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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 RESPONSE TO AMICUS BRIEFS

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 RESPONSE TO AMICUS BRIEFS

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Appellant's Response to the Las Vegas Defense Lawyers' Amicus Brief

On August 22, 2019, this Court entered an Order permitting the parties to file supplemental briefs and requesting the Nevada Justice Association and the Las Vegas Defense Lawyers (LVDL) to provide amicus briefs on the question of: "What is the proper definition of product under Nevada products liability law for purposes of strict liability?" This Court also allowed appellant and respondent to submit a supplemental brief in response to the briefs filed by the amicus curiae.

Points and Authorities

1. Response to Suggested Definition by the LVDL

The LVDL request this Court to adopt a very limited definition of "product" for purposes of strict liability. The LVDL suggests this Court should define "product" as "a manufactured good capable of traveling through interstate commerce," so long as it is *not* a "building or other erected structure that ha[s] become permanently affixed or that [is] appurtenant to the land."

While Appellants do not agree with this definition, even if the Court were to adopt the LVDL definition, the sign at issue would be a product. Specifically, as noted in Appellant's Supplemental Brief, the pylon sign at issue consisted of three primary parts: the load-bearing pillar, the sign cabinet,

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and the cabinet display. Mr. Schueler fell after he stepped on the floor of the sign cabinet. He did not fall from the load-bearing pillar.

Only the load-bearing pillar is permanently affixed to the land. It is the only part of the sign with a building permit. The other parts were manufactured goods shipped from California to Las Vegas, Nevada for use on top of the pillar. They were not permanently affixed to the land, and even LVDL notes the appearance of the sign has been altered throughout the years.

In support of its position, the LVDL relies heavily on Calloway v. City of Reno, 116 Nev. 250, 269 (2000). It analyzes the Calloway factors in an attempt to convince this Court the pylon sign at issue is akin to a building, not a product. When referencing building permits, the LVDL is confusing the load bearing pillar with the portion of the sign Mr. Schueler fell through. The building permit only related to the foundation of the sign. *See*, Vol. I, pg. 061:

Clark County Building Department
PERMIT
401 South Fourth Street • Las Vegas, Nevada 89101
(702) 455-3000

IMPORTANT Always use the permit number below when requesting inspections or information concerning this permit.

PERMIT NUMBER
93-16931 SBB
ISSUE DATE
10/05/93
PROJECT NAME
MGM GRAND/SIGN
SUBDIVISION

PARCEL NO: 162-21-401-006-001 RANGE-TOWNSHIP-SECTION 61-21-21

SITE ADDRESS: 3799 S LAS VEGAS BLVD
TENANT NAME: MGM GRAND HOTEL/SIGN
TENANT NO: HOTEL

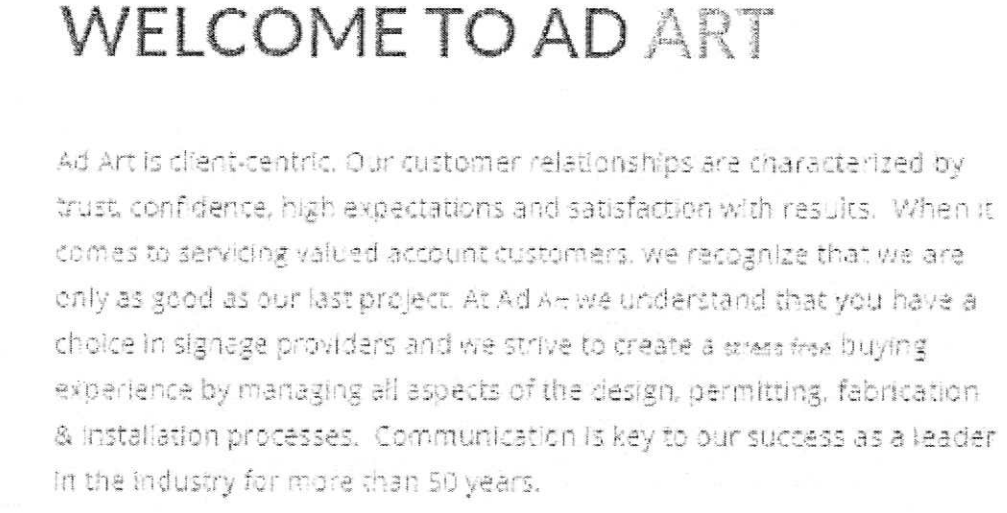
PROPERTY OWNER: M G M GRAND HOTEL INC
CONTRACTOR: AD ART INC

PERMIT: SIGN-BILLBOARD
SIGN-BILLBOARD
VALUATION: 6720
FOUNDATION ONLY THIS PERMIT DOES NOT INCLUDE SUPERSTRUCTURE
FOUNDATION ONLY AND 36" DIA PIPE ONLY/DB
THIS DOES NOT INCLUDE SUPERSTRUCTURE/DEF

NO. UNITS: 0 SQ FOOTAGE: 0 NO. STORIES: 0 QAA: N
OCCUPANCY: TYPE OF CONST: SPRINKLER REQ:

(Highlight added).

In addition, although MGM may have selected the shape and the color of the sign, it is undisputed that Ad Art was in the business of manufacturing and installing signs at the time the MGM sign was constructed. Ad Art advertised itself to be a "signage provider" that "managed all aspects of the design, permitting, fabrication & installation processes." Vol. III at pg. 250:



WELCOME TO AD ART

Ad Art is client-centric. Our customer relationships are characterized by trust, confidence, high expectations and satisfaction with results. When it comes to servicing valued account customers, we recognize that we are only as good as our last project. At Ad Art we understand that you have a choice in signage providers and we strive to create a stress free buying experience by managing all aspects of the design, permitting, fabrication & installation processes. Communication is key to our success as a leader in the industry for more than 50 years.

Ad Art is in the sign business – not the construction business.

The sign cabinet at issue is not a building, nor is it a non-residential structure; it is a sign that was constructed in parts and shipped to Las Vegas for installation on top of the load bearing pillar. Piece by piece, the sign was brought to Las Vegas for installation. In fact, the CEO and Chairman of Ad Art, Terry Long, testified at his deposition as follows:

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> 24 Now, going back to the building of the sign in
> 25 Stockton, the MGM pylon, would the materials for the
>
> Page 71
> 1 construction of the sign had been shipped to Stockton and
> 2 then put together and then you would have shipped the sign
> 3 in pieces out to Las Vegas? Could you tell me a little
> 4 bit about that process?
> 5 MR. LONG: Lacks foundation.
> 6 THE WITNESS: Yes, the sign was fabricated in
> 7 Stockton in sections and then trucked to Las Vegas for
> 8 installation.

Vol. II, pg. 240.

In its brief, the LVDL repeatedly refers to the uniqueness of the sign as alleged evidence it should not be considered a product. While the MGM sign is unique in shape and color, the sign is not necessarily unique. It has a pillar. It has a sign cabinet. And it has an LED display. Signs run up and down nearly every non-residential street in Las Vegas. While the aesthetics of the MGM sign may be unique, the only alterations that are necessary to change the MGM sign into the Rio sign, or the Treasure Island sign, or the Mirage sign[1], or any other sign, is to change the color, size, lettering, and shape. The "nuts and bolts" of the materials that go into producing pylon Alucobond signs are

[1] The Rio sign, the Treasure Island sign, and the Mirage sign are all listed as examples because the Ad Art that build the MGM sign also built these signs. *See*, Vol. III, pg. 303, Head Deposition at 14:10-17, and Vol III, pg. 304, Head Deposition at 21:11-22:5.

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essentially the same. At a minimum, the Court was required to construe this issue in the light most favorable to Mr. Schueler since he was the non-moving party.

Overall, however, the LVDL's suggested definition is far too narrow and already antiquated. The LVDL's even runs afoul of considerations already made decades ago by the Ninth Circuit Court of Appeals. Specifically, in 1964, a Bonanza Airlines plane crashed on its approach from Phoenix to Las Vegas. The cause of the fatal accident was a confusing graphic depiction of the Las Vegas airport approach procedure on an approach chart. *See*, Aetna Casualty & Surety Co. v. Jeppesen & Co., 642 F.2d 339, 341 (9th Cir., 1981). Specifically, the approach chart had two views, a plan view and a profile view. Both views appeared to be drawn to the same scale, though they were not. Based on the confusing graphics, the pilot erroneously believed it was safe to fly at 3,100 feet when he was 15 miles from the airport, when it was not safe to fly at that altitude until he was 3 miles from the airport. The graphic representation was deemed a defective product for purposes of the litigation. Id. at 343.

The LVDL's proposed definition would exclude products such as the approach chart mentioned above. Overall, it is far too narrow. It also fails to consider important public policy issues surrounding product liability law. The

Nevada Supreme Court has previously placed emphasis on public policy considerations. Shoshone Coca-Cola Bottling Co. v. Dolinski, 82 Nev. 439, 442 (1966); Ford Motor Co. v. Trejo, 402 P.3d 649, 655 (Nev., 2017). As such, the LVDL's definition should be rejected.

2. Response to Suggested Definition by the Nevada Justice Association

This Court also invited the Nevada Justice Association (NJA) to provide a suggested definition of the word "product" for purposes of strict product liability. Rather than crafting their own definition of "product," as did the LVDL, the NJA urges this Court to adopt the definition set forth under the Third Restatement. Given this Court has relied on the Restatement for guidance in the past, this suggestion is more appropriate than that of the LVDL.

In its brief, the NJA provides a compelling discussion of public policy. This discussion is similar to the argument of Respondent, albeit with opposite results. For example, the NJA notes Ad Art was in the best position to spread the cost of a dangerous product because of its many customers. This recognizes that Ad Art has sold multitudes of signs. It is irrelevant that there is only one MGM sign. Ad Art has sold countless signs and has countless sign customers.

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Next, Ad Art was in the best position to know of, and guard against, potential defects. In this respect, Ad Art knew, or should have known, people would be working inside the sign cabinet at some time in the future. Ad Art also knew, or should have known, that a person working in the sign cabinet might step on the floor of the sign cabinet – and not just stay on whatever platform there is inside the sign cabinet itself. Ad Art also knew, or should have known, that the floor of the sign cabinet could not hold the weight of a person. As such, Ad Art should have either designed the sign cabinet floor such that it would hold the weight of an average person, or it should have posted warnings within the sign cabinet to not step on the cabinet floor. Ad Art had the opportunity to reduce the risk of loss, yet it chose not to do so.

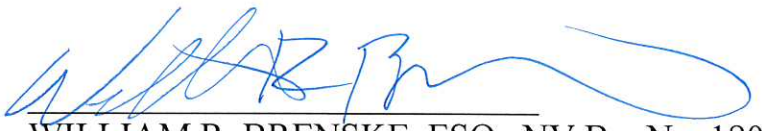
Th NJA also indicates the above considerations still apply even if the customer (MGM) participated in the design process. Clearly, Ad Art was in a far better position than MGM to ensure the sign was designed safely. Presumably, MGM's participation in the sign design was limited to color, shape, and size choices. Ad Art was the party with superior knowledge on which materials to use on the sign and how to put it together safely.

The NJA's suggestion to adopt the definition provided by the Restatement Third of Product Liability is more appropriate than the definition fashioned by the LVDL. That said, and as noted above and in Appellant's

brief, it is Appellant's position that the Court should consider public policy while looking to the Restatement Third for guidance. By doing so, the Court will further its public policy goals of promoting safe products, spreading the cost of harm, and alleviating difficulties in proving negligence on the part of remote sellers. *See*, Calloway v. City of Reno, 116 Nev. 250, 268 (2000).

DATED this 9th day of December, 2019.

BRENSKE ANDREEVSKI & KRAMETBAUER



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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 15 pages.

3. Finally, I hereby certify that I have read this Response to the Amicus Briefs, 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 9th day of December, 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 3rd day of January, 2020 by delivering a true copy with **APPELLANT'S SUPPLEMENTAL BRIEF** to the following:

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