

S253295

**IN THE
SUPREME COURT OF CALIFORNIA**

FRANK C. HART and CYNTHIA HART,
Plaintiffs and Petitioners,

v.

KEENAN PROPERTIES, INC.,
Defendant and Respondent.

AFTER A DECISION BY THE FIRST DISTRICT COURT OF APPEAL, DIVISION FIVE,
CASE NO. A152692, FOLLOWING APPEAL FROM A JUDGMENT OF THE ALAMEDA
COUNTY SUPERIOR COURT, CASE NO. RG16838191.

**RESPONDENT KEENAN PROPERTIES, INC.'S
ANSWER TO THE AMICUS BRIEF OF CONSUMER
ATTORNEYS OF CALIFORNIA**

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INTRODUCTION

Defendant and Respondent Keenan Properties, Inc. hereby answers the amicus brief filed by the Consumer Attorneys of California (“CAOC”). The First District of the Court of Appeal’s majority opinion in this case adheres to well-formulated precedent found in *Pacific Gas & Electric Company v. G. W. Thomas Drayage & Rigging Company* (1968) 69 Cal.2d 33, 42–43 (“*Pacific Gas*”), and *Osborne v. Todd Farm Service* (2016) 247 Cal.App.4th 43, 50. Despite that precedence, the CAOC’s brief attempts to paint a bleak picture for plaintiffs after the Court of Appeal’s decision in *Hart* by incorrectly portraying the opinion as a monumental shift in the hearsay rule.

CAOC portends that the effect of the Court of Appeal’s decision on “consumer plaintiffs and, in particular, on asbestos plaintiffs,” will be “devastating.” This conclusion is built on the false premise that the Court of Appeal’s decision “would literally render it impossible for most asbestos plaintiffs to recover for their injuries” because, according the CAOC, the decision somehow renders it impossible for witnesses to use trademarks to identify a defendant’s taxi cab, delivery

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truck, or consumer product. (CAOC at 11, 18.) However, CAOC's hyperbolic conclusion fails to recognize several critical characteristics of the Court of Appeal's decision which limit its effect.

First, the Court of Appeal expressly stated that it was *not* determining whether an identifying mark on a product is hearsay:

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.

(Opinion at 9 (emphasis added).) As such, CAOC overstates the perceived effect of the decision. CAOC misdirects its focus on logos and trademarks, and, in particular, whether those "statements" are hearsay when placed on products, trucks, labels, signage, uniforms, "and the like." (CAOC at 14-17.) By deliberate design, the Court of Appeal did not move the needle regarding identifying marks on such items. (Opinion at 9.)

Second, the facts in this case, and those recited in the Court of Appeal's decision, are unique. This case involves secondary evidence of unauthenticated writings from a single witness, coworker John

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Glamuzina, who testified that he saw the disputed writings more than 40 years ago. It is this witness's description of the content of those writings – “trucker's invoices” – that is the sole evidence upon which this defendant's liability hinges. Without Glamuzina's testimony regarding the alleged writings, there is no evidence that Keenan supplied anything to plaintiff's job site.

While the CAOC's amicus brief focuses on the admissibility of items depicting logos, it should be made clear that Glamuzina never used the term “logo” or any descriptor remotely equivalent thereof. Nonetheless, it is Plaintiffs position that Glamuzina's testimony regarding a “K' and stuff” on the disputed writings is sufficiently consistent with an exemplar Keenan logo never shown to Glamuzina. In turn, it is CAOC's position that anything with a “logo” should not be deemed hearsay. (*See, e.g.*, CAOC at 17-18.) Whether or not Glamuzina sufficiently described a logo, the mere presence of a logo on a document does not alter whether the contents of the document are hearsay. If, as here, the document is being used to prove the truth of whether an act was done, the document is hearsay and the analysis moves on to the hearsay rule's exceptions.

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Finally, CAOC argues that logos and other identifying marks are so important, so valuable, that they should be deemed reliable evidence of provenance wherever they are found such that they become exempt from the hearsay rule. (CAOC at 17-18.) Under the CAOC's construction, so long as a trademark is placed on a product, package, truck, uniform, or *invoice*, it can be used "for the purpose of providing identification, so that the buyer can be sure that the correct product was received." (CAOC at 13, 17.) For an invoice, this necessarily means one is looking to the contents of the document to prove "the correct product was received." CAOC's proposal is not only incomplete, it completely circumvents the statutory hearsay rule and its exceptions simply by exempting anything that is said to have had a logo on it.

DISCUSSION

CAOC hypothesizes that, as a result of the Court of Appeal's decision in this case, a plaintiff will no longer be able to identify "ABC" brakes that came in a box labeled "ABC." (CAOC at 12.) This ignores the very fact-driven analysis of the Court of Appeal's opinion. More directly, CAOC's "ABC" hypothetical ignores the Court of

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Appeal's express limitation that was not disturbing any law with respect to a witness's observation of a name or logo on a product. Indeed, the Court of Appeal did not disturb any law at all. Under the rules of hearsay and authentication, the Court of Appeal followed established precedent from *Pacific Gas & Electric Company v. G. W. Thomas Drayage & Rigging Company* (1968) 69 Cal.2d 33, 42–43, and *Osborne v. Todd Farm Service* (2016) 247 Cal.App.4th 43, 50.

A. Testimony Regarding a Defendant's Identity Based on a Logo on a Product Is Still Admissible Following the Court of Appeal's Decision in Hart

In the case before the Court, the alleged writings are not the equivalent of seeing a seller's name on the side of a truck or on taxicab. Witness Glamuzina testified that he was checking the contents of the "invoices" to match what was on the truck. (12 RT 3413:9-19.) These writings were used not only to prove Keenan's identity, but Glamuzina's testimony was offered also as "direct evidence" to prove that Keenan supplied asbestos-containing pipe to the plaintiff's job site. (17 RT 4833:8-14.) The alleged writings were not just a name on a piece of paper. They were also itemized lists of what was

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allegedly delivered to the jobsite. As such, the alleged writings were offered to prove that an act had been done; to prove that the pipe at issue had been sold and delivered by the entity named on the writing.

CAOC warns of dire, “devastating” consequences for plaintiffs following the Court of Appeal’s decision. (CAOC at 18.) CAOC foretells of the extinction of toxic tort cases because plaintiffs will no longer be able to identify defendants’ products. (CAOC at 14, 17.) In an effort to prove their point, CAOC cites a number of cases where liability was based, at least in part, on seeing a trade- or service mark on trucks, taxicabs, boxes of ammunition, videos, and salami. (CAOC at 14-16.) Beyond simply stating that these cases “confirm that defendant identification is not infrequently dependent on similar name, logo and/or signage,” CAOC fails to stay how, *if at all*, these cases would come to a different result following the Court of Appeal’s decision in *Hart*. (*Id.*) Indeed, none of these cases are altered by the case now before the Court.

For example, in *Vaccarezza v. Sanguinetti* (1945) 71 Cal.App.2d 687, 693, a manufacturer defendant was disputing that two of its products, pork coppe and salami, were sold to the plaintiff by a

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co-defendant retailer. (*Id.* at 691-92.) However, the co-defendant retailer admitted to selling the products to the plaintiff. (*Id.* at 693.) The retailer provided further evidence that the only such products they provided to customers were made by the manufacturer defendant unless there was a special order. (*Id.* at 693.) While the plaintiff testified that the salami she received had “the paper marker indicating it was Columbo Brand,” it is unclear whether this “paper marker” packaging came from the manufacturer or the retailer. (*Id.* at 693.) In any event, the sum total of these and additional pieces of evidence made it “obvious” to the *Vaccarezza* court “that all material facts found by the trial court find ample support in the record.” (*Id.* at 692.) Assuming the identifying mark was placed on the salami by the manufacturer, the Court of Appeal’s decision in *Hart* would have no effect on the admissibility of the “Columbo Brand” mark on the salami because the *Hart* court stated that it was not weighing in on the admissibility of such evidence. (Opinion at 9.)

In another case cited by CAOC, *Kasel v. Remington Arms Company, Inc.* (1972) 24 Cal.App.3d 711, 717-21, the name “Remington” on boxes of shotgun shells and on a shotgun shell itself

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were but two pieces of evidence introduced at trial among many supporting finding that Remington Arms Company was “an integral part of the composite business enterprise” with the Mexican affiliate company that manufactured the defective shell at issue. It does not appear the identity of the ammunition manufacturer was contested but, even if had been, it is again difficult to see how the Court of Appeal’s decision in *Hart* would change the result given its limited holding and the unique facts of *Hart*. (*Cf.* Opinion at 9 (explicitly not determining whether a witness’s observation of a company’s name or logo on a product is admissible), *with Kasel, supra*, 24 Cal.App.3d at 720 (introduced in evidence were a shotgun shell and several boxes of shells labelled “Remington”).)

To highlight the importance of trademarks on goods, CAOC cites a Missouri case regarding the chain of custody of a “VCR tape.” (CAOC at 10, citing *State v. Bishop* (1989) 791 S.W.2d 195, 196-97.) That tape had been transferred from a person “who was doing undercover work” for a county sheriff, to one of the sheriff’s deputies, to the sheriff himself who placed the VCR tape into an evidence locker. (*Bishop, supra*, 791 S.W.2d at 196-97.) The defendant objected that

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the chain of custody was broken because the middleman deputy did not testify at trial. (*Id.* at 196.) The Missouri Supreme Court’s opinion affirmed admission of the VCR tape because there was sufficient evidence of reasonable assurance that the evidence was what was originally collected and in the same condition. (*Id.* at 198.) The VCR tape was labeled “Battle of the Titans” and with the marks “Adult Video Corporation” and “AVC.” (*Id.* at 196, 198.) The content of the tape when played bore the same identifying “Battle of the Titans” indicia as the label on the outside of the VCR cassette. (*Id.* at 198.) The trial court observed the tape of “original” quality as opposed to a reproduced, “dubbed” version, just as the evidence was described to the undercover agent. (*Id.* at 196, 198.) The defendant made no claim that the tape itself bore any physical evidence of tampering or alteration. (*Id.* at 198.) Finally, and again unlike the facts in the *Hart* matter, the tape itself was introduced at trial as Exhibit 4 and was positively identified at trial by the undercover agent and the sheriff. These various data were sufficient to show the improbability that the tape was anything other than the tape purchased from the defendant. (*Id.* at 198.)

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The importance and utility of the “logo” in *Bishop* is very different than in the *Hart* case now before the Court. Imagine, however, if in *Bishop* the sole evidence that the defendant sold pornographic material was the sheriff’s testimony that 40 years ago he saw a writing, an invoice, identifying the defendant as the seller of “Battle of the Titans” and that the writing no longer exists. Under CAOC’s construction of the hearsay rule (and the Harts’ and trial court’s), this evidence is admissible. This is precisely the danger if Glamuzina’s hearsay evidence becomes admissible.

B. The Court of Appeals’ Decision in *Hart* Is Not the End of Products Liability

In an effort to show that the defense bar is somehow twisting the Court of Appeal’s decision to exclude any form of product identification evidence, CAOC cites a single article that appeared in a publication produced by DRI.¹ (CAOC at 11.) Without any specific citations, CAOC asserts that the DRI has predicted that, without the

¹ According to its website, DRI is a membership organization representing all lawyers involved in the defense of civil litigation. (Website: <https://www.dri.org/about/about-us>; last accessed Oct. 31, 2019.)

admission of evidence of “labels, logos, and the like . . . few, if any asbestos or other toxic tort cases will survive.” (CAOC at 17.)

Contrary to CAOC’s assertions, the conclusion of the cited article is that the Court of Appeal’s *Hart* decision “put the brakes on the admission of hearsay testimony about what shipping or purchase documents supposedly stated about a product.” (Tugade and Weixel, *Breaking the Product Identification Chain*, 61 No. 6 DRI For the Defense, p. 41 (2019).) The DRI article simply echoed the limitations of the Court of Appeal’s holding: “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.” (Opinion at 9.) The hearsay-related holding of Court of Appeal opinion was narrow and limited to a simple task to “determine whether a witness’s testimony regarding what he saw on invoices was admissible.” (*Id.*) As the DRI article notes: “The court took no issue with the trial court’s holding that the foreman’s testimony about seeing a JM logo stamped on a piece of pipe was not barred by the hearsay rule, because it was personal recollection about what appeared *on the product itself.*” (Tugade,

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supra, at 42.) There has been no sea-change as CAOC claims. While CAOC may well believe that the *Hart* opinion is a supposed harbinger of evidentiary upheaval, the Court of Appeal’s opinion simply follows established precedent, including this Court’s holding in *Pacific Gas*.

C. CAOC’s proposed new hearsay exception is inconsistent with the hearsay rule and existing statutory hearsay exceptions

CAOC alternatively urges this Court to fashion an exception to the hearsay rule for “logos, brand names, and the like” because of their “intrinsic reliability.” (CAOC at 17.) CAOC asserts that this reliability is generated because companies place their marks “for the very purpose of identifying themselves as associated with the products.” (CAOC at 17.) The balance of equities, CAOC claims, favors the creation of a trademark exception because the supporting documentation has been lost through no fault of plaintiffs. (CAOC at 18.) Rather, according to the CAOC, it is the defendants who were in the best position to maintain those documents. (*Id.*)

This proposal is not just unbaked, the *Hart* case neither warrants the creation of a new hearsay exception nor does the case have the

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factual ingredients to create a new exception. The proof is that CAOC's proposal is inconsistent with statutory hearsay rules.

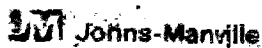
CAOC's focus is centered on logos and various other identifying marks. The Great Assumption of this case, perpetuated by CAOC, is that Glamuzina described a logo or some unique identifying mark on the writings he observed. In that regard, all Glamuzina said was he recalled "Keenan" which he claimed to remember because of the "'K' and stuff" on the writings. He never said that he observed a logo, insignia, or any synonym thereof. If a new "logo exception" to the hearsay rule were ever to be created, this is not the case around which to fashion such a rule because there are insufficient facts to do so.

On the record in the *Hart* matter, given the limited facts, it is completely unclear as to the form of CAOC's proposed rule. Is CAOC suggesting that if a trademark or service mark appears on any item, anything about the item is admissible? In this case, if one were to assume that Glamuzina sufficiently described a logo on the disputed writing, do the contents of the writing then come in to establish what was supplied?

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CAOC's justification for the proposed rule, given "the balance of equities," is that that the subject items and documents have been lost to time through no fault of the plaintiff. (CAOC at 18.) As such, CAOC's "logo exception" proposal would seem to only apply where there is oral, secondary evidence of writings that do not exist (and may never have). It begs the question: What of documents that contain a logo and *that still exist*?

Discussed in Keenan's opposition brief, it is worth again noting that Johns-Manville records produced in this case bore the logo:



(*E.g.*, 1 AA 125.) Those Johns-Manville documents unequivocally show the pipe at the center of this dispute was sold not by Keenan, but by Johns-Manville directly to Mr. Hart's employer and delivered by Johns-Manville directly to the McKinleyville jobsite. (*See, e.g.*, 2 AA 155-76.) Do those Johns-Manville records depicting a logo, the ones that actually exist, come in under CAOC's hearsay exception for logos?

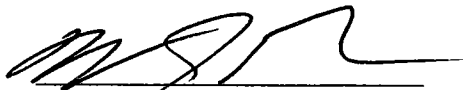
In practice, CAOC's proposed "logo exception" would eliminate evidentiary safeguards regarding hearsay evidence by

eviscerating the hearsay rule and Legislature’s statutes regarding the business record exception so long as a witness says there was a logo on a document that does not exist. For that matter, CAOC’s proposed exception would completely undermine statutory authenticity and secondary evidence protections as well.

The CAOC claims that a logo hearsay exception is needed “because, absent admission of such evidence, few, if any asbestos or other toxic tort cases will survive – as predicted by the DRI.” (CAOC at 17.) Glamuzina “testified Johns-Manville manufactured the pipes based on his observation of a stamp on them, and there was no objection to this testimony.” (Opinion at 9.) The Court of Appeal’s decision does not alter or challenge the landscape on this type of “product identification” testimony. (*Id.*) The idea that it will somehow become impossible for toxic tort cases to survive following the Court of Appeal’s decision is completely unfounded.

Dated: November 1,
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CERTIFICATE OF WORD COUNT

I hereby certify that this brief consists of 2,902 words in Times New Roman 14-point font (13-point for footnotes) as counted by the software program Word for Microsoft Office 365 ProPlus used to generate the text of this brief.

Dated: November 1, 2019

A handwritten signature in black ink, appearing to read 'W. Joseph Gunter', is written over a horizontal line.

W. Joseph Gunter

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