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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

DIANE MINISH, Plaintiff and Appellant, v. HANUMAN FELLOWSHIP, Defendant and Respondent.	H041888 (Santa Cruz County Super. Ct. No. CV158348)

Plaintiff Diane Minish sustained serious personal injuries after she fell off a forklift on premises owned by defendant Hanuman Fellowship (the Fellowship).[1] Minish initially reported that her injuries occurred while she was working as a volunteer, doing construction work for the Fellowship. Both Minish and the Fellowship reported the injury to the Fellowship's workers' compensation carrier and Minish received more than $270,000 in workers' compensation benefits. Minish also filed an action with the Workers' Compensation Appeals Board (WCAB).

More than a year after the accident, Minish filed this civil action seeking damages for personal injuries. The Fellowship answered and asserted that workers' compensation was Minish's exclusive remedy. Minish argued the exclusive remedy rule did not apply because the Fellowship failed to comply with the requirements of Labor

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[1] The name "Hanuman" refers to a mythological monkey in an allegorical, spiritual text; the monkey represents devoted service.

Code section 3363.6[2] for extending employment status to its volunteers. She also argued that her injuries did not "aris[e] out of and in the course of [her] employment" (§ 3600, subd. (a)) because she was visiting a friend and was not volunteering at the time of the accident.

The trial court granted the Fellowship summary judgment on its exclusive remedy defense, reasoning that Minish was judicially estopped from denying she was subject to the workers' compensation remedy. This court reversed the summary judgment in a prior appeal in *Minish v. Hanuman Fellowship* (2013) 214 Cal.App.4th 437, 443 (*Minish I*). This court held judicial estoppel did not apply because the Fellowship had not shown that the WCAB made any findings in favor of Minish. This court rejected the Fellowship's arguments based on equitable estoppel, since the Fellowship had not pleaded equitable estoppel as a defense and there were triable issues concerning the elements of the defense. (*Id.* at p. 459.) This court also construed section 3363.6 and rejected Minish's interpretation of the statute. (*Minish I*, *supra*, at pp. 462-470.)

On remand, the trial court permitted the Fellowship to amend its answer to assert an equitable estoppel defense. The case went to trial. In the first phase of the trial, the court conducted a bench trial on the questions whether the Fellowship had complied with section 3363.6 such that its volunteers were subject to the workers' compensation laws, whether Minish was equitably estopped from asserting that her injuries did not arise out of and in the course of her employment, and on Minish's volunteer status. The trial court construed section 3363.6 and found the Fellowship had complied with its requirements. The court found that based on her prior representations that she was injured while doing volunteer construction work and her acceptance of workers' compensation benefits, Minish was equitably estopped from asserting in the civil action that her injuries did not

[2] Unspecified statutory references are to the Labor Code.

arise out of and in the course of her employment. In light of its findings, the trial court found it unnecessary to adjudicate the question of Minish's volunteer status.

On appeal, Minish contends the trial court abused its discretion when it allowed the Fellowship to amend its answer to allege equitable estoppel six weeks before trial. She contends the trial court erred when it held that section 3363.6 does not require the board of directors of a nonprofit to issue a formal resolution or a legal declaration under penalty of perjury and when it found that the Fellowship's evidence satisfied the statute's requirement of a declaration "in writing and prior to the injury" (§ 3363.6, subd. (a)). Minish also challenges the court's ruling on the equitable estoppel defense, arguing that the evidence was insufficient to satisfy three elements of the defense.

We conclude the court did not abuse its discretion when it granted the Fellowship's motion to amend its answer. We agree with the trial court's interpretation of section 3363.6 and conclude the Fellowship's evidence satisfied the statute's requirements. Thus, the Fellowship has shown that its volunteers are employees for the purpose of the workers' compensation laws. As for the equitable estoppel defense, to equitably estop Minish from asserting that her injuries did not arise out of and in the course of her employment (§ 3600, subd. (a)), the Fellowship was required to show that she knew she was not doing volunteer construction work when she was injured. We conclude the evidence was insufficient to establish such knowledge. Since the Fellowship has not shown that Minish was equitably estopped to argue that her injuries did not arise out of and in the course of her employment and the trial court did not reach this issue on the merits, we shall reverse the judgment.

FACTUAL AND PROCEDURAL HISTORY

I. Background Information Regarding Parties

Baba Hari Dass, an Indian monk, came to the United States in 1970 to teach yoga. The students and followers of Dass founded the Fellowship in 1974. A few years later, the Fellowship purchased land near Mount Madonna in Santa Cruz County and developed the Mount Madonna Center (Center)[3] as a retreat center. The Fellowship's founders moved onto the property in 1978; approximately 80 members of the Fellowship lived at the Center in 2014.

Minish first became involved with the Center in 1995 while investigating Eastern medicine after she was diagnosed with multiple sclerosis. She took classes at the Center in 1996 and 1998 and spent a few nights there. There was evidence she lived and worked at the Center full time in the summer of 2003. Minish works as a computer programmer or software engineer. In late 2003, she volunteered at the Center and used her computer skills to help the Center set up an online reservation system.

At the time of the accident in 2006, Minish was a member of the Center and paid dues of $25 per month. She worked full time as a software engineer for a company that was unrelated to the Fellowship; she was contracted to the University of California at Santa Cruz and did not live at the Center.

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[3] The original named defendants were the Fellowship, the Center, and the Mount Madonna Institute (Institute). The Institute, a separate legal entity, denied any relationship to Minish's accident. At trial, Minish dismissed her civil action as to the Institute and the Center. The Fellowship's enterprises include the Mount Madonna School, the Sirram Foundation, the Pacific Cultural Center in Santa Cruz, and the Gateway Store. The Sirram Foundation publishes Dass's books and raises money to support an orphanage in India.

II. Accident Facts[4]

On September 16, 2006, Minish went to the Center to see a friend who was gravely ill. She spoke with her friend's caregiver, who said it was not a good time to visit, so Minish decided to talk to Dass. The caregiver said Dass was at the "upper lot," working on the construction of the Navaratri, an effigy that is burned as part of an annual celebration. Minish wanted to see Dass and to see what the Navaratri looked like, so she went to the upper lot.

When she got there around noon, she saw 11 or 12 men, who were part of the "rock crew," and three wooden poles buried in the ground. One of the men told her to pick up a chainsaw and "get to work," but she declined because she had never operated a chainsaw before. Another man handed her a tape measure and asked her to measure something, which she declined to do. The men then asked her to get a man who was at the other end of the field near some felled trees to operate the chainsaw. Minish walked about 100 yards to where the man was sitting; when she spoke to him, he looked startled and ran off.

Minish waited for Dass by the felled trees. He did not show up, so she walked back to the area where the rock crew was working on the effigy. When she got there, the men were standing in a circle disagreeing about something. One of them told Minish Dass was sick and would not be coming. The men called her over; she thought they wanted her help to resolve some conflict or needed a small hand to access something.

They handed her a large metal chain and told her to stand on one of the forks of a forklift. Robert Aguirre was operating the forklift. He started the forklift; the forks "shot

[4] Our summary of the accident facts is from Minish's deposition, which was in evidence at trial. Although the parties did not ask the court to review the portion of Minish's deposition describing the accident during the evidentiary portion of the trial, the Fellowship attached most of this material as an exhibit to its trial brief.

into the air," and stopped at a height of 15 feet. Minish was standing on the right fork, which was quite wide. She did not lose her balance as the forks went up. The forks were next to one of the wooden poles. Minish grabbed onto the pole and yelled, "What are you guys doing?" Someone told her to let go and she did. As she transferred her left foot to the other fork, Aguirre raised the forks three to four feet higher. He drove the forklift 10 to 12 feet backward and stopped for a few seconds. He then drove the forklift forward and raised the forks even higher. The forklift hit a hole and shook; Minish was "launched" off the forklift and landed on the ground.

The Fellowship reported the accident to its workers' compensation carrier, the State Compensation Insurance Fund (SCIF), which provided workers' compensation benefits to Minish. In February 2007, Minish filed an application for adjudication of claim with the WCAB. Eight months later, she filed this civil action seeking compensatory and punitive damages for personal injuries due to negligence.

III. Prior Appeal

Minish's first appeal was from a summary judgment. The Fellowship moved for summary judgment arguing that Minish's exclusive remedy was workers' compensation, and Minish "sought summary adjudication that she was not covered by workers' compensation." (*Minish I*, *supra*, 214 Cal.App.4th at p. 443.) The trial court granted the Fellowship's motion and denied Minish's motion. The trial court applied judicial estoppel "to prevent [Minish] from denying that she was a volunteer/employee covered by [workers' compensation] at the time of the accident" and entered judgment for the Fellowship. (*Id*. at p. 454.) It stated, "This ruling rendered it unnecessary to determine whether there were triable issues concerning whether [Minish] was a volunteer/employee for purposes of workers' compensation when she was injured." (*Ibid*.)

This court reversed the summary judgment, reasoning that "the trial court erred in applying judicial estoppel because the material facts necessary to show that the WCAB

had adopted or accepted as true the position plaintiff asserted in her WCAB pleadings" (*Minish I*, *supra*, 214 Cal.App.4th at pp. 454-455)—one of the elements necessary to establish judicial estoppel—"were neither undisputed nor conclusively established." (*Id*. at p. 455; *id*. at pp. 449-450.) This court concluded that the defendants had conflated SCIF and the WCAB, that SCIF is not a judicial or quasi-judicial tribunal charged with authority to make binding determinations of workers' compensation claims, and that Minish's acceptance of workers' compensation insurance benefits did not establish that the WCAB ever adopted or accepted as true the matters asserted in her application for adjudication of claim (hereafter "WCAB Application" or "Application"). (*Id*. at p. 451.) Moreover, there was no stipulation between the parties concerning workers' compensation liability that had been approved by the WCAB. (*Id*. at p. 452.) This court also rejected the Fellowship's arguments that summary judgment was proper because Minish made binding and conclusive judicial admissions in her pleadings in both actions. (*Id*. at pp. 456-457.) The court held that although these may be evidentiary admissions, there were triable issues that precluded summary judgment based on those statements. (*Id*. at p. 458.) In addition, the court rejected the Fellowship's arguments based on the doctrine of equitable estoppel, since the Fellowship had not pleaded equitable estoppel as an affirmative defense, had not pleaded "the facts necessary to establish it," and there were triable issues concerning the elements of the defense. (*Id*. at p. 459.)

In *Minish I*, this court also addressed the parties' contentions regarding the interpretation of section 3363.6. Generally, persons who volunteer for private, nonprofit organizations, who receive no remuneration "other than meals, transportation, lodging, or reimbursement for incidental expenses," are *not* considered employees under the Workers' Compensation Act (sometimes "the Act"). (§ 3352, subd. (i).) But "[i]f a nonprofit organization wants to provide workers' compensation benefits to its volunteers, it may do so under section 3363.6." (*Minish I*, *supra*, 214 Cal.App.4th at p. 462.)

That section provides that "a person who performs voluntary service without pay for a private, nonprofit organization" shall be deemed an employee of the nonprofit for the purposes of the workers' compensation laws "while performing such service," "when the board of directors of the organization, in its sole discretion, so declares in writing and prior to the injury" (§ 3363.6, subd. (a)). In *Minish I*, we rejected Minish's contentions that (1) section 3363.6 required the Fellowship's board "to identify her personally by name and in writing and declare her to be a covered volunteer/employee" (*Minish I*, *supra*, at p. 462) (the personal identification requirement) and (2) the "declaration rendering volunteers covered employees does not become effective unless and until an affected volunteer has notice of the declaration and voluntarily accepts workers' compensation coverage before any injury" (the notice and acceptance requirement). (*Id.* at pp. 467-468.)

IV. Postappeal Procedure in the Trial Court

After this case returned to the trial court, the parties stipulated to a June 2, 2014 trial date. In April 2014, the trial court granted the Fellowship's motion to bifurcate the issue whether Minish was a volunteer worker on the date of the accident. The court thought bifurcation made sense, but stated the first phase of the trial needed to include everything concerning the exclusive remedy defense, including the question whether the Fellowship's board had done what was necessary under section 3363.6 to insure that its volunteers are covered by workers' compensation. The court also continued the trial date to June 30, 2014.

Two days later, the Fellowship filed a motion for leave to amend its answer to assert equitable estoppel as an affirmative defense. Minish opposed the motion, arguing that she would not have sufficient time to do discovery or challenge the defense before trial and the Fellowship had not offered any reason for the delay in bringing the motion. The trial court granted the motion to amend; it ordered that Minish would be allowed to

conduct expedited, limited discovery on the defense and held that the equitable estoppel issue should be heard in the first phase of the trial.

During a pretrial conference, the parties stipulated that the court would decide the legal questions whether the Fellowship had satisfied section 3363.6 and whether the action was barred by equitable estoppel. They also agreed that the question whether Minish was a volunteer at the time of the accident would be tried before a jury.

V. First Day of Trial: Evidence of Hanuman Fellowship's Compliance with Section 3363.6

A. Testimony of Jaya Maxon

Jaya Maxon has been a member of the Fellowship since it was founded in 1974 and has lived at the Center since 1979. She has been a volunteer since she joined the Fellowship. Her volunteer work has included coordinating programming and retreats, secretarial work, helping on work projects, and serving on the Fellowship's board of directors (Board) as its secretary. Maxon stated that people who live at the Center pay an "activity fee" and volunteer a certain number of hours as a credit against that fee.

Maxon testified primarily as a custodian of records and authenticated documents the Fellowship relied on to establish compliance with section 3363.6, including handwritten Board meeting notes, typed committee reports, and typed Board meeting minutes from 1978, 1985, 1986, and 1987.[5]

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[5] In 2008, in verified responses to requests for production of documents, the Fellowship stated: "there was a disastrous fire at the Mount Madonna Center in 1981, which destroyed all of its records. Fortunately, copies of some of the documents pertaining to Board of Directors Meetings were kept in [Ward Mailliard's] home." Before trial, Minish challenged the authenticity of documents produced by the Fellowship. Maxon therefore searched for documents again in 2013 or 2014 and found some original handwritten notes, reports, and minutes in an archive area, which she brought with her to trial.

In May 1978, the Board approved an addition to the Fellowship's bylaws, which provided that "[a]ll committees are subject to periodic review by the Board, and all minutes of meetings shall be submitted to the Board unless otherwise directed." The minutes from that meeting noted that the Board had "written [its] workman's compensation program to find out about covering 15 full-time volunteer workers."

According to the minutes from the June 1986 Board meeting, the Board chairman had "researched and found a company that will insure voluntary workers at a reasonable premium . . . ." Another Board member agreed to research the matter further and bring information back to the Board. In September 1986, the Board selected SCIF as its workers' compensation insurer. SCIF continued to provide workers' compensation coverage for the Fellowship through the date of Minish's accident. At that time, the policy contained a volunteer endorsement.

In 1987, the Board decided to provide group health insurance for certain Fellowship members. The minutes from the March 1987 meeting state: "MEDICAL INSURANCE: Manohar has researched and found a group plan to cover the Center and the Fellowship businesses. Several options for coverage were presented and a plan approved. A committee (Brajesh, Sadanand, Manohar)[6] was formed to work out the details of who was covered and how their premiums would be paid." According to the handwritten notes from that meeting, the Board reviewed different medical plans, discussed whether individuals or "the Center" should pay the premiums, supported

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[6] Fellowship members adopt Hindu or "yoga" names. The Board's records refer to Board members by their Hindu names. For example, Ward Mailliard used the Hindu name Sadanand, Gerald Friedberg used the name "Brajesh," and Brian Bielfeld used the name "Manohar." Minish adopted the Hindu name Sarita. For ease of reference, we shall hereafter refer to persons involved in this case by their given names, not their Hindu names, unless the given names are not in the record.

"subsidizing all long-term residents," and formed the committee to work out a plan for paying for the coverage.

At the next Board meeting in April 1987, the medical insurance committee presented a memorandum to the Board setting forth its proposal (Insurance Memo). The Insurance Memo was prepared by Fellowship president, Ward Mailliard. Maxon prepared the minutes of the April 1987 meeting. Those minutes originally described the Board's discussion of the proposed medical insurance program in paragraph 4. Maxon later drew an "X" through paragraph 4, wrote "See attached" next to it in pencil, and stapled a copy of the Insurance Memo and her handwritten notes to the minutes. At trial, 37 years later, Maxon could not recall why she wrote "See attached" next to paragraph 4 or whether that notation referred to her handwritten notes, the Insurance Memo, or both. A copy of the Insurance Memo was stapled to the minutes when Maxon found the original minutes. But the copy of the Insurance Memo that was attached to the April 1987 minutes—which contains language pertinent to the issues on appeal—is not very legible.

Maxon was absent from the next Board meeting on May 4, 1987; John Diefenbach took notes and prepared the minutes of that meeting. In so doing, Diefenbach used a copy of the Insurance Memo as scratch paper. The handwritten notes he took at that meeting were written on the back of a more legible copy of the Insurance Memo. The Insurance Memo stated in relevant part: "The [medical] insurance program is a voluntary program, however, residents will be urged strongly to consider participation. . . . *It should be noted that workmans* [*sic*] *compensation is in effect for all workers and volunteers in case of accidents during work hours*. This new program is directed at health related questions such as doctor's visits and long term illness." (Italics added.)

At the May 4, 1987 meeting, the Board reviewed and approved the plan in the Insurance Memo and decided to proceed with the plan "pending community response."

According to the minutes of the May 18, 1987 Board meeting, the "Mt. Madonna Community approved medical plan."

B. Testimony of Ward Mailliard

Ward Mailliard was one of the founders of the Fellowship. He was president of the Fellowship for 35 years, until 2012. Mailliard testified that there are different aspects of practice in yoga; one of which is karma yoga, which refers to selfless service. Selfless service includes volunteerism. When they started the Fellowship, everyone was a volunteer.

When the Fellowship purchased the property for the Center in 1978, Mailliard became concerned about obtaining workers' compensation insurance for the volunteers because of the construction work planned for the Center. When they bought the property, there were two buildings there. There are now approximately 40 structures at the Center. Most members do physical work on the property. The decision to provide workers' compensation insurance for volunteers applied to both the residents and the day volunteers who work at the Center. The Fellowship has purchased workers' compensation insurance for its volunteers since at least the early 1980's, perhaps earlier, and has maintained that coverage ever since.

Mailliard recalled preparing the Insurance memo. The Board decided on a health insurance plan for members who had some longevity with the Fellowship. The Fellowship has both paid employees and volunteers. The statement in the Insurance Memo that workers' compensation was in effect for all workers and volunteers for work-related injuries was true at the time. The Fellowship still has workers' compensation insurance and other forms of insurance. Although the Fellowship provides workers' compensation insurance, Mailliard was not aware of the requirements of section 3363.6 until after Minish's accident. The Board members did not discuss section 3363.6 at their April 1987 meeting.

Minish did not testify and presented no live witnesses. Her evidence included excerpts from Jean Ansell's deposition in which Ansell testified that she added Minish's name to the volunteer list after she reported the accident to SCIF.

C. Trial Court Ruling on Section 3363.6 Issue

At the end of the first day of trial, the court heard argument regarding the question whether the Fellowship had complied with the requirements of section 3363.6, subdivision (a)—whether the Fellowship's board of directors had "declare[d] in writing and prior to the injury" that "a person who performs voluntary service without pay" "shall . . . be deemed an employee of the organization for purposes [of the workers' compensation laws] while performing such service." Observing that this is a question of first impression, the trial court held that section 3363.6 does not require a formal resolution or a legal declaration under penalty of perjury. Although "things were done . . . in the less formal way," the trial court found the Fellowship complied with section 3363.6 since it had declared in writing prior to Minish's accident that its volunteers were covered by workers' compensation.

VI. Second Day of Trial: Evidence Regarding Equitable Estoppel

The only live witness during this phase of the trial was Mailliard. The parties relied on excerpts from Minish's deposition, documents from the workers' compensation claim, and pleadings in the civil action.

The evidence included two employer's reports of occupational injury or illness (Employer's Report) on the form prescribed by the Department of Industrial Relations (form 5020). (Cal. Code Regs., tit 8, §§ 14001, subd. (a), 14004.) The first Employer's Report was completed by Robert Peterson, the Fellowship's safety manager, on Sunday, September 17, 2006, the day after the accident. The second Employer's Report appears to have been completed by someone at SCIF on Monday, September 18, 2006, based on information provided by the Fellowship. The top of the form bears the name "State

Compensation Insurance Fund" and states "This form is sent to you for your review and records. Information shown was collected by our agent named below or via a reporting at our website." According to both Employer's Reports, Minish was a volunteer, working in the "special event" department when injured, and usually worked 12 hours a week.

The evidence included three employee's claim for workers' compensation benefits forms, which were on the form prescribed by the Department of Industrial Relations (the DWC-1 form). (Cal. Code Regs, tit. 8, § 10136, subd. (b) [describing form as "Employee's Claim for Workers' Compensation Benefits"]; *id*., §§ 10138, 10139.) The DWC-1 form has two sections: one for the employee to fill out and one for the employer to fill out. (*Id*., § 10139, p. 1288.74.) The Labor Code provides that an employer shall provide an injured employee with the DWC-1 form and a notice of potential eligibility for workers' compensation benefits within one working day of receiving notice or knowledge of a work injury that results in lost time beyond the employee's shift or medical treatment beyond first aid. (§ 5401, subd. (a).) The employee is to complete the form and file it with the employer. (§ 5401, subd. (d).)[7]

The first DWC-1 form was dated September 18, 2006 and signed by Minish. The employer's section of the form was signed by Jean Ansell, the Fellowship's bookkeeper. Ansell also maintained the volunteer list. Ansell did not fill in the dates that the DWC-1 form was provided to Minish or returned to the Fellowship.

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[7] The employee's filing of the DWC-1 form with the employer has several effects: (1) it commences the employee's entitlement to late payment supplements under section 4650, subdivision (d) and a medical evaluation under sections 4060, 4061 and 4062; (2) it tolls the time limits under sections 5405 and 5406 until the employer denies the claim or the injury becomes presumptively compensable; (3) it obligates the employer to authorize medical treatment up to $10,000 until the claim is accepted or rejected; and (4) it prohibits medical providers from collecting directly from the injured worker unless they have received notice that the claim has been rejected. (§§ 5401, subd. (d); 5402, subds. (c), (d); 3751, subd. (b).)

The second DWC-1 form was dated September 23, 2006 and signed by Minish; the employer section of the form was signed by Robert Peterson, the Fellowship's safety manager. This form was given to Minish on September 23, 2006; she returned it to the Fellowship four days later.

The third DWC-1 form was dated October 1, 2006. It was signed by Minish and by Mailliard on behalf of the Fellowship. It stated the employer provided the form to the employee on September 18, 2006 and she returned it that same day, apparently referring to the completion of the first DWC-1 form. Both the first and third DWC-1 forms stated that the injury occurred at 1:00 p.m. on September 16, 2006, in the "upper lot" at the Center.[8] The DWC-1 forms contain the following warning: "Any person who makes or causes to be made any knowingly false or fraudulent material statement or material representation for the purpose of obtaining or denying workers' compensation benefits or payments is guilty of a felony."

Mailliard testified that the Fellowship was required by statute to report the injury to its workers' compensation insurer within 24 or 48 hours. As we have noted, section 5401 required it to provide an injured worker with the DWC-1 form within one working day of receiving knowledge of the injury. In addition, California regulations required the Fellowship to file the Employer's Report with its workers' compensation insurer within five days after obtaining knowledge of the injury. (Cal. Code Regs, tit 8, § 14001, subd. (e).)

The evidence included the Fellowship's "Preliminary Medical Accident Report" form, which the Fellowship asked Minish to complete as part of its investigation. Minish signed this form on September 18, 2006. The form asked Minish to identify her status by

[8] The DWC-1 form asks the employee to state where the injury happened and to "[d]escribe injury and part of body affected," but does not ask how the accident happened.

circling one of three options: "on work exchange," "paid employee," or "guest/visitor"; there was no option for "volunteer." She circled "guest/visitor." Asked to describe what happened, Minish wrote: "Pulling a post out of ground[.] I had taken the chain off post at 14 ft. on forklift[.] The forklift moved and I fell off[,] hitting someone below and landing on my back."

Two days after the accident, the Board passed a resolution stating the Board was "very dismayed to hear of the accident involving a volunteer, Diane Minish on . . . September 16th. We understand that both Workers' Compensation and Cal-Osha [*sic*] were informed about the accident within 24 hours and we had a visit today September 18th by Robert Smith the Cal-Osha [*sic*] representative. . . ." The resolution stated the Board was aware normal safety equipment was not used and normal safety measures were not observed and asked the Center's administration to place Aguirre on administrative leave from operating equipment "until such time as the accident has been thoroughly investigated and the proper remedial measures [are] taken."

The Fellowship relied on eight reports that were written during the first five months after the accident in which health care practitioners and others reported that Minish gave a history of being injured in a fall from a forklift *while working as a volunteer* at the Center. (Unless otherwise stated, the reports were from 2006.) This evidence included: (1) a history and physical prepared by a physician at Regional Medical Center in San José (Regional) on September 16 (Minish gave a history of falling 15 feet from a scaffold; this report does not say she was volunteering); (2) a speech and language pathology evaluation at Regional dated September 19 ("Per [patient] she was working as volunteer and fell off forklift"); (3) an initial evaluation by an occupational therapist at Valley Medical Center (VMC) dated September 22 ("Patient reports that she was doing volunteer construction work"); (4) an initial evaluation and treatment plan by a psychologist at VMC dated September 22 ("Patient reports that she was doing volunteer

construction work"); (5) an assessment by a social worker at VMC dated September 25 (Patient "volunteers for several causes and feels very connected to her community/friends in Santa Cruz"; Patient "states she is on Workers' Comp because she was covered while she was volunteering"); (6) a history and physical by a physician upon Minish's admission to Dominican Hospital in Santa Cruz dated September 28 ("Ms. Minish . . . was doing volunteer work . . . [when] she fell . . . . She recalls the incident leading up to the fall quite clearly." "She works as a software engineer but was doing volunteer work at the time of her fall."); (7) an orthopedic consultation report dated November 16 ("[S]he was on the back of a forklift doing some volunteer work . . . ."; "She was volunteering on weekends doing construction [work] . . . ."); and (8) a neuropsychological evaluation dated February 15, 2007 (Minish "was volunteering her time at [Fellowship/Center] in September 2006 working on a construction site. . . . Ms. Minish said she was the only woman volunteer at the time"); and (9) a copy of the neuropsychologist's intake form, in which Minish wrote she was injured "whilst volunteering on a construction site."

Minish's injuries included a burst/compression fracture at T-7 with a possible spinal cord contusion; blunt chest trauma with two fractured ribs, right pulmonary contusion, pneumothorax and hemothorax; a right clavicle fracture; and two fractured toes on the left foot. After Minish was released from Dominican Hospital in October 2006, she lived at the Center until March or April 2007. Minish told the neuropsychologist she "was unable to return to her three-story town home after her accident because she could not manage stairs. Because of her devotion to the spiritual disciplines of Karmic yoga and selfless service, and her commitment to the [Center], the [Fellowship] offered her a room . . . ."

The Fellowship's evidence included Minish's WCAB Application and her "Petition for Benefits for Employer's Serious and Willful Misconduct" (S&W Petition)

(§ 4553). Minish signed the WCAB Application on February 15, 2007. Therein, she claimed that "while employed as a volunteer" by the Fellowship, she "sustained injury *arising out of and in the course of employment* . . . ." (Italics added.) She claimed her "[a]ctual earnings . . . were: volunteer." In the section where the applicant sets forth the issues to be adjudicated, Minish did not challenge employment, her status as a volunteer, or assert that the injury did not arise out of and in the course of her volunteer work, as she now claims. Neither SCIF nor the Fellowship has contested Minish's assertion that her injury arose out of and in the course of her employment.

The evidence included a compilation from SCIF of workers' compensation benefits paid to and on behalf of Minish. SCIF made temporary disability payments covering the periods September 16, 2006, through October 23, 2007, and January 17, 2008, through November 3, 2008, totaling $83,399.99. SCIF paid $190,318.65 for medical treatment rendered between September 2006 and April 2009.

In her S&W Petition, which was filed in September 2007, Minish alleged she was "injured while volunteering" and "[h]er injury occurred when she fell [from] the forks of a forklift after manipulating a chained pole that had been set in the ground. She was on the forks because she had been instructed to do so by her supervisor, . . . the forklift driver." She alleged her injury was due to the Fellowship's serious and willful misconduct (§ 4553), its violation of certain enumerated safety orders, and its "failure to furnish a safe working environment, or train [its] employees properly." Minish alleged she was therefore entitled to "a 50% penalty against all benefits paid on her claim, costs and attorney's fees."

An insurer may not indemnify an employer against liability for the additional compensation recoverable for the serious and willful misconduct of the employer or its agent. However, an insurer may provide insurance against the expense of defending a claim of serious and willful misconduct. (*Imperial Irrigation Dist. v. Chubb/Pacific*

Indemnity Group (1979) 95 Cal.App.3d 317, 320; Ins. Code, § 11661.) It appears the Fellowship did not have such coverage, since it retained an attorney at its own expense to defend the S&W Petition. Mailliard testified that between September 2007 and October 2013, the Fellowship paid its attorneys $50,080.71 to defend the S&W Petition. The evidence included a transaction report with payment dates and amounts paid. The attorneys charged $9,897.50 for legal services in 2014 that were not listed on the transaction report, for a total of $59,978.21 to defend the claim.

Mailliard prepared a spreadsheet comparing the Fellowship's workers' compensation premiums and experience modifications for the period 2003 through 2013 and testified that the Fellowship's workers' compensation costs increased as a result of Minish's accident. Mailliard handled the Fellowship's workers' compensation costs and testified it was common knowledge that an industrial accident affects the employer's experience modification and premium for three years. Since a significant amount was paid on Minish's claim, the Fellowship's experience modification went up, which caused its insurance premiums to be higher than they would have been had this case not been reported as a workers' compensation claim. Mailliard could not determine the exact amount of the increase, but estimated it was approximately $100,000.

The Fellowship asked the court to judicially notice the pleadings in this case. In her original complaint, filed in October 2007, Minish alleged that she "volunteered to assist at the [Center]" and that the defendants "acted negligently in requesting [her to] stand on a raised forklift while it was moving." In her first amended complaint filed six weeks later, she also alleged she "volunteered to assist at the [Center]." In her second amended complaint, filed in February 2009, Minish deleted the references to volunteering and alleged instead that she "was at defendants' property" when the accident occurred.

Neither side called Minish as a witness. The Fellowship relied on excerpts from her deposition in which she testified that when she filed her WCAB Application, she was

represented by Robert Thayer of the Boccardo Law Firm, the same firm that represented her at trial in the civil action. A different law firm and attorney represented her on the S&W Petition. Before April 2007, Minish knew she was receiving temporary disability payments and medical benefits from SCIF as a result of a workers' compensation claim. Although she "strongly" objected to receiving workers' compensation, she cashed the checks and spent the money. She did not return the checks because she needed the money to survive. By April 2007, she believed the benefits were being paid fraudulently and asked the WCAB to conduct a fraud investigation. An unidentified person gave her a claim number and a phone number. After some time, she called and was told the case had been resolved. Minish testified that she cashed the checks knowing that every time she did so she was committing fraud. She tried to return the money to SCIF in April 2007. She called the claims adjuster, asked what she needed to do to "get rid of you guys," and offered to write a check. The adjuster told Minish she could not speak to her because she was represented by counsel.

The trial court found for the Fellowship on the equitable estoppel defense. The court subsequently issued a statement of decision and judgment for defendant. The court described each element of the defense and the evidence it relied on in finding that Minish was equitably estopped from proceeding with her civil action. The court stated that its findings regarding section 3363.6 and the equitable estoppel defense "negate the need for a trial on the issue of Ms. Minish's volunteer status." Minish filed a motion for new trial, which was denied.

DISCUSSION

I. General Principles Regarding Workers' Compensation and the Exclusive Remedy Rule

As this court observed in *Minish I*, "[a]rticle XIV, section 4 of the California Constitution deems workers' compensation to be an important and beneficial social

policy in California. The Act embodies this policy and establishes 'a compulsory scheme of employer liability without fault for injuries arising out of and in the course of employment.' [Citation.] Its primary objective is to protect individuals against the special risks of employment with comprehensive coverage for their injuries. [Citation.] More specifically, the Act seeks (1) to ensure that the cost of industrial injuries will be part of the cost of goods rather than a burden on society, (2) to guarantee prompt, limited compensation for an employee's work injuries, regardless of fault, as an inevitable cost of production, (3) to spur increased industrial safety, and (4) in return, to insulate the employer from tort liability for [its] employees' injuries." (*Minish I*, *supra*, 214 Cal.App.4th at p. 461, fn. omitted.) "The Act accomplishes these purposes in a number of ways, but primarily it defines 'employment' broadly and establishes a general presumption that any person 'in the service' of another is a covered 'employee' (§ 3351; see § 3357); it requires all employers (except the state) to secure the payment of compensation by obtaining insurance from an authorized carrier or by securing a certificate of consent from the Director of Industrial Relations to become a self-insurer (§ 3700); and it makes workers' compensation an employee's exclusive remedy against an employer for injuries sustained on the job. (§§ 3600, 3602, subd. (a).)" (*Minish I*, *supra*, at p. 461.)

"The underlying premise behind this statutorily created system of workers' compensation is the ' "compensation bargain." ' [Citation.] Pursuant to this presumed bargain, 'the employer assumes liability for industrial personal injury or death without regard to fault in exchange for limitations on the amount of that liability. The employee is afforded relatively swift and certain payment of benefits to cure or relieve the effects of industrial injury without having to prove fault but, in exchange, gives up the wider range of damages potentially available in tort.' [Citation.] [¶] To effectuate this theoretical bargain, the Legislature enacted several provisions limiting the remedies available for

injuries covered by the [Act] (the exclusive remedy provisions). [Citation.] Although the trade-off appears straightforward, '[the Supreme Court] and the Courts of Appeal have struggled with the problem of defining the scope' of the compensation bargain. [Citation.] Indeed, the unabated flow of published decisions *clarifying* the scope of workers' compensation exclusivity suggests considerable confusion as well as innovative lawyering." (*Charles J. Vacanti, M.D., Inc. v. State Comp. Ins. Fund* (2001) 24 Cal.4th 800, 811, quoting *Shoemaker v. Myers* (1990) 52 Cal.3d 1, 15-16.)

"California's Workers' Compensation Act (Lab. Code, § 3600 et seq.) provides an employee's exclusive remedy against his or her employer for injuries arising out of and in the course of employment." (*Wright v. State of California* (2015) 233 Cal.App.4th 1218, 1229 (*Wright*).) The exclusive remedy rule is set forth in section 3602, which provides in relevant part: "[w]here the conditions of compensation set forth in Section 3600 concur, the right to recover compensation is . . . the sole and exclusive remedy of the employee or his or her dependents against the employer" (§ 3602, subd. (a)), and "[i]n all cases where the conditions of compensation set forth in Section 3600 do not concur, the liability of the employer shall be the same as if this division had not been enacted" (§ 3602, subd. (c)). Subdivision (b) of section 3602 sets forth exceptions to the exclusive remedy rule; it specifies three circumstances under which an injured worker "may bring an action at law against the employer, as if [Division 4 of the Labor Code, which governs workers' compensation,] did not apply . . . ." None of those exceptions apply here.

The conditions of compensation are set forth in section 3600, subdivision (a), which provides in relevant part that liability for workers' compensation "in lieu of any other liability whatsoever to any person . . . , shall, without regard to negligence, exist against an employer for any injury sustained by his or her employees *arising out of and in the course of the employment* and . . . , in those cases where the following conditions of compensation concur: [¶] (1) Where, at the time of the injury, both the employer and the

employee are subject to the [workers'] compensation provisions of [the Labor Code]. [¶] (2) Where, at the time of the injury, the employee is performing service growing out of and incidental to his or her employment and is acting within the course of his or her employment. [¶] (3) Where the injury is proximately caused by the employment, either with or without negligence." (Italics added.) Section 3600 sets forth several exceptions, none of which applies here. (§ 3600, subd. (a) ["except as otherwise specifically provided in Sections 3602, 3706, and 4558"]; *id*., subd. (a)(4)-(10) [including exceptions for injuries that are caused by intoxication, intentionally self-inflicted, arise out of an altercation when the worker is the initial aggressor, and other grounds].)

Unlike tort law, "the workers' compensation system is not based upon fault. . . . Accordingly, '[t]he statutory proximate cause language [of section 3600] has been held to be less restrictive than that used in tort law, ... In general, . . . in workers' compensation, it is sufficient if the connection between work and the injury be a contributing cause of the injury . . . .' " (*South Coast Framing*, *Inc*. *v*. *Workers*' *Comp*. *Appeals Bd*. (2015) 61 Cal.4th 291, 298 (*South Coast*).)

A defendant in a civil action that claims the protections of the exclusive remedy rule "bears the burden of pleading and proving, as an affirmative defense to the action, the existence of the conditions of compensation set forth in the statute which are necessary to its application. [Citations.] 'The employee is pursuing a common law remedy which existed before the enactment of the statute and which continues to exist in cases not covered by the statute. It is incumbent upon the employer to prove that the [Workers'] Compensation Act is a bar to the employee's ordinary remedy.' " (*Doney v*. *Tambouratgis* (1979) 23 Cal.3d 91, 96-97, fn. omitted.)

II. The Trial Court Did Not Abuse its Discretion When It Granted the Fellowship's Motion to Amend its Answer

Minish contends the trial court abused its discretion when it allowed the Fellowship to amend its answer to allege an equitable estoppel defense approximately six weeks before trial. The Fellowship responds that the impropriety of Minish "collecting both workers' compensation and personal injury damages has been the focus of this case <u>from the very beginning of litigation</u>." (Underscore in original.)

A trial court may "in furtherance of justice, and on any terms as may be proper, allow a party to amend any pleading . . . in any . . . respect." (Code Civ. Proc., § 473, subd. (a)(1).) Under this state's liberal pleading rules, there is a " ' "strong policy in favor of liberal allowance of" ' " amendments to the pleadings at any stage of the proceeding, including during trial. (*Berman v. Bromberg* (1997) 56 Cal.App.4th 936, 945; *P&D Consultants, Inc. v. City of Carlsbad* (2010) 190 Cal.App.4th 1332, 1345.) A motion to amend a pleading is addressed to the trial judge's sound discretion. (*Berman v. Bromberg*, *supra*, at p. 945.) " '[I]t is an abuse of discretion to deny leave to amend where the opposing party was not misled or prejudiced by the amendment.' " (*Ibid.*) If the motion to amend is timely made and granting the motion will not prejudice the opposing party, it is error to refuse leave to amend. (*Morgan v. Superior Court* (1959) 172 Cal.App.2d 527, 530.) Where the denial of leave to amend "results in a party being deprived of the right to assert a meritorious cause of action or a meritorious defense, it is not only error but an abuse of discretion." (*Ibid.*) Courts generally display great liberality in permitting the amendment of an answer because a defendant "denied leave to amend is permanently deprived of a defense." (*Hulsey v. Koehler* (1990) 218 Cal.App.3d 1150, 1159.)

We review a trial court's order granting or denying leave to amend the pleadings for an abuse of discretion. (*Record v. Reason* (1999) 73 Cal.App.4th 472, 486.) As the

appellant, Minish has the burden to establish such abuse. (*Duchrow v. Forrest* (2013) 215 Cal.App.4th 1359, 1377 (*Duchrow*).)

A. Background

In its motion for summary judgment, which was heard in April 2010, the Fellowship did not expressly rely on the equitable estoppel defense. It did, however cite Evidence Code section 623, which codifies the doctrine of equitable estoppel. In *Minish I*, we rejected the Fellowship's arguments based on Evidence Code section 623 since it had not pleaded equitable estoppel as an affirmative defense, had not pleaded "the facts necessary to establish it," and there were triable issues concerning the elements of the defense. (*Minish I*, *supra*, 214 Cal.App.4th at p. 459.)

This court issued the remittitur in *Minish I* in May 2013. In November 2013, the parties stipulated to June 2, 2014, as the trial date. On March 31, 2014, Minish refused the Fellowship's request to stipulate to amend the answer to add an equitable estoppel defense. In April 2014, the trial court granted the Fellowship's motion to bifurcate and continued the trial date to June 30, 2014.

Two days later—two months before trial—the Fellowship filed its motion for leave to amend its answer to assert an equitable estoppel defense. Minish opposed the motion, arguing that discovery was closed, she would not have sufficient time to do discovery or challenge the defense before trial, and the Fellowship had not offered any reason for the delay in amending its answer.

At the hearing on the motion to amend, the trial court observed that based on the timing of the motion, it would be within its discretion to deny the motion, but given the liberal policy permitting amendment of the pleadings, it was also within its discretion to allow the amendment. The court concluded Minish would not be prejudiced by the amendment, since she had known about the equitable estoppel defense for a long time.

The trial court granted the motion and ordered that Minish would be allowed to conduct expedited, limited discovery regarding this defense.

B. Analysis

Minish relies on *Duchrow*, *supra*, 215 Cal.App.4th 1359 and cases cited therein, including *Melican v. Regents of University of California* (2007) 151 Cal.App.4th 168 (*Melican*) and *Magpali v. Farmers Group, Inc.* (1996) 48 Cal.App.4th 471 (*Magpali*).

In *Duchrow*, in an action to collect attorney fees, the trial court granted the plaintiff's motion to amend his complaint on the fourth day of a five-day trial to conform to proof, thereby changing his theory of liability and increasing the damages prayed for in the complaint sevenfold. (*Duchrow*, *supra*, 215 Cal.App.4th at pp. 1362-1363.) The appellate court concluded the trial court abused its discretion and reversed. The court reasoned the plaintiff had not shown good cause for the delay in amending his pleading, the amendment introduced new and substantially different issues, and the defendant was significantly prejudiced by both the increased damages and the lack of opportunity to investigate and respond to the new theory of liability. (*Id*. at pp. 1363, 1379-1383.) The court relied on cases and statutory law governing amendments to conform to proof at trial. (*Id*. at pp. 1378-1379.)

This case is distinguishable from *Duchrow*. Although the Fellowship did not explain the delay in amending its answer, Minish had been aware of a possible equitable estoppel defense since this court filed *Minish I* at the latest, if not before. The Fellowship asked Minish to stipulate to the amendment three months before trial, which she declined. The court granted leave to amend approximately six weeks before trial—not mid-trial as in *Duchrow*—and the court's order provided for limited discovery related to the defense. Minish does not contend the amount of discovery permitted was inadequate or that she was not prepared to meet the defense. Much of the evidence on the equitable estoppel defense was before the court on the summary judgment motion in 2010. (*Minish I*, *supra*,

214 Cal.App.4th at pp. 446-448.) In addition, on the first day of trial, the court asked Minish's counsel if he was ready to proceed on the equitable estoppel issue, to which he responded in the affirmative.

Melican and *Magpali* are also distinguishable. *Melican* involved a summary judgment motion. At the hearing on the motion, the plaintiffs moved to amend the complaint to allege a new cause of action. The trial court denied leave to amend. The appellate court affirmed, concluding that the trial court had not abused its discretion in denying the "11th-hour" request to amend. (*Melican*, *supra*, 151 Cal.App.4th at p. 177.) The plaintiffs were aware of the facts underlying the new claim when they filed their complaint, but did not seek to amend until five years later and proffered no reason for the delay. The court reasoned it would be unfair to permit them to defeat the defendant's summary judgment motion by "allowing them to present a 'moving target' unbounded by the pleadings." (*Id*. at p. 176.) This case does not involve summary judgment or a last minute request to amend.

In *Magpali*, the trial court denied the plaintiff leave to amend to add a new cause of action on the first day of trial and the court of appeal affirmed. (*Magpali*, *supra*, 48 Cal.App.4th at pp. 475, 488.) The court reasoned that the plaintiff had not offered an explanation for the delay; the trial had started; the defendant would clearly be prejudiced since there had been no discovery regarding the new theory; the claim depended on witnesses who had not been identified or deposed before; and the new cause of action changed the tenor and complexity of the case. (*Id*. at pp. 486-487.) In contrast, the motion here was made weeks before trial; Minish had been aware of the equitable estoppel theory, had already seen most of the documentary evidence, and was permitted to do additional discovery regarding the defense before trial.

For these reasons, we conclude the trial court did not abuse its discretion when it granted the motion to amend the Fellowship's answer.

III. Construction of Section 3363.6

Section 3363.6, subdivision (a) provides in relevant part: "a person who performs voluntary service without pay for a private, nonprofit organization, as designated and authorized by the board of directors of the organization, shall, when the board of directors of the organization, in its sole discretion, so declares in writing and prior to the injury, be deemed an employee of the organization for purposes of this division while performing such service."

Minish contends the trial court erred when it concluded that section 3363.6 does not require a formal resolution or a legal declaration under penalty of perjury and when it held that the Fellowship's evidence satisfied section 3363.6's requirement that the Board "declare[] in writing and prior to the injury" that its volunteers would be deemed employees under the workers' compensation laws. She argues the legislative history of sections 3363.5 and 3363.6 as set forth in various extrinsic materials—the Legislative Counsel's Digests, enrolled bill reports, and other materials—reveals that the Legislature intended to impose the same formality requirements on both public agencies (§ 3363.5) and private nonprofits (§ 3363.6) and that section 3363.6 requires a resolution or a more formal writing than what the Fellowship presented. She reasons that since the Fellowship failed to comply with section 3363.6's formal writing requirement, its volunteers were not covered by workers' compensation, and workers' compensation therefore is not her exclusive remedy.[9]

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[9] As we have noted, this court construed section 3363.6 in *Minish I*, which is the only published opinion construing section 3363.6. There, we rejected Minish's contentions that section 3363.6 required the Board to identify her personally by name and in writing and declare her to be a covered volunteer (the personal identification requirement) and that the Board's section 3363.6 declaration did not become effective unless and until the volunteer had notice of it and accepted the workers' compensation coverage before an injury (the notice and acceptance requirement). (*Minish I*, *supra*, 214 Cal.App.4th at pp. 460-470.) Minish has not asked us to revisit these points in this (continued)

The Fellowship responds that the trial court properly construed section 3363.6; that the plain meaning of that section requires a simple written declaration, not a resolution; and that the evidence it presented met the statutory requirements. The Fellowship argues that since the statutory language is clear, we need not rely on the extrinsic evidence of legislative intent that Minish proffers.

A. Standard of Review

The question whether a worker is an employee within the meaning of the workers' compensation laws is a mixed question of law and fact to be proved like any other question. It is a question of fact when the facts are in dispute. It becomes a question of law, which we review de novo, when only one inference can reasonably be drawn from the facts. (*Spradlin v. Cox* (1988) 201 Cal.App.3d 799, 806-807.)

The interpretation of a statute is a question of law, which we review de novo. (*People ex rel. Lockyer v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 432.) The interpretation of a writing is also a question of law, which we review de novo when the extrinsic evidence relating to the writing is not in conflict. (*Johnson v. Greenelsh* (2009) 47 Cal.4th 598, 604.)

B. Rules of Statutory Construction

Our fundamental task in any case involving statutory interpretation, " 'is to determine the Legislature's intent so as to effectuate the law's purpose.' [Citation.] The well-established rules for performing this task require us to begin by examining the statutory language, giving it a plain and commonsense meaning. [Citation.] We do not, however, consider the statutory language in isolation; rather, we look to the statute's entire substance in order to determine its scope and purposes. [Citation.] That is, we construe the words in question in context, keeping in mind the statute's nature and

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appeal. Instead, she asks us to construe the statute to determine the type of writing it requires and to review the sufficiency of the writing in this case.

obvious purposes. [Citation.] We must harmonize the statute's various parts by considering it in the context of the statutory framework as a whole. [Citation.] If the statutory language is unambiguous, then its plain meaning controls. If, however, the language supports more than one reasonable construction, then we may look to extrinsic aids, including the ostensible objects to be achieved and the legislative history." (*Los Angeles County Metropolitan Transportation Authority v. Alameda Produce Market, LLC* (2011) 52 Cal.4th 1100, 1106-1107; see also *Minish I*, *supra*, 214 Cal.App.4th at p. 463.)

C. Analysis of Section 3363.6

Minish *begins* with the legislative history of both section 3363.6 and section 3363.5 (the analogous provision that applies to public entities). She contends the legislative history of the two provisions, as evidenced by extrinsic materials, demonstrates that the Legislature intended that nonprofits, in declaring their intent to provide workers' compensation coverage to their volunteers, must do so in the same type of formal writing required of public entities in section 3363.5. But before discussing the legislative history of these statutes, Minish does not examine the plain language of section 3363.6 or identify any ambiguity in the words chosen by the Legislature that merits consideration of extrinsic evidence of legislative intent.

As the court explained in *Halbert's Lumber, Inc. v. Lucky Stores, Inc.* (1992) 6 Cal.App.4th 1233, 1238 (*Halbert's*), "[t]here is order in the most fundamental rules of statutory interpretation . . . . The key is applying those rule in the proper *sequence*." In determining the Legislature's intent, "we begin with the language of the statute itself. [Citation.] That is, we look first to the words the Legislature used, giving them their usual and ordinary meaning. [Citation.] 'If there is no ambiguity in the language of the statute, "then the Legislature is presumed to have meant what it said, and the plain meaning of the language governs." ' " (*People v. Superior Court* (*Zamudio*) (2000) 23 Cal.4th 183, 192-193; see also *Minish I*, *supra*, 214 Cal.App.4th at p. 463.)

"In ascertaining the meaning of a statute, we look to the intent of the Legislature as expressed by the actual words of the statute. [Citation.] We examine the language first, as it is the language of the statute itself that has 'successfully braved the legislative gauntlet.' [Citation.] 'It is that [statutory] language which has been lobbied for, lobbied against, studied, proposed, drafted, restudied, redrafted, voted on in committee, amended, reamended, analyzed, reanalyzed, voted on by two houses of the Legislature, sent to a conference committee, and, after perhaps more lobbying, debate and analysis, finally signed "into law" by the Governor. The same care and scrutiny does not befall the committee reports, caucus analyses, authors' statements, legislative counsel digests and other documents which make up a statute's "legislative history." ' " (*Wasatch Property Management v. Degrate* (2005) 35 Cal.4th 1111, 1117-1118 (*Wasatch*), quoting *Halbert's*, *supra*, at p. 1238.) When a statute is clear and unambiguous on its face, we may not divine the Legislature's intent from other sources. (*Ceridian Corp. v. Franchise Tax Bd.* (2000) 85 Cal.App.4th 875, 889.)

Only if the statutory language permits more than one reasonable interpretation, do we look " 'to extrinsic aids, such as the object to be achieved and the evil to be remedied by the statute, the legislative history, public policy, and the statutory scheme of which the statute is a part. [Citation.] . . . Ultimately, the court must select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and it must avoid an interpretation leading to absurd consequences.' " (*Nguyen v. Western Digital Corp.* (2014) 229 Cal.App.4th 1522, 1540.)

As we shall explain, we conclude the language of section 3363.6 is unambiguous and that the plain meaning of the statute simply requires a declaration in writing, made before the injury at issue, not a formal resolution of the Board. We therefore conclude Minish's reliance on extrinsic evidence of legislative intent (the Legislative Counsel's

Digests, enrolled bill reports, and other materials) is misplaced. Our analysis relies on the plain language of both sections 3363.5 and 3363.6, as originally enacted and subsequently amended, but not the extrinsic evidence Minish proffers.

We begin by reviewing the statutory scheme relating to whether a person is a covered employee for the purposes of workers' compensation. Section 3602 provides that the right to recover workers' compensation is the "sole and exclusive remedy" of an injured "employee" against his or her employer. (§ 3602, subd. (a).) Section 3351 defines the term "employee" in broad terms as: "every person in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed," and lists six categories of workers who are expressly covered.

This broad definition of "employee" is subject to several exclusions, which are listed in section 3352. Volunteers are generally excluded. (§ 3352, subds. (b), (d), & (i).) The Labor Code also sets forth several exceptions to the exclusions some of which permit entities to extend employee status to their volunteers. (See e.g., §§ 3363.5 [public entities], 3363.6 [nonprofit organizations], 3364 [unsalaried volunteer members of a sheriff's reserve], & 3364.5 [unsalaried volunteers of a school district].) At issue in this case is the exception for nonprofit organizations in section 3363.6. Since Minish relies on the exception for public entities in section 3363.5, we also review the language of that section.

Former section 3363.5 was added to the Labor Code in 1971. (Stats. 1971, ch. 579, § 1, p. 1173.) When first enacted, it provided: "Notwithstanding Sections 3351 and 3352, a person who performs voluntary service without pay *for a county*, as designated and authorized by the *county board of supervisors*, shall be deemed to be an employee of the *county* for purposes of this division while performing such service. [¶] This section shall not be operative in *any county* until such time as the board of

supervisors, *by resolution or ordinance*, adopts the provisions hereof." (Stats. 1971, ch. 579, § 1; italics added.) Sections 3363.5 and 3363.6 are in division 4 of the Labor Code, the division that governs workers' compensation and insurance. By its plain language, when originally enacted, former section 3363.5 applied only to counties.

In 1974, the Legislature amended former section 3363.5 and added section 3363.6 to the Labor Code. (Stats. 1974, ch. 912, §§ 1, 2, p. 1926.) The 1974 amendment to former section 3363.5 provided: "Notwithstanding Sections 3351 and 3352, a person who performs voluntary service without pay *for a public agency*, as designated and authorized by the *governing body of the agency or its designee*, shall, *upon adoption of a resolution by the governing body of the agency so declaring*, be deemed to be an employee of the *agency* for purposes of this division while performing such service." (Stats. 1974, ch. 912, § 1, p. 1926; italics added.) By its plain language, the 1974 amendment of section 3363.5 extended the coverage option provided by former section 3363.5, which was available only to counties, to any public entity. The Legislature also dropped the reference to "an ordinance," apparently concluding that a resolution was sufficient to memorialize the public entity's decision to extend workers' compensation coverage to volunteers.

In 1974, the Legislature also added former section 3363.6 to the Labor Code. (Stats. 1974, ch. 912, § 2, p. 1926.) It provided: "Notwithstanding Sections 3351 and 3352, a person who performs voluntary service without pay *for a private*, *nonprofit organization* which is exempt from federal income tax under subsection (c) of Section 501 of the Internal Revenue Code, as designated and authorized by the board of directors of the organization, shall, *when the board of directors of the organization* in its sole discretion, *so declares*, be deemed an employee of the organization for purposes of this division while performing such service." (Stats. 1974, ch. 912, § 2, p. 1926; italics added.) When it enacted section 3363.6 in 1974, the Legislature gave nonprofits the

same option of extending workers' compensation coverage to their volunteers that applied to public entities. The Legislature did not mandate workers' compensation coverage for volunteers, but left it to the public entity or nonprofit in its "sole discretion" to decide whether to provide such coverage. Unlike former section 3363.5, which required the governing body of a public agency or its designee to *adopt a resolution* declaring that volunteers will be covered by workers' compensation, former section 3363.6 required only that a nonprofit's board of directors *declare* that its volunteers are so covered.

The Legislature amended former section 3363.6, but not former section 3363.5, in 1976 and 1978. Those amendments defined and clarified the meaning of the statutory phrase "voluntary service without pay," which is not at issue on appeal.[10]

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[10] The 1976 amendment to section 3363.6 added a new paragraph, which provided: "For purposes of this section, 'voluntary service without pay' shall include the performance of services by a parent, without remuneration in cash, when rendered to a cooperative parent participation nursery school if such service is required as a condition of participation in the organization." (Stats. 1976, ch. 51, § 1, pp. 81-82.) Uncodified section 2 of the law explained: "There is some administrative confusion as to whether certain volunteers for nonprofit organizations are employees for purposes of workers' compensation while performing such services. In order to clarify the rights of individuals under the Workers' Compensation Law as soon as possible, it is necessary that this act take effect immediately." (Stats. 1976, ch. 51, § 2, p. 82.)

In 1978, the Legislature amended former section 3363.6 again. (Stats. 1978, ch. 239, § 2, p. 506.) The amendment designated the first paragraph as subdivision (a) and the second paragraph as subdivision (b) and added a new subdivision (c), which provided: "For purposes of this section, 'voluntary service without pay' shall include the performance of services by a person who receives no compensation for such services other than meals and transportation or an allowance or reimbursement for meals and transportation." (Stats. 1978, ch. 239, § 2, p. 506.) Uncodified section 3 of the law explained: "In order for individuals who volunteer their services to nonprofit organizations to continue to be reimbursed for their expenses in connection with such service without the organization being required to obtain workers' compensation coverage for such volunteers, it is necessary that this act take effect immediately." (Stats. 1978, ch. 239, § 3, p. 506.)

The Legislature last amended both sections 3363.5 and 3363.6 in 1979. (Stats. 1979, ch. 76, §§ 2, 3, pp. 185-186; 44D West's Ann. Labor Code (2011 ed.) §§ 3363.5, 3363.6, pp. 66, 68 and (2017 supp.), p. 15.) As amended in 1979, section 3363.5 now provides: "(a) Notwithstanding Sections 3351, 3352, and 3357, a person who performs voluntary service without pay for a public agency, as designated and authorized by the governing body of the agency or its designee, shall, upon adoption of a resolution by the governing body of the agency so declaring, be deemed to be an employee of the agency for purposes of this division while performing such service. [¶] (b) For purposes of this section, 'voluntary service without pay' shall include services performed by any person, who receives no remuneration other than meals, transportation, lodging, or reimbursement for incidental expenses." (§ 3363.5; Stats. 1979, ch. 76, § 2, p. 185.) The 1979 amendment of section 3363.5 (public entities), added the reference to section 3357—the presumption that a worker is an employee—in the first paragraph and the entire second paragraph, defining the phrase "voluntary service without pay." It also added the subparagraph designations "(a)" and "(b)."

Section 3363.6, as amended in 1979, currently provides: "(a) Notwithstanding Sections 3351, 3352, *and 3357*, a person who performs voluntary service without pay for a private, nonprofit organization, as designated and authorized by the board of directors of the organization, shall, when the board of directors of the organization, in its sole discretion, so declares *in writing and prior to the injury*, be deemed an employee of the organization for purposes of this division while performing such service. [¶] (b) For purposes of this section, 'voluntary service without pay' shall include the performance of services by a parent, without remuneration in cash, when rendered to a cooperative parent participation nursery school if such service is required as a condition of participation in the organization. [¶] (c) For purposes of this section, 'voluntary service without pay' shall include the performance of services by a person who receives *no remuneration other than*

meals, *transportation*, *lodging*, *or reimbursement for incidental expenses*." (§ 3363.6; Stats. 1979, ch. 76, § 3, pp. 185-186; italics added to changes made by the 1979 amendment.)

In summary, the 1979 amendment made the following changes to subdivision (a) of section 3363.6: it (1) added a reference to the section 3357 presumption; (2) deleted the references to the Internal Revenue Code, which previously defined the type of nonprofit to which the statute applied; and (3) modified the phrase "so declares" by adding the words "in writing and prior to the injury." The 1979 amendment also modified the language in subdivision (c) defining the phrase "voluntary service without pay." For the purpose of our analysis, the key change is the modification of the phrase "so declares" by adding the words "in writing and prior to the injury."

As originally enacted, former section 3363.6 was silent as to the type of declaration by a nonprofit that would satisfy the statute. Based on its plain language, one purpose of the 1979 amendment was to insure that the requisite declaration be made *in writing* and *before* a particular volunteer was injured. Since important rights are at stake—both the entitlement to workers' compensation benefits and the right to sue the nonprofit civilly—the writing requirement insures that there is a written record of the nonprofit's election and decision to provide workers' compensation coverage to its volunteers, as opposed to relying on the testimony of board members or former board members about oral declarations. This is especially helpful in a case such as this where the decision to extend workers' compensation coverage to volunteers was made years or decades before the accident occurred. The requirement that the writing be made "prior to the injury" (§ 3363.6) prevents the nonprofit from deciding to provide workers' compensation after a volunteer has been injured and backdating the decision to extend workers' compensation coverage when it suits the nonprofit's purposes. As such, it prevents gamesmanship.

In reviewing this statutory history, we note that the Fellowship was formed in 1974, the same year section 3363.6 was enacted. Mailliard testified that he became concerned about obtaining workers' compensation coverage for the Fellowship's volunteers in 1978 and that the Fellowship has purchased such coverage since at least the early 1980's, perhaps earlier. Minutes from the May 1978 Board meeting confirm that the Board was considering workers' compensation coverage for volunteers at that time, but the record does not indicate precisely when such coverage was first purchased. Thus, the record supports the conclusion that the Board may have decided to cover the Fellowship's volunteers before section 3363.6 was amended in 1979 to require that the Board declare its decision to extend workers' compensation coverage to its volunteers in writing.

Minish argues that the legislative history of section 3363.6 demonstrates that the Legislature contemplated that both public entities and nonprofits would be treated identically. Minish contends the plain language of section 3363.6, particularly its use of the term "declare," makes clear that the Legislature contemplated that both public agencies and nonprofits issue a written statement that "formally, explicitly, and officially" sets forth the decision to extend workers' compensation coverage to volunteers and that the "informal, convoluted and confusing document" in this case is not what the Legislature had in mind. Minish sets forth five dictionary definitions of the word "declare" and argues that those definitions require a formal declaration in a writing that made the Board's decision known " 'officially,' 'explicitly,' and 'authoritatively.' "

The Legislature has not defined the term "declare" as it is used in the Labor Code. (§§ 5-29.) Webster's Third New International Dictionary, Unabridged defines "declare" as: (1) "to make known publicly, formally, or explicitly especially by language"; "announce, proclaim, or publish especially by a formal statement or official pronouncement"; "communicate to others"; (2) "to make evident or give evidence of";

(3) "to make a formal acknowledgment of" as in to "*declare* a trust"; and (4) "to state emphatically." (Webster's 3d New Internat. Dict., Unabridged (2017) at <http://unabridged.merriam-webster.com/> [as of Mar. 5, 2018].) These definitions describe various forms of communication, some that require formality and others that do not. They also permit either an oral or a written declaration.

Prior to 1979, former section 3363.6 provided that volunteers of nonprofits would be deemed employees for workers' compensation purposes when the board of directors of the nonprofit "so declares." The statute did not specify the type of declaration required, whether oral or written, formal or informal, or limit the timing of the declaration. The Legislature qualified the phrase "so declares" when it amended the statute in 1979, requiring the declaration be "in writing and prior to the injury." (Stats. 1979, ch. 76, § 3, pp. 185-186.)

The Legislature placed stricter requirements on public entities that elected to provide workers' compensation coverage to their volunteers. When first enacted in 1971, section 3363.5 required the board of supervisors of a county to "adopt[]" the provisions of section 3363.5 "by resolution or ordinance." (Stats. 1971, ch. 579, § 1.) In 1974, that section was amended to require the "governing body of the [public] agency or its designee" to "adopt[] . . . a resolution . . . so declaring." (Stats. 1974, ch. 912, § 1, p. 1926.) That language has not changed since then. (§ 3363.5; Stats. 1979, ch. 76, §§ 2, 3, pp. 185-186.)

Minish argues that section 3363.6 (nonprofits) requires the same formality as section 3363.5 (public entities) because the Legislature used the words "so declares" in section 3363.6. She asserts that the word "declare" requires a written statement that formally, explicitly, and officially sets forth the organization's decision to extend workers' compensation coverage to volunteers, and requires the formality of a resolution or other formal declaration, and not a simple writing. We disagree. Both sections 3363.5

and 3363.6 require declarations by the public entity or nonprofit. Section 3363.5 contains the phrase "so declaring" and section 3363.6 uses "so declares." Both statutes then qualify the type of declaration required. Section 3363.5 requires the declaration be made by a public entity in a resolution; section 3363.6 requires the declaration be made by a nonprofit "in writing and prior to the injury" and nothing more. If the Legislature had wanted a more formal writing by a nonprofit (a resolution or declaration under penalty of perjury), it knew how to tell us that, since it used the words "resolution" and "ordinance" in section 3363.5, both prior to and at the time as it enacted section 3363.6.

Moreover, the Legislature did not use any language that qualified the writing requirement in section 3363.6. It did not require the writing to be "formal," "explicit," "official" or "authoritative" or mandate a formal resolution or declaration of the nonprofit's board of directors. The statute simply requires the nonprofit's board of directors to declare that volunteers are covered by workers' compensation "in writing." (§ 3363.6.) Minish would have us read into the statute a level of formality that the Legislature did not require.

As we have noted, before addressing the language of section 3363.6, Minish's analysis begins with extrinsic evidence of legislative intent.[11] She does not tell us what

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[11] In the trial court, Minish submitted nine pages of legislative history materials regarding the 1974 enactment of section 3363.6 and the 1979 amendment of sections 3363.5 and 3363.6 in support of her opposition to one of the Fellowship's motions in limine. On appeal, Minish has asked us to take judicial notice of 250 pages of legislative history materials she obtained after she filed her notice of appeal. We hereby grant Minish's request for judicial notice of these materials. (Evid. Code, §§ 459, subd. (a); 452, subd. (c); *Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 544, fn. 4.) The legislative materials Minish discusses in her brief include: (1) the Legislative Counsel's Digest of various iterations of the bills that enacted or amended sections 3363.5 and 3363.6 in 1974 and 1979; (2) enrolled bill reports from multiple state agencies in 1974 and 1979; (3) the Legislative Counsel's Summary Digest of bills from 1974 and 1979; (4) an analysis of Assembly Bill 58, which amended both statutes in (continued)

the ambiguity is in section 3363.6 that merits our consideration of these extrinsic materials. Her argument suggests she perceives some ambiguity in the word "declare," but she does not tell us what that ambiguity is. Citing this extrinsic evidence of legislative intent, Minish argues that the difference between the wording of sections 3363.5 and 3363.6 "should not control" this case. The Fellowship argues that since section 3363.6 is clear and unambiguous, we need not consider these legislative materials.

Minish's argument does not follow the proper sequence. If the meaning of a statute "is without ambiguity, doubt, or uncertainty, then the language controls" and "[t]here is nothing to 'interpret' or 'construe.' " (*Halbert's*, *supra*, 6 Cal.App.4th at p. 1239.) We consider such extrinsic evidence of legislative intent only when the statute's language is ambiguous. (*Wasatch*, *supra*, 35 Cal.4th at pp. 1117-1118.) We conclude that since the plain language of section 3363.6 is unambiguous, we need not turn to these extrinsic materials as an aid to interpretation.

Even if we were to consider these materials, they do not alter our interpretation of section 3363.6. Most of the materials Minish quotes in her brief contain language that is consistent with our interpretation of section 3363.6. The only document that arguably contains language that supports Minish's construction is an analysis of Assembly Bill No. 58 (1979-1980 Reg. Sess.) prepared for the Senate Industrial Relations Committee by an unidentified writer.[12] In view of the plain language of the statute and the other legislative materials that are consistent with our construction of section 3363.6, we find this single item unpersuasive.

1979, prepared for the Senate Committee on Industrial Relations; and (5) a legislative analyst report from 1979.

[12] Minish cites a similar report from 1978 to the same committee for Senate Bill No. 1468 (1977-1978 Reg. Sess.), which "died" in the Assembly inactive file. Since that bill was never enacted, the 1978 report is irrelevant.

Minish contends we should treat these two statutes in pari materia and require the same level of formality in the declarations of both public agencies and nonprofits, and hence require the adoption of a corporate resolution by a nonprofit's board of directors. Two " '[s]tatutes are considered to be in pari materia when they relate to the same person or thing, to the same class of person[s or] things, or have the same purpose or object.' " (*Walker v. Superior Court* (1988) 47 Cal.3d 112, 124, fn. 4.) "It is a basic canon of statutory construction that statutes in pari materia should be construed together so that all parts of the statutory scheme are given effect." (*Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1090-1091.) We agree that both sections 3363.5 and 3363.6 relate to the same subject matter in that they provide that both public agencies and nonprofits may declare that their otherwise excluded volunteers are employees for the purposes of the workers' compensation laws. Construing statutes together does not require us to find that they say the same thing. Since the Legislature amended these two section at the same time in 1979, we conclude that the difference between requiring a "resolution" from a public entity and a "writing" from a nonprofit was purposeful. Construing these two statutes together, we have concluded they provide different mechanisms by which a public agency and a nonprofit may "so declare." Minish's reliance on the rule of in pari materia is therefore misplaced.

Finally, Minish argues against applying the rule of liberal construction from section 3202[13] in this appeal. In *Minish I*, this court rejected Minish's contention that the rule of liberal construction did not apply to section 3363.6 because it is an exception to the general rule excluding volunteers. The court reasoned that since section 3363.6 "is an

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[13] Section 3202 provides that division 4 (Workers' Compensation and Insurance) and division 5 (Safety in Employment) of the Labor Code: "shall be liberally construed by the courts with the purpose of extending their benefits for the protection of persons injured in the course of their employment."

exception to an *exclusion*, and as such it expands the reach of workers' compensation," it is "subject to liberal construction under section 3202." (*Minish I*, *supra*, 214 Cal.App.4th at p. 466, fn. 16.) That is the law of the case.

This time, Minish argues liberal construction does not apply for a different reason. She argues section 3202 does not apply when it is possible to discern the Legislature's intent through other means, including the language of the statute and its legislative history. She cites a number of cases. *Brodie v. Workers' Comp. Appeals Bd.* (2007) 40 Cal.4th 1313 is the most recent of those cases. In *Brodie*, the Supreme Court stated: "Section 3202 is a tool for resolving statutory ambiguity where it is not possible through other means to discern the Legislature's actual intent. It is of little or no use here, where other tools permit us to divine that the Legislature did not intend to amend settled law . . . ." (*Id.* at p. 1332; *id.* at pp. 1327-1328 [construction based on plain language of statute and its legislative history].) Since we find no ambiguity and our analysis is based on the plain language of the statute, we need not resort to the rule of liberal construction to address Minish's arguments in this appeal.

IV. The Fellowship's Declaration Complied with Section 3363.6

We next examine whether the evidence in this case satisfied the writing requirement in section 3363.6. The trial court relied on the Evidence Code definition of "writing," which provides: " 'Writing' means handwriting, typewriting, printing, photostating, photographing, photocopying, transmitting by electronic mail or facsimile, and every other means of recording upon any tangible thing, any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof, and any record thereby created, regardless of the manner in which the record has been stored." (Evid. Code, § 250.) Section 8 defines the term "writing" as used in the Labor Code as: "any form of recorded message capable of comprehension by ordinary

visual means. Whenever any notice, report, statement or record is required by this code, it shall be made in writing."

The Fellowship relied on the Insurance Memo and Board meeting minutes to satisfy the writing requirement of section 3363.6. The minutes from May 1978 indicate that the Board was exploring providing workers' compensation coverage for volunteers at that time. Mailliard testified that such coverage had been in place since at least the early 1980's. In June 1986, the Fellowship found a company that would insure volunteers "at a reasonable premium," and in September 1986, the Board selected SCIF as its workers' compensation insurer.

In 1987, the Board considered providing long-time Fellowship members with health insurance coverage. By March 1987, the Board had found and approved a group health plan. At that time, the Board appointed a committee to explore options for *paying* for the coverage. Mailliard prepared the Insurance Memo, which contained the committee's proposal, and presented it to the Board at its April 1987 meeting. In setting forth the committee's cost proposal, the Insurance Memo stated: "It should be noted that workmans [*sic*] compensation is in effect for all workers and volunteers in case of accidents during work hours." (We shall hereafter sometimes refer to this sentence as the "key sentence," a phrase Minish uses.) Maxon prepared the minutes of the April 1987 meeting, which described the Board's discussion of the health insurance plan in paragraph 4. She later struck through paragraph 4, wrote "See attached" next to it, and stapled her handwritten notes and a copy of the Insurance Memo to the minutes. Although Maxon could not recall why she did so, a reasonable inference from the documents is that at its next meeting on May 4, 1987, the Board revised the minutes and incorporated the Insurance Memo into the minutes by the "See attached" reference. According to the minutes of the May 4, 1987 meeting, the Board approved the plan in the Insurance Memo at that meeting.

In our view, the Insurance Memo and the minutes from the April 1987 and May 4, 1987 meetings satisfy the requirements of section 3363.6. The word "minutes" is defined as "the formal record of a deliberative assembly's proceedings, approved (as corrected, if necessary) by the assembly." (Black's Law Dict. (8th ed. 2004), p. 1018.) The minutes should contain a record of the decisions made and things the Board did at the meeting. (*Ibid*.) The Insurance Memo and minutes were typed and capable of comprehension by ordinary visual means, thereby meeting both the Evidence Code and the Labor Code definitions of a "writing." Nothing in section 3363.6 precludes us from considering a group of writings. In the Insurance Memo, the committee—which was composed of three Board members—declared in writing that the Fellowship's volunteers were covered by workers' compensation, which had been the Fellowship's practice for many years. On May 4, 1987, the Board incorporated the Insurance Memo into the minutes of the April 1987 meeting and approved of the plan set forth in the memo, which included the fact that volunteers are covered by workers' compensation, thereby adopting the committee's declaration. The Board's written declaration was made in 1987, long before Minish was injured, thereby satisfying the requirement that the written declaration be made "prior to the injury." (§ 3363.6, subd. (a).)

Minish challenges the probative effect of the Insurance Memo, arguing that the key sentence—which states that workers' compensation is in effect for volunteers—was an "erroneous statement of law" since under section 3363.6, the Fellowship's volunteers could not have been covered by workers' compensation unless and until the Board had made a valid section 3363.6 declaration. Although the key sentence may not have been technically correct when the memo was written, it became legally effective when the Board made the Insurance Memo part of the minutes and approved the plan set forth therein. And that happened in 1987, nineteen years *before* Minish was injured.

Minish contends the language of the memo and Mailliard's testimony suggest that the Board was unaware of the legal requirements of section 3363.6. The trial court found no evidence that there were lawyers present at the Board's meeting to give advice. Nothing in section 3363.6 required the Board to state that it was aware of the statute, understood its requirements, or was making its declaration pursuant to section 3363.6. The statute does not mandate any particular wording or form of declaration. All that is required is a *writing* declaring that volunteers are covered by workers' compensation made *prior to the injury* in question. (§ 3363.6.)

Minish argues that the Insurance Memo is ineffective as a section 3363.6 declaration because it was flagged in the April 1987 minutes by the "See attached" notation, the copy of the memo attached to the April 1987 minutes was "virtually illegible," and the key sentence was buried in a paragraph discussing medical insurance that had nothing to do with workers' compensation. She contends the minutes from April and May 1987 do "not provide a readily accessible organizational record whereby a board member or a volunteer or a carrier could have determined whether" the Fellowship had ever declared that its volunteers would be covered by workers' compensation. As we have stated, the record supports the inference that the Board incorporated the Insurance Memo into the April 1987 minutes. Moreover, the Board expressly approved the memo at the May 4, 1987 meeting.

As for the assertion that the copy of the Insurance Memo that is attached to the April 1987 minutes is virtually illegible, at a pretrial hearing on Minish's motion to compel, the Fellowship's counsel acknowledged that portions of the Insurance Memo were "unreadable" when copied, but stated the originals were "readable." The Fellowship subsequently produced Maxon and the original minutes for deposition; it also produced the original minutes at trial. Although portions of the Insurance Memo attached to the April 1987 minutes are illegible, the key sentence is legible, even in the copy in the

record. And if there was any doubt as to the text of the key sentence, Diefenbach wrote his notes of the next board meeting on a more legible copy of the Insurance Memo. The two copies of the Insurance Memo in the record appear to be copies of the same document; Minish does not point to any differences between the two or argue that they are not. We therefore reject Minish's contentions based on the legibility of the memo.

That the key sentence appears in a document discussing medical insurance does not alter our conclusion. The Insurance Memo contained a proposal for allocating the cost of the new health insurance program, with some of the cost to be borne by the Fellowship. That volunteers were covered by workers' compensation for work injuries impacted the Fellowship's costs and was a component of the committee's analysis. As for Minish's final point, section 3363.6 does not mandate a "readily accessible organizational record." There is no requirement that the nonprofit advise volunteers of its decision to extend workers' compensation coverage to them. (*Minish I*, *supra*, 214 Cal.App.4th at pp. 467-470.)

Minish's evidence included an excerpt from a treatise on advising nonprofit corporations, which states: "If the nonprofit corporation decides to cover volunteers, its board of directors should (1) pass a resolution to this effect; and (2) notify the insurer, who will add an endorsement to the policy . . . ." (2 Advising Cal. Nonprofit Corporations (Cont.Ed.Bar 3d ed. 2012) § 13.27, p. 836.) And her brief on appeal proposes language for such a resolution or declaration. The treatise does not cite any legal authority for its suggestion that nonprofit boards of directors pass a resolution and this appears to be simply a recommendation by the treatise's authors. (*Ibid.*) We agree with the trial court that the treatise excerpt is not persuasive since it was published in April 2012, almost 25 years after the Board declared in writing that volunteers were covered by workers' compensation. That the treatise and Minish's brief propose a clearer or better way a nonprofit board of directors may satisfy the requirements of

section 3363.6 does not mean that the Fellowship did not meet the requirements of section 3363.6.

For these reasons, we conclude the Fellowship complied with the requirements of section 3363.6.

V. Equitable Estoppel

Minish contends the trial court erred when it found her civil action was barred by the doctrine of equitable estoppel because the Fellowship had not demonstrated the first, third, and fourth elements of the defense. Citing our decision in *City of Hollister v. Monterey Ins. Co.* (2008) 165 Cal.App.4th 455 (*Hollister*), she argues the Fellowship also failed to prove that her conduct was intolerably unfair or blameworthy.

A. General Principles Regarding Equitable Estoppel

"Evidence Code section 623 codifies the doctrine of equitable estoppel." (*Minish I*, *supra*, 214 Cal.App.4th at p. 459, citing *Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 384 [recognizing codification].) Evidence Code section 623 provides: "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."

" ' "The doctrine of equitable estoppel is founded on concepts of equity and fair dealing. It provides that a person may not deny the existence of a state of facts if he [or she] intentionally led another to believe a particular circumstance to be true and to rely upon such belief to his[or her] detriment. The elements of the doctrine are that (1) the party to be estopped must be apprised of the facts; (2) he [or she] must intend that his [or her] conduct shall be acted upon, or must so act that the party asserting the estoppel has a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he [or she] must rely upon the conduct to his [or her] injury." ' " (*Minish I*, *supra*, 214 Cal.App.4th at p. 459, quoting *City of Goleta v. Superior Court* (2006) 40

Cal.4th 270, 279 (*Goleta*).) Where even one of these elements is missing, equitable estoppel does not apply. (*Feduniak v. California Coastal Com.* (2007) 148 Cal.App.4th 1346, 1360 (*Feduniak*).)

The California Supreme Court has also used different language—an alternative formulation—to describe the elements of equitable estoppel, stating: "A valid claim for equitable estoppel requires: (a) a representation or concealment of material facts; (b) made with knowledge, actual or virtual, of the facts; (c) to a party ignorant, actually and permissibly, of the truth; (d) with the intention, actual or virtual, that the ignorant party act on it; and (e) that party was induced to act on it. [Citation.] There can be no estoppel if one of these elements is missing." (*Simmons v. Ghaderi* (2008) 44 Cal.4th 570, 584 (*Simmons*); see also *Hollister*, *supra*, 165 Cal.App.4th at pp. 487-488 [reciting same elements].)

We shall use the description of the elements from *Goleta*, since that is the formulation the trial court used below and the parties use in their briefs on appeal.

As the Supreme Court stated in *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 488 (*Long Beach*) equitable estoppel "rests firmly upon a foundation of conscience and fair dealing." "Professor Pomeroy emphasizes the broad equitable concepts underlying the doctrine in the following terms: 'Equitable estoppel in the modern sense arises from the *conduct* of a party, using that word in its broadest meaning as including his spoken or written words, his positive acts, and his silence or negative omission to do anything. Its foundation is justice and good conscience. Its object is to prevent the unconscientious and inequitable assertion or enforcement of claims or rights which might have existed or been enforceable by other rules of the law, unless prevented by the estoppel; and its practical effect is, from motives of equity and fair dealing, to create and vest opposing rights in the party who obtains the benefit of the estoppel.' (3 Pomeroy, Equity Jurisprudence (5th ed. 1941) § 802, p. 180, fns. omitted.)" (*Id.* at p. 488, fn. 22;

Superior Dispatch, *Inc*. *v*. *Insurance Corp*. *of New York* (2010) 181 Cal.App.4th 175, 187 [quoting *Long Beach*].)

"Estoppel effects a forfeiture, i.e., the loss of an otherwise viable right. It is akin to the doctrine of waiver, often invoked in the same breath, and sometimes confused with it. The essence of waiver, however, is the voluntary relinquishment of a known right, which may be effective as a matter of law without any demonstration that the other party was caused by the waiver to expose himself to any harm. Such causation is essential to estoppel, and where it is present the estoppel may arise involuntarily, and may effect the loss of rights the actor did not know he possessed." (*Hollister*, *supra*, 165 Cal.App.4th at p. 487.)

B. Standard of Review

The existence of an estoppel is generally a question of fact. We therefore review the trial court's ruling on the estoppel issue in the light most favorable to the judgment to determine whether it is supported by substantial evidence. (*Feduniak*, *supra*, 148 Cal.App.4th at p. 1360.) "Although estoppel is generally a question of fact, where the facts are undisputed and only one reasonable conclusion can be drawn from them, [the question] whether estoppel applies is a question of law." (*Ibid*.)

" 'Substantial evidence' is evidence of ponderable legal significance, evidence that is reasonable, credible and of solid value. [Citations.] . . . Inferences may constitute substantial evidence, but they must be the product of logic and reason. Speculation or conjecture alone is not substantial evidence." (*Roddenberry v*. *Roddenberry* (1996) 44 Cal.App.4th 634, 651.)

C. The Exclusive Remedy Defense is an Aspect of Subject Matter Jurisdiction

The exclusive remedy defense implicates the trial court's subject matter jurisdiction. We next review the legal principles governing subject matter jurisdiction

over injury claims between employees and employers as these principles provide a framework for our analysis of the estoppel claim.

As the Supreme Court explained in *La Jolla Beach & Tennis Club*, *Inc*. *v*. *Industrial Indemnity Co*. (1994) 9 Cal.4th 27 (*La Jolla*), "Pursuant to constitutional mandate, the Legislature has vested the [WCAB] with exclusive jurisdiction over claims for workers' compensation benefits. (Cal. Const., art. XIV, § 4, Lab. Code, § 5300.) Accordingly, the superior court and the WCAB in [cases such as this one] 'do *not* have concurrent jurisdiction over the whole of the controversy, and one of them will be without jurisdiction to grant any relief whatsoever, depending upon whether or not the injuries were suffered within the course and scope of an employment relationship and so covered by the [workers'] compensation laws.' [Citation.] 'It is elementary that the type and extent of relief which can be granted and the factors by which such relief is determined differ materially between the two tribunals; the superior court cannot award [workers'] compensation benefits, and the [WCAB] cannot award damages for injuries.' [Citation.] The only point of concurrent jurisdiction of the two tribunals is jurisdiction to determine jurisdiction; jurisdiction once determined is exclusive, not concurrent." (*La Jolla*, *supra*, at p. 35, quoting *Scott v*. *Industrial Acc*. *Com*. (1956) 46 Cal.2d 76, 82-83 (*Scott*).) Both "[t]he WCAB and the superior court have concurrent precedential jurisdiction to determine the threshold question of subject matter jurisdiction, namely, whether a cause of action comes within workers' compensation laws, and, thus, within the exclusive jurisdiction of the [WCAB]." (*Yavitch v*. *Workers*' *Comp*. *Appeals Bd*. (1983) 142 Cal.App.3d 64, 70, citing *Scott*, *supra*, at p. 83.)[14]

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[14] Where the injured party files an Application with the WCAB and later files a civil action, as Minish did, the employer may move in the superior court to abate the civil action until the WCAB decides whether an employment relationship and other conditions of compensation exist. (Cal. Workers' Damages Practice (Cont.Ed.Bar 2d ed. 2017) Lawsuits against Employers, § 4.18, p. 4-25 (Workers' Damages), citing *Taylor v*.
(continued)

Generally, the WCAB's exclusive jurisdiction over cases arising under the workers' compensation laws depends primarily upon two factors: (1) the existence of an employment relationship that is subject to those laws, and (2) an injury "arising out of and in the course of the employment" as defined in section 3600, subdivision (a).[15] (Rassp & Herlick, Cal. Workers' Compensation Law (7th ed. 2014) Jurisdiction § 13.08[1], [2], pp. 13-19, 13-21 (Workers' Compensation Law); Workers' Damages, *supra*, § 4.20, p. 4-28.1.)

Superior Court (1956) 47 Cal.2d 148, 151.) A WCAB finding that the injured party is entitled to workers' compensation becomes res judicata in the civil action and provides a basis for invoking the exclusive remedy bar. (Workers' Damages, *supra*, § 4.18, citing *Jones v. Brown* (1970) 13 Cal.App.3d 513, 521.) Conversely, if the civil action is filed and served first, either party may obtain a stay of the WCAB proceedings until the superior court determines whether workers' compensation is the injured party's exclusive remedy. (Workers' Damages, *supra*, § 4.18.) Although one tribunal's jurisdiction is invoked first by priority of filing, proceedings in the other tribunal will be abated or stayed *only* upon a party's motion. (*Ibid.*)

The record does not reveal whether either party ever moved to stay the proceedings before the WCAB. We infer the WCAB action is progressing, at least as to the S&W Petition, since the Fellowship incurred over $59,000 in legal fees to defend that claim between 2007 and 2014. The Fellowship made a motion to stay the superior court action in 2014, which the trial court denied. In June 2014, this court denied the Fellowship's writ petition, which sought an order directing the trial court to vacate its order denying the stay.

[15] Section 3600's requirement that the injury "aris[e] out of" and occur "in the course of the employment" " ' "is twofold. On the one hand, the injury must occur 'in the course of the employment.' This concept 'ordinarily refers to the time, place, and circumstances under which the injury occurs.' [Citation.] . . ." [Citation.] [¶] "On the other hand, the statute requires that an injury 'arise out of' the employment . . . . It has long been settled that for an injury to 'arise out of the employment' it must 'occur by reason of a condition or incident of [the] employment. . . .' [Citation.] That is, the employment and the injury must be linked in some causal fashion." ' " (*South Coast*, *supra*, 61 Cal.4th at p. 297, quoting *LaTourette v. Workers' Comp. Appeals Bd.* (1998) 17 Cal.4th 644, 651.)

If employment is not proven or if the employment is exempt, the WCAB's jurisdiction ends when such a finding is made. (§ 3600, subd. (a)(1); Workers' Compensation Law, § 13.08[1].) Minish argued she was exempt from workers' compensation under the exemption for volunteers in section 3352, subdivision (i), and because the Fellowship had not met the requirements of section 3363.6 for extending workers' compensation to its volunteers. The trial court decided this question adversely to Minish and we agree with its conclusion that the Fellowship's volunteers are subject to the workers' compensation laws.

Having shown an employment relationship, in order to invest the WCAB with exclusive jurisdiction in this case, it is also necessary for the Fellowship to establish an injury arising out of and in the course of the employment. (§ 3600, subd. (a)(2); Workers' Compensation Law, *supra*, Jurisdiction § 13.08[2], pp. 13-19, 13-21; Workers' Damages, *supra*, § 4.20, p. 4-28.1.) Minish has challenged this requirement, arguing that she was not volunteering and was just visiting the Center when she was injured. The trial court did not determine this issue on the merits, finding it unnecessary to reach the issue after ruling on the Fellowship's equitable estoppel defense. In effect, the trial court found that Minish is equitably estopped from arguing that her injuries did not arise out of and in the course of her volunteer work at the Fellowship.

D. First and Third Elements of Equitable Estoppel

Equitable estoppel provides that Minish may not deny the existence of a state of facts (her injuries arose out of and in the course of her employment) if she intentionally led the Fellowship to believe those facts to be true and to rely upon such belief to its detriment. (*Goleta*, *supra*, 40 Cal.4th at p. 279.)

Citing *Vu v. Prudential Property & Casualty Ins. Co.* (2001) 26 Cal.4th 1142, 1152, Minish argues that for equitable estoppel to apply, there must be a misrepresentation or concealment of material *facts* not *pertinent law or legal theories*.

She contends the question whether the Fellowship's workers' compensation policy covered her injuries is "a pure question of law, not fact" involving the interpretation of section 3363.6 and whether the Fellowship had complied with the statute. She argues that since this is a legal question—which is still at issue in this appeal—the Fellowship cannot prove the first element (knowledge) of its equitable estoppel defense.

The legal questions regarding interpretation of section 3363.6 and the Fellowship's compliance therewith involve actions taken by the Fellowship prior to the accident and have nothing to do with representations Minish made after she was injured. Moreover, the interpretation of section 3363.6 and the Fellowship's compliance with the statute resolves the question of a covered employment, the first step in our analysis. The trial court's equitable estoppel ruling precludes Minish from arguing that her injuries did not arise out of and in the course of her employment, which is the second step of the analysis. "Whether an employee's injury arose out of and in the course of [the] employment is generally a question of fact to be determined in light of the circumstances of the particular case." (*Wright v. Beverly Fabrics, Inc.* (2002) 95 Cal.App.4th 346, 353 (*Beverly Fabrics*).) When there is no real dispute as to the facts, however, the question is one of law. (*City of Los Angeles v. Workers' Comp. Appeals Bd.* (2007) 157 Cal.App.4th 78, 83.) Since this issue was not adjudicated below, we cannot say with confidence whether it involves undisputed facts and conclude it presents a question of fact.

For these reasons, we reject Minish's assertion that equitable estoppel does not apply because the first element (whether Minish was apprised of the facts) involves a question of law not fact.

For estoppel to apply, the trial court was required to find on the first element that Minish was apprised *of the facts* (that she knew her injuries did not arise out of and in the course of her employment) and on the third element that the Fellowship was ignorant of the true state *of those facts*. (*Goleta*, *supra*, 40 Cal.4th at p. 279.) Since both the first and

third elements refer to the same facts or circumstances, we consider the first and third elements together.

Minish contends that the facts the trial court identified to satisfy the third element were "distinctly different" from the facts the Fellowship argued it was ignorant of at trial and that the trial court erred when it failed to consider the facts identified by the Fellowship. According to Minish, the Fellowship argued it was ignorant of the fact that she was not volunteering at the time of the accident and was not injured at work; the facts the trial court found the Fellowship was ignorant of were "that Ms. Minish was going to proceed in civil court by lawsuit, rather than proceeding or continuing with the workers' compensation case." The Fellowship responds that although the trial court used different language to describe the facts at issue, the court was expressing the same, connected point and that we should reject Minish's attempt to challenge the sufficiency of the evidence based on semantics.

Since the same facts are at issue for both the first and third elements, we examine the statement of decision as to both elements. Contrary to Minish's assertion, the trial court identified more than one fact that she was apprised of and the Fellowship was ignorant of. The statement of decision described the court's findings on the first element as: "Minish was apprised of the fact that her injuries would be covered by [the Fellowship's] workers' compensation policy" and "that workers' compensation applied." The court found "overwhelming evidence" that she was apprised of those facts, which it described in detail in its decision. Most of that evidence consists of Minish's statements that she was volunteering, doing construction work when she was injured. Regarding the third element, the trial court found the Fellowship was ignorant of the "true facts" that Minish "was going to proceed in civil court by lawsuit, rather than proceeding or continuing with the workers' compensation case." The court later stated Minish's "true stated facts" "were to file a civil lawsuit." The court also analyzed whether the

Fellowship had proven whether it was ignorant of the facts that Aguirre's conduct was serious and willful and Minish would file a petition alleging serious and willful misconduct. Notably, the facts the trial court identified for the third element were different from the facts it identified for the first element. But as we have stated, both elements involve the same facts.

In summary, the court found the facts that Minish knew and the Fellowship was ignorant of were: (1) workers' compensation applied; (2) Minish's injuries would be covered by the Fellowship's workers' compensation policy; (3) Minish intended her receipt of benefits as an admission that workers' compensation applied; (4) Minish intended to file a civil action; and (5) Minish intended to allege the S&W Petition misconduct.

As we have noted, after the trial court resolved the section 3363.6 question, the issue became whether Minish was equitably estopped from asserting her injuries did not arise out of and in the course of her employment. The Fellowship correctly identified this question and argued it was ignorant of any facts that showed Minish was not volunteering at the time of the accident and was not injured at work. The trial court identified five facts that generally relate to the workers' compensation action, but arguably missed the mark by not properly identifying the facts that Minish knew and the Fellowship was ignorant of in its analysis of the first and third elements. On appeal, however, we review the correctness of the trial court's decision, not its reasoning. " 'No rule of decision is better or more firmly established by authority, nor one resting upon a sounder basis of reason and propriety, than that a ruling or decision, itself correct in law, will not be disturbed on appeal merely because given for a wrong reason. If right upon any theory of the law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusion.' " (*D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 19, quoting *Davey v. Southern Pacific Co*. (1897) 116

Cal. 325, 329.) We therefore reject Minish's assertion that the trial court erred because it did not consider the facts argued by the Fellowship.

To prove Minish was equitably estopped to assert that her injuries did not arise out of and in the course of her employment, the Fellowship was required to show (1) Minish was apprised of the facts (she knew her injuries did not arise out of and in the course of her employment); (2) she intended that her conduct (repeatedly stating that she was injured while doing volunteer construction work for the Fellowship) shall be acted upon, or must so act that the Fellowship has a right to believe it was so intended; (3) the Fellowship must be ignorant of the true state of facts; and (4) the Fellowship relied upon Minish's conduct to its detriment. (*Minish I*, *supra*, 214 Cal.App.4th at p. 459.)

To prevail on the first element, the Fellowship was required to prove that Minish knew her injuries did not arise out of and in the course of her employment. This would arguably include the fact that she knew she was *not* doing volunteer construction work at the time of the accident. Minish has not challenged the sufficiency of the evidence to support the trial court's implied findings on the first element. While we may treat that failure as a forfeiture (*People v. Stanley* (1995) 10 Cal.4th 764, 793), we exercise our discretion to address the question.

The Fellowship discusses the sufficiency of the evidence on the first element in its brief. It argues "Minish was apprised of the fact her injuries were covered [by workers' compensation] by virtue of her status as a volunteer." But that is not the proper statement of the first element. The Fellowship relies on the following evidence: Minish told her health care providers and social worker she was doing volunteer work when she was injured, the representations in her WCAB Application, and the fact that she received $273,718.64 in workers' compensation benefits. The trial court relied on this same evidence in its statement of decision, as well as Minish's DWC-1 forms, in which she reported the incident as an industrial injury, and her accident report to the Fellowship.

None of this evidence addresses the question presented by the first element: whether Minish—when she represented she was injured doing volunteer construction work—knew she was in fact not acting as a volunteer or that her injuries otherwise did not arise out of and in the course of her employment.

Arguably, there is some evidence that two days after the accident Minish knew she was not acting as a volunteer when she was injured. When she filled out the Fellowship's "Preliminary Medical Accident Report" form, she circled "guest/visitor" to describe her status. But the form did not have an option for "volunteer." Moreover, when describing the accident, she described the construction work she was engaged in when she fell off the forklift. Given the mixed information on this accident report, we cannot say it constitutes substantial evidence that Minish knew her injuries did not arise out of and in the course of her employment.

The evidence shows that from the date of the accident up to and including the filing of her WCAB Application in February 2007, Minish represented on at least 13 occasions that she was injured while doing volunteer construction work. In April 2007, Minish called SCIF and allegedly tried to return the benefits paid, but did not get very far. This is the first time in the record that she challenged her volunteer status. By that time, she had consulted with the attorneys at the Boccardo Law Firm and filed her WCAB Application. The SCIF adjuster properly told her she had to go through her attorney. We can infer from this that by April 2007 Minish learned that her injuries may not have arisen out of and in the course of her employment. But we are not persuaded that her unfruitful communication with SCIF or her later decision to file a civil action that would test the boundaries of the exclusive remedy rule is substantial evidence that when she represented that she was injured while doing volunteer construction work, she knew her injuries did not arise out of and in the course of her employment. " 'The truth concerning these material facts represented or concealed must be known to the party at the time when

his conduct, which amounts to a representation or concealment, takes place; *or else the circumstances must be such that a knowledge of the truth is necessarily imputed to him*.' " (*Long Beach*, *supra*, 3 Cal.3d at p. 491, fn. 27.) There was no evidence that Minish knew *at the time she repeatedly represented that she was injured while doing volunteer work* that her injuries did not arise out of and in the course of her employment.

Moreover, it is not clear Minish would prevail if the court were to adjudicate the question whether her injuries arose out of and in the course of her employment. The fact that she initially went to the Center to visit a friend does not preclude a finding that the accident arose out of and in the course of her volunteer work at the Fellowship. For example, in the *Beverly Fabrics* case, Paula Wright, a fabric store clerk sued her employer for personal injuries that occurred on the employer's premises. Wright had gone to the store on her day off to sign a condolence card for a coworker. While she was visiting two other coworkers in the store, a shelf that held heavy clay pots began to collapse. Wright and her coworkers grabbed the shelf to prevent the merchandise from falling and in the process, Wright injured her back. Other store employees arrived and helped unload and rebrace the shelf. The store kept customers out of the area and precluded them from helping. If Wright had not been a store employee, she would not have been allowed to help. (*Beverly Fabrics*, *supra*, 95 Cal.App.4th at pp. 349-351.) The employer asserted an exclusive remedy defense, arguing that Wright was "performing service growing out of and incidental to . . . her employment." (§ 3600, subd. (a)(2).) Wright argued the conditions of compensation have not been met because her injury arose out of her voluntary participation in an off-duty social activity not constituting part of her work-related duties. (§ 3600, subd. (a)(9).) (*Beverly Fabrics*, *supra*, at p. 353.) The trial court denied the employer's motion for summary judgment and its motions for nonsuit and judgment notwithstanding the verdict at trial based on the defense. (*Id*. at pp. 350-351.) Since the facts were undisputed, the appellate court found

as a matter of law that workers' compensation was Wright's exclusive remedy and reversed the judgment. (*Id*. at pp. 353, 357.) The court explained: "Injuries sustained while an employee is performing tasks within his or her employment contract but outside normal work hours are within the course of employment. The rationale is that the employee is still acting in furtherance of the employer's business." (*Id*. at p. 354.) "The combination of a personal act performed outside of regular working hours with the performance of acts in furtherance of the employer's business does not defeat a finding that the employee was acting in the course of his or her employment." (*Id*. at pp. 354-355; see also *Eckis v. Sea World Corp*. (1976) 64 Cal.App.3d 1 [exclusive remedy barred civil action by employee who was injured on employer's premises during regular working hours doing tasks her employer asked her to do but that were outside the normal scope of her duties]; *South Coast*, *supra*, 61 Cal.4th at pp. 297-300 [discussing causation requirement under § 3600].)

Since the trial court did not adjudicate the question whether Minish's injuries arose arise out of and in the course of her employment on the merits, that issue is not before us in this appeal. We nonetheless mention *Beverly Fabrics* and *Eckis*, since they demonstrate that this issue may ultimately be resolved adversely to Minish. With that in mind, we cannot say that she knew her injuries did not arise out of and in the course of her employment when she said she was injured doing volunteer construction work.[16]

For these reasons, we conclude there was insufficient evidence to support the trial court's implied finding on the first element of equitable estoppel. And since the knowledge element is missing, "[t]here can be no estoppel." (*Simmons*, *supra*, 44 Cal.4th at p. 584.) In light of our conclusion, we shall not address Minish's additional arguments regarding the third element of equitable estoppel (whether the Fellowship was ignorant of

[16] We do not intend hereby to express an opinion on the question whether Minish's injuries arose out of or in the course of her volunteer work.

the true facts) or her arguments on the fourth element (whether the Fellowship relied to its detriment). We shall, however, comment on the question whether Minish's conduct has been blameworthy or intolerably unfair.

E. Blameworthy Conduct

In *Hollister*, this court stated: "A paradigmatic estoppel arises from prior conduct by the asserting party that is somehow at odds with a point now sought to be asserted in litigation. Typically the triggering conduct is itself in some manner blameworthy. [Citations.] Even if innocent in its own right, the conduct must usually operate to cast a pall of unfairness over the position now asserted." (*Hollister*, *supra*, 165 Cal.App.4th at pp. 486-487.) Minish contends it was not inequitable for her to pursue workers' compensation benefits and later file this civil action arguing she is not subject to the workers' compensation laws.

Since the superior court and the WCAB have concurrent jurisdiction to determine subject matter jurisdiction, an injured worker may pursue both a workers' compensation remedy and a civil action, until the exclusive remedy issue and, thus, subject matter jurisdiction question is finally resolved. (*La Jolla*, *supra*, 9 Cal.4th at p. 35.) The grounds for applying the exclusive remedy rule are numerous, as are the cases that have tested the boundaries of the rule. (See e.g., 2 Witkin, Summary of Cal. Law (11th ed. 2017) Workers' Compensation, §§ 28-72, pp. 836-889; *Charles J. Vacanti*, *M.D.*, *Inc*. *v*. *State Comp*. *Ins*. *Fund*, *supra*, 24 Cal.4th at p. 807 ["This case contains a new twist on the seemingly endless litigation over the scope of workers' compensation exclusivity."].)

The parties have not cited any cases in which equitable estoppel has been applied to bar a civil action after an injured worker has accepted workers' compensation benefits.

Minish's reliance on *Felix v*. *Workmen*'*s Comp*. *Appeals Bd*. (1974) 41 Cal.App.3d 759, 765 (*Felix*) is misplaced. In *Felix*, it was undisputed that the employee's injury arose out of and in the course of the employment. The case addressed

the election of remedies when the employer fails to secure workers' compensation insurance (§§ 3706, 3715). The Labor Code expressly permits an injured worker in that situation to pursue a workers' compensation action and a civil action at the same time. (§§ 3706, 3715.) In such cases, the statutory scheme authorizes proceedings in both tribunals that are intended to be cumulative (*Le Parc Community Assn*. *v*. *Workers*' *Comp*. *Appeals Bd*. (2003) 110 Cal.App.4th 1161, 1173-1174) and the concurrent jurisdiction of both tribunals is not limited to determining subject matter jurisdiction. Moreover, the *Felix* court distinguished the situation presented here, stating: "[W]e do not here deal with the question of the competing exercise of jurisdiction between the appeals board and the superior court to decide an issue such as the existence of an employment relationship, as . . . in *Scott*[, *supra*,] 46 Cal.2d 76. In the instant case both tribunals are expressly vested with jurisdiction by the Labor Code." (*Felix*, *supra*, at p. 763, fn. 3.)

The Fellowship argues Minish's conduct was "certainly blameworthy" because she proceeded with her workers' compensation claim by filing applications with the WCAB, telling her doctors she was volunteering when injured, and accepting "considerable sums" as workers' compensation benefits. Indeed, Minish has been able to pursue her civil action—for over 10 years—and simultaneously take advantage of the relatively swift and certain payment of workers' compensation benefits she has received. But the law permits this in cases where the exclusive remedy is at issue. In *Wright*, *supra*, 233 Cal.App.4th 1218, the employee was injured in December 2010 and filed a workers' compensation claim six days later. (*Id*. at p. 1223.) He received over $137,000 in workers' compensation benefits. (*Id*. at p. 1224.) The employer, the State, argued that this was a representation that his injuries arose out of and in the course of the employment. (*Ibid*.) The trial court granted summary judgment in the civil action. It found that workers' compensation was the employee's exclusive remedy based on an

exception to the going and coming rule, which provides that injuries sustained while commuting to and from work are not compensable under the workers' compensation system. (*Id*. at p. 1226.) The Court of Appeal reversed the summary judgment based on the trial court's failure to analyze whether the bunkhouse rule applied. (*Id*. at pp. 1235-1238.) (The bunkhouse rule provides that if the contract of employment contemplates that the employee will sleep on the employer's premises, the employee is considered to be performing services growing out of and incidental to the employment while on those premises.) (*Id*. at pp. 1231-1232.) Thus, in spite of his receipt of workers' compensation benefits, the employee was entitled to pursue his civil action until the question whether the injury arose out of and in the course of the employment—and thus the exclusive remedy issue—was resolved. Notably, equitable estoppel was not at issue in *Wright*.

Citing *Wright*, one treatise opines: "Filing a workers' compensation claim, with its underlying assumption that the injury arose out of and in the course of employment, including the acceptance of benefit payments from the employer, appears not to preclude an injured worker from suing the employer for damages, seeking to prove that the injury did not occur in the course and scope of the employment." (Workers' Damages, *supra*, § 4.19, p. 4-27.) The same treatise states that it is not always clear whether an alleged tortfeasor is the employer or whether an exception to the exclusive remedy rule applies. The treatise recommends attorneys representing injured parties pursue both the civil and workers' compensation remedies to insure the best outcome for the injured client. (*Id*. at §§ 2.6-2.6C, pp. 2-10 to 2-13.)

With these authorities in mind, we conclude there is nothing blameworthy in Minish accepting workers' compensation benefits and then, upon learning she may have a cause of action in tort, filing litigation that tests the boundaries of the exclusive remedy rule.

Our resolution of the section 3363.6 issue answers the question whether the Fellowship's volunteers are subject to the workers' compensation laws and resolves the employment prong of the jurisdictional inquiry. What remains to be determined with regard to the exclusive remedy defense is whether Minish's injuries arose out of and in the course of her employment. Since the Fellowship has not shown that Minish was equitably estopped to argue that her injuries did *not* arise out of and in the course of her employment, and the question whether her injuries arose out of and in the course of her employment has not been adjudicated on the merits, we reverse the judgment.

DISPOSITION

The judgment is reversed. Each party to bear her or its own costs on appeal.

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Premo, J.

WE CONCUR:

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Elia, Acting P.J.

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Grover, J.