S253295

IN THE SUPREME COURT OF THE STATE 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, Hon. Brad Seligman, Case No. Rg16838191

APPLICATION OF CONSUMER ATTORNEYS OF CALIFORNIA TO FILE AN AMICUS BRIEF IN SUPPORT OF APPELLANTS FRANK C. HART ANDCYNTHIA HART

AMICUS BRIEF OF CONSUMER ATTORNEYS OF CALIFORNIA

SHARON J. ARKIN
(SBN: 154858)
THE ARKIN LAW FIRM
1720 Winchuck River Road
Brookings, Or. 97415
T: 541.469.2892; F: 866.571.5676
E: sarkin@arkinlawfirm.com
Attorney for *Amicus Curiae* Consumer Attorneys of California

CERTIFICATE OF INTERESTED PARTIES

Pursuant to California Rule of Court 8.208, Consumer Attorneys of California certifies that it is a non-profit organization which has no shareholders. As such, *amicus* and its counsel certify that *amicus* and its counsel know of no other person or entity that has a financial or other interest in the outcome of the proceeding that the *amicus* and its counsel reasonably believe the Justices of this Court should consider in determining whether to disqualify themselves under canon 3E of the Code of Judicial Ethics.

Dated: September 19, 2019

Sharon J. Arkin
SHARON J. ARKIN

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APPLICATION OF CONSUMER ATTORNEYS OF CALIFORNIA TO FILE AMICUS BRIEF IN SUPPORT OF PLAINTIFFS AND APPELLANTS FRANK C. HART AND CYNTHIA HART

Consumer Attorneys of California hereby requests leave to file the attached amicus brief in support of plaintiffs and appellants Frank C. Hart and Cynthia Hart.

Counsel is familiar with all of the briefing filed in this action to date. The concurrently-filed amicus brief discusses fundamental public policy issues not otherwise considered or argued by the parties and amicus believes the brief will assist this Court in its consideration of the issues presented.

No party to this action has provided support in any form with regard to the authorship, production or filing of this brief.

STATEMENT OF INTEREST OF THE *AMICUS*

The Consumer Attorneys of California ("Consumer Attorneys") is a voluntary membership organization representing approximately 6,000 associated attorneys practicing throughout California. The organization was founded in 1962. Its membership consists primarily of attorneys who represent individuals subjected in a variety of ways to personal injury, employment discrimination, and other harmful business and governmental practices. Consumer Attorneys has taken a leading role in advancing and protecting the rights of injured

Californians in both the courts and the Legislature.

As an organization representative of the plaintiff's trial bar throughout California, including many attorneys who represent consumers in asbestos and other toxic-exposure cases, as well as personal injury cases of all kinds, Consumer Attorneys is interested in the significant issues presented in this case because it severely impacts the ability of plaintiffs to submit evidence identifying the business who have injured them and impairs the ability of those plaintiffs to hold negligence defendants responsible for their misconduct

ISSUES TO BE ADDRESSED IN THE *AMICUS* BRIEF

CAOC believes that its *amicus* brief can offer this Court valuable insights with regard to the issues presented. This brief addresses a limited number of issues that have not been otherwise fully discussed in the parties' briefing. For example, CAOC provides a wide-ranging review of all the ways that labels, logos and insignia play a part in identification of not just things, but the people responsible for them. It also suggests an alternative means of addressing the hearsay concerns at issue in this case.

The issue in this case is important to a rational and realistic assessment of the public policy impact of failing to recognize that the identification of a product, vehicle, or other item is not hearsay and is admissible for purposes of

identification. This Court's determination will have a significant impact on the law and legal rights in this case and CAOC believes that its input and experience can provide needed context for this Court's decision.

Dated: September 19, 2019

By: *Sharon J. Arkin*

SHARON J. ARKIN

Attorney for *Amicus Curiae*

AMICUS BRIEF OF CONSUMER ATTORNEYS OF CALIFORNIA

DISCUSSION

Logos, labels, insignias, color combinations of design, brand names, trade names, business names, trademarks and the like are important. They mean something to the manufacturers and businesses that use them. They have value – just ask Chanel, Gucci and the hundreds of other manufacturers who have had their goods pirated. In fact, the laws protect them for just that reason. (See, e.g., Bus. & Prof.Code, §§ 14202, et seq. [Model State Trademark Law].)

Markings can identify pharmaceuticals for protection of patients, as well as for prosecutions of defendants for possession of a controlled substance. (*People v. Price* (N.Y. 2012) 950 N.Y.S.2d 725 [officer's identification of pharmaceutical from logo stamped on tablets, was sufficient to establish probable cause, on which to base an indictment or to establish a prima facie case without a lab test.]) As *Price* noted: "The importance of these labels, making for an easy and certain identification, is obvious. The imprints, put there by the original manufacturer, help protect the lives and well being of legitimate prescription users. Indeed, individuals who use several drugs rely on these markings to ascertain which drug is which so as to avoid complications from unhealthy, if not lethal, combinations. Doctors, health care

providers and pharmacists rely on these markings to make positive identifications for the health and well being of their patients." (*Price, supra*, at *3.)

A label can even suffice to convict pornography distributers by establishing a chain of custody. (*State v. Bishop* (Mo. 1982) 781 S.W.2d 195.)

Some states rely on labels, tags, manufacturer marks and the like to impose product liability under an "apparent manufacturer" theory under *Restatement (Second) Torts*, § 400. (See, e.g., *Rubble v. Carrier Corp.* (WA 2018) 192 Wash.2d 190, 194.) As the Washington Supreme Court explained in *Rubble*, "this doctrine provides that '[o]ne who puts out as his own product a chattel manufactured by another is subject to the same liability as though he were its manufacturer.' Today, we join the clear majority of states that have formally adopted the apparent manufacturer doctrine." That court also found that a plaintiff bringing such an action could rely not only on the product's packaging, but also on the apparent manufacturer's logos on packages, on the product, on the invoices for the sale of the product, and on the products' technical data sheets as well as on sales correspondence. (*Id.*, at 210-211.)

Although the *Rubble* court was not asked to address the issue here, i.e., whether reliance on such trade names, marks or logos would have to overcome a hearsay objection, the underlying purpose of the statute would be utterly undermined if that were required. Indeed, the rationale for the imposition of liability is

that the defendant has, by putting its "stamp" on the product, held it out as its own, and is therefore responsible for it.

That same kind of common sense analysis is warranted here; it is essential that toxic tort and asbestos plaintiffs be permitted to identify the defendants whose products they were exposed to by way of their own logos, labels, signs and marks.

The Defense Research Institute ("DRI") has expressly recognized that affirming the appellate court's decision here will decimate asbestos and toxic tort cases – which are already difficult to litigate because of the lapse of time, the long latency period of asbestos diseases and the failure of numerous companies to retain necessary documentation – just like defendant Keenan this case. (See, Tugade and Weixel, *Breaking The Product Identification Chain*, 61 No. 6 DRI For Def. 41, (2019).)

Both Justice Needham's dissent and the Harts' briefing extensively discuss the legal errors in the majority's opinion below. CAOC similarly views the decision as catastrophic in consumer cases.

The appellate court's majority decision would literally render it impossible for most asbestos plaintiffs to recover for their injuries. The first and most critical hurdle in obtaining compensation for asbestos injuries is establishing that the injured person or decedent was exposed to the defendant's asbestos. (*Turley v. Familian Corp.* (2017) 18 Cal.App.5th 969, 979.) Again, due to the lapse of time, faded memories, and lost or

destroyed documents, there is often no way to do that *except through the testimony of living witnesses* who were there and who personally *observed signs, labels, logos*, and who can, on that basis, demonstrate that the defendant's product or company were at the work site where exposure occurred.

The majority's decision below essentially requires production of business records, by the defendant or the entity the defendant supplied the products to or worked for, in order to "prove" that the plaintiff was exposed to that defendant's product. But because the exposures in asbestos cases occurred three, four, five or more *decades* ago, the cases in which the asbestos defendant or the recipient of their products still maintain records of their transactions are extraordinarily rare.

Furthermore, the majority's opinion in the lower court, if adopted, could ultimately preclude *every* asbestos plaintiff from establishing exposure by the simple expedient of precluding all testimony as to product identification. Imagine this: A living plaintiff testifies that in 1973 he went to the auto parts store, asked for "ABC" brakes, and was sold a box that said "ABC" brakes on it. The majority's rule below would preclude that evidence and would forestall any product identification at all, thus unwarrantedly shielding "ABC" from liability *even though it was indisputably "ABC's" product that the plaintiff used.*

Indeed, taken to the extreme suggested by the defense bar in the article cited above, how could *any* asbestos plaintiff *ever* establish the identity of the defendant whose product was used?

According to the DRI, they won't be able to.

But, as the Harts have explained thoroughly and compellingly, what is at issue here is *identification*, not a testimonial hearsay statement. Every label, every logo, every brand name, every trade name, every trade mark is placed on a product, or on a package, or on an invoice, or on a truck, uniform or cap for the purpose of providing *identification*, so that the buyer can be sure that the correct product was received and the user can be sure the correct product was used. When defendants place their marks on their goods, they don't it to be a testimonial statement that falls under the hearsay rule in the first instance, they intend to identify and promote their own product.

Prior court decisions demonstrate how critical this issue is and how natural it is to rely on packaging marks, logos and branding to identify the product used. For example, the First District noted in *McGonnell v. Kaiser Gypsum Co., Inc.* (2002) 98 Cal.App.4th 1098, 1104, the plaintiff's own identification of a defendant's products at a jobsite would be sufficient:

> "McGonnell was one of the best persons, if not the best person, to identify the various products and substances to which he had been exposed during his employment. At his deposition he was able to identify the kinds of materials he worked with, and the brand names of some of the products he had used. He even remembered working with Sheetrock and joint compounds from U.S. Gypsum."

The necessary implication from turning an identifying logo or brand name into a testimonial statement would be that even the plaintiff's own identification of products or companies he or she worked with (based on labels, logos, name tags, signage and the like), would be inadmissible.

Similarly, in *Turley v. Familian Corp.* (2017) 18 Cal.App.5th 969, 984, another division of the First District confirmed that the testimony of the plaintiff's co-employee who ordered the defendant's products and distributed them to employees was sufficient for product identification purposes based on the product numbers, tags, labels and packing slips. If the packages, labels and packing slips that came with the product is all hearsay, and thus inadmissible, it would make it impossible for asbestos plaintiffs to prove that *any* product they used was, in fact, manufactured by the defendant – a result which the defendant and its supporters obviously intend, but which would not promote the interests of justice.

And the danger is not limited to asbestos cases. Indeed, several prior appellate decisions confirm that defendant identification is not infrequently dependent on similar name, logo and/or signage. See, for example, the following:

- *Kasel v. Remington Arms Co., Inc.* (1972) 24 Cal.App.3d 711, 720 & 723 (red and green boxes of defective ammunition which contained the words "Remington" and "Remington Express" were admissible evidence that

defendant Remington "was an integral part of the composite business enterprise which placed the defective shell in the stream of commerce");

- *Guderitz v. Broadway Bros.* (1918) 39 Cal.App. 48, 50 ("one witness who saw the accident, positively identified the truck as one belonging to the defendant, and further stated that it had defendant's name painted upon its side. Another witness also identified it as defendant's truck, though not so positively. The fact that his testimony was somewhat shaken upon cross-examination might well have been argued to the jury, but is of no importance here. The testimony was amply sufficient, if believed by the jury, to support a finding in favor of the plaintiff upon this issue.")

- *Smith v. Deutsch* (1948) 89 Cal.App.2d 419 (identification of owner of taxicab based on testimony about distinctive colors on the cab and name insignia)

- *Tieman v. Red Top Cab Co.* (1931) 117 Cal.App. 40, 45 (owner of taxi involved in pedestrian collision properly identified by company name painted on the taxi)

- *Nash v. Wright* (1947) 82 Cal.App.2d 467, 473 ("if the defendant's name is found painted on the motor car

immediately after it has injured a person in traffic it is sufficient proof to warrant the inference of ownership")

- *Brown-Forman Distillers Corp. v. Walkup Drayage and Warehouse Co.* (1945) 71 Cal. App.2d 795, 796-798, 799 (in contract dispute re receipt of products purchased, company name on side of truck admissible for purposes of ownership)

- *L.A. News Serv. v. CBS Broadcasting, Inc.* (9th Cir. Cal. 2002) 2002 U.S. App. LEXIS 26206 (copyright infringement case in which slate at beginning of the video identified plaintiff held admissible)

- Vaccarezza v. Sanguinetti (1945) 71 Cal.App.2d 687, 693 (food manufacturer's identity could be established through a witness' testimony that he saw a company logo.)

Obviously, CAOC believes that it is most appropriate for this Court to reject the majority's rule below and conclude that such things as logos, brand names and the like are not testimonial for purposes of the hearsay rule. But even if that were this Court's conclusion, that should not be the end of the analysis. This Court has been extremely cautions about balancing the legal interests and the equities in its decisions in order to assure that fairness prevails. (See, e.g. *Kesner v.*

Superior Court (2016) 1 Cal.5th 1132 [finding a duty on the part of a landowner or employer to prevent the transfer of asbestos from the premises to the homes of workers, while limiting the potential plaintiffs who could bring a case so as to avoid unlimited liability].)

Another decision from this Court that sought a similar balance is *In re Cindy L.* (1997) 17 Cal.4th 15, 27-28. *Cindy L.* was a child abuse and dependency case in which this Court applied a judicially created exception to the hearsay rule in child abuse cases. *Cindy L* held that hearsay evidence is not made inadmissible by the hearsay rule where it is particularly trustworthy, there is a substantial need for the hearsay evidence and the class of hearsay evidence possesses an intrinsic reliability that enables it to surmount the usual objections.

The same factors justify the creation of a similar analysis in these cases in the event this Court concludes that labels, logos and the like are otherwise subject to the hearsay rule:

- There is a substantial need for such an exception because, absent admission of such evidence, few, if any asbestos or other toxic tort cases will survive – as predicted by the DRI.
- The evidence of logos, brand names and the like possess an intrinsic reliability based on the fact that logos, brand names and the like are placed on the products, invoices, signs, and materials *by the defendants* for the very purpose of identifying themselves as associated with the products.

- Finally, given the equities, the trustworthiness prong also supports a hearsay exception in this context. Supporting documentation has been lost or destroyed – through no fault of the plaintiffs; rather, defendants had the ability – if not the desire – to retain the relevant documents while plaintiffs had no control over the decisions. The recollection of a witness or a plaintiff as to the brand, logo or other identifying mark on the product, uniform or signage can be tested on cross-examination to assure that due process protections are met; in that context the precision and certainty of the memory or recollection can be challenged and it will then be up to a jury to determine credibility and trustworthiness.

Because the majority's decision below is not only in conflict with basic legal principles but, more importantly, will have a devastating effect on consumer plaintiffs and, in particular, on asbestos plaintiffs, it is respectfully requested that this Court reverse the lower court's decision and conclude that the kinds of identifying items like those at issue here are not barred by the hearsay rule.

Dated: September 19, 2019 THE ARKIN LAW FIRM

By: *Sharon J. Arkin*
SHARON J. ARKIN
Attorney for amicus curiae
Consumer Attorneys of
California

CERTIFICATE OF LENGTH OF BRIEF

I, Sharon J. Arkin, declare under penalty of perjury under the laws of the State of California that the word count for this combined Reply Brief, excluding Tables of Contents, Tables of Authority, Proof of Service and this Certification is less than 3481 words as calculated utilizing the word count feature of the Word for Mac software used to create this document.

Dated: September 18, 2019

Sharon J. Arkin
SHARON J. ARKIN

PROOF OF SERVICE

My business address 1720 Winchuck River Road, Brookings, Oregon 97415.

On **September 19, 2019**, I served the within document described as:

APPLICATION TO FILE AMICUS BRIEF; AMICUS BRIEF

on the interested parties in this action by placing true copies thereof, enclosed in sealed envelopes to be delivered, addressed as set forth in the attached service list with postage paid thereon and depositing them with the United States Postal Service at San Francisco, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on September 19, 2019 at San Francisco, CA.

Sharon J. Arkin
SHARON J. ARKIN

SERVICE LIST

HART v. KEENAN PROPERTIES
Division SF
Case Number S253295

Party	Attorney
	William F. Ruiz Marissa Y. Uchimura Maune Raichle Hartley French & Mudd, LLC 70 Washington Street, Suite 200 Oakland, CA 94607
Frank C. Hart : Plaintiff and Respondent	Denyse F. Clancy Ted W. Pelletier Kazan, McClain, Satterley & Greenwood A Professional Law Corporation 55 Harrison Street, Suite 400 Oakland, CA 94607 Via TrueFiling
	William F. Ruiz Marissa Y. Uchimura Maune Raichle Hartley French & Mudd, LLC 70 Washington Street, Suite 200 Oakland, CA 94607
Cynthia Hart : Plaintiff and Respondent	Denyse F. Clancy Ted W. Pelletier Kazan, McClain, Satterley & Greenwood A Professional Law Corporation 55 Harrison Street, Suite 400 Oakland, CA 94607 Via TrueFiling

Keenan Properties, Inc. : Defendant and Appellant	W. Joseph Gunter CMBG3 Law LLC 100 Spectrum Center Drive, Suite 820 Irvine, CA 92618-4972 Via TrueFiling
Low Ball and Lynch : Other 505 Montgomery Street, 7th Floor San Francisco, CA 94111	Via First Class Mail
Ace Hardware : Other	Farah A. Ballout McGivney, Kluger & Cook, P.C. 515 South Figueroa Street,Suite 1235 Los Angeles, CA 90071
Walsworth WFBM LLP : Other 601 Montgomery Street, Ninth Floor San Francisco, CA 94111	Via First Class Mail
First District Court of Appeal	Via TrueFiling
Alameda Superior Court 2233 Shoreline Drive Alameda, California 94501	Via First Class Mail