NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

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

JULIUS JANISSE,

Plaintiff and Appellant,

v.

MARTIN LUTHER KING JR. – LOS ANGELES (MLK-LA) HEALTHCARE CORPORATION,

Defendant and Respondent.

B326593

(Los Angeles County Super. Ct. No. 19STCV27233)

JULIUS JANISSE,

Plaintiff and Respondent,

v.

MARTIN LUTHER KING JR. – LOS ANGELES (MLK-LA) HEALTHCARE CORPORATION,

Defendant and Appellant.

B328707

(Los Angeles County Super. Ct. No. 19STCV27233)

APPEALS from a judgment and an order of the Superior Court of Los Angeles County, Kristin S. Escalante, Judge. Affirmed.

Law Offices of Twila S. White, Twila S. White; Gelb Law and Yisrael Gelb for Plaintiff, Appellant and Respondent.

Horvitz & Levy, Lisa Perrochet, Bradley S. Pauley; Sanders Roberts, Reginald Roberts, Jr., and Eric Mintz for Defendant, Respondent and Appellant.

Julius Janisse sued his former employer, Martin Luther King Jr. – Los Angeles Healthcare Corporation (MLK) for various employment-related claims. By the time of trial, Janisse's claims against MLK consisted of two whistleblower causes of action, and a derivative cause of action for wrongful termination in violation of public policy. A jury returned a verdict in favor of MLK and against Janisse on all causes of action.

On appeal, Janisse challenges the judgment on numerous grounds, including: judicial bias; misconduct by the judge and defense counsel; evidentiary errors; instructional error; various verdict form errors; misconduct during closing argument; and inadequate jury deliberations. For the reasons discussed below, we conclude none of his contentions has merit. We therefore affirm the judgment.

MLK also appeals from a post-judgment order denying its request, as the prevailing party, for costs incurred in the action.[1] MLK acknowledges that it failed to allocate its costs between those incurred in defending against Janisse's claims for violations of the Fair Employment and Housing Act (FEHA) and those

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[1] We granted MLK's motion to consolidate Janisse's appeal from the judgment (Case No. B326593) and MLK's appeal from the post-judgment cost order (Case No. B328707) for briefing, argument, and decision.

incurred in defending against non-FEHA claims.[2] It nevertheless argues the trial court abused its discretion by denying MLK an opportunity to allocate its costs. We disagree and affirm the order.

FACTUAL AND PROCEDURAL BACKGROUND

The following facts are taken from the evidence presented at trial. Consistent with the substantial evidence standard of review for the jury's factual findings, we resolve every factual conflict in favor of the judgment and draw every reasonable inference in favor of the jury's findings. (*Davis v. Kahn* (1970) 7 Cal.App.3d 868, 847.)

Background

MLK operates a 131-bed hospital and three clinics in an unincorporated area of Los Angeles County. In 2015, Janisse began his employment with MLK as a surgical technician working in perioperative services.

During his employment, Janisse received corrective action notices for various incidents. For example, in January 2016, Janisse received a verbal warning for speaking to nurse Juliana Rodriguez in a threatening manner. In April 2017, Janisse received another verbal warning for yelling and cursing at coworkers Adrian Casares and Chandler Svirillos. Based on these incidents, MLK sent Janisse to a class to learn better communication skills and anger management. Janisse also

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[2] In the absence of a showing that the FEHA claims were frivolous, "only those costs properly allocated to non-FEHA claims may be recovered by the prevailing defendant." (*Roman v. BRE Properties, Inc.* (2015) 237 Cal.App.4th 1040, 1062 (*Roman*).)

received a corrective action notice after sending an email to MLK's human resources department falsely accusing Casares of leaving dirty footprints in the operating room when, in fact, the footprints belonged to Janisse.

In 2017, Janisse lodged several complaints, known as risk incident reports (RIRs), with MLK's management regarding a variety of issues. The first RIR, dated May 16, 2017, concerned a pair of allegedly stolen shoes. A couple months later, Janisse lodged his second RIR, which concerned his dispute with Svirillos about which of them would set up an operating room for a procedure. The third RIR was about an employee who cut her finger outside the operating room. Janisse filed another RIR regarding a verbal confrontation between him, on the one hand, and Casares and Svirillos on the other, in the breakroom after Janisse told them to stop speaking negatively about another employee in the department. After an investigation into this RIR, "it was determined that better professional workplace communication [was] needed in the department."

Janisse also submitted RIRs regarding his ongoing workplace conflict with Casares, whom according to Janisse, had a gang affiliation. Specifically, in one of the RIRs, Janisse stated that because of the "hostile unpredictable behavior" of Casares, he felt "in fear of [his] life when at work." After an investigation, it was "determined there was no valid threat. [Janisse] has communicated with HR, and has been instructed to keep them informed if any further issues arise." In response to an additional RIR regarding Casares's alleged "abusive language and derogatory statements[,]" MLK conducted an investigation and determined "that there was little to no evidence to support harassment allegations."

Janisse also complained that Svirillos had not properly cleaned a machine in a surgical suite. MLK investigated this report, and "determined that there was no unsafe condition created" because Janisse's assertion regarding proper cleaning procedure for the machine was contrary to the procedure outlined in the instructions from the machine's manufacturer.

Events leading to Janisse's termination

In October 2018, nurse Aiwen Young submitted a confidential RIR regarding a failure to comply with hygiene protocols during surgery. Specifically, according to nurse Young, Janisse broke aseptic technique, i.e., "broke scrub," by leaving the operating room during a surgical procedure and failing to perform a surgical scrub before reentering the operating room.

MLK's supervisors investigated nurse Young's report and met with Janisse to discuss it. Janisse did not deny he had broken scrub. MLK verbally warned Janisse and instructed him to adhere to the hygiene protocol. Janisse asked who reported him, and MLK instructed Janisse to refrain from trying to find out that information.

Immediately after his meeting with MLK's management, Janisse confronted nurse Young. Janisse "went up to [nurse Young] and was talking about the situation and looked at her and said I know you didn't snitch on me. And when she said, I did. I reported it, he then said I'm going to kill you."

Nurse Young reported Janisse's threat to MLK's management in a subsequent RIR. Another nurse also corroborated nurse Young's account.

Janisse's confrontation of Young for filing a confidential RIR, and his threat to kill Young, were both violations of MLK's policies. MLK therefore placed Janisse on paid administrative

suspension pending an investigation of his confrontation with nurse Young. MLK's management interviewed nurse Young and the other nurse who witnessed the incident, both of whom confirmed their initial reports. MLK's managers also met in-person with Janisse. MLK ultimately found that Janisse "confronted somebody who had made an incident report and then threatened to kill them," which were both violations of company policy. Based on these findings, MLK terminated Janisse's employment in November 2018.

This lawsuit

In August 2019, Janisse sued MLK. The complaint asserted causes of action for: (1) violation of Health and Safety Code section 1278.5; (2) violation of Labor Code sections 98.6 and 1102.5 (Whistleblowing); (3) violation of Labor Code section 6310; (4) recovery of civil penalties pursuant to the Cal/OSHA (Labor Code section 6427 et seq.); (5) discrimination in violation of FEHA; (6) hostile work environment in violation of FEHA; (7) retaliation in violation of FEHA; (8) failure to take all reasonable steps necessary to prevent discrimination, retaliation, and harassment; and (9) wrongful discharge in violation of public policy.

MLK moved for summary judgment, or in the alternative, summary adjudication. The court granted summary adjudication of Janisse's claims for Cal/OSHA civil penalties (fourth cause of action) and for a hostile work environment under FEHA (sixth cause of action).

Before jury selection, Janisse dismissed his first cause of action for whistleblower retaliation under Health and Safety Code section 1278.5 and his fifth cause of action for racial discrimination under FEHA. Shortly before the end of trial,

Janisse also dismissed his remaining FEHA causes of action for retaliation (seventh cause of action) and for failure to prevent discrimination, retaliation, and harassment (eighth cause of action).

The court granted a directed verdict for MLK on Janisse's factual theory that he experienced whistleblower retaliation for having made a complaint of racial harassment or discrimination. The court also granted MLK's motion for a directed verdict on Janisse's claim for punitive damages, finding that "no reasonable jury could find clear and convincing evidence of malice or oppression" on the part of MLK's managing agents.

After several weeks of trial, Janisse's remaining whistleblower retaliation claims (second and third causes of action), and his claim for wrongful discharge in violation of public policy (ninth cause of action) were submitted to a jury. The jury returned a verdict in favor of MLK and against Janisse on all causes of action. The jury found Janisse had not engaged in any protected whistleblowing conduct because he made no bona fide complaints regarding employee or patient safety at MLK.

Janisse moved for a new trial and for judgment notwithstanding the verdict (JNOV). In a 20-page written ruling, the trial court denied the motions.

Following the entry of judgment, MLK filed a memorandum of costs and a motion to recover its costs as a prevailing party under Code of Civil Procedure sections 998 and 1032. Janisse opposed the motion and moved to tax MLK's costs in their entirety. The trial court denied MLK's motion for costs and granted Janisse's motion to tax costs.

Janisse appealed from the judgment and the denial of his motion for JNOV. MLK appealed from the post-judgment

order denying it prevailing party costs. As noted above, we granted MLK's motion to consolidate the appeals.

DISCUSSION

I. JANISSE'S APPEAL FROM THE JUDGMENT AND DENIAL OF JNOV

Before turning to the merits, we note that many of Janisse's arguments are confusingly and improperly framed as "judicial misconduct" when, in fact, he merely contends the trial court made evidentiary errors or abused discretion in some other way. We arrange his arguments more coherently by categorizing them under appropriate headings below. To the extent we do not address an argument in Janisse's opening brief, we deem it forfeited. (See *Pizarro v. Reynoso* (2017) 10 Cal.App.5th 172, 181 [failure to provide proper headings and coherent organization to the appellant's arguments forfeits consideration of those arguments on appeal].)

A. Judicial Bias

Janisse's first judicial bias claims are premised on purported discussions the trial court had with other Los Angeles Superior Court judges who never presided over the case. Specifically, Janisse contends the trial court "was apparently influenced" by communications she might have had with two other judges about the conduct of Janisse's counsel, Twila White, in other cases. Janisse also accuses yet another judge, who similarly had no involvement in this case, of influencing the trial court based on his supposed "close relationship" with MLK's defense counsel. MLK maintains Janisse forfeited these challenges by failing to raise them with the trial court and,

alternatively, the claims lack merit. We agree with MLK in both respects.

"As a general rule, judicial misconduct claims are not preserved for appellate review if no objections were made on those grounds at trial." (*People v. Sturm* (2006) 37 Cal.4th 1218, 1237; see also *Moulton Niguel Water Dist. v. Colombo* (2003) 111 Cal.App.4th 1210, 1218 (*Colombo*) [defendants "did not preserve their claim of judicial bias for review because they did not object to the alleged improprieties and never asked the judge to correct remarks made or recuse himself"].) This rule exists to prevent a defendant from going "to trial before a judge and gamble on a favorable result, and then assert for the first time on appeal that the judge was biased." (*People v. Rodriguez* (2014) 58 Cal.4th 587, 626.)

Janisse never objected below—either during pretrial proceedings or during trial—to any alleged improper communications between judges, or between MLK's defense counsel and judges not assigned to this case. Nor did he move to disqualify the trial judge. Janisse thus forfeited these claims. (*Colombo, supra*, 111 Cal.App.4th at p. 1218.)

Even if preserved, Janisse's arguments fail on the merits. Arguments for reversal based on judicial bias generally are grounded in the due process clause, "which sets an exceptionally stringent standard." (*Schmidt v. Superior Court* (2020) 44 Cal.App.5th 570, 589 (*Schmidt*).) "It is 'extraordinary' for an appellate court to find judicial bias amounting to a due process violation. [Citation.] The appellate court's role is not to examine whether the trial judge's behavior left something to be desired, or whether some comments would have been better left unsaid, but

to determine whether the judge's behavior was so prejudicial it denied the party a fair, as opposed to a perfect, trial." (*Ibid.*)

Janisse's claims of bias based on the trial court's alleged communications with other judges or the purported misconduct of other judges are entirely speculative. For example, Janisse claims that on one occasion, a judge assigned to the same courthouse but not presiding over this case "went outside to the Grand Avenue exit where [MLK's counsel and its corporate representative] were, and *presumably* talked with him." (Italics added.) On another occasion, Janisse claims that same judge "snarkly" called his attorneys " 'trial attorneys' " in the courthouse hallway. Janisse concedes he is "unaware of the specifics of the communications among [the judges]," but contends the communications "cast a veil of impropriety over the proceedings[.]" These allegations of bias based on mere suspicion or belief do not come close to supporting a reversal of the judgment. (*Schmidt, supra*, 44 Cal.App.5th at p. 589.)

Moreover, there is nothing inherently improper about judges talking to their judicial colleagues about a case. The Canons of Judicial Ethics permit such communications. (See Rothman et al., Cal. Judicial Conduct Handbook (4th ed. 2017) § 5:9, p. 274 ["Canon 3B(7)(a) of the Code of Judicial Ethics permits a judge to 'consult with other judges' "].) Nor are judges under any obligation to disclose any professional relationship they might have with defense counsel, whether presiding over that counsel's case or not. (See *id.* at § 7:32, p. 433 ["The fact that a judge and an attorney are members of the same professional legal organization, or that the judge has only a professional relationship with the attorney, does not normally require the

judge to either recuse or disclose when the attorney appears before the court"] (fn. omitted).)

1. Interactions with Defense Counsel

Janisse further contends that the trial court's interactions with defense counsel demonstrate the court engaged in misconduct or exhibited impartiality. He argues the trial court and MLK's trial counsel "engaged in non-verbal gestures, sometimes eyeballing one another and giving each other cues, and nods of the head, as if they were aligned." He further claims that MLK's counsel was "very aggressive with the court, telling [the trial court] what she must do[,]" which, according to Janisse, resulted in the jury witnessing "what appeared to be an orchestrated 'dog and pony show' between [MLK's counsel] and the court."

Again, Janisse forfeited this argument by not objecting below. (See *Colombo, supra*, 111 Cal.App.4th at p. 1218; see also *Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 794 [to preserve an instance of misconduct of counsel in the presence of the jury, an objection must have been lodged at trial].) Even if preserved, Janisse fails to point to any specific conduct by defense counsel, witnessed by the jury, that was improper.[3] He has, therefore, failed to meet his burden of demonstrating bias or misconduct.

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[3] Janisse's "dog and pony show" allegations are not supported by the record. Janisse cites an excerpt of the record during voir dire in which the only statement made by MLK's counsel was "Objection, your honor." The court sustained the objection. The only other record citation Janisse provides is another instance during voir dire in which the court sustained two of MLK's counsel's objections to questions posed to the jury

2. Interactions with Janisse's Counsel

Throughout his brief on appeal, Janisse points to several interactions between the trial court and his counsel, which he argues demonstrate judicial misconduct or bias. For example, Janisse claims: (1) "[the court] would cut-off [his counsel] and yell at her in front of the jury"; (2) the court frequently interrupted his counsel, "urging her to 'move on' ", "instructed her to 'wrap things up' ", stated her contributions were not helpful and accused her of " 'not making good use of her time' "; (3) the court announced "to the jurors that the trial would not conclude by the initially expected date of November 15, 2022 (implying [Janisse's counsel] was to blame)"; (4) his counsel was "interrupted by the court while presenting important evidence at least 17 times"; (5) "the court told [Janisse's counsel] in front of the jury to 'Be Careful', insinuating that [she] had done something inappropriate"; (7) the court "overtly scolded and used a condescending tone and attitude towards [his counsel]—in front of the jury"; and (8) the court "berated" his counsel during closing arguments.

It is " 'well within [a trial court's] discretion to rebuke an attorney, sometimes harshly, when that attorney asks inappropriate questions, ignores the court's instructions, or otherwise engages in improper or delaying behavior.' " (*People v. Snow* (2003) 30 Cal.4th 43, 78.) "Indeed, '[o]ur role . . . is not to determine whether the trial judge's conduct left something to be

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by Janisse's counsel. These instances do not demonstrate bias or misconduct by the trial court or misconduct by defense counsel. (See *Nevarez v. Tonna* (2014) 227 Cal.App.4th 774, 786 [rulings against a party, even if erroneous, do not establish a charge of judicial bias].)

desired, or even whether some comments would have been better left unsaid. Rather, we must determine whether the judge's behavior was so prejudicial that it denied [the plaintiff] a fair, as opposed to a perfect, trial.' " (*Ibid.*)

Applying these principles, and upon examination of the record, we conclude none of the cited instances suggest that the trial court exhibited a degree of bias that deprived Janisse of a fair trial. In many instances, Janisse's record citations do not support his assertions.[4] In other instances, Janisse completely misrepresents the record.[5]

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[4] Some examples include: Janisse claims that his counsel was berated by the court. As support for this assertion, Janisse cites a sidebar during closing argument when the court merely stated that Janisse's counsel was making an improper argument so it was "going to admonish [counsel] not to use that form of argument . . . ." In support of his assertion that the trial court implied his counsel was to blame for trial not concluding by the initially expected date, Janisse cites a page of the record that in no way implies Janisse's counsel was to blame. The court stated: "I've been really monitoring the time and I was very hopeful that we were going to be able to be guaranteed to [be] finished by November 15th. Now, I'm not – I cannot guarantee that anymore. So with that I am going to thank and excuse you. Thank you very much for being here. I know you have your out-of-town trip on the 15th."

[5] For example, Janisse argues the court "overtly scolded and used a condescending tone and attitude towards [his counsel]—in front of the jury." Not one record citation involves an exchange between the court and Janisse's counsel when the jury was present. We also note that, in support of his assertion that the court would "cut-off [his counsel] and yell at her in front of the jury", Janisse cites pages of the appendix that purportedly

Finally, contrary to Janisse's assertions that the court acted improperly by interrupting his counsel and urging her to "move on," the record demonstrates the court acted well within its broad discretion to control its courtroom. (See *California Crane School, Inc. v. National Com. for Certification of Crane Operators* (2014) 226 Cal.App.4th 12, 22 [court has inherent authority to limit time of trial presentation].) Indeed, the trial court is obligated to make sure the trial proceeds efficiently while giving the parties a fair opportunity to present their respective cases. (See Evid. Code, § 765, subd. (a) [the court shall control the examination of witnesses "so as to make interrogation as rapid, as distinct, and as effective for the ascertainment of the truth"]; Cal. Rules of Court, rule 3.713(c) ["It is the responsibility of judges to achieve a just and effective resolution of each general civil case through active management and supervision of the pace of litigation from the date of filing to disposition"].) " 'Judges need to be proactive from the start in both assessing what a reasonable trial time estimate is and in monitoring the trial's progress so that the case proceeds smoothly without delay.' "

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include screenshots from another judge's personal social media account. Not only does the cited-to evidence fail to show the trial court yelling at Janisse's counsel, but those pages also were not filed in the trial court. We admonish Janisse's counsel for including materials in the appendix that were not filed in the trial court, and order those materials stricken from the appendix. (See Cal. Rules of Court, rule 8.124(g) ["Filing an appendix constitutes a representation that the appendix consists of accurate copies of documents in the superior court file. The reviewing court may impose monetary or other sanctions for filing an appendix that contains inaccurate copies or otherwise violates this rule"].)

(*People v. ConAgra Grocery Products Co.* (2017) 17 Cal.App.5th 51, 149.)

We cannot, of course, ascertain from the reporter's transcript the trial court's tone and demeanor. We note, however, that in its order denying Janisse's motion for a new trial, the court denies Janisse's accusations: "The court did not yell, treat [Janisse's counsel] in a condescending manner, or favor the defense in any manner."

B. Voir Dire

Next, Janisse contends the trial court engaged in "judicial misconduct" by "impos[ing] unreasonable limitations on the scope and depth of inquiry" during his counsel's voir dire of prospective jurors. His arguments, however, boil down to whether the trial court properly exercised its discretion during voir dire. (See *People v. Benavides* (2005) 35 Cal.4th 69, 88 ["An appellate court applies the abuse of discretion standard of review to a trial court's conduct of the voir dire of prospective jurors"].) The record demonstrates the trial court was well within its discretion.

Code of Civil Procedure section 222.5, subdivision (b)(1) provides, in relevant part: "The scope of the examination conducted by counsel shall be within reasonable limits prescribed by the trial judge in the judge's sound discretion." After reviewing the record we conclude that, contrary to Janisse's assertion, the trial court afforded Janisse's counsel ample time to conduct voir dire after the court's own extensive voir dire.[6]

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[6] The court originally set a guideline of "about 40 minutes" for each side to conduct voir dire. Janisse requested additional time. The court expressed 40 minutes was sufficient, but went on

Janisse also argues the trial court erred by prohibiting his counsel from using the word "power" during voir dire, and barring her from referring to personal anecdotes. Janisse asserts: "The court provided no law or precedent that counsel cannot use such statements or refer to personal anecdotes during voir dire." We may treat this undeveloped argument as forfeited. (See *Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 852 (*Benach*) ["When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treated the point as [forfeited]"].)

Janisse's argument also fails on the merits. Counsel for MLK submitted to the trial court "an excerpt of voir dire that [Janisse's] counsel had conducted in a prior trial." That excerpt included the following statement by Janisse's counsel: " 'So I want to talk about power . . . . If you end up on this jury, you'll have immense power, all right? You'll have more power than anyone in the state, in fact anyone in the world in deciding this case . . . . You'll even have more power than the judge in this case.' " This kind of monologue by counsel is not permitted. Code of Civil Procedure section 222.5 permits "examination" of prospective jurors; it does not permit counsel to give speeches or provide anecdotes. Janisse does not cite any authority to support his position.

Moreover, as the trial court explained, Janisse's proposed statements about the jury's "power" were potentially misleading. The court reasoned: The jury does not "have the power to order anybody to do anything. . . . [¶] What they have the obligation and responsibility to do is to listen to the evidence, to follow the

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to state: "But just out of abundance of caution I will give you that extra 20 minutes because you are requesting it."

judge's instructions and make factual findings. . . . They have no power. . . . [¶] [I]t will be improper to suggest that they have the power to do something as opposed to the obligation to follow the court's instructions." The trial court did not abuse its discretion by prohibiting Janisse's counsel from making statements during voir dire about the jury's "power."

Janisse also complains that his counsel was not permitted to use an easel during voir dire. The trial court explained to Janisse's counsel: "You can't have that easel there. I can't see the jury and in jury selection I need to be able to see the jury, so that has to move." The court then inquired why Janisse's counsel needed the easel and counsel responded: "To take notes." The court replied: "No no. So that easel needs to come down right now. Can you move it, please?" Without citation to authority, Janisse argues "[t]his incident, though seemingly minor in isolation, contributes to a broader narrative of concern regarding the unfairness and impartiality throughout the trial proceedings." We reject this meritless accusation. The above-cited exchange occurred outside the presence of the jury, and the court acted within its discretion to order the removal of a physical obstruction so it could observe the demeanor of prospective jurors.

C. After-Acquired Evidence Defense

"The doctrine of after-acquired evidence refers to an employer's discovery, *after* an allegedly wrongful termination of employment or refusal to hire, of information that would have justified a lawful termination or refusal to hire." (*Salas v. Sierra Chemical Co.* (2014) 59 Cal.4th 407, 428.) If the employer shows it discovered information that would have caused it to terminate

the employee for an alternative, lawful reason, the employee's recovery is limited or barred. (*Id*. at p. 430.)

Janisse contends the trial court prejudicially erred by permitting MLK to pursue an after-acquired evidence defense that it failed to raise until after discovery had closed and after trial proceedings had already commenced. MLK's defense was based on Janisse's post-termination admission to his psychiatrist, Dr. Thomas Willet, that he had previously been terminated from Kaiser hospital for threatening a physician. This evidence, however, was never presented to the jury. The trial court bifurcated the trial so that the evidence in support of MLK's after-acquired evidence defense would be presented *only if* the jury first found MLK liable. Because the jury found MLK was not liable, there was no second phase of trial, and the jury heard no evidence on the after-acquired evidence defense.[7]

Accordingly, even if we assume (without deciding) that the trial court abused its discretion in permitting MLK to pursue a defense that, in Janisse's view, was not timely disclosed, Janisse cannot show he was prejudiced. (See, e.g., *De Leon v. Jenkins* (2006) 143 Cal.App.4th 118, 128–129 ["We need not reach the merits of this contention, as it provides no basis for reversal in light of [appellant's] failure to show any prejudice from the trial court's purportedly erroneous ruling"].)

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[7] Without citation to the record, Janisse claims "Dr. Willett [ ] testified that Janisse had threated a physician at Kaiser . . . ." Dr. Willett did not testify in the jury's presence that Janisse threatened a doctor at Kaiser. He so testified only in the earlier Evidence Code section 402 hearing.

D. Evidentiary Rulings

1. Evidence that Janisse threatened MLK nurse Rodriguez in 2016

Janisse contends "MLK's opening statement . . . alleged Janisse had threatened an employee, Juliana Rodrigue[z], in January 2016; this allegation had never been disclosed in discovery and Rodrigue[z] had never been identified as a potential witness." First, we note the record citations provided in support of this assertion do not include MLK's opening statement. Second, there was no pretrial "allegation" MLK was obligated to disclose—at trial, after Janisse denied he ever threatened his coworkers, MLK introduced evidence (through the testimony of former MLK supervisor Ozell Diaz) that Rodriguez had reported that Janisse threated her and Janisse was given a verbal warning. The trial court acted within its discretion by admitting this impeachment testimony. (See Evid. Code, § 780, subd. (i) [a jury may consider "any matter that has any tendency in reason to prove or disprove the truthfulness" of a witness's testimony, including "[t]he existence or nonexistence of any fact testified to by [the witness]"]; see also *People v. Turner* (2017) 13 Cal.App.5th 397, 408 ["The trial court has broad discretion in determining whether to admit impeachment evidence"].)

2. Testimony of Janisse's psychiatrist

Janisse designated Dr. Willett as a psychiatric expert before trial, but later de-designated him. At trial, MLK sought to call Dr. Willett as Janisse's treating physician. Before admitting

the testimony, the trial court held an Evidence Code section 402 hearing.[8]

At the hearing, the court ruled Dr. Willett would be permitted to testify that Janisse's posttraumatic stress disorder (PTSD) that he was currently suffering from was a result of the combination of his earlier termination from Kaiser and his termination from MLK. Weighing the factors in Evidence Code section 352, the court found that Dr. Willet's proposed testimony about Janisse's emotional distress arising from his termination from Kaiser was "extremely relevant" as an alternative source of damages, and that its probative value outweighed any prejudice to Janisse. The court further ruled, however, that testimony about the reason for Janisse's termination from Kaiser is not highly relevant and would be unduly prejudicial to Janisse. It therefore excluded testimony by Dr. Willett about the reasons for Janisse's termination from Kaiser under Evidence Code section 352.

At trial, Dr. Willett testified that Janisse's emotional distress was partly due to a "prior termination from Kaiser Hospital approximately three years before." He also answered "yes" to the question: "[D]id Mr. Janisse express his symptomology through anger?" Dr. Willett explained that, during their second meeting, Janisse became "extremely angry with [him]" and when he repeated it was time to leave, Janisse "opened the inner door to my waiting room rather forcefully and exited my office. He was quite angry."

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[8] Evidence Code section 402, subdivision (b) provides, in relevant part: "The court may hear and determine the question of the admissibility of evidence out of the presence or hearing of the jury . . . ."

Janisse argues that the trial court "failed to act in its role as gatekeeper of expert testimony" because: Dr. Willett lacked the requisite level of expertise; he was permitted to testify on matter far more prejudicial than probative; and he was permitted to answer questions that were clearly improperly eliciting character evidence. We reject these arguments because they are undeveloped and fail to apply the applicable standard of review. (See *Lowery v. Kindred Healthcare Operating, Inc.* (2020) 49 Cal.App.5th 119, 124 [we review a trial court's ruling excluding or admitting expert testimony for abuse of discretion].) Further, after independently reviewing the record, we discern no abuse discretion in the trial court's Evidence Code section 352 ruling.

Janisse also argues that Dr. Willett should not have been permitted to opine that Janisse's emotional distress was caused in part by his termination from a prior job because this was a "prohibited causation issue[.]" Janisse cites no legal authority in support of this contention, and in fact, the case law states the contrary. (See *Lewis v. City of Benicia* (2014) 224 Cal.App.4th 1519, 1538 [psychologist's testimony about sources of emotional distress is relevant to causation in FEHA retaliation action].)

We conclude Janisse has not demonstrated the court abused its discretion by admitting portions of Dr. Willett's testimony.

3. Videotaped deposition testimony

In its ruling denying Janisse's motion for a new trial, the trial court found that plaintiff's counsel "repeatedly violated the court's order regarding the designations" of video deposition testimony Janisse intended to play at trial. The court went on to explain exactly how those orders were violated, and concluded: "Plaintiff's counsel repeatedly violated the court's order regarding

designations, but Plaintiff was permitted to present the portions of the depositions that had been requested. Plaintiff's argument that the court 'disallowed' Plaintiff's clips is false."

On appeal, Janisse does not address the court's above-cited ruling. Rather, he argues that the court precluded more than 20 witness clips of nurse Young (the nurse who reported Janisse threatened to kill her) and nurse Oshunluyi (who witnessed the threat), "which were significant to demonstrate pretext, and contradictions between the two witnesses, and inconsistencies in their testimony." He further claims that the court scolded his lawyer for technological problems, and refused to allow "Janisse's clips for rebutting Young's statements." These general arguments fail to provide an accurate description of the proceedings relating to the video deposition excerpts, and lack the specificity necessary to demonstrate an abuse of discretion. (See *Briley v. City of West Covina* (2021) 66 Cal.App.5th 119, 132 [" '[W]e will not disturb the trial court's [evidentiary] ruling "except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice" ' "]; see also *Paterno v. State of California* (1999) 74 Cal.App.4th 68, 106 (*Paterno*) ["the appellant bears the duty of spelling out in his brief exactly how the error caused a miscarriage of justice"].)

4. Janisse's damages witnesses

Janisse argues he was denied the opportunity to call his two damages witnesses (his wife and daughter) because the court instructed her she was running out of time. This statement is inaccurate. Janisse called his wife as a witness, and she testified regarding his mental state after he was terminated. And although the court initially ruled Janisse could not call both his

wife and his daughter because the testimony would be cumulative, it later reconsidered the ruling and "did not restrict Plaintiff from calling both his wife and daughter."

5. Flex leaves and MLK's charity program

Janisse sought to introduce testimony regarding the denial of his "flex leave" request. Specifically, he wanted to testify as to *why* he purportedly needed "flex leave". The trial court sustained an objection by MLK on relevance grounds, concluding: "I'm going to uphold the relevance objection. This whole denial of a flex, the plaintiff has presented a list of adverse employment actions that they are basing their suit on. The flex is not any part of – it's not a part of any of those adverse employment actions. [¶] There has already been a lot of testimony on this. I don't think the reason that he was seeking to flex is relevant to any issue in the case under [Evidence Code section] 352. It's undue consumption of time." Janisse argues the evidence was relevant to show MLK retaliated against him, and to show he was not threatening to his coworkers (Janisse claims it makes "no sense" that MLK would not grant him a day off if he was threatening). He does not, however, dispute that he never alleged the denial of flex leave was an adverse employment action. In any event, even if tangentially relevant, he has not demonstrated an abuse of discretion, and has failed to show any resulting prejudice. (*Paterno, supra,* 74 Cal.App.4th at p. 106.)

We likewise reject Janisse's argument that the trial court erred by excluding evidence he participated in MLK's "Give Hope" charity program. Janisse does not explain how his participating in a charity program was relevant to rebut MLK's claims that he was threatening and had communication

problems. And again, he does not show how the exclusion of this evidence was an abuse of discretion or prejudicial.

6. Janisse's prostate cancer diagnosis

The trial court excluded evidence that Janisse had been diagnosed with prostate cancer under Evidence Code section 352: "I think it's highly prejudicial to the defendant on the fact that it elicits sympathy from the jury." The court explained that the only potential relevance of this evidence is if Janisse was left without medical insurance when he was terminated and the lack of medical insurance greatly increased his emotional distress because he had cancer and "now he's left without medical insurance." This was not the case, however, because Janisse was eligible for Medicare when MLK terminated his employment.

The court further noted the evidence would potentially be admissible if MLK sought to elicit testimony that Janisse had been prescribed psychiatric medication. In that scenario, Janisse would have been permitted to explain why he chose not to take it (i.e., he was undergoing cancer treatment). But MLK stated it had no intention of eliciting such testimony, and it did not do so.

Thus, the trial court reasonably exercised its discretion by excluding evidence of Janisse's cancer diagnosis as substantially more unduly prejudicial than probative.[9]

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[9] Even if Janisse's cancer diagnosis was relevant to the issue of damages, he has not demonstrated undue prejudice because the jury did not reach the issue of damages given its no liability finding.

7. Other evidentiary rulings

In his opening brief, Janisse lists "examples" of when his counsel was purportedly "interrupted by the court while presenting important evidence." Several of these examples are simply instances in which the trial court sustained objections. For instance, the court sustained MLK's objection on relevance grounds during Janisse's testimony regarding the conduct of MLK employee Svrillos. In another example, Janisse argues his attorney tried to explain the relevance of documents "but the court cut her off and told her that the information she was trying to introduce has no relevance." Janisse fails to demonstrate how the court purportedly abused its discretion with respect to any of these rulings, or how any alleged error might have been prejudicial.

E. Jury Deliberations

Janisse argues "exhibits never made it to the jury and the jury rushed through the Special Verdict form." In support of this assertion, Janisse claims the jury could not have possibly answered "no"—in light of the evidence presented—to the question that asked whether Janisse complained about employee and patient safety. We are unpersuaded by this argument. First, the brevity of a jury's deliberations does not prove that it did not deliberate adequately. (See, e.g., *People v. Williams* (2015) 61 Cal.4th 1244, 1280 [" 'the brevity of the deliberations proves nothing' "]; see also *Vomaska v. City of San Diego* (1997) 55 Cal.App.4th 905, 913 [the jury " ' "may render a valid verdict without retiring, or on very brief deliberation after retiring" ' "].) Second, to the extent Janisse is actually arguing that substantial

evidence does not support the jury's special verdict findings, we deem this challenge forfeited.

"We do not review the evidence to see if there is substantial evidence to support the losing party's version of events. Our power begins and ends with a determination if there was substantial evidence in the winning party's favor. For this reason, [appellant is] required to set forth, discuss, and analyze both the favorable and unfavorable evidence. ' " 'Unless this is done the error is deemed to be [forfeited].' " [Citation.]' " (*Ashby v. Ashby* (2021) 68 Cal.App.5th 491, 513.)

Here, Janisse failed to state the facts in the light most favorable to MLK as the prevailing party. For example, many of his complaints concerned his interpersonal conflicts with coworkers, Casares and Svirillos, and were not about patient safety issues. Janisse also fails to cite the evidence showing he walked through an operating room that Casares had just mopped in order to soil it with his footprints so he could then lodge a false complaint against Casares. Thus, any substantial evidence argument is forfeited.

F. Jury Instructions

Janisse argues the trial court erred by refusing to give a "cat's paw" jury instruction, CACI No. 2511.[10] We disagree.

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[10] Under the cat's paw doctrine, employers may be held "responsible where discriminatory or retaliatory actions by supervisory personnel bring about adverse employment actions through the instrumentality or conduit of other corporate actors who may be entirely innocent of discriminatory or retaliatory animus." (*Reeves v. Safeway Stores, Inc.* (2004) 121 Cal.App.4th 95, 116.) In these situations, the formal decision maker is

" ' " 'In a civil case, each of the parties must propose complete and comprehensive instructions in accordance with his theory of the litigation; if the parties do not do so, the court has no duty to instruct on its own motion.' [Citation.]" ' " (*Metcalf v. County of San Joaquin* (2008) 42 Cal.4th 1121, 1130–1131.)

Before trial began, the court discussed the proposed cat's paw instruction with counsel. After noting the instruction had not yet been completed (i.e., blanks needed to be filled in) the trial court stated: "So I'm going to withhold ruling on this instruction until we see how the evidence comes in." The court further stated: "Again, I will have to see how the evidence comes in. Who is the person to make the decision to discharge. I don't know exactly who that is." As the trial court explained in its order denying Janisse's motion for new trial, however, Janisse "did not renew the request for CACI [No.] 2511, did not include it in the final jury instruction packet that [Janisse] was required to prepare, did not propose revisions based on the evidence presented, and essentially dropped the request for the instruction." Thus, Janisse never submitted a completed, usable CACI No. 2511 instruction, the trial court never denied a request to give the instruction, and Janisse has forfeited this argument on appeal. (*Martinez v. Rite Aid Corp*. (2021) 63 Cal.App.5th 958, 972, fn. 4 [appellant "cannot claim error in the failure to give a jury instruction it did not request"].)

Moreover, even if the court erred by not giving the instruction, Janisse cannot demonstrate prejudice. The jury found Janisse engaged in no protected activity, and thus, MLK

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sometimes referred to as the "cat's paw" of the supervisor harboring retaliatory animus. (*Reid v. Google* (2010) 50 Cal.4th 512, 542.)

was not liable. The jury, therefore, did not reach the question pertaining to a cat's paw instruction, i.e., retaliatory animus.[11]

G. Verdict Form

Janisse argues there were several issues with the verdict form. He claims the verdict form was subjected to multiple changes within 10 minutes of the jury being brought in without Janisse being informed about it; upon notifying the court that the verdict form was wrong, the court did not explain the change made and instead overruled Janisse's counsel's objections; the court allowed MLK's defense counsel to display a PowerPoint slide that was the wrong verdict form, over Janisse's counsel's objection; and Janisse's counsel informed the court of when there was an error or misrepresentation of a particular rule or law but the court would not listen and "shut [Janisse's counsel] down."

None of these arguments support reversal of the judgment. Janisse does not articulate any specific claim of error, and cites no supporting authority. His arguments are, therefore, forfeited. (See *Benach, supra,* 149 Cal.App.4th at p. 852.) Janisse also has not established prejudice as a result of any purported error in the special verdict form. His conclusory assertion that "last-minute changes prejudiced [him]" is insufficient to demonstrate prejudice. Nor does his assertion that his counsel was required to make changes to the verdict form and make copies of it demonstrate a miscarriage of justice.

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[11] We also note that on appeal, Janisse does not explain how the evidence might support a finding in his favor under CACI No. 2511. He does not articulate how any alleged biased MLK supervisor influenced the actions of an unbiased decisionmaker.

In any event, we discern no abuse of discretion. (See *Red Mountain, LLC v. Fallbrook Public Utility Dist*. (2006) 143 Cal.App.4th 333, 364 [the court's framing of the questions in a special verdict form is subject to review for abuse of discretion].) As the trial court noted, "last minute changes to the verdict form and instructions were required" because, after the close of evidence, Janisse informed the court that he would be dismissing certain claims, and "the court directed the verdict on certain issues." As to Janisse's argument regarding the PowerPoint slide, MLK's counsel inadvertently displayed an outdated verdict form. That version included Janisse's FEHA retaliation claim, which Janisse had dismissed. Contrary to Janisse's assertion that his objection to the outdated form was overruled, the court—before any objection was made by Janisse's counsel—stated "that's the wrong verdict [form]" and the court believes "there is a mistake on the slide." MLK's counsel responded: "I deleted it on my side. It didn't show up like that. I will skip over it. One issue was removed." Janisse has not demonstrated an abuse of discretion based on this exchange, nor any resulting prejudice.[12]

H. Directed Verdict on Punitive Damages

Janisse lastly contends the court erred by granting MLK's motion for a directed verdict on his punitive damages claim. His only argument is that the trial court was biased against him because it "predetermin[ed] the outcome of a crucial aspect of the

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[12] As we discussed in section I.E. regarding jury deliberations, to the extent Janisse is arguing substantial evidence does not support the special verdict findings, we conclude he has forfeited the issue by failing to state the evidence in the light most favorable to MLK. (*Ashby v. Ashby, supra,* 68 Cal.App.5th at p. 513.)

trial." Critically missing from Janisse's argument is a discussion of any evidence that would have supported a finding in his favor on his punitive damages claim. Because the jury found MLK not liable on Janisse's substantive claims, it could not have imposed punitive damages even if that claim had gone to the jury. (See *Goodwin v. Wolpe* (1966) 240 Cal.App.2d 874, 880 ["As to exemplary damages, there could be no recovery unless there was ground to recover actual, substantial damages"].)

Janisse focuses on an exchange between the trial court and counsel during the hearing on MLK's motion for a directed verdict. After both sides argued the punitive damages issue, the trial court interrupted MLK's counsel by stating: "You are going to snatch victory from the jaws of defeat unless you feel like you need to make the record. All right. I have thought – I really spent a lot of time on this last night, thinking about this very carefully, going over all of the evidence in my mind. [¶] And I'm firmly convinced that no reasonable jury could find clear and convincing evidence of malice or oppression sufficient to support the punitive damages conclusion and especially I understand that there were managing agents, that a jury could find managing agents were involved in this decision, but I don't feel that there is sufficient evidence that the conduct was committed by the managing agents or that the conduct . . . [constituted] malice oppression or fraud . . . . [¶] So I am going to, after much, much thought and consideration of the case law, I am going to direct the verdict on punitive damages and not allow that question to go to the jury." Janisse's counsel responded: "That is clear reversible error." The court replied: "That's why we have a Court of Appeal. [¶] . . . [¶] I have to make my decisions based on my – that's my job is to make decisions and that is the decision that

I'm making. If that becomes an issue for appeal, then the Court of Appeal will ultimately have to decide the issue."

The trial court's remarks do not support Janisse's contention that the court harbored any bias against him. The court simply explained its role in the judiciary system and correctly noted that contentions of reversible error may be made on appeal.[13]

II. MLK'S APPEAL FROM POST-JUDGMENT ORDER

A. Background

Before trial, MLK served two Code of Civil Procedure section 998 offers to compromise on Janisse. Janisse rejected both offers by allowing them to lapse.

Following the jury verdict and entry of judgment, MLK filed a memorandum of costs and motion to recover its costs as a prevailing party under Code of Civil Procedure sections 998 and 1032.[14] Janisse opposed MLK's motion and moved to tax MLK's costs in their entirety.

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[13] Janisse argues the combined errors deprived him of a fair trial. His argument lacks merit because we have rejected each of Janisse's individual claims of error. Thus, they "cannot logically be used to support a cumulative error claim [where] we have already found there was no error to cumulate." (*In re Reno* (2012) 55 Cal.4th 428, 483.)

[14] MLK also moved to recover attorney fees under FEHA's cost-shifting provision, which permits a prevailing defendant to obtain fees for having defended against frivolous claims. (See Gov. Code, § 12965, subd. (c)(6) ["the court, in its discretion, may award to the prevailing party . . . reasonable attorney's fees and costs . . . except that, notwithstanding Section 998 of the Code of

After a hearing on the motions, the trial court denied MLK its costs as a prevailing party. First, the court found MLK had not met its burden of showing the FEHA claims were frivolous, as required under Government Code section 12965, subdivision (c)(6). Thus, as the trial court correctly noted, only costs properly allocated to non-FEHA claims were potentially recoverable by MLK. The court then concluded: "[MLK] would likely be able to show at least some portion of the claims for retaliation were entirely distinguishable from the FEHA claims. . . . [¶] But [MLK] has not attempted to allocate any costs to the defense of the non-overlapping non-FEHA claims. [MLK] has not met its burden to show the amount of costs that should be allocated to those claims, and thus the Court denies [MLK's] motion for costs in its entirety."

MLK moved for reconsideration under Code of Civil Procedure section 1008—this time submitting evidence of the amount of costs that it incurred it defending against the non-FEHA claims. The trial court (Hon. Charles Lee) denied the motion on the ground that MLK failed to demonstrate new facts, circumstances or law warranting reconsideration.

MLK timely appealed.[15]

Civil Procedure, a prevailing defendant shall not be awarded fees and costs unless the court finds the action was frivolous, unreasonable, or groundless when brought, or the plaintiff continued to litigate after it clearly became so"].) MLK does not challenge on appeal the trial court's denial of those fees.

[15] We reject Janisse's argument that MLK's appeal should be dismissed on the ground that the notice of appeal does not sufficiently identify the order appealed from. The notice of

B. Analysis

Unless the prevailing defendant demonstrates the plaintiff's FEHA claims were frivolous, "only those costs properly allocated to non-FEHA claims may be recovered by the prevailing defendant." (*Roman, supra,* 237 Cal.App.4th at p. 1062.) The sole issue in this appeal is whether the trial court abused its discretion by denying MLK's motion for costs in its entirety based on MLK's failure to allocate its costs between Janisse's FEHA and non-FEHA claims. We conclude no abuse of discretion has been shown.

It is undisputed that MLK did not—either in support of its motion for costs, or in opposition to Janisse's motion to tax costs—attempt to allocate its costs between those incurred in defending against Janisse's claims for violations of FEHA and those incurred in defending against non-FEHA claims. It

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appeal checks the box for "[a]n order after judgment under Code of Civil Procedure, § 904.1(a)(2)." Although the notice omits the date of the post-judgment order, there was only one post-judgment order by which MLK was aggrieved (i.e., the February 28, 2023 order denying MLK its costs as the prevailing party). Further, MLK's designation of the record on appeal states the appeal is from the February 28, 2023 order. It is thus "reasonably clear what [MLK] was trying to appeal from." (See *In re Joshua S.* (2007) 41 Cal.4th 261, 272 [A notice of appeal shall be " ' liberally construed so as to protect the right of appeal if it is reasonably clear what [the] appellant was trying to appeal from, and where the respondent could not possibly have been misled or prejudiced' "]; see also Cal. Rules of Court, rule 8.100(a)(2) ["The notice of appeal must be liberally construed"].) Moreover, although we disagree with MLK's contention on appeal, we are unpersuaded by Janisse's argument that MLK's appeal is frivolous.

nevertheless argues that the trial court "denied MLK an opportunity" to allocate its costs. But it was MLK's burden to do so as the moving party. (See cf. *Christian Research Institute v. Alnor* (2008) 165 Cal.App.4th 1315, 1320 [under the anti-SLAPP statute, the prevailing defendant may recover fees and costs only for the motion to strike, not the entire litigation; as the moving party, the prevailing defendant bears the burden of establishing entitlement to an award of fees and costs, which may require producing records sufficient to provide a proper basis for determining how much time was spent on particular claims]; see also *Ladas v. California State Auto. Assn*. (1993) 19 Cal.App.4th 761, 774 [once items in a cost memorandum are properly objected to, they are put in issue and the burden of proof is on the party claiming them as costs].)

Moreover, the record demonstrates the trial court did not, as MLK contends, "deny[ ] MLK an opportunity to allocate its costs[.]" Nothing prevented MLK from filing evidence allocating its fees and costs with its moving papers. Further, MLK never requested to do so by seeking leave from the court to file supplemental briefing and/or to submit evidence on the allocation issue. Rather, at the hearing on the motion, counsel for MLK urged the court to conduct its own allocation of costs related to the FEHA and non-FEHA claims by going through the line items provided in the memorandum of costs. The court properly exercised its discretion when it declined to perform the allocation itself.[16]

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[16] This is especially true where, as here, it was not easily ascertainable from the memorandum of costs which fees were incurred in defending the non-FEHA claims. As the trial court

MLK's reliance on *Roman, supra*, 237 Cal.App.4th 1040 and *Moreno v. Bassi* (2021) 65 Cal.App.5th 244 (*Moreno*) is misplaced. In *Roman*, the trial court awarded the prevailing defendants all of their costs without evaluating whether the FEHA claims were frivolous. (*Roman, supra*, 237 Cal.App.4th at p. 1050.) The Court of Appeal reversed the order and remanded the matter to the trial court to determine whether the FEHA claims were frivolous, and noted that unless the FEHA claims were frivolous "only those costs properly allocated to non-FEHA claims may be recovered by the prevailing defendant." (*Id*. at p. 1062.) In *Moreno*, an employee sued her employer and "lost all the FEHA claims, lost some non-FEHA claims, and prevailed on some non-FEHA claims." (*Moreno, supra,* 65 Cal.App.5th at p. 249.) The trial court nonetheless awarded the plaintiff "all of her costs . . . without conducting an inquiry into which costs, if any, were incurred solely as a result of . . . the FEHA causes of action" on which she did not prevail. (*Id*. at p. 263.) Thus, the Court of Appeal remanded the matter to the trial court to make the determination and adjust the

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explained: "Counsel [for MLK] stated, for example, that the court should, at the very least, award Defendant $29,000 in 'jury costs' because, according to counsel, those indisputably related to the non-FEHA claims. Counsel is apparently referring to line 3 on the Memorandum of Costs, where $29,030 is claimed for 'jury food and lodging.' The court has no idea of what that line item refers to. The jury was not sequestered and there were no costs associated with jury food and lodging. [¶] Even as to the actual jury fees of $2,074.95, the court cannot conclude that all jury fees were allocable to non-FEHA claims because there were FEHA claims at issue at the beginning of trial that were dismissed by Plaintiff only shortly before closing arguments."

award of costs if necessary. (*Ibid.*) In so doing, the court noted: "It falls within the trial court's discretion to seek input from the parties, such as additional briefing in which the parties identify the costs they contend were caused solely by the inclusion of the FEHA causes of action in the lawsuit, before deciding which costs [plaintiff] is entitled to recover." (*Ibid.*)

Neither *Roman* nor *Moreno* support MLK's position that the trial court abused its discretion by denying MLK's motion for costs based on MLK's failure to allocate costs. That a trial court, after remand from the appellate court, *may* request additional briefing does not mean a trial court is *compelled* to do so when, as here, the prevailing defendant fails to meet its burden in its moving papers and does not request leave to file supplemental briefing.

We further conclude the trial court did not abuse its discretion by denying the motion for reconsideration. Code of Civil Procedure section 1008, subdivision (a) requires that a motion for reconsideration be based on new or different facts, circumstances, or law. "A party seeking reconsideration also must provide a satisfactory explanation for the failure to produce the evidence at an earlier time." (*New York Times Co. v. Superior Court* (2005) 135 Cal.App.4th 206, 212.) MLK's motion did not meet these requirements. In denying the motion, the trial court correctly stated: "A motion for reconsideration is not an opportunity to reargue the case or present evidence that the defense had at the time this matter was originally decided [¶] . . . The motion for reconsideration has no new facts or different facts or circumstances or law as required by [Code of Civil Procedure] section 1008 . . . ."

DISPOSITION

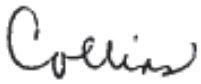
The judgment in favor of MLK is affirmed. The February 28, 2023 post-judgment order denying MLK its fees and costs is affirmed. The parties shall bear their own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

TAMZARIAN, J.

We concur:

ZUKIN, P.J.



COLLINS, J.