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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

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| MARIA DEMETRIO RAMON et al.,<br><br>Plaintiffs and Appellants,<br><br>v.<br><br>CITY OF LOS ANGELES,<br><br>Defendant and Respondent. | B227094<br><br>(Los Angeles County<br>Super. Ct. No. BC387179) |

APPEAL from a judgment of the Superior Court of Los Angeles County. Helen I. Bendix, Judge. Reversed and remanded.

Greene Broillet & Wheeler and Brown Greene; Balaban & Spielberger, Daniel Balaban, and Andrew Spielberger; Ilana Doust; Esner, Chang & Boyer, Stuart B. Esner, and Holly N. Boyer for Plaintiffs and Appellants.

Carmen A. Trutanich, City Attorney, Amy Jo Field and Blithe S. Bock, Deputy City Attorneys for Defendant and Respondent.

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This appeal arises out of a traffic accident in which two teenage pedestrians, Jose Ramon and Karla Hernandez,[1] were struck by a car while crossing an intersection at a marked crosswalk. Jose was killed and Karla suffered serious injuries. Karla and Jose's mother, Maria Demetrio Ramon, (collectively, Plaintiffs) thereafter filed suit against the City of Los Angeles, alleging that the intersection where the accident occurred was in a dangerous condition which proximately caused Jose's death and Karla's injuries. At trial, the jury returned a special verdict in favor of the City, finding that the intersection was in a dangerous condition that created a reasonably foreseeable risk of injury, but that the City did not have notice of the dangerous condition a sufficient time before the accident to have taken measures to protect against it. On appeal, Plaintiffs argue that the judgment against them must be reversed because the jury committed prejudicial misconduct and because there was insufficient evidence to support the special verdict on the notice question. Based on the totality of the record before us, we conclude that there was prejudicial juror misconduct in this case. We therefore reverse the judgment against Plaintiffs and remand the matter for a new trial.

## FACTUAL BACKGROUND AND PROCEDURAL HISTORY

### I. The Lawsuit

On March 12, 2008, Plaintiffs filed suit against the City for wrongful death and personal injury arising out of a traffic accident that occurred on March 13, 2007, at approximately 7:35 a.m. The complaint alleged that Karla and Jose were crossing the intersection of Slauson Avenue and 11th Avenue in a marked pedestrian crosswalk on their way to school when they were struck by a car driven by Keyassun Stinson. Karla and Jose were both seriously injured in the accident and Jose subsequently died from his injuries. The complaint also alleged that, at the time of the accident, the intersection was in a dangerous condition that created a reasonably foreseeable risk of injury, that the City

[1] For clarity and convenience, and not out of disrespect, we shall refer to the Ramon and Hernandez family members by their first names.

had actual or constructive notice of the dangerous condition for a sufficient time before the accident to have taken corrective action, and that the dangerous condition was a substantial factor in causing Jose's death and Karla's injuries.

Plaintiffs did not name Stinson as a defendant in their suit. However, on April 11, 2008, the City filed a cross-complaint against Stinson alleging that he was the cause of the accident. The following year, Plaintiffs filed a motion to dismiss the City's cross-complaint for failure to prosecute the claim. The City thereafter attempted to enter a default against Stinson, and when such efforts failed, the City dismissed its cross-complaint against Stinson without prejudice.

## II. The Evidence at Trial

### A. Plaintiffs' Evidence

Karla was in her senior year at Crenshaw High School when the accident occurred. She testified that, on the morning of March 13, 2007, she walked to the crosswalk at the intersection of Slauson Avenue and 11th Avenue on her way to school. As she had done on other occasions, she took a step off the sidewalk in order to get the oncoming cars to stop. When Karla saw a car in the lane closest to her start to come to a stop, she began crossing the street at the marked crosswalk. Karla walked, but did not run, across the street. She never saw a car in the other lane of traffic and had no memory of being struck. Her first memory after starting to cross the street was waking up in a hospital two days later. As a result of the accident, Karla sustained multiple lacerations to her face and head, a wrist fracture, a pelvic fracture, and a severe leg fracture that required surgery to repair. According to Karla's medical experts, she also suffered a traumatic brain injury in the accident, which continued to cause cognitive disabilities two years later.

Los Angeles Police Officer Jerome Divinity responded to the scene of the accident 20 to 25 minutes after it occurred. At that time, he interviewed Stinson, the driver of the car that hit Karla and Jose. Officer Divinity testified that Stinson was nervous during the interview, but did not appear to be under the influence of alcohol or drugs. According to Officer Divinity's report, Stinson stated that he was driving eastbound on Slauson Avenue in the first lane when two pedestrians ran northbound across the street "dashing"

in front of the eastbound traffic. Stinson further stated that there was a van traveling eastbound in the second lane that "shielded him . . . from seeing the pedestrians sooner," and that the pedestrians "barely escaped" being hit by that vehicle. Stinson told Officer Divinity that he did not see the pedestrians until they were approximately six feet from his car, and that he did not have time to brake to avoid hitting them. He also told the officer that he was traveling 20 to 25 miles per hour when the accident occurred.

Enrique Cabrera was the store manager at Popeye's Chicken restaurant where he had worked for 15 years. The restaurant was located at the intersection of Slauson Avenue and 11th Avenue, and from the cash register, Cabrera had a direct view of the crosswalk. Cabrera had witnessed more than five accidents and a number of "near misses" at the intersection, and had observed that it was difficult for pedestrians to cross the street at the crosswalk because cars rarely stopped for them. He described the most dangerous time of day as the morning hours when children were walking to school and drivers were rushing to work. Prior to the accident, Cabrera once told officers from the Los Angeles Police Department that they needed to improve traffic safety at the intersection, but to his knowledge, the City did not take any corrective action.

Edward Ruzak testified for Plaintiffs as an expert in traffic engineering. As described by Ruzak, the intersection at Slauson Avenue and 11th Avenue was in a high traffic area with peak traffic hours occurring between 7:00 a.m. and 8:00 a.m. In 2007, approximately 10 million vehicles and 60,000 pedestrians crossed the intersection. On Slauson Avenue, there were two lanes of traffic in each direction, and the posted speed limit was 35 miles per hour. At the time of the accident, the intersection had an "uncontrolled marked crosswalk," which meant that the crosswalk was marked with two white lines but was not controlled by a traffic signal, stop sign, or flashing beacon. There were pedestrian crossing road markings and a pedestrian crossing sign in advance of the crosswalk. There were also pedestrian crossing signs at each end of the crosswalk, one of which was partially obscured by a tree.

Ruzak explained that, in traffic engineering, a traffic gap is the expected time gap between two vehicles crossing an intersection, and thus, reflects the amount of time that a

pedestrian should have to cross the street without encountering an oncoming vehicle. During the peak hours of 7:00 a.m. to 8:00 a.m., the intersection at Slauson Avenue and 11th Avenue had five traffic gaps, which meant that there were only five times in that hour when pedestrians could cross the street without having to rely on an oncoming vehicle to stop for them. Ruzak asserted that this number of available traffic gaps was unacceptable. He also stated that the lack of adequate traffic gaps at the intersection increased the risk of a multiple threat collision, which occurs when a vehicle in one lane stops at a crosswalk for a pedestrian who steps onto the street, but a second vehicle in an adjacent lane does not stop and strikes the pedestrian. According to Ruzak, a crosswalk marked with two white lines and pedestrian crossing signs before and at the intersection did not provide pedestrians with effective protection from such a collision threat.

Ruzak reviewed the collision history at the intersection from 1996 to 2007. He testified that, in the 10-year period prior to this accident, there had been eight collisions in which a pedestrian or bicyclist using the crosswalk was struck by a vehicle. In addition to these pedestrian-involved accidents, there had been 21 automobile versus automobile collisions between 1996 and 2007. It was Ruzak's opinion that, at the time of the accident, the intersection at Slauson Avenue and 11th Avenue was in a dangerous condition which was known or should have been known by the City. Ruzak based his opinion on the volume of traffic, the average speed of the vehicles, the crossing distance for pedestrians, the number of available traffic gaps during peak traffic periods, the number of directions from which vehicles cross the intersection, and the collision history. According to Ruzak, these conditions were present as of March 2007, and created a substantial risk of harm to pedestrians who used reasonable care in crossing the street. It was also Ruzak's opinion that the City had notice of the dangerous condition as of May 29, 1998, the date of the third automobile versus pedestrian collision, because there was an observable pattern of pedestrian-involved accidents by that time. Ruzak testified that the City should have installed a traffic signal at the intersection to protect against the risk of harm to crossing pedestrians, and that one cause of the accident in this case was the absence of such a signal.

Mark Firestone was a forensic engineer who testified for Plaintiffs as an accident reconstruction expert. He reconstructed the accident in this case based on police reports and photographs, witness statements and deposition testimony, and his own personal observations and measurements of the intersection where the accident occurred. Based on the damage to Stinson's car, the distance from the car where Karla was found, and the absence of any skid marks immediately before the intersection, Firestone testified that Stinson was driving approximately 25 miles per hour at the point of impact and did not brake prior to hitting Karla and Jose. Firestone also testified that Stinson's car struck Karla first causing her to hit the hood and windshield before launching her 60 feet; the side of the car then struck Jose causing him to travel a shorter distance.

Firestone opined that, at a driving speed of 25 miles per hour, there were only three possible causes of the accident: (1) Stinson acted intentionally in striking the pedestrians with his car; (2) Stinson had an unobstructed view of the pedestrians from the time they stepped off the curb but was not looking ahead for at least four seconds prior to reaching the intersection;[2] or (3) Stinson's view of the pedestrians and the pedestrians' view of Stinson were blocked by the vehicle in the second lane. Firestone further opined that the most likely scenario was that the views of Stinson and the pedestrians were blocked by the other vehicle until it was too late for any of them to avoid the impact. Firestone rejected the other two scenarios because there was no evidence that Stinson had any homicidal intent, was under the influence of alcohol or drugs, or was distracted while driving, and because four seconds was a long time for a driver to be looking in another direction without at least glancing ahead. In concluding that the accident was caused by a visual blockage, Firestone also relied on the relative heights of the vehicles and the pedestrians, Stinson's statement that the vehicle traveling in the second lane shielded him

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[2] In this second scenario, Firestone assumed that Karla and Jose were traveling at an average foot speed of five feet per second. Firestone determined that, at that foot speed, it would have taken them approximately four seconds to travel from the curb to the point of impact in the intersection.

from seeing the pedestrians, and on Karla's statement that, before she stepped off the curb, she saw the vehicle in the second lane coming to a stop but never saw the car that struck her.

Additionally, it was Firestone's opinion that the intersection where the accident occurred was in a dangerous condition despite the reasonable care used by Stinson and the pedestrians. Firestone testified that he based this opinion on the lack of adequate traffic gaps, the absence of a traffic signal, the partially obscured pedestrian crossing signs, and the poor visibility of the crosswalk to approaching vehicles. Firestone also opined that, due to trees partially obscuring the pedestrian crossing signs, Stinson would not have been able to see the signs until he was relatively close to them. Firestone explained that, while the visual blockage caused by a vehicle in the second lane could not have been eliminated, he believed the overall visibility of the crosswalk could have been improved by controlling the intersection with a traffic signal.

Yadi Hashemi was the Southern District Engineer for the City's Department of Transportation between 2003 and 2008. In this position, Hashemi was the person most responsible for the operation and maintenance of the 10,000 intersections in the City's southern district, which included the intersection at Slauson Avenue and 11th Avenue. Hashemi testified that the City did not have a policy of independently investigating the safety of every intersection within its jurisdiction. Rather, the City relied on residents, the police department, the city council, and neighborhood councils to bring potential safety problems to its attention, and in response to such requests, it initiated safety investigations as appropriate. The Los Angeles Police Department, for instance, provided the Department of Transportation with quarterly reports showing the 25 intersections with highest rates of traffic accidents, which Hashemi and his staff reviewed for any notable changes. When there was a traffic accident involving a catastrophic injury, the Los Angeles Police Department also forwarded the accident report to the Department of Transportation for review. Additionally, when the City received reports from residents regarding "near misses" at an intersection, it investigated the intersection to determine if further safety measures were warranted. Hashemi stated that it was also his policy to

initiate a safety investigation any time he received a report of a pedestrian-involved collision in his district.

Hashemi testified that, to his knowledge, the City never investigated the safety of the intersection at Slauson Avenue and 11th Avenue prior to the accident in this case. According to Hashemi, he did not conduct an investigation of the intersection before this accident because he was unaware of the collision history. Between 2003 and 2008, the intersection never appeared on the Los Angeles Police Department's quarterly reports of the intersections with highest traffic accident rates. In addition, the Department of Transportation had not received any complaints from Crenshaw High School or calls from residents about the safety of the crosswalk at the intersection. Hashemi stated that, if he had been aware of the collision history at the intersection, he would have conducted a safety investigation.

Hashemi acknowledged that, in July 2000, the City approved a street resurfacing plan that provided for the implementation of additional safety measures at the intersection in the event that the streets in that area were resurfaced. The plan specifically provided for the painting of a ladder-style crosswalk with large white lines, and the repainting of the curb in front of the crosswalk with a red line to prohibit parking there. Neither of these measures had been implemented prior to the accident in this case. Hashemi also admitted that, in 2001, the City conducted a speed zone survey of the area to assess whether the speed limit of 35 miles per hour should be changed. As part of the survey, the Department of Transportation reviewed the accident history in the area from 1996 to 1998, which showed six injury collisions and 13 property damage collisions. Based on the number of collisions in proportion to the volume of traffic, the accident rate for the intersection was calculated to be 2.5, which according to Hashemi, was fairly low. The City did not make any changes to the speed limit or implement any additional safety measures at the intersection in response to the speed zone survey.

Hashemi recounted that, following the accident in this case, the Department of Transportation received a request from a city councilmember on behalf of Crenshaw High School to investigate the safety of the intersection. In response, Hashemi conducted

a safety investigation which included a review of the intersection's vehicular and pedestrian traffic volumes, peak traffic periods, average traffic speeds, surrounding physical conditions, crosswalk signs and markings, and collision history over a five-year period. Hashemi's investigation showed that there had been three automobile versus pedestrian collisions at the intersection within the past five years. It also showed that the red paint on the curb adjacent to the crosswalk was faded, which could restrict the visibility of motorists and pedestrians if a vehicle was parked there. Additionally, Hashemi determined that Slauson Avenue was a major highway with two lanes of traffic in each direction, that the average driving speed was close to 40 miles per hour, and that Crenshaw High School was located three blocks from the intersection. Based on his investigation, Hashemi initially recommended that the City implement a smart crosswalk at the intersection, which is a pedestrian-activated warning device that causes yellow lights to flash rapidly when a pedestrian crosses the street. Hashemi testified that a smart crosswalk would have provided a better warning system for motorists, and thus, better protection for pedestrians.

Hashemi further explained that, after his initial investigation, the City adopted new California traffic safety standards for evaluating when a traffic control signal at an intersection was warranted.[3] Under the new standards, the City was able to consider gap studies as one of the criteria for implementing a traffic signal. Hashemi thereafter conducted a gap study of the intersection at Slauson Avenue and 11th Avenue, which showed that there were only five traffic gaps between 7:00 a.m. and 8:00 a.m. Because the number of traffic gaps was inadequate under the state traffic safety standards, Hashemi made a new recommendation that the City implement a traffic signal at the intersection.

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[3] The State of California approved the new traffic safety standards in December 2006, three months before the accident in this case; however, the City did not adopt the new standards until sometime after the accident and Hashemi's initial investigation.

Hashemi stated that, if he had investigated the intersection prior to the accident in this case, he would not have recommended the implementation of a traffic signal at that time because it would not have been warranted under the City's traffic safety standards that were then in effect. However, Hashemi would have recommended that a smart crosswalk be implemented prior to the accident because a smart crosswalk would have been warranted. Hashemi never recommended a smart crosswalk at any time prior to the accident because he was unaware of the collision history at the intersection.

**III. Defense Evidence**

Nazir Lalani testified for the City as an expert in traffic and civil engineering. As described by Lalani, a municipality in California typically has no duty to mark a crosswalk, but if it does so, it must mark the crosswalk with two white lines at a minimum. Lalani explained that the crosswalk at the intersection of Slauson Avenue and 11th Avenue exceeded these standards because it was identified by two white lines, a pedestrian crossing sign at each end of the crosswalk, a pedestrian crossing sign in advance of the crosswalk, and pedestrian crossing road markings in advance of the crosswalk. According to Lalani, the state traffic safety standards also provide that a traffic signal generally is warranted when there are five correctable collisions at an intersection within a 12-month period. Lalani noted that the intersection at Slauson Avenue and 11th Avenue had only two pedestrian-involved collisions in the five years prior to this accident, which was consistent with the anticipated rate of pedestrian accidents for this type of intersection.

It was Lalani's opinion that the intersection was not in a dangerous condition at the time of the accident in this case. He testified that he based his opinion on the pedestrian crossing signs and markings that were present at the crosswalk, and on the average rate of pedestrian-involved collisions at the intersection. It was also Lalani's opinion that, prior to the accident, the collision history at the intersection would not have put the City on notice of any condition that was susceptible to correction. Lalani reasoned that the intersection did not meet the requirements for a traffic signal under the state traffic safety standards that were in effect when the accident occurred. Additionally,

Lalani explained that, even if the City had approved a traffic signal prior to the accident, it likely would have taken three years for the signal to be installed.

John Fisher was the Assistant General Manager in charge of transportation operations for the City's Department of Transportation. He testified that the City had a variety of inspection systems to monitor traffic safety, including a computerized traffic control network with 15,000 roadway speed detectors and 350 video cameras placed strategically throughout the City. The City re-evaluated the speed limits of its roadways every seven years which included reviewing the relevant collision history, and also re-examined the safety of marked crosswalks whenever a surrounding street was resurfaced. In 2006, the City began converting its traffic signal lights to more energy efficient light devices, and as part of that process, the City was installing countdown pedestrian signals at every signalized crosswalk. In addition, the City had developed recommended school routes for elementary and middle school children, and was completing a study on non-signalized school crossings at main thoroughfares to determine if they might qualify for a smart crosswalk or traffic signal.

Prior to the accident in this case, Fischer did not have any personal knowledge about the collision history at the intersection of Slauson Avenue and 11th Avenue. He acknowledged, however, that the City would have known of the collision history as of 2001 when it completed a speed zone survey of the area. Fisher recalled that the survey showed a rate of 2.5 accidents per million vehicle miles at the intersection, which he described as being in the average range. Fisher also related that, after the accident in this case, he reviewed the collision history at the intersection and found only five accidents in a 10-year period that he believed could have been prevented with a traffic signal.

Fisher testified that, of the City's 40,000 intersections, only 11 percent had traffic signals. Additionally, once a traffic signal was approved by the City, it typically would take three to four years for the signal to be implemented. Fisher confirmed that, based on the state standards then in effect, the intersection at Slauson Avenue and 11th Avenue would not have qualified for a traffic signal at the time of the accident in this case.

Jeffrey Gailey was a private investigator retained by the City to locate Stinson. In August 2008, Gailey found Stinson after a two-week search and personally served him. In September 2009, Gailey attempted to re-contact Stinson on the City's behalf, but was unable to locate him at that time.

### IV. The Jury Verdict

Following a 10-day trial, the jury commenced its deliberations on Friday, March 5, 2010, at approximately 12:30 p.m. The jury delivered its special verdict later that day at approximately 4:35 p.m. The jury answered "Yes" to the first and second questions of whether the intersection at Slauson Avenue and 11th Avenue was in a dangerous condition at the time of the accident, and whether the dangerous condition created a reasonably foreseeable risk that the accident would occur. However, the jury answered "No" to the third question of whether the City had notice of the dangerous condition a sufficient time prior to the accident to have protected against it, and thus, returned a special verdict in favor of the City. At the request of Plaintiffs' counsel, the trial court polled the jury. According to the polling, the jury voted 11 to 1 in favor of Plaintiffs on the dangerous condition question, 12 to 0 in favor of Plaintiffs on the foreseeable risk question, and 10 to 2 in favor of the City on the notice question.[4]

## DISCUSSION

Plaintiffs raise two arguments on appeal. First, they contend that the trial court erred in denying their motion for a new trial based on juror misconduct. Second, they claim that the jury's verdict that the City did not have notice of the dangerous condition for a sufficient time to have taken corrective action was not supported by substantial evidence. Based on the totality of the record before us, we conclude that the judgment against Plaintiffs must be reversed because there was prejudicial juror misconduct.

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[4] In the polling, the one dissenting juror on the dangerous condition question was Juror Sarah Koster, and the two dissenting jurors on the notice question were Jurors Everardo Sanchez and Jerod Fish.

## I. Relevant Facts

### A. Trial Court's Admonishments and Instructions to Jury

On the eighth day of trial, Juror David Engel informed the trial court and counsel about a conversation that he had earlier that day with two other jurors -- Daniel Burns and Lamont Hopes. As described by Juror Engel, Juror Burns said during a break, "we have heard everything we need to here. I'm ready to go in and make a decision." Juror Hopes agreed that he also was ready to make a decision, stating "we have heard the same stuff over and over again. I'm ready." Juror Hopes then walked away. Juror Burns continued talking to Juror Engel, telling him what his decision was, that "it was obvious," and that "a few of us feel that way." In response, Juror Engel expressed that they had not heard all the evidence and should not be discussing the case.

At the request of Plaintiffs' counsel, the trial court questioned Jurors Burns and Hopes individually. Juror Burns admitted that he had mentioned the trial was repetitive. Juror Hopes denied hearing any discussion about the merits of the case from other jurors. The court admonished both jurors not to discuss the case until deliberations and to keep an open mind because they had not heard all the evidence. The court then made a similar admonishment to the entire jury. Counsel for the parties did not ask Jurors Burns and Hopes any questions about the alleged misconduct, nor move for a mistrial.[5]

Throughout the trial, the jurors were permitted to submit proposed questions for the parties to consider asking the testifying witnesses. During Plaintiffs' presentation of evidence, a juror inquired whether the driver, Stinson, was insured at the time of the accident. The trial court responded that "the issue of insurance, period, is irrelevant, any insurance in this case." At the close of the City's presentation of evidence, a juror asked whether either Karla or Jose was on the phone, texting, or listening to music at the time of the accident. The trial court answered, "You have no evidence that they were doing that." In instructing the jury, the trial court specifically explained: "You must decide the

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[5] At the time of the admonishment, there were no alternates remaining on the jury.

facts based on the evidence admitted in trial." The court also instructed the jury: "You must not consider whether any of the parties in this case have insurance. The presence or absence of insurance is totally irrelevant. You must decide this case based solely on the law and the evidence."

### B. Plaintiffs' Motion for a New Trial Based on Juror Misconduct

Following the jury's verdict, Plaintiffs filed a motion for a new trial based, in part, on juror misconduct. The motion was supported by declarations from five jurors -- Rubina Sarkisyan, Everardo Sanchez, Jerod Fish, Constance Leete, and David Engel. The declarations contained the following allegations of juror misconduct:

#### 1. Prejudgment of the Case

Four of the five declarants stated that Juror Burns discussed the merits of the case with other jurors prior to deliberations. Juror Sarkisyan reported that, after opening statements and before the presentation of evidence, Juror Burns said in the presence of Juror Sarkisyan and other jurors that "[t]he city is not responsible for anything here" and "it is the driver[']s fault." Juror Fish related that he and Juror Burns took smoke breaks during the trial, and at different times, they were joined by Jurors Koster, Engel, Leete, Hopes, and Young. During the breaks, Juror Burns at times shared his view that "the city was not responsible for this case." Juror Leete recalled that two-thirds into the trial, Juror Burns stated in the presence of Jurors Leete, Fish, Hopes, and possibly Koster that "the city was not at fault for the accident." Juror Engel similarly relayed that, during the trial, Juror Burns told other jurors that "the driver of the car was the one who was responsible for this accident and the city did everything they were [*sic*] supposed to do."

#### 2. Use of Cell Phones by Karla and Jose

All five declarants described statements made by multiple jurors during deliberations about their personal experiences with children using cell phones while crossing the street, and the probability that either Karla or Jose was on a cell phone when the accident occurred. According to the declarations, Jurors Burns and Engel specifically discussed how children in their neighborhoods run across the street while on their cell phones. Jurors Burns, Engel, Koster, and Leete also stated that the children in this case

probably were on cell phones when they crossed the street. In his declaration, Juror Sanchez recounted that, in response to the discussion about the children's probable use of cell phones, he reminded the jurors that "[t]here's no evidence of that" in this case. Juror Burns and other jurors responded that they "don't care," and continued referencing their personal views about children not paying attention while crossing the street. Juror Sanchez also said during deliberations that he intended to base his verdict on the history at the intersection, to which some of the jurors replied that "you can't because kids are running, they're on cell phones." In her declaration, Juror Leete reported that some jurors said that "the driver did not have any chance of doing anything" because Karla and Jose probably were on their cell phones and not paying attention when they crossed the street. Those jurors further stated, "that is why it is not the city's fault because nothing would have changed what happened."

**3. Financial Resources of the City and the Driver**

Three of the five declarants reported that Juror Burns and other jurors discussed the respective financial resources of the City and Stinson during deliberations. Jurors Sarkisyan, Fish and Leete similarly recalled that Juror Burns said something to the effect of "the city's broke, the country's broke[,] and we're all broke," so the jury should not award any money in this case. Juror Fish further recounted that the jurors discussed why Stinson was not sued by Plaintiffs and the possibility that it was because he did not have insurance. Juror Burns, in particular, said that Plaintiffs were "only after the city" because "the driver did not have any insurance" and "the city's the only one with deep pockets." Juror Leete likewise recalled that "[o]ther jurors" commented during deliberations that "no one has insurance here -- not the driver of the car and not the girl to pay for this."

**4. Intimidation of Jurors in Deliberations**

Four of the five declarants asserted that Juror Burns acted in a loud and belligerent manner during deliberations. Juror Sarkisyan stated that Juror Burns yelled at the other jurors, including Juror Sarkisyan, during their discussion about whether the intersection was in a dangerous condition. Juror Sanchez recounted that Juror Burns walked up to a

board that showed the accident history at the intersection, turned the board around so that it could not be seen, and then told the other jurors that they did not have to consider that evidence. When Juror Sanchez shared his opinion that the City "should have done something," Juror Burns said to him, "Are you illiterate? You don't know what you're talking about." Juror Leete likewise related that, during deliberations, Juror Burns questioned Juror Sanchez's literacy, did not allow other jurors to express their opinion of the evidence, and turned around the board that showed the accident history at the intersection. In his declaration, Juror Fish recalled that Juror Burns talked over two jurors who did not speak English well, did not let other jurors express themselves, and kept the jury instructions and verdict form in his possession for most of the deliberations.

**5. Compromise Verdict in Deliberations**

All five declarants described a compromise verdict that was reached by the jury before being revoked by the pro-defense jurors at the very end of the deliberations. As set forth in the declarations, the jury deliberated for approximately four hours on the question of whether the intersection was in a dangerous condition at the time of the accident. The jury was deadlocked 8 to 4 in favor of Plaintiffs on this question when Juror Burns, one of the four dissenting jurors, proposed a compromise verdict. Juror Burns specifically said that he would agree to vote that the intersection was in a dangerous condition if the jury voted that the City was not 100 percent liable and limited the damages awarded to Plaintiffs. The jurors all agreed to hold the City 10 percent liable and to limit the damages award to $1 million.

Juror Engel, the foreperson, began filling out the special verdict form around 4:30 p.m. on Friday. The jury voted in favor of Plaintiffs on the first two questions of whether the intersection was in a dangerous condition at the time of the accident, and whether the dangerous condition created a reasonably foreseeable risk that the accident would occur. However, as described in the declarations of Jurors Sarkisyan, Sanchez, Fish, and Engel, when the jury voted on the third question of whether the City had notice of the dangerous condition for a sufficient time to have protected against it, the vote was ultimately 9 to 3 that the City did not have notice. According to the declarations of Jurors Sarkisyan and

Engel, the three jurors who voted in favor of Plaintiffs that the City did have notice were Jurors Sanchez, Fish, and Sarkisyan.

At that point, the pro-plaintiff jurors reminded the rest of the jury of their agreement to hold the City liable and to limit damages. Juror Burns responded that the agreement did not apply to the notice question and that the "deal" was over. Some of the other jurors also said that they were changing their votes because they did not want to come back the following Monday for further deliberations. Immediately after the jury voted 9 to 3 on the notice question, Juror Burns made statements to the effect of "that's it," "ring the bell," and "let's get out of here." Jurors Sanchez and Fish stated that they wanted to discuss the matter further, but other jurors said "we [are] all done, we have the majority, the vote is over."

After the reading of the verdicts, the trial court polled the jury. During the polling, the court asked each juror, "As to question no. 3, . . . is this your verdict?" At that time, Juror Sarkisyan answered "Yes," which would mean that she had voted "No" to the question of whether the City had sufficient notice of the dangerous condition to have taken corrective action. In her declaration, however, Juror Sarkisyan stated that she voted in the jury room that the City did have sufficient notice, and was "confused" in the courtroom when she was polled on the notice question.

**6. Other Alleged Misconduct in Deliberations**

Three of the five declarants recounted that, during deliberations, Juror Hopes referenced his personal experience as a bus driver in discussing the accident. According to the declarations of Jurors Sarkisyan, Sanchez, and Engel, Juror Hopes made statements to the effect that, based on his experience as a professional bus driver, the accident could not have occurred as described by Plaintiffs' expert because an observant driver would have seen the pedestrians with enough time to stop. In his declaration, Juror Fish recalled that Juror Leete stated during deliberations that if the City "put in those smart crosswalks everywhere, then traffic would be horrible and we would not be able to get around."

### C. Trial Court's Ruling on the Motion for a New Trial

The trial court held a lengthy hearing on Plaintiffs' motion for a new trial, and then issued a written ruling denying the motion. The court found that Juror Burns committed misconduct prior to deliberations by discussing the merits of the case, but that such misconduct had been brought to the attention of the parties during trial and Plaintiffs did not request any relief at that time. The court further found that the jury committed misconduct during deliberations by discussing matters outside the record, but that such misconduct was not prejudicial because the jury voted in favor of Plaintiffs on the dangerous condition and foreseeable risk questions, and none of their extraneous discussion related to the dispositive notice question. The court also found that, even if Juror Burns was actually biased against Plaintiffs, such bias did not have a prejudicial effect on the verdict because, according to the polling, the final vote on the notice question was 10 to 2 in favor of the City.

## II. Applicable Law

Juror misconduct is one of the specified grounds for granting a new trial. (Code Civ. Proc., § 657, subd. 2.) "'The right to unbiased and unprejudiced jurors is an inseparable and inalienable part of the right to trial by jury guaranteed by the Constitution.' [Citations.]" (*Weathers v. Kaiser Found. Hosps.* (1971) 5 Cal.3d 98, 110.) "The guarantee includes the right to 12 impartial jurors. [Citation.]" (*Enyart v. City of Los Angeles* (1999) 76 Cal.App.4th 499, 506.) "An impartial jury is one in which no member has been improperly influenced [citations] and every member is '"capable and willing to decide the case solely on the evidence before it"' [citation]." (*In re Hamilton* (1999) 20 Cal.4th 273, 294.)

"'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. [Citation.] 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* (2008) 160 Cal.App.4th 149, 160.)

The moving party bears the burden of establishing juror misconduct. (*Donovan v. Poway Unified School Dist.* (2008) 167 Cal.App.4th 567, 625.) Once misconduct is established, a presumption of prejudice arises. (*Hasson v. Ford Motor Co.* (1982) 32 Cal.3d 388, 416.) The presumption may be rebutted only "by an affirmative evidentiary showing that prejudice does not exist or by a reviewing court's examination of the entire 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 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." (*Id*. at p. 417, fn. omitted.) Misconduct "*unless shown by the prevailing party to have been harmless will invalidate the verdict*." (*Smith v. Covell* (1980) 100 Cal.App.3d 947, 952-953.)

"'In determining whether juror misconduct occurred, "[w]e accept the trial court's credibility determinations and findings on questions of historical fact if supported by substantial evidence."' [Citations.]" (*Donovan v. Poway Unified School Dist., supra,* 167 Cal.App.4th at pp. 624-625.) "'Whether prejudice arose from juror misconduct . . . is a mixed question of law and fact subject to an appellate court's independent determination. [Citations.]' [Citation.]" (*McDonald v. Southern Pacific Transportation Co.* (1999) 71 Cal.App.4th 256, 265.) Therefore, """[i]n reviewing the denial of a motion for new trial based on jury misconduct, the appellate court 'has a constitutional obligation [citation] to review the entire record, including the evidence, and to determine independently whether the act of misconduct, if it occurred, prevented the complaining party from having a fair trial.' . . ."' [Citation.]" (*English v. Lin* (1994) 26 Cal.App.4th 1358, 1364.)

**III. Admissibility of the Evidence**

"Subject to the restrictions of Evidence Code section 1150, a juror's affidavit may be used to impeach a verdict." (*Enyart v. City of Los Angeles, supra,* 76 Cal.App.4th at

p. 506.) Evidence Code section 1150 provides, in relevant part, that "[u]pon 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." (Evid. Code, § 1150, subd. (a).) Accordingly, while the statute prohibits testimony on "'the subjective reasoning processes of the individual juror,'" it does not preclude evidence of "'overt acts' -- that is, such statements, conduct, conditions, or events as are 'open to sight, hearing, and the other senses and thus subject to corroboration. . . .' [Citation.]" (*In re Stankewitz* (1985) 40 Cal.3d 391, 398.) Additionally, "'a statement by a juror during deliberations may itself be an act of misconduct, in which case evidence of that statement is admissible [Citation.]' [Citation.]" (*Grobeson v. City of Los Angeles* (2010) 190 Cal.App.4th 778, 791.)

In opposing Plaintiffs' motion for a new trial, the City made a blanket objection to the entirety of Plaintiffs' supporting declarations on the ground that they evidenced the thought processes of the jurors in violation of Evidence Code section 1150. The City did not object to particular paragraphs in the declarations or otherwise specify which statements it was contending were inadmissible. In ruling on the new trial motion, the trial court noted that the declarations contained some statements that would be inadmissible under the Evidence Code because they were hearsay, speculative, made without personal knowledge, or reflected the subjective reasoning processes of the jurors. However, the trial court did not strike any portions of the declarations in ruling on the motion, but rather found that, even if it considered the entirety of the declarations, Plaintiffs were not entitled to a new trial.

On appeal, the City asserts that this Court should ignore the vast majority of the statements in Plaintiffs' juror declarations because they either violate Evidence Code section 1150 or are inadmissible as irrelevant, speculative, vague, or hearsay. However,

the City never objected to the declarations in the trial court on any ground other than Evidence Code section 1150. Moreover, apart from offering some examples of the types of statements that it considers to be objectionable, the City has once again failed to object to particular paragraphs in the declarations or to specify exactly which statements in each declaration should have been excluded. Although it is true that the declarations include some statements that improperly reflect the subjective reasoning processes of the jurors, they also contain a number of statements that are admissible to impeach the verdict. To the extent the declarations set forth evidence of overt acts that are objectively ascertainable, they are admissible under Evidence Code section 1150. (*Enyart v. City of Los Angeles*, *supra*, 76 Cal.App.4th at p. 508, fn. 5.) To the extent the declarations describe juror statements made during deliberations that themselves constitute misconduct, they are not hearsay and are likewise admissible. (*Weathers v. Kaiser Foundation Hospitals*, *supra*, 5 Cal.3d at p. 110; *Grobeson v. City of Los Angeles*, *supra*, 190 Cal.App.4th at pp. 792-793.) In addition, because the City did not present any counter-declarations in opposing the motion, the acts of misconduct set forth in Plaintiffs' declarations are deemed admitted. (*Tapia v. Barker* (1984) 160 Cal.App.3d 761, 766.) Guided by these principles and the parameters of Evidence Code section 1150, we must determine whether the trial court erred in denying Plaintiffs' motion.

## IV. Juror Misconduct

The uncontroverted evidence presented by Plaintiffs establishes that there were multiple instances of juror misconduct during the trial proceedings, particularly by Juror Burns. Before deliberations began, Juror Burns told at least five other jurors that the City was not responsible for the accident. Juror Burns discussed the merits of the case with other jurors at different times throughout the trial, including on one occasion before the presentation of any evidence. "'For a juror to prejudge the case is serious misconduct.' [Citation.]" (*Grobeson v. City of Los Angeles*, *supra*, 190 Cal.App.4th at p. 791, fn. 7.) Here, the declarations reflect that not only did Juror Burns decide to find in favor of the City before hearing any evidence, but he also repeatedly expressed his opinion of the case to other jurors during the course of the trial. Such prejudgment of the case was serious

misconduct, and supports a finding that Juror Burns harbored an actual bias against Plaintiffs.

The City contends that Plaintiffs "waived" their right to challenge Juror Burns's prejudgment of the case because such misconduct was disclosed prior to deliberations and Plaintiffs never moved for a mistrial nor made any other objection. The City's waiver argument lacks merit. Juror Burns's misconduct was first disclosed to the trial court and counsel on the eighth day of the 10-day trial. At that time, it was revealed that Juror Burns had told Jurors Engel and Hopes that he was tired of the repetitiveness of the trial and was ready to render his verdict. He also told Juror Engel what his decision was and stated that "a few of us feel that way." Juror Engel promptly reported Juror Burns's conduct to the trial court, and at the request of Plaintiffs' counsel, the court individually admonished Jurors Burns and Hopes. However, there is no evidence that, at the time of the admonishment, Plaintiffs were aware of the extent to which Juror Burns had prejudged the case and openly discussed his opinion with other jurors. While Juror Engel's report revealed a single incident of prejudgment by Juror Burns near the end of the trial, the declarations reflect that Juror Burns had reached his decision even before the presentation of any evidence and had discussed the merits of the case with at least three other jurors in addition to Jurors Engel and Hopes. The pre-deliberations misconduct described in the declarations was thus much more extensive and egregious than what was disclosed during the trial. Under these circumstances, Plaintiffs did not waive their right to challenge Juror Burns's misconduct in prejudging the case.

The declarations establish that there was also juror misconduct during deliberations when Juror Burns and other jurors, in direct contravention of the trial court's instructions, speculated about matters as to which there was no evidence in the record. It is well-established that it is misconduct for a jury to consider facts not shown by the evidence. (See *McDonald v. Southern Pacific Transportation Co.*, *supra*, 71 Cal.App.4th at 264 [juror in railroad accident case committed misconduct when he discussed unfeasibility of safety measure as to "which there had been no evidence at trial"]; *Andrews v. County of Orange* (1982) 130 Cal.App.3d 944, 958, disapproved on

other grounds in *People v. Nesler* (1997) 16 Cal.4th 561, 582, fn. 5 [juror in airport noise nuisance action committed misconduct when he discussed alternative source of noise "despite requests [from other jurors] that he desist because there was no evidence on the subject" at trial].) It is also misconduct for a jury to disregard the trial court's instructions not to consider certain matters in reaching a verdict. (See *People v. Nesler*, *supra*, at pp. 570, 579 [juror's disregard of trial court's instruction not to discuss or consider facts not shown by evidence was misconduct]; *People v. Perez* (1992) 4 Cal.App.4th 893, 908 [jury's disregard of trial court's instruction not to discuss or consider defendant's failure to testify at trial was misconduct].)

Here, the declarations reflect that at least two jurors (Jurors Burns and Engel) described how the children in their neighborhoods often run across the street while talking on their cell phones, and at least four jurors (Jurors Burns, Engel, Koster, and Leete) speculated that the children in this case were "probably" on their cell phones when they crossed the street. The jurors engaged in such discussion despite the trial court's unambiguous statement in response to a juror's inquiry that there was no evidence that Karla or Jose was using a cell phone at the time of the accident. Moreover, notwithstanding the trial court's repeated instruction to the jury that the issue of insurance was irrelevant to the case, the jurors also discussed whether the driver of the car involved in the accident was insured, and speculated that his probable lack of insurance was the reason Plaintiffs did not name him in their suit. Juror Burns, in particular, said that Plaintiffs were "only after the city" because "the driver did not have any insurance" and "the city's the only one with deep pockets." The jurors' consideration of these matters as to which there was no evidence in the record, and which the trial court explicitly instructed them to disregard, was misconduct.

In addition, there was other conduct by Juror Burns during the deliberations that, when considered with his extensive prejudgment of the case and disregard of the trial court's instructions, evidences an intent to improperly influence the verdict. According to the declarations, Juror Burns walked up to a board that showed the collision history at the intersection, turned the board around so that it could not be seen, and told the other

jurors that they did not need to consider that evidence. When Juror Sanchez stated his opinion that the City was liable, Juror Burns accused him of being illiterate and told Sanchez that he did not know what he was talking about. When the jury was deadlocked on the question of whether the intersection was in a dangerous condition, Juror Burns negotiated a "deal" with the other jurors in which he agreed to change his vote on the issue of liability in Plaintiffs' favor as long as the jury voted to limit damages. Although the agreement was later revoked by the jury, the act of expressly entering into a compromise verdict was misconduct. The City asserts that the evidence of such misconduct by Juror Burns is inadmissible because it pertains to the mental processes of the jurors. While we agree the jurors' statements about the effect that Juror Burns's misconduct had on their deliberations and verdict may not be considered under Evidence Code section 1150, the acts and statements of Juror Burns and the fact of the agreement themselves constitute misconduct, and are admissible.

Because Plaintiffs met their burden of demonstrating juror misconduct, a presumption of prejudice arose. We must therefore determine from the totality of the record whether such misconduct was prejudicial.[6]

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[6] Plaintiffs allege two other instances of juror misconduct during deliberations: (1) Juror Hopes's statement that, based on his experience as a professional bus driver, Stinson should have been able to see the pedestrians with enough time to stop; and (2) Juror Leete's statement that traffic would be horrible if smart crosswalks were installed throughout the City. As our Supreme Court has explained, however, "[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, so long as the opinion is based on the evidence at trial. Jurors' views of the evidence, moreover, are necessarily informed by their life experiences, including their education and professional work." (*In re Malone* (1996) 12 Cal. 4th 935, 963.) With respect to Juror Hopes's statement, it does not appear he was claiming any specialized knowledge or expertise as a bus driver, but was simply sharing his view that a prudent motorist would have been more aware of his or her surroundings. With respect to Juror Leete's statement, there was testimony from the City's traffic engineer that the City had to consider the impact on traffic flow in deciding whether to install a signal, and thus, Juror Leete's comment was based on evidence presented at trial. Because these two statements did not constitute misconduct, we do not consider them in deciding whether the misconduct that was demonstrated by Plaintiffs was prejudicial.

## V. Prejudice

Based on our independent review of the entire record, including all the evidence, we conclude that the presumption of prejudice in this case has not been rebutted. The misconduct of Juror Burns, in particular, was extensive and egregious. As discussed, Juror Burns decided that the City was not at fault for the accident even before the presentation of any evidence, and he shared his prejudgment of the case with at least five other jurors at various times during the trial. Juror Burns's misconduct also continued during deliberations, as described above. The scope of the misconduct shows that Juror Burns held an actual bias against Plaintiffs throughout the trial, which undermined the integrity of the jury's deliberations.

The City argues that, even assuming Juror Burns was biased, such bias by a single juror could not have caused Plaintiffs any actual harm because, according to the polling, the verdict against them was 10 to 2. In support of this argument, the City notes that the trial court rejected Juror Sarkisyan's statement in her declaration that she (along with Jurors Sanchez and Fish) actually voted in favor of Plaintiffs on the dispositive notice question. The City is correct that the trial court chose not to credit Juror Sarkisyan's statement that she was "confused" during the polling of the jury when asked "is this your verdict." However, in deciding whether the presumption of prejudice has been rebutted, this Court must examine the entirety of the record and make an independent determination as to the likelihood that Plaintiffs suffered actual harm as a result of the misconduct.

Even accepting the trial court's finding that Juror Sarkisyan's statement of confusion during polling was not credible, we cannot ignore the evidence that three of the four other jurors who submitted declarations each stated that the final vote on the notice question was 9 to 3 in favor of the City.[7] Although the trial court chose not to credit

[7] The fourth juror, Juror Leete, did not specify the numerical breakdown of the vote on the notice question, but simply stated that "a majority" voted that the City did not have sufficient notice to have protected against the dangerous condition.

Juror Sarkisyan's statement of confusion, it did not make any specific finding as to the credibility of the other declarants. Accordingly, contrary to the City's characterization, this is not a case where a party "seek[s] to impugn the verdict which nine jurors in open court stated was their verdict by a conclusionary declaration of one juror." (*Bossi v. State* (1981) 119 Cal.App.3d 313, 318.) Nor is this a case where a party is claiming that the verdict itself was defective because of confusion during jury polling. Rather, the question we must address is whether the City has rebutted the presumption of prejudice raised by Juror Burns's serious misconduct by showing no reasonable probability of actual harm to Plaintiffs. Given the conflict in the evidence about the jury's final vote on the notice question, we cannot say that the 10 to 2 vote indicated at polling is sufficient, on its own, to rebut the presumption of prejudice.

Moreover, even assuming that the final vote on the notice question was 10 to 2, the undisputed evidence presented by Plaintiffs demonstrates that there was misconduct by more than one juror in this case. As set forth in the declarations, at least four different jurors (Jurors Burns, Engel, Koster, and Leete) said during deliberations that the children in this case were "probably" on their cell phones when they crossed the street. When Juror Sanchez reminded the jury that there was "no evidence of that" at trial, Juror Burns as well as "other jurors" said that they "don't care." Additionally, according to Juror Fish's declaration, "[m]ost of the jurors" participated in the discussion about why the driver was not sued by Plaintiffs and speculated that it was because he did not have any insurance. In so doing, those jurors disregarded the trial court's explicit and repeated admonition that the issue of insurance was entirely irrelevant to the case.

The City contends that the jurors' references to cell phone usage and car insurance could not have affected the verdict because their statements related solely to the issue of contributory negligence, and not to the dispositive issue of notice. The City, however, takes too narrow a view of the context in which these statements were made. A careful review of the declarations reveals that all of the jurors' comments about the pedestrians' use of cell phones and the driver's lack of insurance were made prior to the jury reaching a verdict on any of the liability issues. The statements were not made during a specific

discussion about apportionment or damages, but rather were part of a broader debate about whether the City had any liability for the accident. Furthermore, some of the jurors' statements about the children's probable use of cell phones were tied to the question of whether the City had sufficient notice of a dangerous condition. For instance, when Juror Sanchez said that he intended to base his decision on the accident history at the intersection, a matter that clearly was relevant to the notice issue, some of the other jurors said, "you can't because kids are running, they're on cell phones." Similarly, according to Juror Leete, when some of the jurors suggested that the children in this case were "probably" crossing the street while on their cell phones, they also added, "that is why it is not the city's fault because nothing would have changed what happened." Given these statements by the jurors, we cannot say that their improper speculation about Karla's and Jose's use of cell phones likely had no impact on their verdict in favor of the City.

Plaintiffs were entitled to a fair trial before 12 impartial and unbiased jurors. The misconduct committed by Juror Burns both before and during deliberations clearly demonstrates an actual bias against Plaintiffs. While the misconduct committed by the other jurors might not, standing alone, have been sufficient to show prejudice, when it is considered with the acts of serious misconduct by Juror Burns, there is a substantial likelihood that Plaintiffs were denied their right to a fair trial. Therefore, based on our independent review of the record, we conclude that the City failed to meet its burden of showing that it was not reasonably probable that Plaintiffs suffered actual harm as a result of the juror misconduct in this case. The trial court erred in denying Plaintiffs' motion for a new trial based on juror misconduct.[8]

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[8] In light of our conclusion that Plaintiffs are entitled to a new trial based on juror misconduct, we need not address their remaining argument regarding the sufficiency of the evidence supporting the jury's special verdict.

## DISPOSITION

The judgment is reversed and the matter is remanded for a new trial. Plaintiffs shall recover their costs on appeal.

ZELON, J.

We concur:

WOODS, Acting P. J.

JACKSON, J.