CASE NO. 75688 - COA

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

CHALRES SCHUELER,

Appellant,

v.

AD ART, INC.

Respondent.

CERTIFIED QUESTION

from the Eight Judicial District Court of the State of Nevada in and for the County of Clark
The Honorable Michael P. Villani, District Court Judge
District Court Case No. A-15-722391-C

AMICUS CURIAE BRIEF OF THE LAS VEGAS DEFENSE LAWYERS

IN SUPPORT OF RESPONDENT

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I. 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. The representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

The Las Vegas Defense Lawyers (LVDL) is a Nevada not-for-profit corporation. The LVDL is represented by M. Bradley Johnson, Esq. and Bianca V. Gonzalez, Esq., of Kravitz, Schnitzer & Johnson, CHTD.

DATED this 20th day of November, 2019.

KRAVITZ, SCHNIZTER & JOHNSON, CHTD.

By: _____

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II. STATEMENT OF INTEREST

The Las Vegas Defense Lawyers ("LVDL") is a professional organization of civil defense attorneys. Among the organization's civic goals are: fostering mutual education and the exchange of ideas with fellow defense counsel; providing balanced defense perspectives in matters of civil defense; promoting cooperation and civility among fellow counsel; improving the public perception of civil defense attorneys through service and education to the community; establishing and maintaining standards of professional conduct; and, seeking to benefit the public by giving voice to the defense perspective.

Through its amicus curiae efforts, the LVDL seeks to assist courts in addressing issues of importance to its membership, including the interests of insurers – and ultimately of the commercial marketplace – in fair, predictable, tort-based remedies.

This Court has invited briefing by amicus curiae to assist the Court in addressing the issue: What is the proper definition of a

product under Nevada products liability law for purposes of strict liability. LVDL is well suited to opine on the issue presented and has a strong interest in ensuring that an accurate definition is established to accomplish the goals set forth under doctrine of strict products liability.

All time and costs for the preparation of this brief have been borne solely by the LVDL, with no contribution by any party.

III. SUMMARY OF THE ARGUMENT

The proper definition of a product under Nevada products liability law for purposes of strict liability defined is a manufactured good capable of traveling through interstate commerce. The term should not include buildings, whether residential, commercial or otherwise, or other structures that have become permanently affixed or that are appurtenant to the land.

The expansion of the term "product" to include non-residential buildings, including pylon signs, as in the case at issue, would unnecessarily expand strict products liability, while furthering no

particular purpose or policy consideration set forth by the doctrine of strict products liability.

IV. ARGUMENT

The doctrine of strict products liability imposes strict liability upon a seller of a product when such product inflicts physical harm upon a user or consumer, or to his or her property.[1] Under the doctrine, strict liability applies even if the seller "has exercised all possible care in the preparation and sale of his product" and even if no privity exists between the seller and the user or consumer.[2] The doctrine was established to shift the burden of accidental injuries caused by defective goods to those in the chain of distribution as a cost of doing business and as an incentive to guard against defects.

Very few, if any, jurisdictions have adopted an express definition of the term "product," as used in strict products liability. In fact, even the *Second Restatement of Torts*, leaves undefined the term, instead providing a non-exhaustive list of examples where the

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[1] *Restat 2d of Torts*, § 402A.
[2] *Id.*

doctrine would apply.[3] Likewise in Nevada, the courts have previously declined to set forth an express definition, instead opting for a case-by-case approach of when the doctrine applies. By way of example, the Nevada Supreme Court previously held that the term is not extended to include buildings for purposes of strict products liability.[4]

A. DEFINING THE TERM "PRODUCT"

For the reasons outlined below, LVDL proposes the following definition for the term "product," consistent with Nevada case law, for purposes of strict products liability: **a manufactured good capable of traveling through interstate commerce.** The term should not include buildings or other erected structures that have become permanently affixed or that are appurtenant to the land.

In *Local Joint Executive Bd., Culinary Workers Union, Local No. 226 v. Stern*, the Nevada Supreme Court noted that "the

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[3] *Id.* at Comment d.

[4] *Calloway v. City of Reno*, 116 Nev. 250, 269, 993 P.2d 1259, 1271, 2000 Nev. LEXIS 24, *37, CCH Prod. Liab. Rep. P15,775, 116 Nev. Adv. Rep. 24, Unemployment Ins. Rep. (CCH) P15,775 (Nev. February 29, 2000) (overturned on other grounds).

doctrine of strict products liability was developed to assist plaintiffs who could not prove that products which caused physical injury at the point of use had been *manufactured* negligently. [5] While the Nevada Supreme Court has not expressly defined the term "product' for purposes of strict products liability, in *Calloway*, it previously held that such definition does not extend to buildings, whether residential, commercial or otherwise.[6] In that case, the Court agreed with the reasoning set forth by other jurisdictions that the policies underlying strict products liability are distinguished "from those involved in the situation where a house *or building* is defective."[7]

First, "in the construction context, tracing a defect to a manufacturer or supplier and locating that entity generally poses no significant problem, unlike the situation with the remote *manufacturer* of a product that *travels through interstate*

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[5] 98 Nev. 409, 411, 651 P.2d 637, 638, 1982 Nev. LEXIS 491, *4, 100 Lab. Cas. (CCH) P55,439. (Emphasis added).
[6] *Calloway*, 116 Nev. at 269.
[7] *Id.* (emphasis added).

commerce."[8] The Court also noted that a builder cannot easily limit its liability by express warranty or disclaimer and that "the purchaser of a building has the opportunity to make a meaningful inspection of the property at issue."[9]

Second, as noted by the Court:

> The raising of a building and the assembly-line manufacturing of a product are not analogous processes. From start to finish, the construction of a building depends on the cooperative interaction of a number of independent parties.
>
> . . .
>
> Most buildings are one-of-a-kind, requiring methods and materials that change with each project. The architect cannot work out design weaknesses in a series of prototypes, which are built but never put on the market, as is often done with manufactured goods. Neither can the contractor test a variety of method and material combinations before putting up the final structure. **Even identical model subdivision homes are subject to the vagaries of subsurface soil conditions**. . . . Furthermore, in construction work the project is generally designed by one independent firm and built by another. The consistent interplay between

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[8] *Id.* (emphasis added).

[9] *Id*; *citing Recovery, Under Strict Liability in Tort, for Injury or Damage Caused by Defects in Building or Land*, 25 A.L.R. 4th 353, 366-67 (1983).

> designer and builder, usually present in the manufacturing industry, is absent in the construction industry. . .
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> Another major distinction between manufactured goods and buildings is that normally **a building is put up at the direction of the owner/developer**, and if his needs change, **the final product may be quite different from that shown in the original plans**. . . .[10]

Lastly, buildings generally have a significantly longer expected useful life than do manufactured goods, which warrants different standards of maintenance and repair.[11]

The proposed definition is consistent with both Nevada case law, and the common theme throughout the Court's reasoning in *Calloway* as to the applicability, or lack thereof, of the doctrine of strict products liability to any building, not just residential. The Court notes there exists a stark contrast between the processes by which a building is constructed and/or raised, and by which a good is manufactured. Furthermore, the Court notes that it is the mobility

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[10] *Calloway*, 116 Nev. at 269-270. (Emphasis added).
[11] *Id.* at 270.

of manufactured goods through interstate commerce which creates a difficulty for users or consumers to trace a product back to a remote manufacturer. Such mobility is not present in buildings or other structures permanently affixed or appurtenant to the land.

B. THE MODEL UNIFORM PRODUCT LIABILITY ACT

The Model Uniform Product Liability Act published by the United States Department of Commerce,[12] unlike the *Second Restatement of Torts*, has defined the term "product" for purposes of strict products liability. Although this act does not have the force of law, its analysis supports the definition set forth by LDVL, which limits the definition to manufactured goods that are capable of moving through interstate commerce.

Section 102(C) of the Act defines product as follows:

> "Product" means **any object** possessing intrinsic value, **capable of delivery** either as an assembled whole or as a component part or parts, and **produced for introduction into trade or commerce**. Human tissue

[12] 44 Fed. Reg. 62714 (1979).

and organs, including human blood and its components, are excluded from this term.[13]

The analysis to this section, states in pertinent part:

"Product" means property which, as a component part or an assembled whole, **is movable**, and possesses intrinsic value. Therefore, included are all goods, wares, merchandise, and their components, as well as articles and commodities **capable of delivery for introduction into trade or commerce**.[14]

C. APPLICABILITY TO THE CASE AT HAND

The same considerations noted in *Calloway* support the proposed definition of the term "product" and weigh against its application, for purposes of strict products liability, to massive pylon signs that are affixed to the land, custom built for a single consumer, such as here. The problems of proof that led to the creation of the doctrine of strict products liability are not present here as it is known who constructed the pylon sign in this case. Likewise, given the sheer size of the pylon sign, it was constructed subject to

[13] *Id.* at 62717 (emphasis added).
[14] *Id.* at 62719 (emphasis added).

specified building codes, regulations, permits and inspections, such that the purchaser of the pylon sign had "the opportunity to make a meaningful inspection of the property at issue."[15]

Construction of the pylon sign, whether or not some component parts were pre-manufactured, likely required the "cooperative interaction of a number of independent parties," including various subcontractors tasked with erecting the massive structure. The pylon sign in this case was custom built "at the direction of the owner/develop" MGM, and the final product was subject to changes or customizations up until its construction.[16] As a custom building, MGM's pylon sign was not constructed with the intent or ability to enter interstate commerce. It was designed and constructed with the intent of being affixed to the land and with a single owner in mind, MGM.

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[15] *Calloway*, 116 Nev. at 269; *citing Recovery, Under Strict Liability in Tort, for Injury or Damage Caused by Defects in Building or Land*, 25 A.L.R. 4th 353, 366-67 (1983).
[16] *Id.*

In addition, the pylon sign at issue, like most pylon signs built on the Las Vegas Strip for other resorts and casinos, has a significantly longer expected useful life than manufactured goods. Pylon signs on the Las Vegas strip are large, immobile, and meant to withstand the test of time, often becoming part of the iconic scenery. In this case, MGM's pylon sign was constructed over two decades ago, and has undergone significant changes, namely in the LED screens displayed atop the sign. For that reason, maintenance and repair standards applicable to most manufactured goods would not apply to buildings, such as MGM's pylon sign.

Appellant argues that because the pylon sign is not a house or residential building, it should still fall under the definition of "product" for purposes of strict products liability. *Calloway* did not so limit the definition and neither have other states. *See Lowrie v. City of Evanston,* 50 Ill. App. 3d 376, 8 Ill. Dec. 537, 365 N.E.2d 923 (1977) (holding that the term "product" does not apply to an open-air parking garage); *Cox v. Shaffer*, 223 Pa. Super. 429, 302 A.2d 456

(1973) (refusing to hold the manufacturer of a silo on plaintiff's land strictly liable under products liability, reasoning that the construction of the silo did not constitute the sale of a 'product,' and that a building so constructed on a site is not a product within the meaning of §402A).

Furthermore, the traditional remedies of premises liability for injuries sustained as a result of a fall from the pylon sign would still apply.

V. CONCLUSION

For the reasons set forth above and in the Respondent's answering brief, this Court should hold that the term "product," for purposes of strict products liability, is defined as a manufactured good capable of traveling through interstate commerce.

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Furthermore, the Court should hold that the term does not apply to buildings or other erected structures, including the pylon sign in the case at hand, that have become permanently affixed or that are appurtenant to the land.

DATED this 22nd day of November 2019.

KRAVITZ, SCHNIZTER & JOHNSON, CHTD.

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VI. ATTORNEYS' CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the formatting, typeface, and type-style requirements of NRAP 32(a)(4)(6) because it was prepared in Microsoft Word 2010 with a proportionally spaced typeface in 14-point, double spaced Century Schoolbook front.

2. I certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, except as exempted by NRAP 32(a)(7)(C), it contains 2,478 words.

3. I certify that I have read this brief, that it is not frivolous or interposed for any improper purpose, and that it complies with all applicable rules of appellate procedure, including NRAP 28(e).

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I understand that if it does not, I may be subject to sanctions.

DATED this 22nd day of November 2019.

KRAVITZ, SCHNIZTER & JOHNSON, CHTD.

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VII. CERTIFICATE OF SERVICE

I certify that on November 22, 2019, I submitted the foregoing *Amicus Curiae Brief* for filing *via* the Court's eFlex electronic filing system. Electronic notification will be sent to the individuals on the electronic filing system.

Chelsey J. Holland

An Employee of KRAVITZ, SCHNITZER & JOHNSON, CHTD