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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

GALE REAVES, Plaintiff and Appellant. v. MARINA ROJAS et al., Defendants and Respondents.	B287972 (Los Angeles County Super. Ct. No. BC489065)

APPEAL from a judgment and orders of the Superior Court of Los Angeles County, Barbara A. Meiers, Judge. Affirmed.

Law Offices of Akudinobi & Ikonte, Emmanuel C. Akudinobi and Chijioke O. Ikonte for Plaintiff and Appellant.

Gutierrez, Preciado & House, Calvin House and Nicholas Hnatiuk for Defendants and Respondents.

Gale Reaves, a former deputy probation officer with the County of Los Angeles (County), sued her former supervisors Marina Rojas, Andrea Washington, and La Carla Williams (collectively defendants) for conspiracy to interfere with her civil rights in violation of title 42 United States Code sections 1983 and 1985(3). Reaves appeals from a judgment of dismissal entered after she and her attorney failed to appear at trial. Reaves's attorney walked out of the courtroom on the day of trial after the trial court denied his oral motion to continue the trial. Reaves argues the trial court abused its discretion in denying the continuance, then dismissing the action. In addition, Reaves challenges three discovery orders, including an order denying Reaves's motion to compel the deposition of the County's person most qualified (PMQ) as to 21 categories of information identified in the subpoena. A second order quashed Reaves's third party subpoenas purportedly served on two deputy probation officers, Michael Oden and Claudia Chase. A third order granted Rojas's motion for evidentiary sanctions based on Reaves's failure to comply with an earlier discovery order. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Allegations in the Third Amended Complaint*[1]

In October 1980 the County hired Reaves as a deputy probation officer trainee, and in 1981 it promoted her to deputy

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[1] Reaves filed her original complaint against the County and individual defendants Rojas, Washington, and Williams on July 25, 2012. The trial court entered judgment for all defendants after sustaining the individual defendants' demurrer and granting the County's motion for summary judgment. On

probation officer. In 2000 Reaves was assigned to the sex offenders unit, with a case load of approximately 50 probationers. Washington was Reaves's immediate supervisor; Washington reported directly to Rojas.

In March or April 2010 one of Reaves's probationers, David O., complained to Rojas about Reaves. The complaint arose after David concealed his employer's contact information from Reaves. After David complained, Rojas transferred his case to Oden. Reaves complained to chief probation officer Donald Blevins about the case transfer. Reaves's complaint led to a meeting with Rojas and the shop steward regarding the case transfer. Rojas threatened Reaves at the meeting, "I know you went to the Chief on me. I don't care how many times you go to him. I want you to know **many more** complaints will be filed against you. You started it."

Reaves alleges that following the meeting, Rojas and Washington retaliated against her by instigating other probationers to file complaints against her. In September 2010, after four additional probationers filed complaints against Reaves, Rojas transferred Reaves's case load to Oden, and later to Chase. Rojas then transferred Reaves from the sex offenders unit to the narcotics unit. Rojas assigned Chase's case load of 135

December 14, 2015 we affirmed the trial court's grant of the County's summary judgment motion, but we reversed the court's dismissal of the individual defendants and directed the trial court to grant Reaves leave to amend her complaint to state conspiracy claims. (*Reaves v. County of Los Angeles* (Dec. 14, 2015, B255920) [nonpub. opn.].) On remand, Reaves filed a third amended complaint on April 20, 2016. The factual background includes the facts as alleged in the third amended complaint.

probationers to Reaves. Over the next two months four more complaints were filed against Reaves. The probationers from the sex offender unit who filed complaints against Reaves did not complain about her until their cases were transferred to Oden or Chase.

On October 27, 2010 Reaves filed complaints with the County against Rojas and Washington, alleging discrimination, harassment, and retaliation. Over the next two months, eight more probationers filed complaints against Reaves. In addition, Oden allegedly tried to recruit narcotics probationer Barbara S. to file a complaint against Reaves.

On December 7, 2010, after over 12 complaints were filed against Reaves, Reaves received a letter of reprimand, followed by a 10-day suspension. On July 26, 2011 Reaves filed a complaint with the Department of Fair Employment and Housing, alleging discrimination and retaliation by the County, identifying Rojas and Washington as the responsible supervisors. Less than a month later, Reaves received another notice of intent to suspend her, signed by Williams, and on October 3 she was suspended for another 10 days. Shortly afterwards, Williams replaced Rojas as the office director.

On November 17, 2011 Reaves filed a complaint with the Equal Employment Opportunity Commission against the County for discrimination and retaliation. On January 5 and July 20, 2012 Williams issued disciplinary letters to Reaves, accusing her of loitering and insubordination. On December 3, 2012 Reaves was suspended for 30 days as a result of additional probationer complaints. Reaves alleges Williams "continued from where [Rojas] stopped in [an] effort to get [Reaves] in trouble and have her fired."

B. *Reaves's Motion To Compel the County's Deposition*

1. *The deposition subpoena*

At some point in late October 2016 Reaves purported to serve a deposition subpoena on the County, setting a deposition for November 14, 2016 of the County's PMQ about 21 categories of information, including investigation of probationer complaints, County policies and procedures, and personnel matters. On November 4 Reaves's attorney, Emmanuel Akudinobi, sent an e-mail to defendants' attorney, Neel Ghanshyam, writing "to inform" him that the deposition was scheduled for November 14. Akudinobi wrote as to the PMQ and another deposition, "Both depositions are based on subpoenas that have already been served. This email is a mere courtesy since you are the counsel of record for the defendants." Ghanshyam responded he would assist Akudinobi with the PMQ deposition, but he requested Akudinobi reschedule the deposition for a more convenient date. Ghanshyam followed up on November 10, requesting Akudinobi narrow the "wide breadth of subjects" and clarify the "specific aspects of the County's respective policies and procedures that [Reaves] will need the deponent to testify on."

During the period from January to July 2017, Akudinobi and defendants' attorneys, Ghanshyam and Calvin House, exchanged e-mails about scheduling the PMQ deposition and narrowing its scope. The meet and confer efforts continued until September 18, 2017, when Akudinobi sent an e-mail to House, in which he "advis[ed]" House that the PMQ depositions would go forward on September 21 and 22, "and no new subpoenas will be issued."

On September 18, 2017 defendants' attorney, Nicholas Hnatiuk (who also represented the County), responded to Akudinobi that the subpoena was never "effectively served," and the County therefore had no obligation to produce an individual in response to the subpoena. However, Hnatiuk stated "in the interest of advancing discovery, [the County was] willing to voluntarily produce individuals to serve as PM[Q]s for the County. However, the delineated categories about which we believe you seek deposition testimony require explanation and limitations in scope." Hnatiuk addressed each category listed in the PMQ subpoena.

2. *Reaves's motion to compel*

On September 20, 2017 Reaves filed a motion to compel the PMQ deposition. Reaves argued she had properly served the County with a subpoena, but the County failed to make its PMQ available for the deposition. According to the motion, the County "provided the name and address of the individual that will receive service on behalf of [the County]," and Reaves "subpoenaed [the County,] setting the deposition for November 14, 2016." In support of the motion, Reaves attached an e-mail from Akudinobi, in which he instructed his process server, James Wimberly, to serve the deposition subpoena on Tracy Jordan Johnson, whom Akudinobi described as "[t]he person responsible for receiving the subpoena." Akudinobi stated in his e-mail to Wimberly that Akudinobi obtained the service information from the "County Office," where Akudinobi was earlier in the day. However, the deposition subpoena filed with the motion contained an unsigned proof of service that had not been filled out. Reaves also attached as an exhibit the meet and

confer e-mails exchanged between the attorneys and the September 18, 2017 letter from Hnatiuk.

In opposition to Reaves's motion to compel, defendants argued the County was not a party to the action, and there was no evidence of personal service of the deposition subpoena on the County or notice to defendants, pointing to the blank proof of service attached to the motion. Hnatiuk stated in his supporting declaration, "[Reaves's] counsel has never provided us with any proof of service of the at-issue subpoena . . . . My office has never received any formal notice of the subpoena from Plaintiff's counsel." Defendants argued the subpoena was defective because Code of Civil Procedure[2] sections 2025.270, subdivision (c), and 2020.510, subdivision (d), required issuance of the subpoena 20 days before the deposition date if the subpoena seeks employment and personal records. Defendants contended the subpoena was overbroad, sought irrelevant information, and had no limitation on the time period for each category of information. Nonetheless, defendants stated they were "willing to help coordinate a PMQ deposition, . . . provided some reasonable restrictions can be implemented with regards to the numerous, overbroad subject matter categories."

In reply, Reaves filed a notice of errata to her motion to compel, attaching a proof of service signed by Wimberly, which stated on October 28, 2016 he served the deposition subpoena on "Tracy Johnson on behalf of [the] County of Los Angeles Probation Department" on October 28, 2016.

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[2] Further undesignated statutory references are to the Code of Civil Procedure.

At the October 13, 2017 hearing the trial court described Akudinobi's handling of the subpoena as "ridiculous. . . . You should have pursued your case enough to know what it was about and specifically what it is you need. Just improper from top to bottom from my perspective." In its written ruling later that day, the trial court denied Reaves's motion to compel the PMQ deposition without prejudice. The court found the deposition subpoena was defective because it did not include a good cause affidavit pursuant to section 1985. In addition, the court ruled Reaves should have set a hearing for an order to show cause for contempt, instead of a motion to compel, because the subpoena was to a third party. The court found that even if Reaves properly filed her motion to compel, the court would deny the motion because the subpoena was overbroad in that it sought discovery of "County policies relating to the entire County of Los Angeles and all of its departments, even those having nothing to do with the Probation Department in issue," and Reaves made no effort to explain why she needed this broad information. The court added, "Until it does so, no relief can be granted."

The court gave the parties permission to file briefs by October 19, 2017 on the issue of whether Reaves could move to compel in lieu of seeking an order to show cause. But the court had stated at the hearing, "[I]f you persuade me that [your] motion to compel is the proper vehicle, I'm telling you now, my tentative has not changed, and it is going to get denied."

Pursuant to a stipulation of the parties, the trial court continued the trial to January 8, 2018. However, the court made clear, "That's it. No more continuances." The court provided in its written order that "[d]iscovery . . . is reopened only to permit the depositions of the individual defendants and the PM[Q] for

the County, with the new trial date to be treated as if it was the original trial date as to these persons only."

C. *Defendants' Motions To Quash Reaves's Subpoenas to Chase and Oden*

1. *The deposition subpoenas*

On September 25, 2017 Reaves purportedly personally served a deposition subpoena on Chase at the probation department office at 200 West Compton Boulevard in Compton. Wimberly signed the proof of service stating he served Chase on that date. Also on September 25 Reaves purportedly personally served a deposition subpoena on Oden at the probation department office at 1330 West Imperial Highway in Los Angeles. Wimberly signed the proof of service stating he served Oden on that date. The Oden deposition was set for October 5; the Chase deposition was set for October 6.

On October 3, 2017 Akudinobi sent an e-mail to Hnatiuk attaching the subpoenas he claimed were served on Chase and Oden. Hnatiuk responded that he first learned of the purported service when he received Akudinobi's e-mail; Hnatiuk had not agreed to accept electronic service; Chase and Oden were not personally served; the purported electronic service was not timely; and, the deponents would not appear on the scheduled deposition dates.

2. *Defendants' motions to quash*

On October 5, 2017 defendants filed two motions to quash the deposition subpoenas purportedly served on Chase and Oden and to impose monetary sanctions. Defendants contended Chase and Oden were never personally served, and the proofs of

personal service on them were fraudulent. In addition, defendants argued Reaves failed to provide notice to them, instead sending the deposition subpoenas by e-mail to defendants' attorney on October 3, two to three days before the scheduled depositions. Further, defendants never agreed to accept electronic service.

In support of the motions, defendants submitted declarations from Chase and Oden. Chase stated she had never been personally served and did not work on September 25, the purported date of service. Oden stated he was never personally served. Defendants sought $750 for fees and costs incurred in bringing the motion to quash the Chase subpoena and $2,511 for bringing the motion to quash the Oden subpoena.

In opposition, Reaves submitted a declaration from Akudinobi stating he had instructed Wimberly to serve Oden at his work location, and "Wimberly notified [Akudinobi] that he has served Mr. Oden by serving Debbie Harris, the person held out to him by the Probation Department as the person authorized to receive service of subpoenas for employees of the Department." Reaves attached a bill from Wimberly for service on Oden, stating "[r]eceived by: Debbie Harris." Reaves did not attach a declaration from Wimberly or the proof of service.

In opposition to the motion to quash the Chase subpoena, Reaves contended the Chase subpoena was served properly on Willard Branch, whom the probation department held out as the person responsible for receiving subpoenas on behalf of probation department employees. But Akudinobi did not address in his declaration service on Chase. Rather, Reaves relied on a bill from Wimberly for service on Chase, stating "[r]eceived by:

Willard Branch." Reaves did not attach a declaration from Wimberly or the proof of service.

Defendants filed with their reply briefs the proofs of personal service on Chase and Oden at their work locations and noted the inconsistency with Reaves's assertion in her opposition that service had been made by substituted service.

At the November 6, 2017 hearing, Hnatiuk argued on behalf of defendants that Chase and Oden were not properly served because the proofs of personal service were fraudulent and there was only hearsay evidence of substituted service. Hnatiuk did not dispute substituted service would have been a proper method of service. Akudinobi responded the subpoenas were properly served on Chase and Oden pursuant to the Government Code. The court rejected this argument, explaining, "I don't know that that person was designated by the agency to receive service for these particular individuals. I don't know anything about it because your declaration does not spell out who actually got the subpoena and was purportedly an authorized representative." The court suggested the parties agree on the persons who would accept service for Chase and Oden and set a mutually acceptable date in the following 30 days for the depositions.

During the hearing, Akudinobi stated his process server (Wimberly) was present in court, although Akudinobi did not request Wimberly be allowed to testify.[3] The court did not hear

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[3] In the trial court's October 13, 2017 order, the court stated as to the motions to quash scheduled for November 6, 2017, "[T]o the extent that proper service is in issue, . . . the parties must have in court and be prepared to call to testify, witnesses as to whether or not proper service took place."

testimony about service of the subpoenas. The court took the motions under submission.

On November 29, 2017 the trial court granted defendants' motions to quash and ordered $750 in sanctions against Reaves and her counsel. The minute order stated the motions to quash were granted "for all of the reasons set forth in [d]efendants' moving and reply papers, the contents of which are incorporated by reference herein."

D. *Defendants' Motion for Monetary, Evidentiary, and Terminating Sanctions*

1. *Defendants' discovery requests and the court orders*

On May 23, 2017 defendants served by mail on Reaves two sets of form interrogatories and a set of requests for admission. Reaves did not respond or request an extension by the June 27 deadline. On July 5 Ghanshyam sent Akudinobi a meet and confer letter by e-mail requesting Reaves respond to the discovery by July 6, but he received no response. On August 7 defendants filed a motion to compel responses to the written discovery and set the hearing for September 11. On the Friday before the Monday hearing, Akudinobi sent an e-mail to Hnatiuk attaching Reaves's responses to the written discovery and requesting defendants take the motion off calendar. Hnatiuk responded the motion would remain on calendar because Hnatiuk did not have time to confirm whether the responses were adequate.

At the hearing on September 11, the trial court granted the motion as to the interrogatories, requiring Reaves to respond to the interrogatories without objection within 20 days. Reaves failed to serve additional responses on defendants. On October 9, 2017 Hnatiuk sent Akudinobi a meet and confer letter outlining

the deficiencies in Reaves's earlier responses. Akudinobi did not respond to the letter.

On August 7, 2017 defendants served Akudinobi by mail with a notice of Reaves's deposition set for August 22. Reaves did not object to the deposition notice. In response to an August 21 e-mail inquiry from Hnatiuk's office asking whether the Reaves deposition was confirmed, Akudinobi responded, "No." The same day House requested Akudinobi provide dates for the Reaves deposition. Akudinobi did not respond to the letter, and Akudinobi and Reaves did not appear for Reaves's deposition.

2. *Defendants' motion for sanctions*

On October 11, 2017 defendants filed a motion for monetary, evidentiary, and terminating sanctions. Defendants argued sanctions were appropriate for multiple discovery abuses, including Reaves's failure to provide responses to the two sets of interrogatories within 20 days of the trial court's September 11, 2017 order and failure to respond to defendants' letter outlining the deficiencies in the prior responses. Defendants also pointed out Reaves failed to appear at her deposition, leading defendants to file a successful motion to compel the deposition, which was now set for October 13. Finally, defendants cited to the fraudulent proofs of service relied on by Reaves in opposing the motions to quash the Chase and Odem deposition subpoenas. Defendants asserted the trial court was required to order monetary sanctions against Reaves and her attorneys for the discovery abuses and requested $4,750 in sanctions.

In opposition, Reaves argued defendants did not informally attempt to resolve the discovery disputes in good faith; defendants had already deposed her in two sessions; and the

proofs of service on Chase and Oden were proper because the code allowed substituted service.

At the November 6, 2017 hearing, Hnatiuk argued defendants had been prejudiced by Reaves's discovery abuses because discovery had closed without defendants obtaining the information they needed. The trial court took the motion under submission.

In its November 29, 2017 minute order, the trial court noted it was difficult to assess "how egregious" Reaves's conduct was given defendants' presentation of a "stack of [interrogatory] responses," but the court found as to the responses the "pervasive evasiveness is clear." The court granted defendants' request for evidentiary sanctions, ruling, "Accordingly, as to every such no-information response and every [partial] response to questions (such as doctor's name but no address), [Reaves] is hereby precluded from offering in evidence at trial the unidentified or only partly identified witnesses and documents, etc. and from testifying to any events involving such persons or documents. The same is true as to facts not provided and/or only partly provided such as the identification of medications and the costs of medication or only the last names of witnesses (by way of example) unless [Reaves] can show that the information in question was provided in full elsewhere in her answers to the various sets of interrogatories in issue." The court also granted defendants' request for $4,750 in monetary sanctions against Reaves and her attorneys.

E. *The Trial Court's Denial of Reaves's Request for a Trial Continuance and Dismissal of the Case*

On December 19, 2017 Akudinobi filed a notice of unavailability of counsel. The notice stated in part, "[Reaves's] counsel are unavailable between December 20, 2017, and January 5, 2018, for any appearances, depositions and hearings in this matter. [¶] Said counsels are out of the country and will not be coming back until the week of January 8, 2018."

On January 8, 2018 the trial court called the case for trial. Defendants announced they were ready for trial; Akudinobi stated he was not. The court noted it had not received a motion for a continuance, the court had a jury, and the matter would proceed to trial. The court stated as to Akudinobi's options, "Either you're going to try it, or you're going to dismiss it, or the court is going to dismiss it. But . . . this is the day for trial." Akudinobi stated, "Unfortunately, I can't try the case the way it is." He explained Reaves was prejudiced by the trial court's refusal to allow the process server to testify at the hearing on defendants' motion to quash the Chase and Oden subpoenas. Akudinobi requested a three-month continuance to complete necessary discovery, which the court denied.

At this point the court learned from the court clerk a jury panel was on its way to the courtroom. Akudinobi argued the court could not start jury selection because it had not yet heard the motions in limine, but the court interrupted him, stating it was leaving the bench. After a recess, the court confirmed the jury panel had arrived and observed defendants' attorneys were present, but Akudinobi was not in the courtroom. At the court's request, defendants' attorney checked in the hallway and

represented Akudinobi was not there.[4] The court inquired whether there was a motion to dismiss. Defendants orally moved to dismiss the action pursuant to section 581, subdivisions (b)(5) and (*l*), based on Reaves's failure to appear at trial. The court granted the motion and dismissed the case without prejudice.

Reaves timely appealed.

F. *Trial Court's Award of Costs to Defendants*

On January 26, 2018 defendants filed a memorandum of costs. Although the memorandum of costs is not in the appellate record, it appears the form did not include the judicial council form worksheet. In response to an e-mail request from Akudinobi, defendants' counsel provided the cost worksheet on February 2. On February 20 Reaves filed a motion to tax costs. She asserted her motion was timely because it was made within 15 days from the February 2 date of service of the memorandum of cost worksheet. She argued the memorandum of costs should be stricken because her claims were neither frivolous nor meritless. Reaves also challenged various costs relating to motions, depositions, service of process, exhibits, and transcripts.

On March 19, 2018 the trial court ruled the memorandum of costs was timely filed because the worksheet was optional according to the judicial council form. The court rejected Reaves's remaining arguments as to why costs should be denied. However, the court deducted the video recording cost of $2,962.50

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[4] Although it is not clear from the record, it is undisputed Reaves was not in the courtroom.

from the $18,310.65 sought by defendants. The court awarded defendants total costs of $15,348.15.[5]

DISCUSSION

A. *The Discovery Orders*

1. *Standard of review*

"We review the trial court's grant or denial of a motion to compel discovery for an abuse of discretion." (*Williams v. Superior Court* (2017) 3 Cal.5th 531, 540; accord, *Property Reserve, Inc. v. Superior Court* (2016) 6 Cal.App.5th 1007, 1018.) "The statutory scheme vests trial courts with "'wide discretion'" to allow or prohibit discovery." (*Williams*, at p. 540; accord,

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[5] In her opening brief, Reaves challenges the trial court's ruling on her motion to tax costs. But we have no jurisdiction to review the order because Reaves did not file a separate notice of appeal from the postjudgment order. Her notice of appeal was filed on February 2, 2018, more than a month before the trial court's order on Reaves's motion to tax costs. Further, the notice of appeal states Reaves is appealing from the January 8, 2018 dismissal order. "'A postjudgment order which awards or denies costs or attorney's fees is separately appealable . . . [citations], and if no appeal is taken from such order, the appellate court has no jurisdiction to review it.' " (*Silver v. Pacific American Fish Co., Inc.* (2010) 190 Cal.App.4th 688, 693; accord *Nellie Gail Ranch Owners Assn. v. McMullin* (2016) 4 Cal.App.5th 982, 1007-1008 [""""[W]here several judgments and/or orders occurring close in time are separately appealable (e.g., judgment and order awarding attorney fees), each appealable judgment and order must be expressly specified—in either a single notice of appeal or multiple notices of appeal—in order to be reviewable on appeal."""""].)

Property Reserve, Inc., at p. 1018 [“““Where there is a basis for the trial court’s ruling and it is supported by the evidence, a reviewing court will not substitute its opinion for that of the trial court.”””].) However, “““[t]he scope of discretion always resides in the particular law being applied, i.e., in the ‘legal principles governing the subject of [the] action . . . .’ Action that transgresses the confines of the applicable principles of law is outside the scope of discretion and we call such action an ‘abuse’ of discretion.”’ [Citation.] An order that implicitly or explicitly rests on an erroneous reading of the law necessarily is an abuse of discretion.” (*Williams*, at p. 540; accord, *Property Reserve, Inc.*, at p. 1018.) Moreover, “[a] trial court must be mindful of the Legislature’s preference for discovery over trial by surprise, must construe the facts before it liberally in favor of discovery, may not use its discretion to extend the limits on discovery beyond those authorized by the Legislature, and should prefer partial to outright denials of discovery. [Citation.] A reviewing court may not use the abuse of discretion standard to shield discovery orders that fall short . . . .” (*Williams*, at p. 540.)

A party challenging a trial court’s discovery orders, “‘must “show not only that the trial court erred, but also that the error was prejudicial.””” (*Property Reserve, Inc. v. Superior Court, supra*, 6 Cal.App.5th at p. 1018; accord, *MacQuiddy v. Mercedes-Benz USA, LLC* (2015) 233 Cal.App.4th 1036, 1045 [“the plaintiff must show that it is reasonably probable the ultimate outcome would have been more favorable to the plaintiff had the trial court not erred in the discovery rulings”].) “‘[W]e cannot presume prejudice and will not reverse the judgment in the absence of an affirmative showing there was a miscarriage of justice.’” (*Property Reserve, Inc.*, at p. 1020; accord, *Century Surety Co. v.*

Polisso (2006) 139 Cal.App.4th 922, 963; see Cal. Const., art. VI, § 13.)

2. *The trial court's denial of Reaves's motion to compel the PMQ deposition was not prejudicial error*

The trial court denied Reaves's motion to compel the County's deposition because Reaves should have set an order to show cause hearing, and the deposition subpoena failed to comply with the good cause affidavit requirement under section 1985, subdivision (b).[6] We agree with the parties that both grounds rest on an erroneous reading of the discovery statutes.

"When a subpoenaed nonparty fails to appear for a deposition or produce documents that were properly requested, the party who subpoenaed the witness may move to compel compliance with the subpoena." (*Sears, Roebuck & Co. v. National Union Fire Ins. Co. of Pittsburgh* (2005) 131 Cal.App.4th 1342, 1351; accord, *Unzipped Apparel, LLC v. Bader* (2007) 156 Cal.App.4th 123, 127; see § 2025.480, subd. (a) ["If a deponent fails to answer any question or to produce any document, electronically stored information, or tangible thing under the deponent's control that is specified in the deposition notice or a deposition subpoena, the party seeking discovery may

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[6] Section 1985, subdivision (b) states, "A copy of an affidavit shall be served with a subpoena duces tecum issued before trial, showing good cause for the production of the matters and things described in the subpoena, specifying the exact matters or things desired to be produced, setting forth in full detail the materiality thereof to the issues involved in the case, and stating that the witness has the desired matters or things in his or her possession or under his or her control."

move the court for an order compelling that answer or production."].)

Further, section 2020.510—which governs deposition subpoenas for "testimony" and "business records, documents, electronically stored information, and tangible things"—expressly provides that "a deposition subpoena under subdivision (a) need not be accompanied by an affidavit or declaration showing good cause for the production of the documents and things designated." (§ 2020.510, subds. (a) & (b); see *Terry v. SLICO* (2009) 175 Cal.App.4th 352, 358 ["The contrary provisions in sections 1985 and 1987.5 . . . are inconsistent with and therefore superseded by section 2020.510."].)

Although the trial court relied on erroneous grounds, "[w]e are required to uphold the ruling if it is correct on any basis, regardless of whether such basis was actually invoked." (*In re Marriage of Burgess* (1996) 13 Cal.4th 25, 32; accord, *Cates v. California Gambling Control Com.* (2007) 154 Cal.App.4th 1302, 1312 [affirming discovery ruling on ground not relied upon by trial court]; *North American Capacity Ins. Co. v. Claremont Liability Ins. Co.* (2009) 177 Cal.App.4th 272, 297 ["we review [the trial court's] ruling, not its reasoning"].) In their opposition, defendants raised two valid grounds for denying Reaves's motion to compel. First, Reaves did not give defendants notice of the PMQ subpoena, as required by section 2025.240.[7] Second, Reaves presented no admissible evidence showing Johnson was an

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[7] Section 2025.240 provides, "The party who prepares a notice of deposition shall give the notice to every other party who has appeared in the action. The deposition notice, or the accompanying proof of service, shall list all the parties or attorneys for parties on whom it is served."

"officer, director, custodian of records, or to any agent or employee authorized by the organization to accept service of a subpoena," as required under section 2020.220, subdivision (b)(2). Reaves did not submit a declaration from Akundinobi or Wimberly attesting that Tracy Jordan Johnson was an employee authorized to accept service of the County PMQ subpoena. Instead, Reaves relied on an e-mail from Akudinobi to Wimberly stating he had obtained the service information from the "County [o]ffice."

Further, even if the denial of Reaves's motion to compel was erroneous, Reaves fails to show prejudice. In the October 13, 2017 ruling, the trial court denied the motion without prejudice and reopened discovery "to permit the depositions of the individual defendants and the PM[Q] from the County, with the new trial date to be treated as if it was the original trial date as to these persons only." Reaves had from October 13 to December 8 (30 days before the new January 8, 2018 trial date)[8] to serve another deposition subpoena on the County, narrowed in scope to address the court's and County's concerns. Further, in opposing the motion, defendants stated they were "willing to help coordinate a PMQ deposition, . . . provided some reasonable restrictions can be implemented with regards to the numerous, overbroad subject matter categories." There is no evidence in the record that following the trial court's denial of the motion Reaves

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[8] Section 2024.020, subdivision (a) states, "Except as otherwise provided in this chapter, any party shall be entitled as a matter of right to complete discovery proceedings on or before the 30th day, and to have motions concerning discovery heard on or before the 15th day, before the date initially set for the trial of the action."

made any effort to serve a narrower subpoena on the County or informally to coordinate a deposition with the County.

3. *The trial court did not abuse its discretion in granting defendants' motions to quash the Chase and Oden subpoenas*

Reaves contends the trial court erred in refusing to allow her process server to testify at the November 6, 2017 hearing because it denied her the opportunity to refute defendants' allegations of fraud.[9] This contention lacks merit.[10]

Reaves is correct the trial court's October 13, 2017 order advised the parties to be prepared to call witnesses to testify concerning service of the Chase and Oden subpoenas at the

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[9] Alhough Akudinobi pointed out his process server was present, Akudinobi did not specifically request the trial court allow him to testify. However, we treat Akudinobi's comment regarding his process server being present as a request for him to testify in light of the court's refusal to allow Akudinobi fully to address his concerns at the hearing and the court's interruption of Akudinobi's argument, when the court announced, "The hearing is over."

[10] Reaves also contends the trial court's delay in waiting until November 29 to rule on the motions to quash effectively barred her from deposing Chase and Oden. But in its October 13, 2017 written order, the trial court had reopened discovery "only to permit the depositions of the individual defendants and the PM[Q] from the County." Based on the prior November 6, 2017 trial date, discovery of third parties, including Chase and Oden, had closed by the time the trial court heard defendants' motion on November 6. Regardless of the timing of issuance of the court's ruling, Reaves needed to request leave to renotice the Chase and Oden depositions, which she failed to do.

November 6, 2017 hearing "to the extent that proper service is in issue." But the trial court did not abuse its discretion in basing its ruling on the evidence presented by the parties in their briefing instead of holding an evidentiary hearing. The proofs of service for the deposition subpoenas state the subpoenas were personally served on Chase and Oden. Then, in her opposition Reaves contended the Chase subpoena was served properly on Branch, whom the probation department held out as the person responsible for receiving subpoenas on behalf of probation department employees, and the Oden subpoena was properly served on Harris.[11] But Reaves failed to present admissible evidence showing Branch or Harris was the "immediate superior" or "agent designated by that immediate superior to receive that service" under Government Code section 68097.1, subdivision (a). As to Oden, Reaves relied on a declaration from Akudinobi that "Wimberly notified [Akudinobi] that he has served Mr. Oden by serving Debbie Harris, the person held out to him by the Probation Department as the person authorized to receive service of subpoenas for employees of the Department." Reaves also relied on a bill from Wimberly for service as "[r]eceived by: Debbie Harris." As to Chase, Reaves simply relied on a bill from Wimberly for service on Chase as "[r]eceived by: Willard Branch."

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[11] The trial court found Reaves could not serve the subpoenas on Chase and Oden by substituted service. But under Government Code section 68097.1, subdivision (a), if a witness is a probation officer, the party serving the subpoena may serve the probation officer "personally, or by delivering two copies to his or her immediate superior at the public entity by which he or she is employed or an agent designated by that immediate superior to receive that service."

Moreover, Reaves did not give timely or proper notice of the Chase and Oden deposition subpoenas to defendants, as required under section 2025.240, instead providing notice in an e-mail just days before the scheduled depositions.

4. *The trial court did not abuse its discretion in granting defendants' motion for sanctions*

Reaves contends the trial court abused its discretion in granting defendants' motion for evidentiary and monetary sanctions because defendants failed to meet and confer before making the motion. Reaves also argues defendants failed to comply with the separate statement requirement under California Rules of Court, rule 3.1345. Both contentions lack merit.

Pursuant to section 2023.030, the trial court, after notice and an opportunity for hearing, may impose monetary and evidentiary sanctions on a party or attorney "engaged in the misuse of the discovery process." (See *Department of Forestry & Fire Protection v. Howell* (2017) 18 Cal.App.5th 154, 191 ["[S]ection 2023.030 permits the trial court to impose as sanctions against anyone who has engaged in a misuse of the discovery process monetary sanctions, issue sanctions, evidence sanctions, terminating sanctions, or contempt sanctions."]; *Lopez v. Watchtower Bible & Tract Society of New York, Inc.* (2016) 246 Cal.App.4th 566, 604 [same].) Under section 2023.010, "[m]isuses of the discovery process" includes "[m]aking an evasive response to discovery," and "[d]isobeying a court order to provide discovery." (§ 2023.010, subds. (f) & (g); see *Department of Forestry & Fire Protection*, at p. 191.)

Unlike section 2030.300, under which a party may move to compel further responses to interrogatories, there is no requirement that a motion for sanctions under section 2023.030 be accompanied by a meet and confer declaration. (*Sinaiko Healthcare Consulting, Inc. v. Pacific Healthcare Consultants* (2007) 148 Cal.App.4th 390, 411 ["Although the 'meet and confer' requirement is an express prerequisite to moving to compel further responses to interrogatories . . . , no such requirement appears in the statutes permitting sanctions based on a party's violation of a court order compelling responses . . . or for misuse of discovery . . . ." (Citations omitted.)].)

Further, although a separate statement is required for a motion for issue or evidentiary sanctions where the motion involves "the content of a discovery request or the responses to such a request," a separate statement is not required "when no response has been provided to the request for discovery." (Cal. Rules of Court, rule 3.1345(a)(7) & (b).) Here, Reaves provided no further responses after the trial court ordered her to respond fully to the interrogatories on September 11, 2017. Although the trial court focused on the adequacy of the responses, defendants had relied on the lack of any further responses as well as other discovery abuses.

Even if a separate statement was required, the court rules "do[] not limit a trial court's discretion to compel further answers notwithstanding the absence of a separate statement." (*Sinaiko Healthcare Consulting, Inc. v. Pacific Healthcare Consultants, supra*, 148 Cal.App.4th at p. 409 [trial court had discretion to treat motion to compel interrogatory responses as motion to compel further responses where responding party served inadequate responses after motion was filed, even though motion

did not include separate statement].) Here, on September 11 the trial court granted defendants' motion to compel Reaves to respond to both sets of interrogatories without objection within 20 days. Yet according to Hnatiuk, "Reaves never served any further, supplemental or amended responses beyond those that were emailed to me on September 8, 2017." Nor did Akudinobi respond to Hnatiuk's October 9 letter requesting further responses. And Reaves's earlier interrogatory responses showed "pervasive evasiveness." Under these circumstances, the trial court did not abuse its discretion in imposing monetary and evidentiary sanctions for Reaves's failure to comply with its prior discovery order.

B. *The Trial Court Did Not Abuse Its Discretion in Denying Reaves's Request for a Trial Continuance*

A party seeking a trial continuance "must make the request for a continuance by a noticed motion or an ex parte application . . . with supporting declarations," and the party "must make the motion or application as soon as reasonably practical once the necessity for the continuance is discovered." (Cal. Rules of Court, rule 3.1332(b).) "Although continuances of trials are disfavored, each request for a continuance must be considered on its own merits. The court may grant a continuance only on an affirmative showing of good cause requiring the continuance. Circumstances that may indicate good cause include: [¶] . . . [¶] (6) A party's excused inability to obtain essential testimony, documents, or other material evidence despite diligent efforts." (Cal. Rules of Court, rule 3.1332(c); see *Thurman v. Bayshore Transit Management, Inc.* (2012) 203 Cal.App.4th 1112, 1127 ["Trial continuances are disfavored

and may be granted only on an affirmative showing of good cause."], disapproved on another ground in *ZB, N.A. v. Superior Court* (*Lawson*) (Sept. 12, 2019, S246711) [2019 WL 4309684, *10, fn. 8]; *In re Marriage of Falcone & Fyke* (2008) 164 Cal.App.4th 814, 823 ["Continuances are granted only upon an affirmative showing of good cause requiring a continuance."].)

We review the trial court's denial of a trial continuance for an abuse of discretion. (*Thurman v. Bayshore Transit Management, Inc., supra*, 203 Cal.App.4th at p. 1126 [denial of trial continuance to allow plaintiff to seek class certification was not abuse of discretion]; *Hernandez v. Superior Court* (2004) 115 Cal.App.4th 1242, 1246 [denial of trial continuance where plaintiff's attorney had terminal illness, then died, was abuse of discretion]; see *Daily v. Sears, Roebuck & Co.* (2013) 214 Cal.App.4th 974, 1004 [trial court acted within its discretion in denying continuance of class certification hearing].)

On the day of trial Akudinobi announced he was not ready, and he requested a three-month continuance. But Akudinobi did not file a motion or ex parte application for a continuance with a supporting declaration, as required by California Rules of Court, rule 3.1332(b). Nor did he make a motion "as soon as reasonably practical once the necessity for the continuance [was] discovered." (*Ibid.*) Akudinobi was aware of the basis for his request for a continuance—his desire to take the County's PMQ deposition and the Chase and Odem depositions—at the time of the trial court's October 13 and November 29 rulings, respectively. Further, Akudinobi did not make an affirmative showing of good cause requiring continuance of the trial. (Cal. Rules of Court, rule 3.1332(c).) In court, Akudinobi argued Reaves was prejudiced by the court's refusal to allow the process server to testify about

service of the Chase and Oden deposition subpoenas. But Akudinobi did not explain what efforts (if any) he made properly to serve the deposition subpoenas after the court granted the motion (and did not seek leave to extend the deadline for completing discovery). Nor is there any evidence Akudinobi reached out to defendants' attorneys to reschedule any of the depositions. Akudinobi likewise did not present evidence showing his diligence in seeking to renotice or otherwise reschedule the PMQ deposition and to narrow the scope of the subpoena. The trial court therefore did not abuse its discretion in denying Reaves's request for a trial continuance.

C. *The Trial Court Did Not Abuse Its Discretion in Dismissing the Case After Reaves and Her Attorney Failed To Appear at Trial*

The trial court dismissed the case without prejudice pursuant to section 581, subdivisions (b)(5) and (*l*). Section 581, subdivision (b)(5), authorizes the trial court to dismiss an action "without prejudice, when either party fails to appear on the trial and the other party appears and asks for dismissal." Likewise, section 581, subdivision (*l*), provides, "The court may dismiss, without prejudice, the complaint in whole, or as to that defendant when either party fails to appear at the trial and the other party appears and asks for the dismissal." We review for an abuse of discretion the trial court's dismissal of an action based on a party's failure to appear at trial. (*Link v. Cater* (1998) 60 Cal.App.4th 1315, 1321 (*Link*); accord, *Schlothan v. Rusalem* (1953) 41 Cal.2d 414, 417-418 [trial court abused its discretion in dismissing case under § 581 for plaintiff's failure to appear at

trial where attorney was prepared to proceed to trial but believed case would be called for trial on following day].)

Reaves contends the trial court erred in dismissing the case under section 581 before ruling on defendants' motions in limine. She argues absent a ruling on the motions in limine, her attorneys could not determine the parameters of the voir dire and opening statement. This argument rings hollow because Reaves and Akudinobi failed to appear at trial because Reaves was not prepared to proceed without additional discovery, not because the trial court intended to proceed with voir dire before ruling on defendants' motions in limine. Further, "'the trial court's in limine ruling is necessarily tentative because the court retains discretion to make a different ruling as the evidence unfolds.'" (*People v. Gonzalez* (2006) 38 Cal.4th 932, 958; accord, *Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 608 ["A pretrial motion in limine is merely an *additional* protective device for the opponent of the evidence, to prevent the proponent from even mentioning potentially prejudicial evidence to the jury."].) Reaves cites no authority, nor could she, for a requirement the trial court must rule on motions in limine before swearing in a jury. Moreover, it would have been defendants, not Reaves, who potentially would have been prejudiced by a delay in consideration of defendants' motions in limine.

Reaves also contends the trial court abused its discretion in dismissing the case under section 581 because the dismissal denied her a trial on the merits, citing *Link, supra*, 60 Cal.App.4th at page 1320. *Link* is distinguishable. There, the Court of Appeal concluded the trial court abused its discretion in dismissing the action after the plaintiff failed to appear on the day of trial, noting the plaintiff had diligently prosecuted the case

for four years, including participating in five mandatory settlement conferences, appearing for trial on five occasions, and having his attorney conduct significant pretrial discovery. (*Id.* at pp. 1324-1325.) The *Link* court noted there was nothing in the record to show either plaintiff or his attorney "was unready to try the case." (*Id.* at p. 1324.) Further, the plaintiff failed to appear on the trial date after the trial court had continued the trial to a date just three days before the plaintiff was scheduled for medical treatment out of the country, and the court had denied plaintiff's request for a continuance. (*Ibid.*)

The *Link* court observed "the trial court was laboring under a number of misapprehensions when it invited dismissal of the case," explaining the court "believed plaintiff had requested and received more continuances than was the case; it believed, without any documentation, that the continuances to receive medical treatment were not justified, and it believed mistakenly that after notice of the April 24 trial date, plaintiff deliberately had made travel arrangements and medical appointments out of state that would clearly be in conflict." (*Ibid.*) Under those circumstances, the trial court "abused its discretion in inviting dismissal of the case and refusing to grant a continuance when the imposition of a lesser sanction would have sufficed." (*Id.* at p. 1325.)

In contrast to the plaintiff and her attorney in *Link*, Reaves and Akudinobi were not ready to try the case. On the day of trial, Akudinobi left the courtroom after the trial court denied his request for a continuance, and he could not be found in the hallway. Unlike the plaintiff in *Link* who failed to appear at trial so she could obtain treatment out of the country, Reaves and Akudinobi failed to appear because Akudinobi felt he could not

proceed in light of the trial court's rulings on the discovery motions, which we have concluded did not constitute an abuse of discretion. Under these circumstances, the trial court did not abuse its discretion in dismissing the action without prejudice.

DISPOSITION

We affirm the trial court's discovery orders and its order dismissing the case. Rojas, Washington, and Williams are to recover their costs on appeal from Reaves.

FEUER, J.

WE CONCUR:

PERLUSS, P. J.

SEGAL, J.