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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

MICHAEL MURDOCH et al., Plaintiffs and Appellants, v. BROCK SOLUTIONS, Defendant and Respondent.	A155716 (San Francisco County Super. Ct. No. CGC12521014)

In 2014, plaintiffs and appellants Michael and Danielle Murdoch (plaintiffs) won a jury verdict assigning defendant and respondent Brock Solutions (Brock) ten percent of the responsibility for a 2011 injury sustained by Michael Murdoch (Murdoch) while working as a millwright on a baggage conveyor during renovations at San Francisco International Airport (SFO). Plaintiffs brought a successful motion for new trial on the basis that the liability assigned to Brock was too low, the ruling was affirmed on appeal, and the case was retried in 2018. The retrial resulted in a verdict finding that Brock's negligence was not a substantial factor in Murdoch's injury. Plaintiffs appeal, asserting several claims of error. We affirm.

BACKGROUND[1]

The present case is a personal injury action arising out of a worksite accident in January 2011. Plaintiff Murdoch was employed as a millwright for Siemens Industry,

[1] Neither party summarizes the full scope of the evidence at the 2018 retrial in their briefs on appeal. Similarly, this decision only describes the factual and procedural background to the extent necessary to resolve the issues on appeal.

Inc. on a construction project at SFO. He was working on a baggage conveyor belt (referred to as IB4), cutting a metal side guard. The conveyor began moving unexpectedly, pulling Murdoch into an opening, where he remained stuck until he was able to pull himself out.

In May 2012, Plaintiffs filed a lawsuit against respondent Brock for negligence and loss of consortium.[2] The complaint alleged that Brock was the subcontractor responsible for "the design, installation, and programming of the computerized system" that controlled the baggage conveyor system Murdoch was working on when he was injured. Plaintiffs alleged that Brock caused Murdoch's injury by starting the baggage conveyor remotely without warning and "without having visual contact with the portion of the conveyor system which they were starting or stopping." Plaintiffs admitted that Murdoch had failed to lock out the conveyor system, but alleged that he "rightfully assumed" that a Bass Electric employee working in the same area "had conformed with the job safety dictates and had manually locked out the conveyor system."[3] Plaintiffs alleged that, due to the accident, Murdoch suffered "severe and permanent injuries to his back" as well as "great mental, physical, and nervous pain and suffering."

The case was tried in 2014. The jury determined Brock and Siemens were negligent, and their negligence was a substantial factor in plaintiffs' injuries. The jury

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[2] Plaintiffs also named as defendants Bass Electric, an electrical subcontractor that had an employee working in the area of the baggage conveyor, and Turner Construction Company, the general contractor. Those defendants were not involved in the retrial and are not parties to the present appeal.

[3] A Brock expert on construction industry safety explained the lockout procedure as follows: "A full-blown lockout-tagout has several elements to it and it begins with the notification. [¶] So you identify that you need to actually perform work on a piece of equipment that needs to be locked out. You notify the operator, or owner, or folks who are involved with the operation of that equipment. [¶] You go in, you put . . . your lock on that. You lock it. You take your key and put it in your pocket. [¶] Full-blown lockout-tagout, you would then add a tag, and it's typical that we put a photograph and/or a phone number on that tag . . . . [¶] So it puts a personal spin on it, and it enables anybody to locate the person who has their tag on it; you have got the lock and the tag."

awarded plaintiffs $3,895,220, comprised of $2,395,220 in economic damages and $1,500,000 in non-economic damages. The jury allocated 80 percent of the fault to Murdoch, 10 percent to Brock, and 10 percent to Siemens. The court reduced the economic damages by Murdoch's percentage of fault, and offset settlement payments and workers' compensation benefits Murdoch received before trial.[4]

Plaintiffs moved for a new trial, arguing the jury's apportionment of fault was against the weight of the evidence. The trial court agreed and granted the motion, concluding Brock's liability "was significant and in excess of the 10% that the jury apportioned." Brock appealed and plaintiffs filed a cross-appeal. In *Murdoch I*, this court affirmed, holding that the trial court did not abuse its discretion in granting the motion for a new trial.

In a motion in limine prior to commencement of the retrial in April 2018, plaintiffs moved to limit the retrial to the issue of apportionment of fault. The trial court denied the motion.

During the 2018 retrial, plaintiffs sought to prove that Brock employee Yat Ming To (To) remotely started the baggage conveyor Murdoch was working on without having determined whether it was safe to do so. In his testimony, To denied that he started the conveyor when Murdoch was injured. Murdoch testified that he agreed "the most important rule for anybody working on top of energized equipment is lockout, tagout." He admitted he had failed to lockout the conveyor belt on the day of the accident at SFO because he thought a Bass Electric employee had done so.

Following trial, the jury found that Brock was negligent, but that the negligence was not a substantial factor in causing Murdoch's injury. In July 2018, the trial court entered judgment in favor of Brock.

Plaintiffs moved for a new trial on several grounds; the motion was supported by declarations from five jurors. In September 2018, the trial court denied the motion.

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[4] Information about the first trial and subsequent appeal is derived from this court's prior decision in *Murdoch v. Brock Solutions* (March 2, 2017, A143310 [nonpub. opn.]) (*Murdoch I*).

DISCUSSION

I. *The Trial Court Did Not Err in Permitting a Retrial on Damages*

In their motion for a new trial following the 2014 verdict, plaintiffs requested a new trial rather than a trial only on liability.[5] The August 2014 court order granting the motion did not limit the new trial to the liability issue. Neither did the March 2017 decision of this court affirming the trial court limit the issues on retrial. (*Murdoch I*, *supra*, A143310.) Nevertheless, on April 4, 2018, the eve of the April 9 scheduled trial, plaintiffs moved in limine to limit the retrial to liability only, citing *Schelbauer v. Butler Mfg. Co.* (1984) 35 Cal.3d 442, 456 (*Schelbauer*).

In their motion in limine and on appeal, plaintiffs point out that the order granting the new trial prepared by the first trial court made it clear that court did not question any aspect of the verdict other than the apportionment of fault. The August 28, 2014 order stated, "The Court reviewed the entire record, making reasonable inferences therefrom, and determined that the evidence was insufficient to justify the verdict. As such, the *sole ground* for granting the motion for a new trial was that the evidence presented at trial was insufficient to justify the verdict as to the fault apportionment, stating that Defendant Brock Solutions was merely 10% at fault for the accident." (Emphasis added.) The order concluded, "The Court is mindful of the presumption in favor of the correctness of the verdict, but based on the testimony of Mr. McAllister, other witnesses, and a careful review of the entire record, the Court found that Defendant Brock Solutions' fault for the accident was significant and in excess of the 10% that the jury apportioned. As such, there was insufficient evidence to justify the verdict regarding the fault apportionment." Nevertheless, the order granted new trial without limitation to the apportionment issue.

Brock challenged the grant of the new trial on appeal. This court affirmed the order in March 2017, without limiting the scope of the retrial; there is no indication in

[5] The motion itself is not in the record, but the trial court's order makes no reference to a request for a limited retrial and plaintiffs do not claim they made any such request.

this court's decision that plaintiffs sought to narrow the scope of the issues at the retrial. (*Murdoch I*, *supra*, A143310.)

In *Schelbauer*, *supra*, 35 Cal.3d 442, the trial court conditionally granted a motion for a new trial. (*Id.* at p. 448.) Under the order, the motion would be denied if the plaintiff consented to a specified reduction in the award; the reduction reflected the court's conclusion that insufficient evidence supported the jury's allocation of liability for the plaintiff's injuries. The California Supreme Court held the trial court was not authorized by statute to issue a conditional remittitur where the damage award was excessive only due to improper apportionment of liability. (*Id.* at p. 454.) On the other hand, the court upheld the grant of a new trial but modified the order to "limit the new trial to the issue of apportionment of liability." (*Id.* at p. 457.) The court acknowledged that "A reviewing court should not modify an order granting a new trial on all issues to one granting a limited new trial 'unless such an order should have been made as a matter of law.' " (*Id.* at p. 456.) In explaining its decision to limit the scope of the retrial, the *Schelbauer* court stated, "There is no reason to subject the parties and the courts to the expense and delay of retrial of those issues on which the jury and the trial court agreed and which are supported by the evidence. Where, as here, the trial court has reviewed the jury's special verdicts and has properly concluded that the jury's apportionment of damages is erroneous but that the damage award is incorrect only to the extent that it reflects an improper apportionment of liability, the trial court should have limited its new trial order to that issue." (*Ibid.*) In so modifying the trial court's order, the court relied on its authority under section 43 of the Code of Civil Procedure to "affirm, reverse, or modify any judgment or order appealed from," to "direct the proper judgment or order to be entered, or direct a new trial or further proceedings to be had." (*Schelbauer*, at p. 458.)

Although *Schelbauer* suggests the argument could have been made in the *Murdoch I* appeal that the trial court abused its discretion in 2014 in ordering retrial on all issues (*Schelbauer*, *supra*, 35 Cal.3d at p. 452), plaintiffs cite no authority that the trial court in 2018 had either the obligation or authority to reconsider the scope of the retrial at

the motion in limine hearing immediately prior to the retrial. By failing to request a limited retrial in their motion for new trial and/or by failing to request a limited retrial in the *Murdoch I* appeal, plaintiffs forfeited any claim that the trial court abused its discretion in granting a new trial on all issues in 2014. (See *Findleton v. Coyote Valley Band of Pomo Indians* (2018) 27 Cal.App.5th 565, 571 [explaining law of the case doctrine].) Accordingly, the trial court did not err in denying plaintiffs' 2018 in limine motion seeking a retrial on allocation of liability alone.

II. *Evidence Regarding Workers' Compensation Benefits*

Plaintiffs argue the trial court abused its discretion (*Stokes v. Muschinske* (2019) 34 Cal.App.5th 45, 55) in allowing evidence regarding Murdoch's workers compensation benefits, which, they argue, "was offered to argue that Mr. Murdoch's injuries were not serious based upon his failure to obtain medical care from collateral sources."

The " 'collateral source rule' " provides that "if an injured party received some compensation for his injuries from a source wholly independent of the tortfeasor, such payment should not be deducted from the damages which the plaintiff would otherwise collect from the tortfeasor." (*Hrnjak v. Graymar, Inc.* (1971) 4 Cal.3d 725, 729 (*Hrnjak*).) In *Hrnjak*, the California Supreme Court considered "under what circumstances a defendant in a tort action may introduce evidence of plaintiff's receipt of collateral source benefits for the purpose of establishing that plaintiff had a motive for feigning injury and refusing to resume gainful occupation." (*Id.* at pp. 726–727.) The court concluded admission of the evidence was error under Evidence Code section 352[6] because the trial court failed "to carefully weigh the relevance and probative value of evidence of plaintiff's receipt of collateral benefits against the inevitable prejudicial impact such evidence is likely to have on the jury's deliberations." (*Id.* at p. 732; accord *Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541, 552.) *Hrnjak*

[6] Evidence Code section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

explained, "The potentially prejudicial impact of evidence that a personal injury plaintiff received collateral insurance payments varies little from case to case. Even with cautionary instructions, there is substantial danger that the jurors will take the evidence into account in assessing the damages to be awarded to an injured plaintiff. . . . Admission despite such ominous potential should be permitted only upon a persuasive showing that the evidence sought to be introduced is of substantial probative value." (*Id.* at pp. 732–733.) The court concluded the evidence did not "establish[] a strong inference that plaintiff was motivated by the insurance receipts rather than by the actual disabling extent of his injuries" and remanded for a new trial on damages. (*Id.* at pp. 733–734.)

At the outset, Brock contends plaintiffs cannot claim error based on the evidence and argument regarding Murdoch's workers compensation benefits because plaintiffs "threw this door wide open" by presenting evidence regarding the inadequacy of the benefits at various times during their case in chief. Plaintiffs do not dispute that they put on evidence regarding Murdoch's benefits, but they argue they were required to do so because the trial court had ruled during the hearing on the motions in limine that evidence regarding Murdoch's alleged failure to use workers' compensation benefits was admissible. Plaintiffs' argument is misplaced. They moved in limine that the 2018 trial should be as to liability only, and success on that motion would have resulted in the exclusion of the evidence regarding workers compensation benefits. However, plaintiffs cite to no portion of the hearing on the motions in limine where they argued that, if the trial court allowed retrial on damages, the court should exclude evidence regarding Murdoch's workers compensation benefits due to the collateral source rule. Accordingly, the claim has been forfeited. (*People v. Williams* (1988) 44 Cal.3d 883, 912 ["It is axiomatic that a party who himself offers inadmissible evidence is estopped to assert error in regard thereto."]; accord *Kim v. Toyota Motor Corp.* (2018) 6 Cal.5th 21, 39.)

In any event, even assuming that plaintiffs preserved their claim and that the evidence should have been excluded, any error in the admission of evidence regarding workers compensation benefits or other collateral sources was not prejudicial. (*Stokes v. Muschinske, supra,* 34 Cal.App.5th at p. 56.) Plaintiffs argue "[t]he references to Mr.

Murdoch's alleged failure to seek 'free' medical care from the workers compensation carrier . . . directly prejudiced the question of Mr. Murdoch's credibility, and the question of whether Mr. Murdoch was harmed." Plaintiffs were not prejudiced on the latter issue because the jury never reached the issue of damages, having concluded Brock's negligence was not a "substantial factor" in plaintiffs' injury. On the issue of Mr. Murdoch's credibility, plaintiffs cite to nowhere in the record where the workers compensation evidence was used to challenge his account of the accident, as opposed to the amount of damages.[7] In any event, the credibility of Murdoch's account of the accident was much more seriously undermined by the evidence that he failed to assert he saw any Brock employee at the time of the accident in forms completed near the time of the accident.[8]

Plaintiffs have not demonstrated any reversible error due to the collateral source rule.[9]

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[7] For example, during closing argument, Brock's counsel pointed out that Murdoch failed to take advantage of psychological treatment benefits available under the workers' compensation scheme and argued to the jury, "if you find that basically he could have gotten himself better and when you are back there trying to figure out what his general damages are, I want you to say at least for that part it's a zero, because you should not be rewarding somebody for sitting around for three years, not getting psych treatment . . . ."

[8] For example, during closing argument, Brock's counsel pointed out that the accident report produced by Murdoch's supervisor stated that Murdoch said that only an employee with Bass Electric was present at the time of the accident.

[9] Plaintiffs also point to a portion of the record where Brock's counsel asked Murdoch, "If you get accepted in the Cherokee Nation, what are the benefits that you would receive?" Plaintiffs objected and defense counsel argued, "The relevance goes to future damages. If the Cherokee Nation provides lifetime . . . they provide a subsidy for medical care, lifetime free medical care, I want to know." The trial court allowed the question and Murdoch responded, "So you can buy land on the reservation. . . . My mom, she doesn't . . . receive an income or a subsidy from them." Given that Murdoch did not testify the Cherokee Nation was a potential collateral source of benefits, any error in allowing the question was harmless. (See *Stokes v. Muschinske, supra,* 34 Cal.App.5th

III. *Attorney Misconduct*

Plaintiffs contend Brock's counsel committed misconduct during closing argument by referencing evidence not admitted at trial. Plaintiffs have not demonstrated any misconduct was prejudicial.

"[M]isconduct by counsel in closing argument . . . can constitute prejudicial error entitling the aggrieved party to reversal of the judgment and a new trial." (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 802 (*Cassim*).) "In conducting closing argument, attorneys for both sides have wide latitude to discuss the case." (*Id.* at p. 795.) "An attorney who exceeds this wide latitude commits misconduct. For example, '[w]hile a counsel in summing up may indulge in all fair arguments in favor of his client's case, he may not assume facts not in evidence or invite the jury to speculate as to unsupported inferences.' [Citation.] Nor may counsel properly make personally insulting or derogatory remarks directed at opposing counsel or impugn counsel's motives or character. [Citation.] Additional examples abound; these are but a few." (*Id.* at p. 796.)

" '[I]t is not enough for a party to show attorney misconduct. In order to justify a new trial, the party must demonstrate that the misconduct was prejudicial. [Citation.] As to this issue, a reviewing court makes "an independent determination as to whether the error was prejudicial." [Citation.] It "must determine whether it is reasonably probable [that the appellant] would have achieved a more favorable result in the absence of that portion of [attorney conduct] now challenged." [Citation.] It must examine "the entire case, including the evidence adduced, the instructions delivered to the jury, and the entirety of [counsel's] argument," in determining whether misconduct occurred and whether it was sufficiently egregious to cause prejudice.' " (*Bigler-Engler v. Breg, Inc.* (2017) 7 Cal.App.5th 276, 296 (*Bigler-Engler*); see also *Cassim*, *supra*, 33 Cal.4th at

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at p. 60 ["single vague reference" to Social Security "could not have affected the jury's verdict"].)

p. 800 [describing required showing of prejudice]; *City of Los Angeles v. Decker* (1977) 18 Cal.3d 860, 872 [articulating independent determination standard of review]; *Bigler-Engler*, at p. 296, fn. 16 [rejecting abuse of discretion standard].)

In the present case, plaintiffs contend Brock's counsel committed misconduct in closing argument by using evidence from outside the record to support the veracity of To's testimony in the 2018 retrial that on the day of the accident he did not turn on the entire system because he was "only doing the verification of those partial sections, we were only doing one section at a time on that day." In particular, Brock's counsel showed the jury two pages from To's 2014 testimony that were never read to the jury in the 2018 retrial.[10] In the prior testimony at issue, To explained what was involved in testing each section of the conveyor belt, which counsel used to rebut plaintiffs' suggestion that To had "made up this whole section by section thing when he came into this trial." As the trial court did, we assume for purposes of this opinion that plaintiffs have shown misconduct.[11]

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[10] Plaintiffs objected to that portion of the closing argument, but they did not clearly indicate that the objection was on the ground that Brock's counsel was referencing portions of the 2014 trial not admitted during the 2018 retrial. Instead, plaintiffs' counsel merely stated, "Objection, Your Honor. Your Honor, this is just not what happened in this trial." The trial court overruled the objection "based on improper argument" and instructed the jury, "Members of the jury, you are going to be judges of the facts. If your recollection differs from what is represented by counsel, it will be your collective recollection that governs and not the argument of counsel." Given our conclusion that plaintiffs have not demonstrated prejudice, we need not determine whether they failed to preserve their claim of attorney misconduct as presented on appeal.

[11] Plaintiffs also argue defense counsel used evidence from outside the record to attack Murdoch's credibility. In particular, Brock's counsel played a portion of Murdoch's videotaped deposition in order to suggest that Murdoch had changed his testimony, but that portion of the deposition had not been shown to the jury. This claim of misconduct requires little discussion, because plaintiffs make no attempt to explain why the videotaped excerpt was prejudicial and because the trial court sustained plaintiffs' objection and admonished the jury, "you cannot consider it." (See *Cassim, supra*, 33 Cal.4th at pp. 803–804 ["Absent some contrary indication in the record, we presume the jury follows its instructions [citations] 'and that its verdict reflects the legal limitations those instructions imposed.' "].)

Plaintiffs argue the improper argument was prejudicial because "The question of whether Respondent was negligent, and whether that negligence caused harm to the Plaintiffs, turned almost entirely on a credibility contest between Mr. Murdoch and Mr. To." On the other hand, Brock argues the information in the objected to portion of the 2014 testimony was similar to other testimony the jury heard from the 2014 trial. We agree. In the objected-to excerpt, counsel asked To to "tell the jury what exactly you are doing during this quote-unquote commissioning of each one of those sections." In response, To described testing different functions and seeing whether they "register[] on the graphical interface" on his laptop, stating in response to further questioning that he was "physically beside the conveyor." In comparison, in a portion of 2014 testimony that *was* designated and read to the jury, To was asked "When it's set to go, IB2, IB4 or whatever . . . and you're turning on equipment . . . are you there looking at it?" To responded "yes" and further confirmed he was "physically present at the line and viewing the line." To also testified, "We're looking at IB4, whatever conveyor we're standing by." In another portion of 2014 testimony admitted in the retrial, To testified that he had both the ability to "turn on [the] whole system" or to go "place by place by place to look at each individual section," and that he may have done both on the day of the accident.[12] None of that 2014 testimony was as clear as To's 2018 testimony that "we were only doing one section at a time on" the day of the accident. But, as critical to the prejudice inquiry, the jury *did* hear *other* 2014 testimony that To was physically present at the conveyor belt during testing and that testing could be done section by section. Accordingly, the objected-to 2014 testimony offered only minimal additional support to Brock's closing argument.

It is also a relevant consideration weighing against a finding of prejudice that the objected-to reference was only a very small part of Brock's counsel's overall closing argument. The circumstances are similar to those in *Cassim*, where the "offending

[12] In their reply brief on appeal, plaintiffs do not dispute that the additional portions of the 2014 testimony were read to the jury during the 2018 trial.

argument was fleeting . . . a mere fraction of counsel's overall closing argument and a miniscule part of the entire . . . trial." (*Cassim*, *supra*, 33 Cal.4th at pp. 802–803.)

Plaintiffs argue juror declarations they submitted in support of their motion for a new trial show the jury disregarded the trial court's admonishment to ignore improper argument and "discussed the improper evidence and argument at length." The following language from juror number six's declaration is representative: "Yat Min To's statements were talked about a lot. Jurors talked about the final argument [defense counsel] had made that the questions [plaintiffs' counsel] asked in the first trial were general and hypothetical. Jurors said they agreed with [defense counsel] that there was no inconsistency between what Mr. To said in the first trial and what he said at other times, including the second trial." That does not appear to be a reference to the limited improper argument. Instead, that appears to be a reference to defense counsel's *overall* argument that To's testimony was consistent between 2014 and 2018. In particular, Brock's counsel argued that "it is not true to basically tell you that all of this stuff was made up for the first time. This was all on the table back in trial number one." Counsel argued that in 2014 plaintiffs' counsel had an assumption that To started the whole line "built into his questions," and To responded "probably I'm not sure, maybe, possibly." The circumstance that that overall argument was supported in part by an improper reference to certain 2014 testimony is not determinative where other properly admitted 2014 testimony also supported the argument.

Plaintiffs have not shown Brock's counsel committed prejudicial misconduct during closing argument.[13]

[13] Plaintiffs also argue Brock's counsel committed misconduct by repeatedly making reference to Murdoch's workers compensation benefits, which he argues was "offered to argue that Mr. Murdoch's injuries were not serious based upon his failure to obtain medical care from collateral sources." However, plaintiffs cite no authority it was misconduct for defense counsel to discuss in his closing argument evidence admitted by the court at trial. We separately address plaintiffs' contention that the court prejudicially abused its discretion in admitting the evidence. (See Part II, *ante*.)

IV. *Juror Misconduct*

Plaintiffs contend misconduct by jurors during deliberations requires reversal of the judgment. In particular, plaintiffs rely on declarations showing that a juror made assertions based on his personal experience as an emergency medical technician (EMT) and that they claim show jurors were biased against plaintiffs and in favor of Brock. Plaintiffs have not shown prejudicial juror misconduct.

A. *Factual Background*

An alternate juror was substituted in as juror number 12, requiring re-commencement of deliberations. According to declarations from other jurors presented in support of plaintiffs' motion for a new trial, this juror invoked his own expertise as an EMT to dispute that Murdoch was injured. For example, juror number 6 averred that, "The new juror who replaced juror #12 said that Mr. Murdoch must not have been injured on the day of the accident because the new juror was an EMT and he knew that if Mr. Murdoch were hurt, the doctor at SFO who saw Mr. Murdoch would not have written that Mr. Murdoch had 'tenderness' instead, the doctor would have written that Mr. Murdoch was injured. Jurors then said that his point about those records was persuasive. No juror said we have to disregard that because it relies not on the evidence but on a juror's expertise."

Plaintiffs also presented declarations that they argue show that "jurors invoked arguments that indicate that they decided the case not on the facts and the law but based upon their passion and prejudice." In particular, juror number 7 averred, "Jurors said they didn't think [Murdoch] should get millions of dollars because Brock may go bankrupt and that would be unfair to Brock's employees and the families of the employees." Juror number 6 averred that another juror—juror number 3, who served as the foreperson prior to replacement of juror number 12—said that "feelings about the case and about the facts of the case are just as valid as analysis and conclusion about the evidence." Another juror "said that she did not accept a particular aspect about the conveyor belt's movement because the Murdochs did not deserve to get millions of dollars in this case."

The trial court admitted the juror declarations offered in support of plaintiffs' motion for a new trial, but the court found that any misconduct was not prejudicial.

B. *Legal Background*

Code of Civil Procedure section 657 authorizes grant of a new trial on the ground of "[m]isconduct of the jury." As relevant in the present case, " 'Jurors are not supposed to receive or communicate to fellow jurors information from sources outside the evidence presented in court. [Citation.] If they do, they are guilty of misconduct.' " (*English v. Lin* (1994) 26 Cal.App.4th 1358, 1363–1364.) Moreover, juror comments reflecting bias are evidence of misconduct "because bias is misconduct." (*Grobeson v. City of Los Angeles* (2010) 190 Cal.App.4th 778, 788 (*Grobeson*).)

" 'Declarations recounting statements, conduct or events "open to sight, hearing, and the other senses and thus subject to corroboration" are admissible to establish juror misconduct. Declarations submitted as proof of an individual juror's subjective reasoning processes, which can be neither corroborated nor disproved, are not.' " (*English, supra,* 26 Cal.App.4th at p. 1364; see also *In re Hamilton* (1999) 20 Cal.4th 273, 294 ["the focus is on whether there is any *overt* event or circumstance, 'open to [corroboration by] sight, hearing, and the other senses' [citation], which suggests a *likelihood* that one or more members of the jury were influenced by improper bias"].)

"Misconduct by a juror . . . usually raises a rebuttable 'presumption' of prejudice. [Citations.] This presumption aids parties who are barred by statute from establishing the actual prejudicial effect of the incident under scrutiny [citations] and accommodates the fact that the external circumstances of the incident are often themselves reliable indicators of underlying bias [citation]. [¶] Still, whether an individual verdict must be overturned for jury misconduct or irregularity ' " 'is resolved by reference to the substantial likelihood test, an objective standard.' " ' [Citation.] Any presumption of prejudice is rebutted, and the verdict will not be disturbed, if the entire record in the particular case, including the nature of the misconduct or other event, and the surrounding circumstances, indicates there is no reasonable probability of prejudice, i.e., no *substantial likelihood* that one or more jurors were actually biased against the

defendant. [Citations.] [¶] The standard is a pragmatic one, mindful of the 'day-to-day realities of courtroom life' . . . . It is 'virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote.' [Citation.] Moreover, the jury is a 'fundamentally human' institution; the unavoidable fact that jurors bring diverse backgrounds, philosophies, and personalities into the jury room is both the strength and the weakness of the institution.' " (*In re Hamilton*, *supra*, 20 Cal.4th at pp. 295–296.)

C. *Analysis*

1. *Comment by a Juror Based on His Experience as an EMT*

As noted previously, several jurors averred in declarations that replacement juror number 12 said he was an EMT and that, in the words of one of the declarations, "if Mr. Murdoch were hurt, the doctor at SFO who saw Mr. Murdoch would not have written that Mr. Murdoch had 'tenderness' instead, the doctor would have written that Mr. Murdoch was injured."

While "[i]t is not improper for a juror, regardless of his or her educational or employment background, to express an opinion on a technical subject," that opinion must be based on the evidence at trial. (*In re Malone* (1996) 12 Cal.4th 935, 963.) "A juror . . . should not discuss an opinion explicitly based on specialized information obtained from outside sources. Such injection of external information in the form of a juror's own claim to expertise or specialized knowledge of a matter at issue is misconduct." (*Ibid.*) Because the replacement juror's assertion about Mr. Murdoch's injury was based on a claim to special expertise as an EMT, the comment was misconduct.

Brock argues that, even if the statement was misconduct, it was not prejudicial because the comment was not inconsistent with plaintiffs' theory of the case. In particular, plaintiffs never claimed Murdoch presented with a serious injury on the day of the accident. Murdoch testified he walked to the clinic and returned to work the next day; his injuries worsened over time. Accordingly, the juror's suggestion that the doctor's note shows Mr. Murdoch did not present with an injury on the day of the accident did not contradict a significant aspect of plaintiffs' case. A comparison to the circumstances in *Smith v. Covell* (1980) 100 Cal.App.3d 947, upon which plaintiffs rely,

is instructive. There, in a personal injury case arising out of an automobile collision, the jury awarded only nominal damages for a plaintiff's back pain that she did not complain about until six weeks after the accident. (*Id.* at p. 951.) Both before and during deliberations, one of the jurors stated that when his back " 'went out' " it "hurt right away." (*Id.* at p. 952.) The court of appeal concluded the statements were impermissible outside evidence that tended to support the defense doctor's conclusion that the collision did not cause the wife's injury because of the delay in her complaint. (*Ibid.*) Thus, in contrast to the present case, in *Smith* the comments "interjected improper 'evidence' at this most critical point in the case." (*Id.* at p. 954; see also *McDonald v. Southern Pacific Transportaion Co.* (1999) 71 Cal.App.4th 256, 266 [juror's opinion based on information outside the trial "directly contradicted the trial evidence concerning a significant element of plaintiff's theory"].)

We also observe that the trial court instructed the jurors, "You must decide the facts based on the evidence admitted in this trial. . . . Do not allow anything that happens outside this courtroom to affect your decision. . . . Do not do any research on your own or as a group. . . . [¶] . . . [¶] You must decide what the facts are in this case only from the evidence you have seen or heard during the trial . . . ." Therefore, the presumption of prejudice arising from the juror misconduct must be considered in conjunction with the presumption that the jurors followed the trial court's instructions. (*Romo v. Ford Motor Co.* (2002) 99 Cal.App.4th 1115, 1130–1133, disapproved on another ground in *People v. Ault* (2004) 33 Cal.4th 1250, 1272, fn. 15.) "[C]autionary admonitions and instructions serve to correct and cure myriad improprieties, including the receipt by jurors of information that was kept from them. . . . [I]t must be assumed that a jury does its duty, abides by cautionary instructions, and finds facts only because those facts are proved." (*NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal.4th 1178, 1223–1224.) In light of the circumstance that the replacement juror's opinion did not contradict a significant element of plaintiffs' theory, and in light of the trial court's admonition not to rely on outside evidence, we conclude the presumption of prejudice has been rebutted. (See *Romo,* at pp. 1133–1134 [relying on instructions in finding no prejudice].)

2. *Statements Allegedly Reflecting Bias*

Brock argues that statements in plaintiffs' juror declarations allegedly showing that other jurors were biased are inadmissible. Under Evidence Code section 1150, subdivision (a), "No evidence is admissible to show the effect of [any] statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined." On the other hand, "any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly." (*Ibid*.) Brock argues that, under that analytic framework, the following statements are inadmissible: (1) "[J]urors said they didn't think [Murdoch] should get millions of dollars because Brock may go bankrupt and that would be unfair to Brock's employees and the families of the employees," and (2) a juror "said that she did not accept a particular aspect about the conveyor belt's movement because the Murdochs did not deserve to get millions of dollars in this case."

In *Enyart v. City of Los Angeles* (1999) 76 Cal.App.4th 499, the court of appeal held admissible juror declarations regarding various statements by other jurors expressing "extremely negative attitudes" toward the City of Los Angeles and its police department. (*Id.* at p. 510.) The statements were treated as "reflecting on the bias of the jurors who uttered them;" the statements were not hearsay because they were not admitted for the truth of the negative assertions made therein. (*Id.* at p. 508, fn. 5; see also *id.* at p. 511.) The court reversed the judgment because "[g]iven the closeness of the verdict . . . , bias on the part of any one of the majority-voting jurors is necessarily prejudicial." (*Id.* at p. 511.)

Also pertinent on this point is the decision in *Grobeson*, *supra*, 190 Cal.App.4th 778. In that case, there was evidence a juror had prejudged the case because she said "she had made up her mind during the second week of a five-week trial." (*Id.* at p. 791.) The court held that was admissible evidence of bias, because, "while evidence about 'mental processes or reasons for assent or dissent' [citation] is not admissible as a general

proposition [citation], there is at least one state of mind that we *must* take into account and that is where the juror has prejudged the case or was biased." (*Id.* at p. 788.) The court further observed that "a statement of bias is misconduct because bias is misconduct. This is what is meant by the phrase 'the very making of the statement sought to be admitted would itself constitute misconduct.' " (*Ibid.*)

In the present case, to the extent the statements during jury deliberations at issue reflect bias, the statements are not inadmissible as evidence of the jurors' mental processes. However, we conclude the statements reflect only an inclination not to award plaintiffs millions of dollars from Brock. The statements do not reflect the kind of pre-existing bias at issue in *Enyart*, where the biased jurors appeared inclined to rule against the defendant due to beliefs unrelated to the evidence admitted at trial. Nor do the statements reflect the type of prejudgment at issue in *Grobeson*. (See also *People v. Weatherton* (2014) 59 Cal.4th 589 [reversing judgment based on evidence a juror prejudged the defendant's guilt].) Here, in contrast, the statements at issue reflect the inclinations of certain jurors during deliberations based on their assessment of the evidence admitted at trial. Further, the comments are fully consistent with a belief—based on the evidence rather than bias—that plaintiffs should not receive millions of dollars because the accident could have been avoided if Murdoch had locked out the conveyor.[14] Additionally, the challenged comments would have been consistent with a verdict finding that plaintiffs had millions in damages but should only receive a fraction

[14] Accordingly, the present case is distinguishable from *Smith v. Covell*, *supra*, 100 Cal.App.3d 947, where a juror said "he was against people suing one another, that awarding high verdicts in cases like this was the cause of high insurance rates, and that a high verdict in this case would have a similar effect" and other jurors said they could not award loss of consortium damages "because a husband takes a vow when he marries and has an obligation to stay with her." (*Id.* at pp. 954–955.) Those comments were incompatible with rendering a verdict based on the evidence in the case.

of that total from Brock given Murdoch's responsibility for the accident.[15] We conclude the statements do not demonstrate juror misconduct.[16]

DISPOSITION

The trial court's judgment is affirmed. Respondent is awarded its costs on appeal.

[15] The allegation that a juror "said that she did not accept a particular aspect about the conveyor belt's movement because the Murdochs did not deserve to get millions of dollars," even if misconduct, is too vague to establish a substantial likelihood of prejudice. The juror declaration does not identify what particular evidentiary issue was under discussion and what, if any, comments the juror made about other evidentiary issues in the case.

[16] We also reject plaintiffs' claim of juror misconduct based on an allegation that a juror who served as a foreperson during part of the deliberations said on more than one occasion that "feelings about the case and about the facts of the case are just as valid as analysis and conclusion about the evidence." The comments are ambiguous and without context; this court cannot conclude there is a substantial likelihood plaintiffs were prejudiced by them.

SIMONS, J.

We concur.

JONES, P.J.

NEEDHAM, J.