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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

HOLI STEPHENS ALLEN, Plaintiff and Respondent, v. STEPHANIE MAURLENE VEGA, Defendant and Appellant.	F040413 (Super. Ct. No. 240428) **OPINION**

APPEAL from a judgment of the Superior Court of Kern County. Sidney P. Chapin, Judge.

Sellar, Hazard, McNeely, Alm & Manning, Seller, Hazard, McNeely & Manning, Aaron Hancock, and David S. Webster for Defendant and Appellant.

Chain, Younger, Cohn & Stiles, David K. Cohn and Jesse Clifford Adams for Plaintiff and Respondent.

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Appellant Stephanie Maurlene Vega appeals from a judgment in favor of respondent Holi Stephens Allen[1] awarding her economic damages as a result of injuries suffered in an automobile accident. Vega contends the judgment contains reversible error

[1]Respondent used the name Holi Michelle Stephens at the time of the automobile accident and in her pleadings below; she has since married.

because (1) the claim for loss of earning capacity presented to the jury was speculative, (2) an evidence or issue sanction should have been imposed for discovery misuse concerning Allen's claim for loss of earning capacity and (3) Allen's claim for past medical expenses was not supported by evidence admitted during her case-in-chief.

We conclude the trial court did not commit legal error or abuse its discretion by allowing the jury to consider the claim for loss of earning capacity, and Vega's position that payment is a condition precedent to recovery of past medical expenses is contrary to established law. Accordingly, judgment is affirmed.

FACTS AND PROCEEDINGS

On February 12, 1999, Allen was driving a car that was struck by a car driven by Vega. As a result of the collision, Allen suffered a fractured pelvis, strained back, injured knee, and a closed head injury that affected the function of the frontal lobe of her brain.

On December 15, 1999, Allen brought a negligence action against Vega to recover for personal injuries and damages sustained in the collision. In a statement of damages, Allen indicated she was seeking special damages for medical expenses to date, future medical expenses, loss of earnings to date and loss of future earning capacity, as well as noneconomic damages for pain and suffering.

On June 15, 2000, a status conference was held and the trial date initially was set for December 11, 2000.

During discovery, Vega propounded requests for admission, interrogatories and a request to produce documents. Allen verified her responses to the written discovery on May 26, 2000. Allen's deposition was taken on November 3, 2000. The contents of the discovery relevant to this appeal are discussed in parts II.A.1 and II.C, *post*.

On September 20, 2000, Allen served a demand for designation of expert witnesses and on October 20, 2000, served Vega with a designation of expert witnesses. Her designation of expert witnesses included a clinical psychologist with an emphasis in

neuropsychology, a vocational rehabilitation expert, and a forensic economist. Vega never served a demand and never designated any experts.

After the mandatory settlement conference in November 2000, Vega sought a continuance of trial. A new trial date was set for October 15, 2001. Subsequently, by stipulation of the parties, the trial date was moved to February 4, 2002, and the trial actually began on February 6, 2002.

The evidence produced at trial showed Allen dropped out of high school in her sophomore year. She used methamphetamines from the age of 16 to 19, but stopped using drugs on December 23, 1995. In 1996, she obtained a GED (general equivalency diploma) without studying for the test. In the fall of 1996, Allen enrolled in Taft Junior College. Allen's career goal when she started was accounting, but she later decided she wanted to be a first grade teacher. As a result, in the fall of 1997 she changed from accounting to liberal arts.

Allen began working as a volunteer at Alpha House, a women's shelter, when she was 16 years old. In October 1996, she became a paid employee of Alpha House and did relief work for full-time employees and also worked weekends. Her weekend shift ran from 8:00 a.m. until 10:00 p.m. and she was paid a flat rate of $25 per day. The house manager testified that, before the collision, Allen was very capable and handled many emergency situations without a problem.

When she was 20 or 21 years old, Allen began to work as a project guide for the Girl Scouts. She worked 15 hours a week and was paid $7 per hour. Girl Scout meetings were brought to local schools for girls who were underprivileged or who had working parents. In connection with these meetings, Allen would play games with the girls, help them with crafts and projects necessary to earn merit badges, and do paperwork.

In the fall of 1997, Allen started a work study job at Taft Junior College and worked as a clerical assistant to Patricia Brown, an academic advisor and part-time instructor. During the school year, Allen worked 10 hours per week and was paid $5.75

per hour. Mrs. Brown testified that Allen took her job very seriously, was dependable and capable, and took it upon herself to find things to do during slow times. Her duties included answering the telephone, making appointments, making copies, sending faxes, correcting student work, keeping a record of grades, and preparing finals.

On the morning of February 12, 1999, while it was still dark, Allen was driving her car through the intersection of Harding Street and Phillipine Street in Taft, California when her car was "T-boned" by a car driven down Phillipine Street by Vega. The first thing Allen remembers after the collision was talking to a California Highway Patrol officer in the emergency room of Mercy Westside Hospital. Allen spent some time in the hospital and then went to live in Alpha House until she was able to get around on her own. She used a walker for about three months and would use a wheelchair for outings that required longer walks.

At trial, Dr. Allison Little testified that Allen suffered a closed head injury to the frontal lobe of her brain as a result of the collision. That area of the brain handles executive functioning, which includes the ability to set goals and formulate how to meet those goals in a successful manner. Dr. Little diagnosed Allen as suffering from a cognitive disorder as well as an adjustment disorder with depression and anxiety. Cognitive disorder, which is part of postconcussive syndrome, can involve changes in personality, inability to concentrate, and apathy.

After the collision, Allen returned to her job at Alpha House, but quit in November 1999. The house manager was no longer satisfied with her performance because Allen did not have the openness that previously allowed her to develop a connection with the clients. The house manager testified that after the collision, Allen's personality changed completely. She went from being open and bubbly to someone who did not take an interest in anything that had previously interested her. For example, before the collision, Allen kept her home meticulously; afterwards, she was indifferent to

housekeeping and no longer fixed her hair or put much effort into her personal appearance.

After the collision, when Allen returned to her job as Mrs. Brown's clerical assistant in the fall of 1999, (1) she needed written instructions more often because she would forget oral instructions, (2) she did not sit still for very long, (3) she seemed distraught, and (4) she would become upset if she could not remember instructions or was unable to finish a task that needed to be completed by a certain time. Also, Allen was not able to do some tasks that she had done before the accident, such as put together study guides and finals. Allen quit her job at Taft Junior College in April or May of 2000, shortly before the end of the term.

Allen returned to her job with the Girl Scouts in October 1999, worked for that season and the next, and stopped working for them in May 2001. She stopped working for the Girl Scouts because she had a difficult time getting things organized and keeping on track.

Dr. Rick Sarkisian, a vocational rehabilitation consultant, testified that prior to the collision and brain injury, Allen was capable of receiving a bachelor's degree and then obtaining a teacher's credential. The liberal arts curriculum Allen was pursuing before the accident was common for students preparing for a teaching career. Allen also took courses, such as child growth and development, that applied toward becoming an elementary school teacher.

Dr. Little also testified that prior to the collision, Allen had the intelligence level and work ethic to obtain a teaching credential.

To quantify Allen's loss of earning capacity, an economist testified as to the difference between what Allen was likely to have earned as a teacher compared to what she would earn if she worked as a bookkeeper. The present value of that difference in earnings was $203,555.

After Allen presented her evidence, Vega rested without presenting any evidence and moved for partial nonsuit and partial directed verdict. Vega argues (1) as to loss of earning capacity, that the testimony of the economist concerning future loss should be stricken, and that it was purely speculative that Allen would have obtained a teaching credential; and (2) as to past medical expenses, that no medical bills had been admitted into evidence at that point, thus defeating any right to recovery. The motions were denied.

The jury received instructions on damages using language from BAJI No. 14.00 (compensatory damages), BAJI No. 14.10 (past and future medical expenses), BAJI No. 14.11 (loss of earnings to date of trial), BAJI No. 14.12 (loss of earning capacity), BAJI No. 14.60 (prohibition against speculative damages), BAJI No. 14.61 (prohibition against punitive damages), BAJI No. 14.65 (preexisting condition), BAJI No. 14.69 (life expectancy) and BAJI No. 14.70 (present value).

Counsel for Allen asserted during closing argument that Allen was entitled to damages for loss of earning capacity because she was no longer capable of obtaining a four-year college degree, although she remained capable of earning a degree from a junior college. He continued by asserting:

> "Now, perhaps you may decide she wasn't going to be a first grade teacher. Maybe she was going to be something else, but that doesn't take away from the fact that because of the injury, because of the closed head injury, she does not have the same abilities to complete that four-year degree with the added opportunity to earn additional income, and, again, whether you consider that she would have become a first grade teacher or whether you feel she might not have become a first grade teacher, that is not really the issue. The issue is how is the closed head injury and the damage to her frontal lobe going to affect her earning opportunities into the future. That is the significant component to her economic losses in this case."

The day after hearing closing arguments, the jury returned a special verdict in which it found Vega's negligence was a legal cause of injury to Allen, and Allen was not negligent. The jury found economic damages of $230,602.36 and noneconomic damages

of $50,000 and entered these two figures on the special verdict form. The jury added these amounts together and found Allen's total damages were $280,602.36.

Judgment was entered in favor of Allen, and Vega filed a motion for new trial and a motion for judgment notwithstanding the verdict. On March 29, 2002, the trial court denied Vega's postjudgment motions. Vega subsequently filed a timely notice of appeal.

DISCUSSION

Vega contends that the trial court erred by (1) allowing a speculative claim of diminished earning capacity to go to the jury, (2) failing to impose an evidence or issue sanction in connection with discovery misuse concerning Allen's claim for loss of earning capacity, and (3) allowing Allen's claim for past medical expenses to be presented to the jury. Based on these contentions, Vega requests a retrial limited to the issue of economic damages.

I. Loss of Earnings Capacity Was Properly Presented to the Jury

Vega contends the trial court committed reversible error when it denied her motion in limine, motion for partial nonsuit or partial directed verdict, and motion for partial judgment notwithstanding the verdict, all of which were based on the allegedly speculative nature of Allen's claim of diminished earning capacity resulting from an inability to pursue a career in teaching.

Vega's contention has three components. First, from a broad perspective, was the issue of loss of earning capacity a type of damage that the jury could properly consider? Second, was the evidence of Allen's inability to pursue a teaching career an appropriate means of proving the amount of damages resulting from her alleged loss of earning capacity? Third, did substantial evidence support the jury's explicit finding as to economic damages and implicit finding that those damages were not speculative?

A. Standard of Review

We review the denial of Vega's motion in limine, motion for nonsuit/directed verdict and motion for judgment notwithstanding the verdict under the substantial

evidence standard. (*Sweatman v. Department of Veterans Affairs* (2001) 25 Cal.4th 62, 68 [judgment notwithstanding the verdict]; *Nally v. Grace Community Church* (1988) 47 Cal.3d 278, 291 [nonsuit]; *Mechanical Contractors Assn. v. Greater Bay Area Assn.* (1998) 66 Cal.App.4th 672, 676-677 [motion in limine that bars all evidence of a claim is tantamount to a nonsuit and reviewed as such].) Accordingly, we accept as true all evidence tending to support the verdict, including all reasonable inferences from the evidence, and resolve all conflicts in favor of the verdict. (*Crawford v. Southern Pacific Co.* (1935) 3 Cal.2d 427, 429.)

Questions of law raised in connection with these motions are subject to independent appellate review. (E.g., *Huffman v. City of Poway* (2000) 84 Cal.App.4th 975, 993 [in the context of a motion for judgment notwithstanding the verdict, duty of care was a legal question subject to independent review].)

B. Rules of Law Governing Awards For Loss of Earning Capacity

The established principles applied by California courts to claims for loss of earning capacity were set forth by the Second Appellate District in *Rodriguez v. McDonnell Douglas Corp.* (1978) 87 Cal.App.3d 626, 656-657 as follows:

> "With respect to loss of future earnings, the decisional law and other authorities carefully point out that '[l]oss of earning power is an element of general damages which can be inferred from the nature of the injury, *without proof of actual earnings or income either before or after the injury*, and damages in this respect are awarded for the loss of ability thereafter to earn money.' (*Connolly v. Pre-Mixed Concrete Co.* (1957) 49 Cal.2d 483, 489 ….) (Italics added.)
>
> "'One's earning capacity is not a matter of actual earnings. The impairment of the power to work is an injury wholly apart from any pecuniary benefit the exercise of such power may bring and if the injury has lessened this power, the plaintiff is entitled to recover. … In short, the test is not what the plaintiff would have earned, but what [s]he could have earned.' (Stein, Damages and Recovery—Personal Injury and Death Actions (1972) § 58, p. 94.) The important distinction just discussed is particularly applicable when the plaintiff is a student or an apprentice. (See

Stein, *supra*, § 84, p. 131; and Johns, Cal. Damages—Law and Proof (2d ed. 1977) § 1.29, pp. 48-49.)

> "The decisional law in California has long applied the above stated rule. [Citations.] In these decisions, the courts sanctioned recovery by the plaintiffs of damages for impairment of future earning capacity…."

With respect to the proof needed to establish a claim for loss of earning capacity, "it is not necessary for a party to produce expert testimony on future earning ability [citations] although some plaintiff's attorneys may choose as a matter of trial tactics to present such evidence. [Citations.]" (*Gargir v. B'Nei Akiva* (1998) 66 Cal.App.4th 1269, 1282 (*Gargir*).)

C. Analysis

First, from the broad perspective, it is clear that Allen presented evidence of her diminished earning capacity by showing that she was no longer able to function as effectively as she had prior to the collision.

The evidence showed Allen worked three part-time jobs approximately 50 hours per week and attended Taft Junior College before the collision. Mrs. Brown from Taft Junior College testified to the change in Allen's performance of her job after the collision. The manager of Alpha House also testified to changes in Allen's work and personal activities that occurred after the collision. Dr. Little testified that in her opinion Allen (1) could not go back to working three part-time jobs and attend school at the same time, (2) would not be able to handle the stress or maintain the concentration necessary to obtain a bachelor's degree, and (3) could obtain a degree from a junior college if she did not take a full course load.

Based on the standards set forth by the California Supreme Court in *Connolly v. Pre-Mixed Concrete Co.*, *supra*, 49 Cal.2d at page 489, the issue of whether or not Allen suffered a loss of earning capacity was properly before the jury because the evidence was sufficient to show that the brain injury suffered by Allen reduced her ability to earn money.

This holding is consistent with the decision in *Lang v. Barry* (1945) 71 Cal.App.2d 121, where the Court of Appeal held the issue of loss of earning capacity was properly before the jury. In that case, the plaintiff was 16 years old and employed as a part-time gas station attendant. He was badly injured when hit by an automobile while crossing the street to reach a car needing tire repair. The court noted that the medical testimony was somewhat unclear but sufficient to establish that the fibula in the plaintiff's left leg was permanently overlapping and that leg's muscles had atrophied, resulting in a permanent difference in the circumference and strength of his legs. (*Id.* at p. 126.) The injury disqualified the plaintiff from regular military service and he was accepted only for limited service as a specialist. The court upheld the award of damages and stated, "[t]he permanent weakness of the left leg having been shown, impairment of the minor plaintiff's earning power could properly be considered by the jury, being within the knowledge and observation of the jury as persons of ordinary intelligence and experience." (*Id*. at pp. 126-127; see Civ. Code, § 3283 [award of damages for future detriment].)

Second, with respect to quantifying the damages from the loss of earning capacity, we consider whether it was appropriate for Allen to offer evidence of a lost teaching career to prove the dollar value of that loss. Vega argues that California "law requires some evidence that one has already entered into a career before diminished earning capacity damages based on loss of that career can be awarded." Vega further asserts that "California courts have consistently refused to award damages for diminished earning capacity based on data for careers not entered at the time of injury."

In her reply brief, Vega appears to have retreated slightly from her interpretation of the case law by arguing that *Zibbell v. Southern Pacific Co.* (1911) 160 Cal. 237, 249 requires that a plaintiff demonstrate that he or she "understands" and is "following" a trade or profession in order to claim damages based on an inability to pursue that trade or profession.

We disagree with Vega's view of how the rules of law should be applied to the loss of earning capacity by a student. Vega's appellate briefs have overlooked a recent example of a student who recovered for loss of earning capacity relating to a teaching career. (*Gargir*, *supra*, 66 Cal.App.4th 1269 [plaintiff, whose negligence was a 50 percent cause of the injury, recovered $600,000].) In *Gargir*, the plaintiff was 16 years old when she injured her knee in a skiing accident. At the time of trial, she was 19 years old and enrolled in college majoring in special education. The appellate court upheld an award for loss of earning capacity based on (1) the plaintiff's testimony about her intention to pursue a master's degree and then a career teaching preschool children with mental and physical disabilities, and (2) her doctor's testimony that plaintiff (a) would have to avoid activity like twisting and turning that could unduly stress the knee and (b) was at risk for a total knee replacement or knee fusion. In addition, the court held the jury was properly instructed under BAJI No. 14.12 concerning loss of earning capacity. (*Gargir*, at p. 1282.)

In this case, Allen presented evidence that she intended to pursue a career as an elementary school teacher, was pursuing an education necessary to that career, was capable of obtaining a teacher's credential, and was no longer able to pursue that career after the collision.

Specifically, Drs. Little and Sarkisian both opined that before the collision Allen was capable of obtaining a teaching credential. In addition, Allen showed more than just her intent to pursue a career as a teacher. She was taking classes towards that goal and was working part-time jobs that had a relationship to that goal. In particular, Mrs. Brown testified about the ability of Allen to put together study guides or finals before the collision, but not after the collision. These tasks show that Allen was actually engaged in activity—albeit, low level activity—that a teacher might do, and she was able to perform the tasks. Furthermore, Allen's work with the Girl Scouts exposed her to children in groups and would have given her an indication of what it was like to deal with children in

that setting and whether or not she enjoyed it. As a result of her employment experience, Allen gained a background in both the paperwork associated with teaching as well as the personal interaction necessary to deal with a group of children. The jury could have found that this experience increased the probability that she would have become a teacher and, thus, the data concerning the earnings of teachers was relevant to determining her damages.

Consequently, like the plaintiff in *Gargir*, Allen was entitled to introduce evidence of her career goal of becoming a teacher and have the jury consider that evidence in connection with determining the amount of damages resulting from her loss of earning capacity.

Vega relies upon *Martinides v. Mayer* (1989) 208 Cal.App.3d 1185 (*Martinides*) for the proposition that damages for loss of earning capacity are speculative in this case. In *Martinides*, the plaintiff was severely injured when struck by a speeding automobile in a hit-and-run incident. At the time of the incident, the plaintiff was not employed because she had recently given birth. Prior to becoming pregnant, she had worked as a nurse's aide. (*Id.* at p. 1191.) Before the incident, plaintiff had discussed her desire to become a licensed vocational nurse (LVN), but had not received any training. Plaintiff's formal education ended with high school, where she was a C minus student. (*Ibid*.)

The jury awarded damages of $3,868,332.75. The trial court granted the defendant's motion for a new trial unless the plaintiff agreed to a reduction of the award to $2.5 million. (*Martinides*, *supra*, 208 Cal.App.3d at p. 1188.) Based on the plaintiff's prior educational and work history, the trial court determined that past and future loss of earnings were speculative because they were based upon what the plaintiff could have earned as an LVN. (*Id*. at p. 1206.)

We conclude *Martinides* is factually and procedurally distinguishable from the present case. Factually, Allen was pursuing an education for the purpose of becoming a teacher, and she produced expert witnesses who testified she was capable of achieving

that goal. The plaintiff in *Martinides* was not pursuing training to become an LVN, and the court's opinion did not reference any testimony from an expert witness that she was capable of becoming an LVN.

Procedurally, the court in *Martinides* was reviewing the trial court's determination that the damages were speculative under an abuse of discretion standard, and it concluded there was a substantial basis in the record supporting the trial court's reasons. (*Martinides*, *supra*, 208 Cal.App.3d at pp. 1197-1198.) In this case, the trial court reached the opposite determination and held that the economic damages were not speculative. Here, as in *Martinides*, there is a substantial basis in the record to support the trial court's determination and, therefore, we conclude that the trial court did not commit reversible error.

Finally, in light of the evidence discussed, we conclude the record contains substantial evidence to support the jury's findings regarding economic damages.

II. An Issue or Evidence Sanction Was Not Mandatory

Vega filed three motions in limine seeking to exclude evidence of diminished earning capacity. The motions were denied. On appeal, Vega contends the failure to exclude the evidence was prejudicial error requiring reversal.

A. Background and Facts

1. Vega's contentions regarding misleading statements

Vega's motions in limine asserted Allen was estopped from claiming loss of earning capacity because Allen's "own statements and conduct denied a claim for future wage loss and intentionally lead defense to believe her only claim for loss of earning was $3,507.50." Vega's authority for the estoppel theory was Evidence Code section 623.[2]

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[2]"Whenever a party has, by his own statement or conduct, intentionally and deliberately led another to believe a particular thing true and to act upon such belief, he is not, in any litigation arising out of such statement or conduct, permitted to contradict it." (Evid. Code, § 623.)

The statements that purportedly misled Vega were made in Allen's responses to interrogatories and deposition testimony.[3] Under form interrogatory 8.1, Allen was asked if she attributed any loss of earnings or earning capacity to the incident. Allen answered "yes." Form interrogatory 8.8 asked Allen if she would lose income in the future as a result of the incident. Allen responded that she was unable at that time to state whether she would lose future income and stated that discovery was ongoing and she reserved her right to supplement her response to the interrogatory.

During her November 3, 2000, deposition, Allen answered "no" when asked: "Any other problems that we haven't discussed, that you can think of, that you attribute to the accident?" Based on this testimony and the assertion that during her deposition Allen never testified that she wanted to become a teacher, wanted a teaching credential or was not able to complete college due to the accident, Vega contends Allen "played hide the ball and was evasive."

To bolster the persuasive force of the motions in limine, Vega included the following invective: "Looking at her academic records the two words 'teaching credential' do not come to mind. For [Allen] now to claim further loss of earnings in light of her previous responses bring to mind another two words 'insurance fraud.'"

2. Allen's opposition

Allen opposed the estoppel theory contained in Vega's motion in limine by asserting that (1) her interrogatory responses, which were verified on May 26, 2000, were not misleading, and (2) any prejudice experienced by Vega occurred because Vega failed to pursue the topic of loss of earning capacity during Allen's deposition or by sending out

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[3]Vega also referenced a response to a request for admission, but that request was worded in the past tense and, therefore, did not encompass future earnings. In addition, Vega asserted Allen's production of documents never mentioned future wage losses due to her inability to obtain a teaching credential.

a supplemental interrogatory in accordance with Code of Civil Procedure section 2030, subdivision (c)(8).[4]

3. Trial court's ruling

The trial court denied the motion in limine to exclude future wage loss, but its reasoning is not part of the appellate record. The transcript reflects the denial of the motion when, prior to jury selection, the trial court revisited the status of various motions in limine and stated: "There is the motion in limine number ten to [ex]clude future wage loss. We discussed that, and the Court denied the motion." The discussion referenced apparently took place off the record. As a result, the trial court's findings of fact and rationale for denying the motion are not available here.

B. Standard of Review

1. Legal theories for exclusion of the evidence

Vega's motions in limine sought the exclusion of evidence concerning future wage loss using an estoppel theory based on Evidence Code section 623. On appeal, Vega analyzes the failure to exclude the evidence under the provisions of the Civil Discovery Act of 1986 (Code Civ. Proc., § 2016 et seq.) concerning the misuse of discovery and the imposition of an issue or evidence sanction. (Code Civ. Proc., § 2023, subds. (a), (b)(2) & (b)(3).)

We do not decide the question whether Vega should be allowed to pursue legal arguments under the Civil Discovery Act of 1986 when those arguments were not presented to the trial court because, regardless of whether we analyze the failure to exclude the evidence under the evidence provisions concerning estoppel or the discovery provisions concerning sanctions, we reach the same result.

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[4] "[A] party may propound a supplemental interrogatory to elicit any later acquired information bearing on all answers previously made by any party in response to interrogatories (1) twice prior to the initial setting of a trial date, and (2) subject to the time limits on discovery proceedings and motions provided in Section 2024, once after the initial setting of a trial date." (Code Civ. Proc., § 2030, subd. (c)(8).)

2. Abuse of discretion standard

Generally, a trial court's rulings on motions in limine are reviewed for an abuse of discretion. (E.g., *Hernandez v. Paicius* (2003) 109 Cal.App.4th 452, 456; *People ex rel. Lockyer v. Sun Pacific Farming Co.* (2000) 77 Cal.App.4th 619, 639-640.)

In addition, a discovery order "is presumed correct and all intendments and presumptions are indulged to support the order on matters to which the record is silent. It is appellants' burden to affirmatively demonstrate error and, where the evidence is in conflict, this court will not disturb the trial court's findings. [Citations.]" (*Laguna Auto Body v. Farmers Ins. Exchange* (1991) 231 Cal.App.3d 481, 487 [imposition of dismissal sanction for discovery violations upheld] disapproved on other grounds in *Garcia v. McCutchen* (1997) 16 Cal.4th 469, 478, fn. 4.)

3. Elements necessary to establish estoppel

In discussing Evidence Code section 623, the court in *Hair v. State of California* (1991) 2 Cal.App.4th 321, 328 stated four essential elements of the equitable estoppel doctrine were (1) the party to be estopped must be apprised of the facts; (2) she must intend that her conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) the other party must rely upon the conduct to her injury.

4. Elements necessary for an evidence or issue sanction

A trial court has broad discretion with respect to the imposition of discovery sanctions, and its determination will be reversed only for an abuse of discretion—that is, arbitrary, capricious, or whimsical action. (*Calvert Fire Ins. Co. v. Cropper* (1983) 141 Cal.App.3d 901, 904.) Notwithstanding the other factors relevant to the exercise of discretion, a discovery sanction may be imposed only if there was a willful failure to comply with provisions of a discovery statute or a court order. (*Vallbona v. Springer* (1996) 43 Cal.App.4th 1525, 1545.)

Accordingly, to prevail on her claim that the trial court abused its discretion by not imposing an issue or evidence sanction on Allen, Vega must demonstrate affirmatively that (1) Allen failed to comply with discovery requirements, (2) the failure was willful, and (3) the trial court acted arbitrarily, capriciously, or whimsically in denying the requested sanction.

The difficulty of affirmatively establishing these three elements and overcoming the presumption that the trial court's discovery order is correct is illustrated by the failure of Vega to cite a single case in which a trial court was reversed for allowing an issue to be resolved on its merits rather than imposing an issue or evidence sanction for discovery misuse.

C. Vega Has Not Established the Statements Were Misleading

Vega contends that the misuse of discovery is shown by Allen's trial testimony that she gave up her plans of becoming a teacher in August or September of 1999, which occurred before she responded to the written discovery (May 2000) or had her deposition taken (Nov. 2000).

1. Deposition testimony by Allen

During the deposition of Allen, Vega's counsel did not directly ask about the loss of future wages or earning capacity. Near the end of the deposition, he asked whether Allen had stopped doing any type of physical activity that she had done regularly before the collision. Allen answered "yes" and then specified walking. Vega's counsel then asked, "Other than walking?" Allen answered, "I was just on the go a lot."

Next, Vega's counsel asked Allen if there were any other problems she could think of that had not been discussed that she attributed to the collision. Allen answered "no."

Vega now contends that Allen played "hide the ball" by not mentioning the loss of a career as a teacher as another problem she attributed to the collision. The trial court apparently disagreed with Vega's interpretation of the questions and answers. Because of

the context in which the general question about other problems was posed, that question may have been interpreted by Allen to refer to diminished physical activity or other physical problems. Immediately before the questions regarding physical activity were questions concerning the effects of the collision on her menstrual cycle and weight.

Consequently, under the applicable standard of review, we must presume that the trial court found (1) Allen interpreted the questions about other problems as addressing other physical problems, (2) Allen did not willfully mislead defense counsel with her deposition testimony, and (3) defense counsel was not misled by the answer.

Accordingly, the deposition testimony of Allen cannot be the basis for a discovery sanction or a ruling excluding evidence on grounds of equitable estoppel.

2. Written discovery responses

Vega's argument that Allen was aware of a loss of future earnings when she became aware that she would not be able to become a teacher assumes that Allen knew a second fact—that the substitute careers she would be capable of pursuing had a lower earning capacity than a career as a teacher. Stated otherwise, the loss of a teaching career does not necessarily mean a loss of future earnings until the replacement possibilities are identified and the earnings from those careers are compared to the earnings from teaching.

Vega avoids stating this factual assumption for an obvious reason—the evidence in the record does not affirmatively establish the assumed fact. For us to find Vega's assumption about Allen's knowledge is accurate would be wrong at two levels of analysis.

First, a reviewing court is required to draw inferences and make presumptions that support the order of the trial court. (See *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) Consequently, we cannot do exactly the opposite and presume a fact to exist for the purpose of reversing a trial court's order.

Second, even if we were permitted to reweigh the evidence in the record, the evidence supports a finding that Allen did not know the inability to pursue a teaching career caused her a loss of future earnings at the time she answered the written discovery.

For example, Allen's testimony during cross-examination at trial shows that she did not equate the inability to become a teacher with a reduction in her future earnings.

> "Q. Okay. You knew that because you couldn't become a teacher, that you would incur losses in the future because you couldn't become a teacher, correct?
>
> "A. I did not know that."

In light of the foregoing, we cannot draw the factual inference that Allen knew of her loss of future wages when she responded to the written discovery.

In summary, because of the findings that we are required to presume the trial court made, Vega is not able to affirmatively establish the four essential elements of equitable estoppel or, alternatively, that Allen willfully failed to comply with discovery requirements. Thus, Vega has not shown that the trial court committed reversible error by not excluding the evidence of loss of future wages.

III. Past Medical Expenses

A. Facts and Background

Allen initially claimed past medical expenses in the amount of $17,583.78. At trial, Allen testified that she was provided with medical care and services from several entities and that she received the various medical bills shown to her by counsel. Those bills were offered into evidence as exhibit 13. Counsel for Vega made an objection as to foundation and the court deferred ruling on the admissibility of the bills.

After each party rested, Vega argued that the issue of past medical expenses should not have been submitted to the jury because Allen never submitted any evidence during her case-in-chief concerning the amount that was paid. The trial court responded by stating that it had "received a medical special statement with an offer that the medical

bills have been paid …." Counsel for Vega acknowledged that he had just been handed that document.

In ruling on the admissibility of past medical bills, the trial court stated that based on the manner in which the issue was addressed during trial and the representation by counsel for Allen that the documents in the special statement were medical payments, it would allow certain of the items for past medical expenses to go to the jury. To implement this ruling, the trial court admitted as evidence Allen's exhibit 13A, which contained documentation relating only to the specific items of past medical expenses allowed to be presented to the jury. In addition, the trial court told the jury it had "granted a motion to strike a figure of claimed total medical expenses striking that figure of 17,854 and substituting as claimed medical expenses the figure of $10,396.36."

The specificity of the jury's findings concerning past medical expenses and economic damages was determined by the form of special verdict used. Allen submitted a special verdict form that divided the damages into only two categories—noneconomic and economic. In contrast, Vega submitted a proposed form of special verdict titled "Special Findings on Verdict."[5] Vega's proposed form asked the jury to make a separate finding as to the amount of each of the five types of damages requested by Allen—past wage loss, future wage loss, past medical expenses, future medical expenses, and pain and suffering.

The trial court addressed the competing verdict forms as follows:

> "All right. With regard to the verdict forms, there was a proposed special finding on verdicts submitted by [Vega's counsel]. It is not in the appropriate form under the rules with regard to the special verdict form. I will use [Allen]'s form, which appears to be appropriate and would not otherwise submit the special findings to the jury.

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[5]This document became part of the appellate record when we granted Vega's motion to augment the record.

> "You can argue to the jury the items of their determination for their determination, but—so as some sort of checklist for your own argument, that is fine, but they aren't going to have that form submitted to them. They'll have the special verdict form submitted as proposed by [Allen].
>
> "[VEGA'S COUNSEL]: That's fine."

As a result, the form of special verdict presented to the jury requested that it make a lump sum finding regarding the amount of economic damages. The jury was instructed about medical expenses using BAJI No. 14.10 and about the requisite causal link between the claimed losses and the tortious conduct using BAJI No. 14.00. In addition, the jury was instructed that medical expenses were a type of economic damage. Accordingly, any award of past medical expenses would have been included in the lump sum of $230,602.36 the jury awarded as economic damages.

B. Rules of Law Regarding the Recovery of Past Medical Expenses

Generally, to recover for medical expenses already incurred, the plaintiff must prove the amount of the claimed expenses, that each of the charges was reasonable, and that the services or supplies were actually provided and were reasonably necessary to the diagnosis and treatment of injuries proximately caused by the defendant's tortious conduct. (Flahavan et al., Cal. Practice Guide: Personal Injury (Rutter Group 2003) ¶ 3:34, p. 3-55; see *Hanif v. Housing Authority* (1988) 200 Cal.App.3d 635, 640 [plaintiff may not recover more than amount paid or liability incurred for past medical care].)

Vega contends that California law "necessitate[s] that [Allen] be awarded no damages for prior medical expenses because the *amount of payment* was never submitted into evidence." (Italics added.) Vega restated this contention by asserting that it was Allen's "burden to show that bills were paid." Similarly, in her reply brief, Vega contends (1) the case law clearly requires proof of payment as a condition precedent to recovery of medical expenses and (2) "[p]roof of payment has long been a pre-requisite to recovery of medical specials."

Vega's objection to the admission of the documents relating to medical expenses incurred, and her related motions, are based on an erroneous understanding of applicable law. In short, a "[p]laintiff need not prove that the medical bills were paid." (Flahavan et al., Cal. Practice Guide: Personal Injury, *supra*, ¶ 3:35.1, p. 3-56.) Evidence of payment permits an inference that the charges were reasonable and evidence of unpaid bills may permit the defendant to argue that the charges were unreasonable. (*Ibid*.)

Vega's erroneous view of the law is evident from the language in *Hanif v. Housing Authority*, *supra*, 200 Cal.App.3d 635. In that case, the Third Appellate District discussed the reasonable value limitation imposed on the recovery of past medical expenses and then stated:

> "Thus, when the evidence shows a sum certain to have been paid *or incurred* for past medical care and services, whether by the plaintiff or by an independent source, that sum certain is the most the plaintiff may recover for that care despite the fact it may have been less than the prevailing market rate." (*Hanif v. Housing Authority*, *supra*, 200 Cal.App.3d at p. 641, italics added.)

This language plainly shows that a plaintiff may recover medical expenses incurred as well as those that have been paid. One rather obvious reason the law does not condition recovery upon payment is that the bills may be unpaid because the plaintiff cannot afford to pay them before obtaining a recovery in a lawsuit against the defendant. (Flahavan et al., Cal. Practice Guide: Personal Injury, *supra*, ¶ 3:51, p. 3-60.)

Another case showing that payment of medical expenses incurred is not a condition to recovery is *Malinson v. Black* (1948) 83 Cal.App.2d 375. In that case, the court stated:

> "It is well settled that the amount paid is some evidence of reasonable value and in the absence of any showing to the contrary such evidence has been held to be sufficient. Likewise, it would seem that evidence of the expense incurred would be some evidence of reasonable value. [Citations.]" (*Id*. at p. 379.)

In light of the foregoing, we conclude Vega's objection to the introduction of the documents relating to medical expenses was properly overruled by the trial court. Furthermore, the trial court correctly denied the various motions made by Vega on the same grounds.

Because of our ruling on the merits of Vega's argument, we need not address the threshold question whether she properly preserved for appeal a challenge to the possible award of past medical expenses or the question whether she waived that challenge or acquiesced in the use of Allen's special verdict form. (See *Heiner v. Kmart Corp.* (2000) 84 Cal.App.4th 335, 346; *Electronic Equipment Express, Inc. v. Donald H. Seiler & Co.* (1981) 122 Cal.App.3d 834, 856-857 [acquiescence to jury instruction].)

DISPOSITION

Judgment is affirmed. Respondent is awarded costs on appeal.

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DAWSON, J.

WE CONCUR:

_____
HARRIS, Acting P.J.

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WISEMAN, J.