WILLIAM R. BRENSKE, ESQ.
Nevada Bar No. 1806
JENNIFER R. ANDREEVSKI, ESQ.
Nevada Bar No. 9095
RYAN D. KRAMETBAUER, ESQ.
Nevada Bar No. 12800
BRENSKE ANDREEVSKI & KRAMETBAUER
3800 Howard Hughes Parkway, Suite 500
Las Vegas, Nevada 89169
Telephone: (702) 385-3300
Facsimile: (702) 385-3823
Email: bak@baklawlv.com
Attorneys for Appellant

IN THE SUPREME COURT FOR THE STATE OF NEVADA

CHARLES SCHUELER, Appellant, v. AD ART, INC., Respondent.	Supreme Court No.: 75688 Dist. Ct. 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

APPELLANT'S ANSWER TO RESPONDENT AD ART, INC.'S PETITION FOR REVIEW BY THE SUPREME COURT

Brenske Andreevski & Krametbauer
3800 Howard Hughes Parkway, Suite 500
Las Vegas, Nevada 89169
(702) 385-3300 · Fax (702) 385-3823

TABLE OF CONTENTS

Brenske Andreevski & Krametbauer
3800 Howard Hughes Parkway, Suite 500
Las Vegas, Nevada 89169
(702) 385-3300 · Fax (702) 385-3823

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:

Brenske Andreevski & Krametbauer
3800 Howard Hughes Parkway, Suite 500, Las Vegas, NV 89169

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

DATED this 19th day of October, 2020.

William R. Brenske, Esq.
Nevada Bar No. 1806
Jennifer R. Andreevski, Esq.
Nevada Bar No. 9095
Ryan D. Krametbauer, Esq.
Nevada Bar No. 12800
Brenske Andreevski & Krametbauer
3800 Howard Hughes Parkway, Suite 500
Las Vegas, Nevada 89169
Telephone: (702) 385-3300
Facsimile: (702) 385-3823
Email: bak@baklawlv.com

Brenske Andreevski & Krametbauer
3800 Howard Hughes Parkway, Suite 500
Las Vegas, Nevada 89169
(702) 385-3300 · Fax (702) 385-3823

Table of Authorities

Brenske Andreevski & Krametbauer
3800 Howard Hughes Parkway, Suite 500
Las Vegas, Nevada 89169
(702) 385-3300 · Fax (702) 385-3823

Issue Presented for Review

Ad Art, Inc. designed, manufactured, and installed the large sign cabinet for the MGM sign and placed it on top of the 150-foot tall steel pylon on MGM's property. The sign cabinet was built in California and moved piece by piece to Nevada for installation. Over the years, the sign cabinet has been aesthetically modified and changed.

While Charles Schueler was standing inside the sign cabinet and completing work on the LED display on July 31, 2013, the floor gave way, causing him to fall to the ground. The Nevada Court of Appeals addressed the issue of whether the sign cabinet is a product and asked what constitutes a "product" for purposes of strict products liability in the State of Nevada.

Argument

1. The Opinion of the Court of Appeals Was Thorough and Well-Reasoned

The Nevada Court of Appeals issued a unanimous 33-page opinion after accepting briefs from the parties, *amicus curiae* briefs, and supplemental briefs from both parties, and after entertaining oral argument from both the parties and the authors of the *amicus* briefs. The published opinion of the Court of Appeals is frankly more thorough and concise than any of the briefs written by either of the parties or the *amici*.

/ / /

Brenske Andreevski & Kramethbauer
3800 Howard Hughes Parkway, Suite 500
Las Vegas, Nevada 89169
(702) 385-3300 · Fax (702) 385-3823

2. Respondent's Factual Account is Incomplete

In their motion, Respondents indicate Mr. Schueler "fell from the pylon while he was assisting with repairs or alterations of the pylon." (Respondent's Motion at 1:17-21). This rendition of the facts is incomplete and creates a substantive misimpression regarding the operative facts.

As with most pylon signs, the MGM sign has three basic components: 1) the load bearing pillar, 2) the sign cabinet, and 3) the cabinet display. The building permit referenced by the parties in their pleadings referred only to the *load bearing pillar* – not the sign cabinet or the sign display. (Vol. I, p. 60). This is significant because Mr. Schuler did not fall from the pillar; he was standing inside the sign cabinet while preparing to work on the sign display when the floor broke way and caused him to fall 150 feet down to the ground. (Vol I. p. 5 and 123). The "product" at issue was the sign cabinet, not the load bearing pillar. Schueler v. Ad Art, 136 Nev. Adv. Op. 52, **f.n. 2.* No building permit was required, nor acquired, for the sign cabinet.

3. The Decision of the Court of Appeals Does Not Conflict with Prior Decisions of this Court

a. The MGM sign is not a building

As noted above, the Court of Appeals was careful and thorough when it rendered its published decision in this matter. Contrary to Respondent's assertions, the decision of the Court of Appeals does not conflict with Calloway

Brenske Andreevski & Krametbauer
3800 Howard Hughes Parkway, Suite 500
Las Vegas, Nevada 89169
(702) 385-3300 · Fax (702) 385-3823

v. City of Reno, 116 Nev. 250 (2000). Respondent asserts Calloway stands for the proposition that buildings and structures, such as townhomes, are not products for purposes of strict liability. It then asks this Court to hold the MGM sign is akin to a building, and therefore not a product.

In its opinion, the Nevada Court of Appeals discussed the Calloway decision at length. It noted this Court explained some jurisdictions have found buildings to be products and others have not, but this Court "did not expressly incorporate either approach into Nevada law." Schueler v. Ad Art, Inc., 136 Nev. Adv. Op. 52, *17 (2020). The Nevada Court of Appeals further explained the reason this Court affirmed the district court's ruling in Calloway was not because of the nature of the product at issue, but because the appellant in Calloway (a construction defect case) sought to recover purely economic losses – something unavailable in strict product liability matters. Id. at 19. As such, the Nevada Court of Appeals concluded Respondent was incorrect when it asserted the Calloway decision excluded buildings from the ambit of strict product liability. Id. at *20.

The Nevada Court of Appeals did not stop there, however. Instead, the Nevada Court of Appeals noted that even *if* this Court's decision in Calloway stood "for the proposition that buildings are not products in the context of strict liability, it would be inapposite here." Id. The sign cabinet from which Mr.

Brenske Andreevski & Krametbauer
3800 Howard Hughes Parkway, Suite 500
Las Vegas, Nevada 89169
(702) 385-3300 · Fax (702) 385-3823

Schueler fell can be removed and transported to another location at any time. It is not designed for human occupancy and was not part of the building permit. Although it is large, the sign cabinet is not akin to a commercial or residential building. Id. As such, even if this Court excluded buildings from the definition of product, the Calloway decision does not prevent the Court from finding the MGM sign is a product.

b. Policy considerations dictate that the MGM sign should be considered a product

Respondent erroneously asserts the Court of Appeals' analysis of policy considerations was misplaced. Respondent argues MGM designed the sign according to its Wizard of Oz theme and that Ad Art should not be held responsible for the safety of the sign cabinet. Whether MGM requested Ad Art to use Emerald City Green or a different color on their sign, has no bearing on the structural integrity of the sign cabinet or the reasonable expectations of any person standing inside of it. While MGM may have given input into the aesthetic appearance of the sign, it is undisputed that Ad Art manufactured, transported, and built the sign at issue.

In this case, it was undisputed that Ad Art used a material called Alucobond around the exterior of the sign cabinet, including the floor upon which Mr. Schueler was standing. (Vol. III, p. 308). When Mr. Schueler stepped on an Alucobond panel as he was working inside the sign cabinet, it

Brenske Andreevski & Krametbauer
3800 Howard Hughes Parkway, Suite 500
Las Vegas, Nevada 89169
(702) 385-3300 - Fax (702) 385-3823

gave way, causing him to plummet to the ground. (Vol. I, p. 5 and 123). The color or shape of the sign had no bearing on the fact the floor of the sign broke under Mr. Schueler's weight. Ad Art was in the best position to ensure the floor of its sign could hold the weight of a person standing inside the sign, not MGM.

The Nevada Court of Appeals clearly reviewed the record thoroughly when addressing policy considerations. For example, in its Opinion, the Court of Appeals referenced deposition testimony from Ad Art's president, Terry Long, in which he said three separate Ad Art employees held the positions of project manager, engineer, and designer of the sign. Schueler, 136 Nev. Adv. Op. 52, *26. As such, even if MGM played a role in determining the aesthetics of the sign, the party responsible for fabricating and manufacturing the sign was Ad Art. The cost of injuries should be borne by the manufacturers of products, not the consumers. Greenman v. Yuba Power Products, Inc., 377 P. 2d 897, 901 (Cal., 1963).

Respondent also argues it should not be held responsible because the sign is not accessible to the "consuming public." Although Respondent asserts the Nevada Court of Appeals was referring to Greenman when using the phrase "consuming public," that term is nowhere in the case. As the Nevada Court of Appeals states, it was referring to the Restatement Second of Torts section

Brenske Andreevski & Krametbauer
3800 Howard Hughes Parkway, Suite 500
Las Vegas, Nevada 89169
(702) 385-3300 · Fax (702) 385-3823

402A, comment c. *See*, Schueler at *10-11 and *f.n.* 6 when it referenced the term "consuming public."

Significantly, the Restatement's reference to "consuming public" does not stop at that term; the Restatement says the manufacturer has a responsibility "toward the consuming public ***who may be injured by its products***." *See*, Schueler at *f.n.* 6 (emphasis added). In this case, it stands to reason that Ad Art knew or should have known the consuming public *who could be injured by their products* were not the general customers of the MGM, but the people who would eventually work on the sign, such as Charles Schueler. Policy considerations dictate that Ad Art had the responsibility to make their sign safe for Mr. Schueler.

c. The Court of Appeals did not err when determining the sign at issue is a product

Pursuant to NRAP 36(c), the Court of Appeals will decide a case by published decision if the case involves an issue of first impression, clarifies a point of law, or constitutes an issue of public importance. NRAP 36(c) (2019). In this case, the Nevada Court of Appeals published the subject decision precisely for these reasons. While this Court has the discretion to review the opinions of the Court of Appeals, it is clear this Court should either allow the published decision to stand or should adopt and affirm it in a published decision of its own.

Brenske Andreevski & Kramethbauer
3800 Howard Hughes Parkway, Suite 500
Las Vegas, Nevada 89169
(702) 385-3300 · Fax (702) 385-3823

Respondent is correct that this Court has not yet defined the word "product" for purposes of strict product liability. Regardless, the Nevada Court of Appeals did not err when providing guidance on how to determine whether something is a product for purposes of strict product liability actions. It further did not err when determining the MGM sign is a product.

The Nevada Court of Appeals indicated most courts have "largely shied away from concentrating on dictionary definitions and instead [have] focused on the [strict liability] doctrine's policy objectives." Schueler at *13. Using a case-by-case approach to determining whether an object is a product is also appropriate because it allows the court to adapt to technical advances. Id. Ultimately, the Nevada Court of Appeals indicated district courts must apply the policy objectives of section 402A of the Restatement when determining whether something is a product. Id. at *14-15.

Ad Art urges this Court to determine the sign at issue is not a product primarily because it is large. This argument ignores the Nevada Court of Appeals' analysis of the characteristics of the sign cabinet at issue. Specifically, the sign cabinet was transported in pieces from Stockton, California to Las Vegas, Nevada and then assembled on top of the pylon by Ad Art employees. Id. at *28. There was "no evidence demonstrating that the sign is now suddenly immovable" (Id. at *30) and the fact that the sign is large does

not remove it from the ambit of strict product liability. Overall, even though the MGM sign cabinet is a large object, it is still a product.

d. The uniqueness of the sign has no bearing on whether it is a product

Respondent also asks this Court to review the opinion of the Nevada Court of Appeals arguing the issue of whether a sign is a product may be more important in Nevada than in any place in the country. While it is true that the State of Nevada has many large signs promoting the entertainment industry, Nevada is hardly unique in its utilization of signs. Signs promote businesses throughout the United States and throughout the entire world.

Ad Art also erroneously argues the unique aesthetic appearance of the MGM sign renders it something other than a product. The Nevada Court of Appeals disagreed. It held "a product need not be mass-produced to be in the stream of commerce, nor are unique products excluded from the realm of strict liability." Schuler at *22. Ad Art builds and sells signs in the ordinary course of its business. Id. If all "unique" signs were removed from the doctrine of strict product liability, sign manufacturers of any sort would be largely insulated from liability because signs are typically designed to conform to the business or real estate for which it is built. Id. The Nevada Court of Appeals appropriately refused to endorse such an interpretation. It would be inappropriate for this Court to reverse this decision.

Brenske Andreevski & Krametbauer
3800 Howard Hughes Parkway, Suite 500
Las Vegas, Nevada 89169
(702) 385-3300 · Fax (702) 385-3823

Conclusion

The Nevada Court of Appeals was incredibly thorough when issuing its ruling on the question that was before it. Review is not necessary. Should this Court feel compelled to issue a ruling, it should affirm and adopt the findings of the Nevada Court of Appeals in a published decision.

DATED this 19th day of October, 2020.

William R. Brenske, Esq.
Nevada Bar No. 1806
Jennifer R. Andreevski, Esq.
Nevada Bar No. 9095
Ryan D. Krametbauer, Esq.
Nevada Bar No. 12800
Brenske Andreevski & Krametbauer
3800 Howard Hughes Parkway, Suite 500
Las Vegas, Nevada 89169
Telephone: (702) 385-3300
Facsimile: (702) 385-3823
Email: bak@baklawlv.com

Brenske Andreevski & Krametbauer
3800 Howard Hughes Parkway, Suite 500
Las Vegas, Nevada 89169
(702) 385-3300 · Fax (702) 385-3823

Brenske Andreevski & Krametbauer
3800 Howard Hughes Parkway, Suite 500
Las Vegas, Nevada 89169
(702) 385-3300 · Fax (702) 385-3823

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) and NRAP 40B(d) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it does not exceed 10 pages.

3. Finally, I hereby certify that I have read this Answer to Respondent's Petition for Review, 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 with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 19th day of October, 2020.

BRENSKE ANDREEVSKI & KRAMETBAUER

WILLIAM R. BRENSKE, ESQ.
Nevada Bar No. 1806
JENNIFER R. ANDREEVSKI, ESQ.
Nevada Bar No. 9095
RYAN D. KRAMETBAUER, ESQ.
Nevada Bar No. 12800
3800 Howard Hughes Parkway, Suite 500
Las Vegas, NV 89169
Attorneys for Appellant,
Charles Schueler

Brenske Andreevski & Krametbauer
3800 Howard Hughes Parkway, Suite 500
Las Vegas, Nevada 89169
(702) 385-3300 · Fax (702) 385-3823

Brenske Andreevski & Krametbauer
3800 Howard Hughes Parkway, Suite 500
Las Vegas, Nevada 89169
(702) 385-3300 · Fax (702) 385-3823

Certificate of Service

Pursuant to NRAP 25(1)(c), I hereby certify electronic service of **APPELLANT'S ANSWER TO RESPONDENT AD ART, INC.'S PETITION FOR REVIEW BY THE SUPREME COURT** was made on the 19th day of October, 2020 by delivering a true copy to the following:

Timothy Hunter, Esq.

Amy Doughty

An employee of Brenske Andreevski & Krametbauer