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OPINIONS AND ORDERS

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ORDER DENYING PETITION FOR REVIEW, SUPREME COURT OF CALIFORNIA (JUNE 25, 2025)

IN THE SUPREME COURT OF CALIFORNIA

CHRISTIAN L. JOHNSON,

Plaintiff and Appellant,

v.

DEPARTMENT OF TRANSPORTATION,

Defendant and Respondent.

No. S290366

Court of Appeal,
Third Appellate District - No. C099319

Before: GUERRERO, Chief Justice.

The request for judicial notice is granted.

The petition for review is denied.

/s/ Guerrero
Chief Justice

OPINION, CALIFORNIA COURT OF APPEAL THIRD APPELLATE DISTRICT (MARCH 17, 2025)

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA THIRD APPELLATE DISTRICT
(San Joaquin)

CHRISTIAN L. JOHNSON,

Plaintiff and Appellant,

v.

DEPARTMENT OF TRANSPORTATION,

Defendant and Respondent.

No. C099319

(Super. Ct. No. STK-CVUCR-2019-281)

Before: HULL, Acting P.J.,
FEINBERG, J, WISEMAN, J.

FEINBERG, J.

Plaintiff Christian L. Johnson sued his employer, defendant California Department of Transportation (Caltrans), based on claims arising out of his employment. While the suit was pending, Paul Brown, an attorney for Caltrans, sent an email about the litigation (the Brown email) to Nicolas Duncan, Johnson's supervisor.

Duncan sent an image of the email to Johnson, who shared it with his attorney, John Shepardson. Johnson and Shepardson then shared the email with several retained experts and other individuals.

After extensive meet-and-confer communications, Caltrans sought a protective order on the ground that the email was covered by the attorney-client privilege. The trial court entered the order.

In the months that followed, the parties engaged in a protracted dispute concerning Johnson's and Shepardson's compliance with the protective order's terms. Eventually, Caltrans filed a motion to enforce the order and later a motion to disqualify Shepardson and three retained experts. The trial court disqualified Shepardson and the experts.

On appeal, Johnson challenges the trial court's disqualification order. Among other arguments, he claims that the Brown email was not protected by the attorney-client privilege, Caltrans waived any privilege through undue delay, and the court abused its discretion in ordering the drastic remedy of disqualification. We find no merit in his arguments and will affirm the order.

BACKGROUND

I.

Johnson's first amended complaint, filed in March 2019, alleged fifteen claims against Caltrans, including for discrimination, harassment, and retaliation. On January 10, 2022, while the suit was pending, Paul Brown, an attorney for Caltrans, sent an email to Nicolas Duncan, who was Johnson's supervisor at the time and not a named party in the litigation. The

email contained a "CONFIDENTIALITY NOTICE" that stated: "This is a privileged attorney-client communication and/or is covered by the attorney work-product doctrine. It is for the sole use of the intended recipient(s). Any unauthorized review, use, disclosure, or distribution is prohibited. If you are not the intended recipient, please contact the sender by reply e-mail and destroy all copies of the original message. Do not print, copy or forward."

Unbeknownst to Caltrans, Duncan took a photograph of the email and sent it to Johnson, who gave it to his attorney, John Shepardson. It is unclear why Duncan did this, and the unredacted email itself is not a part of the record. At this point in the case, trial was set for April 18, 2022.

The next day, Shepardson emailed Caltrans's counsel, Christopher Sims, attaching the image and saying it "was sent to my client." Shepardson asserted that the email was intentionally disclosed and so "appears to be a waiver of attorney-client privilege, if any privilege attaches to communications with Mr. Duncan." Shepardson also stated that the email was "distressing" to Johnson and asked Caltrans to "cease and desist any and all communications with employees that are misleading about the merits of [Johnson's] claims."

Approximately four hours later, Sims responded to Shepardson's email. Sims said that the Brown email was an attorney-client privileged communication as evidenced by the confidentiality language at the bottom of the email. Sims further stated: "Pursuant to the language contained in the email, as well as to [the] code of ethics, we request that you and your client delete or destroy the email. Further, Mr. Duncan does

not have the authority to waive attorney-client privilege on behalf of [Caltrans]." Later that day, Shepardson responded by email requesting legal authority supporting Caltrans's assertion that the privilege applied to communications with Duncan.

The next day, Shepardson sent a letter to Sims entitled "Johnson v. California Department of Transportation (Good Faith Meet and Confer Re Attorney Paul Brown's False & Misleading Email to Mr. Duncan, Christian Johnson's Boss.)" The letter asserted that the Brown email was not protected by the attorney-client privilege; and if it was protected, the privilege was waived because the email was disclosed and was subject to the crime-fraud exception. The letter demanded that Brown cease and desist from making any further "false and misleading" statements to Duncan. It also demanded that Brown "send a clarifying statement" to Duncan to provide a balanced "and accurate depiction" of Johnson's history at Caltrans.

Approximately two weeks later, on January 28, 2022, Shepardson sent another letter to Sims. The letter reiterated Johnson's demand that Caltrans stop providing "false and/or misleading information to any witnesses" and said that the Brown email was "emotionally damaging" to Johnson. The letter additionally stated that Shepardson would be providing the email to the retained experts "for its impact on their opinions." The email would also be offered into evidence at trial. The letter closed by saying: "Unless otherwise promptly informed, I will assume there is no objection to the processes outlined above."

That same day, Johnson met with Bennett Williamson, Ph.D., who had been retained by Shepardson

to provide expert testimony on Johnson's claim that he suffered psychological harm as a result of Caltrans's alleged wrongdoing. Johnson showed Williamson the Brown email, and Williamson read it.

On February 3, 2022, Sims sent a letter to Shepardson. Citing *Upjohn Co. v. United States* (1981) 449 U.S. 383, *Commodity Futures Trading Com. v. Weintraub* (1985) 471 U.S. 343, and California State Bar Rules of Professional Conduct, rule 4.4, Sims maintained that the Brown email was covered by the attorney-client privilege and requested that Shepardson "immediately destroy the email[] and any copies." The letter further said: "Caltrans will resist any attempt made by you to include the email in this action or to offer it as evidence at trial. The email is an attorney-client privileged communication that you should not be in possession of and it is only in your possession because it was provided to you by an individual who lacked the authority or right to do so. [¶] As for your assertion that you plan to share the email with your experts, again we demand you refrain from doing so. The email is a non-discoverable communication that is protected both by attorney-client privilege and the work product doctrine." Sims advised Shepardson that if he did "not immediately cease dissemination and destroy all copies of Mr. Brown's email to Mr. Duncan," Caltrans would seek a protective order from the court and "any and all other remedies provided by law."

Shepardson responded with a letter the same day. It stated that Johnson had "disclosed the email to Dr. Williamson so that his psychological evaluation was based on the truth." Shepardson said that if Johnson had not "disclose[d] the contents of the email and

yet ha[d] this new round of emotional distress, his objective scoring may show he's lying and/or the interview with Dr. Williamson harmed by lack of a clear statement of his condition and the causes of it." The letter also set forth Shepardson's additional legal arguments for why the email was not privileged, including his view that the "dominant purpose" of the email was to "maliciously damage [Johnson's] career and generate a hostile witness against him," that Duncan was not the one whose actions had "'embroiled' Caltrans 'in serious legal difficulties,'" and that the email made false claims and was therefore "fraudulent."

In early February 2022, the parties exchanged a series of written correspondence. Among other things, the parties disagreed about whether the assistance of the appointed discovery referee was required, and Shepardson asked the trial court to set an ex parte hearing about the email. The trial court declined Shepardson's request, stating that the matter should be addressed by the referee.

In an email to Caltrans, Shepardson repeated his statement that Johnson had given the Brown email to Williamson. The email additionally stated that they had given the Brown email to Johnson's "HR experts."

On February 17, 2022, Sims sent a letter to Shepardson advising him that further meet-and-confer efforts would be futile because of what Caltrans saw as Shepardson's "repeated misrepresentations regarding our position on the attorney-client privilege with Caltrans employees and baseless claim of criminal activity." Sims further noted that Caltrans would be filing a motion concerning the email "in the near future."

The same day, the trial court stayed the action pending resolution of an unrelated motion to disqualify Shepardson based on his representation of Johnson's mother. The court lifted the stay on April 1, 2022. The court also vacated the April 18, 2022 trial date; in June 2022, trial was reset for May 8, 2023. On June 21, 2022, Sims served a notice stating that he would be unavailable from July 1, 2022 to August 31, 2022.

II.

On August 18, 2022, Caltrans filed a motion for protective order. The motion asked for an order prohibiting further disclosure or use of the Brown email and its contents, compelling the return or destruction of any existing copies of the email, and requiring Johnson to identify everyone to whom the email had been disclosed. The motion was supported by a declaration from Brown stating that he had sent the email within the scope of his representation of Caltrans for the purpose of preparing "Caltrans's defense as part of the investigation into the claims by [Johnson]."

In opposition to the motion, Johnson filed, among other things, a declaration by Williamson. Williamson stated that "[i]t would be difficult, and perhaps impossible, to give testimony about [Johnson's] psychological harm . . . without consideration of the damaging email."

The trial court referred the motion to the appointed discovery referee, and the referee issued a recommended ruling. On January 3, 2023, the trial court overruled objections to the recommendation and adopted the referee's ruling. The ruling concluded that Caltrans had made a showing that the Brown email was covered by the attorney-client privilege. Citing

Upjohn Co. v. United States, *supra*, 449 U.S. 383, 391, the court determined that the email to Duncan was privileged because its dominant purpose was to obtain relevant information from Duncan and prepare Caltrans's defense in the case. The email was confidential, as indicated by the confidentiality warning at the end. And Caltrans had not waived the privilege through disclosure, delay in bringing the motion, or by other means.

In discussing whether Caltrans had unduly delayed in filing the motion, the trial court cited *State Comp. Ins. Fund v. WPS, Inc.* (1999) 70 Cal.App.4th 644, 656-657 (*State Fund*) and *McDermott Will & Emery LLP v. Superior Court* (2017) 10 Cal.App.5th 1083, 1108-1109 (*McDermott*), two cases involving a lawyer's ethical duties upon receiving documents that are or may be privileged. The court said that Caltrans could have reasonably expected Shepardson to comply with his duties under *State Fund*. The court acknowledged "it may be too much to say that Mr. Shepardson should have concluded that the Brown e-mail was 'obviously' privileged," as understood in *State Fund*. Shepardson realized he had received material that "*may* be privileged" and "responded to his recognition of the issue by immediately informing Mr. Sims of the disclosure, as required by *McDermott*. At that point the burden shifted to defense counsel to 'take appropriate steps to protect the materials.'" Caltrans sought to protect the email by asserting the privilege to Shepardson. In subsequent communications, Shepardson did not say he would proceed to distribute the email; and absent any such warning, Caltrans did not unreasonably delay.

The trial court's order concluded that the Brown email was protected as an attorney-client communication and could not be introduced into evidence at trial. It prohibited Johnson and Shepardson "from any further dissemination of the Brown e-mail." It ordered Johnson and Shepardson to destroy or return "all copies of the Brown e-mail" and file a compliance declaration stating they had done so and identifying "all persons to whom the Brown e-mail is known to have been disclosed, and the date of each disclosure." The order stated that it was not addressing whether Johnson or his retained experts could testify about the email or its effects on Johnson. It also awarded Caltrans $4,400 in attorneys' fees.

On January 10, 2023, Johnson filed a petition for writ of mandate in this court, which stayed the case. On February 6, 2023, we dismissed the petition and vacated the stay.

III.

On March 28, 2023, Caltrans sent a letter to Shepardson asserting that he had not complied with the protective order. Caltrans advised that Shepardson had failed to file declarations showing compliance with the trial court's order as required and had not paid the attorneys' fees awarded. The letter requested compliance by April 4, 2023 and stated that Caltrans would file a motion to enforce if Shepardson failed to comply by that date.

On April 3, 2023, Johnson filed in this court another petition for writ of mandate with a request for a stay. This court denied the petition.

On April 17, 2023, Caltrans filed a motion to enforce the protective order. Shortly thereafter, on April 24, 2023, Johnson and Shepardson served and filed declarations stating they had complied with the protective order and paid the $4,400 due. Shepardson's declaration stated that he had discussed the Brown email with several individuals, including Williamson, on an ongoing basis as of the date of the declaration. The declarations did not state whether the email itself had been provided to those individuals or whether Johnson and Shepardson had retrieved the email. Shepardson later supplemented his declaration to clarify that he had removed and destroyed his own copies of the email as of April 24, 2023.

At a hearing on June 6, 2023, the trial court denied Caltrans's motion to enforce as moot but awarded Caltrans $2,640 in attorneys' fees incurred in preparing and arguing the motion. The order was without prejudice to a new motion concerning violations of the protective order. The court, however, advised the parties that they should meet and confer first.

During the month of June 2023, the parties met and conferred concerning Shepardson's and Johnson's compliance with the protective order. On June 13, Sims sent Shepardson a letter stating that, based on the statements made in his compliance declarations, it appeared that Shepardson was continuing to use and disseminate the Brown email even after the issuance of the protective order. Shepardson's declarations also failed to provide assurance that the individuals to whom the email had been distributed had destroyed their copies. Johnson's declaration had similar deficits.

Two days later, Shepardson sent a responsive letter to Sims. Shepardson asserted that the protective order permitted "verbal communications about the Brown email and its contents" and argued that Johnson and others could testify about the email. According to Shepardson, because the protective order did not address whether the parties could testify about the email, it allowed Shepardson and Johnson to verbally discuss the email. Shepardson additionally argued that Caltrans had waived any objections to third parties possessing the email because it had delayed in seeking enforcement of the privilege, rendering the trial court's protective order "moot." He also maintained that Caltrans was required to file a motion under Code of Civil Procedure section 1008 to expand the protective order and that he and Johnson had complied with the protective order.

IV.

On June 28, 2023, Caltrans filed a motion to disqualify Shepardson and the experts. At the time of the motion, trial was set for August 28, 2023.

Johnson responded by arguing that the motion was essentially a renewed motion and therefore violated Code of Civil Procedure section 1008, which generally prohibits motions to reconsider absent satisfaction of certain preconditions. The trial court rejected this argument and set the motion for hearing.

In a declaration by Sims, Caltrans noted that Williamson had evaluated Johnson at least twice after the disclosure of the Brown email and that Williamson had relied on the email to form his opinion. Two other experts retained by Johnson, Jan Duffy and Virginia Simms, had also reviewed the Brown email, and

Caltrans had not been able to depose any of the three experts because of concerns they would testify about the email as part of their opinions. Caltrans had not had its own expert, Glenn Hammel, who had not received or reviewed a copy of the email, evaluate Johnson since March 2021 out of concern that Johnson would discuss the email; Caltrans likewise did not want to offer Hammel for deposition because of concerns that Shepardson would discuss the email. Moreover, Shepardson's compliance declaration indicated that the email had been given to three percipient witnesses who could be called at trial.

Shepardson filed a declaration noting the extensive history of the case, which had spanned five years and included 35 depositions, thousands of pages of documents exchanged, a mediation, a settlement conference, and the appointment and termination of two discovery referees. He explained that it would be difficult for Johnson to retain new experts at this point in the litigation. Shepardson also asserted that he had not discussed the contents of the email with anyone following the January 3, 2023 protective order. He intended to offer testimony about the Brown email at trial. Shepardson also clarified his prior compliance declarations, providing another list of individuals to whom he had given the email.

Johnson also filed declarations from his experts in opposition to Caltrans's motion. Williamson declared he could testify at trial with or without relying on the Brown email, given the email's declining importance as time passed. Duffy declared that she did not recall seeing the Brown email, although she was told she had received it, and did not need to rely on it to testify. Simms had received the email, could testify without

relying on it, and said she would "look for direction from attorney Shepardson and the Court regarding [the] scope and degree of [her] trial testimony regarding the Brown email."

On August 24, 2023, the trial court issued a tentative order granting the motion to disqualify Shepardson and the experts. Shepardson did not timely request argument, and the court adopted the tentative ruling. In the order, the trial court observed that, based on Shepardson's April 24, 2023 compliance declaration, he disclosed or discussed the Brown email with several individuals even after the court's January 3, 2023 protective order. The court found it "clear that these disclosures were made in spite of CALTRANS' assertion that the Brown email was a privileged and confidential communication and even after the Court found the Brown email to be a privileged and confidential communication." The trial court further concluded that Shepardson had a duty to refrain from using or disclosing the email while the parties and the court resolved the dispute as to the email's status. But he failed to abide by that duty. The court explained: "Mr. Shepardson's testimony . . . establishes that Mr. Shepardson made the decision—early on—to use the Brown email in this litigation in spite of CALTRANS' protests. In opposition, Mr. Shepardson argues that there were delays in CALTRANS' responses and he suggests that he consistently reached out to address and resolve the issue, but Mr. Shepardson's May 23, 2023 declaration and [accompanying exhibit] undermine his argument. Mr. Shepardson's testimony confirms that the decision to use the Brown email was made on January 28, 2022; that is, approximately two weeks after the

inadvertent disclosure and after CALTRANS asserted that the communication was privileged and confidential."

The trial court additionally determined that Shepardson's conduct would prejudice the ongoing proceedings. It rejected Williamson's statement that he could now testify without the Brown email, noting it was contradicted by his earlier statement that it would be "difficult, and perhaps impossible" to testify without it. The Simms and Duffy declarations also raised concerns. They noted that Caltrans had not demanded the return or destruction of the Brown email, but said nothing about Shepardson, suggesting he had not instructed them to delete or destroy the email. The experts also could not be deposed without risking waiver of the privilege, causing significant damage to the litigation. The trial court concluded: "Mr. Shepardson's past disclosure and continuing use of the Brown email will have a substantial and continuing effect on future proceedings in this action. Mr. Shepardson is disqualified because his review and use of the Brown email goes beyond a 'mere disclosure.' . . . Mr. Shepardson elected to use the Brown email as part of his case against CALTRANS prior to the resolution of the dispute regarding its nature. Mr. Shepardson read the Brown email; he reviewed it; he studied it; he evaluated it; he shared it; and, he incorporated its contents into the case and into his trial strategy. Having done so, Mr. Shepardson's continued participation in this case as JOHNSON's counsel raises the likelihood that use of the Brown email could affect the outcome of these proceedings both in terms of CALTRANS' rights against use of its privileged

communications and in terms of the integrity of these judicial proceedings and public confidence in them."

The court vacated the trial date, and Johnson filed a notice of appeal.

DISCUSSION

"A trial court's authority to disqualify an attorney derives from the power inherent in every court '[t]o control in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it, in every matter pertaining thereto.'" (*People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1145.) "[U]ltimately the issue involves a conflict between a client's right to counsel of his choice and the need to maintain ethical standards of professional responsibility. 'The preservation of public trust both in the scrupulous administration of justice and in the integrity of the bar is paramount. . . . [The client's recognizably important right to counsel of his choice] must yield, however, to considerations of ethics which run to the very integrity of our judicial process.'" (*Comden v. Superior Court* (1978) 20 Cal.3d 906, 915, second bracketed insertion in original.)

"A trial court's decision to grant or deny a motion to disqualify counsel is generally reviewed for abuse of discretion." (*O'Gara Coach Co., LLC v. Ra* (2019) 30 Cal.App.5th 1115, 1123; accord *Rico v. Mitsubishi Motors Corp.* (2007) 42 Cal.4th 807, 819 (*Rico*).) "'In exercising its discretion, the trial court must make a reasoned judgment that complies with applicable legal principles and policies.'" (*Clark v. Superior Court* (2011) 196 Cal.App.4th 37, 46 (*Clark*).) "'The order is

subject to reversal only when there is no reasonable basis for the trial court's decision.'" (*Ibid.*) The trial court's express and implied factual findings are reviewed for substantial evidence. (*People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc.*, *supra*, 20 Cal.4th at p. 1143.) We draw all inferences in favor of the prevailing party and accept the trial court's resolution of conflicts in the evidence. (*Clark*, at pp. 46-47.)

I.

An order on a motion to disqualify counsel is immediately appealable as a final determination of rights on a collateral matter. (*Meehan v. Hopps* (1955) 45 Cal.2d 213, 216-217.) As a threshold matter, however, Johnson argues that the trial court lacked jurisdiction to decide Caltrans's motion to disqualify. He maintains that the motion was barred by Code of Civil Procedure section 1008, which forbids renewed motions seeking "the same order" unless the moving party fulfills enumerated conditions that Caltrans did not satisfy here. Johnson posits that the motion to disqualify was a renewed motion as to: (1) the protective order because it sought to change the applicable *State Fund* standard and expand the protective order to cover Johnson's experts, and (2) the motion to enforce the protective order because that motion was denied as moot.

Code of Civil Procedure "[s]ection 1008 expressly applies to all renewed applications for orders the court has previously refused." (*Even Zohar Construction & Remodeling, Inc. v. Bellaire Townhouses, LLC* (2015) 61 Cal.4th 830, 840.) Its purpose "is '"to conserve judicial resources by constraining litigants who would

endlessly bring the same motions over and over, or move for reconsideration of every adverse order and then appeal the denial of the motion to reconsider.'"" (*Id.* at pp. 839-840.) The statute is jurisdictional and the exclusive means for a party to renew a previous motion or to seek reconsideration of a prior order. (*Kerns v. CSE Ins. Group* (2003) 106 Cal.App.4th 368, 384; *Even Zohar Construction*, at p. 840.)

Code of Civil Procedure section 1008 does not apply in the circumstances present here. Caltrans's motion to disqualify did not seek reconsideration of the trial court's ruling on the motion for protective order. Contrary to Johnson's contention, the goal of the motion to disqualify was not to relitigate the trial court's application of *State Fund* and the court's observation that the Brown email may not have been "obviously privileged." Nor was Caltrans effectively attempting to disqualify the experts in the motion for protective order by seeking to prevent the dissemination of the email to them. The motions were seeking distinctively different relief based on different facts; the motion to disqualify was not a renewed motion under the statute. (*See California Correctional Peace Officers Assn. v. Virga* (2010) 181 Cal.App.4th 30, 43.)[1]

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[1] Johnson also suggests that Shepardson should not have been covered by the protective order in the first place because Caltrans's motion did not expressly seek relief against him. Johnson cites Code of Civil Procedure section 1010 and California Rules of Court, rule 3.1110(a), which require a notice of motion to state the nature of the relief sought in the motion and the grounds for the motion. The purpose of these requirements is to apprise the court and the adverse party of the legal issues in the motion; "[a]n omission in the notice may be overlooked if the supporting papers make clear the grounds for the relief sought." (*Luri v. Greenwald* (2003) 107 Cal.App.4th 1119, 1125.) The notice and its

As to the motion to enforce the protective order, which the trial court denied as moot, Caltrans correctly notes that the trial court expressly left open the possibility of new or additional motions concerning violations of the protective order. And in any event, the relief sought in the motion to enforce the protective order—compliance with the protective order—was different than the relief sought in the motion to disqualify—the disqualification of Shepardson and the three experts. Accordingly, the motion to disqualify was not seeking the "'same order'" as the motion to enforce the protective order. (*California Correctional Peace Officers Assn. v. Virga, supra,* 181 Cal.App.4th at p. 43.)

In his reply brief, Johnson notes a previous motion to disqualify Shepardson based on a conflict of interest and appears to argue that the motion to disqualify Shepardson and the experts was a renewal of the earlier motion to disqualify. Johnson apparently made this argument before the trial court but did not raise it in his opening brief. The argument is therefore forfeited, and we need not address it. (*Varjabedian v. Madera* (1977)

20 Cal.3d 285, 295, fn. 11.)

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accompanying papers make clear that Shepardson's role in the dissemination of the Brown email was at issue. Indeed, the introduction of the memorandum of points and authorities in support of the motion is largely devoted to Shepardson's actions. Moreover, the notice of motion requests a protective order covering "Plaintiff," and it is clear that term encompassed not only Johnson himself but also his agents, including Shepardson, in his capacity as Johnson's counsel.

II.

Johnson next contends that the trial court's disqualification order lacked basis because the Brown email was not protected by the attorney-client privilege. We disagree.

A.

"Protecting the confidentiality of communications between attorney and client is fundamental to our legal system. The attorney-client privilege is a hallmark of our jurisprudence that furthers the public policy of ensuring '"the right of every person to freely and fully confer and confide in one having knowledge of the law, and skilled in its practice, in order that the former may have adequate advice and a proper defense."'" (*People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc.*, *supra*, 20 Cal.4th at p. 1146.) "The attorney-client privilege protects the transmission of information regardless of the content or whether the information is discoverable from other sources. [Citation.] It attaches to a confidential communication between the attorney and the client and bars discovery of the entire communication, including unprivileged material." (*DP Pham LLC v. Cheadle* (2016) 246 Cal.App.4th 653, 664; *see* Evid. Code, § 952.)

Corporate clients and public entities can claim the privilege. (*Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 733 (*Costco*); *Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 370; *see* Evid. Code, § 953.) Attorney communications with agents and employees of such entities may be covered by the privilege. (*Upjohn Co. v. United States*, *supra*, 449 U.S. at pp. 391-393; *D. I. Chadbourne, Inc. v. Superior*

Court (1964) 60 Cal.2d 723, 737 (*D. I. Chadbourne*).) "[T]o determine whether a communication is privileged, the focus of the inquiry is the dominant purpose of the relationship between the parties to the communication." (*Clark*, *supra*, 196 Cal.App.4th at p. 51.)

"The party claiming the privilege has the burden of establishing the preliminary facts necessary to support its exercise, *i.e.*, a communication made in the course of an attorney-client relationship. [Citations.] Once that party establishes facts necessary to support a prima facie claim of privilege, the communication is presumed to have been made in confidence and the opponent of the claim of privilege has the burden of proof to establish the communication was not confidential or that the privilege does not for other reasons apply." (*Costco*, *supra*, 47 Cal.4th at p. 733.)

"'The question whether the attorney-client privilege applies to a particular communication is a question of fact if the evidence is in conflict.' [Citation.] '"When the facts, or reasonable inferences from the facts, shown in support of or in opposition to the claim of privilege are in conflict, the determination of whether the evidence supports one conclusion or the other is for the trial court, and a reviewing court may not disturb such finding if there is any substantial evidence to support it."'" (*DP Pham LLC v. Cheadle*, *supra*, 246 Cal.App.4th at p. 664.) "We presume the trial court knew and properly applied the law absent evidence to the contrary." (*McDermott*, *supra*, 10 Cal.App.5th at p. 1103.) A trial court is not required to make any specific findings to support its ruling. (*Ibid.*) We "review the court's order by inferring it made all favorable findings that are supported by substantial evidence." (*Ibid.*)

In this case, the trial court concluded that the Brown email was privileged because Brown was an attorney representing Caltrans, the email involved legal advice or information, and the nature of the relationship between Brown and Duncan was that of a Caltrans attorney obtaining information relevant to litigation from a Caltrans employee. Substantial evidence supports these determinations. It is undisputed that Brown was an attorney for Caltrans. Brown stated that he sent the email to investigate Johnson's claims and defend Caltrans in that litigation. Brown also said that he intended his email to be privileged and confidential. The email bore a confidentiality notice. And the only relationship between Brown and Duncan stemmed from Brown's need to defend his client in litigation brought by one of Duncan's supervisees. These facts satisfied Caltrans's prima facie burden of showing the communication was made in the course of an attorney-client relationship. (*See Clark*, *supra*, 196 Cal.App.4th at p. 51 [substantial evidence of privilege shown by declarations stating documents were sent by company employee to company attorney].)

The burden then shifted to Johnson to show that the Brown email was not confidential or was otherwise unprivileged. (*Costco*, *supra*, 47 Cal.4th at p. 733.) Johnson claims that the "dominant purpose" of the email was not to advance Caltrans's legal interests but was instead to impugn him. The trial court rejected this argument, reasoning that the claim was "completely unsupported by any evidence." It concluded that the more likely explanation was that Brown intended to obtain "relevant information from Duncan." The trial court had the discretion to resolve this

factual dispute, and the record amply supports its finding.

Johnson additionally argues that communications with Duncan were not covered by the attorney-client privilege because Duncan was only a low-level employee and Caltrans could not unilaterally create an attorney-client relationship. In *Upjohn*, the United States Supreme Court explained that the privilege may extend to communications with corporate employees, saying, "Middle-level—and indeed lower-level—employees can, by actions within the scope of their employment, embroil the corporation in serious legal difficulties, and it is only natural that these employees would have the relevant information needed by corporate counsel if he is adequately to advise the client with respect to such actual or potential difficulties." (*Upjohn Co. v. United States*, *supra*, 449 U.S. at p. 391; *see also Zurich American Ins. Co. v. Superior Court* (2007) 155 Cal.App.4th 1485, 1498.) Johnson incorrectly reads this to mean that only those employees who embroil their employers in serious legal difficulties fall within the protection of the privilege. The Supreme Court further explained that it is important for corporate lawyers to be able to exchange information with lower-level employees to adequately represent their corporate clients. (*Upjohn Co. v. United States*, *supra*, 449 U.S. at pp. 391-393.) *Upjohn* does not require lower-level employees to be the source of tortious behavior to be covered by the privilege. (*Id.* at pp. 391, 394.)

Johnson also points to *D. I. Chadbourne*, *supra*, 60 Cal.2d at pages 735-739, in support of his claim that the Brown email was not privileged. In that case, our state Supreme Court set out various guidelines for determining whether a communication from an

employee to an entity's lawyer is protected. The guidelines differentiate situations where the employee is a named defendant, an independent witness, or a witness whose connection "grows out of his employment," among other examples. (*D. I. Chadbourne*, at pp. 736-737.) As an initial matter, the present case involves a communication from an attorney to an employee, not from an employee whose status within the corporation may be unclear. In any event, Johnson never explains why Duncan would qualify only as an "independent witness" or why Brown's communication with him would not fall within the ordinary course of Caltrans activity. (*Id.* at p. 737.) To the contrary, the only reason for Brown to contact Duncan was because of Duncan's position at Caltrans as Johnson's supervisor. In addition, *D. I. Chadbourne* explains that the corporate employer's "dominant purpose" when directing an employee to make a statement controls its privileged status, and "it is the intent of the person from whom the information emanates that originally governs its confidentiality (and hence its privilege)." (*Ibid.*; *see Costco*, *supra*, 47 Cal.4th at p. 735.) As explained above, there was adequate evidence to conclude that Caltrans's purpose, as carried out by Brown, was to investigate Johnson's claims for the purpose of litigation, and both Caltrans and Brown intended the communication to be confidential. Johnson's conclusory allegation that the purpose of the email was to "mislead and damage" him is inadequate to controvert the trial court's findings.

Johnson further contends that the trial court should have conducted an in camera review of the Brown email. This argument fails because, with

exceptions not relevant here, a "presiding officer may not require disclosure of information claimed to be privileged . . . in order to rule on the claim of privilege." (Evid. Code, § 915, subd. (a); *Costco, supra,* 47 Cal.4th at pp. 737-739.)

Finally, we reject Johnson's assertion, relying on *Koo v. Rubio's Restaurants, Inc.* (2003) 109 Cal.App.4th 719, that Caltrans is now attempting to unilaterally create a "'sham'" attorney-client relationship. In *Koo*, a class of restaurant managers sued the corporate defendant for wage and hour claims. (*Id.* at p. 723.) Defense counsel made a statement in a declaration that his law firm represented all the class members as well as the defendant, and the plaintiff moved to disqualify defense counsel based on this apparent conflict of interest. (*Id.* at pp. 725-726.) Considering the distinction between representing the class members in their official capacities "as representatives of the corporation" versus in their individual capacities as current and prospective class members, the appellate court concluded that defense counsel could not "singlehandedly create an attorney-client relationship" with "the managers in their individual capacities." (*Id.* at p. 730.) On the other hand, the statement that defense counsel represented the managers in "their representative capacities, as opposed to their individual capacities, was not entirely unfounded," because case law established that an attorney for a corporation represents both the corporation and its officers in their representative capacities. (*Id.* at p. 731.) The court noted, for instance, that plaintiff's counsel would be unable to have ex parte communications with company employees outside of the class action context, because those employees would have an attorney-client

relationship with company counsel in their representative capacities. (*Id.* at p. 731, fn. 5.)

Here, Caltrans's counsel does not claim to represent Duncan in an individual capacity. His role in the case is limited to his position as a supervisor for Caltrans, and Brown communicated with Duncan for the purpose of representing Caltrans. *Koo* is therefore inapposite.

B.

Johnson also claims that Caltrans waived the attorney-client privilege, because Duncan gave the email to Johnson, Caltrans disclosed "a significant part of the communications," and Caltrans delayed in pursuing a motion for protective order. We find no merit in these assertions.

A party may waive the attorney-client privilege over a "communication protected by the privilege if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to disclosure made by anyone." (Evid. Code, § 912, subd. (a); *McDermott, supra,* 10 Cal.App.5th at p. 1101.) A "significant part" of a communication means the party has revealed the "specific content" of or "substantive information" concerning the communication. (*Southern Cal. Gas Co. v. Public Utilities Com.* (1990) 50 Cal.3d 31, 49; *see also Mitchell v. Superior Court* (1984) 37 Cal.3d 591, 603 [no waiver where admission that client discussed matter with attorney "did not disclose any of the actual substance or content" of the communications].) Consent may be shown by "any statement or other conduct of the holder of the privilege indicating consent to the disclosure, including failure to claim the privilege in any proceeding in

which the holder has legal standing and the opportunity to claim the privilege." (Evid. Code, § 912, subd. (a).) Only the attorney's client, the holder of the privilege, may waive the privilege. (Evid. Code, § 953; *McDermott*, at p. 1101.) In the case of a corporation, the ability to waive the privilege "belongs to corporate management and is normally exercised by the corporation's officers and directors." (*Melendrez v. Superior Court* (2013) 215 Cal.App.4th 1343, 1353-1354; *Commodity Futures Trading Com. v. Weintraub*, *supra*, 471 U.S. at p. 348; *see also Wood v. Superior Court* (2020) 46 Cal.App.5th 562, 576.) "The privilege is not waived when the client's agent discloses a privileged communication without the client's authorization." (*DP Pham LLC v. Cheadle*, *supra*, 246 Cal.App.4th at p. 668.)

Waiver "does not include accidental, inadvertent disclosure of privileged information by the attorney" for the privilege holder. (*State Fund*, *supra*, 70 Cal.App.4th at p. 654.) To assess waiver, a court must consider the privilege holder's subjective intent. (*Id.* at pp. 653-654.) The disclosing party's "own characterization of its intent is not dispositive," however. (*Ardon v. City of Los Angeles* (2016) 62 Cal.4th 1176, 1190; *see also McDermott*, *supra*, 10 Cal.App.5th at p. 1101.) Rather, the court should weigh "[o]ther relevant considerations," including "the precautions the holder took to maintain the privilege and the promptness with which the holder sought return of the inadvertently disclosed document." (*McDermott*, at p. 1102.) "The law does not require that the holder of the privilege take 'strenuous or Herculean efforts' to resist disclosure." (*Regents of University of California v. Superior Court* (2008) 165 Cal.App.4th 672, 683.) The question

in assessing waiver is thus whether the holder of the privilege has pursued reasonable means to preserve the confidentiality of the information. (*Id.* at p. 681.)

Duncan's disclosure of the email to Johnson did not waive the privilege. As noted above, the privilege holder was Caltrans, as represented by its management. Nothing suggests Duncan fell within this group. Nor is there any evidence that Caltrans authorized Duncan to disclose the email. On the contrary, contemporaneous communications from Caltrans's counsel indicated that Duncan did "not have the authority to waive attorney-client privilege on behalf of [Caltrans]."

Contrary to Johnson's contention, Caltrans's disclosure of the confidentiality notice from the footer of Brown's email and its general description of the nature of Brown's communication to Duncan in its motion for protective order also do not constitute a revelation of a "significant part" of the email. (*Southern Cal. Gas Co. v. Public Utilities Com.*, *supra*, 50 Cal.3d at p. 49.) Neither disclosed the "specific content" or "substantive information" of the communication. (*Ibid.*)

Substantial evidence also supports the trial court's conclusion that Caltrans did not consent to the disclosure by failing to pursue reasonable means to preserve the confidentiality of the Brown email. The same day Shepardson informed Caltrans he had the Brown email, Caltrans's counsel notified him that the email was privileged. Caltrans unequivocally invoked the privilege and asked Johnson and Shepardson to "delete or destroy the email." That exchange was followed by additional meet-and-confer communications between Shepardson and Sims. When those communications did not resolve the matter, Sims advised

Shepardson on February 3, 2022 that Caltrans would be seeking a protective order if Johnson and Shepardson did not stop disseminating the email and destroy their copies of it.

We see nothing in the record or in case law to support Johnson's current contention that Caltrans waived the privilege because it did not "*immediately* file a motion for protective order" after receiving notice that the Brown email had been disclosed. A same-day email invoking the privilege and requesting Johnson and Shepardson delete their copies of the Brown email qualifies as a reasonable and good faith measure taken to protect the Brown email's confidentiality, particularly because Caltrans was not on notice that Johnson and Shepardson intended to show the email to others until January 28, 2022.

After receiving that notice, Caltrans escalated its demands. Sims's February 3, 2022 meet-and-confer letter not only repeated Caltrans's demand to delete the email but also asked Shepardson to confirm in writing the identities of the individuals to whom he had shown the email. At that point, trial was set for April 18, 2022. The parties engaged in more correspondence before the trial court stayed the case on February 17, 2022; the stay remained in place for the next month and a half. Sims filed a notice that he would be unavailable between July 1, 2022 and August 31, 2022, although it is unclear whether he played any role in drafting the motion for protective order. Caltrans filed its motion for protective order on August 18, 2022. While it is true that Caltrans could have acted more expeditiously in filing its motion, its failure to do so does not demonstrate inappropriate delay, considering the shifting trial dates, the evolving

actions Johnson and Shepardson took to further disseminate the email, and the prolonged meet-and-confer communications.

Johnson cites a number of cases, but they do not persuade us that Caltrans waived its privilege here. Both *People v. Perry* (1972) 7 Cal.3d 756, 783, overruled by *People v. Green* (1980) 27 Cal.3d 1, and *Mize v. Atchison, T. & S. F. Ry. Co.* (1975) 46 Cal.App.3d 436, 449 support the proposition that the attorney-client privilege can be waived if the holder does not object to disclosure of the privileged material, a proposition that Caltrans does not dispute. *United States v. De La Jara* (9th Cir. 1992) 973 F.2d 746, 749-750 and *AHF Cmty. Dev., LLC v. City of Dallas* (N.D. Tex. 2009) 258 F.R.D. 143, 149 involved instances of parties failing to take steps to recover or object to the use of privileged material; the former involved a seized letter from a defendant to his attorney, and the latter involved documents marked as exhibits in a deposition. In this case, by contrast, Caltrans consistently objected to the disclosure of the email.

We are also unpersuaded by Johnson's further claim that Caltrans waived the privilege by failing to bring legal action against Johnson's experts to whom Shepardson provided the email. Johnson cites no legal authority for this proposition. And in any event, Caltrans continuously and consistently sought to recover the email, including by demanding that Shepardson delete or return all copies of the email, which would reasonably be understood to include those copies Johnson and Shepardson distributed to the experts.

C.

Finally, we reject Johnson's invocation of the crime-fraud exception. The attorney-client privilege does not apply "if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit a crime or a fraud." (Evid. Code, § 956, subd. (a).) "'To invoke the Evidence Code section 956 exception to the attorney-client privilege, the proponent must make a prima facie showing that the services of the lawyer "were sought or obtained" to enable or to aid anyone to commit or plan to commit a crime or fraud.'" (*State Farm Fire & Casualty Co. v. Superior Court* (1997) 54 Cal.App.4th 625, 643; *see Wells Fargo Bank v. Superior Court* (2000) 22 Cal.4th 201, 213, fn. 4.) A "mere assertion of fraud is insufficient." (*BP Alaska Exploration, Inc. v. Superior Court* (1988) 199 Cal.App.3d 1240, 1262.) We review a trial court's finding on the crime-fraud exception for substantial evidence. (*State Farm Fire & Casualty Co. v. Superior Court, supra*, at p. 645.)

The trial court found that Johnson had "failed to adduce *facts*" supporting any of his accusations of criminal or fraudulent behavior. In this court, Johnson's allegations of misconduct by Brown and Caltrans cite only to his own legal arguments filed in the trial court. To the extent that Johnson's trial court filings cite to Shepardson's declaration before the trial court, the declaration contains only conclusory statements and accusations. These are bare assertions of fraud and do not establish a prima facie case that the crime-fraud exception applies.

III.

We turn now to Johnson's contention that the trial court erred when it granted Caltrans's motion to disqualify Shepardson and three expert witnesses. We reject this claim because the record supports the trial court's conclusion that Shepardson breached his ethical obligations by using and disseminating the Brown email. We further conclude that the trial court acted well within its discretion in determining that this conduct, and the resulting risk of harm to Caltrans and the integrity of the proceedings, warranted disqualification.

A.

The "seminal California decision defining a lawyer's ethical obligations upon receiving another party's attorney-client privileged materials" is *State Fund, supra*, 70 Cal.App.4th 644. (*McDermott, supra*, 10 Cal.App.5th at p. 1106.) *State Fund* held: "When a lawyer who receives materials that obviously appear to be subject to an attorney-client privilege or otherwise clearly appear to be confidential and privileged and where it is reasonably apparent that the materials were provided or made available through inadvertence, the lawyer receiving such materials should refrain from examining the materials any more than is essential to ascertain if the materials are privileged, and shall immediately notify the sender that he or she possesses material that appears to be privileged. The parties may then proceed to resolve the situation by agreement or may resort to the court for guidance with the benefit of protective orders or other judicial

intervention as may be justified." (*State Fund, supra*, 70 Cal.App.4th at pp. 656-657.)[2]

In *Rico, supra*, 42 Cal.4th 807, 817-818, our state Supreme Court approved the "*State Fund* rule" and extended it to documents covered by the work product privilege, describing the rule as a "fair and reasonable approach." (*See also Ardon v. City of Los Angeles, supra*, 62 Cal.4th at p. 1187 [California Supreme Court "embraced the *State Fund* holding in *Rico*"].) *Rico* described the *State Fund* rule as "an objective standard" that asks "whether reasonably competent counsel, knowing the circumstances of the litigation, would have concluded the materials were privileged, how much review was reasonably necessary to draw that conclusion, and when counsel's examination should have ended." (*Rico*, at p. 818.)

Once an attorney's examination shows that a document was transmitted between an attorney representing an entity-client and an officer or employee of that client, "that examination would suffice to ascertain the

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[2] These requirements were codified in rule 4.4 of the California State Bar Rules of Professional Conduct, which provides: "Where it is reasonably apparent to a lawyer who receives a writing relating to a lawyer's representation of a client that the writing was inadvertently sent or produced, and the lawyer knows or reasonably should know that the writing is privileged or subject to the work product doctrine, the lawyer shall: [¶] (a) refrain from examining the writing any more than is necessary to determine that it is privileged or subject to the work product doctrine, and [¶] (b) promptly notify the sender." The comments to the rule further state, "If a lawyer determines this rule applies to a transmitted writing, the lawyer should return the writing to the sender, seek to reach agreement with the sender regarding the disposition of the writing, or seek guidance from a tribunal." (Rules Prof. Conduct, rule 4.4, com. [1].)

materials are privileged, and any further examination would exceed permissible limits." (*Clark*, *supra*, 196 Cal.App.4th at p. 53.) The opposing party's claim of privilege will also trigger the receiving attorney's *State Fund* duties. (*McDermott*, *supra*, 10 Cal.App.5th at pp. 1112, 1116 [objections of opposing counsel "constitute substantial evidence that [the receiving law firm] reasonably should have realized the [document] was an inadvertently disclosed, privileged document subject to the *State Fund* rule"].)

The consequence of the receiving counsel's failure to comply with his or her *State Fund* obligations can be disqualification, "assuming other factors compel" that remedy. (*State Fund*, *supra*, 70 Cal.App.4th at p. 657.) A trial court "may not order disqualification "'simply to punish a dereliction that will likely have no substantial continuing effect on future judicial proceedings.'"" (*McDermott*, *supra*, 10 Cal.App.5th at p. 1120.) But an "affirmative showing of existing injury from the misuse of privileged information is not required." (*Ibid.*) Rather, the "'significant question'" is whether there is a "'genuine likelihood'" that the receiving counsel's review and use of the inadvertently disclosed materials will "'affect the outcome of the proceedings before the court.'" (*Ibid.*; *Clark*, *supra*, 196 Cal.App.4th at p. 55.) "'Thus, disqualification is proper where . . . there is a reasonable probability counsel has obtained information the court believes would likely be used advantageously against an adverse party during the course of the litigation.'" (*McDermott*, at p. 1120; *see also Rico*, *supra*, 42 Cal.4th at p. 819 [disqualification proper where receiving party's use of document placed opposing party "at a great disadvantage"].) Disqualification is also

proper when an attorney's continued representation "would undermine the integrity of the judicial process." (*Kennedy v. Eldridge* (2011) 201 Cal.App.4th 1197, 1205.)

We conclude the trial court properly disqualified Shepardson and the three experts after finding that *State Fund*'s obligations were not satisfied. First, the trial court correctly determined that Shepardson breached his *State Fund* obligations after he received the Brown email. When he received the email, Shepardson properly notified Caltrans. (*State Fund*, *supra*, 70 Cal.App.4th at p. 657.) But the record supports the trial court's conclusion that his actions thereafter fell short of what *State Fund* requires. After receiving the email, and especially after Caltrans unequivocally asserted the privilege hours after learning of the disclosure, Shepardson was not permitted to examine the email any further, much less distribute the email to other witnesses or use it to formulate case strategy, pending an agreement between the parties or judicial intervention. (*Id.* at pp. 656-657.) He nonetheless proceeded to do so, providing the email to Williamson, Duffy, and Simms, as well as at least five other individuals. He also announced his intention to use the email in the litigation, telling Caltrans he would be offering it into evidence at trial.

Second, Shepardson continued to use the Brown email after the trial court issued a protective order. The trial court's order determined that the Brown email was a protected attorney-client communication and forbade Shepardson and Johnson from further disseminating the email. Yet the trial court found that Shepardson "continued to refer to, disclose and discuss the Brown email." Substantial evidence in the

record supports this finding. Shepardson also expressed his continued intent to offer evidence of the email at trial, asserting that the trial court's silence on the issue of witness testimony about the email meant that he was permitted to discuss the email and its contents with witnesses.

Third, the record supports the conclusion that there was a reasonable probability that Shepardson and the experts would continue to use the Brown email, or the information it contained, to unfair advantage against Caltrans. As noted, the trial court found that Shepardson continued to use and discuss the email, even after the court determined the email was covered by the attorney-client privilege; he also declared his intention to solicit testimony about it at trial. At the same time, he offered shifting and uncertain assurances about the status of the email. In his April 2023 compliance declarations, for instance, he stated he had "removed all images of the Brown email that [he was] aware of, from hardcopy files, computers, phones and any other electronic devices." But none of the experts noted any such destruction of their copies of the email; and Duffy and Simms were under the impression that Caltrans had not sought the return or destruction of the email, saying Caltrans had "not served me with any motions seeking to return the email." This evidence supported the trial court's concern that not all the images of the Brown email about which counsel was aware had been removed or destroyed.

As for the experts, Williamson offered shifting explanations about whether the Brown email would play a role in his testimony. In his first declaration, he said it "would be difficult, and perhaps impossible, to give

testimony . . . without consideration of the damaging email," but then later stated the email had "lessened in importance" and he could testify without it. Simms also stated that although she had not extensively reviewed the email, she "did find that it appeared retaliatory." In view of this record, substantial evidence supports the trial court's conclusion that there was a distinct probability that the email would be used to unfair advantage. The trial court did not abuse its discretion when it found similarly as to the three identified experts.

We reject Johnson's argument, relying on *McDermott, supra*, 10 Cal.App.5th 1083, that the trial court held Shepardson's actions to the wrong *State Fund* standard and that his "only duty was to notify opposing counsel of the [e]-mail," after which he was presumably free to use or disclose the email, pending action by Caltrans to protect it. In *McDermott*, the appellate court interpreted *State Fund* as "establishing two standards, with each one applying to slightly different situations": one, "when an attorney receives materials that obviously or clearly appear to be privileged," and the other, "when an attorney ascertains that he or she received materials that are not obviously or clearly privileged, but nonetheless may be privileged materials that were inadvertently disclosed." (*Id.* at pp. 1108-1109.) Whether the Brown email was "obviously or clearly" privileged or "may" have appeared privileged upon receipt by Shepardson, Caltrans immediately invoked the privilege when notified, eliminating any question as to whether the holder asserted privilege over the document. (*Id.* at pp. 1108-1109, 1115.)

But even if the email was only potentially privileged, we disagree with Johnson that *McDermott* permitted him to use or disclose the email. While *McDermott* concluded that the receipt of "materials that are not obviously or clearly privileged . . . triggers a more limited response" than the receipt of "materials that obviously or clearly appear to be privileged," it does not state that a party who receives documents that are not clearly privileged may do whatever they wish with the documents after notifying the privilege holder. (*McDermott*, *supra*, 10 Cal.App.5th at pp. 1108-1109.) To the contrary, *McDermott* explained that "[a]llowing opposing counsel to avoid their *State Fund* obligations any time they can fashion a colorable argument for overcoming the privilege would create an exception that would swallow the *State Fund* rule. As *State Fund* and the other cases explain, an attorney's obligation is to review the materials no more than necessary to determine whether they are privileged, and then notify the privilege holder's counsel. At that point, the parties may confer about whether the material is privileged and whether there has been a waiver. If the parties are unable to reach an agreement either side may seek guidance from the trial court. [Citations.] The attorney receiving the material, however, is not permitted to act as judge and unilaterally make that determination." (*Id.* at p. 1113.) Once Caltrans asserted that the email was privileged, Shepardson was obligated to refrain from using it, absent agreement between the parties or a judicial resolution, even if he believed there was some basis for the email to fall outside the privilege.

The trial court's finding that Shepardson failed to comply with his *State Fund* obligations and the pro-

tective order is supported by substantial evidence. The trial court committed no abuse of discretion in disqualifying Shepardson and the experts after those obligations were breached.

B.

Johnson raises a variety of other arguments contesting the trial court's disqualification order, none of which is persuasive.

Johnson first contends that Caltrans unduly delayed in filing its motion to disqualify for tactical reasons and that it should have filed the motion as soon as it learned the Brown email had been disclosed. To waive a motion to disqualify counsel based on delay, the delay must be "extreme or unreasonable." (*Liberty National Enterprises, L.P. v. Chicago Title Ins. Co.* (2011) 194 Cal.App.4th 839, 845.) The ensuing prejudice from the delay must also be extreme: "Even if tactical advantages attend the motion [f]or disqualification, that alone does not justify denying an otherwise meritorious motion." (*In re Complex Asbestos Litigation* (1991) 232 Cal.App.3d 572, 599.)

As we have already concluded, Caltrans did not unreasonably delay in filing the motion for protective order. Caltrans also did not unreasonably delay in filing the motion for disqualification after the trial court issued the protective order. The trial court issued the protective order on January 3, 2023. That order gave Johnson and Shepardson 20 days to file declarations attesting to their compliance. One week later, this court stayed the case after Johnson filed a petition for writ of mandate, which was denied. After the stay was lifted, Johnson and Shepardson did not file the required declarations, and Caltrans sent a letter

requesting compliance with the order by April 4, 2023. On April 3, 2023, Johnson filed another petition for writ of mandate with this court, which was again denied. Caltrans then filed a motion to enforce the protective order on April 17, 2023; Johnson and Shepardson filed the required declarations shortly thereafter. The hearing remained on calendar for June 6, 2023, and Caltrans identified deficits in the declarations. The trial court instructed the parties to meet and confer about the contents of the declarations. The parties continued to meet and confer over the course of June, during which time Shepardson stated that he would be soliciting testimony about the Brown email at trial and could communicate with witnesses about the contents of the email. On June 30, 2023, Caltrans filed the motion to disqualify Shepardson and the expert witnesses.

None of these facts suggests an extreme or unreasonable delay on the part of Caltrans. After obtaining the protective order, Caltrans repeatedly attempted to obtain Johnson's and Shepardson's compliance, including by filing a motion to enforce the protective order after efforts at informal resolution failed. After receiving the compliance declarations and meeting and conferring with Shepardson, it became clear that Shepardson had disseminated the Brown email and its contents and still intended to use the email to his client's advantage at trial. At that point, Caltrans filed the motion to disqualify Shepardson. Notably, Caltrans also requested that the motion be heard on shortened time, given the pending trial date; Johnson opposed the request. The record demonstrates that any delays in filing the motion were the result of the prolonged meet-and-confer process, not because

Caltrans was attempting to delay the motion for tactical advantage.

We likewise reject Johnson's argument that the trial court's order contained insufficient analysis of the prejudice Johnson would suffer as a result of Shepardson's disqualification. As an initial matter, Johnson situates this argument in a portion of his opening brief devoted to the assertion that Caltrans tactically delayed the filing of its motion. He makes his prejudice argument with a series of conclusory assertions that cite to the entire trial court order and does not provide any analysis explaining why the argument warrants reversal. "An appellant must '[s]tate each point under a separate heading or subheading summarizing the point, and support each point by argument and, if possible, by citation of authority.' [Citations.] Failure to provide proper headings forfeits issues that may be discussed in the brief but are not clearly identified by a heading." (*Pizarro v. Reynoso* (2017) 10 Cal.App.5th 172, 179.)

In any event, we see no error. A trial court is not required to discuss, at any length, every factor at issue in a disqualification motion. (*Responsible Citizens v. Superior Court* (1993) 16 Cal.App.4th 1717, 1734, fn. 6 ["A statement of decision . . . is not required for disqualification motions"].) And we presume the trial court knew and applied the law correctly, absent an indication to the contrary. (*McDermott, supra*, 10 Cal.App.5th at p. 1103.)

Moreover, the record supports the trial court's implicit finding that any prejudice to Johnson was outweighed by contrary considerations. The trial court's "paramount concern must be to preserve public trust in the scrupulous administration of justice and the

integrity of the bar." (*People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc., supra*, 20 Cal.4th 1135, 1145.) A client's right to select his or her own counsel "must yield to ethical considerations," such as "[p]rotecting the confidentiality of communications between attorney and client." (*Id.* at pp. 1145, 1146.) As detailed above, substantial evidence supports the conclusion that the Brown email was a privileged attorney-client communication, that Shepardson violated his duties as to that communication, and that there was a reasonable probability he would use the communication for unfair advantage. Under these circumstances, the trial court appropriately exercised its discretion in ordering disqualification.

Johnson further argues that there is a "rule" that disqualification is unwarranted when the disclosed document is received from the disqualified attorney's own client because the client could simply disclose the document to any future attorney, frustrating the goal of disqualification. As with the previous argument, Johnson's brief does not include any analysis or explanation regarding this claim. In any case, Johnson's argument was rejected in *Militello v. VFARM 1509* (2023) 89 Cal.App.5th 602, 621-622. There, the appellate court observed that while it is true that courts "cannot effectively police what a client, after reading or hearing another party's confidential communications, chooses to tell his or her lawyer," it is an entirely different matter to permit an attorney who has improperly used confidential material to continue with the representation. (*Ibid.*) To allow such representation to continue "would undermine the public's trust in the fair administration of justice and the integrity of the bar." (*Id.* at p. 622.) We agree with this conclusion.

Disqualification of a party's chosen counsel may impose hardships on the party, who must then seek new counsel in an already pending case. But a party's choice of counsel may be outweighed by a court's overarching duty to preserve the integrity of the judicial process, through both compliance with ethical rules and the maintenance of public confidence in the proceedings. (*Comden v. Superior Court*, *supra*, 20 Cal.3d at p. 915.) In this case, Shepardson's failure to comply with his ethical duties through his continued use of confidential material created a substantial risk of undue prejudice and risked undermining the integrity of the proceedings. We therefore have little difficulty in concluding the trial court did not abuse its discretion when it disqualified him.

DISPOSITION

The trial court's order disqualifying Shepardson and the expert witnesses Williamson, Duffy, and Simms is affirmed. Caltrans shall recover its costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1) & (2).)[3]

/s/ Feinberg
Judge

We concur:

/s/ Hull
Acting Presiding Judge

/s/ Wiseman
Judge*

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[3] In the conclusion of his opening brief, Johnson includes a single sentence also asking this court to reassign the case to another judge under Code of Civil Procedure section 170.1, subdivision (c). The request is not set forth under a separate heading or accompanied by any argument, and we do not consider it. (*See* Cal. Rules of Court, rule 8.204(a)(1)(B); *Swallow v. California Gambling Control Com.* (2022) 77 Cal.App.5th 1037, 1041, fn. 3.)

* Retired Associate Justice of the Court of Appeal, Fifth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

ORDER DENYING EXTRAORDINARY WRIT OF MANDATE, CALIFORNIA COURT OF APPEAL THIRD APPELLATE DISTRICT (OCTOBER 11, 2023)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA IN AND FOR THE THIRD APPELLATE DISTRICT

CHRISTIAN L. JOHNSON,

Petitioner,

v.

THE SUPERIOR COURT OF SAN JOAQUIN COUNTY,

Respondent,

DEPARTMENT OF TRANSPORTATION,

Real Party In Interest.

No. C099501

San Joaquin County No. STKCVUCR20190000281

Before: EARL, P.J.

BY THE COURT:

Petitioner's request to incorporate by reference case numbers C094966, *Johnson v. The Superior Court of San Joaquin County,* C096210, *Johnson et al.*

v. The Superior Court of San Joaquin County, C096248, *Johnson et al. v. The Superior Court of San Joaquin County,* C096574, *Johnson v. The Superior Court of San Joaquin County,* C097481, *Johnson v. The Superior Court of San Joaquin County,* C097614, *Johnson v. The Superior Court of San Joaquin County,* C098170, *Johnson v. The Superior Court of San Joaquin County,* C098264, *Johnson v. The Superior Court of San Joaquin County,* C098301, *Johnson v. The Superior Court of San Joaquin County,* C099075, *Johnson v. The Superior Court of San Joaquin County,* and C099319, *Johnson v. Department of Transportation* is granted. Petitioner's request for judicial notice is denied as unnecessary, as the materials have been considered.

The petition for writ of mandate with request for stay is denied as follows. As to the request to issue a writ to enforce the automatic stay of the order disqualifying counsel, this court declines to intervene by extraordinary writ at this time. This denial, however, is without prejudice to petitioner filing petition for writ of supersedeas should the trial court continue to fail to enforce the stay of the order. *(URS Corp. v. Atkinson/Walsh Joint Venture* (2017) 15 Cal.App.5th 872, 887, 888 ["an appeal of an order disqualifying an attorney automatically stays enforcement of the order"; "ongoing litigation directed toward the resolution of the parties' respective pleadings is not automatically stayed by [the] appeal"].) As to the remaining challenges, the petition is denied.

/s/ Earl
P.J.

ORDER STRIKING STATEMENT OF DISQUALIFICATION FILED BY JOHN A. SHEPARDSON, SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN JOAQUIN (SEPTEMBER 8, 2023)

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN JOAQUIN

CHRISTIAN JOHNSON,

Plaintiff,

v.

CALIFORNIA DEPARTMENT OF TRANSPORTATION, ET AL.,

Defendants.

Case No: STK-CV-UCR-2019-281

Before: Barbara A. KRONLUND, Superior Court Judge.

On January 8, 2019, plaintiff Christian L. Johnson filed the instant action. On the same day, the case was assigned to this Court for all purposes. Three years later, on March 15, 2022, plaintiff's attorney John A. Shepardson (Shepardson) filed plaintiff's first statement of disqualification. In it, plaintiff alleged that the Court should be disqualified from presiding over this case because the Court had issued purportedly erroneous, adverse rulings which plaintiff claimed demonstrated an appearance of bias. Specifically,

plaintiff complained about the Court's statements, decisions and rulings related to discovery issues and the first discovery referee, including the *Court's* order appointing the first discovery referee.

On March 18, 2022, the Court issued an order striking plaintiff's first statement of disqualification on the basis that it was untimely and failed to state grounds for disqualification on its face. The Court also filed an alternative verified answer.

Three months later, on June 23, 2022, Shepardson filed plaintiff's second statement of disqualification. In it, plaintiff again complained about the Court's statements, decisions and rulings which plaintiff claimed were adverse to him and erroneous, and which plaintiff claimed demonstrated a bias against plaintiff and/or his counsel. In addition, plaintiff again complained about the Court's order appointing the first discovery referee and the apportionment and billing of the discovery referee's fees.

On June 24, 2022, the Court issued an order striking plaintiff's second statement of disqualification on the basis that it failed to state grounds for disqualification on its face. The Court also filed an alternative verified answer.

Approximately four months later, on November 7, 2022, Shepardson filed plaintiff's third statement of disqualification. Plaintiff alleged that the Court was biased against plaintiff and his counsel. Plaintiff again based his challenge on the Court's statements, decisions, and rulings, including all the rulings about which plaintiff complained in the first and second statements of disqualification which plaintiff "incorporated" into this third challenge. In addition, plaintiff

complained about the Court's orders 1) appointing the second discovery referee; 2) continuing the trial; and 3) denying plaintiff's ex parte application to file a document under seal.

On November 16, 2022, the Court issued an order striking plaintiffs third statement of disqualification on the basis that it was repetitive of the prior challenges and disclosed no grounds for disqualification on its face. The Court also filed an alternative verified answer.

On December 8, 2022, Shepardson filed plaintiff's fourth statement of disqualification. In it, plaintiff again complained about the same statements, decisions, and rulings of the Court about which he complained in the prior three statements of disqualification. In addition, plaintiff alleged that the Court had an ex parte communication with the discovery referee.

On December 12, 2022, the Court issued an order striking plaintiff's fourth statement of disqualification on the basis that it was repetitive of the prior challenges and disclosed no grounds for disqualification on its face. The Court also filed an alternative verified answer.

On January 3, 2023, the Court issued an order adopting, with modifications, the recommended ruling of the discovery referee granting defendant's motion for a protective order concerning defendant's attorney-client privileged communication in the possession of plaintiff and Shepardson.

On January 10, 2023, after plaintiff filed a petition for writ of mandate challenging the Court's order striking the fourth statement of disqualification, the California Court of Appeal. Third Appellate District,

issued a *Palma* notice to the Court. The Court then set aside its order striking the fourth statement of disqualification. Thereafter, plaintiff's fourth statement of disqualification and the Court's alternative verified answer were referred to a judge assigned by the Judicial Council of California to issue a ruling on the challenge.

On March 8, 2023, the assigned judge issued an order denying plaintiff's fourth statement of disqualification.

On March 24, 2023, the Court presided over the hearing of plaintiff's motion to disqualify the discovery referee. At the conclusion of the hearing, the Court denied plaintiff's motion for the reasons set forth in the order.

On March 29, 2023, Shepardson filed plaintiff's fifth statement of disqualification. In it, plaintiff complained about the Court's ruling on the motion to disqualify the discovery referee, which plaintiff alleged demonstrated bias and prejudice. Plaintiff again complained of the prior communication between the Court and the discovery referee. Additionally, plaintiff complained about the Court's suggestion regarding setting a further settlement conference. The Court had suggested that, due to the acrimony between the two sides, plaintiff's counsel involve one of his associate attorneys and/or friends or family of the plaintiff to help facilitate settlement discussions.

On April 4, 2023, the Court issued an order striking plaintiffs fifth statement of disqualification on the basis that it was repetitive of the prior challenges and failed to state grounds for disqualification on its face. The Court also filed an alternative verified answer.

On June 30, 2023, defendant filed "Motion to Disqualify Plaintiff's Counsel John A. Shepardson and His Law Firm, to Disqualify Plaintiff's Experts, and to Exclude Other Witnesses from Testifying at Trial" (hereinafter, "motion to disqualify"). The motion to disqualify claimed that plaintiff and plaintiff's counsel failed to fully comply with the January 3, 2023, protective order, and that they, their experts, and witnesses continued to discuss and use the protected email as part of plaintiff's case in chief.

On July 6, 2023, Shepardson filed plaintiff's sixth statement of disqualification. In it, plaintiff claimed that all the Court's statements, decisions, and rulings in this case, including the Court's prior orders striking plaintiff's statements of disqualification, demonstrated a purported bias and embroilment in the proceedings. Additionally, plaintiff alleged that the Court engaged in ex parte communications with defendant's counsel because defendant's counsel contacted the courtroom clerk, pursuant to San Joaquin County Superior Court Rule 3-106, to schedule defendant's ex parte application to shorten time for the hearing of defendant's motion to disqualify plaintiff's counsel.

On July 7, 2023, the Court issued an order striking plaintiffs sixth statement o disqualification on the basis that it was repetitive of the prior challenges and failed to state grounds for disqualification on its face. The Court also filed an alternative verified answer.

On July 18, 2023, plaintiff filed an opposition to defendant's motion to disqualify along with supporting documents, including a declaration and request for judicial notice.

On July 26, 2023, defendant filed its reply and supporting documents. Both sides filed various objections.

On July 31, 2023, the Court continued the hearing of defendant's motion to disqualify t. August 25, 2023, and set the hearing of defendant's motion for summary adjudication for the same day.

On August 24, 2023, at 9:00 a.m. the Court published its tentative ruling on defendant' motion to disqualify and motion for summary adjudication. The tentative ruling noted that it was for the motions scheduled for hearing on August 25, 2023. Pursuant to San Joaquin County Superior Court Rule 3-1113(D) any party who does not agree with the tentative and wishes to orally argue the motion must notify the court clerk by telephone of the intent to orally argue the motion, and to notify all parties, before 4:00 p.m. on the court day preceding the date scheduled for the hearing, or the tentative ruling would become the final ruling of the Court.

Plaintiff did not notify the court clerk prior to 4:00 p.m. on August 24, 2023, of the intent to orally argue the motion. Therefore, on August 25, 2023, the Court's tentative ruling, which was to grant the motion to disqualify to the extent that the motion sought to disqualify Shepardson and his law firm from representing plaintiff in this case, became the final order of the Court for the reasons set forth in the order.

On August 28 2023 the first day of trial, Shepardson and his attorney Adam Koss appeared and attempted to argue against the Court's order granting defendant's motion to disqualify Shepardson from representing the plaintiff in this case. The Court contin-

ued the trial to give plaintiff an opportunity to obtain new counsel. A true and correct copy of the complete reporter's transcript of the hearing on August 28, 2023, is attached hereto as exhibit 1.

Although Shepardson is not a party to this litigation, and no longer represents a party in this litigation, on August 30, 2023, he filed what he entitled "Plaintiff Christian L. Johnson's Seventh Motion to Disqualify the Hon. Barbara A. Kronlund" (hereinafter, "Shepardson Statement of Disqualification") in which he claims to be the attorney of record for plaintiff in this case. In the Shepardson Statement of Disqualification, Shepardson claims that the Court erred in granting defendant's motion to disqualify. Shepardson also contends that the Court wrongfully denied him the right to orally argue the motion to disqualify on August 28, 2023, and wrongfully continued the trial. Shepardson claims that all the Court's statements, decisions, and rulings in this case demonstrate a purported bias and embroilment in the proceedings. Shepardson also claims that after the August 28th hearing, he and the "public" left the courtroom while the "defense team' remained inside. Shepardson claims that he knocked on the door of the locked courtroom but there was no answer. He claims to have observed the defense team leave the courtroom escorted by the bailiff. Shepardson contends that the defense team receives special treatment. Shepardson speculates that the Court engaged in ex parte communications with the defense team when they were in the courtroom. Finally, Shepardson contends that he spoke with "persons" who came to observe the hearing, and that they were "appalled." He attached as an exhibit to the Shepardson Statement of Disqualification a handwritten

declaration with what purports to be signatures of unknown persons, and a typed declaration of another person. Additionally, Shepardson attached as exhibits a partial transcript of the hearing on August 28, 2023, the motion to disqualify, various emails, and the Court's orders of January 3, August 25, and August 28, 2023.

Shepardson does not have standing in this case to bring the Shepardson Statement of Disqualification. Code of Civil Procedure section 170.3(c)(1) states that "[i]f a judge who should disqualify himself or herself refuses or fails to do so, any party may file with the clerk a written verified statement objecting to the hearing or trial before the judge. . . ." (Emphasis added.) Only the "litigants" may seek to disqualify the judge assigned to preside over the case. (*Peracchi v. Superior Court* (2003) 30 Cal.4th 1245, 1251.) This is because the disqualification statutes were enacted "to protect the right of the litigants to a fair and impartial adjudicator." *(Ibid.)*

Persons who are not parties to an action cannot bring a challenge to the judge presiding over the proceeding. (*See, Avelar v. Superior Court* (1992) 7 Cal.App.4th 1270, 1274.) For example, in a criminal case, only the People and the criminal defendant are considered parties who may challenge the judge assigned to hear the case. *(Ibid.)* Neither the victim of the crime, nor the officer who arrests the defendant, nor the police agency in a *Pitchess* motion is a party entitled to challenge the judge. *(Ibid.)*

In this case, because Shepardson is not a party in this proceeding, he cannot bring this challenge on his own behalf. Additionally, Shepardson cannot bring this challenge on behalf of the plaintiff because he no

longer represents the plaintiff or any party, in this case. In *Frisk v. Superior Court* (2011) 200 Cal.App.4th 402, 410-411, one of the defendants filed a Code of Civil Procedure section 170.6 challenge to the judge. However, before the judge acted on the challenge, the plaintiff dismissed that defendant from the case. *(Id.* at p. 410.) The court held that because only a party can file a challenge to the judge presiding over the action, and that defendant was no longer a party in the action, the challenge was properly denied. *(Id.* at pp. 410-411.)

In this case, when Shepardson was plaintiff's attorney, he had standing to bring a section 170.1 challenge to the Court on the plaintiffs behalf. However, now that Shepardson no longer represents a party in this proceeding, he does not have standing to file this challenge, or any other, pleading, on plaintiff's behalf. Accordingly, because Shepardson does not have standing to bring this challenge pursuant to Code of Civil Procedure section 170.1, either in his individual capacity or as plaintiff's attorney in this case, the Shepardson Statement of Disqualification is ordered stricken.

Even if Shepardson could bring the instant challenge in his individual capacity or as the attorney for plaintiff, which he cannot do, the challenge is repetitive of the prior challenges, and it fails to state grounds for disqualification on its face.

Code of Civil Procedure section 170.4(c)(3) states:

> A party may file no more than one statement of disqualification against a judge unless facts suggesting new grounds for disqualification are first learned of or arise after the

> first statement of disqualification was filed. Repetitive statements of disqualification not alleging facts suggesting new grounds for disqualification shall be stricken by the judge against whom they are filed.

Like in the prior challenges, Shepardson again complains about the Court's prior statements, decisions, and rulings in this case. Shepardson contends that the entirety of the Court's prior orders demonstrates the Court's purported bias and embroilment in this case. This is not a new ground for disqualification. The six prior challenges filed by Shepardson on behalf of plaintiff all argue that the Court's prior orders demonstrate a bias against plaintiff. Accordingly, to the extent that the Shepardson Statement of Disqualification is impermissibly repetitive of the prior challenges, it is ordered stricken pursuant to Code of Civil Procedure section 170.4(c)(3).

Further, the Shepardson Statement of Disqualification does not state facts which constitute grounds for disqualification of the Court pursuant to Code of Civil Procedure section 170.1 Where, as here, the disqualification statement does not reveal any grounds for disqualification on its face, the Court can strike the statement of disqualification. (Code Civ. Proc. § 170.4(b); *Neblett v. Pacific Mutual Life Ins. Co.* (1943) 22 Cal.2d 393, 401.)

Code of Civil Procedure section 170.3(c)(1) requires that the disqualification statement set forth "the facts constituting the grounds" for the disqualification of the judge. Mere allegations setting forth the conclusions of the declarant do not constitute such facts. *(Ephraim v. Superior Court* (1941) 42 Cal.App.2d 578, 578-579; *Urias v. Harris Farms, Inc.* (1991) 234 Cal.App.3d

415, 426.) As the person seeking the disqualification of the Court, Shepardson has the burden of showing that the Court is biased or prejudiced; and, in the absence of proof, the presumption is that no bias or prejudice exists. *(Betz v. Pankow* (1993) 16 Cal.App.4th 919, 926; *see also, Estate of Buchman* (1955) 132 Cal.App.2d 81, 104.) The party raising the issue of bias "has a heavy burden and must 'clearly' establish the appearance of bias." *(Wechsler v. Superior Court* (2014) 224 Cal.App.4th 384, 391.)

Shepardson did not meet his burden. The Shepardson Statement of Disqualification does not set *forth facts* to demonstrate that the Court is biased against plaintiff such that plaintiff cannot receive a fair and impartial hearing in this case. Instead, the challenge relies upon Shepardson's speculation, conclusory allegations, personal opinions, and hearsay. Yet, a declaration or verified statement filed in support of disqualification is held to the same standard of admissibility as is oral testimony. *(Mayo v. Beber* (1960) 177 Cal.App.2d 544, 551.) "[B]ias and prejudice are never implied and must be established by clear averments." *(Woolley v. Superior Court* (1937) 19 Cal.App.2d 611, 626.) Verified statements based on speculation are not sufficient to support judicial disqualification. *(Bassett Unified School Dist. v. Superior Court* (2023) 89 Cal.App.5th 273, 289.) Likewise, verified statements which are based upon hearsay or upon information and belief, are insufficient to support a judicial disqualification. *(See, N Beverly Park Homeowners Ass'n v. Bisno* (2007) 147 Cal.App.4th 762, 778; *United Farm Workers of America, AFL-CIO v. Superior Court* (1985) 170 Cal.App.3d 97, 106, n. 6; *Higgins v. City of San Diego* (1899) 126 Cal. 303, 313-314.)

The court in *In re Morelli* (1970) 11 Cal.App.3d 819, 843-44, held that the statement of disqualification may be stricken where, as here, it is based upon "conclusions; references to copious transcripts without citation to specific excerpts; allegations of facts not pertinent or appropriate to the issues to be determined in the hearing; material not legally indicative of bias or prejudice, such as judicial opinions expressed in the discharge of litigation and legal rulings; judicial reactions based on actual observance in participation in legal proceedings; and references to circumstances so inconsequential as to be no indication whatsoever of hostility and nonprobative of any bias or prejudice. (Citations.)"

Shepardson's belief that the Court is biased or prejudiced is irrelevant and not controlling in a motion to disqualify for cause, as the test applied is an objective one. *(United Farm Workers of America v. Superior Court* (1985) 170 Cal.App.3d 97, 104; *Stanford University v. Superior Court* (1985) 173 Cal.App.3d 403, 408 ("the litigant's necessarily partisan views do not provide the applicable frame of reference.").) "In the context of judicial recusal, '[p]otential bias and prejudice must clearly be established by an objective standard.' *(Haworth v. Superior Court* (2010) 50 Cal.4th 372, 389; *Roitz v. Coldwell Banker Residential Brokerage Co.* (1998) 62 Cal.App.4th 716, 724 ("Potential bias and prejudice must clearly be established.").) "[T]he partisan litigant emotionally involved in the controversy underlying the lawsuit is not the disinterested objective observer whose doubts concerning the judge's impartiality provide the governing standard." *(Haworth,* at p. 389.)

Further, "[t]o show bias or prejudice . . . there must be declarations showing indications of personal bias or the existence of some fixed anticipatory prejudgment." (*In re the Marriage of Fenton* (1982) 134 Cal.App.3d 451, 457.) No such showing was made here.

As stated in *People v. Ford* (1914) 25 Cal.App. 388, 395:

> It is not sufficient in a case of this kind, to allege in the affidavit simply that the defendant believes that he cannot have a fair and impartial trial, etc., but it must be made to appear by the affidavit or affidavits on file that a fair and impartial trial cannot be had before the judge about to try the case, by reason of the bias and prejudice of such judge. (Citation.) The affidavit or affidavits must not only state facts, but the facts stated must establish to the satisfaction of a reasonable mind that the judge has a bias or prejudice that will in all probability prevent him from dealing fairly with the defendant.

Additionally, the court in *Ensher, Alexander & Barsoom, Inc. v. Ensher* (1964) 225 Cal.App.2d 318, 322-323, stated:

> Bias or prejudice consists of a 'mental attitude or disposition of the judge towards a party to the litigation . . . ' (Citation.) In order for the judge to be disqualified, the prejudice must be against a particular party . . . and sufficient to impair the judge's impartiality so that it appears probable that a fair trial cannot be held. (Citations.)

(See also, Flier v. Superior Court (1994) 23 Cal.App.4th 165, 171 ("[T]he challenge must be to the effect that the judge would not be able to be impartial toward a particular party.").)

"To disqualify a judge, the alleged bias must constitute 'animus more active and deep. rooted than an attitude of disapproval toward certain persons because of their known conduct.'" *(U.S. v. Wilkerson* (9th Cir. 2000) 208 F.3d 794, 799.) Shepardson did not clearly establish that the Court has an active, deep-rooted animus towards him or the plaintiff. Nor has he clearly established that a person aware of the facts might reasonably entertain a doubt that the Court would be fair and impartial in this matter. The test for such a determination is an objective one; "whether a reasonable member of the public at large, aware of all the facts, would fairly entertain doubts concerning the judge's impartiality." *(Briggs v. Superior* (2001) 87 Cal.App.4th 312, 319.)

> The 'reasonable person' is not someone who is 'hypersensitive or unduly suspicious,' but rather is a 'well-informed, thoughtful observer.' (Citation.) '[T]he partisan litigant emotionally involved in the controversy underlying the lawsuit is not the *disinterested objective observer* whose doubts concerning the judge's impartiality provide the governing standard.' (Citations.)

(*Wechsler v. Superior Court* (2014) 224 Cal. App. 4th 384, 391.)

Moreover, a party challenging the judge for cause "must not isolate facts or comments out of context" as Shepardson has done in the present challenge. (*Flier*

v. Superior Court (1994) 23 Cal.App.4th 165, 170.) Like in the present case, in *Haldane v. Haldane* (1965) 232 Cal.App.2d 393, 395, one of the parties claimed that the judge was biased against him. The court stated that even if the court makes comments which are "critical or disparaging," if they are made in furtherance of the court's duties, they are not grounds for disqualification. *(Ibid.)* "[J]udicial remarks during the course of a trial that are critical or disapproving of, or even hostile to the parties or their cases, ordinarily do not support a bias or partiality challenge." *(Liteky v. United States* (1994) 510 U.S. 540, 555; *see also, Marr v. Southern California Gas Co.* (1925) 195 Cal. 352, 354.)

> [O]pinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible.

(*Liteky,* 510 U.S. at 555; *see also, Marr v. Southern California Gas Co.* (1925) 195 Cal. 352, 354.)

"[A] judge will normally and properly form opinions on the law, the evidence and the witnesses, from the presentation of the case. These opinions and expressions thereof may be critical or disparaging to one party's position, but they are reached after a hearing in the performance of the judicial duty to decide the case, and do not constitute a ground for disqualification." *(Haldane v. Haldane, supra,* 232 Cal.App.2d at 395.) "When making a ruling, a judge interprets the evidence; weighs credibility, and makes findings. In doing so, the judge necessarily makes and expresses

determinations in favor of and against parties. How could it be otherwise? We will not hold that every statement a judge makes to explain his or her reasons for ruling against a party constitutes evidence of judicial bias." (*Moulton Niguel Water Dist. v. Colombo* (2003) 111 Cal.App.4th 1210, 1219.)

Here, the disinterested objective observer would not have doubts as to whether the Court would be fair and impartial in this case because the present challenge is based upon the Court's statements, decisions and rulings issued during the proceedings in this case. Indeed, Code of Civil Procedure section 170.2, subdivision (b), makes clear that it is not grounds for disqualification that a judge "[h]as in any capacity expressed a view on a legal or factual issue presented in the proceeding. . . ." In *McEwen v. Occidental Life Ins. Co.* (1916) 172 Cal. 6, the court stated that findings based upon evidence and argument officially presented can almost never constitute a valid basis for disqualification. "Erroneous rulings against a litigant, even when numerous and continuous, do not establish a charge of bias and prejudice." (*Dietrich v. Litton Industries, Inc.* (1970) 12 Cal.App.3d 704, 719.) A party's remedy for an erroneous ruling is not a motion to disqualify, but rather review by appeal or writ. (*McEwen v. Occidental Life Ins. Co.*, at p. 11; *see also, Ryan v. Welte* (1948) 87 Cal.App.2d 888, 893, "[A] wrong opinion on the law of a case does not disqualify a judge, nor is it evidence of bias or prejudice.".) Otherwise, "no judge who is reversed by a higher court on any ruling or decision would ever be qualified to proceed further in the particular case." (*Ryan v. Welte,* 87 Cal.App.2d at 893.) The proper remedy is an appeal from the erroneous ruling. (*Ibid.*)

As stated in *Liteky, supra,* 510 U.S. at 555:

> [J]udicial rulings alone almost never constitute valid basis for a bias or partiality motion. (Citation.) In and of themselves . . . they cannot possibly show reliance upon an extrajudicial source; and can only in the rarest circumstances evidence the degree of favoritism or antagonism required . . . when no extrajudicial source is involved. Almost invariably, they are proper grounds for appeal, not for recusal.

In this case, if plaintiff disagreed with the Court's rulings, his remedy is by way of an appeal or writ petition.

Code of Civil Procedure § 170 states that it is the duty of the judge to hear matters assigned to him or her. Indeed, the Court of Appeal has stated that it is the court's *obligation* not to recuse itself where there are no grounds for disqualification.

> Judicial responsibility does not require shrinking every time an advocate asserts the objective and fair judge appears to be biased. The duty of a judge to sit where not disqualified is equally as strong as the duty not to sit when disqualified. (Citation.)

(Briggs v. Superior Court (2001) 87 Cal.App.4th 312, 319.)

Accordingly, because Shepardson does not have standing to bring the Shepardson Statement of Disqualification, and because it is repetitive of the prior challenges and discloses no legal grounds for disqualification on its face, the Shepardson Statement of Disqual-

ification is ordered stricken pursuant to Code of Civil Procedure section 170.4, subdivisions (b) and (c).

The parties are reminded that this determination of the question of disqualification is not an appealable order and may be reviewed only by a writ of mandate from the Court of Appeal sought within 10 days of notice to the parties of the decision. (Code of Civ. Proc., § 170.3(d).) In the event that a timely writ is sought and an appellate court determines that an answer should have been timely filed, such an answer is filed herewith.

GOOD CAUSE APPEARING THEREFORE, It is so ordered.

/s/ Barbara A. Kronlund
Superior Court Judge

Date: September 8, 2023

ORDER DENYING PLAINTIFF'S PETITION FOR REVIEW, SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN JOAQUIN (AUGUST 25, 2023)

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN JOAQUIN

CHRISTIAN L. JOHNSON ET AL.

v.

CALIFORNIA DEPARTMENT OF TRANSPORTATION

Case Number: STK-CV-UCR-2019-0000281

Department: 10D

Before: Barbara A. KRONLUND, Presiding Judge.

MINUTE ORDER

There are no appearances by any party.

The Court is in receipt of Plaintiff's request for oral argument. Pursuant to the Court's local rules, 'Any party wishing to contest or argue the tentative ruling must email the court at civilcourtclerks@sjcourts.org that they intend to appear remotely no later than 4:00 PM on the day before the scheduled hearing.' Plaintiff's request for oral argument is untimely, as the Court received the email request at 4:56 P.M. on 08/24/2023. Therefore the Court is affirming its Tentative Ruling.

The Court affirms the tentative ruling as follows:

On 08/23/2023 the Supreme Court denied Plaintiff's Petition for Review and Application for Stay.

If there is request for oral argument, the matter will be heard on 08/28/2023 at 9:00 A.M. in Dept. 10D with personal appearances required.

Court is issuing one tentative ruling for both motions on calendar this date.

TENTATIVE RULINGS:

This is an employment discrimination, harassment, and retaliation action filed by Plaintiff, CHRISTIAN JOHNSON (hereinafter referred to as "JOHNSON") against his employer Defendant CALIFORNIA DEPARTMENT OF TRANSPORTATION (hereinafter referred to as "CALTRANS") during his first period of employment with CALTRANS (between 2017 and 2018 at the CALTRANS District 10 Maintenance Yard) wherein JOHNSON alleges he was sexually and racially harassed and retaliated against while employed as a maintenance worker.

The First Amended Complaint (hereinafter "FAC"), filed on March 12, 2019, is the operative complaint and it alleges 14 causes of action for: (1) EEOC Violation (sexual harassment); (2) EEOC Violation (retaliation); (3) EEOC Violation (racial discrimination/harassment); (4) EEOC Violation (retaliation); (5) FEHA Violation (sexual harassment); (6) FEHA Violation (retaliation); (7) FEHA Violation (racial discrimination/harassment); (8) FEHA Violation (retaliation); (9) FEHA Violation (failure to prevent harassment); (10) Labor Code Violation (retaliation); (11) Labor Code Violation (Retaliation); (12) Violation of 42 USC

1981; (13) Intentional Infliction of Emotional Distress; (14) Negligence; and (15) Injunctive Relief.

CALTRANS has filed a motion for summary adjudication challenging the 13th cause of action for intentional infliction of emotional distress and the 14th cause of action for negligence. The bases for the motion are that: 1) a public entity is not liable for common law torts, such as negligence and intentional infliction of emotional distress; 2) Gov't Code § 815.2 [vicarious liability] is not a statutory basis for liability because the alleged conduct is beyond the scope of employment; and, 3) Gov't Code § 815.6 is not a statutory basis for liability because the statute neither authorizes nor constitutes a cause of action for negligence or intentional infliction of emotional distress against a public entity.

TENTATIVE RULING:

Motion for Summary Adjudication

"A party may move for summary adjudication as to one or more causes of action within an action, . . . if the party contends that the cause of action has no merit, ... A motion for summary adjudication shall be granted only if it completely disposes of a cause of action, ..." California Code of Civil Procedure § 437c(f)(1). A motion for summary adjudication proceeds "in all procedural respects as a motion for summary judgment." California Code of Civil Procedure § 437c(f)(2).

Summary judgment is appropriate if all the papers submitted 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. Code Civ. Proc., § 437c(c).

"'A defendant seeking summary judgment has met the burden of showing that a cause of action has no merit if that party has shown that one or more elements of the cause of action cannot be established [or that there is a complete defense to that cause of action]. . . . Once the defendant's burden is met, the burden shifts to the plaintiff to show that a triable issue of fact exists as to that cause of action. . . . [The court] must determine whether the facts as shown by the parties give rise to a triable issue of material fact. . . . In making this determination, the moving party's affidavits are strictly construed while those of the opposing party are liberally construed.' . . . [The court] accept[s] as undisputed facts only those portions of the moving party's evidence that are not contradicted by the opposing party's evidence. . . . In other words, the facts alleged in the evidence of the party opposing summary judgment and the reasonable inferences therefrom must be accepted as true." (Citation.) *Hanson v. Grode* (1999) 76 Cal.App.4th 601, 603–604.

For the reasons stated below, IT IS HEREBY ORDERED that the motion for summary adjudication of the 13th cause of action for intentional infliction of emotional distress is granted and the motion for summary adjudication of the 14th cause of action for negligence is granted.

EVIDENTIARY RULINGS

There are no evidentiary rulings. Neither party has requested a ruling for evidentiary purposes and no evidentiary objections were lodged by JOHNSON.

Facts

The facts submitted by CALTRANS in support of its motion for summary adjudication are undisputed:

- This action concerns JOHNSON's first employment with CALTRANS which occurred between 2017 and 2018. Fact 1, undisputed.
- During that time, JOHNSON was employed in CALTRANS District 10 Maintenance Yard in Stockton. Fact 2, undisputed.
- Related to that employment, JOHNSON alleges that CALTRANS maintained a discriminatory and hostile working environment, including numerous instances of sexual and racial harassment from fellow co-workers. These instances include calling JOHNSON "boy," using the "N-word" around JOHNSON, JOHNSON observing his co-worker Mark Taylor (Taylor) poke at another co-worker's genitals, Taylor poking JOHNSON "in the butt with a stick" and making several pelvic thrusts into JOHNSON, and Taylor threatening JOHNSON by "trying to make [JOHNSON] feel guilty" and telling him "I can make your life hell. I can get you fired. I carry a concealed weapon in my vehicle." Fact 3, undisputed.
- JOHNSON alleges that his 13th cause of action if intentional infliction of emotional distress is based upon a "mandatory duty" pursuant to "the EEOC and FEHA statutes not to discriminate, harass, or retaliate" against JOHNSON. Fact 5, undisputed.

- JOHNSON'S 13th cause of action does not allege any other statutory basis of liability but it does incorporate by reference the following statutes: Title 42 USC § 2000e-2(a); Title 42 USC § 2000e-3(a); Government Code § 12940; Government Code § 12940(h); Government Code § 12940(k); Labor Code § 1102.5; Labor Code § 98.6; and Title 42 USC § 1981. Fact 6, undisputed.
- JOHNSON alleges the basis of his negligence claim as "CALTRANS had mandatory duties pursuant to EEOC and FEHA to not discriminate, harass, or retaliate against JOHNSON." Fact 8, undisputed.
- JOHNSON further alleges that "CALTRANS breached its mandatory duties and committed negligence per se by violating said statutes." Fact 9, undisputed.
- JOHNSON'S 14th cause of action does not allege any other statutory basis of liability but it does incorporate by reference the following statutes: Title 42 USC § 2000e-2(a); Title 42 USC § 2000e-3(a); Government Code § 12940; Government Code § 12940(h); Government Code § 12940(k); Labor Code § 1102.5; Labor Code § 98.6; and Title 42 USC § 1981. Fact 9, undisputed.
- CALTRANS "is responsible for designing and maintaining the public roads and bridges in the State of California." Fact 11, undisputed.
- CALTRANS has policies in place that prohibit discrimination and harassment. Fact 12, undisputed.

Legal Analysis

Government Code § 815 provides, in pertinent part:

> (a) A public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person.

The Legislative Committee Comments to Government Code § 815 explains, in pertinent part:

> This section abolishes all common law or judicially declared forms of liability for public entities, ... [P]ublic entities may be held liable only if a statute . . . is found declaring them to be liable. Because of the limitations contained in Section 814, which declares that this part does not affect liability arising out of contract or the right to obtain specific relief against public entities and employees, the practical effect of this section is to eliminate any common law governmental liability for damages arising out of torts. . . . (Emphasis added.)

Intentional infliction of emotional distress and negligence are common law tort theories. *See, Myers v. Trendwest Resorts, Inc.* (2007) 148 C.A.4th 1403, 1426 [common law claims include intentional infliction of emotional distress]; *see also, California Service Station and Auto. Repair Ass'n v. American Home Assur. Co.* (1998) 62 Cal.App.4th 1166, 1177–1178 ["A [negligence] suit for damages is based on the theory that the conduct inflicting the injuries is a common-law tort. . . . "].

Accordingly, resolution of this motion will fall on the question of whether there is statutory authority for CALTRANS' liability.

1. Negligence Claim (14th Cause of Action)

A. Government Code § 815.2

Government Code § 815.2 provides, in pertinent part:

> (a) A public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action against that employee or his personal representative.
>
> (b) Except as otherwise provided by statute, a public entity is not liable for an injury resulting from an act or omission of an employee of the public entity where the employee is immune from liability.

The Legislative Committee Comments to Government Code § 815.2 explains, in pertinent part:

> This section imposes upon public entities vicarious liability for the tortious acts and omissions of their employees. It makes clear that in the absence of a statute a public entity cannot be held liable for an employee's act or omission where the employee himself would be immune. The California courts have held on many occasions that a public employee is immune from liability for his discretionary acts within the scope of his

> employment even though the discretion be abused. . . . All that will be necessary will be to show that some employee of the public entity tortiously inflicted the injury in the scope of his employment under circumstances where he would be personally liable. (Emphasis added.)
>
> Thus, there is a two-part analysis required for the application of Government Code § 815.2. The first question posed is whether the act or omission was within the scope of the acting employee's employment. If not, then Government Code § 815.2 does not apply to confer liability to the public entity. If the act or omission was within the scope of employment, the second question posed is whether the act or omission gives rise to a personal cause of action against the acting employee.
>
> Scope of Employment
>
> CACI No. 3720 defines conduct to be within the scope of employment when "(a) the conduct is 'reasonably related to the kinds of tasks that the employee was employed to perform;' or, (b) the conduct is "reasonably foreseeable in light of the employer's business or the [employee's job] responsibilities." *See also, Farmers Ins. Group v. County of Santa Clara* (1995) 11 C.4th 992, 1003.

Ordinarily, the issue of whether an employee acted within the scope of employment presents a question of fact but when the facts are undisputed and there are no conflicting inferences, it becomes a ques-

tion of law. *Mary M. v. City of Los Angeles* (1991) 54 C.3d 202, 213. Here, CALTRANS regards the factual allegations of the FAC as established for purposes of the motion; JOHNSON offers no new or different facts for consideration. Thus, the undisputed facts for purposes of this motion are:

"9. Caltrans has long-established policies and procedures that call for a 'zero' tolerance for sexual/racial discrimination, harassment, or retaliation.

10. Christian and a co-worker Marlon Baker ('Marlon') work out of the Caltrans District 10 maintenance yard, which is located just off Dr. Martin Luther King Drive in Stockton, CA.

. . .

12. They are both black.

13. Caltrans employees Mark Taylor ('Taylor') and Jimmy Ell ('Ell') repeatedly call Christian and Marlon Baker, 'boy' or 'boys', even after it is communicated by Marlon that the language is unacceptable and offensive.

14. Taylor is white.

15. He uses the word N-word, which is inherently racial and offensive, in front of Christian and Marlon.

16. Taylor makes an unwanted poke at Marlon's genitals while Marlon is on the ground doing Caltrans' work.

17. Christian is nearby and sees the battery.

18. In the summer of 2017 Christian is performing work for Caltrans by stenciling on the side of a bridge.

19. His back is to Taylor.

20. First sexual battery of Chris. Taylor approaches Christian and pokes him in the butt with a stick.

. . .

23. Second sexual battery. Christian turns arounds (sic), continues his Caltrans work, and Taylor pokes him again in the butt.

24. Christian tells Taylor to stop it with words to the effect of: 'Man, get out of here with that.'

. . .

33. Third through at least sixth sexual batteries. In January 2018 Christian is leaning over a bridge working on a rail.

34. Lead worker Joey Cook is present at the scene.

35. Taylor walks up behind Christian.

36. Without advance notice, he grabs Christian's belt and simulates sexual intercourse with Christian.

37. He makes several pelvic thrusts with his hips, which pound into Christian's rear-end.

38. Taylor admits he may have made a sexually suggestive motion with his arm.

39. The suggestive action being pretending to spank Christian's behind.

. . .

44. Caltrans undertakes an internal investigation of Taylor's and Ell's abusive conduct toward Christian and Marlon.

45. On or about January 24[,] 2018[,] Christian is interviewed by Caltrans' DCIU Investigatory Aaron Gabbani.

46. The interviewers say the investigation is confidential.

47. Retaliation by pressure to cover-up what happened. That same day, Taylor calls Christian approximately two times.

. . .

50. Christian is feeling pressure from Taylor to cover-up what happened.

51. Taylor interviewed February 21, 2018. After the interview Taylor frantically calls Christian six to eight times.

. . .

58. Retaliation by pressure to obstruct investigation. Taylor then tells Christian to call the investigator and say that his words were taken out of context and that the events were not as previously described.

. . .

62. Christian asks the investigator if he can withdraw his statement and he responds that the matter is out of his hands.

63. More retaliation. That same day, Taylor's brother, Supervisor Matt Connelly, calls

Christian, and it is alleged on information and belief, he does so as part of an agreement with his brother, to pressure Christian to falsely report.

64. Christian does not take the call.

65. DCIU Report signed off on March 9, 2018. The report confirms Taylor engaged in sexual misconduct in violation of Caltrans' policies and procedures.

66. On March 19, 2018[,] Caltrans' EEO Office Chief Shannon Flynn issues the DCIU report to Christian.

67. Retaliation & hostile work environment. On March 26, 2019[,] Taylor contacts Christian and is angry at the findings in the report.

68. He yells at Christian.

69. Taylor says to Christian, "I can make your life hell. I can get you fired. I carry a concealed weapon in my vehicle."

. . .

77. On March 31, 2018[,] Christian receives the DCIU report. Chris is shocked to learn he is listed as a complainant against Taylor.

78. Retaliation. On April 2, 2018[,] Taylor calls Christian and leaves a message stating now he knew why Christian would not return his calls or texts.

79. On April 4, 2018[,] Christian sends a memo to the 'Cal Trans Superintendent District 10'.

80. Hostile work environment. Christian sets forth the reasons why he is being forced to resign.

. . .

83. Retaliation. Christian's ally Marlon is transferred to landscaping and Chris is left isolated from his friend, co-complainant, and ostracized from the local workers.

84. Christian asks to be reassigned to another district where he can do the same type of work, working on bridges.

85. Retaliation. Caltrans refuses to reassign Christian and instead places him in an office across the street from the maintenance yard where Taylor works.

. . .

94. Hostile work environment. Christian is under severe emotional stress from the pressure arising from the sexual harassment, bullying, directives to lie, anger for telling the truth, proximity to Taylor and his friends, dead-end job, fear of physical retaliation and death, loss of the work he loves to do, and while the abuser keeps his job.

. . .

107. Christian is informed and believes that Supervisor Greg Heath knew or should have known of the ongoing sexual and racial harassment, and retaliation, and failed to adequately address and/or prevent the misconduct."

(Plaintiff's FAC, 6:5-13:22.) (Emphasis in original text.)

The case of *Farmers Ins. Group v. County of Santa Clara* (1995) 11 C.4th 992 is on point and dispositive of the issue.

> In *Farmers, supra,* the California Supreme Court conducted a "scope of employment" analysis in the context of a male deputy sheriff's repeated sexual harassment of female deputy sheriffs while both were on the job. The Supreme Court concluded that the sexual harassment was not within the scope of employment, explaining:
>
> "[T]he deliberate targeting of an individual employee by another employee for inappropriate touching and requests for sexual favors is not a risk that may fairly be regarded as typical of or broadly incidental to the operation of a county jail, such conduct must be deemed to fall outside the scope of a deputy sheriff's employment.
>
> . . .
>
> Even though . . . Nelson committed virtually all of the harassing acts during his work hours at the jail, Farmers cannot prevail on the scope of employment issue without also establishing that the acts arose out of the employment. As explained above, '[i]f an employee's tort is personal in nature, mere presence at the place of employment and attendance to occupational duties prior or subsequent to the offense will not give rise to a cause of action against the employer under

the doctrine of respondeat superior.'" (*Farmers Ins. Group v. County of Santa Clara* (1995) 11 Cal.4th 992, 997,1007.)

Here, and with regard to the alleged actions of CALTRANS employees Mark Taylor, Jimmy Ell, and/or Matt Connelly, each of these employees' actions were beyond the scope of their employment. The actions were all personal in nature and not motivated by any work-related duties or disputes over work performance, or the like. With attention to Taylor's threats to have JOHNSON terminated, his threat did not arise out of any inherent authority Taylor had as a CALTRANS employee at the time.

Accordingly, the Court finds that all the alleged conduct involving racial slurs, sexual harassment, sexual battery, threats and intimidation against JOHNSON falls outside of the scope of employment and therefore, Government Code § 815.2 does not confer vicarious liability for these actions to CALTRANS.

This leaves the remaining factual allegations involving: 1) the inaction of CALTRANS' employee, Joey Cook (lead worker), when present at the scene of an incident of sexual battery; 2) the inaction of Greg Heath (supervisor), knowing of the harassment of, and threats/intimidation to, JOHNSON; and, 3) an unidentified CALTRANS' employee's decision not to re-assign JOHNSON away from Taylor . These alleged omissions all relate to the individual employee's supervisory duties and as such, the alleged omissions fall within the scope of the individual employee's scope of employment.

Accordingly, the second step of the Government Code § 815.2 analysis becomes necessary.

Act/Omission Gives Rise to Cause of Action against Offending Employee

> "[I]n order for vicarious public entity liability to attach, a public employee, either named as a defendant or at least 'specifically identified' by the plaintiff, must have engaged in an act or omission giving rise to that employee's tort liability." *Koussaya v. City of Stockton* (2020) 54 Cal.App.5th 909, 944.
>
> Setting aside the fact that with regard to a failure to re-assign JOHNSON away from Taylor, no individual employee has been named (*see*, FAC, ¶ 85), none of the factual allegations against Joey Cook, Greg Heath, and/or the unnamed CALTRANS' employee responsible for reassignments supports a personal cause of action against the respective employee. *See, C.A. v. William S. Hart Union High School Dist.* (2012) 53 Cal.4th 861, 877 ["Absent . . . a special relationship, there can be no individual liability to third parties for negligent hiring, retention or supervision of a fellow employee, and hence no vicarious liability under section 815.2. . . . "].

Accordingly, as to the remaining factual allegations that are within the scope of the offending employee's employment, Government Code § 815.2 does not confer vicarious liability for these actions to CALTRANS because the offending employee cannot be held personally liable for the alleged negligence.

B. Government Code § 815.6

Government Code § 815.6 reads:

"Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty."

The Legislative Committee Comments to Government Code § 815.2 explains, in pertinent part:

> "This section declares the familiar rule, applicable to both public entities and private persons, that failure to comply with applicable statutory or regulatory standards is negligence."
>
> It is well-settled that Government Code § 815.6 "imposes liability on a public entity if it breaches a mandatory statutory duty that is intended to protect against the kind of injury the party seeking relief has suffered, and the breach proximately caused that injury." *Lawson v. Superior Court* (2010) 180 Cal.App.4th 1372, 1383 citing *Creason v. Department of Health Services* (1998) 18 Cal.4th 623, 629; *see also, Guzman v. County of Monterey* (2009) 46 C.4th 887, 898 (emphasis added).
>
> Citing *Lawson, supra,* and *Guzman, supra,* CALTRANS submits that Government Code § 815.6 is its own cause of action and does not, and cannot, encompass either the common law theories of negligence and/or intentional infliction of emotional distress and therefore, it does not provide statutory

> authorization for either the negligence cause of action (14th cause of action) or the intentional infliction of emotional distress cause of action (13th cause of action).

In addition to the Lawson and Guzman cases, CALTRANS directs the Court to CACI No. 423 which sets forth the distinct elements that must be shown in order to properly state a cause of action under Government Code § 815.6. They are:

- Public entity defendant violated a specific statute, regulation or ordinance;
- Plaintiff was harmed; and,
- Public entity defendant's failure to perform its duty was a substantial factor in causing plaintiff's harm.
- Public entity defendant, however, is not responsible for plaintiff's harm if public entity defendant proves that it made reasonable efforts to perform its duties under the statute/regulation/ordinance.

The Court notes that in asserting both the 13th cause of action for intentional infliction of emotional distress and the 14th cause of action for negligence, JOHNSON specifically references Government Code § 815.6 and asserts that through Government Code § 815.6, CALTRANS is liable to JOHNSON because CALTRANS has mandatory duties and has breached said mandatory duties as stated under the Equal Employment and Opportunity Commission (EEOC) and Fair Employment and Housing Act (FEHA); more particularly, duties not to discriminate, harass or retaliate. *See*, FAC ¶¶ 203-211.

Thus, the Court will turn its attention to the question of whether Government Code § 815.6 is applicable such that it can provide a statutory basis upon which JOHNSON can assert his negligence and/or intentional infliction of emotional distress claims.

"First and foremost, application of section 815.6 requires that the enactment at issue be obligatory, rather than merely discretionary or permissive, in its directions to the public entity; it must require, rather than merely authorize or permit, that a particular action be taken or not taken. (Citation.) It is not enough, moreover, that the public entity or officer have been under an obligation to perform a function if the function itself involves the exercise of discretion. (Citation.)" *Haggis v. City of Los Angeles* (2000) 22 Cal.4th 490, 498–499.

San Mateo Union High School Dist. v. County of San Mateo (2013) 213 Cal.App.4th 418, 429, further explains:

> "While the dividing line between a discretionary and mandatory duty is not always definitive, the California Supreme Court has articulated 'rigid requirements for imposition of governmental liability under Government Code section 815.6. . . . ' (Citation.) "'An enactment creates a mandatory duty if it requires a public agency to take a particular action. [Citation.] An enactment does not create a mandatory duty if it merely recites legislative goals and policies that must be implemented through a public agency's exercise of discretion." [Citation.]' (Citation.) "Courts have construed this first prong

> rather strictly, finding a mandatory duty only if the enactment 'affirmatively imposes the duty and provides implementing guidelines.' [Citations.]" (*Guzman v. County of Monterey* (2009) 46 Cal.4th 887, 898; *see also Department of Corporations v. Superior Court* (2007) 153 Cal.App.4th 916, 932.)

The court has also recognized that under section 815.6, inclusion of the term "shall" in an enactment "does not necessarily create a mandatory duty; there may be 'other factors [that] indicate that apparent obligatory language was not intended to foreclose a governmental entity's or officer's exercise of discretion.' [Citations.]" (*Guzman v. County of Monterey, supra*, 46 Cal.4th 887, 898, 899.) "In determining whether a mandatory duty actionable under section 815.6 had been imposed, the Legislature's use of mandatory language (while necessary) is not the dispositive criteria. Instead, the courts have focused on the particular action required by the statute, and have found the enactment created a mandatory duty under section 815.6 only where the statutorily commanded act did not lend itself to a normative or qualitative debate over whether it was adequately fulfilled." (Citation.) "It is not enough," the California Supreme Court has declared, "that the public entity or officer have been under an obligation to perform a function if the function itself involves the exercise of discretion." (*Haggis v. City of Los Angeles, supra*, 22 Cal.4th 490, 498.)

"[T]he term 'enactment' refers to 'a constitutional provision, statute, charter provision, ordinance or regulation.'" Government Code § 810.6; *see also, Tuthill v. City of San Buenaventura* (2014) 223 Cal.App.4th 1081, 1091–1092.

There is no doubt that the predicate statutes affirmatively impose a duty upon public agencies (including CALTRANS) not to discriminate or harass, or permit discrimination or harassment, on the basis of race or sex, and/or not to retaliate against those who make or pursue or assist in such claims.

The focus for purpose of this motion is on the question of whether the predicate statutes have the necessary implementing guidelines. *See, Guzman v. County of Monterey* (2009) 46 Cal.4th 887, 898 citing *O'Toole v. Superior Court* (2006) 140 Cal.App.4th 488, 510 and *Clausing v. San Francisco Unified School Dist.* (1990) 221 Cal.App.3d 1224 ["If rules and guidelines for the implementation of an alleged mandatory duty are not set forth in an otherwise prohibitory statute, it cannot create a mandatory duty"].

In *Clausing, supra*, the court explains, for example, "all provisions of the state Constitution 'are mandatory and prohibitory, unless by express words they are declared to be otherwise.' Unquestionably, [a provision of the state Constitution] is mandatory. Thus, all agencies of government are required to comply with it, and are prohibited from taking official actions which violate it or contravene its provisions." *Clausing v. San Francisco Unified School Dist.* (1990) 221 Cal.App.3d 1224, 1236.

Clausing extends this same rationale to state statutes. Referencing California Education Code's prohibition on corporal punishment, the court writes @ 1240:

> "These statutes are clearly prohibitory in effect; they set forth an express statutory prohibition on certain conduct, with certain

> enumerated exceptions. Although they may establish important rights and confer significant benefits on members of the public (citations), they do not create any mandatory, affirmative duty on the part of public schools and school districts to take action or carry out measures to ensure that students are never subjected to corporal punishment by teachers. The statutes set forth no guidelines or rules for schools to follow in implementing an affirmative duty to prevent corporal punishment. If rules and guidelines for the implementation of an alleged mandatory duty are not set forth in an otherwise prohibitory statute, it cannot create a mandatory duty." (Emphasis added.)

As noted above, the same rationale applies for federal statutes. *See*, Government Code § 810.6 ["'Enactment' means a constitutional provision, statute, charter provision, ordinance or regulation.].

> Critically, Clausing instructs that while it is one thing to require that "all agencies of government . . . comply with [an enactment], . . . [and] prohibit[] [public agencies] from taking official actions which violate it or contravene its provisions," "it is an entirely different matter to conclude that [the enactment] is self-executing in the sense that it establishes an affirmative duty to act on the part of [the public entity], provides remedies for its violation, or creates a private cause of action for damages." *Clausing, supra* @ 1236 (emphasis added). At footnote 5, the Clausing court explains, citing *Taylor v.*

Madigan (1975) 53 Cal.App.3d 943, 951: "[An enactment] contemplating and requiring [future] legislation [administrative or otherwise] is not self-executing. [Citation.] In other words, it must be regarded as self-executing if the nature and extent of the right conferred and the liability imposed are fixed by the [enactment] itself, so that they can be determined by an examination and construction of its terms and there is no language indicating that the subject is referred [for further] action [citation]; and such provisions are inoperative in cases where the object to be accomplished is made to depend in whole or in part on subsequent legislation." *Clausing v. San Francisco Unified School Dist.* (1990) 221 Cal.App.3d 1224, 1236–1238.

Thus, "[i]n order for Government Code section 815.6 to be applicable, the enactment relied upon must impose a mandatory duty, not a discretionary duty; neither must the enactment simply set forth a prohibition or a right, as opposed to an affirmative duty on the part of a government agency to perform some act. (Citation.) In every case, '[t]he controlling question is whether the enactment at issue was intended to impose an obligatory duty to take specified official action to prevent particular foreseeable injuries, thereby providing an appropriate basis for civil liability. [Citation.]' (*Keech v. Berkeley Unified School Dist.* (1984) 162 Cal.App.3d 464, 470.) The question of whether an enactment is

> intended to impose a mandatory duty on a public entity to protect against a particular kind of injury is a question of law." *Clausing v. San Francisco Unified School Dist.* (1990) 221 Cal.App.3d 1224, 1239.

As discussed above, in asserting the 13th cause of action for intentional infliction of emotional distress and 14th cause of action for negligence, JOHNSON cites generally to EEOC and FEHA statutes and further specifies: Title 42 USC § 2000e-2(a); Title 42 USC § 2000e-3(a); Government Code § 12940; and Labor Code § 1102.5; Labor Code § 98.6; and Title 42 USC § 1981, incorporating each statute into the cause. Thus, these are the relevant predicate statutes.

None of these cited or referenced statutes, however, imposes a mandatory duty as required by Government Code § 815.6. Instead, each statute "recites legislative goals and policies that must be implemented through a public agency's exercise of discretion." *San Mateo Union High School Dist. v. County of San Mateo* (2013) 213 Cal.App.4th 418, 429. This is evidenced by the fact that CALTRANS has its own policies and directives in place that prohibit racial or sexual discrimination, racial or sexual harassment and/or retaliatory practices. *See*, Fact 12, undisputed; *see also*, Declaration of Shalinee Hunter, ¶¶ 3-5, Exhibits A-C.

A review of each cited and referenced statute confirms this.

Title 42 USC § 2000e-2(a) provides:

"It shall be an unlawful employment practice for an employer–

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." Title 42 USC § 2000e-3(a) provides:

"It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."

In these EEOC statutes, there is no reference to, or inclusion of, specific guidelines and/or rules; the statutes are not self-executing; the statutes are prohibitive and recite legislative goals and policies. As such, they do not create a mandatory duty as required for the application of Government Code § 815.6 in this case.

Government Code § 12940 provides, in relevant part:

"It is an unlawful employment practice, . . . :

(a) For an employer, because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, reproductive health decisionmaking, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or veteran or military status of any person, to refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge the person from employment or from a training program leading to employment, or to discriminate against the person in compensation or in terms, conditions, or privileges of employment.

. . .

(h) For any employer, . . . to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part.

. . .

(k) For an employer, . . . to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring."

In these FEHA statutes, there is no reference to, or inclusion of, specific guidelines and/or rules; the statutes are not self-executing; the statutes are prohibitive and recite legislative goals and policies. As such, they do not create a mandatory duty as required

for the application of Government Code § 815.6 in this case.

Labor Code §§ 1102.5 reads, in pertinent part:

(a) An employer . . . shall not make, adopt, or enforce any rule, regulation, or policy preventing an employee from disclosing information to a government or law enforcement agency, to a person with authority over the employee, or to another employee who has authority to investigate, discover, or correct the violation or noncompliance, or from providing information to, or testifying before, any public body conducting an investigation, hearing, or inquiry, if the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation, regardless of whether disclosing the information is part of the employee's job duties.

(b) An employer . . . shall not retaliate against an employee for disclosing information, or because the employer believes that the employee disclosed or may disclose information, to a government or law enforcement agency, to a person with authority over the employee or another employee who has the authority to investigate, discover, or correct the violation or noncompliance, or for providing information to, or testifying before, any public body conducting an investigation, hearing, or inquiry, if the employee has reasonable cause to believe that the information discloses a vio-

lation of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation, regardless of whether disclosing the information is part of the employee's job duties.

(c) An employer . . . shall not retaliate against an employee for refusing to participate in an activity that would result in a violation of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation.

(d) An employer . . . shall not retaliate against an employee for having exercised their rights under subdivision (a), (b), or (c) in any former employment.

. . . .

Labor Code § 98.6 reads, in pertinent part:

(a) A person shall not discharge an employee or in any manner discriminate, retaliate, or take any adverse action against any employee or applicant for employment because the employee or applicant engaged in any conduct delineated in this chapter [Division of Labor Standards Enforcement] or because the employee or applicant for employment has filed a bona fide complaint or claim or instituted or caused to be instituted any proceeding under or relating to his or her rights that are under the jurisdiction of the Labor Commissioner, made a written or oral complaint that he or she is owed unpaid wages, or because the employee has initiated any action or notice pursuant to Section 2699, or has testi-

> fied or is about to testify in a proceeding pursuant to that section, or because of the exercise by the employee or applicant for employment on behalf of himself, herself, or others of any rights afforded him or her.

These Labor Code statutes make no reference to, nor does it include, specific guidelines and/or rules; the statutes are not self-executing; the statutes are prohibitive and recite legislative goals and policies. As such, they do not create a mandatory duty as required for the application of Government Code § 815.6 in this case.

Title 42 USC § 1981 reads, in pertinent part:

(a) Statement of Equal Rights

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
>
> . . .

(c) Protection against impairment

> The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

This statute makes no reference to, nor does

> it include, specific guidelines and/or rules; the statute is not self-executing; the statute is prohibitive and recites legislative goals and policies. As such, it does not create a mandatory duty as required for the application of Government Code § 815.6 in this case.

With this finding, the Court stresses the point made by CALTRANS in its moving papers and that is, "Although none of the foregoing statutes imposes a mandatory duty upon CALTRANS under Government Code § 815.6, this failure does not affect [JOHNSON's] separate causes of action which allege violations of these same statutes specifically." *See*, *Clausing v. San Francisco Unified School Dist.* (1990) 221 Cal.App.3d 1224, 1241 ["Appellants have stated a cause of action for violation of their federal constitutional rights, as set forth in the sixth cause of action of their third amended complaint. But they have no grounds for asserting in addition that this federal statute creates a mandatory duty on the basis of which they may seek damages under Government Code section 815.6."].

And, for the reasons stated above, summary adjudication of the 14th cause of action for negligence is granted.

2. Intentional Infliction of Emotional Distress

The discussion above applies equally to the 13th cause of action for intentional infliction of emotional distress. And so, for those same reasons, summary adjudication of the 13th cause of action for intentional infliction of emotional distress is granted.

TENTATIVE RULING:

Motion to Disqualify Counsel and Expert Witnesses

Defendant, California Department of Transportation (CALTRANS) brings a motion to disqualify counsel for Plaintiff, Christian Johnson (JOHNSON), and to disqualify JOHNSON's expert witnesses and exclude other witnesses from testifying at trial in the above-referenced matter.

Today, the Court rules only upon the motions to disqualify Mr. Shepardson and Johnson's expert witnesses. Any motion to exclude any non-expert witness at trial shall be addressed and handled as part of the parties' motions in limine.

For the reasons stated below, Motion to Disqualify John Shepardson and his law firm as Johnson's counsel and to disqualify Johnson's expert witnesses is Granted.

EVIDENTIARY RULINGS

With his Opposition, JOHNSON filed a Request For Judicial Notice seeking judicial notice of the previously lodged Brown email. "Judicial notice may not be taken of any matter unless authorized or required by law." *See*, Evidence Code, § 450. Here, the Brown email was 'lodged' with the Court for purposes of a previous hearing but it is not a filed court document and therefore, it is not part of the court record. Cf, Evidence Code, § 452(d). Nor is the Brown email an official act of a legislative, executive or judicial department of the State of California. Cf, Evidence Code, § 452(c). Moreover, the requested review of the document is neither appropriate nor relevant to the resolution of the pending motion to disqualify. '[T]he existence of a document may be judicially noticeable[;]

the truth of statements contained in the document and its proper interpretation are not subject to judicial notice. *Fremont Indemnity Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97, 113. Moreover, the Court has already ruled that the Brown email is a privileged and confidential communication. *See*, January 3, 2023 Order. For all these reasons, IT IS HEREBY ORDERED that the Request for Judicial Notice is denied.

With its Reply, CALTRANS files both general and specific objections to the Declaration of John A. Shepardson, Esq. in Opposition to Defendant's Motion to Disqualify Christian's Attorney and Exclude Expert and Lay Testimony, filed July 18, 2023. IT IS HEREBY ORDERED:

- To the extent Mr. Shepardson's declaration statement constitutes a legal argument, the objections to the statements are sustained.
- To the extent Mr. Shepardson's declaration statement constitutes a legal conclusion, the objections to the statements are sustained.
- To the extent Mr. Shepardson's declaration is a recitation of a document or a statute or a rule, the document shall speak for itself and the objections to Mr. Shepardson's characterizations of the same are sustained.
- To the extent Mr. Shepardson's declaration poses questions, the questions are not testimony and so, the objections to the questions are sustained.
- To the extent Mr. Shepardson's declaration challenges the Court's findings that the

Brown email is privileged and confidential, the objections to such challenges are sustained. Mr. Shepardson's statements regarding any issues-factual or otherwise –underlying the Court's findings and decision that the Brown email is privileged and confidential are irrelevant to the motion before the Court.

- To the extent Mr. Shepardson makes character attacks upon CALTRANS in Statement 100(4) of the declaration, the objection is sustained.
- All other objections are overruled.

On July 27, 2023, JOHNSON filed "Objections to Defendant's Reply Papers Filed in Support of its Motion to Disqualify Christian's Attorney and Exclude Expert and Lay Testimony." After due consideration of the same and with good cause therefor, IT IS HEREBY FURTHER ORDERED that the objections are overruled for the reasons that follow.

With regard to JOHNSON's objection that CALTRANS filed a 142-page supplemental declaration with its Reply, the objection is overruled. The objection mischaracterizes the document as being a new document; one with new evidence and arguments. That is not the case. The Supplemental Declaration of W. Christopher Sims filed on July 26, 2023 is, in fact, a two-page declaration in which Mr. Sims explains that by a clerical error, his declaration which was filed with the moving papers on June 30, 2023 was not signed and upon discovery of that fact, he promptly signed the declaration and served the signed declaration (which was identical to the previous declaration except for the fact that it was unsigned) upon JOHNSON on

June 30, 2023. The Supplemental Declaration goes on to explain that when his office attempted to file the signed declaration with the Court, it was rejected as having been previously filed. Thus, the Supplemental Declaration explains that a Notice of Errata was prepared with the signed declaration and subsequently accepted by the Court. The Supplemental Declaration has attached to it the signed declaration and all of its exhibits as well as the proof of service showing service of the signed declaration upon JOHNSON on June 30, 2023. There is no new evidence or new arguments presented with the Reply.

JOHNSON's remaining objections are actually arguments challenging the merits of CALTRANS' objections. Because JOHNSON's "objections" are not truly evidentiary objections, they are overruled. Insofar as the Court carefully considered each of the objections made by CALTRANS and in doing so, also considered the arguments made by JOHNSON against the objections, the evidentiary issues raised by JOHNSON have been addressed.

The Background Facts

On January 20, 2022, JOHNSON's counsel, John Shepardson, advised CALTRANS' lead counsel, W. Christopher Sims, that JOHNSON would be re-tested by his retained psychologist, Dr. Williamson on January 28, 2022. Later that same day, CALTRANS attorney Paul Brown sent an email message to Nicholas Duncan who was a CALTRANS Maintenance Supervisor and the supervisor of JOHNSON at the time. It is this email message from Mr. Brown to Mr. Duncan that is at the heart of this motion to disqualify, hereinafter referred to as "the Brown email."

Within approximately 27 minutes after Mr. Brown sent his message to Mr. Duncan, Mr. Duncan photographed the message and sent it electronically to JOHNSON who then provided the photographed message to Mr. Shepardson.

The following morning, Mr. Shepardson sent an e-mail message to Mr. Sims with the attached copy of the photographed Brown email. In the message, Mr. Shepardson stated, in part, "[t]he enclosed email was sent to my client. It was an intentional disclosure. This appears to be the waiver of the attorney-client privilege, if any privilege attaches to the communication with Mr. Duncan."

Mr. Sims responded that same day and asserted that the Brown email was an attorney-client privileged and confidential communication and requested that it be deleted or destroyed and claimed that Mr. Duncan did not have authority to waive the privilege on behalf of CALTRANS. Mr. Shepardson replied with a rebuttal of CALTRANS' privilege claim. There was no mention of any intent to distribute the Brown email to others.

On January 28, 2022, Mr. Shepardson communicated to CALTRANS that "we are providing the email to our experts for its impact on their opinions." In fact, the Brown email was disclosed to Dr. Williamson and discussed with JOHNSON.

Mr. Sims re-stated the attorney-client privilege and again demanded that the Brown email and any copies be destroyed and demanded that the message not be disclosed to JOHNSON's experts, and asked that any persons to whom the message had been disclosed be identified. CALTRANS advised JOHNSON

that if he did not agree to cease and desist dissemination and destroy all copies, CALTRANS would file a motion for protective order.

A motion for protective order was filed and after a full hearing on the matter, on January 3, 2023, the Court granted the motion finding that the Brown email constituted a privileged and confidential attorney-client communication.

The Court's order further required that "[w]ithin 20 days following mailing of notice of entry of the Court's order, [JOHNSON] and his attorney, John Shepardson, shall: A. Return or destroy all copies of the Brown email and prepare, serve, and file a declaration under penalty of perjury that this has been done, or explaining the reason[s] it cannot be done. . . . [;] B. Include in the declaration identification of all persons to whom the Brown email is known to have been disclosed, and the date of each disclosure."

On or about April 17, 2023, CALTRANS filed a motion to enforce the protective order because neither JOHNSON nor his counsel had filed their respective declarations as ordered.

On April 24, 2023, JOHNSON and Mr. Shepardson filed their respective declarations. JOHNSON testified that to the best of his knowledge, he "destroyed all images of the 1/10/22 Paul Brown email to Nicholas Duncan that are in [his] possession." Declaration of JOHNSON, ¶ 3. JOHNSON then identifies seven (7) individuals to whom he showed and/or with whom he discussed the communication. *See*, Christian's Declaration Re Court Ordered Destruction of Attorney Paul Brown's 1/10/22 Email to Nicholas Dunn Forwarded to Christian, filed April 24, 2023. According to

JOHNSON's declaration, this activity began in January of 2022 and appears to have continued through November of 2022. JOHNSON further testifies that he "disclosed the Brown email with my attorney on or about 1/10/22 and thereafter many times to the present." Declaration of JOHNSON, ¶ 11 (emphasis added).

Mr. Shepardson, for his part, testified that he and his staff, at his direction, "have removed all images of the Brown email that [he is] aware of, from hardcopy files, computers, phones and any other electronic devices." Declaration of Shepardson, ¶ 11. Mr. Shepardson then identifies at least thirteen (13) individuals to whom he showed and/or with whom he discussed the communication. Mr. Shepardson states in his declaration that discussions regarding the Brown email have continued to "today" or "to the present" and include multiple discussions with JOHNSON's expert witness, Dr. Williamson, up to three to four weeks prior to April 24, 2023. *See*, Declaration of John A. Shepardson, Esq. Re Compliance with Court Order for Destruction of Brown Email, ¶¶ 15 [Christian Johnson], 16 [Marti Castillo], 18 [Sue Pelmulder], 19 [Violet Sabbatini], 20 [Marghuerite Johnson], 21 [Bennet Williamson], 33 [Jason Shepardson], and 34 [Eileen Perez]. In a supplemental declaration filed June 30, 2023, Mr. Shepardson further testified that he discussed the Brown email with ethics attorneys David Carr and Adam Koss and with Merri Baldwin.

It is clear that these disclosures were made in spite of CALTRANS' assertion that the Brown email was a privileged and confidential communication and

even after the Court found the Brown email to be a privileged and confidential communication.

CALTRANS now argues that Mr. Shepardson's disclosure of the Brown email "will irreparably affect the outcome of the proceedings [and] has and will prejudice" CALTRANS. CALTRANS submits that Mr. Shepardson's conduct "threatens the administration of justice and the integrity of the bar" and so, '[d]isqualification is the only remedy." Memo of Points & Authorities, page 1;10-15.

Mr. Shepardson argues that disqualification of him and of the expert witnesses is drastic and prejudicial. He argues that it was CALTRANS' delay in protecting the Brown email that created the circumstance that CALTRANS finds itself in and this motion is a tactical motion which should be denied.

Legal Standard for Disqualification Motion

Clark v. Superior Court (2011) 196 Cal.App.4th 37, 47–49 provides a good overview of the cases that create the legal standard for a disqualification motion. The Clark Court explains:

> A trial court's authority to disqualify an attorney derives from its inherent power to "control in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it, in every matter pertaining thereto." (Code Civ. Proc., § 128, subd. (a)(5); *SpeeDee*, 20 Cal.4th at p. 1145, 86 Cal.Rptr.2d 816, 980 P.2d 371; *see also Oaks Management Corporation v. Superior Court, supra,* 145 Cal.App.4th at p. 462, 51

Cal.Rptr.3d 561.) "The power is frequently exercised on a showing that disqualification is required under professional standards governing . . . potential adverse use of confidential information." (*Responsible Citizens v. Superior Court* (1993) 16 Cal. App.4th 1717, 1723–1724, 20 Cal.Rptr.2d 756.)

A disqualification motion involves a conflict between a client's right to counsel of his or her choice, on the one hand, and the need to maintain ethical standards of professional responsibility, on the other. (*City and County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal.4th 839, 846, 43 Cal.Rptr.3d 771, 135 P.3d 20.) Although disqualification necessarily impinges on a litigant's right to counsel of his or her choice, the decision on a disqualification motion "involves more than just the interests of the parties." (*SpeeDee, supra*, 20 Cal.4th at p. 1145, 86 Cal.Rptr.2d 816, 980 P.2d 371.) When ruling on a disqualification motion, "[t]he paramount concern must be to preserve public trust in the scrupulous administration of justice and the integrity of the bar. The important right to counsel of one's choice must yield to ethical considerations that affect the fundamental principles of our judicial process." (SpeeDee, at p. 1145, 86 Cal.Rptr.2d 816, 980 P.2d 371; *see also Jessen v. Hartford Casualty Ins. Co.* (2003) 111 Cal.App.4th 698, 705–706, 3 Cal.Rptr.3d 877.)

The *SpeeDee* court recognized that one of the

> fundamental principles of our judicial process is the attorney-client privilege: "Protecting the confidentiality of communications between attorney and client is fundamental to our legal system. The attorney-client privilege is a hallmark of our jurisprudence that furthers the public policy of ensuring '"the right of every person to freely and fully confer and confide in one having knowledge of the law, and skilled in its practice, in order that the former may have adequate advice and a proper defense."' [Quoting *Mitchell v. Superior Court* (1984) 37 Cal.3d 591, 599, 208 Cal.Rptr. 886, 691 P.2d 642.]" (*SpeeDee, supra*, 20 Cal.4th at p. 1146, 86 Cal.Rptr.2d 816, 980 P.2d 371.) Because it is this privilege that was the touchstone for the trial court's disqualification ruling, we outline the rules developed for safeguarding that privilege.

State Compensation Ins. Fund v. WPS, Inc. (1999) 70 C.A.4th 644

> In *State Fund, supra*, the court evaluated the ethical obligations of a lawyer when that lawyer comes into possession of privileged materials without the holder of the privilege having waived it. (*Id.* at pp. 654–655, 82 Cal.Rptr.2d 799.) The court, to "protect the sanctity of the attorney-client privilege and to discourage unprofessional conduct" (*id* at p. 657, 82 Cal.Rptr.2d 799), ruled that:
>
> "the obligation of an attorney receiving privileged documents due to the inadvertence of another is as follows: When a lawyer who

receives materials that obviously appear to be subject to an attorney-client privilege or otherwise clearly appear to be confidential and privileged and where it is reasonably apparent that the materials were provided or made available through inadvertence, the lawyer receiving such materials should refrain from examining the materials any more than is essential to ascertain if the materials are privileged, and shall immediately notify the sender that he or she possesses material that appears to be privileged." (*Id.* at p. 656, 82 Cal.Rptr.2d 799.)

Rico v. Mitsubishi Motors Corp. (2007) 42 C.4th 807

In *Rico, supra,* the court adopted the obligations articulated in State Fund and extended them to materials protected by the attorney work product privilege, noting those obligations were rooted in the attorney's obligation to "'respect the legitimate interests of fellow members of the bar, the judiciary, and the administration of justice.'" (*Rico, supra,* 42 Cal.4th at p. 818, 68 Cal.Rptr.3d 758, 171 P.3d 1092.) Rico also addressed the question of remedy when the attorney, having obtained privileged documents, did not comply with those obligations. Rico echoed State Fund's caution that "'"[m]ere exposure"' to an adversary's confidences is insufficient, standing alone, to warrant an attorney's disqualification" (Rico, at p. 819, 68 Cal.Rptr.3d 758, 171 P.3d 1092, quoting State Fund, at p. 657, 82 Cal.Rptr.2d 799), because Rico agreed such a "a draconian rule . . . '"[could] nullify a

> party's right to representation by chosen counsel any time inadvertence or devious design put an adversary's confidences in an attorney's mailbox.'"" (*Rico*, at p. 819, 68 Cal.Rptr.3d 758, 171 P.3d 1092.) Rico also stated, however, that "'in an appropriate case, disqualification might be justified if an attorney inadvertently receives confidential materials and fails to conduct himself or herself in the manner specified above, assuming other factors compel disqualification.'" (*Ibid.*)

(Emphasis added.)

Importantly, "regardless of how the attorney obtained the documents, whenever a reasonably competent attorney would conclude the documents obviously or clearly appear to be privileged and it is reasonably apparent they were inadvertently disclosed, the State Fund rule requires the attorney to review the documents no more than necessary to determine whether they are privileged, notify the privilege holder the attorney has documents that appear to be privileged, and refrain from using the documents until the parties resolve or the court resolves any dispute about their privileged nature. The receiving attorney's reasonable belief the privilege holder waived the privilege or an exception to the privilege applies does not vitiate the attorney's State Fund duties. The trial court must determine whether the holder waived the privilege or an exception applies if the parties fail to reach an agreement. The receiving attorney assumes the risk of disqualification when that attorney elects to use the documents before the parties or the trial court has resolved the dispute over their privileged nature and the documents ultimately are found to be privileged."

McDermott Will & Emery LLP v. Superior Court (2017) 10 Cal.App.5th 1083, 1092–1093.

Legal Analysis

Here, CALTRANS immediately advised JOHNSON that it was asserting the attorney-client privilege when CALTRANS first learned that Mr. Duncan had shared the email with JOHNSON. While Mr. Shepardson disagreed with CALTRANS' assertions, Mr. Shepardson still had the duty under *State Fund, supra*, to refrain from using or otherwise disclosing the communication until the parties or the Court resolved the dispute. *McDermott Will & Emery LLP v. Superior Court* (2017) 10 Cal.App.5th 1083, 1092–1093. Mr. Shepardson and JOHNSON did not do so. Their own declarations show that each discussed and disclosed the Brown email to several people, including the expert witnesses. *See*, Christian's Declaration Re Court Ordered Destruction of Attorney Paul Brown's 1/10/22 Email to Nicholas Dunn Forwarded to Christian, filed April 24, 2023; *see also*, Declaration of John A. Shepardson, Esq. Re Compliance with Court Order for Destruction of Brown Email, filed April 24, 2023.

In addition to the declaration that Mr. Shepardson submitted in compliance with the January 3, 2023 protective order, Mr. Shepardson also filed a declaration on July 18, 2023, in opposition to this motion to disqualify, and testified that the Brown email was provided to JOHNSON's "experts for its impact on their opinions." *See*, Declaration of Shepardson, ¶¶ 34, 39. Mr. Shepardson testified that prior to JOHNSON's January 28, 2023 examination with Dr. Williamson, CALTRANS attorneys "were on notice that Christian claimed the [Brown] email was damaging, he would

not give it up, and knew . . . that Christian would be interviewed about his present work conditions [by Dr. Williamson] and so naturally would disclose the [Brown] email and its damage to the doctor during his examination." Declaration of Shepardson, ¶ 26. In fact, in his declaration dated May 23, 2023, Mr. Shepardson testified that "[o]n 1/28/22, [he informed CALTRANS] the Brown email was being provided to adverse third parties." *See*, Second Declaration of John Shepardson, dated May 23, 2023, ¶ 5(4) ["On 1/28/22, Defendant was informed the Brown email was being provided to adverse third parties."]. On January 28, 2022, Mr. Shepardson wrote CALTRANS, in pertinent part:

> "Five, we are providing the email to our experts for its impact on their opinions.
>
> Six, to address the email only, we will make Christian and the experts available for their depositions for up to two hours each, which seems more than reasonable. Of course, as you know, Dr. Williamson is retesting Christian and you can depose him on the email along with the results of the recent (today's) testing. . . .
>
> Seven, we intend to offer the email into evidence at trial. . . . "

See Second Declaration of John Shepardson, dated May 23, 2023, Exhibit 3.

Mr. Shepardson's testimony establishes that he elected to use the Brown email as part of his case against CALTRANS prior to the resolution of the dispute regarding its nature. Mr. Shepardson read it,

studied it, evaluated it, shared it and incorporated its contents into the case and into his trial strategy.

Mr. Shepardson's testimony also establishes that Mr. Shepardson made the decision – early on-to use the Brown email in this litigation in spite of CALTRANS' protests. In opposition, Mr. Shepardson argues that there were delays in CALTRANS' responses and he suggests that he consistently reached out to address and resolve the issue, but Mr. Shepardson's May 23, 2023 declaration and Exhibit 3 to his declaration undermine his argument. Mr. Shepardson's testimony confirms that the decision to use the Brown email was made on January 28, 2022; that is, approximately two weeks after the inadvertent disclosure and after CALTRANS asserted that the communication was privileged and confidential.

Mr. Shepardson strenuously argues that disqualification is not warranted because CALTRANS failed to act; CALTRANS failed to immediately protect the email and for his part, Mr. Shepardson complied with his ethical duties under State Fund. Mr. Shepardson maintains that CALTRANS had the "burden to act," generally citing to the McDermott case but without any pinpoint citation. In reviewing the McDermott case, it appears that Mr. Shepardson's arguments rely upon the discussion in the McDermott dissent. The McDermott dissent expresses its opinion that the McDermott majority created "an unwarranted extension of the ethical rule declared in *State Comp. Ins. Fund v. WPS, Inc.*," *supra*. *See, McDermott Will & Emery LLP v. Superior Court* (2017) 10 Cal.App.5th 1083, 1126. "[A] majority opinion of the [appellate court] states the law and . . . a dissenting opinion has no function except to express the private view of the dissenter." *Wall v.*

Sonora Union High School Dist. (1966) 240 Cal.App.2d 870, 872. "Under stare decisis, . . . [d]ecisions of every division of the District Courts of Appeal are binding . . . upon all the superior courts of this state, ... Courts exercising inferior jurisdiction must accept the law declared by courts of superior jurisdiction. It is not their function to attempt to overrule decisions of a higher court." *Auto Equity Sales, Inc. v. Superior Court of Santa Clara County* (1962) 57 Cal.2d 450, 455.

This Court is bound to follow *McDermott, supra.* As previously noted, the McDermott Court has concluded and directed that the "State Fund rule requires the attorney to . . . refrain from using the documents until the parties resolve or the court resolves any dispute about their privileged nature. The receiving attorney's reasonable belief the privilege holder waived the privilege or an exception to the privilege applies does not vitiate the attorney's State Fund duties. The trial court must determine whether the holder waived the privilege or an exception applies if the parties fail to reach an agreement. The receiving attorney assumes the risk of disqualification when that attorney elects to use the documents before the parties or the trial court has resolved the dispute over their privileged nature and the documents ultimately are found to be privileged." *McDermott Will & Emery LLP v. Superior Court* (2017) 10 Cal.App.5th 1083, 1092–1093.

Having failed to do so, Mr. Shepardson now bears the risk of his decision to use and disclose the Brown email.

JOHNSON's expert witness, Dr. Williamson, in a sworn declaration signed on August 31, 2022, testifies that he was shown the Brown email by JOHNSON

and the same was discussed during his evaluation of JOHNSON. Dr. Williamson further testified:

> "29. The email has necessarily and significantly affected my evaluation of Christian because it caused him to relive the experiences central to the instant case that were extremely upsetting to him. This is common in cases involving trauma.
>
> 30. Because of the email I have expended additional time and effort in assessing him and am prepared to offer opinions about his effects.
>
> 31. I fully expect to testify at trial about my opinions of Christian, including the negative effect of this email. It would be difficult, and perhaps impossible, to give testimony about Christian's psychological harm caused by Defendant . . . without consideration of the damaging email. The negative effect of the email relates directly to Christian's mental health and exacerbated the psychological damage he is experiencing. Christian would not have been forthright had he not shared the letter and its effect on him with me during my evaluation." (Emphasis added.)

See, Declaration of John A. Shepardson in Opposition to Defendant California Department of Transportation's Motion for Protective Order, filed October 10, 2022, Exhibit 24.

In opposing this motion to disqualify Dr. Williamson as an expert witness, Mr. Shepardson testifies that the expert witnesses, including Dr. Williamson, "can testify without . . . reliance on the

[Brown] email." *See*, Declaration of Shepardson, filed July 18, 2023, ¶¶ 88, 105. Indeed, Dr. Williamson also testifies that he is "now prepared to, and can, testify at trial with or without reliance on the Brown email as its effects have attenuated." Declaration of Bennett Williamson, dated July 15, 2023, filed as Exhibit P to the Declaration of John A. Shepardson, Esq. in Opposition to Defendant's Motion to Disqualify Christian's Attorney and Exclude Expert and Lay Testimony, filed July 18, 2023. This testimony is completely contrary to Dr. Williamson's previous testimony and gives the Court serious concern.

The other expert witnesses are Human Resources experts, Jan Duffy and Virginia Simms. Ms. Duffy testifies that she "was provided a copy of the Brown email early in 2022" although she has "no present recollection [on July 13, 2023] of seeing the email." She further testifies that she has "not [been] served with any motions . . . seeking to return or destroy the Brown email." She confirms that she "can testify without relying on the Brown email, or if asked, . . . [she] can testify about the Brown email." *See*, Declaration of HR Expert Jan Duffy dated July 13, 2023, filed as Exhibit R to the Declaration of John A. Shepardson, Esq. in Opposition to Defendant's Motion to Disqualify Christian's Attorney and Exclude Expert and Lay Testimony, filed July 18, 2023.

Preliminarily, Ms. Duffy's testimony raises the question of whether all images of the Brown email that Mr. Shepardson is aware of have been removed, deleted or destroyed as Mr. Shepardson represents is the case in his April 24, 2023 declaration. *See*, Declaration of John A. Shepardson, Esq. re Compliance with Court Order for Destruction of Brown Email, filed

April 24, 2023, ¶ 11 ["I, and at my direction, my staff, have removed all images of the Brown email that I am aware of, from hardcopy files, computers, phones and any other electronic devices."] The inference from this statement is that Mr. Shepardson and his office have done all they could to remove all images of the Brown email. The Court would expect that to include a direction from Mr. Shepardson or his law firm to those hired in this case to also remove all images of the Brown email. Ms. Duffy's testimony suggests that she still has possession of the Brown email; in other words, the inference is that Mr. Shepardson has not directed that the Brown email be removed, deleted or destroyed from her file in this matter. More to the point of this motion, however, is the fact that the Brown email is part of her current consciousness and evaluation regarding this case.

With regard to Human Resources expert, Virginia Simms, Ms. Simms testifies that she was also provided a copy of the Brown email in early 2022. And, Ms. Simms has also testified that she has not been asked "by Defendant" "to return the email." Ms. Simms testifies that she "can testify at trial with or without relying on the Brown email" and while she has "not done any in depth consideration of the email," she found "that it appeared retaliatory." *See*, Declaration of HR Expert Virginia Simms dated July 13, 2023, filed as Exhibit Q to the Declaration of John A. Shepardson, Esq. in Opposition to Defendant's Motion to Disqualify Christian's Attorney and Exclude Expert and Lay Testimony, filed July 18, 2023.

Again, there is a preliminary concern that not all images of the Brown email of which Mr. Shepardson is aware have been removed, deleted or destroyed as Mr.

Shepardson represented to the Court was the case. And, Ms. Simms testimony establishes that the Brown email is part of her current consciousness and evaluation regarding this case.

After giving due consideration to the facts, the legal standard and the written arguments and documentary evidence submitted, IT IS HEREBY ORDERED that the motion to disqualify John Shepardson and his law firm as JOHNSON's counsel and the motion to disqualify JOHNSON's experts is granted.

The Court finds that Mr. Shepardson's past disclosure and continuing use of the Brown email will have a substantial and continuing effect on future proceedings in this action. Mr. Shepardson is disqualified because his review and use of the Brown email goes beyond a "mere exposure." As noted above, Mr. Shepardson elected to use the Brown email as part of his case against CALTRANS prior to the resolution of the dispute regarding its nature. Mr. Shepardson read the Brown email; he reviewed it; he studied it; he evaluated it; he shared it; and, he incorporated its contents into the case and into his trial strategy. Having done so, Mr. Shepardson's continued participation in this case as JOHNSON's counsel raises the likelihood that use of the Brown email could affect the outcome of these proceedings both in terms of CALTRANS' rights against use of its privileged communications and in terms of the integrity of these judicial proceedings and public confidence in them.

The several declarations submitted by Mr. Shepardson in this case demonstrates the extent to which Mr. Shepardson has already incorporated the Brown email into this case. It is especially noteworthy that

Mr. Shepardson continued to refer to, disclose and discuss the Brown email even after the Court issued the protective order finding the communication to be privileged and confidential. The Court therefore finds Mr. Shepardson's disqualification necessary to prevent future prejudice or harm to CALTRANS from Mr. Shepardson's exploitation of the e-mail's contents. The "bell cannot be 'unrung.'" *Rico v. Mitsubishi Motors Corp.* (2007) 42 C.4th 807, 815.

The continued representation of JOHNSON by Mr. Shepardson could also trigger doubts about the integrity of the judicial process because Mr. Shepardson's previous access to and use of the Brown email "could undermine the public trust and confidence in the integrity of the adjudicatory process." *See, Clark v. Superior Court* (2011) 196 C.A.4th 37, 55.

> "[D]isqualification does not require evidence of an existing injury from the use of the inadvertently disclosed materials." McDermott, *supra* @ 1124 citing *Clark v. Superior Court, supra* @ 55. "Disqualification is proper as a prophylactic measure to prevent potential future harm to [CALTRANS] from information [Mr. Shepardson] should not have used." *Ibid.*

The critical question is whether there is a genuine likelihood that Mr. Shepardson's review and use of the Brown e-mail will affect the outcome of this action and this Court answers the question affirmatively.

> With regard to the expert witnesses, it is well-established that if an expert has relied on privileged material to formulate an

> opinion, the court may exclude the expert's testimony as necessary to enforce the privilege. *Fox v. Kramer* (2000) 22 C.4th 531, 539. CALTRANS makes the point that the circumstances created by Mr. Shepardson's use and disclosure of the Brown email to Dr. Williamson and other expert witnesses cannot be mitigated short of disqualification of the expert witnesses because CALTRANS cannot depose the expert witnesses about their opinions without risking waiver of the privilege. Here, again, "the bell cannot be 'unrung'" and use of the Brown email by JOHNSON's experts undermines "the defense experts' opinions and place[s] [CALTRANS] at a great disadvantage." *See, Rico v. Mitsubishi Motors Corp.* (2007) 42 C.4th 807, 815, 819.

Thus, the Court finds that the damage done by Mr. Shepardson's review and use of the Brown email is unmitigable and disqualification of Mr. Shepardson and his firm and disqualification of the expert witnesses is the proper remedy.

IT IS SO ORDERED.

/s/ Barbara A. Kronlund
Presiding Judge

Defendant's Motion for Summary Adjudication is granted.

Defendant's Motion to Disqualify counsel for Plaintiff, Christian Johnson, (JOHNSON) and to disqualify JOHNSON's expert witnesses is granted.

Counsel for Defendant shall prepare the formal orders consistent with the orders herein.

The Jury Trial Assignment set at 9:30 AM on August 28, 2023 remains as previously ordered.

TENTATIVE RULING,
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN JOAQUIN
(AUGUST 24, 2023)

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN JOAQUIN

CHRISTIAN L. JOHNSON ET AL.

v.

CALIFORNIA DEPARTMENT OF TRANSPORTATION

Case Number: STK-CV-UCR-2019-0000281

Before: Barbara A. KRONLUND, Presiding Judge.

Motion for summary adjudication/Motion for Disqualification

On 08/23/2023 the Supreme Court denied Plaintiff's Petition for Review and Application for Stay .

If there is request for oral argument, the matter will be heard on 08/28/2023 at 9:00 A.M. in Dept. 10D with personal appearances required.

Court is issuing one tentative ruling for both motions on calendar this date.

TENTATIVE RULINGS:

This is an employment discrimination, harassment, and retaliation action filed by Plaintiff, CHRISTIAN

JOHNSON (hereinafter referred to as "JOHNSON") against his employer Defendant CALIFORNIA DEPARTMENT OF TRANSPORTATION (hereinafter referred to as "CALTRANS") during his first period of employment with CALTRANS (between 2017 and 2018 at the CALTRANS District 10 Maintenance Yard) wherein JOHNSON alleges he was sexually and racially harassed and retaliated against while employed as a maintenance worker.

The First Amended Complaint (hereinafter "FAC"), filed on March 12, 2019, is the operative complaint and it alleges 14 causes of action for: (1) EEOC Violation (sexual harassment); (2) EEOC Violation (retaliation); (3) EEOC Violation (racial discrimination/harassment); (4) EEOC Violation (retaliation); (5) FEHA Violation (sexual harassment); (6) FEHA Violation (retaliation); (7) FEHA Violation (racial discrimination/harassment); (8) FEHA Violation (retaliation); (9) FEHA Violation (failure to prevent harassment); (10) Labor Code Violation (retaliation); (11) Labor Code Violation (Retaliation); (12) Violation of 42 USC 1981; (13) Intentional Infliction of Emotional Distress; (14) Negligence; and (15) Injunctive Relief.

CALTRANS has filed a motion for summary adjudication challenging the 13th cause of action for intentional infliction of emotional distress and the 14th cause of action for negligence. The bases for the motion are that: 1) a public entity is not liable for common law torts, such as negligence and intentional infliction of emotional distress; 2) Gov't Code § 815.2 [vicarious liability] is not a statutory basis for liability because the alleged conduct is beyond the scope of employment; and, 3) Gov't Code § 815.6 is not a statutory basis for liability because the statute neither authorizes nor constitutes a cause of action for negligence or

intentional infliction of emotional distress against a public entity.

TENTATIVE RULING:

Motion for Summary Adjudication

"A party may move for summary adjudication as to one or more causes of action within an action, . . . if the party contends that the cause of action has no merit, ... A motion for summary adjudication shall be granted only if it completely disposes of a cause of action, ... " California Code of Civil Procedure § 437c(f)(1). A motion for summary adjudication proceeds "in all procedural respects as a motion for summary judgment." California Code of Civil Procedure § 437c(f)(2).

Summary judgment is appropriate if all the papers submitted 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. Code Civ. Proc., § 437c(c).

"'A defendant seeking summary judgment has met the burden of showing that a cause of action has no merit if that party has shown that one or more elements of the cause of action cannot be established [or that there is a complete defense to that cause of action]. . . . Once the defendant's burden is met, the burden shifts to the plaintiff to show that a triable issue of fact exists as to that cause of action. . . . [The court] must determine whether the facts as shown by the parties give rise to a triable issue of material fact. . . . In making this determination, the moving party's affidavits are strictly construed while those of the opposing party are liberally construed.' . . . [The

court] accept[s] as undisputed facts only those portions of the moving party's evidence that are not contradicted by the opposing party's evidence. . . . In other words, the facts alleged in the evidence of the party opposing summary judgment and the reasonable inferences therefrom must be accepted as true." (Citation.) *Hanson v. Grode* (1999) 76 Cal.App.4th 601, 603–604.

For the reasons stated below, IT IS HEREBY ORDERED that the motion for summary adjudication of the 13th cause of action for intentional infliction of emotional distress is granted and the motion for summary adjudication of the 14th cause of action for negligence is granted.

Evidentiary Rulings

There are no evidentiary rulings. Neither party has requested a ruling for evidentiary purposes and no evidentiary objections were lodged by JOHNSON.

Facts

The facts submitted by CALTRANS in support of its motion for summary adjudication are undisputed:

- This action concerns JOHNSON's first employment with CALTRANS which occurred between 2017 and 2018. Fact 1, undisputed.
- During that time, JOHNSON was employed in CALTRANS District 10 Maintenance Yard in Stockton. Fact 2, undisputed.
- Related to that employment, JOHNSON alleges that CALTRANS maintained a discriminatory and hostile working environment, including numerous instances of sexual and racial harassment from fellow co-workers.

These instances include calling JOHNSON "boy," using the "N-word" around JOHNSON, JOHNSON observing his co-worker Mark Taylor (Taylor) poke at another co-worker's genitals, Taylor poking JOHNSON "in the butt with a stick" and making several pelvic thrusts into JOHNSON, and Taylor threatening JOHNSON by "trying to make [JOHNSON] feel guilty" and telling him "I can make your life hell. I can get you fired. I carry a concealed weapon in my vehicle." Fact 3, undisputed.

- JOHNSON alleges that his 13th cause of action if intentional infliction of emotional distress is based upon a "mandatory duty" pursuant to "the EEOC and FEHA statutes not to discriminate, harass, or retaliate" against JOHNSON. Fact 5, undisputed.
- JOHNSON'S 13th cause of action does not allege any other statutory basis of liability but it does incorporate by reference the following statutes: Title 42 USC § 2000e-2(a); Title 42 USC § 2000e-3(a); Government Code § 12940; Government Code § 12940(h); Government Code § 12940(k); Labor Code § 1102.5; Labor Code § 98.6; and Title 42 USC § 1981. Fact 6, undisputed.
- JOHNSON alleges the basis of his negligence claim as "CALTRANS had mandatory duties pursuant to EEOC and FEHA to not discriminate, harass, or retaliate against JOHNSON." Fact 8, undisputed.

- JOHNSON further alleges that "CALTRANS breached its mandatory duties and committed negligence per se by violating said statutes." Fact 9, undisputed.
- JOHNSON'S 14th cause of action does not allege any other statutory basis of liability but it does incorporate by reference the following statutes: Title 42 USC § 2000e-2(a); Title 42 USC § 2000e-3(a); Government Code § 12940; Government Code § 12940(h); Government Code § 12940(k); Labor Code § 1102.5; Labor Code § 98.6; and Title 42 USC § 1981. Fact 9, undisputed.
- CALTRANS "is responsible for designing and maintaining the public roads and bridges in the State of California." Fact 11, undisputed.
- CALTRANS has policies in place that prohibit discrimination and harassment. Fact 12, undisputed. Legal Analysis

Government Code § 815 provides, in pertinent part:

> (a) A public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person.

The Legislative Committee Comments to Government Code § 815 explains, in pertinent part:

> This section abolishes all common law or judicially declared forms of liability for public entities, ... [P]ublic entities may be held liable only if a statute . . . is found declaring them to be liable. Because of the limitations contained in Section

814, which declares that this part does not affect liability arising out of contract or the right to obtain specific relief against public entities and employees, the practical effect of this section is to eliminate any common law governmental liability for damages arising out of torts. . . . (Emphasis added.)

> Intentional infliction of emotional distress and negligence are common law tort theories. *See, Myers v. Trendwest Resorts, Inc.* (2007) 148 C.A.4th 1403, 1426 [common law claims include intentional infliction of emotional distress]; *see also, California Service Station and Auto. Repair Ass'n v. American Home Assur. Co.* (1998) 62 Cal.App.4th 1166, 1177–1178 ["A [negligence] suit for damages is based on the theory that the conduct inflicting the injuries is a common-law tort. . . ."].

Accordingly, resolution of this motion will fall on the question of whether there is statutory authority for CALTRANS' liability.

1. Negligence Claim (14th Cause of Action)

A. Government Code § 815.2

Government Code § 815.2 provides, in pertinent part:

> (a) A public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would, apart from this section, have given rise to a

cause of action against that employee or his personal representative.

(b) Except as otherwise provided by statute, a public entity is not liable for an injury resulting from an act or omission of an employee of the public entity where the employee is immune from liability.

The Legislative Committee Comments to Government Code § 815.2 explains, in pertinent part:

> This section imposes upon public entities vicarious liability for the tortious acts and omissions of their employees. It makes clear that in the absence of a statute a public entity cannot be held liable for an employee's act or omission where the employee himself would be immune. The California courts have held on many occasions that a public employee is immune from liability for his discretionary acts within the scope of his employment even though the discretion be abused. . . . All that will be necessary will be to show that some employee of the public entity tortiously inflicted the injury in the scope of his employment under circumstances where he would be personally liable. (Emphasis added.)

Thus, there is a two-part analysis required for the application of Government Code § 815.2. The first question posed is whether the act or omission was within the scope of the acting employee's employment. If not, then Government Code § 815.2 does not apply to confer liability to the public entity. If the act or omission was within the scope of employment, the second question posed is whether the act or omission

gives rise to a personal cause of action against the acting employee.

Scope of Employment

CACI No. 3720 defines conduct to be within the scope of employment when "(a) the conduct is 'reasonably related to the kinds of tasks that the employee was employed to perform;' or, (b) the conduct is "reasonably foreseeable in light of the employer's business or the [employee's job] responsibilities." *See also, Farmers Ins. Group v. County of Santa Clara* (1995) 11 C.4th 992, 1003.

Ordinarily, the issue of whether an employee acted within the scope of employment presents a question of fact but when the facts are undisputed and there are no conflicting inferences, it becomes a question of law. *Mary M. v. City of Los Angeles* (1991) 54 C.3d 202, 213. Here, CALTRANS regards the factual allegations of the FAC as established for purposes of the motion; JOHNSON offers no new or different facts for consideration. Thus, the undisputed facts for purposes of this motion are:

"9. Caltrans has long-established policies and procedures that call for a 'zero' tolerance for sexual/racial discrimination, harassment, or retaliation.

10. Christian and a co-worker Marlon Baker ('Marlon') work out of the Caltrans District 10 maintenance yard, which is located just off Dr. Martin Luther King Drive in Stockton, CA.

. . .

12. They are both black.
13. Caltrans employees Mark Taylor ('Taylor') and Jimmy Ell ('Ell') repeatedly call Christian and Marlon Baker, 'boy' or 'boys', even after it is communicated by Marlon that the language is unacceptable and offensive.
14. Taylor is white.
15. He uses the word N-word, which is inherently racial and offensive, in front of Christian and Marlon.
16. Taylor makes an unwanted poke at Marlon's genitals while Marlon is on the ground doing Caltrans' work.
17. Christian is nearby and sees the battery.
18. In the summer of 2017 Christian is performing work for Caltrans by stenciling on the side of a bridge.
19. His back is to Taylor.
20. First sexual battery of Chris. Taylor approaches Christian and pokes him in the butt with a stick.

. . .

23. Second sexual battery. Christian turns arounds (sic), continues his Caltrans work, and Taylor pokes him again in the butt.
24. Christian tells Taylor to stop it with words to the effect of: 'Man, get out of here with that.'

. . .

33. Third through at least sixth sexual batteries. In January 2018 Christian is leaning over a bridge working on a rail.

34. Lead worker Joey Cook is present at the scene.

35. Taylor walks up behind Christian.

36. Without advance notice, he grabs Christian's belt and simulates sexual intercourse with Christian.

37. He makes several pelvic thrusts with his hips, which pound into Christian's rear-end.

38. Taylor admits he may have made a sexually suggestive motion with his arm.

39. The suggestive action being pretending to spank Christian's behind.

. . .

44. Caltrans undertakes an internal investigation of Taylor's and Ell's abusive conduct toward Christian and Marlon.

45. On or about January 24[,] 2018[,] Christian is interviewed by Caltrans' DCIU Investigatory Aaron Gabbani.

46. The interviewers say the investigation is confidential.

47. Retaliation by pressure to cover-up what happened. That same day, Taylor calls Christian approximately two times.

. . .

50. Christian is feeling pressure from Taylor to cover-up what happened.

51. Taylor interviewed February 21, 2018. After the interview Taylor frantically calls Christian six to eight times.

. . .

58. Retaliation by pressure to obstruct investigation. Taylor then tells Christian to call the investigator and say that his words were taken out of context and that the events were not as previously described.

. . .

62. Christian asks the investigator if he can withdraw his statement and he responds that the matter is out of his hands.

63. More retaliation. That same day, Taylor's brother, Supervisor Matt Connelly, calls Christian, and it is alleged on information and belief, he does so as part of an agreement with his brother, to pressure Christian to falsely report.

64. Christian does not take the call.

65. DCIU Report signed off on March 9, 2018. The report confirms Taylor engaged in sexual misconduct in violation of Caltrans' policies and procedures.

66. On March 19, 2018[,] Caltrans' EEO Office Chief Shannon Flynn issues the DCIU report to Christian.

67. Retaliation & hostile work environment. On March 26, 2019[,] Taylor contacts Christian and is angry at the findings in the report.

68. He yells at Christian.

69. Taylor says to Christian, "I can make your life hell. I can get you fired. I carry a concealed weapon in my vehicle."

. . .

77. On March 31, 2018[,] Christian receives the DCIU report. Chris is shocked to learn he is listed as a complainant against Taylor.

78. Retaliation. On April 2, 2018[,] Taylor calls Christian and leaves a message stating now he knew why Christian would not return his calls or texts.

79. On April 4, 2018[,] Christian sends a memo to the 'Cal Trans Superintendent District 10'.

80. Hostile work environment. Christian sets forth the reasons why he is being forced to resign.

. . .

83. Retaliation. Christian's ally Marlon is transferred to landscaping and Chris is left isolated from his friend, co-complainant, and ostracized from the local workers.

84. Christian asks to be reassigned to another district where he can do the same type of work, working on bridges.

85. Retaliation. Caltrans refuses to reassign Christian and instead places him in an office across the street from the maintenance yard where Taylor works.

. . .

94. Hostile work environment. Christian is under severe emotional stress from the pressure arising from the sexual harassment, bullying, directives to lie, anger for telling the truth, proximity to Taylor and his friends, dead-end job, fear of physical retaliation and death, loss of the work he loves to do, and while the abuser keeps his job.

. . .

107. Christian is informed and believes that Supervisor Greg Heath knew or should have known of the ongoing sexual and racial harassment, and retaliation, and failed to adequately address and/or prevent the misconduct."

(Plaintiff's FAC, 6:5-13:22.) (Emphasis in original text.)

The case of *Farmers Ins. Group v. County of Santa Clara* (1995) 11 C.4th 992 is on point and dispositive of the issue.

> In *Farmers, supra,* the California Supreme Court conducted a "scope of employment" analysis in the context of a male deputy sheriff's repeated sexual harassment of female deputy sheriffs while both were on the job. The Supreme Court concluded that the sexual harassment was not within the scope of

employment, explaining:

> "[T]he deliberate targeting of an individual employee by another employee for inappropriate touching and requests for sexual favors is not a risk that may fairly be regarded as typical of or broadly incidental to the operation of a county jail, such conduct must be deemed to fall outside the scope of a deputy sheriff's employment.
>
> . . .
>
> Even though . . . Nelson committed virtually all of the harassing acts during his work hours at the jail, Farmers cannot prevail on the scope of employment issue without also establishing that the acts arose out of the employment. As explained above, '[i]f an employee's tort is personal in nature, mere presence at the place of employment and attendance to occupational duties prior or subsequent to the offense will not give rise to a cause of action against the employer under the doctrine of respondeat superior.'"

(*Farmers Ins. Group v. County of Santa Clara* (1995) 11 Cal.4th 992, 997,1007.)

Here, and with regard to the alleged actions of CALTRANS employees Mark Taylor, Jimmy Ell, and/or Matt Connelly, each of these employees' actions were beyond the scope of their employment. The actions were all personal in nature and not motivated by any work-related duties or disputes over work performance, or the like. With attention to Taylor's threats to have JOHNSON terminated, his threat did not

arise out of any inherent authority Taylor had as a CALTRANS employee at the time.

> Accordingly, the Court finds that all the alleged conduct involving racial slurs, sexual harassment, sexual battery, threats and intimidation against JOHNSON falls outside of the scope of employment and therefore, Government Code § 815.2 does not confer vicarious liability for these actions to CALTRANS.
>
> This leaves the remaining factual allegations involving: 1) the inaction of CALTRANS' employee, Joey Cook (lead worker), when present at the scene of an incident of sexual battery; 2) the inaction of Greg Heath (supervisor), knowing of the harassment of, and threats/intimidation to, JOHNSON; and, 3) an unidentified CALTRANS' employee's decision not to re-assign JOHNSON away from Taylor . These alleged omissions all relate to the individual employee's supervisory duties and as such, the alleged omissions fall within the scope of the individual employee's scope of employment.

Accordingly, the second step of the Government Code § 815.2 analysis becomes necessary.

Act/Omission Gives Rise to Cause of Action against Offending Employee

> "[I]n order for vicarious public entity liability to attach, a public employee, either named as a defendant or at least 'specifically identified' by the plaintiff, must have engaged in an act or omission giving rise to that employee's

tort liability." *Koussaya v. City of Stockton* (2020) 54 Cal.App.5th 909, 944.

Setting aside the fact that with regard to a failure to re-assign JOHNSON away from Taylor, no individual employee has been named (*see*, FAC, ¶ 85), none of the factual allegations against Joey Cook, Greg Heath, and/or the unnamed CALTRANS' employee responsible for reassignments supports a personal cause of action against the respective employee. *See, C.A. v. William S. Hart Union High School Dist.* (2012) 53 Cal.4th 861, 877 ["Absent . . . a special relationship, there can be no individual liability to third parties for negligent hiring, retention or supervision of a fellow employee, and hence no vicarious liability under section 815.2. . . . "].

Accordingly, as to the remaining factual allegations that are within the scope of the offending employee's employment, Government Code § 815.2 does not confer vicarious liability for these actions to CALTRANS because the offending employee cannot be held personally liable for the alleged negligence.

B. Government Code § 815.6

Government Code § 815.6 reads:

"Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the

> public entity establishes that it exercised reasonable diligence to discharge the duty."

The Legislative Committee Comments to Government Code § 815.2 explains, in pertinent part:

> "This section declares the familiar rule, applicable to both public entities and private persons, that failure to comply with applicable statutory or regulatory standards is negligence."

> It is well-settled that Government Code § 815.6 "imposes liability on a public entity if it breaches a mandatory statutory duty that is intended to protect against the kind of injury the party seeking relief has suffered, and the breach proximately caused that injury." *Lawson v. Superior Court* (2010) 180 Cal.App.4th 1372, 1383 citing *Creason v. Department of Health Services* (1998) 18 Cal.4th 623, 629; *see also, Guzman v. County of Monterey* (2009) 46 C.4th 887, 898 (emphasis added).

> Citing *Lawson, supra,* and *Guzman, supra,* CALTRANS submits that Government Code § 815.6 is its own cause of action and does not, and cannot, encompass either the common law theories of negligence and/or intentional infliction of emotional distress and therefore, it does not provide statutory authorization for either the negligence cause of action (14th cause of action) or the intentional infliction of emotional distress cause of action (13th cause of action).

In addition to the Lawson and Guzman cases, CALTRANS directs the Court to CACI No. 423 which sets forth the distinct elements that must be shown in order to properly state a cause of action under Government Code § 815.6. They are:

- Public entity defendant violated a specific statute, regulation or ordinance;
- Plaintiff was harmed; and,
- Public entity defendant's failure to perform its duty was a substantial factor in causing plaintiff's harm.
- Public entity defendant, however, is not responsible for plaintiff's harm if public entity defendant proves that it made reasonable efforts to perform its duties under the statute/regulation/ordinance.

The Court notes that in asserting both the 13th cause of action for intentional infliction of emotional distress and the 14th cause of action for negligence, JOHNSON specifically references Government Code § 815.6 and asserts that through Government Code § 815.6, CALTRANS is liable to JOHNSON because CALTRANS has mandatory duties and has breached said mandatory duties as stated under the Equal Employment and Opportunity Commission (EEOC) and Fair Employment and Housing Act (FEHA); more particularly, duties not to discriminate, harass or retaliate. *See*, FAC ¶¶ 203-211.

Thus, the Court will turn its attention to the question of whether Government Code § 815.6 is applicable such that it can provide a statutory basis upon which JOHNSON can assert his negligence

and/or intentional infliction of emotional distress claims.

"First and foremost, application of section 815.6 requires that the enactment at issue be obligatory, rather than merely discretionary or permissive, in its directions to the public entity; it must require, rather than merely authorize or permit, that a particular action be taken or not taken. (Citation.) It is not enough, moreover, that the public entity or officer have been under an obligation to perform a function if the function itself involves the exercise of discretion. (Citation.)" *Haggis v. City of Los Angeles* (2000) 22 Cal.4th 490, 498–499.

San Mateo Union High School Dist. v. County of San Mateo (2013) 213 Cal.App.4th 418, 429, further explains:

> "While the dividing line between a discretionary and mandatory duty is not always definitive, the California Supreme Court has articulated 'rigid requirements for imposition of governmental liability under Government Code section 815.6. . . .' (Citation.) '"An enactment creates a mandatory duty if it requires a public agency to take a particular action. [Citation.] An enactment does not create a mandatory duty if it merely recites legislative goals and policies that must be implemented through a public agency's exercise of discretion." [Citation.]' (Citation.) "Courts have construed this first prong rather strictly, finding a mandatory duty only if the enactment 'affirmatively imposes the duty and provides implementing guidelines.' [Citations.]" (*Guzman v. County of*

> *Monterey* (2009) 46 Cal.4th 887, 898; *see also Department of Corporations v. Superior Court* (2007) 153 Cal.App.4th 916, 932.)

The court has also recognized that under section 815.6, inclusion of the term "shall" in an enactment "does not necessarily create a mandatory duty; there may be 'other factors [that] indicate that apparent obligatory language was not intended to foreclose a governmental entity's or officer's exercise of discretion.' [Citations.]" (*Guzman v. County of Monterey, supra*, 46 Cal.4th 887, 898, 899.) "In determining whether a mandatory duty actionable under section 815.6 had been imposed, the Legislature's use of mandatory language (while necessary) is not the dispositive criteria. Instead, the courts have focused on the particular action required by the statute, and have found the enactment created a mandatory duty under section 815.6 only where the statutorily commanded act did not lend itself to a normative or qualitative debate over whether it was adequately fulfilled." (Citation.) "It is not enough," the California Supreme Court has declared, "that the public entity or officer have been under an obligation to perform a function if the function itself involves the exercise of discretion." (*Haggis v. City of Los Angeles, supra*, 22 Cal.4th 490, 498.)

> "[T]he term 'enactment' refers to 'a constitutional provision, statute, charter provision, ordinance or regulation.'" Government Code § 810.6; *see also, Tuthill v. City of San Buenaventura* (2014) 223 Cal.App.4th 1081, 1091–1092.

There is no doubt that the predicate statutes affirmatively impose a duty upon public agencies (including CALTRANS) not to discriminate or harass,

or permit discrimination or harassment, on the basis of race or sex, and/or not to retaliate against those who make or pursue or assist in such claims.

The focus for purpose of this motion is on the question of whether the predicate statutes have the necessary implementing guidelines. *See, Guzman v. County of Monterey* (2009) 46 Cal.4th 887, 898 citing *O'Toole v. Superior Court* (2006) 140 Cal.App.4th 488, 510 and *Clausing v. San Francisco Unified School Dist.* (1990) 221 Cal.App.3d 1224 ["If rules and guidelines for the implementation of an alleged mandatory duty are not set forth in an otherwise prohibitory statute, it cannot create a mandatory duty"].

In *Clausing, supra,* the court explains, for example, "all provisions of the state Constitution 'are mandatory and prohibitory, unless by express words they are declared to be otherwise.' Unquestionably, [a provision of the state Constitution] is mandatory. Thus, all agencies of government are required to comply with it, and are prohibited from taking official actions which violate it or contravene its provisions." *Clausing v. San Francisco Unified School Dist.* (1990) 221 Cal.App.3d 1224, 1236.

Clausing extends this same rationale to state statutes. Referencing California Education Code's prohibition on corporal punishment, the court writes @ 1240:

> "These statutes are clearly prohibitory in effect; they set forth an express statutory prohibition on certain conduct, with certain enumerated exceptions. Although they may establish important rights and confer significant benefits on members of the public

> (citations), they do not create any mandatory, affirmative duty on the part of public schools and school districts to take action or carry out measures to ensure that students are never subjected to corporal punishment by teachers. The statutes set forth no guidelines or rules for schools to follow in implementing an affirmative duty to prevent corporal punishment. If rules and guidelines for the implementation of an alleged mandatory duty are not set forth in an otherwise prohibitory statute, it cannot create a mandatory duty." (Emphasis added.)

As noted above, the same rationale applies for federal statutes. *See*, Government Code § 810.6 ["'Enactment' means a constitutional provision, statute, charter provision, ordinance or regulation.].

Critically, Clausing instructs that while it is one thing to require that "all agencies of government . . . comply with [an enactment], . . . [and] prohibit[] [public agencies] from taking official actions which violate it or contravene its provisions," "it is an entirely different matter to conclude that [the enactment] is self-executing in the sense that it establishes an affirmative duty to act on the part of [the public entity], provides remedies for its violation, or creates a private cause of action for damages." *Clausing*, *supra* @ 1236 (emphasis added). At footnote 5, the Clausing court explains, citing *Taylor v. Madigan* (1975) 53 Cal.App.3d 943, 951: "[An enactment] contemplating and requiring [future] legislation [administrative or otherwise] is not self-executing. [Citation.] In other words, it must be regarded as self-executing if the nature and extent of the right conferred and the liability imposed

are fixed by the [enactment] itself, so that they can be determined by an examination and construction of its terms and there is no language indicating that the subject is referred [for further] action [citation]; and such provisions are inoperative in cases where the object to be accomplished is made to depend in whole or in part on subsequent legislation." *Clausing v. San Francisco Unified School Dist.* (1990) 221 Cal.App.3d 1224, 1236–1238.

Thus, "[i]n order for Government Code section 815.6 to be applicable, the enactment relied upon must impose a mandatory duty, not a discretionary duty; neither must the enactment simply set forth a prohibition or a right, as opposed to an affirmative duty on the part of a government agency to perform some act. (Citation.) In every case, '[t]he controlling question is whether the enactment at issue was intended to impose an obligatory duty to take specified official action to prevent particular foreseeable injuries, thereby providing an appropriate basis for civil liability. [Citation.]' (*Keech v. Berkeley Unified School Dist.* (1984) 162 Cal.App.3d 464, 470.) The question of whether an enactment is intended to impose a mandatory duty on a public entity to protect against a particular kind of injury is a question of law." *Clausing v. San Francisco Unified School Dist.* (1990) 221 Cal.App.3d 1224, 1239.

> As discussed above, in asserting the 13th cause of action for intentional infliction of emotional distress and 14th cause of action for negligence, JOHNSON cites generally to EEOC and FEHA statutes and further specifies: Title 42 USC § 2000e-2(a); Title 42 USC § 2000e-3(a); Government Code § 12940; and

> Labor Code § 1102.5; Labor Code § 98.6; and Title 42 USC § 1981, incorporating each statute into the cause. Thus, these are the relevant predicate statutes.
>
> None of these cited or referenced statutes, however, imposes a mandatory duty as required by Government Code § 815.6. Instead, each statute "recites legislative goals and policies that must be implemented through a public agency's exercise of discretion." *San Mateo Union High School Dist. v. County of San Mateo* (2013) 213 Cal.App.4th 418, 429. This is evidenced by the fact that CALTRANS has its own policies and directives in place that prohibit racial or sexual discrimination, racial or sexual harassment and/or retaliatory practices. *See*, Fact 12, undisputed; *see also*, Declaration of Shalinee Hunter, ¶¶ 3-5, Exhibits A-C.

A review of each cited and referenced statute confirms this.

Title 42 USC § 2000e-2(a) provides:

"It shall be an unlawful employment practice for an employer–

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

Title 42 USC § 2000e-3(a) provides:

"It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."

In these EEOC statutes, there is no reference to, or inclusion of, specific guidelines and/or rules; the statutes are not self-executing; the statutes are prohibitive and recite legislative goals and policies. As such, they do not create a mandatory duty as required for the application of Government Code § 815.6 in this case.

Government Code § 12940 provides, in relevant part:

"It is an unlawful employment practice, . . . :

(a) For an employer, because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, reproductive health decisionmaking, medical condition,

genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or veteran or military status of any person, to refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge the person from employment or from a training program leading to employment, or to discriminate against the person in compensation or in terms, conditions, or privileges of employment.

. . .

(h) For any employer, . . . to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part.

. . .

(k) For an employer, . . . to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring."

In these FEHA statutes, there is no reference to, or inclusion of, specific guidelines and/or rules; the statutes are not self-executing; the statutes are prohibitive and recite legislative goals and policies. As such, they do not create a mandatory duty as required for the application of Government Code § 815.6 in this case.

Labor Code §§ 1102.5 reads, in pertinent part:

(a) An employer . . . shall not make, adopt, or enforce any rule, regulation, or policy preventing an employee from disclosing information to a government or law enforcement agency, to a person with authority over the employee, or to another employee who has authority to investigate, discover, or correct the violation or noncompliance, or from providing information to, or testifying before, any public body conducting an investigation, hearing, or inquiry, if the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation, regardless of whether disclosing the information is part of the employee's job duties.

(b) An employer . . . shall not retaliate against an employee for disclosing information, or because the employer believes that the employee disclosed or may disclose information, to a government or law enforcement agency, to a person with authority over the employee or another employee who has the authority to investigate, discover, or correct the violation or noncompliance, or for providing information to, or testifying before, any public body conducting an investigation, hearing, or inquiry, if the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation, regardless of whether

disclosing the information is part of the employee's job duties.

(c) An employer . . . shall not retaliate against an employee for refusing to participate in an activity that would result in a violation of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation.

(d) An employer . . . shall not retaliate against an employee for having exercised their rights under subdivision (a), (b), or (c) in any former employment.

. . . .

Labor Code § 98.6 reads, in pertinent part:

(a) A person shall not discharge an employee or in any manner discriminate, retaliate, or take any adverse action against any employee or applicant for employment because the employee or applicant engaged in any conduct delineated in this chapter [Division of Labor Standards Enforcement] or because the employee or applicant for employment has filed a bona fide complaint or claim or instituted or caused to be instituted any proceeding under or relating to his or her rights that are under the jurisdiction of the Labor Commissioner, made a written or oral complaint that he or she is owed unpaid wages, or because the employee has initiated any action or notice pursuant to Section 2699, or has testified or is about to testify in a proceeding pursuant to that section, or because of the exercise by the employee or applicant for

> employment on behalf of himself, herself, or others of any rights afforded him or her.

These Labor Code statutes make no reference to, nor does it include, specific guidelines and/or rules; the statutes are not self-executing; the statutes are prohibitive and recite legislative goals and policies. As such, they do not create a mandatory duty as required for the application of Government Code § 815.6 in this case.

Title 42 USC § 1981 reads, in pertinent part:

> (a) Statement of Equal Rights
>
> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
>
> . . .
>
> (c) Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

This statute makes no reference to, nor does it include, specific guidelines and/or rules; the statute is not self-executing; the statute is prohibitive and recites legislative goals and policies. As such, it does not create a mandatory duty as required for the application of Government Code § 815.6 in this case.

> With this finding, the Court stresses the point made by CALTRANS in its moving papers and that is, "Although none of the foregoing statutes imposes a mandatory duty upon CALTRANS under Government Code § 815.6, this failure does not affect [JOHNSON's] separate causes of action which allege violations of these same statutes specifically." *See, Clausing v. San Francisco Unified School Dist.* (1990) 221 Cal.App.3d 1224, 1241 ["Appellants have stated a cause of action for violation of their federal constitutional rights, as set forth in the sixth cause of action of their third amended complaint. But they have no grounds for asserting in addition that this federal statute creates a mandatory duty on the basis of which they may seek damages under Government Code section 815.6."].

And, for the reasons stated above, summary adjudication of the 14th cause of action for negligence is granted.

2. Intentional Infliction of Emotional Distress

The discussion above applies equally to the 13th cause of action for intentional infliction of emotional distress. And so, for those same reasons, summary adjudication of the 13th cause of action for intentional infliction of emotional distress is granted.

TENTATIVE RULING:

Motion to Disqualify Counsel and Expert Witnesses

Defendant, California Department of Transportation (CALTRANS) brings a motion to disqualify counsel for Plaintiff, Christian Johnson (JOHNSON), and to disqualify JOHNSON's expert witnesses and exclude other witnesses from testifying at trial in the above-referenced matter.

Today, the Court rules only upon the motions to disqualify Mr. Shepardson and Johnson's expert witnesses. Any motion to exclude any non-expert witness at trial shall be addressed and handled as part of the parties' motions in limine.

For the reasons stated below, Motion to Disqualify John Shepardson and his law firm as Johnson's counsel and to disqualify Johnson's expert witnesses is Granted.

EVIDENTIARY RULINGS

With his Opposition, JOHNSON filed a Request For Judicial Notice seeking judicial notice of the previously lodged Brown email. "Judicial notice may not be taken of any matter unless authorized or required by law." *See*, Evidence Code, § 450. Here, the Brown email was 'lodged' with the Court for purposes of a previous hearing but it is not a filed court document and therefore, it is not part of the court record. Cf, Evidence Code, § 452(d). Nor is the Brown email an official act of a legislative, executive or judicial department of the State of California. Cf, Evidence Code, § 452(c). Moreover, the requested review of the document is neither appropriate nor relevant to the resolution of the pending motion to disqualify. '[T]he existence of a document may be judicially noticeable[;]

the truth of statements contained in the document and its proper interpretation are not subject to judicial notice. *Fremont Indemnity Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97, 113. Moreover, the Court has already ruled that the Brown email is a privileged and confidential communication. *See*, January 3, 2023 Order. For all these reasons, IT IS HEREBY ORDERED that the Request for Judicial Notice is denied.

With its Reply, CALTRANS files both general and specific objections to the Declaration of John A. Shepardson, Esq. in Opposition to Defendant's Motion to Disqualify Christian's Attorney and Exclude Expert and Lay Testimony, filed July 18, 2023. IT IS HEREBY ORDERED:

- To the extent Mr. Shepardson's declaration statement constitutes a legal argument, the objections to the statements are sustained.
- To the extent Mr. Shepardson's declaration statement constitutes a legal conclusion, the objections to the statements are sustained.
- To the extent Mr. Shepardson's declaration is a recitation of a document or a statute or a rule, the document shall speak for itself and the objections to Mr. Shepardson's characterizations of the same are sustained.
- To the extent Mr. Shepardson's declaration poses questions, the questions are not testimony and so, the objections to the questions are sustained.
- To the extent Mr. Shepardson's declaration challenges the Court's findings that the

Brown email is privileged and confidential, the objections to such challenges are sustained. Mr. Shepardson's statements regarding any issues-factual or otherwise – underlying the Court's findings and decision that the Brown email is privileged and confidential are irrelevant to the motion before the Court.

- To the extent Mr. Shepardson makes character attacks upon CALTRANS in Statement 100(4) of the declaration, the objection is sustained.
- All other objections are overruled.

On July 27, 2023, JOHNSON filed "Objections to Defendant's Reply Papers Filed in Support of its Motion to Disqualify Christian's Attorney and Exclude Expert and Lay Testimony." After due consideration of the same and with good cause therefor, IT IS HEREBY FURTHER ORDERED that the objections are overruled for the reasons that follow.

With regard to JOHNSON's objection that CALTRANS filed a 142-page supplemental declaration with its Reply, the objection is overruled. The objection mischaracterizes the document as being a new document; one with new evidence and arguments. That is not the case. The Supplemental Declaration of W. Christopher Sims filed on July 26, 2023 is, in fact, a two-page declaration in which Mr. Sims explains that by a clerical error, his declaration which was filed with the moving papers on June 30, 2023 was not signed and upon discovery of that fact, he promptly signed the declaration and served the signed declaration (which was identical to the previous declaration except for

the fact that it was unsigned) upon JOHNSON on June 30, 2023. The Supplemental Declaration goes on to explain that when his office attempted to file the signed declaration with the Court, it was rejected as having been previously filed. Thus, the Supplemental Declaration explains that a Notice of Errata was prepared with the signed declaration and subsequently accepted by the Court. The Supplemental Declaration has attached to it the signed declaration and all of its exhibits as well as the proof of service showing service of the signed declaration upon JOHNSON on June 30, 2023. There is no new evidence or new arguments presented with the Reply.

JOHNSON's remaining objections are actually arguments challenging the merits of CALTRANS' objections. Because JOHNSON's "objections" are not truly evidentiary objections, they are overruled. Insofar as the Court carefully considered each of the objections made by CALTRANS and in doing so, also considered the arguments made by JOHNSON against the objections, the evidentiary issues raised by JOHNSON have been addressed.

The Background Facts

On January 20, 2022, JOHNSON's counsel, John Shepardson, advised CALTRANS' lead counsel, W. Christopher Sims, that JOHNSON would be retested by his retained psychologist, Dr. Williamson on January 28, 2022. Later that same day, CALTRANS attorney Paul Brown sent an email message to Nicholas Duncan who was a CALTRANS Maintenance Supervisor and the supervisor of JOHNSON at the time. It is this email message from Mr. Brown to Mr.

Duncan that is at the heart of this motion to disqualify, hereinafter referred to as "the Brown email."

Within approximately 27 minutes after Mr. Brown sent his message to Mr. Duncan, Mr. Duncan photographed the message and sent it electronically to JOHNSON who then provided the photographed message to Mr. Shepardson.

The following morning, Mr. Shepardson sent an e-mail message to Mr. Sims with the attached copy of the photographed Brown email. In the message, Mr. Shepardson stated, in part, "[t]he enclosed email was sent to my client. It was an intentional disclosure. This appears to be the waiver of the attorney-client privilege, if any privilege attaches to the communication with Mr. Duncan."

Mr. Sims responded that same day and asserted that the Brown email was an attorney-client privileged and confidential communication and requested that it be deleted or destroyed and claimed that Mr. Duncan did not have authority to waive the privilege on behalf of CALTRANS. Mr. Shepardson replied with a rebuttal of CALTRANS' privilege claim. There was no mention of any intent to distribute the Brown email to others.

On January 28, 2022, Mr. Shepardson communicated to CALTRANS that "we are providing the email to our experts for its impact on their opinions." In fact, the Brown email was disclosed to Dr. Williamson and discussed with JOHNSON.

Mr. Sims re-stated the attorney-client privilege and again demanded that the Brown email and any copies be destroyed and demanded that the message not be disclosed to JOHNSON's experts, and asked

that any persons to whom the message had been disclosed be identified. CALTRANS advised JOHNSON that if he did not agree to cease and desist dissemination and destroy all copies, CALTRANS would file a motion for protective order.

A motion for protective order was filed and after a full hearing on the matter, on January 3, 2023, the Court granted the motion finding that the Brown email constituted a privileged and confidential attorney-client communication.

The Court's order further required that "[w]ithin 20 days following mailing of notice of entry of the Court's order, [JOHNSON] and his attorney, John Shepardson, shall: A. Return or destroy all copies of the Brown email and prepare, serve, and file a declaration under penalty of perjury that this has been done, or explaining the reason[s] it cannot be done. . . . [;] B. Include in the declaration identification of all persons to whom the Brown email is known to have been disclosed, and the date of each disclosure."

On or about April 17, 2023, CALTRANS filed a motion to enforce the protective order because neither JOHNSON nor his counsel had filed their respective declarations as ordered.

On April 24, 2023, JOHNSON and Mr. Shepardson filed their respective declarations. JOHNSON testified that to the best of his knowledge, he "destroyed all images of the 1/10/22 Paul Brown email to Nicholas Duncan that are in [his] possession." Declaration of JOHNSON, ¶ 3. JOHNSON then identifies seven (7) individuals to whom he showed and/or with whom he discussed the communication. *See,* Christian's Declaration Re Court Ordered Destruction of Attorney Paul

Brown's 1/10/22 Email to Nicholas Dunn Forwarded to Christian, filed April 24, 2023. According to JOHNSON's declaration, this activity began in January of 2022 and appears to have continued through November of 2022. JOHNSON further testifies that he "disclosed the Brown email with my attorney on or about 1/10/22 and thereafter many times to the present." Declaration of JOHNSON, ¶ 11 (emphasis added).

Mr. Shepardson, for his part, testified that he and his staff, at his direction, "have removed all images of the Brown email that [he is] aware of, from hardcopy files, computers, phones and any other electronic devices." Declaration of Shepardson, ¶ 11. Mr. Shepardson then identifies at least thirteen (13) individuals to whom he showed and/or with whom he discussed the communication. Mr. Shepardson states in his declaration that discussions regarding the Brown email have continued to "today" or "to the present" and include multiple discussions with JOHNSON's expert witness, Dr. Williamson, up to three to four weeks prior to April 24, 2023. *See*, Declaration of John A. Shepardson, Esq. Re Compliance with Court Order for Destruction of Brown Email, ¶¶ 15 [Christian Johnson], 16 [Marti Castillo], 18 [Sue Pelmulder], 19 [Violet Sabbatini], 20 [Marghuerite Johnson], 21 [Bennet Williamson], 33 [Jason Shepardson], and 34 [Eileen Perez]. In a supplemental declaration filed June 30, 2023, Mr. Shepardson further testified that he discussed the Brown email with ethics attorneys David Carr and Adam Koss and with Merri Baldwin.

It is clear that these disclosures were made in spite of CALTRANS' assertion that the Brown email

was a privileged and confidential communication and even after the Court found the Brown email to be a privileged and confidential communication.

CALTRANS now argues that Mr. Shepardson's disclosure of the Brown email "will irreparably affect the outcome of the proceedings [and] has and will prejudice" CALTRANS. CALTRANS submits that Mr. Shepardson's conduct "threatens the administration of justice and the integrity of the bar" and so, '[d]isqualification is the only remedy." Memo of Points & Authorities, page 1;10-15.

Mr. Shepardson argues that disqualification of him and of the expert witnesses is drastic and prejudicial. He argues that it was CALTRANS' delay in protecting the Brown email that created the circumstance that CALTRANS finds itself in and this motion is a tactical motion which should be denied.

Legal Standard for Disqualification Motion

Clark v. Superior Court (2011) 196 Cal.App.4th 37, 47–49 provides a good overview of the cases that create the legal standard for a disqualification motion. The Clark Court explains:

> A trial court's authority to disqualify an attorney derives from its inherent power to "control in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it, in every matter pertaining thereto." (Code Civ. Proc., § 128, subd. (a)(5); *SpeeDee*, 20 Cal.4th at p. 1145, 86 Cal.Rptr.2d 816, 980 P.2d 371; *see also Oaks Management Corporation v. Superior Court,*

supra, 145 Cal.App.4th at p. 462, 51 Cal.Rptr.3d 561.) "The power is frequently exercised on a showing that disqualification is required under professional standards governing . . . potential adverse use of confidential information." (*Responsible Citizens v. Superior Court* (1993) 16 Cal.App.4th 1717, 1723–1724, 20 Cal.Rptr.2d 756.)

A disqualification motion involves a conflict between a client's right to counsel of his or her choice, on the one hand, and the need to maintain ethical standards of professional responsibility, on the other. (*City and County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal.4th 839, 846, 43 Cal.Rptr.3d 771, 135 P.3d 20.) Although disqualification necessarily impinges on a litigant's right to counsel of his or her choice, the decision on a disqualification motion "involves more than just the interests of the parties." (*SpeeDee, supra*, 20 Cal.4th at p. 1145, 86 Cal.Rptr.2d 816, 980 P.2d 371.) When ruling on a disqualification motion, "[t]he paramount concern must be to preserve public trust in the scrupulous administration of justice and the integrity of the bar. The important right to counsel of one's choice must yield to ethical considerations that affect the fundamental principles of our judicial process." (*SpeeDee*, at p. 1145, 86 Cal.Rptr.2d 816, 980 P.2d 371; *see also Jessen v. Hartford Casualty Ins. Co.* (2003) 111 Cal.App.4th 698, 705–706, 3 Cal.Rptr.3d 877.)

> The *SpeeDee* court recognized that one of the fundamental principles of our judicial process is the attorney-client privilege: "Protecting the confidentiality of communications between attorney and client is fundamental to our legal system. The attorney-client privilege is a hallmark of our jurisprudence that furthers the public policy of ensuring '"the right of every person to freely and fully confer and confide in one having knowledge of the law, and skilled in its practice, in order that the former may have adequate advice and a proper defense."' [Quoting *Mitchell v. Superior Court* (1984) 37 Cal.3d 591, 599, 208 Cal.Rptr. 886, 691 P.2d 642.]" (*SpeeDee, supra*, 20 Cal.4th at p. 1146, 86 Cal.Rptr.2d 816, 980 P.2d 371.) Because it is this privilege that was the touchstone for the trial court's disqualification ruling, we outline the rules developed for safeguarding that privilege.

State Compensation Ins. Fund v. WPS, Inc. (1999) 70 C.A.4th 644

In *State Fund, supra*, the court evaluated the ethical obligations of a lawyer when that lawyer comes into possession of privileged materials without the holder of the privilege having waived it. (*Id.* at pp. 654–655, 82 Cal.Rptr.2d 799.) The court, to "protect the sanctity of the attorney-client privilege and to discourage unprofessional conduct" (*id* at p. 657, 82 Cal.Rptr.2d 799), ruled that:

> "the obligation of an attorney receiving privileged documents due to the inadvertence of another is as follows: When a lawyer who

receives materials that obviously appear to be subject to an attorney-client privilege or otherwise clearly appear to be confidential and privileged and where it is reasonably apparent that the materials were provided or made available through inadvertence, the lawyer receiving such materials should refrain from examining the materials any more than is essential to ascertain if the materials are privileged, and shall immediately notify the sender that he or she possesses material that appears to be privileged." (*Id.* at p. 656, 82 Cal.Rptr.2d 799.)

Rico v. Mitsubishi Motors Corp. (2007) 42 C.4th 807

In *Rico, supra*, the court adopted the obligations articulated in State Fund and extended them to materials protected by the attorney work product privilege, noting those obligations were rooted in the attorney's obligation to "'respect the legitimate interests of fellow members of the bar, the judiciary, and the administration of justice.'" (*Rico, supra*, 42 Cal.4th at p. 818, 68 Cal.Rptr.3d 758, 171 P.3d 1092.) Rico also addressed the question of remedy when the attorney, having obtained privileged documents, did not comply with those obligations. Rico echoed State Fund's caution that "'"[m]ere exposure"' to an adversary's confidences is insufficient, standing alone, to warrant an attorney's disqualification" (*Rico*, at p. 819, 68 Cal.Rptr.3d 758, 171 P.3d 1092, quoting State Fund, at p. 657, 82 Cal.Rptr.2d 799), because Rico agreed such a "a draconian rule . . . '"[could] nullify a

> party's right to representation by chosen counsel any time inadvertence or devious design put an adversary's confidences in an attorney's mailbox.'"" (*Rico*, at p. 819, 68 Cal.Rptr.3d 758, 171 P.3d 1092.) Rico also stated, however, that "'in an appropriate case, disqualification might be justified if an attorney inadvertently receives confidential materials and fails to conduct himself or herself in the manner specified above, assuming other factors compel disqualification.'" (*Ibid.*)

(Emphasis added.)

Importantly, "regardless of how the attorney obtained the documents, whenever a reasonably competent attorney would conclude the documents obviously or clearly appear to be privileged and it is reasonably apparent they were inadvertently disclosed, the State Fund rule requires the attorney to review the documents no more than necessary to determine whether they are privileged, notify the privilege holder the attorney has documents that appear to be privileged, and refrain from using the documents until the parties resolve or the court resolves any dispute about their privileged nature. The receiving attorney's reasonable belief the privilege holder waived the privilege or an exception to the privilege applies does not vitiate the attorney's State Fund duties. The trial court must determine whether the holder waived the privilege or an exception applies if the parties fail to reach an agreement. The receiving attorney assumes the risk of disqualification when that attorney elects to use the documents before the parties or the trial court has resolved the dispute over their privileged nature and the documents ultimately are found to be privileged."

McDermott Will & Emery LLP v. Superior Court (2017) 10 Cal.App.5th 1083, 1092–1093.

Legal Analysis

Here, CALTRANS immediately advised JOHNSON that it was asserting the attorney-client privilege when CALTRANS first learned that Mr. Duncan had shared the email with JOHNSON. While Mr. Shepardson disagreed with CALTRANS' assertions, Mr. Shepardson still had the duty under *State Fund, supra*, to refrain from using or otherwise disclosing the communication until the parties or the Court resolved the dispute. *McDermott Will & Emery LLP v. Superior Court* (2017) 10 Cal.App.5th 1083, 1092–1093. Mr. Shepardson and JOHNSON did not do so. Their own declarations show that each discussed and disclosed the Brown email to several people, including the expert witnesses. *See*, Christian's Declaration Re Court Ordered Destruction of Attorney Paul Brown's 1/10/22 Email to Nicholas Dunn Forwarded to Christian, filed April 24, 2023; *see also*, Declaration of John A. Shepardson, Esq. Re Compliance with Court Order for Destruction of Brown Email, filed April 24, 2023.

In addition to the declaration that Mr. Shepardson submitted in compliance with the January 3, 2023 protective order, Mr. Shepardson also filed a declaration on July 18, 2023, in opposition to this motion to disqualify, and testified that the Brown email was provided to JOHNSON's "experts for its impact on their opinions." *See*, Declaration of Shepardson, ¶¶ 34, 39. Mr. Shepardson testified that prior to JOHNSON's January 28, 2023 examination with Dr. Williamson, CALTRANS attorneys "were on notice that Christian claimed the [Brown] email was damaging, he would

not give it up, and knew . . . that Christian would be interviewed about his present work conditions [by Dr. Williamson] and so naturally would disclose the [Brown] email and its damage to the doctor during his examination." Declaration of Shepardson, ¶ 26. In fact, in his declaration dated May 23, 2023, Mr. Shepardson testified that "[o]n 1/28/22, [he informed CALTRANS] the Brown email was being provided to adverse third parties." *See*, Second Declaration of John Shepardson, dated May 23, 2023, ¶ 5(4) ["On 1/28/22, Defendant was informed the Brown email was being provided to adverse third parties."]. On January 28, 2022, Mr. Shepardson wrote CALTRANS, in pertinent part:

"Five, we are providing the email to our experts for its impact on their opinions.

Six, to address the email only, we will make Christian and the experts available for their depositions for up to two hours each, which seems more than reasonable. Of course, as you know, Dr. Williamson is retesting Christian and you can depose him on the email along with the results of the recent (today's) testing. . . .

Seven, we intend to offer the email into evidence at trial. . . . "

See Second Declaration of John Shepardson, dated May 23, 2023, Exhibit 3.

Mr. Shepardson's testimony establishes that he elected to use the Brown email as part of his case against CALTRANS prior to the resolution of the dispute regarding its nature. Mr. Shepardson read it, studied it, evaluated it, shared it and incorporated its contents into the case and into his trial strategy.

Mr. Shepardson's testimony also establishes that Mr. Shepardson made the decision – early on-to use the Brown email in this litigation in spite of CALTRANS' protests. In opposition, Mr. Shepardson argues that there were delays in CALTRANS' responses and he suggests that he consistently reached out to address and resolve the issue, but Mr. Shepardson's May 23, 2023 declaration and Exhibit 3 to his declaration undermine his argument. Mr. Shepardson's testimony confirms that the decision to use the Brown email was made on January 28, 2022; that is, approximately two weeks after the inadvertent disclosure and after CALTRANS asserted that the communication was privileged and confidential.

Mr. Shepardson strenuously argues that disqualification is not warranted because CALTRANS failed to act; CALTRANS failed to immediately protect the email and for his part, Mr. Shepardson complied with his ethical duties under State Fund. Mr. Shepardson maintains that CALTRANS had the "burden to act," generally citing to the McDermott case but without any pinpoint citation.

In reviewing the McDermott case, it appears that Mr. Shepardson's arguments rely upon the discussion in the McDermott dissent. The McDermott dissent expresses its opinion that the McDermott majority created "an unwarranted extension of the ethical rule declared in *State Comp. Ins. Fund v. WPS, Inc.*," *supra. See, McDermott Will & Emery LLP v. Superior Court* (2017) 10 Cal.App.5th 1083, 1126.

> "[A] majority opinion of the [appellate court] states the law and . . . a dissenting opinion has no function except to express the private view of the dissenter." *Wall v. Sonora Union*

> *High School Dist.* (1966) 240 Cal.App.2d 870, 872. "Under stare decisis, . . . [d]ecisions of every division of the District Courts of Appeal are binding . . . upon all the superior courts of this state, ... Courts exercising inferior jurisdiction must accept the law declared by courts of superior jurisdiction. It is not their function to attempt to overrule decisions of a higher court." *Auto Equity Sales, Inc. v. Superior Court of Santa Clara County* (1962) 57 Cal.2d 450, 455.

This Court is bound to follow *McDermott, supra.* As previously noted, the McDermott Court has concluded and directed that the "State Fund rule requires the attorney to . . . refrain from using the documents until the parties resolve or the court resolves any dispute about their privileged nature. The receiving attorney's reasonable belief the privilege holder waived the privilege or an exception to the privilege applies does not vitiate the attorney's State Fund duties. The trial court must determine whether the holder waived the privilege or an exception applies if the parties fail to reach an agreement. The receiving attorney assumes the risk of disqualification when that attorney elects to use the documents before the parties or the trial court has resolved the dispute over their privileged nature and the documents ultimately are found to be privileged." *McDermott Will & Emery LLP v. Superior Court* (2017) 10 Cal.App.5th 1083, 1092–1093.

Having failed to do so, Mr. Shepardson now bears the risk of his decision to use and disclose the Brown email.

JOHNSON's expert witness, Dr. Williamson, in a sworn declaration signed on August 31, 2022, testifies

that he was shown the Brown email by JOHNSON and the same was discussed during his evaluation of JOHNSON. Dr. Williamson further testified:

> "29. The email has necessarily and significantly affected my evaluation of Christian because it caused him to relive the experiences central to the instant case that were extremely upsetting to him. This is common in cases involving trauma.
>
> 30. Because of the email I have expended additional time and effort in assessing him and am prepared to offer opinions about his effects.
>
> 31. I fully expect to testify at trial about my opinions of Christian, including the negative effect of this email. It would be difficult, and perhaps impossible, to give testimony about Christian's psychological harm caused by Defendant . . . without consideration of the damaging email. The negative effect of the email relates directly to Christian's mental health and exacerbated the psychological damage he is experiencing. Christian would not have been forthright had he not shared the letter and its effect on him with me during my evaluation." (Emphasis added.)

See, Declaration of John A. Shepardson in Opposition to Defendant California Department of Transportation's Motion for Protective Order, filed October 10, 2022, Exhibit 24.

In opposing this motion to disqualify Dr. Williamson as an expert witness, Mr. Shepardson testifies that the expert witnesses, including Dr. Williamson,

"can testify without . . . reliance on the [Brown] email." *See*, Declaration of Shepardson, filed July 18, 2023, ¶¶ 88, 105. Indeed, Dr. Williamson also testifies that he is "now prepared to, and can, testify at trial with or without reliance on the Brown email as its effects have attenuated." Declaration of Bennett Williamson, dated July 15, 2023, filed as Exhibit P to the Declaration of John A. Shepardson, Esq. in Opposition to Defendant's Motion to Disqualify Christian's Attorney and Exclude Expert and Lay Testimony, filed July 18, 2023. This testimony is completely contrary to Dr. Williamson's previous testimony and gives the Court serious concern.

The other expert witnesses are Human Resources experts, Jan Duffy and Virginia Simms. Ms. Duffy testifies that she "was provided a copy of the Brown email early in 2022" although she has "no present recollection [on July 13, 2023] of seeing the email." She further testifies that she has "not [been] served with any motions . . . seeking to return or destroy the Brown email." She confirms that she "can testify without relying on the Brown email, or if asked, . . . [she] can testify about the Brown email." *See*, Declaration of HR Expert Jan Duffy dated July 13, 2023, filed as Exhibit R to the Declaration of John A. Shepardson, Esq. in Opposition to Defendant's Motion to Disqualify Christian's Attorney and Exclude Expert and Lay Testimony, filed July 18, 2023.

Preliminarily, Ms. Duffy's testimony raises the question of whether all images of the Brown email that Mr. Shepardson is aware of have been removed, deleted or destroyed as Mr. Shepardson represents is the case in his April 24, 2023 declaration. *See*, Declaration of John A. Shepardson, Esq. re Compliance with

Court Order for Destruction of Brown Email, filed April 24, 2023, ¶ 11 ["I, and at my direction, my staff, have removed all images of the Brown email that I am aware of, from hardcopy files, computers, phones and any other electronic devices."] The inference from this statement is that Mr. Shepardson and his office have done all they could to remove all images of the Brown email. The Court would expect that to include a direction from Mr. Shepardson or his law firm to those hired in this case to also remove all images of the Brown email. Ms. Duffy's testimony suggests that she still has possession of the Brown email; in other words, the inference is that Mr. Shepardson has not directed that the Brown email be removed, deleted or destroyed from her file in this matter. More to the point of this motion, however, is the fact that the Brown email is part of her current consciousness and evaluation regarding this case.

With regard to Human Resources expert, Virginia Simms, Ms. Simms testifies that she was also provided a copy of the Brown email in early 2022. And, Ms. Simms has also testified that she has not been asked "by Defendant" "to return the email." Ms. Simms testifies that she "can testify at trial with or without relying on the Brown email" and while she has "not done any in depth consideration of the email," she found "that it appeared retaliatory." *See*, Declaration of HR Expert Virginia Simms dated July 13, 2023, filed as Exhibit Q to the Declaration of John A. Shepardson, Esq. in Opposition to Defendant's Motion to Disqualify Christian's Attorney and Exclude Expert and Lay Testimony, filed July 18, 2023.

Again, there is a preliminary concern that not all images of the Brown email of which Mr. Shepardson is

aware have been removed, deleted or destroyed as Mr. Shepardson represented to the Court was the case. And, Ms. Simms testimony establishes that the Brown email is part of her current consciousness and evaluation regarding this case.

After giving due consideration to the facts, the legal standard and the written arguments and documentary evidence submitted, IT IS HEREBY ORDERED that the motion to disqualify John Shepardson and his law firm as JOHNSON's counsel and the motion to disqualify JOHNSON's experts is granted.

> The Court finds that Mr. Shepardson's past disclosure and continuing use of the Brown email will have a substantial and continuing effect on future proceedings in this action.

Mr. Shepardson is disqualified because his review and use of the Brown email goes beyond a "mere exposure." As noted above, Mr. Shepardson elected to use the Brown email as part of his case against CALTRANS prior to the resolution of the dispute regarding its nature. Mr. Shepardson read the Brown email; he reviewed it; he studied it; he evaluated it; he shared it; and, he incorporated its contents into the case and into his trial strategy. Having done so, Mr. Shepardson's continued participation in this case as JOHNSON's counsel raises the likelihood that use of the Brown email could affect the outcome of these proceedings both in terms of CALTRANS' rights against use of its privileged communications and in terms of the integrity of these judicial proceedings and public confidence in them.

The several declarations submitted by Mr. Shepardson in this case demonstrates the extent to which Mr. Shepardson has already incorporated the Brown email into this case. It is especially noteworthy that Mr. Shepardson continued to refer to, disclose and discuss the Brown email even after the Court issued the protective order finding the communication to be privileged and confidential. The Court therefore finds Mr. Shepardson's disqualification necessary to prevent future prejudice or harm to CALTRANS from Mr. Shepardson's exploitation of the e-mail's contents. The "bell cannot be 'unrung.'" *Rico v. Mitsubishi Motors Corp.* (2007) 42 C.4th 807, 815.

The continued representation of JOHNSON by Mr. Shepardson could also trigger doubts about the integrity of the judicial process because Mr. Shepardson's previous access to and use of the Brown email "could undermine the public trust and confidence in the integrity of the adjudicatory process." *See, Clark v. Superior Court* (2011) 196 C.A.4th 37, 55.

> "[D]isqualification does not require evidence of an existing injury from the use of the inadvertently disclosed materials." *McDermott, supra* @ 1124 citing *Clark v. Superior Court, supra* @ 55. "Disqualification is proper as a prophylactic measure to prevent potential future harm to [CALTRANS] from information [Mr. Shepardson] should not have used." *Ibid.*

The critical question is whether there is a genuine likelihood that Mr. Shepardson's review and use of the Brown e-mail will affect the outcome of this action and this Court answers the question affirmatively.

With regard to the expert witnesses, it is well-established that if an expert has relied on privileged material to formulate an opinion, the court may exclude the expert's testimony as necessary to enforce the privilege. *Fox v. Kramer* (2000) 22 C.4th 531, 539. CALTRANS makes the point that the circumstances created by Mr. Shepardson's use and disclosure of the Brown email to Dr. Williamson and other expert witnesses cannot be mitigated short of disqualification of the expert witnesses because CALTRANS cannot depose the expert witnesses about their opinions without risking waiver of the privilege. Here, again, "the bell cannot be 'unrung'" and use of the Brown email by JOHNSON's experts undermines "the defense experts' opinions and place[s] [CALTRANS] at a great disadvantage." *See, Rico v. Mitsubishi Motors Corp.* (2007) 42 C.4th 807, 815, 819.

Thus, the Court finds that the damage done by Mr. Shepardson's review and use of the Brown email is unmitigable and disqualification of Mr. Shepardson and his firm and disqualification of the expert witnesses is the proper remedy.

IT IS SO ORDERED.

/s/ Barbara A. Kronlund
Presiding Judge

ORDER FOURTH CHALLENGE FOR CAUSE AGAINST JUDGE BARBARA A. KRONLUND, SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN JOAQUIN (MARCH 8, 2023)

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN JOAQUIN

CHRISTIAN JOHNSON,

Plaintiff,

v.

CALIFORNIA DEPARTMENT OF TRANSPORTATION,

Defendant.

Case No: STK-CV-UCR-2019-0000281

The Fourth Challenge for Cause Against San Joaquin Superior Court Judge Barbara A. Kronlund under Code Civ. Proc. § 170.1 et seq. is DENIED. Judicial notice is taken of each challenge in this case, Judge Kronlund's responses, supporting documents for those pleadings, and the appellate record in this case. Judicial notice is not taken of any other document that was not provided as an exhibit.

SUMMARY OF RULING

There is no evidence of bias by Judge Barbara A. Kronlund in any action taken in this case, and a reasonable person would not believe that she is biased against the moving party or moving party's counsel.

[. . .]

Good afternoon Judge Kronlund,

I write to inquire as to whether you or the San Joaquin County civil bench as a group have determined whether a referee may recommend, and the court order, that a party's portion of referee's fee be paid by the attorney for the party. As you are probably aware, CCP section 639(d)(6)(B) states that In determining whether a party has established an inability to pay the referee's fee, the court shall consider only the ability of the party, and not the party's attorney, to pay the fees. This suggests (but does not expressly state) that only the party shall be responsible for payment. In a prior motion in a case I am currently involved in for you, the predecessor referee recommended that the attorney pay his client's portion of the fee. I am considering the same course unless the court has determined this is improper. In this particular case especially, I do not want to provoke further controversy. Kindly let me know your position. Thanks.

Tony Abbott

Hi Tony. The Court has not specifically considered this issue, nor has the Civil Division as a policy or rule.

I would recommend that you simply document your reasons for making any particular allocation so that if there's an objection, the Court can consider your course of action in light of your reasoning, vis-a-vis any objections thereto. Thank you,

Barbara A. Kronlund, Civil Judge

The threshold question is whether this constitutes a disallowed ex parte communication. It likely does.

Judge Kroniund's initial order striking the challenge says, "No particular case was referenced in the email communication."

But Abbott's email says, "In a prior motion in a case I am currently involved for you, the predecessor referee recommended that the attorney pay his client's portion of the fee. " It is, of course, possible that Abbott was assigned to multiple cases with prior referees in which a referee recommended the attorney pay a client's portion of the fee with the prior referee and is considering the same now, but it seems unlikely that there . . . .

[. . .]

ORDER DENYING MOTION FOR DISQUALIFICATION OF JUDGE KRONLUND, CALIFORNIA COURT OF APPEAL THIRD APPELLATE DISTRICT (JANUARY 10, 2023)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA IN AND FOR THE THIRD APPELLATE DISTRICT

CHRISTIAN L. JOHNSON,

Petitioner,

v.

THE SUPERIOR COURT OF SAN JOAQUIN COUNTY,

Respondent,

DEPARTMENT OF TRANSPORTATION,

Real Party In Interest.

No. C099319

San Joaquin County No. STKCVUCR20190000281

Before: MAURO, Acting P.J.

BY THE COURT:

By way of petition for writ of mandate, petitioner Christian L. Johnson challenges trial court Judge

Barbara A. Kronlund's December 12, 2022, order striking petitioner's fourth statement of disqualification. No opposition was filed. As explained below, it appears the trial court erred. This court accordingly issues a stay of all proceedings, pending further order of this court, except as to proceedings described herein.

In his statement of disqualification, petitioner claimed the trial judge should disqualify herself pursuant to Code of Civil Procedure section 170.1, and cited alleged improper ex parte communications that he claimed violated the California Code of Judicial Ethics. (*See* Code Civ. Proc., § 170.1, subd. (a)(6)(A)(iii) [legal grounds for disqualification include circumstances in which "[a] person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial"].) Judge Kronlund struck petitioner's statement of disqualification without referring it to another judge.[1] By statute, "[a] judge who refuses to recuse himself or herself shall not pass upon his or her own disqualification or upon the sufficiency in law, fact, or otherwise, of the statement of disqualification filed by a party." (Code Civ. Proc., § 170.3, subd. (c)(5).) Nevertheless, a trial court may strike a statement of disqualification if it is untimely or if "on its face it discloses no legal grounds for disqualification." (Code Civ. Proc., § 170.4, subd. (b).) Consequently, this court solely considers whether Judge Kronlund properly ruled on her own disqualification.

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[1] Petitioner's statement of disqualification also incorporated by reference 35 separate acts of the trial court that petitioner had raised in a previous statement of disqualification. It appears the trial court properly struck these as repetitive. (*See* Code Civ. Proc., § 170.4 subd. (c)(3).)

In striking the statement of disqualification, the trial court explained that the claimed ex parte communication, on its face, failed to constitute grounds for disqualification. Petitioner's claim was based on an email exchange between the trial court and the second appointed discovery referee, wherein the referee asked Judge Kronlund if the superior court had a policy regarding recommending that referee fees be paid by the attorney for the party. Judge Kronlund answered that the superior court did not have such a policy or rule but recommended the referee document his reasoning for making any particular allocation. Petitioner maintains those emails were an improper ex parte communication, and a person aware of the facts therein might reasonably entertain a doubt regarding the trial court's impartiality.

In concluding this did not constitute grounds for disqualification, the trial court explained that "[t]he communication was not an ex parte communication insofar as it was not a communication involving this case but rather, it was a communication about the existence of a general Court policy." And, [n]o particular case was referenced in the email communication." The court further emphasized that under the relevant California Code of Judicial Ethics, a judge may consult with other judges or court personnel whose function is to aid the judge in carrying out the judge's adjudicative responsibilities.

It appears, however, that at a minimum, the email communications present a factual question as to whether they pertained to petitioner's case. Indeed, in his email to Judge Kronlund, the referee wrote: "In a prior motion in a case I am currently involved in for you, the predecessor referee recommended that the

attorney pay his client's portion of the fee. I am considering the same course . . . In this particular case especially, I do not want to provoke further controversy." Those circumstances appear to reference petitioner's case.

Further, while the trial court correctly notes that the California Code of Judicial Ethics permits a judge to "consult with court personnel," the Code's definition of "court personnel" expressly excludes, "persons who are appointed by the court to serve in some capacity in a proceeding . . . " (Cal. Code Jud. Ethics, canon 3B(7)(a).)

And while an exception exists for ex parte communication for "administrative purposes," that exception still requires the judge to "promptly . . . notify all other parties of the substance of the ex parte communication and allow[] an opportunity to respond." (Cal. Code Jud. Ethics, canon 3B(7)(b).) Similarly, if a Judge receives an unauthorized ex parte communication, the judge must notify the parties of the substance of the communication and provide an opportunity to respond. (Cal. Code Jud. Ethics, canon 3B(7)(d).) There is no indication that occurred here.

In short, it does not a ear that petitioner's statement of dis disclosed a *facia* y inadequate legal basis for disqualification. (*See* Code Civ. Proc., § 170.4, subd. (b); *see also* Code Civ. Pro., § 170.1, subd. (a)(6)(A)(iii).)

This court is considering issuing a peremptory writ of mandate in the first instance, *i.e.*, without first issuing an alternative writ. *(Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171.) The current petition will become moot if the court vacates its order of December 12, 2022, (striking petitioner's fourth

statement of disqualification) and instead permits the question of disqualification to be otherwise resolved as described in Code of Civil Procedure section 170.3. In the event the trial court is considering proceeding in this manner, it must, however, afford the parties notice and an opportunity to be heard before vacating its earlier decision. (*See Brown, Winfield & Canzoneri, Inc. v. Superior Court* (2010) 47 Cal.4th 1233.) Respondent court is requested to inform this court of any relevant action in the case that it takes consistent with this notice and to provide a status update on or before January 23, 2023.

If respondent court chooses to change its order in the manner described herein, this court will dismiss the instant petition as moot.

/s/ Mauro
Acting P.J.

DISCOVERY REFEREE RECOMMENDED RULING, SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN JOAQUIN (JANUARY 3, 2023)

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN JOAQUIN

CHRISTIAN JOHNSON,

Plaintiff,

v.

CALIFORNIA DEPARTMENT OF TRANSPORTATION and DOES 1 through 100, inclusive,

Defendants.

Case No. STK-CV-UCR-2019-281

Dept.10D

Submission Date: October 21, 2022
Action Flied: January 8, 2019
Trial Date: August 28, 2023

Before: Hon. Barbara A. KRONLUND,
Judge of the Superior Court.

DISCOVERY REFEREE'S RECOMMENDED RULING ON CALIFORNIA DEPARTMENT OF TRANSPORTATION'S MOTION FOR

PROTECTIVE ORDER AND OTHER REMEDIES; ORDER

I. Overview

By order filed September 16, 2022, the undersigned was appointed as Discovery Referee. Defendant CALIFORNIA DEPARTMENT OF TRANSPORTATION (defendant or Caltrans) moves for a protective order regarding an electronic mail message which was transmitted to plaintiff CHRISTIAN JOHNSON (plaintiff or Johnson) and which It claims is protected by the attorney-client and work product privileges. The protective order requested is that 1) plaintiff be prevented from introducing the e-mail (presumably at trial); 2) that the e-mail and any copies be returned or destroyed; 3) that plaintiff be prevented from any further dissemination of the e-mail; and 4) that plaintiff identify the persons to whom disclosure of the e-mail was made and the date(s) of said disclosures. Notice of Motion, 1:28-2:5, Johnson opposes the motion and requests monetary sanctions. Caltrans does not request sanctions. For reasons set forth below, the recommended ruling is that the motion be granted and that no sanctions be awarded.

II. Facts

Plaintiff's operative pleading Is the First Amended Complaint (FAC) filed March 12, 2019. The FAC presents 14 causes of action alleging, in essence, that during Johnson's employment by Caltrans in Stockton, California, he was harassed, discriminated against, and retaliated against based on his race, forcing him to quit his employment on April 4, 2018, and causing general and special damages. After the court ruled on

Caltrans' demurrer and motion to strike, Caltrans answered on September 13, 2019, generally denying the allegations of the FAC and alleging 36 affirmative defenses. Caltrans does not contend that any of these defenses bear on the resolution of this motion.

There appears to be no dispute that Johnson was re-hired by Caltrans in October of 2020 and assigned to Rio Vista, California. Caltrans Opening Memorandum, 1:28-2:2; There his supervisor, at least as of January 10, 2022, was Caltrans Maintenance Supervisor Nicholas Duncan (Duncan). *Id.*, 2:2-4.

Discovery commenced and a trial date of June 1, 2021 was selected. A subsequent minute order continued the trial date to January 24, 2022. With an exception not here relevant, non-expert discovery closed on May 2, 2021. The deposition of plaintiff's retained psychologist, Dr. Williamson, was taken on June 28, 2021. In early January 2022 Caltrans requested, and was granted, a continuance of the trial. At a trial setting conference on January 10, 2022, a new trial date of April 18, 2022, was selected, with a deadline for filing motions in limine of March 28, 2022.

Later on January 10, 2022, at 10:13 a.m. plaintiff's counsel, John Shepardson, advised Caltrans' lead attorney W. Christopher Sims by electronic mail that Johnson would be re-tested by Dr. Williamson on January 28, 2022. Declaration of John Shepardson (Shepardson Dec.), paragraph 3, Exhibit 2. Also on January 10, 2022, at approximately 4:01 p.m., Caltrans attorney Paul R. Brown sent an e-mail message to Duncan (hereinafter the Brown e-mail) which is the subject of this motion. Declaration of Nikolette Y. Clavel (Clavel Dec.), paragraph 2. Mr. Brown is identified in the moving papers as the Assistant Chief

Counsel with the Sacramento Legal Office of Caltrans. Declaration of Paul R. Brown (Brown Dec.) paragraph 1. The record does not disclose whether the Brown e-mail was sent in response to the earlier message advising of the scheduled re-testing by Dr. Williamson, and the content of the Brown e-mail remains undisclosed to the Court and Referee to this day.

Within approximately 27 minutes after Mr. Brown sent his message to Duncan, the latter, for reasons best known to him, photographed the message and sent it electronically to Johnson, who then provided the photographed message to Mr. Shepardson by message dated January 10, 2022, at 4:28 p.m. *See* Clavel Dec., paragraph 1., Shepardson Dec., paragraph 4.

The next morning, on January 11, 2022, at 10:51 a.m., Mr. Shepardson sent an e-mail message to Mr. Sims with an attached copy of the photographed Brown e-mail. Shepardson Dec., paragraph 5, Exhibit 4; Clavel Dec., paragraph 3, Exhibit A. In this message Mr. Shepardson stated in part "[t]he enclosed e-mail was sent to my client. It was an intentional disclosure. This appears to be the waiver of the attorney-client privilege, if any privilege attaches to the communications with Mr. Duncan." *Ibid.*

Mr. Sims responded by message dated January 11, 2022, at 2:47 p.m. in which he asserted that the Brown e-mail was an attorney-client privileged communication, as indicated at the bottom of the message, requested that it be deleted or destroyed, and claimed that Mr. Duncan did not have authority to waive the privilege on behalf of Caltrans. Clavel Dec., paragraph 3, Exhibit A; Shepardson Dec., paragraph 6, Exhibit 4. Mr. Shepardson responded the next day with a 9-page letter setting forth his analysis and rebuttal of

the privilege claims. Clavel Dec. paragraph 4, Exhibit B; Shepardson Dec., paragraph 7, Exhibit 5. There was no mention of any intent to distribute the Brown e-mail to others. *Ibid.*

The next correspondence was Mr. Shepardson's letter dated January 28, 2022, which was sent electronically that day, the same day as the re-evaluation of plaintiff by Dr. Williamson. Clavel Dec. paragraph 5, Exhibit C; Shepardson Dec., paragraph 9, Exhibit 6. In that letter Mr. Shepardson stated, among other things, that we are providing the email to our experts for its impact on their opinions." *Ibid.* In fact, plaintiff disclosed the Brown e-mail to Dr. Williamson and discussed its contents with him at the January 28 re-evaluation. Declaration of Christian L. Johnson dated August 28, 2022, (Johnson Dec.) paragraphs 11-18; Declaration of Bennett Williamson, PhD. dated August 31, 2022 (Williamson Dec.), paragraphs 19, 20. Plaintiff does not contend this disclosure was not approved by Mr. Shepardson.

Mr. Sims responded by letter dated February 3, 2022, in which he re-stated the attorney-client privilege, added a claim of work product protection, again demanded that the Brown e-mail and any copies be destroyed, demanded that the message not be disclosed to plaintiff's experts, and asked that any persons to whom the message had been disclosed be identified. Clavel Dec. paragraph 6, Exhibit D; Shepardson Dec., paragraph 10, Exhibit 7. The letter further maintained that Duncan had no authority to waive Caltrans' privileges, and stated that if plaintiff did not agree to cease dissemination and immediately destroy all copies Caltrans would file a motion for protective order. *Ibid.*

Mr. Shepardson replied with a 9-page letter of the same day—February 3, 2022—in which he asserted, among other things, that the dominant purpose of the Brown e-mail was to maliciously damage plaintiff; that the attorney-client privilege did not extend to Duncan, that the crime-fraud exception destroys any privilege; and that the privilege had been waived by disclosure of the message to plaintiff, Clavel Dec. paragraph 7, Exhibit E.; Shepardson Dec., paragraph 11, Exhibit 8. This was the opening salvo to, a flurry of e-mail messages and telephone. calls from February 4 to 17, 2022, between the parties' attorneys, some of which involved the then-serving Discovery Referee, during which neither side changed its position on the underlying issues. Clavel Dec. paragraphs 8-19, Exhibits F-O; Shepardson Dec., paragraphs 12-27, Exhibits 9-18. Early in this back-and-forth, on February 4, 2022, Mr. Shepardson flatly refused to agree not to distribute the Brown e-mail further and disclosed it had already been provided to Dr. Williamson and plaintiff's "HR experts." Clavel Dec. paragraph 9, Exhibit G; Shepardson Dec., paragraph 13, Exhibit 10. At least twice during this period Caltrans stated its intent to seek court involvement by motion. Shepardson Dec., paragraphs 18, 27, Exhibits 13, 18.

On February 17, 2022, the Court issued a minute order staying the action pending resolution of the possible disqualification of Mr. Shepardson due to his claimed representation of plaintiff's mother while actively litigating a discovery dispute involving her. The stay lasted until April 1, 2022, at which time the Court lifted the stay, vacated the April 18, 2022 trial date, and set a trial setting conference for June 3,

2022. This conference resulted in a new trial date of May 8, 2023.

Caltrans ultimately filed the pending motion for protective order on August 18, 2022, with a hearing date of September 22, 2022. Plaintiff applied ex parte to file the Brown e-mail under seal. By minute order dated September 1, 2022, the Court vacated 'the hearing date and appointed the current Referee, indicating a formal Order of Reference would follow. In light of this order, plaintiff withdrew his request to file the Brown e-mail under seal. Plaintiff thereafter unsuccessfully challenged the appointment of the Referee. *See* Minute Order filed September 30, 2022. Plaintiff's opposition papers to this motion were filed October 10, 2022, and Caltrans reply papers were filed October 17, 2022. Plaintiff applied ex parte once again to file the Brown e-mail under seal; this application was denied by minute order filed October 19, 2022.

The submission date selected for this motion was October 21, 2022. The parties have agreed by electronic messages that the Proposed Recommended Ruling, Recommended Ruling, and any other documents the Referee may serve and for file may be served by electronic mail only.

The Proposed Recommended Ruling was. served on the parties on November 7, 2022. Thereafter both Johnson and Caltrans timely requested a hearing before the Referee. Prior to the hearing, with the permission of the Referee, each party submitted written objections to the Proposed Recommended Ruling. The hearing commenced on November 28, 2022 at 10:00 a.m., and concluded at 12:00 noon on the same day. Johnson appeared personally and by his attorney, John A. Shepardson, Esq. Caltrans appeared

by its attorneys, Nikolette Y. Clavel, Esq., and W. Christopher Sims, Esq. The hearing was reported by Certified Shorthand Reporter Vicki Jelley. The matter was argued and submitted. Some of the points raised during the hearing are discussed below.

III. Discussion

Caltrans' statutory basis for this motion is the general power conferred by CCP section 128(a)(5). *See* Opening Memorandum, 3:17-22, citing the section and *Peat v. Superior Court* (1988) 200 Cal.App.3d 272, 275, 288. An examination of plaintiff's opposition papers reveals that he does not contest the Court's power to issue the protective orders requested by Caltrans. These orders are based on Caltrans' assertions of the attorney-client privilege and work product doctrine. These issues are ruled upon following preliminary rulings on ancillary issues raised by the parties.

A. Caltrans Adequately Met and Conferred

Plaintiff contends. Caltrans did not adequately meet and confer. *See* Opposition Memorandum, 18:1-4. This Motion is not brought under CCP section, CCP section 2031.010 et seq., because the Brown e-mail was not produced in response to a discovery request. Nothing in CCP section 128 requires a meet and confer declaration. Assuming *arguendo* that such a declaration is required, the declarations of both Ms. Clavel and Mr. Shepardson and their numerous exhibits confirm this dispute was met and conferred to death. As of February 17, 2022, Caltrans stated that further meet and confer efforts would be futile. Shepardson Dec., paragraph 27, Exhibit 18. Based on

correspondence exchanged by the parties to that point, the Referee agrees. Plaintiff insisted the Brown e-mail was not privileged and if any privilege once existed it had been waived. Caltrans denied both assertions. This was a zero-sum dispute with no room for compromise—the communication was privileged or it was not. Where the parties have exchanged views and an impasse has been reached, further efforts may be dispensed with. *Clement v. Alegre* (2009) 177 Cal. App.4th 1277, 1293-1294. Such was the case here.

A related issue is plaintiff's implicit contention that Caltrans "unduly delay[ed] conferring about the e-mail." Opposition Memorandum, 5:7. This contention is rejected. Caltrans first asserted the attorney-client privilege within 4 hours of receiving notice from Mr. Shepardson that his client had received the Brown e-mail. While thereafter Caltrans did not match plaintiff letter for letter and message for message, it consistently asserted, and never compromised, its claims of privilege.

B. Defendant's Request for Judicial Notice Is Granted

Caltrans requests that judicial notice be taken of Mr. Shepardson's declaration dated November 17, 2021, filed in this case, claiming an hourly rate of $350 in connection with a discovery motion. The apparent purpose of this request is to attack the claim for a rate of $825 per hour for this motion. *See* Reply, 6:16-7:13. The request is granted. Evidence Code section 452(d). However, the prior declaration has no evidentiary value in this motion given the denial of plaintiff's request for monetary sanctions.

C. Ruling on Claim of Attorney-Client Privilege

Caltrans, as [t]he party claiming the privilege has the burden of establishing the preliminary facts necessary to support its exercise, i.e., a communication made in the course of an attorney-client relationship. Citation omitted. Once that party establishes facts necessary to support a prima facie claim of privilege, the communication is presumed to have been made in confidence and the opponent of the claim of privilege has the burden of proof to establish the communication was not confidential or that the privilege does not for other reasons apply." Citation omitted. *Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 733 (hereinafter Costco).

1. Caltrans Has Made a Prima Facie Showing of Privilege

There is no dispute that Mr. Brown is one of the lawyers representing Caltrans in this action and that Caltrans, a public entity, is the client. *See Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 370-371. The Brown e-mail was sent within the scope of Mr. Brown's representation. *See* Brown Dec., paragraph 6.

The attorney-client privilege covers information emanating from the attorney, and includes "advice" given to the client. *See* Wegner, Fairbank, Epstein & Chernow, Cal. *Pract. Guide: Civil Trials & Evidence* (The Rutter Group 2022) (hereinafter Wegner Fairbank) sections 8:2022, 8:2025 and citations. Plaintiff claims the Brown e-mail contains no legal advice, but does contend it supplied allegedly factual information which plaintiff characterizes as false. Opposition Memorandum, 16:17-20. Even assuming this is true,

the distinction does not help plaintiff. "The privilege equally attaches to both legal and 'factual' information/advice exchanged between attorney and client. Neither the statutes articulating the attorney-client privilege nor the cases which have interpreted it make any differentiation between 'factual' and 'legal' information:' 'Wegner Fairbank at section 8:2025 and citations; emphasis in original. Accordingly, even if the Brown e-mail had provided no legal analysis but contained a statement as inflammatory as we have evidence that Johnson is lying about the extent of his emotional distress," the privilege would remain intact providing Duncan was a Caltrans employee covered by the privilege.

Caltrans does not contend that Duncan was an officer of Caltrans, a co-party to this suit. or a person authorized to speak for Caltrans regarding this action. The sole remaining question bearing on the existence of a prima facie showing of privilege is whether nevertheless the Brown e-mail, sent to Duncan, a first-line supervisor and plaintiff's immediate superior, is within the privilege. Caltrans correctly points out that the answer to this question turns on the dominant purpose of the relationship between the parties to the communication. *Clark v. Superior Court* (2011) 195 Cal.App.4th 37, 51, citing *Costco* at 735. The only relationship between Mr. Brown and Duncan was as Caltrans' attorney to Caltrans' employee. The purpose of the short-lived relationship created by the Brown e-mail was to "prepare Caltrans' defense as part of the investigation into the claims by plaintiff in this matter." Brown Dec., paragraph 5. It can be inferred that this work included obtaining relevant information from Duncan.

Mr. Brown does not state what claims he was investigating by contacting Duncan, and plaintiff points out that Duncan was not a witness to the alleged misconduct out of which the suit arose. However, it is permissible to infer that Johnson is claiming ongoing emotional distress, and damage to his career, if for no other reason than the hiatus in his Caltrans employment. Dr. Williamson states that as of January 28, 2022, Johnson was "doing somewhat better psychologically until the email caused a setback in his progress," implying that even prior to the email Johnson was experiencing ongoing distress. Williamson Dec., paragraph 27. Indeed, if plaintiff's emotional distress had fully abated there would have been little need for Dr. Williamson's updated evaluation.

"[I]f the corporation's dominant purpose in requiring the employee to make a statement is the confidential transmittal to the corporation's attorney of information emanating from the corporation, the communication is privileged." *Costco* at 735. Mr. Duncan, as plaintiff's immediate supervisor, likely had daily contact with plaintiff and might well have knowledge of emotional distress or job-related difficulties he was experiencing. Duncan's knowledge is knowledge "emanating from Caltrans. *See* Civil Code section 2332.

The United States Supreme Court has recognized that it may be necessary to glean information relevant to a legal problem from middle management or non-management personnel as well as from top executives." *Upjohn Co. v. United States* (1981) 449 U.S. 383, 391. In that case Upjohn's general counsel, Mr. Thomas, was directed by Upjohn's board of directors to investigate "questionable payments" Upjohn may

have made to foreign governments. As part of this investigation Thomas sent a confidential questionnaire to "All Foreign General and Area Managers" regarding such payments and interviewed certain Upjohn personnel. Responses to the questionnaire were sent directly to Thomas. The Internal Revenue Service ultimately became involved and demanded the questionnaires and notes of the interviews. Upjohn objected to production based on the attorney-client privilege and work product doctrine. In upholding the privilege, the *Upjohn* opinion quoted with approval the Magistrate's earlier finding that "Mr. Thomas consulted with the Chairman of the Board and outside counsel and thereafter conducted a factual investigation to determine the nature and extent of the questionable payments and to be in a position to give legal advice to the company with respect to the payments.' (Emphasis in original.) Citation omitted. Information, not available from upper-echelon management, was needed to supply a basis for legal advice concerning compliance . . .." *Upjohn* at 394. So too here, Caltrans' legal department, including Mr. Brown, was retained by Caltrans to defend this action. Among defense counsel's other duties are undoubtedly to investigate the merits of Johnson's claims and to give legal advice to Caltrans regarding such claims, Evaluating the merits of Johnson's current damage claims plausibly required obtaining information from Caltrans employees such as Duncan who 'are not part of "'upper echelon management."

Plaintiff argued, both in his Opposition Memorandum and at the hearing, that the Brown e-mail could not have been privileged because Mr. Duncan did not "embroil [Caltrans] in serious legal difficulties"

Upjohn at 391. Nothing in *Upjohn* or the other cases cited by plaintiff suggests that in the corporate context, for the privilege to extend to lower-level employees such employees must have participated in the tortious or otherwise illegal conduct. It is doubtful that all of Upjohn's General and Area Managers, and all of the employees interviewed, were involved in bribing foreign governments. Nevertheless, the privilege was found to exist.

Plaintiff argues that the dominant purpose of the Brown email was to damage his character, his career, and his relationship with Mr. Duncan, Opposition Memorandum, 14:14-18, 16:8-24. This charge is completely unsupported by any evidence. It also makes no sense, unless one conflates defending the suit with damaging plaintiff, in which case every defense lawyer "damages" his opposing party. Johnson had re-acquired employment with Caltrans and had been promoted, thereby mitigating his damages, to Caltrans' benefit. Plaintiff offers no plausible reason why Mr. Brown would be motivated to undermine this mitigation by aggravating his emotional distress or crippling his career prospects.

Based on the foregoing, the Referee concludes that Caltrans has made its prima facie case that the attorney-client privilege protects the Brown e-mail. That said, there is some authority in *D. I. Chadbourne, Inc. v. Superior Court of San Francisco* (1984) 60 Cal.2d 723, which suggests a contrary result. Specifically, the opinion stated, among others, the following principles:

3. When an employee has been a witness to matters which require communication to the corporate employer's attorney, and the

employee has no connection with those matters other than as a witness, he is an independent witness; and the fact that the employer requires him to make a statement for transmittal to the latter's attorney does not alter his status or make his statement subject to the attorney-client privilege;

4. Where the employee's connection with the matter grows out of his employment to the extent that his report or statement is required in the ordinary course of the corporation's business, the employee is no longer an independent witness, and his statement or report is that of the employer;

5. If, in the case of the employee last mentioned, the employer requires (by standing rule or otherwise) that the employee make a report, the privilege of that report is to be determined by the employers purpose in requiring the same; that is to say, if the employer directs the making of the report for confidential transmittal to its attorney, the communication may be privileged. *Chadbourne at* 737.

The argument would go that Mr. Duncan is a witness described under 3 above; that reports on his observations of plaintiff's emotional distress, career prospects, or other information relevant only to the suit, are not required of him in the ordinary course of business, as stated in 4 above; and hence Caltrans' purpose in requiring information from Duncan, *i.e.* whether Caltrans, through Brown, directed the report for transmission to Caltrans' attorneys, as described in 5, does not come into play.

Chadbourne dealt specifically with a statement obtained from an employee witness by an investigator for a firm employed by Chadbourne's insurance company for the purpose of investigating accidents likely to lead to litigation against the insurance company's insureds. According to the investigator's declaration, the investigation firm had been directed by the attorneys for the insurance company and Chadbourne to transmit their reports directly to the attorneys, that the statement in issue was intended to. be confidential and was in fact only provided to the insurance carrier and the attorneys. *Chadbourne* at 728-729. The Supreme Court concluded that whether, under such circumstances, the statement was not privileged as a matter of law, but rather that the existence of the privilege was a factual issue presented to the trial court. *id. at* 727. The opinion' thereafter set forth the analytical framework for deciding the factual issue, which included the points quoted above.

The distinctions between *Chadbourne* and this case are obvious. There is no statement made by the employee, Mr. Duncan, or any indication that such a statement was required of him. The Brown e-mail was authored by Brown, the attorney, and no reply appears in the record. There is no attenuated chain of transmission. The Referee therefore concludes that the determining factor is Caltrans' dominant purpose, by its attorneys, in initiating the contact with Duncan via the Brown e-mail; that the *Upjohn* analysis and rationale supports the existence of the privilege; and therefore Caltrans has made its prima facie case. This being the case, the burden shifts to plaintiff to "establish the communication was not confidential of that

the privilege does not for other reasons apply." *Costco* at 733.

Plaintiff also argued, both in his meet and confer correspondence and at the hearing (but not in the body of his Opposition Memorandum) that Caltrans refusal to accept service of trial subpoenas for its lower-level employees was proof no attorney-client relationship existed with them. Shepardson Dec., paragraph 12, Exhibit 9. The argument is unsupported by legal authority. The two situations are distinct. As an example, even where the attorney-client relationship is uncontested, a defendant is not obligated to authorize his attorney to accept service of the summons and complaint, but may require personal service.

2. The Brown E-Mail Was Confidential

The attorney-client privilege protects confidential communications between a lawyer and his client. A confidential communication is defined as follows:

> "[C]onfidential communication between client and lawyer means information transmitted between a client and his or her lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted, and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship."

Evidence Code section 952.

Plaintiff has failed to rebut the presumption that the Brown e-mail was intended to be confidential, and an examination of the Opposition Memorandum reveals he did not even try. The e-mail was transmitted by Mr. Brown to no one but Duncan, and it contained the following post-script; "CONFIDENTIALITY NOTICE: This is a privileged attorney-client communication and/or is covered by the attorney work-product doctrine. It is for the sole use of the intended recipient(s). Any unauthorized review, use, disclosure, or distribution is prohibited." While this statement cannot establish an attorney-client relationship, it is evidence that the message was sent in confidence, and is consistent with Mr. Brown's unrebutted declaration testimony to that effect. *See* Brown Dec., paragraph 4. Plaintiff correctly points out that this "boilerplate" was attached even to messages sent to Mr. Shepardson, but there is no evidence in the record which suggests, and plaintiff does not claim, that Duncan knew this or was authorized or encouraged to share the Brown e-mail with anyone, including plaintiff.

Plaintiff's "other reasons" that the privilege does not apply are 1) that Duncan's disclosure to Johnson constituted a waiver; 2) that Caltrans' delay in filing this motion created a waiver; 3) that Caltrans is estopped to assert the privilege; and 4) that the crime-fraud exception applies. Further, plaintiff argued for the first time in his objections to the Proposed Recommended Ruling that 5) the CONFIDENTIALITY NOTICE quoted above was a significant part of the communication, disclosure of which waived the privilege objection to the whole message; 6) plaintiff's own characterizations of the e-mail were "disclosures" creating

waiver; and 7) Caltrans directly placed the Brown e-mail in issue in a matter going to the heart of the case. These points are considered in that order.

3. Duncan's Disclosure to Johnson Did Not Waive the Privilege

The attorney-client privilege is waived with respect to a communication protected by the privilege if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to disclosure made by anyone." Evidence Code section 912(a). Caltrans, as the client is the holder of the privilege. Evidence Code section 953(a). The privilege can be waived only by the holder of the privilege. *McDermott Will & Emery, LLP v. Superior Court* (2017) 10 Cal.App.5th 1083, 1101.

"[T]he power to waive the corporate attorney-client privilege rests with the corporation's management and is normally exercised by its officers and directors." *Commodity Futures Trading Corn. v. Weintraub* (1985) 471 U.S. 343, 348; *Venture Law Group v. Superior Court* (2004) 118 Cal.App.4th 96, 105. The principle applies with equal force to public entities such as Caltrans. At the risk of stating the obvious, Mr. Duncan is not part of Caltrans' management Plaintiff does not contend that Mr. Brown or any officer of Caltrans directed, authorized, or encouraged Mr. Duncan to disclose the Brown e-mail to plaintiff or anyone else. The post-script at the end of the message, set forth in bold italics and quoted above, is directly to the contrary. it follows that Caltrans did not consent to the disclosure to plaintiff, and hence no waiver under Evidence Code section 912(a) occurred as a result.

4. Caltrans' Failure to File Its Motion Before Dr. Williamson's January 28, 2022 Examination Did Not Waive the Privilege

Plaintiff's first point regarding delay is that Caltrans waived the privilege by failing to file its motion for protective order before the January 28, 2022 evaluation by on Williamson. Plaintiff contends "Defendant was informed the Email had to be disclosed to Dr. Williamson on 1/28/22." Opposition Memorandum, 12:23-24. Plaintiff further alleges "Defendant was on notice from 1/11/22 that Christian intended to disclose the Email to experts and use it in the case." *Id.*, 13:17-18. Neither statement finds any support in the only communications from Mr. Shepardson to defense counsel prior to January 28, to wit, the two e-mail messages of January 11, 2022 and the 6-page letter dated January 12, 2022. *See* Shepardson Dec., paragraphs 5, 7, Exhibits 4, 5.

Further, despite the contentious history of this case, Caltrans had some reason to believe that plaintiff and his attorney would refrain from distributing further the Brown e-mail until the privilege issue was resolved, whether by agreement or court intervention. This inference is supported by the California Supreme Court's decision in *Rico v. Mitsubishi Motors* Co. (2007) 42 Cal.4th 807, 817, quoting with approval from *State Comp. Ins. Fund v. WPS, Inc.* (1999) 70 Cal.App.4th 644, 656-657, as follows:

"When a lawyer who receives materials that obviously appear to be subject to an attorney-client privilege or otherwise clearly appear to be confidential and privileged and where it is reasonably apparent that the materials were provided or made available

through inadvertence, the lawyer receiving such materials should refrain from examining the materials any more than is essential to ascertain if the materials are privileged, and shall immediately notify the sender that he or she possesses material that appears to be privileged. The parties may then proceed to resolve the situation by agreement or may resort to the court for guidance with the benefit of protective orders and other judicial intervention as may be justified."

Given the complexity in the law regarding when attorney communications with public entity employees are protected by the attorney-client privilege, it may be too much to say that Mr. Shepardson should have concluded that the Brown e-mail was "obviously" privileged. What cannot be disputed is that he immediately recognized the issue. His opening message on January 11, 2022, stated "[t]his appears to be a waiver of the attorney-client privilege, if any privilege attaches to communications with Mr. Duncan."

The Referee concludes that Mr. Shepardson recognized, at a minimum, that he had received material from his client which may be privileged. This situation was addressed directly in *McDermott Will & Emery LLP v; Superior Court, supra,* 10 Cal.App.5th 1083 (*McDermott*), first cited by plaintiff at the hearing before the Referee, and which applied the standards set forth in *State Comp. Ins. Fund v. WPS, Inc., supra.* Specifically, "when an attorney ascertains that he or she received materials that are not obviously or' clearly privileged, but nonetheless may be privileged materials that were inadvertently disclosed . . . the attorney's duty is simply to notify the privilege holder that the attorney may have privileged documents that were inadvertently disclosed. At that point, the onus

shifts to the privilege holder to take appropriate steps to protect the materials if the holder believes the materials are privileged and were inadvertently disclosed." *McDermott* at 1108-1109. Because Duncan was a lower-level Caltrans manager whose communications with Caltrans lawyers were not obviously privileged, the Referee concludes this standard applies.

Whatever Mr. Shepardson concluded about the potentially privileged nature of the Brown e-mail, he responded to his recognition of the issue by immediately informing Mr. Sims of the disclosure, as required by *McDermott.* At that point the burden shifted to defense counsel to "take appropriate steps to protect the materials." *Ibid.*

Caltrans sole "step" to protect the e-mail prior to January 28 was Mr. Sims' message of January 11, 2022 stating Caltrans' position that the communication was privileged and that Mr. Duncan had no authority to waive it. As aforementioned, Mr. Shepardson responded by his January 12 letter, which ended with "[w]e welcome submittal of any and all legal authority from you so that hopefully it resolved (sic) promptly and amicably, one way or the other." There was nothing which suggested that if a motion were not filed before January 28 that plaintiff would consider the privilege waived and proceed to distribute the e-mail to his experts. In the absence of such a clear warning the Referee declines to rule that Caltrans' failure to file a motion in the 11 court days which elapsed from Mr. Shepardson's January 12 letter to Johnson's disclosure of the e-mail to Dr. Williamson constituted a waiver.

Further, it is by no means clear that even if a motion for protective order had been tiled during this

period that disclosure would not have occurred. As discussed below, the purpose of such a motion Is to prevent disclosure of the privileged material. During the meet and confer process plaintiff claimed that "[t]o Withhold the damaging document [from Dr. Williamson may have resulted in seriously flawed results and even a finding that Christian was engaging in lying or misleading conduct." Shepardson Dec., paragraph 13, Exhibit 10. Johnson testified in his declaration that he felt he had a duty to be honest with Dr. Williamson, which he discharged by mentioning the e-mall and disclosing it to him. Declaration of Christian L. Johnson, paragraphs 11-15. Dr. Williamson testified that "Christian would not have been tested or interviewed accurately If he failed to disclose or acknowledge the e-mail and its continuing effect on him." Declaration of Bennet Williamson, Ph.D., paragraph 25. Taken together, these statements suggest disclosure of the e-mail to Dr. Williamson would have occurred no matter what Caltrans did. Nowhere does plaintiff claim that if a motion had been filed before January 28, he would have refrained from such disclosure.

5. That This Motion Was Not Filed Until August 18, 2022 Did Not Waive the Privilege

Plaintiff claims that the seven-month delay between the time the disclosure of the Brown e-mail occurred and the filing of the motion resulted in a waiver of the privilege. Evidence Code section 912(a) provides in pertinent part that "[c]onsent to disclosure is manifested by any statement or other conduct of the holder of the privilege indicating consent to the disclosure, including failure to claim the privilege in any proceeding in which the holder has legal standing and

the opportunity to claim the privilege." Emphasis supplied. Case law makes clear that the legal standing and opportunity must be present not just during the pendency of the case, but in an actual legal proceeding before a court or other tribunal. *See Kerner v. Superior Court* (2012) 206 Cal.App.4th 84, 114-116 (issue whether party waived privilege by failing to 'timely object to discovery referee's ruling on motion to compel production of documents is remanded to trial court); *Calvert v. State Bar* (1991) 54 Cal.3d 765,780 (privilege waived for failure to claim during testimony in State Bar disciplinary hearing); *People v. Perry* (1972) 7 Cal.3d 756, 783 (psychotherapist-patient privilege not waived by patient testimony in murder trial); *Mize v. Atchison T. & S.F. Ry, Co.* (1975) 46 Cal.App.3d 436, 449, 450 (failure to make proper and timely objection at trial). In this case, the only "proceeding" which occurred during the period January 10,2022 to August 18, 2022, was the April 1,2022 hearing on Mr. Shepardson's disqualification. The Brown e-mail was not at issue in that proceeding, and there was no opportunity or need to assert the privilege.

The cases first cited by Johnson in his written objections to the Proposed Recommended Ruling are distinguishable and do not suggest a contrary conclusion. In *Curie v. Superior Court* (2001) 24 Cal.4th 1057, the issue presented was whether a superior court judge who had been ordered disqualified from serving on a criminal case was a "party to the proceeding" within the meaning of CCP section 170.3(d) so as to allow him to seek a writ of mandate setting aside the order. The Supreme Court found he was not in so doing the opinion cited CCP section 170.5(1) defines "proceeding" as the action, case, cause, motion, or

special proceeding to he tried or heard by the judge." However, by express terms of section 170.5 terms this definition applies only "[f]or the purposes of sections 170 to 170.5." The issue presented in *Curie* is in no way similar to the issue of waiver In this case—no one disputes Caltrans' standing to claim the privilege. And, even lithe definition in CCP section 170.5(f) is applied to the term "proceeding" in Evidence Code section 912(a), Caltrans has in fact, by its motion, claimed the privilege in this case.

In *People v. Gillard* (1997) 57 Cal.App.4th 136, a search warrant served at the office of defendant's lawyer resulted in seizure of the client's file. The file was sealed by the special master and "held under seal to allow Gillard to file a motion to suppress or to seek return of the materials . . . No motion or objection was filed and the file was released to the prosecution. Because the record contains no indication Gillard interposed a timely objection or motion to suppress to prevent release of that file, we conclude any privilege which might have attached to those materials is deemed waived." *Id.* at 164. In this case the Brown e-mail was never held under seal for the purpose of allowing Caltrans an opportunity to assert its privileges. Plaintiff had control of it at all times after its Initial disclosure by Duncan, and exercised that control by distributing It to his experts. Caltrans did interpose a timely objection. Caltrans has filed a motion, albeit one plaintiff says was unduly delayed.

This leaves the issue whether Caltrans' manifested consent to disclosure "by any statement or other conduct indicating consent to the disclosure . . ." Evidence Code 912(a). No statement manifesting consent appears in the record. Caltrans' counsel consistently

asserted the privilege and never compromised it position. The "other conduct" on which plaintiff relies is delay—the simple passage of time during which no motion was filed. Plaintiff cites *United States v. De La Jam* (9th Circuit 1992) 973 F.2d 746 in support of this argument. In that criminal case law enforcement executed a search warrant at defendant's home and seized, among other documents, a letter from defendant's attorney. At trial, the letter was admitted in evidence over defendant's objection. The appellate court found that defendant had waived the attorney-client privilege by failing to take any action to recover the letter or protect its confidentiality between the time of the seizure and its introduction in evidence at the trial. *Id.* at 750. The court pointed out that 9th Circuit opinions had previously held that' waiver could occur "by implication." *Id.* at 749. This is consistent with Evidence Code section 126, which states that "[conduct includes all active and passive behavior, both verbal and nonverbal."

Assuming *arguendo* the *De La Jara* opinion is persuasive authority in this case, the court explained that "[when the disclosure is involuntary, we will find the privilege preserved if the privilege holder has made efforts 'reasonably designed' to protect and preserve the privilege. Citation omitted. Conversely, we will deem the privilege to be waived if the privilege holder fails to pursue all reasonable means of preserving the confidentiality of the privileged matter." *Id.* at 750.

Applying these criteria to this case, the Referee finds that Caltrans' efforts to protect and preserve the privilege have been reasonable. The initial "effort" was Mr. Sims' message sent within 4 hours of the initial notification asserting the privilege and demanding

that plaintiff delete or destroy Brown e-mail. Subsequent correspondence making similar demands also constituted effort to preserve the privilege. As aforementioned, Caltrans had no notice that disclosure to plaintiff's experts would occur until January 28, 2022, and by February 4, 2022 Mr. Shepardson confirmed that such disclosure had in fact occurred. The horse had left the barn. Any opportunity to prevent distribution of the Brown e-mail by motion for protective order had been lost. The most such a motion could have accomplished (and the most this motion can accomplish) is to undo, to the extent possible, the disclosure, and prevent introduction or use of the privileged e-mail or its contents at trial. From that point forward, the only effort which would be reasonably required is that which would resolve the privilege issue before trial. Trial was set at that time for April 18, 2022 Caltrans could have proceeded by motion for protective order or, alternatively, a motion in limine. Even if Caltrans had promptly filed a motion for protective order after February 4, the court's order of February 17 staying the action would have prevented a hearing on the motion until after April 1, 2002. At the April 1 hearing the court vacated the trial date and set a trial setting conference on June 3, 2022, which resulted in a new trial date of May 8, 2023. The privilege issue was still very much alive, as evidenced by continued correspondence between the parties. *See* Shepardson Dec., paragraphs 29-31, Exhibits 20-22. However, any immediate need to file a motion had evaporated.

6. The Record Does Not Support An Estoppel

Evidence Code 623 sets forth the statutory expression of the doctrine of equitable estoppel: "Whenever a party has, by his own statement or conduct, intentionally and deliberately led another to believe a particular thing true and to act upon such belief, he is not, in any litigation arising out of such statement or conduct, permitted to contradict it." The elements the proponent of an estoppel must prove to establish it are "(1) The party to be estopped must know the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had the right to believe that it was so intended; (3) the party asserting the estoppel must be ignorant of the true state of facts; and, (4) he must rely upon the conduct to his injury," *Ashou v. Liberty Mutual Fire Ins. Co.* (2006) 138 Cal.App.4th 748, 766-767. The existence of an equitable estoppel, including any disputed issue affect, Is to be decided by the court. *Hopkins v. Kedzierski* (2014) 225 Cal. App.4th 738, 745.

Plaintiff claims that Caltrans' "refusal to seek an immediate [protective] order, while on notice the Email was being provided to Christian's experts (psychological harms and HR violations) and were relying on it" creates an estoppel. Opposition Memorandum, 14:3-5. Initially, it must be pointed out that every factual component of this claim is false. Caltrans never refused to seek an immediate protective order. Plaintiff never suggested that it do so until after the Brown e-mail had been distributed to Plaintiff's experts. *See* Shepardson Dec., paragraph 13, Exhibit 10. Neither Mr. Shepardson's initial messages disclosing that he

had received the Brown e-mail nor his follow-up letter of January 12, 2022 made reference to a protective order or stated any intent to provide the Brown e-mail to his retained experts. Put another way, Mr. Shepardson did not say he would feel free to disclose the Brown e-mail to his experts unless Caltrans filed a motion immediately. *Ibid.* Caltrans was first notified the Brown e-mail was being provided to plaintiff's experts by Mr. Shepardson's January 28, 2022 letter. This was the same day plaintiff showed the message to Dr. Williamson. No express notification that such any such experts were relying on the Brown e-mail was provided until Dr. Williamson's declaration was filed and served on October 10, 2022, with the rest of plaintiff's opposition papers.

Returning to the elements of an estoppel, plaintiff does not identify the relevant facts Caltrans knew (Element 1). Plaintiff does not state what conduct by Caltrans it intended plaintiff act upon, or what action that would be (Element 2). Having received Mr. Sims' initial message asserting the attorney-client privilege, it would have been illogical to conclude that Celli-arts intended that plaintiff's action be disclosing the Brown e-mail to his experts. Plaintiff does not state the "true facts" of which he was ignorant (Element 3). Finally, having received Mr. Sims' letter and not having disclosed prior to January 28, 2022 his intent to distribute the Brown e-mail, it cannot be said plaintiff justifiably relied on Caltrans' failure to file a motion prior to that time (Element 4). On all counts, plaintiff's attempt to show an estoppel falls.

7. The Crime-Fraud Exception Does Not Apply to Defeat the Privilege

The statutory basis for the crime-fraud exception is Evidence Code section 956(a), which provides "[t]here is no privilege under this article if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit' a crime or a fraud?' The party claiming crime-fraud has the burden of providing a factual basis adequate to support a good faith belief by a reasonable person that a crime or fraud has been committed or that there was a plan to do so. *See*, Well, Brown, et. al. *Cal Pract. Guide: Civ. Pro. Before Trial* (The Rutter Group 2022) (hereinafter Well & Brown) section 8:154, citing *United States v. Zolin* (1989) 491 U.S. 554, 572. "[I]n order to establish the crime/fraud exception to the privilege, the party opposing the privilege must establish a prima facie case of fraud. [T]he party must also establish a reasonable relationship between the fraud and the attorney-client communication." *People v. Superior Court* (1995) 37 Caf.App.4th 1757, 1769; internal quotation's and citation omitted.

Plaintiff has failed to adduce facts which establish any of this. The sole evidence submitted in opposition to the motion is the declaration of Mr. Shepardson. This declaration does not even attempt to show that the services of Caltrans' legal department were sought or obtained by Caltrans to commit or plan to commit a crime or fraud. Evidence Code section 956(a). This omission is undoubtedly present because the obvious reason these lawyers were retained was to defend the case brought by Johnson. Similarly, Mr. Shepardson's declaration sets forth no facts to support a fraud or violations of Penal Code sections 131 or 133. At the

hearing before the Referee plaintiff asserted that Mr. Shepardson's declaration testimony characterizing the content of the Brown e-mail is evidence which supports the crime-fraud exception. *See* Shepardson Dec., paragraph 4, alleging the e-mail "contains false, misleading, defamatory, and retaliatory statements . . . " This testimony does not state facts, but rather legal conclusions and lay opinions which are not admissible as being helpful to a clear understanding of his testimony. Evidence Code section 800(b). These statements have no probative value.

Similar assertions are presented by way of argument. *See* Opposition Memorandum, 16:25-17:27, alleging Mr. Brown made false, misleading, deceitful, statements and engaged in criminal activity. The court must disregard "facts" contained in an unverified statement. *See Smith, Smith & Kring v. Superior Court* (1997) 60 Cal.App.4th 573, 577-578. Matters set forth in memoranda of points and authorities are not evidence and cannot provide the basis for the granting or denial of a motion. *Ibid.* Plaintiff has cited no case wherein a court found that a fraud had been committed, or a violation of Penal Code sections 131 or 133 had occurred, when an attorney conveyed his client's factual assertions or legal theories of the case to his client's employee, even where the facts were ultimately disproven or the theories rejected by the court or jury. The Referee declines to recommend that this court be the first.

Finally, the Referee disagrees with plaintiff's assertion that destroying the copies of the Brown e-mail in plaintiff's possession or control would be a crime. No authority for this proposition is cited. Return, deletion, or destruction of the copies of the Brown e-mail

in plaintiff's possession or control would only have the effect of restoring Caltrans privilege, to the extent possible. This would in turn merely place Caltrans in the position it occupied before the unauthorized disclosure occurred.

8. Inclusion of the CONFIDENTIALIY NOTICE in the Moving Papers Did Not Waive the Privilege

Plaintiff claimed for the first time in his objections to the Proposed Recommended Ruling that Caltrans' inclusion in its moving papers of the CONFIDENTIALIY NOTICE included as a post-script to the Brown e-mail "disclosed a significant part of the [privileged] communication," resulting in waiver of the privilege as to the whole message. *See* Evidence Code section 912(a). The claim is rejected for several reasons. Caltrans does not claim this post-script, which is set forth below Mr. Brown's complimentary close and electronic signature, is a confidential communication it seeks to protect. Rather, its function, by its terms, is to advise anyone who may receive body of the message of its privileged status and that it "is for the sole use of the intended recipient(s) and that "(a)ny unauthorized review, use, disclosure, or distribution is prohibited."

To create a waiver "[t]he disclosure must reveal enough substantive information so that the specific content of the communication has been disclosed. Well & Brown, section 8:199.1, citing *Southern Calif. Gas Co. v. Public Utilities Comm'n* (1990) 50 Cal.3d 31, 49; emphasis in original. Judging by the broad characterizations of the parties, the substantive information of the message was set forth in the redacted portion, and was completely distinct from the claim of

confidentiality. Had the CONFIDENTIALITY NOTICE not been appended to the message, plaintiff would no doubt be arguing that this suggests the message was not confidential and that Duncan was free to distribute it to whomever he pleased. It is common for privileged and unprivileged information to be contained in the same document. That is the situation here.

9. Plaintiff's Own Characterizations of the Brown E-Mail Were Not Disclosures" Creating Waiver

For the first time in his objections to the Proposed Recommended Ruling plaintiff claims that his attorney's own claims that the Brown e-mail was "false, misleading, defamatory, *criminal*, omitted DICU report, private &/or sexual info" created a waiver. Plaintiff's' Objections To 'Tentative Ruling," 3:25-4:2; with citations, emphasis in original. The contention is absurd. Neither Johnson nor Mr. Shepardson is the holder of Caltrans' privilege. There is no evidence Caltrans agreed with, consented to, or endorsed Mr. Shepardson's colorful characterizations. As aforementioned, these amount only to legal conclusions and opinions having no probative value. In any case, these accusations do not contain any substantive information disclosing the specific content of the message. Well & Brown, section 8:109.1.

10. Caltrans Did Not Place a Communication in issue Going to the Heart of the Claim

Case law has recognized that "fundamental fairness' may require disclosure of otherwise privileged

information or communications where plaintiff has placed in issue a communication which goes to the heart of the claim in controversy." *See Mitchell v. Superior Court* (1984) 37 Cal.3d 591, 604, where plaintiff had allegedly claimed emotional distress caused in part by Information about DBCP supplied by her attorneys. *See also Merritt v. Superior Court* (1970) 9 Cal.App.3d 721, 730, "the theory of plaintiff's lawsuit placed in issue the conduct and state of mind of his personal injury counsel in falling to propose a settlement;" *Steiny & Co., Inc. v. California Elec. Supply Co.* (2000) 79 Cal.App.4th 285, 292, plaintiff could not pursue damage claim and foreclose examination thereon by asserting trade secret privilege. Johnson cites these cases in support of his contention that Caltrans has waived its privilege because it "directly placed the e-mail in issue going to the heart of the case—retaliation and CJ's damages." Objection To Proposed Recommended Ruling, 4:3-5.

There are several problems with this theory. In all of the above-cited cases the damage claim was set forth in the pleadings. Caltrans pleadings do not refer to the Brown e-mail, and its existence and content are not central to its theory of the case. Caltrans' claim of privilege and its defenses to the action are not inconsistent. Most important, Caltrans did not intentionally place the e-mail in issue, as plaintiffs did with their pleaded damage claims in the above-cited cases. The disclosure to Johnson was unauthorized. This claimed basis for waiver is meritless.

11. The Content of the Brown E-Mail Will Not Be Considered in Ruling on the Motion

Plaintiff has applied unsuccessfully to file the Brown e-mail under seal. The Court denied the application, stating "[t]he Court nor Referee has indicated a need for it." Minute order filed October 19, 2022. With exceptions not applicable here, the statutory rule is that "the presiding officer (which presumably includes a Discovery Referee) may not require disclosure of information claimed to be privileged . . . in older to rule on the claim of privilege." Evidence Code section 915(a); *Costco* at 736-738. Only when the court has already ruled that a waiver has occurred or an exception applies may the court conduct an in camera examination of the privileged material to determine whether some protection is nevertheless warranted. *Id.* at 740.

For reasons set forth above, the Referee concludes that no waiver has occurred, nor has plaintiff shown that any exception applies. Therefore, the recommended ruling is that the content of the Brown e-mail not be considered in ruling on Caltrans' motion.

D. Ruling on Claim of Work Product

"A writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories is not discoverable tinder any circumstances." CCP § 2018.030(a). This is sometimes referred to as absolute work product. Other work product is discoverable only if the court "determines that denial of discovery will unfairly prejudice the party seeking discovery in preparing that party's claim or defense or will result in an injustice." CCP § 2018.030(b). This is sometimes

described as qualified work product. In either case the attorney (in this case Mr. Brown) is the holder of the privilege. *Lasky, Haas, Colder & Minter v. Superior Court* (1985) 172 Cal.App.3d 264, 271-273. As with the attorney-client privilege, the party asserting work product protection is required to make a showing of the preliminary facts supporting the claim. *Citizens For Ceres v. Superior Court* (2013) 217 Cal.App.4th 889, 911.

1. Caltrans Has Not Made A Prima Facie Case Of Absolute Work Product

An examination of Mr. Brown's declaration reveals that nowhere does he make the simple assertion that his message to Duncan contains his impressions, conclusions, opinions, or legal research or theories. No facts are set forth in the declaration which support an inference that it contains this content. The omission is fatal. Mr. Brown's statement that he believes that the message is protected work product is not probative. *See Kendall v. Barker* (1988) 197 Cal.App.3d 619, 624. The assertion in the Opening Memorandum and Reply that the Brown/Duncan e-mail contains Paul Brown's mental impressions regarding Plaintiff's claims is not evidence and cannot provide the basis for granting this motion. *See Smith, Smith & Kring v. Superior Court, supra,* 60 Cal.App.4th at 577-578. No prima facie showing of absolute privilege having been made, no rebuttal was required of plaintiff.

2. Caltrans Has Not Made a Prima Facie Case of Qualified Work Product

One policy the work product doctrine Serves is to "[p]revent attorneys from taking undue advantage of

their adversary's industry and efforts." CCP section 2018.020(b). Caltrans argues that Mr. Brown's selection of Duncan as the recipient of his e-mail message is protected work product. Specifically, Caltrans argues in the case of witness lists, 'qualified work product attaches to the extent it reflects the attorney's industry and effort in selecting which witnesses to ask for a recorded statement." (*Coito v. Superior Court* (2012) 54 Cal.4th 480, 501). Qualified work product is crucial in this context because '[e]ven without obtaining the witness statements themselves . . . [opposing counsel] would obtain valuable information by free riding on the attorney's identification of the most salient witnesses.' *(Ibid.)* Here, disclosure of the Duncan/Brown e-mail would allow Mr. Shepardson to 'free ride' on Paul Brown's identification of a 'salient witness' related to the issues in this case." Opening Memorandum, 10:6-13.

The quotes from *Coito* are accurate and the argument is persuasive What is completely lacking is competent factual evidence supporting the argument. Mr. Brown does not testify in his declaration that he prepared or considered any witness list. He does not claim that he was the one who selected Duncan for contact, or whether there were other employees he considered but did not select. For all we know, Mr. Brown was told by Caltran' management to "contact Duncan and see what he knows." Or, alternatively, he might have received a telephone call from Duncan inviting contact. All that is stated is that he sent the message as part of his investigation of plaintiff's claims, this does not necessarily suggest any effort or industry in selecting Mr. Duncan as a "salient witness." As before, 'Caltrans' points and authorities are no

substitute for Mr. Brown's declaration testimony. *See Smith, Smith & Kring v. Superior Court, supra,* 60 Cal.App.4th at 577-578. No prima facie showing of qualified privilege having been made, no rebuttal was required of plaintiff.

E. Conclusion

Based on the attorney-client privilege only, Caltrans' motion is granted. However, this hardly spells the end of the matter. Plaintiff received the Brown e-mail through no fault of his own, and claims it caused him emotional distress. Is such distress, arguably caused by the litigation process, a recoverable component of damage? if so, to what extent will he be allowed to testify to the privileged e-mail's content and effect on him? The message is now part of Dr. Williamson's chart. Will he give it up? To what extent will he be allowed to rely upon It? He has testified "[I]t would be difficult, and perhaps impossible, to give testimony about Christian's psychological harm caused by Defendant Christian (sic) without consideration of the damaging email." Williamson Dec., paragraph 31. Has he talked himself out of a job? What use will plaintiff's "HR experts" be allowed to make of the Brown e-mail given that Brown is not a Caltrans HR officer or employee? These and related questions are unresolved. The Referee does not rule or imply that by finding the Brown e-mail privileged and recommending that the motion be granted that these issues must be resolved in Caltrans' favor.

Further, regarding the claim of work product, this recommended ruling does not find that no valid claim of work product exists. Rather, the recommended ruling is that because Caltrans has failed in

this motion to make a prima facie case, no protective order based on work product should issue. Whether Caltrans can take another stab at preventing use of the Brown e-mail at trial by motion in limine or other means based on the work product privilege is not addressed or decided.

F. Sanctions are Denied

Plaintiff cites no statutory or other legal basis for imposition of monetary sanctions in a motion of this kind. CCP sections 2023.010 and 2023.020, cited by plaintiff, apply to misuses of the discovery process and failure to meet and confer as required for discovery motions. The Brown e-mail was not produced in discovery. Plaintiff has not prevailed. Sanctions are denied.

IV. Recommended Ruling

For reasons set forth above, the recommended ruling is as follows:

1. Defendant Caltrans' motion for a protective order is GRANTED. The Brown e-mail is a protected attorney-client communication which shall not be introduced at that over Caltrans' objection.

2. Plaintiff and his counsel are prohibited from any further dissemination of the Brown e-mail.

3. Within 20 days following mailing of notice of entry of the court's order on this motion, plaintiff and his attorney, John A. Shepardson, shall do all of the following:

A. Return or destroy all copies of the Brown e-mail and prepare, serve, and file a declaration under penalty of perjury that this has

been done, or explaining the reason(s) it cannot be done.

B. Include in the declaration identifications of all persons to whom the Brown e-mail is known to have been disclosed, and the date of each disclosure.

4. The issue of to what extent plaintiff and witnesses called by plaintiff, including his retained experts, may testify regarding the Brown e-mail and its effect on plaintiff is not addressed or ruled upon.

5. Plaintiff's request for monetary sanctions is DENIED.

V. Further Recommended Ruling

The Discovery Referee spent 29.0 hours communicating with the parties, examining the flaying, opposition, and reply papers, analyzing the legal authority cited by the parties, conducting independent legal research on the issues presented, and preparing the Proposed Recommended Ruling on this motion. An additional 3.5 hours was spent communicating with the parties after the service of the Proposed Recommended Ruling and examining each party's objections to thereto. 2.7 hours was spent preparing for the hearing before the Referee, and 2.8 hours was spent traveling to and from the hearing and presiding over it. Analyzing the new issues and authorities submitted by plaintiff and preparing this Recommended Ruling and proposed Order consumed another 7.2 hours, Total time spent on his motion comes to 45.2 hours.

The Referee is mindful of the 20-hour limitation placed on his services by the order filed September 16,

2022. However, this' assignment is among the most challenging the Referee has handled in 7 years of doing this work. The time Involved was due in part to the volume of paper submitted by the parties, the number and complexity of the issues raised and claims made, the extensive citations to authority, communications with the parties, the submission or written objections prior to the hearing, the issues discussed at the hearing, and the additional time needed to address and resolve these issues in the Recommended Ruling. At $400 per hour, 45.2 hours creates a potential fee of $18,080.00.

CCP section 639(d)(5) allows the Court, at the request of any party, to set the maximum number of hours the referee may charge, and the Court has done so in this case. The same section provides that "[U]pon the written application of any party or the referee, the court may, for good cause shown, modify the maximum number of hours . . . " The undersigned Referee in this case, pursuant to CCP section 639(d)(5), hereby applies to the Court, based on the above-stated considerations, for a modification of the maximum number of hours he may charge to 45.2, or to such lesser number as the Court in its discretion deems appropriate.

The Referee's past practice has been to divide the obligation to pay his fee equally between the parties, which is consistent with paragraph 3 of the order filed September 16, 2022 and CCP section 645.1(b) Unequal allocations of the fee have only been recommended where the result should have been obvious to the losing party from the beginning, or sanctions were warranted but some deficiency in the request prevented their imposition. An equal division is

recommended here. The recommended ruling is that whatever total fee the Court ultimately approves, such fee shall be paid 50% by plaintiff Christian L. Johnson, and 50% by defendant California Department of Transportation, no later than 30 days after mailing of the notice of entry of the Court's order on this motion

/s/ J. Anthony Abbot
Discovery Referee

Dated: November 30, 2022

ORDER

The Recommended Ruling of the Discovery Referee having been considered, and good cause appearing therefor,

IT IS ORDERED:

1. Defendant Caltrans' motion for a protective order is GRANTED. The Brown e-mail is a protected attorney-client communication which shall not be introduced at trial over Caltrans' objection. The Court does not grant the motion for protective order based on work product, and Caltrans is free to argue the Brown Email is protected work . . . .

2. Plaintiff and his counsel are prohibited from any further dissemination of the Brown e-mail.

3. Within 20 days following mailing of notice of entry of the court's order on this motion, plaintiff and his attorney, John A. Shepardson, shall do all of the following:

A. Return or destroy all copies of the Brown e-mail and prepare, serve, and file a declaration under penalty of perjury that this has been done, or explaining the reason(s) it cannot be done. The declaration is to be filed with the court in this case.

B. Include in the identification of all person to whom the Brown e-mail is known to have been disclosed, and the date of each disclosure.

4. The issue of to what extent plaintiff and witnesses called by plaintiff, including his retained experts, may testify regarding the Brown e-mail and

its effect on plaintiff is not addressed or ruled upon in this Order.

5. Plaintiff's request for monetary sanctions is DENIED.

IT IS FURTHER ORDERED, that the Court, having considered the application of the Discovery Referee for a modification of the maximum number of hours he may charge for this motion, hereby establishes that maximum at 45.2 hours. Based on that maximum, the Court approves the Referee's fee in the total amount of $ 18,080.00, which shall be paid 50% by plaintiff Christian L. Johnson, and 50% by defendant California Department of Transportation, no later than 30 days after mailing of the notice of entry of this Order.

/s/ Barbara A. Kronlund
Judge of the Superior Court

DATED: 1/3/23

Court has considered Plaintiff's objections to Referee Proposed Ruling on Defendant's Motion for Protective Order directed to Plaintiff Christian L. Johnson, as well as Defendant's Responses to Plaintiff's objections. Court over rules all 58 objections, as being unmeritorious. The recommended ruling is thorough, well-reasoned and well-supported. No legal errors are contained in the Recommended Ruling.

Court finds the objections to be made without substantial justification & awards Caltrans $4,400 attorneys fees per . . .

ORDER MODIFYING OPINION AND DENYING REHEARING, CALIFORNIA COURT OF APPEAL THIRD APPELLATE DISTRICT (APRIL 4, 2025)

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA THIRD APPELLATE DISTRICT
(San Joaquin)

CHRISTIAN L. JOHNSON,

Plaintiff and Appellant,

v.

DEPARTMENT OF TRANSPORTATION,

Defendant and Respondent.

No. C099319

(Super. Ct. No. STK-CV-UCR-2019-281)

[NO CHANGE IN JUDGMENT]

Before: HULL, Acting P.J.,
FEINBERG, J, WISEMAN, J.

ORDER MODIFYING OPINION AND DENYING REHEARING

THE COURT:

To correct a clerical error, the court vacates the April 1, 2025, order modifying the opinion and denying rehearing.

It is ordered that the published opinion filed herein on March 17, 2025, be modified as follows:

On page 8, in the first sentence of the first paragraph, the words "On January 10, 2023," and "which stayed the case" are deleted, and the words "and on January 10, 2023, this court stayed the case" are added. As modified, this sentence now reads:

Johnson filed a petition for writ of mandate in this court, and on January 10, 2023, this court stayed the case.

This modification does not change the judgment. Appellant's petition for rehearing is denied.

BY THE COURT:

/s/ Hull
Acting Presiding Judge

/s/ Feinberg
Judge

/s/ Wiseman
Judge*

* Retired Associate Justice of the Court of Appeal, Fifth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

PETITION FOR REVIEW, FILED IN THE SUPREME COURT OF CALIFORNIA (APRIL 16, 2025)

IN THE SUPREME COURT OF CALIFORNIA

CHRISTIAN L. JOHNSON,

Plaintiff and Petitioner,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF SAN JOAQUIN,

Respondent,

CALIFORNIA DEPARTMENT OF TRANSPORTATION,

Defendant and Real Party In Interest.

No. S290366

Review of Appellate Decision Third Appellate District, Case No. C099319 San Joaquin County Superior Court, Case No. STK-CV-UCR-2019-281

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[TOA, TOC, Omitted]

I. Issue Presented

In January 2022, Christian was directly sent a Caltrans attorney email that emotionally damaged him. He provided it to his attorney, who immediately provided it to CalTrans' counsel. Unlike in *Rico v. Mitsubishi Motors Corp.,* in her 1/3/23 order, the trial judge here found the email not clearly privileged and thus applied the *McDermott/State Fund,* infra, lower standard, which simply required disclosure to opposing counsel. On 8/25/23, the judge arbitrarily ignored her prior order, and in violation of *Rico's prospective application rule,* retroactively applied the *McDermott/State Fund* higher standard back to January, 2022, create ethical violations to disqualify Christian's attorney one day before a jury trial after 4.5 years of litigation. Should the published opinion defying *Rico*, upholding the judge's unreasoned late-term attorney disqualification, and denying Christian and his lawyer their constitutional rights, be citable California law?

II. Summary Argument

One, Institutional Harm. Respectfully, the *published* opinion allowed the trial judge by application of an ex post facto[1] standard to late-term disqualify

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[1] From https://en.wikipedia.org/wiki/Ex post_facto_law

Christian's lawyer, which violated Christian and his lawyer's constitutional rights. The opinion endangers the constitutional rights of all Californians. The opinion undermines the administration of justice by allowing the arbitrary disqualification of civil and criminal lawyers. This is a significant and dangerous unchecked expansion in trial judges' discretion and contrary to well-settled law. This expansion in arbitrary power will create chaos and delay in the court system. Devious counsel will be encouraged to bring late-term motions to disqualify their adversaries. Trial lawyers will quell advocacy for fear of arbitrary removal. Ex post facto laws are so anathema to the American justice system that prohibition against them is imbedded in the U.S. and California Constitutions.

An ex post facto law[1] is a law that retroactively changes the legal consequences or status of actions that were committed, or relationships that existed, before the enactment of the law.

From https://constitution.congress.gov/browse/essay/artI-S9-C3-3-2/ALDE_00013191/#ALDF_00020315

In the *Federalist No. 44*, James Madison asserted that ex post facto laws are contrary to the first principles of the social compact, and to every principle of sound legislation.3 In the *Federalist No. 84*, Alexander Hamilton further justified prohibitions on ex post facto laws by arguing:

The creation of crimes after the commission of the fact, or . . . punishment for things which, when they were done, were breaches of no law, and the practice of arbitrary imprisonments, have been, in all ages, the favorite and most formidable instruments of tyranny.4

The prohibition on ex post facto laws seeks to assure that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed and restricts governmental power by restraining arbitrary and potentially vindictive legislation.5

Two, disqualification of counsel must be a "reasoned judgment consistent with the legal principles and policies appropriate to the matter at issue. . . . If it is not supported by sufficient reason, an order disqualifying an attorney and thereby depriving a litigant of the attorney of his choice constitutes an abuse of discretion that must be reversed on appeal." *(McPhearson v. Michaels Co.* (2002) 96 Cal.App.4th 843, 851.) Respectfully, the trial judge's decision was clearly unreasoned as we will show below.

III. Background

African-American Christian Johnson ("Christian") is subjected to the N-word, called a "boy", and a mock anal rape while bending over to replace a form on the side of the Stockton Channel Bridge by Caucasian CalTrans employee Mark Taylor. An internal CalTrans investigation and report substantiates the abuses. (Vol. 2: p. 180-197) Suit is filed on 1/8/19 (Vol. 9: p. 2006) CalTrans takes Christian's Psychologist Expert Dr. Bennett Williamson's deposition in June and July, 2021 and learns Christian informed the doctor of hostile work events and how they damaged him. (Vol. 8: p. 1811: ls. 23-28; Vol. 9: p. 2182: ls. 9-19)

CalTrans Tactically Delays Protecting the E-mail. On 1/10/22: Christian's attorney informs CalTrans attorney Christopher Sims ("Sims") that Christian has a follow up psychological examination on 1/28/22. CalTrans knows Christian will inform the doctor of his current work conditions and emotional injuries. (Vol. 8: p. 1812: ls. 1-3) A trial date of 4/18/22, is set. CalTrans' attorney Paul Brown sends an email ("E-mail") about Christian to Christian's boss, Nicolas Duncan. Brown fails to take adequate precautions to

protect its confidentiality as Duncan 27 minutes later forwards it to Christian (Vol. 8: p. 1812: ls. 1-8) At 4:28 p.m. Christian forwards it to his attorney, and the E-mail contains false, misleading, defamatory and retaliatory statements about Christian. Christian's attorney informs Sims of the E-mail at 10:51 a.m. on 1/11/22 and provides reasons why there was a waiver of the privilege. (Vol. 8: pp. 1852-1853: ls. 23-13)

At 2:47 p.m. on 1/12/22, Sims claims the E-mail is privileged. (Vol. 12: p. 2787-2788: ls. 25-1) Christian's attorney sends an eight-page letter claiming the E-mail is not privileged. (Vol. 12: pp. 2787-2788: ls. 25-1)

For the next 22 days, Sims says nothing. (Vol. 8: pp. 1896-1897)

1/28/22—Notice Circulating E-mail. On 1/28/22, Christian is being evaluated and he discloses the E-mail to the doctor. (Vol. 8: p. 1812: ls. 13-17). Dr. Williamson states his custom was to ask Christian how things were currently at work and how he was doing, that Christian was disturbed by the E-mail, emotionally upset, and that Christian would not have tested accurately if he concealed the E-mail and its effect on him. (Vol. 6: p. 1221: ls. 3-16) Christian's attorney sends a letter to Sims, confirms Sims failed to respond to his 1/12/22 letter, and says Christian intends to offer the E-mail into evidence and is being provided to experts. (Vol. 8: pp. 1896-1897)

On 2/3/22, Sims responds and does not indicate surprise by release of the E-mail. (Vol. 2: p. 355: ls. 9-13) Christian's attorney says the dominant purpose of the E-mail was to damage Christian's career; generate a hostile witness; was and intentional disclosure, triggered significant emotional damage; identified the

risk if Christian failed to disclose the E-mail; and cited legal authority. (Vol. 2: p. 173: ls. 7-14) On 2/4/22, Christian's attorney advises Sims to review the legal authority provided (Vol. 8: pp. 1854-1855: ls. 19-3) and suggests CalTrans move ASAP for a judicial finding on the E-mail. (Vol. 8: p. 1919)

On 2/11/22, Christian's attorney asks the referee for a hearing or expedited briefing and hearing schedule. (Vol. 8: pp. 1855-1856: ls. 4-2) CalTrans' counsel Nikolette Clavel ("Clavel") rejects referee involvement. (Vol. 8: p. 1856: ls. 3-8) On 2/14/22, Christian's attorney sends an email confirming it is CalTrans policy that the attorney-client privilege does not extend to supervisors at Mr. Duncan's level. (Vol. 8: p. 1946)

On 2/15/22, the referee asks for direction from the trial judge. On 2/15/22, Christian's attorney requests an ex parte hearing before the trial judge, who refuses, and directs the matter to the referee. Sims objects and insists the trial judge handle it. (Vol. 8: pp. 1856-1857: ls. 3-7)

On 2/17/22, Sims stops meet and confer efforts and says CalTrans would be filing a motion *"in the near future."* (Vol. 8: p. 1857: ls. 8-11)

On 7/1/22, Christian's attorney informs CalTrans their delay has waived the privilege. (Vol. 1, pp. 132-133) CalTrans denies waiver and refuses unnecessary communications until after 8/3/122. (Vol. 1, pp. 135-138)

On 8/18/22, CalTrans files a motion for protective order. (Vol. 8: p. 1858: ls. 1-2; Vol. 1: pp. 17-18)

The trial judge's 1/3/23, protective order, finds the *McDermott/State Fund low-level* standard applies to

the E-email, Christian's attorney only had to disclose the E-mail, which he did and the burden shifted to CalTrans to take reasonable steps to protect the privilege. (Vol. 11: pp. 2636-2637: ls. 15-6)

The trial judge handwrites:

> The recommended ruling is thorough, well-reasoned, & well-supported. No legal errors are contained in the Recommended Ruling. (Vol. 8: p. 1708: ls. 23-28)

The order makes a hybrid finding: the document is privileged but not its contents or effects.

E. Conclusion

> Based on the attorney-client privilege only, Caltrans' motion is granted. However, this hardly spells the end of the matter. Plaintiff received the Brown e-mail through no fault of his own, and claims it caused him emotional distress. Is such distress, arguably caused by the litigation process, a recoverable component of damage? *If so, to what extent will he be allowed to testify to the privileged e-mail's content and effect on him. The message is now part of Dr. Williamson's chart. Will he give it up? To what extent will he be allowed to rely upon it?* He has testified "[i]t would be difficult, perhaps impossible, to give testimony about Christian's psychological harm caused by Defendant Christian (sic) without consideration of the damaging email." Williamson Dec., paragraph 31. Has he talked himself out of a job? *What use will plaintiff's "HR experts' be allowed to make of*

> *the Brown e-mail given that Brown is not a CalTrans HR officer or employee? These and related questions are unresolved. The Referee does not rule or imply that by finding the Brown e-mail privileged and recommending that the motion be granted that these issues must be resolved in Caltrans' favor.* (Vol. 12: pp. 2811-2812: ls. 16-2) (emphases added)
>
> 4. *The issue to what extent plaintiff and his witnesses called by plaintiff, including his retained experts, may testify, regarding the Brown e-mail and its effect on plaintiff is not addressed or ruled on.* (emphasis added) (Vol. 12: p. 2815: ls. 10-12)

On 6/30/23, CalTrans files a motion to disqualify Christian's attorney and his experts and argues for overruling the 1/3/23, order by applying the *McDermott/State Fund* higher standard for handling the E-mail. (Vol. 7: pp. 1652-1669 (pp. 1659-1666)).

Christian's attorney *over-complied* with trial court's 1/3/23, *McDermott/State Fund lower* standard, including by 1) multiple meet and confer writings; 2) disclosing experts were being provided the E-mail; 2) requesting judicial officer involvement. (Vol. 8: p. 1823-1834: ls. 20-15; p. 1848: ls. 23-24)

The trial court 8/25/23, order fails to address CalTrans' CCP 1008 violations, errs in assuming jurisdiction, grants the motion to disqualify counsel and experts, fails to follow 1/3/23, rulings and findings, and without notice, imposes the higher McDermott/*State Fund* standard, and finds it violated to justify disqualification. (Vol. 12: pp. 2987.10-2987.19).

Errant Judicial Actions.

A lawyer has an obligation to protest erroneous rulings *(Gallagher v. Municipal Court* (1948) 31 Cal.2d 784, 795-796.). Due to errant judicial action, Christian's lawyer is forced to file a slew of trial court motions, oppositions, objections, 11 writs, and 10 petitions, including relating to:

1) On *2/17/22*, Sims sends an email to the trial court and stated in part:

   Further, Mr. Shepardson currently has an objection regarding the *Referee and alleged conflicts* pending with the Court. If you could please confirm whether this matter should be heard by the Discovery Referee or by the Court. (emphasis added) (Vol. 8: p. 1966);

2) That same day, the trial judge *sua sponte* places a stay on the case and sets an Evidence Code section 403 hearing to determine if Christian's attorney should be disqualified for a *conflict* in representing Christian and his mother. The trial judge finds a sham relationship based on two cases that have no application to his case: where either the client or attorney claim there was no relationship. (Vol. 9: pp. 2120-2122) Both Ms. Johnson and Christian's attorney provide declarations stating there is an attorney-client relationship. (Vol. 6: p. 1352: ls. 9-21; Vol. 17: p. 3916: ls. 13-18) The trial judge shows no interest in CalTrans' attorneys' conflict in representing a former employee. (Vol. 17: p. 3917: ls. 8-13);

3) Requiring Christian's attorney to pay *$8,000* for referee services cancelled by him and ordered and received by Sims. As a government lawyer, Sims violated his duty to justice, not harass, and just seek wins. *(County of Santa Clara v. Superior Court* (2011) 50 Cal.4th 35, 57.) The referee is notified of his billing error, fails to respond, and improperly disburses the $8K retainer. (Vol. 5: pp. 937-938; Vol. 17: p. 3916: ls. 20-25; Vol. 4: pp. 721-723—copies of emails showing Sims agreed to pay for the referee fees—"Caltrans will of course pay your fee.");

4) Improperly ordering Christian, a CalTrans laborer, to pay one-half of the referee fees when he could not afford it. (Vol. 17: p. 3917: ls. 4-5);

5) Ordering payment of fees without due process of law. (Vol. 17: p. 3917: ls. 12-13);

6) Telling Christian in a settlement conference that government workers are not as good as those in the private sector. (Vol. 17: p. 3917: ls. 1-2);

7) Referring to Christian's attorney as a "mouthpiece," a term used to refer to criminal lawyers that do the mob's bidding without ethics. (Vol. 17: p. 3915: ls. 18-24; Vol. 6: p. 1353 ls. 9-20; Vol. 5: p. 1032);

8) Referring to Christian's mother as "mom." (Vol. 17: p. 3917: ls. 6-7);

9) Suggesting Christian and his attorney sit a separate room in a settlement conference

while a "paralegal" settled the case. (Vol. 17: p. 3917: ls. 17-19; Vol. 6: p. 1352: ls. 9-21);

10) After a writ is filed, the appellate court issues a *Palma notice* indicating the trial judge should refer a judicial disqualification motion to another judge. The trial judge reverses her ruling, and the outside judge finds the trial judge more likely than not engaged in a disallowed ex parte communication in violation of California Code of Judicial Ethics ("CCJE"). (Vol. 5: pp. 895-6 & 996-999);

11) On 8/28/23, the trial judge states in a minute order that Christian gave notice that he filed an appeal of the disqualification order. (Vol. 16, p. 3886). The oral transcript confirms the judge was notified of the appeal (Vol. 16, p. 3706: ls. 16-2). The judge is provided a copy of the notice of the appeal before the hearing and it references the legal authority that the filing stayed the order for attorney disqualification (Vol. 16: p. 3706: ls. 1-7). The judge's minute order falsely states Christian was not ready to proceed, when the reporter's transcript shows otherwise (Vol. 16: p. 3706: ls. 1-28). Christian is required to file another writ, and the appellate court messages the trial judge is not following the law by stating in pertinent part:

> This denial, however, is without prejudice to petitioner filing a petition for a writ of supersedeas *should the trial court continue to fail to enforce the stay order.* (*URS Corp. v. Atkinson Walsh Joint Venture* (2017) 15

Cal.App.5th 872, 887 (emphases added) (Vol. 17: p. 3921)

12) At the jury trial on 8/28/23, the trial judge should allow it to proceed with Christian's attorney as trial counsel given the automatic stay. In violation of the automatic stay-the trial judge prohibits Christian's counsel from speaking, demands to speak directly to Christian, and continues the jury trial date. (Vol. 17: p. 3918: ls. 4-5; p 3921);

13) After the hearing, the trial judge allows Cal-Trans' legal team ex parte access to stay inside her locked courtroom. (Vol. 17: p. 3918: ls. 9-13) Respectfully, this appears to have violated the CCJE for improper ex parte communication and partial treatment.

IV. Statement of Appealability

This petition stems from the trial court's order entered on 8/25/23, granting CalTrans' motion for disqualification (Vol. 7: pp. 1650-1651) of Christian's attorney and his experts (Vol. 15: pp. 3665-3688). On 3/17/25, the appellate opinion was issued and on 4/3/25, there was slight modification of the opinion and a denial of Christian's petition for rehearing.

V. Legal Discussion

A. Lower Courts Failed to Enforce and Misapplied Code of Civil Procedure 1008.

One, pure questions of law are subject to de novo review. *(Aryeh v. Canon Business Solutions, Inc.* (2013) 55 Cal.4th 1185, 1191; *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 527. The trial court failed to

rule on the application of CCP ("CCP") 1008. (Vol. 8: pp. 1813-1814: ls. 19-9; Vol. 12: pp. 2976-2987.19) CCP 4 states the CCP provisions are liberally construed. CCP 1008 is a remedial statute. Remedial statutes are liberally construed. (*Niedermeir v. FCA US LLC* (2024) 15 Cal.5th 792, 823.) The appellate court erred in narrowly construing CCP 1008 by finding if the form of relief is different, that the same issue or matter can be ruled on again without compliance with the statute. Robert I. Weil (Ret.), et. al., Cal. Prac. Guide: Civil Procedure Before Trial (June 2024 Update) states CCP 1008 applies when the same matter or issue subsequently ruled on:

> [9:324.1] What constitutes "motion for reconsideration":
>
> The name of the motion is not controlling. The above requirements (¶ 9:324) apply to any motion that asks the judge to *decide the same matter previously ruled on.* [*See R & B Auto Ctr., Inc. v. Farmers Group, Inc.* (2006) 140 CA4th 327, 373, 44 CR3d 426, 463 (citing text); (emphases added)

Two, in *Lennar Homes of Calif., Inc. v. Stephens* (2014) 232 Cal.App.4th 673, 681, the court found CCP 1008 applied if the same matter or issued was being addressed, and that the name of the motion was *not* controlling.

Three, both lower courts erred in failing to require CalTrans to comply with CCP 1008.

B. Trial Court Erred with an Unreasoned Ex Post Facto Late-Term Attorney Disqualification.

One, from Jon B. Eisenberg, et. al., Cal. Prac. Guide: Civil Appeals and Writs (12/24 Update):

> [8:94.1] Attorney disqualification motions: Whether to recuse an attorney because of a conflict of interest (although factual findings are reviewed for substantial evidence and conclusions of law are reviewed de novo). *[People ex rel. Department of Corporations v. SpeeDee Oil Change Systems, Inc.* (1999) 20 C4th 1135, 1143-1144, 86 CR2d 816, 822—"a disqualification motion involves concerns that justify careful review of the trial court's exercise of discretion"; *In re Charlisse* C. (2008) 45 C4th 145, 159, 84 CR3d 597, 606-607;
>
> In exercising its discretion, however, the trial court must make a "reasoned judgment" that complies with the applicable legal standard. An order disqualifying an attorney that is not supported by "sufficient reason" constitutes "an abuse of discretion that must be reversed on appeal." *[McPhearson v. Michaels Co.* (2002) 96 CA4th 843, 851, 117 CR2d 489, 496;
>
> [8:94.1a] Exception where no factual dispute: Where there are no disputed factual issues, the appellate court independently reviews the trial court's disqualification determination as a question of law. *[People ex rel. Department of Corporations v. SpeeDee Oil Change*

> *Systems, Inc.* (1999) 20 C4th 1135, 1144, 86 CR2d 816, 822;
>
> [8:114.8] Interpretation of court order or judgment: The meaning of a court order or judgment is a question of law subject to the appellate court's independent review. [*In re Insurance Installment Fee Cases* (2012) 211 CA4th 1395, 1429, 150 CR3d 618, 645]

Two, here there were no material disputed facts. The trial court's 1/3/23, order established the E-mail was not clearly privileged and *McDermott/State Fund* lower standard of care to simply to disclose it, which was promptly done, and the "onus" shifted to Caltrans to protect the privilege. The 1/3/23, and 8/25/23, orders were subject to independent review. Declarations submitted by Christian and his counsel contained facts that were not disputed regarding compliance with the 1/3/23, order. CalTrans's multiple delays, refusal to meet and confer, and to engage with the referee were undisputed. The material facts were not in dispute. The effect of those facts was. Moreover, even under a substantial evidence/abuse of discretion of standard, the lower courts erred.

Three, CalTrans had the initial burden to show Christian's attorney possessed confidential information materially related to the proceedings. *(Sundholm v. Hollywood Foreign Press Association* (2024) 99 Cal.App.5th 1330, 1341.) *(Sundholm)* CalTrans never met its burden. (Vol. 1, pp. 20-210) CalTrans never disclosed the nature of the information.

Four, clear attorney conduct standards and violations were required for attorney disqualification.

Sanchez Ritchie v. Energy (2014) 2014 WL 12637956 stated at page 2:

> "[a]n order of disqualification of counsel is a drastic measure, which courts should hesitate to impose except in circumstances of *absolute necessity.*". . . disqualification motions should be subjected to particularly strict judicial scrutiny."). "Moreover, with regard to the ethical boundaries of an attorney's conduct, a *bright line test is essential* . . . an attorney must be able to determine beforehand whether particular conduct is permissible; otherwise, an attorney would be uncertain whether the rules had been violated until . . . he or she is disqualified. *Unclear rules risk blunting an advocate's zealous representation* of a client." *Snider v. Superior Court,* 113 Cal. App. 4th 1187, 1197-98 (Cal. Ct. App. 2003) (emphases added)

Five, Relevant Law. *State Compensation Insurance Fund v. WPS, Inc.* (1999, 2nd DCA) 70 Cal.App.4th 644, 656-657 *(State Fund) indicated a higher and lower* standard of care for handling claimed privileged documents depending on whether they were "clearly" or "may" be privileged:

> Accordingly, we hold that the obligation of an attorney receiving privileged documents due to the inadvertence of another is as follows: When a lawyer who receives materials that *obviously* appear to be subject to an attorney-client privilege or otherwise *clearly* appear to be confidential and privileged and where it is reasonably apparent that the materials were provided or made available through

> inadvertence, the lawyer receiving such materials should refrain from examining the materials any more than is essential to ascertain if the materials are privileged, and shall immediately notify the sender that he or she possesses material that appears to be privileged. The parties may then proceed to resolve the situation by agreement or may resort to the court for guidance with the benefit of protective orders and other judicial intervention as may be justified. We do, however, hold that whenever a lawyer ascertains that he or she *may* have privileged attorney-client material that was inadvertently provided by another, that lawyer must *notify* the party entitled to the privilege of that fact. (emphases added)

Six, in *Rico v. Mitsubishi Motors Corp.* (2007) 42 Cal.4th 807 *(Rico),* this Court disqualified an attorney for use of inadvertently received and *clearly* privileged documents. At page 817, the Court stated that the *State Fund* standard was to be applied *prospectively.* Here, the trial judge applied the wrong *McDermott/ State Fund* higher standard retrospectively. *Rico* also recognized an attorney's obligation to protect his client's interest (*id.*, p. 818). Here, the E-mail damaged Christian and was evidence of a criminal act. The lower courts ignored these important factors. *Rico* recognized that by inadvertence or devious design a party could put an adversary's confidences in an attorney's mailbox to obtain disqualification (*id.*, p. 819). Caltrans' tactical silence, delays, refusal to meet and confer, or engage the discovery referee reflect such a design. CalTrans knowingly allowed the E-mail to seep deep

into the pores of Christian's case before moving to disqualify. That was the kind of tactical litigation conduct, the courts, until now, have discouraged.

Seven, *McDermott v. WPS Will & Emery LLP v. Superior Court* (2017) 10 Cal.App.5th 1083, 1108-1109 *(McDermott)* interpreted *State Fund* as creating two standards of care: a higher standard of care for handing "clearly" privileged documents and a lower standard of care for "not clearly" privileged documents:

> Finally, a reasonable way to reconcile the issue is to interpret *State Fund* as establishing two standards, with each one applying to slightly different situations. The language Defendants quote applies when an attorney receives materials that *obviously or clearly appear to be privileged* and it is reasonably apparent the materials were inadvertently disclosed. In that situation, the attorney receiving the materials must refrain from examining them any more than is necessary to determine their privileged nature, immediately notify the privilege holder the attorney has received materials that appear to be privileged, attempt to reach an agreement with the privilege holder about the materials' privileged nature and their appropriate use, and resort to the court for guidance if an agreement cannot be reached. The attorney must not further review or use the materials for any purpose while the issue remains in dispute. (emphases added)
>
> The language Dick quotes applies when an attorney ascertains that he or she received materials that are *not obviously or clearly*

> *privileged,* but nonetheless may be privileged materials that were inadvertently disclosed. This plainly is a lower standard, and it triggers a more limited response. In this situation, the attorney's *duty is simply to notify* the privilege holder that the attorney may have privileged documents that were inadvertently disclosed. At that point, the *onus shifts* to the privilege holder to take appropriate steps to protect the materials if the holder believes the materials are privileged and were inadvertently disclosed. (emphases added)

Eight, on 1/3/23, the trial judge found that the E-mail was "not clearly" privileged and Christian's attorney handling of the document was *subject to the lower standard of care.* (Vol. 12: pp. 2800: ls. 7-14)

Nine, the 1/3/23, order only barred Christian and his counsel from further *dissemination* of the E-mail (Vol. 12: 2815: ls. 1-2) and did not bar discussing the E-mail contents or effects because they remained eligible for trial presentation because the E-mail had been sent directly to Christian and he claimed damaged him. (Vol. 12: pp. 2811-2812: ls. 16-2; p. 2815: ls. 10-12)

Ten, the 1/3/23, order acknowledged Christian's experts had copies of the E-mail, did not order their return, and expressly left open the option of expert trial testimony on the E-mail contents and effects. (Vol. 12: pp. 2811-2812: ls. 16-2; p. 2815: ls. 10-12)

Eleven, Ex Post Facto. The trial judge in her 8/25/23, order, arbitrarily, without notice, foundation, change in factual finding, or explanation retroactively

applied the higher *McDermott/State Fund* standard back to January, 2022:

> Here, CALTRANS immediately advised JOHNSON that it was asserting the attorney-client privilege when *CALTRANS first learned that Mr. Duncan had shared the email with JOHNSON.* While Mr. Shepardson disagreed with CALTRANS' assertion,
>
> Mr. Shepardson still had the duty under *State Fund, supra* to refrain from using or other otherwise disclosing the communication until the parties or the Court resolved the dispute . . . Mr. Shepardson and JOHNSON did not do so. (Vol. 12: p. 2987.15) (emphasis added)

Twelve, in the 8/25/23, order the trial judge had no factual basis for applying the *McDermott/State Fund* higher standard because she never overturned her 1/3/23, factual finding that the E-mail was "not clearly" privileged. (Vol. 12: 2987.10-.19) The ruling lacked substantial evidence to change in standard. *(Tire Distributors, Inc. v. Cobrae* (2005) 132 Cal.App. 4th 538, 544,

Thirteen, the 1/3/23, order called for declarations from Christian and his attorney (Vol. 12: p. 2815: ls. 3-9) which were provided. (Vol. 12: p. 2987.10-19)

Fourteen, the 8/25/23, disqualification order, *without record support,* stated the E-mail itself had been improperly disseminated by counsel. (Vol. 12: 2987.15-.16)

> It is especially noteworthy that Mr. Shepardson continued to refer to, disclose and discuss

> the Brown email even after the Court issued its protective order finding the communication to be privileged and confidential. (emphasis added) (Vol. 12: p. 2987.18)

Fifteen, Christian's lawyer's declaration showed that after the 1/3/23, order was issued, the E-mail was not disseminated (To the best of my knowledge, neither I nor my office staff disseminated to third-parties the E-mail after the trial court's 1/3/23, order.) (Vols. 11: pp. 2674-2675; 12: pp. 2829-2832).

Sixteen, the 8/25/23, order erred in finding improper discussion about the E-contents and effects as the 1/3/23, order applied the *McDermott/State Fund* lower standard and expressly did not prohibit trial testimony on the contents and effects. (Vol. 12: p. 2811-2812: ls. 15-2) Naturally, if trial testimony was permitted on the E-mail contents and effects, speaking about them in preparation for trial was proper.

Seventeen, the lower courts erred in finding Christian's attorney assumed a risk of disqualification because that risk if the *McDermott/State Fund* higher standard applied ("materials at issue must obviously or clearly appear privileged" at p. 1113) Under the trial court's 1/3/23, order, the *McDermott/State Fund* lower standard applied and it only required that timely disclosure.

Eighteen, the trial court stated on page 2987.17:

> The Court would <u>expect</u> that to include a direction from Mr. Shepardson or his law firm to those hired in this case to also remove all images of the Brown email. (emphasis added)

Nineteen, the expectation was unsupported by the record because the 1/3/23, order did not call for the experts to return their copies, expressly recognized they had copies, and left open the possibility of testimony about the E-mail contents and effects.

In sum, the trial judge clearly abused her discretion by unreasonably, arbitrarily, and retroactively changing the rules for handling the E-mail. She disregarded her prior order, and without notice or justification imposed a higher standard of conduct, and without factual or legal justification applied that standard back to January 2022. The judge unreasonably disregarded her 1/3/23, order's language that expressly did not bar trial testimony on the E-mail contents or effects to find the email could not be discussed. The 8/25/23, order unreasonably disregarded the court-imposed standards to justify the late term disqualification. The judge, without foundation, found Christian's attorney disseminated the actual E-mail after the 1/3/23, order was issued. Therefore, the trial judge's 8/25/23, attorney disqualification decision was unreasoned, violated the 1/3/23, order, and the *McDermott/State Fund* case law and standards. The trial judge erred under an de novo review, clearly abused her discretion, and her findings lacked substantial evidence.

C. Trial Judge Erred by Failing to Make a "Reasoned" Disqualification Ruling by Failing to Consider a Number of Other Important Factors.

One, the trial court was required to make a "reasoned" decision. (*McPhearson v. Michaels Co.* (2002) 96 Cal.App.4th 843, 851.)

Two, at page 1340, S*undholm* indicated that disqualification is a drastic action and stated:

> "Disqualification motions implicate several important interests, among them are the clients' right to counsel of their choice, the attorney's interest in representing a client, the financial burden of replacing a disqualified attorney, and tactical abuse that may underlie the motion." *(Roush v. Seagate Technology, LLC* (2007) 150 Cal.App.4th 210, 218-219

Three, disqualification usually imposes a *substantial hardship* on the disqualified attorney's client, who must bear the costs of finding a replacement. The client suffers a *heavy penalty* where the attorney is highly skilled. (*Gregori v. Bank of America (1989)* 207 Cal. App.3d 291, 300.) Motions to disqualify often pose a threat to the integrity of the judicial process, can be misused to harass opposing counsel, delay litigation, or intimidate into otherwise unacceptable settlements. (*id.*, at pages 300-301)

Four, the trial judge failed to weigh, consider, and/or reason upon:

1) The prejudice to Christian;[2]
2) His right to his chosen counsel;[3]
3) Christian's attorney's interest in representing Christian;[4]

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[2] Delayed justice: wrongs committed in 2018.

[3] Wants present counsel.

[4] Clio account shows advanced costs of approximately $380K and 3,201.25 of office time hours for this case.

4) Christian's counsel's skill in employment law;[5]

5) The financial burden on Christian to replace counsel;

6) The possibility that tactical delay underlies the disqualification motion;

7) The E-mail damaged Christian;[6]

8) The E-mail was sent directly by CalTrans to Christian;

9) CalTrans knew Christian would disclose the E-mail at his 1/28/22, psych evaluation and did nothing;

10) CalTrans offered no explanation for its 22-day delay;

11) CalTrans stopped meeting and conferring as of 2/17/22;

12) CalTrans rejected discovery referee involvement;

13) Disclosure of the E-mail was first by the Christian to his expert witness;

14) Failed to acknowledge the facts that supported the crime/fraud exception;

15) Failed to consider Christian's attorney obligation to protect his client's interests as well

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[5] As solo attorney obtained $605K jury verdict in Stockton against CalTrans in 2017 and fees and costs award of approximately $1.3M.

[6] Through no fault of Christian, he was damaged by CalTrans' errant E-mail.

> as see that evidence of a crime was not destroyed. (Vol. 8: 2987.10-2987.19)[7]

Five, respectfully, the trial judge's failure to consider, weigh, and/or reason upon so many important factors relating to Christian's and attorney's interests demonstrates that her honor did not engage a sufficiently reasoned decision. The trial court's analysis was grossly weighted in favor of CalTrans' interest in removing Christian's attorney. Therefore, it is overwhelmingly clear that the trial judge did not make a reasoned and impartial decision and there was an abuse of discretion.

D. Lower Courts Erred by Allowing Tactically Late Motion to Disqualify.

One, since the material facts are not in dispute as to the delays, the review should be de novo. *(In re Insurance Installment Fee Cases* (2012) 211 Cal.App.4th 1395, 1429.)

Two, to waive a motion to disqualify the delay must be extreme or unreasonable. (*Liberty National Enterprises, L.P. v. Chicago Title Ins. Co.* (2011) 194 Cal.App.4th 839, 845.). We have both here.

Three, the motion should be brought as soon as the basis for the motion becomes apparent. From Michael Paul Thomas, California Civil Courtroom Handbook and Desktop Reference, section 28:23 (emphasis added) (4/23 Update):

> Although there is no time limit on a motion to disqualify an opposing attorney, such a motion should be made as soon as the basis

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[7] Email involved violations of Penal Code §§ 131 & 133.

> for the motion becomes apparent—motions first made at the time of trial are strongly disfavored. (*See* Maruman Integrated Circuits, Inc. v. Consortium Co., 166 Cal. App. 3d 443, 451, 212 Cal. Rptr. 497 (6th Dist. 1985); Liberty National Enterprises, L.P. v. Chicago Title Ins. Co., 194 Cal. App. 4th 839, 847, 123 Cal. Rptr. 3d 498 (2d Dist. 2011) [proper for trial court to deny motion brought as a tactical device to delay the litigation] (emphases added)

Four, CalTrans knew in January, 2022, that the E-mail was being disclosed to experts for use at trial. (Vol. 8: p. 1854: ls. 7-13) The cat was clearly out of the bag.

Five, CalTrans waited 17-months to file its motion for disqualification. (Vol. 12: pp. 2987.10-.19)

Six, CalTrans' delay was extreme and unreasonable.

E. Lower Courts Erred in Failing to Narrowly Construe the Privilege Statute and Misapplyied *Upjohn* and the *Chadbourne* Factors.

One, de novo review applies as there is no conflict about the E-mail contents, and the persons who sent and received the E-mail. *(Sprengel v. Zbylut* (2019) 40 Cal.App.5th 1028, 1042.)

Two, privileges in the Evidence Code are strictly construed. *(Wells Fargo Bank v. Superior Court* (2000) 22 Cal.4th 201, 206).

Three, the trial court failed to strictly construe Evidence Code section 954. (Vol. 8: pp. 1678-1710) The appellate court erred too. A narrow construction supported a finding the E-mail was unprivileged. *(Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 527.)

Four, *Upjohn Co. v. United States* (1981) 449 U.S. 383, 391, indicated the E-mail was not privileged because Duncan did not embroil CalTrans in the litigation (Vol. 8: 1811: 23-28) and the Brown declaration fails to state Duncan was made aware he was being questioned so Caltrans could obtain legal advice. (Vol. 1: 19-20; Vol. 8: pp. 1852-1853, ls. 23-13)

Five, from Civil Trials and Evidence, supra:

> [8:2008] Comment: Chadbourne sets forth detailed guidelines ("basic principles") for determining whether a communication in the corporate setting is privileged and, if so, whether waiver of the privilege has occurred. [*See D.I. Chadbourne, Inc. v. Sup.Ct. (Smith)* (1964) 60 C2d 723, 736-738, 36 CR 468, 477-478]
>
> The Chadbourne guidelines are crucial in dealing with attorney-client privilege/waiver issues in the corporate or entity context. [Cf. *D.I. Chadbourne, Inc. v. Sup.Ct. (Smith), supra,* 60 C2d at 735, 739, 36 CR at 476, 479—privilege lost;

Six, *D.I Chadbourne, Inc. v. Superior Court, supra,* at pages 736-738, identified 11 factors in evaluating whether an attorney-client privilege applies to communication in a corporate context. From Civil Trials and Evidence, supra:

a) [8:2012] Communication in capacity solely as independent witness: Employees who have witnessed matters that require communication to corporate counsel and who have no connection with those matters other than as a witness are treated simply as independent witnesses. In that capacity, the fact the corporate employer requires the employee to make a statement for transmittal to the corporation's lawyer does not itself bring the statement within the attorney-client privilege. (emphases added) *[D.I. Chadbourne, Inc. v. Sup.Ct. (Smith), supra,* 60 C2d at 737, 36 CR at 477] (emphases added)

Seven, Christian's boss. Nicholas Duncan was an independent witness. (Vol. 1: pp. 19-20; Vol. 8: pp. 1852-1853: ls. 23-13; Vol. 7: p. 1910-"No claim has been made for wrongdoing in the Rio Vista worksite. Supervisor Duncan had no involvement in this case.") The purpose for the E-mail was retaliation-to damage Christian's character, his career and/or his relationship with his boss, Duncan. (Vol. 1: p. 164: ls. 14-18)

Eight, the communication between Brown and Duncan was not in the normal course of business; it was in the unusual course of defending against this lawsuit. There was nothing normal about sending an email that was misleading, derogatory, fraudulent, and/or criminal. (Vol. 2: p. 206)

Nine, Duncan was neither a co-defendant nor natural person to speak for CalTrans. (Vol. 16: p. 3692)

Ten, there was no more liberality in finding privilege for corporate entities as compared to individuals.

Eleven, factors 8 and 10 were neutral involving insurance.

Twelve, factor 9 supported nonprivilege as the E-mail was intended to mislead and damage Christian. (Vol. 1: p. 166: ls. 2-7)

Thirteen, through no fault of his own, Christian was intentionally exposed to the E-mail (Vol: 8, pp. 1852-1853: ls. 23-13) and his declaration about the E-mail contained facts. Brown failed to comment in detail about the contents. (Vol. 2: pp. 311-312) Christian's opinion testimony was evidence. (Evid. Code § 701.).

F. Lower Courts Erred in Finding Dominant Purpose of E-Mail Was Legal Advice.

One, the E-mail was an *intentional* disclosure by a CalTrans agent directly to Christian: from Brown to Duncan, and Duncan to Christian. (Vol. 8: p. 1680: ls. 4-18) The intentional, targeted, and emotionally damaging disclosure to Christian differentiates this case from *Rico, State Fund, and McDermott's* inadvertent disclosure to attorney analysis.

Two, the appellate decision erred in inferring Brown's work was trying to obtain *relevant* information from Duncan. The record reflects Brown *supplied* private, false, misleading, and defamatory information. (Vol. 3: p. 452: ls. 15-19-27 cites in record to false, misleading, retaliatory, or criminal statements made about Christian)

G. Lower Courts Erred in Failing to Find Waiver Based on Fundamental Fairness.

Through no fault of his own, Christian was damaged by the E-mail. "Fundamental fairness" required waiver as CalTrans directly sent the E-mail to Christian and damaged him. *(Merritt v. Superior Court* (1970) 9 Cal.App.3d 721, 730.) These are facts vastly different from *Rico, McDermott, and State Fund.*

H. Lower Courts Erred in Failing to Require Caltrans Take Reasonable Steps to Protect the Privilege.

One, Estoppel. The lower courts erred in failing to recognize that CalTrans *obstructed* resolution by refusing to both meet and confer (Vol. 8: pp. 1852-1858: ls. 18-11) and use the referee for judicial review. (Vol. 8: p. 1856: ls. 5-9). Pursuant to Evidence Code section 623, CalTrans was estopped to deny waiver because they refused timely judicial resolution of the dispute.

Two, Evidence Code section 912(a) states:

> (a) Except as otherwise provided in this section, the right of any person to claim a privilege provided by Section 954 (lawyer-client privilege) . . . is waived with respect to a communication protected by the privilege if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to disclosure made by anyone. Consent to disclosure is manifested by any statement or other conduct of the holder of the privilege indicating consent to the disclosure, including *failure to claim the*

> *privilege in any proceeding in which the holder has legal standing and the opportunity to claim the privilege.* (emphases added)

Three, from *McDermott,* at page 1118:

> A privilege holder may waive the privilege, and render the State Fund rule inapplicable, by failing to take reasonable steps necessary to preserve the privilege. (*See* Evid. Code, § 912, subd. (a).) (emphases added)

Four, waiver will be implied if a party failed to failed to bring a timely motion. *(Doers v. Golden Gate Bridge, Highway & Transp. Dist.* (1979) 23 Cal.3d 180, 184-185.) From the Hon. Karen L. Stevenson, et. al., Cal. Prac. Guide: Federal Civil Procedure Before Trial:

> 6) [11:805] Waiver resulting from failure to take reasonable steps to preserve privilege: Absent the "reasonable steps" above (¶ 11:799 ff.) . . . [*See* FRE 502(a); *United States v. De La Jara* (9th Cir. 1992) 973 F2d 746, 749-750—attorney-client privilege *waived by defendant's failure to act within 6 months* after police seized privileged letter from his attorney; AHF Community Develop., LLC v. City of Dallas (ND TX 2009) 258 FRD 143, 149—even if initial disclosure inadvertent, producing party waived privilege by subsequent conduct] (emphasiss added)

Five, *De La Jara, supra,* at page 750, states that *failure to take all reasonably steps waives the privilege.*

Six, Caltrans knew as of 1/28/22, that the E-mail was being circulated to experts for use at trial set for 4/1/22 (Vol. 12, p. 2787: ls. 1-2) Under those circumstances, CalTrans was required to immediately act to protect the privilege, particularly with a trial date of 4/18/22.

Seven, the trial court abused its discretion by finding CalTrans seven-month delay in filing their motion reasonable. (Vol. 8: p. 1682: ls. 11-18; Vol. 16: pp. 3712-3743)

Eight, CalTrans waived the privilege because it knew Christian would disclose the E-mail in his psychological evaluation exam on 1/28/2022. (Vol. 8: p. 1811: ls. 23-28; Vol. 8: pp. 1852-1853: ls. 23-13) CalTrans knew the E-mail would be disclosed to the expert because it had caused Christian emotional damage at work. (Vol. 16: pp. 3714-3715: ls. 4-22).

Nine, CalTrans waived the privilege by knowingly allowing the experts to keep and use the E-mail. (Vol. 7: pp. 1704-1705: ls. 15-7) This was conduct indicating consent. (Evidence Code § 912(a))

Ten, *Liberty National Enterprises, L.P. v. Chicago Title Ins. Co., supra,* at page 847 states:

> Delay is significant not only from the perspective of prejudice to the nonmoving party, it is also an indication that the *alleged breach of confidentiality was not seen as serious* or substantial by the moving party. (*E.g.*, *Glover v. Libman* (N.D.Ga.1983) 578 F.Supp. 748, 767 [delay can be seen as an admission that confidentiality and conflict are not significantly at stake].) (emphasis added)

> Finally, the showing that the delay was unreasonable was of such a character and weight that the *burden shifted to Chicago to justify the delay.* (In re Complex Asbestos Litigation, supra, 232 Cal.App.3d 572, 599, 283 Cal.Rptr. 732.) (emphasis added)

Eleven, CalTrans did not treat the E-mail as confidential with its delays (which it did not meet its burden to justify), failure to meet and confer, rejection of the referee, and imprudently failed to take adequate precautions with Duncan so he would keep the E-mail confidential.

Twelve, in 2022, CalTrans did not meet and confer for 235 days. (Vol. 8: pp. 1852-1858: ls. 18-11) The appellate court misconstrued the record when it stated "any delay" in filing the motion for disqualification was the result of the prolonged meet and confer process. There was no evidence to support that finding. From 1/28/22 to 6/23, CalTrans had a 17-month delay in bringing its motion to disqualify, stopped meeting and conferring from of 2/17/22 to 7/6/22, and none thereafter, so there was about 15 months of no meeting and conferring. (Vol. 8: pp. 1852-1858: ls. 18-11)

I. Lower Courts Erred in Failing to Find Waiver for Caltrans Intentionally Disclosing Verbatim E-Mail Content.

One, the appellate court stated on page 20 that a "significant part" of a communication is "specific content" or "substantive information," and cited to *(Southern Cal. Gas Co. v. Public Utilities Com.* (1990) 50 Cal.3d 31, 49.) However, in *Southern Cal* there was

only general comments about various documents; not enough to waive the privilege.

Two, CalTrans intentionally disclosed a significant part of the E-mail by disclosing verbatim 63 "specific content" words (Vol. 1: p. 20: ls. 1-5) in a public court filing. The appellate opinion curiously contends that even CalTrans's public filing was not a waiver because only the holder can waive the privilege.

Three, the appellate court reasoned that the disclosure of the actual contents of the E-mail by CalTrans' legal counsel was not a waiver of the privilege to the document. However, the disclosure was used to claim the privilege and *no privilege holder after three years has leaped forward* to claim inadvertent disclosure. CalTrans was estopped to claim otherwise. CalTrans cannot have it both ways—use of the information disclosed to advance their case while concealing the remainder of the document under the cloak of privilege.

Four, CalTrans' disclosure was significant. (Vol. 1: p. 20: ls. 1-5) CalTrans *cherry picked verbatim words* from the document in order to support the claim of privilege.

Five, CalTrans admitted the "specific content" disclosed was significant because they used to claim the privilege.

In sum, the intentional disclosure of an admittedly significant portion of the actual words from the E-mail by legal counsel in a public court filing and relied upon and used by CalTrans to advance its position constituted a clear waiver of the privilege to the entire document. The legal department constituted the privilege holder or acted with their authority, and certainly

there has been no filing for the past 2.5 plus years claiming the disclosure was inadvertent. Therefore, the appellate court's refusal to find waiver because a privilege holder did not waive the privilege was in error.

J. Lower Courts Erred by Ignoring Factual Evidence Showing Prima Facie Evidence Supporting the Crime-Fraud Exception.

One, the crime/fraud exception has a low bar. Christian only needed to make a prima facie case that has a foundation in fact. (Nahama & Weagan Energy Co.) (1988) 199 Cal.App.3d 1240, 1262-1263.) Trial court erred in finding the facts and opinion about the E-mails provided by Christian, his attorney, and Dr. Williamson's opinion were not admissible—they were in evidence. (Vol. 3: pp. 452-452, ls. 1-13)

Two, Christian provided evidence that had a foundation in fact, including that the letter failed to mention the DCIU report confirming wrongdoing (Vol. 2: p. 203); was false, misleading, and subject to the crime-fraud exception (Vol. 2: p. 206); Brown should cease and desist making false and misleading statement to Duncan and others; he should send a clarifying statement that provided a balanced and accurate depiction of Christian's history at Caltrans (Vol. 2: p. 207): Brown provided a misleading history that was unnecessary and harmful; the email was defamatory and failed to reference that the DCIU substantiated wrongdoing (Vol. 2: p. 209); Brown provided false and misleading facts and concealed material facts and then only asked for negative information (Vol. 2: p. 213); Brown did not provide any legal advice (Vol. 2: p. 222); dominant purpose was not

to obtain objective information: it was to create in Duncan's mind that Christian was an employee that made wild and unsubstantiated complaints; he was trying to get Christian's supervisor to act against Christian's interests; the E-mail was a malicious effort to damage Christian's career (Vol. 2: p. 230); dominant purpose was to damage Christian; false statements about Christian; his work in Rio Vista was not part of the complaint; Brown engaged in multiple violations of the *Penal Code sections 131 & 133,* by misrepresenting information in connection with an investigation conducted by the head of a department of the State of California; and by making a false statement to a witness upon any trial, proceeding, inquiry, or investigation with the intent to affect the testimony. (Vol. 2: pp. 275-278)

K. Lower Courts Erred in Drawing Inferences Favorable to Caltrans Because They Hid Behind a Privilege.

The appellate court erred in allowing CalTrans to draw favorable inferences about the E-mail while hiding the document behind a privilege. (*Faugh v. Perez* (2006) 145 Cal.App.4th 592, 601.)

L. Lower Courts Erred in Barring Experts.

One, CalTrans' 8/18/22, of motion for protective order only named Christian (Vol. 1: pp. 1-2), the 1/3/23, the order failed to state experts were subject to the order, allowed experts to keep their E-mail copies, and did indicate they could testify about E-mail contents and effects. (Vol. 8: pp. 1678-1710)

Two, Christian's experts should not have been disqualified for the same reasons as his lawyer should not have been.

M. Lower Courts Erred in Violating Federal and State Constitutional Rights.

One, constitutional issues are reviewed de novo. *(Brown v. Mortensen* (2019) 30 Cal.App.5th 931, 938.)

Two, the 14th Amendment of U.S. Constitution prohibits depriving persons of life, liberty, or property without due process of law and denying persons equal protection of the laws. The California Constitution contains these rights and guarantees the right to trial by jury in civil cases.

Three, for the reasons stated herein, the lower court decisions have denied Christian and his trial lawyer their constitutional due process, equal protection, and jury trial rights.

Four, on 8/28/23, with the automatic stay in effect, the jury trial should have been proceeded with Christian's attorney as trial counsel. The trial judge violated the stay law, refused to proceed, and continued the trial.

Five, on 8/30/23, we again alerted the trial judge of her error (Vol. 16: pp. 3692-3891), she continued to violate the automatic stay by stating Christian's attorney did not have standing, struck the judicial challenge, and took no corrective action (Vol. 17: pp. 4023-4037)

Six, Christian was forced to file a writ to get the trial judge to follow the stay law, and the appellate court ordered that if the trial judge *continued to not*

follow the law, Christian would have the right to bring another writ. (Vol. 17: p. 3921) Only then did the trial judge comply with the stay. (Vol. 17 p. 3921)

Seven, Christian and his lawyer should have had their jury trial in August and September, 2023. Instead, the judge's errant rulings and conduct have delayed and denied Christian and his lawyer their constitutional rights of due process, equal protection, and a jury trial.

VI. Conclusion

Christian and his lawyer request this Court accept this case for review. We request reversal of the lower court decisions and/or remand with instructions that the lower courts comply with the law.

Respectfully submitted,

_____

John A. Shepardson, Esq.
For Plaintiff Christian L. Johnson

Dated: _____

EXHIBIT 1 —
HEARING TRANSCRIPT,
RELEVANT EXCERPTS
(OCTOBER 16, 2018)

[October 16, 2018, Transcript, p. 86]

MR. DELACRUZ: Gabbani testified that Jimmy Ell used the terms boys and it was different from Mr. Taylor's use of the term boys, but Mr. Ell did not dry hump a coworker or poke a coworker with a stick. That was the difference.

With regard to Mr. Baker, he's not here. We couldn't reach him. Appellant attempts to paint Mr. Baker as a bad apple is just–he may not be an angel, but his statements are corroborated by the testimony of Joey Cook and Chris Johnson. And there was a real victim here and it was Chris Johnson.

This also was not an environment of just horseplay. Chris Johnson testified that there was goofing off or horseplay and then there was taking it to the extreme. Mr. Taylor took it to the extreme.

With regard to credibility of witnesses, Mr. Taylor cannot credibly deny that he dry humped or air humped Christian Johnson while Chris was bending over the side of a bridge. Chris had a distinct clear memory of the incident. He remembered hanging off the bridge. He remembered there were cars passing by, that he could not hear very well. He remembered Mr. Taylor holding his belt. Then he remembered Mr. Taylor

physically making contact with his butt for a few seconds.

Joey Cook testified that he saw the incident on the bridge. He saw Chris hanging off the side of the bridge and he saw Mr. Taylor grab his belt. Then he saw Mr. Taylor make pelvic thrusts towards Chris's butt.

In his interview with Aaron Gabbani about the matter, Marlon Baker stated that he saw the incident. He saw Chris hanging off the side of the bridge and he saw Mr. Taylor grab his belt. Then he saw Mr. Taylor make pelvic thrusts and other sexual gestures towards Chris's butt.

Government Code Section 11513 allows his Honor to consider Marlon's statements to Mr. Gabbani about the matter because it supplements Joey and Chris's testimony–live testimony in this matter.

Mr. Taylor cannot credibly deny that he used the N word in the presence of Chris and Marlon Baker. Chris had a clear memory that Mr. Taylor had told him a story where Mr. Taylor stated, Nigger, look at these prices. In his interview with Aaron Gabbani Marlon stated he recalled Mr. Taylor telling the story and confirmed that Mr. Taylor had used the N word in his presence. Again, the Government Code allows his Honor to consider Marlon's statements to Mr. Gabbani because it supplements Chris's testimony.

Mr. Henderson, who Appellant called specifically to refute this allegation, was asked about it and his testimony was I don't recall that. He didn't say

no. He didn't say that didn't happen. He said I don't recall that.

Mr. Taylor cannot credibly deny that he poked Chris in the butt with a stick. Chris had a clear memory of that incident that occurred on the side of a roadway while he was stenciling the bridge. Chris remembered being bent over and Mr. Taylor poking him in the butt with a tree branch. In his interview with Mr. Gabbani, Marlon recalled the incident and stated that he saw Mr. Taylor poking Chris in the butt with a stick. Again, his Honor may consider Marlon's statement to Mr. Gabbani because it is supplemented by Chris's testimony. And Mr. to shift blame to Marlon Baker. He appeared honest about some questions and evasive on other questions. In his testimony today he stated I'm apologetic for the situation or words to that effect. He did not take responsibility for his actions. Indeed, as Aaron Gabbani testified, this is exactly how Mr. Taylor presented in his investigatory interview. He appeared open, friendly, and talkative and honest enough without getting himself in trouble.

After his February 21st interview with Mr. Gabbani, Mr. Gabbani admonished Mr. Taylor to keep the contents of his interview and the nature of the investigation confidential. That same day merely hours later Mr. Taylor called Chris trying to have Chris change his story. Chris testified he felt pressured into changing his story. This is further evidence of Mr. Taylor's lack of credibility. Rather than owning up to his bullying and misconduct he chose to lie about these incidents, and

he tried to cover it up. Mr. Taylor's testimony simply cannot be credible.

Mr. Taylor's bullying misconduct constitutes inexcusable neglect of duty, willful disobedience, discourteous treatment, and other failure of good behavior. To be subject to discipline for inexcusable neglect, the employee must have actual or constructive . . . .

. . .

VERIFIED ANSWER OF JUDGE BARBARA A. KRONLUND (SEPTEMBER 8, 2023)

I, Barbara A. Kronlund, do declare as follows:

1. I am a Judge of the Superior Court of California, County of San Joaquin. I have been assigned to preside over the instant action. If called upon as a witness, I would competently testify to the matters as stated herein.

2. On August 25, 2023, I granted defendant's "Motion to Disqualify Plaintiff's Counsel John A. Shepardson and His Law Firm, to Disqualify Plaintiffs Experts, and to Exclude Othe Witnesses from Testifying at Trial" ("motion to disqualify"). Among other things, the order disqualified John A. Shepardson (Shepardson) and his law firm from representing plaintiff Christian L. Johnson in this case. Even though Shepardson does not presently represent plaintiff or anyone else in this case, on August 30, 3023, he filed what he entitled "Plaintiff Christian L Johnson's Seventh Motion to Disqualify the Hon. Barbara A. Kronlund" ("Shepardson Statemen of Disqualification") in which he held himself out to be the attorney of record for plaintiff. In the Shepardson Statement of Disqualification, Shepardson claims that the Court erred in granting defendant's motion to disqualify, wrongfully denied Shepardson the opportunity to orally argue the motion to disqualify on August 28, 2023, and wrongfully continued the trial. Shepardson contends that the Court's statements, decisions, and rulings issued over the course of the litigation demonstrate that the Court is biased and "embroiled" in this case. Shepardson

claims that after the August 28th hearing, he and the "public" left the courtroom while the "defense team" remained inside the closed courtroom. Shepardson contends this was preferential treatment. He speculates that the Court engaged in ex parte communications with the defense team when they were inside the courtroom. Finally, Shepardson contends that he spoke with "persons" who came to observe the August 28th hearing and they were "appalled."

3. I deny Shepardson's claim that I am biased in this case, or that any ground for disqualification exists. I am not biased or prejudiced against or in favor of the plaintiff. I am no biased or prejudiced against or in favor of Shepardson. I am not biased or prejudiced against or it favor of any party or attorney in this action. I know of no reason why I cannot he fair and impartial.

4. I deny Shepardson's claim that I engaged in ex parte communications with the defense team when they were purportedly in the courtroom. I deny Shepardson's claim that my statements, decisions, and rulings have been the product of bias. All rulings made by me in this action have been based upon facts and arguments officially presented to me, my understanding of the law and my experience in handling similar cases. I am not predisposed to rule in any particular manner in the instant case. To that end, attached hereto as exhibit 1 is a true and correct copy of the entire reporter's transcript for August 28, 2023.

5. All statements made by me, and all actions taken by me in this proceeding, and it every proceeding over which I have presided, have been done in furtherance of what I believe were my judicial duties. My statements and rulings are set forth in the records

and in the files herein which are the best evidence hereof. To the extent plaintiff's statement of my statements and rulings are inconsistent therewith, they are denied.

6. I know of no facts or circumstances which would require my disqualification or recusal in this case.

7. I do not believe that my recusal would serve the interests of justice.

I declare under penalty of perjury that the foregoing is true and correct.

Executed September 8, 2023, at San Joaquin County, California.

/s/ Barbara A. Kronlund
Superior Court Judge

PLAINTIFF'S SEVENTH MOTION TO DISQUALIFY JUDGE BARBARA A. KRONLUND (AUGUST 30, 2023)

CALIFORNIA SUPERIOR COURT
SAN JOAQUIN COUNTY

CHRISTIAN L. JOHNSON,

Plaintiff,

v.

CALIFORNIA DEPARTMENT OF TRANSPORTATION and DOES 1-100, inclusive,

Defendants.

Case No. STK-CV-UCR-2019-281

PLAINTIFF CHRISTIAN L. JOHNSON'S SEVENTH MOTION TO DISQUALIFY THE HON. BARBARA A. KRONLUND FOR HER CONTINUING BIAS, PREJUDICE, AND LACK OF IMPARTIALITY IN VIOLATION CCP § 170.1 FEDERAL AND STATE CONSTITUTIONAL REQUIREMENTS OF DUE PROCESS AND EQUAL PROTECTION OF THE LAW

I, John A, Shepardson, Esq., declare:

1. I have personal knowledge of the following facts and circumstances, and would and could competently testify thereto, if called a witness.

2. Code of Civil Procedure ("CCP") section 170.1 states:

> (a) A judge shall be disqualified if any one or more of the following are true:
>
> (1)
>
> (A) The judge has personal knowledge of disputed evidentiary facts concerning the proceeding.
>
> (B) A judge shall be deemed to have personal knowledge within the meaning of this paragraph if the judge, or the spouse of the judge, or a person within the third degree of relationship to either of them, or the spouse of such a person is to the judge's knowledge likely to be a material witness in the proceeding.
>
> (2)
>
> (A) The judge served as a lawyer in the proceeding, or in any other proceeding involving the same issues he or she served as a lawyer for a party in the present proceeding or gave advice to a party in the present proceeding upon a matter involved in the action or proceeding.
>
> (B) A judge shall be deemed to have served as a lawyer in the proceeding if within the past two years:
>
> (i) A party to the proceeding, or an officer, director, or trustee of a party, was a

client of the judge when the judge was in the private practice of law or a client of a lawyer with whom the judge was associated in the private practice of law.

(ii) A lawyer in the proceeding was associated in the private practice of law with the judge.

(C) A judge who served as a lawyer for, or officer of, a public agency that is a party to the proceeding shall be deemed to have served as a lawyer in the proceeding if he or she personally advised or in any way represented the public agency concerning the factual or legal issues in the proceeding.

(3)

(A) The judge has a financial interest in the subject matter in a proceeding or in a party to the proceeding.

(B) A judge shall be deemed to have a financial interest within the meaning of this paragraph if:

(i) A spouse or minor child living in the household has a financial interest.

(ii) The judge or the spouse of the judge is a fiduciary who has a financial interest.

(C) A judge has a duty to make reasonable efforts to inform himself or herself about his or her personal and fiduciary interests and those of his or her spouse and the personal financial interests of children living in the household.

(4) The judge, or the spouse of the judge, or a person within the third degree of relationship to either of them, or the spouse of such a person is a party to the proceeding or an officer, director, or trustee of a party.

(5) A lawyer or a spouse of a lawyer in the proceeding is the spouse, former spouse, child, sibling, or parent of the judge or the judge's spouse or if such a person is associated in the private practice of law with a lawyer in the proceeding.

(6)

(A) For any reason:

(i) The judge believes his or her recusal would further the interests of justice.

(ii) The judge believes there is a substantial doubt as to his or her capacity to be impartial.

(iii) A person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial. (emphasis added)

(B) Bias or prejudice toward a lawyer in the proceeding may be grounds for disqualification. (emphasis added)

(7) By reason of permanent or temporary physical impairment, the judge is unable to properly perceive the evidence or is unable to properly conduct the proceeding.

(8)

(A) The judge has a current arrangement concerning prospective employment or other compensated service as a dispute resolution neutral or is participating in, or, within the last two years has participated in, discussions regarding prospective employment or service as a dispute resolution neutral, or has been engaged in that employment or service, and any of the following applies:

(i) The arrangement is, or the prior employment or discussion was, with a party to the proceeding.

(ii) The matter before the judge includes issues relating to the enforcement of either an agreement to submit a dispute to an alternative dispute resolution process or an award or other final decision by a dispute resolution neutral.

(iii) The judge directs the parties to participate in an alternative dispute resolution process in which the dispute resolution neutral will be an individual or entity with whom the judge has the arrangement, has previously been employed or served, or is discussing or has discussed the employment or service.

(iv) The judge will select a dispute resolution neutral or entity to conduct an alternative dispute resolution process in the matter before the judge, and among those available for selection is an individual or entity with whom the judge has the arrangement, with whom the

judge has previously been employed or served, or with whom the judge is discussing or has discussed the employment or service.

(B) For the purposes of this paragraph, all of the following apply:

(i) "Participating in discussions" or "has participated in discussion" means that the judge solicited or otherwise indicated an interest in accepting or negotiating possible employment or service as an alternative dispute resolution neutral, or responded to an unsolicited statement regarding, or an offer of, that employment or service by expressing an interest in that employment or service, making an inquiry regarding the employment or service, or encouraging the person making the statement or offer to provide additional information about that possible employment or service. If a judge's response to an unsolicited statement regarding, a question about, or offer of, prospective employment or other compensated service as a dispute resolution neutral is limited to responding negatively, declining the offer, or declining to discuss that employment or service, that response does not constitute participating in discussions.

(ii) "Party" includes the parent, subsidiary, or other legal affiliate of any entity that is a party and is involved in the

transaction, contract, or facts that gave rise to the issues subject to the proceeding.

(iii) "Dispute resolution neutral" means an arbitrator, mediator, temporary judge appointed under Section 21 of Article VI of the California Constitution, referee appointed under Section 638 or 639, special master, neutral evaluator, settlement officer, or settlement facilitator.

(9)

(A) The judge has received a contribution in excess of one thousand five hundred dollars ($1500) from a party or lawyer in the proceeding, and either of the following applies:

(i) The contribution was received in support of the judge's last election, if the last election was within the last six years.

(ii) The contribution was received in anticipation of an upcoming election.

(B) Notwithstanding subparagraph (A), the judge shall be disqualified based on a contribution of a lesser amount if subparagraph (A) of paragraph (6) applies.

(C) The judge shall disclose any contribution from a party or lawyer in a matter that is before the court that is required to be reported under subdivision (f) of Section 8421 l of the Government Code, even if the amount would not require disqualification under this paragraph. The manner of disclosure shall be the

same as that provided in Canon 3E of the Code of Judicial Ethics.

(D) Notwithstanding paragraph (1) of subdivision (b) of Section 170.3, the disqualification required under this paragraph may be waived by the party that did not make the contribution unless there are other circumstances that would prohibit a waiver pursuant to paragraph (2) of subdivision (b) of Section 170.3.

(b) A judge before whom a proceeding was tried or heard shall be disqualified from participating in any appellate review of that proceeding.

(c) At the request of a party or on its own motion an appellate court shall consider whether in the interests of justice it should direct that further proceedings be heard before a trial judge other than the judge whose judgment or order was reviewed by the appellate court.

(Amended by Stats. 2010, Ch. 686, Sec. I. (AB 2487) Effective January 1, 2011.)

3. From Jon B. Eisenberg, et. al., Cal. Prac. Guide: Civil Writs and Appeals:

A. Challenges for Cause

[3:9] In General: Impartiality is indispensable to the administration of justice. Whether the trial is before a judge or jury, it is an "eternal verity" that the parties are entitled to a judge who has no bias or prejudice or interest in the case. [*Austin v. Lambert*

(1938) 11 C2d 73, 76, 77 P2d 849, 851]

As provided by statute, "A judge shall be disqualified" where ground for disqualification is shown to exist. [CCP § 170. l(a)J

(5) [3:41] Challenge based on due process of law: A party's right to due process is violated in the following circumstances:

(a) [3:41.11 "Direct, personal, substantial, pecuniary interest": Due process is violated when the judge "has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case." [*Aetna Life Ins. Co. v. Lavoie* (1986) 475 US 813, 821-822, 106 S.Ct. 1580, 1585 (emphasis added)]

(b) [3:41.21 Probability of actual bias too high: Even when a judge does not have any direct, personal, substantial, pecuniary interest in a case, there are "rare instances" in which "the probability of actual bias on the part of the judge . . . is too high to be constitutionally tolerable." (*Caperton v. A.T. Massey Coal Co., Inc.* (2009) 556 US 868, 877, 890, 129 S.Ct. 2252, 2259, 2267 (internal quotes omitted); *People v. Freeman* (2010) 47 C4th 993, 996, 103 CR3d 723, 725; *see People v. Clark* (2021) 73 CA5th 95, 103, 288 CR3d 124, 129-130-judge's relationship with prosecutor, comprised of single instance of co-participation in civics education program (with 4 classroom visits and 2-hour moot court session) did not reflect "constitutionally intolerable possibility" that judge harbored

an interest in outcome of defendant's trial]

1) [3:41.31 "Embroiled in bitter controversy": A party's right to due process is violated when a judge "becomes embroiled in a running bitter controversy" with a litigant. [*Mayberry v. Pennsylvania* (1971) 400 US 455, 465, 91 S.Ct. 499, 505]

2) [3:41.4] "Part of accusatory process": And a judge's recusal is required because of a due process violation when the judge becomes a "part of the accusatory process." [*In re Murchison* (1955) 349 US 133, 137, 75 S.Ct. 623, 625]

3) [3:41.5] Compare-appearance of bias: On the other hand, a judge's appearance of bias is not enough to establish a due process violation. [*People v. Freeman, supra,* 47 C4th at 996, 103 CR3d at 725]

In these circumstances, a party should "seek disqualification under state disqualification statutes." [*People v. Freeman, supra,* 47 C4th at 996, 103 CR3d at 725]

(c) [3:41.6] Comment: Most matters relating to judicial disqualification do not rise to a constitutional level. [*Aetna Life Ins. Co. v. Lavoie, supra,* 475 US at 820, 106 S.Ct. at 1584]

Thus, claims of personal bias, hostility, financial interest or relationships generally do not implicate due process of law. [*Aetna Life Ins. Co. v. Lavoie, supra,* 475 US at 820, 106 S.Ct. at 1584; *Brown v. American Bicycle*

Group, LLC (2014) 224 CA4th 665, 673-675, 168 CR3d 850, 857-858]

(d) Application

g. [3:46] Bias or prejudice (lack of impartiality): A judge is disqualified where, for any reason:

- The judge believes there is a substantial doubt as to his or her capacity to be impartial (CCP § l 70.l(a)(6)(A)(ii)); or
- Other persons "aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial" (CCP § 170.1(a)(6)(A)(iii) (emphasis added)).

(1) [3:47] Compare-due process challenge: Judicial bias can be the basis of a due process challenge on appeal from the final judgment. *See*, 3:144.4.

(2) [3:48] What constitutes "bias": "Bias" exists where the judge evidences a "predisposition to decide a cause or an issue in a certain way, which does not leave the mind perfectly open to conviction." (*Pacific & Southwest Annual Conference of United Methodist Church v. Sup.Ct. (Barr)* (1978) 82 CA3d 72, 86, 147 CR44, 52]

(3) [3:49} Test for impartiality: The test under § 170.1(a)(6)(A)(iii) is objective: "The situation must be viewed through the eyes of the . . . average person on the street" as of the time the motion is brought. [*United Farm Workers of America v. Sup.Ct. (Maggio, Inc.)* (1985) 170 CA3d 97, 104, 216 CR 4, 9

(emphasis added)]

"The word 'might' in the statute was intended to indicate that disqualification should follow if the reasonable man, were he to know all the circumstances, would harbor doubts about the judge's impartiality." [*United Farm Workers of America v. Sup.Ct. (Maggio, Inc.), supra*, 170 CA3d at 104, 216 CR at 9 (emphasis added)]

(a) [3:50] Legal vs. factual determinations: Various factors may impact on how the "average person on the street" views a judge's participation in a case. One such factor is whether the judge is deciding factual questions or issues of law . . . because the former are entitled to considerable deference while the latter are reviewable de novo on appeal. [*United Farm Workers of America v. Sup.Ct. (Maggio, Inc.), supra*, 170 CA3d at 104,216 CR at 10; *see*, ¶ 3:6)

(d) [3:54.5] Facts and circumstances must be considered in their entirety: The facts and circumstances prompting the challenge must be evaluated in their entirety. A finding of judicial bias cannot be based on one isolated comment made during a hearing or trial, but must be considered in the context of the entire proceeding. [*Flier v. Sup.Ct. (Perkins)* (1994) 23 CA4th 165, 172, 28 CR2d 383, 387- "[i]n the context of the entire proceeding the words 'good boy' would not lead a person to reasonably entertain a doubt about (Judge's) ability to be impartial toward (Defendant) because of race"]

(4) [3:55] Application-matters constituting bias or prejudice: A judge is disqualified where any of the following factors is established:

(a) [3:56) Bias toward party: The judge's bias toward a party is clearly ground for disqualification. [*See Pacific & Southwest Annual Conference of United Methodist Church v. Sup.Ct. (Barr)* (1978) 82 CA3d 72, 86, 147 CR44, 52]

- [3:58.2] In a sexual harassment/assault case, Judge disparaged Plaintiffs credibility by questioning why she did not resist her assailant more forcibly, and insinuated that sexual harassment cases were a nuisance and a misuse of the judicial system. Judge's attitude revealed gender bias, raising doubt as to whether Plaintiff received a fair trial. [*Catchpole v. Brannon* (1995) 36 CA4th 237, 249, 42 CR2d 440,446 (disapproved on another ground by *People v. Freeman, supra*, 47 C4th at 1006, 103 CR3d at 733, fn. 4)]

(d) [3:59] Bias toward counsel: The judge's bias or prejudice toward a lawyer in the proceeding is ground for disqualification. [CCP § l 70.l{a)(6)(B)]

However, it must be more than a quick flare-up or isolated occurrence. The judge must be so personally embroiled with the lawyer as to destroy the judge's capacity for impartiality. [*See In re Buckley* (1973) 10 Cal.3d 237, 256, 110 CR 121, 133]

But sometimes grounds for disqualification

are first disclosed during trial. (They may even become known for the first time after judgment; *see*, ¶ 3:145.) Accordingly, a challenge for cause is allowed under CCP § 170.3 even after the trial or proceeding has commenced if made "at the earliest practicable opportunity." [*Oak Grove School Dist. v. City Title Ins. Co.*, *supra*, 217 CA2d at 705, 32 CR at 302-challenge for cause timely where made immediately after judge admitted bias]

However, such challenge does not affect the judge's power to proceed with the trial. [CCP § 170.4(c)(1) (discussed at, ¶ 3:151)]

(c) [3:102] Content: The statement of disqualification is in the nature of a pleading. It must set forth facts constituting ground for disqualification and an objection to the hearing or trial before the judge. [CCP § l 70.3(c)(1)]

[3:105] A disqualification statement charging bias or prejudice must set forth specifically the facts on which the charge is predicated . . . "a narrative of facts from which the existence of bias or prejudice appears probable." [*See Oak Grove School Dist. v. City Title Ins. Co.* (1963) 217 CA2d 678, 707, 32 CR 288,303]

However, where the judge admitted bias during the trial, a disqualification statement reciting that fact was sufficient. [*Oak Grove School Dist. v. City Title Ins. Co.*, *supra*, 217 CA2d at 707, 32 CR at 303]

3) [3:106] Power to strike insufficient

statement: The judge against whom a disqualification statement is filed cannot pass upon the facts alleged in the disqualification statement (CCP § 170.3(c)(5)). But the judge may order stricken a statement that "on its face . . . discloses no legal grounds for disqualification." [CCP § l 70.4(b); see further discussion at, 3:148] a) [3:107] Rationale: As explained by one court: "A judge is without power to pass upon the question of his own disqualification where an appropriate issue of fact is presented by the statement charging bias or prejudice . . . However, where the statement is insufficient, the judge can so determine" under the procedure provided for in§ 170.4(b) and thereafter "proceed to try the cause on its merits." [*Oak Grove School Dist. v. City Title Ins. Co., supra,* 217 CA2d at 701-702, 32 CR at 301 (decided under prior Jaw); *see also Urias v. Harris Farms, Inc.* (1991) 234 CA3d 415, 421-422, 285 CR 659, 662]

It is unnecessary for the challenging party to show actual bias. It is sufficient to demonstrate that "a person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial." A "'reasonable person' is not someone who is 'hypersensitive or unduly suspicious,' but rather is a 'well-informed, thoughtful observer.'" The challenging party has a "heavy burden" and must "clearly establish the appearance of bias." [*Wechsler v. Sup.Ct.* (Wechsler)(2014) 224 CA4th 384, 390-391, 168 CR3d 605,610

> (internal quotes omitted); *see Mt. Holyoke Homes, L.P. v. Jeffer Mangels Butler & Mitchell, LLP* (2013) 219 CA4th 1299, 1311, 162 CR3d 597, 606]
>
> 4) [3:138] Judge's "track record" as proof of bias? A judge's "track record" that is so lopsided as to create a reasonable doubt of the judge's impartiality in the minds of persons aware of that record may be sufficient to disqualify the judge under CCP § 170.1(a)(6)(A)(iii) (causing reasonable person to doubt impartiality; *see* ¶ 3:46).
>
> [3:140] PRACTICE POINTER: In any event, the judge's "track record" is one of the key factors considered by parties in deciding whether to exercise a peremptory challenge (CCP § 170.6; *see*, ¶ 3:164 ff.). Sources of information on a judge's "track record" are discussed at ¶ 3:3.

4. On 1/3/23, this Court issued an order granting Defendant's motion for protective order (true copy, Exhibit 1, with highlighting on this and other exhibits for ease of reference). The order stated on pages 15-16:

> Further, despite the contentious history of this case, Caltrans had some reason to believe that plaintiff and his attorney would refrain from distributing further the Brown e-mail until the privilege issue was resolved, whether by agreement or court intervention. This inference is supported by the California Supreme Court's decision in *Rico v. Mitsubishi Motors Co.* (2007) 42 Cal. 4th 807, 817, quoting with approval from *State Camp. Ins.*

Fund v. WPS, Inc. (1999) 70 6 Cal.App.4 644, 656-657, as follows:

"When a lawyer who receives materials that obviously appear to be subject to an attorney-client privilege or otherwise clearly appear to be confidential and privileged and where it is reasonably apparent that the materials were provided or made available through inadvertence, the lawyer receiving such materials should refrain from examining the materials any more than is essential to ascertain fi the materials are privileged, and shall immediately notify the sender that he or she possesses material that appears to be privileged. The parties may then proceed to resolve the situation by agreement or may resort to the court for guidance with the benefit of protective orders and other judicial intervention as may be justified." (emphases added)

Given the complexity in the law regarding when attorney communications with public entity employees are protected by the attorney client privilege, it may be too much to say that Mr. Shepardson should have concluded that the Brown e-mail was "obviously" privileged. What cannot be disputed is that he immediately recognized the issue. His opening message on January 11, 2022, stated "It]his appears to be a waiver of the attorney-client privilege, if any 20 privilege attaches to communications with Mr. Duncan."

The Referee concludes that Mr. Shepardson recognized, at a minimum, that he had

received material from his client which may be privileged. This situation was addressed directly in *McDermott Wil &Emery LLP v. Superior Court*, *supra*, 10 Cal.App.5th 1083 (McDermott), first cited by plaintiff at the hearing before the Referee, and which applied the standards set forth in *State Comp. Ins. Fund v. WPS, Inc.*, *supra*. Specifically, "when an attorney ascertains that he or she received materials that are not obviously or clearly privileged, but nonetheless may be privileged materials that were inadvertently disclosed . . . the attorney's duty is simply to notify the privilege holder that the attorney may have privileged documents that were inadvertently disclosed. At that point, the onus shifts to the privilege holder to take appropriate steps to protect the materials if the holder believes the materials are privileged and were inadvertently disclosed." *McDermott* at 1108-1109. Because Duncan was a lower level Caltrans manager whose communications with Caltrans lawyers were not obviously privileged, the Referee concludes this standard applies. (emphases added)

Whatever Mr. Shepardson concluded about the potentially privileged nature of the Brown e-mail, he responded to his recognition of the issue by immediately informing Mr. Sims of the disclosure, as required by McDermott. At that point the burden shifted to defense counsel to "take appropriate steps to protect the materials." *Ibid.*

5. 1/3/23 COURT ORDER STATED THE LOWER STANDARD OF RESPONSE IDENTIFIED IN MCDERMOTT IS ADOPTED. The Court clearly stated the lower level of response applied to attorney Shepardson's receipt of the Brown email. He only had to disclose the not clearly privileged document to opposing counsel. He had no duty to meet and confer, which he did anyway. He had no duty to take the matter to a judicial officer, which he did and Defendant rejected. He had no duty to file a motion, which Defendant did 7 months later, which was so late, that it waived the privilege as a matter of law, and the trial judge committed 3 reversible error in finding otherwise. She also committed reversible error not finding waiver for Defendant's intentional disclosure of a significant part of the Brown email. At pages 27-28 the 4 1/3/23, order stated:

> **E. Conclusion**
>
> Based on the attorney-client privilege only, Caltrans' motion is granted. However, this hardly spells the end of the matter. Plaintiff received the Brown e-mail through no fault of his own, and claims it caused him emotional distress. Is such distress, arguably caused by the litigation process, a recoverable component of damage? Is such distress, arguably caused by the litigation process, a recoverable component of damage? If so, to what extent will he be allowed to testify to the privileged e-mail's content and effect on him? The message is now part of Dr. Williamson's chart. Will he give it up? To what extent will he be allowed to rely on it? He has testified "[i]t would be difficult, and perhaps

> impossible, to given testimony about Christian's psychological harm caused by Defendant Christian (sic) without consideration of the damaging email." Williamson Dec., paragraph 31. Has he talked himself out of a job? What use will plaintiffs (sic) "HR experts" be allowed to make of the Brown e-mail given that Brown is not a Caltrans HR officer or employee? These and related questions are unresolved. The Referee does not rule or imply by finding the Brown e-mail priviled and recommending that the motion be granted that these issues must be resolved in Caltrans' favor. (emphasis added)

6. Defendant brought a motion to disqualify attorney Shepardson (true copy of memorandum (true copy, Exhibit 2) and argued *against* application of the lower standard that the Court adopted in its 1/3/23, order above.

7. Defendant argued for the previously REJECTED higher standard of compliance identified in *State Comp. Ins. Fund v. WPS, Inc.* (1999) 70 Cal. App.4th 644, 656-657 (State Fund).

8. TRIAL JUDGE FAILED TO APPLY CCP 1008. Since Defendant was asking the Court to overrule the earlier finding, it was required to bring a renewal motion to do so through Code of Civil Procedure (CCP) section 1008.

9. It is undisputed Defendant failed to bring a renewal motion pursuant to the statute.

10. Therefore, pursuant to CCP 1008, the Court LACKED THE JURISDICTION to grant Defendant's

motion to disqualify counsel and bar expert and lay testimony.

11. If the Court had correctly applied the plain law, it was mandated to deny Defendant's motion on jurisdictional grounds.

12. The Court's failure to even address the argument in its ruling (Exhibit 3) was a gross error, and reflected, respectfully, the trial judge was so biased and lacking in impartiality she was willing to ignore and not follow the law to benefit Defendant and damage Christian and his lawyer.

13. Note: the trial judge was very detailed in her ruling and the failure to address a separate and lead argument, the application of CCP 1008, created an inference that the trial judge realized there was no rational way to find for Defendant on the issue and so simply ignored it.

14. On such an important motion as the disqualification of counsel and barring experts, heard one day before trial was to start, after 4.5 years of litigation, to fail to address the Court's lack of jurisdiction pursuant to CCP 1008, respectfully suggested either gross incompetence or, more likely great bias, prejudice, and even malice toward Christian and his counsel.

15. What was particularly troubling was the trial judge continually stated she was unbiased and 21 impartial, and then proceeded to engage in actions further demonstrating bias, prejudice, and lacking in impartiality.

16. TRIAL JUDGE FAILED FOLLOW HER OWN 1/3/23, ORDER THAT THE LOWER STANDARD IDENTIFIED IN MCDERMOTT APPLIED.

17. The Court's 8/25/23, order stated in pertinent part:

> In reviewing the McDermott case, it appears that Mr. Shepardson's arguments rely on the discussion in the McDermott dissent. The McDermott dissent expresses its opinion that the McDermott majority created "an unwarranted extension of the ethical rule declared in *State Comp. Ins. Fund v. WPS, Inc.*," *supra. See, McDermott Will & Emery LLP v. Superior Court* (2017) 10 Cal.App.5th 1083, 1126.
>
> "[A] majority opinion of the [appellate court] states the law and . . . a dissenting opinion has no function except to express the private view of the dissenter." *Wall v. Sonora Union High School Dist.* (1966) 240 Cal.App.2d 870, 872. "Under stare decisis, . . . [d]ecisions of very division of the District Courts of Appeal are binding . . . upon all the superior courts of this state, . . . Courts exercising inferior jurisdiction must accept the law declared by courts of superior jurisdiction. It is not their function to attempt to overrule decisions of a higher court." *Auto Equity Sales, Inc. v. Superior Court of Santa Clara County* (1962) 57 Cal.2d 450,455.
>
> This Court is bound to follow *McDermott, supra.* As previously noted, the McDermott court has concluded and directed the "State

> Fund rule requires the attorney to . . . refrain from using documents until the parties resolve or the court resolves any disputes about their privileged nature. The receiving attorney's reasonable belief that the privilege holder waived the privilege or an exception to the privilege applies does not vitiate the State Fund duties. The trial court must determine whether the holder waived the privilege or an exception applies if the parties fail to reach an agreement. The receiving attorney assumes the risk of disqualification when the attorney elects to use the documents before the parties or the trial court has resolve the dispute over their privileged nature and the documents are ultimately are found to be privileged. *McDermott Will & Emery LLP v. Superior Court* (2017) 10 Cal.App.5th 1083, 1092-1093.

18. Respectfully, the trial judge's failure to follow her own prior order and misapply *McDermott*, showed clear bias, prejudice, and lack of impartiality.

19. In *McDermott*, the Court there—on the particular facts of THAT CASE—said of the two standards, the higher standard applied.

20. IN OUR CASE, the Court already evaluated the different standards, and determined the lower standard identified in *McDermott* applied.

21. Respectfully, the trial judge, then misapplied its own *McDermott* standard by applying the higher standard.

22. The trial judge by adopting the fallacious higher standard, proceeded to then find that attorney

Shepardson violated it to justify disqualification and his experts barred from testifying.

23. In other words, respectfully it appears the trial judge intentionally refused to apply her own predetermined lower standard identified in *McDermott*, intentionally erred in applying the higher standard, and then used this false premise, to justify imposing the extremely damaging orders of disqualifying of counsel and barring of experts-one day before the jury trial was to start.

24. The trial judge's ruling was outside the bounds of all reasonable judging and a gross abuse of discretion.

25. THE TRIAL JUDGE VIOLATED THE CALIFORNIA RULES OF COURT AND CONSTITUTIONAL DUE PROCESS BY WRONGFULLY DENYING ORAL ARGUMENT. The trial court issued a tentative ruling and stated if the tentative was going to be contested, the hearing would be on 8/28/23.

26. I notified the Court shortly before 5 p.m. on 8/24/23, that Plaintiff was contesting the ruling (Exhibit 4. true copy of submittal to the trial court for why the notice was timely).

27. Under California Rule of Court, rule 3.1308, notice only need be provided by 4 p.m. the day before the hearing.

28. It is undisputed the Court set a hearing date of 8/28/23.

29. Therefore, Plaintiff timely contested the tentative and was entitled to a hearing.

30. On 8/25/23, the Court affirmed its tentative ruling and did not provide official service to Plaintiff of it (Exhibit 3).

31. On 8/25/23, I had hand-delivered to the Court a letter (Exhibit 4), which set forth in detail why notice contesting the tentative ruling was timely and Christian was entitled to oral argument.

32. On 8/28/23, I and attorney Adam Koss appeared in Court to contest the tentative ruling and ruling, and the Court refused to hear any argument (Exhibit 5) on the basis I had already been disqualified, despite the Court's failure to provide official written notice of it.

33. The Court (and Defendant's counsel at 8:20 a.m.) was provided a copy of the notice of appeal before the hearing (Exhibit 6), which referenced the legal authority that the filing of an appeal stays the order for disqualification.

34. Her honor had no interest in hearing any argument.

35. Her honor than issued a minute order (Exhibit 7) that falsely stated that Christian said:

> "Plaintiff informs the Court that he is not ready to proceed at this time." (emphasis added)

36. In fact, the transcript of the hearing shows that he wanted to proceed with the trial and objected to a continuance:

> MR. KOSS: Mr. Shepardson has filed a notice of appeal this morning which states the disqualification. (emphasis added)

THE COURT: All right. Mr. Johnson, were you ready to proceed?

CHRISTIAN JOHNSON: Yes, with John as my attorney because there's a stay in disqualification. (emphasis added)

THE COURT: So you're not ready to proceed today?

CHRISTIAN JOHNSON: I am because John is my attorney, and there's a stay in disqualification. (emphasis added)

THE COURT: Okay. Did you want to be heard Caltrans?

MR. SIMS: Yes, Your Honor. I haven't been served or made aware of any appeal in this matter. This is news to me.

MR. KOSS: Your Honor—

THE COURT: Mr. Koss, I'm sorry, but at this point, I'm not permitting anything for the reasons that I stated. The Court has ordered Mr. Shepardson disqualified as counsel.

CHRISTIAN JOHNSON: I objected.

THE COURT: The same thing, you're representing Mr. Shepardson here today. It's no different than if he were speaking to the court, so there's no standing—

CHRISTIAN JOHNSON: I object to the continuance. (emphasis added)

MR. KOSS: I understand, Your Honor, but we need to make a record that—

THE COURT: Could-would Caltrans please give notice?

MR. SIMS: Yes. I'm sorry. Caltrans will give notice. (emphasis added)

37. The record shows that the trial judge falsely characterized Mr. Johnson's position and 3 falsely labeled him as not being ready to proceed to trial, which he was. The five-year statute is coming due soon and the trial judge manipulated what was said to make it look like the Plaintiff was not ready to proceed. In fact, all the trial documents requested by the Court were served on opposing counsel and filed with the Court on 8/28/23. Plaintiff was ready to go and the trial judge wrongly continued it Additionally, the Court said it was allowing time for Christian to get another lawyer, which showed the trial judge great animus and bias against Christian's lawyers-she wants him out of the case, irrespective of the client's right to determine who is lawyer is and the law that the appeal stays of the disqualification order.

38. In other words, the trial judge is so clearly biased, prejudiced, and lacking in impartiality that she refuses to follow the law . The appeal stays her disqualification order-and she doesn't care. She is violating her obligation under the California Code of Judicial Ethics ("CCJE") to follow the law, avoid impropriety, and the appearance of it.

39. Mr. Johnson was ready to proceed with the trial and the disqualification of attorney Shepardson was being stayed-and the judge was made aware of this-and the judge to Christian's prejudice continued the trial, for the approximate sixth time.

40. As of the hearing on 8/28/23, the Court had still not given official notice of its ruling and notice had not been waived. Therefore, the court's disqual-

ification order was not in legal effect and the Court should not have continued the trial on the basis that attorney Shepardson had been disqualified. Additionally, the Court was on notice of the appeal staying the disqualification order had been filed-because on 8/28/28, the notice was placed in the court's box for filing due to the inability of a court clerk to immediately file it because of short staffing.

41. The Court's refusal to follow the CRC for timely contesting the motion, then was improperly used by the Court to find disqualification and preclude any further contesting of the ruling, which was a violation of Christian's constitutional due process rights.

42. Moreover, on 8/24/23, we timely contested of the tentative ruling, which further informed the Court that it had erred in failing to address CCP 1008 and its misapplication of its own McDermott standard. The judge had notice of her errors, and could have corrected them, and chose not to, which was prejudicial to Christian and showed a lack of impartiality.

43. These actions of the judge, along with prior errant ones identified in the six prior motions to disqualify, show, respectfully, that it is now virtually impossible for the judge to be fair in this case. It appears she wants attorney Shepardson off the case because of his challenges to her errant orders, rulings, and/or actions. She his so embroiled in the litigation, and respectfully, seeking to retaliate against Christian and his lawyer for their objections and challenges to her errant actions and orders, that she is intent on removing Christian's attorney and gutting Christian's case, as seen by her barring experts.

44. The law strongly disfavored disqualification during trial and the judge ignored the law.

45. The barring of Christian's experts was improper for the same reasons disqualification was: the Court incorrectly applied the higher standard from *State Fund* to find the improper dissemination of the Brown email to the experts.

46. The Court showed bias and prejudice as the experts all testified they could testify without reliance of the Brown email.

47. Expert Jan Duffy did not even recall seeing it.

48. The judge ignored the fact that Defendant failed to even secure their copies of the emails from the third-party experts, which showed waiver, and that her own order left it an open question as to whether experts or lay witnesses could testify about the existence or contents of the Brown email.

49. Since as of 8/28/28, Defendant still had failed to secure an order barring testimony about the existence or contents of the Brown email, how can one rationally exclude them from testifying because they were merely exposed to the Brown email?

50. The Court incorrectly found that by discussing the Brown email, that was a violation of the 1/3/23, order, which was an irrational finding because since the Court left open the possibility that there could be testimony about the Brown email, that meant naturally you can talk about it and prepare witnesses for it because testimony suggests verbal communication at the jury trial.

51. After the hearing on 8/28/23, Defendant's legal team was allowed to stay in the trial judge courtroom, while the public was locked out. I personally knocked on the courtroom door and it was not opened. Later, Defendant's legal team left the courtroom, escorted by a sheriff. Defendant's lawyers obtained preferential and unexplained access and use of a public courtroom. Were their improper ex parte communications with the Court or its staff? What was said if anything? Why were Defendant's legal team given preferential treatment. (*See* sworn statements of observers of the preferential treatment). I personally observed the preferential treatment. Respectfully, it's a bad look for the legal system, especially for African-Americans and people of color that have not received equal justice under law for centuries, a broken promise of the American dream, the Declaration of Independence and the U.S. and California Constitutions.

52. I spoke with the persons that came to observe the Court proceedings and they were appalled at the conduct of the Judge Kronlund (Exhibit 8).

53. In sum, respectfully, a lay person aware of the facts would reasonably find the judge is biased and lacking in impartiality.

54. In my opinion, based on the facts above, the trial judge is clearly biased, prejudiced and intent on removing me from being Christian's counsel and this view has been echoed by those watching the 8/8/23 hearing.

55. The trial judge's clear misrepresentation of Christian's position on a continuance and wanting to proceed to trial reflects the Court is simply is

disregarding facts to support positions that damage Christian and his lawyer-which demonstrates deep bias and prejudice.

I declare under penalty of perjury under California law that the foregoing case facts are true and correct.

Respectfully Submitted,

/s/ John A. Shepardson, Esq.
For Plaintiff Christian L. Johnson

Date: August 30, 2023

PLAINTIFF'S NOTICE OF APPEAL, FILED IN SUPERIOR COURT OF CALIFORNIA COUNTY OF SAN JOAQUIN (AUGUST 28, 2023)

Filed 2023 Aug 28 PM 3:39
Clerk of Court
Superior Court of CA
County of San Joaquin
STK-CV-UCR-2019-281

Attorney or Party without Attorney

State Bar No: 129081
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City: Campbell
State: CA Zip Code: 95008
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Email Address: john@shepardsonlaw.com
Attorney for (Name): Christian L. Johnson

Superior Court of California, County of San Joaquin
Street Address: 180 E. Weber Avenue
Mailing Address: 180 E. Weber Avenue
City and Zip Code: Stockton, California 95202
Branch Name: Civil Unlimited

Plaintiff: Christian L. Johnson
Defendant: California Department of Transportation, et al.

☒ Notice of Appeal

Notice: Please read *Information on Appeal Procedures for Unlimited Civil Cases* (Judicial Council form APP-001) before completing this form. This form must be filed In the superior court, not in the Court of Appeal. A copy of this form must also be served on the other party or parties to this appeal. You may use an applicable Judicial Council form (such as APP-009 or APP-009E) for the proof of service. When this document has been completed and a copy served, the original may then be filed with the court with proof of service.

1. NOTICE IS HEREBY GIVEN that (name): Plaintiff: Christian L. Johnson

   appeals from the following Judgment or order In this case, which was entered on (date): August 25, 2023

   ☒ An order or judgment under Code of Civil Procedure, § 904.1(a)(3)-(13)

   ☒ Other (describe and specify code section that authorizes this appeal):

   See Attachment A *See* Attachment B-Order on Motion to disqualify Plaintiff's attorneys appealed from.

2. For cross-appeals only:

   a. Date notice of appeal was filed in original appeal:

   b. Date superior court clerk mailed notice of original appeal:

c. Court of Appeal case number *(if known);*

Date: 8/25/23

/s/ John A. Shepardson
Type or Print Name

/s/ John A. Shepardson
(Signature of Party or Attorney)

ATTACHMENT (NUMBER) A

(This Attachment may be used With any Judicial council form.)

1. The order to disqualify Plaintiffs Attorney on eve of trial is appealable because it was a final order upon a collateral issue. *Meehan v. Hopps* (1955) 45 Cal.2d 213, 216; *see In re Marriage of Skelley* (1976) 18 Cal.3d 365, 368.

2. Granting the Motion to Disqualify was also appealable as ordering injunctive relief. *Meehan v. Hopps* (1955) 45 Cal.2d 213, 216; *See* § 904.1, subd. (a)(6) [current version of statute making orders granting or denying injunctions immediately appealable].

3. The effect of this appeal from the Order granting the Motion for Disqualification of Counsel results in automatically stay of enforcement of the disqualification order. *URS Corp. v. Atkinson/Walsh Joint Venture* (2017) 15 Cal.App.5th 872, 887-890

ATTACHMENT (NUMBER) A

(This Attachment may be used With any Judicial council form.)

1. The order to disqualify Plaintiff's Attorney on eve of trial is appealable because it was a final order upon a collateral issue. *Meehan v. Hopps* (1955) 45 Cal.2d 213, 216; *see In re Marriage of Skelley* (1976) 18 CaI.3d 365, 368.

2. Granting the Motion to Disqualify was also appealable as ordering injunctive relief. *Meehan v. Hopps* (1955) 45 Cal.2d 213, 216; *See* § 904.1, subd. (a)(6) [current version of statute making orders granting or denying injunctions immediately appealable].

3. The effect of this appeal from the Order granting the Motion for Disqualification of Counsel results in automatically stay of enforcement of the disqualification order. *URS Corp. v. Atkinson/Walsh Joint Venture* (2017) 15 Cal.App.5th 872, 887-890

HEARING TRANSCRIPT WHERE SHEPARDSON WAS DENIED THE RIGHT TO SPEAK, SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN JOAQUIN, (AUGUST 28, 2023)

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN JOAQUIN

CHRISTIAN JOHNSON,

Plaintiff,

v.

CALIFORNIA DEPARTMENT OF TRANSPORTATION; and DOES 1 to 100, inclusive,

Defendants.

Case No: STK-CV-UCR-2019-281

Department: 10D

Before: Barbara A. KRONLUND, Judge.

[August 28, 2023, Transcript, p. 4]

THE COURT:—so this is not appropriate.

MR. KOSS:—if I may on behalf of Mr. Shepardson, I have two quick points I'd like to address to you.

THE COURT: Mr. Koss, I apologize, but just as inappropriate as t would be for Mr. Shepardson to

speak at this hearing, the same thing applies to you. It's really no different.

At this point, the court has made a ruling that Mr. Shepardson is disqualified from proceeding as Mr. Johnson's attorney, so I just need to know at this point, are we proceeding with the trial that's scheduled today or not? And I assume Mr. Johnson wants to have representation for this matter. Is Mr. Johnson here?

MR. SHEPARDSON: He is, Your Honor, and there is—

THE COURT: Mr. Shepardson, I've instructed you not to speak. I'm basically directing you at this point that you are not to speak at this proceeding. I'm not giving you permission to do that.

Mr. Johnson, are you here?

CHRISTIAN JOHNSON: Yes, Your Honor.

THE COURT: Let me ask you this: Are you ready to proceed to trial, or would you like to have a lawyer represent you? I can give you time to do that.

MR. KOSS: Your Honor, I have just two procedural statements to say to you if I may, please, Your Honor.

THE COURT: Counsel, I appreciate that you're here, but based on the court's ruling, I'm not going to do that.

MR. KOSS: Mr. Shepardson has filed a notice of appeal this morning which states the disqualification.

THE COURT: All right. Mr. Johnson, were you ready to proceed?

CHRISTIAN JOHNSON: Yes, with John as my attorney because there's a stay as to the disqualification.

THE COURT: So you're not ready to proceed today?

CHRISTIAN JOHNSON: I am because John is my attorney, and there's a stay in disqualification.

THE COURT: Okay. Did you want to be heard, Caltrans?

MR. SIMS: Yes, Your Honor. I haven't been served or made aware of any appeal in this matter. This is news to me.

Also, I'll just point out for the record that Mr. Shepardson appears to be whispering to his former client telling him what to say here, which I find is inappropriate given the court's order on disqualification.

THE COURT: Okay. Mr. Johnson, at this point, the court is going to go ahead and give you some opportunity to obtain counsel, so what I'm going to do is today was going to be the day for the start of trial. Instead, I'm going to vacate today's trial date. I'm going to continue the matter for three months. That should be ample time hopefully for obtaining alternate counsel, and that will be a trial setting at 8:45 in this department, 10, D as in dog. Dates?

THE CLERK: It's going to be November 27th, 2023 at 8:45 here in Department 10D.

THE COURT: That's for trial setting, all right? That will conclude today's matter then.

MR. KOSS: Your Honor—

THE COURT: Mr. Koss, I'm sorry, but at this point, I'm not permitting anything for the reasons that I stated. The court has ordered Mr. Shepardson disqualified as counsel.

CHRISTIAN JOHNSON: I object.

THE COURT: The same thing, you're representing Mr. Shepardson here today. It's no different than if he were speaking to the court, so there's no standing—

CHRISTIAN JOHNSON: I object to the continuance.

MR. KOSS: I understand, Your Honor, but we need to make a record that—

THE COURT: Could—would Caltrans please give notice?

MR. SIMS: Yes. I'm sorry. Caltrans will give notice.

THE COURT: All. right. Thank you.

[. . .]