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A152692

IN THE

SUPREME COURT OF CALIFORNIA

FRANK C. HART and CYNTHIA HART,

Plaintiffs and Petitioners,

vs.

KEENAN PROPERTIES, INC.,

Defendant and Respondent.

ON REVIEW OF DECISION OF THE FIRST DISTRICT COURT OF APPEAL, DIVISION FIVE
FOLLOWING APPEAL FROM A JUDGMENT OF THE ALAMEDA COUNTY SUPERIOR COURT
HON. BRAD SELIGMAN • CASE NO. RG16838191

PETITION FOR REVIEW

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ISSUES PRESENTED

1. Is a witness' testimony identifying a defendant's logo or name inadmissible hearsay?

2. When a defendant destroys its invoices showing it sold a defective good, what constitutes sufficient evidence for authentication of the secondary evidence as to the invoices? [*See, e.g.*, Cal. Evid. Code § 1523(b)].

INTRODUCTION AND REASONS TO GRANT REVIEW

The unprecedented 2-1 majority opinion below will mandate the following evidentiary rulings:

> Q. Who drove into the crowd?
>
> A. It was a yellow truck. The truck said Acme Trucks, Owner Driver Jim Jackson.
>
> Objection: Hearsay.
>
> Trial court: Sustained.

. . .

> Q. What did you eat that made you ill?
>
> A. A hamburger. It came in a bag reading "Jack-in-the-Box." It was wrapped in a white "Jack-in-the-Box" paper.
>
> Objection: Hearsay.
>
> Trial court: Sustained.

. . .

> Q. Detective, what evidence did you have that the defendant lived in the house you found the drugs?
>
> A. There were electric bills at the residence in his name.
>
> Objection: Hearsay.
>
> Trial court: Sustained.

. . .

Q. Whose dog was it that bit you when you were delivering the mail?

A. Bob Smith's dog. It had a collar, and it said: "If lost, return to Bob Smith, (415) 323-0055."

Objection: Hearsay.

Trial court: Sustained.

Prior to the published 2-1 opinion below, it was without question that a truck could be identified by its color or logo. [*Brown-Forman Distillers Corp. v. Walkup Drayage and Warehouse Co.* (1945) 71 Cal.App.2d 795, 797-798]. A food manufacturer's identity could be established through a witness' testimony that he saw a company logo. [*Vaccarezza v. Sanguinetti* (1945) 71 Cal.App.2d 687, 693]. A criminal's residence might be identified by specific indicia such as a name on documents in his home. [*People v. Williams* (1992) 3 Cal.App.4th 1535, 1541-1543].

The majority opinion eviscerates this longstanding precedent, holding that a witness' testimony that he saw the defendant's logo on the defendants' invoices is inadmissible hearsay. Specifically, the majority held that the trial court, the presiding judge for Alameda County Complex Asbestos Litigation, abused its discretion in admitting a foreman's identification of the defendant company's "K" logo and name "Keenan" on a company invoice. The majority opinion determined that the name and logo are inadmissible hearsay that fall within no exceptions. Notably, the defendant company in this case destroyed its invoices, making introduction of the actual invoices impossible. The majority also held that the trial court abused its discretion in finding that

there was sufficient authentication of Plaintiffs' secondary evidence as to the invoices, even though the defendant always delivered invoices with its signature "K" logo, as the foreman testified he witnessed in this case.

The majority's novel rule of law creates direct conflicts between the Courts of Appeal:

First, the majority opinion conflicts with well-settled precedent that an operative fact—such as a name or logo—is circumstantial evidence, and not hearsay. [*See, e.g.*, *People v. Williams*, 3 Cal.App.4th at 1541-1543; *see also People v. Fields* (1998) 61 Cal.App.4th 1063, 1068-1069; *Meeks v. Autozone, Inc*. (2018) 24 Cal.App.5th 855, 865].

Second, as the dissenting opinion holds, even if the defendant's name or logo on the defendant's invoices was offered for the truth of the matter asserted, this evidence is plainly admissible as an admission of a party opponent. [Evid. Code § 1220]. The majority opinion presents a clear conflict with this well-settled authority. [*See, e.g.*, *Jazayeri v. Mao* (2009) 174 Cal.App.4th 301, 324-325].

Whether identification of a name or logo is inadmissible hearsay is a matter of surpassing importance to state law. The majority opinion creates havoc at the most basic level in both criminal and civil cases. Because of this unprecedented published opinion, if a person suffers food poisoning by eating a hamburger wrapped in a "Jack-in-the-Box" wrapper, there can be no testimony that the wrapper said "Jack-in-the-Box." If a person is hit by a yellow truck reading "Acme Trucks," there can be no testimony as to the name of the truck. If a witness hears the greeting "Hi Norman" as the suspect walks into a room, such identification testimony is precluded under the Court of Appeal's rationale. This overturns established precedent. [*See e.g.*, *People v.*

Freeman (1971) 20 Cal.App.3d 488, 492]. Notably, the law firms who requested publication of the majority opinion were fully transparent in their intent to use the majority opinion to exclude ***all*** evidence of product identification, whether it is on defendant's invoice, as in this case, or on defendant's physical product. [*See* Defendant Keenan's Letter Requesting Publication, filed below 11/13/18 ("Keenan Letter"); Low, Ball & Lynch's Letter Requesting Publication, filed below 11/14/18 ("Low, Ball & Lynch Letter")].

The majority opinion presents such a significant sea change in California law that a Westlaw search for "Is a logo or name hearsay?" produces the majority opinion as the top result. To say that this creates widespread uncertainty and chaos in both California criminal and civil cases is a gross understatement. Further, as noted by the dissent, wholly contradictory evidentiary rules will now apply in federal courts, which without question allow this evidence, versus California courts, where the majority opinion has tossed aside established precedent. Now, trial courts and courts of appeal have no clear answer to this question: How do plaintiffs and prosecutors identify the defendant?

This case presents an ideal vehicle to resolve pure questions of law on an issue of statewide importance. This Court's review is required.

BACKGROUND

I. The jury found that plaintiff Frank Hart was exposed to asbestos-cement pipes supplied by defendant Keenan.

At trial, the jury found that "Keenan supplied [asbestos-cement] pipes . . . exposed Mr. Hart to asbestos."[1] [Opn. at 1].

Mr. Hart suffers from the asbestos cancer mesothelioma. [Opn. at 1]. In 1976 and 1977, he installed Johns-Manville asbestos-cement pipe in McKinleyville in Humboldt County. [Opn. at 2]. His employer was Christeve Corp., a contractor who won a public-works bid to install new sewer lines. [*Id.*; 9 RT 2434:8-25]. Mr. Hart's job was "cutting asbestos-cement pipe," and he "installed thousands of feet of the pipe." [Opn. at 2].

Plaintiffs alleged that defendant Keenan, a distributor, supplied the asbestos-cement pipe to Mr. Hart's jobsite.

A. The project foreman identified "K" and "Keenan" on the invoices delivered with the asbestos-cement pipe.

It is undisputed that defendant Keenan destroyed the invoices it delivered with its asbestos-cement pipe. However, Mr. Hart's foreman on the McKinleyville project, John Glamuzina, identified the Keenan logo "K" and the word "Keenan" on the invoices he signed that accompanied deliveries of the asbestos-cement pipe. [Opn. at 6-8; 12 RT 3404:13-15, 3415:17-20].

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[1] This factual background derives from both the evidence cited in the Opinion below and additional evidence in the appellate record whose omission from the Opinion was called to appellate court's attention in plaintiffs' Petition for Rehearing (filed 12/4/18).

Over 4,000 feet of Johns-Manville pipe were delivered to the site, one flatbed trailer at a time, several times a week. [*Id.* at 2, 3]. Mr. Glamuzina greeted many deliveries, checked the load against the "invoices" provided with the delivery, signed the invoices, and returned them to the front office at day's end. [*Id.* at 2].

Mr. Glamuzina testified that he saw "the name Keenan on the invoices that [he] personally signed." [Opn. at 3, 5-8; *id.* at 6]. The name Keenan "sticks out" in his memory because of "their K" logo. [*Id.* at 8]. He did not recall any other suppliers on the invoices he signed. [*Id.*].

B. Substantial evidence corroborated the foreman's identification of "K" and "Keenan" on the invoices.

1. In the early 1970s, Keenan purchased an existing Eureka facility that stocked and distributed Johns-Manville asbestos-cement pipe, obtained the Johns-Manville product line, and continued to stock and distribute Johns-Manville pipe from that facility. [8 RT 2207:4-2209:5]. In 1977, when Mr. Hart was exposed to that pipe, Keenan was in a distributorship agreement with Johns-Manville to distribute its pipe to "Humboldt County and surrounding areas." [13 RT 3673:11-3674:25, 3745:1-3]. Keenan's facility was remote ("100 miles from nowhere"), making it the likely supplier for the nearby McKinleyville project. [8 RT 2207:4-2209:5].

2. Not only was Keenan the sole area distributor of Johns-Manville pipe, but it had already supplied that pipe to an earlier phase of the McKinleyville project.

The McKinleyville project was split into three phases, and Christeve won the bid for Phase 3. [9 RT 2434:8-25]. A Christeve competitor (Thibodo) won the bid for an earlier phase. [*Id.*] The Keenan

invoice in evidence shows that Keenan distributed Johns-Manville pipe to Thibodo for its earlier work on the McKinleyville project – as admitted by Keenan's representative (Mr. Garfield). [15 RT 3242:3-19; 13 RT 3711:17-3712:16].

3. Keenan's representative also established that, consistent with Mr. Glamuzina's recollection, Keenan provided invoices that bore its distinctive Keenan logo. [13 RT 3710:1-19]. This logo was a mark suggestive of pipes – the product at issue – that were bent and arranged to form a capital "K" within a circle. [13 RT 3655:25-3657:4].

Moreover, providing these invoices with deliveries was critical to its "direct sales" business model. When a customer ordered Johns-Manville pipe, Keenan then bought the pipe from Johns-Manville and arranged for its delivery by either Johns-Manville or a common carrier. [13 RT 3666:11-3667:9]. These "direct" sales were Keenan's most common practice, saving inventory space and manpower and thus reducing its costs. [13 RT 3668:13-3669:1].

Under this "direct sale" model, Keenan invoices were critical – the only way for the customer to identify and pay Keenan for the delivery. [8 RT 2218:19-2220:1].

4. Ms. Mitrovich, the Christeve's bookkeeper in the 1970s, specifically recalls processing Keenan invoices with the "K" logo. The majority opinion cites her testimony that Christeve received "invoices" for "materials at the jobsite" but notes that she did not specifically recall "if Keenan supplied asbestos-cement pipe to Christeve in McKinleyville." [*Id.*]. But Ms. Mitrovich connected Christeve directly to Keenan. Like Mr. Glamuzina, she also recognized the Keenan name and distinctive "K" logo. [9 RT 2463:10-2465:22, 2505:21-2506:12]. And

Ms. Mitrovich recalled that Christeve "dealt with" Keenan, she recognized Keenan invoicing, and she recalled paying invoices with the Keenan logo. [*Id.*].

5. Not only did Keenan have no local pipe-supply competitor, but the evidence specifically refuted that anyone else would have sent pipe, or anything else, with an invoice bearing the Keenan "K" logo.

Keenan acknowledged that it was required to protect its logo in trade. [13 RT 3723:19-25]. That trade was valuable – *e.g.*, sales volume of about $186,000,000.00 in 1981 alone. [15 RT 3234:1-3235:21]. And when Keenan sold its name and logo to a third party in a 1983 asset sale, the buyer continued to use that valuable name and Keenan "K" logo in trade. [8 RT 2206:3-12; 13 RT 3698:14-18].

Further, Keenan offered no evidence that its valuable name and logo were ever infringed upon.

C. The trial court held that testimony as to the "K" logo and "Keenan" name was admissible, non-hearsay.

The trial court, the presiding judge for Alameda County Complex Asbestos Litigation, denied Keenan's motion in limine to exclude the foreman's testimony as to the "K" logo and "Keenan" name.

First, the trial court held that "a logo, emblem, or similar designation of identify [is not] testimonial hearsay; rather, it is circumstantial evidence of identi[t]y." [Opn. at 9; 1 AA 118]. The trial court held that "[t]his case is . . . about whether or not somebody can testify he saw a name, or I'll even use the words a 'brand' on a document and whether that's circumstantial evidence of that. I think that the testimony is not testimonial. It's not a matter that a hearsay rule would normally apply to and until the court of appeals addresses that, if I see a

yellow cab, I will allow permission to say it's a Yellow Cab. If I have somebody come in and say I saw a hat that had a big letter on it, I will allow that testimony, and if someone comes in and says I saw a big K on it, I will permit the testimony." [Opn. at 9-10; 4 RT 923:17-924:6].

Second, the trial court held that even if the "K" logo or "Keenan" name were testimonial evidence offered for the truth of the matter asserted, these were admissions of party-opponent Keenan, and therefore fell within a hearsay exception under Evidence Code section 1220. [1 AA 118].

Finally, the trial court found that there was sufficient evidence to authenticate the secondary evidence as to the destroyed invoices, including that Keenan's corporate representative testified that defendant Keenan always delivered invoices with its pipes, and that Keenan invoices were marked with the "K" logo. [1 AA 118-119].

D. The jury found Keenan liable for delivering asbestos-cement pipe to Mr. Hart's jobsite.

Based on all of this evidence, the jury found that "Mr. Hart was exposed to asbestos-cement pipe supplied by Keenan," apportioning Keenan "17%" of that fault for causing his disease. [Opn. at 4].

II. In a 2-1 decision, the majority reversed, excluding testimony based on the Keenan logo as inadmissible "hearsay."

In a split 2-1 decision, the court below reversed the judgment on the jury's verdict against Keenan.

A. The majority held that identification of the logo "K" and name "Keenan" was inadmissible hearsay.

The majority held that Mr. Glamuzina's "testimony" that the invoices were marked with a "K" or "Keenan" was "inadmissible

hearsay." [Opn. at 1, 5, 9]. The majority held that the trial court abused its discretion in finding that the "K" logo and "Keenan" name were non-testimonial circumstantial evidence, and instead held that these identifying factors "were out-of-court statements offered to prove the truth of the matter asserted: namely, that Keenan supplied the pipes." [Opn. at 9].

The majority also rejected the hearsay exception for party-opponent statements [Evid. Code § 1220], holding that the "declarant" of the invoices was not Keenan but Mr. Glamuzina. [Opn. at 13].

Further, the majority held that the trial court abused its discretion in finding sufficient evidence to authenticate Plaintiffs' secondary evidence as to the destroyed invoices, holding that "Glamuzina's testimony was insufficient" to do so. [Opn. at 14].

Thus, the majority held Mr. Glamuzina's entire "testimony regarding Keenan invoices" inadmissible. [Opn. at 16].

The majority also found "no other evidence" from which the jury could find that Keenan supplied any pipe to the McKinleyville jobsite. [Opn. at 1, 16]. Thus, it reversed the judgment. [*Id.*].

B. The dissenting opinion found that the "K" logo and "Keenan" name were admissions of a party opponent.

Justice Needham dissented, finding that the "K" logo and "Keenan" name were admissions of a party opponent, and that there was sufficient evidence authenticating the secondary evidence as to the destroyed invoices:

1. Party-opponent hearsay exception: If the "K" logo and "Keenan" name were offered for their "truth," they met the hearsay exception for the "statement of a party-opponent." [Opn. at 19 (*citing*

Evid. Code § 1220)]. The trial court reasonably concluded that invoices bearing the "K" logo were "authored" by Keenan, making the "K" logo and "Keenan" name party admissions by Keenan. [*Id.* at 19-20].

2. Personal-knowledge testimony: Mr. Glamuzina had "personal knowledge" of the "facts *to which he testified* – that he personally saw invoices bearing Keenan's name." [Opn. at 22 (emphasis in original)]. This evidence, "if believed," allowed the jury to "decide whether to infer that the pipe was indeed from Keenan." [*Id.*].

3. Authentication and secondary evidence: Mr. Glamuzina's "secondary evidence" about the content of the invoices was admissible because the invoices were sufficiently "authenticated" as Keenan invoices. [Opn. at 22]. The collective evidence (from Mr. Glamuzina, Ms. Mitrovich, and Keenan's corporate representative) that Keenan's invoices bore the distinctive "K" logo allowed the jury to "conclude that the invoices" he saw "were, in fact, Keenan invoices, as Mr. Hart purported them to be." [*Id.*].

In sum, the dissent found no "abuse of discretion" in "admitting Glamuzina's testimony." [Opn. at 23]. And the dissent found the majority opinion particularly troubling in that it overturned a jury verdict in rejecting the circumstantial evidence that Keenan supplied the asbestos-cement pipes: "Of course, it was up to the jury to decide whether to believe Glamuzina's testimony and trust his recollection of what he saw on the pipe invoices, and Keenan's lawyer was free to present evidence and argue that Glamuzina was incorrect. But any doubts as to Glamuzina's recollection went to the weight of the evidence, *not* its admissibility." [*Id.* (emphasis in original)]. And because the jury

apparently "accepted Glamuzina's testimony," the majority's reversal was "all the more disturbing." [*Id.*].

Upon Keenan's request, the majority and dissenting opinions were published on November 19, 2018.

III. In a Petition for Rehearing, plaintiffs noted that the majority opinion omits facts material to the "hearsay" ruling.

Plaintiffs filed a Petition for Rehearing, calling to the appellate court's attention numerous facts from the record that were omitted from the Opinion's factual recitation, all of which corroborated Plaintiffs' secondary evidence that the invoices accompanying the asbestos-cement pipe were marked "K" or "Keenan." [*See* 12/4/18 Petition for Rehearing at 7-11]. The Court of Appeal denied the Petition for Rehearing.

DISCUSSION

I. Review is necessary <u>both</u> to secure uniformity of decision and to settle an important question of law.

Plaintiffs and petitioners respectfully request this Court's review of the published, split opinion below (Opinion), in which the 2-1 majority holds for the first time in California that a witness's personal-knowledge testimony about seeing a company's logo on company documents is inadmissible "hearsay" that falls within no exception. This ruling conflicts with longstanding California precedent and, if allowed to stand, will have far-reaching consequences in trial courts throughout the State. [*See* Cal. Rules of Court, rule 8.500(b)(2)].

A. Uniformity of decision: The opinion's novel "hearsay" rule conflicts with other published appellate decisions.

1. The majority opinion upends established precedent that operative facts are not hearsay.

a. Identification of an operative fact is not hearsay.

In line with established authority, the trial court stated that the "a logo, emblem, or similar designation of identity [is not] testimonial hearsay; rather, it is circumstantial evidence of identi[t]y." [Opn. at 9-10; 1 AA 118].

The trial court's holding accords with longstanding precedent. Documents not offered for the truth of the matter asserted are, by definition, not hearsay. Hearsay is defined in Evidence Code section 1200 as "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." Where "the very fact in controversy is whether certain things were said or done and not . . . whether these things were true or false, . . . in these cases the words or acts are admissible not as hearsay[,] but as original evidence." [1 Witkin, Cal. Evidence (4th ed. 2000) Hearsay, § 31, p. 714].

Thus, "[i]f a fact in controversy is whether certain words were spoken or written and not whether the words were true, evidence that these words were spoken or written is admissible as nonhearsay evidence." [*People v. Fields*, 61 Cal.App.4th at 1063, 1068-1069 ("Defendant's possession of a pager which displayed the number for the telephone in the parking lot adjacent to the gas station utilized by [the drug dealer] is nonassertive conduct admissible either because it is

evidence of a relationship or indicative of the purpose for which it was used."); *see also Meeks*, 24 Cal.App.5th at 865 (holding that trial court abused its discretion in excluding testimony as to content of missing text message, because content was not hearsay but instead offered to prove that objectively and subjectively offensive messages were sent); *Jazayeri*, 174 Cal.App.4th at 316 (overstatement of the number of dead or unusable chickens on the poultry condemnation certificates not hearsay because not offered for truth of matter asserted but as direct evidence of the fraudulent statements made by defendants)].

In *Rogers v. Whitson* (1964) 228 Cal.App.2d 662, 675, a decision cited with approval by this Court in *People v. Price* (1991) 1 Cal.4th 324, 437, the Court of Appeal held that certain construction bills were admissible "as evidence of the relationship of owner and independent contractor between defendant and [a person] and not as proof for the truth of the matters stated therein." Documents containing operative facts, such as the words forming an agreement, are not hearsay. [*People v. Dell* (1991) 232 Cal.App.3d 248, 261–262 (prostitutes' offer of an additional $40 for copulation admitted as "operative facts" or "verbal acts")] The operative facts rule also applies in an action for fraud. [1 Witkin, *supra*, Hearsay, § 33, p. 715 ("In an action for ... deceit, the words spoken, written, or printed may be proved")].

b. Identification of a name or logo is not hearsay.

The operative fact doctrine applies without question to issues of identity, such as presented here. "We can know a person's name only by being told, either by the person or someone else, unless, of course, we happen to have christened the person. But a name, however learned, it

not really testimonial. Rather, it is a bit of circumstantial evidence." [*U.S. v. May*, 622 F.2d 1000, 1007 (9th Cir. 1980) (holding that the names of persons entering the base as reflected on data cards were non-hearsay)]. "Utterances serving to *identify* are admissible as any other circumstances of identification would be." [6 Wigmore on Evidence (3d ed.) p. 240].

Prior to the majority opinion, California law was well-settled that identification of a name on an item on which such name is likely to be found is "circumstantial evidence that a person with the same name as the defendant resided in the apartment from which they were seized. Therefore, when introduced for the purpose of showing residency, they are admissible nonhearsay evidence." [*People v. Williams*, 3 Cal.App.4th at 1541-1543 (name of person on utility bill found in residence is circumstantial evidence that a person with the same name as the defendant resides in the residence, "regardless of the truth of any express or implied statement contained in those documents."); *see also Brown-Forman Distillers*, 71 Cal.App.2d at 797-798 (testimony that a truck was painted bright red color and marked "Walkup" was admissible as circumstantial evidence that this was a "Walkup" truck); *Vaccarezza*, 71 Cal.App.2d at 693 ("The plaintiff wife testified that the salami when received by her had the paper marker indicating it was Columbo Brand. From this evidence it is too obvious to require further comment that the finding that the salami and coppe in question were sold to plaintiffs by defendant retailer and manufactured by defendant wholesaler, if not compelled by the evidence, at least finds ample support therein."); *People v. Freeman*, 20 Cal.App.3d at 492 ("The fact that the statement "Hi, Norman" was made tended to prove circumstantially that one

Norman had come to the house of a person associated with Foster, the alleged associate of Norman Freeman in the armed robbery.")].

In sum, evidence of such "operative facts" that are non-assertive conduct does not constitute hearsay. [*See People v. Smith* (2009) 179 Cal.App.4th 986, 1003 (where "the very fact in controversy is whether certain things were said or done . . . the words or acts are admissible not as hearsay[,] but as original evidence," *citing* 1 Witkin, Cal. Evidence (4th ed. 2000))].

c. The "K" logo and "Keenan" name were non-hearsay operative facts.

In this case, the foreman testified that he saw the logo or brand "K" for Keenan on the invoices accompanying the pipe deliveries. This "K" marking is non-assertive conduct admissible as circumstantial evidence that the invoices had a letter "K" logo. The jury could assess this circumstantial evidence, along with the defendant's corporate representative's testimony that the defendant's invoices were marked with a "K" logo, to determine whether the defendant Keenan delivered the pipes.

d. The majority opinion based its holding on inapposite authority.

The majority's rationale for dismissing this black letter law, and further in holding that the trial court abused its discretion in following this law, is nonsensical. The Court of Appeal states repeatedly that it is not "persuaded" [Opn. at 9-10] by this authority, but cites nothing to contradict it.

First, the majority opinion relies on *Pacific Gas & E. Co. v. G.W. Thomas Drayage etc. Co.* (1968) 69 Cal.2d 33, 42-43 in holding that

"invoices" are "hearsay" [Opn. at 8], but *Pacific Gas'* holding is limited to the principal that ***third party*** invoices entered for the purpose of proving the truth of the costs incurred are hearsay. [*Pacific Gas*, 69 Cal.2d at 43, fn. 10 (invoices submitted to plaintiff by third parties not admissible to show that repairs described therein had been made where not "'supported by the testimony of a witness qualified to testify as to its identity and the mode of its preparation'")]. *Pacific Gas* has no bearing on this case. The invoices in this case were not prepared by third parties. They were prepared by defendant Keenan. Further, they were not offered to prove the "truth of the matter asserted," such as the amount of pipe shipped or the cost of the pipe. Instead, the foreman's testimony as to the presence of the letter "K" was "circumstantial evidence that "a person with the same name as the defendant" delivered the pipe, and therefore were "admissible nonhearsay evidence." [*People v. Williams* (1992) 3 Cal.App.4th 1535, 1541-1543].

Next, the majority opinion dismisses the cases involving circumstantial evidence of identification, on the basis that they are distinguishable, because they "[u]tterances serving to *identify* are admissible as any other circumstances of identification would be." [Opn. at 10, *citing People v. Freeman*, 20 Cal.App.3d at 492]. The majority's attempt to distinguish the facts below on this basis is baffling, because the foreman's identification of the "K" for Keenan is a statement "serving to *identify*" defendant Keenan. [*People v. Freeman*, 20 Cal.App.3d at 492].

Finally, the majority differentiates the invoices with defendant's name showing circumstantial evidence of his residence in *People v. Williams*, 3 Cal.App.4th at 1535, because in "unlike in *Williams*, the

invoices themselves have been destroyed and the Harts did not offer any into evidence." [Opn. at 11]. In so doing, the majority inexplicably ignores Evidence Code 1523(b), which does not require production of the documents themselves when they have been destroyed through no fault of the proponent, and they have, as here, been established as authenticated through circumstantial evidence of Keenan's custom and practice to issue an invoice with the letter "K" upon delivery of its goods. [Cal. Evid. Code. § 1523(b)].

In sum, in holding that testimony as to a company's logo on a company's invoice cannot be used as circumstantial evidence that the company prepared the invoice accompanying the delivered goods, the majority upends decades of well-settled law. Further, the majority opinion places trial courts, who must address this type of question every day, in an untenable position of not knowing whether to follow the majority's new rule of law, or longstanding principles, including, *inter alia*, Wigmore on Evidence. The majority opinion requires this Court's review.

2. The majority overturns well-settled law that a statement of a party opponent falls within an exception to the hearsay rule.

As both the dissenting opinion and the trial court found, "[s]ufficient evidence supported the hearsay exception for a statement of a party-opponent." [Dissenting Opn. at 17, *citing* Evid. Code. § 1220]. "The evidence was that Keenan sent invoices to customers, those invoices bore circled 'K' logo, Glamuzina checked and signed invoices accompanying the asbestos-containing pipe, he observed 'Keenan' on those invoices, and the word 'Keenan' stuck in his mind because of the

way the 'K' was written. Upon this state of facts, it would be reasonable to conclude that it was Keenan who authored invoices bearing the name 'Keenan,' so that Keenan would be paid for its pipes. Because it was reasonable to conclude that defendant Keenan was the declarant, the court did not abuse its discretion in ruling the statement admissible for the plaintiffs as the statement of a party-opponent." [Dissenting Opn. at 17]. The majority opinion conflicts with the well-settled law that statements by a party-opponent are admissible as exceptions to the hearsay rule, and requires review.

a. Documents prepared by the opposing party are not subject to exclusion under the hearsay rule.

Both the trial court's holding and the dissenting opinion accord with well-settled law as to statements by a party opponent. [Cal. Evid. Code§ 1220]. Documents prepared by the opposing party are not subject to exclusion under the hearsay rule, because they are admissions. "Admissions of a party . . . are received to prove the truth of the assertions; i.e., they constitute affirmative or substantive evidence that the jury or court may believe as against other evidence, including the party's own contrary testimony on the stand." [1 Witkin, Cal. Evidence, supra, Hearsay, § 91, p. 794]. "Express admissions may be oral or written . . . . Written admissions are found in many types of informal and formal documents, and the fact that a writing is made pursuant to statute, e.g., an income tax return, does not preclude its use." [*Id.*, § 92, p. 795].

The majority opinion ***directly conflicts*** with *Jazayeri v. Mao*, which held that invoices or accountings prepared by the defendant are admissible as an exception to the hearsay rule under Evidence Code

§ 1220. [*See Jazayeri*, 174 Cal.App.4th at 324-325; *see also Horton v. Remillard Brick Co.* (1915) 170 Cal. 384, 400 (defendant's financial documents, including profit and loss sheet and assets and liability account); *StreetScenes v. ITC Entertainment Group, Inc*. (2002) 103 Cal.App.4th 233, 244 (unaudited balance sheets presented to court and opposing party by counsel); *Shenson v. Shenson* (1954) 124 Cal.App.2d 747, 752 (defendant's income tax returns); *Sill Properties, Inc. v. CMAG, Inc.* (1963) 219 Cal.App.2d 42, 54–55 (minutes of meeting of defendant's board of directors stating value of assets); *Keith v. Electrical Engineering Co.* (1902) 136 Cal. 178, 181 (paper containing a statement of sales made by defendant and the dates of such sales "handed to plaintiff by defendant")].

Moreover, the majority opinion also contradicts with federal law, which unquestionably allows testimony as to a party's trade names and logos as admissions by a party-opponent: "Documents that bear [a party's] trade names, logos, and trademarks are statements by [that party] itself, and are admissible as admissions by a party-opponent under Rule 801(d)(2)," and thus not hearsay. [*Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd*., 454 F.Supp.2d 966, 974 (C.D. Cal. 2006); *see also Lannes v. CBS Corp*., 2013 WL 12075369 at n. 7 (C.D. Cal. 2013) (holding in an asbestos mesothelioma case, that the witness' identification of the word "Cranite" on the gaskets was sufficient to show that Crane manufactured the gaskets); Dissenting Opn. at 17-18].

b. The majority opinion cites no authority overturning Evidence Code section 1220.

Just as with its disagreement with the operative fact doctrine, the majority's attempt to distinguish the well-settled law on party admissions

finds no basis in California law. The majority cites *People v. Lewis* (2008) 43 Cal.4th 415, 498 for the proposition that this Court found that drawings were not an "admission" by a party defendant. But, as the dissent points out [Dissenting Opn. at 18], *Lewis* is wholly distinguishable, because the prosecutors' theory of the case was that the defendant had ***not*** produced the drawings, therefore the party-opponent exception did not apply. [*Id.*] In contrast, in this case, Keenan drafted the invoices with a letter "K," making them admissions of a party opponent.

Second, the majority rejects the party-opponent doctrine on the spurious basis that the foreman Glamuzina "could not be party-opponent." [Opn. at 12]. On the contrary, as the dissent correctly notes, the foreman Glamuzina is not the "declarant:" "[T]he question is whether the declarant—the one who made the invoice statement—was a party-opponent, not whether witness Glamuzina was a party-opponent. If defendant Keenan was the declarant, the statement falls within the hearsay exception if offered by the plaintiffs, no matter what witness the plaintiffs used." [Dissenting Opn. at 18].

Finally, the majority cites *DiCola v. White Brothers Performance Products, Inc.* (2008) 158 Cal.App.4th 666, 679 for the proposition that package labeling "Burly Brands" was inadmissible hearsay, but in *DiCola*, the court of appeal specifically noted that the appellants in that case had not argued any hearsay exception. [*Id.* at 681, *see also* Dissenting Opn. at 18, n. 7].

The majority's rejection of the party-opponent doctrine based on (i) a mis-application of this Court's precedent and (ii) a mis-understanding about who the "declarant" is for purposes of the hearsay rule has resulted in a rule of law that wreaks havoc on previously well-

settled California evidentiary law. Plainly, the majority opinion requires this Court's review in order that trial courts and courts of appeal will have a clear understanding of how to answer a critical evidentiary issue they must face on a daily basis in both civil and criminal cases.

3. The majority rejects well-settled law that subscribing witness testimony is not required for authentication.

a. Circumstantial evidence is sufficient to identify destroyed documents.

Although the invoices themselves were destroyed, the majority stated that they had to be authenticated for the foreman's secondary evidence to be admissible. [Opn. at 14; *see also* Evid. Code §§ 1401, 1523(b)].

"Authentication of a writing means . . . the introduction of evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is." [Evid. Code, § 1400]. The testimony of a subscribing witness is not required. [Evid. Code, § 1411], and authentication may be established by circumstantial evidence and the document's contents. [Evid. Code, § 1410; *People v. Skiles* (2011) 51 Cal.4th 1178, 1187]. Custom and practice, such as Keenan's custom and practice of issuing invoices with its materials, is sufficient to authenticate. [*See People ex. Rel. Harris v. Sarpas* (2014) 225 Cal.App.4th 1539, 1571 (evidence as to a bank's custom and practice in accepting and negotiating checks was sufficient to authenticate the checks for the purpose for which they were admitted).].

The majority states that the foreman Mr. Glamuzina alone "could not authenticate" the invoices he saw as being prepared by Keenan.

[Opn. at 15]. But the invoices did not have to be authenticated by Mr. Glamuzina alone. Instead, they were properly authenticated under governing standards to which the majority cites. [Opn. at 15 (*citing* Evid. Code § 1410 ["The Evidence Code does not limit the means by which a writing may be authenticated"]; *Continental Baking Co. v. Katz* (1968) 68 Cal.2d 512, 525 ("documents must be authenticated *in some fashion*"); *see People v. Skiles*, 51 Cal.4th at 1187 ("a writing can be authenticated by circumstantial evidence and by its contents"); *Ramos v. Westlake Services LLC* (2015) 242 Cal.App.4th 674, 684 (same)].

b. The evidence in this case met the threshold for authentication.

As the dissent wrote, the evidence "met the threshold for authentication." [Dissenting Opn. 19]. The majority erroneously fails to acknowledge that the invoices that Mr. Glamuzina saw (Keenan name/ logo) were authenticated as Keenan invoices by other evidence, including that:

1. Keenan was the area distributor for Johns-Manville asbestos-cement pipe [8 RT 2207:4-2209:5; 13 RT 3673:11-3674:25, 3745:1-3]. Keenan was also the only distributor around. Its Eureka facility was remote, "100 miles from nowhere." [8 RT 2207:4-2209:5].

2. Keenan supplied the Johns-Manville pipe to an earlier phase of the same McKinleyville project. [9 RT 2434:8-25; 15 RT 3242:3-19; 13 RT 3711:17-3712:16].

3. Keenan provided invoices that bore its "K" logo. Keenan's representative also established that, consistent with Mr. Glamuzina's recollection, Keenan provided invoices that bore its distinctive Keenan logo. [13 RT 3710:1-19].

4. Providing invoices with its deliveries was critical to Keenan's "direct sales" business model. Under this "direct sale" model, Keenan invoices were the only way for the customer to identify and pay Keenan for the delivery. [8 RT 2218:19-2220:1].

5. Keenan sold materials to Christeve with its "K" invoice. Ms. Mitrovich, the Christeve's bookkeeper in the 1970s, specifically recalls processing Keenan invoices with the "K" logo. [9 RT 2463:10-2465:22, 2505:21-2506:12]. And she recalled that Christeve "dealt with" Keenan, she recognized Keenan invoicing, and she recalled paying invoices with the Keenan logo. [*Id.*]

6. No other invoice would have borne the Keenan logo. Keenan acknowledged that it was required to protect its logo in trade. [13 RT 3723:19-25]. That trade was valuable – *e.g.*, sales volume of about $186,000,000.00 in 1981 alone. [15 RT 3234:1-3235:21]. And when Keenan sold its name and logo to a third party in a 1983 asset sale, the buyer continued to use that valuable name and Keenan "K" logo in trade. [8 RT 2206:3-12; 13 RT 3698:14-18].

All of this evidence, omitted from the majority opinion, supports the trial court's discretionary ruling that the "K" logo and "Keenan" name that Mr. Glamuzina described were sufficiently authenticated as secondary evidence as to the destroyed invoices.

c. The majority's reliance on *Osborne* is misplaced.

The majority justifies its holding by citing *Osborne v. Todd Farm Service* (2016) 247 Cal.App.4th 43. [Opn. at 14]. But this case is wholly inapposite. In *Osborne*, the deliverer testified that he never supplied receipts or invoices with his deliveries, therefore it was within the trial

court's discretion to find that that plaintiff did not prove the preliminary facts necessary to admit her testimony about the delivery receipts into evidence. [*Osborne*, 247 Cal.App.4th at 53]. In contrast, in this case, the evidence was that defendant Keenan always supplied its delivery with an invoice, and that the invoice would have been marked with the distinctive "K" logo.

Hence, the trial court did not abuse its discretion in ruling that the invoices were authenticated as Keenan invoices. [Opn. at 14 (Mr. Glamuzina's "description" of the invoices he saw "consistent with" the "exemplar of a Keenan invoice" authenticated by corporate representative Garfield)]. And that ruling is properly disturbed only if it was an "abuse of discretion." [*Ramos*, 242 Cal.App.4th at 684 (*quoting People v. Smith*, 179 Cal.App.4th at 100)]. And therefore any matters stated in those invoices were *Keenan statements* and thus party admissions constituting exceptions from the hearsay rule. [*See* Evid. Code § 1220].

In sum, the majority's opinion has created direct conflicts among the courts of appeal as to (i) whether operative fact testimony is hearsay; and (ii) whether statements on a party's own documents are admissible under the party admission exception to the hearsay rule. These are questions that must be answered every day by trial courts and courts of appeal across the state. This Court's review is required to answer these recurring questions of law.

B. Important question of law: review is required to answer how to identify a defendant.

Finally, review is necessary because the issues raised by the published majority opinion will recur throughout the state, in not just asbestos cases but all manner of civil and criminal cases.

1. Asbestos cases: the majority opinion creates confusion as to defendant identification.

The majority opinion's unprecedented holding will arise in virtually all asbestos cases, which routinely turn on product identification issues. [*E.g.*, *Weber v. John Crane, Inc.* (2006) 143 Cal.App.4th, 1433, 1439 (product identification from being "shown" product "packaging" or "logo"); *McGonnell v. Kaiser Gypsum Company, Inc.*, 98 Cal.App.4th 1098, 1101 (plaintiff testified that he "had seen bags of cement" bearing the defendant's "name")].

Moreover, although the majority opinion involves company invoices, the majority left open the questions as to whether its holding would also apply to "a witness's observation of a company's name or logo on a product." [Opn. at 10]. Indeed, foreman Mr. Glamuzina testified that he saw a Johns-Manville "stamp" on the asbestos-cement pipes. [*Id.*] But because "there was no objection to this testimony," the propriety of "admitting" it was not before the court below. [*Id.*] It will be though in future cases, where defendants will now request exclusion of any product identification evidence in light of the majority's holding that the identification of a name or logo is inadmissible hearsay.

This is not conjecture. The majority opinion below was initially unpublished, signaling a potential limitation to this case's specific facts. But both counsel for defendant Keenan and a second asbestos-defense

firm urged publication specifically *because* they want the majority's rule to apply to the "commonly occurring" issues in *all* asbestos cases: "Publication . . . will clarify the application of these statutes to *commonly occurring facts* in asbestos-related personal injury cases." [Keenan Letter at p. 2; Low, Ball & Lynch Letter at pp. 1-2 (emphasis added)]. Indeed, publication was requested on the stated basis that these issues occur "frequently," "commonly," and "on a regular basis," requiring the majority's rule to be "uniformly applied to asbestos litigation." [Keenan Letter at pp. 1, 2; Low, Ball & Lynch Letter at pp. 1, 2.]

Importantly, the law firms expressly requested publication so that the majority opinion's holding could be applied not only to what a witness saw on a document, but also on a "thing." [Low, Ball & Lynch Letter at 1].

2. Other civil and criminal cases: the majority opinion creates statewide havoc.

The problem created by the majority's decision is not limited to asbestos-disease cases.

Again, these defendants urged publication on the ground that the majority's rule applies across the board to *all* cases;

- The published Opinion dictates broadly "that testimony regarding the content of invoices, bills, or receipts is inadmissible hearsay, regardless of the lapse of time or lack of other available evidence." [Keenan Letter at p. 1.]
- The published Opinion will apply its rule not just to "asbestos-related personal injury cases" but also all "cases involving lost or destroyed documents." [*Id.* at p. 2.]
- "*[T]estimony regarding what someone saw on a document or thing is admitted regularly*." [Low, Ball & Lynch Letter at p. 1 (emphasis added)].

There are myriad scenarios where the majority's rule would require the exclusion of personal, eyewitness testimony about seeing a name or logo:

In a tainted-food case, eyewitness testimony that food wrapper bore the defendant restaurant's name: **Excluded**.

In a trip-and-fall case, eyewitness testimony that the hazard on which the plaintiff tripped bore the defendant's logo: **Excluded**.

In a mail-fraud case, eyewitness testimony that the fraudulent solicitation was on the defendant's letterhead: **Excluded**.

In a mail-carrier dog bite case, the name of the owner on the dog's collar: **Excluded.**

In a hit-and-run case, eyewitness testimony that the vehicle fleeing bore the name of the manufacturer of the defendant's car: **Excluded.**

In a bank-robbery case, eyewitness testimony that the getaway car had a personalized California license plate: **Excluded**.

In a criminal assault case, eyewitness testimony that the assailant had a distinctive tattoo that matches one on the defendant: **Excluded**.

In a murder-for-hire case, eyewitness testimony that the hit man wore clothing with the insignia of the defendant's gang: **Excluded**.

Before the majority opinion below, these eyewitnesses could testify freely about their observations, and the jury could assess that and other evidence to determine civil culpability or criminal guilt. No longer.

Finally, one further effect thrusts the published majority opinion into statewide focus and importance. As the majority notes, this defendant (Keenan) long ago "disposed of" and "destroyed" corporate documents like "invoices" and "receipts" showing its pipe sales. [Opn. at 9]. And defendants urge that the majority's rule now properly applies to

all "cases involving lost or destroyed documents" – any "testimony regarding the content of" such destroyed "invoices, bills, or receipts" is simply "inadmissible hearsay." [Keenan Letter at pp. 1, 2]. In this light, the majority's rule now creates a perverse incentive for companies to destroy their corporate documents, thus eliminating the paper record of the company's activities and rendering "inadmissible" any eyewitness testimony about the documents' contents.

This cannot and should not be the governing rule in California.

CONCLUSION

Plaintiffs and Petitioners pray that this Court grant review of the majority Opinion below, and for such other relief as to which they may be entitled.

DATED: December 31, 2018

Respectfully submitted,

KAZAN, McCLAIN, SATTERLEY & GREENWOOD
A Professional Law Corporation

By: _____

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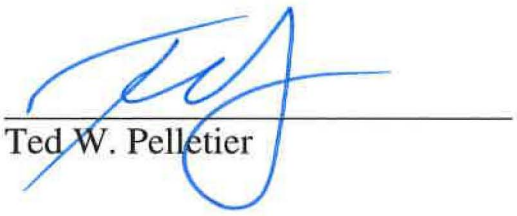
CERTIFICATE OF WORD COUNT

I, Ted W. Pelletier, hereby certify that the text of this brief consists of 7,485 words, in Times New Roman 14-point font, as counted by my word processing program.

DATED: December 31, 2018



Ted W. Pelletier

Exhibit A

Filed 11/21/18 (unmodified opinion attached)

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

FRANK C. HART et al.,

Plaintiffs and Respondents,

v.

KEENAN PROPERTIES, INC.,

Defendant and Appellant.

A152692

(Alameda County
Super. Ct. No. RG16838191)

ORDER MODIFYING PUBLICATION ORDER OF NOVEMBER 19, 2018

THE COURT:

Due to clerical error and inadvertence, the order filed November 19, 2018 directing publication of the opinion in the above-referenced matter attached an incorrect attorney and trial court listing page. The correct attorney and trial court listing is attached to this order and shall replace the incorrect listing.

Dated: _____ _____, P.J.

Trial Court: Alameda County Superior Court

Trial Judge: Hon. Brad Seligman

Counsel:

Maune Raichle Hartley French & Mudd, LLC, David L. Amell and Marissa Y. Uchimura for Plaintiffs and Respondents.

CMBG3 Law, W. Joseph Gunter, Gilliam F. Stewart for Defendant and Appellant

Filed 10/26/18; Certified for Publication 11/19/18 (order attached) (unmodified opinion)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT
DIVISION FIVE

FRANK C. HART et al., Plaintiffs and Respondents, v. KEENAN PROPERTIES, INC., Defendant and Appellant.	A152692 (Alameda County Super. Ct. No. RG16838191)

Keenan Properties, Inc. ("Keenan") appeals from the judgment in an asbestos-related personal injury case. Frank C. Hart ("Mr. Hart") and Cynthia Hart ("Mrs. Hart") (collectively, "the Harts") sued Keenan and other entities alleging Mr. Hart developed mesothelioma as a result of exposure to asbestos-containing products. The jury found Keenan supplied pipes that exposed Mr. Hart to asbestos. This finding was based on a foreman's testimony regarding invoices purporting to show Keenan supplied asbestos-cement pipes to a worksite in McKinleyville, California in the 1970s. We conclude this testimony was based on inadmissible hearsay, and there was no other evidence Keenan supplied the pipes. Accordingly, we reverse the judgment against Keenan.

FACTUAL AND PROCEDURAL HISTORY

Mr. Hart suffers from mesothelioma, which is caused by exposure to asbestos. Mr. Hart worked in construction as a pipe layer, and, since 1985, he was a foreman of pipe layers.

The McKinleyville Jobsite

From September 1976 to March 1977, Mr. Hart worked in McKinleyville, and his job involved cutting asbestos-cement pipe. In McKinleyville, Mr. Hart worked for Christeve Corporation ("Christeve"). The project involved installing new sewer lines, and Mr. Hart worked with eight-inch, asbestos-cement pipe manufactured by Johns-Manville Corporation ("Johns-Manville"). Mr. Hart installed thousands of feet of the pipe. The pipe was delivered to the jobsite on flatbed trailers, but Mr. Hart did not know who supplied the pipe. As a pipe layer, Mr. Hart had no access to information regarding the supplier, but the "people that would know would be people who worked in the office or the foremen."

John Glamuzina ("Glamuzina") was one of Mr. Hart's foremen on the project in McKinleyville.[1] Glamuzina was Mr. Hart's direct supervisor from January to March 1977. Glamuzina observed Mr. Hart cut and bevel asbestos-cement pipe without any respiratory protection. Glamuzina estimated his crew laid over 4,000 feet of pipe.

Glamuzina knew Johns-Manville manufactured the pipe based on his observation of a stamp on the pipe. Glamuzina believed Keenan supplied the pipe because he signed invoices when truckers delivered loads. Glamuzina checked the invoices to make sure the load matched the information on the invoices. Glamuzina turned in a carbon copy of the invoices to the office at the end of the day. Glamuzina believed Keenan supplied all of the pipe his crew laid in McKinleyville.

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[1] Due to his unavailability at the time of trial, the jury watched a videotape of Glamuzina's deposition, which occurred on March 13, 2017, almost four months prior to trial. Glamuzina was 81 years old at the time of his deposition.

Glamuzina could not recall exactly how Keenan was written on the invoices. Glamuzina was working in the field and in a hurry, so he checked the load and the numbers on the invoices, signed them, and gave them back to the truckers. He believed Keenan was the supplier based on "their K and stuff." Glamuzina did not recall the names of any other suppliers. Depending on how fast his crew was laying pipe, Glamuzina received about two or three loads of pipe per week. Other foremen also checked the invoices, and Glamuzina checked about one or two per week.

Olga Mitrovich, Christeve's bookkeeper in the 1970s, testified that employees, including Glamuzina, were responsible for accepting materials at the jobsite, and they would "initial the ticket," send it to Christeve's office, and Mitrovich would "compare the invoice with the delivery ticket" before paying the invoice. However, Mitrovich did not know if Keenan supplied asbestos-cement pipe to Christeve in McKinleyville.

Keenan's corporate representative, Timothy Garfield, acknowledged that Keenan sent its customers invoices. At his deposition, and during trial, he identified a document as a copy of a Keenan invoice.[2] The document contained Keenan's logo, which consisted of a "K" in a circle. However, the invoice was for products Keenan sold to an entity called Three D. Const. Co., not to Christeve in McKinleyville. Garfield testified he had "no information whatsoever that Keenan ever sold anything that was used in the McKinleyville work while Mr. Hart was working there."

Complaint, Trial, Verdict, and Damages

On November 6, 2016, the Harts filed a complaint for personal injury and loss of consortium against numerous entities, including Keenan. Keenan answered the complaint and denied the allegations. At trial, which began on July 5, 2017, Keenan was the only remaining defendant.

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[2] The court marked this exhibit for identification but did not admit it into evidence, finding there was not a sufficient foundation to admit it.

On July 14, 2017, the jury rendered its verdict, finding, among other things, that Mr. Hart was exposed to asbestos-cement pipe supplied by Keenan. The jury awarded economic damages, non-economic damages, and damages for loss of consortium. The jury allocated fault among ten entities, finding that Keenan was 17% at fault. In its amended judgment, filed September 23, 2017, the court apportioned 45% of prior settlements to potential, future wrongful death claims, and the remaining 55% to the personal injury action. The total net verdict against Keenan was $1,626,517.82. Keenan timely appealed.

DISCUSSION

On appeal, Keenan makes three arguments. First, Keenan contends the court "abused its discretion in allowing . . . Glamuzina's double hearsay testimony regarding the contents of an unavailable, unauthenticated 'receipt.' " Second, Keenan argues the testimony of an expert witness regarding Mr. Hart's medical expenses was inadmissible. Third, Keenan contends the court "erred when it included . . . [Mrs. Hart] among the prospective wrongful death heirs in determining the proportion of settlements to set aside for those heirs." We do not address Keenan's second and third arguments because we conclude there was no admissible evidence showing Keenan supplied asbestos-cement pipe to the McKinleyville jobsite.

I.

The Court Abused Its Discretion by Admitting Glamuzina's Testimony

Keenan's first argument challenges the admissibility of Glamuzina's testimony regarding the supplier of the pipe at the McKinleyville jobsite. We begin with the standard of review.

A. *Standard of Review*

" ' "[A]n appellate court reviews any ruling by a trial court as to the admissibility of evidence for abuse of discretion." ' " (*Osborne v. Todd Farm Service* (2016) 247

Cal.App.4th 43, 50 (*Osborne*).) A trial court abuses its discretion "only if the trial court's order exceeds the bounds of reason. [Citation.] 'Where a trial court has discretionary power to decide an issue, an appellate court is not authorized to substitute its judgment of the correct result for the decision of the trial court.' [Citation.] We will only interfere with the lower court's judgment if appellant can show that under the evidence offered, ' " 'no judge could reasonably have made the order that he did.' " ' " (*DiCola v. White Brothers Performance Products, Inc.* (2008) 158 Cal.App.4th 666, 679 (*DiCola*).)

B. *Keenan's Motion in Limine*

Before trial, Keenan moved in limine to exclude Glamuzina's testimony. Keenan argued the Harts could not authenticate purported Keenan invoices, and Glamuzina's testimony regarding Keenan invoices was inadmissible hearsay. The Harts argued there was no need to authenticate the invoices because Glamuzina did not testify regarding their content. At the hearing on this motion, the court tentatively denied it. However, the court permitted the Harts to file a supplemental brief addressing *Osborne*, *supra*, 247 Cal.App.4th 43, a case in which the court excluded evidence purporting to establish the supplier of an item involved in an accident. After considering the additional briefing, the court entered a written order denying the motion in limine.

C. *The Court Abused Its Discretion by Denying Keenan's Motion to Exclude Glamuzina's Testimony*

On appeal, Keenan contends Glamuzina's testimony that Keenan was the supplier of the pipe used in McKinleyville was inadmissible hearsay. We agree with Keenan. We begin with a more detailed account of Glamuzina's testimony.

1. *Glamuzina's Testimony*

To establish Keenan supplied asbestos-cement pipe to the McKinleyville jobsite, the Harts relied on Glamuzina's testimony regarding signing invoices when truckers delivered loads of the pipe. Glamuzina testified as follows:

"Q. And how did you know Keenan was the supplier of the asbestos cement pipe that your crew was laying in the City of McKinleyville?

"A. Well, there would be different invoices to sign when the truckers would come up with a load.

"Q. Okay. Did you personally sign any of these invoices?

"A. There was a few. I can't remember how many.

"[¶] . . . [¶]

"Q. The invoices that you mentioned, what exactly did they have? What information did they have on them?

"A. It would just -- the trucker would have an invoice of his load, what he had on his load, and I'd just double-check it, see -- usually it tells you where it came from. That's all.

"Q. And what do you mean where it came from?

"A. What plant or -- stuff like that, I didn't -- all I would do is count the load and see what we had and sign it, and it would be off.

"Q. And what sort of materials was Keenan [s]upplying to the City of McKinleyville job?

"A. The transite pipe for the sewer.

"Q. This is the Johns-Manville transite pipe?

"A. Yeah. Yes.

"Q. Did you see the name Keenan on the invoices that you personally signed?

"A. I recall a few times, yes."

Later, when examined by another attorney, Glamuzina was asked:

"Q. You mentioned that some of the materials were supplied by Keenan, and you mentioned that you saw Keenan on some of the invoices; is that right?

"A. I recollect some of it, yes.

"Q. How was Keenan written on the invoices?

"A. I thought it was, if I can remember right, I think it was like a print, I'm not positive, like a black print or -- I can't -- to be honest, I can't recall exactly.

"Q. Do you know if it just said Keenan or if there were any other words?

"A. I couldn't answer that.

"Q. The invoices that you would see with Keenan written on there, what types of materials were being supplied by Keenan?

"A. I would just check the load for my eight-inch pipe, shorts or whatever came on the pipe, that's all I would check on that.

"Q. So you were checking the invoices to make sure that the amount of pipe or whatever materials were being supplied matched what was on the truck?

"A. Yeah, whenever I was there, when they delivered when I was there, I was always checking.

"Q. And did you ever have to sign any of the invoices indicating that you had done your check and the invoices matched what was being delivered?

"A. We did sign a trucker's invoice, yes.

"Q. And then what would you do with the invoice?

"A. I'd take a copy and give it to the office.

"Q. Would the trucker keep a copy of the invoice?

"A. He would keep his, that's correct.

"Q. Were those like carbon copy invoices?

"A. That's correct.

"Q. I'm sorry. And who would you give your copy to?

"A. I would turn everything into the office at the end of the day.

"[¶] . . . [¶]

"Q. Now, when you were going through these invoices, did you see any other names of any other suppliers aside from Keenan?

"A. No. I was in a hurry. When you're working out in the field, you're in a hurry, you just sign it and give it back. You look at the top of the load and you look at the big numbers, and that's it. That's what you remember. You don't look at the little.

"Q. Why is it that Keenan sticks out in your mind?

"A. Just the way the -- their K and stuff is all -- I don't know. Maybe it's through the years, maybe it's worked into my head. I don't know.

"Q. But as you sit here today, you can't recall the names of any other suppliers on any of those invoices that you reviewed at McKinleyville?

"[¶] . . . [¶]

"THE WITNESSS: That's correct."

2. *Glamuzina's Testimony Was Based on Hearsay Evidence*

" 'Hearsay evidence' is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code, § 1200, subd. (a).)[3] Hearsay evidence is inadmissible, unless it falls under an exception. (§ 1200, subd. (b).) Invoices, bills, or receipts are inadmissible hearsay, unless offered for the limited purpose of corroborating a witness's testimony. (*Pacific Gas & E. Co. v. G. W. Thomas Drayage etc. Co.* (1968) 69 Cal.2d 33, 42–43 (*Pacific Gas & E.*); *Jones v. Dumrichob* (1998) 63 Cal.App.4th 1258, 1267.)

[3] All undesignated statutory references are to the Evidence Code.

Here, there were no invoices or receipts showing Keenan supplied asbestos-cement pipe to the McKinleyville jobsite. Christeve wound up its business in 2001, and all of its documents were destroyed in 2002. Keenan either disposed of all its documents or transferred them to its successor in 1983. Its successor testified that if documents were transferred to it, they were destroyed. The document shown to Keenan's corporate representative was not an invoice from Keenan to Christeve.

Glamuzina's belief that Keenan supplied the asbestos-cement pipe was based on his review of invoices or delivery tickets. The wording on these invoices or delivery tickets were out-of-court statements offered to prove the truth of the matter asserted: namely, that Keenan supplied the pipes. The invoices described by Glamuzina were hearsay. (*Pacific Gas & E.*, *supra*, 69 Cal.2d at pp. 42–43.)

Furthermore, Glamuzina's testimony, standing alone, was insufficient to prove the pipe Glamuzina saw on the truckers' loads was asbestos-cement pipe supplied by Keenan. Glamuzina believed Keenan supplied the pipes based on his review of invoices or delivery tickets. Critically, he lacked personal knowledge of who the supplier was. His testimony was inadmissible for this reason. (§ 702 ["the testimony of a witness concerning a particular matter is inadmissible unless he has personal knowledge of the matter."].)[4]

In finding otherwise, the trial court stated it did not consider "a logo, emblem, or similar designation of identity as testimonial hearsay; rather, it is circumstantial evidence of identi[t]y." The trial court made a similar point at the hearing on the motion in limine.

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[4] As we discuss *post*, neither is Glamuzina's oral testimony regarding Keenan's name or logo on invoices admissible under section 1523 because his testimony is based on hearsay. Our dissenting colleague argues Keenan did not object on the ground that Glamuzina lacked personal knowledge of the identity of the supplier. (Dis. opn., *post*, at p. 3.) But Keenan did object to Glamuzina's testimony on hearsay grounds, and Glamuzina lacked personal knowledge precisely because his belief regarding the identity of the supplier was based on words he said he read or saw on invoices or delivery tickets.

It stated: "This case is . . . about whether or not somebody can testify he saw a name, or I'll even use the word a 'brand' on a document and whether that's circumstantial evidence of that. [¶] I think that the testimony is not testimonial. It's not a matter that a hearsay rule would normally apply to and until the court of appeals addresses that, if I see a yellow cab, I will allow permission to say it's a Yellow Cab. [¶] If I have somebody come in and say I saw a hat that had a big letter on it, I will allow that testimony, and if someone comes in and says I saw a big K on it, I will permit that testimony. So [the motion in limine] is denied."

We are not persuaded by this analysis. Glamuzina also testified Johns-Manville manufactured the pipes based on his observation of a stamp on them, and there was no objection to this testimony. Here, we are not called upon to determine the proper basis for admitting testimony regarding a witness's observation of a company's name or logo on a product. Instead, we must determine whether a witness's testimony regarding what he saw on invoices was admissible. The information Glamuzina observed on invoices or delivery tickets was an out-of-court statement used to show Keenan supplied asbestos containing pipes; the statement was offered for the truth of that matter. (See *Pacific Gas & E.*, *supra*, 69 Cal.2d at p. 43 ["invoices, bills, and receipts . . . are hearsay"].) Thus, Glamuzina's testimony about the identity of the supplier of the pipe was based on hearsay. (*DiCola*, *supra*, 158 Cal.App.4th at p. 681 [determining package labeling reading "Burly Brands" and instruction sheet constitute hearsay when offered to prove the truth of the matter asserted, namely, that the box contained a "Burly Brands" product.].)

In arguing otherwise, the Harts rely on *Jazayeri v. Mao* (2009) 174 Cal.App.4th 301, but that case is inapposite. In *Jazayeri*, the court found altered copies of documents were not hearsay because they were not offered for the truth of the matter asserted. (*Id.* at p. 316.) Instead, the documents were offered "as the operative documents establishing

the fraud perpetuated on appellants." (*Ibid.*) But Glamuzina's testimony regarding Keenan invoices was offered for the truth of the matter asserted: namely, that Keenan supplied the pipes.

Nor are we persuaded by the Harts's reliance on *People v. Freeman* (1971) 20 Cal.App.3d 488 (*Freeman*). In *Freeman*, a witness for the prosecution testified she heard her daughter greet someone using the words, "Hi, Norman." (*Id.* at p. 492.) The court determined the testimony was not hearsay because it was "not offered to prove the statement's truth or falsity but as evidence of the fact that the statement was made." (*Ibid.*) The court reasoned the statement was circumstantial evidence of Norman Freeman's presence at a particular location at a time when he said he was elsewhere. (*Ibid.*) Citing Wigmore on Evidence, the *Freeman* court noted that " '[u]tterances serving to *identify* are admissible as any other circumstance of identification would be.' " (*Ibid.*)

Here, unlike in *Freeman*, we cannot disregard the truth or falsity of the out-of-court statements at issue. According to Glamuzina, the invoices contained the name of the vendor supplying the material and submitting the invoices for payment. Glamuzina's testimony regarding the content of the invoices was used to prove that Keenan was the vendor. Therefore, the content of the invoices was being offered for the truth of the matter asserted in them. (See *Osborne*, *supra*, 247 Cal.App.4th at pp. 52–53 [testimony regarding supplier of hay bales was properly excluded as hearsay because it was offered to prove the truth of the matter asserted].)

Among other decisions, the Harts cite *Brown-Forman Distillers Corp. v. Walkup Drayage & Warehouse Co.* (1945) 71 Cal.App.2d 795, 798, to support their contention that "California law routinely accepts . . . identifying information as circumstantial evidence of origin or identification." At oral argument, the Harts also relied on *People v. Williams* (1992) 3 Cal.App.4th 1535 (*Williams*), in which the court considered the

admissibility of a fishing license and two checks to prove the defendant resided in the apartment where the documents were found, and concluded that "regardless of the truth of any express or implied statement contained in those documents, they are circumstantial evidence that a person with the same name as the defendant resided in the apartment from which they were seized." (*Id.* at p. 1542.)

Here, unlike in *Williams*, the invoices themselves have been destroyed and the Harts did not offer any in evidence. Thus, we are not considering the admissibility of documents. We cannot disregard that Glamuzina's testimony was offered for the truth of the matter asserted in an out-of-court statement. When the statement of the supplier's name or identity appears in an invoice or on a delivery ticket, then it is an out-of-court statement. (*Pacific Gas & E.*, *supra*, 69 Cal.2d at pp. 42–43.) When the statement is used to prove the truth of the matter asserted, namely, that Keenan supplied pipes to the McKinleyville jobsite, then it is only admissible if it satisfies a hearsay exception.[5]

3. *No Hearsay Exception Applies*

In denying Keenan's motion in limine, the trial court stated that if the invoice was hearsay, then "the invoice bearing the Keenan logo is a statement of a party (or a statement of one authorized by a party) and accordingly comes within an exception to the hearsay rule." On appeal, the Harts make the same argument. We disagree.

"Evidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant in an action to which he is a party in either his individual or representative capacity, regardless of whether the statement was made in his individual or representative capacity." (§ 1220.) In *People v. Lewis* (2008) 43 Cal.4th 415, our Supreme Court determined drawings found in the defendant's apartment were not

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[5] Keenan refers to Glamuzina's testimony as "double hearsay." We disagree. Instead, Glamuzina's testimony was based on hearsay.

admissible as party admissions because there was no evidence the defendant drew them. (*Id.* at p. 498.)[6]

Similarly here, no copies of Keenan invoices or delivery tickets showing it supplied pipes to the McKinleyville jobsite were admitted into evidence, and Glamuzina worked for Christeve, not Keenan. At oral argument, the Harts acknowledged Glamuzina's testimony was offered against Keenan. "[I]n order to bring a statement or declaration within the operation of the rule contended for it must be shown that the statement or declaration was signed or made by the party against whose interest it is sought to have it apply; and that is not the situation here presented." (*Pansini v. Weber* (1942) 53 Cal.App.2d 1, 5.)

We respectfully disagree with the dissent's view that this hearsay exception applies because Keenan was the declarant. (Dis. opn., *post*, at pp. 1–2.) Keenan's corporate representative had no information regarding whether Keenan sold pipes used in McKinleyville, and the Harts did not produce any invoices showing it did. Instead, the Harts were forced to rely on the testimony of Glamuzina, an employee of Christeve. Thus, Glamuzina could not be a party-opponent. When ruling on the motion in limine, the court was considering the admissibility of this testimony, not the admissibility of a document. Without a document showing Keenan supplied the pipes to the McKinleyville jobsite, Glamuzina's testimony was not admissible as an admission by Keenan, and the Harts do not contend any other hearsay exception applies.

4. *Glamuzina's Testimony Is Not Admissible Under Evidence Code Section 1523 Because It Is Based on Hearsay*

In ruling on Keenan's motion in limine, the trial court noted "Keenan's records of invoices were apparently destroyed by its successor. See [section 1523, subdivision (b)]."

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[6] Abrogated on other grounds in *People v. Black* (2014) 58 Cal.4th 912, 919–920.

But this Evidence Code provision does not provide a basis for admitting Glamuzina's testimony.

Oral testimony of the content of a writing is admissible "if the proponent does not have possession or control of a copy of the writing and the original is lost or has been destroyed without fraudulent intent on the part of the proponent of the evidence." (§ 1523, subd. (b).) Here, Keenan's records were destroyed by it or its successor. For this reason, the Harts relied on Glamuzina's oral testimony to establish Keenan supplied the pipes in McKinleyville.

But, as explained by our Supreme Court, "[s]econdary evidence . . . must comply with the rules governing the admissibility of evidence generally, including . . . the hearsay rule . . . ." (*Dart Industries, Inc. v. Commercial Union Ins. Co.* (2002) 28 Cal.4th 1059, 1070, fn. 2.) In other words, "[a] writing that passes muster under the secondary evidence rule is not necessarily admissible. The writing 'still may be inadmissible because of other exclusionary rules of evidence, such as hearsay . . . .' " (*Molenda v. Department of Motor Vehicles* (2009) 172 Cal.App.4th 974, 994–995.) As explained *ante*, Glamuzina's testimony was based on hearsay, and no hearsay exception applies. Hence, Glamuzina's oral testimony regarding the content of the invoices was not admissible under section 1523, subdivision (b).

5. *Glamuzina Could Not Authenticate the Keenan Invoices Because His Testimony Was Not Otherwise Admissible*

In overruling Keenan's motion in limine, the trial court's final point was that Glamuzina's testimony was sufficient to authenticate the Keenan invoices because it was his duty to check them, and his description was consistent with an exemplar of a Keenan invoice. On appeal, the Harts agree, pointing out that "the proponent of secondary evidence must still satisfy the threshold showing of authenticity."

A writing must be authenticated before it, or secondary evidence of its content, may be received in evidence. (§ 1401.) In addition, when the content of a writing is

proved by secondary evidence, authentication is required. (§ 1521, subd. (c).) But the secondary evidence must be "otherwise admissible." (§ 1521, subd. (a).) Here, as explained *ante*, Glamuzina's testimony regarding Keenan invoices was based on hearsay and no exception applies. This secondary evidence was not "otherwise admissible," so the question of whether the Keenan invoices were properly authenticated does not come into play.

Even if the authentication requirement did apply, Glamuzina could not authenticate the purported Keenan invoices. "Authentication of a writing means (a) the introduction of evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is or (b) the establishment of such facts by any other means provided by law." (§ 1400.) To introduce a writing, a proponent must establish that the writing is authentic, which usually means introducing evidence "that the writing was made or signed by its purported maker." (Cal. Law Revision Com. com., 29B pt. 4 West's Ann. Evid. Code (1995 ed.) foll. § 1400, p. 440; see *People v. Goldsmith* (2014) 59 Cal.4th 258, 266–267.)

"A writing may be authenticated by anyone who saw the writing made or executed, including a subscribing witness." (§ 1413.) The Evidence Code does not limit the means by which a writing may be authenticated. (§ 1410.) Nonetheless, courts do not assume "documents are what they purport to be . . . . Generally speaking, documents must be authenticated in some fashion before they are admissible in evidence." (*Continental Baking Co. v. Katz* (1968) 68 Cal.2d 512, 525.)

Here, Glamuzina was a Christeve foreman, so, with regard to the purported Keenan invoices, he did not see "the writing made or executed . . . ." (§ 1413.) Keenan's corporate representative acknowledged Keenan sent its customers invoices, but he had "no information whatsoever that Keenan ever sold anything that was used in the McKinleyville work while Mr. Hart was working there." Christeve's bookkeeper did not

know if Keenan supplied asbestos-cement pipe to Christeve in McKinleyville. If the Harts were required to authenticate the purported Keenan invoices, then Glamuzina's testimony was insufficient to do so. (See *Osborne*, *supra*, 247 Cal.App.4th at p. 53 [refusing to admit the plaintiff's testimony about her observation of delivery tickets identifying a supplier in part because she "did not possess the physical document to which her testimony referred and no other witness . . . claimed to have seen it."].)

Because there was no reasonable basis for admitting Glamuzina's testimony regarding Keenan invoices, we conclude the trial court abused its discretion by doing so. The erroneous admission of this evidence was not harmless because there was no other evidence establishing Keenan supplied asbestos-cement pipe to the McKinleyville jobsite. Accordingly, we reverse the judgment against Keenan.

DISPOSITION

The judgment against Keenan is reversed. Keenan is entitled to costs on appeal. (Cal. Rules of Court, rule 8.278(a).)

JONES, P.J.

I concur.

BRUINIERS, J.

(A145125)

Dissent of Needham, J.,

The majority reverses the Harts' $1.6 million jury verdict against appellant Keenan Properties, Inc. (Keenan) on the ground that the trial judge abused his discretion in allowing jurors to hear sworn testimony that invoices accompanying asbestos-containing pipes bore the name "Keenan." I respectfully dissent.

At issue is the admissibility of John Glamuzina's testimony that the invoices and delivery tickets he personally observed had the name "Keenan" on them. The trial court's admission of the evidence is reviewed for an abuse of discretion. " 'Where a trial court has discretionary power to decide an issue, an appellate court is not authorized to substitute its judgment of the correct result for the decision of the trial court.' [Citation.] We will only interfere with the lower court's judgment if appellant can show that *under the evidence offered,* ' "*no judge could reasonably have made the order that he did.* " ' [Citation.] [A] showing will be 'insufficient if it presents a state of facts which simply affords an opportunity for a difference of opinion." (*DiCola v. White Brothers Performance Products, Inc.* (2008) 158 Cal.App.4th 666, 679–680, italics added.)

1. Hearsay

Assuming that the out-of-court statement (pipe invoice with the name "Keenan") was offered for its truth (to prove the pipes were provided by Keenan), the statement is hearsay and the question is whether a hearsay exception applies.

Sufficient evidence supported the hearsay exception for a statement of a party-opponent. (Evid. Code, § 1220.) The evidence was that Keenan sent invoices to customers, those invoices bore a circled "K" logo, Glamuzina checked and signed invoices accompanying the asbestos-containing pipe, he observed "Keenan" on those invoices, and the word "Keenan" stuck in his mind because of the way the "K" was written. Upon this state of facts, it would be reasonable to conclude that it was Keenan

who authored invoices bearing the name "Keenan," so that Keenan would be paid for its pipes. Because it was reasonable to conclude that defendant Keenan was the declarant, the court did not abuse its discretion in ruling the statement admissible for the plaintiffs as the statement of a party-opponent. (See *Lannes v. CBS Corp.* (N.D.Cal. 2013) 2013 U.S. Dist. Lexis 191312, fn. 7 [mesothelioma plaintiff's testimony, that he saw the defendant's name on replacement sheet material and ordering guides for replacement parts that contained asbestos, was admissible because it pertained to an admission by a party-opponent under Fed. Rule Evid. 801(d)(2)]; *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.* (C.D.Cal. 2006) 454 F.Supp.2d 966, 974 ["Documents that bear [a party's] trade names, logos, and trademarks are statements by [that party] itself, and are admissible as admissions by a party-opponent under [Fed. Rule Evid. 801(d)(2)]"].)

The majority's reliance on *People v. Lewis* (2008) 43 Cal.4th 415 is misplaced. (Opn. 12.) In *Lewis*, the court determined that drawings found in a defendant's apartment were not admissible as party admissions because there was *no* evidence the defendant drew them and, in fact, the prosecutor's theory at trial was that someone *other* than the defendant had drawn them. (*Lewis,* at p. 498.) Here, by contrast, the plaintiffs contended that Keenan created the invoices, and there was at least some evidence to support that theory. After all, it would make no sense under the facts of this case for anyone other than Keenan to submit an invoice requiring payment to Keenan.

The majority also suggests that Glamuzina's testimony was not admissible as a party admission because Glamuzina did not work for Keenan. (Opn. at 12.) However, the question is whether the declarant – the one who made the invoice statement – was a party-opponent, not whether witness Glamuzina was a party-opponent. If defendant

Keenan was the declarant, the statement falls within the hearsay exception if offered by the plaintiffs, no matter what witness the plaintiffs used.[7]

[7] The majority cites *DiCola, supra*, 158 Cal.App.4th 666 for the proposition that the testimony about the invoice bearing Keenan's name was hearsay. *DiCola* specifically noted, however, that the appellants in that case had not argued any hearsay exception. (*Id.* at p. 681.) Here, the Harts argue, and the court ruled, that a hearsay exception applied.

2. Personal Knowledge

The majority contends that Glamuzina lacked personal knowledge of the identity of the supplier. (Opn. 9.) Its position is unpersuasive. In the first place, appellant Keenan did not object on that ground. (Evid. Code, § 353.) Moreover, Glamuzina had personal knowledge of the facts *to which he testified* – that he personally saw invoices bearing Keenan's name. From this testimony, if believed by the jury, the jury could decide whether to infer that the pipe was indeed from Keenan.

3. Authentication

Although the invoices themselves were not admitted into evidence, the majority points out that they had to be authenticated for Glamuzina's secondary evidence to be admissible. (Opn. 14; see Evid. Code, § 1401.)

"Authentication of a writing means . . . the introduction of evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is." (Evid. Code, § 1400.) The testimony of a subscribing witness is not required (Evid. Code, § 1411), and authentication may be established by circumstantial evidence and the document's contents (Evid. Code, § 1410; *People v. Skiles* (2011) 51 Cal.4th 1178, 1187).

Here, Glamuzina's testimony suggested that he saw "Keenan" with a distinctive "K" on the invoices, and Keenan's corporate representative admitted that Keenan sent its customers invoices with a distinctive "K." From this evidence, the jury *could* conclude that the invoices Glamuzina saw were, in fact, Keenan invoices, as Hart purported them to be. This met the threshold for authentication. (Evid. Code, § 403.)

The majority's reliance on *Osborne v. Todd Farm Services* (2016) 247 Cal.App.4th 43 is unavailing. There, it was ruled that a trial court had not abused its discretion in declining to admit the plaintiff's testimony that she saw delivery tickets

identifying the supplier of hay bales. However, this was not merely because the plaintiff failed to offer the delivery tickets or a corroborating witness (as the majority notes), but also because the alleged source of the documents testified that no such receipt *ever existed*, he did not segregate hay in his barn by supplier, and he did not document the supplier of hay included in any delivery. (*Id* at p. 53.) Here, in stark contrast, Keenan admitted that it *did* invoice its customers with invoices. Moreover, the fact the court in *Osborne* found that a trial court's ruling was within its discretion does not by any means establish that the court in this case exceeded its discretion.

In sum, appellant Keenan fails to show that the trial court abused its discretion in admitting Glamuzina's testimony. Of course, it was up to the jury to decide whether to believe Glamuzina's testimony and trust his recollection of what he saw on the pipe invoices, and Keenan's lawyer was free to present evidence and argue that Glamuzina was incorrect. But any doubts as to Glamuzina's recollection went to the weight of the evidence, *not* its admissibility. (And as we now know, the jury accepted Glamuzina's testimony as true, rendering the reversal of the verdict all the more disturbing.)

NEEDHAM, J.

(A152692)

Filed 11/19/18

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

FRANK C. HART et al.,

Plaintiffs and Respondents,

v.

KEENAN PROPERTIES, INC.,

Defendant and Appellant.

A152692

(Alameda County
Super. Ct. No. RG16838191)

ORDER CERTIFYING OPINION FOR PUBLICATION

THE COURT:

The requests for publication, filed November 13, 2018 and November 15, 2018, are granted. Pursuant to California Rules of Court, rule 8.1105(b), the opinion, filed on October 26, 2018, is ordered published.

Dated: _____ _____, P. J.

Trial Court: Alameda County Superior Court

Trial Judge: Hon. Winifred Y. Smith

Counsel:

Kazan, McClain, Satterley & Greenwood, Justin Alexander Bosl, Ted W. Pelletier, Michael T. Stewart for Plaintiff and Appellant.

Horvitz & Levy, Lisa Perrochet, Jason R. Litt; Hugo Parker, James Carl Parker for Defendant and Respondent.

PROOF OF SERVICE

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Alameda, State of California. My business address is Jack London Market, 55 Harrison Street, Suite 400, Oakland, CA 94607.

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PETITION FOR REVIEW

on the interested parties in this action as follows:

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Alameda County Superior Court
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E. A. Pawek

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **Frank C. Hart and Cynthia Hart v. Keenan Properties, Inc.**
Case Number: **TEMP-HR33R7OK**
Lower Court Case Number:

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