019, Plaintiff filed an opposition. On January 18, 2019, MSS filed a reply.

OBJECTIONS TO EVIDENCE

MSS's Objections to Plaintiff's Evidence

MSS objects to Plaintiff's entire declaration and various portions of the declaration on the grounds of lack of foundation, argumentative and hearsay.

All of MSS's objections are overruled. The Court notes that to the extent that MSS contends that Plaintiff's declaration contradicts prior testimony, this goes to the weight of her testimony. However, in determining whether any triable issue of material fact exists, the Court will in its discretion, give great weight to admissions made in deposition and disregard contradictory and self-serving affidavits of the party. (*Preach v. Monter Rainbow* (1993) 12 Cal.App.4th 1441, 1451.)

MSS's Objections to Wole Akinyemi's Declaration

- Objections 1-3: Overruled.
- Objection 4: Sustained.

REQUEST FOR JUDICIAL NOTICE

MSS's Request for Judicial Notice

MSS requests judicial notice of the federal court's ruling on Defendants' motion for summary judgment in this case. Plaintiff objects on the ground that

judicial notice of the truth of the matter asserted in the document is improper.

The Court overrules Plaintiff's objections. Notably, because the document of which MSS seeks judicial notice is a ruling, not just a pleading or other document submitted to a court, judicial notice is proper. (*See Ramsden v. Western Union* (1977) 71 Cal.App.3d 873, 879.) As the Court may take judicial notice of court records (see Evid. Code, § 452(d)), Defendant's request is granted. However, the Court will not take judicial notice of the truth of the findings in the ruling. (See *Herrera v. Deutsche Bank National Trust Co.* (2011) 196 Cal.App.4th 1366, 1375.)

Plaintiff's Request for Judicial Notice

On January 11, 2019, Plaintiff filed a request for judicial notice of various portions of depositions transcripts of (1) Rafi Boghossian, (2) Lusita Ayala, (3) Anita Ventimiglia and (4) Ruby De La Cruz. Plaintiff also requests judicial notice of the reporter's transcripts of the proceedings on Monday, September 25, 2017. These documents are not judicially noticeable. Plaintiff cites no authority allowing the Court to take judicial notice of transcripts, and the transcripts are not orders, judgments, or other judicially noticeable court documents. (*See Ramsden v. Western Union* (1977) 71 Cal.App.3d 873, 879.) Therefore, Plaintiffs request is denied

LEGAL STANDARD

The function of a motion for summary judgment or adjudication is to allow a determination as to whether an opposing party cannot show evidentiary support for a pleading or claim and to enable an order of summary dismissal without the need for trial. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843.) CCP Section 437c(c) "requires the trial judge to grant summary judgment if all the evidence submitted, and 'all inferences reasonably deducible from the evidence' and uncontradicted by other inferences or evidence, show that there is no triable issue as to any material fact and that the moving party is entitled to judgment as a matter of law." (*Adler v. Manor Healthcare Corp.* (1992) 7 Cal.App.4th 1110, 1119.)

As to each claim as framed by the complaint, the defendant moving for summary judgment must satisfy the initial burden of proof by presenting facts to negate an essential element, or to establish a defense. (CCP § 437c(p)(2); *Scalf v. D. B. Log Homes, Inc.* (2005) 128 Cal.App.4th 1510, 1520.) Courts "liberally construe the evidence in support of the party opposing summary judgment and resolve doubts concerning the evidence in favor of that party." (*Dore v. Arnold Worldwide, Inc.* (2006) 39 Cal.4th 384, 389.)

Once the defendant has met that burden, the burden shifts to the plaintiff to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto.

To establish a triable issue of material fact, the party opposing the motion must produce substantial responsive evidence. (*Sangster v. Paetkau* (1998) 68 Cal.App.4th 151, 166.)

DISCUSSION

The parties agree on the following: Prior to commencing this lawsuit, Plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") against MSS and USC. On December 30, 2017, the EEOC (1) found that based on its investigation, it could not conclude that there had been a violation of law and (2) gave Plaintiff a right to sue notice. (UFs 1-2.) Plaintiff did not file a charge of discrimination with the California Department of Fair Employment and Housing ("DFEH"), and Plaintiff did not obtain a right to sue from DFEH. (UF 3-4.)[2] Plaintiff was employed by MSS as a nurse and placed at a number of different healthcare facilities, including USC, on a temporary basis. (UFs 22, 24-26.) There is a dispute as to the remaining facts.

Federal Court's Findings

Defendants filed a motion for summary judgment as to Plaintiff's FAC in federal court. The district court granted Defendants' motion as to the Title VII claim

[2] Plaintiff solely disputes these facts on the ground that Plaintiff was not required to file a claim with the DFEH.

and remanded the remaining claims back to this court. (Remand Order p.1.)[3]

Regarding MSS, the district court found that under the *McDonnell Douglas* test,[4] Plaintiff cannot make a prima facie case for discrimination.[5] The

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[3] In its ruling, the district court noted that Defendants both served Plaintiff with requests for admission and that Plaintiff failed to respond. As a result, the district court deemed Defendants' requests as admitted. (*Id.* p.2.) Accordingly, the district court deemed as admitted the following: (1) Plaintiff committed a medication error on or about January 17, 2016, (2) MSS placed her on a do-not-call list for legitimate, non-discriminatory reasons, (3) Plaintiff's race had nothing to do with MSS placing her on a do-not-call list, (4) Plaintiff was never discriminated against during her employment with MSS, (4) Plaintiff's employment was not terminated because of her race. (*Id.* p.3.) The district court however noted that despite the fact that these admissions significantly determine the issues for summary judgment in this matter, even without these admissions, the Court would grant summary judgment for the Defendants on the Title VII claims. (*Id.*)

[4] California has adopted the three-stage burden-shifting test established by the United States Supreme Court in *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, for claims of discrimination based on a theory of disparate treatment. (*Guz v. Bechtel Nat. Inc.* (2000) 24 Cal.4th 317, 354.) Under the McDonnell Douglas test, the plaintiff has the initial burden to establish a *prima facie* case of discrimination. (*Id.*) Once the plaintiff establishes a prima facie case of discrimination, the burden shifts to the defendant employer to offer a legitimate, nondiscriminatory reason for its action. (*Id.* at 355-56.) If the defendant employer offers a legitimate nondiscriminatory reason, the burden then shifts back to the plaintiff to prove the defendant employer's proffered reason was mere pretext for unlawful discrimination. (*Id.* at 356.)

[5] To establish a *prima facie* case the plaintiff must provide evidence that (1) he was a member of a protected class, (2) he was qualified for the position he sought or was performing competently in the position he suffered an adverse employment action:

district court found that (1) Plaintiff submitted no evidence to suggest a discriminatory motive and (2) provided no explanation for why the court should have inferred and attributed a racial animus against Africa-Americans from MSS when MSS hired Plaintiff knowing she was African-American, and then proceeded to place her at numerous healthcare facilities before the medication error concerning Plaintiff occurred. (*Id.*) The district court also found that the undisputed facts demonstrated that the sole reason for Plaintiff's removal from any hospitals was the medication error attributed to her, not her race. (*Id.*) The federal court further found that MSS offered sufficient evidence, including Plaintiff's own deposition testimony, to show that after MSS was informed of Plaintiff's medication error, MSS properly upheld its company policy to not place Plaintiff at any other healthcare facilities until it received clearance that Plaintiff could continue working. (*Id.* at 7.) As such, the federal court granted MSS's motion for summary judgments as to Plaintiff's Title VII claim.

The district court further found that Plaintiff's evidence failed to overcome USC's legitimate business reasons in part because Plaintiff failed to prove that USC did not have a reasonable basis to believe that there was a medication error. (*Id.*) The district court noted that Plaintiff's sole factual contention was that there was an accounting error with the medication

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such as termination, demotion, or denial of an available job, and (4) some other circumstance suggests discriminatory motive. (*Guz v. Bechtel Nat. Inc.* (2000) 24 Cal.4th 317, 355.)

dispenser. However, the district court found that Plaintiff failed to provide any evidentiary explanation regarding how this error in the machine affected the case. (*Id.*) Thus, the district court granted Defendants' motion for summary judgment as to the Title VII case. (*Id.* at 7.) *First Cause of Action: Race Discrimination [Title VII ADA*[6] *and Government Code section 12940(h)]*

i. Failure to Exhaust Remedies under FEHA

MSS argues that because Plaintiff only exhausted her remedies as to her Title VII claim but not her FEHA claim, Plaintiffs first cause of action fails.

"Under California law "an employee must exhaust the . . . administrative remedy" provided by the Fair Employment and Housing Act, by filing an administrative complaint with the California Department of Fair Employment and Housing (DFEH) (Gov. Code, § 12960; cf. *id.*, §§ 12901, 12925, subd. (b)) and obtaining the DFEH's notice of right to sue (*id.*, § 12965, subd. (b)), "before bringing suit on a cause of action under the act or seeking the relief provided therein (*Martin v. Lockheed Missiles & Space Co.* (1994) 29 Cal.App.4th 1718, 1724.)

"To exhaust his or her administrative remedies as to a particular act made unlawful by the Fair Employment and Housing Act, the claimant must specify that

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[6] The federal Court granted summary judgment as to the Title VII claim in Defendants' favor.

act in the administrative complaint, even if the complaint does specify other cognizable wrongful acts. We have recognized, in the context of the Fair Employment and Housing Act, that the failure to exhaust an administrative remedy is a jurisdictional, not a procedural, defect, and thus that failure to exhaust administrative remedies is a ground for a defense summary judgment." (*Martin v. Lockheed Missiles & Space Co.* (1994) 29 Cal.App.4th 1718, 1724 [internal citations omitted].)

Employees who believe they have been discriminated against generally have one year in which to file an administrative complaint with the DFEH, the agency charged with administering the FEHA. (*McDonald v. Antelope Valley Comm. College* (2008) 45 Cal.4th 88, 106.)

Here, it is undisputed that while Plaintiff filed a claim with the EEOC, Plaintiff did not file a claim with DFEH. (UFs 1-4.) As such, Plaintiff has failed to exhaust her remedies regarding her race discrimination claim under FEHA.

The Court is unpersuaded by Plaintiff's argument that she exhausted her remedies by filing a claim solely with the EEOC. In fact, *Martin v. Lockheed Missiles & Space Co.* (1994) 29 Cal.App.4th 1718, held contrary to Plaintiff's contention. In *Martin*:

> [i]n April 1991 Martin filed an administrative charge of age discrimination against Lockheed with the federal Equal Employment Opportunity Commission (EEOC). It appears

> that the EEOC then referred the charge to the DFEH, which (also in April 1991) notified Martin that the EEOC "will be responsible for the processing of this complaint," that "[t]hat agency should be contacted directly for any discussion of resolution of the charge," and that the DFEH would close its case "on the basis of 'processing waived to another agency.' " In the same document the DFEH gave Martin notice of the right to file a private lawsuit in a California court.
>
> In February 1992 Martin undertook to amend her administrative charge to add theories of sexual discrimination, harassment and retaliation. She filed her amended charge with the federal EEOC on February 26, 1992; in her briefing she appears to acknowledge that she did not separately file the amended charge with the California DFEH. On February 28, 1992, the EEOC issued a notice of right to sue to Martin. It is neither shown nor asserted that DFEH took any further action in this matter after April 1991. (*Martin v. Lockheed Missiles & Space Co.* (1994) 29 Cal.App.4th 1718, 1724-1725.)

The Court of Appeal found that the EEOC right-to-sue notice satisfied the requirement of exhaustion of administrative remedies only for purposes of the action based on title VII. (*Martin v. Lockheed Missiles & Space Co.* (1994) 29 Cal.App.4th 1718, 1726.) In essence, the Court of Appeal found that while Martin had exhausted his remedies as to the age discrimination claim, he had failed to exhaust his remedies as to the

violations based on FEHA. (*Id.*) The Court of Appeal noted that DFEH never received the opportunity, with respect to these additional theories of violation of the Fair Employment and Housing Act, to pursue the "vital policy interests embodied in [the Act], i.e., the resolution of disputes and elimination of unlawful employment practices by conciliation. (*Id.* at 1728.)

Likewise, here, it is undisputed that Plaintiff failed to file a claim with DFEH prior to commencing this action. Thus, the motion is granted as to the first cause of action.

Moreover, even if the EEOC claim satisfied Plaintiff's exhaustion requirement, Plaintiff has failed to offer sufficient evidence to raise a triable issue of fact as to whether MSS's actions were based on a discriminatory motive.[7] MSS offers evidence that it has a policy to not send nurses who commit medication errors to any hospitals until the error is cleared, and that it was pursuant to this policy that Plaintiff was placed off the list of available nurses after USC contacted MSS regarding the medication error. (Decl. Garma ¶¶ 4-5, 7-10.) Such evidence is sufficient to shift the burden to

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[7] To establish a *prima facie* case the plaintiff must provide evidence that (1) he was a member of a protected class, (2) he was qualified for the position he sought or was performing competently in the position he held, (3) he suffered an adverse employment action, such as termination, demotion, or denial of an available job, and (4) some other circumstance suggests discriminatory motive. (*Guz v. Bechtel Nat. Inc.* (2000) 24 Cal.4th 317, 355.)

Plaintiff to show that MSS had a discriminatory intent in undertaking its actions.

Pursuant to UFs 48 and 49, (1) no employee at MSS ever made any negative or disparaging comments about African-Americans to Plaintiff, and (2) Plaintiff does not believe that MSS treated her unfairly because of her race. Plaintiff does not dispute these facts. Rather, regarding UF 48 and 49, Plaintiff in her separate statement argues that MSS discriminated against Plaintiff by negligently and intentionally disseminating libelous and slanderous statements to defame Plaintiff. However, Plaintiff's contentions do not raise a triable issue of fact as to whether MSS discriminated against her based on her race as is alleged in the FAC. Plaintiff fails to put forth any evidence that suggests that MSS's alleged discriminatory actions were based on Plaintiff's race.[8] As such, Plaintiff has failed to raise a triable issue of fact as to her first cause of action.

Accordingly, MSS's motion for summary adjudication is granted as to the first cause of action on this ground as well.

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[8] As noted by the federal court, this is especially supported by the fact that Plaintiff was hired by MSS, and MSS placed Plaintiff on assignments with various facilities. (Remand Order at p. 6-7.)

Second and Third Causes of Action: Defamation – Libel and Slander

MSS argues that Plaintiff's defamation claims for libel and slander fail because they are barred by the applicable one-year statute of limitations period.

Section 340, subdivision (c), provides a one-year limitations period for "[a]n action for libel [and] slander. . . ." (*Federal Deposit Ins. Corp. v. Dimino* (2008) 167 Cal.App.4th 333, 349.) A cause of action for defamation accrues at the time the defamatory statement is published. (*Id.* at 348 [citing *Shively v. Bozanich* (2003) 31 Cal.4th 1230].)

Here, the alleged defamatory statements consisted of MSS informing another hospital on January 28, 2016, that Plaintiff was accused of a medication error and that Plaintiff was being investigated by the DEA. (UFs 57-58.) MSS offers as evidence the declaration of Ruby De La Cruz Garma-Williams, the director of nursing for MSS. Garma-Williams declares that on February 10, 2016, Plaintiff submitted a written statement responding to an evaluation Plaintiff received from USC regarding her alleged medication error. (Decl. Garma ¶ 9.) MSS attaches the letter as Exhibit 2 to the declaration. (*Id.* Ex. 2.) Because the complaint was not filed until March 17, 2017, based on MSS's evidence, the burden shifts to Plaintiff to show that a triable issue exists as to whether Plaintiff's claim is barred by the applicable statute of limitations period.

In opposition, Plaintiff first argues that MSS waived its statute of limitations argument by failing to

raise the issue in its opposition papers when Plaintiff sought leave to file the FAC when the case was pending in federal court. The Court is unpersuaded by Plaintiff's argument and finds that the authority cited by Plaintiff does not support Plaintiff's argument. Furthermore, Plaintiff fails to introduce any evidence in support of her argument that MSS failed to raise a statute of limitations defense in its, answer to the FAC and in the MSJ in federal court.

Next, Plaintiffs opposition papers argue that Plaintiff's claim is not bared by the applicable one-year limitations period because Plaintiff did not discover the defamatory statements until the deposition of Raffi Boghossian was taken on August 11, 2017. However, Plaintiff offers no evidence to support such a contention. Plaintiff's declaration makes no reference to when she discovered the alleged defamatory statements. As such, Plaintiff has failed to raise a triable issue of fact regarding whether her claim is barred by the applicable one year limitations period.

Thus, the motion is granted to the second and third causes of action.

The Court notes that because Plaintiff has failed to raise a triable issue of fact regarding statute of limitations, it is unnecessary to address MSS's remaining contentions regarding the second and third causes of action.

Sixth Cause of Action: Failure to Prevent Discrimination – Government Code section 12940(k)

MSS argues that like the first cause of action, Plaintiff's sixth cause of action fails because Plaintiff only exhausted her remedies as to her Title VII claim, but not her FEHA claim. The analysis for the first cause of action regarding exhaustion of remedies applies here. As such, Plaintiff's sixth cause of action fails.

Even if the sixth cause of action is not barred by Plaintiff's failure to exhaust remedies, the Court finds that there is no triable issue of fact regarding the sixth cause of action. Government Code section 12940(k) makes it unlawful 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. (Gov. Code, § 12940(k).)

In order to state a claim for failure to prevent discrimination, a plaintiff must show (1) actionable discrimination or harassment by employees or non-employees; (2) Defendant's legal duty of care toward plaintiff (defendant is plaintiff's employer); (3) breach of duty (failure to take all reasonable steps necessary to prevent discrimination and harassment from occurring); (4) legal causation; and (5) damages to plaintiff (*See Trujillo v. No. County Transit Dist.* (1998) 63 Cal.App.4th 280 287, 289; *Carter v. Cal. Dept of Veterans Affairs* (2006) 38 Cal.4th 914, 925 fn. 4 ["courts

have required a finding of actual discrimination or harassment under FEHA before a plaintiff may prevail under section 12940(k).”]; Govt. Code §12940(k); *see also Bradley v. Dept. of Corrections & Rehabilitation* (2008) 158 Cal.App.4th 1612, 1630 [after employers are informed of harassment, they must take immediate and appropriate action reasonably calculated to end the harassment.].)

Here, as with the first cause of action, MSS puts forth evidence showing that its decision to take Plaintiff off the list of available nurses after USC contacted MSS regarding the medication error was pursuant to company policy, not discriminatory intent. (Decl. Garma 4-5, 7-10.) Such evidence is sufficient to shift the burden to Plaintiff As discussed above, Plaintiff however fails to provide any evidence showing that she was discriminated against by MSS. Rather, the discriminatory conduct of which Plaintiff complains was communed by USC employees. As such, Plaintiff fails to put forth evidence showing that that a triable issue exists as to the sixth cause of action.

Therefore, the motion is granted as to the sixth cause of action.

CONCLUSION AND ORDER

MSS’s motion for summary judgment/adjudication is granted in entirety. MSS is ordered to lodge with the Court and serve on Plaintiff a proposed judgment within twenty (20) days of this order.

Moving Party are ordered to provide notice of this order and file proof of service of such.

DATED: January 23, 2019

/s/ Elaine Lu
Elaine Lu
Judge of the Superior Court

App. 48

Appeal No.: B304749

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

CAROL PULLIAM,

Plaintiff and Appellant,

v.

UNIVERSITY OF SOUTHERN CALIFORNIA

Defendant and Respondent.

Appeal from a Judgment of the
Superior Court, County of Los Angeles
Case No.:BC654563, Hon. Elaine Lu, Judge

PETITION FOR REHEARING

CAROL PULLIAM
4180 N. Sierra Way #407
San Bernardino, CA 92407
Telephone No.: (818) 626-1568
Plaintiff and Appellant: Self-Represented

Table of Contents

Table of Authorities

California Statutes

United States Cases

Other

[4] **I. Introduction.**

A review of the Court's August 23, 2022 Panel Decision and its members demonstrated the Panel:

(1) misstated underlying facts in the trial;

(2) legally erred in denying Plaintiff and Appellant Carol Pulliam (Pulliam) the right to obtain the identities of the jurors;

(3) legally erred in not following the California Constitution and binding case precedent regarding the time the disqualification of trial Judge Lu commenced; and

(4) Panel members Justices Ashmann-Gerst and Victoria Chavez were disqualified from the Panel.

At the outset, the Panel Decision did not discuss or recognize the systemic denial of due process in the trial court by the refusal to give out the identity of the jurors to the parties.

The Panel Decision avoided this issue which was argued extensively at oral argument in the appeal by stating as follows in the Panel Decision at page 10, ln 20-26:

> "**During voir dire, all jurors stated their names and several stated their areas of residence.** This information was readily available to Pulliam. Her ex parte applications, however, failed to show that, equipped with this information, she made any effort—let alone "a diligent effort" (Eng, supra, 21 Cal.App.5th at p. 710)—to contact the jurors through other means."

The oral argument on appeal demonstrated such statement to be false, as the counsel for Defendant and Respondent USC was not present at the trial and did not have any information as to any such alleged disclosures having been made.

[5] The Panel Decision effectively dismissed the oral argument upon appeal by refusing to recognize such with an argument at Panel Decision, page 9, FN 8 stating as follows in relevant part:

> "Pulliam filed her appellate briefs in propria persona but was represented by counsel at oral argument. **We only consider issues raised in Pulliam's briefs; "[w]e do not consider arguments that are raised for the first time at oral argument. [Citation**.]" (Haight Ashbury Free Clinics, Inc. v. Happening House Ventures (2010) 184 Cal.App.4th 1539, 1554, fn. 9.)" (Emphasis added.)

The Court is respectfully invited to review the Declaration of Carol Pulliam filed herewith as Exhibit 1 stating the truth of the events at the trial regarding jury disclosure. Such Declaration states in relevant part as follows:

"1. I was present during the voir dire examination. Jurors had a number identifying them.

2. No juror stated their name or their area of residence.

3. Neither I nor my attorneys had such information available to us from the voir dire examination, nor during the trial, nor after the trial.

4. After the conclusion of the trial and prior to an ex parte application for juror information, I went to the Superior Court Jury Room Clerk (Clerk) and requested the juror identification information which was public information.

5. The Clerk refused to provide such information and told me I had to bring a motion to obtain such information.

6. The minimum time frame for a hearing on motion at that time was greater than the statutory time period to file a motion to set aside the verdict and judgment.

7. By refusing to provide me with the juror information, the Clerk denied me the right to timely obtain the juror information needed to file the motions for a new trial and to vacate the judgment, unless such information was sought by an ex parte application." (Declaration of Carol Pulliam, Exhibit 1)

The Panel Decision has a truncated version of the facts, despite the detailed version set forth in the in the Opening Brief.

Carol Pulliam suffered injury from numerous causes of action in addition to the two before the jury. These are set forth in the August 24, [6] 2022 Daily Kos article "California Judiciary Still Corrupt 11 Years After Court Holds Only Legislature Can Fix Problem".

Such article describes Carol Pulliam as an egregious example of a victim of judicial misconduct in the USC case as set forth as follows in the draft legislation to establish a "State of California Commission on Judicial Oversight and Victims Compensation for Judicial Misconduct and Judicial Abuse of Power":

> "(18) amending SBX 2 11 by adding Section 22 to rectify the bias against Carol Pulliam as a representative of the various categories to be

immediately paid by the California State Controller tax free from funds allocated to the State Courts and State Judiciary based upon California Superior Court Judge Elaine Lu (Judge Lu) not disqualifying herself as required by CCP Section 170.1(a)(6)(A)(iii) and/or Code of Judicial Ethics, Canon 3E(1) and (2) during the case of *Carol Pulliam v. USC Verdugo Hills Hospital*, when Judge Lu became aware that her friend Beong-Soo Kim had applied for, was being considered, and would likely receive the position of General Counsel of USC prior to the beginning of the trial.

Beong-Soo Kim obtained the position two months after the trial ended but during the time of post-trial motions. Judge Lu did not recuse herself until two months after Beong-Soo Kim and USC announced had obtained the position. Judge Lu was ruling on the case during the time that she was aware of Beong-Soo Kim's "relationship" with defendant USC.

The case was rife with racial overtones as USC terminated Carol Pulliam, the only black nurse at the USC Verdugo Hospital for her refusal to sign a "blank incident report" as a "black nurse" to be used against a Chinese/Japanese nurse who USC Verdugo Hospital wanted to terminate due to her Complaints about racial discrimination by the "Filipino" nurses who control the nursing staff at USC Verdugo Hospital and are a majority of the nurses there.

USC Verdugo Hospital was promoting racial tensions between the various races in the nursing staff by "pitting one race against another" so that USC Verdugo Hospital could claim any racial tensions occurred within the races of the nursing staff and not due to USC Verdugo Hospital's policies of controlling the nursing staff [7] through "racial dissention", thereby relieving USC Verdugo Hospital of any blame for the firing.

When Carol Pulliam refused to be a part of USC Verdugo Hospital's scheme, USC Verdugo Hospital terminated and "blacklisted" her in retaliation supporting:

1. Racial Bias: $10 million tax free for Judge Lu adopting and advocating for racial bias;

2. Libel: $6 million tax free for Judge Lu adopting and advocating for libel at $1 million per year from 2016-2022;

3. Fraud upon the Court/or Fraud: $10 million tax free for Judge Lu adopting and advocating for fraud upon the court;

4. Intentional/or Negligent Interference with Contract: $10 million tax free for Judge Lu adopting and advocating for intentional interference with contract;

5. Intentional/or Negligent Interference with prospective business advantage: $10 million tax free for Judge Lu adopting and advocating for intentional

interference with prospective business advantage; and

6. Intentional/or Negligent Infliction of Emotional Distress: $10 million tax free for Judge Lu adopting and advocating for intentional infliction of emotional distress; and

7. voiding and annulling the judgment in the case signed by Judge Lu;

8. voiding and annulling the actions of Judge Martin who replaced Judge Lu and cancelled a hearing on post-trial motions on the day of the hearing, precluded Carol Pulliam from adding Defendant MSS to the Notice of Appeal and denied Carol Pulliam's motion to require the Court Reporter to produce the second part of the trial's last day for the appeal;"

These two examples demonstrate the difference between the "reality" of the facts and the "fiction" of the Panel Decision.

II. Grounds for Rehearing.

This Petition for Rehearing is based upon the following grounds:

(1) the Panel misstated the undisputed facts of the underlying trial;

(2) The Panel erred in not disqualifying Judge Lu:

[8] (a) by not following the California Constitution, Article VI, Section 14, Cl. 2 (Decisions of the Supreme Court and courts of appeal that determine causes shall be in writing with reasons stated.) binding case precedent *Kowis v. Howard* (1992) 3Cal.4th 888, 892; and case precedent *Swanson v. Marley-Wylain Co.* (2021) 65 Cal.App.5th 1007,1015; and

(b) by not following the holdings of *Christie v. City of El Centro* (2006) 135 Cal.App4th 767, 776, *Rossco Holdings Inc., v. Bank of America*, (2007) 149 Cal.App. 4TH 1353, 1362, and *Kulchar v. Kulchar* (1969) 1 Cal.3d 467,471 regarding the timing of the commencement of the disqualification of Judge Lu;

(c) by not following California Constitution Article IV, Section 18 (Impeachment for misconduct in office);

(d) by not following CCP Section 170.1(a) (6) (A)(iii) (A person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial);

(e) by not following Code of Judicial Ethics, Canon 3E (1) and (2) for failure to self-disqualify and failure to disclose that LA County had an interest in this case and appeal in that Judge Lu was, and is, currently receiving payments from LA County in the form of "supplemental or local judicial benefits" of Cafeteria Plan health benefits, a Professional Development Allowance and contributions to her 401K plan in addition to her California State Compensation amounting to an approximate 29% of her current California State

Compensation, and USC Keck School is receiving approximately $170 million a year from LA County as payments for patient care and physician medical education at Los Angeles County + USC Medical Center in its latest contract commencing in 2019:

> [9] ("The Keck School of Medicine of USC will provide patient care and physician medical education at Los Angeles County + USC Medical Center (LAC+USC), continuing a long-standing collaboration to provide medical care to the Los Angeles community.
>
> **The Los Angeles County Board of Supervisors approved a five-year, $170 million annual funding agreement for the Keck School to provide patient care services and physician medical education at LAC+USC.** LAC+USC is the largest academic teaching hospital on the West Coast and one of the largest public hospitals in the nation.
>
> "**Our partnership with Los Angeles County began in 1885**," says Laura Mosqueda, MD, dean of the Keck School. "We are pleased to continue this historic partnership to provide superb medical care to the Los Angeles County community, including those who are most vulnerable.") (Emphasis in original and added.") USC Press Statement August 12, 2019;

(3) The Panel erred in not disqualifying Justices Ashmann-Gerst and Victoria Chavez each of whom received the "supplemental or local judicial benefits from

LA County when each was a State Superior Court judge for the County of Los Angeles in 1986-2001(Ashmann-Gerst) and 1992-2005 (Chavez) and USC Keck School was and is receiving approximately $170 million a year from LA County as payments for patient care and physician medical education at Los Angeles County + USC Medical Center commencing in its latest contract in 2019 violating:

(a) Code of Judicial Ethics, Canon 3E 4 (c) ("the circumstances are such that a reasonable person aware of the facts would doubt the justice's ability to be impartial.") (failure to self-disqualify and failure to disclose LA County was compensating them and was and is compensating Los Angeles County + USC Medical Center in its latest contract since 2019).

III. Detailed Misstatement of Facts.

(1) the Panel misstated the facts of the underlying trial:

[10] (a) the Panel omitted to state that the trial court docket does not show a Judgement in favor of MSS against Carol Pulliam in response to the Motion for Summary Judgment, the Docket and Register of Actions only show a non-appealable order. (See Docket: "**01/23/2019** Order (re Motion for summary judgment by Defendant MSS Nurses Registry) Filed by Clerk") leaving MSS in the trial;

(b) the Panel did not consider the evidence showing the count of the Tramadol in the Pyxis machine

commencing on January 16, 2016 (the day that Carol Pulliam was not working) showed two Tramadol pills removed by Nurse Morford on January 16, 2016 at 12:39 pm (Opening Brief, page 24, ln 3-5) pasted Carol Pulliam's name into another document of January 17, 2016 showing her removing one Tramadol pill. There was a discrepancy as at the end of each day, the end count of Tramadol pills was 11 for both January 16, and 17, 2016, demonstrating Carol Pulliam did not remove any Tramadol pill. (See Appellant's Opening Brief page 23, ln 7 to page 29, ln 9 setting forth the events with citations to documents and the record.);

(c) Raffi Boghossian in his deposition dated August 11, 2017 admitted to tampering with the Tramadol count to falsely implicate Carol Pulliam (Opening Brief, page 27, ln 8-29, ln 9);

(d) Lusita Ayala admitted to forging Carol Pulliam's name on a Death Incident Report against another nurse (Opening Brief, page 29, ln 10- page 30, ln 15);

(e) USC Attorney Avi Hurwitz, argues non evidence and makes false statements to the jury in closing argument over plaintiff's attorney's objections violating B&P Code Section 6068(d) and Judge Lu does nothing to cure the problem other than telling the jurors they don't have to believe everything defendant's counsel says without requiring him to remove the false documents and instructing the jury to disregard them, demonstrating [11] bias in favor of defendant USC (Opening Brief, page 30, ln 16- page 32, ln 7);

(f) Raffi Boghossian sent the false email/pyxis document and false statement to MSS stating Carol Pulliam was under DEA Investigation (Opening Brief, page 32, ln 8-page 35, ln 9);

(g) USC's scheme to frame Carol Pulliam falls apart in witness depositions of Raffi Boghossian and Ruby Garma Williams, Affidavit of Anita Ventimeglia and audio flash drive of 1/26/2016 conversation between USC Nurse Lusita Ayala and Carol Pulliam, AML flash drive done on 2/14/20 and court reporter transcription on 5/14/20 concerning Lusita's forgery of Carol Pulliam's signature in Clerk's Transcript (Opening Brief, Page 35, ln 10- page 43, ln 6); and

(h) Raffi Boghossian admits he lied about the existence of a DEA investigation to MSS and Ruby De La Cruz Garma-Williams admits she did nothing to independently verify either the medication error or the DEA investigation statement, but passed them on, even though she was a State of California Nurse Fraud and Abuse Investigator for the State of California Department of Health Services (Opening Brief, page 43, ln 7-page 54, ln 9; page 60, ln 10-page 67, ln 8).

IV. Panel Error Regarding Time of Judge Lu Disqualification.

(1) the Panel erred in not disqualifying Judge Lu earlier:

(a) by failing to support its decision with legal reasoning rather than "wild speculation". (California

Constitution, Article VI, Section 14, Cl. 2, ("Decisions of the Supreme Court and courts of appeal that determine causes shall be in writing with reasons stated."), controlling precedent (*Kowis v. Howard*, (1992) 3Cal.4th 888, 892-893; precedent *Swanson v. Marley-Wylain Co.* (2021) 65 Cal.App.5th 1007,1014- 1015 "The law of the case doctrine states that when, in deciding an appeal, an appellate court 'states in [12] its opinion a principle or rule of law necessary to the decision, that principle or rule becomes the law of the case and must be adhered to throughout its subsequent progress. . . .'" (*Kowis v. Howard* (1992) 3 Cal.4th 888, 892-893, 12 Cal.Rptr.2d 728, 838 P.2d 250.) The doctrine does not extend to summary denials of writ petitions. (*Id.* at p. 894, 12 Cal.Rptr.2d 728, 838 P.2d 250.) But when "the matter is fully briefed, there is an opportunity for oral argument, and the cause is decided by a written opinion[,] [t]he resultant holding establishes law of the case upon a later appeal from the final judgment." (*Ibid.*) *Swanson v. Marley-Wylain Co.* (2021) 65 Cal.App.5th 1007, 1014-15; and

(b) by not following the holdings of *Christie v. City of El Centro* (2006) 135 Cal.App4th 767, 776 ("disqualification occurs when the facts creating disqualification arise, not when disqualification is established"; *Rossco Holdings Inc., v. Bank of America*, (2007) 149 Cal.App. 4TH 1353, 1362 "[o]rders made by a disqualified judge are void"; and *Kulchar v. Kulchar* (1969) 1 Cal.3d 467, 471 "Extrinsic fraud usually arises when a party is denied a fair adversary hearing because he has been "deliberately kept in ignorance of the action or

proceeding, or in some other way fraudulently prevented from presenting his claim or defense." (3 Witkin, Cal. Procedure, p. 2124.) "Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, as by keeping him away from court, a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interest to the other side,—these, and similar cases which show that [13] there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and a fair hearing." (*United States* v. *Throckmorton* (1878) 98 U.S. 61, 65-66 [25 L.Ed. 93, 95].)

V. Justices Ashmann-Gertz and Chavez are Disqualified.

Justices Ashmann-Gerst and Victoria Chavez each received the "supplemental or local judicial benefits from LA County when each was a State Superior Court judge for the County of Los Angeles in 1986- 2001(Ashmann-Gerst) and 1992-2005 (Chavez)

During such time USC Keck School was receiving money from LA County and now is receiving

approximately $170 million a year from LA County as payments for patient care and physician medical education at Los Angeles County + USC Medical Center commencing in its latest contract in 2019.

Justices Ashmann-Gertz and Chavez sitting on the Panel violates Code of Judicial Ethics, Canon 3E 4 (c) ("the circumstances are such that a reasonable person aware of the facts would doubt the justice's ability to be impartial.") (failure to self-disqualify and failure to disclose LA County was compensating them and was and is compensating Los Angeles County + USC Medical Center in its latest contract since 2019).

Conclusion

California suffers from systemic judicial corruption affecting all levels of the judiciary as demonstrated by this case and the refusal of the Superior Court judges (Lu and Martin) to disclose and self-disqualify at the outset of their appointment and Justices Ashmann-Gertz and Chavez to do the same.

[14] Justice Elwood Lui only escaped the same fate due to his having left the judiciary in 1987 to join Jones Day, returning to the Court of Appeal in 2015.

It is not known if he received "supplemental or local judicial benefits" from the County of Los Angeles when he was a California Superior Court Judge for the County of Los Angeles or whether he or Jones Day represented the County of Los Angeles or USC when he was with Jones Day.

If any of the above are true, he also should be disqualified for the same reasons as Justices Ashmann-Gertz and Chavez.

For these reasons, the Petition for Rehearing must be granted.

The corruption of the California Judiciary has to end now!

As the U.S. Supreme Court held in *Cooper v. Aaron*, 358 U.S. 1, 18 (1958)-"No state legislator or executive or **judicial officer can war against the Constitution without violating his undertaking to support it.**" (Emphasis added.)

Dated: September 6, 2022 Respectfully submitted,

By: _____
Carol Pulliam
Self-Represented

Certificate of Word Count
The text of this Petition for Rehearing consists of 3,211 words as counted by Word 365 word processing program used to generate the Petition for Rehearing.
DATED: September 6, 2022
Respectfully submitted,

By: _____
Carol Pulliam
Self-Represented

Declaration of Carol Pulliam

I, Carol Pulliam, declare:

The following facts are within my personal knowledge, and if called to testify, I could and would testify as follows:

1. I was present during the voir dire examination. Jurors had a number identifying them.

2. No juror stated their name or their area of residence.

3. Neither I nor my attorneys had such information available to us from the voir dire examination, nor during the trial, nor after the trial.

4. After the conclusion of the trial and prior to an ex parte application for juror information, I went to the Superior Court Jury Room Clerk (Clerk) and requested the juror identification information which was public information.

5. The Clerk refused to provide such information and told me I had to bring a motion to obtain such information.

6. The minimum time frame for a hearing on motion at that time was greater than the statutory time period to file a motion to set aside the verdict and judgment.

7. By refusing to provide me with the juror information, the Clerk denied me the right to timely obtain the juror information needed to file the motions for a

new trial and to vacate the judgment, unless such information was sought by an ex parte application.

I declare the foregoing is true and correct under the laws of the State of California. Executed this 6th day of September at Washington, DC.

Carol Pulliam

Supreme Court No.: **S276704**

IN THE SUPREME
COURT OF THE
STATE Of CALIFORNIA

CAROL PULLIAM,
Plaintiff and Petitioner,
v.
UNIVERSITY OF SOUTHERN CALIFORNIA,
Defendant and Respondent.

Petition from the Decision of the Second Appellate District, Division 2, Justices Ashmann-Gertz, J., concurring Lui, P.J. and Chavez, J.,
Appeal Number B304749;
Appeal from Judgment of the Los Angeles County Superior Court Hon. Elaine Lu, Los Angeles County Superior Court; Case Number BC654563.

PETITION FOR REVIEW

CRC Rule 8.500 (a)(1), (b)(1) and (c)(2)-(party has called the Court of Appeal's attention to any alleged omission or misstatement of an issue or fact in a Petition for Rehearing Denied Justices Lui, P.J. Ashmann-Gertz, J. and Chavez, J.)

CAROL PULLIAM
4180 N. Sierra Way #407
San Bernardino, CA 92407
Telephone No.: (818) 626-1568
Plaintiff and Appellant: Self-Represented

[2] **Table of Contents**

[3] **Table of Authorities**

[4] **I. Introduction.**

This Petition for Review represents the third challenge this year of a Court of Appeal District decision denying a party's Fourteenth Amendment rights to due process and equal protection.

The other two Court of Appeal District decisions occurred in: (1) the Third Appellate District appeal in *RYAN CLIFFORD v. ALPHA EPSILON PI FRATERNITY, INC.*, Appeal No, CO 87528, Petition for Review Denied Supreme Court No.: 5274222 (06/15/2022); and (2) the Sixth Appellate District appeal in *PETRA MARTINEZ, STANLEY ATKINSON v.* U4RIC INVESTMENTS, LLC, Appeal No. H049626, Petition for Transfer from Appellate Division of the Superior Court Denied (12/30/2021); Petition for Writ of Error Coram Nobis Denied, Supreme Court No.: S273818, (6/01/2022).

With the addition of the present Petition for Review from the Second Appellate District, to the previous petitions, three of the six Court of Appeal Districts will have violated:

(1) the Fourteenth Amendment's requirement of due process and equal protection;

(2) the binding U.S. Supreme Court decision of *Cooper v, Aaron*, (1958) 358 U.S. 1, 18;

(3) California Constitution: Article 1, Section 7 and Article 6, Section 12, Paragraphs (h), (c) and (d);

(4) California law particularly CCP Section 170.1 and California Code of Judicial Ethics, Canons 3E(1) and (2).

CRC Rule 8.500(b)(1) mandates the present Petition for Review be granted.

CRC Rule 8.500(b)(1) states in relevant part:

> [5] "Where it is necessary to secure uniformity of decisions or to settle important questions of law."

II. The Judge and Justice Violations in the Underlying Case.

Every judge and justice denied Plaintiff' and Petitioner Carol Pulliam's (Carol Pulliam) Fourteenth Amendment due process and equal protection rights and California Constitutional rights in the underlying case and appeal as follows:

(1) Los Angeles Superior Court Judge Elaine Lu (Judge Lu) refusing to disclose and self-recuse herself from the underlying case: (a) at all times received from Los Angeles County "supplemental or local judicial benefit" payments equal to approximately 29% of her state compensation, in addition to her state compensation, while LA County was also paying approximately $170 million per year to Defendant and Respondent University of Southern California (USC) for its services at the LA County/USC

Medical Center; and (b) her friend Beyong Su Kim was applying for, and became, the General Counsel of USC;

(2) Court of Appeal Justice Ashmann-Gerst (Justice Ashmann-Gerst) who wrote the Court of Appeal Decision affirming the Judge Lu's judgment against Carole Pulliam: (a) when she was a Los Angeles County Superior Court judge received the same "supplemental or local judicial benefit payment" percentage of her state compensation as Judge Lu; and (b) did not disclose or self-disqualify in Carol Pulliam's appeal;

[6] (3) Court of Appeal Justice Victoria Chavez (Justice Chavez) who concurred in the Court of Appeal Decision affirming the Judge Lu's judgment against Carole Pulliam: (a) when she was a Los Angeles County Superior Court judge of received the same "supplemental or local judicial benefit payment" percentage of her state compensation as Judge Lu; and (b) did not disclose or self-disqualify in. Carol Pulliam's appeal;

(4) Presiding Justice Elwood Lui (Lui, PJ) who concurred in the Court of Appeal Decision affirming the Judge Lu's judgment against Carole Pulliam: (a) when he was a partner in the law firm Jones Day represented LA County in the cases of *Sturgeon v. County of Los Angeles* (2008) 167 Cal.App.4th 630 (Sturgeon 1), 635 ("Jones

Day, Elwood Lui, Jason C. Murray and Erica L. Reilley for Defendant and Respondent"), *Sturgeon v. County of Los Angeles* (2010) 191 Cal.App.4th 344 (Sturgeon II), 345 ("Jones Day, Elwood Lui, Brian D, Hershman and Erica L. Reilley for Defendants and Respondents"), and *Sturgeon v. County of Los Angeles et al.*, (2015) 242 Cal.App.4th 1437 (Sturgeon III), 1439 ("Jones Day, Elwood Lui, Erica Reilley, and Charlotte S. Wasserstein for Defendants and Respondents."); and (b) did not disclose or self-disqualify in Carol Pulliam's appeal.

III. Issues Presented.

A. Whether the California system of allowing judges and justices' violations has denied Carol Pulliam due process and [7] equal protection under the Fourteenth Amendment, *Cooper v. Aaron*, supra, the California Constitution Article 1, Section 7 and Article 6, Section 12, Paragraphs (b), (c) and (d), California law CCP Section 170.1 and the Article 1, Section 7 and Article 6, Section 12, Paragraphs (b), (c) and (d)?

B. Whether CRC Rule 8.500(b)(1) and (c) violates the Fourteenth Amendment?

IV. Argument.

The December 16, 2020 Blog "Seeking Review by the California Supreme Court" authored by M.A.T. Legal Director Myron Moskowitz directly states the California Supreme Court will not review the errors of the Court of Appeal as follows in relevant part:

> "If you lost in the Court of Appeal, you can then ask the California Supreme Court to hear your case, via a "petition for review".
>
> The Supreme Court denies over 95% of these petitions. And, of course, even if the Court grants your petition for review, you might still lose when the Court rules on the merits of the case.
>
> What's going on here? What competent lawyer in his right mind would spend his client's money preparing and tiling *a complaint in a trial court* with less than a 5% chance of winning? Or file *an appeal* to the intermediate appellate court such a tow payoff?
>
> **So why do so many of them do exactly that in the Supreme Court? Mostly because they don't understand how the Supreme Court views its job.**
>
> [8] The lawyer thinks, "I file a complaint because I'm right on the facts and the law. **And I file an appeal when I think the trial court got it wrong. Supreme Court? Same thing. The Court of Appeal got it wrong, and once I show this to the Top**

> **Court, they'll grant my petition, hear it on the merits, and give me my victory.**"
>
> **Wrong approach, because the Supreme Court has a very different perspective.** The Justices (and their law clerks) think: "Trial judges make mistakes, so we have an elaborate, expensive group of intermediate appellate courts – staffed by hard-working, intelligent judges and law clerks – to review trial court records and correct those mistakes. **Occasionally those appellate courts make mistakes too, but it's not the Supreme Court's job to correct them.** ***We are not a Court of Error Correction.*** **We have only seven judges, so we have tittle to handle no more than about 100 cases a year. We use those 100 cases** ***to clarify the law.*** **The law needs clarifying when different intermediate appellate courts have announced conflicting rules of law, or when some unresolved question of law affects a large segment of society or some industry or institution. If your case doesn't involve such a question, we won't hear your case –** ***even if we agree that you got screwed by the intermediate appellate court!*** **Our legal system isn't perfect. Live with it.**" (Emphasis added.)

The problem is the selected approach of the Supreme Court does not conform to the requirements of the Fourteenth Amendment for due process and equal protection, the U.S. Supreme Court decision of *Cooper v. Aaron*, supra, 358 U.S. at 18, the California

Constitution Article 1, Section 7 and Article 6, Section 12, Paragraphs (b), (c) and (d).

The systemic intertwining of the California Supreme Court with the California Judicial Council has resulted in the ability of judges to [9] avoid their duties of due process and equal protection under the Fourteenth Amendment, the U.S. Supreme Court decision of *Cooper v. Aaron*, supra, 358 U.S. at 18, the California Constitution Article 1, Section 7, and Article 6, Section 12, Paragraphs (b), (c) and (d), and California law particularly CCP Section 170.1 and the California Code of Judicial Ethics, Canons 3E(1) and (2) by judges not being held accountable for their violations of such constitutional provisions and laws.

The California Judicial Council enacting California Rule of Court 8.500(b)(I) and (c) violates:

(1) the Fourteenth Amendment to the U.S. Constitution;

(2) the holding of the U.S. Supreme Court decision *Cooper v. Aaron*, supra, 358 U.S, at 18; and

(3) the California Constitution Article 1, Section 7, and Article 6, Section 12, Paragraphs (b), (c) and (d).

The refusal of the California judges and justices to follow the requirements set forth below is denying due process, denying equal protection and "warring with the constitution" amongst other things:

(1) the U.S, Constitution, Fourteenth Amendment;

(2) U.S. Supreme Court and California precedent as referenced in the Petition for Rehearing, *Cooper v. Aaron*, supra, 358 U,S. at 18, stating in relevant part:

> "Article VI of the Constitution makes the Constitution the "supreme Law of the Land." In 1803, Chief Justice Marshall, speaking for a unanimous Court, referring to the Constitution as "the fundamental and paramount law of the nation," declared in the notable case of *Marbury v. Madison,* 1 Cranch 137, 177, that "It is emphatically the province and duty of the judicial [10] department to say what the law is." **This decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system. It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Every state legislator and executive and judicial officer is solemnly committed by oath taken pursuant to Art. VI, cl. 3, "to support this**

> **Constitution."** Chief Justice Taney, speaking for a unanimous Court in 1859, said that this requirement reflected the framers' "anxiety to preserve it [the Constitution] in full force, in all its powers, and to guard against resistance to or evasion of its authority, on the part of a State. . . ." *Ableman v. Booth*, 21 How. 506, 524.
>
> **No state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it.** Chief Justice Marshall spoke for a unanimous Court in saying that: "If the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery. . . ." *United States v. Peters*, 5 Cranch 115, 136." (Emphasis added.)

(3) the California Constitution, Article 1, Section 7 (limits on due process and equal protection not to exceed those imposed by the Fourteenth Amendment to the U.S. Constitution);

(4) the California Constitution, Article 6, Section 12, Paragraphs (b), (c) and (d) stating in relevant part:

> "(b) **The Supreme Court may review the decision of a court of appeal in any cause.**

> [11] (c) **The Judicial Council shall provide, by rules of court, for the time and procedure for transfer and for review**, including, among other things, provisions for the time and procedure for transfer with instructions, **for review of all or part of a decision**, and for remand as improvidently granted.
>
> (d) This section shall not apply to an appeal involving a judgment of death." (Emphasis added)

People v, Guilford, (2014) 228 Cal.App.4th 651 at 661 stating in relevant part:

> **"[I]f a party disagrees with the Court of Appeal's section of the material facts or identification, of the applicable law, the party can petition for a rehearing and point out the deficiencies in the court's opinion."** *(People v. Garcia* (2002) 97 Cal.App.4th 847, 854-855, 118 Cal.Rptr.2d 662; see *Torres v. Parkhouse Tire Service Inc.* (2001) 26 Cal.4th 995, 1000, fn. 2, 111 Cal.Rptr.2d 564, 30 P.3d 57 [**Supreme Court's policy is to decline to review facts of appellate court decision no petition for rehearing challenging the facts was filed**]; Cal. Rules of Court rule 8.500(c)(2).)" (Emphasis added.) and

In the present case, a Petition for Rehearing was filed and denied within a day.

The systemic corruption existing in the California judicial system fueling such refusal is resulting in the

California Judges "warring against the Constitution", see *Cooper v. Aaron*, supra, 358 U.S. at 18.

The Judicial Council violated California Constitution Article 6, Section 12, Paragraphs (b) and (c) by limiting the granting of a Petition for Review in the California Supreme Court only to the grounds set forth in California Rule of Court 8.500(b) and (c). Such grounds are in relevant part:

> [12] "**(b) Grounds for review**
>
> The Supreme Court may order review of a Court of Appeal decision:
>
> (1) **When necessary to secure uniformity of decision or to settle an important question of law;**" (Emphasis added.);
>
> "**(c) Limits of review**
>
> (1) **As a policy matter, on petition for review the Supreme Court normally will not consider an issue that the petitioner failed to timely raise in the Court of Appeal.**
>
> (2) A party may petition for review without petitioning for rehearing in the Court of Appeal, but as a policy matter the Supreme Court normally will accept the Court of Appeal opinion's statement of the issues and facts **unless the party has called the Court of Appeal's attention to any alleged omission or misstatement of an issue or fact in a**

> **petition for rehearing**". (Emphasis added.)

The corruption is so ingrained that. California lawyers are obligated to fight to protect judges by the February 14, 2020 "California Lawyers Association (CLA) Statement Regarding Attack on Supreme Court Justices" stating as follows in relevant part:

> "Current events are an important reminder of core tenets of our Constitutional Democracy and the role of lawyers and judges in it. **As an organization comprised of officers of the court and as a representative of the legal profession, we are called** to defend the rule of law, **to discourage attacks on the independence of the judiciary**, and to support the separation of powers."
>
> * * *
>
> **While protected by the First Amendment**, personal attacks on judges by elected officials, warning that potential decisions in eases pending before the court will result in adverse consequences to those judges, are inappropriate. **Attacks on those who are required to make decisions based on the facts presented, the law, and precedent – whether they be judges**, [13] lawyers, jurors, or others involved with the administration of justice – **are unwarranted**, undercut the ideals of fair enforcement, impartiality, and the equal application of laws to everyone, **and denigrate a critical component of our government**. The three co-equal

> branches of our Constitutional Democracy – Executive, Judicial and Legislative – each play a vital role. And each must respect the authority of the others." (Emphasis added.)

The Supreme Court effectively controls the State Bar. Pursuant to California Rules of Court, Rule 9.90, the California Supreme Court appoints five attorney members of the California State Bar's Board of Trustees. The Board of Trustees has thirteen members. Six are non-attorney (public) members: four are appointed by the Governor; one is appointed by the Senate Committee on Rules; and one is appointed by the Speaker of the Assembly. Two attorneys are appointed by the Legislature: one by the Speaker of the State Assembly; and one by the State Senate Committee on Rules.

The State Bar is effectively controlled by the Supreme Court which controls the State Bar by seven of the thirteen (the majority) of the State Bar Trustees being members of the State Bar and subject to its discipline.

Between the Supreme Court control. of the State Bar and the CLA members obligation to protect the California Supreme Court and the judges from criticism, despite the constitutional right of free speech, criticism of the judges is actively suppressed in California and the critics sanctioned.

Conclusion

[14] Based upon the above analysis, it is imperative that the Supreme Court grant the Petition for Review and immediately conform to:

(1) the requirements of due process and equal protection of the Fourteenth Amendment;

(2) the binding U.S. Supreme Court decision of *Cooper v. Aaron*, supra, 358 U.S. at 18; and

(3) the California Constitution Article 1, Section 7, and Article 6, Section 12, Paragraphs (b), (c) and (d).

In doing so, Carol Pulliam respectfully requests each member of the California Supreme Court determine whether he/she received "supplemental or local judicial benefit" payments from a county or court if, and when, he/she was a Superior Court judge, are disclosing such and are self-disqualifying,

Dated: October 2, 2022

Respectfully submitted,

By: /s/ Carol Pulliam
Carol Pulliam,
Self-Represented

Certificate of Word Count

The text of this Petition for Review consists of 2,716 words as counted by Word 365 word processing program used to generate the Petition for Review.

Dated: October 2, 2022

Respectfully submitted,

By: /s/ Carol Pulliam
Carol Pulliam

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES
Civil Division
Central District, Stanley Mosk Courthouse,
Department 26

BC654563 February 26, 2020
CAROL PULLIAM VS 8:30 AM
USC VERDUGO HILLS HOSPITAL
ET AL

Judge: Honorable Elaine Lu
Judicial Assistant: E. Lopez
Courtroom Assistant: B. Ly

CSR: Julie Park, CSR 13925
ERM: None
Deputy Sheriff: None

APPEARANCES:

For Plaintiff(s): Carol Pulliam by Nina Riley

For Defendant(s): Gil Yosef Burkwitz

NATURE OF PROCEEDINGS: Hearing on Motion for New Trial

Pursuant to Government Code sections 68086, 70044, California Rules of Court, rule 2.956, and the stipulation of appearing parties, Julie Park, CSR 13925, certified shorthand reporter is appointed as an official Court reporter pro tempore in these proceedings, and is ordered to comply with the terms of the Court Reporter Agreement. The Order is signed and filed this date.

Matter is called for hearing.

Appearing counsel for plaintiff represents to the Court she has filed a Substitution of Attorney. The document does not appear on the docket when the matter is called. Counsel provides the court with an unconformed courtesy copy. Counsel is informed that if the document does not appear on the docket by the end of the day today, the clerk is directed to file the copy provided.

Matter is argued.

After oral argument the court rules as indicated below and as more fully reflected in the Court's Order, which is signed and filed this date and incorporated herein by reference.

Plaintiff's motion for a judgment notwithstanding the verdict is DENIED.

Plaintiff's motion for a new trial is also DENIED.

USC is ordered to provide notice of this order and file proof of service of such.

LATER:

Upon review of the docket, the court finds the Substitution of Attorney is not appearing on the docket. The Judicial Assistant is directed to file the copy provided to the court.

Superior Court of California
County of Los Angeles
Department 26

CAROL PULLIAM, Plaintiffs, v. USC VERDUGO HILLS HOSPITAL, MSS NURSES REGISTRY, INC., and DOES 1 through 25, Defendants.	Case No.: BC654563 Hearing Date: February 26, 2020 ~~**[TENTATIVE]**~~ **ORDER RE:** PLAINTIFF'S MOTION FOR NEW TRIAL

Background

Plaintiff Carol Pulliam ("Plaintiff") filed this wrongful termination action on March 3, 2017 against MSS Nurses Registry Inc., which hired Plaintiff as an agency nurse and assigned her to work for defendant University of Southern California ("USC") (erroneously sued as USC Verdugo Hills Hospital).

Plaintiff alleged that USC employed and wrongfully terminated her, retaliating against her and interfering with her employment contract with MSS. USC denied these allegations, contending it never employed Plaintiff, never discharged Plaintiff, and did not engage in any wrongdoing.

On December 11, 2019, after an eight-day jury trial, the jury rendered a verdict in favor of USC on both causes of action, wrongful termination in

violation of public policy and intentional interference with contractual relations.

On January 6, 2020, the USC served its notice of entry of judgment on Plaintiff.

On January 21, 2020, Plaintiff filed notice for two post-trial motions, a motion for a judgment notwithstanding the verdict and a motion for new trial.

On January 31, 2020, Plaintiff filed and served her post-trial motions on USC. On February 10, 2020, USC filed an opposition. On February 19, 2020, Plaintiff filed a reply.

Timeliness

Notice of a motion for new trial must be filed within fifteen days of notice of entry of judgment (CCP § 659(a)(2).) Within ten days of filing notice of intention to move for a new trial, the moving party must serve and file the memorandum in support. (Cal. Rules of Court, rule 3.1600(a).)

Here Plaintiff filed her notice of intent to move for new trial within fifteen days of notice of entry of judgment and filed her motion and memorandum in support of the motion within ten days of filing her notice of intent to move. Accordingly, Plaintiff's motion is timely.

Oversized Papers

"Except in a summary judgment or summary adjudication motion, no opening or responding memorandum may exceed 15 pages." (Cal. Rules of Court, Rule 3.1113(4) Further. "In lo reply or closing memorandum may exceed 10 pages." (*Ibid.*) An oversized paper is considered the same as a late-filed paper. (*Id.* at (g).) However, a party may apply for leave to file a longer memorandum. (*Id.* at (e).) "A memorandum that exceeds 10 pages must include a table of contents and a table of authorities. A memorandum that exceeds 15 pages must also include an opening summary of argument." (*Id.* at (f).) The Court may refuse to consider a late-filed paper. (Cal. Rules of Court, Rule 3.1300(d).)

The Court notes that here Plaintiff has filed a 13-page reply. No leave of the Court has been requested in filing an oversized reply. Further, the reply does not contain a table of contents and a table of authorities. Nonetheless, the Court will exercise its discretion to consider the excess pages of Plaintiff's reply.

Addendum to Reply

On February 25, 2020, Plaintiff filed an addendum to her reply. The Court did not authorize Plaintiff to file any supplemental reply. In any event, the Court has read and considered Plaintiff's addendum to her reply and finds that it references materials that are not relevant to Plaintiff's motion for new trial or Plaintiff's motion for judgment notwithstanding the verdict.

Legal Standard

Judgment Notwithstanding Verdict standard

"The Court "shall render judgment in favor of the aggrieved party notwithstanding the verdict whenever a motion for a directed verdict for the aggrieved party should have been granted had a previous motion been made." (Code Civ. Proc., § 629(a).) "A JNOV motion challenges the legal sufficiency of the opposing party's evidence ('a demurrer to the evidence'). i.e., it challenges whether that evidence was sufficient to prove the claims or defenses asserted by the opposing party and now embodied in the jury's verdict." (Wegner. et al., *Civ. Trials and Evid.* (The Rutter Group 2016) ¶ 18:4.) "Thus, for purposes of a JNOV motion, all evidence supporting the verdict is presumed true. The issue is whether these facts constitute a prima facie case or defense as a matter of law." (Id., ¶ 18:54.) The Court does not weigh evidence or credibility of witnesses. (Id., ¶ 18:55.)

A motion for judgment notwithstanding the verdict may be granted only if it appears from the evidence, viewed in the light most favorable to the party securing the verdict, that there is no substantial evidence in support." (*Sweatman* v. *Department of Veterans Affairs* (2001) 25 Cal.4th 62, 68.)

Motion for New Trial Standard

"A motion for new trial is a creature of statute; . . . " (*Neal v. Montgomery Elevator Co.* (1992) 7 Cal. App. 4th 1194, 1198.) A movant must satisfy Code of Civil

Procedure sections 657 and 659. Under Code of Civil Procedure section 657, a motion for new trial may be granted if there is any:

> 1. Irregularity in the proceedings of the court, jury, or adverse party, or any order of the court or abuse of discretion by which either party was prevented from having a fair trial.
>
> 2. Misconduct of the jury; and whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by a resort to the determination of chance, such misconduct may be proved by the affidavit of any one of the jurors.
>
> 3. Accident or surprise, which ordinary prudence could not have guarded against.
>
> 4. Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial.
>
> 5. Excessive or inadequate damages.
>
> 6. Insufficiency of the evidence to justify the verdict or other decision, or the verdict or other decision is against law.
>
> 7. Error in law, occurring at the trial and excepted to by the party making the application.

(Code Civ. Proc., § 657.)

The determination of a motion for a new trial rests so completely within the court's discretion that its

action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears. (*Romero v. Riggs* (1994) 24 Cal.App.4th 117, 121-122.) However, "[t]he right to a new trial is purely statutory, and a motion for a new trial can be granted only on one of the grounds enumerated in the statute." (*Fomco, Inc. v. Joe Maggio, Inc.* (1961) 55 Cal.2d 162, 166.) "As the motion for a new trial finds both its source and its limitations in the statutes [Citation], the procedural steps prescribed by law for making and determining such a motion are mandatory and must be strictly followed [Citations]. Applying this rule, it has uniformly been held that an order granting a new trial is in excess of jurisdiction and void if, for example. it is made in a proceeding in which the remedy of new trial is not available [Citations.] (*Mercer v. Perez* (1968) 68 Cal.2d 104, 118.)

Discussion

Judgment notwithstanding the Verdict

Plaintiff's moving papers do not provide any argument to support her motion for judgment notwithstanding the verdict. California Rules of Court, rule 3.1113(b) provides that "[t]he memorandum must contain a statement of facts, a concise statement of the law, evidence and arguments relied on, and a discussion of the statutes, cases, and textbooks cited in support of the position advanced." Here, Plaintiff "offer[s] no statement of the facts of the case that support the verdict, and no identification of the specific evidence or

arguments on which [her] challenges to the sufficiency of the evidence rely." (*Quantum Cooking Concepts, Inc. v. LV Associates, Inc.* (2011) 197 Cal.App.4th 927, 933.) Due to these omissions, the Court has "no obligation to undertake its own search of the record 'backwards and forwards to try to figure out how the law applies to the facts' of the case." (*Id.* at p. 934.) Accordingly, Plaintiff's request for judgment notwithstanding the verdict is DENIED.

New Trial Motion

Plaintiff moves for a new trial based on statutory grounds of (1) irregularity in proceedings, (2) misconduct of the jury, (3) accident or surprise, (4) newly discovered evidence, and (7) error in law. The Court now turns to each.

(1) Irregularity in the Proceedings and (2) Misconduct of the Jury

"A new trial may he granted where there is an '[i]rregularity in the proceedings.' (§ 657, subd. (1).) An 'irregularity in the proceedings' is a catchall phrase referring to any act that (1) violates the right of a party to a fair trial and (2) which a party 'cannot fully present by exceptions taken during the progress of the trial, and which must therefore appear by affidavits.'" (*Montoya v. Barragan* (2013) 220 Cal.App.4th 1215, 1229-1230 [internal citations omitted].)

A new trial may also be granted based on juror misconduct. A party moving for a new trial on the ground of juror misconduct must establish both that misconduct occurred and that the misconduct was prejudicial. (*Stokes v. Muschinske* (2019) 34 Cal.App.5th 45, 52.) In determining this, "a court generally undertakes a three-step inquiry in ruling on a new trial motion based on juror misconduct. First, the court determines whether affidavits supporting the motion are admissible. Second, the court determines whether the facts establish misconduct. Third, the court determines whether any misconduct resulted in prejudice." (*Ibid.*)

In support of her motion for new trial, Plaintiff alleges as follows: The jury was sent to deliberate at 2:56 pm on December 11, 2019. without the evidence hooks, were told that the end of the day was at 4:15 pm. The Court told the Jurors "that there were donuts in the deliberation room that the judge kindly purchased for the jurors, which was nice, hut donuts are proven to slow people down as the blood is going to the intestines to digest the food when it should be going to the brain for deliberation! The jurors had already had lunch so these donuts which would have caused sticky hands and napkins, was unnecessary and distracting, especially when you consider that they are there to hold the paperwork and to talk without food in their mouths." (Motion p.5:14-19.) The Judge presiding over the trial left: at approximately 3:00 pm to teach a class, and a substitute judge did not appear until the reading of the verdict. (*Id.* at p. 5:20-25.) It took forty-five minutes or

thirty-four minutes[1] to give the evidence books to the jury as the parties had to redact information from the exhibits.[2] (*Id.* at pp. 6:13-7:4.) Within twenty-six minutes of the evidence books being provided to the jury, the jury reached a verdict. (*Id.* at p. 7:5.) The jurors had thirty-four internal questions to consider. (*Id.* at p. 7:8.) Therefore, it was "Physically Impossible for the Jury to Consider the Thirty Four Questions. . . ." (*Id.* at p. 7:28.) After talking to some jurors at the end of the trial. Plaintiff s Counsel learned that the jurors all stated that they determined that Plaintiff was not an employee of USC and therefore did not need to read and review the jury instructions and evidence book. (*Id.* p.8:17-18.) Plaintiff contends that this "evidence" shows that the jury refused to deliberate which was misconduct and an irregularity. (*Id.* pp.8-9:4.)

Plaintiff's moving papers do not properly cite any evidence to support this claim. (*See* Cal. Rules of Court, rule 3.1113(k).) The only evidence mentioned to support Plaintiff's contentions are the declarations of Plaintiff and Plaintiff's former counsel. (Motion p. 5:12-13.) The attached evidence is unlabeled and unauthenticated. (*Id.* at pp. 16-55.) Further, the only declaration attached to the moving papers is the declaration of Plaintiff, which merely recites when the

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[1] The moving papers are inconsistent as to the amount of time it took to get the evidence into the jury room.

[2] The moving papers do not allege that any dispute arose in the parties' joint efforts to redact the exhibit hinders. Nor does Plaintiff explain why, in the absence of any dispute concerning what information to redact. judicial monitoring was necessary for the parties to redact information from the exhibit binders.

jury deliberations started, when the judge left for a prior engagement, that information needed to be redacted, that there was no judge to monitor the redactions, that the redactions took thirty-four minutes, and that the jury reached a verdict twenty-six minutes later. (*Id.* at pp. 14-15.) Plaintiff's Declaration is not properly certified under penalty of perjury as required by Code of Civil Procedure section 2015.5.

Plaintiff submits with her reply a declaration from her former counsel. (Reply. pp. 108-110.) The Court is disinclined to consider this new evidence offered for the first time in reply. (See e.g. *Joy v. Mahaffey* (2013) 218 Cal.App.4th 1522, 1537-1538).

Even if the Court were to consider Plaintiff's former counsel's declaration, it consists of hearsay statements of jurors' possible state of mind, which would not provide grounds for a new trial As the Court has previously noted. Plaintiff's former counsel's assertion that the jurors focused their attention on one particular area of evidentiary weakness in Plaintiff's case – the lack of evidence to show that Plaintiff was an employee of USC – improperly delves into the thought process of the jurors. It is well settled that the verdict may not be impeached by examination of the jurors' mental processes. (*People v. Steele* (2002) 27 Cal.4th 1230, 1263-1264.) "Thus, the rule renders the jurors' subjective thought processes immaterial and of no jural consequence. From this it follows that evidence that the jurors misunderstood the judge's instructions, were influenced by an improper remark of a fellow juror, . . . or had been influenced by inadmissible

evidence is simply of no legal significance. In short, under both the common law and Evidence Code section 1150, the jurors' motives, beliefs, misunderstandings, intentions, and the like are immaterial." (*People v. Hill* (1992) 3 Cal.App.4th 16, 30, disapproved on other grounds in *People v. Nester* (1997) 16 Cal.4th 561, 582, fn. 5.) Thus, even if Plaintiff were to uncover evidence that the jurors gave greater weight to the lack of evidence to support one element of the causes of action – whether Plaintiff was an employee of USC – than they did to evidence relating to other elements, this evidence would in any event be immaterial and inadmissible. (Minute Order 1/31/20.) Accordingly, Plaintiff has not provided admissible evidence to support her claim of misconduct and irregularity.

Even if the Court were to find that Plaintiff has presented sufficient evidence, the Court would still find that Plaintiff has failed to demonstrate prejudice as there is no requirement that a jury deliberate for any specific length of time. 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." (CCP § 613, [italics added].) "This statute is hut a recognition in other words of the unlimited authority of the jury *to determine .for themselves whether a deliberation is necessary to enable them to render a verdict.* The time they may devote to such deliberation *if the same is deemed necessary*, is left wholly to their judgment." (*Vomaska v. City of San Diego* (1997) 55 Cal.App.4th 905, 910-911 [upholding denial of new trial where jury returned a verdict within 10 minutes

of being in the jury room and before exhibits had been given to the jury].)

Here, it is undisputed that the Court read all the jury instructions aloud to the jury before the jury retired to the deliberation room. There is no indication that the jurors, having been read the jury instructions in open court and having listened to the presentation of evidence throughout the trial, were not properly deliberating during the entire thirty-four to forty-five minutes that Counsel spent redacting the exhibit hinders and the twenty-six minutes afterward with the exhibit hinders.

(3) Accident or Surprise

"A trial court may order a new trial based on surprise. (Code Civ. Proc., § 657, subd. (3).) The surprise must have detrimentally impacted the party moving for a new trial, but the movant must not have been able to prevent or guard against it by ordinary prudence." (*McCoy v. Pacific Maritime Assn.* (2013) 216 Cal.App.4th 283, 305.1 "From a very early date—1866—it has been held that surp[r]ise, as a ground for a motion for a new trial, should be looked on with 'suspicion.'" (*Fletcher v. Pierceall* (1956) 146 Cal.App.2d 859, 866, [correction to spelling of 'surprise'].) "In making a motion for new trial on this ground, the party seeking relief has the burden to prove that he exercised reasonable diligence to discover and produce the evidence at trial. If he does not make this showing, the motion must he denied. Moreover, a general averment

of diligence is insufficient. The moving party must state the particular acts or circumstances which establish diligence." (*In re Marriage of Liu* (1987) 197 Cal.App.3d 143, 153–154.)

Plaintiff contends that the surprise here was that an exhibit presented during trial was different from the one USC previously had and that USC lied to the jurors that Plaintiff had not been working on January 26, 2016. (Motion p. 9:5-8.) Plaintiff claims further evidence was produced at trial that surprised Plaintiff but fails to identify what evidence and how it was material. (Id. pp. 9-12:4.) Plaintiff fails to allege any diligence undertaken to avoid this surprise. Further, it is unclear how there was any surprise as USC presumably produced this evidence during discovery, which Plaintiff does not appear to dispute.

(4) Newly Discovered Evidence

"The claim of newly discovered evidence as ground for a new trial is universally regarded with distrust and disfavor for obvious good reasons. A sound public *policy* requires every litigant to exhaust all diligence and reasonable efforts to produce at the trial of his cause all existing evidence in his behalf." (*Bliss v. Security-First Nat. Bank of Los Angeles* (1947) 81 Cal.App.2d 50, 59.) "The essential elements which must be established are (1)[ ] the evidence is newly discovered; (2)[ ] reasonable diligence has been exercised in its discovery and production; and (3)[ ] the evidence is material to the movant's case." (*Sherman v. Kinetic*

Concepts, Inc. (1998) 67 Cal.App.4th 1152, 1161 [internal citations omitted).)

Plaintiff points to only one piece of newly discovered evidence – a recording that Plaintiff purportedly made in 2016, which Plaintiff has lodged with the Court on a flash, and an accompanying transcript. (Motion p.12:23-25.) The Court notes that Plaintiff did not provide this evidence to the Court until February 14, 2020. Plaintiff's moving papers provide no explanation whatsoever as to why Plaintiff did not seek to admit the recording at trial or why a recording that Plaintiff purportedly made in 2016 should be deemed newly discovered evidence. Nor does Plaintiff set forth what steps in furtherance of reasonable diligence she undertook to "discover" the evidence earlier. In her reply, Plaintiff contends that this evidence was stolen unbeknownst to Plaintiff and recently recovered by the Los Angeles District Attorney's office. (Reply, p. 9:3-7.) Plaintiff does not cite to any evidence to support these assertions. Nor does Plaintiff explain how, even assuming arguendo that the evidence was stolen as she claims, Plaintiff could have been unaware of the existence of this evidence. Logically, if this evidence were so crucial, one would think that prior to trial, Plaintiff would have at least alerted her former counsel of its existence and would have advised her counsel that she had made such a recording.

Even if the Court were to disregard Plaintiff's failure to exhaust all diligence and reasonable efforts to locate this evidence prior to trial, the Court notes that Plaintiff has failed to properly authenticate the

recording. (See Evid. Code, § 1400, See also *People v. Patton* (1976) 63 Cal.App.3d 211, 220 [holding that an audio recording must be authenticated in the same way as a writing under Evidence Code Section 1400).) With regard to the certification of transcriptions, the individual who has signed the certification does not verify that he himself listened to the audio recording and prepared the transcription. Instead, the signer affirms only that the transcriptions have been prepared by an unidentified "duly qualified transcriber, who has confirmed that such transcriptions are, to the best of *their* knowledge and belief, true and accurate transcriptions." This is inadmissible hearsay. Further, the signer disavows liability for errors and omissions in the transcriptions.

Even if the Court were to consider the unauthenticated audio recording, the recording itself is unclear. A substantial portion of the audio is unintelligible. Accordingly, even if the Court were to deem the audio recording to be new evidence, the Court would find the recording to be immaterial. At best, this evidence would be merely cumulative or impeaching evidence, which would not be grounds to grant a new trial. (See e.g. *Fairbairn v. Fairbairn* (1961) 194 Cal.App.2d 501; See also *Smith v. Sugich Co.* (1960) 179 Cal.App.2d 299.)

(7) Error in Law

"[A] trial court may grant a new trial if "its original ruling, as a matter of law, was erroneous." (*Collins*

v. Stater Memorial Hospital (2011) 196 Cal.App.4th 1, 17–18 [internal citations omitted].)

Plaintiff identifies two possible errors in law in her moving papers (1) that on the reading of deposition transcripts the Court did not read the law on depositions until after they were read and (2) that there was a discussion between the judge and counsel in front of the jurors in the courtroom regarding Plaintiff's contract with a third party. (Motion p. 13:8-12.) As a preliminary matter, Plaintiff does not cite to any transcript or other evidence to support either of these claims. (See Cal. Rules of Court, rule 3.1113(b).) With regard to the first contention, no error of law has been alleged. With regard to the second contention, the record does not support this claim.

CONCLUSION AND ORDER

For the foregoing reasons, Plaintiff's motion for a judgment notwithstanding the verdict is DENIED. Plaintiff's motion for a new trial is also DENIED.

USC is ordered to provide notice of this order and rile proof of service of such.

DATED:
February 26. 2020

/s/ Elaine Lu
Elaine Lu
Judge of the Superior Court