S253295

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

PETITIONERS' BRIEF ON THE MERITS

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FRANK C. HART and CYNTHIA HART**

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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
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ISSUES PRESENTED

1. Is a witness' identification of a defendant's logo or name inadmissible hearsay?

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

INTRODUCTION

The central issue presented is: *How do plaintiffs and prosecutors identify a defendant?*

Prior to the majority opinion below, California law was well-settled that statements of identification are admissible as non-hearsay, circumstantial evidence.

Thus, if a person witnesses a yellow "Acme" cab hit a pedestrian, his testimony that he saw a yellow "Acme" cab provides circumstantial evidence as to the identification of the perpetrator. [*Brown-Forman Distillers Corp. v. Walkup Drayage and Warehouse Co.* (1945) 71 Cal.App.2d 795, 797-798].

If a fast food patron gets ill from a hamburger, her testimony that she ate a hamburger wrapped in Jack-in-the-Box wrapping and contained in a Jack-in-the-Box bag is circumstantial evidence as to the identity of the restaurant. [*Vaccarezza v. Sanguinetti* (1945) 71 Cal.App.2d 687, 693].

If the police find utility bills with the defendant's name on them in the same apartment where they find illegal drugs, these invoices are circumstantial evidence of the identity of the person who resides in this apartment. [*People v. Williams* (1992) 3 Cal.App.4th 1535, 1541-1543].

Here, consistent with the above evidence—all held to be non-hearsay statements of identification by our appellate courts—a foreman, John Glamuzina, testified that he saw the logo "K" and the name "Keenan" on invoices accompanying delivery of asbestos-cement pipe to Plaintiff Frank Hart's jobsite. The trial court held that this was non-hearsay, circumstantial evidence that the identity of the supplier of the asbestos-cement pipe was Defendant Keenan Properties, Inc. ("Keenan"). In other words, it was some evidence that Defendant Keenan supplied the asbestos-cement pipe to Mr. Hart's jobsite, offered in conjunction with other evidence that Keenan invoices always had its signature "K" logo; Keenan always supplied invoices with the delivery of its sales; and Keenan had entered into a contract with the asbestos-pipe manufacturer to distribute its asbestos-cement pipe in remote Humboldt County, where Mr. Hart was exposed to this pipe at his jobsite. Notably, Keenan has destroyed its invoices, making the admission of the actual invoices impossible. After a one month trial, the jury returned a verdict in favor of Plaintiffs.

The majority opinion reversed the judgment against Keenan, holding that the trial court abused its discretion in admitting Mr. Glamuzina's testimony that he saw the "K" logo or "Keenan" name on the invoices. The majority opinion held that identification evidence, such as Defendant's name or logo, is inadmissible hearsay. And not only that, the majority opinion also held that evidence as to a name or logo falls within no exception to the hearsay rule, even if such name or logo was a statement of a party opponent printed on Defendant's own document. The majority opinion thus eradicated two key evidentiary principles: (i) evidence as to identification is non-testimonial, non-

hearsay; and (ii) even if the statement of identification is deemed testimonial hearsay, it falls within the hearsay exception of statements by a party opponent. [*See, e.g.*, Evid. Code § 1220].

Finally, the majority opinion compounded the evidentiary conundrum by raising the bar on what is required to authenticate secondary evidence as to documents that have been destroyed.

Without the evidence of identification as to the "Keenan" name or "K" logo, the majority opinion held that there was not substantial evidence to support the jury's verdict that Mr. Hart's exposure to asbestos from Keenan-supplied asbestos-cement pipe contributed to Mr. Hart's risk of developing mesothelioma, and it reversed the jury's verdict.

The majority opinion, untethered from any California precedent, is wrong.

First, the majority opinion erroneously overrides well-settled law that statements of identification are non-hearsay. [*See, e.g.*, *People v. Williams*, 3 Cal.App.4th at 1541-1543].

Second, as the dissenting opinion holds, even if defendant's name or logo on defendant's invoices was offered for the truth of the matter asserted, this evidence is plainly admissible as a statement of a party opponent. [Evid. Code § 1220]. The majority opinion presents a clear conflict with well-settled authority [*see, e.g.*, *Jazayeri v. Mao* (2009) 174 Cal.App.4th 301, 324-325], and provides no principled reason why California should abandon this axiomatic evidentiary doctrine.

Third, the majority opinion erroneously ignores that the custom and practice of always providing invoices with a logo on them—as was the case here for Defendant Keenan—is sufficient to authenticate the

secondary evidence as to the destroyed invoices. [*See People ex. Rel. Harris v. Sarpas* (2014) 225 Cal.App.4th 1539, 1571].

The rule of law promulgated by the majority opinion—that a witness may not testify as to a logo or name he saw—does not serve the policy behind the hearsay rule of exclusion. Exclusion of hearsay evidence protects the interests of a party by allowing the jury to assess the credibility of the person making a testimonial statement, and further by subjecting the testimony to cross-examination. [Morgan, *Hearsay Dangers and the Application of the Hearsay Concept* (1948) 62 Harv. L.Rev. 177, 188 (stressing the value of cross-examination in uncovering errors in the declarant's four testimonial qualities—language use, sincerity, perception, and memory)]. But consider the witness who testifies that he saw a "red light," or a "bloody glove," and may be cross-examined as to his language use, sincerity, perception, and memory. This is plainly permissible non-hearsay evidence from a percipient witness, and is no different from the foreman who testified he saw the "K" logo or the name "Keenan." [*See, e.g.*, 6 Wigmore, Evidence (Chadbourn rev. 1976) § 1791, p. 240 ("Utterances serving to *identify* are admissible as any other circumstance of identification would be." (original emphasis))]. In both instances, the witness may be cross-examined under oath, as the foreman was at length in this case, as to the accuracy and sincerity of his perception and memory, thereby allowing the jury to properly evaluate the reliability of the statements.

Nor does the majority opinion's rejection of the statement-of-a-party-opponent exception serve the policies underlying the hearsay doctrine. Our Legislature created an exception for out-of-court statements that were made by the party opponent, as defendant Keenan

did here by printing its "K" logo and "Keenan" name on its invoices. [*See* Cal. Evid. Code § 1220]. One reason for this categorical exception for party statements is that the lack of opportunity to cross-examine is deprived of significance by the incongruity of the party objecting to his own statement on the ground that he was not subject to cross-examination by himself at the time. [2 Morgan, Basic Problems of Evidence 226 (1961)]. Thus, "[f]or statements of a party to be admissible, there is no requirement they be subject to cross-examination when made." [*Auto-Owners Ins. Co. v. Jensen* (8th Cir. 1981) 667 F.2d 714, 722].

In sum, there is neither precedent nor policy supporting the majority opinion below. Petitioners request that this Court overrule the majority opinion reversing the trial court's admission as to the testimony identifying the "K" logo and "Keenan" name, and remand for the court of appeal's consideration of the remaining issues not yet addressed below.

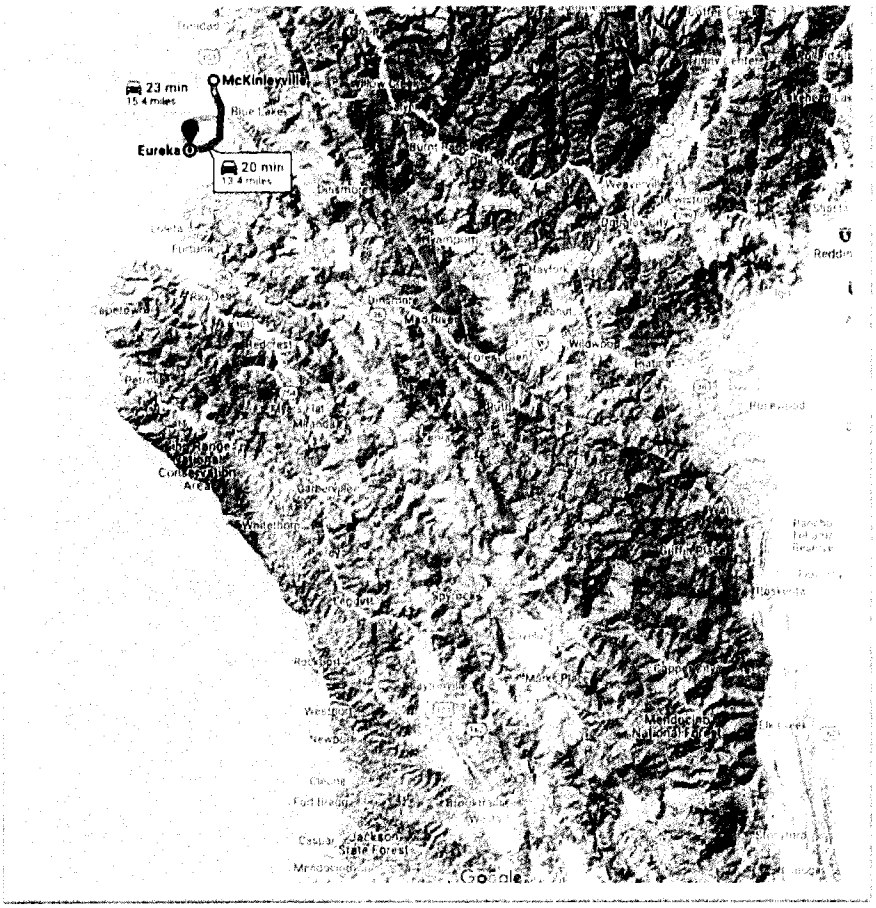
FACTUAL AND PROCEDURAL HISTORY

I. Mr. Hart was exposed to asbestos while installing asbestos-cement sewer pipe in McKinleyville, California.

Mr. Hart worked for Christeve Corporation, a contractor who won a public-works bid to install new sewer lines in McKinleyville (Humboldt County) in 1976 and 1977. [9 RT 2427:18-25, 2431:24-2433:3, 2434:8-25, 2438:12-17; 12 RT 3324:10-3326:24]. Mr. Hart's job was "cutting asbestos-cement pipe;" he "installed thousands of feet of the pipe" at the McKinleyville jobsite. [Opn. at 2; 12 RT 3344:1-13].

II. Keenan supplied Mr. Hart's jobsite with asbestos-cement pipe.

Keenan was a plumbing supply company. [13 RT 3685:13-3686:2]. In the early 1970s, Keenan bought an existing Eureka facility that stocked and distributed Johns-Manville asbestos-cement pipe. [8 RT 2207:4-2209:5]. Eureka is in Humboldt County [13 RT 3662:12-3663:25]. Keenan's Eureka facility was remote ("100 miles from nowhere"). [8 RT 2207:4-2209:5]. However, Eureka was only 20 minutes away from Mr. Hart's jobsite in McKinleyville, also in Humboldt County.[1]



[1] Google Maps <maps.google.com> [as of June 12, 2019].

Through the purchase of the Eureka facility, Keenan obtained the existing Johns-Manville product line, and continued to stock and distribute Johns-Manville pipe. [8 RT 2207:4-2209:5]. Keenan supplied asbestos-cement pipe to the City of Eureka and the County of Humboldt. [8 RT 2207:4-2209:21; 13 RT 3363:6-3364:3].

In 1977, when Mr. Hart was exposed to Johns-Manville pipe in McKinleyville, Keenan was in a distributorship agreement with Johns-Manville to distribute its asbestos-cement pipe to "Humboldt County and surrounding areas." [13 RT 3673:11-3674:25, 3745:1-3]. Indeed, before Mr. Hart started working on the McKinleyville job, Keenan had already supplied the McKinleyville project with Johns-Manville pipe. Specifically, the McKinleyville project was split into three phases, and Mr. Hart's employer Christeve won the bid for Phase 3. [9 RT 2434:8-25]. The undisputed evidence shows that on an earlier project phase, won by Christeve's competitor Thibodo, the Johns-Manville pipe was supplied by Keenan. [15 RT 3242:3-19; 13 RT 3711:17-3712:16 (admitted by Keenan representative Garfield)].

Keenan argues that Johns-Manville directly sold its pipe to the McKinleyville project, but the only evidence of this is one invoice from Johns-Manville dated November 8, 1976, which at best demonstrates that Johns-Manville also supplied some asbestos-cement pipe to the McKinleyville job. [1 AA 125].

III. Keenan always supplied invoices with its deliveries.

Keenan commonly employed a "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 costs. [13 RT 3668:13-3669:1]. Under this model, the Keenan invoices accompanying the delivery were critical – the only way for the customer to identify and pay Keenan for the delivery. [8 RT 2218:19-2220:1].

Keenan contends that asbestos-cement sewer pipe was historically sold only by the manufacturer to the end user. [Answer to Pet. at 14]. On the contrary, the testimony Keenan cites for this argument refers to the fact that unlike sewer pipe (the McKinleyville job), Keenan did not distribute "high-pressure water main pipe;" Keenan sold sewer pipe, such as that to which Mr. Hart was exposed. [*See* Opp. at 14 (*citing* 8 RT 2228:2-14; *cf.* 9 RT 2431:4-23 (Ms. Mitrovich: all "sewer" pipe); 12 RT 3328:22-3329:10 (Mr. Hart: "new sewer line"), 3398:6-8 (Mr. Glamuzina: same)].

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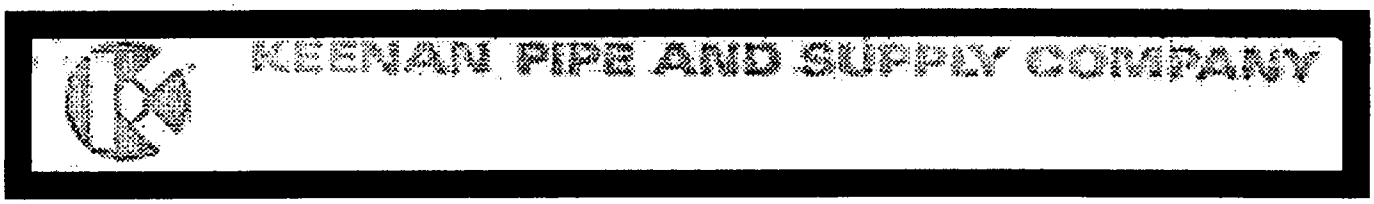
IV. All Keenan invoices bore the "K" circle logo.

Keenan's corporate representative (Mr. Garfield) confirmed that Keenan provided invoices that bore its distinctive Keenan logo. [13 RT 3706:18-23, 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, as set forth below [13 RT 3655:25-3657:4]:



[2141A; 9 RT 2463-2464].

[Keenan's Website <http://keenaneureka.com> (as of June 12, 2019)].

Keenan's name recognition and trade logo—its signature "K"—were valuable—*e.g.*, sales volume of about $186,000,000 in 1981 alone. [15 RT 3234:1-3235:21; 13 RT 3723:19-25]. 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]. Keenan offered no evidence that its valuable name and logo were ever infringed upon by a "copycat" user.

V. Mr. Hart's foremen identified the "K" logo and Keenan name on invoices accompanying the asbestos-cement pipe deliveries.

Mr. Hart's foreman on the McKinleyville project, John Glamuzina, offered eyewitness testimony that the Johns-Manville pipe

was delivered to the site with invoices bearing the Keenan logo "K" and the word "Keenan." [Opn. at 5-8; 12 RT 3404:13-15, 3415:17-20].

According to Mr. Glamuzina, he saw his crew lay over 4,000 feet of Johns-Manville pipe at the site. [12 RT 3420:3-6]. Such pipe was delivered to the site one flatbed trailer at a time, several times a week. [Opn. at 2, 3; 12 RT 3344:11-19, 3416:21-3417:5, 3419:25-3420:6]. 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. [Opn. at 2; 12 RT 3400:19-3401:1, 3403:23-3404:7, 3413:9-3414:8]. Beyond the name "Keenan" and the "K" logo, Mr. Glamuzina did not testify as to any of the contents of the invoices, such as cost and amounts delivered. [12RT 3413:6-19]. He testified that he checked the loads of pipe delivered to confirm that the delivery matched what was represented on the invoice. [12 RT 3413:6-19].

Mr. Glamuzina testified that he saw "the name Keenan on the invoices that [he] personally signed." [Opn. at 3, 6-8; 12 RT 3400:3-23, 3404:13-15, 3412:22-25]. The name Keenan "sticks out" in his memory because of "their K" logo. [*Id.* at 8; 12 RT 3415:9-20]. He did not recall any other suppliers on the invoices he signed. [*Id.;* 12 RT 3415:9-16, 3415:21-3416:2, 3420:11-15].

VI. Mr. Hart's employer Christeve had a purchasing relationship with Keenan.

Mr. Glamuzina's recollection was supported by testimony from Christeve's 1970s bookkeeper, Olga Mitrovich. Although she did not specifically recall whether Keenan supplied the asbestos-cement pipe to Christeve on Phase 3 of the McKinleyville project [Opn. at 3; 9 RT

2462:8-11], Ms. Mitrovich did connect Christeve directly to Keenan. She recognized the Keenan name and distinctive "K" logo. [9 RT 2461:25-2462:4, 2463:10-2465:22, 2505:21-2506:12]. And she recalled that Christeve "dealt with" Keenan, recognized Keenan invoicing, and recalled paying invoices with the Keenan logo. [*Id.*]

VII. Based on his personal recollections, Mr. Glamuzina testified to his belief that Keenan supplied the pipe.

Mr. Glamuzina testified that he believed Keenan supplied the Johns-Manville pipe to the McKinleyville project. [Opn. at 2, 6-8; 12 RT 3400:16-18, 3404:8-12, 3404:24-3405:3]. This belief was based on his personal recollections that the pipe was delivered with "Keenan" ("K") invoices. [12 RT 3400:16-3401:1, 3404:8-15, 3412:22-25, 3413:9-19, 3415:9-20].

VIII. Invoices reflecting the relevant 1970s pipe sales were long ago discarded or destroyed by Christeve and Keenan.

Mr. Glamuzina's recollections could not be tested against the actual invoices reflecting 1970s pipe sales, either sales to Christeve or sales by Keenan. "Christeve wound up its business in 2001, and all of its documents were destroyed in 2002." [Opn. at 9; 9 RT 2445:2-19, 2447:7-16]. Likewise, "Keenan either disposed of all its documents or transferred them to its successor in 1983," and the successor testified that if documents were transferred to it, they were destroyed. [Opn. at 9; 8 RT 2211:15-2212:13, 2213:19-2214:11, 2220:16-2221:16, 2234:3-8, 2239:23-2240:1].

IX. The trial court held that evidence as to the "K" logo and "Keenan" name on invoices was admissible non-hearsay.

Keenan moved *in limine* to exclude all of Mr. Glamuzina's testimony about the invoices that he saw with the pipe deliveries. [1 AA 060-070]. Specifically, Keenan sought an order excluding any "reference to Keenan invoices by witness John Glamuzina" on the grounds that the invoices were unauthenticated and were hearsay. [1 AA 060] Keenan argued that in the absence of physical copies of the invoices Mr. Glamuzina saw, the invoices were incapable of being authenticated. [1 AA 066]. And Keenan argued that invoices are necessarily hearsay when offered to prove the truth of their contents. [1 AA 069]. Keenan did not dispute that Mr. Glamuzina's testimony that the invoices bore the name "Keenan" was based on his own personal knowledge. [1 AA 069]

The trial court, the presiding judge for Alameda County Complex Asbestos Litigation (Hon. Brad Seligman), denied Keenan's motion on three grounds:

1. Eyewitness testimony not "hearsay": The trial court first ruled that Mr. Glamuzina's eyewitness testimony about what he *personally saw* is simply not "hearsay." A "logo, emblem, or similar designation of identity [is not] testimonial hearsay; rather, it is circumstantial evidence of identi[t]y." [Opn. at 9; 1 AA 118]. A witness "can testify he saw a name, or I'll even use the words a 'brand' on a document." [Opn. at 9-10; 4 RT 923:17-924:6 (witness can properly testify that he saw a "yellow cab," or a "hat that had a big letter on it," or a document with "a big K on it")].

2. Party admission: Next, the trial court ruled that, even if testimony about the "K" logo or "Keenan" name on an invoice was

offered for the truth that Keenan created the invoice, these "statements" were admissions of party-opponent Keenan and thus admissible under the hearsay exception of Evidence Code section 1220. [Opn. at 12; 1 AA 118].

3. Authentication: The trial court also found 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].

X. The jury found Keenan liable for contributing to Mr. Hart's exposure to asbestos.

After four weeks of trial, the jury made the express finding of fact that "Mr. Hart was exposed to asbestos-cement pipe supplied by Keenan:"

1. Was Frank Hart exposed to asbestos released from asbestos-cement pipe supplied by Keenan?

Yes ✓ **No** ___

If Yes, answer the next question. If No, the presiding juror should sign and date this form and return it to the court attendant.

[2 AA 242].

The jury apportioned Keenan "17%" of the fault for causing Mr. Hart's mesothelioma. [Opn. at 4; 18 RT 5112:19-5127:2, 5132:18-5133:19; 2 AA 242-246].

XI. In a 2-1 decision, the majority opinion reversed,

In a split 2-1 decision, the court below reversed the judgment on the jury's verdict against Keenan, ruling that Mr. Glamuzina's eyewitness testimony should have been excluded.

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 the invoices' creator (Keenan) but the person who saw them (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 16].

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 infer that Keenan supplied any pipe to the McKinleyville jobsite. [Opn. at 1, 16]. Thus, the majority reversed the judgment. [*Id.*]

B. The dissent held that the "K" logo and Keenan name were statements of a party opponent.

Justice Needham dissented, finding that Mr. Glamuzina's testimony about what he saw was admissible for three reasons:

1. 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.*] And Keenan in the trial court did not object that Mr. Glamuzina's testimony was not based on personal knowledge. [*Id.*]

2. 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].

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, Justice Needham found no "abuse of discretion" in "admitting Glamuzina's testimony." [Opn. at 23]. Justice Needham found it particularly troubling that the majority 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.*]

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

C. The majority opinion did not reach the remaining issues on appeal.

Because the majority reversed the judgment against Keenan based solely on its ruling about Mr. Glamuzina's testimony, the majority did not address two other arguments that Keenan had asserted on appeal: (1) "the testimony of an expert witness regarding Mr. Hart's medical expenses was inadmissible"; and (2) the trial court "erred when it included" plaintiff Cynthia Hart "among the prospective wrongful death heirs in determining the proportion of settlements to set aside for those heirs." [AOB 27-35].

XII. 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.

XIII. This Court granted review.

Petitioners petitioned for review with respect to the majority opinion's holding that (i) a witness' identification of a name or logo is inadmissible hearsay that falls within no exception; and (ii) there was insufficient evidence to authenticate the destroyed Keenan invoices under the secondary evidence doctrine. On February 27, 2019, this Court granted review.

DISCUSSION

The majority opinion erred in holding that (i) statements of identification are hearsay; or, in the alternative, (ii) they do not fall within the party-opponent exception to the hearsay doctrine. Additionally, the majority opinion erred in holding that the secondary evidence as to destroyed Keenan invoices was not sufficiently authenticated by replete circumstantial evidence, including Mr. Glamuzina's testimony that he saw "Keenan" on the invoices with the distinctive "K" logo, and the fact that "Keenan's corporate representative admitted that Keenan sent its customers invoices with a distinctive 'K.'" [Diss. Opn. at 22].

I. Standard of review: abuse of discretion.

The abuse-of-discretion standard of review applies to a trial court's rulings on the admissibility of evidence, including the application of exceptions to the hearsay rule. [*Dart Indus., Inc. v. Commercial Union Ins. Co.* (2002) 28 Cal.4th 1059, 1078]. "Under this standard, a trial court's ruling will not be disturbed, and reversal of the judgment is not required, unless the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest

miscarriage of justice." [*People v. Guerra* (2006) 37 Cal.4th 1067, 1113 (overruled on other grounds in *People v. Rundle* (2008) 43 Cal.4th 76, 151)].

II. Mr. Glamuzina's testimony as to the name "Keenan" and the "K" logo are non-hearsay statements of identification.

The trial court held that "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 well-settled precedent, and accordingly the trial court did not abuse its discretion in admitting Mr. Glamuzina's testimony that he saw the "K" logo and "Keenan" name as circumstantial, non-hearsay evidence of identity.

A. Statements of identification are non-testimonial and non-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." However, 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].

Statements of identification are a witness' recollection of non-testimonial circumstantial evidence that the witness perceived. "Utterances serving to *identify* are admissible as any other circumstance of identification would be." [6 Wigmore, Evidence § 1791, p. 240; *see also* Wegner, et al., Cal. Practice Guide: Civil Trials and Evidence (The

Rutter Group 2018) ¶ 8:1054, p. 8D-14 ("An out-of-court statement is nonhearsay when offered to establish the *declarant's identity*...") (original emphasis)].

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 "admissible nonhearsay evidence." [*See 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*, 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* (1971) 20 Cal.App.3d 488, 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.")].

California is not alone in recognizing the well-settled principle that statements of identification are non-testimonial, non-hearsay evidence. [*See, e.g., United States v. May* (9th Cir. 1980) 622 F.2d 1000, 1007 ("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."); *Kennedy v. State* (1913) 182 Ala. 10, 17-18 (testimony based on seeing a picture of a bullet on a box admissible to identify the box as a box of bullets); *Steen v. State* (Ind.Ct.App. 2013) 987 N.E.2d 159, 162-163 (testimony of seeing security tags and store labels with store's name on clothing admissible as circumstantial evidence of the identity of the store from which clothing originated); *Commonwealth v. Clark* (1973) 363 Mass. 467, 471 (testimony regarding imprint on the gun not hearsay and admissible circumstantial evidence of gun's caliber); *People v. Malone* (1994) 445 Mich. 369, 371 (statements of identification are not hearsay when identifier is subject to cross-examination, and thus testimony of two other witnesses that witness had previously identified defendant as perpetrator was admissible as substantive evidence in defendant's murder trial.); *State v. Cannon* (Mo.Ct.App. 1985) 692 S.W.2d 357, 359 (evidence of name by which a person is known is not within rule excluding hearsay evidence); *Gonzales v. State* (Nev.Ct.App. 2015) 354 P.3d 654, 663-664 (photographs of a rental car agreement and a receipt bearing defendant's name that police found in car parked in victim's driveway were admissible as non-hearsay); *Commonwealth v. Harvey* (1995) 446 Pa.Super. 395, 398-399 (minor's testimony based on seeing label on bottle served only to establish identity of manufacturer and was therefore not subject to the hearsay rule)].

B. Identity evidence gains its "force" or relevancy from the totality of the circumstances.

Identity evidence gains its relevancy by virtue of the limited chances that the "mark" (the identifying feature, name, or logo) occurred in combination with the "object" (that which is identified): "[I]ts force depends upon the *necessariness of the association between the mark and a single object.* Where a certain circumstance, feature, or mark, may be commonly be found associated with a large number of objects, the presence of that feature or mark in two supposed objects is little indication of their identity, because on the general principle of relevancy, the other conceivable hypotheses are so numerous, i.e., the objects that possess the mark are numerous and therefore any two of them possessing it may well be different. But where the objects possessing the mark are only one or a few, and the mark is found in two supposed instances, the chances of the two being different are nil or are comparatively small." [2 Wigmore, Evidence (Chadbourn rev. 1976) § 411 (original emphasis; internal citations omitted)]. Thus, the relevancy of identification evidence depends on the totality of the circumstances, with an increased relevancy arising where the chances that the mark has not occurred on disparate objects: "A mark common to two supposed objects is receivable to show them to be identical *whenever in human experience the mark does not occur with so many objects that the chances of the two supposed objects are too small to be appreciable.* But it must be understood that this test applies to the total combination of circumstances offered as a mark, and not to any one circumstance going with others to make it up." [*Id.* (original emphasis)].

Thus, in *Dege v. United States* (9th Cir. 1962) 308 F.2d 534, the Ninth Circuit held that evidence that a person called purporting to be "A" was plainly admissible in light of the "substance of the communication itself" being "sufficiently corroborative of identification to constitute prima facie proof thereof." [*Id.* at 535-536 (holding that in a bird smuggling case, other corroborative evidence that "A" was the caller was, *inter alia*, that she was in the bird business and her car had been found with birds in it)]. "These are sufficiently 'closely related circumstances' to make the question of the admissibility of the alleged conversation with a person making the representations a matter of discretion resting with the trial judge." [*Id.; see also People v. Williams*, 3 Cal.App.4th at 1542-1543 (A "utility bill is an item of personal property of the type which is more likely to be found in the residence of the person named than in the residence of any other person. That inference is reasonable whether or not the item bears the address of the place where it is discovered. The nature of the item, coupled with the name it bears, it sufficient to give rise to the inference that the person named resides in that place."); *Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 596 (statements from the murder victim to the battered women's shelter identifying herself as "Nicole" were not admitted "to prove the truth of the matter stated," because "[t]hese statements were introduced only as circumstantial evidence tending to identify the caller. They were properly admissible for this nonhearsay circumstantial evidence purpose."); *People v. Herman* (1920) 49 Cal.App. 592, 596 (holding testimony from a bookkeeper that she had a telephone conversation with a man who said his name was "Herman" from the "American Junk Company" was admissible, and it was for the jury to determine what

weight should be given to the same); *People v. McGaughran* (1961) 197 Cal.App.2d 6, 16 (holding that a phone call in which the person identified himself as the defendant, and also revealed information only known to defendant, his wife, and sister-in-law, was "sufficient foundation to leave the question of whether or not defendant made the call, to the jury."); *People v. Hess* (1970) 10 Cal.App.3d 1071, 1078 (admitting testimony as to a telephone call in which the defendant identified herself; "The identity of a party to a telephone conversation may be established by circumstantial as well as direct evidence.").

C. The "K" logo and "Keenan" name were non-hearsay circumstantial evidence of identity.

Applying the authority set forth above, Mr. Glamuzina's testimony that he saw the distinctive "K" logo and "Keenan" name on the invoices accompanying the asbestos-cement pipe deliveries to Mr. Hart's jobsite is circumstantial evidence of identity: specifically, it is evidence Keenan supplied the asbestos-cement pipe to Mr. Hart's jobsite. Moreover, this case exemplifies the principle that "each additional circumstance reduces the chances of there being more than one object so associated" with the "K" logo or "Keenan" name, because any other possibilities are "too small to be appreciable." [2 Wigmore, Evidence (Chadbourn rev. 1976) § 411]. The foreman's testimony that he saw the "K" logo and "Keenan" name on the invoices —thus identifying Keenan as the distributor —are further corroborated by the totality of the circumstances, including (i) the testimony of Keenan's corporate representative that Keenan sent its customers invoices with the distinctive "K" [2141A; 13 RT 3706:18-23, 3712:21-3713:13]; (ii) Keenan distribution of the same asbestos-cement pipe in the same

remote area of Humboldt County [8 RT 2207:4-2209:5; 13 RT 3673:11-3674:25, 3745:1-3]; (iii) Keenan's supply of asbestos-cement 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]; (iv) Keenan's sale of other materials to Christeve with its "K" logo invoice [9 RT 2463:10-2465:22, 2505:21-2506:12]; (v) Keenan's "direct sales" business model, which required providing accurate invoices with deliveries [8 RT 2218:19-2220:1]; and (vi) the fact that no competitor's invoice would have borne Keenan's valuable, protected logo [8 RT 2206:3-12; 13 RT 3698:14-1813, 3723:19-25; 15 RT 3234:1-3235:21].

D. The majority opinion relies on inapposite authority.

The majority opinion states it is not "persuaded" [Opn. at 9-10] by the well-settled authority that statements of identification are non-hearsay, but cites nothing to contradict it.

First, the majority opinion relies on *Pacific Gas & Electric Co. v. G.W. Thomas Drayage & Rigging Co.* (1968) 69 Cal.2d 33, 42-43 in holding that "invoices" are per se "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 that the costs of the pipe

that were incurred. 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*, 3 Cal.App.4th at 1541-1543]. As the dissent below correctly observes, the "facts to which [Mr. Glamuzina] *testified*" [Diss. Opn. at 22 (original emphasis)] were that he "personally *saw* invoices bearing Keenan's name" [*id.* (emphasis added)]. Mr. Glamuzina said nothing about the *content* of the invoices. He offered only direct evidence of what *he saw*: invoices with the Keenan name/logo accompanied the pipe on delivery. This was the same as if he had seen the Keenan name or "K" logo on the delivery van. [*See Brown-Forman*, 71 Cal.App.2d at 797-798 (name observed on van admissible as operative fact)].

In turn, the jury was asked to infer (from this and other evidence) that Keenan supplied the pipe that Mr. Glamuzina received. On this point, his testimony was *circumstantial* evidence that, coupled with other evidence, allowed the jury to so infer.

Next, the majority opinion dismisses the cases involving circumstantial evidence of identification, on the basis that they are distinguishable, because "[u]tterances serving to *identify* are admissible as any other circumstances of identification would be." [Opn. at 11 (original emphasis; 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 ("Without analysis and without citation of authority, defendant charges that Mrs. Duckworth's 'Hi, Norman'

testimony was hearsay. It was not hearsay, because not offered to prove the statement's truth or falsity but as evidence of the fact that the statement was made. . . . Norman Freeman's presence at the home of Annette Duckworth (at a time when he said he was asleep at the home of his fiancée, Brenda Banks) was itself a relevant fact. 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.")].

Finally, the majority differentiates the invoices with defendant's name showing circumstantial evidence of his residence in *People v. Williams*, 3 Cal.App.4th 1535, because "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. [Evid. Code. § 1523(b)].

In sum, the majority erroneously ignores well-settled law that statements of identification are non-testimonial, non-hearsay circumstantial evidence. The trial court did not abuse its discretion in admitting Mr. Glamuzina's testimony as to his observation of the "K" logo and Keenan name on the invoices accompanying the delivery of the asbestos-cement pipes.

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

In the alternative, even if Mr. Glamuzina's observations of the "K" logo and Keenan name are considered to be statements offered for the truth of the matter asserted, as both the dissenting opinion and the trial court found, "[s]ufficient evidence supported the hearsay exception for a statement of a party-opponent." [Diss. Opn. at 19 (citing Evid. Code. § 1220); 1 AA 118]. "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." [Diss. Opn. at 19-20]. The majority opinion erroneously upends well-settled law that statements by a party opponent are admissible as exceptions to the hearsay rule.

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 that statements by a party opponent are admissible as an exception to the hearsay rule. [Evid. Code § 1220]. There are two primary requirements: (i) the statement must be offered against a party; and (ii) the declarant must be a party to the action. [Wegner, et al., Civil

Trials and Evidence at ¶¶ 8:1150-8:1153, pp. 8D-41 to 8D-42]. The statement does not need to contradict an essential element of the party's prima facie case; it suffices that the party's out-of-court statement contradicts something the party is trying to prove or supports something the adversary is trying to prove. [*Id.* at ¶¶ 8:1150, 8:1153 (citing *Gates v. Pendleton* (1925) 71 Cal.App. 752, 756-757 and *Kincaid v. Kincaid* (2011) 197 Cal.App.4th 75, 85-86 ("Okay, I was having sex with [decedent]" admissible as statement by a party opponent.))]. "The exception to the hearsay rule for statements of a party is sometimes referred to as the exception for *admissions* of a party. However, Evidence Code section 1220 covers all *statements* of a party, whether or not they might otherwise be characterized as admissions." [*People v. Horning* (2004) 34 Cal.4th 871, 898, fn. 5 (original emphasis)].

California law is well-settled that invoices prepared by a defendant are admissible as an exception to the hearsay rule under Evidence Code section 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 Entm't 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 Eng'g 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, federal law 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.* (C.D. Cal. 2006) 454 F.Supp.2d 966, 974; *see also Lannes v. CBS Corp.* (C.D. Cal. July 10, 2013, Case No. CV 12-1876 PA) 2013 WL 12075369, at *8, fn. 7 (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); Diss. Opn. at 20]. Indeed, under federal law, Rule 801(d)(2) of the Federal Rules of Evidence exempts admissions of a party opponent from the operation of the rule of hearsay, Rule 802, by defining admissions of a party-opponent as "not hearsay." [Fed. Rules Evid., rule 801(d)(2), 28 U.S.C.].

One rationale for the exception made for statements by an opposing party is that party's ability to rebut the out-of-court statement by "put[ting] himself on the stand and explain[ing] his former assertion." [*Harris v. United States* (D.C. 2003) 834 A.2d 106, 115-116 (citing *Chaabi v. United States* (D.C. 1988) 544 A.2d 1247, 1248, and 2 McCormick, Evidence § 1048, p. 5)]. Another is "the sense that in an adversary system a party should be held to its prior statements and should not be able to raise a hearsay objection to statements made by, adopted by, or imputed to that party." [*Id.* (citing Advisory Com. note to Fed. Rules Evid., rule 801, 28 U.S.C., and 2 McCormick, Evidence § 254, p. 136; *see United States v. GAF Corp.* (2d Cir. 1991) 928 F.2d 1253, 1262)].

B. The invoices were statements by the opposing party Keenan, admissible under Evidence Code section 1220.

As recognized by the dissent, "[s]ufficient evidence supported the hearsay exception for a statement of a party opponent." [Diss. Opn. at 19 (citing Evid. Code § 1220)]. "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." [*Id.* at 19-20]. Accordingly, under Evidence Code section 1220, the content of the Keenan invoices is "not made inadmissible by the hearsay rule," because it is offered against a party to the action (Keenan) and was a statement made by a party opponent (Keenan). [Evid. Code § 1220].

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

The majority opinion's attempt to distinguish the well-settled law on party statements/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. [Opn. at 12]. However, as the dissent points out, *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. [Diss. Opn. at 18]. 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 a party-opponent." [Opn. at 13]. On the contrary, as the dissent correctly notes, Keenan as the creator of the invoice is the declarant, not Mr. Glamuzina: "[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." [Diss. Opn. at 20].

Finally, the majority cites *DiCola v. White Bros. Performance Products, Inc.* (2008) 158 Cal.App.4th 666, 679, for the proposition that package labeling "Burly Brands" was inadmissible hearsay. [Opn. at 10]. But in *DiCola*, the court of appeal specifically noted that the appellants had not argued any hearsay exception. [*Dicola,* 158 Cal.App.4th at 681, *see also* Diss. Opn. at 21, fn. 7].

D. The party opponent exception still applies, even though Keenan destroyed the invoices.

Keenan's sole argument as to why the statutory party opponent exception to the hearsay rule does not apply in this case is that Keenan destroyed its invoices. [Answer to Pet. at 18]. Keenan is wrong. Evidence Code section 1523, which addresses secondary evidence as to destroyed documents, operates in conjunction with Evidence Code section 1220 to allow the admission of the content of these destroyed invoices. This is illustrated by *YDM Mgmt. Co., Inc. v. Sharp Cmty. Med.* (2017) 16 Cal.App.5th 613. In *YDM*, a witness testified as to summary spreadsheets she had created of invoices submitted by the defendant/party-opponent. [*Id.* at 618-619]. The Court of Appeal held

that (i) such testimony is not made inadmissible by the hearsay rule when offered against the declarant in an action to which her or she is a party [Evid. Code § 1220]; and (ii) the summary spreadsheets submitted in lieu of the actual invoices were admissible as secondary evidence [Evid. Code §1521]. [*YDM,* 16 Cal.App.5th at 630-631]. Thus *YDM* expressly condones admission of secondary evidence of a statement of a party opponent, which is what Plaintiffs' offered in the form of Mr. Glamuzina testifying that he saw the Keenan invoices.

In sum, the majority's rejection of the party-opponent doctrine is 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 trial court did not abuse its discretion in holding that in the alternative, the content of the Keenan invoices was admissible under the party opponent exception to the hearsay rule.

IV. The trial court's authenticity ruling was not an abuse of discretion.

If the "statement" of witnessing a "K" logo was itself hearsay (which Plaintiffs dispute in the first instance), the question is whether the "declarant" of that statement was Keenan. If so, it was a party admission and thus properly admissible over any hearsay objection. [*See* Evid. Code § 1220].

The trial court found that the declarant was Keenan. [1 AA 118]. This finding rested on the court's ruling that Plaintiffs' evidence was sufficient to authenticate the invoices as Keenan invoices. [1 AA 118-119]. And this ruling was not an abuse of discretion.

A. Standard of review: A trial court's authenticity finding must be upheld unless it was an abuse of discretion.

"A trial court's finding that sufficient foundation facts have been presented to support admissibility is reviewed for abuse of discretion." [*Ramos v. Westlake Services LLC* (2015) 242 Cal.App.4th 674, 684 (finding no "abuse of discretion" in admitting a language "translation" document based on "circumstantial evidence of its authenticity") (quoting *People v. Smith* (2009) 179 Cal.App.4th 986, 1001); *see Jazayeri*, 174 Cal.App.4th at 319 ("broad discretion")].

B. Secondary Evidence Rule: The content of destroyed documents may properly be authenticated by circumstantial evidence.

The admissibility of oral testimony to establish the contents of a writing is governed by the Secondary Evidence Rule, codified in Evidence Code sections 1520-1523. [*People v. Skiles* (2011) 51 Cal.4th 1178, 1187].

Under this Rule, because the original invoices that accompanied the asbestos-cement pipe deliveries to the McKinleyville jobsite no longer exist, oral testimony about their contents could properly be offered: "Oral testimony of the content of a writing" may be admitted "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." [Evid. Code § 1523(b); *see* Opn. at 13-14; 1 AA 118; *see also* Opn. at 9 (Christeve documents "destroyed in 2002"; Keenan documents "disposed of" or "transferred" in 1983 to "successor" who then "destroyed" them)].

Although allowed generally (under section 1523), the "secondary evidence" of oral testimony about the invoices' contents still had to be "otherwise admissible.'" [*People v. Skiles*, 51 Cal.4th at 1187 (*quoting* Evid. Code § 1521(a))]. For secondary evidence to be "otherwise admissible," the writing "must be authenticated" (under section 1401). [*Id.* at 1187 and fn. 4 (citing Evid. Code § 1401 ("Authentication of a writing is required before secondary evidence of its content may be received in evidence.")].

"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 (a)].

The types of "evidence" that can authenticate a writing are quite broad and varied. "The means of authenticating a writing are not limited to those specified in the Evidence Code." [*People v. Skiles*, 51 Cal.4th at 1187 (*citing* Evid. Code § 1410); Evid. Code § 1411 (testimony of subscribing witness not required); *Ramos,* 242 Cal.App.4th at 684 ("no strict requirement as to how a party authenticates a writing")]. The writing simply "must be authenticated *in some fashion.*" [*Continental Baking Co. v. Katz* (1968) 68 Cal.2d 512, 525 (emphasis added)].

Thus, "a writing can be authenticated by circumstantial evidence and its contents." [*People v. Skiles*, 51 Cal.4th at 1187; *Ramos*, 242 Cal.App.4th at 684; *see Young v. Sorenson* (1975) 47 Cal.App.3d 911, 915 ("indirect and circumstantial evidence"); *People v. Gibson* (2001) 90 Cal.App.4th 371, 383 ("Circumstantial evidence, content and location are all valid means of authentication.")]. This includes an entity's custom and practice in generating the type of writing at issue. [*E.g., People ex. Rel. Harris,* 225 Cal.App.4th at 1571 (evidence of "bank's custom and

practice in accepting and negotiating checks" was "sufficient to authenticate the checks")].

C. The majority did not find an abuse of discretion—and none occurred.

Here, the majority opinion did not apply the proper standard of review, failing to find that the trial court abused its discretion in finding sufficient evidence to authenticate the invoices that Mr. Glamuzina saw as Keenan invoices.

The trial court expressly found evidence "sufficient to establish the preliminary fact of authenticity." [1 AA 118-119]. The court's order cited numerous supporting facts: (i) Mr. Glamuzina, "as part of his duties," checked the invoice" that came with pipe deliveries and "signed off on it"; (ii) his "description of the logo" on the invoices – "their K and stuff" – was "consistent with an exemplar of a Keenan invoice, which has a logo of a large 'K'"; and (iii) the original invoices "were apparently destroyed," allowing oral testimony about their contents. [1 AA 118 (citing Evid. Code § 1523(b))].

This authenticity finding may properly be reversed only if it was abuse of discretion. [*Ramos*, 242 Cal.App.4th at 684].

But the majority did not find an abuse of discretion—or indeed even acknowledge that standard of review.[2] [Opn. at 14-16]. Instead, it offered several reasons that do not meet the review standard:

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[2] The majority later held more broadly that "admitting Glamuzina's testimony regarding Keenan invoices" was an overall abuse of discretion, but this addressed a different issue on review – the admission of evidence generally. [*See Dart,* 28 Cal.4th at 1078 ("[A]n appellate court reviews any ruling by a trial court as to the admissibility of

1. The majority stressed that Mr. Glamuzina alone "could not authenticate the purported Keenan invoices" because he "did not see 'the writing made or executed.'" [Opn. at 15-16 ("Glamuzina's testimony was insufficient" to authenticate)]. But though testimony of a witness to the document's creation *can* suffice to authenticate a writing [Evid. Code § 1413], such "testimony of a subscribing witness is *not required* to authenticate a writing" [Evid. Code § 1411 (emphasis added); *see* Diss. Opn. at 22 ("not required")]. Instead, a document can be authenticated in many ways, including from "circumstantial evidence." [*People v. Skiles*, 51 Cal.4th at 1187; *Ramos*, 242 Cal.App.4th at 684; *People v. Gibson,* 90 Cal.App.4th at 383; *Young,* 47 Cal.App.3d at 915].

2. The majority ruled that Mr. Glamuzina's "oral testimony regarding the content of the invoices" was not made "admissible" by Evidence Code section 1523(b). [Opn. at 13-14]. But this confuses the issue. Section 1523 provides only that oral testimony about a writing's contents is not automatically *inadmissible* when the writing has been destroyed (by someone other than the evidence's proponent). [Evid. Code § 1523(b)]. Thus, subdivision (b) allowed Plaintiffs to offer oral testimony about the writings generally.

3. The majority rules that authentication of the invoices that Mr. Glamuzina saw is irrelevant because his "secondary evidence" of the invoices' contents – containing the Keenan name and "K" logo – was "based on hearsay" and thus not "otherwise admissible." [Opn. at 14-15].

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evidence for abuse of discretion.")]. The majority did not assess whether the trial court's specific, express authenticity finding [1 AA 118-119] was an abuse of discretion.

But this turns the issue on its head. Because the invoices were sufficiently authenticated as Keenan invoices [1 AA 118-119], they were statements made *by Keenan* as the declarant and thus admissible under the hearsay exception for party admissions [Evid. Code § 1220]. In other words, the finding of authenticity *established* the hearsay exception, rendering Mr. Glamuzina's oral testimony about the invoices' contents admissible (over a hearsay objection).

Thus, the majority never addressed the abuse-of-discretion review standard, let alone found that an abuse of discretion occurred on the authenticity ruling.

And none did occur. As even the majority concedes (in a different context), a trial court's order abuses discretion only if, "under the evidence offered, no judge could reasonably have made the order." [*See* Opn. at 4-5 (*quoting DiCola*, 158 Cal.App.4th at 679)]. Here, ample evidence supported the trial court's finding that, under the entire circumstances, the invoices that Mr. Glamuzina saw were authentic "Keenan" invoices. The invoices came with deliveries of a kind of pipe that Keenan sold and delivered, in a remote area where Keenan had a distributorship agreement to sell it, to a worksite where Keenan had previously delivered the same pipe, and the invoices bore the distinct "K" logo that Keenan put on its invoices that it delivered with its products. Certainly it cannot be said that no reasonable judge could possibly have found these facts sufficient to authenticate the invoices as Keenan's.

Finally, the majority was wrong to justify its holding by citing *Osborne v. Todd Farm Service* (2016) 247 Cal.App.4th 43. [*See* Opn. at 16]. *Osborne* shows the flip-side of the abuse-of-discretion standard,

holding that the trial court there did not abuse its discretion in finding that evidence was *not* authenticated. There, the plaintiff injured by falling on hay bales sought to establish the identity of the hay's supplier. [*Osborne*, 247 Cal.App.4th at 45-46]. She offered testimony that she saw a "delivery person" with a "ticket" (or "receipt") identifying the supplier as "Berrington." [*Id.* at 53]. The ticket itself no longer existed, rendering her testimony secondary evidence of the ticket's contents. [*Id.*] But unlike here, ***no other evidence supported a finding the ticket was an authentic "Berrington" ticket***: "no other witness claimed to have seen it"; the "alleged source" of the ticket "testified that no such receipt ever existed" and "did not document the supplier of hay included in any delivery." [*Id.*] Based on that *Osborne* evidence, "it was well within the trial court's discretion to find that [the plaintiff] failed to prove the preliminary facts necessary to admit her testimony about the delivery receipt into evidence." [*Id.*]

Here, the facts are "in stark contrast"—as the dissent below notes. [Diss. Opn. at 23]. Unlike in *Osborne,* Keenan "admitted that it *did* invoice its customers with invoices." [*Id.*] And (as set forth above), myriad other evidence shows that Keenan *did* sell to Christeve, *did* provide invoices with its K logo, and *did* sell pipe to an earlier phase of the McKinleyville project. As the dissent again notes, that 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." [*Id.* (emphasis added)]

Here, the trial court's finding that the invoices Mr. Glamuzina saw were authentic "Keenan" invoices was well within its discretion. The majority found no abuse of discretion, and if it had it would have erred.

Thus, because the invoices described by Mr. Glamuzina were Keenan's, their contents were Keenan statements. If those statements ("this is a Keenan invoice") were "hearsay," they were admissible party admissions.

CONCLUSION

Plaintiffs and Petitioners pray that this Court reverse the majority opinion and remand for consideration of the remaining issues, and for such other relief as to which they may be entitled.

DATED: June 12, 2019

Respectfully submitted,

KAZAN, McCLAIN, SATTERLEY
& GREENWOOD
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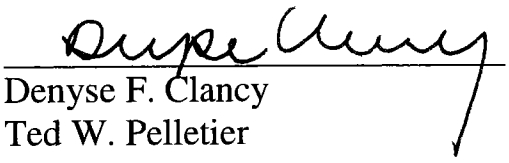
By: 
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CERTIFICATE OF WORD COUNT

I, Denyse F. Clancy, hereby certify that the text of this brief consists of 9,795 words, in Times New Roman 14-point font, as counted by my word processing program.

DATED: June 12, 2019

Denyse F. Clancy

PROOF OF SERVICE

Frank C. Hart and Cynthia Hart v. Keenan Properties, Inc.
Supreme Court of California Case No. S253295

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.

On June 12, 2019, I served true copies of the following document(s) described as:

PETITIONERS' BRIEF ON THE MERITS

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BY ELECTRONIC SERVICE VIA TRUEFILING: I electronically served the document(s) described above via TrueFiling, on the recipients designated on the Transaction Receipt located on the TrueFiling pursuant to the California Supreme Court website establishing the case website and authorizing service of documents.

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The Honorable Brad Seligman
Alameda County Superior Court
1221 Oak Street
Oakland, CA 94612

via the following method:

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with the practice of Kazan, McClain, Satterley & Greenwood for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid. I am a resident or employed in the county where the mailing occurred. The envelope was placed in the mail at Oakland, California.

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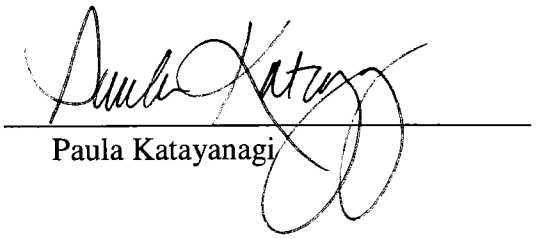

Paula Katayanagi