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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

TINA GUSTAVE,

Plaintiff and Respondent,

v.

MARIA EUGENIA COLMENARES,

Defendant and Appellant.

G045201

(Super. Ct. No. 30-2009-00117777)

O P I N I O N

Appeal from orders of the Superior Court of Orange County, B. Tam Nomoto Schumann, Judge. Affirmed.

Ford, Walker, Haggerty & Behar, Stephen Ward Moore, Maxine J. Lebowitz and Donna Rogers Kirby, for Defendant and Appellant.

Purcell Law and Chris Purcell; and Kristen Martin, for Plaintiff and Respondent.

INTRODUCTION

In this personal injury case, we are called upon primarily to determine whether juror declarations may be used as admissible evidence to support a motion for a new trial based on juror misconduct. Ever since the California Supreme Court handed down the leading case on this issue, *People v. Hutchinson* (1969) 71 Cal.2d 342 (*Hutchinson*), courts have struggled to determine whether such declarations recount “overt acts” or “subjective mental processes,” evidence of the former being admissible and of the latter inadmissible. The trial court in this case decided that the declarations were inadmissible and denied the part of a motion for new trial based on juror misconduct.

Portions of the declarations arguably gave evidence of admissible “overt acts.” Because the trial court stated what its ruling would be if the declarations had been admitted, however, we affirm the order denying the motion for new trial. The defendant also failed to present evidence of error regarding excessive damages for pain and suffering. Accordingly, we also affirm the denial of the motion on the basis the damages were excessive.

FACTS

Appellant Maria Eugenia Colmenares’ SUV rear-ended Tina Gustave’s car on February 9, 2007. Liability was undisputed. The chief issue at trial was Gustave’s non-economic damages for past and future pain and suffering from injury to her neck.¹ Gustave sought no damages for medical bills, lost earnings, or damage to her car.² There was conflicting testimony about the severity of the injury to her neck and also about whether her neck problems predated the accident. Both sides called medical experts as witnesses, and Gustave, her daughter, her husband, and a friend testified about the pain

¹ The jury also awarded damages for future medical expenses, but Gustave agreed to a remittitur of this amount at the hearing on the motion for new trial. This category of damages is not at issue in this appeal.

² Gustave testified that she went back to work seven or eight months after the accident.

she had been experiencing and the limitations on her activities since the accident. The jury returned a verdict in Gustave's favor, awarding her \$200,000 for past pain and suffering and \$1,350,000 for future pain and suffering.

Colmenares moved for a new trial on the grounds of jury misconduct and excessive damages. She obtained declarations from two of the jurors explaining how they had arrived at the verdict. According to these declarants, the jury *based its award* on the assumption that Gustave earned \$50,000 per year. The jury multiplied this amount by four years (the amount of time between accident and trial) to arrive at the past pain and suffering damages and by 27 years (Gustave's assumed life expectancy) to determine the future award.³ (Gustave was 50 years old at the time of trial.) Gustave obtained a counterdeclaration from one of these same jurors (who was also the jury foreman) that someone mentioned to the jury Gustave probably earned \$50,000 per year. The counter-declarant also stated that while the jury used the presumed yearly earnings as its basis, the award was for pain and suffering, not lost earnings.

The trial court denied the motion for a new trial for jury misconduct. The court ruled the juror declarations were inadmissible under Evidence Code section 1150, subdivision (a), because they were confined to the mental processes of the declaring jurors in arriving at a verdict. But the court also ruled that, even if the declarations were admissible, the motion would still be denied because the counterdeclaration stated the jurors were aware they were awarding damages for pain and suffering, not lost future earnings.

Colmenares has appealed from the order denying the motion for new trial after judgment on the grounds of both juror misconduct and excessive damages.

³ There was no evidence at trial either about Gustave's yearly earnings or about her life expectancy.

DISCUSSION

An order denying a motion for a new trial is not itself appealable. We review the order as part of the judgment. (*Walker v. Los Angeles County Metropolitan Transportation Authority* (2005) 35 Cal.4th 15, 19.) Our task on reviewing the denial of a motion for a new trial on the grounds of juror misconduct is to examine the entire record, including the evidence, and to determine independently whether an act of misconduct occurred and, if so, whether the act prevented the moving party from having a fair trial. (*Iwekaogwu v. City of Los Angeles* (1999) 75 Cal.App.4th 803, 818; see also *Whitlock v. Foster Wheeler, LLC* (2008) 160 Cal.App.4th 149, 158 (*Whitlock*).)

I. Juror Misconduct

Under Code of Civil Procedure section 657, subdivision 2, a court may grant a new trial on the grounds of “misconduct of the jury.” Evidence Code section 1150, however, limits the kind of evidence a court may admit “upon an inquiry as to the validity of a verdict” 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.” Evidence is not admissible, however, “to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent or dissent from the verdict or concerning the mental processes by which it was determined.” (Evid. Code, § 1150, subd. (a).) According to the statute, evidence of statements, etc., *likely* to influence the verdict improperly is admissible, but evidence showing that statements, etc., *actually* influenced a juror’s vote or mental processes is not.

The distinction between likely-to-influence admissible evidence and actually-influencing inadmissible evidence may account for the resort to the rebuttable presumption of prejudice from jury misconduct. (See *People v. Honeycutt* (1977) 20 Cal.3d 150, 156 (*Honeycutt*).) If some statement or conduct occurred that was likely to

influence the verdict improperly, the moving party does not have to show it actually did. Prejudice is presumed. The presumption of prejudice coupled with the statutory language, however, puts the party opposing the motion for a new trial in something of a bind. In order to rebut the presumption, the opposing party must show that the statements or conduct did *not* affect the verdict. (See *In re Stankewitz* (1985) 40 Cal.3d 391, 402-403 (*Stankewitz*.) Evidence Code section 1150, however, prohibits the admission of the most obvious kind of rebuttal evidence – evidence showing the statements or conduct had no effect on the jurors’ decision or their mental processes. (See *Hasson v. Ford Motor Co.* (1982) 32 Cal.3d 388, 412-413 [evidence of juror inattention admissible; evidence from jurors that they were paying attention not admissible].)

The seminal case on Evidence Code section 1150, *Hutchinson, supra*, 71 Cal.2d 342, draws the line between admissible and inadmissible evidence in a different place.⁴ Instead of distinguishing between likely-to-influence statements and conduct and actually-influencing statements and conduct, *Hutchinson* distinguishes between “proof of overt acts, objectively ascertainable” and “proof of the subjective reasoning processes of the individual juror, which can be neither corroborated nor disproved” (*Hutchinson, supra*, 71 Cal.2d at p. 349.) The former is admissible; the latter is not. “The only improper influences that may be proved under [Evidence Code] section 1150 to impeach a verdict, therefore, are those open to sight, hearing, and the other senses and thus subject to corroboration.” (*Id.* at p. 350.)⁵ The statute itself does not make proof of a juror’s subjective reasoning processes inadmissible; instead, it prohibits evidence of the effect of

⁴ *Hutchinson* was issued in 1969, shortly after Evidence Code section 1150 became effective (in January 1967). As Justice Traynor explained in the opinion, the new code section reflected the gradual shift in the courts’ willingness to accept evidence impeaching a verdict. (*Hutchinson, supra*, 71 Cal.2d at pp. 346-349.)

⁵ The court added, quoting a New Jersey evidence committee, “[T]hese facts can be easily proved or disproved. There is invariably little disagreement as to their occurrence.” [Citation.]” (*Hutchinson, supra*, 71 Cal.2d at p. 350.) Actual practice has not borne out these rosy predictions. Courts are routinely confronted with declarations recounting statements or conduct in the jury room and counterdeclarations denying that the statements or conduct occurred. (See, e.g., *Oakland Raiders v. National Football League* (2007) 41 Cal.4th 624, 630-632; *Hasson v. Ford Motor Co., supra*, 32 Cal.3d at pp. 409-410; *Grobson v. City of Los Angeles* (2010) 190 Cal.App.4th 778, 784.)

a statement, conduct, condition, or event on a juror's mental processes. This is not the same thing.

The *Hutchinson* rule is now firmly entrenched in California jurisprudence. We therefore follow it as best we can. (*Hutchinson, supra*, 71 Cal.2d at p. 348 [Legislature has not preempted field].)

Although our Supreme Court has referred hopefully to a “bright line” or a “clear line” between overt acts and subjective reasoning processes (*People v. Romero* (1982) 31 Cal.3d 685, 689; *Hasson v. Ford Motor Co., supra*, 32 Cal.3d at p. 414), in practice the line has not been so easily discernible. One reason the *Hutchinson* formula has not laid the problem to rest may be that “overt” and “subjective” are not mutually exclusive, opposites, or on either end of a continuum. A statement can be both overt and subjective: “Although I think the evidence shows this defendant is guilty beyond a reasonable doubt, I am going to vote to acquit anyway because I did not like the way the prosecutor cross-examined the defendant's mother.” Making such a statement in the jury room is both proof of the speaker's subjective reasoning process and an overt act, objectively ascertainable and subject to corroboration. In fact, a jury deliberation may be described as a series of overt acts by which jurors reveal their subjective reasoning processes.

We thus turn to the cases to try to discern a pattern for finding evidence either admissible or inadmissible to support an inquiry into the validity of a verdict. The easy ones are, unfortunately, few and far between. For example, a court had no trouble admitting, as evidence of an “overt act,” a declaration stating a juror had been reading a novel during the trial. (*Hasson v. Ford Motor Co., supra*, 32 Cal.3d at p. 410.) The overt act in *Hutchinson* was the bailiff's pressuring the jury to hurry up and reach a verdict. (*Hutchinson, supra*, 71 Cal.2d at p. 346, fn. 1.) Most commonly, however, the losing party seeks to admit evidence of statements made by jurors during deliberations. As courts have observed, classifying statements as overt acts or subjective mental processes

has proven to be most difficult. (See, e.g., *Stankewitz*, *supra*, 40 Cal.3d at p. 298; *Grobesson v. City of Los Angeles*, *supra*, 190 Cal.App.4th at p. 787.) The communications and discussions are “overt acts,” “open to sight [and] hearing and thus subject to corroboration.” The information or ideas communicated, however, reflect subjective mental processes. Is evidence of these communications or discussions admissible or not?

Courts seem to be willing to admit declarations describing statements such as the one recounted in *Stankewitz*, in which a juror in a robbery trial instructed the rest of the jury on the elements of robbery, basing his remarks on his 20-plus years of experience as a police officer. (*Stankewitz*, *supra*, at p. 396; see also *DiRosario v. Havens* (1987) 196 Cal.App.3d 1224, 1237-1238 [foreman told jurors judge could reduce excessive verdict]; *McDonald v. Southern Pacific Transportation Co.* (1999) 71 Cal.App.4th 256, 262-264 [juror made statements about railroad crossings based on professional experience]; *Whitlock*, *supra*, 160 Cal.App.4th at pp. 154-156 [juror in asbestos case told others of experiences with naval cleaning and equipment replacement procedures].)

Along the same lines are cases in which someone has blown the whistle on a juror who has consulted some outside source – such as an attorney (*Honeycutt*, *supra*, 20 Cal.3d at p. 157), a physician (*Walter v. Ayvazian* (1933) 134 Cal.App. 360, 363), or a pastor (*People v. Danks* (2004) 32 Cal.4th 269, 307) – or who has conducted an outside experiment.⁶ (See, e.g., *People v. Southern Cal. Edison Co.* (1976) 56 Cal.App.3d 593, 598 [juror spoke to Edison employee about whether power line could set tree limb on fire]; *Smoketree-Lake Murray, Ltd. v. Mills Concrete Construction Co.* (1991) 234 Cal.App.3d 1724, 1745-1746 [juror conducted demonstration regarding pouring concrete in jury room].) In *Karlsson v. Ford Motor Co.* (2006) 140 Cal.App.4th 1202,

⁶ Finding evidence to be *admissible*, it should be emphasized, does not inevitably lead to the conclusion that a juror committed misconduct or that the losing party was prejudiced. These are separate determinations.

declarations regarding one juror's visit to a Ford dealership to inspect seatbelts and his report to the jury were admitted into evidence. (*Id.* at p. 1234; see also *Bell v. State of California* (1998) 63 Cal.App.4th 919, 932-933 [re-creation of police hold on prisoner].) The standard jury instructions explicitly command jurors not to discuss the case with outsiders or to do their own research (see, e.g., CACI No. 5000), so courts become particularly exercised when they receive evidence of jurors disregarding these instructions.

For example, in *Honeycutt, supra*, the court admitted evidence the jury foreman had consulted an outside attorney regarding sentencing, even though the foreman did not communicate the conversation between himself and the attorney to the other jurors. To determine whether the presumption of prejudice had been rebutted, the Supreme Court delved deeply into the foreman's mental processes, interpreting his questions to the lawyer to mean that he might be "contemplating a conviction of involuntary manslaughter . . . , but that he was concerned . . . that if [the defendant] were convicted of such lesser manslaughter charge he might escape state prison." (*Honeycutt, supra*, 20 Cal.3d at p. 157.) Although no evidence suggested the foreman had mentioned the attorney's remarks to the other jurors, "[n]evertheless the errant juror was the foreman whose perceptions and conclusions may often sway other jurors." (*Id.* at p. 158.) His discussion with the attorney, even though kept to himself, "in clear violation of the trial court's admonitions interjects outside views into the jury room and creates a high potential for prejudice. . . . [W]e cannot condone a practice whereby a juror receives outside counseling relative to the applicable law, as to do so would subordinate the court's evaluation of the law to that of the juror's outside source" (*Id.* at p. 157.)

The common thread running through these cases is the intrusion into the jury deliberations – and therefore presumably into the jury's thought processes – of extraneous information, compromising the jury's ability to consider only admitted evidence, in direct violation of the court's instructions. What makes it worse, the

improperly considered information is often conveyed so as to suggest the weight of expertise behind it – whether the juror’s own expertise or the expertise of someone outside the jury room. As the court observed in *Stankewitz*, if the police officer who incorrectly advised the jury on the elements of robbery had kept his thoughts to himself during deliberations, a posttrial declaration revealing them would probably not be admissible. (*Stankewitz, supra*, 40 Cal.3d at pp. 399-400.) Communicating the thoughts to the jury, however, was an admissible “overt act.”

Declarations revealing the inner workings of a particular juror’s mind, when the workings have not been communicated to other jurors, are usually – but not always – ruled inadmissible. (See *Honeycutt, supra*, 20 Cal.3d at p. 158.) For example, in *People v. Hall* (1980) 108 Cal.App.3d 373, three jurors signed declarations stating they thought they were convicting the defendant of a misdemeanor rather than the felony of which he was actually convicted. (*Id.* at pp. 376-377.) In *Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892, a juror declared that she did not believe liability had been established or voted on, and she voted for damages only because she thought liability had been already decided and because she felt she had to get back to work. (*Id.* at p. 910.)⁷ In both cases, the declaration evidence was inadmissible. (But see *People v. Perez* (1992) 4 Cal.App.4th 893, 908 [declarations stating jurors based guilty verdict on defendant’s failure to testify would be admissible].)

This leaves a vast middle ground of decisions about whether a declaration recounting statements made in the jury room contains evidence of admissible overt acts or inadmissible subjective reasoning processes. (See, e.g., *Lankster v. Alpha Beta Co.* (1993) 15 Cal.App.4th 678, 681 [declarations regarding juror interpretation of liability admitted]; *Smith v. Covell* (1980) 100 Cal.App.3d 947, 952, [declaration regarding juror’s

⁷ Proof of juror bias – the ultimate subjective reasoning process – operates under different rules. Courts do not hesitate to admit declarations showing juror bias. (See, e.g., *Grobson v. City of Los Angeles, supra*, 190 Cal.App.4th at pp. 788, 790-791.) In *People v. Nesler* (1997) 16 Cal.4th 561, 579-590, the Supreme Court discussed juror bias at length without even once referring to Evidence Code section 1150.

description of his own back injury in back injury case admitted]; *English v. Lin* (1994) 26 Cal.App.4th 1358, 1363, 1365 [declaration regarding juror's statement about relative's salary apparently admissible, although not misconduct]; *People v. Lewis* (2001) 26 Cal.4th 334, 387, 389 [jury foreman's statement to another juror during penalty phase that murder defendant would have "everlasting life" regardless of verdict inadmissible]; *Ford v. Bennacka* (1990) 226 Cal.App.3d 330, 332, fn. 1, 335-336 [declarations from jurors regarding how they apportioned fault inadmissible]; *Iwekaogwu v. City of Los Angeles* (1999) 75 Cal.App.4th 803, 819 [declarations regarding strong words and emotional descriptions considered].)⁸

The California Supreme Court confronted this problem in *Krouse v. Graham* (1977) 19 Cal.3d 59 (*Krouse*). The defendant complained – and offered declarations to show – that the jury inflated the amounts awarded to the plaintiffs to offset the fees the jury assumed the plaintiffs' attorneys would collect.⁹ The declarations stated that "several jurors commented" about the possibility that the plaintiffs' attorneys would get one-third of the award as a fee; the jury "considered" this possibility and increased the award accordingly. (*Id.* at p. 80.)

The court acknowledged that the declarations could be construed to refer to subjective mental processes, but "an extensive discussion evidencing an implied agreement" to include attorney fees in the award would be misconduct requiring reversal. (*Krouse, supra*, 19 Cal.3d at p. 81.) This discussion would be an overt act, open to sight and hearing, and would presumably qualify as "statements . . . of such a character as is likely to have influenced the verdict improperly," even though it would also encompass

⁸ In many instances, the opinions do not explicitly state that the declarations are admissible. The courts, however, refer to them when they discuss whether the declarations show misconduct or prejudice. Because the analysis would not get that far if the declarations were inadmissible (see *People v. Perez, supra*, 4 Cal.App.4th at p. 906 [three-step process for new trial on jury misconduct grounds]), we assume the courts considered the declarations admissible evidence.

⁹ For example, the jury added \$30,000 for legal fees to one plaintiff's personal injury award of \$60,000 to arrive at the final figure. (*Krouse, supra*, 19 Cal.3d at p. 80.)

the mental process by which the jury arrived at its verdict. The court determined that the declarations submitted by the defendant were “inconclusive.” Because the addition of attorney fees to the award was, at least potentially, a “serious matter,” the court decided that “the declarations should have been admitted and considered by the court in ruling upon defendant’s motion for a new trial.” (*Id.* at pp. 80-84.) Rather than ordering a new trial, however, the court vacated the order denying the new trial and instructed the trial court to hear the motion over again with the declarations admitted into evidence.

The declarations submitted by Colmenares and Gustave are similarly inconclusive. On the one hand, the declarants recount how they personally arrived at the figure for noneconomic damages. These are subjective reasoning processes that cannot be either corroborated or disproved. Evidence regarding these mental processes would be inadmissible. (See *People v. Danks, supra*, 32 Cal.4th at pp. 298-302 [isolating inadmissible subjective portions of declarations].) But the declarations also give details of the discussions among the jurors of the basis for calculating damages. Someone told the jury that people in Gustave’s job earn \$50,000 per year.¹⁰ The jury “felt” it was possible that Gustave might not be able to work in the future and might experience “a drop off in earnings due to her injuries.” The jury used the life expectancy period from plaintiff’s counsel’s closing argument – 27 years – to determine the multiplier for future pain and suffering. All three declarations are in accord as to the way the jury arrived at its figures. Whether these would be overt acts, objectively ascertainable is open to debate. (Cf. *Drust v. Drust* (1980) 113 Cal.App.3d 1, 9 [juror declarations explaining breakdown of personal injury future expenses award admissible].)

Under other circumstances, we might have adopted the *Krouse* solution and returned the case to the trial court to decide the motion after admitting the portions of the

¹⁰ Plaintiff’s counsel evidently planted this seed. In both his opening and closing arguments, he connected the award of pain and suffering damages with earnings – minimum wage, what the experts charged per hour. In the counterdeclaration, the declarant referred to the plaintiff’s counsel’s argument about using the expert’s hourly fee as a “benchmark” for calculating pain and suffering damages.

declarations giving evidence of overt, ascertainable acts. In this case, however, we already know how this reconsideration would come out. The court stated that even if the declarations were admissible, the motion for new trial would still be denied because they established the purpose of the award as compensation for future pain and suffering, not lost future earnings. It therefore found no misconduct.

We review an order denying a motion for new trial for abuse of discretion, reviewing the entire record to determine independently whether grounds exist for granting the motion. (*Santillan v. Roman Catholic Bishop of Fresno* (2012) 202 Cal.App.4th 708, 733.) Evidence of juror misconduct creates a rebuttable presumption of prejudice (*Honeycutt, supra*, 20 Cal.3d at p. 156) and provides grounds for a new trial. (Code Civ. Proc., § 657, subd. (2).) When the motion for new trial is based on juror misconduct, we review the record “to determine whether there is a reasonable probability of actual harm to the complaining party resulting from the misconduct. [Citations.] Some of the factors to be considered when determining whether the presumption [of prejudice] is rebutted are the strength of the evidence that misconduct occurred, the nature and the seriousness of the misconduct, and the probability that actual prejudice may have ensued.” (*Hasson v. Ford Motor Co., supra*, 32 Cal.3d at p. 417, fn. omitted.)

In this case, the trial court’s alternative holding assumed the admission of the jurors’ declarations and still found no misconduct because, regardless of how the jury arrived at the future damages figure, the declarations supported Gustave’s position that the award was for pain and suffering, not lost earnings. A jury has a great deal of leeway in determining pain and suffering damages. (See, e.g., *Duarte v. Zachariah* (1994) 22 Cal.App.4th 1652, 1665.) We therefore conclude, after reviewing the entire record, that even if the jury based its award on considerations described in the affidavits, no misconduct occurred. Accordingly we affirm the portion of the order denying a new trial on the basis of jury misconduct.

II. Excessive Damages

The trial court did not rule on the portion of Colmenares' motion for new trial on excessive damages for pain and suffering. It ruled only that future medical expenses were excessive. A new trial was forestalled by Gustave's accepting a reduction in the verdict equal to the amount of the future medical expenses awarded by the jury.

If a court has not ruled on a motion for new trial within 60 days of one of the statutory triggering events, the motion is deemed denied. (Code Civ. Proc., § 660.) In this case, the triggering event has long passed, and the trial court cannot rule on the motion for new trial based on excessive pain and suffering damages. (Cf. *Uzyel v. Kadisha* (2010) 188 Cal.App.4th 866, 901 [court cannot enter new order on new trial motion after expiration of statutory period].) We therefore consider the motion denied as to excessive pain and suffering damages.

Although we review the denial of a motion for a new trial for abuse of discretion, we must also review the entire record to determine independently whether grounds exist for granting the motion. (*ABF Capital Corp. v. Berglass* (2005) 130 Cal.App.4th 825, 832.) Colmenares argued that \$1.3 million for future pain and suffering was excessive, but she offered nothing to back up her argument. There were, for example, no citations to cases with comparable fact patterns or surveys of personal injury awards. There was no evidence of any kind. The bare statement that the award was too much is insufficient. Neither the trial court nor our court is in a position to determine the propriety of the amount of future pain and suffering damages for a permanent injury without some help. Accordingly, since there is nothing in the record providing grounds for a new trial on the ground of excessive pain and suffering damages, we affirm the trial court's implied denial of the motion on that ground.

DISPOSITION

The order denying the motion for new trial is affirmed. The parties are to bear their own costs on appeal.

BEDSWORTH, J.

WE CONCUR:

O'LEARY, P. J.

ARONSON, J.