

IN THE SUPREME COURT OF THE STATE OF NEVADA

Supreme Court Case No. 87794

OSCAR HERNANDEZ, Appellant v. THE HOME DEPOT, INC.; RIDGE TOOL COMPANY, Respondents.	Electronically Filed May 28 2024 09:36 AM Elizabeth A. Brown Clerk of Supreme Court
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CERTIFIED QUESTION PURSUANT TO NRAP 5

United States District Court
District of Nevada
Case No. 2:22-cv-00938-APG-EJY
Hon. Andrew P. Gordon

RESPONDENT'S ANSWERING BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed:

Respondent, **RIDGE TOOL COMPANY**, is a subsidiary of **EMERSON ELECTRIC CO.**, which is a public corporation which trades on the New York Stock Exchange.

THE HOME DEPOT. INC. (a party not directly related to the issue briefed herein) is a public corporation which trades on the New York Stock Exchange.

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DATED this 28th day of May, 2024.

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TABLE OF CONTENTS

TABLE OF CONTENTS	III
TABLE OF AUTHORITIES	IV
JURISDICTIONAL STATEMENT.....	1
ROUTING STATEMENT	1
STATEMENT OF THE ISSUES PRESENTED FOR REVIEW	1
STATEMENT OF THE CASE.....	1
STATEMENT OF RELEVANT FACTS	2
SUMMARY OF RESPONDENT’S ARGUMENT.....	4
STANDARD OF REVIEW	4
ARGUMENT.....	5
A. THE TREND IN AMERICAN LAW HAS BEEN TO ABSOLVE TRADEMARK LICENSORS OF POTENTIAL PRODUCTS LIABILITY UNLESS IT PARTICIPATED SUBSTANTIALLY IN THE DESIGN, MANUFACTURE OR DISTRIBUTION OF THE PRODUCT.	5
B. APPELLANT’S RELIANCE ON THE APPARENT MANUFACTURER DOCTRINE IS MISPLACED.....	9
C. THE CASE LAW AND ARTICLE CITED BY APPELLANT DO NOT SUPPORT APPELLANT’S POSITION.	11
D. RESPONDENT DID NOT HIDE THE FACT THAT IT WAS A MERE LICENSOR ONLY.....	17
E. TRADEMARK LICENSING FOSTERS ECONOMIC GROWTH, ENABLES PRODUCT INNOVATION AND EMPOWERS THE CONSUMER	19
CONCLUSION.....	24

TABLE OF AUTHORITIES

CASES

<i>Anunciacao v. Caterpillar Inc.</i> , No. 07-10904-JGD, 2011 U.S. Dist. LEXIS 118374 (D. Mass. Oct. 13, 2011) -----	8
<i>Auto Ins. Co. of Hartford Conn. v. Murray, Inc.</i> , 571 F. Supp. 2d 408 (W.D.N.Y. 2008)-----	7
<i>Bova v. Caterpillar, Inc.</i> , 761 N.Y.S.2d 85 (N.Y. App. 2d Dept. 2003) -----	8
<i>Brandimarti v. Caterpillar Tractor Co.</i> , 527 A.2d 134 (Pa. Super. Ct. 1987)-----	12
<i>Burket v. Petrol Plus of Naugatuck, Inc.</i> , 579 A. 2d 26 (Conn. 1990) -----	15
<i>City of Hartford v. Associated Construction Co.</i> , 384 A. 2d 390 (Conn. Super. Ct. 1978)-----	12
<i>Connelly v. Uniroyal, Inc.</i> , 289 N.E.2d 155 (Ill. 1979)-----	13
<i>D’Onofrio v. Boehlert</i> , 635 N.Y.S.2d 384 (N.Y. App. 4th Dept. 1995)-----	7
<i>Fletcher v. Atex, Inc.</i> , 68 F. 3d 1451 (2d. Cir. 1995) -----	15
<i>Harrison v. B. F. Goodrich Co.</i> , 881 So. 2d 288 (Miss. Ct. App. 2004)-----	6
<i>Hebel v. Sherman Equipment</i> , 442 N.E. 2d 199 (Ill. 1982) -----	9, 13, 14
<i>Holman Motor Co. v. Evans</i> , 314 S.E. 2d 453 (Ga. Ct. App. 1984) -----	15
<i>In re Fontainebleu Las Vegas Holdings, LLC</i> , 127 Nev. 941, 955, 267 P.3d 786 (2011)-----	5
<i>In Re TMJ Implants Products Liability Litigation</i> , 880 F. Supp. 1311 (D. Minn. 1995)-----	15
<i>Jackson v. Cold Spring Terrace Property Owners Assoc.</i> , 939 S.W. 2d 762 (Tex. Ct. App. 1997)-----	15
<i>Kasel v. Remington Arms Co.</i> , 101 Cal. Rptr. 314 (Cal. Ct. App. 1972)-----	14
<i>Lou v. Otis Elevator Co.</i> , 933 N.E. 2d 140 (Mass. App. Ct. 2010) -----	8
<i>Nautilus Ins. Co. v. Access Med., LLC</i> , 137 Nev. Adv. Rep. 10, 482 P.3d 683 (2021)-----	4
<i>Nelson v. Int’l Paint Co.</i> , 734 F. 2d 1084 (5th Cir. 1984)-----	16
<i>Nev. Dep’t of Corr. v. York Claims Servs.</i> , 131 Nev. 199, 348 P.3d 1010 (2015) --	5
<i>Saez v. S&S Corrugated Paper Machinery Co., Inc.</i> , 695 A.2d 740 (N.J. App. Div. 1997)-----	14
<i>Schenepf v. Kansas Gas Service Company</i> , Case No. 04-4143-JAR, 2005 U.S. Dist. LEXIS 4167 (D. Kan. Mar. 4, 2005)-----	7
<i>SSP Partners v. Gladstron Invs. (USA) Corp.</i> , 169 S.W. 3d 27 (Tex. App. 2005) -	7
<i>Torres v. Goodyear Tire & Rubber Co.</i> , 786 P.2d 939 (Ariz. 1990) -----	7, 12
<i>Torres v. Goodyear Tire</i> , 867 F. 2d 1234 (9th Cir. 1989)-----	16

<i>Turner v. Bituminous Cas. Co.</i> , 244 N.W.2d 873 (Mich. 1976)-----	14
<i>Yoder v. Honeywell, Inc.</i> , 900 F. Supp. 240 (D. Colo. 1995)-----	15

OTHER AUTHORITIES

Restatement (Third) of Torts: Product Liability (Am. Law Inst. 1998) -----	5
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RULES

NRAP 5(a)-----	5
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JURISDICTIONAL STATEMENT

Respondent does not disagree with Appellant's Jurisdictional Statement.

ROUTING STATEMENT

Respondent does not disagree with Appellant's Routing Statement. The Supreme Court has already issued an Order Accepting Certified Question from the United States District Court for the District of Nevada. [See Doc. # 24-06524.]

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Respondent does not disagree with Appellant's Statement of Issues Presented.

STATEMENT OF THE CASE

This products liability matter arises from the Appellant's accident of March 21, 2021. The accident happened during the course of Appellant's employment while using a RIDGID¹ Model R350RHF Nail Gun that had been purchased by his employer from a local Home Depot store. Following removal to the United States District Court for the District of Nevada, Appellant alleged in his Amended Complaint against The Home Depot, Inc. and Ridge Tool Company that the nail gun malfunctioned and caused a nail to be fired, which struck him in the chest. [AA² 032,

¹ In his Opening Brief, Appellant misspells the trade name at issue. For the sake of clarity, the proper spelling of the trade name is "RIDGID" (in all capital letters).

² For citation purposes, Appellant's Appendix will be referred to as "AA" followed by a page number and line paragraph number, if applicable.

¶ X.] Specifically, he alleged that the nail gun was “defective, unreasonably dangerous, and was not fit for the purposes and uses for which it was intended” [AA 033-034, ¶ XIV], while asserting causes of action premised on strict liability, negligence, breach of express warranty and breach of implied warranty of fitness.

Upon the completion of discovery, Ridge Tool Company moved for summary judgment on the grounds that it and/or its affiliated companies were merely the licensor of the “RIDGID” trade name and played absolutely no role in the design, manufacture and sale of the nail gun or the formulation of its warnings. [AA 060.] In its Order dated December 18, 2023, the District Court granted Ridge Tool Company’s motion for summary judgment as to the negligence, express warranty and implied warranty causes of action. [AA 095.] As to the Appellant’s strict liability claim, the District Court certified a question of law to the Supreme Court of Nevada, while granting leave to Ridge Tool Company to file a new motion after this Court issues its decision. [AA 095-096; AA 109-114.]

STATEMENT OF RELEVANT FACTS

As it relates to the certified question before this Court, the relevant facts – *none of which are disputed in Appellant’s Opening Brief* – are as follows:

“RIDGID” is a trademark owned by Ridgid, Inc. In 2003, the “RIDGID”

trademark was licensed by Emerson Electric Co.³ and its affiliate, Ridgid, Inc., to Home Depot, U.S.A., Inc., pursuant to a trademark license arrangement (“the license arrangement”). Home Depot then used the “RIDGID” trademark to market a line of power tools under the “RIDGID” trade name.

The “RIDGID” power tools marketed by Home Depot under the license arrangement are designed and manufactured by other companies for, and on behalf of, Home Depot. The “RIDGID” power tools marketed by Home Depot under the license agreement are not, and never have been, designed or manufactured by Respondent, Ridge Tool Company, or any of its affiliated companies; nor was Respondent, Ridge Tool Company, or any of its affiliated companies, involved with the formulation of the products’ warnings and instructions. The Model R350RHF nail gun involved in Appellant’s accident is one example of the “RIDGID”-brand power tools marketed by Home Depot under the licensing agreement.

In summary, the only connection between Respondent, Ridge Tool Company, and the Model R350RHF “RIDGID” nail gun involved in Plaintiff’s accident would have been the licensing to Home Depot U.S.A. of the “RIDGID” tradename by its affiliated companies: Emerson Electric Co. and Ridgid, Inc.

³ As stated in Respondent’s NRAP 26.1 Disclosure, Emerson Electric Co. is Ridge Tool Company’s corporate parent.

SUMMARY OF RESPONDENT’S ARGUMENT

The overwhelming trend in American case law during recent decades has been to absolve trademark licensors of strict liability unless the trademark licensor was substantially involved in the product’s design, manufacturing, distribution and/or formulation of warnings. The trend merely reflects the law as it developed following the passage of the Restatement (Second) and the clear rule set forth in the Restatement (Third). It is in the face of this undeniable trend that the Appellant instead relies on cases that discuss the Apparent Manufacturer Doctrine (AMD), but Appellant’s reliance on the AMD is misplaced and the cases cited in his Opening Brief do not support his position.

Indeed, trademark licensing fosters economic growth and product innovation, while empowering the consumer with greater choice, better products and lower prices. A rule adopted by this Court in line with Respondent’s position herein would be consistent with the rule set forth in the Restatements and adopted by many other states and would continue the benefits that trademark licensing imparts to Nevada’s businesses and its consumers.

STANDARD OF REVIEW

The Supreme Court decides certified questions of law on a *de novo* basis. *See, Nautilus Ins. Co. v. Access Med., LLC*, 137 Nev. Adv. Rep. 10, 482 P.3d 683, 687 (2021) (citing *Nev. Dep’t of Corr. v. York Claims Servs.*, 131 Nev. 199, 203, 348

P.3d 1010, 1013 (2015)). The *de novo* standard coincides with the purpose of a certified question, which is to clarify Nevada law when there is “no controlling precedent in the decisions of the Supreme Court or the Court of Appeals of this State.” NRAP 5(a). However, the Supreme Court’s “role is limited to answering the question[] of law posed” to it. *In re Fontainebleu Las Vegas Holdings, LLC*, 127 Nev. 941, 955, 267 P.3d 786, 794-95 (2011). The Supreme Court does not revisit the certifying court’s factual determinations. *Id.* at 953, 267 P.3d at 793.

ARGUMENT

A. The Trend in American Law has been to Absolve a Trademark Licensor of Potential Products Liability unless it Participated Substantially in the Design, Manufacture or Distribution of the Product.

The overwhelming trend in American law for the last few decades has been to restrict the potential liability of trademark licensors to those situations where the licensor substantially participated in the design, manufacture, or distribution of the allegedly defective product.

This trend follows the 1998 publication of the Restatement (Third) of Torts: Product Liability (Am. Law Inst. 1998) [hereinafter, “Restatement (Third)”]. Section 14 of the Restatement (Third) provides, in part, that:

“[o]ne engaged in the business of selling or otherwise distributing products who sell or distributes as its own a product manufactured by another is subject to the same liability as though the sell or distributor were the product’s manufacturer.”

Restatement (Third) § 14.

Within this context, comment D to the Restatement (Third) specifically addresses the liability of trademark licensors and states that the rule set forth in Section 14:

does not, by its terms, apply to the owner of a trademark who licenses a manufacturer to place the licensor's trademark or logo on the manufacturer's product and distribute it as though manufactured by the licensor. In such a case, even if purchasers of the product might assume that the trademark owner was the manufacturer, the licensor does not 'sell or distribute as its own a product manufactured by another' . . . Trademark licensors are liable for harm caused by defective products distributed under the licensor's trademark or logo when they participate substantially in the design, manufacture, or distribution of the licensee's products. In these circumstances they are treated as sellers of the products bearing their trademarks.

Restatement (Third) § 14 cmt. d (emphasis added).

Therefore, under the Restatement (Third)'s rule, absent substantial participation in the design, manufacture or distribution of the product, the trademark licensor cannot be liable for an alleged product defect. Courts from around the United States soon followed with quick adaptations of the Restatement (Third)'s rule:

- *Harrison v. B. F. Goodrich Co.*, 881 So. 2d 288, 292 (Miss. Ct. App. 2004) (relying on the Restatement (Third), the Court held that “there is no liability for an allegedly defective product on the part of a trademark

licensor who was not involved in the design, manufacture or sale of the product.”)

- *SSP Partners v. Gladston Invs. (USA) Corp.*, 169 S.W. 3d 27, 40 (Tex. App. 2005) (“trademark licensor may be liable as an apparent manufacturer when the licensor is *significantly* involved in the manufacturing, marketing, or distribution of the defective product.”) (emphasis added) (citing *Torres v. Goodyear Tire & Rubber Co.*, 786 P.2d 939, 945 (Ariz. 1990)).
- *Schenepf v. Kansas Gas Service Company*, Case No. 04-4143-JAR, 2005 U.S. Dist. LEXIS 4167, at *12-13 (D. Kan. Mar. 4, 2005) (claim against a trademark licensor was viable where there is “substantial or integral involvement in the manufacture, sale, distribution, or marketing of the alleged defective product.”)
- *Auto Ins. Co. of Hartford Conn. v. Murray, Inc.*, 571 F. Supp. 2d 408, 423 (W.D.N.Y. 2008) (trademark licensor not liable “where there is no evidence of ‘actual control’ over the production, including any capacity to exercise control over product quality, or the distribution, including sales.”); *see also*, *D’Onofrio v. Boehlert*, 635 N.Y.S.2d 384, 385 (N.Y. App. 4th Dept. 1995), where New York’s Appellate Division upheld the trial court’s decision granting defendant Spalding’s (a trademark licensor)

- motion for summary judgment because a “trademark licensor cannot be held liable for injuries caused by a defective product bearing its label where the licensor did not design, manufacture, sell, distribute or market the allegedly defective item.”; *Bova v. Caterpillar, Inc.*, 761 N.Y.S.2d 85, 87 (N.Y. App. 2d Dept. 2003) (products liability could not be imposed on licensor where, although the name “Caterpillar” was on the forklift involved in the accident, plaintiff did not offer evidence that Caterpillar, Inc. had participated in the manufacture, sale or distribution of the forklift).
- *Lou v. Otis Elevator Co.*, 933 N.E. 2d 140, 148 (Mass. App. Ct. 2010) (trial court did not commit error by instructing the jury from Sec. 14 of the Restatement (Third)).
 - *Anunciacao v. Caterpillar Inc.*, No. 07-10904-JGD, 2011 U.S. Dist. LEXIS 118374, at *10 (D. Mass. Oct. 13, 2011) (only a nonseller trademark licensor which “participates *substantially* in the design, manufacture or distribution of the licensee’s product may be held liable under Massachusetts law as an apparent manufacturer.”) (emphasis added)

The trademark licensing arrangement was Respondent’s, Ridge Tool Company’s, only involvement (through affiliated companies) with the Model R350RHF RIDGID nail gun involved in Appellant’s accident. The undisputed record demonstrates that Ridge Tool Company had no role whatsoever with the

Model R350RHF nail gun’s design, manufacture and distribution or the formulation of its warnings or instructions. To the contrary, the undisputed evidence is that Ridge/Emmerson companies licensed the “RIDGID” tradename to Defendant, Home Depot – which then marketed a line of power tools, including the Model R350RHF RIDGID nail gun at issue, that were designed and marketed by third-party companies. [AA 072, ¶ 5.]

B. Appellant’s Reliance on the Apparent Manufacturer Doctrine is Misplaced

Appellant cites the Apparent Manufacturer Doctrine (AMD) to support his position. Appellant’s reliance on the AMD is curious, at best, since the AMD is a separate and distinct potential basis for liability than that of a trademark licensor’s when based on substantial participation in the product’s design, manufacture, or distribution.

First developed in the early 20th century⁴, the AMD was applied to wholesale and retail sellers that placed their own labels or trademarks on goods that had been manufactured by others⁵. These “*apparent* manufacturers” then took the position (to avoid potential liability) that, as a non-manufacturer who simply placed its logo or

⁴ This analysis of the historical development of the AMD is taken, in part, from *Hebel v. Sherman Equipment*, 442 N.E. 2d 199, 201 (Ill. 1982) (superseded by statute), one of the cases discussed in Appellant’s Opening Brief.

⁵ One common example of this practice is Sears’ historic use of its well-known “Craftsman”, “Die-Hard”, and “Kenmore” labels for its line of power tools, automotive batteries and appliances.

trademark on the product, it could not be liable for the product's defect or non-performance. Against this setting, and at a time when notions of modern-day "products liability" law had yet to be developed in American jurisprudence, the AMD emerged to prevent the wholesale/retail seller from denying that it manufactured the goods in question, especially where the trademark or logo likely led reasonable consumers to believe that wholesale/retail seller had indeed manufactured the goods.

Two justifications for the development and use of the AMD emerged: (i) to protect the consumer who reasonably expected that the product in question carried the level of quality that the consumer had come to expect from the apparent manufacturer, and (ii) to provide the injured consumer with a target if the identity of the actual manufacturer (as opposed to the apparent manufacturer) was not disclosed or was otherwise unavailable.

The AMD as applied by Courts throughout the United States eventually converged in Section 400 of the Restatement (Second) of Torts when it was published in the 1960s. However, the very wording of the Restatement (Second) applies the AMD only to those that actually *sell* the product:

- The title to Section 400 of the Restatement (Second) is "*Selling as Own Product Chattel Made by Another*" (emphasis added);

- The text of Section 400 of the Restatement (Second) states that it applies to an entity which, “puts out as (its) own product a chattel manufactured by another”; Comment A to Section 400 explains that the term ‘one who puts out a chattel’ includes “anyone who *supplies* it to others for their own use or for the use of third persons, *either by sale or lease or by gift or loan*” (emphasis added).

As such, Section 400 of the Restatement (Second) applies only to entities that actually sell or otherwise transfer the goods at issue. Trademark licensors like Ridge Tool Company and its affiliated companies, which were otherwise not involved in the nail gun’s design, manufacture and/or distribution, do not fall in that category.⁶ Accordingly, the AMD has no applicability to Ridge Tool Company and Appellant’s reliance on it is entirely misplaced.

C. The Case Law and Article Cited by Appellant Do Not Support Appellant’s Position.

Appellant seeks to support his position by citing one outlier case and cases that do not actually discuss the potential strict liability of a trademark licensor. Most certainly, Appellant cites cases decided before the adoption of the Restatement (Third) and the development of the modern trend of absolving trademark licensors

⁶ There is no dispute that The Home Depot sold the nail gun to Appellant’s employer and that Ridge Tool Company never took possession of it.

of strict liability unless they participated substantially in the product's design, manufacturing and/or distribution.

For example, the *Brandimarti* case cited by the Appellant is clearly in the minority. See *Brandimarti v. Caterpillar Tractor Co.*, 527 A.2d 134 (Pa. Super. Ct. 1987). If nothing else, *Brandimarti* was decided well-before the Restatement (Third) was published. Its holding runs contrary to the very requirement of the Restatement (Second) that any finding of liability against a trademark licensor must be limited to one that actually sells or distributed the product⁷. By contrast, cases decided in the same time period as *Brandimarti*, like *Torres v. Goodyear Tire & Rubber Co.*, 786 P. 2d 939 (Ariz. 1990), imposed liability against the trademark licensor only where it was inextricably involved in providing the licensee with production formulas and specifications, retained the right to approve the licensee's labeling, marketing, packaging and advertising and where the licensor also retained approval over materials used by the licensee.⁸ *Id.* at 947. With cases like *Brandimarti* in conflict

⁷ It is not even clear from the published opinion in *Brandimarti* whether Caterpillar Tractor Company had issued a trademark license to Towmotor, Inc, the manufacturer of the forklift at issue. What is clear from the published opinion, however, is that "Caterpillar did not manufacture or sell the forklift at issue". See *Brandimarti*, 527 A.2d at 139.

⁸ See also, *City of Hartford v. Associated Construction Co.*, 384 A. 2d 390, 392 (Conn. Super. Ct. 1978) (liability against the trademark licensor found where it designed, advertised, manufactured, distributed, sold, nationally promoted and issued instructions and specifications for the product).

with the very wording of the Restatement (Second), it is little wonder that the Restatement (Third) clarified the potential liability of trademark licensors who are not otherwise involved in the product's design, manufacture or distribution of the product.

The other cases cited by the Plaintiff are likewise unavailing. They too were all decided before the Restatement (Third) was ever published, whereas the post-Restatement (Third) cases cited in this Brief clearly show the modern trend in the case law. Appellant relies heavily on the *Connelly* case from the Illinois Supreme Court. However, *Connelly* did not actually impose liability on the licensor (Uniroyal). *See Connelly v. Uniroyal, Inc.*, 289 N.E.2d 155 (Ill. 1979). It simply held that the mere fact that the licensor was not in the chain of the product's distribution was not dispositive on the issue, while it remanded the case to the trial court for further proceedings consistent with the case's holding. *Id.* at 412. Just a few years later, in *Hebel*, the Illinois Supreme Court concluded that the trademark licensor was not liable under the Restatement (Second), while explaining that its holding in *Connelly* was based on the trademark licensor "integral involvement" in the overall production of the product.⁹ *Hebel v. Sherman Equipment*, 442 N.E.2d 199, 204 (Ill. 1982) (superseded by statute).

⁹ The Supreme Court of Illinois in *Hebel* stated, "Comparing the facts of the two cases, it is evident that the circumstances that persuaded us that Uniroyal should be

Two other cases cited by Appellant involve Michigan’s adaption of “successor liability” (see *Turner v. Bituminous Cas. Co.*, 244 N.W.2d 873 (Mich. 1976)) and New Jersey’s adoption of the “product line” theory of “successor liability” (see *Saez v. S&S Corrugated Paper Machinery Co., Inc.*, 695 A.2d 740 (N.J. App. Div. 1997)) – neither case appearing to contain any discussion whatsoever of the AMD. Finally, in *Kasel*, the licensor was held liable for the underlying product defect only because it was found to be inextricably involved with the product’s development – facts far afield from those before this Court.¹⁰ *Kasel v. Remington Arms Co.*, 101 Cal. Rptr. 314 (Cal. Ct. App. 1972).

Although Appellant’s Opening Brief would have the reader believe that judicial findings of liability against trademark licensors were common and widespread under various interpretations of the Restatement (Second), that contention is belied by the historic record. Not only did *Hebel* absolve the trademark licensor, but other cases did so as well for various reasons articulated by the court.

responsible for defective products manufactured by its licensee are absent here.” *Hebel*, 442 N.E.2d at 205.

¹⁰ The majority’s decision in *Kasel* closed by noting that its decision “is confined to the specific facts of this case,” including that the licensor (Remington) had caused the manufacturer to be formed, equipped and launched; had personnel at the manufacturer’s facility; had trained the manufacturer’s key personnel; had stock ownership, officers and directors in common with the manufacturer; had financed, and had received substantial revenue from, the manufacturer; and had rights to control over the quality of the goods produced by the manufacturer. *Kasel*, 101 Cal. Rptr. at 334.

See, e.g., In Re TMJ Implants Products Liability Litigation, 880 F. Supp. 1311, 1318 (D. Minn. 1995), *aff'd* 113 F. 3d 1484 (8th Cir. 1996) (Plaintiffs did not allege that they relied on the reputation of the licensor in making the purchase decisions)¹¹; *Burket v. Petrol Plus of Naugatuck, Inc.*, 579 A. 2d 26, 35 (Conn. 1990) (trademark licensor did not actually sell or distribute the allegedly defective product and was not involved in the product's design or manufacturing); *Fletcher v. Atex, Inc.*, 68 F. 3d 1451, 1465 (2d. Cir. 1995) (trademark licensor did not participate in the manufacturing process); *Yoder v. Honeywell, Inc.*, 900 F. Supp. 240, 246 (D. Colo. 1995) (no evidence that the trademark licensor provided specifications for the allegedly defective produce or exercised significant control over the product's production); *Jackson v. Cold Spring Terrace Property Owners Assoc.*, 939 S.W. 2d 762,763-64 (Tex. Ct. App. 1997) (licensor's involvement was limited to merely displaying the trademark on the product and providing some marketing assistance to the licensee); *Holman Motor Co. v. Evans*, 314 S.E. 2d 453, 455 (Ga. Ct. App. 1984) (trademark licensor was not liable as apparent manufacturer where the identity of the actual manufacturer was disclosed).¹²

¹¹ There could be no such reliance under the facts before this Court as it is undisputed that Appellant was not the actual purchaser of the nail gun at issue.

¹² As discussed in the following section of this Brief, Respondent fully disclosed the name of the actual manufacturer of the nail gun at the earliest stages of this litigation.

Moreover, even the 2018 Jordan Lewis article¹³ cited by the Appellant does not help his cause. In that article, the author makes the following points:

- Citing Sec. 14 of the Restatement Third), it states that the AMD “*was designed only to extend manufacturer liability to retail sellers who place their trademark on goods. Thus, unless the trademark licensor also sells the goods . . . they cannot be held liable under the doctrine.*”
- The expansive view of the AMD reflected in cases like *Brandimarti* (Pennsylvania) and *Hebel* (Illinois) is the minority view;
- Most states have limited the reach of the AMD, while others (Michigan; Arizona; Missouri; Texas; Wisconsin) have refused to adopt the doctrine either by legislation or case law¹⁴.
- Other jurisdictions (New York, Connecticut, Massachusetts, Kansas, and Colorado) apply the AMD only to those instances where the licensor plays

¹³ The 2018 Jordan Lewis article was an exhibit to the Respondent’s Reply Brief submitted to the district court. It was not made part of the Appendix submitted by the Appellant and is, instead, made part of the Respondent’s Appendix. [See RA 011-016.]

¹⁴ This includes the Ninth Circuit’s rejection of the AMD under Arizona law in *Torres v. Goodyear Tire*, 867 F. 2d 1234, 1236 (9th Cir. 1989), while noting that, even under an analysis of the Restatement (Second)’s AMD rule, Goodyear had not “put out” or sold the product. *See also, Nelson v. Int’l Paint Co.*, 734 F. 2d 1084, 1087 (5th Cir. 1984) (rejecting, under Texas law, application of the AMD under Sec. 400 of the Restatement (Second)).

a significant role in the production, marketing or chain of distribution of the product.

In summary, the case law and article cited by the Appellant in his Opening Brief do not support his position. *Brandimarti* is actually an outlier. Other cases decided at about the same time as *Brandimarti* reached the conclusion that a trademark licensor could be strictly liable for a product defect only where it participated substantially in the product's design, manufacturing, distribution and/or the formulation of its warnings.

D. Respondent Did Not Hide the Fact that it was a Mere Licensor Only

A recurring theme in Appellant's argument, both before the federal district court and in his Opening Brief, is his statement that the "*identity of the true manufacturer was not revealed to [Appellant] until after discovery closed in the federal action*" [Appellant's Opening Brief ("AOB") at p.6.] – the obvious implication being that Respondent laid a trap during discovery in the federal district court and then sprung a surprise on the Appellant with its motion for summary judgment. Although not directly related to the certified question before this Court, Respondent would be remiss if it did not address the inaccuracy of the statement.

In fact, Ridge Tool Company's status as the mere licensor of the "RIDGID" tradename was first made known to the Appellant in its Petition for Removal dated

June 13, 2022 [AA 073-074, ¶¶ 6-7] and then, almost immediately thereafter, in par. 5 of Respondent’s Answer of June 20, 2022. [AA 049.]

Subsequently, par. 3 of Exhibit B to Respondent’s Rule 26 Initial Disclosure, dated August 10, 2022, [RA 020, ¶ 3] mentioned “*Ridge Tool Company’s licensing of the ‘RIDGID’ trade name and the company’s non-involvement in the product’s design and manufacture or the formulation of its warnings*”, and identified the product manufacturer, Techtronic Industries Power Equipment (formerly known as “One World Technologies, Inc.”) at par. 4 [RA 020, ¶ 4]. In addition, several of the documents made part of Respondent’s Rule 26 disclosure, including the nail gun’s Repair Sheet and Operator’s Manual, also identified to any reader, including the consumer, the name of the product manufacturer. [RA 022, 024, 029, 030, 031.]

Plaintiff’s deposition took place on December 12, 2022. A representative of the product manufacturer, David Anderson, was present for the testimony and the subsequent product inspection that took place that afternoon at Plaintiff’s counsel’s office. He was introduced to Plaintiff and his counsel, both of whom were told of his association with Techtronics, and his name appears on the official transcript as a representative of “Techtronic Industries”. At the start of the deposition, he was again introduced to the Plaintiff on the record as “*David Anderson of Techtronic Industries, One World Technologies*”. [RA 035.]

Appellant and his counsel, for whatever reason, ignored all of the above. They were never deceived about Ridge Tool Company's status as the mere licensor of the "RIDGID" trade name and they were never deceived as to the identity of the actual product manufacturer. Instead, they allowed discovery in the federal district court to close without any Interrogatories and/or Requests for Production or, for that matter, without any discovery whatsoever on the licensing issues against Respondent, Ridge Tool Company. They took no deposition of a Ridge Tool Company witness. That was Appellant's decision, but he cannot now complain of "prejudice."

E. Trademark Licensing Fosters Economic Growth, Enables Product Innovation and Empowers the Consumer

As the Court is aware, trademark licensing involves a trademark owner (the "licensor") that grants permission to another entity (the "licensee") to use that trademark, or "brand", on terms and conditions agreeable to both parties.¹⁵

Because one of the historic functions of a trademark was to indicate the manufacturing source of a product, trademark licensing was once impossible

¹⁵ For reference, Respondent has utilized the following sources as an overview of this topic and attached for convenience to Respondent's Appendix: TRADEMARK LICENSING MODULE 12, available at https://www.wipo.int/export/sites/www/sme/en/documents/pdf/ip_panorama_12_learning_points.pdf (last accessed May 16, 2024); Professor William Hennessey, *The Role of Trademarks in Economic Development and Competitiveness*, FRANKLIN PIERCE LAW CTR., previously retrieved at http://ipmall.info/hosted_resources/Hennessey_Content/RoleofTrademarksinEconomicDevelopmentandCompetitiveness.pdf.

because of the confusion that would result if a product was manufactured by one company but carried the name or logo of another. That changed with the passage of the Lanham Act in the 1940s which, among other things, allowed for trademark licensing provided that the licensor retained some interest and control over the quality of goods sold in association with the trademark. This retained interest served to ensure that the consumer will receive the same quality of goods no matter where, and by what entity, the trademarked product is manufactured.

The exponentially greater use of trademark licensing since passage of the Lanham Act has resulted in trademark-based merchandising where the trademarks of popular companies, sports teams, universities and the like carry with them significant consumer recognition and appeal, resulting in better sales (at a better price) of otherwise common goods or services. In the case of new products, trademark licensing allows a company to launch initial sales after teaming-up with the owner/licensor of a recognized brand. Alternatively, the two companies can use trademark licensing to “co-brand” a product or service. Finally, through trademark licensing, companies can make known to the market the fact that their product contains a valued ingredient or component – for example, computer manufacturers’ use of “Intel inside” – or that their product meets certain technical standards.

Trademark licensing undoubtedly provides material benefits to the licensor and licensee. Trademark licensing generates royalties to the licensor, fosters

territorial expansion and allows companies to take advantage of each other's manufacturing, distribution, sales, and marketing expertise. Trademark licensing allows companies to enter new product markets, monetize old or discontinued trademarks that otherwise no longer have any value and, in some cases, convert trademark infringers into valued partners.

As a result, the use of trademark licensing is pervasive throughout the worldwide economy. It certainly is pervasive in Nevada's economy. But the consumer also enjoys substantial benefit from the free use of trademark licensing. Consumers every day rely on known brands of goods and services and can make their product selection in a matter of seconds based on the brand's perceived quality or distinctive attribute, both of which is conveyed by the presence of the licensed trademark. Without access to the brand, the consumer would otherwise be unsure about the product's quality, reliability, and safety. Purchase decisions would take hours, not seconds.

Accurate market information in the form of freely-licensed trademarks and brands, therefore, saves the individual consumer time and effort in making market decisions. By multiplying an individual consumer's saved time by the millions of consumers who purchase a product every day based on its recognized licensed trademark, it is easy to see how society saves millions of hours of productive consumer activity every day by the free use of trademark licensing.

When a brand or trademark is licensed, the good will of the brand or trademark is carried over to the finished product. This facilitates the process of “product differentiation” among consumers, permitting the consumer to exercise “freedom of choice” when selecting among multiple brands of the same product – cola-flavored soft drinks, for example – for purely subjective reasons or for no reason at all. This process of “product differentiation” reinforces the autonomy of the individual consumer. In essence, the consumer becomes “king” in the buy/sell process.

Because trademark licensing allows brands to enter new markets, price competition results when multiple producers lower their prices to gain market share. The prices of multiple brands of the same product are much lower than they would be with only a single brand.

Brand competition is another consumer benefit of the widespread use of trademark licensing. In addition to simply lowering prices to match a competitor, manufacturers who gain access to a product line or new market through the use of a licensed trademark will often add new features, increase warranty protections or use other non-price methods to increase market share. Economic efficiencies improve and, again, the consumer benefits.

When an old and unused trademark is licensed to another company and the licensee then enters a new geographic market or uses the trademark to market a new product, the licensee will need to advertise, hire new employees in legal, risk

management, accounting, regulatory, design, marketing, and other areas. Some of these tasks are “farmed out” to third party companies. In the process, economies are expanded, tax revenue is generated, and jobs are created. The consumer again benefits by this economic expansion.

If this Court were to adopt a rule that imposed strict liability on trademark licensors simply for licensing the trademark and nothing else, the frequency of trademark licensing would undoubtedly drop due to the inevitable “chilling effect” that the rule would create. Potential licensors would be less likely to license a trademark or brand knowing that they might be strictly liable for a product defect despite not being involved in the product’s design, manufacturing, distribution processes and/or the formulation of its warnings. Less trademark licensing would result in less product development, decreased availability of consumer goods in new markets, less price competition, less product differentiation and, in the end, fewer jobs. The marketplace sees less product innovation, decreased efficiencies, higher prices, and fewer jobs. The consumer, including those in Nevada, loses power.

For these reasons, this Court should not impose strict liability onto licensors who simply license the trademark or brand without meaningful and substantial involvement in the product’s design, manufacturing, distribution and/or formulation of warnings. In this way, Nevada would join the clear majority of other states in

facilitating trademark licensing as an important tool for expanding markets, creating jobs and empowering the consumer.

CONCLUSION

For the reasons set forth herein, this Court should adopt a rule that absolves trademark licensors of strict liability for product defects except where the trademark licensor substantially participated in the product's design, manufacturing, distribution and/or formulation of the product's warnings.

DATED this 28th day of May, 2024.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style requirements of NRAP 32(a)(6) because: This Answering Brief has been prepared in proportionally spaced typeface using Microsoft Office Word with 14-point font size in Times New Roman type style.

2. I further certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points, and does not exceed 30 pages.

3. I hereby certify that I have read this Answering Brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to a page of the transcript or appendix where the matter relied on is to be found.

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4. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 28th day of May, 2024.

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