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PERSPECTIVE

Court of Appeal ruling muddies the waters on punitive damages

By Timothy D. Reuben

Every lawyer is always interested in guidance about punitive damages, but unfortunately in *Morgan v. J-M Manufacturing Company*, 2021 DJDAR 1643 (2021), Division 1 of the 2nd District Court of Appeal has muddied the standard for an award of punitive damages against a corporate defendant. In that case, Justice Victoria Chaney, writing for the court, Justice Frances Rothschild and San Luis Obispo County Superior Court Judge Rita Federman, concurring, reversed a jury verdict for $15 million in punitive damages. Although the opinion was initially not published, the appellate court later certified it for publication, so now it is a case to be reckoned with.

From 1979 through 1985, plaintiff Morgan contracted mesothelioma due to exposure to asbestos dust at construction jobsites and in 2018 sued various parties, including J-M Manufacturing. J-M had acquired out of bankruptcy court certain assets of Johns-Manville Corporation in 1983. As described recently in one bankruptcy court opinion: "Before filing for bankruptcy, [Johns-] Manville was the largest producer and provider of asbestos in the world. Manville's asbestos was used widely throughout many industries for decades in the United States. The medical dangers associated with exposure to asbestos were not well known until latent asbestos injuries began to manifest across the country in the 1960s. 'The health risks caused by asbestos were finally given broad acknowledgment on the legal front in 1973' .... 'By the 1980s, asbestos producers coalesced into an industry-wide consortium, presenting a unified litigation front." *In re Johns-Manville Corporation*, 581 B.R. 38 (Bankr. S.D.N.Y. 2018) (internal citations omitted). Simply put, J-M had to have been well aware of the risks to humans of asbestos products when it purchased the Manville assets.

Nonetheless, in 1983, J-M began selling asbestos-cement pipe to construction sites, having purchased the asbestos-cement pipe business from Johns-Manville. It would therefore seem obvious that J-M knew at the most senior level of the company that exposure to asbestos could cause workers severe illness. However, the opinion, while describing the facts, takes no note of this reasonable inference. At trial, all other defendants settled except for J-M. The case was tried before a jury, Judge Maurice A. Leiter presiding, which determined that J-M was 45% responsible for Morgan's disease and awarded over $7 million in compensatory damages plus another $15 million in punitive damages. J-M appealed, claiming: (1) there was no evidence that Morgan was exposed to J-M products; (2) the court should have given an instruction that J-M was not liable for any asbestos exposure prior to 1983; and (3) Morgan had not met his burden under Civil Code Section 3294(b). On the first issue, the court found there was substantial evidence to support the jury's finding of exposure to J-M products, and on the second issue the court held the trial court did not have to give an argumentative instruction. But on the third issue, the court held that the punitive damage award was "not supported by substantial evidence."

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How and why did the appellate court reach its conclusion about punitives? The opinion notes that its review is "for sufficiency of the evidence." Pursuant to Civil Code Section 3294(b), in order to obtain punitive damages against a corporate entity, the plaintiff must show "advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice ... on the part of an officer, director or managing agent of the corporation." J-M argued there was no evidence that "a J-M[] officer, director, or managing agent authorized or ratified any conduct," and pointed out that the J-M employees identified at trial were not officers, directors or managing agents. Instead Morgan "'treated J-M[] as a monolithic entity" and referred to the company — in its entirety — as "they," without ever identifying who "they" referred to.'

But Morgan contended that "the entire organization was involved in the acts giving rise to malice," relying on *Romo v. Ford Motor Co.*, 99

Cal. App. 4th 1115 (2002), vacated on other grounds by *Ford Motor Co. v. Romo*, 538 U.S. 1028 (2003). The *Romo* court found that when "the entire organization is involved in the acts that constitute malice," then"[t]here is no requirement that the evidence establish that a particular committee or officer of the corporation acted on a particular date with 'malice.'" The Morgan appellate court here actually recognizes and heavily quotes *Romo*, but then goes on to distinguish its holding by arguing that *Romo* also requires a showing that "the corporation and the structure of management decisionmaking ... permits an inference that the information [supporting malice] in fact moved upward to a point where corporate policy was formalized." The opinion acknowledges that J-M's officers, directors and managing agents "may" have had the requisite state of mind to support the exemplary damages award, but the court simply concludes: "We have reviewed the record for evidence from which the jury could have concluded that an officer, director or managing agent — someone responsible for J-M[]'s corporate policy — had the requisite state of mind to support a punitive damage award. We found none."

Importantly, the opinion appears to endorse the holding in *Romo*, although it does not do so expressly. The appellate court could have disagreed with *Romo* and interpreted Civil Code Section 3294 narrowly, requiring that an actual officer, director or managing agent be specifically identified with proof of his or her ratification, prohibiting compliance through mere inference. However, since the opinion seems to embrace the *Romo* holding, this case can now arguably be cited for the *Romo* proposition that a jury can infer the authorization or ratification required by Civil Code Section 3294 to support a punitive award. In a large corporation (such as J-M) with layers of management committees, it is frequently difficult to identify a single specific manager with evidence of ratification in order to satisfy a plaintiff's burden. So in this way, the opinion is good news for plaintiffs generally.

But unfortunately, *Morgan* is light on analysis and explanation. It simply concludes that on review it found no evidence to support an inference without any summary of what was actually in evidence. There were J-M employees identified, and therefore there had to be some evidence about the entity and its structure. Moreover, J-M was peddling asbestos products that were widely known to be dangerous and bought that business from Johns-Manville — clearly the senior management of the company knew what it was buying at the time and knew it was going to be selling a product that causes severe illnesses to workers. When a court elects to publish an opinion to provide guidance and make law, it typically needs to provide enough information and hopefully legal evaluation so as to guide lawyers and trial courts in this critically important area — but here we are left to guess. Why in this case was there not an obvious inference that the J-M hierarchy did not know it was providing a known dangerous product to jobsites? Perhaps there was evidence of warnings — but we do not know. Perhaps the lower-level employees identified lied about the product — but we do not know. For the appellate court to simply conclude here without more that it reviewed the record and found nothing to support J-M's corporate knowledge is just not enough. More is needed for sound guidance to the bench and the bar. ■

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