IN THE COURT OF APPEALS OF THE STATE OF NEVADA

CHARLES SCHUELER, Appellant, vs. AD ART, INC., a foreign corporation, Respondent.

Supreme Court No.: 75688-COA
District Ct. Case No.: A-15-722391-C

AMICUS CURIAE BRIEF OF THE NEVADA JUSTICE ASSOCIATION

(In Support of Appellant and In Favor of Reversal)

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NRAP 26.1 CORPORATE DISCLOSURE STATEMENT

The undersigned counsel certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal:

The Nevada Justice Association ("NJA"), an *amicus curiae,* is a non-profit organization of independent lawyers in the State of Nevada. The *amicus curiae* is represented by Therese M. Shanks, Esq., of Robison, Sharp, Sullivan & Brust in this matter.

NJA, and its counsel, did not appear in the district court in this matter. NJA submits this brief upon request by the Court of Appeals.

Dated this 20th day of November, 2019.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASE LAW

NEVADA STATUTE

NEVADA RULE

SECONDARY SOURCES

AMICUS INTEREST AND AUTHORITY TO FILE

NJA is a non-profit organization of independent lawyers in the State of Nevada who represent consumers and share the common goal of improving the civil justice system. NJA seeks to ensure that access to the courts by Nevadans is not diminished. NJA also works to advance the science of jurisprudence, to promote the administration of justice for the public good, and to uphold the honor and dignity of the legal profession.

On August 22, 2019, the Court of Appeals filed its order specifically requesting the NJA to file an amicus brief on the definition of a "product" under Nevada's product liability law. Accordingly, NJA files this brief pursuant to NRAP 29(a).

SUMMARY OF THE ARGUMENT

An outdoor sign is a "product" for purposes of strict product liability even if it is specially designed. Nevada has not adopted a general definition for what constitutes a "product" under strict liability law. However, the Restatement (Third) of Torts: Product Liability (the "Third Restatement") defines a "product" as any "tangible personal property distributed commercially for use or consumption." Restatement (Third) of Torts: Prod. Liab., § 19(1) (1998).

When previously confronted with the question of whether real property is a "product" under strict liability law, the Nevada Supreme Court adopted the Restatement (Second) of Torts § 402A (the "Second Restatement"). *See Calloway v. City of Reno,* 116 Nev. 250, 268-70, 993 P.2d 1259, 1270-72 (2000) (*overruled on other grounds by Olson v. Richard,* 120 Nev. 240, 89 P.3d 31 (2004)). The Second Restatement, however, does not define "product." Because the Third Restatement fills this gap, this Court should adopt the general definition of product found in Section 19 of the Third Restatement.

Under the definition of "product" in the Third Restatement, a defendant who manufactures and markets custom items is properly subject to strict liability if the defendant is more than an "occasional seller." Contrary to the District Court's analysis of the case law, the issue is not whether an item is specially designed or custom made. It is, instead, whether the defendant qualifies as more than an

"occasional seller." Because "occasional sellers" have never been subject to strict liability, *see* Restatement (Second) of Torts § 402A cmt. f (1965), a defendant who does not normally manufacture or market the specific type of defective custom product at issue should not be held strictly liable. *Dayberry v. City of E. Helena,* 80 P.3d 1218, ___ (Mont. 2003); *Queen City Terminals, Inc. v. Gen. Am. Transp. Corp.,* 653 N.E.2d 661 (Ohio 1995).

However, where the defendant is in the business of manufacturing and marketing custom products of the same nature, strict liability is appropriate. *Rawlings v. D.M. Oliver, Inc.,* 159 Cal. Rptr. 119 (Ct. App. 1979). Unlike the occasional seller, these defendants can spread the costs of damage from defective products among their other customers, and are in a better position than the plaintiff to know of and guard against defects inherent in the general type of product, even if the product's design varies from customer to customer. Furthermore, where the plaintiff is not the customer involved in the design process, the judicial concerns regarding the plaintiff's ability to prove negligence on the part of a remote manufacturer or seller are no different than the concerns in cases involving mass-produced products.

ARGUMENT

In this appeal, this Court must determine whether an outdoor sign that was specially designed constitutes a product for purposes of strict product liability.

This is a question of law that this Court reviews *de novo. Felton v. Douglas Cnty.*, 134 Nev. 34, 35, 410 P.3d 991, 994 (Nev. 2018); *see also* Restatement (Third) of Torts: Prod. Liab. § 19 cmt. a (1998) ("[I]n every instance it is for the court to determine as a matter of law whether something is, or is not, a product."). As this brief will demonstrate, outdoor signs constitute "products" for purposes of strict product liability even when they are specially made.

I. THE GENERAL DEFINITION OF A "PRODUCT".

While Nevada has not specifically defined what constitutes a "product" for the purposes of strict products liability, it has previously followed the Second Restatement to determine whether real property is a "product." *See Calloway v. City of Reno,* 116 Nev. 250, 267-70, 993 P.2d 1259, 1270-72 (2000) (*overruled on other grounds by Olson v. Richard,* 120 Nev. 240, 89 P.3d 31 (2004)). The Second Restatement, however, does not contain a general definition for "product." *See* Restatement (Second) of Torts § 402A (1965). Instead, the Second Restatement merely notes that strict product liability extends "to cover the sale of ***any product*** which, if it should prove to be defective, may be expected to cause physical harm to the consumer or his property." *Id.* at cmt. b. (Emphasis added).

At the time the Second Restatement was being drafted in the early 1960s, strict product liability was a relatively new concept in American law. *See* Restatement (Third) of Prod. Liab., § 19 at cmt. a. It was only after the Second

Restatement's publication that the question of whether an item was a "product" became a prevalent issue in strict product liability litigation. *See id.*

In 1998, when the Restatement (Third) of Product Liability ("Third Restatement") was published, it filled this gap in the Second Restatement by specifically defining a "product" as:

> (1) 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.

Id. at § 19(1). The drafters of the Third Restatement explain that they compiled this definition after considering both the definitions given to "product" by various state legislatures and courts, and the policies underlying the strict imposition of liability. *Id.* at cmt. a.

Because the Nevada Supreme Court has previously looked to the Second Restatement to determine whether something constitutes a "product" for strict liability, this Court should adopt the definition of product provided by the Third Restatement. Unlike the Second Restatement, which does not answer the question posed by this Court, the Third Restatement provides a definition that is derived from consideration of the underlying policies supporting the strict imposition of liability.

II. A CUSTOM ITEM IS A "PRODUCT" IF THE DEFENDANT MANUFACTURES AND MARKETS SIMILAR TYPES OF CUSTOM ITEMS COMMERCIALLY.

A. A DEFENDANT WHO COMMERCIALLY MANUFACTURES AND MARKETS CUSTOM ITEMS IS SUBJECT TO STRICT LIABILITY.

The Third Restatement's requirement that a "product" be "commercially distributed" arises from the general policy that occasional sellers of items should not be held strictly liable for a defect.[1] *See Skarski v. Ace-Chicago Great Dane Corp.*, 485 N.E.2d 1312, 1316 (Ill. App. Ct. 1985) ("Courts have used the phrase 'stream of commerce' to make the distinction between the one-time or casual seller to whom strict products liability does not apply and a defendant engaged in the business of selling products."); Restatement (Second) of Torts § 402A at cmt. f ("The rule does not, however, apply to the occasional seller of food or other such products who is not engaged in that activity as a part of his business.").

There is a significant different between the "occasional" seller who does not normally market or manufacture the type of defective product at issue and the frequent seller who routinely markets and manufactures that specific type of custom product. As explained by the California Court of Appeals:

> Concern for victims is stated to be the 'paramount policy' to be promoted by strict products liability. Its purpose is also to transfer the cost of injuries caused by defective products from the injured person, powerless to protect himself, to the manufacturer, thus spreading the cost of compensating victims throughout society as a cost of doing business by the manufacturer. Defendant . . . does not appear to have been an occasional seller. It appears to have been engaged in manufacturing and selling products as part of its full

[1] This is often referred to as the "stream of commerce" policy.

> time commercial activity. The uniqueness of [the] order may not alter its responsibilities.

Rawlings v. D.M. Oliver, Inc., 159 Cal. Rptr. 119, 122 (Ct. App. 1979) (internal citations omitted).

Courts overwhelmingly hold that defendants who routinely market or manufacture a type of custom good are subject to strict liability, irrespective of whether the good is "one-of-a-kind."[2] These courts note that "[t]o be in the stream of commerce does not require that the product be mass-produced or placed on the shelf at numerous locations." *Skarski,* 485 N.E.2d at 1316. As long as the "defendant is engaged in the business of selling the product and markets it to a buyer for the buyer's use," the underlying policies of strict liability are satisfied. *Id.*

Furthermore, nothing in the Restatement requires an item to be "mass-produced" before it may be considered a product. *See, e.g., Munhoven v.*

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[2] *See, e.g., Fortman v. Hemco, Inc.*, 259 Cal. Rptr. 311, 318 (Ct. App. 1989) (holding that the manufacturer of a "one-of-a-kind" mold was subject to strict liability because it routinely manufactured custom molds); *DeLeon v. Commercial Mfg. & Supply Co.*, 195 Cal. Rptr. 867, 873 (Ct. App. 1983) (holding that a manufacturer of a bin specially made to fit a production line was subject to strict liability); *Boddie v. Litton Unit Handling Sys., a Div. of Litton Sys., Inc.*, 455 N.E.2d 142, 149 (Ill. App. Ct. 1983) (holding that the manufacturer of a custom conveyor belt could be held strictly liable because it was "in the business of designing and marketing conveyor systems"); *Zuniga v. Norplas Indus. Inc.*, 974 N.E.2d 1252, 1260 (Ohio Ct. App. 2012) (holding that the manufacturer of a custom conveyor belt was subject to strict liability because "[i]t had sold at least one conveyor belt system prior to the system at issue").

Northwind Marine, Inc., 353 F.Supp.2d 1072, 1074 (D. Alaska 2005) ("There is nothing in Alaskan law, nor the Restatement, imposing . . . a requirement" that "products are only subject to strict liability if they are mass produced"). Instead, the Restatement simply requires that the item be distributed "commercially." Restatement (Third) of Torts: Prod. Liab. § 19.

The cases relied upon by the District Court did not hold that an item must be "mass produced" to qualify as a "product." Instead, these cases found that the items at issue were not "products" because the defendants were only occasional sellers. For example, in *Dayberry v. City of East Helena,* the Montana Supreme Court held that a public pool built by a city "was not in the stream of commerce" because the city did not commercially manufacture and market pools. 80 P.3d 1218, 1221 (Mont. 2003) (applying a stream of commerce analysis from its earlier opinion *Papp v. Rocky Mountain Oil & Minerals, Inc.*, 769 P.2d 1249 (Mont. 1989)).

Similarly, in *Queen City Terminals, Inc. v. General American Transportation Corp.,* the Ohio Supreme Court refused to extend strict liability because the defendant did not normally manufacture or market the defective item, and it was instead a "specific, one-time order" for six "TankTrains" made from a patented design that the defendant had no legal right to reuse in the future. 653 N.E.2d 661, 672 (Ohio 1995). *Queen City* has not been interpreted by Ohio courts

as requiring items to be mass produced in order to qualify as "products" for strict liability purposes. In 2012, after discussing and applying *Queen City,* the Ohio Court of Appeals held that the defendant could be subject to strict liability for defects arising from a custom-designed conveyor belt because the defendant was "in the business of designing and building machinery," and "had sold at least one conveyor belt system prior to the system at issue." *Zuniga v. Norplas Indus. Inc.,* 974 N.E.2d 1252, 1260 (Ohio Ct. App. 2012).

Thus, the question is not whether an item is custom made, but whether the defendant who markets and manufactures it is an "occasional seller." If the defendant is the business of marketing and manufacturing custom items, those items are "products" for purposes of strict liability.

B. THESE AUTHORITIES ARE CONSISTENT WITH NEVADA'S POLICIES UNDERLYING STRICT LIABILITY.

Holding the frequent marketer or manufacturer of a custom product strictly liable is consistent with Nevada's policies underlying strict product liability. Those policies are (1) "spread[ing] the costs of damage from dangerously defective products to the consumer by imposing them on the manufacturer or seller," (2) "promot[ing] safety by eliminating the negligence requirement," and (3) alleviating the difficulties inherent in proving "a remote manufacturer's or seller's negligence." *Calloway,* 116 Nev. at 268, 993 P.2d at 1271.

First, a defendant who is in the business of marketing and manufacturing a type of custom product can spread the costs to its other customers because it will manufacture and market more products of the same type, even if of a different design. *See Rawlings,* 159 Cal. Rptr. at 122. As the Nevada Supreme Court has explained, "[t]he public interest in human safety requires the maximum possible protection for the user of the product, and those best able to afford it are the suppliers of the chattel." *Allison v. Merck & Co.,* 110 Nev. 762, 769, 878 P.2d 948, 953 (1994) (internal quotations omitted).[3] In contrast, the "occasional seller" cannot spread the costs of a dangerously defective product by "spread[ing] the costs throughout its many customers, because no other customers exist." *Queen City,* 653 N.E.2d at 672.

Second, holding these defendants strictly liable promotes safety because a defendant who frequently manufactures and markets a particular type of custom product is in a far better position than the plaintiff to know of and guard against potential defects. In Nevada, "strict liability for injuries caused by defective products is properly fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market." *Allison*, 110

[3] *See also* Restatement (Second) of Torts § 402A cmt. c. (1965) ("[P]ublic policy demands that the burden of accidental injuries caused by products . . . be placed upon those who market them, and be treated as a cost of production against which liability insurance may be maintained.").

Nev. at 767-68, 878 P.2d at 952. In a case involving a defendant who manufactures and markets custom products, strict liability is properly fixed on the defendant.

This is true even where the customer participates in the design process. In *Zuniga,* the Ohio Court of Appeals rejected the argument that designing a conveyor belt to a customer's specifications absolved the defendant of strict liability, because there was evidence that the defendant has previously sold a different conveyor belt designed under a different customer's specifications and, thus, the defendant generally knew more about the risk of potential defects in conveyor belt systems and the materials used to manufacture them than the plaintiff. 974 N.E.2d at 1260. Similarly, in *Stoddard v. Ling-Temco-Vought, Inc.,* a federal court held that the defendant was liable under strict products liability for defects in an aircraft which the defendants modified pursuant to the Air Force's special design because the defendants generally modified aircrafts and were in a better position to guard against defects. 513 F.Supp. 314, 320 (C.D. Cal. 1980).[4]

Finally, where the plaintiff is not the customer who participated in the design process of a custom product, the same concerns exist regarding the plaintiff's

[4] *See also Munhoven v. Northwind Marine, Inc.,* 353 F. Supp. 2d 1072, 1074 (D. Alaska 2005) (rejecting the argument that a customer's requested modifications absolved the defendant of strict liability for defects in a boat because the modifications were minor)

ability to prove a remote manufacturer's or seller's negligence as they do in cases involving mass-produced items. Unlike the townhome in *Calloway,* the plaintiff here could not approve the final product design, could not inspect the product, and was not involved in the design process. *Calloway,* 116 Nev. at 270, 993 P.2d at 1271-72. Thus, the rationale applied by the Nevada Supreme Court in *Calloway* does not apply to plaintiffs who are not involved in the design process of a custom product. Accordingly, an outdoor sign is clearly a "product" even when it is custom made.

III. OUTDOOR SIGNS ARE TANGIBLE PERSONAL PROPERTY.

Unlike the framing at issue in *Calloway* or the swimming pool in *Dayberry*, an outdoor sign is not physically built and incorporated into real property but is instead constructed elsewhere and simply assembled on-site. As courts have aptly noted, "the question of whether an article is 'attached' to real estate is not the ultimate test; rather an analysis in terms of the policy considerations supporting the imposition of strict liability must be employed to determine whether [the article] constitutes a 'product.'" *Trent v. Brasch Mfg. Co.,* 477 N.E.2d 1312, 1317 (Ill. App. Ct. 1985).[5] To hold otherwise would result in "different standards of liability

[5] *See also Keck v. Dryvit Sys. Co.,* 830 So. 2d 1, 6 (Ala. 2002) (holding that "the law of fixtures is inapplicable to determining what constitutes a product" and the question must resolved "based on the underlying policies of product-liability law").

for manufacturers based upon whether or not their products happened to end up attached to an improvement to real property[.]" *Hickory Springs Mfg. Co. v. Star Pipe Prod., Ltd.,* 991 F. Supp. 2d 778, 782 (N.D. Miss. 2014).

Here, an outdoor sign unquestionably qualifies as a product when the underlying policies of strict liability are taken into consideration. Outdoor signs are generally manufactured and sold by parties who do not own the real estate, at locations separate from the real property where the signs are erected. Thus, there are "judicial concerns about a plaintiff's ability to prove a remote manufacturer's or seller's negligence," *Calloway,* 116 Nev. at 268, 993 P.2d at 1270, particularly where the plaintiff is not the owner of the real property on which the sign is located, and is not the owner of the sign.

In addition, defendants in the business of manufacturing and selling outdoor signs are capable of spreading the costs of damage due to inherently dangerous defects throughout their customer base. *Id.* And, by virtue of being in the business of manufacturing and selling outdoor signs, these defendants are also in a better position to guard against inherent defects, thereby "promot[ing] safety." *Id.*

Finally, an outdoor sign falls within the general definition of "tangible personal property." The Third Restatement notes that "most . . . products are tangible personal property." *Restatement (Third) of Torts: Prod. Liab.,* § 19 cmt. c. "Tangible personal property" is defined as is "personal property that can be

seen, weighed, measured, felt, touched or in any other way perceived by the senses . . ." *Property,* Black's Law Dictionary (11th ed. 2019).[6] A sign can clearly be perceived by the senses, and falls within this definition.

Finally, the fact that an outdoor sign must generally be assembled on site does not preclude it from being a product. "An assemblage of component parts is also, itself, a product." *Restatement (Third) of Torts: Prod. Liab.,* § 19 cmt. c. Thus, there is no question that an outdoor sign qualifies as "tangible personal property" and is a product.

CONCLUSION

For the reasons set forth above, NJA requests that this Court adopt the definition of "product" set forth in the Third Restatement, and find that a defendant who is more than an "occasional seller" of custom products be held strictly liable for defects in the custom products that the defendant manufactures and markets commercially.

Dated this 20th day of November, 2019.

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[6] The Nevada Legislature has adopted this definition in other contexts. *See* NRS 374.090; NRS 372.085.

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this Appellant's Reply 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 Word 16 in 14 font and Times New Roman type.

2. I further certify that this opening 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 is proportionately spaced, has a typeface of 14 points or more, and contains 3,270 words.

3. Finally, I hereby certify that I have read this 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. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity

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with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 20th day of November, 2019.

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CERTIFICATE OF SERVICE

I hereby certify pursuant to NRAP 25(c), that on the 20th day of November, 2019, I caused service of a true and correct copy of the above and forgoing **AMICUS CURIAE BRIEF OF THE NEVADA JUSTICE ASSOCIATION (In Support of Appellant and In Favor of Reversal)** pursuant to the Supreme Court Electronic Filing System, and by first class United States mail, postage prepaid, to the following:

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