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IN THE COURT OF APPEALS OF THE STATE OF NEVADA

CHARLES SCHUELER, Appellant, vs. AD ART, INC., Respondent.	SUPREME COURT CASE NO.: 75688-COA DISTRICT COURT CASE NO.: A-15-722391-C

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

RESPONDENT'S REPLY TO APPELLANT'S SUPPLEMENTAL BRIEF AND AMICUS CURIAE

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TABLE OF CONTENTS

NRAP 26.1 DISCLOSURE STATEMENT

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

Law firms whose partners or associates have appeared for the party in the instant case (including proceedings in the district court or before an administrative agency) and are expected to appear in this court:

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These representations are made in order that Judges of this Court may evaluate possible disqualification or recusal.

DATED this 3rd day of January, 2020.

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TABLE OF AUTHORITIES

Cases

I. SUPPLEMENTAL ISSUE ADDRESSED

1. Why are buildings not considered products under strict liability?

2. How is the analysis of an industrial machine different than that of other products?

3. Was the MGM pylon placed into the stream of commerce?

II. SUMMARY OF THE SUPPLEMENTAL ARGUMENT

Buildings, such as the MGM Pylon, are not products for the purposes of addressing strict products liability. The MGM pylon is not an industrial machine as addressed by the New York courts, thus the physical characteristics of the pylon can be considered when determining that it is not a product. Finally, the MGM pylon was not placed in the stream of commerce and the MGM pylon was not being used but instead was being altered.

III. POINTS AND AUTHORITIES

A. The MGM Pylon is a building and therefore not considered a product for the purposes of strict products liability.

Outside the context of residential buildings, Nevada has not addressed buildings or structures being subject to strict products liability. The Illinois Appellate Court for the First District has addressed this issue. The Illinois Appellate Court for the First District has held that certain "buildings" are not "products" for purposes of strict liability in tort. Buildings, such as the MGM Pylon, are not products for the purposes of strict products liability.

What is and is not a product was addressed by the Illinois Appellate Court for the First District on several occasions in 1977. In *Lowrie v. City of Evanston*, 50 Ill.App.3d 376, 365 N.E. 2d 923 (1977) there was a lawsuit relating to a fall in a municipal parking garage. *Id.* The court after addressing the underlying policy

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reasons of strict products liability concluded "that a [parking garage] such as is involved here is not a product within the meaning of the use of that term…" *Id.* Part of the reasoning was that the court found that the framers did not intend a structure such as a building to be a product…because the liability of builders is articulated in other sections of the Restatement. *Id.* at 385.

That same year, the issue of whether a sheltered care facility was a product for the purposes of strict products liability was decided in *Immergluck v. Ridgeview House, Inc.*, 53 Ill.App. 3d 472, 368 N.E.2d 803 (1977). Rona Immergluck brought an action against Ridgeview House, Inc. for injuries received when she fell to the ground from one of the windows on the fourth floor. *Id.* The court held, amongst other things, that the product was not mass produced and not placed in the stream of commerce. *Id.* For that reason, the court determined that the sheltered care facility was not a product. *Id.*

In 2004, the Illinois Appellate Court for the First District again came to the same conclusion. The court held "[b]ased on policy considerations supporting the strict liability doctrine, courts have consistently held that buildings and indivisible parts of the building structure itself, such as bricks, supporting beams and railings, are not deemed products for the purposes of strict products liability." *Martens v. MCL Const. Corp.*, 347 IllApp.3d 303, 807 N.E.2d 480 (2004). In this case, the

Plaintiff fell from a steel beam that was bolted to the vertical columns and formed an indivisible component part of the structural skeleton of the new building. *Id.*

Thus, the Illinois Appellate Court for the First District came to the same conclusions that the Nevada Supreme Court came to in *Calloway v. City of Reno,* 116 Nev. 250, 993 P.2d 1259 (2000). That conclusion being that a building, whether it be a condominium, parking garage, sheltered care facility, and in this case the MGM Pylon, are not products for the purposes of strict products liability. The policies behind strict products liability are not served by holding that buildings and their indivisible component parts are products.

B. The MGM Pylon is not an industrial machine and should not be analyzed in accordance with industrial machines.

Plaintiff relied upon a recent opinion of the Court of Appeals of the State of New York to support their position. Reliance upon this case is not appropriate given the litigation involved an industrial machine. Given that it was an industrial machine, the state of New York used a different analysis which is not analogous to the MGM pylon sign involved here.

The asbestos litigation case involving "coke ovens" is not analogous to the MGM Pylon at issue in this appeal. The Court of Appeals of New York addressed the fact that a "coke oven" would be considered a product under the theory of strict products liability. *Matter of Eight Jud. Dist. Asbestos Litig.*, 33 N.Y.3d 488, 129 N.E. 3d 891 (2019). They noted industrial machines have been assumed to be

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products for strict liability purposes. *Id.* at 494 (internal citations omitted). "Because many products in this context can create 'circumstances where the danger from use was likely to be so very disastrous,' our case law has not focused on creating an exhaustive list of the product's physical characteristics but has instead focused on those potential dangers." *Id.*

The MGM Pylon is not an industrial machine and should be not analyzed as such as Plaintiff has suggested. The Court of Appeals of New York has carved out a specific analysis pertaining to industrial machines that addressed warnings of use rather than physical characteristics. This type of analysis is not extended to other products that would not be considered industrial machines. There is no situation where the MGM Pylon would be considered an industrial machine.

Given that it is not an industrial machine, it is not appropriate to look at the "potential dangers." The differences between the "coke oven" and the MGM pylon are too numerous to list. To put it simply, the MGM Pylon's sole purpose is for advertisement of the MGM Grand Resort's shows, restaurants, and other experiences. It can certainly not be compared to a "coke oven" which is used to create coke, a fuel used in the production of steel. *Id.* at 491. The MGM Pylon has no inherent potential dangers in its use that is likely to be so very disastrous. Given that the use is for it to be stationary part of the land to advertise for the MGM Grand.

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For those reason, the holding of the Court of Appeals in *Matter of Eighth Jud. Dist. Asbestos Litig.* should not be considered in determining whether the MGM Pylon is a product. Furthermore, it is entirely appropriate to consider the uniqueness and physical characteristics of the sign in determining that the MGM pylon is certainly not a product.

C. The MGM Pylon was not in the stream of commerce and thus does not meet the policy considerations surrounding products.

The MGM Pylon was not injected into the stream of commerce. The pylon in question was built for the sole use of MGM Grand in 1993 and/or 1994. (056-058). The sign was never intended to be used by anyone other than MGM Grand and was not placed into the stream of commerce. This is similar to the holding of the Illinois Appellate Court for the First District in *Immergluck v. Ridgeview House, Inc.*, 53 Ill.App. 3d 472, 476, 368 N.E.2d 803, 805 (1977). Wherein the court held that the sheltered care facility "is not in any stream of commerce." The Appellate Court of Illinois, Third District also found that a guardrail was not placed into the stream of commerce. *Maddan v. Cullinan & Son, Inc.* 411 N.E.2d 139, 88 IllApp.3d 1029 (1980). Here, the MGM pylon was not placed in any stream of commerce.

Furthermore, there is no "use" of the sign once it was built on the property of MGM. When considering whether an item is placed in the stream of commerce, it must be for the buyer's use. *Boddie v. Litton Unit Handling* Systems, 118 Ill.App.3d 520, 530, 455 N.E.2d 142, 149. "[I]t becomes apparent that the cornerstone of

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liability rests upon the defendant's active participation in placing the product into commerce ***for use and consumption by others***. *Keen v. Dominick's Finer Foods, Inc.* 364 N.E.2d 502, 504, 49 Ill.App.3d 480, 482 (1977).

Plaintiff was not "using" the sign in question when the incident occurred. Plaintiff was working for the Young Electric Sign Company to repair/replace and LED display on the MGM pylon. (001-011). Specifically, Plaintiff was attempting to sever the structure connecting the LED cabinet to the main structure when the incident occurred. *Id.* This is not a situation where Plaintiff was injured using a conveyer belt, working on a manufacturing line, or working with a coke oven to make steel.

One would expect to use a conveyor belt to transport items from one location to another. Thus, it is being injected into the stream of commerce to do that very function. The coke oven addressed above, the use of the product was to make coke a fuel for making steel. It was injected into the stream of commerce for that very use. There are numerous other items that are used in manufacturing which in their nature are being used to create a product that will be put into the stream of commerce.

The MGM pylon was not injected into the stream of commerce. The only true "use" for the MGM pylon would be for advertisement of events, attractions, or dining available within the MGM Grand. Plaintiff was only present inside the sign

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because his employer was hired to make significant alterations to the LED display. Plaintiff was in the process of altering the MGM pylon, not using the MGM pylon.

Given that the MGM pylon was not injected into the stream of commerce, the policy considerations involving a product being injected into the stream of commerce is not satisfied.

III. CONCLUSION

For the reasons set forth above, Defendant AD ART requests that this Court affirm the District Court's holding and find that summary judgment was properly granted in this case. The MGM pylon is not a product for the purposes of strict products liability as it does not meet the public policy considerations.

DATED this 3rd day of January, 2020.

Respectfully submitted,

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/s/ Timothy F. Hunter

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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 NRAC 32(a)(5) and type style requirements of NRAC 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word with 14 pt. font size and Times New Roman font.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7)(C), because it does not exceed 30 pages.

3. Finally, I hereby certify that I have read this respondent's 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)(1), which requires every assertion in brief regarding matters in the record to be supported by 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 requirements of the Nevada Rules of Appellate procedure.

DATED this 3rd day of January, 2020.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25(1)(c), I hereby certify that I am an employee of RAY LEGO & ASSOCIATES and that on the 3rd day of January, 2020 electronic service of **RESPONDENT'S SUPPLEMENTAL BRIEF** was made by delivering a true copy with Appellant's and Respondent's Joint Appendix to the following:

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