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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

CATHERINE DENISE CRANFORD,

Plaintiff and Appellant,

v.

CITY OF HUNTINGTON BEACH,

Defendant and Respondent.

G043791

(Super. Ct. No. 30-2008-00106397)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Jamoa A. Moberly, Judge. Affirmed.

Alexander Krakow & Glick, Bernard Alexander and Tracy L. Fehr for Plaintiff and Appellant.

Neal Moore, Senior City Attorney, and John M. Fujii, Deputy City Attorney, for Defendant and Respondent.

Catherine Denise Cranford appeals from the judgment in her action against her former employer, the City of Huntington Beach (the City). Cranford alleged she suffered workplace harassment by a co-worker due to her sexual orientation, and retaliation by the City for having complained about the harassment in violation of the California Fair Employment and Housing Act (FEHA) (Gov. Code, § 12940). Cranford also alleged her medical privacy rights were violated by the City when a letter written by her therapist in connection with her worker's compensation claim containing Cranford's allegations of workplace sexual orientation harassment was released to investigators outside the City's worker's compensation unit. The trial court granted the City's motion for summary adjudication on the FEHA causes of action, and a jury found that although Cranford's medical privacy rights were violated, she was not harmed. On appeal, Cranford contends: (1) there were material issues of fact as to the FEHA causes of action precluding summary adjudication; (2) insufficient evidence supports the special verdict; (3) the trial court abused its discretion by denying her motions to exclude certain evidence; and (4) the trial court erred by denying her motions for judgment notwithstanding the verdict and new trial. We find no error and affirm the judgment.

#### THE OPERATIVE COMPLAINT<sup>1</sup> & PROCEDURAL FACTS

After two rounds of successful demurrers, Cranford filed her third amended complaint (hereafter the complaint) against the City and Kelli Herrera (who was eventually voluntarily dismissed by Cranford). Cranford, who is gay, alleged she was an

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<sup>1</sup> While on a demurrer we assume all the well-pleaded allegations of the complaint to be true (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318), that is not the case on review of a summary judgment/adjudication motion (see *Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 599, fn. 1 [“demurrer challenges sufficiency of the pleading whereas the motion for summary judgment assumes sufficiency of pleadings and requires the introduction of evidence to determine whether or not the allegations have any basis of fact”].) Nonetheless, because issues to be addressed in a summary judgment/adjudication motion are framed by the pleadings (*Wattenbarger v. Cincinnati Reds, Inc.* (1994) 28 Cal.App.4th 746, 750), we begin by setting forth the allegations of the operative complaint.

employee at the City's jail and Herrera was a coworker. Both were detention officers at the jail and both were promoted to detention supervisor positions in 2004. The two apparently did not get along. In October 2005, Cranford learned some of her coworkers, led by Herrera, were talking about Cranford's sexual orientation and private life. She believed that once two jail detention officers were looking at a picture of "a 'real ugly butchie girl'" on the computer and one commented "'we should show this to [Cranford]'" Cranford was considering filing a complaint with her (and Herrera's) supervisor, Jail Administrator Dale Miller, when she learned Herrera had already complained to Miller about her. Herrera had threatened to file a complaint against Cranford if she "did not stop asking questions about [Herrera's] conduct." Cranford felt intimidated so she did not file a complaint against Herrera. When Cranford later approached Herrera to attempt to resolve their differences, telling Herrera to not discuss Cranford's sexual orientation and personal life with coworkers, Herrera told Cranford "[not to] 'play the gay card.' . . ." Herrera retaliated against Cranford by repeatedly complaining to Miller about Cranford's job performance and constantly confronting Cranford about job-related matters.

Cranford alleged that for his part, Miller knew Herrera's complaints were unfounded. Miller never disciplined Cranford in any way as a result of Herrera's complaints and in fact nominated her as Supervisor of the Year for 2006. Nonetheless, Herrera's harassing behavior, which Cranford believed was motivated by Cranford's sexual orientation, created a hostile workplace for Cranford, and Miller conducted no investigation. Around January 2007, when Cranford was serving as acting jail administrator, she wrote a memorandum to employees about food consumption in the jail, which Herrera openly mocked. One time in 2007, when a "homosexual man" was being brought in for booking, the "arresting officer yelled that the prisoner had HIV." When Cranford tried to "chastise the officer for violating the prisoner's right of privacy[.]" the

officer looked at Cranford “dismissively . . . and walked away, inferring that the prisoner’s homosexuality did not warrant respect for his right of privacy.”

In April 2007, Cranford left work on stress leave and filed a worker’s compensation claim. In June 2007, Cranford’s treating therapist, Denise Davis, sent the City’s worker’s compensation office a letter (hereafter the Davis Letter) summarizing Cranford’s treatment. The Davis Letter mentioned workplace harassment due to her sexual orientation as one of the causes of Cranford’s stress. The Davis Letter also contained other personal information about Cranford including her “diagnoses, medications, and private information including [her] sexual orientation, a breast cancer scare, details about [her] domestic partnership termination, foreclosure on [her] home, and other private and confidential information.”

In August 2007, Cranford learned the police chief obtained a copy of the Davis Letter, when he directed a police department lieutenant and a sergeant interview Cranford about her claim of being harassed due to her sexual orientation. As a result of the harassment by Herrera and the unauthorized disclosure of the Davis Letter, Cranford became so distraught she could not return to work, and she resigned in April 2008.

Based on the foregoing, Cranford’s complaint contained a cause of action for improper disclosure of medical information in violation of the Confidentiality of Medical Information Act (CMIA) (Civ. Code, § 56 et seq.), and worker’s compensation laws (Lab. Code, § 3762), and a cause of action for invasion of privacy. Her complaint also contained three causes of action for violation of the FEHA, including for hostile workplace sexual orientation harassment, retaliation, and failure to prevent harassment (Gov. Code, § 12940).

The City filed a motion for summary judgment or in the alternative summary adjudication. The trial court denied summary judgment but granted summary adjudication of the FEHA causes of action. The court found the harassment cause of action failed because the City presented undisputed evidence showing Cranford could not

establish harassment based on her sexual orientation. The court concluded Cranford could not prevail on her retaliation cause of action because she could not show she suffered any adverse employment action. Cranford could not rely on disclosure of the Davis Letter as an adverse employment action because her complaint did not plead the letter's disclosure as an act of retaliation. And, in any event, neither disclosure of the Davis Letter nor Herrera's alleged harassment constituted adverse employment actions by the City. Finally, the court concluded Cranford's failure to prevent harassment cause of action fell with her harassment cause of action.

Following a jury trial on the remaining causes of action, the jury returned a special verdict finding the City had improperly disclosed Cranford's private medical information, but the disclosure was not a substantial factor in causing any harm to Cranford. The trial court entered judgment for the City and denied Cranford's motions for judgment notwithstanding the verdict and for a new trial.

#### PHASE I: SUMMARY ADJUDICATION OF FEHA CLAIMS

##### A. *Facts*<sup>2</sup>

##### *City's Undisputed Facts*

The City's separate statement contained the following facts that were either specifically designated undisputed by Cranford, or were ineffectively disputed in her responsive statement. Cranford began working at the jail as a detention officer in 2001. Between 2001 and 2004, Cranford discussed with various coworkers the fact she was gay, and she never directed anyone to keep it a secret. Cranford admitted because her domestic partner called her at work once or twice a week yelling and screaming, most jail personnel knew she was gay. Cranford told Miller about instances of domestic violence

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<sup>2</sup> In her opening brief's attack on the summary adjudication of her FEHA causes of action, Cranford cites extensively to trial testimony in setting forth the facts. Such references are inappropriate and we disregard them: we are confined to the record before the trial court when it ruled on the summary adjudication motion. (*Haberman v. Cengage Learning, Inc.* (2009) 180 Cal.App.4th 365, 377.)

with her partner. Cranford told other coworkers about her breast cancer scare, her break up with her domestic partner, and her bad financial situation. She told at least three coworkers she was receiving mental health treatment and taking medication because of an overdose incident. Cranford was not present during the alleged incident where two detention officers looked at a picture of a woman on the computer and made reference to Cranford, but the incident involved two of Cranford's coworker friends and happened at the end of 2004 or beginning of 2005. The alleged harassing comment by Herrera was made in 2005 when she told Cranford "she had a friend that was also gay and she didn't care that [Cranford] was gay, but that [[Cranford] should] not to [*sic*] play the gay card[,]'" and it would "piss people off" if she did.

As early as 2006, Cranford believed Herrera was complaining to Miller about Cranford once or twice a week about her job performance and those complaints resulted in Cranford being called into Miller's office over 50 times. Cranford was designated to be Miller's acting jail manager in 2006 and 2007 when he was not present, and he nominated her as Supervisor of the Year in 2006. Cranford knew the City policy prohibiting sexual harassment, requiring sexual harassment be reported to the supervisor, and the procedure for filing a complaint about harassment. Cranford never told Miller, any other supervisor, or any other coworker she was being harassed by Herrera because of her sexual orientation. Cranford told Miller that Herrera was harassing her by making repeated complaints to Miller about job-related matters. On November 1, 2005, Cranford met with Miller to tell him she heard coworkers were gossiping about her sexual orientation. Miller asked Cranford if she wanted to file a complaint; she said she did not. Cranford claimed Herrera made a "preemptive strike" by telling Miller she was considering filing a complaint against Cranford, which coerced Cranford into not filing a formal complaint against Herrera.

Cranford agreed neither Herrera nor any other City employee ever told Cranford she should not have received her promotion to supervisor because of her sexual

orientation, called her derogatory names, or said anything derogatory to her about her sexual orientation, said they disliked Cranford because of her sexual orientation, or said they disapproved of Cranford's gay lifestyle. No City employee ever touched Cranford offensively, physically threatened her, or demanded sexual favors from her. The City never took away any of Cranford's pay, demoted her, transferred her, reprimanded her, or disciplined her. As to the 2007 booking incident, Cranford agreed as a detention officer she was concerned about the transmission of communicable diseases and wanted to know if an inmate was HIV positive so appropriate precautions could be taken when handling the inmate.

With regard to how the Davis Letter was released, the City provided declarations from various City employees. The City Attorney, Jennifer McGrath, declared she had been notified by the City's worker's compensation staff the Davis Letter contained allegations of workplace harassment due to sexual orientation. McGrath obtained the letter and believed that if substantiated the allegations could expose the City to liability and might warrant disciplinary action against the alleged harasser. She discussed the matter with the Police Chief Kenneth Small. McGrath ultimately determined she should provide Small with the letter so the allegations could be investigated by the police department's confidential investigative unit, the Professional Standards Unit. McGrath's sole motive in providing Small the Davis Letter was to have the sexual orientation harassment allegations investigated; she had "no other ulterior or retaliatory motive."

Small declared the Professional Standards Unit was supervised by the department's executive officer, Lieutenant Craig Junginger, who reported directly to Small. It conducted completely confidential investigations of department matters including complaints against personnel. Its records were locked up and inaccessible to anyone not in the unit, including the police chief. After being told by McGrath about the allegations in the Davis Letter, Small asked her for a copy, which was sent to him via

e-mail. Small did not recall actually reading the letter. He provided a copy to Junginger and directed him to use the letter only in conjunction with a confidential Professional Standards Unit investigation into the harassment allegations. Junginger declared he received the letter from Small, not from anyone in the worker's compensation division. He put the letter in the unit's confidential files and did not authorize anyone to copy the letter.

*Cranford's Separate Statement*

In her own separate statement, Cranford added the following additional facts relating to alleged harassment by Herrera. In her deposition, Herrera acknowledged she made at least 15 complaints to Miller about Cranford, about once a month. Herrera's complaints were about such things as Cranford's asking for "unpaid leave to volunteer for Hurricane Rita . . . [when Herrera felt Cranford] had no relatives personally affected," Cranford's memorandum to staff concerning jail personnel eating jail trustees' snack items, and Cranford's scheduling herself for available overtime hours and not making those hours available to other jail employees. Cranford complained to Miller that "Herrera's complaints were excessive and borderline harassment."

Cranford stated as an undisputed fact that Herrera believed Miller favored Cranford because she was gay. The fact was supported by page 132 from Herrera's deposition, where she agreed with Cranford's counsel that Cranford's sexual orientation might have been a factor in Miller's favoritism. In its reply, disputing the fact, the City provided pages 131 through 133 from Herrera's deposition placing the testimony in context. In full, Herrera testified she felt Miller generally sided with Cranford because he liked her and they were friends. When Herrera asked if Cranford's homosexuality could have also been a factor, Herrera speculated it could have made Miller "tiptoe[]" around Cranford more, but it was equally plausible it was as simple as Miller liked Cranford and did not like Herrera—"I don't know . . . How would I know that."

With regard to disclosure of the Davis Letter, Cranford provided deposition testimony from Small and another City employee to the effect that production of the full Davis Letter was not necessary to initiate an investigation into allegations of sexual harassment it contained. Allegations of employee workplace harassment were not generally within the purview of the police department's Professional Standards Unit, but rather were normally investigated by the human resources department. Cranford's worker's compensation claim file was confidential and should not have been released outside the worker's compensation unit. The worker's compensation case manager overseeing Cranford's claim (Janice Gannon), her supervisor (Patti Williams), and the human resources director (Michelle Carr) were the only persons within the worker's compensation unit who should have had access to Cranford's file and each denied they released the letter. Gannon and Williams could not recall any other time where information from a confidential worker's compensation file was released outside the unit. McGrath did not contact Cranford to ask her permission to release the Davis Letter.

## 2. *Summary Adjudication Standard of Review*

Cranford contends the trial court erred by granting summary adjudication of her FEHA claims. The same standards applicable to summary judgments apply to summary adjudications. (*Westlye v. Look Sports, Inc.* (1993) 17 Cal.App.4th 1715, 1727.) "Summary judgment is appropriate only if there is no triable issue of material fact and the moving party is entitled to judgment in its favor as a matter of law.

[Citation.] . . . A defendant moving for summary judgment . . . must show that one or more elements of the plaintiff's cause of action cannot be established or that there is a complete defense. [Citation.] The defendant can satisfy its burden by presenting evidence that negates an element of the cause of action or evidence that the plaintiff does not possess and cannot reasonably expect to obtain evidence needed to support an element of the cause of action. [Citation.] If the defendant meets this burden, the burden shifts to the plaintiff to set forth 'specific facts' showing that a triable issue of material

fact exists. [Citation.] ¶ We review the trial court’s ruling de novo, liberally construe the evidence in favor of the party opposing the motion, and resolve all doubts concerning the evidence in favor of the opposing party. [Citation.] We will affirm an order granting summary judgment . . . if it is correct on any ground that the parties had an adequate opportunity to address in the trial court, regardless of the trial court’s stated reasons.

[Citations.]” (*Securitas Security Services USA, Inc. v. Superior Court* (2011)

197 Cal.App.4th 115, 119-120.)

### 3. *Sexual Orientation Harassment*

Cranford contends triable issues of fact exist as to whether she suffered hostile workplace sexual orientation harassment in violation of the FEHA. We disagree.

*Hope v. California Youth Authority* (2005) 134 Cal.App.4th 577, 587-588 (*Hope*) cogently sets forth the legal principles: “The FEHA states that ‘[i]t shall be an unlawful employment practice . . . ¶ . . . ¶ . . . [f]or an employer, . . . because of . . . sexual orientation[ ] to harass an employee . . . . Harassment of an employee . . . by an employee, other than an agent or supervisor, shall be unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action.’ (Gov. Code, § 12940, subd. (j)(1) . . . .) ¶ ‘[A]n employee claiming harassment based upon a hostile work environment must demonstrate that the conduct complained of 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 [sexual orientation]. . . . The working environment must be evaluated in light of the totality of the circumstances: “[W]hether an environment is ‘hostile’ or ‘abusive’ can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employees work performance.” [Citation.] ¶ ‘In determining what constitutes “sufficiently

pervasive” harassment, the courts have held that acts of harassment cannot be occasional, isolated, sporadic, or trivial, rather the plaintiff must show a concerted pattern of harassment of a repeated, routine or a generalized nature.’ [Citation.] [¶] The harassment must satisfy an objective and a subjective standard. “[T]he objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff’s position, considering ‘all the circumstances.’ . . . .” [Citation.] And, subjectively, an employee must perceive the work environment to be hostile. [Citation.] Put another way, ‘[t]he plaintiff must prove that the defendant’s conduct would have interfered with a reasonable employee’s work performance and would have seriously affected the psychological well-being of a reasonable employee and that [she] was actually offended.’ [Citation.] [¶] Further, ‘[t]he FEHA imposes two standards of employer liability for sexual [orientation] harassment, depending on whether the person engaging in the harassment is the victim’s supervisor or a nonsupervisory coemployee. The employer is liable for harassment by a nonsupervisory employee only if the employer (a) knew or should have known of the harassing conduct and (b) failed to take immediate and appropriate corrective action. (§ 12940, subd. (j)(1).) This is a negligence standard. . . . Because the FEHA imposes this negligence standard only for harassment “by an employee other than an agent or supervisor” (§ 12940, subd. (j)(1)), by implication the FEHA makes the employer strictly liable for harassment by a supervisor.’ [Citation.]”

The evidence submitted in conjunction with the summary judgment/adjudication motion established Cranford could not prove essential elements of a sexual orientation harassment claim. First and foremost, there was no evidence to support a conclusion Cranford was harassed because of her sexual orientation or that any such sexual orientation harassment was sufficiently severe or pervasive so as to alter the conditions of her employment. (*Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 283 (*Lyle*).

Cranford relies on evidence that Herrera repeatedly complained to Miller, who was both Cranford's and Herrera's supervisor about Cranford's *job performance* and Cranford and Herrera had frequent confrontations in the workplace about job related matters. During that time, Miller uniformly took *Cranford's* side in disputes, designated her as his acting jail manager in his absence, and nominated her as Supervisor of the Year.

There is no evidence Cranford was being harassed by Herrera, or anyone else, because of her sexual orientation. Indeed, the only evidence in any way related to Cranford's sexual orientation being an issue in the workplace was that Cranford heard that in late 2004 or early 2005 two of *Cranford's* coworker friends looked at a picture of woman on the computer and one suggested they show the picture to Cranford. Cranford was not present when the incident took place. Cranford believed her coworkers "openly discussed" her sexual orientation and her personal life and Herrera was the instigator of such discussions, but there was no evidence of any specific thing said about Cranford by any particular person and no evidence Cranford personally witnessed any such discussions: mere allegations of workplace gossip are not actionable. (*Beyda v. City of Los Angeles* (1998) 65 Cal.App.4th 511, 518-519, 521 [incidents that a plaintiff does not witness and of which he is not aware "cannot affect his or her perception of the hostility of the work environment"; "mere workplace gossip is not a substitute for proof"; rather "[e]vidence of harassment of others, and of a plaintiff's awareness of that harassment, is subject to the limitations of the hearsay rule. It is not a substitute for direct testimony by the victims of those acts, or by witnesses to those acts"]; see also *Thompson v. City of Monrovia* (2010) 186 Cal.App.4th 860, 878-879.)

The only substantiated comment ever made having anything to do with Cranford's sexual orientation was when Cranford confronted Herrera about workplace gossip and Herrera told Cranford "she had a friend that was also gay and she didn't care that [Cranford] was gay, but that [[Cranford should] not to [*sic*] play the gay card[,]'" and

that it would “piss people off” if she did. Cranford admitted this was the only comment Herrera ever made to her relating to her sexual orientation. Neither Herrera nor any City employee ever called Cranford derogatory names, said anything derogatory about her sexual orientation, said they disliked her because of her sexual orientation, or that they disapproved of her lifestyle.

The acts of harassment alleged against Herrera fall far short of “establishing “a pattern of continuous, pervasive harassment” [citation], necessary to show a hostile working environment under FEHA.” (*Haberman v. Cengage Learning, Inc.* (2009) 180 Cal.App.4th 365, 382.) Indeed, they stand in stark contrast to the evidence found to be sufficient in other cases to support a claim of sexual orientation harassment. For example in *Hope, supra*, 134 Cal.App.4th at page 580, plaintiff was a cook at a juvenile detention facility. He was repeatedly called “motherfuckin’ faggot’ and a ‘homo’” by his immediate supervisor in front of other employees. The supervisor would “rant and rave” to the next level supervisor that he would not work with “this gay guy” and the next level supervisor would do nothing to correct the behavior. (*Id.* at p. 582.) A guard assigned to the kitchen routinely called plaintiff “faggot ass bitch,” “faggot ass motherfucker,” told the wards that plaintiff “looked at them because he thought they were pretty[,]” instructed them to not to assist plaintiff with duties, and tore up incident reports plaintiff wrote on wards. (*Id.* at p. 581.)

Here, the evidence showed only that Cranford and Herrera did not get along, and Herrera disapproved of many things Cranford did in performing her job. There is nothing that would support a conclusion Herrera acted because of Cranford’s sexual orientation. (See *Jones v. Department of Corrections and Rehabilitation* (2007) 152 Cal.App.4th 1367, 1378 [absence of nexus between alleged harassment and protected classification negates FEHA claim].) Herrera’s repeated complaints to Miller about Cranford may well have been misplaced petty nitpicking, but the FEHA is not a workplace civility code. (*Lyle, supra*, 38 Cal.4th at p. 295.) As noted in *Guthrey v. State*

*of California* (1998) 63 Cal.App.4th 1108, 1110: “Anyone who has ever worked in an office or, for that matter, been a schoolchild on the playground knows that petty differences arise which cannot always be resolved without hurt feelings. Does that mean that these festering disputes in the workplace should find their way into the courts for resolution? Absolutely not. This case is a prime example of where such work-related differences have no place in the courtroom.”

Cranford’s sexual orientation harassment claim fails for another reason as well. Cranford concedes that because Herrera was not a supervisory employee (both were detention supervisors supervised by Miller, and it was Cranford who served as the acting jail manager in Miller’s absence), her claim required proof the City knew or should have known of the harassing conduct and failed to take immediate and appropriate corrective action. (Gov. Code, § 12940, subd. (j)(1).) The City’s separate statement contained undisputed evidence Cranford never complained to Miller or anyone else at the City that she was being harassed because of her sexual orientation. Cranford’s complaint to Miller that Herrera’s incessant complaints to him about her were “borderline harassment” did not put the City on notice Cranford was being harassed because of her sexual orientation. Cranford did complain to Miller that she believed coworkers were talking about her sexual orientation and personal life, but when asked if she wanted to file a complaint, she declined. And in any event, her belief that coworkers were gossiping about her did not put the City on notice she was being harassed because of her sexual orientation.

In short, the incidents upon which Cranford bases her sexual orientation harassment claim are insufficient to support a hostile workplace sexual harassment claim under the FEHA. Accordingly, the trial court properly granted summary adjudication on the sexual orientation harassment cause of action (Gov. Code, § 12940, subd. (j)(1)), and the failure to prevent sexual orientation harassment cause of action as well. (See *Trujillo v. North County Transit Dist.* (1998) 63 Cal.App.4th 280, 286-287 [no cause of action for

violation of Gov. Code, § 12940, subd. (k) [formerly subd. (i)], absent a finding plaintiff suffered actionable harassment]; in accord, *Tritchler v. County of Lake* (9th Cir. 2004) 358 F.3d 1150, 1154 [plaintiff must “be found to have been subjected to sexual harassment stemming from a hostile environment” before jury can reach issue of whether Gov. Code, § 12940, subd. (k), was violated; see also Chin et al., Cal. Practice Guide: Employment Litigation (The Rutter Group 2011) [¶] 10:481.2, p. 10-86 [“[n]o [Gov. Code, § 12940, subd. (k)[,] action lies for failure to take necessary steps to prevent harassment if no harassment in fact occurs”].)

#### 4. Retaliation

Cranford contends there were triable issues of fact regarding her FEHA retaliation cause of action. She contends release of confidential medical information from her worker’s compensation claim file was an adverse employment action because it ultimately caused her to resign from her employment and was done in retaliation for her having complained about sexual orientation harassment. We disagree.

We need not spend undue time on Cranford’s complaint the trial court erred by deeming the Davis Letter impermissible grounds for opposing summary adjudication because it was not pled in her complaint as a retaliatory act. Cranford’s third amended complaint alleged only Herrera’s harassment of her as the retaliatory conduct, i.e., that after she complained to Miller about Herrera’s conduct, Herrera “retaliated” by stepping up her constant criticisms of Cranford.

A plaintiff cannot raise new and unpleaded issues in opposing a summary judgment motion. (*Government Employees Ins. Co. v. Superior Court* (2000) 79 Cal.App.4th 95, 98-99, fn. 4.) The trial court correctly concluded release of the Davis Letter as an act of retaliation was a new and unpleaded theory. But the City’s summary judgment/adjudication motion specifically addressed the Davis Letter in conjunction with the retaliation claim. And in any event, the trial court addressed the theory on its merits, concluding Cranford presented no evidence from which it could be concluded release of

the letter constituted an adverse employment action. Accordingly, we address the merits of Cranford's argument.

In order to establish a prima facie case of retaliation, Cranford must show (1) she engaged in a "protected activity" (e.g., reporting or complaining about sexual orientation harassment), (2) the City subjected her to an adverse employment action, and (3) a causal link between the protected activity and the adverse employment action. (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1042 (*Yanowitz*.) Even if the harassing conduct is not actionable, Cranford's report of it is protected activity if she reasonably believed she was reporting a violation of the FEHA. (*Id.* at p. 1043.)

We apply the well-accepted burden shifting paradigm specified by *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 802-804 (*McDonnell Douglas*), to a wrongful termination/retaliation claim. (*Reeves v. Safeway Stores, Inc.* (2004) 121 Cal.App.4th 95, 111-112 (*Reeves*.) In the trial context, the *McDonnell Douglas* framework requires the plaintiff to present sufficient evidence supporting prima facie case of retaliation, which gives rise to a presumption the employer acted unlawfully. The employer may then dispel the presumption by articulating a legitimate, nondiscriminatory reason for its action. If the employer does that, the presumption disappears and the issue then becomes one of whether the plaintiff has proven by a preponderance of the evidence the existence of discriminatory animus and a causal link between it and the adverse action she suffered. (*Mamou v. Trendwest Resorts, Inc.* (2008) 165 Cal.App.4th 686, 715 (*Mamou*); *Reeves, supra*, 121 Cal.App.4th at pp. 111-112.)

In the summary judgment context, the employer as the moving party "has the initial burden to present admissible evidence showing either that one or more elements of the plaintiff's prima facie case is lacking or that the adverse employment action was based upon legitimate, nondiscriminatory factors." (*Hicks v. KNTV Television, Inc.* (2008) 160 Cal.App.4th 994, 1003.) If the employer meets that initial burden, "the plaintiff then has the burden to produce 'substantial evidence that the

employer's stated nondiscriminatory reason for the adverse action was untrue or pretextual, or evidence the employer acted with a discriminatory animus, or a combination of the two, such that a reasonable trier of fact could conclude the employer engaged in intentional discrimination.'" (*Ibid.*) To survive a summary judgment motion, the plaintiff must produce evidence that creates a material factual dispute pertaining to the employer's asserted reason, evidence sufficient to support "a reasoned inference that the challenged action was the product of discriminatory or retaliatory animus." (*Mamou, supra*, 165 Cal.App.4th at p. 715.)

Here, the City met its burden to show a legitimate reason for releasing the Davis Letter and doing so was not for any retaliatory reason. The City Attorney declared she was apprised of the letter's contents by the City's worker's compensation unit because it contained allegations of sexual orientation harassment. The City Attorney reviewed the letter and made the decision to provide a copy of the letter to the police chief directing him that the harassment allegations should be investigated by the police department's confidential Professional Standards Unit. The City Attorney, the police chief, and the supervisor of the Professional Standards Unit, all declared the Davis Letter was not released beyond those select few persons.

The burden then shifted to Cranford to present evidence creating a triable issue as to whether the City's proffered reason for releasing the Davis Letter was a pretext for retaliation. She did not carry her burden.

Cranford presented no evidence she engaged in a protected activity. She admitted she never reported or complained to her supervisor or any City employee that she was being subjected to sexual orientation harassment. She did complain to Miller about Herrera's constant complaints to Miller about her job performance. But there is absolutely no evidence supporting any causal link between Cranford's complaints to Miller and the City Attorney's decision to release the Davis Letter to the police chief for investigation of the allegations therein. There is no evidence the City Attorney had any

knowledge of the animosity between Cranford and Herrera, or of any complaints Cranford made to Miller. Without a causal link between the protected activity (i.e., complaining to Miller about Herrera) and the adverse employment action (i.e., release of the Davis Letter) the retaliation claim fails (*Yanowitz, supra*, 36 Cal.4th at p. 1042), and the trial court properly granted summary adjudication of the FEHA retaliation cause of action.

##### *5. Due Process/Overlong Reply*

Cranford contends her due process rights were violated when the trial court granted the City permission, over Cranford's objection, to file a 15-page memorandum of points and authorities in reply to her opposition to the summary judgment motion, and then overruled Cranford's evidentiary objections to additional evidence put forth by the City in a reply to her separate statement of material facts. We find no prejudicial error.

Although the rules of court provide for a 10-page limit to reply papers on a summary judgment motion, it rests within the sound discretion of the trial court to grant a request to exceed that limit. (Cal. Rules of Court, rule 3.1113(e).) Cranford has not shown the trial court abused its discretion by allowing the City five additional pages for reply in view of the already lengthy moving and opposition papers (25 pages each), the lengthy separate statement (53 pages), and Cranford's lengthy response to the separate statement (93 pages). Nor has Cranford demonstrated a due process violation—she does not suggest the City raised any new arguments in its reply to which she was unable to respond.

Cranford's contention the City's overlong reply was unfairly supplemented by a reply separate statement in which new evidence was introduced is similarly unavailing. The new evidence consisted of a section from the City's city charter regarding who has authority to bind the City to contracts and three additional pages of Herrera's deposition to place in context the one page Cranford quoted from in her separate statement. Whether to consider such new evidence rest within the sound

discretion of the trial court. (*San Diego Watercrafts, Inc. v. Wells Fargo Bank* (2002) 102 Cal.App.4th 308, 316.) Cranford has not shown that discretion was abused. In her reply brief, she concedes the City's submission of the additional pages from Herrera's deposition was proper. And the city charter provision was offered by the City in relation to the two causes of action on which the trial court denied summary adjudication.

PHASE II: TRIAL OF INVASION OF PRIVACY/RELEASE OF CONFIDENTIAL  
MEDICAL INFORMATION CLAIMS

*A. Sufficiency of the Evidence*

*1. Standard of Review*

Cranford's causes of action for disclosure of confidential medical information in violation of the CMIA (Civ. Code, § 56 et seq.) and worker's compensation laws (Lab. Code, § 3762), and invasion of privacy, went to trial. The jury returned a special verdict finding the City improperly disclosed Cranford's private medical information in violation of her privacy rights, the CMIA, and Labor Code section 3762, but the disclosure was not a substantial factor in causing harm to Cranford. Cranford contends the weight of the evidence does not support the jury's finding and the overwhelming evidence at trial was that release of confidential medical information contained in the Davis Letter caused her "non-trivial harm." We will not disturb the jury's special verdict.

Our standard of review is well-established. "Under the substantial evidence standard of review, our review begins and ends with the determination as to whether, on the entire record, there is substantial evidence, contradicted or uncontradicted, which will support the trial court's factual determinations. [Citations.] Substantial evidence is evidence of ponderable legal significance, reasonable in nature, credible, and of solid value. [Citation.]" (*Ermoian v. Desert Hospital* (2007) 152 Cal.App.4th 475, 501; see *Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874.) We review the relevant trial evidence in view of that standard.

## *2. Trial Evidence*

Gannon, the City's worker's compensation claims examiner handling Cranford's claim testified she sent Cranford a worker's compensation authorization so she could obtain information from Cranford's medical and psychological providers. Cranford at first did not want to sign the authorization expressing her concern that confidential information would get back to the jail. Gannon promised Cranford all documents would remain in the physical custody of the worker's compensation unit, would remain confidential, and would only to be used to process the worker's compensation claim. Cranford signed and returned the authorization so her worker's compensation claim would be processed. The worker's compensation unit had a duty to keep Cranford's medical information confidential, and the only people who were supposed to have access to Cranford's file were the human resources director (Carr), the risk manager (Williams), and the worker's compensation adjuster (Gannon).

When the Davis Letter was released from Cranford's file, initially no one knew how it happened. Cranford learned about it when she received a telephone call from the Police Chief Small on August 22, 2007, asking her about the harassment allegations in the letter. Cranford was alarmed and called Gannon to find out how the chief got the letter. Gannon promised to investigate. Gannon had no doubt Cranford was very upset about the letter's release.

City Attorney McGrath, testified she learned about the Davis Letter from Williams, the risk manager. McGrath made the decision to send the Davis Letter to the police chief for investigation of allegations of sexual orientation harassment, although she recognized it contained confidential medical information as well. McGrath conceded releasing the medical information in the letter violated "HIPPA" (Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. § 1320d-2 [confidentiality of medical records]; and the CMIA (Civ. Code, § 56, et seq. [same]), and she could have initiated the harassment investigation without releasing the entire letter (by either

redacting it, or summarizing the harassment portion). McGrath testified that as City Attorney she had an obligation to investigate and/or prevent illegal harassment in the workplace and she had to act on the allegations in the Davis Letter.

Cranford's therapist, Davis, testified she had begun conducting therapy sessions with Cranford in November 2004, treating her for stress and depression, and they were making progress. In March 2007, Cranford fainted during a workplace training exercise, prompting her to go out on stress leave. From March 2007, until Cranford learned from the police chief the Davis Letter had been released to him, Davis believed Cranford was "slowly and surely . . . getting better and stabilizing[]" working through the issues causing her stress. Davis believed Cranford would eventually be able to return to work. Davis described Cranford as a very private person and she was very concerned about signing the release allowing the worker's compensation unit to have access to her psychological records. Davis testified the release of the Davis Letter outside of the worker's compensation unit was the main cause of Cranford's emotional distress. Davis did not believe Cranford's emotional distress was due to the actual investigation of her sexual orientation harassment claims.

Anthony Reading, a clinical psychologist, testified as an expert witness for Cranford. Before Cranford left work on stress leave, she had significant personal issues that were causing her stress. Cranford had been successfully working through these issues with Davis from 2004 through March 2007, but her work-related stress was increasing. Cranford's panic attacks in early 2007 were tied to her job. Up until August 2007, Cranford was improving and intended to return to work. Reading opined release of the Davis Letter was "a fracturing experience for [Cranford] arising from the notion of a complaint, the notion that there would be an investigation, [and] the notion that that would be seen to be originating from her." It affected her mood and caused problems throughout her personal life. Following release of the Davis Letter, Cranford's major depression became more severe and as of September 2009, she was still suffering

from major depression and a panic disorder. Reading agreed the investigation of allegations of workplace sexual orientation harassment was something Cranford did not want to occur and when the letter was released triggering the investigation, the fact the investigation had occurred made it too untenable for her to return to work.

Cranford's former domestic partner, with whom Cranford was involved from September 2006 through the relevant times in 2007, testified that after Cranford received the telephone call from the police chief in August 2007, Cranford became a different person, more "stressed out" about work, and increased the frequency of her appointments with Davis.

Cranford testified she was reluctant to sign the authorization for release of medical information to the worker's compensation unit because she was very concerned about her medical and psychological records being released outside the worker's compensation unit. Cranford testified she had discussed her sexual orientation with several coworkers over the years—at least 10 of the 18 to 20 people who worked at the jail—and she received routine telephone calls at work from her domestic partner in which they would be arguing. Cranford had also discussed with her supervisor Miller, and/or other trusted coworkers, her disintegrating and sometimes violent relationship with her domestic partner, her treatment with Davis and medication for depression, her breast cancer scare, and financial troubles she was having. Cranford testified that prior to August 2007, her emotional state was improving and she had "every intention of going back to work." Cranford conceded she had been applying for other jobs prior to August 2007, but said she was not seriously looking for a new job. Cranford was extremely upset when she learned the Davis Letter had been released to the police chief and had been given to the police department's Professional Standards Unit for investigation as investigators who rotated through the unit would have knowledge of her personal information, and there would be a lingering stigma attached to her. Cranford feared the

Davis Letter would be shown by investigators to other persons interviewed during the investigation or its contents would be leaked.

The City presented expert testimony from Stephen Signer, a psychiatrist. He originally examined Cranford in September 2007 in connection with her worker's compensation claim, and then again in the Fall of 2009. In the 2007 examination, Cranford told Signer she felt she was being harassed and unfairly criticized by coworkers after she had been promoted. Cranford had a fainting-type episode on March 22, 2007, during a training session, which she associated with being stressed. Cranford explained to Signer that at the time she had been in the process of terminating her seven-year domestic partnership, they were having difficulties with dividing property and dealing with the horses they had, and she was having financial difficulties as well. Cranford had also been caught up in an "internet scam." Cranford told Signer she was more recently having panic and anxiety over the release of the Davis Letter to the police chief. The chief had indicated to Cranford he needed to investigate her allegation of sexual orientation harassment. Cranford "tried to deflect" his call for an investigation, and "started to panic and she knew she would be in the investigation and everybody would be interviewed, although she realized that ultimately this might be good for herself or others." In that September 2007 interview, Cranford only expressed being "upset" over the fact there was going to be an investigation of the sexual orientation harassment allegations, and she did not express concern the Davis Letter also contained medical information about her that had been divulged.

In their interview, Cranford told Signer her history of stress related to a breast cancer scare in 2004, a volatile relationship with her previous domestic partner which included domestic violence and her partner's threatening to commit suicide using Cranford's gun. Cranford denied any problems with her current domestic partner. Cranford had taken medication for anxiety and panic. Cranford indicated she ultimately wanted to get out of working at the jail and perhaps return to school to study veterinary

medicine, although she thought it was not financially feasible. Cranford's social history predating her employment with the City included that she grew up in a family with step-siblings and her father was an alcoholic. She enlisted in the military, but briefly went AWOL when she was having financial difficulties and trying to avoid having her car repossessed. She returned to her base, was briefly placed on a suicide watch, and ultimately discharged from the military under honorable conditions. Signer diagnosed Cranford with "adjustment disorder with mixed emotions, anxiety and depression, non-industrial." He did not find her to be disabled from being able to work.

Signer examined Cranford again in October 2009, interviewing her for almost three hours. Signer asked Cranford if she had any corrections to offer about his September 2007 report, and she did not. Cranford discussed with Signer her move to Texas, applying for various jobs there, her domestic relationship, and her current treatment and symptoms. Cranford was still depressed and anxious and had "panics, particularly over what was happening with her lawsuit." Cranford did not suggest to Signer that she was upset about the release of confidential medical information contained in the Davis Letter. Signer had also reviewed psychological testing performed on Cranford by a neuropsychologist and Reading's deposition as part of his current evaluation. Cranford suffered from a long-standing "low level chronic depressive condition," post-traumatic stress disorder going back to childhood trauma involving a variety of disruptive and violent incidents, adjustment disorder, anxiety, and depression. Signer opined the release of the full Davis Letter had not contributed anything more than "transient upset" to Cranford. Cranford indicated to Signer it was the initiation of an investigation into her allegations of harassment that was upsetting, not the release of her confidential medical information.

On cross-examination, Cranford's counsel endeavored to impeach Signer with his deposition testimony he did not recall any specific question he asked Cranford about the release of the Davis Letter. Signer agreed release of a confidential medical

record would cause someone anxiety and because Cranford had “trust issues” she would be more affected. On redirect, Signer testified he had specifically discussed the release of the Davis Letter with Cranford, and she indicated it was investigation of sexual orientation harassment allegations that was distressing.

### 3. Analysis

Causation and damages are ordinarily questions of fact for the jury’s determination. (*Ortega v. Kmart Corp.* (2001) 26 Cal.4th 1200, 1205; *Vasquez v. Residential Investments, Inc.* (2004) 118 Cal.App.4th 269, 288; *R.J. Land & Associates Construction Co. v. Kiewit-Shea* (1999) 69 Cal.App.4th 416, 429.) Substantial evidence supports the jury’s finding on causation.

As the City points out, the issue in this case was not the release of the Davis Letter per se. The letter contained allegations of workplace sexual orientation harassment the City was obligated to investigate. The issue was whether Cranford was harmed by the prohibited release of *confidential medical information* contained therein. Cranford concedes as much. There is substantial evidence supporting the City’s defense that Cranford’s emotional distress was not the result of the disclosure of her medical information.

Signer, the City’s examining expert psychiatrist, testified that when he examined Cranford in September 2007, they discussed the myriad stressors Cranford was experiencing in her life. Signer testified that as he documented in his written report, Cranford indicated to Signer the panic and anxiety she was having with regards to the release of the Davis Letter to the police chief was because there would be an investigation into her allegation of workplace sexual orientation harassment. Cranford “tried to deflect” the chief’s call for an investigation, and “started to panic and she knew she would be in the investigation and everybody would be interviewed, although she realized that ultimately this might be good for herself or others.” Cranford did not express concern that with release of the unredacted Davis Letter, confidential medical

information was also divulged. When Signer examined Cranford again in October 2009, Cranford had nothing she wanted to correct in Signer's 2007 report. Cranford again gave no indication her current anxiety and depression was because confidential medical information contained in the Davis Letter had been divulged, it was the initiation of an investigation into her allegations of harassment that was upsetting. Signer's medical opinion was that the release of the full Davis Letter had not contributed anything more than "transient upset" to Cranford.

Cranford's assertion Signer's testimony "should be disregarded in its entirety" because he never asked Cranford how she felt about release of the Davis Letter is meritless. Although at his deposition Signer could not recall the specific questions he asked Cranford about the release of the Davis Letter, he testified he had specifically discussed the release of the Davis Letter with Cranford.

Signer's conclusion it was investigation of sexual orientation harassment allegations that was distressing to Cranford, is consistent with other testimony. Cranford's expert psychologist, Reading, testified release of the Davis Letter was "a fracturing experience" for Cranford because from its release arose "the notion of a complaint, the notion that there would be an investigation, the notion that that would be seen to be originating from her." There is other evidence that would allow the jury to draw the permissible inference that release of confidential medical information contained in the Davis Letter was not a substantial cause of Cranford's emotional condition. There is abundant evidence that before the letter was released, Cranford was suffering anxiety and depression and suffering stress from any number of personal factors. Virtually every personal fact discussed in the Davis Letter (her sexual orientation, turbulent break up with her domestic partner, financial distress) and most of the medical information discussed in the letter (breast cancer scare, treatment and medication for depression), had previously been disclosed by Cranford to various coworkers over the years. Although we certainly do not condone the City Attorney's compromising Cranford's medical privacy

by disclosing the entire Davis Letter to the police chief and internal affairs investigators, we cannot say the jury's finding divulging her private medical information was not a substantial factor in causing harm to Cranford is unsupported by the evidence.

### *B. Evidentiary Issues*

Cranford contends she was denied a fair trial because the trial court erroneously denied her pre-trial motions in limine to exclude: (1) evidence concerning a specific romantic relationship she became involved in after the Davis Letter was released; and (2) Signer's expert testimony. The trial court's ruling on a motion in limine is reviewed for abuse of discretion. (*Piedra v. Dugan* (2004) 123 Cal.App.4th 1483, 1493.) Even if an abuse of discretion is found, we cannot reverse absent a showing of prejudice, i.e., that but for the alleged error, it is reasonably probable the jury would have returned a more favorable verdict. (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 801-802.) Neither is the case here.

#### *1. Cranford's Relationship with "Shannon"*

Before trial, Cranford moved to exclude certain evidence concerning her personal life including about her relationship with "'Shannon' or Shannon's life circumstances, marriage, and relationship issues." Apparently, the details of the relationship surfaced during the deposition of Cranford's expert witness, Reading. Shannon was a married woman with young children who lived in Texas, with whom Cranford had become romantically involved. Cranford argued "Shannon has a number of personal issues and unsavory life circumstances which, if revealed, would be embarrassing." The trial court deferred ruling on the motion, noting the relevance of any particular information concerning Cranford's personal life "was contextual," and objections to the evidence would have to be raised as appropriate as trial proceeded.

At trial, Cranford's counsel elicited testimony from Reading concerning Cranford's relationship with Shannon as an example of her poor decision-making abilities after leaving employment with the City. The testimony was brief, Reading

testified Cranford had described the relationship as a “bad relationship.” Although “initially a loving relationship,” Shannon was disabled, married, and conflicted about whether she wanted to be with Cranford. On cross-examination, the City’s counsel asked Reading only a few questions concerning this relationship. The questions spanned just over one page of the reporter’s transcript and none elicited any objection from Cranford. Reading testified on cross-examination that Cranford met Shannon on-line before resigning from the City, moved to Texas, and moved in with her, and there were problems in the relationship including that Shannon was married to a man and disabled. The City made no reference to Shannon in its closing argument.

Cranford contends the trial court abused its discretion by allowing evidence about Shannon. Cranford asserts the evidence unfairly allowed the City to parade before the jury salacious details of her personal life “paint[ing her] as an unsympathetic homewrecker, i.e., a ‘bad person’ . . . unworthy of receiving justice.” We disagree. The trial court specifically directed that objections to testimony concerning Cranford’s personal life would have to be raised during trial as the relevance of any such information could only be assessed as the case unfolded. It was *Cranford* who then specifically elicited the testimony about Shannon from her own expert witness. Accordingly, her complaints are waived. (*People v. Moran* (1970) 1 Cal.3d 755, 762 [defendant cannot complain on appeal that admission of evidence was error where he offers it].) Furthermore, we cannot say Cranford suffered any prejudice from the evidence. It was only briefly mentioned during her expert’s testimony and not mentioned at all during closing argument, and certainly never argued by the City in the manner Cranford suggests.

## 2. *Signer’s Expert Testimony*

Cranford contends the trial court should have granted her motion in limine to exclude Signer’s testimony on causation. Her motion was premised on the assertion that at his deposition Signer admitted he asked no specific questions of Cranford

pertaining to her reaction to release of confidential medical information contained in the Davis Letter. In its opposition, the City pointed out Cranford was taking Signer's deposition testimony out of context; Signer testified he had discussed Cranford's reaction to the release of the letter with Cranford. The trial court denied Cranford's motion.

Cranford argues her motion in limine to exclude Signer's testimony should have been granted. She argues Signer had no foundation upon which to base his opinion she suffered only "transient upset" due to the disclosure of her confidential medical information, because he never questioned her on her reaction to the Davis Letter. (See *Jennings v. Palomar Pomerado Health Systems, Inc.* (2003) 114 Cal.App.4th 1108, 1117 [foundation predicate for expert opinion is required].) As with her sufficiency of the evidence argument, in which she makes the same allegation about Signer's trial testimony, Cranford is wrong. Signer testified he and Cranford discussed the release of the Davis Letter. Furthermore, we cannot say Cranford was prejudiced as Signer's trial testimony was consistent with testimony from Reading and with inferences the jury could reasonably draw from other evidence.

### *C. Post-Trial Motions*

In view of our conclusions above, we need only briefly address Cranford's attack on the trial court's rulings on her post-trial motions for judgment notwithstanding the verdict and new trial.

Cranford moved for judgment notwithstanding the verdict on the grounds there was no substantial evidence supporting the jury's special verdict finding release of her medical information was not a substantial cause of harm. "The trial court may grant judgment notwithstanding the verdict only if the verdict is not supported by substantial evidence. The court may not weigh evidence, draw inferences contrary to the verdict, or assess the credibility of witnesses. The court must deny the motion if there is any substantial evidence to support the verdict. [Citations.]" (*Begnal v. Canfield & Associates, Inc.* (2000) 78 Cal.App.4th 66, 72.) Because the jury's verdict was supported

by substantial evidence, the trial court properly denied the motion for judgment notwithstanding the verdict.

Cranford sought new trial on the grounds of insufficient evidence (Code Civ. Proc., § 657, subd. (6)), and the erroneous admission of evidence concerning her relationship with Shannon. An order denying a motion for new trial is reviewed for abuse of discretion (*In re Marriage of Green* (1989) 213 Cal.App.3d 14, 25; *Diemer v. Eric F. Anderson, Inc.*, (1966) 242 Cal.App.2d 503, 509), meaning we will disturb the ruling only where its order exceeds all bounds of reason. (*Walker v. Superior Court* (1991) 53 Cal.3d 257, 272.) In view of our conclusion the jury's special verdict is supported by sufficient evidence and there was no error in admitting evidence concerning Shannon, we cannot say the trial court abused its discretion by denying Cranford's new trial motion.

#### DISPOSITION

The judgment is affirmed. Respondent is awarded its costs on appeal.

O'LEARY, P. J.

WE CONCUR:

MOORE, J.

FYBEL, J.