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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

ADOLFO CORNAVACA et al., Plaintiffs and Appellants, v. MARK COLBY HORWEDEL, Defendant and Respondent.	B276291 (Los Angeles County Super. Ct. No. BC524601)

APPEAL from a judgment of the Superior Court of Los Angeles County, Randy Rhodes, Judge. Reversed and remanded.

Parris Law Firm, R. Rex Parris, Bruce L. Schechter and Jason Fowler; Grignon Law Firm, Margaret M. Grignon and Anne M. Grignon, for Plaintiffs and Appellants.

Wesierski & Zurek, Christopher P. Wesierski and Andres Camacho for Defendant and Respondent.

I. INTRODUCTION

Plaintiffs Adolfo and Vera Cornavaca appeal from a judgment following a jury trial. Plaintiffs are the parents of Adolfo Cornavaca, Jr. (the decedent), whom defendant Mark Colby Horwedel struck and killed with his car. Plaintiffs sued defendant for negligence in the decedent's wrongful death. The first jury trial resulted in a mistrial after plaintiffs' opening statement. Following a second jury trial, the jury found defendant negligent, but, by a nine-to-three vote, found the negligence was not a substantial factor in the decedent's death.

We agree with plaintiffs that they showed unrebutted evidence of juror misconduct resulting in prejudicial error due to a juror's failure to deliberate, and thus we remand for a new trial. For the benefit of the trial court, we also address three evidentiary challenges that plaintiffs raise, as well as plaintiffs' contentions that instructional error, juror misconduct, and attorney misconduct occurred.

II. BACKGROUND

A. The Accident

On March 29, 2013, at approximately 3:30 a.m., defendant was driving eastbound on Rancho Vista Boulevard in Palmdale, California. The decedent was walking at the time of the accident. Defendant struck and killed the decedent with his car.

On October 15, 2013, plaintiffs filed a complaint against defendant for the single cause of action of negligence in the

wrongful death of the decedent. In defendant's second amended answer, defendant asserted as a defense comparative negligence.

B. First Trial

At a February 10, 2016, hearing, the trial court ruled on several motions in limine, including granting two defense motions that excluded evidence of destruction of evidence, Nos. 3 and 13. Motion in limine No. 3 requested exclusion of "argument, questions or insinuations by Plaintiffs' counsel that Defendant pulled decedent out of or off of his car following the collision, threw decedent's amputated right leg into the desert, or in any way tampered with evidence at the scene." Defendant contended such evidence would result in undue prejudice to defendant and mislead the jury under Evidence Code section 352.[1] The trial court granted the motion.

Defendant's motion in limine No. 13 requested exclusion of "any argument or insinuation that Defendant's father-in-law, Mike . . . Oppelt, destroyed evidence by disposing of the front license plate of Defendant's automobile . . . ." Defendant contended such argument was irrelevant, and that any probative value was substantially outweighed by undue prejudice to defendant by misleading the jury. The trial court also granted this motion.

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[1] 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."

The first trial commenced on February 18, 2016. Plaintiffs had withdrawn their request for judicial notice of defendant's prior DUI convictions. However, plaintiffs' counsel stated during his opening statement: "And the defendant absolutely knew he shouldn't be driving, absolutely knew it. He had been convicted three times." The trial court raised its own objection to plaintiff's opening statement. Plaintiffs' counsel stated that he wanted to use defendant's deposition testimony that he had been convicted three times for DUI, but the trial court found the DUI convictions were inadmissible character evidence under Evidence Code section 1101 and could never be introduced during a civil trial. Because the trial court found plaintiffs' counsel's opening statement could not be cured by an instruction, the trial court declared a mistrial.

C. Writ Proceeding and Renewed Request to Admit Evidence of DUI Convictions

Plaintiffs filed a petition for writ of mandate with this court on February 23, 2016, regarding the exclusion of defendant's DUI convictions. We denied the petition because a writ of mandate for admissibility of evidence is generally not available. (*Cornavaca v. Superior Court* (Feb. 26, 2016, B270406) [nonpub. order].) Although we denied the petition for writ of mandate because it involved a pretrial evidentiary issue, our order clearly informed the trial court that its interpretation of Evidence Code section 1101 was incorrect as a matter of law. (*Ibid.*) Our denial set forth the binding interpretation of the statute that the court must apply and stated that we expected the trial court to follow it.

Prior to the second trial, plaintiffs requested the trial court consider our opinion. The trial court again found that Evidence Code section 1101, subdivision (b) did not apply to civil cases. The court also found evidence of defendant's prior DUI convictions would be unduly prejudicial under Evidence Code section 352.

D. Second Trial

The second trial began on February 29, 2016 and ended on March 16, 2016. Both parties called several witnesses, including defendant, law enforcement witnesses, and experts. We summarize the relevant testimony below.

1. Defendant

Defendant testified he woke up at approximately 3:00 a.m. on March 29, 2013, after having gone to bed at approximately 9:00 p.m. the night before the accident. Defendant smoked marijuana regularly on the weekends but denied smoking marijuana before he began his drive the morning of the accident.

At the time of the accident, defendant was driving to his coworker's house so they could carpool to work at Camp Pendleton. He was in the number two lane, with two lanes going eastbound. Defendant was traveling at around 60 to 65 miles per hour at the time of the accident. Defendant had on his low beam headlights and could see 50 to 100 feet in front of him.

The accident surprised defendant, who did not know he had hit a human being. There was no sidewalk in the area, and defendant had never seen a pedestrian there. Defendant believed

he had hit a piece of debris or an animal, such as a coyote. Defendant did not apply his brakes until after impact. After impact, defendant slowly stopped his vehicle one-quarter to one-half mile east of the area of impact. Defendant then got out of his vehicle to survey the damage. Defendant denied removing any part of his bumper or debris from his vehicle. Defendant's right headlight was broken.

Defendant traveled back through the scene of the accident at about 15 miles per hour. Driving through the scene, defendant did not see the decedent's body, nor any shoes, pants, keys, or belt buckle on the road. Defendant called his coworkers to tell them to go to work without him. Defendant then drove to his father's house where his truck was stored. Plaintiffs' counsel showed defendant a picture, taken at defendant's father's house, of the vehicle involved in the accident. There was a hose visible in the picture to the left of the vehicle. Defendant denied using the hose to clean his vehicle.

At his father's house, with the aid of a flashlight and the houselights, defendant could see blood on his vehicle. Defendant then called his girlfriend (now wife), drove to meet her, and she drove him back to the scene. Defendant denied asking his girlfriend to call her father, a Los Angeles Police Department detective. Deputies from the Los Angeles County Sheriff's Department (the sheriff's department) were already present.

2. Law Enforcement Witnesses

Detective John Heald, who had been with the sheriff's department for over 25 years, testified as the lead accident investigator. Detective Heald is not an accident

reconstructionist. He had investigated 1,000 to 1,500 traffic accidents during his career, including some involving fatalities.

Detective Heald arrived at 4:30 to 5 a.m. Detective Heald stated there was a full moon at the time of the accident, and a street light at the intersection of 15th Street and Rancho Vista Boulevard where the collision occurred. Detective Heald documented the evidence from the accident scene and gave it to sergeant Jeff Perkins. Detective Heald measured the location of items using a roll tape. There was no sidewalk in the area.

Sheriff's deputies located part of defendant's vehicle's front bumper west of 20th Street on Rancho Vista Boulevard. The piece of the bumper was located south of the fog line.[2] Part of the decedent's right leg was located south of the road, in the desert. Various articles of the decedent's clothes were located on the road, including the decedent's keys, shoes, and pants. The decedent's body was also on the road. There was some plastic debris from defendant's vehicle, one piece located partially on the fog line, and another on the desert side of the fog line. Detective Heald did not list this debris in his evidence description document. There was a six-foot blood streak, located south of the fog line, which also was not listed in the evidence document compiled by detective Heald.

A security camera located on 8th Street and Rancho Vista Boulevard captured video of the decedent walking by on the sidewalk at 3:17 a.m. The decedent did not have an abnormal gait. The video showed defendant's vehicle at 3:32 a.m.

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[2] The fog line is a solid white line delineating the outer boundary of the drivable portion of the road. If a person was driving eastbound in the lane closest to the fog line, the fog line would be to the south.

Detective Heald took a photograph of defendant's vehicle. There was blood on the windshield. Detective Heald testified that some part of the decedent's body went through the windshield. In another photo, there was an ice cooler at the foot of the passenger side seat. Detective Heald determined there were blood drops on the ice cooler. He did not see blood spatter on the glove compartment above the ice cooler. The drops on the ice cooler were never tested as to whether they were blood.

Detective Heald testified that based on his investigation, the area of impact was six feet north of the fog line, into the travel lane. Detective Heald concluded the decedent was walking in the street at the time of impact. The decedent was wearing dark blue jeans, a black shirt, and black shoes at the time of the accident. Detective Heald testified that a driver traveling at 60 to 65 miles per hour who could see only 50 to 100 feet in front was driving unsafely.

Sergeant Jeff Perkins arrived at the accident scene between 7:30 and 8:30 a.m. He observed paint chips in the roadway as well as portions of headlights in the roadway from defendant's vehicle. He also observed the decedent's shoes, keys, pants, and body in the travel lane. Sergeant Perkins created a diagram based on the evidence documented by detective Heald to determine area of impact. Sergeant Perkins noted that the six-foot blood streak south of the fog line was not included in detective Heald's evidence document. Sergeant Perkins opined the area of impact could have happened up to or on top of the fog line. However, sergeant Perkins opined the area of impact was more likely than not three to six feet into the travel lane. He categorized the area where the decedent was walking as extremely dark.

Deputy Jon Schnereger testified that he conducted a field sobriety test on defendant, beginning at approximately 4:20 a.m. and ending at 4:43 a.m. Defendant passed the breathalyzer test for alcohol. Based on the field sobriety test, deputy Schnereger concluded defendant was not impaired.

Mark Schuchardt, a criminalist and toxicologist for the Los Angeles County Medical Examiner/Coroner's office, examined the decedent's blood and urine. Based on his analysis, the alcohol level in the decedent's chest blood was 0.17. The alcohol level in the decedent's vitreous (eye) blood was 0.18. The alcohol level in the decedent's urine was 0.21.

Susannah Knetchel, a senior criminalist with the Los Angeles County Sheriff's Department Crime Lab, examined defendant's vehicle several days after the accident, on April 2, 2013. She found no blood stains on its interior. She found no evidence of blood on the steering wheel, the passenger seat, or the driver's seat. She also found no evidence of an attempt to clean blood inside the vehicle. At the time of her analysis, there was no ice cooler in defendant's vehicle.

3. Expert Testimony

Plaintiffs' expert Dr. Kenneth Solomon testified as an expert in the fields of accident reconstruction, biomechanics (looking at injury patterns), and human factors (how a person perceives the events prior to, during, and immediately after an accident). Dr. Solomon noted that defendant in his deposition testified that he had hit something on the side of the road. Both he and defendant's accident reconstruction expert, Dr. Burkhard, had almost the same conclusion regarding defendant's vehicle's

speed at the time of impact, with Dr. Solomon finding defendant traveled at 62.1 miles per hour. Dr. Solomon testified that low beam headlights can project up to 300 feet. Dr. Solomon testified the moon was at 95 percent illumination the night of the accident. Dr. Solomon opined that based on the visibility, defendant could have certainly avoided hitting the decedent. Dr. Solomon opined marijuana use as a possible factor for defendant's alleged inattentiveness, as well as "microsleep."

Dr. Solomon testified that one of his opinions was that the decedent was 2.15 to 3.21 feet north of the fog line (into the travel lane) when impact occurred, if considering only blood splatter and making assumptions. He also opined the decedent was more probably than not struck south of the fog line.

Defendant's expert Dr. Peter Burkhard, an accident reconstructionist, opined the speed of defendant's vehicle was likely 62.3 miles per hour at the time of the accident. He testified that the decedent was four to six feet in the travel lane when the accident occurred. Dr. Burkhard noted he did not account for several items in his analysis, including the six-foot blood streak south of the fog line that was not documented by deputy Heald.

Defendant's expert Dr. Anthony Stein, a human factors expert, conducted a vision study at the scene of the accident to determine if the decedent would be visible to a driver. Based on his analysis, Dr. Stein opined no driver would have been able to detect the decedent in the roadway in time to avoid the accident. Dr. Stein did not factor in marijuana usage for his analysis. Dr. Stein based his analysis on Dr. Burkhard's accident reconstruction analysis.

Plaintiffs' toxicologist Dr. John Treuting analyzed a blood sample drawn from defendant at 5:20 a.m. following the accident.

Dr. Treuting concluded that based on his analysis, defendant had active compounds of marijuana in his system, including a fast-acting compound. Dr. Treuting opined the level of compound in defendant's blood indicated defendant had to have smoked marijuana when he woke up around 3 a.m. Dr. Treuting also reviewed the Los Angeles coroner's report for the decedent. Based on his review, the decedent had marijuana cannabinoids and an alcohol level of 0.21 in his system.

E. Verdict

On March 16, 2016, the jury returned a verdict. The jury found by a vote of eleven-to-one that defendant was negligent. The jury then found by a vote of nine-to-three that defendant's negligence was not a substantial factor in causing the decedent's death. Judgment for defendant was entered on April 7, 2016.

F. Motion for New Trial

Plaintiffs moved for a new trial. Plaintiffs made several arguments in support, which we will further discuss below, including erroneous evidentiary rulings, juror misconduct, attorney misconduct, and instructional error. On June 20, 2016, the trial court denied plaintiffs' motion for new trial. This appeal followed.

III. DISCUSSION

A. Juror Misconduct

Plaintiffs contend the trial court erred by denying their motion for new trial. We review an order denying a motion for new trial for abuse of discretion. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 859.) However, "we must determine whether the court abused its discretion by examining the entire record and making an independent assessment of whether there were grounds for granting the motion." (*ABF Capital Corp. v. Berglass* (2005) 130 Cal.App.4th 825, 832; see *Whitlock v. Foster Wheeler, LLC* (2008) 160 Cal.App.4th 149, 158 [appellate court "must independently review the trial court's determination of whether a [party] was prejudiced by juror misconduct. [Citations.]"].)

Juror misconduct is one ground for relief by a motion for new trial. (Code Civ. Proc., § 657, subd. 2.) "'In ruling on a request for a new trial based on jury misconduct, the trial court must undertake a three-step inquiry. [Citation.] First, it must determine whether the affidavits supporting the motion are admissible. (Evid. Code, § 1150.) If the evidence is admissible, the trial court must determine whether the facts establish misconduct. [Citation.] Lastly, assuming misconduct, the trial court must determine whether the misconduct was prejudicial.' [Citation.]" (*Whitlock v Foster Wheeler, LLC, supra*, 160 Cal.App.4th at p. 160.)

In support of their juror misconduct argument, plaintiffs submitted the declaration of Juror Maccarone. Plaintiffs asserted three purported instances of juror misconduct. We

address paragraph nine of Juror Maccarone's declaration concerning Juror Goldarreh and will not reach the other claimed misconduct. Juror Maccarone declared: "Juror . . . Goldarreh stated that as soon as she heard evidence that alcohol and marijuana were found in the Decedent's system she made up her mind that she would not award anything to the Plaintiffs. [Juror] Goldarreh did not participate in deliberations and simply stated that she would vote for whatever gave the Plaintiffs zero recovery."

We first decide whether paragraph nine of Juror Maccarone's declaration concerning Juror Goldarreh is admissible. The evidence challenging the validity of a verdict is analyzed under Evidence Code section 1150, subdivision (a): "Upon an inquiry as to the validity of a verdict, 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. No evidence is admissible to show the effect of such 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." (*People v. Danks* (2004) 32 Cal.4th 269, 301-302.) "Evidence Code section 1150 '"prevents one juror from upsetting a verdict of the whole jury by impugning his own or his fellow jurors' mental processes or reasons for assent or dissent. 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." [Citation.]' [Citation.]" (*People v. Engstrom* (2011) 201

Cal.App.4th 174, 184; *Vomaska v. City of San Diego* (1997) 55 Cal.App.4th 905, 910.)

Paragraph nine of Juror Maccarone's declaration as to Juror Goldarreh is admissible under Evidence Code section 1150 in order to show the verdict was improperly influenced by Goldarreh's failure to deliberate and her biased state of mind. Juror Maccarone's declaration was proof of overt acts by Juror Goldarreh that are objectively ascertainable, namely her statements that she had made up her mind once she heard the decedent had alcohol and marijuana in his system and that she would vote for whatever gave plaintiffs zero recovery, and her action in refusing to deliberate. Juror Goldarreh's statements are not inadmissible hearsay insofar as they were used to prove her biased state of mind and her conduct. (Evid. Code, § 1250, subd. (a); *Grobeson v. City of Los Angeles* (2010) 190 Cal.App.4th 778, 790-792 (*Grobeson*) [juror statement "I made up my mind during trial" admissible as "statement of bias"]; (*People v. Cleveland* (2001) 25 Cal.4th 466, 485 [inquiry into conduct of juror rather than content of statement generally not prohibited by Evidence Code section 1150].)

The next inquiry is whether Juror Goldarreh's conduct rose to the level of juror misconduct. A statement of bias includes a statement showing a juror has prejudged a case. A statement of bias is misconduct. (*Grobeson, supra*, 190 Cal.App.4th at pp. 788, 790-791, & fn. 7; see *Clemens v. Regents of University of California* (1971) 20 Cal.App.3d 356, 361 ["For a juror to prejudge the case is serious misconduct."].) In *Grobeson*, the plaintiff's counsel, following a jury verdict against the plaintiff, moved for a new trial and asserted juror misconduct. Counsel submitted a declaration concerning a phone conversation she had with a

juror. (*Grobeson, supra*, 190 Cal.App.4th at p. 784.) This juror had voted against the plaintiff and stated to plaintiff's counsel, "I made up my own opinion in the second week of trial." (*Ibid*.) The trial court granted the plaintiff's motion for new trial, finding juror misconduct occurred because the juror had prejudged the case. (*Id.* at p. 785.)

"Bias is often intertwined with a failure or refusal to deliberate." (*People v. Lomax* (2010) 49 Cal.4th 530, 589.) "A refusal to deliberate is misconduct." (*Ibid.*) "'A refusal to deliberate consists of a juror's unwillingness to engage in the deliberative process; that is, he or she will not participate in discussions with fellow jurors by listening to their views and by expressing his or her own views. Examples of refusal to deliberate include, but are not limited to, expressing a fixed conclusion at the beginning of deliberations and refusing to consider other points of view, refusing to speak to other jurors, and attempting to separate oneself physically from the remainder of the jury.'" (*People v. Cleveland*, *supra*, 25 Cal.4th at p. 485.)

Here, Juror Goldarreh said she made up her mind the moment she heard the decedent had alcohol and marijuana in his system. The first instance in which such evidence was introduced occurred on March 9, 2016 during defendant's cross-examination of Dr. Treuting regarding the coroner's report. Plaintiffs did not finish their case-in-chief until March 10, 2016. Thus, based on Juror Maccarone's declaration, Juror Goldarreh made up her mind before plaintiffs' case-in-chief had concluded and before deliberations began. Her statements are a prima facie showing of bias and thus demonstrate misconduct. Supporting that showing of bias as well as an intertwined failure to deliberate, Juror Maccarone declared Juror Goldarreh refused to deliberate and

said she would vote only for whatever gave plaintiffs zero recovery.

Defendant cites to *People v. Allen and Johnson* (2011) 53 Cal.4th 60 (*Allen*) to argue Juror Goldarreh's conduct was not misconduct. In *Allen*, the defendants were convicted of first degree murder. (*Id.* at p. 64.) During the guilt phase of deliberations, two jurors reported to the court their belief that Juror No. 11 had prejudged the case while evidence was still being presented. (*Id.* at p. 65.) According to the foreperson, on the second day of deliberations, Juror No. 11 had said, "'When the prosecution rested, she didn't have a case.'" (*Id.* at p. 66.) Following interviews with the jurors, the trial court discharged Juror No. 11 on two grounds, including prejudgment of the case. (*Id.* at p. 69.)

Our Supreme Court found the trial court erred in discharging Juror No. 11 on the basis of prejudgment of the case. (*Allen, supra*, 53 Cal.4th at p. 71.) The Court noted review of a decision to discharge a juror required a somewhat stronger showing than is typical for abuse of discretion. (*Ibid.* [requiring a """demonstrable reality""" for basis of discharge].) Our Supreme Court distinguished *Grobeson* from the case before it: "*Grobeson* involved misconduct committed while evidence was still being presented. This case is different. Juror No. 11's statement was made during deliberations, and only made reference to his previous state of mind at a single point during the trial. It did not indicate an intention to ignore the rest of the proceedings. The Attorney General has cited no case, and we have found none, in which a juror was discharged for prejudgment based solely on comments made during deliberations. [¶] Unlike the juror in *Grobeson*, Juror No. 11's comment, however phrased, was subject

to some interpretation. His remark was not an 'unadorned statement' that he had conclusively prejudged the case. It did not establish that he had ignored further evidence, argument, instructions, or the views of other jurors. . . . A juror who holds a preliminary view that a party's case is weak does not violate the court's instructions so long as his or her mind remains open to a fair consideration of the evidence, instructions, and shared opinions expressed during deliberations." (*Id.* at p. 73, fn. omitted.) The Supreme Court noted Juror No. 11 had participated in jury discussions and voted "undecided" on the fifth day of deliberations. (*Id.* at p. 74.) "We cannot reasonably expect a juror to enter deliberations as a *tabula rasa*, only allowed to form ideas as conversations continue. What we can, and do, require is that each juror maintain an open mind, consider all the evidence, and subject any preliminary opinion to rational and collegial scrutiny before coming to a final determination." (*Id.* at p. 75.)

Allen does not demonstrate that Juror Goldarreh committed no misconduct. Here, Juror Goldarreh's statement that "she made up her mind" when evidence showed the decedent's system had alcohol and marijuana was an "unadorned statement" that she had prejudged the case. (See *Grobeson, supra*, 190 Cal.App.4th at p. 790 [juror's statement that "I made up my mind during trial" was clear statement of prejudgment of case].) Juror No. 11 in *Allen* deliberated with other jurors and voted undecided after five days of deliberations; in contrast, Juror Goldarreh did not engage in deliberations and decided before them. Based on Juror Maccarone's unopposed declaration, Juror Goldarreh did not "maintain an open mind," "consider all the evidence," nor subject her "preliminary opinion to rational and

collegial scrutiny before coming to a final determination." Given Juror Goldarreh's refusal to deliberate and prejudgment of the case, the evidence in the record demonstrates serious juror misconduct.[3]

Finally, we must determine whether the record demonstrates the juror misconduct was prejudicial. Juror misconduct raises a rebuttable presumption of prejudice. (*Whitlock v. Foster Wheeler, LLC, supra*, 160 Cal.App.4th at p. 162.) It may be rebutted by examination of the entire record to determine whether there is a reasonable probability of actual harm to the complaining party. (*Hasson v. Ford Motor Co.* (1982) 32 Cal.3d 388, 417.) "Some of the factors to be considered when determining whether the presumption is rebutted are the strength of the evidence that misconduct occurred, the nature and seriousness of the misconduct, and the probability that actual prejudice may have ensued." (*Ibid.*)

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[3] Defendant did not file a counter declaration to Juror Maccarone's declaration. Unless counteraffidavits or declarations are filed, the moving party's affidavits and declarations are deemed admitted. (*Lankster v. Alpha Beta Co.* (1993) 15 Cal.App.4th 678, 681, fn. 1; *Chronakis v. Windsor* (1993) 14 Cal.App.4th 1058, 1066; *Moore v. Preventive Medicine Medical Group, Inc.* (1986) 178 Cal.App.3d 728, 740, fn. 8.) Accordingly, paragraph nine of Juror Maccarone's declaration is deemed admitted to the extent it complies with Evidence Code section 1150 and is otherwise admissible. We are cognizant of the strict time limitations in briefing and deciding a new trial motion and the possible difficulty of obtaining counter testimony from jurors, yet here defendant offered no evidence of any attempts to obtain counter testimony nor of a Code of Civil Procedure section 237, subdivision (b) request for juror contact information.

A review of the record indicates that there is a reasonable probability of actual harm to plaintiffs. Both sides had presented competing evidence as to whether the decedent had been struck while in the travel lane or south of the fog line. There was evidence indicating defendant was driving at an unreasonable speed based on visibility. There was evidence that indicated defendant may have been under the influence at the time of the accident.

Juror Goldarreh's misconduct was serious, and she was among the majority of jurors who, by a nine-to-three vote, found defendant's negligence was not a substantial factor in causing the decedent's death. Because three-quarters of jurors are required to render a verdict under article I, section 16 of the California Constitution, a nine-to-three vote favors a finding of prejudice. (*Weathers v. Kaiser Foundation Hospitals* (1971) 5 Cal.3d 98, 110 ["Since the verdict was nine to three, the disqualification for bias of any one of the majority jurors could have resulted in a different verdict."]; *Grobeson, supra*, 190 Cal.App.4th at p. 792 [affirming order granting new trial because the loss of one biased juror on vote of 9 to 3 actually prejudiced the plaintiff]; *Andrews v. County of Orange* (1982) 130 Cal.App.3d 944, 959 ["Manifestly, on the nine-to-three verdicts, disqualification of any one juror who voted with the majority would have resulted in a different verdict and caused prejudice."], disapproved on other grounds in *People v. Nesler* (1997) 16 Cal.4th 561, 582, fn. 5.)

On this record, there is a reasonable probability that but for the juror misconduct a different outcome may have occurred that was favorable to plaintiffs. Accordingly, the trial court abused its discretion by denying plaintiffs' motion for new trial on the grounds of juror misconduct. We therefore remand for a new

trial. We need not rule on plaintiffs' other arguments concerning juror misconduct purportedly committed by other jurors.

Typically, we do not decide matters unnecessary for the disposition of the appeal. (*Palermo v. Stockton Theatres, Inc.* (1948) 32 Cal.2d 53, 65; *Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229, 259.) However, on reversal of a judgment and remand for a new trial, the Court of Appeal is required to determine all questions of law necessary for final determination of the case. (Code Civ. Proc., § 43; *Hale v. Morgan* (1978) 22 Cal.3d 388, 405.) For the guidance of the trial court, we will discuss the following issues. (See *Ovando v. County of Los Angeles* (2008) 159 Cal.App.4th 42, 70 [discussing effect of proposition in case because the issue was likely to arise again on remand, though unnecessary for affirming or reversing the judgment].)

B. Exclusion of Evidence Purportedly Indicating Destruction or Tampering of Evidence

Plaintiffs contend the trial court erred by its in limine ruling excluding under Evidence Code section 352 evidence that defendant purportedly tampered with or destroyed evidence. Plaintiffs rely only on the pretrial ruling on motion in limine No. 3 and do not assert that they ever asked the trial court to revisit it during the trial.

Whether evidence was properly excluded under Evidence Code section 352 is reviewed for abuse of discretion. (*McCoy v. Pacific Maritime Assn.* (2013) 216 Cal.App.4th 283, 295-296; *Boeken v. Philip Morris, Inc.* (2005) 127 Cal.App.4th 1640, 1685.) An abuse of discretion occurs if the trial court exercised its

discretion in an arbitrary, capricious, or patently absurd manner resulting in a manifest miscarriage of justice. (*Boeken v. Philip Morris, Inc., supra*, 127 Cal.App.4th at p. 1685.)

Plaintiffs assert evidence suggested the decedent's body ended up where it was because defendant removed the body from his vehicle, where it had landed upon impact. Plaintiffs also asserted there was evidence defendant had thrown the decedent's leg into the desert. Plaintiffs in their appellate brief rely on plaintiffs' counsel's own assertion that the decedent's body was in defendant's vehicle.

The trial court did not abuse its discretion by granting a motion in limine to prohibit such questioning. In their written opposition to defendant's motion in limine No. 3, plaintiffs relied only on vague statements that "photographs" and "witness testimony" would confirm their theory of evidence tampering. At the pretrial hearing, the trial court stated that it understood that the place of impact in the side or middle of the road was at issue but did not have anything in the motions to suggest tampering with evidence, stating that the motion was granted "without prejudice" to being reconsidered. This was not reversible error on this record. (*People v. Letner and Tobin* (2010) 50 Cal.4th 99, 159 [requiring for review of denial of motion in limine that movants were "required to renew their objection at trial, when the trial court would have the opportunity to evaluate their objections in light of the actual evidence presented."])

The trial court could reasonably conclude that, without meaningful evidence in support of an evidence tampering theory, questioning about it would have low probative value and have a high likelihood of misleading the jury. The trial court reasoned that the prejudice would be great in this case, as asking

defendant about whether he threw the decedent's leg into the desert or removed the decedent's body from the vehicle would suggest the decedent's suffering, which is not at issue in a wrongful death case. (See *Corder v. Corder* (2007) 41 Cal.4th 644, 661 [recovery for wrongful death is current and reasonable future financial benefits to heirs, and monetary equivalent of loss of comfort, society, and protection; it does not include pain and anguish suffered by the decedent].)

Plaintiffs assert the line of questioning excluded by motion in limine No. 3 should have been permitted because it was necessary for determining where the area of impact occurred. However, plaintiffs were permitted to ask defendant about whether any debris was removed from the vehicle and whether anything came into the vehicle. Plaintiffs also asked detective Heald about the hole in the passenger side of the windshield, and he testified that he believed at least part of the decedent's body had gone through the windshield. Having elicited this testimony at trial, plaintiffs did not revisit the in limine order and seek to have the court rule, in context of the evidence, on the additional probative value of asking whether defendant removed the decedent's body from his vehicle and threw the decedent's leg into the desert, compared with the danger of misleading the jury.

The trial court indicated that if plaintiffs provided some expert testimony supporting their theory it would reconsider its ruling on motion in limine No. 3. Specifically, the court ruled: "[B]ased on what I've heard thus far, again, I'm going to grant the motion without prejudice. Bring me something one of these experts ties together with your argument, [plaintiffs' counsel], and I'll reconsider it." It is not clear that the trial court ruled that *only* expert testimony could support reconsideration of the

motion in limine. It was clear that the trial court wanted *some* evidence that supported tampering, and expert testimony may have been what appeared to it the most plausible possibility. The trial court did not prohibit reconsideration based on something else that "ties together" the facts with the argument that tampering occurred. If, for example, defendant testified that the decedent's body had become lodged onto his vehicle, then asking whether he had pulled the decedent's body off the vehicle would have high probative value. It might establish error if plaintiffs had made a reconsideration request based on such lay testimony, and the trial court had denied it because it was not based on expert testimony. But this did not occur. The trial court's ruling as stated was not an abuse of discretion.

Plaintiffs also contend that the trial court's ruling on defendant's motion in limine No. 13 was in error because there was evidence of tampering related to defendant's father-in-law taking certain items that should have been admitted. This ruling also was addressed on one occasion during trial.

Defendant's father-in-law Oppelt took defendant's vehicle's license plate from the scene of the accident. Oppelt also testified during a deposition that he "probably" removed the ice cooler from defendant's vehicle. The trial court determined in limine that these matters would have very low probative value as to the area of impact and a high substantial danger of misleading the jury.

During trial, plaintiffs' counsel wanted to ask detective Heald about whether Oppelt moved the ice cooler. Plaintiffs wanted to show that the decedent's body had entered into the vehicle, as demonstrated by drops of blood on the ice cooler, but could not because the ice cooler was removed and not tested for

blood. The court prohibited plaintiffs from asking detective Heald as to whether Oppelt removed the ice cooler with drops of blood, finding such questioning to be at most impeachment of Oppelt. Plaintiffs' counsel explained that their view that the ice chest had blood drops on it was based on a photograph, and the trial court stated that plaintiffs could admit such a photograph to show the blood drops without needing to discuss Oppelt.

On this record, this was not an abuse of discretion. As to the license plate removal, the court found evidence of Oppelt's alleged misconduct would mislead the jury regarding the relevant issues, namely defendant's negligence resulting in the decedent's death. The trial court could reasonably find the probative value of asking about the license plate's removal to be low in comparison to the substantial danger of misleading the jury. As to the ice cooler removal, it appears the trial court found asking whether Oppelt removed the ice cooler was not relevant to the issue of defendant's negligence. While we conclude that the ice cooler's removal had relevance, the trial court could find, on the evidence provided, the probative value was also low in comparison to the substantial danger of misleading the jury. Plaintiffs were permitted to ask detective Heald about the presence of an ice cooler in defendant's vehicle and whether there was blood on it. The trial court did not abuse its discretion by denying admission of evidence concerning Oppelt's removal of the license plate and the ice cooler.

On retrial, plaintiffs may present a more complete evidentiary basis for their arguments, and the trial court is free to weigh matters differently.

C. Defendant's Prior DUI Convictions

Plaintiffs contend the trial court erred by excluding evidence of defendant's prior DUI convictions. Evidence Code section 1101, subdivision (a) provides: "Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion." However, there is an exception as described in Evidence section 1101, subdivision (b): "Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . .) other than his or her disposition to commit such an act." We make clear that, contrary to the trial court's statements here, Evidence Code section 1101 applies in civil cases. (See *Ghadrdan v. Gorabi* (2010) 182 Cal.App.4th 416, 421 [applying Evidence Code section 1101 to a civil case and concluding that prior conviction could be admitted if the defendant had been involved and conviction was relevant to a subdivision (b) factor, such as knowledge or motive]; *Holdgrafer v. Unocal Corp.* (2008) 160 Cal.App.4th 907, 928, fn. 10 ["While section 1101 usually arises in criminal cases, the statute applies in civil cases as well."].) Defendant's prior DUI convictions are relevant and admissible as to what a reasonable person in defendant's position would know regarding driving under the influence. (See *People v. Ochoa* (1993) 6 Cal.4th 1199, 1205 [for defendant convicted of gross vehicular manslaughter while

intoxicated, evidence of defendant's prior DUI convictions was properly admitted to show defendant's knowledge of risk of driving while intoxicated].) The trial court also had the obligation to follow our February 26, 2016, order, which stated that section 1101, subdivision (b) applies in civil cases and stated that we expect the trial court to follow binding California law.

However, the trial court also found evidence of the prior DUI convictions would create substantial danger of undue prejudice under Evidence Code section 352. Undue prejudice to defendant would include the jury finding defendant was driving under the influence at the time of the accident solely because he had been convicted of DUI before. On this record, the trial court could find the probative value was low. Plaintiffs had evidence indicating defendant was driving under the influence at the time of the accident, namely Dr. Treuting's testimony. Defendant testified he did not smoke marijuana prior to driving the day of the accident. Defendant also presented testimony indicating defendant passed the field sobriety test. Thus, there was a dispute as to whether defendant was actually driving under the influence when the accident occurred. Given such a dispute, the trial court could reasonably find the probative value of the prior DUI convictions was outweighed by the substantial danger of undue prejudice to defendant. The trial court did not abuse its discretion by excluding evidence of defendant's prior DUI convictions.

D. Expert Opinion Testimony on Area of Impact

Plaintiffs contend the trial court erred by permitting detective Heald and sergeant Perkins to provide opinion

testimony on the area of impact. Traffic officers whose duties included investigating automobile accidents are deemed qualified experts for various factors involved in accidents. (See *Hart v. Wielt* (1970) 4 Cal.App.3d 224, 229; *Williams v. Cole* (1960) 181 Cal.App.2d 70, 76.) "[C]ases may occur where the opinions of trained experts in the field on this subject [traffic collisions] will be of great assistance to the members of the jury in arriving at their conclusions. In such cases, a traffic officer who has spent years investigating accidents in which he has been required to render official reports not only as to the facts of the accidents but also as to his opinion of their causes, including his opinion, where necessary, as to the point of impact, is an expert. Necessarily, in this field much must be left to the common sense and discretion of the trial court." (*Kastner v. Los Angeles Metropolitan Transit Authority* (1965) 63 Cal.2d 52, 57.) We note sergeant Perkins and detective Heald were designated as non-retained experts by defendant for trial.

The trial court indicated that detective Heald was not testifying as an expert. The trial court also ruled that the sheriff's deputies could provide opinion testimony, whether it be lay or expert, based on their training. This was an erroneous approach. Neither detective Heald nor sergeant Perkins was a percipient witness to the accident, and thus they should not have been permitted to provide a lay opinion on area of impact. (See Evid. Code, § 800 [lay opinion typically rationally based on perception of witness].) Testifying as to point or area of impact in this case would require expert testimony. (*Kastner v. Los Angeles Metropolitan Transit Authority, supra*, 63 Cal.2d at p. 57.) Detective Heald and sergeant Perkins can offer expert opinion testimony on area of impact, provided they are qualified. (See

Evid. Code, §§ 720, 801.) On remand, we leave it to the trial court to determine the scope of the sheriff's deputies' qualifications.

E. Instructional Error

Plaintiffs argue that the trial court erred by not allowing CACI No. 204 to be read to the jury. On appeals alleging that the trial judge improperly refused to give a particular instruction, appellate courts review the evidence in the light most favorable to the claim of instructional error. (*Sills v. Los Angeles Transit Lines* (1953) 40 Cal.2d 630, 633; *Veronese v. Lucasfilm Ltd.* (2012) 212 Cal.App.4th 1, 4-5.) "'[I]n determining whether or not the instructions given are correct, we must assume that the jury might have believed the evidence upon which the instruction favorable to the losing party was predicated, and that if the correct instruction had been given upon that subject the jury might have rendered a verdict in favor of the losing party.' [Citation.]" (*Henderson v. Harnischfeger Corp.* (1974) 12 Cal.3d 663, 674.)

CACI No. 204 provides: "You may consider whether one party intentionally concealed or destroyed evidence. If you decide that a party did so, you may decide that the evidence would have been unfavorable to that party." CACI No. 204 should be given only if there was evidence of suppression. (*Sprague v. Equifax, Inc.* (1985) 166 Cal.App.3d 1012, 1051.) Plaintiffs cite to the purported evidence of tampering in section III.B. above. Plaintiffs also cite to the photograph of defendant's vehicle at his father's house taken the day after the accident, which showed a

hose near the front of the vehicle.[4] As indicated above, the trial court did not abuse its discretion by excluding evidence concerning purported tampering of evidence by defendant or defendant's father-in-law. With the trial evidence limited, the evidence that was introduced at trial was speculative as to evidence of suppression of evidence. Thus, the trial court did not err by not reading CACI No. 204 to the jury.

Plaintiffs also argue instructional error because CACI No. 706 was not provided to the jury. CACI No. 706 provides: "A person must drive at a reasonable speed. Whether a particular speed is reasonable depends on the circumstances such as traffic, weather, visibility, and road conditions. Drivers must not drive so fast that they create a danger to people or property. [¶] If [*name of plaintiff/defendant*] has proved that [*name of defendant/plaintiff*] was not driving at a reasonable speed at the time of the accident, then [*name of defendant/plaintiff*] was negligent." Based on the record, the trial court either read only the first paragraph of CACI No. 706 to the jury, finding the second paragraph was argumentative and a negligence per se instruction, or refused to give the instruction at all. Plaintiffs have failed to provide an adequate record to resolve this issue in their favor. (*Foust v. San Jose Construction Co., Inc.* (2011) 198 Cal.App.4th 181, 187). Nevertheless, because we are here giving guidance on remand, we note our view that there was sufficient evidence for a jury to find that defendant was not driving at a reasonable speed, so CACI No. 706 was appropriate.

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[4] Defendant was asked whether he used the hose to wash his vehicle, and he denied doing so.

F. Attorney Misconduct

Plaintiffs assert three instances of attorney misconduct by defendant's counsel. One instance occurred during cross-examination of Dr. Treuting. The parties had agreed to not reference that defendant had been arrested for the accident. Dr. Treuting however referred to an arrest report and an arresting officer. Defendant's counsel then stated, "Let's make one thing clear: there was never an arrest in this case." It is undisputed defendant was actually arrested. Plaintiffs' counsel requested: the trial court provide a limiting instruction, defendant be put on the stand to establish his arrest, or a mistrial. The trial court denied all requests.

An attorney commits misconduct by making a false statement of fact or law to a jury. (*City of Los Angeles v. Decker* (1977) 18 Cal.3d 860, 871.) Rule 5-200 of the Rules of Professional Conduct provides in pertinent part: "In presenting a matter to a tribunal, a member: [¶] . . . [¶] (B) Shall not seek to mislead the judge, judicial officer, or jury by an artifice or false statement of fact or law . . . ." Here, defendant's counsel, by making a false statement of fact that there was never an arrest, committed misconduct. The trial court erred by failing to take any curative measures, such as an admonition to the jury. (See *Wank v. Richman & Garrett* (1985) 165 Cal.App.3d 1103, 1115 [though the defendant's counsel's remarks constituted misconduct, trial court's admonition to the jury cured any potential prejudice].)

Plaintiffs also contend defendant's counsel committed misconduct by asking detective Heald several questions as to whether the drops on the ice cooler were tested for blood and

implying that the drops could have been from mortar because of defendant's construction job. As noted, plaintiffs were not allowed to raise the issue that Oppelt had taken the ice cooler. Plaintiffs requested a mistrial on this ground. Defendant contended the sheriff's department had possession of the ice cooler and could have tested it. Plaintiffs assert defendant's counsel's line of questioning was unfair because plaintiffs could not inquire as to why the drops on the ice cooler were not tested.

There does not appear to be misconduct. Plaintiffs were proscribed from mentioning that Oppelt had taken the ice cooler. However, the record does not indicate plaintiffs were prohibited from asking detective Heald or another witness why testing of the drops was not possible. Detective Heald, for example, could have testified that the ice cooler had been removed prior to an opportunity for testing, without mentioning Oppelt's involvement. Plaintiffs' counsel asked Knetchel, the senior criminalist, about how she could not test the ice cooler because it was not present when she conducted her analysis.

Finally, plaintiffs contend defendant's counsel committed misconduct during closing argument by mentioning that plaintiffs were not present in the courtroom. During trial, the court had admonished plaintiffs' counsel regarding the plaintiffs having to leave the courtroom when they became emotional listening to testimony. The trial court found it was distracting to the jury. Plaintiffs contend it was misconduct for defendant's counsel to mention plaintiffs not being present.

Evidence in a case consists of admitted testimony and exhibits. "California courts have repeatedly held attempts to suggest matters of an evidentiary nature to a jury other than by the legitimate introduction into evidence is misconduct whether

by questions on cross-examination, argument or other means." (*Smith v. Covell* (1980) 100 Cal.App.3d 947, 960.) Though attorneys have wide latitude to discuss the case in closing argument (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 795), it is misconduct to suggest that the jury should decide the case based on facts not in evidence. Defendant's counsel's statement appears to have served no purpose other than to suggest that the jury should decide the case based on a fact not in evidence and therefore constituted misconduct. Nevertheless, this claim was forfeited by the failure to object to the argument at the time. It could easily have been addressed by an admonition to the jury that they are not to consider the presence or absence of the parties in the courtroom.

IV. DISPOSITION

The judgment is reversed and the case remanded for a new trial. Plaintiffs Adolfo and Vera Cornavaca may recover their costs on appeal from defendant Mark Colby Horwedel.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

RAPHAEL, J.*

I concur:

KRIEGLER, Acting P.J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

BAKER, J., Concurring

I concur in the result only. For reasons I will briefly explain, plaintiffs Adolfo and Vera Cornavaca have not established the trial court erred in declining to find juror misconduct. But I do believe reversal is required because the trial court abused its discretion in granting defendant Horwedel's motion in limine number 3, which improperly limited plaintiffs' case at trial.

The majority holds the trial court should have granted plaintiffs a new trial because Juror Goldarreh engaged in "serious juror misconduct" by refusing to deliberate with other jurors and by improperly prejudging the case. (Maj. Opn. at 18.) A full accounting of the record before us and a proper application of controlling authority demonstrate Juror Goldarreh did neither.

The sole evidence of juror misconduct comes from the declaration of Juror Maccarone; he was one of the three jurors whose view did not carry the day during deliberations. The majority decides Juror Goldarreh refused to participate in deliberations based on the following sentence in paragraph 9 of Juror Maccarone's declaration: "[Juror] Goldarreh did not participate in deliberations and simply stated that she would vote for whatever gave the Plaintiffs zero recovery." This sentence, however, is unreliable evidence of a failure to deliberate because—merely two declaration paragraphs later—Juror

Maccarone swears to the truth of a fact that demonstrates his assertion of a failure to deliberate is false. Juror Maccarone avers in paragraph 11: "Several of the jurors, including [Juror] Goldarreh, [Juror] Becker, and a naval veteran stated that they viewed the law enforcement testimony and the police report as scientific evidence and proof of where the point of impact occurred." Perhaps it goes without saying, but discussions among jurors of the testimony at trial and the proof of where the point of impact occurred are, in a word, deliberations. Thus, regardless of the absence of any counter-declarations in the record, Juror Maccarone's declaration is at best internally contradictory, and it cannot be evidence establishing a failure to deliberate.

That leaves the majority's assertion that Juror Goldarreh improperly prejudged the case, based on Juror Maccarone's assertion that "Juror . . . Goldarreh stated that as soon as she heard evidence that alcohol and marijuana were found in the Decedent's system she made up her mind that she would not award anything to the Plaintiffs." The surrounding context in Juror Maccarone's declaration reveals Juror Goldarreh made this statement during post-trial deliberations with the other jurors. And that brings this case squarely within our Supreme Court's holding in *People v. Allen* (2011) 53 Cal.4th 60 (*Allen*). The majority quotes the most salient passage of the *Allen* opinion, but it bears repeating: "*Grobeson* [*v. City of Los Angeles* (2010) 190 Cal.App.4th 778] involved misconduct committed while evidence was still being presented. This case is different. Juror No. 11's statement [i.e., 'When the prosecution rested, she didn't have a case'] was made during deliberations, and only made reference to his previous state of mind at a single point during the trial. It did not indicate an intention to ignore the rest of the proceedings.

The Attorney General has cited no case, and we have found none, in which a juror was discharged for prejudgment based solely on comments made during deliberations." (*Allen*, *supra*, at pp. 72-73.)

This case is apparently now the first to so hold, and unwisely so. Jury verdicts are not trivial things to be lightly cast aside because a juror expresses a view in strong terms during deliberations or is unaware that fine distinctions in wording (e.g., "I made up my mind defendant was not liable" versus "I couldn't see how plaintiffs would overcome that evidence") will be the difference between being thanked for his or her service and being branded guilty of serious misconduct. If today's holding were the rule, it would unfortunately provide even more incentive for attorneys who lose at trial to run after jurors to see if they will sign declarations with diction they did not draft and consequences they may not comprehend. Without evidence of a failure to deliberate—and there is none, for reasons I have explained—I would not hold Juror Goldarreh engaged in misconduct.

I am nevertheless of the view that reversal of the judgment is required for an entirely separate reason: the trial court erroneously precluded evidence and inquiry on matters a rational jury could find relevant to the question of whether defendant (or his father-in-law, as it pertains to the ice chest) spoliated evidence of the accident. The trial court forbade certain evidence and questioning at trial that would suggest the possibility that defendant removed the accident victim's body from defendant's car or otherwise altered the accident scene after the fatal collision. There was a good-faith basis for inquiring into such matters, and evidence that would tend to show the victim's body

(or a part of the victim's body) was moved was directly relevant to the key dispute at trial while posing little if any danger of undue prejudice, confusing the issues, or unduly consuming time. The trial court's exclusion of such evidence under Evidence Code section 352 was accordingly an abuse of discretion. (*Center for Biological Diversity v. County of San Bernardino* (2010) 188 Cal.App.4th 603, 616 [""""The abuse of discretion standard is 'deferential,' but it 'is not empty"""""].)

Having agreed reversal of the judgment is required and a new trial is necessary, I see no need to opine on the remainder of the issues discussed by the majority.

BAKER, J.