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Struggling with Evidence: An Examination of Recent Evidence Decisions

Justice Mark Simons, California Court of Appeal, First Dist., Div. 5
Gary A. Watt, Hanson Bridgett LLP
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PROGRAM MATERIALS

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Evidence Case Update
CCCBA MCLE Spectacular 2023

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Case Name	Court	Description
1. *People v. Bloom* (2022) 12 Cal.5th 1008 (unavailable witness prior testimony)	Supreme Court	After his murder convictions and death sentence were affirmed on direct appeal and his petition for state writ of habeas corpus was denied, petitioner sought federal writ of habeas corpus. The United States District Court denied petition. Petitioner appealed. The Ninth Court of Appeals, reversed and remanded. Following retrial, defendant was convicted in the Superior Court of first degree murder and second degree murder, and associated multiple-murder special-circumstance finding and various firearm- and weapon-use findings, and was sentenced to death. Defendant appealed. The Supreme Court held: 1. unavailable witness's testimony at defendant's original trial on capital murder charges, that three or four days before homicides, defendant asked witness to get him handgun, offering $1,200 and mentioning he had contract to kill someone, was admissible in guilt phase of defendant's retrial under evidentiary rule governing former testimony, where defense counsel in original trial cross-examined witness regarding effects of his drug use and reasons for his delay in reporting encounters with defendant, which gave jury ample basis to question witness's veracity; 2. unavailable witness's testimony at defendant's original trial on capital murder charges, that two nights before killings of defendant's father, stepmother, and stepsister,

		defendant told her to stay indoors, and she saw defendant outside her house carrying her brother's rifle, and regarding defendant's antagonistic relationship with father, who was angry at him, was admissible in guilt phase of defendant's retrial under evidentiary rule governing former testimony; and 3. possibility that current counsel would have cross-examined witness differently or more searchingly does not, in itself, render prior testimony inadmissible.
2. *Paige v. Safeway* (2022) 74 Cal.App.5th 1108 (cross examination of experts)	First Dist., Div. 3	Customer brought negligence and premises liability action against store after slip and fall in crosswalk of store parking lot. The Superior Court granted store's motion in limine, and, following trial, entered judgment on jury verdict for store, and customer appealed. The Court of Appeal held: 1. customer did not waive claim that trial court erred in precluding cross-examination of store's expert; 2. as a matter of first impression, party may cross-examine an adverse expert about any publication that has been established as a reliable authority, whether or not the expert referred to, considered, or relied on that publication for his or her opinion; 3. expert's deposition testimony sufficiently established that organization's standards for safe walking surfaces was a reliable authority; and 4. court's error in failing to allow store customer to cross-examine store's expert witness regarding organization's standards for safe walking surfaces was not prejudicial.
3. *Kline v. Zimmer* (2022) 79 Cal.App.5th 123 ("reasonable medical certainty" burden)	Second Dist., Div. 8	A patient who was implanted with an artificial joint during hip replacement surgery, filed a personal injury action against a medical device manufacturer. The patient alleged the device was defective. After two trials, the lower court entered judgment on a jury verdict awarding economic and noneconomic damages to the patient. Furthermore, the lower court denied the manufacturer's motion for a new trial. On appeal, the manufacturer claimed the trial court made two categories of evidentiary errors when it excluded the manufacturer's proffered medical opinions because they

		were not stated to a reasonable medical probability; and as a result, it prevented the manufacturer from presenting any expert testimony. The Court of Appeal held that the reasonable medical probability requirement applies only to the party bearing the burden of proof on the issue. Because the *patient* bore the burden of proof, the reasonable medical probability requirement did not apply to the manufacturer. Thus, the court held the trial court's error in excluding the manufacturer's medical expert's statements and the resulting exclusion of the manufacturer's expert testimony deprived the manufacturer of a fair trial.
3.1 Legislature's Response to *Kline*: SB 652	N/A	801.1. (a) Where the party bearing the burden of proof proffers expert testimony regarding medical causation and where that party's expert is required as a condition of testifying to opine that causation exists to a reasonable medical probability, the party not bearing the burden of proof may offer a contrary expert only if its expert is able to opine that the proffered alternative cause or causes each exists to a reasonable medical probability, except as provided in subdivision (b). (b) Subdivision (a) does not preclude a witness testifying as an expert from testifying that a matter cannot meet a reasonable degree of probability in the applicable field, and providing the basis for that opinion.
4. *People v. Matale* (2022) 13 Cal.5th 372 (spontaneous statements; prior inconsistent statements)	Supreme Court	Defendant was convicted of murder, attempted murder, and conspiracy to commit murder, and was sentenced to death. Defendant appealed. The Supreme Court held (among other things): 1. witness's statements to officer were not admissible under hearsay exception for spontaneous statements; and 2. witness's prior statement about defendant's bragging about shooting victim was admissible as a prior inconsistent statement.
5. *People v. Portillo* (2023) 91 Cal.App.5th 577 (price tag hearsay)	Second Dist., Div. 7	Defendants were each convicted of one count of grand theft, based on allegations that they stole 15 boxes of adjustable dumbbells. Defendants appealed. The Court of Appeal held:

		1. price listings on retailer's website and price tags in brick-and-mortar store were nonhearsay circumstantial evidence of fair market value of dumbbells; and 2. circumstantial evidence was sufficient to support finding that one defendant participated in theft, as required for conviction for grand theft. A concurring justice agreed that the price testimony could come in but disagreed with the majority's reasoning for same.
6. *Ramirez v. Avon Products* (2023) 87 Cal.App.5th 939 (PMQ Testimony; business records)	Second Dist., Div. 8	User of talcum powder and her husband brought action against manufacturer for negligence, design defect, strict liability, failure to warn, fraud, fraud by non-disclosure, and negligent misrepresentation, alleging that user developed mesothelioma after exposure to asbestos in talcum powder. The court granted summary judgment to manufacturer. User and husband appealed, and user died while appeal was pending. The Court of Appeal held: 1. manufacturer's designated corporate representative for deposition was not exempted from personal knowledge requirement for testimony by non-expert witness; 2. the mere fact that a corporation's designated witness researches the topics to be addressed at deposition (as required by 2025.230's "known or reasonably available"), is asked about a matter at a deposition, and provides information in response does not make that testimony admissible, via declaration or otherwise; 3. memoranda summarizing telephone conversations between corporate employees were not admissible under business records exception to hearsay rule, when offered by corporation in support of its motion for summary judgment in absence of a showing that such type of memo was prepared in ordinary course of business by corporate employee. Accordingly, the summary judgment was reversed.

7. *Doe v. Brightstar Residential Inc.* (2022) 76 Cal.App.5th 171 (police report hearsay)	Second Dist., Div. 8	A handyman of a residence for the disabled was charged with sexual assault on a resident. Plaintiff Doe sued Brightstar, the residence, for negligence. Brightstar moved for summary judgment on the negligence claim asserting the attack was unforeseeable. In response, Doe introduced evidence from a police file that Brightstar knew its handyman had a history of harassing women. The trial court excluded the evidence claiming it was inadmissible double hearsay and granted Brightstar's motion for summary judgment based on lack of foreseeability. The Court of Appeal reversed: The first issue was one of Brightstar's owner's statement to officers investigating the incident that the perpetrator had "'a history of loitering around the facility and harassing female employees.' One of the officers recorded [the owner's] admission in a police report, which was in the file Doe included as an exhibit to her summary judgment opposition." "It is true that police reports are *often* inadmissible … But not always." Double hearsay is admissible if a justification for admitting the evidence rebuts the hearsay objection at each level. On the first level, the owner's admission about the perpetrator was "the admission of a party opponent." (See Evid. Code § 1220.) At level two, the police report was admissible as an official record. (See Evid. Code § 1280.) For its part, Brightstar "contested neither the authenticity of the police report nor the foundational requirements for the official records exception … ." The report and the admission within it were admissible, and the admission was *relevant* on the issue of foreseeability of the molestation. The Court of Appeal repeated the analysis to find admissible statements Brightstar's employees made to police about the perpetrator. At level one, the statements made by employees were offered not for their truth, but for the non-hearsay purpose that the defendant and its employees were on notice of the perpetrator's "disturbing and unsupervised presence." At level two, the police reports containing these statements counted as official records. Thus, whether Brightstar or its owners knew or should have known of any danger presented by the handyman was a disputed fact.

8. *Berroteran v. Superior Court* (2022) 12 Cal.5th 867 (Evid. Code § 1291(a)(2) prior depo testimony)	Supreme Court	Consumer brought action against vehicle manufacturer alleging causes of action for multiple counts of fraud, negligent misrepresentation, violation of the Consumers Legal Remedies Act, and violation of the Song-Beverly Warranty Act arising from his purchase of a truck that allegedly had a defective engine. The Superior Court granted the manufacturer's motion in limine to exclude deposition testimony of nine unavailable witnesses who were manufacturer's employees and former employees. Consumer petitioned for writ of mandate. The Court of Appeal, 41 Cal.App.5th 518, granted the petition. Review was granted. The Supreme Court held: 1. Opponent of deposition's introduction, which appeared at non-adjudicatory civil deposition representing aligned witness, did not bear any burden to prove that it lacked a similar interest and motive to examine its witnesses at that deposition, and 2. The statutory provision concerning testimony taken in earlier proceeding and offered against party to that former proceeding articulated general rule, but not categorical bar, against admission at trial of prior testimony from typical discovery deposition.
9. *Bowser v. Ford Motor Co.* (2022) 78 Cal.App.5th 587 (authorized admissions)	Fourth Dist., Div. 2	Consumers brought action against automobile manufacturer under the Song-Beverly Consumer Warranty Act and for common-law fraud, alleging that consumers purchased one of manufacturer's automobiles and that automobile was defective. Jury returned special verdicts in favor of consumers on all issues. Consumers elected to recover compensatory damages under Song-Beverly Act rather than for fraud, and the court awarded them $42,310.17 in compensatory damages, $84,620.34 as a statutory penalty, and $253,861.02 in punitive damages. Manufacturer moved for new trial and JNOV. The court denied both motions. On consumers' motion, the court awarded them $836,528.12 in attorney fees and $94,264.99 in costs. Manufacturer appealed. The Court of Appeal held:

		1. trial court did not abuse its discretion by admitting under authorized-admissions hearsay exception certain of manufacturer's internal e-mails and other documents; 2. trial court abused its discretion by admitting under authorized-admissions hearsay exception e-mail sent by employee of manufacturer saying that launch of engine model used in consumers' automobile was “not going well”; 3. trial court abused its discretion by admitting under authorized-admissions hearsay exception e-mail sent by employee of manufacturer listing major warranty issues with engine model used consumers' automobile; 4. trial court abused its discretion by admitting under authorized-admissions hearsay exception e-mail sent by employee complaining that director of manufacturer's customer-service division had pressured employee to state that engine model used consumers' automobile was “crap”; 5. trial court's erroneous admission of emails was harmless error; and 6. trial court did not abuse its discretion by admitting under former-testimony hearsay exception depositions of four witnesses taken in prior, unrelated class action.
10. *Doe v. SoftwareONE, Inc.* (2022) 85 Cal.App.5th 98 (hearsay)	Fourth Dist., Div. 3	Former employee brought action against former employer, alleging her firing was discriminatory and retaliatory. The court granted former employer's motion for summary judgment, but thereafter granted former employee's motion for new trial. Former employer appealed. The Court of Appeal held (among other things): 1. De novo standard applies to motion for new trial based on error of law in granting summary judgment. 2. But an abuse of discretion standard applies to evidentiary rulings. 3. An out of court statement that plaintiff was a bitch is not hearsay, because not offered for the truth but as evidence of corporate culture. Similarly, a statement that employer was a “guy’s club” came under the “authorized admission” exception to

		hearsay. Although the speaker was not the employee's supervisor, the speaker's "high position in the corporate hierarchy and defendant's characterization of him in its motion and supporting evidence as 'leadership' are substantial evidence of his authority to speak, in general terms, about defendant's company culture. 4. Plaintiff related the statements in both her declaration against summary judgment and in her declaration supporting her new trial motion. Defendant objected to statements in the new trial motion, but had not on summary judgment. Held, objection waived: "Even if the trial court had sustained defendant's objection to plaintiff's second declaration, the same evidence would still have been before the court through plaintiff's first declaration." The Court of Appeal affirmed the grant of new trial.
11. *People v. Venable* (2023) 88 Cal.App.5th 445 (creative expression)	Fourth Dist., Div. 2	Defendant was convicted of murder and attempted murder with a gang enhancement and a gang-related firearm enhancement for a drive-by shooting. The only witness to identify Defendant was a police informant, gave a series of conflicting accounts, and also testified the Defendant was being framed. The prosecution emphasized a rap video made by Defendant's younger brother, in which Defendant appeared, which displayed, guns, drugs, money, gang signs, and referenced the shooting. Defendant appealed. The Court of Appeal held: 1. The admission if the rap video did not comply with the requirements of the newly effective Evidence Code Section 352.2. Section 352.2 is meant to balance the probative value of creative expressions against the substantial danger of undue prejudice. 2. Section 352.2 is ameliorative and therefore applies to cases that are not yet final. 3. The admission of the rap video without the safeguards of Section 352.2 was prejudicial to Defendant.

Evidence Case Update
CCCBA MCLE Spectacular 2023

Justice Mark Simons, California Court of Appeal, First Dist., Div. 5

I. *People v. Bloom* (2022) 12 Cal.5th 1008, 1053

A. **E.C. 721(a)**:

Expert witness may be cross-examined to same extent as any other witness and also may be fully cross-examined as to qualifications, the subject of their opinion and the basis and reasons for that opinion.

B. *Bloom:* prosecutor may c-x defense expert A by highlighting possible inconsistencies between A's opinion and D's statements in an interview with expert B, which A admittedly had considered in conducting his evaluation.

C. **Key**: aware of, read, considered, and relied on

II. *Paige v. Safeway* (2022) 74 Cal.App.5th 1108, 1121-1126

A. **E.C. 721(b)**:

May cross-examine an expert on content and tenor of a scientific, technical or professional text only if:

(1) X referred to, considered, or relied on it in forming opinion
(2) It has been admitted into evidence
(3) It has been established as reliable authority
Read into evidence; do not admit as exhibit

B. *Paige* underlined (3)

III. *Berroteran v. Sup. Ct.* (2022) 12 Cal.5th 867, 890

A. **E.C. 1292**: former testimony admissible under the hearsay rule in a civil action **if** declarant unavailable and the party to the former proceeding "**had the right and opportunity to cross-examine the declarant with an interest and motive similar**" to the opposing party at the current hearing.

B. Big issue—**depositions** in other cases.

C. Is the depo merely a discovery depo—if so, not admissible

(1) "Interest and motive" not similar

D. *Berroteran*: **multi-factor test** in a **"factually intensive" determination** whether depo had a **purpose** other than discovery, and to **orally or "preferably in writing" disclose its reasoning on the record**

E. Depositions in the same case

IV. *Bowser v. Ford Motor Co.* (2022) 78 Cal.App.5th 587, 620-622

A. Utilized the *Berroteran* analysis and upheld the admission of a deposition against the defendant.

B. **E.C. 1222(a)**: statement against a party admissible under hearsay rule if made by a person **authorized by that party to make statement** concerning subject matter of the statement

C. **"**A **corporation... speaks only through its officers and agents**. Accordingly, statements assertedly made by a corporation are not usually analyzed as party admissions under Evidence Code **§**1220 but rather as authorized admissions under Evidence Code **§**1222.**"** (*Bowser* at p. 611.)

D. *Bowser* rejected Ford's argument that this hearsay exception did not apply to statements between the corporation's agents and admitted relevant email chains among high ranking employees. (at pp. 611-617.)

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PERSPECTIVE

Ramirez: responding to restrictions on the affirmative use of PMQ testimony

By Don Willenburg

A new Court of Appeal decision will likely have wide-ranging effects on civil practice involving long-ago events. Litigants that are not "natural persons" are required to designate a "person most qualified" ("PMQ") to appear at depositions. (Code Civ. Proc., § 2025.230.) Such witnesses customarily testify in contexts other than depositions as well. Recently, *Ramirez v. Avon Products, Inc.* 2023 DJDAR 607 ruled that testimony from a PMQ based on investigation, while appropriate for discovery, is inadmissible in evidence because it is based on hearsay, not personal knowledge.

Defendant Avon won summary judgment relying on a declaration from a PMQ that "Avon never included or used asbestos as an ingredient or component of its cosmetics products. Since the [early 1970's,] Avon has required its talc suppliers provide only asbestos-free talc." The PMQ began work at the company in 1994, but had done "investigation" in preparation for her PMQ deposition. The trial court held that was good enough, and overruled plaintiffs' objections to the declaration.

The Court of Appeal reversed. "The Evidence Code recognizes only two types of witnesses: lay witnesses and expert witnesses," and only experts can testify based on hearsay. "There is no special category of 'corporate representative' witness." "Even trained and sworn police officers who are authorized by the State of California to investigate crimes are not exempt from the requirements of the Evidence Code when testifying at trial in a non-expert capacity. Gallo was simply a lay witness, and as such she was limited to matters as to which she had personal knowledge. ssThe Evidence Code ... does not recognize a special category of 'person previously designated as most knowledgeable' witness."

The decision distinguished admissibility from discovery. "[T]he purpose of discovery is to permit a party to learn what information the opposing party possesses on the subject matter of the lawsuit, and the scope of discovery is not limited to admissible evidence. [Citation omitted.] Thus, the mere fact that a person is asked about a matter at a deposition and provides information in response does not make that testimony admissible at trial."

The standard PMQ investigative process magnifies, rather than diminishes, the hearsay concerns. "Given the time frame involved, Gallo is most likely 'channeling' information from people who not only lacked personal knowledge themselves, but acquired their information from people who also lacked personal knowledge. This oral passing of information raises exactly the reliability concerns which animate the personal knowledge requirement, not to mention the rule against hearsay."

The Court of Appeal held not only that the PMQ's declaration testimony was inadmissible, but that she could not authenticate the old documents. Avon did not lay the groundwork for arguing the business records exception to hearsay, and the exception probably would not apply to many of the documents culled from corporate files anyway.

The decision may not break much new doctrinal ground, but it likely will have a huge practical effect. Much like Avon's witness here, PMQs routinely question employees and former employees, review corporate records, and testify in deposition, declarations and trial based on that investigation. So, what can an entity litigant (corporate or otherwise, defendant or plaintiff) do to make evidence of such witnesses and long-ago events admissible?

1. Personal knowledge. The best and most obvious response is to identify and designate witnesses who have personal knowledge of the entity's history and operations. This may require designating multiple witnesses for different topics. It will also not be possible in many instances, most notably for events and conditions decades ago.

2. The entity litigant could also try to use prior testimony of PMQs or other witnesses who did have personal knowledge, under the "former testimony" hearsay exception in Evidence Code section 1292. The statute's first two requirements are straightforward enough: "(1)The declarant is unavailable as a witness" and "(2) The former testimony is offered in a civil action." It's the third condition that will be difficult and require skillful advocacy, as well as fortuitous circumstances: "The issue is such that the party to the action or proceeding in which the former testimony was given had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which the party against whom the testimony is offered has at the hearing." It is much easier if you are offering the former testimony against someone that was a party to the former proceeding (Evid. Code, § 1291), though presumably that will be rare.

3. Some documents may qualify for the "business records" hearsay exception under Evidence Code sections 1271 & 1272. This is great if you can meet the standards, but

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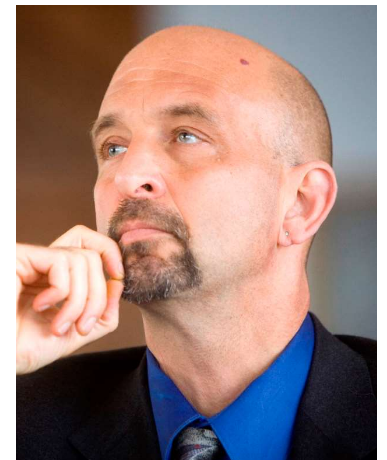

many documents that may be in the files of a business or other entity will not qualify for this exception.

The business records exception applies only to "a record of an act, condition, or event … when offered to prove the act, condition, or event," and even then only if:

"(a) The writing was made in the regular course of a business;

(b) The writing was made at or near the time of the act, condition, or event;

(c) The custodian or other qualified witness testifies to its identity and the mode of its preparation; and

(d) The sources of information and method and time of preparation were such as to indicate its trustworthiness."

(Evid. Code, § 1271.) Query whether after *Ramirez* subdivision (c) will also require personal knowledge. That could effectively negate the business records exception for old records.

4. Other documents may escape hearsay via the "ancient documents" exception. "Evidence of a statement is not made inadmissible by the hearsay rule if the statement is contained in a writing more than 30 years old and the statement has been since generally acted upon as true by persons having an interest in the matter." (Evid. Code, § 1331.) The proponent of the over-30 (since when is over 30 "ancient?" But I digress) writing will need to have separate admissible evidence that "the statement has been since generally acted upon as true by persons having an interest in the matter." It might be possible to do this by "daisy-chaining" prior PMQ testimony asserting the truth of the statement. Prior PMQs are presumably "persons having an interest in the matter." (So could be opposing litigants in those prior cases.) That could work even if the prior PMQ testimony could not come in under the former testimony exception.

5. Another possibly applicable hearsay exception is for documents affecting property. "Evidence of a statement contained in a deed of conveyance or a will or other writing purporting to affect an interest in real or personal property is not made inadmissible by the hearsay rule if:

(a) The matter stated was relevant to the purpose of the writing;

(b) The matter stated would be relevant to an issue as to an interest in the property; and

(c) The dealings with the property since the statement was made have not been inconsistent with the truth of the statement."

(Evid. Code, § 1330.) Section 1330 could potentially apply to, for example, recitals in merger and acquisition documents.

6. Expert opinions. As *Ramirez* suggested, experts may render opinions based on hearsay, which could include the hearsay testimony and documents. At least two limitations are immediately apparent. First, you are unlikely to find an expert in the history of your client. You may, however, locate an expert in the history of the industry or field in which your client operates who can render general opinions about industry practices, etc. Second, while an expert can render an opinion based on hearsay, the expert cannot relate to the jury the content of any case-specific hearsay. *People v. Sanchez*, 63 Cal.4th 665 (2016).

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PERSPECTIVE

EVIDENCE FOR IDIOTS

Logos, dumbbells, and hearsay

By Gary A. Watt

Welcome to *Evidence for Idiots*. Some of you are thinking this column's not for you because you're no idiot when it comes to evidence. Others are thinking you're not going to read this because you don't take insults lightly. But the title was inspired by the author's typical reaction to evidence: headscratching and headaches. So read on. The goal is to grapple with evidence and perhaps, in the end, experience some form of enlightenment. And what better way to start *Evidence for Idiots* than a discussion about dumbbells!

The Hearsay Rule

Before turning to a recent case, *People v. Portillo*, review of the beloved hearsay rule would be in order. According to Wigmore, the rule has its roots in the rise of witness testimony during the 1600s. Fortunately, for our purposes we can fast forward to this century.

"'Hearsay evidence' is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." Evid. Code § 1200(a). We tend to think of the familiar shorthand: an out-of-court statement offered for the truth of its content. *Hart v. Keenan Properties, Inc.*, 9 Cal. 5th 442, 447 (2020). "Except as provided by law, hearsay evidence is inadmissible." Evid. Code § 1200(b).

However, out-of-court statements offered for a "purpose *other than* to prove the truth of the matter stated … [are] not hearsay." *People v. Wilson*, 11 Cal. 5th 259, 305 (2021) (emphasis added). Such statements are "nonhearsay" so long as offered for "some purpose independent of the truth of the matter it asserts." *People v. Hopson*, 3 Cal. 5th 424, 432 (2017). "For example, suppose A hit B after B said, 'You're stupid.' B's out-of-court statement asserts that A is stupid. If those words are offered to prove that A is, indeed, stupid, they constitute hearsay and would be inadmissible unless they fell under a hearsay exception. However, those same words might be admissible for a *nonhearsay purpose*: to prove that A had a motive to assault B. The distinction turns not on the words themselves, but what they are offered to prove." *Hart*, 9 Cal. 5th at 447-48.

Black and white examples of non-hearsay purposes only go so far. In *Hart*, the ultimate question was whether Keenan pipes caused the plaintiff's illness. A former worker at the construction site recalled some delivery invoices (the events were 44 years earlier) having a distinct "K" on the label (which generally described Keenan's logo). Were recollections of the invoice with a "K" at the job site offered to prove anything at all about the content of the logo?

A Court of Appeal majority said yes, the "wording on these invoices … were out-of-court statements offered to prove the truth of the matter asserted: namely, that Keenan supplied the pipes." *Hart v. Keenan Properties, Inc.*, 29 Cal. App. 5th 203, 211 (Ct. App. 2018). The "testimony regarding the content of the invoices was used to prove Keenan was the vendor. Therefore, the content of the invoices was being offered for the truth of the matter asserted in them." *Id.* at 213. The Court of Appeal found no hearsay exception applied, making the testimony inadmissible.

The California Supreme Court reversed. The out-of-court statement – the logo recalled by the witness – was not offered to prove the truth of anything in or on the invoices. It was circumstantial evidence that Keenan supplied pipe to the jobsite. The testimony was offered for a *nonhearsay* purpose – indications of Keenan pipe at that location during the relevant time – thereby making it admissible.

As the Supreme Court further explained, "the link between Keenan and the pipes does not depend on the word 'Keenan' [on an invoice] being a true statement that Keenan supplied the pipes. Instead, the link relies on several circumstances demonstrated by the evidence," including testimony that when some of the pipes were delivered, the witness "was given an invoice bearing Keenan's name and logo." *Hart*, 9 Cal. 5th at 449-50. Such evidence would be subject to a jury's ultimate decision about links in the evidentiary chain. The logo recollection may have been thin and subject to skepticism (going to weight, not admissibility), but it was not inadmissible under the hearsay rule. So, words and images observed can be relevant without seeking to prove the words or images are "true."

From Logos to Price Listings

What does all this have to do with dumbbells? That brings us to *People v. Portillo*, 91 Cal. App. 5th 577 (Ct. App. 2d Dist., May 15, 2023). In *Portillo*, defendants were convicted of one count of grand theft. The issue was whether the collective value of 15 boxes of stolen dumbbells exceeded $950, a threshold for grand theft.

At trial, the only valuation evidence was testimony from the warehouse manager where the theft occurred. Armed with the manufacturing number (from surveillance video), the manager searched Amazon, Walmart, and "Gym and Fitness" online for retail pricing. Based on the lowest price observed of $357 per box and 15 stolen boxes, total value easily exceeded the minimum necessary to support a grand theft conviction.

The jury found defendants guilty of grand theft. The defendants appealed, asserting the warehouse manager's pricing testimony was inadmissible hearsay offered for

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the truth of the dumbbells' value. Was it? The Court of Appeal said "no," unanimously finding the pricing testimony admissible. But not all justices agreed as to why it was admissible.

Price But Not Actual Price, So Not Hearsay

According to the majority, "an out-of-court statement by a Walmart employee that Walmart was offering to sell adjustable dumbbells for $357 (or a price listing or price tag to that effect) is hearsay if it is offered for the truth that Walmart was willing to sell the dumbbells for $357 . . . ."

However, the advertised price could be "evidence of a retailer's offer to sell . . . for the purpose of inviting a marketplace transaction." "If evidence of the . . . price listing for $357 is presented to show Walmart was advertising the dumbbells for sale at $357, but not for the truth of whether Walmart would consummate a transaction at the advertised price . . . this would be a nonhearsay purpose because it is 'relevant regardless of [its] truth.'" 91 Cal. App. 5th at 511 (quoting *Hart*, 9 Cal. 5th at 449). The majority's lengthy and scholarly discussion, among other things, analogized to car prices and common knowledge that actual transactions frequently occur at other than the advertised price.

"[W]e consider the advertised prices for dumbbells in the retail market for the nonhearsay purpose of showing there were offers to sell the dumbbells in a specified price range." The court distinguished "evidence of the existence of a retailer's advertised price (the nonhearsay purpose) from whether the individual retailer is willing to sell at that price or believes its price reflects the value of the item (the hearsay purposes)." *Id.* at 511. "The advertised prices may be considered by the jury as circumstantial evidence of the price at which willing sellers and willing buyers would consummate a transaction in the marketplace." *Id.* at 512.

Thus, for hearsay purposes, the majority appears to view testimony about price as distinguishable between advertised prices and prices actually paid. Since the price of an actual purchase was not the purpose for the testimony, the nonhearsay purpose – advertised prices reflecting a market for dumbbells – enabled the testimony to evade the clutches of the hearsay rule.

Price As Actual Price, But Not Hearsay

Portillo's concurrence also found the pricing testimony admissible but disagreed with the majority's reasoning. "If an online retailer is not willing to sell the item at the advertised price or does not believe the advertised price reflects the item's value, then the advertised price does not tend to prove or disprove anything about the fair market value of the item." *Id.* at 521. "[T]o be relevant, the evidence of the price listings must tend to prove what the majority understands to be the 'truth' they assert: the retailers' willingness to sell the dumbbells at the stated prices and, ultimately, the dumbbells' value. That is, the price listing evidence is only relevant if it serves what the majority has identified as its hearsay purpose."

The concurrence concluded the observed prices were nonhearsay "verbal acts" or "operative facts." "The price listings *were* offers to sell the dumbbells at the stated prices." (Emphasis original.) However, the price listings were admissible as "circumstantial evidence of a hypothetical agreement – between a willing buyer and a willing seller . . . ." Such an offer is not a statement "whose evidentiary value depends on its 'truth,' but a nonhearsay 'verbal act' or 'operative fact' whose evidentiary value derives from whether it occurred."

Examining cases involving offers to contract, the concurrence found no reason why "these principles should not apply equally to evidence introduced to establish the hypothetical agreement that serves as the basis for determining an item's fair market value. As offers to sell the dumbbells at stated prices, the online retailers' price listings were verbal acts (or operative facts) elemental to the formation of such an agreement," and thus, admissible.

The Price is Right?

Did the majority and the concurrence strive too hard to put a fine point on this? Was it necessary to define the listed prices as offers to engage in transactions but not prices that might actually result in a sale? This is a case about whether the total value of the stolen merchandise exceeded $950 thereby satisfying an element of grand theft. When the manager testified to the prices he personally viewed online (just like any shopper might), was he providing the jury with any truth about the listed prices he had seen? Or was he simply describing a marketplace he had observed? Were his observations of prices on vendor websites qualitatively different than the former employee's observation of invoices in *Hart*?

"Fair market value may be established by opinion or *circumstantial evidence*." *People v. Grant*, 57 Cal. App. 5th 323, 329 (2020) (emphasis added). Assuming sufficient foundation, weren't the prices observed by the warehouse manager just circumstantial evidence of marketplace data points (subject to the rigors of cross-examination) in the jury's search for a value determination? If so, did the majority in *Portillo* need to describe the price listings as "offer[s] … for the purpose of inviting a marketplace transaction?" Is there an air of legal fiction about that construction?

The concurrence concludes that the listed prices are in fact, purchase prices. Nonetheless, such pricing testimony is exempt from the hearsay bar because the advertising of prices constitutes a "verbal act" or "operative fact" in the form of an offer to contract. Was it necessary to try to fit price listings within the law of words imbued with legal consequences irrespective of the ultimate truth of the words? And if so, as the majority notes, what about the requirement that "verbal acts" and "operative facts" be direct elements of the offense or claim? The element of the offense here was stolen merchandise with a total value exceeding $950, not the price per box of dumbbells observed by the warehouse manager. And did the concurrence come down too hard on the majority in describing the majority's construction – invitations for transactions – as completely irrelevant if no sale would result at the advertised price?

There's a song with a lyric, "he had many questions, like children often do." Why does evidence make me wish there was a dandy book, *Evidence for Idiots*, with a really cool chapter on hearsay? Are these mind-numbing hearsay knots unamenable to consensus? Is the correct doctrinal justification for what seems like something uncontroversial – testimony as to marketplace prices *personally observed* in stores or online – "analytically elusive." *Hart*, 9 Cal. 5th at 448. Does the hearsay rule require the retailer of the dumbbells to testify? Picture the author's head spinning round and round.

In all this hearsay haze, one thing does not appear analytically elusive. Trial judges make evidence rulings on the fly, and if *Hart* and *Portillo* are any indication, quite often correctly. As *Hart* and *Portillo* also reveal, appellate justices, with the luxury of time, quite often disagree with trial judges and each other about the rules of evidence. But maybe that's the point – grappling with evidence is as good as it gets – a sign that judges and lawyers want to get it right. Evidence, it seems, is difficult. And certainly no place for dumbbells.

Grappling with evidence is as good as it gets – a sign that judges and lawyers want to get it right.

***Evidence for Idiots* is a quarterly column presented by Hanson Bridgett's Appellate Group.**

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