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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

DONNA SALLER et al.,

Plaintiffs and Respondents,

v.

CROWN CORK & SEAL COMPANY, INC., et al.,

Defendants and Appellants.

B260277

(Los Angeles County Super. Ct. No. BC342363)

APPEAL from a judgment of the Superior Court of Los Angeles, Anthony J. Mohr, Judge. Affirmed in part and reversed in part.

Morris Polich & Purdy, Dean A Olson; Armstrong & Associates, William H. Armstrong; Horvitz & Levy, Lisa Perrochet and Curt Cutting for Defendants and Appellants.

Waters Kraus & Paul, Michael B. Gurien for Plaintiffs and Respondents.

In 2006, William Saller (Saller) died of asbestos-related mesothelioma. In 2013, following a retrial, a jury found defendant Crown Cork & Seal Company, Inc. (Crown Cork) liable for Saller's wrongful death; in addition, the jury found that Crown Cork was guilty of malice. After accounting for the jury's allocation of fault and pretrial settlements, the trial court entered judgment in favor of Saller's wife and two adult daughters (Plaintiffs) and against Crown Cork for $1.365 million in noneconomic damages, $131,543.22 in economic damages and $3.6 million in punitive damages.

On appeal, Crown Cork challenges the judgment in two principal ways. First, Crown Cork contends that the jury's liability finding was flawed: the trial court refused to instruct the jury on the sophisticated intermediary defense and the jury's finding against Crown Cork on the consumer expectation theory of design defect was unsupported by substantial evidence. Second, Crown Cork argues that the punitive damages award was flawed both legally and factually.

We hold as follows: (1) the trial court properly refused to instruct the jury on the sophisticated intermediary defense because there was insufficient evidence to justify such an instruction; (2) the jury's finding on the consumer expectation theory of design defect was supported by substantial evidence; and (3) the punitive damages award

was unsupported by substantial evidence. Accordingly, we reverse the punitive damages award. In all other respects, the judgment is affirmed.

BACKGROUND

I. Saller's asbestos exposure at the Standard Oil refinery

Saller worked for Standard Oil Company (Standard Oil) at its refinery in El Segundo, California from 1959 to 1967. Although Saller had a number of different jobs during his tenure at the Standard Oil refinery, he did not work primarily with asbestos-containing products. However, although he did not install, cut, or remove asbestos-containing pipe insulation, Saller worked around other workers who did perform such work, exposing him to dust from such work; in addition, he cleaned up after the insulators, which exposed him directly to pieces of asbestos-containing insulation and dust from those products.

II. Saller's exposure to Mundet's asbestos-containing products at the Standard Oil refinery

Among the insulation products that Saller saw being used at the Standard Oil refinery were those produced by Mundet Cork Corporation (Mundet). Mundet was a New York corporation based in North Bergen, New Jersey. Mundet started out in the 1890's making cork bottle caps. Over time Mundet diversified its product line to include asbestos-containing products. Mundet began selling asbestos-containing insulation products in the early 1950's. At one point, Mundet had an insulation contracting office in

Los Angeles and its marketing materials listed the Standard Oil refinery in El Segundo as a "[r]epresentative [i]nstallation[ ] of Mundet Industrial Insulation." According to Saller, he saw insulating packages at the El Segundo refinery that he believed were manufactured by Mundet because the packages had a big "M" on them. Mundet stopped manufacturing insulating products in September 1963. At the time, Mundet was losing money on its insulation business.

III. Crown Cork's acquisition of Mundet

In November 1963, Crown Cork, a Pennsylvania corporation that produces food and beverage containers and packaging, including bottle caps, bought a controlling interest in the stock of Mundet. Unlike Mundet, Crown Cork never entered the asbestos-containing products business.

In February 1964, Mundet sold the assets of its insulation products division to another company, Baldwin-Ehret-Hill. The sale transferred all inventory, machinery and equipment, employees, offices, documents and records relating to Mundet's insulation business.

Two years later, in January 1966, after Crown Cork purchased the remaining stock of Mundet, Crown Cork merged with Mundet.

IV. The first trial against Crown Cork

In November 2005, after being diagnosed with mesothelioma, Saller and his wife filed suit against 22 named defendants, including the manufacturers of various

asbestos products to which Saller believed he was exposed; Saller sued Crown Cork individually and in its capacity as Mundet's successor in interest. After Saller died in February 2006, his wife and daughters continued the lawsuit.

In 2007, Plaintiffs' claims proceeded to trial against 2 of the 22 defendants—Crown Cork and Bondex International, Inc. (Bondex). The jury ruled for the defense, rejecting Plaintiffs' strict liability design defect claim and their negligent failure-to-warn claim. Plaintiffs appealed and this court ordered a new trial, ruling that the trial court erroneously refused to instruct the jury on two of the plaintiffs' theories of liability—the "consumer expectations" theory of design defect and strict liability for failure to warn. (*Saller v. Crown Cork & Seal Co., Inc.* (2010) 187 Cal.App.4th 1220, 1225, 1231–1240 (*Saller*).) Bondex filed for bankruptcy protection while the first appeal was pending, leaving Crown Cork as the only defendant remaining for the retrial. (*Id.* at p. 1225, fn. 1.)

V. The retrial against Crown Cork

The retrial, which began on November 19, 2013, was bifurcated into a liability phase and a punitive damages phase. On December 13, 2013, the jury returned a verdict in favor of Plaintiffs on their claims for strict liability for design defect under the consumer expectation test, strict liability for failure to warn, and negligence. On the design defect claim, the jury found, by a vote of 11-1, that there was a defect and, by a unanimous 12-0 vote, found that the defect

was a substantial factor in causing Saller's mesothelioma. On the failure to warn claim, the jury, by a vote of 11-1 found that there was such a failure and, by another unanimous vote, found that the failure to warn was a substantial factor in causing Saller's mesothelioma. On Plaintiffs' negligence claim, the jury was a little more divided, finding that Mundet/Crown Cork was negligent by a 9-3 vote and by a 10-2 vote that such negligence was a substantial factor in causing Saller's mesothelioma. In addition, the jury, by a vote of 10-2, found by clear and convincing evidence that Mundet/Crown Cork was guilty of malice.

The second or punitive damages phase was tried on December 16, 2013. After less than two hours of deliberations, the jury, by a vote of 9-3, returned a punitive damages award of $3.6 million against Crown Cork.

Crown Cork subsequently filed motions for judgment notwithstanding the verdict and for a new trial, which were opposed by Plaintiffs, and then denied on October 24, 2014.

Crown Cork timely appealed.

DISCUSSION

I. The trial court properly refused to instruct the jury on the sophisticated intermediary defense

Crown Cork requested, and the trial court rejected, an instruction stating that Mundet had no duty to warn Saller about the potential hazards of its asbestos-containing products because Mundet sold its products to a sophisticated

intermediary,[1] namely, Standard Oil. Crown Cork argues that the trial court's ruling "was error" and urges us to order a retrial so that "the parties and the trial court can craft a jury instruction that precisely tracks" the holding in *Webb*, *supra*, 63 Cal.4th 167. We disagree.

A. STANDARD OF REVIEW

"A party is entitled upon request to correct, nonargumentative instructions on every theory of the case advanced by him which is supported by substantial evidence." (*Soule v. General Motors Corp*. (1994) 8 Cal.4th 548, 572; *Bay Guardian Co. v. New Times Media LLC* (2010) 187 Cal.App.4th 438, 465–466.)

The substantial evidence standard of review involves two steps. "First, one must resolve all explicit conflicts in the evidence in favor of the respondent and presume in favor of the judgment all *reasonable* inferences. [Citation.] Second, one must determine whether the evidence thus marshaled is substantial. While it is commonly stated that our 'power' begins and ends with a determination that there is substantial evidence [citation], this does not mean we must blindly seize any evidence in support of the respondent

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[1] As our Supreme Court noted in its recent decision *Webb v. Special Electric Co., Inc*. (2016) 63 Cal.4th 167 (*Webb*), the terminology used in connection with this area of the law is "notoriously confusing": "sophisticated purchaser," "learned intermediary," "bulk supplier." (*Id*. at p. 176, fn. 1.) We will follow the Supreme Court's lead and use the term "sophisticated intermediary." (*Id*. at p. 176.)

in order to affirm the judgment . . . . '[I]f the word "substantial" [is to mean] anything at all, it clearly implies that such evidence must be of ponderable legal significance. Obviously the word cannot be deemed synonymous with "any" evidence. It must be reasonable . . . , credible, and of solid value . . . .' [Citation.] The ultimate determination is whether a *reasonable* trier of fact could have found for the respondent based on the *whole* record." (*Kuhn v. Department of General Services* (1994) 22 Cal.App.4th 1627, 1632–1633, fns. omitted.) "[T]he power of an appellate court *begins* and *ends* with the determination as to whether, on *the entire record*, there is substantial evidence, contradicted or uncontradicted, which will support the determination, and when two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trial court. *If such substantial evidence be found, it is of no consequence that the trial court believing other evidence, or drawing other reasonable inferences, might have reached a contrary conclusion*." (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873–874.)

" 'A judgment will not be reversed for error[ ] in jury instructions unless it appears reasonably probable that, absent the error, the jury would have rendered a verdict more favorable to the appellant.' " (*Scott v. Rayhrer* (2010) 185 Cal.App.4th 1535, 1540.)

B. THE SOPHISTICATED INTERMEDIARY DEFENSE REQUIRES EVIDENCE OF ACTUAL RELIANCE

In *Webb*, *supra*, 63 Cal.4th 167, our Supreme Court formally adopted the sophisticated intermediary doctrine as it has been expressed in Restatement Second of Torts, section 388 and Restatement Third of Torts, Products Liability, section 2. (*Id*. at pp. 185–187.) "Under this rule, a supplier may discharge its duty to warn end users about known or knowable risks in the use of its product if it: (1) provides adequate warnings to the product's immediate purchaser, or sells to a sophisticated purchaser that it knows is aware or should be aware of the specific danger, *and* (2) reasonably relies on the purchaser to convey appropriate warnings to downstream users who will encounter the product." (*Id*. at p. 187.) "Because the sophisticated intermediary doctrine is an affirmative defense, the supplier bears the burden of proving that it adequately warned the intermediary, or knew the intermediary was aware or should have been aware of the specific hazard, and reasonably relied on the intermediary to transmit warnings." (*Ibid*.)

Drawing on prior California case law, the court in *Webb*, *supra*, 63 Cal.4th 167, stressed that " 'to avoid liability, there must be some [factual] *basis* for the supplier to believe that the *ultimate user* knows, or should know, of the item's hazards.' " (*Id*. at p. 189, first italics added.) In other words, " 'the intermediary's sophistication is not, as [a] matter of law, sufficient to avert liability; there must be a sufficient [factual] reason for believing that the

intermediary's sophistication is likely to operate to protect the user, or that the user is likely to discover the hazards in some other manner.' " (*Ibid.*) As a result, our Supreme Court held that "[t]o establish a defense under the sophisticated intermediary doctrine, a product supplier must show not only that it warned or sold to a knowledgeable intermediary, but also that it *actually and reasonably relied* on the intermediary to convey warnings to end users." (*Ibid*, italics added.)

In reaching its decision, the Court in *Webb*, *supra*, 63 Cal.4th 167, "recognize[d] direct proof of actual reliance may be difficult to obtain when, as in the case of latent disease, the material was supplied to an intermediary long ago. However, actual reliance is an inference the factfinder should be able to draw from circumstantial evidence about the parties' dealings." (*Id.* at p. 193.)

The absence of supporting evidence was critical to the Supreme Court's decision in *Webb*, *supra*, 63 Cal.4th 167. In that case, the jury found that the defendant, a supplier of crocidolite asbestos to the Johns Manville Corporation (Johns Manville), "the oldest and largest manufacturer of asbestos containing products in the country," liable for failing to warn about the dangers of its product. (*Id.* at pp. 177–179.) The trial court, however, granted the defendant supplier's motion for judgment notwithstanding the verdict (JNOV). (*Id.* at p. 179.) The Court of Appeal reversed and remanded. Our Supreme Court granted review and subsequently held that the JNOV was unjustified,

["b]ecause substantial evidence supports the jury's verdict, and [the defendant supplier] did not have a complete defense as a matter of law." (*Ibid.*) Since the evidence showed that the defendant supplier did not warn Johns-Manville, the supplier's defense depended on evidence of Johns-Manville's sophistication. "Although the record clearly show[ed] Johns-Manville was aware of the risks of asbestos *in general*, no evidence established it knew about the particularly acute risks posed by the crocidolite asbestos [the defendant] supplied." (*Id.* at pp. 192–193.) Moreover, the record was "devoid" of any evidence about the defendant's dealings with Johns Manville such that the jury could infer that the defendant actually and reasonably relied on Johns Manville to provide the necessary warnings to the plaintiff. (*Id.* at p. 193.)

C. CROWN CORK FAILED TO PRODUCE EVIDENCE OF ACTUAL AND REASONABLE RELIANCE BY MUNDET ON STANDARD OIL'S SOPHISTICATION

Crown Cork argues that "[t]here was enough evidence here to support an inference that a reasonable seller in Mundet's shoes would have known about Standard Oil's sophisticated approach to industrial hygiene. A reasonable jury could certainly infer that, if Standard Oil purchased insulation from Mundet (as plaintiffs contend), someone on Standard Oil's extensive industrial hygiene team would have communicated with Mundet." Crown Cork's argument is without merit because it is based, not on inferential reasoning derived from established fact, but on guesswork.

It is well established that " 'the inference or inferences indulged in must be reasonable, must be based on the evidence, and cannot be the result of mere guess, surmise or conjecture' [citations], or 'be based on imagination, speculation or supposition.' " (*Marshall v. Parkes* (1960) 181 Cal.App.2d 650, 655.) As the court in *Brautigam v. Brooks* (1964) 227 Cal.App.2d 547, explained, " ' "A legal inference cannot flow from the nonexistence of a fact; it can be drawn only from a fact actually established. [Citation.]" . . . [¶] " 'If the existence of an essential fact upon which a party relies is left in doubt or uncertainty, the party upon whom the burden rests to establish that fact should suffer, and not his adversary.' " ' " (*Id*. at p. 556.)

Here, there was no evidence whatsoever about the dealings between Mundet and Standard Oil. No documents were admitted into evidence showing, for example, a supplier contract between Mundet and Standard Oil or the volume of sales by Mundet to Standard Oil's El Segundo refinery on a yearly, quarterly, or monthly basis when Saller worked at the refinery or at any time. The only documents that linked Mundet in some way with the El Segundo refinery were some Mundet sales brochures that listed the refinery as a "[r]epresentative [i]nstallation[ ] of Mundet Industrial Insulation." Nor was there any testimony offered by any witness who had worked at Mundet during the operative time period and had personal knowledge of that company's dealings with Standard Oil. The best that the defense could offer was the testimony of a single witness, a

former Crown Cork employee who began working for the company in 1972—eight years *after* Mundet sold off the assets of its thermal insulation products division to another company. This witness's testimony about Mundet's insulating business was very limited and highly generalized—Mundet got into the insulation business in 1951; stopped manufacturing insulating products in 1963; and sold the insulating business in 1964. Moreover, there was no testimony or documents from Standard Oil regarding its dealings with Mundet. As the trial court observed, there was "really almost no evidence from the defense" regarding Mundet generally or, more specifically, its dealings with Standard Oil. This dearth of evidence was not due to any neglect or misconduct by Crown Cork. The documentary evidence appears to have been lost in a wholly innocent manner. The relevant documents were transferred to the purchaser of Mundet's insulation business in 1964, more than half a century ago, and that purchaser subsequently went out of business.

While we are sympathetic with the difficulty of defending (or bringing) a claim whose operative facts lie decades in the past, the law requires that inferences must be based on evidence. As the trial court explained to defense counsel: "the fact that it's hard to find a witness doesn't justify relaxing or bending the rules of evidence." Here, the record is devoid of the evidence necessary to justify an instruction on the sophisticated intermediary defense.

Although there was evidence at trial that Standard Oil was aware of the risks of asbestos in general prior to or during the time Saller worked at the El Segundo refinery, no evidence was introduced establishing that Standard Oil knew about the risks posed by the asbestos containing products supplied by Mundet. In addition, the record is devoid of any evidence about Mundet's dealings with Standard Oil generally or the El Segundo refinery in particular such that the jury could have inferred that Mundet actually and reasonably relied on Standard Oil to provide the necessary warnings to Saller. In other words, Crown Cork's argument that "someone on Standard Oil's extensive industrial hygiene team would have communicated with Mundet" is little more than wishful thinking given the evidence and, as such, is not the basis for a jury instruction.

In short, because an instruction on the sophisticated intermediary defense was not supported by substantial evidence, the trial court properly refused Crown Cork's request for such an instruction.

II. The jury's verdict on Plaintiffs' claim for design defect under the consumer expectation test is supported by substantial evidence

A manufacturer may be held strictly liable for placing a defective product on the market if the plaintiff's injury results from a reasonably foreseeable use of the product. (*Soule v. General Motors Corp., supra*, 8 Cal.4th at p. 560.) Products liability may be premised, inter alia, upon a theory of design defect. (*Anderson v. Owens–Corning Fiberglas*

Corp. (1991) 53 Cal.3d 987, 995.) Defective design may be established under two theories: (1) the consumer expectations test, which asks "whether the product performed as safely as an ordinary consumer would expect when used in an intended and reasonably foreseeable manner"; or (2) the risk/benefit test, which asks whether "the benefits of the challenged design outweighed the risk of danger inherent in the design." (*Ibid.*) The jury here was instructed under the consumer expectations test only.

Crown Cork argues that the jury's finding with respect to Plaintiffs' design defect claim was unsupported because it purportedly "introduced undisputed testimony that the refinery workers who worked with asbestos insulation were advised of the need to take precautions, such as using respirators and suppressing dust levels with 'wet methods.' . . . [¶] Accordingly, . . . the jury could *not* properly find that the refinery workers would have formed an affirmative expectation that exposure to insulation dust was harmless if used without precautions." We are unpersuaded by Crown Cork's argument.

A. STANDARD OF REVIEW

In evaluating a claim that substantial evidence did not support a judgment, we, as discussed above, "view all of the evidence in the light most favorable to the judgment, drawing every reasonable inference and resolving every conflict to the support the judgment." (*Jonkey v. Carignan Construction Co.* (2006) 139 Cal.App.4th 20, 24.) Even if the jury's findings are against the weight of the evidence, they

will be upheld if supported by evidence that is of ponderable legal significance and reasonable in nature. (*Ibid.*) " 'The testimony of a witness, even the party himself, may be sufficient' " to constitute substantial evidence. (*In re Marriage of Mix* (1975) 14 Cal.3d 604, 614; *Consolidated Irrigation Dist. v. City of Selma* (2012) 204 Cal.App.4th 187, 201; Evid. Code, § 411.)

B. SUBSTANTIAL EVIDENCE SUPPORTED JURY'S FINDING

Crown Cork's position is based on the testimony of one witness, John Spence (Spence), whose testimony, like that of Saller's, was presented through prior deposition testimony.

Spence was not a "refinery worker" as that term is commonly understood or as that term is used in the context of this case, that is, Spence did not install, cut, or remove asbestos-containing pipe insulation or routinely work in close proximity to or around other refinery workers who did perform such work. Before going to work for Standard Oil in 1945, Spence had already earned a master's degree in organic chemistry and a doctorate in organic chemistry and engineering from Purdue University. In December 1945, he began working for Chevron Research Corporation, a subsidiary of Standard Oil. In 1954, Standard Oil sent Spence to Harvard University's School of Public Health to earn a second master's degree, one in industrial hygiene. Upon his return to Standard Oil from Harvard, Spence helped develop and run a corporate industrial hygiene department that had a staff of 20 or 30 that included a

toxicologist and at least five industrial hygienists with different specialties.

Spence testified that by the mid-1950's Standard Oil knew that asbestos was suspected of being causally connected with certain forms of cancer and that as a response to that risk he further testified that Standard Oil required workers to wear respirators when they were exposed to dust, including dust from asbestos-containing products. However, Spence also testified that the precise use of respirators at any particular Standard Oil facility was determined not by the corporate industrial hygiene department that he headed, but by the safety engineers at each facility. More critically, Spence did not offer any testimony about safety conditions or practices at the El Segundo refinery during the time Saller worked there or at any other time. In other words, Spence testified only about Standard Oil's practices generally.

The only refinery worker who testified about working practices and conditions at the El Segundo refinery was Saller. Among other things, Saller testified that although he attended monthly safety meetings at the refinery, and even though asbestos was sometimes discussed at those meetings, Standard Oil never warned him about any health risks from working with or around Mundet pipe coverings and that he was never told to wear any safety equipment, such as a respirator while working with or around Mundet pipe coverings. He also testified that he never saw any warnings on boxes of Mundet insulation.

In addition, Plaintiffs' industrial hygiene expert testified that she saw "no evidence, that, in the El Segundo refinery, there was an asbestos-control[ ] program and supervision that required appropriate precautions to be utilized in the time frame Mr. Saller worked there." Plaintiffs' expert further testified that while "corporate edicts" may be issued by a corporate industrial hygiene department, the safety engineers at individual facilities "can't be everywhere all the time," and that "it's very apparent, during th[e] time frame when Mr. Saller worked, many people at refineries, including El Segundo, were working without the benefit of exposure controls when they were working with or around asbestos."

Given the testimony of both Saller and Plaintiffs' expert, the jury could properly find that Standard Oil refinery workers, including those who worked at the El Segundo refinery, could form an affirmative expectation during the period 1959 to 1967 that exposure to insulation dust was harmless even if no safety precautions, such as the use of a respirator, were taken.

As we discussed in *Saller*, *supra*, 187 Cal.App.4th at pages 1236–1237, Saller's testimony standing alone would have been sufficient to permit an inference by the jury that Mundet's asbestos-containing products did not meet the minimum safety expectations of its ordinary users. The jury, as evidenced by its votes, apparently found Saller's testimony and the testimony of Plaintiffs' expert to be quite compelling. On the design defect claim, the jury found, by a

vote of 11-1, that there was a defect under the consumer expectations theory and, by a unanimous 12-0 vote, found that the defect was a substantial factor in causing Saller's mesothelioma.

In sum, viewing Saller's testimony and that of Plaintiffs' expert in the light most favorable to Plaintiffs, giving them the benefit of every reasonable inference, and resolving, as we must (*Jonkey v. Carignan Construction Co.*, *supra*, 139 Cal.App.4th at p. 24), all conflicts between, on the one hand, Saller's testimony and the testimony of Plaintiffs' expert, and, on the other hand, Spence's testimony in Plaintiffs' favor, we conclude that there is substantial evidence to support the jury's finding for design defect under the consumer expectation test.

III. The punitive damages award is not supported by evidence of Crown Cork's ability to pay

Crown Cork argues, inter alia, that the punitive damages award was improper because Plaintiffs' expert could offer testimony only about the financial condition of Crown Cork's parent, Crown Holdings. We agree. Because the punitive damages award was not supported by substantial evidence, because Plaintiffs failed to meet their burden, we decline to address Crown Cork's other arguments regarding the punitive damages award.

A. STANDARD OF REVIEW

"Evidence of a defendant's financial condition is a legal precondition to the award of punitive damages. [Citation.] We examine the record to determine whether the challenged

award rests upon substantial evidence. [Citations.] If it does not, and if the plaintiffs had a full and fair opportunity to make the requisite showing, the proper remedy is to reverse the award." (*Soto v. BorgWarner Morse TEC Inc.* (2015) 239 Cal.App.4th 165, 195 (*Soto*).)

B. AN AWARD OF PUNITIVE DAMAGES REQUIRES EVIDENCE OF THE DEFENDANT'S ABILITY TO PAY

An award of punitive damages hinges on three factors: the reprehensibility of the defendant's conduct; the reasonableness of the relationship between the award and the plaintiff's harm; and, in view of the defendant's financial condition, the amount necessary to punish him or her and discourage future wrongful conduct. (*Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 928 & fn. 13; *Adams v. Murakami* (1991) 54 Cal.3d 105, 110 (*Adams*).) Only the third prong is at issue here.

"[O]bviously, the function of deterrence . . . will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort. [Citations.] By the same token, of course, the function of punitive damages is not served by an award which, in light of the defendant's wealth . . . exceeds the level necessary to properly punish and deter." (*Neal v. Farmers Ins. Exchange*, *supra*, 21 Cal.3d at p. 928.) The "most important question is whether the amount of the punitive damages award will have deterrent effect—without being excessive. . . . [T]he award can be so disproportionate to the defendant's ability to pay

that the award is excessive for that reason alone." (*Adams*, *supra*, 54 Cal.3d at p. 111.)

Accordingly, "an award of punitive damages cannot be sustained on appeal unless the trial record contains *meaningful* evidence of the defendant's financial condition." (*Adams*, *supra*, 54 Cal.3d at p. 109, italics added.) "Without such evidence, a reviewing court can only speculate as to whether the award is appropriate or excessive." (*Id*. at p. 112.) In short, what is required "is evidence of the defendant's ability to pay the damage award." (*Robert L. Cloud & Associates, Inc. v. Mikesell* (1999) 69 Cal.App.4th 1141, 1152.)

On the issue of a defendant's ability to pay, the plaintiff bears the burden of proof. (*Adams*, *supra*, 54 Cal.3d at p. 123.) "It is not too much to ask of a plaintiff seeking such a windfall to require that he or she introduce evidence that will allow a jury and a reviewing court to determine whether the amount of the award is appropriate and, in particular, whether it is excessive in light of the central goal of deterrence." (*Id*. at p. 120.)

C. EVIDENCE OF A CORPORATE PARENT'S ABILITY TO PAY IS NOT SUFFICIENT IF THE LIABLE DEFENDANT IS A SUBSIDIARY

It is a touchstone legal principle in American jurisprudence that "a corporation is a legal entity that is distinct from its shareholders." (*Grosset v. Wenaas* (2008) 42 Cal.4th 1100, 1108; *Dole Food Co. v. Patrickson* (2003) 538 U.S. 468, 474.) "Part and parcel of this general principle is

that 'a parent corporation . . . is not liable for the acts of its subsidiaries.' " (*Santa Clarita Organization for Planning and the Environment v. Castaic Lake Water Agency* (2016) 1 Cal.App.5th 1084, 1104.) In other words, "more is required than solely a parent-subsidiary corporate relationship to create liability of a parent for the actions of its subsidiary." (*Walker v. Signal Companies, Inc.* (1978) 84 Cal.App.3d 982, 1001.)

In accord with these general principles, the Civil Code requires that in order to establish a defendant's ability to pay "[e]vidence of profit and financial condition shall be admissible *only* as to the *defendant . . . found liable to the plaintiff* and to be guilty of malice oppression, or fraud." (Civ. Code, § 3295, subd. (d), italics added).) As a result, evidence of a corporate parent's financial condition is not evidence of one of its subsidiaries' ability to pay if the subsidiary and not the parent was the defendant found liable and guilty of malice. (*Tomaselli v. Transamerica Ins. Co.* (1994) 25 Cal.App.4th 1269, 1282–1283 (*Tomaselli*).)

In *Tomaselli*, *supra*, 25 Cal.App.4th 1269, the only evidence the plaintiff presented was the parent company's annual consolidated report. (*Id.* at pp. 1282–1283.) The *Tomaselli* court found that this evidence was not sufficient to support an award of punitive damages against the subsidiary. (*Ibid.*) The *Tomaselli* court also rejected the argument that the award supported the theory that the subsidiary and the parent companies were alter egos, because the issue of alter ego was not litigated or decided at

trial. (*Id*. at pp. 1284–1285.) Similarly, in *Soto*, *supra*, 239 Cal.App.4th 165, the court of appeal reversed a punitive damage award because the plaintiff's expert testified mostly about the parent corporation's finances, not the defendant subsidiary's ability to pay. (*Id.* at pp. 195–198; see generally *Walker v. Signal Companies, Inc*., *supra*, 84 Cal.App.3d at p. 1001 ["no factual justification" to increase punitive damages award based on parent corporation's net worth].)

C. THERE WAS NO EVIDENCE OF CROWN CORK'S ABILITY TO PAY

Here, as in *Tomaselli*, *supra*, 25 Cal.App.4th 1269, the only evidence presented to the jury regarding Crown Cork's ability to pay were testimony and documents regarding Crown Cork's parent, Crown Holdings. There was, in other words, no evidence presented to the jury regarding the actual defendant's ability to pay—no evidence regarding Crown Cork's net worth, net income, total assets, total liabilities, cash flow or expenses. Moreover, Plaintiffs have no one to blame for their evidentiary shortfall except themselves.

A plaintiff seeking punitive damages has a number of discovery options. A plaintiff may seek an order permitting pretrial discovery of a defendant's financial condition or profits. (Civ. Code, § 3295, subd. (c).) The Legislature has also allowed a plaintiff seeking punitive damages to use subpoenas to require a defendant to produce financial information at trial. A plaintiff "may subpoena documents or witnesses to be available at the trial for the purpose of

establishing the profits or financial condition . . . and the defendant may be required to identify documents in the defendant's possession which are relevant and admissible for that purpose and the witnesses employed by or related to the defendant who would be most competent to testify to those facts." (Civ. Code, § 3295, subd. (c).) "The traditional subpoena process protects the defendant's privacy interests while affording the plaintiff some assurance that the defendant's financial information will be at the ready if and when it becomes necessary. Moreover, the traditional subpoena process allows the plaintiff to identify key documents and witnesses and prepare its strategy accordingly." (*Soto*, *supra*, 239 Cal.App.4th at p. 193.)

Alternatively, and more informally, "a plaintiff may request that the defendant 'stipulate to a process by which [the defendant] would gather documents pertaining to [its] financial condition, bring them to trial under seal and make them immediately available" in the event that the jury's findings make punitive damages available. [Citation.] This procedure "is a frequently used and effective means of handling the matter when a claim for punitive damages is alleged," and may be suggested or facilitated by the court." (*Soto*, *supra*, 239 Cal.App.4th at p. 193.)

Or, a plaintiff may do nothing pretrial and instead wait until liability is established to ask the court for the order described in Civil Code section 3295, subdivision (c). (See *Mike Davidov Co. v. Issod* (2000) 78 Cal.App.4th 597, 609.) However, as one well respected practice guide notes,

"[w]aiting until the jury has returned a verdict on liability before seeking discovery of defendant's financial information is *extremely risky*: The court may, in its discretion, deem the request untimely." (Haning et al., Cal. Practice Guide: Personal Injury (The Rutter Group 2016) ¶ 6:162.1a, p. 6-94, italics added.) Although a trial court is authorized to order discovery at the close of the liability phase, (see *Pfeifer v. John Crane, Inc.* (2013) 220 Cal.App.4th 1270, 1306), that authority "does not preclude a trial court from determining, in its discretion, that such an order is inappropriate." (*I–CA Enterprises, Inc. v. Palram Americas, Inc.* (2015) 235 Cal.App.4th 257, 284.)

Here, although the case had been pending since 2005, and although Plaintiffs went to trial twice against Crown Cork, there is nothing in the record before us indicating that Plaintiffs ever took or even attempted to take any of the discovery steps discussed above. On the record before us, Plaintiffs did not ask for discovery or a stipulation until *after* the liability verdict was rendered. Plaintiffs' decision to take a "wait-and-see approach" (*Soto*, *supra*, 239 Cal.App.4th at p. 198) was a gamble, a gamble that in retrospect was ill-advised. Although Crown Holdings does not as a matter of course create balance sheets for its subsidiary, Crown Cork, there were "financial records" from which such a balance sheet could have been "constructed," but such a reconstruction would take time. The trial court, quite reasonably, decided that a delay would risk having the jury "dissipate" away; rather than risk a mistrial, the trial court

denied Plaintiffs' belated request for discovery. On appeal, Plaintiffs, tellingly, do not challenge the trial court's decision.

Because Plaintiffs had a full and fair opportunity to develop and present their case for punitive damages, and because no evidence of Crown Cork's ability to pay was presented to the jury, the punitive damages award is reversed and the matter is not remanded for a retrial of the issue. Under these circumstances, Plaintiffs do not get a second bite at the punitive damages apple. (*Kelly v. Haag* (2006) 145 Cal.App.4th 910, 919–920; *Soto*, *supra*, 239 Cal.App.4th at p. 198.)

DISPOSITION

The award of punitive damages is reversed. In all other respects, the judgment is affirmed. The parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

ROTHSCHILD, P. J.

LUI, J.