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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

ROBIN BONGON,

Plaintiff and Appellant,

v.

KAISER FOUNDATION HOSPITALS,
INC. ET AL.,

Defendants and Appellants.

A137303

(Alameda County
Super. Ct. No. RG10495979)

Appellant Robin Bongon prevailed in a jury trial on her claim of sexual harassment in the workplace. She now challenges the trial court's order granting respondents' motion for a new trial, which the court based on findings that her attorney committed prejudicial misconduct and the clear weight of the evidence was contrary to the verdict. Bongon also contends the court erred in awarding respondents attorney fees with respect to a summary judgment motion. Respondents cross-appeal from the court's denial of their motion for judgment notwithstanding the verdict.

We affirm the court's orders granting a new trial and denying judgment notwithstanding the verdict. We vacate the order awarding attorney fees and remand for further proceedings consistent with this opinion.

I. FACTS AND PROCEDURAL HISTORY

A. Complaint and Pretrial

In her complaint against respondent Kaiser Foundation Hospitals, Inc. (Kaiser) and her supervisor, respondent Ron Navarra (Navarra), Bongon alleged that Navarra had subjected her to sexual harassment. Bongon asserted causes of action for violation of the California Fair Employment and Housing Act (FEHA) (Govt. Code, § 12900 et seq.), retaliation, gender discrimination, disability discrimination, wrongful termination, violation of Article I, Section 8 of the California Constitution, intentional infliction of emotional distress, and constructive termination.

In her complaint, Bongon alleged numerous acts of sexual harassment, including Navarra rubbing against her so she could feel his penis. She complained to Kaiser, filed a workers' compensation claim, and went on stress leave. Due to her stress, Bongon alleged, she had a miscarriage.

The court granted summary adjudication in Kaiser's favor as to Bongon's claims for retaliation, gender discrimination, disability discrimination, wrongful termination, and violation of Article I, Section 8 of the California Constitution. Bongon does not challenge the dismissal of these claims. In addition, Bongon voluntarily dismissed her claims for intentional infliction of emotional distress and constructive termination. Bongon's remaining claims—for a FEHA violation, sexual harassment, and being subjected to a hostile work environment—were presented to a jury.

Before trial, the court also granted in part Kaiser's motion in limine to exclude any lay or expert opinion, testimony, evidence, or reference regarding the miscarriage Bongon suffered in August 2009. Specifically, the court granted the motion subject to the possibility that a treating physician could be qualified to opine that the miscarriage was caused by the work-related stress she allegedly experienced due to Navarra. The court expressly directed that Bongon could not testify to her personal opinion on the matter.

B. Trial Testimony

1. Navarra Becomes Bongon's Supervisor (January 2008)

Bongon started working for Kaiser in 1989 and continued in its employ at least through the date of trial. In September 2007, she began working as a biomedical engineer in Kaiser's hospital in Walnut Creek. In January 2008, Kaiser hired Navarra as manager of biomedical engineering services for its hospitals and medical clinics located in Contra Costa County. As such, Navarra became Bongon's immediate supervisor. His office was adjacent to Bongon's workspace.

Before the events constituting the alleged sexual harassment, Bongon expressed dislike of Navarra's management practices. Bongon's good friend, Norman Shauf (Shauf), who would testify on Bongon's behalf, also resented Navarra.

2. Alleged Sexual Harassment (December 2008 through April 2009)

At trial, Bongon testified that Navarra engaged in several acts of sexual harassment between approximately December 2008 and no later than April 30, 2009.¹

a. *"Missed You" Email*

In December 2008, Kaiser's Northern California biomedical engineering group held a holiday party at which Kaiser recognized Bongon and others for becoming journeymen biomedical engineers. To Navarra's surprise, Bongon did not attend. The next morning he sent her an email stating he had missed her at the party and noting he had a gift (a Kaiser backpack) that Kaiser gave to its biomedical engineers.² Bongon asserted at trial that the email meant Navarra was "trying to connect" with her on "inappropriate levels."

Bongon claimed Navarra knew she was going to miss the party because she was responding to a service request. However, Kaiser's "BEMS" system—a computer

¹ As respondents urged at trial, however, Bongon represented in an interrogatory response that the first instance of harassment was not in December 2008, but the "penis-rubbing" incident in January 2009.

² The full text of the email read: "Missed you there—what happen—ever[y]thing ok? I got your backpack gifts and will drop them off first chance."

database in which biomedical engineers are required to record their response to service calls—did not show that Bongon had been responding to a call when the party took place. When confronted with this evidence, Bongon claimed she could have forgotten to enter the call in the BEMS system. But she acknowledged that she did not complain about Navarra's email in her formal complaint to Kaiser about his conduct.

b. "You Are Loved" Pin

Also in December 2008, Navarra gave Bongon a pin bearing the words "You Are Loved."

Navarra testified that he often carried these pins with him and has given away "quite a few" of them, which bear the website address for a religious organization connected to Navarra's son, who is a pastor. At the time, Navarra understood from Bongon that she was having a difficult time in her personal life, and he told her that he was hesitant to discuss religion at work but had noted she kept a Bible on her desk. At trial, Navarra denied that he was attempting to harass her sexually, but acknowledged she appeared very insulted when he gave her the pin.

Bongon testified that she was the only employee to receive such a pin, she "found it odd" Navarra had given it to her, she felt "uncomfortable" and "awkward" and believed the incident was "inappropriate," and she resented his perception that she was facing personal challenges. On the other hand, when she was interviewed in connection with her workers' compensation claim concerning the alleged harassment, Bongon stated that she regarded the pin as a sign Navarra was "trying to be kind." Bongon did not mention this incident in her complaint to Kaiser or even during the first day of her deposition.

c. Winking and Staring

Bongon testified that Navarra repeatedly winked and stared at her, which "offended" her and made her "uncomfortable." Navarra denied that he intentionally winked or stared at Bongon, but noted that the window of his Walnut Creek office looked onto her desk area.

Bongon did not mention Navarra's winking or staring when she complained to Navarra's boss or spoke with her coworkers. Nor did she mention it when she filed her formal harassment complaint with Kaiser, when she was interviewed by Kaiser's investigator, or on the first day of her deposition.

d. Request for Bongon's Personal Contact Information

Bongon testified that she was further offended when Navarra asked her at least two or three times for her home address and telephone number. She had supplied this information to Kaiser's human resources department, and she was unsettled about Navarra learning she had moved and asking for the information again; she did not understand why he needed it. Bongon insisted that it was sufficient for Navarra to have the number of her Kaiser-issued cell phone.

Navarra explained that, as a department supervisor, he needed this type of information to comply with Kaiser's "live call-in policy," which obligated him to call and speak to an employee who leaves a message that he or she will miss work due to illness. He asserted that he had the information for all or almost all of his employees, and other witnesses at trial confirmed they had given their personal contact information to Navarra or Kaiser management. Bongon's complaint to Kaiser did not mention Navarra's information requests.

e. Inquiry About Coworker Modjaver

According to an entry on Navarra's work calendar, Navarra asked Bongon on January 5, 2009, whether she was dating another Kaiser employee, Hoss Modjaver, who did not work in the biomedical engineering department. According to Navarra, he explained to Bongon that her personal life was her own, but seeing Modjaver when she was supposed to be working was disruptive; Bongon replied that she understood, and Navarra thought the conversation had gone well. In Navarra's view, the time Modjaver spent "hanging around the department, beyond work-related activities," was distracting Bongon from doing her job.

Bongon testified that she was offended by Navarra's inquiry, even though others in the department already knew about her relationship with Modjaver. Bongon's complaint to Kaiser did not mention Navarra's question about Modjaver.

In addition, Modjaver testified that Navarra had said to him, "[I]f [Bongon] was my girlfriend, I would want to be around her all the time as well." Navarra testified that he did not remember saying this to Modjaver, but it could have occurred when Modjaver once came to his office to share his own concerns about his (Modjaver's) relationship with Bongon.

f. Penis-rubbing Incident

The main incident Bongon complained about allegedly occurred in late January 2009. Bongon testified that Navarra was demonstrating a "reminder" feature of Kaiser's Lotus Notes email program and, in doing so, leaned into her space and rubbed his penis against her thigh. After she shifted her chair to her left, Navarra rubbed his penis against her a second time. At this point, Bongon testified, she fully believed that Navarra's winking and staring, the "You Are Loved" pin, and his request for her home address and telephone number meant he was attracted to her and pursuing her, and she became frightened.

Respondents maintained that Bongon had made inconsistent statements about this incident, however, including whether Navarra's penis was erect at the time and whether the contact was intentional (although she did represent in her deposition that it "felt" erect to her). Therapists who discussed the incident with Bongon did not record any statement that Navarra's *penis* had come into contact with her, a matter they said they would have noted.

Bongon's friend and coworker, Shauf, testified that he witnessed the incident. According to Shauf, Navarra was situated very close to Bongon, and when Bongon moved away from him, Navarra moved closer to her again. However, Schaaf did not actually see Navarra rub his penis against her.

Navarra denied that his groin area, much less his erect penis, had come into contact with any part of Bongon's body.

At trial, Kaiser attempted to recreate the alleged penis-rubbing incident based on Bongon's testimony and other evidence showing the configuration of her work desk. According to this evidence, Bongon was sitting in her desk chair and she and Navarra were facing her computer monitor, which was directly in front of her with the mouse located near her right hand.³ In the demonstration, Kaiser's attorney (Janine Simerly) sat in either of the two chairs Bongon could have been using at the time, and directed Navarra to stand facing the computer and reenact his use of the mouse to demonstrate a feature of the email program. When Navarra did so, he could not touch his groin area against Simerly's leg or other part of her body.

g. "F-word" Story

Bongon contended that, around February 2009, Navarra told her and Shauf about an incident in which he confronted one or more young men running out of a store with a woman's purse, and they repeatedly said "what the fuck" to him. When he tried to describe this event to his mother, Navarra recounted, he made a gesture with his phone as if taking a picture under her skirt. Bongon thought Navarra used the "F-word pretty loosely" and the reference to the picture of his mother's crotch was "just gross."

Shauf explained that Navarra's story had mentioned his inability to use his cell phone to take a photograph of one of the youths, and this evolved into a discussion of his

³ The following testimony from Bongon's deposition was read at trial: "A. I was at my desk and [Navarra] came out of his office asking me if I had used Lotus Notes alarm, and he came around to my desk to show because you have to go around—to show me by grabbing my mouse and showing me something on my computer, and his penis rubbed up against my thigh as I was sitting there. [¶] Q. And [Navarra] was standing to your right; is that correct? [¶] A. Yes. [¶] Q. Was he facing you or was he facing the computer? [¶] A. What do you mean? [¶] Q. Which way was Mr. Navarra facing when he— [¶] A. He was facing the computer. [¶] Q. And the computer was in front of you; correct? [¶] A. Correct. [¶] Q. So you were both facing forward towards the computer; is that correct? [¶] A. Well, yes."

inability to work the camera on his cell phone generally; it was then that Navarra said he had inadvertently taken a picture of his mother's crotch.

Navarra acknowledged that his story had included the youths' use of the "F-word" but otherwise denied the allegations. Bongon's complaint to Kaiser did not mention this incident.

h. Commenting About Bongon's Hands

Bongon contended that, around March 2009, Navarra took her hands, commented on their appearance, and said he would like to pay for her to have a manicure but his wife would be "livid" if he did so. Bongon claimed that she was "in shock" and "very offended." Navarra denied making any such comment.

i. Attempting to Affix Tape to Bongon

Bongon also testified that, in March or April 2009, she became very upset when Navarra approached as if to place a piece of tape on her. When she told Navarra not to touch her, however, he stuck the tape to her computer instead. Navarra denied this event, and Bongon's complaint to Kaiser did not mention it.

j. Approaching Bongon with Paper in Front of His Crotch

Finally, Bongon testified that in April 2009, Navarra approached her desk holding a report in front of his groin area. Bongon's coworker, Shauf, stood up and Navarra returned to his office. Bongon was "offended," thought Navarra's behavior was "odd," and "felt he was hiding something."

3. Leave From Work and No Further Incidents

Upon the advice of her treating clinical psychologist, Bongon went on stress-related leave from Kaiser from April 30, 2009, to approximately May 31, 2009, purportedly so she would not be around Navarra. After Bongon complained to Kaiser about Navarra's conduct, no further incidents of alleged harassment occurred.⁴

⁴ Sharon Burton, of Kaiser's human resources department, investigated Bongon's complaints and concluded that the penis-rubbing incident likely did not happen as Bongon described and that the other incidents did not amount to harassment.

4. Misconduct at Trial by Bongon's Attorney

a. Questions During Redirect of Bongon

As mentioned, the trial court had ruled in limine that evidence of Bongon's miscarriage could not be introduced without appropriate expert testimony. Nonetheless, without that testimony, the following transpired during the redirect examination of Bongon, conducted by her attorney, Marylon Boyd (Boyd): "Q. [Boyd] Now, Ms. Bongon, after you came back to work following your leave, would you tell the jury how you—whether you continued to feel emotional distress? [¶] A. I did when they made me go back to my regular shift hours shortly after *I had suffered a miscarriage.*" (Italics added.)

The court sustained Kaiser's objection and implicitly granted Kaiser's motion to strike. Boyd protested—in front of the jury—arguing that Bongon was describing her emotional distress and "not saying what it is caused by." The court replied: "I am going—I am getting frustrated. . . . I want [you to] frame your questions properly and make them as they are supposed to be within the scope of cross-examination. You are not here to reopen your direct examination, which you have completed . . . at some length, and the witness is instructed to answer the question without volunteering information and without speculating or guessing. I've had to say that before. I am saying it again, and I don't want to have to say it yet another time."

Less than two pages later in the reporter's transcript, in the context of an inquiry about the pain and suffering Bongon allegedly experienced, Boyd asked Bongon if there had "come a time when you had to go to the hospital in August of 2009?" The court and parties knew that this hospitalization concerned Bongon's miscarriage. Kaiser objected, and the trial court sustained the objection. The court added, "Ms. Boyd, we have been over this a number of times." Boyd moved on to another topic.

b. Comment After Demonstration During Cross-Exam of Navarra

After Kaiser's attorney conducted the demonstration during Navarra's direct examination concerning the alleged penis-rubbing incident, Boyd conducted her own

demonstration during Navarra's cross-examination. The defense demonstration differed from Kaiser's, in that it assumed Bongon's computer was to her *left* (rather than her right) and that her computer mouse was located near her *left* hand. Boyd also directed Navarra to stand as if he were facing the side of *Bongon's body*, rather than her computer. Boyd exclaimed, "You couldn't possibly rub your penis on me like that, could you?," to which the court warned her to ask a question of the witness, as opposed to offering her own rhetoric or sarcasm. As Boyd sat where she said Bongon would have been located, Boyd directed Navarra to reach across Boyd's body as if he were going to use the mouse. As Navarra did so, he had contact with Boyd's body. The following exchange occurred: "Q. [Boyd] When you [bent over to use the mouse] from this direction, you could touch my thigh with your crotch area, couldn't you? [¶] A. That's a possibility. [¶] Q. [Boyd] *I felt it.* [¶] THE COURT: You know— [¶] MS. BOYD: I'm sorry. I apologize. [¶] THE COURT: There is no evidence of what you felt, Ms. Boyd, and I am going to ask you to desist, and this is going to be the last time I do so before I impose some form of sanction that will be sufficient to convince you to desist from this kind of commentary. Ms. Boyd's comment is stricken. [¶] The jury is to disregard it, and Ms. Boyd, you are admonished to behave with the appropriate decorum that this trial requires." (Italics added.)

C. Jury's Verdict

The jury found Kaiser and Navarra liable for sexual harassment and awarded Bongon \$10,000 in economic damages and \$114,000 for emotional distress. Judgment was entered accordingly.

D. Respondents' Motions for Judgment Notwithstanding the Verdict and New Trial

Kaiser and Navarra thereafter filed motions for judgment notwithstanding the verdict (JNOV) and a new trial. They requested JNOV on the ground that the evidence, even when viewed most favorably to Bongon, did not establish that she had experienced severe or pervasive sexual harassment. And they sought a new trial on

two grounds: (1) the verdict was against the clear weight of the evidence; and (2) Bongon's counsel had committed prejudicial misconduct by eliciting evidence of Bongon's miscarriage as proof of her emotional distress despite the in limine order, and by stating during the demonstration that she "felt" Navarra's groin area touch her thigh.

The court denied the JNOV motion, but granted a new trial on the grounds that the verdict was against the clear weight of the evidence and Bongon's counsel committed prejudicial misconduct. As discussed *post*, the court supported its rulings as to both motions in its specification of reasons (Code Civ. Proc., § 657).

E. Respondents' Motion for Attorney Fees

In October 2012, Kaiser and Navarra filed a motion to recover attorney fees incurred in preparing their reply papers in the summary judgment proceeding, in which they had obtained summary adjudication on a number of Bongon's claims. Bongon opposed the motion. The trial court ordered Bongon and Boyd to pay Kaiser and Navarra \$15,100 as reasonable attorney fees.

F. Appeal and Cross-Appeal

Bongon appealed from the judgment and the orders granting a new trial and imposing sanctions (attorney fees). Kaiser and Navarra cross-appealed from the judgment and the order denying JNOV.

II. DISCUSSION

We address the orders granting a new trial, denying JNOV, and imposing sanctions in turn.

A. New Trial

The trial court has authority to set aside a jury verdict and order a new trial on grounds set forth in Code of Civil Procedure section 657. Attorney misconduct may warrant a new trial as an "[i]rregularity in the proceedings of the court" under subdivision (1) of that section, if it is reasonably probable that the party moving for a new trial would have obtained a more favorable result absent the misconduct. (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 800-803; *City of Los Angeles v. Decker* (1977)

18 Cal.3d 860, 871.) A new trial may also be granted if the evidence was insufficient to justify the verdict; that is, the verdict was against the clear weight of the evidence. (Code Civ. Proc., § 657, subd. (6); *Candido v. Huitt* (1984) 151 Cal.App.3d 918, 923.)

1. Attorney Misconduct

The trial court concluded that Bongon’s attorney committed prejudicial misconduct in two respects—questioning Bongon regarding her miscarriage and commenting during her demonstration that she “felt it”—and that these occurrences collectively created a reasonable probability that Kaiser and Navarra would have obtained a more favorable result if the misconduct had not occurred. We review for an abuse of discretion. (*Malkasian v. Irwin* (1964) 61 Cal.2d 738, 747-749 (*Malkasian*); *Whitlock v. Foster Wheeler, LLC* (2008) 160 Cal.App.4th 149, 160.)

a. Boyd’s Questioning Regarding the Miscarriage

The trial court’s specification of reasons for its new trial order recounted the incident as follows. After Boyd had asked Bongon whether she continued to feel emotional distress after returning to work and Bongon responded with a reference to her miscarriage, the court admonished Boyd and instructed her to frame her questions properly. Then, “[o]nly moments later, Boyd, deliberately and without regard to the Court’s instruction, attempted to elicit the information a second time by asking, ‘Did there come a time when you had to go to the hospital in August 2009?’ ” The court concluded: “This question could only have been designed to elicit excluded evidence, as [Bongon’s] August 2009 hospital visit was directly related to her miscarriage. Thus, in spite of the Court’s ruling on a pretrial motion and its admonition to her, Boyd attempted to push the jury towards speculating sympathetically in [Bongon’s] favor by seeking to bring in facts previously ruled excluded from evidence. This is misconduct. [Citations.]”⁵

⁵ The court also stated: “The misconduct was not cured with an instruction to the jury, as none occurred; and it was not likely to have been sufficiently cured by the Court’s admonition of Boyd, which may have only highlighted the information relating to Plaintiff’s miscarriage to the jury by calling attention to it.”

The court did not abuse its discretion. It was reasonable for the court to conclude that Boyd’s question about Bongon having to “go to the hospital in August 2009”—when Bongon had a miscarriage—was intended to elicit Bongon’s testimony that she went to the hospital in August 2009 when she had a miscarriage. Because this question was put to Bongon in the midst of other questions concerning the emotional distress she allegedly suffered due to Navarra, Boyd was suggesting—without evidentiary foundation—that Navarra’s conduct resulted in her hospitalization; and because Bongon had already told the jury that she had a miscarriage after she returned from her stress-related leave in May 2009, the jury could well suspect that the August 2009 hospitalization was due to the miscarriage. In essence, Boyd’s questioning suggested that Navarra’s conduct caused Bongon to miscarry, and both the miscarriage and its cause were barred by the in limine order.

Bongon’s arguments to the contrary are unpersuasive. She contends there was nothing wrong with Boyd’s first question (whether Bongon had been distressed when she returned from leave) because it pertained to Bongon’s return from stress-related leave at the end of May 2009, *before* the miscarriage in August 2009, and Boyd was obligated to ask Bongon about her emotional distress. However, the court did not rule that this first question, *in itself*, constituted misconduct. The point is that Bongon’s *answer* to the first question referenced her miscarriage, and even though the court at that juncture instructed Boyd to frame her questions appropriately, Boyd nonetheless proceeded to ask about the hospital visit that was directly related to the forbidden topic of Bongon’s miscarriage.⁶

⁶ Bongon also emphasizes that it was Bongon in her answer, not Boyd in her question, who mentioned Bongon’s miscarriage during the trial. She urges that party misconduct is distinct from attorney misconduct, and there is no evidence Boyd was prompting Bongon to mention the miscarriage. Of course, counsel has the obligation to inform her client of the in limine order, and it would not have been unreasonable for the court to conclude, based on its observations of the trial proceedings as a whole, that Boyd asked the question to elicit the information. We note that, immediately preceding Boyd’s question that elicited the miscarriage testimony, the court sustained Kaiser’s objection to another line of questioning that was prohibited by a different in limine

Bongon next argues that Boyd’s second question (whether Bongon had gone to the hospital in August 2009) did not actually mention miscarriage, contained no prejudicial information, and was never answered by Bongon, so it cannot be considered in determining whether there was prejudicial attorney misconduct. Not so. Although Boyd’s question did not use the word “miscarriage,” there is no dispute that the August 2009 hospital visit was directly related to the miscarriage. Moreover, because she asked about it in the context of the distress Bongon suffered due to Navarra, Boyd’s question improperly suggested to the jury that she had to be hospitalized due to Navarra’s conduct, and opened the door to Bongon testifying again about the miscarriage. A court does not have to sit on its hands and allow the witness to spill the impermissible beans to the jury before taking appropriate action, especially where, as here, the witness had already made it abundantly clear that she was willing to speak about the forbidden subject despite the court’s order.

Next, Bongon argues that the two cases cited by the trial court in its specification of reasons are inapposite because, in those cases, the attorney rather than the client referenced the inadmissible material. (*Malkasian, supra*, 61 Cal.2d 738; *Garden Grove School Dist. v. Hendler* (1965) 63 Cal.2d 141 (*Garden Grove*).) But the court cited these cases for the proposition that an attorney may not attempt to “push the jury towards speculating sympathetically in Plaintiff’s favor by seeking to bring in facts previously ruled excluded from evidence.” That is essentially what occurred in *Malkasian* and *Garden Grove*, and it was reasonable for the court in this case to conclude that Boyd was doing so as well. (*Malkasian, supra*, 61 Cal.2d at pp. 746-747 [making a statement to the jury without factual support, or urging the jury to speculate, is misconduct]; *Garden Grove, supra*, 63 Cal.2d at p. 143 [appealing to the jury’s self-interest and provinciality,

ruling—and then Boyd attempted to argue the issue in front of the jury. And earlier in the trial, Bongon had allegedly violated yet another in limine order when she used the word “retaliation” in her testimony. As the number of such incidents increases, the probability that any one of them was due to innocent happenstance decreases.

making representations of fact, referring to facts not in evidence, and alluding to personal knowledge in summation to the jury, was misconduct].)

Lastly, Bongon argues that Boyd did not violate the in limine order because she did not suggest the miscarriage was *caused* by or related to Bongon's work-related emotional distress. Bongon forgets, however, that the in limine order precluded *any* reference to the miscarriage. Moreover, as explained *ante*, Boyd *did* suggest the miscarriage was due to Bongon's work, since the context of her questions was the distress Bongon suffered at work due to Navarra's alleged conduct.

b. Boyd's "I Felt It" Comment

In its specification of reasons for granting the new trial, the court described the context of Boyd's second instance of misconduct as follows: "On cross-examination, Boyd initiated her own demonstration with Navarra, which began with the inelegant remark, 'You couldn't possibly rub your penis on me like that, could you?' for which she was admonished by the Court. [Citation.] Boyd then proceeded to sit in the chair, while Navarra stood to her right. Boyd instructed Navarra to assume that Plaintiff's mouse was on the *left* side of Plaintiff's computer monitor, contrary to photographs of Plaintiff's workstation. Boyd then asked Navarra: 'When you [bent over, imitating your position during the penis-rubbing incident] from this direction, you could touch my thigh with your crotch area, couldn't you?' [Citation.] Navarra responded, 'That's a possibility.' [Citation.] Apparently unsatisfied with Navarra's response, Boyd stated, '*I felt it.*' [Citation.] The Court immediately admonished Boyd, declaring '[t]here is no evidence of what you felt, Ms. Boyd,' and threatened her with 'some form of sanction that will be sufficient to convince you to desist from this kind of commentary.' [Citation.] The jury was then admonished to disregard Boyd's statement. [Citation.] No objection was made by Defense counsel due to the instantaneous admonition by the Court."

The court continued: "The Court finds, however, that Boyd's deliberate, self-serving tactic was not likely to have been sufficiently cured by the admonition. The jury viewed the demonstration from a vantage point in the jury box to the *right* of the chair, so

that Navarra's back was to them, rendering most of them unable to see whether actual conduct of any kind occurred. Accordingly, hearing Boyd confirm the results of her demonstration to her own liking by stating 'I felt it' could have easily led the jury to believe that her demonstration resulted in Navarra's penis or crotch area touching Boyd. This result, under almost any but the most contrived circumstances, was wholly improbable. Given the importance of this event to Plaintiff's claims, the Court finds that it is reasonably probable Defendants were prejudiced by Boyd's conduct. Considered with Boyd's two references to facts explicitly excluded by a motion in limine, the combined effect is that Defendants were likely prevented from obtaining a more favorable result at trial."

Bongon argues that the court committed error for a number of reasons, none of which we find convincing. First, she contends Boyd's "I felt it" exclamation was not prejudicial misconduct because it was "true," as shown by Navarra's own testimony: "Q. Mr. Navarra, when you did the demonstration with me, did you—were you—did you come in contact with my body? [¶] A. Yes, there was body contact." However, that testimony said nothing about his *penis* coming in contact with Boyd. (Previously, Navarra had said it was merely a "possibility" that Boyd had contact with his crotch area.) The "truth" of Boyd's statement was therefore not established. In any event, whether or not it was true that Boyd "felt it," she acted improperly by announcing it aloud to the jury as if testifying, and by vouching for a purported fact that the jury could not assess due to its position in the courtroom.

Next, Bongon argues that Boyd's "I felt it" comment was unimportant since the defense did not object or request a curative instruction or sanction. However, that was because the court acted promptly on its own, warning Boyd and admonishing the jury before the defense had a chance to make a request. As the court noted, "No objection was made by Defense counsel *due to the instantaneous admonition by the Court.*" (Italics added.)

Bongon further claims that Boyd's "I felt it" remark was not prejudicial because Boyd could have alternatively said, "Let the record reflect that there was physical

contact between the witness and myself.” But that just confirms the impropriety of Boyd’s comment: Boyd did *not* make such a request, but instead affirmatively declared “I felt it.” If she had asked for the record to reflect physical contact, her request may or may not have been granted; but it would not have indicated that Navarra’s *penis* touched Boyd, which is what Boyd intimated when she said “I felt it” after asking Navarra whether his “crotch area” had touched her thigh.

Lastly, Bongon suggests Boyd’s conduct was not prejudicial because there was an evidentiary basis for the desk configuration she used during her demonstration. Again, however, Bongon misses the point. Boyd was not sanctioned for the way she configured the demonstration; to the contrary, the court allowed Boyd to conduct her demonstration using the configuration she chose. Instead, the court took issue with Boyd’s “I felt it” statement, finding it unduly prejudicial because the jury could not see the area of the alleged contact for itself.

In light of the critical importance of the alleged penis-rubbing incident in the case, and the disputed evidence as to whether the incident occurred, the court did not abuse its discretion in concluding that Boyd’s “I felt it” comment constituted prejudicial misconduct. (See *Garden Grove*, *supra*, 63 Cal.2d at pp. 143-144 & fn. 1 [misconduct where counsel, among other things, referred to facts not in evidence, made representations of fact, and alluded to his personal knowledge]; see also *People v. Wagner* (1975) 13 Cal.3d 612, 619-620 [misconduct where prosecutor asked questions suggesting he was aware of facts that were not in evidence].)

c. Collective Prejudice

The trial court was in a unique position to gauge the impact of Boyd’s questions and “I felt it” remark. From this vantage point, the court concluded that these incidents collectively created such prejudice that Kaiser and Navarra likely would have obtained a more favorable result if the misconduct had not occurred: by her questions, Boyd insinuated to the jury that Bongon was hospitalized, perhaps due to her miscarriage; and by her “I felt it” remark, Boyd insinuated that she felt Boyd’s crotch and, therefore,

Bongon's account of this incident was true. Boyd fails to establish an abuse of discretion. (See *Malkasian, supra*, 61 Cal.2d at pp. 748-749 [new trial order will be upheld on appeal, even if the misconduct is ostensibly minor and the ground is a debatable one, because all due weight must be given to the trial court's expressed opinion that there was a miscarriage of justice].) Bongon therefore fails to show that the court improperly granted a new trial on the basis of attorney misconduct.

2. Weight of the Evidence

To prevail on her claim of a hostile work environment based on sexual harassment, Bongon had to prove the harassment was “ ‘severe enough or sufficiently pervasive to alter the conditions of employment and create a work environment that qualifies as hostile or abusive to employees because of their sex.’ ” (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1043 (*Hughes*)). And Bongon had to show not only that she subjectively perceived a hostile work environment, but that a reasonable person in her position, under the totality of the circumstances, would have shared her perception. (*Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 283-284 (*Lyle*)).

The trial court concluded that, based on the clear weight of the evidence, there was no severe or pervasive sexual harassment that gave rise to a subjectively and objectively hostile work environment. We must affirm the order unless “there is no substantial basis in the record” for the court's reasoning. (Code. Civ. Proc., § 657; *Lane v. Hughes Aircraft Co.* (2000) 22 Cal.4th 405, 412.)

a. Court's Reasons for Concluding Verdict Was Against the Evidence

As a threshold matter, the court found that Bongon was not a credible witness: “Weighing the whole of her testimony for its internal consistency, for its material shifts in substance from one point to another in the record, for its consistency with the testimony of other witnesses (both those who testified in her behalf and those arrayed against her), for the demeanor she displayed while testifying, and for its inherent improbability, the Court cannot find Plaintiff's testimony to be credible.” Accordingly,

the court gave little weight to Bongon's account of what occurred or her testimony that she was uncomfortable, frightened, or repulsed by what Navarra allegedly did.

The court then went through each of Navarra's allegedly harassing acts and found the evidence insufficient to support Bongon's assertions: the winking or staring, if it occurred, did not bother Bongon, in light of her failure to raise the issue before the second day of her deposition; Navarra's questioning of Modjaver was due to his managerial obligation to ensure productivity in the workplace; Bongon's testimony that she felt the "You Are Loved" pin inappropriate was "wholly undercut by her previous statements" in support of her workers' compensation claim and other evidence; Navarra's "missed you" email was not intended to sexually harass Bongon; Navarra did not act inappropriately in asking, as Bongon's supervisor, for her home address and telephone number; Bongon's version of the penis-rubbing incident was not believable in light of their physical locations at the time of the incident, Bongon's descriptions of the matter to Kaiser and to her therapist, the demonstration conducted by Kaiser's attorney, and the fact that the demonstration by Bongon's attorney assumed without foundation that the mouse was situated on Bongon's left side; Navarra's crude joke did not involve Bongon and was not directed toward her; his denial of the manicure reference and tape incident was more credible than Bongon's assertion that they occurred; and the weight of the evidence was contrary to Bongon's claim that she was offended and scared when Navarra held paper in front of his crotch.

The court concluded: "Taken together, the evidence weighs heavily against each and every one of Plaintiff's claimed 'incidents of sexual harassment.' Even if some of the charges against Navarra could be credited, and the Court finds that none can, the Court would be bound to conclude that they are insufficiently severe or pervasive to support a verdict for severe or pervasive conduct constituting sexual harassment.

[Footnote with citations omitted.]"

b. Substantial Basis for the Court's Reasons

Substantial evidence—indeed, the evidence the trial court cited in its specification of the reasons for its ruling—supported the court's findings that Bongon was not a credible witness and that Navarra's alleged acts did not constitute severe or pervasive sexual harassment causing a hostile work environment. Bongon's arguments to the contrary are meritless.⁷

First, Bongon argues that the court's statement of reasons so intertwined the trial evidence with Boyd's misconduct that the two cannot be separated. Bongon is incorrect. The court discussed its two grounds for the new trial order under separate headings. Under the heading referring to the weight of the evidence, the court set forth the basis for its ruling with reference to Bongon's lack of credibility and with citation to evidence which, it concluded, demonstrated the falsity of Bongon's claims. Even when it discussed Boyd's demonstration of the penis-rubbing incident, the court explicitly separated its evidentiary analysis from Boyd's misconduct: "*Misconduct aside*, and in light of the aforementioned evidence to the contrary, Plaintiff's demonstration of this event, elicited on cross examination of Navarra, is not credible." (Italics added.)

Second, Bongon contends the court mischaracterized the penis-rubbing demonstration because there was evidence to support Boyd's configuration of Bongon's desk area. However, Bongon ignores the fact that Boyd's demonstration departed from Bongon's sworn deposition testimony describing how the incident occurred. She also ignores the fact that the court rejected the defense version of the penis-rubbing incident for reasons besides the configuration by Boyd at trial: the court found that "body

⁷ Bongon's opening brief fails to address the court's finding that she was not a credible witness, fails to set forth fairly the evidence that supports the court's findings, and fails to explain *why* the evidence was insufficient to support the court's conclusions concerning the weight of the evidence. She has therefore waived or forfeited her challenge to the new trial order on this ground. (See, e.g., *Myers v. Trendwest Resorts, Inc.* (2009) 178 Cal.App.4th 735, 749 [failure to recount evidence in support of verdict precludes substantial evidence challenge to denial of JNOV].) Nevertheless, we will review the order on the merits, based on the arguments Bongon does make.

mechanics” alone made it improbable that Navarra would have been able to rub his penis on Bongon while leaning over her workstation; Bongon’s initial reports of the incident did not mention any penis rubbing; and Bongon’s testimony at trial was not credible. There was a substantial basis in the record for the trial court’s ruling.

The court did not err in granting a new trial.

B. Judgment Notwithstanding the Verdict

In deciding whether to grant JNOV, the trial court employs a different standard than the one it applies in deciding whether to grant a new trial. Rather than weighing the evidence and judging the credibility of the witnesses, the court must view the evidence in the light most favorable to the prevailing party, and then determine if there is substantial evidence to support the jury’s verdict. (*Clemmer v. Hartford Ins. Co.* (1978) 22 Cal.3d 865, 877-878.) If the verdict is supported by substantial evidence, JNOV must be denied. Because the standards for granting a new trial and granting JNOV differ, the trial court may properly conclude that a new trial is appropriate but JNOV is not. (*Jones v. Evans* (1970) 4 Cal.App.3d 115, 121.)

1. Court’s Ruling

In explaining its denial of JNOV, the court stated: “Indulging in every inference to support the verdict, the Court cannot conclude that there is no substantial evidence to support the jury’s finding that this conduct constituted actionable sexual harassment. In addition, varying accounts as to this evidence, as testified to by trial witnesses, make JNOV inappropriate.” For example, the court noted, there were significant conflicts in the evidence regarding the penis-rubbing incident, and although the court found Bongon not to be credible, it would not be unreasonable for a trier of fact to conclude that what Bongon was saying was true. The court then identified what it found to be substantial evidence of sexual harassment, assuming the trier of fact believed Bongon’s account: Navarra’s winking and staring at her, his statements regarding Modjaver, the “missed you” email and “You Are Loved” pin, Navarra’s repeated requests for Bongon’s home address and telephone number, his statements regarding her hands and buying her a

manicure, and the penis-rubbing incident. There was, therefore, a plausible foundation to conclude that a reasonable person in Bongon's circumstances would consider her work environment hostile or abusive. In addition, the court noted, Bongon testified that these actions affected her "quite a bit" and she became antisocial, cried every night, did not go out, and no longer attended church regularly.

We review an order denying JNOV for substantial evidence supporting the trial court's conclusion. (*Hauter v. Zogarts* (1975) 14 Cal.3d 104, 110.)

2. Substantial Evidence

Substantial evidence supports the trial court's conclusion. Although there was evidence from which a jury could conclude that Bongon's account of the events was not credible, the evidence did not *preclude* the jury from believing Bongon's account as a matter of law; and if the jury did believe Bongon's account—including the penis-rubbing incident—it could reasonably conclude that the totality of the incidents demonstrated severe or pervasive sexual harassment from an objective as well as subjective standpoint.

Kaiser nonetheless contends it was entitled to JNOV because, even assuming the incidents Bongon alleged had occurred as she described, they do not constitute substantial evidence of sexual harassment that was severe or pervasive.

a. Severe Harassment

Kaiser argues that not even the penis-rubbing incident could constitute "severe" harassment because "a single incident must be severe in the extreme and generally must include either physical violence or the threat thereof." (Quoting *Herberg v. California Institute of the Arts* (2002) 101 Cal.App.4th 142, 151, cited in *Hughes, supra*, 46 Cal.4th at p. 1043.) Kaiser notes that the incident purportedly occurred in the office in Shauf's presence, and Navarra did not grab Bongon's breast or crotch, try to undress her, place his hand under her clothing, or do anything that could have caused her reasonably to fear for her safety or believe a sexual assault was imminent.

Kaiser's argument is unpersuasive. First, as the trial court observed, *Hughes* did not dictate that severe harassment based on a single incident *must* involve an actual or

threatened physical assault, but merely noted that an actual or threatened physical assault was an *example* of potentially severe harassment. (*Hughes, supra*, 46 Cal.4th at pp. 1043, 1049.) Second, even if an actual assault were required, we question whether a supervisor rubbing his erect penis twice against a female employee’s body, without her consent, might not satisfy that requirement. And third, if the jury found Bongon’s version of the penis-rubbing incident credible, the overt and aggressive sexual nature of that incident could lead the jury to believe that Navarra’s other conduct had a sexual overtone as well. Taking all the incidents together—and viewing them in the light most favorable to the verdict—Kaiser fails to convince us that the conduct could not be found sufficiently severe as to create a hostile work environment.⁸

b. Pervasive Harassment

Kaiser asserts, essentially, that none of Bongon’s claimed incidents constitutes sexual harassment and, therefore, collectively they cannot constitute pervasive sexual harassment as a matter of law. (*Haberman v. Cengage Learning, Inc.* (2009) 180 Cal.App.4th 365, 383-385 [affirming grant of summary judgment after analyzing each of 13 statements and concluding that some were not based on sex and others constituted occasional and trivial events rather than a concerted pattern]; *Lyle, supra*, 38 Cal.4th at pp. 283-284 [an employee generally cannot recover for harassment that is occasional, isolated, sporadic, or trivial, and where no loss of tangible job benefits has occurred, the

⁸ In this regard, the cases on which respondents rely are distinguishable. Some of them, including *Hughes*, did not involve an employment context in which an employee was allegedly touched in a sexual manner by a supervisor. (*Hughes, supra*, 46 Cal.4th at pp. 1039-1040.) Other cases involved only a single incident or fewer and different incidents than the ones Bongon alleged. (E.g., *Del Valle Fontanez v. Aponte* (D.P.R. 1987) 660 F.Supp. 145, 146-149 [no severe or pervasive sexual harassment even if, as plaintiff asserted, her supervisor called her to his office, locked the door behind her, and pressed her against the door so that she felt his erect penis pressing against her body, and seconds later forced himself upon her again despite her protest]; *Flowers v. Federal Express Corp.* (D. Colo. Jan. 18, 2008, No. 06-cv-01010) 2008 U.S. Dist. Lexis 4077, pp. *3-11 [no severe or pervasive sexual harassment where plaintiff alleged that her supervisor pressed up against her with an erection and, in a separate incident, grabbed her thigh for a few seconds].)

plaintiff “must make a ‘commensurately higher showing that the sexually harassing conduct was pervasive and destructive of the working environment’ ”.)

Specifically, Kaiser contends Navarra requested Bongon’s personal contact information merely to comply with Kaiser’s policies, and there was no evidence that he attempted to contact her for any reason unrelated to work; Navarra’s “missed you” email was a common pleasantry without any sexual innuendo; Navarra’s inquiry about Modjaver arose out of his observation that his visits were disruptive; Navarra’s use of the “F-word” had no sexual connotation, and his joke about using his cell phone to take a picture under his mother’s skirt was not aimed at Bongon; Navarra’s gift of the “You Are Loved” pin was not sexual or romantic; his approach with paper in front of his crotch had no evident sexual connotation; and his winking, staring, commenting on Bongon’s hands, and trying to affix tape on her shoulder were mere annoyances. (*Lyle, supra*, 38 Cal.4th at pp. 282-283 [“annoying or ‘merely offensive’ comments in the workplace are not actionable,” and neither is the use of “crude or inappropriate language in front of employees” unless “sexual innuendos or gender-related language [is directed] toward a plaintiff or toward women in general”]; see *Mokler v. County of Orange* (2007) 157 Cal.App.4th 121, 145-146 [nonsupervisor’s three acts—a brazen request for plaintiff’s home address and “isolated but boorish comment” about her marital status, an effort to pull the plaintiff to him, and on another occasion touching her breast with his arm—did not prove sexual harassment].) Furthermore, Kaiser adds, Bongon’s speculation about Navarra’s motive cannot constitute substantial evidence supporting the verdict. (See *Gherman v. Colburn* (1977) 72 Cal.App.3d 544, 582 [testimony about another person’s state of mind would have been speculative, incompetent, and irrelevant].)

Again, however, if the trier of fact found Bongon credible, and believed that Navarra twice rubbed his erect penis against her in the workplace as she claimed, the trier of fact could also conclude that these other incidents not only occurred, but had a sexual connotation. As the trial court set forth in its specifications of reasons for its order, these events could be construed to be part of a pattern of sexual harassment that a trier of fact might reasonably conclude to be a hostile work environment.

Lastly, Kaiser argues there is an independent basis for holding that several of the alleged incidents cannot support the verdict: Bongon did not complain about them when they occurred or, in some instances, even during the first phases of discovery. Bongon's harassment complaint to Kaiser in May 2009 included the penis-rubbing incident, his comment on her hands, and holding a report in front of his groin. But it did not include Navarra's request for her personal contact information, winking and staring, trying to put tape on her shoulder, asking whether she was dating Modjaver, the "F-word" story, the "missed you" email, or the "You Are Loved" pin. Furthermore, Bongon represented in discovery that the alleged harassment began with the penis-rubbing incident on January 30, 2009, thus excluding the "missed you" email, the "You Are Loved" pin, and Navarra's inquiry about whether she was dating Modjaver. Kaiser insists that Bongon's failure to mention these incidents is evidence that she was not bothered by them and they did not create an abusive working environment.

The fact that Bongon did not mention these incidents, however, goes primarily to her credibility—whether the events occurred as she recounted and, if so, how she perceived and felt about them. And those issues are for the trier of fact. Although her omission of these incidents from her complaint to Kaiser might lead a jury to reject her account, it does not *preclude* a jury, as a matter of law, from deciding there were a sufficient number of incidents as to constitute severe or pervasive sexual harassment creating a hostile work environment.

Respondents fail to establish that the court erred in denying JNOV.

C. Attorney Fees

Bongon contends the court erred in awarding respondents attorney fees, pursuant to California Rules of Court, rule 2.30 (rule 2.30), in connection with her late opposition to respondents' summary judgment motion.

1. Background

Respondents filed their summary judgment motion on March 8, 2012, and Bongon's opposition was due on May 8, 2012. Bongon filed an opposition on May 8,

but three days later served an amended opposition and a notice that she would seek an ex parte order continuing the summary judgment hearing to accommodate the service of her corrected opposition. For a few days beginning on May 9, however, respondents' attorneys prepared their reply papers based on Bongon's May 8 opposition, because they could not predict whether the court would allow Bongon's amended opposition. As it turned out, the court allowed Bongon to file her amended opposition by May 18. But the court also stated in its order: "The Court notes that counsel for Defendants allegedly have already spent a considerable number of hours preparing the Reply papers due on May 17, 2012. Defendants are *hereby granted leave to seek reimbursement of the attorney's fees and costs* incurred in the preparation of the Reply papers." (Italics added.) Bongon thereafter filed her amended opposition.

2. Respondents' Motion for Attorney Fees

In October 2012, after the jury verdict and the order granting a new trial, respondents filed a motion seeking \$15,100 in attorney fees incurred due to the scheduling change Boyd requested and her amended opposition to the summary judgment motion. Respondents based their motion on rule 2.30 and the court's prior order granting leave to seek reimbursement for their attorney fees. They argued that a continuance of a summary judgment hearing would ordinarily have to be sought by the time the opposition was due (citing Code Civ. Proc., § 437c, subd. (h)), Boyd did not seek a continuance until days after that deadline, respondents' attorneys meanwhile worked on responding to the original opposition, and those efforts were "wasted due to significant differences between the [memorandum of points and authorities] used in support of each version" of Bongon's opposition.

Bongon opposed the motion, contending the court had no authority to award the attorney fees as a sanction, and the evidence did not support it.

In reply, respondents argued that subdivision (h) of Code of Civil Procedure section 437c (section 437c) permits a court to make an order continuing a hearing on a motion for summary judgment conditional on such terms "as may be just." In addition,

the court has authority to require a party who filed a declaration in bad faith or solely for delay to pay the opposing parties' reasonable expenses. (§ 437c, subd. (j).) Respondents urged that rule 2.30 authorized sanctions for Boyd's failure to follow the rules of court, including rule 3.1300 (requiring that moving or supporting papers be served and filed in accordance with Code of Civil Procedure section 1005 unless otherwise provided by law), and section 437c, subdivision (b)(2) requires that an opposition to a summary judgment motion be filed 14 days before the hearing.

The court granted respondents' motion by written order, which stated Bongon and Boyd "are to reimburse Defendants pursuant to Rule 2.30 of the California Rules of Court in the amount of \$15,100.00 representing the amount of reasonable attorneys fees incurred by Defendants in responding to Plaintiff's opposition to Defendants' Motion for Summary Judgment."

3. Analysis

Bongon contends the court erred, primarily because there is no lawful basis for awarding the attorney fees under rule 2.30, and the court's order does not cite any statutory authority for such a sanction. Respondents now concur, in light of a decision issued *after* the court's order. (*Sino Century Development Limited v. Farley* (2012) 211 Cal.App.4th 688, 691 (*Sino*) [authority to award "reasonable monetary sanctions" under rule 2.30(b) for violation of a rule does not authorize compensation of attorney fees incurred as a result of the violation].)

Although we will vacate the court's order, we will remand the matter for the court to consider several issues. First, *Sino* concluded that "[a]ttorney fees cannot be imposed as a monetary *sanction* for attorney misconduct *without specific statutory authorization (or an agreement of the parties)*." (*Sino, supra*, 211 Cal.App.4th at p. 694, italics added.) Here, unlike *Sino*, respondents brought their motion not solely under rule 2.30, but also pursuant to the terms of the court's previous order continuing the summary judgment hearing, which explicitly ruled that respondents were "*hereby granted leave to seek reimbursement of the attorney's fees and costs incurred in the preparation of the*

Reply papers.” (Italics added.) After the court issued this ruling, Bongon accepted its benefits by filing her amended opposition. Moreover, respondents suggested in the trial court that recovery for their attorney fees might be warranted under certain provisions of section 437c. Although section 437c does not expressly refer to an award of attorney fees as sanctions—and we do not opine whether section 437c does, in fact, authorize the award of attorney fees in these circumstances—the court may consider on remand whether there is any specific statutory authorization or agreement of the parties that would support the award of attorney fees.

Second, although rule 2.30(b) does not authorize full compensation of attorney fees incurred as a result of a rules violation, the fact remains that rule 2.30(b) does authorize “reasonable monetary sanctions.”⁹ Bongon does not establish that respondents cannot recover reasonable monetary sanctions as a matter of law; this too is a matter the court may consider on remand.

Third, as respondents argue, *Sino* confirmed that the court may order the person who violated the rules to pay the aggrieved party’s “reasonable expenses, including reasonable attorney’s fees and costs, incurred in connection with the motion for sanctions.” (Rule 2.30(d); *Sino, supra*, 211 Cal.App.4th at pp. 697-699.) Respondents urge that we remand so the court can consider imposing a sanction in the amount of the fees and costs they incurred in *bringing* their motion for attorney fees. Although respondents did not request this relief initially in the trial court, we conclude that the interests of justice will be served if all parties, and the trial court, can start anew in addressing the relevant issues, particularly since *Sino* was decided after the parties briefed the motion and the court issued its ruling.

⁹ Rule 2.30(b) provides: “In addition to any other sanctions permitted by law, the court may order a person, after written notice and an opportunity to be heard, to pay reasonable monetary sanctions to the court or an aggrieved person, or both, for failure without good cause to comply with the applicable rules. For the purposes of this rule, ‘person’ means a party [or] a party’s attorney. . . . If a failure to comply with an applicable rule is the responsibility of counsel and not of the party, any penalty must be imposed on counsel and must not adversely affect the party’s cause of action or defense thereto.”

We also recognize that Bongon contends the court's order is erroneous for three other reasons: (1) it does not explicitly mention the precise conduct establishing the basis for the award (rule 2.30(e)); (2) it awarded "the amount of reasonable attorneys fees incurred by Defendants in responding to Plaintiff's opposition to Defendants' Motion for Summary Judgment," even though Kaiser had sought only "the amount of reasonable attorneys' fees accrued by Defendants responding to Plaintiff's *first* set of Reply papers" (italics added) and only the preparation of the first set of reply papers related to the alleged misconduct of the scheduling change; and (3) it imposed the attorney fees against Bongon as well as Boyd, even though there was no contention that Bongon was responsible for the summary judgment rescheduling or the amendment of the opposition papers (rule 2.30(b)). We do not decide these issues; the trial court may address them on remand to the extent appropriate.

III. DISPOSITION

The orders granting a new trial and denying judgment notwithstanding the verdict are affirmed. The order imposing \$15,100 as attorney fees or sanctions under rule 2.30 of the California Rules of Court is vacated, and the matter is remanded for further consideration of respondents' request for attorney fees and sanctions consistent with this opinion. Each party shall bear its own costs on appeal.

NEEDHAM, J.

We concur.

SIMONS, Acting P.J.

BRUINIERS, J.