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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

TORANG SEPAH, M.D., Plaintiff and Appellant, v. COUNTY OF LOS ANGELES, Defendant and Respondent.	B290775 (Los Angeles County Super. Ct. No. BC622387)

APPEAL from a judgment of the Superior Court of Los Angeles County, Malcolm Mackey, Judge. Affirmed in part, reversed in part, and remanded.

Olivier Schreiber & Chao, Monique Olivier; Campins Benham-Baker, Julia Campins and Hillary Benham-Baker, for Plaintiff and Appellant.

Gutierrez, Preciado & House, Calvin House and Nohemi Gutierrez Ferguson, for Defendant and Respondent.

Plaintiff and appellant Torang Sepah, M.D. (Sepah) appeals from a judgment entered against her, and in favor of defendant and respondent County of Los Angeles (County), on claims of whistleblower retaliation, gender discrimination, retaliation for complaining about gender discrimination, failure to prevent retaliation and gender discrimination, and defamation. Sepah's whistleblower retaliation claim under the Labor Code was resolved by a trial jury, which found she could not recover because she was not a County employee. The remainder of Sepah's claims were decided by the court, most by summary adjudication. Sepah presents a host of arguments for reversal that attack the trial court's rulings at nearly all stages of the litigation. Chief among the issues we are asked to decide are the soundness of the jury's finding that Sepah was not a County employee and the correctness of the trial court's summary adjudication rulings.

I. BACKGROUND

Sepah is a board-certified psychiatrist who began work as a full-time staff employee at the County's Twin Towers Correctional Facility (the jail) and then switched to a *locum tenens* position.[1] A year and a half later, in early July 2015, the County terminated its *locum tenens* relationship with Sepah. At

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[1] *Locum tenens* means "a physician who acts as a temporary substitute for another." (*Khajavi v. Feather River Anesthesia Medical Group* (2000) 84 Cal.App.4th 32, 39; accord, *Bode v. Los Angeles Metropolitan Medical Center* (2009) 174 Cal.App.4th 1224, 1234, fn. 5.)

the time, Sepah was told her termination was prompted by an anonymous complaint against her by a colleague.

Sepah responded by suing the County. In her operative complaint, Sepah alleged seven causes of action: (1) a whistleblower retaliation claim pursuant to Labor Code section 1102.5; (2) a companion claim for Private Attorneys General Act (PAGA) civil penalties (Labor Code section 2698 et seq.); (3) a whistleblower retaliation claim pursuant to Health and Safety Code section 1278.5; (4) a gender discrimination claim under the Fair Employment and Housing Act (FEHA); (5) a failure to prevent discrimination claim under FEHA; (6) a retaliation claim under FEHA; and (7) a defamation claim. Before trial, the trial court granted summary adjudication for the County on all three of Sepah's FEHA-based claims plus her defamation claim. We shall provide a brief overview of the evidence presented at trial and we will later recount the pertinent facts and procedural details as necessary to resolve the various arguments made on appeal.

At trial, Sepah presented evidence she was regarded by several of her former colleagues and supervisors as a dedicated physician who cared deeply about the rights and care of her in-custody patients. She also presented evidence her patient advocacy put her in conflict with certain of her colleagues and supervisors, i.e., that she repeatedly complained to her immediate supervisors and to investigators from the Office of the Inspector General of the Los Angeles County's Department of Mental Health (OIG) about the lack of access to safe and effective anti-psychotic medicine for inmates, inadequate patient notes by her colleagues, and the need for peer review of patient notes. Eventually, the deputy director at the County's Department of

Health Services met with Sepah and two other like-minded doctors to discuss their complaints and concerns about patient care. At the same time, Sepah brought her patient care concerns to the medical director of the County's Department of Mental Health, who had oversight responsibility for the jail's psychiatric unit. Before she met with the medical director, however, her *locum tenens* relationship with the jail was terminated.

The County presented evidence that Sepah was terminated not in retaliation for her patient advocacy but for creating an "extremely hostile work environment," as detailed in an anonymous letter from "Many of The Psychiatrists of Twin Towers." The County presented testimony supporting the letter's principal allegations, namely that Sepah made "racial comments" about other physicians, "made fun" of the accents of foreign-born colleagues, made derogatory comments about clinicians' outfits (like "'She dresses like a Mexican hooker'"), and "printed up patient notes to circulate them and share them in order to make fun of the writers." In addition, the County presented testimony from Sepah's immediate supervisor who found Sepah showed "a serious lack of judgment" when dealing with her colleagues, which meant that some of Sepah's colleagues regarded her as "bullying, harassing, [and] intimidating." The County also presented evidence that as a *locum tenens*, Sepah was an independent contractor, not a County employee, and therefore could be summarily dismissed without an investigation into the anonymous letter's allegations.

The jury ruled against Sepah without reaching the question of whether the County terminated her because of the various complaints she had made to supervisors and the OIG. The first question on the special verdict form asked: "Was the County of

Los Angeles Torang Sepah's employer?" The jury unanimously answered, "No." As instructed, the jury did not answer any further questions.

At a subsequent bench trial on the Health and Safety Code whistleblower retaliation claim,[2] the parties did not present any additional witnesses; instead, they relied on the evidence presented at the jury trial and on supplemental briefing. After hearing oral argument, the trial court found in favor of the County.

II. DISCUSSION

Sepah's various arguments for reversal can be grouped into four categories. First, she challenges a pretrial discovery ruling, namely, that certain OIG documents concerning its investigation into conditions at the jail were privileged and need not be produced in discovery. Second, she challenges the trial court's summary adjudication rulings that resolved her FEHA causes of action and her cause of action for defamation. Third, Sepah challenges trial evidentiary rulings that barred her from introducing "me too" evidence of discrimination purportedly experienced by others, evidence she complained about gender discrimination, and evidence the County considered rehiring her

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[2] Unlike Labor Code section 1102.5, whose protection is limited to "employees," Health and Safety Code section 1278.5's protection extends to any "patient, employee, member of the medical staff, or any other health care worker of the health facility." (Health & Saf. Code, § 1278.5, subd. (b)(1).)

after terminating her *locum tenens* arrangement. And fourth, she contests legal rulings the trial court made on the issues of whether and how the jury should determine whether she was an employee and whether her claim for whistleblower retaliation under the Health and Safety Code required trial by jury.

Sepah's arguments concerning her status vel non as a County employee are unavailing. The trial court correctly instructed the jury to consider factors identified in *S.G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341 (*Borello*) rather than the "ABC" test adopted in *Dynamex Operations West, Inc. v. Superior Court* (2018) 4 Cal.5th 903 (*Dynamex*), which does not govern because the employment question in this case does not involve Industrial Wage Orders. (*Id.* at pp. 913-914.) In the same vein, the trial court did not err in denying Sepah's motion to instruct the jury she was an employee as a matter of law because there was a substantial conflict in the evidence. These two conclusions, which establish the soundness of the jury's finding that Sepah was not an employee, make it unnecessary to discuss Sepah's contentions of wrongly excluded evidence and error in instructing on the elements of a retaliation claim; none of these rulings had any bearing on the employment status question the jury found determinative.

We additionally hold (1) the trial court did not abuse its discretion in concluding the OIG documents Sepah sought in discovery were covered by the official information privilege and need not be disclosed, (2) Sepah was not entitled to a jury trial on her Health and Safety Code whistleblower retaliation claim (having received a jury trial on her Labor Code whistleblower retaliation claim) and the verdict the trial court reached is

supported by substantial evidence, and (3) the trial court did not prejudicially err in summarily adjudicating Sepah's FEHA causes of action. As to summary adjudication of Sepah's defamation claim, however, reversal is required because there is a material dispute of fact on the issue of malice.

A. Sepah's Arguments Attacking the Finding She Was Not An Employee Are Unavailing

1. The jury instruction on Sepah's employment status

Before trial, the parties submitted conflicting instructions on the "Definition of Employee and Employer." Sepah's proposed instruction drew upon the definitions used in California's wage order for professional, technical, clerical, mechanical, and similar occupations.[3] The County based its instruction on FEHA-related case law addressing the difference between employees and

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[3] Sepah's proposed instruction provided: "An Employee means any person employed by an employer. Employees in the health care industry means any of the following: [¶] (1) Employees in the health care industry providing patient care; or [¶] (2) Employees in the health care industry working in a clinical or medical department, including pharmacists dispensing prescriptions in any practice setting; or [¶] (3) Employees in the health care industry working primarily or regularly as a member of a patient care delivery team; or [¶] (4) Licensed veterinarians, registered veterinary technicians and unregistered animal health technicians providing patient care. [¶] An Employer means any person or entity who directly or indirectly, or through an agent or any other person, employs or exercises control over the wages, hours, or working conditions of any person."

independent contractors and argued an instruction in its preferred form was consistent with *Borello*.[4] Over Sepah's objection, the trial court instructed the jury with the County's proposed instruction.

Now, Sepah advances two arguments. First, she claims the jury should have been instructed to determine employee status using the "ABC test" our Supreme Court recently adopted in *Dynamex*.[5] Second, she argues that even if the ABC test is

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[4] The County's proposed instruction provided: "An employer is a person who control[s] another person's performance of employment duties. In deciding whether Torang Sepah was an employee of the County of Los Angeles, you should consider the following factors: [¶] (1) Payment of salary and other employment benefits and Social Security taxes; [¶] (2) Whether Torang Sepah was paid on an hourly basis; [¶] (3) Ownership of the equipment necessary to performance of the job; [¶] (4) Location where the work is performed[;] [¶] (5) Obligation of the County of Los Angeles to train Torang Sepah; [¶] (6) Authority of the County of Los Angeles to hire, transfer, promote, discipline or discharge Torang Sepah; [¶] (7) Authority to establish work schedules and assignments; [¶] (8) County of Los Angeles' discretion to determine the amount of compensation earned by Torang Sepah; [¶] (9) Skill required of the work performed and the extent to which it is done under the direction of a supervisor[;] [¶] (10) Whether the work is part of the County of Los Angeles' regular business operations[;] [¶] (11) Skill required in the particular occupation; and [¶] (12) Duration of the relationship of the County of Los Angeles and Torang Sepah."

[5] Under the ABC test, a worker is presumed to be an employee, unless the hiring entity establishes each of the following: "(A) that the worker is free from the control and

inapplicable, the instruction given by the trial court failed to comply with the common law test established by *Borello* for determining whether an individual is an employee or an independent contractor. Specifically, Sepah maintains the instruction misstates the law because (a) it did not advise jurors that the right to control the work is the most important consideration and (b) it did not correctly identify the secondary factors endorsed by our Supreme Court. Neither argument is persuasive.

a. Dynamex*'s ABC test is inapplicable*

Even assuming *Dynamex* were retroactive (an argument Sepah never makes), *Dynamex* does not hold, or even suggest, that the ABC test is applicable to non-wage order-related claims like her Labor Code whistleblower retaliation claim.

In *Dynamex*, the trial court certified a class of delivery drivers who believed they had been improperly classified as independent contractors by their defendant employer. The drivers maintained the allegedly improper classification violated a state wage order, and they also asserted various claims that were not based on the wage order. (*Dynamex*, *supra*, 4 Cal.5th at p. 914.)

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direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact; *and* (B) that the worker performs work that is outside the usual course of the hiring entity's business; *and* (C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed." (*Dynamex*, *supra*, 4 Cal.5th at p. 957.)

In a writ proceeding brought by the employer, the Court of Appeal held the wage order definitions of "employ" and "employer" were applicable to the employee/independent contractor question with respect to obligations arising out of the wage order. (*Dynamex*, *supra*, at p. 915.) The Court of Appeal also held, however, that the *Borello* standard applied to plaintiffs' non-wage order causes of action. (*Id*. at pp. 915-916.) Later, when the defendant filed a petition for review in the Supreme Court, it challenged only the Court of Appeal's conclusion that the wage order definitions were applicable to the employee/independent contractor determination under the wage order claims. (*Id*. at p. 916 & fn. 5.) In other words, the Court of Appeal's holding that *Borello* applied to the non-wage order claims went unchallenged.

In holding the ABC test applied to the drivers' wage order-related claims, our Supreme Court repeatedly referred to the narrow scope of the defendant's petition (*Dynamex*, *supra*, 4 Cal.5th at pp. 916, 942) and stressed the correspondingly narrow scope of its own holding. (*Id.* at pp. 913-914 ["Here we must decide what standard applies, under California law, in determining whether workers should be classified as employees or as independent contractors *for purposes of California wage orders* . . . ."].) In reaching its decision, *Dynamex* did not overrule or criticize *Borello*. To the contrary, the Supreme Court repeatedly stated that *Borello* is the "seminal" California decision on how to distinguish between employees and independent contractors. (*Id.* at pp. 915, 929.)

Thus, while *Dynamex* changed the appropriate standard for determining whether an individual is an employee entitled to wage order protection or an independent contractor who is not, it

does not hold the ABC test applies to a plaintiff's non-wage order claims. In *Dynamex*'s wake, appellate courts have accordingly limited the application of the ABC test to wage-order-related claims only. (See, e.g., *Garcia v. Border Transportation Group, LLC* (2018) 28 Cal.App.5th 558, 570-571 [holding *Dynamex*'s ABC test applied only to the plaintiff's wage-order-related claims but *Borello*'s multi-factor common law test applied to the plaintiff's non-wage-order-related claims.)

Here, Sepah never asserted a wage order-based claim and the jury was never asked to decide a wage-order-related issue. *Dynamex* therefore provides no grounds for reversal.[6]

b. the jury instruction does not otherwise warrant reversal

At issue in *Borello* was whether cucumber pickers were employees of an agricultural grower for purposes of workers'

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[6] In a "Notice of New Authority" filed on December 3, 2019, Sepah listed "California AB 5," which is a reference to Assembly Bill No. 5 (2019-2020 Reg. Sess.). Sepah noted "[t]his law, which goes into effect January 1, 2020, is relevant to Appellant's argument at 40-45 of her Opening Brief and 11-18 of her Reply Brief." Those sections of her briefs argue the jury was misinstructed on employment status partly because the instructions did not incorporate *Dynamex*'s ABC test.

Just as her briefs do not argue *Dynamex* should apply retroactively, Sepah does not assert Assembly Bill No. 5 should apply retroactively. Any reliance on Assembly Bill No. 5 as purported grounds for reversal is accordingly forfeited (and seemingly meritless (*Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1208-1209; Lab. Code 2750.3, subd. (i)(2), (3))).

compensation. Drawing from the common law, our Supreme Court explained that "'[t]he principal test of an employment relationship is whether the person to whom the service is rendered has the right to control the manner and means of accomplishing the result desired . . . .'" (*Borello*, *supra*, 48 Cal.3d at p. 350.)

Although the right to control has been described as "the 'most important' or 'most significant' consideration," it is not the only consideration. (*Borello*, *supra*, 48 Cal.3d at p. 350.) To the contrary, *Borello* endorsed considering several "'secondary' indicia" that bear on employment status, including factors borrowed from the Restatement (Second) of Agency.[7] *Borello* also approvingly cited several additional factors considered by cases in other jurisdictions.[8] The Court in *Borello* cautioned, however,

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[7] The factors adopted by *Borello* from the Restatement are: "(a) whether the one performing services is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether or not the work is a part of the regular business of the principal; . . . (h) whether or not the parties believe they are creating the relationship of employer-employee." (*Borello*, *supra*, 48 Cal.3d at p. 351.)

[8] Those factors drawn by *Borello* from non-California cases are: "(1) the alleged employee's opportunity for profit or loss

that all the factors are intertwined and cannot be mechanically applied. (*Id.* at p. 351.) "Each service arrangement must be evaluated on its facts, and the dispositive circumstances may vary from case to case." (*Id*. at p. 354.)

Here, Sepah did not object to the instruction given either on the ground that it does not state an employer bears the burden of proving independent contractor status or on the ground it does not expressly identify the right to control the manner in which work is performed as the most important factor. Nor did she separately propose the court so instruct the jury.[9] Her argument now that both were required is accordingly forfeited. (*Carrau v. Marvin Lumber & Cedar Co.* (2001) 93 Cal.App.4th 281, 296-297 ["'A failure to object to civil jury instructions will not be deemed a waiver where the instruction is prejudicially erroneous as given, that is, which is an incorrect statement of the law. On the other hand, a jury instruction which is incomplete or too general must be accompanied by an objection or qualifying instruction to avoid the doctrine of waiver'"]; *Mesecher v. County of San Diego* (1992) 9 Cal.App.4th 1677, 1686 ["A civil litigant must propose complete

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depending on his managerial skill; (2) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers; (3) whether the service rendered requires a special skill; (4) the degree of permanence of the working relationship; . . . (5) whether the service rendered is an integral part of the alleged employer's business." (*Borello*, *supra*, 48 Cal.3d at pp. 354-355.)

[9] Rather, the choice trial counsel presented to the court was only whether to give Sepah's own flawed instruction (which she does not defend on appeal) or the County's instruction.

instructions in accordance with his or her theory of the litigation and a trial court is not 'obligated to seek out theories [a party] might have advanced, or to articulate for him that which he has left unspoken'"]; see also *People v. Pearson* (2013) 56 Cal.4th 393, 416 [a "defendant's failure to make a timely and specific objection on the ground he now raises forfeits the claim on appeal"].)

Even putting aside the forfeiture, for argument's sake, as to the right to control factor, the jury instruction given on Sepah's employment status did identify this key consideration at the outset (albeit not expressly as such): "An employer is a person who control[s] another person's performance of employment duties."[10] From there, the challenged instruction listed in a neutral fashion some of the secondary indicia identified in *Borello*, including factors related to the control of the work, the skill necessary to perform the work, the compensation and opportunity for profit or loss from the work, and whether the work is part of the County's regular business. In so doing, the instruction did not misstate the *Borello* standard and there is no basis to conclude the trial court erred in giving the defense-

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[10] Sepah's trial attorney emphasized this point during summation: "[Y]ou're going to be given a form [stating] what the law is on employee and employer, and there's a bunch of factors in there. [¶] And basically, it's a lot—a lot of it is about the control, whether the County of Los Angeles can control . . . Sepah's work environment." Naturally, the County's attorney, in her closing argument, argued Sepah was not an employee. But she did not take issue with counsel for Sepah's assertion that "a lot" of the issue came down to the right to control the manner of doing the work.

proposed instruction rather than Sepah's. (*Thompson Pacific Construction, Inc. v. City of Sunnyvale* (2007) 155 Cal.App.4th 525, 553 ["A party is not entitled to have the jury instructed in any particular fashion or phraseology, and may not complain if the court correctly gives the substance of the applicable law"].)

2. Sepah's motion to direct a finding she was an employee

Sepah testified that when she became a *locum tenens* she received a different badge and worked fewer hours, but otherwise her work remained the same: She had the same duties and responsibilities, saw the same patients, and attended the same meetings as when she was a County employee. As a result, on the day the jury began (and concluded) its deliberations, Sepah filed a motion for directed verdict, arguing the trial court should find as a matter of law that the County was her employer.

At or around the same time Sepah made her motion, the trial court learned the jury had already come to a verdict. The court heard argument from the parties and denied the motion, observing that the issue was one for the jury.

"[A] motion for a directed verdict is in the nature of a demurrer to the evidence. [Citations.] In determining such a motion, the trial court has no power to weigh the evidence, and may not consider the credibility of witnesses. It may not grant a directed verdict where there is *any* substantial conflict in the evidence. [Citation.]" (*Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 629.) "A directed verdict may be granted only when, disregarding conflicting evidence, giving the evidence of the party against whom the motion is directed all the value to which it is legally entitled, and indulging every legitimate

inference from such evidence in favor of that party, the court nonetheless determines there is no evidence of sufficient substantiality to support the claim or defense of the party opposing the motion, or a verdict in favor of that party. [Citations.]" (*Id.* at pp. 629-630.) Applying this standard, the trial court correctly denied the motion for a directed finding that Sepah was an employee because substantial evidence supports the jury's finding to the contrary.

On cross-examination, Sepah admitted that when she was a *locum tenens* she worked part-time, was paid an hourly rate for her work that was determined by one of several physician registries utilized by the County, and received her paychecks from that registry (which also paid for her malpractice insurance). In addition, she testified that as a *locum tenens* she did not receive any benefits from the County, was responsible for paying her own Social Security taxes, and, pursuant to the terms of her contract with the registry, "knew" she was not an employee of the County and "understood" that she was an independent contractor.

This evidence of non-employment status was reinforced by testimony from Susan Moser (Moser), the County's human resources manager. She testified that *locum tenens* personnel were not considered by the County to be employees. Moser explained, "[T]hey're not on the payroll. We don't administer their paycheck, their benefits, . . . their leaves. We don't do it. They're not employees." The County's position on Sepah's employment status was further supported by the language of the contract between the County and the physician registry Sepah used. Section 20 of that agreement, entitled "Independent Status of Contractor," provided, in pertinent part, as follows: "The

employees, agents, subcontractors and/or independent contractors of one party shall not be, or be construed to be, the employees or agents of the other party for any purpose whatsoever." The contract additionally stated that when a registry physician agreed to provide services to the County, he or she would sign a "Contractor Non-Employee Acknowledgement and Confidentiality Agreement," which, in part, provided as follows: "I understand and agree that the [registry] has exclusive control . . . . I understand and agree that I must rely exclusively upon [the registry] for payment of salary and any and all other benefits . . . . [¶] I understand and agree that I am not an employee of the County . . . for any purpose whatsoever . . . ."

In light of this evidence, the least that can be said is there existed a substantial conflict in the evidence regarding Sepah's employment status, one requiring jury resolution. The trial court therefore did not err in denying the motion for a directed finding. (*Howard v. Owens Corning*, *supra*, 72 Cal.App.4th at p. 629.)

B. Sepah's Various Claims of Evidentiary Error, and Her Claim the Trial Court Misinstructed the Jury on What Must be Proven to Establish Retaliation, Had No Bearing on the Jury Verdict

Reviewing courts will not set aside a verdict or reverse a judgment because of the erroneous exclusion of evidence unless the error "resulted in a miscarriage of justice." (Evid. Code, § 354; *Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 801-802.) "A miscarriage of justice occurs only when the reviewing court is convinced it is reasonably probable a result more favorable to the appellant would have been reached absent the error." (*California Crane School, Inc. v. National Com. for Certification of Crane*

Operators (2014) 226 Cal.App.4th 12, 24; accord, *Pannu v. Land Rover North America, Inc.* (2011) 191 Cal.App.4th 1298, 1317 ["'trial court's error in excluding evidence is grounds for reversing a judgment only if the party appealing demonstrates a "miscarriage of justice"—that is, that a different result would have been probable if the error had not occurred'"].) The same principles apply to asserted instructional error. (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 580; *Maureen K. v. Tuschka* (2013) 215 Cal.App.4th 519, 531 ["Instructional error is prejudicial where it seems probable that the error affected the verdict"].)

At trial, the jury was presented with a single cause of action for resolution: Sepah's whistleblower retaliation claim under Labor Code section 1102.5, which required her to prove as a threshold matter that she was an employee of the County when she was terminated. The jury unanimously found otherwise, and that disposed of the whistleblower retaliation claim without need to address the other elements that must be proven to succeed on that claim.

Sepah now argues she should have been able to present evidence at trial about her complaint of gender discrimination, about discrimination assertedly experienced by others, and about the County's willingness to consider rehiring her post-termination. None of these issues, however, has any bearing on whether Sepah was an employee, and they accordingly cannot have prejudiced the jury's verdict. (See, e.g., *Taulbee v. EJ Distribution Corp.* (2019) 35 Cal.App.5th 590, 597; *Brokopp v. Ford Motor Co.* (1977) 71 Cal.App.3d 841, 854 ["If, of course, the jury predicated Ford's liability on the theory of strict liability, no error in the evidence relating to negligence could be prejudicial"].)

Similarly, Sepah contends the trial court erred in instructing the jury that a disclosure of publicly known facts is not a protected disclosure under Labor Code section 1102.5. But this likewise had no bearing on the jury's verdict, which turned solely on its finding that Sepah was not an employee.

C. The Trial Court Did Not Abuse Its Discretion in Denying Sepah Access to Certain OIG Documents

During pretrial proceedings, the County refused to produce documents relating to any OIG investigation of the jail during the relevant time period on the ground that disclosure was precluded by the official information privilege (Evid. Code, § 1040). Sepah moved to compel production of the OIG documents.

In support of its opposition, the County submitted the declaration of Max Huntsman (Huntsman), then the Inspector General for the County. In his declaration, Huntsman identified several reasons why disclosure of OIG investigatory materials would run counter to the public interest, including because it would have a deleterious effect on the OIG's ability to investigate and obtain detailed and accurate information about misconduct and substandard care by the Sheriff's Department in the future. In addition, the County submitted excerpts from Sepah's deposition showing the OIG collected information from Sepah in confidence—the OIG lawyer-investigator met with Sepah in another city so that none of her colleagues from the jail would see them together and the investigator told Sepah her name would not be used in the OIG report.

The dispute was ultimately referred to a discovery referee, who denied Sepah's motion with respect to the OIG materials. The trial court, after balancing Sepah's need for the materials

against the County's interest in preserving the confidentiality of the materials, overruled Sepah's objection to the referee's ruling and found the information protected by the official information privilege.

"A trial court's determination of a motion to compel discovery is reviewed for abuse of discretion. [Citation.] . . . . The party claiming the privilege has the burden of establishing the preliminary facts necessary to support its exercise . . . . [Citations.] Once that party establishes facts necessary to support a prima facie claim of privilege, . . . 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. [Citations.]" (*Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 733.)

The trial court's decision to deny Sepah access to the OIG documents was not an abuse of discretion. Sepah's deposition testimony indicated the OIG collected information for its investigation into conditions at the jail in a confidential manner and the Huntsman declaration established the continued confidentiality of the OIG documents outweighed the necessity for disclosure. (Evid. Code, § 1040, subd. (a) & (b)(2); *Shepherd v. Superior Court* (1976) 17 Cal.3d 107, 123-125, overruled on other grounds in *People v. Holloway* (2004) 33 Cal.4th 96, 131.)

Sepah argues, however, that the County subsequently and impliedly waived the privilege "when it relied upon the OIG report in moving for summary judgment . . . and then again at trial." Sepah's argument is not persuasive. An implied waiver of a privilege does not occur "where the substance of the protected communication is not itself tendered in issue, but instead simply represents one of several forms of indirect evidence in the

matter." (*Mitchell v. Superior Court* (1984) 37 Cal.3d 591, 606.) Here, the record reveals the County did not put at issue—either in its summary judgment motion or at trial—the OIG's investigation into or conclusions about patient care conditions at the jail.

The County's summary judgment motion did not rely on declarations from Huntsman or any OIG investigator, nor did it rely on any OIG documents. Instead, its OIG-related evidence was limited to one of Sepah's supervisors, who had cooperated with the OIG investigation and who stated in his declaration supporting the County's motion for summary judgment that all of the patient care concerns brought to his attention by Sepah were the "same issues" he had been discussing with government agencies for many years before Sepah started working at the jail.

Similarly, at trial, the County did not call Huntsman or any OIG investigators to testify and did not admit into evidence any OIG documentation. Instead, the County elicited OIG-related testimony from only two OIG interviewees whose testimony on the subject was confined to the scope of the investigation as those interviewees understood it. Under such circumstances, the County did not put the substance of the OIG investigation or the resulting report at issue.

D. Sepah Was Not Entitled to a Jury Trial on Her Health and Safety Code Whistleblower Claim, and the Trial Court's Verdict on That Claim Is Supported by Substantial Evidence

Sepah contends the trial court erred when it denied her a jury trial on her Health and Safety Code section 1278.5[11] claim. Under our Supreme Court's recent decision in *Shaw v. Superior Court* (2017) 2 Cal.5th 983 (*Shaw*), the contention lacks merit.

The Court in *Shaw* considered whether a health care worker had a right to a jury trial in connection with a cause of action for retaliatory discharge against her former employer under the same statute we are concerned with here, section 1278.5. (*Shaw*, *supra,* 2 Cal.5th at p. 987.) Pursuant to that cause of action, the plaintiff sought compensatory and emotional distress damages, lost salary and benefits, and fees and costs.

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[11] The statute provides, in relevant part: "No health facility shall discriminate or retaliate, in any manner, against any patient, employee, member of the medical staff, or any other health care worker of the health facility because that person has done either of the following: [¶] (A) Presented a grievance, complaint, or report to the facility, to an entity or agency responsible for accrediting or evaluating the facility, or the medical staff of the facility, or to any other governmental entity. [¶] (B) Has initiated, participated, or cooperated in an investigation or administrative proceeding related to the quality of care, services, or conditions at the facility that is carried out by an entity or agency responsible for accrediting or evaluating the facility or its medical staff, or governmental entity."

Undesignated statutory references that follow are to the Health and Safety Code.

(*Id*. at pp. 988-989.) Accordingly, the "specific question" before the Court was whether there "is a right to a jury trial in the civil action authorized by section 1278.5(g) when, as in this case, a plaintiff . . . seeks to recover compensatory damages as well as other relief in such an action." (*Id*. at p. 996.) The plaintiff also asserted a *Tamney v. Atlantic Richfield Co*. (1980) 27 Cal.3d 167 (*Tamney*) cause of action for wrongful discharge in violation of public policy. (*Id*. at pp. 987-988.)

After analyzing the statute's language and legislative history, the Court in *Shaw* concluded the statute does not afford a plaintiff the right to a jury trial. (*Shaw*, *supra,* 2 Cal.5th at pp. 993-1003.) Our Supreme Court elected not to decide whether there is a state constitutional right to a jury trial in connection with such a claim because the plaintiff had another, similar claim that was entitled to a jury trial, the *Tamney* claim. (*Id*. at p. 1004.)

Here, Sepah, like the plaintiff in *Shaw*, pursued a section 1278.5 claim seeking compensatory damages, lost salary, and fees and costs. Like the plaintiff in *Shaw*, Sepah also pursued a separate claim for retaliatory termination for which she was entitled to a jury trial; instead of a *Tamney* claim, it was a claim for retaliation under Labor Code section 1102.5. Sepah sought identical relief on both whistleblower retaliation claims. And Sepah got a jury trial on her Labor Code claim for retaliatory termination. Under these circumstances, *Shaw* controls and establishes the trial court did not err in denying her a jury trial on her section 1278.5 claim.

Separately, Sepah also argues substantial evidence does not support the trial court's judgment in favor of the County on her section 1278.5 claim. In passing on this argument, "we

resolve all conflicts in favor of the party prevailing at the trial court level and must give that party the benefit of every reasonable inference in support of the judgment. When more than one inference can be reasonably deduced from the facts, the appellate court cannot substitute its deductions for those of the superior court. Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion. It is sufficient if any reasonable trier of fact could have considered it reasonable, credible and of solid value." (*San Diego Unified School Dist. v. Commission on Professional Competence* (2013) 214 Cal.App.4th 1120, 1141-1142, internal quotation marks and citations omitted.)

To prevail on her section 1278.5 claim, Sepah needed to establish a causal link between her protected activity and the County's termination of her contract. (*Armin v. Riverside Community Hospital* (2016) 5 Cal.App.5th 810, 830.) Here, the County presented reasonable, credible, and solid evidence upon which the court could rely to find there was no such link.

Specifically, the County introduced testimony from Moser, the human resources manager, and several supervising psychiatrists at the jail that the decision to terminate Sepah was made by Moser and Moser alone. In addition, the County presented evidence that when Moser made the decision to terminate Sepah, she did not consider or rely on any of Sepah's allegedly protected activities (e.g., cooperating in the OIG investigation, defending patients' rights to privacy, and advocating for peer review). Moser testified that upon receiving the anonymous letter she decided immediately—i.e., without the benefit of any investigation—to terminate Sepah's *locum tenens*

relationship with the County in order to protect County employees from any further misconduct by Sepah.

The propriety of Moser's action was affirmed by the County's expert witness, Benjamin Stormer. Stormer, who had performed hundreds of preliminary reviews of complaints against both County employees and *locum tenens* personnel who worked for the County, testified that in his experience, in every instance where the alleged policy violator was in the *locum tenens* category, the matter was determined to be "non-jurisdictional" (i.e., the County had no jurisdiction to discipline the alleged offender because he or she was not a County employee) and the complaint was not investigated.

Because there is substantial (albeit contradicted) evidence supporting the trial court's determination the County had a legitimate, non-pretextual reason for Sepah's termination, we affirm the judgment on the section 1278.5 claim.

E. The Trial Court's Summary Adjudication Rulings Require Partial Reversal, Solely as to the Defamation Claim

1. Standard of review

"In reviewing an order granting summary adjudication, 'we apply the same standard of review applicable on appeal from a grant of summary judgment. [Citation.]'" (*Rehmani v. Superior Court* (2012) 204 Cal.App.4th 945, 950.) Where a "'case comes before us after the trial court granted a motion for summary [adjudication], we take the facts from the record that was before the trial court when it ruled on that motion. [Citation.] "'We review the trial court's decision de novo, considering all the evidence set forth in the moving and opposing papers except that

to which objections were made and sustained.'" [Citation.] We liberally construe the evidence in support of the party opposing summary [adjudication] and resolve doubts concerning the evidence in favor of that party. [Citation.]' [Citation.]"[12] (*Wilson v. 21st Century Ins. Co.* (2007) 42 Cal.4th 713, 716-717.)

2. The FEHA retaliation claim for complaining of gender discrimination

a. additional background

Sepah's operative complaint alleged she was improperly discharged shortly after she complained to a supervisor about gender discrimination. In May 2015, Sepah met with Dr. Jeffrey Marsh (Marsh) to discuss a conflict she recently had with her immediate supervisor, Dr. Joseph Simpson (Simpson), regarding a patient care issue; at the time, Marsh was Simpson's immediate supervisor. A few days later, after Marsh met with both Sepah and Simpson, Sepah sent a follow-up email to Marsh thanking

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[12] Both Sepah and the County submitted objections to each other's evidence on the County's motion for summary judgment/adjudication. The reporter's transcript indicates the trial court intended to rule on the parties' respective objections. The record before us, however, does not reflect any such rulings. Our Supreme Court has held that "if the trial court fails to rule expressly on specific evidentiary objections, it is presumed that the objections have been overruled." (*Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 534 [rejecting a presumed sustained approach to evidentiary objections that were not ruled upon].) Accordingly, we proceed as if the trial court had overruled both parties' evidentiary objections.

him for attempting to resolve the conflict between her and Simpson.

In that email, Sepah expressed concern that Simpson had demonstrated a gender bias against her. To support her concerns, she identified examples of how Simpson responded differently to male psychiatrists who disagreed with him over similar patient care issues. Because Sepah felt Simpson was not the "most appropriate person to supervise" her, she requested a transfer to another supervisor. Less than two months later, Marsh advised Sepah that the County was terminating her *locum tenens* relationship with the County effective immediately.

The County moved for summary adjudication on Sepah's FEHA retaliation claim on two principal grounds: First, the County contended Sepah could not establish a prima facie case of retaliation because she could not demonstrate a causal link between her protected activity (complaining of gender bias) and the County's adverse employment action (her termination). According to the County, Moser was not aware of any of Sepah's protected activity. Second, the County argued it terminated Sepah's contract for legitimate business reasons, namely, the allegations in the anonymous letter that Sepah had "created an extremely hostile work environment" by "discriminating against others' races and national origins." Marsh forwarded that letter to Moser, who, because she found the letter's allegations to be both believable and egregious, decided to terminate Sepah's *locum tenens* contract. Based on these same arguments, the County also moved for summary adjudication on all of Sepah's other retaliation-based claims.

In her opposition, Sepah pointed to the following, which, according to her, demonstrated a causal link between her

asserted gender discrimination complaint and her termination and showed the County's reason for terminating her was pretextual in nature: she was terminated shortly after raising a gender discrimination complaint; the anonymous letter was drafted by a doctor who lacked personal knowledge of any of the allegations contained in the letter and who exaggerated the allegations provided to her by others; the letter lacked dates, names, and locations for most of the allegations; the contributors to the letter harbored hatred, ill will, and a history of prior disputes with and a willingness to injure Sepah; and Moser recommended that Sepah be terminated only 50 minutes after receiving the letter and without the benefit of any investigation into its veracity. Sepah contrasted the quick action to terminate her with the County's decision not to investigate her complaint of gender bias. In addition, Sepah disputed that Moser was the sole decision maker with respect to her termination and further argued that even if Moser was the sole decision maker, she was controlled by others, such as Marsh, who harbored retaliatory motives.

The trial court, after hearing argument from the parties, denied the County's motion for summary adjudication as to all of the retaliation-based claims, including the FEHA retaliation claim, but granted summary adjudication to the County on Sepah's FEHA-based discrimination claims (gender discrimination and failure to prevent discrimination).

Less than two months later, at a pretrial conference, the trial court stated it would summarily adjudicate the FEHA retaliation claim in the County's favor as well. The trial court indicated the County was entitled to summary adjudication as to all claims related to gender discrimination, including the FEHA

retaliation claim. In a subsequent minute order, the trial court characterized its revised ruling on the FEHA retaliation claim as a "clarification" of its prior ruling on the County's motion for summary judgment/adjudication.

b. analysis

"[I]n order to establish a prima facie case of retaliation under the FEHA, a plaintiff must show (1) he or she engaged in a 'protected activity,' (2) the employer subjected the employee to an adverse employment action, and (3) a causal link existed between the protected activity and the employer's action." (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1042.) The prima facie evidentiary burden is "'not onerous.'" (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 355.) Courts have observed that proof of retaliation often depends on circumstantial evidence because it consists of "subjective matters only the employer can directly know, i.e., his attitude toward the plaintiff and his reasons for taking a particular adverse action." (*Mamou v. Trendwest Resorts, Inc.* (2008) 165 Cal.App.4th 686, 713 (*Mamou*).) As a result, "'[t]he causal link may be established by an inference derived from circumstantial evidence, "such as the employer's knowledge that the [employee] engaged in protected activities and the proximity in time between the protected action and the allegedly retaliatory employment decision."'" (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 614-615.)

Here, Sepah presented evidence she engaged in protected activity (her email to Marsh complaining of gender-differentiated treatment) and suffered an adverse employment action (termination of her contract). In addition, she presented circumstantial evidence of a causal link between her complaint

and her termination and of the arguably pretextual nature of her termination: only a few weeks elapsed between the time of her email to Marsh and her termination, and Marsh did not take any action with respect to her complaint about Simpson (whereas he acted with dispatch in responding to the anonymous letter, including having his assistant press for a response from Moser). Although Sepah's evidence of pretext is circumstantial, it is not too weak to sustain a reasoned inference in her favor. Indeed, much of the same evidence was sufficient for her similar whistleblower retaliation claims under the Labor Code and the Health and Safety Code to survive summary adjudication.

Accordingly, when the evidence submitted by the parties is liberally construed in support of Sepah and all doubts are resolved in her favor, the County was not entitled to judgment as a matter of law on the FEHA retaliation claim. (*Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 283 ["Proof of discriminatory intent often depends on inferences rather than direct evidence. . . . And because it does, 'very little evidence of such intent is necessary to defeat summary judgment'"].)

Nevertheless, reversal is not required on this point because Sepah has not shown any injustice or prejudice to her arising from the grant of summary adjudication. "A judgment is reversible only if any error or irregularity in the underlying proceeding was prejudicial. . . . There is no presumption of prejudice. (Cal. Const., art. VI, § 13; Code Civ. Proc., § 475.) Instead, the burden to demonstrate prejudice is on the appellant. [Citation.]" (*Freeman v. Sullivant* (2011) 192 Cal.App.4th 523, 527-528.) Sepah makes two arguments in an effort to show prejudice but neither is convincing.

First, Sepah asserts the trial court's clarification of its ruling on the FEHA retaliation claim "fundamentally altered [her] presentation of evidence to the jury by barring all evidence of [her] gender discrimination complaints." This assertion, however, is offered in a wholly conclusory manner—she does not identify exactly what evidence she was prevented from presenting to the jury or how its omission affected her overall case. If anything, the record suggests she was not prejudiced. The record, for example, shows Marsh's failure to forward Sepah's complaining email to Moser or Moser's assistant in the human resources department was addressed by Sepah's attorney during her direct examination of Marsh.

Second, Sepah argues that if the FEHA retaliation claim had not been resolved on the eve of trial, then the jury instruction on her employment status would have reflected the common law definition of employment as reflected in FEHA-related case law and thus the jury might have reached a different result on her employee status. Sepah's argument is not supported by the record. When she submitted her proposed instruction on employment status, the trial court had not yet clarified its ruling on the FEHA retaliation claim. In other words, even though the FEHA retaliation claim was still at issue when she submitted her proposed instruction on employment status, Sepah elected to base her instruction not on FEHA-related case law utilizing the common law definition of employment but on the definitions used in the wage order for professional, technical, clerical, mechanical, and similar occupations. Moreover, the trial court ultimately adopted the County's proposed instruction on employee status, and we have held that instruction was not a misstatement of the law.

3. The defamation claim

a. additional background

The basis for Sepah's defamation claim was the anonymous letter presented to Marsh by Sepah's colleagues, which alleged Sepah, by her comments and conduct, had "created an extremely hostile work environment."

The County argued it was entitled to judgment as a matter of law on Sepah's defamation claim for two principal reasons. First, the letter was absolutely privileged under Civil Code section 47, subdivisions (a) and (b). Second, if the letter was not absolutely privileged, it was protected by section 47, subdivision (c)'s conditional privilege because the letter was between interested parties and made without malice.

In response, Sepah contended the letter was not absolutely privileged because it was not written as part of the "proper discharge of any official duty" by the anonymous psychiatrists who contributed to the letter or as part of any legislative, judicial, or other proceeding authorized by law. Sepah argued further that the letter was not conditionally privileged because it was made with malice.

In support of this latter point, Sepah introduced evidence the letter's author and contributors had negative feelings toward Sepah. For example, it was undisputed the author of the letter stated that Sepah was "'not normal,'" "'VERY SNEAKY and out of control,'" "not well-liked among her colleagues," and inclined to be "'punitive.'" In addition, it was undisputed that one of the psychiatrists who contributed to the letter described Sepah as "'dangerous'" after Sepah critiqued the other psychiatrist's clinical notes. It was also undisputed that a number of the contributors to the letter were upset about the prospect of Sepah

serving on a newly-created peer review committee, which had the power to "punish" psychiatrists at the jail for missteps in treating patients. Relatedly, it was undisputed Sepah had previously reported a psychiatrist for violating patient confidentiality and soon thereafter that doctor was not seen working at the jail for more than a year.

There was also evidence the contributors to the letter conceived of it as a means to prevent Sepah from serving on the peer review committee and/or as a way to get her fired, that contributors to the letter were openly hostile to and about Sepah, and that the letter's author admitted to exaggerating and mischaracterizing some of the letter's anecdotes in the hope of getting Sepah fired.

The trial court found that the letter was conditionally privileged under Civil Code section 47, subdivision (c) and that, while Sepah presented evidence that the letter arose out of anger at her, "anger [wa]s insufficient to prove the presence of malice so as to defeat the [conditional] privilege."

b. analysis

We agree with the trial court that the letter was not protected by absolute privilege—there was no evidence the letter had been written as part of the contributing psychiatrists' official duties as required under Civil Code section 47, subdivision (a), and there was no evidence the letter was authorized by law and reviewable by mandate so as to bring it within the privilege set forth in section 47, subdivision (b). (*Cruey v. Gannett Co.* (1998) 64 Cal.App.4th 356, 369 (*Cruey*).)

We disagree, however, with the conclusion there was no disputed issue of fact as to whether the letter was written with

malice. ""'The malice necessary to defeat a qualified privilege is "actual malice" which is established by a showing that the publication was motivated by hatred or ill will towards the plaintiff *or* by a showing that the defendant lacked reasonable grounds for belief in the truth of the publication and therefore acted in reckless disregard of the plaintiff's rights [citations].'"" (*Taus v. Loftus* (2007) 40 Cal.4th 683, 721.) "Actual malice may be proved by direct or circumstantial evidence. Factors such as failure to investigate, anger and hostility, and reliance on sources known to be unreliable or biased 'may in an appropriate case, indicate that the publisher himself had serious doubts regarding the truth of his publication.' [Citation.] However, any one of these factors, standing alone, may be insufficient to prove actual malice or even raise a triable issue of fact. [Citation.]" (*Annette F. v. Sharon S.* (2004) 119 Cal.App.4th 1146, 1167, quoting *Reader's Digest Assoc. v. Superior Court* (1984) 37 Cal.3d 244, 257-258.)

In *Cruey*, *supra*, 64 Cal.App.4th 356, the trial court granted summary judgment to a defendant co-worker on a plaintiff's defamation claim. The Court of Appeal reversed, holding that a triable issue of fact was raised as to whether the co-worker's internal complaint of sexual harassment against the plaintiff was made maliciously. The co-worker admitted she "react[ed] angrily when [plaintiff] confronted her with negative job evaluations," stated she "would not allow [plaintiff] to threaten her job and her family but knew how to protect her job," and filed her complaint with her employer the day following her receipt of the negative evaluations. (*Id.* at pp. 366-370; accord, *Mamou*, *supra*, 165 Cal.App.4th at pp. 729-730 [a jury could find that managers' statements of employee's alleged misconduct and bad character

were motivated by ill will where one manager characterized employee as a member of the "Syrian regime" and reportedly planned to "get" or "get even with" employee and another manager made extreme comments concerning employee's alleged breaches of loyalty].)

Here, like the plaintiff in *Cruey*, Sepah presented evidence from which it could be reasonably inferred the contributors to the letter were not only angry at her, but fearful about their job security, and took action with the intent of harming Sepah to safeguard their jobs. In addition, Sepah presented evidence the allegations in the letter were deliberately exaggerated and/or not placed in their proper context.

Viewing the evidence liberally in support of Sepah and resolving all doubts in her favor, we hold that the County was not entitled to judgment as a matter of law on the defamation claim because Sepah's evidence raised a triable issue of fact as to malice. In addition, we hold further that the prejudice to Sepah from the summary adjudication of her defamation claim was patent. The jury was never presented with her claim and the jury's lone finding that Sepah was not a County employee is irrelevant to her defamation claim, as that claim does not stand or fall on her employment status. (*John Doe 2 v. Superior Court* (2016) 1 Cal.App.5th 1300, 1312 [listing elements of a defamation claim].)

DISPOSITION

The judgment is vacated. The order granting summary adjudication on Sepah's defamation claim is reversed and the matter is remanded to the trial court for further proceedings on that claim. The jury verdict on Sepah's Labor Code whistleblower retaliation claim, the court verdict on Sepah's Health and Safety Code whistleblower retaliation claim, and the trial court's adjudication of Sepah's FEHA claims are all affirmed. The parties shall bear their own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BAKER, J.

I concur:

KIM, J.

Torang Sepah, M.D. v. County of Los Angeles
B290775

RUBIN, P. J. - Concurring

I concur in the judgment.

RUBIN, P. J.