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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

CHRISTIE ALEXIS BREN et al., Plaintiffs and Appellants, v. DONALD L. BREN, Defendant and Respondent.	B227018 (Los Angeles County Super. Ct. No. BC295617)

APPEAL from a judgment of the Superior Court of Los Angeles County. Rex Heeseman, Judge. Affirmed.

Hillel Chodos; Hugh John Gibson for Plaintiffs and Appellants.

Quinn Emanuel Urquhart & Sullivan, John B. Quinn, Eric J. Emanuel and Diane Doolittle for Defendant and Respondent.

* * * * * *

In a fraud action, the trial court entered judgment in favor of defendant and respondent Donald L. Bren (Bren) after the jury determined that he did not make a false promise to plaintiff and appellant Jennifer Gold (Gold), the mother of two of Bren's children, plaintiffs and appellants Christie Alexis Bren (Christie) and David Leroy Bren (David) (the latter sometimes collectively appellants). According to Gold and appellants, the trial court committed a host of erroneous pretrial and evidentiary rulings that require reversal of the judgment.

We affirm. The trial court properly exercised its discretion in precluding discovery and excluding evidence of financial arrangements Bren may have had with other children and their mothers, and his testamentary documents. Appellants were not prejudiced by the trial court's limiting discovery and excluding evidence and theories relating to damages and, in any event, the trial court properly exercised its discretion in making its rulings. Finally, the trial court properly granted summary judgment against Gold on the ground that her fraud claim was time-barred.

FACTUAL AND PROCEDURAL BACKGROUND

Bren and Gold's Written Support Agreements.

Bren is the chairman and chief executive officer of the Irvine Company. He and Gold met in 1984 and the two maintained a non-exclusive dating relationship for the next several years. They did not discuss having an exclusive relationship, getting married or having a child together. During their relationship, Bren maintained multiple homes and employed several household workers. At some point during their relationship, Bren told Gold that he spent $3 to $5 million per month to maintain his lifestyle.

In January 1988, after Bren had not seen Gold for a few months, Gold told him she was between five and six months pregnant. She told Bren she would need financial assistance and Bren agreed. She and Bren also discussed that she would have sole custody of the child and make day-to-day decisions, while Bren's role would be limited to providing financial support. Bren told her that he wanted to memorialize any agreement in writing and advised her to seek legal counsel.

Gold retained attorney William Burkitt to represent her. In January 1988, Burkitt submitted to Bren's counsel, Stuart Tobisman, Gold's proposed budget of approximately $6,200 per month and the parties engaged in negotiations. For the purpose of developing a negotiating position, Tobisman had researched what a family court might award under these circumstances. On February 1, 1988, Bren and Gold signed an agreement providing that although Bren did not acknowledge paternity he would pay Gold a lump sum of $13,784 and $5,000 per month thereafter through January 1, 1989. The 1988 agreement also obligated Bren to take a paternity test after the child's birth. Though Gold stated she was surprised when she saw that Bren refused to acknowledge paternity and that the refusal was inconsistent with his private statements to her, she agreed to the provision. Nothing in the agreement obligated Bren to be an active parent involved with the yet-unborn child.

Christie was born in April 1988; thereafter, Bren and Gold negotiated and ultimately entered into a second agreement when paternity testing showed that Bren was her biological father. Gold retained well-known family law practitioner Michael Maroko to represent her. In October 1988, Maroko sent Bren's counsel Tobisman a detailed "proposal for settlement as to all issues pertaining to the claim of paternity." The proposal sought payment for Christie's reasonable needs. Bren and Gold, through their counsel, continued to negotiate for the next several months. During the course of the negotiations, Gold threatened to initiate court proceedings against Bren. She relied on Maroko's advice in refraining from filing suit.

The agreement, signed in May 1989 but effective January 1, 1989, provided for monthly child support payments of $3,500, monthly payments to Gold of $2,500, payment of uninsured medical expenses not to exceed $1,200 annually, payment for private school and summer camp, and payment of college and graduate school tuition and expenses. According to Gold, she agreed to a smaller amount than she would have been awarded in family court because Bren told her that he would always take care of them and Christie would have everything she needed. Maroko, however, opined that the amount was reasonable based on his knowledge of what the court might award. The

1989 agreement further provided that neither Bren nor Gold would identify or suggest to the public that Bren was Christie's natural father.

Bren and Gold, through their counsel, negotiated a third agreement after she advised him she was pregnant with a second child. In October 1991, Maroko sent Tobisman a detailed proposal which included a monthly budget of approximately $16,000 plus one-time expenses of approximately $9,000. In a November 1991 handwritten letter to Bren, Gold indicated that after deleting her personal expenses from the budget, she calculated her expenses to be $13,804.83 per month. Though Bren continued to pay for her personal expenses, she acknowledged that he did not want them included as part of the support agreement. The December 1991 agreement provided that Bren would make monthly child support payments of $10,000 and a direct payment to Gold of $5,000 per month. It also provided corresponding payments for uninsured medical expenses, private school and summer camps, and college and graduate school tuition and expenses for both children. Within a reasonable time after the second child was born, the 1991 agreement required paternity testing and provided the agreement would terminate if Bren were shown not to be the biological father of the child. The 1991 agreement expressly provided that it replaced and restated the prior agreement as well as all other "prior agreements or understandings of the parties."

Bren and Gold stopped seeing each other in the mid-1990's. Bren did not see appellants with any regularity after that point, and Gold complained to one of her friends about his absence. Because the 1991 agreement had a five-year term, the two began negotiating an extension of the agreement in mid-1996. Gold retained attorney Jonathan Chodos to represent her. A March 1996 handwritten note from Gold to Tobisman indicated that she and Bren had discussed that the new agreement would maintain the current monthly payments provided by the 1991 agreement. In May 1996, all parties signed a five-year extension of the 1991 agreement that superseded all prior agreements. While each of the four agreements was being negotiated, Bren and Gold did not discuss how the support amounts related to what might be awarded in family court.

According to Gold, the reason she signed all agreements was because Bren verbally promised to recognize appellants as his own and maintain a parent-child relationship with them. Again according to Gold, had those promises not been made, Gold would have brought an action in family court to receive significantly more support than was provided by the agreements. Gold conceded, however, that those promises did not appear in any of the four written agreements that she signed. Nor were those promises reflected in correspondence between Bren and Gold or their attorneys written in connection with the negotiation of those agreements. Bren denied making such promises.

Bren made all the payments required under the agreements. Because of the payments, Gold was able to stay at home to raise appellants and did not seek outside employment. While growing up, appellants attended private school for many years and took multiple overseas vacations. Appellants could not recall an occasion where they wanted or needed something that they did not get. Neither Gold nor her attorneys ever communicated to Bren's attorney that Bren had failed to perform anything he promised.

Family Law Action.

In 2001, after Gold had married Jerry Gold, she encountered Bren at the Ivy Restaurant one evening and believed that he ignored her and her family. At that point, Gold realized that Bren had no intention of maintaining a relationship with appellants. Though Bren recalled seeing Gold from a distance at the restaurant that evening, he did not see appellants.

Also in 2001, the 1996 agreement was set to expire. After unsuccessful negotiations for a further extension of the agreement, Bren initiated a separate family law proceeding in August 2003 to determine his paternity and support obligations going forward, *Bren v. Gold*, Los Angeles County Superior Court No. BF023597, and the trial court entered judgment in June 2009.[1] Bren conceded the issue of paternity. On the basis of the evidence offered during the trial, the trial court ruled that Bren had

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[1] An initial judgment had been entered in 2006, but was later vacated because appellants had not been properly joined as parties.

successfully rebutted the presumptive guideline for setting support provided in Family Code section 4057, subdivision (a) by showing that he was an extraordinarily high income earner as defined in Family Code section 4057, subdivision (b)(3). It determined that application of the guideline support amount would yield a figure that greatly exceeded appellants' needs and, accordingly, calculated a support amount that reflected appellants' actual and reasonable needs, taking into account the wealth of their parents and the cost of meeting those needs. Because Christie had reached the age of majority in 2006, the trial court awarded her only retroactive support in the amount of $1,127,918, comprised of a $14,224 monthly payment for reasonable expenses, an average of $6,676 per month for tuition and unreimbursed health care costs and $25,000 per month for intangible needs. It awarded David—then still a minor—a base amount of $13,276 per month for tangible needs, plus an additional $5,285 per month for tuition and health care and $25,000 per month for intangible needs. David also received $1,803,002 in retroactive support.

The Instant Action.

In October 2003, Gold individually and as guardian ad litem for appellants filed the operative, first amended complaint, which alleged causes of action for breach of contract, fraud and intentional infliction of emotional distress. Gold and appellants alleged that Bren told Gold if she entered into a private agreement for appellants' support and forego instituting child support proceedings, "he would always provide for the support and maintenance of Christie and David by, among other things, making payments directly to her as the custodial parent; that he would continue to recognize them as his children and maintain a parent-child relationship with them; and that he would make provision during their childhood and after they attained majority, and at his death, for their economic welfare in a manner commensurate with his vast wealth and station in life." They further alleged that Bren did not intend to fulfill these promises when made and sought damages in an amount at least equal to the difference between what Bren had paid since the children's birth and what he would have been ordered to pay as support under California law.

The trial court sustained Bren's demurrer without leave to amend, and we reversed the ruling as to the cause of action for fraud, concluding that the complaint adequately alleged the elements of a claim for promissory fraud. (*Bren v. Bren* (July 26, 2004 [nonpub. opn.], B173014).) Following remand, the parties resumed discovery, and the trial court granted Bren's motion for a protective order concerning discovery of financial information. Gold and appellants sought writ review and we issued a writ of mandate which permitted Gold and appellants "to conduct appropriately limited discovery with which to obtain reliable information of Bren's annual gross income." (See *Bren v. Bren* (Oct. 7, 2005, B183992).) We expressly cautioned that Gold and appellants had not demonstrated good cause for the discovery of "the exhaustive inventory of financial information they sought to compile, particularly from business entities related to Bren."

In July 2006, Bren moved for summary judgment on multiple grounds. Initially, the trial court granted the motion against Gold and appellants, ruling that the applicable three-year statute of limitations barred their fraud claim. On reconsideration, the trial court determined that the limitations period had been tolled as to appellants while they were minors and permitted them to proceed. We summarily denied both Bren's and Gold's request for writ review of the summary judgment rulings. (*Bren v. Superior Court* (Sept. 11, 2007, B198900); *Gold v. Superior Court* (May 11, 2007, B198882).)

Over Gold's objection, in August 2009 the trial court permitted Bren to file a cross-complaint for indemnity against Gold, who answered and filed her own cross-complaint for indemnity against Bren. The trial court sustained Bren's demurrer without leave to amend to the subsequent cross-complaint.

In October 2009, the trial court issued a protective order, precluding the discovery of information about support arrangements Bren may have entered into with other mothers of his children, if any, and about estate planning documents. In February 2010, Gold and appellants brought a motion seeking discovery of the information largely subject to the protective order, including information regarding the Irvine Company, child support arrangements for other children Bren may have fathered and testamentary documents. Bren opposed the motion. The trial court reaffirmed its October 2009 order

and denied discovery about other support arrangements and testamentary documents. It also deferred discovery of Bren's net worth.

An eight-day jury trial commenced in August 2010. Bren, Gold, their prior counsel and appellants testified. The Honorable Robert Schneider, a retired superior court judge who had served in family court, testified as an expert on Bren's behalf. He described the process he would have employed as a family court judge to determine child support, particularly when one parent was considered an extraordinarily high wage earner. He stated that once he determined a parent could pay essentially anything, he would require support payments sufficient to raise the children to "something in the neighborhood of that station in life and standard of living." He opined that nothing in the four agreements was inconsistent with what a family law court would have ordered, even in the case of a high wage earner. The jury also received a stipulation that Bren had paid a total of $2,887,981 in child support through December 1, 2002.

By special verdict, the jury determined that Bren did not make a false promise to Gold that was important to the transaction. Accordingly, it did not answer any questions concerning the remaining elements of fraud, including damages. The trial court entered judgment in favor of Bren and this appeal followed.

DISCUSSION

Conceding that substantial evidence supports the judgment, appellants confine their challenges to pretrial and evidentiary rulings. They contend the trial court prejudicially abused its discretion by precluding discovery and hence the admission of evidence relating to Bren's other children and estate planning, limiting evidence and argument concerning the calculation of damages, denying summary judgment on statute of limitations grounds and making rulings concerning other pleadings beyond the complaint. We find no merit to their contentions.

I. The Trial Court Properly Exercised Its Discretion to Limit Discovery.

Appellants contend that the judgment should be reversed because they were denied access to information about arrangements Bren may have had with other children born out of wedlock and their mothers, as well as information about his estate plan. We review an order denying discovery for abuse of discretion. (*In re Miranda* (2008) 43 Cal.4th 541, 554.) "'Where there is a basis for the trial court's ruling and the evidence supports it, a reviewing court will not substitute its opinion for that of the trial court. [Citation.]' [Citation.] The trial court's determination will be set aside only when it has been established that there was no legal justification for the order granting or denying the discovery in question. [Citation.]" (*Save Open Space Santa Monica Mountains v. Superior Court* (2000) 84 Cal.App.4th 235, 245–246.) Moreover, a judgment will not be reversed on the basis of such an error unless prejudice is affirmatively demonstrated. (Cal. Const., art. VI, § 13; Code Civ. Proc., § 475.) Prejudice is not presumed and the burden is on appellants to show its existence. (*Winfred D. v. Michelin North America, Inc.* (2008) 165 Cal.App.4th 1011, 1038.)

A. Bren's Arrangements with Other Children.

Before trial, the trial court twice ruled that appellants were not entitled to discovery of the names of, contact information about and amounts paid to Bren's other children and their mothers; written agreements for the support of those children; and the identity of all parties and counsel in other support proceedings involving Bren. In its first order in October 2009, the trial court granted Bren's request for a protective order on the ground that the privacy interests of non-parties to the action outweighed the relevance of such information. Denying appellants' renewed discovery request, the trial court issued a subsequent order in March 2010, rejecting appellants' position that the purported relevance of the information outweighed privacy considerations. The trial court ruled: "This discovery implicates the privacy rights of not only Bren, but those of his alleged other children and their mothers. The latter are not parties. In addition, the Order observed, those children or their mothers, if any, were evidently not notified of these proceedings, or their permission sought. Plaintiffs still have not demonstrated this

information cannot be obtained without disclosure from Bren. All things considered, this court denies plaintiffs' request." Ultimately, for the same reasons, the trial court granted Bren's motion in limine to preclude evidence about Bren's other children and their mothers.

In *Valley Bank of Nevada v. Superior Court* (1975) 15 Cal.3d 652, 656, the court explained that the constitutional right of privacy provided in article I, section 1 of the California Constitution "extends to one's confidential financial affairs as well as to the details of one's personal life." (Accord, *In re Marriage of Burkle* (2006) 135 Cal.App.4th 1045, 1063 ["The right to privacy extends to one's personal financial information"]; *Davis v. Superior Court* (1992) 7 Cal.App.4th 1008, 1019 ["the right of privacy extends to the details of one's personal life"].) The constitutional protection is not an absolute prohibition to discovery of confidential information, but rather, provides that disclosure must be justified by a compelling interest. (*White v. Davis* (1975) 13 Cal.3d 757, 775.) Moreover, "the constitutional elevation of privacy to an '"inalienable right" expressly protected by force of constitutional mandate' compels a finding of relevancy before confidential financial information may be disclosed. [Citation.]" (*Gordon v. Superior Court* (1997) 55 Cal.App.4th 1546, 1557.) As summarized in *Rancho Publications v. Superior Court* (1999) 68 Cal.App.4th 1538, 1549–1550: "Courts carefully balance the 'compelling' public need to disclose against the confidentiality interests to withhold, giving great weight to fundamental privacy rights. Mere relevance is not sufficient; indeed, such private information is presumptively protected. The need for discovery is balanced against the magnitude of the privacy invasion, and the party seeking discovery must make a higher showing of relevance and materiality than otherwise would be required for less sensitive material. [Citations.]"

Here, appellants offer two reasons why there was a compelling need for information about Bren's support arrangements with other children and their mothers. First, they argue that such evidence would have been relevant to Bren's credibility—that is, evidence of other arrangements involving promises to maintain a relationship with the children or to provide for them in a manner consistent with his station in life would have

made it more likely that made similar promises to Gold, thereby tending to discredit his testimony to the contrary. Preliminarily, we note that the existence of such promises is nothing more than appellants' speculation. (See *Davis v. Superior Court, supra*, 7 Cal.App.4th at p. 1017 ["Mere speculation as to the possibility that some portion of the records might be relevant to some substantive issue does not suffice" to establish the heightened threshold of relevance].) In any event, appellants have failed to demonstrate that the evidence would have been relevant. According to Evidence Code section 210, "'[r]elevant evidence' means evidence . . . having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." "'It is a fundamental rule of evidence that you cannot prove the commission of an act by showing the commission of similar acts by the same person at other times and under other circumstances. Such evidence is simply not relevant. . . .' [Citations.]" (*Brokopp v. Ford Motor Co.* (1977) 71 Cal.App.3d 841, 851.)

Appellants likewise failed to demonstrate a compelling need for the information on the basis of their second reason that higher payments to other children would have tended to show that Bren was not providing appellants with everything they reasonably needed or wanted. Appellants had the benefit of Judge Schneider's testimony that the parent's station in life and ability to pay is relevant to the determination of reasonable needs. He testified that under such circumstances, "reasonable needs" could include private school, a large home, a nanny and domestic help, nice vacations and private tutors. Appellants testified that their reasonable needs—including the foregoing—had been satisfied throughout their childhood and beyond. Evidence of payments to other children—whether or not in a different amount than appellants received—would not have tended to disprove this testimony, and therefore was not relevant. (See Evid. Code, § 210.)

In any event, even if there had been some error in precluding the discovery and admission at trial of evidence of other financial arrangements, appellants have failed to demonstrate they suffered prejudice. Financial information concerning arrangements with other children was not relevant to the jury's conclusion that Bren did not make a

false promise. Accordingly, there is no reasonable probability that the verdict would have been different had such information been the subject of discovery and admitted as evidence. (See *Beyda v. City of Los Angeles* (1998) 65 Cal.App.4th 511, 521 [no prejudice from the exclusion of evidence irrelevant to the element on which the plaintiff's case faltered].)

B. Bren's Will and Estate Planning Documents.

In her complaint, Gold alleged that Bren promised he would make provision for the children "at his death, for their economic welfare in a manner commensurate with his vast wealth and station in life."[2] On the basis of this allegation, appellants sought discovery of Bren's estate planning documents. As with the information about Bren's arrangements with other children and their mothers, the trial court twice ruled that appellants were not entitled to estate planning information. In the October 2009 order granting Bren's request for a protective order, the trial court ruled that "will and estate documents fall within the privacy protections in Article I, Section 1, of the California Constitution." The trial court declined to revisit its conclusion in the March 2010 order denying appellants' discovery requests. Ultimately, the trial court granted Bren's motion in limine to preclude evidence of wills and estate planning documents at trial.

In *Estate of Gallio* (1995) 33 Cal.App.4th 592, 597, the court concluded that wills and testamentary documents are protected from discovery under the right of privacy set forth in the California Constitution. Again, because of the protection, the court must balance the fundamental right of privacy against a compelling need for discovery. (*Ibid*.) Appellants assert that they demonstrated a compelling need for the information on the basis of hypotheticals. They posit that if Bren made a provision for appellants in his will and then changed it, such conduct would show he never intended to provide for them upon his death. Or they claim that if Bren made provision for children in his will other than appellants, such conduct, too, would show a lack of intent to perform. These

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[2] Notably, Gold never testified about this specific promise at trial. Rather, she more vaguely stated that Bren promised "he would always have a relationship with the kids and that he would always make sure that they were taken care of."

scenarios, however, fail to demonstrate how testamentary evidence was relevant to appellants' position. Bren denied making promises outside the scope of the written agreements. Thus, the absence of any provision for appellants in his will was consistent with his testimony and failed to establish any lack of intent to perform.

In any event, appellants have again failed to demonstrate prejudice from the trial court's rulings. (See *Philippine Export & Foreign Loan Guarantee Corp. v. Chuidian* (1990) 218 Cal.App.3d 1058, 1085 ["to obtain a reversal of a judgment on appeal on the ground of erroneous discovery rulings, appellant must demonstrate the rulings were so prejudicial as to constitute a miscarriage of justice"].) The evidence was undisputed that, despite Gold's request, Bren had refused to purchase a life insurance policy or set up a trust fund to provide for appellants in the event of his untimely death. Given that the jury knew Bren had declined to make long-term provision for appellants' security, it is not reasonably probable that the addition of testamentary documents possibly confirming that evidence would have affected the verdict.

II. The Trial Court Properly Exercised Its Discretion in Limiting Evidence and Theories Relating to Damages.

In several variations of essentially the same argument, appellants contend that the trial court should have permitted them to present additional evidence and argument demonstrating what Gold would have received as support had she brought an action in family law court. Specifically, appellants contend that the trial court abused its discretion by precluding them from offering evidence of the family law court guideline or "DissoMaster" calculation of support; they should have been permitted to establish damages calculations by presenting a trial-within-a-trial; Judge Schneider's testimony should not have been admitted; they were entitled to additional information about Bren's income as well as that of the Irvine Company; and the family law judgment served to bar the litigation of certain damages issues. We disagree.

Preliminarily, we observe that each of appellants' arguments relates to damages, not liability. Because the jury concluded that Bren was not liable for fraud, having never

made a false promise that was material to the transaction, it did not reach the issue of damages. For this reason, any ruling concerning damages—even if erroneous—was not prejudicial to appellants and therefore cannot be the basis for reversal of the judgment. (*Lewis v. County of Contra Costa* (1955) 130 Cal.App.2d 176, 179 [error in admitting evidence of the disabled plaintiff's accumulated sick leave was not prejudicial because "[t]he verdict clearly indicates that the jury found there was no liability and did not reach the point of fixing the amount of damages sustained"].) Appellants argue that evidence relating to damages was relevant to the question of Bren's incentive to make the promises asserted by Gold. The *Lewis* court rejected a similar argument, finding that the sick leave evidence was not an unfair attack on the plaintiff's credibility and did not tend to show he was attempting to seek a double recovery. (*Id*. at p. 179.) While we agree with the *Lewis* court's analysis that any error concerning damages was not prejudicial, we briefly address each of appellants' damages claims to explain why there was no error.

A. DissoMaster Calculations.

The trial court permitted both parties to offer evidence and argument that the appropriate measure of damages for the jury to consider was the difference between what Bren paid to Gold and what a family law court would have ordered Bren to pay. The trial court accurately observed that this measure was precisely what appellants sought in their complaint. They alleged that as a result of Bren's fraud, they "have been damaged in an amount at least equal to the difference between the economic value of the life-style provided by the child support actually paid to Jennifer Gold as custodial parent by defendant to date, and the economic value of the life-style which would have been provided by the amounts which he was required to pay and would have been ordered to pay to Jennifer Gold as custodial parent under California law . . . ." While the parties were able to prove that amount through their own testimony and expert witnesses, the trial court granted Bren's motion in limine and declined to permit the jury to consider DissoMaster calculations to ascertain fraud damages. We review the trial court's in limine ruling for an abuse of discretion. (*Zhou v. Unisource Worldwide* (2007) 157 Cal.App.4th 1471, 1476.)

"The DissoMaster is one of two privately developed computer programs used to calculate guideline child support as required by [Family Code] section 4055, which involves, literally, an algebraic formula."[3] (*In re Marriage of Schulze* (1997) 60 Cal.App.4th 519, 523–524, fn. 2.) Thus, the DissoMaster is a tool utilized exclusively in family law cases that may result in a rebuttable presumption affecting the burden of proof that the amount of child support established by the guideline formula is the correct amount of child support to be ordered. (Fam. Code, § 4057, subds. (a) & (b).) The presumption may be rebutted by evidence showing that application of the formula would be unjust or inappropriate for several reasons, among them that "[t]he parent being ordered to pay child support has an extraordinarily high income and the amount determined under the formula would exceed the needs of the children." (Fam. Code, § 4057, subd. (b)(3).)

Appellants contend that they should have been permitted to satisfy their burden to establish damages by proffering the DissoMaster calculation, which would have then enabled Bren to offer evidence to rebut the presumption. While we reiterate as a threshold matter that this is a fraud action—not a family law matter—we find it significant that such a procedure would not have occurred in family law court. In *Estevez v. Superior Court* (1994) 22 Cal.App.4th 423, 431, the court held that where an extraordinarily high income parent stipulates as to his ability to pay any amount of reasonable child support, it is unnecessary for the trier of fact to engage in the burden-shifting process contemplated by the Family Code. Rather, the only question for the trier of fact is what amount of support will meet "the reasonable needs of the children commensurate with [the parent's] status as an extraordinarily high earner." (*Ibid*.)

Here, had the jury reached the question of damages, it received the evidence and instructions necessary to answer the question of appellants' reasonable needs, commensurate with Bren's income status. The jury received information about Bren's

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[3] The Legislature did not adopt the algebraic formula on which the DissoMaster relies until 1992, four years after Christie was born. (See *In re Marriage of Fini* (1994) 26 Cal.App.4th 1033, 1041, fn. 7.)

annual income between 1988 and 2001, which showed that by 2001 he earned approximately $58 million. Gold and appellants testified about appellants' reasonable needs while growing up, which included living in Beverly Hills, attending private school and taking multiple vacations. On the basis of Gold's testimony that Bren told her he spent approximately $3 million to $5 million per month to maintain his lifestyle, appellants argued that their reasonable needs would be met by a monthly support payment of $400,000.

Enabling the jury to properly consider this evidence and argument, the trial court instructed that appellants claimed as damages the difference between what a family law court would have ordered as support between February 1988 and September 2002 and what Bren actually paid during the same time period. It further directed the jury to determine that amount on the basis of the law explained in the instruction, which provided: "At all relevant times the family law judge would order the parent to make support payments sufficient for the child's reasonable needs. In deciding the amount of those payments, that judge would evaluate that parent's income and ability to pay. That support obligation extends beyond life's mere necessities if that parent is able to afford more. A child's needs vary with the parent's standard of living, circumstances and station in life. Whether that parent is rich or very rich can make a difference in that determination." Because appellants had the opportunity to present evidence consistent with the instructions governing support calculations, the trial court properly exercised its discretion in excluding the DissoMaster calculations.

B. Trial-Within-A-Trial.

In a legal malpractice action, to establish causation and damages the plaintiff is required to prove that but for the attorney's negligent acts or omissions, he would have obtained a more favorable judgment or settlement in the action in which the malpractice allegedly occurred. (*Viner v. Sweet* (2003) 30 Cal.4th 1232, 1241.) This requirement essentially requires a "trial-within-a-trial" of the underlying case. (*Mattco Forge, Inc. v. Arthur Young & Co.* (1997) 52 Cal.App.4th 820, 834.) The trial-within-a-trial method does not recreate what the trier of fact would have done, but instead requires the jury to

determine what a reasonable court or jury would have done. (*Id.* at p. 840.) The standard is an objective one, with the malpractice jury to decide what the result should have been, rather than what its result would have, could have or might have been, had the matter been before a particular judge or jury. (*Ibid*.)

Relying on *Mattco Forge, Inc. v. Arthur Young & Co., supra*, 52 Cal.App.4th 820, appellants argue that they should have been permitted to show what a family court would have awarded by utilizing the trial-within-a-trial methodology sanctioned in professional negligence cases. The trial court rejected their efforts, as do we. Appellants argue that this method was warranted because their damages recovery was the difference between what they received and what Bren would have been ordered to pay by a family law court. But this measure of damages is no different than that in any fraud case—the difference between what the defrauded party has received and that which she would have received and had a right to expect, but for the fraud. (Civ. Code, §§ 1709, 3333.)

More importantly, appellants ignore that a trial-within-a-trial utilized in professional negligence cases is a method of establishing causation, as "the plaintiff must show that *but for* the alleged malpractice, a more favorable result would have been obtained." (*Viner v. Sweet, supra*, 30 Cal.4th at p. 1239.) Promissory fraud—the cause of action brought by appellants—has no "but for" element. Rather, the elements of promissory fraud are: "'(1) a promise made regarding a material fact without any intention of performing it; (2) the existence of the intent at the time of making the promise; (3) the promise was made with intent to deceive or with intent to induce the party to whom it was made to enter into the transaction; (4) the promise was relied on by the party to whom it was made; (5) the party making the promise did not perform; (6) the party to whom the promise was made was injured.' [Citation.]" (*Muraoka v. Budget Rent-A-Car, Inc.* (1984) 160 Cal.App.3d 107, 119.) Litigating a trial-within-a-trial was unnecessary to establish any of these elements.

C. Judge Schnider's Testimony.

Before trial, appellants moved in limine to exclude expert testimony on the issue of what a family law court would have awarded as child support during the applicable

time period for which they contended Gold would have sought support, and specifically moved to exclude Judge Schnider's testimony. The trial granted the motion in part, ruling: "He [Judge Schnider] can testify to the general procedures that you would utilize when you determine the parent in question has an income of two or three million or more so you have to go through this different approach. He can testify to that. I'll let him testify to that. I'm not going to let him testify what he would have done if he would have been the judge." On appeal, appellants challenge the admission of that limited aspect of Judge Schnider's testimony, arguing that it invaded the province of the jury.

A witness may testify as an expert "if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert" concerning "a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." (Evid. Code, §§ 720, subd. (a) & 801, subd. (a).) Expert opinion may be admitted to "'assist'" the jurors, "'even if the jury has some knowledge of the matter . . . .'" (*People v. McAlpin* (1991) 53 Cal.3d 1289, 1300.) "'It will be excluded only when it would add nothing at all to the jury's common fund of information, i.e., when "the subject of inquiry is one of such common knowledge that men of ordinary education could reach a conclusion as intelligently as the witness."'" (*Ibid.*) "[T]he decision of a trial court to admit expert testimony 'will not be disturbed on appeal unless a manifest abuse of discretion is shown.'" (*Id*. at p. 1299; accord, *Avivi v. Centro Medico Urgente Medical Center* (2008) 159 Cal.App.4th 463, 467 ["A court's decision to exclude expert testimony is reviewed for abuse of discretion"].)

Here, the trial court properly exercised its discretion to permit Judge Schnider to testify about family law court procedures. He testified about the process a court would have used between 1988 and 1996 to determine support payments for children of a high wage earner, which was the time period during which Gold entered into the agreements with Bren. Such procedures were beyond the common experience of the jury. Moreover, contrary to appellants' assertion, Judge Schnider's testimony was unlike that of the expert in *Piscitelli v. Friedenberg* (2001) 87 Cal.App.4th 953, 972–974, where the appellate court held it was an abuse of discretion to permit expert testimony in a legal malpractice

case on the issue of how certain arbitrators would have ruled in the underlying matter. The court reasoned that "[t]o entrust that ultimate determination to an expert, i.e., to allow the expert to reach the ultimate question of whether Piscitelli's underlying arbitration would have been successful, invades the jury's function." (*Id.* at p. 974.) Here, in contrast, Judge Schnider testified only as to the approach he would have used in ascertaining the appropriate level of support under the circumstances. He did not testify about the likelihood of appellants receiving any particular support award; rather, the jury received instructions that specifically directed them to make that determination. (Compare *Piscitelli v. Friedenberg, supra,* at pp. 975–976 [reasonably probable that incomplete jury instructions led the jury to rely on expert testimony as to how the arbitrators would rule, thereby prejudicially affecting its verdict].)

D. Discovery and Evidence of Bren's Income.

Appellants further contend that the trial court abused its discretion by precluding them from obtaining discovery about Bren's gross income and income earned by the Irvine Company and, in turn, by preventing them from presenting additional income evidence at trial. They rely in large part on our 2005 writ opinion in which we determined that appellants were entitled to the discovery of Bren's "gross income" as that term is used in Family Code section 4058[4] and remanded the matter to allow appellants "to conduct appropriately limited discovery with which to obtain reliable information of Bren's annual gross income."

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[4] Family Code section 4058, subdivision (a), defines "annual gross income" to include: "(1) Income such as commissions, salaries, royalties, wages, bonuses, rents, dividends, pensions, interest, trust income, annuities, workers' compensation benefits, unemployment insurance benefits, disability insurance benefits, social security benefits, and spousal support actually received from a person not a party to the proceeding to establish a child support order under this article. [¶] (2) Income from the proprietorship of a business, such as gross receipts from the business reduced by expenditures required for the operation of the business. [¶] (3) In the discretion of the court, employee benefits or self-employment benefits, taking into consideration the benefit to the employee, any corresponding reduction in living expenses, and other relevant facts."

The record establishes that by 2006, Bren had produced his personal ledger which reflected his income from 1988 to 2001, as well as his W-2, 1099 and K-1 forms utilized for income tax purposes. (See *In re Marriage of Loh* (2001) 93 Cal.App.4th 325, 332 [tax returns identify a presumptively correct measure of gross income].) Bren's personal financial manager, John Flynn, subsequently averred that during the relevant time period Bren did not exercise any stock options, he did not receive income from an estate or business trust, his business expense reimbursements did not serve to offset personal living expenses, and he did not realize gains from the sale of real property other than personal residences. This information satisfied the concern we expressed in 2005 that "[a]lthough the income reported on Bren's W-2 and 1099 forms may constitute an approximation of his annual gross income, there is no evidence in the record proving this to be so."

Citing a *Business Week* article that described Bren's lifetime charitable giving level as exceeding $1.3 billion, appellants speculate that the income information they received was incomplete. According to that article, however, Bren and the Irvine Company had recently donated undeveloped land to the public. There is no indication in the article how that land was valued or how much of the estimated value was comprised of appreciation over time. As Bren indicated at trial, there is a distinction between income from the Irvine Company and asset appreciation. And as we indicated in our prior opinion, Family Code section 4058 is concerned with and specifically defines what constitutes a parent's income for support purposes. Appellants' argument does not suggest that Bren's production of income information was in any way incomplete.

Correspondingly, we find no basis in the record to support appellants' assertion that they were precluded from presenting evidence of Bren's income to the jury. To the contrary, Bren was questioned extensively about his income and assets, and the jury received documentary evidence reflecting Bren's annual income for the relevant time period.

Finally, the trial court properly exercised its discretion to preclude additional discovery about the Irvine Company. The trial court's ruling was consistent with our

2005 determination that appellants had not shown good cause for the extensive discovery of financial information sought from business entities related to Bren. In an effort to overcome these rulings, appellants argue that information about the value of the Irvine Company should have been produced as evidence of Bren's "earning capacity." (See Fam. Code, § 4058, subd. (b) ["The court may, in its discretion, consider the earning capacity of a parent in lieu of the parent's income, consistent with the best interests of the children"].) Typically, the attribution of "earning capacity" is used to calculate sufficient support from an unemployed or underemployed parent. (*In re Marriage of Everett* (1990) 220 Cal.App.3d 846, 859.) We decline to accept appellants' position that evidence of a high-wage parent's earning capacity is relevant in all instances because of the hypothetical possibility that a company he owns could pay him a higher salary. Absent any evidence that Bren had artificially deferred his income, that his salary was inconsistent with those of similarly situated individuals in the industry or that there was anything else to suggest some collusive arrangement involving the Irvine Company, there was no basis to allow discovery of financial information about the Irvine Company beyond its provision of Bren's gross income.

The cases cited by appellants do not persuade us that a different conclusion is warranted. (See *In re Marriage of Berger* (2009) 170 Cal.App.4th 1070, 1081–1083 [parent's support obligation may not be reduced by a voluntary agreement to defer salary]; *In re Marriage of Williams* (2007) 150 Cal.App.4th 1221, 1238–1241 [finding that trial court has discretion to impute a reasonable rate of return on supporting parent's investment portfolio and investment property to calculate guideline child support]; *In re Marriage of Cheriton* (2001) 92 Cal.App.4th 269, 291–292 [trial court abused its discretion in refusing to consider parent's substantial wealth (described as tens of millions in stock and options) in setting support]; *In re Marriage of Destein* (2001) 91 Cal.App.4th 1385, 1396–1397 [no abuse of discretion to impute some level of income to assets invested in a growth portfolio].) Here, the jury received evidence of Bren's substantial wealth. Bren produced information about his income from multiple sources, including investment accounts and stock option exercises, that showed a steady and

significant increase in his annual income between 1988 and 2001 which ranged from the millions and to the tens of millions. In view of this information, the trial court properly exercised its discretion to limit additional discovery about the Irvine Company.

E. Effect of Family Law Judgment.

The family law judgment, which covered Bren's support obligations for the time period after the last agreement expired, included an award of $25,000 per month each to Christie and David to cover their "intangible needs." Though disputing that the family law order undervalued the award for their reasonable, tangible needs, appellants contend that the award for intangible needs collaterally estopped Bren from arguing that the jury was precluded from awarding an amount for intangible needs. This argument fails for two independent reasons.

First, collateral estoppel applies when there is a second action between the same parties on a different claim, and provides that the first action """operates as an estoppel or conclusive adjudication as to such issues in the second action which were actually litigated and determined in the first action."""" (*Murray v. Alaska Airlines, Inc.* (2010) 50 Cal.4th 860, 867.) "For purposes of collateral estoppel, an issue was actually litigated in a prior proceeding if it was properly raised, submitted for determination, and determined in that proceeding. [Citation.] In considering whether these criteria have been met, courts look carefully at the entire record from the prior proceeding, including the pleadings, the evidence, the jury instructions, and any special jury findings or verdicts." (*Hernandez v. City of Pomona* (2009) 46 Cal.4th 501, 511.) Because appellants have not offered anything from the prior action beyond the trial court's order—such as pleadings, motions, or evidence—they have not met their burden to establish that the issue of appellants' intangible needs was actually litigated.

Second, we find no indication in the record that appellants were estopped from arguing that damages could include their intangible needs. Appellants testified that they suffered because Bren was not present while they were growing up. David testified that he observed his friends with their fathers and felt like he was "missing out on something that [he] didn't really understand." Moreover, in connection with the instructions

concerning the jury's obligation to determine the difference between what appellants received and what a family law court would have ordered, the trial court instructed that a parent's "support obligation extends beyond life's mere necessities if that parent is able to afford more. A child's needs vary with the parent's standard of living, circumstances and station in life." The evidence and instructions demonstrated that the jury was not estopped from including an element of intangible needs in awarding damages.

III. The Trial Court Properly Granted Summary Judgment Against Gold.

In December 2006, the trial court granted summary judgment in favor of Bren on the ground that the three-year limitations period in Code of Civil Procedure section 338, subdivision (d) barred the action.[5] In its statement of decision, the trial court concluded that Bren's alleged misrepresentations were comprised of promises to recognize appellants and maintain a relationship with them and were made prior to Gold's entering the first 1988 agreement. After summarizing the undisputed evidence, the trial court reasoned that "if indeed Bren had promised to: 1) provide support for Christie and David in a manner and amount commensurate with his vast wealth past their childhood and into their majority, 2) recognize them, and 3) always maintain a relationship with them, Gold was undisputedly aware or at least should have been aware that Bren had broken those promises on many occasions beginning in 1988 and proceeding on forward." Accordingly, the trial court ruled "that the uncontradicted facts are susceptible of only one legitimate inference which is that the limitations period accrued well over three years before Plaintiffs filed their Complaint in May of 2003."

We review a summary judgment de novo to determine whether there is a triable issue as to any material fact and whether the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c); *Galanty v. Paul Revere Life Ins. Co.*

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[5] Subsequently, the trial court ruled that the limitations period was tolled as to appellants while they were minors, enabling them to pursue the action. Moreover, because judgment was not entered against Gold until after the jury verdict, Gold's challenge to the grant of summary judgment is timely.

(2000) 23 Cal.4th 368, 374.) To be entitled to judgment, the moving party must show by admissible evidence that the "action has no merit or that there is no defense" thereto. (Code Civ. Proc., § 437c, subd. (a).) A moving defendant meets this burden by presenting evidence demonstrating that one or more elements of the cause of action cannot be established or that there is a complete defense to the action. (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 849–850.) Once the defendant makes this showing, the burden shifts to the plaintiff to show the existence of a triable issue of material fact, which must be demonstrated through specific facts based on admissible evidence and not merely the allegations of the pleadings. (Code Civ. Proc., § 437c, subd. (p)(2); *Borders Online v. State Bd. of Equalization* (2005) 129 Cal.App.4th 1179, 1188.) "'While resolution of the statute of limitations issue is normally a question of fact, where the uncontradicted facts established through discovery are susceptible of only one legitimate inference, summary judgment is proper.'" (*Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, 487.)

Bren moved for summary judgment on several grounds, including that Gold filed her fraud claim after the applicable limitations period had run. An action for fraud must be brought within three years of the fraud, but the cause of action is "not deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake." (Code Civ. Proc., § 338, subd. (d).) As explained in *Debro v. Los Angeles Raiders* (2001) 92 Cal.App.4th 940, 950, a plaintiff's "discovery" of the facts constituting the fraud cause of action means only that he or she is aware of sufficient facts to put a reasonable person on inquiry notice of the cause of action. Thus, courts interpret Code of Civil Procedure section 338, subdivision (d) to mean the statute of limitations commences "when the plaintiff suspected or should have suspected that an injury was caused by wrongdoing." (*Kline v. Turner* (2001) 87 Cal.App.4th 1369, 1374.) "The statute of limitations begins to run when the plaintiff has information which would put a reasonable person on inquiry. A plaintiff need not be aware of the specific facts necessary to establish a claim since they can be developed in pretrial discovery. Wrong and wrongdoing in this context are understood in their lay and not legal senses." (*Ibid.*,

citing *Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1110–1111.) Once a plaintiff suspects or should suspect wrongdoing, even without being aware of the specific facts necessary to establish a claim, she must affirmatively "go find the facts; she cannot wait for the facts to find her." (*Jolly v. Eli Lilly & Co.*, *supra*, at pp. 1110–1111.)

We agree with the trial court that the undisputed evidence established that Gold knew or should have known that Bren's asserted promises were fraudulent more than three years before she filed her May 2003 complaint. With respect to the promise that Bren would always provide support for appellants into their majority in a manner and amount commensurate with his vast wealth, the undisputed evidence showed that in 1988 Bren declined to set up a life insurance policy for appellants; in 1988 and again in 1991 Bren refused to set up a trust fund for appellants; Gold understood at the time of the 1989 agreement that Bren intended for his support obligations to expire in a manner consistent with California law, with the exception of his agreement to pay for educational expenses; Bren required Gold to create a budget and itemize her support expenses, and he declined to pay for multiple expenses outside of those parameters; Gold knew that many of the provisions in the 1988 agreement and beyond were inconsistent with Bren's asserted oral promise; and Bren made clear through his negotiation of the multiple agreements with Gold that he did not intend to provide for more than was specified in each of those agreements.

Similarly, with respect to Bren's promises that he would recognize appellants and always maintain a relationship with them, the undisputed evidence showed that Bren and Gold consistently agreed in the written agreements that they would not identify Bren as appellants' natural father; 1989 correspondence from Bren's attorney stated that Bren had already denied paternity to a number of individuals; 1989 correspondence from Gold stated that Bren had shown no interest in being involved with Christie's upbringing; appellants never went on vacation with Bren or stayed overnight at his home; and Bren had not had any contact with appellants since 1997.

On the basis of the undisputed evidence, Gold suspected or reasonably should have suspected that Bren never intended to perform the asserted promises well before

May 2000. The evidence showed that Bren not only failed to carry out any of the asserted promises, but also acted in a manner directly contrary to any of those promises for many years. By waiting for more than three years after being aware of sufficient facts to put a reasonable person on notice of Bren's wrongdoing, Gold lost her right to pursue her fraud claim. "[T]he fundamental purpose of the statute [of limitations] is to give defendants reasonable repose, that is, to protect parties from defending stale claims. A second policy underlying the statute is to require plaintiffs to diligently pursue their claims. Because a plaintiff is under a duty to reasonably investigate and because a *suspicion* of wrongdoing, coupled with a knowledge of the harm and its cause, will commence the limitations period, suits are not likely to be unreasonably delayed, and those failing to act with reasonable dispatch will be barred." (*Jolly v. Eli Lilly & Co.*, *supra,* 44 Cal.3d at p. 1112.)

We find no merit to Gold's contentions that summary judgment was improperly granted. First, characterizing the undisputed evidence as showing nothing more than Bren's nonperformance, she relies on *Tenzer v. Superscope, Inc.* (1985) 39 Cal.3d 18, 30–31 for the proposition that something more than nonperformance of an oral promise is required to establish fraudulent intent. But here, evidence of Bren's nonperformance well before 2000—or more accurately, his conduct that was completely inconsistent with any of the asserted oral promises—was sufficient to make a reasonably prudent person suspicious of fraud, thereby putting Gold on inquiry. The evidence here is akin to that in *Kurokawa v. Blum* (1988) 199 Cal.App.3d 976, where the plaintiff brought a cause of action for fraud alleging that the defendant intentionally misrepresented to her in 1965 when they began their relationship that he would share equally with her any accumulated property and earnings if she devoted herself to providing domestic services. The appellate court affirmed a grant of summary judgment on the ground the 1983 complaint was time-barred, explaining: "To the extent Kurokawa characterized Beaumont's promises as 'fraudulent,' that fact immediately became apparent upon his nonperformance in January 1971 when the parties separated." (*Id.* at p. 989; see also *Kline v. Turner, supra,* 87 Cal.App.4th at p. 1375 [summary judgment on statute of

limitations grounds affirmed where the plaintiff knew, more than three years before filing suit, that the defendant had not paid him as promised; the plaintiff should have reasonably suspected that the defendant's excuse for nonpayment was something other than negligence].)

Second, Gold argues that the extent of her inquiry should have been evaluated in light of her confidential relationship with Bren. The trial court soundly and properly rejected this claim, citing undisputed evidence showing that between 1988 and 1996 the parties dealt with each other arms' length, represented by separate counsel. (See *In re Marriage of Baltins* (1989) 212 Cal.App.3d 66, 87–88 [where parties elect to deal with each other at arms' length, any obligations imposed by a confidential relationship terminate]; *Tracy v. Tracy* (1963) 213 Cal.App.2d 359, 363 [husband and wife not in a confidential relationship during settlement negotiations where each party had separate counsel and all negotiations were conducted in the presence of counsel].)

Finally, Gold contends that the tolling of the limitations period later applied to appellants because of their minority should have been applied to her as well. She relies on a statement in *Leeper v. Beltrami* (1959) 53 Cal.2d 195, 208–209, where the court asked whether the fact that the limitations period was tolled as to a husband could benefit his wife and explained: "If the cause of action were a joint one, the statute would be tolled as to both. 'If an action not severable is not barred as to one of the parties on account of his infancy at the time the cause of action arose, it is not barred as to either of the other parties.' [Citation.]" But the *Leeper* court declined to apply the rule in view of its limited nature, stating that "[n]ormally parties are not joint obligees unless they have entered a contract together which operates so as to give them a joint right of action [citations], or, unless a defendant or defendants have injured a property interest owned by plaintiffs in some form of joint ownership. [Citation.]" (*Id*. at p. 209.) A cause of action

for fraud falls into neither of these categories. Accordingly, the limitations period as to Gold's separate cause of action was not tolled.[6]

DISPOSITION

The judgment is affirmed. Bren is entitled to his costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.

DOI TODD

We concur:

_____, P. J.

BOREN

_____, J.

CHAVEZ

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[6] Appellants raise a handful of other issues that hinge on our reversal of the judgment. Because we have concluded that the judgment must be affirmed, we need not consider the balance of appellant's arguments. They include whether evidence of Bren's new worth should be produced before the punitive damages phase of any retrial, whether Bren should have been permitted to file a cross-complaint for indemnity against Gold (which he voluntarily dismissed before trial) and whether the demurrer to Gold's subsequent cross-complaint for indemnity should have been sustained.