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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

BELINDA JACKSON,

Plaintiff and Appellant,

v.

CORINTHIAN COLLEGES, INC.,

Defendant and Respondent.

B254015

(Los Angeles County  
Super. Ct. No. SC116601)

APPEAL from a judgment of the Superior Court for Los Angeles County,  
Rafael A. Ongkeko, Judge. Affirmed.

Law Offices of Zulu Ali, Zulu Ali and Maleha Khan-Avila for Plaintiff and  
Appellant.

Payne & Fears, Jeffrey K. Brown and Robert T. Matsuishi for Defendant and  
Respondent.

Plaintiff Belinda Jackson filed a complaint against defendant Corinthian Colleges, Inc. (Corinthian) and others arising from an incident in which an instructor at a Corinthian-owned college where Jackson was a student allegedly grabbed Jackson's breast. The trial court granted Corinthian's motion for summary judgment on the only cause of action alleged against it, for negligent hiring. Jackson appeals, contending there is a triable issue of material fact as to whether Corinthian breached its duty, and also arguing that the trial court abused its discretion by denying Jackson's requests for a continuance and for leave to file an amended complaint. We affirm the judgment.

## **BACKGROUND**

Corinthian, a private, for-profit post-secondary education company, operates the West Los Angeles campus of Everest College, where Jackson was enrolled in the medical assistant program. The incident at issue in this case took place at that campus.

According to Jackson, on the morning of June 6, 2011, she was sitting in a classroom, waiting for her class to begin. There were two other students in the classroom. Her instructor, Dr. Ahmed Khourshed, entered the classroom, approached her desk, and placed his hand on her breast. Jackson grabbed Khourshed's wrist and removed his hand. Khourshed smiled and walked to his desk to wait for the other students to arrive.

At least a week later, Jackson reported the incident to two Corinthian employees who worked in the career services department. After speaking with those employees, Jackson called the police to report the incident. Jackson attended class while she waited for the police to arrive, but before they arrived someone came to the classroom and asked her to go the office of Corinthian's director of education, Veronica Tarango. The police arrived shortly after Jackson went to

Tarango's office. Jackson described the incident to both Tarango and the police officers, and provided a written statement to Tarango. Jackson gave Tarango and the officers the names of the two students who witnessed the incident, and Tarango gave the officers the information about Khourshed that they requested.

Corinthian immediately placed Khourshed on administrative leave. Lynn Westerfield, the Regional Human Resources Manager for Corinthian, conducted an investigation, and Khourshed was terminated less than two weeks later. Jackson graduated on time from Corinthian's medical assistant program on April 20, 2012, about 10 months after the incident with Khourshed, and found employment in the medical field immediately following her graduation.

On April 4, 2012, Jackson filed the instant lawsuit against Khourshed, Corinthian, and Everest College West Los Angeles Campus (Everest).<sup>1</sup> She alleged four causes of action against Khourshed (assault, battery, sexual battery, and intentional infliction of emotional distress) and a single cause of action against Corinthian for negligent hiring. Attached to the complaint were the declarations of the two students who witnessed the incident, Sabrina Butler and Alessandro Dinuzzo. Each student described what they saw, and each stated that he or she learned a few weeks after the incident that Khourshed no longer worked at Everest. In addition, Dinuzzo stated that he saw Khourshed act strangely when a certain female student (not Jackson) left the class and when her name later was mentioned, and that Khourshed always appeared to favor his female students more than his male students.

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<sup>1</sup> According to language in the judgment in this case, Everest is not a separate entity, but is a dba of Corinthian.

Jackson did not serve Khourshed with the summons and complaint. Jackson filed her proof of service on Corinthian on June 4, 2012, and Corinthian filed its answer to the complaint on June 28, 2012. Trial was set for June 18, 2013.

Corinthian completed its written discovery in early November 2012, and took Jackson's deposition in January 2013. Jackson did not propound any written discovery until March 6, 2013, when she served Corinthian with form interrogatories and a demand for production of documents. On March 11, 2013, she served on Corinthian a notice of deposition of the person most knowledgeable (PMK) for Corinthian, but she failed to specify in the notice the matters on which examination was requested, as required by Code of Civil Procedure<sup>2</sup> section 2025.230. Corinthian immediately objected to the deposition notice for its failure to comply with section 2025.230, and explained that without such a description of the matters on which examination was requested, Corinthian could not determine who was most qualified to testify. Corinthian also stated that it would cooperate in scheduling the deposition once Jackson served an amended notice that complied with section 2025.230. When no amended deposition notice was served, counsel for Corinthian contacted Jackson's counsel in late March 2013, and again in late April.

The amended notice finally was served, and the parties agreed to a date for the deposition on July 18, 2013 (i.e., a month after the original trial date). On May 16, 2013, the parties filed a joint stipulation asking the trial court to continue the trial date by at least 100 days, and order that any motion under section 437c be filed and served not less than 30 days before date set for hearing the motion, with

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<sup>2</sup> Further undesignated statutory references are to the Code of Civil Procedure.

the hearing on the motion no later than 15 days before the continued trial date.<sup>3</sup> The trial court granted their request in full, and continued the trial to October 4, 2013.

On July 17, 2013 -- the day before the scheduled deposition of Corinthian's PMK -- Corinthian's counsel was informed that the deposition could not go forward because Jackson's counsel was ill. Corinthian's counsel asked Jackson's counsel to propose dates for the continued deposition, and Jackson's counsel proposed five dates in August (August 1, 2, 7, 13, or 15). The parties agreed to conduct the deposition on August 15.

On August 2, 2013, Corinthian filed its motion for summary judgment, with a hearing date of September 3. The evidence Corinthian submitted in support of its motion included the declaration of Lynn Westerfield, who stated, among other things, that Corinthian never received any complaints from its students or employees (other than Jackson) regarding any sexually inappropriate conduct by Khourshed, and that Corinthian was never aware of any criminal history of Khourshed that would suggest he would sexually assault any of Corinthian's students or employees. Corinthian also submitted excerpts of Jackson's deposition testimony in which Jackson admitted that she does not have any evidence regarding whether Khourshed engaged in any sexual harassment, assault, battery, or any other wrongdoing before he was hired by Corinthian, whether Corinthian was aware that Khourshed was unfit in any way for the position he held, or whether any other student or employee complained to Corinthian about Khourshed

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<sup>3</sup> Apparently, the case was assigned originally to Department J in the Santa Monica courthouse, and was reassigned on March 29, 2013 to Department 92 of the Stanley Mosk courthouse. The parties stated that they had not received any further communications from the Superior Court and, despite their best efforts, they had been unable to obtain any information regarding the identification of the trial judge or any rules governing pretrial procedures in that department.

engaging in sexually inappropriate conduct.<sup>4</sup> Corinthian's separate statement of undisputed material facts in support of its motion for summary judgment included facts supported by this evidence.

In her opposition to Corinthian's motion, Jackson argued, among other things, that the motion should be denied or continued because she needed to conduct further discovery. She noted that the deposition of Corinthian's PMK needed to be rescheduled due to Corinthian's cancellation of the deposition for good cause.<sup>5</sup> She also argued that she needed to serve Khoureshed with the complaint, obtain discovery from him, conduct a criminal background check on him, propound discovery regarding Corinthian's contractual agreement with its students, and obtain written depositions of Khoureshed's former employers, certain Corinthian employees, and former classmates of Jackson. Although Jackson cited to section 437c, subdivision (h) and its requirement of an affidavit to support a party's request for a continuance of a summary judgment motion, the affidavit Jackson filed failed to comply with the requirements of that subdivision. (See, e.g., *Roth v. Rhodes* (1994) 25 Cal.App.4th 530, 548 [to comply with the statute, there must be a "statement which suggests what facts might exist to support the opposition to the motions"].)

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<sup>4</sup> Corinthian acknowledged that Jackson testified that she had made a complaint related to Khoureshed text messaging with another student in class, and that her classmate Dinuzzo had complained to Corinthian that Khoureshed gave preferential treatment to female students.

<sup>5</sup> The deposition had been scheduled to take place on August 15, 2013 -- four days before Jackson's opposition was to be filed -- but Corinthian had to cancel it on August 13 after the PMK's father had a stroke. Counsel for Corinthian offered to continue the hearing date for the motion and/or continue the hearing date and trial date, but Jackson's counsel never provided any draft stipulation or joint ex parte applications to obtain a continuance from the trial court.

Jackson also filed a separate statement in opposition to the summary judgment motion. Jackson purported to dispute each of Corinthian's facts related to Corinthian's lack of knowledge of, or Jackson's admissions that she did not have any evidence of, prior sexual wrongdoings by Khourshed, and Corinthian's lack of knowledge of Khourshed's unfitness or other student or employee complaints about Khourshed engaging in sexually inappropriate behavior. As to all of those purportedly disputed facts, Jackson stated that the deposition of Corinthian's PMK was canceled for good cause and was in the process of being rescheduled, and that other discovery "is continuing."

On September 3, 2013 -- the date of the hearing on the summary judgment motion -- Jackson filed an ex parte application for an order continuing the hearing. Like the previous affidavit filed in support of her opposition to the summary judgment motion, the affidavit filed in support of her ex parte application also failed to comply with section 437c, subdivision (h). Nevertheless, the trial court continued the hearing on the summary judgment motion to October 9, 2013, and continued the trial date to November 1, 2013. Counsel for Jackson did not contact Corinthian's counsel to propose dates for the PMK deposition for more than two weeks after the September 3 hearing. The parties ultimately agreed to, and did, conduct the deposition on the afternoon of October 1, although there was some dispute about whether the examination was ended prematurely by Corinthian.

It appears that the trial court provided a tentative decision to the parties granting the summary judgment motion on October 7, 2013. Counsel for Corinthian emailed a copy of the tentative decision to Jackson's counsel on that date, and asked if Jackson intended to submit on that tentative decision. Counsel for Jackson indicated that Jackson would not submit on the tentative, and stated that Jackson intended to ask the trial court to continue the motion because the deposition of Corinthian's PMK had not been completed. On October 9, the date

of the scheduled hearing, Jackson filed another ex parte application for an order continuing the summary judgment hearing. The papers filed in support of and in opposition to the ex parte application include declarations by counsel accusing counsel for the other party of acting improperly regarding the deposition.

The trial court continued the hearing on the summary judgment motion to November 26, 2013. The court also ordered Jackson to immediately present to Corinthian appropriate dates for the continued deposition of Corinthian's PMK, and ordered that any opposition to the summary judgment motion be filed and served within 10 days after the completion of the deposition, with the reply to that opposition due within seven days after service of the opposition. Finally, the court ordered that no further continuances of the hearing on the motion would be issued, and ordered the parties to meet and confer to select appropriate dates to continue the final status conference and the trial date, and to file a joint stipulation with those selected dates.

The continued deposition of Corinthian's PMK was completed on November 4, 2013, and Jackson filed her further opposition to the summary judgment motion on November 12. Citing certain testimony from the PMK deposition, Jackson argued in her opposition that Corinthian's discovery responses were incomplete and insufficient, and that the PMK was inadequate because she had no personal knowledge of the circumstances surrounding the hiring of Khourshed in 2000 because she had not joined Corinthian until 2008. Therefore, she requested another continuance of the hearing, so there could be an investigation to find a different PMK with knowledge of Khourshed's hiring and of other student complaints about Khourshed, and also to allow her to depose the chair of the medical assistant program. In addition, Jackson argued that summary judgment should be denied because there were triable issues of fact as to whether Corinthian owed its students a duty "to employ reasonable steps to address student

complaints and maintain[] faculty personnel files,” and whether Corinthian had notice of Khourshed’s sexually deviant behavior with female students. Finally, Jackson argued that she should be granted leave to amend her complaint to add new causes of action for negligent infliction of emotional distress, vicarious liability, and premises liability, all of which purportedly would be based upon discovery responses received from Corinthian’s PMK. Jackson did not file an amended separate statement with her further opposition.

The trial court denied Jackson’s request for a further continuance. The court found that the PMK deposition testimony that Jackson cited did not suggest what Jackson contended it suggested. The court also found that, in any event, there was no need to find a PMK with knowledge of whether Corinthian conducted a background check on Khourshed when it hired him because Jackson failed to show that a failure to conduct such a check would have been a breach of any duty Corinthian owed to Jackson. Finally, the court also found there was no evidence to suggest that the chair of Corinthian’s medical assistant program had any knowledge of any prior complaint of sexual assault by Khourshed.

Addressing the merits of the summary judgment motion, the trial court noted that Corinthian moved for summary judgment on three grounds: that there was no duty as a matter of law, that there was no breach, and that there were no damages. The court rejected the first ground, finding that Corinthian failed to meet its burden to establish that a school has no duty to prevent an unwanted sexual advance by one of its instructors toward an adult student. However, the court found that Corinthian met its burden as to the second ground, breach of duty, because it produced evidence that it had no knowledge that Khourshed might sexually assault a student (which could give rise to a duty to prevent such an assault), and that Jackson failed to produce any evidence to raise a triable issue. The court noted that Jackson’s evidence that she reported to Corinthian that Khourshed and another

female student text-messaged during class and that she believed Khourshed gave preferential treatment to that student does not show that Corinthian had knowledge of, or should have been on notice of, Khourshed's possible propensity to commit sexual assault.

Finally, the court denied Jackson's request for leave to amend her complaint. The court found that Jackson's request not only was procedurally infirm, but she failed to even discuss the merits of the proposed new claims. In any event, the court found that the proposed new claims could not survive summary judgment: the negligent infliction of emotional distress and premises liability claims required the elements of duty and breach, which the court found Jackson had no evidence to support, and vicarious liability could not be asserted under the circumstances of this case.

The court granted the motion for summary judgment, and entered judgment in favor of Corinthian. Jackson timely filed a notice of appeal from the judgment.

## **DISCUSSION**

On appeal, Jackson contends: (1) the trial court erred in granting summary judgment because there is a triable issue of material fact regarding whether Corinthian breached a duty it owed to her; (2) the trial court abused its discretion by denying her request for a continuance to conduct further discovery; and (3) the trial court abused its discretion by denying her request for leave to amend the complaint. None of these contentions has merit.

### *A. Merits of Summary Judgment Ruling*

In the trial court, a defendant moving for summary judgment must present evidence that one or more elements of the plaintiff's claim cannot be established or that there is a complete defense to the claim. If the defendant meets that burden of

production, the burden shifts to plaintiff to show that a triable issue of material fact exists as to that claim or defense. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) The plaintiff shows that a triable issue of material fact exists by pointing to evidence that would allow a reasonable trier of fact to find that fact in favor of the plaintiff. (*Ibid.*) If plaintiff fails to do so, the defendant is entitled to judgment as a matter of law.

On appeal from a summary judgment, we make “an independent assessment of the correctness of the trial court’s ruling, applying the same legal standard as the trial court in determining whether there are any genuine issues of material fact or whether the moving party is entitled to judgment as a matter of law.” (*Iverson v. Muroc Unified School Dist.* (1995) 32 Cal.App.4th 218, 222.) Like the trial court, we must strictly construe the moving party’s evidence and liberally construe the opposing party’s evidence, and we must consider all inferences favoring the opposing party that a trier of fact could reasonably draw from the evidence. (*Binder v. Aetna Life Ins. Co.* (1999) 75 Cal.App.4th 832, 838.)

In this case, as noted, Corinthian presented evidence that prior to Khourshed’s assault on Jackson it never received any complaints from its students or employees regarding any sexually inappropriate conduct by Khourshed, and was not aware of any criminal history of Khourshed suggesting a propensity to commit sexual assault. This evidence, if believed by the trier of fact, would negate an essential element of Jackson’s negligent hiring claim against Corinthian -- breach of a duty owed to Jackson by Corinthian. (See, e.g., *Federico v. Superior Court* (1997) 59 Cal.App.4th 1207, 1214 [“an employer’s duty . . . is breached only when the employer knows, or should know, facts which would warn a reasonable person that the employee presents an undue risk of harm to third persons”].) To defeat summary judgment, Jackson needed to present evidence sufficient to allow the trier

of fact to find in her favor on this element. (*Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at p. 850.)

In her opening brief on appeal, Jackson contends there was a triable issue of fact regarding whether Corinthian “breached its duty to prevent the unwanted sexual advances of one of its teacher towards [Jackson], an adult student at [Corinthian’s] school, because [Corinthian] had knowledge of prior similar complaints or incidents.” But Jackson presented no evidence that any complaints of similar incidents had been made to Corinthian. Although she states in her opening brief that “Corinthian was informed on multiple occasions by students, including [Jackson], of Dr. Khourshed’s indiscretions,” her citation to the record is to her brief in opposition to the summary judgment motion, rather than to *evidence*. Moreover, to the extent she did present evidence of complaints made by students regarding Khourshed’s conduct, those complaints had to do with Khourshed text messaging with another student, and giving female students preferential treatment on tests. Those complaints are insufficient to put Corinthian on notice that Khourshed would sexually assault Jackson.<sup>6</sup>

Jackson’s citation to excerpts from the deposition testimony of Corinthian’s PMK do not assist her. She contends these excerpts -- which appear to have been taken out of context -- “expose . . . Corinthian’s clear negligent supervision and negligent investigation of serious complaints made by students,” and therefore

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<sup>6</sup> We note that in her appellant’s reply brief, Jackson argues Corinthian could be held vicariously liable for the sexual assault under a respondeat superior theory. Jackson did not, however, allege any such claim in her complaint; her only claim against Corinthian was for negligent hiring. In any event, the California Supreme Court has held that an employer cannot be held vicariously liable for a sexual tort committed by its employee when, as in this case, the employee’s “personal motivations [in committing the tort] were not generated by or an outgrowth of workplace responsibilities, conditions or events.” (*Lisa M. v. Henry Mayo Newhall Memorial Hospital* (1995) 12 Cal.4th 291, 302.)

raise a triable issue of fact precluding summary judgment. They do not, because there is no evidence that any “serious complaints” related to sexual misconduct were ever made to Corinthian. At best, the excerpts demonstrate only that there was some confusion (by both the questioner and the PMK) during the questioning of the PMK.

Jackson’s assertion in her appellant’s reply brief that on summary judgment “the court must assume the facts to be favorable for Ms. Jackson . . . [¶] [and may] only consider [whether] there is evidence to possibly conceive of meeting th[e] elements [of the cause of action],” demonstrates a misunderstanding of the standard on summary judgment. First, when the moving party presents evidence that negates an element of a cause of action -- such as Westerfield’s declaration stating that Corinthian had no knowledge of any similar complaints or incidents involving Khourshed -- and the opposing party does not present *evidence* to controvert the moving party’s evidence, the trial court ordinarily must accept the moving party’s evidence as true. (*Trujillo v. First American Registry, Inc.* (2007) 157 Cal.App.4th 628, 636.) The opposing party cannot seek to controvert the moving party’s evidence “based on speculation, imagination, guesswork, or mere possibilities.” (*Doe v. Salesian Society* (2008) 159 Cal.App.4th 474, 481; see also *Yuzon v. Collins* (2004) 116 Cal.App.4th 149, 163, 166.) Second, the duty of the court in ruling on a summary judgment motion is not, as Jackson argues, to determine if the opposing party’s evidence “may conceivably meet” the elements of the claim. Rather, it is to determine whether the evidence presented is sufficient to allow a reasonable trier of fact to find in favor of the opposing party. (*Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at p. 850.)

In this case, the trial court properly granted summary judgment because Corinthian presented evidence that it had no knowledge, and no reason to suspect, that Khourshed might engage in sexually inappropriate behavior with a student,

and Jackson failed to present any evidence from which a reasonable trier of fact could conclude otherwise.

B. *Denial of Continuance*

Jackson contends the trial court abused its discretion in denying her third request for a continuance under section 437c, subdivision (h), because she “clearly met the standard [under that section] by establishing that facts essential to justify opposition may exist but could not then be presented.” We disagree.

Section 437c, subdivision (h) provides in relevant part: “If it appears from the affidavits submitted in opposition to a motion for summary judgment or summary adjudication or both that facts essential to justify opposition may exist but cannot, for reasons stated, then be presented, the court shall deny the motion, or order a continuance to permit affidavits to be obtained or discovery to be had or may make any other order as may be just.” In other words, a party seeking a continuance of the summary judgment motion must file an affidavit that shows: “(1) the facts to be obtained are essential to opposing the motion; (2) there is reason to believe such facts may exist; and (3) the reasons why additional time is needed to obtain these facts.” (*Wachs v. Curry* (1993) 13 Cal.App.4th 616, 623.)

Jackson did not file any affidavit in connection with her third request for a continuance that met these requirements. Instead, she simply argued in her further opposition to the summary judgment motion that (1) based upon the testimony of Corinthian’s PMK “it appears that the discovery produced by Defendant Corinthian was incomplete and insufficient”; (2) “there is a clear overwhelming need for investigation as to a Person Most Knowledgeable for Defendant Corinthian who is actually aware of the circumstances surrounding the hiring of Dr. Khourshed in 2000”; (3) she needs to conduct “an investigation of a more consistent Person Most Knowledgeable . . . of student complaints against Dr.

Khourshed”; (4) she needs further discovery from other faculty with personal knowledge of student complaints against instructors; and (5) she believes that the deposition of the Chair of the medical assistant program is critical because he received multiple student complaints regarding the faculty in his program.

Even if we construe Jackson’s further opposition as an affidavit contemplated by section 437c, subdivision (h), we would find the trial court did not abuse its discretion by denying the continuance.

First, as the trial court noted, Jackson failed to show there is reason to believe that the contemplated discovery would produce evidence relevant to the cause of action she alleged.

Second, and perhaps more importantly, the trial court reasonably could conclude that Jackson’s inability to timely obtain “facts essential to justify opposition” (§ 437c, subd. (h)) -- *if they even exist* -- was due to her lack of diligence in conducting discovery. (See *Cooksey v. Alexakis* (2004) 123 Cal.App.4th 246, 257 [“Although the statute does not expressly mention diligence, . . . [a] good faith showing that further discovery is needed to oppose summary judgment requires some justification for why such discovery could not have been completed sooner”].) The record shows that Jackson unreasonably delayed in conducting discovery. She did not propound any discovery until more than nine months after Corinthian filed its answer to the complaint, and three months before the initial trial date. Her initial notice of deposition of Corinthian’s PMK was defective, and despite Corinthian’s immediate objection, she did not serve an amended notice of deposition for more than a month. After the trial court continued the hearing on the summary judgment motion for five weeks because the deposition did not go forward as planned, Jackson waited more than two weeks before contacting Corinthian to propose dates for the deposition. The deposition did not take place until a little more than a week before the continued hearing on

the summary judgment motion, so that when a dispute arose surrounding the termination of the deposition, there was insufficient time to resolve the dispute before the continued hearing. Although the court granted Jackson's request for a second continuance to complete the PMK deposition, it stated that it would grant no further continuances. It should come as no surprise, then, that the trial court denied Jackson's third request for a continuance to allow her to conduct additional discovery. We find no abuse of discretion in that ruling.

C. *Denial of Leave to Amend*

Jackson contends the trial court abused its discretion by denying her request for leave to amend her complaint to add new causes of action, arguing that there is a policy in favor of granting leave to amend when the defendant would not be prejudiced by the amendments. We find that Jackson has failed to show any prejudicial abuse of discretion.

As the trial court noted in denying Jackson's request, her "ad hoc motion" for leave to amend was "entirely devoid of a discussion of the merits of these potential claims." Her opening brief on appeal suffers from the same infirmity. Moreover, Jackson fails to address the trial court's further findings that (1) any negligent infliction of emotional distress or premises liability claim she might allege would require her to establish duty and breach of duty, which the court had already found Jackson had no evidence to support, and (2) Corinthian could not be held vicariously liable as a matter of law. Thus, even if it could be found that the trial court abused its discretion -- although we do not make such a finding -- Jackson has failed to meet her burden on appeal to demonstrate that the trial court's denial of leave to amend was prejudicial. (See § 475 ["No judgment, decision, or decree shall be reversed or affected by reason of any error, ruling, instruction, or defect, unless it shall appear from the record that such error, ruling,

instruction, or defect was prejudicial. . . . There shall be no presumption that error is prejudicial, or that injury was done if error is shown”]; *Paterno v. State of California* (1999) 74 Cal.App.4th 68, 106 [“our duty to examine the entire cause arises when and only when the appellant has fulfilled his duty to tender a proper prejudice argument. . . . [T]he appellant bears the duty of spelling out in his brief exactly how the error caused a miscarriage of justice”].) Accordingly, we affirm the trial court’s denial of leave to amend the complaint.

### **DISPOSITION**

The judgment is affirmed. Corinthian shall recover its costs on appeal.

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

WILLHITE, J.

We concur:

EPSTEIN, P. J.

COLLINS, J.