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IN THE COURT OF APPEALS OF THE STATE OF NEVADA

CHARLES SCHUELER, Appellant, v. AD ART, INC., Respondent.	Court of Appeals Case No.: 75688 - COA Dist. Ct. Case No.: A-15-722391-C **APPELLANT'S SUPPLEMENTAL BRIEF**

Appeal from the Eighth Judicial District Court of the State of Nevada
in and for the County of Clark
The Honorable Michael P. Villani, District Court Judge

APPELLANT'S SUPPLEMENTAL BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases cited

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Statutes cited

Treatises cited

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Issue Presented for Review

What is the proper definition of a product under Nevada products liability law for purposes of strict liability?

Points and Authorities

1. Relevant Facts

In order to properly answer the question posed by this Court, it is first necessary to understand the characteristics of the sign at issue. As with most pylon signs, the MGM sign has three basic components: the load bearing pillar to support the sign, the sign cabinet, and the cabinet display. In this case, Charles Schueler was tasked with replacing the LED message display (the cabinet display) on the MGM pylon sign in Las Vegas, Nevada. (Vol. I, p. 123). To do so, Mr. Schueler was standing inside the sign cabinet.

In this case, the cabinet of the sign (the portion at issue) was manufactured by Ad Art in Stockton, California and then brought to Las Vegas in pieces for installation. (Deposition of Terry Long at 53:12-17, Vol. II at p. 235). The sign cabinet was covered with a material known as Alucobond. Alucobond is essentially two pieces of aluminum with rubber between them. (Deposition of Douglas Head at 35:20-36:4, Vol. III, p. 308). As Mr. Schueler was working within the sign cabinet, he stepped onto a triangular piece of

Alucobond. The Alucobond gave way, causing Mr. Schueler to fall 150 feet to the ground. (Vol. I, p. 5 and Vol. I, p. 123).

Here, it is undisputed that the building permit produced in this case related to the foundation (or load bearing pillar) of the sign, and not the portion of the sign that is in dispute. (*See*, Vol. I, page 060). In fact, the building permit repeatedly referenced by Ad Art (as alleged support for the proposition that the sign is a building), relates only to the "foundation" of the sign. It specifically excludes the superstructure. (*See*, Vol. I, page 060). This interpretation was confirmed by Douglas Head (current executive Vice President of the current Ad Art corporation and former employee of the previous Ad Art corporation), when he testified the permit was for the foundation, not the sign. (Deposition of Douglas Head at 42:4-6, Vol. III at p. 310). As such, the question in this case is not whether the load bearing pillar that was built from the ground up to support the sign is a product. The question is whether the sign cabinet that Mr. Resoso was standing in is a product.

2. Burden of Proof

As a preliminary matter, Mr. Schueler must remind the Court he is appealing a decision on a Motion to Dismiss. As such, all facts must be construed in his favor. Buzz Stew, LLC v. City of N. Las Vegas, 124 Nev. 224,

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228 (2008). Mr. Schueler does not have the burden to prove the sign cabinet is a product; Ad Art has the burden to prove it is *not* a product.

3. Nevada Case Law

Ad Art has relied on Calloway to convince the court the sign cabinet is a building, not a product. In Calloway v. City of Reno, homeowners sued the builders of their townhouses arguing their homes were defective products. *See*, Calloway v. City of Reno, 116 Nev. 250 (2000). In making its decision on that case, this Court gave a detailed analysis of the difference between manufactured goods and buildings. Calloway at 269-270. Specifically, this Court indicated buildings differ from manufactured goods in that they are: 1) one-of-a-kind; 2) not subject to prototypes; 3) generally designed by one firm and built by another; 4) may change from original design to final product; and 5) have a longer expected useful life. Id. Without defining "product," this Court concluded the differences between buildings and manufactured goods is a reason to treat them differently under the law.

Here, Ad Art asks this Court to look at one Calloway factor, namely that the MGM sign is one-of-a-kind, and conclude it cannot be considered a product under strict product liability law. While the MGM sign may be one-of-a-kind, it has many characteristics of manufactured goods. For example, it could have been subject to prototypes. It was both designed and built by Ad

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Art. Finally, it is possible the final product was the same as the original design – though the facts surrounding this factor are unknown.

Although the above analysis is helpful in distinguishing buildings from manufactured products and in addressing previous arguments made before the trial court, it is not exactly on point regarding the question posed by this Court. Neither the Nevada legislature nor this Court have defined the word "product" insofar as strict product liability is concerned.

4. Case Law and Statutes from Other Jurisdictions

a. Statutes

The Nevada legislature has not defined "product." Our state is not alone in its lack of a definition of "product". The word remains largely undefined under the law. An exception to this is Indiana, which has codified the definition of "product" for purposes of product liability law as "any item or good that is personalty at the time it is conveyed by the seller to another party." Ind. Code section 34-6-2-114(a). Indiana also clarifies that the definition does not apply to transactions that are primarily the sale of a service. Ind. Code section 34-6-2-114(b).

Another exception is Washington. Pursuant to Rev. Code Wash. (ARCW) section 7.72.010(3), "'Product' means any object possessing intrinsic value, capable of delivery either as an assembled whole or as a component part

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or parts, and produced for introduction into trade or commerce. Human tissue and organs, including human blood and its components, are excluded from this term." Rev. Code Wash. (ARCW) section 7.72.010. The remaining states do not appear to have codified the definition of "product" for purposes of product liability.

b. Recent New York Decision

Given there are few statutes to analyze, it is also prudent to analyze existing case law nation-wide. One of the most recent decisions regarding the definition of "product" came from the New York Court of Appeals. *See*, Matter of Eighth Jud. Dist. Asbestos Litig., 33 N.Y. 3d 488 (N.Y. Ct. App., June 11, 2019). In that case, the plaintiff worked as a "lid man" on a 13-foot-high, 1 ½ foot-wide "coke oven" from 1966 to 1993. A "coke oven" burns coal at a high enough temperature to make "coke," which is then used to make steel. Id. at 491. A "coke oven battery" is a collection of individual coke ovens lined up together and built into the wall of a building. Id. In the case reviewed by the New York court, the coke oven in dispute could hold more than 25 tons of coal at once and was part of a 10-story tall, 3 football-field-long, coke battery. Id. at 502-03.

There, the plaintiff died from cancer attributed to coke oven emissions. After his estate sued the manufacturer of the coke oven for strict product

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liability and failure to warn, the defendant moved for summary judgment arguing coke ovens are not products. The trial court found coke ovens were products because the defendant marketed many different types of coke ovens throughout North America, the customer could select the number of ovens they wanted for their coke oven battery, and the manufacturer published a brochure explaining the types of ovens available and their parts. Id. at 493. As such, despite their massive size, "sound social policy" led the court to conclude the manufacturer "was in the best position to assess if the coke ovens it was marketing were safely made…". Id.

The appellate court of New York reversed, saying it would take approximately 1,460,000 labor hours to build the coke oven battery at the place where the plaintiff had worked. As such, the appellate court concluded the manufacturer provided a service of installing the battery, not a product. Id.

The highest court of New York reversed again noting the manufacturer had full control over the manner in which the ovens were built and it received financial benefit from the production process. Id. at 497. The manufacturer was also in the best position to assess the safety of the ovens. Id. at 498. The highest court also noted that even if coke ovens batteries are taxable as real

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property[1], they can still be products under strict product liability – just as elevators and large turbines can. Id. at 500. The court found size and immobility are irrelevant to the question of whether something is a product. Id. The highest court also rejected the notion that the manufacturer simply provided a service because it took over 1.4 million hours to build the coke oven battery. It noted the presence of a service component does not mean the item is not a product. Id. at 501. In sum, the court noted public policy dictated reversal because the defendant failed to meet its burden to prove the ovens were not a product. Id. at 502. (Note: the burden was on the defendant because this was a motion for summary judgment – much like the case at hand).

c. Public Policy Approach

Similar to the New York decision outlined above, many courts have taken the approach that "product" should not be defined, rather, it should be analyzed on a case-by-case basis, based on public policy considerations. For example, in Illinois, the courts have taken the approach that the word "product" does not need to be defined; instead, Illinois courts consider the public policies underlying strict liability laws when determining whether to impose liability. Bastian v. Wausau Homes, Inc., 620 F. Supp. 946, 949 (N.D. Ill., 1985).

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[1] In a previous case, the highest court in New York found coke oven batteries were taxable as real property.

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When asking whether something was a "product" from the public policy approach, the First District Court of Appeals in Illinois analyzed whether a large grain storage tank was a product. There, Seegers Grain Company hired KCM construction company to build a large one-million-bushel grain storage tank. As part of the contract, KCM purchased large steel plates from U.S. Steel Corporation. Unfortunately, the steel plates were not suitable for use in extreme cold. A little over a year after the grain storage tank was completed, temperatures plunged to -10°F and the tank violently imploded, causing millions of dollars in damages. *See*, Seegers Grain Co. v. United States Steel Corp., 218 Ill. App. 3d. 357 (1991). The Illinois court found that even though the large steel plates were welded together into a grain tank after delivery, they were products for purposes of strict product liability. Id. at 367. The Illinois court also explained the basis for this decision was to advance the policy considerations of product liability law. Id. at 368. U.S. Steel had the opportunity to warn of a danger or instruct on the proper use of the plates but failed to do so. *See*, id. at 367. Specifically, U.S. Steel was in the best position to warn that the steel it sold was not suitable for extreme cold – something a typical grain company would not know.

Arizona agrees with the Illinois' approach and indicates that "an object or instrumentality" will be a product "if such classification serves the policy

considerations of strict liability tort doctrine." Menendez v. Paddock Pool Constr. Co., 172 Ariz. 258, 264 (1991).

Likewise, Hawaii courts have specifically declined to define product "in order to cope with technological advances." Kaneko v. Hilo Coast Processing, 65 Haw. 447, 455 (1982). Instead, Hawaii courts make the determination on a case-by-case basis after looking at the applicable case law, public policy considerations, comments to the Restatement, and the Model Uniform Products Liability Act. Id. Based on those considerations, the Supreme Court of Hawaii found an escalator was a product for purposes of a child's claim against the escalator manufacturer, but it was not a product for purposes of her claim against the Sears store where it was installed. Leong v. Sears Roebuck & Co., 89 Haw. 204, 211 (1998). In sum, for Hawaii courts, the issue is not whether the specific item is a "product", it is whether the item should be considered a product against a specific defendant in a specific case.

Montana courts also rely on public policy, but take a narrower view of the definition of "product." Specifically, Montana has focused on whether the plaintiff has the ability to pinpoint a negligent party or act in the manufacturing process. *See*, Harrington v. LaBelle's of Colorado, 235 Mont. 80, 84 (1988); Haedt v. H&H Lumber, 1993 Mont. Dist. LEXIS 484, *4 (1993). If so, the plaintiff may be required to assert a general negligence claim rather than a

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strict product liability claim. The primary concern of the court, however, is ensuring injured parties have an adequate remedy at law. Id.

d. Restatement Approach

Other courts have relied on treatises for a definition of "product." For example, California courts have relied on the Restatement Third of Torts, Products Liability, section 19(a), for a definition of "product." *See*, Johnson v. United States Steel Corp., 240 Cal App. 4th 22, 31 (2015). According to the Restatement, "product" is defined as any "tangible personal property distributed commercially for use or consumption." Id. California Courts have also relied on the Restatement to define "component parts" as including "raw materials, bulk products, and other constituent products sold for integration into other products." Id. at 33. Under California case law, manufacturers of component parts may be held liable for defective components that cause harm. Id. at 34. Likewise, Missouri courts implied in dicta that the Restatement of Torts (Third) definition of "product" was persuasive, noting a "product" is "tangible personal property distributed commercially for use or consumption." *See*, Hobbs v. BSA, Inc., 152 S.W. 3d 367, 372 (2004). Similarly, New Jersey courts referred to the Restatement (Second) definition when finding asbestos is a product – though this ruling came out before the Restatement (Third) was

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written. *See*, Fischer v. Johns-Manville Corps., 193 N.J. Super 113, 132 (1984).

Nevada has also previously turned to the Restatement when analyzing questions regarding strict product liability. Specifically, the Nevada Supreme Court relied on the Second Restatement when confronted with the question of whether real property was a product. *See*, Calloway v. City of Reno, 116 Nev. 250, 268-270 (2000) (overruled on other grounds). Unfortunately, although the Second Restatement does contain guidance regarding strict product liability, it does not contain a definition of "product." This gap is filled by the Third Restatement. Pursuant to the Third Restatement, a "product" is:

> …tangible personal property distributed commercially for use or consumption. Other items, such as real property and electricity, are products when the context of their distribution and use is sufficiently analogous to the distribution and use of tangible personal property that it is appropriate to apply the rules stated in this Restatement.

Restatement (Third) of Product Liability at section 19(1). This definition is especially compelling given the Nevada Supreme Court's previous reliance on the Restatements for guidance.

e. Independent Definition Approach

Other courts have fashioned their own definitions of "product". In Connecticut, for example, while there is no published decision on the issue, unpublished decisions have defined product as "any item, thing, or commodity

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which, upon acquiring its physical existence and identity, through the process of manufacture or otherwise, is put in the stream of commerce either by sale, for use, consumption or resale, or by lease or bailment." *See*, McCarthy v. ECP-PF: CT Operations, Inc., 2016 Conn. Super. LEXIS 910, *7 (2016) (unreported). This court-prepared definition has been used repeatedly in Connecticut – though it appears as if all cases using this definition are unpublished.

5. Application to Case at Hand

As noted above, different states have taken different approaches when defining "product" for strict liability purposes. Significantly, the Nevada Supreme Court has already found it considers public policy concerns when analyzing product liability cases. Specifically, in Allison v. Merck & Co., this Court found "'the burden of accidental injuries caused by products intended for consumption [must] be placed on those who market them.'" Allison v. Merck & Co., 110 Nev. 762, 781 (1994). Given the history of the case law in this state and the prevailing view among states, it would be more appropriate to analyze whether something is a "product" on a case-by-case basis viewing public policy, than to produce a rigid definition of the word. This Court can also rely on the Restatement Third for guidance when defining product while analyzing the public policy concerns.

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In this respect, the Nevada Supreme Court previously gave deference to public policy concerns when it agreed that "public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market." Shoshone Coca-Cola Bottling Co. v. Dolinski, 82 Nev. 439, 442 (1966). More recently, the Nevada Supreme Court affirmed its commitment to public policy by affirming the consumer-expectation test, finding products are defective if they do not perform in the manner reasonably to be expected in light of their nature and intended function. Ford Motor Co. v. Trejo, 402 P.3d 649, 655 (Nev., 2017).

Here, it cannot be disputed that it was reasonable for Mr. Schueler to expect the floor to hold up when he stepped on it. In addition, although the sign cabinet is a large product, it was designed and shipped by Ad Art. Ad Art was in the best position to assess the safety of the sign and what amount of weight the Alucobond could hold. Ad Art was also in the best position to provide a warning, as it could have installed a warning against stepping on the Alucobond when installing the sign.

When analyzing the above public policy concerns in view of the Restatement Third, it is also clear the sign at issue was "tangible personal property distributed commercially for use and consumption." The sign was

obviously tangible property. It was also distributed commercially for use by Ad Art's customers. In this respect, Ad Art advertises itself as a "leader in the industry" that gives its customers "a stress-free buying experience by managing all aspects of the design, permitting, fabrication, and installation processes." (Vol. I, p 125).

Conclusion

Although this Court requested a definition of a product, the historical case law of this state and the case law from other jurisdictions suggest it is not appropriate to fashion a rigid definition of "product." Instead, whether something is a product should be assessed on a case-by-case basis based on existing public policy concerns. This court should also take guidance from the Restatement Third, especially considering previous decisions from the Nevada Supreme Court which relied on the Restatement Second for guidance.

DATED this 20th day of November, 2019.

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Attorney's 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 brief has been prepared in a proportionally spaced typeface using *Microsoft Office Word* in *14 pt. Times New Roman*.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it does not exceed 20 pages.

3. Finally, I hereby certify that I have read this supplemental appellate 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)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found.

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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 20th day of November, 2019.

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Certificate of Service

Pursuant to NRAP 25(1)(c), I hereby certify electronic service of Appellant's Opening Brief was made on the 20th day of November, 2019 by delivering a true copy with **APPELLANT'S SUPPLEMENTAL BRIEF** to the following:

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